A N

Hiſtorical Treatiſe

O F

An ACTION or SUIT at Law;

AND OF THE

Proceedings uſed in the *King's Bench* and *Common Pleas*, from the *Original Proceſſes* to the *Judgments* in both Courts; wherein the *Reaſon* and *Uſage* of the *old*, *obſcure* and *formal* Parts of our *Writs* and *Pleadings*, ſuch eſpecially as have Reference, or relate to the *ancient* Method of *Practice*, as well before the Statute of *Niſi prius* as afterwards, are duly conſidered, in order to ſhew from whence they aroſe.

ALSO

An Account of the *Alterations* that have been made from Time to Time for regulating the Courſe of Practice in the ſeveral Courts.

WITH

Such *Remarks* and *Obſervations*, as tend to explain and illuſtrate the preſent Mode of Practice;

AND

Pointing out ſuch Particulars as would *contract* the *Proceedings*, and render them more *conciſe*, *plain* and *ſignificant*, and *leſs expenſive* to the *Suitors*.

Neſcire quid antequam natus ſis acciderit, id eſt ſemper eſſe puerum.
CIC.

By R. BOOTE.

The SECOND EDITION, with ADDITIONS.

LONDON:
Printed by his MAJESTY'S LAW-PRINTERS;
For W. OWEN, between the *Temple-Gates*, *Fleet-ſtreet*:
MDCCLXXXI.


BIBLIOTHECA · BODLEIANA

THE PREFACE.

THE *Obſcurity* and *Expence* which neceſſarily attend the conducting of a *Suit at Law*, eſpecially where *Special Pleadings* are requiſite to be made, have long been the Subject of Complaint, not only to *Clients* who ſenſibly feel theſe Inconveniences, but likewiſe to every conſcientious Practitioner of the Law.

The Courts at *Weſtminſter* have long been ſenſible of this Grievance; and nothing perhaps could be more agreeable to the *Sages* of the Law, as well as to *Clients* themſelves, than to point out ſome Method by which the Proceedings in a Suit may be contracted or reduced into Forms more conciſe, and conſequently leſs intricate and leſs expenſive than they are at preſent.

To effect ſo deſireable an End, nothing will be more conducive than the diſbur-

thening the Pleadings in a Suit of that great Number of dark and obſcure References to *ancient* Cuſtoms and Things, with which (though they are now become obſolete, and apparently unneceſſary) the Proceedings at Law ſtill continue to be enveloped, obſcured, and rendered unneceſſarily expenſive.

The following *Hiſtorical Treatiſe of a Suit at Law*, is intended, not only to *illuſtrate* and *explain* ſuch *formal* Parts of our Writs and Pleadings, but to point out ſuch Parts of them as, having no other Foundation than in *ancient* Uſe and Cuſtoms, it is apprehended may be very well ſpared, and the remaining Part of the Pleadings thereby not only rendered more clear, ſignificant and intelligible, but at the ſame Time leſs grievous to the Client.

How far the Detail I have engaged in, may be found ſufficient to anſwer the End I had in View muſt be left to the Reader's Judgment to determine. But, if from the Reflections and Obſervations which are ſuggeſted in the Courſe of this Work, there is Matter ſufficient pointed out, to ſhew the Reaſonableneſs and Expediency of ſuch a Reformation in the preſent Mode of Law Proceedings, it is hoped ſome Gentleman who may be more equal to the Taſk, will improve upon the Hints I have given

given, and more effectually point out the Manner in which ſuch a Reformation, or Amendment, may be brought about; and that thoſe who alone have it in their Power, will one Day put a finiſhing Hand to a Work ſo extremely neceſſary and ſo much wiſhed for. Till ſomething of this Sort be done, we muſt ſtill puzzle on in the obſcure and dark Tracts of Antiquity, in which the young Practitioners often loſe their Way, to the manifeſt Delay of Juſtice, and to the no ſmall Expence of the Client.

King *James* the Firſt was ſo ſenſible of the great Burthen and Inconveniences of the ſuperfluous Branches in Law Proceedings in his Time, that in a Speech in the *Star-Chamber* in 1614 (as I have read in an old Tract of *J. Cooke*'s) he promiſed to cut them all off, though in Reality we do not find any great Matter was done towards it in his Time. And in the troubleſome Reign of his unhappy Son King *Charles* the Firſt (the Martyr to the Laws and Religion of his Kingdom) there was no Time for Reflection on Matters of this Sort; but in the Reign of King *Charles* the ſecond, the Grievances ariſing from hence were thought ſo great, that the *Courts* at *Weſtminſter*, to their Honour be it remembered, took the Matter into their Conſideration;

and in order to remove the expenſive, unneceſſary, and vexatious Methods of Practice then in Uſe, they made a Rule to regulate the Law Proceedings, by which, as well as by ſeveral Acts of Parliament and ſubſequent Rules, many luxuriant Branches of this overſpreading Vine have from Time to Time been lopp'd off.

But in doing this it is evident that many Intricacies and contradictory Methods (with reſpect to the old Grounds of Practice, as will be ſhewn) were introduced, and many Things which might have been ſpared were ſuffered to remain; Things which at preſent render the Proceedings in a Suit not only contradictory, but altogether dark and myſterious, and unintelligible, even, as it is imagined, to one half of the Practitioners themſelves; few of them diving to the Bottom for the Reaſon and Meaning of their Uſe, but contenting themſelves with a ſuperficial Knowledge only, juſt as they find them directed to be uſed in the Books of Practice.

It is well known that there were formerly various Kinds of Actions made uſe of upon different Occaſions, eſpecially in the Court of *Common Pleas*; and the *Orinal Writs* employed in ſuch Actions were as various as the ſeveral *Cauſes* of Actions upon

upon which they were grounded. Hence we meet with Actions of *Aſſize*, Actions upon the ſeveral Writs of Formedon in *Deſcender*, in *Remainder*, and in the *Reverter*, *&c.* all which are now laid aſide, and ſupplied by others, *viz.* by *Ejectments*, *&c.*

Again, the ſuing out *Special Originals* in the Court of *Common Pleas*, and filing *Bills* in the *King's Bench*, were always the neceſſary Introductions to a Suit; and tho' theſe are much laid aſide too, (for generally ſpeaking they are not uſed in *one* Action in an *hundred*, and when they are, it is more to enhance the Expence and hurt the Parties, than for any real Uſe or Neceſſity there is, or need be, for them) yet we continue in our Writs and Pleadings many formal Matters which have Reference to them, and which (as they are mere Formalities, are really unneceſſary, and tend only to render the Proceedings more intricate and expenſive) might very well be ſpared. The ſame alſo may be ſaid with regard to many other Things now uſed in a Suit.

When one conſiders the great Number of Amendments that have from Time to Time been made in Point of Practice, in order to prevent the vexatious Behaviour

That ſome of our Formalities are become ridiculous to every ſenſible Perſon, I believe will be granted; as alſo, that many are uſeleſs and unneceſſary. Let me then aſk this Queſtion, whether it be moſt prudent to continue ſuch Things, which are an Oppreſſion and Burthen upon the Subject, in Reference to old Laws and Cuſtoms, or to reform and eaſe them by new?

If it ſhould be objected, that a Reformation of this Kind may prove hurtful to the Practice in general, I can only anſwer that I am inclined to think the contrary. As Things are at preſent circumſtanced, many People would ſooner be contented to loſe their Right, than encounter with the *Difficulties* of the Law; for where is the Encouragement to a Suitor, when after having been at a conſiderable Expence in order to obtain Juſtice againſt ſome litigious Adverſary, perhaps for the Omiſſion of ſome mere Matter of Form he ſhall become intangled in a *Demurrer*, or ſhall be obliged to drop his Suit, and pay Coſts, or go through the whole Proceedings afreſh? Or, ſuppoſing he ſues for a juſt Debt, he ſhall be obliged to expend twice as much as the Debt he ſues for amounts to, before he ſhall be able to obtain a *Judgment* or *Verdict*; and after

he has ſucceeded thus far, he is certain of being Money out of Pocket to carry that *Judgment* into Execution.

From ſuch Conſiderations as theſe, People are often deterred from having Recourſe to the Law in order to recover what is ever ſo unjuſtly with-held from them. And hence it is that Attornies, like Phyſicians and Surgeons, are ſeldom applied to but through mere Neceſſity, and then, not without the moſt terrible Apprehenſions for the Coſts of Suit.

And indeed there is but too much Reaſon for this; for the Law is ſo loaded with Stamp Duties and Office Fees, that theſe, together with Counſel's Fees, are ſufficient to deter Men from ſeeking for Remedies at all. In the mean Time the Attorney lies under no ſmall Difficulty to ſatisfy his Client, that theſe Fees make up the Bulk of his Bill. Certain it is, that when theſe Fees come to be deducted, there are but few Mechanics who would be contented with ſo little Profit for their Induſtry, as an Attorney is *allowed* for conducting a Suit at Law.

It is well known that not many Years ago *half a Guinea* was the common Fee to an Opening Counſel, and in common Caſes

a *Guinea* to a ſuperior one, or Pleader; and though it is as well known now that there is not a Gentleman at the Bar who will accept of ſuch Fees, yet there is ſo little Conſideration in the *Allowance* of Coſts, that for this, in *common Caſes*, no more than 1 *l.* 11 *s.* 6 *d.* is *allowed* as the *common* Coſts; the Conſequence is, that the *extra* Coſts muſt be paid by the Client, which, with Execution Fees, (in all Caſes for ſmall Debts of 4 or 5 *l.*) make the Remedy worſe than the Diſeaſe. Is this reaſonable? or is it an Encouragement to Men to become Suitors to the Courts of Law for Juſtice? This is mentioned as a Hint to ſhew the Neceſſity of a more equitable Manner of *taxing* Coſts, and not as any Reflection upon the Gentlemen at the Bar.

And here I cannot but obſerve, that whilſt an Increaſe of Cuſtoms on Goods and Merchandiſe affords the Merchant and Mechanic an Opportunity of enhancing the Prices of their reſpective Commodities, no additional Weight of Taxes, no extraordinary Dearneſs of Proviſions, or any other of the Neceſſaries of Life, work any Change with reſpect to the Attornies; but what was their Fee three hundred Years ago, remains the ſame to this Day. Is not this a Hardſhip upon them?

But

But to return. What adds to the Miſchief ariſing from the preſent Intricacy of Law Proceedings, as it reſpects the Practitioners of the Law, is, that Clients, terrified by the great Coſts which neceſſarily attend the Proſecution of a Suit in the Courts at *Weſtminſter*, are driven into an inferior Court within the Confines of this Metropolis, which greatly ſubſtracts from the Buſineſs in the Courts at *Weſtminſter*.

In this Court, juſt alluded to, poor Men are arreſted for *forty Shillings* *; a ſhocking Inducement for having Recourſe to it! And there too upon the *Service* of a *Proceſs* they are preſently run up to an *Execution*, and impriſoned for very trifling Sums, with as much Severity as for ever ſuch great ones in the Courts above.

It were therefore to be wiſhed for the Sake of the Poor, that Courts of Conſcience were eſtabliſhed to take Place of it, and that Matters of greater Concern were confined to the Courts at *Weſtminſter* only. Though with regard to ſuch Cauſes as are not cognizable by a Court of Con-

* Since the publiſhing the firſt Edition of this Treatiſe, an Act hath paſſed, whereby this Court alluded to, and all inferior Courts are reſtrained from holding a Defendant to bail for any Sum under 10*l*.

ſcience,

a
th
nt Intricacy and
aing the Proceed-
ourts at *Weſtminſter*,
lteration can hardly
unleſs a Law be en-
poſe, Clients will have
Court, where their Suits
ſooneſt ended, and at the

the Reformation, ſo much
r, once eſtabliſhed; were our
s and Mode of Practice reduced
re plain, leſs intricate, and leſs ex-
Method, the Difficulties and Hard-
upon both Attornies and Clients
ould vaniſh; and inſtead of ſuch Altera-
ons proving hurtful to the Profeſſion in
eneral, the Obloquies it at preſent la-
bours under would be removed, Clients
would find it their Intereſt to apply to
the Courts above rather than to an inferior
Court, and the Buſineſs at *Weſtminſter*
would not fail of receiving a conſiderable
Increaſe by it.

Till this deſireable Event is brought
about, the following Sheets may at
leaſt ſerve to facilitate the Study of the
practic Part of the Law, by giving the
younger Students an Inſight into ſo
much of the ſeveral Forms and Methods
of

of Practice, as may tend to illuſtrate and explain ſuch formal Parts as are ſtill retained in our Writs and Pleadings, and are the Means of rendering them obſcure, and to many unintelligible.

Having given the Reader a ſufficient Inſight into the Nature and Deſign of the following Work, it remains to take Notice of one Objection, which perhaps may be made to the Manner in which it is executed.

It may, very probably, be objected, that too many *common* and *familiar Forms*, which are to be met with in Books already extant, are here introduced; but the Reader is deſired to conſider, that theſe *Forms* were introduced either the better to explain what related to them, or in order to ſhew the Difference therein between the two Courts, and were abſolutely neceſſary for that Purpoſe; ſuch, however, may be eaſily paſſed over.

For the Reſt, I am not unconſcious of many Faults, which may be found in the Courſe of the enſuing Pages; I have not Vanity enough to think the Performance is ſo compleat, or ſo well executed as the Subject deſerves. If however what I have done ſhould induce ſome abler Pen to correct

rect its Errors, and more fully point out the *Reaſon* and *Grounds* of our *Writs* and *Pleadings*, and expatiate more largely on the Means of eſtabliſhing the Reformation aimed at, I ſhall think my Time and Labour not ill beſtowed; and that I may deſerve and hope for that Candour, which may be neceſſary to excuſe the Inaccuracies of this Performance.

R. B.

A N

THE CONTENTS.

Of an Action.

Of the commencing an Action in the King's Bench.

Of the commencing an Action in the Common Pleas.

The

Of the Defendant's Appearance in the King's Bench.

Of the Defendant's Appearance in the Common Pleas.

Came

Of the Declaration in the King's Bench.

Of the Declaration, and declaring in the Common Pleas.

Of the Venue.

Of Imparlances.

Of the Plea and Pleadings.

Double

Of an Iſſue.

Of making up an Iſſue in the Common Pleas.

Of

Of making up the Niſi prius Roll, or Record for Trial.

Of making up the Iſſue in the Common Pleas.

Of the Jury-Proceſſes, viz. the Venire, Diſtringas, and Habeas Corpora.

The

Of Juſtices of Aſſize, and Niſi prius.

Of the Trial, Jury, and Tales.

Of challenging the Jury.

Of the Verdict.

Of the Poſtea.

Of Coſts.

Of entering up Judgment on the Roll in the King's Bench.

Of entering up Judgment in the Common Pleas.

Of an Execution.

APPENDIX.

AN HISTORICAL TREATISE OF A SUIT at LAW.

AS the following Sheets are deſigned to exhibit the ſeveral *Forms* of Proceedings, uſed in an Action at Law in the Courts of *King's Bench* and *Common Pleas*, from the original Proceſs down to the Execution; ſo far at leaſt as may ſuffice to explain and illuſtrate the formal Parts of ſuch Proceedings, and to point out the Grounds and Reaſons for the Uſe thereof; it will be proper to ſay ſomething, by Way of Introduction, concerning the Original of theſe two Courts.

The Court of *King's Bench* is that out of which all the other Courts of Law were originally formed. It appears from the moſt ancient and authentic Hiſtorians, that in the Times of the *Saxons* and *Danes* our Kings did hold a Court of Juſtice, wherein they uſed to ſit in Perſon, and to judge not only according to Law, but alſo to Equity; and that as Petitions and Appeals became burthenſome to the Prince, he was under a Neceſſity of ſubſtituting ſome Perſon to adminiſter Juſtice to his Subjects. The Perſon ſo ſubſtituted was inveſted with proper judicial Authority as the King's Chief Juſtice; and as there was originally

but one Court for the Determination of *Civil* Cauſes of all Kinds, ſo he had in Effect the whole Power, not only of the Chief Juſtice of the *King's Bench*, but likewiſe of the *Common Pleas* and *Exchequer*, centered in him for a long Time, *viz.* 'till the Reign of King *Richard* the ſecond, (as it is preſumed) who made *two* other *Juſtices*, and aſſigned to each a diſtinct Juriſdiction, that is, one of the North, and the other of the South Part of *England*, which ſomewhat diminiſhed the great Authority of the former, who notwithſtanding was ſtill looked upon as the Chief, and was accordingly ſtiled *Capitalis Angliæ* * *Juſticiarius*.

The Court wherein the Chief Juſtice ſat was Part of the King's Palace. It was called *Curia Domini Regis*, and was removeable with the King's Houſehold. And by the 28 *Edw.* 1. *c.* 5. this Court is to follow the King. In this Court all Differences which happened between the Barons, and other great Men of the Realm, were heard and determined; and likewiſe all Cauſes, as well concerning *Common Pleas*, as Pleas *of the Crown*; but Matters of an inferior Nature, between Subject and Subject, as Contracts, Debts, *&c.* were then uſually determined in the *County*, and *Hundred* Courts, which were the original Courts for ſuch Purpoſes in thoſe Days.

---

* *Juſticiarius*—the Reaſon why he is called *Juſticiarius*, and not *Judex*, is becauſe in ancient Times the Latin Word for him was *Juſticia*, and not *Juſticiarius*, as appears by Glanvill, lib. 2. *c.* 6. ſecondly, becauſe he has his Authority by Deputation, and not *Jure Magiſtratus*. See Blo. tit. Juſtice.

And

And it is beyond all Doubt that before the Conqueſt, theſe two Courts, the *County* Court and *Hundred* Court, had long been and then were the Chief Courts of Law for determining all Matters between Party and Party, as well Eccleſiaſtical as Civil, and wherein the Biſhops uſed to preſide, jointly with the Sheriff; nor can it be ſaid with any Certainty that there were any other Courts of Law ſubſiſting for determining Diſputes between Subject and Subject; but it is obſerved by ſeveral Hiſtorians, that amongſt other the arbitrary Proceedings of this King, the Conqueror, "The "Biſhops were prohibited from preſiding at "*County* Courts or *Shire-gemots*, in order to "deprive the Biſhops of their Share of the "Fines or Mulcts; and that he inſtituted "*other Courts*, before unknown to the Engliſh; which not only tended to the Inconvenience of the Parties, who were ignorant "of the Rules and Practices of theſe Courts, "but they were under the Neceſſity of *following the Prince*, whereſoever he went, becauſe "they always attended on him." What theſe new Courts were, is hard to determine, but it may be preſumed, one was the Court of *Common Pleas* (now ſo called) for at this Time, it is well known, that with Reſpect to landed Property there was a General Change; and the Norman Laws took Place and were ſubſtituted inſtead of the Saxon Laws; and the Proceedings were carried on in the *Norman Language*; or rather that *Common Pleas*, and Matters with Reſpect to Land, were drawn into and determined in the *King's* Court, inſtead of the *County* Court. And it is very evident that moſt of

our Law Terms are derived from the Norman Language during that Period.

About the Year 1215 in the Diſpute between King John and the Barons, and upon their adjuſting the Articles of the two famous Charters, entitled *Magna Charta* and *Charta de Foreſta*; one of the Articles was "*That Sheriffs ſhould not hold County Courts above once a Month*, and that they as well as Caſtellans, Coroners &c. *ſhould be reſtrained from holding Pleas of the Crown*; before which Time it is to be preſumed, that the *County Court* uſed to be held oftener than every *fourth* Week throughout the Year as it now is, and from that Time has been the ſtated Time for holding of it. It is alſo as certain that Pleas of the Crown as well as Civil or Common Pleas were held and determined in it.

Afterwards King *Hen.* 3. being requeſted by the *Nobility, granted by *Magna Charta*, or the Great Charter, that *Communia Placita non ſequerentur.*

---

* *Gwin*, in the Preface to his *Readings*, ſaith that until Henry 3d. granted the *Great Charter*, there were but two Courts in all, called the *King's Courts*, viz. the *Exchequer* and the *King's Bench*; which was then called *Curia Domini Regis*, and *Aula Regis*; becauſe it followed the Court or King; and that upon the Grant of that Charter, the Court of Common Pleas was erected and ſettled in one Place certain, viz. *Weſtminſter Hall*, and therefore, after that, all Writs ran *quod ſit coram Juſticiariis meis apud Weſtm.*; whereas before they ran *coram me vel Juſticiariis meis*, without any Addition of Place, ſo that Common Pleas, if not tryed in the *County* Court, which was called the Sheriffs Court, muſt of courſe have been tried in the King's Bench; and by what has been before obſerved, they certainly were, eſpecially from the Time of King William the Firſt. In ſhort, from the beſt Obſervations which have been hitherto

made

*ſequerentur Curiam ſuam, ſed in * loco certo tenerentur.* This Great Charter †, or the Revival of the *Saxon* Laws of King *Edward* the Confeſſor,

---

made, it may be collected and agreed upon, that the *County* Court took Cognizance of Pleas of the Crown in ſome Reſpects, and alſo of Common Pleas or Plea of Land and all other Matters between Subject and Subject until the Conqueſt; alſo that ſoon after the Conqueſt, the Norman Laws with reſpect to Terms and Services of Land took Place, and Pleas of Land were taken up and tried in the King's Bench, or rather they were tried heard and determined by Juſtices appointed for that Purpoſe, who ſat in the King's Bench jointly with the Chief Juſtice of that Court, ſo that Pleas of the Crown and Common Pleas were held indifferently in the King's Court or King's Bench, and uſed to follow the King; alſo that it thus continued until the Confirmation of Magna Charta by Hen. 3d. when the Juſtices appointed for trying Common Pleas or Pleas of Land were ordered to ſit in a fixed and certain Place and not to follow the King, (which the Chief Juſtice of the King's Bench continued to do) and by their being thus ſever'd, they became a diſtinct and ſeparate Court, viz. a Court of Common Pleas, ſo that this Court may be rather ſaid to be ſever'd from the other, than created by this ſtatute, and from this Time the County Court began to loſe great Part of its Buſineſs.—The Conſideration of this may help to determine our Judgment with reſpect to what hath been ſaid of late Years of this Court of Common Pleas; viz. that it was created by Mag. Ch.

* *In loco certo.—Weſtminſter Hall*, with the *Exchequer*, was the King's Palace at this Time; the *Hall* was built by King *William Rufus*, and the Courts of Law held there; and whenever the King's Houſehold removed from it, the Courts of Law alſo did, and followed the King, until the making of *M. C.* from which Time the Court of *C. P.* by virtue thereof, remained fixt, and continued to be held in this *certain Place*, notwithſtanding the King's removing from it. And it has continued to be a Place for the Courts of Law ever ſince, unleſs upon very extraordinary Occaſions.

† There is a notable Remark in Hiſtory, that at the renewing the two Great Charters by this King, the Lords Spiri-

feſſor, had before been granted by King *Henry* the firſt, to ingratiate himſelf with his Barons,

---

Spiritual and Temporal being aſſembled, with each a lighted Taper in his Hand, before him in *Weſtminſter Hall*, the Archbiſhop of *Canterbury* denounced a Curſe againſt thoſe who ſhould violate the Laws, or alter the Conſtitution of the Kingdom. After which the Lords threw down their lighted Tapers upon the Ground, crying out, *So may the Souls of thoſe*, who ſhould violate the Charters, *ſmoke and ſtink in Hell.* So precious were thoſe Laws then eſteemed, and are now reckoned, and it is hoped ever will remain the Bulwark of *Engliſh* Liberties. This Anathema was denounced *May* 3, 1253. There was another Excommunication againſt the Breakers of this Charter, denounced the 25 *Ed.* 1.

By this laſt mentioned Act (25 *Ed.* 1.) it was ordained that theſe two Charters ſhould be ſent under the Great Seal to all Sheriffs to be publiſhed in the County Court 4 times in the Year in full County. And to all Cathedral Churches to be read to the people twice in every Year. It was alſo ordained "*That if any Statute be made contrary to the Great "Charter, or the Charter of the Foreſt, that ſhall be holden "for none*".

It is worthy the Remembrance of every Engliſhman, that ſo great was the Power of the *Pope* at this Time, over a blind ignorant and bigotted People, that after he had interdicted the Kingdom and excommunicated King John; abſolved his Subjects from their Oaths of Allegiance and not only depoſed the King but abſolutely gave away his Kingdom to Philip of France, and ſtirred up the Barons to aid Philip by making War againſt their King; but that King John no ſooner made Peace with the Pope, by a moſt ſhameful Submiſſion in reſigning his Crown, without the Conſent of his People, and receiving it again from Pandolph his Legate to hold as a Feudatory of the Church of Rome, and alſo agreeing to pay a very large Sum of Money; but his *infallible Holineſs* then changed Sides; and not only abſolved the King and excommunicated the Barons, but when the *Charter of Liberties* was ſhewn to him, for which they contended, He cry'd out. "What, do the Barons of England endeavour to dethrone *a* King who has taken upon him the holy Croſs

rons, in Prejudice to his elder Brother Duke *Robert*, and afterwards by King John, and was a Bone of Contention between the Kings and their Subjects for near 200 Years; being ſometimes granted, then recalled, not being fully confirmed to the Subjects until the 9th of this King.

By this Act, or rather Charter of Engliſh Liberties, (it not being deemed an Act of Parliament, but a new Declaration, by this King, of the old fundamental Laws of the Land or Liberties of the Subject) the Court of *Common Pleas* was ſevered from the *King's Bench*, (ſo called from an old *Saxon* Word, *Banc*, ſignifying an high Seat whereon the Kings uſed to ſit); for before this Charter, all Pleas were held indifferently therein, and conſequently the *Common Pleas* did follow the King, *Ubicunque fuerit in Anglia*, with the Court of *King's Bench*; and though ſome have been of Opinion that the Court of *Common Pleas* was *created* by *Magna Charta*, yet by the Proviſion in the next Chapter, viz. *Et ea quæ per eoſdem*, (ſ. Juſticiarios Itinerantes) *propter Difficultatem aliquorum Articulorum, terminari non poſſunt, referantur ad Juſticiarios noſtros de Banco et ibi terminentur*, it is manifeſt that at the Time of making of *Magna Charta* there were *Juſticiarii de Banco*; which muſt, as my Lord *Coke* obſerves, be meant of the *Common Pleas*. This is eaſily reconciled,

---

Croſs and is under the *Protection* of the *Apoſtolic See*, and would they enforce him to transfer *the Dominions* of the *Roman Church* to others! By Saint *Peter* this muſt not go unpuniſhed." And then by a definitive Sentence he damn'd and caſſated for ever the *Charter of Liberties*, and ſent the King *a Bull* containing that Sentence at large, See Echard, &c.

by conſidering that *Juſticiarii de Banco* uſed to ſit, and all Pleas were held indifferently, in one and the ſame Court which was the *King's Bench*; but after that Charter was granted *Common Pleas* were ſever'd and held apart, and became the Buſineſs of a diſtinct Court, *viz.* of the Court of * *Common Pleas.*

At this Time, 'tis ſaid, began the Study of the *Common Law*, and the *Chief Juſtice* of the *King's Bench* was no longer ſtiled *Capitalis Angliæ Juſticiarius*, but *Capitalis Juſticiarius ad Placita coram Rege tenenda*, vel *Juſticiarius de Banco Regis*; and the *Chief Juſtice* of the *Common Pleas* was ſtiled, *Juſticiarius de Banco.*

The two Courts being thus ſeparated, the *King's Bench* was now eſpecially exerciſed in *criminal* Matters and *Pleas* of the *Crown*; and the handling of *private* Contracts, and *civil* Actions, was left to the Court of *Common Pleas*, which ſeem, by the 12 & 13 *Ch. of M. C.* to be eſpecially limited to this Court, and the *King's Bench* to be thereby reſtrained from holding *Pleas* thereof: and therefore, afterwards, all Writs returnable in the *Common Pleas* were returnable *Coram Juſticiariis noſtris apud Weſtmonaſterium*; but Writs returnable in the *King's Bench* continued to be returnable *Coram Rege*, vel *Coram nobis ubicunque fuerimus in Anglia.*

Therefore, when we read at this Time, (as we often may) that " The Suits in the *King's*

* The *Common Pleas* was anciently ſo called *Anno* 2 *Edw.* 3. *c.* 11. becauſe, ſaith Camden, Communia *Placita inter Subditos ex Jure noſtro, quod* Commune *vocant, in hoc diſceptantur.*

" *Bench*

"*Bench* were *originally* Suits for Offences only, "and Matters that were againſt the *Peace* of "the Realm, *&c.*" here the Term *originally* muſt be underſtood to mean immediately after *Magna Charta*, for before the making of this Statute (ſays my Lord *Coke*) *Common Pleas* might have been holden in the *King's Bench*, and all Writs were returnable in the ſame *Bench*; and becauſe the Court was holden *Coram Rege*, and followed the King's Court, and was returnable at the King's Will, the Returns were, *Ubicunque fuerimus in Angliâ*; whereupon many Diſcontinuances enſued, great Trouble was given to the Jurors, great Expence to the Parties, and great Delay of Juſtice: for which Cauſes this Clauſe of *Magna Charta* was made. And the *Pleas* of the Crown were divided into *High Treaſon*, *Miſpriſion of Treaſon*, *Petty Treaſon*, *Felony*, &c. and were limited to this Court, becauſe *contra Coronam et Dignitatem Regis*; ſo that of theſe the *Common Pleas* cannot hold Plea. But to ſhew that *Common Pleas* may be holden in the *King's Bench*, my Lord aſſigns theſe Reaſons, *viz.* 1ſt, It is to be obſerved, the King is out of the Statute, and may ſue in that Court; 2dly, If a Man be *in Cuſtody* of that Court, any Perſon may charge him with an *Action* therein for *Debt*, *Covenant*, or the like perſonal Action, becauſe *he* that is *in Cuſtody*, ought to have the Privilege of that Court; 3dly, Any Action that is *Quare Vi et Armis*, where the King is to have a Fine, (of which hereafter) may be ſued in that Court; 4thly, Replevins may be moved thither; 5thly, Albeit *originally* the *King's Bench* be reſtrained by this Act to hold Plea of any *Real Action*, yet by a Mean it may, as when removed thi-

ther by a Writ of *Error* from the *Common Pleas*, &c. This leads us to ſhew by what Means the Court of *King's Bench*, ſoon after the making of *Magna Charta*, drew to itſelf the Cognizance of *Civil Actions*, as at this Day, notwithſtanding that Statute.

Firſt, as the Court of *Common Pleas* had it's Juriſdiction by an *original Writ* out of *Chancery*, ſo (after the ſettling that Court at *Weſtminſter*, which became the ſole Court for *Civil* Matters, and by which, great Variety of Buſineſs, and Profit accrued to it) the Court of *King's Bench*, in order to hold Plea of *Civil* Actions, very ſoon claimed a Right to hold Pleas of Actions of *Treſpaſs* * *on the Caſe*, by the like *Original*, being made returnable therein; a *Treſpaſs ſuper Caſum*, being conſidered, in it's Nature, to be an *Action of Treſpaſs*; and all *Treſpaſſes* being *contra Pacem*, the *King's Bench*, by this Means, aſſumed the Cognizance thereof.

Secondly, As to Pleas of *Debt* †, and *Real Actions*, or *Pleas of Land*, they for ſome Time

---

* It was called an Action *Super Caſum*, becauſe the *Original* was framed and adapted to the Nature and Circumſtances *of the Caſe*, according to the Statute *Weſt.* 2. 13 *Ed.* 1. *&c.*

† *Fitzherb. N. B. fo.* 119. *b.* & *k.* declares that there is no Writ in Law for *Debt*, but a *Juſticies*, which is a judicial Commiſſion to the Sheriff to determine the Matter *ne amplius inde Clamorem audiamus*; ſo that the *King's Bench* ought not to be troubled with the Matter at all: or, if by *Original*, in the *Common Pleas*. Is not the *Original* itſelf a Summons? And *Kitc.* in *Ret. Brev. fo.* 4 Tit. *Com. Bank*, declares, that *Summons*, *Attachment*, and *Diſtreſs*, ſucceſſively diſtinct 15 Days, is the only Proceſs at Common Law for *Debt*.

longer

longer continued cognizable in the *Common Pleas* only; for, as to *Debt*, that being certain and demandatory, it could not come under the Title of an Action *Super Caſum*, and conſequently the *King's Bench* could have no Pretence for a Writ to be returnable therein, to compel a Perſon to appear in ſuch an Action: therefore, at length, it became the Method of the *King's Bench*, in order to take Cognizance of *Debt* likewiſe, to file a *Bill* againſt the *Defendant*, thereby ſuppoſing him to be already in the *Cuſtody* of the *Marſhal* of the King's Houſhold, (if not really ſo) in which Caſe the *Plaintiff* had Liberty to *declare* againſt him there in *Debt*, rather than the *Marſhal* ſhould have his Priſoner taken from him, to be charged in another Court; we may obſerve, that one of my Lord *Coke*'s Reaſons, which he aſſigns, why *Common Pleas* might have been holden in the *King's Bench*, is, that if the Defendant *be in Cuſtody* of that Court, *&c.* and indeed this uſed to be the *real* Caſe at firſt, and it was not grounded on a Suppoſition only, as afterwards it was; and this, at length, introduced the feigned one; that is, the now preſent Method of *declaring* againſt a *Defendant* in the *King's Bench*, as being *in the Cuſtody of the* * *Marſhal of the King's Marſhalſea.* And the

* *Marſhal* [*Mareſcallus*] of the King's Houſe, otherwiſe called *Knight Marſhal*, uſed to exerciſe his Authority in the King's Palace, in hearing and determining all Pleas, and Suits, between thoſe of the King's *Houſe* and Perſons within the Verge, and puniſhing Faults committed there, ſee 18 *Ed.* 3. &c. and *Marſhalſea* was the Court or Seat of the Marſhal. The *Marſhalſea* Priſon, in *Southwark*, is of late Foundation, though perhaps derived from the former.

Proceedings

Proceedings by the *Original* out of *Chancery* in Actions *Super Caſum*, as at firſt uſed in the *King's Bench*, came to be likewiſe ſupplied by this very Method of *declaring*, and the *Original* in ſuch Caſes became to be diſcontinued. Hence you ſee aroſe Actions on the Caſe in the *King's Bench*, from hence *filing Bills*, and *declaring* againſt the *Defendant*, as in *Cuſtody* of the *Marſhal*.

As to *Real* Actions, or *Pleas* of Land, theſe continued ſtill longer *cognizable* only in the *Common Pleas*, by Writs of *Right*, Writs of *Aſſize*, and other *original* Writs iſſuing out of *Chancery*, and returnable therein; but theſe being now generally diſuſed, by *Ejectments* taking Place of theſe *Real Actions*; and as *Ejectments* are Actions of Treſpaſs, (at leaſt grounded on ſuppoſed Treſpaſſes) and ſo *contra Pacem*, they conſequently became likewiſe *cognizable* in the *King's Bench*; but this is *ſtill* upon ſuppoſing the Defendant *in Cuſtody*, *&c.* for that is the Ground-work of the Cauſe depending there, unleſs it is by *Orignal* out of *Chancery*. So that, at preſent, the Court of *Common Pleas* ſeems to have no more to do in *Real Actions*, (except in paſſing *Fines* and *Recoveries*) than the Court of *King's Bench*.

The *Ejectione Fermæ's*, to recover the Poſſeſſion, became frequently in Uſe in *Henry* the Eighth's Time, and is now the moſt common Means of trying Titles to Land, inſtead of *Real* Actions; from which Time the Courts of *Kings Bench* and *Common Pleas* ſeem to have had a concurrent Juriſdiction in all *Civil* Matters except as to *Fines* and *Recoveries*, as at this Day.

Of

Of an Action.

An Action (*Quia agitur de Injuria*) is defined to be, * *A Right of proſecuting to Judgment for what is due to One's ſelf*; or, *A legal Demand of One's Right*. And it is of two Kinds, one that concerns Pleas of the Crown, the other which concerns Common Pleas. And this of *Common Pleas* is divided into Actions Real, Perſonal, and Mixed.

The *Suit*, or following the *Proſecution* until *Judgment*, is regularly called an *Action*, but not afterwards; and therefore it is, that a *Releaſe of all Actions* is not a *Releaſe* of an *Execution*, becauſe the *Execution* doth begin after the *Action* doth end. The Foundation of the *Action* is an *original* Writ, and doth determine by the *Judgment*; but Writs of *Execution* are called *Judicial*, becauſe they are grounded upon the *Judgment*.

Of the commencing an Action in the King's Bench.

The Commencement therefore of an Action in the *King's Bench* was, at firſt, by an *original* Writ out of *Chancery*, in like Manner as was uſed in the *Common Pleas*; or elſe it was by *filing a Bill* againſt the *Defendant*, both which Methods ſtill continue to be made uſe of, but the common Method is by *Bill*.

If the Action was commenced by Bill, the Defendant was, and now is, ſuppoſed to be

* *Actio nihil aliud eſt quam Jus proſequendi in Judicium quod ſibi debetur.* Co. Lit. *Action n'eſt autre Choſe que loyal Demand de ſon Droit.*

in

in the Cuſtody of the Marſhal of the King's Marſhalſea, as before obſerved. The particular old Direction of this Bill is loſt by Diſcontinuance, though it is reaſonable to ſuppoſe it was to this, or the like Purpoſe:

To the Juſtices of our Lord the King, before the King himſelf,

B. *to wit.* A. B. *complains of* C. D. *being in the Cuſtody of the Marſhal of the Marſhalſea of our ſaid Lord the King, before the King himſelf. For this, to wit, That whereas*, &c. ſetting forth the Complaint, or Cauſe of Action.

Upon the filing this *Bill*, a Proceſs uſed to iſſue to ſummon the Defendant to appear before the Lord the King, on ——— (a certain Return Day) *whereſoever he ſhould then be in England*, to anſwer the *Bill*. This Proceſs was called a *Bill* of that County wherein the Court then reſided, (as at preſent it is called a *Bill of Middleſex*) becauſe the *Marſhal*, being an Officer of the King's Houſhold, (in whoſe Cuſtody the Defendant was ſuppoſed to be) was then in that County, *viz.*

Middleſex, *to wit. It is commanded the Sheriff, that he take* A. B. *if he be found in his Bailiwick, and ſafely keep him, ſo that he may have his Body before our Lord the King, on whereſoever, &c. to anſwer to* C. D. *of a Plea of Treſpaſs, and that he have there then this Precept.*

By Bill.

This

This ſhort, and commandatory Proceſs was ſigned *per Billam*, (to ſhew the Suit was by a *Bill* filed, and not by *Original*) and with the Name of the *chief Clerk aſſigned to inroll Pleas in the Court before the King himſelf*; and it iſſued upon the *Bill*'s being filed: but in caſe the *Defendant* had made his Eſcape, and was not to be found in that County, (which was ſuppoſed to be the Caſe when the Defendant lived in any other County) then the Sheriff returned the Writ with *Non eſt inventus*; upon which a ſecond Writ iſſued into the County where the Defendant lived or was thought to be. This ſecond Writ was called a *Teſtatum*, but it afterwards gained the Name of a *Latitat*, from that Word therein, *Cum Teſtatum eſt quod* Latitat, *&c.* and is in the Nature of a *Teſtatum Bill*; and in this ſecond Writ of *Latitat*, the very *Return* of the *Bill* uſed to be inſerted therein, inſtead of the Words "*At a certain Day now paſt, &c.*" till which Time the *Latitat* could not iſſue. Afterwards it became the Method, firſt to ſue out a *Bill*, and to get it returned of *Courſe* by the Sheriff, and then to ſue out a *Latitat*; and this Method continued (as 'tis preſumed) a long Time, (*i. e.* until about 90 Years ago) when for eaſing the Subject, and for expediting Juſtice, (as it was called) it was contrived to put theſe *two* Writs in *one*; ſo that the Defendant might be attached in any other County than that wherein the Court reſided, without firſt ſuing out and filing the *Bill* of *Middleſex*. And this was done, by only ſuppoſing in the *Latitat*, that a *Bill* had iſſued, and was returned, *Non eſt inventus*, and filed; as the *Latitat* itſelf now plainly ſhews, *viz.*

GEORGE

GEORGE *the Third*, &c. *To the Sheriff of* B. *greeting. Whereas we lately commanded our Sheriff of* Middleſex, *that he ſhould take* A. B. *and* C. D. *if they might be found in his Bailiwick, and keep them ſafely, ſo that he ſhould have their Bodies before Us at* Weſtminſter, *at* a certain Day now paſt, *to anſwer to* E. D. *in a Plea of Treſpaſs; and our ſaid Sheriff of* Middleſex *at that Day returned to Us, That the aforeſaid* A. *and* C. *are not found in his Bailiwick: whereupon, on the Behalf of the ſaid* E. *it is ſufficiently atteſted in our Court before Us, that the aforeſaid* A. *and* C. *do run up and down, and ſecret themſelves in your County. Therefore we command you, that you take them, if they may be found in your Bailiwick, and ſafely keep them, ſo that you may have their Bodies before us at* Weſtminſter, *on next after to anſwer to the aforeſaid* E. *of the Plea aforeſaid; and that you have there then this Writ. Witneſs,* W. *Lord* M. *at* Weſtminſter, *the Day of in the firſt Year of our Reign.*

Lee.

A. B. and *C. D.* you are ſerved, *&c. Vi poſt.*

Though this firſt Proceſs is called a *Bill*, (in all Probability from the Words *per Billam* at the Bottom, to ſhew it is grounded on a *Bill* filed, and was not by an *Original* out of *Chancery*) yet this is not that Bill, you ſee, which ſuppoſes the Defendant to be *in the Cuſtody of the Marſhal, &c.* This *Bill*, or *Proceſs*, is a Summons only for the Defendant to appear, and anſwer the other; which, conſequently, was filed before this Proceſs iſſued. Nor is this called ſimply a *Bill*, but

a

a *Bill of Middleſex*, to diſtinguiſh it from the *original Bill*, or *Declaration*, (which in this Court is called a *Bill*) and uſed to be filed before the Proceſs iſſued, or againſt the Return thereof: and ſuch a Bill *is* ſtill preſumed to be filed, to warrant every Declaration in this Court, (though it is never filed now, but of Neceſſity, unleſs it be againſt Priſoners, or Attornies and Officers of the Court) and upon the Defendant's Appearance, the Declaration is received as a Copy of it only. See *Styles's Pract Reg.* 210. where the *filing* the *Bill* is ſaid to be the Ground-work of the Cauſe depending; and is, as the *Original* in the *Common Pleas*, which gives the Court a *Juriſdiction* to hold Plea of the Matter therein complained of.

Having ſeen the Original and Nature of the *Bill*, by which a Suit was, and is now uſually commenced in the *King's Bench*, and of the *Summons*, that is, the *Bill of Middleſex*; let us ſee how a Suit uſed to be, and is now begun in the Court of *Common Pleas*.

Of the Commencement of an Action in the Common Pleas.

Since *Magna Charta*, the Commencement of every Suit in the *Common Pleas* (unleſs againſt Attornies and Officers of the Court) is by an *original Writ* iſſued out of the Court of *Chancery*; which, by it's being made returnable therein, gives the Court a Juriſdiction to hold Plea of the Matter therein ſpecified; (as it does the *King's Bench*, when made returnable in that Court) for though this Court was ſevered from the *King's Bench* by *Magna Charta*, for the trying of *Common Pleas*; yet it had not an

Authority thereby to proceed in ſuch Matters *ex Officio*; but there was from the Beginning a Precedent for it's Proceedings, and Rules of Practice; and that was the *County* Court; now as the Sheriff in his County Court could not take Cognizance of a Plea of Debt, or Damages, above forty Shillings, without the King's Writ; therefore in every ſuch Caſe, a Writ iſſued out of the Chancery directed to the Sheriff to give him a Juriſdiction to hold Plea thereof, and was the original Writ for trying ſuch Cauſes: So the *Common Pleas*, being deſigned to be a Court of a ſuperior Nature to this, in all Matters of a civil Nature, between Subject and Subject, required ſomething in every ſuch Cauſe to give it a Juriſdiction to proceed therein; and this was done, by taking the like Original Writ out of *Chancery*, as was uſed for the County Court, but made returnable before the Juſtices of his Majeſty's Court of *Common Pleas* at *Weſtminſter*; the very iſſuing of the Writ, ſuppoſes the Cauſe of Action to be above forty Shillings, and alſo that the Court ought not, or rather, that it is beneath the Dignity of the Court to take Cognizance of any Thing under; and it ſeems that much of the Method of the Practice of the *County* Court was taken up by this; for Inſtance, at this Time the old Law of *Frankpledge* *, as eſtabliſhed by King *Alfred*, ſtill

* It is obſervable that though the Law of *Frankpledge* is diſuſed as obſolete; yet it was never legally ſet aſide: therefore the Summons grounded on the Plaint in the County Court very reaſonably continues the old Form, *viz. Berks, to wit*, W. E. *Eſq*; *Sheriff of the County aforeſaid, To the Bailiff of the Hundred of* O. *and* R. S. *my Bailiff jointly and ſeverally greeting, Becauſe* A. B. *at my Court held for*

ſtill prevailed in all the Kingdom; and therefore the Original was framed in purſuance of it, and *Pledges to proſecute* uſed to be returned thereon. Now the Method of procuring this *Original* was, by making a ſhort Note to the *Curſitor* of the County, which Note was called a *Præcipe*, or *Pone*. Theſe were varied according to the Nature of the *Action*; and *four* Defendants, and no more, were to be inſerted therein: And upon this, the *Curſitor* made out the *Original*, and gave it to the *Attorney*; under Seal. The *Original* in Caſe run thus:

CHARLES, *by the Grace of God*, &c. *To the Sheriff of* Berkſhire, *greeting. If* A. B. *makes you ſecure to proſecute his Claim, then put* C. D. *late of* Wantage, *in your County, Yeoman, by ſure and ſafe* * *Pledges, that he be before our Juſtices at* Weſtminſter, *in eight Days of St.*

---

for the County aforeſaid, complains againſt C. D. *of a Plea of Treſpaſs on the Caſe*; and hath found Pledges of proſecuting and ſo forth, *Therefore I command you and each of you that you ſummon*, &c.

* Pledges.—*Plegii dicuntur Perſonæ qui ſe obligant ad hoc, ad quod qui eos mittit tenebatur.* The Reaſon of theſe Pledges is ſet forth in the Writ, and they uſed to be actually found, and ſtand Securities to anſwer the Fine; and alſo ſuch Coſts and Damages as the Defendant or Tenant ſhould be put to in all Perſonal or Real Actions. Afterwards they were only found in Real Actions; but as theſe came to be diſuſed, they were, and are now, become *feigned* Pledges, and uſed only as Matter of Form, to agree with the Writ, and ſignify now nothing, unleſs to ſhew what the Practice once was. It is ſaid, that if the Plaintiff was a poor Man, and could not find *Pledges*, he pledged his *Faith*, and then the Writ run, "If *A. B. ſhall* "*make you ſecure to proſecute his Claim* by his Faith, *becauſe he is poor, then put*, &c."

Hilary, *to anſwer to the ſaid* A. B. *in a Plea, that* * *whereas the ſaid* C. D. *on the* 10*th Day of* December *in the ſecond Year of the Reign,* &c. (ſo on, reciting the whole Complaint or Declaration in the Writ) *to the Damage of the ſaid* A. B. 30 *l. and have you there the Names of the Pledges, and this Writ. Witneſs Ourſelf at,* &c.

The *Original,* we obſerve, was twofold; firſt, for the Sheriff to take Security from the Plaintiff to proſecute his Suit, *ſi fecerit te ſecurum, &c.* and then to put or ſummon the Defendant, *tunc pone, C.* &c. nor indeed could the Sheriff even ſummon him by good Summoners (as the Method then was) except the Plaintiff had firſt indemnified him by giving good Pledges, that his Claim was juſt as the Words of the Original did import, *viz. ſi* A. B. *fecerit te ſecurum de clamore ſuo proſequendo tunc Summoneas* C. D. *per bonos Summonitores,* &c. which ſhews what excellent Proviſion the Common Law made to prevent frivolous, vexatious, and groundleſs Suits; nor was it leſs careful in ſecuring a Man's juſt Right and Property; and this was taken up by the Courts of *King's Bench* and *Common Pleas,* from the general Law

* In the *Original,* the *Complaint,* or *Declaration,* is fully ſet forth, that the Defendant might know the Cauſe of *Action*; but in the *King's Bench* it is ſet forth in the *Bill* filed, as *that* is the *Original* there, to which the Defendant, by the *Bill of Middleſex,* was ſummoned to appear and anſwer; aud he being ſuppoſed to be already in the *Cuſtody of the Marſhal,* there was no Occaſion for any other *Addition:* and we may ſuppoſe this is ſtill the Reaſon why no *Addition* is given to the Defendant there, as it is done in the *Common Pleas.*

of * *Frankpledge*, then in Uſe, whereby all the *Freemen* in the Kingdom were formed into ſuch admirable Communities, and Fellowſhips, that all the Members thereof were Pledges for each other, and reſponſible for one another, as well in Caſes of private Debts and Contracts, as for public Peace and Security; and therefore nothing could be bought or ſold, but in the Preſence of two Vouchers, at leaſt, of the ſame Hundred or Community; by which you ſee the Common Law aimed as well to prevent the committing of Wrongs, as the providing Remedies for Wrongs, when committed. And hence on good Reaſon, Pledges *de Proſequendo* were introduced, and actually given by every Plaintiff in this Court, on his commencing every Suit, before the Defendant was ſummoned or attached to appear.

The *Original* being made out, it was given to the Sheriff to be properly executed, and returned; there was this Difference attended it: In ‡ *Caſe*, *Treſpaſs*, *Trover*, and *Ejectment*, an *Attachment* of the Defendant's Goods, by the Sheriff, was the firſt *Proceſs* on the *Original*, in which Caſes the Defendant was hurt; therefore here the Writ commands the Sheriff that he ſhould take *Pledges* for the *Defendant*'s

---

* *Omnis Homo qui voluerit ſe teneri pro libero, ſit in* Plegio, *ut* Plegius *eum habeat ad Juſticiam, ſi quid offenderit*, &c. was the Law of *William* the Couqueror.

‡ It is from this, that the formal Beginnings of the Declarations in this Court vary as they do, for they ſtill refer to this Practice. For by the Declaration in *Caſe*, &c. it is ſaid the Defendant *was attached* to anſwer. And in *Debt*, &c. it is thereby ſaid that the Defendant *was ſummoned* to anſwer, &c. *V.* under *Declaration*.

Appearance; but in *Debt*, *Covenant*, *Annuity*, *Account*, *Detinue*, and *Replevin*, the Sheriff begun by ſummoning, or warning the Defendant to appear, in which Caſes the Defendant was not hurt, in the firſt Inſtance; and therefore here there was no Command in the Writ for the Sheriff to take Pledges of the *Defendant*, but in every Caſe the Sheriff was directed by the Writ to take Security from the Plaintiff to proſecute his Suit. The Writ run thus in *Caſe*, *Treſpaſs*, and *Ejectment*:

CAR. *&c. Vic.* B. *ſal'tem. Si* A. *fecerit te ſecurum de clamore ſuo proſequend' tunc pone per Vadios et Salvos Pleg.* B. C. *nuper de, &c. quod ſit coram Juſt. noſtris apud* Weſtm' *in* Oct. *&c. ad reſpond'* A. D. *quare cum, &c. (vel quare Vi et Armis, &c. ad dampnum, &c. ut dicit Et habeas ibi nomina Pleg' et hoc Breve. Teſte, &c.*

And in *Debt*, *Covenant*, *Annuity*, *Account*, *Detinue*, *and Replevin*, the Writs were thus, *viz.*

CAR. *&c. Vic.* B. *ſal'tem. Præcipe* C. D. *nuper de, &c. quod juſte, &c. reddat* A. B. 50 *lib. quas ei debet et injuſte detinet ut dicet Et niſi fecerit et præd'* A. *fecerit te ſecurum de clamore ſuo proſequend'* tunc Summoneas per bonos Summonitores *præd'* C. *quod ſit coram Juſt. noſtris apud* Weſtm' *in* Oct. *&c. oſtenſurus quare non fecerit Et habeas ibi ſum' et hoc Breve, Teſte, &c.*

Only

Only in *Covenant* it was, *quod teneat, &c.* Conventionem, *&c.* And in *Replevin, quod juſte et ſine Delatione Replegiari fac'* A. *&c.*

However, notwithſtanding this, the Sheriff uſed to take *Pledges* in *Debt, &c.* for unleſs he did, it was thought there was not ſufficient Authority from the *Return* to warrant any further Proceſs. In neither Caſe originally was the *Body* of the Defendant *arreſted*, ſo tender was the Law of a Man's Liberty; unleſs the Sheriff returned *Summoneri feci* in *Treſpaſs, &c.* and the Defendant did not appear, then the Court awarded a *Capias*, or a *Diſtringas*, as they thought fit; and in *Debt, &c.* the Court awarded an *Attachment* and *Diſtreſs infinite:* but when the Sheriff returned *Nil habet* on the *Original*, then the *Capias* was awarded even in *Debt*, and ſo on to the *Alias & Pluries*, and then to the *Outlawry*, on *Non eſt inventus* returned on theſe Writs.

We may obſerve that theſe Proceſſes were only to enforce the Defendant's Appearance, and iſſued on his Contempt in not appearing, on being ſummoned; for if the Defendant appeared after an *Attachment* or *Diſtringas*, his Goods were thereupon diſcharged by the Court; and if he was arreſted on the *Capias*, he could ſue out a Writ of *Mainprize.*

But when thoſe real Pledges came to be diſuſed, the Sheriff afterwards uſed to return the Original of courſe, thus:

Pledges to proſecute { *John Doe* and *Richard Roe.*

The within named C. D. *hath nothing in my Bailiwick whereby to ſummons him. The Anſwer of* A. C. *Eſq; Sheriff.*

Upon which it was carried to the *Filazer* of the County, for ſuch further Proceſs to be made out thereon as was required, either to *arreſt* the Defendant, or ſue him to an *Outlawry*; and then the *Original* was filed by the *Filazer*, with the *Cuſtos Brevium*, for a Teſtimony that the Court had a Juriſdiction to take Cognizance of the Matter therein; for upon filing the Writ, the Court became poſſeſſed of the Suit.

But ſtill the more ancient Practice was, (before theſe common or feigned *Pledges* became abſolutely in Uſe) that when an *Original* was ſued out againſt a Knight, Eſq; or Gentleman of Worth, who had ſufficient Lands or Tenements in the County, for the Sheriff ſtill to execute the *Original*, by ſummoning the Defendant; for if it was returned of courſe by *Nil habet* as above, the Defendant might have brought his Action againſt the Sheriff for diſabling him in his Eſtate. And if *Pledges* were not found to the Sheriff, by the Plaintiff (or in the *Chancery* before upon taking out the *Original*, which uſed often to be done for Expedition) yet they might be found afterwards in the Court wherein the Writ was returnable, rather than the Writ ſhould abate for want thereof. And but of late Years, notwithſtanding the Diſuſe of *real Pledges*, if theſe *common* or feigned *Pledges* were not returned by the Sheriff, upon the *Original*, it was *Error*, and the Defendant might plead it in *Abatement*. How was this con-

conſonant to reaſon? Severe Practice indeed! But this, though late, was remedied in *Bayn-ton* v. *Mayſer et al' Paſ.* 16 *Car.* 1.

On the Diſuſe of *real Pledges*, a new Method of Practiſe was introduced; for the Method of firſt ſuing out, and executing, or even getting the *Original* firſt returned of courſe, came to be dropped; and for Eaſe and Expedition, the Practice came to be, for Attornies to make out a *Præcipe* for a *Capias*, which the *Filazer*, as now, made out, and afterwards, at his Leiſure, entered the ſame upon a Roll; which Roll, at the End of the Term, he delivered to the Curſitor, who thereby made out the *Originals* to warrant ſuch *Capias's* all at once; and giving them to the *Filazer*, he filed them with the *Cuſtos Brevium*, which Practice is ſtill uſed; ſo that the *Original* is, now, become a meer uſeleſs, and as it is preſumed, an unneceſſary Proceſs, unleſs conſidered as a Proceſs ſued out, and filed, meerly to give the Court a Juriſdiction to hold Cognizance of the Matter therein, which certainly was not the only End and Intent of it.

An *Outlawry*, originally, was not uſed in *Civil Actions*; for in the Reign of that ever memorable, great and good King *Alfred*, and until long after the Conqueſt, no Man was outlawed but for *Felony*, the Puniſhment whereof was Death; and therefore an Outlaw was ſaid to bear *Caput Lupinum*, becauſe any Man might kill him, he being out of the Protection of the King's Laws, as he might kill a Wolf, which was then eſteemed the moſt pernicious Animal that infeſted the Kingdom.

Ut-

Utlegatus et Waiviata Capita gerunt Lupina, quæ ab omnibus impune poterunt amputari; merito enim ſine lege perire debent, qui ſecundum legem vivere recuſant; alſo *utlage pur felonie teigne leu pur loup, et eſt criable Woolferſhered, pur ceo, que loup eſt beaſt hay de touts gents, et de ceo en avant liſt al aſcun de le occire or feor del loup, dont cuſtome ſolvit leu avoire dun man del countie pur chaſcun teſte de utlage et de loup*, &c. *i. e.* an Outlaw for Felony holds the Place of a Wolf, and is called Wolf-head, becauſe that, as a Wolf, he is hated of all Men, and becauſe it is as lawful for any one to kill him, as he might a Wolf; of whom it is ſaid, that it was the Cuſtom to have of the Sheriff of the County, as a Reward for each Head of an Outlaw, and a Wolf, *&c.* *Wingate* ſays a Mark, which was then a great Piece of Money, and conſequently a conſiderable Reward. Therefore, conſidering it was not only lawful, but meritorious to kill an Outlaw, there is no Room to wonder why it was then common for Outlaws to fly to the Woods for Shelter, ſome of whom, as *Robin Hood*, and others, have tranſmitted their Names to Poſterity by their Audaciouſneſs. In *Bracton*'s Time it was reſolved, that Proceſs of Outlawry ſhould lie in all Actions that were *Vi et Armis*. By the Stat. 13 *Ed.* 1. it lies in Account; and it was not until the Beginning of the Reign of *Ed.* 3. that it was reſolved, "*That for avoiding Inhumanity and Chriſtian Blood, it ſhould not be lawful for any Man, but the Sheriff, to put an Outlaw to Death, though it was for Felony.*" By 25 *Ed.* 3. *c.* 17. it lies in *Debt*, *Detinue*, and *Replevin*; and by the 19 *Hen.* 7. the like Proceſs lies in *Caſe*, as in *Treſpaſs*; ſo that

that an *Outlawry* is now grounded on an *original Writ* in every Circumſtance. But Proceſs of Outlawry, being to put the Defendant out of the King's Protection, and by which he forfeited all his Goods, and was impriſoned, and loſt the Profits of his Land; great Care was formerly taken that no Perſon ſhould be outlawed without ſufficient Notice, and therefore it was, that *three Capias's* ſhould iſſue, before there ſhould be Proceſs of *Outlawry*, *i. e.* the *Capias*, *Alias*, and *Pluries*. Thus when a *Capias* iſſued upon the Return of the *Original*, and that *Capias* was returned *Non eſt inventus*, the *Alias* iſſued; and upon *Non eſt inventus* returned on the *Alias*, the *Pluries* iſſued; and upon the Return thereof, Proceſs of *Outlawry* iſſued. How far this Law was abuſed, may be imagined by the * Stat 6 *H.* 8. *that no Man ſhall be outlawed before he is proclaimed in the County wherein he lives, or did laſt live*; and by the 31 *Eliz. c.* 3. *that the Sheriff is to make three Proclamations, the firſt in full County*, i. e. at the Sheriff's *Torn*, the ſecond at the *Seſſions*, and the third near the *Church Door* where the Defendant lives.

Theſe three Writs now, are made out all at once by the *Filazer*, and returned of courſe by the Attorney himſelf, merely as introductory to the Proceſs of *Outlawry*, without any Summons or Notice to the Defendant, otherwiſe than by the Proclamations. But, in ſhort, an *Outlawry* in civil Actions is only neceſſary againſt a Man of Worth, where it may ſerve to com-

* It is preſumed this Statute gave Riſe to the Writ of Proclamation.

pel his Appearance, in order to get *Judgment* and *Execution*.

It is to be noted, that the Court of *King's Bench* cannot proceed to *Outlawry*, but by an *Original* out of *Chancery*, returnable therein.

And here one Thing remains to ſpeak of relating to this *original* Writ, and that is, with reſpect to *Fines* upon *Originals*.

Sir *Matthew Hale* tells us, That before and until the Reign of King *John*, Fines uſed to be impoſed *pro ſtultiloquio*, from whence aroſe thoſe common Fines *pro pulchre Placitando*. As the firſt were impoſed in order to enforce Plainneſs and Perſpicuity in our Pleadings, ſo the laſt were no other than *Fines* impoſed by the Court for Profit; and oftentimes conſiderable Sums of Money, Horſes, or other Things were given to obtain Juſtice; and he gives us an Inſtance, *inter Placita incerti Temporis Regis Johannis*, the Men of *Yarmouth* againſt the Men of *Haſtings* and *Winchelſea*, wherein it is ſaid, "*Afferunt Domino Regi tres Palfredos et ſex Aſturias Narenſes ad Inquiſitionem habendam per Legales*, &c. and that frequently the ſame was done, and often accounted for in the Pipe-Office under the Name of *Oblata*.

But this was in part remedied by King *John* and *Henry* the Third's Charters, *Nulli vendemus Juſticiam vel Rectum*. However, *Fines* upon * *Originals*, being then become certain,

* It has been obſerved, that there were *Originals* iſſued out of *Chancery* long before the *Common Pleas* was ſevered by *M. Ch.* for even in the *County Courts*, if the Debt

certain, have continued to this Day; and though it is uncertain when thoſe Fines aroſe, yet it is certain they were to purchaſe the King's Favour or Leave to proſecute in his *Courts*, rather than in the *County* or *Hundred* Courts, or the Courts of their *Lords*; and they became ('tis ſaid) a conſiderable Profit to the *Court*, ſeeing, that if the Debt or Damages ſpecified in the *Original* exceeded 40 *l.* a Fine of a *Mark* was to be paid to the King, and ſo proportionably for a larger Sum. But if we conſider the Value of Money, and that no Fine was paid for a Sum under 40 *l.* it will not appear to have been ſo oppreſſive, at that Time, as it does at preſent, for 40 *l.* then, I ſuppoſe, was as much as 200 *l.* is now; and yet the ſame Fine ſtill remains to be taken in *Debt*, *&c.*

Originals on Precipe's *quod reddat* were the moſt common Writs upon which thoſe Fines uſed to be taken (the Sum therein being aſcertained) at the Beginning of a Suit; but Fines upon Treſpaſſes, *&c.* were according to

---

Debt was above 40 *s.* there always iſſued a *Juſticies* to the Sheriff to enable him to take *Cognizance* of it; which *Juſticies* was an *Original*. And with reſpect to Lords of Courts, it was a *Maxim* among the *Normans*, *That no one could hold Plea of Lands without the King's Patent, nor Plea of Debt above* 40 *s. without the King's Writ*. The King's Writ was the *Original* iſſued by the *Chancellor*, who had the Cuſtody of the Seal of the Court, both for Writs and Patents; which, originally, were formed by him. And from what is obſerved by Sir *M. Hale* with reſpect to Fines, until the Reign of King *John*, it is not unreaſonable to ſuppoſe that even in the King's Court, before *M. Ch.*, in *Civil Cauſes*, they proceeded by *Original* out of *Chancery*, upon which *Original*, theſe Fines uſed to be taken.

the

pel his Appearance, in order to get *Judgment* and *Execution*.

It is to be noted, that the Court of *King's Bench* cannot proceed to *Outlawry*, but by an *Original* out of *Chancery*, returnable therein.

And here one Thing remains to ſpeak of relating to this *original* Writ, and that is, with reſpect to *Fines* upon *Originals*.

Sir *Matthew Hale* tells us, That before and until the Reign of King *John*, Fines uſed to be impoſed *pro ſtultiloquio*, from whence aroſe thoſe common Fines *pro pulchre Placitando*. As the firſt were impoſed in order to enforce Plainneſs and Perſpicuity in our Pleadings, ſo the laſt were no other than *Fines* impoſed by the Court for Profit; and oftentimes conſiderable Sums of Money, Horſes, or other Things were given to obtain Juſtice; and he gives us an Inſtance, *inter Placita incerti Temporis Regis Johannis*, the Men of *Yarmouth* againſt the Men of *Haſtings* and *Winchelſea*, wherein it is ſaid, "*Afferunt Domino Regi tres Palfredos et ſex Aſturias Narenſes ad Inquiſitionem habendam per Legales, &c.* and that frequently the ſame was done, and often accounted for in the Pipe-Office under the Name of *Oblata*.

But this was in part remedied by King *John* and *Henry* the Third's Charters, *Nulli vendemus Juſti[illegible]* However, *Fines* [illegible] then become certain,

certain, have continued to this Day; and though it is uncertain when thoſe Fines aroſe, yet it is certain they were to purchaſe the King's Favour or Leave to proſecute in his *Courts*, rather than in the *County* or *Hundred* Courts, or the Courts of their *Lords*; and they became ('tis ſaid) a conſiderable Profit to the *Court*, ſeeing, that if the Debt or Damages ſpecified in the *Original* exceeded 40 *l.* a Fine of a *Mark* was to be paid to the King, and ſo proportionably for a larger Sum. But if we conſider the Value of Money, and that no Fine was paid for a Sum under 40 *l.* it will not appear to have been ſo oppreſſive, at that Time, as it does at preſent, for 40 *l.* then, I ſuppoſe, was as much as 200 *l.* is now; and yet the ſame Fine ſtill remains to be taken in *Debt*, &c.

Originals on Precipe's *quod reddat* were the moſt common Writs upon which thoſe Fines uſed to be taken (the Sum therein being aſcertained) at the Beginning of a Suit; but Fines upon Treſpaſſes, &c. were according to

---

Debt was above 40 *s.* there always iſſued a *Juſticies* to the Sheriff to enable him to take *Cognizance* of it; which *Juſticies* was an *Original*. And with reſpect to Lords of Courts, it was a *Maxim* among the *Normans*, *That no one could hold Plea of Lands without the King's Patent, nor Plea of Debt above* 40 *s. without the King's Writ*. The King's Writ was the *Original* iſſued by the *Chancellor*, who had the Cuſtody of the Seal of the Court, both for Writs and Patents; which [illegible]ally, were formed by him. [illegible] Sir *M. Hale* with reſpect [illegible]ing *John*, it is not [illegible] the King's Court, before [illegible]roceeded by *Original* or [illegible]al, theſe Fines [illegible] 1.

The

the Damages in the Judgment, which Fine the Court ſet and levied by *Capiatur* in the Judgment, which was entered up accordingly, *Et Prædictus defendens Capiatur.* And this was in all Caſes, where the Plaintiff declared for a Thing done *Vi et Armis*; but by 4 & 5 *W.* & *M.* this *Capiatur* Fine in *Treſpaſs*, *Ejectment*, *Aſſault*, and *Impriſonment*, is taken away, and in lieu thereof 6 *s.* 8 *d.* is to be paid to the *Prothonotary* at the Time of ſigning the *Judgment*, which he allows the Plaintiff again in his Coſts.

From hence it was, that all Matters of *Debt* might be put in the ſame Action, becauſe the *Fine* upon the *Original* could be taken in Proportion to the Sum demanded; but *Debt* and *Treſpaſs* could not, for the *Fine* in *Treſpaſs* was to be in the Judgment, and to be ſet by the Court: and from this aroſe a Diſtinction between Actions, and how they were to be ſeparated.

After the 13 *Car.* 2. Præcipe's *quod reddat* began to be laid * aſide in *Debt*, on purpoſe to avoid paying this *Fine*; for it became the Practice for Attornies to make out Inſtructions for a *Capias clauſum fregit*, with an *Ac etiam* in *Debt*, for as much as it was (according to that Statute) inſtead of a *Præcipe quod reddat*; and this is the preſent uſual Practice; ſo that theſe *Fines* are not paid now, but upon *Special Originals*. As when an *Original* on a *Præcipe quare Clauſum fregit* with an *Ac etiam* in *Debt* is ſued out, and Judgment is ſigned thereon

* The Reaſon why *Originals* were laid aſide, ſee *poſt*.

by

by *Default*. Now this Judgment is not warranted by that *Original*, the Writ being in *Treſpaſs*, and the Judgment in *Debt*; and therefore, in this Caſe, if a Writ of *Error* is brought, the Plaintiff muſt purchaſe a *New Original* to warrant his *Judgment* according to the Nature of it, which is in *Debt*; and 'tis upon this *Special Original* the Curſitor takes the *Fine*; for if not ſo warranted, the *Judgment* may be ſet aſide for *Error*. But in caſe no Writ of *Error* is brought, then no ſuch *Special Original* is filed, and conſequently the *Fine* is avoided; as it is if the Cauſe is tried upon ſuch *Clauſum fregit*, and a *Verdict* has paſſed, for then it is helped by the Statute of *Jeo faille*, and no Error lies. In many other Caſes a *New Original* is neceſſary.

Now when we conſider the Nature of theſe Beginnings of a Suit, that is, the *Bill* which is *ſuppoſed* to be filed in the *King's Bench*, and the *Original* which is *ſuppoſed* to be ſued out, returned, and filed in the *Common Pleas*, and the *formal* Parts of our *Pleadings* which depend on each of them; when, I ſay, we conſider the Obſcurity that appears therein, we conclude, that though theſe, and the *formal* Parts of the ſubſequent Proceedings, dependant on them, might in ancient Times have been neceſſary and material; yet that at this Time they are become uſeleſs and unneceſſary, and almoſt *unintelligible* Forms; and that what were then introduced for Conveniency, are now antiquated as to their Uſe. And yet theſe are continued as Things wonderfully material, and with much Exactneſs followed, though one may venture to ſay, (as it is very certain) that they

they only ſerve to ſwell the Bulk of the ſubſequent Proceedings, and very unneceſſarily increaſe the Expence of a Suit, if no other Inconveniencies depended on them.

For with reſpect to the *Bill* ſuppoſed to be filed in the *King's Bench*, it is thereby aſſerted that the Defendant is *in the Cuſtody of the Marſhal, &c.* which is fictitious; alſo that *Pledges* are given by the Plaintiff to proſecute, *&c.* which is altogether as untrue; nor does it appear that ever any Proceſs iſſued requiring *Pledges*, or that ever any *Pledges* were really found in this Court, yet with theſe the *Declaration* is concluded, and the *Memorandum* at the Beginning of the *Iſſue*, with the *Imparlance* before the Plea, *&c.* depend on, and refer to it, as moſt of the ſubſequent Pleadings do in ſome Reſpect or another. And yet what is this *Bill* but a mere formal Thing grounded on Fiction, and full of Falſities, and which is, indeed, never filed but of Neceſſity? For the Statute of *Jeo faillé* helping the Omiſſion of *filing* and *continuing* it on the Roll, if there is no Writ of *Error* brought, there is no *Bill* filed, (unleſs againſt * Priſoners, or Attornies and Officers

* The filing a *Bill* againſt *Priſoners*, in the Manner as it is now done, is in no Reſpect agreeable to the original Uſe of it; for this is not done till after the Defendant has been *impriſoned* by virtue of a Proceſs ſubſequent to a *Bill*'s being ſuppoſed to be filed, and not till when the Plaintiff comes to declare, which ſuppoſes an *Appearance* likewiſe to that *Bill*. And how great is the Hardſhip upon theſe poor People that this is ſuffered! As Priſoners, they merit ſome Mercy; but inſtead of this, they are burthened with greater Coſts than ever, for inſtead

cers of the Court; and in caſe a Writ of *Error* is brought, ſuch a *Bill* may be filed at any Time before *Errors* are aſſigned. But is it not ridiculous to think, that a Judgment ſhould be ſet aſide for *Error*, for want of ſuch a Piece of Formality? What is the Intent of it, that makes it ſo neceſſary? Why, it gives the Court it's Juriſdiction!

And with reſpect to the *Original* out of *Chancery*, (which is ſaid to be ſued out to warrant the *Capias* in the *Common Pleas*, as the filing the *Bill* warrants the *Bill of Middleſex* in the *Kings Bench)* is it not juſt ſuch another formal, uſeleſs, and unneceſſary Proceſs, which draws after it many Inconveniences, and formal Matters in the ſubſequent Pleadings? Does it not create an extraordinary Charge for the *Capias?* Is not the *Fine*, when taken, an unneceſſary Expence? They are in themſelves evidently unneceſſary, becauſe we often do without, and indeed never *file* a *Bill* or a *Special Original*, but in Caſes where they are particularly required, or purely to *increaſe* the Coſts of the Defendant. Do not theſe Proceedings render the Beginning of a Suit ob-

---

ſtead of one *Bill*, they are ſaddled, I may ſay, with no leſs than *four:* for inſtance, When a Plaintiff comes to declare againſt a Priſoner, the *Bill* is filed on Stamps, and a Copy (that is, the Declaration, which in this Court is received as a Copy of the *Bill)* on Stamps is to be *delivered* to him *in Cuſtody*, another on Stamps to be annexed to an Affidavit for him to give a *Rule* to plead on. One may wonder at the Neceſſity for all this, but ſo it is; and with reſpect to the Coſts to the Priſoner, it is in Effect as ſo many *Bills* againſt him.

ſcure and difficult? Or, to ſpeak paradoxically, Is not a Suit almoſt always ended before it is begun? For *Judgments* are generally *firſt* obtained, before the Suits are thus formally begun; and then (ſometimes) ſet *aſide* for not being ſo. Beſides, when a *Judgment* is ſigned, which requires a *Special Original* to warrant it, and that *Original* is not made out and filed in due Time, which is very often the Caſe, there muſt be *a Petition* to the *Maſter* of the *Rolls*, and an Order drawn up upon that Petition, which Order muſt be entered and filed, even for Leave for the Curſitor to make it out; by which we ſee how Proceedings may be enlarged, and Coſts multiplied, for what, at this Time, may juſtly be deemed the moſt uſeleſs and unneceſſary Proceedings in a Suit imaginable.

'Tis true, it may be ſaid, that without ſuch a *Bill* filed, or preſumed to be filed in the *Kings Bench*, the Court has no Juriſdiction to proceed in the Cauſe; and without ſuch an *Original* ſued out, and filed, the *Common Pleas* has none: ſo that the two greateſt Courts of Law in the Kingdom, wherein Right and Juſtice is to be adminiſtred to the Subjects, muſt continue to owe their Authority to meer Formality and Fiction, when it may be very eaſily remedied, and ſuch unneceſſary Things ſupplied, by only declaring the *Bill of Middleſex* or *Latitat* in the one, and the *Capias* in the other, to be the *original* and leading Proceſs; and then, the formal Proceedings depending on the *Bill* and *Original*, with all it's Obſcurity, would fall of courſe, the Foundation being removed. And thus the Beginnings of a Suit would be rendered eaſy, plain, and ſignificant.

Having

Having thus far treated of the Commencement of an Action in each Court, in the Manner they were formerly and are ſometimes now uſed, in order to explain and render more intelligible the formal Parts of the ſubſequent Pleadings that depend on, or relate to them; it may here be uſeful to ſet forth and examine the Forms of the Proceſſes or Writs themſelves, as were, and are now in uſe, that the Changes made therein may appear. And firſt,

Of the Bill, or Original, in the King's Bench.

The Bill, when filed, runs thus:

Hilary Term in the 2d Year, *&c.*

Middleſex, ff. A. B. *complains of* C. D. *being in the Cuſtody of the Marſhal of the* Marſhalſea *of our Lord the King, before the King himſelf, for this, to wit, That whereas the ſaid* C. *on the* ——— *Day of, &c.* (ſetting forth the Complaint as in the Declaration, and concluding) *and therefore he brings his Suit, &c.*

Pledges to proſecute, { *John Doe* and *Richard Roe*

It has been obſerved why the Defendant was ſaid to be in the *Cuſtody of the Marſhal*; but it may ſeem odd, why *Pledges* were indorſed upon this *Bill*, ſeeing no Proceſs iſſued to require them. To ſolve this Difficulty, it may be alledged, they were brought in uſe from the general Law of Frank-pledge, and were

borrowed from the *County* and *Hundred* Courts; and this *Court* firſt introduced theſe feigned or formal Pledges, in order to agree, in ſome Reſpect, with the Practice of the other Courts, wherein they were really found; or rather to agree with the *original* Writ in the *Common Pleas*, which they firſt made uſe of. On filing this *Bill*, the chief Clerk's Proceſs iſſued, for the Defendant to appear thereto, which Proceſs we now call a *Bill of Middleſex*, and remains yet the ſame in Form, except as to the Return, the *Ac etiam*, and the *Engliſh* Notice.

The Bill of Middleſex.

Middleſex, ſſ. *The Sheriff is commanded to take* C. D. *if he may be found in his Bailiwick*, and *keep him ſafely, ſo that he may have his Body before our Lord the King, on* —— —— *next after* —— —— *whereſoever our ſaid Lord the King ſhall then be in* England, *to anſwer to* A. B. *of a Plea of Treſpaſs, and that he have then there this precept.*

By Bill. (Chief Clerk's Name.)

This Proceſs was directed to the *Sheriff*, as the proper Officer to execute the King's Writs; for though the Defendant either was, or was ſuppoſed to be already in the Cuſtody of the *King's Marſhalſea*, or *Steward* of his Houſhold, yet as that Officer's Juriſdiction extended thro' the whole County, where his Majeſty was, the *Sheriff* was, notwithſtanding, the proper Officer for executing this Proceſs, and to have the Body *whereſoever he ſhould be at the Return*; and on this Proceſs, (being the firſt after the Commencement of the Suit) the Defendant

fendant was *arreſted* or *ſummoned* to appear; but if he was not found before the *Return* thereof, then on *Non eſt inventus* returned by the Sheriff, an *Alias Bill* iſſued; and after that a *Pluries Bill.* But if the Defendant lived not in that County where the Court lay, then the *Sheriff* returned the *Bill* of courſe, thus:

The within-named C. D. *is not found in my Bailiwick.*

And then, upon filing the *Bill*, the Plaintiff was at Liberty to ſue out a *Teſtatum Bill* into any other County, where the Defendant was ſuppoſed to be; and after that an *Alias*, and *Pluries Teſtatum Bill.* This *Teſtatum Bill* ſoon gained (as before obſerved) the Name of a *Latitat*, and runs thus:

The Teſtatum Bill, or Latitat.

CHARLES, *by the Grace of God, of, &c. to the Sheriff of* B. *Greeting. Whereas we lately commanded our Sheriff of* Middleſex, *that he ſhould take* C. D. *if he might be found in his Bailiwick, and ſafely keep him, ſo that he might have his Body before Us, on* ——— (the Return of the Bill exactly inſerted) *to anſwer to* A. B. *in a Plea of Treſpaſs; And whereas Our ſaid Sheriff of* Middleſex, *at that Day, returned to us that the aforeſaid* C. *was not to be found in his Bailiwick, whereupon, on the Behalf of the ſaid* A. *it is ſufficiently atteſted in our Court, before us, that the ſaid* C. *doth run up and down, and ſecretes himſelf in your County. Therefore we*

command you, that you take the ſaid C. *if he may be found in your Bailiwick, and ſafely keep him, ſo that you may have his Body before us at* Weſtminſter, *on next after to anſwer to the ſaid* A. *of the Plea aforeſaid, and have you then there this Writ. Witneſs at* Weſtminſter, *the Day of in the Year of our Reign.* (Chief Clerk's Name.)

This was the ancient Form, and it ſerved in all Caſes, as the *Bill of Middleſex* did, without ever expreſſing any *Cauſe of Action*, but only by *Treſpaſs*, until the 13 *Car.* 2. *c.* 2. which enacts, *That no Writ of Treſpaſs ſhould hold the Defendant to any Bail, &c. any further than an Appearance, unleſs the true Cauſe of Action was expreſſed in the Writ.* So that then in order that theſe Writs ſhould expreſs *the* Cauſe of Action, *as the Common Pleas Writs did*; they begun to uſe the *Ac etiam Billæ* after the Words *of a Plea of Treſpaſs.* And this was untruly ſaid to be *ſecundum Conſuetudinem Curiæ noſtræ coram nobis exhibend'*, to expreſs the *Cauſe of Action*, and thereupon hold the Defendant to Bail; as in a *Bill of Middleſex*, thus: "*And alſo to a Bill of the ſaid* A. *againſt the ſaid* C. *to be exhibited according to the Cuſtom of the Court of our ſaid Lord the King, before the King himſelf, for* 20 *l. upon Promiſe,*" or 20l. Debt, *&c.* And in a *Latitat*, thus: "*And alſo to a Bill of the ſaid* A. *againſt the ſaid* B. *to be exhibited according to the Cuſtom of our Court before Us for* 20 l. *upon Promiſe,*" &c. 20 l. Debt, *&c.* as it was, for the *Ac etiam* varied according to the Nature of the Action.

But about the Year ——, it was contrived for the *Eaſe* of the Subject, and for *expediting* Juſtice, as it was *called*, to put the *Bill of Middleſex* and the *Latitat* into one; ſo that the Defendant might be taken on the *Latitat* in any County, without firſt ſuing out a *Bill of Middleſex*; and this was done by only ſuppoſing a *Bill of Middleſex* had iſſued, and was *returned*; and upon this the Form of the *Latitat* came to be altered to what it now is, *viz.*

ANN, *by the Grace of God, &c. To the Sheriff of* B. *Greeting. Whereas we lately commanded our Sheriff of* Middleſex *that he ſhould take* C. D. *if he might be found in his Bailiwick, and ſafely keep him, ſo that he might have his Body before Us at* Weſtminſter, at a certain Day now paſt, *to anſwer to* A. B. *in a Plea, &c.*

For as the *Bill of Middleſex* was not, but was only ſuppoſed to be, ſued out, it was impoſſible to inſert in the *Latitat* the very Return of it, as uſed to be done; and therefore the Words, *at a certain Day now paſt*, were introduced to ſupply the *Return* of the *Bill of Middleſex* ſo ſuppoſed to be ſued out.

One would reaſonably have imagined, that the Courts at *Weſtminſter*, in order to *eaſe the Subject*, and to *expedite Juſtice*, might have ſchemed out a more eaſy Method, than thus putting theſe *two* Writs into *one*, as they might have ordered the *Bill of Middleſex* to have run into every County, and have ſuppreſſed the *Latitat*; and it might have been called a *Bill of Berkſhire*, a *Bill of Oxfordſhire*, *&c.* as well as a *Bill of Middleſex*. Is it not the *King*'s Proceſs, and

every *County* under his Juriſdiction? Or they might have ſuppreſſed both the *Original Bill* and *Latitat*, and have eſtabliſhed it as a general Proceſs for the *Commencement* of a *Suit*. This would have rendered the Beginning of a *Suit* ſomewhat more intelligible: but now, whenever a *Latitat* is ſued out, (though it be the leading Proceſs in every *County*, except *Middleſex*) two Things are firſt ſuppoſed to have been done, which are, an *Original Bill* ingroſſed and filed in the Office, and a *Bill of Middleſex* ſued out, returned, and filed likewiſe; and which, in fact, ſeldom or never are done.

Before the Stat. 13 *C.* 2. there was the greateſt Abuſe, that can be conceived, made of the *Bill of Middleſex*; for thereby it was in the Power of any one Man to devour the Credit of 500, by arreſting them, as was then the Practice, on this Writ for large Sums; and by never *declaring*, to avoid paying any *Coſts* to the Defendant. It even became a By-word to ſay, * *I'll beſtow a Bill of Middleſex on ſuch a one*, and this meerly to vex and diſquiet a Man, or miſchievouſly to injure and hurt him: Therefore the Intent of this Statute was to prevent frivolous and vexatious Arreſts, by ordering, *that no more than* 40*l. Bail ſhould be taken, unleſs the true Cauſe of Action was expreſſed in the Writ*, (and this was done, as obſerved, by the *Ac etiam*, or elſe they muſt have had Recourſe to *Originals* out of *Chancery* again) and alſo by ſubjecting the Plaintiff to pay Coſts (for not

* This was a Complaint made, I find, in the Time of *Oliver*'s Uſurpation, as a Thing that had been long in Practice: how long before is hard to ſay; but it is very evident that it continued until the making of this Statute.

declaring)

declaring) to the Defendant on his ſigning a *Non pros*, which the Defendant could not do before.

But this Statute was not attended with it's deſired Effect and Deſign, nor did it remedy thoſe Evils the Act complains of; for it was as eaſy to inſert an *Ac etiam* *, where there was no true Cauſe of Action at all, as it was to arreſt a Man before any *Ac etiam* was uſed; for nothing more was required by this Act than that the Writ ſhould expreſs the Cauſe of Action: So that the Abuſe ſtill continued, and it was not remedied until that excellent Statute of 12 *Geo.* 1.

By the 12 *Geo.* 1. it is ordered, *That the Plaintiff, to hold the Defendant to Bail, muſt firſt make an Affidavit of his Debt, which muſt be ſworn to be* 10l. *or above, and thereby ſet forth his Cauſe of Action; and if no ſuch Affidavit is made and filed, the Defendant is not to be arreſted, but to be ſerved with a Copy of the Proceſs, under which is to be an* Engliſh *Notice declaring the Intent of ſuch Service.* And this made great Alteration in the Uſe of theſe Proceſſes, *viz.* That where an Affidavit of the Cauſe of Action is made and filed, the Writ is made out with an *Ac etiam* as uſed to be, and the Sum ſworn to is indorſed on the Back, that the Sheriff may know *for what* to take Bail; but if no Affidavit is made, the Defendant is not to be arreſted, but to be *ſerved* with a *Copy* of the Proceſs only: in which Caſe

* The only Check upon the Plaintiff, from ſtill purſuing this iniquitous Practice, was his being ſubject to pay Coſts for not declaring in due Time; which Coſts at this Time, was about 10*s.* only.

the

the Writ is made out *without* any *Ac etiam*, and the following *Engliſh* Notice is ſubjoined.

C. D. *you are ſerved with this Proceſs, to the Intent that you may, by your Attorney, appear in his Majeſty's Court of King's Bench at the Return thereof, being the Day of next, in order to your Defence in this Action.*

So that our Proceſſes now are as follow:

A Bill of Middleſex, when bailable.

Middleſex, to wit. *The Sheriff is commanded to take* C. D. *and* J. D. *if they be found in his Bailiwick, and that he keep them ſafely, ſo that he may have their Bodies before our Lord the King at* Weſtminſter, *on* * Monday *next after eight Days of Saint* Hilary, *to anſwer to* A. B. *in a Plea of Treſpaſs*; † and alſo to a Bill

* All Proceſſes and Writs in this Court are now made returnable at a *Day certain*, which before were made returnable on a general Return, *wheresoever*, &c.

† There are a great many Niceties and curious Diſtinctions in the Writs in Pleadings in a Suit which often paſs unobſerved. Here is one in the *Ac etiam*; in the Bill it is, *According to the Cuſtom of the Court of our ſaid Lord the King, before the King himſelf*; in the *Latitat* it is, *According to the Cuſtom of Our Court before Us.* The *Bill* is not *teſted*, but is ſuppoſed to be a commandatory Precept iſſued by the *King*'s Order, and ſigned by his Chief Clerk, aſſigned to inroll Pleas before himſelf. The *Latitat*, and all the ſubſequent Proceſſes, are *teſted* in the Name of the *Chief Juſtice* of the *Court*, who are ſuppoſed to become poſſeſſed of the Cauſe upon the Sheriff's Return, and filing the *Bill of Middleſex*; *ſed quære*, if not upon filing the *Original Bill.*

As

a Bill of the ſaid *A.* againſt the ſaid *C.* to be exhibited according to the Cuſtom of the Court of our ſaid Lord the King before the King himſelf, for 20 *l.* upon Promiſe; *and that he then have there this Precept.*

By Bill, Lee.

Indorſed on the Back, *Bail by Affidavit affiled for* 10 *l.*

A Bill of Middleſex, when not baillable.

Middleſex, to wit. *The Sheriff, &c.* (it is the ſame as the other, only the *Ac etiam* is omitted, and the *Engliſh* Notice is ſubjoined.)

By Bill, Lee.

C. D. *You are ſerved with this Proceſs, to the Intent that you may, &c.* ut ſupra. So likewiſe is made out the *Alias* and *Pluries* Bill, with or without the *Ac etiam,* as for a *Bill.*

A Latitat, when baillable.

GEORGE *the Third, by the Grace of God, &c. To the Sheriff of* Berkſhire, *Greeting.*

As the *Cauſe of Action* is to be ſworn to, according to the 12 *Geo.* 1. and the *Affidavit* is to be filed in the Office from whence, and before, the Proceſs iſſues, whereby the Cauſe of Action muſt be ſet forth; *Quære,* whether *Ac etiams* are not become unneceſſary? The Diſtinction is full enough, by *indorſing* the Sum ſworn to, for holding the Defendant to Bail in the one Caſe, and omitting ſuch *Indorſement* in the other. And the Cauſe of Action is better ſet forth by the Affidavit; beſides, the *Ac etiam Billæ* refers to a fictitious Thing.

Whereas

Whereas we lately commanded our Sheriff of Middleſex *that he ſhould take* C. D. *and* R. R. *if they might be found in his Bailiwick, and keep them ſafely, ſo that he ſhould have their Bodies before Us at* Weſtminſter, *at a certain Day now paſt, to anſwer to* A. B. *in a Plea of Treſpaſs*; and alſo to a Bill of the ſaid *A.* againſt the ſaid *C.* to be exhibited according to the Cuſtom of our Court before Us, for 20 *l.* upon Promiſe: *And our ſaid Sheriff of* Middleſex *at that Day returned to Us, that the aforeſaid* C. *and* R. *are not found in his Bailiwick; whereupon, on the Behalf of the ſaid* A. *it is ſufficiently atteſted in our Court before Us, that the aforeſaid* C. *and* R. *do run up and down and ſecrete themſelves in your County. Therefore we command you, that you take them, if they may be found in your Bailiwick, and ſafely keep them, ſo that you may have their Bodies before Us at* Weſtminſter, *on* Monday *next after eight Days of St.* Hilary, *to anſwer to the aforeſaid* A. *of the Plea* and Bill *aforeſaid, and that you have then there this Writ before* W. L. Mansfield *at* Weſtminſter, *the 28th Day of* November *in the firſt Year of our Reign.*

Lee.

Indorſed on the Back, *Bail by Affidavit filed for* 10 *l.*

If the *Latitat* is not to hold the Defendant to Bail, then the *Ac etiam* and the Words *and Bill* are omitted therein; and the like Notice is ſubjoined, and ſo it is in the *Alias* and *Pluries Latitat.*

Our

Our Writs being now printed with Blanks, they run in the plural Number, in caſe there ſhould be more than one Defendant to be inſerted therein; but if there be but one Defendant, then *John Doe* or *Richard Roe* is added to make it agree with the printed Form.

Of the Original out of Chancery, and Proceſſes thereon.

It has been obſerved, that the Commencement of a Suit in the *Common Pleas*, is by an *original* Writ out of the Court of *Chancery*; and the *Proceſſes* are ſaid to be the *Writs* and *Precepts* that go forth upon that *Original*.

The *Original* uſed to be procured by a *Note* to the *Curſitor*, called a *Præcipe*, or *Pone*.

The Præcipe thus:

Berks. ſſ. *Præcipe* C. D. *nuper de, &c.* and therefore called a *Præcipe*.

Berkſhire to wit. *Command* C. D. *late of* W. *in the ſaid County, Yeoman, that he render to* A. B. 100 *l. Debt, which he unjuſtly detains, &c. Ret'* —— In Detinue, *that he render to* A. B. *one Horſe, or, &c. which he unjuſtly detains, &c. Ret'*

The Pone thus:

Berks. ſſ. *Si.* A. B. *fecer' &c tunc Pone, &c.* C. D. *nuper, &c.* and therefore ſo called.

Berkſhire,

Berkſhire to wit. *If* A. B. *makes you ſecure in proſecuting his Claim, then put by ſafe Gages and Pledges* C. D. *late of* W. *in the ſaid County, Yeoman, to anſwer to the ſaid* A. *in a Plea of Treſpaſs, &c.* ſetting forth the Complaint. *Ret'.*

The * Original on the Præcipe.

CHARLES, *&c. To the Sheriff of* B. *Greeting. Command* C. D. *late of, &c. that he juſtly, and*

---

* Here are only *two* Precedents given of *Original Writs*. The *Originals*, as formerly made out by the *Curſitors*, and which are now diſuſed, being as *many* and as *various*, as the *Cauſes* of Action on which they were grounded; ſome of theſe *Originals* uſed to be proceeded on before the *Sheriff*, as a *Juſticies*, a *Writ of Treſpaſs, &c.* and therefore were ſaid to be *Vicountiel*; and theſe were removeable into the *King's Bench* and *Common Pleas* by another *Original Writ*, called a *Pone, &c.* The *Regiſter*, and *Natura Brevium*, ſhew the Variety and Nature of *Original Writs*, which are now ſupplied by other Methods of Practice, both in *Real, Perſonal*, and *Mixed* Actions.

See *Robun's Eng. Lawyer.*

The County Courts, and Sheriff's Turn, were ancient Courts in the Time of King *Alfred*, and before. In the Turns were tried all Pleas of the *Crown*; and in the County Courts, all *Common Pleas* under 40 *s.* without the King's Writ; and above, to any Value, with the King's Writ, according to the Maxim, *Quod Placita de Catallis, Debitis, &c. quæ Summam* 40 *s. attingunt, vel excedunt, ſecundum Legem et Conſuetudinem Angliæ, ſine Brevi Regis Placitari non debent.* Hundred Courts, and Courts Baron, had afterwards the ſame Powers granted them; and this was becauſe Men ſhould have Law and Juſtice at Home

and without Delay, render to A. B. *five Pounds, which he owes to, and unjuſtly detains from him, as he ſaith; and unleſs he ſhall ſo do, and the aforeſaid* A. *ſhall make you ſecure to proſecute his Claim, then ſummon by good Summoners the aforeſaid* C. *that he be before our Juſtices at* Weſtminſter *in eight Days of St.* Hilary, *to ſhew wherefore he will not do it.*

Home, and not be obliged to ſue in, or follow the King's Courts. But after the Court of *Common Pleas* was ſettled at *Weſtminſter*, theſe Courts came to decline; for by the Contrivance of the Judges and Attornies, men were brought to ſue in the *Common Pleas* and *King's Bench*, or rather were neceſſitated ſo to do: for what did it ſignify for a man to ſeek for Juſtice near Home, when after Judgment there, or before, his ſuit was ſure to be removed by virtue of theſe *Original Writs* into one of the Courts above? and the *King's Bench* eſpecially, by virtue of a Bill filed by way of *Mutuatus*, (as it is ſaid) would take Cognizance of a Cauſe of 5 *s.* and oblige a poor Man in *York* or *Cornwall*, not worth 40 *s.* to try his Cauſe at *Weſtminſter*? For otherwiſe it was not lawful for a Man to ſue in a Court of Record for a Debt not amounting to 40 *s.* and therefore the Courts below, in order to keep the Buſineſs there, and to prevent their being ſwallowed up by thoſe ſuperior Courts, allowed the Suitors to divide their Actions under 40 *s.* to hinder the Removal of them, *&c.* It was certainly beſt when Juſtice was provided for poor Men at their own Doors; and was the Sum of 40 *s.* to be multiplied to it's real worth that it was at that Time, and the Courts above reſtrained from taking Cognizance of any Thing under, to what a low Ebb would the Courts at Weſtminſter be reduced! And notwithſtanding the whole Buſineſs is now engroſſed by them, how little is conſidered the exceſſive Dearneſs of obtaining Juſtice for ſmall Sums of 3 or 4, or 5 *L.* *&c.*

And

And have then there the Names of the Summoners, and this Writ. Witneſs Ourſelf at Weſtminſter, *the Day of in the Year of our Reign.*

E.

An Original on the Pone.

CHARLES, *by the Grace of God, &c. To the Sheriff of* B. *Greeting. If* A. B. *makes you ſecure in proſecuting his Claim, then put* C. D. *late of* W. *in your County, Yeoman, by ſafe Pledges and Gages, that he be before Our Juſtices at* Weſtminſter *in eight Days of St.* Hilary, *to anſwer to the ſaid* A. *in a plea that whereas the ſaid* C. *on the firſt Day of* May *in the Year of our Lord, &c.* (ſetting forth the Complaint, or Cauſe of Action, according to the Attornies Inſtructions) *to the Damage of the ſaid* A. 100 l. *and have you then there the Names of the Pledges, and this Writ. Witneſs Ourſelf at* Weſtminſter, *the Day of in the Year of our Reign.*

E——.

The *Præcipe* was for Things certain, and on which the *Curſitor* received the *Fine*. The *Pone* was for Things not certain, as for *Treſpaſſes, &c.* and on which no *Fine* could be received. Theſe Writs being returned by the *Sheriff*, were carried to the *Filazer* for ſuch further Proceſs to be made out as was neceſſary, and to be by him filed with the *Cuſtos Brevium*; and until King *Charles* the Second's Time it was *abſolutely* neceſſary for theſe *Originals*

ginals to be *firſt* made out and filed, becauſe the *Declarations* were to be warranted by them; but more eſpecially in *Treſpaſs, Caſe, &c.* for the *Original* uſed to be recited fully in the *Declaration*, and the *Declaration* was to agree with it; for if there was any *Variance* between the *Writ* and *Declaration*, the Defendant could take an Advantage of it, by pleading it in *Abatement*; for which Reaſon the *Declaration* in this Court has been properly defined to be an *Expoſition of the Original Writ.*

After *Originals* were returned of courſe, and *Attachments* and *Diſtringas's* were laid aſide, but more eſpecially after that Rule of *Car.* 2. the leading Proceſſes were, either a *Capias quod reddat* on the *Præcipe*, or a common *Capias quare Clauſum fregit* on the *Pone.*

A Capias quod reddat.

CHARLES, *&c. To the Sheriff of* B. *Greeting. We command you, that you take* C. D. *late of* W. *in your County, Yeoman, if he ſhall be found within your Bailiwick, and ſafely keep him, ſo that you may have his Body before Our Juſtices at* Weſtminſter *in eight Days of St.* Hilary, *to anſwer to* A. B. *of a Plea, that he render to the ſaid* A. 100l. *which he owes to, and unjuſtly detains from him, as it is ſaid; and have then there this Writ. Witneſs, &c. at* Weſtminſter. T.

A Capias quare Clauſum fregit.

CHARLES, *&c. To the Sheriff of* B. *Greeting. We command you, that you take* C. D.

late of W. *in your County, Yeoman, if he ſhall be found in your Bailiwick, and ſafely keep him, ſo that you may have his Body before our Juſtices at* Weſtminſter *in eight Days of St.* Hilary, *to anſwer to* A. B. *in a Plea wherefore with Force and Arms he broke the Cloſe of the ſaid* A. *at* W. *and other Injuries to him did, to the great Damage of the ſaid* A. *and againſt our Peace; and have you there this Writ. Witneſs, &c. at* Weſtminſter *the Day of in the Year of our Reign.* T.

This was called a *Common Capias Clauſum fregit*, becauſe the Cauſe of Action was not eſpecially ſet forth.

If the Defendant could not be taken upon the firſt *Capias*, the Plaintiff had then a *Capias by Continuance*, being the ſame in Form, but called ſo by it's being continued on the Roll by the *Filazer*, from the Time the firſt iſſued, and ſo on from Term to Term until the Defendant was taken. But in caſe the Defendant was gone out of that County wherein the *Original* was filed, and as the Plaintiff could not ſue out a *Capias* into any other County, therefore upon the *Capias* being returned *Non eſt inventus* by the Sheriff, Leave was given for the Plaintiff to take out a * *Teſtatum*

* As the Plaintiff could not ſue out a *Capias* but into that County wherein he had filed an *Original*, the Intent of the *Teſtatum* was to enable the Plaintiff to follow the Defendant into any other County, and take him therewith. The Uſe of this Writ was at firſt much abuſed, in this Reſpect; if the Plaintiff had a Mind *to try his Cauſe*

tatum Capias into any other County, in order that he might follow the Defendant, and take him whereſoever he was to be found.

Theſe Proceſſes continued in Uſe until the Reign of King *Charles* the Second, at which Time great Amendment and Regulation was *endeavoured* to be made in the practical Part of the Law; for, *firſt*, by a Rule made for ſettling and regulating a Courſe of Practice, it was ordered, (for avoiding long and unneceſſary Repetitions of the *Original Writ*, as uſed to be, and was then done; *ſee* under *Declaration*) *that Declarations in Actions of Treſpaſs, Caſe, &c. other than Debt, ſhould not repeat the Original Writ, but only the Nature of the Action.* And *ſecondly*, by the 13 *Car.* 2. the Sheriff was reſtrained from taking any greater Bail or Security than 40 l. *unleſs the true Cauſe of Action was expreſſed in the Writ*, that is, in the *Clauſum fregit.* And from hence aroſe a new kind of Practice; for as the *Original* was not to be repeated in the *Declaration*, it was very evident there was no Occaſion for any

---

Cauſe in B. and the Defendant lived in *Y.* the Plaintiff would file his *Original* to warrant his Judgment, and ſue out a *Capias* in *B.* and then ſue out a *Teſtatum* to take the Defendant in *Y.* which put the Defendant to the Neceſſity of trying the Cauſe in *B.* and bringing his Witneſſes at a great Diſtance: and therefore the Courts thought proper, in order to remedy this, to change the *Venue* in ſuch Caſes, upon the Defendant's Affidavit that the *Cauſe of Action* aroſe in *Y.* and not in *B.* that the Cauſe might be tried in the *proper* County, if the Defendant required it.

Original at all, at the Beginning of the Suit, to ſet forth the Complaint as uſed to be; and therefore Attornies, inſtead of making a long *Præcipe* or *Pone*, for the *Curſitor* ſetting forth the Complaint as Inſtructions for the *Original*, made a ſhort Note for the *Capias*, thus:

Berks. ſſ. *If* A. B. *makes, &c. then put, &c.*
C. D. *late of* W. *in your county, Yeoman,*
Ret. *broke the Cloſe at* W.
W.

Upon which the *Filazer* (inſtead of the *Curſitor*) granted the *Capias Clauſum fregit*, and entering this *Præcipe* on a Roll, delivered the Roll at the End of the Term to the *Curſitor*, who thereby made out the *Originals* all at once, to be filed with the *Cuſtos Brevium*. Theſe *Common Originals* now were only the *Clauſum fregit* teſted in the Name of the King, to give the Court it's Juriſdiction; but as it was neceſſary by the 13 *Car.* 2. to *expreſs* the *Cauſe of Action* in the Writ, to hold the Defendant to Bail, the *Ac etiam* was introduced in the *Clauſum fregit*; and from hence *Præcipe's quod reddat* began to be laid aſide likewiſe; *inſtead of which*, in order to avoid paying the Fine, Attornies beſpoke a *Clauſum fregit* with an *Ac etiam* in Debt, or, *&c.* for as much as the *Debt* was, *viz.*

Berks. ſſ. *If* A. B. *makes, &c. then put, &c.*
C. D. *late of* W. *in your County, Yeoman,*
broke the Cloſe at F. Ac etiam *for* 100 l. *in*
Debt, Ret. in eight Days of St. Hilary.
W.

Or,

Or, if in *Caſe*, thus:

Berks. ff. *If* A. B. *&c. then put, &c.* C. D. *late of* W. *in your County, Yeoman, broke the Cloſe at* F. Ac etiam in Caſe *for* 20 l. *Ret. in eight Days of St.* Hilary. W.

So that the *Clauſum fregit* became, and is now, the leading Proceſs in this Court, with this Difference only; If the Defendant is not to be held to bail, the *Clauſum fregit*, without any *Ac etiam* as before, is the proper Proceſs; and which now, in purſuance of the 12 *Geo.* 1. has the like *Engliſh Notice* under it, as the *Bill of Middleſex*, or *Latitat*; but if the Defendant was, and is now, to be held to Bail, the *Ac etiam* is inſerted therein, and therefore is called a *Bailable Capias*, and the other a *Common Clauſum fregit.*

A Capias, with an Ac etiam.

GEORGE *the Third, &c. To the Sheriff of* B. *Greeting. We command you, that you take* C. D. *late of* W. *in your County, Yeoman, and* R. R. *if they ſhall be found in your Bailiwick, and ſafely keep them, ſo that you may have their Bodies before our Juſtices at* Weſtminſter *in eight Days of St.* Hilary, *to anſwer to* A. B. *of a Plea, wherefore with Force and Arms they broke the Cloſe of the ſaid* A. *at* E. *and other Wrongs to him did, to the great Damage of the ſaid* A. *and againſt our Peace.* And alſo that the ſaid *C.* may anſwer to the ſaid *A.* according to the Cuſtom of our Court of the Bench, in a certain Plea

of Debt upon Demand for 20 *l.* *And have you there this Writ. Witneſs Sir* Charles Pratt, *Knt. at* Weſtminſter, *the* 28*th Day of* November, *in the* 2*d Year of our Reign.*

The only Inſtructions to the *Filazer* for theſe Writs are as follow:

B ——. ſſ. *Capias for* A. B. *againſt* C. D. *late of* W. *in your County, Yeoman, ret. in eight Days of St.* Hilary. B——.

If bailable.

B ——. ſſ. *Capias for* A. B. *againſt* C. D. *late of* W. *in your county, Yeoman, ret. in eight Days of St.* Hilary. B——.

And alſo for 20 l. *Debt.* *Affidavit for* 10 *l.*

Or,

And alſo for 20 l. *on Promiſe.* Affidavit for 10l. *&c.*

Theſe are the *Præcipe's* which the *Filazer* enters on the Roll, as Inſtructions for beſpeaking the *Originals* of the *Curſitor*; and it is eaſy to judge what Sort of * *Originals* are made out (if

* The *Original Writ*, that is now ſuppoſed to iſſue out of the *Chancery*, to give this *Court* its Juriſdiction, is nothing more than a printed blank Form of the *Clauſum fregit* itſelf, filled up by the *Curſitor*, with the Parties Names, returnable in the *Common Pleas*, and teſted in the Name of the King, (without any Stamp, or ever paſſing under the Seal of the Court) and then filed with the *Cuſtos Brevium*, in whoſe Office they lie to be conſumed by Time, un-

(if any are) from them. It is not pretended they are to warrant any *Judgment* in the Court, but only to give the Court its *Juriſdiction*; for if any *Original* is required to warrant a *Judgment*, on a Writ of Error brought, ſuch *Original*, which uſed to be made out and filed at the Beginning of the Suit, is now beſpoke after the *Judgment*, and is called a *Special Original*. By this we ſee, how Time works a Change in Things; for inſtead of *one* Original, as uſed to be, there are now two requiſite, one to *give* the Court its *Juriſdiction* to proceed in the Cauſe, the other to *warrant* the *Judgment* of the Court in the ſame Cauſe. And inſtead of the firſt *Original* being to warrant the Declaration and the *Judgment*, as was the original Intent of it, the *Judgment* is now a *Warrant* for the Original!

Of the Defendant's Appearance.

With reſpect to the Defendant's *Appearance* in the Court of *King's Bench*, little need be ſaid of it, further than, that when this Court began to take Cognizance of *Civil* Pleas, it was uſual to arreſt the Defendant on every Proceſs of the Court, and bring him up into the *Cuſtody of the Marſhal* of the *Marſhalſea*, in order to enforce him to appear to the *Bill* filed. If the Action was for any thing under 20 *l.* they let

---

unleſs eaten by Vermin; for 'tis not pretended they are of any Uſe in the Suit, unleſs it muſt be, that the Court of *Common Pleas* ſhall have no Juriſdiction but from ſuch Originals!

the Defendant *out of Cuſtody* upon *Common Bail*; but if for 20 *l.* or above, they made him give *Special Bail.*

In Lord *Wentworth*'s Time the 20 *l.* ſunk to 10 *l.*

The *Common Bail*, it is preſumed, always run thus:

M. ff. C. D. *is delivered to Bail upon the taking of his Body*, (that is to ſay) *to* John Doe *and* Richard Roe, *at the Suit of* A. B.

But after the 12 *Geo.* 1. the Form was altered to what it is now, *viz.*

M. ff. C. D. *having been ſerved with Proceſs, is delivered to Bail* (that is to ſay) *to* John Doe *and* Richard Roe, *at the Suit of* A. B.

But with regard to the Defendant's *Appearance* in the Court of *Common Pleas*, a great deal of Matter and Form depended on it; for formerly, every *Plaintiff* and *Defendant* was obliged to appear in his *proper Perſon* at the Return of the Writ, which *Appearance* was recorded by the *Filazer*, who * continued the Proceſſes of the Court until the *Prothonotary* took it up on the Delaration. For,

On the Defendant's being *ſummoned*, he was to *appear*, or caſt an *Eſſoin*; that is, ſend his

* It is from this, that now, when a Defendant is diſcharged by the Court *before* Declaration, the *Filazer* is the Officer to ſign the *Superſedeas*; but *after* Declaration *Superſedeas*'s are ſigned by the Prothonotary.

Excuſe

Excuſe for his not appearing; and the Clerk of the *Eſſoins* entered ſuch *Eſſoin*, and after ſuch Entry the *Defendant* could not appear again that Term, becauſe the *Plaintiff*, by the *Eſſoin* Roll, had the ſame Day given him; and therefore the *Defendant* was not allowed to *appear* and plead in the *Plaintiff*'s Abſence.

This *Eſſoin* was to be ſent on the very * Day the Writ was returnable, for if the Defendant omitted caſting an *Eſſoin* that Day, the Plaintiff had Liberty the next Day to enter an *Exception* with the Clerk of the *Eſſoins*, and obtain an Order that the Defendant's *Eſſonium non recipiatur.*

And therefore, as the *firſt* Day of the Term was called the *Eſſoin-day*, ſo the *ſecond* was called the *Exception-day*; and the *third* Day was called the *Retorna Brevium* Day; for on this third Day the *Sheriff* returned the Writs into Court, and delivered them to the *Cuſtos Brevium*; and then it was that the Court was ſeiſed of the Cauſe by the Poſſeſſion of the Writ.

The fourth Day was called the *Appearance* Day, for on this Day both *Plaintiff* and *Defendant* were to appear; it was granted to the Defendant *ex Gratia* by the Court, and if the Defendant did appear, the Court proceeded *ore Tenus*, and *ex Officio* abated the Writ, or gave further Time for the *Plaintiff* to *declare*; but if the *Defendant* did *not* appear,

---

* *Eſſoins* were allowed on many other Occaſions in the Court of *Common Pleas* eſpecially in *Real Actions*, and even on the *Return of* the *Venire* &c. See *poſt.*

then

then the *Plaintiff* appeared and * *offered* himſelf, and the *Filazer* recorded his Appearance, and that the Sheriff had returned the Writ. And this he did to pray further Proceſs of the Court, for if the Writ was returned by *Summoneri feci*, then the Court granted an *Attachment* and *Diſtreſs infinite* in *Debt*; but in *Treſpaſs*, becauſe of the *Fine* to the King, the King's Proceſs iſſued, which was a *Capias*, or a *Diſtringas*, as the Court thought proper. But if the Writ was returned by *Nil habet in Ballivâ meâ per quod Summoneri poteſt*, the *Capias* uſually iſſued in both Caſes. If the *Capias* was returned *Non eſt inventus*, the Plaintiff again *offered* himſelf, and then an *Alias Capias* iſſued; and upon *Non eſt inventus* thereon, the *Pluries*; after which they proceeded to Proceſs of Outlawry. †

By *Magna Charta*, none are to be impriſoned *Niſi per Legale Judicium Parium ſuorum vel per Legem Terræ*. It was one Part of the Law of the Land to *commit* for *Contempts*, and it was confirmed by this Statute; and we may obſerve,

---

* The Form of the Entry in every Action for the *Plaintiff* in this Caſe was, "*Et præd' quer' obtulit "ſe iiii Die, &c. et prædict' Def. non venit; ideo "Præceptum Vic. quod, &c.*" by which, *Obtulit ſe*, it was taken, that the *Plaintiff* was to appear in *propriâ Perſonâ*; for then [illegible] make Attorney but by Patent, [illegible] the Writ commanded [illegible] &c. and that was taken [illegible] *Nat. Brev. Raſt. &c.*

† The [illegible] *Debt, Detinue* [illegible] *Caſe.*

the above Proceſſes, *i. e.* the *Capias*, *Alias*, and *Pluries*, were grounded on the Defendant's *Contempt* in not obeying the Summons, and *appearing* accordingly; and which iſſued to compel his Appearance, and not to impriſon the Body for the *Debt* only.

If the Defendant * caſt an *Eſſoin*, he had of courſe Time given him to the next Term. In ſome Caſes the Defendant had *two* Eſſoins allowed him, until the Delays thereby grew ſo great an Hindrance to Juſtice, that in many Caſes they were diſallowed. See Stat. *Weſt.* 2. and 12 *E.* 2. But it is difficult to ſhew when it became the Practice for the Sheriff, in order to take away *Eſſoins*, to return the *Original Writ* of Courſe *by Nil habet*, that the *Capias* might iſſue thereon, and the Defendant to be *arreſted* without being firſt *ſummoned:* Though we can't obſerve the Inconveniences previous to it, yet we may judge of the Severities that enſued.

For, if the Defendant was taken by the *Capias*, *Alias*, or *Pluries*, the Sheriff was not obliged to take Bail for his Appearance, unleſs the Defendant ſued out a Writ of † *Mainprize*,

---

* Before the Stat. of *Weſtminſter* 2. *c.* 10. All *Attornies*, it is ſaid, were made by Letters Patent under the Broad Seal, and theſe *Patents* were inrolled by the *Clerk* of the *Warrants*; but this *Statute* gives Liberty to all Perſons of *appearing* by, and appointing an *Attorney*; and then the *Clerk* of the *Warrants* received each Perſon's *Warrant of Attorney*, after which *Eſſoins* were caſt, and *Appearances* were by *Attornies*, and not *in Perſon* ſo frequently as uſed to be before.

† See *Natura Brev.* for this Writ.

becauſe

becauſe the Writ commanded him to take him, *ſo that he might have his Body, &c.* though he might take Bail for him of his own Accord. Therefore, by the 23 *H.* 6. *c.* 10. the Sheriff is obliged to take Bail, otherwiſe an Action lies againſt him; and the Plaintiff is at Liberty to take an *Aſſignment* of the *Bail Bond*, or, upon his Return of *Cepi Corpus*, amerce the Sheriff for not bringing in the Body.

From hence it is concluded, that after it became the Practice for the *Sheriff* to return the *Original* by *Nil habet* of courſe, every *Defendant* uſed to be arreſted on the *Capias*, as on the *Bill of Middleſex*; and upon ſuch *Arreſt* was obliged to give *Bail* to the Sheriff to appear; or elſe (where the Action was for ſomething of ſmaller Concern) ſend to an Attorney to undertake to appear for him; which was done, if the Sheriff thought proper to accept of it, by his *indorſing* on the Back of the Writ, or Warrant, ſuch his *undertaking* to appear for the *Defendant*; and there are ſome Inſtances where Attornies have been fined, or ordered to pay Coſts, *&c.* for refuſing to appear according to his Undertaking.

If the Defendant was arreſted for 20 *l.* or above, the Plaintiff's Attorney, by entering a *Ne recipiatur* with the *Filazer*, did crave * ſpecial Bail to the Action; for this *Ne recipiatur*

* The giving Bail to the Action came in on returning the *Capias* by *Cepi C. D. cujus Corpus, &c.* for before then, if the Defendant did not appear on the Summons, the Sheriff might attach him by his Goods, or

cipiatur was, that no Warrant of Attorney, or Appearance ſhould be received until *Bail* was filed with the Judge; and therefore it was irregular for the Defendant to *file* a Warrant of Attorney, before *Bail* was put in. And this Rule was taken from the Practice of the *King's Bench*, where they diſcharged no Perſon out of Cuſtody, without ſpecial Bail, if the Debt was 20 *l.* But here, as well as in that Court, in Lord *Wentworth*'s Time, it ſunk down to 10 *l.*

The Hardſhip in this Caſe was, that the Defendant's *Bail* were obliged to travel to *Town*, live where they would, to put in *ſpecial Bail*; for the Judges were not impowered to appoint * *Commiſſioners* in the Country to take *Recognizances* of Bail until the 4th of *W. & M. c.* 4.

---

or by Pledges; if by his Goods, and he did not appear, they were forfeited; if by Pledges, and he did not appear, the Pledges were amerced. And this Bail, as Pledges are diſuſed, ſupply their Place.

* The Commiſſioners appointed are *Juſtices* of Peace, or *Barriſters* at Law, who reſide in the Country, and are ſo few therein, that it *now* frequently happens, (eſpecially where the Arreſt is upon a ſhort Return) that after a Man and his Bail have been riding from *Town* to *Town* after a Commiſſioner, to take the Recognizance, they can't meet with one, and are obliged at laſt to come to *London*, to put in Bail before a Judge, to prevent an Aſſignment of the Bail-bond; and what adds to this Miſchief, is, that if *Bail* is put-in in *Town*, ſuch *Bail* muſt *juſtify in Town*; conſequently a Man and his Bail may be kept a Week in Town from their Buſineſs; for, if they go down, they muſt come up again to *juſtify*. This is a Hardſhip that may be eaſily remedied.

But

But as it was become the general Practice, in both Courts, for a Man to be arreſted upon a general Writ of *Capias Clauſum fregit, Bill of Middleſex, Latitat, &c.* for 40*s.* and leſs, and even where, as in Treſpaſs, nothing was due, and where only *Common Bail*, or a *Common Appearance* could be required, without ever expreſſing the Cauſe of Action, many litigious and vexatious Proceedings aroſe, and extraordinary Bail was exacted by the Sheriff's Officers, *&c.* as are complained of by the Statute. Therefore, to reſtrain theſe Abuſes, the 13 *Car.* 2. was made, whereby the Sheriff is reſtrained from taking any greater Security *than* 40 *l. unleſs the true Cauſe of Action was expreſſed in the Writ.* And this, as before obſerved, gave Riſe to the inſerting the *Ac etiam* in the Proceſſes of each Court, thereby to ſet forth the Cauſe of Action; but yet, as no Proof was required to be made of the *Debt*, or Cauſe of Action, previous to the ſuing out the Writ, *Ac etiams* were nevertheleſs (where Ill-nature and Malice prevailed) inſerted therein, and thoſe litigious and vexatious Proceedings ſtill continued, to the great Injury, Oppreſſion, and Expence of the Defendant.

For when a Man was arreſted on ſuch a Proceſs, and could not find *Bail* to the Sheriff, he had no Way left to obtain his Diſcharge, but by *ſummoning* the Plaintiff before a *Judge, to ſhew his Cauſe of Action*, which was generally done by the Plaintiff's ſwearing to his Debt; if not, the Defendant was *diſcharged* by the Judge's Order. But all this while the Defendant continued in Cuſtody on the Arreſt, and though the Defendant could *give Bail* to the Sheriff, yet

yet Summons's were no leſs as frequently taken out, to *ſhew Cauſe why Common Bail*, or a *Common Appearance ſhould not be accepted*, to avoid *putting in Bail* to the *Action*. Here was rare Work for the Attornies! It is more eaſy to conceive, than expreſs, the litigious and vexatious Miſchiefs in the Practice, while theſe Proceedings continued; and yet it was not remedied until the 12 *G.* 1.

By this Statute the Plaintiff is obliged to make an *Affidavit* of his Debt or Cauſe of Action, and that the Sum due is 10 *l.* or upwards, *previous* to ſuing out the Proceſs, to hold the Defendant to Bail; for if the Sum is not 10 *l.* the Defendant *is not* to be arreſted, but is to be ſerved with a Copy of the Proceſs only, with an *Engliſh* Notice thereto, (for the Proceſs ſtill continued in * *Latin)* to ſhew the Intent of ſuch Service. This was an excellent Law indeed! and worthy of being made perpetual! for it introduced a new and eaſy Method of ſummoning the Defendant to appear; and through this, as obſerved, the Common Bail-Piece was altered in it's Form.

As to the Defendant's *Appearance* in this Court, where ſpecial Bail was not required, it was made by a ſhort Note of the Attorney, and is now thus:

---

* *William* the Firſt brought in the *Norman* Language, but the Proceedings were recorded in *Latin*, being a dead Language, and not ſubject to Variation. The *French* continued till *Hill.* 36 *Ed* 3. when it was aboliſhed, though Notes were much longer continued to be taken in *French*; and Proceedings continued to be recorded in *Latin* until 4 *Geo.* 2.

B ——. ff. *Appearance for* C. D. *late of* W. *in the ſaid County, Yeoman, at the Suit of* A. B.
R. B.

Which is left with the *Filazer*, to be entered on his Appearance Roll; and in caſe the Defendant *fails* to file *Common Bail*, or enter ſuch *Appearance*, on the Return of the Proceſs, or in *eight* Days after, this Statute gives the Plaintiff Leave (upon an *Affidavit* made, and filed of the Service of the Proceſs) to *appear* for him, and to leave a *Declaration* in the proper *Office*, and upon *giving* him Notice to *plead* thereto, (according to the Rules of the Court) to proceed to *Judgment*. And this is very reaſonable, as in this Caſe the Defendant is in no Reſpect ſurprized in the Plaintiff's Proceſs, but is, as we may ſay, * *twice* ſummoned to *appear*, and defend himſelf

* Our ancient Laws were much in Favour of Liberty, and though now a Man can't be arreſted in the Courts of *Weſtminſter* but for 10*l.* or above, yet it is queſtioned, if it would not be better if it was reduced to much leſs. This is ſpoke in Favour of Trade; for was a Man under no Fear of Reſtraint, it would put a Stop to Credit; and was the Arreſt to be for a leſs Sum, the Plaintiff (on whom the Hardſhip lies, to be forced to take any Remedy for a juſt Debt) would be in a fairer Way of getting his Money.

A Man can ſooner pay 5 or 6*l.* than 10*l.* and it was for this Reaſon, that about *London*, a Plaintiff had Recourſe to the Palace Court; which Court for *twelve Miles* round *London*, and alſo the City Courts for *London*, held to Bail for *forty Shillings*, and above; but now by an Act paſſed in the 19th Year of his preſent Majeſty, it is enacted, that after the 1ſt of *July*, 1779, no Perſon ſhall be arreſted or held *To Bail upon Proceſs iſſuing out of any inferior Court for leſs than* 10l. ſo that now a Man can't be arreſted for leſs than 10*l.* and in ſome Counties not under 20*l.* and in ſuch a Caſe, how can it be expected, if the Defendant can't pay his Debt upon the Arreſt, he can diſcharge himſelf

himſelf againſt the Plaintiff's Suit, that is once by the Service of the Writ, and next by the Notice

---

ſelf from Gaol with the Addition of Coſts? Whereas, had the Arreſt been for 4 or 5 *l.* only, a Defendant might have raiſed it, or got Friends, much ſooner, to relieve him.

But now, as the Arreſt is for 10 *l.* a Plaintiff is very unwilling the Defendant ſhould be diſcharged; and, to puniſh him, ſtill proceeds to prevent it, and thereby increaſes the Hardſhip on both; for the Plaintiff's Revenge is ſharpened by reaſon of his Coſts, and the ſame Coſts is an Addition to the Defendant's Debt, and thereby his Diſcharge is rendered ſtill more difficult; for theſe Coſts, upon a Writ of Inquiry, may be 7 *l.* or 8 *l.* at the leaſt; and 14 *l.* or 15 *l.* if by Verdict on a Trial: generally they are much more,

The not holding a Man to Bail for *leſs* than 10 *l.* and that by *Oath* of the Plaintiff, was deſigned to favour a Man's Liberty; now ſuppoſe a Man is *ſerved* with a *Copy* of a Writ, for a juſt Debt of 4 *l.* or 5 *l.* only, the only Check upon the Defendant for the Non-payment is the growing Coſts; and what is then the Conſequence, with reſpect to both Parties? The Plaintiff muſt proceed to Judgment by Inquiry, or Verdict, to prevent his being non-proſs'd, and add ſuch large Coſts to his Debt, before he can receive any Benefit by his Suit, that are ſufficient to deter any Plaintiff from ſuing at all, where the Payment is the leaſt doubtful; and 'tis evident an experienced Tradeſman will rather loſe ſuch a Debt, than riſque a certain great Expence in endeavouring to get it. This is an Occaſion for a Defendant to exult, and run in Debt wherever he can get Credit; and as to the Defendant, thoſe Coſts are ſuch an Addition to a ſmall Debt, that it is impoſſible to expect a Man, who can't pay 4 *l.* or 5 *l.* ſhould pay 15 *l.* or 20 *l.* and if not, his Body, Goods, and Chattels, muſt be, and continue to be, liable to be taken in Execution, to the immediate Ruin of himſelf and Family, and remain a Diſcouragement to his future Endeavours, for theſe are large

Notice of a Declaration being left in the Office; and without this Liberty given to the Plaintiff thus to proceed, he would be in no Capacity of receiving any Benefit by his Suit, nor the Court of giving any Judgment or Relief to him therein.

However, it may be obſerved, that this, and many other Methods of the preſent Practice, are quite oppoſite and contradictory to the old, eſtabliſhed, and fundamental Laws and Cuſtoms of the Courts, in many Inſtances, as may be obſerved throughout. (See

---

Coſts for a poor Man to pay. However, the induſtrious Creditor is the greateſt Sufferer; his Debt is moſt often loſt, and his Coſts are a certain Addition to it; and it is difficult to point out a Method to ſave or prevent it; unleſs a Plaintiff, by eſtabliſhing a ſmall Debt by Oath, might arreſt a Defendant, and after ſome ſhort Time of Impriſonment, if the Debt was not paid, the Defendant ſhould be releaſed both from Gaol and the Debt. Such Puniſhment, when rendered certain, and proportioned to the Debt, might deter the wild, the careleſs, and diſhoneſt Part of Mankind, from contracting Debts but with an Intent to pay them. Then the Plaintiff would know his Loſs, and be at Liberty, not to add ſuch extraordinary Coſts to it, as he now muſt. It need be no Bar to a Man's giving Bail, and conteſting the Suit; and it would prevent ſuch long Impriſonments, for ſmall Sums, that poor Priſoners labour under, It would prevent a whole Family's being ruined (as is often the Caſe) by an Execution againſt the Goods, &c. It is difficult to ſay what, but ſome ſuch Method might be ſubſtituted to ſave the Plaintiff's Expence in proceeding, who in general is the Sufferer, and the long Impriſonments poor Men moſt frequently endure, &c.

poſt.)

poſt.) However it is an excellent Law, and ſhews how much the Proceedings, or Pleadings in a Suit, want to be regulated, and made agreeable to the preſent Mode of Practice, without harbouring ſo much Obſcurity, and unintelligible References to ancient Matters as they do.

After the Defendant has appeared to the Plaintiff's Proceſs, or in caſe the Plaintiff appears for him, according to the above new eſtabliſhed Method of Practiſe, the next regular Proceeding in a Suit is the Plaintiff's *Count*, or *Declaration*, exhibiting his *Complaint* or *Cauſe of Action*; which uſed, and is now *ſuppoſed*, to be done by the *Bill* or *Original Writ*, filed in the reſpective Courts; though, in fact, neither the one nor the other is but very rarely or ever done, except, as obſerved, againſt Priſoners, *&c.* neither of them being *now* requiſite at the Commencement of a Suit, they being helped by the Statute. And therefore they may, with great Reaſon, be laid aſide; eſpecially, as by what has been ſaid, and as it will evidently appear, they only (when now occaſionally uſed) tend to the increaſing the Expence of the Suit, and multiplying the Proceedings, without the leaſt Neceſſity for them.

Of the Declaration.

A *Declaration**, or *Count*, is an Inſtrument framed to ſet forth the Complaint or Demand of the Plaintiff or † Demandant, againſt the Defendant or † Tenant; and which uſed, and ought to contain, the whole Matter or Subſtance thereof.

The original Deſign, and principal Eſtabliſhment of the Court of *King's Bench*, after the making of *Magna Charta*, being to determine criminal Proceedings, it is ſaid, *Civil* Cauſes were the *By*-buſineſs of this Court, and entered by way of *Memorandums*; from which it may be concluded, that the *Declaration* was begun with the ſame *Memorandum*, which is now prefixed before the *Iſſue*, (ſee *poſt.*) it ſeems to have been ſo. But to begin on this Head with more Certainty:

In the Court of *King's Bench*, the *Declaration* uſed to be drawn from the Bill then filed by the *Clerks* in the *King's Bench* Office, who were

---

* Though a *Declaration* and *Count* may be ſometimes confounded, yet a *Count* more properly ſignifies the *Declaration* in the *Original Proceſs*, and chiefly uſed in Real Actions in the *Common Pleas*; it ſeems to come from the *French* Word *Counter*, or *Contor*, to *declare*: So Serjeants at Law have been called *Counters*, or *Contours*; and at this Day we call their paſſing a Recovery at Bar, *Counting* at Bar.

† *Demandant* and *Tenant* were Terms uſed in *Real Actions* only, in the *Common Pleas*, and are diſuſed with them.

then

then many, and did the Buſineſs therein for the Attornies at large, or for thoſe who had not Seats there; in like Manner as the *Clerks* in the *Exchequer* of Pleas do now, for theſe *Clerks*, in Right of their being *Clerks* in the Office, were called *Attornies of the Court*; and no *Attornies at large*, till after the Fire of *London*, were admitted to file their own Pleadings; and it was from thoſe *Clerks* that the Clerk of the Declarations received his Fee of 2 *s.* a Term for * *pyeing*, *filing*, and *keeping* the Declarations; and 'tis ſuppoſed they paid him as well for the *Attornies* at large who employed them as for themſelves.

The Bill or *Declaration* being † ingroſſed and filed by the Plaintiff's Clerk, (which was done for the entring up Continuances thereon) he then delivered a Copy of it to the Defendant's Clerk, who filed the Common Bail, who taking a Copy of it for his own and Client's Uſe, returned it again the next Term when he came to plead, with his Plea (if he pleaded the general Iſſue) wrote on the Side of it, (or

* This word *pyeing*, as made uſe of in an old Rule of Court, ſignifies the ſelecting the Declarations from that confuſed Manner in which they were brought in, and reducing them into an alphabetical Order, for the more ready finding them, *&c.* It is a Term yet in Uſe among the Printers, but here it ſignifies the Reverſe of this, for they call pyeing the caſting away the Letters out of the Frame, or Box, confuſedly together; and this they call making Pye.

† *Ingroſſing*, *filing* and *continuing*, have been long diſuſed; but it is yet charged for, as done previous to the delivering, or filing the Declaration.

elſe entered his Plea in the general Iſſue Book in the ſame Office) which was called giving a Plea on the Book-ſide. And in the Books of our preſent Practice it is laid down as a Rule, *that the Plaintiff's Clerk, or Attorney, may make up the Iſſue, or Paper-book, in all Caſes where the Plea may be given or the Book-ſide,* without ſaying what ſuch Pleas are which may be ſo given, it being to be underſtood to be the general Iſſue; for if the Defendant pleaded any ſpecial Plea, he filed it with the Clerk of the *Papers* in the ſame Office, for the Plaintiff's Clerk to beſpeak a Copy of it; and then the Clerk of the Papers had a Right to make up the Paper-book or Iſſue from the Pleadings of the Parties, which Privilege they ſtill retain in this Court; and in this Office the Clerk of the *Bails*, the Clerk of the *Rules*, and other Officers of the Court had their Seats, and therein all Buſineſs was tranſacted by theſe *Clerks* from their Clients Inſtructions.

In the *Common Pleas* the Buſineſs, *originally*, was from Time to Time heard *Ore tenus* at the Bar, and the Prothonotaries were then the Scribes who took down the Acts of the Court. They began to take up the Cauſe from the Return of the Writ, therefore, upon the Plaintiff's declaring, they ſet forth the Authority by which the Court proceeded, that it might appear that the Court had Cognizance of the Cauſe. Wherefore, in all Actions where the firſt Proceſs was by Summons, they took Notice of the Summons, and ſaid, *C. D.* * *Sum-*

* It has been obſerved before, what gave Riſe to this Difference in the Prothonotary's Entries, *p.*

monitus

monitus fuit ad reſpondendum, &c. And ſo in Treſpaſs, *&c.* where the Proceſs was by Attachment, they ſaid, *C. D. Attachiatus fuit ad reſpondendum, &c.*

As the Plaintiff declared *Ore tenus*, which was minuted down by the Prothonotary, who afterwards entered the Declaration in Form, agreeable to the Writ on the Roll: So was likewiſe the Prayer to *imparle*, this being all that was done the firſt Term by the Court, after the Parties had appeared; and then the Roll was called the *Imparlance Roll*; and afterwards, when a *Plea* was given to enter, they made the *Entry* on another Roll called the *Plea Roll*, and from thence they tranſcribed the *Niſi prius Roll*, on the *Back* of which the Judgment was entered. But as the Buſineſs of the Court increaſed, the Prothonotaries found it difficult to manage the Buſineſs of the Court, in making thoſe Entries; and therefore they permitted Attornies to draw up the Pleadings, and leave them in their Office to enter occaſionally; and afterwards to deliver the Proceedings in Paper to one another, and to pay them for the ſeveral Entries on paſſing the * *Niſi prius Roll*; [the Practice of the *King's Bench* is ſuppoſed to have introduced this in the *Common Pleas*]. And from theſe Pleadings in Paper, or in the Office, the *Niſi prius*

* The Prothonotaries in the *Common Pleas* (and Clerk of *Niſi prius* in the *King's Bench)* do paſs all *Records*, or *Niſi prius Rolls*, for Trial, and are paid ſo much *per* Sheet for ſo doing, becauſe the *Niſi prius Rolls* are ſuppoſed to be made up by themſelves, from the ſeveral Rolls in their Offices, *&c.*

Roll was made up; and *after the Verdict*, they made up the *Plea Roll* from the *Niſi prius Roll*, in order to enter up the Judgment thereon. This was inverting the ancient Practice, for now the Proceedings begun to run in a new Channel.

Attornies, having gained Knowledge and Skill from the Entries of the Prothonotaries, in common Caſes drew their own *Declarations*, or elſe uſed to apply to Counſel to do it; or, it might be rather ſaid, that in difficult Caſes, while the *Original* was in Uſe, the Counſel drew or ſettled the *Præcipe* for the *Original*, for that in Treſpaſs, Caſe, *&c.* was a Guide for the *Declaration*; for in the *Common Pleas* (and alſo in the *King's Bench*, when the Proceedings were by *Original*) the whole *original Writ* uſed to be inſerted in the *Declaration*, as introductory to the ſubſequent Part which was a little more full; and ſo the *Original* containing the whole Subſtance of the Complaint or Demand, it was no more than reducing the Writ into the Form of a *Declaration*, by repeating the ſame Matter, as contained in the *Original*, over again; with ſometimes a little more Certainty as to Time, Place, *&c.* and for which Reaſon the Declaration has been moſt properly ſaid to be, *An Expoſition of the original Writ, adding Time, Place, and other neceſſary Circumſtances to it, to render it certain, that the ſame might be triable.* It being a ſtrictly obſerved Rule, that there ſhould be no Variance between the *original Writ* and the *Declaration*, but that the one ſhould be a Warrant for the other; for, if there was any Variance, the Defendant might plead it in Abatement.

And

And this Method of repeating the *Original* is ſtill often (and as it is conceived unwarrantably) uſed in *Qui tam Actions* in this Court. In order to explain this clearly, and thereby to elucidate the preſent formal Beginning of the *Declaration* in the *Common Pleas*, it will be neceſſary to recite ſome Part of the *Original* again. Suppoſe the Writ run thus:

CHARLES, *&c. To the Sheriff of* B. *Greeting. If* A. B. *make you ſecure to proſecute his Claim, then put* C. D. *late of* W. *in your County, Yeoman, by ſure and ſafe Pledges, that he be before our Juſtices at* Weſtminſter *in eight Day of St.* Hilary, *to anſwer to the ſaid* A. *in a Plea, that whereas the ſaid* C. *on the tenth Day of* November *in the ſecond Year of our Reign, at* W. *in the ſaid County, was indebted to the ſaid* A. *in the Sum of* 20 l. *of good and lawful Money of* England, *for divers Goods, &c.* (ſo on with the whole Complaint, or Demand, concluding) *to the Damage of the ſaid* A. 40 *l. as it is ſaid; and have you there the Names of the Pledges, and this Writ. Witneſs Ourſelf at* Weſtminſter, *&c.*

Now in drawing the Declaration, they begun thus:

B——. ſſ. C. D. *late of* W. *in the ſaid County, Yeoman, was attached to anſwer to* A. B. *in a Plea, that whereas the ſaid* (here came in a Recital of the Complaint as in the Original) *on the* 10*th day of* November *in the ſecond*

ſecond Year of the Reign, &c. at W. *in the ſaid County, was indebted to the ſaid* A. *in the Sum of* 20 *l. of lawful Money, &c.* down to *to the Damage of the ſaid* A. 40 *l.* Inſtead thereof they went on, and continued it thus: *And whereupon the ſaid* A. *by* R. B. *his Attorney, complains, that whereas the ſaid* C. *on the ſaid* 10*th Day of* November *in the ſaid ſecond Year of the Reign &c. at* W. *aforeſaid, in the County aforeſaid, was indebted to the ſaid* A. *in the ſaid Sum of* 20 *l. of good and lawful Money of* E. *for divers Goods, Wares, &c.* (and ſo on with the very ſame Complaint over again, concluding the Declaration with) *to the Damage of the ſaid* A, *forty Pounds; and thereupon he brings his Suit* *, *&c.*

---

* *And therefore he brings his Suit, &c.* which is an Offering to verify by Witneſſes the Cauſe of Complaint; but againſt an Attorney, that Form was never in Uſe, but it was by way of Petition to the Court, *and therefore he prays Relief, &c.* becauſe Attornies and Officers of the Court were privileged Perſons. This, *&c.* is made by a modern Writer to ſupply theſe Words, "*And hath good Proof of the Pre-*" *miſſes, when the Court will conſider thereof.*" And it is very probable ſome ſuch Words were anciently uſed, ſeeing they are properly anſwered by the *Quando, &c.* in the Plea, *viz.* "*When and where the Court* "*will conſider thereof*" whieh is now ſupplied by *when, &c.* for if ſome ſuch Words were not to be underſtood, the *&c.* in each is ſuperfluous; but we find by our oldeſt books and records, that *Et inde producit ſect' &c.* and *Quando, &c.* have been always uſed for a formal Concluſion of the *Declaration* and *Plea.*

But

But this, at length, was thought a very great Grievance to the Subject, ſo very unneceſſarily to *double* the *Declaration*; and therefore, by the Rule in the Time of *Charles* II. made for *ſettling* and *regulating* a Courſe of Practice and Pleadings, (a Thing which may be thought wanting at preſent) it was ordered, for avoiding long and unneceſſary Repetitions of the *original Writ*, in Actions upon the Caſe, and perſonal Actions, penal Statutes, *&c. that Declarations in Actions of Treſpaſs, upon any general Statute, &c. other than Debt, ſhould not repeat the Original, but only the Nature of the Action.* This brought the Declaration to the preſent Form, *viz.*

B——. ſſ. C. D. *late of* W. *in the ſaid County, Yeoman, was attached to anſwer to* A. B. *in a Plea of Treſpaſs on the Caſe, &c. and whereupon the ſaid* A. B. *by* B. R. *his Attorney, complains that whereas the ſaid* C. *on the* 10*th Day of* November *in the ſecond Year of the Reign —— was indebted to the ſaid* A. *in the Sum of ——*

The whole Recital of the *Original* being ſupplied by that, *&c.* and therefore that, *&c.* in the Common Pleas *here*, ought not to be omitted in the *Declaration*, it being at preſent, a neceſſary Part of the Pleading; for as it ſupplies the *Original*, ſo it alſo ſupplies the Return thereof, and is the Reaſon why no *Pledges* are added at the *End* of the *Declaration*, as is uſed in the *King's Bench*, when the Proceedings there are by *Bill*, and not by *Original*. Before this Rule, there was, as before obſerved, a Neceſſity for an *Original* to be ſued

ſued out at the Commencement of the Suit, which was a *Guide* for drawing the *Declaration* by, ſo that they might agree; but afterwards, as the *Original* was not to be repeated, there could be no Occaſion for one, for that or any other Purpoſe; conſequently, it muſt be ſuppoſed, that ſoon after this Rule the ſuing out *Originals* began to be omitted.

Notwithſtanding this Rule, the Recital of the *Original* is generally uſed in *Qui tams*, and pretty fully in Actions of *Treſpaſs* in this Court, wherein it may be as well omitted, as it is in *Caſe*. The Declarations themſelves will clearly ſhew this.

Now in the *King's Bench* by *Bill*, they were not confined ſo ſtrictly in drawing the Declaration, as a Fault therein was not attended with ſuch an Expence to the Client to amend it, as it might be amended by the Bill upon the File; and in caſe there was any Fault diſcovered in the Bill, that might be amended, ſo as to warrant the Declaration. But a Fault in the Declaration in the *Common Pleas* often put the Plaintiff to the Expence of purchaſing a new Original; for the Declaration being grounded on the Original, they were to agree together; and in caſe any Fault was diſcovered in the Original itſelf, it could not be helped but by the Purchaſing, *i. e.* praying for, ſuing out, and returning a new original Writ. However, as in the *King's Bench* the Defendant was ſuppoſed to be in the Cuſtody of the Marſhal of the King's *Marſhalſea*, they always begun the Declaration with Relation to the Bill filed, or ſuppoſed to be filed, in this Manner, *viz.*

B——. ff. A. B. *complains of* C. D. *beingin the* * *Cuſtody of the Marſhal of the* Marſhalſea

* Until lately, one could not *declare* againſt a Defendant in the *King's Bench*, who was neither in the Cuſtody of the *Marſhal*, or who had not filed his *Bail*; for *no otherwiſe* could the Defendant be ſaid *to be in Court*; and conſequently the Court had no Cognizance of any Matter againſt him. And therefore, if a Defendant was in *Cuſtody* of a *Sheriff*, in a County Gaol, upon the Proceſs of this Court, the Plaintiff was obliged, firſt to bring him up by *Habeas Corpus*, and turn him over to the *Marſhal*, in order to declare againſt him. And this ſeems to be the ſtrongeſt Evidence that can be, that anciently, every Defendant in this Court was to be really *in the Cuſtody of the Marſhal*, before any Proceedings could be had; or this Court could take Cognizance againſt him on any Civil Matter; for this was the *Ground-work* of the Court's Proceeding. But by the 4 & 5 *W. & M. c.* 21. Leave is given to the Plaintiff to *declare* againſt a Defendant in the *Cuſtody* of the *Sheriff* or Bailiff, as effectually as if in Cuſtody of the *Marſhal*, ſo that *the Declaration ſets forth in whoſe Cuſtody the Defendant is*. Obſerve then, if the *Ground-work* is not, by this Statute, quite ſubverted; if not by this Statute, how is it when a Defendant *is not in Cuſtody at all*, nor has entered any Bail, as is the Caſe, when a Defendant is ſerved with a *Copy of a Proceſs* only, and the Declaration is left in the Office, and yet he muſt be declared againſt as in Cuſtody of the *Marſhal?* It need not be further obſerved, how much the preſent Practice deviates from the true Reaſon of *declaring* againſt a Man *as in Cuſtody of the Marſhal*; but ſeeing it runs counter to Truth, and the very Nature and Reaſon of the Court's proceeding in a Cauſe, why ſhould this antiquated Cuſtom be continued?

of

of our Lord the King, before the King himſelf, for this, to wit, that whereas the ſaid C. *on the* 10*th Day of* November, *&c. was indebted to the ſaid* A. *in the Sum of, &c.* (adding Pledges at the End thereof, *viz.*) * *Pledges to proſecute, John Doe and Richard Roe.*

By this it will appear that the Relation the *Declaration* has to the *Original* in the *Common Pleas*, and the Relation it has to the *Bill* filed, or ſuppoſed to be filed, in the *King's Bench*, is the Reaſon of the Difference, in *Form*, of the *Declarations* between the two Courts; for, was it not for the *Original*, and it's ſuppoſed Return of *Pledges* in the *Common Pleas*, there would be no Occaſion for that, *&c.* at the Beginning of the *Declaration* there, to ſupply the

* Can any good Reaſon be aſſigned, why *Pledges* are uſed in the *King's Bench* (and alſo in the *Common Pleas*) when it is againſt *Attornies* or *Officers* of the Court there, and not by Original? Did ever any Proceſs iſſue here requiring Pledges? And yet theſe are continued with much Exactneſs, and are the Support of the *Memorandum* at the Beginning of the *Iſſue*. And the formal and feigned *Pledges* were thought ſo material, before the 4 & 5 *Annæ*, that the Want thereof was a Matter of *Demurrer*. And ſince then, if by Chance they have been omitted, Summons's have been, and may be taken out, for the Plaintiff *to ſhew Cauſe* why he ſhould not *amend* his *Declaration*, by adding them. A fine Amendment truly! which a litigious Defendant ſeldom omits to avail himſelf of, when he wants to protract or delay a Suit, and it ſhews the Miſchiefs that may ariſe through the Uſe of Pledges.

Original

Original and *Return*. And was it not for the formal ſuppoſing the Defendant to be in *Cuſtody* of the Marſhal, in the *King's Bench*, there would be no Occaſion for ſuch a *fictitious* Beginning, nor for adding *Pledges* at the End of the *Declaration*, nor conſequently for the *Memorandum* at the Beginning of the Iſſue, in the *King's Bench*; but the Declaration might be more plain, ſimple, and ſignificant in one and the like Form in both Courts, wherein the Defendant's Addition, and the Nature of the Action, ſhould appear, *viz.*

B —— *to wit.* A. B. *by* R. B. *his Attorney, complains of* C. D. *late of* W. *in the ſaid County of* B. *Yeoman, of a Plea of for that whereas the ſaid* C. *on the* 10*th Day of* November *in the Year of our Lord* 1762, *at* W. *in the ſaid County, was indebted to the ſaid* A. *in, &c. And therefore he brings his Suit, &c.*

The *Court* ſuch *Declaration* is in, would appear by the *Chief Clerk*'s, or the reſpective *Prothonotary*'s Name at the Top of it.

There are ſome Particulars taken Notice of by our Books, wherein a Declaration in one Court differs from that in the other; but unleſs it be in the formal Beginning of each, it is preſumed theſe Differences are very immaterial: as whether an *Alias Dict'* be in or not, of a *Profert* in *Cur'* in the *Body*, or at the *End* of the *Declaration*; and ſo of *Letters Teſtamentary, &c.* or whether it be in the *Year* of our *Lord*, or in the *Year* of the *Reign* of the King, ſeeing all theſe are almoſt now uſed indifferently.

Formerly,

Formerly, indeed, when *Originals* were ſued out as the leading Proceſſes, then if an *Alias Dict'*, or Year of the Reign, *&c.* was in the *Writ*, it was neceſſary the ſame ſhould be in the *Declaration*, to agree with it. So likewiſe in Reference to the ancient Practice in the *Common Pleas* in *Debt*, *Covenant*, *Account*, *Annuity*, *Detinue*, and *Replevin*, wherein the Defendant was uſed to be *ſummoned* on the *Original*, the Declaration ſaid, *Summonitus fuit ad reſpondendum, &c.* And in *Treſpaſs*, *Caſe*, *Trover*, and *Ejectment*, wherein *Attachments* were uſed, it ſaid, *Attachiatus fuit ad reſpondendum, &c.* And ſo, even at this Day, theſe formal Words ſtill continue in Uſe in the *Common Pleas*, notwithſtanding the Practice to which they relate has been diſcontinued ſome hundred Years. What religious Obſervers of Antiquity have the Practiſers of the Law been, in all Things that were not abſolutely forbidden them!

But the better to obſerve the Difference, let us peruſe a few Forms of Declarations in each Court in *Debt*, *Caſe*, and *Treſpaſs*, as they are at preſent in uſe.

Declarations.

The common formal Beginning of a Declaration in the King's Bench.

Berkſhire, *to wit.* A. B. *complains of* C. D. *being in the* * *Cuſtody of the Marſhal of the*

* The Defendant being alledged to be in the *Cuſtody of the Marſhall*, there was no Occaſion for any further Addition to his Name; and this is the Reaſon why it is omitted in the *King's Bench.*

Marſhalſea

Marſhalſea *of our Lord the King, before the King himſelf, for this, to wit, that whereas the ſaid* C. *&c.* and ends with

Pledges to profecute, { *John Doe* and *Richard Roe.*

The common formal Beginning of a Declaration in the Common Pleas, in Caſe, Treſpaſs, Trover, and Ejectment.

Berkſhire, *to wit.* C. D. *late of* W. *in the ſaid County* * *of* B. *Yeoman, was attached to anſwer to* A. B. *of a Plea of Treſpaſs on the* † *Caſe, &c. and whereupon the ſaid* A. B. *by* R. B. *his Attorney, complains, that whereas the ſaid* C. *on the, &c.* without adding any Pledges.

N. B. If the Action be in *Debt, Detinue, Covenant, Account, Annuity,* or *Replevin,* then it muſt be, *Was ſummoned to anſwer.*

---

* By the Court of *Common Pleas* the County in the Margin is Part of the Declaration, though not held ſo in *B. R.* and this *of B.* may therefore be omitted, as 'tis ſuperfluous.

† This *&c.* is neceſſary, and ought not to be omitted, becauſe it ſupplies the Recital of the *Original* and Return of *Pledges*; and the Reaſon why there is no *&c.* here in *Debt, Treſpaſs, &c.* is, becauſe in theſe you ſee, the Original is in Part recited, notwithſtanding the *R.* in *Cha. 2.*

A Declaration in Debt on Bond in the King's Bench.

Berkſhire, *to wit*, A. B. *complains of* C. D. *being in the Cuſtody of the Marſhal of the* Marſhalſea *of our Lord the King, before the King himſelf,* * *of a Plea that he render to the ſaid* A. 100l. *of lawful Money of* Great Britain, *which he owes to and unjuſtly detains from him, for this, to wit, that whereas the ſaid* C. *on the* 10th *Day of* May *in the Year of our Lord* 1730, *at* W. *in the ſaid County, by his certain Writing Obligatory, ſealed with the Seal of the ſaid* C. *and to the Court of our ſaid Lord the King, now here ſhewn* †, *the*

Date.

Profert.

---

* When the *King's Bench* took Cognizance of *Debt* by Original, they purſued the Form of the *Common Pleas* in the *Declaration* in this Place; for it is plain, this is a Recital of the *Original* Writ, as in the *Common Pleas*, and can no ways here relate to any Proceſs out of the *King's Bench*, and therefore theſe Words, *Of a Plea that he render, &c.* ſhould (as is conceived) be omitted in the Declarations in *Debt* in *B. R.* when the Proceedings are not by Original, as generally they are not.

† The Reaſon why a Deed that is pleaded ought to be ſhewn to the Court, is, becauſe every Deed muſt prove itſelf to have ſufficient Words, whereof the Court muſt adjudge; and it is alſo to be proved otherways, as by Witneſſes, or other Proof, if the Deed be denied, for that is Matter of Fact. 1 *Inſt.* 121. *b.*

Of every Deed pleaded, with a *Profert hic in Cur'*, the other Party is intitled to crave *Oyer, i. e.* to hear it;

the Date whereof is the ſame Day and Year above, acknowledged himſelf to be bound to the ſaid A. *in the ſaid* 100 l. *to be paid to the ſaid* A. *whenever he the ſaid* C. *ſhould be thereunto required. Yet the ſaid* C. *although often required, &c. hath not paid to the ſaid* A. *the ſaid* 100 l. *but hath hitherto refuſed, and ſtill doth refuſe to pay the ſame to him, to the Damage of the ſaid* A. 20 l *and therefore he brings his Suit, &c.* Breach.

R. B. for the Plaint. / *B. R.* for the Def. { Pledges to proſecute } *J. Doe* and *R. Roe.* Pledges.

A Declaration in Debt on Bond in the Common Pleas.

Berkſhire, *to wit.* C. D. *late of* W. *in the ſaid County, Yeoman, was ſummoned to anſwer to* A. B. *of a Plea, that he* * *render to him* 100 l.

---

it; which is now generally given by making a Copy of ſuch Deed for him. *Oyer* is an old *French* Word, and was anciently uſed for what we now call *Aſſizes*, *Anno* 13 *E.* 1. And the Juſtices Commiſſion, a Commiſſion of *Oyer et Terminer*; though anciently every Deed that was pleaded was actually brought into Court, and could not be taken out again till after the Matter was determined.

* This is a Recital of Part of the Original with an *&c.* to ſupply the Remainder of it, with the Return thereof. The ſame is in the Declaration on a *Mutuatus*, and others in *Debt*. And though this formal Part is copied from the *Common Pleas* by the

100 l. *which he owes to, and unjuſtly detains from him, &c. and whereupon the ſaid* A. *by* R. B. *his Attorney, complains, that whereas the ſaid* C. *on the* 10*th Day of* May *in the Year of our Lord* 1730, *at* W. *in the ſaid County, by his certain Writing Obligatory, acknowledged himſelf to be bound to the ſaid* A. *in the ſaid* 100 l. *to be paid to the ſaid* A. *whenever he the ſaid* C. *ſhould be thereunto required; Yet the ſaid* C. *although often required, &c. hath not paid to the ſaid* A. *the ſaid* 100 l *but hath hitherto refuſed, and ſtill doth refuſe to pay him the ſame, to the Damage of the ſaid* A. 20 l. *and therefore he brings his Suit, &c. And the ſaid* A. *brings here into Court the aforeſaid Writing Obligatory, which teſtifies the ſaid Debt in Form aforeſaid, the Date whereof is the ſame Day and Year above mentioned.*

N. B. The moſt material Difference in theſe is in the formal Beginning of them, elſe they may be uſed indifferently for either Court, it being not material whether the *Profert in Cur'* be in the Middle or End of the Declaration; though it is preſumed this in the *Common Pleas*

King's Bench, yet it ought to be without the *&c.* there being nothing in the *King's Bench* to be ſupplied by the *&c.* therefore this Part of the *Declaration* therein had been beſt omitted. And the Declaration thus, A. B. *complains of* C. D. *being in the Cuſtody of the Marſhal of the* Marſhalſea *of our Lord the King, before the King himſelf, for this, to wit, that whereas, &c.* without any, *of a Plea that he render, &c.* either in *Debt*, or on a *Mutuatus*,

is the moſt ancient Form. Letters Teſtamentary, *&c.* are always at the End in both Courts, becauſe the *Profert in Cur'* of theſe cannot well be introduced in the Body of the Declaration.

In Debt on Bond, with an Alias Dict. in the King's Bench.

Berkſhire, *to wit.* A. B. *complains of* C. D. *otherwiſe called* C. D. *of* W. *in the County of* B. *Yeoman, being in the Cuſtody, &c.*

In the Common Pleas.

Berkſhire, *to wit,* C. D. *late of* W. *in the ſaid County, Yeoman, otherwiſe called* C. D. *of* W. *in the County of* Berks, *Yeoman, was ſummoned to anſwer to* A. B. *of a Plea, that &c.*

If an *Alias Dict'* is uſed, it ought to be *Literatim,* as in the Bond. An *Alias dict'* was never neceſſary in the *King's Bench,* and however neceſſary it might have been formerly in the *Common Pleas* to agree with the Original, it is not ſo now, but is thought to be beſt omitted, to avoid the Riſque of making a Miſtake therein.

A Declaration on a Mutuatus in the King's Bench.

Berkſhire, *to wit.* A. B. *complains of* C. D. being in the Cuſtody of the Marſhal of the

Marſhalſea *of our Lord the King, before the King himſelf* " *of a Plea, that he render to* " *the ſaid* A. 50l. *of lawful Money of* Great " Britain, *which the ſaid* C. *owes to, and* " *unjuſtly detains from him,*" *for this, to wit, that whereas the ſaid* C. *on the* 10*th Day of* May *in the Year of our Lord,* 1730, *at* W. *in the ſaid County of* B. *borrowed of the ſaid* A. *the ſaid ſum of* 50l. *to be paid to the ſaid* A. *whenever he the ſaid* C. *ſhould be thereunto afterwards required; yet the ſaid* C. *although, &c.* The Breach and Pledges as before.

On a Mutuatus in the Common Pleas.

Berkſhire, *to wit,* C. D. *late of* W. *in the ſaid County, Gentleman, was ſummoned to anſwer to* A. B. *of a Plea that he render to the ſaid* A. 50 l. *of lawful Money of* Great Britain, *which he owes to, and unjuſtly detains from him, &c. and whereupon the ſaid* A. *by* R. B. *his Attorney complains, that whereas the ſaid* C. *on the* 10*th Day of* May *in the Year of our Lord, &c.* The ſame as above, without Pledges.

A Declaration in Caſe in the King's Bench.

Berkſhire, *to wit,* A. B. *complains of* C. D. *being in Cuſtody of the Marſhal of the* Marſhalſea *of our Lord the King, before the King himſelf, for this, to wit, that whereas the ſaid* C. *on the Day of in*

the Year of our Lord 1740, *at* W. *in the ſaid County of* B. *was indebted to the ſaid* A. *in the Sum of* 30 l. *of lawful Money of* Great Britain, *for divers Goods, Wares, and Merchandizes, &c.* Or for Money lent, Work done, *&c.*

In Caſe in the Common Pleas.

Berkſhire, *to wit.* C. D. *late of* W. *in the ſaid County, Apothecary, was attached to anſwer to* A. B. *of a Plea of Treſpaſs on the Caſe, &c. and whereupon the ſaid* A. *by* R. B. *his Attorney complains, that whereas the ſaid* C. *on the Day of in the Year of our Lord* 1740, *at* W. *in the ſaid County of* B. *was indebted to the ſaid* A. *in the Sum of* 30 l. *of lawful Money of* Great Britain, *for divers Goods, &c.*

Declarations in *Caſe* differ only in the formal Beginning of them, and adding *Pledges* in the *King's Bench*, and omitting them in the *Common Pleas*. And in this only, in the *Common Pleas*, is truly expreſſed the Nature of the *Action*, viz. *Treſpaſs on the Caſe*; whereas in the others it is ſet forth in the whole Subſtance of the Declaration.

A Declaration in Treſpaſs in the King's Bench.

Berkſhire, *to wit.* A. B. *complains of* C. D. *being in the Cuſtody of the Marſhal of the*

Marſhalſea *of our Lord the King, before the King himſelf, for this, to wit, that whereas the ſaid* C. *on the Day of in the ſecond Year of the Reign of our Sovereign Lord* George *the Third, now King of* Great Britain, *&c. at* W. *in the County of* B. *with Force and Arms, to wit, with Swords, Staves, Knives, Fiſts, and Feet, made an Aſſault upon the ſaid* A. *and beat, wounded, and ill-treated him, ſo that his Life was deſpaired of, and then and there other Injuries to him did, againſt the Peace of our ſaid Lord the now King, to the great Damage of the ſaid* A. *of* 100 l. *and therefore he brings his Suit, &c.*

Pledges, *&c.*

In Treſpaſs in the Common Pleas.

Berkſhire, *to wit.* C. D. *late of* W. *in the ſaid County, Yeoman, was attached to anſwer to* A. B. *of a Plea, wherefore with Force and Arms he made an Aſſault upon him the ſaid* A. *at* D. *in the ſaid County of* B. *and beat, wounded, and ill-treated him, ſo that his Life was greatly deſpaired of, and then and there other Injuries to him did, againſt the Peace of our ſaid Lord the now King, &c. and whereupon the ſaid* A. *by* R. B. *his Attorney, complains, that whereas the ſaid* C. *on the Day of in the ſecond Year of the Reign of our Sovereign Lord* George *the Third, now King of* Great Britain, *&c. at* D. *in the ſaid County of* B. *with Force and Arms, to wit, with Sword, Staves, Knives, Fiſts and Feet,*

Feet, made an Aſſault upon the ſaid A. *and beat, wounded and ill treated him, ſo that his Life was deſpaired of, and then and there other Injuries to him did, againſt the Peace, &c. to the Damage of the ſaid* A. 100 l. *and therefore he brings his Suit, &c.*

Theſe few Sketches of Precedents are only to ſhew the Agreement there is between the *Declarations* of both *Courts*, and wherein they differ from each other; which, as obſerved, is only in the formal * Beginnings, and is owing to the Reference they have to the *Bill*, and the *Original* in the reſpective *Courts*, though in ſome in the *Common Pleas*, eſpecially thoſe in *Treſpaſs*, we find the *Original* more fully ſet forth than in the others. And now, in *Qui tam Actions*, the *Original* is generally all repeated, notwithſtanding the Rule of *Car.* 2. to reſtrain the Repetition thereof.

Before we depart from this Head, there are yet two Things to be taken Notice of, that is, the *Venue*, and the *Day* of the Action.

With reſpect to the *Venue*, it is ſaid, that on the ſettling of *Niſi prius*, they obliged the Plaintiff to try his Action where it accrued, becauſe the *Jury* was to come from where the *Fact* was committed. But while the Proceſs was by *Attachment* and *Diſtreſs*, which could

* As to the formal Beginnings and Concluſions of Declarations in particular Caſes, as *for* and *againſt* Executors or Adminiſtrators, Aſſignees of a Bankrupt, Attornies, &c. they are to be ſeen in the printed Books of Precedents.

be

be only where the Defendant's Goods were, it begat a Diſtinction between Actions; the one being called *Tranſitory*, which related to *Goods* and *Chattels*, and was to follow the Defendant wherever he could be found; the other was called *Local*, becauſe it related to *Lands*, and the Proceſs was to be on the *Lands*. *Theſe* were to be laid in the County where the *Lands* lay; but in *Tranſitory Actions* the Plaintiff had Liberty to chuſe his *Venue*, being ſuppoſed to lay it where the Action accrued; and in caſe Defendant fled from that Place, the Plaintiff had Liberty to try his Action in the County wherein the Defendant was *ſummoned*. But this came at length to be much abuſed, for the Plaintiff would lay his *Action* far from the *Place* where the *Action* aroſe, which put the Defendant under a Neceſſity of carrying his Witneſſes into a County far from the Place. In order to prevent this, the 6 *R.* 2. was made, which enacts that Writs of *Account*, *Debts*, *&c.* ſhould be commenced in the County where the *Contracts* were made; for if the *Contracts* were made in another County than contained in the *Original*, the Writ ſhould abate. But this *Statute* (it is ſaid) was never put in uſe, for it was thought the Plaintiff could not then follow the Defendant into another County, and it was foreſeen that many other Miſchiefs would ariſe; therefore the Judges aſſumed a Power of changing the *Venue*. The Alteration began in the *King's Bench*, for there, where the Proceſs was by *Bill*, they could eaſily change the *Venue*; but in the *Common Pleas*, where they muſt have an *Original* to warrant their Proceedings, it was more difficult: Therefore here,

here, at firſt, the Plaintiff was obliged to ſue out an *Original*, where the Action aroſe; and then a * *Teſtatum Capias* into another County where the Defendant was to be found. But as this was tedious, chargeable, and inconvenient, this Court began to change the *Venue*, and allowed the Plaintiff to file a *new Original* to warrant his *Declaration*. Thus it continued until 21 *J.* 1. whereby *Perſonal* and *Tranſitory* Actions, as *Debt*, *Detinue*, *Aſſault* and *Battery*, *&c.* may be laid in any County.

However, the Courts, notwithſtanding this Statute, upon an Affidavit, that the Cauſe of Action aroſe in ſuch a County and not elſewhere, will of Courſe change the *Venue* to it's proper County, if not laid ſo; and this is now a Motion of Courſe. But *Local* Actions, as *Ejectments*, *Waſte*, *Treſpaſſes*, *Quare clauſum fregit*, *&c.* muſt be laid in the proper Counties where the Actions aroſe, or where the Lands lie.

With reſpect to the *Time* of laying the Action: In Debt upon Bond, or upon a Note, *&c.* the certain Day is deduced from the Bond or Note itſelf, and conſequently will appear by the Declaration thereon. But in all Actions upon the *Caſe*, *Treſpaſs*, *Aſſault*, *Battery*, *&c.* we are not obliged to lay the certain Day, the Cauſe of Action aroſe, in the Declaration; but if it be laid on ſome Day *after* the Cauſe of Action aroſe, and *before* the Commencement

---

* *Quære*, if this did not give Riſe to the *Teſtatum?* The like Uſe of a *Teſt.* ſtill continues, and in many Inſtances is deemed abſolutely neceſſary, notwithſtanding the Allowance to file a new Original.

of the Suit, it is ſufficient. And it is with great Reaſon this is allowed, as in ſome Caſes it may be impoſſible for a Plaintiff to aſcertain the Day by Evidence, or it may be forgot, *&c.*

Of Imparlances, &c.

Formerly the *Declarations* uſed to be entered upon the *Roll*, then filed and *docketted*; and * *Continuances* uſed to be entered thereon from that Term until the Defendant pleaded to Iſſue, or confeſſed the Action; becauſe then, in moſt Caſes, the Defendant was not obliged to plead the ſame Term that the Declaration was of, but he was intitled to an *Imparlance, i. e.* Time to imparle or plead from that Term to the next ſubſequent Term.

In the *King's Bench* the Defendant had an Imparlance, vel *Licencia Interloquendi*, in all

---

* A *Continuance* was the continuing the laſt Proceeding upon the Roll from one Term to another, and ſo on, that no intervening Term might appear, for if there did, the Party not making ſuch *Continuance* to keep himſelf as acting in the Cauſe, was ſaid to be out of Court; and ſo if no Entry of an *Imparlance* appeared in the Declaration, the Defendant might have ſigned a *Non pros*, or *demurred*. But now the Statute of *Jeo faillé*, 21 *J.* 1. helping the *filing* and *continuing* has occaſioned the Diſuſe of it, for a *Bill*, or *Declaration*, is now never ingroſſed and filed, and conſequently no *Continuances* entered thereon but in particular Caſes; for if there is no Writ of *Error*, there needs no *Bill* to be filed, though it is always charged, and allowed for as done in the *King's Bench*, becauſe, I ſuppoſe, *it may be required* to be done,

Caſes;

Caſes; for being arreſted on a general Writ of *Bill of Middleſex*, or *Latitat*, wherein no Cauſe of Action appeared, conſequently he could not know the Cauſe of Action, nor how to make his Plea, until the *Declaration* was entered; and therefore was very reaſonably indulged with an *Imparlance*.

But in the *Common Pleas* it was not general, for in ſome Caſes the Defendant had an *Imparlance* of courſe, in others not; for Inſtance, If the Defendant appeared upon an Arreſt by a common *Clauſum fregit*, he had an *Imparlance* of courſe; but if the Writ had been ſpecial, according to the Truth of the Action, and returnable the *firſt* or *ſecond* Return of the Term, then the Defendant was to plead that Term, becauſe the Plaintiff's *Complaint* or *Declaration* being ſet forth in the *Writ*, the Defendant could thereby know the Cauſe of Action, and how to make his Defence; and therefore in that Caſe, as he already had ſome Time to conſider of it, and prepare his Plea from the *Summons*, there was the leſs Reaſon for his having further Time of courſe, eſpecially ſo long Time as an *Imparlance*. But in all *Real* Actions the Defendant was intitled to an *Imparlance* of courſe.

Although in the *Common Pleas* the Defendant was indulged with an Imparlance, according to the Cuſtom of this Court's Method of Proceeding, yet it was not cuſtomary, or the Practice of this Court, ever to make any *Entry* of an * *Imparlance* on the Roll, or in the Pleadings,

* And yet in an Ejectment Cauſe (becauſe it's in the Nature of a real Action) an *Imparlance* muſt be entered

ings, otherwiſe than in this Manner at the Bottom of the Declaration, *Imparlance to the firſt Day of next Term*, which never appeared in the *Record*; for what did it ſignify to the Court whether or no the Defendant pleaded the ſame Term the Declaration was of, or not?

But in the *King's Bench* they always entered the Plea with the *Imparlance* before it, which was either *general*, when Defendant was intitled to it of courſe, and entered thus, *And now at this Day, that is to ſay*, Friday *next after eight Days of St.* Hilary, (being the firſt Return of that Term) *until which Day the ſaid C. had Leave to imparle to the ſaid Bill, and then to anſwer, &c.* Or elſe *ſpecial*, which was granted by the Court, and was prayed when the Defendant wanted to plead ſome ſpecial Plea, which he could not plead after a general *Imparlance*, (for there were ſeveral Pleas in Abatement and Bar, which the Defendant had no Right to plead after a general *Imparlance*) and therefore theſe Words were uſually added thereto, *Saving all Advantages, as well to the Juriſdiction of the Court, as to the Writ and Declaration, &c.*

But now by a Rule in the *King's Bench*, *Trinity* 5 & 6 *Geo.* 2. * *Imparlances*, in ſome Reſpects, are taken away; for it is hereby

---

entered with the *Prothonotary*, *i. e*, the *Prothonotary* muſt be paid 2 *s.* for the Entry of an *Imparlance*, though none is made.

* To take away the *Imparlance*, or Time to plead in the *Common Pleas*, a Rule was made, *Mich.* 3 *Geo.* 2. to the like Purpoſe, from whence the Rule in the *King's Bench* was taken.

ordered

ordered, That if the Writ be returnable the *firſt* or *ſecond* Return of any Term, *&c.* then if the Declaration be *delivered with Notice to plead four Days before the End of the Term*, the Defendant ſhall plead the ſame Term *without* any *Imparlance*; but if the Writ *be not* returnable the *firſt* or *ſecond* Return; or in caſe it be, and the Declaration is not delivered with Notice to plead *four Days* before the End of the Term, then the Defendant has yet an *Imparlance*. So that an *Imparlance* now depends on the *Return* of the Writ, and the *Delivery* of the Declaration, and conſequently the Entry thereof.

Whenever the Defendant is intitled to an *Imparlance*, the Entry of ſuch *Imparlance* is made before the Plea as above, *viz. And now at this Day, that is to ſay,* * Friday *next after eight Days of St.* Hilary *in this ſame Term, (until which Day the ſaid* C. *had Leave to imparle to the ſaid Bill, and then to anſwer thereunto) before our Lord the King at* Weſtminſter *come as well the ſaid* A. *by his Attorney aforeſaid, as the ſaid* C. *by* R. B. *his Attorney; and the ſaid* C. *defends the Wrong and Injury when, &c. and ſaith that* —— Then follows the Plea.

* This is always the *firſt* Return of the Term the *Plea* is of, becauſe by the Courſe of the *King's Bench* they never entered *Continuances* until the *Plea* came in, though the Declaration was delivered four Terms before; nor do they now make any *Continuances* from the Declaration to any intervening Term: As ſuppoſe the Declaration of *Eaſter* Term, and the Plea of *Hilary* next, no Notice is taken of *Trinity* and *Michaelmas* Term. *See poſt*, of making up *Iſſues*.

An

An Entry of an *Imparlance* in this Manner, is thought to be neither a material, nor a neceſſary Part of the Pleadings, from it's having never been uſed in the *Common Pleas*; and according to the preſent Practice of this Court, ſuch an Entry is not made, when a *Plea* is of the *ſame* Term with the *Declaration:* And what indeed does it ſignify to the Court, whether or no it appears by the Record that the Defendant pleaded the ſame Term, or not*? And if it is not neceſſary, the Queſtion will be, Whether the Uſe of it is in any Reſpect hurtful? One need only conſult the Notes of Practice to ſee what Miſchief has attended the Uſe of it, for though it doth not much lengthen the Pleadings, it often ſerves to perplex them, and leads the young Practitioner into Miſtakes; for Inſtance, The Declaration was of *Hilary* Term, the Defendant did (as he may, and ought to do) deliver his Plea *with an Imparlance* of *Eaſter* Term; the Plaintiff took *Iſſue* on this *Plea*, and as he could not alter the Defendant's *Entry* of the *Imparlance*, he was obliged to make up his *Iſſue* of that *Eaſter* Term, and conſequently award the *Venire* of that Term; though he did not deliver the Iſſue till after *Trinity* Term, becauſe he could not (as it was a Country Cauſe) go to the Trial until

* Is there not as great a Reaſon for uſing ſuch an Entry before a Replication, Rejoinder, or other Pleading, as before a Plea? Theſe ſhall be intended, when they are entered of Record, that they were made of the ſame Term in which the Plea came in. Why not the Plea of the ſame Term with the Declaration.

the

the *Aſſizes* following. Now what was the Conſequence of this? Why, when the Plaintiff came to paſs his Record for Trial, on an *old* Iſſue, he had to pay the Clerk of the Dockets for a *poſt Terminum*, and 4 *s.* 8 *d.* to the Clerk of the Treaſury for a *poſt Roll*, *&c.* All unneceſſary Sums to be paid by the Plaintiff or Defendant, and yet this frequently happens.

But this is not all, for it is frequently the Occaſion of greater Miſchiefs, as when the Judgment comes to be entered up, it muſt be entered up with *Continuances* on the Roll by * *Vicecomes non miſit Breve* from the *Return* of the *Venire* to the *Teſte* of the *Diſtringas*, which Entry of the *Continuances*, it is believed, is frequently forgot, and oftentimes omitted; and this through the Uſe of an *Imparlance*. And yet, if this formal Entry is not properly uſed, the Court, in all Probability, will ſet the Judgment aſide, or allow it as a Matter of *Error!*

It is confeſſed, that in order to avoid paying *Poſt-terminums*, *&c.* it is moſt uſual for the Defendant to deliver his Plea *without* the Entry of the *Imparlance* before it, which leaves the Plaintiff at Liberty to make the *Imparlance* to the ſame Term he makes up his *Iſſue* of, which may be three or four Terms after the *Declaration* and *Plea*. But why ſhould any Inlet to Miſtakes or Impropriety remain in the Pleadings, when it may be removed without any Inconveniency whatever? And therefore would it not be better to diſcontinue the Uſe of the Entry of *Imparlances* in this Court, as it is in the *Common Pleas?*

* See under the Method of entering up Judgments in the *King's Bench.*

Of the Plea, and Pleadings.

A *Plea* is commonly taken for the Defendant's *Anſwer* to the Plaintiff's *Declaration*, though it may in general be taken for that which either Party alledgeth for himſelf in a Court, in a Cauſe there depending; and conſequently *Pleadings*, in a large Senſe, contain all the Matters which come after a *Declaration*, as well on the Plaintiff's Part, as on the Defendant's, until an *Iſſue* is joined between them.

A Plea pleaded to the Action is either *general* or *ſpecial*.

A *general Plea* is a conciſe and direct *Anſwer* of the Defendant to the Plaintiff's *Declaration*, framed and contrived of old in ſuch Words as were proper to deny the whole Part of the Declaration: As if the Defendant was charged with a *Treſpaſs*, the general Plea was, that he was *Not guilty* thereof, which is now commonly called the *general Iſſue*. Such is the Plea of *Nil debet*, or *He owes nothing*, to an Action of Debt on a Contract; *Non eſt Factum*, or *It is not his Deed*, to an Action of Debt on a Bond; or, *Solvit ad Diem*, or *He paid it at the Day*, to a Bond. Such is *Non aſſumpſit*, or *He did not aſſume upon himſelf, and promiſe, &c.* to an Action on the Caſe upon a Promiſe, *&c.*

A *ſpecial Plea* is a Plea drawn up in Form, ſetting forth the Matter pleaded at large, with an apt Concluſion to the Declaration or Action.

There are likewiſe other Pleas framed of old by the Courts, to anſwer the Occaſion of them; and though they do not come under the

the Denomination of iſſuable Pleas, yet they are moſt commonly ranked with them as ſuch, though they are rather a Confeſſion of the Truth of the Plaintiff's Declaration; as *Non ſum informatus*, or, *I am not informed to ſay any thing in Bar, &c. Nil dicit*, or, *He ſays nothing* in Bar, *&c. Cognovit Actionem*, or, *He confeſſes the Action, &c.* Theſe were framed by the Court, to be uſed when the Defendant neglected to plead in Time, and by his Silence implied a Confeſſion of the Action; for without ſuch Means the Plaintiff could obtain no Satisfaction by his Suit: Or elſe they were really pleaded by the Defendant himſelf, in order to give the Plaintiff Judgment for his Demand, without the Expence of going to a Trial.

With reſpect to Pleading in general, it may be neceſſary to underſtand that the Tenor of the Writ is to compel the Defendant to appear in Court at the Return thereof, and defend the Plaintiff's Charge againſt him; at which Time, anciently, every Defendant, either in Perſon or by his Attorney, did actually appear, and plead what they had to ſay in their Defence, *Ore tenus* at the Bar. If it was any ſpecial Matter, the Counſel ſpoke ſuch Matter at the Bar, and the Plaintiff's Counſel did likewiſe *Ore tenus* reply thereto. And the Prothonotaries, and their Entering Clerks, (whoſe Buſineſs it was) did enter ſuch Pleadings in Books and upon Rolls, from which they tranſcribed the Iſſue Roll. But if it appeared to the Court, upon opening the Matter, that the Plaintiff had no Right to maintain his Action, the Judges *ex Officio* abated the Writ, or otherwiſe gave a

further Day to the Parties to reply, rejoin, *&c.*

But as the Buſineſs increaſed, and flowed in from the *Hundred* and *County Courts*, this Method became burthenſome both to the Clerks and the Courts; and therefore, as obſerved before, Attornies received the Care of carrying on the Pleadings till an *Iſſue* was joined: but on bringing in the *Iſſue* Roll, they paid for the *Entries*, as if entered by the Prothonotaries themſelves.

Theſe Pleadings, Cuſtom and Uſe had brought to a *general* Form in *general* Caſes; and what in ſuch Caſes uſed to be ſpoken of courſe at the Bar, came at length to be given of courſe in Writing by the Defendant's Attorney, and are called *general Pleas*, or *general Iſſues*; and are as follow:

Non eſt Factum to a Bond in the King's Bench.

And the ſaid C. D. *by* R. B. *his Attorney, comes and defends the Force and Injury, when, &c. and ſays that he ought not to be charged with the ſaid Debt by Means of the ſaid Writing Obligatory, becauſe he ſays that the ſaid Writing Obligatory is not his Deed. And of this he puts himſelf upon the Country.*

Non eſt Factum to a Bond in the Common Pleas.

And the ſaid C. D. *by* R. B. *his Attorney, comes and defends the Force and Injury, when, &c.*

and ſays that he ought not to be charged with the ſaid Debt by virtue of the ſaid Writing, becauſe he ſays that the ſaid Writing is not his Deed. And of this he puts himſelf upon the Country.

Non eſt Factum, by an Executor or Adminiſtrator, for either Court.

—— *And ſays that he ought not to be charged with the ſaid Debt, by virtue of the ſaid Writting, becauſe he ſays that the ſaid Writing is not the Deed of the ſaid* J. S. *(the Teſtator) and of this he puts himſelf upon the Country.*

Nil debet in the King's Bench.

And the ſaid C. D. *by* R. B. *his Attorney comes and defends the Force and Injury, when, &c. and ſays that he does not owe to the ſaid* A. B. *the aforeſaid* 30l. *nor any Part thereof, in Manner and Form as the ſaid* A. B. *above complains againſt him. And of this he puts himſelf upon the Country.*

Nil debet in the Common Pleas.

—— *And ſays that he does not owe to the ſaid* A. B. *the ſaid* 30l. *or any Part thereof, in Manner and Form as the ſaid* A. *has above declared againſt him. And of this he puts himſelf upon the Country.*

Nil debet in Debt qui tam, &c. in the King's Bench.

And the ſaid C. D. *by* R. B. *his Attorney comes and defends the Force and Injury, when, &c. and ſays that he does not owe to our ſaid Lord the King and the ſaid* A. *who as well, &c. the ſaid* 40l. *nor any Part thereof, in Manner and Form as the ſaid* A. *who as well, &c. above complains againſt him. And of this he puts himſelf upon the Country.*

Nil debet in Debt, qui tam, &c. in the Common Pleas.

— *And ſays that he does not owe to our ſaid Lord the King, and to the ſaid* A. *who as well &c. the ſaid* 40l. *or any Part thereof, in Manner and Form as the ſaid* A. *who as well, &c. has above declared againſt him. And of this he puts himſelf upon the Country.*

Non detinet in Debt in the King's Bench.

And the ſaid C. D. *by* R. B. *his Attorney, comes and defends the Force and Injury, when, &c. and ſays that he does not detain from the ſaid* A. C. *the ſaid* 30l. *or any Part thereof, in Manner and Form as the ſaid* A. B. *above complains againſt him. And of this he puts himſelf upon the Country.*

Non

Non detinet in Debt in the Common Pleas.

Is Word for Word the ſame as in the *King's Bench.*

Non detinet in Caſe in both Courts.

—— *And ſays that he does not detain from the ſaid* A. B. *the ſaid Goods and Chattels, in the ſaid Declaration ſpecified, or any Part of them, in Manner and Form as the ſaid* A. *above complains againſt him. And of this, &c.*

Nil debet nec detinet in both Courts.

—— *And ſaith that he doth not owe to the ſaid* A. B. *the aforeſaid* 30 l. *nor any Part thereof, in Manner and Form as the ſaid* A. *hath above declared againſt him; nor doth he detain from the aforeſaid* A. *the Horſe aforeſaid, in Manner and Form as the ſaid* A. *hath above declared againſt him. And of this, &c.*

Non infregit Conventionem for either Court.

And the ſaid C D. *by* R. B. *&c. and ſays that he did not break the ſaid Covenant* (or Covenants, or any one of them) *in the ſaid Declaration above ſpecified, in Manner and Form as the ſaid* A. *above thereof complains againſt*

him. And of this he puts himſelf upon the Country.

Non aſſumpſit in the King's Bench.

And the ſaid C. D. *by* R. B. *his Attorney, comes and defends the Force and Injury, when, &c. and ſays that he did not undertake in Manner and Form as the ſaid* A. B. *above complains againſt him. And of this he puts himſelf upon the Country.*

Non aſſumpſit in the Common Pleas.

Is the ſame as in the *King's Bench.*

Non aſſumpſit by Executors or Adminiſtrators for either Court.

And the ſaid C. D. *and* E. F. *by, &c. and ſay that the ſaid* E. F. (the Teſtator) *in his Life-time, did not undertake, in Manner and Form as the ſaid* A. B. *above complains againſt them. And of this they put themſelves upon the Country.*

Not guilty in Caſe in the King's Bench.

And the ſaid C. D. *by* R. B. *his Attorney, comes and defends the Force and Injury, when, &c. and ſays that he is not guilty of the Premiſſes above laid to his Charge, as the ſaid* A. *above*

above complains againſt him. And of this he puts himſelf upon the Country.

Not guilty in Caſe in the Common Pleas.

Is the ſame as in the *King's Bench.*

Not guilty in Treſpaſs in the King's Bench.

—— *And ſays that he is not guilty thereof. And of this he puts himſelf upon the Country.*

Not guilty in Treſpaſs in the Common Pleas.

—— *And ſays that he is not guilty of the ſaid Treſpaſs, as the ſaid* A. *above complains againſt him. And of this, &c.*

Not guilty in Treſpaſs and Aſſault in either Court.

—— *And ſays that he is not guilty of the ſaid Treſpaſs and Aſſault, &c.*

The common Replication to each of theſe general Iſſues is this, *And the ſaid* A. *doth the like*, that is, *doth likewiſe put himſelf upon the Country.* Whereupon the Iſſue is joined between the Parties.

Theſe

Theſe *general Pleas* are tranſcribed from the common Books of Practice, only to ſhew that there is no material Difference between the Forms of them, but that they may be uſed indifferently for one Court as the other.

Special Pleadings were formerly divided into two Kinds only, *viz. Pleas in Abatement*, and *Pleas in Bar*. The Order of Pleading was, *firſt*, to the Juriſdiction of the Court; *ſecondly*, to the Perſon of the Plaintiff; *thirdly*, to the Count; *fourthly*, to the Writ; *fifthly*, to the Action of the Writ; and *ſixthly*, in Bar of the Action itſelf.

A *Plea in Abatement* was temporary, and too often dilatory; for it was not to deſtroy the Plaintiff's Action, but only to ſtop the Cauſe for a while, until ſome Defect was removed: As a *Miſnomer* of the Defendant, to cure which the Plaintiff entered up a Diſcontinuance by *Nil Capiat per Breve* on the Roll, and then brought a new Action in the Defendant's right Name; which ſhews this Plea was generally made uſe of to gain Time.

The *Plea in Bar* was an Objection to the Plaintiff's Action, and went to the Right in Demand, ſhewing Cauſe why the Plaintiff ought not to have the ſame; and it was either peremptory and perpetual, as when the Defendant pleaded a *general Releaſe*, which deſtroyed the Plaintiff's Action for ever. Or it was temporary, and barred only for a Time; as the Plea *Plene adminiſtravit*, which is a good Plea in Bar, until more Goods come to the Executor's Hands.

Pleas in Bar, in many Caſes, were reduced to a general and conciſe Form, as was the general

general Iſſue; and they were called *general Bars*, as, *Infra Ætatem, Solvit ad Diem, Son Aſſault, Plene adminiſtravit, Riens per Deſcent, Nul tiel Record, per Minas, Comperuit ad Diem; Non aſſumſit infra ſex Annos, St.* 21 *Jac.* 1. *Non Cul. infra ſex Annos; Actio non Accrevit infra ſex Annos, &c.*

All theſe Pleas had a formal Beginning and Ending; for Uſe and Practice naturally introduce Form and Method, from which all our Pleadings had their Riſe. The apt and proper Beginning of a Plea in Abatement was, and is, *That the Defendant ought not to anſwer the Bill*, or *Declaration, &c.* And it concluded thereto, thus, *Whereupon he prays Judgment of the Bill (or Declaration) aforeſaid, and that the ſaid Bill be* * *quaſhed.*

The apt and proper Beginning of a *Plea in Bar* was, and is, *That the Plaintiff ought not to have or maintain his Action aforeſaid againſt him, becauſe he ſaith that, &c.* And it concluded to the Action thus, *Wherefore he prays Judgment if the Plaintiff ought to have or maintain his Action aforeſaid againſt him, &c.*

All *Affirmative Pleas* were concluded, *And this he is ready to verify.* But *Negative Pleas* were to be averred, becauſe it was a Maxim, *That Negatives cannot be proved.*

---

* To *quaſh*, from the old *French*, *Quaſſer*, is to overthrow or annul any Thing. So when an Indictment, Order of Seſſions, Preſentments, *&c.* are ſet aſide by the Court for Inſufficiency, they are ſaid to be quaſhed.

Alſo

Alſo when the Defendant pleaded to Iſſue, he concluded, * *And of this he puts himſelf upon the Country*; and when the Plaintiff did, he ſaid, *And this he prays may be inquired of by the Country*; and the other Party joined Iſſue by ſaying, *And the ſaid doth ſo likewiſe.* For tho' the Iſſue may conſiſt of ſeveral diſtinct Pleadings, yet this at laſt muſt be the Concluſion of every Iſſue to be tried by a Jury. And indeed it often did, and does now more frequently happen, that when the Plea was *ſpecial*, and to which the Plaintiff could not take Iſſue, he was under a Neceſſity of replying ſpecially, and many other Pleadings went to the making up the Iſſue; as a † *Rejoinder* to the *Replication*, a *Surrejoinder* to *that*; a *Rebutter* to the *Surrejoinder*, and a *Surrebutter* to the *Rebutter*, &c. ſo that an Iſſue in fact was joined ſooner or later, as the Matter

* Every Defendant is under a Neceſſity of defending himſelf, and conſequently will put himſelf upon the faireſt Means, of having Juſtice done him, which the Law gives him; and that is, *to put himſelf upon his Country* for their Judgment and Opinion of the Matter, which the Court *muſt* grant him: but a Plaintiff, who is as a Petitioner to the Court wherein he ſues, *prays it may be inquired of by the Country*.

† Pleadings are divided into *Bars*, *Replications*, *Rejoinders*, *Surrejoinders*, *Rebutters*, *Surrebutters*, &c. Theſe are Words of Art, and are called *Bars*, *Barræ*, becauſe it bars the Plaintiff of his Action; *Replicatio*, *á Replicando*; *Rejunctiones*, *á Rejungendo*; *Rebutter*, from the *French* Word *Rebouter*, *á Repellando*; and ſo of *Surrebutter*, &c. In ancient times, ſays my Lord *Coke*, a Bar was called, *Exceptio peremptoria*; a Replication, *Replicatio*; a Rejoinder, *Triplicatio*; a Surrejoinder, *Quadruplicatio*, &c.

gave

gave Room for it. And it might happen that ſometimes the Plaintiff, and ſometimes the Defendant, firſt concluded *to the Country*; and all ſuch ſpecial Pleadings were concluded agreeably to the Nature and Effect of them, *viz. Whereupon the ſaid as before, prays Judgment whither, &c.* for, as obſerved, Method and Form being introduced by Practice, begun and ended all our Pleadings.

The Rules for Pleading were, that all Pleas were to be ſuccinct, without unneceſſary Repetitions, and direct and pertinent to the Caſe, and not by Way of Argument or Rehearſal, but directly an Anſwer to the Charge in the Declaration; that every Plea was to be *ſingle*, and certain, and not to contain a Variety of Matter to one and the ſame Thing. A *double Plea* was not allowed to be good, becauſe where there was a double Matter, no certain Iſſue could be taken: As for Inſtance, If an Infant ſealed an Obligation by *Dureſs*, he could not by his Plea take Advantage both of *Infancy* and *Dureſs*, by reaſon of Duplicity, leſt the Jury ſhould be too much incumbered. This was deemed a great Reproach, and as ſuch was caſt on the Courts at *Weſtminſter* by the *Civilians*, who ſaid, 'Twas forcing a Man to fight with one Hand tied behind him: The *Civilians* had certainly the Reaſon on their Side, for why ſhould a Man be debarred from uſing every Plea he can in his own Behalf? But ſee 4 & 5 *Ann. c.* 16. whereby Leave is now given to plead as many ſeveral Matters as are thought to be neceſſary. However, this muſt be

be by Leave of the Courts, as ſome double Pleas may be contradictory in themſelves, *&c.*

It was a Rule that every Defendant's Plea ſhould be taken moſt ſtrongly againſt himſelf; for it was reaſonable to ſuppoſe, that every Defendant would at firſt ſet up the beſt Defence he could. But a Defendant, who was not obliged to plead a ſpecial Plea, might plead the general Iſſue proper to the Action, and give the ſpecial Matter in Evidence; and in many Caſes the general Iſſue was allowed, to avoid Tediouſneſs and Multiplicity: And ſuch Pleadings were reduced to a very conciſe Form, and more conſonant to the general Rules of Pleadings, than what they are at this Time.

That our Pleadings were not only greatly lengthened, but as greatly multiplied before the Act of 4 & 5 *Ann.* to what they were in ancient Times, is very evident from the Pleadings themſelves; and the Length of Records now is not only a great Expence and Burthen to the Parties, but is a Reproach to the Law itſelf.

Sir *Matthew Hale*, ſpeaking of the Length of the Proceedings in his Time, in Compariſon to what they had been, ſays, "The Reaſons "whereof ſeem to be theſe, *firſt*, becauſe in "ancient Times the Pleadings were drawn at "the Bar, and the Exceptions alſo taken at "the Bar, which were rarely taken for the "Pleaſure or Curioſity of the Pleader, but "when it was apparent the Omiſſion or Mat-"ter excepted to was the very Merit and "Life of the Cauſe, and purpoſely omitted "or miſpleaded, becauſe the Matter would "bear no better; but *now*, the Pleadings being

" being *firſt drawn in Writing*, are drawn to " an *exceſſive Length*, and with very much " Labouriouſneſs and Care enlarged, leſt it " might afford an Exception not intended by " the Pleader, and which could be eaſily ſup- " plied from the Truth of the Caſe, leſt the " other Party ſhould catch the Advantage, " which commonly the adverſe Party ſtudies, " not in Contemplation of the Merits or Juſ- " tice of the Cauſe, but to find a Slip to " faſten upon; though, in Truth, either not " material to the Merits of the Plea, or at " leaſt not to the Merits of the Cauſe." *Hiſt. of the C. L.* It may be added, that *of late* it hath been attempted to catch and intangle an Adverſary by Length and Intricacy of Pleading; but the learned Artiſt was properly caught in his own Net.

My Lord *Coke* obſerves, and it is worthy Obſervation, " That in the Reigns of *Ed.* 2. " *Ed.* 1. and *upwards*, the Pleadings were " plain and ſimple, but nothing curious, ever- " more having chief Reſpect to Matter, and " not to Forms of Words, *&c.*" In the Reign of *Ed.* 3. he ſays, " Pleadings grew to Per- " fection, both without Lameneſs and Curio- " ſity; for *then* the *Judges* and *Profeſſors* of " the Law were excellently *learned* Men, and " the Knowledge of the Law flouriſhed; the " *Serjeants* of the Law drew their own Plead- " ings, *&c.*" So likewiſe ſays Sir *Matthew Hale*, and further, that " Though Pleadings " in the Times of thoſe Kings (meaning *H.* 4, " 5, *&* 6. *Ed.* 4. *&* 5. and *H.* 7.) were far " ſhorter than afterwards, eſpecially after *H.* " 8. yet they were much longer than in the

" Time

" Time of *Ed.* 3. and the Pleaders, yea and " the Judges too, became ſomewhat too cu- " rious therein; ſo that, that Art and Dexte- " rity of Pleading, which in it's Uſe, Nature, " and Deſign, was only to render the Fact " plain and intelligible, and to bring the Mat- " ter to Judgment with a convenient Cer- " tainty, began to degenerate from it's pri- " mitive Simplicity, and the true Uſe and " End thereof, and to become a Piece of Nice- " ty and Curioſity; which how theſe latter " Times have improved, the very *Length* of " the Pleadings, the many and unneceſſary " *Repetitions* and *Miſcarriages* of Cauſes, upon " ſmall and trivial Niceties in Pleading, have " too much witneſſed."

What theſe great Men have ſaid may be conſidered as a Reproach to the Pleaders, who, through Ignorance of the real Points on which the Merits of the Cauſe might depend, choſe to fill their Pleadings with a Multitude of nice and curious Matters, rather than omit any Thing which the adverſe Party might take an Advantage of; or perhaps with a View that the Pleadings, by Length and Intricacy, might puzzle and perplex one another. Be it as it will, it muſt be allowed that the Merit would be infinitely great in him, who ſhould find Means to reduce the Pleadings to a more conciſe and ſimple Form, or chalk out ſome Method intirely to ſupply the Uſe of ſpecial Pleadings. How many Inſtances may be given, where, by pleading generally, a Cauſe might have been tried upon an Iſſue of no more than 10, or 12, or 14 Sheets, which by ſpecial Pleadings has been ſpun out to 100,

150, or 200 Sheets, and which, where the Matter in Diſpute has not been above 5 *s.* Value, has coſt the Party 200 *l.*? Is this an Honour to the Law? Is it not enough to deter any Man from taking a Remedy to protect his Right and Property? If what theſe learned Judges have ſaid was before the Act for pleading ſeveral Matters, what ſhall one ſay now, when ſpecial pleadings are ſo greatly increaſed, and are drawn with ſo much Labour and Nicety, and ſo vaſtly ſpun out, as to render an Iſſue of ſuch prodigious Length? Special Pleadings may be now ſaid to be a particular Branch of the Law; and yet how few know it's Form and Niceties? Attornies know but little of the Matter; in ſhort, they don't pretend to it, for as ſpecial Pleadings muſt be ſigned by Counſel, they firſt get them drawn by ſome Gentleman, who by his Practice has gained Skill and Experience therein, and then get the Draught ſettled and ſigned by ſome eminent Counſellor, who ſtuffs it with all the curious and nice Matters it may *ſeem* to want. It is ſufficient for an Attorney (I was going to ſay) to underſtand the Terms of Art uſed therein, and what they import; as *Averments, Proteſtandoes, Bars, Traverſes, Juſtifications, Pleas puis darreign Continuances, Affirmatives, Negatives, Repugnants, &c.*

However well deſigned the Stat. of 4 & 5 *Annæ* was, yet 'tis a *Quære* if ever any Act, that was made for the Amendment of the Law, tended ſo much to increaſe the Expence of a Suit as that does; ſo that People have much more Reaſon to exclaim and cry out againſt it than ever they had. This is a Branch of the

Law ſo luxuriant in its Nature, and ſpreads ſo wantonly and viciouſly, as to want much pruning; and it may be truly ſaid, through this only, that a Client *often breaks his Teeth by endeavouring to come at the Kernel*; or, in other Words, *that the Remedy is worſe than the Diſeaſe.*

To give one Example only of the evil Effects of *ſpecial* Pleadings out of the great Number of Actions for *Treſpaſſes*, and upon the *Caſe*, which are brought upon much leſs Occaſions. Pleaſe to obſerve the *Iſſue* placed at the End of this Treatiſe, wherein the Pleadings were grounded upon the following Circumſtances: The Inhabitants of *W.* in *Oxfordſhire* had enjoyed a *Right* of Angling in the River *Thames*, without any Interruption, Time immemorial, until it happened that the Defendant *F. G.* caught a ſmall Salmon, (a Thing never known there before, it being ſo far up the River.) This was too alarming to the *Plaintiff* who rented the Fiſhery, and thereupon he went and demanded the *Fiſh*, which the Defendant refuſed to give up; and to make ſure Work of it, ſold it to a neighbouring Gentleman for 2 *s.* The *Plaintiff* upon this complained to his Landlord, who was wiſe enough to forbid the Peoples angling, and ordered an Action to be brought againſt the Defendant *F. G.* and others, who were in Company with him. The *Right* of a *free Fiſhery*, which the *Plaintiff* now claimed, coming in Queſtion, in order to try it, (as it tended to take away and deſtroy the innocent Amuſement of the Inhabitants, which they had ſo long enjoyed) ſome *Freeholders* and *Copyholders* of

of the Pariſh gave the Defendants Liberty to *juſtify* under them, as having a *Right of fiſhing in half the Stream next to their Lands*; a Thing that was adviſed, as abſolutely neceſſary, for the Defendants to avail themſelves by. And the Cauſe was tried upon this Iſſue, folio near 160, which coſt the Parties above 200 *l.* The Plaintiff ſucceeded under an old Grant of the Fiſhery. *Quære*, what did he gain by it? And *quære*, if no Method can be found out for trying ſuch a Cauſe upon the *general Iſſue* with *equal* Advantage to the Defendant?

Of an Iſſue in Fact, or Fact.

An *Iſſue*, ariſing from the Pleadings, is the next Thing to be ſpoken of. An *Iſſue* is ſaid to be joined, when there is a certain Point or Matter iſſuing out of the Allegations of the Plaintiff and the Defendant, which conſiſts of an *Affirmative* on one Side, and a *Negative* on the other; and therefore it is called an *Iſſue* from the *French* Word *Iſſuer*, to flow from.

An *Iſſue* is of two Kinds, *viz.* an *Iſſue in Law*, and an *Iſſue in Fait*, or *Fact*. An *Iſſue in Law* is joined upon a *Demurrer*, and the Matter of Law is to be determined by the Court. An *Iſſue in Fait*, or *Fact*, is joined, when, as is before obſerved, there is an *Affirmation* of a Thing on one Side, and a *Negation* on the other, which fix a certain preciſe Point to be tried by a Jury; as when the Plaintiff declares that the Defendant owes him 20 *l.* and the Defendant pleads *Nil debet*, or that he owes the Plaintiff nothing. Now whether he

brings into the Court of our ſaid Lord the King, before the King himſelf, now here, his Bill againſt C. D. *being in the Cuſtody of the Marſhal of the* Marſhalſea *of our ſaid Lord the King, before the King himſelf, of a Plea of Treſpaſs on the Caſe,* (as 'tis) *and there are Pledges for the Proſecution thereof, to wit,* John Doe and Richard Roe, *which ſaid Bill follows in theſe Words, to wit,* Berkſhire, *to wit,* A. B. *complains of* C. D. *being in the Cuſtody of the Marſhal of the* Marſhalſea *of our Lord the King, before the King himſelf, for this, to wit, that whereas,* ſo on to the End of the Declaration, omitting Pledges, *&c.* and then the Plea in a new Line, with the Replication and Award of the *Venire,* viz.

And the ſaid C. D. *by* O. P. *his Attorney, comes and defends the Force and Injury, when, &c. and ſaith that* (the Plea, *Verbatim*) *and thereupon he puts himſelf upon the Country; and the ſaid* A. B. *doth the like;* * *Therefore let*

ſet forth, (which is not mentioned in the Pleadings, but only in this *Memorandum*) it is moſt reaſonable to ſuppoſe that, *originally,* the *Memorandum* was inſerted *before* the *Bill* filed, and likewiſe before the *Declaration,* which was delivered as a Copy of it: And if it muſt be ſtill uſed, it is moſt proper to be uſed before the Declaration, notwithſtanding no Bill is filed, as it alledges.

* The Award of the *Venire,* when the Parties *are come to Iſſue,* is ſuppoſed to be the Act of the Court, and was then immediately entered on the *Iſſue Roll* by the entering Clerks, and is now awarded of courſe on

let a Jury come thereupon before our Lord the King at Weſtminſter, on*
next after *and who neither,* † *&c. to*

on the Paper Copy of the *Iſſue* by the Attorney, and ought to be made returnable therein of the ſame Term.

* The *Venire* was *originally* the only Proceſs that iſſued for bringing a *Jury* to try the Cauſe. But after the *Diſtringas* was introduced for that Purpoſe, the *Venire* was, and is now made returnable ſome Day before the Trial: As if the Cauſe is to be tried in *Town*, then the *Venire* is made returnable the firſt Return, or ſome other Return, before the *Sittings*; ſo that the *Diſtringas* may bear *Teſte* on *that* Return Day, and be *returnable* ſome Return Day *after* the *Sittings* the Cauſe is intended to be tried at. Or if the Cauſe is to be tried in the *Country*, then the *Venire* is made to bear *Teſte* the *firſt*, or ſome other Day in the Term preceding the Aſſizes, and is made *returnable* the *laſt* of that Term, in order that the *Diſtringas* may bear *Teſte* on *that* Return Day, and be made *returnable* the *firſt Return* of the ſubſequent Term, after the Aſſizes: This is ſuppoſing the Iſſue was made up of that preceding Term; if not, ſee *poſt*. Some Attornies leave a Blank for the Return of the *Venire* in the *Copy* of the *Iſſue*, and ſome make it returnable ſome Day in the Term the Iſſue is joined, as it ought to be.

† Theſe Contractions being explained by the Words at Length, need here no further Enclairciſſement, other than *facere recognitionem* being rendered *to recognize*, it may be obſerved, that as *Cognition* is Knowledge, Acknowledgment, or Opinion; ſo *to recognize* is to take Knowledge of, by a well-weighing, or ſerious Acknowledgment of the Truth of the Matter,

recognize, &c. * *becauſe as well, &c.* † *the ſame Day is given to the ſaid Parties there.*

Theſe *&c.'s* are Contractions of the general Words in the Writ of *Venire*, which is here awarded, and the Words may as well be put at Length, *viz. And who are in no wiſe of Kin either to the ſaid* A. B. *or to the aforeſaid* C. D. *to recognize upon their Oath the whole Truth of the Premiſſes, becauſe as well the ſaid* A. *as the ſaid* C. *have put themſelves upon that Jury, the ſame Day is given to the ſaid Parties there.*

This *Memorandum*, I preſume, was originally inſerted before the Bill filed, not only becauſe it is ſaid that the Acts of the Court were entered by way of Memorandums, but the Thing itſelf ſeems to declare it; conſequently it then related to the firſt Day of the Term, or the very Day of filing the Bill: but when they came to make up the Iſſue, perhaps two or three Terms afterwards, they varied the Memorandum accordingly, and ſaid,

Berks. ſſ. *Be it remembered, that in* Hilary *Term* laſt paſt, *before our Lord the King at* Weſtminſter, *came* A. B. *by* R. B. *his Attorney and brought into the Court of our ſaid*

* For their juſt and impartial Opinion of the Matter which they come to recognize.

† The *Dies datus* is the Order of the Court to the Parties, to come at the Return of the *Venire*, before the Court and Jurors to receive their Opinion of the Matter to be tried, which by the Iſſue they had put themſelves upon.

Lord

Lord the King then there his certain Bill againſt C. D. *being in the Cuſtody of the Marſhal, &c.*—The Reſt as in the former one.

But as the filing the Bill came to be left off, the Memorandum was only uſed before the Iſſue, as at preſent; but ſtill it refers to a Bill ſuppoſed to be filed, and therefore now varies in four Caſes, *viz. firſt*, when the Declaration (or Bill) is of the ſame Term with the Iſſue, as in the firſt Precedent; *ſecondly*, where it is neceſſary to make it of a particular Day in the ſame Term with the Iſſue, as where the Cauſe of Action aroſe after the firſt Day of the Term, in which Caſe they only mention the certain Day of filing it, thus;

Berks. ſſ. *Be it remembered, that on* Saturday *next after eight Days of St.* Hilary, *in this ſame Term, &c.* as in the firſt Precedent.

Thirdly, Where the Declaration is of a precedent Term, as we have ſeen by the ſecond Precedent before; and *fourthly*, where the Declaration is above four Terms before the Iſſue is made up, in which Caſe they can't ſay—— *of Hilary Term laſt paſt*, but

Berks. ſſ. *Be it remembered that* heretofore *that is to ſay, in the Term of St.* Hilary *in the Year of the Reign of our Sovereign Lord* George *the Third, now King of* Great Britain, *&c. before our ſaid Lord the King at* Weſtminſter, *came* A. B. *by* R. B. *his Attorney, &c.* ut ſupra.

And

And whenever the *Iſſue* is made up of a Term ſubſequent to the Declaration, the Plea is entered with an Imparlance before it, thus:

Berks. ſſ. *Be it remembered, that in* Hilary *Term laſt paſt, before our Lord the King at* Weſtminſter, *came* A. B. *by* R. B. *his attorney, and brought into the Court of our ſaid Lord the King then there his Bill againſt* C. D. *being in the Cuſtody, &c.* The Reſt as in the former one, then the Plea with the Imparlance. *And now at this Day, (that is to ſay) next after* (the firſt Return of that Term the Iſſue is made up) *in this ſame Term, to which Day the ſaid* C. *had Leave to imparle to the Bill aforeſaid, and then to anſwer the ſame before our Lord the King at* Weſtminſter, *came as well the aforeſaid* A. *by his Attorney aforeſaid, as the ſaid* C. *by* E. F. *his Attorney; and the ſaid* C. *defends the Force and Injury, when, &c. and ſaith that* —— The Plea *verbatim*, with the Award of the *Venire* as before.

This Imparlance was formerly uſed in all Caſes, becauſe in all Caſes the Defendant was intitled to it; and it was then uſual to enter ſuch Imparlance before the Plea upon the Plea Roll, and which of courſe was of the very Term the Plea came in; and ſo when they came to tranſcribe the *Niſi prius* Roll from the *Plea Roll*, the Imparlance of courſe appeared to be of the Term the Plea came in, and thereby diſcovered the Term in which the Iſſue was joined; and as the Plaintiff could not alter theſe Entries, they were frequently

frequently obliged to make up the *Niſi prius* Roll from an old Iſſue; in which Caſe there were claimed extra Fees by the Clerk of the Dockets and Clerk of the Treaſury, for Poſt Term and a Poſt Roll, *&c.* . But when theſe Entries on the Roll were laid aſide, and Attornies delivered their Pleadings in Paper, then they delivered the Plea without any Imparlance before it, on purpoſe that the Plaintiff's Attorney might make the Entry of the Imparlance of the ſame Term he made up the Iſſue, (though the Plea was two or three Terms before then) and thereby preſerve it from being an old Iſſue, in order to avoid paying ſuch Exactions: For Inſtance, the Declaration was of *Eaſter* Term, and the Plea of *Trinity*; the Iſſue was made up of *Hilary* following, and the Imparlance to the ſame Term; but it is ſaid this Practice is not warranted by the Proceedings. See more of Imparlances *ante*, *p.*

The *Memorandum* is to ſhew when the *Bill* was filed, or ſuppoſed to be ſo; and the *Imparlance*, when the Plea came in. But of what *neceſſary* Uſe is either? The Court of *Common Pleas* uſes neither one nor t'other, as we ſhall ſee; and it is very evident by what was obſerved before, . that the Uſe of the Entry of the *Imparlance* in this Court, only tends to create an Expence in the Suit, not only in lengthening the Iſſue, but in unneceſſary *Fees* to the Officers, and alſo by *multiplying* Continuances on the *Judgment Roll*, which ought to be avoided, for the Sake of Plainneſs and Perſpicuity.

Of making up an Iſſue in the Common Pleas.

The *Iſſue* in the *Common Pleas* was anciently tranſcribed from the ſeveral *Rolls* made uſe of in this Court; as the *Appearance* Roll, the *Imparlance* Roll, the *Plea* Roll, *&c.* from which they made up the *Iſſue* Roll; from which Rolls Copies were uſed to be taken for the Parties out of the *Prothonotaries* Office. And though the Proceedings are now carried on by the *Attornies* by *Paper Copies*, as in the *King's Bench*, where they firſt begun it, and introduced the ſame Practice in this Court; yet upon paſſing the Record with the Prothonotary, or upon ſigning a *Non pros*, entering a *Diſcontinuance*, *&c.* the Prothonotary is ſtill paid for the *Entries*, as if entered on his Rolls by his Clerks; and this, though no Roll be yet in the Office.

Therefore the *Iſſue* is now made up by the Attorney, by only copying over all the Pleadings in due Courſe and Order; as firſt, the *Declaration*, then the *Plea*, then the *Replication*, *&c.* and after all, the Award of the *Venire*. This is joining the *Iſſue* in a very ſimple and plain Manner, without any unneceſſary or intermediate Entry, which is preſumed to be no Part of the Pleadings, as the Entry of the *Memorandum* before the Declaration, and the *Imparlance* before the Plea in the *King's Bench*, thus:

Jones Hilary *Term, in the Year of the Reign of King George the ſecond.*

Berkſhire, *to wit.* C. D. *late of* W. *in the ſaid County, Yeoman, was attached to anſwer to* A. B. *in a Plea of Treſpaſs on the Caſe, &c. and whereupon the ſaid* A. *by* R. B. *his Attorney complains, that whereas the ſaid* C. *&c.* ſo on to the End of the Declaration, and then the Plea in a new Line, thus:

And the ſaid C. *by* E. F. *his Attorney, comes and defends the Force and Injury, when, &c. and ſaith that* (the Plea *Verbatim*, and then in a new Line, each ſubſequent Pleading, if any) *And of this he puts himſelf upon the Country, and the ſaid* A. *doth the like*; (then follows the Award of the *Venire*) *Therefore the Sheriff is commanded, that he cauſe to come here, on the Morrow of the Purification of the Bleſſed* Mary, *twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c.*

Or they award the *Venire* in Words at Length, *viz.*

Therefore the Sheriff is commanded that he cauſe to come here, on the Morrow of the Purification of the Bleſſed Mary, *twelve free and lawful Men of the Body of his County, each of whom having* 10 l. *a Year at the leaſt in Lands, Tenement, or Rents, by whom the Truth of the Matter may be the better known, and who are in no wiſe of Kin either to the ſaid*

ſaid A. *or to the ſaid* C. *to make a certain Jury of the Country between the Parties aforeſaid, of the Plea aforeſaid, to recognize upon their Oath the whole Truth of the Premiſſes, becauſe as well the ſaid* A. *as the ſaid* B. *between whom the Difference is, have put themſelves upon that Jury.*

The * *Dies datus*, which is added in the *King's Bench*, is not uſed at all in the *Common Pleas*, on the Return of the *Venire*, at this Time; nor do they give a *Dies datus* even on the Award of the *Habeas Corpora*, which is eaſily accounted for: And therefore why it is *not* uſed on either in the *Common Pleas*, and in the *King's Bench* on both, will be better conſidered in ſpeaking of the Jury Proceſſes, where the Reaſon for this Omiſſion in the *Common Pleas* will appear.

Though the Form of the Writ of *Venire* itſelf (except the Return) is the very ſame in both Courts, yet you ſee the Award thereof, in the *Common Pleas*, is much more full than the Award thereof in the *King's Bench*. Now if we have Reſpect to the Court the Writ is awarded by, and made returnable in, we may eaſily account from whence this Difference aroſe: As for Inſtance, in the *King's Bench* the Writ is ſuppoſed to be awarded immediately

* A *Dies datus* is a Day, or Time of Reſpite, given by the Court to the Parties, from that Day to the *Day given* for them to appear again, and is uſed upon ſeveral Occaſions; and whereſoever ſuch a Time of Reſpite is given, it ſeems proper for a *Dies datus* to be entered.

by the King himſelf, who is ſuppoſed to be there in Court; therefore it is *imperatively* ſaid, *Let a Jury come thereupon before, &c.* now, *Let a Jury* ſupply thoſe Contractions of *twelve, &c.* and *by whom, &c.* But in the *Common Pleas*, where the Writ is awarded by the Court, by virtue of a Commiſſion or delegated Power, it is ſaid, *Therefore the Sheriff is commanded, viz.* by virtue of that Power, *that he cauſe to come*, not by the *Poſſe Comitatus* to force them, but by *bonos Summonitores*, (good Summoners) or cauſe them to come *here, viz.* at *Weſtminſter*, where the Court was ſettled, *twelve, &c.* See *Venire.*

Here we ſee an Iſſue joined in a very plain and ſimple Form, cloſed with an Award of a full and inſtructive *Precept* to the Sheriff, to ſummon a Jury to come and try that *Iſſue* at *Weſtminſter*, where the Court was ſettled; and then, all Trials being at the Bar, there was no other Record made up than the *Iſſue Roll* itſelf; which, being in Court, was the proper Record, on the Back of which they entered up the Judgment. And thus it continued from the making of *Magna Charta*, as 'tis preſumed, until the Statute of *Niſi prius*, commonly called the Statute of *Weſtminſter* 2.

This Statute was made by *Edward* the firſt, 1283, who firſt conſtituted Writs of *Niſi prius*, in order that Matters of *Law* might be tried in his *own Courts* at *Weſtminſter*, and Matters of *Fact* in the *Country*; for which Purpoſe the *Venire* was made returnable ſome Day in the *next* Term, on which Return Day the *Sheriff* was to return the Jury, *Unleſs the Juſtices* itinerantes *prius tali Die et Loco venerint, &c.* And thus

thus the Clauſe of *Niſi prius* was firſt introduced in the *Venire*, and continued to be ſo from *Edward* the firſt to the Time of *Edward* the third.

The *Venire* commanded them to come into Court, ſo that their Appearance before the Juſtices of *Aſſize*, or *Niſi prius*, was an Excuſe for their Non-appearance in *Bank*. And though no Iſſues were returned on the *Venire* to make them appear at *Niſi prius*, yet the Difficulty was ſo much the greater on them to appear afterwards at *Weſtminſter*, which they were obliged to do; for if they appeared not at *Niſi prius*, nor at *Weſtminſter*, then iſſued the *Habeas Corpora* and *Diſtringas* to bring them in, with *Iſſues* returned. By this we ſee the *Habeas Corpora* and *Diſtringas* iſſued thro' Neceſſity, on a *real* Default of the *Jurors* not appearing on the *Venire*, and not in that formal Manner they do now.

King *Henry* the ſecond, in the 23d Year of his Reign, divided the Kingdom into ſix Parts, and to every Part he aſſigned three Juſtices, called by *Bracton*, *Itinerantes*, and by *Britton*, *Juſtices* in *Eyre*, to diſtinguiſh them from the others, who were called, *Reſidentes*, *Sedentes*, and afterwards *Juſticiarii de Banco*, which Title they now have. Theſe Juſtices in *Eyre* had their Circuits, not unlike our Aſſizes, and ſo continued until the Reign of *Edward* the third, about which Time their Authority began to decline, by inſtituting Juſtices of Aſſize and *Wardens* of the *Peace*, now called *Juſtices* of the Peace; and in the next Reign (*Richard* the the ſecond) the Juſtices of the *Common Pleas* were authorized to take Aſſizes, *&c.* So that the *Juſtices* appointed for taking the *Aſſizes* were

were the *Juſtices itinerant*, who were appointed to go into every County for that Purpoſe, by a ſpecial Commiſſion, and not the Juſtices of the *Common Pleas*; for theſe, as my Lord *Coke* obſerves, had no Power to take Aſſizes in the Country, until the 8th of *Richard* the ſecond, *c.* 2. being about 150 Years after that Court was ſettled at *Weſtminſter*.

Now in order to diſcover how the *Venire*, together with the *Habeas Corpora* and *Diſtringas*, came to be made out of Courſe, as they are now; and the Clauſe of *Niſi prius* to be taken out of the *Venire*, and placed in the *Habeas Corpora* and *Diſtringas*; it muſt be conſidered that by the Statute of *Marlebridge*, (52 *H.* 3. *c.* 11. 1267.) it was enacted, *that after a Man had put himſelf upon any Inqueſt, he ſhould have but one* * *Eſſoin*; but that Statute not limiting the Time when the *Eſſoin* ſhould be taken, it uſed moſt frequently to be taken on the *Habeas Corpora* and *Diſtringas*; for this Reaſon, if the Jury did not appear at *Niſi prius* on the *Venire*, which often happened, and as no Iſſues were returned on the *Venire*, in caſe they did not appear at *Weſtminſter* on the Day in Bank, which was too expenſive and troubleſome for them to do, if they could avoid it; therefore they ſtood out until a *Habeas Corpora* (or *Diſtringas*) iſſued; and then, when

* It has been mentioned, that an *Eſſoin* was an Excuſe for a Man's *not appearing*, and was allowed on divers Occaſions, not only upon the Return of the *Original*, but on the Return of the *Venire*, *&c.* and were grounded on divers Cauſes, which were *traverſable* by the Plaintiff.

they came to ſave the Penalty on the *Habeas Corpora*, (or *Diſtringas*) one of the Parties *eſſoined* himſelf; and the Jury, after much Expence and Trouble, returned *Re infecta*.

Now in order to remedy this, 'tis ordered by the Statute of *Weſtminſter* 2. (13 *E.* 1. *c.* 27. 1285.) "That after any Man hath put himſelf "on an Inqueſt, an *Eſſoin* ſhall be allowed him "at the *next* Day, *poſtquam Aliquis poſuerit ſe in* "*Inquiſitionem ad proximum Diem, alloquetur* "*ei Eſſonium, ſed ad alios Dies, &c.* but all "the following Days, the taking the *Inqueſt* "ſhall not be delayed by the *Eſſoin*, whether "he was *eſſoined* before or no; neither ſhall "any *Eſſoin* be allowed after the Day given "*prece partium, &c.*" Now the *Proximus Dies*, after Iſſue joined, was the Return of the *Venire*; and therefore, in order to get rid of the Defendant's *Eſſoin* at *Niſi prius*, they made the *Venire* returnable the * ſame Term the *Iſſue* was joined; and by Conſequence, when the Defendant was to caſt an *Eſſoin*, he had no other Day to do it by the Words of the Statute than on that Return Day; and by this they got rid of all the *Eſſoins* on the Behalf of the Defendant at *Niſi prius*; for as the *Venire* was made returnable the ſame Term the *Iſſue* was joined, it was made returnable in Court without any Clauſe of *Niſi prius* in it, in order, as obſerved, to get rid of the Defendant's *Eſſoin* at the next Aſſizes. And hence it was, that the *Dies datus* was omitted in the *Common Pleas*,

* This ſhews that the *Return* of the *Venire* awarded at the Cloſe of the Iſſue ſhould be of the ſame Term.

in

in the Award of the *Venire*, (although it is ſtill uſed in the * *King's Bench*) becauſe the Party being in Court the ſame Term Iſſue was joined, continues in Court by his Attorney. By this we may underſtand, that if the Defendant appeared on the Return of the *Venire*, and did caſt an *Eſſoin*, it was allowed; and then he could not be again eſſoined on the Return of the *Habeas Corpora* at the Aſſizes. But as it anſwered no End for the Defendant to eſſoin himſelf on the Return of the *Venire* when the Jury did not appear, conſequently it dropt of courſe; and ſo having loſt his Time to *eſſoin*, by not appearing on the Return of the *Venire*, the Jury was of courſe reſpited, and a *Habeas Corpora* and *Diſtringas* awarded, as appears by the Jurat. on the Record; and then by the Words of the Statute the Inqueſt was to paſs, *whether he was eſſoined before or no.* And the Reaſon why no *Dies datus* is

* At this Time the *King's Bench* had but little to do in *Civil* Actions, and becauſe they had not Buſineſs to fit the whole Term *de Die in Diem*, therefore they adjourned from one Day to another, and they gave *a Day* to the Parties to be preſent, when they ſat on the *Venire*; but there was no Day given to the Parties on the *Diſtringas*, for the ſame Reaſon as in the *Common Pleas*, *viz.* becauſe if the Defendant did not appear, *the Inqueſt might paſs by Default*; but now, though that Court is come into the ſame Method of Practice with the *Common* Pleas in reſpect to the iſſuing the *Venire* and *Diſtringas*, we not only ſee a *Dies datus* on the *Venire*, but likewiſe on the *Diſtringas*; but whether it be done with any Propriety or not, would be ſome Satisfaction to know.

given on the Return of the *Habeas Corpora* to the Parties, is, becauſe they were obliged to appear, or the *Inqueſt ſhould paſs by Default.*

We have obſerved that the *Venire* originally was the only Proceſs that iſſued for bringing in a *Jury* to try the Cauſe; and the Writ itſelf is a full and inſtructive Precept for that Purpoſe; and the *Habeas Corpora* and *Diſtringas* never iſſued but through Neceſſity, which was not owing to any Defect in the Writ itſelf, but to the Defendant's being *eſſoinable* on the *Venire*, which was a great Hindrance to Juſtice; for if the Defendant appeared and *eſſoined* himſelf, the Jury returned, *Re infecta*; and if he did not appear, the Jury was obliged to appear in *Bank*.

Another Miſchief, 'tis ſaid, attended this Proceſs, which was, that the Parties not ſeeing the *Pannel* before-hand, could not be prepared to make their *Challenge*.

Theſe Miſchiefs might have been eaſily remedied, by taking away the Defendant's *Eſſoins*, and ordering Iſſues to be returned on the *Venire*; and likewiſe by ordering the Sheriff to make his Return with the *Pannel* ſome certain Days before the Aſſizes, and then the *Venire* might have continued the only Writ, ſimple and plain in itſelf, for bringing on a Jury to try the Cauſe. But inſtead of this, a ſtrange round-about Way was taken, whereby the Proceedings were multiplied, and the Record lengthened, without any Manner of Reaſon; for with reſpect to the firſt Miſchief, we have ſeen what a Method in Practice was had to take away the Defendant's *Eſſoin* at the Aſſizes. It was further endeavoured to be remedied by laying

laying Coſts on the Defendant, where the Plaintiff prevailed. But with reſpect to the Pannel, it had no Remedy until the 42 *Ed.* 3. *c.* 11. whereby it is enacted, "*That no Inqueſt* "*but Aſſize, and Delivery of Gaols, ſhall be* "*taken by Writ of* Niſi prius, *before the Names* "*of them, that ſhall paſs on the Inqueſt, be re-* "*turned into Court*". From this Time they could no more place the *Clauſe of Niſi prius* in the *Venire*, as was directed by the Statute of *Weſtminſter* 2. and therefore it was taken out of the *Venire*, and placed in the *Habeas Corpora* and *Diſtringas*. And from hence theſe Writs began to be made out for Trial in the ſame formal Way as it is continued to this Day. On the *Venire* was returned the *Jury*, and then the *Habeas Corpora* and *Diſtringas* iſſued to bring them in. The Award of the *Habeas Corpora* and *Diſtringas* appears by the *Jurata* in the *Record*, but does not at all appear on the *Iſſue* Roll, which is the proper Record, the Reaſon of which we ſhall ſee by-and-by.

The Statute of 42 *Ed.* 3. is ſaid to have had many good Effects: *Firſt*, the Parties knew the Names of the Jury; *ſecondly*, the *Venire* being returned, the Defendant had no *Eſſoin* on the *Habeas Corpora* and *Diſtringas*, but was obliged to appear, or elſe by Stat. *Weſtminſter* 2. the *Inqueſt* was taken by Default; *thirdly*, the Jury on *Niſi prius* were fined, if they did not appear. But from hence the Proceedings were multiplied by the common Uſe of the *Habeas Corpora* and *Diſtringas*, and the Record lengthened by the *Jurata*.

We might here take a View of the *Niſi prius Roll*, or what we now call the *Record* for Trial;

but it may help to underſtand it the better, if we endeavour to explain the old Method of Practice a little further.

Before the Statute of *Niſi prius*, there could be no Occaſion for a *Niſi prius* Roll, or any other *Record* than the *Iſſue Roll*, on which the Judgment after Trial was immediately entered up; but after the Statute of *Niſi prius*, the Clerks of the Treaſury made up a *Roll* from the *Iſſue Roll*, which was called the *Niſi prius Roll*, as the other could not be carried out of the Treaſury, but was to remain a Record of the Proceedings.

Now when *Iſſue* was joined, the *Venire* was thereby awarded to be returnable the laſt Day of that Term, without any *Niſi prius* in it, (as uſed to be;) and from that Day the *Habeas Corpora*, or *Diſtringas*, was teſted, with the *Niſi prius* therein, and returnable on the Day in *Bank*, or the firſt Day of the Term after the Aſſizes. But in caſe the Parties did not go to Trial at the next Aſſizes after Iſſue joined, or in caſe the Iſſue was not joined of an iſſuable Term, then the Proceſs of *Venire* was continued by *Vicecomes non miſit Breve*, in this Manner, *viz. At which Day came the ſaid Parties, by their Attorneys aforeſaid, before his ſaid Majeſty's Juſtices at* Weſtminſter, *and the Sheriff of the ſaid County hath not ſent back the ſaid Writ to him as aforeſaid directed; therefore the Sheriff, as before, is commanded that he cauſe to come, &c.* and then there was a new *Venire* awarded on the *Iſſue Roll*. And thus the *Venire* was continued from *Term* to *Term*, even to the *Term* wherein the *Habeas Corpora* or *Diſtringas* was teſted. But the Award of the *Habeas Corpora* or *Diſtringas* was never entered on the *Plea*, or *Iſſue* Roll,

Roll, but only at the firſt Day of the next Term after the Aſſizes, when the *Poſtea* was returned, in entering up the Judgment, they begun with * *Poſtea Continuato inde Proceſſu*, which was a Recital of the Continuance warranted by the *Placita* in the *Niſi prius* Roll. And the Reaſon of this Practice was this; if they had entered the Award of the *Habeas Corpora*, or *Diſtringas*, on the *Plea* or *Iſſue* Roll, and had not gone to Trial, they muſt from thence have awarded an *Alias* and *Pluries Habeas Corpora* or *Diſtringas*, which would have ſeemed to have obliged the Jury to come in Terms perhaps not *iſſuable*; but the other continued the Act of the Court as well; for *Poſtea Continuato inde Proceſſu* ſhews, on the *Plea* or *Iſſue* Roll, that the laſt Award of the *Venire* was continued to the Day in *Bank* by the Proceſs. And as it was neither expedient nor neceſſary to enter theſe *Continuances* of *Vicecomes non miſit, &c.* on the *Niſi prius* Roll or Record, therefore a general Entry was thought neceſſary thereon. And this was done by the *Placita* between the Award of the *firſt Venire* and the *Jurata*, which ſerved to ſhew the Judge of Aſſize that it was an Iſſue *continued* to the laſt Term, and is now a Warrant to the Officer to continue the *Venire* on the Iſſue Roll until then; for this *Placita* was of the Term next preceding the Aſſizes,

* Though this Entry is yet uſed in the *King's Bench*, and that whether the Iſſue is tried the ſame Term or not, it has been long diſcontinued in the *Common Pleas*, there being properly no Continuance neceſſary, but by *Vic' non miſit, &c.*

and by Conſequence was to the iſſuing the *Habeas Corpora*, or *Diſtringas*. Hence it is that the *Common Pleas* uſe no *Placita* after the Award of the *firſt Venire*, when they go to Trial the *ſame* Term that the *Iſſue* is joined, for that would be apparently unneceſſary, ſince this *Placita* came in, inſtead of theſe *Continuances*, and in this Caſe there is none. But in the *King's Bench* they always entered two *Placita's*, one at the top of the *Roll*, and the other after the Award of the *Venire*, though the Iſſue is tried the ſame Term it is joined; and for this Reaſon it is certain that antiently the *Continuances* in that Court were from one Day to another in the ſame Term, and not from Term to Term. And this they ſtill continue to do, though it is ſeemingly at this Time apparently wrong; for in this Caſe the ſecond *Placita* is Word for Word with the firſt, conſequently it comes in very abruptly, and can have no Meaning at all in it.

Having ſaid thus much of the *Iſſue*, and *Venire* awarded thereby, we ſhall now take a View of the *Record* for Trial, by which the Awards of the *Habeas Corpora* and *Diſtringas* will appear.

Of making up the Niſi prius Roll, or Record.

After the Statute of *Niſi prius* the Clerks in the *King's Bench*, and the Prothonotaries in the *Common Pleas*, uſed to make up a *Niſi prius* Roll from the *Iſſue* Roll, and give it to the Attorney under their Seal for Trial. But after

:er Attornies took upon themſelves to carry on :he Proceedings by Paper Copies, they like-wiſe of courſe made up the *Iſſue Roll*, and *Niſi* ›*rius Roll* (or Record, as we call it) for Trial, and carrying them both with the Pleadings to the reſpective Officers, they examined them together; and keeping the *Iſſue Roll* to file, they paſſed and ſealed up the *Niſi prius Roll*, (which they gave back to the Attorney) as extracted and made up by themſelves, being then paid for the ſeveral Entries. And ſo the Record is ſtill ſuppoſed to be made up by theſe reſpective Officers whoſe Buſineſs it is, and who are to make up the proper Continuances thereon as the Acts of the Court. Now in making up the *Niſi prius Roll*, as theſe Officers uſed to do, the ſame is done in the following Manner.

In the King's Bench.

They firſt ingroſs in large Hand a Title thereto called a * *Placita, i. e.* Pleas, being the firſt Word of that Title; then in a new Line is ingroſſed the *Iſſue*, with the Award of the *Venire, verbatim*; then is added another

* *Pleas, Placita*, are now taken for all Pleadings, Debates, and Trials at Law, and are divided into Pleas of the Crown, and Common Pleas. So *Pleas* here ſignify Pleas or Debates had before our Lord the King at *Weſtminſter* ſuch a Term; *Pleas* in the *King's Bench* being always ſuppoſed to be had before the King himſelf.

Placita,

* *Placita*; and after this ſecond *Placita*, in a new Line, follows the *Jurata*, being the *Reſpite* of the Jury, (as ſuppoſed to have been ſummoned by the *Venire*) the *Adjournment* of the Cauſe, and the *Award* of the *Diſtringas Juratores*; the *Jurata* being the Act of the Court, grounded on a ſuppoſed Default of the Jurors not coming on the *Venire*, *viz.*

Pleas before our Lord the King at Weſtminſter, *of the Term of St.* Hilary, *in the Year of the Reign of our Sovereign Lord* George *the Third, by the Grace of God, of* Great Britain, France, *and* Ireland *King, Defender of the Faith, &c.* 1765. *Roll* 25. Lee.

Berkſhire, *to wit. Be it remembered, that on* Wedneſday *next after eight Days of St.* Hilary *in this ſame Term, before our Lord the King at* Weſtminſter, *came* A. B. *&c.* The Iſſue, with the Award of the *Venire*, *verbatim*; then the *ſecond Placita.*

Pleas before our Lord the King at Weſtminſter, *of the Term of St.* Hilary *in the Year of the Reign of our Sovereign Lord* George *the Third, by the Grace of God, of* Great Britain, France, *and* Ireland *King, Defender of the Faith, &c.* 1765.

Berkſhire, *to wit. The Jury between* A. B. *Plaintiff, and* C. D. *Defendant, of a Plea of Treſpaſs*

---

* When the Cauſe is tried the ſame Term the Iſſue is joined, the ſecond *Placita*, as here, is Word for Word

Treſpaſs on the Caſe, (as 'tis) *is* * *reſpited before our Lord the King at* Weſtminſter, *until* † Monday *next after fifteen Days from the Day of* Eaſter, (the next Return Day after the

---

Word as the firſt; but if it is not tried the ſame Term Iſſue is joined, then the only Difference will be, that the *firſt Placita* will remain of the ſame Term Iſſue was joined of, and the *ſecond* muſt be of the Term it is tried, changing the Name of the King, if the firſt ſhould be dead. It has been obſerved why two *Placita's* are uſed in this Court; but when it is tried the ſame Term, that Reaſon will not hold good now, and it ſeems to come in very abruptly.

* The Reaſon of this has been noted before.

† This is the Adjournment-day, or Day in *Bank*, being the firſt Return-day after the Trial, and conſequently the Return-day of the *Diſtringas*; until *four* Days after which, final Judgment cannot be ſigned; therefore the Plaintiff makes it returnable as ſoon as conveniently may be after the Day of Trial; as if it is to be tried at the Sittings *within* Term, then the *Return* may be the firſt *Return-day* after the Sittings in the ſame Term. But if it is to be tried at the Sittings *after* Term, or at the *Aſſizes*, then it is uſually made *returnable* the firſt *Return* of the ſubſequent Term. It may happen that the Cauſe, for particular Reaſons, may be adjourned or put off by Conſent, or, *&c.* and not tried at the Time firſt mentioned in the *Jurata*; and if in the Country, it may be ſome Terms after, before it is tried; in which Caſe, when it is to be brought on again for Trial, the Record muſt be reſealed, the *Niſi prius* Day, and the Return of the *Diſtringas* muſt be eraſed, and the new Day of *Trial* and *Return* put in, which muſt be after the Day of Trial, as before obſerved. And as for the Terms intervening, between the Award of the firſt *Venire* and the Return of the *Diſtringas*, they will be taken Notice of, in entering up the Judgment, by *Continuances* of the *firſt Venire*, by *Vicecomes non miſit Breve*.

Trial)

Trial) * *unleſs his Majeſty's Juſtices, aſſigned to hold the Aſſizes in the County aforeſaid, ſhall firſt come on Monday the fifth Day of* March, *at* Reading *in the ſaid County, according to the Form of the Statute in that Caſe made and provided,* † *for Default of the Jurors becauſe none of them did appear,* ‡ *therefore let the Sheriff have the Bodies of the ſaid Jurors to make* § *the ſaid Jury between the Parties aforeſaid accordingly,* ‖ *the ſame Day is given to the Parties aforeſaid at the ſame Place*

---

* *Unleſs his Majeſty's Juſtices, &c.* the Statute of *Niſi prius* is the *ſecond of Weſtminſter*, 1285; but for *Middleſex* the Statute muſt be meant to be the 18 *Eliz. c.* 12. for before that Statute there were no Juſtices of *Niſi prius* for *Middleſex*; but Cauſes tried at *Weſtminſter*, before then, were tried at the Bar.

† *For Default of the Jurors, &c.* every Cauſe that is tried at *Niſi prius*, at this Time, is tried through a *ſuppoſed Default* of the Jurors not coming to *Weſtminſter* on the Return of the *Venire*, where they were ſummoned to, and is the Ground on which the *Jurata* is founded, for reſpiting *the* Jury, and awarding the *Diſtringas*.

‡ *Therefore let &c.* imperatively ſaid, the King commanding it.

§ *The ſaid* (not *a*) *Jury*, becauſe they are ſuppoſed to be the *ſame Jury* as were before ſummoned, and no others.

‖ *The ſame Day is given, &c.* it being before obſerved why a *Dies datus* is added at the End of the *Jurata* in this Court. The *Quære* is, Whether it is neceſſary or not? and if neceſſary, why is it omitted in the *Common Pleas?* A *Dies datus* was added to the Award of the *Venire*, becauſe the Defendant was originally *eſſoinable* thereon; and if he did not appear, he had a Day of courſe to appear on the *Diſtringas*; but if he did *not* appear on the *Diſtringas*, the Inqueſt might be taken by Default, and no other Day could be given him; then why is a *Dies datus* added here?

And

* *And be it known that the King's Writ in this Caſe upon Record was delivered to the Under-Sheriff of the County aforeſaid the twelfth Day of* February (the laſt Day of the Term) *in this ſame Term, before our Lord the King at* Weſtminſter, *to be executed according to Law at his Peril.*

If it is to be tried in Town, at the Sittings within, or after Term, you ſay,

Unleſs the King's right truſty and well-beloved William *Lord* Mansfield, *his Majeſty's Chief Juſtice, aſſigned to hold Pleas before the King himſelf, ſhall firſt come on* Thurſday *the Day of* February, *at* Weſtminſter-hall *in the ſaid County of* Middleſex, *according to the Form of the Statute, &c.*

And then, *And be it known*, as added for the Aſſizes, is omitted; but *quære* the Reaſon for it?

---

* *And be it known, &c.* the *Diſtringas*, being awarded on *Default* of the Jurors not coming to *Weſtminſter* on the Return of the *Venire*, is here ſaid to be given the laſt Day of the *ſame* Term, to the Under-ſheriff to be executed, *&c.* If this is a neceſſary Part of the *Jurata*, why is it omitted, if the Cauſe is to be tried in *Middleſex?* Where is the Difference, ſeeing every Cauſe that is tried in *Middleſex* is by *Niſi prius*, as well as in the Country? (excepting Trials at Bar, which is out of the common Way.) And yet in Town Cauſes this Clauſe is always directed to be left out, in both Courts, though there ſeems to be as much Reaſon for the Uſe of it in Town as there is for the Country.

Of making up the Niſi prius Roll or Record, in the Common Pleas.

The making up the Record in the *Common Pleas* is likewiſe done after the ſame Manner with a *Placita* prefixed, proper for this Court, *viz.*

Pleas at Weſtminſter, *before Sir* Charles Pratt, *Knt. and his Brethren, Juſtices of our Lord the King of the* * *Bench, of the Term of St.* Hilary *in the Year of the Reign of our Sovereign Lord* George *the third, &c.* *Roll.* Jones.

Berkſhire, *to wit.* C. D. *late of* W. *in the ſaid County, Yeoman, was attached to anſwer to* A. B. *of a Plea of Treſpaſs upon the Caſe, &c. And whereupon the ſaid* A. *by* R. B. *his Attorney, complains that &c.* ſo on with the *Iſſue* and the Award of the *Venire, verbatim*; after which they leave a Space for a † *ſecond Placita*, if needful, (as on the Change or Death of the Chief Juſtice; or if the Cauſe is not tried of the ſame Term

* *Of the Bench, &c.* in a certain Place according to *Magna Charta*, where *Common Pleas* were to be held by his Majeſty's Juſtices, and therefore called Juſtices *of the Bench.*

† *Second Placita, &c.* as this ſecond *Placita* came in as a general Entry, inſtead of the *Continuances* on the *Iſſue Roll*, and which were thought neither neceſſary nor expedient to be entered on the *Niſi prius* Roll: So where there was no *Continuance* at all, as when the Cauſe was tried of the *ſame* Term the *Iſſue* was joined, there was no Occaſion for a *ſecond Placita*, unleſs at the Death or Change of the Chief Juſtice, *&c.* Therefore when the Cauſe is intended to be tried the *ſame* Term the *Iſſue* is joined, there is no *ſecond Placita*, but only a Space left to add it, in caſe the Cauſe ſhould *not* be tried, or in caſe of the Death or Change of the Chief Juſtice *in* the ſame Term.

men-

mentioned in the said Panel, in which Cases only they are a joined Panel) and after such Space they enter the Panel, being the Adjournment of the Cause, Return of the Jury, and Award of the Habeas Corpora Juratorum, thus:

Berkshire, to wit. *The Jury between* A. B. *Plaintiff, and* C. D. *late of* W. *in the said County, Yeoman, in a Plea of Trespass on the Case, is respited here until Fifteen Days from the Day of Easter, unless the King's Justices, assigned to hold the Assizes in the said County of* B. *according to the Form of the Statute in that Case made and provided, shall first come on Monday the first Day of March, at* R. *in the said County, for Default of the Jurors because they come not; therefore let the Sheriff have the Bodies of the several Persons mentioned in the Panel annexed to the Writ of* Habeas Corpora Juratorum, *to him directed, to make a Jury between the said Parties of the Plea aforesaid.* * *And be it known, that the Justices here in Court, in this same Term, delivered a Writ thereupon to the Under Sheriff of the said County, to be executed in due Form of Law, &c.*

If to be tried in Town at the Sittings, you say,

Unless Sir Charles Pratt, *Knight, his Majesty's Chief Justice of the Bench here, assigned to hold Pleas at* Westminster, *according* ...

* *And be it known, &c.* See the Dowe [illegible] *King's Bench.*

Form of the Statute in that Caſe made and provided, ſhall come before on the Day of February, *at* Weſtminſter *aforeſaid, in the great Hall of Pleas there, commonly called* Weſtminſter-hall, *in the ſaid County of* Middleſex, *for Default, &c.*

And then, *And be it known, &c.* is omitted here, as it is in the *King's Bench.*

Reſpect being had to the Courts the *Diſtringas* and *Habeas Corpora* are awarded by, and made returnable in, there appears no material Difference in the *Awards* thereof, any more than there is of the *Venire.* Both contain, in brief, the Subſtance of the reſpective Writs; and as the *Venire* in both Courts is the ſame, except in the Return, ſo the *Diſtringas* and *Habeas Corpora* are to one and the ſame Purport and Effect, though called by different Names, *viz. Diſtringas* in the *King's Bench,* from that Word formerly uſed therein, *Præc. tibi quod Diſtringas, &c. Jur. Sum. &c.* And *Habeas Corpora* in the *Common Pleas,* from thoſe Words in the Writ, *Præc' tibi quod Habeas Corpora coram Juſt. &c. Jur. ſum, &c.* Both iſſue on a ſuppoſed Default of the Jurors not appearing on the Return of the *Venire,* ('tis ſaid thro' a *ſuppoſed* Default, for in fact originally theſe Writs were not grounded on a Suppoſition only, as they are now, but on a *real* Default;) and therefore the Courts, by virtue of the Statute of *Niſi prius,* adjourned the Cauſe to a future Day, and gave a Reſpite to the Jury until then, in order that the Cauſe ſhould be tried in the proper County before the Juſtices of *Niſi prius*; for which Purpoſe theſe Writs are awarded, thereby commanding the Sheriff to have the Jury before them at *Weſtminſter,*

at the *Return* thereof, *unleſs his Majeſty's Juſtices aſſigned to hold the Aſſizes, ſhall firſt come on ſuch a Day and Place, &c.*

The *Record* is the Sum of the whole Proceſs; therefore fully to diſſect and examine every particular Part of it, from the firſt *Placita* to the *Jurata*, together with the ſeveral Matters and Things to which it relates, would afford much Pleaſure and Profit to a curious Inquirer, as the ſame may be done with much more Exactneſs and Nicety than here is pretended to be, and many Things now unnoticed would be accounted for; and then, thoſe Things which now appear ſo obſcure and unintelligible, might ſeem to have been one Time material, though they are now become obſolete and unneceſſary.

But to go on; the next Thing to be conſidered in the Suit is the *Jury Proceſſes*, that is, the *Venire*, the *Diſtringas*, and the *Habeas Corpora*. For this Purpoſe a View of theſe Writs in the preſent printed Forms will be neceſſary, as in all Probability they are the ſame in Subſtance, if not in Form, that they were many hundred Years paſt. And hence will appear whether any Reaſon can be aſſigned why two ſuch Writs, as are now made out to nick with the Occaſion, are ſtill neceſſary; or whether the *Venire* alone may not be made ſufficient to bring a Jury together to try a Cauſe, and fully anſwer the End of both; ſo that the Record may be ſhortened by ſtriking out the *Jurat.* and much Expence ſaved to the Parties in the Suit.

The Venire in the King's Bench.

GEORGE *the Third, &c. to the Sheriff of* Berkſhire, *Greeting. We command you, that*

you * *cauſe to come before* † *Us at* Weſtminſter, *on* § Wedneſday *next after eight Days of the Purification of the bleſſed Virgin* Mary, ‖ *twelve free*

---

* *Cauſe to come, &c.* not by the *Poſſe Comitatus*, to compel them, but *per bonos Summonitores*, to warn them to come. And here two Things ſays Lord *Coke*, are to be obſerved; firſt, that the Summoners muſt be *boni, i. e. fide Digni ut Valeant Ligitimum Teſtimonium perhibere, cum inde per Juſticiarios fuerunt requiſiti. Secondly*, It is ſpoken in the Plural Number, *per bonos Summonitores*, and therefore there muſt be two at leaſt.

† *Before Us, &c.* the King, as obſerved, being ſuppoſed to ſit in this Court in Perſon; all Writs returnable therein, are returnable before himſelf; whereas in the *Common Pleas*, they are made returnable before *his* Juſtices at *Weſtminſter, &c.*

§ Some Return Day before the Day of Trial. The Writ ſhould be teſted the firſt Day of that Term the Iſſue is joined of. See under Award of *Venire*.

‖ *Twelve, &c.* a Trial by a *Jury*, and the Number *Twelve* is more ancient than any written Law we have. That it was in Uſe in the *Saxon* Times, is manifeſt from the Laws of King *Ethelred*, made at *Vanatinga*, [Vanting, Wanatinge] now *Wantage*, in *Berks*, which ſpeak thus: "*In all Hundreds,* "*let there be Aſſemblies, and twelve Freemen of the moſt an-* "*cient, together* (cum Præpoſito, in *Saxon* ȝeþeþa) *with* "*the Reeve of the Hundred, ſhall ſwear not to condemn the* "*Innocent, nor abſolve the Guilty.*" The County and Hundred Courts were the Courts wherein Cauſes between Party and Party were chiefly heard, and determined by a Jury; and the main Reaſon of the great Silence of a Trial by a Jury, before or in the *Saxons* Time, by our Writers, may be, that the vulgar Purgations [the *Ordales*] were notwithſtanding the moſt uſual Means of trying Perſons, and eſpecially in criminal Affairs. Theſe were of divers Sorts, and then every where in uſe; and Sir *Matthew Hale* ſays, "*That in all the Time of King* John *the Purgations per Ig-* "*nem et Aquam, or the Trial by Ordeal, continued, as appears* "*by frequent Entries upon the Rolls. But it ſeems to have* "*ended with this King, for I do not find it in uſe in any Time* "*afterwards.*" And *N. B.* Although it be *Twelve* in the

* *free and* † *lawful Men* ‡ *of the Body of your County, each of whom having* ‖ *ten Pounds a Year*

---

the Writ, yet by ancient Cuſtom the Sheriff muſt return 24; ſo that, in this Caſe, *Uſage* and *ancient Cuſtom* maketh Law.

* *Free, &c.* The Tenure by *Villainage* came in with the *Saxons*; conſequently, before then, there could be no ſuch Diſtinction as between *Free* and *Bondmen*: but afterwards, during the Continuance of that Tenure, *Villains*, being ſubject to the Wills of their Lords, were not to be put on Juries. So careful was the Law in chooſing a *free* Jury, not ſubject to the Influence of any Perſon! But ſince the aboliſhing that Tenure by Stat. 12 *Car.* 2. other Conſtructions are improperly made of this Word *free*, as to be free from Prejudice, Envy, *&c.*

† *Lawful, &c.* That is Men ſubject to the Laws of the Land; and therefore not Aliens, nor Outlaws, *&c.*

‡ *Of the Body, &c.* This was ordered ſo lately as the 4 & 5 *Annæ*; before which Time, the Jury uſed to be awarded from the *Viſne* or Neighbourhood, as Town, Pariſh, or Hundred, *&c.* and the Reaſon was, becauſe *Qui Vicinus facti Vicini præſumitur ſcire.* And then the Writ run, *Homines de Vicineto de W. in Com' tuo.*—But as a Jury was often wanting for Want of *Hundredors*, duly qualified, it was ordered by this Statute that the Jury ſhould be awarded out of the *Body* of the County.

‖ *Ten Pounds, &c.* that from their Worth they might be able to bear their Expence, and Loſs of Time in their Attendance on the Trial; and not, that *Honeſty* and *Juſtice* were not to be found among the poorer Sort of People. By the Statute of *Weſtminſter* 2. *c.* 38. it was to be 20*s.* only. By 21 *Ed.* 1. 40*s.* By 35 *H.* 8. the Form of the Writ is deſcribed to be,—*Præcipimus, &c. quod Venire facias, &c. quorum qualibet habeat* 40 *Solid', &c. ad minus per quos Rei Veritas, &c.* By 27 *El.* 4*l.* and by 4 & 5 *W.* & *M.* 10*l.* and 6*l.* in *Wales*, as it remains at this Time. But *quære*, if 20*s.* the 13 *E.* 1. was not more worth than 10*l.* now?

at the leaſt in Lands, Tenements, or Rents, by whom the Truth of the Matter may be the better known, and who are in no wiſe of * *Kin either to* A. B. *the Plaintiff, or* C. D. *the Defendant, to* † *make a certain Jury of the County between the Parties aforeſaid, of a Plea of Treſpaſs on the Caſe, becauſe as well the ſaid* C. D. *as the aforeſaid* A. *between whom the Difference is,* ‖ *have put themſelves upon that Jury; and have you there the Names of the Jurors, and this Writ. Witneſs* William *Lord* Mansfield, *at* Weſtminſter, *the* 23*d Day of* January *in the Year of our Reign.* Lee.

The Venire in the Common Pleas.

GEORGE, *&c. To the Sheriff of* Yerkſhire, *greeting. We command you, that you cauſe to come before our Juſtices at* Weſtminſter, *in eight Days of the Purification of the Bleſſed* Mary, *twelve free, &c. who are in no wiſe of Kin either to* A. B. *the Plaintiff,*

---

* *No wiſe of Kin, &c.* an excellent Care in the Law, both in reſpect to the Jury and Parties; for the being of *Kin* would be apt to render their Judgment ſuſpicious of Partiality.

† *To make a certain Jury,* &c. *ad Recognizandum.* The Words in the Award of the Writ are here rendered *to make a certain Jury,* becauſe the Jury was ſome Time called *Recognitores,* as *Recognitores Aſſizæ* in Aſſize.

‖ *Have put, &c.* i. e. have ſubmitted themſelves, and the Matter in Diſpute, to their Judgment and Opinion.

or

or C. D. *late of* W. *in your County, Yeoman, the Defendant, to make, &c. Witneſs Sir* Charles Pratt, *Knt. at* Weſtminſter, *the* 23*d Day of* January *in the Year of our Reign.* Jones.

The *Venire* in this Court is the very ſame as in the *King's Bench* except in the Return, and the adding the Defendant's Addition to his Name.

The Diſtringas in the King's Bench.

GEORGE, *&c. to the Sheriff of* B. *Greeting. We command you, that you diſtrain the Bodies of the ſeveral Perſons named in the* * *Pannel hereunto annexed,* † *Jurors ſummoned in Our Court before Us, between* A. B. *Plaintiff, and*

---

* *Named in the Pannel, &c.* 'Till lately the Writ run, *Præcipimus tibi quod diſtringas* A. B. *de, &c.* C. D. *de*— E. F. *de* —— *&c.* naming the whole 24 with their Additions, as they were named in the *Pannel* returned on the *Venire*; for the Return to the *Venire* was Inſtructions to the Attorney to make out the *Diſtringas* by: but now, as the like *Pannel* is returned in both Writs, the Sheriff will return the *Diſtringas* without the *Venire*, ſo as he is paid for the Returns of both; by which the *Venire* is become almoſt uſeleſs, and is ſeldom made out at all in the *King's Bench.*

† *Jurors ſummoned, &c.* as ſuppoſed by the *Venire*; for by Stat. *Weſtminſter* 2. *None ſhall be put on Juries but ſuch as were before ſummoned.* 'Tis well known the Jurors are ſummoned of courſe, by the Sheriff, without either Writ, unleſs 'tis a Special Jury.

C. D. *Defendant,* * *by all their Lands and Chattels in your Bailiwick, ſo that neither they nor any of them do intermeddle therewith, until you ſhall have other Command from Us in that Behalf, and that you anſwer Us for the Iſſues of the ſame, ſo that you have their Bodies before us at* Weſtminſter, † *on next after fifteen Days from the Day of* Eaſter, § *or before our Juſtices aſſigned to hold the Aſſizes in your County, if they ſhall firſt come on* Monday *the fifth Day of* March *at* R—— *in your County, according to the Form of the Statute in that Caſe made and provided, to make a certain Jury between the ſaid Parties, of a Plea of Treſpaſs on the Caſe, and to hear their Judgments of many Defaults;* ‖ *and have you there the Names of the Jurors and this Writ. Witneſs, &c.*

---

* *By all their Lands, &c.* It would be a ſevere Diſtreſs on the Jurors, if this Writ was to be executed literally. The *Habeas Corpora* has no ſuch Clauſe.

† *On, &c.* The Writ ſhould bear *Teſte* on the Return Day of the *Venire,* and be made returnable on ſome Day after the Trial; if tried at *Niſi prius,* 'tis uſually the firſt Return of the next Term.

§ *Or before, &c.* This *Niſi prius* Clauſe is the moſt material Part of this Writ, and before the 42 of *Ed.* 3, it uſed to be inſerted in the *Venire*; for, until then, the *Diſtringas* and *Habeas Corpora* never iſſued but of Neceſſity.

‖ *And have you there the Names, &c.* This is omitted in the *Habeas Corpora,* and with good Reaſon; for their Names having been before returned into Court by the *Venire,* as this Writ itſelf declares, *Jurors ſummoned, &c.* therefore this Part ſeems quite ſuperfluous.

If for *Middleſex*, you ſay,

Or before our truſty and well-beloved W. L. M. *aſſigned to hold Pleas in Our Court before Us, if he ſhall come on the Day of at* Weſtminſter *in the ſaid County.*

If for *London*,

At Guildhall *of the City of* London *aforeſaid.*

The Habeas Corpora in the Common Pleas.

GEORGE, *&c. To the Sheriff of* B. *Greeting. We command you, that you have before our Juſtices at* Weſtminſter, *in fifteen Days from the Day of* Eaſter, *or before our Juſtices aſſigned to hold the Aſſizes in your County, according to the Form of the Statute in that Caſe made and provided, if on* Monday *the fifth Day of* March, *at* R. *in your ſaid County, they ſhall firſt come, the Bodies of the ſeveral Perſons named in the Pannel to this Writ annexed, being the Jurors ſummoned in Our Court, before our Juſtices at* Weſtminſter, *between* A. B. *Plaintiff, and* C. D. *late of* W. *in your County, Yeoman, Defendant, of a Plea of Treſpaſs on the Caſe, to make that Jury; and have you there this Writ. Witneſs, &c.*

If for *Middleſex*, you ſay,

Or before Our faithful and well-beloved Sir C. Pratt, *Knight, Our Chief Juſtice of our Court*

of the Bench, appointed according to the Form of the Statute in that Caſe made and provided, if on the Day of at W ſtminſter *in your County, he ſhall firſt come, the Bodies, &c.*

For *London*,

If on the Day of at Guildhall *of the City of* London *aforeſaid, he ſhall firſt, &c.*

Though the Tenor and Intent of theſe two Writs are for one and the ſame Purpoſe, that is, to conſtrain the Jurors to appear, who had before been ſummoned, and had made Default; yet we ſee the *Diſtringas* is more full and compulſory than the *Habeas Corpora*. The *Habeas Corpora* is plain and ſimple, and yet ſignificant; very conciſe, and yet full and ſufficiently inſtructive, without any ſuch compulſory Matter as the *Diſtringas* is ſtuffed with; as, *Diſtrain, &c. by all their Lands and Chattels, &c. ſo that neither they, nor any other for them, do intermeddle therewith, &c. until, &c. and that you anſwer Us for the Iſſues of the ſame, ſo that, &c.* It may be preſumed that the *King's Bench*, inſtead of taking a Precedent from the *Habeas Corpora*, (wherein the only Difference neceſſary to have been made would have been the making it returnable *before Us*, inſtead of *before our Juſtices)* might think proper to uſe the ſame Form in *Civil* Caſes, which they before had uſed in *Criminal*. But without deſcanting on the Form, let us conſider the Uſe, and ſee if the ſame Neceſſity remains, for uſing two ſuch Writs for Trial, as there formerly did.

It has been obſerved, that after the Statute of *Niſi prius*, until the 43 *Ed.* 3. the *Venire* was the only general Proceſs that iſſued to bring in a Jury, and in which the *Niſi prius* Clauſe was inſerted; and if the Parties appeared, they went to Trial thereon. And the Reaſons for uſing or introducing the other Writs, were theſe;

Firſt, As the Jury was awarded out of the *Viſne*, it ſometimes happened that, for want of Hundredors, a full Jury did not appear; in which Caſe the Jury were obliged by the Writ to appear in *Bank*; but this they ſeldom did, becauſe no Iſſues were returned on the *Venire*; therefore this was the common Caſe in which the *Diſtringas* and *Habeas Corpora* iſſued to bring them in. But this Reaſon will fail now, becauſe the Jury are awarded out of the Body of the County, and a full Jury ſeldom fails to * appear.

Secondly, If the Jury appeared at the *Aſſizes* on the *Venire*, the Defendant might *eſſoin* himſelf; which if he did, the Jury, as to that Cauſe, returned *Re infecta*, and the Cauſe was adjourned to *Weſtminſter*. Now in order to get rid of the Defendant's *Eſſoin* at *Niſi prius*, they made the *Venire* returnable in the ſame Term the *Iſſue* was joined, inſtead of the ſubſequent Term *after* the *Aſſizes*, and then iſſued out the *Diſtringas* or *Habeas Corpora* returnable the ſubſequent Term, with the *Niſi prius* therein; on which the

* And in Caſe they do, they may be ſupplied by a *Tales*, as ſee *poſt*.

De-

Defendant had no *Eſſoin* allowed. (*Vide ante*, *p.* .) And this almoſt introduced the formal Manner of making out theſe two Writs for Trial, even as we do now. This, however, was not the conſtant Practice, for they ſometimes went to Trial on the *Venire*, and only iſſued out the *Diſtringas* or *Habeas Corpora*, when it was thought the Defendant would take the Advantage of his Liberty to caſt an *Eſſoin*. But even this is ſo long ago as upwards of 400 Years ſince; and the Manner of *eſſoining*, nay, the Thing itſelf, is obſolete and forgotten, and can therefore be no Reaſon why the *Venire* alone is not at preſent a ſufficient Proceſs with the *Niſi prius* therein, to ſummons a Jury and go to Trial on.

Thirdly, It was complained that the Parties, by not ſeeing the Pannel before-hand, could not be prepared to make their Challenges; therefore, to remedy this, it was enacted by the 42 *Ed.* 3. *c.* 11. (near 400 Years ſince,) "*That no* "*Inqueſt but, &c. ſhould be taken by Writ of* Niſi "prius, *before the Names of them that were to* "*paſs on the Inqueſt, ſhould be returned into Court.*" This fully eſtabliſhed the two Writs as neceſſary for Trial; for from hence they could no longer place the *Niſi prius* Clauſe in the *Venire*, but it was taken out and placed in the *Diſtringas* and *Habeas Corpora*; and all the Uſe that was now made of the *Venire*, was, to get a *Pannel* of a Jury returned into Court by the Sheriff, on which the *July* was ſaid to be *impanelled*; and the Names of the Jury, as returned in the *Pannel*, were inſerted in the *Diſtringas* and *Habeas Corpora*, and then ſummoned thereon by the Sheriff.

But

But this Practice having been long diſuſed, the *Venire* is become uſeleſs, and may or may not be made out in the *King's Bench.* If made out, it is moſt uſually returned together with the *Diſtringas*, and not before; or if *not* made out at all, the Sheriff makes the ſame Return by his Pannel to the *Diſtringas*, and is then paid for *both* Returns at once, whereby the Attorney ſaves the Profits of the Writ to himſelf. What Uſe is made of it in the *Common Pleas*, but to pay the Clerk of the *Habeas Corpora* his Fees? How does the Defendant ſee the Pannel any Time the ſooner, as the Plaintiff has the Poſſeſſion of it even to the Trial, *&c.?*

It is very evident the Writ is become meerly formal and uſeleſs; and therefore if one Writ can be ſaved, and if every Cauſe is removed, by Diſuſe or otherwiſe, for the Neceſſity of two Writs, why ſhould not the *Venire* alone (as it originally was and may) be eſtabliſhed as the only one for the Sheriff to ſummon a Jury on, eſpecially as 'tis evident that it is (at leaſt it may be made) a full and inſtructive Precept for that Purpoſe? And if ſo, why ſhould any Thing be retained that is ſuperfluous, and may be ſpared, and only tends to perplex the Proceedings, and multiply Coſts? The Benefits that would ariſe, by eſtabliſhing the *Venire* as the only Proceſs neceſſary, would be, that the Record might be ſhortened by the Jurat. which would become then unneceſſary; the Writ of *Diſtringas* and *Habeas Corpora*, and the Return thereof ſaved, (for the Sheriff is now paid for two Returns, though one and the ſame Pannel ſerves for both Writs, and though the *Venire* is never made out at

all) and much Expence in every Cauſe, that is created thereby, would be ſaved to the Parties.

Of Juſtices of Aſſize, and Niſi prius.

It has been mentioned that the *County* and *Hundred* Courts were formerly the Courts wherein were heard and determined by a Jury, all Matters of ſmall Concerns between *Subject* and *Subject*. But Actions of a ſuperior Nature, as Actions of * *Aſſize*, *&c.* were to be heard and determined in the *King*'s Courts, or Courts above. But as Actions of *Aſſize* always paſſed by a Jury, and it being difficult and expenſive for a Jury out of the County to follow the *King's Courts*, or to attend at *Weſtminſter* after the *Common Pleas* was ſettled there, it was about 1176 that *Juſtices* in *Eyre*, or *Itinerant*, were appointed by a ſpecial Commiſſion to go into every County to take *Aſſizes*, and were therefore called *Juſtices of Aſſize*; and after their taking ſuch *Aſſizes*, the Commiſſions

* *Aſſize*, *&c.* may come from the *French*, *Aſſis*, and that from *Aſſideo*, to ſit together. In general it ſignified an Aſſembly of certain Men with the Juſtice, ſitting together at a certain Place and Time; as the Judges are ſaid to hold their *Aſſizes* (or Seſſions) when they go their Circuits, *Aſſizes* alſo ſignified certain Writs, formerly much in Uſe in *real* Actions; and it is preſumed, were ſo called from their calling together and authorizing certain Perſons to ſit thereon: As the Writ of *Aſſize of Novel diſſeiſin*; of *Mort d'Anceſtor*, *&c.* In ſuch Actions it alſo ſignified the *Jury*, and the Pannel, the Pannel of *Aſſizes*, *&c.* St. 6 *H.* 6. and ſuch Actions, Actions of *Aſſize*, *&c.*

were

were returned into the Courts above, for a Confirmation of what they had done.

Now as it too frequently happened that theſe *Juſtices*, thro' ſome Difficulty in the Cauſe, or upon the *Eſſoin* of the Defendant, or other Matter, adjourned ſuch Cauſes to the *King's* Courts, or Court at *Weſtminſter*, to be determined there, to the great Inconvenience and Expence of the Jury, and the Parties concerned; therefore, in order to remedy this, and that Actions of *Aſſize* ſhould be tried in the proper County, the Statute of *Weſtminſter* the ſecond, called the Statute of *Niſi prius*, was made, by which it is enacted, "That from henceforth *two* "*Juſtices* ſworn ſhall be aſſigned, before "whom and none other, *Aſſizes of Novel* "*diſſeiſin*, *&c.* ſhall be taken, and they ſhall "* aſſociate unto themſelves one or two of "the diſcreeteſt Knights of the Shire, into "which they ſhall come, and ſhall take the "ſaid *Aſſizes*, *&c.* and ſuch Inquiſitions *ſhall* "*not* be determined by any *Juſtices* of the "Bench, unleſs a *Day* and *Place* certain be "appointed in the Shire, in the Preſence of "the Parties. And the *Day* and *Place* ſhall "be mentioned in a *judicial* Writ by theſe "Words: *Præcipimus tibi quod Venire facias* "*coram Juſticiariis noſtris apud Weſtmonaſte-* "*rium in octabis Sancti Michaelis, niſi talis et* "*talis, tali Die et Loco, ad Partes illas Vene-* "*rint, duodecim*, *&c.* And when ſuch In- "queſts ſhall be taken, they ſhall be returned "into the Bench, and there ſhall Judgment be

* From hence is derived the Judges *Aſſociate*, and Clerk of *Aſſize*.

"given

" given, *&c.*" (This plainly ſhews the *Niſi prius* Clauſe was firſt in the *Venire.)*

This Statute leads us to conſider the *Juſtices* of the *Bench*, and the *Juſtices ad Capiendas Aſſizas*, in different Lights; the *Juſtices* at *Weſtminſter*, as Judges in *Bank*, before whom the Proceedings were to continue to be, until they gave final Judgment on the Matter; the *Juſtices of Aſſize*, as Commiſſioners ſent on Purpoſe (for the Eaſe of the Parties and Jury) to try the Cauſe in the County, and make their Return to the *Juſtices* of the *Bench*, of what was done therein, in order that the *Inqueſt* found by the Jury might be confirmed by them. And 'tis for this Reaſon that the *Venire* then, and afterwards the *Habeas Corpora* and *Diſtringas*, were made returnable at *Weſtminſter*.

Another Thing to be obſerved is, that theſe Juſtices *ad Capiendas Aſſizas* were not the Juſtices of the *Bench*; for theſe had no Power to take Aſſizes before the 8th of *R.* 2. *c.* 2. but were enabled thereto by this Statute, from which Time theſe Commiſſions *ad Capiendas Aſſizas* ſoon came to be enlarged, and were made to contain Commiſſions of *Niſi prius* and *Gaol-delivery*, *&c.* and to be executed more regularly, and at certain Times, that is, in *Lent-time* and the *Long Vacation*; theſe being the moſt leiſure Times for the Judges to go, and the Counſel to attend them in their Circuits.

Another Thing is, that *London* and *Middleſex* were Counties excepted out of theſe Commiſſions, by reaſon the Courts themſelves were ſettled in theſe Counties; and therefore it was complained of by 18 *Eliz. c.* 2. " That here-" tofore all *Iſſues* joined in any of the Courts of " Record at *Weſtminſter*, triable in the County of " *Middleſex*,

" *Middleſex*, have been uſually tried at the Bars " of the ſaid Courts. And that great Num- " bers of Actions have of late Years been " brought in the ſaid County of *Middleſex* for " Speedineſs of Trial, *&c.* by Reaſon where- " of the Judges had been hindered in Pro- " ceedings before them, by Demurrer or other- " wiſe, to the Delay of Juſtice, *&c.* and there- " fore it is enacted, that the Judges of the ſe- " veral Courts, *&c.* ſhall or may, as Juſtices or " *Niſi prius* for the ſaid *County*, within Term, " or * four Days after the End of every Term, " try all Manner of Iſſues, *&c.* and that Writs " of *Niſi prius* ſhall be awarded as for any " other County, *&c.*" So that all Iſſues that are now tried at *Weſtminſter*, at the Sittings *within* or *after* Term, and in every *other* County, are tried as at *Niſi prius*; and not only the *Venire*, but a *Diſtringas* and *Habeas Corpora* iſſue, there being no Trials at Bar but what are granted by ſpecial Leave of the reſpective Courts, on ſome great Affair.

The *Niſi prius Day*, and the *Day* in † *Bank*, were eſteemed in Law as one Day for ſome Purpoſes: As if the Defendant made Default at *Niſi prius*, and an *inſufficient* Protection, or *Eſſoin*, was caſt for him, by reaſon whereof the Inqueſt was not then taken; and if at the Day in *Bank* the Protection was *diſallowed*, the Inqueſt then paſt, whether the Defendant appeared at the Day in *Bank* or not; even as it would

* By a late Statute this Time is enlarged.

† The Day in *Bank* in the *Common Pleas*, is the *Eſſoin* Day of the next Term after the *Aſſizes*, ſo that if the Defendants *Eſſoin* the *Aſſizes* was diſallowed, Judgment was to be entered up as of the Day in *Bank* or *Eſſoin*

would have done at *Niſi prius*, had no *Eſſoin* been caſt at all for him. Some time after, the Day in *Bank* was taken up in examining the Sufficiency of *Eſſoins* on the Defendant's Appearance then, *&c.* from whence 'tis preſumed come the *four Days* after the Day in *Bank*, before final Judgment can now be ſigned on the *Poſtea*, and which are now allowed for the Defendant to move in *Arreſt* of Judgment, or for a *new Trial*, *&c.*

Of the Trial, Jury, and Tales.

Having ſpoke of the Jury Proceſſes, we come now to ſpeak of the Jury themſelves, and of the Trial by them of the Matter in Iſſue; which is to find out the Truth thereof according to the Evidence that is given to them by the Witneſſes of each Party. Their Oath is, *Well and truly to try the Iſſue joined between the Parties, and true Verdict give according to the Evidence.* And in giving their *Verdict* they muſt all agree; for the firſt Queſtion the Court puts to them, after they have conſidered of the Matter, and come to offer their Opinion is, *Whether they are all agreed in their Verdict?* To which the Foreman muſt anſwer, *Yes*, in the Preſence and hearing of them all.

Eſſoin Day; which is the Reaſon why Judgments in this Court relate to the *Eſſoin* Day of the Term; but in the *King's Bench* the Day in *Bank* was the *quatuor Die poſt*, which they reckoned the *firſt* Day of the Term, and on which Judgments in this Court were to be entered up, which is the Reaſon why Judgments in the *King's Bench* relate to the firſt Day of the Term only, and not to the *Eſſoin* Day.

A *Trial* may be ſaid to be two-fold, that is, in *Fact* and in *Law*. *Firſt*, The *Queſtio Juris*, or a Trial on Matter of *Law*, is uſually tried by the Judges on a Demurrer or ſpecial Verdict, *&c.* *Secondly*, The *Queſtio Facti*, or a Trial of *Fact*, is to be tried by a Jury, and not the Judges; for, *ad Queſtionem Juris reſpondent Judices, ad Queſtionem Facti reſpondent Juratores.*

A *Trial* by a Jury of ſo many Friends and Neighbours, as they are eſteemed to be, and wherein they muſt all agree, is one of the faireſt Means in the World for obtaining Juſtice (if not the only one) for any Certainty. And in this Kingdom it is ſo very ancient, that we find it was practiſed before any of our written Laws were eſtabliſhed. And the *Qualifications* of the Jurymen, as required by the Jury Proceſs, clearly evince how careful the Law was of having Juſtice done, and that neither Party ſhould be diſſatisfied with their Verdict; for, as hath been noted, they were to be,

Firſt, *Liberi et Legales Homines*, whereby all Villains, Outlaws, *&c.* are excluded.

Secondly, *De Vicineto*, whereby they are preſumed to know ſomething of the Fact, *&c.*

Thirdly, *Quorum qualibet habeat*, *&c.* whereby having a Freehold of ſo much a Year, they may, without any Reflection on the poorer Sort, be eſteemed to be Men leſs liable to Corruption, and better able to bear the Trouble and Loſs in attending.

Fourthly, *Et qui nec* A. B. *nec* C. D. *&c.* whereby all Affinity and Conſanguinity to either of the Parties is taken away.

Fifthly, *Ad faciendum quandam Jurat. Patriæ*, *&c.* whereby Peers are excluded from

intermeddling with Matters of the poorer Sort, for they are not *Pares Patriæ*, but *Pares* of an higher Rank.

If either of theſe Qualifications was found to be wanting, in any or either of them, it was a ſufficient Ground for objecting to ſuch a Jury-man's paſſing on the Inqueſt. And thus it continued until the 35 *H.* 8. *c.* 6. but as it too frequently happened that (as the Jury were to be *de Vicineto)* for want of *Hundredors*, duly qualified, a full Jury did not appear; or if they did, were often challenged as being of *Kin* to one or other of the Parties; or in ſome other Reſpect not indifferent Men, whereby great Delay and Trouble as well as Expences, were had; therefore, by this Statute, it was enacted, *that the Sheriff ſhould return for the future* ſix *of the Jury out of the County, and* ſix *out of the Viſne; and in caſe a full Jury did not appear, then the Sheriff was to return a Supply of Men of the County from out of thoſe then in View of the Court, in order that the Cauſe ſhould not remain untried.* This Statute gave Riſe to the *Tales de Circumſtantibus*, which was not at Common Law as the Jury was. And hence, if a full Jury did not appear, the Court, at the Prayer of the Party, directed the Sheriff to return a *Tales*; and thereupon the Sheriff returned a ſufficient Number of ſuch as were then in View of the Court. Theſe were to be of like Reputation with thoſe impanelled before. By the 4 & 5 of *W.* & *M.* theſe *Tales Men* were to have 5 *l* a Year; and by the 7 & 8 of *W.* 3. they were to be Freeholders or Copy-holders of the County. But many Inconveniences ſtill attending the too frequent Delays by Jurors not appearing, or Challenges made to

them, and the Difficulty of ſupplying ſuch Deficiencies by Perſons properly qualified to be choſen upon the *Tales*, a further Remedy was thought neceſſary, in order to expedite Juſtice; and this was provided by the 4 & 5 *Annæ*, whereby it is enacted, *that the Venire ſhall be awarded out of the Body of the County*, which has rendered the *Tales* almoſt uſeleſs, for it ſeldom happens now but a full Jury appears.

Upon the *Jurors* coming to the Bar, they are called over as named in the *Pannel*; and as they are called, either Party has a Right to challenge them; and if good Cauſe be ſhewn for ſuch Challenge, it is allowed, and the Officer proceeds to call the next; and ſo on, until 12 out of the 24 are ſworn. This Challenging the Jury is of common Right, and was formerly frequently uſed.

A *Challenge* (*Calumnia*, a feigned Word) in a legal Senſe, as applied to a Jury, is an Exception againſt them; and is twofold, *viz.* to the *Array*, and to the *Poll*.

A *Challenge* to the *Array* is a general Exception to all the Perſons ſo * arrayed or impannelled, as well to the *principal* Pannel as the *Tales*. And this was, and is generally done in reſpect of Partiality, or Default of the Sheriff, and not of the Perſons impannelled; as where the Sheriff is of Kin to one of the Parties, *&c.*

A

* Arrayed or impannelled. The Names of the Jurors are ranked by the Sheriff in a long Strip of Parchment one under another, which Ranking is called the Array: So in common ſpeaking we ſay, Battle Array, for Order

A Challenge to the Poll is an Exception againſt one or more particular *Jurors*; and this may be *peremptory* or *principal.*

A *peremptory* Challenge is an Exception to any of the Jury, without ſhewing any Cauſe; which is only in Caſes of *Treaſon* or *Felony*, in Favour of *Life.* At Common Law a Priſoner could challenge * *thirty-five* peremptorily; but by 38 *H.* 8. they were reduced to *twenty*, which in Felony is ſtill in Force. But by the 1 *&* 2 *W. & M.* the Challenge of *thirty-five* in *Treaſon*, or *Petit Treaſon*, is reſtored.

The *principal* Challenge is ſo called, becauſe, if found true, it is ſufficient. And this *principal* Challenge to the *Poll* was reduced to four Heads, *viz. Propter Honoris Reſpectum*, in Reſpect of Dignity; as becauſe ſuch a Perſon was a *Peer* of the Realm, *&c. Propter Defectum*, for ſome Defect; as becauſe ſuch a Perſon was an *Alien*, or a *Minor*, or had not a Freehold, *&c. Propter Affectum*, as where a Juror was of *Kin* to one of the Parties, or had given a Verdict before in the ſame Matter, or had been an Arbitrator, or had eat and drank at one of the Party's Coſts, *&c. Propter Delictum*; as when a Juror was outlawed, or excommunicated, or had been convicted of Felony, *&c.*

---

of Battle; and ſo to array the Jury is to order, or place them in the Pannel; and Pannel ſignifies no more than a little Part, as a Pannel of a Door, a Pannel of Wainſcot, *&c.* and when this is done, the Jury are ſaid to be impannelled or arrayed.

* By Uſage and Cuſtom, the Sheriff is obliged to return 24; however, in general, the *Pannel* contains the Names of 48 Jurors, who are ſummoned.

The

The *Verdict*, ſo called from *Vere dictum, quaſi dictum Veritatis*, is the Judgment or Opinion of the Jury on the Matter, which they give in to the Judge, after having heard the Caſe, and the Evidence thereon. This they do by their Foreman, and it is then minuted down on the Record by the Judge's *Aſſociate*.

A *Verdict* is either general or ſpecial. It is ſaid to be *general* when it is delivered in like general Words with the Iſſue, as that the Defendant is *Guilty* or *Not Guilty*; or it is ſaid to be *ſpecial*, when they find ſuch and ſuch a Thing to be done, declaring the *Facts* as in their Opinion are proved, and praying the Judgment of the Court as to the Law upon thoſe Facts.

Sometimes it happens, that Nobody appears to make any Defence for the *Defendant*; he is then called, and a *Verdict* is given of courſe for the *Plaintiff*, with ſuch Damages as he can prove to have ſuſtained. On the other Hand, ſometimes the *Plaintiff* don't appear; he is then ſaid to be *nonſuited*, and ſuch *Nonſuit* is recorded by the *Aſſociate*, at the Inſtance of the *Defendant*; and in this Caſe the *Defendant* is now intitled to his Coſts, as he is on every *Nonſuit*, where the *Plaintiff* would have been intitled to Coſts in caſe he had appeared. But a *Nonſuit* is no Bar to a new Action: ſo there is a Difference between a *Nonſuit* and a *Retraxit*.

A *Nonſuit* is when the *Plaintiff* is called upon by the Court, and don't appear; and a *Retraxit* is when the *Plaintiff* is in Court, and declares he will not proceed in his Cauſe any

further; in which Caſe the Action is barred for ever.

Sometimes the *Plaintiff*, after he has entered his Cauſe, (which being called on, and a Jury ſworn) will come and withdraw his Record, and thereby ſuffer a *Nonſuit*; but this don't amount to a *Retraxit*. A *Retraxit* muſt be in Perſon, and not by Attorney.

A *Plaintiff*, when he finds himſelf not ſufficiently prepared to go to Trial, (as in caſe a material *Witneſs* ſhould be wanting, or ſome Matter to be given in Evidence is not obtained, *&c.*) will rather ſuffer a *Nonſuit* than hazard a Trial; becauſe, ſhould the *Defendant* obtain a Verdict, (unleſs in Ejectment) the Defendant may plead it in *Bar* to a new Action; but a *Nonſuit*, as is ſaid, is no Bar.

When the *Jury* have given their Verdict, or the *Plaintiff* is *nonſuited*, the *Aſſociate* records the ſame on the Back of the Record; and if the Cauſe was tried at the Aſſizes, afterwards, (*viz.* four Days after the Day in Bank in the next Term) he delivers the ſame to the Party in whoſe Favour it is. But when the Cauſe is tried in Town, the *Aſſociate* delivers the Record, with his Minutes only of the *Verdict* or *Nonſuit*, indorſed on the Back of the Pannel, immediately to the Attorney; and the Attorney records the Subſtance thereof on the Back of the Record. This is called the *Poſtea*, and is the proper Inſtructions for entering up the Judgment on the *Iſſue* Roll. It is called the *Poſtea* from the firſt Word thereof, for it began, *Poſtea Die et Loco, &c.* It is the Subſtance of what was done at the *Aſſizes* or *Niſi prius*, as is ſeen in the following Forms:

A Poſtea at the Aſſizes for the Plaintiff, where the Defendant makes Default in the King's Bench.

* *Afterwards,* † *on the Day and at the Place within contained before Sir* M. F. *Knight, one of the Juſtices of our Lord the King of the Bench, and* , *Eſq; one of the Barons of the Exchequer of our ſaid Lord the King, Juſtices of our ſaid Lord the King aſſigned to take the Aſſizes in the ſaid County of* B. *according to the Form of the Statute in that Caſe made and provided; the within-named* A. B. *came by his Attorney within contained, and the within-named* C. D. *although ſolemnly demanded,* § *came not, but made Default*

---

* *Afterwards,* that is, after the Return of the *Venire,* and the awarding the *Diſtringas* or *Habeas Corpora.*

† *On the Day and at the Place within contained, &c. i. e.* on the Day of *Niſi prius,* and at the Place appointed for holding the Aſſizes before, *&c.* came, *&c.* at which Time the Defendant is called to hear the Names of the *Jurors* that are to paſs on the Inqueſt.

§ *Came not, but made Default.* If the Defendant ſays nothing when the Pannel is called by way of *Challenge* to the *Poll* or the *Array,* the Court proceeds to ſwear the Jury; and then it is ſuggeſted by the Entry of the *Poſtea,* that the Defendant being ſolemnly *called, came not, but made Default.* Therefore it is ordered by the Court, that the Jury be *taken* or are *accepted* of by the Court, *through his Default in not challenging them.* This *Default* relates to nothing more, for the Defendant and his Attorney might be there ready at the firſt calling of the Cauſe; and he loſes no Advantage by ſuch a *ſuppoſed* Default, but that

fault. Therefore let the Jurors of the Jury within mentioned be taken againſt him by Default; and the Jurors of that Jury being ſummoned came, who to ſay the Truth of the within Contents being choſen, tried and ſworn, ſay upon their Oath, that the within-mentioned Writing Obligatory is the Deed of the within-named C. D. *as the within-named* A. B. *has within declared againſt him; and they* * *aſſeſs the Damages of the within-named* A. B. *by Occaſion of the detaining that Debt, over and above his Coſts and Charges by him about his Suit in this Behalf, expended, to and for thoſe Coſts to forty Shillings.*

---

he cannot challenge any of the Jurors after they are ſworn. It notwithſtanding ſounds very ſtrange to hear it alledged that the Defendant *came not, but made Default*, on being called, though he was there, and made none; and that, before a Word about the Jury is ſpoke. It ſeems the *Aſſociate* and *Cryer* take each a Fee for ſuch *ſuppoſed Default*, and therefore it may be ſuppoſed to be thus drawn up to warrant ſuch Fee.

* *And they aſſeſs the Damages, &c.* Where the Plaintiff prevails, the Jury always find ſome *Damages* that he has ſuſtained, (or elſe he is nonſuited) which intitles him to his Coſts of Suit; ſuch Damages are more or leſs, as they ſee Cauſe for it. A *Penny* Damages, in ſome Caſes, intitles him to Coſts; but in ſome others he ſhall have no more Coſts than Damages, *&c.* At Common Law there was neither Damages nor Coſts, but if the Plaintiff did *not* prevail, he was amerced *pro Falſo Clamore*; and if he *did* prevail, then the Defendant was *in Miſericordia*, for his unjuſt Detention of the Plaintiff's Right. And thus it ſtood till the Statute of *Glouceſter, Anno* 6 *E.* 1. 1278, whereby Damages and Coſts, *&c.* are given.

The

The Poſtea, when in Town, for the Plaintiff, on Default, in the King's Bench.

Afterwards, that is to ſay, on the Day and at the Place within contained, before Sir William Lee, *Knight, the Chief Juſtice within named,* Thomas Owen, *Gentleman, being aſſociated unto the ſaid Chief Juſtice, by Force of the Statute in that Caſe made and provided, the within-named* A. B. *came by his Attorney within-contained; and the within-named* C. D. *although ſolemnly demanded, came not, but made Default. Therefore let the Jurors, &c.* as above.

A Poſtea at the Aſſizes for the Plaintiff, on Non Aſſumpſit, in the Common Pleas.

Afterwards, on the Day and at the Place within contained, the within-named A. B. *by his Attorney within-named, came before Sir* John Willes, *Knight, Chief Juſtice of our Sovereign Lord the King of his Common Bench, and Sir Knight, one of his ſaid Majeſty's Juſtices of the ſaid Common Bench, Juſtices of our ſaid Sovereign Lord the King appointed to hold the Aſſizes for the County of* B. *and the within-named* C. D. *although ſolemnly required, came not there, but made Default. Therefore let the Jury, whereof Mention is within made, be accepted of againſt him by his Default; whereupon the Jurors ſummoned*

ſummoned to be upon that Jury came to declare the Truth of the within Contents, and being choſen, tried, and ſworn, ſay upon their Oaths, that the ſaid C. D. *did undertake in Manner and Form as the ſaid* A. B. *within complains againſt him, and they aſſeſs the ſaid* A. B. *his Damages occaſioned by the ſaid within Contents, beſides his Expences and Coſts laid out by him in this Behalf, to* Pounds, *and for his Expences and Coſts to forty Shillings.*

A Poſtea in Town, in the Common Pleas, by Default.

Afterwards, the Day and Place within contained, before Sir Charles Pratt, *Knight, Chief Juſtice within written, having*
Gentleman, for his Aſſociate, according to the Force of the Statute in ſuch Caſe made and provided, cometh the within-named A. B. *by his Attorney within contained; and the within-written* C. D. *although ſolemnly called, cometh not. Therefore let the Jury, &c.* as above.

A Poſtea where the Defendant appears.

Afterwards, at the Day and Place, &c. come as well the within-named A. B. *as the within written* C. D *by their Attornies within contained, and the Jurors of the Jury, whereof Mention is within made, being ſummoned, came to declare the Truth of the Matter within contained; and being choſen, tried, and ſworn upon their Oaths, ſay, that, &c.*

For

For the Plaintiff, on Nil debet.

——— *ſay upon their Oaths, that the within-named* C. D. *doth owe to the within-named* A. B. *the* 30l. *within mentioned, in Manner and Form as the ſaid* A. B. *within complains againſt him; and they aſſeſs, &c.*

For the Plaintiff, in Treſpaſs.

——— *ſay upon their Oaths, that the within-named* C. D. *is guilty of the Premiſſes within-laid to his Charge, in Manner and Form as the ſaid* A. B. *within complains againſt him; and they aſſeſs the Damages of the ſaid* A. B. *by Occaſion thereof, over and above his Coſts and Charges, &c.*

For the Plaintiff, in Ejectment.

——— *ſay upon their Oaths, that the ſaid* C. D. *is guilty of the Treſpaſs and Ejectment within-written, in Manner and Form as the ſaid* A. B. *within complains thereof againſt him; and they aſſeſs the Damages of the ſaid* A. *by Occaſion thereof, over and above, &c.*

In Ejectment, Guilty as to Part; Not guilty as to the Reſidue.

——— *As to the Treſpaſs and Ejectment of one Moiety of the within-written Tenements, they ſay upon their Oaths, that the ſaid* C. D. *is guilty*

guilty thereof as the ſaid A. B. *within complains againſt him; and they aſſeſs, &c.* as before. *And as to the Treſpaſs and Ejectment of the other Moiety of the Tenements within-written, the ſaid Jurors ſay upon their Oaths, that the ſaid* C. D. *is not guilty thereof, as the ſaid* A. B. *has within by Pleading alledged. Therefore, &c.* See Judgment.

For the Plaintiff on an Iſſue of Plene Adminiſtravit, in the King's Bench.

——— *ſay upon their Oaths, that the ſaid* C. D. *hath, and on the Day of exhibiting the Bill of the ſaid* A. *within-written, to wit, on the Day of in the Year of the Reign of our Sovereign Lord the preſent King, had divers Goods and Chattels which were of the ſaid* F. *at the Time of his Death in her Hands to be adminiſtred, to the Value of the Debt within ſpecified, whereof ſhe might have made Satisfaction to the ſaid* A. *for his ſaid Debt, to wit, at* W. *within contained, in the County aforeſaid; and they aſſeſs the Damages of the ſaid* A. *by Occaſion thereof, beſides his Expences and Coſts by him, &c.* Vide antea.

In the *Common Pleas* in this, you ſay, *On the Day of ſuing out the Original Writ of, &c.*

For the Defendant, on Not guilty in Treſpaſs.

——— *ſay upon their Oaths, that the ſaid* C. D. *is not guilty of the Treſpaſs in the Declaration within*

within ſpecified, as the ſaid C. *hath by his Pleading within alledged. Therefore,*

One Defendant guilty in Treſpaſs, others not.

——— *ſay upon their Oaths, that the ſaid* C. D. *is guilty of the Treſpaſs within-written, as the ſaid* A. B. *within complains thereof againſt him; and they aſſeſs Damages, &c. And the ſaid Jury further upon their ſaid Oaths ſay, that the ſaid* E. F. *and* G. H. *are not guilty of that Treſpaſs as the ſaid* E. F. *and* G. H. *within by pleading for themſelves have alledged. Therefore, &c.*

For Defendant, an Executor, that his Teſtator Nonaſſumpſit.

——— *ſay upon their Oaths, that the within-named* C. D. *(the Teſtator) did not, in his Life-time, undertake in Manner and Form as the ſaid* A. B. *hath within declared, &c.*

Part for Plaintiff, Part for Defendant, on an Aſſumpſit.

——— *As to the firſt and laſt Promiſes in the Declaration within mentioned, they ſay upon their Oaths, that the ſaid* C. D. *undertook, in Manner and Form as the ſaid* A. B. *within complains againſt him; and they aſſeſs the Damages of the ſaid* A. B. *by Occaſion thereof, over and*

and above his Coſts and Charges by him about his Suit in this Behalf expended, to Pounds, *and for thoſe Coſts and Charges to* 40 s. *And as to the Reſidue of the Promiſes and Undertakings in the ſaid Declarations alſo within mentioned, the ſaid Jurors further upon their Oaths ſay, that the ſaid* C. D. *did not undertake, in Manner and Form, as the ſaid* C. D. *within, by pleading for himſelf, has alledged. Therefore, &c.*

For the Defendant, in Treſpaſs, on the Statute of Limitations pleaded.

——— *ſay upon their Oaths, that the ſaid* C. D. *did not, at any Time within ſix Years next before the ſuing out the ſaid Writ, break and enter the Houſe of the ſaid* A. *nor take and carry away the Goods and Chattels of the ſaid* A. *within contained, as the ſaid* C. *has within by pleading alledged.*

The Entry, where the Plaintiff is nonpros'd.

——— *And the Jurors of that Jury being ſummoned, came; who, to ſay the Truth of the within Contents, were choſen, tried and ſworn, and after Evidence being given to them, of and upon the within contained, went from the Bar of this Court to diſcourſe of their Verdict of and upon the Premiſſes; and after the ſaid Jury had diſcourſed and agreed among themſelves, they came back to the ſaid Bar to give their Verdict in this Behalf; upon which the ſaid*

ſaid A. B. *being ſolemnly required came not, nor did he further proſecute his ſaid Bill againſt the ſaid* C. D. *Therefore, &c.*

In the *Common Pleas*, —— *Nor did further proſecute his ſaid* Writ.

The Entry, where a Juror is withdrawn.

—— *Were choſen, tried and ſworn, to declare the Truth of the within Contents, whereupon for certain Cauſes moving as well the ſaid Juſtices as the Parties,* E. F. *one of the Jurors of the within-mentioned Jury was withdrawn from the Pannel; and the Reſidue of the Jurors of that Jury are intirely diſcharged from giving any Verdict of and concerning the within-mentioned Premiſſes, &c.*

By theſe are ſeen, in general the Forms of the *Poſtea's*, either for Plaintiff or Defendant. They are drawn up in ſuch general Words, as the *Iſſues* to which they relate are worded, and may be with or without the Defendant's Default. They are afterwards *continued* on the *Iſſue Roll*, for they are the Inſtructions for entering up the Judgment thereon, which afterwards obtain the Name of the *Judgment Roll*, as ſee *poſt.* by which we ſhall ſee the Reaſon of the formal Beginning of the *Poſtea.*

Though by the late Act there are now ſcarce any Want of *common* Jurors, yet it may be proper to add a *Poſtea* with a *Tales*, to ſee the Form thereof, as it may be wanted in *ſpecial* Juries.

A Poſtea, with a Tales in Town.

Afterwards, that is to ſay, on the Day and at the Place within mentioned, before William *Lord* Mansfield, *the Chief Juſtice within written, there being aſſociated unto him* T. O. *Gentleman, according to the Form of the Statute in that Caſe made and provided, came the within-named* A. B. *by his Attorney within contained, and the within-named* C. D. *although ſolemnly required, came not, but made Default. Therefore let the Jury, whereof Mention is within made, be accepted of againſt him through his Default; and the Jurors of that Jury being ſummoned, ſome of them, that is to ſay,* E. F. G. H. I. K. (naming ſuch of them as appear, and are ſworn of the Pannel) *and becauſe the Reſidue of the Jurors of the ſame Jury do not appear, therefore other Perſons of thoſe ſtanding by the Court, by the Sheriff of the County aforeſaid, at the Requeſt of the ſaid* A. *and by the Command of the ſaid Chief Juſtice, are now newly ſet down, whoſe Names are affiled in the within-written Pannel, according to the Form of the Statute in that Caſe made and provided; which ſaid Jurors ſo newly ſet down, that is to ſay,* L. M. N. O. P. Q. *&c.* (naming the Taleſmen) *being required, came; who, together with the ſaid other Jurors before impannelled and ſworn to declare the Truth of the within-Contents, being elected, tried and ſworn upon their Oaths declare, that the ſaid* C. D. *did not undertake in ſuch Manner, &c.* as before.

Though

Though it is ſaid that the late Act has rendered the *Tales de Circumſtantibus* almoſt uſeleſs, it is ſpoken with reſpect to *common* Juries; but where there is a *ſpecial* Jury, it does not always happen that 12 out of the 24 do appear; in which Caſe it is common to take ſome from out of the common Jury to add to the Pannel of the ſpecial Jury to make up the Number; and in ſuch a Caſe theſe common Jurymen are conſidered as *Tales-men, viz.*

A Poſtea at the Aſſizes, with a Tales.

Afterwards, (that is to ſay) on the Day, in the Year, and at the Place within mentioned, come as well the within-named J. B. *Eſq; as the within-named* W. R. *by their Attornies within-named, before Sir* Michael Foſter, *Knight, one of the Juſtices of our Lord the King aſſigned to hold Pleas before the King himſelf, and Sir* Sidney Stafford Smythe, *Knight, one of the Barons of our ſaid Lord the King of his Court of* Exchequer, *his Majeſty's Juſtices aſſigned to hold the Aſſizes for the within-written County of* B. *according to the Form of the Statute, &c. And certain of the Jurors of the Jury, whereof Mention is within-made, ſummoned to be upon that Jury (that is to ſay) Sir* T. H. *Knight,* J. E. H. H. J. T. *and* W. B. *Eſquire, come and on that Jury are ſworn; and becauſe the Reſt of the Jurors of that Jury do not appear, therefore ſeven other Perſons of the By-ſtanders, being by the Sheriff within written hereunto elected at the Requeſt of the ſaid* J. *and by the Command of the*

ſaid Sir Michael Foſter, *are now newly ſet down, whoſe names are affiled in the within-written Pannel, according to the Form of the Statute, &c. and which ſaid Jurors, ſo newly ſet down, (that is to ſay)* C. G. R. B. F. P. J. W. T. P. J. W. *and* J. L. *Gentlemen, being required, come likewiſe, and together with the ſaid other Jurors before impannelled, being tried and ſworn to ſpeak the Truth of the Matters within contained, upon their Oaths ſay that the ſaid* W. *does owe to the ſaid* J. *the ſum of* 500 l. *ſpecified in the firſt Count of the within Declaration, being Parcel of the within-mentioned Sum of* 1000 l. *in Manner and Form as the ſaid* J. *hath within thereof complained againſt the ſaid* W. *And they aſſeſs the Damages of the ſaid* J. *by Reaſon thereof, beſides his Coſts and Charges by him about his Suit in this Behalf laid out and expended, to one Shilling, and for his ſaid Coſts and Charges to forty Shillings. And the Jurors aforeſaid upon their ſaid Oaths further ſay, that as to the Reſidue of the ſaid ſum of* 1000 l. *the ſaid* W. *does not owe the ſame, or any Part thereof, to the ſaid* J. *as the ſaid* W. *hath in pleading within alledged.*

N. B. This Action was for Bribery at the Election of a Member for *Abingdon* in Com. *Berks.*

The Judgment.

Therefore it is conſidered that the ſaid J. B. *do recover againſt the ſaid* W. R. *his ſaid Debt and Damages by the ſaid Jury in Form aforeſaid aſſeſſed, and alſo* l. *for his ſaid Coſts and*

and Charges by the Court of our ſaid Lord the King, now here, adjudged of Increaſe to the ſaid J. *by his Aſſent, which Damages in the whole amount to ſix hundred, &c. Pounds; and the ſaid* William *in Mercy, &c*

The *Poſtea* being ingroſſed on the *Back* of the Record, the Party intitled to it, on the Day in *Bank*, (or afterwards) gives a Rule on the *Poſtea* in the *King's Bench*, called a Rule for Judgment; which Rule is out in four Days, excluſive after the giving it. But till this Rule is expired, final Judgment cannot be ſigned. Theſe *four* Days are allowed for the other Party to move in Arreſt of the Judgment, or for a new Trial; or he may bring a Writ of Error. And though no ſuch Rule is given in the *Common Pleas*, yet the ſame Time is allowed there for the ſame Purpoſes; and if nothing is done to avoid the Judgment, then the Party, having got the *Poſtea* ſtamped with a double Half-crown Stamp, carries the ſame to the proper Officer, that is, the *Maſter*, or *Secondary* of the *King's Bench* Office, or the *Prothonotary* in the *Common Pleas*, to *tax* his Coſts thereon. This is called ſigning the *final* Judgment, and the Coſts are called Coſts *de incremento*, or *increaſed* Coſts.

Of Coſts.

It has been obſerved, that there was no ſuch Thing as Coſts at Common Law, but that, if the Plaintiff did *not* prevail, he was *amerced* for his *falſe Claim*; and if he *did* prevail, the Defendant was *in Miſericordia*, for his unjuſt

Detention of the Plaintiff's Right. It was called *in Miſericordia*, becauſe the *Amerciament* to be impoſed was to be but ſmall, and rather leſs than the Offence, according to *Magna Charta*, *c.* 14.

Theſe *Amerciaments* were then inſtead of *Coſts*; and though the Uſe is gone, the Term ſtill remains, for where the Plaintiff or Defendant in the Action fails, the Entry of the Judgment is ſtill *Ideo in Miſericordia*, *&c.* But as this made no Amends to the Plaintiff for the *Coſts* he had been out of Pocket, the Statute of *Glouceſter* 6 *Ed.* 1. *c.* 1. was made, whereby *if any Perſon recovered Damages in a Plea perſonal or mixed, he ſhould have his Coſts.* This is ſaid to be the Original of Coſts *de incremento*, for then the Damages were found by the Jury; and the Court, inſtead of Amerciaments, uſed to tax the moderate Fees of *Counſel* and *Attornies*.

Thus it ſtood for the Plaintiff, until the 43 *El. c.* 6. whereby, if the Plaintiff did not recover in a perſonal Action (not concerning Freehold nor Aſſault and Battery) 40 *s.* he ſhould have no more Coſts than Damages, unleſs, *&c.* The ſeveral Statutes relating to Coſts and Damages are the 6 *Ed.* 1. *c.* 1. 6 *Ed.* 2. *c* 14. 3. *H.* 7. *c.* 10. 23 *H.* 8. *c.* 15. 8 *El. c.* 2. 18 *El. c.* 15. 43 *El. c.* 6. 4 *Ja.* 1. *c.* 3. 7 *Ja.* 1. *c.* 5. 21 *Ja.* 1. *c.* 16. 13 *Car.* 2. *c.* 2. 22 *&* 23 *Car.* 2. *c.* 9. 5 *&* 6 *W. & M. c.* 12. 8 *&* 9 *W.* 3. *c.* 10. 11 *&* 12 *W.* 3. *c.* 9. 4 *&* 5 *Ann. c.* 16, *&c.*

The awarding of *Coſts* was always *diſcretionary* in the Court, and formerly the *Puiſne* Judge of the Court uſed to allow the *Coſts*, and make a *ſpecial* Rule for the Payment of them; upon the Service whereof, and Refuſal of Pay-

Payment, an *Attachment* uſed to iſſue. But now it is become the Courſe of the Courts to refer the taxing of the *Coſts* to the *Secondary* and *Prothonotaries*, and not to make any *ſpecial Rules* for ſuch Matters. And theſe Officers have a diſcretionary Power to allow what is reaſonable, and diſallow what is not ſo; for ſuch Coſts are only to be allowed as have neceſſarily occurred in the Proſecution, or where one of the Parties has cauſed the other to have been at extraordinary Charges. And therefore it has been held that Coſts ought not to be paid for the putting off a Trial, where no Fault was in the Party againſt whom it was moved. In like Manner, *no Coſts* ſhould be allowed for unreaſonable Motions, nor for extraordinary Fees to Counſel, as retaining Fees, *&c.* nor extraordinary Expences on Witneſſes at the Trial, nor paying them beyond what is uſually allowed for their Attendance, *&c.* but for ſuch Expences only as the Party was neceſſarily put to in the Proſecution of the Suit. And hence ariſes the Difference in Coſts between Party and Party, and Coſts between the Attorney and his Client.

When the Coſts on the *Poſtea* are taxed, (which is moſt frequently done on an Affidavit of the increaſed Coſts) final Judgment is then ſaid to be ſigned, and is then ready to be entered up on the Roll.

Of entering up Judgment on the Roll in the King's Bench.

It has been obſerved before, that the *ſecond Placita* in the Record for Trial, was a general

Entry made uſe of to ſupply the *Continuances* of the *Venire*, even to that *Term* mentioned in that *Placita*, (which was the Term of Trial) and ſerved to ſhew the Court that the Iſſue was continued to the laſt Term. It was likewiſe a Warrant to the Officer to continue the *Venire* until then, when he came to enter up the Judgment on the Iſſue Roll. And this introduced the general formal Beginning with *Poſtea Continuato inde Proceſſu*, in entering up the Judgment, *viz.*

—— The Iſſue ends with, *The ſame Day is given to the Parties aforeſaid at the ſame Place*, then they go on with * *Afterwards the Proceſs thereof being continued between the Parties aforeſaid, of the Plea aforeſaid, by the Jury aforeſaid, being reſpited between them before our Lord the King at* Weſtminſter, *until next after* (the Return of the *Diſtringas*) ‡ *unleſs the Juſtices of our Lord the King, aſſigned to take the Aſſizes in the County aforeſaid, ſhall firſt come on the Day of at* R. *in the ſaid County of* B. *according to the Form of the Statute in ſuch Caſe made and provided,* † *for Default of the Jurors, becauſe*

* *Afterwards the Proceſs, &c.* that is, the Writ of *Venire*.

‡ If the Cauſe is tried in Town, it is, *Unleſs the King's right truſty and well-beloved* William *Lord* Mansfield, *his Majeſty's Chief Juſtice aſſigned to hold Pleas before the King himſelf, ſhall firſt come on the Day of at the* Guildhall *of the City of* London, *or* Weſtminſter-hall, *&c.* And then alſo —

And the ſaid Chief Juſtice before whom, &c. ſent hither his Record, &c.

† *For Default of the Jurors, &c.* This is only a Recital of Part of the Award of the *Diſtringas*, grounded on a ſuppoſed Default of the Jurors not coming on the *Venire*.

none

none of them did appear, ‡ *at which Day before our Lord the King at* Weſtminſter *the aforeſaid* A. B. *comes by the ſaid* R. B. *his Attorney aforeſaid; and the ſaid Juſtices of our ſaid Lord the King, before whom, &c. ſent hither their Record had in theſe Words, to wit, Afterwards, that is to ſay, on the* ‖ *Day and at the Place within contained before* —— (here comes in the *Poſtea, verbatim*; after which follows the Judgment.) *Therefore it is conſidered that the ſaid* A. B. *recover againſt the ſaid* C. D. *his ſaid Damages, by the ſaid Jury in Form aforeſaid aſſeſſed; and alſo* (the Coſts *de incremento*) *for his ſaid Coſts and Charges, by the Court of our ſaid Lord the King now here adjudged of Increaſe to the ſaid* A. B. *with his Aſſent, which Damages in the whole amount to*
And the ſaid C. *in Mercy, &c.*

If what is before alledged be conſidered, that is, that anciently the Court of *King's Bench* had ſo little to do in *Civil* Actions, that they had not Buſineſs to ſit the whole Term, *de Die in Diem*, but adjourned from one Day to another, in the ſame Term, and gave a Day to the Parties to be preſent when they did ſit. If this, I ſay, be conſidered, there will ſome Reaſon appear for the Uſe of a ſecond *Placita*, though the Cauſe was tried the ſame Term that the Iſſue was joined; and likewiſe for their beginning the Entry of the Judgment on the Roll with *Poſtea Continuato inde Proceſſu, &c.*

‡ *At which Day, &c.* That is, on the Return of the *Diſtringas.*

‖ *On the Day and at the Place, &c.* The Day and Place of *Niſi prius* mentioned in the *Jurat*, or Award of the *Diſtringas.*

But at preſent they both ſeem, not only unneceſſary, but very incoherent; for this Form is now uſed when there is no Continuance at all, as when the Cauſe is tried the ſame Term the *Iſſue* is joined, in which Caſe the *Venire* is returned in the ſame Term, on which *very* Return Day the *Diſtringas* is teſted. Where then is any *Continuance* of the Proceſs?

When the Cauſe is not tried the ſame Term the Iſſue is joined, then the firſt *Venire*, awarded by the Iſſue, is continued by *Vicecomes non miſit Breve*; and ſo on in like Manner, from Term to Term, until the *Diſtringas* iſſues; and the laſt *Venire* is continued, as before, by *Poſtea Continuato, &c.* thus:

—— *the ſame Day is given to the Parties aforeſaid at the ſame Place*; * *at which Day before our Lord the King at* Weſtminſter *came the Parties aforeſaid, by their Attornies aforeſaid, and the Sheriff of* Berks *did not return the ſaid Writ, nor did they do any Thing thereupon; therefore let a Jury come thereupon before our Lord the King at* Weſtminſter, *on next after* (ſome Return in the Term next after that the *firſt* Writ was returnable in) *who are in no wiſe of Kin either to the ſaid* A. B. *or to the ſaid* C. D. *to take Cognizance upon their Oath of the whole Truth of the Premiſſes, becauſe as well the ſaid* C. D. *as the ſaid* A. *have put themſelves upon that Jury; the ſame Day is given to the Parties aforeſaid at the ſame Place,* (if there is to be other Continuances to other Terms, begin again for each) *at which Day before our Lord the King at* Weſtminſter *came the Parties aforeſaid, by their*

* *At which Day, &c. i. e.* on the Return Day of the *Venire.*

Attornies

Attornies aforeſaid, and the ſaid Sheriff of B. *did not return the ſaid Writ, nor did they do any thing thereupon; therefore, as before, let a Jury come, &c.* (to the next Term, and ſo on from Term to Term, to that wherein the *Diſtringas* is returnable.) *Afterwards the Proceſs being continued between the Parties aforeſaid of the Plea aforeſaid, by the Jury being reſpited between them, before our Lord the King at* Weſtminſter, *until next after unleſs his Majeſty's Juſtices aſſigned to hold the Aſſizes in the County aforeſaid ſhould firſt come on* Saturday *the Day of at* R. *in the ſaid County, according to the Form of the Statute in ſuch Caſe made and provided, for Default of the Jurors, becauſe none of them did appear; at which Day before our Lord the King at* Weſtminſter *the aforeſaid* A. B. *comes by the ſaid* R. B. *his Attorney, and his ſaid Majeſty's Juſtices before whom, &c. ſent hither their Record had in theſe Words, to wit, Afterwards, that is to ſay, on the Day and in the Year, and at the Place, &c.* (the *Poſtea verbatim*) *therefore it is conſidered, &c.*

Of the Entry of the Judgment on the Roll in the Common Pleas.

The Entry of the Judgment on the Roll in the *Common Pleas* differs in Form from that in the *King's Bench*, though it is the ſame in Subſtance. The Reaſon of this Difference is, that in the *Common Pleas* they allow no Continuance of the Proceſs, when the Cauſe is tried the ſame Term the Iſſue is joined, and for the ſame

ſame Reaſon they uſe no ſecond *Placita*; therefore, inſtead of *Poſtea Continuato inde Proceſſu*, after the Cloſe of the Iſſue, they begin more properly thus:

At which Day (*i. e.* the Return Day of the *Venire*) *the Jury between the Parties aforeſaid, in the Plea aforeſaid, was reſpited thereupon between them here until the Morrow of* All Souls, (*i. e.* the Return of the *Habeas Corpora*) *then next following, unleſs the Juſtices of our Sovereign Lord the King aſſigned to take the Aſſizes in the County aforeſaid by Form of the Statute, &c. ſhould firſt come on the Day of then next paſt, at* A. *in the County aforeſaid*; *and now here at this Day,* (*i. e.* the Return Day of the *Habeas Corpora* above) *the ſaid* A. B. *comes by his Attorney aforeſaid, and the ſaid Juſtices of Aſſize before whom, &c. ſent here their Record in theſe Words: Afterwards, that is to ſay, on the Day, &c.* (the *Poſtea verbatim*) *therefore it is conſidered that the ſaid* A. *do recover his ſaid Damages againſt the ſaid* C. *to Pounds aſſeſſed by the ſaid Jury in Form aforeſaid*; *and alſo Pounds adjudged by the Court here to the ſaid* A. *at his Requeſt of Increaſe for his ſaid Coſts and Damages*; *which ſaid Damages in the whole amount to Pounds, and the ſaid* C. *in Mercy, &c.*

But if the Cauſe is not tried the Term Iſſue is joined, then is added a *ſecond Placita*; and the firſt *Venire* is continued by *Vicecomes non miſit Breve* only: after which Continuance they begin as above, *At which Day the Jury, &c.* without

without ever any *Poſtea Continuato, &c.* for that would ſeem to be a Continuance upon a Continuance.

The Queſtion is, If the Reſpite of the Jury is a Continuance of the Proceſs, to give ſome Colour for the Entry by *Poſtea Continuato, &c.* in the *King's Bench*? If not, we muſt have Recourſe to the former Reaſon aſſigned for this Entry, *viz.* that *Continuances* in the *King's Bench* were from one Day to another, in the ſame Term; which Reaſon will not hold good at this Day, the Continuances being from Term to Term only.

The Entry of the Judgment varies, according to the Judgment that is given, of which the Books of Practice are ſufficiently full. However, two Things may be here obſerved, as they are preſumed to have been uſed before any Coſts were given by the Judgment, according to the Stat. 6 *E.* 1. *viz.* the *amercing* the Plaintiff for his *falſe Claim*; and the Defendant for his *unjuſt Detention* of the Plaintiff's Right, *&c.* In regard to the firſt, where the Defendant prevails, the Entry of the Judgment againſt the *Plaintiff* is ſtill thus in the *King's Bench*:

Therefore it is conſidered that the ſaid A. *take nothing by his ſaid Bill, but that he be in Mercy of the Court for his falſe Clamour, and that the ſaid* C. *go thereof without Day*; * *and it is further conſidered that the ſaid* C. *recover againſt the ſaid* A. *Pounds for his Coſts and Charges laid out by him about his*

* This is an Addition to the former Judgment, ſince the Statute gave Coſts.

Defence

Defence in this Behalf adjudged to the ſaid C. *by the Court of our ſaid Lord the King now here by his own Aſſent, according to the Statute in ſuch Caſe made and provided, and that the ſaid* C. *have Execution thereof.*

In the Common Pleas.

Therefore it is conſidered that the ſaid A. *take nothing by his ſaid Writ, but be in Mercy for his falſe Clamour thereupon; and that the ſaid* C. *go thereof without Day,* * *&c. Alſo it is conſidered, &c.*

* See Note in foregoing Page.

Sometimes, as in *Repleven, &c.* it is, *That the ſaid* A. *and his Pledges for proſecuting, are in Mercy, &c.*

In Regard to the ſecond, that is, *amercing* the *Defendant*, we have ſeen before the Judgments with reſpect to it. But in all Actions in both Courts that were *Vi et Armis*, the Judgment againſt him was with a *Capiatur, And that the ſaid* C. *be taken, &c.* inſtead of *in miſericordia*, becauſe in this Caſe there was a Fine due to the King; and therefore the Judgment was to be diſtinguiſhed on every Roll by putting the Word *Mi'a*, or *Capiatur* in the Margin, as is ſuppoſed for the more ready finding the *Capiatur Fines*, in order to collect them.

Before the Stat. 16 & 17 *Car.* 2. the not entering the Words *Mi'a*, or *Capiatur*, or putting one for the other, was Matter of *Error*.

To all *Fines* Impriſonment was incident; and therefore in Actions *Vi et Armis*, where a Fine was to be ſet, the Judgment was, *Quod Defendens Capiatur*, that is, *Capiatur quouſque Finem fecerit.* But now by the 4 & 5 *W.* & *M.*

M. Capiatur Fines in Actions *Vi et Armis* are ſaid to be taken away, and no Judgment ought to be entered with a *Capiatur*. However, the common Form ſtill continues, *And that the ſaid* C. *be taken*, &c. though there be no Fine ſet by the Court; the Reaſon of which is, that inſtead thereof, the Plaintiff, upon ſigning the final Judgment in ſuch Actions, is to pay to the Officer 6 *s.* 8 *d.* in lieu of the Fine, which 6 *s.* 8 *d.* is to be allowed the Plaintiff again in the Coſts. And 'tis ſaid, in the *Common Pleas* they enter the Judgments with *Nihil de Fine quia remittitur per Stat'*. So that by this Statute a Fine of 6 *s.* 8 *d.* inſtead of being taken away, is rather rendered certain, and to be paid by the Plaintiff, inſtead of the Defendant. Whether the Plaintiff ever gets it again, is another Thing!

The *Capiatur* Fine was for a Breach of the public Peace, which every Action *Vi et Armis* implies, and upon ſuch a Record, Proceſs of Outlawry might iſſue out of the *Crown Office* againſt the Defendant for the Fine, if not paid; but in Actions upon the Caſe, &c. where the Plaintiff did not declare with a *Vi et Armis*, there the Defendant was to be *amerced* only, and not *taken* and impriſoned. And this was the Reaſon of the Difference in the Entries of the Judgments.

Thus much is ſaid to ſhew to what the formal Parts of the Judgments relate only; to which much more might be added.

The *Judgment* itſelf is ſaid to be the Voice of the Law. And therefore *Judicium ſemper pro Veritate accipitur*; and the ancient Words thereof

thereof are very ſignificant, *viz. Conſideratum eſt, &c.* thereby implying that the Judgment was given by the Court, upon due Conſideration of the Matter before them. And yet, before the Statute of *Jeofails*, and the 4 & 5 *Annæ*, to what a Number of Exceptions, and vexatious Proceedings upon Writs of Error, *&c.* was a Judgment liable? Eſpecially for Want of Form in the moſt trifling, unneceſſary, and almoſt inſignificant Things imaginable, *viz.* the Want of *Pledges* upon the Bill or Original, the Omiſſion of a *Profert in Curia*, the Omiſſion of *Vi et Armis*, or *Contra Pacem*, or *Hoc paratus eſt Verificare*, the Want of *Continuances* in the Pleadings, or in the Judgments, *&c. &c.*

The only Thing to be obſerved further on this Head, in order to contract the Proceedings, is this, whether a general Entry by *Poſtea Continuato inde Proceſſu, &c.* in both Courts, where the Cauſe is not tried the ſame Term the Iſſue is joined, but of ſome ſubſequent Term, may not be ſufficient of itſelf to continue the *firſt* Proceſs of *Venire*, awarded at the Cloſe of the Iſſue to the Term the *Judgment* thereon be given, (whether or no it be to the next Term, or three or or four Terms after Iſſue is joined) and thereby ſupply all thoſe Continuances by *Vicecomes non miſit Breve*; or where *by Motion in Arreſt of Judgment*, or Motion *for a new Trial*, or by arguing a *ſpecial Verdict*, *&c.* there are *intervening* Terms; if not, it is abſolutely neceſſary every *intervening* Term ſhould be particularly taken Notice of in the Entry of the Judgment, or elſe there is an Error in the Record; which frequently happens

pens for Want of ſuch Entries, though no Notice be taken of it.

To clear up this Point, and to ſhew that it may, let us ſuppoſe the *Venire* to be to the only Proceſs for ſummoning a Jury for a Trial. This *Venire* is awarded at the Cloſe of the *Iſſue* to be returnable the ſame Term the *Iſſue* is joined; for Inſtance, in *Hilary* Term. Now if the Cauſe is tried upon this Writ with the *Niſi prius* Clauſe therein, it is *teſted* the *firſt* Day of that Term, and *returnable* the *laſt*, or ſome Day *after* the Trial, if in Town; but if for the *Sittings* after Term, or for the *Aſſizes*, it is *teſted* the *laſt* Day of that Term, and returnable the *firſt* of *Eaſter*. And then the Entry of the Judgment may be very properly according to the Form uſed in the *Common Pleas*, thus: *And now here at this Day (i. e.* the Return Day of the Writ) *the ſaid* A. B. *comes by his Attorney aforeſaid, and the Juſtices of Aſſize before whom, &c. ſent here their Record in theſe Words, Afterwards, that is to ſay, on the Day and at the Place within contained, &c.* (the *Poſtea verbatim) therefore it is conſidered, that*—ſo on with the Judgment. This is ſhort and plain, and yet full and explicit. But ſuppoſe the Cauſe is to be tried of ſome *ſubſequent* Term, for Inſtance, of *Trinity* Term, then the *Venire* awarded at the Cloſe of the *Iſſue* need not be made out, but only ſuppoſed to have iſſued, (as it is chiefly now) but a new *Venire* made out for Trial *teſted* the *firſt of Trinity*, and returnable the *laſt*, or ſome Day *after* the Trial for Town Cauſes; or *teſted* the *laſt of Trinity*, and returnable the *firſt of Michaelmas* Term for the *Aſſizes*. In which Caſes the firſt *Venire* awarded at the Cloſe of the

Iſſue may be continued by ſuch a general Entry as *Poſtea Continuato inde proceſſu, &c.* in entering up the Judgment, *viz. Afterwards the Proceſs being continued between the Parties aforeſaid, of the Plea aforeſaid, until* —— (the Return of the *Venire* made out for the Trial)—— *at which Day the ſaid* A. B. *comes by his Attorney aforeſaid, and the Juſtices, &c.* Now if ſuch a general Entry may be allowed to be a *Continuance* of the firſt *Writ* awarded in *Hilary* Term, it will ſupply all thoſe *Entries* on the Roll by *Vicecomes non miſit Breve, &c.* from Term to Term, until the entering up of the Judgment, in a very plain and ſimple Manner. And by this it is evident that the Writs of *Diſtringas* and *Habeas Corpora* may be well ſpared, and then of Conſequence there will be no Occaſion for the Entry of the *Jurat.* on the Record; and this, I preſume, will be agreeable to the original Uſe of this Writ.

Though the Entry of the final *Judgment* on the *Roll* is conſidered here as the next Proceeding after *ſigning* the *Judgment*, yet this need not be immediately done; for upon ſigning the Judgment, the Party intitled to the Benefit of it may firſt bring an Action on his Judgment, or he may have an Execution for the Satisfaction of his Damages, or Debt and Coſts, and *afterwards* enter up his *final Judgment* to warrant ſuch Action or Execution.

An Action is ſaid to be *Fructus et Finis Legis*, the Fruit and End of the Suit; for, as obſerved before, the Execution doth begin after the Action or Suit is ended: and therefore a Treatiſe of a Suit at Law ought to end here

here with the Judgment. But as there are ſeveral Writs of Execution now in Uſe, it may not be improper to take a ſlight View of them before we conclude.

Of an Execution.

An Execution is a judicial Writ, grounded on the Judgment of the Court from whence it iſſues; and is ſuppoſed to be granted by the Court, at the Requeſt of the Party at whoſe Suit it is, to give him Satisfaction on the Judgment which he hath obtained. And therefore an Execution cannot be ſued out in one Court, upon a Judgment obtained in another.

There are three Sorts of Executions commonly in Uſe at this Time, for the obtaining Satisfaction for a Debt, Damages, or Coſts given by the Judgment, *viz.*

A *Capias ad Satisfaciendum* againſt the Body of the Defendant only;

A *Fieri facias* againſt the Goods and Chattels of the Defendant only, and

An *Elegit* againſt the Goods and Chattels, (except Oxen and Beaſts of the Plough) and alſo one half of the Defendant's Lands, to hold by the Plaintiff, until the Debt or Damages and Coſts are ſatisfied.

The *Ca' Sa'* was given by the Statute of *Marlebridge*, *c.* 23. This Writ, by the Common Law, iſſued only in *Treſpaſs quare Vi et Armis*; but by the Statute 25 *Ed.* 3. it may iſſue in other Caſes, before which Time we ſee how tender the Common Law was of reſtraining a Man's Liberty. And now, indeed, whenever the Body is taken by this Writ, the

Plaintiff can have no other Execution againſt his Goods and Chattels, Lands or Tenements; for as *Corpus humanum non recipit Æſtimationem*, ſo it is deemed the greateſt and higheſt Satisfaction one Man can have of another. And hence, if a Man died in Cuſtody before the 21 *Jac.* 1. on this Writ, the Debt was preſumed to be ſatisfied; but by this Statute, *c.* 24. where a Defendant dies in Cuſtody on this Writ, the Plaintiff, or his Executors and Adminiſtrators, by reviving the Judgment, may have a new Execution againſt his Lands or Goods.

The *Fi' Fa'* was the only Writ of Execution that lay at Common Law, and was afterwards confirmed by the Statute of *Weſtminſter.* 2. If this Writ iſſues, and the Defendant has not any Goods or Chattels, whereby the Debt and Damages may be levied; or if only Part thereof be levied, the Plaintiff at the Return thereof may have another Writ of Execution, either another *Fi' Fa'*, or a *Ca' Sa'*, or an *Elegit*, for further Satisfaction.

The *Elegit* was given by the Statute of *Weſtminſter* 2. *c.* 18. If upon this Writ only Goods and Chattels be levied, and thoſe not ſufficient to ſatisfy the Plaintiff's Debts and Damages, the Plaintiff may have another Execution, either a *Ca' Sa'*, or a *Fi' Fa'*, or another *Elegit*, it being in Effect but a *Fi' Fa'*, and the Law is very deſirous a Man ſhould have a full Satisfaction on his Judgment.

And yet we can't but obſerve one very great Hardſhip that lies on the Plaintiff in this Reſpect, and that is this: When a Plaintiff has obtained a Judgment for a Debt in Caſe, *&c.* on a Trial or Writ of Inquiry, the Coſts allowed

allowed on ſigning final Judgment are up to that Time only, and the Coſts of an Execution, and levying the Debt and Coſts, are not conſidered. Therefore, if the Plaintiff takes out an Execution, the *Coſts* thereof with the Sheriff's Warrant, the Officer's Fee for taking the Defendant, or taking and keeping Poſſeſſion of his Goods, the Appraiſement and Inventory, the Bill of Sale, and the Sheriff's Poundage, muſt be all paid out of the Plaintiff's Debt; and this may amount to 40 *s.* at the laſt, and oftener to 3 or 4 *l.* which is a great deal out of a Debt of 5 or 6 *l.* or out of 20 *l.* and muſt give great Diſſatisfaction to a Suitor.

'Tis hard enough for a Man to be forced to take any Remedy at all for a juſt Debt, and how much more ſo, if after he has obtained a Judgment for his Debt and Coſts, as he imagines, he is ſtill to be put to this further Expence? *I have recovered my Debts and Coſts by a Judgment of the Court, and yet am ſo much out of Pocket!*

The Reaſon, as preſumed, why this is not conſidered, and allowed for in Coſts, on ſigning the final Judgment, is, becauſe the Court don't know what Remedy the Plaintiff will take on his Judgment; as inſtead of an Execution he may chuſe to bring an Action on it, and then only he can recover his Coſts without ſuch Expence. But even then, the Remedy is often worſe than the Diſeaſe; for if the Defendant can't pay the Coſts of one Suit, how can it be expected he ſhould pay the Coſts of two?

The Hardſhip is the ſame on a Defendant, where he prevails. But in order to remedy this, it is a Pity that the Party is not at Liberty to make his Election, on ſigning his final Judgment, what Method he will take that the Officer may make an Allowance accordingly.

It is for this Reaſon that Bonds and Warrants of Attorney to confeſs Judgment are made in double the Sum, becauſe by recovering the Penalty, theſe Coſts may be taken thereout.

APPENDIX.

APPENDIX.

Of an Iſſue joined in the Common Pleas *in an Action of Treſpaſs for fiſhing, &c.*

Cooke.

Hilary Term in the Thirty-third Year of the Reign of King *George* the Second.

Oxfordſhire, to wit. } FRANCIS G. late of *Warborough*, in the ſaid County, Yeoman; *William A.* late of the ſame Place, Victualler; *John E.* late of the ſame Place, Labourer; *Joſeph A.* late of the ſame Place, Maltſter; and *Samuel H.* late of *Benſington*, in the ſaid County, Gentleman, were attached to anſwer *Edward B.* of a Plea wherefore with Force and Arms they fiſhed in the *free* Fiſhery of the ſaid *Edward*, in the River *Thames*, at *Shillingford*, within the Pariſh of *Warborough*, in the ſaid County of *Oxford*, and the Fiſh of the Value of twenty Pounds thereout took and carried away; and alſo wherefore, with Force and Arms, they fiſhed in the *ſeveral* Fiſhery of the ſaid *Edward* in the River *Thames* at *Shillingford* aforeſaid, within the Pariſh of *Warborough* aforeſaid, in the ſaid County of *Oxford*, and the Fiſh of the Value of other twenty Pounds thereout took and carried away, and other Wrongs there did to the ſaid *Edward*, to the great Damage of the ſaid *Edward*, and againſt the Peace of our Lord the preſent King: And whereupon the ſaid *Edward*, by *A. B.* his Attorney, complains that Declaration.

1ſt Count. the ſaid *Francis*, *William*, *John*, *Joſeph*, and *Samuel*, on the firſt Day of *January* in the Year of our Lord one thouſand ſeven hundred and fifty-nine, and on divers other Days and Times between that Day and the twentieth Day of *November* then next following, with Force and Arms fiſhed in the *free* Fiſhery of the ſaid *Edward*, in the River *Thames*, at *Shillingford* aforeſaid, within the Pariſh of *Warborough* aforeſaid, in the ſaid County of *Oxford*, and the Fiſh, to wit, one Salmon, twenty Barbels, twenty Jacks, one thouſand Perches, one thouſand Blays, one thouſand Roaches, one thouſand Daces, one thouſand Gudgeons, and one thouſand Eels, of the Value, *&c.* thereout took and carried away; And alſo for

2*d* Count. that the ſaid *Francis*, *William*, *John*, *Joſeph*, and *Samuel*, on the ſaid firſt Day of *January* in the Year aforeſaid, and on divers other Days and Times between that Day and the twentieth Day of *November* then next following, with Force and Arms fiſhed in the *ſeveral* Fiſhery of the ſaid *Edward*, in the River *Thames*, at *Shillingford* aforeſaid, within the Pariſh of *Warborough* aforeſaid, in the ſaid County of *Oxford*, and the Fiſh, to wit, one Salmon, twenty Barbels, twenty Jacks, one thouſand Perches, one thouſand Blays, one thouſand Roaches, one thouſand Daces, one thouſand Gudgeons, and one thouſand Eels, of the Value, *&c.* thereout took and carried away, and other Wrongs, *&c.* to the great Damage, *&c.* and againſt the Peace, *&c.* Whereupon the ſaid *Edward* ſays that he is injured, and hath ſuſtained Damage to the Value of twenty Pounds, and therefore he brings his Suit, *&c.*

And

And the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by *R. Boote* their Attorney, come and defend the Force and Injury, when, *&c.* and ſay that they are Not guilty of the Treſpaſs aforeſaid, in Manner and Form as the ſaid *Edward* hath above thereof complained againſt them; and of this they put themſelves on the Country; and the ſaid *Edward* doth ſo likewiſe; and for further Plea as to the fiſhing in the ſaid Fiſhery in the ſaid *firſt Count* of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt Count* of the ſaid Declaration mentioned thereout taking and carrying away above ſuppoſed to have been committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by Leave of the Court here for this Purpoſe firſt had and obtained, according to the Form of the Statute in ſuch Caſe made and provided, ſay, that the ſaid *Edward* ought not to have his aforeſaid Action thereof againſt them, becauſe they ſay that the ſaid Fiſhery in the *firſt* Count of the ſaid Declaration mentioned, and in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon a certain Piece or Parcel of Land, covered with Water, called the River *Thames*, adjoining to a certain Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, Plea.

and in Breadth from the Bank of the ſaid River next the ſaid Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, to the Middle of the Stream of the ſaid River; and that the *Preſident and Scholars of Saint John Baptiſt College* in the Univerſity of *Oxford* aforeſaid, before the firſt Time when, *&c.* and at the ſaid ſeveral Times when, *&c.* were and ſtill are ſeiſed in their Demeſne as of *Fee* of and in four Acres of Land, with the Appurtenances, lying and being in the ſaid Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and Parcel thereof; and that they the ſaid Preſident and Scholars, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, *&c.* had of and in the ſaid four Acres of Land, with the Appurtenances, Parcel, *&c.* from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have for themſelves, their Farmers and Tenants of the four Acres of Land, with the Appurtenances, Parcel, *&c.* for the Time being, a *free* Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds above in this Plea particularly mentioned, every Year, at all Times of the Year, at free Will and Pleaſure, as belonging and appertaining to their aforeſaid four Acres of Land, with the Appurtenances, Parcel, *&c.* and the ſaid Preſident and Scholars being ſo ſeiſed of and in their aforeſaid four Acres of Land, with the Appurtenances, Parcel, *&c.* they the ſaid Preſident

Preſident and Scholars, before the firſt Time when, *&c.* to wit, on the thirtieth Day of *May* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, at *Shillingford* aforeſaid in the County aforeſaid, by a certain Indenture then there made between the ſaid Preſident and Scholars of the one Part, and one *Richard B.* of the other Part, the one Part of which ſaid Indenture, ſealed with the common Seal of the ſaid Preſident and Scholars, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, now bring here into Court, the Date whereof is the Day and Year laſt aboveſaid, for the Conſiderations therein mentioned, did demiſe and to Farm let unto the ſaid *Richard B.* four Acres of Land, with the Appurtenances amongſt other Things, To have and to hold the ſame unto the ſaid *Richard B.* his Executors, Adminiſtrators, and Aſſigns, from the Feaſt of the *Annunciation of the Bleſſed Virgin Mary* then laſt paſt, until the End and Term of twenty Years from thenceforth next enſuing and fully to be compleat and ended; by virtue of which ſaid Demiſe he the ſaid *Richard B.* afterwards and before the firſt Time when, *&c.* to wit, on the ſaid thirtieth Day of *May* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, entered into the ſaid four Acres of Land, with the Appurtenances, Parcel, *&c.* and was, and from thenceforth hitherto hath been, and ſtill is thereof poſſeſſed; and being ſo thereof poſſeſſed, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, as the Servants of the ſaid *Richard B.* and by his Command at the ſaid ſeveral Times when, *&c.* fiſhed in the ſaid

Fiſhery

Fiſhery above in this Plea particularly mentioned, and in which, *&c.* as in the *free* Fiſhery of the ſaid *Richard B.* and the ſaid Fiſh in the *firſt* Count of the ſaid Declaration mentioned thereout took and carried away, as they lawfully might, for the Cauſe aforeſaid, which are the ſaid fiſhing in the ſaid *Fiſhery* in the ſaid *firſt* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Declaration mentioned thereout taking and carrying away, whereof the ſaid *Edward* hath above complained againſt them, the ſaid *Francis, William, John, Joſeph* and *Samuel*; and this they are ready to verify; wherefore they pray Judgment if the ſaid *Edward* ought to have his aforeſaid Action thereof againſt them, *&c.* and for further Plea as to the fiſhing in the ſaid Fiſhery in the ſaid *firſt* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Declaration mentioned thereout taking and carrying away, above ſuppoſed to have been committed by the ſaid *Francis, William, John, Joſeph* and *Samuel*, they the ſaid *Francis, William, John, Joſeph* and *Samuel*, by like Leave of the Court here for this Purpoſe firſt had and obtained, according to the Form of the Statute in ſuch Caſe made and provided, ſay, that the ſaid *Edward* ought not to have his aforeſaid Action thereof againſt them, becauſe they ſay that the ſaid Fiſhery in the *firſt* Count of the ſaid Declaration mentioned, and in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon a certain Piece or Parcel of Land, covered with Water, called the River *Thames*, adjoining

adjoining to a certain Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next to the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, unto the Middle of the Stream of the ſaid River; and that the Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, before the firſt Time when, *&c.* and at the ſaid ſeveral Times when, *&c.* were and ſtill are ſeiſed in their Demeſne as of Fee, of and in four Acres of Land, with the Appurtenances, lying and being in the ſaid Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, and Parcel thereof; and that they the ſaid Preſident and Scholars, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, *&c.* had of and in the ſaid laſt-mentioned four Acres of Land, with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have for themſelves, their Farmers and Tenants of the aforeſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, *&c.* for the Time being, *Common of* Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds above in this

Plea

Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging and appertaining to their aforeſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, *&c.* and the ſaid Preſident and Scholars being ſo ſeiſed of and in the aforeſaid laſt-mentioned four Acres of Land, with the Appurtenances, they the ſaid Preſident and Scholars, before the firſt Time when, *&c.* to wit, on the thirtieth Day of *May* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, at *Shillingford* aforeſaid in the County aforeſaid, by a certain Indenture then and there made between the ſaid Preſident and Scholars of the one Part, and the ſaid *Richard B.* of the other Part, one Part of which ſaid laſt-mentioned Indenture, ſealed with the Common Seal of the ſaid Preſident and Scholars, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* now bring here into Court, the Date whereof is the Day and Year laſt aforeſaid, for the Conſideration therein mentioned, did demiſe and to Farm lett unto the ſaid *Richard B.* the ſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, *&c.* to have and to hold the ſame unto the ſaid *Richard B.* his Executors, Adminiſtrators and Aſſigns, from the Feaſt of the *Annunciation of the bleſſed Virgin Mary* then laſt paſt, unto the End and Term of twenty Years from thenceforth next enſuing and fully to be compleat and ended; by virtue of which ſaid Demiſe the ſaid *Richard B.* afterwards, and before the firſt Time when, *&c.* to wit, on the ſaid thirtieth Day of *May* in the Year of our Lord one thouſand

thouſand ſeven hundred and fifty-eight aforeſaid, entered into the ſaid laſt-mentioned four Acres of Land, with the Appurtenances ſo demiſed in Form aforeſaid, Parcel, *&c.* and at the ſaid ſeveral Times when, *&c.* was, and from thenceforth hitherto hath been, and ſtill is thereof poſſeſſed; and being ſo thereof poſſeſſed, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, as the Servants of the ſaid *Richard B.* and by his Command, at the ſaid ſeveral Times when, *&c.* fiſhed in the ſaid Fiſhery above in this Plea particularly mentioned, and in which, *&c.* as in the *common* Fiſhery of the ſaid *Richard B.* there; and the ſaid Fiſh in the *firſt* Count of the ſaid Declaration mentioned thereout took and carried away, to the Uſe of the ſaid *Richard B.* uſing the ſaid *Common* of Fiſhery of him the ſaid *Richard B.* as they lawfully might, for the Cauſe aforeſaid, which are the ſaid fiſhing in the ſaid Fiſhery in the ſaid *firſt* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Declaration mentioned thereout taking and carrying away, whereof the ſaid *Edward* hath above complained againſt them the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*; and this they are ready to verify; Wherefore they pray Judgment if the ſaid *Edward* ought to have his aforeſaid Action thereof againſt them, *&c.* and for further Plea, as to the fiſhing in the ſaid Fiſhery in the ſaid *firſt* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Declaration mentioned thereout taking and carrying away, above ſuppoſed to have been committed by the ſaid *Francis*,

Francis, *William*, *John*, *Joſeph* and *Samuel*, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by like Leave of the Court here for this Purpoſe firſt had and obtained, according to the Form of the Statute in ſuch Caſe made and provided, ſay, that the ſaid *Edward* ought not to have his aforeſaid Action thereof againſt them, becauſe they ſay that the ſaid Fiſhery in the *firſt* Count of the ſaid Declaration mentioned, and in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon a certain Piece or Parcel of Land, covered with Water, called the River *Thames*, adjoining to a certain Cloſe or Parcel of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead* next the ſaid River, and in Breadth from the Bank of the ſaid River next to the ſaid Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, unto the Middle of the Stream of the ſaid River, and which ſaid Fiſhery above in this Plea particularly mentioned, and in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* was the *free* Fiſhery of the ſaid Preſident and Scholars of Saint *John Baptiſt College* in the Univerſity of *Oxford*; for which Reaſon they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, as the *Servants of the ſaid Preſident* and Scholars, and by their Command, at the ſaid ſeveral Times when, *&c.* fiſhed in the ſaid Fiſhery

Fiſhery above in this Plea particularly mentioned, and in which, *&c.* as in the *free* Fiſhery of the ſaid Preſident and Scholars; and the ſaid Fiſh in the *firſt* Count of the ſaid Declaration mentioned, as the Fiſh of the ſaid Fiſhery of them the ſaid Preſident and Scholars, thereout took and carried away, as it was lawful for them to do, for the Cauſe aforeſaid, which are the ſaid fiſhing in the ſaid Fiſhery in the ſaid *firſt* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Declaration mentioned thereout taking and carrying away, whereof the ſaid *Edward* hath above complained againſt them the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*; and this they are ready to verify; Wherefore they pray Judgment if the ſaid *Edward* ought to have his aforeſaid Action thereof againſt them, *&c.* And for further Plea as to fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, above ſuppoſed to have been committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by Leave of the Court here for this Purpoſe firſt had and obtained, according to the Form of the Statute in ſuch Caſe made and provided, ſay, that the ſaid *Edward* ought not to have or maintain his aforeſaid Action thereof againſt them, becauſe they ſay that the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Piece or Parcel of Land, covered with Water,

called the River *Thames*, adjoining to a certain Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by and along the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, unto the Middle of the Stream of the ſaid River; and that the Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, before the firſt Time when, *&c.* and at the ſaid ſeveral Times when, *&c.* were and ſtill are ſeiſed in their Demeſne as of Fee of and in four Acres of Land, with the Appurtenances, lying and being in the Pariſh aforeſaid, in the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and Parcel thereof; and that they the ſaid Preſident and Scholars, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, *&c.* had of and in the aforeſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, *&c.* from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had for themſelves, their Farmers and Tenants of the ſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, *&c.* for the Time being, a *free* Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the

the Limits and Bounds above in this Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging to the ſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. and the ſaid Preſident and Scholars being ſo ſeiſed of and in their aforeſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. they the ſaid Preſident and Scholars, before the firſt Time when, &c. to wit, on the thirtieth Day of *May* in the Year of our Lord one thouſand ſeven hundred and fifty eight, at *Shillingford* aforeſaid in the County aforeſaid, by a certain Indenture then and there made between the ſaid Preſident and Scholars of the one Part, and the aforeſaid *Richard B.* of the other Part, the one Part of which ſaid laſt mentioned Indenture, ſealed with the common Seal of the ſaid Preſident and Scholars, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* now bring here into Court, the Date whereof is the ſame Day and Year laſt aforeſaid, for the Conſiderations therein mentioned, did demiſe and to Farm lett unto the ſaid *Richard B.* the ſaid four Acres of Land, with the Appurtenances, Parcel, &c. To have and to hold the ſame unto the ſaid *Richard B.* his Executors, Adminiſtrators and Aſſigns, from the Feaſt of the *Annunciation of the Bleſſed Virgin Mary* then laſt paſt, until the End and Term of twenty Years from thence next enſuing and fully to be compleat and ended; by virtue of which ſaid laſt-mentioned Demiſe he the ſaid *Richard B.* afterwards, and before the firſt Time when, &c. to wit, on the ſaid thirtieth

Day of *May* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, entered into the ſaid laſt-mentioned four Acres of Land ſo demiſed in Form aforeſaid, with the Appurtenances, Parcel, *&c.* and was and from thenceforth hitherto hath been, and ſtill is thereof poſſeſſed; and being ſo thereof poſſeſſed, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, as the Servants of the ſaid *Richard B.* and by his Command, at the ſaid ſeveral Times when, *&c.* fiſhed in the ſaid Fiſhery above in this Plea particularly mentioned, and in which, *&c.* as in the *free* Fiſhery of the ſaid *Richard B.* and the ſaid Fiſh in the *firſt* Count of the ſaid Declaration mentioned thereout took and carried away as the Fiſh of the ſaid *Richard B.* coming out of the *free* Fiſhery of the ſaid *Richard B.* as they lawfully might, for the Cauſe aforeſaid, which are the ſaid fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, whereof the ſaid *Edward* hath complained againſt them the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*; and this they are ready to verify; Wherefore they pray Judgment if the ſaid *Edward* ought to have his aforeſaid Action thereof againſt them, *&c.* And for further Plea as to the fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, above ſuppoſed to have been committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and

Samuel, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by like Leave of the Court here for this Purpoſe firſt had and obtained, according to the Form of the Statute in ſuch Caſe made and provided, ſay, that the ſaid *Edward* ought not to have his aforeſaid Action thereof againſt them, becauſe they ſay that the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned is, and at the ſaid ſeveral Times when, &c. and long before, was a Fiſhery in and upon a certain Piece or Parcel of Land, covered with Water, called the River *Thames*, adjoining to a certain Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next to the ſaid Cloſe or Piece of Land called *Bury Mead*, unto the Middle of the Stream of the ſaid River, and that the Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, before the firſt Time when, &c. and at the ſaid ſeveral Times when, &c. were and ſtill are ſeiſed in their Demeſne as of Fee of and in four Acres of Land, with the Appurtenances, lying and being in the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and Parcel thereof; and that they the ſaid Preſident and Scholars, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when,

&c. had of and in the ſaid laſt-mentioned Land, with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have for themſelves, their Farmers and Tenants of the aforeſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, *&c.* for the Time being, *Common* of Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds above in this Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging and appertaining to the aforeſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, *&c.* and the ſaid Preſident and Scholars being ſo ſeiſed of and in their aforeſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, *&c.* they the ſaid Preſident and Scholars, before the firſt Time when, *&c.* to wit, on the thirtieth Day of *May* in the Year of our Lord one thouſand ſeven hundred and fifty-eight aforeſaid, at *Shillingford* aforeſaid in the County aforeſaid, by a certain other Indenture then and there made between the ſaid Preſident and Scholars of the one Part, and the ſaid *Richard B.* of the other Part, the one Part of which ſaid laſt-mentioned Indenture, ſealed with the common Seal of the ſaid Preſident and Scholars, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* now bring here into Court, the Date whereof is the Day and Year laſt aboveſaid, for the Conſiderations therein mentioned, did demiſe and to Farm lett unto the ſaid

ſaid *Richard B.* the ſaid four Acres of Land, Parcel, &c. with the Appurtenances, To have and to hold the ſame unto the ſaid *Richard B.* his Executors, Adminiſtrators and Aſſigns, from the Feaſt of the *Annunciation of the Bleſſed Virgin Mary* then laſt paſt, unto the End and Term of twenty Years from thenceforth next enſuing and fully to be compleat and ended; by virtue of which ſaid laſt-mentioned Demiſe the ſaid *Richard B.* afterwards, and before the firſt Time when, &c. to wit, on the ſaid thirtieth Day of *May* in the Year of our Lord one thouſand ſeven hundred and fifty-eight aforeſaid, entered into the ſaid laſt-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. ſo demiſed in Form aforeſaid, and was, and from thenceforth hitherto hath been, and ſtill is thereof poſſeſſed, and being ſo thereof poſſeſſed, they the ſaid *Francis, William, John, Joſeph* and *Samuel*, as the Servants of the ſaid *Richard B*, and by his Command at the ſaid ſeveral Times when, &c. fiſhed in the ſaid Fiſhery above in this Plea particularly mentioned, and in which, &c. as in the *Common* Fiſhery of the ſaid *Richard B.* and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout took and carried away to the Uſe of the ſaid *Richard B.* uſing the ſaid *Common* of Fiſhery of the ſaid *Richard B.* there, as they lawfully might, for the Cauſe aforeſaid, which are the ſaid fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, whereof the ſaid *Edward* hath

above complained againſt them the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*; and this they are ready to verify; Wherefore they pray Judgment if the ſaid *Edward* ought to have his aforeſaid Action thereof againſt them, *&c.* and for further Plea as to the fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, above ſuppoſed to have been committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by like Leave of the Court here for this Purpoſe firſt had and obtained, according to the Form of the Statute in ſuch Caſe made and provided, ſay, that the ſaid *Edward* ought not to have his aforeſaid Action thereof againſt them, becauſe they ſay that the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon a certain Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to a certain Cloſe or Parcel of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next to the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, unto the Middle of the Stream of the

ſaid

ſaid River, and which ſaid Fiſhery above in this Plea particularly mentioned, and in which, &c. is, and at the ſaid ſeveral Times, when, &c. was the *ſeveral* Fiſhery of the ſaid Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*; for which Reaſon they the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, as the *Servants of the ſaid Preſident and Scholars*, and by their Command at the ſaid ſeveral Times when, &c. fiſhed in the ſaid Fiſhery above in this Plea particularly mentioned, and in which, &c. as in the *ſeveral* Fiſhery of the ſaid Preſident and Scholars, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned as the Fiſh of the ſaid Fiſhery of them the ſaid Preſident and Scholars thereout took and carried away, as it was lawful for them to do, for the Cauſe aforeſaid, which are the ſaid fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, whereof the ſaid *Edward* hath above thereof complained againſt them the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, and this they are ready to verify; Wherefore they pray Judgment if the ſaid *Edward* ought to have his aforeſaid Action thereof againſt them.

And the ſaid *Edward*, as to the ſaid Plea of the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by them ſecondly above pleaded in Bar, as to the fiſhing in the ſaid Fiſhery in the ſaid *firſt* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Declaration mentioned thereout Replication.

out taking and carrying away, above committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, ſays that he, by reaſon of any thing therein alledged, ought not to be barred from having his aforeſaid Action thereof againſt them, becauſe he ſaith that true it is that the ſaid Fiſhery in the *firſt* Count of the ſaid Declaration mentioned, and in which, *&c.* is and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon the ſaid Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the ſaid Cloſe or Piece of Land in the ſaid Plea mentioned, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, to the Middle of the Stream of the ſaid River, as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above alledged; but the ſaid *Edward* further ſaith, That the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, at the ſaid ſeveral Times when, *&c.* of their *own Wrong* fiſhed in the ſaid Fiſhery of the ſaid *Edward* in the *firſt* Count in the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count in the ſaid Declaration mentioned thereout took and carried away in Manner and Form as the ſaid *Edward* hath above thereof complained againſt them,

them; Without this, that the Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, &c. had of and in the ſaid four Acres of Land with the Appurtenances in the ſaid Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have for themſelves, their Farmers and Tenants of the ſaid four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, a *free* Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds in the ſaid Plea particularly mentioned, every Year, at all Times of the Year, at free Will and Pleaſure, as belonging and appertaining to their aforeſaid four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* in their ſaid Plea have above alledged; and this the ſaid *Edward* is ready to verify; Wherefore inaſmuch as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above acknowledged the committing of that Treſpaſs, the ſaid *Edward* prays Judgment, and his Damages by reaſon of the committing thereof to be adjudged to him, &c. And the ſaid *Edward*, as to the ſaid Plea of the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by them thirdly above pleaded in Bar as to the fiſhing in the ſaid Fiſhery in the ſaid *firſt* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Decla-

Traverſe of &c.

Declaration mentioned thereout taking and carrying away, above committed by the ſaid *Francis*, *William*, *John*, *Joſeph and Samuel*, ſays, that he, by reaſon of any Thing therein alledged, ought not to be barred from having his aforeſaid Action thereof againſt them, becauſe he ſaith, that true it is that the ſaid Fiſhery in the *firſt* Count of the ſaid Declaration mentioned, and in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon the ſaid Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the ſaid Cloſe or Piece of Land in the ſaid Plea mentioned, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land, called *Bury Mead*, otherwiſe *Haſeley Mead* next the ſaid River, and in Breadth from the Bank of the ſaid River next the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, unto the Middle of the Stream of the ſaid River, as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above alledged; But the ſaid *Edward* further ſaith, That the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* at the ſaid ſeveral Times when, *&c.* of their *own Wrong*, fiſhed in the ſaid Fiſhery of the ſaid *Edward* in the firſt Count in the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid firſt Count in the ſaid Declaration mentioned thereout took and carried away in Manner and Form as the ſaid *Edward*

Edward hath above thereof complained againſt them; Without this, that the Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, *&c.* had of and in the ſaid four Acres of Land, with the Appurtenances in the ſaid Plea mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have for themſelves, their Farmers and Tenants of the aforeſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, *&c.* for the Time being, *Common* of Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds in the ſaid Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging and appertaining to their aforeſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, *&c.* in Manner and Form as the ſaid *Francis*, *William*, *John*, *Joſeph and Samuel* in their ſaid Plea have above alledged; and this the ſaid *Edward* is ready to verify; Wherefore inaſmuch as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above acknowledged the committing of that Treſpaſs, the ſaid *Edward* prays Judgment, and his Damages by reaſon of the committing thereof to be adjudged to him, *&c.* And the ſaid *Edward*, as to the ſaid Plea of the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by them fourthly above pleaded in Bar as to the fiſhing in the ſaid Fiſhery in the ſaid *firſt* Count Traverſe of, *&c.*

Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Declaration mentioned thereout taking, and carrying away, above committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, ſays, that he by reaſon of any thing therein alledged ought not to be barred from having his aforeſaid Action thereof againſt them, becauſe he ſaith that true it is that the ſaid Fiſhery in the *firſt* Count of the ſaid Declaration mentioned, and in which *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon the ſaid Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the ſaid Cloſe or Piece of Land in that Plea mentioned, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Heſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, unto the Middle of the Stream of the ſaid River, as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above alledged; but the ſaid *Edward* further ſaith, That the ſaid Fiſhery in the ſaid Plea particularly mentioned in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* was the *free* Fiſhery of the ſaid *Edward*, and not the *free* Fiſhery of the ſaid Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, as the ſaid *Francis*, *William*,

William, *John*, *Joſeph* and *Samuel* have above in their ſaid Plea alledged; and this the ſaid *Edward* prays may be inquired of by the Country, and the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* do the ſame likewiſe; And the ſaid *Edward* as to the ſaid Plea of the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* by them ſecondly above pleaded in Bar as to fiſhing in the ſaid Fiſhery ... the *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſeccnd* Count of the ſaid Declaration mentioned thereout taking and carrying away, above committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, ſays that he, by reaſon of any thing therein alledged, ought not to be barred from having his aforeſaid Action thereof againſt them, becauſe he ſaith that true it is that the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon the ſaid Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the ſaid Cloſe or Piece of Land in the ſaid Plea mentioned, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by and along the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, unto the Middle of the Stream of the ſaid

1ſt Iſſue joined by the plaintiff.

ſaid River, as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above alledged; but the ſaid *Edward* further ſaith, That the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, at the ſaid ſeveral Times when, *&c.* of their *own Wrong* fiſhed in the ſaid Fiſhery of the ſaid *Edward* in the *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout took and carried away in Manner and Form as the ſaid *Edward* hath above thereof compl.ined againſt them; Without this, that the Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, *&c.* had of and in the ſaid four Acres of Land with the Appurtenances in the ſaid Plea mentioned, Parcel, *&c.* from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had for themſelves, their Farmers and Tenants of the ſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, *&c.* for the Time being, a *free* Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds in the ſaid Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging to the ſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, *&c.* in Manner and Form as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* in their ſaid Plea have above alledged; and this the ſaid *Edward* is ready to verify; Wherefore in as much as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*

Traverſe.

muel have above aknowledged the committing of that Treſpaſs, the ſaid *Edward* prays Judgment, and his Damages by reaſon of the committing thereof to be adjudged to him, *&c.* And the ſaid *Edward*, as to the ſaid Plea of the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* by them thirdly above pleaded in Bar as to the fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, above committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, ſays, that he, by reaſon of any thing therein alledged, ought not to be barred from having his aforeſaid Action thereof againſt them, becauſe he ſaith that true it is, that the ſaid Fiſhery in the *ſecond* Count of the ſaid Declaration mentioned, in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon the ſaid Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the ſaid Cloſe or Piece of Land in the ſaid Plea mentioned, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next the ſaid Cloſe or Piece of Land called *Bury Mead*, unto the Middle of the Stream of the ſaid River, as the ſaid *Francis*, *William*, *John*, *Joſeph* and

and *Samuel* have above alledged; But the ſaid *Edward* further ſaith, that the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, at the ſaid ſeveral Times when, &c. of their *own Wrong* fiſhed in the ſaid Fiſhery of the ſaid *Edward* in the *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout took and carried away in Manner and Form as the ſaid *Edward* hath above thereof complained againſt them; Without this, that the ſaid Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, &c. had of and in the ſaid laſt-mentioned Land, with the Appurtenances in the ſaid Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have for themſelves, their Farmers and Tenants of the aforeſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, *Common* of Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds in the ſaid Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging and appertainining to the aforeſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* in their ſaid Plea have above alledged; and this the ſaid *Edward* is ready to verify;

Traverſe.

Wherefore

Wherefore in as much as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above acknowledged the committing of that Treſpaſs, the ſaid *Edward* prays Judgment, and his Damages by reaſon of the committing thereof to be adjudged to him, *&c.* and the ſaid *Edward*, as to the ſaid Plea of the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* by them laſtly above pleaded in Bar as to the fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, above committed by the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, ſays that he, by reaſon of any thing therein alledged, ought not to be barred from having his aforeſaid Action thereof againſt them, becauſe he ſays that true it is that the ſaid Fiſhery in the *ſecond* Count of the ſaid Declaration mentioned, and in which, *&c.* is, and at the ſaid ſeveral Times when, *&c.* and long before, was a Fiſhery in and upon the ſaid Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the ſaid Cloſe or Piece of Land in the ſaid Plea mentioned, called *Bury Mead*, otherwiſe *Haſeley Mead*, in the Pariſh of *Warborough* aforeſaid, and running cloſe by the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, and extending in Length the whole Length or Side of the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, next the ſaid River, and in Breadth from the Bank of the ſaid River next to the ſaid Cloſe or Piece of Land called *Bury Mead*, otherwiſe *Haſeley Mead*, unto the Mid-

dle of the Stream of the ſaid River, as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above alledged; but the ſaid *Edward* further ſaith, That the ſaid Fiſhery in the ſaid Plea particularly mentioned, in which, &c. is and at the ſaid ſeveral Times when, &c. was the ſeveral *Fiſhery of the ſaid Edward*, and not the ſeveral *Fiſhery of the ſaid Preſident and Scholars* of Saint *John Baptiſt* College in the Univerſity of *Oxford*, as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above in their ſaid Plea alledged; and this the ſaid *Edward* prays may be inquired of by the Country; and the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* do the ſame likewiſe.

2d Iſſue joined by the Plaintiff.

Rejoinder. And the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, as to the ſaid Plea of the ſaid *Edward* by him above pleaded by way of Reply as to their ſaid Plea by them above ſecondly pleaded in Bar, as to the fiſhing in the ſaid Fiſhery in the ſaid firſt Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid firſt Count of the ſaid Declaration mentioned thereout taking and carrying away, ſay, as before, That the Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, &c. had of and in the ſaid four Acres of Land, with the Appurtenances in the ſaid Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have for themſelves, their Farmers and Tenants of

of the ſaid four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, a *free* Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds in the ſaid Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging and appertaining to their aforeſaid four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above in their ſaid Plea in that Behalf alledged; and of this they put themſelves upon the Country, and the ſaid *Edward* doth ſo likewiſe; and the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* as to the ſaid Plea of the ſaid *Edward* by him above pleaded by way of Reply as to the ſaid Plea of the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by them thirdly above pleaded in Bar as to the ſaid fiſhing in the ſaid Fiſhery in the ſaid *firſt* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *firſt* Count of the ſaid Declaration mentioned thereout taking and carrying away, ſay, as before, that the ſaid Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, &c. had of and in the ſaid four Acres of Land with the Appurtenances in the ſaid Plea mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have for themſelves, their

1ſt Iſſue joined by the Defendant.

Farmers and Tenants of the aforeſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, *Common* of Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds in the ſaid Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging and appertaining to their aforeſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have in their ſaid Plea alledged; and of this they put themſelves upon the Country, and the ſaid *Edward* doth ſo likewiſe; And the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, as to the ſaid Plea of the ſaid *Edward* by him above pleaded by way of Reply as to the ſaid Plea of the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, by them ſecondly above pleaded in Bar, as to the fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid ſecond Count of the ſaid Declaration mentioned thereout taking and carrying away, ſay, as before, that the Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, &c. had of and in the ſaid four Acres of Land with the Appurtenances in the ſaid Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill

3d Iſſue joined by the Defendants.

ſtill of Right ought to have for themſelves, their Farmers and Tenants of the ſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being a *free* Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds in the ſaid Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging to the ſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above in their ſaid Plea in that Behalf alledged; and of this they put themſelves upon the Country, and the ſaid *Edward* doth ſo likewiſe. And the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel*, as to the ſaid Plea of the ſaid *Edward* by him above pleaded by way of Reply as to their ſaid Plea by them thirdly above pleaded in Bar, as to the fiſhing in the ſaid Fiſhery in the ſaid *ſecond* Count of the ſaid Declaration mentioned, and the ſaid Fiſh in the ſaid *ſecond* Count of the ſaid Declaration mentioned thereout taking and carrying away, ſay, as before, That the ſaid Preſident and Scholars of Saint *John Baptiſt* College in the Univerſity of *Oxford*, and all thoſe whoſe Eſtate they now have, and at the ſaid ſeveral Times when, &c. had of and in the ſaid laſt mentioned four Acres of Land with the Appurtenances in the ſaid Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been uſed and accuſtomed to have, and of Right ought to have had, and ſtill of Right ought to have

3d Iſſue joined by the Defendants.

for themſelves, their Farmers and Tenants of the aforeſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being *Common* of Fiſhery in the ſaid River *Thames*, at *Warborough* aforeſaid, and within the Limits and Bounds in the ſaid Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleaſure, as belonging and appertaining to the aforeſaid laſt-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the ſaid *Francis*, *William*, *John*, *Joſeph* and *Samuel* have above in their ſaid Plea in that Behalf alledged; and of this they put themſelves upon the Country, and the ſaid *Edward* doth ſo likewiſe. Therefore, as well to try that Iſſue as the aforeſaid ſeveral other Iſſues between the Parties aforeſaid above joined, the Sheriff is commanded that he cauſe to come here, in eight Days of the *Purification of the bleſſed Mary*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c.

4th Iſſue taken by the Defendants.

Venire awarded.

Whoever conſiders the enormous Length of theſe Pleadings, and the vaſt Expence that muſt neceſſarily have accrued to the Parties by this Means, cannot but wiſh to ſee ſome Reformation in regard to the Manner of proſecuting ſuch Suits, eſpecially for the ſake of the Poor, who, how much ſoever they have Right and Juſtice on their Side, are for the moſt Part unable to ſupport the Expence that is neceſſary to make that Right appear to the Satisfaction of a Court of Judicature.

Is

Is it not monſtrous that the mere Chance of having caught a Fiſh of *two* Shillings Value —— the ſtopping the Courſe of a trifling Rivulet —— the cutting off the Bough of a Tree not worth *Six-pence* —— the once riding acroſs a Ground, *&c.* ſhould give Riſe to Pleadings of 100, 150, or 200 Sheets in Length, and occaſion an Expence of 150, or 200 *l?* And yet ſuch Sort of Treſpaſſes, or Actions on the Caſe grounded on ſuch Matters, whereby a Right comes in Queſtion, give Riſe to the moſt extenſive and expenſive Pleadings, and often end in the Ruin of one or other of the Parties concerned in the Suit.

Where a poor Man happens to be the Defendant in ſuch a Caſe, it is impoſſible he ſhould be able to conteſt ſuch a Suit, without riſquing the Ruin of himſelf and his Family, if he ſhould have the Misfortune to fail in his Defence. And indeed, conſidering the unavoidable Uncertainty that is daily experienced in regard to Deciſions upon Matters of this Kind, it would in general be more adviſeable for a poor Man in ſuch a Caſe quietly to yield up his Right, than to conteſt with a rich and potent Adverſary, in Favour of whom the old Adage is too often verified, *viz.* that *Might* overcomes *Right*.

But how poor ſoever a Man may be, if he has a Right, it is but natural for him to ſtruggle to ſupport it as long as he is able: And how great is the Hardſhip the Law puts him under, when, in order to do this, it obliges him to engage in ſuch a Labyrinth of tedious and expenſive Pleadings!

For notwithſtanding it is a Maxim in the Law, that every *Right* has a *Remedy*, yet, in

order to make this Right appear, (upon which the whole Succeſs of the Suit depends) it muſt neceſſarily, according to the preſent Mode of Practice, be ſet forth in ſpecial Pleadings for that Purpoſe, which Pleadings muſt likewiſe be ſupported by proper Evidence. In the mean Time the Pleadings themſelves are liable to many Exceptions, all which muſt be either guarded againſt at the firſt Cut-ſet, or ſufficiently anſwered in the Courſe of the Suit. The leaſt Omiſſion or Miſtake in any of theſe, how intricate ſoever they may be, not only gives his Adverſary an Advantage over him, but often renders his Suit abortive. And thus, beſides the Diſappointment, the whole Coſts of ſuch a Suit are thrown upon him, and he is perhaps cruſhed and ruined for ever.

Nor is the Caſe leſs hard upon him, even ſuppoſing he has the good Fortune to get the better of his Adverſary, and ſucceed in the Suit; for the *extra* Coſts, which are not allowed upon a Taxation, and the Client is therefore obliged to pay out of his Pocket, are in ſuch a Suit very conſiderable, and often amount to more than the Thing in Diſpute is worth; and thus the Remedy becomes worſe than the Diſeaſe.

So that after all, ſucceed or not ſucceed, a poor Man in Caſes of this Sort, as I obſerved before, had better quietly yield up his Right, than conteſt with a powerful and litigious Adverſary, who is determined to have his Will, though he tramples on the Rights and Liberties of his Neighbour. What then ſhall we ſay to this boaſted Maxim of the Law, which

which the Rich indeed may avail themſelves of, but the Poor in many Caſes are more likely to be ruined than benefited by?

Formerly, as has been obſerved in another Place, a Man could plead but one ſingle Plea, the Law not allowing a Duplicity, much leſs a Multiplicity of Pleas in the ſame Cauſe. Such Plea indeed might be either Special or General; but if a general Plea was thought adviſeable, the Defendant could not give every ſpecial Matter, how much ſoever it might tend to ſupport his Right, in Evidence upon the Trial; and if he pleaded one ſingle Plea ſpecially, it too often failed him.

In order to remedy the Inconveniencies ariſing from this Reſtriction, the Act of the 4 & 5 *Annæ* was made, whereby, by Leave of the Court, a Man may plead as many ſeveral Pleas as his Attorney thinks proper for his Defence. But how much this Liberty is capable of being abuſed, and the dreadful Conſequences that muſt often reſult from it with regard to poor People, may be ſeen by a Review of the foregoing Pleadings, and others more extenſive in our Law Books, grounded upon as trivial Circumſtances, and cannot but be alarming to every conſidering and conſcientious Man.

Let us ſee, therefore, if no Remedy for this Evil can be found; an Attempt, I confeſs, I had no Thoughts before of running into. ——

It was the Wiſh of ſome Men, above a hundred Years ago, that the *General* Iſſue might be allowed in all Caſes, and that the Special Matter

Matter might be given in Evidence on the Trial; and this ſeems to be the only Method of redreſſing the Grievance ſo long complained of. But it muſt be granted that under a general Law for this Purpoſe, many Inconveniences might ariſe, eſpecially where the Plaintiff does not know what ſuch Special Matter is, by which the Defendant intends to avail himſelf; in that Caſe the Plaintiff would undoubtedly lie under great Difficulties to guard againſt ſuch Evidence. This Inconveniency, however, (as is conceived) might be eaſily removed.

Every Age gives Light to another, by ſome new Thing or Method introduced and brought into Practice. With reſpect to the preſent Subject, let us take an Example from the Statute of the 2d of *Geo.* 2. with regard to the Allowance of ſetting off of mutual Debts. This Statute enacts that mutual Debts may be ſet off one againſt the other, either by being pleaded in Bar, *or* given in Evidence on the General Iſſue, on *Notice* being *given* of the particular Sums intended to be *ſet off*, and on what Account due, *&c.* But before the making this Statute, ſuch Debts were to be pleaded ſpecially in Bar; and this new, though late Method of ſetting off mutual Debts on the General Iſſue, on *giving Notice* of ſuch Set-off, was found ſo beneficial, that by the 8 *G.* 2. *c.* 24. it was made perpetual; but without ſuch Notice ſuch Evidence is not to be received.

The Intent of ordering ſuch Notice to be given of the particular Sums intended to be ſet off on pleading the General Iſſue, was, that the

the Plaintiff might know the Nature of the Defendant's Claims thereby, and prepare to controvert ſuch Demands of the Defendant, as well as to prove his own.

Now in order to reduce into Practice a ſimilar Method in Actions of *Treſpaſs* and on the *Caſe*, where a Juſtification is requiſite, let us for Example ſuppoſe, that on pleading the General Iſſue in the foregoing Caſe, ſuch a Notice as the following had been to be given the Plaintiff of the Special Matter the Defendant intended to give in Evidence on the Trial of the Cauſe, inſtead of pleading thoſe Special Matters in that formal Manner in which they appear, *viz.*

Mr. ——, *Take Notice that the ſeveral Defendants intend to give in Evidence on the Trial of the Iſſue in this Cauſe, that the Preſident and Scholars of Saint* John the Baptiſt *College in the Univerſity of* O. *are ſeiſed in Fee of certain Lands in the Pariſh of* W. in *the ſaid County, and being ſo ſeiſed have for themſelves, their Farmers and Tenants, a Right to fiſh in the ſaid Fiſhery in the Declaration mentioned, at all Times, at their free Will and Pleaſure, as belonging to their Lands, &c. and that the ſaid Defendants as their Servants, and by their Command, did fiſh in the ſaid Fiſhery in the ſaid Declaration mentioned, and under whom the ſaid Defendants intend to juſtify their doing the ſame in Manner, &c. as they lawfully might.*

Alſo that the ſaid Preſident and Scholars, being ſo ſeiſed as above, demiſed the ſaid Lands whereof, &c. to one Richard B. *of the ſaid Pariſh*

Pariſh of W. *and that the ſaid Defendants, as Servants of the ſaid* Richard B. *and by his Command, did fiſh in the ſaid Fiſhery in the ſaid Declaration mentioned, and under whom the ſaid Deſendants alſo intend to juſtify their doing the ſame in Manner, &c. as they lawfully might; which ſaid ſeveral Rights, or one of them, with ſuch Matters as relate thereto, which ſhall be neceſſary and ſufficient to juſtify and defend the ſaid Defendants againſt the Right and Damages of the Plaintiff, theſe Defendants ſhall inſiſt on giving in Evidence on their Behalf, purſuant to, &c. Dated the Day of* 1765.

By ſuch a Notice as this the Plaintiff would have been let into the Knowledge of what the Defendants intended to have availed themſelves of, and might have prepared himſelf therefrom to controvert their Right, by proving his own, by that Grant of the Fiſhery under which he claimed the Right, to the Excluſion of the Defendants, and thoſe under whom they claimed, with as much Benefit as by their Pleas; for what indeed is the Nature of the Plea itſelf, but a Notice of a Juſtification under a certain Right, which the Plaintiff by his Replication denies them to have, and thereby puts that Point in Iſſue, though in a more formal Manner? Would not the whole Merits of the Cauſe have come before the Court on the Trial with an equal Degree of Certainty, and that upon an Iſſue of a very moderate Length, *i. e.* 10 or 12 Sheets? Would not the Counſel have been as well enabled to have argued on the Merits upon ſuch a Notice, as upon

upon thoſe Special formal Pleadings? Would not the ſame Evidence have been required to determine the Fact? Would not the Judge and Jury have been capable of hearing and determining upon the Merits as well, if not better? For here a greater Degree of Latitude might have been given to have let in the Parties to the Proof of every Matter tending to ſhew on whoſe Side the Merits were, and the Court might have given their Judgment with a greater Degree of Equity, than when tied down to the ſtrict Rules of Pleading, which frequently afford a great Number of Exceptions that are generally taken at the Bar, and much Time is often ſpent on ſettling thoſe Points. The ſame may be ſaid of other Caſes of the ſame Nature; for this is mentioned *Exempli Gratia* only.

How often does it happen, in ſuch Caſes, that through one or the other of the Parties failing in their Pleadings to lay hold on ſome Matter that was neceſſary, that it proves his Overthrow, when it has been apparent to the Court that the Merits of the Cauſe were for him: And if ſo, is this owing to any Defect in the Law itſelf, which is deſirous that every Man ſhould have Juſtice done him; or is it through the Confinement to that ſtrict Rule, or Mode of pleading which is now practiſed, and to the many Exceptions ſuch Pleadings are liable to?

Then as to the Reaſonableneſs and Propriety of it, an Example may be drawn from Suits in Ejectment. Every Declaration in Ejectment is grounded on a ſuppoſed Treſpaſs, by which a Right or Title comes in Queſtion; yet

yet here are no Special Pleadings; nay here by the common Rule the Defendant *muſt* plead the *General Iſſue*, and confeſs the Plaintiff's *Leaſe* and *Entry*, and the *Ouſter* by himſelf, and inſiſt on his Title only, and the Cauſe is determined upon the Evidence of a Right or Title, which is produced on the Trial by the one or the other of the Parties, and what is this but giving the Special Matter in Evidence? Why not ſo in other Actions in Treſpaſs? If the Plaintiff has a Right, ought he not to ſhew it? If the Defendant has, where is the Reaſon of his pleading it ſpecially, (which only gives the Plaintiff an Opportunity of taking Exceptions to it) and ſhall not be allowed to give it in Evidence on the Trial without?

Another Example of the Reaſonableneſs of ſuch a Reformation, may be drawn from the Pleadings in criminal Caſes: Here every Defendant is obliged to plead generally *Not guilty* to put himſelf upon his Country, yet notwithſtanding ſuch General Plea, is not every favourable Circumſtance that can be alledged for him admitted and received by the Court? Why might not the ſame Thing be done on an Iſſue in Fact in Caſes of Treſpaſs and on the Caſe in civil Matters where a Right and Property, *&c.* is concerned, as well as upon an Indictment?

It may reaſonably be imagined that, was this to be allowed, an Attorney, in order to lay hold of every Matter that might be thought advantageous to his Client in ſuch Caſes, would be very prolix and copious in drawing ſuch Notices; but to prevent any Degree of Prolixity

lixity, or too great Copiouſneſs thereby, it might be ordered, that the Secondaries or Clerk of the Rules ſhould, from the Attornies Inſtructions, reduce ſuch Notices into a Rule of Court, in a very conciſe Manner, with ſome general Words to let in all relative Matters in the Nature of a Side-Bar Rule; or that, ſuch Inſtructions ſhould be firſt ſigned by Counſel as neceſſary, and then drawn up into a Rule, which Rule ſhould be ſerved ſome certain Days before, and the Service proved on the Trial; Copies of ſuch Rules being affixed to the Briefs, would be neceſſary Inſtructions for the Counſel to plead from. Here no Room for Exceptions would be given, and however unneceſſary ſome Part of the Rule might be, the Counſel would ſoon ſee what really tended to the Merits of the Cauſe.

It may be objected, that it is impoſſible to reduce ſuch a Method into general Practice; for in Actions of Covenant, or where an Action is brought againſt an Executor who has one or more Judgments to plead, (which being Matters of Record muſt be pleaded ſpecially at large) or Bonds paid, *&c.* in Diſcharge of Aſſets, and ſuch like Caſes it cannot be admitted with any Conveniency. In ſome Caſes it may be inconvenient, at leaſt there may be at preſent an Appearance of ſome Inconveniences that would ariſe from it in particular Caſes; but all this is no Reaſon why it may not be allowed and uſed in Actions of Treſpaſs and on the Caſe where the Matter will bear it.

However, it is not meant that Special Pleadings ſhould be entirely thrown aſide; all that

is

is contended for, is, that the General Iſſue, with a Liberty of giving the Special Matter in Evidence upon the Trial, may reaſonably and with Propriety be allowed, in ſuch Caſes as inſtanced before, in order to give the poorer Sort of Clients an Opportunity to avail themſelves by an eaſy and cheap Method, rather than by that tedious, perplexed, and expenſive one of pleading every Matter ſpecially, in Juſtification or Bar, as in the foregoing and following Iſſues.

The following Iſſue is in Replevin, the Nature of which Action, moſt of all others, gives Room for long and tedious Pleadings in Matters of as trivial a Concern as the preceding one, as may be eaſily ſeen thereby; and the Queſtion is, if ſuch Pleadings cannot be ſupplied by the like or by ſome other Method. If ſo, ſuch a Cauſe might be tried upon an Iſſue of 10 or 12 Sheets, inſtead of one of above 130, as this is.

Though here are two Precedents only given, as very extraordinary ones in ſuch Caſes, yet I believe it will be granted by every experienced Practitioner, that theſe are of a moderate Length, conſidering the great Number of others moſt frequently uſed in Actions of the like Nature.

Hilary

Dickins.

Hilary Term in the Thirty-third Year of the Reign of King *George* the Second.

Berks. ff. } THOMAS C. and *George D.* were ſummoned to anſwer *Adam Luſh* of a Plea wherefore they took the Cattle of the ſaid *Adam Luſh*, and unjuſtly detained the ſame againſt Gages and Pledges, *&c.* and whereupon the ſaid *Adam Luſh*, by *A. B* his Attorney complains, that the ſaid *Thomas* and *George*, on the twenty-ſeventh Day of *December* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, at the Pariſh of Saint *Leonard*, in *W.* in the ſaid County, in a certain Place there called the *Old Moor*, took the Cattle, to wit, eight Sheep of the ſaid *Adam Luſh*, and unjuſtly detained them againſt Gages and Pledges, until, *&c.* Whereupon the ſaid *Adam Luſh* ſays that he is injured, and hath ſuſtained Damage to the Value of twenty Pounds; and therefore he brings Suit, *&c.*

And the ſaid *Thomas* and *George*, by *R. B.* their Attorney, come and defend the Wrong and Injury when, *&c.* and as Bailiffs of the Mayor, Burgeſſes and Commonalty of the Borough of *W.* in the County of *Berks* well acknowledge the taking of the ſaid eight Sheep in the ſaid Place, in which, *&c.* becauſe they ſay that the ſaid Place called the Cognizance.

Old Moor, in which, &c. long before the ſaid Time when, &c. and at the ſaid Time when, &c. was, and ſtill is a certain large Waſte or Common Paſture, called and known by the ſeveral Names of the *Old Moor*, otherwiſe *Portman's Moor*, otherwiſe *Portman's Mead*, containing by Eſtimation a large Number of Acres, to wit, forty Acres, lying and being at *W.* aforeſaid in the County of *Berks* aforeſaid, and lying and being within the Manor of *W.* in the County of *Berks* aforeſaid, and Parcel of that Manor; and that the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, long before the ſaid Time when, &c. and at the ſaid Time when, &c. were and ſtill are ſeiſed in their Demeſne as of Fee of and in the ſaid Manor of *W.* whereof, &c. with the Appurtenances, and being ſo thereof ſeiſed, becauſe that the ſaid eight Sheep at the ſaid Time when, &c. were in the ſaid Place in which, &c. Parcel, &c. eating up, feeding and depaſturing on the Graſs there then growing, and doing Damage there to the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, they the ſaid *Thomas* and *George*, as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, well acknowledge the taking of the ſaid eight Sheep in the ſaid Place, in which, &c. and juſtly, &c. as a Diſtreſs for the ſaid Damage ſo by them there done and doing, &c. and this they are ready to verify; Wherefore they pray Judgment, and a Return of the ſaid eight Sheep, together with their Damages, &c. according to the Form of the Statute in ſuch Caſe made and provided, to be adjudged

to

to them, &c. And for further Cognizance as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Thomas* and *George*, by Leave of the Court here for this Purpoſe firſt had and obtained, according to the Form of the Statute in ſuch Caſe made and provided, as Bailiffs of the Mayor, Burgeſſes and Commonalty of the Borough of *W.* in the County of *Berks*, well acknowledge the taking of the ſaid eight Sheep in the ſaid Place, in which, &c. becauſe they ſay that the ſaid Place called the *Old Moor* in which, &c. long before the ſaid Time when, &c. and at the ſame Time when, &c. was and ſtill is a certain large Waſte or Common Paſture, called or known by the ſeveral Names of the *Old Moor*, otherwiſe *Portman's Moor*, otherwiſe *Portman's Mead*, containing by Eſtimation a large Number of Acres, to wit, forty Acres, ſituate, lying and being at *W.* aforeſaid, in the County of *Berks* aforeſaid, and that the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, long before the ſaid Time when, &c. and at the ſaid Time when, &c. were and ſtill are ſeiſed in their Demeſne as of Fee of and in the ſaid Waſte or Common Paſture in which, &c. with the Appurtenances, and being ſo thereof ſeiſed, becauſe that the ſaid eight Sheep, at the ſaid Time when, &c. were in the ſaid Place in which, &c. eating up, feeding and depaſturing on the Graſs there then growing, and doing Damage there to the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, they the ſaid *Thomas* and *George*, as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty of the

Borough of *W.* aforeſaid, well acknowledge the taking of the ſaid eight Sheep in the ſaid Place in which, &c. and juſtly, &c. as a Diſtreſs for the ſaid Damage ſo by them there done and doing, &c. and this they are ready to verify; Wherefore they pray Judgment, and a Return of the ſaid eight Sheep, together with their Damages, &c. according to the Form of the Statute in ſuch Caſe made and provided, to be adjudged to them, &c.

Plea. And the ſaid *Adam Luſh*, as to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made as to the taking of the ſaid eight Sheep of the ſaid Declaration mentioned, ſays, That they the ſaid *Thomas* and *George*, by reaſon of any Thing therein alledged, ought not, as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, to acknowledge the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor*, in which, &c. to be juſt, becauſe he ſays that long before the ſaid Time when, &c. one *William F.* was and yet is ſeiſed of the ſaid Place called the *Old Moor*, in which, &c. in the ſaid Pariſh of Saint *Leonard* in *W.* in his Demeſne as of Fee, and being ſo ſeiſed thereof, he the ſaid *William* afterwards, that is to ſay, on the twentieth Day of *December* in the ſaid Year of our Lord one thouſand ſeven hundred and fifty-eight, at *W.* aforeſaid, gave Licence to the ſaid *Adam Luſh* to put his Cattle aforeſaid into the ſaid Place called the *Old Moor* in which, &c. to depaſture the Graſs there then growing, by virtue of which Licence the ſaid *Adam Luſh* afterwards, and before the ſaid Time when, &c. put the ſaid Cattle into the ſaid Place in which, &c.

&c. to depaſture the Graſs in the ſame there growing, which ſaid Cattle were in the ſaid Place in which, *&c.* on the Occaſion aforeſaid depaſturing the Graſs there then growing, until the ſaid *Thomas* and *George* on the twenty-ſeventh Day of *December* in the ſaid Year one thouſand ſeven hundred and fifty-eight, at the ſaid Pariſh of Saint *Leonard* in *W.* the ſaid Place, in which, *&c.* took the ſaid Cattle of the ſaid *Adam Luſh*, and unjuſtly detained the ſame againſt Gages and Pledges until, *&c.* in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; Without this, that the ſaid Place called the *Old Moor* in which, *&c.* at the ſaid Time when, *&c.* was Parcel of the Manor of *W.* in the ſaid Cognizance mentioned, as the ſaid *Thomas* and *George* have in their ſaid Cognizance above alledged; and this the ſaid *Adam Luſh* is ready to verify: Wherefore in as much as the ſaid *Thomas* and *George* have above acknowledged the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor* in which, *&c.* the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, *&c.* And for further Plea in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Adam Luſh*, by Leave of the Court here to him for this Purpoſe granted, according to the Form of the Statute in ſuch Caſe lately made and provided, ſays, That the ſaid *Thomas* and *George*, by reaſon of any thing therein alledged,

as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor*, in which, *&c.* to be juſt, becauſe he ſays, that long before, and at the ſaid Time when, *&c.* one *William F.* was, and ſtill is ſeiſed of and in diverſe, to wit, fifteen Acres of Land, with the Appurtenances, lying and being in a certain Cloſe called *Portman's Field*, otherwiſe Saint *John's Field*, lying at *W.* aforeſaid, in his Demeſne as of Fee, and that the ſaid *W. F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *W. F.* ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor*, in which, *&c.* for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining; and the ſaid *W. F.* being ſo ſeiſed thereof before the ſaid Time when, *&c.* to wit, on the twentieth Day of *September* in the Year of our Lord one thouſand ſeven hundred and

and fifty-ſix, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid fifteen Acres of Land with the Appurtenances (amongſt other Things) to one *Job W.* to have and to hold the ſame to the ſaid *Job W.* from the Feaſt of Saint *Michael the Archangel* then next enſuing, according to the preſent Stile, for and during one whole Year thence next following, and ſo from Year to Year for ſo long Time as it ſhould pleaſe the ſaid *W. F.* and *Job W.* by virtue of which ſaid Demiſe the ſaid *Job W.* afterwards, and before the ſaid Time when, *&c.* to wit, on the thirtieth Day of *September* in the Year laſt aforeſaid, according to the preſent Stile, entered into the ſaid fifteen Acres of Land with the Appurtenances, and became and was poſſeſſed thereof, and continued ſo poſſeſſed thereof until and upon the thirtieth Day of *October* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, according to the preſent Stile, and being ſo poſſeſſed thereof, he the ſaid *Job W.* afterwards, (to wit) on the ſaid thirtieth Day of *October* one thouſand ſeven hundred and fifty-eight, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid fifteen Acres of Land with the Appurtenances to the ſaid *Adam Luſh*, to hold the ſame to him from the Feaſt of *All Saints*, according to the Old Stile then next enſuing, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, by virtue of which ſaid laſt-mentioned Demiſe the ſaid *Adam Luſh* afterwards, and before the ſaid Time when, *&c.* to wit, on the thirteenth Day of *November* in the Year of our Lord one

thouſand ſeven hundred and fifty-eight, entered into the ſaid fifteen Acres of Land with the Appurtenances, and became and was poſſeſſed thereof, and being ſo poſſeſſed thereof he the ſaid *Adam Luſh*, after the ſaid Feaſt of *All Saints*, according to the Old Stile in the Year laſt aforeſaid, and before the ſaid Time when, &c. to wit, on the ſame Day and Year in the ſaid Declaration mentioned, put the ſaid eight Sheep, then being the commonable Sheep of the ſaid *Adam Luſh*, and levant and couchant in and upon the ſaid fifteen Acres of Land with the Appurtenances, into the ſaid Place in which, &c. to feed upon the Graſs there growing, and to uſe his ſaid Common of Paſture there, and the ſaid eight Sheep were depaſturing in the ſaid Place in which, &c. on that Occaſion, as they lawfully might, till the ſaid *Thomas* and *George*, before the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following according to the Old Stile, to wit, at the ſaid Time when, &c. of their own Wrong took the ſaid eight Sheep in the ſaid Place in which, &c. and unjuſtly detained the ſame againſt Gages and Pledges until, &c. in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; and this he is ready to verify: Wherefore in as much as the ſaid *Thomas* and *George* have above acknowledged the taking of the ſaid eight Sheep in the ſaid Place in which, &c. the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, &c. And for further Plea in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above

above made as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Adam Luſh*, by like Leave of the Court here to him for this Purpoſe granted, according to the Form of the Statute in ſuch Caſe lately made and provided, ſays, That the ſaid *Thomas* and *George*, by reaſon of any thing therein alledged as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place in which, *&c.* to be juſt, becauſe he ſays, that true it is that the ſaid Place called the *Old Moor* in which, *&c.* long before, and at the ſaid Time when, *&c.* was and ſtill is a certain large Waſte or Paſture called and known by the ſeveral Names of the *Old Moor*, otherwiſe *Portman's Moor*, otherwiſe *Portman's Mead*, containing by Eſtimation a large Number of Acres to wit, forty Acres lying and being at *W.* aforeſaid in the County of *Berks* aforeſaid, as the ſaid *Thomas* and *George* have in their ſaid Cognizance above alledged; But the ſaid *Adam Luſh* further ſays, That long before, and at the ſaid Time when, *&c.* one *W. F.* was, and ſtill is ſeiſed of and in a certain Meſſuage and diverſe, to wit, one hundred Acres of Land with the Appurtenances, ſituate, lying and being at *W.* aforeſaid, in his Demeſne as of Fee, and that the ſaid *W. F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid Meſſuage and Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *W. F.* ſtill of Right ought to

to have for himſelf and themſelves, his and their Farmers and Tenants of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, &c. every Year from the Feaſt of *All Saints* according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary*, according to the ſame Stile then next following, to be had and taken with Sheep as to the ſaid Meſſuage and Land with the Appurtenances belonging and appertaining; and the ſaid *W. F.* being ſo ſeiſed of the ſaid Meſſuage and Land with the Appurtenances, afterwards, and before the ſaid Time when, &c. to wit, on the twentieth Day of *September* in the Year of our Lord one thouſand ſeven hundred and fifty-ſix, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid Meſſuage and Land with the Appurtenances to one *Job W.* to hold the ſame to him from the Feaſt of Saint *Michael the Archangel* then next following, according to the preſent Stile, for one whole Year then next to come, and ſo from Year to Year for ſo long Time as it ſhould pleaſe the ſaid *W. F.* and *Job W.* by virtue of which ſaid Demiſe the ſaid *Job W.* afterwards, and after the Feaſt of Saint *Michael the Archangel* in the Year of our Lord one thouſand ſeven hundred and fifty-ſix, according to the preſent Stile, and before the ſaid Time when, &c. (to wit) on the thirtieth Day of *September* in the Year laſt aforeſaid, according to the preſent Stile, at *W.* aforeſaid, entered into the ſaid Meſſuage and Land with the Appurtenances, and became and was, and continually from thenceforth hitherto hath been,

been, and ſtill is poſſeſſed thereof, and being ſo poſſeſſed thereof, he the ſaid *Job W.* afterwards, and before the ſaid Time when, *&c.* (to wit) on the twentieth Day of *December* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, according to the preſent Stile, at *W.* aforeſaid, gave Leave and Licence to the ſaid *Adam Luſh* to put the ſaid eight Sheep into the ſaid Place in which, *&c.* to feed upon the Graſs there growing, by virtue of which ſaid Licence the ſaid *Adam Luſh* afterwards, and after the Feaſt of *All Saints* in that Year, according to the Old Stile, and before the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, and before the ſaid Time when, *&c.* (to wit) on the Day and Year in the ſaid Declaration mentioned, put the ſaid eight Sheep into the ſaid Place in which, *&c.* to feed upon the Graſs there growing, and the ſaid eight Sheep were depaſturing in the ſaid Place in which, *&c.* on that Occaſion, as they lawfully might, till the ſaid *Thomas* and *George* at the ſaid Time when, *&c.* of their own Wrong took the ſaid eight Sheep in the ſaid Place in which, *&c.* and unjuſtly detained the ſame againſt Gages and Pledges until, *&c.* in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; and this he is ready to verify: Wherefore in as much as the ſaid *Thomas* and *George* have above ackowledged the taking of the ſaid eight Sheep in the ſaid Place in which, *&c.* the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, *&c.*

Old Moor, in which, &c. long before the ſaid Time when, &c. and at the ſaid Time when, &c. was, and ſtill is a certain large Waſte or Common Paſture, called and known by the ſeveral Names of the *Old Moor*, otherwiſe *Portman's Moor*, otherwiſe *Portman's Mead*, containing by Eſtimation a large Number of Acres, to wit, forty Acres, lying and being at *W.* aforeſaid in the County of *Berks* aforeſaid, and lying and being within the Manor of *W.* in the County of *Berks* aforeſaid, and Parcel of that Manor; and that the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, long before the ſaid Time when, &c. and at the ſaid Time when, &c. were and ſtill are ſeiſed in their Demeſne as of Fee of and in the ſaid Manor of *W.* whereof, &c. with the Appurtenances, and being ſo thereof ſeiſed, becauſe that the ſaid eight Sheep at the ſaid Time when, &c. were in the ſaid Place in which, &c. Parcel, &c. eating up, feeding and depaſturing on the Graſs there then growing, and doing Damage there to the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, they the ſaid *Thomas* and *George*, as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, well acknowledge the taking of the ſaid eight Sheep in the ſaid Place, in which, &c. and juſtly, &c. as a Diſtreſs for the ſaid Damage ſo by them there done and doing, &c. and this they are ready to verify; Wherefore they pray Judgment, and a Return of the ſaid eight Sheep, together with their Damages, &c. according to the Form of the Statute in ſuch Caſe made and provided, to be adjudged

to

to them, &c. And for further Cognizance as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Thomas* and *George*, by Leave of the Court here for this Purpoſe firſt had and obtained, according to the Form of the Statute in ſuch Caſe made and provided, as Bailiffs of the Mayor, Burgeſſes and Commonalty of the Borough of *W.* in the County of *Berks*, well acknowledge the taking of the ſaid eight Sheep in the ſaid Place, in which, &c. becauſe they ſay that the ſaid Place called the *Old Moor* in which, &c. long before the ſaid Time when, &c. and at the ſame Time when, &c. was and ſtill is a certain large Waſte or Common Paſture, called or known by the ſeveral Names of the *Old Moor*, otherwiſe *Portman's Moor*, otherwiſe *Portman's Mead*, containing by Eſtimation a large Number of Acres, to wit, forty Acres, ſituate, lying and being at *W.* aforeſaid, in the County of *Berks* aforeſaid, and that the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, long before the ſaid Time when, &c. and at the ſaid Time when, &c. were and ſtill are ſeiſed in their Demeſne as of Fee of and in the ſaid Waſte or Common Paſture in which, &c. with the Appurtenances, and being ſo thereof ſeiſed, becauſe that the ſaid eight Sheep, at the ſaid Time when, &c. were in the ſaid Place in which, &c. eating up, feeding and depaſturing on the Graſs there then growing, and doing Damage there to the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, they the ſaid *Thomas* and *George*, as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty of the

Borough of *W.* aforeſaid, well acknowledge the taking of the ſaid eight Sheep in the ſaid Place in which, *&c.* and juſtly, *&c.* as a Diſtreſs for the ſaid Damage ſo by them there done and doing, *&c.* and this they are ready to verify; Wherefore they pray Judgment, and a Return of the ſaid eight Sheep, together with their Damages, *&c.* according to the Form of the Statute in ſuch Caſe made and provided, to be adjudged to them, *&c.*

Plea. And the ſaid *Adam Luſh*, as to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made as to the taking of the ſaid eight Sheep of the ſaid Declaration mentioned, ſays, That they the ſaid *Thomas* and *George*, by reaſon of any Thing therein alledged, ought not, as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, to acknowledge the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor*, in which, *&c.* to be juſt, becauſe he ſays that long before the ſaid Time when, *&c.* one *William F.* was and yet is ſeiſed of the ſaid Place called the *Old Moor*, in which, *&c.* in the ſaid Pariſh of Saint *Leonard* in *W.* in his Demeſne as of Fee, and being ſo ſeiſed thereof, he the ſaid *William* afterwards, that is to ſay, on the twentieth Day of *December* in the ſaid Year of our Lord one thouſand ſeven hundred and fifty-eight, at *W.* aforeſaid, gave Licence to the ſaid *Adam Luſh* to put his Cattle aforeſaid into the ſaid Place called the *Old Moor* in which, *&c.* to depaſture the Graſs there then growing, by virtue of which Licence the ſaid *Adam Luſh* afterwards, and before the ſaid Time when, *&c.* put the ſaid Cattle into the ſaid Place in which, *&c.*

&c. to depaſture the Graſs in the ſame there growing, which ſaid Cattle were in the ſaid Place in which, *&c.* on the Occaſion aforeſaid depaſturing the Graſs there then growing, until the ſaid *Thomas* and *George* on the twenty-ſeventh Day of *December* in the ſaid Year one thouſand ſeven hundred and fifty-eight, at the ſaid Pariſh of Saint *Leonard* in *W.* the ſaid Place, in which, *&c.* took the ſaid Cattle of the ſaid *Adam Luſh*, and unjuſtly detained the ſame againſt Gages and Pledges until, *&c.* in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; Without this, that the ſaid Place called the *Old Moor* in which, *&c.* at the ſaid Time when, *&c.* was Parcel of the Manor of *W.* in the ſaid Cognizance mentioned, as the ſaid *Thomas* and *George* have in their ſaid Cognizance above alledged; and this the ſaid *Adam Luſh* is ready to verify: Wherefore in as much as the ſaid *Thomas* and *George* have above acknowledged the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor* in which, *&c.* the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, *&c.* And for further Plea in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Adam Luſh*, by Leave of the Court here to him for this Purpoſe granted, according to the Form of the Statute in ſuch Caſe lately made and provided, ſays, That the ſaid *Thomas* and *George*, by reaſon of any thing therein alledged,

as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor*, in which, *&c.* to be juſt, becauſe he ſays, that long before, and at the ſaid Time when, *&c.* one *William F.* was, and ſtill is ſeiſed of and in diverſe, to wit, fifteen Acres of Land, with the Appurtenances, lying and being in a certain Cloſe called *Portman's Field*, otherwiſe Saint *John's Field*, lying at *W.* aforeſaid, in his Demeſne as of Fee, and that the ſaid *W. F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *W. F.* ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor*, in which, *&c.* for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining; and the ſaid *W. F.* being ſo ſeiſed thereof before the ſaid Time when, *&c.* to wit, on the twentieth Day of *September* in the Year of our Lord one thouſand ſeven hundred and

and fifty-ſix, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid fifteen Acres of Land with the Appurtenances (amongſt other Things) to one *Job W.* to have and to hold the ſame to the ſaid *Job W.* from the Feaſt of Saint *Michael the Archangel* then next enſuing, according to the preſent Stile, for and during one whole Year thence next following, and ſo from Year to Year for ſo long Time as it ſhould pleaſe the ſaid *W. F.* and *Job W.* by virtue of which ſaid Demiſe the ſaid *Job W.* afterwards, and before the ſaid Time when, *&c.* to wit, on the thirtieth Day of *September* in the Year laſt aforeſaid, according to the preſent Stile, entered into the ſaid fifteen Acres of Land with the Appurtenances, and became and was poſſeſſed thereof, and continued ſo poſſeſſed thereof until and upon the thirtieth Day of *October* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, according to the preſent Stile, and being ſo poſſeſſed thereof, he the ſaid *Job W.* afterwards, (to wit) on the ſaid thirtieth Day of *October* one thouſand ſeven hundred and fifty-eight, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid fifteen Acres of Land with the Appurtenances to the ſaid *Adam Luſh*, to hold the ſame to him from the Feaſt of *All Saints*, according to the Old Stile then next enſuing, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, by virtue of which ſaid laſt-mentioned Demiſe the ſaid *Adam Luſh* afterwards, and before the ſaid Time when, *&c.* to wit, on the thirteenth Day of *November* in the Year of our Lord one

thouſand ſeven hundred and fifty-eight, entered into the ſaid fifteen Acres of Land with the Appurtenances, and became and was poſſeſſed thereof, and being ſo poſſeſſed thereof he the ſaid *Adam Luſh*, after the ſaid Feaſt of *All Saints*, according to the Old Stile in the Year laſt aforeſaid, and before the ſaid Time when, &c. to wit, on the ſame Day and Year in the ſaid Declaration mentioned, put the ſaid eight Sheep, then being the commonable Sheep of the ſaid *Adam Luſh*, and levant and couchant in and upon the ſaid fifteen Acres of Land with the Appurtenances, into the ſaid Place in which, &c. to feed upon the Graſs there growing, and to uſe his ſaid Common of Paſture there, and the ſaid eight Sheep were depaſturing in the ſaid Place in which, &c. on that Occaſion, as they lawfully might, till the ſaid *Thomas* and *George*, before the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following according to the Old Stile, to wit, at the ſaid Time when, &c. of their own Wrong took the ſaid eight Sheep in the ſaid Place in which, &c. and unjuſtly detained the ſame againſt Gages and Pledges until, &c. in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; and this he is ready to verify: Wherefore in as much as the ſaid *Thomas* and *George* have above acknowledged the taking of the ſaid eight Sheep in the ſaid Place in which, &c. the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, &c. And for further Plea in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above

above made as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Adam Luſh*, by like Leave of the Court here to him for this Purpoſe granted, according to the Form of the Statute in ſuch Caſe lately made and provided, ſays, That the ſaid *Thomas* and *George*, by reaſon of any thing therein alledged as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place in which, *&c.* to be juſt, becauſe he ſays, that true it is that the ſaid Place called the *Old Moor* in which, *&c.* long before, and at the ſaid Time when, *&c.* was and ſtill is a certain large Waſte or Paſture called and known by the ſeveral Names of the *Old Moor*, otherwiſe *Portman's Moor*, otherwiſe *Portman's Mead*, containing by Eſtimation a large Number of Acres to wit, forty Acres lying and being at *W.* aforeſaid in the County of *Berks* aforeſaid, as the ſaid *Thomas* and *George* have in their ſaid Cognizance above alledged; But the ſaid *Adam Luſh* further ſays, That long before, and at the ſaid Time when, *&c.* one *W. F.* was, and ſtill is ſeiſed of and in a certain Meſſuage and diverſe, to wit, one hundred Acres of Land with the Appurtenances, ſituate, lying and being at *W.* aforeſaid, in his Demeſne as of Fee, and that the ſaid *W. F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid Meſſuage and Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *W. F.* ſtill of Right ought to

to have for himſelf and themſelves, his and their Farmers and Tenants of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, &c. every Year from the Feaſt of *All Saints* according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary*, according to the ſame Stile then next following, to be had and taken with Sheep as to the ſaid Meſſuage and Land with the Appurtenances belonging and appertaining; and the ſaid *W. F.* being ſo ſeiſed of the ſaid Meſſuage and Land with the Appurtenances, afterwards, and before the ſaid Time when, &c. to wit, on the twentieth Day of *September* in the Year of our Lord one thouſand ſeven hundred and fifty-ſix, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid Meſſuage and Land with the Appurtenances to one *Job W.* to hold the ſame to him from the Feaſt of Saint *Michael the Archangel* then next following, according to the preſent Stile, for one whole Year then next to come, and ſo from Year to Year for ſo long Time as it ſhould pleaſe the ſaid *W. F.* and *Job W.* by virtue of which ſaid Demiſe the ſaid *Job W.* afterwards, and after the Feaſt of Saint *Michael the Archangel* in the Year of our Lord one thouſand ſeven hundred and fifty-ſix, according to the preſent Stile, and before the ſaid Time when, &c. (to wit) on the thirtieth Day of *September* in the Year laſt aforeſaid, according to the preſent Stile, at *W.* aforeſaid, entered into the ſaid Meſſuage and Land with the Appurtenances, and became and was, and continually from thenceforth hitherto hath been,

been, and ſtill is poſſeſſed thereof, and being ſo poſſeſſed thereof, he the ſaid *Job W.* afterwards, and before the ſaid Time when, &c. (to wit) on the twentieth Day of *December* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, according to the preſent Stile, at *W.* aforeſaid, gave Leave and Licence to the ſaid *Adam Luſh* to put the ſaid eight Sheep into the ſaid Place in which, &c. to feed upon the Graſs there growing, by virtue of which ſaid Licence the ſaid *Adam Luſh* afterwards, and after the Feaſt of *All Saints* in that Year, according to the Old Stile, and before the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, and before the ſaid Time when, &c. (to wit) on the Day and Year in the ſaid Declaration mentioned, put the ſaid eight Sheep into the ſaid Place in which, &c. to feed upon the Graſs there growing, and the ſaid eight Sheep were depaſturing in the ſaid Place in which, &c. on that Occaſion, as they lawfully might, till the ſaid *Thomas* and *George* at the ſaid Time when, &c. of their own Wrong took the ſaid eight Sheep in the ſaid Place in which, &c. and unjuſtly detained the ſame againſt Gages and Pledges until, &c. in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; and this he is ready to verify: Wherefore in as much as the ſaid *Thomas* and *George* have above ackowledged the taking of the ſaid eight Sheep in the ſaid Place in which, &c. the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, &c.

&c. And the ſaid *Adam Luſh*, as to the ſaid Cognizance of the ſaid *Thomas* and *George* by them laſtly above made as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, ſays, That they the ſaid *Thomas* and *George*, by reaſon of any thing therein alledged, ought not, as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, to acknowledge the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor* in which, *&c.* to be juſt, becauſe he ſays, that long before, and at the ſaid Time when, *&c.* one *W. F.* was, and ſtill is ſeiſed of and in the ſaid Place called the *Old Moor* in which, *&c.* in his Demeſne as of Fee, and being ſo ſeiſed thereof he the ſaid *William* afterwards, that is to ſay, on the twentieth Day of *December* in the ſaid Year of our Lord one thouſand ſeven hundred and fifty-eight, at *W.* aforeſaid, gave Licence to the ſaid *Adam Luſh* to put his Cattle aforeſaid into the ſaid Place called the *Old Moor*, in which, *&c.* to depaſture the Graſs there then growing, by virtue of which Licence the ſaid *Adam Luſh* afterwards, and before the ſaid Time when, *&c.* put the ſaid Cattle into the ſaid Place in which, *&c.* to depaſture the Graſs in the ſame there growing, which ſaid Cattle were in the ſaid Place in which, *&c.* on the Occaſion aforeſaid depaſturing the Graſs there then growing, until the ſaid *Thomas* and *George*, on the twenty-ſeventh Day of *December* in the ſaid Year one thouſand ſeven hundred and fifty-eight, at the ſaid Pariſh of ſaint *Leonard* in *W.* in the ſaid Place in which, *&c.* took the ſaid Cattle of the ſaid *Adam Luſh*, and unjuſtly detained the ſame againſt

againſt Gages and Pledges until, &c. in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; Without this, that the ſaid Mayor, Burgeſſes and Commonalty of the Borough of *W.* aforeſaid, at the ſaid Time when, &c. were ſeiſed in their Demeſne as of Fee of and in the ſaid Waſte or Common Paſture called the *Old Moor*, in which, &c. as the ſaid *Thomas and George* have in their ſaid Cognizance above alledged; and this the ſaid *Adam Luſh* is ready to verify: Wherefore in as much as the ſaid *Thomas* and *George* have above acknowledged the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor*, in which, &c. the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, &c. And for further Plea in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them laſtly above made as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Adam Luſh* by Leave of the Court here to him for this Purpoſe granted, according to the Form of the Statute in ſuch Caſe lately made and provided, ſays, That the ſaid *Thomas* and *George*, by reaſon of any thing therein alledged, as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place in which, &c. to be juſt, becauſe he ſays, that long before, and at the ſaid Time when, &c. one *William F.* was, and ſtill is ſeiſed of and in diverſe (to wit) fifteen Acres of Land with the Appurtenances, lying and being in a certain Cloſe called *Portman's Field*, otherwiſe

otherwiſe Saint *John's Field*, lying at *W.* aforeſaid, in his Demeſne as of Fee, and that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *William F.* ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor*, in which, *&c.* for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining; and the ſaid *William F.* being ſo ſeiſed thereof before the ſaid Time when, *&c.* (to wit) on the twentieth Day of *September* in the Year of our Lord one thouſand ſeven hundred and fifty-ſix, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid fifteen Acres of Land with the Appurtenances (amongſt other Things) to one *Job W.* to have and to hold the ſame to the ſaid *Job W.* from the Feaſt of Saint *Michael the Archangel* then next enſuing, according to the preſent Stile, for and during one whole Year thence next following, and ſo from Year to Year for ſo long Time as it ſhould pleaſe

pleaſe the ſaid *William F.* and *Job W.* by virtue of which ſaid Demiſe the ſaid *Job W.* afterwards, and after the Feaſt of Saint *Michael* one thouſand ſeven hundred and fifty-ſix, according to the preſent Stile, (to wit) on the thirtieth Day of *September* in the Year laſt mentioned, according to the preſent Stile, entered into the ſaid fifteen Acres of Land with the Appurtenances, and became and was poſſeſſed thereof, and continued ſo poſſeſſed thereof until and upon the thirtieth Day of *October* in the Year one thouſand ſeven hundred and fifty-eight, according to the preſent Stile; and being ſo poſſeſſed thereof he the ſaid *Job W.* afterwards, and before the ſaid Time when, *&c.* (to wit) on the ſaid thirtieth Day of *October* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid fifteen Acres of Land with the Appurtenances to the ſaid *Adam Luſh*, to hold the ſame to him from the Feaſt of *All Saints*, according to the old Stile, then next enſuing, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile; by virtue of which ſaid laſt-mentioned Demiſes the ſaid *Adam Luſh* afterwards, and before the ſaid Time when, *&c.* (to wit) on the thirteenth Day of *November* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, entered into the ſaid fifteen Acres of Land with the Appurtenances, and became and was poſſeſſed thereof; and being ſo poſſeſſed thereof he the ſaid *Adam Luſh* after the ſaid Feaſt of *All Saints*, according to the Old Stile, in the Year laſt aforeſaid, and before the

ſaid

ſaid Time when, &c. (to wit) on the ſame Day and Year in the ſaid Declaration mentioned, put the ſaid eight Sheep, then being the commonable Sheep of the ſaid *Adam Luſh*, and levant and couchant in and upon the ſaid fifteen Acres of Land with the Appurtenances, into the ſaid Place in which, &c. to feed upon the Graſs there growing, and to uſe his ſaid Common of Paſture there, and the ſaid eight Sheep were depaſturing in the ſaid Place in which, &c. on that Occaſion, as they lawfully might, till the ſaid *Thomas* and *George*, before the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the Old Stile, (to wit) at the ſaid Time when, &c. of their own Wrong took the ſaid eight Sheep in the ſaid Place in which, &c. and unjuſtly detained the ſame againſt Gages and Pledges until, &c. in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; and this he is ready to verify: Wherefore in as much as the ſaid *Thomas* and *George* have above acknowledged the taking of the ſaid eight Sheep in the ſaid Place in which, &c. the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, &c. And for further Plea in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them laſtly above made as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Adam Luſh*, by like Leave of the Court here to him for this Purpoſe granted, according to the Form of the Statute in ſuch Caſe lately made and provided, ſays, That the ſaid *Thomas* and *George*,

George, by reaſon of any thing therein alledged as Bailiffs of the ſaid Mayor, Burgeſſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place in which, *&c.* to be juſt, becauſe he ſays that true it is, that the ſaid Place called the *Old Moor* in which, *&c.* long before, and at the ſaid Time when, *&c.* was and ſtill is a certain large Waſte or Paſture called and known by the ſeveral Names of the *Old Moor*, otherwiſe *Portman's Moor*, otherwiſe *Portman's Mead*, containing by Eſtimation a large Number of Acres (to wit) forty Acres lying and being at *W.* aforeſaid in the County of *Berks* aforeſaid, as the ſaid *Thomas* and *George* have in their ſaid Cognizance above alledged; But the ſaid *Adam Luſh* further ſays, That long before, and at the ſaid Time when, *&c.* one *William F.* was, and ſtill is ſeiſed of and in a certain Meſſuage and diverſe, (to wit) one hundred Acres of Land with the Appurtenances, ſituate, lying and being at *W.* aforeſaid, in his Demeſne as of Fee, and that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid Meſſuage and Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *William F.* ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, *&c.* every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of

the *Purification of the Bleſſed Virgin Mary*, according to the ſame Stile then next following, to be had and taken with Sheep, as to the ſaid Meſſuage and Land with the Appurtenances belonging and appertaining; and the ſaid *William F.* being ſo ſeiſed of the ſaid Meſſuage and Land with the Appurtenances, afterwards, and before the ſaid Time when, &c. (to wit) on the twentieth Day of *September* in the Year of our Lord one thouſand ſeven hundred and fifty-ſix, according to the preſent Stile, at *W.* aforeſaid, demiſed the ſaid Meſſuage and Land with the Appurtenances to one *Job W.* to hold the ſame to him from the Feaſt of Saint *Michael the Archangel* then next following, according to the preſent Stile, for one whole Year then next to come, and ſo from Year to Year for ſo long Time as it ſhould pleaſe the ſaid *William F.* and *Job W.* by virtue of which ſaid Demiſe the ſaid *Job W.* afterwards, and after the Feaſt of Saint *Michael the Archangel* in the Year of our Lord one thouſand ſeven hundred and fifty-ſix, according to the preſent Stile, and before the ſaid Time when, &c. (to wit) on the thirtieth Day of *September* in the year laſt aforeſaid according to the preſent Stile, at *W.* aforeſaid, entered into the ſaid Meſſuage and Land with the Appurtenances, and became and was, and continually from thenceforth hitherto hath been, and ſtill is poſſeſſed thereof; and being ſo poſſeſſed thereof he the ſaid *Job W.* afterwards, and before the ſaid Time when, &c. (to wit) on the twentieth Day of *December* in the Year of our Lord one thouſand ſeven hundred and fifty-eight, according to the preſent Stile, at *W.* aforeſaid,

gave Leave and Licence to the ſaid *Adam Luſh* to put the ſaid eight Sheep into the ſaid Place in which, &c. to feed upon the Graſs there growing, by virtue of which ſaid Licence the ſaid *Adam Luſh* afterwards, and after the Feaſt of *All Saints* in that Year, according to the Old Stile, and before the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, and before the ſaid Time when, &c. (to wit) on the ſaid Day and year in the ſaid Declaration mentioned, put the ſaid eight Sheep into the ſaid Place in which, &c. to feed upon the Graſs there growing, and the ſaid eight Sheep were depaſturing in the ſaid Place in which, &c. on that Occaſion, as they lawfully might, till the ſaid *Thomas* and *George* at the ſaid Time when, &c. of their own Wrong took the ſaid eight Sheep in the ſaid Place in which, &c. and unjuſtly detained the ſame againſt Gages and Pledges until, &c. in Manner and Form as the ſaid *Adam Luſh* hath above thereof complained againſt them; and this he is ready to verify; Wherefore in as much as the ſaid *Thomas* and *George* have above acknowledged the taking of the ſaid eight Sheep in the ſaid Place in which, &c. the ſaid *Adam Luſh* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, &c.

Replication.

And the ſaid *Thomas* and *George*, as to the ſaid Plea of the ſaid *Adam Luſh* by him firſt above pleaded in Bar, as to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made, as before, ſay, That the ſaid Place called the *Old Moor* in which, &c. at

the ſaid Time when, &c. was Parcel of the Manor of *W.* in the ſaid Cognizance mentioned, as the ſaid *Thomas* and *George* have in their ſaid Cognizance above alledged; and of this they put themſelves upon the Country, and the ſaid *Adam Luſh* doth the ſame, &c. And the ſaid *Thomas* and *George* as to the ſaid Plea of the ſaid *Adam Luſh* by him ſecondly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made, ſay, That the ſaid eight Sheep in the ſaid Declaration mentioned were at the ſaid Time when, &c. in the ſaid Place called the *Old Moor* in which, &c. wrongfully feeding and depaſturing on the Graſs there then growing, and doing Damage there to the ſaid Mayor, Burgeſſes and Commonalty aforeſaid, as the ſaid *Thomas* and *George* have above in their ſaid Cognizance alledged; Without this, that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, &c. had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and ſtill of right ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor*, in which, &c. for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of*

the Bleſſed Virgin Mary then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining, in Manner and Form as the ſaid *Adam Luſh* hath above in his ſaid Plea in that Behalf alledged; and this the ſaid *Thomas* and *George* are ready to verify; Wherefore they pray judgment, and a Return of the ſaid eight Sheep, together with their Damages, *&c.* according to the Form of the Statute, *&c.* to be adjudged to them, *&c.* And the ſaid *Thomas* and *George*, as to the ſaid Plea of the ſaid *Adam Luſh* by him thirdly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made, ſay, That the ſaid eight Sheep in the ſaid Declaration mentioned were at the ſaid Time when, *&c.* in the ſaid Place called the *Old Moor* in which, *&c.* wrongfully feeding and depaſturing on the Graſs there then growing, and doing Damage there to the ſaid Mayor, Burgeſſes and Commonalty aforeſaid, as the ſaid *Thomas* and *George* have above in their ſaid Cognizance alledged; Without this, that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid Meſſuage and Land in that Plea mentioned with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants, of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, *&c.* every

Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary*, according to the ſame Stile, then next following, to be had and taken with Sheep, as to the ſaid Meſſuage and Land with the Appurtenances belonging and appertaining, in Manner and Form as the ſaid *Adam Luſh* hath above in his ſaid Plea in that Behalf alledged; and this the ſaid *Thomas* and *George* are ready to verify; Wherefore they pray Judgment, and a Return of the ſaid eight Sheep, together with their Damages, *&c.* according to the Form of the Statute, *&c.* to be adjudged to them, *&c.* And the ſaid *Thomas* and *George*, as to the ſaid Plea of the ſaid *Adam Luſh* by him firſt above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them ſecondly above made, ſay, That the ſaid Mayor, Burgeſſes and Commonalty of the ſaid Borough of *W.* aforeſaid, at the ſaid Time when, *&c.* were ſeiſed in their Demeſne as of Fee of and in the ſaid Waſte, or Common Paſture, called the *Old Moor* in which, *&c.* in Manner and Form as the ſaid *Thomas* and *George* have above in their ſaid Cognizance alledged; and of this they put themſelves upon the Country, *&c.* and the ſaid *Adam Luſh* doth the ſame likewiſe. And the ſaid *Thomas* and *George*, as to the ſaid Plea of the ſaid *Adam Luſh* by him ſecondly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them above ſecondly made, ſay, That the ſaid eight Sheep were at the ſaid Time when, *&c.* in the ſaid Place called the *Old Moor* in which, *&c.* wrongfully, feeding and depaſturing on the Graſs

Graſs there then growing, and doing Damage there to the ſaid Mayor, Burgeſſes and Commonalty aforeſaid, as the ſaid *Thomas* and *George* have above in their ſaid Cognizance in that Behalf alledged; Without this, that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor* in which, *&c.* for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining, as the ſaid *Adam Luſh* hath above in his ſaid Plea in that Behalf alledged; and this they the ſaid *Thomas* and *George* are ready to verify: Wherefore they pray Judgment, and a Return of the ſaid Sheep, together with their Damages, *&c.* according to the Form of the Statute, *&c.* to be adjudged to them, *&c.* And the ſaid *Thomas* and *George*, as to the ſaid Plea of the ſaid *Adam Luſh* by him thirdly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them

ſecondly above made, ſay, That the ſaid Sheep in the ſaid Declaration mentioned were at the ſaid Time when, &c. in the ſaid Place called the *Old Moor* in which, &c. wrongfully feeding and depaſturing on the Graſs there then growing, and doing Damage there to the ſaid Mayor, Burgeſſes and Commonalty aforeſaid, as the ſaid *Thomas* and *George* have above in their ſaid Cognizance alledged; Without this, that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, &c. had of and in the ſaid Meſſuage and Land with the Appurtenances in that Plea mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, &c. every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary*, according to the ſame Stile, then next following, to be had and taken with Sheep, as to the ſaid Meſſuage and Land with the Appurtenances belonging and appertaining, the ſaid *Adam Luſh* hath above in his ſaid Plea alledged; and this they the ſaid *Thomas* and *George* are ready to verify; Wherefore they pray Judgment, and a Return of the ſaid Sheep, together with their Damages, &c. according to the Form of the Statute, &c. to be adjudged to them, &c.

Rejoinder. And the ſaid *Adam Luſh*, as to the ſaid Plea of the ſaid *Thomas* and *George* above in Reply pleaded

pleaded to the ſaid Plea of him the ſaid *Adam Luſh* ſecondly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made as before, ſaith, That the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *William F.* ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor* in which, *&c.* for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining, in Manner and Form as the ſaid *Adam Luſh* hath above in his ſaid Plea in that Behalf alledged; and this the ſaid *Adam Luſh* prays may be enquired of by the Country, and the ſaid *Thomas* and *George* do the ſame likewiſe. And as to the ſaid Plea of the ſaid *Thomas* and *George* by them in Reply pleaded to the ſaid Plea of him the ſaid *Adam Luſh* thirdly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them firſt above made, the ſaid *Adam Luſh* as before, ſaith, That the ſaid *William F.* and

all

all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, &c. had of and in the ſaid Meſſuage and Land in that Plea in Bar mentioned, with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *William F.* ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, &c. every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary*, according to the ſame Stile, then next following, to be had and taken with Sheep, as to the ſaid Meſſuage and Land with the Appurtenances belonging and appertaining, in Manner and Form as the ſaid *Adam Luſh* hath above in his ſaid Plea in that Behalf alledged; and this the ſaid *Adam Luſh* alſo prays may be enquired of by the Country, and the ſaid *Thomas* and *George* do the ſame likewiſe. And as to the ſaid Plea of the ſaid *Thomas* and *George* above in Reply pleaded to the ſaid Plea of him the ſaid *Adam Luſh* ſecondly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them ſecondly above made, as before, ſaith, That the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, &c. had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *William F.* ſtill of Right ought

ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor* in which, *&c.* for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining, as the ſaid *Adam Luſh* hath above in his ſaid Plea in that Behalf alledged; and this the ſaid *Adam Luſh* alſo prays may be enquired of by the Country, and the ſaid *Thomas* and *George* do the ſame likewiſe. And as to the ſaid Plea of the ſaid *Thomas* and *George* above in Reply pleaded to the ſaid Plea of the ſaid *Adam Luſh* thirdly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them ſecondly above made as before, ſaith, That the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, *&c.* had of and in the ſaid Meſſuage and Land with the Appurtenances in that Plea in Bar mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *William F.* ſtill of right ought to have for himſelf and themſelves, his and their Farmers and Tenants of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, *&c.*

&c. every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary*, according to the ſame Stile then next following, to be had and taken with Sheep as to the ſaid Meſſuage and Land with the Appurtenances belonging and appertaining, as the ſaid *Adam Luſh* hath above in his ſaid Plea alledged; and this the ſaid *Adam Luſh* alſo prays may be enquired of by the Country, and the ſaid *Thomas* and *George* do the ſame likewiſe. Therefore as well to try this Iſſue as the ſaid ſeveral other Iſſues above joined between the Parties, the Sheriff is commanded that he cauſe to come here in eight Days of the *Purification* of *the Bleſſed Virgin Mary*, twelve, *&c.* by whom, *&c.* who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.*

FINIS.

The CASE of JOHN WOODHOUSE, Eſq; of *Bridewell Hoſpital*, one of the Directors of the *Eaſt-India* Company.

IN the Autumn of 1775, he was ſeiſed with a violent cold, or influenza, which continued ſome months, then fell on the bowels and brought on a conſtant purging. He took the advice of eminent phyſicians, and found relief, but not a cure. In the ſpring following, as the complaint increaſed, he went to Bath, drank the waters, took ſuch medicines as were judged proper, and bathed three or four times; by which means the diſorder ſeemed ſomewhat abated;—in July went to the German Spa, where he continued three months, during ſix weeks of which time he received benefit from the Geronſteer water, but then the diſorder changed to a dyſentery; which was removed by medical aſſiſtance. He went on with the waters, and was rather better; but relapſed in the winter, and continued equally bad for ſeven or eight months.

In June 1777 he returned to Spa, and drank the Savaniere waters, which had a good effect for a month, then grew worſe, tried former medicines to no purpoſe, and was obliged to leave off drinking the waters; but bathed in the mineral bath

bath of Tonolet made warm; and in the natural hot baths of Chaude Fontaine, without any benefit: the dyſentery daily increaſing, with much pain he returned to England, quite emaciated and feeble.

In September, upon the encouragement given him by a worthy gentleman in the neighbourhood of Nevil-Holt, Leiceſterſhire, (a Member of Parliament) and by the advice of Dr. Garrow, of Barnet, he went to try the waters of Nevil-Holt, firſt in ſmall quantities, as an alterative, increaſing the doſe gradually, from a pint to three or four: they acted as a purgative, in a greater or leſs degree, according to the number of glaſſes drank, and more than anſwered his moſt ſanguine expectations: for though no other opening medicine could be taken without manifeſt prejudice, the briſkeſt operation by theſe waters did not in the leaſt degree relax or weaken, but braced and ſtrengthened him. In ſix weeks the dyſentery was cured, and the purging greatly abated, and continued ſo during the winter in London, where he drank that water pretty conſtantly. In 1778 he ſpent two months at Nevil-Holt, drinking the water at the fountain head, got perfectly cured, and returned home in good health, and has recovered his fleſh, ſtrength, and ſpirits, and ſo continues, 1780.

The NEVIL-HOLT WATER is ſold by W. OWEN, at the ORIGINAL MINERAL WATER WAREHOUSE in LONDON, No, 11, near Temple-bar, Fleet-ſtreet, (eſtabliſhed in its reputation above fifty years, by the recommendation of the moſt eminent Phyſicians) where the Gentlemen of the Faculty, and the Public, may depend

depend on being faithfully ſerved with all the mineral waters, in the greateſt perfection, viz.

The genuine SELTZER WATER, immediately from the fountain head, filled under the inſpection of the Comptroller to his Highneſs the ELECTOR of TREVES:—The genuine GERMAN SPA Water, from the Pouhon ſpring, in large and ſmall flaſks; and the genuine PYRMONT Water, in three-pint bottles.

BRISTOL Water, SCARBOROUGH Water certified by the Magiſtrates of Scarborough, NEVIL-HOLT, HARROGATE, TILBURY, MALVERN, JESSOP:—Bath Water, certified by the pumper, and CHELTENHAM Water, arrive conſtantly freſh every week as uſual.—Alſo Tar Water.—Sea Water in it's utmoſt purity, taken up ſeveral leagues at ſea.—Cheltenham and Scarborough Salts.

W. OWEN preſumes to aſſure the Gentlemen of the Faculty, and the Public, that the mineral Waters, ſold at his Warehouſe, are filled in the moſt proper ſeaſons only, when they are in perfection. And as he has ſpared no pains nor expence to have the genuine waters of Seltzer, Pouhon Spa, and Pyrmont, ſecured in the beſt manner, ſo as effectually to preſerve their mineral ſpirit, and medicinal virtues, he has reaſon to flatter himſelf that the Waters he imports are not inferior to thoſe at the fountain head.

*** Great quantities of ſpurious waters having been notoriouſly ſubſtituted in the room of the genuine, to the diſappointment of the Phyſicians, and their Patients, as fully appears by a certificate in my poſſeſſion; in order to prevent impoſitions ſo dangerous to health, as much as lies

lies in my power, I have found it neceſſary t
ſeal with my name, every bottle of SELTZE
water, and of PYRMONT, and SPA water im-
ported by me; of which thoſe who favour m
with their commands will pleaſe to take notice
And, for the ſame reaſon, I beg leave to requeſ
they will give orders to have a bill and receip
ſigned by their moſt obedient ſervant,

W. OWEN.