REPORT

OF

CASES

ADJUDGED IN THE

Court of King's Bench,

From *Easter* Term 12 *Geo.* 3. to *Michae*
14 *Geo.* 3. (both inclusive.)

With some select Cases

In the Court of Chancery,

AND

Of the Common Pleas,

WHICH ARE WITHIN THE SAME PERIO

TO WHICH IS ADDED,

THE CASE OF GENERAL WARRAN

AND

A COLLECTION OF MAXIMS.

BY CAPEL LOFFT, ESQUIRE, OF LINCOLN'S I

DUBLIN:

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M.DCC.XC.

PREFACE.

FROM the excellence of our conſtitution, the dignity of our laws, the abilities of thoſe by whom they are adminiſtered, and the learning and authority of our reporters, through a long ſeries of ages, and of ſome yet living, I feel much awe in revolving within my own mind, and ſtill more in offering to the profeſſion, and ſubmitting to public examination, the collection of caſes contained in the enſuing ſheets. But all theſe circumſtances, though they heighten the difficulty, yet heighten the deſire; and I ſhould hope would tend to excuſe the ſucceſs of the attempt, if it ſhould be inadequate to my wiſhes.

And though a preface is generally deſigned as an apology for the work, and therefore ought not to want an apology itſelf, yet, before I proceed farther, I ſhould wiſh to obviate any prejudices which my reader may entertain, even from this preface, which he can hardly be more ſenſible than myſelf to be much inferior to the gravity and dignity of the ſubject. Indeed upon other terms I muſt not have written any. The ſentiments of a young and private man bear too wide a diſproportion to thoſe which I have to offer in the body of the work. And they will do ill, if there are any, who ſhall judge from the weakneſs of my own thoughts of the ſtrength of thoſe which are not properly my own. And if I ſhall appear to have expatiated warmly here, they will recollect I do not pretend to ſpeak to them beyond: And that where one loves, be the object however worthy, (and what can eaſily be found more worthy of love and admiration than the voice of our laws ſpeaking to us in judgment) the meaſure of what is ſaid is apt to proceed rather from affection than ſtrict rule; more from what one *feels* than from what is *neceſſary*.

However, if any thing in this preface ſhall be thought to approach, though at a great diſtance, to the weight and importance of the occaſion, it will anſwer my wiſhes; the much that falls ſhort meaſures with my ability: But neither the one or the other will affect the CASES themſelves, and the POINTS of LAW, which is not merely the *principal* but the *only* thing in this volume in which I venture to aſk for my reader's attention; of whoſe candour I deſire

now to be heard with indulgence of the motives which have induced me to an undertaking of ſome labour; and in which the perſon attempting, the attempt itſelf, and the execution, muſt owe much to a favourable interpretation.

As an *Engliſhman* I cannot help loving and revering the laws of my country; as *a member of the profeſſion* of the *law* I am attempting to diſcharge a debt which Lord *Bacon* ſays every man incurs to his profeſſion; and, as I cannot pay it of mine own, to pay it in that coin which I have endeavoured to treaſure up in the courſe of my attendance on the courts: As *a man* it were a ſhame if I could contemplate with coldneſs and indifference *thoſe laws* which have made the beſt proviſion for the rights of humanity; are the general admiration of mankind, and the common ſupport and protection of *natives, denizens, and aliens;* nay, as far as may conſiſt with the public ſafety, of *enemies* living beneath their ſhadow. *Laws*—at which the breaſts of philoſophers have burned with rapture! Which gladden the heart of the peaſant in his cottage, knowing himſelf not beneath their defence. Thoſe benign and venerable laws which add glory, ſtability, and happineſs to the THRONE; make the *Noble* greater and more unenvied in his dignity; give power to *all*, for their own ſecurity, and the ſervice of the public; but for oppreſſion to *none*. Thoſe LAWS which the moſt acute ſagacity has been employed to inveſtigate, and which the moſt ſevere judgment has approved with admiration; which four hundred years ago had the encomium from an hiſtorian not enthuſiaſtic in his praiſes, a foreigner, and of an hoſtile country, as the BEST LAWS for PRINCE and PEOPLE: Which reſult from a conſtitution which one of the wiſeſt hiſtorians of antiquity had pronounced muſt be the beſt; "a compoſition "of the three ſimple forms of other governments; which conſtitution the *Athenian* teacher of wiſdom had defined by anticipation "a monarchy ſubſiſting in laws;" which the noble orator, philoſopher, and ſenator of *Rome* had recognized as the moſt excellent, from the mild ſeverity and equitable juſtice which would flow from it; and which a politician, eſteemed the deepeſt of antiquity, has delineated after their traces, and appears only to have been miſtaken in thinking it too highly finiſhed and too delicately tempered to be permanent: A miſtake which the experience of ages has refuted, and which ages more may refute. Thoſe LAWS and that CONSTITUTION which have their

their roots in the abyſs of unfathomable antiquity, their branches over the mighty empire which, under Providence, they formed and preſerved—and which grew, from ſuch a ſyſtem of liberty, juſtice, peace, concord, and order, double that of the *Roman*, in its utmoſt extent—and their head in heaven: Thoſe laws and that conſtitution which neither the blind ambition, nor the miſtaken counſels, nor the unhappy fortune of kings, the pride and contention of our ancient nobles, the dark ſtorm of ſuperſtition, the waves and ſea of popular fury, nor the mining of time, nor the lightnings of war, darted on *Britain* by united enemies, each ſingly formidable to any other ſtate, and ſtrong in our domeſtic diſſenſions, have now for ages been able to deſtroy. Deſtroy? The ſhock of ages, tyranny, ſuperſtition, popular madneſs, all in their turn contributed to mature their perfection, to ſtrike them forth in their meridian luſtre, to clear the obſcure, retrench the weak and ſuperfluous, aboliſh the dangerous, ſtrengthen the beſt; and erect a model of legal liberty for the inſtruction and benefit of mankind, as well as the delight and wonder and bleſſing of *Engliſhmen*: For which not only ſo many heroes have died in the field or bled upon the ſcaffold, but ſo many of the firſt abilities and integrity have toiled through a life of labour, of danger, and often with public calumny for their reward, upon the *Bench*, to preſerve them; ſo many to frame them, adjuſt their proportions, direct their uſes, and connect new parts from time to time, as occaſion demanded, to the general ſyſtem, in the *Senate*—I wrong my country in borrowing an imperfect name from immortal *Rome*—in the PARLIAMENT of ENGLAND; which, when it really repreſents the people, and juſtly executes its exalted truſt, may look down on all other human inſtitutions with a conſcious ſuperiority, and compaſſion for their imperfections.

I take laws amongſt men, in the idea in which they appear to me moſt perfect, to be regulations of ſociety to which the members are bound to ſubmit, as being *neceſſary* for the liberty and happineſs of the *community*, agreeable to reaſon and the divine law, and ſupported by ſuch reſtraints and penalties *only* as are *indiſpenſably* requiſite for the end of the *public ſecurity and welfare*, and founded either on the expreſs conſent of all who are to be bound by them, or virtually by thoſe whom they freely chooſe and depute to conſent for them. Any reader will judge how this will apply to our conſtitution, and what degree of praiſe that conſtitution

conſtitution, merits if it does apply. Let my veneration for this conſtitution plead my excuſe in the bold attempt I have hazarded of publiſhing theſe caſes.

I had intended to call them ſimply a collection of caſes, being ſenſible that none are *properly* REPORTS but ſuch as are publiſhed by authority, or are the judgments of learned and reverend judges, committed to the public by themſelves.

But as reports of caſes is grown a familiar name in the titles of books, at many different periods, I have not avoided the *name*, ſince, though I pretend to *no authority*, it is an additional *pledge* of that fidelity to which I *do* pretend; and which I am *bound* by intereſt and duty to *preſerve*.

JUDGMENTS, it is true, as the GREAT SIR MATTHEW HALE obſerves, are *but* EVIDENCE of *law*, and not LAW; yet, as he ſubjoins, they are the HIGHEST EVIDENCE: And it would be very impertinent for me to obſerve what weight the judgments given within the period comprehended in this book ought to carry with them. I know that it is felt and aknowledged.

But as JUDGMENTS are but *evidence* of law, REPORTS are but *evidence* of judgments; and ſtand, therefore, a ſtep *lower*. Yet farther, I muſt deſcend ſtill *another* ſtep, and freely confeſs, what my reader would have underſtood perfectly without me, that theſe reports are *far* from the *beſt* evidence of theſe judgments. But with this I can aſſure him (and I know I muſt ſpeak to thoſe who are beſt able, and were moſt concerned, and bound to refute me, if I were ſpeaking falſely, and whoſe cenſure, as I ſhould in the higheſt degree merit, I could leaſt ſuſtain) that I have not *wilfully miſrepreſented* or *neglected* any of thoſe judgments. They are *all* within the memory of almoſt the whole *bar*, and of all the *judges* who delivered them; of whom the public has loſt *none*, having ſuffered only (and there greatly indeed) in the Exchequer, in which court none of the notes of the caſes in this book were taken.

Still how ſhall I reply to the objection which muſt be made, that when I acknowledged the difficulty and the importance of ſuch a work, and the extraordinary merit of thoſe who have been engaged in it before me, I ſhould preſume to undertake it?

I muſt partly anſwer, that many of theſe learned and excellent men are now no more upon earth; and that I am ſure, valuable as their labours were, they would have

ſooner

ſooner burned them than have ſuppreſſed the efforts of induſtry in the profeſſion, which they loved and honoured, which they adorned and ſo much benefitted by publiſhing their works, if they had conſidered it as a prohibition to poſterity to attempt a labour in which they had thus excelled. The beſt ſingle work of genius and learning would be bought too dear if it were to deter all ſubſequent ages from an endeavour to do any thing of a like nature. One could have reſigned an *Homer*, or even (which perhaps is more) *Shakeſpeare*, if they were to be enjoyed upon the hard terms of ſilencing all inferior efforts. Becauſe there has been a *Raphael*, a *Vandyck*, a *Corregio*, a *Titian*, was it fit that painting ſhould be at a ſtand? Or ſhould ſculpture drop the chiſſel becauſe there had been a *Phidias*, an *Angelo*, a *Roubilliac?* There would not have been theſe progreſſive honours for that art to boaſt if artiſts had reaſoned thus: And when there has been a *Roubilliac* every man has a right to be as near him as he can; or to excel him if he is able: And though he ſhould be ſatisfied he could never do this, there is yet room for fame in a much inferior degree of excellence. Should we have no muſic becauſe there has been an *Handel* and a *Purcel?* or live without houſes or churches becauſe there has been *Vitruvius*, *Jones*, and *Wren?* or have no phyſicians becauſe we have had *Sydenham* and *Meade?* or no hiſtory becauſe there has been *Herodotus*, *Livy*, *De Thou*, *Clarendon?* or have no legiſlators or judges becauſe there has been a *Solon*, an *Alfred*; an *Hale*, an *Holt?* or no defence becauſe we were once defended by *Drake*, *Vernon*, *Boſcawen*, *Marlborough*, *Wolfe?* or no philoſophy becauſe we had *Bacon*, *Boyle*, and *Newton?* or ſhall there be no chriſtians becauſe there was once primitive chriſtianity? or rather the more excellent and uſeful any thing is ought not the labour to be the more general in thoſe whoſe ſtudy and opportunities are any way adapted to it? And if we allow encouragement to ſecond, third, and much lower claſſes, in works even of pleaſure and imagination, ought not a man to expect the ſame indulgence who is bringing ſomething to the ſtock of the public uſe, where, if he fall ſhort of any conſiderable fame, he may yet do ſervice?

Indeed, ſuch reſtrictions would do much worſe than exclude me; nor ſhould we have had that excellent living reporter, whoſe works make my apology the moſt difficult if he had reſolved that becauſe ſo much had been done admirably

admirably it would be wrong to attempt doing any thing well for the future.

But I am now to ſpeak in anſwer to that objection of the *living* reporters. I don't know that there ever were fewer ſince the beginning of the year-books, now above four centuries and an half: And I gladly acknowledge their merit as remarkable as the ſmallneſs of their numbers. But if one *bad* reporter ſhould be added it would be his own loſs and misfortune; if you will his folly—or, if you chooſe to ſay—his crime; it *can* be no prejudice to the *good:* But if the caſes I have to offer ſhall turn out not ſo bad (as I am ſure it will be my own fault if they are not far from uſeleſs, conſidering who were the judges, what the queſtions, and what have been the deciſions) I flatter myſelf it will be a pleaſure to them that their labours have encouraged a young man to labour in his profeſſion; with unequal powers, but not with little induſtry; nor, he hopes, it will appear, with little fidelity.

But the great ſtreſs will be, that theſe caſes are *principally* in the King's Bench, and the public have aſſurance they may expect them from a reporter whom they highly value from experience. I am glad that they do expect them: I ſhould be ſorry they were to truſt to my little ſkiff only to conduct them through the ocean of legal knowledge, vaſt for ages back, and ſo widely extended in modern times. But I am ſure *that* reporter is too well *eſtabliſhed* and too well *deſerving* to be hurt by this work of mine: And I am as far from the *madneſs* of expecting as thoſe who know me will be convinced I am from the *malignity* of wiſhing it. There have been concurrent reporters for a long time back; ſo that I hope, whatever reporters there are, and however excellent, there is room for me, without injury to the living or the dead. And though I might have much more reaſon to fear than I can give cauſe of umbrage, I wiſh that my fellow labourers in the vineyard may rather *all* exert themſelves than that *one* ſhould be kept out.

I do not apologize, therefore, to any gentleman who has reported or means to report any caſes which I have taken; I think it would be more arrogant than humble if I ſhould; neither do I apologize with the public; none of whom are bound to be purchaſers of any book; nor, when they have purchaſed it, to form any other opinion than their own judgment ſhall enable them and their temper diſpoſe them to form. I cannot apologize to the public for endeavouring to ſerve them in ſome way or other—it were more than

infamous

infamous in any man not to endeavour it: And I thought I could not attempt to ſerve them in a more natural or leſs oſtentatious manner than in the way of my profeſſion, and by giving them not my own thoughts and opinions, which I ſhall be ſparing to do till I think they may deſerve their notice, but the thoughts, opinions, and judgments of thoſe who, I am ſure, *muſt* deſerve and are ſecure of their notice, and upon matters of the higheſt importance and moſt public concern, as to *ſome* of theſe caſes, and of concern to the *profeſſion*, more or leſs, I hope, as to *all*; if it be true that the ſmalleſt degree of legal knowledge ought not to be neglected.

In point of fact, too, I muſt obſerve this, that in a few years conſtant attendance I have hardly known a caſe of any importance, either in law or equity, ſettled upon the authority of a ſingle reporter, however eminent and reſpectable; but that I have known (and there are many who know it better) numbers of caſes, where an obſcure point in one reporter, though of no ordinary merit, has been made clear by reference to another, where the true giſt of the queſtion has been aſcertained, and the true reaſons of the judgments, by lights drawn from the *concurrence*, nay, ſometimes, from the *oppoſition* of various reporters. And I need not ſay that a very ſtrong part of the evidence which we have for the moſt important and moſt certain of all hiſtories ariſes from the independent teſtimony of diſtinct reporters, contained in a volume too ſacred to be named with this.

I would now deſire to ſpeak ſomething of the general conduct and deſign of the work I have attempted.

In caſes of importance thoſe who have attended the courts will not be ſurprized if, beſides the *ſubſtance*, I have often been ſtruck with the *form* of an argument; the *exordium*, connexion, and cloſe: And they will at leaſt excuſe, I flatter myſelf, the attempt which I have ſometimes made of retaining as much as I conveniently might, and was able, even of theſe which if not ſtrictly neceſſary appeared graceful, and, as all juſt ornaments always are, ſubſervient to uſe. I have obſerved in ſome of the greater arguments that ſtructure and compoſition, perſpicuous order, and elegant dependency of which I am ſenſible much is loſt, by the unavoidable contraction of the argument, in many inſtances by the omiſſion ſometimes of the words of the ſpeaker, and the uſe of others leſs apt of my own; and by other cauſes—not the leaſt of which will be, that you cannot *hear* the ſpeakers, but muſt be content to read.

This

This however, I am ſure, if I could have tranſmitted the pleadings as they were ſpoken, I ſhould eaſily have juſtified myſelf in more inſtances than one, to a great part of my readers, notwithſtanding the length. I think, I ſhould have attained, what Lord BACON obſerves, in his preface to his law arguments, is wanting in the more compendious method, a delineation, and tracing out a form of argument, which the younger ſtudents might imitate with pleaſure and advantage. For the law is injured if it be thought ſo dry and jejune a ſtudy as ſome have ſuppoſed; on the contrary I hope, it is generally allowed to be a liberal, a noble, and a very extenſive ſcience, nearly connected with the other arts and ſciences in general; however remote ſome of them may appear: Since nothing that raiſes the mind, extends the imagination, informs the judgment or rectifies the will, nothing virtuous, nothing wiſe, nothing graceful can be unſuitable to the character of an *Engliſh* lawyer: who is properly defined by Lord *Holt*, a *miniſter* of *right* and *juſtice*; who by the very MAXIMS of his profeſſion is to be above mercenary and ſordid intereſts; and who is admitted to the fulleſt and moſt diſtinct view of our laws, the accumulated wiſdom of above a thouſand years, and of the wonderful and divine fabric (I think, I cannot ſay too much, when I call it divine) of this our conſtitution. Nor, particularly, can a chaſte and manly eloquence miſbecome him; which *muſt* be *uſeful*; for none teach ſo forcibly, ſo fully, ſo immediately, as thoſe who can moſt *agreeably* perſuade; if they will apply thoſe powers of perſuaſion to their *proper* end. I hope theſe obſervations will not be imputed as vanity to the maker of them, who ſpeaks of the profeſſion with more love and ſincerity, as I readily again confeſs, than either abilities or need;—or perhaps policy with regard to his perſonal reputation, which might rather have been ſerved by not ſo free an avowal that he ſees that excellence which he can *only* ſee. But if little appears here of the *grace* of theſe arguments, the fullneſs of them in ſome inſtances may contribute to their uſe; and where I have taken *too much* it will be no hurt to my *readers judgment* to reject the *ſuperfluous*; if I had taken too little by truſting to my own I ſhould have paid myſelf a compliment with little coſts; but perhaps not much to his ſatisfaction.

Senſible, how much more the dialogue ſtrikes one than bare narrative, I have generally preferred it to ſaying this or that advocate ſaid thus or thus. And frequently, when I have begun obliquely in the form of narrative, I have broken

broken off where the paſſage ſtruck me and continued the argument in the perſon of the ſpeaker, hoping that my readers will be affected as I have been, and be moſt pleaſed when they have occaſion to think leaſt of the reporter and moſt of the ſpeaker; in argument, but particularly in the judgment.

There will be found inaccuracies in my language, I doubt not; of ſome I am conſcious; others may have eſcaped me. I would wiſh any who might read theſe pages to find as few defects of this kind as may be; but where they do find them, I hope they will not reject the ſubſtance becauſe they diſlike the form; or ſay this is inaccurate, and therefore the judge could never ſay it:—But examine whether it be juſtice, law, and reaſon; examine whether in *fact* (which they may eaſily know in ſuch recent caſes) the principle was laid down; and then they have my full leave to place the inaccuracy to my account, if they will place the good ſenſe, law and authority, to the account of thoſe to whom it belongs.

With reſpect to orthography, the reader may obſerve ſome words originally *Latin* derived through the medium of the *French*, ſpelt with the characteriſtic *u*; and ſometimes the ſame words without—I have omitted the *d* ſometimes in priviledge and alledge and ſuch words; and ſometimes inſerted it. I hope neither party will be angry, as I have done my beſt to pleaſe both in a matter which I think perfectly innocent, and in which, much may be ſaid on both ſides.

But now to return to the ſubſtance—I own I have thought Lord *Holt's* modeſty made him almoſt *unjuſt*, when he ſuppoſed that thoſe ſcambling reports which he mentions, would make poſterity think ill of his underſtanding and that of his brethren on the bench. For my own part, I do not think I ſhall utter any abſurdities in reporting the judgments of the caſes; becauſe I think, I ſhall ſay nothing in ſubſtance but what was ſaid by the court; but if I ſhould, I know where the blame will lie: And it is eaſier and readier for me to expect poſterity will think I was a blockhead, than it will to make the moſt remote ages of poſterity forget who were the judges who preſided during the period included in theſe notes; and while they ſhall remember *that*, I have no fear that any miſtakes of mine ſhall do their memory a wrong; and yet, I have done a good deal to avoid any.

The arguments, except where the caſe was new or very important, will be found generally not long: Though I did not

not choose to omit them even in smaller cases; because they lead the mind to consider and understand the point of decision.

The JUDGMENTS are taken generally at large; and often almost *verbatim*. And though I have used short-hand for almost all the notes, I hope I shall not be thought prolix in the manner in which I have taken them.

I own the authority of the venerable PLOWDEN, and of the author of the REPORTS, which by way of eminence are so called, weighed with me greatly: And I wish they had an effect on the *execution* proportionable to that which they had upon the *design*; and had enabled me to reach the mark as they excited me to aim at it, and shewed me where it stood, having indeed for their part erected it on so admirable a foundation, on so fair an eminence, and so much to the ornament and benefit of the profession.

In them you will find the JUDGMENTS *exact* in form, the *reasons* and principles *entire*, their force, dependence, and connexion preserved; and even in *collateral* points a vast magazine of learning, besides that which enriches them in direct application to the principal matter. For they thought of law and decided it not as a matter of *memory*, but as a science; and therefore did not consider *bare unconnected facts*, generally, and divested of their particular circumstances, but were accurate and curious in observing the distinctions, qualifications, and exceptions in the application of general rules to particular cases; they looked not on the shell and corpse, but on the *soul* of the law: Yet they were fond of general rules as the parents of certainty; but they kept them within their limits so as not to work an absurdity or *injustice*, and sometimes raised particular rules into general, so far as the reasons were general. The law is still considered as a science and decided on *similar* principles, and, as I have heard a learned and eminent practicer affirm, much the greater part of COKE is yet law; so much indeed as almost the *whole*. And yet those who go not back to the source, are apt to suppose that our modern law is a thing of yesterday, whereas the statutes have made the principal alterations, and that rather in particulars than generals. But common-law still prevails in a very considerable extent, and, as was truly said in the time of *Edw.* 4th, is as old as the *world*; being no other than common sense and justice brought down indeed, and applied, to particular circumstances of our policy and constitution, which have given rise to *rules* long since *settled*. And you hardly ever hear at this day a dispute about

about principles of common law, almoſt infinite as they are, but about the *application* of them to the caſe in queſtion.

And at this time law is conſidered in a more complicated and extenſive view than perhaps ever before, from the encreaſe of ſtatutes, the growth of arts and commerce, the various diſpoſitions of property, and the fraud and violence reſulting from ſo many jarring intereſts and paſſions, as are the growth of a wealthy and civilized ſociety, in which both virtues and vices have a larger ſcope, and vices particularly a more *viſible* and *formidable* operation. In ſuch a ſtate therefore, when the law of *commerce*, of general policy, and of *nations*, is become ſo large a part of the law of *England*, when precedents and caſes are ſo multiplied, and furniſh ſuch a labyrinth of argument, it is not merely of curioſity but of *neceſſity* to ſee why, by what rules of law, by what application of precedents, with what limitations and under what circumſtances, a particular caſe was decided; and not ſimply the heads of the caſe, and on what ſide judgment was given. And I obſerve this fullneſs with regard to the circumſtances of the caſe and reaſons of the judgment has been adopted by one of the lateſt of our reporters, and one of the beſt of this or any time.

And to endeavour after theſe examples is doubtleſs right, and I hope not uſeleſs though one fall far ſhort.

I do not mean, in ſpeaking of reaſons and principles, that caſes reſt, or ought to reſt, upon the refinements of arbitrary, vague and private reaſon; but I mean that there are many caſes (moſt indeed upon wills) that fall under no expreſs precedent, or particular proviſion, but which principles and analogy *muſt* govern: And that when precedents *do* apply, it is not uſeleſs to obſerve to what extent and in what manner; leſt we ſhould miſtake the *true* principles of the deciſion, and under the ſhadow of *imaginary* precedents wander into error and deluſion.

The caſes in this collection, with that of a ſecond volume preparing for the preſs, which are ſomewhat particular, are theſe: The caſe of General Warrants; the *Negro* cauſe, and the caſe of *Lee* and *Ganſel*; the one pointing the extent of *perſonal* liberty in this country, the other of *legal* coercion:—The *Minorca* cauſe, in which the extenſive privileges of the *Britiſh* conſtitution to protect any ſingle individual from arbitrary puniſhment, by any power in any part of the empire, were ſtrongly manifeſted; the *Grenada* cauſe, which aſſerted the liberty of an whole iſland in a very material

material point; the case of *Bolt* and *Purvis* concerning the privileges of the *East India* Company, and the judgment in the case of corruption in the *Hindon* election, in which the fundamental principle of our constitution was vindicated. —And of more private causes, the case of *Clark* and *Johnson* on a gaming contract of a servant with his master's money, whether the master shall bring the action and have the evidence of the servant; the two remarkable bankruptcy cases of *Spotwood* and *Grey*, and of *Fisher* and *Fordyce*; with a late very particular one determined in *Easter* term last 1776; the case of *Jewson* and *Read* on the custom of *London*; the case of *Martin* and *Hynde* last *Easter* term, on the engagement of the rector to the bishop, for providing a competent subsistence for his curate; the case of non-residence the same term; the determination of the court of King's Bench how far, and upon what terms a discovery shall entitle the party discovering, to bail or to discharge, in the case of Mrs. *Rudd*; the case of *Morgan* and *Jones*; the case of revocation on Mr. *Lacy*'s will; *Eyre* and *Popham* on specific performance; *Hatton* and *Hooley* on double legacies; the case of election on general *Pulteney*'s will; *Vallejo Wheeler* on barratry; the cases of cross remainders, or *Burville* and *Burville*, and *Wright* and *Holford*.—And others.

I flatter myself the example of Sir James Burrow, and the sincerity of my intention will be my shield, from the displeasure of those high and honourable courts whose decisions I have taken; and so far as I shall appear to have done it honestly, I hope for some degree of their approbation: If in any respect I have done otherwise, the cases are too recent for me to pass unobserved or uncondemned; though were I not confident that I stand clear of this, my own heart would be my heaviest condemnation.

I have said thus much of the reasons which have induced me to the publishing of these cases; of the assurance I have that I shall not be judged unexamined, and that when examined, my worst censure will be that my intention was better than my power. I stand rather early in life for such an attempt, and but just beyond the threshold of my possession; I have just mentioned some of the most material causes, and the manner in which I mean to report them. I submit the whole respectfully, not with confidence, but with a contented hope, to the judgment of the profession, in a case where I have nothing to hope, but according to the truth and fidelity with which I shall appear to have acted;

acted; and the degree of uſe in which they may ſerve the profeſſion muſt meaſure, in a great proportion, what advantage or reputation the author may expect. Of ſome degree of reputation, he owns he is ambitious: He thinks it not an illiberal nor a diſingenuous profeſſion, that he wiſhes ſome encreaſe of honeſt eſtimation, in due ſeaſon, and with proper aſſiduity, in that line of life, in which duty and his inclination have prompted him to labour. But even more than he can wiſh for an honeſt ſucceſs and credit, in the path and duties of his profeſſion does he pray that Providence may avert from him and that profeſſion, the obtaining or deſiring of that ſucceſs diſhoneſtly. This at leaſt he is ſure, that there are other paths to ſucceſs (whether he ſucceeds in them or not) than fraud and indirection; ſince, notwithſtanding the common ſlander on the three profeſſions, they have all (and not leaſt the law) been diſtinguiſhed in all times by men who have advanced conſtantly in their integrity, have preſerved it in the higheſt honours, and preferred it to thoſe honours, to their fortunes, lives, and every earthly endearment when they came in competition. And thanks to the vigilance of the judges, the ſanctity of our laws, and the wholeſome ſeverity of juſtice, there is little encouragement to any who would underprop a villainous deſign by baſe, unworthy, and ſcandalous artifices: And while all fair diligence is honoured in every cauſe, they will conſider what reaſon there is to imagine that diſhoneſt or iniquitous inventions will be proſperous or endured in any.

I have ſeen many inſtances in the few years obſervation I could make to perſuade me, that the conduct which beſt becomes a liberal and an honeſt man, is generally moſt ſerviceable both to the client and thoſe concerned for him: And whatever in theſe notes may tend to communicate any uſeful precedents, to the furtherance of juſtice, the diſcouragement of iniquity, the honour of the laws, and conſequently of the profeſſion and public, I ſhall be happy to have imparted. The reader will *judge*; it is my buſineſs only to *report*, and to wiſh that ſo much and no more may receive his approbation as ſhall really, in any reſpect, deſerve it.

Lincoln's Inn,
1 Aug. 1776.

CAPEL LOFFT.

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Michaelmas Term,

3 Geo. 3. 1763. C. B.

Note, This case was not taken by myself, but communicated by the favour of a gentleman to whom I am much obliged, and whose permission I have to publish it.

John Wilkes, Esq; *against* Wood.

The Case of General Warrants.

Middlesex to wit, 6th of December 1763.

AT the court of *Common Pleas*, at *Westminster*. Sittings after *Michaelmas* term, before Lord Chief Justice *Pratt*, John *Wilkes*, Esq; plaintiff; *Robert Wood*, Esq; defendant.

In an action of trespass, for entering the plaintiff's house, breaking his locks, and seizing his papers, *&c.*

The plaintiff's counsel were—

Serjeant *Glyn*, Mr. Recorder *Eyre*, Mr. *Stow*, Mr. *Wallace*, Mr. *Dunning*, Mr. *Gardiner*.

The defendant's counsel were—

Solicitor-General *Norton*, Serjeant *Nares*, Serjeant *Davy*, Serjeant *Yeates*. Attorney for the plaintiff, Mr. *Philips* of *Cecil-street*.

For the defendant—

Philip Cartaret Webb, Esq; Solicitor to the Treasury, and Mr. Secondary *Barnes*.

The

[2] The ſpecial Jury—

Plukenet Woodroffe, Eſq; of *Chiſwick*; *William Baker*, Eſq; of *Iſleworth*; *William Clark*, Eſq; of *Edmonton*; *James Gould*, Eſq; of *Edmonton*; *Stephen Pitt*, Eſq; of *Kenſington*; *Nathaniel Turner*, Eſq; of *Hampſtead*; *Jonathan Richardſon*, Eſq; of *Queen-Square*; *John Weſton*, Eſq; of *Hatton-Garden*; *Harry Blunt*, Eſq; of *Hatton-Garden*; *Henry Boſtock*, Eſq; of *Hatton-Garden*; *John Boldero*, Eſq; of *Hatton-Garden*; *John Egerton*, Eſq; of St. *John's-ſtreet*.

Mr. *Gardener* opened the caſe, with declaring the foundation, that on the 30th of *April* laſt, Mr. *Wood*, with ſeveral of the king's meſſengers, and a conſtable, entered Mr. *Wilkes*'s houſe; that Mr. *Wood* was aiding and aſſiſting to the meſſengers, and gave directions concerning breaking open Mr. *Wilkes*'s locks, and ſeizing his papers, &c. for which Mr. *Wilkes* laid his *damages* at *five thouſand* pounds.

Serjeant *Glynn*, then enlarged fully, on the particular circumſtances of the caſe, but remarked that the caſe extended far beyond Mr. *Wilkes* perſonally, that it touched the liberty of every ſubject of this country, and if found to be legal, would ſhake that moſt precious inheritance of *Engliſhmen*. In vain has our houſe been declared, by the law, our aſylum and defence, if it is capable of being entered, upon any frivolous or no pretence at all, by a ſecretary of ſtate. Mr. *Wilkes*, unconvicted of any offence, has undergone the puniſhment. That of all offences that of a ſeizure of papers was the leaſt capable of reparation; that, for other offences, an acknowledgement might make amends; but that for the promulgation of our moſt private concerns, affairs of the moſt *ſecret perſonal* nature, no reparation whatſoever *could* be made. That the law *never* admits of a *general ſearch-warrant*. That in *France*, or *Spain*, even in the inquiſition itſelf, they never delegate an *infinite* power to ſearch, and that no magiſtrate is capable of delegating any ſuch power. That ſome papers, quite *innocent* in themſelves, might, by the *ſlighteſt alteration*, be converted to *criminal* action. Mr. *Wilkes*, as a *member of parliament*, demanded the more caution to be uſed, with regard to the ſeizure of his papers, as it might have been naturally ſuppoſed, that one of the *legiſlative* body might have papers of a *national* concern, not proper to be *expoſed* to every eye. When we conſider the perſons concerned in this affair, it ceaſes to be an outrage to Mr. *Wilkes perſonally*, it is an outrage to the *conſtitution* itſelf. That Mr. *Wood* had talked highly

highly of the power of a ſecretary of ſtate; but he hoped by the verdict he would be brought to think more meanly of it. That if the warrants were once found to be legal, it would fling our liberties into a very unequal ballance. That the conſtitution of our country had been ſo fatally wounded, that it called aloud for the redreſs of a jury of *Engliſhmen*. [3] That their reſentment againſt ſuch proceedings was to be expreſſed by large and exemplary damages; that trifling damages would put no ſtop at all to ſuch proceedings: Which would plainly appear, when they would conſider the perſons concerned in the preſent proſecution, perſons, who by their duty and office ſhould have been the *protectors* of the conſtitution, inſtead of the violators of it.

Mr. *Eyre*, the Recorder of *London*, then ſtood up: He apologized to the bench for appearing in the preſent cauſe, conſidering the office he bore, but that he thought it was a cauſe which affected the liberty of every individual.

The Lord Chief Juſtice deſired he would make no apology. He then obſerved, that the preſent cauſe chiefly turned upon the *general queſtion*, whether a ſecretary of ſtate has a power to force perſons houſes, break open their locks, ſeize their papers, *&c.* upon a bare ſuſpicion of a libel by a *general warrant*, *without name* of the perſon charged. A ſtrange queſtion, to be agitated in theſe days, when the conſtitution is ſo well fixed, when we have a prince upon the throne, whoſe virtues are ſo great and amiable, and whoſe regard for the ſubject is ſuch, that he muſt frown at every incroachment upon their liberty. Nothing can be more unjuſt in itſelf, than that the proof of a man's guilt ſhall be extracted from his *own* boſom. No legal authority, in the preſent caſe, to juſtify the action. No precedents, no legal determinations, not an *act of parliament* itſelf, is ſufficient to warrant any proceeding *contrary to the ſpirit of the conſtitution*.

Secretary *Williamſon*, in *Charles* the ſecond's time, for backing an illegal warrant, was ſent to the Tower by the Houſe of *Commons*. The jury, he obſerved, had no ſuch power to commit; he knew it well; but, for his part, he wiſhed they had, as he was perſuaded they would exerciſe it, in the preſent caſe, as it ought to be.

On the famous certificate in Queen *Elizabeth*'s time, how far a man might be detained by a warrant of a privy counſellor, the anſwer of the judges, even in *thoſe* days, confined it to *high treaſon only*, and the power to arreſt to be derived from the perſonal command of the king, or a privy counſellor.

counſellor. He then congratulated the jury, that they had now in their power the preſent cauſe, which had been by ſo much art and chicanery ſo long poſtponed. Seventy years had now elapſed, ſince the revolution, without any occaſion to enquire into this power of the ſecretary of ſtate, and he made no doubt but the jury would effectually prevent the queſtion from being *ever* revived again. He therefore recommends it to them to embrace this opportunity (leaſt another ſhould not offer, in haſte) of inſtructing thoſe great
[4] officers in their duty, and that they (the jury) would now erect a great ſea mark, by which our ſtate pilots might avoid, for the future, thoſe rocks upon which they now lay ſhipwrecked.

N. B. The Recorder ſhone extremely.

The firſt witneſs on the proſecution was *Matthew Brown* —ſays, that he is butler to Mr. *Wilkes*. That on the thirtieth of *April* laſt, about nine o'clock in the morning, *Watſon*, *Blackmore*, *Mony*, and *Man*, king's meſſengers, and *Chiſholm*, a conſtable, came to Mr. *Wilkes*'s houſe. That *Watſon* followed Mr. *Wilkes* into the houſe, and *Mony* came next; *Blackmore* and *Man* followed after. That this witneſs never heard them, or either of them, declare their buſineſs, or the purpoſe of their coming. That as ſoon as Mr. *Wilkes* was carried away, which was about noon, Mr. *Wood* and Mr. *Stanhope* came: That Mr. *Wood* aſked Mr. *Watſon*, "Have you locked up all the rooms where Mr. "*Wilkes*'s papers are?" He anſwered "Yes; I have got "the key of the ſtudy." That Mr. *Wood* and Mr. *Stanhope* then went into the parlour; the meſſengers continued waiting in the paſſage. That ſoon after Mr. *Webb* knocked at the door; upon it's being opened this witneſs attempted to ſtop him, but he ruſhed in. That Mr. *Wood* ſtaid that time about half an hour; that when he went away he gave orders to the meſſengers, that no one ſhould come in or go out till he returned, but bade them lock up all the doors. That he came back again in about an hour. That in the mean time ſeveral of Mr. *Wilkes*'s friends came, *viz. Humphry Cotes*, *Gardiner*, *Philips*, *Hopkins*, *&c.* and were denied admittance by the conſtable: That *Watſon*, the meſſenger, upon being called upon by theſe gentlemen to produce his orders for refuſing them admittance, ſaid he had only a verbal order from Mr. *Wood*. That the meſſengers, however, did at laſt permit the gentlemen to come in.

That ſoon after Lord *Temple* came; that in a ſhort time after Mr. *Wood* returned, and appeared to be very angry that

that the gentlemen had been admitted, "Who let theſe men in?" That the meſſengers anſwered, "They would come in." Mr. *Wood* then aſked, "Who would come in?" Mr. *Gardiner* anſwered, "'Twas I, Sir."

That ſoon after that Mr. *Wilkes*'s friends went away; that Mr. *Wood* then called for a candle, which was brought him, and he and Mr. *Stanhope* then went up ſtairs, with *Mary* and *Blackmore*, the meſſengers, who appeared to take their orders from Mr. *Wood* and Mr. *Stanhope*. That they *rummaged all* the papers together they could find, in and about the room; that they (the meſſengers) fetched a ſack, and filled it with the papers. That *Blackmore* then went down ſtairs, and fetched a ſmith to open the locks. That *Mann*, a meſſenger, then came, and would whiſper Mr. *Wood*, who bade him ſpeak out; he then ſaid he brought orders [5] from Lord *Halifax* to ſeize *all manuſcripts*. That the ſmith then came, and, by the direction of *Blackmore*, the meſſenger, opened four locks of the lower drawers of a bureau; that they took out *all* the papers in thoſe drawers and a pocket-book of Mr. *Wilkes*'s, and put them *all* into the ſack together, and then ſealed up the ſack. That this witneſs was preſent during all this time; that the meſſengers were obedient, and paid an entire regard to the directions of Mr. *Wood* and Mr. *Stanhope*. That when Mr. *Wood* went away it was near two o'clock in the afternoon; that Mr. *Wood*, upon the whole, might be near two hours and an half in Mr. *Wilkes*'s houſe. That no kind of inventory was made of the papers which were put into the ſack. That Mr. *Stanhope* appeared all along to be favourable, and frequently bade the meſſengers be *cautious* and *careful*.

Upon his being croſs-examined, he ſaid,

That Mr. *Wilkes* was carried away about noon.

That Mr. *Wilkes* went out in the morning about ſix, and returned home about nine o'clock.

That Mr. *Hopkins* had been there that morning before.

That Mr. *Wood* did abſolutely and poſitively (this witneſs avers it) order, upon his going out, that all the doors ſhould be locked up, particularly the ſtreet door: That Mr. *Wood* told the meſſengers they knew their orders, and bade them execute them. That he remembers Mr. *Stanhope* bid them be careful in rummaging, but don't recollect Mr. *Wood* ſaid ſo. That *Chiſholm*, the conſtable, held the ſack, whilſt the meſſengers filled it with papers.

That Mr. *Wood* was not there when the locks were open-

ed: He now ſays, that Mr. *Wood* had before declared that the locks muſt be opened.

That Mr. *Stanhope* ſaid, to be ſure, the locks muſt be opened. That Mr. *Wood*, he now ſays, was at one time above an hour in Mr. *Wilkes*'s ſtudy.

That Mr. *Stanhope* was there with Mr. *Wood* at the time the papers were carried away.

That Mr. *Webb* was gone away ſome time before.

Richard Schofield ſays, that he is a livery ſervant to Mr. *Wilkes*: That he let Mr. *Wood* in at the door on the 30th of *April*, about eleven o'clock in the morning, as he thinks,
[6] to the beſt of his remembrance; that Mr. *Wood* ſtaid the firſt time about a quarter of an hour. He confirms in general the laſt witneſs.

That *Wood* went away, and returned in about an hour.

That the meſſenger, upon being aſked by Mr. *Gardiner* for his orders, ſaid he had only verbal ones, from Mr. *Wood*.

That he can give *no* account of what paſſed up ſtairs, as he remained all that time in the paſſage below.

He confirms the laſt witneſs on that circumſtance of the meſſenger, *Mann's*, coming from Lord *Halifax*, with freſh orders.

That a poſt-letter came, in the mean time, directed to Mr. *Wilkes*, which the meſſenger, *Watſon*, received, and would not deliver till Mr. *Wood* returned, who immediately delivered it, *unopened*, into this witneſs's hands.

That Mr. *Wood*, when he went away, ordered the doors to be kept faſt locked, particularly the ſtreet door.

That *Blackmore* came down ſtairs, and aſked this witneſs where Mr. *Wilkes*'s ſmith lived, and he anſwered him he believed in *Cheapſide*.

Upon his being croſs-examined, he ſaid,

That Mr. *Wood* came about a quarter of an hour after Mr. *Wilkes* was carried away to Lord *Halifax*.

That Mr. *Wood*, Mr. *Stanhope*, the four meſſengers, with the conſtable, together with another gentleman, whom he did not know, were the perſons who came into the houſe.

Humphry Cotes ſays, that he was at Mr. *Wilkes*'s the 30th of *April* laſt, in the morning, about eleven o'clock, being ſent for by Mr. *Wilkes*.

That Mr. *Wood* came in between twelve and one: That he (this witneſs) had been down to the court of Common Pleas, to apply for a *habeas corpus*, and, upon his return to Mr. *Wilkes*'s houſe, was told that Mr. *Wilkes* was not at home,

home, and that he, *Cotes*, muſt not come in; this was between twelve and one o'clock. He demanded the reaſon why he muſt not come in, and by whoſe authority the door was locked. The man at the door anſwered, by the ſecretary of ſtate's.

The ſolicitor-general diſputed this evidence, as Mr. *Cotes* did not declare the man's name. [7]

But *Cotes* then ſaid, that the door-keeper called *Watſon*, the meſſenger, to him; who ſaid he had the ſecretary's verbal order only, but not a written one.

That this witneſs did then inſiſt upon being admitted, and did accordingly enter the houſe.

That Mr. *Wood* preſently after came in, and ſaid, with anger, "What do theſe men do here!"

That this witneſs then ſaid, "What buſineſs have you here, Sir?" Mr. *Wood* anſwered, that he was the ſecretary of ſtate's ſecretary.

That this witneſs then ſaid, he had nothing to do with the ſecretary of ſtate, nor his ſecretary neither; that his name was *Humphry Cotes*, and was to be ſpoken with at any time.

That he (this witneſs) ſtaid at Mr. *Wilkes*'s houſe till paſt two o'clock.

That he was deſired by Mr. *Wood* to be preſent when Mr. *Wilkes*'s papers were ſealed up, which he refuſed to do.

The ſolicitor-general did not croſs-examine him.

Richard Hopkins, Eſq; ſays, that he went to Mr. *Wilkes* on the 30th of *April* laſt, at half an hour paſt nine o'clock in the morning, and ſtaid two hours; found then no kind of obſtruction.

That Mr. *Wood* was not there at this time, as this witneſs verily believes; but that when he returned, Mr. *Wood* had been there.

Confirms the laſt witneſs's account, of the obſtructions to his entring the houſe, at this his laſt coming. That he was deſired to be preſent at the ſealing up Mr. *Wilkes*'s papers, which he declined doing.

Arthur Beardmore ſays, that he was in *Weſtminſter-hall* on the 30th of *April* laſt, and, hearing of Mr. *Wilkes*'s arreſt, he went directly to his houſe, and, with ſome difficulty, gained admittance. That when he gained admittance, and came into the parlour, Mr. *Wood* was there, altercating with the laſt witneſs, Mr. *Hopkins*.

That Mr. *Gardiner* and Mr. *Cotes* were then there. [8]

That Lord *Temple* was likewiſe there.

That he (this witneſs) obſerving much confuſion, demanded of Mr. *Wood* to ſhew his authority, and that much wrangling then enſued. That Mr. *Wood* and Mr. *Webb* were both there at this time. That Mr. *Wood* intreated the company to believe, that the ſecretaries had acted entirely purſuant to the advice and direction of the attorney and ſolicitor generals; to which this witneſs anſwered, that he very much doubted it.

That this witneſs, coming into the parlour again through the paſſage, ſaw Mr. *Webb* ſtanding at the foot of the ſtairs, with ſome keys in his hand, which this witneſs did preſume, and verily did believe, to be ſome of Mr. *Wilkes*'s keys to his private eſcritoires and drawers.

That Mr. *Wood* did deſire him (this witneſs) to be preſent at the ſealing up Mr. *Wilkes*'s papers, which he utterly refuſed to do.

The council for the proſecution declined examining Mr. *Gardiner* and Mr. *Philips*, (who had both been preſent) on account of their being employed in the cauſe; and therefore reſt here.

The ſolicitor-general then ſtood up to make the defence which he divided into two parts; and firſt, he maintained the plea of *Not guilty*; but if the jury ſhould be of opinion that would not ſtand good, and that the evidence he ſhould bring would not be capable of ſetting aſide the evidence already produced in the court on the other ſide; he then, ſecondly, relied on the *ſpecial juſtification*. He was at a loſs, he ſaid, to underſtand what Mr. *Wilkes* meant by bringing an action againſt Mr. *Wood*, as he was neither the iſſuer of the warrant, nor the executioner of it. If the conſtitution had been in ſuch an egregious manner attacked, why not bring the ſecretaries of ſtate, themſelves, into court? Why ſhould Mr. *Wilkes* commence ſeparate actions againſt each perſon? Is Mr. *Wilkes*, at any event, entitled to tenfold damages? This was the firſt time he ever knew a *private* action repreſented as the cauſe of all the good people of *England*. If the *conſtitution* has, in any inſtance, been violated, the *crown* muſt be the proſecutor, as it is in all *criminal* caſes. The conſtitution does not conſiſt in any one particular part of the law; the whole law is the conſtitution of the country, and a breach in one part of the law is as much a violation of the conſtitution as of another. Though ſo much has been ſaid on the other ſide, with regard to the injury that might reſult from the promulgation of ſecrets, no proof had been brought of any thing being promulgated.

promulgated that was not proper to be ſo. The arguments which had been uſed againſt ſeizing of papers, to procure proof, were *felo de ſe*, unleſs the major was denied to include the minor. He then went upon the argument touching the warrant, and obſerved that theſe warrants had been iſſued as far back as the courts of juſtice could lead them. That the late act of parliament of *George* the Second for taking up vagrants was a *general ſearch-warrant*, and he never knew it was ever eſteemed an infringement of our conſtitution. That theſe warrants had exiſted *before*, *at*, and *ſince* the revolution, and had been till this caſe unimpeached; that if ſo contradictory to the conſtitution of this country, they could never have remained to this time. [9]

He then made a general obſervation to the jury, that it was their duty to hear the cauſe coolly and diſpaſſionately, without any bias to one ſide or the other. He then went on to make remarks on the evidence which had been given by the plaintiff; remarked that the queſtion of liberty had nothing to do with the preſent cauſe, which only reſpected the ſeizure of papers. That the meſſengers went bunglingly about their buſineſs; Mr. *Wood* was only ſent to ſee they did their duty.

He then went on to make remarks on the *North Briton*, No. 45. That it was a libel on the three branches of the legiſlative body, king, lords, and commons; that it was a libel of ſuch a nature, that when it was before the two houſes of parliament not one ſingle perſon, in either houſe, ever uttered one ſingle word in defence of it. That the whole of the *North Britons* were of ſuch a nature, that it aſtoniſhed moſt conſiderate perſons how they ſhould have paſſed ſo long unnoticed; that it had attacked private perſons, perſons in public ſtations, with their names written at full length; which had already produced bloodſhed, in an inſtance which they all well knew: And what farther fatal conſequences might reſult from thoſe publications, who would be anſwerable! If Mr. *Wilkes* ſhould be proved to be the author of theſe papers, and of that libel of libels, No. 45. (an equal to which he defied this or any other age to produce) if he ſhould be proved to be the author of that paper, which he was confident he ſhould be able to prove, to the full ſatisfaction of the court and jury; in that caſe, ſo far from thinking him worthy of *exemplary* damages, he was certain they would view him in his true and native colours, as a moſt vile and wicked incendiary, and a ſower of diſſention amongſt his majeſty's ſubjects. He then obſerved,

ſerved, that the *freedom* of this country conſiſts, that there is *no man ſo high*, that he is *out of the reach of the law*, nor any *man ſo low*, *that he is beneath the protection of it.*

That the warrant was legal in itſelf: That the authority of a ſecretary of ſtate was ſufficiently eſtabliſhed. That
[10] damages ſhould always be reckoned according to the *injury* received: A jury that ever acted on any other principles certainly forſwore themſelves.

Lord *Halliſax* then came into court, and being ſworn, ſaid, that he did receive information concerning No. 45.

That he did iſſue warrants in conſequence of ſuch information. That he did deſire Mr. *Weſton*, his ſecretary, to go to Mr. *Wilkes*'s, and ſee that the meſſengers did their duty; that Mr. *Weſton* declined it, beſeeching his Lordſhip to excuſe him, on account of his weak nerves, and ill ſtate of health; that he then did deſire Mr. *Wood* to go, who accordingly went. That he had reaſon to believe that Mr. *Wilkes* was the author of No. 45.

That he had information previous to the apprehending Mr. *Wilkes*, and his Lordſhip believes, to the beſt of his remembrance, it was on the very day the warrant was put in execution.

That this information tended to prove Mr. *Wilkes* the author of No. 45; but he cannot pretend to charge his memory with the entire contents of the information.

That orders were given by his Lordſhip to the meſſengers, but he declares that he cannot, at this time, pretend to recollect either their names or their perſons. That theſe orders were given by his Lordſhip previous to the apprehenſion of Mr. *Wilkes*.

Upon the Lord Chief Juſtice expreſſing a deſire to be informed by his Lordſhip concerning the nature of the information ſaid to be received at his office, and about which his Lordſhip appeared rather ſhy, and cautious of entering upon, the ſolicitor-general then produced an affidavit of *Walter Balff*, a printer in the *Old Bailey*, which was read, in order to prove Mr. *Wilkes* the author of No. 45.

[I cannot recollect the whole of this affidavit, but it had in general a tendency to prove *Wilkes* the author and this *Balff* the printer of No. 45.]

Upon Lord *Halliſax*'s being croſs-examined, he ſaid, that Mr. *Weſton* is his own ſecretary, and that Mr. *Wood* was Lord *Egremont*'s ſecretary.

His Lordſhip was aſked, whether he ſhould think himſelf then authorized to command the ſecretary of Lord *Egremont*

Egremont to do any thing. After ſome heſitation, his Lordſhip anſwered, not without conſulting Lord *Egremont*.

Said, that the offices are carried on in ſeparate departments, but form only one complete ſecretary's office. He owns, however, that each ſecretary has the entire chooſing and appointing his own officers. [11]

That the warrant for the apprehenſion of Mr. *Wilkes* was iſſued (as he calls it, which, being explained, ſignifies made out) on the 26th of *April* laſt, and the information he now fixes to have been received on the 29th of *April*, and the arreſting *Wilkes*'s perſon the 30th day of *April*.

N. B. His Lordſhip here fairly acknowledges that he iſſued the warrant three whole days before he received any information at all; and that during theſe three days the warrant lay dormant, whilſt they were upon the hunt for intelligence.

The king's ſpeech at the cloſe of the laſt ſeſſions of parliament was then read.

The *North Briton*, No. 45, was afterwards read.

Some ſtrictures of the ſolicitor-general then enſued, upon the heinouſneſs of the author's crime.

Thomas Caddell ſays, that he is apprentice to *Andrew Millar*, a bookſeller in the *Strand*; that he is nearly out of his apprenticeſhip. That Mr. *Wilkes* called there in the ſummer of 1762, and left word with him; (this witneſs) that his maſter ſhould advertiſe a new paper, ſhortly to come out, entitled the *North Briton*, and to be publiſhed by him (*Millar*): That his maſter did, in conſequence, advertiſe it, and was paid by Mr. *Wilkes* the ſum of one pound eight ſhillings, for advertiſements.

[*N. B.* The receipt was produced in court.]

That his maſter did afterwards, upon conſidering the affair, decline publiſhing the *North Briton*; ſaying he would publiſh no political matters.

Serjeant *Glynn* then objected to their going into the evidence, to prove Mr. *Wilkes* the author of other papers, which had no reſpect to the paper in queſtion; but

The Lord Chief Juſtice allowed it to be a *good corroborating chain*: But obſerved, if they failed in the *laſt* link, the *whole* would *fall* to the ground.

William Johnſton ſays, that he is a bookſeller in *Ludgate-ſtreet*. That Mr. *Wilkes* applied to him to publiſh the *North Briton*, previous to it's appearing: That Mr. *Wilkes* did explain to him the general deſign; that he ſaid he muſt [12]

have

have a publiſher who would not ſtand in fear of the cenſures of juſtice.

That he never met Mr. *Wilkes* any where on this account; but that Mr. *Wilkes* always came to him.

That he, (this witneſs) upon conſideration of this matter, declined publiſhing the *North Briton*.

That Mr. *Wilkes* then deſired him to recommend a publiſher: That he recommended Mr. *Kearſly* to him.

That he (this witneſs) had a correſpondence with Mr. *Wilkes*, concerning the *North Britons*, and reviſing them for the preſs; but that, after three or four numbers of the paper were publiſhed, he (this witneſs) did, upon conſidering the affair, decline that alſo.

Jonathan Scott ſays, that he knows Mr. *Wilkes*'s hand-writing, and proves a number of letters ſhewn him to be Mr. *Wilkes*'s hand-writing, *viz.*

No.	1,	dated *Weſtminſter*,	26 *July* 1762.
	2,	ditto,	29.
	3,	ditto,	8 *Auguſt*.
	4,	*Ayleſbury*,	15.
	5,	ditto,	25.
	6,	*Great George-ſtreet*,	7 *October*.
	7,	*Wincheſter*,	14.
	8,	ditto,	31.
	9,	*Great George-ſtreet*,	*Friday Morning*.
	10,	ditto,	27 *November*.
	11,	ditto,	12 *December*.
	12,	ditto,	17.

All theſe were read; they are to *Kearſly*, and relate to *North Britons*, then ſent to be publiſhed.

[*N. B.* Between twenty and thirty letters were produced, but theſe only were read.]

Walter Balff ſays, in the firſt place, that he is under a recognizance, and therefore prays he may be excuſed from anſwering any queſtion which may tend to *affect* or *injure himſelf*.

[13] A debate enſued for near an hour, whether he may or may not be allowed the privilege.

The Solicitor-General very ſtrenuouſly aſſerts, that in the preſent caſe he may *not* be allowed it.

Serjeant *Glynn*, and the Recorder, reply to him.

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The Lord Chief Juſtice gives it as his opinion, that the man is *not bound* to anſwer to any matter which may tend to *accuſe* himſelf.*

Balff, then ſays, that he is a printer in the *Old Bailey*, and that he knows Mr. *Wilkes*.

Queſtion—Did you receive this letter? One being ſhewn to him. Anſwer—Yes.

A letter of the 22d of *April* was then read of Mr. *Wilkes* to *Walter Balff*, which, from the purport of it, has a ſtrong tendency to prove *Wilkes* the author of No. 45.

This letter of *Wilkes* refers to an incloſed paper (which paper does not appear) which he directs *Balff* to bring in, in the form of a letter, betwixt the concluſion of the next *North Briton*, and his propoſals.

This letter likewiſe directs *Balff* to print the *North Briton* ſpoken of, in the compaſs of *two* ſheets.

Charles Shaw ſays, that he is an apprentice to *Walter Balff* the laſt witneſs. That the *North Briton*, No. 45. was printed at his maſter's houſe. That he knows Mr. *Wilkes*, and has ſeen him often at his maſter's houſe, but that he does not know the buſineſs upon which he came there.

George Kearſley ſworn, but not ſuffered to be examined, being under a proſecution at this time.

Michael Curry ſays, that he is a journeyman printer, that he was employed by Mr. *Wilkes* to work at the preſs in *Great George-ſtreet*; that Mr. *Wilkes* gave them the whole ſet of the *North Britons* to be printed, and called them at that time *his North Britons*.

The counſel for the proſecution objected to this laſt being a proper evidence at all to the queſtions; as Mr. *Wilkes* or any other perſon's *republiſhing* a work, againſt which there was no judicial determination, could never affect them, as the *original* author and publiſher of it. [14]

They then went into the *legality* of the warrant, and many *precedents* of the ſame kinds of warrants were produced in court, to prove ſuch warrants the conſtant uninterrupted courſe of the ſecretaries office from the revolution.

The warrants from Lord *Halliſax*, for apprehending the authors, printers and publiſhers of the *North Briton* No. 45. were likewiſe read.

Lovell Stanhope, Eſq; ſays that he came to Mr. *Wilkes*'s houſe immediately after he was carried away to Lord *Halliſax*'s; that he went with Mr. *Wood*, and ſtayed there half an

* Nemo tenetur ſeipſum accuſare.

an hour; that he was there but once, and ſtayed till the papers were ſealed up; that he never went out of the ſtudy; that Mr. *Wood* was in the ſtudy but part of the time, and did nothing at all but obſerve what paſt; that he (Mr. *Wood*,) gave no orders to break locks by any kind of means, nor gave the meſſengers any orders or directions at all, but only bade them do their duty, and uſe civility!

That Mr. *Wood* was not in the room when the ſmith was ſent for, nor gave any orders for that purpoſe, as Mr. *Stanhope* obſerved; that Mr. *Wood* was not preſent when the locks were opened.

But that it was *Blackmore*, the meſſenger, who broke open the locks, (in this circumſtance Mr. *Stanhope* exactly confirms *Matthew Brown*'s evidence.)

That Mr. *Wood* went to Mr. *Wilkes*, merely at the inſtance of Lord *Hallifax*, in order to inforce a due and proper obedience to, and execution of, the warrant, and to prevent the meſſengers from committing any blunders.

That a debate ariſing, whether a table with a locked drawer ſhould be removed entire or be opened, Mr. *Mann* was ſent to Lord *Hallifax* for directions, and brought word that the drawers muſt be opened.

Upon his being croſs examined, ſaid that the meſſengers were to take *manuſcript papers* only, and not meddle with *improper* matters, ſuch as *printed* books, *papers*, *&c.* That he did think it incumbent upon him (this witneſs) to ſee that all the *proper* papers ſhould be removed.

[15] *Robert Chiſholm* ſays that he was the conſtable called upon to attend the meſſengers to Mr. *Wilkes*; that it was on the 30th of *April* laſt, at ſix o'clock in the morning, that he was called upon; that Mr. *Wood* came immediately after Mr. *Wilkes* was carried away; that he (this witneſs) heard Mr. *Wood* give no kind of orders at all; in ſhort, that his opinion is, Mr. *Wood* only came to take care that the meſſengers did nothing that was wrong or improper.

Mr. *Dunning* aſked this witneſs, whether he then imagined, that Mr. *Wood* appeared there merely on behalf of Mr. *Wilkes*, as his friend—he anſwered not ſo neither.

This witneſs ſhuffled and prevaricated very much, and contradicted his own evidence more than once.

Philip Carteret Webb, Eſq; ſays that Mr. *Wood* was ſent by the ſecretaries, merely to ſee that the meſſengers executed their warrants in due form and order; that he (this witneſs) was only once at Mr. *Wilkes*'s, and then not more than half an hour; that he went becauſe the ſecretary of ſtate

ſtate was uneaſy, and anxious to know what was doing at Mr. *Wilkes*'s; that he (this witneſs) was never up ſtairs at Mr. *Wilkes*'s; that he had a converſation with Lord *Temple* in the parlour. That he denies he had ever any keys of Mr. *Wilkes* in his hands; that he verily believes he had *no* keys at all in his hands; but that if he had any, they were his *own* and not Mr. *Wilkes*'s.

Upon being croſs-examined by Mr. *Dunning*, *Philip Carteret Webb* then ſaid, that upon recollection he was abſolutely certain, that he had *no* keys at that time in his hands.

That Mr. *Weſton* was deſired by Lord *Halifax* to go, but that he excuſed himſelf on account of his weak nerves, and ill ſtate of health, and that upon his (Mr. *Weſton*) declining it Mr. *Wood* was deſired by my Lord to go, which he accordingly did.

Richard Watſon ſays he is a king's meſſenger, that he was at Mr. *Wilkes*'s on the 30th of *April* laſt, that Mr. *Wood* was there and did nothing at all as this witneſs obſerved, but only gave them directions how to act.

The Solicitor-General obſerved, when *Balff* and *Kearſley*'s evidence were ſet aſide, that he placed little dependence on their evidence, as to the proof of Mr. *Wilkes* being the author of No. 45, and indeed he ſaid it was not very material, for that the letter from Mr. *Wilkes* to *Balff* the printer which had been read, ſee page 26, and which he then held in his hand, was concluſive evidence againſt him. *Norton* expatiated long upon the circumſtance of [16] this letter: He obſerved that it was a lucky circumſtance for them that No. 45 was the only number of the *North Briton* which was printed on two ſheets of paper, that it was the only number that had a letter at the end of it, with the propoſals following. He enlarged very fully on all theſe correſponding circumſtances.

Lord Chief Juſtice *Pratt* aſked for the letter which was encloſed, that he might compare it with the letter at the end of the *North Briton*, No. 45.

But the Solicitor-General anſwered, he had it not.

Serjeant *Glynn* in his *reply* obſerved, that the manner of defence that had been ſet up would neceſſarily make his reply longer than it otherwiſe would have been. What he had to remark he ſhould divide under two heads, 1ſt, as to the defence which had been ſet up of *not guilty*; and 2dly, make obſervations on the *ſpecial juſtification* that had been pleaded.

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The evidence proved, uncontroverted, that Mr. *Wood* was the prime actor in the whole affair. He then obſerved that the three witneſſes on the ſide of the defendant gave different evidences of the buſineſs Mr. *Wood* came about: Mr. *Philip Carteret Webb*'s account was quite inconſiſtent: Was it poſſible to ſuppoſe that a man of Mr. *Wood*'s character and known abilities ſhould be ſent only with a meſſage that any menial ſervant could have delivered as well; and that he ſhould have nothing elſe to do with the affair. He then obſerved that all the witneſſes called to oppoſe the evidence of their ſide were *all* parties, and againſt whom proſecutions of a like nature were at preſent depending. He then went upon the point of *juſtification*, and obſerved, that as to Mr. *Wilkes* being the author of No. 45, they had totally failed in any kind of proof whatſoever; or if they had produced the appearance of a proof, it was quite aſide to the preſent queſtion, and to which he ſhould not at any event have made any reply, as there was at preſent depending a proſecution, as to that particular point, in his defence of which he made no doubt he ſhould be able fully to prove, that Mr. *Wilkes* was not the author.—That Mr. *Wilkes* could not be ſuppoſed or even ſuſpected of any deſign againſt the preſent eſtabliſhment; that he was educated in and had always adopted whig principles; that he was known to be attached to and to have the higheſt opinion of the preſent prince on the throne, which he had often and upon many occaſions declared; and his conduct had always been anſwerable to theſe declarations. When crimes have been exaggerated, and ſo much declamation made uſe of as there has been on the preſent occaſion, one would naturally have expected that ſome proof would have followed; but that in reality could never have been the caſe, as the ſole
[17] deſign was to blacken Mr. *Wilkes*'s character, without any foundation in fact. He then obſerved that various hands were commonly employed in moſt periodical works; that Mr. *Wilkes* was not denied to be the author of ſome of the *North Britons*; but that it was not likely he was the author of No. 45, and that indeed the republication of the work in volumes, in which was No. 45, ſo far from being a preſumption againſt him, certainly affords the ſtrongeſt reaſon to think he was not the author; for if he had been ſo, it is not likely he would have been concerned in a publication, whilſt a criminal proceſs was depending. He then obſerved as to the warrant, that it was deſtitute of thoſe things neceſſary to make it legal: That a *previous information* was al-

ways

ways necessary. That the defendants had nothing to entitle them to a verdict; that the evidence they had set up was perfectly declamatory and unfair: Possibly Mr. Solicitor-General's office, might demand from him what he had said; but that he was well satisfied, from that gentleman's known good character and great abilities, that he would have refused to plead in a cause of a similar nature, which he was not forced to do *ex officio*. He was satisfied the jury would not view Mr. *Wilkes* as not entitled to a verdict, because loaded with calumny: That the case was a wound given to the constitution, and demanded damages accordingly: That Mr. *Wilkes*'s papers had undergone the inspection of very improper persons to examine his private concerns, and called for an increase of damages on that score. The evidence brought of *precedents* of these kind of warrants only shew how *easy* things may *creep* into our *constitution*, *subversive* of its very *foundation*. He then closed with telling the jury he made no doubt, but they would find a verdict for the plaintiff, with large and exemplary damages.

The *Lord Chief Justice* then summoned up the evidence of the whole, and observed it was an action of trespass, to which the defendant had pleaded first not guilty, and then a special justification. He then went through the particulars relating to the justification, the king's speech, the libel No. 45.

Information given, that such a libel was published,

Lord *Halifax* granting a warrant; messengers entering Mr. *Wilkes*'s house; Mr. *Wood* directed to go thither only with a message, and remaining altogether inactive in the affair.

If the jury should be of opinion, that every step was *properly* taken as represented in the justification, and should esteem it fully proved, they must find a verdict for the defendant. But if on the other hand they should view Mr. *Wood* as a party in the affair, they must find a verdict for the plaintiff, with damages. This was a general direction his Lordship gave the jury, and he then went into the *particulars* of the evidence. The chief part of the *justification*, he observed, consisted in proving Mr. *Wilkes* the *author*, and the evidence given, together with the letters to *Kearsley* plainly shew, that Mr. *Wilkes* was *generally* so. Then as to No. 45, the evidence was of two sorts, first a letter to fix it upon him, and the other general: As to the proof of the republication of the *North Britons* given by *Currie*, supposing it of itself sufficient, of which there was a doubt, it did not extend to the present case, to justify a *warrant* [18]

issued

iſſued ſeveral weeks *previous* to that period. As to the letter, the gentlemen muſt take that out with them, together with the *North Briton*, No. 45, and allow all the weight to the circumſtance they think it will admit of.

If upon the whole they ſhould eſteem Mr. *Wilkes* to be the *author* and *publiſher*, the juſtification would be fully proved. But that, to do this, it was eſſentially neceſſary to have the encloſed paper in the letter to *Balfe*, as, without that, all the reſt was but *inference*, and not the proof *poſitive* which the law required. As to Mr. *Wood*, he was deſcribed on one ſide as very active in the affair, and on the other ſide as quite inoffenſive. *Aiders* and *abetters* are always eſteemed *parties*: but if a perſon preſent remains only a ſpectator, he cannot be affected. The evidence on the one ſide had been poſitive, and on the other ſide only negative. Mr. *Wood* might have ſaid and done as repreſented on the one ſide, when the evidences on the other ſide were not preſent: If upon the *whole* they ſhould be of opinion, that Mr. *Wood* was active in the affair, they muſt find a verdict for the *plaintiff* with damages. His lordſhip then went upon the warrant, which he declared was a point of the *greateſt conſequence* he had ever met with in his whole practice. The defendants claimed a right, under *precedents*, to force perſons houſes, break open eſcrutores, ſeize their papers, *&c.* upon a *general* warrant, where no inventory is made of the things thus taken away, and where *no offenders names are ſpecified in the warrant*, and therefore a *diſcretionary* power given to *meſſengers* to ſearch wherever their *ſuſpicions* may chance to fall. If ſuch a power is *truly* inveſted in a ſecretary of ſtate, and he can delegate this power, it certainly may affect the perſon and property of every man in this kingdom, and is *totally ſubverſive* of the *liberty* of the *ſubject*.

And as for the *precedents*, will that be eſteemed law in a ſecretary of ſtate which is *not* law in *any* other magiſtrate of this kingdom? If they ſhould be found to be *legal*, they are certainly of the moſt dangerous conſequences; if *not legal*, muſt aggravate damages. Notwithſtanding what Mr. Solicitor-General has ſaid, I have formerly delivered it as my opinion on another occaſion, and I ſtill continue of the ſame mind, that a jury have it in their power to give damages for *more* than the *injury* received. *Damages* are deſigned not only as a *ſatisfaction* to the *injured* perſon, but likewiſe as a *puniſhment* to the *guilty*, to *deter* from any ſuch

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proceeding for the future, and as a proof of the *deteſtation* of the *jury* to the *action* itſelf. †

As to the proof of what papers were taken away, the plaintiff could have no account of them; and thoſe who were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lays upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the *office precedents*, which had been produced ſince the revolution, are *no* juſtification of a practice in *itſelf illegal*, and *contrary* to the *fundamental principles* of the *conſtitution*; though its having been the *conſtant practice* of the office, might fairly be pleaded in *mitigation* of *damages*. *

He then told the jury they had a very material affair to determine upon, and recommended it to them to be particularly cautious in bringing in their verdict. Obſerved, that if the jury found Mr. *Wilkes* the author or publiſher of No. 45, it will be filed, and ſtand upon record in the court of Common Pleas, and of courſe be produced as proof, upon the criminal cauſe depending, in barr of any future more ample diſcuſſion of that matter on both ſides; that on the other ſide they ſhould be equally careful to *do juſtice*, according to the evidence; he therefore left it to the conſideration.

The jury, after withdrawing for near half an hour, returned, and found a *general verdict* upon both iſſues for the *plaintiff*, with a *thouſand pounds* damages.

After the verdict was *recorded*, the Solicitor-General offered to prefer a *bill* of *exceptions*, which the Lord Chief Juſtice refuſed to accept, ſaying it was out of time.

The court ſat at nine o'clock in the morning, and the verdict was brought in at twenty minutes paſt eleven o'clock at night.

† Vita reipublicæ pax, et animi libertas et libertatis, firmiſſimum propugnaculum ſua cuique domus legibus munita.

* Ut pœna ad paucos, metus ad omnes pertingat,
Judicandum eſt legibus non exemplis.

Sir James Burrow's Reports in 1 vol. cut this Term. See his advertisement at the end of the 5th vol. of his Reports.

Eaſter Term,

12 Geo. 3. 1772. K. B.

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1 Bl. Com. 127. Curran in Rowan's trial. 19 How. U. S. R. 534. 536. 2 B. Hargr. 448.

Somerſet *againſt* Stewart.

MAY 14, 1772.

ON return to an *habeas corpus*, requiring Captain *Knowles* to ſhew cauſe for the ſeizure and detainure of the complainant *Somerſet*, a negro—The caſe appeared to be this— 2 Oſtab. trials 1.

That the negro had been a ſlave to Mr. *Stewart*, in *Virginia*, had been purchaſed from the *African* coaſt, in the courſe of the ſlave-trade, as tolerated in the plantations; that he had been brought over to *England* by his maſter, who intending to return, by force ſent him on board of Captain *Knowles's* veſſel, lying in the river; and was there, by the order of his maſter, in the cuſtody of Captain *Knowles*, detained againſt his conſent; until returned in obedience to the writ. And under this order, and the facts ſtated, Captain *Knowles* relied in his juſtification.

Upon the ſecond argument, (Serjeant *Glynn* was in the firſt, and, I think, Mr. *Mansfield*) the pleading on behalf of the negro was opened by Mr. *Hargrave*. I need not ſay that it will be found at large, and I preſume has been read by moſt of the profeſſion, he having obliged the public with it himſelf: But I hope this ſummary note, which I took of it at the time, will not be thought impertinent; as it is not eaſy for a cauſe in which that gentleman has appeared, not to be materially injured by a total omiſſion of his ſhare in it.

Mr. *Hargrave*.

The importance of the queſtion will I hope juſtify to your lordſhips the ſolicitude with which I riſe to defend it; and however unequal I feel myſelf, will command attention. I truſt, indeed, this is a cauſe ſufficient to ſupport my own

[2] unworthineſs by it's ſingle intrinſic merit. I ſhall endeavour to ſtate the grounds from which Mr. *Stewart*'s ſuppoſed right ariſes; and then offer, as appears to me, ſufficient confutation to his claim over the negro, as property, after having him brought over to *England*; (an abſolute and unlimited property, or as right accruing from contract;) Mr. *Stewart* inſiſts on the former. The queſtion on that is not whether ſlavery is lawful in the colonies, (where a concurrence of unhappy circumſtances has cauſed it to be eſtabliſhed as neceſſary;) but whether in *England?* Not whether it ever has exiſted in *England*; but whether it be not now aboliſhed? Various definitions have been given of ſlavery: One of the moſt conſiderable is the following; a ſervice for life, for bare neceſſaries. Harſh and terrible to human nature as even ſuch a condition is, ſlavery is very inſufficiently defined by theſe circumſtances—it includes not the power of the maſter over the ſlave's perſon, property, and limbs, life only excepted; it includes not the right over all acquirements of the ſlave's labour; nor includes the alienation of the unhappy object from his original maſter, to whatever abſolute lord, intereſt, caprice or malice, may chuſe to transfer him; it includes not the deſcendible property from father to ſon, and in like manner continually of the ſlave and all his deſcendants. Let us reflect on the conſequences of ſervitude in a light ſtill more important. The corruption of manners in the maſter, from the entire ſubjection of the ſlaves he poſſeſſes to his ſole will; from whence ſpring forth luxury, pride, cruelty, with the infinite enormities appertaining to their train; the danger to the maſter, from the revenge of his much injured and unredreſſed dependant; debaſement of the mind of the ſlave, for want of means and motives of improvement; and peril to the conſtitution under which the ſlave cannot but ſuffer, and which he will naturally endeavour to ſubvert, as the only means of retrieving comfort and ſecurity to himſelf.—The humanity of modern times has much mitigated this extreme rigour of ſlavery; ſhall an attempt to introduce perpetual ſervitude here to this iſland hope for countenance? Will not all the other miſchiefs of mere utter ſervitude revive, if once the idea of abſolute property, under the immediate ſanction of the laws of this country, extend itſelf to thoſe who have been brought over to a ſoil whoſe air is deemed too pure for ſlaves to breathe in it; but the laws, the genius and ſpirit of the conſtitution, forbid the approach of ſlavery; will not ſuffer it's exiſtence here. This point, I conceive, needs no further enlargement:

enlargement: I mean, the proof of our mild and juſt conſtitution is ill adapted to the reception of arbitrary maxims and practices. But it has been ſaid by great authorities, though ſlavery in its full extent be incompatible with the natural rights of mankind, and the principles of good government, yet a moderate ſervitude may be tolerated; nay, ſometimes muſt be maintained. Captivity in war is the principal ground of ſlavery: Contract another. *Grotius de J. B. & P.* and *Pufendorf*, *b.* 6. *c.* 3. § 5. approves of making ſlaves of captives in war. The author of the Spirit of Laws denies, except for ſelf-preſervation, and then only a temporary ſlavery. Dr. *Rutherforth*, in his Principles of Natural Law, and *Locke*, abſolutely againſt it. As to contract; want of ſufficient conſideration juſtly gives full exception to the conſidering of it as contract. If it cannot be ſupported againſt parents, certainly not againſt children. Slavery impoſed for the performance of public works for civil crimes, is much more defenſible, and reſts on quite different foundations. Domeſtic ſlavery, the object of the preſent conſideration, is now ſubmitted to obſervation in the enſuing account, its firſt commencement, progreſs, and gradual decreaſe: It took origin very early among the barbarous nations, continued in the ſtate of the *Jews*, *Greeks*, *Romans*, and *Germans*; was propagated by the laſt over the numerous and extenſive countries they ſubdued. Incompatible with the mild and humane precepts of chriſtianity, it began to be aboliſhed in *Spain*, as the inhabitants grew enlightened and civilized, in the 8th century; its decay extended over *Europe* in the 4th; was pretty well perfected in the beginning of the 16th century. Soon after that period, the diſcovery of *America* revived thoſe tyrannic doctrines of ſervitude, with their wretched conſequences. There is now at laſt an attempt, and the firſt yet known, to introduce it into *England*; long and uninterrupted uſage from the origin of the common law, ſtands to oppoſe its revival. All kinds of domeſtic ſlavery were prohibited, except villenage. The villain was bound indeed to perpetual ſervice; liable to the arbitrary diſpoſal of his lord. There were two ſorts; villain regardant, and in groſs: The former as belonging to a manor, to the lord of which his anceſtors had done villain ſervice; in groſs, when a villain was granted over by the lord. Villains were originally captives at the conqueſt, or troubles before. Villenage could commence no where but in *England*, it was neceſſary to have preſcription for it. A new ſpecies has never ariſen

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till now; for had it, remedies and powers there would have been at law: Therefore the moſt violent preſumption againſt is the ſilence of the laws, were there nothing more. 'Tis very doubtful whether the laws of *England* will permit a man to bind himſelf by contract to ſerve for life: Certainly will not ſuffer him to inveſt another man with deſpotiſm, nor prevent his own right to diſpoſe of property. If diſallowed by conſent of parties, much more when by force; if made void when commenced here, much more when imported. If theſe are true arguments, they reach the King himſelf as well as the ſubject. Dr. *Rutherforth* ſays, if the civil law of any nation does not allow of ſlavery, priſoners of war cannot be made ſlaves. If the policy of our laws admits not of ſlavery, neither fact nor reaſon are for it. A man, it is ſaid, told the judges of the Star-Chamber, in the caſe of a *Ruſſian* ſlave whom they had ordered to be ſcourged and impriſoned, that the air of *England* was too pure for ſlavery. The parliament afterwards puniſhed the judges of the Star-Chamber for ſuch uſage of the
[4] *Ruſſian*, on his refuſing to anſwer interrogatories. There are very few inſtances, few indeed, of deciſions as to ſlaves, in this country. Two in *Charles* the 2d. where it was adjudged *trover* would lie. *Chamberlayne* and *Perrin*, *Will.* 3*d. trover* brought for taking a negro ſlave, adjudged it would not lie.—4th *Ann.* action of *trover*; judgment by default: On arreſt of judgment, reſolved that *trover* would not lie. Such the determinations in all but two caſes; and thoſe the earlieſt, and diſallowed by the ſubſequent deciſions. Lord *Holt*—As ſoon as a ſlave enters *England* he becomes free. *Stanley* and *Harvey*, on a bequeſt to a ſlave; by a perſon whom he had ſerved ſome years by his former maſter's permiſſion, the maſter claims the bequeſt; Lord *Northington* decides for the ſlave, and gives him coſts. 29th of *George* the 2d. *c.* 31. implies permiſſion in *America*, unhappily thought neceſſary; but the ſame reaſon ſubſiſts not here in *England*. The local law to be admitted when no very great inconvenience would follow; but otherwiſe not. The right of the maſter depends on the condition of ſlavery (ſuch as it is) in *America*. If the ſlave be brought hither, it has nothing left to depend on but a ſuppoſed contract of the ſlave to return; which yet the law of *England* cannot permit. Thus has been traced the only mode of ſlavery ever been eſtabliſhed here, villenage, long expired; I hope it has ſhewn, the introducing new kinds of ſlavery has been cautiouſly, and, we truſt, effectually guarded againſt by the ſame laws.

Your

Your lordships will indulge me in reciting the practice of foreign nations. 'Tis discountenanced in *France*; *Bartholinus de Republicâ* denies its permission by the law of *France*. *Molinus* gives a remarkable instance of the slave of an ambassador of *Spain* brought into *France*: He claims liberty; his claim allowed. *France* even mitigates the ancient slavery, far from creating new. *France* does not suffer even her King to introduce a new species of slavery. The other parliaments did indeed; but the parliament of *Paris*, considering the edict to import slavery as an exertion of the sovereign to the breach of the constitution, would not register that edict. Edict 1685, permits slavery in the colonies. Edict in 1716, recites the necessity to permit in *France*, but under various restraints, accurately enumerated in the Institute of *French* Laws. 1759 Admiralty court of *France*; *Causes Celebrées*, title *Negro*. A *French* gentleman purchased a slave, and sent him to *St. Malo's* entrusted with a friend: He came afterwards, and took him to *Paris*. After ten years the servant chuses to leave *France*. The master not like Mr. *Stewart* hurries him back by main force, but obtains a process to apprehend him, from a court of justice. While in prison, the servant institutes a process against his master, and is declared free. After the permission of slaves in the colonies, the edict of 1716 was necessary, to transfer that slavery to *Paris*; not without many restraints, as before remarked; otherwise the ancient principles would have prevailed. The author *De Jure Novissimo*, though the natural tendency of his book, as appears by the title, leads the other way, concurs with diverse great authorities, in reprobating the introduction of [5] a new species of servitude. In *England*, where freedom is the grand object of the laws, and dispensed to the meanest individual, shall the laws of an infant colony, *Virginia*, or of a barbarous nation, *Africa*, prevail? From the submission of the negro to the laws of *England*, he is liable to all their penalties, and consequently has a right to their protection. There is one case I must still mention; some criminals having escaped execution in *Spain*, were set free in *France*. [Lord *Mansfield*—Rightly: for the laws of one country have not whereby to condemn offences supposed to be committed against those of another.]

An objection has arisen, that the *West India* company, with their trade in slaves, having been established by the law of *England*, its consequences must be recognized by that

that law; but the eſtabliſhment is local, and theſe conſequences local; and not the law of *England*, but the law of the Plantations.

The law of *Scotland* annuls the contract to ſerve for life; except in the caſe of colliers, and one other inſtance of a ſimilar nature. A caſe is to be found in the Hiſtory of the Deciſions, where a term of years was diſcharged, as exceeding the uſual limits of human life. At leaſt, if contrary to all theſe deciſions, the court ſhould incline to think Mr. *Stewart* has a title, it muſt be by preſumption of contract, there being no deed in evidence: on this ſuppoſition, Mr. *Stewart* was obliged, undoubtedly, to apply to a court of juſtice. Was it not ſufficient, that without form, without written teſtimony, without even probability of a parol contract, he ſhould venture to pretend to a right over the perſon and property of the negro, emancipated, as we contend, by his arrival hither, at a vaſt diſtance from his native country, while he vainly indulged the natural expectation of enjoying liberty, where there was no man who did not enjoy it? Was not this ſufficient, but he muſt ſtill proceed, ſeize the unoffending victim, with no other legal pretence for ſuch a mode of arreſt, but the taking an ill advantage of ſome inaccurate expreſſions in the *Habeas Corpus* Act; and thus pervert an eſtabliſhment deſigned for the perfecting of freedom? I truſt, an exception from a ſingle clauſe, inadvertently worded, (as I muſt take the liberty to remark again) of that one ſtatute, will not be allowed to over-rule the law of *England*. I cannot leave the court, without ſome excuſe for the confuſion in which I roſe, and in which I now appear: For the anxiety and apprehenſion I have expreſſed, and deeply felt. It did not ariſe from want of conſideration, for I have conſidered this cauſe for months, I may ſay years; much leſs did it ſpring from a doubt, how the cauſe might recommend itſelf to the candour and wiſdom of the court. But I felt myſelf over-powered by the weight of the queſtion. I now in full
[6] conviction how oppoſite to natural juſtice Mr. *Stewart*'s claim is, in firm perſuaſion of its inconſiſtency with the laws of *England*, ſubmit it chearfully to the judgment of this honourable court: And hope as much honour to your lordſhips from the excluſion of this new ſlavery, as our anceſtors obtained by the abolition of the old.

Mr. *Alleyne*—Though it may ſeem preſumption in me to offer any remarks, after the elaborate diſcourſe but now delivered, yet I hope the indulgence of the court; and ſhall confine my obſervations to ſome few points, not included

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by Mr. *Hargrave*. 'Tis well known to your lordſhips, that much has been aſſerted by the ancient philoſophers and civilians, in defence of the principles of ſlavery: *Ariſtotle* has particularly enlarged on that ſubject. An obſervation ſtill it is, of one of the moſt able, moſt ingenious, moſt convincing writers of modern times, whom I need not heſitate, on this occaſion, to prefer to *Ariſtotle*, the great *Monteſquieu*, that *Ariſtotle*, on this ſubject, reaſoned very unlike the philoſopher. He draws his precedents from barbarous ages and nations, and then deduces maxims from them, for the contemplation and practice of civilized times and countries. If a man who in battle has had his enemy's throat at his ſword's point, ſpares him, and ſays therefore he has power over his life and liberty, is this true? By whatever duty he was bound to ſpare him in battle, (which he always is, when he can with ſafety) by the ſame he obliges himſelf to, ſpare the life of the captive, and reſtore his liberty as ſoon as poſſible, conſiſtent with thoſe conſiderations from whence he was authoriſed to ſpare him at firſt; the ſame indiſpenſible duty operates throughout. As a contract: In all contracts there muſt be power on one ſide to give, on the other to receive; and a competent conſideration. Now, what power can there be in any man to diſpoſe of all the rights veſted by nature and ſociety in him and his deſcendants? He cannot conſent to part with them, without ceaſing to be a man; for they immediately flow from, and are eſſential to, his condition as ſuch: They cannot be taken from him, for they are not his, as a citizen or a member of ſociety merely; and are not to be reſigned to a power inferior to that which gave them. With reſpect to conſideration, what ſhall be adequate? As a ſpeculative point, ſlavery may a little differ in its appearance, and the relation of maſter and ſlave, with the obligations on the part of the ſlave, may be conceived; and merely in this view, might be thought to take effect in all places alike; as natural relations always do. But ſlavery is not a natural, 'tis a municipal relation; an inſtitution therefore confined to certain places, and neceſſarily dropt by paſſage into a country where ſuch municipal regulations do not ſubſiſt. The negro making choice of his habitation here, has ſubjected himſelf to the penalties, and is therefore entitled to the protection of our laws. One remarkable caſe ſeems to require being mentioned: Some *Spaniſh* criminals having eſcaped from execution, were ſet free in *France*. [Lord *Mansfield*—Note the diſtinction in the caſe; In this caſe,

France

[7] *France* was not bound to judge by the municipal laws of *Spain*; nor was to take cognizance of the offences ſuppoſed againſt that law.] There has been ſtarted an objection, that a company having been eſtabliſhed by our government for the trade of ſlaves, it were unjuſt to deprive them here.—No: The government incorporated them with ſuch powers as individuals had uſed by cuſtom, the only title on which that trade ſubſiſted; I conceive, that had never extended, nor could extend, to ſlaves brought hither; it was not enlarged at all by the incorporation of that company, as to the nature or limits of its authority. 'Tis ſaid, let ſlaves know they are all free as ſoon as they arrive here, they will flock over in vaſt numbers, over-run this country, and deſolate the plantations. There are too ſtrong penalties by which they will be kept in; nor are the perſons who convey them over much induced to attempt it; the deſpicable condition in which negroes have the misfortune to be conſidered, effectually prevents their importation in any conſiderable degree. Ought we not, on our part, to guard and preſerve that liberty by which we are diſtinguiſhed by all the earth! to be jealous of whatever meaſure has a tendency to diminiſh the veneration due to the firſt of bleſſings? The horrid cruelties, ſcarce credible in recital, perpetrated in *America*, might, by the allowance of ſlaves amongſt us, be introduced here. Could your lordſhip, could any liberal and ingenuous temper indure, in the fields bordering on this city, to ſee a wretch bound for ſome trivial offence to a tree, torn and agonizing beneath the ſcourge? Such objects might by time become familiar, become unheeded by this nation; exerciſed, as they are now, to far different ſentiments, may thoſe ſentiments never be extinct! the feelings of humanity! the generous ſallies of free minds! May ſuch principles never be corrupted by the mixture of ſlaviſh cuſtoms! Nor can I believe, we ſhall ſuffer any individual living here to want that liberty, whoſe effects are glory and happineſs to the public and every individual.

Mr. *Wallace*—The queſtion has been ſtated, whether the right can be ſupported here; or, if it can, whether a courſe of proceedings at law be not neceſſary to give effect to the right? 'Tis found in three quarters of the globe, and in part of the fourth. In *Aſia* the whole people; in *Africa* and *America* far the greater part; in *Europe* great numbers of the *Ruſſians* and *Polanders*. As to captivity in war, the Chriſtian princes have been uſed to give life to the priſoners; and it took riſe probably in the *Cruſades*, when they gave them

them life, and ſometimes franchiſed them, to enliſt under the ſtandard of the croſs, againſt the *Mahometans*. The right of a conqueror was abſolute in *Europe*, and is in *Africa*. The natives are brought from *Africa* to the *Weſt Indies*; purchaſe is made there, not becauſe of poſitive law, but there being no law againſt it. It cannot be in conſideration by this or any other court, to ſee, whether the *Weſt India* regulations are the beſt poſſible; ſuch as they are, while they continue in force as laws, they muſt be adhered to. As to *England*, not permitting ſlavery, there is no law againſt it; nor do I find any attempt has been made to prove the exiſtence of one. Villenage itſelf has all but the name. Though the diſſolution of monaſteries, amongſt other material alterations, did occaſion the decay of that tenure, ſlaves could breathe in *England*: For villains were in this country, and were mere ſlaves, in *Elizabeth*. *Shepard*'s Abridgment, afterwards, ſays they were worn out in his time. [Lord *Mansfield* mentions an aſſertion, but does not recollect the author, that two only were in *England* in the time of *Charles* the 2d. at the time of the abolition of tenures.] In the caſes cited, the two firſt directly affirm an action of *trover*, an action appropriated to mere common chattels. Lord *Holt*'s opinion, is a mere *dictum*, a deciſion unſupported by precedent. And if it be objected, that a proper action could not be brought, 'tis a known and allowed practice in mercantile tranſactions, if the cauſe ariſes aboad, to lay it within the kingdom: Therefore the contract in *Virginia* might be laid to be in *London*, and would not be traverſable. With reſpect to the other caſes, the particular mode of action was alone objected to; had it been an action *per quod ſervitium amiſit*, for the loſs of ſervice, the court would have allowed it. The court called the perſon, for the recovery of whom it was brought, a flaviſh ſervant, in *Chamberlayne*'s caſe. Lord *Hardwicke*, and the afterwards Lord Chief Juſtice *Talbot*, then Attorney and Solicitor-General, pronounced a ſlave not free by coming into *England*. 'Tis neceſſary the maſters ſhould bring them over; for they cannot truſt the whites, either with the ſtores or the navigating the veſſel. Therefore, the benefit taken on the *Habeas Corpus* Act ought to be allowed.

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Lord *Mansfield* obſerves, The caſe alluded to was upon a petition in *Lincoln's Inn Hall*, after dinner; probably, therefore, might not, as he believes the contrary is not uſual at that hour, be taken with much accuracy. The principal

principal matter was then, on the earneſt ſolicitation of many merchants, to know, whether a ſlave was freed by being made a Chriſtian? And it was reſolved, not. 'Tis remarkable, tho' the *Engliſh* took infinite pains before to prevent their ſlaves being made Chriſtians, that they might not be freed, the *French* ſuggeſted they muſt bring their's into *France*, (when the edict of 1706 was petitioned for,) to make them Chriſtians. He ſaid, the diſtinction was difficult as to ſlavery, which could not be reſumed after emancipation, and yet the condition of ſlavery, in its full extent, could not be tolerated here. Much conſideration was neceſſary, to define how far the point ſhould be carried. The court muſt conſider the great detriment to proprietors, there being ſo great a number in the ports of this kingdom, that many thouſands of pounds would be loſt to the owners, by ſetting them free. (A gentleman obſerved, no great danger; for in a whole fleet, uſually, there would not be ſix ſlaves.) As to *France*, the caſe ſtated decides no
[9] farther than that kingdom; and there freedom was claimed, becauſe the ſlave had not been regiſtered in the port where he entered, conformably to the edict of 1706. Might not a ſlave as well be freed by going out of *Virginia* to the adjacent country, where there are no ſlaves, if change to a place of contrary cuſtom was ſufficient? A ſtatute by the legiſlature, to ſubject the *Weſt India* property to payment of debts, I hope, will be thought ſome proof; another act deveſts the *African* Company of their ſlaves, and veſts them in the *Weſt India* Company: I ſay, I hope, theſe are proofs the law has interfered for the maintenance of the trade in ſlaves, and the transferring of ſlavery. As for want of application properly to a court of juſtice; a common ſervant may be corrected here by his maſter's private authority. *Habeas corpus* acknowledges a right to ſeize perſons by force employed to ſerve abroad. A right of compulſion there muſt be, or the maſter will be under the ridiculous neceſſity of neglecting his proper buſineſs, by ſtaying here to have their ſervice, or muſt be quite deprived of thoſe ſlaves he has been obliged to bring over. The caſe, as to ſervice for life was not allowed, merely for want of a deed to paſs it.

The court approved Mr. *Alleyne's* opinion of the diſtinction, how far municipal laws were to be regarded: Inſtanced the right of marriage; which, properly ſolemnized, was in all places the ſame, but the regulations of power over children from it, and other circumſtances, very various; and

and adviſed, if the merchants thought it ſo neceſſary, to apply to parliament, who could make laws.

Adjourned till that day ſe'night.

Mr. *Dunning*—'Tis incumbent on me to juſtify Captain *Knowles*'s detainer of the negro; this will be effected, by proving a right in Mr. *Stewart*; even a ſuppoſed one: For till the matter was determined, if were ſomewhat unaccountable that a negro ſhould depart his ſervice, and put the means out of his power of trying that right to effect, by a flight out of the kingdom. I will explain what appears to me the foundation of Mr. *Stewart*'s claim. Before the writ of *habeas corpus* iſſued in the preſent caſe, there was, and there ſtill is, a great number of ſlaves in *Africa*, (from whence the *American* plantations are ſupplied) who are ſaleable, and in fact ſold. Under all theſe deſcriptions is *James Somerſet*. Mr. *Stewart* brought him over to *England*; purpoſing to return to *Jamaica*, the negro choſe to depart the ſervice, and was ſtopt and detained by Captain *Knowles*, 'till his maſter ſhould ſet ſail and take him away to be ſold in *Jamaica*. The gentlemen on the other ſide, to whom I impute no blame, but on the other hand much commendation, have advanced many ingenious propoſitions; part of which are undeniably true, and part (as is uſual in compoſitions of ingenuity) very diſputable. 'Tis my misfortune to addreſs an audience, the greater part of which, I fear, [10] are prejudiced the other way. But wiſhes, I am well convinced, will never enter into your lordſhips minds, to influence the determination of the point: This cauſe muſt be what in fact and law it is; it's fate, I truſt, therefore, depends on fixt invariable rules, reſulting by law from the nature of the caſe. For myſelf, I would not be underſtood to intimate a wiſh in favour of ſlavery, by any means; nor on the other ſide, to be ſuppoſed maintainer of an opinion contrary to my own judgment. I am bound by duty to maintain thoſe arguments which are moſt uſeful to Captain *Knowles*, as far as is conſiſtent with truth; and if his conduct has been agreeable to the laws throughout, I am under a farther indiſpenſable duty to ſupport it. I aſk no other attention than may naturally reſult from the importance of the queſtion: Leſs than this I have no reaſon to expect; more, I neither demand nor wiſh to have allowed. Many alarming apprehenſions have been entertained of the conſequence of the deciſion, either way. About 14,000 ſlaves, from the moſt exact intelligence I am able to procure are at preſent here; and ſome little time paſt, 166,914

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in *Jamaica*: there are, beſides, a number of wild negroes in the woods. The computed value of a negro in thoſe parts 50 *l.* a head. In the other iſlands I cannot ſtate with the ſame accuracy, but on the whole they are about as many. The means of conveyance, I am told, are manifold; every family almoſt brings over a great number; and will, be the deciſion on which ſide it may. Moſt negroes who have money (and that deſcription I believe will include nearly all) make intereſt with the common ſailors to be carried hitherto. There are negroes not falling under the proper denomination of any yet mentioned, deſcendants of the original ſlaves, the aborigines, if I may call them ſo; theſe have gradually acquired a natural attachment to their country and ſituation; in all inſurrections they ſide with their maſters: Otherwiſe, the vaſt diſproportion of the negroes to the whites, (not leſs probably than that of 100 to one) would have been fatal in it's conſequences. There are very ſtrong and particular grounds of apprehenſion, if the relation in which they ſtand to their maſters is utterly to be diſſolved on the inſtant of their coming into *England*. Slavery, ſay the gentlemen, is an odious thing; the name is: And the reality; if it were as one has defined, and the reſt ſuppoſed it. If it were neceſſary to the idea and the exiſtence of *James Somerſet*, that his maſter, even here, might kill, nay, might eat him, might ſell living or dead, might make him and his deſcendants property alienable, and thus tranſmiſſible to poſterity; this, how high ſoever my ideas may be of the duty of my profeſſion, is what I ſhould decline pretty much to defend or aſſert, for any purpoſe, ſeriouſly; I ſhould only ſpeak of it to teſtify my contempt and abhorrence. But this is what at preſent I am not at all concerned in; unleſs Captain *Knowles*, or Mr. *Stewart*, have killed or eat him. Freedom has been aſſerted as a natural right, and therefore unalienable and unreſtrainable; there is perhaps no branch of this right, but in ſome
[11] at all times, and in all places at different times, has been reſtrained: Nor could ſociety otherwiſe be conceived to exiſt. For the great benefit of the public and individuals, natural liberty, which conſiſts in doing what one likes, is altered to the doing what one ought. The gentlemen who have ſpoke with ſo much zeal, have ſuppoſed different ways by which ſlavery commences; but have omitted one, and rightly; for it would have given a more favourable idea of the nature of that power againſt which they combate. We are apt (and great authorities ſupport this way of ſpeaking)

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to call thoſe nations univerſally, whoſe internal police we are ignorant of, barbarians; (thus the *Greeks*, particularly, ſtiled many nations, whoſe cuſtoms, generally conſidered, were far more juſtifiable and commendable than their own:) Unfortunately, from calling them barbarians, we are apt to think them ſo, and draw concluſions accordingly. There are ſlaves in *Africa* by captivity in war, but the number far from great; the country is divided into many ſmall, ſome great territories, who do, in their wars with one another, uſe this cuſtom. There are of theſe people, men who have a ſenſe of the right and value of freedom; but who imagine that offences againſt ſociety are puniſhable juſtly by the ſevere law of ſervitude. For crimes againſt property, a conſiderable addition is made to the number of ſlaves. They have a proceſs by which the quantity of the debt is aſcertained; and if all the property of the debtor in goods and chattels is inſufficient, he who has thus diſſipated all he has beſides, is deemed property himſelf; the proper officer (ſheriff we may call him) ſeizes the inſolvent, and diſpoſes of him as a ſlave. We don't contend under which of theſe the unfortunate man in queſtion is; but his condition was that of ſervitude in *Africa*; the law of the land of that country diſpoſed of him as property, with all the conſequences of tranſmiſſion and alienation; the ſtatutes of the *Britiſh* legiſlature confirm this condition; and thus he was a ſlave both in law and fact. I do not aim at proving theſe points; not becauſe they want evidence, but becauſe they have not been controverted, to my recollection, and are, I think, incapable of denial. Mr. *Stewart*, with this right, croſſed the *Atlantic*, and was not to have the ſatisfaction of diſcovering, till after his arrival in this country, that all relation between him and the negro, as maſter and ſervant, was to be matter of controverſy, and of long legal diſquiſition. A few words may be proper, concerning the *Ruſſian* ſlave, and the proceedings of the Houſe of Commons on that caſe. 'Tis not abſurd in the idea, as quoted, nor improbable as matter of fact; the expreſſion has a kind of abſurdity. I think, without any prejudice to Mr. *Stewart*, or be merits of this cauſe, I may admit the utmoſt poſſible to be deſired, as far as the caſe of that ſlave goes. The maſter and ſlave were both, (or ſhould have been at leaſt) on their coming here, new creatures. *Ruſſian* ſlavery, and even the ſubordination amongſt themſelves, in the degree they uſe it, is not here to be tolerated. Mr. *Alleyne* juſtly obſerves, the municipal

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[12] regulations of one country are not binding on another; but does the relation ceaſe where the modes of creating it, the degrees in which it ſubſiſts, vary? I have not heard, nor, I fancy, is there any intention to affirm, the relation of maſter and ſervant ceaſes here? I underſtand the municipal relations differ in different colonies, according to humanity, and otherwiſe. A diſtinction was endeavoured to be eſtabliſhed between natural and municipal relations; but the natural relations are not thoſe only which attend the perſon of the man, political do ſo too; with which the municipal are moſt cloſely connected: Municipal laws, ſtrictly, are thoſe confined to a particular place; political, are thoſe in which the municipal laws of many ſtates may and do concur. The relation of huſband and wife, I think myſelf warranted in queſtioning, as a natural relation: Does it ſubſiſt for life; or to anſwer the natural purpoſes which may reaſonably be ſuppoſed often to terminate ſooner? Yet this is one of thoſe relations which follow a man every where. If only natural relations had that property, the effect would be very limited indeed. In fact, the municipal laws are principally employed in determining the manner by which relations are created; and which manner varies in various countries, and in the ſame country at different periods; the political relation itſelf continuing uſually unchanged by the change of place. There is but one form at preſent with us, by which the relation of huſband and wife can be conſtituted; there was a time when otherwiſe: I need not ſay other nations have their own modes, for that and other ends of ſociety. Contract is not the only means, on the other hand, of producing the relation of maſter and ſervant; the magiſtrates are empowered to oblige perſons under certain circumſtances to ſerve. Let me take notice, neither the air of *England* is too pure for a ſlave to breathe in, nor the laws of *England* have rejected ſervitude. Villenage in this country is ſaid to be worn out; the propriety of the expreſſion ſtrikes me a little. Are the laws not exiſting by which it was created? A matter of more curioſity than uſe, it is, to enquire when that ſet of people ceaſed. The Statute of Tenures did not however aboliſh villenage in groſs; it left perſons of that condition in the ſame ſtate as before; if their deſcendants are all dead, the gentlemen are right to ſay the ſubject of thoſe laws is gone, but not the law; if the ſubject revives, the law will lead the ſubject. If the ſtatute of *Charles* the 2d. ever be repealed, the law of villenage revives in it's full force. If my learned brother, the ſerjeant, or the other gentlemen who argued on the ſuppoſed ſubject of freedom,

dom, will go thro' an operation my reading aſſures me will be ſufficient for that purpoſe, I ſhall claim them as property. I won't, I aſſure them, make a rigorous uſe of my power; I will neither ſell them, eat them, nor part with them. It would be a great ſurprize, and ſome inconvenience, if a foreigner bringing over a ſervant, as ſoon as he got hither, muſt take care of his carriage, his horſe, and himſelf, in whatever method he might have the luck to invent. He muſt find his way to *London* on foot. He tells [13] his ſervant, Do this; the ſervant replies, Before I do it, I think fit to inform you, Sir, the firſt ſtep on this happy land ſets all men on a perfect level; you are juſt as much obliged to obey my commands. Thus neither ſuperior, or inferior, both go without their dinner. We ſhould find ſingular comfort, on entering the limits of a foreign country, to be thus at once deveſted of all attendance and all accommodation. The gentlemen have collected more reading than I have leiſure to collect, or induſtry (I muſt own) if I had leiſure: Very laudable pains has been taken, and very ingenious, in collecting the ſentiments of other countries, which I ſhall not much regard, as affecting the point or juriſdiction of this court. In *Holland*, ſo far from perfect freedom, (I ſpeak from knowledge) there are, who without being conſcious of contract, have for offences perpetual labour impoſed, and death the condition annext to non-performance. Either all the different ranks muſt be allowed natural, which is not readily conceived, or there are political ones, which ceaſe not on change of ſoil. But in what manner is the negro to be treated? How far lawful to detain him? My footman, according to my agreement, is obliged to attend me from this city, or he is not; if no condition, that he ſhall not be obliged to attend, from hence he is obliged, and no injury done.

A ſervant of a ſheriff, by the command of his maſter, laid hand gently on another ſervant of his maſter, and brought him before his maſter, who himſelf compelled the ſervant to his duty; an action of aſſault and battery, and falſe impriſonment, was brought; and the principal queſtion was, on demurrer, whether the maſter could command the ſervant, tho' he might have juſtified his taking of the ſervant by his own hands? The convenience of the public is far better provided for, by this private authority of the maſter, than if the lawfulneſs of the command were liable to be litigated every time a ſervant thought fit to be negligent or troubleſome.

Is there a doubt, but a negro might interpoſe in the defence of a maſter, or a maſter in defence of a negro? If to all purpoſes of advantage, mutuality requires the rule to extend to thoſe of diſadvantage. 'Tis ſaid, as not formed by contract, no reſtraint can be placed by contract. Which ever way it was formed, the conſequences, good or ill, follow from the relation, not the manner of producing it. I may obſerve, there is an eſtabliſhment, by which magiſtrates compel idle or diſſolute perſons, of various ranks and denominations, to ſerve. In the caſe of apprentices bound out by the pariſh, neither the trade is left to the choice of thoſe who are to ſerve, nor the conſent of parties neceſſary; no contract therefore is made in the former inſtance, none in the latter; the duty remains the ſame. The caſe of contract for life quoted from the Year-Books, was recognized as valid; the ſolemnity only of an inſtrument judged requiſite. Your lordſhips, (this variety of [14] ſervice, with diverſe other ſorts, exiſting by law here,) have the opinion of claſſing him amongſt thoſe ſervants which he moſt reſembles in condition: Therefore, (it ſeems to me) are by law authoriſed to enforce a ſervice for life in the ſlave, that being a part of his ſituation before his coming hither; which, as not incompatible, but agreeing with our laws, may juſtly ſubſiſt here: I think, I might ſay, muſt neceſſarily ſubſiſt, as a conſequence of a previous right in Mr. *Stewart*, which our inſtitutions not diſſolving, confirm. I don't inſiſt on all the conſequences of villenage; enough is eſtabliſhed for our cauſe, by ſupporting the continuance of the ſervice. Much has been endeavoured, to raiſe a diſtinction, as to the lawfulneſs of the negro's commencing ſlave, from the difficulty or impoſſibility of diſcovery by what means, under what authority, he became ſuch. This, I apprehend, if a curious ſearch were made, not utterly inexplicable; nor the legality of his original ſervitude difficult to be proved. But to what end? Our legiſlature, where it finds a relation exiſting, ſupports it in all ſuitable conſequences, without uſing to enquire how it commenced. A man enliſts for no ſpecified time; the contract in conſtruction of law, is for a year: The legiſlature, when once the man is enliſted, interpoſes annually to continue him in the ſervice, as long as the public has need of him. In times of public danger he is forced into the ſervice; the laws from thence forward find him a ſoldier, make him liable to all the burthen, confer all the rights (if any rights there are of that ſtate) and enforce all penalties

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of neglect of any duty in that profeſſion, as much and as abſolutely, as if by contract he had ſo diſpoſed of himſelf. If the court ſee a neceſſity of entering into the large field of argument, as to right of the unfortunate man, and ſervice appears to them deducible from a diſcuſſion of that nature to him, I neither doubt they will, nor wiſh they ſhould not. As to the purpoſe of Mr. *Stewart* and Captain *Knowles*, my argument does not require *trover* ſhould lie, as for recovering of property, nor treſpaſs: A form of action there is, the writ *per quod ſervitium amiſit*, for loſs of ſervice, which the court would have recognized; if they allowed the means of ſuing a right, they allowed the right. The opinion cited, to prove the negroes free on coming hither, only declares them not ſaleable; does not take away their ſervice. I would ſay, before I conclude, not for the ſake of the court, of the audience; the matter now in queſtion, intereſts the zeal for freedom of no perſon, if truly conſidered; it being only, whether I muſt apply to a court of juſtice, (in a caſe, where if the ſervant was an *Engliſhman* I might uſe my private authority to enforce the performance of the ſervice, according to it's nature,) or may, without force or outrage, take my ſervant myſelf, or by another. I hope, therefore, I ſhall not ſuffer in the opinion of thoſe whoſe honeſt paſſions are fired at the name of ſlavery. I hope I have not tranſgreſſed my duty to humanity; nor doubt I your lordſhips diſcharge of yours to juſtice.

Serjeant *Davy*—My learned friend has thought proper to [15]
conſider the queſtion in the beginning of his ſpeech, as of great importance: 'Tis indeed ſo; but not for thoſe reaſons principally aſſigned by him. I apprehend, my lord, the honour of *England*, the honour of the laws of every *Engliſhman*, here or abroad, is now concerned. He obſerves, the number of 14,000 or 15,000; if ſo, high time to put an end to the practice; more eſpecially, ſince they muſt be ſent back as ſlaves, tho' ſervants here. The increaſe of ſuch inhabitants, not intereſted in the proſperity of a country, is very pernicious; in an iſland, which can, as ſuch, not extend it's limits, nor conſequently maintain more than a certain number of inhabitants, dangerous in exceſs. Money from foreign trade (or any other means) is not the wealth of a nation; nor conduces any thing to ſupport it, any farther than the produce of the earth will anſwer the demand of neceſſaries. In that caſe money enriches the inhabitants, as being the common repreſentative of thoſe

neceſſaries; but this repreſentation is merely imaginary and uſeleſs, if the encreaſe of people exceeds the annual ſtock of proviſions requiſite for their ſubſiſtence. Thus, foreign ſuperfluous inhabitants augmenting perpetually, are ill to be allowed; a nation of enemies in the heart of a ſtate, ſtill worſe. Mr. *Dunning* availed himſelf of a wrong interpretation of the word natural: It was not uſed in the ſenſe in which he thought fit to underſtand that expreſſion; 'twas uſed as moral, which no laws can ſupercede. All contracts, I do not venture to aſſert are of a moral nature; but I know not any law to confirm an immoral contract, and execute it. The contract of marriage is a moral contract, eſtabliſhed for moral purpoſes, enforcing moral obligations; the right of taking property by deſcent, the legitimacy of children; (who in *France* are conſidered legitimate, tho' born before the marriage, in *England* not:) Theſe, and many other conſequences, flow from the marriage properly ſolemnized; are governed by the municipal laws of that particular ſtate, under whoſe inſtitutions the contracting and diſpoſing parties live as ſubjects; and by whoſe eſtabliſhed forms they ſubmit the relation to be regulated, ſo far as its conſequences, not concerning the moral obligation, are intereſted. In the caſe of *Thern* and *Watkins*, in which your lordſhip was counſel, determined before Lord *Hardwicke*.—A man died in *England*, with effects in *Scotland*; having a brother of the whole, and a ſiſter of the half blood: The latter, by the laws of *Scotland* could not take. The brother applies for adminiſtration to take the whole eſtate, real and perſonal, into his own hands, for his own uſe; the ſiſter files a bill in Chancery. The then Mr. Attorney-General puts in anſwer for the defendant; and affirms, the eſtate, as being in *Scotland*, and deſcending from a *Scotchman*, ſhould be governed by that law. Lord *Hardwicke* over-ruled the objection againſt the ſiſter's taking; declared there was no pretence for it; and ſpoke thus, to this effect, and nearly in the following words—Suppoſe a foreigner has effects in our ſtocks, and
[16] dies abroad; they muſt be diſtributed according to the laws, not of the place where his effects were, but of that to which as a ſubject he belonged at the time of his death. All relations governed by municipal laws, muſt be ſo far dependant on them, that if the parties change their country the municipal laws give way, if contradictory to the political regulations of that other country. In the caſe of maſter and ſlave, being no moral obligation, but founded on princi-

principles, and ſupported by practice, utterly foreign to the laws and cuſtoms of this country, the law cannot recognize ſuch relation. The arguments founded on municipal regulations, conſidered in their proper nature, have been treated ſo fully, ſo learnedly, and ably, as ſcarce to leave any room for obſervations on that ſubject: Any thing I could offer to enforce, would rather appear to weaken the propoſition, compared with the ſtrength and propriety with which that ſubject has already been explained and urged. I am not concerned to diſpute, the negro may contract to ſerve; nor deny the relation between them, while he continues under his original proprietor's roof and protection. 'Tis remarkable, in all *Dyer*, for I have cauſed a ſearch to be made as far as the 4th of *Henry* 8th, there is not one inſtance of a man's being held a villain who denied himſelf to be one; nor can I find a confeſſion of villenage in thoſe times. [Lord *Mansfield*, the laſt confeſſion of villenage extant, is in the 19th of *Henry* the 6th.] If the court would acknowledge the relation of maſter and ſervant, it certainly would not allow the moſt exceptionable part of ſlavery; that of being obliged to remove, at the will of the maſter, from the protection of this land of liberty, to a country where there are no laws; or hard laws to inſult him. It will not permit ſlavery ſuſpended for a while, ſuſpended during the pleaſure of the maſter. The inſtance of maſter and ſervant commencing without contract; and that of apprentices againſt the will of the parties, (the letter found in it's conſequences exceedingly pernicious;) both theſe are provided by ſpecial ſtatutes of our own municipal law. If made in *France*, or any where but here, they would not have been binding here. To puniſh not even a criminal for offences againſt the laws of another country; to ſet free a galley-ſlave, who is a ſlave by his crime; and make a ſlave of a negro, who is one, by his complexion; is a cruelty and abſurdity that I truſt will never take place here: Such as, if promulged, would make *England* a diſgrace to all the nations under earth: For the reducing a man, guiltleſs of any offence againſt the laws, to the condition of ſlavery, the worſt and moſt abject ſtate, Mr. *Dunning* has mentioned, what he is pleaſed to term philoſophical and moral grounds, I think, or ſomething to that effect, of ſlavery; and would not by any means have us think diſreſpectfully of thoſe nations, whom we miſtakenly call barbarians, merely for carrying on that trade; For my part, we may be warranted, I believe, in affirming the morality

or propriety of the practice does not enter their heads; they make ſlaves of whom they think fit. For the air of
[17] *England*; I think, however, it has been gradually purifying ever ſince the reign of *Elizabeth*. Mr. *Dunning* ſeems to have diſcovered ſo much, as he finds it changes a ſlave into a ſervant; tho' unhappily, he does not think it of efficacy enough to prevent that peſtilent diſeaſe reviving, the inſtant the poor man is obliged to quit (voluntarily quits, and legally, it ſeems we ought to ſay,) this happy country. However, it has been aſſerted, and is now repeated by me, this air is too pure for a ſlave to breathe in: I truſt, I ſhall not quit this court without certain conviction of the truth of that aſſertion.

Lord *Mansfield*—The queſtion is, if the owner had a right to detain the ſlave, for the ſending of him over to be ſold in *Jamaica*. In five or ſix caſes of this nature, I have known it to be accommodated by agreement between the parties: On its firſt coming before me, I ſtrongly recommended it here. But if the parties will have it decided, we muſt give our opinion. Compaſſion will not, on the one hand, nor inconvenience on the other, be to decide; but the law: In which the difficulty will be principally from the inconvenience on both ſides. Contract for ſale of a ſlave is good here; the ſale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the perſon of the ſlave himſelf is immediately the object of enquiry; which makes a very material difference. The now queſtion is, whether any dominion, authority or coercion can be exerciſed in this country, on a ſlave according to the *American* laws? The difficulty of adopting the relation, without adopting it in all its conſequences, is indeed extreme; and yet, many of thoſe conſequences are abſolutely contrary to the municipal law of *England*. We have no authority to regulate the conditions in which law ſhall operate. On the other hand, ſhould we think the coercive power cannot be exerciſed: 'Tis now about fifty years ſince the opinion given by two of the greateſt men of their own or any times, (ſince which no contract has been brought to trial, between the maſters and ſlaves;) the ſervice performed by the ſlaves without wages, is a clear indication they did not think themſelves free by coming hither. The ſetting 14,000 or 15,000 men at once free looſe by a ſolemn opinion, is much diſagreeable in the effects it threatens. There is a caſe in *Hobart*, (*Coventry* and *Woodfall*,) where a man had

had contracted to go as a mariner: But the now caſe will not come within that deciſion. Mr. *Stewart* advances no claim on contract; he reſts his whole demand on a right to the negro as ſlave, and mentions the purpoſe of detainure to be the ſending of him over to be ſold in *Jamaica*. If the parties will have judgment, *fiat juſtitia, ruat cœlum*, let juſtice be done whatever be the conſequence. 50 l. a head may not be a high price; then a loſs follows to the proprietors of above 700,000 l. ſterling. How would the law ſtand with reſpect to their ſettlement; their wages? How many actions for any ſlight coercion by the maſter? We cannot in any of theſe points direct the law; the law [18] muſt rule us. In theſe particulars, it may be matter of weighty conſideration, what proviſions are made or ſet by law. Mr. *Stewart* may end the queſtion, by diſcharging or giving freedom to the negro. I did think at firſt to put the matter to a more ſolemn way of argument: But if my brothers agree, there ſeems no occaſion. I do not imagine, after the point has been diſcuſſed on both ſides ſo extremely well, any new light could be thrown on the ſubject. If the parties chuſe to refer it to the Common Pleas, they can give them that ſatisfaction whenever they think fit. An application to parliament, if the merchants think the queſtion of great commercial concern, is the beſt, and perhaps the only method of ſettling the point for the future. The court is greatly obliged to the gentlemen of the bar who have ſpoke on the ſubject; and by whoſe care and abilities ſo much has been effected, that the rule of deciſion will be reduced to a very eaſy compaſs. I cannot omit to expreſs particular happineſs in ſeeing young men, juſt called to the bar, have been able ſo much to profit by their reading. I think it right the matter ſhould ſtand over; and if we are called on for a deciſion, proper notice ſhall be given.

Trinity Term, *June* 22, 1772.

Lord *Mansfield*—On the part of *Somerſet*, the caſe which we gave notice ſhould be decided this day, the court now proceeds to give its opinion. I ſhall recite the return to the writ of *habeas corpus*, as the ground of our determination; omitting only words of form. The captain of the ſhip on board of which the negro was taken, makes his return to the writ in terms ſignifying that there have been, and ſtill are, ſlaves to a great number in *Africa*; and that the trade in them is authorized by the laws and opinions of *Virginia* and

and *Jamaica*; that they are goods and chattels; and, as ſuch, ſaleable and ſold. That *James Somerſet*, is a negro of *Africa*, and long before the return of the king's writ was brought to be ſold, and was ſold to *Charles Stewart*, Eſq. then in *Jamaica*, and has not been manumitted ſince; that Mr. *Stewart*, having occaſion to tranſact buſineſs, came over hither, with an intention to return; and brought *Somerſet*, to attend and abide with him, and to carry him back as ſoon as the buſineſs ſhould be tranſacted. That ſuch intention has been, and ſtill continues; and that the negro did remain till the time of his departure, in the ſervice of his maſter Mr. *Stewart*, and quitted it without his conſent; and thereupon, before the return of the king's writ, the ſaid *Charles Stewart* did commit the ſlave on board the *Ann* and *Mary*, to ſave cuſtody, to be kept till he ſhould ſet ſail, and then to be taken with him to *Jamaica*, and there ſold as a ſlave. And this is the cauſe why he, Captain *Knowles*, who was then and now is, commander of the above veſſel, then and now lying in the river of
[19] *Thames*, did the ſaid negro, committed to his cuſtody, detain; and on which he now renders him to the orders of the court. We pay all due attention to the opinion of Sir *Philip Yorke*, and Lord Chief Juſtice *Talbot*, whereby they pledged themſelves to the *Britiſh* planters, for all the legal conſequences of ſlaves coming over to this kingdom or being baptized, recognized by Lord *Hardwicke*, ſitting as Chancellor on the 19th of *October* 1749, that *trover* would lie: That a notion had prevailed, if a negro came over, or became a chriſtian, he was emancipated, but no ground in law; that he and Lord *Talbot*, when Attorney and Solicitor-General, were of opinion, that no ſuch claim for freedom was valid; that tho' the Statute of Tenures had aboliſhed villains regardant to a manor, yet he did not conceive but that a man might ſtill become a villain in groſs, by confeſſing himſelf ſuch in open court. We are ſo well agreed, that we think there is no occaſion of having it argued (as I intimated an intention at firſt,) before all the judges, as is uſual, for obvious reaſons, on a return to a *habeas corpus*; the only queſtion before us is, whether the cauſe on the return is ſufficient? If it is, the negro muſt be remanded; if it is not, he muſt be diſcharged. Accordingly, the return ſtates, that the ſlave departed and refuſed to ſerve; whereupon he was kept, to be ſold abroad. So high an act of dominion muſt be recognized by the law of the country where it is uſed. The power of a maſter over his ſlave has

been

been extremely different, in different countries. The ſtate of ſlavery is of ſuch a nature, that it is incapable of being introduced on any reaſons, moral or political; but only poſitive law, which preſerves its force long after the reaſons, occaſion, and time itſelf from whence it was created, is eraſed from memory: It's ſo odious, that nothing can be ſuffered to ſupport it, but poſitive law. Whatever inconveniences, therefore, may follow from a deciſion, I cannot ſay this caſe is allowed or approved by the law of *England*; and therefore the black muſt be diſcharged.

Pitt *againſt* Harbin.

MRS. *Harbin* deviſed to her four nieces, and on the death of any of them without iſſue, the whole ſhould go to the ſurvivor or ſurvivors; but if any of her ſaid nieces died, having child or children, then the ſhare to go to ſuch child or children; if all died without iſſue, then the whole to her nephew.

Catherine Pitt, one of the nieces, married *G. Pitt*, and had iſſue *W.* and *G.* Both died in the life of the mother; *G. Pitt* left iſſue *Eliz.* and *G.* grand-children of *C.* the three other nieces died without iſſue, one in 1712, *C.* in 1745, and another in 1759, and *F.* in 1765. The will was made in 1705.

On the death of *F.* the grand-children of *C.* claim the whole. On the other hand, the repreſentatives of Mrs. *Harbin* ſay, that nothing but the ſingle ſhare which *C* took by ſurvivorſhip goes to the grand-children of *C.* [20]

It was argued, that if a niece left children, 'twas meant thoſe children ſhould take all by ſurvivorſhip, which their parent could have taken if living; and all that on failure of iſſue was to have gone over to the nephew of the teſtatrix, which was the whole. And that the nieces who ſurvived *C.* and died without iſſue, could take only a life intereſt, which they could have preferably to the iſſue of the deceaſed ſiſter, but no more; they could not take any part but by implication, being grand-children, and not children; and if they take at all by implication, they ſhall take the whole. On the other hand, that conſiſtently with the intention of the teſtator, no ſurvived ſhare can go to the repreſentatives of the dead niece. How is it poſſible, if there be an accrued ſhare to ſifters repreſentatives during the term, the whole ſhould go to the nephew? And yet the whole is to go to him, or none.

Can

Can the children of *C.* take? The teſtatrix ſays there ſhall be no ſurvivorſhip. They can take no more than *C.* at her death was intitled to, which was only her own and the ſhare of one of the ſiſters. If *C.* had ſurvived all four ſiſters, they would then have been to take the whole. It was contended, on the part of the children, they ſhould take as of property undiſpoſed any where elſe.

Sir *Thomas Sewell*, Maſter of the Rolls—The intention of the teſtatrix, clearly made out from the will, is, that the children, if any, ſhould take the whole. I think no conjecture ſhould be drawn; but from neceſſary implication, the will muſt be preſerved.

She gives in legacies 150l. to her brothers and ſiſters, and 20l. to one niece, 10l. a piece to the other three.

She limits the intereſt for as much of the term as ſhall run out during the life of her nieces; but this no more, expreſsly, than a life intereſt to the nieces, remainder in the term to children, if any; and if any of the nieces die without children, then the part or ſhare ſhall go to the ſurvivor or ſurvivors. The laſt died without children; and here lies the difficulty. She meant, I think, not only the ſhare accruing to the ſiſter leaving iſſue at the time of her deceaſe, but all the ſurvivorſhips of the other ſhares, to go to her child or children; if other or others had been here, inſtead of ſurvivor or ſurvivors, there could have been no doubt: The meaning then muſt have been, the children ſhould take; the whole ſhare ſhould have gone to the children. Suppoſe it otherwiſe, on the child or children
[21] dying in the life-time of any of the four ſiſters, the ſhare of the children would have been taken out of their repreſentatives, and gone to Mr. *Windham*, which is abſurd.

Directions given accordingly.

Univerſity Caſe.

Marriet *againſt* Gregory.

INFORMATION in the nature of a *quo warranto* againſt the defendant, to ſhew cauſe, why he holds the office of fellow of *Trinity-Hall*. The election was by the fellows, in the abſence of the maſter. It appeared, it ſeems, on affidavits, that the maſter by the ſtatute was to be forewarned and waited for; that the election was to have ten days

days notice, was not to be in vacation; and that in twenty-eight days, inclusive of the ten, the election muſt be made, otherwiſe lapſe to the maſter; and that the maſter muſt reſide, and not even lye a night out without leave of the college. Dr. *Marriet* being abſent, the fellows gave notice on the firſt day of term, that an election would be on the 20th of *October*. The maſter writes word, being abſent, that his health will not permit him to come before the 8th of *November*, (which was a day after the twenty-eight days;) but if he does not come then, they may go on without him. They did not elect till the 3d of *November*. Objected, that this election was bad, and conſequently the title of Mr. *Gregory*; that they ſhould have waited for the maſter; that the election could not be good in his abſence; and that at leaſt, in this, the title of the gentleman choſen a fellow was bad, that he was admitted without the maſter On the other hand, that the court had not ſtrictly an authority to grant informations; for that colleges in the univerſity were not within the ſtatute of 9 Queen *Anne*; but that they were agreed to waive exceptions of form, and reſt on the merits. That the maſter was bound to have been reſident, that he was both *præmonitus & expectatus*, according to the ſtatute, forewarned and expected, a reaſonable time; that he had no right to appoint a day; that if he had been there, and had not given a vote, they might, by the ſtatute, have elected without him: The ſame if he was abſent beyond due time, and had by his refuſal to attend precluded himſelf from giving a vote. That had he been preſent, and given a vote with the minority, the election by the majority would have been good without him; much more, when he choſe to be abſent, having due notice, and more than was ſtrictly due; and that the election was therefore good. Contended by Mr. *Dunning*, that it was not good.

A form of government there muſt be in the college ſubſiſting in ſome perſons, and to which an head is neceſſary. [22]

The ſtatutes of the founder have appointed an head; that is, the maſter. "*Conforment ſocii cuſtodis ſuffragio*," are the words. *Præſentia cuſtodis neceſſario requiritur, ſuffragia majoris partis ſociorum ſufficiant, ſi magiſter votim non dederit, aut ſi alia parte det.* The power of the maſter was reſtrained from ſtopping the election, and alſo from abſenting himſelf *ſi præmonitio fuerit & expectatus fuerit, neque intereſſe voluit*, the fellows may elect.

There

There can be no reaſon to raiſe a doubt, more than if the conſtitution had been recent. Plea of uſage avails not againſt the maſter.

The maſters have uſually been of another college; are not bound by the conſtitutions to attend; but have a right. Forty electors in his abſence, againſt five in his preſence, are of no import; he has probably in moſt, certainly in many, by his ſubſtitute been preſent; as by the conſtitution he might. Had this been the caſe before the court, probably the five and the forty would have changed ſides.

An inſtance ſhould have been brought, when he had expreſſed his pleaſure to be there, and they had proceeded without him, and the election allowed.

By the college ſtatutes, there is a prohibition to proceed to election in vacation, and till after ten days are expired, that abſent fellows may have an opportunity to attend, in expreſs terms. Exceptions have been taken, by his adverſaries, againſt Dr. *Marriet*'s abſence; though, I believe, they ſet him the example.

Exceptions to the vaſt difficulty of informing the maſter of the election propoſed; as if all the buſineſs, real buſineſs in the world, were confined within the college walls; and as if the ſame monks filled thoſe walls as formerly, who did not know where *London* ſtood.

Therefore, on the eleventh day, without notice, the fellows proceeded to the election; as if it were not only competent under the ſtatute, but neceſſary, to proceed immediately. Wherever the founder has not limited the maſter's authority, he may make bye laws not inconſiſtent with the law of the land; unleſs the appointment of a ſubſtitute had been provided, they could not without notice have concluded the election without his perſonal appearance.

[23] In the caſe of the Mayor of *Bedford*, who abſented himſelf on an election, the recorder took on himſelf to proceed without the mayor; it came before this court, and the election was ſet aſide. The objection is nugatory, that he may evaſively abſent himſelf, and lay claim to the nomination: There are compulſive powers, and penal inforcements, in this caſe; and the claim of nomination would be of no effect, if unduly ſet up. 'Tis abſurd, to ſuppoſe ſuch ignorance in the viſitor, having magnified, for reaſons, the collegiate juriſdiction, that he ſhould not diſtinguiſh ſuch a caſe. That the conſtitution of *præmonitio*, that they ſhould not elect while the maſter was taking a ride,

ride, but wait till the ride is over, as the ſenſe of *expectatus fuerit*, ſeemed ſet up for joke, but was ſeriouſly uſed.

The maſter, though perceiving no doubt, as was avowed, his preſence would have no influence, yet ſignified his intention. They would not however allow him the mere feather of admiſſion. The bells ſet a ringing by way of triumph; though that was regularly to be at the arrival of the viſitor, when the election was concluded; the maſter called on, by way of inſult ſure, when he was to be a mere cypher. He was not to come among them in their hours of exultation, amidſt the ringing of the bells, to anounce the joyful tidings; and give any painter that might be in town, an occaſion of deſcribing the happieſt man in the world, a fellow newly elected. All this was to be nothing to him; when they were ſubſided into their monaſtic ſadneſs, then he was bound to partake in it; their ſcenes of feſtivity he was baniſhed from, though his known humanity muſt have been delighted with the ſight.

Three days before the time appointed by Dr. *Marriet*, they thought fit to elect; not that they thought they were bound to employ all the time from whence the election might commence, in the duties of electing; for they did not.

They ſay the ſolemnities of the law might be omitted, and the *premonitio* therefore of an abſent maſter not neceſſary. Did the founder mean ſo? No. He is to be waited for, ſays the founder. But who, ſay they, is to admoniſh, or to give warning? The ſenior fellow, or the whole body, as their own ſenſe of the matter is. Suppoſing they imagined their election valid without the maſter, for a moment ſuppoſe it to be ſo; why not, at leaſt, wait for the admiſſion by the maſter? which could not affect their right of election, and is not worth inſiſting on by Dr. *Marriet*, without eſtabliſhing the material right of election. I hope, the fellows, having ſworn obedience to the maſter, will not think it at leaſt unreaſonable, to be obliged by a judicial deciſion to the performance of their oaths: An obedience ſo fit and becoming, that, I think, I may venture to affirm no gentleman would refuſe, but from the [24] prejudice of trifling quarrels. They, indeed, on their part, and I for my client, whether as to judges authoriſed by the law to determine the cauſe, or arbitrators choſen by conſent of both parties, have ſubmitted the matter in queſtion to this court. Let them not, therefore, having brought their cauſe hither, aſſert a ſuppoſed power to wait for their viſitor, whom

whom neither we nor they know, and of whom no traces are diſcovered for theſe three hundred years that I can make out. In the mean while, inſtead of any attention to the profeſſion of the law, it might be a muſic college, a college of rope-dancers, according to the various genius of their members, till the *Jews* are pleaſed to be convinced of a *Meſſiah* having come. 'Tis exactly the ſame caſe, as where the viſitatorial power, and that of the maſter coincided; and therefore on diſpute, a reference was neceſſary to this court. In Sir *John Strange*'s Reports, *The King* againſt *Bentley*, it was determined, as there was no viſitor for the body of the univerſity, the judgment belonged to this court.

Why are we to examine concerning a non-entity?

On an information on the 9th of Queen *Ann*, mayors and other officers, will take in maſter of a college as head of a lay-corporation, the fellows are as aldermen; and therefore come within the deſcription. This was denied, becauſe they are ſaid to be officers of a corporation in cities or towns; and are thus contradiſtinguiſhed by the locality. How contradiſtinguiſhed? They uſe the largeſt deſcription—*or other place:* Has *Trinity-Hall* no locality? We are warranted to ſay, therefore, this place is a corporation, is ſubject to the juriſdiction of this court. A *mandamus* has not been unuſual, but otherwiſe: It has not been applied for before in the inſtance of an univerſity, for a reaſon which I am ſolicitous to maintain, for the credit of the univerſity; no other college, nor that before, has been in the ſtate in which *Trinity-Hall* now is. If a man is improperly kept out, this court will ſee that he be put in; if improperly put in, that he be put out. I think, this power will not be eaſily diſputed.

Mr. *Davenport*—The queſtion before the court, in the caſe of *The King*. v. *Corporation of Hertford*, quoted by Mr. *Dunning*, was only to determine whether a miſdemeanor, battery or treſpaſs. With reſpect to *Wincheſter College*, as the warden, being biſhop of *Cheſter*, was alſo viſitor, they were obliged to have recourſe to the King's juriſdiction, becauſe the maſter could not viſit himſelf.

Mr. *Dunning* continued—It has been ſaid to the merits of the cauſe, it were better to ſuffer an injuſtice from irregular proceedings on their part, than the inconvenience which they ſaid would ariſe from the court's interfering.
[25] What the inconvenience from the interpoſition of the court can be, to prevent irregularities and undue elections, which

which here is no other power to prevent, if they happen in this college. 'Tis ſaid, *præmonition* muſt have been when the maſter was abſent; for, to what purpoſe when he was preſent? They might have found, if they had gone to 1698, inſtead of 1699, that a proteſt was made, and by the ſenior fellow, againſt elections in abſence of the maſter. And in 1691, a decree, when the majority of the fellows were agreed, that they ſhould have waited for the maſter. The election, by the ſtatute and their own confeſſion, was not neceſſary, nor could be without the maſter's preſence, if he choſe to come in eighteen days after the tenth: After which, if no election is made, within theſe eighteen days, the election devolves to the maſter. They anticipated four days. I ſubmit the election is void, for want of the preſence of the maſter; and for want of admiſſion by the maſter.

Lord Chief Juſtice—This is an application by Dr. *Marriot*, maſter of *Trinity-Hall*, which is a college in *Cambridge*, that an information may be entered in the nature of a *quo warranto*, againſt a Mr. *Gregory*; who, he complains, has uſurped a fellowſhip of that college. It has been objected, that there being no heirs to the viſitor, it eſcheats to the King; who waives it. It might have been objected, this is an eleemoſinary foundation; and therefore, goes to the King in Chancery. But this is not upon a caſe of charity, but of a lay-foundation; and therefore the caſe comes before the King in this court.

In the *Wincheſter* caſe, it was held a ſuſpenſion while the wardenſhip and viſitation coincided; and that ſo long this court had juriſdiction.

In the act 19 *G.* 2. there is a proviſion inſerted, that in caſe a diſpute ſhould ariſe about the election of a maſter or fellows, it ſhould not be referred to the viſitatorial power of the King, but to the King here: And judgment muſt certainly be according to the ſtatutes of the place. An objection has been raiſed, that an information in the nature of a *quo warranto* will not lie in this court, nor can be filed by the coroner of this court; but by the attorney-general, who may chooſe whether he will file or no, as it does not come within the 9th of Queen *Ann*. But it has been, I think, truly aſſerted, ſuch information exiſted before the 9th of Queen *Ann*; and if ſo, it is not taken away. It may become very material to perſons as poſſeſſed of franchiſes. It was very right in counſel on both ſides to enter into the merits of the cauſe; that the court, who is obliged to find a remedy, if that on information would not do, might

might not be compelled to find one. If Dr. *Marriet* were ſo diſpoſed, he might nominate another to be fellow, as by lapſe: But it has been dropt by counſel, that Dr. *Marriet*
[26] has no objection to Mr. *Gregory*, and would not be willing to ſet up a perſon who would be entitled to try the right; though thinking himſelf injured. The maſter could not have a right to appoint the day; for then the *præmonitio* would have been abſurd. After the ten days, and not before, they are to meet, and then may proceed to election within the term allowed.

The maſter gives notice in this caſe, in theſe words—"I cannot poſſibly, by reaſon of my health, go on before the 8th of *November*, and therefore appoint that day; and if I don't come down, you may go on the day after:" On which it's obſervable, on the Doctor's own conſtruction of the ſtatute, he appointed after the lapſe of the term; for he ſays, the twenty-eight days include the ten from the firſt day of term; it therefore expired on the 7th of *November*: And the fellows might well be unwilling to ſubject themſelves to a three or four years litigation. As to admiſſion, the abſence of the maſter is to anſwer for it. The ſtatute expreſsly ſays, "the maſter ſhall not lie one night out of college without leave." I am ſorry they have interpreted, by giving a beneficial conſtruction, as they do, that the maſter and fellows are to lay every night out of college. I hope it will not extend to compel reſidence, as it has been underſtood otherwiſe ſo many years; but, in this reſpect, his abſence precludes him. It appears to me, the admiſſion, as ſet forth in the affidavit by the ſenior fellow, is ſufficient; and that Dr. *Gregory* is ſufficiently elected.

Mr. Juſtice *Aſton*—It is very material, to conſider in what manner the exerciſe ſhould be of an information, in the nature of a *quo warranto*.

The precedents are in the name of the attorney-general; but a great number have been found, 'tis aſſerted, on a late ſearch, filed by the coroner of this court.

Rule diſcharged.

Bail.

EXCEPTION againſt three offered for bail inſtead of two: Not allowed. I ſuppoſe, becauſe notice was given of all to juſtify; ſo that the plaintiff might have taken them or any he pleaſed: For notice, that *A. B. C.*

or

or two of them, will juſtify, is bad; as appears by the opinion of the court in another caſe.

Irregularity.

ON a motion to ſet aſide proceedings for irregularity: The irregularity complained of was, the proceſs being ſerved on the ſheriff of *Middleſex*, when it ſhould have been *London*.

It proved to be a miſtake of the perſon who ſerved the proceſs, as to the ſituation of the premiſſes; which were on the right ſide of *Chancery-lane*, and all the houſes on that ſide he conceived to be in *Middleſex*; as it ſeems, indeed, they are, except one or two. They ſuffered the plaintiff to go on, without notice of the irregularity, till the day before he might have ſigned his judgment. [27]

Rule to ſet aſide the proceedings, but without coſts.

Goodlight *againſt* Bridge.

Confidence between Client and Attorney.

THE court will not permit an attorney to alledge, his client has declared before action brought, he will waive a forfeiture on which he ſupports his action.

Anonymous.

ON a verdict againſt a man, for having in his poſſeſſion a piece of old copper markt with the broad-arrow. Motion to mitigate the fine; but it was not conceived within the judges authority by the ſtatute. The man appeared ſimple, and really ignorant of the meaning of the mark. Affidavit that he was not worth above 30 l. clear.

Judgment, with a fine of 40s.

Abatement.

WHEN a woman is ſued as feme-ſole, and between the original proceſs and appearance, marries, the action ſhall not abate on a writ of error; and to this, *King* v. *Jones* (Lord *Raymond*) was cited.—Therefore, to reverſe judgment or abate the action, the plea muſt be on a writ of

of error, that ſhe was, at the time of ſuing out the original writ, and ſtill is, a feme-covert.

Baxter *againſt* The Corporation of Shrewſbury.

ON a motion for a new trial, as on a verdict againſt evidence; the jury having found a cuſtomary right for perſons born in the place to be admitted, paying 5 l.

[28] The court, particularly Juſtice *Aſton*, ſeemed to doubt the exiſtence of ſuch a bye-law; and it ſtood over. And afterwards, in the ſame term, Lord *Mansfield* delivered his opinion thus——

We all think this a matter of great importance, to come to a ſolemn determination; though by what courſe requires to be deliberately reſolved.

If the 5 l. fine be only a bye-law, it might be repealed; if uſage, not. The jury indeed found it an uſage, but new evidence has ariſen ſince.

Whether it extends generally, or no, is a point of very weighty diſcuſſion. The largeneſs of the fine is difficult to be accounted for; but my brother *Aſton* has mentioned toll, and other pecuniary advantages, which may be a good cauſe why the freemen of *Shrewſbury* ſhould be ſubject to ſo large an one.

We think the rule ought to be diſcharged.

Appearance to Judgment.

ON a motion of Mr. *Gould*, to diſpenſe with the perſonal appearance of certain delinquents to receive judgment:

It appeared they were overſeers, and had diſpoſſeſſed a poor woman out of a little cottage where her father had lived fifty years, on an apprehenſion that ſhe would marry, and thereby gain a ſettlement. The woman was wandering without an houſe, and her cottage had been deſtroyed in the night.

Lord *Mansfield*—The court ſuſpends the rule for commanding or diſpenſing their perſonal appearance, 'till it be known whether the overſeers will rebuild the houſe, at the expence computed of 20 l. and pay the expence of journies and time ſet by the court. If they fail of ſo doing, it is likely to turn out much more.

Seale

Seale *againſt* Hunter.

To ſet aſide a Verdict for exceſſive Damages.

ON an action for damages for the value of a grey-hound, the plaintiff laid his damages at 20 l. The jury by their verdict gave 80 l. and one of the jurors ſaid, he would not get off the bed on which he then threw himſelf, till they gave 500 l. Motion to ſet aſide the verdict, as exceeding the damages laid by the plaintiff in his declaration. [29]

It appearing to the court that the verdict did exceed, and that the jury had taken into conſideration abuſive words ſpoken, as if the action had been, *& alia enormia*, the verdict was ſet aſide.

King *againſt* Badford.

ON an information for ſuffering and exerciſing within his houſe billiards and other unlawful games.

The man was not ſummoned, the games not expreſſed, except billiards, which were laid as againſt the 30 *G.* 2. which was held not to extend, except to perſons under particular deſcriptions; and billiards were not taken to be within any other act except, perhaps, 33 *H.* 8. which inflicts different penalties from what were intended by the information, and ſubjects the offender to the cognizance of a different juriſdiction.

Rule to ſhew cauſe quaſhed.

Bail.

IF rule be to put in bail within four days, and bail be put in after the four days, and before motion for attachment, it ſeems good. *Sed Qu.*

Bail in Felony.

ON return to an *habeas corpus*, priſoners were brought before the court, on ſuſpicion of ſtealing feloniouſly a large quantity of cotton.

It was pleaded, that the commitment being on ſuſpicion, and proprietors in the linen trade commonly, on account of

the great loſs ſuſtained, charging the whole ſtock, there was no ground ſufficient to ſuppoſe felony on account of quantity; and therefore, that they be admitted to bail.

1ſt *Objection.* That they may take their trial in five days at the ſeſſions; and that the priſoners got into their hands a large quantity, under pretence of printing, but took out the marks. Therefore the intent made them guilty of ſtealing *ab initio*; as in an horſe taken from the owner under pretence of trying his paces.

[30] 2d *Objection.* To three of the bail, ſix being offered, and that they muſt give four bail; and Mr. *Bearcroft* ſaid, that when more was offered than the law will require, as four are required in the caſe of felony, they muſt be able to juſtify all.

Court—No ſuch rule.

3d *Objection.* In the caſe of felony, leſs than four are never taken.

The court denies.

4th *Objection.* Againſt the bail; notice of ſix, and three allowed; one of whom does not appear.

Court agreed not to admit bail, unleſs the third appeared; and obſerved, that it is an exception againſt the perſon offering bail, to have ſo many excepted: One was received at laſt, of thoſe excepted.

The proſecutor conſents that they ſtay in *Tothill-fields*, on condition, that they be delivered up on notice.

Trinity

Trinity Term,

12 Geo. 3. 1772. K. B.

Barker *againſt* Freeman.

On Conſtruction of a Deed.

[31]

LIMITATION to ſupport an eſtate tail, ran in the following terms———

Eſtate for ninety-nine years, if the tenant ſhould ſo long live; and after his death to truſtees, to preſerve contingent remainders during his life.

Argued, That this limitation being repugnant, the ſubſequent eſtates were all void. That the deſign of the ſettler could not be known; that it was more than obſcure and untechnical, it was unintelligible, nonſenſical, and impracticable; and an utter contradiction. The ſettler was maſter of the queſtion, and has ſaid, the eſtate of the truſtees ſhall not commence during his life, but after his death. An eſtate for ninety-nine years, is not an eſtate for life: So that the remainder is void at its creation, for want of particular eſtate to ſupport; for it is not to commence till after his death. And, in conſtruction of law, his life may out ſtand the term, and then there will be no eſtate out of which the remainder can ſpring; for it cannot veſt during his life, he has expreſſed the contrary; and after his death it cannot, becauſe the particular eſtate is ſhort of an eſtate for life.

In the caſe of *Dormer* v. *Forteſcue*, 1762, in the Houſe of Lords.——Limitation of an eſtate to *John Dormer*, and his heirs; and if he died without iſſue, to *Robert Dormer* for ninety-nine years. And on his death, or ſooner expi-

ration of the term, to the truſtees named, to preſerve contingent remainders during life. The ſame incongruity was alledged: And had it not been for the words "or ſooner
[32] "expiration of the term," would have been a caſe in point. An eſtate for life, to commence after death, is void: But the expiration of the term might have happened by effluxion, forfeiture, or various ways. Therefore, if it was then determined thoſe words only, "or ſooner," &c. made it good, it appears an expreſs determination in favour of the preſent objection. As to the doctrine of rejecting inſenſible words; it cannot be diſputed, they may reject, or more properly diſregard, inſenſible words; that is words, I ſuppoſe, that cannot be underſtood. Words are not inſenſible that are contrary to other words in an inſtrument, but very operative; they make it effectually void.

Serjeant *Glynn*, on the other ſide—This is a point which your lordſhips left open, having decided the reſt; and is, whether an eſtate of freehold paſſed to the truſtees to preſerve contingent remainders, or not. In which laſt caſe, the whole intent fails of all parties. We contend it to be a remainder to the truſtees of an eſtate of freehold, an eſtate for years only between; which being a chattel intereſt, the freehold, having nothing elſe between, commenced immediately to the truſtees.

The very part to which your lordſhips apply your attention at preſent, proves the intent, that the truſtees muſt take immediately on ſurrender, forfeiture, or other accidental lapſe of the term, before death of the tenant for years.

The true method of conſtruing, we ſubmit, is—rejecting the words "after the deceaſe," or ſupplying other words, "or ſooner expiration," &c. It is ſaid, there's no pretence nor precedent on the books, for rejecting any words not merely inſenſible. In Lord *Coke*, an eſtate to heirs male, without ſaying of his body, makes a good fee-ſimple, rejecting the word "male." So in all conditions of a deed, or limitations of a ſettlement, a word not only that defeats, but makes leſs beneficial than the former, is always, by the conſtant courſe of the conſtruction of law, rejected.

In this caſe, if we do not reject the words contended for, a ſettlement in conſideration of marriage will be totally defeated.

Conſidered as a common condition, it ſhall be taken beneficially to the grantee; that is, in the import of it to the truſtees; but it is objected, why ſhould we not reject words repug-

repugnant, on one ſide as well as on the other? And then the whole intent would periſh to the parties on both ſides; contrary to the maxim, *ut res magis valeat quam pereat*; ſo by the mere dry rule of conſtruction, we muſt reject in favour of the grantee. They ſay, rejection would be inſufficient; but we muſt ſupply, I muſt ſay, by implication of law. I ſubmit, the words "or ſooner expiration" might be underſtood. It was held in *Dormer* v. *Forteſcue*, they might, even ſuppoſing they were not taken as inſerted, and that the inſertion was principally for the benefit of thoſe who were to take advantage of forfeiture. I hope, therefore, your lordſhips will adjudge the eſtate to be veſted in the truſtees, and that the plaintiff ſhall recover. [33]

Mr. *Dunning*—I never underſtood, that every deed was abſolutely indefeazible. It ſeems, the intention is all in all; and once find out that, all expreſſion is ſuperfluous, and no repugnancy of words can cover the intention, but that it will appear with ſufficient certainty and effect. I never did underſtand ſuch an extent of conſtruction was or could be allowed. If the intention be diſcovered to preſerve contingent remainders; if he had only named the perſons he meant to take in ſucceſſion, without appointing limitations or aſcertaining the eſtate to paſs, and was to ſay only "'tis my intent that contingent remainders be preſerved," the court will make the limitations, aſcertain the quantity and quality of the eſtate; and, on this ſingle hint, frame and execute for him, a complete will. Is an eſtate, then, in *futuro*, to be made one to commence immediately; an eſtate for years, to be made a freehold; an eſtate for life, a fee-ſimple! (All theſe are new principles, poſitively aſſerted.) What would not be the confuſion? All the language of the law, all the technical terms inſiſted on in ſuch numbers of caſes, all vaniſh: All were argued (if intention was enough) by ignorant men, and determined by ignorant judges. It ſeems to ſtrike at the foundations of all law. I have often heard, one only ill deciſion is productive of more miſchief than can poſſibly be compenſated by any good to individuals: But it ſeems we muſt ſeek from authority, what can't be had from argument. In the determination of the caſe which has been diſputed between us, which my learned friend aſſerts, impowers the court to alter and inſert, and reject generally, the opinion is, we cannot alter words in the deed; we cannot inſert words, but we may reject words merely inſenſible. If there

is

is room for two conſtructions, equally legal, then, I underſtand, the court may chooſe that which anſwers the intent, *ut res magis valeat.* It is a great deal more, that the court is required to do here, than the court ever granted to a will: It defeats the favourite ſucceſſion of the law, by taking it from the heir at law. Even if a teſtator ſays, I mean to diſinherit my heir at law; he's a raſcal, and ſhall never have a ſixpence of my money;" if he limits it no where elſe, it goes to the heir: And I hope this will be the laſt of the laws of *England* which ſhall be over-turned.

Lord *Mansfield.* After reciting the deed, concluding with limitations in tail to the firſt and every other ſon, his lordſhip proceeded to judgment upon the point particularly in queſtion.

[34] The intent of the parties depends on this, whether there is a good eſtate of freehold, to ſupport the limitations to the firſt and every other ſon.

There is no reſulting uſe in the grantor; nor ſpringing uſe, as in an executory deviſe, to the truſtees. The difference of favour between a will and a deed, is, as to the technical terms of limitation, which are required in a deed, but may be diſpenſed with in a will: But intent (as in Lord Chief Juſtice *Willes*'s opinion) muſt be equally preſerved. This contradiction leaves no doubt of the intent, it being on a valuable conſideration for a ſettlement to iſſue. The great opinion in the Lords went againſt the ſtrict, technical, verbal terms. The limitation is not after death there, ſimply, but the end or ſooner determination. Where there are any parts to ſhew intention, the courts muſt lay hold of them; as, "or other ſooner," *&c.* But as theſe words would have overturned the latter branch, (for it's a limitation to the firſt and every other ſon living; the anceſtor's was an eſtate interpoſed, without freedom to ſupport it) therefore they rejected the words "after deceaſe," as inſenſible; though, certainly, they are words not without an operative meaning.

The limitation is to prevent the father, with conſent of the ſon, from barring the remainders without the truſtees: Are not, here, the words "after his deceaſe," followed by "to "preſerve contingent remainders during his life," inſenſible?

Therefore, I am of opinion, either "after deceaſe" ſhould be rejected, or "other ſooner determination" be ſupplied: And this will be rule, when intent can't be made out from the body of the deed.

Bail.

Bail.

NOT admiſſible, on account of effects abroad.

Award.

MOTION to ſet aſide an award for that the arbitrator had awarded coſts of arbitration, without ſpecial authority for ſo doing.

Mr. *Mansfield* argued, That arbitrators, without ſpecial authority, have no ſuch power.

Mr. *Dunning*—This is not a ſpecial arbitration, but a general one under the act, to determine all differences, and do complete juſtice between the parties; the coſts of the action and arbitration, as well as the debt, have been given by the arbitrators againſt the defendant in this caſe; because, in their judgment, the defendant ſhould never have litigated. [35]

Mr. *Mansfield*—I conceive, the power of the arbitrators is to decide differences between the parties at the time of ſubmiſſion; and, beſides, there is the great inconſiſtency of its being ſaid that coſts ſhall not be paid, and yet they tax coſts.

Mr. *Dunning*—Suppoſing the debt 100 l. and the coſts 5 l. and 105 l. coſts given; then they ſay they will give no coſts; that is, having included the coſts in the full ſum, they add, for fear of miſtake, the coſts ſhall not be paid beſides.

Lord *Mansfield*—It only appears an inaccuracy in the wording; but I ſee no reaſon to ſet aſide the award on it.

Mr. *Mansfield*—If your lordſhip thinks the award may be ſubſtantiated in the reſt, the coſts of the arbitration, at leaſt, will not be good.

Lord *Mansfield*—'Tis a very nice diſtinction: It does not appear upon the face of the award; if it had, you might legally have taken avail.

Mr. Juſtice *Aſton* [I think] of the ſame opinion.

Mr. *Cowper*—In the caſe of *Giles* v. *Underwood*, coſts of the reference were not allowed to be diſcharged; it not appearing upon the face of the award.

Lord *Mansfield*—The caſe cited by Mr. *Cowper* is in point.

Let the rule be diſcharged.

Gregory

Gregory *againſt* Onſlow.

ON a motion for an attachment for contempt, in reſiſting the ſheriff of *Shrewſbury*, on an arreſt for debt.

On the plaintiff's affidavit, it appeared, that they were aſſaulted in attempting to execute the warrant, and one had his arm beaten to a jelly; and that the defendant *Onſlow* took from them the King's warrant; and that they got away the defendant by force, from the hands of legal proceſs.

[36] Mr. *Bearcroft*—That, if true, the ſheriff might and ought to have returned a reſcue; that they had behaved violently, and refuſed bail; and that, except the metaphorical injury of being beaten to a jelly, all the harm that had happened was the entanglement of one of their ſpurs in one of the women's petticoats. As for the contempt of the court charged, in ſaying many deriding words, they could not have anſwered more poſitively and preciſely, if they had anſwered to interrogatories. And hoped, therefore, his lordſhip would not think it neceſſary to interpoſe, by the extraordinary aſſiſtance of attachment, but diſcharge the rule without coſts.

Mr. *Dunning*, on the contrary, That the ſheriff had a right to chooſe his remedy, if he thought attachment better than returning a reſcue. That the metaphorical harm was only metaphorically anſwered; for they admit the plaintiff, being a great large man, got a little hurt, but don't believe his ſide was all a jelly. At leaſt, then, I ſhall gain by an attachment, an eſtimate of the quantity of his ſide that was made jelly. *Onſlow* owns, that being ſtruck at, he gave a blow with the ſhovel at *Gregory*; and ſeems to have relied much on his wife, mother and ſiſter, to facilitate his eſcape. This, my friend ſays, is very natural: I admit it; but I hope he does not think it legal.

As to the objection of not returning a reſcue; they object being treated with great lenity by a proceſs being taken out, where they will have every advantage legally poſſible, inſtead, of being concluded by a much ſeverer mode of action.

The contempt of the court will perhaps be better anſwered, when they come to ſwear upon interrogatories, in anſwer to the charge againſt them, before the maſter of this court.

Lord

Lord *Mansfield*—There appear faults on both ſides; *Onſlow* confeſſes ſtriking firſt, (how the ſhovel came in does not appear;) and they refuſed bail.

I think it would be improper to proceed on an attachment, as the parties could not anſwer farther.

Let the rule be diſcharged.

Elderton *againſt* Freemantle.

ON a promiſſory note for a debt contracted by an inſolvent debtor before his diſcharge, given to a truſtee for the benefit of the creditor.

Turner v. Schomberg, Strange's Reports. [37]

Mr. *Hammond*—An inſolvent debtor, before he went to priſon owed 36 l. he was afterwards diſcharged by the inſolvent act; and then agreed and promiſed to pay, by two guineas a month, the whole ſum; and having thus diſcharged twelve guineas, on his inability to pay more, the creditor came on him to prove a new debt, on a new promiſe: But not allowed.

In the caſe of *Ford* v. *Chilten*, Common Pleas, *Hilary* Term 1772. *Chilten* was an attorney, he was indebted before his diſcharge on this very act of *G.* 3. 1769; he promiſed to pay that debt after his diſcharge; and concluded ignorantly in his count in the action brought againſt him, to the country and not to the court.

Serjeant *Davy* was then counſel; and was held by the court to have ſpoken the very ſenſe of the act. On account of the informality of the plea, he ſaid the defendant was concluded; but that the intention of the act being to relieve inſolvents, was to be taken liberally, largely, and in its full extent; ſo as to diſcharge the perſon of the debtor of all debts contracted before the act.

The only queſtion here is, the diſcharge of the perſon of the debtor, for the act does not diſcharge the debt; if the debtor is an honeſt man, he will give a written document of the debt, on which the promiſſory note was given to the truſtee, for the benefit of *Elderton* and *Hall*; which truſt the law will recognize, and not take it as a note to a third perſon in extinguiſhment: Nor can it be underſtood otherwiſe than the old debt, with a new promiſe; nor is the debtor to be taken to engage for more than payment, nor that he would ſurrender (or ought) his perſon to be impriſoned.

Judgment for the defendant.

Note.

Note. This was on demurrer, and the points on which Mr. *Hammond* argued, were, that the truſt and note to a third perſon, for the benefit of the original creditors, was no extinguiſhment of the debt contracted before the diſcharge, under the inſolvent act, and creation of a new one ſubſequent to the act: And that the perſon of the defendant was not liable, but diſcharged under the inſolvent act. On theſe two points, particularly the ſecond, the court grounded their determination.

Information.

The King *againſt* Wallis and Clarke, Bailiffs or Chief Magiſtrates of Ipſwich in the County of Suffolk, and Others.

[38] ON the information of *Banford*, a coffee-houſe-keeper of *Ipſwich*, for certain miſdemeanors——

Banford alledged, that they had quartered nine ſoldiers on him, and three horſes, for which he had no accommodation.

That *Wallis* had prohibited playing cards at the plaintiff's coffee-houſe; till, on advice, he was informed ſuch amuſements were lawful.

That *Wallis* quartered them out of malice to him; and that he has been a long time 47 l. out of pocket.

Stubbing, a brandy-merchant, in ſupport of *Banford*'s affidavit, ſays "that his trade is much diſcouraged; and that his cuſtomers "ſay, they muſt deal with the *Clarkes*, "*W.* and *J.* or they ſhall be ruined by ſoldiers quartered "on them."

Another deponent complains, that *Clarke*, on his repreſenting the number of ſoldiers, deſired to ſee the billets, and tore them.

On the other ſide, the counſel for *Wallis* and the *Clarkes*, alledged in their defence, from their affidavits, that *Wallis* being informed of an houſe encouraging gaming, ſent for the perſon, who complained "that it was very hard; for "*Banford* had people gaming from morning to night:" That on this, a general order iſſued, to ſuppreſs all thoſe houſes, of which there are many. Afterwards, that going to *Banford*'s, he was very ſcurrilouſly treated by *Banford*'s cuſtomers, for interrupting their play. On which, he ſays, "he diſcouraged the houſe." That *Banford* came and

com-

complained of being over quartered, which *Wallis* denied, ... that he could bear it better than moſt others: That he found he was encouraged to fly in the face of juſtice, which ... would not ſuffer as long as he acted as a magiſtrate; that *Banford* had been ſhamefully favoured, and that he ...ould have his proportion encreaſed now. That he, Mr. *Wallis*, would afterwards have adviſed with all the juſtices, to ſee whether *Banford* was over-quartered; and that *Squire*, an Attorney on the part of *Banford*, ſaid, he did not wiſh to proceed, and was ſatisfied.

As to the charge againſt *Clarke*, of tearing billets, the [39] anſwer given is, that it was to prevent men from getting billeted on three or four places at once, and contribution being raiſed accordingly. He denies *Stubbing*'s affidavit, of the cuſtomers of *Stubbing* refuſing to deal but with *Clarke*, on account of billeting ſoldiers: And refers to the regiſter, that *Clarke's* trade has decreaſed ſince he was a magiſtrate.

It appears, I think, that there are one hundred and ſeven licenſed houſes in *Ipſwich*.

Serjeant *Glynn* was on the ſame ſide with Mr. *Wallace*; and added, that he hoped, the rule againſt the defendants would be diſcharged with coſts.

Mr. *Dunning*, for the informant. That the complaint is very ſerious; that *Wallis* reſented his excluſion from a ſociety, which he purſues now, as very pernicious; that *Wallis* did not uſually billet there before; that the billets were uſually ſigned by one juſtice, but this by two, in which *Wallis*'s name was unneceſſary. That the party in town were Sir *John Mordaunt*'s dragoons, about ſixty men and ſixty horſe, that there was at leaſt one hundred and five licenſed houſes in *Ipſwich*; and therefore *Banford* had more by much quartered on him than his due proportion; that the accommodations were not good, by Mr. *Wallis*'s own confeſſion, who ſays, "the houſe derives its profits, not "from the lodgings, but from the company that comes to "play there." That 'tis ſaid, Mr. *Wallis*'s conduct, if irregular and oppreſſive, is the firſt; that 'tis the firſt, is accounted for eaſily. 'Tis admitted, the lodging-rooms are juſt ſufficient for the family only. The argument is, "you have not room for horſes or ſoldiers now, but you "may have both; the long room you uſe for unlawful "games, and from which that profit ariſes which makes it "fit you have ſo many men and horſes, quartered on you, "divide that, and make part into ſtabling, the other part "for lodging room for the ſoldiers." Mr. *Wallis*, in his affidavit, explains his motive; "You have flown in the

"face

" face of juſtice; one of us muſt fall: I will level you, or " periſh in the attempt."

As for the application to the juſtices, if any, that it was ſet up for colour to ruin and deſtroy that houſe which alone he wanted to deſtroy.

As to the dropping of the enquiry before the juſtices, it aroſe from Mr. *Stanton*, one of the juſtices, telling him " that their juriſdiction extended not to review."

They ſay, they had a deſire of ſuppreſſing the amazing number of theſe houſes: Have they ſuppreſſed many? If
[40] they had ſuppreſſed *Banford*'s for his ſuppoſed crime, which I am authorized to ſay now is none, their motive would have appeared; if they had ſtruck off more, they would have ſuppreſſed thoſe with whom they had no quarrel. As for *Banford*'s being the beſt houſe in the town, Mr. *Wallis*, the defendant, ſays, it is not ſo in the lodgings, which are allowed but ſufficient for the family; but he infers the profits, from the gaming and extravagance which, he ſays, he ſees is carried on there.

Lord *Mansfield*—When application is made for an information againſt a magiſtrate, for partiality and corruption, the whole caſe ought to be ſtated; for out of the whole the grounds muſt ariſe, on which farther proceedings may be granted or refuſed.

So vexatious a method of enquiry into the conduct of men, expoſed by their office to much miſrepreſentation, as that which omits very material points, and reſts on thoſe only perverted by falſe conſequences which ſerve the proſecution, merits to be diſcountenanced. In the inſtance before us, *Banford* has been guilty of an attempt to impoſe on the court. He ſtates what may look like an intention of overburthening him in *Wallis*, and omits the prior part of the affair. A ſerjeant (it appears, at the coming out of the ſtate) and four men, were ſent to be billeted at *Banford*'s. Though the men were wet; though after a long march; and arrived at night, in very bad weather, (in *November*) he would not admit them to the kitchen fire; but turned them out to ſhift for themſelves as they might be able.

The ſerjeant goes and tells the magiſtrates their orders were not obeyed. In the mean while a great diſturbance enſues, and a perſon who happened to hear it, begs for peace, that ſome care might be taken of the ſoldiers.

Clarke and *Wallis* remove the ſoldiers to the *White Lion* and the *Croſs*. So far were they from malice to *Banford*, that

that they ſhewed improper favour to him. Afterwards a man comes to the knowledge of *Wallis*, who kept a billiard table; he is ſummoned, confeſſes, and begs that *Banford* and many others may be put down, or otherwiſe he ſhall be ruined. On this the magiſtrates give a general order againſt all the licenſed houſes ſuſpected of exerciſing unlawful games, and at unſeaſonable hours. Very ſcurrilous behaviour paſſes againſt *Wallis* at his coming into *Banford*'s. *Squire* and another attorney tell him they wonder at the impudence and ignorance of the magiſtrates: That they were gentlemen, and had a right to play at what, and in what manner, they pleaſed. 'Tis ſaid, and it appears likely on the face of the affidavits, that an aſſociation has been entered into, to intimidate the magiſtrates, and to ſupport the proſecution.

Some time after, *Banford* has nine ſoldiers and three [41]
horſes quartered on him: He goes to Mr. *Wallis*, ſays, he thinks himſelf ill uſed in being burthened by ſo many. *Wallis* anſwers, "I do not think you are ill uſed; for "where the *Lion* and *Croſs* have twelve, you ought to have "eighteen. I was much ſurpriſed to find you have been "ſhamefully excuſed theſe three years, from having any "quartered on you. You have flown in the face of juſtice "and the laws; to which I underſtand you are encouraged "by a ſet of diſſipated heroes. While I act as a magiſtrate, "be aſſured, I ſhall ſupport juſtice and the laws to my ut"moſt: One of us muſt give way; and I will either make "you fall, or periſh in the attempt." Theſe words he uſed, or ſome to the like effect, importing a ſpirited reſolution of maintaining the duty of that authority with which he was entruſted. A violation had been committed by *Banford* of the duty and reſpect he owed to the laws; and it ſeemed but equitable his proportion ſhould be encreaſed, after he had warded the juſt burthen ſo long, and with ſo much contumacy.

Clarke has little particularly againſt him, except his acting with *Wallis*, in quartering the nine ſoldiers and three horſes; (for what is ſaid in the affidavit of *Suſan Groves* deſerves no attention.) It's true, the affidavit ſpeaks, that for not dealing with *Clarke* ſhe had been ſo over-run with ſoldiers that ſhe was forced to quit her buſineſs and habitation; but ſhe denies the truth of that fact, ſays ſhe did deal with him, and that ſhe was not overburthened; and expreſſes great concern, that ſhe was deceived by the affidavit read to her,

in

in ſuch a manner that ſhe could not tell how to underſtand it.

A circumſtance is mentioned, That a man came, who ſaid he thought he had been overburthened; *Clarke* ſays, "I can't help till the next change of quarters; and then I "will relieve you." The other then ſubjoins, "I have ſo "little dealings with you, I hardly know how to aſk you "to ſubſcribe to my bowling-green." To which *Clarke* replies, "No mattter; I don't do for the trade, but I "don't mind half a guinea: However, if I think of you, "think of me." Is not this referred to the ſubſcription, and the return he thought reaſonable for it in the man's cuſtom? Has it any thing to do with the quartering, and relief from that; which he promiſed before hand, as ſoon as it could be reaſonably done?

I think, therefore, theſe ought to be diſcharged with coſts; and if the anſwer of *J. Clarke*, did not appear ambiguous, together with another circumſtance, I ſhould think the ſame as to him. It appears, on being aſked whether there were not lucrative profits, which inclined him to take the troubleſome and unthankful office of billeting; certainly, ſays he, I confeſs.

[42] He anſwers to the charge of this converſation, that he never acknowledged the taking any lucrative profits.

What has more weight with me is, that a perſon thinking himſelf over-quartered, applied for a removal of two ſoldiers, and two other men, and beſpoke ſome ſpirits; but not liking them, deſired to change, and others were ſent, which he and his companions complained of, and he bought no more; after which the men were ſent back to him again.

I think, therefore, the rule againſt him ought to be diſcharged, without coſts.

Note—In the caſe of *The King* againſt *Badford*, (the *Eaſter* Term precedent) this man had been proceeded againſt on three infinuations, for ſuffering billiards and other unlawful games. The man not ſummoned; the games not expreſſed, except billiards, which were laid as againſt the 30 *G.* 2. which was held not to extend, except to perſons under particular deſcriptions; and billiards not taken to be within any other act, except (perhaps) the 33 *H.* 8, which inflicts different penalties from what were intended by the information, and ſubjects the offence to the cognizance of a different juriſdiction. This was the caſe to which Mr. *Dunning*

Dunning alluded; and the grounds of the court were on the irregularity of the proceedings.

Aſſault.

ON an action of aſſault, againſt ſome gentlemen, ſcholars of *Cambridge*, which ſtood for judgment, the court was applied to, in order to obtain leave that their perſonal appearance might be diſpenſed with; for that the aſſault was by miſtake, and the gentlemen were very ſorry.

Lord *Mansfield*—If the gentlemen are concerned, they would be ſorry not to go before the maſter. 'Tis a very great offence, to attack a man in ſuch a manner, under pretence of miſtake. It ſeems as if they went with a determination to beat ſomebody. 'Tis a very great irregularity. If we don't admit the cognizance of the univerſity, we muſt keep the peace in it. Make the rule to go before the maſter, with coſts.

Note, This aſſault was committed, I think, againſt a perſon reſident in the univerſity, but not matriculated there.

Anonymous.

ON an action of aſſumpſit, againſt a tenant for neglect [43]
to repair hedges, *&c.* the defendant counts, landlord did not aſſign timber for repair, nor was there any proper which he had a right to take.

It was held that this plea was bad, both in form and ſubſtance; for that, 1ſt, Defendant ſaith not, he aſked the landlord to aſſign; which he muſt firſt do, and afterwards, on refuſal, may take without leave.

Next, That by plea "none to which he had a right," he puts on the jury to determine on the matter of law.

Likewiſe, That for laying no venue, the count was bad.

Poſſibilities.

Anonymous.

MORE 176. Caſe of *Whitlocke* v. *Hardinge*, a leaſe by a joint-tenant, of a moiety, to hold after her death for ſixty years, if the other joint-tenant ſhould live ſo long, not good. This caſe was cited, to prove poſſibilities; but *Selwyn* v. *Selwyn*, by Lord *Talbot*, quoted to the contrary. But the court ſaid, this was a caſe of veſted executory intereſts.

tereſts. *Clarke* v. *Clarke*, 2 *Vern.* 223. was quoted. The court ſeemed to think, under circumſtances, a poſſibility aſſignable, though in general, as a choſe in action, not aſſignable.

V. 2 Blackſtone 290.

The King *againſt* Hill.

ON an information in the nature of a *quo warranto*, to ſhew cauſe why he exerciſed the office of burgeſs of the borough of *Saltaſh*——

Lord *Mansfield*—In 1757, an election was began; and adjourned, for a riot, to the 17th of *September*. 'Tis remarkable, that in the affidavit, Mr. *Mayo* complains of the delay deſigned to his prejudice, and declares himſelf elected duly; however *Hill*, was *de facto* elect. In 1759, to quiet diſputes, both reſign. The difference in the terms of renunciation is remarkable: *Mayo* reſigns all claim; *Hill* his office. *Hill* immediately re-elected. The dilemma ſeemed good, on mature conſideration, that the day, if good for the renunciation of *Hill*, was good for his re-election. Nothing has been ſtated in proof of a proceeding to poll in favour of *Mayo* the firſt day; if there had, ſomething might have been; though in the abſence of a returning officer, on account of a riot happening, there is no precedent of an election being held good. The only objection to the election, then, of *Hill*, muſt have been want of ſummons. The court cannot take that up without any ſuggeſtion of it from the parties; nor preſume, after fifteen years acquieſcence. Therefore we are all agreed, that the rule muſt be diſcharged.

[44]

Rex *againſt* Metcalf, Eyanſon, and Others.

To enlarge Judgment on a Riot.

THE court will not give judgment ſeparately, when two defendants are included in the ſame action; unleſs cauſe can be ſhewn, why there's no chance of the appearance of one. But allowed that the others, againſt whom verdict had paſſed, and who were in *Yorkſhire*, indigent people and miners, need not be waited for.

Metcalf and *Eyanſon* had a farther day to appear; after which they were ordered to go before the maſter.

For

For a Rule to ſhew Cauſe againſt W. Eſq. Juſtice of the Peace.

WHY an information ſhould not go againſt him, for not, in purſuance to an act of parliament, (the 19th *G.* 2.) paying in the poor's money raiſed by a fine, on certain perſons convicted of profane ſwearing; and not returning the record of the conviction. Rule granted for enquiry of the juſtice; no notice having been yet given him, that a motion would be for an information.

King *againſt* Wallet.

ON a motion, to ſhew cauſe why an order of juſtices of the peace, for removing the defendant from his office of clerk of the peace of *Middleſex*, ſhould not be quaſhed.——

Mr. *Wallace*—The act of parliament gives abſolute power, without appeal to the juſtices of peace, to remove or ſuſpend any clerk of the peace, for any miſdemeanor in the execution of his office.

In this caſe the charge is in writing, according to the act, and has five articles.

1ſt. Negligence; in drawing ſummary indictments, which have afterwards proved defective. [45]

2d. Neither attending at ſeſſions himſelf, nor providing a ſufficient deputy.

3dly. Entruſting the records of the quarter-ſeſſions to a man's keeping in another county, whereby they could not be found.

4thly. Not attending, as his office requires, at the laſt general quarter-ſeſſions, nor providing any to attend.

5thly. For taking extortiouſly, by colour of his office, the ſum of 10s. 4d. of a certain perſon named in the charge, upon the commitment of a perſon for felony likewiſe named in the charge.

Of all, each and every of the miſdemeanors, ſeverally charged to every one of the articles, they find him guilty, and diſcharge him.

The matter in plea, in ſupport of the rule, has been given, that ſome articles of the charge are defective. I affirm, that every one of the articles would have been good; I think, in an indictment: But the law would have been ſufficient of itſelf, even without the act, at common law.

However, it's competent to the ſole diſcretion of the juſtices, whom the legiſlature have entruſted in this inſtance with the ſole power to remove or ſuſpend as they ſee fit, on the proving any ſingle miſdemeanor in the execution of office; if there be, admitting it, for the queſtion ſake, a defective or inſufficient article in the charge, it will not affect the reſt, nor can the order of the juſtices be ſet aſide.

Mr. *Dunning*, to the ſame effect. Concluding, that he hopes what articles can, may ſtand; and what cannot, will be not entered, if the court be ſatisfied of the ſufficiency of any one, for the obvious reaſon, That clerks of the peace will, to the full extent of their power be tempted to tranſgreſs or be negligent.

Mr. *Eyre*, Recorder—My lord, I am not clear that the gentlemen on the other ſide will find it eaſy to prove any of the articles not ſufficient, as charged, for miſdemeanors. The quarter-ſeſſions is judge as to the miſdemeanors both of law and fact. The analogy is much greater between this caſe and an indictment, than an action on words; where, if a jury find their verdict on words, ſome of which are actionable, and ſome others not, (*vide* the caſe in Lord
[46] *Raym.* 886.) the whole is void, becauſe the damages go upon the whole; but here each cauſe aſſigned ſtands diſtinctly as a cauſe of removal.

If it ſhould be ſaid, greater tenderneſs ſhould be uſed, becauſe the perſon removed loſes his freehold: He took it ſubject to the conditions of the act; there was no freehold in the office before the act; but he was removeable by the *cuſtos rotulorum* at pleaſure.

Long before the making of the act in, *Cro. Car.* 436. negligence in a deputy, was ſufficient to deprive of office by common law.

2 *Lev.* 71. *King* v. *Lady Broughton*, in eſcape; ſhe having an office for life, as warden.

Negligence of her deputy permitting the eſcape; was a forfeiture of her freehold in the office, and ſubject to a fine. As to the charges—There's one indictment, without any addition; another of murder, without its being drawn with the words "felonioufly, and of malice fore-"thought." The records are of admiſſions of magiſtrates, whereby to prove their title to hold office. The other articles are ſufficiently clear, allowed, and ſtrong; and, as I apprehend, every one of them miſdemeanors.

Mr.

Mr. *Lane*—I am of the ſame ſide. The charge of drawing defective indictments may be thought a fault of the head only; however, it will not be queſtioned, I ſuppoſe, to be a miſdemeanor. If here had been two or three it might be thought hard: But the inſtances are ſelected out of a great number.

The charge of not employing proper perſons is of the ſame kind. I need not ſpeak to the charge of extortion.

The fifth charge, of not attending by himſelf or ſufficient deputy, I find, was taken ambiguouſly: But it's founded on the act of parliament expreſsly.

Mr. *Cox* began for *Waller*, but was deſired to plead it the next day.

Mr. *Cox*, for the defendant—As we are to argue on an order made by the juſtices, for the removal of Mr. *Waller* from his office, much has been ſaid what the juſtices may do: But I chooſe to argue on what they have done. I except againſt the mode of puniſhment they have taken upon themſelves to inflict. The act gives power, on a charge in writing, to remove for any miſdemeanor. The word miſdemeanor is a word of law: And therefore is to be taken notice of by your lordſhips; who will ſee, whether by law the offences charged come under that denomination; in which I apprehend, is always contained ſome degree of guilt. The act has given great latitude of power: An hour's ſuſpenſion, or an abſolute removal for ever. I apprehend, that the legiſlature intended, by ſaying, as the act does, from time to time, that directly on a miſdemeanor, without waiting to accumulate a great number of charges of different degrees and different times; and then exerciſe, at once, the full extent of their juriſdiction.

Vide 4 Blackſtone, c. 1. p. 5. 8vo. Ed.

[47]

They recite, that whereas *Waller*, clerk of the peace, &c. has been guilty of all the miſdemeanors, we do order that he be for ever removed from his ſaid office.

It would be apparent in common parlance, that if it had been aſked, why did you puniſh him ſo ſeverely? the anſwer had followed, that for the number of miſdemeanors contained in the charge, we think fit to exerciſe our full authority. If any of the acts charged as miſdemeanors, be not, it ſeems clear that the puniſhment will be diſallowed; the order having been made on offences of inferior degree, and ſuch as reach not to that degree on which the order of removal muſt be grounded. I repeat, miſdemeanor is a term of law, and which your lordſhips will therefore take notice of. A poor boy, *Charles Pleaſant*, having received

ſentence before Sir *John Fielding*, for tranſportation for a fraud, for that he had paſſed a note which was falſe, the cauſe was removed hither; and the court was clearly of opinion, no fraud. [I ſuppoſe, becauſe the boy was found ignorant of the note's being bad.]

As to the drawing of indictments, five are ſeverally charged under one head; ſo that five miſdemeanors are to be proved under that head:

1ſt. It's not the office of the clerk of the peace, who is only to return the records of indictments perfect into the court. Next, the legiſlature expreſsly calls the falſe drawing of indictments, miſtakes; and therefore not miſdemeanors. It may be ſaid, the number will make the caſe worſe: Five hundred are charged. I have nothing to do with matter out of record, five only are ſtated. In an indictment of bigamy it's drawn againſt the peace of our Lord the King, when the offence was in the laſt reign; and whether the offence did not continue, has been long matter of ſerious diſcuſſion by men of very conſiderable abilities.

In that of murder, feloniouſly, *&c.* are omitted. It may be neglect; I ſubmit, it's nothing worſe. And the record takes no notice that the indictment was not drawn again; and therefore it will be taken of courſe for the defendant. In that of burglary, the offence is charged, that he drew "*A.* broke into the houſe," without ſaying "entered." Who can ſay, his inſtructions were not ſo? Addition was not inſerted: There's no damage proved to the public; it's not pretended the party did not come to his trial. If within three years they find five out of about two thouſand four hundred indictments, Mr. *Waller* deſerves commendation, for his aſtoniſhing accuracy in making ſo few errors. For the charge which accuſes him of not attending, nor providing ſufficient deputy: Beſides that it does not ſpeak to times, it does not ſay that ſome friend did not provide one for him. With reſpect to the ſeven records removed, (if they deſerve that ſacred name of records,) nothing of that nature can be more inſignificant: 'Tis not maintained, 'tis his buſineſs to keep the records in the county. I know not that it is a miſdemeanor; but, admitting it to be ſo, the charge contradicts itſelf. They don't directly charge his taking the records out of the county; it ſays, he took ſeven; they proceed to add, they were kept out of the county by Mr. *Waller*, and that ſo negligently, that they could not come at them: And yet

[48]

theſe

theſe very perſons, Mr. *Waller's* enemies, bring all the ſeven into court. They ſay they were kept out of the county for twelve years; when 'tis admitted, on all hands, Mr. *Waller* has been in the office only eight. To the laſt, I anſwer; to the ſecond, it's too indefinite to admit of any defence, or to convey the leaſt ſhadow of certainty, what ſort of crime is intended. I hope your lordſhips will, therefore, not ſuffer ſo vague, accumulated, and, I preſume to ſay, illegal a charge, to eſtabliſh ſo ſevere and irretrievable a penalty on the unhappy object of its attack.

Mr. *Mansfield*, to the ſame effect. Towards the end—The charge of miſdemeanor by extortion, the only charge on record which I take to be legal, is a charge containing ſo different degrees as to the oppreſſion of the party, and more general injury to the public, that of all charges, it ſhould leaſt have reſted, with all it's ornamental expatiations, on intendment or ſuppoſition: However, if one of all the articles of accuſation be inſufficient, the whole, I apprehend will be vitiated. Though there are many *dictums*, that orders are to be beneficially conſtrued, I underſtand them as to the form, is to the ſubſtantial part; I take it, they muſt reſt upon the ſame ground as convictions do. Though there's an inſtance in *Strange*, which would aſtoniſh one, if one did not know the jealouſy entertained of the conduct of inferior courts: An order to remove a pauper; the order was quaſhed, becauſe it's ſaid to be made in a ſeſſions held on an adjournment, without ſtating, that the ſeſſions was held within the ſtatutable time after which the adjournment was duly made. As ſuch a power, by the ſtatute under which the juſtices were empowered to act, is entruſted to the juſtices, as I know no other inſtances of in that magiſtracy, I truſt intendment and ſuppoſition, and an order ſo informal and inſubſtantial, ſhall not deprive Mr. *Waller* of a very valuable freehold. *King* v. *Raynes*; an [49] order, in a report in *Raymond*, was ſet aſide for extortion, (to wit) that he took, by colour of office, of *Langhorne* (a labourer,) a certain ſum named in the order; then they charge another extortion; and it was not ſpecified that the extortions were committed in the county for which he was clerk. And though the juſtices, in their judgment, declared they removed him for the offences above ſpecified, offences in the execution of his office; yet the order was ſet aſide, after an argument firſt here and then before all the judges, on theſe ſubtle objections, which ſeem merely to affect logical or grammatical nicety. But thoſe ſages of the law

law thought intendment was not to be admitted where a ſummary proceſs is granted, to deprive a man of his freehold, without a jury. No injuſtice can be done by ſetting aſide the order; for if there be any extortion which occaſioned the juſtices to ſee cauſe for the removal of Mr. *Waller* from his office an order will recommence, and finally be effectual to remove him.

Mr. *Davenport* to the ſame effect--As to the extortion 10s. 6d. is particularly charged: There was a reaſon for this; it is upon a commitment for felony, for taking lead off a dwelling-houſe. This is made felony by a particular act of parliament; in the old table of fees 10s. 4d. ſtands as a fee, as for treſpaſs. If by indictment before a jury this had been brought in evidence, it would at once have removed the charge of extortion. The juſtices ſaw this, and therefore, they neither left it to be tried that way, nor laid it ſeparate, "*juncta juvant;*" it's impoſſible, ſay they, but he muſt ſink under one or other of the charges. For this fault, ſo material in the far moſt important part, if not the only one in the order, I hope the order will be ſet aſide.

I was prevented by a ſudden fit of illneſs from attending; but I learnt from a gentleman of *Lincoln's Inn*, that the order was confirmed.

Hunter *againſt* Lord Deloraine.

ACTION on the caſe; demurrer to the declaration, becauſe Lord *Deloraine* was ſummoned.

It was held by the court, he could not be ſummoned, being a peer; and that the court would take notice of his peerage, without its being pleaded.

Venue.

ON an action of debt, by the Company of Chandlers and Soap-makers in the city of *Briſtol*, againſt one of the body, for keeping more than the due number of apprentices, on the ſtatute of *Elizabeth*.——

[50] It was alledged that the juries of the city of *Briſtol* ſeemed inclined to diſcourage proſecutions in reſtraint of trade, and that ſeveral indictments had been thrown out; and that they believe there is not ſufficient impartiality, and therefore pray to change the venue to *London*, and that it may be tried by a *Middleſex* jury.

Mr

Mr. *Lucas*, againſt the rule—This general ſuggeſtion is not ſufficient to ſupport the rule; the matter is between the company, and a member of their own, for keeping more apprentices than allowed. Therefore, no ſtranger being party on either ſide, the diſpoſition to diſcourage ſeems to have no room to operate, ſuppoſing it to exiſt.

The indictment muſt have been on the ſtatute of *Eliz.* and therefore the throwing it out, concerned not them as a corporate body, it not being on a bye law of their own. Therefore, I ſubmit to the court, that the rule for changing the venue be diſcharged.

Mr. *Buller*, on the other ſide—In the caſe of *Mylock* v. *Saladine*, (*Bur.*) a ſuggeſtion of general partiality produced duly before the court, by affidavit, was held ſufficient; and, as is now deſired, it was allowed to change the venue. And the cauſe ſuggeſted was the ſame merely as here; an apprehenſion that a fair trial could not be had, proved by the throwing out an indictment. 4 Bur. 1564.

Lord *Mansfield*—You are right, Mr. *Buller*, in the caſe cited, but the application will not coincide, though you have ſupported the rule very well; but the throwing out of the indictment is not proof of inclination to diſcourage. The matter aroſe on the ſtatute of *Eliz.* to which many have a diſlike. The matter is a ſmall, probably, (from one of the like nature, I remember to have tried) not above 10l. and for that reaſon, the grounds ſhould have been very full.

Not in tranſitory only, but even in local actions, this court will certainly order the venue to be changed, where there is a *dignus vindice nodus*; but not otherwiſe, by any means.

Hodges *againſt* Lovat.

TO recover the penalty on an uſurious contract, on an action brought within a year from *October* 1770, on the ſtatute of Queen *Ann*, againſt uſurious contracts. Vide 12 A. ſt. 2. c. 16.

Contract made in *October* 1768, but no money paid till 1ſt *October* 1770.

It was contended by counſel, that the contract was only void at the time, but not liable to the treble penalty till the time of payment; therefore, there was a cauſe of action within the time limited by the ſtatute. *Loyd* v. *Williams*, was on contract for 100l. for three months, 6l. was uſuriouſly [51]

ouſly paid at the time of the advance, and the principal paid back at the end of the time. In that caſe, the money on the uſurious contract was paid on advance, at the commencement of the contract, and the principal only paid back afterwards.

Mr. *Buller*—I hope the whole cauſe of action was the uſurious contract itſelf, and which muſt be proved to have been within a year.

There is an opinion of Baron *Manwood*, *Cro. El.* 20. *Malory* v. *Bird*, If a man, contrary to the ſtatute, agree to take 20l. for the loan of 100l. if he take nothing, he is not liable to the penalty; but if he take a ſhilling, he is; not the money was neceſſary to be taken, but ſomething to bind the contract. Now the negotiable promiſſory note given on the contract binds it, and no more is requiſite. In bribery, the agreement is ſufficient, without any thing given. The plaintiff having declared on the contract muſt prove it within the year; though, otherwiſe, he might have gone on the receipt of the money.

Mr. *Cowper*, in replication—I beg leave to offer in reply; Mr. *Buller* has ſaid, that we declared on the contract, and therefore are barred from plea grounded on the payment. We declared on the uſurious taking of the money the 5th of *October* 1770, in conſideration of the uſurious contract.

Mr. *Buller* has quoted a *dictum* of Baron *Manwood's*, which I think does not affect us; but only prevents our declaring on the contract merely, without counting on the payment made on the uſurious contract.

In the caſe of bribery, the crime of the party who is to be puniſhed under the ſtatute, is complete from the agreement, though nothing ſhould be received.

Lord *Manſfield*—I think Mr. *Cowper* is right in his argument as to the time of action, for the parties to theſe uſurious contracts being preſſed for a little money, don't except to the terms, till the day when payment makes them ſmart. So that, if the cauſe of action did not ariſe from time of payment, it would in a great meaſure defeat the ſtatute.

Horam *againſt* Lazarus.

[52] ON a motion of Mr. *Dunning* to make a rule abſolute, which had been given to ſhew cauſe why the ſurplus on

on a *teſtatum fieri facias* ſhould not be repaid to the defendant.

On the affidavits, it appeared, that the debt was 30l. on which, the evening of the laſt day of *Michaelmas* Term, the writ iſſued. The ſheriff comes to the houſe to execute the writ; the debtor deſires the execution may be delayed; the ſheriff refuſes it, becauſe he ſhould be liable, the writ being returnable the next day: But they agree together, that if *Lazarus* can on that day raiſe the money to the appraiſed value of the goods, he ſhall have them then.

The next day the goods are ſold under the execution for 49l. 12s. *Lazarus* ſome time in the day brings to the office 80 guineas, and being told the goods had ſold for 51l. he leaves the 30 guineas, and claims return of his goods.

The ſheriffs, however, refuſe to return the goods, as the money paid in fell ſhort of the appraiſed value; nor is the money returned.

The court, on hearing the argument on both ſides, is of opinion, the haſtening the execution ſo violently, by colour of return of the writ, is by no means commendable; nor the detainure of the entire goods, when the debtor had raiſed ſo near the full value.

Therefore, that the rule for the defendant be enlarged for the preſent, and that on repayment of the 30 guineas it be diſcharged, without coſts.

Anonymous.

SUIT by ſpecial original, for a debt under 10l. thrown out, as being bad by the ſtatute.

Bankruptcy.

Anonymous.

ON a commiſſion of bankruptcy, the commiſſioners have full right to enquire, whether one who comes in to prove his debt under a commiſſion, means to proceed at law.

Ejectment, fraudulent.

Anonymous.

IF a declaration in ejectment be ſerved, and the parties to the ejectment, or any of them, aſk what to do with it,

it, and whether they are to ſhew it to the landlord; and anſwer is given by him who ſerves, 'Tis only a form of law that he leaves it, and that it ſignifies nothing to them or any body; poſſeſſion on that ejectment is not good. A clerk who drew the notice of ejectment, being aſked by a perſon who claimed under the landlord in poſſeſſion, whether any thing had been done in the ejectment, ſwears that the queſtion is impertinent; and therefore continues the converſation he was in with ſomebody elſe, waiving any anſwer. This was held by the court a fraudulent ſcheme to procure poſſeſſion: And Lord *Mansfield* ſet aſide the rule obtained upon it; obſerving, NOTHING WAS SO SILLY AS CUNNING.

The King *againſt* King.

ON an inquiſition taken before Alderman Kennet—— A motion to ſet aſide the inquiſition for irregularity.

Corbett let a ſhop to a perſon who had a mind to leave it without notice, but was told, that by the cuſtom of *London*, half a year's notice was expected; another perſon admitted tenant, who uſed the ſhop, but going out one morning, upon his return, found a padlock on the door, which he took off. A perſon enters upon the ſhop, as by virtue of an aſſignment of the term from the original tenant againſt whom the plaintiff ſues; and thereon an inquiſition is taken, againſt which exceptions were made, on the ground of irregularity in the original proceedings.

Vide 5 R. 2 ſt. 1. c. 8.

Objection to the count that Mrs. *Corbett* as ſole ſhopkeeper ſues by the cuſtom of *London*; and that no ſuch cuſtom was before the court to take notice of.

That the venue was ill taken, being taken in a part of *Fleet-ſtreet*, which is a place large enough; and that it ſhould appear in a part neareſt the premiſſes.

That there is no iſſue properly joined; for that the defendant denies the count, and ſays that he entered duly under *Corbett*'s leſſee. Mrs. *Corbett*, who was plaintiff, replies not; but *Woodfall* obtrudes as proſecutor for the King, and
[54] denies nothing, but only prays, as the plaintiff, that it may be enquired of the country.

The court was hereupon moved, to quaſh the inquiſition.

Mr. *Buller*, on the other hand, That the caſe being ſettled by his conſent, he expected no more objections than he was prepared to anſwer——

That

That Mr. *Murphy* was preſent, [at taking the inquiſition] and made no objection to the intereſt not being ſtated as of freehold; which was another of the objections made.

That the court below was to take notice of the cuſtom, without pleading, it being their own cuſtom.

That the venue was taken from the neighbourhood, which from the definition itſelf appeared to be ſufficient. Vide 3 Blackſtone 294.

That as to *Woodfall* coming in as proſecutor for the crown, without ſhewing how, it's mere form; and there are two caſes of Lord *Hale* [which he cited] to prove it is not neceſſary he ſhould ſhew how he comes in.

Mr. *Murphy*, in reply, obſerved, that the caſes alluded to by Mr. *Buller*, were in one inſtance of a city court taking notice of their own cuſtom; but that this did not extend to a juſtice under an act of parliament, though he might be an alderman. And as to *Woodfall*, though in the other caſe of Mr. *Buller*, the court of King's Bench took notice of their own officer, the maſter of the Crown-office, as a proper perſon to proſecute for the King, yet it would not extend to this caſe.

It ſtood over; but the court ſeemed inclined to diſcountenance the objections, as formal. 1 *Roll's Rep.* 105. was quoted.

Settlement.

Anonymous.

THE court ſeemed of opinion, that from ſtatute-fair, to ſtatute-fair, was a ſufficient hiring for a year to gain a ſettlement.

The King *againſt* Skinner.

ON a motion to quaſh an indictment againſt——*Skinner*, Eſq; one of his Majeſty's juſtices of the peace of the town of *Poole*, for ſcandalous words ſpoken by him, in a general ſeſſion of the county; in which he ſaid to the grand jury, "you have not done your duty; you have diſ- "obeyed my commands: You are a ſedious, ſcandalous, "corrupt, and perjured jury." [55]

Serjeant *Davy*, in ſupport of the indictment—That it was of high importance. They who are one of the chief pillars of the conſtitution ſhould not be thrown into open contempt.

An

An action by any one ſeparate would not be good, becauſe the offence is not againſt *Peter*, *John*, &c. in their ſeveral and ſole capacities, or any of them, but againſt them as one body, as a grand jury; and neither could they ſue jointly, becauſe they are no corporate body. A remedy by indictment is proper and neceſſary; it's the only one they can have; it's the natural and uſual proceſs in a crime againſt the public.

If it's refuſed, it will be equivalent to ſaying, Theſe very men ſhould have taken their remedy at law as private individuals, had a particular affront been given to them; but as a grand jury, (where the inſult is vaſtly more material,) they muſt be attacked with impunity, and ſhall have no relief; nor the public, who ſuffers by the indignity done them.

Mr. *Lucas*, againſt the indictment—That it was a very new and ſingular proceeding.

If the words were not ſpoken againſt the jury in the execution of their office, they are not words liable to an indictment; and if they were ſpoken, while they were ſitting in the execution of their office, the judge was ſo too in his: And the principle is clear, that a judge of a court of record is not liable to an indictment for words ſpoken by him, ſitting as judge; eſpecially, becauſe it is not impoſſible to conceive the exiſtence of a corrupt jury: And if the charge was true againſt them, ſhall Mr. *Skinner* be ſubject to a proceſs, in which he would have no power to juſtify, for the truth of the words ſpoken? 2 *Strange* 1157. *The King* v. *Pococke*, on words ſpoken by the defendant of *Kent*, a ſworn juſtice, ſaying "He is ſworn, and is a knave, and "forſworn;" agreed that it was not actionable, becauſe ſpoken with reference to a matter paſt, and not ſpoken againſt him in the execution of his office. 12 *Mod.* 98.

[56] It would be impoſſible the authority of a judge could ever be ſupported, were they liable to the ſuit of any perſon, for words ſpoken by a judge as ſuch.

Lord *Mansfield*—I am willing, as neither Serjeant *Davy*, nor Mr. *Buller*, find any precedent in the Hiſtory of *England*, for an indictment of this kind, to give them time till next term to find any.

What Mr. *Lucas* has ſaid is very juſt; neither party, witneſs, counſel, jury, or judge, can be put to anſwer, civilly or criminally, for words ſpoken in office. If the words ſpoken are opprobrious or irrelevant to the caſe, the court will take notice of them as a contempt, and examine

Vide Sh. P. C. 173. a. Vaughan 135. 12 Rep. 24.

on

on information. If any thing of *mala mens* is found on ſuch enquiry, it will be puniſhed ſuitably.

The words are extremely improper. If the party were not a borough juſtice, I ſhould think there might be grounds to apply to the great ſeal to remove him from his office. But to go on an indictment, would be ſubverſive of all ideas of a conſtitution. If any precedent ſhould be found, you ſhould have time to make uſe of it; otherwiſe it would be proper to quaſh the indictment immediately.

Dodd *againſt* Innis.

In Arreſt of Judgment.

ON an action for breach of covenant. The cauſe of action was on a leaſe, in which leſſee covenants with leſſor, to leave ſufficient compoſt on the ſoil of the landlord, at the end or ſooner expiration of the term, the leſſee having the yard, barn, and a room to lodge in and dreſs diet.

Upon theſe words of the leaſe, the defendant pleads, that he did not covenant; but that there is a condition, if the leſſor gives room for corn, then the leſſee ſhall have compoſt.

Mr. *Wallace*, on the other ſide—'Tis very extraordinary, Mr. *Innis* ſhould not demur to the declaration of the plaintiff, but wait till verdict went againſt him, to enhance the coſts. 'Tis true, the leſſee covenants and agrees to and with the leſſor, and yet the covenant is contended to be on the part of the leſſee only. If the words had been, *ſhould have*, or *ſhall have*, the covenant could not have been queſtioned. I truſt, the word *having* will be quite ſufficient for the ſame purpoſe.

In replication, for the defendant. Mr. *Wallace* has objected no demurrer to the declaration. Mr. *Innis* was conſcious of its being a condition, and therefore reſted the matter of fact with the jury; and had it not happened, we had but three gentlemen on the ſpecial jury, probably the cauſe would have gone no farther. 'Tis plain, the jury gave a verdict that muſt be ill grounded; they gave one ſhilling damages, which, if any damages were incurred, muſt be raſtly incompetent. [57]

The plain intention was, that the covenant, which we call a condition, was for the advantage of the leſſor; who, if

if he thought proper, might have the compoſt, on furniſhing the room, barn, &c.

Mr. *Dunning*—It cannot be doubted, both from the words and ſenſe, I think, that the leſſor meant to leave himſelf at liberty, as in terms he has done, to give him the uſe of the barn, if he inclined to take the benefit of the covenant.

Mr. *Bearcroft*—The expence of a ſpecial jury was incurred by the defendant, that the tenants might not determine between landlord and tenant; however, he could only obtain three gentlemen, and the reſt were tenants.

I don't think law caſes are neceſſary here, but the plain common ſenſe of the words.

Lord *Mansfield*—The argument of Mr. *Bearcroft* is a very good one: and I am glad to find there's ſuch perſpicuity in language, that there was learning wanting to raiſe any difficulty in the matter. The parties had none; they were plain ſenſible men; accordingly, they put the iſſue on the fact. "You did not give me room to beſtow my ſtraw, "&c." ſaid the tenant. "I did," ſays the leſſor. Can there be any thing clearer, than that the covenant could not be to reſide in the breaſt of the landlord, to make election during any part of the term? Had it been ſo, the tenant beſtows his corn and ſtraw, houſes his cattle, &c. and then comes to the landlord, and ſays, "I don't want "you to furniſh compoſt; and that being the condition on "which you was to lodge your corn, and have the other "benefits expreſſed; take your corn, cattle and ſtraw, and "carry them where you think good." Where the tenant covenants to repair, if the leſſor finds ſufficient timber, the proviſo reſtrains the covenant: But in this caſe there is not the leaſt foundation for ſuch conſtruction. Let the rule in arreſt of judgment be diſcharged.

Davis *againſt* Taylor.

ON a motion to make a rule abſolute, for putting off a trial——Mr. *Jones*, in ſhewing cauſe againſt the rule, alledged to the court, that it was a caſe on an action againſt a ſurgeon for unſkilfulneſs; that the declaration was entered the laſt term, and the matter was duly ſet down for trial; but that, on ſuggeſtion of the abſence of a material witneſs, proceedings have been ſtaid. That it is a ſcheme to delay till the ſittings in *Michaelmas* Term; and therefore

therefore, as they might have had their wiſhes, that he hoped the cauſe would go on immediately.

Mr. *Cox*—That there was a material witneſs; and that the plaintiff would be ready to try the cauſe the ſittings after term.

Lord *Mansfield*—You gave notice; why did you venture ſo far, when you had not your witneſs?

Mr. *Cox*—We were diſappointed of him then, and are uncertain whether he can come before *Michaelmas*.

Lord *Mansfield*—And yet offer to try it the ſitting after term! Palpable ſubterfuge upon the face of the motion.

Mr. *Cox*—My lord, we could be ready to try it, rather than delay till the next term; but we would like the probable chance of getting him by a ſhort ſtay.

Lord *Mansfield*—It's an exceeding oppreſſion and vexation of defendant's; this contrivance practiſed, of putting aſide trials from term to term, by the court's relaxing its practice, has gained greatly too much ground. All the inconveniencies the act was deſigned to ſtop will recur, if any ſlight cauſes be allowed for enlarging time after notice given of trial.

Notice Irregular.

A Notice having been ſerved on a rector of *Wales*, in a writ of *latitat*, on ſuit of a curate, to bring him into court, to anſwer for non-payment of ſix years and a half penſion, for ſervice of the cure, at 12 l. *per annum*; on return in court, it not appearing the name of the attorney of the plaintiff had been inſerted, the rule was obliged to be diſcharged, but without coſts. Lord *Mansfield* declaring, if there had been a poſſibility of ſupporting the rule, he would have taken an advantage of a ſtraw.

Motion to diſpenſe with the perſonal Appearance of certain *Cambridge* Scholars.

On Judgment to be given on Aſſault.

MOTION to diſpenſe with their perſonal appearance, on account of their being in *Ireland*; of which they are both natives, and have conſiderable connexions there. Prayer, that a fine may be accepted, on a ſuggeſtion that their preſence would be to no purpoſe, as the

the court would ſee no grounds for puniſhment by way of example.

Mr. *Dunning*—It ſeems extraordinary, it ſhould be deſired perſons ſhould be diſpenſed with becauſe they are in *Ireland*, when they ought to have been here. The truth of what Mr. *Pemberton* aſſerts is foreign entirely, as it ſeems to me, when they have pleaded guilty, and from thence become ſubject to judgment. If they thought their caſe was good, they had nothing to fear. I can't conceive why, immediately on having pleaded guilty, they ſhould withdraw themſelves.

Mr. Juſtice *Aſton*—In *The King v. Harwood*, a very aggravating caſe, it was long argued, whether, on affidavits, appearance ſhould be diſpenſed with; and the groſs abuſe of his office as juſtice of peace, was the cauſe on which it was refuſed to diſpenſe with appearance.

Lord *Mansfield*—If from the nature of the aſſault you have any aggravating circumſtances to prove by affidavits, we will grant you a rule to ſhew cauſe; otherwiſe, their age and ſituation are ſufficient cauſe why we ſhould not bring them, at an expence greater perhaps than the fine the court would ſee fit to adjudge, to gratify the proſecutor, by expoſing them in open court; eſpecially, as they have in ſome manner atoned for their miſconduct, in pleading guilty. A very ſmall cauſe, on a common aſſault will be allowed to diſcharge perſonal appearance: Would not the court have diſpenſed with the rioters laſt term, if the fine had been undertaken? Rule to ſhew cauſe.

The King *againſt* Plumbe.

ON a rule to ſhew cauſe why a *certiorari*, by which a cauſe had been removed from the court of the mayor and aldermen of the city of *London*, on a plea of certain franchiſes, ſhould not be quaſhed.

This caſe had been argued the preceding term by Mr. *Wallace* and Mr. *Mansfield*, againſt the rule; Mr. *Dunning*, for the rule.

Mr. *Wallace* argued, on the ground of the authority of the court over all the inferior juriſdictions in the kingdom.

He farther argued, That till after the return of the writ, the court of King's Bench never ſtopped the *certiorari*, on a ſurmiſe that the court below had a right to a *precedendo*.

[60] Several caſes were cited, in which the *certiorari* was ſued out of the court, and return made of the writ; in which it

was

was held here, that disfranchiſement was not lawful for words.

Mr. Mansfield—The queſtion is not whether this court will ultimately take cognizance of the information, nor whether it can, againſt the mayor and aldermen; but only whether the court will not examine the information? whether not ſee, if there be cauſe of the disfranchiſement; or, on the contrary, no cauſe being ſeen, will not at once end proceedings here, or any where elſe?

Mr. Dunning—It has been ſaid, that a *certiorari* can never be quaſhed till after return; in moſt caſes, I conceive, it may be more properly before. The caſe of the city of *London*, different as in many reſpects from other corporations, is in this perfectly the ſame with all others; therefore the juriſdiction of this court, if it grants a *certiorari* in this inſtance, cannot refuſe to the meaneſt corporation. This court has no juriſdiction to disfranchiſe the members of a corporate ſociety. Let it be ſuppoſed, your lordſhip ſhould think that the disfranchiſement was good, or the other way; your lordſhip could not, nor would ſtop the proceedings below. It would be very convenient, were it lawful, in a thouſand inſtances, to bring the cauſe hither to get an opinion: But the law has no notion of ſuch convenience. In this ſtate of the buſineſs, it is not competent for this court to give its deciſion. I believe, the carrying with them ſuch a direction, would be very convenient to parties: But I hope it has never been found neceſſary, nor will at this time, in this place, be judged competent.

It has been hinted by Mr. *Wallace*, as if the court below had no authority to proceed. I am confident, 'tis impoſſible they ſhould be more irregular than they would in ſetting out here. The caſes ſtated, as far as they went, ſeemed for a *certiorari*; but on farther view it appears, that in one of the inſtances particularly, the party was impriſoned by the court below after disfranchiſement for words. I mean not to contend, nor I believe will any body doubt, that a writ of *habeas corpus* will go forth from this court, when a man is deprived of his liberty. In another, they had paſſed ſentence of the fine. This is not a charge under a general criminal juriſdiction, nor an offence by the courſe of the common law; it is one of the corporation in itſelf. It were indecent to have the diſputes liable to ariſe on an opinion given by this court, interpoſing unneceſſarily, and therefore improperly. As to the right of disfranchiſement, the mode, and ſeveral circumſtances flowing from the proceed-

ings in the court below, when the judgment of the court below goes on either ſide; this court, on application of either party, will judge the matter of law, and of the right of the corporation.

[61] I cannot imagine why application ſhould be made in 1772, to bring, irregularly, a cauſe before this court, which, if any diſſatisfaction is taken on the inferior judgment, will come regularly hither; eſpecially, when the whole effect to be had would be, the fetching papers up to be ſent down again preciſely in the ſtate they came.

Till ſome act has been done injurious to the right, by disfranchiſing; to the property, by ſetting a fine; or the perſon, by impriſoning; I am ſatisfied your lordſhips will not interpoſe. All the caſes cited, or that can be cited, I am poſitive, fall under one or other of theſe three deſcriptions. Has there been any inſtance, where on a mere complaint a *certiorari* has been eſtabliſhed? This is merely ſuch a complaint of a corporate body againſt a member of its own.

The court denied a *certiorari*.

Lord *Mansfield*—Though no precedent of a *certiorari* quaſhed before the return, yet there can be no reaſon againſt it, in caſe the writ ſhould not have iſſued. *Bur.* Caſe of the Quakers; as title was not judged in queſtion, the *certiorari* itſelf, after the return filed, was quaſhed; and a ſuperſedeas iſſued againſt it.

The writ of *certiorari* not being a miniſterial writ, but a prerogative writ, as *mandamus*, *habeas corpus*, &c. muſt have proper foundation on an affidavit, or on the face of the writ. In courts not ſuperior, but ſuch as this court will pay a proper deference to, there is a moſt abſolute neceſſity not to interfere with their proceedings, without full cauſe. Let us conſider to what effect it would be: Not to try the franchiſes; for nothing is there in the writ or application of parties, from whence we can take cognizance. No information of miſtake in law, or any other particular, on which to remove the cauſe. To view the proceedings, and ſend them back for deciſion, would be nugatory. Four caſes only in an hundred years; *Rogers*, for words and an aſſault; a *certiorari* iſſued, and afterwards a *procedendo*; though, in an aſſault, this court has certainly a concurrent juriſdiction. In that, and all the other caſes, no effect followed from the *certiorari*; therefore, we all agree, that the *certiorari* be quaſhed.

The

The King *against* Backhouſe.

IN an arreſt, the officer apprehending difficulty in executing of the proceſs, made a pretence of a note, which the defendant to this ſuit ſaid he ſhould be glad to ſee. With ſome difficulty, he was let in; and comes up to the defendant, and tells him he has a writ to execute on him for 40 l. And *Backhouſe*, much enraged, ſaid, his houſe [62] was his caſtle. That then the bailiff ſaid it was very ungenteel; on which, *Backhouſe*, (the officer ſays, and the other officer who ſtood without and ſaw the bailiff running) aimed a piſtol at him. On a trial, the jury find *Backhouſe* guilty. This motion being after a verdict, no evidence as to the fact of the aſſault was admitted; but on its being ſhewn to the court, that the man was a bankrupt, on affidavit; with confeſſion of the party on the trial, that he would charge an aſſault on the whole family; which he did, by ſwearing before a juſtice an aſſault to the father, having made his firſt complaint againſt the ſon only; then, before the grand jury, he added the mother.—On theſe grounds, and a probability found that the ſuppoſed piſtol was a ſugar-hammer, and that the officer who ſwore to the arreſt was intercepted, by a paſſenger ſtanding before the window, from ſeeing what paſſed, the injury and prevarication of the action, the inability of the defendant to pay any large pecuniary penalty, and the groſs abſurdities in many of the moſt ſubſtantial parts of the evidence, it was prayed in arreſt of judgment, that a very moderate fine might be impoſed.

Mr. *Wallace*—If apprehended or real bankruptcy be admitted, the execution of juſtice will become impracticable. I therefore hope, as the jury have found the defendant guilty, though they have acquitted all the reſt, the court will ſubject him to coſts, and a ſatisfaction, to check ſo unwarrantable a reſiſtance for the future.

Lord *Mansfield*—By all the evidence on the trial the defendant was moſt clearly guilty; they all agree as to the bailiff's running out; (whether what *Backhouſe* uſed againſt the bailiff was a piſtol or a hammer, the bailiff was greatly intimidated, and, at leaſt, took it for a piſtol.) The precedent is an extreme bad one, of ſuffering offences of this nature to eſcape ſlightly; he muſt either compound by his friends, if they will undertake as ſuggeſted, or ſuffer corporal puniſhment.

Mr. *Wallace*, counſel for the proſecutor, accepted one guinea; with coſts to be taxed by the maſter as between attorney and client. The court, on undertaking by the defendant to conform to the terms, ſet a fine of one ſhilling.

King *againſt* Davis.

FOR a rule to ſhew cauſe why an information ſhould not iſſue againſt —— *Davis*, Eſq. a collector of the cuſtoms, and juſtice of peace, for ſitting as one of the juſtices under the ſtatute of 12 *Ann*, *c.* 18. to eſtimate the ſalvage of the veſſel; of which ſalvage, by the act, he was entitled, as cuſtom-houſe officer, to a part.

[63] *Brery*, a fiſherman, claimed 50 guineas for ſalvage, which *Williams*, the owner of the veſſel, refuſed; and ſaid, that he had not been run aground, but by *Brery*'s man. On this, *Brery* applies to Mr. *Davis*, for a detainer of the veſſel, till the owner, Captain *Williams*, ſhould anſwer to the claim of the ſalvage. Mr. *Davis*, being one of the three juſtices of the counties adjacent, ſat to try the queſtion of ſalvage between the parties. It appearing before them, upon examination, that the ſchooner was worth 9000 l. and the ſmack 300 l. that the former would have periſhed, after quitting the trackled, had not the ſmack, at the peril of itſelf and crew, ſaved it; the other ſide giving no evidence, they decided for the claimant. It's objected to Mr. *Davis*, he refuſed Mr. *Clement*, a juſtice of the county, propoſed by the maſter. There's a clauſe, it was argued, in the act, which prevents his being proceeded againſt by information; becauſe, on conviction, it ſubjects him to a conſiderable penalty, forfeiture of office, and incapacity of acting as juſtice: And 'tis hoped, this court, after forty years in office, will not, without accuſation, ſubject him to an information.

On the other hand, the objection againſt Mr. *Davis*, that he ſhould not have been the juſtice, but was to have appointed one, was argued.

The court was of opinion, that as the act, on diſpute, empowers the parties to three juſtices; therefore he was not to appoint himſelf, nor exclude the other ſide from appointing, as by the affidavits it's proved he did; eſpecially, as he took a bond of indemnity for whatever might be the conſequence of the matter between the parties, and as a ſatisfaction is granted to the cuſtom-houſe officer under the act.

The

The court therefore of opinion, that the rule ſhould be made abſolute.

Lincoln, a man belonging to *Brery*'s veſſel, ſwears, that *Brery* would have periſhed in ſteering towards the ſchooner, had not the wind turned the ſail round.

The court thought the award of the cuſtom-houſe officer a very reaſonable one; who ſaid, that had half a guinea been agreed, a guinea was merited. And they were of opinion, the difference about the danger of the veſſel would not entangle the queſtion. So that the ground ſeems to have been by no means the unfairneſs of the deciſion, but the great impropriety and irregularity of his ſitting as judge, who, as cuſtom-houſe officer, was to take benefit of the value of the ſalvage.

Tuite or Chote *againſt* Fawkes.

ON a rule to ſhew cauſe why an information ſhould not be granted againſt the defendant, for forcing the plaintiff to ſell cheeſe at three pence *per* pound, by menaces —— [64]

Chote, by his affidavit depoſes, that on the 10th day of *April*, a riotous aſſembly happened at *Dunmow* in *Eſſex*; and people came, to the number of fifty, threatening him, and ſo compelling him to ſell butter at 6d. (he dwelling then at *Benton*, two miles off *Dunmow*,) and cheeſe at 3d. That a day or two after, *Charles Fawkes*, a conſiderable innkeeper, who had been ſtrolling about the country, came and ordered a cheeſe at 3d. *per* pound, which *Chote* ſaid he could not afford. *Fawkes* perſiſted urging him, and aſked him, in a menacing way, "Only ſay you won't;" and intimated, that if he did not, other people would come and ſell it for him. And that, in fear of having the mob on him, he was obliged to ſell. And that *Gibſon*, a labourer, ſervant to *Fawkes*, came ſoon after; and, he ſays, that *Gibſon* had a cheeſe at the ſame price, from the ſame apprehenſion, that he was employed by *Fawkes*.

Fawkes depoſes, that the riot was firſt diſcovered by him, that he had as much cauſe to dread it as any body; that he gave the firſt notice of it; and verily believes, he was principally inſtrumental in ſuppreſſing it, by telling people, invited to join the mob, whom he had conſtantly employed for many years, that he would never more employ them if they did. That ſeveral of the moſt conſiderable tradeſmen; in order to quiet the mob, he is informed and believes, cauſed it to be proclaimed by the common cryer, that they would

would ſell their cheeſe at 3d. *per* pound; when he did, as well as many others. That he went to *Chote*, not uſing any menaces, or ſaying that he would ſell for him, or any thing to that effect or intent; and that *Chote* readily conſented. And ſays, that he made the bargain, not out of malice, on a view to take advantage, but thinking it the fair price of the cheeſe. And that the mob was diſperſed two or three days before.

Others of *Dunmow*, on the part of *Fawkes*, made oath that *Fawkes* was a conſiderable innkeeper, and had no intereſt in their belief, to encourage the mob; but on the contrary, out of a good intention, gave the firſt intelligence that the mob was diſperſed two or three days before. And that they believe the price was fair; and the information out of a malicious and wicked deſign.

Obſerved, againſt the rule that *Fawkes* is not mentioned in the firſt riot, nor any thing about him; that he is brought
[65] in after by *innuendo*, ſo as to involve him in an odious imputation, without the leaſt particular aſſigned as ground: And that the whole charge is as poſitively denied, and as fully, on the one hand, as it could poſſibly be charged on the other. On which grounds, from the inſufficiency of the proof, and the ſtrong appearance of malice on the plaintiff's affidavit, it's deſired and hoped from the court, that the rule be diſcharged.

On the other part it was urged, That *Fawkes* ſpoke to a proclamation which he believes to have been made, without ſaying of his own knowledge, or producing a ſingle witneſs to ſo public a fact: That affirming it was done to pacify the mob, he nevertheleſs applies to *Chote*, out of the limits of the proclamation, two miles from *Dunmow*, and not any of the tradeſmen of *Dunmow*: That the price for which the cheeſe was ſold is confeſſed by both their affidavits, and gives very ſtrong preſumption, if no other part corroborated, of the truth of the fear and menaces alledged by the plaintiff.

After hearing this contradictory evidence, the court diſcharged the rule.

James *againſt* Penrice.

ON a rule obtained to ſhew cauſe why action ſhould not be ſtaid, on account of defendant being become a bankrupt; the motion was objected to, becauſe it might have

have been litigated upon a plea, and that defendant means to litigate it.

Rule diſcharged.

ON a motion, that cauſe may be ſhewn why a writ of enquiry ſhould not be executed here, in *London*; in a caſe of a clerk, to determine what was due from his maſter to him: On ſuggeſtion, that the jury at *Guildhall* would be of low and indigent perſons, and not qualified to eſtimate where the matter might be of ſome hundreds.

Court—No colour.

Lady Mayo's Caſe.

TRANSFER of monies in the Bank, in the name of a feme-covert, made by the huſband; which monies, it was ſuſpected, ſhe held by virtue of a truſt to her own ſeparate uſe. A memorandum was made by the Bank, on transferring the ſtock, of a defect of title ſuſpected. It was held, that to make a memorandum on transfer of ſtock, ſignifying a flaw ſuſpected in the title, muſt not be allowed; [66] nor will any ſecret truſt, as againſt the party who has open legal title, affect the Bank. And Lord *Mansfield* added—I won't ſay a word againſt the holder of the ſtock having his action againſt the Bank for diſparaging his title.

Curia Cancellaria, at Lincoln's Inn.

WHEN there is a real eſtate of 1200l. value, debts on bond to 1000l. and on ſimple-contract to 1000l. more; all that can be done is, not to let the bond-creditors in upon the perſonalty, but the ſimple-contract creditors cannot touch the 200l. ſurplus of the realty.

Simple contract creditors cannot come upon the real eſtate.

Tythes.

MODUS ſet up ſince the 13 *Elizabeth*, binds not the ſucceſſor.

A peremptory compoſition requires notice to determine.

If endowment be of tythes, and uſage has not followed the endowment, the claimant, as to ſuch tythes as fail of uſage, ſhall not ſupport his claim; any more than on a conveyance of lands he ſhall claim lands as parcel of the eſtate conveyed, where poſſeſſion has not followed the conveyance.

Modus, when not binding. Vide 13 Eliz. c. 10.

2 Blac. c. 3. Temporary compoſition.

Endowment of tythes, with failure of uſage.

If

Costs, when defendant claims more tythes than there are tythable goods.

If more tythes are claimed than the defendant to the bill has kinds of tythable goods, the practice of the Exchequer is, (it was represented to the court) to discharge the bill with costs, as to such tythes.

Effect of misspleader of a modus.

It appears, that misspleader of a modus in the Exhequer always occasions a decree for tythes in kind; even though it appears in evidence that it was a good modus; but it is without prejudice to the inhabitants of the parish.

Raymond *against* Webb.

Trustee may not vary the mode of sale prescribed.

A Trustee under a will, sells by private contract an estate in trust, which by a decree of Lord *Camden* was to be sold before a master; the plaintiff, who was bargainee of the estate, was not party nor privy to the decree, but was a purchaser without notice, for a valuable consideration.

[67] Lord Chancellor—After a decree by Lord *Camden* in this case, that the estate should be sold before a master, the court cannot now warrant a sale by private contract.

Mr. Attorney-General contended, that the objection to the decree of Lord *Camden* interposing, was, that the plaintiff was no party to that decree.

Lord Chancellor—All the effect of that will be, the plaintiff may recover at law, which otherwise he could not.

Bill dismissed: The party being left to take his remedy at common law, the court being of opinion that equity ought not to interpose.

Michaelmas Term,

12 Geo. 3. 1772. K. B.

Campbell's Caſe.

On a Plene adminiſtravit.

[68] ON a motion for a new trial—On an action brought againſt executor, he pleaded *plene adminiſtravit*; there was evidence that he had paid intereſt upon a legacy of the teſtator's. The jury found for the plaintiff. It was contended, that upon the evidence, they ought to have found for the defendant; for that there was evidence of his having fully diſcharged, as far as there were aſſets. On the other hand, that by paying intereſt on the debt, he had admitted aſſets. It was urged, that this payment of intereſt was injurious to the legatee, by lulling him into a falſe ſecurity, while the executor ſpent the aſſets in paying debts of an equal degree.

It was urged, that in the caſe of the Duke of *Somerſet*, intereſt paid for ſeventeen years, was determined by the maſter of the Rolls, and confirmed by the Lords Commiſſioners, to be evidence concluſive of aſſets.

Lord *Manſfield* obſerved, that payment was *prima facie* evidence; and repeated payment, with length of time, very ſtrong preſumption: But that, though it impoſed on the executor the *onus probandi* to the contrary, yet it could not in any caſe be taken concluſively againſt all evidence poſſible to be given.

That the payment in the principal caſe was pleaded, to have been four years continually. The difficulty the laws have laid on executors, for ages, has been properly complained of, that honeſt executors know not how to be ſafe, nor diſhoneſt can be puniſhed.

Where

Where there is a bond-debt unknown to the executor, and there has been a payment of intereſt on a ſimple-contract
[69] debt, before the bond-debt comes out; in which caſe, it would be *male fide* to pay the principal on the ſimple-contract, unleſs the bond-debt could be ſatisfied firſt; ſhould the payment of intereſt on the ſimple-contract, under ſuch circumſtances, be concluſive againſt the executor? Certainly not.

His Lordſhip deſired, that he might not be underſtood as giving an opinion, that the executor would be allowed debts in an inferior or equal degree after payment of intereſt, in the debt in queſtion; for that then an executor might take an occaſion, by paying a ſmall ſum on account of intereſt, to deceive and fruſtrate the juſt expectations of a creditor in higher degree, in favour of a creditor in inferior degree. That in all events, there was cauſe to grant a rule for a new trial.

The rule was granted accordingly.

Clark *againſt* Adair.

IN this caſe it was determined, that an engagement of inteſtate to pay money out of a growing fund, was a lien upon the adminiſtrator chargeable upon that fund.

Raymond *againſt* Bridges.

ON a writ of error brought againſt a judgment in the court of common pleas.—

The judgment was on an action on the caſe againſt the ſheriff, in which there were two counts:

1ſt. That the defendant ſuffered *John Champion*, indebted to the plaintiff on account in the ſum of 20l. 17s. 10d. to eſcape.

2d. That the defendant being ſheriff of the county of *Eſſex*, might have arreſted *Champion*, and did not.

The judgment, with damages and coſts, amounted to about 60l.

For the plaintiff in error, error aſſigned againſt the judgment, that the two counts are totally repugnant; ſuppoſing the cauſe of action in both the ſame.

That they are the ſame is evident, The ſum is preciſely the ſame; both notes are dated the ſame day; both payable in ten days after date; the writ ſued out in both on the ſame day. It will be ſaid, every thing will be intended

in

in favour of the verdict; every thing that can be reasonably intended: But here, I conceive, the mere natural intendment will be, that the party was trying, whether he might not recover though one note only was given, by counting on two; or recover one way if he could prove an escape, and in the other if he could prove there might have been an arrest and was not: Your Lordship must intend too, that in the same day the plaintiff sued out two writs on notes of hand, when he might have recovered by one; you must intend too, that he did not know how much 20l. 17s. 10d. amounted to twice told, for he lays his damages at 40l. very reasonably if one note only, but preposterously and unaccountably if on both. For your Lordship knows, if any sum, how great soever, be proved, the plaintiff can recover no more than he has laid his damages in the declaration. I must, with great deference to your Lordship, observe, the court of Common Pleas differs from this court, in this; that if there be ever so many counts, and any one of them is proved for the plaintiff, he shall recover damages in his whole action, though the other counts go for the defendant. [70]

I am told by the attorney, these two counts will make a difference in expence of 20l. to the defendant in that action, the now plaintiff in error.

In this court, I am told, if the plaintiff lays several counts in his action and proves only some, he can have costs only on the counts he proves; and that your Lordship went farther, and said, the defendant should have costs where no proof was for the plaintiff.

Lord *Mansfield*—I did so; but it was in the case of very special pleas. Therefore, where the plaintiff does not prove his counts, neither he nor the defendant has any costs in them, in common cases.

It was observed, that when the statute of *Glouceſter* first gave costs, such was the simplicity of the common law, the counts were single, declarations single, and ever thing much shorter than at this time.

Lord *Mansfield* observed, That supposing there were but one note, justice had been done; the plaintiff had recovered no more than he was intitled: That nothing but a necessity of finding the note single could be regarded, so as to disaffirm the judgment. That every count was considered a distinct action; that those multiplied counts had taken rise from an inconvenience not many years ago in a case of this

this nature. *That finesses of this nature were very proper in furtherance, very bad in hindrance of justice.*

Whether a Power of Revocation assignable under a Commission of Bankrupts.

[71] ON a question, whether a power of revocation was an interest capable of paying to the assignees under a bankruptcy; the power being not in possession, but expectant on a contingency.

The power of revocation in the bankrupt was to take place on survivorship, and the bankruptcy arose before the event happened.

It was said, this was within the 13 *Eliz.* 34 *H.* 8. 21 *J.* 1. 5 *G.* 2.

That these acts, though separate, have ever been considered joint laws, and interpreted liberally and beneficially. Here was an estate for life; first to his wife, then to himself, remainder to his issue, and for default of such issue, remainder absolutely to himself. His wife, by whom the issue was to be had, was dead; he had no issue, could have none to take under the deed, therefore the remainder vested in him; and being so vested, was assignable: If not assignable, it's extinguishable.

Mr. *Buller* argued, there could be no fraud to the creditors, as there was no benefit they could take.

Lord *Mansfield*—The estate for life, remainder to himself in fee, is vested in the assignees; he could convey it by a common deed: The conscience therefore is, that he has no power to execute now, for the other limitations could not take place; the whole was in him, and is now in the assignees.

Goodwin *against* Philips.

THIS was a case, in which a jury, being at difference in themselves what verdict to find, on account of contrary circumstances, to balance, as it seemed, the evidence on both sides, agreed the majority of voices should decide. A party to the cause (the plaintiff) goes, and by private conversation finds this out.

Seven were on the side of the verdict, four against, and one doubtful. They debated it; and at last the majority brought over the others to agree, that their opinion should determine.

The

The court, on all theſe circumſtances, would not ſuffer a motion againſt the verdict; eſpecially, as it was given on that ſide where they thought the evidence ſeemed to preponderate.

Bail.

PARISH of their reſidence, is not a ſufficient deſignation in notice of bail. [72]

Bail not knowing how many he is Bail for, rejected.

BAIL aſked, How many he was bail for ſince he obtained his certificate? *Anſwer*—Three. *Queſtion*—Any more? *Anſwer*—Not that he knew.

Lord *Mansfield*—Don't you know how many you are bail for?

I don't keep an account.

Lord *Mansfield*—Then no man that does not ſhall be bail in this court.

Notice of Bail.

THE conſequence of irregular notice is not diſcharge of the bail as bad, but grant of a future day to enquire. The effect of irregular notice.

Demand of Plea.

Toll.

ON a queſtion, upon a toll for corn, it was diſputed, whether malt was to be conſidered as corn? Plea demanded on a Sunday, is to be conſidered as no demand at all.

Lord *Mansfield* thought it was in the nature of flour; and being manufactured, and taking the denomination of malt, it was not to be held corn, but changed its ſpecies: And for flour, which was in the ſame predicament, no toll had been pretended.

But upon a motion for a new trial, upon the ground of the acts of parliament having conſtantly conſidered malt as corn, and ſo in the univerſity-grants; his Lordſhip ordered a new trial immediately upon the motion without coſts.

The

The King *againſt* Eden.

Information.

ON a rule to ſhew cauſe why an information ſhould not be granted againſt the defendant, Mayor of *Derby*, for diſperſing a paper charged to be a libel, reflecting on an attorney of the mayor's court.

[73] Objection againſt the rule—That there is no evidence to prove the publication complained of, nor that Mr. *Eden* was the publiſher, nor that the party complained of was entirely innocent of the charge.

The paper complained of, was a petition againſt the attorney for keeping the petitioner in cuſtody after having taken money for his diſcharge; and it was objected, that the affidavits of publiſhing and diſperſing by Mr. *Eden*, went to memory, belief and opinion.

That this was an application in the way of extraordinary juſtice, and that the party applying ought to come clear before the court; and that the attorney was guilty of the breach of duty charged.

Mr. *Wallace*, on the other ſide—The carrying to the printer is proved againſt Mr. *Eden*; and this is publiſhing. The mayor had miſbehaved himſelf moſt flagrantly, in joining in the petition, that the attorney might be diſcharged for his diſhoneſt behaviour. The petition was addreſſed to the Recorder of the preceding year, (which certainly is not the ſtyle of the court,) and to all honeſt and humane perſons; which makes it ſtill more general.

The court ſeemed to think, that the carrying to the printer was not publiſhing, on the circumſtances in this caſe; and that this way of proceeding by information was very improper.

Rule diſcharged.

The King *againſt* Coate, the Keeper of a Madhouſe.

ON a motion for judgment of the court, for confining a perſon in a madhouſe——

Lord *Mansfield*—This was an indictment againſt *R. Coate* the elder, and *Suſanna* his wife, *Coate* the younger, *Ewbank*, and others, for ſending Mrs. *Ewbank*, unjuſtly, and without

out legal warrant, to a private houſe for the reception of perſons diſordered in their minds, and there confining her for two months nearly. Mrs. *Ewbank* ſwears, ſhe was very ill uſed by her huſband, who took her children from her; afterwards he beat her, and uſed her very ill. Then he told her ſhe muſt go to the child, who was ready to die, at *Stratford*; that he took her; ſhe deſcribed the way and manner. The huſband ſaid, "This is for ſending to me." "I never ſaw," ſhe ſays, "a doctor or apothecary in the "time. A lunatic bit my arm. I was chained. A ſur- "geon was ſent for, as pretence. A gentleman and a "lady came, and pitied me. I feared the child would [74] "be hurt, or he would take the child and murder it on "a common. Mrs. *Mills* came and lamented, I pitied "her; ſhe was ſent by order of her huſband, who, ſhe "ſaid, had done the thing with Mrs. *Miller*." Mrs. *Eccles*, another witneſs, the ſame who ſhe ſaid came with a gentleman, ſaid ſhe was an honeſt, very ſenſible woman; that her huſband uſed her very cruelly, and that ſhe ſaid he uſed the child—!—That ſhe went to conſult an attorney, how ſhe might have a ſeparate maintenance from her huſband; that ſhe was perfectly ſane when ſhe ſaw her; that ſhe pitied her extremely, and wanted an *habeas corpus* to releaſe her; but was told it would be very expenſive. "What, if my huſband had another wife!" She ſaid, the huſband had ſaid, he would ſend his wife to a madhouſe.

Mrs. *Mills* ſays, ſhe was confined in a madhouſe, with one perſon ſane, and another lunatic; that ſhe lamented, and Mrs. *Ewbank* with her lamented extremely; that they concerted matters together, to get her out; that Mrs. *Mills* wrote a direction, and hid it in her boſom.

On the part of the defendants. Of her being mad, and accuſing her huſband with every woman. That ſhe would ſpit in people's faces, and the boys followed her in the ſtreets. That ſhe was either mad, or worſe. That the huſband was a very honeſt man. That *Miller* did not believe what ſhe had ſaid of his wife; that ſhe was mad, or worſe. From a general note, the huſband's character is ſpoke to as good by all the witneſſes for the defendant.

The jury brought *Coate* and his wife guilty, and *Ewbank* the huſband; and acquitted the reſt, without any great ſtruggle on the part of the proſecutor.

On the part of Mrs. *Mills*. That ſhe was brought to the ſame madhouſe, under pretence of her huſband being arreſted; when ſhe got there, ſhe was cruelly thrown down; when ſhe aſked the place what it was, Mrs. *Coate* ſaid

ſaid, it was a place for mad bitches, ſuch as you. She called Mrs. *Mills* a d——d infernal b—h. The ſtench, ſuch as made her almoſt retch. They gave her rotten beef; and Mrs. *Coate* ſaid, ſhe was not mad, but a great b——h.

I would ſtate, then, my directions to the jury on this occaſion, as a matter of great public concern.—There is no authority by the law for a private madhouſe. The circumſtances muſt govern therefore. It would be very hard to ſay, that in caſes where a party is unfortunately viſited with this calamity, they ſhould always have their caſe made notorious by a commiſſion under the great ſeal. That every indigent perſon ſhould be neceſſitated to that expenſive remedy, which would ſwallow up all their ſubſtance. In Doctor *Monro*'s caſe, you obſerve, whatever would be done
[75] by the moſt tender huſband or parent, muſt be the treatment; no coercion, no harſhneſs of treatment; nothing but with the beſt view, ſubject to the aſſiſtance of the faculty. Whatever is done with any other view, all unneceſſary ſeverity, all confinement other than for the beſt purpoſe of the unhappy perſon's recovery; will ſubject to a cenſure proportionable to the conduct. Here I muſt take notice, that till this time I never heard of a madhouſe, without regular attendance by ſome of the faculty; here, Mrs. *Mills* was under temporary confinement without any.

The other, be ſhe mad or not, had no phyſic, ſhe declares, ſince ſhe was 17; no pretence ſhe had any given her. Much has been ſaid, and I think on a wrong foundation, of regulating theſe houſes. The law recognizes them not; if we go to regulate them, we eſtabliſh them by law. In Mr. *Wood*'s caſe, Dr. *Monro* was acquitted by a ſpecial jury, both here and in *London*; it appearing there, that every thing had been done for the beſt.

Every caſe of this ſort, muſt ſtand the ſtricteſt teſt: It muſt always be ſupported on its own particular circumſtances. Whatever has been done not compleatly juſtifiable, muſt abide its fate. Whatever cannot be proved to have been with the beſt motives, let the doers anſwer for in ſuch manner as thoſe ought to do who have taken upon them an act of authority not allowed by the law, and in which neceſſity alone can ſerve for excuſe, and that neceſſity manifeſtly proved.

Lord *Mansfield* obſerved—Of the two huſbands, I think *Mills* much the worſt; my difficulty is, how to puniſh the huſband without ruining the wife.

A ſcheme

A ſcheme of a ſeparate maintenance was adopted; eight ſhillings a week propoſed, the ſum the huſband of *Ewbank* allowed in the madhouſe. He pleaded, his having been burnt out ſince, and the expence of ſupporting his child; he offered to pay five ſhillings a week, alledging, he would do his duty to his wife, which he had never refuſed; that he would be very glad if ſhe became fit; that to promiſe more than he could perform would be fraudulent. Lord *Mansfield* obſerved—Mrs. *Eccles* evidence, of the huſband's ſaying he would ſend his wife to a madhouſe, and what was ſaid by the wife, "this is for your ſending a ſheriff and warrant." If we puniſh him with long impriſonment, (his livelihood is by his labour,) we ruin him, his wife and children.

She was deſired, I think, by Mrs. *Eccles*, who has received the approbation of the court for a ſenſible humane woman.

Ewbank was told, the court would be obliged to do what was much againſt their inclination, if he would not undertake. [76]

Mrs. *Read*, on the part of the huſband, conſented to maintain the child, on condition the huſband ſhould undertake to pay ſix ſhillings a week; with liberty to apply to the court, if he ſhould ever be charged with his wife's debts, contracted during her ſeparation.

The huſband was deſired by Lord *Mansfield*, to let his wife ſee her child ſometimes; but, he ſaid, the poverty of his circumſtances would oblige him to ſend his child a hundred or two miles off.

The court ſtays judgment on *Mills*, till his wife thinks fit to complain of him; his condition being ſuch, that he could not be impriſoned without ruin to both. The other three committed till the court ſhould have conſidered the judgment on them.

Preſcription*.

Rex *againſt* Johns.

ON an information in the nature of a *quo warranto*, to ſhew cauſe why he exerciſed the office of mayor of a corporation conſtituted by the charter of Queen *Elizabeth*

* Præſcriptio eſt titulus, ex uſu & tempore ſubſtantiam capiens ab authoritate legis. 1 *Inſt.* 113.

——Preſcription was pleaded, That from the juſtices of the laſt year for the borough, mayor for the year following is choſen. Objection to the plea, That there can be no preſcription, where evidence is upon record of the creation of an office *vel cujusvis præterea rei*; and that the office of borough-juſtice itſelf was created within time of legal memory; and, it was contended, took place in the time of *Charles* 1ſt. 100 years after the charter: That it cannot be preſcription, nor even uſage; for the charter gave no ſuch power; and an uſage againſt the charter cannot be ſupported, for that every charter implied a negative on every practice contrary to that it grants or permits. In *The King* v. *Philips*, *Strange's Reports*, where a mayor is elected *pro uno anno integro*, without *tantum*, or any other reſtriction added; in that caſe, *Philips* ſet up an uſage from the charter downwards, for holding over in the office; but ſuch uſage was there declared bad. In the caſe of the corporation of *Yarmouth*, a conſtant uſage was pleaded, and proved, of chooſing by the majority of aldermen preſent; though the charter directs, they ſhall be choſen by a majority of the whole number.
[77] The uſage was contended, as explanatory of the cuſtom; that this court determined it could not be ſo. That Lord Chief Juſtice *Lee*, in the caſe of the corporation of *Yarmouth*, declared that uſage could not explain a charter [againſt the words;] that the court muſt explain it [according to the words and meaning;] that the corporation in that caſe pleaded an uſage, to chooſe their mayor from the aldermen: The words of the charter were, to be choſen from the burgeſſes or inhabitants; the conſtruction they put on theſe words, and which they contended was eſtabliſhed by uſage, was, that aldermen being burgeſſes were not excluded from being juſtices.

In this caſe the court was of opinion, that the charter did not mean to include aldermen, and therefore the uſage was not admitted*.

Lord *Mansfield* obſerved—Uſage will be good or bad, according to circumſtances; where the words of a charter are equivocal, and it ſtands indifferent how to interpret, contemporary uſage will explain the words†.

* Conſuetudo non prejudicat veritati.

† Contemporanea expoſitio eſt optima interpres legum conſuetudo.

King

King *againſt* Rebot.

IN the caſe of tolls of a light-houſe rated to the poor ——The queſtion was, whether it came within the ſtatute 43 *El.* It was ſaid, *Fulham Bridge* was rated at 1000l. *per annum*, equally between *Fulham* and *Putney*: that if a maſter ſhould put a ſervant into a light-houſe, he would certainly gain a ſettlement. *Bunbury* 81. there was an opinion, that light-houſes were not of a nature to be ſubject to church-rates. Three judges were of that opinion; but Baron *Price* diſſented. In the caſe in queſtion, the light-houſe was actually uſed as a dwelling-houſe by the defendant; that the annual profit is the meaſure of the value; that 'tis objected, tolls are paid from different parts of the kingdom, and are of very uncertain profit; yet ſtill, 'tis in conſequence of the houſe that they are collected, and the houſe has a local relation to the pariſh of which it is a part; and ſome eſtimate may be made. That in *The King* v. *Corporation of Wickham*, *Hales* was of opinion, a mere toll was liable. Cellars, warehouſes, corn-mills, ever were and are liable. Much ſtronger this: That *Ranelagh-houſe* would let at about 100l. *per annum*; but on account of the money it brings, is rated vaſtly higher. That there might be a queſtion, whether heriots and ſuch property were rateable; which may not ariſe within the year. But here is an houſe, lands, and annual profits; and as to the degree in which they ſhould be rated, an appeal to the quarter-ſeſſions would decide that.

On the other ſide, that the juſtices of *Harwich* were all intereſted, it being a local juriſdiction; ſecondly, there was reaſon enough to ſet aſide the order, becauſe they had taken in the duties, and had ſaid ſo, in effect, in their order; for they rate a little building of no value but as a light-houſe, and ſcarce ten yards of ground, as bringing in 1400l. *per annum*. Thirdly, The toll is collected of ſhips paſſing by, not coming in. That there are about twelve ſuch light-houſes in the kingdom, and the attempt is unprecedented: That this had been compared to the caſe of a ſhop, on the other ſide; but who ever heard the profits of a ſhop rated? Mr. *Mansfield* added, that this was to be conſidered as the profits of an office: And that in the caſe of *The King* v. *Shellfield*, it had been determined, the profits of an office were not liable. Now here the office belongs to the crown, as of duty, for the preſervation of the kingdom; and the

[78]

crown neceſſarily delegates that truſt to perſons who are to ſupport the houſe, keep up the lights, and execute the other neceſſary concerns, and to have the profits in recompence. Mills are rated as houſes inhabited by the miller and his ſervants, and not in reſpect of the toll. Lead mines are not rateable. Stalls in a market not rateable to the poor. *Vide Roll's Abr.*

His Lordſhip was deſirous it ſhould ſtand over; but expreſſed his preſent opinion, they were not rateable: *Et poſtea*, in the ſame term, his Lordſhip delivered the opinion of the court.

Lord *Mansfield*—We are all of opinion, that the tolls being raiſed all over the kingdom from veſſels from different parts, are not to be conſidered as locally related to the pariſh: And they have expreſsly rated the toll, and not the houſe. Has any body enquired of *Putney Bridge*, for I am informed that the attempt failed? However, it matters not as to this caſe.

Coate, the Keeper of the Madhouſe, and his Wife brought up to Judgment.

PROPOSED by the court, That they ſhould pay 50l. of which the one moiety to be placed in the hands of Mrs. *Eccles*, for the benefit of Mrs. *Ewbank*; and the other to be in the hands of a truſtee. Mrs. *Mills* propoſed Alderman *Harley*. Lord *Mansfield* ſaid, he would ſpeak to him upon, and would take care that her huſband ſhould not meddle. The rule was accordingly, *Coate* ſhould pay coſts of the proſecution, and 50l. into the hands of Alderman *Harley*, for the ſupport of Mrs. *Mills*; 50l. to Mrs. *Eccles*, for the ſupport of Mrs. *Ewbank*.

The Court ſet a fine of 6s. 8d.

[79] Lord *Mansfield* obſerved, That it was proper perſons who kept theſe houſes ſhould be taught, by this example, what had been earneſtly repeated to them before; "that the circumſtances of the caſe alone could ſupport their act." That they were not to take a wife, becauſe her huſband ſaid ſhe was mad; nor an huſband, becauſe his wife. That the opinion of an able phyſician, on view of the party, and on his examination into the caſe, would be the only proper guide: And that every thing muſt appear ſtrictly, with all diligence and due advice, to be done for the beſt.

Appren-

Apprentices.

ON a caſe of binding out apprentices by churchwardens, as under the ſtatute of 39 *Eliz. c.* 3. *ſect.* 3. It came before the court on an order of ſeſſions.

The churchwardens bound out the child to a perſon of another pariſh.

Minchard, cited from *Salkeld*; *ſtat.* 8 & 9 King *William*, cited; ſtatute of Queen *Ann*, cited.

Argued, That the ſtatute of *Elizabeth* ſaith, that the churchwardens may put out children to whom they ſee convenient; and are the words "within the pariſh" to be ſupplied?

On the other ſide it was obſerved, in the caſe of *Salkeld*, cited above, the judgment was on account of the particular time the child was bound out.

Lord *Mansfield*—This ought to have been made a ſpecial caſe; and the perſon not receiving ſhould be indicted, that it may come before the court in that way; it not appearing on the order, whether the juſtices made it on the matter of law, or inſufficiency of the perſon to whom they bound the child. His Lordſhip obſerved, there had been a caſe two or three terms ago, where a perſon, to whom the child was bound, had a houſe within the pariſh, [but not reſident there.]

It was ſuggeſted by counſel, The ſeſſions had determined, though not ſpecified in their order, on the point of law. That apprentices could not be bound out to an houſekeeper of another pariſh; though ſuch houſekeeper was an occupier of lands within the pariſh belonging to the churchwardens ſo binding out.

This came before the court ſo, that Lord *Mansfield* had not an opportunity of delivering an opinion judicially; but he obſerved, as a private opinion, that he thought if the juſtices did determine on that ground, they did very right. [80]

Mr. Juſtice *Aſton* was of the ſame opinion: And obſerved, how hard it might be to bind an apprentice on a perſon occupying lands in one pariſh and being a houſekeeper in a very diſtant one.

Bankrupt.

LORD *Mansfield* expreſſed a doubt, whether a bankrupt could demand inſpection of the proceedings under

der a commiſſion, in order to litigate them. On conſulting concerning the practice, it appeared, that ſuch inſpection was never permitted in a caſe where the bankrupt litigated an act of bankruptcy.—It was compared with inſpection of a record. But Lord *Mansfield* ſaid, if the truth was with them, they did not want inſpection: but that the uſe of it would be, that they might make evidence, by ſeeing where the evidence preſſed. Lord *Mansfield* ſaid, the court would order, for aſking, that the clerk of the commiſſion ſhould attend with the proceedings at the trial.

It ſeemed agreed by the court, that a creditor might demand inſpection of the proceedings.

Horam *againſt* Humfreys.

Action on a Promiſe of Marriage.

THE cauſe was tried by Mr. Juſtice *Aſton*. The damages were laid at 5000l. and the promiſe was proved, and procuring of a licence by the defendant. The judge repreſented to the jury the nature of the action; the injury of fixing a young woman's affections, and then trifling and flying off, after a ſolemn deliberate engagement, ſo far advanced; and the prejudice it might be to her in future life: That they ſhould give ſuch damages as the circumſtances in evidence, either aggravating or extenuating, ſhould require; and that the rank and condition of the parties would be to be conſidered. And that he could not help obſerving, that the fortune of the defendant had not been given in evidence, though the damages were ſet, in a vague manner certainly, at 5000l. that they would regulate their damages, therefore, from what from his buſineſs he might appear; and any ability they might have to judge of his ſubſtance. The jury gave 500l. damages. Mr. *Horam*, the father of the plaintiff, had a place in the board of works, and the defendant appeared to be a pawnbroker.

Nuncupative Wills.

[81] PROOF of them in the Prerogative-Court at Doctors Commons.

Execution.

Execution.

SHERIFF liable to the acts of his officer acting under colour of his warrant.

Executor.

THE will itself, before probate, is sufficient title for the executor to the goods of the deceased, as to his property as executor; the probate being only necessary to enable him to sue for debts due to the testator.

Simson *against* Tuck.

ON an action to recover penalties, on the statute 13 *G.* 2. for running a gelding not his own property, of the value of 20*l.*

Another penalty for running a gelding for less than 50*l.* Penalty 200*l.* on both taken together.

The counsel for the prosecution—That the act was intended to discourage petty matches amongst the lower people, and to improve the breed of horses. They called witnesses to support their case.

It was argued for the defendant, that upon the preamble of the act it appeared, that "whereas idleness among the "common people is encouraged by the races for small sums, "be it enacted," *&c.* and that the worst of all idlers are common informers; but that since the law supported information of this kind, they were only desired not to assist the charge unless they found it plainly evidenced.

Witness were called on the other side.

Lord *Mansfield* left it to the jury; observing, that the value of geldings was not at all proved, which was a leading point. That the question turned upon what horses were entered for the saddle, and that if they believed they entered for the saddle, and then run to have the saddle for forty shillings, it would be the same as if they ran for the saddle. That one of the witnesses said they did not run for the saddle; that the jury would judge of the weight of probability, for if true, then the evidence did not support the count.

That on the part of the defendant it was said, that the father did not run the horse; that it was quite without his privity; that this was peremptorily sworn, and a full de-

fence

fence if true. His lordſhip obſerved ſome circumſtances in corroboration; which if they believed, they would find for the defendant; if not, the offence was grievouſly aggravated: It was perjury to avoid a penalty fixed by the law, on which the queſtion upon the facts aroſe. That he doubted not they would find a proper verdict.

Jury found for the defendant.

Miſnomer.

PLEA againſt an action for miſnomer of the defendant's chriſtian name, *Clariſſa*, when it was *Clara Elizabeth*; but having put in bail in the name of *Clariſſa*, ſhe was precluded from that plea.

Blackwell *againſt* Green.

ON information againſt the defendant, maſter of an hackney-coach, for endeavouring to drive over him, and ſtriking him.

After judgment by default, they would have read affidavits in denial of the fact.

Court—They can't controvert the fact after ſuffering judgment to go by default; they muſt pay coſts.

Partnerſhip.

EVERY partner is liable jointly and ſeverally.

Settling of Caſes.

LORD *Mansfield* ſaid, he uſed to obſerve caſes were uſually reſerved and hung over often four or five years. That it was the cuſtom formerly for judges to have caſes argued at their own chambers. That he never ſuffered a caſe to be reſerved for him to ſettle; and always took care
[83] to have one caſe ſettled, before the next came on: And now, he added, I believe it's the conſtant practice, and I will not permit that practice to be broken in upon.

On an application, that an alteration might be made in the ſettling a caſe, which had been already drawn up and ſigned by the counſel——

Lord *Mansfield*—In this caſe the jury having found their verdict, and the caſe drawn and ſettled, we cannot now alter

alter it nor can I permit it. *As it was ſettled in the preſence of the jury it muſt ſtand.*

Stow *againſt* Drinkwater.

Chattels in auter Droit.

IF a feme-ſole be poſſeſſor of chattels in *auter droit* as executrix, and after intermarry, the law maketh no gift thereof to her huſband though he ſurvive her.

A caſe was mentioned by the court, in which the huſband had poſſeſſion as being *prochein ami*. *Vide* 3 *Mod.* 58—9.

Putting off Caſes by Conſent.

LORD *Mansfield*—The order of the court, which confines to four days, would be entirely evaded, if putting off by conſent, without good cauſe ſpecified, were allowed. I remember a caſe when I came into court, the famous caſe of *Robinſon, which had been put off by conſent twenty-three terms.*

Return of a Sheriff to a Special Capias.

RETURN *non eſt inventus infra balliv'*; but the names of the ſheriffs in the return were *Oliver* and *Bull*, one ſheriff of the laſt year, the other of the preſent.

Motion for an attachment for a falſe return.

Rule granted: But the court deſired they would give notice to the parties before they took them, that they might appear in court, and, if it was a miſtake, ſhew it.

Davenport *againſt* Tyrell.

[84]

A Writ of error on a judgment in the King's Bench in *Ireland*, 9 *G.* 3. The judgment was given upon a bill of exceptions tendered below. Lord *Mansfield* declared the opinion of the court, that the court below was wrong, in giving judgment on a bill of exceptions; but that they had given judgment, independent of the bill of exceptions, as they ought to have. And added, We cannot reverſe it for the informality.

It was on a queſtion of the right of holding office as mayor, in which there were two iſſues; one of which was, whether

whether duly elected; the other, whether he had taken the ſacrament in due time. And on the ſecond iſſue, they did not find tha he had taken the ſacrament, but only the oath; whereon judgment was given againſt him, and that judgment affirmed.

Notice of Indictment.

Queſtion on the 14 *G.* 2. c. 17.

NOTICE on the 20th *July*; commiſſion-day on the 29th; before 14 *G.* 2. fourteen days notice was always to be given; on which account it was contended, that the ten days muſt be concluſive of the day of notice. But the court did not affirm nor controvert that point, it not coming directly under conſideration.

Execution levied by an Attorney after Notice of the Debt ſatisfied.

JUDGMENT, That the attorney reſtore the goods in execution; pay the coſts of execution, and the coſts of the action.

Conviction.

THE conviction of return of a pauper from the place to which he has been legally removed, muſt be by confeſſion, or oath, or view of the juſtice himſelf; and the return muſt be without certificate, to make the conviction good.

Vagabond.

[85] JUSTICE, by 13 & 14 *Car.* 2. may commit a vagabond to the watch-houſe, to hard labour for a month, or to the next ſeſſions.

Commitment.

NO ſupporting one on the ſtatute *G.* 2. for returning, without the return certified in the commitment.

Affidavit

Affidavit of Debt.

A. Maketh, that *B.* is indebted in a certain ſum, then the jurat ſigned. Affidavit ſufficient, it being under peril of perjury if not true, though the word oath omitted. *Quod nota.*

Bennet's Caſe.

DEED of covenant in conſideration of marriage. Eſtate for life, to the huſband and wife. Covenant to renew leaſes as long as the huſband and wife ſhould live, for the benefit of the iſſue male; and on default of ſuch iſſue, for the iſſue female of their two bodies: And in caſe either of *ceſtui que vie's* did become ſick or infirm, the huſband and wife being two of them, the huſband ſhould renew ſuch leaſe or leaſes.

The queſtion was, Whether after the death of the huſband it was not the intent of the deed, the executor ſhould renew; and if the executor ſhould renew, then whether, as he had once renewed, the intention were not thereby ſatisfied; his executors, heirs or aſſigns not being mentioned? *Siderf.* 151. was cited.

It was contended, That if the executor, and his executors or aſſigns, were not to renew, the proviſion would be nugatory; the leaſes muſt be full at the time the iſſue is to take.

It was further argued, That the executor was to renew out of the perſonal eſtate, and not out of the ſurplus of the real.

On the other hand it was argued, That the intention certainly would be executed here, if made out, as well as in a court of equity; but that the intention was otherwiſe.

Further, That it was ſaid expreſsly in the deed, the remainder of the term was what the heir was to have. In *Siderfin*, the caſe was, *A.* covenants to give *B.* 20l. a year; this was contended to be only a gift of a ſingle 20l. for one year: But there, the evident conſtruction could not be ſuch as was contended; but here, a leaſe has been renewed, which is all the words or reaſonable intendment require. [86]

To this it was objected, in replication, That not the words only, but the intention of the parties, and the intereſt they had, the objects they had in view at the time, were principally to be regarded. That every deed is to be conſtrued in favour of the purchaſers; that even the words "ſuch leaſe or leaſes" were directly convincing.

Lord

Lord *Mansfield*—This is a case of a marriage-settlement. The husband, being possessed of a church-lease, covenants to surrender in six months from the marriage, and purchase a new lease, in which the wife was to be one of the *cestui que vie's*; because she was to be sure the lease should not determine during her life. It's said, that the word "either," which properly is between two, signifies only, that when one of the first lessees dies, another is to be put in. This will not answer the following words, "lease or "leases." Besides, expressly, *Ethelred*, the wife's name, is always, by the covenant, to be continued during her life: This supposes a possibility of more than one removal. If but one, the heir might have nothing but only the surplus of the profits.

I construe, That the heir in the deed of *Thomas Bennet* the father, was to have a full lease.

'Tis not usual to give an opinion, in a case coming out of Chancery; but in this I do, and shall direct the certificate accordingly.

Richardson *against* Fen.

On a Plea of Non assumpsit infra sex Annos.

Plea of non assumpsit infra sex annos. Any the slightest acknowledgment would take it out of the statute.

THE defendant pleaded the statute of limitations, *non assumpsit infra sex annos*. Evidence, it seems, came out on the trial, that he met a man in a fair, and said he went to the fair to avoid the plaintiff, to whom he was indebted. This was within the six years, and was held a sufficient *assumpsit* to take it out of the statute, there being no other debt between them; and thereupon the jury found for the plaintiff.

On a motion for a new trial——

[87]

Lord *Mansfield*—A very little would take it out of the statute of *non assumpsit*. In a case of Lord *Barrymore*, *A.* said to *B.* You are indebted to me so and so; *B.* said, No; but we will settle the account. This acknowledgment of an account to settle between them, was held to take it out of the statute.

Wheatly *against* Edwards.

ACTION of criminal conversation; the jury had found for the plaintiff. On a motion for a new trial, there was strong evidence of perjury in the witnesses to the

the criminal converſation, on expreſs teſtimony againſt them.

The plaintiff had ſworn before an attempt of the defendant to commit a rape on his wife; and afterwards an actual commiſſion by *Edwards* the defendant; the jury brought in their bill ignoramus.

After this, the defendant brought an action againſt the plaintiff in this cauſe, for a malicious conſpiracy, and recovered 300l. damages.

After this the huſband brought his action againſt the defendant, for criminal converſation, and ſucceeded.

There were ſtrong circumſtances in proof of the charge; amongſt others, the plaintiff's own mother ſwearing it, and the expreſs and poſitive teſtimony of the witneſſes to the fact. On the other hand it was remarkable, that the mother ſhould have mentioned nothing of this to her ſon, till a long time after; but for this ſhe accounted, by ſaying, as Lord *Mansfield* obſerved, that her ſon knew enough already; and had ſufficiently ſuffered by his wife's elopement. There was great improbability, too, that men, who appear to have been utter ſtrangers and not apprized or ſuſpecting, ſhould come preciſely in time, and be ocular witneſſes of the fact; and this, I think, in noon-day, in the huſband's houſe, and the door not faſtened. And that the huſband himſelf ſhould ſwear firſt to an attempt of force; then to actual force; and then to voluntary familiarity of his wife with the ſame man. This and other circumſtances Lord *Mansfield* particularly obſerved. There was direct teſtimony of ſubornation of perjury, by the plaintiff's conſent, of the witneſſes; and this in different places, by three different witneſſes. On the other ſide, four perſons ſwore to the character of one of the witneſſes, who was living, and who ſwore the other was dead, and that he had ſeen him in his coffin; and yet there was a witneſs who ſwore an affidavit that this man was alive.

Lord *Mansfield* pronounced, That there appeared no ground on the evidence for granting a new trial; but that they might proceed by indicting the witneſſes for perjury. *Nota*—In the caſe of *Chapman*, there is farther notice taken what was the event of that indictment, and the conſequences thereon. *Vide Infra.*

Bail.

BY a late rule of the court, bail not preſent at the firſt ſitting of the court muſt wait till the riſing.

Golightly

Golightly *againſt* Reynolds.

Of trover. Vide 3 Blackſtone 152. 8vo. edit. Cro. Eliz. 434—5. 219, 485, 495, 638, 723, 824, 870, 883. Salk. 655, 666, 667. 4 Bur. 1. p. 31. 4 Bur. 1363.

ACTION of trover upon the following caſe: Action brought for ſix ſilver table-ſpoons, two ſilver ſalts, two ſilver ſalt-ſpoons, one bank-note of 20l. No. 203, dated 19th *November* 1771, and ten guineas in gold; all which were the produce of a bank-note of 50l. ſtolen by one *Fergusſon*, found on him when taken up, and produced in evidence at the *Old Baily* by the plaintiff, the proſecutor, at the trial of the ſaid *Fergusſon*, who was convicted of the theft of the ſaid bank-note of 50l.

Before the action was brought, all the ſaid table-ſpoons, ſalts, and ſalt-ſpoons, and the ſaid bank-note of 20l. and the ſaid ten guineas in gold, were demanded by the plaintiff from the defendant, who had them in his cuſtody, and refuſed to deliver them.

The queſtion is, whether the plaintiff can recover in this action?

Signed { EDWARD BEARCROFT, for defendant.
THOMAS DAVENPORT, for plaintiff.

(Copy of the original caſe laid before the judges.)

For the plaintiff it was argued, that till the 21 *H.* 8. *c.* 11. Reſtitution was not, except in appeal; but that act gives reſtitution on indictment as well as appeal. It gives indeed, a particular mode; that juſtices of gaol-delivery, or other juſtices before whom ſuch felon ſhould be found guilty, ſhall give ſuch remedy by writ of reſtitution, as by appeal; not excluding, 'tis apprehended, any other mode.

That *Hawk. Pl. Cro.* ſays, there is a mode of recovery when the goods demanded were not ſtolen from the plaintiff; when the appellee hath diſpoſed of the things ſtolen, the appellant hath a right to what the things ſtolen were diſpoſed of for; and that now the law was the ſame in that caſe. And ſo was the caſe of gold ſtolen, and changed into ſilver, *Cro. El.* 661. and cattle ſtolen, and ſold in open market, *Noy* 128.

[89]

That was this action of trover not to be good, another action cannot be well conceived. Detinue would not do properly, as being rather for the things themſelves. Trover ſuppoſes an innocent finding; but yet a wrong in the refuſal of reſtitution: which applies preciſely to the caſe.

On the other ſide, That on conſideration what the nature of an appeal is, the plaintiff has not here a writ of reſtitution. It is given on an appeal, as an encouragement to proſecute

profecute to conviction; and it is to recover the ſpecific thing. Where the proceedings are to recover ſpecific goods, the form is exact. If an appeal be to recover a ſpecific thing, one ſhould expect the form ſhould be accordingly; and in fact, an appeal, by the form, gives the recovery of the very things ſtolen: And even if any thing ſtolen be omitted, it cannot be recovered.

That if the court ſhould think the argument too ſtrong, at leaſt the defendant was excuſable, acting under great authorities, in bringing the caſe before the court.

That trover was inſufficient, when the party was taken, and the goods ſeized, on behalf of the crown, by the proper officers. That then, the plaintiff could only recover by judgment of appeal: That this would be the caſe, if the action was brought for the very goods. That if the authorities of law, cited by Mr. *Bearcroft*, on the other ſide, were too ſtrong to be contradicted, and an action would lie, without the neceſſity of bringing an appeal, yet this was not the proper action; and that the propriety of law gave detinue, not trover: For that, to maintain trover, you muſt ſtate, and be able to prove, that the party was poſſeſſed of theſe goods, and accidentally loſt theſe goods; and that the defendant found them, and refuſed to reſtore. If you never had the poſſeſſion of the goods, you fail in the ground of trover.

That this benefit is to be had as in judgment on appeal by the award of judges of oyer and terminer. But in this caſe, there being a doubt in the learned judges, whether ſuch benefit can be adminiſtered here, the proper court is miſtaken; the remedy is not here. That Mr. *Reynolds* acted under a ſpecial truſt, under obligation of office, and would be unjuſtifiable by delivery of them, without proper authority; that the writ of reſtitution is founded on improper detention; that as to this action, at leaſt, of trover, it ought not to be maintained. [90]

The judge who tried the felon ſaid, that, on the conviction, Mr. *Reynolds* declared he ſhould make no difficulty of the matter; and ſeemed then willing not to conteſt the reſtitution. The writ of reſtitution was contended as a neceſſary and deciſive remedy. To which it was anſwered, they might plead to the writ of reſtitution, ſo that it was not immediately deciſive.

Lord *Mansfield*—It would be the hardeſt prerogative poſſible, if an innocent party ſhould loſe his goods to the crown, becauſe a felon had taken them away. There is

very

very great reaſon why, before proſecution, to avoid compoſition of the felony, trover ſhould not be brought. There is no queſtion, therefore, but ſome way, and to ſome extent, a plaintiff is entitled to reſtitution. But how are we to conſtrue the reſtitution which ſhould be made? Narrowly, for the very thing ſtolen? No: Liberally, againſt ſo odious a prerogative.

Vide 3 Inſt. 242. b.

Title Reſtitution, pl. 22.

Brooke cites the 7 *E.* 2. where it was agreed by the judges of the King's Bench, and by thoſe of the Common Pleas, that in appeal for money taken *felonice*, reſtitution ſhall be where no property is known.

I don't ſee why trover is not good.—The ſtatute puts an indictment in the ſame caſe as a writ of appeal. The ſtatute ſays, it ſhall be reſtored; but leaves the party to his own way of recovery.—Since this ſtatute, it gives him a particular remedy, but does not take away his other remedy.

Vide Cro. Eliz. 278. of Reſtitution, and 638. Vide etiam, 663. which ſpeaks expreſsly to the point of this caſe.

I don't believe there has been a writ of reſtitution theſe two hundred years. The caſe has been adjudged already, in former caſes; as in *Noy* and *Cro. Eliz.* very rightly before, in favour of natural juſtice, againſt the rigour of the forfeiture.

Mr. Juſtice *Aſton*—*Croke* ſays, and this has greateſt weight, as a cotemporary expoſition, that in his time ſuch recovery of goods was common at *Newgate*. He means the *Old Bailey*.

Vide Burn, title Reſtitution of ſtolen goods vol. 3, p. 394, 4to edit.

Burn, a very judicious writer, takes it to be within the ſtatute of *H.* 8.

Judgment for the plaintiff.

[91]

Note, The words of the ſtatute *H.* 8. are, "Be it enacted "by this preſent parliament, that if any felon or felons "hereafter do rob or take away any money, goods, "or chattels, from any of the king's ſubjects—from "their perſon, or otherwiſe, within this realm, and "thereof the ſaid felon or felons be indicted, and after "arraigned of the ſame felony, and found guilty there-"of, or otherwiſe attainted, by reaſon of evidence "given by the party ſo robbed, or owner of the ſaid "money, goods or chattels, or by any other by their "procurement, that then the party ſo robbed, or "owner, ſhall be reſtored to his ſaid money, goods "and chattels; and that as well the juſtices of gaol-"delivery, as other juſtices before whom any ſuch "felon

" felon or felons ſhall be found guilty, or otherwiſe " attainted, by reaſon of evidence given by the " party ſo robbed, or owner, or by any other by " their procurement, have power, by this preſent act, " to award, from time to time, writs of reſtitution for " the ſaid money, goods and chattels, *in like manner* " *as though any ſuch felon or felons were attainted at the* " *ſuit of the party in appeal.*"

Vide 5 *Co.* 110. *Viner's* Abridgment, p. 156. title Reſtitution; and *Kelyng*, 49. Foxley's caſe.

I do not find a writ of reſtitution, directed to the ſheriff, though a friend has mentioned one; but I find a writ of reſtitution to the bailiff of a liberty; which, *mutatis mutandis*, as to that circumſtance, I conclude muſt be the ſame. I ſhall copy it *verbatim* from the *Theſaurus Brevium*. It is thus:

Writ of Reſtitution to the Bailiff of a Liberty, in an Appeal of Robbery. Theſ. Brev.

Rex, &c. W. A. *ballivo prioris domus, de* C. *&c. cum* R. T. *nuper in curia noſtra coram nobis appellaverit* T. A. *de, &c. de eo, quod idem* T. *unam burſam, &c. (recitando omnia verba ut in appello)* ad valentiam 40l. de bon. et catt. *prad.* R. & 16l. *in pecun. numerat. de denar. prædicti* R. *apud* W. *in com.* M. *invent. felonice furat. fuiſſet, cepiſſet, et aſportaviſſet, contra pacem noſtram, unde præd.* T. *per quandam jur. patrie inde inter eos capt. convict. eſt. Et pro eo quod invent. eſt per pred. jurat. quod idem* T. *ad recent. proſecut. dicti* R. *capt. fuit, ſicut nobis conſtat de record. Conſ. fuit in eadem curiâ noſtrâ, coram nobis, quod præd.* R. *rehabeat* bona, catt. et denarios ipos præd. *ac jam ex parte præd.* R. *in curia noſtra coram nobis accepimus, quod bona, catt. et denar. præd. ad manus tuas, 6 die, &c. ult. præterit. tent. apud* G. *præd. devenerunt* *. *Tibi præcipimus quod eidem* R. *plenam reſtitutim. eorundem bon. catt. et denar. ſine dilat. habere facias. Et qualit. hoc breve noſtrum fueris execut. nobis, apud* Weſtm. *die, &c. conſt. jus. hoc breve noſtrum nobis remitten. T. &c.* *

* So the copy; but I preſume it will be found thus: In curia noſtra, coram nobis, 6 die, &c. ult. præterit. tent. apud G. accepimus quod bona, catt. et denar. præd. ad manus tuas devenerunt; and ſo I have tranſlated.

* It is ſubmitted to the learned, whether by this writ of reſtitution the bailiff, or ſheriff when ſerved on him, was not on the face of it empowered to reſtore in value, in caſe the goods were loſt? The appellant, for certainty, was obliged to ſpecify all the goods on his appeal; and this writ recites the declaration, and commands reſtitution of the ſame goods, in like

[93] The King, &c. to *W. A.* bailiff of the prior of the houſe of *C.* &c. Whereas *R. F.* late in our court before us, hath appealed

like manner ſpecifying them: So that if the goods were to be had, I apprehend the ſheriff could not give the value inſtead of them; nor the appellant demand the value; but the very goods were to be reſtored: And if he had omitted any in his appeal, he could not have reſtitution of them awarded by this writ; for the writ could not contain other goods beſides thoſe in the appeal. If, however, the goods were loſt or deſtroyed by any unavoidable accident, the value of them is ſpecified in the writ.

Is not this a direction to the ſheriff in that caſe, that he may know what he is to reſtore, in lieu of the goods loſt or deſtroyed; and the appellant may know what he has to receive?

And might not the ſheriff have returned, That ſince the iſſuing of the writ, and before it came to his hands, the goods were deſtroyed by fire, or ſtolen by houſe-breakers, or the like; and therefore, that he had made full reſtitution thereof in value, according as the value of the ſame was expreſſed in the writ?

Would it not have been ſtrange, when the goods were in the cuſtody of the law, that the appellant, after the expence of proſecution, ſhould loſe all benefit of the writ, only becauſe they were deſtroyed, loſt, or periſhed, without his fault? Suppoſe they were in their own nature periſhable, and not capable of keeping; as dead fowls, or the like?

Suppoſe the very caſe here, that they had been changed by the felon before conviction; might not the writ, which expreſſes the value, have then been adapted to the caſe, and have directed the value to be given, when nothing elſe could be given? Does not the reaſon given by Lord Coke fail, if the party had omitted in his appeal to recite the goods ſtolen, the felon might have eſcaped conviction; and the writ of inſtitution ſhall not give him more than he has recited in his appeal, becauſe he ſhould be puniſhed for his neglect? But if the identical ſubjects of the appeal are gone without his fault, then may not the writ of reſtitution give him the value; or may it only recite what is not, and do nothing for him, when he has done all that the law requires? Surely if it expreſſes the value, even when the goods remain, it does not this for nought; and a multo fortiori it will give a ſuitable remedy, when the goods were gone before the appellant could be entitled to the writ.

In Plowden's admirable Commentaries, there is a diſſertation on equity of interpretation of ſtatutes—Eyſton *againſt* Studde; at the end of the caſe, among other caſes, this is put. By the ſtatute 1 E. If a man, dog or cat eſcape out of the ſhip, neither the ſhip or any thing in it ſhall be eſteemed a wreck; [and note the equity of interpretation extends this to any other creatures,] the ſheriff is to ſave all the goods he can, and keep them for a year and a day: That if the owner claim them within that time, and make his title, they may be reſtored to him; if not, they are the King's, a price being ſet upon them by the ſheriff and corporation. And they are to be ſent back to the ville or town where they are found, that it may be known what is the King's. And if the ſheriff be convicted of doing otherwiſe, he is to be impriſoned during the King's pleaſure and to pay damages. Now, ſuppoſe the goods were freſh meat or fiſh, apples, or oranges, or any thing which would not keep, and the ſheriff ſells them, and depoſites the money in the ville or town; by the letter he ſhould be impriſoned, but by the ſpirit and equity he hath done well; he ſhall not be puniſhed, he hath fulfilled the law.

I do not mean theſe obſervations to confirm the judgment, which perhaps were actum agere; and it ſtands on a better ground; but as the writ is uncommon

appeled *T. A.* of, *&c.* and that the ſaid *T.* one purſe, *&c.* [94]
(here recite all the goods as in appeal) *to the value of* 40l. of
the goods and chattels of the ſaid *R.* and 16l. in money,
of

rare, and little known, I hope I may be excuſed for tranſcribing it, and having the correſpondence it ſeems to have with the judgment.

In Tremaine's Pleas of the Crown there is a writ of reſtitution, on the ſtatute of 21 *H.* 8. which has been pointed to me.

The caſe is, Burges v. Coney: The writ runs in hæc verba——

Midd. ſſ. Dominus Rex mandavit Edwardo Coney breve ſuum, in hæc verba: ſſ. Gulielmus tertius Dei gra. Anglie, Scotie, Francie et Hibernie Rex, fidei defenſor, &c. Edwardo Coney ſalutem. Cum ad cam delib'ationem gaole noſtre de Newgate, tent' pro com. Midd. apud Juſtice Hall in le Old Bailey, in ſuburbiis civit. London. die Mercur. ſcilicet, 9 die Decembris, anno regni noſtri octavo coram Edwardo Clarke mil. major. civit. London. Georgio Treby mil. capital. Juſtic. noſtro de banco, et al. ſociis ſuis juſticiar noſtris ad gaol. noſtrum de priſonar. in eadem exiſtent. delib'and. aſſignatis ad recentem proſecution. Johannis Burges ſen. quidem Thomas Barnes, nup. de paroch. de Enfeild, in com. Mid. labourer, convict. exiſtit de eo quod ipſe 28 die Auguſti, anno regni noſtri octavo, ad paroch. præd. in com. præd. tres juvencas, Angl. three heifers, color. red pied, p'tii cujuſlibet earum 3l. 5s. et un. al juvencam, Angl. one heifer, color. black, p'tii 3l. 5s. de bonis et catal. cujuſdam Johannis Burges ſen. adtunc et ibidem exiſten invent. adtunc et ibidem felonice furat. fuit capt et effugavit, contra pacem noſtram coron. et dignitat. noſtras prout per record. inde plenius liquet et apparet. cumque ex inſinuatione præd. Johannis Burges jam accepimus quod ſeparal. juvenc. bon. et catall. præd. ad manus tuas devener. et in cuſtod. tua jam exiſt. Nos igitur volentes p'fat. J. Burges fieri quod eſt juſtum et rationi conſonan. tibi precipimus firmit. injungend. quod. juvencas bon. et catall. præd. vel. tal. eor. qual. ad manus tuas unquam devener. ſeu jam exiſtunt prefat. J. Burges ſine dilatione reſtituas et delib'es juxta formam ſtatut. in hujuſmodi caſu edit et proviſ. vel quod tu ipſe ſis coram juſtic. noſtris ad gaol. noſtram de Newgate, de priſon. eadem exiſten. de ib'and. aſſign. ad prox. delib'ation. gaole noſtre præd. in com. Midd. tenend. apud Juſtice Hall, præd. die Veneris, ſcilicet, 15 die Januar. nunc prox futur. oſtenſur. quare id facere noluiſti vel non poſuiſti et ulter. ad faciend. quod curia noſtra in ea parte ulterius conſiderare vent; et habeas ibi tunc hoc breve.

Et præd. E Clarke milit. major. civit. London. præd. apud Juſtice Hall præd. 9 die Decembris, anno regni noſtri octavo. Harcourt—Tremaine. 15.

I have been reminded, that the writ of reſtitution, ſaying ad valentiam, is not to enable the ſheriff to reſtore the value; but only becauſe the appeal, or indictment, muſt recite the value,—that it may appear, whether the offence is grand or petty larceny. I believe in highway robberies, and burglaries, the indictment recites the value; though a penny there, is as much capital felony as an hundred pound. But, ſince the reciting the value in the indictment is held to be of ſome uſe, towards aſcertaining the degree of the crime, or for other reaſons, why may not the ſame value, recited in a writ of reſtitution, be of uſe in favour of the proſecution; for whoſe relief the ſame remedy is given on indictment, which before could only be had and that with greater difficulty and circuity, on appeal? And perhaps the value is not recited in indictments ſimply to ſhew whether felony or not clergy; ſince in ſome inſtances it's felony independent of the value: but it may be to enable the crown to give relief, in caſe the goods are changed between indictment and this writ; or, if not originally intended, the general

of the money of the ſaid *R.* at *W.* in the county of *M. feloniouſly ſtole, took and carried* away againſt our peace; whereupon the ſaid *T.* by a certain jury of the county thereon between them taken, was convicted: And whereas it is found by the jury, that the ſaid *T. at the freſh ſuit of the ſaid R. was taken* as to us appeareth of record. It was conſidered in the ſame our court before us, that the ſaid *R.* have again *his goods and chattels aforeſaid.*

And now on the part of the ſaid *R.* in our court holden before us on the 6th day of *April* laſt paſt, at *G. &c.* we have been informed, that the goods, chattels and money aforeſaid, have come to your hands. Therefore we command you, that to the ſaid *R.* you cauſe full reſtitution to be made of the *ſaid goods, chattels and money* without delay. And how you ſhall have executed this our writ, you ſhall make appear before us by the return of this our writ. Witneſs ourſelf, *&c.*

Arminer's Caſe.

[95] QUESTION, whether for life or in fee? Deviſe of my worldly eſtate to my daughter *A.* for life; and after her deceaſe, to her daughters *A.* and *B.* equally, according to the cuſtom of the manor: The reſt and reſidue of his goods and chattels undiſpoſed, *viz.* the grange, to his ſon. Contended, that this, by the rules of law, was no more than for life, no more having been expreſſed. It was ſaid farther, the intent of the teſtator was, that it ſhould be no more; for in the inſtance before, where he intended to give an inheritance, he limited after eſtate for life, to them for ever. By a grant for life, he will have diſpoſed of what he calls his worldly eſtate; and this deſcription

neral equity of the caſe, perhaps, may attach to it. Becauſe the laws favour reſtitution. And by 6 Rep. 90, where Popham 191. is cited, this ſtatute extends to executors, though not named: and it ſhould ſeem greater reaſon that the ſheriff ſhould reſtore in value to the party himſelf, where the goods are loſt. And if the ſheriff ought to reſtore in value, on a writ of reſtitution; in that caſe, then the party may recover againſt the ſheriff when he refuſes to reſtore, which was the principal caſe.

Note alſo, The judgment in detinue is for the thing; or if that be not reſtored, then to enquire the value. Vide Raſtell's Entries, 218. title Detinue, pl. Judgment, ſec. 4.

In Raſtell's Entries, title Appeal, pl. Reſtitution, 1, 2, 3, 4, 5, 6, 7, you may find writs of reſtitution in various caſes, but without the words ad valentiam in general: in one of them there is, which is after verdict. However, when theſe words are omitted, the general reaſon ſeems the ſame; and when they are uſed, the value is aſcertained without circuity.

ſcription of it will be naturally and ſufficiently fulfilled, by ſuffering the particular eſtate to deſcend accordingly; and, on its expiration, the reverſion to veſt abſolutely in the heir at law.

The heir at law ſhall not be diſinherited but by expreſs terms: And though in this caſe, he might have diſpleaſure againſt his eldeſt ſon, yet he might be contented to convey the eſtate to the infants in queſtion for life; ſo as to paſs it from his ſon, during his life, in all probability, but not to the diſheriſon of his ſon's children.

Bheſon and *Barnewell*, before Lord *Talbot*, and *Tuffnel* and *Page*, before Lord *Hardwicke*, were cited to prove, that paſſing worldly eſtate, did not always infer an intention to paſs the whole intereſt.

Queſtion made, what was to be underſtood by "according to the cuſtom of the manor?

It was anſwered, it might be underſtood by cuſtomary fine, *&c.*

It was argued on the other ſide, that another deviſe was to a ſon, in the ſame words, which yet clearly paſſed a fee.

That two precedent deviſes were the ſame, where a fee was admitted, only with theſe words, *for ever*, which did not properly paſs a fee; but in a will, upon the ground of intention. The teſtator gave what was not ſpecifically bequeathed to theſe two: there was no ſpecific bequeſt beſides.

Burr. 2. by Lord *Mansfield*. *Oakes, on the demiſe of Windfall*, againſt *Bridal*.

An enquiry was made, who thoſe were, to whom teſtator paſſed remainder over; but not anſwered. [96]

It was inſiſted by Mr. *Buller*, that the bequeſt firſt made to the ſon, of the grange, excluded him from any thing elſe. And it being admitted, that the general import of the words *my worldly eſtate*, was a diſpoſal of the whole, what was there to counteract the general ſenſe here?

The caſe of *Oakes* and *Bridall* ſeemed determined on different grounds; and Lord *Mansfield* declared it ſo. For there, it being a deviſe among ſeven, of a houſe and ſtables, (a very ſmall and periſhing property) it was determined it ſhould be ſold, and the money divided.

Lord *Mansfield*—This is the conſtruction of the will of a mariner, [this appeared in the beginning of the will, I think] who ſeems not to have had much abler aſſiſtance. We muſt endeavour to make out his meaning as well as we are able. Nothing is clearer than that, generally, a fee

ſhall

ſhall not paſs without expreſs words of limitation. But in a will, it has been much held, that "*my eſtate*" was implicative of a fee, when it might be made out, from the reſt of the will, to ſignify the intereſt. As when a man ſays, "I deviſe my eſtate to pay debts." The heir at law, is not capable of being diſinherited while any part of the eſtate remains unpaſt elſewhere. This man took plainly his grange and houſe to be chattels; for he ſays, he diſpoſes ſo and ſo of his goods and chattels, not ſpecifically diſpoſed: Namely, "I give the grange to my ſon." A gift of chattels would have been abſolute.

He gives a particular eſtate for life, and remainder for ever, to his grandſon, the ſon of the heir at law; then this eſtate for life to *A.* and then equally to *A.* and *B.* her daughters, according to the cuſtom.

What can this mean? not the ſaving of another man's right; he could not have given the eſtate, ſo as the lord ſhould have loſt his admittances, *&c.* ſuch meaning would have been ſuperfluous and ridiculous. But it has a meaning, as ſignifying the intent of teſtator to paſs a fee; as he knew, *by the cuſtom of the manor, lands were inheritable.* I conſider it as a fee to the grandſon. I reſt not a little on the teſtator's eventually intending to paſs his whole eſtate, afterwards expreſſed by that ſweeping-clauſe, of all his goods and chattels not ſpecifically diſpoſed; and accordingly diſcharge the rule,

On the Will of Thomas Rowſe.

[97] *THOMAS Rowſe*, the teſtator, was poſſeſſed of a chattel intereſt, and ſtiles himſelf yeoman in the will.

He deviſes to his wife 10l. out of one of his farms, ſettled on her before marriage; ſtraw to thatch an houſe; and an hogſhead of cyder. He makes *Anne*, his daughter, an infant of three years old, his whole executrix.

And whereas his wife is with child by him, if ſhe have a child after his death, to ſuch child, if male, two third parts of his eſtate; if a daughter, one half. Then *J. Rowſe* and another made executors in truſt.

And in caſe his daughter *A.* and the after-born child *happen to die*, then remainder over.

The event of a poſthumous child did not happen; and it was queſtioned, whether the remainder over could take effect, the contingency precedent having never happened.

And

And, 2dly, If it could take effect, when? and what was the meaning, "if my daughter die?" What event was it to mark, on which the remainder might veſt?

It was not ſo much argued on the point, where the remainder could veſt, (the poſthumous child, who was to take firſt, not having been born,) as on the ſecond point, what limitation was created by thoſe words, "if my daughter die."

It was contended, that it meant *before my death*; and, if ſo, that the remainder could not veſt, as the daughter ſurvived the teſtator.

It was attempted too, I think, to be argued, that "if "my daughter, *&c.*" was inſenſible; becauſe ſhe muſt die, and therefore the remainder could not veſt at all.

On the other hand, it was argued, that here was ſome contingency certainly meant to be ſupplied: It could not be taken to expreſs a general contingency of dying ſome time or other, which the teſtator knew muſt happen; but muſt mean ſome particular contingency.

In caſe my daughter die, and in caſe the other above-mentioned children ſhall die, this is expreſſed as a contingency, though, if taken literally, it's certain. The ſupplying a contingency is where the contingency is neceſſary. [98]
By legal neceſſity, I underſtand ſuch a violent preſumption as will admit no contrary preſumption. *Corrington* and *Heller*, before Lord *Hardwicke*. In the caſe of *Chapman* and *Brown*, before your lordſhip, this court would not ſupply a contingency, to deſtroy remainders. I preſume, the reaſon is, that every part of the will muſt be performed according to the intention. I conceive, this governing rule here applied, will the moſt ſecure poſſeſſion. I here underſtand the teſtator to have had great diſlike and diſtruſt of his wife. He intruſts the care of the education of his children to his ſiſter-in-law, *Anne Rowſe*. He conſidered it might happen, that the wife, if his children ſhould come of age to diſpoſe, might induce them, from their filial love, to give their whole ſhare to the mother; if not, ſhe would come in for her diſtributive ſhare. "If my daughter *A.* "die, and the other after-born children die."

"If my daughter *Anne* die"—When? Before my death, "'tis ſaid. And the other after-born children die"—— When? Not before my death, for that implies a contradiction; and we are to ſupply two different contingencies? one to ſuit one part, and the other another part. Certainly, if ſhe die before ſhe come of age, or if ſhe die unmarried.

ried. Otherwiſe, what we contend for, that the wife ſhould not come in, would be overſet. *Chapman* and *Brown*. We can't on arbitrary conjectures, however probable, ſupply omiſſions.

Serjeant *Glynn*—The courts of law have never introduced confuſion of the executive and legiſlative power. The intention of the will, conſidered on the whole, will certainly govern. In this caſe, *A.* has a wife, a daughter, and a ſiſter. He conſiders the daughter as the ſole preſent object, and accordingly gives her all; but, recollecting there may be ſome poſthumous children, he makes the uſual proviſion of two third parts, if a ſon; if a daughter, to ſhare equally. Then are the words, "If my daughter *A.* die, "and the after-born child die." Theſe words are underſtood, on all hands, to be obſcure. Mr. *Heath* has contended, the court will not ſupply two contrary conſtructions —I ſuppoſe this rather a technical diſtinction, than ſuch an one as courts are uſually governed by in the conſtruction of a will. We do not want here, however, to ſupply a double conſtruction. If my daughter die before ſhe is of age to diſpoſe: I ſubmit, the apparent intention requires the conſtruction ſhould be, if they die before they are of age to diſpoſe. This is a queſtion of a perſonal eſtate; it's a family proviſion: 'Tis not like the diſpoſal of a real eſtate in ſeveral branches; more for perpetuating a name, very often, than for other conſiderations. It's the great part of the benefit of ſuch a gift, in our caſe, that when the parties come of age to diſpoſe they may have the abſolute power. If a poſthumous ſon ſhould have been born; if it had been underſtood, "if ſuch poſthumous ſon die unmarried," the perſonalty might be to remain forty or fifty years uſeleſs: That would be abſurd in any caſe; incredible in this caſe
[99] of ours. I contend here, no eſtate is defeated by this conſtruction: That a revertion is given to the brother and ſon of the teſtator, is begging the queſtion; and therefore, I urge the leſſee of the plaintiff has no claim.

Lord *Mansfield*—*Thomas Rowſe*, the teſtator, was poſſeſſed of a chattel, and was a yeoman.

Deviſe to his beloved wife, of 10l. out of one of the farms which he had ſettled before her marriage; ſtraw to thatch a houſe, as much as ſhe ſhould chooſe to thatch *him*; and an hogſhead of cyder. *Anne*, whole executrix, who was three years of age; and, ſuppoſing his wife enſient, if ſhe have a child after his death, to ſuch child, if male, two third parts; if a daughter, one half. Then *A. Rowſe*

and

and another made executors, in truſt; and in caſe the daughter and the after-born child happen to die, then remainder over. The idea, that courts are to find out the intention from the general view of the will, is right; and, conſidering the great abuſe of language every where, the ignorance of particular teſtators, and even of thoſe who make wills for them, that meaning cannot be found out by the accuracy of expreſſion. If the letter is taken, the leſſee of the plaintiff can't take; for the contingency has never happened; the poſthumous child has not been born. One of the oldeſt caſes that has happened in the world is, where a teſtator has taken for granted a contingency which never happened, and therefore founded a limitation over, what muſt be the fate of this limitation? This was the caſe of *Jones* and *Weſtcombe*, in Chancery. I believe, in the printed caſe, a long ſtring of caſes will be found, cited by me. Upon another caſe, the court of Common Pleas was of one opinion, this court and the court of Chancery of another. The caſe of *Craſſus* and *Scævola*, in the time of ancient *Rome*, was preciſely this: It had long been contended, that where the contingency did not take place that was primarily in the view of the teſtator, deviſe over was gone. It now ſeems eſtabliſhed, that if what was the original object of the teſtator hath not happened, that yet, what he intended further, ſhould take effect. On the will of *Preſgrave*: This was a deviſe to a child, of whom teſtator's wife was enſient, which ſhould be born after his death. The wife had ſeveral children, all in the teſtator's life. It was there held, that the child, who was to have taken if poſthumous, ſhould take: As there was no reaſon to think, if he meant the child to take if born after his death, on the preſumption that it would be ſo born, during his life. To conſider the will particularly: *Anne* was made whole executrix; ſhe was but three years old: He can't mean ſhe ſhould act as executrix; he underſtood that, by making her executrix, he gave her the reſidue. He appoints executors in truſt; he appoints his ſiſter to take care of his daughter: No other ſon or daughter was born. The daughter lives fifteen years after coming of age. The teſtator does not appear to have had any great affection to his wife: He gives little but what he muſt. The dying muſt be underſtood a contingent dying; "in caſe ſhe die," cannot be underſtood otherwiſe. The contingency, I take to be, the dying before a capacity to act as executrix: In which contingency, he

[100]

he had rather the deviſee over had taken than the adminiſtrator.

Cheſterton *againſt* Cheſterton.

For Certificate out of Chancery.

"I Give and bequeath all my freehold and copyhold eſtate." Whether this be a deviſe in fee, or for life; there being no farther limitation?

Lord *Mansfield*—The general rule, to be ſure, is, that without words of limitation, an eſtate for life only paſſes. But, I believe, whenever it takes effect, though it muſt ſtand as a determination, I am afraid the teſtator's intent is diſappointed. But in a caſe where the word *eſtate* is uſed, it ſhall be taken, the full right and inheritance; unleſs where it's plainly ſo reſtrained, that it muſt be ſynonimous to *land*, "As all my eſtate or land lying and being;" *expreſſing locality*. But here is technically and accurately, "*freehold* and *copyhold*;" theſe are eſtates of *inheritance*, and paſs as ſuch by that deſcription; and in 1746, in a caſe from Chancery, *Snees and Cornwitt* againſt *Dell and Cornwitt*, this court was of opinion, when the teſtator had ſeveral eſtates, freehold and copyhold, equity of redemption, &c. ſeven or eight different kinds, and ſaid, "I give *my* "*eſtate* to my wife"—this was ſaid to mean for life only; for the mortgage could not be given her in fee. On this, the court held clearly, that of ſuch eſtates, of which an inheritance could lawfully paſs, *viz.* the freehold and copyhold, the inheritance paſſed to the wife.* We ſhall make our certificate, therefore, accordingly in the caſe, if we don't alter our opinion; which we don't imagine. We will let you know.

In this caſe farther, from a view of the will, it appears that the teſtator has given a plain inheritance to his eldeſt ſon in another part, in the ſame terms, "eſtate."

* Verba generaliter dicta reſtringuntur ad habilitatem rei vel perſonæ.

Hilary Term,

13 Geo. 3. 1773. K. B.

Doe, on Demiſe of Burville, *againſt* Burville.

[101]

THIS caſe was argued in the King's Bench, *Michaelmas* term, *November* 1772. Special verdict.

A. deviſes in truſt to *B.* for the uſe of his wife; and after her deceaſe, to the uſe of his ſon *D.* for life, without impeachment of waſte, remainder to the heirs male of his body; and in default of ſuch iſſue, to the heirs female; remainder, in like manner, to his other ſons; remainder over to the uſe of his daughters, as tenants in common, (if two or more,) and not as joint-tenants.

Remainder to the heirs of his brother *Abraham* for ever. All the ſons die without iſſue. The daughters die, being ſeven in number, in the life of the ſurvivor of the two ſons. Queſtion, whether croſs remainders to the daughters can take place?

It was pleaded in this manner, in favour of croſs remainders.

Mr. *Le Maitre*—This being the conſtruction of a will not of a deed, and not being to the diſinheriſon of an heir, for this reaſon, croſs remainders, by implication, though by the general rule of law not admitted except in expreſs words, will be thought within the reaſon of the law; notwithſtanding the *dictum*, that croſs remainders ſhall not take place where more than two.

4 *Leon.* 14. called by Lord *Hardwicke* the leading caſe. Cro. *Ja.* cited. *Dyer* 330. The teſtator had a ſon *H.* and two daughters, and meſſuages in fee; one of 24 ſhillings value; the other of 26 ſhillings. *H.* had iſſue two ſons, who died, living the father. He deviſes one meſſuage to his daughter *Alice* and her heirs for ever and, the other to

Thomaſin

Thomaſin and her heirs for ever; and upon the death of either reſpectively without iſſue, he gives over her part to
[102] the other, and her heirs for ever; and if both die without iſſue, then to his two grandſons.

Three of the judges thought it croſs remainders to the daughters.

Dyer 300. A man had five ſons, his wife enſient of the ſixth, and he deviſed the third part of all his lands to his ſon and heir; the other two parts to his four younger ſons, by name, and the heirs male of their body begotten; and if the *enfan en ventre* was a ſon, then he to have his fifth part with his four younger brothers, as coheir; and if all five died without iſſue, reverſion to her right heirs for ever. The ſixth ſon died, and three of the younger. Adjudged, the ſurvivor ſhould have the two entire parts.

Holmes and *Meynell*, 4. *Raym.* 425. *A.* deviſes lands to his two daughters, equally to be divided between them; and if they die without iſſue, to his nephew. The eldeſt daughter died without iſſue; the other daughter entered. Queſtion, whether her entry lawful; and whether the deviſe took place to the nephew, on the death of one of the daughters only? The court conſidered it as a croſs remainder.

Cole and *Levinſon*, (*Ventris.*) Implication of croſs remainder taken, not good, on account of expreſs words to the contrary. *Cumber* and *Hill*, *Hilary* term, 7 *Geo.* 2. On a ſpecial verdict on ejectment, Lord *Hardwicke* obſerved the authority of the caſe of *Holmes* and *Meynell*. Difference taken there, as the deviſees were of equal relation.

Brown and *Williams*, Lord Chief Juſtice *Lee* cited, to proved contingent remainders might be by implication. But it was ſaid, from Lord *Mansfield*, that Lord *Hardwicke* gave his opinion to the contrary. And Lord *Mansfield* cited another caſe, where it was held that a croſs remainder was bad; becauſe, though on the event there were but two, there might have been more; and ſo not good in creation.*

Before Lord *Northington*, *Wright* and *Holford*. On Mrs. *Holford*'s will, 1767, ſeveral limitations to ſons, a limitation to daughters, not thought good; becauſe there might have been more than two. Lord *Northington* did not take that opinion to be law; determined otherwiſe: And on appeal

* Quod ab initio non valuit, tractu temporis non convaleſcet.

peal to the Houſe of Lords, judgment according to that opinion.

Before Lord *Camden* a caſe was argued, in which his Lordſhip ſaid, that croſs remainders could not be by deed, but by will. That it had been ſaid, that croſs remainders could not be between more than two; but never determined: That if it ever came before the court, it would deſerve [103] conſideration. That therefore, croſs remainders, in the caſe of children againſt more remote relations, ſhould be thought admiſſible, on the great authorities by which Judge *Doddridge's dictum* is overſet, of remainders between more than two. Theſe conſiderations will, I hope, entitle me to the judgment of the court; and, in conſequence, a verdict for a moiety.

Serjeant *Hill*—I underſtand the argument had to be diviſible into two heads:

The firſt is, that there is no force in the doctrine of croſs remainders by implication, between more than two. If it has been received as eſtabliſhed by judges, counſel, and conveyancers, I profeſs, *ſtare deciſis* is, in my idea, the beſt rule; and I truſt that the court will not overſet a reſolution ſo taking riſe, ſo nouriſhed and matured. I aſſure myſelf, I ſhall prove it not to be the *dictum* of *Doddridge* only.

2 *Roll's* 471. A cotemporary judgment to *Gilbert* and *Witten*, ſays, it was not the opinion of *Doddridge* only, but of three of the judges who ſat, againſt the Lord Chief Juſtice. Lord Chief Juſtice *Pemberton* underſtood thus in the caſe of *Holmes*, 2 *Jones*. The caſe of *Gilbert* and *Witten* agrees with the caſe here, only with the difference of being between two; for it cannot be between three or more. I underſtand Sir *T. Raymond's* argument, which he has reported in the ſame manner. Let me take notice of the firſt caſe, *Dyer* 303. The caſe there was not looked upon to be law: The words are "*il ſemble*," which implies a reporter's opinion only. It was cited in ſubſequent caſes, alluded to, but not admitted to be law. *Hales* ſaid, Nor would it be if it was in a will; for croſs remainders cannot be between three or more, without expreſs words.

The next in which the doctrine was received, that croſs remainders cannot be between more than two, is *Williams* and *Brown*. There it was ſaid, the court relied on the caſe of *Coomber* and *Hill*; and ſaid afterwards, that croſs remainders cannot be to more than two: This is not the only caſe. *Marriet* and *Townley*, 1. *Vez.* Lord *Hardwicke* ſays, with expreſs words, "there might be croſs remainders

ders to more than two, with expreſs words:" Doubtleſs, they might; but we ſay, not without: And this appears to have been the opinion of ſome of the ableſt judges that ever ſat on the bench. I underſtand the caſe to have been very different before Lord *Camden*; it being on articles for conveying ſtock, and articles being executory.

The caſe of *Wright* and *Lord Cadogan*, cited on the other ſide as *Wright* and *Holford*. If I may be expected to ſpeak ſomething of reaſons, (which, in a queſtion drawn from obſcure antiquity, perhaps is not neceſſary) Lord *Hardwicke* [104] conſidered it to be the avoiding ſplitting of tenures. Other reaſons have been attempted; but I contend for it as a fixed maxim of law, which it is now too late to ſhake. The predilection of a teſtator to his own children, preferably to remote relations, has been argued. I don't deny it to have weight; but I ſay, no queſtion was ever determined on it ſingly.

I come to the ſecond queſtion, Whether, whatever may have been the general rule, any implication may be raiſed here, from the words of the will?

Coomber and *Hill*, Lord *Hardwicke*. "The rule is, and "I know not a better or clearer, to make croſs remainders "there muſt be either expreſs words, or neceſſary implica-"tion. The words, when to take place by neceſſary impli-"cation muſt be ſuch as cannot be ſatisfied by any more than "one conſtruction." I apprehend too, that croſs remainders are in the nature of a jointenancy; ſo that, here croſs remainders would be contrary to the words of the will, which expreſsly exclude jointenancy: And when the teſtator has deviſed a tenancy in tail, in common, I cannot ſee how we are to imply croſs remainders.

The gentlemen muſt be driven to ſay, that the court is warranted, in the conſtruction of a legal deviſe, to inſert words between the ſubſtantive deviſe and the laſt contingent remainder, to create croſs remainders. I conceive, it ſtands totally indifferent, whether the teſtator meant to raiſe croſs remainders or no.

In the caſe of *Leach* and *Jackſon*, 1771, Lord *Apſley* ſaid, the doctrine in the caſe of *Wright* and *Lord Cadogan* did not, he underſtood, overſet the doctrine we contend for.

In reply, Mr. *Le Maitre*—The caſe of 4 *Mod.* has never been anſwered. As to the ſtreſs laid on jointenancy, the teſtator is *inops conſilii*; and other meanings might be underſtood of that word; as that they ſhould not take jointly, to the diſheriſon of thoſe in remainder. Intermediate words

do

do not appear neceſſary to be inſerted here, when the remainder is to a remote relation. With regard to *ſtare deciſis*; I always thought, that there ſhould be a reaſon which either continues to exiſt, or exiſted at the time, or at leaſt no reaſon to the contrary; *et malus uſus abolendus*.

Lord *Mansfield*—It will be proper to argue again. It has been very well argued; but I would wiſh the order inverted the next time: Firſt, "By conſidering what the intention is;" and then, "Whether it will be good, or otherwiſe, by any rule of law." It's obſervable, that the eſtate is diviſible into three parts: He deviſes to his ſons for life, ſucceſſively; with remainders to the heirs male of each reſpectively; remainder to their heirs female reſpectively: So that the heirs female muſt take before it deſcends from one ſon to the other. He limits to his daughters, not calling them heirs female, but daughters; then in a familiar manner, to be drawn technically afterwards, with remainders. [105]

As to neceſſary implication, That is now admitted to underſtand highly probable implication. As to confuſion, If the daughters died without iſſue, and there were ſix more, it would create as much confuſion by deſcent as by croſs remainder. If in the caſe before the Houſe of Lords, the queſtion was expreſsly on that point, it will have great weight; but if it was *in tranſitu*, it will have much leſs. What Lord *Hardwicke* ſaid of neceſſary implication, muſt be underſtood in the general view; or otherwiſe it muſt be by expreſs words, and not implication. Let the whole will be added to the caſe.

The entire caſe appears to be this, which I had from a draught ſhewn me by a friend, and which appears very accurate.

The teſtator was poſſeſſed of three eſtates: His capital meſſuage, and lands thereunto belonging; an eſtate at *Headcorne*; another at *Boxley*; all in the county of *Kent*. By his will he deviſes his capital meſſuage, and the lands thereunto belonging, to his wife for life.

Remainder to his eldeſt ſon *James*, in tail male; remainder in tail female.

Remainder to his ſecond ſon *John*, in tail male; remainder in tail female.

Remainder to his third ſon *George*, in tail male, with like remainder.

Then follow theſe words, "And for want of ſuch iſſue, "to all and every my daughter and daughters, as tenants "in

" in common, if more than two, and not as joint tenants, " and to the heirs of their bodies iſſuing."

" Remainder to the heirs of my brother *Abraham* for ever."

The ſame diſpoſition of the eſtate at *Headcorne*; only the ſecond ſon is preferred, and the eldeſt named laſt.

The ſame as to the eſtate of *Boxley*; only the third is preferred.

[106] The like remainders to the daughters, in the ſame words.

The like remainder to the heirs of *Abraham*, in fee.

The teſtator had three ſons and ſeven daughters. All the daughters are dead in the life of the ſurviving ſon, *John*, who is dead, as all his brothers, without iſſue.

1000l. portions given to his daughters, to be paid on the day of marriage with conſent of his wife. 30l. *per annum* if, after coming of age, they ſhould chooſe to live ſeparate.

Deviſe of 10l. *per annum* to his brother *Abraham*.

This was tried in the aſſizes of the county of *Kent*. Queſtion, If croſs remainders to the daughters?

5th *February* 1773. Mr. *Cox*—This gentleman, though perhaps not poſſeſſed of a very large fortune, ſeems deſirous of making a very ſtrict ſettlement.

The whole will is now ſtated, purſuant to the directions of the court.

If there was a doubt what was the intent, I hope it is now clear. He appears to have had an inclination very ſtrong, to keep the eſtates ſeparate. If croſs remainders can take place, then part of the eſtate may be in the daughters of *James*, and part of the ſame eſtate in the heirs of *John*.

Theſe words I look on as very remarkable: " And in " default of ſuch iſſue, to all and every my daughter and " daughters, if two or more, *&c.* as above."

" If two or more," is expreſsly, as if he had ſaid, more than one. If the ſix daughters die, is it poſſible that the ſurviving daughter ſhould not take the whole, before the heirs of his brother *Abraham*? Then, if on the death of any daughter, the part of that daughter was to go to the heir of his brother *Abraham*, yet on the ſurvivorſhip of one daughter after all the reſt, the whole would be to be retained, how is this to be conceived? He ſays too, " *her* and their bodies," uſing the ſingular number. Then remainder to the heirs of his brother *Abraham*, who could be no particular perſon he could have in contemplation, the remainder being to take place after the death of his ten children. I muſt obſerve, with reſpect to the caſe of *Gil-*

V. ſupra, Pitt *and* Harbin.

bert

bert and *Witten*, that it, and the cases which have been governed by it, which have been very few, stand principally upon the single *dictum* (very respectable, indeed) of Justice *Doddridge*. [107]

The intent of the testator has always been very strongly considered: The limitation over has been in favour of a person in being. The understanding of words in devises has great difficulty. The court, in *Gilbert* and *Witten*, says, "The testator having given several messuages *distinctly*, to "several persons, there is no cross remainder; the testator's "express intent being to keep the estates separate." Mr. Justice *Doddridge* said, "*Cross remainders cannot be by impli-* "*cation between more than two.* The estates having been "given severally here, cross remainders would be against "the intent." Great opinions have been against that of Justice *Doddridge*. *Holmes* and *Meynell*: The contrary opinion was declared more consonant to the intent of the testator, which ought to govern. As to the opinion of the court in that case, founded on the expressions, we may well admit it. Lord *Northington* took notice of the *dictum* of *Doddridge*, which, he says, he did not know had ever been solemnly determined.

2 *Roll's Rep.* 224. Here the original limitation was in favour of two strangers; remainder to the heir at law.

Dyer 330. In this case the declared project of the testator was to keep the estates separate to the issue of his eldest son.

"To the heirs of their bodies respectively." Here the plain intention was, to keep separate; and the remainderman was in equal degree. Lord *Hardwicke* laid great stress on the word "*respectively*:" That it was the same as if a moiety had been given: *That it cannot be understood by implication, that the testator meant to give over his estate, while heirs of his own body were still living.* *Brown* and *Williams*, 2 *Strange*; here, too, was the word "*respectively*."

Cole and *Levinson*. This was on covenant to stand seized to uses. The court said, it would have been otherwise in a will.

Dyer 303. I believe, Lord *Hardwicke* calls the leading case: A man had five sons; his wife ensient of a son.

4 *Leon* 14. There the limitation was in favour of sons; the remainder over was to a stranger. An heir who might be an hundred years hence, seems equal to a stranger. Case of *Holmes* and *Meynell*, *Skinner*.

The court ſaid, "*That to give againſt the child of the teſtator, would be againſt nature.*" That even the words would
[108] not be ſufficient, any more than the intent; the words being, "If *they* die," which cannot be ſatisfied by the death of one. He ſaid, he approved the diſtinction of *Doddridge*. What he might probably conſider as the diſtinction here, I can't pronounce; but, as he declares the eſtates given ſeparate, were to be kept ſeveral, it takes it out of our caſe.

Wright and *Cadogan*. Lord *Northington* had ſo prepoſſeſſed himſelf in favour of croſs remainders, that he would hardly ſuffer Mr. *Yorke* to argue it.

Twiſden and *Locke*, before Lord *Camden*. Queſtion, Whether croſs remainders?

Lord *Camden* ſaid—"*I am clear croſs remainders cannot be "in a deed by implication——Courts uſed to lean againſt them.* "*Doddridge, arguendo*, ſaid, That croſs remainders cannot "be raiſed by implication: *If it comes to be argued, it will "deſerve conſideration.*" The word *reſpectively* had great ſtreſs laid upon it. In the other caſe, croſs remainders would have been allowed, if it had not been for the word *reſpectively*.

As to inconvenience, Suppoſe *Abraham* had had ſeven daughters: Take the other part; will not the confuſion in that caſe, on their ſide, be equal?

It has been argued in favour of relation——Here is a regular gradation: Firſt, the ſons; then, the daughters; then, on all their dying, *&c.* the remainder to the heirs of his brother *Abraham*.

The words *with remainder*, I hold to be of great force. A remainder I underſtand to be, what I have not diſpoſed already. It appeared on enquiry, that the teſtator died about four months from making the will.

Lord *Mansfield*—Are you at all agreed as to the age of this man and his wife?

Anſwer—Whatever his age was, it appears by the limitation to his daughter, he had not in contemplation any daughters hereafter to be born:

Mr. Juſtice *Aſhhurſt*—After limitation to his ſon, limitation goes immediately to his daughters: So that he had no contemplation of having more ſons.

Mr. *Wallace*—We are to conſider, Whether the intent of croſs remainders to be created, was in the teſtator.
[109] Next, Whether the rules of law will maintain it. To the ſons it was clearly an eſtate tail; their daughters were not to take by purchaſe; there could be no croſs remainders between

between them. The daughters of his ſons are preferred to his own daughters. We are not in the caſe of perſons entirely unprovided for.

If a meaning in favour of ſuch remainder can be made out by the words, the rule of law muſt take effect. I don't ſee any difference in the words, "for default of iſſue," to ground a ſtrong diſtinction upon.

The undivided eſtate is relied on much: But making them tenants in common is equivalent to cutting it into ſeven portions.

In the caſe of *Dyer* 303. the words governed.

In the caſe of *Leonard*, the words *whole eſtate*. For it cannot be taken, that on the death of one the other ſhould be ouſted by the remainder-man.

The caſe of *Holmes* and *Meynell*.

Caſe of *Wright* and *Cadogan*. If Lord *Northington* determined without argument, according to Mr. *Cox*, I preſume it's left open for argument. Here the matter in queſtion was, as to validity of articles of appointment: This part of the caſe did not come into conſideration. The parties, I know, ſtill underſtand that matter to be open to argument. I therefore apprehend, the decree of the Houſe did not decide this point.

The caſe determined by Lord *Camden* was on articles of marriage; refers to the caſe before Lord *Northington*, which I have relied on to be open to argument.

As to the rule of law—

The caſe in *Dyer*, commonly called *Huntley*'s caſe.

This was decided on deviſe of *an entire tenement* to two different perſons: On the death of one, moiety to remainder. This is ſubſequent in time to the other, quoted by Mr. *Cox* from the ſame book.

Gilbert and *Witten*. On the death of one, the whole to remainder-man. I allow here there are three tenements.

Comber and *Hill*. My Lord *Hardwicke* did not determine on the word *reſpectively*, but as of additional force.

Lord *Hardwicke*—Croſs remainders have never been created by the words "for default of iſſue." Mr. *Cox* would carry the words to that effect. [110]

Brown and *Williams*. My Lord Chancellor was of opinion, the caſe was not ſtrong enough to admit croſs remainders, which are never favoured by law, and can only be created by neceſſary implication. Then the words *ſeverally* and *reſpectively* were taken notice of, as effectually diſjoining.

Let us see what can be done in raising cross remainders between more than two.

Mr. Justice *Doddridge* says, Although, peradventure, a cross remainder may be between two, yet if there be more than two, cross remainders cannot be without express limitation; because of the great inconvenience and uncertainty.

Justice *Bridgeman*, *Carter* 171.

Meynell and *Holmes*, allowed by Justice *Pemberton*.

Cole and *Levinson*, Justice *Hale* allows it.

Lord *Raymond* had prepared an argument on that ground, which he gives in his Reports; but had not occasion to argue it.

Brown and *Williams*. Lord *Hardwicke* says, On account of the great confusion and uncertainty, cross remainders shall not be between more than two.

Justice *Lee* says, The rule of *Doddridge* has been understood as law.

As low as 1748, Lord *Hardwicke* continued in the same opinion. 2 *Vezey* 105. The law avoided cross remainders between more than two on original grounds, to avoid splitting of tenures. I have mentioned another reason, because of the uncertainty of the estate to be taken by the survivor. By express words, he says, they may.

Lord *Camden* did not judge it determined: He said only, If it was brought in question, it would require to be solemnly argued.

As to this distinction imputed to Justice *Doddridge*, of remainders between two, and between more, it seems to
[111] have been considered as law before his time, and has been recognized ever since.

Lord *Mansfield*—If it had been determined in this appeal in the House of Lords, in the case of *Wright*, all the judges would have been called on. A determination would have had great weight. I was in the House, and left it before the decree was made, as nothing difficult was entered into. The decree went on the other ground.

Mr. *Cox*—What I argued was with a view, not of considering whether one estate-tale might be consolidated out of two; but that no son of *John* could take while *James* was living: It was argued, that "with remainder," has no more effect than "on default of issue;" it seems to me, that "with remainder" has the effect of confining the sense of the words "on default of issue" to the death of all the daughters.

In the case of *Dyer*, the word *all* did not determine.

In the case of *Leon*, the words did not determine.

As to recognizing the words of Justice *Doddridge*, I take the ground of his *dictum* not to be in our law.

Tenancy

Tenancy in common, it was ſaid, muſt operate to ſeparate the eſtates. I will then aſk, what is to become of the words "to all and every my daughter and daughters;" and then again, "to the uſe of *her* and their bodies?"

Lord *Mansfield*—This is a caſe, which has been greatly agitated for above a century; and it will require being ſpoken to with preciſion. Let it therefore ſtand over. 'Tis a rule of property; and it is of much greater conſequence that it ſhould be determined, than on which ſide. The teſtator had no idea of *Abraham*'s taking; he carries over to the heirs of *Abraham*; which gives an appearance as if *Abraham* was to take after his lineal deſcent ſhould fail. This is as in the caſe of ſettlements; it is a family proviſion: 'Tis made in form of ſtrict ſettlement. Where implication has been received, it has not been by technical words, as in a deed, but by evident expreſſion of intent.

It came to judgment in *Eaſter* term, 22d *May* 1773.

Lord *Mansfield*—One *George Charlton*, having a wife and three ſons, *James*, *John*, and *George*, and ſeven daughters, made his will in 1770. He gives portions; makes regulations concerning time of payment, conſent and the like. He gives a legacy of 10l. to his brother *A.* which is no otherwiſe material than as ſhewing him alive. He gives ſome lands in fee to his eldeſt-ſon; then, of other eſtates, firſt a deviſe to his wife for life, to *James* for life, remainder in tail-general, like remainder to his other ſons; then limitation, to the uſe of all and every my daughter and daughters, if two or more, as tenants in common, and not as joint-tenants, and the heirs of her and their bodies iſſuing, remainder to the heirs of my brother *Abraham*. Then, of the ſecond eſtate, after limitation, to ſons as before; and for default of ſuch iſſue to all and every my daughter and daughters, as tenants in common, and not as joint-tenants; [*the reſt as above.*] Then the third eſtate in like manner, as tenants in common, and not as joint-tenants, &c. with remainder to the heirs of my brother *Abraham* for ever. The teſtator died, leaving iſſue his three ſons and ſeven daughters. The daughters all died without iſſue in the life of the ſurviving ſon; the ſon is alſo dead without iſſue: Queſtion, without ſtating how it ariſes, Whether croſs remainders can be between the daughters? If croſs remainders, a verdict for a moiety; if not, a non-ſuit. 'Tis certain, that ſurvivorſhip by expreſs terms may be limited. *Now, if the intent may be clearly ſeen, ſtrictneſs of words is not required by law upon a will.* The argument did not

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not ſo much reſt on the intent, as on a rule of conſtruction echoed backwards and forwards. 'Tis certain, as to the reaſon aſſigned why croſs remainders ſhould not be between more than two to avoid ſplitting of tenures, this might come in by way of argument; for certainly, by law, there might be ſuch remainders. But as this rule has been frequently uſed in argument, and even judgment, though never judicially decided on alone, we think it ought to have great weight, as far as the meaning goes; which we take to be, "that between two, preſumption is in favour of "croſs remainders; between more than two, preſumption "is againſt them: But either may be counteracted on evidence of intent."

In the caſe of *Coomber* v. *Hill*, croſs remainders were diſallowed.

In the caſe of *Browne* v. *Williams*, for the ſame reaſon.

Gilbert v. *Witten*, between three croſs remainders, diſallowed.

Cole v. *Levinſon*, Juſtice *Hale* ſaid, That if croſs remainders were between three, it would not be allowed, unleſs intent.

In *Mariot* v. *Townley*, Lord *Hardwicke* ſaid, That croſs remainders could not be between more than two, *unleſs it appeared by the words plainly to be the intent.* The words in that caſe were "as joint-tenants."

In *Gilbert* v. *Witten*, [Juſtice *Pemberton*] The court will not effectuate croſs remainders between more than two, *unleſs the intent be plain and unavoidable, ſo as to force the court to give them.* We will ſee what intent appears here; now he evidently regards the order of ſucceſſion; the female line is to take after the male in every one of the eſtates limited, ſucceſſively, to his three ſons. Then his daughters have their limitation. He evidently preſumed his daughters might be reduced to two, or one only, before the time of ſuch limitation taking effect to them. If *two or more* are the words, and they are to take nothing leſs than the whole, *remainder (in the ſingular number)* to the *heirs* of his brother *Abraham*, not expecting his brother ſhould live to take; if he had expreſsly given to his daughters, to take by ſurvivorſhip, this would have made what the law calls a croſs remainder; and he has done it as effectually as if in technical terms. *There would have been no doubt had it been leſs expreſs in words, for the limitations are ſo ſtrict in deſcent, that it cannot be ſuppoſed the heirs of* Abraham *were to take while any deſcendants of the teſtator ſurvived, according to the ſucceſſive deſcent*

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deſcent he had eſtabliſhed. If there had been one daughter, ſhe was to have taken nothing leſs than the whole; the heirs of *Abraham* were to take nothing leſs than the whole. *The teſtator could not have limited croſs remainders more clearly and ſignificantly.* My brother *Willes* is of the ſame opinion. Conſequence, that verdict ſtands for the moiety.

St. John *againſt* Errington.

ON a feigned action of a covenant, to try the right of an advowſon under a will, as between the deviſee and the heir at law.

Words "contracted and agreed" determined to ſignify purchaſe as well as contract.

The words *contracted and agreed*, determined by circumſtances of intent to include and paſs with effect eſtate abſolutely purchaſed as well as in contract.

The caſe then ſtated appears thus: The teſtator had a very large eſtate in diverſe other counties, but in the county of *Hampſhire* had nothing at all. He had a mind to purchaſe there for his wife. He afterwards, in conſequence of this inclination, enters into articles for the purchaſe of an advowſon. Under theſe circumſtances, and *having one advowſon, actually purchaſed, and the contract upon the other being executory, he makes his will*, and gives thus: All my *advowſons* in the county of *Hants, for the purchaſe whereof I have already contracted and agreed*, to his wife. Theſe, I think, are the very words. Queſtion, Whether the purchaſed advowſon, with that for which he had only contracted, paſſed?

Lord *Mansfield*, in delivering the judgment of the court, was very brief. He obſerved, *That the teſtator conſidered a purchaſe as well paſſing under the expreſſion of contracted and agreed for; every purchaſe was a contract, and ſomething more.* The teſtator rightly conſidered every thing complete, but the mere form of conveyance. He took, therefore, no difference between a contract *executory* under ſuch circumſtances, and *one executed.* We can't ſatisfy the intent; and ſhould violate the words, if we did not take it as a deviſe to the wife of *both advowſons.*

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After the judgment, Mr. *Wallace* got up, and ſaid—To ſatisfy your Lordſhip fully, how perfectly right you was in conſtruction of the teſtator's intent; I may now produce, what was perhaps no legal authority in this ſtage of the buſineſs, the inſtructions given by the teſtator in his own hand-writing: "All my advowſons in the county of *Hants* "already

" already purchaſed, or for the purchaſe whereof I have " contracted and agreed."

For what paſſed in the Common Pleas, *vide infra.*

Arminer, Aſſignee of Grey; *againſt* Spotwood.

An execution againſt a bankrupt adverſe, and not procured by him, ſhall not make a bankruptcy relate to the day of the ſervice of the writ; though a fraudulent uſe may have been made, a ſecret judgment ſhall not bind the goods. Attachment does not ſeem to mean execution. If the creditor does not proceed to actual execution, but lies by till act of bankruptcy, he ſhall loſe his goods notwithſtanding ſervice of the writ; for they are oſtenſibly the goods of the bankrupt, and as ſuch the creditor ſhall take them.

ON an iſſue directed out of Chancery, to try whether the bankrupt became ſo the 5th of *April* 1769; or on any, and what time——

This caſe came on to be argued in *Michaelmas* term 1772; and was thus, on a ſpecial verdict.

An execution on the 5th of *April* 1769, againſt the defendant, *bonâ fide*; but kept ſecret from the creditors till—— 1769: Execution was openly levied, the ſheriff's officer lived all the time in *Grey*'s houſe; ſome time after, by agreement, *Grey* paid *Spotwood* a debt of 1400l.

It does not appear of what value, or of what kind, the goods. In the interval, nobody ſuſpected the goods to have a ſecret lien on them; and he contracted ſeveral great debts. On the 8th of *May* the jury find an act of bankruptcy: Queſtion, Whether this was an act of bankruptcy on the 5th of *April*, within the 21 *J. c.* 18. which recites to this effect; Whereas frauds daily encreaſe, to the great hurt of the realm, *&c.* and provides, that if a trader departs the realm, procures arreſt, or makes fraudulent conveyance, that he become a bankrupt; or by procuring his goods to be attached or ſequeſtered? If the defendant has procured his goods to be attached or ſequeſtered, or made a fraudulent conveyance, he then is within the act; conſider him under both theſe appearances.

It was obſerved by Mr. Juſtice *Blackſtone*, That the law is very anxious to catch a trader on the firſt inſtant of his decline, that he may not wantonly proceed to ruin himſelf and his creditors. The caſe of *Slater* v. *De Mattews*, was an aſſignment of all; but the * court, in their judgment of that caſe reſted here. Suppoſe a bankrupt can favour a creditor by an aſſignment of all, yet the ſecret conveyance was fraudulent. *Burr.* 821. Juſtice *Denniſon*:—An aſſignment of all is an act of bankruptcy; becauſe it muſt be fraud. Juſtice *King*, in the caſe of *Jacobs*, ſays, That an aſſignment of part if fraudulent, is an act of bankruptcy.

It may be obſerved, that the conſtruction of penal ſtatutes muſt not be extreme: Firſt, This is not on a penal ſtatute, for ſtatutes of bankruptcy are not conſidered penal. But I know only one rule, that all ſtatutes muſt be conſidered,

ſidered, as ruled in *Heydon*'s caſe, to advance the remedy and public good; this was the opinion of all the judges in the Exchequer. The ſtatute of 21 *James* declares, all laws concerning bankruptcies ſhall be conſtrued liberally and beneficially to the relief of the creditor.

Whether the execution is taken as procuring his goods to be ſequeſtered, or a fraudulent conveyance, *Grey* is liable on either account.

Mr. *Manſfield*, on the other ſide—Mr. *Wigmore* has properly obſerved, That we muſt find the deſcription of a bankrupt in the laws to that purpoſe.

1ſt. The execution was not by procurement of the bankrupt, it was a violent act: It was therefore no conveyance or procurement. The ſtatute of *James* ſays *willing*.

As to the word *attached*, ſuppoſing *fieri facias* to be an attachment really in itſelf, yet it was not a voluntary procurement to be attached. I know, by the ſtatute law, from the time of the writ delivered to the ſheriff, by the common law, from the date of the teſte, the execution relates; but to which ever it be referred, it cannot affect the bankrupt, for it was not his act. This was not of the bankrupt's procurement. Shall we ſay it was from the ſale? It is complained the bankrupt prevented the ſale: So far, then, he rather hinders the attachment. Unleſs Mr. *Wigmore* can prove, that the letting a man continue in poſſeſſion after execution be an act of bankruptcy, there is none here. 29 Car. 2.

As for bankruptcy by relation, there are but two kinds of it that I know by the law: That of being arreſted, and an eſcape; or being arreſted and thrown into priſon.

As to the caſe of *Slater*, it was by colluſion between the bankrupt and the principal creditor. Whether a conveyance can be without deed, I will not go to determine; but the want of a voluntary act of *Grey*'s in the departing from the goods, is ſufficient to throw it out of the ſtatute. [116]

On the other ſide it was argued, That the agreement was a fraud, by keeping it ſo long ſecret from the creditors; and this by reaſon of an agreement, on account of which *Spotwood* had 1400l. by him from *Grey*. The execution ſhall be ſaid to have been procured, as the defendant availed himſelf fraudulently of the execution. Thus a nuiſance, by every continuation, ſhall be a new erection. A lawful entry, and an unlawful act thereon, makes the entry treſpaſs by relation.* In replication.

Lord

* Qui malo intuitu facit aliquid videtur peccaſſe ab initio.

Lord *Mansfield*—I ſhould be glad to have all this heard again; it's yet a new caſe. Whether an execution be an attachment, was ſoon determined. Whether the execution was for a *bonâ fide* debt? and Whether the execution was adverſe? are the two great queſtions.

If the execution was *bonâ fide* the plaintiff by the ſtatute of *James*, by letting *Grey* continue in poſſeſſion of the goods, loſt them entirely. On a former trial it was proved a *bonâ fide* debt, and the execution was clearly proved; adverſe threatning letters were ſent; delays of execution threatned therein, frequently procured by the defendant. Having then a leaning, which every man ought to have, to catch hold of any fraud there might be in the tranſaction, it being of infinite public concern, I had a doubt, whether there might not be a relation to the time of execution, by the ſubſequent agreement between the plaintiff and defendant, on which the bankrupt preſerved his credit, and had dealings continued with him in the ſhop, by people who had no ſuſpicion of the nature of the tranſaction between them. It may be found, from the circumſtances of the caſe, leſs or more criminal. As if it was premeditated; or on the contrary by repeated intreaties, and out of indulgence, without a concerted ſcheme long before.

I would have the queſtion be, Whether the uſe made of the execution ſhall relate to the 5th of *April*, ſo as to come within the ſtatute of *James*?

I have always underſtood, with regard to conveyance to create a bankruptcy, that ſuch conveyance muſt be by deed.

28 Jan. 1773. Serjeant *Glynn* contended, That the judgment was an act of bankruptcy by colluſion, if the words had been leſs expreſs; for that any colluſion would create a bankruptcy. That by the words of the ſtatute it was ſo: If a trader procure his goods to be attached, it is an act of bankruptcy. The words of the ſtatute of *Elizabeth* authorize me to ſay it is; and if the ſtatute had not, the ſpirit of the law would.

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Mr. *Grey*, we aſſert, procurred the *fieri facias* to be ſerved on him, and his goods to be levied the 5th of *April*; attachment is ſaid not to refer to execution.

Attachment on meſne proceſs cannot be the evil meant to guard againſt, nor attachment on the cuſtom of *London*; but an execution is almoſt the only means, except conveyance of intereſt, which is provided for ſeparately. An execution is the miſchief to be guarded againſt.

If

If any perſon procures his goods to be attached or ſequeſtered—Sequeſtration is expreſſed with a view to Chancery proceedings; attachment to all kinds of ſeizure by proceſs of law. It is ſaid, in one of the acts of bankruptcy, that ſanctuary ſhall not be for bankrupts. A ſanctuary was a word ſtrictly defined, with a proper ſtrict application. There was no ſanctuary, in its proper ſenſe, at the time of the ſtatute; yet, that the words may not be nugatory, they were taken to be meant of places privileged from arreſt. Attachment has no ſuch confined ſenſe: It has been uſed conſtantly, as a much more general word than judgment or execution.

Mr. *Manſfield* has argued the ſtatute of frauds, by which, though formerly relating to the teſte, the title is made good from procuring the *fieri facias*. But in caſe of bankruptcy, the execution ſhall not be complete againſt creditors upon a commiſſion of bankruptcy, till ſale.

Lord *Raymond* 251. Though a writ of *levari facias* be firſt delived to the ſheriff, yet if the ſheriff executes a writ delivered afterwards firſt, this binds the property, and the party muſt be content to have remedy againſt the ſheriff. The time, I conceive, to prevent a title to aſſignees, muſt be the actual ſeizure of the goods. In this caſe, the very ſeizure is infected with fraud. Smallcombe *againſt* Crefs and Buckingham, ſheriffs of London.

You cannot, I apprehend, my Lord, ſuffer tranſactions of this kind, and ſay the entry was *bonâ fide*, and the fraud commences at the ſeizure. I hold it to be a ſettled rule of law, That he who enters upon a proceſs of law, and abuſes it to an illegal act, he is a treſpaſſer *ab initio*.

The officer does not appear as a bailiff: Mr. *Grey* carries on his trade as if nothing had happened.

All this muſt be underſtood, therefore, for the benefit of *Spotwood* and *Grey*, by colluſion between them and the bailiff. *Burr.* 37. *Rice* and *Serjeant.*

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In our caſe here was a long delay, which can't be underſtood as fair; but ſhews that he did not mean to uſe the writ for his recovery of his own debt, but for the purpoſe of ſerving *Grey* againſt the other creditors. This attachment or execution, therefore, is within the meaning of the act; and, conſequently, an act of bankruptcy.

Mr. *Wallace*, for the defendant—The queſtion is, Whether *Grey* became a bankrupt on the fifth of *April*, or no? We are on a queſtion of poſitive law, which has never been extended by any equitable conſtruction. There are many inſtances, where the miſchief has been as great to credi-

creditors, and the general intereſts of commerce, as any provided againſt by the ſtatutes; yet on none of theſe can your Lordſhip take an act of bankruptcy to be committed, except where founded plainly in the expreſs words of the ſtatute.

The only words applicable to the caſe are, "If any perſon procures his goods to be attached or ſequeſtered, with "an intent to delay or defraud his creditors." Attachment is taken by Serjeant *Glynn* to be a proceſs on perſonal goods at law: Sequeſtration, on the perſonal goods in Chancery. There is no ſuch proceſs in Chancery to this effect: There is attachment in ſome of the courts of *London*, and there is ſequeſtration; both by cuſtom. The effect of the attachment is to bind the goods from the ſerving of the writ, though execution be not levied immediately. But Serjeant *Glynn* will have notice of the writ to the defendant. Notice is never given to the defendant. In this caſe an agreement is ſtated after the entry of the officer. Does this make procuring an execution?

The defendant then on the writ, finding that it was intended by *Spotwood* to have execution immediately, intreats him to ſtay execution; for he ſhould be ruined in his trade: "Keep it a ſecret; I may be able to pay in a few days." *Grey* knew not of the writ; he is frightened with an execution in the houſe. The creditor, therefore, is fooliſh enough to forbear his right. Afterwards *Grey*, not being able to ſatisfy the debt, the execution is executed, and the goods ſold. He procures an execution, which came on him on a ſudden, without a ſhadow of profit. A treſpaſſer may be *ab initio* in ſome caſes, where the *quo animo* appears from the firſt by the ſubſequent act.

If a man uſes a diſtreſs as his own goods, the law will ſay, You took it not as a diſtreſs, but to uſe them illegally. So if a man goes into an inn, and takes any of the furniture from thence; You came, the law ſays to him, not to uſe the inn, but to ſteal. If a man ſuffers goods of his own
[119] to be in a man's hands, and appear the man's own, this does not make the man a bankrupt; but the creditors ſeize all the goods. In this caſe there is no enlargement of conſtruction to be made.

Bankruptcy is a crime; conſidered as ſuch by law; and ſubject to the moſt heavy puniſhment. Shall another man's act, done without my knowledge, be my crime?

Replication. Serjeant *Glynn*, in reply—The miſchief which it is contended the act of bankruptcy meant to redreſs, is very ſmall:

ſmall: The miſchief to a creditor, loſing his remedy by a ſecret colluſion, is very great. If this be admitted, the practice will be, to have a credit or in every caſe, take this mode.

Mr. *Wallace* has ſaid, Attachment and ſequeſtration are not applicable to caſes of bankruptcy, and that the proceſs out of Chancery, or by cuſtom of *London*, is ſequeſtration, and no where elſe. I think, I find ſequeſtration in the Eccleſiaſtical Courts has been taken to be within the ſtatute.

Attachment, I take to be as general a word as poſſible; and hope your Lordſhip will think yourſelf authorized and obliged by the ſtatute, to give it ſo large an interpretation as may at leaſt not provide againſt very ſmall and imaginary miſchiefs, and leave the way open to the greateſt. I am not ſo different from Mr. *Wallace*, in his opinion. I agree with him, that the matter muſt be conſtrued, *ſecund. ſubjectam materiem*.

Mr. *Wallace* has argued, That if the ſheriff's officer comes in with the writ at one door, and the bankrupt, by going out at the ſame time at another, commits an act of bankruptcy, the writ is executed by the entry, and the plaintiff has his title complete.

If this be the caſe, then, from the inſtant of the bailiff's entering, the execution thereby made took a taint from the ſubſequent fraud.

As Mr. *Wallace* ſays, You can't ſee the intent of a man's heart, but by his overt-act. In this we are agreed, the plaintiff acts not from the time of his entry: Till *Grey* having by another act openly proved himſelf a bankrupt, it was neceſſary to produce this act, to defeat the remedy of other creditors. Mr. *Wallace* has ſaid, "Shall a common entreaty for delay to levy execution; ſhall this, when the "writ is ſerved on me by another man; ſhall this indulgence attach fraud to me?" No, certainly, without other circumſtances: But as far as the action is affected with fraud, made evident from the circumſtances of the proceſs, then *Grey* and *Spotwood* are anſwerable together for the whole tranſaction, from the beginning. The intent of ſuing out [120] the writ is to be interpreted, from the conduct of the parties, to take its effect accordingly.

Your Lordſhips will ſee, the writ was not brought into the houſe to be executed. I will not pretend to ſay what act preciſely ſhall amount to an execution; but from whatever act we date it, there is an original fraud in the tranſaction, to which the execution and all ſubſequent tranſactions will

will relate, and which conſtitutes a bankruptcy from the firſt.

Lord *Mansfield*—The queſtion ſent by a feigned iſſue, was to try whether the bankruptcy became ſo the fifth of *April* 1769; or at any, and what time? The words on which this queſtion is argued are 21 *J. c.* 15. "If any perſon ſhall willingly."

I will ſtate the caſe, for the uſe of the ſtudents.

A writ was iſſued out the fifth of *April* 1769, returnable the twenty-third: It was ſerved the ſame day. The jury ſtate, that the execution was not procured by the bankrupt: But they ſay, from the fifth of *April* 1769, (it is admitted excluſively on both ſides) the bankrupt traded as with his own goods: Nothing was done on the writ. Whether, therefore, an execution on the fifth makes an act of bankruptcy, or the evident bankruptcy on the eighth of *May?*

I was of opinion, that attachment and ſequeſtration were not words to expreſs execution. A ſecret execution would not anſwer the purpoſe; For, on a judgment kept ſecret, and execution delayed, another creditor may come in in the mean while. There is ſequeſtration by Eccleſiaſtical Court, City Courts, *&c.* I ſee none of the counſel took up my opinion. I thought it might be too narrow.

Serjeant *Glynn* has argued, that the conſtruction by the words of the ſtatute ſhall be large and liberal. I ſummoned up accordingly.

As I never find a difficulty to change my opinion, I ſummed up according to the jury, that attachment or ſequeſtration may come within the ſenſe of the word execution.

The jury found an act of bankruptcy on the eighth of *May:* A clerk was brought to witneſs, (not a friend of the bankrupt) who proved the debt, on which the execution was taken, was for a more conſiderable ſum of money than was levied. But after, *Grey* kept paying debts to *Spotwood*, which were not in execution; thinking, very miſtakenly, he might avail himſelf of the ſecret judgment. He proved many threats of *Spotwood* againſt *Grey*; but I thought fraud appeared in *Spotwood*'s delaying execution. On the ſecond trial, I expreſſed myſelf as if attachment and ſequeſtration meant execution. But, leſt any gentleman might be miſled by a curſory note on that point, I muſt declare myſelf much more inclined to my former opinion. However, I admit procuring the execution may be within the act, it is not on that point I found my judgment.

[121]

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An act of bankruptcy is a crime by positive law: Nothing can be taken by construction; though great mischief happened not expressly provided for. In the case of *Roberts*, the execution there must have been fraudulently and wilfully procured, to delay or defraud his creditors. I am convinced, the execution was adverse. The assignee would have given in evidence, had there been any ground of supposing of an agreement previous to or co-extensive with the execution, if they could have proved it. But *non constat* when the agreement was made. If it was a day, or hour, or minute later, it cannot be procuring. The agreement indeed acted contrary, and defeated the execution. Accordingly, a second execution was actually levied. It would be very harsh and perilous to draw the line. How many men have been saved by the delay of a day or two! Shall it be fraud to delay three or four days, or after what time? The defendant was totally mistaken in the intent of the execution, which was, that the plaintiff should get his money on the other debt, and then have the benefit of his judgment. He is precluded by the delay: The general law precludes him; and, could that be defeated, the particular law, That a man using goods of another as his own, the creditor shall seize them. What remedy the creditor may have by other ways, concerns not this matter. I am of opinion, this was not an act of bankruptcy on the fifth of *April*.

Mr. Justice *Aston* was of opinion, that the words *attached* and *sequestered* are not of execution; but are applied where there is an ostensible lien on a secret trust to defraud creditors: Otherwise they would have used the proper words, [My Lord *Mansfield* had observed this] *shall procure an execution to be executed*. The subsequent transaction cannot make it a procuring.

The secret execution was, undoubtedly, *delayed* fraudulently; but no fraudulent agreement to make a bankruptcy. The goods in execution are liable for the creditor; and *Atwood* must lose them. The creditors may have their remedy; as in the case of *Rice*: But we have no right to construe this, which is *juris positivi*, to be an act of bankruptcy. I express no positive opinion on the former point; but I am of opinion on the latter, that it is no bankruptcy.

Mr. Justice *Willis* inclined to think attachment and sequestration would not take in execution; because arrest was abolished, on mesne process; said he was precluded from taking the agreement to have been before the 5th of *April*,

by

by the finding of the jury: And whatever he might otherwiſe have thought, he was now bound, by a poſitive finding, from queſtioning that point; and, that being admitted on the finding, he was alſo precluded from conſtruing the act of bankruptcy to refer to the execution on the fifth of *April*.

Mr. Juſtice *Aſhhurſt* expreſſed his concurrence with his brothers on the bench, on the doubt of attachment and ſequeſtration, referring to execution. He conſidered the caſe as decided on the other point: The procurement of the execution by *Grey* not being proved, without which no ſubſequent act could make a bankruptcy.

Hatton *againſt* Hooley.

Before the Lord Chancellor, on the Conſtruction of the Effect of a Deviſe of a Codicil added to the Will of Lady Iſabella Finch, on *Appeal* from *Sir* Thomas Sewell, *Maſter of the Rolls.*

THIS caſe came on to be argued *Michaelmas* term 1772, and was thus:

Lady *Iſabella Finch* gave by her will to *Lydia Hooley* five hundred pounds: She then gave an annuity by a codicil; afterwards ſhe gave by another codicil a thouſand pounds. The words were theſe—"I add this codicil to my will: I "give to *Lydia Hooley* a thouſand pounds."

Mr. Solicitor-general—It is of little conſequence what rule of preſumption is eſtabliſhed, where intention ſtands neutral: But it is of great conſequence there ſhould be ſome ſettled. In the caſe of portions, the laſt declaration of intention has been underſtood to take in the full and whole intention. *Bruin* and *Bruin*, *(Peere Wms.)* and others.

For the caſe of legacies particularly, *Maſters* and *Maſters*. There was reaſon to think an addition was intended; for between the will and codicil the teſtatrix had received a very great acceſſion of fortune. *Duke of St. Alban's* and *Beauclerk*, (*Atkins.*) Lord *Hardwicke*'s opinion in the caſe is incorrect; but we may eaſily conjecture what was delivered. Lord *Hardwicke* went on the civil law, as this court has a concurrent juriſdiction with the eccleſiaſtical: And with the view of ſettling the opinion, four rules are cited from the civil law.

1ſt.

1ſt. The ſame ſpecific thing given twice, can be paid but once.

2dly. Equal ſums of money, or goods of the ſame value, will paſs but once. [123]

Dig. 29. *l.* 12. from *Ulpian. Si eadem ſumma bis ſcribatur &c. Antoninus reſcripſit, ſolvendam duplicatam; ſi evidentiſſime probetur teſtatorem ita voluiſſe:* Therefore the legatee muſt prove. Lord *Hardwicke* ſays it's the ſame, by the better authorities, if in a different inſtrument, as in the ſame. *Dig.* If an 100l. be given, and afterwards 50l. if intention be proved, both muſt be paid; if otherwiſe, not: *Idem eſſet ſi in codicillis eſſet factum. Celſus,* however, is quoted as an opinion by Lord *Hardwicke,* ſaying that the heir muſt prove the negative of the intention. *Gothefrid* ſays otherwiſe; and that the heir is bound to the ſmalleſt ſum: *Lib.* 37. *c.* 2. tit. *De Legat.* The caſe is cited. If two copies of a will, 100l. in one to *Titius,* 50l. in the other, *utrumque legatum nequaquam, ſed tantum quinquaginta aurea,* the law of the code *de codicillis* does not ſeem to point. Lord *Hardwicke* cited *Lib.* If a legacy to a daughter by a will, and afterwards a portion, the daughter ſhall not have both.

Another not in the note of Mr. *Atkins,* a more direct authority 34 *Dig.* 1. *l.* 18.

A perſon had ſeveral *liberti*; ſome he had freed by his codicil, others by his will: *Quos teſtamento manumiſerat, iis decem menſtruos alimentorum nomine, legaverat*; and then to thoſe whom he had freed by his will; ſeven by his codicil, and ſeven alſo to the *liberti* he manumitted by his codicil. The determination was, The *liberti* manumitted by his will were not to have ſeventeen or ten, but only ſeven; and its being ſaid *alimentorum nomine,* Lord *Hardwicke* ſaid, it would make no difference; for might not a man bequeath a double maintenance, as well as any other double legacy?

Celſus, on the adverſe ſide, is the only authority. If it's neceſſary to balance authorities in civil law, *Ulpian* is a much higher authority. *Papinian* is the firſt authority, *Ulpian* the ſecond; they were both *præfecti prætorii* under different emperors. The text, it's ſaid by Lord *Hardwicke,* the text is to be regarded, and not the commentators; the reaſon is alſo very good. Of the commentators, the firſt were ſoon after the finding of the *pandect* at *Amalfi*; theſe were men in moſt barbarous times, about the 13th century. The ſecond claſs were ſchoolmen and caſuiſts; this ſecond claſs we may gueſs the merit of, if it were to be known no

other way but by hearing their profeſſion. The third were not practical lawyers, but moſtly *French* and *German* profeſſors; theſe lived in more enlightened times, and ſo far are much preferable to the other two, but will hardly be claſſed with the text. The *Dutch* and *German* commentators took much pains to ſupport what *Trebonius* had vainly
[124] boaſted, that not one adverſe opinion was to be found throughout. And *Juſtinian* forbid, as vainly, any man to interpret the code differently; one commentator endeavours to reconcile ſeven hundred different opinions. Among the ancient lawyers there were ſects as among the philoſophers; *Labeo* and *Capito* were of different ſects. One of the commentators ſays, *Legatarius dicitur probare cum non probetur in cortiarium*; or to that effect.

If one turns to another ſet of writers, they run ſo much on generals, that it's difficult to make out an opinion; but they agree, that if a gift be twice for the ſame thing, it ſhall be paid but once.

Here is a legacy to a ſervant for ſervice; which, I think, amounts nearly to the ſame thing.

[Will was read.]

30th Auguſt 1768. Deviſe to her brother of her houſe [in *Berkley-ſquare*,] and of her furniture not otherwiſe diſpoſed, charged with diverſe legacies. I "give to my woman *Lydia Hooley* 500l. "to be paid in three months after my deceaſe; to her ſiſter "30l." Then appoints executors.

Codicil, 31ſt October 1768. "I Lady *Iſabella Finch* deſire this may be conſidered as "a part of my will: I give an annuity to my ſervant *Lydia* "*Hooley* of 12l. for life, over and above what is given in the "will; I give an annuity of 30l. to my ſervant *Smith*, in lieu "of what I had given in my will.

Second codicil, October 28th, 1769. "I add this codicil to my will: I give *Lydia Hooley* 1000l" And farther orders, after the codicil to her ſervant *Lydia Hooley*. "I farther order the ſum of 60l. to be paid to *Rebecca Hooley*," [the ſiſter.] Now this caſe, before Sir *Thomas Sewell*, Maſter of the Rolls, was taken to be a legacy of the ſum in the will, and in the codicil.

Mr. *Jackſon*—I am in a worſe caſe than the commentators, who came after the original writers; I will ſay little therefore. It's incumbent on the legatee to prove the intention, for without intention there is no will: What would it be *inter vivos?* A man is in debt 100l. he pays the 100l. This,

This, though not expreſſed as payment, will in common ſenſe be underſtood payment, and not a gift.

How is it here, a codicil and a will are the ſame inſtrument.

The civil law-books, your Lordſhip will obſerve, are ſingly on the conſideration of two equal ſums; but where the ſecond legacy is an augmentation of the firſt, 'tis eaſy to ſuppoſe the teſtator altered his mind, and encreaſed the legacy in the will. I ſhall only cite one authority to what has been ſo fully argued: *Verius puto ut probet legatarius*; [125] *non ei qui agit ſemper probatio incumbit*, [The words "over and above what is given in the will" were relied on, to prove a more than ordinary anxiety of ſaying when ſhe gave over and above.]

On the other ſide, Mr. Attorney-general—This is a caſe of a legacy of 500l. in general terms; and another, in terms equally general, of 1000l. by a codicil. I would endeavour to cite what appears to me in the will and codicil, becauſe I think the intent of the teſtatrix may be ſufficiently collected. In her third codicil ſhe ſays, "This codicil I add to my will;" this implies an additional legacy. I take it univerſally underſtood, a codicil is taken, *primâ facie*, not to be the ſame inſtrument with a will. *Swinburn*, *Burn*, *Wentworth*, *&c.* define it to be a leſs ſolemn inſtrument, altering, adding to, explaining, or ſubtracting from a will. *Swinburn* ſays, If there be two wills, the laſt revokes the firſt; but if two codicils, the claimant on each ſhall have title: Only *Gothefrid* is of different ſentiment; the *incumbit actori* is, where *legatarius* produces *duas ſcripturas*, it lies on him to prove both to be the act of the teſtator. But, that proved, it lies on the heir to prove *poſteriorem eſſe inanem*. 9 *Dig. lib.* 9. *Lib.* 37. *tit.* 2. where a teſtator has ſhewn great marks of underſtanding and affection, I think it will be underſtood that by ſuch, where a title is expreſſed in one place to a legacy, ſuppoſe, of an 100l. and afterwards of 200l. both will be underſtood. If there are marks of impoſſibility, and no evidence of much affection, a difference may be taken, and forgetfulneſs pleaded.

Where it is ſaid, *Si Titio centum aurei legentur, & in alio ſcripto quinquaginta aurei, utrumque nequaquam debetur, ſed quinquaginta aurei tantum debentur*; that is, *primâ facie* no intention appears which, or whether both, or no, the teſtator meant to give. Therefore, on the common maxim, "*Melior eſt conditio, poſſidentis*" the heir will not be to pay till proof made of title by legatee.

In the caſe where it was ſaid, Whereas I have given to *A*, 1000l. I now give her 1600l. Here was particular notice taken of the former bequeſt, and intention plainly expreſſed of augmenting that legacy, not of ſuper-adding a new one to it. I therefore humbly pray your Lordſhip, that the judgment of the Maſter of the Rolls may be confirmed.

It was obſerved, That by the civil law there was no teſtament without an univerſal heir, and the conteſt was between the legatee and him. If any thing takes this out of that reaſon of the civil law, it will take it out of the rule. The brother of Lady *Iſabella Finch* has a particular fund charged with ſpecific legacies; and three young ladies, his daughters, have the reſt of the perſonalty.

The annuity is not charged particularly, nor the 1000l. They are not charged on the houſe or furniture; and therefore the young ladies are liable to them, and they muſt be paid out of the reſidue.

The latter legacy being at all events payable, the only queſtion is of the firſt; and that conteſt is not between legatee and univerſal heir, but between one legatee and another.

Note. It ſeems on the whole, that the 500l. in the will was not thought charged upon the deviſe of the houſe and furniture.

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It was farther obſerved, That the bounty of the teſtatrix ſeemed progreſſive; and that the ſlighteſt proof would be ſufficient againſt the preſumption, which was at firſt always made in favour of the heir.

Mr. *Jackſon*—In the caſe of the *liberti*, the uſe of the codicil is properly explained to be, to add, alter, or explain: There it was uſed to enlarge the objects of her bounty; in our caſe to enlarge the bounty. It is true, a codicil is not a part ſtrictly of the will, but an addition made on deliberation to a will. The teſtatrix ſays, "I add this codicil to my will;" ſhe takes notice of it, as if ſhe recited. And therefore, I would deſire your Lordſhip to obſerve, that ſhe gives the 1000l. by way of enlargement of the former legacy; inſtead of the 500l. 1000l. is given. It ſeems to me the caſe of *The Duke of St. Alban's* v. *Beauclerk*, where the Dutcheſs begins her codicil by putting the reader in remembrance of her will. 'Tis ſaid, the legacy is made payable at different times; the teſtatrix, writing theſe ſhort directions, might well omit the time of payment here; and we might contend, with as much appearance of probability, that the codicil being to alter and explain, where it does not alter, as in the time of payment, the enlarged legacy is payable at the end of three months.

Mr.

Mr. Juſtice *Aſton*—Do you recollect *Wallop* v. *Hewit*, where equal legacies were given, 2d Chancery Reports? *Charles* 2. Lord *Shafteſbury* in this court, with the judges, on reading the will and codicil, adjudged both legacies were payable. *Swinburn*: If a ſum is twice bequeathed, it is twice due, if bequeathed in two different writings as a will and codicil: otherwiſe not.

February 6th 1733.

Lord Chancellor, aſſiſted by Mr. Juſtice *Aſton* and the Lord Chief Baron *Smith*. I was not preſent at the firſt opening of Juſtice *Aſton*'s opinion; but he ſeems to have introduced it, by ſaying that there was no internal evidence of intent that could weigh conſiderably. That the rules of law, collected from the *Roman* lawyers, and what he ſhould ſtill have a much higher reſpect for, the deciſions of this court given in ſeveral caſes, would be the only guide. That it had been ſaid the proof lay on the legatee; that a codicil and a will was the ſame as if in one inſtrument; and if two [129] ſums, the laſt ſhould be paid.

Lord *Hardwicke*, on the Dutcheſs of *St. Alban*'s will, made a decree upon that caſe, which has been repreſented as a general deciſion, not a decree on particular circumſtances; as taking no diſtinction, in any caſe, between a will and codicil; as laying the whole proof on the legatee, and the ſtrongeſt preſumption in favour of the heir. His Lordſhip, in this and in many other caſes, will ſpeak much more accurately from manuſcript notes. I ſhall therefore premiſe generally, what may ſhew the contrary of this ſuggeſtion, and leave the report of that caſe to his Lordſhip.

1ſt. Where the ſame *corpus* is given by both codicil and will, as the ruby ring. *Cujacius* ſays, *Aliud eſt juris in quantitate, ſi eadem res in eodem teſtamento legatur, bis ſolvi non poteſt; rem conſequetur vel æſtimationem. Legatarius probet,* & *rem* & *æſtimationem ſolvendam.*

It was ſuppoſed in argument, that Lord *Hardwicke* declared, that in the caſe of the ſlaves it made no difference; that both were for the ſame cauſe, and the leſs ſum only ſhall be paid: But his Lordſhip cites caſes to the contrary. In the *Dig.* it appears, if it was left 100l. and afterwards 50l. in the ſame will, both ſhould be paid.

Si quantitas bis legatur, bis ſolvetur, niſi probatur ſecundam admendi voluntatem fuiſſe.

It ſtruck me as very odd, that when a man in the ſame inſtrument gives twice, it ſhould be forgetfulneſs; and yet this to be at the diſtance of ſeven lines: Notwithſtanding that, in different inſtruments, at the diſtance of a year or more,

more, ſuch a multitude of writers as I ſhall ſhow agree that both ſums ſhall be paid.

With reſpect to the ten *aurei*, and afterwards ſeven; *de ſpecialiter in teſtamento generaliter in codillis.*

Minochius's rule, too, may be adopted, of both being for the ſame cauſe.

The Chancellor *Langiſſean* has decided upon a ſimilar caſe.

There is another rule— *Si major quantitas in codicillis legata fuerit, majori minor ineſſe videtur; niſi legatus aliter probaverit:* But this reaſoning is drawn from the caſe of the ſlaves only. That this rule was applied by Lord *Hardwicke* beyond the ſpecial caſe, I believe you will hardly find, unleſs he was inconſiſtent with himſelf, which is not eaſily believed: He recognizes the authority of *Swinburne*, but here is a difference, "*nam ineſſe videtur*," he conſiders the two duplicate codicils, with hardly the leaſt variation. With regard to the *Roman* law, where two equal ſums are
[130] given by two different writings, there is a great weight of authorities that both ſhall be paid. *Dig. l.* 22. *tit.* 3. *Gothefrid*, That where the ſame ſum, it is a double legacy; *in eodem teſtamento ſi idem corpus bis legatur non niſi evidentiſſimis teſtimoniis, bis ſolvendum; ſed in diverſis ſcripturis.* In different writings, it ſeems then, the preſumption is in favour of the deviſee. And this looks ſo ſtrong, as to imply an idea, that where there was a ſpecific legacy twice given, (the ſtrongeſt, one ſhould think, of all poſſible caſes,) of a double legacy as againſt the deviſee, the deviſee ſhould have *& rem & æſtimationem*; unleſs it could be proved by circumſtances, or evidence of witneſſes, too eaſily received in that law, that the teſtator meant otherwiſe. But in caſe of a ſpecific legacy, Q. Whether this idea can generally prevail; and whether Lord *Hardwicke* has not ſhewn it to be diſallowed in the caſe of *The Duke of St. Alban's* v. *Beauclerk? Godolphin*, in his Orphan's Legacy, laſt chapter in the book, laid down certain poſitions for the better underſtanding legacies.

Minochius De Probationibus

Swinburne, part 7. *c.* 21. *tit.* 13.

Ricard, a book of authority.

Lord *Hardwicke* affirms the doctrine in *Swinburne*, by diſtinguiſhing the caſe from it.

Upon the two caſes in this court, *Wallop* v. *Huit*, *Newport* v. *Kynaſton*, in the ſame book, the ſame rule laid down; 500l. and then 500l. in ſilver.

In

In a leſs ſum, *Swinburne*, and *Godolphin* are clear both ſhall be taken.

Godolphin. If a teſtator in a will gives 10l. and 50l. in a codicil; and ſays his executor ſhall only give 50l. this is a ademption; therefore, had he not revoked, had it exiſted naked, both ſhould be paid.

Can a man know, in a great eſtate, preciſely what he gives? He gives ſo much at all events, and more if he comes to more.

If the firſt be a leſs, and afterwards a greater ſum, (*Ricard*, *p.* 4. Teſtamentary Donations,) what ſhall we ſay, if by the ſame act the teſtator has firſt diſpoſed of a leſs ſum, and afterwards a greater? My opinion is, they ſhall not be blended; it lies in the heir to prove that the intent was not to give both, for the words of the will ſhall have the preſumption in their favour: It is idle to ſuppoſe the teſtator did not know what he had given before.

Wyndham v. *Wyndham.* [131]

Pitt v. *Pigeon.*

Maſters v. *Maſters.*

I ſhall only add, That in this caſe, if we take the 1000l. as ademption of the 500l. it is the ſame as if the 500l. only had been given in the codicil.

I think, in this caſe, *Lydia Hooley* is entitled as well to the 500l. in the will, as the 1000l. in the codicil.

Lord Chief Baron *Smith.* After ſtating the caſe, his Lordſhip proceeded nearly to this effect:

On conſideration, I am clearly of opinion with my brother *Aſton.* It ſeems agreed on all hands, that the intent, when it can be found out, is the beſt rule. Lord *Hardwicke* ſeems to have determined on this ground, in the caſe of *St. Alban*'s.

On the part of the plaintiff, intention in favour of the legatee was argued; on the part of the executors, a perfect neutrality. Taking it as neutral, let us ſee the rule of law.

If in the ſame inſtrument, If equal ſums, the legatee muſt prove them due.

If in different inſtruments, if different ſums, then the executors muſt prove both not meant to be paid. *Swinb.* 125—6, 530. Caſe of *Ruſſel.*

St. Alban's caſe was determined on the particular grounds; nobody can doubt, I think, that the laſt codicil was taken as merely inſtead of the firſt. In that caſe too, the codicil was not a different inſtrument; for her Grace, by the particular

ticular words, had drawn the codicil into the body of the will.

Lord Chancellor—I can't help conſidering myſelf very highly obliged to Mr. Juſtice *Aſton* and Baron *Smith*, for their great pains on this occaſion.

It would be unneceſſary for me to ſay any more, than that I am of the ſame opinion. But Mr. Juſtice *Aſton* having put me to ſtate ſome caſes, of which I am ſo fortunate to poſſeſs better notes than are in print, I ſhall principally confine myſelf to them.

[132] When this came before me by appeal, the caſe by Lord *Hardwicke* was ſo urged on me, that I could not help doubting my own opinion in favour of the maſter. I therefore called in ſome of the moſt able judges of *Weſtminſter-Hall*, who have conſulted more than one or two civilians.

Indeed, this being a matter of eccleſiaſtical nature, we muſt determine, as in every caſe where there is a concurrent juriſdiction, by the laws which direct them: That is, we muſt ſee, what the civil law ſays. We are all agreed, there is nothing of weight in the writing to prevent the matter from ſtanding indifferent; therefore, our rules of intention can have no effect; and we muſt ſee the rules of law.

Lord *Hardwicke* ſays, the caſe divides itſelf into ſeveral parts.

Then he ſays, I am of opinion that in this caſe, upon the reaſon of the thing, the being in a different inſtrument makes no difference, becauſe ſhe has directed them to be taken as one; and as the will and codicil make but one will, and the rule from the text of the civil law, even more certainly than the commentators, ſeems that both ſhould not [if in the ſame will] be paid, therefore, his Lordſhip was of opinion there that both ſhould not.

He does not ſay that the heir is bound to prove the will; but that if he proves the ſecond ſum, *inanem eſſe*, that is ſufficient.

There are words in my manuſcript, that the power reſerved by the teſtatrix made the will and codicil but one inſtrument, *ineſſe videtur*.*

Lord *Hardwicke* conſidered the laſt codicil as merely ſubſtituted for the firſt, as far as they concur, and took them into the body of the will.

In *Swinburne*, ſays his Lordſhip, it is true, in ſome of the inſtances it is ſo, but not in this caſe, (that is, in *Swinburne*, the

* Verba relata ad id maxime, operantur ut ineſſe videatur.

the codicil and will being taken as different inſtruments, diſtinct legacies to the ſame perſon might paſs by each; but here not, the teſtatrix having declared the will and codicils but one inſtrument.)

Lord *Hardwicke* ſuppoſes Sir *Joſeph Jekyll*, in the caſe of *Maſters* v. *Maſters*, to have ſaid, that both were given in the ſame inſtrument; and then ſays, very juſtly, the current of teſtimonies was to the contrary.

He ſays, the codicil was proved as part of the will; and [133]
the ſecond pecuniary legacy ſhould not be taken, unleſs it was proved it would be ſo if in the ſame inſtrument. The ſecond reaſon, as taken by Lord *Hardwicke*, was, I take, that reaſon on which Sir *Joſeph Jekyll* meant to reſt the addition of fortune as a proof of intention.

Wallop and *Huit* ſtated—200l. given to two by will; and afterwards 200l. to two by codicil: Whether the double was intended, or no, they knew not. Lord *Shafteſbury*, aſſiſted by three judges, (there was no evidence entered into of intention) decreed 400l. a-piece to be paid.

Wyndham and *Wyndham*. The teſtator publiſhed his will in ———, and in ———: He gave 1500l. to each of his children; and 1000l. to his children henceforth to be born. By his ſecond will he gave 4000l. to his little infant, *John*, who was born a few weeks before.

Queſtion—Whether he ſhould have 4000l. or 5000l.?

It was contended, the words *henceforth to be born*, had been interlined after the birth of *John*: No ſufficient evidence of this, and parol evidence to the contrary. It was ſaid, that if he had meant to give 4000l. he might have ſaid, in ſatisfaction of all portions. This will was ſaid, as to the laſt part, that it operated as a declaration of truſt: But this was in the 27th of *C.* 2. and the declaration of truſts came in by the 29th. The next caſe, determined by Lord *Nottingham*, depended on the eſtate not being ſufficient for the charities, *&c.* if twice the ſum was to be paid.

Newport and *Kynaſton*. A will ſpeaks at the ſame time; a codicil implies an alteration.

Pitt and *Pigeon*. "I give to ſuch child as ſhall be living "at my deceaſe 300l." Afterwards he had three children; and by codicil gives 200l. Whether ſhould be good, and to whom? Whether to the eldeſt, or to all three? It was determined, that the will extended to all, and that the codicil made no alteration in the will. That whether a leſs ſum or a greater was given in the will than in the codicil, both were

were to be paid; unleſs the eſtate was inſufficient, or there was the moſt evident proof of the contrary intention.

I conſulted a very great civil lawyer, whether there was any deciſion there in this matter. His Lordſhip furniſhed me with one caſe, grounded on the *Roman* law, where equal ſums were given.

[134] I have the ſatisfaction of thinking, ſo far from contradicting my Lord *Hardwicke*, we concur with his opinion. In the particular caſe he decided, he grounded his opinion on the will and codicil having been but one inſtrument by the power reſerved. That is the ſtrongeſt internal evidence; the bequeſt cannot be doubted there, either in the nature of the thing, or the intent of the teſtatrix. But the general rule of the civil law, his Lordſhip uniformly recognized: ſuch, I think, as we have taken in the caſe before us.

Decree—That the 500l. in the will, and alſo the 1000l. in the codicil, be paid to the legatee.

Jewſon *againſt* Read.

ON a motion to ſet aſide a judgment for irregularity

Mrs. *Jewſon*, a milliner of the city of *London*, and exerciſing her trade as *feme ſole*, claiming this privilege as by the cuſtom of *London*, borrows money of Mr. *Read*, an apothecary, to carry on her trade, to the amount of 900l. and enters into a warrant of attorney to confeſs a judgment; upon which judgment is entered.

The aſſignees applied, upon the oath of Mrs. *Jewſon* that her huſband was not privy to the proceedings, to ſet aſide the judgment.

It was argued againſt the rule, to the effect as follows:

I ſhould ſubmit to the court, Mrs. *Jewſon*'s aſſigns are her repreſentatives, and entitled to no more than ſhe herſelf: If ſhe come to avoid her own act, ſhe ſhall not do it; and therefore the aſſignees ſhall not for her.

She has not inſinuated the leaſt degree of fraud.

The execution and judgment was objected to, becauſe the declaration was as againſt a *feme ſole* by the cuſtom of *London*, whereas ſhe was a *feme covert*, and ſuppoſed a joint trader with her huſband. An abſurd principle to depend on, this! It was contended; namely, that as a *feme covert* ſhe could ſign a warrant of attorney, and confeſs judgment, it was thought ſhe might as well plead and be impleaded alone: But if otherwiſe, the method of objection would have

have been by demurrer to the judgment. If the warrant be ſet aſide, we can't come in as legal creditors, we can do nothing to recover our debt. The gentlemen on the other ſide may, either in equity, or by bringing an action. Now it appears by the affidavits, the money was lent her as a *feme ſole*, trading by the cuſtom of *London*. [135]

On the ſame ſide, it was argued in the declaration, ſhe is ſued as a *feme covert*, being a ſole trader by the cuſtom of *London*. If it had been true, and ſhe, being a *feme covert*, had been impleaded as a *feme ſole*, the remedy ought to be by writ of error. It is of too great conſequence to Mrs. *Jewſon*, who will be able to obtain no ſecurity, nor recover any thing, if on motion only the judgment be ſet aſide—of too great conſequence to the city of *London*.

The court of Chancery has had a ſimilar caſe before them, upon petition; which they thought much too great for them to determine in that manner. They have therefore ordered an action to be brought on it, which will be tried before your Lordſhip in the next ſitting.

Mr. *Wallace*—I take the ſigning a warrant of attorney in this caſe, to be at leaſt a warrant conditional. I think, even in reſpect of fraud as we are told, *Read* cannot come in with the creditors, if this judgment be ſet aſide. It's my opinion, it's not a fraud as between them; but as to the other creditors, it may perhaps ſeem otherwiſe.

Your Lordſhip has held, an action upon the cuſtom of *London* muſt be before the courts of the city of *London*. This court cannot take notice of the cuſtom as the ground of action; though in defence they muſt. In a defence it's a part of the cuſtom. Then it ſtands, the cuſtom being laid out of the queſtion, Whether a bond by a *feme covert* is good at the common law? Is this too great a queſtion for this court to determine on? I take it, therefore, on a confeſſed judgment we are in the common courſe: And your Lordſhip will ſee there are no grounds.

[Court obſerved, in caſe of a *feme ſole* entering into a bond, and afterwards marrying, they entered judgment againſt her as a *feme ſole*, whereupon the court ſet aſide the judgment.]

As to the cuſtom, there was a queſtion, Whether upon the cuſtom of *London*, a woman's real eſtate can be affected?

It was held not.

Can a woman who has an huſband give warrant of attorney not to defend herſelf in an adverſe judgment, without

out the concurrence of her husband; and in this court where her creditors cannot sue her on the custom?

[136] It was properly observed, that the husband must join in error. Can the creditors oblige the husband to join? Might not this be thought a sufficient reason? Was it ever heard there was a case of a married woman giving a bond, with a warrant of attorney to confess judgment, in the case of money which she might or might not apply to her trade; and which, in the instant of receiving it, she might give away, or do what she would with it?

But the man will not lose his distribution as creditor. If he does not come in as legal creditor, will he not as equitable creditor? Surely.

With regard to the custom of *London*, and impleading in the city, I read with attention your Lordship's decision in *Lavie* and *Cox*; and the court saith it not, I think. The court saith, A *feme covert* exercising a trade wherein her husband meddleth not, she may be impleaded sole.

Lord *Mansfield*—In the case I alluded to, there was irregularity in her. It was a *bonâ fide* action, on expectation of a near bankruptcy; no fraud. If the husband has not demanded his remedy by writ of error, he is the person entitled to that remedy; and no one else can impeach the judgment.* If the assignees have a right, they will have the benefit of an action. As at present advised, I think the custom cannot be proved in this way before the court; nor we take notice of it as the ground of the action. I am of opinion, the assignees must use their action; an action, if they please, of trover. If it's good by law against the assignees, there is no ground for the court to proceed (as in equity) in a summary way. They have advantage of the judgment and of conscience. If this is fraud, the assignees certainly will take their advantage: And I see no other cause why the advantage should be taken from the creditor.

If the *feme* had gone from her husband, and he complained, we then *auditâ querelâ* might have given relief in a summary way. And if motion had been on the part of the husband, we might have done the same: But nothing has been said on the part of the husband.

Let it stand over for a few days, that we may see what the husband says.

Afterwards, it was argued before the court by Mr. *Cowper*, on four questions.

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1st, Whether by the custom the obligation was good, without her husband, on action here?

2dly,

* Quilibet potest renuntiare juri pro se introducto.

2dly, Whether the judgment valid?

3dly, Whether the warrant to confeſs judgment by attorney good?

4thly, Whether the cuſtom can be tried here?

There is a difference between acts done by a *feme covert* and an infant: The one is incapable for want of natural judgment; an infant can do nothing but what he is bound to do for the benefit of others, or clearly or indiſputably for its own benefit. A *feme covert* is only incapable for want of liberty, being *ſub poteſtate viri*; but where the cuſtom expreſsly enables her to act, in matters concerning her trade, independent of her huſband, ſhe is exempted from that incapacity, and is under no other. If ſhe may manage her trade, ſhe may ſurely borrow money.

The validity of the obligation, I think, may be evidently evinced. The huſband is not neceſſary to be joined in the action.

The conſideration of the bond was very expreſsly for the uſe of her trade—it was ſo recited.

Whether the appearance by attorney was good, I think, can ſcarce be queſtioned. If ſhe may plead and be impleaded, ſhe may undoubtedly appoint an attorney. Whether the confeſſion of judgment is good, I muſt confeſs I can't find precedents. I was informed, on directing application to the city court, that when a *feme ſole* trader by the cuſtom of *London* confeſſes judgment, it is always entered in the court above.

4th, Whether an action on the cuſtom of *London* maintainable here?

It is admitted the court will allow them, when properly brought in, that they are good matters of defence. If the *feme covert* can contract a debt, that debt follows the perſon every where. Vide Jemino *and* Burrows.

The cuſtoms of *London* are not the only cuſtoms which have been proceeded on here in actions; yet certainly they are of the metropolis, are therefore of importance, and affect great numbers; have been recognized in books ever ſince *R.* 2. and have been taken notice of in equity and common law.

Wilford, chamberlain of *London*, *Cro. Eliz.* 682. Debt on a recognizance acknowledged to the plaintiff in *London*, according to the cuſtom there, for orphanage-money. Cuſtom alledged. All the court were reſolved, it was a good recognizance; and on error in the Exchequer-chamber, judgment was affirmed. [138] Vide 4. Co. 64, 65.

Bird

Bird and *Wilford* 464. Upon error on a judgment in debt in the Common Pleas. Error assigned; debt upon an obligation, as successor to the late chamberlain, and that obligation to a sole corporation shall not go to his successor. *E.* 4. *c.* 20. cited; and argued, that as a chattel, it shall not go to a successor. And the court were of opinion, the obligation was good. And *Dyer* 48. cited; and that it is lawful and reasonable, the custom being averred to be so: Wherefore judgment was affirmed.

When a custom is not contrary to the common law, it's a part of it, and therefore determinable here.

In the case cited, the recognizance would have been had, but the court (if I may so say) legitimate the custom on a bye-law.

Keskot and *Brady*, an action of debt in the county of *Chester*, which came before your Lordship; and there your Lordship took notice of the bye-law.

Lord *Mansfield*—It has been extremely well argued: I would only desire, Mr. *Cowper*, that you would argue on the objection of the necessity of the husband's being made a party here. Undoubtedly, when a right is established by the law of *France*, and the party comes here, the debt must be recovered here, according to the law of *France*; of which the court will take notice on information upon evidence, and decide thereon. But the question will be, Whether by the common law, the appearance of the husband joined in the action be not necessary, when they come to enter judgment in this court?

Vide Jemino *and* Burrows.

It is impossible for us to determine the question this term. I see a great field of argument open. It must stand over for next term.

Mr. *Wallace* said, The averment of the money being for her trade, was contrary to Mr. *Jewson*'s oath.

Mr. *Cowper*—I am sure Mr. *Read* swears every sixpence was lent for the trade. It is true, Mrs. *Jewson* employed them on her entering into acceptance of bills of exchange. But on the affidavit it appears, this acceptance was within three years, and this bond was three years ago full.

[139] Mr. *Wallace*—By the custom, she should be imprisoned: For the attachment is not upon her goods, but person; and the law would not receive this custom of separating a wife from her husband.

Lord *Mansfield*—If that had been the case, we could not have granted execution on the commission.

Mr.

Mr. Juſtice *Denniſon's* opinion, in the caſe of *Ballard* and *Bennet*, that there is a diſtinction between the city of *London* and all other corporations, on account of the modes of recovery, is material.

Caſe cited which Mr. *Cowper* had cited, 1 *E.* 4. *Michaelmas* term, in which a diſtinction is taken of cuſtoms whereon the particular remedy muſt be had in a particular court.

1 *Lev.* 131. Only a *dictum* of counſel: Anſwered, that it was a *dictum* by counſel and judges, that a *feme covert* may be ſued here without her huſband.

Sid. 178. Negative bye-laws cannot exclude the juriſdiction of the courts of *Weſtminſter*.

Action on the cuſtom of *London* for calling a woman wh—: The court took notice of this cuſtom.

Mr. *Buller* took the difference to be between common law and local cuſtoms: That the judges are bound to take notice of the common law, without particular citing; but cuſtoms muſt be particularly cited. On the reaſon of the caſe, a *feme covert* is *quaſi ſole*, trading by the cuſtom of *London*. A *feme ſole* can undoubtedly have her action here: A *feme* trader by cuſtom is not *quaſi feme ſole*, if ſhe cannot ſue here. Beſides, nobody can be tried in the city courts, who does not live within the juriſdiction: Therefore, if any body out of the juriſdiction be indebted to her on account of her trade, ſhe cannot recover.

On the queſtion, Whether ſhe can give ſecurity without her huſband? Mr. *Buller* argued, this was neceſſarily incidental to her trade, with reference to the maxim.*

On the queſtion, Whether the huſband ſhould be ſued? the words of the cuſtom were cited; which provide, that if the huſband be ſued, he ſhall not be liable. This was alledged to be conditional; not compelling him to be ſued with her, but providing for her indemnity if he is; and *cui bono*, that he be ſued, when he cannot be liable. [140]

Lord *Mansfield*—It is a hard caſe againſt *Read*, who appears *bonâ fide* to have lent the money, and with the privity of the huſband, as it ſeems. But the great difficulty is, how the woman alone, being a *feme covert*, can be ſued in the courts of common law, as ſingle.

The courſe of the law here gives the huſband an opportunity of being heard: And when a local action comes here, it muſt follow the rules of our law. Therefore it

 ſeems

* Quoties aliquid cui conceditur, conceditur & id per quod pervenitur ad illud.

ſeems to want ſtrong ſupport of precedent. Notes were not in uſe, nor thought of here, when the cuſtom took riſe.

The huſband being aſked, whether he was privy to the tranſaction of *Read's* lending the money, ſaid poſitively he was not, nor ſhould he have approved it, nor was he privy to the execution.

Lord *Mansfield*—This conſiderably juſtifies his oppoſition.

This caſe ſtood over, on the neceſſity of the huſband's joining in affidavit.

Mr. *Buller* opened, on a point which the court thought very material: Whether the huſband was privy to the matter?

Mr. *Buller* obſerved, the ſuſpicious behaviour of Mr. *Jewſon*, on his examination laſt term; his heſitation, perplexity, and inſtruction from one of the aſſignees, that he entered the money advanced to Mrs. *Jewſon*, not as the reſt, in the name of *Jewſon*, but *Read*; that he had applied part to his own uſe, in building a houſe; that he left them apart always, to conceal his knowledge; that he had declared, Mr. *Read*, he hoped, would never be deprived of his remedy: Many other circumſtances inducing ſtrong ſuſpicion of fraud.

Then to the point of joining the huſband in the judgment. If the huſband were to plead, he muſt not be made liable by the cuſtom; if he ſhould be joined, he ſhould not be charged or impeached. To what uſe, then, to join him? It would be to deſtroy, not maintain the cuſtom. Beſides, the huſband, by pleading falſely, might ruin the wife, and bring her to perpetual impriſonment. That the rule, that an action where a remedy is given, muſt be carried on according to the rules of the court where the action is brought, will not be an objection. Here is an action of debt, which is according to the rules of the court, as far as the cuſtom will permit. If there is to be no diſtinction, then a cuſtom is aboliſhed, which is *res ex cauſâ rationabili uſitata quæ privat communem legem.* If the huſ-
[141] band be joined, it muſt be for his or his wife's benefit; or thirdly, for conformity: For his it cannot be, for he is no way liable to any inconvenience, except his being deprived of the comfort of his wife, ſhould ſhe be impriſoned; but he knew this inconvenience, and took his chance of it, and therefore ſhall not be permitted to plead exemption from that. If her trade is fortunate, he can at any time put an end to the trade; if unfortunate, by parity of reaſon,

reaſon, he muſt ſubmit to this ſingle inconvenient rule, to which he might have known himſelf liable. For the *feme's* benefit it cannot be. We have ſhewn before it may be to her great damage. If it ſhould be thought for conformity's ſake, where an equitable relief is deſired, and in a ſummary way, your Lordſhip will not think the want of conformity ſufficient ground to prevent the action here.

Mr. *Wallace*—By the common law, a warrant of attorney by a *feme covert*, without her huſband, is undoubtedly void. If they would maintain their cuſtom, they muſt have come to their relief regularly, and ſued for remedy regularly.

By the words of the cuſtom, where a *feme covert* uſeth any craft of her own money, whereof the huſband medleth not, ſhe ſhall be as a *feme ſole*, with reſpect to that corporation; may ſue and be ſued alone: If ſhe be condemned, ſhe ſhall be impriſoned. The cuſtom of an execution on her goods (if it be a cuſtom) muſt be immemorial before the ſtatute of *H.* 3. Your Lordſhip could not have granted *capias ad ſatisfaciendum*: The ſtatute gave it then on action of account againſt bailiffs or receivers; that of *E.* 2. gave it in debt, detinue, and many other particulars. It is ſaid, indeed, on the entry of the judgment, that it was on money, touching her credit: It is ſaid, but what proof of it's truth?

52 H. 3. commonly called the ſtatute of Marlbridge, c. 23.

2. *Kele* 273. On a queſtion, Whether a *feme* by the cuſtom can ſell ale? The court ſaid, whether this could be by the cuſtom, they would not take notice—it may be tried in the city courts: The huſband muſt join here. A *procedendo* was granted in that caſe.

In the caſe of *Lavie* and *Cox*, your Lordſhip and Mr. Juſtice *Yates* were of opinion, on giving judgment, that the cuſtom might be pleaded in defence of the courts here; but not otherwiſe. A ſimple-contract creditor, by the book, is in ſome caſes conſidered as a ſpecialty-creditor. Being ſued here, he pleaded the cuſtom; it was neceſſary to be admitted, otherwiſe he was twice liable. No inſtance of a *feme covert* giving a bond; of courſe, none of a warrant to confeſs a judgment. Caſes have been cited, where a *feme* may be ſued without her huſband.

Caſes of baniſhment or tranſportation, and many others of the ſame ſort, come not the leaſt nigh the point. Baniſhment is a civil death; tranſportation is a temporary death. Mr. Juſtice *Yates*, on the circuit, in a queſtion, Whether a *feme ſole*, whoſe huſband had been tranſported for ſeven

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years, and was then abroad pursuant to his sentence, might plead without him?

Mr. Justice *Yates* took time to consider, and afterwards determined, that from necessity the *feme* must be admitted to plead.

Lord *Mansfield*—I ventured to determine the same concerning it, as analogous to abjuration of the realm.

In the case of the chamberlain of *London*, the chamberlain was considered as a sole corporation. But, say the gentlemen, the husband has no concern. No, certainly: The wife is to be imprisoned—What does a divorce matter? In some instances it is of no account; in others, I believe it may. Mr. *Wallace* said more, very ably to the point. And was followed by Mr. *Davenport*, nearly to this effect:

Mr. *Davenport*—I don't see by the custom the *feme* is entitled to borrow. She may buy and sell as a sole trader by the custom: I do not see any thing further necessarily implied by the custom. It will be taken strictly, I conceive, not only by the general rule, but from its particular nature; which is to favour one creditor, to the prejudice of the rest.

Nor does the custom intitle the wife, either by words or implication. In a suit here the custom legally attaches to place, not to person, and is thus distinguished from prescription. This is a particular custom, confined to the city of *London*, existing there only: For from the case of the chamberlain of *London*, the custom being alledged in the city court, the action and whole process follow of course. But in this case, from the beginning of the action to the final judgment, the action is regulated by the custom; not a step can be taken without: And it cannot be taken notice of, except in the courts whence the custom originated. A determination was cited referred to *Brooke*, title *Custom*, from the Year-book, distinguishing between *Gavelkind*, *Borough-English*, and such customs, of which the courts throughout the kingdom would take notice, the common law proceeding regularly on the custom assigned; and customs where not the right only but particular remedy was given by the custom, out of or contrary to the mode of proceeding by common law.

Mr. *Cowper*—I endeavoured before to prove the lending money and executing a bond, was incidental, from the nature of the custom; for if they give her the right, they give her the means. Therefore, farther, she might not only borrow, but give a bond, and of course confess judgment.

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M

Mr. *Wallace* obſerves, as deciſive, the ſtatute of *Marl-bridge*. But certainly, if the cuſtom did not give remedy by execution on the goods before, when an act of parliament came, and gave a remedy applicable to the caſe, the court having the matter before them, it was competent to apply the remedy accordingly. For the queſtion concerning the cuſtom of a *feme ſole* giving a bond, we are looking for a needle in a bundle of hay. There has not been one found, there may be many. We applied to the court of the city, the anſwer was remarkable—"That the judgment had always been entered in this court." It has been ſaid, the conſideration does not appear. I preſume to ſay, being known on record, it muſt be taken to be true.*

As to locality, I admit cuſtoms are ſuch, as to the right they give. But when the law has recognized the cuſtom, it will certainly give the remedy. She is a debtor on this as well as on the other ſide of *Temple-Bar*.

[An attorney of the city courts was called upon by the court, to ſay, whether he knew of a *feme ſole* bringing an action in thoſe courts, on the cuſtom. He ſaid he had known many caſes in which the wife had been ſued without her huſband.]

Mr. *Cowper* continued to ſay, That if the court ſhould doubt, whether the millinary trade was within the cuſtom, they would direct the recorder to certify. If on the matter of law, he ſaid, they ſhall be diſpoſed to contend with us, they may bring their writ of error. It may be ſaid, we pleaded a releaſe of error. I hope the plea was good: It was obtained *bonâ fide*. But the court will be, after all, to judge of the validity of the plea. We, if precluded from this, have no remedy.

Lord *Mansfield*—This is an application to the court to ſet aſide a judgment, as entered up without authority.

Allowing what we will of the extent of the authority of a *feme covert*, trading as a *feme ſole* by the cuſtom of *London*, ſhe enters into a bond, without mention of herſelf as a ſole trader, or of the conſideration of the debt. Then ſhe grants a warrant of attorney, without any mention of herſelf as a ſole trader. The attorney has a long declaration of the conſideration of the debt; of Mrs. *Jewſon*'s being a ſole trader, &c. Had the attorney any right to enter judgment on this collateral circumſtance? Does not this make it without authority? If there were any thing litigable,

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* Nemo poteſt contra recordum verificare per patriam.

able, it appearing a *bonâ fide* debt, and without fraud againſt the huſband, we would wiſh, in ſo large a ſum, to give the creditor a chance.

The huſband, by the caſe in *Croke*, joins in a ſimple-contract action; and he has a great intereſt, that he may not be deprived of her ſociety.

Does the cuſtom empower her to enter into a bond to bind her heirs? Suppoſe ſhe had a great real eſtate, does the cuſtom empower her to make executors? Here's a trader as a *feme ſole*, dealing on paper-currency to 70,000l. The notion of this would have ſtartled the city at the time of making the cuſtom: But this refers to the other ſecurity. Upon the bond for this 9000l. does it not change the nature of the debt? A bond given by a *feme covert* is void by law; has the cuſtom ſaid any thing to ſupport it? Certainly not. Is there a ſingle caſe, where a *feme ſole* trader has given a bond? Is there one where ſhe has anſwered an action without her huſband? The cuſtom declares ſhe ſhall join, only providing for the ſecurity of the huſband. If ſhe cannot by the common law, nor, as appears, by the cuſtom, be ſued herſelf without her huſband, can ſhe make an attorney? *

The cuſtom ſeems to ſay nothing of the execution of the goods. The reaſon may be, that they live under the ſame roof; their goods are therefore mixed. Therefore there was a fault in entering judgment on execution, if that ground be good.

On the whole matter, the court was unanimous, That the goods unſold be reſtored; and the value of thoſe ſold, in the hands of the ſheriff, be reſtored; and that the huſband appear in court, and his concurrence be mentioned in the rule. JUDGMENT WITHOUT COSTS.

Bail.

Good debts may be conſidered as part of effects of bail, and yet they are a choſe in action.

BAIL was aſked, what he was worth; and ſaid, 100l. Being then aſked, where it was; he ſaid, in the hands of his cuſtomers. Allowed ſufficient, if the debts were good debts.

* Nemo potêſt plus poteſtatis in alium tranſferre quam in ſe habeat.

OBJECTION

OBJECTION to bail, that one of them was a lieutenant of a marching regiment, which, by affidavit, the deponent says, he is informed and verily believes in *America*, and therefore the lieutenant likely to be compelled to join it immediately. This objection on information and belief not admitted.

Information and belief good on an affidavit against bail, when the matter in its nature is matter of information and belief.

BAIL said, he had an estate of 50*l. per annum* in *Yorkshire*: They said, it was become a fashion to swear to estates in distant counties.

Lord *Mansfield*—Then if he swears falsely, you must indict him.

If a man offering himself as a bail, will swear he has effects in such a place, he is not to be rejected; but you may indict him for perjury.

Entry of Judgment.

WHEN judgment is entered at a time when by the rules and practice of the court it may be entered without irregularity, the party shall not be admitted to say it was sooner entered than it should have been; and, under that pretence, entitle himself to begin again without costs, by calling it a *snapping judgment*.

A regular judgment, not to be called a snapping judgment.

Lord *Mansfield* said, he did not understand the application of that expression, as *applied to a regular judgment*. That they might, before the expiration of the time for signing judgment, have moved for an enlargement.

Sheriff.

WHERE a sheriff comes to levy execution, and the party against whom the writ went declares a *bona fide* assignment for debt, and thereon possession of a stranger, the sheriff may impannel a jury to try the possession.

Maxim.

THE maxim, *Qui peccat in syllaba peccabit in tota causa*, was taken notice of from the bench as reprobated, in many instances, by many acts of parliament. *Vide* 52 *H.* 3. *c.* 11. 14 *E.* 3. *st.* 1. *c.* 6. 9 *H.* 5. *st.* 1. *c.* 4. 4 *H.* 6. *c.* 3. 8 *H.* 6. *c.* 12. *s.* 2. & *c.* 15. 5 *G.* 1. *c.* 13. 8 *H.* 6. *c.* 12. *s.* 2. 8 *H.* 6. *c.* 15. 6 *G.* 1. *c.* 21. *s.* 10. 5 *G.*

c. 19. of amendments. Of *jeofails*: 36 *E.* 3. *ſt.* 1. *c.* 15. 8 *H.* 6. *c.* 12. *ſ.* 1. 32 *H.* 8. *c.* 30. *ſ.* 1. Of miſpleadings aided by verdict, *vide* 18 *Eliz. c.* 14. 21 *J.* 1. *c.* 13. Of want of form; not to arreſt judgment after demurrer, *vide* 27 *Eliz. c.* 5. 4 *An. c.* 16. *ſ.* 1. With an exception, however, of certain criminal caſes, *vide* 18 *Eliz. c.* 14. *ſ.* 2.
[146] 27 *Eliz. c.* 5. *ſ.* 3. 21 *J.* 1. *c.* 13. *ſ.* 3. 16 & 17 *C.* 2. *c.* 8. *ſ.* 4 *An. c.* 16. *ſ.* 7. 5 *G.* 1. *c.* 13. *ſ.* 2. Of defects in form amendable, ſee farther, 27 *Eliz. c.* 5. *ſ.* 2. Of judgments by confeſſion, 4 *An. c.* 16. *ſ.* 2. Of revenue of the crown, 4 *An. c.* 16. *ſ.* 24. Mandamus and information, 9 *An. c.* 20. *ſ.* 7. Proceedings in *Engliſh*, 4 *G.* 2. *c.* 26. *ſ.* 4. Of judgment after verdict, *vide* 16 & 17 *C.* 2. *c.* 8. Vide *Ruffhead*'s Index to the 9th vol. but above all in direct application, *vide ſtat. de Wallia*, 12 *E.* 1. *Ruffhead*'s Appendix, p. 9. *Cum vero deforciens comparuerit, quia per verba brevis non poteſt ſciri petitio petentis eo quod multe et quaſi infinite ſunt rationes petende neceſſe habet ille qui petit quod narret verſus deforcientem, et exprimat rationem petitionis ſue*, et hoc per verba veritatem continentia ſine calumnia verborum, et non obſervatâ illâ durâ conſuetudine, "*Qui cadit a ſyllabâ cadit a totâ cauſâ.*"

Miſpriſion of words.

WHERE the jury find a greater ſum than that laid in the declaration, *il ſemble* the verdict cannot be amended by making the ſum equal to that in the declaration; and the caſe of *Wray* and *Liſter* was cited. And it was ſaid, a declaration in *debet* and *detinet* againſt an executor could not be amended by ſtriking out the *debet*, and retaining the *detinet* only.

Indictment.

INDICTMENT maintainable for fraudulently obtaining goods, under pretence of a treaty of marriage.

Warranty of Goods.

IF a ſeller warrants an horſe ſound, he does it at his peril if the horſe was not found at the time of ſale; whether he knew it or not.

The court, in a caſe of this ſort, did not chooſe to grant a new trial; though the judge who had preſided at the trial

trial expreſſed himſelf rather inclined to the ſide of the plaintiff, and the jury had found for the defendant.

Lord *Mansfield* ſaid, the courts were uſually enough troubled at the firſt trial in ſuch matters: That it was neither clear enough, nor important enough, to anſwer a ſecond trial.

The counſel on the ſide of the plaintiff deſired a new trial; on ſuggeſtion, that the perſon who ſummoned the jury was a bailiff and alehouſe-keeper, and for that reaſon might well have influence over the perſons he ſummoned, on both theſe accounts:* That the horſe was admitted to ſhew for twenty, and yet was bought by the defendant for twelve; and that this was a ſtrong preſumption of his unſoundneſs: That the plaintiff was no jockey, and the defendant was. That the plaintiff had ſuppreſſed evidence of unſoundneſs, which in fairneſs he ſhould not. [147]

Lord *Mansfield*—It does not follow in every caſe, where the weight of evidence may ſeem rather againſt the verdict, that a new trial ſhould be ordered. There is no nice point of property.

Not every cauſe where the evidence ſeems to preponderate againſt the verdict, is a cauſe for a new trial.

The plaintiff aſks, that he may be at the expence of 20l. at leaſt, for the chance of twenty, which is the whole value of the horſe. *Uncertain juſtice by a verdict is much better than certain injuſtice:* Which latter, I think, would follow, by granting a new trial where there is contradictory evidence beſides.‡

Uncertain juſtice better than certain injuſtice.

Agreement to abide the Event.

WHERE there is an agreement of many cauſes to abide the fate of one, for the expedition of juſtice and the great benefit of the parties, it is to be, on a determination of that one to the full ſatisfaction of the court.

Where cauſes are conſolidated, the verdict which ſhould bind the reſt ought to be fully ſatisfactory to the court.

Bail.

PROPERTY abroad, where the ordinary writs of the crown go not, ſignifies nothing, though to any amount.§

King

* Quod fieri non debuit, factum valet.

† Lex vult potius privatum incommodum quam publicum malum.

‡ Fruſtra quid alicui conceditur niſi concedi poſſit & id per quod perveniatur ad illud. Lex nil facit ſupervacue.

King *against* Jackſon.

The court will not puniſh in an extraordinary way, where the act complained of was occaſioned by fault of the complainant, and he is obliged to do that juſtice he ought to have done himſelf, if the matter does not appear malo animo, but will leave him to his ordinary remedy.

THE court refuſed to grant an information againſt *Jackſon*, a juſtice of the peace, for forcing one *Rawlinſon* to marry a woman whom he does not deny to have got with child; but ſays * he was not willing to marry, ſhe having had two baſtard children before her marriage, neither of which belonged to or were fathered on him. The force the juſtice uſed was threatening to commit if he did not marry her. But the court diſcharged the rule; obſerving. "*That though the juſtice might be thought to have "ſpoken haſtily, yet either to marry the woman he had got with "child, which he ought to do after the injury, or to indemnify "the pariſh, was what by law they were entitled to require of "him: On refuſal of one or other of which they certainly would "commit him.*"

[*148] Rule diſcharged, without coſts.

Bail.

The value of the houſe not material in bail.

IT was ſaid, a man muſt rent a houſe of 10l. *per annum*, to be taken as bail. Mr. Juſtice *Aſton* ſaid, the rent was immaterial in this caſe; for his being an houſe-keeper was only required, that they might know where to find him; his other effects were to anſwer, and if he had ſufficient of them it would do.

Mandamus.

APPLICATION for a mandamus to admit a burgeſs; on the other ſide, they offered to admit without a mandamus.

The court would not immediately grant a mandamus, till it ſhould appear by their refuſal that a mandamus was neceſſary.

The King *againſt* Denniſon.

ON a motion for an information, grounded againſt the defendant for a letter, accuſing a noble Lord *inter chriſtianos innominandi flagitii, & quod non proficit ſcire.*

The

The letter was full of indignation; expreſſes great complaint of injury; great and ungrateful injury, done to his character; threatens, if driven, to bring matters to light which would make this climate very diſagreeable to his Lordſhip: That from attachment to the family he does it with reluctance, and from obligations to his Lordſhip. How muſt his Lordſhip bluſh, he aſks him; and how muſt the world; if he ſhould divulge, his lordſhip ſolacing himſelf with his menial ſervants: If thoſe deteſtable practices ſhould be diſcloſed, what would be the conſequence?

He requires an indemnification for all his expences, and a good title in law to be made for an houſe; which, he ſays, his Lordſhip had promiſed to let him for twenty-one [149] years, and requires farther an indemnification for the injury done to his character.

It appeared that the defendant had been confeſſor to the informant; and that about two years ago he had renounced and became a proteſtant.

It was ſtated, that afterwards he went and lived on a curacy of 50l. *per annum*, in *Eſſex*, at a diſtance from his Lordſhip; and was traduced, as he ſuggeſts, by his Lordſhip; of theft, perfidy, and getting a baſtard child: That then he wrote the letter; and it was alledged, as againſt the information, that the crime, whatever it might be, the informant does not juſtify by declaring his innocence. That the defendant not as confeſſor, but as a domeſtic, was witneſs of indecent practices, which he does not think himſelf obliged particularly to diſcloſe, but ſhall be able, if neceſſary, to prove them, by himſelf and many witneſſes.

That where the party did not appear innocent, an information was not uſually granted.

Bur. 548. It appeared, the parties applying were cheats, as well as thoſe applied againſt. Application rejected. *Bur.* 653. The court ſaid, the party not having ſworn to his innocence, the application muſt be rejected. Rex v. Peach and others. Rex v. Athay.

Lord *Manſfield*—I am ſorry to ſee theſe fruits of converſion; this man was a confeſſor to his Lordſhip. [Then his Lordſhip ſtated the crime charged as perpetrated, or at leaſt attempted.] In this mode of application, even juſtification of the truth of the fact will not do. This man, if he had not been a convert, is ſtill liable to be called a jeſuit, from his manner of defence, ſaying, by means excluſive of confeſſion; what does that imply? That his Lordſhip has been guilty of very indecent practices. Why does not he ſpeak out! Juſtification of the truth not good to an information Vide 5 Rep. 125. De Libellis famoſis. ſec. 4. Hobart 252—3. Luke v. Hatton.

It

It is true, this is an application for an extraordinary remedy; and therefore the court will not grant it lightly: But they will do juſtice; and therefore they will not withhold it, if the nature of the caſe requires it.

As to the caſe of challenges; where it appeared the challenger brought an information againſt the party accepting, there the court would not grant. In the caſe of a man convicted for ſelling ale without licence, there, on legal conviction, the man not being able to ſay, he was not guilty, the court would not grant ſuch a remedy for informality only.

[150] Beſides, for argument ſake, admitting the crime, here is a letter to extort money to compromiſe a felony.

As to the objection to his Lordſhip not anſwering, here is an accuſation ſo general, that it hardly admits a direct anſwer; becauſe there was no ſaying, eſpecially if his Lordſhip be innocent, what was to be charged.

LET THE RULE BE MADE ABSOLUTE.

And I think there never was a more odious attempt to ground an information on.

Mr. Juſtice *Aſton*, to the ſame effect nearly. He concluded, with obſerving, that the defendant, from a catholic confeſſor, ſeemed to have become a proteſtant extortioner.

Mr. Juſtice *Aſton*—It ſeems very odd, if there ſhould be a rule, that on application for an information, the party applying ſhould declare his innocence againſt a general charge; when, on information granted, you cannot juſtify for the truth: That he was of the ſame opinion with his brethren for making the rule abſolute. He concluded, with ſaying, the defendant was alike criminal, be the charge true or falſe. If true, why did he not proceed by indictment? Why is the whole affair to end by compromiſe? If falſe, what is it but a moſt ſhocking calumny to extort money?

Note. What ſeems remarkably particular in this head, is, the defendant in the cloſe of his letter offers, that if his Lordſhip makes him the title to the houſe, and gives his character the indemnification deſired; the truth ſhall never be known, his Lordſhip's character will be eſtabliſhed; party diſguſt will gradually ſubſide. And that he ſhall be glad to ſhew his Lordſhip, that no body has a more ſincere, tender or grateful affection for his Lordſhip, nor more willing to do do him every ſervice, nor more reluctant to do him any hurt; which pro-

professions fall under the same dilemma with the circumstances noticed in the precedent observation.

Foreign Judgment.

YOU can't bring an action on a foreign judgment, as judgment, but you may bring an action of debt, and give the judgment in evidence.

Vide Barrows v. Jemino, 2 Strange 1733.

Attorney of the Court.

NOT to be held to bail in civil cases; for he is always *in curia*.

Hilary Term, 4th February 1773. Cur' Canc'.

AN injunction was moved on affidavit, suggesting that *A.* had not accounted to *B.* as he ought to have done, for the rents he had received, and the wood he had cut down.

Injunction must be against present waste.

Lord Chancellor—There is not a word in your affidavit to supply your motion. *An injunction is to stay present waste.* You complain not that the party is cutting down wood, &c. but that he has not accounted for the rents he has received, nor the wood he has cut down.

Order of Nisi Prius.

ON motion to make an order of *nisi prius* a rule of court, it was moved, that the court would permit certain explanatory words to be inserted. But the court directed the words applied for should be made a separate rule.

Coote *against* Thackerary.

ON an action on *assumpsit* to recover a certain sum, on a quantity of hops sold to the defendant; it appeared the plaintiff had made a difference of 21ol. to his advantage. The jury, however, found for the plaintiff; and a motion was made for a new trial, on the ground of excessive damages; and the rather, because several actions had been consolidated into one.

It appeared, that the plaintiff sold the same quantity which had cost him 6l. 18s. the same day for 7l. 10s. and that

that he had bought hops about the ſame time for 7l. 5s. with a view to raiſe the ideal value.

Lord *Mansfield*—The conſolidating of ſeveral actions into one is certainly of very great public utility. Formerly, if there were ever ſo many actions on the ſame cauſe, the jury found ſeparately on every one. You may, ſome of you, remember, that old *Crayeroft* made a great ſtand againſt the [152] introduction of this rule. When I propoſed it, he could not give it up without his client's conſent; the right of an *Engliſhman* to try an hundred actions, if he thought fit. He went at laſt to conſult his client (it was the laſt day of term): We thought he would not bring back his client's conſent; he came very late, and refuſed. On this, I directed the rule to be drawn up, with leave of *imparlance* in all the actions but one. *Crayeroft* then deſired he might have a diſcovery of letters, which he had been offered before; and then took the rule, for conſolidating the actions in one, without writ of error or bill of equity. A day or two after, the defendant in the cauſe came to me, as I was ſitting in *Guildhall*; ſaid, he had the greateſt obligation in the world; that he thought he been deſired to give up ſomething, he did not know what, to his hurt, as he then imagined; on the contrary, he had, without trouble, without expence, been at once admitted to recover 2500l.

Not every miſtake of agents, counſel, or witneſſes, is a ground for a new trial: but the real merits of the cauſe not being ſatisfied, is. Vide Bright v. Eynon, 393. Vide 4 Blackſtone, c. 33. ſ. 5. 3 Blackſtone, c. 24. p. 387, 392. 8vo. edit.

It is not to be denied, that not every miſtake or omiſſion of agents, counſel, or witneſſes, is a ground for a new trial: But if the real merits of the cauſe appear clearly not to have been conſidered, there is then moſt clearly ſufficient ground.

In this caſe, the counſel for the defendant examined a witneſs or two, and reſted the affair, as they well might, as to that action, on the ſingle, ſtrong circumſtance, of the plaintiff himſelf, on the ſame day, buying at 6l. 18s. ſelling at 7l. 10s. Had I been apprized, that ſo many other actions depended on the event of this, I ſhould much have been deſirous of entering into the whole evidence. It might have availed them; it might have had an oppoſite conſequence: But the witneſſes they had a right to produce. I remember, upon the trial, one of the parties, I forget whether witneſs or defendant, ſtarted up as if he had been ſhot, and ſaid, in vehement expoſtulation to his counſel, when he heard the jury were going to find their verdict, "Sir, we have an hundred witneſſes to produce!" "What did you mean!" Poſſibly, the witneſſes who remained would have had ſome material effect as to the other actions, (where

(where the *argumentum ad hominem* was not equally conclusive) by ſettling more generally the price of commodity.

I could wiſh I were authorized to ſay, that the courts of law would afford no relief to either party, when engaged in theſe ſpeculative contracts. But gaming, in all it's ſorts, is too big an evil for the regulation of poſitive law. Subject it to that, and the event is, you reſtrain it not at all; but the honeſt party ſuffers doubly; and the knave eſcapes and triumphs. The former loſes, he pays; it is a debt of honour: The latter happens to loſe, then the condition is changed: I would have taken, if I had won; but now, I'll pay you in law. *This is gaming very high indeed; tends to a monopoly; enhances the price of one of the neceſſaries of life; and therefore merits all the diſcouragement we can give it.*

It has been objected, that the plaintiff will be at a great [153]
expence: For my part, I have no objection, when gaming is put in practice, that both ſides ſhould diſpoſe of part of their money in *Weſtminſter-Hall.* The plaintiff, if he has expence, will have it only in damages; the defendant, in all events, will have the coſts to pay. And I ſhall be perfectly well ſatisfied if the trouble, and ſome ſhare of the expence, fall on both, that they may learn on each ſide, to quit theſe methods of gain, and apply themſelves to a more certain and ſafer, as well as more honeſt way of livelihood.

Juſtice *Willes* was for letting in a new party, who might not have the perſonal objection againſt him as *Coote.* Lord *Mansfield* ſaid, that was not neceſſary, as he would take care to inform the jury, as to the other parties, that his conduct, in ſelling at one price and buying at another, was not to be taken againſt them, as *argumentum ad hominem*; but as inſight for ſettling; and that it might go to eſtabliſh the price for 61. 18s.

Mr. Juſtice *Aſhhurſt* ſaid, he ſhould not have been for a new trial, though perhaps he differed from the jury; (there was contradictory evidence, and then it was their right to chooſe had it not been that ſo many other actions depended on it, which it was very hard to preclude the parties, by judgment by default. He obſerved, the counſel did what the experience of the court muſt juſtify: *Would not weaken ſtrong evidence, by adding to it.* That he ſhould not therefore condemn him; but thought, that the witneſſes, collectively, might be of conſequence, as to the other actions, which were to abide the fate of this.

Bail.

Bail.

NO sheriff's officer, or other person concerned in execution of process, shall be bail in this court.

Notice to Lessee.

If landlord gave tenant notice to quit, or pay such a rent, and tenant holds over, landlord may bring an action for use and occupation, and shall recover the rent specified in the notice.

ON a question, Whether a landlord may not recover what rent he shall have demanded in a notice to quit, in case the tenant does not quit at the term.

It was objected, that by the statute of 4 *G.* 2. *c.* 28. If any tenant for term of life or years, hold over beyond the expiration of the term, the landlord shall recover double damages, by an action of debt, for the yearly value. Defendant must put in special bail, and shall have no relief in equity: That this was a very favourable act * for the landlord; he must therefore keep within the terms of it, and not come for a remedy of his own invention.

[*154]

Lord *Mansfield*—A man cannot hold over in spite of his landlord, and at a rent different from what is demanded.

Note. It seems therefore, in action for use and occupation, the landlord may recover the new rent set in the notice; and that holding over afterwards is an assent to that new rent.

Crawford *against* Witten.

DEBT brought by administration on a foreign judgment. It was upon a debt on which judgment had been entered in the Mayor's Court of *Calcutta*.

On demurrer plaintiff assigned cause, on non averment of letters of administration.

2dly, That an *assumpsit* does not lie here in *England*, on a judgment recovered in *Calcutta*, because they are governed by different laws, of which we cannot take notice in the courts in *England*.

Suppose gaming lawful in *Bengal*, and debt thereon recoverable in *Bengal*, would the court here create an *assumpsit*?

Vernon 540. In the case of a note given, the statute of limitations was pleaded: The note was given abroad. The Lord Keeper declared, that the statute of limitations could not be pleaded; but *indebitatus assumpsit* might be pleaded.

This

This last was not judicially determined. [It was not before the court.]

If we admit an *assumpsit* in any case, we must admit upon every foreign action the laws of every nation, however repugnant to those of *England*.

Lord *Mansfield*—I believe there is but one case determined on the point, which was in Chancery, and, I think, decisive for the plaintiff: But, *I think there is no need of any —a promise confirmed by judgment in a territory subject to* Great Britain, *the court will not look whether gaming is lawful* in Bengal.

Mr. Justice *Aston*—The court has no doubt about the matter; and they admitted the *assumpsit* by their demurrer. When an action comes properly before any court, it must be determined by the laws which govern the country in which the action accrued.

Information.

[155].

IN the case of a very poor person, Lord *Mansfield* observed, that proceeding by information was not the proper manner. On the case of a *Leicestershire* fidler, brought up by information, Lord *Mansfield* observed, the ground of this rule being laid down by the court, was taken.

Information.

IF a charge is simple, and denial has other circumstances coupled with it, which are not in the charge, it induces a violent presumption, that the denial is evasive and deceitful.

A denial coupled with circumstances in answer to a simple charge, infers suspicion of fraud.

Stamps.

IT was questioned, where there is one plaintiff, and several defendants, and eight different debts assigned in affidavit, whether the stamps be necessary to all eight severally, with penalty on each for omission.

Lord *Mansfield*—I will not, without any authority, suffer the constant practice of this court for thirty years to be broke through, and not of this court only, but, the master

tells me, of the Common Pleas; especially when the ex pence to the suitors would be so enormously encreased.

Amendments.

ALL rules to amend, are with payment of costs.

Composition where the whole penalty is to the party grieved.

Composition on a penal statute, where the whole penalt is to the party grieved. Action on 32 G. 2. which gives 5c to the party grieved by bailiffs in arrest, extorting unju fees, or any other mal-behaviour of bailiffs to persons und arrest: And it was questioned, whether the party grieve could compound without leave of court? The court was cle of opinion, according to my note, that they might—*Sed q*

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Costs.

Privilege.

MOTION, That the defendant's attorney might p costs, the defendant being a Member of Parli ment.

The court would not grant the rule, but said, the pr per process against a Member was by sequestration; and th it would hurt the practice of the court to grant the rule.

Rex *against* Curril and others.

ON a motion for a new trial, on indictment for co spiracy, the defendant having been found guilty.

It was on charging one *Farral* with forging a will, und which he took a pecuniary interest. The draught of t will was in the testatrix's hand writing. Divers expressio of *Curril* testified, that he had done for *Farral*, and, th on *Farral* being committed, one of the defendants sa "We shall be soon worth 500l." And that *Curril* said, W "must take possession of the hotel," meaning *Farral*'s hou Again, that *Curril* said, on another occasion, "I have do "the job: We must take possession of the bargain," mea ing *Farral*'s house. That he said to *Farral*'s wife, "I ha "authority to seize the goods; for your husband will "hanged: And you will see him go up *Holborn Hill*." Th Mr. *Eyanson*, who had been employed as an attorney f *Curril*, being told, that it was a felonious affair, left and would have nothing to do with it.

This and more evidence was reported by Lord *Mansfi* on the side of the prosecution.

On the ſide of the defendant, the evidence reported was nearly this:

That one of the witneſſes had ſaid, he thought there was room to litigate the will.

Another ſet of circumſtances of ſtrong evidence againſt *Curril* was, that of one *Lee*, that the will of the teſtatrix was produced before *Curril*, the draught of it all in her own hand writing. That *Curril* not only ſaid he had authority to ſeize the goods, but pretended a falſe authority from Sir *John Fielding*, and thereon got *Iriſh* chairmen to carry them off.

Lord *Mansfield* cloſed his report by ſaying, "There is [157]
"very ſtrong evidence; and the jury found *Curril* guilty:
"And I can ſee no ground for granting a new trial."

The counſel for the defendant employed much time in endeavouring to exculpate the defendant, as acting haſtily and improperly, but not maliciouſly. And he went on by ſaying, that whether the evidence was ſufficient to ſupport the charge, muſt be left to the court. In criminal caſes * the cuſtom of ordering new trials is as ancient as we can trace back by the books. In civil caſes the jury were ſubject to an attaint, which made new trials come in much ſlower. *

* So they were in criminal, vide Hale's Pleas of the Crown.

Lord *Mansfield*—Can you ſhew that? For I thought the firſt new trial in a criminal caſe was granted in the caſe of the *Jew*—the *King* and *Goddard*, before Lord Chief Juſtice *Lee*.

The counſel cited *Levinz*, in which a motion for a new trial, on the part of the King, was made: But there it was ſaid, that the defendant being acquitted, ought not to be tried again, and put in danger. Juſtice *Windham* thought this not neceſſary to be obſerved, as it was not matter of death: But the court ſaid, *in all criminal caſes that rule held; but that if defendant had convicted, there might have been a new trial.*

Lord *Mansfield*—I don't find one before Chief Juſtice *Lee*.

It was admitted afterwards, that none had been actually granted before.

Lord *Mansfield*—*There is no doubt now, that now-a-days, proper ground, we would grant a new trial.* But there is not a tittle of ground for the charge [againſt *Farrall*.] they had meant favourably, they would at leaſt have gone by a civil action. When *Eyanſon* was adviſed to quit having any concerns with them, and had left them, to

avoid this buſineſs, being told it was a felonious affair, *Currill* ſaid, "If I had known the matter, I would have done for him." *It is not neceſſary to prove an actual conſpiracy, nor expreſſed malice; a conſpiracy and malice is to be inferred from the circumſtances taken together.*

Ex facto oritur jus.

The ſeizure without authority; the many other circumſtances I have urged already: Does this look like the behaviour of a man acting innocently, and not with a deſign of conſpiracy? *If we were to grant a new trial, we ſhould be thought, either to ſuppoſe the evidence not proper to have been laid before the jury, or that the conſequence they drew did not follow properly from the premiſes; neither of which is my opinion.*

[158] The Judges *Aſton* and *Aſhurſt* were of the ſame opinion.

Mr. Juſtice *Willes* was not on the bench.

Curril defended himſelf on his belief that there was a juſt ground; and did not enter, I think, into any other material circumſtance of defence.

Lord *Mansfield* deſired to ſee the warrant.

The information of *Catherine Honeywood* before Sir *John Fielding* was read.

The ſubſtance of it ſeemed to be this: That ſhe was chairwoman to *Catherine Butler*; *that ſhe ſaw Mr.* Farral *write ſeveral times over the name of* Catherine Butler *the teſtatrix*; that ſhe threw the pieces of paper he had ſo written into the fire. That he ſhewed a paper to one *Turberville*, which he had ſo written, and aſked him whether it would do? *Turberville* aſſented, and produced a paper, importing to be the Will of *Catherine Butler*, and *Farral* ſigned it *Catharine Butler*. There was a poſitive charge of forgery; and this *Turberville* was never wrote to to prove or diſprove the aſſertion. It is ſaid he is mad.

As Mr. *Curril* was entering largely into his defence,

Lord *Mansfield*—Mr. *Curril*, I ſhould be very glad to hear what you or any in your behalf have to offer; but this was not before me on the trial; and therefore I cannot hear it.

Curril ſaid, he was going to have ſpoken to it on the trial, but Mr. *Wallace* would not let him.

Lord *Mansfield*—Very properly: For you would not have given evidence to the jury in your own cauſe; nor to me in their hearing.

If you have any affidavit to your inſufficiency or character, we ſhall be very glad to hear it.

Affidavit

Affidavit of the poorneſs of his circumſtances, and that he was not worth 5os.

JUDGMENT — *Fine* 1s. *Impriſonment for ſix calendar months.*

Attachment.

MOTION for an attachment for not obeying a rule of court. Not granted; but inſtead of it, a rule to go before the maſter; otherwiſe an attachment, *niſi cauſa.* Rule of practice.

Practice.

YOU can't have regularly a rule for an attachment againſt the ſheriff for not bringing in the body, till you have excepted againſt the bail. Terms of trial at bar vide 3 Blackſtone, ch. 23.

Trial at Bar.

HIS lordſhip would never conſent to one without production of all deeds and evidence in writing which each ſide intended to make uſe of on the trial. And ſaid, *the counſel ſhould never conſent to a trial at bar without theſe terms.*

The terms agreed on in the uſual manner, and the judgment to be final and concluſive by conſent. This Lord *Mansfield* obſerved, was no more than might have been compelled in a court of Chancery, but with great expence.

One ſide relying on a particular regiſter, and ſaying it would decide the cauſe; and the party on the other ſide ſaying he ſhould be very ſorry to have it tried without; and a third perſon being in poſſeſſion, and refuſing to permit inſpection of it; the court at firſt declined granting the rule; but preſently Lord *Mansfield*, and the reſt of the court, granted a rule for a trial on the firſt *Saturday* on next term. But Lord *Mansfield* obſerved, that this part of the rule would not bind them, unleſs inſpection was granted; and deſired them to intimate to the party in poſſeſſion, that the court would compel him if he ſhould refuſe to produce the regiſter; it being public evidence.

Lord *Mansfield* had obſerved, that though the general rule was not to grant the trial at bar on an iſſuable term, yet it had been granted, and would be done on proper occaſions.

New

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New Trial.

Time for new trial on new discovery.

NEVER too late to move for a new trial on a new discovery; which will take it out of the general rule of four days, if you apply in due time after the discovery made

Grosvenor *against* Gape.

IN this matter, a rule of the court of Common Pleas having been attempted to be invaded, the court of King's Bench here very much discouraged the motion.

The court of Common Pleas had granted costs against the plaintiff in this court; upon which the defendant here in the King's Bench moved for a rule to shew cause why proceedings should not be staid till payment of costs in former action? The plaintiff in the new action came before this court to shew cause against the rule, on suggestion of mal-practices by suppression of evidence. Many objections were thought by the court to lay against the application. They *thought that every court should have such regard to its own proceedings, as not to suffer them to be eluded by an application to another.* That the Common Pleas should have been applied to; that the plaintiff must find security to pay costs, as the court should see fit on hearing, or else that he must apply for his remedy in the Common Pleas.

The plaintiff had grounded his defence in the Common Pleas on an action in this court.

Morgan *against* Jones.

THIS cause came on before the King's Bench, *Hilary* term 1773, for the opinion of the court, to be returned on their certificate in chancery, and was thus:

Sir *Thomas Morgan*, previous to his marriage, was seised of various estates; particularly in the counties of *Monmouth* and *Glamorgan*; partly in *Borough-English*, partly in *Gavelkind*: And makes a settlement, in consideration of marriage with Lady *Rachael Cavendish*, to himself for life; remainder to trustees to preserve contingent remainders; remainder to his heirs-male by Lady *Rachael*; reversion to himself in fee. This settlement was made in 1723, and contains provisions for portions for younger children. And he covenants to convey two small copyhold estates and also a free-

[161]

hold. He purchased several freehold and copyhold estates

aft

after the marriage, and in 1725 mortgaged his freehold and another part of his estate to Mr. *Paget* for 11000l. the 3d of *April* 1731, having issue four children; *William*, born in 1725; *Edward*, *Rachael*, and *Elizabeth*, [the defendant, now Mrs. *Jones*, then about two years old] he makes his will; (his lady being, 'tis stated, supposed then pregnant) and first, he gives his jewels to Lady *Rachael* for life, and after her death to his son *William*, and if he dies without issue, limitation to *Edward* absolutely. The house in *Tredigar* to his son *William* and his heirs for ever; the furniture to *William* for life, with like limitation over to *Edward*, on failure of issue of *William*, as of the jewels. The rest of his personalty he directs to be applied by the trustees of the settlement for payment of debts and legacies.

He directs his youngest son *Edward*, by name, to surrender certain lands held in *Borough-English* to the use and behoof of the eldest, his heirs and assigns for ever. Then he limits the estates in *Brecon* in manner following: To *Edward* the customary lands, which were mostly gavelkind, for life, with trustees to preserve contingent remainders; remainder to the first and every other son in tail-male; and for default of such issue, remainder to the eldest son for life, with like remainder over; and for want of such issue, to such son as shall be born to the testator after his decease, limitation of the *Monmouth* and *Glamorganshire* estates in like manner, as of the former, to the two sons, only the elder preferred) and in case, and if it shall so happen, that his said sons *William* and *Edward*, and any after born *son* shall die without issue male of their bodies as aforesaid, then and in such case he devises, for want of such issue of his sons then living, and of any son or sons lawfully begotten, and hereafter to be born, all the rest and residue of his real and personal estate not before disposed of, to his brother *T. Morgan* for life, with trustees to preserve contingent remainders; remainder to *Thomas* the younger for life, with like trusts to preserve contingent remainders; remainder to the heirs-male of his body; and for default of such issue, remainder for life to *Charles*, the second son of his brother, with remainder to trustees as before; remainder to his heirs-male; *remainder* to the right heirs of Sir *William* himself in fee. Here too in the limitations of the *Monmouthshire* and *Glamorganshire* estates, as to the customary lands, the younger is preferred as to the elder.

He

He appoints Lady *Rachael*, her brother the Duke of *Devonshire*, and his own brother, guardians of the children, in case they should be under age at his decease.

There is a power given to his eldest son, and so to his youngest, when they come into possession respectively, of
[162] making leases, raising portions and jointures; the same power is also given to his brother *Thomas* and his heirs-male, when they come into possession respectively.

The words relating to the after-born issue are interlined in both places where they occur, and not taken notice of in the attestation.

The question sent out of Chancery was, *Whether* Thomas Morgan *the brother*, Thomas Morgan *the younger, and* Charles Morgan, *or any of them, took any, and what estate, in the counties of* Monmouth *and* Glamorgan, *by the residuary clause in the said will?*

All the issue living at the making of the will are since dead, except the youngest, Mrs. *Jones*, and without issue; nor was there any son after born.

The case was argued first in *Hilary* term, 4th *February*, 1773.

Mr. *Kenyon* stated the case as above—and then proceeded. I am to contend, that *Thomas Morgan* took an estate for life; his son an estate for life; and the sons of that son an estate in tail-male. We are to consider, whether the will is to operate at all? If it is, the question is answered. I am going to consider the devise as an apparent devise of the reversion in fee, expectant on the failure of the estates-tail under the marriage-settlement. I presume it will be said, that the reversion passes by way of executory devise, after failure of issue male generally. Whether there is a competent party to take; whether a competent instrument to pass, and in a competent time, will be, I suppose, questioned. If it should be said the limitation could only take place as an executory devise, 1 Lord *Raymond* 523. my Lord *Holt* says, a man seised of a reversion after failure of an estate-tail, grants it after such failure, this is no executory devise; but *from* and *after* only marks when the reversion should vest in possession.

He left his wife guardian, supposing she should certainly survive him.

If it should be thought children by another wife would have made an alteration, that event has not happened. If it had, the case of *Christopher* and *Christopher* might have made it doubtful.

Skinner

Skinner—The words are to be governed by the intention of the party, whether there be legal words or no. It would be contrary to the intent, and pernicious, if more remote relations ſhould be preferred. Now in our caſe he gives to his ſons already born, his ſons hereafter to be born, and for failure of ſuch iſſue to Sir *Thomas Morgan* his brother, and his heirs-male ſucceſſively. And if this be ſo conſtrued as to let in a ſuppoſed limitation extending to heirs of a future marriage, and this be interpreted to exclude Sir *Thomas*, then thoſe who are no where expreſsly named, or neceſſarily underſtood, thoſe whom it was not probable he ſhould have or expect, or who, in fact, never came into the actual poſſibility of exiſtence, would be made to bar the eſtate expreſsly limited over to the teſtator's brother, contrary to the plain intent, and almoſt every object of the will would be defeated. [163]

If it cannot take place as a deviſe of the reverſion, or a contingent remainder, I hope it may take effect as an executory deviſe.

If it is after failure of general iſſue, it is too late as a remainder; but he gives over his jewels, in caſe Sir *William* ſhould die without iſſue at his death, then it may be underſtood ſo of the others, and ſo not too remote.

Lord *Mansfield*—I take the two grounds to be; firſt, That this is a will referring to a marriage-ſettlement; and ſo refers to the ſons under the marriage-ſettlement: Secondly, That if it was with reſpect to ſons by another marriage, it would create eſtates-tail by implication.

To this Mr. *Kenyon* agreed, and Serjeant *Hill* was preparing to reply, but Lord *Mansfield* being to go into the Houſe of Lords, the argument was adjourned.

Feb. 8. Serjeant *Hill* for defendant—I am to ſupport before your Lordſhip the claim of Mrs. *Jones*, as the only ſurviving iſſue of the teſtator, and heir at law. The queſtion is, Whether by the reſiduary clauſe, *Thomas Morgan*, or his two ſons, *Thomas* and *Charles*, took any and what eſtate in the counties of *Monmouth* and *Glamorgan*? I humbly ſubmit the deviſe intended by the teſtator cannot by the intendment and words of the will; cannot by the

[* I don't find this caſe but in *Forth* and *Chapman* before Lord Chancellor *Parker*, the court went very far in order to reſtrain the words to *iſſue living at the death*; but ſtill in ſuch a manner as to diſtinguiſh remarkably between a term and a freehold; conſtruing the ſame deviſe as to the freehold to be on failure of iſſue generally at any time; as to the term on failure at the death: And thus *et res magis valeat*. So that any thing then ſeemed to be thought eaſier than to adapt the ſame conſtruction to real eſtates.]

rules

rules of law, by the cases adjudged, be considered other than an executory devise. If that be admitted, his intent was contrary to the rules of law, and therefore is no intent. † He knew that he had two sons and two daughters at the time of making the devise; he knew there might be a default of that issue, and of the issue of any other marriage; in case of such default, uncertain in time, uncertain whether it should ever happen, he devises over—the very words are as strong as possible.

[164] "Forasmuch as it is my intent and meaning, in case my "sons or any other son of mine hereafter to be born, should "die without issue male of them, or any one of them; "then follows (he repeats the words again) and in case, "and if it shall so happen, and for want of such issue of "my said sons *William* and *Edward*, and of any other son "or sons of mine lawfully begotten, he devises over—(then "and in such case, and if it shall so happen) to his brother "*Thomas Morgan* for life, with the several limitations over "for life, and in tail to the issue of his brother."

This is of the second sort of executory devises (where no present fee passes, nor any immediate freehold is limited) [as *Fearne* 64.]

There have been several sorts proposed of estates, which may be supposed intended. Mr. *Kenyon* has mentioned them; and it shall be my endeavour to shew none of them can take effect.

1st, The brother can't take by remainder. A remainder is defined by Lord *Coke* as a residue of a particular estate depending upon it, and created by the same instrument: Here the estate is created at different times, and by different instruments. *More* against *Parker*.

Bryan—I apprehend there is no difference between a springing use and executory devise; but that one being created by deed and the other by will, the latter shall be more favoured, if the intent appear and be consonant to law.

I conceive, upon the cases above cited, if the testator be only seised of a reversion in fee, he can't by words ever so proper pass a remainder or executory devise of it. He might have said, *I devise the reversion to my brother, and after to his sons*; or devised the estates in marriage-settlement *ut nomine*.

[Lord *Mansfield*—He has, I doubt, devised thus: "All "my lands in *Monmouth* and *Glamorgan*."] I apprehend

† Omne legibus vetitum impossibile.

there

there is no immediate deviſe; becauſe it is limited after the death of iſſue born, or hereafter to be born. There might have been a great chaſm between the particular eſtate and the gift out of the reverſion to his brother. Had he ſurvived Lady *Rachael*, and married again, would the deviſe then have been good? If it would have been bad, it is ſo: It was either good or bad originally: No ſubſequent event could make it good, if not ſo at firſt. *

The words *lawfully begotten*, and *hereafter to be born*, make no difference; any more than *procreatorum* and *procreandorum*; which laſt equally applies to ſons already begotten, as the firſt *procreatorum*, notwithſtanding the ſeeming difference in grammatical import; and ſo here lawfully begotten and hereafter to be born, is no more than if he ſaid ſimply hereafter to be born. [165]

Burrows, *Goodman* and *Haſkins*, 873. Deviſe, reciting articles of marriage-ſettlement, to the heirs of her niece by a ſecond huſband lawfully to be begotten; and on default of ſuch iſſue, then over.

Queſtion, Whether limitation is good as eſtate-tail by implication? Whether as executory deviſe? Whether the deviſe, the event never happening to the iſſue by the ſecond huſband, ſhould be thrown out of the caſe? It was ſaid, that it might have been contingently too remote as an executory deviſe; and *if bad in original, never could be made good.*

[Lord *Mansfield*—*You need not cite caſes: 'Tis a principle.*]

Eſtate-tail by implication to the ſons of a ſecond wife is the ſecond mode, and is therefore inconſonant with the former, which ſuppoſes the iſſue to be intended of Lady *Rachael* only: Arguing on both infers that both are uncertain; and that uncertainty I apprehend is as ſtrong againſt a will as a deed.

But if I prove to your Lordſhip that he never intended to raiſe eſtates-tail by implication, they can never be created. Suppoſe a man has an only ſon, makes an eſtate in truſtees to the uſe of his ſon for life, without impeachment of waſte; then immediately on the death of his ſon, remainder to the heirs of his ſon in tail. If before the birth of a grandſon, the ſon by feoffment or any other way alien, your Lordſhip will not ſupport the eſtate-tail, why is this but becauſe the

* Quod ab initio non valuit tractu temporis non convaleſcit.

eſtate

eſtate in truſtees cannot be raiſed by implication to preſerve contingent remainders.

What I mainly contend, my Lord, is, that the intention is contrary to law; there are many caſes adjudged, and of the higheſt authority, a determination in the Houſe of Lords, which is *Laneſborough* and *Fox*, determined in the Houſe of Lords in the time of Lord *Talbot*.

I ſhall come to that caſe preſently, but *Vaugh.* 259. I ſhall cite firſt, believing its authority has never been ſo much as queſtioned. I ſhall take the very words of the will.—After truſts appointed for payment of debts out of a leaſe-
[166] hold eſtate, if other perſonalty not ſufficient, proviſion for raiſing portions for daughters; and after payment of debts and portions, the rents and profits of the ſame to his ſon.—"My will and meaning is, that if it happen that my ſon "*George*, *Mary* and *Catherine* my daughters, ſhould die "without iſſue of their bodies lawfully begotten, then all "my freehold lands which I am now ſeiſed of ſhall come, "remain and be to my nephew *William Roſe* and his heirs "for ever."

Lord *Vaughan*—The law does not approve eſtates-tail by implication. Eſtates-tail by implication, which is only conſtructive, ſhall not be good to the diſinheriſon of the heir at law. It muſt be a neceſſary implication: I call that a deviſe by neceſſary implication, to *A.* when *A.* only can take.

If in that caſe the intention of raiſing eſtates-tail by implication was not neceſſary, and therefore not admitted, I apprehend the ſame reaſon will hold here with equal ſtrength.

4 *Mod.* 316. *Moor* and *Parker*. A caſe which has been mentioned to another purpoſe. *George Chute* the father being ſeiſed, made a ſettlement to *George* his ſon for life, remainder in tail-male, reverſion in fee to *George* the father. He made his will, providing, that if his ſon's wife die in the life of her huſband without iſſue male, then the ſon ſhall have power to make a jointure to any other wife: And for want of iſſue male by his ſaid ſon, then to his ſon by any other wife; 4000*l.* to his grandaughter. And in caſe of failure of iſſue male by his ſon *George*, then all to his grandchildren and their heirs.

The queſtion is, Whether *George* had an eſtate-tail, ſhare and ſhare alike, or for life?

It would be impoſſible to create an eſtate-tail, by tacking the words in the will to thoſe in the ſubſequent limitation; becauſe the ſettlement and will are two diſtinct conveyances.

Another

Another caſe there is, a very ſtrong one, I apprehend.

3 *Mod.* 104. In ejectment, ſpecial verdict—Teſtator being ſeiſed in fee, had two ſons and four daughters, and makes his will, containing *inter alia* as follows: Item, "I "give my eſtate to *Nicholas* my ſon, and if it pleaſes God "to take my ſon, then to my daughters ſhare and ſhare "alike: And if any of my daughters die without iſſue "unmarried, then her ſhare to the ſurvivors: And if all "my ſons and daughters die without iſſue, then over."

Here was an apparent eſtate for life (with a very ſtrong probability of intending to carry it further) and yet the court was of opinion no eſtate-tail in the daughters.

Laneſborough and *Fox*, I apprehend, is a caſe in point; [167] both againſt the reſtraining the words *hereafter to be born* to the children of Lady *Rachel*, and againſt raiſing eſtates tail by implication. Determined by eight of the judges. Eſtates in truſt to preſerve contingent remainders. *James Lane* was tenant for life; remainder to his heirs male, as purchaſors.

James Lane, the father, ſeiſed of the reverſion, makes his will; a deviſe to *James*, and ſays, "If my ſon *James* "die without iſſue," meaning plainly, to take in his daughters; remainder over. It was reſolved *Frances*, the daughter of *James*, who died without iſſue male, ſhould not take.

It would not hold, in our caſe, that to raiſe eſtates-tail by implication, nor by reſtraining iſſue, ſo as to ſignify iſſue male only: Nor here to reſtrain iſſue, ſo as to ſignify iſſue of the marriage only.

This muſt be the reaſon why Mr. *Kenyon* entered a proteſt againſt citing caſes, by ſaying, every will ſtood on its own ground.

I muſt ſay, this is not only an eſtate which is not limited ſo as to take place according to law: But that no lawyer in the houſe, without altering the intent, could make the deviſe conſonant to law.

[Lord *Manſfield*—To be ſure, it is a very important caſe, though very imperfectly reported in the printed caſes, which make an impoſſibility, by making the ſenior judge ſpeak firſt.]

The caſe cited from my Lord *Raymond* is not his own report, Here was limitation in tail male to the ſons of *James*, the younger, as appears by expreſs limitation in the determination in the Houſe of Lords, tho' omitted in Lord *Raymond*.

Badger and *Lloyd*. *John Lloyd*, ſen. conveyed the leaſe and releaſe to the uſe of himſelf, for ninety-nine years, if he ſhould ſo long live; ſame remainder to *John*; remainder

to

to *Elizabeth*, wife of *John*, for life, remainder to truſtees during the life of the two *Johns*, to preſerve contingent remainders; remainder to the iſſue of *John* the younger, in tail male; remainder to himſelf in tail male; reverſion in fee. He had four ſons, and by his will deviſes after the death of *John* the younger, to *Thomas*, the ſecond ſon, in tail male; remainder to *Paul*, the third; remainder on his death without iſſue male, and none of the brothers living, to the fourth, in fee.

The reporter makes it ſaid, the will is revived, which is nonſenſe. It is better reported in *Salkeld*, though not ex-
[168] actly. If he had diſpoſed of the reverſion under the marriage ſettlement, it would come within our caſe.

[This was determined a veſted remainder in *Peter*, the fourth ſon, and the court ſaid, this was the caſe of a reverſion expectant on an eſtate tail, deviſed after death of tenant in tail, to another in tail: This not an executory but immediate deviſe; and from and after only declares when it ſhould veſt in poſſeſſion.]

Holmes and *Meynell*. There was an expreſs deviſe to the daughters, and the heirs of their bodies; remainders over. Here it was evident, that he meant remainder to the ſurvivor on the death of either. If there had been more than two, they would not have raiſed an eſtate tail by implication. If the queſtion had been, how the after-born ſons were to take, in our caſe, it might have applied.

The reaſon againſt raiſing eſtates tail by implication between more than two, is the uncertainty of the eſtate. This, then, applies rather more againſt Mr. *Kenyon*; for there might have been more than two after-born ſons, and the uncertainty of what eſtates, and in what manner they are to take, affects the queſtion as much on that ground as it does *Holmes* and *Meynell*.

Hob. 313. *B.* ſeiſed in fee, makes a conveyance to *A.* remainder to *B.* and *C.* ſucceſſive, without ſaying *ſicut nominati in charta*. *B.* and *C.* can't take immediately; they are not parties to the deed, and the remainder void for uncertainty. I ſuppoſe this affects the deviſee as well as the grantee. *The title of the heir at law is a certainty: It muſt be defeated by ſomething as ſtrong as itſelf.* If there be two wills, and priority or poſteriority is doubted, neither can take effect.

If deviſe to *John Smith*, Eſq; of the county of *Middleſex*;

ſex; remainder to his two nephews, and there be two perſons anſwering the deſcription, the whole deviſe is void.*

If I remember, Mr. *Kenyon* ſays, he deviſes an eſtate tail to the ſons already born, in expreſs terms, excluſive of the after-born ſons. Therefore, there is no eſtate tail by implication to the after-born ſons; and yet, by and by, he [169] maintains an eſtate tail in thoſe after-born ſons, by implication; and this, he ſays, is *noſcitur ex ſociis*: Whereas I think, it is rather *noſcitur ex diſſociis*.

I think, I have proved, that it can't operate as a remainder; nor as reſtrained to the ſons of Lady *Rachel*; nor as eſtates tail, by implication, to the after-born ſons; nor as a diſpoſal of the reverſion under the marriage ſettlement; therefore there remains only that it ſhould operate as an executory deviſe, which cannot be, I humbly ſubmit, conſiſtent with the rules of law, nor with that uniformity of deciſions neceſſary in judgments, and which, I am confident, your Lordſhip will always maintain here, as long (and very long may that be) as your Lordſhip ſhall preſide in this court.

Mr. *Kenyon*, in replication—I have looked into more reports than I have cited, by ſome fifty: Many of thoſe cited on the other ſide, I thought were to be paſſed over, as they did not ſeem to be to the point. The learned Serjeant opened with a rule, which, I hope, will decide the point, *That the teſtator's intent ought to take place, when not contrary to law.* We differ only in our conceptions of it's agreement or contrariety. In the caſe of *Robinſon* and *Robinſon*, the court determined a different eſtate to what the teſtator certainly meant: But the teſtator's primary intent was, that deviſee ſhould take; and the court would fulfil that intention as far as by law they could. It is not pretended here, that the heirs of Sir *Thomas Morgan* are incapable of taking; how they ſhould take, the court will ſee.

I did not quote *Holmes* and *Meynell* as a caſe in point, but for the ſake of Lord Chief Juſtice *Pemberton*'s judgment in *Skinner*.

In

* I believe it will occur to every reader, that the deviſe is only void in ſuch caſe, if nothing can be found to explain it upon the will: In which courts will catch at the ſlighteſt circumſtance, to determine the perſon, rather than the will ſhould fail; nay, even parol evidence has been admitted, in favour of a will, upon ſuch a caſe, to explain the perſon intended: ſo that courts have, of late, at leaſt, and perhaps upon the general principle, and the directions of the ſtatute of wills, for the favourable conſtruction, rarely, if ever, been diſpoſed to let in the heir againſt the expreſs declaration of the teſtator, who appoints another, while there was any poſſibility of tracing out, by any means of receivable evidence, who that other was.

In the case in Lord *Vaughan*'s Reports, 259, the inte
of the proposition there laid down has been much doubte
Lord Chief Justice *Wilmot* said, that he had often doubt
the position there laid down, that an heir cannot be disinh
rited but by necessary implication. That he could wi
there had been added, *or plain intention.*

The case of *Lanesborough* and *Fox*, I understand, was a
estate for ninety-nine years to *James Lane*, and after, a
estate to the heirs of his body. The Lords were of op
nion, that the estate of *James* could not be enlarged b
implication. I will venture to say, that it cannot, bein
only a chattel interest, be enlarged, even by express words.

[Lord *Mansfield* said, there was no question there abou
the heirs of the body of *James*.]

[170] I hope, either by exclusion of the after-born issue, or b
raising estates to them by implication, the limitation ov
may stand to the heirs of *Thomas Morgan*.

Lord *Mansfield*—As at present advised, I cannot wis
a farther argument, the subject has been so well argued o
both sides; and all that can be said on it seems to be ex
hausted: But if the parties desire a farther argument,
shall certainly give it.

On motion made on behalf of Mrs. *Jones*, the defendant
it stood for farther argument.

12 *February*, 1773.

Whether the meaning restrains the words to the sons of the first marriage.

Lord *Mansfield*—The only ground you went upon to sup
port it, as an executory devise, was a dying without issue
in the life of testator. This, I think, is not within the in
tent of the testator, and therefore, it did not strike me
The words would carry to the issue of the second marriage
If the meaning restrains them to the first, there will fall th
question.

Whether a double contingency.

But, suppose the meaning of the will dont confine the
words to the first issue, then, whether there is not a doubl
contingency. And though in the case of *the Duke of Nor*
folk, such double contingency was thought too remote, ye
I need not quote *Saberton* and *Saberton*, and many other o
the modern cases, where it has been held, that if the second
contingency never arises, (as in this case, if there were no
after-born sons) then the devise over is good, as within the
time of law.

I speak no opinion; but would hear every point argued.

Question

Queſtion too, Whether here is not an expreſs deviſe to the after-born ſon? who has a power given him, whenever he ſhall be born, &c. to appoint jointure, and make leaſes, in the ſame manner as the other ſons. Whether the after-born ſon does not take by expreſs deviſe.

The caſe came on again *Trinity* term, 4th of *May*.

Mr. *Dunning*—This caſe comes before the court from Chancery, for the opinion of the court——I ſhall ſtate ſhortly.

Sir *William Morgan* makes a deed of ſettlement previous to his marriage: Eſtates tail are given, in the uſual manner, to his eldeſt and other ſons; then reverſion to himſelf in fee.

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Then he makes a will after his marriage, and diſpoſes of ſome eſtates to his youngeſt ſon, *Edward Morgan*, and the heirs male of his body; then to the eldeſt ſon, in like manner; remainder to ſon to be born after his deceaſe; deviſes over to his brother *T. Morgan*, for life; remainder to his heirs male; remainder to himſelf, in fee: Thus of the eſtates purchaſed ſince the marriage. As to the eſtates which he conſidered in himſelf, under the marriage ſettlement; he diſpoſes of his eſtates in *Monmouth* and *Glamorgan*, after failure of iſſue of his ſons already born, and of any other ſon lawfully begotten, and hereafter to be born, to his brother, *T. Morgan*, for life; with remainder to the iſſue in tail male.

He made this will the third of *April*, 1701, and died the 24th, leaving iſſue, *William* and *Edward Morgan*, and daughters, *Rachel* and *Elizabeth*. *William* died an infant, in 1740; *Edward* at the age of twenty-one, in 1746; then *Rachel* died without iſſue, and *Elizabeth* only ſurvived. At this time the queſtion in all wills, is the clear intention, which it's the duty and inclination of the courts to follow.

Sir *Charles Morgan*, nephew of the teſtator, was living at the time of the teſtator's deceaſe, and entered on the death of his father and brother, and is in poſſeſſion. If the daughter take, it will be contrary to the intention of the teſtator. If the words *after born ſon* are conſidered as preferring ſuch iſſue to his brothers, they may be underſtood ſons of Lady *Rachel*, under the marriage ſettlement. That teſtator meant Sir Charles ſhould take before his daughter.

This will was made in the teſtator's laſt illneſs: I think, we may aſſert, he muſt have meant after-born ſons, or ſons of whom Lady *Rachel* might probably be enſient, and who might be born after his deceaſe. Beſides, in his will he makes Lady *Rachel* guardian of theſe after-born children; which ſhe could be of no others but ſuch as were That by after-born ſons, he muſt have meant of Lady Rachel.

to be born of her. If it ſhould be preſumed, the hardſhip would have been great, if he had got over the then illneſs: Either in that caſe he would have had an opportunity, and clination, probably, on having children by a ſecond marriage, to have altered his will, or, if he had not altered it, it is determined on the concurrent teſtimony of Sir *Eardley Wilmot*, Lord Chief Juſtice *De Grey*, and Lord Chief Baron *Parker*, that a marriage and children was virtually a revocation of a precedent will.

That the contingency of after-born children, whatever it meant, never happening, the next remainder took place immediately.

But take this meaning as large as poſſible when he had no after-born iſſue, the next remainder, in the intention of the teſtator and operation of law, takes immediate effect. If the court over-rules this ground, they will over-rule not only the authority, but, which is more, the good ſenſe of many concurrent determinations. But it is ſaid here is no abſolute deviſe; and eſtates-tail muſt be raiſed * by expreſs words or neceſſary implication. What neceſſary implication means, but plain implication, I can't tell; and if it means any thing more, I apprehend it would not have been uſed at this day. No croſs remainder would ever take effect by neceſſary implication. I underſtand the court dropt ſomething laſt Term about a contingency with a double aſpect, which is a quaint phraſe I do not perfectly underſtand—But if it means as on truſt on one event, the entire eſtate-tail to one perſon and if ſuch an event happens, then the entire to another perſon; I take this not to be ſuch a contingency: But this is ſo far a contingency with a double aſpect, as to have conſideration of the after-born ſons, and if none are born, then on that contingency, a diſpoſal looking immediately to the heirs of Sir *Thomas Morgan*.

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What is meant by a contingency, with double aſpect.

Lord *Mansfield*—Are you not aware that a double contingency is, as in the Duke of *Norfolk*'s Caſe, where there were three or four ſuch contingencies.

[*Saberton* and *Saberton* there quoted; *Stanley* and *Leigh*. If a ſon is born, he takes the whole eſtate immediately; if no ſuch ſon is born, then the deviſe over is good. I don't conſider this as immediately affecting the caſe, but only *quatenus cunque vid datâ*, it was taken hold of to ſet the argument in all its lights.]

This is an eſtate of inheritance. I admit it would not be good as an executory deviſe; that there is no expreſs limitation I acknowledge: However, there is an implied one Then as to the power of jointuring to the after-born ſons—

Lord

Lord *Mansfield*—This ſtruck me very much: But I take it 'tis only of the eſtates he was ſeiſed of in fee, not of thoſe in *Monmouth* and *Glamorganſhire*.

I underſtand that after the death of the elder brother, the younger ſon was to take all, and would be in poſſeſſion of the whole; and as to which eſtates are concerned, the proviſo ſays, "all the eſtates of which he was or ſhould "hereafter be in poſſeſſion;" and that the ſame power of leaſing and jointuring ſhould be on one, and not on the other, or in a different way, was unlikely: And this power is to ariſe on and not before their coming into poſſeſſion; ſo that though it could not take effect, perhaps, as to either of the ſons provided for under the marriage ſettlement, either as to the part into which the youngeſt was to come firſt into poſſeſſion, or that into which the eldeſt; yet as to the other-born ſons, it might take effect; and then there is a deviſe by implication, or elſe the after-born ſons may be meant of the ſons of Lady *Rachel* only, and if that be the caſe, it makes for us. And laſtly, as I underſtand, the caſe of *Laneſborough* and *Fox* is made of importance to the point; If my learned friend ſhews in what they *agree*, I promiſe to ſhew in what they *differ*. [173]

Lord *Mansfield*—I contend, that neither the brother, nor the two ſons of that brother, took any thing under the will, by the reſiduary clauſe. I maintain it to be an executory deviſe after an indefinite failure of iſſue; and therefore too remote. The intention of the teſtator will be ſupported, but not againſt the heir at law; except upon clear proofs. The intention of the teſtator alſo, however clear, cannot be complied with, if not conſonant to law. The reſiduary clauſe is, "As to all my eſtates not hitherto deviſed, I give "and bequeath, in caſe my ſons, born and hereafter to be "born, die without iſſue of their bodies, lawfully to be "begotten; then, in ſuch caſe, and if it ſhall ſo happen, "I give and bequeath to my brother, *&c.*"

For the defendant. That it is an executory deviſe; too remote, and therefore void.

He ſpeaks, as plainly as poſſible, of eſtates not hitherto deviſed: He gives expreſsly, after a general and indeterminate failure of iſſue. It will never be ſaid, that if Sir *William* had been adviſed by an able conveyancer, he would have made a deviſe conſonant to law, if he did not make ſuch an one, but one quite the contrary.

As to the meaning of the words, "after-born ſons," I do not ſee any gentleman arguing this point; has ſpoken with

That for uncertainty what after born ſons means, the heir at law ſhall come in, if it be uncertain; but that it is general, and carried too far; and that eſtates-tail cannot be raiſed by implication, where no preceding eſtate is given.

certainty, which of the two meanings the teſtator had; whether a general failure of iſſue, or of iſſue by Lady *Rachel*. Both cannot be maintained; and then, for the uncertainty, the heir at law will come in. But I apprehend, whatever he poſſibly might intend, he has made the deviſe ſo general, that it cannot be reſtrained to ſons of Lady *Rachel*. As to eſtates tail, to be raiſed by implication to all the after-born ſons, I believe there never was ſuch a raiſing of an eſtate to perſons who had no previous eſtate given them. Where a man gives an eſtate to his ſon after his wife's death, an eſtate for life is indeed raiſed to the wife; but it is by an implication ſtrictly neceſſary. But I contend, no eſtate has ever been raiſed by any lower degree of implication without a precedent eſtate.

Uncertainty.

Gardiner and *Sheldon*. In the caſe before cited, *Holmes* and *Meynell*, the court take notice, that they can't give an eſtate to the ſons, becauſe they do not know how and in what order they are to take. Here Sir *William* has not given a hint, whether they ſhould take for life, remainder in tail; whether they ſhould take by croſs remainders between themſelves; whether ſucceſſive; or how.

Want of eſtate precedent.

Cummins. That no eſtate tail was raiſed by the words, "For want of iſſue male, or failure of iſſue male;" for want of a preceding eſtate. I think the caſe of *Laneſborough* and *Fox* is very much to the point, where the queſtion was, whether *James Lane* took any greater or other eſtate than under the ſettlement. The objection was preciſely as in favour of Mrs. *Jones*: The court ſaid, there was no neceſſary implication, and leſs was not ſufficient.

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[Lord *Mansfield*—Had he not an eſtate for life?] Yes; but under the ſettlement: And thoſe two eſtates could not be tacked together in two inſtruments. What Mr. *Kenyon* ſaid did not ſeem to the caſe that the eſtate of *Lane* being for years could not be enlarged. The caſe of *Moor* and *Parker* is preciſely the ſame as that of *Laneſborough* and *Fox*, (except the eſtate for life) which, for the reaſon before-mentioned, and in the arguments of the counſel, and in the opinion of the houſe, ſeems to have been thrown quite out of the queſtion. And then the deciſion was, that it can't take place as an eſtate by implication; and as an executory deviſe was too remote, what is the natural conſtruction of the proviſo? Why, it was as to the eſtates he came by after the marriage by purchaſe, and was ſeiſed in fee: And of ſuch eſtates for life are made, to all who are to take in them. But, as to the te-

nants

nants in tail, they could even ſuffer a recovery, and bar the whole intereſt; much leſs do they want power to grant leaſes, and raiſe jointures. As to croſs remainders raiſed by implication, where is the precedent eſtate to raiſe them out of?

That no arguments from analogy of the caſes of Saberton, &c.

As to the analogy from the caſes of *Saberton* and *Saberton*, *Stanley* and *Leigh*, I take it, there is no argument from them in ſupport of this deviſe; becauſe in all thoſe caſes, there is an expreſs deviſe to thoſe after whoſe death without iſſue male remainder over is limited.

[Lord *Mansfield*—As to this caſe, I would explain the double contingency more clearly than I had done. "If my "ſons die without iſſue, then I give over; if I have another "ſon, and he die without iſſue, then I give over alſo."]

As to the diſpoſal of them, the difficulty aroſe, that in caſe of real eſtate, an unborn perſon might bar the tail, when he came to the age of twenty-one; but in perſonal, it was thought that there was no bar, becauſe there could be no recovery: And thence, I take, the difficulty aroſe. But the birth immediately is a bar in that caſe, and the whole eſtate veſts. Mr. *Mansfield* concluded with obſerving, that as it could not be good, for the reaſons he ſtated, as an immediate deviſe of the reverſion, it could no way take effect, but as an executory deviſe, and as ſuch, void.

Mr. *Dunning*—I admitted, in ſetting out, that the intention of the teſtator, however plain, cannot take effect, unleſs conſonant to law. I admitted, that as an executory deviſe, it was not good; but it is therefore contended, (without a ſhadow of ground, that I can find) that Sir *William Morgan* meant an executory deviſe. Why throw ſuch an aſperſion on the memory of my client's anceſtor, as to ſuppoſe he knew any thing about them, or their diſtinctions? or meant to make, or in fact did make one? The words, "then and if it ſhall ſo happen," are the only words on which it is taken that he meant a future and not a preſent intereſt. I thought I had already anſwered this, and that no doubt was entertained about them, and, I think, the court ſtill entertains none.

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It has been ſaid, from ſome notes in ſhort hand, which I do not expect to hear generally in theſe caſes, that he can't mean after-born in both the ſenſes; and therefore, that he meant neither. He muſt have meant one way or the other; and it is indifferent to me which he meant. As to what has been ſaid, that in croſs remainders there was a precedent eſtate always, the ground of all theſe determinations

tions has been neceſſary implication; in other words, plain intention: If the intent is either way plain, I can't ſee the neceſſity of ſuch previous eſtate given by the will.

In the caſe Mr. *Mansfield* cited, where an eſtate for life paſſes by implication, there is no previous eſtate to the party; ſo that, I think, the caſe makes againſt the argument. As to *Gardiner* and *Sheldon*, the caſe was reſted on the ſuppoſed uncertainty, and on that point, I don't think it quite ſufficient.

The caſe of *Moor* and *Parker* was determined on the footing, that I can't take two inſtruments together. So was the caſe of *Lonſtorough* and *Fox* expreſsly, by what I have been able to ſee of the arguments and deciſion of the Houſe of Lords. And if I contended, that two inſtruments ſhould be tacked together, they would make againſt me, and I ſhould be arguing againſt deciſions. As to the point of jointuring, *&c.* my learned friend ſaid, it was of no uſe to thoſe who had an eſtate tail, but to thoſe who had an eſtate for life. Then it was applicable to nobody; for it is taken in the ſettlement always as connected with ſuch eſtate, to which Mr. *Mansfield* makes it uſeleſs. It is not, perhaps, uſeleſs to have the power of granting leaſes, raiſing jointures, *&c.*

Judgment of the Court. Caſe ſtated.

Lord *Mansfield* delivered the opinion of the court in the following terms:

Sir *William*, at the time of making his will, was ſeiſed in fee of ſeveral eſtates in *Monmouth* and *Glamorgan*, and alſo of equities of redemption, and of eſtates in *Brecon*; and had great eſtates in *Monmouth*, under the ſettlement. Eſtate to himſelf for life; remainder to the iſſue of Lady *Rachel*, in tail male; reverſion to himſelf, in fee: With proviſions in truſt of the uſual contingencies of a ſon's being or not being. Having, therefore, this reverſion in fee, and ſeeing his eldeſt ſon greatly provided for by the marriage, he gives to his youngeſt ſon *Edward*, in ſtrict ſettlement; remainder to *William*; then to the after-born ſon, whom he makes alſo tenant for life; remainder to his brother *Morgan*. The next diſpoſition regards the queſtion.—For the ſake of the *bar* and *ſtudents*, I cite ſo much of the caſe. "Foraſmuch as it is my intent and meaning, that if all my "ſons, and ſuch hereafter to be born, and their iſſue male "of their bodies, lawfully to be begotten, as aforeſaid," (which has nothing to be referred to but the diſpoſal in fee precedent) "die without iſſue male. In caſe and if it ſhall "ſo happen, that my ſons *William* and *Edward* die with-

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"out

"out iſſue, and any other after-born *ſon* without iſſue, then "I give the *remainder*, which is a word of importance, and "all reverſions, *&c.* which are words in courſe, to my bro-"ther," in ſtrict ſettlement, as before to his ſons: And this he does with the ſame powers as under the marriage ſettlement: Remainder in tail male to his brother's ſons; reverſion to his own right heirs, in fee. The queſtion ariſes, whether the deviſe not too remote? Before I come to this, a queſtion ariſes, which is very material. Whether it is to be conſtrued, though there are are no words to reſtrain it, that the limitation in queſtion extends to the ſons he might have *by any marriage*, or thoſe *by Lady* Rachel *only*.

Queſtion, Whether the after-born ſons, mean ſons by any marriage, or by Lady Rachel only?

There is a power given to his eldeſt ſons, ſo to his youngeſt, when they come reſpectively into poſſeſſion, to make leaſes; the ſame power is given to his brother *Thomas*, and his heirs male, when they come into poſſeſſion ſucceſſively.

Queſtion, Whether the limitation, as to all the lands under the ſettlement, is not void? If it is, the daughter is entitled, as the reverſion was in Sir *William* in fee.

Whether the limitation over void; if it be, defendant entitled.

It is contended, that by the after-born *ſons, is meant ſons of any ſucceeding marriage*; which, there being no previous limitation to the iſſue of ſuch ſucceeding marriage, then there is a limitation of a fee; but ſuch a fee which the law will not allow, but upon certain reſtrictions.

It has afterwards been contended upon another point.

*Moſt of the diſputes in the world ariſe from words.** It is ſaid a *neceſſary implication* muſt be; and *this neceſſary implication* muſt be an *impoſſibility to be otherwiſe*. There never was ſuch an one. A *neceſſary implication is ſuch as does not want a conjecture*, but, upon the whole, cannot be doubted of.

What is neceſſary implication.

In the caſe of *Corrington* and *Hellier*, a man by his will, meaning to make a family ſettlement, and to prevent the remainder from being barred by the tenant, he having no freehold, made an eſtate for ninety-nine years, *if he ſhould [177] long live*: The drawer omitted the words, *if he ſhould ſo long live*. It was *not impoſſible* he ſhould give an eſtate for ninety-nine years; but Lord *Hardwicke*, on the general view of the caſe, thought the words were to be added, *to ſatisfy the plain intent*. Serjeant *Hill*, in opening ſaid, there was no doubt of the intention; but that it was not ſo expreſſed as to take effect by law. Mr. *Mansfield* pretty ſtrongly

* Vide Eſſay on Human Underſtanding, c. 9, 10, 11.

ſtrongly doubted the intention; and when intention is doubted by counſel, without argument, I own it goes a great way. Sir *William Morgan*, who had moſt amply provided for his daughters, being poſſeſſed of a very great eſtate, after default of heirs male of his body, under the ſettlement, gives to his brother, whether he thought of a ſecond marriage, or no: Neither he nor the drawer plainly, had thought of an executory deviſe. Now I think, therefore, this deviſe may be ſupported according to the intention of the teſtator, *two ways*: Firſt, if he had a view to a *ſecond* marriage; if that had taken effect, according to what has very juſtly been ſaid by Mr. *Dunning*, this *marriage with iſſue* would have been a *revocation* of the ſettlement and will; ſo that the brother would not have taken the reverſion till after a general failure of iſſue male: But taking it, as I verily believe to be meant, of Lady *Rachel only*: The teſtator was in his *laſt illneſs*; the will three weeks before *his death*; he makes Lady *Rachel guardian* and *executrix*. He diſpoſes of the remainder by theſe words expreſsly, *remainder*; not *remainders*, as conſidering what eſtate he had to give, and finding it was only what ſhould be *remaining* in him *after the failure of the eſtates particularly limited under the marriage ſettlement*; this which *remainder* he gives, *under that deſcription*, *immediately* to his brother, with the ſeveral ſubſequent limitations over to the iſſue; reverſion to himſelf in fee ſtill reſerved. But taking the words *after-born ſons* in the *largeſt ſenſe*, what will be the conſequence? That the ſons *of any other marriage* ſhall take an *eſtate tail*.

In caſe I ſupply the words, "In caſe my ſons:" The ſons I have now, or any hereafter to be born ſon of *any other wife*, lawfully to be begotten, ſhall die without iſſue of their bodies, lawfully to be begotten, then remainder to Sir *Thomas Morgan*? What then? If Sir *Thomas Morgan* is not to take till after failure of the iſſue male; he not meaning to diſinherit any of his ſons; it then follows, that they take an eſtate tail. And the other ſons are an *example how* they are to take it; *ſcilicet*, *ſucceſſivè*.*

As to the power of jointuring, &c. which is properly given to tenants in tail, if it extend to *all the ſons*, as well on eſtates under the ſettlement as in fee, (and that part which impowers his brother, and the iſſue of his brother, when they

* Verba relata, &c.
Certum eſt quod certum reddi poteſt.

they ſhall come ſucceſſively into poſſeſſion, can't properly, I [178]
think, extend to the ſettled eſtates) then it is, as *clear and expreſs* as poſſible, an eſtate tail to the ſons born, and after to be born, in the ſtricteſt ſenſe; remainder in tail to his brother; reverſion to himſelf, in fee. If we are to conſtrue this as an executory deviſe, we are deſired to *ſtrain a conſtruction, in order to ſet aſide the teſtator's whole will and intent, which ought not to be done.* We ſhall make our *certificate* according to our preſent opinion; and if we ſhould alter our opinion, we will have it argued again.

[It never, I believe, was farther agitated in the King's Bench: and the Lord Chief Juſtice made his decree according to the certificate; from which decree Mrs. *Jones* appealed to the Houſe of Lords, and the counſel began to be heard, *April* 22, 1774.

At the ſame time a croſs appeal was brought againſt the decree of the court of Chancery, concerning ſome copyhold lands under the ſame will; and both were proceeded upon together. The queſtion upon the copyholds was before the Lord Chancellor, at the ſittings after *Trinity* term, 1773; but, as the queſtion which was before the King's Bench appears much the principal, it ſeems better to take together what relates to that, though, for convenience of the parties, both were argued together before the Houſe: And I ſhall have principally taken the argument in ſuch parts as were little or not all urged before the court of King's Bench; and which, though they did not ſeem immediately to affect the deciſion, appear to contain ſeveral uſeful points.

CERTIFICATE was returned *accordingly*, and the Lord CHANCELLOR made his DECREE purſuant to the CERTIFICATE: From which an APPEAL was had to the HOUSE of LORDS, and by the *advice* of all the JUDGES, DECREE AFFIRMED.

The King *againſt* Newman, and others.

On the Game-Act.

ON an information for undue conviction on the ſtatute againſt keeping and uſing greyhounds.

Uſing a grey-hound merely, in company with a qualified gentleman who keeps it, is not within the ſtatute.

Mr. *Newman*, it appears on the evidence, convicted two perſons who were themſelves unqualified, but who were out with a qualified perſon; which they pleaded in their defence.

fence, and that the dogs were not their own. He ſaid he knew it, and, turning to his brother juſtice ſaid, "They are duly convicted," and obliged his brother juſtice to convict them. The information is againſt both juſtices.

[179] In this caſe it was ſaid, on the part of the juſtice, that the convicted perſons not being qualified by their own evidence, and it not appearing by any evidence expreſsly, that the perſon they were with was a qualified perſon, or that the dogs were, as they aſſerted, not theirs, but his, that the information might not be granted. It was farther ſaid, that it has never been adjudged, that unqualified perſons out with qualified, were free from the penalty; nor that it ſignified whether the dogs belonged to the qualified men, or to the others: For the being out to *uſe* them, was ſufficient within the ſtatute; or at leaſt it had been much doubted—Serjeant *Burland*, for the defendants.

Lord *Mansfield*—Let the juſtice pay the whole coſts, and go before the Maſter.

Serjeant *Burland*—Does your Lordſhip think them *ſufficiently* qualified?

Lord *Mansfield*—*Yes*; and it's matter of tenderneſs to take it this way. I know you to be very judicious, and thought you led to it. The defence you ſet up for the juſtice was *none*; if it had been ever thought of by them.

I remember the caſe at *Exeter* of the poacher; the greyhound taken in his poſſeſſion: Even a ſpecial jury had no doubt, but found for the defendant. *Keeping* and uſing are the words of the ſtatute. Shall not a gentleman take any body out with him, to beat the buſhes, and ſee a hare killed? it appeared too, on the evidence, that the ſummons was taken out on the *Sunday*, and that the parties aſked an hour's time to go for Mr. *Linch*, the gentleman they went out with, who, they ſay, is worth ſeveral hundreds *per annum*. It is not pretended on the other ſide, but they might have brought this witneſs in three or four hours at leaſt.

This, Lord *Mansfield* obſerves, with ſome of the abovementioned, were very aggravating circumſtances. However, you know the ſtrength (he added) of your own caſe: Take it by way of information. Serjeant *Burland*, however, thought it adviſeable to deſire leave then to refer it to the Maſter, which was granted accordingly.

The

The King *againſt* Sir Joſeph Mawbey, and others.

Barley mixed with forfeited wheat ſubject to be ſeized with it.

ON the ſtatute of 11 *G.* 3. againſt diſtillation of wheat, two hundred quarters found preparing for that uſe, in the proportion of one-third wheat to two-thirds barley.

Setting up a mill to evade the act not ſufficient.

They took thirty quarters of the wheat the defendants prevented the conſtables from taking; and Sir *Joſeph Mawbey* makes the conſtable a promiſe in writing, to ſurrender the aforeſaid wheat, and deſires the conſtable to ſeal: Afterwards, they turned the conſtable away, and altered the proportion to one-eighth of wheat to the barley. Thus they contrived to make an uncertainty in the quantity and quality of the commodity. [*180]

A ſervant of Sir *Joſeph* depoſes, as to the mixture in the proportion of one-third of wheat, and in the manner neceſſary for diſtilling. The ſeizure of the wheat by warrant, and the prevention; and afterwards, the ſhooting the wheat and barley together, in ſome degree by himſelf; and believes, the other ſervants might ſhoot more together, as they were ordered.

Coote Miller, one of the men who were commiſſioned to execute the warrant, depoſes to the tenor of the warrant, and names the perſons who were alſo to execute, and went together. Proportion one-third to two-thirds. Servants, with broomſticks, *&c.* prevented. *Furneſs* and *Thomas Mawbey* had the warrant ſhewed them before receipt of a note from Sir *Joſeph Mawbey*, which ſays, if law will warrant them in what he underſtands they are about.

John Lumley—*Coote* deſired to ſee whether the wheat was in the ſame proportion as before. Sir *Joſeph Mawbey* lets him in, but won't ſuffer the quarters to be taken.

Rule to ſhew cauſe why judgment ſhould not go againſt Sir *Joſeph* and *Thomas Mawbey*.

Lord *Mansfield* made his report. Special verdict found, that *Mawbey* and his brother were traders in diſtillery; that they were not millers; that *Gough* had reaſon to ſuſpect, that there were more than five quarters; that they found two hundred and fifty quarters, two third parts wheat, and one-third barley; that they found them ſo mixed, that it was utterly impoſſible to ſeparate them. That on going to a ſecond ſeizure, they found about an hundred and fifty quarters mixed, about one-third part wheat, and the reſt barley;

ley; that Sir *Joseph Mawbey* and his brother violently resisted and obstructed the seizure; and, on the whole, if the seizure was *lawful*, they find for the plaintiff; if *otherwise*, for the defendant; and submitted to the opinion of the court.

11 *G.* 3. *c.* 1, prohibitory of exportation of wheat and wheat-flour, and the use of them in distillery, then if any distiller, *&c.* have more than five quarters of wheat or wheat-flour at one time, or any for his use, penalty enacted; then power on warrant from justices to constable, to enter and seize. There is an exception of grinders of corn and millers. The question arose on this, Whether the wheat ground, and flour so mixed with barley, was forfeited?

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The old case was cited, if a man of his own act, mix hay with my hay, or money with my money, so that they cannot be separated, nor the part of each ascertained, the whole shall be mine.

Cro. J. Warn and *Eyres*. The question was on an action of assault and battery; the plaintiff violently threw some money into an heap of money of the defendant's. There it was said and agreed, that the plaintiff had no right to any part; that otherwise a man should be made a trespasser against his will.

On the other side, that by the 13 *G.* 3. (these are annual acts.) There is an authority to seize any mixture: So that the legislature thought with Sir *Joseph*.

The principal thing which seemed observable in Lord *Mansfield*'s report was, that the jury found him and his brothers *not* millers. It appearing strongly on the evidence, that the mill was *not* worked, nor had tackle as of a grinding mill, within the statute, but was as a colour for the keeping the wheat, and applied to the purposes of the distillery.

The wheat appeared in the evidence about two hundred quarters, the barely four hundred and fifty quarters.

Lord *Mansfield* observed, it was very laborious to separate the wheat from the barley; and if the wheat had been mixed by their own fault, they could have recovered nothing.

The obstruction on the evidence appeared not very violent, consisting in threatening tongues, without beating them.

Note, In the pleadings before, in reply to the observation of the act since his resistance, providing for seizure of any

any mixture, it was ſaid, the act did thus *ex majore & abundanti cautela.* That in the caſe of embroidery, upon the act 22 *G.* 2. c. 36. with which, and the proviſions of this act, a compariſon had been made, there was a poſſibility of ſeparating.

Verba ex abundanti cautela ſuperaddita interpretationi non officiunt.

Lord *Manſfield*—I had no doubt at the time, nor any now. But the defendant deſiring a ſpecial verdict, I thought it neceſſary, for the ſake of a more ſolemn argument, to grant him that. I won't enter into what has been ſaid by myſelf on the trial, being merely willing to hear the opinion of my brothers. There has been nothing new, but ſaying, the act of the preſent King is expoſitory of the former. [182]

But it has been made ſince this queſtion, to ſhew the ſentiments of the legiſlature, in caſe any queſtion ſhould ariſe in future. As to the caſes in which the law, in other inſtances, has given a power of ſeizing forfeitures, though mixed, it has been done in things joined at the time appointed for the ſeizure, but ſeparable in their own nature.

In caſes of ſeizing of veſſels, if the legiſlature means to ſay the ſhip, they will ſay ſo in expreſs words. As to embroidery, it might have been ſeparated from the cloaths. A doubt might, without this, be conceived, whether if embroidery only had been mentioned, any thing elſe could be ſeized? There is an exception of the millers.

Lord *Manſfield* obſerved farther, the ſeizure in a mill made no difference here, the parties did not come within the preſumption. It is a temporary act, one of thoſe ſeldom made to continue longer than a year, and, I believe, generally with a power reſerved of being diſcontinued ſooner, on ceaſing of the occaſion. It is made for the public benefit, on great exigencies. Whether Sir *Joſeph Mawbey* mixed the grain, or bought it mixed, he is a treſpaſſer againſt the law, and ſhall not avail himſelf of his own wrong. Therefore, I continue of opinion the obſtruction to the ſeizure, made by Sir *Joſeph* and his brother, was not juſtifiable. Were it otherwiſe, the act of the 11th of the preſent reign deſtroyed itſelf. There ſeems to me no doubt on the point; and the only queſtion can be on the value, which was determined by the verdict, and was always in the ſame proportion.

Nemo lucrabitur de injuria ſua propria.

The Judges *Aſton* and *Aſhburſt* delivered their opinions on the circumſtances principally with Lord *Manſfield*; only the former obſerved, that the act had no occaſion to ſay, whereas a diſpute has ariſen, *&c.* and that on an action on the ſtatute there could be no doubt about the number of the quarters,

ters, nor of 5l. penalty for every quarter. The latter ſaid the caſe in *Popham*, of hay mixed, was to the point. The he could not agree with Mr. *Lee*, that his client did no know the law; but he did not mean to obſerve, but evad it: And concluded with a wiſh, that all who were in th ſame intention might find the ſame fate.*

Proſecutor being ſatisfied, COURT ſet a FINE of 6s. 8d They agreed to take the ſum of 500l. which was conſidera bly leſs than ſettled by the verdict.

* Dolus & fraus legibus inviſa.
Ως πασχοιλο και αλλος οτις τοιαυτα γε ρεζει.

Eaſter

Eaſter Term, [183]

13 Geo. 3. 1773. K. B.

Eldridge.

BOND entered into by two obligors jointly and ſeverally. The nominal obligor offered evidence to prove the conſideration illegal: The Judge, before whom the cauſe was tried, excepted to the admiſſibility of the witneſs.

On this a new trial was moved; and, in the argument for the new trial, *Tomkins* and *Barnet*, 5 *W. & M.* was cited. Action on a bond entered into by three on an uſurious contract. Uſury was ſet up as a defence againſt the bond; and one of the obligees was admitted in evidence. There was alſo cited the caſe of *Goſling* and *The Eaſt India Company*.

Lord *Mansfield*, on this motion of Mr. *Buller*, mentioned a caſe at *Guildhall*. Two defendants in an action; queſtion on admiſſibility; they were charged as partners. Said Lord *Mansfield*—I believe I admitted each as evidence againſt the other.

A council mentioned the name of the caſe, which he ſaid was *Backhouſe* and *French*, and that Mr. *Dunning* was council in it; but his lordſhip ſaid he was not quite clear, what his opinion was upon that caſe; or, at leaſt, that the reaſons upon which he grounded his judgment had ſlept his memory.

Conviction.

ON a conviction on the ſtatute againſt hawkers and higlers, the juſtice ſtates that *A.* being one credible witneſs,

Of licence and duty to be paid by hawkers and higlers, vide 8 & 9 W. 3. c. 25. 9 & 10 W. 3. c. 27. 3 Ann. c. 4. 7 Ann. c. 7. 1 G. 1. c. 12. Of the penalty of forging a licence, vide 9 & 10 W. 3. c. 27. ſ. 5. Of not having a licence ready, or lending, vide 3 & 4 Ann. c. 4. ſ. 4. Of hawkers of unſtamped newſpapers, vide 16 G. 2. c. 26. ſ. 5. Vide Burn, title of hawkers.

[184] witneſs, ſwore that *B.* the perſon convicted, travelled from town to town as an higler. The affidavit of *A.* afterwards ſtated in the conviction, is, that the ſaid *B.* ſold him four yards of ribbon.

Conviction bad—becauſe the matter that ſupports it is falſified by the affidavit.

Information.

Information, not proper to try a civil right.

THE court will not grant an information to try a civil queſtion; except where the parties ſtand out againſt a trial at law.

This was on a complaint againſt commiſſioners, by act of parliament for lighting and paving, for not ſuffering their houſes, *&c.* to be rated; to which they defended—that ſuch houſes were not within the diſtrict.

The court were of opinion, this was a ſubject more proper for an appeal than an information.

Appeal.

Appeal from quarter ſeſſions final, and what relief may be had, and how.

WHERE a power of appeal to the quarter-ſeſſions is given by Parliament, and that to be final; no other mode of trial can be admitted than that preſcribed by the act; but on refuſal to admit the appeal, duly offered or want of due publication, purſuant to the act, the court will give the neceſſary relief.

Motion adjourned, till the party who moved has an opportunity to appeal againſt the next rate to be made; for that by this means, either the queſtion would be dropt, or the rate tried; and either way thoſe who moved for the information would have the object for which they moved.

Informality.

Stile of the court of King's Bench miſtaken for that of the Common Pleas, vitiates the judgment.

MOTION againſt an execution levied on judgment of this court, on account of informality. The writ ſtates the plaint before our Juſtices at *Weſtminſter*, which is the ſtile of the Common Pleas—whereas it ought to have been "before Ourſelves at *Weſtminſter*, or wherſoever we ſhall be in *England*."

Rule granted to ſet aſide judgment and execution.

Return

Return to *Mandamus*.

MOTION for an information againſt the mayor and burgeſſes of *Nottingham*, for a falſe return to a writ of *Mandamus*. The writ recites, "Whereas it has been "ſhewn, and that there have uſed, and ought to be, ſix "junior counſel choſen; therefore *mandamus*, &c. to aſſem-"ble and chooſe accordingly."

They return to the *mandamus*, that there ought not be ſix junior counſel choſen as above, at the time of the writ iſſued, nor before.

Evidence of election from 1712 to 1722, in the manner required by the *mandamus*.

Objection to the information, that there was no appearance upon the charter of ſuch mode of election, which ought to be ſtronger evidence againſt the uſage; eſpecially when for fifty years there had confeſſedly been none ſuch, than any they could offer, to induce the court to grant an information.

On the other ſide—that there was ſufficient ground for an information; and that this was the only way of bringing it before a jury: And that if the right had once veſted, *agavit* could be no bar againſt it. That at leaſt they ſhould have made ſuch a denial, as to alledge that the records contradicted ſuch right; otherwiſe, that it ſhould be taken at preſent that they ſupported it.

Motion ordered to be adjourned, to ſee whether the parties would bring it on without information. ——*

Davis *againſt* Morriſon.

Action of Trover.

ONE *Deeds* bought plate of the defendant, and gave him a draft on a banker. The defendant *Morriſon* Pawnbroker, not knowing

goods to have been unlawfully obtained by deceit, not liable to anſwer. Of brokers, that they ſhall be ſworn, vide 13 E. 1. ſt. 5. in Ruffhead's Appendix. Sale to a pawnbroker not to alter the property in London, vide 1. J. 1. c. 21 their fees, 21 J. 1 c. 17. ſ. 3, 21 Ann. ſt. 2. c. 16. ſ. 2. Not to buy and ſell bullion, 6 & 7 W. 3. c. 17. ſ. 7. Stockbrokers, 8 & 9 W. 3. c. 20. ſ. 60. Not to extend to carrying on any home or foreign trade or partnerſhip, except as to inſurance, vide 6 G. 1. c. 18. ſ. 25. Exception in favour of the South Sea Company, 6 G. 1. c. 18. ſ. 24. 27. Eaſt India Company, 6 G. 1. c. 12. ſ. 28. Reſtraints and penalties on ſtock jobbing, 7. G. 2. c. 8. To enter all their contracts, 7 G. 2. c. 8. ſ. 9. Penalty on retailers of ſpirits taking pledges, 24 G. 2. c. 40. ſ. 12. vide alſo 30 G. 2. 24. 32 G. 2. c. 24. ſ. 2.

gave

* Quilibet præſumitur optime pro ſua cauſa dicere.
Stabitur præſumptioni donec probetur in contrarium.

[186]

gave a receipt on this draft as for caſh. *Deeds* pawned the plate to the plaintiff, a pawnbroker, ſhewing him this receipt given by the defendant, as evidence of his property; on which *Davis* took the goods in pawn. The draft was a bad one; for *Deeds* had no money with the banker on whom he drew. *Deeds* was tried on an indictment on the 30 *G.* 2. preferred by *Morriſon*, for procuring, under falſe pretences —*Davis* procured the goods on the trial, to convict *Deeds* —*Morriſon* ſeized and kept the goods. *Davis* on this brought an action of *trover*. The jury at *Guildhall* found a ſpecial verdict, ſubject to the opinion of the court.

Mr. *Bearcroft*—The ſtatute of *James* has a very long preamble complaining againſt a new ſet of brokers.

Then *ſ.* 4. recites, that no kind of goods that are ſtolen, or robbed, or *badly* or unlawfully purloined or *come by*, but theſe take them in pawn; therefore, for the avoiding of the ſaid miſchiefs and inconveniencies, thefts, robberies, felonies and *bad* people; then it proceeds to enact, that no property ſhall be changed in goods wrongfully or unjuſtly purloined, taken, robbed or ſtolen.

It is obſervable, that acts of parliament, in deſcribing felonies generally, uſe the word *feloniouſly*, as in an indictment; now here, though they deſcribe a felony, they purpoſely avoid the word *feloniouſly*; diſtinguiſhing, I think, clear between *unlawfully come by*, or *purloined*, in a manner not ſubject to an indictment; and ſuch as are feloniouſly come by. The *ſtat.* 34. *G.* 2. ſays, to be ſure only of goods, when the pawnbroker *knows them* to have been fraudulently obtained: But, I think, that by the *Statute of James*, whether the pawnbroker *knows* the fraud or *not*, no property veſts. And I think it is of great conſequence to the public, to have the ſtatute ſo conſtrued. Mr. *Bearcroft* particularly urged, that *Davis* had never any property in the plate; it having come to his hands againſt the right of the owner, in whom he contended the property always remained; and, therefore, that an action of *trover* was not maintainable. And he cited 6 *Mod.* 114. that goods obtained by fraud were *no* property. [But *note*, this was as between the parties, and not as a third perſon.]

It was contended for the pawnbroker, that it was neceſſary by the *ſtatute of James*, that the taking ſhould be feloniouſly, *vi & armis*; that Mr. *Morriſon* gave credit here to *Deeds* on the draft, as for caſh. He did not queſtion whether he had caſh at the banker's; but gives credit to the draft as caſh: Therefore the defendant *Morriſon* having endor-

endorſed the bill of parcels, acknowledging the receipt, accepting the draft as caſh, is not at liberty to take advantage. Mr. *Davis* accepted the draft on Mr. *Morriſon*'s credit as payment. Mr. *Morriſon* has no right to ſay *Deeds* came fraudulently to the goods by falſe pretences, and, therefore, no property veſted. *Davis* contributed to convict *Deeds*, and this ought not to be turned by the defendant to his prejudice. [187]

Lord *Mansfield*—The caſe is admitted by Mr. *Bearcroft*, that it would be exceeding hard: If the *law*, however, will have it ſo, there is *no* remedy. But, I think, this caſe is not within the *ſtatute of James*, which makes the property not veſt againſt the *right* owner, as between *him* and the *taker*.

Here *Morriſon* acquires to himſelf property, without the concurrence of the owner; he gives credit to a cheat: Who is to ſuffer? He, or a third innocent perſon?

Mr. Juſtice *Aſton*—I think the ſtatute is to be underſtood of a fraudulent, tortious, or ſurreptitious taking, without the concurrence of the owner. If the word *obtained* had been in the ſtatute, I ſhould have thought it clearer: But, as the evil is greatly encreaſed ſince the *ſtatute of James*, I could *wiſh* the pawnbrokers took at their peril.

Mr. Juſtice *Aſhurſt* much to the ſame effect as to the conſtruction of the *ſtatute of James*.

Bail.

A Perſon offered as bail, was deſcribed in the notice as an hatter; on exception taken to the notice he appeared to be a ſervant to an hatter, hired for a year. He lived in a ſeparate houſe—the court rejected him.

Bail deſcribed as hatter, being ſervant to an hatter, rejected.

Notice of Bail, with the Sur-Name omitted.

THE court gave them leave to take two days time to juſtify.

Sur-name of bail omitted; time to juſtify.

Zoffani *againſt* Jennings.

ON a rule to ſhew cauſe, why, on payment of coſts to the maſter, the trial of the cauſe between the parties ſhould not be put off till next term.

Affidavit that major Bruce is a material evidence, and that he is major of ſuch a regiment, and that the regiment is at the Grenades, held not ſufficient to put off the trial; but it might have done if the cauſe had appeared to have merits.

Affidavit on which the rule was moved, was, that Major *Bruce* is a material evidence to the defendant; and that he is major of ſuch a regiment, which regiment is now at the *Grenades*.

[188] Objected—that the major himſelf is not ſaid to be at the *Grenades*, but only his regiment.

Lord *Manſfield*—There is certainly a flaw in this affidavit if he does not ſwear that Major *Bruce*, but his regiment, is at the *Grenades*. I would not have gone upon this *wholly* if there had been merits.

DISCHARGE THE RULE.

Harrington *againſt* Jennings.

COMPLAINT againſt an attorney for not acting according to his duty as ſuch, in forwarding the plaintiff's buſineſs; and, that he did not proceed againſt the original debtor, but admitted of one Mr. *Hughes* undertaking *per quod amiſit*, her debt.

It was a debt on a reſpondential bond.

It was ſaid, that the attorney had favoured the original debtor unduly.

Beſides, that he was not at liberty to act out of the general courſe, and contrary to the authority given; and then to ſay he had done for the beſt.

That he does not ſay he explained the nature of the proceedings to his client; or gave her to underſtand ſhe was made to give up the benefit againſt the original debtor, and rely on the other ſingly.

That it is true, ſhe conſented in general terms, not underſtanding the nature of the buſineſs—ſhe ſaid it would be very agreeable to her to have her money; but this was not giving an authority to *loſe* her money for her.

That the attorney might have been ſure, that *Hughes* was not ſolvent, or he would not have made himſelf reſponſible for a man in ſo bad circumſtances, as the original debtor was known to be.

Mr. Juſtice *Aſton*—The queſtion is, Not whether *Jennings* ſhall be ſecurity for the bond, or, whether ultimately he ſhall be liable to an action; but whether there is ground to proceed originally againſt him *now?*

I

If he acted not intentionally ill, but with *good* deſign, though eventually unhappy, this is *no* ground to proceed *criminally* againſt an attorney.

Firſt, as to the bond, when *B.* offered bail and ſaid, [189] "it's no matter whether good bail, I am ready to pay you "an handſome compliment."—"No," ſays *Jennings*, "I "will not conſent." Then *Hughes*, whom he ſwears to have taken for a good man, and whom I can't ſay he has ſworn falſely in ſo ſwearing, offers to put in and perfect bail, &c. A better offer one attorney could not make to another.

Then as to ſuſpending the proceedings on the bail bond; it appears the worſt part: But ſhe *knew* and *approved* it, as appears on her affidavit.

As to the promiſe about paying the money, ſhe knew by whom it was to be paid; and *Jennings* ſeems to have thought ſhe would have the money.

However *imprudent* it may have been, it does not appear to have been done *malo animo*.

As for *Hughes* having been diſcharged from the proceedings on the attachment, it was done after ſhe had diſcharged *Jennings* from acting for her. As ſhe may have her remedy by *action*, if it ſhould appear he knew *Hughes* not to be ſolvent, which would be very bad; the court will not grant an *attachment* in a *doubtful* matter.

Mr. Juſtice *Aſhhurſt*—The court will not grant an attachment but on a *clear* caſe; nor proceed *criminally*, where the conduct of a party ſeems to have been *intended* for the beſt. *B.* appears not to have been ſolvent; and, beſides, is ſince dead: So that the plaintiff would have no remedy againſt him. *Hughes is* living, does not appear inſolvent; ſo that I don't ſee but it may be better for the plaintiff.

Attachment will not be granted in a doubtful matter, when the party may have his remedy by action.

I am of opinion with my brothers, the rule ought to be diſcharged.

RULE DISCHARGED.

ON a mandamus moved againſt the Commiſſioners of *Wavertree* for not laying out public roads according to the act of parliament.

Lord *Mansfield*—I don't think we can ſuperſede the adjudication of the juſtices, unleſs manifeſtly unjuſt.

But, though the adjudication there is made final, yet [190] when they come into this court, to have granted them a prerogative-writ *for their aſſiſtance in the executing, the court will look into the juſtice.*

A caſe

A caſe was mentioned by his Lordſhip, in which, though in appeal from the Grand Seſſions of *Wales*, their ſentence had been affirmed by the Houſe of Lords; yet when it came before the court of Chancery, the party having got out of the juriſdiction, Lord *Hardewicke would not grant the aſſiſtance of the court without* entering into the *juſtice* of the caſe; notwithſtanding the judgment in the Houſe of Lords.

Bail.

Rule of Practice.

Four days to put in bail, mean excluſive of the return.

FOUR days *excluſive* of the return-day to put in bail; and if the laſt is of a Sunday, then the whole of Monday. And within the four days, it's common to have a ſummons, to ſhew cauſe at a Judge's chamber, why there ſhould not be an order of four days afterwards to put in bail.

Cochin *againſt* Heathcote.

Feme covert has a power of appointment by will or deed, ſhe executes by both, and it does not appear which was prior, both were on the ſame day. By the deed ſhe ſettles,

ON a caſe out of Chancery for the certificate of the judges.

Caſe ſtated, that *Mary*, the wife of *Dodſley*, conveyed with her huſband a conſiderable part of her eſtate in 176 by deed—to the uſe of her huſband and herſelf for life and the longer liver—then to her iſſue as tenants in common. And in caſe ſhe and her huſband ſhould die without iſſue, then to be diſpoſed of in ſuch manner as by will or otherwiſe ſhe ſhould appoint, notwithſtanding her coverture. This of her eſtate in *Nottingham*; of her eſtate in *Cheſhire* in like manner; except as to her power of diſpoſal which is by will, not by deed.

on failure of iſſue of her and her huſband, to ſuch children of her ſiſters as ſhall be living at the death of her and her huſband, or the longeſt liver, *habendum* to ſuch children of her ſiſters as ſhall be living at her deceaſe. The will deviſes to ſuch children of her ſiſters as ſhall be living at her deceaſe. A child born after her deceaſe, and before her huſband's. Queſtion, Whether he could take? Determined—that if the deed was firſt there being no power of revocation given; therefore the will, *quo ad hoc*, would be no effect; if the will was firſt, it being revocable in it's nature, was revoked by the deed, if the deed was contrary: That the whole, therefore, would turn upon the ſtyle of the deed; and that by the deed, the child of the ſiſter took; the office of the *Lat.* being to aſcertain the quantity and quality of the eſtate, and not to deſtroy the premiſes.

Th

Then ſhe ſettles among ſuch children of her ſiſters *Perkinſon* and *Heatchcote* as ſhall be living at the deceaſe of *her and her huſband*; *habendum*, to ſuch children as aforeſaid, as ſhall be living after her *own* deceaſe. [191]

This will was made at the ſame time as the deed, by which ſhe gives to all ſuch children of her ſiſters as aforeſaid, as ſhall be living at *her* deceaſe.

She died in 1770; her huſband in 1771. *Godfrey Heathcote*, ſon of her ſiſter *Heathcote*, named in the deed and will, was born *after* the death of Mrs. *Dodſley*, but *before* the death of the huſband.

Contended—that the will could have no effect; that the whole operated by deed; that a jury would be very much inclined to *Godfrey Heathcote* (who was born of Mrs. *Dodſley*'s ſiſter ten months and two days after Mrs. *Dodſley*'s death.) Infant in *ventre ſa mere*, *living* even before her deceaſe, the time limited in the *habendum*, but that *this* conſtruction was not deſired of the court; but only that the will could not be good; and the deed, which ſhe was permitted to make, being not a deed, with power of revocation, but abſolute; therefore, that having only executed her power by deed, ſhe could afterwards execute it to another effect by will. That in the deed ſhe gave to children living after the deceaſe of *her and her huſband*, or the longeſt liver; and the *habendum*, to children living at her death. That it is the rule of law, that the *habendum* cannot limit to *other* perſons than thoſe *named* in the *premiſſes*, or in a manner *contradictory* to the premiſſes. That, however, it might happen, either by error in the tranſcriber, or apprehenſion ſhe ſhould out live her huſbband; ſhe *has* made the *habendum plainly repugnant* to the premiſſes, and deſtructive of them.

On the other ſide Mr. *Wallace*—That Lord *Coke* ſays, if a man gives to *A.* and *B.* in the premiſſes, *habendum* a moiety to one, and a moiety to the other, that the *habendum* makes them tenants in common, and only explains the deed. Co. Lit. 183.

That Sir *Thomas Jones* ſtates a variety of inſtances, where an *habendum* may enlarge, abridge, or explain.

That it ought not to be objected to her, that ſhe has made two inſtruments, a will and a deed, that her intention might take effect, by one or the other: Much leſs ſhould an intent which ſhe has ſo guarded by both, be diſappointed.

That

192] That in the will, which, if nothing elſe, is an explanatory inſtrument, ſhe gives to all ſuch children [of her ſiſter] as ſhall be living at her deceaſe.

The conditions in the deed affect ſuch children as ſhall be living at her death; therefore, if the child of her ſiſter born after her death, ſhould take, he would take, without being ſubject to the condition.

Lord *Mansfield*—This is too plain a caſe. If the deed was before the will, there is no power of revocation; if after, the deed revokes the will. It is a deed of appointment of uſes, and therefore liberally to be conſtrued. It ſeems plain, that ſhe veſts the intereſt to ſuch as ſhall be living at the time of the death of the longeſt liver of her or her huſband: And the condition to be performed by ſuch as ſhall be living at the time of the death of the ſurvivor, makes it very clear. In comes a blunder by the ſcrivener: It's plain it was a blunder. The office of an *habendum* is to aſcertain the quality and quantity of the eſtate, and therefore in the caſe of Mr. *Wallace*, of an eſtate to two; *habendum* to the one, for life; remainder to the other, in tail, the *habendum* only aſcertains and fixes the meaning of the premiſſes, but does not contradict or deſtroy them; but a gift to *A.* and *B.* in the premiſſes, *habendum* to *A.* only, was, I believe, never heard of. All the *habendum* could operate here, was to make them tenants in common, inſtead of joint-tenants: Therefore, as the will is of no effect, and the condition muſt be applied to the intent of the deed, that *Godfrey Heathcote* [the ſiſter's ſon] took, is clear.

Bail.

JEW Bail excepted againſt. He came to juſtify for 600l. He ſaid he was a merchant, and a Jew; that he rented an houſe of 10l. *per annum*; that he was worth a great deal more than he came to juſtify for. He was aſked, whether he carried a box about the country; he ſaid he did, but that he was worth a great deal more in the warehouſe way; that he never carried goods to leſs amount than 500l. He was bail in another action or two of ſome amount.

Court thought him good bail.

Under-

Undertaking.

AN attorney undertook to enter a common appearance; but, though he wrote the undertaking, he did not ſign it, but immediately retracted.

The court was applied to for an attachment, but diſ- [193]
charged the rule, thinking the undertaking not ſo complete as to hinder it's being retracted.

Coſts.

ON a queſtion, on aſſignment of bail bond, by judge's order, aſſignment held good; but there was a litigation about coſts, of eight or nine ſhillings, as to which the court would not grant the rule.*

Inquiſition.

ON a motion to ſet aſide a writ of enquiry for irregularity.

The complaint was, that whereas notice had been given to execute the writ before the ſheriff, at *Guildhall*, at ſuch a day and hour, the plaintiff had procured it to be executed an hour before: And that the defendant does not believe the plaintiff can make out his demand, according to the ſum in the writ executed. That the notice was of a writ of enquiry, to be executed between ten and twelve in the forenoon; that he attended, by counſel, *before eleven*, and waited till paſt twelve: That the writ of enquiry had been executed *ex parte* only, at ten, as he was informed and believes.

On the other ſide, that the clerk of the defendant's attorney had been applied to, to know whether the defendant meant to attend by counſel, or no; that he ſaid, he did not know: That then he was deſired to ſay, they ſhould execute the writ of enquiry between ten and eleven, as near eleven as might be, unleſs by a line he was informed that ſome other time would be more convenient to the counſel who ſent. That not receiving ſuch a note, they met about a quarter before eleven, purſuant to the notice; that the jury did not execute the writ till after eleven: That they had found an average value.

Mr.

* De minimis non curat lex.

Mr. Juſtice *Aſton* obſerved, that the affidavit was crammed with a vaſt quantity of unneceſſary matter, by which they ſeemed diſpoſed to crowd two motions together: And that they either came to ſet aſide for irregularity, with coſts, or elſe to be let in on coſts, to plead the merits. That they had better confine themſelves to the former: That as to the value, that was ſuppoſed proved in evidence.

[194] Mr. *Wallace* ſaid, the party attended five minutes before eleven, being told they meant to execute as near eleven as might be.

The miſchief of ſuperfluous and irrelevant affidavits.

Mr. Juſtice *Aſton* obſerved, they had made their caſe a *great deal the worſe* by admitting an *heap* of *affidavits* much ſuperfluous; in great part *inſignificant*; and in ſome *falſe*. That, however, though it did not ſeem they could have much to ſay in the matter, yet that ſince a gentleman attended, with a ſerious intention of ſpeaking to the caſe, he would not take it out of their power.

Rule.

And therefore, on payment of COSTS of the *writ*, and alſo of the *motion*, let the WRIT *be ſet aſide*, on their *conſenting*, *not* to bring a *writ* of *error*. The *writ* of *enquiry* to be *executed* on *Monday* next; and, I think, you will take care to be time enough.*

Bail.

PARISH of St. *James*, *Clerkenwell*, without ſaying in what ſtreet, too large notice. However, he being preſent in court, they agreed to admit him.

Bail.

NOT knowing how many actions he was bail in, or for what ſums, REJECTED.

Covenant.

COVENANT on articles to be the plaintiff's hired ſervant for one year and a quarter, and to pay at the expiration of the term, 200. Defendant covenants that he would afterwards, at the expiration of the term, ſurrender his trade and buſineſs, as a ſilk mercer, to *J. Preſton*, the plaintiff's nephew, or ſuch other as the plaintiff ſhould appoint.

Other

* Res contra legem acta pro infecta habetur.

Other covenants with a *penal ſum* of a thouſand pounds.

Breach aſſigned, that the defendant *did not ſurrender* at the expiration of the term to *John Preſton*, the plaintiff's nephew, or *any other* perſon *appointed*.

To which the defendant pleaded ſeven different counts, [195] five of which were at iſſue at bar *en païs*; two were on demurrer, upon which this caſe was argued, the principal was, that the plaintiff did not find ſufficient ſecurity for the payment of the ſum ſtipulated.

Againſt this it was argued, that by the caſe (2 *Mod.* 309) reciprocal covenants cannot be pleaded in bar one againſt another. Condition that defendants ſhould give ſuch releaſe as the judge of the Prerogative court ſhould think fit. Vide 33 H. 6. 13. 4 H. 7. 4. Plea, that the judge did not appoint any releaſe, held not good; becauſe he ought to have tendered it to the judge. Becauſe there is no covenant on the part of the judge; but where mutual covenants otherwiſe.

(1 Lord *Raymond*, 124) Covenant that *Squire* ſhould aſſign to defendant his intereſt in an houſe, *&c.* and defendant pay 30l. Plaintiff aſſigned for breach, that defendant did not pay. Defendant pleaded that *Squire* did not aſſign. Plaintiff demurs. Adjudged for him; becauſe *mutual and independent covenants*: And the parties might have *reciprocal* actions; and that therefore the plaintiff might bring his action *before* aſſignment of the houſe: And if he did not *aſſign*, defendant might have his remedy. French executor of Squire v. Trewin.

(Sanders, 319) Debt on ſpecialty. Plaintiff declared, on agreement produced in court, *nemine*, that defendant ſhould give to plaintiff the ſum of 775l. for certain lands and meſſuages therein ſtated. Five ſhillings earneſt paid: And that defendant ſhould pay the reſidue a week after the feaſt of St. *John* the *Baptiſt* next enſuing. Breach aſſigned, that notwithſtanding defendant had paid the five ſhillings, parcel of the ſum above-mentioned, he had not paid the reſidue, though often thereunto required, to the plaintiff's damage. The defendant prayed *oyer* of the deed, which was read him. *In hæc verba*, to wit, 11 *May*, 1668, it is agreed upon by doctor *John Pordage*, and *Baſſet Cole*, Eſq; *et quæ ſequuntur*. On *oyer* the defendant demurred on ſeveral points: And *inter alia* the grand exception was, that the plaintiff, in his declaration, has not averred that he *conveyed* the lands, or at leaſt, that he *tendered* a conveyance; and that the defendant hath *no* remedy to obtain the lands, and therefore that the plaintiff could not ſupport his action, not having conveyed or tendered. But the court held, that Pordage v. Cole, Hil. 20 & 21 Car. 2.

both

both were to be taken as parties to the conveyance; and if the plaintiff did not convey, defendant had an action of covenant againſt him. And thus, that *each party* had *mutual* remedy againſt the other.

P. 535. Mic. 8 G. rot. 212.

Sir *John Strange*'s Reports, that in *Blackwell v. Nash*, plaintiff covenants to transfer ſtock, and defendant to pay for it. Plaintiff pleads, that he was ready at the day, &c. to

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transfer, but that the defendant refuſed to accept or pay. On demurrer, contended that this was a *condition precedent*, and the words to pay *for it* ſhewed ſo: And therefore, that the plaintiff ſhould have ſhewn that he *did perform* the condition on his part by *actual* transfer. Contended on the other hand, that the covenants were *mutual*. *Per curiam*, That the conſideration was a *covenant to transfer*, and not *actual* transfer; though if it had, *tender* and refuſal would have been a *performance*. Affirmed in the Exchequer chamber.

That in *Dawſon* againſt *Myer*, on error in the Exchequer, from a judgment of the King's Bench, it is reported by *Str.* 712, that the plaintiff declared an action of covenant, that in conſideration of 738l. 10s. he covenanted to transfer the produce of 634l. in lottery annuities, ſubſcribed by the plaintiff, and defendant covenanted to accept and pay. Plaintiff ſets forth *tender*, and that defendant *refuſed*. Demurrer to the plea of tender: And on this demurrer the court gave judgment for the plaintiff; for that they were *mutual diſtinct* covenants. And that the covenants being *mutual*, the *tender* was to be laid *out* of the caſe, and plaintiff not obliged to anſwer to it.* And on the trial in error, *Eyre*, chief juſtice of the Common Pleas, *Gilbert* chief baron, and four of the other judges, were unanimouſly of opinion, that the judgment of *B. R.* was right, and *affirmed* it accordingly. And the caſe was held ſo clear for the plaintiff, on the firſt opening, that there was no argument. And on error in parliament, the plaintiff ſubmitted, without bringing it to an argument, and paid the money.

It was farther argued by Mr. *Buller*, in the principal caſe before the court, that there was an authority that *one* breach of covenant could not be ſet off againſt *another*, becauſe the damages might not be equal.

Covenant to do an act at a particular time, as in the caſe of *Fletcher*, *anno octavo* of his preſent Majeſty, in *Hilary* term,

* Lex non cogit ad ſupervacua.
Idem eſt nil dicere ac inſufficienter dicere.

term, there Mr. Juſtice *Yates* ſaid, the covenant is to do a thing before a particular day, and that is one characteriſtic of mutual covenants.

Here, too, if one covenant muſt be performed, all the covenants, which are many, muſt be performed, before the plaintiff can be entitled to his action.

That if the covenants were not mutual, the condition precedent lay on the part of the defendant, to have been performed by him.

Secondly, which, I think, was the point in demurrer, Mr. *Buller* urged, that even if theſe ſhould not be thought mutual, but dependant contracts, he hoped the judgment of the court in favour of his client; becauſe the act aſſigned in breach of covenant not to have * been done, was to be dependant, if the contracts were not mutual, on a precedent act to be performed by the defendant, before the plaintiff was to perform his covenant.

For that after the year and a quarter's notice, it was agreed, that the defendant ſhould yield up his trade to the plaintiff. That then the partnerſhip ſhould be entered into between the plaintiff and ſuch perſon as the defendant ſhould appoint: That then the ſum agreed on ſhould be paid as before.

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That the articles were to be firſt executed, and plaintiff find ſufficient ſecurity.

On the other ſide, it was argued, that the condition to be performed by the defendant was dependant; that the plaintiff had not performed his, and therefore was not entitled. That the defendant was a perſon in conſiderable trade; that he had entertained thoughts of putting his nephew into the ſhop, after paying off the moiety of the ſtock. That he looked out for a perſon; that a journeyman weaver was recommended; that he took him into his ſhop, to try him as a ſervant, it's ſaid; and he was to take him into the ſhop. It's true, *after* the execution of the articles of partnerſhip; that immediately *from* and after the execution of the articles of partnerſhip, the defendant ſhould permit the plaintiff and *John Preſton*, or other perſon appointed, to enter, *&c.*

Farther, that the ſecurity of 250l. by monthly payments, was a *precedent* condition to be performed, the defendant not relying on the reſponſibility.

That to conſtrue an independent mutual covenant, would be againſt

If it were conſtrued, that it is an independent and mutual covenant, Mr. *Preſton*, the defendant, would be obliged to rely on the perſonal credit and ſecurity of the plaintiff, contrary to his own plain intention, and that of the drawer of the articles.

the meaning, equity, and faith of the agreement; becauſe the defendant would be obliged to rely on a perſonal ſecurity, on which by the terms of his agreement, he had declared he did not choose to rely.

That

That at the year and quarter expired, the plaintiff at that time, and at the houſe which was to have been entered, ſhould have tendered the ſecurity on which the houſe was to be entered. That on the other ſide, the learned gentleman who drew the declaration had thereon declared, he had tendered the ſecurity, but that the ſecurity, as was the fact, would not execute. He would not have ſtated this, if the *tender* of the ſecurity were not neceſſary, as a *precedent* condition. And therefore Mr. *Preſton*, on the ſecurity refuſing to execute, by reaſon of non-performance of the condition on the part of the plaintiff, was not bound to his. And therefore prayed judgment.

In replication.

Mr. *Buller*—That though he believed the defendant would do himſelf as much ſervice as he could, they could judge of his intention only by his deed. They have covenanted to do diſtinct acts of a mutual nature. If the court [198] conſtrues it an independent covenant, the plaintiff owing only 100l. ſhall not recover againſt the defendant, in caſe he owed a thouſand.

Lord *Mansfield*—This caſe has been *extremely well* argued on *both* ſides; and the *conſequence is*, the court forms a *clear* opinion.

Independent covenants.

The *rule* of law, to be ſure *is*, that covenants *independent* cannot be *ſet off* one againſt the other. There is *another* ſort of covenants, which are, in their nature, *conditions*; and *he* who is to *perform* the *firſt* condition, *cannot* have his action till he *has* performed.

Covenants conditional.

Covenants reciprocal.

There are alſo covenants *reciprocal*: * ſuch are *all purchaſes*; in which, if the ſeller is ready, *tendering* the *conveyance*, and the buyer is not ready to *pay* the money, *then* the ſeller ſhall *not paſs* his *eſtate without*.

It would be the *moſt monſtrous* caſe in the world, if the argument on the ſide of Mr. *Buller's* client was to *prevail*. It's of the very *eſſence* of the agreement, that the defendant will not *truſt* the *perſonal* ſecurity of the plaintiff. A *court* of *juſtice* is to *ſay*, that *by operation of law he ſhall, againſt his teeth*. He is to let him into his houſe to ſquander every thing there, without *any* thing to *rely* on, but what he has *abſolutely refuſed* to truſt. This payment, therefore, was a *precedent* condition *before* the covenant of putting into poſſeſſion was to be performed on the part of the defendant. †

Mr

* Pacta reciproca vel utrumque ligant vel neutrum.

† Conditio præcedens infecta alteram partem ſolvit.

Mr. Justice *Aston*—There is a transposition in the articles, which are *ill* marshalled. This is a mutual and independant covenant to be performed by the plaintiff antecedent to any thing done on the part of the defendant; and this being the intent and legal construction, the law will so marshal the words, as to give it this effect. ‡

The law will marshall words to their true effect.

Mr. Justice *Ashhurst*—Whether a condition be precedent or not, I think is always to be determined by the *nature* of the transaction, and the *meaning* of the parties. The tendering of the security was to be *precedent* to the assigning of the stock, and entering into the articles of co-partnership. And *this* could not have *hurt* the plaintiff, who could *never* have been made *liable* to the *payment*, if the stock were not assigned, nor possession delivered.

Condition precedent, or not, is to be determined by the nature of the transaction.

JUDGMENT FOR THE DEFENDANT.

ON a motion for an information to shew cause, why a turnpike should not be set up again, which had been taken down at a meeting of twelve of the commissioners; on suggestion of irregularity in the time and manner of meeting. [199]

The court said all the twelve should have been moved against; for, if any were criminal, all were equally so; but that it did not seem there was any ground for an extraordinary criminal information.

Rule refused.

The King *against* Villers.

INFORMATION on the statute 22 *Geo.* 2. against importing foreign embroidery, to recover 100l. penalty on a special case; which finds, that the defendant imported the foreign embroidery made up into wearing apparel, with him in his portmanteau, and after his landing it was seized.

Vide 4 Ed. 4. c. 1. anno 1463.

3 *Edw.* 4. *c.* 4. an act mentioning certain merchandize, not lawful to be brought into this realm; recites the great mischief to several artificers by divers articles manufactured by strangers, enemies, *&c.* against good laws, *&c.*

22 *Ed.* 4. *c.* 3. a temporary act continued by the statute 1 *R.* 3. *c.* 10. tantamount to the former, for ten years.

Act 5 *Eliz. c.* 7. increasing the penalties.

13 & 14 *Car.* 2. *c.* 13.

22 *Geo.*

‡ Lex verba ita collocata ad mentem et legitimum sensum instruit.

22 *Geo.* 2. *c.* 36. intitled, An act for the prohibiting the importing and wearing of foreign embroidery—recites the great ſums expended.

Enacts, no embroidery to be imported; forfeiture of ſuch embroidery as ſhall be imported.

Penalty of 100l. on the importer.

Lord Mansfield.

Mr. *Morgan* enumerating the evil, Lord *Mansfield* ſaid, theſe were rather to the jury: The court was to conſtrue the act.

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Mr. *Morgan* proceeded to obſerve, that the jury had found againſt Lord *Villers*, the defendant, as the importer; that the plaintiff had declared againſt him as ſuch; that this being a remedial ſtatute, the court was concerned as much as poſſible to ſuppreſs the miſchief, and advance the remedy: That Lord *Villers* had owned his having brought a vaſt quantity. That his wearing in a foreign country ſome of the clothes, would not exempt him from the ſtatute.

On the other ſide, that the jury had not found Lord *Villers* an importer, but had found ſpecially that the 3d and 22d of *Edw.* 4. 5 *Eliz.* only enacted a forfeiture of the cloaths, and other manufactures prohibited.

13 & 14 *C.* 2. recites nearly as the act in queſtion: The act carries an idea of it's being brought and imported for ſale, and not a ſyllable of them worn; forfeiture, therefore, enacted of ſuch parcels, *&c.* Forfeiture of 5ol. to the ſeller. 22 *G.* 2. enacts a forfeiture of the garment, but exempts the wearer from the penalty.

3d of his preſent Majeſty againſt the importation of ribbons.

c. 28.

6th of his preſent Majeſty againſt importing foreign ſilks and velvets.

The 3d of his preſent Majeſty provides, that it ſhall not be conſtrued to extend to ſuch as ſhall be worn as part of wearing apparel.

The 6th provides according to the 22d of his [late] Majeſty: That, therefore, the defendant having theſe cloaths made up as wearing apparel, though not actually, perhaps, worn, is not liable to the penalty. Mr. *Davenport.*

Replication to Mr. *Davenport*—The words of 22 *G.* 2. ſpeak of bringing over before: Whether before the act of 22 *G.* 2. garments were ſeizable, I will not contend, as Sir *Joſeph Mawbey* did when he mixed the wheat and barley.

The

The caſe of avoiding the penalty by procuring foreign embroidery to be worn a day only by the importer on his voyage.

No difference between bringing over and importing.

Lord *Mansfield*—I think I muſt take it for granted this never has been a caſe before the preſent, in which the wearer is made liable to the penalty as importer: It muſt depend on the words of the ſtatute. There were need of very *ſtrong* words to make a gentleman, *wearing* foreign clothes, not only liable to be *ſtript*, but alſo, the *inſtant* he has foot on *Engliſh* ground, to the forfeiture of 100l. [201]

The ſtatute 22 G. 2. recites, where great quantities of gold and ſilver thread lace, *French* and brocade are brought over for ſale, whereby great ſums of money have been expended and carried out of the kingdom; and whereas ſeveral ſtatutes have been enacted, prohibiting the ſale—therefore, the legiſlature conſiders particularly and ſolemnly, as to the 100l. forfeiture, importation in the way of merchandize. Accordingly taylors and milleners are made ſpecially liable to a penalty: Becauſe they can have them *only* in the way of trade.

Suppoſe a foreign *ambaſſador* comes over; is he and his attendants within the penalty, for only having a gold button on their coat?

Suppoſe a *ſtranger*, entirely *ignorant* of our native laws, comes in the cloaths of his own country; are we to *catch* every *ſtranger* likewiſe who ſhall come among us?

It is remarkable too, that the ſtatute 22 G. 2. particularly ſpecifies gold and ſilver *thread lace*, *French* and brocade; all of which, except the laſt, are manufactures brought over ſeparate, to be affixed to the garment here. It remained, therefore, to be queſtioned, whether the garment was liable, if they were brought over worked into it? And the legiſlature ſeemed to have a doubt, which I will not ſay was groundleſs, whether the gold and ſilver lace, *&c.* ſo worked, was ſeizable. However, as to the ſeizure, the ſtatute particularly provided; but not as to the penalty when worked into wearing apparel: But the wearer is particularly excepted, as has been before obſerved. Lord *Vilr.* might as well have had theſe cloaths on his back, as in his portmanteau.

JUDGMENT FOR THE DEFENDANT.

Diſtreſs.

ON the ſtatute of Diſtreſſes, 27 *G.* 2. providing for repayment of ſurplus on demand; ſuing out a writ, it was contended, is not demand, for you ſhould make your demand before you commence your action.

Anno ſalutis 1225. Of diſtreſs, that none ſhall be diſtrained for more than is due. See Magna Charta, 9 *H.* 3. *c.* 10.

Anno 1266. Diſtreſs not to be outrageous, nor of plough cattle.
[202] Vide 51 *H.* 3. *ſtat.* 4.

None to diſtrain for amends of injury, without award of court. Vide ſtatute *Marlebridge*, 52 *H.* 3. *c.* 1. Nor out of his fee, *c.* 2. Nor in the highway, ſaving the king, *c.* 15. Nor in the ancient fees of the church. Vide 9 *Ed.* 2. *ſtat.* 1. *c.* 9. *

Called articuli cleri, * Anno 1315

Commonly called 1 Weſt. anno 1275. Diſtreſſes not to be driven out of the country, and to be reaſonable on pain of ranſom. Vide 52 *H.* 3. *c.* 4. 3 *Ed.* 1. *c.* 16. 1 & 2 *Ph.* & *M.* *c.* 12.

Freeholder not to be diſtrained to anſwer of his freehold. Statute of *Marlebridge*, *c.* 22.

None to be diſtrained for another's debt. Vide 3 *Ed.* 1. *c.* 23.

The cattle of the plough not to be taken for the king's debt, if others can be found, 28 *Ed.* 1. *c.* 12. To be driven to a pound within three miles, vide 1 & 2 *Ph.* & *M.* *c.* 12.

Sheriffs to have four deputies to make replevin. *Ibidem*, *ſ.* 3.

Anno 1665. If firſt diſtreſs not ſufficient, it may be repeated. 17 *Car.* 2. *c.* 7. *ſ.* 4.

That goods diſtrained for rent may be ſold, if rent not paid within a reaſonable time. Vide 2 *W.* & *M.* *c.* 5.

Corn and ſtraw looſe, vide *ſ.* 3. Double damages for wrongful diſtreſs, vide *ſ.* 5.

Not to be taken in execution, without paying the arrears of rent to landlords. Vide 8 *Ann.* *c.* 14.

Goods removed, diſtrainable within five days. 8 *Ann.* *c.* 14. *ſ.* 2.

Within thirty days. 11 *G.* 2. *c.* 19.

That arrears may be diſtrained after leaſe determined. Vide 8 *Ann.* *c.* 14. *ſ.* 6.

Penalty of double value on fraudulent removing. 11 *Geo.* 2. *c.* 19. *ſ.* 3.

Cattle

Cattle on the common, and crops growing, diſtrainable for rent. Vide *ibid. ſ.* 8.

Diſtreſſes may be ſecured and ſold on the premiſſes. *Sec.* 10. [203]

In caſe of diſtreſs for rent, irregularity not to make it void. Vide *ſec.* 19.

Amends may be tendered. Vide 19 & 20.

General iſſue, 21.

Pounding in *Scotland.* 20 *G.* 2. *c.* 43. *ſ.* 23. anno. 1747.

Juſtices in warrants of diſtreſs for penalty, to limit the time for ſale of the diſtreſs. Vide 27 *G.* 2. *c.* 20. and the ſtatutes there referred to in Mr. *Ruffhead*'s edition.

Diſtreſſes muſt be of things of a valuable property: Dogs, bucks, does, and other animals *feræ naturæ*, cannot be diſtrained. Even valuable property cannot be diſtrained, when in actual preſent uſe, as an horſe, when a man or woman is riding on him; an ax in a man's hand cutting wood.

Thirdly, Things for the maintenance of trades for the benefit of the commonwealth, and there by the authority of law. As an horſe at a ſmith's ſhop, not to be diſtrained for rent out of the ſhop; materials in a weaver's ſhop; cloth of cuſtomers at a taylor's; ſacks at a mill or market.

Fourth, Nor a thing diſtrained already; for it is in the cuſtody of the law: Nothing at common law ſhould be diſtrained, which could not be rendered in as good plight as when taken; but this is altered as to corn, by 2 *W.* & *M.* *c.* 5. but, I apprehend, it ſtill holds as to dead poultry, dead fiſh, and the like.

Fifthly, Nor beaſts of the plough, (nor utenſils of profeſſion, as the axe of a carpenter, or the books of a ſcholar) while there are other diſtrainable goods. *Co. Inſt. c.* 7. *ſ.* 51.

Nor ſhall diſtreſs be taken for uncertain ſervices. *Co. Inſt. lib.* 1. *ſ.* 136. vide alſo *Burn's Juſtice*, tit. *Diſtreſs.*

A diſtreſs for rent cannot be in the night. 1 *Inſt. l.* 2. *c.* 12. *ſ.* 213.

Nor could a man, by common law, break open doors to take it.

A man cannot work or uſe cattle diſtrained, but for the benefit of the owner. Vide *Wood's Inſt. b.* 2. *c.* 2. *p.* 146.

By 7 *Ann. c.* 12. the goods of an ambaſſador, or other public miniſter ſhall not be diſtrained; if they are, the diſtreſs is void. [204]

If cattle are put into a pound overt, the owner muſt feed them; and, if they die for want of food, there is no remedy

againſt the diſtrainer, but he may diſtrain again. And it is very remarkable, that though the divine law given to *Moſes* provided for the caſe of a bird with her young ones, for the ox treading out the corn, for the beaſt of one's enemy fallen in the way; though the *Athenians* even puniſhed with death the cruelty of a young man in putting out the eyes of quails for his ſport, yet, our law does not puniſh any, the moſt inhuman treatment of a beaſt, otherwiſe than as it may occaſion damage to the owner, * or danger immediate to the public, as by over-driving oxen, or the like: But the owner may uſe his own animal with what ſavageneſs he pleaſes; and the Law of *England*, which is a law of mercy, yet (as it has been complained ſomewhere before) hinders him not. Yet, I queſtion whether, if an owner of any animal were to commit an act of wanton and extreme cruelty on it in public, or in the preſence of any entreating him not, whether he would not be liable to an indictment at common law, as guilty of a nuiſance. For mens eyes and ears are not to be offended with outrages on humanity; nor an example of cruelty to be ſet: And whatever is againſt common morality, and committed publicly, I conceive is within the common law of *England*, vide *Jones* and *Randall infra*. This kind of digreſſion, I hope, is excuſable, as the doctrine of diſtreſſes naturally led to it; by that part of it which permits cattle to be ſtarved in the pound, if the perſon from whom they were diſtrained, does not come to feed them.

* Vide 37 H. 8. c. 6. 2 G. 1. c. 22. 31 G. 2. c. 42. vide the ſeveral Game Acts, and the Dog Act.

With reſpect to ſurplus in the caſe above, the court was of opinion that the ſtatute of 27 *G.* 2. was not to be interpreted, negatively, that the money is not to be reſtored, unleſs on demand; but imperatively, that it ſhall be reſtored on demand.

Rice *againſt* Denton.

CUSTOM houſe officer on the 15 *G.* 2. *c.* 25.

Queſtion, Whether the defendant had a right to regauge a caſk of rum before he granted a permit. The act ſays, the merchant may land without payment of duty, on the [295] terms of lodging it in a warehouſe, *&c.* that the duty ſhall be in proportion to the gauge taken upon landing.

There is the exciſe gauger, the cuſtom-houſe gauger, and the city gauger; which laſt is a kind of mediator between the other two.

Contended

Contended, that the officer ſhould deliver up immediately, without ſecond gauging.

On the part of the defendant—That the ſtatute of C. 2. enacted the duty before landing; that in order to remedy this inconvenience, the ſtatute 15 *G.* 2. allows them to lodge rums of the produce of the *Weſt Indies* in warehouſes to be approved by the cuſtom-houſe officers: On producing the certificate from the collector, the officer is to grant a permit. The proviſion is, that he ſhall deliver the rum in ſuch quantity as is expreſſed in the certificate. Queſtion, Whether the gauging always ſo concluſive, that the officer ſhall never be at liberty to regauge. That though the ſtatute ſeemed to think, that the ſame quantity would always continue, badneſs of the caſk, and a thouſand other circumſtances, would exceedingly alter the quantity. The crown having enlarged the time for payment of the duty, firſt to ſix months, and afterwards to twelve months, favourably to the owners, if there be any loſs, it ought to be to the proprietor, and not to the crown; that the certificate, therefore, from the collector, is to be the meaſure of the duty. If any loſs, the proprietor muſt abide it, and not have quantity delivered which is not there, being loſt. That it was intended the officer ſhould know what he was to grant the permit for, and that multitudes of frauds muſt ariſe, if he has not that right.

Vide allowance for waſte, 22 & 23 C. 2. c. 5. ſ. 3.

On the other ſide it was contended, in reply, that no fraud from the time of the ſtatute to this had happened, for want of ſuch a power to regauge. That he is merely intruſted with the charge of keeping, and the care of the warehouſe, and has no diſcretionary power as to the permit.

Ale not to be mixed after gauge taken, vide 22 & 23 C. 2. c. 5. ſ. 11. 7 W. 3. c. 30.

Lord *Mansfield*—I do not know, as it may be neceſſary, perhaps, to apply to parliament, whether you ought not to do it as ſoon as poſſible. * It does not appear by the cuſtom interpreting the act till 1772, nor by any act in being. It's apparent where the fraud is: *Smuggled* or *adulterated* goods may be brought in, to the *injury* of the *revenue*.

JUDGMENT FOR THE PLAINTIFF.

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OF exciſe laws, ſee 12 *Car.* 2. *c.* 23. the beer and ale exciſe granted to King *Charles* for life. 1 *G.* 3. *ſt.* 1. *c.* 1. Anno 1660.

Duties on foreign liquors to be paid by importer, vide 12 *Car.* 2. *c.* 23. *ſ.* 14. 15 *Car.* 2. *c.* 11 *ſ.* 17. 22 & 23 *Car.* 2. *c.* 5. *ſ.* 9. Vide 1 Ventris, 72.

Oaths

* Judicis eſt jus dicere non dare.

Oaths of officers of the exciſe, 12 *Car.* 2. *c.* 23. *ſ.* 33.

Hereditary exciſe, 12 *Car.* 2. *c.* 24. *ſ.* 15. By this ſtatute the duties were made payable by importers before landing.

Commiſſioners not to take exciſe to farm; penalty of bribing exciſeman; exemption of colleges; directions for landings; where appellant ſhall have coſts; exciſe offices to be kept in market-towns, vide 15 *Car.* 2. *c.* 11. *ſ.* 2, 16, 21, 17, 19, 10.

Vide Burn. firſt vol. Powers of commiſſioners given to farmers of the exciſe, 16 & 17 *Car* 2. *c.* 4.

Additional exciſes expired, vide 22 & 23 *Car.* 2. *c.* 5. 29 *Car.* 2. *c.* 2. 1 *W.* & *M. c.* 24. 2 *W.* & *M. ſ.* 2. *c.* 3. & *c.* 10. 3 *W.* & *M. c.* 1. 5 *W.* & *M. c.* 7. 7 & 8 *W.* 3. *c.* 3.

Power to juſtices or commiſſioners to mitigate fines, 22 & 23 *Car.* 2. *c.* 5. *ſ.* 8.

Certioraries not allowed in proceedings on exciſe, *ſ.* 14.

Vide alſo, 1 *W.* & *M. ſ.* 1. *c.* 24. 2 *W.* & *M. c.* 3. 4 *W.* & *M. c.* 3. 5 *W.* & *M. c.* 20. 4 *An. c.* 6. Vide the act 1 *G.* 1. *c.* 12. for appropriating duties to the aggregate fund.

Vide 1 Burn. Powers and directions for preventing the concealment of liquors, and other frauds, 7 & 8 *W.* 3. *c.* 30. Vide 8 & 9 *W.* 3. *c.* 19. Vide 18 *G.* 2. *c.* 26. *ſ.* 8. Vide 10 *G.* 3. *c.* 44.

Weekly ſum of 3700l. to be paid out of the exciſe revenue, as a fund, vide 12 & 13 *W.* 3. *c.* 12. made perpetual 6 *G.* 1. *c.* 4.

Commiſſioners and officers to be ſworn, vide 10 *An. c.* 19. *ſ.* 122. *c.* 26. *ſ.* 75.

Penalty of obſtructing an exciſe officer, 6 *G.* 1. *c.* 27. *ſ.* 7.

[207] Power by warrant to ſearch houſes, vide 11 *G.* 1. *c.* 30. *ſ.* 2. Vide rules for taking out permits, *ſ.* 10. Proof to be admitted of his authority, without producing his deputation, vide *ſ.* 32.

Directions on ſeizure of tea, coffee, &c. vide 12 *G.* 1. *c.* 28.

Three commiſſioners impowered to act, vide 1 *G.* 2. *c.* 16. *ſ.* 4.

Duty on ſweets leſſened, 10 *G.* 2. *c* 17.

Puniſhment of perſons going armed in defiance of exciſe laws, vide 19 *G.* 2. *c.* 34. 11 *G.* 3. *c.* 51.

Offences

Offences againſt exciſe laws excepted out of general pardons, vide 20 *G.* 2. *c.* 52.

Summons left at offender's houſe to be deemed good notice, vide 32 *G.* 2. *c.* 17.

Power to ſeize forfeited veſſels, 33 *G.* 2. *c.* 9. *ſ.* 16.

Additional exciſe, 1 *G.* 3. *c.* 7. *ſ.* 1.

Vide of other points relative to exciſe, 5 *G.* 3. *c.* 43.

Greſham college purchaſed for an exciſe-office, 8 *G.* 3. *c.* 32. For defraying the expence, vide 10 *G.* 3. *c.* 32. 12 *G.* 3. *c.* 46.

Feltham and others Churchwardens, *againſt* Terry, or Tyrrel, and others, Overſeers.

Action of Trover againſt the Overſeers, on the Caſe following.

A Churchwarden was convicted on the ſtatute for neglect of duty; the overſeers of the poor levied the penalty, and did not account for the ſurplus, nor apply to the uſe of the poor. Conviction quaſhed: The churchwardens brought an action for money had and received againſt the overſeers; on which, upon a ſpecial caſe for the opinion of the court, the queſtion was, whether, on the circumſtances of this caſe, an action for money had and received would lie; or whether trover ought not to have been brought, or ſome other action of treſpaſs?

Plaintiff may waive a tort, and bring an action purely of a civil nature, where it is for the benefit of the defendant.

Lord *Mansfield* delivered the judgment of the court to this effect, *May* 8, 1773.

We took this matter of the caſe of *Feltham* againſt *Terry and others* into conſideration. A churchwarden was guilty of neglect of duty, under the ſtatute. On conviction before the juſtices of peace, the overſeers of the poor levied the penalty, and there remained a ſurplus of twelve ſhillings; on the refunding of which we go. It appears, they did not account, nor apply to the uſe of the poor: The churchwardens brought an action for money had and received, againſt the overſeers, the conviction being quaſhed. It was a *tort* therefore; and it has been ſaid, that an action for the detainure ſimply, was not proper: For that an action of *trover*, or *treſpaſs*, might have been brought.

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However, we are *clear* that the party may *waive* the *tort*; which if he does, *it is to his own prejudice*, and in *favour of the defendant*. He cannot then come for damages; he cannot ſay, if the goods are ſold, that they were double the value the defendant ſold them for: *Here nothing can be recovered*

vered but what is *conſcientiouſly due*; *nothing but the real value*; and the defendant loſes *no defence* which he *can* make *bona fide*; whereas in an action of treſpaſs, it would have been *no legal* juſtification to ſay, they acted *ex officio*.

Before Lord *Hardwicke*, *Cheeſeborough and another* againſt *Moreſon*, on an *indebitatus aſſumpſit*. *Moreſon* received money of a bankrupt, as the price of goods the aſſignee came to recover. It was ſaid, he cannot affirm and deny; alledge the contract, and avoid it.* The caſe of *Hope* and *Why* was cited; which was, the defendant was indebted to one who died inteſtate; defendant *took* money *ſecretly*, ſomething very like *ſtealing* it.† It was ſaid, the adminiſtrator who ſued in the name of the inteſtate, from whom the money was taken, could not bring an *indebitatus aſſumpſit*; but it was agreed, he might *waive* the *tort*. Lord chief Baron *Parker* ſaid, in that caſe, that this action would lie in *every* caſe, but that of money *won* at play; and that it would by the aſſignee to recover money paid by a bankrupt. Mr. Juſtice *Aſton* has a note of a judgment very *ably* given in the Common Pleas, which, for the ſake of the *Bar*, I would deſire him to cite.

Mr. Juſtice *Aſton*—The caſe to which his Lordſhip alluded, and has deſired me to cite, was *Hitchin and others*, aſſignees of a bankrupt, againſt *Campbell*. Judgment and execution on *indebitatus aſſumpſit*, againſt the banker, levied to the amount of 1500l. in 1769: The ſame year the bankrupt was found to have committed an act of bankruptcy. They ſue the ſheriff to recover the money levied. It appeared afterwards, that he had committed an act of bankruptcy in *February*, which was before the execution. Lord Chief Juſtice *De Grey* ſaid, that the effect of a *commiſſion* was to *diveſt any* eſtate out of the bankrupt; but *before* the *commiſſion* the *act* of *bankruptcy diveſted nothing*. The ſheriff taking the goods, *no* commiſſion having iſſued, is *no* treſpaſſer; but if he has them in poſſeſſion, and has not ſold the goods, an *indebitatus aſſumpſit* will lie.

[209] Trover for the lawful coming by and unlawful detainer. An indebitatus aſſumpſit held good in the room of trover.

Vezey, 326.

[In *Levins*, 1 part 142. *Elſhington* v. *Doſhunt*, not *guilty* was held a good plea, on *indebitatus aſſumpſit*, which it would not have been, if nothing including in its nature a *tort* could be ſued for by this action; and though the plaintiff *waives* the *tort* by bringing this action, yet the defendants

* Allegans contraria non eſt audiendus.
† Ex maleficio non oritur contractus.

dants being permitted to plead not guilty, shews that it may be brought where denying of the *tort* is a sufficient denial of the action; because it is a denial that the plaintiff had any civil cause of action where the civil right depends on the *tort* committed.

That Lord *Raymond*, 742, *assumpsit* will lie for money paid by order of an illegal court.]

That in earlier cases, it appears this action has been adopted as a very beneficial one, by taking away wager of law. That it has been questioned, whether the purchasers under the bankrupt are liable; but they come in by his title: And whoever *takes* the money, *implies* a promise to do what is just.*

I think this action of the churchwardens is the *fairest*, and most *equitable* and *just* that can be.

POSTEA returned for the PLAINTIFF.

Of churchwardens, vide 3 *Car.* 1. *c.* 3. *f.* 2. 21 *J.* 1. *c.* 7. *f.* 5. and statutes relating to nonconformists, poor, *&c.*

A counsellor or attorney ought not be chosen church- [210]
warden, and if he is, he may have a prohibition, by reason of his attendance on the courts of *Westminster*.

Dissenting teachers, or persons in holy orders.

Other dissenters, not being teachers, may find substitutes.

Persons who have prosecuted a felon to conviction, exempted in that parish. Vide *Burns*, first vol. title *Churchwardens*.

Earl of Sandwich *against* Miller.

Scandalum Magnatum.

A peer may lay his action of his scandalum magnatum, where he pleases: But on just ground of suspicion, that there cannot be a fair trial, the venue shall be changed; otherwise not.

ON a motion on the part of the defendant, suggesting, that an impartial trial could not be had in the county of *Middlesex*, by reason of the high office, weight and influence of the plaintiff in that county, as a peer of the realm

* Lex quemlibet feciſſe præſumit quod lege fieri debuerat.

Note, There is a *nisi prius* case Lord *Raymond*, 742. *Meath* v. *Death* and *Pollard*, where it was held, that for money paid as costs, on order of reversal, which order was after quashed, *indebitatus assumpsit* would not lie. But Lord *Raymond* seems to have doubted, and says, the money was paid by churchwardens and overseers both, and the action brought by the churchwardens only.

Note too, That in the part of Mr. Justice *Aston*'s judgment, between these marks [ ] I am somewhat uncertain whether I have taken the very case cited.

realm, and firſt commiſſioner of the admiralty, and praying leave to change the *venue* from *Middleſex* to *London*, where the cauſe of action aroſe. The action was brought by Lord *Sandwich* againſt the defendant, as publiſher of a libel, reflecting on him falſely.

Mr. *Wallace*, againſt the motion—That the plaintiff's being a peer of the realm, and firſt commiſſioner of the admiralty, was nothing to the jury of *Middleſex*, any more than to any other jury.

That the caſe of Lord *Shaftſbury* was very different, being on an indictment of conſpiracy brought by him againſt certain perſons, for falſely indicting him of high treaſon: And they alledged that he had great influence with the ſheriffs. What influence has his Lordſhip with Mr. *Oliver* and Sir *Watkin Lewes*? That they alledged in that caſe, that the witneſſes were afraid to come up; that they had been barbarouſly uſed in the preſence of the court. Is there any thing like in this caſe? What intereſt Lord *Sandwich*'s office might give him at *Portſmouth* or *Plymouth*, I don't know; but it does not ſerve him much here.

Mr. *Mansfield*—That he did not know what particular intimacy Lord *Sandwich* had with the freeholders of *Middleſex*; but he believed, their particular affection for him did not operate very violently. That he did not think the freeholders on the one ſide *Temple Bar* were ſo very different from the freeholders on the other.

[211] Mr. *Dunning* declared that he was ready, if neceſſary, to have given his aſſiſtance to clear Lord *Sandwich* from the imputation of his new acquired popularity.

Serjeant *Glynn* for the defendant—That Mr. *Miller* had declared his apprehenſion of a *Middleſex* jury, that whatever the reaſons of his apprehenſions might be, it would make no difference as to the trouble of producing witneſſes; that the cauſe of action aroſe in *London*; that though it was held in the law a caſe of *ſcandalum magnatum*, gave him a power to lay his *venue* where he pleaſed; and, tho' the authorities might ſeem too ſtrong to be over-ruled, yet he hoped, if it was ſtill open, their Lordſhips' breaſt would not incline to ſuch a determination: That the reaſon given that a lord's character was injured in every country, was equally applicable to any other man of any notice in the world.

That he imagined the ſlighteſt objection from ſhewing cauſe of apprehenſion, would be ſufficient with their Lordſhips to obtain a removal of the *venue*, which would be only purſuing the principles of law. In motions for change of the

the *venue*, the court is not anxious to know how far the excuſe is grounded. Lord *Shaftſbury* had his *venue* laid rightly; and yet very *little* matter was *there* thought neceſſary to change the *venue*.

That in the caſe of Lord *Gerard*, an action was brought for words, and the *venue* was changed; *becauſe*, per *curiam* —he ſhould not as a *peer* take an advantage which might *prejudice* the defendant.

Lord *Manſfield*—The *law* is extremely *clear*, admitted by the counſel, admitted by the motion, that for ſcandalous words a peer may lay the *venue* where he pleaſes. There are many other caſes in which the *venue* may be laid *any where*. If a *ground* is ſhewn, the court will grant a change of the *venue* for a fair trial. But are the freeholders of *Middleſex* ſuch deſpicable wretches, that a peer would have more weight with them than a cobler? And as the defendant has the knight of the ſhire for his counſel, I ſuppoſe that will be a full counterbalance.

RULE DISCHARGED.

Of *ſcandalum magnatum*, vide 3 *Ed.* 1, *c.* 34.

Maxims of law.

Ex maleficio non oritur contractus.
Par ſcientia pares contrahentes facit.

Inſurance. [212]

ON a motion for a new trial.

The cauſe had been tried, and a verdict found by a ſpecial jury of merchants.

It appeared that the defendant had inſured a ſhip which was to ſail from *Poole* to *Newcaſtle*, for 1000l. This ſhip was loſt; and *after* the loſs, defendant writes to deſire the inſurance may be increaſed. The letter is dated on a day when no poſt went out; the next day, the account of the loſs of this veſſel is in the papers; but the defendant does not take out the letter or retract. The notice and the loſs being diſcovered, the under-writer ſues againſt this inſurance as fraudulently obtained, and void.

The queſtion turned principally on when the ſhip to be inſured was to ſail, and whether it was in port or no, at the time of the inſurance procured; and whether the defendant

fendant knew of the loſs when he wrote for the additional inſurance?

The jury found for the defendant.

The plaintiff ſaid, he believed the ſhip was in port when he inſured, at the time of making the inſurance, becauſe the wind had been eaſterly ſince he arrived at *Poole*. The plaintiff too complained, that the letter he received from the captain of the veſſel was either falſified as to the date, or being put in on a day when no poſt went out, he ſhould have taken it out of the office and diſpatched another ſome way more expeditiouſly.

The letter was to this effect: "Depend upon it I ſhall "uſe all expedition, and ſail the firſt opportunity; every "thing is ready."

He complains that he had no notion when the ſhip would ſail; and that this intelligence did not arrive in time, he believes fraudulently; the letter being dated on a day when no poſt goes out.

On the other hand it was ſaid, 'twas ſtrange the plaintiff, being in *London*, having this buſineſs of inſurance in contemplation, and curious to know when the ſhip would ſail, or whether it had not ſailed already, ſhould not do what any the idleſt man in the world would have done, either go into a coffee-houſe, or read a newſpaper. If he had, he might have ſeen that ſhips had gone out about the time that this ſhip of the defendant's did go, and were loſt; that as to the date of the letter, it was very remarkable that
[213] the under-writer ſhould not take notice of this, either miſtake or miſrepreſentation, till the ſhip was loſt; which, it was obſerved, looked like unaccountable laches or craft on that ſide. That there was, at leaſt, a counterbalance of evidence, on which a ſpecial jury of merchants were extremely competent to decide; * and that the court, in ſuch a caſe, would hardly interpoſe. And that though a full diſcloſure is required by the law of inſurance, yet it muſt be ſuppoſed of ſuch circumſtances, of which it would not be natural to imagine the plaintiff was better informed than the defendant; the contrary of which, it was alledged, ſeemed here.

Vide Da Coſta againſt Scandret, Parker's Laws of Shipping and Inſurance, p. 311. and Seaman againſt Fonnereau, p. 322.

Lord *Mansfield*—'Tis very proper that all matters, eſpecially of this nature, ſhould be ſo conducted, that the party *guilty* of *fraud*, may ſee they are *not like* to *gain* by it, It is always by *circumſtances* that *fraud* is *diſcovered*. And 'tis very remarkable here, that this gentleman inſured in *London*,

Dolus & fraus legibus inviſa. Nullo calliditate ſtultitiæ ex facto jus oritur.

from

* Cuilibet in arte ſuâ eſt credendum.

from *Poole* to *Newcaſtle*, 1000l. only. That *after* the time when the account came to *Poole* of his ſhip being *loſt* in ſailing to *Newcaſtle*, he writes for a *farther* inſurance. It may be diſcovered, whether he did not *actually* read the paper which gives this account; it *may* be diſcovered *when* this letter was put into the poſt; which, it was *ſtrange* a man of buſineſs ſhould ſend, when *no* poſt went out, and without waiting for *what* news *that* or the *next* ſhould bring; and, that on the *next* day's intelligence, he did not correct his notice. Something too may be collected from any *indorſing* that may appear to have been made by the office, importing the time on which the letter went out. I remember a caſe at *Poole*, which turned on that only. I *never* have any difficulty in altering my opinion: At firſt, I thought the matter *ſuſpicious*, afterwards I doubted; and am now returned to my former opinion.

RULE MADE ABSOLUTE FOR A NEW TRIAL.

Point reſolved by Lord *Mansfield at Niſi Prius*.

WHEN the principal is made liable by the bill being delivered to him, though the agent agrees for payment, you may charge the principal.

Jury.

A Juryman being put on the pannel, excuſed himſelf on account of age, being eighty. Exemption from ſervice on a jury on account of age.

Lord *Mansfield* diſcharged him, and ſaid they did *very wrong* to put him on the pannel.

Of exemptions from juries, Vide ſtatute of Weſtminſter 2. 13 *Edw.* 1. *c.* 38, that old men above the age of ſeventy, perſons continually ſick or diſeaſed, at the time of ſummons or not dwelling in the county, ſhall not be ſummoned. [214]

Apothecaries within *London* and ſeven miles thereof, being free of the company, and country apothecaries who have ſerved ſeven years apprenticeſhip, ſhall be exempted from ſerving on juries, and their return ſhall be void, unleſs they voluntarily conſent to ſerve.

Clergymen cannot be impannelled on juries. *

Diſſenting teachers qualified under the toleration act, exempted from ſerving as jurors.

Quakers. And of ſuch of theſe privileges as are ſince the ſtatute 13 *Edw.* 1. the jurors ought to come in *perſon* and

* Nemo militans Deo implicet ſe negotiis ſecularibus.

and claim their privilege, for the ſheriff cannot return it; and if any anſwer be made, the *jury* muſt try it.

Counſellors, attornies, clerks and other miniſters of the king's courts, are not to ſerve on juries.

A lord of parliament ſhall not be returned on a jury: But if he is, the pannel is not void; but he may challenge to it himſelf, or the party may challenge him.

Tenants in ancient demeſne, miniſters of the foreſt out of the 18, foreſt, coroners, officers of the ſheriff, &c. vide the writ *De non ponendis in aſſiſa et juratis.*

Perſons may be exempted by the king's charter; yet, in a grand aſſize, perambulation or attaint, ſuch exemption ſhall not ſerve, † vide 52 *H.* 3. ſtatute of *Marlebridge*, c. 14. which ſays, *de chartis verò exemptionis et libertatis*, &c. as touching charters of exemption and privilege, that thoſe who obtain them ſhould not be put in aſſizes or juries, or any recognitions, it is provided: That if their oath be ſo [215] neceſſary that without them juſtice cannot be done, (as in the grand aſſize and perambulations, and deeds or writings of agreements, where witneſſes are named, or attaints or the like) that they be compelled to ſwear, ſaving to them otherwiſe their privilege and exemption as aforeſaid.

Anno ſolutis 1267.

In *Berkley*'s caſe, and ſome excellent learning in *Nicholles* verſ. *Nicholles*, vide *Plowden*'s caſe by the ſame admirable reporter.

Tickell *againſt* Read.

A maſter may juſtify the aſſault, that the plaintiff was beating his ſervant, and that he prevented him, which was the aſſault, &c. of which the plaintiff complains.

ACTION of aſſault and battery, defendant pleads the general iſſue, not guilty; and alſo a ſpecial plea in juſtification, that he aſſiſted his ſervant, whom the plaintiff was beating.

Contended, that the law will not juſtify a maſter interpoſing on an aſſault againſt his ſervant, by aſſaulting the perſon who beats the ſervant, as it does a ſervant in like caſe interpoſing for his maſter; becauſe it was the duty of the ſervant, who was hired to ſerve and be aſſiſtant to his maſter's perſon, but not ſo the maſter to the ſervant.

On

‡ Neceſſitas publica major eſt quam privata. Vide *Bacon's Law Tracts.*
Non poteſt rex gratiam facere cum injuria alterius.
Rex non poteſt facere injuriam.
Lex communis ita prærogativam regis admetita eſt ut ne cujus hæreditatem tollant lædantve. Vide *Plowden.*

On the other hand it was contended to this effect nearly; the duty of maſter and ſervant was reciprocal; and if the ſervant owed to the maſter fidelity and obedience, the maſter owed to the ſervant protection and defence; and might, therefore, well juſtify by this plea. Vide Co. Inſt. 65. of the reciprocal duties between lord and tenant.

Lord *Mansfield*—I *cannot* tell them a *maſter* interpoſing when his *ſervant* is *aſſailed*, is not *juſtifiable*, under the circumſtances of the caſe, as well as a *ſervant* interpoſing for his maſter: *It reſts on the relation.*

Note, that *Burn* cites *Hawkins*, that there are opinions a maſter ſhall not forfeit a recognizance for breach of the peace for beating another in defence of his ſervant; but *Burn* cites alſo *Salkeld* 407, that a maſter cannot juſtify, becauſe he might have an action for the loſs of his ſervice. But the reaſon of the caſe ſeemed there (and *note*, it was not the principal caſe, but a caſe cited in argument) that the defendant pleaded an aſſault in defence of his poſſeſſion, (which was, conſidering his ſervant too much, as his goods and chattels, and, as far as that was the ground of his defence, he had his remedy by action for the loſs of the value of his ſervice) but if he had juſtified that he did it in defence of his ſervant, I ſee no reaſon from that caſe, or any principles of juſtice or law, why the plea might not have been allowed; for when a ſervant defends his maſter, it is not for his own ſake, but for his maſter's; and when the maſter defends his ſervant, a man like himſelf ſuſceptible of wounds and [216] injuries, an *Engliſhman*, or at leaſt free by being in *England*, a perſon under his ſpecial protection, it ſeems to be very far from ſufficient to ſay, the maſter needed not to have been a loſer if his ſervant's bones had been broken; for he might have recovered in an action for loſs of ſervice. What compenſation or benefit is this to the ſervant? And the *true* juſtification, I take it is, that he did it in defence of the ſervant, and by obligation of that protection which he owed him for his ſervice. And on the whole, I think, a maſter would much better deſerve to loſe the benefit of an action for loſs of ſervice, if he did not defend his ſervant when he was able from a violent aſſault, which might endanger his limbs or life, than that he ſhould be precluded from giving that defence, becauſe truly, let what will fall to the ſervant ſhort of death, the maſter may recover in damages, and ſhall only loſe and be puniſhed,

niſhed, if he gives that defence which he owes in a caſe of danger and unjuſt aſſault to his ſervant, not having performed all the duty of a maſter barely by paying his wages.

Den, on the demiſe of Vernon, *againſt* Ogle and others.

QUESTION, whether ſettlement voluntary or for valuable conſideration?

By deed in 1712, father ſettles upon his ſon, in conſideration of marriage and the portion his wife was to bring him, to the ſon for life, to his wife for life, remainder to the iſſue male of that or any other marriage, remainder to *Francis Ogle* the defendant.

In 1723 another ſettlement, in conſideration of marriage of his ſon with a ſecond wife, to the ſon for life, to the wife for life, remainder to the iſſue of his ſon by his firſt wife.

Argued, that the iſſue of the ſecond marriage ſhould take before the defendant.

Jenkins verſ. Keymis in Exchequer, vide alſo 237. the opinion of the Ld. Keeper Bridgman.

1 *Lev.* 150. conſideration of firſt marriage extended to the iſſue of a ſecond marriage.

2 *Peere Williams* 485. *Oſgood* againſt *Strode and others*, before Lord *Macclesfield.*

[217]

Father and ſon, on the ſon's marriage, article to ſettle lands on the huſband for life, remainder to the wife for life, remainder to the iſſue male of the marriage, remainder to the nephew in fee. If the ſettler had the ſole intereſt in himſelf, the limitation to the nephew is voluntary; otherwiſe, if the ſon had an intereſt, ſo that without him the father could not make the ſettlement; for then it ſhall be underſtood that the father ſtipulates with the ſon that he will come into the agreement, if the ſon conſents that on failure of the precedent limitations, the eſtate ſhall go over to the nephew.

Rule.

Lord *Mansfield*—If a father, on the marriage of his ſon, ſettles an eſtate, it is an eſtabliſhed rule, *before* all caſes, that nothing is *more common* than to limit over to a *younger* ſon, on failure of iſſue of the *eldeſt* ſon.

Deed of ſettlement, 1712. Settlement in general terms, in favour of all the ſons and daughters of the eldeſt brother, before the iſſue of the younger.

The leſſor of the plaintiff's title ſprings out of the ſettlement in 1723. The parties are, the father and his two

ſons

sons on one part; *A. Mills*, the intended wife, on the second part; and the trustees on the third part.

If the settlement is set aside, it must be on the 27 *Eliz.* against fraudulent conveyances. The lessor must set aside the first settlement as fraudulent, and claim under the second settlement as a purchasor. This act, by the *preamble*, *leg.* and *whole tenor*, is provided against *injury* to be done to *honest purchasors*, by making the conveyance void against purchasors *only*. * If the settlement is set aside as *fraudulent*, it must be only because it's voluntary. Construction of 27 Eliz.

In the settlement of 1723, the settlement on the eldest son is on a *valuable consideration*, the payment of four hundred pounds out of his wife's portion, to *Philip*, the father. There is *no consideration* with respect to *Francis*, under whom the lessor claims; Therefore *Francis*, on a voluntary consideration *merely*, should not set aside his brother from having according to the devise of 1712. † Neither law nor equity will aid one volunteer against another.

In 1728 a deed of settlement is made, reciting the deed of 1712, and a second marriage takes place, between the eldest son and *Jane Wilson*, on the faith evidently of the deed. Supposing you have it against you on the other deed, can you lay any title under the deed of 1728? What was done with the deed of 1712?

It was answered, it continues in the hands of trustees, who have done no act to pass the interest out of them. [218]

Mr. Justice *Aston* said, Why, the trustees executed the deed of 1723.

Lord *Mansfield* continued—The whole turns upon the deed of 1723. If the trustees thought any thing of the deed of 1712, the conveyance is fraudulent.

In the second there is a limitation to the heirs general of the eldest son by the first marriage; he giving up the general estate-tail to his issue-male by any marriage. Whether this were a mistake or no, there is an immediate limitation in favour of *Francis*.

It was said, if the representative of *Philip*'s daughter by the second marriage should take, it would be against his own bargain: And that, probably, the failure of issue of

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* Perquisitum est ad quod quis pervenerit facto aut assensu suo non causa neque delicto. V. 3 Inst. 3.

† In pari causa potior est conditio defendentis.

Consideratio bona est sanguinis vel affectus naturalis.

Consideratio æstimabilis est matrimonii vel pecuniæ. V. Twynne's case, 3 Rep.

the firſt marriage was an event not in contemplation of the parties at the time of the ſettlement in 1723.

Mr. Juſtice *Aſton* cited *Doe*, on the demiſe of *Hammerdon*, againſt *Wilton*.

Bankrupt.

ON a queſtion, Whether an innkeeper ſending out wine, dealt as a chapman in liquors, or no; the court would not determine, but left it to the jury, as depending on the quantity in evidence.

Warrant of Tranſportation.

QUESTION, on entering into a recognizance for tranſportation, Whether this court, or the judges of aſſize, were entitled to fix the time in which the party recognizor ſhould tranſport himſelf.

5. 4 G. c. 11. Mr. *Cowper* urged, the general ſuperintendency of this court, wherever a recognizance was to be entered into with the crown; and therefore, that the power was always diſcretionary in this court, as to the time in which the party ſhould tranſport himſelf.

[219]

James *againſt* Price.

Action of Trover. Caſe from the Devon *Aſſizes.*

AGREEMENT for the exchange of the *Folly*, the plaintiff's veſſel, for the *Rooker*, the defendant's veſſel. The plaintiff was to give twenty-five guineas to boot; and if the *Folly* was loſt in the voyage ſhe was then to pay then thirty guineas beſides. The plaintiff paid a guinea earneſt.

The defendant wrote to the plaintiff an excuſe for not ſending the *Rooker*, becauſe it had been previouſly ſold to Lord *Courtney*.

The plaintiff deſired his peremptory anſwer; becauſe if the *Folly* was loſt, it would be to the defendant's hurt. He afterwards tendered the twenty-four guineas, a guinea being deducted on account of the earneſt paid; but the defendant would not accept. Afterwards, the *Folly* was loſt on another voyage. The plaintiff brought *trover* for the *Rooker*, the defendant's veſſel.

It was contended for the plaintiff, that the earneſt having been paid, and tender of the reſt of the money, was equivalent to an actual delivery and payment. That *trover* was a good action to recover property *tortiouſly* converted, though the actual poſſeſſion was never in the party: For that the property was veſted. Vide Reynolds *and* Golightly, ſupra.

Cro. Eliz. 866. Action of detinue for certain parcels of plate. Contended, that as there was no delivery actual by bailment, but only bargain and ſale, detinue would not lie. But held well enough, and the condition being performed, that he ſhould have the plate again. And though the caſe was that the plaintiff had ſold the plate to the defendant, upon condition, that on payment of ſuch a ſum, on ſuch a day, the indenture ſhould be void; and though the ſum was paid at the day, yet there being an indorſement on the deed, by conſent of both, that if the plaintiff ſhould pay ſuch a ſum on ſuch a ſubſequent day, he ſhould have them again, this was held ſufficient for the plaintiff to maintain detinue of the goods, though by the defendant's paying the ſum at the firſt day, they had ceaſed to be the property of the plaintiff's; and if detinue would lie, ſo would trover; and if trover would lie in that caſe, ſtill more in this. Bateman *and* Elman.

Mr. *Manſfield*, on the other hand—That the plaintiff could not recover by this action: That whether on hearing witneſſes, they would be able to recover on *aſſumpſit*, was uncertain: But that no property was *transferred*, which is neceſſary to ſupport trover. That to ſay, it is a tortious converſion, is begging the queſtion. That in a caſe from *Roll's* Abridgment, (which had been cited on the other ſide by Mr. *Cowper*) there was delivery from *A.* to *B.* for the benefit of a third perſon; the property *actually paſſed* from *A.* and *veſted* in the third perſon, by being *transferred* to *B.* who repreſented that third perſon. That the caſe in *Croke* appeared to be only that the vendor of goods actually ſold, on tender of money, recovers againſt the vendee. That a caſe in *Bulſtrode* (which had been cited) ſeemed juſt like that in *Roll's* Abridgment: That in the caſe in *Cro. Eliz.* the money being paid, it is the ſame as if he had never ſold, the condition being performed: And the condition being a part of the deed, the property never paſſed from the owner, other than conditionally. [220]

Mr. *Cowper* replied, that Mr. *Manſfield* at leaſt ſeemed to admit, that the plaintiff, ſome way or other, was entitled, diſputing only, whether by this action. Replication

That in an *aſſumpſit* the plaintiff, doubtleſs, might have recovered; but that he is not, for that reaſon or any other, precluded from recovering by trover: That the property only is neceſſary for trover. If goods are bought, money paid, goods afterwards refuſed to be delivered, action of trover lies, and even action of detinue, which I take it, makes no difference, but that the very goods themſelves only can be recovered in detinue;* and ſo is the authority of *Noy*, that payment of earneſt transfers the property.

* Quære de hoc and vide Reynolds *and* Golightly.

Lord *Manſfield*—I wiſh you may find a *caſe*, Mr. *Cowper*, on which *payment* entitles to *trover*: For ſuch a caſe would be nearly connected with this. We think the *conſcience* of the caſe is entirely on your ſide.

Afterwards, on the fourteenth of *May*, in the ſame term and year, Lord *Manſfield* delivered the *judgment* of the *Court*, to this effect.

This is an action of trover. [And after ſtating the caſe] The queſtion was, not on the *juſtice* of the caſe, but on the nature of the action. You ſee *every* part of the agreement is *performed* by the plaintiff: On the part of the defendant there is a *breach* of contract; but there is likewiſe a *ſpecial injury*, the *detainure* of the veſſel. An action of *detinue* would have been good: An action of *trover* then, which goes on *detainer* and converſion, what will it's effect be? It's laid down by Lord Chief Juſtice *Holt*, that where a man *keeps* what *another* has a *right of property* in, this keeping is a *converſion*, and *tortious*.

[221] If the *caſes* ſtand with this *doctrine*, the point is clear. *And very happily, the more the law is looked into, the more it appears founded in equity, reaſon, and good ſenſe.**

Noy's Maxims, *c.* 42, *page* 86 to 88. If I *ſell* my horſe for money, I may *keep* him till the money is paid: But if I do preſently tender the money, and it is refuſed, I may take the horſe, or have my action for the detainment.

Godbolt, 339.

Cumberback, 341, *B. tenders* the money, the *property* is *altered*.

Noy's Maxims. Exchange of an horſe; the earneſt *binds* the bargain †

W=

* Lex eſt ſanctio juſta jubens honeſta et prohibens contraria.
Lex eſt ſumma ratio.
Ratio eſt anima legis.
Nulla vetita aut turpia præſumuntur, ſed contraria omnia legitima atque honeſta.

† Quod arrhabonis loco perſolvitur pactum ligat.

We obſerve, that the grounds in fact in this caſe, are very ſtrong: The vender did every thing in his power; we wiſhed to be ſatisfied that the law was on his ſide; we have conſidered the authorities, and are very glad to find it *is* ſo.

JUDGMENT FOR THE PLAINTIFF.

Goodright, on Demiſe of Parrack, *againſt* Patch.

LIMITATION to his daughter *C. Parrack*, for life, without impeachment of waſte; And from and after the expiration of that term, to her ſon and ſons, daughter and daughters, *equally* to be divided; and on default of ſuch ſon and ſons, daughter and daughters, limitation over. Contended, this is an eſtate in *fee*; becauſe no limitation to reſtrain it: Or if not in fee, then an eſtate-tail. *Son and ſons* are *nomina collectiva*: and though daughter and daughters were not then ſo determined, yet they are within the reaſon.

Here are words correſpondent with thoſe of *body*: The ſon or ſons of *C. P.* As there were *children*, there could be no default of ſons, in the *reſtrained* ſenſe of the term [222] ſons, becauſe a *default* of them infers a *negative* of their coming into *exiſtence*; and by no means ſignifies the ſame as *failure*. But, taking *ſons* to mean *iſſue*, then *default* will have it's proper and uſual import.

On the other ſide, Though it is probably the general intent of a teſtator, when he gives an eſtate, without particular *limitation*, to paſs an eſtate in fee, yet it muſt appear on ſome circumſtances; or otherwiſe the conſtruction of law will prevail; which makes it an eſtate for life. That if default be taken ſtrictly, then if a child had been born to *Catherine*, the eſtate had veſted in that child: On the death of that child, an infant, the elder brother of *Thomas* would have taken, *contrary* to the *intent*, and the remainder over to *Thomas* not have operated. That the word ſon or ſons, daughter or daughters, of *Catherine* were only a *deſignatio perſonæ*: That the words *lawfully begotten* make no difference: For, Lord *Coke* ſays, every child muſt be of the body. (*Quod nota nam profecto ſi ipſe non dixiſſet opinor in dubium cecidiſſet an ita lex ſentiret neminem ſine parentibus naſci.*) But if a man deviſes an eſtate to huſband and wife, and after their death then to their *children*, whatever child or children they ſhall have after ſhall take an entailed eſtate, though there was none at the time. That the evidence of the teſtator's *intent*, in ſuch a caſe as this, to over-rule the operation

operation of law; muſt amount to a moral *certainty*; almoſt a *demonſtration*.

In replication, it was argued, that no *moral* certainty, but ſuch *hints* as could be ſpelt out, explanatory of intention, were the guide the court had been accuſtomed to take in ſuch caſes. The *limitation* being wanted, there is only a deſcription of the perſon, it is ſaid: But *default* of ſuch ſon and ſons, daughter and daughters, points out *limitation*. Lord *Coke*'s reaſon in *Wilde*'s caſe has been often queſtioned.

Lord *Mansfield*—In this caſe, it is difficult to come at the intent of teſtator: *Quod voluit non dixit*. Something has been *omitted*: It is highly probable he meant an eſtate in *fee* or in tail. I really can't find a ground.

We will take a little time to ſee whether we can make any thing of it. As to *default* of ſuch ſon or ſons, daughter or daughters, it would have been *hard* to extend it, if a child had been *born and died* immediately.

Mr. Juſtice *Aſton*—It ſeems extraordinary, that he ſhould make his favourite daughter's children tenants for life, limitation over in fee, to *Thomas*, the ſon of the other daughter.

Lord *Mansfield*—I can make a conjecture, but can't find any thing upon the will. The misfortune is, it is nonſenſe.

[223] 28 *June*.

Lord *Mansfield*—This caſe ſtands for judgment of the court. One *T. B.* being ſeized in fee of the premiſes, makes his will. It appears he had two daughters, becauſe he gives them 5l. a-piece by his will. He gives a meſſuage and tenement to his wife; and alſo the eighth part of another, during the term of her life.

After her deceaſe, to truſtees, their heirs and aſſigns for ever, to preſerve contingent remainders, in *truſt*, for *C. Parrack*, his daughter, for life; remainder to the ſon or ſons, daughter or daughters of *C.* lawfully to be begotten, equally to be divided among them, if more than one; and for want of ſuch *iſſue*, to his grandſon, *T. Parrack*, his heirs and aſſigns for ever: The reſt and reſidue to his wife.

C. had no children at the time of the will, but three at the time of his deceaſe; a ſon and two daughters. It is not material to ſtate how the parties in ejectment come to claim; as the only queſtion is, whether the deviſe to "*ſon* "*or ſons, daughter or daughters,*" be an eſtate for *life* or of *inheri-*

inheritance? Now the rule of law is *ſettled*, by analogy from a variety of caſes, that where there are *no* words of *limitation*, general words will operate *no more* than an eſtate for *life* in the deviſee. The ſecond rule *is*, that in *ſuch* caſe, the words *ſhare and ſhare alike, or equally to be divided*, ſhall not enlarge the eſtate; but theſe words ſhall have another legal operation. It has been truly argued from the bar, that the *intent* of the party is *generally counteracted* by this rule; I believe this to be true: For teſtators generally don't take the difference between a *real* deviſe, and a deviſe of *chattels*; and therefore, the court *will always catch at circumſtances* expreſſing *intent*, though there be no expreſs words. I recollect but one caſe cited at the bar, to ſupport the interpretation of the deviſe, ſo as to give an eſtate of inheritance.

Burr. Rep. 1895. *Oates*, on the demiſe of *Wigfall* againſt *Brydon*. A woman deviſed her *houſe* to her huſband for life; remainder to her brother for life; and then to *ſeven* perſons, ſhare and ſhare alike; "but if my huſband die "before my brother, then my will is, that it be *divided* "*amongſt* them." The maſter has *marked* theſe *particular* words as the *ground* of the judgment. The houſe was worth about 100l. the words could not operate to make them tenants in common; for that had been done before: It can't make a diviſion of annual value; and a ſpecific diviſion of the houſe into ſeven parts cannot be put in execution, to the benefit of any of the parties.

There is another caſe, in which the children take a fee. [224]
An *entire* fee was given to truſtees; the reſt of the rents and profits to be *divided* among them when they attain the age of twenty-one. The court *collected* they were to take the profits proceeding when they attained the age of twenty-one, and alſo a *fee*, becauſe the truſtees had one. *Mod. Rep.*

In this caſe, with all the deſire poſſible to ſupport the conjecture I *really* have, that the teſtator did *not* mean to give to *Thomas immediately* after the *life* of the *ſons* or *daughters* of *C.* I can find no ground. It might have been an *executory deviſe*, with the words, "in caſe *C. Parrack* die "without *iſſue in my life time*; or, in caſe *the iſſue of her* "*body ſhould die without iſſue in my life time*, then I give "over." An implication might have been grounded of conſiderable weight, but here we muſt raiſe an *implication* upon an *implication*, which is too much, and too wide.

Serjeant

Serjeant *Burland* cited the caſe of Lord *Hardwicke*, *Goodland* and *Goodwin*: That caſe would be of great importance, if it had been *fully* or *accurately* reported. I remember, I was in it, but have no note; ſo that I thought certainly, that nothing material came into argument upon it.

Caſe in *Atkins*, year 1746, and in *Vezey*. The only queſtion is ſtated to have been, whether the children *unborn* ſhall take.

In the caſe cited there are *very* material points, if it had been argued: Firſt, that he deviſes his *eſtate*; then farther, the deviſe is to his daughter; and for want of children of her, to his own *right heirs*, *ex parte paternâ*, which muſt be after failure of the iſſue of his *own* body, that is to ſay, iſſue of his *daughter*. We can ſee no ground here to conſider the deviſe as more than a deviſe for *life*. The conſequence is, JUDGMENT for the DEFENDANT.

The deſcribing of the meſſuage by it's particular *locality* was relied on by his Lordſhip as one of the reaſons of his judgment.

Attachment.

IF time of exception is out, you can't juſtify after the expiration of the time, if you have not before; but you may avail yourſelf, to ſtop an attachment againſt the ſheriff.

[225]

Bail.

EXAMINATIONS of bail, Lord *Mansfield* obſerved, were grown to ſuch an extent, that the court muſt ſtop them.

Indemnity to the Sheriff.

Martin *againſt* Wenham. *In the Caſe of Mr.* Wenham *and others.*

AN indemnity entered into for a year, as a ſecurity for the ſheriff, and his officer. The defendant gives this indemnity, with ſureties, to the under ſheriff.

Afterwards, the defendant gives notice that he does not mean to ſtand by his indemnity; and this notice is left at the under clerk's of the under ſheriff.

On

On the firſt complexion of the affair, Lord *Mansfield* expreſſed himſelf *ſtrongly* againſt this notice *diſcharging* the obligation. What is the effect? Can it diſcharge ſuch a man's indemnity? Certainly not. It might have affected the principal in *conſcience*, if the notice had been to the principal himſelf; but given to an agent, how is it to operate? *It cannot affect the principal farther than the agent is an agent in courſe of buſineſs.* If this giving up of the ſecurity had been of the courſe of buſineſs, it would have been good by the hands of the agent; but being no notice to him, *qua* agent, it cannot poſſibly reach the principal: And if they will do any thing, they muſt bring their action, if it can be maintained any where, againſt the man to whom they ſent the notice.

Mr. Juſtice *Willes* ſaid, that he ſhould ſpeak with great diffidence, and be always diffident of himſelf, whenever his opinion differed from the practice of the court. But that on the particular circumſtances, he thought it might be open to a new mode of examination, Mr. *Dunning* having offered to put the money into their hands.

That on the principle of law, he thought the indemnity ſtood till the ſheriff's year was out. Eſpecially, that Mr. *Weeman* cannot demand a diſcharge without the concurrence of the reſt. But that as the under ſheriffs did not attend at the office, they were liable for their agent's neglect.

Suppoſe the ſecurities had come all together, and ſaid, we greatly diſapprove *Bolland*, your officer; we muſt deſire you would deliver no more warrants to him: Suppoſe the under ſheriffs had promiſed that they would not; would a jury, on an action for damages, not charge the ſheriffs?

And what is done here? Why, they apply to the agent, [226] who does not deny the notice, but only ſays, he does not remember any written notice, and believes the notice was not given till after the warrant ſerved.

Mr. Juſtice *Aſhhurſt* doubted the ſtrength of the facts to ſupport the motion; and doubted the principle of law, whether the ſheriffs would have been chargeable, if the notice had been to them perſonally: Much more when to their *agent only*, out of the ordinary way of buſineſs.

Lord *Mansfield*—I have *no* doubt, if they had ſaid, they would grant *no* warrants the ſheriffs could *never* have *recovered damages* in point of *law*. But whether the *undertaking* of *Firth*, the agent, would have *bound them*, *does not appear*

fear to me by any means *clear*. However, though there were three persons present, only *Wenman* knows any thing of it, who cannot be a witness on the trial.*

The court at last determind to admit *Frith* to make a suppletory affidavit, as to what he knew about the warrant.

RULE ENLARGED.

Lord *Mansfield*—Let the writs be produced, and the accounts delivered to *Wenman*; and let *Frith* answer more fully as to the notice.

Indemnification endorsed on the writ by plaintiff's attorney.

Afterwards, on the fifteenth of *May*, *Frith*'s affidavit, according to the terms of the enlarged rule, was read, "That, to the best of his recollection and belief, the warrant granted to *James Bolland*, 18 *Jan.* 1771, was delivered out after the notice of the defendants: That he is further confirmed in his belief, by an indemnification endorsed on the writ, by virtue of which the warrant issued."

Lord *Mansfield*—It comes out very clearly now; and Mr. *Frith* would have done well if he had disclosed this on his former affidavit: As I am satisfied he had it in his mind then. The idea of the accounts was, to see whether the day and the particular action on which the loss happened, had been stated: It appears clearly *not*.

The counsel for the defendant moved on this, that the sum of 360l. on which judgment had issued, and execution
[227] had been levied, might be returned to the defendants; which, I believe, was the original motion.

Lord *Mansfield*—If we grant this rule, we shall determine the question in a *summary* way: For the question is *still*, whether they, the sheriffs, are liable for the act of *Frith*?

Mr. *Dunning*—Yes, my Lord; I say the sheriffs take an indemnity, to prevent their being prejudiced by consequences.

Lord *Mansfield*—This is *very strong* on the *indemnity* taken by the sheriffs. I apprehend, however, the sheriffs, in action against them, may have a remedy over, either against *Frith*, as discharging the standing security, or against the plaintiff's attorney, upon the indemnification. *And we would not, by a summary proceeding, obstruct these remedies.*

If this goes there will be an immense circuity.† *Martin* comes

* Neminem oportet testem esse in causa sui privata.

† Note, a circumstance of this case, which, I think, appears by the affidavits, that when the sheriff came upon *Wenman*, he desired they would [illegible]

comes against *Frith*, *Frith* against *Priddle*. (The plaintiff's attorney.) I think it would be proper to enlarge the rule further. *Frith* should shew cause why *he* should not be answerable to the *sheriffs*; and *Priddle*, both to them and *Frith*.

Lord *Mansfield* took notice, that they had not brought in this case the proper parties before the court: But that they might make *Frith* and *Priddle* parties to another rule; And that it was to be considered, whether *Priddle* was not understood as the sole security. That the rule should be suspended; and might be drawn for a very short day. His Lordship thought, that they could have nothing to answer to it, and that the sheriffs should be entitled to recover.

RULE ENLARGED, and *Frith* and *Priddle* to answer why they should not indemnify the sheriffs, as to 360l. and proportionable poundage.

Lord *Mansfield* asked, in what capacity *Frith* acted?

It was answered, as an under clerk.

Lord *Mansfield*—Is it usual for *under clerks* to take indemnities?

A gentleman in court said he had been an under sheriff for many years, and never knew it.

Serjeant *Davy* said, it was *customary* in *Devon*, and they had no other way. [228]

I find no more of this case; but I take it, that the court appear to have decided on it: That an agent of the under sheriff, as clerk, cannot bind the sheriff or under sheriff to matters not properly within his business.

That when a person becomes surety for a year, with others, he can't discharge the indemnity given to the sheriff without the consent of the sheriff, and of the other sureties. Vide Wood's Inst. 55. 56.

That if the under sheriff, in this case, had taken notice of what had been said to *Frith*, and had said, he would deliver no more warrants to *Bolland*, *Wenman* declaring, if he did, he would not stand to his indemnity, the under sheriff, in such case, would not have been entitled to recover damages in this action.

Note too, the pains taken by the court to avoid circuity of action. Lex non amat circuitum.

Plea Boni judicis est lites dirimere.

for *Lewis* first, another of the sureties, which they did. *Lewis* complained, and *Wenman* gave him an indemnity, on payment of 400l.

Plea of Coverture.

WHETHER neceſſary, where a *feme covert* is arreſted; or whether ſhe ſhall be diſcharged ſummarily upon motion?

This was in a caſe in which Mrs. *Baddeley* had been arreſted, and applied to be diſcharged on motion, and a copy of the marriage, accompanied with an affidavit that her huſband was ſtill living.

Mr. Juſtice *Aſton* ſaid, that he had learned from one of the judges of the Common Pleas, that in three caſes cited in a queſtion there, it was held in great doubt, whether a copy of the regiſter was ſufficient; becauſe the wife, perhaps, lived ſeparately from her huſband.

Mr. *Murphy*, the counſel in the cauſe, was deſired to enquire into the caſe in the Common Pleas.

Indictment.

In Arreſt of Judgment.

OBJECTION to an indictment, that the *time* of the offence charged is not ſpecified.

Indictment that before and after the ſixth of June, the proſecutor was a Juſtice of Peace: And that at the petty ſeſſions held at Weſtminſter, the defendant then and there ſpoke, &c. bad.

* The indictment was for words ſpoken of a Juſtice of Peace, in the execution of his office. The words were, "You did not do juſtice." It's charged in the indictment, that the words were ſpoken at the petty ſeſſions holden for *Weſtminſter*.

It was argued againſt the motion, that the time and place was ſufficiently ſtated by collection from the whole indictment: For firſt, that the indictment ſets forth, that on the ſixth of *June*, *W. B.* was a Juſtice of Peace; then in the clauſe in queſtion, that at the petty ſeſſions holden for *Weſtminſter*, *then* and there defendant ſpoke, *&c.*

That in this offence ſo much ſtrictneſs is not neceſſary as in a capital queſtion; that even in capital caſes *adtunc & ibidem* ſhall refer to the time mentioned firſt in the indictment, without repetition.

[*229]

ab abſurdo.

ab inconvenienti.

Farther, it was argued to what other time it could refer. Lord *Hale* ſays, that even in capital caſes, the degree of ſtrictneſs required in indictments is the diſeaſe and reproach of the law, and calls for remedy.

That

That the reason assigned why the Time must be so particularly stated is, that the *forfeiture* may relate accordingly; and that in case of murder it may appear, whether the death was within the year and the day; that this reason did not apply to this case. ex artificialibus. a dissimili.

That even where it might apply, it did not hold in practice; for that a man might be indicted for having given the wound in 1770, and the death might be proved in 1769 sufficiently for conviction. A non-usu. Vide 2 Hale, Plac. Cor. c. 25. p. 179. Emlyn's edit.

Mr. Serjeant *Hawkins*, *Plac. Cor.* was cited.

Mr. Serjeant *Davy* said, that he should not cite either *Hale* or Serjeant *Hawkins*; he hoped in such a case as this, a few words from Serjeant *Davy* would be sufficient. That if the *then* could be preferred to *one* time only, he admitted the once mentioning of the time was sufficient. That here nobody could tell the time in this case; that the indictment set forth that *before and after* the 6th of *June* Mr. *B.* was a justice, *&c.* and that at the petty sessions holden for *Westminster*, *then* and there the defendant spoke, *&c.* Whether the *then* referred to *all*, *any*, or *what time* he could not tell; perhaps he regarded all times that ever were or shall be; he fancied the court would not help the indictment, by guessing what time, or by referring it to all.

Cui curia assensit.

And JUDGMENT was accordingly ARRESTED thereupon.

New Trial.

Rule.

[230]

NEVER take a rule for a new trial, without special order of the court beyond four days.* Lord Mansfield.

Langfielde, on Demise of Banton *against* Hodges, Copyholder.

In Ejectment.

BY the custom of the manor, copyholds were held upon lives. Equitable presumption rebutted by parol evidence.

A person

* Nulli negabimus aut *differemus* justitiam vel rectum, Ma. Char.

A person who was tenant of certain copyhold lands in the manor, according to the custom, put in the name of the lessor of the plaintiff, who was his *nephew*, with his own.

Question, Whether the putting in his name should be considered as an advancement in consideration of blood and natural affection, or only make this nephew a trustee.

It was, I think, admitted, that the *equitable presumption* was, that he took *only* as *trustee*; but to repel this presumption, *parol* evidence was offered that he afterwards said—"*I give it him.*"

Lord *Mansfield* thought, that as the nephew was *in* of the *legal* estate *before* these words, "*I give it him,*" they were *proper evidence* to be left to the jury of the *intent* upon the *original* taking, and lead *naturally* to *interpret* it. And that wherever a *legal estate* is *taken away* by *equitable presumption*, you may *always rebut* by *parol* evidence.

Vide Lamplugh *and* Lamplugh 1 Peere Williams, term Mich. 1709. p. 111. and the case following it, and the case following of Lady Dowager Granville.

Part of the evidence went to prove, that he had *purchased* with an *intent* to give it to his *nephew*.

The *administrator* of the uncle claimed on the other side.

Lord *Mansfield* said, he thought the *administrator's* claim in equity was *very unquestionable*; and that he never heard of such a case.

Vide Dutchess Dowager of Beaufort.

[231] It was said, however to have been determined in a case of ——— verſ. *Crew*, 1 *Peere Williams*.

Note, This case I do not find: But there is a case of *Philips* verſ. *Philips*, *termino paſchæ* 1701. reported in *Peere Williams*, where it was determined in *communi banco*, that an estate *per auter vie*, should go to the administrator (by the statute of 29 *Car.* 2. *c.* 3. *ſ.* 12) where there was no executor.

Lord *Mansfield* observed, that in the case of *Selwyn* verſ. *Browne*, Lord *Talbot* went on the residuary devise, and that *parol* evidence could not be admitted there, because it would have *contradicted*, not *explained* the devise. Lord *Hardwicke* thought the residuary devise not sufficiently clear, and suspected fraud; neither decreed in that case on the ground of equitable presumption, not to be rebutted by parol evidence.

That in the particular case where a man gives his executor five pounds personally for his trouble, it was decided he made him a trustee; and that upon the *particular* circumstances

ſtances of that caſe, the argument of *equitable preſumption* had been carried into *general* application *much too largely*.

It was ſaid afterwards, that the parol evidence in *Selwyn* and *Browne* was to *raiſe* the equity, and not *rebut* it; and his Lordſhip ſeemed to concur in that opinion.

14 *May* 1773. Lord *Mansfield* ſtated the caſe. That it appeared in evidence that the inteſtate gave 600l. for the eſtate juſt before his death: That he had ſaid he *intended* it *Longfielde* [his nephew] after his death, and would *give it* him: That at another time he ſaid he had purchaſed it for him.

He had been dead nine years—it did not appear when the plaintiff entered. And it was argued,

1ſt, Whether parol evidence was good or admiſſible at all in this caſe?

2d, Whether to rebut the equitable preſumption?

3d, Whether, if parol evidence could be admitted, and might rebut an equitable preſumption, the evidence in this caſe was ſufficient to that purpoſe?

As to another point, whether a new admittance neceſſary, on all hands, that where there are remainders over, the firſt admittance is ſufficient to ground an ejectment. That [132] a man ſhall *never* be *non-ſuited* by a *legal* eſtate in his *own truſtee*.

It was contended, that by general preſumption, where a man *purchaſes* a copyhold, and *pays* the *fine*, the purchaſe-money going in *diminution* of his *perſonal* eſtate, that there is, therefore, a *reſulting truſt* to the executor or adminiſtrator.

The adminiſtrator cannot hold the eſtate, if the inteſtate has given it over to another; nor can he defeat the eſtate of that other.

Renewal of Leaſe, with ſeveral eſtate for life, by cuſtom of the manor; the firſt taker cannot by ſurrender bar the ſucceſſion: [Perhaps conſidering him as a truſtee for the remainders, vide *Manſel* and *Manſel*, 2 *Peere Williams*.]

It is ſaid, it's not within the Statute of Frauds; becauſe there is an eſtate by legal implication only, and that this will not do againſt the equitable preſumption. I am clear there may be a rebuttal by parol evidence.

In Equity Caſes abridged, this rebutter is ſet up to ſupport a truſt againſt *equitable implication*. There was a ſon, and yet they admitted a rebuttal to prove a truſt. As to the evidence, it appears to me clear *quo intuitu*, the firſt ſtep was taken, if a man merely ſays, I *give*, or *intend to give*, this

this, to be sure, passes nothing; because the intent is not legally executed: 'Tis a rule.* But here he purchased; he put in his nephew's name; his nephew was admitted; he intended it for his nephew ('tis said in evidence) after his death; from the purchase to the last minute of his life, he declared his intention. WE ALL AGREE: And the CONSEQUENCE is, that the plaintiff has both the *legal* and *equitable* estate.

* Vide Brett *and* Rigden.

JUDGMENT FOR THE PLAINTIFF.

His Lordship observed, that an equitable presumption was only a kind of *arbitrary implication* raised, to stand only till some *reasonable proof* brought to the contrary.

Holloway, Parson of Swallowfield, *against* Hewit.

For a new Trial.

ACTION against defendant for non-payment of tithes.

Plaintiff alledged cutting down clover grass and making it into hay, and carrying it off, without having first set out the tythes, which *by right ought to have been set out for the plaintiff, according to immemorial usage, &c.

[*233]

Vide of tithes commentar. b. 2. c. 3. 18 E. 3. st. 3. c. 7. 45. Ed. 3. c. 3. 1 R. 2. c. 13. 5 H. 4. c. 11. 7 H. 4. c. 6. 27. H. 8. c. 20. 32 H. 8. c. 7. 27 H. 8. c. 21. 37 H. 8. c. 12. 2 & 3 Ed. 6. c. 13. s. 12. 31 H. 8. c. 13. s. 1. 22 & 23 C. 2. c. 15. 3 W. & M. c. 3. 11 & 12 W. 3. c. 16. 1 G. 1. st. 2. c. 26. s. 2. Justices of Peace empowered to give remedy for small

Witness called, who said it was the custom to make the clover grass into hay-cocks before they set out the tithes, and that they used to pay in kind.

Another witness says, he believes they used to pay tithe in kind for every tenth cock.

Another says, that for twenty years back they took tithe in kind.

Another swears to fifty years back.

Another that he lived ever since the hard winter at *Swallowfield*, that they used then to take tithe in kind.

Another, I think said, that he had lived twenty-five years at *Swallowfield*, that the general custom was to make into hay, and then set out the tithes before they carried: That at first he *paid*; but after they took the tithes in kind.

Another, that for eighteen years it has always been taken in *kind*, but that before it used to be *paid* for: However, thirty years ago, he says it used to be taken in *kind*.

Evidence for defendant—A witness, who says he was servant to young *Ellis*, who was then the farmer of the tithes; that about eighteen years ago, a dispute arose about the payment. Mr. *Ellis* looked into the articles, and said he must set out the tithes, for else it would make a bad custom;

cuſtom; that if they found any would *not* ſet out, they muſt make agreement. tithes, 7 & 8 W. 3. c. 6 4. Ann. c. 27.

Another witneſs—That after he left the pariſh, it was not the reputation of the pariſh that tithes were to be paid in kind.

Several witneſſes for the plaintiff ſpoke of this *Ellis* and of the cuſtom as before ſtated on the part of the plaintiff.

The jury found for the defendant.

The balance of the evidence appeared extremely ſtrong on the part of the plaintiff; there were but two evidences in all, ſuch as they were, on the part of the defendant.

It was objected, that on a penal ſtatute, eſpecially when the party came in for trifling damages vexatiouſly, it was contended, that the verdict ſhould not be diſturbed by a new trial—unleſs prevarication appeared, or tampering with the jury. [234]

Jarvis qui tam againſt *Hall*, on the Game Act—for killing an hare. *Wilſon's* Rep. Lord Chief Juſtice *Lee* ſaid, that he did not remember that ever a new trial was granted on a penal action.

Lord *Mansfield—Never on ſuch a penal action to be ſure.* [For in *Strange's* Reports on a *qui tam* action for killing an hare, determined that an indictment will not lie; a ſummary mode of proceeding before the juſtices having been provided by the ſtatute.] The King *and* Buck. Str. 679.

Raymond's Reports. *Smith*—For loſs of the plaintiff's houſe by defendant's negligently keeping of his fire. Verdict for the defendant. Lord *Holt* was diſſatisfied; yet the court would not grant a new trial. Vide Salkeld 644.

Lord *Mansfield*—This was not a penal action; and I myſelf ſhould have refuſed a new trial in that caſe: 'Twas a very hard one, and defendant loſt his own houſe by it. Smith *and* Frampton.

And where a verdict is againſt the *form* of law, but according to the *juſtice* of the caſe, as in the Ducheſs of *Mazarine's* Caſe, the court will not unſettle the verdict.] Verdict againſt form, but according to juſtice of the caſe, not to be diſturbed, vide Salkeld 646.

And farther, on the Statute of *Uſury*, on a motion for a new trial, it was adjudged by the counſel, that the court would not even grant a rule to ſhew cauſe.

Lord *Mansfield*—What do you think upon a *bond*, if a wrong verdict for defendant.

My Lord, I don't apprehend that to be a penal action. Execution cannot be taken out for the penalty, but only for the value of the bond.

Lord *Mansfield*—The doctrine is *right*,* but is not *applicable*: Theſe are all proſecutions by common informers. This is a queſtion of right; almoſt the only action on which it can be tried by the common law; 'tis a moſt beneficial way for the defendant of trying the title. The jury don't give the damages; they are never directed. You might as well ſay, where there are *double coſts*, there ſhall not be a new trial.

RULE ABSOLUTE FOR A NEW TRIAL.

[235] ON an action for aſſault and battery, and falſe impriſonment; tried at the *Salſbury* aſſizes before Mr. Juſtice *Blackſtone*.

Brookſhaw *againſt* Hopkins.

TO ſet aſide judgment of Nonſuit, and be at liberty to proceed to a new trial.

Action charges that the plaintiff laid hands on the defendant violently and beat him, and bound him with fetters, and confined him in a private mad-houſe.

Vide 21 J. c. 12. Plea not guilty.—Special juſtification, that he is a juſtice of peace, and did it in execution of his office, [the perſon being mad.]

Vide 34 E. 3. c. 1. On the part of the plaintiff this was denied to have been done in execution of his office.

It was, by Juſtice *Blackſtone* held, that whatever irregularity, yet it was by colour of office, and therefore nonſuited the plaintiff.

Mr. *Dunning* in ſupport of the motion—That if there ever was a poſſibility of magiſtrates being reſponſible for private aſſaults, he ſhould imagine this was one of thoſe caſes of reſponſibility. And that as to the former acts, at leaſt of thoſe complained againſt, he acted not in the execution of his office; nor within his juriſdiction. That as to the quantity of damages that might, or ought to be recovered, the court would not look into that, as it certainly belonged to another tribunal.

The *Norwich* Caſe was ſtated—Lord *Mansfield* ſaid it aroſe from the officer's executing the warrant improperly; taking up in the city, when he ſhould have taken up in the county. On another cited by Mr. *Dunning*, Lord *Mansfield* obſerved, the order was to take up lewd women, and he took up a modeſt woman.

Mr.

* Namely—Nemo bis in diſcrimen veniet pro eodem delicto.

Mr. *Wigmore*, on the ſame ſide with Mr. *Dunning*—That there was no warrant from the juſtice to take up the man; and though not denied, that if a man be furiouſly mad, the juſtice, without warrant, may detain him; this muſt be on the merits and evidence of the fact, and requires being tried by the country.

That there is no pretence here that it was upon information: That in caſes of this ſort, for a juſtice of peace to juſtify his proceeding, there ought to be ſomething in writing.

That the two caſes mentioned by Mr. *Dunning*, are on the argument of *Money* and *Leach*, * and that his Lordſhip ſaid there, that there were many other caſes, in which the act done might not be within the juriſdiction, ſo as to entitle the juſtice to the benefit of the ſtatute. And that Mr. Juſtice *Blackſtone* had declared, that he thought the leaſt colour of juriſdiction ſufficient; and, at the ſame time, as a reaſon why the nonſuit would not prejudice them, that they would be at liberty to try whether it ought to have been granted. [236]

* Vide Sir James Burrow's Rep. p. 1761, the caſe alluded to is Lawſon or Dawſon *and* Clark, and p. 1767.

Lord *Mansfield*—I dare ſay Mr. *Wigmore* has not lately looked into the caſe [to which he referred] becauſe it turned on how far the conſtable was authorized as a miniſterial officer. For in ſome caſes, the warrant is a juſtification to the officer, though the act of the juſtice be not according to law, as to what it may command.

There may certainly be a material diſtinction as to the act; if he ſtruck the firſt man he met, he does not do it within his juriſdiction.*

Mr. Juſtice *Aſton*—It appears it was done, perhaps, in favour of the plaintiff to prevent miſchief; and in that caſe, though not in execution of his office, perhaps it may ſtand.

Lord *Mansfield*—As this has never been before the jury, but comes on the judges nonſuit, I doubt we muſt go on the ſtrict point of law.

Of pleading the general iſſue, and giving the ſpecial matter in evidence, vide 7 J. 1 c. 5. 21 J. 1. c. 12. vide Burn, ad vol. tit. Juſtices of the Peace, ſ. 6. et alibi.

Irregularity.

MOTION to ſet aſide proceedings for irregularity, the attorney's name not having been endorſed on the writ.

On

* Lex neminem ad malefaciendum hortatur; neque licentiam ulli, faciendi facit.

On its appearing, however, that there had been ſomething done ſince on the other ſide to continue the cauſe, notwithſtanding this irregularity.

RULE DISCHARGED—but, I think, without coſts.

Bail.

Rule.

Regula. BAIL in the name of one of the plaintiffs only, where there are joint plaintiffs to the action, are no bail.

The notice was right, they had proceeded as far as demurrer.

The maſter ſaid there was no cauſe in court, for want of the names of both the plaintiffs; * if the parties were in court, they might waive the exception by proceeding.

Lord *Manſfield* ſaid he would ſtay proceedings till rectifying of the bail.

RULE taken to give judgment as of this term; try the writings after term; and rectify the bail—by conſent.

Common Appearance.

ON a common appearance proceeding to plead, admits regularity of the appearance.

Eſtate *pur auter vie.*

IF there be an eſtate to *B. durante vita*, *A.* and grantee dies in life of *ceſtuy que vie*, and a ſtranger entereth a general occupant, he ſhall be admitted, and pay the fine *Coke* Copyhold 62.

Eſtate *pur auter vie* of copyhold granted to one and his heirs; heir entereth as ſpecial occupant. Where by cuſtom the copyhold might be extended, party ſhall be admitted of the extent, paying the fine. Ditto.

29 *Car.* 2. *c.* 3. Eſtate *pur autre vie* ſhall go to the executors or adminiſtrators, where there is no deviſe or occupant thereof.

* De non apparentibus et non exiſtentibus eadem eſt ratio. Quod ab initio non valuit tractu temporis, &c.

BAIL in error cannot ſurrender the principal; but muſt pay the money if judgment is affirmed. 15 May.

The King *againſt* the Inhabitants of the Weſt Riding of Yorkſhire, for neglecting to Repair.

LORD *Mansfield*—You can't come here, the indictment not here: If we give an opinion, we can't give a judgment: You can't come here for an opinion to us; they ſhould come to you. But, I don't ſee why by conſent you may not move it for the furtherance of juſtice.

They moved accordingly.

The indictment was for not repairing a bridge, and two hundred feet of highway, which they had been uſed to repair.

They pleaded guilty for the bridge, and twenty-four feet eaſt, and twenty-one feet weſt.

Not guilty for the reſt.

Queſtion 1ſt, Whether defendants *primâ facie* liable by ſtatute?

Or 2d, Whether by common law?

That *primâ facie* the pariſh is liable to repair; and ſo by common law.

If the inhabitants of the Weſt Riding at large are liable by ſtatute, this liability ſhould be ſtated on the indictment.

That there is no way of ſhewing them guilty on this indictment but by common law, or immemorial uſage.

That the ſtatute 22 *H.* 8. *c.* 5. gives power to juſtices of the peace in every ſhire, *&c.* or any four of them, to hear and determine in general ſeſſions annoyances of bridges.

And that whereas in many parts of the kingdom it cannot be proved what hundred, *&c.* town or pariſh is liable to the repair, by reaſon whereof ſuch bridges lie often long without repair, to the great annoyance of the king's ſubjects: Therefore it provides, that where it cannot be *known* and proved what hundred, *&c.* town or pariſh is liable, the [239] ſhire or riding, (and as to the other caſes provided for by the ſtatute) ſhall be liable: But ſtill, if it can be known and proved, that ſuch a pariſh is liable, it remains charged

as

as before the ſtatute, and that in ſuch caſe, they are not to come againſt the Riding.

And that the power given to the juſtices was not meant to take away the ſuperintending power of the king's court at *Weſtminſter*.

A lection. juriſprudent. 2 Inſt. 6 & 7 to 706.

Lord *Coke*, in his reading on this ſtatute ſays, this court or court of Eyre, or court of aſſize, or ſheriff's tourn, were the only courts impowered by law to hear and determine.

The firſt clauſe of the act impowers the juſtices of the ſhire, or four of them, one of whom to be of the quorum, to hear and determine.

That the ſtatute of 2 *Ph.* & *M.* gives them the ſame power.

That all the learned judges ſince had recognized what was before held by the common law, that *primâ facie*, the pariſh is liable, as well for three thouſand feet, as three hundred.

That the clauſe, on which it is ſuppoſed the queſtion is meant to turn, is, that it would be more convenient to have the repair of roads 300 feet from bridges, determined in the quarter ſeſſions. To be ſure, becauſe the quarter ſeſſions ſit four times a year; and therefore, it goes on, that foraſmuch as if ſpeedy remedy be not had, the inhabitants would have little avail, be it enacted, that the bridges and highways within 300 feet be repaired and maintained, whenever need ſhall require. Will not this be ſufficiently ſatisfied by giving the juſtices authority to compel the repairing?

The law lays it upon the pariſh: The indictment ſtates, that this road lies in the pariſh of *Selburgh* The court will never ſuppoſe, that an immemorial duty, altering the common law, can have ariſen ſince the ſtatute of *H.* 8. and yet that they will be bound to prove an immemorial duty, by what they have laid in the indictment. That the ſtatute does not, in this particular, alter the common law: That at leaſt, the ſtatute does not extend to this court, or the court of aſſize: That the court will take it at common law, even for that reaſon, without looking farther.

Lord *Manſfield*—That it was argued extremely well, whether the act is not declaratory of the common law: It appears it is.

Opinion of the court That the act ſeems declaratory of the common law

When it does not appear who ought to repair, then it is certain that in ſuch caſe, at common law, it is on the inhabitants of the county; when the road extends 300 feet from the bridge it ſhall end.

That

The repair at common law is on the county, when it does not appear who ought to repair.

That the ſtatute does not alter the power of this court at common law, but only gives a power to the quarter ſeſſions.

That the ſtatute does not alter the juriſdiction of the court.

Brookſhaw *againſt* Hopkins.

[240]

ON the motion above, for a rule to diſcharge a nonſuit.

Argued againſt the motion, that the defendant was mayor of *Shrewſbury*, and, by conſequence, Juſtice of the Peace, by virtue of his office.

That if the merits could be gone into, the defendant had behaved with the greateſt civility.

That one *Langton* complained of ſome ill behaviour of the plaintiff.

That the plaintiff terrified *Langton*'s wife, who was with child, exceedingly.

That the defendant ſent expreſſes to the relations, who took the plaintiff, and confined him in a mad houſe for ſix months.

Nonſuit of the plaintiff, for default of notice; and alſo for that the plaintiff did not bring his action within ſix months.

It was ſaid, that as to the neceſſity of a complaint in writing, the meaning of the ſtatute was, that the juſtice might not be compelled to give evidence of a complaint or information, which he did not keep in his memory for ever.

That though proper, prudent, and generally right, to have an information in writing, yet, the time being elapſed, he was not bound to ſhew in evidence by what authority he acted.

That for a manifeſt breach of the peace, in his view, the commitment was good, though without warrant.

Juſtice may commit for breach of the peace in his view, without warrant or information.

Even had it been the caſe of ſettlement of a pauper, payment of tithes, or any caſe where the juſtice acts under a particular power, he ſhall not be forced to ſhew his authority, after ſuch diſtance of time.

Lord *Mansfield*—I ſhall read the report.

An action of falſe impriſonment and binding in fetters: There is another count for a common aſſault; damages laid at 5000l.

[241]

Caſe ſtated, that the plaintiff was at that time perfectly in his ſenſes, a gentleman of large fortune.

On

On the part of the defendant a witneſs produced, who ſaid he ſaw him behaving very angrily at *Langton*'s, becauſe he was not let in; threatened Mrs. *Langton* very much; behaved very furiouſly: But he could not ſay he was out of his ſenſes.

That he afterwards inſiſted on going to the races at *Stamford*; that Mr. *Hopkins* endeavoured to perſuade him not: That at laſt, on his growing very angry, and ſtill inſiſting that he would go, Mr. *Hopkins*, the mayor, defendant in the cauſe, ordered the conſtable and the ſerjeant to ſeize and carry him to gaol; which was done. Another witneſs, the conſtable, ſays, the ſerjeant gave him orders to ſeize the plaintiff at *Langton*'s houſe, and bring him before the juſtices. Here is a defect; it does not appear *by what authority* the town ſerjeant did this.

No part of this evidence affected the other defendant.

The plaintiff endeavoured to prove a continuation of this impriſonment, by his friends.

One of the witneſſes ſaid, he would not have taken the man to gaol [I think this was the conſtable] if *Hopkins* had not been mayor.

Hopkins had nothing to do with what was done by the relations of the plaintiff, and does not appear to have known what they did.

The *great* defect in the evidence is, that it does not *appear* whether *Hopkins* committed the man on complaint of *Langton*, or on his *own view*.

On the other ſide, they denied his having done what he did *purſuant* to, and in *execution* of his *office*.

There has been no propoſal to an *agreement* on the part of the plaintiff, which any gentleman here is authorized to make. I don't explain the reaſon; there is a defect of evidence, which I don't chooſe to enter upon at preſent.

[242] I wanted to know, whether the plaintiff would have *accepted* the *nonſuit*, if the juſtice *waives* the *coſts* of the *nonſuit*, which, in the caſe of a *juſtice* of peace, is *double* coſts.

I am perſuaded, whether *Hopkins* was guilty or not, of irregularity, or no, he did not intend any harm, but rather kindly to the plaintiff.

Mr. *Dunning*—I don't wonder your Lordſhip's preſent opinion, from the ſtate of the evidence at preſent, as to the innocence, or, perhaps, good intentions, of the defendant; but I conceive the preſent imperfect ſtate in which the evidence appears, is what the plaintiff complains—the ſtopping of the matter in its preſent ſtate, is the very ground

of

of his diſſatisfaction. But it *might* appear in his *favour*; he conceives at leaſt it *would*.

I differ in part in opinion with the learned judge who tried the cauſe. He thinks, that *colour* of *office* is ſufficient; I think, that acting in *purſuance* of office *legally* is *neceſſary*: I do not *know* what elſe is acting in *execution* of office.

But a *ſtrange* but *ſtrong* caſe, that the court of Common Pleas, having *no* juriſdiction in *criminal* caſes, ſhould iſſue a writ for the *execution* of a *man*. They would *act* as a *court certainly*; and they have a *power* to *iſſue writs*: Yet, they would *not act within their juriſdiction*, or be *protected by it*.

Suppoſe *this* court, without *any proceſs* before them, ſhould *order* the *execution* of a *man*; this would be under *colour* of *office*; but *not* in *execution*.

Is there any thing done by the plaintiff that could amount to a breach of the peace? As to the defendant, he acted *being a juſtice*; but, as far as I can ſee, *not as one*.

I ſubmit, that it will be neceſſary to go farther into the caſe.

I apprehend, that in the caſe of *Money* and *Leach*, the ground on which the court went was, that there *was* an acting by *colour* of office; but not in *legal purſuance* of that office.

[Lord *Manſfield*—You are very right, Mr. *Dunning*; and I thought ſo yeſterday, from memory.]

I ſhall hope that the court will think a farther enquiry into this buſineſs is *neceſſary*: On which the court will *judge for* or *againſt* the conduct of the defendant, as ſhall appear on a fuller view.

Mr. *Gee*—That they had been let to proceed far enough; [243] and that nothing was to be proved ſtrong enough to amount to a breach of the peace: That they had evidence to have gone into againſt the other defendant.

Being aſked, why they did not come againſt him, as not being ſtopped by the objection in favour of *Hopkins*? It was anſwered, that he alſo was a magiſtrate. It was aſked why, when the judge ſaid there appeared nothing againſt the other defendant; but I don't know what was anſwered.

Lord *Manſfield*—The queſtion is of *conſequence*, as for the *protection* of a *juſtice of peace*, by conſtruction of the ſtatute: It is *alſo* of *conſequence*, becauſe it will be *final* againſt the plaintiff; for if we pronounce, that, on the evidence, the juſtice *acted* in *execution* of his office, then the plaintiff is too *late*, being *beyond* ſix months.

I own

I own the *great* difficulty is, that I cannot decide upon the evidence, whether he committed upon *complaint* of *Lon-ton*, or upon his *own view* of his behaving furiouſly; or upon his inſiſting to have his horſe to go to the races. *To a-ſure, the act does not protect juſtices for an act done by* PRE-TENCE of office: But where an act is done *unformally* where, in another manner, it might have been *legally* done there, in conſideration that *country gentlemen are generally* in the office that have *no emolument*, at leaſt the *beſt* of them therefore, if they do what by *law* they are *impowered* to do, and *might* have done another way, the act *protects* them from ſuffering for the *mere* informality.

On *complaint*, a juſtice may *commit*; but in ſtrict form the complaint ſhould be in writing: On his own view, he may commit *without* complaint, if he has *reaſon* to *apprehend* the peace will be broken, though not actually broken.

The juſtice, too, ought to have produced witneſſes, to ſhew the ground of the commitment.

God forbid, too, that a man ſhould be puniſhed for re-ſtraining the fury of a lunatic, when that is the caſe.

But if it is ſo here, Mr. *Hopkins* did not act under his office: There is ſpecial power given to two juſtices.

It is a great ſatisfaction to a judge, that a nonſuit is not concluſive.

[244] I think this rule ought to be abſolute, and the cauſe be tried, without prejudice to the queſtion, whether Mr. *Hop-kins* acted within his office, or no.

Mr. Juſtice *Aſton*—The intent of the act 24 *G.* 2. to be ſure is, that on notice, the juſtice may tender amends, with-out going to trial.

I can't ſee on the evidence, whether the defendant acted in execution of his office, or no. I think, therefore, the rule ought to be made abſolute, without prejudice to the queſtion.

Mr. Juſtice *Aſhurſt* nearly to the ſame effect.

Mr. Juſtice *Willes* was abſent.

Lord *Mansfield*, however, thought it ſo hard a caſe, that he extremely wanted the parties to come to an agreement: And at laſt ordered the rule to ſtand as it did, and not ab-ſolute. He ſaid, he was fully perſuaded in his own mind, however the matter went.

RULE SUSPENDED, to ſee whether the parties would come an agreement.

Vide 24 *G.* 2. *c.* 44.

Caſe

Caſe of Rookes, Executor of Stansfield, *& al*., Proprietors of the Navigable Canal from Leeds to Liverpool.

ACTION of trover and converſion for having detained wood of the property of the plaintiff.

The principal queſtion was, Whether the jury had aſſeſſed the value of the wood, as well as of the land, in their verdict? And in point of law, whether upon the conſtruction of the act they could?

Mr. *Wallace*—That by the act, commiſſioners, or any five of them, were empowered to aſſeſs the value of the lands, or underwood, in order to make a compenſation.

And if the party does not chooſe to abide by their deciſion, then a jury to be ſummoned, to enquire and aſſeſs, and their verdict final and concluſive to all parties.

It was objected, that the verdict at 55l. per acre, did not include the wood. [245]

That the plain import of the verdict appeared to be to include the wood: That the commiſſioners had excepted the wood; the jury made no exceptions, and therefore certainly included it.

Evidence had been offered, that other jurors had valued lands of nearly the ſame value, at pretty near the ſame price, without the wood; and they would have introduced evidence from the jurors; that they did not mean to include the wood in their verdict. But Mr. Juſtice *Gould*, who tried the cauſe, did not think this evidence proper to be admitted; and Mr. *Wallace* hoped, that the court would think the learned judge did rightly in rejecting it: For otherwiſe, if ſuch evidence were admitted, to narrow, or rather ſubvert a verdict, there would be nothing certain.

On the other ſide, that the commiſſioners expreſsly went on the value of the land only; that the jury were to try the ſame matter, and eſtimate the value on the ſame ſubject, which was the land only.

By the warrant iſſued, and by the only authority under which they act, they can do nothing but ſet a price on what had been before conſidered, and aſſeſſed by the commiſſioners.

That it was ſaid, wood might be purchaſed, and paſs under the name of land: Admitted; but in this mode of proceeding, they are ſtrictly confined, and can go no farther than the warrant expreſsly limits their authority.

That

That they were ready to have offered evidence, that at the time the commiſſioners were to make a valuation of the lands, the land was not ſo ſet out that they could value the wood, either by the act or in the nature of the thing.

That they offered in evidence the declaration of the ſhewers themſelves, taken by the jury. "Gentlemen, you "are not to value the wood, but the land only." That this was the expreſs declaration of the ſhewers on both ſides.

That they offered evidence, that the jurymen themſelves acknowledged the impoſſibility of valuing the wood, as not being properly ſet out: And that on the ſame day, in a neighbouring wood, the ſame jury valued the land by itſelf, at the ſame price preciſely, without the wood. That therefore, both in law they could not, and in fact they did not,
[246] nor could in the nature of the thing, value the wood: And therefore, that the plaintiff will be entitled to a new trial.

Mr. *Dunning*—That he apprehended, by referring the verdict of the jury to the precedent adjudication, and conſtruing the two inſtruments together, the court would ſee, that the jury could not take in the wood. That though this was not, in ſtrict propriety of words, an appeal, yet there was in it the nature of an appellant power; ſo that a new ſubject could not be included.

That parol evidence had been objected againſt; and parol evidence in ſubverſion of a verdict: That however, it did not ſubvert, but explain and ſupport the verdict. And that whether parol evidence was or was not received, it could never be imagined in common law, or common ſenſe, that the matter appealed againſt is not to be taken into the conſtruction of the verdict.

Lord *Mansfield*—Is there an expreſs power to the jury, to eſtimate the wood ſeparate from the land?

Mr. *Dunning*—None in terms; but the practice has always been ſo.

It was farther contended on the ſame ſide, that either according to their warrant the jury aſſeſſed, excluſive of the wood, or they did what was not within their authority, and therefore void.

That it appears clearly in point of fact, that they aſſeſſed no more than the commiſſioners; and in point of law, that they could aſſeſs no more.

That here, the whole jury ſaid it was the land they valued, and that only. Suppoſe the evidence of the jury not to be admiſſible, that there was evidence which they were ready

ready to have given; that the jury only walked over the ground: And was this the way to make a valuation of wood? Does any body buy or ſell timber ſo? And finally, that they either did not in fact value, or by law could not value any thing but the land.

Lord *Mansfield*—Upon the face of theſe proceedings, cannot ſay I am ſatisfied the valuation of the jury reaches to the timber.

By the act, the authority to the jury is, in caſe of diſagreement: The warrant is, to ſet a value upon the land and grounds aſſeſſed by the commiſſioners: And to be ſure their proper juriſdiction was, to value the land only: The commiſſioners might value the wood at another time, and the parties be ſatisfied.

That the power of the jury was relative to that of the commiſſioners and co-ordinate to it.

I am very far from being clear that the *wood was* taken in; ſo far, that I rather think it was *not*. [247]

In ſo doubtful a caſe, therefore, *I don't quite* enter into the *objection* to *parol* evidence.

That parol evidence is proper to explain a doubtful fact.

In the *nice* queſtion as to *identity* of action, you may, to avoid this *preciſe* objection, *over* the *identity* of the action.

And whenever the jury have deducted, I have often *ordered* an indorſement to be made on the poſtea, to avoid the queſtion being made, and by *conſent*.

The rule is very *wiſe*, that a *juror ſhall not ſay*, "*I ſaid* "*this in my verdict, but I don't mean according to thoſe words*, "*I was over-ruled*"—or the like.

That though a juror ſhall not contradict his verdict on the cauſe before him, yet on the doubt what was the queſtion before him, the evidence of a juror and other evidence is proper.

But this is only *trying what was* the *queſtion* before the *jury*, which would be admitted on a *judge's certificate*; which might be *averred* by the *commiſſioners* or *ſheriffs*.

Mr. Juſtice *Aſton*—That there was *no diſpute* between the parties about the wood, therefore not natural they ſhould find for the *wood*—It would be *great injuſtice* to *deny* a new trial.

Mr. Juſtice *Aſhhurſt*—'Tis clear there was no original juriſdiction in the jury; therefore, *we muſt take it* they acted *right*; that is, *purſuant* to their *warrant*, by *conſidering only* the *adjudication* of the *commiſſioners*. And if there was an

That the power of the jury was not original; that it muſt be preſumed they acted according to law; that is, according to their derivative power, expreſſed in the warrant.

occaſion

acceſſion for *parol* evidence, I think it would come in very *properly*.

RULE MADE ABSOLUTE FOR A NEW TRIAL.

Lord *Mansfield* ſaid he ſuſpected the jury had found the value of the wood and land *both*, though they thought of nothing but the *land*.

Attorney.

SERVICE to an attorney's *agent* conſidered as ſervice to himſelf. *

[248]

Evidence.

Rule of Diſcovery.

Regula ex æquo et bono.

LORD *Mansfield*——If there is any deed on which nothing turns, as to the *merits* or *ſubſtance*, but which, in point of *form* is *neceſſary* to be *ſhewn*, and the parties refuſe producing it, thereby putting the *oppoſite* ſide to *great coſts* and *trouble*, and frequently *great delay*; and they *loſe* their *ſuit*; I *always* order the *maſter* to draw up the *whole* coſts incurred on the *other* ſide by ſuch *unreaſonable* conduct; as I remember I *did firſt* in a caſe, when they *forced* a witneſs to *come* from *Portugal*, to *prove* an *exhibit*. I made the *maſter* draw the rule, charged with *all* the coſts of *bringing* this *evidence*, which the *other* party *might* have *ſpared* them.

Note, This was in a caſe in which they had *refuſed* to admit the entries in a *cuſtom-houſe* book, and *obliged* the officer to quit his own and the *public* buſineſs, at the port of *Briſtol*, to *come* up to *town*, to *prove* the entries.

His Lordſhip ordered the rule to be made that they *ſhew cauſe why the cuſtom-houſe entries* ſhould not be admitted.

Note, As to the caſe of the weſt riding of *Yorkſhire*, it ſeems there had been a miſtake; and that it was meant to have been directed to his Lordſhip in his capacity of *judge of aſſize*, and not in that of *Lord Chief Juſtice of the King's Bench*.

Double Writs.

NOTE, a *writ* of *fieri facias* and *capias ad ſatisfaciendum*, *both* iſſued out together, motion to reſtore the *money levied*, the *body* being *already diſcharged*.

The

* Qui facit per alium facit per ſe.

The motion was made by Mr. *Dunning*, on the ground that it was *incompetent* to ſue out *two* writs at the *ſame* time againſt the *ſame* perſon, on the *ſame* cauſe. That in ſuch caſe, a common writ of execution out of this court would draw *all* the conſequences of an *extent* out of the *Exchequer*.

Lord *Mansfield* ordered the rule to be made abſolute, and obſerved, they had only aſked too little; for they might have aſked to ſet aſide *both* writs.

RULE ABSOLUTE.

Judgment.

MOTION for leave to enter up *judgment* for the *defendant*. Vide the King *and* Davis.

This was on the queſtion of ſalvage of a veſſel mentioned above. Verdict was given for 130l. *conditioned* to wait the event of arbitration: That if the arbitrator ſhould decide the claimant to be entitled to more than 5l. then this ſum ſhould be in hand, to anſwer his coſts and *damages*; but if the arbitrator ſhould find *no more* than 5l. then that plaintiff ſhould pay the coſts, and judgment be entered for the defendant. Arbitrator did not find above 5l. and *judgment* was thereon moved for the defendant, *which was granted accordingly*.

Service.

MOTION, that ſervice on the party's clerk in court, ſhould be good ſervice, on ſuggeſtion, that he abſconded to avoid ſervice. Not granted: But inſtead thereof, rule granted, that ſervice at his laſt place of abode ſhall be good ſervice.

Jackſon's Caſe.

ACTION of treſpaſs againſt overſeers for taking his gelding. They alledged, that by virtue of their office, and in purſuance of a judge's order, they levied ſatisfaction for a poor's rate, which was the treſpaſs complained.

It was objected on the trial, that by the ſtatute of 24. *G.* 2. demand ſhould have been made of the peruſal of the juſtice's warrant, and ſix days neglect or refuſal.

Judge

Judge being of the ſame opinion, plaintiff was non-ſuited.

In ſupport of the non-ſuit, that this was a remedial act, and to be conſtrued according to the rule in *Heydon*'s caſe, ſo as to ſuppreſs the miſchief, and advance the remedy.

That the miſchief was, that juſtices were often enſnared by ſurprize on ſome little inadvertency into which they had fallen; that the remedy was, giving them a power to rectify
[250] that inaccuracy or miſtake; ſo as neither the perſon affected by it might ſuffer, nor the juſtice be vexatiouſly harraſſed.

That in order to this, notice is required by the ſtatute to give the party a power of tendering amends, bringing money into court, or pleading as he ſhould be adviſed.

Vide 24. G. 2. c. 44. That by ſec. 6. Conſtables and headboroughs are likewiſe not to be proceeded againſt, without demand of peruſal of

A mente legiſlatorum. the warrant: That churchwardens and overſeers are within the remedy; that after conſtables, headboroughs is added by the ſtatute, or other officer.

A verbis. That perhaps it would be contended officers ejuſdem generis were meant; that however in a remedial act, the churchwardens and overſeers were not to be excluded, who had a principal need of the juſt protection of the act.

A ſimili. That farther, they are acting under the order of the juſtices, and in behalf and aid of juſtice.

That both by the ſpirit therefore, and letter of the act, the churchwardens and overſeers are protected.

A ſtatutis in pari materiâ. On the ſame ſide, that by the ſtatute of 4 of King *James* c. 5. the churchwardens were not protected; that the 21 of *James* was provided for their benefit as far as that ſtatute extends.

That the ſtatute of 24 *G.* 2. was remedially provided for ſuch officers as are not taken notice of in either of the former acts.

That the juſtices have power by warrant to iſſue out diſtreſs and levy the poor's rate; that theſe officers acted regularly, and as they were bound to act.

That the plaintiff was not without remedy, for he might have had a replevin. That there had been a caſe in the Common Pleas where the collector had been conſtrued an officer within the ſtatute, before Lord Chief Juſtice *Wilmot*; the ſame in effect as in this caſe.

It was argued from the reaſon of the act, that it was neceſſary to give protection as fully as might be to officers concerned in the maintenance and regulation of the poor.

Ab inconvenienti. On the 43 of *Eliz.* he is liable to an indictment if he does not execute the precept.

27 G. 2. c. 20. On an act for the more eaſy and effectual proceeding on diſtreſs. Clauſe, that the officer executing ſuch warrant ſhall deduct reaſonable charges, &c. and theſe general words, comprehend officers of all deſcriptions who are empowered to execute the warrant, and as far as the act under the juſtices order: Churchwardens and overſeers are officers ejuſdem generis, with conſtables and headboroughs.* And why, might not the prerogative bounty of the legiſlature extend farther relief and remedy upon occaſion ſeen than had been done by the more ancient ſtatutes, before that occaſion was ſeen and apprehended? [251]

On the other ſide, that by the 43 *Eliz.* the diſcretionary power as to the poor's rate, is not in the juſtices of peace but in the pariſh officers; churchwardens and overſeers ſhall proceed by precept from the juſtice; that therefore, the juſtice is obliged, whatever he might think, to grant ſuch warrant or precept. That the 24 G. 2. is provided in caſe the juſtice does wrong; how can he do wrong here, where he has no diſcretionary power? "Other perſon acting by his "order, or in his aid" does too extend to pariſh officers? Then, that an action is to be brought againſt a conſtable, without making the juſtice a party. Upon very good reaſon, 'tis preſumed, that it may be ſeen where the fault lies. But that here if the rule were quaſhed an action would lie againſt the juſtice, who yet cannot be in fault.

That the conteſt between the overſeers and the plaintiff was, whether his horſe was taken within the pariſh to which the overſeers belonged.

Lord *Mansfield*—There is no ſuch thing in the caſe, it never came into queſtion, nor is reſerved on the caſe. Expreſsly on the report the queſtion is only "whether the "overſeers are within the 24 of G. 2." It never was made a queſtion, as I underſtand in the report, whether they acted purſuant to their warrant.

Objection: That the judge ſhould not have nonſuited till proof that *B.* the place where the horſe was taken, lay within the pariſh.

Lord *Mansfield*—If they exceeded their warrant there's an end of the ſtatute; [for the ſtatute was made to protect thoſe who acted under warrant: not thoſe who acted without.]

Mr. *Cox* ſaid that he was in the caſe, and contended that the overſeers were not within the ſtatute; the judge called

* Quando duo jura concurrunt in eadem perſona idem eſt ac ſi eſſent in diverſis.

[252] for the act and pronounced on the words of that "th
"clearly were;" and that accordingly it was a clear no
ſuit.

Lord *Mansfield*—They are certainly within the act of t
24 *G.* 2. and if the doubt had been on the other point, I
would have called for the juſtices warrant.

Mr. *Davenport* however endeavoured to go on the ſam
grounds as Mr. *Cox*, to ſhew the overſeers and churchwa
dens not within the act.

Lord *Mansfield*—The only queſtion is "whether ove
"ſeers are within the 24 *G.* 2."

No juſtice is compelled to grant an illegal warrant; a
every legal warrant he is bound to grant.

The warrant is the authority under which the overſee
act. To extend the benefit of the ſtatute of *James*, was t
intent of the ſtatute 24 *G.* 2. and that all officers acting und
a juſtice's warrant were included by it. If they had diſtrai
ed out of the pariſh it would have been no protection.

The judges *Aſton* and *Aſhhurſt* were of the ſame opinio
as to the clearneſs of the caſe and the effect of the act.

The rule moved was to ſhew cauſe on a ſpecial caſe, r
ſerved at the aſſizes, why the nonſuit ſhould not be ſet aſid

RULE DISCHARGED.

Bail.

ON exception to bail becauſe they were three in t
notice; the court was of opinion the exception w
not good, and that the notice was good though three we
mentioned, provided they could all juſtify.

Aſſault.

MOTION to diſpenſe with perſonal appearance
defendant, convicted of an aſſault.

The court ſaid, it was not to be done for aſking; ho
ever the rule was taken by conſent, the clerk in court u
dertaking in the uſual manner.

[253]

Information.

MOTION for an information againſt diverſe inh
bitants of the town of *Dover*, for aſſembling wi
beat of drum, making a great riot in the town, attacki
of the conſtables, attacking one of the magiſtrates, thre
eni

ening to make a *Brentford* election of it: and that they obſtructed the mayor in attempting to read the riot act.

Mr. Juſtice *Aſton*—If they continued without diſperſing an hour, after the riot act being read, 'tis within the ſtatute, and we can't proceed by way of information; however we will not intend it, unleſs it appears.

Letters of Adminiſtration.

MOTION for a rule to ſhew cauſe why an extract from the Conſiſtory Court, ſhould not be ſufficient oyer of letters of adminiſtration.

The ſuggeſtion, on which this rule to ſhew cauſe was obtained, was that the party who demanded oyer of theſe letters had made the other drunk, and picked his pocket of them.

RULE to ſhew CAUSE.

Sheriff.

SHALL not be entitled to poundage if judgment irregular.

Latitat.

ON the firſt proceſs on latitat, perſonal ſervice cannot be diſpenſed with; to allow otherwiſe, would be to repeal all the acts relative to outlawries; the very nature of the writ ſuppoſes the party will hide himſelf. *

On a Motion for a Mandamus to admit Mr. Webber, a Reſidentiary Canon of the Church of Chicheſter.

Conſtitution ſtated.

A DEAN and four canons reſidentiary, who are to elect a reſidentiary canon on vacancy of any of the number.

That by the rules and cuſtom of the church he who has [254] the majority of votes in his favour ſhall be elected.

That Mr. *Webber* had two votes; the dean for Doctor *Pettiwarth*; and the third canon for another gentleman;

* In fictione juris ſemper ſubſiſtit æquitas.

ſo that Mr. *Webber* had the majority as againſt either of the other two candidates.

That in all common corporation elections, that in elections for members of parliament, the major part with reſpect to the other candidates is ſufficient.

Local conſtitutions were ſet up againſt this general cuſtom, viz. a bye law the 15 of *October* 1573. No one ſhall be elected a reſidentiary canon unleſs he have the good will of the dean; and have alſo the majority of the canons beſides the dean.

That the church of *Chicheſter* is a very ancient inſtitution; one of the moſt ancient.

In reply to this—that no former inſtitution is ſtated before this bye law, though the church of *Chicheſter* be ſo ancient; that if there are any bye laws to govern a chapter it muſt be by the viſitor, exerciſing his viſitatorial power.

It is ſtated as an ordnance made by the dean and chapter, and confirmed by the biſhop; negatively it appears therefore, not exerciſing his viſitatorial power. It does not appear the cuſtom of elections has agreed with this bye law. The dean is never named in the regiſtering of theſe elections.

The dean indeed ſays, he believes the cuſtom has been in favour of the negative voice of the dean; but he aſſigns no reaſon.

The two canons for Mr. *Webber* ſpeak as poſitively to the contrary.

That by the ſtatute of *H.* 8. the bye law, if it were ever ſo good originally, it could not ſtand.

That the canons have always declined bringing this queſtion before a temporal court.

That by the ſtatute 33 *H.* 8. *c.* 27. *anno.* 1541. it is provided albeit, that whereas all leaſes made by dean or warden have as good an effect as if the whole body had aſſented; yet by peculiar cuſtoms and local inſtitutions the ſame were not good by any one, or more, diſſenting; that to eſtabliſh an uniform reaſon and conformity univerſally, ſuch
[255] diſſent of any one of the body, or more, ſhall not hinder the making of ſuch leaſe.

That the reaſon aſſigned by Serjeant *Burland*, that it was deſigned to make ſeſſions of eccleſiaſtical bodies eaſier was allowed; that this reaſon ſo aſſigned and allowed was againſt the dean, for that the dean having a negative voice would obſtruct and not facilitate, and would not be introducing the uniform reaſon of the common law.

That

That as to the point, that by common law he muſt have the majority of the whole body, this is not a queſtion of votes upon a ſingle ſubject, as granting leaſes or the like; but it is a caſe where the choice ſplits itſelf amongſt ſeveral candidates: That in ſuch caſe he who has the majority with reſpect to the others, has a ſufficient majority by common law, to which this ſtatute of *H.* 8. meant to reduce all elections.

That before 1723 the cuſtom was not according to the old bye law of 1573; that the decree of 1723 provides that no ſingle perſon as had before been uſed ſhould elect ſeparately, and that two months notice ſhould be given of any vacancy, to prevent prejudice to the rights of the reſt: That if he does otherwiſe he ſhall be guilty of breach of truſt, and be dealt with according to law.

Lord *Manſfield* aſked, whether there was any inſtance either way.

Mr. *Bearcroft* ſaid, there was one inſtance in which the biſhop not being able to decide, decreed the competitors to decide between them. *

* This decree would have been ſomewhat novi generis at common law.

Evidence of the death of Mr. *Trevigan* the precedent reſidentiary, and that the dean and chapter met in the chapter houſe of the aforeſaid church of *Chicheſter* capitularly aſſembled; and that then and there they proceeded to election of a reſidentiary to ſupply the ſaid vacancy: Due notice having been given of ſuch aſſembly to be held, and that the votes were as hath been ſtated above. Whereupon, Mr. *Webber* humbly ſubmits it to the court that he was duly elected, and accordingly prays a mandamus may be directed to the dean to admit him; that he applied to the dean to admit him, who abſolutely refuſed, and would aſſign no reaſon. That the deponent is ignorant of the ſtatutes and conſtitutions of the ſaid church; but that he believes the refuſal to admit him was founded on a certain obſolete ſtatute or bye law, which gives a *negative* voice to the dean.

Order of 1723. In domo capitulari coram reverendo viro Thoma Sherlock decano. [256]

Lord *Manſfield*—I ſee the biſhop of *London (Sherlock)* was the dean, who knew as much of the canon law, * and a great deal of the common law, as any man.

The

* He was originally bred and, I believe, called to the bar; and the traces of that profeſſion ſeem very evident in the clearneſs, cloſeneſs, and method, with which he has arranged his arguments, and his manner of diſcuſſing

The order ſtated: That "whereas the preſence of the "whole body had been not neceſſary; and that one or two "had been uſed to proceed to election; that henceforth no "man ſhall be elected without two months notice, or with "leſs than two canons preſent: Proviſo, that this ſhall "not extend to elections made ſooner by the dean and "whole body, or in which the abſent members ſhall give "their conſent in writing."

The dean of *Chicheſter* made affidavit, that orders had uſually been made by the dean and chapter, and confirmed by the biſhop.

He then ſtates the order or ſtatute of 1573, "that the "conſent of the major part beſides the dean ſhall be ne-"ceſſary:" And farther ſets forth that neither he nor the Reverend Mr. *Hurdis*, who voted for Mr. *Miller*, gave conſent to the election of Mr. *Webber*.

The Reverend Mr. *Franklin*, who voted for Mr. *Webber*, ſtates the ſame order or bye law in his affidavit; and farther ſtates, that it does not appear by the book or other-wiſe that this bye law, order or decree, has been put into execution by giving the dean a negative.

That they had appeared always to go by the rules of common law, which gives the election to him who is choſen by the major part, with reſpect to the reſt.

[257] Farther joint affidavit, by the two voters for Mr. *Webber*, "that the order had never been regiſtered; that it was "never referred to in the acts of the dean and chapter."

A caſe appeared from the books where the dean and one canon voted for one candidate, and two canons for another; and on reference to the biſhop it was appointed "that there be five canons pro hac vice, and two reſidentiaries; which ſaid two were to divide the profits between them; and that the ſenior be firſt admitted.

In

cuſſing and weighing evidence, particularly in his proofs of the reſurrection. I do not mean that this knowledge is not viſible in the profeſſors of theology, and of the other liberal profeſſions, arts and ſciences; but I conceive it is peculiarly forenſic, and no where more ſtriking than in *Shakeſpeare*, who thus became an honour to two profeſſions by a very rare and eminent felicity, and I hope it will ſhew there is more of amity and mutual connection and ſupport between the two profeſſions than is uſually ſuppoſed. And that *Themis* furniſhes no bad arms for piety and truth; and that there is no part of liberal and uſeful knowledge from which the ſtudy of the law does not borrow, and to which it does not lend, ornament and aſſiſtance.

In ſupport of the rule, Serjeant *Glynn*—The queſtion is not whether Mr. *Webber* is entitled to a *mandamus*; but in the nature of an appeal to the parties, whether he is not duly elected?

That he had the common law majority in his favour. Objection, that he ſhould have the canon law majority; and alſo the conſent of the *Dean*.

As to the inſtitution of 1573, it was before doubted, whether it was a bye-law, or part of the original ſtatute; it now appears to be a bye-law. It has not the ſeal of the church, nor the epiſcopal ſeal: Therefore it is defective, for want of being authenticated either by the church or the biſhop.

It ſeems, that the bye-law, by ſome miſtake, was never either confirmed or rejected by the ſociety.

The biſhop's conſent was never neceſſary to a bye-law, if good in itſelf, but the dean and chapter are ſufficient.

As to the particular apprehenſions of particular members, the dean would ſupport it by uſage ſince it wants uſage; but it is only on ſuggeſtion: He gives no inſtance.

That the order of 1723 ſpeaks not of majority; ſpeaks nothing of a negative voice, though by ſo learned and laborious a man, and of no great facility in giving up a right of office, as *Sherlock*.

That they had conſidered themſelves as governed by the ſame rules as a lay corporation.

That before the bye-law, the obvious rule, that a majority in reſpect of the other candidates is ſufficient, obtained, as at common law; that the bye-law is void, as repugnant to their original conſtitution; and as againſt the ſtatute of *H.* 8. and introducing greater difficulties than before the ſtatute.

That the act profeſſes to reduce the right of eccleſiaſtical elections to common law: That it has been objected, there is no ſtanding rule of elections at common law, but the appointment of the founder; but the ſtatute expreſsly extends to take away what it conſiders as an inconvenience, and provides that there ſhall be no negative voice. Therefore the negative of the dean is void; and as to the conſent of the majority of the whole, required by the order, it is required againſt the rules of common law, which the ſtatute makes the ſtandard, againſt the conſtitution, againſt the uſage, of the church of *Chicheſter*. [258]

Lord *Mansfield* aſked, whether they had a copy of the ſtatute of 1573.

They

They ſaid, they had no full copy; and Lord *Mansfield* took notice, that the copy before the court was only a notorial copy, and ſaid the indorſement "original ſtatute of the church of *Chicheſter*," is certainly, I think, a very *modern* hand; and that the names ſubſcribed are all in one hand.

Serjeant *Kempe* argued on Sir *Saliſbury Cotton*'s caſe, 53 *Strange*; which was, by the charter of *Denbigh* there are two bailiffs, two aldermen, and twenty-five capital burgeſſes; and by the charter, if a capital burgeſs die, or be removed, it ſhall be lawful for the bailiff, aldermen, and capital burgeſſes, or the major part, quorum unum ballivorum & unum aldermannorum duo eſſe volumus, to elect another. Determined, the preſence only of one alderman and one bailiff neceſſary; and that they have no negative voice.

That here the bye-law requiring a majority, contrary to the common law, ſtatute and uſage, and to the prejudice of a third perſon, was void.

Mr. *Dunning*—That the inſtitution ſtates, that before the members uſed to proceed pari vote, which excludes a diſſenting voice.

That in 1687 they repeal the bye-law of 1574, which was nearly to the ſame effect, on a different ſubject, as that of 1573, and only a year later; and that therefore, it ſeemed, that at that time the bye-law of 1573 was either repealed, or had repealed itſelf by diſuſe.

In 1723, it ſeems, that a ſingle perſon was held ſufficient by the ſociety to do a capitular act.

It is true, that livings in the gift of the church are ſpoken of in the enacting part of that order, and not in expreſs
[259] words, "reſidentiary canons:" But the preamble is as large as poſſible, and it follows in pari gradu.

As to the idea which the learned Serjeant (Serjeant *Burland*) ſuggeſted, of the biſhop of *Chicheſter* being viſitor, I hope it's not true: For then, I am afraid, we ſhall be told, that we have nothing to do here; but I take it, he acted as a friend.

Lord *Mansfield*—There is no viſitor at *Chicheſter*, in the idea which you ſuggeſt, as in the two univerſities.

Mr. *Lee* began with obſerving that it was contended, that by the common law, a majority of the whole body was required; and was going to cite caſes to the contrary: But Lord *Mansfield* ſtopped him, and ſaid, they don't ſay there is any ſuch rule by common law, but by canon law. The counſel who made that obſervation always goes upon right grounds.

Mr. *Lee* proceeded, that by virtue of the ſtatute, the negative was at leaſt taken away, in all caſes, except where the original inſtitution of the founder had given it.

Burn

Burn ſays, (I cite reaſons rather than authority) that he thought the intent of the ſtatute was to take away the negative voice.

Note, in a former part of the argument, the caſe de capitulariter congregatis, in Sir *John Davis*'s Reports, was cited, which is highly worth reading.

Lord *Mansfield*—I take it, that at every meeting for a reſidentiary the dean has voted. It is expreſsly ſaid, that it was ſo upon the laſt election.

The church clerk was aſked by his Lordſhip, whether the dean and reſidentiaries were uſed to meet; and whether the dean voted? He anſwered yes; always.

Lord *Mansfield*—Then it is apparent, that the dean hath not a negative; for elſe the canons would elect, and preſent to the dean.

On the other ſide, contended, that either in general the majority of the whole body was required, or elſe that Mr. *Webber* was at leaſt excluded by the peculiar inſtitution.

That as there was no original ſtatute to regulate the election, it muſt be underſtood, that either by uſage or bye-law, the election in behalf of Dr. *Pettiwarth* is good. That the dean is an elector, and muſt be preſent, and either nominate or aſſent.

That as to the objection, that the law is void in itſelf; void, [260]
becauſe it does not appear regularly formed; that it's bad by common law; bad by being obſolete; and bad by ſtatute.

Anſwer, That it is a law of two hundred years ſtanding, and preſented by an authenticated copy; and that it did not appear, that in any lay corporation the ſeal is required to authenticate a bye-law: That as to being void in itſelf, it is certain it would have been good by a founder before the ſtatute; * and that the ſtatute did not take away the negative voice, if given by a founder: And that if it were a bye-law made before the ſtatute, not contrary to the original conſtitution, it would be as good as if made by the founder.

As to it's being obſolete, that the entries before the year 1735 don't ſtand contrary to the law, that when they repealed the ſtatute of 1574 by not repealing that of the preceding year, they confirmed it. At leaſt, that and the other being both in the ſame book, and ſo cloſe together, they could not overlook it.

That it would not be bad, by not agreeing in all points with the ordinary courſe of common law, in which however,

* The order of 1573 is clearly thirty-two years after the ſtatute; but I think it was contended 1573 was in ſupport or affirmance of ſome more ancient cuſtom.

ever, there were many diverſities, unleſs it could be proved bad for ſome of the foregoing reaſons.

[Lord *Mansfield*—It has been taken from a roll; it does appear hardly to have been in any book.]

That as to the order of 1723, it is not that a ſingle canon ſhall elect; but it is that one or two ſhall not elect in the abſence of the reſt, without notice.

That it is ſubmitted to the court, that it rather affirms the principle of a majority of the whole body being neceſſary, by ſaying nothing of any inconvenience ariſing.

Lord *Mansfield*—I doubt the words are ſtronger.

The words were admitted to be very ſtrong; but it was ſaid, they ſuppoſed an abſurdity, that could not happen, either by ſtatute or common law; that one canon, in the abſence of the reſt, without notice, or regular meeting, ſhould elect a reſidentiary.

[261] That the caſe in 1735 was a matter that could never come in queſtion; it was no election: The four were divided into equal numbers; two on one ſide, and two on the other.

That it was probably a reference in compliment to the biſhop.

Lord *Mansfield* obſerved upon it, that if the dean claimed a caſting voice at that time, then the order of 1573 was ſet aſide, which excluded the idea of a caſting voice.

In continuation of the argument, it was ſaid, that the miſchief provided againſt by the act was, that the diſſent of any one member, not being the dean, or head, would be a prevention. As to the head of the corporation, they were not in fear of procuring his aſſent; but the fear was, leſt a ſingle opponent amongſt the whole body ſhould obſtruct the whole. And why ſhould the univerſities have a negative voice, which are merely lay corporations, if the negative voice was to be taken away, in the caſe of dean and chapter, which are ſtrictly an eccleſiaſtical juriſdiction, and governed more immedately by the canon law, which gives ſuch a negative?

The caſe was ordered to ſtand over for the ſecond day of peremptories in the next term.

Whereupon poſtea, to writ, in the next term, on looking into the books, &c. of the corporation, and conſidering the caſe, the court granted the mandamus in favour of Mr. *Webber*.

RULE ABSOLUTE FOR THE MANDAMUS.

Treſpaſs.

Treſpaſs.

ACTION brought in the ſhape of treſpaſs. On hearing the nature of the caſe, Lord *Mansfield* ſaid they ſhould have brought an action for money had and received; and added, You know the treſpaſs may be waived, as has been ſolemnly determined. Vide Feltham and Terry ante.

Immaterial Counts.

MOTION to ſtrike out the immaterial parts of the declaration, with coſts. It was an action of eſcape againſt the ſheriff.

Rule to ſhew cauſe, why it ſhould not be referred to the [262] maſter, to expunge the unneceſſary and immaterial parts, and with coſts.

Note, It is always the practice to grant this rule, in all caſes where the declaration is materially ſuperfluous or irrelevant in its parts. And there is a ſimilar practice in Chancery.

Common Pleas, 22 May 1773.

In the Caſe of General Moſtyn.

ON a motion to enlarge a peremptory rule for going to trial, in this cauſe, which was an action of falſe imprisonment, brought againſt the governor of *Minorca*, by *Fabrigas*, a native.

The ſuggeſtion on behalf of the rule was, that a witneſs material to the defendant in this cauſe, and on whoſe abſence it had been enlarged before, had been unexpectedly delayed, but was now daily expected from *Minorca*.

It was urged againſt the rule, that this witneſs was in *Minorca* when the general was there; that he might have brought him with him; that he had once already enlarged the time; and that the rule was peremptory.

On the other ſide, that general *Moſtyn* was in no default for not bringing the witneſs; that the court having granted the precedent rule in his favour, on account of the neceſſity of the witneſs, would grant this farther enlargement, the witneſs being ſtill neceſſary. That the defendant would riſque ten thouſand pounds damages, and, what was of ſtill more conſequence,

conſequence, reputation, if he went to trial without him That the plaintiff would not ſuffer, as judgment might h had as early of next term as they pleaſed, they being rea to try on the ſecond ſittings of the term; and that if th tried the iſſue the ſittings after this, they could not ha judgment before the fourth of the next term.

That it was true rules once enlarged before ſhould not b granted, where the perſon making requeſt had been th cauſe of the delay, by not exerciſing his proper power and uſing the occaſion in his hand; but not when the par applying was not guilty of neglect, and where the ſam cauſe of neceſſity ſubſiſted, as induced the court firſt to gra the rule. That the promotion of juſtice was what mu govern the court in this, as in all other ſubjects of dete mination before them; that ſurprize and delay were th two evils to be avoided, and that the defendant was rea to give them all poſſible ſecurity againſt either.

[263]

A peremptory rule always means ſo far peremptory, as may conſiſt with juſtice.

The COURT granted the RULE PEREMPTORY, to go trial the ſecond ſittings in the next term, explaining th meaning of peremptory to be unleſs the defendant hinder by tempeſt, or ſome inevitable accident from producing h witneſs. *

Bail.

AN Attorney is not bail.

Riens per Deſcent.

Campbell's Caſe.

3 W. and M. c. 14. heir may plead riens per deſcent, and the jury ſhall enquire into the value of the lands deſcend. Vide Palmer v. Jones. 1 Vern. 134.

ACTION againſt executor, charging him with aſſe *riens per deſcent* pleaded. It appeared in evide that the plaintiff had a ſhilling from his anceſtor; and was contended that for his falſe plea, he ſhould be charg with the whole debt.

Lord *Manſfield*—I remember a caſe in which I was cou ſel for the Duke of *Portland*, in which the ſword-bl company came for 200,000l. aſſets; there was a great a prehenſion leaſt there ſhould have been ſome ſmall circu ſtance to catch at. It would have been a terrible injuſti to charge on account of a falſe plea of ſome trifling matte

* Lex neminem cogit ad impoſſibilia.

y miſtake of inadvertency, for the whole debt: As I remember in the chancery caſes, where an executor was charged with aſſets, by reaſon of the repair of a chimney-back, bout the value of 10d.

In the caſe now before the court all the land was deviſed ray; but the deviſe being void by the ſtatute of fraudnt deviſes, it was ſaid, it went to the heir by deſcent with ſpect of creditors: There was a bequeſt of a ſhilling the heir, which he never received.

Lord *Mansfield* ſaid, there never was an idea that a falſe a of *riens per deſcent*, in ſuch an inſtance as this, ſhould arge the party with the whole debt. That it would be ry unreaſonable to charge him, on ſuch a ground, in ch a manner where the party took in reality nothing by cent.

Mr. Dunning—This is the caſe of a diſinherited heir at w, who comes in as by way of form only, that complete tice may be done to the creditors.

On *Campbell*'s engaging that he would not obſtruct the [264]
intiff, the plaintiff engaged that he would pay the coſts. t he ſays *Campbell*'s pleading *riens per deſcent* has been an obſtruction to him. Now *Campbell* can't plead otherwiſe according to the ſubſtantial truth of the caſe. The plaintiff will have his claim on the aſſets which may hereafter ariſe, and there can be no inconvenience to the plaintiff.

Lord *Mansfield*—I wiſh you had a caſe of authority, Mr. *Dunning*, to maintain that where a very ſlight deviſe, however inconſiderable, came to the heir, it ſhall not be aſſets to charge him with by deſcent. I aſked Mr. *Buller*, there being deviſes in the will which reached to the whole eſtate, how the aſſets came to deſcend. Mr. *Buller* replied, that by the ſtatute the deviſe was void, and therefore there were aſſets, becauſe the lands deſcended. But I doubt whether it does deſcend. The will is void with reſpect to creditors; but ſuppoſing there were creditors to 300l. deviſe to 700l. the will would ſtand as to the ſurplus. Therefore the deviſe is void quoad the creditors only, which does not appear to me to make deſcent of the lands.

Mr. *Buller*—I thought the defendant would have pleaded *riens per deſcent* except the lands in the deviſe; but now he has put us to trial upon a falſe plea.

Mr. Juſtice *Aſhhurſt* ſeemed to recognize this ground; and ſaid, he was afraid the deviſe muſt be charged with the coſts.

Lord

Lord *Mansfield*—What is the practice of the ſtatute?

Mr. *Wallace* ſeemed to ſay, that the practice was, that the heir pleaded nothing by deſcent; and that the replication was—"deſcended for the creditors."

Lord *Mansfield*—I find the words of the ſtatute ſtronger than I thought, and ſtated; for the ſtatute not only ſays "ſuch deviſe ſhall be void as againſt creditors;" but "againſt them only."

Mr. Juſtice *Aſhhurſt*—If the ſtatute had been againſt the deviſe in general, then the plea of *riens per deſcent* would not have been good. But in this they ſhould have found for the defendant.

Lord *Mansfield*—It ſeems they had not read the ſtatute, for there is a proviſo that the heir may plead *riens per deſcent*, that the plaintiff may reply to that and a jury may enquire, and if there be lands ſhall find the value. But upon a nihil dicit there ſhall be debt and damages.

[265] RULE ABSOLUTE to ſet aſide the capias and money to be returned.

Mr. Juſtice *Aſton* ſaid, If an eſtate ſold for a great deal more than expected the deviſe is void, as againſt creditors, yet the lands ſhall not deſcend.

Notice.

14 G. 2. c. 17. Motion on the ſtatute held to be notice.

IT ſeems that on a motion, on the fourteenth of his late Majeſty for judgment as in caſe of a nonſuit, the motion itſelf upon the ſtatute ſhall be held to benotice. And ſo, I have ſince heard from Mr. *Cowper*, is the practice.

Rule.

Regula generalis.

WHEN a rule is made abſolute you can't anſwer to it, but move to have it diſcharged; for otherwiſe you might as well on a writ of execution on a judgment go into the merits of the cauſe.

Coſts.

Coſts.

23 *G.* 2. *c.* 33. *ſ.* 19.

" THAT where the jury find damages under 40s. the " plaintiff ſhall have no coſts, but the defendant " double coſts, unleſs the judge ſhall certify that the free- " hold principally came in queſtion, or that an act of bank " ruptcy principally came in queſtion:" The act of bank-ruptcy muſt be ſo in queſtion as to be, to the ſatisfaction of the court, proved principally in queſtion.

Trinity Term,

13 Geo. 3. 1773. K. B.

IN the caſe of the Reſidentiary Canonry of *Chicheſter* I am informed (for I was abſent the firſt ſix days of th term, by reaſon of an accidental blow, from which I pro videntially eſcaped with life;) that the two grounds o which the court decided were—firſt, that the negative voi of the dean could not be ſupported by the bye law; ſecon that by the uſage of the common law, which ſeemed to th court to have governed the elections of the church of *Ch cheſter*, a majority of the whole body was not neceſſary but only a majority with reſpect of the other candidates.

Notice of Ejectment.

ON a motion for a rule to ſhew cauſe why ſticking u the notice on the door of the houſe ſhould not b deemed good ſervice, no perſon being found in the hou to whom to deliver the notice; the court ſeemed to think that a vacant poſſeſſion muſt firſt be proved.

Collins v. Dunch. *Burr.* 1116. was cited, that if no body could be foun they might ſtick it upon the door.

Lord *Manſfield*—There is no difficulty, except as to th form.

The maſter was conſulted.

On the whole the court doubted, and it was ordered t be moved the next day.

267]

Campbell *againſt* Vaughan.

On Error from Ireland.

ON a queſtion, Whether eſtate for life, or in fee.

Special verdict. That on the fourth of *February* 173 teſtator died, having made his will the ſame day.

" Devi

" Deviſe, that my brother have my eſtate during life; " and, after his deceaſe, to his firſt and other ſons; the " elder to be preferred before the younger. And, for " want of ſuch iſſue, my nephew *Barlow* and niece *Cathe-* " *rine Fiſher* take ſhare and ſhare alike, during life; re- " mainder to their iſſue male; remainder to the heirs of " my nephew *Barlow Scot* for ever."

The brother died without iſſue. The defendant claims under the brother; the plaintiff under the nephew.

Fine levied; the remainder man entered, to defeat the operation of the fine.

The court of King's Bench in *Ireland* determined the eſtate, that the teſtator's brother, under whom the defendant claimed, took only an eſtate for life.

It was contended, that the plain intent was to convey an eſtate tail to his brother's iſſue.

That as this could not be to the ſons as purchaſers, for want of words of limitation, therefore it could only operate as an inheritance, by conſtruing an eſtate to them, thro' the father, the brother of the teſtator.

An annuity is limited to the heir at law, to him and his heirs male, with liberty to diſtrain on default of payment. This annuity is limited to him and his heirs male, " till he " come into poſſeſſion of my eſtate," ſays teſtator, in ſuch manner as aforeſaid. Then follows limitation to nephew and nieces, for life reſpectively; then after their deceaſe, to the firſt and every other ſon, the elder to be always preferred before the younger.

Contended, that he firſt diſpoſed of the moiety for life, and confining the argument to the nephew, as whatever is truly inferred of him will apply equally to the nieces.— Firſt, there is a life eſtate to the nephew; then to the firſt [268] and every other ſon, ſhare and ſhare alike, without expreſs words of limitation. It was meant the ſons ſhould take an eſtate of inheritance: The words follow, " And for want " of ſuch iſſue, remainder over." Now the nephew is found to be the heir at law, in equal degree at leaſt of affection with the brother. Now if the words " for want of " ſuch iſſue," had ſtood, without thoſe to the ſons, they would have created an eſtate tail by implication to the nephew: Therefore, here it muſt be interpreted an eſtate of inheritance to the ſons, whom he meant to take, it being deſigned for the ſons of the nephew, as before for the ſons of the brother. Then, whether croſs remainders? Now whatever applies to the nephew muſt equally apply to

the niece. The words "for want of ſuch iſſue male," muſt apply to both (in the ſame ſenſe.) The remainder cannot take place till the limitations, both to nephew and nieces, and their iſſue reſpectively, be ſpent. And by the following clauſe, "Then my will and meaning is, for want of "ſuch iſſue, that all my eſtate, as aforeſaid, ſhall go to my "nephew, *Barlow Scot.*"

Therefore the nephew had a complete and entire eſtate in him when he levied the fine, and ſuffered the recovery. An annuity is given to the nephew, *J. Barlow*, of inheritance to him, till he ſhall come into poſſeſſion: No ſuch annuity is given to *B. S.* Something may be argued from the difference of expreſſion; but the will is ſo inaccurate, nothing, perhaps, can be well collected from that. He has limited an annuity plainly as to be in tail, but yet without mentioning time of payment, time of diſtreſs, whether rent annual, or no. I ſhall cite but two caſes, *Robinſon* and *Robinſon*.

[Here Lord *Manſfield* interpoſed—Are they in the ſame words? You have great luck, if you have found any ſuch; if not, you had better confine yourſelf to the general argument; for it depends on the preciſe words.]

Mr. Serjeant *Walker*—I contend before your Lordſhips in favour of the plaintiff in error: (Defendant in ejectment) Firſt, that *J. Barlow* and *Catherine Fiſher* took an eſtate only for life. It is expreſsly limited during the time of their reſpective lives; and, after their deceaſe, to their heirs male, ſhare and ſhare alike; the elder to be preferred before the younger. And, for want of ſuch iſſue male, then remainder over to *Barlow Scot.* I contend, no ſuch general limitation has ever been interpreted a remainder over in tail. Now he can't have ſaid more clearly to the nephew and nieces for life only? the ſons to take as purchaſors. He then gives an annuity very ſtrongly to *Barlow* and his heirs, till he comes into poſſeſſion, which muſt be after his deceaſe. It's ſaid, he meant an eſtate tail, when he ſaid heirs male, and meant the ſame thing therefore when he ſaid ſons. I apprehend, the argument turns directly contrary.

[269] I have no doubt, every ignorant man, when he uſes the words heirs male, or iſſue male, means preciſely the ſame as when he ſays ſons, and no more; but in the one caſe the technical words over-rule.

In the caſe of *Evans* and *Aſhley*, before your Lordſhips, you

your Lordſhip ſupplied the words, which, probably, were wanting here, if an eſtate tail were meant to the ſons. There was a remainder to unborn ſons, after an expreſs limitation in tail to the ſons born of the ſame parents, without the words to the heirs male, which your Lordſhip ſupplied from the intent, and which would here make the conveyance perfect.

Lomax and *Hatfield*, before Lord *Hardwicke*. The teſtator had a ſon, who had diſobliged him, and four daughters. He made a limitation for life, dependent on a truſt, to the ſon, when he ſhould attain the age of forty; remainder to the firſt and every other ſon; and, for want of ſuch iſſue, remainder over. [It ſeems Lord *Hardwicke* did not determine.]

I ſhall not cite the caſe of *Corrington* and *Hellier*, and only a very few others. *Humberſton* and *Humberſton*.

Lord *Mansfield*—That was quite upon another principle; being upon a ſucceſſion of eſtate for life. As to the caſe of *Robinſon* and *Robinſon*, it was very different; the eſtate being limited to one ſon; that ſon died, and another was born. Queſtion not only, Whether he ſhould take by purchaſe, but whether he ſhould take at all; but from the intent of the eſtate continuing in the male line, the word "ſon" was taken as nomen collectivum, extending to all the heirs male.]

If your Lordſhip ſhould think there was no eſtate tail in the nephew and nieces, then the recovery was not good; if your Lordſhip ſhould think otherwiſe, I hope, you will not underſtand words ſo bare as capable of creating croſs remainders. The words "ſhare and ſhare alike," are as ſtrong as if he had ſaid, "tenants in common;" the words "reſpectively" imply ſeparate eſtates, and therefore a moiety.

Serjeant *Walker*—Mr. *Mansfield* has reſted his whole argument on one point only; and it was the intereſt of his client. I have gone on all the circumſtances of the will. I have not ſaid that in all caſes where the anceſtor has an eſtate for life, the ſons can't take an eſtate of inheritance; but that there is no appearance from the words here, that they can take without referring to the anceſtor. In the firſt diſpoſition, it's for want of ſuch iſſue of his brother. In the ſecond diſpoſition, the words "for want of ſuch iſſue" [270] can admit of no other conſtruction. All the caſes cited by Mr. *Mansfield* are where there is a regular eſtate tail but not carried on far enough, whether that defect can be ſup-

plied. This will be an anſwer to the caſe of *Evans* a *Aſtley*; what governed was the expreſs limitation in pa and a manifeſt intention to carry it on farther; of ſuch intent the direction to take the arms and the name of t family was a ſtrong implication. *Lomax* and *Hatfield*. H they ſay, the ſon was on the face of the will in diſpleaſ with the father; therefore he was reſolved the eſtate ſho not be veſted in him, but derived from him to his hei but, there being heirs capable to take by purchaſe, t only carried the inheritance on farther, according to plain intent. Whether there be croſs remainders noth can be plainer. I don't reſt on the word "all," and what can be ſtronger? No eſtate is to go over, till all go over, they never can die without iſſue, till failure iſſue of both, becauſe they are brother and ſiſter.

Lord *Mansfield*—The queſtion is, whether *J. Bar* the nephew took an eſtate for life, or an eſtate in t When a will is ſo untechnical and inaccurate as t 'tis very dangerous to lay great ſtreſs on monoſyllab The beſt rule therefore, in this and every caſe upon wi is to find the general intent; and then, as much as gra mar and language will permit, to interpret particular preſſions accordingly. Here plainly there are different ſto whom he means to take.

As it was ſaid in *Corrington* v. *Hellier*, 'tis according the common way. Limitation to the firſt and other ſo the elder to be preferred before the younger, are the v technical words; then follow, and for want of iſſue m of *R. Barlow* [the brother] which is inaccurate, but meaning is clear, the ſons are to take the elder prefer before the younger; does this only extend to the line ſons living? The manifeſt intent was, the heirs male thoſe ſons. And if I give the anceſtor an eſtate tail, t I defeat the expreſs words for he gives it to him expre for life; intending evidently, that no body ſhould def the eſtate tail in the common way, the anceſtor havin in him. Then, as to the limitation to *J. Barlow* and *Fiſher*, why does it hold that the ſons can't take but th the anceſtor? And what does iſſue male mean? Plai refers to what went before, but rejecting only the w *ſuch* 'tis very manifeſt, and even if that word were retain (this is not indeed before the court) I ſhould ſay, the ef would only be that the ſons ſhould take for life, with any alteration as to the anceſtors. I am therefore cle

of opinion, that *J. Barlow* only took for life. The conſequence is judgment affirmed.

[271]

ON the ſtatute 30 *G.* 2. *c.* 24. perſons being brought up who were in cuſtody, on a charge of obtaining money under falſe pretences; it had appeared that they had ſold ſome goods to a cuſtomer who not liking them, they made a conditional ſale to another perſon: If the perſon who brought this proſecution ſhould not take them. The money was not returned, becauſe the goods were not abſolutely diſpoſed of.

Lord *Mansfield* obſerved, that it was ſurprizing how many abuſes had been made of this ſtatute.

Indictment.

IT was ſaid, and the maſter ſeemed to think ſo, that two perſons could not be indicted for an aſſault againſt two, in one indictment: But Mr. Juſtice *Aſton* ſaid, this opinion had been held in *The King* v. *Clendon*, but that caſe had been over ruled, and the law was now held to be otherwiſe. Vide 4 Bur. 983—4.

Common Pleas.

Parker *againſt* Marſhal.

ON an application to oblige Mr. *Marſhal*, an attorney of the court, to deliver up the court rolls of the manor of *Wandſworth* and *Batterſea* belonging to Lord *Spencer*.

Lord *Spencer* appointed Mr. *Sutton* his ſteward; Mr. *Sutton* appointed Mr. *Marſhal* his deputy; and afterwards Mr. *Sutton* reſigned. Lord *Spencer* appointed Mr. *Parker* his ſteward; and Mr. *Marſhal* refuſed to give up the court rolls into the hands of Mr. *Parker*.

Strange and *How* was cited, in which, mortgage deeds were intruſted by a counſel into the hands of an attorney, and the attorney truſted them with the mortgager, who took up money upon them; the court ſaid, attornies ſhould be compelled to perform their truſt.

Another caſe cited from Serjeant *Wilſon*'s Reports, where an attorney, *quâ* attorney, was made liable tho' he acted as attorney of another court.

The

[272] The difficulty with the court was, that Mr. *Marſhal* here acted as deputy and not as attorney.

A caſe was ſtated which induced the opinion of the court, that a rule to deliver up the rolls might be granted. It was a caſe in which Lord Chief Juſtice *Ryder* expreſſed his opinion, that an attorney ſworn of the court gains credit by that means, and is therefore liable to a rule to rectify a miſconduct tho' not directly within his office as an attorney.

But it was not thought that there appeared ſufficient, upon Mr. *Parker*'s affidavit, to transfer the poſſeſſion of the rolls into his hands.

Rule to ſhew cauſe why the court rolls of the manors of *Wandſworth* and *Batterſea* ſhould not be delivered to Lord *Spencer*.

Variance between Writ and Judgment.

IN writ of error the addition was eſquire, in the judgment gentleman.

Motion to amend the writ.

Writ of error, whether amendable.

Lord *Mansfield*—You never amend a writ of error; you muſt bring a new one. Is not ſo?

Which was admitted. But Mr. *Buller* contended, the addition was not neceſſary.

Lord *Mansfield*—No writ.

Note, Addition may be in ſome caſes unneceſſary: But if it is uſed, the party miſtakes it at his peril; for I think, it has been determined, that it is never ſurpluſſage.

Afterwards, however, on looking into the ſtatute 5 *G.* 1. *c.* 13. it appeared, that writs of error varying from the record may be amended. And leave to amend was granted accordingly. *Sed vide infra.*

Information.

MOTION for leave to file an information againſt *James Dunn*, an overſeer of the poor in the pariſh of St. *John* the *Martyr*, for having offered a bribe of 5l
[273] to a man, a ring, and the value of a licence to marry a woman. That the man is a pauper of the pariſh of St. *Michael*'s, and a widower, with four children: That the woman is very infirm, and has been in the hoſpital. It appeared, the offer was made in *June* 1772; but does not ſay when the marriage was, except illatively; that about the ſame

ſame time the overſeer ſaid, it was a bad thing, and he would not do it again.

COURT—You have ſtaid three terms; it will be a great expence: Go to the GRAND JURY.

Notice of Ejectment.

NOTE, the reſolution of the court, with reſpect to the caſe of ejectment, mentioned above, turned in favour of ſticking it up on the door, there being nobody to be found within. And this was determined on the report of Mr. *Cowper*, as to the practice.

Common Pleas.

Attachment.

NOT in the nature of an original, as of old imagined; and therefore does not require fifteen days from the teſte to the return.

IN the court of Chancery, diſtinction taken notice of between heir apparent and heir preſumptive. Heir apparent is he, who, in the courſe of law, muſt be heir, if he ſurvives his anceſtor, as the eldeſt ſon. Heir preſumptive is he who has the preſent preſumption in his favour, that he will be heir; but which preſumption may be excluded by the intervention of ſome body who has a nearer title. Thus, a nephew may be heir preſumptive, but not heir apparent. Thus, a daughter is heir preſumptive, before a ſon is born, but not heir apparent. The moſt remote relation of the whole blood may be heir preſumptive; but the heir apparent can only be he who, if not diſinherited, or dead before his anceſtor, muſt take of courſe, becauſe it is impoſſible any other ſhould be nearer, or ſo near to the inheritance. Diſtinction between heir preſumptive and heir apparent.

Parkes.

ON a motion to diſcharge defendant out of cuſtody, for want of being charged in execution within two terms.

The caſe was, the marſhal had two perſons in his cuſtody at the ſame time, both of the name of *Parkes*. And the rule being, to bring the defendant, naming him by his ſur-

name

name only, or acknowledge him in custody, the marshal acknowledged *Parkes* to be in his custody, and the plaintiff proceeded regularly, as he thought, to charge the defendant in execution. It happened, that the term before that the defendant had removed himself into the custody of the warden of the Fleet; so that the other *Parkes* had been mistaken in the proceedings for the real defendant.

It was contended, that the marshal not being intentionally wrong, and they having proceeded literally right as to the name, and intentionally right as to the person, though in point of fact they were formally mistaken; that therefore the defendant should not take advantage; and that in a case of *Steward*, if a treaty could have been made out to the satisfaction of the court, they would not have discharged the defendant, though the time had elapsed.

On the other side, it was said, that a treaty and agreement being a waivure on the part of the defendant's self, there was a great difference. And it was said, that all these rules admitted of liberal construction. (Which, however, is not altogether true; nam in gratia delicti faciendæ liberalitas; in pœna irrogandâ non item, versatur.)

Lord *Mansfield*—There is no doubt in this case: There must be exceptions to the literal import of every rule. It was to prevent neglect, and the party suffering by that neglect, that the rule was intended. No such thing has happened! This has been a slip, if I may so say, in the practice of the court, by not inserting the christian name of the defendant; And whether the plaintiff should suffer by this motion, or the marshal, the rule of this court would work monstrous injustice.

This rule is construed very strictly in general; but there are exceptions. Why is an agreement excepted? It is not by the literal words of the rule. Why is an imposition excepted? There is no such exception on the face of the rule.

It was objected, the party would be detained in custody all the long vacation; but this, on the circumstances of the case, it appeared would not happen.

Ungrammatical Words in an Affidavit.

OBJECTION to the words of an affidavit, that they contained no denial.

[275] The words were, that they, the deponents, nor any of them, never received.

Lord

Lord *Mansfield* held, that the meaning was apparent; And that if they had received notice, the form of words would never bring them off on an indictment of perjury.

Writ of Error.

THE variance in the writ of error, in the case lately before the court. Lord *Mansfield* took notice, that it was the same to them as if it had been none; for that by the 5 *G.* 1. *c.* 13. writs of error, where there was a variance, were to be amended into the court into which they were returnable; which was in this case before the LORDS in PARLIAMENT, where it would be amended of course. That therefore the jurisdiction of this court had nothing to do with it.

RULE DISCHARGED, as to the amendment of the writ, without costs.

Upon costs applied for, Lord *Mansfield* said, Would you have the court pay them? I am sure, if they are to be paid, it was the court in this case who should have paid them.

Mr. Justice *Aston* this day, being the twenty-first of *June*, gave a CHARGE to the GRAND JURY, stating the importance of their trusts, both to individuals and the public; particularly as to that part which concerned the suppression of disorderly houses, and thereby stopping the first source of the most ignominious and fatal vices.

Action of Debt for double Rent, on the Statute.

TWO hundred and forty pounds claimed, for two year's double rent, as a penalty for overholding premises, at sixty pounds *per annum* in value.

Verdict and judgment stated, that the plaintiff shall recover one hundred and eighty pounds.

Contended, that this being a fixed debt, the plaintiff [276] must recover the whole; or the verdict is found against him for the whole.

Another objection, that the habendum in the lease is from the first of *June*, for three years, and notice to quit is on the first.

Lord

* Mala grammatica non vitiat chartam.

Lord *Mansfield*—From the firſt of *June* then is, that on the ſecond of *June* the tenancy begins, and holds to the firſt; therefore declaration good.

Againſt this the following caſe, with another, was ſtated, *Lewellyn* againſt *Williams* and others, *Cro. Ja.* term *Mich.* anno octavo, in *B. R.* Ejectment. Leaſe on the twelfth of *December*. Habendum a primo die. Jury found a leaſe, dated the firſt of December, (habendum from henceforth) but delivered on the twelfth. Court held, it ſhould be taken from the day of the date, and from henceforth are one, being a computation from the time paſt; But they ſaid, a leaſe of the firſt of December, habendum a die datus, ejectment cannot be alledged the ſame day.

Lord *Mansfield*—The only difference is, you begin from the wrong end; you ſtate a caſe which relates to the commencement of the term.

As to the other objection, it was likewiſe diſmiſſed, and it was obſerved, that the defendant, to the declaration of the plaintiff, pleads nil debet; that is, neither the whole nor any part thereof. By which he puts himſelf on the jury, to try not only whether the whole be due, but whether any part be due: And therefore they may find againſt him for a part.

Third objection, that whereas the jury had found one hundred and eighty pounds, for the double damages of a year and an half expreſsly, this was an error in the computation. Diſmiſſed alſo immediately, as being an error of computation in the objector, to ſuppoſe this an error in the jury.

Pariſh of Bething.

AGAINST an order of ſeſſions, by which an order of two juſtices to collect a ſeparate rate in the tithing of *Newburn*, had been quaſhed.

The order of the two juſtices was upon the 13 & 14 *Car.* 2. and upon the ground, that the inhabitants of the tithing were unable to receive any benefit from the ſtatute of *Elizabeth*.

[277] It was argued by Mr. *Dunning*, in ſupport of the order of the two juſtices, that the 13 & 14 *Car.* 2. provide for the ſeparation of ſuch pariſhes as, by reaſon of their largeneſs, cannot receive benefit from the ſtatute of 43 *Eliz.*

Objection

Objection againſt the order of ſeſſions, that the pariſh which the order had conſidered, had in fact received ſome benefit, and was therefore not within the ſtatute.

Mr. *Dunning*, on the other hand—That the legiſlature, if they were applying a remedy to a miſchief which did or could exiſt, muſt only mean ſuch an one, as where the churchwarden could not conveniently perform his duty with the reſt of the pariſh officers, nor the pariſh conveniently come at them. For no pariſh, take it to be as large as to fill a county, or even as large as the kingdom, can have ever been in the ſtate of not receiving the benefit of the 43 of *Eliz.* at all. Taking this to be a meaning that ſuch a pariſh was meant, as where the churchwardens could not conveniently perform their duty, nor the pariſh conveniently come at them, that then ſcarce could there have exiſted a caſe, to which this meaning was more applicable than that before the court? For that this is ſtated to be a little inſulated tything, twenty miles diſtance from the pariſh. The pariſh officers can't very conveniently, (performing their duty as they do, without reward, and without any need of increaſing the difficulty) they cannot very conveniently go twenty miles to collect; nor the pariſh ſo far to attend them.

That the meaning of the order, in ſaying, the tithing could not conveniently receive the benefit, is explained by the ſituation of the place, and the only conceivable intendment of the ſtatute.

That even if theſe words had not been in the order; but they had poſitively declared, that the tithing could not receive the benefit; there would ſtill have been no ground, upon ſuch declaration, againſt their order.

That the utmoſt that can be objected againſt theſe words is, that they are unneceſſary; for that the ſtatute ſhews plainly what was conſidered and provided againſt. Some pariſhes, by reaſon of their ſituation, could not receive the full benefit of the 43 *Eliz.* and this only was or could be in contemplation, if any thing was meant; and the proviſion was, that thoſe who, by ſuch circumſtances, were in a worſe condition than other inhabitants, though it was impoſſible they could have been totally out of the benefit, ſhould be put on the ſame footing.

That the propoſition, thus maintained, appeared ſo ſelf-evident, or at leaſt ſo clear, when entered into, that the only thing that ſeemed requiſite to prove, was, that it had not already been otherwiſe decided. That there had indeed been

been ſeveral dicta preſerved in notes; but that there had been abſolutely no ſolemn deciſion, nor even any thing militating ſtrongly againſt this interpretation of the ſtatute. As to the *King* and inhabitants of *St. Giles's* in the fields, that there the determination, though this caſe had been often agitated, was, that a ſeparation being ſtated of the inner diviſion of *St. Giles's*, the court ſaid, non conſtat, this is a new term, and we know of no ſuch diviſion. That ſomething more paſſed in converſation amongſt the judges, but no deciſion. That the pariſh of St. *Giles's* is nothing in compariſon of that in queſtion, as to extent.

That in the caſe of *Peeton* and *Weſtgard* there was no ſtating that the pariſh could not receive the benefit; that it appeared for 123 years they had in fact received it. That it is ſtated there that Lord *Mansfield* ſaid, in his judgment, that "the policy of the ſtatute of *Car.* 2. was bad: That "the diſtricts ſhould rather be enlarged than diminiſhed— "and that inability ſhould have been proved; that none "was proved, but the contrary." That in the declaration his Lordſhip was thoroughly juſtified; for that it appeared they had the full benefit, and had always had it. That as to what was to be inability, the court had at that time no occaſion to go into it: And therefore, Mr. *Dunning* ſaid, he preſumed it was ſtill open to him to underſtand this caſe as not againſt him; and that it is the only one of any authority. That therefore, he thought himſelf ſtill at liberty to hope his Lordſhip's concurrence, to ſupport him in the interpretation of the ſtatute of the 13 & 14 *Car.* 2. ſo as to make it applicable to what is poſſible and eaſily conceivable, inſtead of what, in his ideas, was by no means either.

That, on theſe grounds, he begged leave to conclude, there was nothing in the order by which it appeared the juſtices had been wrong; and then, that he ſhould only aſk the uſual rule of the court to be applied, that nothing wrong ſhall be intended againſt the juſtices, which does not appear.

That he had omitted to obſerve, that there is another objection, namely, that a tithing is no word within the deſcription of the ſtatute. That to this he ſhould reply briefly, and content himſelf with ſaying, that diviſion, the word uſed in the caſe of St. *Giles's*, and in the objection, is (as he doubted not the court would anticipate him in ſaying) a very vague word; whereas tithing is a very definite one, and muſt conſiſt of no leſs than ten houſes, with the proper officer.

On

On the other ſide in ſupport of the order of ſeſſions, by which the order of juſtices was quaſhed.

That it is admitted the juſtices order is proper in other reſpects; but that there is a queſtion, whether the diviſion was created before or by this order. That it does not appear that the overſeers were made to act for this tithing as a ſeparate diviſion; that it was apprehended the two juſtices ought to have ſtated this; and that 'till it was done there was no diviſion.

In the caſe of *Weſtgard* it was ſtated, that the pariſh of Stanhope in the county palatine of *Durham*, had a joint appointment—the money levied by another aſſeſſment—that it had four diſtinct quarters—that it was twenty miles in length, and eight, at a medium, in breadth. After this an order was made to ſeparate this quarter, and removals were made, and appeals from one quarter againſt another.

That the caſe was twice ſolemnly argued. That Lord *Mansfield* declared, that the policy of the ſtatute was miſtaken, that the diſtricts ſhould rather be enlarged than diminiſhed. That afterwards his Lordſhip ſaid, but not as neceſſary to the deciſion, that the inability ſhould have appeared.

That Mr. Juſtice *Wilmot* had ſaid, he was of the ſame opinion as to the firſt, and that one hundred and twenty years had proved they were not under inability; and that the ſubſequent forty years practice could not alter the uſage.

That, in the caſe now before the court, there had been an acquieſcence of fifteen years only; in the other of forty.

That Mr. *Dunning* had ſuggeſted, there was a difference of opinion about the policy of the ſtatute, but that on the caſe it appeared, that his Lordſhip and Lord Chief Juſtice *Wilmot* both concurred, and that no caſe was ſtated in which it was affirmed to be otherwiſe.

That to prevent uncertainty of ſettlement, multiplicity of officers, and encreaſe of expence, the contrary to the policy of that ſtatute would be neceſſary; for the more you ſeparate pariſhes, the more you multiply officers, and encreaſe the burthen of rotation and the difficulties of the poor. That an order of 1758, which had been ſtated, was a mere order by conſent, and as ſuch given up by the counſel, and that there was nothing elſe to ſupport the order of the juſtices.

Lord

[280] Lord *Mansfield*—There cannot be ſo clear a caſe. Without entering into the general argument, what was the order of ſeparation? It is a mere nullity. It does not appear there were any overſeers appointed; but it appears negatively there were no overſeers 'till 1772, which does by no means conclude the court to ſay there were any appointed, even then.

Mr. Juſtice *Aſton*—There is no need of entering into the queſtion whether the policy of the ſtatute is good, or not; but it muſt appear clearly, that the pariſh was not able by reaſon of its largeneſs to receive the benefit of the ſtatute of Elizabeth; there is no ſuch thing ſtated here; there was nothing to create a ſeparation, but a mere order by conſent, upon which nothing was then done; nor appears to have been done to this time; it was on a propoſal between the owner of this tithing and the pariſh officer of *Beething*.

As to what was ſaid about the ten houſes it does not appear; nor can we infer there were more than ten. And this inconvenience, ſtated as general, I dare ſay affected Mr. *Smart*, the owner of the tithing, and perhaps, no body beſides.

Curia conſenſit unanimiter.

RULE made ABSOLUTE to quaſh the ORDER of JUSTICES, and confirm the ORDER of SESSIONS.

Attorney.

ON a queſtion, whether an attorney might be bail; it ſeems the objection was held to be reſtrained to the court in which he was attorney; ſed de hoc quæro ulterius etſi non immerito videatur.

Penalty.

RULE; never to take out execution for a penalty upon money to be paid by inſtallments; you muſt never take out execution but upon the money actually due: Therefore the jury often find what is really due. Lord *Mansfield*.

Habeas Corpus.

A Man brought up by habeas corpus, who had been committed for a felony in violently aſſaulting and robbing *Mary Hill* on the King's Highway. Notice had been ſerved

ſerved on *Mary Hill*, that the court on ſuch a day would be moved, &c. But notice was not ſerved on the committing juſtice.

The court ſaid this notice was ſhort.

The woman did not appear.

Lord *Mansfield* ordered the priſoner to be remanded, as not entitled to bail, being committed not on ſuſpicion of felony, but on expreſs charge of felony on the face of the warrant; and therefore not to be bailed unleſs particular circumſtances had been ſhewn.

Bail.

ON it's being objected againſt a perſon that he ſtiled himſelf *gentleman*, when he had a commiſſion in the *Birmingham* way—Lord *Mansfield*—Is no man to ſay he is a gentleman who deals by commiſſion?

Bradley Clerk of the Peace.

ON a queſtion, whether the clerk of the peace taking an aſſignment under the act of inſolvency, the aſſignment ſhall go to his heirs, ſubject to the proviſions of the act, or to his ſucceſſors.

Lord *Mansfield*—Whether the clerk of the peace took officially is not regularly before the court. However there can be no doubt; it gives to the clerk of the peace,* not to him and his heirs.

* Nomine officii.

Another queſtion, whether the aſſignment ſhould not have been by deed indented and inrolled?

Lord *Mansfield*—I ſuppoſe there is a purchaſer which makes this application ſtill more improper, if an agreement is depending. If an agreement has been made actually, bring your action, and the court will give a ſolemn opinion.

Inſolvent Debtors.

ON the act of 32 *G.* 2. for the relief of inſolvent debtors; the court did not receive the petition for want of notice to the plaintiff.

Evidence.

ON a motion to enlarge time of trial, on account of t absence of a material witneſs.

It was on a caſe which aroſe abroad. The diſpute w about a quantity of rum, and whether the rum was t plaintiff's private property, or belonged to the owners of t ſhip. It was ſaid, the ſecond mate of the ſhip, was the on perſon who could prove this point: And they refuſed to a mit an entry made by the ſecond mate, in proof of the m ter.

Lord *Mansfield*—If the witneſs was dead this eviden would certainly be good. There uſed to be thought a d ference if he was beyond ſea; but I ſee no reaſon for t difference, unleſs it ſhould appear the witneſs is comi home. This is not the caſe of a cauſe ariſing in *Englan* and the witneſs goes abroad. We will therefore, though the common caſe we enlarge only for one term, enlarge this caſe in infinitum if the witneſs cannot be come at, a they refuſe on the other ſide to admit real evidence.

Goodright on Demiſe of Roſſe *againſt* Harwoo

A ſummary Note of the Arguments, in the Queſtion of Re cution; with the opinions of the Judges more at large. C. 21 June 1773.

THIS was an action of ejectment, to recover chambe in *Lincoln's Inn*. On a ſpecial verdict, the jury foun a will made by Mr. *Lacy* in 1748, (whereby the defendan claims) and they find, that he being ſeiſed, *int. al.* of th chambers, and alſo being intitled, by virtue of a marriag ſettlement, to certain lands ſold, and the money to be em ployed in the purchaſe of other lands to the ſame uſes, bu which money is not as yet laid out in the purchaſe of other did by his will, bearing date as above, deviſe as follows. give, bequeath, and deviſe, to my dearly beloved frien Mrs. *Mary Harwood*, all my real and perſonal eſtate what ſoever and whereſoever; and I further will and deſire tha ſhe pay the following legacies; [they then find a ſmall on to his niece, the plaintiff, who is heir at law, and two othe legacies in the uſual manner to ſervants] and that afterward in the year 1756, he made another will in writing, ſigned by

by himself, and attested by three subscribing witnesses, whereby he made a different disposition; but in what particulars on their oath they know not; and they further on their oath say, that they do not find that the testator cancelled, or defendant destroyed it; or what is become of it, [283] they know not, and conclude in the usual form, praying the judgment of the court, whether this be a revocation; and if it be, they find for the plaintiff; if otherwise for defendant.

The first will was in evidence on the trial.

It was argued by Serjeant *Burland* for the plaintiff, and Serjeant *Davy* for the defendant.

Serjeant *Burland*—That as the devisee cannot be to take the same interest as in the first, she was to take none at all; for every thing had been given her by the former will, except 2 [or 3] trifling legacies; and if something was taken away from her by the latter, the former and latter could not stand together.

Serjeant *Davy* for defendant—That there must be animus revocandi; that no accidental destruction of a will would set it aside. That a will cannot be revoked without either express revocation, or contrary appointment. Serjeant *Burland* in his replication, cited *Howard* and *Howard* —1 *Vez.* 179. Lord *Hardwicke* said, the settlement in that case very providentially revoked the will, though the uses could not take effect.

Serjeant *Davy*—That in the case of Lord *Anglesea*'s will, the House of Lords was of opinion, that two wills and seven codicils made one entire will. In the case of *Hitchen* and *Basset*, 1 *Shower*, an issue had been directed out of the Exchequer upon a bill of the heir at law's bringing; a revocation was found; Lord *Hales* seemed to have been much dissatisfied; another issue was directed; the jury find specially a latter will, but do not find he has devised any lands. Court determined, a revocation did not appear; for that it was not found any lands passed, and therefore it stood indifferent.

Lord Chief Baron *Hale* indeed says, where there is a second substantive independant will it operates a revocation, by construction of law, though there is no express revocation; but it may be otherwise here; and it does not appear but it might be a confirmation.

3 *Mod.* 203. 4 *P.* 2. *K. B.* In ejectment: Special verdict, that Sir *H. Killigrew*, [on whose will the question before the Exchequer] in 1644 made a will; in 45 he made

aliud teſtamentum, but what was contained therein the jurors are altogether ignorant: Judgment four years after, in *K. W.* for the plaintiff; judgment affirmed in the Houſe of Lords.

Vide *Salkeld* 592. Where, in the ſame caſe, the court was of opinion this was no revocation, but might concern
[284] other lands, no lands at all, or might be a confirmation of the former. Here Mr. *Lacy*, in 1748, deviſed his real and perſonal eſtate to the defendant; and gave directions to her for the payment of legacies. That, in 1756, he made another different, but what it contained they do not know; and they do not find that teſtator cancelled, or defendant deſtroyed it; they do not know what is become of it. I might contend, that this part of the finding is repugnant, and therefore void; for if they never ſaw they had no legal evidence; if they did, how could they find a different diſpoſition, and yet not know in what.

(It was objected from the bench—What if they had been told by an attorney who drew the will, that he meant a different diſpoſition?) Serjeant *Davy*, Sir, that might have been ſomething, but they ſay no ſuch thing.

Objection from the bench. Yet the jury is not to find the evidence, but the fact, and give their judgment upon it.

Serjeant *Davy*—But, my Lord, it would have gone no farther than evidence of meaning, and not a will actually made.

Now as to the point of revocation. It was ſaid, and the ſame argument ran throughout, that every latter will revokes a former. 'Tis true in words; but, I ſay, to revoke a good will is required that the latter be inconſiſtent with the former; or revoke it in expreſs words. So that all the arguments uſed by *Pemberton*, *Maynard*, and thoſe great men, from *Swinburne*, *Godolphin*, and *Coke*, are mercly found. I own that where an act is done irreconcileable, or inconſiſtent, 'tis a revocation.—As if he make a will to a perſon incapable of taking; though this be void, 'tis a revocation of the former by the plain intent: And ſo if a feoffment be made without livery. But if there are two wills conſiſtent, both ſtand, and ſhall be but one will and inſtrument, and operate jointly as the whole laſt will of the teſtator. Every ſeveral deviſe is in like manner the will of the teſtator. I give my real eſtate to *A*; this is his will: I give ſo much of my perſonal to *B*; this is his will: And thus be there ever ſo many particular deviſes, without regard to

ferent

ference of time or inſtrument containing them, all taken together conſtitute his complete laſt will; nor ſhall any be defeated on account of thoſe which are ſubſequent, unleſs for manifeſt repugnancy between them.

But 'tis ſaid, if there are two wills without dates, neither ſhall ſtand, that is, if the one be inconſiſtent with the other; but otherwiſe, both. *Coward* and *Marſhall*, *Cro. E.* the court determined, where there were two wills that both might ſtand; though the teſtator had married between the one and the other; and this, though there was a manifeſtly [285]
different diſpoſition between one and the other; [and that a material one] ſince they were not contradictory.

It ſeems then, that there may be different inſtruments, both of them conſiſtent, and both ſhall ſtand. A man makes a partial diſpoſition, as of his lands in the province of *York*; he may make another of his lands in the province of *Canterbury*: If he makes a will afterwards contradictory to either of the former, which ſhall it revoke? Only that to which it is contradictory. On the words aliud teſtamentum, it was contended in the caſe of *Hitchen* and *Baſſet*, that it muſt be another detached from the former, and therefore, as being the laſt, defeat the operation of that which preceded; but this failed on the principle already maintained, that every part of a will is the teſtator's will; and the whole collectively his laſt. Perhaps, the teſtator might have a doubt as to the effect of his former will on the lands converted into money, which were to be reveſted in land; for if a man gives all his real and perſonal eſtate, and afterwards lays out money in lands, neither the lands will paſs nor the intereſt in equity. A caſe was mentioned 2 *R.* 3. fo. 2. where a revocation was held, becauſe a different executor appointed.

I think, whether a revocation or no revocation is matter of fact, and muſt be left to the jury; it was the very iſſue in Sir *H. Killigrew's* caſe; as whether a man guilty of murder, or felony of any other kind,—theſe are technical legal terms, in which the jury frequently find the complicated fact, together with the matter of law reſulting from it. [I think Serjeant *Davy* intended to intimate, that from the imperfection of the finding on the ſpecial verdict, the court were left in uncertainty, and that as they had not taken upon them to find generally, at leaſt a venire facias de novo would be proper. Sed qu. what more particular? I ſhould almoſt incline to think the jury, from what Serjeant *Davy* ſaid, had found

that he made a ſecond will, but did not revoke the firſt, (as meaning not in terms) and then left the title to court.

Objection from the bench—Suppoſe the jury had found thus, "that teſtator had made a ſecond will, whereby he "revoked the former;" would not this have been open to the court, upon the circumſtances; like other legal terms, on the effect whereof the court judges [I think, this was ſubſtantially what was obſerved. Sed qu.]

The court took a diſtinction and ſaid, "where the in-"ſtrument is complete, that revocation or no revocation is "matter of law, before the court; but where the inſtru-"ment is imperfect, by reaſon of interlineation, there the "jury are to find."

[286] Serjeant *Davy*—I proceed to a ſhort caſe or two farther.—Suppoſe the jury had found the will totally different; but that it did not exiſt at the time of Mr. *Lacy*'s death: Then I contend there was no need of republication of the firſt will; but the will, which alone exiſted at the teſtator's death, ſtands; and the other was a nullity. In the caſe of *Glazier* and *Glazier*, before the court of *K. B.* the teſtator made a will; afterwards he made a ſecond, effectually revoking the former: This will he afterwards cancelled. The jury find all this matter: The court, on very ſolemn deliberation, held, that the cancelling of the ſecond will was an immediate republication of the firſt. I am willing to anſwer all that has been ſaid by my brother *Burland*, out of reſpect, as not chooſing to paſs over any thing he has ſaid. If I have done otherwiſe, it has not been intentionally. I beg leave to conclude with this obſervation.

Though the jury have in this caſe believed the witneſſes and found that another will was made, it may be of dangerous conſequence to encourage the conſtruing this as a revocation of the former, without knowing the will itſelf; there will be no ſecuring a will, if another will may be ſet up as a revocation, without any neceſſity of ſhewing the will itſelf. The legiſlature has taken great pains by the ſtatute of frauds, which will be made ineffectual. The caſe of *Rifligrew* was before the ſtatute, and very probably confirmed that part of it which relates to wills. The court ſeemed to doubt, whether the ſtatute meant not that the ſame authority, the evidence of the inſtrument, ſhould be neceſſary for revocation as for making. However, it was obſerved, that deeds and acts of parliament may be ſupported on parol evidence, if proved to be loſt.

Note, The caſe in 10 *Ca.* 94, with the reaſons there laid down, ſeems very worthy of obſervation, eſpecially as to the neceſſity of ſhewing the deed itſelf, unleſs that be proved impoſſible; and if it be, the ſame reaſons may ſeem to hold ſtill ſtronger, for a full finding of contents at leaſt.

Serjeant *Davy*—Suppoſe a will made two days before the teſtator's death; and the jury find the making of this will, and that, inter alia, there was ſuch a deviſe; but whether it was in being at teſtator's death, or what elſe it contained, they are totally ignorant.

Mr. Juſtice *Blackſtone*—It ſeems of conſequence that, for aught appears, the ſecond will may exiſt now.

Serjeant *Davy* applied the maxim, de non apparentibus & non exiſtentibus eadem eſt ratio.

Serjeant *Burland*—If my brother *Davy*, who has contend- [287]
ed againſt the finding as void, could get rid of another objection, I ſhould be very little ſolicitous about the reſt: It is that, ex vi termini, a different diſpoſition muſt be taken to be an inconſiſtent one; and why a different will, except to make a different diſpoſition. He contends however, that there was no poſſible evidence; But your Lordſhips have given in great part, indeed entirely, an anſwer; and the court will ſuppoſe the jury have found on complete evidence: Parol evidence may be admitted of the contents undoubtedly. Every will adding to the former would not be a revocation; but inconſiſtency in any part is a revocation.

The court ſeemed to be very clear, that lands converted into money, to be reveſted, were a part of the realty, and the money would paſs as lands, under the name of real eſtate: And ſo, I think, there has been a very late authority.

This queſtion afterwards came to be adjudged *Hilary* term, fourth *February* 1774.

Mr. Juſtice *Nares*—This was on an action of ejectment, of chambers of Mr. *Lacy*, on the demiſe of leſſor of the plaintiff.

The ſpecial verdict ſtates, "That Mr. *Lacy*, being ſeiz-
"ed of certain lands, by virtue of a marriage ſettlement,
"which lands had been ſold, the money was to be laid out
"in the purchaſe of other lands; and being entitled alſo
"to chambers in *Lincoln's Inn*, made his will in 1748, as
"follows: I give, bequeath and deviſe to my dearly be-
"loved friend, Mrs. *Mary Harwood*, of *Maiden-lane*, all
"my real and perſonal eſtate, whatſoever and whereſoever:
"And

" And I further will and desire, that she pay the following " legacies; to the testator's niece 300l. and two other be- " quests, in the usual manner, to servants."

The verdict proceeds to state, " That Mr. *Lacy*, still en- " titled to the estates, in the purchase whereof the money " was to be laid out, did make, and duly publish, another " testament in writing, with three subscribing witnesses: " And the jurors on their oath say, thereby he made a dif- " ferent disposition; but in what respects the jurors know " not: And that they do not find that testator cancelled, or " defendant destroyed it; or what became of it they know " not."

I shall not trouble the court with the infinite number of cases concerning revocations, but only that of Sir *H. Killigrew*'s will, reported in *Hardr.* 3 *Mod. Salkeld* and *Skower*'s P. Cases; in which I shall use the opinions on both sides in
[288] my opinion on this case: On which I will first observe, there is evidently a title in the lessor, as niece, and, by the circumstances of the family, heir at law of the testator. The
Maxim. heir at law is greatly favoured in judicial decisions; and the maxim holds, melior & fortior est dispositio legis quam dispositio hominis. No conjecture or implication, other than necessary, will be admitted; and revocations, being considered as remitters in favour of the heir, are introduced of circumstances, and by legal operation, invito testatore.

Therefore *Owen* 76, a man, fearing he was only tenant in tail, suffered a recovery, in order to enable his disposition in fee: But this recovery bars his will. In another case where a man was about to make a feoffment, but being told it would hurt his will, said he would not, yet did, by advice afterwards, on persuasion it would not prejudice his will; as far as livery and seisin had gone, this avoided the will. And in the *Roman* civil law, whence all our notions of testamentary dispositions, the favour to the heir was carried much farther: Therefore a will made, where parents, sisters, or brothers, give nothing either to the other (for it was reciprocal) was termed inofficiosum testamentum, and concluded insanity. But afterwards this relaxed, or at least evasions were found; and therefore quantacunque pars legata saved the complaint of inofficiosum testamentum. What is here set up in bar? A will, against which another will is found on the verdict.

Nor is it to be objected, that the heir does not shew this second will; or that, for default of proof by the heir, that it does not make equally against her; she should therefore fail

fail of ſupport to her title. No man ſhall be bound to ſhew that deed whereto he is a ſtranger, and neither claims any thing comprized therein, nor in right of one claiming under it. And this is held 10 *C.* 94, and *Brook monſtr. de fait.*

Neither does it lie upon the heir to plead it otherwiſe than generally; and accordingly *Plowd.* 410, by all the judges, a party in any title or bar ſhall not be obliged to plead more than makes for himſelf. A man may plead a feoffment generally, though upon condition, without pleading the condition. And therefore, ſuppoſe ejectione firmæ, a deviſe pleaded; you make your replication on the ſtatute of mortmain. To this, in replication, the plea muſt be of the ſaving, or that the deviſe is to the univerſity. Suppoſe this in ejectione firmæ: Plaintiff claims as heir; defendant ſets up a laſt will: Plaintiff in his replication, that it was not a laſt will; he is not bound to ſhew more: But ſhe muſt ſhew, either that the ſecond will was defeated, or elſe that it is a confirmation of the firſt; ſo far at leaſt as ſhe herſelf is concerned.

In the caſe in *Crobe E.* 721, the ſecond will was adjudged [289] not a revocation of the firſt; becauſe, on comparing them, it appeared they both very well were conſiſtent. But it is incumbent on the deviſee, claiming under the firſt will, to ſhew the ſecond is conſiſtent with the firſt: For, prima facie, it appears otherwiſe; a codicil, and not a will, being the proper inſtrument to vary; and a will (as a complete inſtrument) naturally intending a revocation of any former will, till the contrary can be proved.

Nor do I apprehend it is neceſſary that the jury find expreſsly in words, a revocation, if they find ſuch circumſtances as amount to one in law. 2 *R.* 2. Lex revocat in ſe. And neither need fraud be found expreſsly on the verdict, if it be plainly apparent on the matter found; as in the caſe of *Oliver* and *Robertſon*, laſt term; for ex facto oritur jus. In the caſe of *Killigrew*, the jury did not find whether there were any lands at all deviſed; and the court held it immaterial; for had they not ſaid ſo, the court would not have preſumed it. But as they did, the finding was not the worſe. At the beſt, Mrs. *Harwood*'s claim did not appear certain; the jury doubted at leaſt whether it was not defeated by the ſecond will: And even ſo, if they are uncertain whether her entire intereſt, or any part of it, remained by the ſecond will, the conſtruction will neceſſarily be in the negative; quoties cunque juratories dubitant an aliquid ſit perinde eſt ac ſi non eſſet. For, if they don't find any thing

Maxim.

thing in her favour, de non apparentibus & non exiſtentibus eadem eſt lex. But it is ſaid, the finding is inconſiſtent; the finding cannot be otherwiſe on the evidence. The teſtator ſaid, "However ſhe might think ſhe ſhould take every "thing, ſhe was d——bly miſtaken." Now ſhe was general deviſee, under the firſt will, nor can ſhe lay claim to the chambers, unleſs they find them expreſsly deviſed.

If a doubt remains, whether the wills exiſts, as I cannot but think it does, or ought, then, in dubiis non præſumitur teſtamento.

If the will ſhould be found, I think the lands may deſcend in the mean while, as 9 *E.* 4. 26.

This I ſay, without relying on the maxim, that a complete will is ipſo facto a revocation of the firſt: And where there are two wills without a date, both are void; becauſe one is ſubſequent: And, which ever it be, it revokes the former.

There is almoſt every thing. The will muſt be preſumed to be de eadem re, 1 *Shower*, 49. The diſpoſition ſhall be preſumed to differ in the general, and not only in particulars.

But it was ſaid very ably, at the bar, that the court muſt look into the will; and the entries are quibus lectis & auditis; that is, where they are to decide upon particular premiſſes, between deviſees, or on the whole will; but here it makes againſt the defendant.

The chief juſtice ſaid, in *Killigrew*'s caſe, "We cannot "fancy ſo and ſo." However, they found at laſt they were obliged to fancy ſomething. And Serjeant *Pemberton* in that caſe, ſays, "If there is to be a preſumption, it ſhall "be in favour of the heir at law."

[290] But what is the effect on the ſtatute of frauds? In *Cart* it is ſaid that a feoffment may operate as a revocation. As *Darley* and *Darley*, [*C. B.* ſed qu.] the ſeventh of the king, that a recovery operated as a revocation. I apprehend, this caſe comes within the words of the ſtatute which ſays, "Unleſs altered by another will in writing." And here is one in writing found. I am of opinion, there is ſufficient ground for me to determine it a revocation.

I am therefore of opinion that there ought to be judgment for the plaintiff.

Mr. Juſtice *Blackſtone*—In conſidering this ſpecial verdict I was at firſt inclined to think, it was either imperfect or repugnant, and therefore that there ſhould have been a venire facias de novo; on further conſideration, I think it is not

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ther. Not imperfect, for they have found every thing they can, and it would be superfluous to order a new jury; not repugnant, because I can conceive a case in evidence, which would warrant such a finding, as testator saying, "He had "made a new will; but no man should know in what till "after his death.". But though the finding may be good, as to these particulars, yet the circumstances may be so slender, as not to warrant our determination in oversetting a legal and apparent disposition. They find, that the plaintiff was almost absolutely disinherited by the first will, which is now existing, and apparent legally before the court; they find a second will, which appears not, nor is any where to be found.

I shall not enter into the crude and uncertain opinions of early times; but shall enter into the case of Sir *H. Killigrew*'s will, just previous to the statute of frauds; which passed before almost all the courts of law and equity, and finally into the House of Lords.

The case, I apprehend, was this: Sir *H. Killigrew*, in 1644, made a will in favour of a Mrs. *Berkeley*, and a natural son; in 1645 he made a second, which, like this, was never found.

Soon after the restoration, the court directed an issue to [291]
be tried by a jury of the county of *Cornwall*, whether the will was revoked. The jury find generally, that it was revoked. Serjeant *Maynard* reports, 1 *Show.* that the old gentleman, meaning Lord *Hale*, wondered what the jury could mean. A second issue was ordered in *Berkshire*; the jury find specially, that he made a second will, "aliud testamentum;" but do not find, that he devised any lands by the second will; a third trial was offered, but the parties declined it, despairing, I presume, of any more light upon the second will. The court was of opinion, therefore, on the finding upon the second issue, that it not being found whether there were any lands devised, it stood indifferenter: And accordingly they adjudged. 2 *Car.* 2. *Hardr.* 374. And on this ground the third trial was offered.

After this, it came before Lord *Nottingham*, in the court of Chancery; and, to stop the merits, his Lordship granted a perpetual injunction: But, some time after, they succeeded better with the Master of the Rolls, and so got rid of the injunction.

This case is very well reported 3 *Mod.* 203, and 1 *Sk.* 146. It is also reported in *Cumberbach*, 90, but very ill. The argument being on the second day from King *William*'s landing.

landing, no judgment was given at that time; and all thoſe judges were removed at the revolution. But in *Trinity* term, 5 *W.* judgment was given for the plaintiff, who made title under the firſt will: A writ of error was brought into the Houſe of Lords, to reverſe the judgment, but it was affirmed. And by *Salkeld*, 592, it appears, the court were of opinion, that it might concern other lands, or no lands at all, or be a confirmation of the former.

It has been admitted, and received as law, before and ſince the ſtatute of frauds, for near an hundred years, that a ſecond will, no where to be found, cannot operate as a revocation; and a will which is not neceſſarily inconſiſtent, ſhall not, where the contents appear, operate as a revocation; and therefore in *Coward* and *Marſhall*, *Cro. E.* 721, *A.* deviſes lands to his youngeſt ſon, and his heirs; and afterwards remarried, and by another will, deviſed the land to his feme for life, paying annually a rent to the youngeſt ſon, and his heirs. Whether this be a revocation, was the queſtion? and held, not; but both may ſtand, unleſs manifeſtly contrary. In the preſent caſe does it appear the ſecond will, muſt be inconſiſtent with the firſt?

It is obſervable upon the caſe in *Hardr.* my Lord *Hale* agrees with the reſt of the Barons, in thinking that the ſecond will not appearing, does not revoke the firſt; though
[292] he thought that a ſubſequent, independent will, whether conſiſtent or not, even though of chattels only, would operate as a revocation.

I rely on the caſe already cited, that, where the matter ſtands indifferenter, it may concern other lands, or no lands at all, or may agree with and confirm the former. There is no finding, but that this ſecond will is not an exact tranſcript of the former. The jury find a different diſpoſition; this might have been found without a ſpecial jury. How does it differ? Was it of lands, or not? Was it real, perſonal, or mixed? Did it enlarge or leſſen the deviſes of the former? How did it affect Mrs. *Harwood's* claim? Did it take it away entirely, or make a change in it, as to ſome particular limitation, or leave it entirely untouched?

It is impoſſible to find an anſwer on the verdict to any of theſe queſtions; and yet, without one, without our ſeeing more fully than at preſent the purport of the ſecond will, how are we to determine that Mrs. *Harwood's* apparent claim is defeated by it? A mourning ring, or a hatband, would ſatisfy the finding.

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So ſtrictly was revocation interpreted, to avoid prejudice to an eſtabliſhed will, even before the ſtatute, *Cro. Car.* 31. Teſtator deviſes certain legacies to his brothers, and other perſons; afterwards, in the ſpace of ſome years, falling ſick, he was aſked queſtions, concerning whom he would have executor, and of his funeral, *&c.* and farther, was deſired to give legacies to his father, brothers, and other relations: Said he would not give or leave them any thing. All this was was ſet down in a codicil, and proved. Whether this was a revocation of the legacies to the two brothers, plaintiffs? And determined not, on the caſe made; and ſo decreed by the Lord Keeper, aſſiſted by the Maſter of the Rolls, and the three judges, *Doddridge*, *Jones*, and *Croke*: For, non conſtat, what the teſtator meant by thoſe words, and upon ſuch doubtful ſpeeches, to nullify a will adviſedly made, without clear and perſpicuous revocation, ſhall not be admitted. So here, non conſtat, what is meant by this different diſpoſition, or to what it extends: And we cannot, to help the difficulty, go out of the verdict; for I take it to be a ſettled rule, that nothing ſhall be preſumed on a ſpecial verdict, except by neceſſary implication; except in the caſe of ſpoliation, where every thing ſhall be preſumed againſt the ſpoiler. But here, the jury find a ſtrong negative; for "they do not find that teſtator "cancelled, or defendant deſtroyed it." And if any preſumption could be admitted on any verdict, the law will certainly never preſume a crime, in any inſtance. However, it is ſaid, ſomething muſt be preſumed on both ſides; and if that be ſo, the ſcales ſhall preponderate in favour of the heir. But a negative is no preſumption, that lands are not gavelkind; that a will is not revoked, and the like: This is not preſuming; it is a queſtion on matter of fact, and the proof lies to be made on the other ſide, non neganti ſed affirmanti incumbit probatio. And in this caſe, preſumptions are neceſſary for the heir, but not for the deviſee; who ſhews a plain title, and puts the oppoſite party to the poſitive proof of it's being defeated. [293] Maxim.

And here too, the cuſtody of the ſecond will is never ſurely to be preſumed in the deviſee of the firſt. For if it was againſt her, it would have been entruſted to any body's hands but her's; if for her, it matters not who was entruſted with it.

Revocations of deviſes (and the ſame may be ſaid of uſes) are either immediate and direct, or conſtructive.

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The former ſpecies of revocations might be introduced by parol, before the ſtatute, in the moſt improper manner; and theſe the ſtatute provides againſt. With reſpect to the other ſort, 1 *Vezey*, 292, it is reported Lord *Hardwicke* ſaid, "Theſe words of the ſtatute (referring to the 6 *ſ.*) are an "expreſs excluſion of any other means: For the words "againſt the clauſe are both negative and affirmative." And in *Atkins*, it muſt purſue *ſ.* 6. which ſection is, "No "deviſe in writing, of lands, tenements, or hereditaments, "or any clauſe thereof, ſhall be revocable, otherwiſe than "by ſome other will, or codicil, in writing, or other writ- "ing declaring the ſame, or by burning, cancelling, tear- "ing, or obliterating the ſame, by the teſtator himſelf, or "in his preſence, and by his directions and conſent. But "all deviſes and bequeſts of lands and tenements ſhall con- "tinue in force until the ſame be burned, cancelled, torn, or "obliterated, by the teſtator, or his directions, in manner "aforeſaid, or unleſs the ſame be altered by ſome other will "or codicil, in writing, or other writing of the deviſor, "ſigned in the preſence of three or more witneſſes, declar- "ing the ſame." Whatever, then, Lord *Hale's* opinion of a will of chattels revoking lands might be, before the ſtatute, it cannot now be law; all preſumptive revocations are at an end. And very probably, if the time is conſidered, Lord *Hale's* opinion in that caſe gave riſe to that part of the ſtatute.

The attempt is hitherto unprecedented, of deſtroying one valid will by another hitherto unknown: And, whatever favour the heir may merit in the eye of law, I will venture to aſſert, his claim is not more ſacred, in a free, commercial country, than a valid and apparent teſtamentary diſpoſition.

If there be any queſtion, it ſhall be between the deviſees of the firſt and ſecond will; but never to let in the heir. And 3 *Mod.* 258, goes ſtill farther: For the plaintiff in ejectment made title as heir at law; the defendant under a
[294] will. The plaintiff produced a ſubſequent will, atteſted by three witneſſes, but not in preſence of teſtatrix; which, though not good as a will, they contended, might be good as a revocation; for that it was a writing ſufficient under the ſtatute of frauds: And, upon the firſt argument, it was adjudged for the defendant, "that a ſecond will muſt be "a good will, in all it's circumſtances to revoke a former will." It is reported alſo, 1 *Show.* 159, and the court, 1 *Carthew*, 80, that the ſecond will cannot be good, as a de-

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vise of lands; and yet, that it cannot operate as a revocation, contrary to the intent of testatrix. And in the case 1 *W.* 343, Lord *Cowper* recognized the case of *Eccleston and Speke*, because the devise of the same lands to the same person. And, for ought appears in the case before us, this may be even a legal devise of the same lands to the same person. And, if the second will contained a different disposition to a third person, and the first will was destroyed, on a supposition that the second was good, this, he said, should never let in the heir, though the second turned out to be void, any more than a cancelling by mistake, where a testator, sick in bed, and with two Wills under his pillow, should order his friend to cancel the last, who, instead thereof, cancels the first.

A second devisee might avail himself of a different disposition, to maintain an ejectment; but the heir must prove a revocation, and not a different disposition: For, as Lord *Cowper* says above, "the meaning of the second will was "to give to the second devisee what it took from the first; "and if the second could take nothing, the first could lose "nothing."

I fear I have been too long; but the novelty of the case, and the greatness of the opinions against me, extorted it from me. I apprehend, that it would be of very dangerous consequence; it would let in perjuries innumerable, and set aside the statute of frauds entirely. Either an express revocation should be found, or such contents of a will as the court may clearly see.

Least of all should it be in the case of an heir at law; who might keep a second will private, and yet avail himself of it, as a revocation, by raising conjectures, which common sense will presume; that the second will was not a mere copy or transcript of the first. And therefore, I think, judgment for the defendant.

Mr. Justice *Gould*—I disagree with the opinion of my last learned brother; but entirely concur with that of my brother *Nares*.

I take the case to be entirely novel, and nothing similar to it but the case alluded to of *Bassett*: For there the jury did not find any lands devised by the second will; the court held it immaterial.

The court of King's Bench, at some distance of years, had in effect the same case before them. It may be sufficient to say, that it appeared to be the sense of the bar, and of both courts, that a second, if not consistent with the former, would amount to a revocation. Indeed, though

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by the words of the ſtatute of frauds, an expreſs deviſe of lands is made neceſſary, or an expreſs revocation, in writing, yet, Lord *Cowper* held, in the caſe before cited, that where there was a deviſe of chattels, with expreſs words of revocation, it ſhould revoke lands.

I take it, from the extraordinary application and learning of thoſe who diſcuſſed Sir *H. Killigrew*'s will, that a ſecond will, not conſiſtent with the former, is a revocation; for Maxim. voluntas teſtatoris eſt ambulatoria uſque ad mortem. And revocations, by operation of law, are not excluded by the ſtrong words of the ſtatute. And the intention of the teſtator is not neceſſary; for even againſt it the operation of law ſhall revoke a will. And I think it never has been doubted, that diſpoſitions of truſts, which are expreſsly mentioned in the eighth ſection, are not more revocable by operation of law than a will. Even marriage, and birth of a child, has been held by three learned judges, a revocation.

There are three points to be conſidered:

1ſt, Of the exiſtence of the ſecond will.

2dly, The effect of it's non-production.

3dly, It's conſiſtence or inconſiſtence with the former.

As to the firſt, the exiſtence of the ſecond will, they do not find the teſtator cancelled, or defendant deſtroyed it. This is ſimilar to the caſe in *Hardreſs*, which *Finch*, the ſolicitor-general, contends with the court, that the finding of the jury was good there, which was, that they did not find any lands deviſed; for that, this being matter of fact, ſhall not be preſumed by the court: And very properly compares it to the caſe of fines without proclamations, *Hob.* 262. If a fine be found, but no finding of proclamations, the court ſhall not preſume any: And in that caſe, if the jury had found that they did not find there were any proclamations, this would have made the verdict never a whit the worſe; for it would have been only a fuller explanation of their mind. Thus I take it here; when a will is found, the preſumption is, that it exiſts, till it be proved to the contrary: And the finding of the jury leaves that at leaſt untouched, and in it's full vigour.

[296] As to the ſecond queſtion, of the effects of it's non-production, whoever has the poſſeſſion of one teſtamentary diſpoſition may be preſumed to have the poſſeſſion of all, and can come at them. It is againſt reaſon to ſuppoſe the heir deſtroyed it, who is almoſt totally diſinherited by the firſt. Next, the finding does not take away the preſumption

tion of deviſee having the will in her poſſeſſion, if it does not even ſtrengthen it.

We muſt at leaſt ſuppoſe, if that ground is not tenable, that the will is miſlaid or loſt: And then the finding is good, and the evidence properly admiſſible, at common law. The jury find, that what is become of it they know not. The jury in *Hitchen* and *Baſſet* find, aliud teſtamentum, in writing, which, by the law of evidence, ſpeaks as well after the ſtatute of frauds as before.

It is true, the ſtatute of frauds requires a will in writing; but if the will exiſts, the defendant is preſumed to have it; if loſt, it muſt be proved as it can.

3dly, I think we muſt take it, that the jury find abſolutely a different will: Qui dicit generaliter nihil excludit. If they had thought the diſpoſition differed partially, they would have ſaid ſo. I can't help taking them to underſtand, that the general diſpoſition was different, though in ſome particulars it may agree: And this is certainly a revocation. Maxim.

But ſuppoſe them not to be taken ſo generally; and that it be uncertain whether a general or a partial difference, yet it puts the deviſee to her title.

The title of all fees is, prima facie, in the heir; it muſt be taken from him by clear and unexceptionable title, and the deviſee is an abatrix, unleſs ſhe ſhews a written title againſt him. The heir is ſaid to be the favourite of the law, but this is not ſtrictly true; for, in the ſcale of æqual juſtice, there is no favourite; but the law ſees a clear title in the heir, and therefore will expect certainty to overſet it.

I can't ſubſcribe to the obiter dictum of my Lord *Cowper*, in the caſe alluded to from *Peere Williams*, who ſays, if the deviſee was different under the ſecond will, and the firſt was deſtroyed, on a ſuppoſition that the ſecond would be good; if afterwards the ſecond turns out void, this ſhall not let in the heir; nor take from the former deviſee, to veſt in him. This would be finally to veſt in a perſon in whom finally the teſtator did not mean it ſhould veſt, in prejudice to the heir, who, prima facie, has the title.

But are we clear that the heir had not at laſt the favour [297] of the teſtator, and that a perſon entirely a ſtranger to his blood ſhould ſweep all. The preſumption you may ſee in *Swinburne* 162, by very ſtrong caſes carries an almoſt irreſiſtible bias in favour of the heir. And the teſtator in his ſecond will might, if I may ſay ſo, be in a more perfect

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ſtate of family, and the natural regard to the heir have it's effect.

I will cite, as to the heir's being a favourite, what Lord *Hardwicke* ſaid in a caſe before him, which was taken by the afterwards Lord Chief Juſtice *Wilmot*, who was even then eſteemed remarkably accurate in his notes.

"There are a great variety of caſes artificially diſtinguiſhed, concerning the favour always ſhewn to an heir at law. [As where preſumptions are taken from change of circumſtances, or from ſome act or ſaying of the teſtator, whence it is concluded it might be, that the teſtator meant to make an alteration in his will.] This reaſoning is ſometimes rather forced, and perhaps not a little too refined; but where there is a ſecond will there is no ſuch difficulty; and we may do an injuſtice if we diſinherit the heir; but the claim of the deviſee being vitiated by uncertainty, there is no ſuch danger." I am therefore of opinion that judgment ſhould be for the plaintiff.

Lord Chief Juſtice *De Grey*—There can be no occaſion, after ſo learned and accurate a diſcuſſion, to enter into an argument. I will ſtate my opinion on detached grounds.—It appears clearly to every one who conſiders the ſubject, that the heir has an original and ſubſtantive, the deviſee a dependant and derivative title, ſuppoſing the ſame diſpoſition continue to the death of teſtator.

The teſtator is preſumed to have continued in his intention, till it is proved he has done the contrary; ſo where a change of intention appears the ſame conſtancy is preſumed, till farther alteration is apparent. It appears too, that a perſon may make an alteration gradually by different diſpoſitions, in different inſtruments. We may ſee the difficulty in the caſe *Cro. E. Coward* and *Marſhall*, a codicil is an inſtrument to vary; a will, in its prima facie import, ſhall be intended a full declaration what ſhall be done after the teſtator's death; and therefore a ſecond, revocation of the former. The court with great caution and prudence ſaid there, it ſhall be only a revocation pro tanto. I take it to be right what my brother *Blackſtone* ſaid, that it was the final opinion, that a will ſhall not be preſumed ipſo facto a revocation of the former; but the court ſhall ſee the contents. But the variety of trials ſhewed great heſitation; and though it ſtands finally, and ſo I am willing to take it, that a ſecond
[298] will, without looking into the contents, ſhall not revoke the former; yet, if you can look ſo far, as to find that there

w.

was a different will, then the first will, if I may use the expression, is not the last.

But let us suppose the case in *Hitchin* and *Buffet* to have been, not that the will could absolutely not be found, but that the rest being destroyed by fire or vermin, there remained only the signature of testator with the date, and attestations of the three subscribing witnesses; and these words in the beginning "I hereby revoke all former wills;" this is not merely a revoking but a disposing will; for throwing the other into the fire would have answered the purpose of revocation. I conceive Lord *Cowper* may be understood of a conditional revocation; as if it were—"if such a devisee can take, that then the former will be revoked; "there if the second devisee by event cannot take the former will shall stand." If a man had devised, "I hereby "dispose of all my worldly estate as follows:" I apprehend no man could claim under the former will. If in this case, it had been, "whereas I have disposed of the greater part "of my estate to Mrs. *Harwood*, I hereby make a different "disposition;" this, I conceive, would have prevented her intitling herself under the former will.

In the case of *Kitchen* and *Basset*, it appears, "that the "making a new instrument presumes some change, but may "not be of itself sufficient to revoke." But it will, if there be other circumstances, as if the situation of his family was in general at least the same as before, his estates the same; he makes a will with three attesting witnesses, (which was not necessary as to personalty but to real only, and Mr. *Lacy*, was a person very conversant in courts of law, and a very able lawyer.) Circumstances being such, claiming under a derivative title you must shew me, (and there I ground my judgment, in which I am sorry to differ from my very learned brother *Blackstone*;) nothing has been done by the second will, to affect your claim, shew me that the disposition of the second varies not as to you; and we are satisfied. Can Mrs. *Harwood* maintain her title, without presuming? It must be presumed the second will does not concern lands, or only partially, or only in an estate for life.

If it may be otherwise, I apprehend that a will may be evidence of different contents, yet if we can't produce the instrument there will be no effect: and yet no man shall suffer for loss of evidence in writing, by fire or misfortune; and even records shall be proved as they can.

What is the case of two wills without dates? *A.* takes by one will, *B.* by another; both come in exclusion of the

heir: And yet as neither can prove as againſt the other, th
title, the court will not arbitrate between the parties, will nc
[299] permit them (as might appear on the principles of natur
juſtice) to divide, but the heir at law ſtands aloof againſt a
the world, and ſays till ſome of you can prove an expre
title againſt me, my original right ſhall ſtand.

In the caſe of ſpoliation it is preſumed, the ſpoliation w
made by the deviſee; becauſe the inſtrument deſtroyed w
againſt the deviſee.

I can ſee no ground, that the diſappointment of the i
tention of the ſecond will ſhould ſet up the former.

The jury do not find that he did cancel it, I might almo
ſay they find he did not; but law will preſume it not ca
celled till proof. And I have ſaid already the effect m
operate as a revocation, and yet the purpoſe never anſwere

In the caſe of Lord *Lincoln*, who in compliment to
lady he intended to marry raiſed uſes, and yet never ma
ried, none of theſe uſes took effect; yet they operated
defeat his will: And ſo it would have been had he actual
married, and all the uſes had been ſpent. A woman mak
a will when ſole, and after marries; and by operation
law, though her huſband dies before her, yet the act
marriage was a revocation; and, as every will implies rev
cability, that power being taken away, the will no long
ſubſiſts: So where a man marries and has children;
a late determination) and yet, here are no words of rev
cation. I am therefore of opinion, that judgment ought
be for the plaintiff before the deciſion.

'Tis obſervable, that on the conference upon the benc
it was remarked, that Mr. *Lacy* might be in doubt, for
was at leaſt a queſtion at the time of his making the wi
whether a reverſionary intereſt which he had, would p
by the words real and perſonal eſtate; and if they comp
hend what was not a legal eſtate, but a bare equitable
tereſt.

Serjeant *Burland* obſerved, the caſe of *Glazier* in
K. B. had been determined in the Eccleſiaſtical Court, bef
Sir *George Lee*, *Vide Hilliers* caſe, 3 *Atkins* 798, the c
trary way; and that from the eccleſiaſtical law we born
all our ideas of wills. That if we were to conjecture,
intent might rather be to give her money inſtead of cha
bers, which he ſuppoſed, on account of her ſex, by
laws of the ſociety ſhe could not inhabit. Serjeant *D*
ſaid, he had forborne to ſay any thing before about
eccleſiaſtical courts on purpoſe, but if that was to the po

he had the ſtrongeſt caſe in the world, for they had determined for him. The court declined giving judgment on the inſtant, which Serjeant *Davy* urged, as he ſaid, he had no doubt a judgment in their favour would releaſe 10,000l. out of Chancery.

Lord Chief Juſtice—If the court ſhould ſee cauſe to determine in your favour, there would yet be certainly a writ of error. [300]

N. B. I learn by a friend, the teſtator was tenant in tail of the lands, under his father's ſettlement, with a reverſion to the right heirs in tail, whoſe heir teſtator was; and the lands having been ſold, was directed by ſtatute 8th of Queen *Ann*, in ſome degree confirming, in others altering, the ſettlement to reveſt part of the money ariſen from the ſale, in other lands to uſes of that ſettlement. Teſtator died without iſſue, and without reveſting, and his heir at law claims as by the reverſion; and alſo that *Mr. Juſtice Nares*, in ſaying that the lands might deſcend to the heir, till diſcovery obſerved on the authority laid down by *Lord Coke*, *Co. Litt.* 111. that where deviſor ſeized in fee deviſes lands by will, the freehold or intereſt in law is in deviſee before entry; and in that caſe nothing deſcends to the heir. This however he ſeemed to hold as an obiter dictum, and to deny the law as there held; and therefore that notwithſtanding, in the caſe before the court the lands might deſcend conditionally, though the deviſor here, by failure of iſſue at his deceaſe, had the reverſion in him at the time of his death, as tenant in fee.

I am reminded by a worthy friend of the following caſe; ex parte Helier Apr. 30th, 1754, 3 Atk. 798.

A queſtion in a cauſe before Sir George Lee as Judge of the Prerogative Court, whether the execution of a ſecond will is a revocation of the firſt, though the ſecond was afterwards cancelled; and whether ſuch cancelling ſet up the will again.

Sir George Lee gave ſentence that it was a revocation; and that the cancelling the ſecond did not ſet up the firſt.

A petition was prepared to the Lord Chancellor on the part of the principal deviſees, for a full commiſſion of delegates; and alſo a croſs petition praying that the commiſſion may iſſue to judges of the common law and civilians only.

Lord Hardwicke directed a commiſſion of delegates to judges and civilians only.

Fiat audivi this caſe afterwards came before the delegates, and the ſentence confirmed Sir George Lee's ſentence ex relatione Rowlandi Ayſcough Armig. J. C. Vide infra the caſe of Berkenſhaw and Gilbert.

Interrogatories.

KEEPER of *Maidſtone* Gail ſworn to anſwer interr gatories, touching a CONTEMPT, ſuppoſed to ha been committed by him againſt this COURT. For defa of bail he was COMMITTED.

Notice in Ejectment.

[301]

DECLARATION delivered at a houſe of —— *Buckinghamſhire*, which borders on lands in *Oxfo ſhire*, for which lands the ejectment was brought.

Mr. *Cowper* obſerved, that declaration in ejectment w in the nature of an original writ, as proceedings commen by it. And that the Common Pleas carried it ſo f that they expected it to be ſerved on the premiſſes deman ed in ejectment; and would not take ſervice on the wi to be ſervice on the huſband.

Court were agreed ſervice upon the party at his hou was good, tho' the premiſſes were in another county.

And Mr. Juſtice *Aſton* ſaid it differed from an origi writ, becauſe the ſheriff had not a juriſdiction out of t county.

Information.

ON a motion for an information, the original pape ſhould not be annexed to the affidavit, as it pr duces a difficulty and trouble on a trial.

Ejectment.

MOTION for judgment againſt the caſual eje tor.

There were joint partners in the buſineſs of brewer and the declaration was ſerved on one.

Per curiam, that it would not do as they had not ſe ved it upon both; it not appearing that they lived both the ſame houſe.

Attachment.

MOTION for an ATTACHMENT againſt the SHE RIFF for not returning the WRIT.

Th

The court at firſt doubted, whether the motion was right the laſt day of term.

Mr. *Buller* ſaid, whenever the attachment was abſolute in the firſt inſtance, he underſtood it to be the rule, that it might be moved the laſt day of term. [302]

COURT—You muſt ſerve perſonally, to make it abſolute. The under ſheriff has a public office, and it ſhould have been ſerved there. Inſtead of this, it was ſerved upon a maid ſervant.

Oyer of Copy.

Of Letters of Adminiſtration.

MOTION, that oyer of a copy out of the conſiſtory court, may be ſufficient oyer.

Objection, that letters of adminiſtration are not like a deed.

And that it being ſtated, the letters of adminiſtration were taken out of his pocket, the party was not entitled, as he gave no account of them, nor did it appear they were loſt; and unleſs this did appear, he ſhould not have recourſe to a copy, even in the caſe of a deed.

RULE ABSOLUTE, that oyer of a copy from the conſiſtory court be ſufficient oyer.

Declaration in Ejectment.

SERVICE of declaration in ejectment on the niece, in the abſence of the tenant in poſſeſſion.

It was ſaid, though this ſervice had been admitted to be good, where the tenant in poſſeſſion abſconded, to keep out of the way of the notice; yet here the aunt had in fact not abſconded, nor was out of the way, with an intent to avoid the notice: But that ſhe kept a boarding-ſchool, and it was her cuſtom to be abſent at *Whitſuntide* and *Chriſtmas*. That the niece received the notice, ſhe, the aunt, being abſent, according to her cuſtom. But that the niece did not tell her of it, as ſhe did not know when ſhe would come home.

But it not being denied in the affidavit, that the niece did give the notice, nor denied that the aunt received it, upon theſe grounds, RULE ABSOLUTE.

Conſtable's

Constable's Return.

COMPLAINT againſt the conſtable by the grand jury, for refuſing to amend his return; he returned generally that all was right in the pariſh.

There happened to be a very bad road in it which the conſtable had not preſented: And the grand jury therefore directed him to amend his return, which he refuſed to do.

He ſaid in his excuſe that it was true the road was very bad, but the man had promiſed to mend.

Lord *Mansfield*. You ſhould have remembered you were on your oath, and to find according to truth and fact. The jury have done right. It is extremely blameable in a conſtable to find upon favour and affection.

The jury would do well to conſider whether they might not do very right to find a bill of indictment againſt him which as Juſtices of Peace, ſo is the Grand Jury impowered at common law to do on their own knowledge, as well as upon the information of others.

The evil has diffuſed itſelf in a ſcandalous manner over the kingdom.

Evidence.

OBJECTION to a receipt for damages taken by the plaintiff's attorney, ſpecifying the verdict, that this was not evidence of the judgment, for that nothing leſs than a copy of the judgment, duly authenticated, could be evidence of the judgment.

Lord *Mansfield* diſallowed the objection, declaring it was captious, that there was no diſpute between the parties as to the reality of the judgment; and that all the queſtion between them was matter of form, and even that might have been cured, if the jury would have waited a couple of hours. That on a ſimilar objection at *Guildhall*, he made the jury ſtay for a copy of the judgment.

Attachment.

ON a rule to ſhew cauſe why an attachment ſhould not be ſet aſide for irregularity. The irregularity complained

plained of was, that the attachment was abſolute in the firſt inſtance.

The maſter ſaid it was diſcretionary in the court, whether it ſhould be abſolute in the firſt inſtance or not.

That the ſheriff, for not returning the writ, parties, for non-payment of coſts, purſuant to a rule of court, have the rule abſolute againſt them in the firſt inſtance: And that he apprehended, that the general rule was, that wherever a party was guilty of a contempt, he ſhall anſwer in cuſtody.

King and *Jones*, in *Strange*.

That *Salkeld*, 84, it was ſaid, it was not uſual to give a ſecond rule to a party who had ſlighted the firſt; that he ſhould anſwer in cuſtody; that to do otherwiſe would be to expoſe the court to further contempt.

Mr. *Dunning*—That unleſs the juſtice of a court is obſtructed, an attachment will never be granted in the firſt inſtance.

That where there is an application againſt parties, for diſobeying a rule of any nature leſs high than that of the immediate and neceſſary juſtice of the court, the court will always give them an opportunity of juſtifying themſelves.

That this was entirely different to the caſe of a refuſal to pay money under an order of court, or of inſulting an officer of the court.

That one of the parties was an infant, and that the court would certainly not attach him, for doing what by law he could not do, being guilty of a contempt, an offence which he was not of age or diſcretion to incur.

Lord *Mansfield* deſired to ſee the rule, and the affidavit upon which it iſſued, and the affidavit of diſobedience.

With regard to the general practice, Lord *Mansfield* enquired; and there was, he ſaid, a little difference of opinion, as to the general rule.

But in the preſent caſe (his Lordſhip added) it is as clear as the ſun, the rule ſhould not go abſolute: For, as to many, it was not delivered perſonally; and, as to undertaking to deliver up poſſeſſion, they can anſwer no farther than to what was in their own power, and not jointly and ſeverally. [305]

In caſe of non-payment of coſts, the attachment is in the nature of an execution; but here, the defendant was apparently in the ſituation of not being able to make title. And the parties knew it: For I bailed him at *Guildhall*, and would

would not ſuffer a large ſum to be required, though I could not diſmiſs without bail.

Mr. Juſtice *Aſton*—I wonder very much at the doubt.

As to non-payment, it is in the nature of an execution upon the civil ſuit; as to the diſobedience of the ſheriff, he is an officer of the court; as to contemptuous words againſt the proceſs or inſult, by words or actions, when this is repreſented by the officer to them, the court will pay a particular attention in favour of the proceſs; and in theſe inſtances the rule is abſolute at firſt. But, where a reaſon may be aſſigned for non-performance of the rule, as on not obeying an award, or the like, the court will always grant a rule to ſhew cauſe at firſt: And I wonder the officers of the court ſhould have any doubt about it.

Q. N. Nam videtur valde bone diverſitie.

Lord *Mansfield* obſerved, that an attachment for non-payment of coſts, was ſo much in the nature of an execution, that the parties were not bailable.

Lord Mexborough *againſt* Sir John Delaval.

ON a rule to ſhew cauſe why, on payment of coſts, judgment ſhould not be ſet aſide againſt defendant, upon two nihils returned on two writs of ſcire facias. And why the defendant ſhould not be permitted to come in as executor, and plead nil debet.

The caſe appears to have been, that Sir *Francis Delaval* being indebted 10,000l. to Lord *Mexborough*, his brother, Sir *Thomas*, joined with him as ſecurity; that afterwards Sir *Francis* applied for 5000l. to pay off annuities, which his brother, Sir *John*, lent him; the ſurplus, if any, to be applied to the payment of Lord *Mexborough*'s judgment debt. That afterwards a propoſal was made, to change Sir *Thomas*'s ſecurity for that of Sir *John*'s, on condition that Sir *Francis* ſhould make an eſtate tail to the ſon of Sir *John*;
[306] which condition was never performed, and Sir *Francis* died about a quarter of a year afterwards, and the eſtate deſcended to Sir *John*. Lord *Mexborough*, on a falſe return of two nihils, procures judgment on the 10,000l. debt againſt Sir *John*, who was executor.

Counſel againſt the rule—Whenever the court ſets aſide a judgment regularly obtained, it is always to let in the merits and juſtice of the caſe: And if theſe be not here with the defendant, your Lordſhip will not grant him the indulgence of this ſummary proceeding.

Sir

Sir *Francis Blake Delaval* was tenant for life of a very large eſtate: yet, wanting money, he borrowed 10,000l. Sir *Francis Delaval*'s brother had the eſtate made over by an aſſignment in truſt, to pay an annuity to Sir *Francis Delaval*.

It was thought proper the brother, Mr. *Thomas Delaval*, ſhould make a ſecurity, with his brother, to Lord *Mexborough*, for 10,000l. It was thought, between the family, that it would be better to let in Sir *Francis*'s other brother, inſtead of *Thomas*; and Sir *John* was to pay 4000l. per annum, on condition that Sir *Francis* ſhould join to cut off the entail when his ſon came at age, and that the debt ſhould be paid off. Lord *Mexborough* was adviſed to give up his former ſecurity, which he did, and ſet up the covenant only, and the firſt judgment obtained againſt Sir *Francis* ſolely. Sir *John* was to pay only 2500l.

Sir *John* contended, that he was not bound to pay the debt on the eſtate, as Sir *Francis* died in a quarter of a year, without having performed the condition of making an eſtate tail; and that he was executor to the covenantor, and could not be ſued upon the death of the teſtator, who was covenantee. That Lord *Mexborough* having been prevailed on to give up his former ſecurity, and having no remedy, but upon the executor of the teſtator, the court would not ſuffer the judgment to be ſet aſide, in prejudice to the juſtice of the caſe.

Judgment by default was ſigned on the ſecond ſcire facias.

A fieri facias was then ſued out, and the ſheriff returned nulla bona.

A davaſtavit had been ſued out, upon which the defendant pleaded the general iſſue, nil debet;—that the defendant was informed of all the proceedings againſt him.

Mr. *Wallace*—If Sir *Francis Delaval* has any remedy to which he is entitled, he will have it in another manner.

The ground of the application is, that Sir *John Delaval* has no more aſſets than 1600l. to ſatisfy the 10,000l. and therefore applies to the court, that he may not be liable to pay any more. It is not denied, that Lord *Mexborough* had lent the ſum: but he entered into an agreement with Sir *Francis*, who became bound with his brother. [307]

Sir *John* comes in after, only in a more beneficial manner, as a recovery is to be ſuffered as ſoon as his ſon ſhall come of age, that then a term ſhall be created to raiſe the ſum of 25,000l.

25,000l. for payment of the debts, among which Lord *Mexborough*'s is one. An annuity is provided for Sir *Francis*, to ceaſe when Sir *Francis* ſhall think fit to advance himſelf in marriage. Lord *Mexborough* was applied to, that Sir *Francis* and *Thomas* had ceaſed to act; that Sir *John* had taken the management; and an abſolute ſecurity ſhould be made, as before, to his Lordſhip; He was aſſured of this by Sir *Francis*, in the preſence of Sir *John*'s attorney.

That afterwards Sir *John*, upon the death of Sir *Francis*, ſet up the non-performance of the conſideration of making the eſtate tail. That in the caſe in *Strange—Wharton*, the court would not admit the executrix to plead, that ſhe was ready to ſatisfy the creditor with all aſſets in her hands, merely on account of delay.

Mr. *Cowper* ſaid, that Lord *Mexborough*, having an equitable claim and leaſe, and a legal right, and having proceeded regularly, ſhall therefore be entitled to his legal remedy, and the defendant not admiſſible to a ſummary relief.

Mr. *Buller*—That, on principles of law and equity, the plaintiff was entitled, and the defendant barred: That the debt was juſt, and the proceedings in it regular. That as to the equity, the defendant ſhould bring equity with him when he demands it; that he ſhould pay equitable aſſets.

Mr. *Dunning*, on the other ſide—This caſe ſtands upon a peculiar footing. I underſtand, that the learned Serjeant who ſpoke before, profeſſed that the rule muſt ſtand, unleſs there could be new matter, on which he could ſhew the court otherwiſe.

That as to the coſts, if the gentlemen dropped their action in the Common Pleas, then the coſts would be paid if it were continued, they would await the event. That as to the intent of not paying the 10,000l. it was at leaſt doubtful whether ſuch was the meaning of the application. That as to delay, the circumſtances were different from what had been ſtated. That Sir *John* was not apprehenſive
[308] of the effects of the proceedings againſt him, and therefore did not proceed with the utmoſt expedition.

That as to the 5000l. if they were legally entitled to it they would recover it the only way by which a legal debt is to be recovered, that is, legally. That the caſe in *Strange* differed extremely, becauſe there the matter had been decided, as to liability, two years before: And whether a delay after that, upon an application, as of courſe, was like

del-

delay of one term only, the matter not being decided, he ſubmitted to the court. That caſe, indeed, was cited only for what the court had ſaid, and which they alſo had ſaid in the ſecond caſe, then referred to, with reſpect to not driving the party to an auditâ querelon, a method in a great meaſure obſolete, the ſame thing being done on motion. That theſe returns are in fact matter of courſe, and it was not deſired of them to do their duty by ſerving the two writs, but that they ſhould return the two nihils, inſtead of ſerving them, this is contended. This is the equity for which they contend.

They ſay before the court, in ſubſtance, if you don't give us the 5000l. give us a legal right to 5000l. Why this pains? If they have a legal right, they will litigate it with us; if not, why do they claim? As to this 5000l. it was lent by Sir *John Delaval* to his brother, for paying off annuities; and becauſe Sir *Francis* had not agreed with his annuitants. And for the payment of other debts are words added, with reſpect to the application of the ſurplus. Is it to be conceived that Sir *John Delaval*, who lent a ſum to his brother, to be repaid, ex vi termini, for paying off preſſing incumbrances, ſhould now be obliged to give 5000l. for the benefit of his brother-in-law, Lord *Mexborough?*

As to the deed, if Lord *Mexborough* was in contemplation, he is in the number of thoſe who are entitled to the 2500l. Shall a covenant be enforced when the condition has totally failed? It is true, Sir *John* has now the eſtate; but that was not the benefit in contemplation; the benefit in contemplation was to move from Sir *Francis:* In conſequence of which, and in the conſideration whereof, Sir *John* was to pay the 2500l. The poſſeſſion of this eſtate is independent on the deed, advantageous as it has happened, but foreign entirely to the deed.

That an equitable title has ariſen has been next ſtated, from converſation between Sir *Francis* and Lord and Lady *Mexborough*, in the preſence of Mr. *Farral*. It may be ſufficient to ſay, Sir *John* was not preſent, and that Mr. *Farral* had never been employed by Sir *Francis*. If permitting his brother to employ his own attorney, in a deed for his brother's benefit, was making that attorney his own attorney, I do not know: There is nothing elſe that can in this inſtance. [309]

The buſineſs of Sir *Francis* with Lord *Mexborough* and his Lady was nothing to Sir *John*. If Sir *Francis* did ſay that

that ſecurity was abſolute upon this deed, he miſrepreſented the matter; but neither is this any thing to Sir *John*.

If it be ſaid that as an executor he has taken benefit, and is liable; if it be a benefit, it is one he entered into reluctantly, only taking the office as heir of the family, to bind himſelf as to what he thought aſſets.

Serjeant *Davy*—It has been the practice long before I knew *Weſtminſter Hall*, that where there have been two nihils returned, and the defendant had been informed he could have made his diſcharge, the court will not put him to the trouble of an audita querela. I don't remember one ſince I have known *Weſtminſter Hall*; the court has always relieved upon motion.

A practice there has been for the ſheriff to return nihil, that is, nothing within his baillwick by which he can ſummon the party; this is done by the deſire of the proſecutor. A ſecond writ iſſues, and then the principle laid down, is, that two nihils returned it ſhall be the ſame as if on a ſcire feci there had been no return, the caſe is quite different; and the practice may be much more reaſonable. It is the intereſt of the party to make the enquiry; and the law will intend he does it. But an executor may be totally ignorant of a judgment againſt the teſtator: If it were allowed any judgment, creditor might ruin an innocent executor. The court never did allow this; I truſt the court never will allow it: It would be a reflection on the laws if they ever did allow, on a ſcire feci the party is perſonally warned; the ſheriff is liable to an action for a falſe return; and therefore on a ſcire feci the defendant is for ever concluded; and an audita querela can't relieve him. Here in this caſe the defendant has immediate ſecurity, perſonal ſervice is not neceſſary, the ſheriff too is not liable to an action for a falſe return.

Lord *Mansfield*—How ſo?

Becauſe, wherever the return is a negative only, the ſheriff cannot be liable to an action; and ſo it is upon a non eſt inventus.

Lord *Mansfield*—Is it ſo? I think I have lately determined otherwiſe.

I was going to ſay my Lord that if the plaintiff can prove, on a non eſt inventus, that the ſheriff did not execute the writ, then he may have his action againſt the ſheriff, but not the
[310] defendant. In theſe nihils it is as well known as that there is a ſheriff in *Middleſex*, that the plaintiff always ſolicits thoſe returns.

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Lord *Mansfield*—It is a very bad practice, and ought not to be continued; and it does not seem to be founded in reason or consistent with law, nor with the opinions of the court, that the sheriff may not be charged with an action for a false return even though negative.

Serjeant *Davy*—As to the equity of the case, there are, they say, equitable assets to which the plaintiff is entitled, whatever they may be if they are not legal instead of equitable, the court will not deprive Sir *John* of his legal advantage; and I would only farther say, as I would not go over the same ground which has been so well trod before me, that your Lordship will not determine upon the proceedings, ex parte, without hearing Sir *John*'s evidence.

Lord *Mansfield*—I think, brother *Davy*, what you have dropt may be exceeding proper, and tend to prevent expensive litigations between parties nearly allied. That Sir *John* might be permitted, and *Farral*, to make affidavit of what passed in the conversation between Lord and Lord *Mexborough*, concerning giving up the old security; which was certainly a good one; and that it may appear how far Sir *John* was concerned in it either by himself or the act of Farral.

To be sure the court regularly adheres to regular judgments, if in the support of the merits and justice; but if AGAINST THE MERITS AND JUSTICE THEY ALWAYS GET RID OF THE MERE FORMALITY of THEM; but they do it upon terms. I see it may be of great consequence to the parties to have this matter cleared up, they may make their affidavit on *Monday*.

Affidavit of Sir *John Delaval* and *Oliver Baron*. *Baron* believes that Sir *John Delaval* was in possession from 1764 to 1771, of all Sir *Francis Blake Delaval*'s settled estate, subject to an annuity to Sir *Francis* of 2,000l. per annum; that both these opponents have heard Sir *Francis* express his apprehensions, that Sir *Thomas* would become a bankrupt; he being, as these deponents verily believe, in very bad circumstances at that time. *Baron* says, that in pursuance of a letter [from Sir *Francis*,] the deponents and *Thomas* went to *Doddington* on the 29th of *May*, Sir *Francis* entered into an agreement to release Sir *Thomas* within twelve days from the security of 10,000l. to be paid to Lord *Mexborough*. That Sir *John* said he had nothing to do with it, not knowing of the loan; and that he thought himself ill-used, in not having the security disclosed to him. That Sir *John* made a proposal to pay off Sir *Francis*'s debts, which Sir *Francis*

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Francis shewed him an account of; that Lord *Mexborough* was not among them. That Sir *John* was astonished at the amount, that he agreed however to lend 5000l. to buy in annuities for his brother; but that he had nothing to do with Lord *Mexborough*'s debt; and that he expressed an idea the 5000l. was too large for the purpose of paying off the annuities; but Sir *Francis* said he must have elbow room. That *Farral*, the attorney, asked Sir *Francis* why he had not mentioned Lord *Mexborough*, and to which Sir *Francis* replied, he had not mentioned for fear of oversetting the whole. That however he was persuaded to propose it, and Sir *John* accepted the charge to be made on the estate; that *Farral* was very urgent that Sir *Francis* might be bound by forfeitures not to marry, and Sir *Francis* also was urgent upon it; that he Sir *John* said, he thought such restrictions of marriage were illegal; that then Sir *Francis* said you do this to get over our agreement. No, says Sir *John*, to convince you of the contrary, if you will cause it to be inserted, that unless counsel shall think such forfeitures good both in law and equity, that they shall be void, there I will agree.

Proposals were made that Sir *Francis* should settle an estate tail upon Sir *John's* son: When they came to town counsel were of opinion, that the restrictions were illegal and void. That the deponent *Oliver* thought he did Lord *Mexborough* a material service in getting Sir *John*'s consent to stand security instead of Sir *Thomas*, and thus procuring a good security instead of what he understood a desperate one. That *Oliver* applied to the plaintiff, mentioning a design to release Sir *Thomas*, and make Sir *John* security; that Lord *Mexborough* and his Lady not seeming to incline to the exchange, *Oliver Baron* said to them, I think your Lordship loses little or nothing, and may get a very good security instead of a bad one; that however, they still remaining disinclined, *Farrall* left them; that Sir *Francis* spoke earnestly to *Farral* afterwards, and insisted upon Lord *Mexborough* being persuaded by *Farral*, to consent to the exchange of securities; saying that Lord *Mexborough* was like a mad-man if he did not, that the estate would be in the hands of the assignees if *Thomas* held it six weeks longer. That *Farral* refused to go unless sent for by the plaintiff, he says that Lord *Mexborough* did actually send for him, and seemed ready to execute; but to his great surprize, when the matter came to be discussed again, and Sir *Francis* declared the security of Sir *John* to be as good as the bank of *England*, Lord and La-

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dy *Mexborough* expreſſed an apprehenſion that Sir *John* was to get by the ſecurity.

Farrall repeated that his Lordſhip could looſe nothing by the ſecurity. Lady *Mexborough* ſaid, you may looſe nothing, but *Tom* will be ruined unleſs ſomething is done. That Lord *Mexborough* ſaid, he wiſhed he had never lent the money; and Lord and Lady *Mexborough* ſaid it was very wrong to do Sir *Francis* ſervice, and afterwards reproach him for it. That then his Lordſhip conſented; but upon [312] the inſtrument being read by *Farrall*, when he came to the words and I acknowledge to have received ſatisfaction, Lord *Mexborough* ſaid, he had not received ſatisfaction, I wiſh I had. On which the deponent ſaid, my Lord you have only a chance of ſatisfaction, I can't promiſe you any more. Sir *John* obſerved on the forfeitures being declared illegal, that then he muſt not ſuffer the eſtate to be charged with Lord *Mexborough*'s debt, as otherwiſe he ſhould be tied and Sir *Francis* free. That the deponent *Farrall* believes that the reaſon of Sir *Thomas* and his Lady being unwilling to confeſs ſatisfaction on Sir *John*'s ſecurity, and accept Sir *John*'s was, from their apprehenſions partly that Sir *John* would take a benefit, and partly from the deponents ſaying that his Lordſhip had only a good chance for a ſatisfaction, which he truly thought.

Sir *John* ſpeaks in confirmation of all this part, and that he is ſure Lord and Lady *Mexborough* knew, and he had told Lord *Mexborough*, that by the family ſettlement there was a contingency of Sir *Francis* having children, and therefore he Sir *John* could not make an abſolute ſecurity, till his ſon, who was but ten, came of age. That the intent of making the day of the covenant bear date with that of the agreement, was not to make void the agreement for 1000l. annuity to be paid to Sir *Francis*, for that he admits payment due for 1000l. That Sir *John* had raiſed 45,000l. and had never taken any benefit therefore during the life of Sir *Francis*. That he told Lady *Mexborough*, ſhe knew he had never received any benefit from the covenant, and that he is informed by eight learned counſel he can derive no benefit from the ſame, and is not liable to pay any part of the 10,000l. other than from the ſurplus of the 5000l. after paying annuities.

Lord *Mansfield*—The manner in which this application is made miſled me the firſt day it came on, for it is ſtated as a judgment debt obtained; and therefore an application for an equitable relief on their performing equity and payment of

coſts.

costs. I was therefore misled to suppose this was a case of a judgment debt obtained, to be relieved on a motion to which there might be an equitable right, as upon an audita querela. And an idea being suggested to me that this was an unconscientious use made by the plaintiff of the judgment, and that it was capable of being turned unconscientiously the other way on the matter of form, I therefore thought it right that the affidavits, especially on Serjeant *Davy*'s side, should be entered into. There was never an intention of entering into the merits, but putting them into a way of being tried. If Sir *John* is debtor, by a specialty he can't discharge himself as being executor, nor as conditional trustee; but in this case Lord *Mexborough* has his remedy, not excluded nor prejudiced by this motion.

[313] Supposing, as seems, that there was a condition to be performed in the covenant, then if Sir *John*, or *Farral*, his agent, had drawn Lord *Mexborough* in, as on a good security, and absolute, his Lordship would have had an action on the case, for the 10,000l. so that there would have been no occasion for setting the matter upon terms; but this has been positively denied. If the defendant thinks he has any ground to go upon, he is not embarrassed by the form, notwithstanding his representation.

I come now to what I premised. I think the defendant has proceeded too candidly: And I think that they ought to have proceeded against the judgment, as unconscientiously obtained, And therefore, though it's nothing to the parties, yet, for the sake of the practice, and of the rule, I will order the rule, without payment of costs.

The assets applied for in *April*—promised when applied for—due diligence used—account delivered in, by which there appears a very considerable deficiency—nothing objected—in the mean while, he is tempted into a judgment of form, of which he can know nothing, no notice being given; and it's made a confession of assets, contrary to their own acknowledgment.

Now, without prejudice to practice, this was done in *Trinity* term; pending the amicable treaty between them, the judgment is obtained. Now, by way of reference, when it operates as nothing but reference, a form merely may be sufficient: As to this, it's the parties business to take notice of it. But when an executor, an administrator knowing indeed of the judgment in this case, but who may know nothing of it, shall have been drawn into a confession of assets, as by default, for that is the principle on which it proceeds, in such

ſuch a caſe as this, the ſetting aſide the judgment is EX DEBITO JUSTITIÆ, when ſuch an uſe is made of it.

I would have it underſtood from this judgment, that no principle of law exiſts ſo diametrically oppoſite to juſtice. Upon form, againſt another, it is very well; but by way of ſerious concluſion, it is unjuſt and unconſcientious. If you would make a real uſe of it, you muſt give a real notice.

Michaelmas Term,

13 Geo. 3. 1773. K. B.

Licence.

MOTION for an information againſt a juſtice of peace, for refuſing a licence to the informant.

An indictment had been preferred againſt the perſon to whom the licence was granted, for ſtopping up the king's highway, but quaſhed. A ſecond indictment was preferred the juſtice refuſed to quaſh it, and ſaid, if it was quaſhed it ſhould be in the court of King's Bench.

The caſe ſtated on her ſide was, That an agreement had been made with the complainant for building a bridge; that ſhe, not being paid, nor having conveyance made to her according to the agreement, within the time agreed, diſcharged the workmen, and ſtopped up the road. That the public had enjoyed the road for ten years; after which ſhe made the obſtruction, and, after applying to the juſtice, he refuſed the licence, without reaſon.

The caſe made on the other was, that at firſt there was no real conſideration, but that it was only agreed that the public ſhould be at the expence of the repairs. That afterwards the juſtice, on her requeſt, agreed to pay 10l. to her ſon as heir at law: That he tendered the 10l. but that ſhe, after the public had enjoyed it nine or ten years, demanded conſideration for the ground, and an agreement to be made between them. That then, on their refuſal to comply with this new demand, ſhe obſtructed the works. And that, as to refuſal of the licence, he was moved thereto, becauſe the houſe had the fame of a diſorderly houſe; and that he has a witneſs, on whoſe affidavit it will appear, that it was a diſ-

[315] orderly one. And that they had not ſuggeſted that the houſe is neceſſary to the accommodation of the inhabitants. That if the reaſon ſuggeſted, of the road, had been the true one ſtill he ought not to be harraſſed with an information: But

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he positively swears to the other, of it's being a disorderly house.

Lord *Mansfield*, when the counsel was about to go on, said, he thought they were very wrong on both sides.

That as to the woman, it appeared evidently, she had made an agreement, and that a note of hand for 10l. was in her son's hands, pursuant to that agreement. If she thinks, after this, and with the public enjoyment for ten years, if she thinks she can come off, because there was no conveyance, (after much trouble and litigation) she will find herself much mistaken, and is very ill advised. It is an unfit attempt.

On the other hand, I can't agree with what was very tenderly hinted, that a justice of peace may refuse a licence because a party will not come into his terms. She may be ill advised and unreasonable; but still this will not bear him out in such an application of his authority. It is the case of *Naboth's* vineyard. As to her character with respect to her house, I wish nothing had been sworn about it. It appears to me, it would have been as good twenty years after as twenty years before; for which first years he has nothing to say against it, had she not obstructed the road.

But she ought to have come for an information with clean hands, and that not appearing the case, yet, in compassion to the woman, and for the benefit of all parties, I should be glad to hear she would withdraw her information, on their granting her a licence, and payment of the 10l.

Mayor's casting Vote.

I Think, of common right, the mayor has no casting vote, but must support his claim either by charter or usage. *Per* Lord *Mansfield*.

In assault and Battery.

DECLARATION, by way of recital, and whereas, &c. objected against, and *Cro. Eliz.* 507, cited, and *Strange* 681.

Briggs v. Sheriff Dobbs v. Edmonds nota in this

ner case. It first began with a recital, and afterwards there was a positive averment. ed per curiam in that case, that the objection must not be extended, as having gone enough before, and that the latter part good, and the former cured by verdict. Vide e same case in Lord Raymond, 1413.

[316] CURIA—You had better waive the objection, as the part will of course be permitted to amend.

Vide *Bultivant* v. *Holman*, Cro. Ja. 537.

Case of Hotley *against* Scot.

Mr. Dunning *stated the Case.*

SIR *John Astley*, tenant for life, remainder, after inte mediate limitations to the now Earl of *Tankerville*, b virtue of Sir *John's* marriage with the granddaughter of t then Earl, she being previously seised of the estates in que tion, and others, joined with her husband to levy a fin whereon a power was derived to make leases in possessio but not of future interest, and so as it be incident to an go along with the reversion; clause of re-entry, on no payment of rent, for twenty-one days.

Under colour of this power, Sir *John* granted a lea by indenture to Mr. *Prichard*, in 1761, to hold by a year rent of 21l. with proviso, in case rent should be behind f twenty-one days, having been lawfully demanded, or no su ficient distress or assignment, that then it shall be lawful f Sir *John*, his heirs, or assigns, to re-enter: And the rent also reserved to Sir *John*, his heirs, and assigns. Anoth lease, with like proviso, in case of rent behind, or want sufficient distress. By attending to the terms of the rese vation, you will see the objection, which is the power re-entry to Sir *John*, his heirs and assigns, whereas should be, by the terms of the power after his decease, the reversion or next remainder-man.

Second objection, that whereas the re-entry is by power unclogged with the necessity of demand, or failu of distress, Sir *John* has burdened it with these. Had *John* reserved a power to himself in a fee, which was own, I think the objection would be fatal; much more as the power is from his wife, and the clogging is to the p judice of his grandson. The case of *Brooker* and *Merr* will be objected, where the construction was held of words of the statute of *H.* 8. with respect to rent reserv by tenant in tail, where heirs and assigns will be taken to such as should become entitled to the reversion in the fam settlement; but the statute does not speak any thing of remedy, the power does.

And though the construction may avail, as to the re it cannot as to the title. Lord *Tankerville* is in by a title ramou

ramount, and the only one under which Sir *John* derives, and which the granddaughter of his anceſtor, Lord *Tankerville*, certainly meant to reſerve to him; which cannot be as heir or aſſign to Sir *John*, and which Sir *John* ſeemed to think, quite forgetful of the power. [317]

Lord *Manſfield*—I ſhould be glad to know if the words ſtated are preciſely, " ſo as in each leaſe there be a clauſe of " re-entry, if the rent be unpaid for twenty-one days."

This was admitted.

Mr. *Bearcroft*—With reſpect to the other leaſe, *Prichard* and *Whitfield*, I doubt my duty to the court, and myſelf, will not permit me to argue that a *die datus*: that of re-entry in thirty-one days: That, ſtill more, of the eſtate for life exceeded.

Lord *Manſfield*—To be ſure, a *die datus* is a ſettled point, and cannot be departed from. If it were now open, I ſhould incline to conſtrue excluſive or incluſive, as would beſt ſubſtantiate the deed; for the expreſſion is very ambiguous.

Mr. *Bearcroft*—I am perſuaded his Lordſhip means to take exceptions of form, to ſhew his generoſity, in granting new leaſes upon the ſame terms.

As to the object, with reſpect to the re-entry, I underſtand it is admitted, the remedy for rent will be the ſame. And how is this objection to be ſupported, upon a fair and liberal conſtruction? And it is agreed, with reſpect to powers of this ſort, the court will conſtrue as liberally as a court of equity. Let me then be admitted, as they ſupport their cauſe by a liberal conſtruction, to ſupport mine by the ſame. As to the word " heirs," I cannot underſtand Lord *Tankerville* as an heir, certainly; but if I can make him out to be an aſſign, it will be ſufficient for your Lordſhip's determination. I know not there is any technical definition of the word aſſign. Now Sir *John*, joining with his wife, may be properly conſtrued as grantor; and Lord *Tankerville*, if he has a right of re-entry, (which ſure he has by law, and of which the tenant will be cognizant) he has the right as an aſſign.

Let us conſider as to the operation of the power of re-entry. I contend it adds nothing but what comes in by force of law, or follows upon a deficiency of the vague and not ſufficiently explicit words of the power. Is not rent always to be demanded, before a diſtreſs becomes liable, or a forfeiture incurred? And as to the other, if there be a ſufficient diſtreſs, what then? The rent will be recovered without

without re-entry; and neither in reaſon, equity, or conſcience, could there be any other intent of the original power. In ſome reſpects, Lord *Tankerville* has an advantage; as for inſtance, without clauſe of re-entry is improper, and rigo-
[318] rous, the power complained of defends the perſon. And the attorney who drew the leaſe was the perſon to ſtart the objection.

Mr. *Dunning*, in reply—I don't apprehend the nature of the caſe, or Lord *Tankerville's* character, makes it requiſite for me to inſiſt on indulgence. As to him his character has hitherto ſtood unimpeached, and will ſtand unimpeachable. As to the attorney, he may appear, when I have ſtated the whole, to merit approbation. He drew it as for a man ſeiſed in fee; he never was informed otherwiſe till after Sir *John's* death. He diſcovered the flaw to his own prejudice as having a very beneficial leaſe. I do not deny that it would be very abſurd, if, in the conſtruction of powers, this court differed at all from the court on the other ſide. With reſpect to the caſe cited, or rather hinted, I gave it up, becauſe I thought it ſhortened my queſtion. If it had appeared material to my client, I ſhould have done wrong not to have obſerved to your Lordſhip, that there the conſtruction was *ſecundum ſubjectam materiem*; heirs ſpecial, not heirs general: But here the conſtruction would require, that your Lordſhip ſhould take as heir ſpecial him who is no heir at all.

With reſpect to the term aſſigns, Mr. *Bearcroft* ſaid, there was no definition: It may be difficult to attempt a definition as being too clear to need or admit one. However, I may thus take for granted, by way of definition, that an aſſign is one who can take an aſſignment from a perſon qualified to make it. It is not incident to a reverſion: Does it ariſe where ariſe from the contract? As to the diſtinction between the power given, and the power purſued, taking the original power of re-entry in the moſt liberal conſtruction, (for I ſhould be aſhamed to make a verbal one) I think it is impoſſible to maintain the conſiſtency of the latter with the former. There is but one condition in the former; no clauſe of re-entry. In the latter there are three conditions, of which only the firſt, the rent being behind, is the condition of the former. Can it ever be ſeriouſly contended, theſe powers are ſubſtantially and in effect the ſame?

Lord *Mansfield*—This is to try the validity of a leaſe, made in execution of powers.

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The ſtate of the caſe is, *Mary Prince*, who married Sir *John Aſtley*, was ſeiſed in fee of the premiſſes, and levies a fine; and afterwards made a ſettlement: And there is a power to Sir *John Aſtley* to grant leaſes of preſent and not of future intereſt; ſo as it go along with and be incident to remainder and reverſion. And ſo as there be a clauſe of re-entry, in caſe of rent being behind twenty-one days.

There is a power of revocation.

All the uſes ſubſequent to Sir *John*'s eſtate for life were revoked, and the Earl of *Tankerville* is become entitled, as remainder-man. Sir *John* is dead. Then comes the leaſe in queſtion, with reſervation of rent, and clauſe, in this manner; that is to ſay, with re-entry, on condition of the former nature, if rent unpaid for twenty-one days. There are one or two objections; firſt, that the meaning, though not expreſſed in the words, is, that clauſe of re-entry ſhould go to the inheritance; that it does not if it goes to the heirs general of Sir *John*. [319]

To prove that, by the power, it ought to be reſerved to the inheritance, was not difficult: By the ſubject matter it muſt go along with the rent, and be incident to the reverſion.

Nobody can have the re-entry but he who ſhould have the rent, were there no leaſe; and ſo in the very text of *Littleton*, *Co. Lit.* 213. *f.* 346, 347; by conſtruction therefore it muſt be ſo. Now upon the conſtruction of the leaſe it's reſerved for twenty-one years, payable half yearly, (that is the ſame as if it had been during the term) and then it goes with the inheritance. Then, what is the meaning of heirs and aſſigns, it muſt mean (it was admitted, of neceſſity, at the bar) thoſe to whom the inheritance ſhould go, and ſo is the reaſon and authorities. The heirs and aſſigns can have no other meaning. It would be ſuperfluous to expreſs the meaning more particularly; as in the caſe in *Sanders*, of a covenant reſerved to a ſtranger, his executors and aſſigns, the court decreed, it muſt go to the deviſee, and executor muſt be rejected.

Why then, as to the reſervation in the other part, how was it to have been worded? They ſay expreſsly, to the perſons in reverſion, and remainder. It would have been void on the ſtatute 34 *H.* 8. *c.* 24, if they were not aſſigns to the leſſor by the ſettlement, they are aſſigns a thouſand ways: They have provided ſufficiently. As to demand, a clauſe of re-entry is required, as a ſecurity for the rent: Demand is requiſite, both by common law and ſtatute: A clauſe of re-

entry

entry will never be allowed to operate farther than as a ſecurity for rent.

New Trial.

NO intereſt had been paid upon a bond from 1754 to 1773: The jury found for the bond. Lord *Mansfield* ſaid, the preſumption againſt the bond was within no ſtatute of limitations; would be governed by the evidence. A parol confeſſion would ſet up a bond twenty years hence.
[320] That he remembered, from circumſtances, the evidence of ſeventeen years had been taken as preſumption ſufficient againſt a bond.

The court granted a rule to ſhew cauſe, in order to inquire farther into the circumſtances. *Queras velim amplius de hâc cauſa lector bone.*

Action for Money had and received.

IT was obſerved, this was a liberal action, in which the party waives all tort, treſpaſs, and damages. As in a caſe of laſt term, (vide *Feltham* and *Tyrrell*) where it was rightly argued, you may waive the treſpaſs and damages, where there is a treſpaſs, and come for the money had and received.

But where an attorney has taken a receipt, and diſcharged defendant out of cuſtody, he charges himſelf with the whole, and acknowledges ſatisfaction, and can't plead, that no more came to his hands than ſo much, and in that way clear himſelf of the reſidue.

Recital.

WITH reſpect to the "whereas," which was argued in declaration of aſſault and battery, the court was informed that exception was done with.

It was obſerved, that in *Fielding* and *Vincent*, it was firſt deviſed how to get clear of this objection: That the caſe of *Wilder*, in *Strange*, 1151, had farther ſhaken it. And that three terms after, the caſe of *Marſhall*, 1162, made an end of it.

New

New Trial.

MOTION for a new trial, on account of verdict againſt evidence.

Queſtion, Whether an attorney exerciſing the buſineſs of *ſcrivener* was a trader, within the ſtatute?

Suggeſted that, upon the evidence, the jury ought to have found him a trader.

Rule to ſhew cauſe.

Civil Action. [321]

CHARACTER of the defendant cannot be gone into in a civil action. Lord *Mansfield.*‡

Recognizance.

MOTION for a *certiorari* to remove a recognizance—Not granted as never having been the practice; but inſtead thereof rule to ſhew cauſe granted, why the clerk of the peace ſhould not diſcharge the recognizance on payment of the fees.

Rule.

THE court will not oblige a perſon to give a copy of a declaration which has come into his hands without fraud or ſurprize, and without which the proſecutor cannot proceed againſt him criminally. For the court will not oblige a defendant to aſſiſt in a proſecution againſt himſelf.*

Adminiſtration.

TAKING out letters of adminiſtration on a falſe oath, is with reſpect to ſeamen a capital felony by the ſtatute.

Venue.

AFTER plea pleaded you can't move to change the venue.†

Attachment.

‡ In capitalibus extenuat aut excuſat delictum quod non item in civilibus.
* Nemo tenetur ſeipſum accuſare.
† Omnia ordine et decenter fiant.
Allegans contraria non eſt audiendus.

Attachment.

MOTION for attachment, for non-performance of an award made in purſuance of a rule of court. Rule to ſhew cauſe.

[322]

Slander.

DECLARATION ſtated, that whereas the plaintiff is a wool-comber, and a perſon had agreed with him for a certain quantity of wool, the defendant well knowing of the premiſſes, and in order to bring him into diſcredit with perſons buying and ſelling with him, and deprive him of his livelihood, ſpoke the words laid in the declaration, he (*innuendo* the plaintiff) is not worth a penny, and he will run away.

2 *Shower*'s Reports, cited "he is an idle raſcal, and not "worth a groat;" actionable if ſpoken of a trader. Rolls abridged in the very caſe of a wool-comber, "buy no more "wool of him, for he is not worth a penny."

It was ſaid as to the averment, it was ſufficiently averred for the court to ſee that the plaintiff was a wool-comber, and got his money by buying and ſelling in that trade; as in the caſe in *Bronlow*'s Reports, plaintiff ſtates, that whereas he is a judge, defendant not being ignorant of the premiſſes—held a good averment.

Mr. Serjeant *Davy e contra*, that the words were not actionable; for that wherever a man not neceſſarily lives upon his trade, or ſo as to be liable to the ſtatutes of bankruptcy, ſlander lies not for ſaying he is not worth a groat.

3 *Mod. Chapman* and *Lamphire*, a carpenter deſcribes himſelf to be ſuch, and then ſtates, that he got much money by buying of timber and materials, and building of houſes, and that the defendant ſpoke of him as follows, "he "is broken and run away and will never return again," which is much the ſame as ſtated here, and the judges were divided, two againſt two, whether theſe words were actionable or not. *Anderſon* and *Fairfax*.

Action lies not for ſuch words ſpoken of a farmer; unleſs he declares ſpecially, that he gets his living by buying and ſelling.

They would not be actionable if ſaid of a vintner, nor of a ſhoemaker; [this laſt the court denied] becauſe not liable to the bankrupt laws.

In

In the case 2 *Shower* 295, the words were spoken of a weaver; and the case stated specially, that he got his living by buying and selling.

It is not sufficiently stated here that any body traded with him, or he with any body.

The court thought otherwise: And that a wool-comber, [323] not stated to be a labourer, must of necessity be intended to buy wool to work with.

A farmer, the court observed, was no trade at all; which must have been the reason of the decision cited above.

The court further said, that they would not disturb the case, especially after verdict.

Information.

COURT will not proceed by way of information for every disobedience of a constable to a warrant of a justice, or order of sessions, but the method of proceeding is by indictment. *

Irregularity.

IN general you must come upon an irregularity at first, and not wait for a second, to set aside the antecedent. Irregularity of rule is to be taken notice of the moment the next step is to be taken. Irregularity of declaration in the same manner, before judgment. And so is the rule in the court of Common Pleas; and this on principles of justice, and for prevention of expence. You can't come after execution, to set aside judgment, on account of irregularity of the declaration: But the instant you have notice of judgment signed, you must take advantage of the irregularity, then at least, if not before. §

Trover.

MOTION to be at liberty to plead several matters in an action of trover.

COURT—By a book, near two centuries ago, it appears, release is a sufficient plea to trover, and you have no need to plead any thing more.

On

* Nusquam recurritur ad extraordinarium nisi ubi deficit ordinarium.

§ Vigilantibus non dormientibus jura subveniunt.

[324]

On the 31 G. 2.

ON a queſtion, Whether lime was within the act.

The act provides, that no perſon ſhall be liable to pay toll for any cart or carriage, or horſe, &c. which ſhall be employed in carrying dung, compoſt, mould, ſoil, or any other thing, employed in the cultivating or manuring of lands. Pleaded, that lime was within the ſtatute.

Objection, that lime was not within the exemption.

Ex etymologia. 1ſt, That lime could not be comprehended within the words, dung, mould, or ſoil; neither, a fortiori, within the word compoſt, which neceſſarily implied a thing, in the making of which there was more than one article employed, and properly ſignified ſomething artificially compounded. Lime is a ſimple article, and is, ſurely, not compounded by being burnt and brought to diſſolution: which would rather decompound it, if it were a compoſition before.

Ex verbis antecedentibus. The general words "any thing uſed in cultivating or manuring of lands," muſt be referred to the antecedent words, which ſpeak of harrow and plough, and muſt be underſtood to mean things ejuſdem generis, inſtruments of huſbandry. *

Ex ſtatutis in pari materia. Farther, that lime is always comprehended in expreſs words, where it is meant to be exempt.

Ex abſurdo et inconvenienti. That nothing will pay, in this inſtance of the turnpike road of Lynn Regis; for lime is almoſt every thing that paſſed there.

On the other hand, it was contended, that the legiſlature uſed as general words as poſſible; clearly intending to comprehend every ſpecies of manure, and that if the exemption did not include lime, it would be totally nugatory. To the objection, that then the toll will be taken; for that nothing elſe was carried on that road but lime, it was anſwered, that this is only a branch of the general turnpike road.

That the words and intent of the ſtatute both concurred to exempt lime; for that the clauſe firſt exempts all inſtruments of huſbandry; next beaſts and carriages for the

[325] conveyance of ſuch implements; then ſeveral kinds of manure, ſpecially named, by way of introduction to the general

* Verba intelligenda ſecundum ſubjectam materiem.
Verba generalia reſtringuntur ad habilitatem rei vel perſonæ.

ral words, and then generally, in the moſt univerſal exteſit, any other thing employed in the manuring or cultivation of lands.

That the action was brought againſt the agent of the commiſſioners, whereas it ſhould have been againſt the commiſſioners themſelves. And that this was ſtronger than the caſe of *Evans* and *Sadler*, for the money had been paid back.

Lord *Mansfield*—It has very properly been obſerved, that where the legiſlature meant to exempt lime, they have expreſsly exempted it by name, as in the ſtatute of the 7 *G.* 3. and the circumſtances of this caſe give an additional ſtrength to that objection, from its being the general manure.

It would be confounding the ſignification of words, to ſay lime is ſignified by compoſt.

It is abominable to make a catch by plea, in abatement to the indictment, on account of the name. And, as to the other miſtake in filing it, if I had thought there had been any thing in it, I would have ſent it back to be filled again.

I dare ſay, the commiſſioners defended to the action, and then it would have the ſame effect as if brought againſt them. *

Beſides, if there were any weight in the objections, they come now too late for a nonſuit.

Trover.

Atkinſon *againſt* Barnes.

GOODS of *A.* aſſigned to *B.* and *C.* *B.* ſells them to *D.* who gives a promiſſory note, payable in fourteen days. After this *D.* aſſigns to *E.* all his goods.

The note having never been paid, *B.* refuſes delivery.

D. brings trover, affirming that the giving the note was payment; and that thereby the property veſted in him.

Gibſon and *Ware* cited. Property aſſigned for a man of *Dantzick* to a man of *Berwick*. The man became inſolvent.

An agent of his found means to come for the goods, which were ſent by a ſhip. The ſeller gives notice to the captain of the inſolvency, and, upon this, the captain refuſes to deliver them; and accordingly they were not delivered into the hands of the agent. [326]

That

* Omnis ratihabitio retro trahitur et facto æquiparatur.

That here *Atkinſon*, the aſſignee of *Cheſter*, the buyer, could have no better right than the buyer. That *Cheſter*, the buyer, had not made payment; for a note was no payment, till ſatisfied, and was only a proof of the ſum the goods ſold for. *Barnes*, the ſeller, kept the poſſeſſion of the goods, by the deſire of *Cheſter*, the buyer, till a time agreed on: And, upon this, it was contended, that the poſſeſſion of the ſeller, in conſequence of this agreement, was the poſſeſſion of *Cheſter*, the buyer.

To this, Mr. *Mansfield* replied, that if it had been a delivery to a third perſon, it would have been ſo; but that here was no more than muſt be the caſe where goods are not immediately delivered.

Lord *Mansfield*—You need not give yourſelf any trouble; for the whole of the argument goes, I think, upon a miſtaken foundation: That this was only an *inchoate* ſale, and not perfect by delivery.

Theſe are the goods *Stephens* ſold by *Barnes*: There is a note, giving credit to all the world, that they were ſold to *Cheſter*. *Cheſter* was to enter into the houſe, and deſires that *Barnes* would let them ſtay, not to give him the trouble of removing them. *Barnes* agrees; they ſtay as furniture: And more than this, *Barnes* blows hot and cold; for he does not wait delivery of poſſeſſion till the note be paid, but ſends the goods to *Cheſter*.

After this *Cheſter*, not being ſolvent, applies to *Barnes*, and deſires he would take back the goods. *Barnes* ſays, "I will not take back the goods; I will have payment." Upon this *Cheſter*, as he had a right to do, ſays, "I take "this as a complete ſale; and you muſt abide by it as ſuch." Mr. *Barnes*, therefore, ſhall not plead that there was no complete ſale; having affirmed one by refuſing the goods, and demanding payment. *

Farther, he indorſes the note to an indorſee; though he afterwards ſtruck him out.

[327]

Original.

IN a caſe where parties, who were perſons of conſiderable property, were proceeded againſt by original, inſtead of bill of latitat, Lord *Mansfield*, in a very ſtrong and lively manner, expreſſed his indignation at the oppreſſion uſed againſt

* Quilibet ſua facta ſcire et præſumitur et debet. Allegans contraria non eſt audiendus.

against the ſuitors of this court, through compulſion by clients ſometimes, and at other times through the paſſions of thoſe who were employed in the cauſe.*

If the parties will not conſent to appear, if they refuſe to conſent not to bring a writ of error, you may have great reaſon to proceed by original; but to do it in the firſt inſtance, eſpecially as it was ſworn on affidavit that the parties offered to depoſit the money in court before the original ſued out, in ſuch a caſe, a method of this kind was highly cenſurable. That, on firſt being informed, as far as entreaty, objection, and declaration, could go, he had gone; and if he had thought himſelf authorized to have made an order to prevent ſuch method of proceeding, in ſuch a caſe he ſhould have done it very gladly; but did not think himſelf empowered.

However, that it was deſtructive to the parties themſelves ſo proceeding; and ſeemed to intimate, that on a verdict he had more than once, in ſimilar circumſtances, threatened to leave it to the jury, whether it was not a proper motive for them to encreaſe the damages.

In this cauſe there were twenty defendants. Againſt one they began by ſuing out latitat: Againſt all the other nineteen they ſue out ſo many originals. The attorney complained, and owns, by his affidavit, that he diſapproved ſuing by original, under the circumſtances; but that his clients choſe it. It does not appear, however, that he ever adviſed his clients before not to do ſo, though he remonſtrated afterwards. It was ſaid farther, that whereas a bill was ſued in the Exchequer was the cauſe alledged, the bill was ſued three days after the original. If any thing ſo abſurd as delay could have been apprehended in parties of character, and in ſuch circumſtances, why proceed by latitat in the firſt, which was to try the merits?

Lord *Mansfield*—There is no manner of doubt, but that a man may make uſe of legal proceſs (legal in the ordinary courſe of proceeding) in ſuch a manner as ſhall be a contempt of the court, and a moſt grievous oppreſſion.

I remember a caſe of Mr. *Hanbury*, who had bill with his coachman. There was a difference about ſome extra work; the bill was not immediately paid; the coachman, to be revenged, got his maſter to be taken into arreſt about nine at night; he was carried to a ſpunging houſe. He [328]

ſent

* Eſt quidam perfectius in rebus licitis.
Summum jus ſumma injuria.

ſent to me. I tried to conſider, whether he could be taken out; but the proceſs iſſued out of the Common Pleas, and I could not, therefore, get him out. It came before the Common Pleas, who committed both the bailiff and coachman.

So a tenant waiting for his landlord, on the day of payment he could not find him. The landlord arreſted him next day. The court of Common Pleas made him pay the coſts.

So on arreſt of a merchant on the *Exchange*; the court, on the like grounds, committed.

Here I am glad to hear Mr. *Mallifon* adviſed his client not to proceed. But they, hearing there had been a proceeding inducing a charge of felony, [the underwriters of a policy of inſurance had ſummoned the maſter of the veſſel to appear and anſwer before Sir *John Fielding* for the wilful loſs of the veſſel] they, to have their revenge, proceeded by original.

On the other hand, proceedings in the Exchequer, for a diſcovery which may charge parties with a felony, are extraordinary indeed.

Certificate.

CERTIFICATE of marriage not evidence, unleſs it be ſhewn as a copy from the pariſh regiſter.

Bail.

A Man cannot be objected to as bail, for not having been aſſeſſed to the poor's rate; for it is only evidence of his being an houſekeeper.

Evidence.

ON a queſtion, whether a promiſſory note, in the hands of an executor, were the teſtator's hand-writing, he refuſed to produce the note.

[529] Lord *Mansfield* informed him, that if it had been at niſi prius, which had turned on ſuch a matter, he would have ordered the cauſe to ſtand over.

The attorney who drew the will was interrogated, whether he would make affidavit, that he believed it was the teſtator's hand writing. He declined doing it; but would

ha-

have falſified the hand by other witneſſes: This the court declared would be abominable, and would not ſuffer it.

Execution.

WHERE a judgment is above a year old, you can't proceed to execution upon it, without firſt reviving it by ſuing out ſcire facias.

Non Procedendo.

YOU cannot have a non procedendo for want of tranſcribing, till you have a certificate from the office in the Exchequer, that there is no tranſcript.

Attorney.

LORD *Mansfield*—I don't know whether it would not be a good rule, for the maſters of each ſide not to allow an attorney any diſputed items, if he ſays he does not keep books.

Summary Proceedings.

AN application in a ſummary way waives treſpaſs, as an action for money had and received waives damages.

Warrant of Attorney.

WARRANT of attorney given by a feme ſole. She afterwards married. The court granted leave to enter up judgment in the name of the huſband and wife.

Payne *againſt* Hill. [330]

Building Act.

IT ſeems, that by the conſtruction of the 12 G. 3. the offence is committed as ſoon as the wall is finiſhed, in a manner contrary to the act; but at leaſt, when the ſhell is finiſhed, after which, nothing done to the inſide can make an alteration; eſpecially as the action is to be brought within three months.

Limitation.

IT was obſerved, that a year was the common limitation in acts creating penalties, where a moiety went to the informer, and a moiety to the poor of the pariſh.

Broker.

ACTION brought by a broker in his own name, for his principal. The jury found accordingly for the principal. Contended that verdict ſhall not be diſturbed becauſe action in the name of the broker.

That a broker is a ſufficient agent for the parties, within the meaning of the ſtatute of frauds; and his note a ſufficient note to bind the bargain: Eſpecially as the defendant made credit with the *Eaſt India* company on this note.

That in chancery, where the defendant might have availed himſelf of the ſtatute of frauds, if he anſwers to the bill, inſtead of demurring, the court of chancery will decide according to the equity of the caſe.

That where a contract is in part executed, court of Chancery will decree a ſpecific performance.

That where note is ſigned by one party, but in poſſeſſion of the other, there are ſeveral caſes that both ſhall be bound.

Hatton and *Grey*, Chancery caſes, 264. *Vern.* 221. [S. *James Lowther* and *Carill*; but note here, the court did not abſolutely decide.] 2 *Eq. Ca. Abr.* 45. *qu. v.* 20.

[331] Where an agreement made by parol, and there is evidence of that parol agreement in writing, this is ſufficient to bind the contract.

Counteſs Dowager of *Montacute* v. *Maxwell*, *Str.* 236. [Note, there the ground ſeems to have been that the marriage was had in conſideration of the promiſe.]

[But vide *Peere Williams*, 618, where the ſame caſe is reported, and determined, that to make the marriage a performance in ſuch caſe, would be directly againſt the meaning of the ſtatute.]

That the deciſion in a court of law would be the ſame on the ſtatute of frauds as in a court equity, as to the rule which would govern it, though the method of applying for relief, and the mode of giving it, and the ſubject of juriſdiction, might differ.

Lord *Manſfield*—Queſtion is, Whether this caſe is within the ſtatute of frauds?

The

The very title and the ground on which that ſtatute was made, have been the reaſon of many exceptions againſt the letter of the ſtatute.

And I agree, that every conſtruction of the ſtatute which would be good in a court of equity, will be good in a court of law: For equity can't relieve, againſt the legiſlature; and every court of law is bound to conſtrue according to the intent of legiſlature. Vide the great caſe of Cowper and Cowper, 2 Peere Williams, 685, 686.

I have already ſaid if the party owned in writing, the caſe of *Hatton* and *Grey* would hold here.

As to parol evidence, ſuch would let in a great tempeſt of perjury; but there is no occaſion to parol any thing.

This man is the broker that buys for the defendant; this is the man that buys for the *Ruſſian*, the plaintiff.

When they go on ſpeculation, one man goes and commiſſions the broker to buy, at ſuch a price, for he thinks it will riſe; another comes to the ſame broker to ſell, for he thinks it will fall.

But then there is no evidence, you ſay, of the order. The note, of which the defendant availed himſelf before the *Eaſt India* company, ſays, "I have bought, [ſtating the quantity and price] by your order, and upon your account, for myſelf."

If there were any doubt, which would not be ſufferable when the man has availed himſelf, parol evidence came very properly. [332]

The ground I go upon is, that it is by an Agent who acts by Authority, and whoſe Note in writing is the Note of the Parties. This will take it out of the Statute of Frauds.

Farther, if it were neceſſary, it is out of the Statute, becauſe a Note ſigned by one, and in poſſeſſion of the other, amounts, in this kind of caſe, to the ſame thing as if the party in poſſeſſion had ſigned it.

Mr. Juſtice *Aſton*—In ſuch caſes, they ſhould not charge a declaration upon parol evidence merely; unleſs, as here, in ſupport of his acceptance of the note.

Mr. Juſtice *Willes* ſpoke principally of the acceptance for the defendant. If he had not meant to be bound, ſhould have immediately returned it.

Mr. Juſtice *Aſhhurſt*—That, in the truth of the caſe, the *Ruſſian*, and not the broker, was the buyer.

Vide the caſe of *Colt* v. *Netervell*, 2 *Peere Williams*, 304, 308.

Common Pleas, 18 Nov. 1773.

ON a motion for a new trial, in ejectment, the co
obſerved, they were always very ſtrongly inclined
favour of the poſſeſſion; and in courts of law, as well a
courts of equity, the tenant is conſidered as a purcha
for valuable conſideration.

Plea.

ACTION on the caſe on promiſes. Rule for libe
to plead non aſſumpſit generally; and the plea of
ſtatute limitations, videlicet non aſſumpſit infra ſex annos

Declaration.

IT ſeems to be the rule, that declaration is not to
delivered to the party himſelf. when there is an att
ney.

Plea.

[333] IF a plaintiff has a right to demand a plea in *Tr*
term, and omits to demand plea during the whole va
tion, queſtion, whether this was not giving the defend
farther time.

Per curiam.

It is the practice of the court, that a delay to dema
plea does not hinder your ſigning judgment the day
you demand your plea.

Irregularity.

YOU muſt not overpaſs a term, and, on accou
irregularity, avail yourſelf next term.

But Mr. Juſtice *Blackſtone* ſeemed to have obſerved,
you might wait till the other party ſigned judgment,
ſhewed that he meant to make uſe of the irregularity.

Declaration.

BEFORE appearance declaration cannot be take
be in chief; but muſt be de bene eſſe, or nothing
Ir

Irregularity.

IN a caſe where a party who appeared to the court not to have merits, complained of being ſurprized by ſomething, which he called an irregularity, on the other ſide, and of which he had delayed to complain in the uſual time.

Per curiam.

If there has been a ſurprize, all the conſequence is, they have been ſurprized into doing juſtice earlier than they intended.

Appearance.

IT ſeems to be a rule in the Common Pleas, that when plaintiff has entered an appearance for the defendant, all ſubſequent notice muſt be delivered to the defendant himſelf.

Replevin Bond.

QUESTION, upon application to relieve from the penalty of a replevin bond, it was much doubted, whether ſuch relief could be extended.

B. R. 19 November 1773.

Bail.

TO be put in on the return day of the diſtringas; for you can't move till the next day.

Mayor and Burgeſſes of the Town of Berwick upon Tweed *againſt* Johnſon.

ACTION of treſpaſs on the caſe on Letters Patent granted in the ſecond year of *James* the Firſt to the Mayor and Burgeſs of *Berwick upon Tweed*; which letters were read in court, verbatim, and were in effect as follows, as to the point in queſtion:

"That no perſon not of the gild ſhall make merchandize without the conſent of the Mayor and Burgeſſes."

"And

" And that no ſtranger, without the gild, ſhall ſell, ex-
" cept in groſs, within the ſaid borough, &c. unleſs by the
" conſent as aforeſaid."

Act of parliament 2 *Ja. c.* 28. confirming the charter and providing, that no perſon who is a ſtranger, extraneus, ſhall make merchandize, &c.

The defendant was a native of *England*, had lived twelve years in *Berwick*, and ſerved the public offices; and upon his carrying on trade within *Berwick*, this action was brought.

[335] Argued, that at this day ſuch a charter would not be good at Common law.

Yet that not every charter not according to the courſe of the common law, is void; for there are many cuſtoms derogatory to the common law, which may be preſumed to have taken riſe from the charters of ſome or other of our kings.

It muſt have been obſerved, that by the 16 *R.* 2. and other ſtatutes, no perſon may buy or ſell in any city, who is a ſtranger.

And that the king's charter to the contrary ſhall be void.

The caſe, therefore, is to be conſidered on the act of parliament, entitled, " An act for confirming the King's " charter to the Mayor and Burgeſſes of *Berwick upon Tweed.*" It cannot be ſaid, that the only intent was to make the charter good againſt the King, his heirs, and ſucceſſors. It ſtands generally and abſolutely to confirm.

Long cotemporary uſage may juſtly weigh in the expoſition of a doubtful act, or doubtful point; but ſure, it cannot be applied to ſubvert the expreſs, plain ſenſe of an act which binds the King and his ſucceſſors, and this court.

It was conceived, the benefit of this act might be waived for a time; and, to prevent prejudice to the right from the non uſer, it was provided, that perſons excluded by the former part might make, and carry on, their merchandize with the good will and liking of the Mayor and Burgeſſes. They knew this indulgence, or connivance, might be determined whenever the Mayor and Burgeſſes ſhould chooſe, and had no idea, an act of parliament (eſpecially with the proviſion, not neceſſary, indeed, but added, ex abundanti cautela) could become obſolete by any negligence or connivance.

That nemo mercator qui ſit extra gildam, and nemo mercator qui ſit extraneus, are words tantamount: And that the parliamentary confirmation expreſsly extends to every

every thing granted, or meant to be granted, by the charter.

Mr. *Dunning*—That the caſe having been fully ſtated, he ſhould only enquire whether Mr. *Johnſon*, having lived twelve years in the town, having ſerved all public offices, and borne all the burthen, ſhould be reſtrained, by the conſtruction of this act, from partaking of the benefit.

Nullus mercator qui ſit extraneus muſt be underſtood of a merchant *Alien*. There are a multitude of caſes where they are ſo interpreted; and none that I know where they [336] ſtand for men who are not freemen of the place, ſimply, without other words.

If any other meaning be given the words of this charter, this charter would be illegal; and then, according to the general rule, when there are two conſtructions, the legal will be admitted. * If this extends to all the King's dominions, and was not ſupported by a precedent ſtatute, it will be void; but if it is reſtrained as aliens, it will be good, and conformable to the 16 *R.* 2.

But you will ſay, why, if there was an act of parliament already, was this granted as a ſpecial privilege? I do not know how far the particular ſituation of *Berwick* might exempt the town, or be ſuppoſed to exempt it from the benefit of the general act; but I don't reſt my cauſe upon that point: I think I ſhall be warranted to maintain my caſe, if I prove that nullus qui ſit extra gildam, and the other, mercator extraneus, are two different qualifications; and that the latter extends not to natural born ſubjects of the King, reſident within the town of *Berwick*.

That this act will have a different conſtruction from the generality of thoſe which are made in reſtraint of trade, if after having lain a dead letter for 170 years, it ſhall now, for the firſt time, operate in ſo extenſive and extraordinary a manner.

That no cuſtoms were confirmed by the act but what exiſted before.

On the other ſide, if mercator extraneus means aliens, what is the meaning of the other words, qui ſit extra gildam.

There

* Verba ſemper accipienda in mitiori ſenſu, ut res magis valeat quam pereat.

Nulla inhoneſta aut illegitima præſumuntur.

Rex præſumitur omnes leges regni ſui noſſe et habere in ſcrinio pectoris ſui.

There is no other ſenſe, I apprehend, of the word extraneus than as more generally expreſſed in the charter of the city of *London*: Strangers or aliens to thoſe of the city.

That the court would not conſider the propriety of the charter, or the particular wiſdom of the legiſlature; but what the charter meant to grant, and what the legiſlature intended to confirm.

Lord *Mansfield* ſaid, he ſhould be glad to have a full copy of the charter.

[337] To prove extraneus here, meant a ſtranger inmate, he obſerved it had been ſaid, that extraneus was a word that requires words of explication; and here there are ſuch words.

That he would not put the parties to an argument, as it did not turn on argument, but on the conſtruction of the charter.

The uſage is very ſtrong in this caſe, as exiſting ever ſince the ſtatute: And I can't help obſerving, that it's granted, "that they have a gild, &c. as heretofore uſed." The preamble ſeems to refer to the uſage precedent.

Mr. Juſtice *Aſton* ſeemed to think, from the uninterrupted uſage, that perhaps it might be preſumed there was a bye-law, by which the Mayor and Burgeſſes had declared their good will and pleaſure that a foreigner might trade.

Afterwards, in the ſame term, 23 Nov. Friday, Lord *Mansfield* delivered the opinion of the court, to the effect as follows:

This is an action of treſpaſs, which the corporation of *Berwick* have thought fit to bring againſt defendant, for ſelling goods in a public ſhop, by Retail, at *Berwick*.

They ground upon the charter, that no Stranger in *Berwick* ſhall ſell by Retail.

The Facts material to be ſtated, and they are very material in ſuch a caſe, are theſe:

That the defendant, about twelve years ago, came to ſettle in *Berwick*, and exerciſe without proſecution, or any reprehenſion, the trade of ſelling Stockings, &c. by Retail at *Berwick*: that he had continued ſo doing ever ſince, and that the cuſtom hath been ſo for all Inhabitants.

The Charter and Act of Parliament is referred to.

The Queſtion is, Whether the Inhabitants of *Berwick* have Miſtaken their Charter ever ſince, and this is a new diſcovery, or whether the Right Conſtruction has been put upon it.

The

The Reſtraint is ſo pernicious to Public Policy, that the King is reſtrained by ſeveral ancient Acts of Parliament from granting ſuch Privileges.

This is a Charter granted by *James* the Firſt. From *Edward* the Third, downwards, this Town had many Privileges. [338]

There had been a Doubt, whether *Berwick* belonged to *England* or *Scotland*. On the Union of the Two Kingdoms this Charter was made.

A Bye-Law was made for the *Regulation* of the Burgeſſes, and alſo for Inhabitants with the borough. There is a clauſe which obliges the Burgeſſes to be reſident within the borough, *comorantes et reſidentes*. The cuſtom, indeed, has ſince prevailed otherwiſe.

The Burgeſſes alſo are made liable to payment of Scot and *Let*.

The Latin is ſomewhat worſe, I think, in this Charter, than in that of *Edward* the Third: Worſe, indeed, I think never exiſted. The more a man underſtands Latin, the leſs he will be able to underſtand this.

The clauſe ſuppoſes, that every man of the Community, inhabiting and reſident, and liable to bear the Burthens, (which were very great in a Frontier town) may Trade, buy, and ſell Freely. *

There ſeem to be two objects; one to confirm their Privileges, the other to grant them new.

The firſt Clauſe is to give them a Gild, in ſuch manner and form as they have Uſed or ought. *Ita quod nullus mercator extraneus qui non ſit de gildâ illâ faciat aliquam* merchandizam *niſi de* Groſſo *infra* Burgum *prædictam*.

Now in the tranſlation, as they tranſlate it, it ſtands thus: "Make any merchandize, by buying or ſelling within the precincts, &c. I don't know where any Latin can be found, that *facere merchandizam* ſhould mean buying and ſelling. It is mere balderdaſh: We muſt find out the meaning—he means to grant them farther Privileges. "*Volumus atque jubemus et per præſentes concedimus quod quicunque mercatores Petierint Burgum prædictam cum mercatura Sive Extranei Sive Aili qui ſint in Pace Noſtra de Quocunque Loco.*" A proviſion follows, that they may be at Liberty, *eundo redeundo, &c.* And then farther, ſpeaking of the Foreign traders, *quod non occaſionentur propter Mis-telling in loquelis ſuis: Et quod Nullus Mercator qui ſit Extraneus et Non*

* Qui ſentit onus ſentire debet et commodum.

[339]

Non de Gilda mercaturæ prædictæ aliquod Mercimonium faci
niſi de Groſſo. That is, if a merchant living out of t
town comes, he ſhall Sell only in Groſs, and not in R
tail.

It is implied, mercator Extraneus may be de Gilda;
he is Not, then for the Benefit of the Inhabitants of t
Town he is Reſtrained.

Held that long and conſtant uſage would be a ground of preſumption againſt poſitive words of a bye-law, or very ſtrong ones of a charter, eſpecially if the charter was in reſtraint of trade. Maxim.

This ſeems to be the Meaning of the Words of the Cha
ter. If they had been much leſs ſtrong (though I am
far from thinking it doubtful, that I think this is much t
better conſtruction) in ſo diſadvantageous a caſe, I ſhou
make no difficulty of conſtruing it thus, Even were it
clear as the Sun, after a Conſtant Uſage of an Hundre
and Seventy years, We think it Ought to be Underſtood
that the Burgeſſes had entered into an Agreement to Re
nounce this Privilege. For this is not a part of their Con
ſtitution which they Cannot alter; and then, on the Max
im, Quilibet poteſt renuntiari juri pro ſe introducto, W
ſhould have been Determined by the Uſage of ſuch Anti
quity.

RETURN the POSTEA for the DEFENDANT.

Goodright *againſt* Gregory.

Ejectment.

ON a Special Caſe, reſerved from the Aſſizes of *Devo*
in ejectment, the caſe ſtates, that *Gregory* being ſeiſe
of a Tenement, agreed to diſpoſe of it to one *Stancomb*
This was done by a ſcrivener, in an informal manner, b
Indorſement under Seal. It appears, that the Indorſemen
was not Stamped, and no Form of Delivery. This actio
is brought againſt the Daughter of the vendor by a volun
tary Conveyance.

Mr. *Buller*—I apprehend the only queſtion is, wheth
this Indorſement be a Deed; if it were, the conveyance i
clearly void by the act. The Definition of a Deed is, "
"Writing under Seal;" which this is ſtated to be.

If any thing is wanted, it is a delivery. I apprehend thi
is a Delivery in Fact: And no Words are required, which
perhaps, diſtinguiſhes a Deed from Livery of Lands.

Coke, c. 5. f. 5. ſays, 'Tradition is only neceſſary; other
wiſe a mute man could not deliver a deed. Vide C.
Litt. c. 7. 7.

O

On the other ſide, That this writing was not intended, nor is to be conſidered as a deed. Every writing under ſeal is not a deed; for then a will would be a deed if it were only ſealed; a letter, under ſeal, would be a deed. [340]

If it had been meant to be delivered as a deed, it would have been delivered after atteſtation; inſtead of which, it's delivered before.

No words are uſed. It's delivered back by the witneſs to *Gregory*, and by him to the purchaſor. Though words are not neceſſary, yet ſomething, is perhaps, to ſhew the intent.

1 *Leon*, 140. Debt on obligation; plea, non eſt factum. The jury found the ſpecial matter, videlicet, that the defendant ſubſcribed and ſealed the ſaid obligation, and caſt it upon a table, and defendant took it up. And the court was of opinion, that upon the matter, the jury had found againſt the plaintiff; and that it was not like the caſe where words were ſpoken, as ſaying, "this will ſerve;" for then, by ſpeaking of the words, the will of the obligor appeareth, and that is his deed.

Cro. Eliz. 147, there is the ſame caſe, and the ſame diſtinction.

Peck, on demiſe of *Philips*—leſſee, in a ſhort memorandum aſſigned his tenement to another; aſſignee re-aſſigned. His Lordſhip was here of opinion, in this court, that it was a ſufficient aſſignment without Stamps. The want of ſtamps does not avoid a deed; it only prevents its being produced in evidence, and you may only have it ſtamped, and pay the penalties, and then it is a deed.

Lord *Mansfield*—It's given in his preſence, and he receives the money: It is clearly a deed between the parties; and muſt be ſo therefore, as with reſpect to the Stamp Act.

Mr. Juſtice *Aſton*—As to the circumſtance of atteſtation, though the ſolemn form is, "ſealed and delivered before us," an inaccuracy in that ſhall not overſet every thing. Caſes of Wills ſtand very numerous to that effect.

I do not ſee that it was neceſſary to conſider it as a deed. If a man can honeſtly avoid the expence of the ſtamps, I don't ſee why he ſhould not: the Parties call it a memorandum.

Lord *Mansfield*—Delivery only would not make it a deed; for a memorandum may be delivered.

Aſſignment dated 1768. *Stancombe*, the original vendee, aſſigned it then; but no poſſeſſion went with the aſſignment.

Poſtea

[341] Poſtea muſt be returned for the Defendant, they may get it ſtamped and bring a new ejectment.

Debt *and* Bankruptcy.

YOU cannot proſecute notes of hand or bills of exchange by action of debt.

An action of aſſumpſit, which is a demand founded on implied contract, is ſufficient to make a man a debtor within the bankrupt laws.

A. delivers to *B.* who afterwards became a bankrupt, a quantity of ſaltpetre to be refined. No demand is made till after the bankruptcy.

Quere, Whether this was a debt within the meaning of the bankrupt laws?

Per Curiam held not: becauſe no debt accrued before the bankruptcy.

Perhaps the ſtatutes concerning bankruptcy do much more miſchief than good: but we muſt, while they continue (which perhaps will be for ever) decide according to law *. But this caſe is very particular. A man depoſits his own ſaltpetre to be refined by a refiner, and be returned within a reaſonable time. At the time of iſſuing the commiſſion, and long after, this ſaltpetre was ſtill in ſpecie. The plaintiff had waived the delay and indulged him with time. He could not come for the value; for the property ſtill remained in him. He might have had trover; all which could have been recovered was the property itſelf, and the uncertain damages on a verdict.

Bill.

THE act obliges action upon attorney's bill not to be brought till a month after the bill delivered; in order that if the parties chooſe to proceed in a ſummary way they may, by referring the bill to be taxed.

Rogues.

[342] 13 *Geo.* 1. *c.* 23. *ſ.* 8.

GATHERERS of ends of yarn convicted by one or more witneſſes, before one or more juſtices, to be deemed

* Eſt hoc per quam durum: ſed Ita Lex Scripta.
Eſt boni judicis cogitare tantum ſibi permiſſum quantum ſit commiſſum ac creditum.

deemed and taken incorrigible rogues, and punished according to the ſtat. 12 *Ann.*

Walker *againſt* Chapman.

ON a motion for a new trial, his Lordſhip read his Report. This was an action for money had and received.

Mrs. *Hopkins* was called, who ſaid the defendant *Chapman* had been page to the King, and engaged in her preſence, that if the plaintiff *Walker* would pay 50l. to her, he *Chapman* would get the plaintiff a place in the cuſtoms. That ſhe was preſent when *Walker* interrogated the defendant, whether he would procure the place; and that *Chapman* ſaid he would; or ſtand for the payment of the money: and that it was the ſame, whether paid to the witneſs Mrs. *Hopkins* or himſelf.

On the part of the defendant, the witneſſes ſpoke very ill of the character of the witneſſes againſt the defendant; and one or two witneſſes ſpoke of the good character of the defendant.

Beſides, it was contended that the action would not lie, from the nature of the caſe, the plaintiff being party to the iniquitous contract: and in pari delicto potior eſt conditio defendentis, the law will not ſuffer a party to draw juſtice from a foul fountain.

On the opening of the caſe, the exception to the competency gave a ſuſpicion of the merits: but on being aſked whether he would ſtand the trial or pay the money, (as the conſequence of the matter's coming out clearly ſo flagrant as ſtated, would not end with payment, but as he was in ſuch a relation to the court, on his ſuffering his name ſo to be tampered with, to give hopes of place, repreſentation would be made to his Majeſty, and the conſequences were eaſy to be foreſeen) Mr. *Chapman* declared he would ſtand the trial, let the event be what it would.

The whole tranſaction is ſtated to have paſſed when none were preſent but Mr. *Chapman* the defendant, this witneſs, and the plaintiff.

The jury found for the plaintiff.

After the verdict on this motion, the court would not ſuffer Mrs. *Hopkins*'s character to be gone into, as the jury had believed her.

A letter from an attorney was produced, laying as a ground for a new trial the claim in diſpute neceſſaries procured

procured from Mrs. *Hopkins* and loſs of time, at a ſum between 40l. and 50l. This letter was ſent to Mr. *Chapman*, and it concludes by ſaying, that if Mr. *Chapman* did not get her the place, (which he had ſo often promiſed her in the cuſtoms) Mr. *Walker* would bring an action or apply by petition to her Majeſty.

Chapman's affidavit was read, importing that Mrs. *Hopkins*, the only witneſs againſt him, was very indigent, and had been ſupplied by the ſervants of the court with victuals, goods, and money. And that ſhe, without the conſent or knowledge of the defendant introduced the plaintiff to him, who ſaid, "Sir, I am told you can do me a piece of "ſervice, and get me a place by ſpeaking to Lord *North*; "I have ſerved with alderman *Kennet*," or ſomething to that effect. That he, the defendant, ſaid, "he was not "ſo great a man as to preſume to ſpeak to Lord *North*; "that he had no intereſt to procure any place; if Mr. "alderman *Kennet* had, he would give what advice and "aſſiſtance was in his power, but could promiſe nothing "for himſelf." That afterwards *Walker* offered him ſomething; which he immediately refuſed, and ſhut the door on him; that after this the letter before mentioned, threatning him with an action, was delivered to him; and on his abſolute refuſal to pay a farthing, another perſon came, who ſaid he was no lawyer, but was deſirous Mr. *Chapman* ſhould pay a little money to get rid of the affair. *Chapman* ſaid, he would have nothing to ſay to him.

Chapman farther ſwears, that *Walker* never was deſired by him to lay out any money on his account, or advance any money, or procure any neceſſaries, or the like, for Mrs. *Hopkins* as ſtated.

Walker ſwears to Mrs. *Hopkins* having treated with him, and aſſuring him, that by her intereſt with Mr. *Chapman*, ſhe could get him a place; that they agreed on a ſum; but that he *Walker* required to ſee *Chapman* firſt. That accordingly Mrs. *Hopkins* promiſed to introduce him; that ſhe did accordingly; that he told *Chapman* of the converſation between him and Mrs. *Hopkins*; and that *Chapman* ſaid, if he *Walker* would pay the money to Mrs. *Hopkins*, he the defendant *Chapman* would engage to get him the place, and deſired him to pay to Mrs. *Hopkins* any ſum not ſhort of the ſum of 70l. agreed on for the place, and that he meant it as a preſent to Mrs. *Hopkins*, on account of the friendſhip he had for her; that he might depend on the place, or he would ſtand bound for the money; that *Chapman* ſaid

ſaid it might be neceſſary to enquire into the character of him the deponent *Walker*, on which he the ſaid deponent ſaid he had ſerved Mr. Alderman *Kennet* for ſix years, and that *Chapman* might have a character from him; that he hoped *Chapman* did not mean to deceive him, for he was a poor man, and had a large family; that *Chapman*, again, [344] made the moſt poſitive aſſurances.

That theſe aſſurances were repeated; that on the faith of them he advanced 50l. by inſtalment to Mrs. *Hopkins*, and informed *Chapman* thereof, who ſaid he had done very right; again aſſuring him of the place.

That *Chapman* having put him off ſeveral times, he at laſt found means to come at the ſpeech of him—that then *Chapman* ſaid he meant only a joke, and hoped he had got rid of the woman; and that he ſhould not pay the money; and that if *Walker* came to trouble him any more, he ſhould get him committed. He denies that *Chapman* had ever ſaid he was not ſo great a man as to preſume to ſpeak to Lord *North*, and that he could only promiſe his advice.

The counſel for the defendant objected, that though *Walker* anſwers minutely every part of *Chapman*'s evidence, (even to the moſt immaterial circumſtances) except only the letter of Attorney, he does not anſwer that, which muſt be taken therefore as admitted. It imports a very different ground, namely, neceſſaries, lodging, &c. at the requeſt of the defendant provided for Mrs. *Hopkins*; that therefore great ſuſpicion of perjury preſſes upon the plaintiff and his witneſs. That Mr. *Walker* could not be ſuppoſed ſo ignorant as to imagine that *Chapman* ſhould have the immediate diſpoſal of places in the cuſtoms.

That as to the objection on the point of law, Mr. *Walker*'s guilt, admitting all he ſtates to be true, puts him out of a ſtate of entitling himſelf to any relief, he having contracted for a bribe, as to which his want of ſucceſs makes no difference, nor was ever taken to make any.

That this point of law however was not meant to have been relied upon on opening the trial, and was immediately withdrawn on his Lordſhip's intimation. Nor did they now mean to rely on it, but truſted the perjury of the witneſs would appear ſufficiently; and the incerdibility in the thing itſelf, that either *Chapman* ſhould undertake it, or *Walker* imagine that he could.

Lord *Mansfield*—As to the objection in point of law, it is of ſome importance to be generally ſettled, and therefore I ſaved this point.

Action

Action for money had and received—contended that the defendant ſeduced him to give money on credit of getting him a place in the cuſtoms. The money paid—and now taking it thus for the ſake of the point in queſtion, that the money was paid in conſideration of this contract, yes ſays the defendant, but the contract is illegal, and therefore retain your money. And Mr. *Wallace* ſays very properly the plaintiff comes to be relieved from this illegal contract and there is a great difference where a party comes to overturn an illegal contract, and to be relieved againſt it, he ſhall not be relieved if he comes to take the benefit of an illegal contract; there he never ſhall be relieved, becauſe to relieve him, the court muſt affirm the contract.

[345]

Not only in prohibited contracts, but moral offences which would ſubvert the contract, the law will admit of this relief. The law for political reaſons prohibits a bankrupt from giving any money to a creditor to obtain a certificate yet the bankrupt on application ſhall have the money refunded.

Vide Eq. Ca. Ab. 86.

So in the caſe of uſury, when they don't come for the penalty, but to have the money refunded after payment of principal and intereſt. There was ſomething which ſeems to have fallen rather haſtily upon ſuch a queſtion in *Tomkins* and *Barnet*, * but the later authorities are otherwiſe, as in the caſe of *Daſhwood*.

* Namely that money paid by miſtake might be recovered on indebitatus aſſumpſit, but not money on an illegal conſideration, vide Salk. 22.

The caſe of *Law* and *Law* is a caſe almoſt in point 'twas on a bond given to a man as a ſecurity that the obligor would uſe his intereſt with a commiſſioner of the cuſtoms to get him a place in the cuſtoms, (for had the party contracting been a commiſſioner himſelf, he would have been within the ſtat. 5 & 6 *Ed.* 6.

As to the bond itſelf, I know not whether Lord *Talbot* had any doubt, but he ſtates thus:

Lord *Talbot*—The counſel on both ſides ſay the bond is good in law; therefore I ſhall determine upon the merits.

(Why they could not ſay otherwiſe, without deſtroying their own caſe, the objection was on the face of the condition.)

Now, if a condition is void in a court of equity, it will be void in law, as in the caſe of *Perkin*, bond of ſubmiſſion to proſtitution decreed void as *contra bonas mores*—ſo in the caſe of *Low* and *Peere*.—Bond, the condition of which was, the obligor ſhould not marry any but the obligee it was held that this was void and deſtroyed the bond, becauſe the obligee was not bound to marry him, and there

fore

fore againſt public policy, he might be kept in a ſtate of celibacy —In all theſe caſes, a court of equity will relieve a perſon who comes to diſallow the contract, and there is no difference between a court of law and equity as to ſuch relief, even when the condition does not appear upon the [346]
bond. (I think in all theſe caſes the court of equity adopts that principle which tends moſt to prevent the miſchief. It has been ſolemnly determined in the Common Pleas, its the ſame if proved, vide the caſe of *Collins*. And the reaſon he gives is almoſt as great as the authority.)

There is alſo a caſe of *Shipley* and *Woodhouſe* ſimilar to that of *Perkins*.

As to the letter in this caſe now before the court, it is very extraordinary it ſhould not have occurred at the time of the trial; it appears now, however. And it is very extraordinary on the other hand that the whole ſtreſs of the evidence ſhould lie on a witneſs who can only be denied by the plaintiff or defendant. This woman is impeached in the only manner in which ſhe can be impeached; by her character. However, as the jury credit her, we ſhould not go into that.

But let us examine farther how ſhe ſtates the payment of the money; ſhe ſtates he paid her 50l. any one would have ſuppoſed this ſum was paid at once. No: it appears on the plaintiff's evidence he paid it by inſtalments: farther, it is on a different contract; there ſhe makes it a contract for 50l. for a place worth 70l. the plaintiff makes the contract itſelf 70l.

Then as to the time of the letter, which is the moſt important circumſtance of all, for when Mr. *Wallace* had got half through, I was pretty clear there would be no new trial. But the time of that letter deſerves the utmoſt attention. I ſee what the letter conveys, and which may be the truth of the caſe—lending money to Mrs. *Hopkins*. He lent very probably on credit of her having intereſt with the defendant. The ſum is an unliquidated ſum; 'tis not alledged as upon contract, but ſhe boards and lives with him.

An unliquidated ſum, inſtead of a ſpecific ſum: this gives the ſtrongeſt ground for apprehenſions, and furniſhes great cauſe for a new trial.

But the defendant having neglected to produce this letter on the trial, the new trial ſhould be without coſts.

Mr. Juſtice *Aſton*—The caſe of *Tomkins* and *Barnet* is ſo looſely ſtated, that the reporters ſeem not to know what to make of it; one ſtates it to have been at Niſi prius, the

other in the King's Bench, as before a full court. And I ca
not therefore give much credit to a note ſo looſely ſtated
[347] a *dictum*, which is there that money cannot be recover
againſt a ſolicitor, ſo as to oblige him to refund, where t
money was given for bribing.

I queſtion whether Bribery in Elections, the growing vi
of this kingdom, would not be more likely to be reduced
it were known to be otherwiſe, and that a Briber could r
cover againſt the Bribee.

However, I give no opinion on that—nor what wou
have been the caſe if Mr. *Chapman* had procured the pla
and *Walker* had brought his action.

But here I take my ground upon the fraud.

Farther, the difference between an unliquidated and
ſpecific ſum, between a ſum in groſs and a ſum ariſing
money lent, neceſſaries furniſhed and other articles.

The non-anſwer to the letter now produced, joined
the doubtfulneſs of the queſtion, makes ground abunda
for a new trial.

The not anſwering this is, I think, an abandonment
the cauſe.

But the new trial, I think, ought to be on payment
coſts.

Mr. Juſtice *Aſhhurſt*—The caſe of *Law* and *Law* cit
by his Lordſhip is a caſe in point; and if a Court of Equ
would relieve there upon the bond, a Court of Law
relieve here—this to the point of law grounded on
fraud.

Then as to a new trial on the evidence of fact: if
defendant's negligence makes it neceſſary, as it does
tainly, that coſts be added, the importance of the
equally makes it requiſite a new trial be granted.

Lord *Mansfield*—The caſe of *Tomkins* aroſe from
money not having been paid to the man bribed; but its
to a ſolicitor to his order. There certainly he ſhall not r
ver againſt the ſolicitor, but ſhall take the loſs, having t
ed the money into his hands for ſuch a purpoſe.

Certiorari.

RETURN to a Certiorari—upon which the juſ
to whom the certiorari iſſued, return order upon
matter in queſtion.

Motion that the juſtices may return examinations b
them.

The court would not grant this. And Mr. Juſtice *Aſton* [348] ſaid, that if a conviction is returned, the court never order them upon information to return examinations. Except in caſes of Coroners, where the court, as ſupreme Coroner of the kingdom, will order a return of the depoſitions as the ground on which they go.

If they return falſely or inſufficiently that an action may lie is another thing; but we never oblige them to return to the certiorari evidence before them, ſuch as affidavits, or the like.

Outlawry.

MOTION to reverſe an outlawry in the uſual way.

Refuſed—the record not being in court.

Allowance under the Inſolvent Act.

MOTION to reduce allowance as being diſcretionary in the court, in the caſe of a priſoner under the inſolvent act.

The court would not do it; and ſaid they never allowed leſs than the full ſum of 2s. 4d. a week.

Inſolvent Act.

WHETHER a perſon who held a poſt in the horſe-guards could be diſcharged under the inſolvent act, ſtill retaining that poſt for his own benefit, was queſtioned.

It was urged, that it was a poſt which he could not aſſign, neither could he ſell it, unleſs by permiſſion, and that it was matter of indulgence whether he might ſell or no.

Mr. Juſtice *Aſton abſente Capitali Juſticiario*—My Lord is not here. I ſpoke to him of it at *Serjeant's-Hall*, and mentioned that it appeared very hard that a perſon poſſeſſed of a valuable intereſt, tho' not aſſignable, ſhould hold againſt his creditors, and take the benefit of the inſolvent act. My Lord Chief Baron *Smythe* was preſent, and mentioned a caſe of *Richardſon* a bankrupt, where, though the intereſt was not aſſignable, the court would not permit the bankrupt to have his certificate till he had ſold it. And Lord *Mansfield* ſaid he remembered the caſe. [349]

If he had applied to his officer, and the officer would not have conſented, then it would have been different.

Serjeant in Militia.

IT ſeems the office of ſerjeant in the militia is not held an intereſt within the inſolvent act, not being vendible.

Time of Payment of the Groats under the Inſolvent Debtors Act.

NOTICE given to pay on Saturday objected, becauſe made payable by the act on every Monday.

The court ſaid Monday was only by way of inſtance, and any other day would do.

After judgment in the caſe of *St. John* and *Errington*, * upon Sir *Brian Broughton*'s will, the party who had made the eſſay of what opinion the King's Bench entertained on his ſide, finding it adverſe, the matter appeared in form.

* Vide ſupra, p. 113.

This caſe came before the Common Pleas, and was argued pretty largely, rather upon conſtruction, as to the effect which the words muſt legally carry, than upon the intent.

St. John *againſt* The Biſhop of Wincheſter.

On a *Quare impedit*. 29 *Nov.* 1773. *Mich. Term.*

I HAD been preſent at part of the arguments in the Common Pleas, but had taken no note as far as I find, and not expecting it would come on when it did for judgment, I was not in that court till a little after eleven. However, though the Lord Chief Juſtice had proceeded a little way, I was able to collect the greateſt part of the judgment, which was nearly to this effect:

The title of all fees is *prima facie* in the heir, where it originally reſides, and muſt not be taken out of him, unleſs by expreſs words, or neceſſary implication.

Vaughan 263.

[350] Here it was very probable the teſtator did not mean to divide any of the lands immemorially occupied with the farm.

Vide 259, various caſes where he ſhall not be diſpoſſeſſed but by neceſſary implication.

Two

Two inſtances, I think, there are, which may be qualifications of this rule.

One where the deſcription is partitive, and from its ſeveral members the entire deſcriptions of the eſtate intended may be collected, rejecting as ſurplûſage what is inſignificant or ſuperfluous, or does not anſwer the general and entire deſcription itſelf, ſo taken from the ſeveral parts, but is inconſiſtent with it and impoſſible to be ſatisfied.

The other, where the deſcription conſiſts of two parts; one of which is a complete deſcription, with which the thing correſponds, and the other not belongs to it at all.

The teſtator here had an advowſon in poſſeſſion, he had eſtates contracted for. Is the advowſon in queſtion bought or not bought? Wills muſt be interpreted according to the common ſenſe of words, in the general and vulgar uſe of them among men. In common language, if a man has an eſtate in poſſeſſion, and is aſked have you contracted for this eſtate? No: I have bought it long ago. If aſked have you bought ſuch an eſtate? No: I have contracted for it. Words are to be taken in wills according to the common and obvious acceptation. There is no drawing a line between an eſtate bought before the will three months or twenty years. And farther, it does not appear there was any contract independent of the conveyance.

Next, this deſcription is not diſtributive in ſuch a manner as that part will fully anſwer the circumſtances of the eſtate, and another part not apply to it; for no part applies to it; therefore none can be retained as completely or at all deſcriptive, and the reſt rejected as ſurpluſage.

The words "contracted and agreed" will not expreſs an actual purchaſe; there muſt be words interpolated, ſuch as the eſtates which I have before purchaſed, and alſo thoſe which I have contracted and agreed for.

But there is another ground on which, if we agree, the judgment I pronounce will be principally founded. It is the alternative deviſe, or in lieu thereof, what does that refer to, the entire deſcription before? As to the eſtate contracted for in *Hants*, there was no occaſion to give an alternative of what he could deviſe; but of an eſtate which [351] he wiſhed, but could not legally, in lieu of that, the money to ariſe from the ſale in *Lincoln*, which will exactly anſwer to this one advowſon. This eſtate deſcends to the heir at law: What the remedy at law will be, is another conſideration, and not before the court. The heir at law, however, may be compelled in a court of equity, to ſell the eſtate,

eſtate, and to receive the money. Next, Lady *Braughton Delves* is to lay out the money, which will buy the eſtate in *Hampſhire*. If the *Lincoln* eſtate ſells for more, the heir at law will have the ſurpluſage, if for leſs, it will be to be ſupplied out of the aſſets.

Now where there is a thing given, and an equivalent inſtead of it, the equivalent explains the thing. On a computation, the 27,000l. given as an equivalent, will exactly anſwer the eſtates contracted for in Hants.

I have looked into the caſe in the court of King's Bench, which is materially different: For there is no mention of the circumſtance which concerns the *Lincolnſhire* eſtate. Without any judgment, therefore, or opinion upon that, we are of opinion, the advowſon purchaſed does not paſs to Lady *Braughton Delves*. As to the word advowſons, in the plural number, it appears, that the teſtator uſed the ſame word where he had no advowſon to paſs, but only a preſentation to a perpetual curacy; which he might indeed take for an advowſon, but to which the ſame objection would lie, as to the uſe of the plural number.

Error from the Common Pleas.

In the King's Bench, Trinity term, 4 June 1774.

Mr. *Mansfield*—My Lord, this comes before your Lordſhip by Error out of the Common Pleas. The plaintiff claims under the widow of teſtator, as deviſee; the defendant under a conveyance from Sir *Brian Braughton*, the heir at law, on a ſpecial verdict, upon which the judgment in the Common Pleas was formed. The jury found as follows: The jury find in 13 June 1763, articles of agreement between Sir *Brian Braughton*, the teſtator, and *A. B.*

Other articles in the ſame year with Mr. *Pitt*, to convey lands.

In February 1764, conveyance of the advowſon to Sir *Brian Braughton*.

Farther ſtated, that Sir *Brian*, having made this purchaſe and having eſtates in *Suffolk*, *Lincoln*, and *Salop*, and a ſmall eſtate in *Cheſhire*, made his will in 1764. The material
[352] part is, "I give all the manor, meſſuages, advowſons "farms, tenements, hereditaments whatever, in the county of *Hants*, for the purchaſe whereof I have already "contracted and agreed, to my dearly beloved wife, or, "li.

"lieu thereof, the money ariſing from the eſtates in *Lin-*
"*coln.*"

An eſtate in *Stamford* he gives to his heirs in tail; remainder over to perſons named in the will.

Like deviſe of advowſons in *Cheſhire*.

Verdict ſtates, that he had no advowſon in *Cheſhire*, or *Stamford*, but only a nomination to a perpetual curacy for the time being.

Queſtion, Whether as to the advowſon purchaſed before the making of the will, Lady *Braughton* is entitled? This will appear upon the intent, and circumſtances.

This does not depend either upon caſes or rigid rules of law; but on the conſtruction of the mere will.

The ſole diſpute is not on the quantity of the eſtate; but on the premiſſes, whether this advowſon did paſs.

The verdict ſtates in 1763.

In *October* 1763, contract for the purchaſe, to be completed on the thirteenth of *May* 1764; before which he purchaſed the *Hampſhire* advowſon.

He appears then to have intended to give his property in *Hants* to Lady *Braughton*, his *Stamford* and *Cheſhire* eſtates to his heir.

He has given in the moſt comprehenſive manner poſſible, and uſed the word advowſons in the plural number. It is contended on the part of the heir at law, that, notwithſtanding theſe general words, they are ſo limited and reſtrained by the words, "for the purchaſe whereof I have already "contracted and agreed," that their effect ſhall fail of carrying ſo extenſively as they otherwiſe muſt have done. Yet, undoubtedly, every purchaſe is a contract, and more; and ſo every man would underſtand theſe words, upon the common interpretation.

This advowſon had been recently purchaſed, and therefore he might not ſo ſtrictly have attended to the diſtinction.

What would have been the caſe if he had ſaid purchaſed? The heir would have ſaid, "You have only the advowſon of "*Matſon*, the reſt were only in contract." The heir would [353]
have been told, that in equity, it was to be taken that the teſtator, by the contract, had made a good purchaſe, in the ſenſe of paſſing it as ſuch; and therefore, *vice verſâ*.

The words are not ſatisfied with this conſtruction, if only one ſhould paſs. *Bulſtr.* 176, "All my moieties in "*Kent*" paſſed, the one in *Kent*, and another in *Eſſex*.

Another

Another caſe, in much earlier days, *Dyer* 376, a man, who on feoffment had conveyed an houſe, formerly the houſe of *R. Cotton*. It turned out, *R. Cotton* never had it, but *James Cotton* had; and this was held ſufficient to paſs the houſe, though upon a feoffment.

Burr. Goodright, on demiſe of *Paul*, againſt *Paul*, Queſtion, upon a will, "my farm in *Bovengton*, in the tenure of *Smith*," Queſtion, upon a woodland expreſsly excepted in the leaſe of *Smith*, which yet was held to paſs.

Mr. *Dunning*—The queſtion, if there be any, is a queſtion of intention. I find a difficulty how there can be a doubt of the intention. If he has not uſed the fitteſt words to expreſs what I conceive to have been his intention, I own, had I been at his elbow, I could not have furniſhed him with better words. I admit, that the words which ſtand firſt are ſo general, as to paſs all his eſtate in *Hampſhire*; but the following words, I think, have juſt the ſame effect as if, having given the whole of a thing in the beginning, he ſhould expreſsly reſtrain that whole to one half.

He gives Lady *Braughton* money, to carry the contracts into execution; therefore this was given as an equivalent, in caſe any doubt upon title; not in order to purchaſe what was purchaſed already. I don't know the queſtion can be made clearer than on the words of the will.

But Mr. *Mansfield* ſays, it's a contract and more; it's one of thoſe mores which does not comprehend but exclude the leſs. It was near the purchaſe; might it not have been much more remote? The purchaſe was made complete about four months before the will; can the conſtruction upon this will depend upon the date? If they had been purchaſed thirty years before, would it have made a difference? If the purchaſe was preceded by a contract, this, it is ſaid, may make a diſtinction. I don't know that was the fact; nor is it upon evidence, and probably there was none; nor do I care if there were: For a thing purchaſed, preceded by a contract, or a purchaſe without any precedent contract, will make no difference in this reſpect. The method to have removed a doubt would have been, not to have ſaid purchaſed ſimply, or contracted ſimply; but he would have ſaid, "for which I have contracted and agreed, "or purchaſed." But even if the word had been purchaſed, a contract would be conſidered as a purchaſe, and executed as ſuch, by a common application on the other ſide the Hall: But I deny the terms are convertible, or that a purchaſe

purchaſe will be implied to paſs by words, which paſs expreſsly an eſtate in contract.

Not only words, but every letter of the will, muſt have its effect given, and that at the expence of expunging whole ſentences; eſpecially that "for the purchaſe whereof I have contracted and agreed." I will only ſay, the force of this I can't conceive, with reſpect to operative words, and which can be brought in only to have their operation, and not *currente calamo*; whereas, on the other ſide, one may eaſily conceive how the letter *s* might come in by accident, or overſight, or of courſe merely. I think my friend was not guarded as uſual, upon the whole of the caſe, when he ſaid inaccuracies are not to be regarded. I will beg the court may uſe them as they always do, reject them: But I think they may reject the letter *s* as coming in as impertinent, rather than whole ſentences in different parts of the will, evidently material, and which cannot come in by accident, or of courſe. And there can be no prevention of dying inteſtate; which, if it be an evil, he muſt do at all events, as to ſome parts.

He uſes this word advowſon in the counties of *Cheſhire* and *Stamford*; and I ſhould have thought it thrown in generally, among words comprehenſive of every poſſible ſpecies of property, if he had not mentioned tithes; but at leaſt, it ſhews that he was miſtaken in the one inſtance, for he had no advowſon in theſe counties, though he had a donative. Why then are we obliged to ſuppoſe, in the other inſtances, that he was more preciſely acquainted with the ſtate of his property? Theſe two inſtances cannot be ſaid to be immaterial: And they were not in the caſe upon which your Lordſhip decided.

Mr. *Manſfield*—I find we concur perfectly, that all wills muſt be interpreted by his intent who made them.

I don't agree that the words, "contracted and agreed," are as effectually reſtrictive as if he had ſaid, after words paſſing the whole, that he gave only half.

Lawyers may underſtand the difference very clearly between contract and purchaſe; and know that the contract, being completed, ſinks in the purchaſe; But I was contending for what is the common ſenſe and language of teſtators.

With reſpect to the words which paſs the eſtates in *Staffordſhire* and *Cheſhire*, I ſhould think the argument runs rather, that he uſed general words in both inſtances, meaning all the eſtates in thoſe counties ſhould paſs to his brother; as in the other to his widow. I do not think it proper to make

any

any argument upon the former judgment of the court; a knowing that if the caſe were the ſame, it would have n effect upon what ſhall be now determined. If it was not th ſame, it will have a different conſtruction; if it were th ſame, then and now, yet ſtill, if the court thought th judgment wrong upon which the queſtion turns, they woul have no regard to the former deciſion. I declare, I can ſe nothing that makes a diſtinction. What I rely upon is, h meant the eſtates in thoſe counties before named ſhoul paſs to his brother; in the other to his widow.

Lord *Mansfield*—If this caſe came before the court ex actly in the ſame circumſtances as before, the opinion the given would have no influence upon the preſent determin tion. On the contrary, the authority ſince would greatl ſhake that deciſion. An heir does not take by intent o teſtator; but for want of being excluded.

The heir cannot be diſinherited by probable conjecture or what is called in *Gardiner* and *Sheldon* poſſible implication I have ſtruggled as far as I could to be of opinion with th determination now before us; and but yeſterday I ha brought myſelf to be ſatisfied: But, on having the caſe be fore me, and finding what the argument was ſtrongl grounded on in the judgment, of an equivalent given, is miſtake, I am returned to my former opinion.

The whole queſtion between us is, whether the word ad vowſon had a meaning; and that meaning underſtood and applied, then the conſequence will follow.

If he had ſaid "the advowſon of *Motſon*, and the ad vowſon of *Abbot's End*, for which I have already contracte and agreed," there could not have been a doubt upon a re cent purchaſe. Queſtion, whether the word advowſons, in the plural number, is to be rejected?

I have no doubt, it might have been upon argument both of the ſubject matter, and argument upon the intent. In family eſtates they go as general words; but in this caſe the were particularly circumſtanced.

Whether to gratify himſelf, or his wife, he had a mind to make a purchaſe in *Hampſhire*, where he had no famil eſtate, and ſell in *Lincoln*, for that purpoſe he enters into contract; and for the ſame he gives directions in his will.

13th June 1763, he contracts for lands in *Hampſhire*, to the value of about 13,000l. covenant to be completed 13th of May, 1764.

[356] 13 October 1763, he articles for other eſtates, and an advowſon; 7000l. paid down on the 25th of March 176 till

ſtill the money was to be paid [14000l. I think, was the ſum, there or thereabouts.]

25 February 1764, he purchaſes the advowſon. There are then three different ſorts of eſtates, which he had to diſpoſe of, one upon articles wholly executory; another upon articles not wholly ſo, becauſe a third part of the money had been paid; the third under actual recent purchaſe.

To this laſt the drawer of the will muſt have been privy, as the interval was between the third of February and tenth of April, when the will was made.

The drawer meant to comprehend them all in general words. He ſays, therefore, "for the purchaſe whereof I "have already contracted and agreed." If he had ſaid only contracted and agreed, that would have excluded the contract, where a great part of the purchaſe-money had been paid. Then he brings in the word advowſons, and he takes in all he has in *Hampſhire*, with the utmoſt generality.

Now ſhall this be ſet aſide, becauſe he has ſaid, "for "the purchaſe whereof I have already contracted and agreed?"

What was greatly relied on in the Common Pleas; and led me to think I ſhould find reaſon to agree with that judgment was, that he has given an equivalent.

That he meant only the mere executory contracts, becauſe he has given, in lieu thereof, the money from the ſale of the *Lincolnſhire* eſtate. Now the equivalent muſt be underſtood co-extenſive with the thing for which it is to be an equivalent; and the 27,000l. from the ſale of the *Lincoln* eſtates, will juſt amount to the purchaſe of the eſtates under contract, executory in *Hampſhire*. But, looking into the will and verdict, I find there is no ſuch thing. It cannot be an equivalent; for this, becauſe 7000l. was already paid. He gives that, and ſo much more money as ſhall be neceſſary: Then it is not an equivalent, but is to carry the purchaſe into execution.

What does this mean? He could not but have in view this would be carried into execution before his death. The time was elapſed. It is merely that he gives her as much more as ſhall be neceſſary to complete the purchaſe of whatever of the eſtates intended for her ſhould happen to be unpurchaſed at his death.

The whole then is, whether there are words in the will. It is manors, lands, and advowſons. Now we muſt reject the word in its literal ſenſe, and ſuppoſe they did not underſtand what the word meant. No argument ariſes from what

what relates to the deviſe in the other place: For all it proves is, he meant in once inſtance to give the whole to his brother, in the other to his wife.

Mr. Juſtice *Aſton* expreſſed his opinion upon theſe grounds, amongſt others, that the queſtion was, whether ſubſequent words ſhall reſtrain the effect of the plural of the word advowſon: That, he thought, the words which followed in this caſe ought not to take away the efficacy of the former.

That the great ſtreſs of the argument in the Common Pleas laid upon the equivalent, does not apply. Therefore, with his Lordſhip, upon the manifeſt words and intent, that both will paſs.

The other two Judges were of the ſame opinion.

Judgment in Common Pleas REVERSED.

On Appeal to the HOUSE of LORDS, the Judgment of the King's Bench was AFFIRMED.

Attorney.

HIL. 1768. RULE. It is ordered, that the maſter be ordered to prepare the proper book, and that every attorney in the cities of *London* and *Weſtminſter*, or within ten miles, ſhall enter their names and place of abode, or ſuch other place within the cities of *London* or *Weſtminſter*, where he may be ſerved with notice. And that ſervice ſhall be good where he was laſt entered. And if any attorney neglect or diſobey to enter, then ſervice at the maſter's office ſhall be deemed good ſervice, except where perſonal ſervice is required.

The alternative in this rule—place of abode, or ſuch place, &c. where he may be found, was objected againſt. But Mr. Juſtice *Aſton* explained, that there were many attornies, who had no fixed certain place of reſidence; that therefore, ſuch place where he might be ſerved, though not his actual place of abode, was mentioned. But where name and place of abode is entered, then ſervice at that place is the proper ſervice.

[358] RULE, *Mich.* 10 *G.* 2. Upon all proceſs on the firſt and ſecond day of the term, the declaration muſt be delivered conditionally, on the return day.

Eſſoign Day.

FILING a declaration on the Eſſoign day of the term is not to be a declaration as of the term itſelf.

Right

Right of Soil in an Highway.

ON a queſtion of a right of ſoil in an Highway, it was contended, the preſumption was in favour of the freeholders on each ſide, and not of the lord of the manor: Evidence of ownerſhip was offered on behalf of the lord. The judge who tried held it not ſufficient to repel the preſumption. On the motion for a new trial, contended, that the jury ſhould have found upon this evidence: And that all preſumptions of this nature admitted proof to the contrary. Thus taking gravel, &c. was a *prima facie* preſumption of the right of the ſoil.

By the 5 *Eliz. c.* 13. *ſ.* 3. ſurveyors of the highways may take rubbiſh, or any the ſmalleſt broken ſtones of any quarry or quarries within any pariſh where they are ſurveyors, for the repair of the ways within their pariſh or limits, without the controul, licence, or conſent of the owners. Therefore taking ſtones, &c. away, does not prove a right of ſoil concluſively, againſt evidence that they took as ſurveyors.

Poſſeſſion is evidence of property: But if poſſeſſor will acknowledge he is in for another, that is evidence, not only againſt himſelf, but againſt all mankind.

Paſſing over another's ground is, *prima facie*, evidence of a right of way; but you rebut this if you prove he aſked leave.

A gate croſs a road is a nuiſance, unleſs it be an ancient gate, but not then, though a modern would. And a nuiſance ſhall not be preſumed, becauſe that would be preſuming criminality, which the law never doth preſume.

As to the preſumption of the ownerſhip of the ſoil of an ancient highway, whether it be in the lord of the manor, or in the owners of the freehold on each ſide.

Brooke, tit. *Chemin. Plac.* 10. Note, by all the juſtices, the king hath nothing in the highway but paſſage for himſelf and his ſubjects; but the freehold is in the owner of the ſoil. [359]

Another caſe, that the ſoil and freehold of the highway belongs to the owner of the lands of each ſide, and therefore he ſhall be obliged to cleanſe the ditches.

1 *Roll's Abr.* 392. Generally, the owner of the ſoil on both ſides the way ſhall have the trees growing in the way.

Contended, on the other ſide, that the preſumption in all caſes was, that the lord of the manor was owner of the ſoil.

ſoil. The lords of manors, from time immemorial, wer owners of the ſoil. If no other right of ownerſhip has bee exerciſed, the right continues where it was.

Brooke, Chemin. Plac. 11. Note, where a man gives a ma nor, the donee of the manor hath the freehold and ſoil o the highway, and might have diſtrained, but is prevented b the ſtatute, *Et ex hoc ſequitur*, that the lord of the mano is owner of the ſoil. *Keilway*, 141.

Lord *Manſfield*—My great doubt in this caſe is, whethe the jury exerciſed any judgment upon the evidence, reje ing the preſumption. As to the preſumption, I think th principle of the more modern authorities is rightly take that the preſumption is in favour of the lord of the mano even though the highway may be more ancient than th grant of the manor. If no body can ſay they have any ar gument or proof of property in them, then it belonged t the crown, and paſſed with the reſt of the lands.

But if the roads paſſed through the property of other and are ſo ancient that no body can ſay when they wer made, or ſpeak to property, the only queſtion is, where the firſt preſumption upon that naked, ſtrict, abſtracte caſe.

I think the reaſon of the thing is, when the naked pre ſumption ſtands ſtripped of evidence, that it is in the owne of the land on each ſide. But this is only ſuch a preſump tion as is not like a title. Acts of ownerſhip againſt a tit once clearly eſtabliſhed, would not have been ſet up, ſo t to avail againſt the title.

For the ſake of certainty (and it does not matter ho how it is determined, if there be a certainty) the preſumpt on is in favour of the owners on each ſide.

[360] But there is alſo a preſumption in favour of the lord- How does the preſumption ſtand in favour of the lord There is an under-tenant in one of them, who pays to h immediate aſſignor, who pays over to the lord.

A tenant applies for leave to pull down one of theſe co tages, becauſe he has not room to turn.

Theſe are recent inſtances, and preſume more ancie acts of ownerſhip.

Another agrees to pay five guineas for gathering coals o the ſoil; but then thinks it not worth his while.

This is ſtrong evidence. The nature of all evidence i that contrary evidence, if to be produced, will take off it weight: But here is no ſuch contrary evidence. I imagi the jury took it as a direction for a nonſuit.

M

Mr. Juſtice *Gould* having ſtated to them that the evidence was not ſtrong enough to repel the preſumption.

On theſe circumſtances, and the ground of it's being a queſtion of right of property, rule granted for a new trial, but on payment of coſts.

Entry.

Doe, on the Demiſe of Davenport *againſt* Duncanan.

ON a rent charge, ariſing from coal mines, with clauſe of re-entry for arrearages, entry held not neceſſary to maintain an action, unleſs to ſave the effect of a fine, in which the ſtatute of 4 *H.* 7. made it neceſſary.

Bur. 1895, was cited. Lord *Raymond*, 750. And 14 *G.* 2. *c.* 28. which provides, that in all caſes between landlord and tenant, without any formal demand and re-entry, the ſheriff ſhall and may deliver poſſeſſion. And it was argued, that this ſtatute was a conſtructive declaration of parliament, that the caſe in *Salkeld* and Lord *Raymond* is law; namely, that wherever you can enter, you muſt; and that you muſt gain the poſſeſſion by entry, before you can part with it. And the counſel who contended for the neceſſity of the entry ſaid, he could not find to the contrary any caſe, or any thing, on any general principal law.

Lord *Mansfield* aſked what was the reaſon of the diſtinction between non-payment of rent and the other caſes. [361]

Mr. *Davenport* took a diſtinction, and ſaid that, on condition broken, the eſtate in this caſe was ſaid to reveſt, which he apprehended, was an incorrect expreſſion, for that the original eſtate continued; but where the grantee had no eſtate in the lands, but merely a naked power of re-entry, there he muſt enter, or have no action.

Mr. *Wallace*—That the re-entry was not one in form, and actual, but an entry in law.

Where an heir ſhould enter, and ſome body enters before him, the old doctrine of abatement ‡ and intruſion is not

‡ Abatement is where one enters after the anceſtors, before the heir. Intruſion is where one enters, or continues on poſſeſſion, after an eſtate for life determined, to the prejudice of remainder, or reverſion. There is alſo diſſeiſin, which is an unlawful entry, and ouſter of him that hath actual ſeiſin. Uſurpation, where one who has no right to preſent, preſents to a church, and his clerk is admitted and inſtituted, and continues for ſix months. Diſcontinuance is where he who has not the full right, aliens, and puts the party injured to a real action. Deforcement, properly, is where he who has no right, has recovered againſt the perſon who hath the right; or holds poſſeſſion from him who hath the right of the property, but never had the poſſeſſion.*

* Vide Hale's Analyſis, ſ. 43. Co. Lit. and 3d Commentaries.

now

now ſo held, that a counſel upon a circuit would give advice to make an actual entry. What end of juſtice is it to anſwer?

Fines, I own, have a technical reaſon, with reſpect to entry. It appears by *Coke*, that their operation is to diveſt all legal poſſeſſions, and reduce them to a bare right; therefore you muſt enter to reveſt the poſſeſſion.

In caſe of vacant poſſeſſion, the old form was, you muſt enter and ſeal upon the premiſſes; but if there was any perſon to confeſs properly to the ejectment, it was not neceſſary to uſe this form; and the ſtatute ſeemed to have intended only to determine as to vacant poſſeſſions. Or ſuppoſe the meaning to have been otherwiſe, might not he argued the legiſlature, in that inſtance, in a caſe between landlord and tenant, and the parliament, more compoſed of landlords than lawyers, might not they think they were making law, and not advert that it was law before?

Lord *Mansfield* obſerved, this often happened; and that there had been a caſe, where Sir *Eardley Wilmot* cited ſeveral inſtances of it; and that it was particularly likely in this caſe.

Lord *Mansfield*—I was upon the trial, and continue clearly of opinion, that re-entry was not neceſſary, except to avoid a fine; and there it is neceſſary, by the expreſs words of the ſtatute. If ejectments had been known then, in the uſe to which they are now applied, the legiſlature would, probably, have mentioned them.

[362] But, to make an entry neceſſary here, would have no other effect than that of obliging to a troubleſome ceremony, to take the chance of it's being omitted, or informally executed, to turn the party round, and avoid a juſt debt.

Ludlam on the Demiſe of Hunt.

In Ejectment.

ON a caſe reſerved from the *Leiceſter* aſſizes for the opinion of the court.

This was upon the will of *Samuel Ludlam*, in 1738.

His power of making the will turned upon the validity of a will contended to have been made by his father, in 1684.

A queſtion aroſe, whether a copy of this will, from the ſpiritual court of *Leiceſter*, could be admitted, which was the principal point ſubmitted.

And

And it was argued, that no rule of evidence was more clear and certain than that when a deed or will is to make a title, the deed or will muſt itſelf be produced, and not a copy. And that ever ſince the caſe in *Rolles*, ſo it hath been univerſally held, and that upon many and good reaſons, and in conformity with the ſtatute of frauds.

That though it would be too much to ſay, that on all occaſions the evidence of a copy ſhould be refuſed, yet, that there muſt be very ſtrong reaſons to admit of any thing that might any way ſeem to tend to the prejudice of ſo general and uſeful a rule. The copy comes from the ſpiritual court, but the hand and ſeal of that court is not the proper evidence here, to prove the authenticity of a will by a copy.

Poſſeſſion has gone ever ſince as it would have gone without the will.

There is no other evidence of the will but this copy; and, by the nature of the thing, a will is generally capable of other evidence.

But the mark of the executor (for he did not write) is intended to be compared to the mark he uſed to affix to other inſtruments. This was a mark ſet to a bond given to the ſpiritual court for producing the will.

There is no ground in authority or reaſon for admitting [363]
compariſon of marks.

That it appeared the will was never in poſſeſſion, if it ever exiſted.

That in favour of the heir at law where circumſtances are doubtful, the court would incline always.

As to another objection, which was, that this being in *Carliſbrough*, and lands incloſed there by act of parliament, the act of parliament ſhould have been produced.—It was anſwered, that ejectment being a liberal action, and by having only the lands in queſtion, they could conveſs no other.

On the other ſide, that the rule which held in all caſes is only to take the beſt evidence of which the caſe would admit.

And if there has been no poſſeſſion under the will, there has been no ſuch adverſe poſſeſſion as might be evidence to-wards inducing a preſumption againſt it.

Lord *Mansfield*——The caſe is clear—a man by loſing the evidence of his title ſhall not loſe his eſtate. If I cannot prove a deed by producing it, you may produce a counterpart; if you can't produce the counterpart, I may produce a copy, even if you cannot prove it

to be a true copy; if a copy cannot be produced, you may into parol evidence of the deed.*

When poſſeſſion had gone againſt a will for moſt part thirty years, and the will from that time, the time of making, never appeared, the evidence of the will went yond the poſſeſſion.—And here all the family are evide to this will, by ſigning the ſecurity to the ſpiritual court, allegation, by all kind of judicial proceedings, and the p ſeſſion has not been adverſe to the will.

Mr. Juſtice *Aſton*—Evidence from the regiſter-book been received in two inſtances. The court of Chancer the caſe of *Gorges* and *Foſter*, decreed that the copy or bate of a will ſhould be received in evidence as the orig will itſelf—Now the court of Chancery never decrees ſhall be evidence, which in its nature is not evidence.

[364] Lord *Mansfield* obſerved, that it being ſtated all the ſcribing witneſſes were dead, the laſt in 1736, com riſon of hands was all the evidence which could be given

Separate Fiſhery.

THE preſumption is, that he who has a ſeparate fiſh is owner of the ſoil. Vide *Skinner* 342. *Brook*, title *Peſchariæ*. *Co. Lit.* 121. *Roll. Abr.*

This was upon a caſe reſerved, which was therefore ſerved to require a finding much leſs ſtrict and circumſta than a ſpecial verdict. And Lord *Mansfield*, I think, of opinion, that notwithſtanding Lord *Coke*'s obſerva the preſumption certainly was, that the man who hath ſ ral fiſheries is the owner of the ſoil; and that Sir *John vie* obſerves upon *Coke*'s objection to the contrary, and nies it expreſsly; and then if there is no evidence to contrary, the preſumption ſtands.

Mr. Juſtice *Aſton*—That notwithſtanding the *dictum* of L *Coke* (who yet admits that by the words *aquam ſuam* the will paſs) the caſe in *Salkeld* 637. Caſe in *Brooke plac. paſſe* cited by Mr. *Wallace*, and another ſtill ſtronger with Sir *John Davie* go to the contrary.

Curia omnis aſſenſit.

Juſtification.

WHEN three perſons join in one juſtification, the ju cation is good for all or bad for all. *Str.* 1104. qu Te

* Evidentia eſt optima quam res recipiat probatio; in qua ſi ſumm ficiant vel ad minima liceat decurrere nunquam autem per infirmi barè licet; neque ubi fontes ſuppetant rivulos ſectari.

Tenant from Year to Year.

MORTGAGEE ſerves the tenant with declaration in ejectment, the tenant defends to the ejectment, under colour that if he did not defend, he ſhould be turned out.

Contended, that ejectments by mortgagees are not conſidered as claims under an adverſe title, but as means of coming at the rent, and therefore notice of ejectment is not neceſſary in ſuch caſes in that manner which is required, where a landlord turns the tenant out.

The defence on the part of the tenant was called by [365]
Lord *Manſfield* a moſt wicked defence; and he ſaid, that ſuch an objection was never made before as the preſent. The mortgagee when he brings an action of this nature, would never ſuffer the mortgagor to turn the tenant out of poſſeſſion. From year to year, is an eſtate which huſbandry requires to have ſtability, and the law will not refuſe it.

In great eſtates, who gives notice, the landlord or tenants?

I would not have it thought, if the tenants are ready to ſtorm, and leave their landlord, giving him notice to defend, that the mortgagor ſhall turn tenant out.

Tenant from year to year, every year is a new demiſe, and may be ſo pleaded.

Mr. Juſtice *Aſton*—The ſerving the tenants with the declaration is the form only by which the mortgagee requires the rent againſt the mortgagor, who is his tenant at will, after the condition broken.

Mortgagee ſays, I come for title on the whole eſtate of the mortgagor, I ſhall not turn out the tenant; if I would, the court would not ſuffer me.

Lord *Manſfield*—It goes equally to paramount poſſeſſion, and I think there would have been no difference if it had been a leaſe for years.

The mortgagee only makes uſe of the proper form: judgment will go againſt a nominal perſon, and tenant cannot be hurt, if he will do as he ought, not make any defence.

Curia omnis aſſenſit abſente—Mr. Juſtice *Willes*.

The King *againſt* George.

ON a ſpecial verdict, in which the queſtion principal ariſing was, whether reſiants in a manor within a hundred owing ſuit and ſervice to a leet within the hundred but not comenſurate or co-extenſive with it, the limits of the hundred reaching beyond thoſe of the leet, ſhall be obliged to ſerve as conſtables out of the leet, but within the hundred.

[366] Serjeant *Davy*—It was argued that there are two ſorts of ſuits, ſuit-heriot and ſuit-ſervice. Suit-heriot is on commorancy, and ſuit-ſervice ariſes on reſervation.

With reſpect to ſuit-heriot, it binds all except biſhops freeholders and women, and others particularly exempt by the ſtatute of *Marlebridge*—and tenants in antient demeſne though not exempt by the ſtatute, but on account of the dignity of their ſervice. *Shower*, 2 *Ventr.* 344.—It appears by the latter, tenants in ancient demeſne may, notwithſtanding, be made conſtables of the hundred.

Fitzherbert 161. folio edition. Tenants in an antient demeſne are not bound to do ſuit at the ſheriff's leet; there is a writ which exempts them, but he does not ſay from being conſtables.

So women are exempt from doing ſuit; but a woman may by cuſtom be obliged to be conſtable. [That is, I apprehend, by finding a ſubſtitute.] Vide *Wood's Inſt.*

3 *Keble* 230. *King* and *King*. Queſtion whether living within an inferior leet will exempt a man from being conſtable of an hundred? *Hale* ſaid 'twas what the court leet could not meddle with, and the hundred extended beyond the leet.

11 *Mod. Regina* and *Jennings*. Court held defendant not excuſed, though an inhabitant of the town of *Farnham*, notwithſtanding it appeared that no man of that town was ever known to execute the office of conſtable of the hundred; therefore it will not follow that if a man cannot be obliged to do ſuit in two leets, that he cannot be obliged to be conſtable, becauſe he does ſuit.

Lord *Hale* ſays, he that owes ſuit to the leet, owes not to the hundred, but by cuſtom he may do ſo; and here the cuſtom is alledged and found upon the verdict.

On the other ſide by Serjeant *Burland*—Contended, that ſince leets were ſeparated from the tourne, for the conven-

ence

ence of the hundred, no perſon ſhould be liable to do ſervice at two leets, eſpecially as when he had found pledges at one leet, all the purpoſes of the antient policy were anſwered. And ſo in *Coke*'s Commentaries on *Magna Charta*, chap. 10. and on the Statute of *Marlebridge*. 'Tis carried ſo far, that if a man has houſes in two leets, he ſhall be obliged only to do ſervice where he is reſident; nay, ſomething farther, that if his houſe ſtands in two leets, he ſhall be obliged to do ſervice only where his bed ſtands. *Hawkins Plac. Cor.*

The court leet is in no reſpect inferior to the juriſdiction [367] of the hundred *pro viſu franci plegii*, as the ſheriff's tourne of the hundred was; and therefore that a perſon doing ſuit at the leet, cannot be liable to be choſen conſtable.

Regular conſtables are to be choſen at the leet, and the jury who are reſiants chooſe them; they are ſuppoſed to be choſen from among the reſiants. They could not before the time of *Edw.* 3. which is the æra of the inſtitution of juſtices, be choſen, unleſs preſent at the court leet, for they could not be choſen but in the court, and when the ſeſſion of the court was diſſolved, the ſteward's juriſdiction ceaſed.

If they were reſiant, they were obliged to be preſent, or were ameſnable to the jury; if preſent and refuſing to be ſworn, they were ameſnable to the ſteward.

With reſpect to women, it cannot be applicable to the hundred of a cuſtom to chooſe women as conſtables for the hundred; for women were exempted from attendance on the leet. And it has been already obſerved, a conſtable could not be choſen but from thoſe who were preſent at the leet—and beſides, if ſhe could not find a deputy, and nobody ſhall be obliged to be a deputy, ſhe could not be obliged to ſerve herſelf.

That tenants in antient demeſne were under a particular exemption: but the non-liability contended for is not in the nature of a particular exemption, but more favourable.

'Tis a queſtion, whether a conſtable is an officer by common law or by the Statute of *Wincheſter?* The more antient authorities are, that he came in by the ſtatute.

Both theſe courts may be held at the ſame day and hour, and he cannot be attendant on both; and the law will not impoſe an impoſſibility as a general duty.

It is not ſtated that this is a ſubordinate leet; for where a leet has a particular juriſdiction, it may be otherwiſe, as appears by *Hale*'s Pleas of the Crown.

It

It is admitted too that it may be a cuſtom that the reeve and a few reſiants may attend, but in the ſame place. *Cro. Ja.* It is bad that all the reſiants ſhould attend.

[368] That it is not found that the manor of *Abbots Wooton* is within the juriſdiction; But this is not finding that it was ever part or parcel of the hundred. This is not found: if it were, what ſhall we ſay of a freehold which may be within the manor, but cannot be parcel of it.

That the caſe of *King* and *King* in *Freeman* and *Keble* is not very ſatisfactory authority. Lord *Hale* is made to ſpeak unintelligibly, and alſo is made to contradict his own declared opinion in his Pleas of the Crown, where he ſays, "conſtables were by the Statute of *Wincheſter*."

That 'tis very extraordinary that no other book ſhould contain theſe ſuppoſed opinions.

As to the caſe in 11 *Mod.* that from 7 to 11 *Mod.* is as bad authority as can be. That the reaſons given in the 11 *Mod.* are ſo bad, that it cannot be ſuppoſed they came from the bench. What is the lord's having a right to ſit as judge in the leet, to the jury's chooſing a conſtable.

Replication Serjeant *Davy* in reply—I have found a great part of my argument anſwered as I expected, and ſhall therefore give the court very little trouble.

That a man cannot be liable to do ſuit at two courts at once; becauſe a man cannot be obliged to be in two places at once, or do two incompatible offices at once, I admit, that the ſame faith need not be given to the public at two leets: this may be good as general argument, but there muſt be a particular cuſtom ſhewn, which ſhall make leets as they were once generally, liable.

As to the incapacity of a man's being in two places, I ſhall be diſpoſed to grant it; but what will follow? Not that he may plead a general exemption, but in caſe he is choſen in one court, he may ſpecially plead this to exempt him from ſerving at the ſame time in another: but this will be only an exemption *pro iſta vice*, and ceaſe with the particular reaſon *.

My brother farther draws an inference, that becauſe a man cannot do ſervice in different court-leets, he cannot ſerve as conſtable. The juries ſay he cannot chooſe a man as conſtable, but who is either reſident and at the leet, or obliged to be there.

Suppoſing

* Ceſſante cauſa ceſſat effectus.

Suppoſing he will not be ſworn, what can be done? Not make him be ſworn, but puniſh him for refuſing to be ſworn equivalent to the amercement at a court leet. [369]

My brother ſays, ſuppoſing there is a cuſtom in general, that reſiants of a leet ſhould ſerve within the leet, though without the hundred, yet no ſuch cuſtom is found. 'Tis only ſtated that there is an antient cuſtom, that they do ſerve. If a cuſtom is duly found, I apprehend that they do, is evidence they ought. But, ſays my brother, 'tis only evidence of the fact. I have not ſagacity enough to take the diſtinction; the exiſtence of a cuſtom is evidence of a cuſtom, as the exiſtence of a thing is evidence of its being.

The objection is very curious, that ſaying the manor is within the hundred, is no finding it to be parcel of the hundred. How do they uſe the word in other places? The reſiants within a place are reſiants of a place; the reſiants within the hundred, which they ſpeak of before, are reſiants of the hundred. A manor within the hundred is parcel of the hundred by neceſſary preſumption, and muſt be ſo underſtood, unleſs the contrary be found.

Next my brother attacks my caſe on the authority of the reporters names, and of the nonſenſe they make the judges talk. As to the names of reporters, were they to ſpeak their own ſentiments, and we were to judge from them and their language, God help the judges! I wiſh reporters would give us the judgment rather than the reaſons. But if the judgment in both reporters agree, the court will look to the judgment and authority of the judges ſo agreeing. As to the nonſenſe the judges are made to talk, that ſhall be placed to the account of the reporters.

Mr. Juſtice *Aſton*—It is ſet forth there is and hath been an hundred from time immemorial, and that the manor is within the hundred; this I muſt take as parcel of the hundred; and it is farther ſet forth, that from antient time the reſiants were liable to do ſuit and ſervice at the lord's leet—and farther, that ſuch as were choſen by the jury in the leet have of antient time been uſed to ſerve the office of conſtables within the hundred. And the defendant, being ſo choſen, refuſed to take the oath or ſerve the ſaid office.

Whether conſtables were by common law or by ſtatute is not of much conſequence to the queſtion. But by the better and more modern opinion, they are by the common law. As to ſwearing in conſtables, it appears by *Hawkins*, if the party did not take the oath in the leet, before the juſtices

tices were empowered to ſwear him, he was amenable to the next court. I do not reckon women, and perſons under particular incapacities, are within the nature of this queſtion.

[370] As to tenants in antient demeſne, I am informed from the caſe in *Shower* and *Ventris*, of the *King* and *Betteſworth*, that tenants in antient demeſne were liable to ſerve as conſtables. As to particular inabilities, they would be excuſed when they aroſe; he wiſhed this minuter queſtion to be thrown out of the caſe, and wiſhed the general queſtion to be conſidered, whether reſiants of a court-leet within the hundred ſhould be liable to ſerve as conſtables for the hundred, though not within the leet, but extending beyond it. In the abſence of Lord *Mansfield*, he declined giving any opinion.

Quære ulterius de hâc cauſa ſed ut meminiſſe videor curia poſtea cenſuit contra defendentem et judicium fuit pro Rege.

Outlawry.

OUTLAWRY to be reverſed on terms of payment of coſts, appearance, and putting in bail.

Mic. 12 *G.* 2. Rule of court that defendant muſt enter into terms as above, of appearing and putting in bail to a new original.

2 *Str.* 1156. Caſe to the like effect.

The new original muſt agree in the nature of the action, and the ſum in demand.

3 *Lev.* Where the outlawry is reverſed, plaintiff muſt delare upon a new original, if in another county.

It was doubted, whether the words that he may declare ſhould have an imperative conſtruction, he ſhall declare.

Mr. Juſtice *Aſton* ſeemed to think they were not imperative; and that a new original was only neceſſary where the party choſe to declare in another court.

Rule of Practice.

A ſettled rule of the court not to enter into any ſpecial arguments, the laſt paper day of the term; becauſe it would delay the motions till the next term.

[371]

Toll.

New Trial.

ACTION brought by Lord *Gaineſborough* as lord of the manor of *G.* for non-payment of toll.

The

The jury found for the plaintiff.

Motion for a new trial, on the ground that the conſideration laid on ſome of the counts was not ſufficient: and the verdict being general upon all the counts, no judgment could be had upon it, becauſe the conſideration in evidence was inſufficient on ſome, and the jury had found upon the whole matter.

Per Curiam—To prove that the counts as laid in the declaration were inſufficient, is no ground for a new trial: you muſt come in arreſt of judgment.

If the jury find right upon the whole, on the miſtake of not finding upon a right count, the court will be very averſe to granting a new trial.

Rule to ſhew cauſe why judgment ſhould not be arreſted.

Indictment.

WHETHER good on 13 *Geo.* 1. *c.* 5. which provides that gatherers of ends of yarn ſhall be brought before a juſtice. Exception therefore was taken in arreſt of judgment, that the offence was not an indictable offence.

To this Mr. *Buller* obſerved, that the 17 *Geo.* 2. had provided, that upon conviction the offender ſhall be deemed an incorrigible rogue: that the words duly convicted, can only mean on indictment.

On the other ſide it was denied that the ſecond ſtatute took away the mode of puniſhment by the firſt; becauſe the object of that was to take into one all the different acts with reſpect to vagrants: and it recites the former ſtatutes without any expreſs words ordering any different mode of puniſhment: ſo that duly convicted muſt be underſtood in the manner provided by the original ſtatute. Court were of the ſame opinion; and the judgment was thereon arreſted, and recognizance diſcharged of courſe.

Return.

SHERIFF'S return is not traverſable—you can only have an action for a falſe return.

Appoint-

Appointment of Overſeers.

TWO appointments being made the ſame day, and it not appearing which was firſt, the court on the caſe ſtated were immediately of opinion, that a third made the following day muſt be held good, and the foregoing void for uncertainty.

However, a rule to ſhew cauſe was granted, vide *infra*.

Outlawry.

AS to the matter of appearance abovementioned, it was afterwards mentioned in the court that by the ſtatute 4 & 5 *W. & M.* no perſon who ſhall be outlawed for any cauſe, matter, or thing, treaſon or felony excepted, ſhall be compelled to appear in perſon to reverſe the outlawry, nor to put in ſpecial bail; except in caſes where ſpecial bail is required, *Salk.* 296. Vide 2 *Str.* 1178. *Senecold* and *Hampſon*.

Rule where Judgment goes by Default.

YOU can't deny the ſubſtantial charge, where judgment goes by default, but you may go to extenuation very properly by evidence.

Compoſition on a Penal Act.

MOTION for leave to compound on the building act by conſent of the plaintiff—the court would not grant the rule as of courſe, for that it might be covin or colluſion.

Court directed that as ſoon as the buildings were finiſhed agreeable to the ſtatute, and the miſpleadings corrected the motion might be made—in the meanwhile proceedings to be ſtaid.

Coſts

7 *James* I.

IN all causes where justices of peace, constables, &c. do any thing in execution of their office, they may plead the general issue; and if verdict for defendant, or judgment by nonsuit, liberty to tax the double costs.

Hilary

At this Term, Mr. Cowper begins his Reports, & his superior merit as a Reporter renders it unnecessary to read the remainder of this Volume, which is of use only so far as it serves to fill up a chasm in the history of decisions from the time of Burrow to that of Cowper.—

Hilary Term,

14 Geo. 3. 1774. K. B.

Lee *againſt* Ganſell.

ON a motion to ſhew cauſe why the defendant ſhould not be diſcharged out of the cuſtody of the marſhal.

The ground inſiſted on to maintain the motion was, that Major General Ganſell, the defendant, was illegally arreſted, and the arreſt thereof null and void, and that he ought to be diſcharged from the conſequences of the arreſt.

Caſe, that the defendant having lodgings to his ſeparate uſe, and the door thereof being ſhut, the ſame was broken open, contrary to law, in order to arreſt him. The arreſt thereon bad.

The caſe was ſtated thus, in anſwer to this ſuggeſtion:

Major General *Ganſell* had lived for ſeveral years in lodgings, taken by the year of Mr. *Mayo*; which lodgings had one common entry into the ſtreet, by the houſe door.

The plaintiff, in proſecution of a debt, with a due warrant, and the aſſiſtance of divers perſons, entered, by the
[375] OUTER DOOR being OPEN, and being in thus, they aſked for the General; but were refuſed, and obſtructed by force: And going up ſtairs to his apartment, found him upon the ſtair-

Note, This caſe had been before in the Common Pleas, on the fourteenth of *September* 1773. And I have ſeen a printed account of the caſe, which ſays, that it was tried by Mr. Juſtice *Nares*, on three ſeveral indictments, preferred againſt Major General *Ganſell*, "for maliciouſly and FELONIOUSLY ſhooting at *John Hyde*, bailiff, and others," named in the indictment. And that, as to the point of law, Mr. Juſtice *Nares* had expreſſed himſelf of opinion, that the defence of General *Ganſell*, that his houſe was his caſtle, was *indiſputably found doctrine*.

The JURY found him NOT GUILTY.

ſtair-caſe, and were endeavouring to follow him in, and that *Hyde* the bailiff, ſhewed him the warrant; and, on his getting away from them, as he was juſt entered in at the door, and before he could ſhut it to, got his knee in, and a piſtol was fired at him through the door, thus partly open, by the general; that they ruſhed in, and endeavoured to ſecure him, and he fired another piſtol. That at laſt, however, they arreſted him, by force, in conſequence of his reſiſtance, and for their own ſecurity. And thus that the arreſt was good.

The evidence on affidavits was much the ſame as on the trial in the Common Pleas.

The point firſt relied on in anſwer was, that the arreſt was good, becauſe the door of the lodgings was not broke open; but the ſheriff's officer had firſt made a lawful entrance, by puſhing in a part of his leg; and if he was afterwards turned out, he might well force the door, to execute the proceſs.

The evidence was entered into to prove this part of the caſe.

But if this fact was doubted, then they contended, upon the point of law, that if an outer door was open, an inner door might be broke, and the arreſt legal.

In *Hale*'s Pleas of the Crown it has not been ſtated whether the owner inhabited.

That there was a caſe of chambers in a college, and if *A.* lets a chamber, and the door be broke open, you may have an indictment, *quare domum manſionalem fregit*; but this, *ex neceſſitate rei*, leſt juſtice ſhould fail. And the lodging is not the manſion-houſe of the party, to defend him from arreſt on civil proceſs, though it may be to ſecure his property and perſon from robbers, and enable him to proſecute criminally againſt a wrong doer; ſince the owner of the houſe, who was not robbed, could not proſecute for the robbery; and it is neceſſary ſome body ſhould.

Keiling, 83, takes a diſtinction where there is but one common entrance, and where there are divided houſes; for if there be ſeparate poſſeſſion, this ſhall of itſelf only put the occupant in the ſtate of a lodger.

Old Bailey, Michaelmas term, Lord Chief Juſtice *Holt*; where inmates have ſeparate rooms, and keep ſtair-caſes ſeparately, yet have entry by one door with the owner, the indictment muſt be *quare domum manſionalem fregit*, of the owner; and they are not *domus manſionalis*, of the inmates. An old clerk ſaid, the practice had been according to *Keeling*'s

ing's book, on which Juſtice *Holt* ſaid he grounded his judgment. Theſe apartments were taken by the year, on certain rent.

Caſe 13 of his preſent majeſty, *A.* tried for burglary, in breaking open the manſion-houſe of *Chandler*, who was an inmate, and had taken a parlour and ſhop in the dwelling-houſe of the owner. Though the houſe was divided into ſeveral apartments, and the owner inhabits in one of them, yet this was contended to be the manſion-houſe of the owner.

All the judges, on conference, held, that the indictment was well laid: For as the owner inhabits one part, there would be no remedy in ſuch an inſtance, which happens frequently in *London*; but expreſsly otherwiſe if the owner had inhabited any part.

Farther, it was argued, in the third place, as a very important queſtion, whether the arreſt be illegal, even taking this to have been the manſion-houſe of General *Ganſell*.

The ſheriff is to take defendant, if within his bailiwick, *Br.* Treſpaſs, 390, where *Littleton* and the reſt hold, that the ſheriff, on a *fieri facias*, is not warranted to break the houſe, and ſhall be liable for treſpaſs: But the taking of the goods ſhall be excuſed; and accordingly *Dalton*. So that, though they are liable to treſpaſs, if the arreſt be illegal, in doing what exceeds their authority, yet what is done by authority ſhall be good.

Conviction does not hinder evidence till a man be attainted by Judgment.

Objection to reading of *Lee*'s evidence, as convicted of perjury. It was held by Lord *Mansfield*, that conviction was not ſufficient, unleſs judgment thereupon. Lord *Mansfield* ſaid, he thought there did not exiſt a caſe in law, where a conviction could be read before judgment. A man may move in arreſt of judgment.

Mr. *Morgan* mentioned a caſe, in which he ſaid, the conviction was admitted without judgment. They pleaded againſt a woman as *feme ſole*; ſhe pleaded her coverture: and the conviction was admitted of her huſband, for tranſportation, in order to bar the plea of coverture. And the ſaid plea was accordingly adjudged inſufficient.

Lord *Mansfield*—This was evidence in a civil action, to make the *feme* liable: It went to prove there had been a tranſportation, but you could not have brought it to have proved a crime.

Mr. Juſtice *Aſton* obſerved, that the conviction and order was made by a ſpecial act ſufficient evidence. To which

Lord

Lord *Mansfield* farther added, the judge made a regular judgment in felonies for tranſportation; and as civil evidence you may read a verdict, but not where a diſability is to be introduced on the crime of the party. [377]

On the other ſide, in ſupport of the motion on the caſe, as ſtated upon the evidence on their part, it was argued to the following effect:

That with reſpect to *domus manſionalis*, the law had ſpoken with particular regard to the liberty and ſecurity of men in their houſes. But that in all the caſes cited, it appears it would have been burglary to have broke open the apartment or lodging houſe, to have robbed General *Ganſell*. And not one caſe, in which the ſheriff can break open the door to arreſt, where to rob it would have been burglary, in the ſame circumſtances. A chamber in a college would have been protected; and in that inſtance they may be ſaid to have all one door. There is no doubt it would have gained a ſettlement.

As to the right of keeping and detaining on the arreſt, in the caſe cited from *Brooke* and *Dalton*, there is a caſe in *Atkins*, 138, where a petitioning creditor, who could not arreſt, got the debtor where he could be arreſted, and then got his own debt; and from the perſon who might have arreſted, the benefit of the arreſt was taken away, and the bail diſcharged by Lord *Hardwicke*, becauſe the petitioning creditor, through whom he came to the opportunity, had not the right of arreſt.

It has been much relied, that though an action would lie, yet the arreſt ſhould be good, to keep the General in cuſtody. Now wherever a privileged perſon, in conſequence of his attendance on a court of juſtice, is arreſted, it does not end by ſubjecting the perſon arreſting to an action: But the party ſo arreſted ſhall be diſcharged. And here, that if the arreſt was unwarrantably made, the court will not permit the parties to take advantage of their own wrong. [*Nemo lucrabitur de injuria ſua propria.*]

Mr. *Dunning* obſerved, that he was glad to find Mr. *Wallace*, and the other gentlemen, inſiſted ſo much on endeavouring to deny the fact, as ſtated by the general, becauſe he thence took the liberty to infer, that they did not rely, ſo poſitively as might appear in words, on the point of law.

Obſervation on the evidence.

What may be the conduct of the General is another point; though by the proper judge, and by the proper trial,

trial, he ſtands acquitted of the crime; at leaſt as imputed to his charge. But whatever be his conduct, his birth-right here is a law and liberty which he is entitled to whenever he demands it. Let us obſerve what is the caſe. If a ſole individual be the occupant, in that caſe the keeping ſhut his outer door may be preſumed a ſufficient defence, it is competent to him to ſhut it: To a perſon who inhabits by a demiſe under him, in a part of the houſe, this is not competent; the door then of his apartment is to him the door of his houſe, as being the only one which to him can anſwer the purpoſes which the outer door does to the owner.

[378]

That the door of his apartment is to a lodger as the outer door to the inhabitant.

Though it is not always of neceſſity, nor perhaps here, to go upon the original foundation of a right of law, yet I will beg leave to obſerve, when we apply the maxim, that every man's houſe is his caſtle, we mean not to perſuade the inhabiter of a poor hut, that it is provided with draw-bridges or portculliſes, but only that it is under ſuch ſufficient protection as may provide for his ſecurity in a more pleaſant, or perhaps, a better way—that it is FORTIFIED BY THE LAW. * Lord *Hale* has been cited: but I did not imagine that it would have been contended that Lord *Hale* had been ſo inaccurate as to have forgot, in ſtating a caſe, the very ground on which it is to be underſtood to have went. It appears to me, whatever privileges an houſe of ſtone gives from arreſts, the ſame legal protection is given me by a houſe of mud. And whether the apartments be more or leſs, I don't ſee the difference of reaſon, and cannot, therefore, ſee the difference of law. The leſs the number of apartments, the leſs garriſon they will require: and I don't ſee why what ſhould only be ſuppoſed to make it more tenable, ſhould increaſe the danger.

Domus ſua cuique caſtellum.

Every man's houſe fortified by the law.

That therefore materials, ſtrength, apartments, inner or outer door, make no difference.

As to the word inmates, I don't ſee it is uſed in an opprobious ſenſe, as next to vagabonds, but it may apply for the purpoſe, if the owner had no ſufficient nor ſettled apartment, but might be obliged to go from room to room as the convenience of the family required. It would make an odd doctrine in our criminal caſes, if two outer doors ſhould be underſtood to protect owner and lodger; but one door the owner only. The caſe in burglary is certainly held, that if a ſhop hired of *B.* by *A.* and *A.* does not lay in it, no burglary can be committed; becauſe it is not the dwelling-

That it would be ſtrange if two outer doors ſhould protect owner and lodger, but one the owner only.

* Similem habemus Demoſthenis præſtantiſſimum & notiſſimum locum, ου γαρ λιθοις ουδε πλινθοις ειχισα την πολιν.

dwelling-houſe of the owner who has let it, nor of lodger, becauſe he did not dwell there: and may it not appear to introduce ſome abſurdity, that the ſame law ſhould be where the lodger does dwell? On that ground it appears to me that neither owner nor leſſee could maintain an indictment of burglary. And in this caſe too the door of the apartment is the only defence of General *Ganſell*, not againſt the miniſters of juſtice only, but the profeſſed violators of it. As to the caſe ſtated as lately before this court, what was the deciſion makes not againſt me: and what might paſs after was converſation, and not deciſion.

That if a lodger may not defend the door of his own apartment, he has no ſecurity.

'I go on to the point reſted on ſo ſtrongly, that the officers ſhall be liable for a treſpaſs; but the arreſt good. If a treſpaſs be all we are entitled to recover, our ſatisfaction for the breach of domeſtic ſecurity will not be worth much. The privilege ſpoken of in perſons going to the court, is the privilege of the court, rather than of the perſons. And further, on the general rule obtaining, I apprehend whenever an injuſtice is done, the juſtice is to undo it: otherwiſe it would be encouraging much violation of juſtice in the perſons themſelves and others. And then without any particular authority, the name of *J. S.* or any body elſe, who compaſſes his debt of 200l. by a violation of the law—at the expence of 10l. I recover 190l. He will, perhaps, not have always the moſt profound reverence for the law, to ſuch a degree, as in balance of the account, not to find himſelf diſpoſed to the violation. As to pecuniary recompence, it applies but very ill to ſatisfy for the loſs of liberty: for the ſpecific injury nothing but a ſpecific remedy is deſired, and the reſtoration of liberty can be the only compenſation for the loſs of it.

That treſpaſs is an inadequate compenſation. That 'tis not like privilege of going to the court. That juſtice conſiſts in undoing injuſtice. That it would encourage injuſtice. That on ſuch a balance of account, a bad man would be much more likely to break the law, than to fear it.

Libertas non recipit æſtimationem.

Mr. *Cox* deſired to obſerve, that the lodgers and inmates are, upon a computation, underſtood to be about ſeven-ſixths of the inhabitants of the city. That an idea he could had been among them, however wretched they might otherwiſe be, they might each protect ſecurely his perſon and family under his own lock and key. If this only claim of happineſs be taken from them, from henceforth they muſt not be ſafe in their beds.

Mr. Cox.

Number of lodgers.

An oppreſſive creditor may drag him out of his bed, throw him into priſon, and complete his wretchedneſs.

A dure et inconvenienti.

Mr. *Murphy* obſerved on the circumſtances which appeared contradictory in the evidence againſt General *Gan-*

Mr. Murphy.

On the evidence as contradictory.

The case of Lord *Hales* is not the only one, *Cro. Jac.* fo. 65. and *Hawkins's* Pleas of the Crown, both agree that indictments of burglary will lay, and several chambers shall be the *domus mansionales*. Therefore, says *Hale*, wherever there are servants who have no several occupancy, it shall be the *domus mansionales*; also chambers in the inns of court are always taken as separate houses. And let me ask whether, if General *Ganfell* had been possessed of a most valuable collection of pictures, and Mr. *Lee* had taken offence and broke into those chambers, should not the indictment have been laid against him for breaking the mansion-house of General *Ganfell*.

On the authority as not against the case, but rather for it.

Another case was that of the King and *Broffer*. The case was a travelling Jew had been robbed at a public house it had been supposed that the publican had assisted and therefore, *propter necessitatem*, the indictment was to be laid as for breaking open the house of an inmate or lodger. The publican was afterwards acquitted, and therefore the indictment could not be supported for defect of form, as it should have been (unless *propter necessitatem*) for breaking the mansion-house of the owner. A case cited before Sir *Tho. Clarke*—when the party was imprisoned, and discharged, the arrest having been illegally made.

[380]

Party discharged, where arrest illegal.

Mr. *Morgan*, upon the evidence as improbable—and that the door might have been broke, and afterwards locked by driving in the screws; that with respect to the point of law where the arrest had been illegal, the court would not endure the holding over upon such an arrest.

Mr. Morgan on the evidence.

Mr. *Murphy* defined inmates as occasional occupants only or inhabitants at will.

Inmates.

Mr. *Dunning* observed, that colleges were anciently called houses; and yet every chamber deemed a separate house.

Argumentum a simili.

The case stood over—

Afterwards 26 *Jan.* in the same term, the Lord Chief Justice delivered the opinion of the court.

GENTLEMEN,

This is a motion on the part of General *Ganfell* to be discharged out of custody; on the ground of an illegal arrest "for that the officer broke open his door, which by law he could not; and that the arrest having been in an illegal mode, the law ought to discharge him, and put him in the same condition as before."

There are three defences, I think, made:

1. The

1. That the door was open; and that the officer having his thigh in, defended his entry.

2. That they had a right to break open the door, in execution of civil proceſs—no ground is taken that there was not ſufficient notice.

3. That the arreſt was legal, for they were to take him wherever they could find him; and the only illegal thing was, the breaking open the door, for which there lay an action of treſpaſs, or in the more ſummary mode of proceeding, an attachment againſt the officers.

As to the firſt, there is great contrariety of evidence; [381] and what would be the conſequence in law, of the door being partly open, if the perſon within, ſtruggling to keep out the officer, ſhut it, I ſhall not examine, as I am by no means clear of the fact, as to its circumſtances: And as I think it may be entirely thrown out of the queſtion.

The ſecond, whether this door may be broke open in execution of meſne proceſs?—I will ſtate the caſe; and, ſpeaking from memory, you will correct me if I miſtake—I ſpeak for the ſake of the ſtudents and thoſe who attend.—The fact is, Mr. *Mayo* was owner of this houſe in which Mr. *Ganſell* had a right to two rooms on the firſt floor, opening to the ſtair-caſe; and two on the next, opening alſo to the ſtair-caſe; with the uſe of the kitchen and of a garret. It is farther ſtated, Mr. *Ganſell* is tenant for years—though that makes no difference—and, which is the material thing, that there was but one door at which both came in. Mr. *Ganſell* was up ſtairs; they went up, giving notice, and broke the door open—nothing turns upon the notice, or manner of breaking. I ſhould ſtate that they entered legally at the outer door, being open.

The queſtion is, whether the door of the apartment can be lawfully broke open?——Now by the law, the houſe and door have a privilege annexed: I forbear giving any particular epithet at preſent, to the door thus privileged. But let us conſider what this privilege is; which is not the privilege given by the law to the man, properly ſpeaking, who abſconds from his creditors, and evades the proceſs of the law, but ariſes from a maxim of ſound policy, whereby leſſer evil is ſuffered to avoid a greater, and for the ſecurity of a greater good, a leſs is ſuperſeded.—The outer ſhall not be broke open—this is the man's caſtle. The idea took riſe in times of greater violence, in that reſpect, at leaſt, than the preſent: when protection of the outer door was very neceſſary to the inhabitants, not only from thefts, but

from open violence of various kinds. But this maxim, thus taken, will not admit of any equitable extenſion or beneficial enlargement. Accordingly, in the oldeſt caſe, 18 *Ed.* 4. which gave riſe to the privilege at all, on the *fieri facias* they entred, and broke in at the outer door, and they decided that they ſhall not break the door; and for that treſpaſs lies: But they broke a trunk in which were the goods; the taking of the goods was lawful. *Semain's* caſe, 5 *Co.* in the reign of *Eliz.* the breaking open was treſpaſs; but the taking of the goods, though the opportunity was gained by treſpaſs, lawful. I don't ſay that I ſhould be diſpoſed to decide exactly in the ſame manner, in a caſe the ſame before me, but to ſhew from the earlieſt times downwards with what ſtrictneſs this principle has always been underſtood; and in *Yelverton* you find, *Popham* doubted whether the outer door was privileged; and it was reſted upon the ſingle caſe of *Edward*. But as to the outer door, the law is now clearly taken, and the privilege full underſtood.

This ſeems a kind of remitter of the act done to the better right by which it might now be done.

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I don't believe there has been a ſingle dictum, or it would have been cited, mentioning the protection of an inner door. In *Hobart.* 62, *Hobart* 263. they had come legally in at the outer door; they broke the inner, and committed many great miſdemeanors: They were puniſhed for the miſdemeanors; but the entry into the lodger's apartment (they having once come in legally at the outer door) was held good. And yet one of theſe was a very harſh caſe, for they broke in where the man and his wife were in bed and behaved with great violence and outrage; but I lay ſtreſs on this to ſhew how ſtrictly this maxim has always been taken—when the outer door or window is ſecure, and the entry has been lawful and peaceable by them, and when the due notification and demand has been made and refuſed (to juſtify proceeding to ſuch extremities) the family are then in ſafety, and in their accuſtomed protection againſt all inſult and injury and wrong-doers from without. And very lately the caſe has been very ſolemnly determined in the year 1762, *Aſtin* and *Pindar*; that was a caſe upon treſpaſs all the other points were anſwered, except the breaking of the inner door, and it fell in with ſuch violence, that the officer fell in with it: and it was determined by all the court, that the breaking the inner door was lawful, after the entry by the outer.

Agreeably to theſe principles, and theſe deciſions, I ſhall cite a very ſenſible diſtinction from a book in my hand, to the point in queſtion.

Foſter,

Foſter, tit. *Hom. c.* 8. § 20. "The rule that every man's houſe is his caſtle, when applied to arreſts on legal proceſs, has been carried as far as political juſtice will warrant; and perhaps farther than the ſcale of reaſon and ſound policy this will warrant. In the caſe of life, as we have before hinted generally,—but in the caſe of life more particularly,—this privilege, and the maxim which ſupports it, will admit of no extenſion. It muſt be confined to breaking the outer door, or window, for the protection of the family, and ſecurity from without; and it belongs to thoſe whoſe domicile it is; for it is not the ſanctuary of a ſtranger. And when a man eſcapes from the arreſt, he is not privileged by his houſe."

The queſtion now is come to this——"Whether this be an houſe? Every houſe certainly muſt have an outer door.—It has been ſaid, that chambers in Colleges are houſes, and chambers in the Inns of court, and burglary will lie. Why they have every one of them an outer door, which protects them from without; they have ſeveral occupants, and no others dwelling in them. In *Lincoln's-Inn* they may have [383] eſtates of inheritance; in the others they may have eſtates for life; and in colleges, as long as they reſide there. And in the caſe which has been mentioned of *Newcaſtle-Houſe*, they may have ſeparate fee.—They have two outer doors.—When the owner of the houſe has nothing to do with it, but a cellar or ſtable, there burglary muſt be laid in the houſe of the lodger;—but if otherwiſe, and there are lodgers in the houſe, who have not an outer door, there burglary muſt be laid in the houſe of the owner.

With reſpect to the opinion of Lord *Hale*, great as the authority is, perhaps it is not clearly expreſſed; or was not fully reported, according to his meaning; or might not be ſufficiently conſidered. At all events, we cannot decide upon a ſingle and uncertain determination, againſt ſo many clear and poſitive deciſions, againſt the oldeſt caſes, confirmed and recognized by the moſt modern, and againſt the moſt eſtabliſhed principles of the law.

If there were nothing elſe againſt the propoſition, which it has exhauſted ſo much learning and ingenuity to ſupport, it might be confuted from the abſurdity; for whereas the largeſt houſe in *London* is protected by but one door, General *Ganſell* had four doors,—four houſes, within one, to protect him: And there had been greater pretence, if it had been on the firſt ſtair-caſe, which was the firſt door of his they had come at.

With

With reſpect to relief, it is not material to ſpeak; the behaviour of the party might induce the court to refuſe relief, in a ſummary way: Tho' when a perſon is arreſted in attending the proceſs, the court has interpoſed, not only by puniſhing the officer, but by diſcharging the priſoner out of cuſtody—but this would greatly turn on the diſcretion of the court; and this is not a caſe of that nature.

We are therefore all of opinion that General *Ganſell* ought not to be diſcharged.

Gaming.

Jones *againſt* Randall.

23 *April* 1774. K. B.

23 April, 1774, K. B. DECLARATION that there was a promiſſory note on a wager given to the plaintiff by defendant in caſe of a decree in the court of Chancery ſhould be reverſed in the Houſe of Lords, to which decree the perſon who had laid upon the reverſal was party, and had ſet off his loſs by the reverſal, upon which the deciſion would be againſt him by his gain upon the wager if it ſhould be reverſed. They gave in evidence a copy of a minute-book of the Houſe of Lords.

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Verdict for the plaintiff—upon which motion for a new trial, becauſe evidence inſufficient. Lord *Mansfield* being againſt them upon that point, there was another—that the contract was illegal: So that the points in this caſe were two.

1. That the evidence was inſufficient, which went to the new trial.

2. That the contract was illegal which went to the motion in arreſt of judgment.

Mr. *Wallace*—That the contract was neither dangerous nor immoral, nor yet illegal, becauſe no poſitive law againſt it, and becauſe a fair wager.

Mr. *Mansfield* upon the ſame grounds—and that if wagers of indecorum were not only not to be encouraged, but even muſt be diſallowed as illegal, then a wager upon the life of a father and of an aunt againſt a grandmother bad—alluding to a caſe.

And that there will be leſs danger of unfair and immoral contracts, becauſe the advocates cannot be bought off; and much leſs the Lords. That it would be leſs dangerous than

than any other; becauſe few gameſters held any ſubject ſo little intereſting, and had none they knew leſs about.

As to the contempt of the court, how does that appear? It may naturally happen that both parties, ſuppoſing the court will decide right, diſpute as long as reaſon and argument will hold out, and then come to the dernier reſort, a wager; and if it be a contempt to ſuppoſe it uncertain, which way a court of law or equity may decide, how happens what we obſerve daily? How few lawyers will venture to pronounce a point of law certain; and if one of the counſel, having looked in his note-book, might ſay, 'tis very clear for you; another—I think, Sir, the weight of authorities makes againſt you—and a third, I wiſh you ſucceſs, but indeed 'tis doubtful—what ſhould a man do, a great part of his fortune depending upon the event? What would a prudent man ſay, but lay the wager in order to be ſafe at all events. The knowledge, or more truly the ignorance, of both parties in this caſe was equal; and the ſtakes equal.

Mr. *Dunning*—That whatever would be law to Mr. [385]
Jones, would be law to any other perſon of whatever profeſſion or knowledge. That the contempt was evident, admitting the propoſition that the laws of this country were certain; that the judges knew them, and would decide accordingly. That to make the wager fair, the laws muſt be ſuppoſed uncertain; and the judges ſo ignorant as not to know, or, knowing, ſo wicked as not to decide accordingly; and though the learned gentleman abſtained in words from comparing it with a lottery, yet he muſt in idea to juſtify his motion.

The caſe of Lord *Marchmont* was only upon the different abilities of counſel; and upon a queſtion of Fact unknown to either party; and for all I know equally probable, where Mr. *Pigot* or *Coddrington* was then alive. That to lay a wager of the ſort of this, now before the court, was as if a man were to lay a wager upon the truth of a mathematical propoſition with which he was well acquainted. I hope your Lordſhips will ſhew that determinations of law are certain; and too ſerious to be treated like matters of the leaſt and moſt deſpicable regard, things of mere chance.

Lord *Mansfield*—This caſe muſt be taken upon the count in the declaration; and in declaration it is ſtated as a wager. The appeal depending, and the perſon who made the wager a party, if he won, the money was to pay the loſs of the Suit; and if he loſt, he was to receive the very ſame

ſum

ſum out of what he recovered in the event of the appeal. There is no inequality, therefore; now the queſtion is, whether this Wager on ſuch circumſtances ſhall be maintained?

There is no poſitive Law: Many things are bad by that, which otherwiſe were not. There is no poſitive Law, nor any Caſe in the books; but Mr. *Dunning* argues rightly, and I think very concluſively, that if it is bad upon principle this is ſufficient. The Law would be a ſtrange Science if it reſted ſolely upon Caſes; and if after ſo large an increaſe of Commerce, Arts and Circumſtances accruing, we muſt go to the time of *Rich.* 1. to find a Caſe, and ſee what is Law. Precedent indeed may ſerve to fix Principles, which for Certainty's ſake are not ſuffered to be ſhaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be Evidence of law, is not Law in itſelf; much leſs the Whole of the Law.

Vide the caſe in Burr.

Whatever is contrary, *bonos mores eſt decorum*, the Principles of our Law prohibit, and the King's court, as the general Cenſor and Guardian of the public Manners, is bound to reſtrain and puniſh. Now here is a Wager only to ſecure the preciſe Sum which defendant would be to pay. Both parties of equal knowledge or equal ignorance. *

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If indeed any thing had come out upon the caſe, though appearing under Colour of a Wager, to cover a Corrupt Agreement, then the court upon that coming out would certainly have Defeated ſuch a purpoſe.

It is ſtated in *Puffendorf* and *Grotius*, I think, amongſt evaſions to ſimony——ſpeaking to a perſon, I will bet 10,000l. I don't get the biſhop—rick: this was evident Corruption.

If this had been a bet with one of the Lords, this was a bribe. If it had come out upon the caſe that it was a corrupt Agreement, in order to get uſury upon money lent by the event; or to receive part of the thing in debate; * this the Law would diſallow. It might have been very bad had it been between Party and Attorney or Advocate.

* Which is champerty.

Here it was only a man's Inſuring ſomething at all events. If there were ſeveral policies, it might be a large ſum, and the event might be the loſs of a man's whole fortune, upon which he might have a reaſonable deſire to ſecure ſomething.

It

* Par ſcientia pares contrahentes facit.

It is argued upon the doctrine of Predeſtination that the event is certain; (that is, Certain when it ſhall happen:) but in Truth, the perſon who laid the wager, laid with the preſumption of the caſe againſt him, as a Decree of the court of Chancery had been on their ſide, which the preſumption, in ſome meaſure was, would not be reverſed. But the law is certain—it were very unhappy, gentlemen, for you, if it were certain to every man, before the decision. But this Certainty is ſo Uncertain, that it requires a great deal of money to come at the Laſt opinion of what is law. As to Lord *Holt's* caſe, [which Mr. *Dunning* had apologized to his Lordſhip for alluding to] I know not whether there ever was ſuch an one; but there might be circumſtances of Inducement, which might warrant his declaration. I remember Dr. Sherlock ſaid, on mentioning what eccleſiaſtical Judges they had, that a Surrogate had pronounced upon a point—a Barber by ſaid, I will wager a crown that is not Law; the Surrogate took the Bet, and went to a Doctor of Law to aſk his opinion.

I think, if any kind of betting was to be tolerated, it would be this in the caſe before us now, in order to oblige gentlemen to ſtudy ſo hard, that they would venture their money their opinions were right: And it is a wager not likely to be very frequent. Is it then againſt good Policy? It is no more than on a fair Bet, an endeavour to ſecure ſomething, let the event fall as it will; in a matter where men of great parts and learning might have very different opinions, and the reſult impoſſible to be foreſeen by men in the ſituation of the parties, before the event. Nor do I [387] ſee a diſreſpect, either relying ſo ſtrongly on each ſide, that their own opinion was Law.

There is on the whole, I ſay, nothing againſt good morals or policy to affect the Contract, or induce us to declare the Plaintiff ſhall not recover.

All the reſt of the Judges of the ſame opinion—abſent *Aſhburſt*.

Lord *Mansfield* obſerved farther, that if there ever was a ſuit to authorize a wager, this was one. His Lordſhip ſaid, when he went down, and ſaw the reaſons of the caſe, he only conſidered what coſts. But Mr. Solicitor-general, in opening, went upon the caſe of *Perryn* and *Blake*, expreſs limitation, and afterwards very ſtrong words.

You will follow my ideas immediately (ſaid his Lordſhip.) I aſked him, "Mr. Solicitor, you don't mean to argue upon "this? It is not in the reaſons." "No; but they have altered

altered their grounds." However, I defired the cafe migh be confined to the reafons ſtated in the printed cafe: An upon them the decree was affirmed.

Note, This is a very ſpecial cafe, and ſeems not intende as a precedent, except where there ſhall be almoſt a identical parity of circumſtances. The exact equa lity, and it being between parties in the ſuit, and r balance in part the loſs or gain on the event, appear th principal grounds.

As to the point of evidence, and objection that only copy was read, and only the petition and decree, where they inſiſted, the original ſhould have been produced evidence, and the previous proceedings, as bill and anſwe and decree in Chancery read, as in a verdict, which, the inſiſted, could not be read in evidence, unleſs the declara tion and plea were read, and ſo of the reſt of the interme diate proceſs.—

Lord *Mansfield* ſaid, I remember Mr. *Onſlow*, in the ca of Sir *Watkins Wynne*, inſiſted on the COPY being read the HOUSE of COMMONS, and though I had the origin papers by me, [as counſel] I did not dare read them, Mr. *Onſlow* inſiſted on the point of dignity of the Houſ But what defeated Mr. *Onſlow*'s objection of dignity wa that the HOUSE of LORDS is a COURT of RECORD, bu the HOUSE of COMMONS not.

And I remember a caſe of law to this point, which learned very early the firſt year, upon the northern circu I was not in the cauſe, but was one of the by-ſtander There was occaſion to read the minutes of the HOUSE LORDS in the caſe of Lord *Derwentwater*. Sir *Thom*
[388] *Bootle* inſiſted, the minutes could not be read, becauſe th were not on ſtamps, and he ſucceeded. But, as ſoon it was over, he whiſpered me, "It is very well; but ſtam "were not neceſſary."

On my return I enquired in town, and found that all t Judges of England were agreed, that the Minutes of t Houſe of Lords were not within the act of Queen *Anne*.

RULE DISCHARGED.

Lodge *againſt* Porthouſe.

Award.

ON a rule to ſhew cauſe why an attainment ſhould n iſſue for non-performance of an award.

In anſwer to the rule, it was alledged, firſt, that material witneſſes were not heard on the ſide of the party complained againſt, within the time prefixed for making the award.

Secondly, that the award was executed, or appeared to be executed before the day; and after by eraſures, the day, &c. was altered to make it appear to have been executed on the day.

Lord *Mansfield*—Does the party ſay in what the witneſſes were material?

Contended, that when witneſſes were unſworn, they were not under the preſumption of being immaterial, if they had been examined, when the requeſt was made in time. And that even farther, the arbitrators themſelves had promiſed to hear them. And that they had not anſwered by denying the refuſal.

Lord *Mansfield* obſerved, that if the party had been adviſed by any counſel who was a friend, he would have deſired to refer. The defendant had paid 3l. 7s. 6d. into court; ſo far was payment. The only queſtion was, whether plaintiff was entitled or no. There was beſides two guineas and an half, for rent, demanded; ſomething for wood, about two ſhillings; and another demand of furniture for ſtalls.

There is a contrary demand of a right to paſſage.

If he the plaintiff did not recover more than had been paid into court, he was liable to coſts.

The rent was a falſe demand: It was putting them unjuſtly upon proving payment; which they did by producing the receipt. [389]

As to the ſecond, it was admitted by the defendant.

As to the third, the arbitrators, from their own acknowledgment, compromized it, by cutting off one fourth.

What then was there to be proved?

After one hearing, however, plaintiff alledged he had a material witneſs. One of the arbitrators excuſed himſelf from hearing him, as not being at leizure at the time deſired; but that the other would hear it.

Accordingly one witneſs only appeared, and proved only what the defendant had admitted.

The plaintiff deſired to produce farther evidence.

And does it appear, in ſo ſhort a time as between the firſt and fifth of November, this conduct was driving off the matter, with a view that the time might be expired?

The

The arbitrators poſtponed making their award, and offered to hear the plaintiff's farther evidence on the 25th of November, and gave notice that on the 28th they ſhould make their award.

Between the firſt and fifth of November can he complain of want of notice? Attorney for the defendant is met by the plaintiff's agent, on the road; and agent of the plaintiff is told of the time appointed—to which the anſwer was, that Mr. *Lodge* was not able to have his witneſſes, or to be preſent himſelf then; but that he ſhould be at leaſt any time between the firſt and fifth of November. He has five days previous notice. He was an attorney, as appears by the affidavits, reſident upon the place; nor does he ſhew why he could not have his witneſs then.

This behaviour is driving them about, and putting them to the expence of this circuity, after all the coſts of the arbitration. The ſum demanded, ſo far as is proved due, is a little ſhort of what was paid into court: The alteration of the date proceeds from his own requeſt of farther time.

Therefore, let the Rule to ſhew cauſe why the award ſhould not be ſet aſide, be diſcharged with coſts;

And the Rule of Attachment be made abſolute.

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Mandamus.

To a Steward of a Copyhold Court to admit.

MOTION for a *mandamus* to a ſteward of a manor to admit.

The ſteward, in anſwering to the rule, ſtated, that the perſon claiming to be admitted claimed under a will, with other deviſees; and that the claim of thoſe deviſees had been found void, by reaſon of inſanity in the teſtator.

To this the party applying for the *mandamus* replied, that by the finding of void deviſes, as to the other deviſes, it did not appear that the title of the deviſee now claiming was affected; for that the deviſees claimed under codicils, at the time of which the teſtator might be inſane; but not therefore of courſe at the time of making his will.

Mr. *Bearcroft* ſaid farther, that this was a caſe between a cuſtomary heir and a deviſee: That a cuſtomary heir might try his title without admittance; but no other perſon could.

Lord

Lord *Mansfield*—The deviſee will ſhew his deviſe; which will be ſufficient to protect him againſt being turned out by the heir. The tenant is in by admittance only according to the quality of his eſtate in his true right: and the lord, thro' his ſteward, is only an inſtrument of cuſtom to convey that right. V. Coke's Complete Copyholder

But there is cauſe enough, from what has appeared of the refuſal of the ſteward to admit, to grant a *mandamus*. This refuſal cannot be for any good reaſon: The admittance is no title by itſelf; nor would prejudice any adverſe title; * the ſteward would have a fee the more. And his ſtanding in the relation of father to the heir at law, beſides adjourning the court to avoid admitting, increaſes the ſuſpicion.

Rule abſolute for a Mandamus.

Arreſt.

IF a bailiff hath made a legal arreſt in a ſtreet, and the priſoner eſcapes, bailiff may juſtify, on a freſh purſuit, breaking open the door of the houſe, to retake the priſoner.

New Trial. [391]

ON a motion for a new trial, on a ground ſuggeſted of the jury finding expreſsly againſt evidence.

This was on an action of treſpaſs. The treſpaſs declared on was breaking into the plaintiff's ſhop, when his goods were upon auction, damaging his goods, and obſtructing the ſale. No damages proved. Lord *Mansfield* ſaid he left it to the jury, upon the damages on the trial. They found for the defendant: He declared himſelf not diſſatisfied; and ſaid, he thought they ought to waive their motion; for if they went to it again, they might probably recover ſixpence, which would be all they could deſerve. Vide Bur. Farewell *and* Chaſſey, p. 54.

Arbitration.

Coſts.

COSTS of arbitration to abide the event. The meaning of this is, that the party who prevails with the arbitrator ſhall be in the ſame ſituation, as to coſts, as he would have been on a verdict. If on loſing the cauſe he would not have been ſubject to the coſts of the cauſe on a verdict, neither is he on an arbitration; for in that caſe ſomething Coſts of arbitration to abide the event means ſuch coſts as might have been loſt or gained upon verdict.

* Quicquid in cuſtodiâ legis eſt invita lege evadere non poteſt.

ſomething ſpecial muſt be inſerted on the order, without which he cannot be liable to other coſts (upon the general direction of coſts to abide the event) than he would have been on a verdict.

And it is always drawn ſo, unleſs there be ſpecial directions to the contrary.

The expreſſion means the coſts of the cauſe to abide the event in ſuch manner as they would have done on verdict. Therefore executors are not liable under ſuch general word other than they would have been upon a verdict.

New Trial.

Rex *verſus* Greg.

Indictment.

ON an action tried at the *Middleſex* aſſizes, before Mr Juſtice *Aſton*, on two counts.

[392] One for driving a dray in ſuch manner, that caſually and by misfortune, the horſes being careleſsly driven, the off wheel ran over one *E. A.* an infant of two years old, and killed her on the ſpot.

The ſecond count was, for careleſsly and negligently driving the horſes; by which careleſſneſs and negligence, many of the king's ſubjects were frightened and greatly endangered.

The jury found againſt the defendant, on both counts.

Mr. *Dunning* objected, that on this driving, and the accident caſually, and by misfortune, and ſo ſtated in the indictment, no offence is ſtated.

But that particularly on the ſecond count he meant to take his exception, as that whereon no offence could be pretended to be charged; though, he ſaid, he was very ready to meet them on the firſt.

Court aſked, whether there had been any coroner's inquiſition on the body; which it appeared there had not—much to the diſſatisfaction of the court.

Rule to ſhew cauſe.

Vide 1 Hale, c. 39. p. 476. expreſs to this point.

Note, The firſt count ſeems to charge, very clearly, an offence amounting to manſlaughter, a negligent careleſs driving in a public ſtreet in London, whereby an infant, unable to get out of the way, was killed. And the reaſons and authorities ſeem to be clear, that ſuch a driving

a driving through a crowd would have been murder, without any expreſs or particular malice proved.

Accidentally and caſually, by itſelf, charges no crime at all; it is only *homicide per infortunium*; yet the thing which cauſed the death is a deodand. But negligence and careleſſneſs is a crime, and at leaſt manſlaughter when it produces death of an human creature; nay, very wilful and obſtinate negligence, as driving through a crowd, or ſhooting at random through a crowd, though under excuſe of ſhooting at a mark beyond, will be murder. So throwing tiles, or the like, off an houſe, without giving notice, in a ſtreet where many people are paſſing, if any one be killed, it is held it will be murder.

And any killing, not juſtified by neceſſity, or the command of law, nor purely accidental and involuntary, not depending on the care or will of the perſon by whoſe means it happened, will be murder, or manſlaughter, according to the circumſtances. Vide 1 *Hale* and *Burn*, title Homicide.

[393]

——— Nicholls.

MOTION to ſet aſide an award, as againſt evidence.

There was a counter-motion for an attachment for non-performance of the award.

It was diſputed between the parties on a leaſe for fourteen years and an half, and rent 14l. *per annum*, and covenant that half a year's rent ſhould remain in the hands of the tenant till the laſt year.

Queſtion, whether the firſt or laſt year was meant in which the half year's rent was intended to be retained.

Lord *Mansfield*—Where is the doubt? The current half year is to be in the hands of the tenant, and the half year to be paid when the next becomes due.

It appeared, however, the tenant had three quarters of a year in arrears, inſtead of half an year.

Lord *Mansfield*—It would be ruin to grant his motion: He has three quarters of a year in arrears, inſtead of half a year.

Rule to ſet aſide the award muſt be diſcharged; and the Rule for an Attachment goes of courſe.

Prideaux

Prideaux *againſt* Arthur.

Information for a challenge to a juſtice of peace.

Court will not grant an information, where the charge is made under falſe or ambiguous colours, where the words ſpoken admit of a favourable interpretation; where the party complaining comes late.

[394]

THIS was on a motion for an information againſt an attorney for inſulting and challenging a juſtice of peace on ſuch a day, he the juſtice then ſitting in the execution of his office.

It appeared that the attorney called on the informant on a day of ſeſſion's buſineſs, when he deſired of one of the juſtices to know when he might ſpeak with Mr. *Prideaux*; who told him—after dinner. Then the attorney, who repreſents himſelf as aggrieved by a charge from a man who came as from Mr. *Prideaux*, of an impoſition on the pariſh by a falſe bill, and alſo of the ſame charge in a letter, threatening to ſtrike him off the roll if he did not clear himſelf of every particular—the attorney repreſenting himſelf as ſurprized by this meſſage, ſent and delivered in the preſence of many of his clerks, and a poſitive declaration he ſhould be ſtruck off the rolls—he therefore told Mr. *Prideaux* (as he ſtates and is confirmed by two witneſſes) that he expected ſatisfaction, or was determined to have ſatisfaction, if the laws of his country would give it him. Mr. *Prideaux* ſays, that he the defendant ſaid, he expected the ſatisfaction of a gentleman, but he ſays alſo, the attorney offered him the complainant fifty guineas if he would ſay the will was falſe: meaning, as he believes, to have an action. This paſſed when they were at wine after dinner.

The court from this, when the repreſentation would have led any one to think, that the inſult ſuppoſed to have been offered, happened in the actual execution of his office, and buſineſs of a juſtice; from the ambiguous manner in which the complainant ſwears,—namely, that the defendant demanded the ſatisfaction of a gentleman, or uſed words to the like effect—whereas the complainant himſelf appears to have interpreted as the attorney complained againſt repreſents, if the laws of his country would give it; * and laſtly, from the lateneſs of the application—for the ground of complaint above ſuggeſted happened in Trinity term laſt—for all theſe reaſons the court refuſed to interpoſe in a ſummary way.

* Verbà non accipienda in duriori ſenſu contra legem ubi in mitiori ſenſu et legitimo competant.

Rule diſcharged.

Attorney

Attorney,

Service of Apprenticeſhip.

AN attorney took indentures for the ſervice of a clerk —The attorney died before the time expired; articles of aſſignment were entered into, but failed of ſufficient execution in point of form. On theſe circumſtances the court conſidered as I took it, that the ſervice continued under the old maſter in order to make it good, there being no defect in the clerk—*ſed qu:* Whether the caſe were not, that the articles of aſſignment were deſtroyed by accident.

Seducing Artificers.

ANY of his Majeſty's ſubjects ſeducing artificers to work abroad, the penalty by 23 *G.* 2. is 500l. beſides imprisonment.

Patent.

For new Inventions.

IT does not ſeem to hold true, that a patent cannot be good for a new invention grafted upon an old one. Per Lord *Mansfield.*

Bail Bond.

ASSIGNMENT of bail bond by ſtatute 4 & 5 *Ann.* gives a diſcretionary power to the court to ſtay the proceedings.

Venue.

MOTION by defendant to change the venue from London to York, on an allegation that the cauſe roſe at *Newcaſtle*; and alſo that ſeveral material witneſſes reſide in the ſame town; nor does he believe any witneſs neceſſary to the plaintiff lives out of it. It was an action on a policy of inſurance.

Court: The plaintiff has his election; and unleſs upon ſpecial circumſtances, the defendant cannot change to a

county where the cauſe of action did not ariſe, except by conſent. Particularly, the venue could not be tried at Newcaſtle, becauſe there are no aſſizes there this year; and a policy of inſurance (even if there were not this reaſon) might as well be tried in one place as in another.

Leave to Compound on the Building Act.

MOTION for leave to compound on the Building act on payment of coſts granted; but the court diſapproved this motion, by which the poor were to get nothing and the plaintiff pocket the coſts.

Marriage.

MOTION to diſcharge a woman out of cuſtody, it being ſuggeſted that at the time of application, and at the time of her being taken into cuſtody, and ſince, ſhe was and is a married woman and her huſband then and now living, and that ſhe was taken in arreſt upon a civil action.

[396] Court refuſed to diſcharge her upon motion, there being evidence of the marriage, but none of their ever having lived together, or co-habited; and they ſuſpecting pretence or colluſion.

Irregularity.

DECLARATION on *debet* and *detinet*; original on the *detinet* only: The court ſeemed willing to conſider ſuch variance if poſſible, not fatal.

30th January. 30th January being Sunday, the day was kept the next day after, and the court did not go into buſineſs on 1ſt February the Monday.

Common Pleas.

Half-blood not inheritable. Vide Black. Comm. L. 2 Ch. 14. ſec. 6. and Maynard's ſucceſſion to

ON the maxim, that the whole blood only may inherit.* Lord Chief Juſtice *De Grey* obſerved there was a very ſenſible diſtinction in the old books *Bracton* 64. *Briton* 251. and *Fleta*, that the heir of the half the Caſes there cited of 10 Aſſizes 27 and Mich. 19 Ed. 2. folio 62. Edition; but note it is not an impediment to deſcent of eſtates tail, to the crown.

* Hæres non poteſt eſſe de dimidio ſanguine.
Seiſina facit ſtipitem.

blood ſhall take by deſcent from the father, though not by purchaſe.

But this, though it is evidently a hardſhip to a family not to be able to adopt it, cannot be now adopted.

The caſe appears to have been—

A man ſeiſed in fee of an eſtate, marries, and has two daughters; his wife dies and he marries again.

The eſtate in fee deſcends to the two daughters as heirs to their father: The mother-in-law entered and took the rents, and they all lived on the eſtate.

Afterwards a poſthumous ſon is born of this ſecond venter. Queſtion whether after the deceaſe of the daughters, the ſon could claim the inheritance as deſcended to him.

The maxim was quoted, *poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*; and therefore that the converſe ſhould hold if the ſon had been a brother of the whole blood, but that the ſiſters had been in poſſeſſion under the deſcent, and that therefore the poſthumous ſon could not take, as being only of the half-blood to them who were laſt ſeiſed. [397]

Agreed, that it is not neceſſary to receive rent, or that rent ſhould become due, to make actual poſſeſſion.

More 151. 3 *Cro.* 4 *Inſt.* 14—5.

That entry will be as good by actions as words.

That actual ouſter may be qualified. 275 Roll's Abridgment, where one as guardian in ſocage enters; it is at the election of the infant to treat this as a diſſeiſin, or entry for his advantage.

Cro. Car. 303. Lord *Effingham*'s caſe in the name of *Blundell* and *Ball.*

The mother might have entered for her quarentine, which continued nearly to the birth of the poſthumous ſon; and therefore her entry is not to be preſumed a diſſeiſin. 1 *Roll's Abr.* 740—1.

It ſhall not be in the power of a perſon who may enter lawfully, to make his entry by a diſſeiſin, to the prejudice of him who hath a right; and ſo to do that by wrong which he cannot do by right. * 1 *Roll's* 618, where a perſon enters as guardian, he ſhall not, by making a leaſe and reſerving rent, make a diſſeiſin. V. the caſe of Tracy Atkins, 4 Bur. 1 vol.

But here the misfortune is, that the election not being made in the life of thoſe who had a right to make it, it cannot be made afterwards.

* Quod fieri vetatur ex directo vetatur etiam ab oblique.
Nemo lucrabitur de injuriâ ſuâ propriâ.

If there had been no daughters, the poſthumous ſon born in the houſe is actually ſeiſed, and the law, if neceſſary, would explain the entry of the mother as the entry of the ſon; (*Moore* 151.) and the poſſeſſion of the mother as the poſſeſſion of the ſon. But here the eſtate of the daughters is interpoſed who were laſt ſeiſed, and the poſthumous ſon cannot therefore claim through them, he being of the half-blood; and he who will take as heir in fee-ſimple, muſt make himſelf heir of the whole blood to the perſon laſt ſeiſed.

Though it is hard law, and we ſhould have been glad to find it otherwiſe, yet, as the inheritance deſcended on the daughters, and was not ouſted by the entry of the mother; and no election was made in the life-time of the daughters, and the entry of the mother was in the poſſeſſion of the
[398] ſon, we muſt determine accordingly, That the poſthumous ſon cannot take.

It is clearly and rightly admitted that the poſthumous
Salk. 228. ſon cannot be aided by the ſtatute of *W.* which relieves only in the caſe of remainders.

Poſtea muſt be returned for the leſſor of the plaintiff.

Cuſtom.

CUSTOM alledged in the manor of *Kings Swinford* —that a man may be tenant by curteſy.

Alſo, that eſtates within the manor are intailable, and that a recovery is abſolutely neceſſary to bar the eſtate in tail; where a fine would be neceſſary to bar at common-law.

Contrary evidence, ſometimes of barring by ſurrender, at other times by recovery. The judge upon the trial left it that the cuſtom might be both ways, as in *Everard* and *Smallrey*, *Mich.* 13 *G.* 2.

That a ſurrender was the natural way; and if there was a cuſtom both ways the preferable way, as the moſt natural, the moſt eaſy, and unexpenſive.

King'

King's Bench.

On a ſpecial Verdict.*

A. being poſſeſſed from his father of an undivided moiety in the county of Mayo, and alſo of another undivided moiety in the King's county in the kingdom of Ireland; and alſo of other particular eſtates of conſiderable value; makes a deed of ſettlement, reciting in the preamble his natural affection to his blood, family, and name, and that the purpoſe of the deed is to ſettle his undivided moiety (that is his expreſſion) accordingly he does, by a very long conveyance, reciting very ſpecially indeed the ſituation, &c. and afterwards limitation of the uſes; and then follows a clauſe—"with all my other eſtates in the kingdom of Ireland," without any limitation of uſes.

Sweeping clauſe will not carry eſtates of a different nature from thoſe, &c.

Queſtion: Whether eſtates which he had in the kingdom of Ireland, beſides theſe moieties paſſed.

Lord *Mansfield*—The queſtion on this deed went on two points. [399]

Firſt: Whether the general words would paſs any particular eſtate not before expreſſed.

Second: Admitting thoſe general words ſufficient to paſs an eſtate not before named, yet there being no limitation of uſes, whether this eſtate ſhould not reſult to the grantor?

The queſtion admits very eaſily of the deciſion on either point—but on the firſt, which is moſt difficult, it is to be conſidered that the preamble of a deed, as of an act of parliament is a key to the whole.

V. Analogy between deed and act of parliament in many reſpects in the notes on Wynne's Dialogues on the laws of England.

Having declared the conſideration of blood, &c. as mentioned in the caſe, he proceeds to his intention of ſettling one undivided moiety: Now he had two; one in the county of Mayo, the other in the King's county.

He then goes with the utmoſt tautology to enter into the moſt minute and repeated deſcription that could be made; all confined to this eſtate which deſcended from his father. He limits the uſes, and then comes, what perhaps was the blunder of the tranſcriber, but take it at the moſt it is only a ſweeping cauſe of all his other eſtates in the kingdom of Ireland; by which kind of ſweeping clauſes, conveyancers often take in every thing relative to what had been before recited,

* This the Caſe of leſſee of Moor v. Moor in error from K. B. Ireland.

recited, and which it was poſſible they might have omitted to enumerate preciſely; (and beſides it helps forwards a line,) but they never mean to paſs any thing new. Now the particular eſtate in queſtion, is ſtated to be of conſiderable value.

Now is it credible this would have paſſed by ſo few general words, when ſuch an immenſe detail was made of the others?

Does it appear in the preamble, that any thing was meant to be ſettled by the deed, but the undivided moiety only? Is this eſtate to be carried by a ſweeping clauſe when mentioned no where elſe? Nor with any circumſtances elſewhere to give a ſhadow of appearance, that it had ever once been thought of by way of paſſing under the deed. *

Second point.

On the ſecond point, if it could appear theſe words were otherwiſe ſufficient to have paſſed the eſtate in queſtion; what will be the conſequence if no uſes have been limitted?

[400]

Now, the not limiting of any uſe, goes ſtrongly amongſt other grounds to prove that there was no intention it ſhould paſs; next there having been no ſuch limitation, the uſe not paſſing any where elſe reſults to the grantor.

Vide Bacon on uſes.

Lord *Mansfield* obſerved farther, that probably the word ſaid had been left out, and that it might be "All my other ſaid eſtates," with reference to the undivided moiety.

Mr. Juſtice *Aſton* much to the general effect of the chief juſtice. And he ſaid he ſhould be obliged to go over the ſame ground, that he did not think there was any doubt.

The judges *Willes* and *Aſhhurſt* much to the ſame effect.

Sentence of corporal puniſhment not to be pronounced on a perſon in his abſence.

ON the caſe of a perſon indicted at common law for decoying ſailors on board a ſhip, it being repreſented to the court, that the crown was inclined to mercy, and the court being deſired to diſcharge him, on ſome corporal puniſhment, he being unable, by reaſon of his poverty, to pay a fine, the court ſaid they could not award corporal puniſhment in *abſentem*.

Conſent of attorney-general where neceſſary, and how.

That the proper way was, the man having been long impriſoned, and ſuggeſted to be unable to pay a fine, to obtain a *fit manumiſſus*. At laſt, by conſent, the court ſet a fine of one ſhilling, but obſerved, for the ſake of the rule, the conſent

* Clauſula generalis ad ea refertur de quibus ſpecialiter præmiſſum eſt, ut acceſſoria earum vel nonnunqnam res ejuſdem generis ſecum ferat; non autem nova et diverſi generis.

nſent of the Attorney-general, and that upon warrant, as neceſſary.

The Attorney-general declaring himſelf authorized to nſent, the court made the rule accordingly.

Compoſition on the Building-Act.

MOTION to compound on payment of coſts.

Mr. Juſtice *Aſton*—You have been told before this kind compoſition the court by no means approves: And when, t of compaſſion, the court granted the rule, a few days o, and the only one hitherto, I find that it would be wn into precedent. But that, he added, was on parti- ar circumſtances, and affidavit of extreme poverty; and : he thought the court ought not to grant the rule.

Rule diſcharged.

Declaration in Ejectment. [401]

CASE in *Barnes*, 153, held to be miſreported, and on enquiry into the practice if declaration is in Hila- ry, notice to appear in Eaſter term, and plaintiff does no- thing in Eaſter, he cannot ſign judgment in Trinity term.

Abſent Lord *Mansfield*.

Declaration in Ejectment.

MOTION that ſervice of notice in Ejectment on the ſervant of an inſane perſon might be good ſervice. The ſervant intended to be ſerved, it was ſuggeſted, took care of him, and paid the rents.

Notice of declaration not to be delivered to ſervant of inſane, but to committee.

Mr. Juſtice *Aſton*, in the abſence of Lord *Mansfield*, was ſtrongly againſt the rule, and held that the ſervant was not uthorized to defend the poſſeſſion of the lunatic. And hen poſſeſſion was to be changed, and a lunatic turned out of his eſtate, it would be neceſſary to ſerve a committee, nder a commiſſion empowered to take care of his eſtate.

Mr. Juſtice *Aſhhurſt*—The ground in common caſes of rvice of notice on a ſervant being deemed good ſervice, is ecauſe it is preſumed to come to the notice of the maſter, hich cannot hold in this caſe. *

Common

* Ceſſante cauſa ceſſat cauſatum.

Common Pleas.

QUARE IMPEDIT.

The Reverend Edward Bernard, Doctor of Div
nity, Provoſt of Eton College, with the Fe
lows of the ſaid College, *againſt* the Biſhop
Wincheſter.

On a Special Verdict.

THIS was on a claim of the advowſon of *Worpleſd*
to which the crown had preſented.

The verdict ſtates, that King *Charles* the Second w
ſeiſed of the advowſon of *Petworth*, *jure coronæ*, and aft
wards the other ſucceeding kings of England.

[402] That the Duke of *Somerſet* had the living of *Kirby*, a
Eton college the living of Worpleſdon.

That afterwards, by an act of parliament of King *W.* 3
it is enacted, that the living of Kirby ſhall be ſettled in th
King and Queen, and their ſucceſſors, for ever. That th
living of *Worpleſdon* ſhall be in *Eton* college. That th
Duke and Ducheſs of Somerſet, their heirs, &c. ſhall b

Saving. patrons of Petworth, ſaving the right of all other perſon
but the King and Queen, the Duke and Ducheſs, and Et
college.

Preſentation of Lord Egremont. It ſtates, that Lord Egremont had preſented to the livin
of Kirby, and whether the crown be entitled to the rectо
of Worpleſdon, they know not.

And they ſubmit the whole to the judgment of the cour
in the uſual manner.

That the act was neceſſary to effect the conveyance. Serjeant *Burland* argued, for the plaintiffs, that the a
was neceſſary to effect this conveyance; the college cou
not convey without an act. The act eſtabliſhes the conve
ance. The crown was to take for ever the living that w
to be conveyed from the Duke; the college that from t
crown; and the Duke that from the college.

Lord Egremont's claim. Lord *Egremont* claims as againſt the crown, inſiſtin
(under the general ſaving) on a title paramount.

Poſſeſſion has been quiet ſeventy years.

That the crown ought not to attack the fault The Duke of Somerſet, having been miſtaken in h
title, and conveying what he had not right to convey, t
the poſſeſſion of a third becauſe its own has been diſturbed, with
or privity of the third.

poſſeſſi

poſſeſſion of the crown is diſturbed. Is the crown, therefore, to come on the poſſeſſion of the college; and have its remedy againſt that? The college was not bound to take notice of the Duke's title, to which it was a ſtranger, and not privy.

There appears to have been a treaty between the college and the Duke of Somerſet. The college were, certainly, to ſee their title; but what conſideration the crown was to have, in order to enable the Duke to make this equivalent to the college, was nothing to the college.

If the college lawyers had enquired what title the Duke had to the living of Kirby, which he undertook to convey to the crown, it is to be apprehended they would have been told it was not their buſineſs.

That the college had nothing to do with the title the Duke had to convey to the crown.

If it had been the caſe of a common perſon, they would have had their remedy againſt one who had conveyed them a bad title; but not againſt a perſon entirely innocent.

[403]

That a common perſon would have remedy againſt the wrong-doer, but not againſt the innocent.

There is no ſaving in the act on account of eviction of title; "that if the title ſhould not fail on one part, it ſhould "affect the reſt:" For if this had been the caſe, it would have been expreſſed; and if it had been expreſſed, it would have been void, *ab initio*.

That there is no ſaving in the act on account of eviction.

This appears to be contended on the principle of the law of exchange; and ſo if one fails the whole is anſwerable. But I contend there is no exchange, except where the contract or agreement is between two parties only. I don't ſay two perſons; for tenants in common, or joint tenants, be they ever ſo many, may be one party. [For each hath one undivided property, as one perſon, though joint tenants have it by one title, and one right, and tenants in common by ſeveral titles, or one title and ſeveral rights.

That if there had, it would have been void as to third perſons.

That this is no exchange; becauſe between more than two parties.

Exchange is founded on this idea on the definition of the very text of *Littleton*, *l.* 1. *ſ.* 62. If there be two men, each ſeiſed, and one granteth his land to the other, in exchange for land which the other hath.

That the definition of Littleton confines exchange to two.

Between more parties than two there is no ſuch mutuality or reciprocality. *Bulſtrode*'s caſe, 4 *Co.* 21. the warranty in exchange is only a ſpecial warranty, and does not extend to recover in value in any other lands than thoſe given in exchange.

That the reaſon of mutuality confines it.

Authority.

If

Vide 62, f. 12. That between three there may be good consideration, but no mutuality; ergo, no exchange, and that the word exchange must be used. f. 62.

If *A.* gives to *B. B.* to *C.* and *C.* to *A.* this may be good consideration, but no mutuality: And there is no privity of estate, or privity of contract. It was properly observed, that wherever there is exchange the word must be used. Vide 9 *E.* 4. *Co.* 51. *Perkins* 253, and *Brooke*, title *Exchange*. Without the word exchange, it is only one thing in consideration of another, and cannot pass without livery, and so here.

That in exchange the parties have no freehold till executed by entry.

In exchange the parties have no freehold till executed by entry. *Co. Litt.* 50. 3. *Mod.* 85. *Fitzherbert's Abridgment*, title *Exchange*, *pl.* 10. And *E.* 4. 53. If one dies before exchange executed by entry, the exchange is void, and the heir cannot enter as a purchasor.

That in exchange the heir could not have entered, if donee had died.

If it had been land, and the donee of the estate in exchange had died without entering, the heir could not have entered.

That exchange of reversion not good without attornment.

* In case of a reversion, the same law is, that exchange is not good till executed by attornment, which was necessary by common law.

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That exchange of advowson not good till induction before the death of one of the parties. That none of these could be supposed necessary here to make the conveyance effectual.

In case of a living, in the same books, exchange is void, unless there be induction before the death of one of the parties. Would it, or can it be supposed it would be so here?

That in exchange estates must be of equal quality, but not necessary here. That as it fails in all the incidents and characteristic qualities, it is not an exchange.

To perfect an exchange the estate must be equal. If the legislature had known the Duke had an estate for life, would it not have been good in this case against an estate in fee? I contend, the conveyance under the act would have been as good as if in fee; but *e contra*, if exchange. It fails, therefore, in every one of the ingredients. It has not the words; an entry is not necessary; there are more parties than two, and no need of equality of estate.

If

If this is to be the caſe, that the act is to be conſidered as a deed of exchange, it's whole effect is to ceaſe. The new erected churches ſink into their original ſtate; the poor not to be maintained by the hamlets; the pariſhes to be deſtroyed; (though the act ſays they are to remain for ever) and all this becauſe Lord *Egremont* claims a paramount title. That it would totally defeat the act to conſider it as exchange.

Nay more, if it is an exchange, it is void, *ab initio*; as if one gives an eſtate for life, and takes an eſtate in fee; this, by way of exchange, is void, *ab initio*, and not merely voidable. That as ſuch it would be void ab initio, not merely voidable,

The rector may be called upon to refund the 10l. *per annum* he has received many years back; and all parties, in the ſame manner, to refund what they have received. and that all the parties would be to refund all they had received.

Farther, if this be to be conſidered as an exchange, and as a good exchange, the uſurpation of Lord *Egremont* cannot defeat it. To defeat an exchange there muſt be an eviction by elder title; till then it is only voidable. Farther that if it were a good exchange, Lord Egremont could not defeat it without regular eviction by an elder title.

If one of the parties enters by wrong upon the other, the other cannot enter by right upon him, but is put to his aſſize. But where the eſtate was defeaſible at firſt, as exchange by tenant in tail, the iſſue enters—or exchange by huſband having lands *jure uxoris*, the wife enters, then the other may enter, on him ſo defeating the exchange. In the caſe of a ſtranger entering by wrong, the other cannot enter upon him: And ſo the books. 9 *E.* 3. 21 *Brookes*, pl. Exchange, 12, 13. *Perkins* 219.

What is meant by entering by wrong? If one of the parties or a ſtranger, after exchange perfected, enter; and the title then is to be tried by aſſize. [405]

And if a ſtranger enter by title, he muſt have a legal eviction upon his elder title; otherwiſe he will enter as by wrong.

If this be the caſe with a common perſon, a *fortiori*, in the crown, whoſe eſtate can hardly, in any caſe, be evicted without office found, or matter of record. *Roll's Abr.* If an eſtate commence by matter of record it muſt be defeated by matter of record alſo.* Now the King never takes but by matter of record. That ſtill more in the crown, which takes or gives nothing but by record.

Suppoſe

* Naturali æquitati convenit quodlibet eodem jure diſſolvi quo ligatum eſt. Rex neque dat neque accipit niſi per recordum.

That the King could not recover againſt the college without office.

Suppoſe the King's title to have been defeated; and that the crown had a right thereupon to reſort to remedy againſt the college, (which, however, would not follow, if the firſt were true, and neither admitted) yet even then the K[illegible] could not recover againſt the college, without office found. *Stamford, Prerogative*, 55. In all caſes where a ſubject ſhall not have poſſeſſion without entry, the King ſhall not have title without office, or other matter of record.

Caſes.

If the King enters, upon a condition broken, he cannot enter without matter of record.

That here not after office ſhall the crown be entitled without actual ſeizure.

Nay, if the King's title be found by office to an incorporeal hereditament, as an advowſon, he ſhall not be entitled before ſeizure; and party may traverſe the preſentation, without denying the office.

Scire facias requiſite.

Where a common party would be put to his action, the King will be put to his *ſcire facias*.

In this caſe, I repeat, if the crown ſuffers, by entry or uſurpation of Lord *Egremont*, the crown is in the caſe of all common perſons, and muſt ſeek remedy againſt the perſon who did the wrong, and not againſt an innocent perſon. ‡

That is an act of parliament giving diſtinct independent intereſts.

This is an act of parliament; and an act of parliament at the particular requeſt of the parties; and an act which aſſigns to every one a certain diſtinct intereſt, independent of the intereſts taken by the others. Either it muſt be repealed by another act of parliament, or all the parties are bound by it, and none can reſort to the third for a recompenſe for what they received from another, without ſufficient title.

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Recapitulation.

Finally, I conclude from all, that this cannot be argued upon the principle of exchange: That if it could, Lord *Egremont* muſt firſt evict, and that then the crown would be entitled to preſent, till the title was found againſt it by office. And that if the crown had a right to reſort againſt the college, on eviction of the title conveyed to them from the Duke of *Somerſet*, it muſt firſt be evicted, and office found before it can reſort againſt the college for recompenſe.

On behalf the defendant, Mr. Serjeant *Kenyon*.

Eſtates of the parties and conveyance.

The learned Serjeant began with ſtating the record; namely that the Duke being poſſeſſed under the marriage ſettlement as tenant for life, of the living of *Kirby*, the crown [illegible] ſeiſed of the living of *Worpleſdon*, *jure coronæ*, and the co[illegible] leg[illegible]

‡ Lex ita prærogativam regis admetita eſt ut ne hæreditatem alicujus tali læderve.

ge, in it's collegiate capacity, being ſeiſed of the living of
worth, the Duke being deſirous to exchange the living of
by for that of *Petworth*, as more commodious to him,
the college being willing to accept in lieu of it the living
Worpleſdon, which the crown was ready to grant to them,
conſideration of receiving *Kirby* from the Duke: That to
ſecure theſe purpoſes, an act of parliament was made.
hat the crown thereby took *Kirby* as in exchange for *Wor-*
don; the college *Worpleſdon*, as in exchange for *Petworth*;
the Duke *Petworth*, as an exchange for *Kirby*.

That the conveyance had been made under the act of parliament, on the ſuppoſition that the Duke, inſtead of a life eſtate, had a good and abſolute fee to paſs in the advowſon of *Kirby*, and which fee he covenanted to convey to the crown, in conſideration of the crown conveying to the college the living of *Worpleſdon*, and the college to the Duke the living of *Petworth*. That the Earl of *Egremont* coming under the general ſaving of the act, by a title paramount to that of the Duke of *Somerſet*, under which the crown claimed, the queſtion now was, whether the crown, being divested of that title in conſideration of which it conveyed *Worpleſdon* to the college, ſhould not now reſort to its original title to the living of *Worpleſdon*, againſt the college.

That the crown gave to the college on conſideration the Duke ſhould convey a fee to the crown.

Queſtion, whether the Duke, having only an eſtate for life to convey, the crown ſhould not reſort to the college.

Firſt, *Eton* college could not have attained their object of exchanging *Worpleſdon* in exchange for *Petworth*, without the interpoſition of legiſlature.

The act neceſſary.

Secondly, When legiſlature did interpoſe, I contend, here is a true legal technical exchange.

That this was a ſtrict true exchange.

Thirdly, The legiſlature never meant to alter the nature of the exchange; but to leave it as the parties intended and as the law conſtrues it.

That it was the intent of the parties.

Next, I ſhall contend upon the intention of the legiſlature itſelf, that the grant of *Worpleſdon* from the crown to the college muſt be null and void, unleſs the Duke of *Somerſet* had a good fee to convey to the crown in the advowſon of *Kirby*, according to the mutual agreement of the parties; unleſs you will ſuppoſe the legiſlature guilty of the greateſt injuſtice in the world.

The intent of the legiſlature.

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The laſt matter will be the title of Lord *Egremont*: And the neceſſity of a legal eviction, as my Lord *Egremont*'s title incidentally in queſtion, I ſhall not omit.

The title of Lord Egremont.

That

Littleton's description of a particular case.

That this was an exchange—I take that mentioned fro *Littleton* not to be a definition but a description of a particu case of exchange. He then goes on to another.

Definition of exchange, mutual grant of equal interests one for other.

There is a definition in *Finch*, p. 103, which has been so faithfully copied as it ought.

" An exchange is a mutual grant of equal interests o for other."

The touchstone of assurances does vary a little, " A m " tual grant of equal interests one for the other." Wh ther the relative article may make a difference, I will not b but I chose to take it from the fountain head.

Mutuality here from the words Anno 4 & 5 W. & M. c. 13.

My brother says, there is no reciprocality; no mut grant—Let us see what the act says. " An act for divid " the chapelries of *North Chapel* and *Dugton* from the par " of *Petworth*, and erecting them into new parishes, " for settling the advowsons and rights of patronage of " rectories of *Petworth*, *North Chapel*, *Dugton*, Cl " *Farnham*, *Royal*, *Worplesdon*, *Kirby*, *Overblows*, " *Catton*, and the vicarage of *Long Horsley**—according " a mutual agreement between one and the other of " parties."

* Note, the title in Ruff head' ends at this mark. *

From the meaning and necessity of the thing.

Thus says the title; and of necessity the agreement is tween all three; therefore the reciprocality is betwee three, and runs throughout. My brother says, the w exchange is necessarily restrained to two; I don't see reason. It is a word of mutuality. And *Virgil*, of a sw of bees hanging from a tree, says they hung *pedibus per* *ua nexis*. And in a conveyance of three parts, four pa and so on, the parties mutually agree. The college of E as much stipulates and contracts to convey to the Duk *Somerset*, as they do to take from the crown; the crow much contracts and stipulates to take from the Duke, a does to convey to the college; and the Duke as much c tracts and stipulates to convey a good and absolute fee to crown, as to take from the college.

Exchange is mutuality, and mutuality may be between more than two.

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That here it is mutual agreement expressly of all three.

My brother contends, the college is merely neutral. H does it appear? Not on the record, in which it is expr contained that all three agree; and from whence it c nates signifies not a tittle.

That the college is no more innocent than the Duke.

It may be said, that the college of *Eton* is intirely in cent. I see not that it is more so than the Duke of Som set, who, I am persuaded, did not know that he a mere tenant for life.

I m

I never underſtood, where there were three parties, but that all the parties were equally bound to look to the title of each other.

All parties in mutual covenants equally bound to look to each other's title.

The next thing is of mutual intention. It has never yet been argued but that, in the view of the parties, the contract was meant and underſtood by all as of equal intereſts; in the event it turned out otherwiſe: The Duke had only an eſtate for life, expectant on the death of the Dutcheſs. If the Duke had been ſeiſed, as he ſuppoſed himſelf, of a fee, there is no doubt they would have been before the legiſlature, as having all equal intereſts.

Intention of parties.

The next, and the great force of the argument, reſts on this, which I cannot go by. "I muſt ſee the very word exchange." I conceive the only meaning is, one thing is to be the conſideration for the other, and this meaning is abundantly expreſſed. This is the natural meaning of the act in general, ſuppoſing no argument to be drawn from the words; which I ſhall conſider by and by. The crown giving to *Eton*, *Cleaver*, *Worpleſdon*, and *Farnham Royal*, are to have *Kirby* from the Duke; and the college interchangeably, for it's part, is to convey to the Duke the rectory of *Petworth*.

The very word exchange not neceſſary; the meaning ſufficient: and this meaning clear in the caſe.

This, therefore, is an agreement for changing over between theſe three parties, this could never have been conſtrued, as no exchange as between any of theſe parties and a ſtranger, a *fortiori*, therefore not as between themſelves.

I did liſten with ſome attention to find whether my brother had been more fortunate in his reſearches, as to the neceſſity of an exchange being only between two perſons. I have looked into *Fitzherbert*, *Brooke*, &c. and I cannot find even a *dictum* why it cannot be between more than two. I think it was incumbent to have given a reaſon, as I do not find, nor hear that my brother has found a precedent which is ſo. Lord *Coke*, in *Bulſtrode's* caſe, ſays, the reciprocal conſideration of one thing given for another, is the ground of all; and from this is the implied conſideration and warranty raiſed.

No authority that the word muſt be uſed. No reaſon given.

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Though the caſe of joint tenants, perhaps, and coparceners, (who, though they have ſeveral inheritances, have one freehold) may not be applicable to this caſe, in the caſe of tenants in common both freehold and inheritance is diſtinct. Now tenants in common may exchange with a third perſon, which goes much, I think, in proof of the reaſon and principle.

Tenant in common may exchange tho' both freehold and inheritance diſtinct; againſt it.

ergo exchange may be between more than two. No caſe

ciple. If there be no precedent exactly commenſurate with the preſent caſe, there is none againſt it.

I come to the laſt—the "one for other." The touch-ſtone of aſſurance ſays, "the one for the other." I agree with my learned brother, and will take it from the fountain. It comes then preciſely to the caſe.

Proofs that the word is not neceſſary

This Gothic word of *excambium* is much relied on. Lord *Coke*, I admit, is clear that no word will ſupply it; I do not admit *Perkins* is ſo clear to this; I admit there is a *dictum* of two of the juſtices; I admit it is ſo in *Fitzherbert*, and ſo in *Brooke*, the one from the other. But *Perkin* ſays expreſsly, it may be by the word *permutatio*, &c. or word to the like effect.

Anſwer to caſes cited.

I muſt beg my brother's pardon, for ſaying he does not ſtate the 2d —— 253, right. It does not ſay, it has been reſolved, but only it is ſaid, an exchange cannot be without the word *excambium*.

A caſe has been cited by my brother *Burland*, that if the word exchange be not inſerted it can only operate as mutual grants. Therefore if *A.* by deed indented, give to *B.* an acre of land in fee, and *B.* grant back to *A.* in like manner this cannot be good without livery of ſeiſin. But if the conſideration had been ſtated, that *A.* gives *Black* acre to *B.* in conſideration of *White* acre given to him by *B.* and this appears upon record, then ſays the caſe, of neceſſity it ſhould operate as an exchange; as if the word *excambium* had been inſerted.

Littleton, in his 65 *ſ.* ſaith, it behoveth that the land be equal: For if one gives his eſtate in tail for another's eſtate in fee, this cannot be good.

Here *Littleton* doth not make it neceſſary to uſe the word "exchange;" he uſes the word "for," to operate as an exchange.

To prove that it is not an appropriate word, lands recovered in warranty are ſaid to be in *excambio*.

That in the caſe of the legiſlature a liberal uſe of words is to be intended.

I contend farther, that whatever might be the caſe with reſpect to common perſons, with reſpect to the legiſlature a greater latitude will be admitted. And a fee will paſs without the word "heirs," by act of parliament, and in conveyance the legiſlature does not grant and demiſe, but gives and ſettles: It ſpeaks not with the nicety and formality of a private conveyancer, but with it's own dignity and authority.

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favour

Another thing, this is the caſe of the crown; and there are a variety of caſes where words will raiſe a condition in favour of the crown, which would not in the caſe of a common perſon. In the caſe of the crown conſtruction ſhall be in favour of the crown.

But I chooſe rather to rely on this being by act of parliament; and I have already ſubmitted humbly to your Lordſhip an act of parliament, framed and executed upon the original intention of the parties.

The legiſlature concluded all the parties before them brought an eſtate in fee; ſo did the parties: The parties meant an exchange of theſe eſtates, as of equal intereſts: ſo did the legiſlature. No defect was then dreamed of, either by the legiſlature or any of the parties. Whether from ſcitancy, or how, I know not, his grace had not that eſtate of inheritance which the parties and legiſlature ſuppoſed he had. It is not gueſs; the parties underſtood a fee was to be brought; I think it is demonſtrable. Intent of legiſlature and parties.

The very dividing is ſtated in the title to be on an agreement between the parties; which, by the language in the ſtatute, is evidently ſuppoſed, and which runs through the whole. Now the agreement in contemplation could never be that the crown ſhould give an eſtate in fee to the college, in order that the college might have an eſtate in fee to the Duke; and enable him to give his expectant poſſibility in a chattel for his life, after the life of the Ducheſs, to the crown. This cannot be the meaning which is to be intended of any of the parties, and ſtill leſs of the legiſlature. Proofs from the words.

The conſequence then is, if the crown gave a good title in fee to the college, they ought to have from the Duke the conſideration for which, in the underſtanding of all the parties, and in the deſign of legiſlature, it was given. If they have not that conſideration, the college have not the title to the advowſon, which, from the nature of the agreement, they took only conditionally, if the crown ſhould have an equal eſtate of fee in exchange.

The legiſlature may adopt the agreement of the parties, eſpecially when, from imbecility, they cannot perform themſelves; as in the caſe of *Eton* college. And when they have, the words uſed by legiſlature are to be liberally conſtrued, according to the intent of the parties. Lord *Coke* ſays, *parliamentum, teſtamentum, arbitramentum*, are thus to be conſtrued. And, in conformity to this rule, I beg leave to obſerve, your Lordſhip will go on the purview of the ſtatute, upon the intent of the parties, and of the legiſlature. That the conſtruction of the act otherwiſe would argue an injuſtice in legiſlature.

[411] If the legiſlature had underſtood otherwiſe, they would have left the Duke and the college without their aſſiſtance; they would have made an honourable compenſation at leaſt, if they meant to deveſt the heir.

And they not having relieved any defect, it is to be preſumed there was none then thought to exiſt.

The act is ancillary to the agreement. If this defect had been underſtood by parliament, they muſt have given their aid to operate an injuſtice; which that they ſhould do is an intendment that never will be made.* But I contend, the only view of the legiſlature was to ſerve the agreement, and to paſs a fee, as they then ſuppoſed, in exchange among all the parties; and the agreement failing, the act fails with it: And no part can ſtand, I farther contend, without making the legiſlature work a wrong.

How is it to operate? As an exchange? There is no equality of eſtate: An eſtate for life on one ſide, of inheritance on the other. Therefore the exchange is a nullity, and no entry, agreement, acceptance, or acquieſcence, can make it good. *Dyer* 353.

If, therefore, it ſtood on a common law conveyance, it would be null.

Certainly, the legiſlature never meant to give a *tortious* fee, nor to aid any defect, in a caſe of this kind.

But it is contended, this is an act of the legiſlature, and therefore irreſiſtable; and no miſtake can ſuperſede it's operation. But, taking it at the loweſt, and lower than perhaps, for argument, it might be taken, it is at leaſt an involuntary deception of parliament, committed by a tenant for life taking upon himſelf to paſs a fee: And where parliament aſſiſts individuals in their contracts with one another, it will take care that an innocent party ſhall not ſuffer by another party deceiving them, whether willingly or accidentally, by a falſe ſuggeſtion: And if there be ſuch a deception, the act is void: It is ſure enough a deception will deſtroy the effect of a conveyance, ſo it does a grant of letters patent: And where the party himſelf is bound in conſcience to rectify the miſtake, where a deed would have been void, where letters patent would have been cancelled, it would be ſtrange if an act of legiſlature ſhould rivet an injuſtice on the parties.

This

* Ea conſtructio legis ſemper facienda ut ne cui fiat injuria.

Leges injuſta jubere nunquam præſumuntur—Lex enim injuſta, non eſt lex.

Quod ab initio in ſe caſſum fuit nulla ratihabitione confirmari poteſt.

This brings me to another conſideration—What is to become of the chapelries? I muſt be underſtood to contend that they never have been rectories; that they have been chapelries annexed to the living. [412]

I do not ſee the weight of the objection, that the officers will be indictable for every act they have done. I think they will be conſidered as officers *de facto*, acting under an authority ſufficient to protect their acts: Neither will they be indictable, nor puniſhable of treſpaſs. That the officers will not be diſturbed for antecedent acts.

As to the veſting in the *Duke*, and his heirs, it is not a peculiar veſting, more than to the other parties; and the whole was ſubject to the condition above-mentioned.

Next, the length of time for which poſſeſſion has continued has been objected. The Duke of *Somerſet* lived till forty-eight; after him his next heir; nor could the right be known till the vacancy, and accruer of Lord *Egremont's* title.

To conclude this part—It was underſtood by the parties, and by the legiſlature, that the Duke ſhould convey a fee; in conſideration of which the crown was to convey an equal eſtate to the college, and the college to the *Duke*. It was an agreement, I ſubmit, for an exchange, in the true legal ſenſe: It could not be an exchange, unleſs equal eſtates paſſed between all parties. The eſtates paſſed could not be equal; for the Duke paſſed, and could only paſs, an eſtate for life, for which the crown was to give, and the Duke to take an eſtate in fee. An exchange, then, of equal eſtates was the juſtice and intent of the agreement; this or no other could be it's legal operation; to this the legiſlature meant to afford their aſſiſtance. And the agreement of the parties not being poſſible to be effected, according to their intent, the intent of parliament, law and juſtice, the whole fails: And the legiſlature certainly meant the whole, or nothing, ſhould take effect. Recapitulation of the whole.

Next, as to Lord *Egremont's* title, though this is incidental, your Lordſhip will take notice of it, as affecting the title of the crown to *Worpleſdon*. He comes as a purchaſor, for a valuable conſideration, under the ſettlement. It's left as a doubt, whether Lord *Egremont* had a right to preſent: I think it could not properly be otherwiſe on a ſpecial verdict. The jury could not properly find he entered by title, it being intended to be left to the court.

I don't find, if Lord *Egremont's* title was good before, that my brother contends much it was taken away by the

[413] act. Even if there had been no saving, I rely upon it, it would not have been taken away.

What legal eviction then? If not barred by the act, because he has a title paramount to the act, and is not named in the act clearly, his presentation is not by any other means taken away.

There can be no title in the crown.

But it is found upon record the crown did present. I shall contend this can operate no more, if there had been a thousand, than a collation. Vide 302 *Salkeld*, *Hobart*. 6. *Co*. 29. *Green's* case. *Vaughan*, 14.

Tufton against Bishop of Litchfield and Coventry and others.

As to the necessity of office found in general, it is true that the crown takes by record, and shall be devested *by* record: But by act of law the crown may be devested.* Where the crown has a remainder, and the particular estate is evicted, the remainder is evicted also. Where the estate of the crown depends on a condition, the condition discharged, the crown has lost its estate, without office, though vested before.

It appears by the books, when the crown presents by a wrong title, though it has a right, as *jure coronæ*, when it's real title was by lapse, such presentation is merely void; a *fortiori*, therefore, where there is no title at all. And usurpation of title shall not be intended of the crown; but rather the presentation shall be as if it had never been made; not voidable, but void.

I hope, on the whole, your Lordship will consider this as an intended stipulation, by way of exchange, that the legislature adopted it as such; that as an exchange it might have been good at common law, if the Duke had really conveyed what he was understood to convey, and took upon himself to convey; that however. he not having done, nor having been able, by the nature of his estate, to do this, there is no exchange, there being no equality; that therefore the agreement fails, and being a mutual entire agreement, must fail in the whole if in part; and that the act, being meant only to give it aid, if it had been in it's nature supportable, fails with it—and that the crown has not been premature in presenting, though without any office—and that it's original right shall not be taken away without consideration—that it is too much to say, the crown shall be driven to a recompense against I don't know who. And that, therefore, the court

* Melior et fortior est dispositio legis quam dispositio hominis.

ourt will concur in thinking the crown is in it's original tate.

Mr. Serjeant *Burland*, in replication—My brother says, [414] at what I quoted as a definition, from *Littleton*, of e word exchange, is not a definition, but only an inance; and to this purpose cites a paſſage out of *Finch*. do not ſee the diſtinction between *Littleton*'s idea of exchange and that of *Finch*; and that in the touchone, I think does not vary. There is no hint that I can d in any of the books of an exchange between more than o.

It would be very extraordinary if no notice had been en. Lord *Coke*, in a chapter or two after, ſpeaks of the ference and agreement between partition and exchange. d where *Littleton* ſaith partition may be between three, never ſays a word of exchange poſſible between three. One for other," in ſenſe, and propriety of language, ft be the ſame as " one for the other," to make any ng of it. One for other I apprehend to be bad Engliſh; *our autre* I apprehend to be bad French; But the relae muſt be underſtood in both.

The crown is nominally a party, but ſubſtantially the pare are the Duke and the college. With the crown the lege made no agreement, unleſs it be an agreement to reive.

I contend ſtill, that nothing will paſs by way of exchange, if the word exchange be not uſed; unleſs by livery and ſeiſin: The operation of this word, therefore, is purely to avoid the neceſſity of livery and ſeiſin.

Put a common perſon in the place of the crown. A writ of right of advowſon brought by Lord *Egremont*, who was the party to vouch? the college could not vouch—Who is to vouch? The Duke of *Somerſet* and his heirs; not a third perſon. What are they to recover in value? What was given by the Duke. The living of *Worpleſdon* was not given by the Duke.

It is ſaid, tenants in common may exchange, and that this is the moſt ſimilar caſe—I am glad it is. They make but one party, [*cui curia aſſenſit*] and if they paſs an eſtate in common, they take back an equal eſtate in common, as tenant for life, and he in remainder, take back eſtates for life, and in remainder.

Tenants in common all together but one party.

My brother admits the authorities in *Fitzherbert*, *Coke*, and all the books, about the neceſſity of uſing the word; but he ſays *Perkins* does not require the word *excambium*, but ſays *permutatio* may be uſed, or any other word equivalent

lent to exchange; that is, if there be any other word in Latin equivalent to *excambium*, if there be any word in English equivalent to exchange, if there be an equivalent word to which the law annexes the same idea, it will be used as properly: Supposing it were *permutation*, for instance. But giving one land for another does not operate as an exchange. My brother would contend, that *for* is the operative word; for *Littleton* has used "one for another," and must mean exchange. It means it there, because he was speaking of exchange in the very place; but if he had been speaking on another subject, would one for other of itself have implied an exchange? No; for then an exchange would be if an estate for life passed for a fee; which, however, my brother admits cannot be an exchange, because it is not an equal estate. Equality of estate is one requisite. mutuality is another; and a mutual exchange must be between two parties only.

[415]

That one land for another does not of itself operate as exchange

Mutuality between two parties only.

The construction of the act, he contends, must agree with the intention of the parties; this I admit. The preamble declares the intention of the act is the dividing of the chapelries, and settling of the advowsons. [*Curia*, the dividing the chapelries is not in the preamble. This is a mistake of my brother *Kempe*'s] As to settling the advowsons, then that would not be answered by annihilating the act of parliament.

The intention of the parties not to be answered by destroying the effect of the act.

As for remedy, I apprehend it will not be contended the Duke of *Somerset*'s heirs are not in a condition to make amends: And the college would be greatly injured if, for the bad title conveyed from the Duke to the crown, to which the college were strangers, amends were to be required from them.

Judgment.

Lord Chief Justice *De Grey*.—I find, on conferring, we agree in opinion, and will give no farther trouble, though we are always glad to hear you. It may be necessary to state the outlines of the case.

Settlement—Estate to the Duchess for life; to himself for life; remainder to sons, in tail male; remainder to daughters, in tail.

The Duke of *Somerset* had the rectory of *Petworth* within his manor, and was very desirous to get it; the crown engages to give, not for it's own interest, a very commodious living to the college, for which the college was to convey *Petworth* to the Duke, and the Duke to convey in value to the crown. The college could not convey without the act.

The

The Duke had a farther object, of uniting three parish-
es; which the other parties had nothing to do with.

The legislature, therefore, make a conveyance by vesting
and settling, with a saving to rights other than of the par-
ties.

The Earl of *Egremont* has his claim under the daughters,
by virtue of the marriage settlement.

The crown presents upon the disturbance of Lord *Egre-* [416]
mont, the matter having rested from 1692 to 1760.

Question, Whether the old right of the crown stands to
the living of *Worplesdon*, against the college?

The right of Lord *Egremont*, under the saving, stands as
if the act had never been made.

In the construction of private acts of parliament we are
to go on principles of common law, applied to the subject.
If the intention, therefore, was to make a partition, or ex-
change, the incidents will follow accordingly.

It has been said it is a question, whether the legislature
making this conveyance was not to follow the consequences
of exchange in it's equality—one of which, it is said, is
that an eviction by one party shall defeat the whole, *ab ini-
tio*.

Exchange is a possessory act, and by common law might
pass by parol, and without livery and seisin; and though
this is altered by the statute of frauds, yet it's other inci-
dents remain.

It's not necessary to say whether the word exchange be
necessary.

It will be proper to say what is the nature of exchange.
It has been said, if tenant in tail exchange with tenant in
fee, and the heir enter, the whole is defeated.

It is not necessary equal estates should be in the persons,
but the estates given must be equal.

It is observable that no arbitrary effect is derived from
exchange; but the effect must be derived from the reme-
dies.

Re-entry is one; which is entire and indivisible, and
therefore if a party is evicted, though only of a life estate,
yet he must enter on the whole.

This condition of re-entry is not given to a stranger; for
it proceeds on privity—but against a stranger.

Suppose now the second party impleaded; he vouches the
other; vouchee fails; recovery in value *pro tanto* only: And
that specifically of the lands only.

It

[417] It is lineal only, and not collateral: For proceeding on operation of law, the law will not introduce the hard effects of collateral warrantry.

Another remarkable circumſtance is this, that though acts for eſtabliſhing exchange are very frequent, yet they who have made this act have made no mention of exchange.

Take it a little farther—And, to conſider it diſtinctly, let us take it more ſummarily, as on lands.

Acts of a third party not prejudicial.

A. in conſideration of a grant from *B.* infeoffes *C.* with warranty; *C.* infeoffs *B.* with warranty; *B.* is impleaded by *C.* he cannot vouch *A.* who takes nothing.

So here *B.* the Duke of *Somerſet*, cannot vouch *A.* the college, becauſe *A.* never had the lands; therefore the loſs remains at home; therefore the loſs is yet where it ſhould be: The loſs remains where the bad title was. If *B.* has no aſſets the loſs remains with *C.* where elſe ſhould it remain?

In a more ſimilar caſe—ſuppoſe ſecurity for an eſtate made partly by money paid by feoffee, and partly by ſecurity given by a ſtranger. Security of the ſtranger failing will not evict the eſtate of the third perſon. Suppoſe a conveyance to uſes, (without extraordinary covenants) each conveys for his own, the caſe would be the ſame; and a miſtake in the title of one of the parties, unleſs particularly guarded againſt, would not affect a third perſon.

How does this affect the caſe; and how agree with it? Exactly *mutato nomine*.

This is the more reaſonable, conſidering the circumſtances of the caſe. It muſt have originated from the Duke of *Somerſet*: The crown had no intereſt.

The family ſettlement was in the hands of the Duke. Suppoſe it had been before the parliament, they would have taken *Kirby*, and ſettled *Petworth* in the ſame manner.

The maxim, *res inter alios acta alteri nocere non debet*, is of weight and application to this caſe.

The inconvenience which would ariſe from croſs warranty, as well as croſs remainders, is a reaſon why we ſhould not labour to introduce it.

[318] It is ſaid, this is not the ſame as an eſtate in lands, an advowſon lying in grant. It may be neceſſary to have a different mode of conveyance, but the rights are the ſame. And ſo I think the crown being a party makes no difference, except in the mode of proceeding.

What

What does the saving do? It makes an estate defeasible, which otherwise would have been indefeasible: And Lord *Egremont* takes his benefit.

I do not take it as material in what manner they proceeded: For a legal eviction on record would not have affected the college.

Therefore JUDGMENT, I think, ought to be for the PLAINTIFF.

The WHOLE COURT of the same opinion.

5 *February*. B. R.

Bail.

NOTICE of bail in *Hatton-street*, *Middlesex*, held sufficient, without naming any parish, though the name is changed within these two years from *Hatton-garden* to *Hatton-street*.

Constables.

IN the case of constables chosen at the leet, to serve for the hundred, I have found the farther arguments and opinion of the court.

Mr *Dunning* observed, that when the question was last before the court, it had been so fully argued, that there could be no need of enlargement.

He observed, that liability to being tythingman could not of itself be any exemption from being constable: For that it is only the same jurisdiction, in different extents.

And here the larger district comprizes the whole of the other; so that the difficulty would be no more for the conjunction of two offices in one person than from the single office of constable to be executed by that person.

That he is liable to do suit at a court-leet one day in the year, is not surely reason of general exemption: And besides it is stated, that by custom the resiants of the manor have been accustomed to do suit at the court of hundred. We don't come upon him for non-performance of suit, but for performance of the duty of constable; to which by the finding upon the verdict he is bound. [419]

The exemption will extend to all the resiants of the leet, if the claim set up be allowed; the leets may run throughout the hundred, and then this exemption applying thus to each

leet

leet in particular, and to all in general, there will be none to ſerve.

Lord *Mansfield*—Mr. *Dunning*, we would ſpare you and ſhould be glad to know where the doubt is.

Contended on the other ſide, that the defendant owes no ſervice to any other leet but that in which he is reſiant: and that he does not owe to the hundred to ſerve as conſtable.

That the nature of a court and the reaſons of eſtabliſhing it, were for exemption from ſervice out of the leet; that a leet was originally deſigned to form a common ſociety of perſons anſwerable for one another, anciently a perſon reſiant of the leet, might not leave it without licence from the leet.

That generally a perſon of an inferior leet ſhould not be liable to do ſervice to a ſuperior.

Coke, on *magna charta* and the ſtatute of Marlebridge, that the chief pledge was to produce the reſt; and the pledge who was ſo called chief was the conſtable.

That there had been great variety of opinion, or contrariety between my Lord *Coke* and *Hale*; that the latter was of opinion, the conſtable of the hundred was of ancient inſtitution, antecedent to any ſtatute in being; that Lord *Coke* thought it came in by the ſtatute: That perhaps the difference might be reaſonably ſolved by ſaying, that the high conſtable was of new inſtitution, and not ancient; diſtinguiſhed from the conſtable of the hundred, for that anciently there were no leets but of the hundred.

That the ancient power of puniſhing was only by diſtreſs when preſent, or by amercement when abſent.

That *Keble* 11 *Mod.* and *Freeman* were books of no authority. [Lord *Mansfield* would not allow this of the laſt: and ſaid Mr. *Hopkins*, a friend of his, would frequently inſiſt *Freeman*'s Reports to be the beſt of all; and that he himſelf thought very many of them well reported.]

[420]

Upon this it was obſerved, that as to *Keble* and 11 *Mod.* they were not only defective in authority, but that in *Keble* Lord *Hale* had been made to contradict himſelf, and 11 *Mod.* to talk very unintelligibly of a diſtinction between borough and upland towns; and that admitting *Freeman* of authority, it is very ſtrange he ſhould be the only Reporter of authority who had ſupported the opinion, and ſo many of the beſt authorities to the contrary.

As to the finding, that the jury was to find facts and not evidence of facts.

It does not appear any unwilling perſon was ever forced to come in and ſerve—the mere uſe of the word cuſtom will not ſatisfy the court, they meant to find the cuſtom in the ſenſe of law.

But that they only take it in the common acceptance of the word in the country, and in common parlance; that in another part they had uſed the words immemorial uſage, which here they would not.

Lord *Mansfield*—If I take it right, there is no authority or dictum that the reſiants of a leet within hundred are excuſed; much leſs that it is good not by cuſtom that they ſhould ſerve. On the other hand there is the expreſs authority of the caſe of *Key* reported by two books: And if both the worſt reporters that ever reported, yet if they ſtate a very long caſe the ſame way in the ſenſible part, and alſo in the leſs material; would you have me think two bad reporters can concur and agree, in ſaying the choice of conſtables is no article of the leet, and therefore no excuſe that they were within another leet; can I believe they would concur in ſaying this, if no ſuch thing had ever been ſaid. 11 *Mod.* goes ſo far as to ſay that the choice of conſtables is no article of the leet; and that if the general exemption failed, yet preſcription would make it good.

As to the cuſtom I think they have found ſufficiently on the words; and no man can doubt the meaning. I ſhould be ſorry, if I could help it, to ſend them back to try it all over again. They find there hath been a court held from time whereof the memory of man runneth not to the contrary: And that by ancient cuſtom, conſtables were eligible and elected in the court leet of the ſaid manor, from amongſt the reſians of the manor to ſerve as conſtables for the hundred: They find an ancient cuſtom in a court of immemorial exiſtence; the cuſtom is to be intended as coeval with its exiſtence—if not the jury would have found otherwiſe and ſtated its beginning.

Mr. Juſtice *Aſton* obſerved, that a man might not be able to do ſervice at two leets in the ſame reſpects, and therefore not to find pledges at two leets: But that the conſtable was an article according to *Hale*, not within the leet. Vide *Shower's* caſes, *Betteſworth*.

Mr. Juſtice *Willes* ſaid, that it appeared from the caſe in *Noble*, that the exemption which might be claimed only operated *pro tanto*.

New Trial.

ACTION upon a policy of insurance from Grenada to London, with the usual covenants, and that the ship should sail to and from Grenada.

The ship sailed, and on his return the captain stopped at Antigua, meaning as it appeared on the state of the evidence to go home, and not to continue captain the whole voyage. The ship laid at anchor off Antigua thirty-six hours.

The ship on return was lost.

Question: Whether this a deviation? One side Lord *Mansfield* observed, contended that every innocent delay was a deviation; the other that a deviation must be a crime; his Lordship reported his directions to the jury. I told them the insured was obliged to find a captain or person to take the conduct of the vessel; that it appeared this delay was owing to the staying for a mate. At that time in my own mind I was inclined to think it a deviation, but I left it to the jury, they found it no deviation.

Mr. *Wallace*—That the captain, in doubt of the abilities of the master, endeavoured to get a mate. That the ship was becalmed off Dominica; that the captain endeavoured in the mean while to get a mate; but failing went to Antigua directly. That there was no express deviation, for that it is not pretended the ship was out of the line of her voyage, no time spent in trade for himself. Nothing more was done than what proper care required to prevent the loss of the vessel; and nothing more than setting the master on shore and returning directly. As to accidental circumstances of what storms he might either have fallen into or avoided by this necessary and prudent step, that this will not vary the case.

Mr. *Dunning*—That there was nothing to vary the case as before the jury and that to them it was very properly left; that the delay was for the interest of the persons concerned in bringing this action.

Mr. *Mansfield*—For the new trial.

[422] That the evidence went sufficiently in proof of a deviation; that whether by going fifty or an hundred leagues out of the way, or by loitering in the harbour, it would be all alike.

That

That the ground was altered from what had been taken upon the trial; for then it had been attempted to juſtify the deviation, but now to prove there was none.

As to neceſſity, which was the ground on which the captain himſelf had reſted, he might have got a mate at Grenada; that it was no excuſe that the men in the veſſel were not capable, for proper men ought to have been provided when they ſet from the port of departure. He concluded with obſerving, that he thought the jury were men not much acquainted with queſtions of that ſort; to which Mr. *Wallace* anſwered that one of them was a captain of a ſhip himſelf.

Mr. *Bearcroft*—That it was a very plain caſe for a new trial, and that if any thing better had been poſſible to have been ſaid, Mr. *Wallace* would never have endeavoured to excuſe the deviation, by ſaying the captain carried on no trade for himſelf.

Lord *Mansfield*—The inclination of my mind is much the ſame as on ſumming up; but I doubt on ſuch a caſe when the jury have found the verdict whether there ſhould be a new trial. They ſet ſail from Grenada, no neceſſity for delay, if the maſter had been ſick, or one of the men died, they might have delayed twice as long without any ground of complaint from the delay.

There has been no fraud, no intention of carrying on trade for themſelves, this does not indeed alter the point of law; but may alter the reaſons for granting a new trial after verdict.

Mr. Juſtice *Aſton* ſeemed to think it was not much material when they changed the maſter of their voyage, or when they ſet out: And it might be more expeditious at *Antigua*. And as to illneſs he ſays he is well at preſent, but by the ſubſequent letter he ſays he has been ill.

Mr. Juſtice *Willes*—If there had been no finding I ſhould have been at a loſs how to direct; they certainly were bound to ſet out with proper men. It may be dangerous however to conſtrue thirty-ſix hours delay fatal, for it would be very hard for commerce that ſuch a delay, for which there was a good reaſon for the ſecurity of the ſhip, ſhould be held of ſuch prejudice to the captain: Though perhaps he would have done better if he had avoided the delay, by providing all things neceſſary before he ſet out; there would be no drawing the line, a delay of five hours might be conſtrued a deviation.

If

If the court think it neceſſary to take time I ſhall be very ready; but I ſee at preſent no cauſe for ſetting aſide the verdict.

Mr. Juſtice *Aſhhurſt* held that the captain appeared, however it might be, evidently to have done his beſt for the ſafety of the veſſel; and that after it had been tried by a jury of merchants * he ſhould be very unwilling to unſettle.

*Of deviation where it ſhall charge and where not, vide Parker's Laws of ſhiping and Inſurance 320—322, 350—365.

Court diſcharged the Rule.

Pew.

Fiſke and Rout.

On a Motion for a prohibition.

PRESCRIPTION laſd that he and his anceſtors, and thoſe whoſe eſtate he hath, have immemorially held and enjoyed a certain pew.

Contended, that it is not good without ſhewing that he repaired, or his anceſtors, &c.

Mr. Juſtice *Aſton*—It certainly needs not be alledged on a declaration; nor farther needs it be proved. The pew might never want repairs: Or be it as it will, if a man and his anceſtors have held time which no man can remember to the contrary, (for I don't ſee that it is neceſſary to preſcribe from *R.* 1.*) ſurely this is ſufficient to ſupport a claim of right; the repairs are only evidence.

Lord *Mansfield*—Yet it is not barely by ſetting in it; for that may be by leave from the ordinary.

Mr. Juſtice *Aſton*—Being immemorially uſed with the houſe is ground of preſcription, or building the pew may be found a title.

Mr. Juſtice *Aſhhurſt*—Perhaps as a claim againſt common right it may be in the caſe of toll, which requires conſideration to be alledged and proved. Mr. Juſtice *Aſton* I ſhould be very glad to hear the caſe argued.

[424]

Accordingly it ſtood over.

Mr.

* From the reign of R. the firſt has been the commencement of legal memory ever ſince from 3 E. 1. ch. 39. Vide 2 Commentar and continues to be ſo now, tho' from the latter period to the preſent year 1776, is a ſpace of 501 years.

Mr. Juſtice *Aſton* ſaid, that if they meant to argue the caſe he ſhould be glad to hear it argued when the court was full, and to know if they had any caſes.

Mr. *Wallace* mentioned the caſe of *Kenrick* and *Taylor*, *Wilſon*'s Reps. 326. where Lord Chief Juſtice *Lee* ſaid it was not neceſſary to ſhew repairs againſt a wrong doer; becauſe it was a rule of law, that you need not ſhew any cauſe againſt a wrong doer, but of the ordinary it is otherwiſe; for of common right he has the diſpoſal of ſeats, and repairs muſt be proved, for you cannot ouſt the ordinary without ſhewing conſideration.

Mr. Juſtice *Aſton*—As to the ayle the ordinary had it not of common right but it will be intended the perſon who preſcribes was the builder of the ayle; and if otherwiſe it muſt be alledged. And where the allegation is neceſſary, and not laid in the declaration, it will not be preſumed; and accordingly where the ſcienter was not laid in an action for driving a mad bull—bad, though there was a verdict for the plaintiff. And ſo the caſe in *Salk. Buxendin* and *Sharpe*, and caſe in *Lutwyche*; and therefore where repairs are neceſſary, they cannot be intended without being alledged. 2 Salk. 661.

Mr. *Wallace*—That in the caſe of toll it was neceſſary to prove conſideration, but not neceſſary to alledge conſideration.

And alſo the diſtinction concerning the ſituation of a vew. 2 *Inſt.* 306. 12 Co. Vide Wood's Inſt. B. 1. ch. 7. p. 89.

Mr. Juſtice *Aſhhurſt*—That they might amend the ſuggeſtion before the prohibition iſſued.

Mr. *Cooper*—That preſcription for a ſeat in the church was in itſelf of a temporal nature, and generally went along with the freehold; and therefore that the ſuit was in its original, *coram non judice*. Caſe of *Loyd*.

Mr. *Wallace*—That where there is a diſturbance in a pew, the ordinary has a juriſdiction.

Mr. *Cooper*—Where it is firſt brought here the court will draw the trial to the common law; though where they commenced in the ordinary's court, there might be no original defect of juriſdiction.* [425]

Rule to ſhew cauſe why ſuggeſtion ſhould not be amended thereupon. Vide *Siderfin* 89 and 361. *Barrow* againſt *Keene*.

* Acceſſorium non ducit ſed ſequitur ſuum principale.
Omne magis dignum trahit ad ſe minus dignum.
Ex demum veræ leges exiſtimandæ quibus *omnes* aſſenſerint.

Bonsey v. Lee.

Keene. 3 *Leving* 72, was also cited which is to this effect. A prohibition was moved, suggesting that the trial of letters patents and all grants of the crown is at common law, and not in the ecclesiastical court; and that the defendant had libelled against him for tythes upon title to the rectory by letters patent from the crown more ancient. Resolved, that the foundation of the suit being the tort in withdrawing the tythes, and the title only an incident, the court shall try the temporal matter so long as they proceed as the temporal law would in such case; but when they proceed in a temporal matter otherwise than the temporal law would, they are then to be prohibited; but not before. In *Lev.* are cited 1 *R.* 3, 4. 12 *Rep.* 66. 3 *Cro.* 466. † 3 *Cro.* 788. *Baker* and *Rogers.*

Nelson v Sharpe 3 Croke, here is what is commonly called 1 Cro. or better, Cro. Eliz.

Note, The next case in *Levinz*, *Ashley* and *Feckham* seems very full to the principal case of *Fiske* and *Rout.*

Action on the case—Plaintiff declares that he is seised of a messuage; and that he and all those que estate he hath, have time out of mind had all the seats, and the sole sepulture in the church; and that the defendant disturbed him.

After verdict for the plaintiff, in arrest of judgment, that he had shewn no consideration, in not prescribing to repair. To which it was said, that against a stranger, or wrong-doer, no title or consideration is necessary to be shewn; but where he claims against the ordinary himself he ought to show some cause, as building, repairing: And so upon that report it seems to have been resolved, *per curiam unanimiter.*

IN the case above of the indictment for driving over a child, I have found the court were of opinion that the second was sufficiently laid, and had evidence to support it.

[426] Mr. *Dunning*—That there was disagreement between the evidence, whether the horses were trotting or walking; and that to support the second count, there was not evidence that any of the king's subjects were frightened or endangered. That the whole misfortune arose from placing the child in a very imprudent situation, and leaving it there, in a public street. That the unhappy event was, in some degree, imputable to the drayman; but much more to those who placed the child there. And that the object of the action

† Quod prius fit tempore potius in jure.
Qualibet evidentia juris sive facti plus aut minus valet secundum ejus—tra quod intenditur firmitatem.

action was, probably, the deodand, by the particular finding concerning the wheel.

That the indictment charges misfortune or mischance, which are known otherwise than as crimes by the laws of this country.

That if the evidence proves any thing, it proves something not charged in the indictment; and therefore, at any rate, too much or nothing. And therefore that the verdict is void.

Lord *Mansfield*—It was very properly left to the jury upon the second count. Here is a dray in the streets of London; going a faster pace than a trot; (it is said in the evidence between a trot and a gallop) it appears he was twenty yards behind the horses: The people were terrified, and cried out.

It is said on the other side, he was at the horses' heads; but this is contrary evidence very proper to be left to the jury. And it weighs very much with me that he ran away immediately, driving as fast as he could.

Award.

ON a dispute about a church-rate, one party offered a submission: But it was contended, that the matter being originally of ecclesiastical cognizance, they should go for a definitive sentence into that court.

Lord *Mansfield*—Is not a submission stronger than any sentence? If they will not take a submission offered, with payment of full costs, I will consider of it this time twelvemonth.

New Trial.

ASSIGNEES bring an action of money had and received, to recover debts due to a bankrupt. Evidence of commission sued; docket; petition to the lord chancellor, in the usual form; bond to prove the bankruptcy. All these proceedings by the defendant. [427]

After all this a letter to the bankrupt was written by the defendant, who had done all these acts, offering to stop proceedings under the commission, on payment of 500l. A false or collusive act shall conclude against the parties to the fraud, though all the world besides may be permitted to controvert it.

The money paid, and defendant contended against the

assignees, that no act of bankruptcy was committed, till a time subsequent to this payment.

Lord *Mansfield*, in making his report, said he was o opinion, on the trial, that it lay not in the mouth of th defendant to say this, when he had gone through so many proceedings, extremely unjust and oppressive, in any othe view.

Whatever it might be with respect to other persons,* thought it conclusive against the defendant, and I left it t the jury, whether they believed these acts of the defendan fraudulent: And then if they did, that as to the point o law, my opinion was, the assignees needed not to shew an other evidence, so far as defendant was concerned; a especially as the docket was not withdrawn on the groun of new information, but on the express terms of the mone being paid. This I thought was as strong as any thi could be.

Mr. *Davenport*—When I state them claiming as assignee they ought to prove the bankruptcy not by the weakness the defendant, but by their own strength.‡

That if the question had stood on the particular time bankruptcy, the defendant's acknowledgment must ha concluded him; but not if there was no act of bankrupt then, or even now.

That the petition and bond, &c. were no proofs of ban ruptcy.

If there had been any doubt, whether act of bankrupt or not, and the defendant had collusively assisted in attemp ing to make colour of it as one, then I admit, on the force the case, that the assignees might have come against the fendant.

[428] Lord *Mansfield*—The whole argument seems to turn a circle; that assignees, when they bring an action, m shew an act of bankruptcy committed; and then it b —that there is no proof.

The propriety of proof must depend on the party c cerned: His declarations are evidence against himself; writings are evidence; much more his oath is evidence.

And so in a case which frequently occurs, suppose a ditor to agree with a trader, that one shall come and

* Res inter alios acta alteri nocere non debet.
Allegans turpitudinem suam non est audiendus.
Allegans contraria non est audiendus.
Nemo lucrabitur de injuria sua propria.
‡ Quilibet debet causam tenere sua vi; non imbecillitate adversarii.

and he ſhall deny himſelf, and they take out the commiſſion by colluſion. The parties ſhall never be permitted to ſay it was by conſent and covin; the bankrupt ſhall never be permitted to ſay ſo: And this was decided in a capital caſe,* that the bankrupt ſhall not come a year afterwards, and plead it was agreed between them, and therefore no bankruptcy. But yet this ſhould not be a bankruptcy, as againſt a *bonâ fide* creditor. And there is not a more beneficial point in the law.

* Perrot's.

The doctrine is ſimilar of fines and voluntary conveyances.

The extortion is ſufficient evidence againſt himſelf. He ſhall not ſay, "I acted very cruelly, and with great extortion; but there is nothing in my admiſſion of the bankruptcy, which was void and falſe."

If he could have ſhewn any thing that he was innocent; had withdrawn the docket, on better information, and had taken no advantage; ſo that he could have denied the bankruptcy, conſiſtent with innocence, it would have been ſufficient.

And thus the evidence was left, not as concluſive, indeed, but very fit to be left to the jury; and very properly they found, I think.

Mr. Juſtice *Aſton*, much to the ſame effect; relying principally on withdrawing the docket, on payment.

Evidence.

WITH reſpect to the caſe of *Jones* and *Randall*, I have a little memorandum what was ſaid by Lord *Mansfield*, on the firſt motion; which, becauſe it more fully opens the nature of the evidence of a Minute-Book of the Houſe of Lords, I inſert here.

Lord *Mansfield*—There is no difference between the Journal and Minutes: For there is not a word added upon the Journal. And it is not a looſe minute book, but a regular [429] common judgment, is read the ſecond day, and then every word of it is entered upon the book.

There has been a doubt, whether the minutes of the Houſe of Commons could be admitted, becauſe not a court of record: But they being evidence of public buſineſs, that queſtion has now ceaſed. Are the books of the Houſe of Lords to be carried all round the kingdom, when every perſon has a right to reſort to them? How great would be the inconvenience!

As to previous proceedings, the whole point turned here, whether there had been an appeal and decree: So that there

was no neceſſity to give the previous proceedings in evidence.

Return.

THIS cauſe was argued on Friday the 23d of November, in Michaelmas term 1773, and now came on for judgment on the ninth of February 1774.

On an action of treſpaſs and falſe impriſonment, defendant pleaded a ſpecial juſtification, on a capias out of the ſheriff's court, on a cauſe before that court, having juriſdiction of the ſame, in which the defendant levied his plaint, whereupon proceedings were had, which the caſe ſet forth, and a capias iſſued from the ſaid court, commanding him to take the body of the defendant, &c.

To this plea there was a ſpecial demurrer, containing three exceptions.

1ſt, That the cauſe of action was not ſet forth; only that he levied his plaint.

2dly, That they have not ſhewn the return made to the writ.

3dly, That they have not ſhewn the day when returnable.

And firſt it was contended, from 2 *Roll's Abr.* that if the officer who takes the defendant does not return the writ he is a treſpaſſor, *ab initio.*

Moor, 57.

To a pluries replevin you muſt return.

2dly, when you juſtify, you muſt ſhew the cauſe of action.

2 *Lutwyche*, 295.

[430] 3dly, Return muſt have a certain day.

2 *Danv. Cro. Ja.* 323.

So that generally, though a court be held from three weeks to three weeks, yet the return muſt not be at the next court; but the writ muſt have a certain day of return.

Lutw. 914, 925.

3 *Levinz*, 194.

On the other ſide, that where the arreſt was on meſne proceſs, it ſeemed the rule was as Mr. *Buller* had ſtated, but not on proceſs of execution.

That in the caſe in *Salkeld*, the principal determination was not what Mr. *Buller* ſpeaks—that the caſe is alſo reported, Lord *Raymond*, 462, and 4 *Mod.* 396, and expreſsly

preſsly held to be ſo diſtinguiſhed. On meſne proceſs, as *capias ad reſpondendum*, greater nicety is required.

So in *Fuller's* caſe, in the reports, 5 *Co.* 90, *ſcire facias*, the execution was held to be good, without return of the writ.

So if a man be taken on a *capias ad ſatisfaciendum*, the execution is good, though the writ be not returned; for the plaintiff has the effect of his ſuit, without any thing farther to be done.

Nor are theſe authorities confined to diſputes between the parties, and where the ſheriff is party. *Lane.* Caſe of *Daily* and *Joliffe* againſt the ſheriff, ſame diſtinction taken between meſne proceſs and execution.

That in point of practice, no return is ever made to a writ of execution; unleſs it be for a ſpecial purpoſe, to proceed againſt the plaintiff.

As to ſtating the proceſs, 1 *Lev.* 81. it appears, that if the court proceed erroneouſly, action ſhall not lie againſt the officer for falſe impriſonment.

That nothing but proxility in pleading and encreaſe of expence would follow.

As to objection that the precept ſtated is void, this is no foundation for an action of falſe impriſonment.

Mr. *Bulley*, in reply—That all the caſes he had cited, [431] except the firſt, were ſtated to be on execution: And that even the firſt appeared to be ſo.

Between the parties the diſtinction holds, but not with the ſheriff's officer, who muſt purſue the authority, or elſe by the caſes before cited, 2d *Danv. Cro. Eliz.* and *Cro. Ja.* he is a treſpaſſor, *ab initio*. With reſpect to the parties who cannot return, they may avail themſelves of the writ, though it be not returned;* but otherwiſe of the ſheriff, whoſe duty it is to return. Caſe 4 *Co.* 1. which ſpeaks of liberate, does not affect the argument; for liberate is not an alternative proceſs. The caſe in 5 *Co.* is between the parties.

How far the caſe of *Gwyn* and *Poole* may go, I will not ſay; but I think it cannot extend ſo far as to make it material to this point to enquire.

In the ſecond caſe it was only the officer who juſtified, and the officer is not cognizant of the action, but the ſheriff and his deputy is.

As

* Lex neminem cogit ad impoſſibilia.

As to the third, Mr. *Chambers* says it's only error. This is all I would have it; for this is confessedly enough to ground the action against the parties; for then the imprisonment is without authority. The officer, indeed, is not cognizant to it, as said before; but if bad for one, it is bad for both.

Lord *Mansfield*—I will look into the cases: It tends to settle a point of practice. I own I wish the defendant may be right; I don't believe, in fact, they ever return execution.

Afterwards, on the ninth of February 1774, as above, his Lordship delivered the opinion of the court to this effect:

After stating the case, and points of law made on the demurrer, *ut supra*.

As to the first objection, that the cause of action is not set forth, only that he levied his plaint. You will see in *Lily*'s Practical Register what the nature of a plaint is in this inferior court. It's in the nature of a short declaration.

Lev. quandam querelam suam infra jurisdictionem.

[432] 2 *Perk.* 914. The defendant sets forth much in this manner.

Formerly the courts were much stricter with respect to the inferior courts; nor would presume any thing as to the process.

2 *Lev.* 71.

Raym. 81.

But 2d *Mod.* 95. The plaintiff alledges generally, without saying what kind of trespass.

As to the point of not shewing he became indebted within the jurisdiction, the same liberality is to be used. If the defendant really and fairly had meant to avail himself, he would have pleaded to the jurisdiction;* or it would have been bad by error. The same objection was overruled in Common Pleas, 31 *G.* 2.

The second objection, of no return, depends upon the distinction between a mesne process and execution.

5 *Co.* 90. *Bowe*'s case; and the reason, that nothing more is to be done.

The case cited by Mr. *Buller*, as a principal ground, it appears, was on mesne process.

The case in *Salk.* 429, was in replevin.

5 *Mod.*

* Qui non negat ubi debeat et possit, fatetur.

5 *Mod.* The court ſaid, "the officer is not puniſhable if he does not return the writ.

The third objection, that the return day is not ſhewn forth. All the caſes are either upon meſne proceſs, imparlance, or jury proceſs.

It is admitted to be good when the appearance is enforced, and party brought into court.

2 *Cr.* 48. 2 *Cro.* 284.

The reaſon why the day ſhould be ſhewn certainly on meſne proceſs went upon a different ground.

The laſt caſe, 2 *Mod.* 59. aſſault brought, and falſe impriſonment.

As to the exception of *ad proximam curiam*, inſtead of [433]
ſetting forth the day when returnable, the chief juſtice held it bad, for want of this, but the three other juſtices held it good. And how can the return be certain when the judgment is *de die in diem?*

We are all three of opinion that the Plea was good, and Judgment ought to be for the Defendant.

Affidavit.

Not to be defamatory.

LORD *Mansfield* obſerved, that the affidavits of the court were never to be made ſubſervient to defamation, and complained (as he had done on a late occaſion) of the practice.

Sheriff.

IT ſeems, on enquiry into the practice, the ſheriff cannot have poundage till the goods are ſold.

Privilege.

A Man arreſted in attending the proceſs of the court. He proceeded as for a contempt againſt the party arreſting, and brought his action for falſe impriſonment. His attorney made up the action, on the defendant's releaſe of the debt, and payment of coſts. An attachment was moved againſt the attorney, for having compromized the matter without the conſent of his principal.

Court

Court ſaid he was very right; for that the arreſt was good, though officer puniſhable for the contempt.

Inſolvent Act.

DEBT due before the diſcharge, but *ſolvendum in futuro* at a day ſubſequent to the diſcharge. Queſtion, whether the debtor was diſcharged from this debt? Mr. *Lucas* contended he was. Lord *Mansfield*, on the full opening of the caſe, ſeemed to doubt; and Mr. Juſtice *Aſton* ſaid it would be proper to look into the caſes. And now Lord *Mansfield* told Mr. *Lucas*, that he (Mr. *Lucas*) was very right; and Lord *Mansfield* ſaid he had been re-
[434] minded by his clerk, after the riſing of the court, that he had made twenty orders accordingly. It is when the money becomes due, not when payable: When the contract is upon a contingency, it differs.*

Jenkins and *Jennings*, *Bur.* 82.

2 *Str.* 249.

This was on the 5 *G.* 3.

Mr. Juſtice *Aſton* obſerved, the words on the 12 *G.* 3 were much ſtronger, contracted, accrued, cauſed or growing due.

Pariſh Clerk.

Mandamus.

ON a motion for a *mandamus* to reſtore to the office of pariſh clerk, the *mandamus* was refuſed, the party applying not having ſhewn any title, in the opinion of the court; and it appeared there was a *plenarty* of office for the office was full of the principal: And the court would not grant a *mandamus* to admit a deputy.

Admitted

* Thus a legacy to *A.* payable when he arrives at twenty-one, ſhall be paid to the repreſentatives of *A.* if he dies before. But "I give to *A.* "when he arrives at twenty-one years," is a lapſed legacy, if he die before. And the difference is, whether the time is annexed to the ſubſtance of the grant, or the grant abſolute, and the time annexed to the payment or truſt to executors until *A.* arrives at twenty-one; and when he has attained that age then to *A.* is a preſent legacy; and if *A.* dies under age, will go over to his children.

Vide *Goſs* v. *Nelſon*, *Bur.* p. 226. And vide the caſe, p. 228.

Admitted, that an action for fees would lie. And the appointment of a parish clerk may be good, it seems, without writing.

Habeas Corpus.

IN return to this writ a married lady was brought into court who appeared to have been extremely ill used by her husband; he demanded her to be restored to him.

It appeared she had been taken out of his hands by her own consent, and for his security.

On her appearance in obedience to the writ the court said, if she had any thing to say they would hear her and would take care, if it was necessary, not to let her husband take her as she was coming back. And that a tipstaff was in such instances sent: But if she would say nothing the court would not. [435]

Lord *Mansfield* said, That the court would never grant further than that a person appearing to legal process, should not be in a worse condition than before. *

The court does not say but that he shall answer if he takes her; the court sometimes will say that they will not interpose when he takes her in court; and in the case of an infant the court has declared so. V. Bur. 606.

Mr. *Dunning* was contending, that unless where there was a separation or marriage denied, the court would never interpose to protect a femmes return.

On the other hand it was said, I think, by Lord *Mansfield*, that this interposition for the safety of the wife's person, was what the court would always exert on due application and proper grounds.

The lady said she should be glad to be mistress of her own free person; as she had been separated from her husband for ten years.

Lord *Mansfield*—Madam, It is not in my power to divorce you, but I give notice the court will never suffer the husband to take her on return, when brought up by an *habeas corpus*.

Notice being given to the court that he waited at a neighbouring coffee-house, to seize her on her return, the court sent a tipstaff to bring him into court, and on his appearing there Lord *Mansfield* said to him, I thought you had been better acquainted with the practice of the court, (for he

The protection of party and witness attending proceſs, eundo, manendo, redeundo.

* Actus legis nemini facit injuriam.

he was an attorney) than to think you might ſeize your wife on her return from the court: We had expreſsly declared, and the court will never permit it, unleſs they ſay ſo. Even to a witneſs (much more to a party), the court gives full protection, going, continuing in the court, and returning.

If you had dared to ſeize her until her return home, (by which I mean wherever ſhe pleaſes to go) I ſhould certainly have committed you. The court will never endure its proceſs ſhould be made ſubſervient to this, againſt a perſon who comes up in obedience to it.

[436]

Society of Grays Inn.

ON a diſpute whether rateable or not which ſtood for trial—Motion to ſtay proceeding on a ſuggeſtion of a petition in parliament, without any other ſuggeſtion of any thing that might make it wrong to proceed, or that effectual juſtice could not be done in the cauſe.

Lord *Mansfield*—The ſtrongeſt reaſon that could be for their going on to trial, that they have applied to parliament; the parliament will then ſee what is the legal right.

Rioters.

IN caſe of ſome perſons convicted of a riot at Dover, of a violent and dangerous kind, and who were brought up to receive the judgment of the court. Mr. Juſtice *Aſton* pronounced the judgment which was, that the court on their conviction ſet a fine of 100l. each on two of them; as to the other two (for there were four) on affidavit of their having a family and not being worth 5l. after payment of their debts; the court adjudged, that they be impriſoned for ſix months each.

Motion: That the priſoners might be carried down to Dover and impriſoned there, inſtead of being in the priſon of this court: Thus much argued that it was in the power of the court.

Lord *Mansfield* ſaid, he had no doubt of the power of the court over all the priſons in the kingdom;* but would not interpoſe without precedent in ſuch a caſe; for that it was a very great riot, and man's life had been endangered.

Rule

* So in a caſe in Sir James Burrow, all the priſons in England are the priſons of this court.

Rule to ſhew Cauſe.

WHEN you move for a rule to ſhew cauſe on the day before the end of the term, the rule muſt be drawn ſpecially for the laſt day. Rule of practice.

Place.

PLACE of waiter to the commiſſioners of the cuſtoms is not a place to take away the benefit of the inſolvent act.

Eaſter Term,

14 Geo. 3. 1774. K. B.

Note, Serjeant Burland *ſucceeded this term, as one of the puiſne* Barons *of the* Exchequer, *in the room of the late learned and much regretted* Judge, Baron Adams, *who died of a fever on the circuit.*

Certificate.

CERTIFICATE in diſcharge of a bankrupt pending the ſuit operates in the nature of a releaſe.

Award.

TIME elapſed, which is limited by the ſtatute for proceeding againſt an award; they applied for an attachment for non-performance of the award.

To this motion it was ſuggeſted in diſcharge of the attachment, that they were at iſſue in the court of exchequer on the validity of the award.

Lord *Manſfield*—We have nothing to do with that—the ſtatute binds the court of exchequer as well as this court.

New Trial.

MOTION for a new trial.—Vedict had been found for plaintiff, on evidence of a converſation by one of the witneſſes. Affidavits were offered of an *alibi* at the time of the converſation alledged, ſworn to, namely, that the perſon who ſwore was then in another place.

Cou

Court granted a rule to ſtay proceedings till the trial of [438]
the indictment, with liberty to produce a copy of the indictment in evidence, in caſe the witneſs ſhould be convicted.

Femme Covert.

BY a rule of court money had been directed to be paid into the hands of a father for the benefit of his daughter, who was a femme covert.

The father refuſed on apprehenſion of an action. And now the court was moved, that the money may therefore be directed to be paid into the hands of another perſon, named on behalf of the femme.

The court ſaid this in the caſe of a femme covert was analogous to levying a fine, or examining before chancery, and therefore ſhe muſt appear in perſon.

Juſtification.

NO juſtification of bail ſignify any thing after the ſheriff has been ruled.

Iſſue.

YOU cannot ſign judgment for non-payment for the iſſue, until demand and refuſal.

ON a motion to ſet aſide an order founded on the 9th of *G.* 3. for building *Black-Friars-Bridge.*

There is a compulſory power to buy in lands for the better building of the bridge, in caſe no agreement can be made; this power is given to the mayor, aldermen, and commonalty in common council aſſembled.

It appeared upon the caſe ſtated, that the complainant againſt this order was a mortgagee and ſo ſtated in the order.

2d. That the order imports to have been made by the mayor, commonalty and citizens.

3d. That the meſne proceedings before adjudication are [439]
all in the paſt tenſe and not in the preſent: And upon theſe ſeveral grounds it was contended the order ought to be quaſhed; there was another point that they have ſtated the order to be in purſuance of the act, without ſaying in what manner.

And

And firſt, That by ſtating the complainant to be mortgagee they have not ſhewn a caſe upon their own ſtating whereby it appears they were impowered.

2d. That there is no ſuch corporation as the mayor, commonalty, and citizens of *London* deſcribed in the act.

3d. That the paſt tenſe inſtead of the preſent was againſt precedent, and all the reaſon of the law which ſuppoſes all matters before it be done *eo inſtanti*.

4th. That acting under a ſpecial authority they ſhould have ſhewn ſpecially how they had purſued that authority.

To this it was anſwered, firſt—that mortgagee was within the general words of the act "all perſons ſeized of any "eſtate or intereſt." Now a mortgagee has a legal eſtate in the term and an equitable intereſt in ſecurity.

2d. That the act does not mean that it ſhall be neceſſary to give the corporation of *London* a new corporate name; and that the proper corporate name is mayor, commonalty, and citizens.

That it would defeat the end of the act, if you were obliged to buy many acres, in order to come at a few.

As to not uſing the preſent tenſe in proceedings, that this would have been abſurd ſpeaking of things not done until after.

In anſwer to this it was replied, that all acts which compel a man to part with his property in a ſummary way muſt ever be purſued ſtrictly, and the power be fully ſet forth whereon ſuch an authority is given, derogatory to the common law. As in order of juſtices for removal of a pauper, it muſt be ſtated complaint was made by churchwardens, that it may be ſeen the queſtion came properly before the court. And if the removal be on the ſtatute of King *W.* it muſt be ſtated, that the pauper was likely to become chargeable, that it may appear they had juſt ground laid before them of removal.

[440] "In purſuance of the act," without ſtating in what manner, is only telling the court, that in their conceptions, they have done as the act directs; which might equally be an anſwer in any caſe, however erroneous, illegal, or oppreſſive. The court is to judge whether they have proceeded according to the act, not on the credit of ſuch a general declaration of themſelves in their own caſe, but by ſeeing, on legal evidence, how they have acted. And this evidence, if they were in the right, they ought to have laid before the court.

As

As to *præstitit*, it is certainly wrong; for the law presumes all its proceedings to be on record the instant the acts arise. And there are cases which prove that such a variance is fatal, Lord *Raymond*, 1376. Conviction upon swearing, 6 & 7 King *W.* quashed, because said that a witness *præstitit sacramentum*, and not *præstat*.

Lord *Mansfield*—This is a very nice objection; because when the man has taken his oath, though it be supposed taken down at the instant, it must be *præstitit*.*

Rejoinder—That it is sufficient if it appears that the persons empowered by the act are the persons treating and applying.

This is not an authority vested as a judicial or legislative power; but it is a capacity given and vested in the constituent parts, (which for this purpose are the mayor, aldermen, and common council) in order to enlarge their powers of purchasing lands.

Now if there is an authority to *A.* to purchase the lands of *B.* his treating with *B.* is a sufficient proof of his pursuance of the authority.

The city of *London* could not be a purchasor, under other description than as mayor, aldermen, and common council, or commonalty.

Now if the name commonalty goes farther than common council, and includes others as well as themselves, this surplusage will not certainly vitiate, if it be proved the parties empowered have all concurred in the contract.

That mortgagee, in or out of possession, is within the words "estate or interest;" and if you must tender the whole mortgage money, (which was contended) you may be obliged to tender 20,000l. for a purchase of the value of 10l. That as to this the provision is optional in the corporation, and either way compulsory on the party.

As to the objection of *præstitit*, instead of *præstat*, it may have its place; but in things which are done after some other, it cannot be improper to use a tense expressive of their being so after done. [441]

Lord *Mansfield*—In this case the *præteritum*, in propriety of language, necessarily implies the present.

Mr. *Dunning* was very large on the absurdity of supposing the act to mean the corporation must purchase all to come at once; the public accommodation be delayed or defeated, if they do not take great estates upon their hands to obtain a title; and a number of unnecessary houses be bought, to come at a few that they do want.

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* This seems to be the proper use of the preteritum perfectum; which some therefore, I think, have not improperly called the preteritum præsens, as standing on an indivisible point between the past and the present

As to the objection to the tenſe, that perhaps there neve was a time when falſe grammar was required; but ther were times in which the diſtinction between falſe and tru grammar was not ſo well underſtood as at preſent: An there were always times in which people took notes witho knowing what they took, or underſtanding what the heard; and thus converted into nonſenſe that which is, thoſe who hear and underſtand, extremely good ſenſe. N did grammar, if it was falſe, ever make void a deed or re cord.* Nor was all the nicety of ſpecial pleading requir in perſons who did not undertake nor pretend, nor ough to be obliged, to underſtand thoſe dangerous and miſchie ous ſubtleties.

As to the objection to the deſcription, it amounts to n more than only too many applied—you have all applied A few of that all would have done; a part would ha done; but the whole cannot. Beſides, the objection wa not made at the quarter ſeſſions, when competent to ha been made, if there was any thing in it.

Serjeant *Glynn* was againſt the order, Mr. *Bearcroft* an Mr. *Dunning* in ſupport of it:

Lord *Mansfield*—What was meant to be gained, ſup poſing the party complaining ſhould ſucceed?

The anſwer was, the great inconvenience of the diminu tion of the value of the lands remaining, whereas the jur determined only on the value of ſo many ſquare feet ground. This was objected, as a conſiderable defect in th valuation.

Lord *Mansfield*—I wiſh you could have proceeded to ſe tle it ſome other way; for it may be very troubleſome them though we ſhould happen to be for them, and the prevail in point of form; (unleſs, indeed, we ſhould thin that there is no power to force the mortgagee to ſell th land) but what if we conceive there was a way, and a pow of coming at the lands, and that they had been only irr gular in point of form?

[442]

Terms were propoſed by Mr. *Bearcroft*.

Mr. *Cox* ſaid, he hoped he ſhould render a reference un neceſſary, by ſhewing the plainneſs of the caſe, in whic he had more information than the other gentlemen.

The commiſſioners are to be treated with; the mayo aldermen, and commonalty, in common council aſſemble are the commiſſioners to treat; but when the conveyance

* Mala grammatica non vitiat chartam.

to be made, this is to be done by the city in general, "the "mayor, commonalty, and citizens;" otherwiſe they would ſoon petition againſt the act; if they were to be called on whenever a conveyance was to be made.

As to mortgagee, it ſuppoſes a caſe where the mortgage may cover the whole premiſſes; therefore if there is a mortgagee not in poſſeſſion, the object is, that the city may come into the title without the trouble of a foreclosure in Chancery.

Mr. *Alleyne*—Without going out of the record, the application is to be made in the very ſtile ſtated in the record.

The court ſaid, however, that whatever there might be in the record, there was not a word in the order. *Sed v. infra.*

Lord *Mansfield*—I was very anxious to have it ſettled in an amicable manner; for the victory will be very hurtful to the party: And if the jury are to aſſeſs in a litigious manner, they will ſet a looſe value on the lands.

Mr. *Dunning* objected to the propoſal of purchaſing the whole term; but ſaid that there could be no objection, he thought, on the part of the city, to make an enquiry.

Lord *Mansfield*—I had inclined to a reference. This is a ſpecial authority given by an act of parliament, to make a man part with his lands againſt his will, and muſt therefore be ſtrictly purſued: And it muſt appear on the face of the proceedings that it has been ſo purſued.

Powers derogatory to private property, tho' by act of one's own repreſentatives, to be very ſtrictly conſtrued, and not enlarged by intendment. Quod nota.

The firſt objection is, that the mayor, aldermen, and commonalty, are not the perſons empowered, but the mayor, citizens, and commonalty, which are two diſtinct things; one a ſecular body, for * particular purpoſes, the other a corporation at large. Can we look into the conſtitution of *London*, and ſay, that the mayor, citizens, and commonalty have no authority; or that it is made by the mayor, aldermen, and commonalty, in common council aſſembled, when upon the face of the record it appears otherwiſe?

That the variance of ſtile is material and cannot be cured by evidence of the conſtitution of the city, or by conjecture.

There is another objection, which has not been taken notice of, which is, that it does not appear that *Croke*, the mortgagee out of poſſeſſion, had notice. They ſtate, indeed, that he had due notice; but there are ſeveral ſpecific circumſtances required by the act, which ought to have been ſtated, in purſuance of a ſpecial authority.

[*443]

Acts under a ſpecial authority ſhould be ſpecially ſet forth.

Now as to the merits—(for the others are objections againſt the form)—Now *Croke*, it ſeems, is tenant out of poſſeſſion, for a two or four year's term, I think, remaining.

The mortgagee is not compellable to account with the mortgagor, and there is a great difference, as to affecting the intereſts of the term. Then what ſays the act? The mortgagee out of poſſeſſion might ſign to any body; he ſhall ſign to the perſons empowered. Yes; but under certain regulations.

Mortgagee and mortgagor ought both to be made parties, when their reſpective intereſts are concerned.

I deſire to be underſtood as not deciding that the city may not proceed againſt mortgagee and mortgagor, for their reſpective intereſts. With mortgagee, as for an apportionment of the term eſtate; with mortgagor for the reverſion; but then they muſt both be parties: And they don't come in under partitular proviſions, but the general words.

Mr. Juſtice *Aſton* ſaid, that in this caſe the appearance of the mortgagor would not cure.

He concurred with Lord *Mansfield*, in ſaying that the judgment was very unſatisfactory, in ſaying the money ſhould be paid to *Croke*, or ſome other perſon intereſted; whereas the act of parliament leaves nothing at large, but puts them to an award; and calls in all the parties intereſted, in order to have the value fairly and clearly aſſeſſed.

Wright *againſt* Holford.

Caſe out of Chancery for Certificate.

THIS aroſe upon a clauſe in the will of Mrs. *Helſ* wife of *Peter Holford*, made by virtue of powers reſerved to her under the ſettlement.

[444] The deviſe was, all her moieties to her huſband, for life without impeachment of waſte; limitation of a term 500 years, as proviſion for younger ſons; then limitation tail male to the elder ſon, with remainder to the uſe of and every the daughter and daughters of her by her huſband the aforeſaid *Peter Holford*, to be begotten, and to the heirs of her and their bodies, lawfully begotten; for daughters, if more than one, to take as tenants in common and not as joint-tenants; remainder to her own right heirs in fee. She died without revoking her will, leaving a ſon by him, and two daughters, *Conſtantia* and *Maria*, and a ſon by a former huſband, who was the plaintiff. And qu

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tion, whether the plaintiff, as heir at law, became intitled, upon the death of *Conſtantia* without iſſue, under the diſpoſition of the will: or whether the ſhare went to the other ſiſter, by ſurvivorſhip?

On the ſide of the heir at law—I ſhall lay this down as a principle in law, as old as *H.* 7. and down to the preſent times, that the heir at law is not to be diſinherited but by expreſs deviſe, or neceſſarily implied, and that probable conjecture will not do. I ſhall cite *Gardiner* and *Sheldon*, and *Williams* and *Brown*, which, I think, are preciſely the ſame with this, and have only a colour of diſtinction at beſt, and that a very ſlight one. I ſhall take notice of the caſe of *Holmes*, and ſhall make a few curſory obſervations on the long ſtring of caſes which have ariſen.

Certainty is the grand object of the law, on the conſtruction of a will, as it is moſt highly expedient that diſpoſitions of eſtates ſhould be preſerved. How is this to be attained, but by the principle I have inſiſted on? If the heir be diſinherited by any thing leſs, inſtead of a certain deviſe, (or what I take to be the ſame, a neceſſary implication) if any the ſtrongeſt probability be admitted to ſupply this, uncertainty and conjecture will be introduced; whereas no obſcurity can be, if neceſſary implication be required: For neceſſity is an extreme, and all extremes are very eaſily defined.

Lord *Mansfield* ſaid, no one doubted the caſe of *Gardiner* and *Sheldon*; they only explained the meaning of neceſſary implication. Lord *Hardwicke*, in the caſe of *Corrington* and *Hellier*, never doubted the caſe of *Gardiner* and *Sheldon*, but only ſhewed what a neceſſary implication was. There a man had made an eſtate to *A.* for ninety-nine years, with the ſubſequent limitations over. No man can ſay it was neceſſary he ſhould mean to ſay, "if he ſo long live." He might have given a man an eſtate for ninety-nine years; but under all the circumſtances, the court judged the intent to be certain, or neceſſarily implied. A neceſſary implication is, where the intent upon the whole is clear, ſo as to ſatisfy the conſcience of the court, and that no reaſonable man who [445] hears it can doubt, and muſt be upon the will itſelf, and not from any thing out of the will.

Serjeant *Hill* proceeded with the caſe of *Cumber* and *Hill*, ſt. 64.

Williams and *Brown*.

There is not only a want of neceſſary implication, but the croſs remainder, ſuppoſing it well and ſufficiently conveyed

by the expreſſions, and not too uncertain and indefinite to take effect, cannot here be ſupported, becauſe bad in law in its origin, even admitting the teſtatrix had intended croſs remainders, and well and ſufficiently expreſſed her intention, according to law: For in this caſe it being to daughter or daughters, lawfully to be begotten, there might have been more than two, and no croſs remainder ſhould be between more than two, and therefore thus the ſupport would be not good of the croſs remainders contended for; which, if they could be proved to have been intended, muſt be proved in ſuch a manner as, it is humbly ſubmitted to your Lordſhip, will not agree with law.

The words are almoſt the ſame as in *Cumber* and *Hill*; and what has been obſerved of croſs remainders, as a reaſon of their being ſo reſtrained and circumſcribed as I am contending before your Lordſhip they have been, by ancient and ſucceſſive adjudications, is, that they create great confuſion.

How far this reaſon holds, or what other, it is not my buſineſs to inſiſt on. However, it is enough for me if I prove, that in fact a rule of law, ſettled by deciſions, there is now ſtanding, which, whether for the reaſon hinted to above, or for whatever other, will not allow croſs remainders but by neceſſary implication; nor between more than two. And a deviſe muſt be good in its original creation, or it cannot be eſtabliſhed by ſubſequent event. If this be admitted, then in the caſe before us, the huſband being living at the making of the will, there might have been more than two. But if there be a difference, it muſt ariſe on the word reſpective; which is ſuperfluous: For it muſt be underſtood where the perſons are of the ſame ſex. And *Bacon* very ingeniouſly, as he does every thing, explains the maxim, *expreſſio eorum quæ tacite inſunt nihil operatur.*

Maxim.

[The caſe of *Cumber* was cited from the bench, which was to his grandſon, *Hendon*, and his granddaughter, and the heirs of their bodies reſpectively.]

Serjeant *Hill* continued—In the caſe of *Doe*, on the demiſe of *Burville*, againſt *Burville*, if the implication had not been raiſed, the eſtate would have gone from and not
[446] to the heir at law: And this is conſonant to the principles I ſet out with, and ſo *Holmes* and *Meynell.*

Ejectment—" I deviſe all my lands in *A.* to my two daugh-
" ters, *E.* and *A. M.* and the heirs of their body, equally
" to be divided among them. And if they die without iſ-
" ſue,

" ſue, then all to my nephew, *F. M.* with divers remain-
" ders over."

This, being the caſe of a teſtator, ſhould be governed by intention, as in 13 *H.* 7. a deviſe to a ſon and heir, after the death of his wife, makes an eſtate to the wife, for her life. This is proof of what intention he was ſpeaking of not being a probable conjecture, but neceſſary implication, in the ſtricteſt ſenſe; an eſtate to the heir, after the death of the wife: He was not then to have it before; nor was any third perſon to take; and therefore the wife muſt: And the diſpoſition was ſuch in that caſe, it was ſaid, as prudence and reaſon would juſtify.—And what was the caſe? It was in favour of the poſterity of the teſtator, who could not otherwiſe take but by ſuch implication, and the whole was intended, and altogether. And the word all, he ſaid, ſhewed plainly the whole was intended to paſs together.

Dyer, 330.

Cro. Ja. 365. *Gilbert* and *Witten.*

The caſe Lord Chief Juſtice *Pemberton* denied is, where there was an expreſs croſs remainder limited, and therefore cannot be law.

Lord *Hardwicke*, 1 *Atkins*, 215. Deviſe to two daughters, and the heirs of their bodies; and, for default of ſuch iſſue, remainder over: That this was to be underſtood reſpective iſſue. If the word had been, " If they die without " iſſue heirs of their or either of their bodies," this I admit, in any caſe, would create a croſs remainder. But here the words are " All and every the daughter and daughters " of the body of the ſaid *Peter Holford*, on the body of me, " *Conſtantia Holford*, begotten."

No more than a deviſe to the daughters, and the heirs of their body or bodies, to take as tenants in common, if more than one. This is no more than to the heirs of their bodies; and, on failure of iſſue of any one of them, then the ſhare goes to the heir. But it is ſaid if there had been one only, ſhe ſhould have taken all: Why if more ſhould not the ſhares go by ſurvivorſhip?

I anſwer—The intent is not ſo ſtrong as to be neceſſary; and if I can find any diſtinction between the one caſe and the other, I conceive it to be ſufficient to keep the eſtate in the heir at law. Now portions to daughters are generally given to them as advancement in marriage; accruer of ſhare by ſurvivorſhip might come too late to be of uſe in that reſpect; and it is only probable conjecture therefore to ſay that the meant ſuch ſhare ſhould accrue, rather than deſcend to

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the heir. Therefore it was I grounded myſelf on this principle at firſt that certain intent, not probable conjecture, was neceſſary in diſheriſon of the heir.

Mr. *Hardgrave* on the other ſide—I ſubmit the ſame reaſon, which induced her to prefer the iſſue male to the iſſue of her former huſband, would alſo induce to prefer the iſſue female to the heir at law. The limitation to the daughters is ſtill more material, for it is to all and every my daughter and daughters; therefore if there had been one daughter only born, ſhe would have been preferred to the heir. Now what difference can be effectually taken to ſhew that the heir was meant to be preferred to the reſt of the daughters, if more than one upon the death of one; who was not preferred to that one if there had been one only: Then the limitation over to the heir at law is this—" and for default of " ſuch iſſue" what iſſue is this? It refers to the preceden words " all and every" for the daughters ſhould take in remainder before the heir, who was not to take until after failure as full as could be expreſſed.

Dyer 303. Croſs remainder between more than two an againſt the heir.

4 *Leon.* Where the court adjudged in a manner which ſhews that in ancient times, where a more rigid interpretation of wills was held than has been for a long time paſt, implicative conſtructions were admitted to raiſe croſs remainders, where reaſon ſupported them. The next caſe I ſhall cite is *Holmes* and *Meynell*—*Raymond*—*Skinner*—Sir *Thom Jones*—and *Pollexf.*

I ſhould not have relied on the word " all" ſo ſtrongly if it had not been relied on in a determined caſe, *Spelman* and *Stonor*, 9 *May*, 1768.

The words of Lord *Camden* are, " this caſe is very clear " on the words each and every, independent of the author " rities; and is much ſtronger than the caſe of *Wright* an " *Cadogan*,* in which I grounded my opinion on *Trueſdale* " and *Beſt*."—And I truſt I ſhall ſhew this was the very caſe which was the ground with the houſe.

Lord *Manſfield*—You muſt not go to that, for that [meaning the ſuppoſing deciſion in the Houſe of Lords would prevent our ſending the caſe back. I don't think in fact it was determined, for the judges were not called in, was up—and ſtaid a little, and then went out—but be it as it will!

[448]

* The caſe which is before the court now of Wright and Holford, as I underſtand, only the names differing.

will, we muſt take it for granted it was not determined there, for the court of chancery can't ſend a caſe preciſely the ſame which has been already determined in the Houſe of Lords.

Mr. *Hargrave* continued—I ſhall only beg leave to ſay, that Lord *Northington* determined for us.

Lord *Mansfield*—You don't mean on the appeal. This was explained, and at laſt it appeared Lord *Northington* was admitted to have thrown out an opinion in their favour, and Mr. *Hargrave* proceeded to obſerve, that he had ſtated Mr. *Yorke* in his argument, as holding it too clear to be argued.

In the caſe where they refuſed to imply a croſs remainder; this was, becauſe it was to have ariſen upon a contingency which never happened the deviſee dying before ſixteen, this is the caſe in *Dyer*. Two reaſons are given in the caſe of *Gilbert* and *Witten*, againſt croſs remainders, one that the deviſe being to the two ſons by expreſs limitation, there ſhould be no croſs remainders by implication; ſecond, not between more than two, but this caſe has been ſince determined on contrary reaſons; and it is not doubted that a man may create croſs remainders between more; by expreſs words. The only queſtion is therefore, whether he ſatisfies the court upon the circumſtances of his intent. In *Cumberback*, the word "reſpectively" was uſed, which certainly ſeemed to imply the limitation over to take effect in failure of reſpective iſſue, which muſt mean excluſive of croſs remainders; and the word "all" was not there. The caſe of *W.* and *Brown* was ſtronger, for the word "all" was in the will, but there was alſo the word "reſpectively;" and though it was ſaid the court did not determine in the caſe of *W.* and *Brown* upon that word, yet in *Davenport*, it is admitted they did.

I apprehend that the preceding deviſes to the ſons are not a very different thing from the deviſes to the daughters; every family has a greater regard to ſons—and it rather turns the other way—ſhe meant it to deſcend entire to the ſons; but not ſo to the daughters—and I apprehend what is obſerved by way of interpretation ſtands in its full force.

1 *Leon.* 14. Deviſe to the ſons, and if they died without iſſue, remainder—there was what Lord *Pemberton* calls in the caſe of *Holmes* and *Meynell* a preſumption of nature, that he would not diſinherit his iſſue in favour of a ſtranger; the caſe of *Holmes* and *Meynell*, it was ſaid, was not ſo ſtrong, there were only the words "they and all." I contend,

contend, there was alſo in that caſe the ſame preſumption of nature which I hope will always prevail, over an intent in the leaſt degree doubtful, expreſſed in diſheriſon of the heir.

[449] [It was objected, that if it was once determined in the court of Chancery, this would bar a caſe being made.

Lord *Mansfield*—Not at all, when they come for farther directions than what appear on the decree.]

It was ſaid, and I don't deny it, other parts of the will may be looked into to explain—this I don't deny; and I hope it will be ſo; there is a limitation with reſpect to the younger children, that if any of the younger children die unmarried and under age, that then the ſhare or portion ſhall go to the ſurvivor; and if all, then the ſhare to go to the inheritance. This inſiſted for, inferring a like intention here (which was the uſe made) would, I think, rather imply that if there had been a like intention, the maker of the will knew how to limit a croſs remainder in expreſs words, had done it, and therefore would have done it. The maker of the will in that clauſe relating to younger children, was not ſatisfied with implying croſs remainders in default of iſſue; but took care it ſhould paſs by the proper way of expreſs limitation. There appears a predilection I deny not; but we are not to look into this appearance, nor the grounds of this predilection, but rely on the clear and certain title of the heir not to be defeated, unleſs by clearneſs and certainty againſt it. We rely on an old diſtinction not admitting croſs remainders, where they might have ariſen between more than two. I ſhall content myſelf with ſaying, that all the caſes cited differed materially as to the circumſtances, the heir would have been diſinherited in ſome of them, if the croſs remainders had not been implied; in an other it would have gone in diſheriſon of the teſtator's remaining children reſpectively.

Lord *Mansfield*—Let it ſtand over.

Does not Lord *Hardwicke* rely greatly on the uſe of the word "reſpectively" in the caſe of *Comber* and *Hill*, and *Williams* and *Brown*? And the word "reſpectively" diſjoins the inheritance; and this is very near as ſtrong as the word which you admit would imply a croſs-remainder. To this it was again inſiſted, that ſuperfluous words, which muſt have been implied if not expreſſed, could make no alteration.

Lord

Lord *Mansfield*—In conſtruction of intent it certainly would,* as where it is in default of ſuch iſſue the whole to go over, this would have been implied if not expreſſed; and yet the want of ſuch words appearing in the will, would make a great difference in argument of intent. [It ſeems where the word "whole" was uſed in *Holmes* and *Meynell* with the word "all," nothing would paſs until the whole could go over; and in the mean while the daughters on failure of iſſue would take by ſurvivorſhip reſpectively.] But if theſe words were abſent, the implication would amount to no more [450] (unleſs upon other ſpecial circumſtances) than that the whole would be to go over finally but by parcels; that on failure of the reſpective iſſue, the ſhare would deſcend to the inheritance.

The caſe came on for judgment the laſt day of the term, and Lord *Mansfield* delivered the judgment of the court to this effect.

May 21, 1774.

I found it the cuſtom to ſay nothing upon caſes which came for certificate; nor to declare any reaſons upon the certificate.—True the bar might come at the opinion when it came on in chancery; but I think the cuſtom was wrong. The two caſes before us ſtand for our opinion upon certificate, and we ſhall ſtate as follows.

The caſe of *Wright* and *Holford*, articles of agreement upon marriage of *Conſtantia*, then the widow of *John Wright*, ſhe was impowered to make a diſpoſition by a deed with two witneſſes, or a will with three witneſſes, of any eſtate which ſhould come to her during coverture, or by deſcent to her huſband, or any remainders or reverſions under the ſettlement, which ſhould ariſe. She became entitled as heir by the death of her brother to an undivided moiety which he gives in truſt to her huſband for life, without impeachment of waſte, (then a term of five hundred years with eſtates tail to the ſons of the marriage,) and then follows deviſe of the ſame eſtate to the uſe of all and every the daughter and daughters of me the ſaid *C.* by *P. Holford* lawfully, &c. and the heirs of their body lawfully; ſuch daughters if more than one, [to take as tenants in common and not as joint-tenants,] and for default of ſuch iſſue to the heirs of

* P. W 79—80. on the maxim, Conſtructio eorum quæ tacite inſunt nihil operatur; and Bacon's maxims.

of me *Conſtantia* for ever. She died without revoking her will, leaving a ſon and heir at law and two daughters.—One died at two years old, the other is unmarried and an infant. Queſtion, therefore upon the death of the elder daughter an infant and without iſſue; whether the heir at law became entitled after the death of *P. Holford?* We ſhall not go into the caſes which would be too long the laſt day of term; but we ſhall ſtate the certificate in ſuch words as will carry the reaſons with them, and will manifeſt the diſtinction between this and the caſes of *Cumber* and *Hill*, and *William* and *Brown* ſtrongly relied on by Serjeant *Hill*.

The opinion we are of will be certified in theſe words—"there are no words in the ſettlement of remainders or reverſions to limit over the ſhare of the two daughters, upon their dying without heirs of their bodies reſpectively; or the contrary the whole eſtate is expreſsly limited over upon the failure of all the daughters and all their iſſue." (Theſe words are emphatically put in to ſatisfy Mr. Serjeant *Hill* there is no limitation upon failure of daughters reſpectively
[451] or of the heirs of their bodies reſpectively, but in as full words as can be, general and total failure of all and every the daughters, and all and every their iſſue.

We think they take CROSS REMAINDERS.

Warranty.

New trials unfavourable, eſpecially where the perſon, on whoſe ſide the verdict is, will be affected with ſomething of a criminal nature.

MOTION for a new trial on a verdict againſt evidence upon an action of warranty, for an horſe of the price of 17l.

Lord *Mansfield*—I would adviſe you to ſet down with your loſs, rather than come for a new trial when the jury have determined for the ſeller. No ground for a new trial. Better it ſhould be determined once for all right or wrong.

New Trial.

ON an action brought for mal-proſecution againſt an attorney, the jury had found for the defendant; the plaintiff moved to be let in to a new trial.

The court ſaid, defendant was ſufficiently tried once where the ſuit was criminal.*

Attachment

* Nemo bis diſcrimen ninibit pro eodem delicto.

Attachment.

THE attachment goes of courſe for non-performance of an award; and in order to get rid of it, you muſt ſet aſide the award.

Verdict.

IT ſeems where a ſpecial caſe has been reſerved a new trial has been granted, without previouſly ſetting aſide the former verdict.

Coſts in Ejectment.

WHERE there is ejectment, and judgment againſt the defendant by default, there is no recovery of coſts upon the judgment, becauſe the defendant is only nominal. In this caſe you may bring an action in conſequence of judgment to recover meſne profits, and coſts of ejectment.

Goodright.

EJECTMENT.

Queſtion on the Effect of a Reſiduary Clauſe.

TESTATOR ſeiſed in fee, made his will in 1753, with this clauſe—" in caſe my perſonal eſtate (which I have before deviſed to my wife) be not ſufficient for payment of debts, then I deviſe my lands in *Aldercombe*, to truſtees for payment of my debts; and if not ſufficient, then the reverſion of inheritance of my wife's jointure to be liable; all the reſt and reſidue of my real and perſonal eſtate whatſoever and whereſoever to my dearly beloved wife." The wife proved the will, the perſonalty was ſufficient to pay his debts.

Queſtion: Whether he meant to comprize the eſtate deviſed to the truſtees, and include it in the reſiduary clauſe? If he did, the wife will take; if not, the heir.

Contended, that he could not mean to give this eſtate to his wife; becauſe he thought that it might not be ſufficient

to

to pay debts, *Row*'s caſe—" deviſe to *R. B.* if he pay all " my debts and funeral expences for ever; and if he do " not pay them, deviſe to Mrs. *E. F.* all the reſt and reſi- " due not herein before bequeathed." Deviſe contended to be executory; but as *B.* died before the teſtator the court would not admit of that; and they ſaid that Mrs. *E.* could not take by the reſiduary clauſe.

The different words " not before deviſed" which were in that caſe make no alteration, but are merely tautologous. The reſiduary clauſe is here, as generally, mere matter of courſe; there is a caſe where a man with words wide enough to paſs his whole intereſt not knowing of an intereſt he had, it did not paſs.

1 *P. W.* 302. *Coke* and *Oakley*. *A.* went to ſea; his father left during his abſence certain leaſehold eſtates to him: he returning left his gold buttons, tobacco-box, and all other things to his dear friend *Oakley*. Queſtion, whether the leaſehold eſtates would paſs? Trever held not, and that executor held as truſtee.

Mr. *Wilſon*—On the ſtate of the queſtion, that if any thing the heir ſeemed to have the worſt caſe, becauſe the firſt clauſe gave to the truſtees, the other to the wife; and the queſtion (even if it were any thing) only between the wife and truſtees.

But take the whole it is thus. If deviſee ſhould take upon failure of a contingency which never happened; now on the plain intent I ſubmit the deviſee ſhould not.

[453] *Row* was determined on the ground of a lapſed deviſe. *Wright* and *Holt* was the ground. He deviſes expreſsly all his lands in *E.* to *J. Carter*, and his heirs; and if he died without heirs, then over. *Carter* died without iſſue, in the life of the teſtator. The deviſe over can't take place, even under the reſiduary clauſe, becauſe the lands had been expreſsly deviſed.

2d *Vern.* 394. Deviſe to *J. S.* of 500l. if he were alive, and ſhould come from beyond ſea; deviſe over void.

Bethel and *Holmden*. Lord Chancellor, 16 Nov. 1772. Teſtator *H.* directed his lands to be ſold, intereſt to the wife for life, and to his three nephews, who ſhould be living at the death of the wife. They all died in the life-time of the wife; the reſt and reſidue was given to the wife. Queſtion, whether this would paſs the intereſt of the lands ſold for money? Held it would not.

1 *Leon.* 251. Deviſe of lands in fee for erecting and maintaining a free ſchool, and all other his lands, to *T.*

[Lord

[Lord *Mansfield*—This muſt be a miſtake; for all other his lands is an expreſs exception.]

2 *Raym.* 1324. Teſtator directed his debts to be paid immediately after his deceaſe, and gave power to his wife to ſell his lands for payment, (if need ſhould be) and to pay legacies; and all reſt and reſidue to his wife. Lord *Cowper* was of opinion, though a power given to the wife to ſell, and fee paſſed, ſubject to payment of debts, that ſhe took nothing. There can be no ſtronger implication, in caſe the perſonal eſtate ſhould fail, he deviſes to truſtees, in payment of debts, if the perſonal then anſwered as it did, he did not deviſe.

How great the abſurdity, that if the perſonal had not been entirely ſufficient, that then the ſurplus ſhould be a reſulting truſt to the heir at law. Lord *Talbot* determined it ſhould not, but 3d *W.* 61. the Lord Chancellor, and three aſſiſting judges, thought otherwiſe. How ſtrange, then, that, if the perſonalty is entirely ſufficient, the whole real eſtate deviſed, as ſubſidiary to it, ſhould paſs to the wife.

Mr. *Cuſt*—That there was a ſtrong diſtinction between the caſes; becauſe the deviſe to a man and his heirs is good, upon contingency; namely, if he ſurvive the teſtator.

That as to ſo much of the caſe as lands to be turned into [454]
money, that very circumſtance anſwered them; for then, under the name of reſidue void eſtates, eſtates after acquired would paſs.

In the caſe of *Sprig*, he deviſed his whole eſtate for payment of debts; there could be then no reſidue, unleſs out of that ſurpluſage.

The caſe before the preſent Lord Chancellor was on a queſtion whether by the word eſtate the wife took in fee, or for life; not whether ſhe took or not.

That the caſe in *Forreſter*, *Malabar* and *Malabar*, went upon the circumſtances whether he meant the eſtate ſhould be real or perſonal. It was declared there, by Lord *Talbot*, that it appearing on the will that he meant it ſhould be ſold in all events, and made perſonal, therefore the heir could not take, but deviſee muſt. The deviſe was, "All the reſidue of my perſonal eſtate."

Lord

On one ſide it was obſerved, that the wife was legatee of lands purchaſed after the marriage, by way of farther proviſion: On the other ſide, that this was not (even in the idea of civilians) ſufficient to let in the heir; becauſe it is not *in officioſum teſtamentum*; for he gives legacy to the heir, *ex noviſſimis*.

Lord *Mansfield*—The teſtator, *Humberton*, being ſeiſed in fee of the premiſſes in queſtion, and divers others in *Lincolnſhire*, and elſewhere, after ſeveral precedent deviſes, legacies, and bequeſts, part of realty, deviſes thus:

"In caſe my perſonal eſtate, excluſive of ſuch part "therefore as I have before given and bequeathed to my "wife, ſhall not be ſufficient to pay my debts, I give to "my brother,——, and my friend, ————, and their "heirs, in truſt, to pay debts and legacies, and ſupply de-"fects in the perſonal eſtate." And in caſe not ſufficient, then he deviſes the reverſion of inheritance of his wife's jointure; and wiſhing and hoping his perſonal and real eſtate in *A.* ſhall be ſufficient to pay all pecuniary legacies, and alſo particular legacies to his heirs, on condition of giving up their claim to lands under the uncle's will; then comes the reſiduary clauſe of reſt and reſidue to his dearly beloved wife. This action is brought by a coheir for a moiety.

There are two ways of conſidering the queſtion; firſt, whether this reſidue does not take in the lands, as not deviſed. Now the lands are deviſed upon a contingency which never happened. This is, it ſeems, as if there had been no ſuch limitation at all. Now the deviſe is only in caſe perſonalty ſhould not be ſufficient, which it was.

But ſuppoſe, on the other hand, there had been a ſmall part neceſſarily to be paid, and accordingly paid out of the lands—as to this, there would have been a reſulting truſt to ſome body. As for Mr. *Cuſt*'s objection in point of form, it has been often over-ruled: No man ſhall be nonſuited on account of an eſtate in his own truſtee.

[455]

Now under the will, if the heir were to have the truſt reſulting, the truſt is only a part of his title. Now what is this? It is only a truſt eſtate, and in equity nothing more than to raiſe money by ſelling, or mortgaging for payment; then after payment it carries the whole ſurpluſage; ſo that either, as was the fact, there being ſufficient from the perſonal, or if there had not been quite ſufficient, the widow was entitled; and the reſt and reſidue carries every thing but what was neceſſary for the payment of debts.

POSTEA for the DEFENDANT.

Stainham *againſt* Bell.

Limitation upon contingency of failure of

THE caſe was thus: Deviſe to a ſon, of which he ſuppoſed his wife enſeint, of his whole eſtate, with certain

certain limitations if it should be a daughter. And on failure of issue of such son in tail, or daughter dying under age, remainder to his wife, the wife shall take, though no after-born son or daughter ever came into being.

supposed future issue, that issue never comes into being, the limitation over as good as if the contingency had happened of such issue being born and failing.

1 *Peere Williams*, 390. Devise to son in tail; if son should die without issue, then to *A.* his wife; then to *M. S.* in tail; then remainder for life to the plaintiff. *A.* dying in the life of the son, upon failure of that contingency, the remainder over is void.

That the case before the court is distinguishable from *Jones* and *Westcombe*.

The devise in the principal case was, "Whereas my "wife is now pregnant, if she bring forth a son, I desire "he may have my estate when he comes to twenty-one "years, paying certain annuities: But if she has a daugh-"ter, a moiety to my wife; the other moiety to my two "other daughters, share and share alike. If either of "them die before twenty-one, then survivorship to the "daughter; but if both die without issue before twenty-"one, then the whole to my wife." The case in fact was that no son was born, nor any daughter.

Question, Whether the wife should take?

Moore, 486, 487. Covenant to levy a fine; remainder to the first, second, third, and fourth son; and if it fortune the fourth son die without heirs of his body, then the estate to *H.* He never had more than one son. Limitation over, the court was of opinion, was good; and the words not conditional but merely limitation.

3d *Lev.* 105. [*qu.*] Upon special verdict, this case, that *A.* was seised in fee, and had four sons, devise to his wife; but if she marry, then that the first son, *H.* enter; like remainder to the other sons. She never did marry. Question, Whether the entail could take place? [456]

2d *Str.* 1092. *Andrews* v. *Fulham*; where *Gulliver* v. *Wicket* is cited; and *Jones* and *Westcombe*, *White* and *Barber*, argued before this court.

Therefore if there was but one daughter, he could not mean that one should take more than two, and the wife nothing: And it appears that if the daughters both failed, the mother was to take the whole; therefore, on general failure of issue, the mother was to take.

Lord *Mansfield* asked, whether there were not many of the modern cases which came nearer than *White* and *Barber*?

Mr. *Davenport* alluded to one argued by Mr. *Heath* and Serjeant *Glynn*.

Lord

Lord *Mansfield*—I only aſk the queſtion, whether there was any difference, except that there was not a fee, but the lands deſcended to the heir in the mean while?

Yes, my Lord; and perhaps becauſe the wife might take as executrix.

Lord *Mansfield*—It is remarkable, this was very finely argued by the two Roman orators, *Craſſus* and *Scævola*, in ancient Rome, on the will of *Coponius*; and that the caſe was admirably argued ſo long ago, upon the intent and ſtrict letter, mutually contended for and oppoſed.

Mr. Juſtice *Willes*—If two daughters, he gives a moiety to the wife; *a fortiori* if but one.

15 May 1774, laſt day of Eaſter term.

Lord *Mansfield* having firſt introduced, in the manner above reported, the caſe of *Wright* and *Holford*, proceeded to judgment upon this caſe, which he pronounced in the following terms nearly:

The next is a new one in its form—*W. S.* ſeiſed of the premiſſes, made will. "And whereas my loving wife is "now pregnant, if ſhe brings forth a ſon, I deſire he may "inherit my eſtate, paying to my wife 4l. a year; paying [457] "30l. to one daughter, and 10l. to the other. If ſhe "ſhould bring forth a daughter, a moiety to my wife, and "a moiety to my daughters, when they come to the age of "twenty-one. And if they die under age, and without "iſſue, the ſurvivor to take the ſhare: And if they all die un-"der age, and without iſſue, the whole to my wife; and if "my wife die before my daughters, and they die without "iſſue, then I give the whole to my heir at law."

The teſtator's wife was not enſeint at the time of making his will, or death; the daughters died without iſſue, under age; the mother married the Defendant, *B.* and died.

This is different from the famous caſe of *Jones* and *Weſtcombe*; the eſtate will deſcend to the heir at law till the contingency—and they are all executory deviſes—and if a ſon had been born, and lived to age, none of them would have taken place. But we ſhall not go into reaſons, or diſtinguiſh the caſes, but ſimply ſtate our opinion.

We think it was the plain intention of the teſtator, in caſe no ſon ſhould be born, and he ſhould have no daughters who ſhould live to the age of twenty-one years, that the wife ſhould have the whole eſtate. Therefore we think, on the event that has happened, that ſhe ought to have the whole eſtate.

The caſe of *Coponius* was 660 of Rome, 1834 years ago, and was declared by Lord *Mansfield* to be the ground of

Jones

Jones and *Weſtcombe*. Vide *Cartrou Hiſt. Romaine*, vol. 14. and *Cic. de Oratore*, and in ſeveral other of his works.

Deed.

ACTION of debt upon bond, with a certain day. Plea. Agreement that the bond ſtood only as an indemnity, and that the plaintiff was not damnified, and judgment of the court, whether he ought to recover. On this they join iſſue in demurrer at law.

And the queſtion before the court was in effect, whether parol evidence could be admitted to prove a condition, where the conveyance was abſolute, without fraud, upon the face of the record?

On the part of the plaintiff, it was contended that no parol evidence could be admitted, to vary and change the nature of the ſpecial obligation expreſſed on the deed.

To prove this, he firſt obſerved that not even on a will [458] can parol evidence be brought to make good a deviſe, except where all appears clear on the face of the will; and the uncertainty is extrinſic, and ariſing out of evidence. And that therefore, though in the caſe of *Malabar*, Lord *Talbot* ſuffered evidence to be paid, that the teſtator meant ſuch a perſon ſhould take as deviſee, and not a perſon as deſcribed by the will, the next day he ſaid he had been wrong in admitting that evidence; but thought there was enough to determine on the will.

There is an excellent diſtinction, with the uſual ingenuity of the author, laid down in *Bacon*, upon the difference between an apparent uncertainty on the face of the inſtrument, and a latent uncertainty, reſulting from external evidence. He ſays a ſecret uncertainty of words not apparent on the face of the inſtrument is cured by averment, for that ambiguity which ſprings from matter of fact is removed by averment of the fact:* But an ambiguity apparent on the face of the inſtrument is never holpen by averment. And the reaſon is, (as he very excellently adds) becauſe the law will not couple and mingle matter of ſpecialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds follow, and ſubject to averments; and ſo in effect, that to

Law tracts Reg. 23 of his Maxims.

* Ambiguitas verborum latens verificatione ſuppletur; nam quod ex eo oritur ambiguum verificatione facti tollitur.
Ambiguitas verborum patens nullâ verificatione ſuppletur.

paſs without deed which the law appointeth ſhall not paſs but by deed.

Therefore, if a man give land to *J. D.* and *J. S. et hæredibus*, (without ſaying whether of their heirs) it ſhall not be ſupplied by averment to whether of them the intention was. And he adds (after another inſtance of the caſe of perpetuities) infinite caſes might be put; for it holdeth generally, that all ambiguity of words, by matter within the deed, ſhall be holpen by conſtruction or election; (neither can apply to this caſe) but never by averment.

And there is a caſe in *Croke* very like the preſent; only it was not there attempted to go ſo far. They wanted to vary the effect of the deed as to circumſtance; not to defeat it in ſubſtance, and take away its operation entirely. The caſe was, *Cro. Eliz.* 697. *Hayford* v. *Andrews*, debt on obligation; condition to pay the money at a certain time; agreement pleaded to pay at a future day; plea bad. 1 *H. 7.* Brian Juſtice. That it never was known, from the beginning of the world, that a man might aver againſt a ſpecialty by matters diverſe, where the deed had a legal commencement.

[459] In 8 *Co. Altham's* caſe, *A.* levies a fine to *William*, his ſon—Upon this the judge can't make queſtion for any matter of law; but now the party comes, and avers matter of fact, that *A.* had two ſons named *William*, an elder and a younger, and his intent was to levy the fine to the younger. This averment out of the fine is good of this matter of fact, which ſtands well with the words of the fine, and ſhall be tried by the country.* But if a man by deed gives to one of the ſons of *J. S.* who has divers ſons, here he ſhall not aver which ſon he intended. And a little lower he cites the caſe cited by *Bacon*, and authorities from the year-books; and adds, no averment can make that good which, upon conſideration of the deed, is apparent to be void.

Caſe of *Andrew—Fitz-Gibbons*—Bond—Plea againſt it that it was for compoſition of felony. And the Lord Chief Juſtice held the plea good; but it was becauſe this went to the deſtruction of the deed which never had a legal exiſtence, § if it were true, and was not a collateral plea, which did not go to the deſtruction of the deed itſelf.

Alſo

* Ad quæſtionem facti non reſpondent judices ſed juratores.
Ad quæſtionem legis non reſpondent juratores ſed judices.
§ Idem eſt contra legem eſſe ac omnino non exiſtere.

Alſop and *Mears*, K. B. Hil. 1771. The Chief Juſtice is ſaid to have declared, that there never was heard a caſe, he believed, in which parol evidence was admitted to annul or ſubſtantially alter a ſpecialty.

Lord *Mansfield*—If the fact is true, it's a proceeding contrary to a ſolemn agreement upon a ſatisfaction; which the law will no more ſuffer, than to proceed on warrant of attorney after ſolemn agreement and ſatisfaction.

Make a motion to ſtay proceedings, reſerving the demurrer: And if on what Mr. *Wilſon* has argued very ſtrongly, the court ſhall be of opinion you can't plead againſt terms of the bond, then you will conſider if you cannot amend your plea, by coming in for ſatisfaction, or what is tantamount.

What cannot be maintained as a plea muſt not be given in evidence, [nor made uſe of on motion. ‡]

Rule propoſed, upon condition of giving up the plea of *non eſt factum*, payment of coſts, if againſt them, and judgment final upon demurrer, that the defendant may be at [466] liberty to amend his plea.

They not waiving their plea of *non eſt factum*, and it appearing to the court that the plea of agreement was falſe—

JUDGMENT for the PLAINTIFF.

But, for the ſake of the bar, Lord *Mansfield* obſerved that the objection had been perfectly right to the collateral evidence. But if there had been merits, the court would have got at it another way.

Covenant to ſecure quiet Poſſeſſion.

ON a queſtion, whether covenant ſhould extend to diſturber by wrong, or under lawful title only. Covenant by mortgagee out of poſſeſſion to indemnify againſt all loſſes, charges or expences, which covenantee might be put to by mortgagors, or any perſons claiming under them. Aſſignees enter under a commiſſion of bankruptcy againſt mortgagor, and withhold poſſeſſion; breach aſſigned, that he has not peaceably and quietly held and enjoyed, nor can peaceably hold nor enjoy, according to the true intent, &c. for that certain perſons entered, as aſſignees under the commiſſion. The defendant replies, that he is mortgagee out of poſſeſſion, and that, the entry complained

‡ Quod fieri vetatur ex directo vetatur etiam ab obliquo.

of was by certain persons claiming as assignees under *A.* and *B.* as being then bankrupts; whereupon demurrer.

Dyer, 28. was cited. Covenant to keep quiet the possession. Objected, that the disturbance was by wrong, and that therefore the plaintiff might have had trespass; but the court said, the agreement being generally to possession, and the principal cause of the covenant, that therefore the plaintiff should recover.

Lev. 298. It was said, that the possession, and not the title, was the subject of the contract. (So that the covenantor was to secure possession to the covenantee, whether disturbed by right or wrong.)

Hob. 34, 35.

In the principal case it was observed, that a mortgagor out of possession having no possession to pass, covenants for the possession, and title. That covenantee would have the benefit of his title, unless covenantor were liable: as he would not have legal possession, nor remedy against disturbers, with or without title.

[461] Objected on the other side, what can mortgagees warrant but as far as their own title as mortgagees? They cannot maintain an ejectment: And the entry under the commission was lawful.

Lord *Mansfield*—Must it not be taken for granted, on this pleading that the disturbance is by wrong? They have pleaded it so; and you have demurred, and so admitted it instead of joining issue.

Demurrer in law admits all facts in controversy between the parties in the point of demurrer.

Question asked from the bench—Is that commission in force?

Undoubtedly—was the answer.

Mr. Justice *Ashhurst* observed, this plea was very odd, not averring they were then bankrupts, but saying, "claiming as assignees under *A.* and *B.* as being then bankrupts."

Lord *Mansfield*—I think it's very clear the covenant does not contain trespass.

Judgment therefore for defendant on the first count.

The

Note, This inconvenience renders demurrers much less frequent; especially as their end is often attained in divers ways, as by special verdict, case reserved, arrest of judgment, bill of exceptions, &c. after the facts found.

There was another count, for giving poſſeſſion; on which judgment for the plaintiff, poſſeſſion never having been conveyed,

Penalty on Bond.

DEBT is the ſubſtance; penalty is the form of recovering it. As ſoon as the court of Chancery had determined that the debt was only the money upon the bond, and this court had determined, ſince the ſtatute of uſury, that the penalty was not uſury, it is aſtoniſhing there ſhould be any difference. And an annuity is exactly in the ſame predicament; and the judgment ſtands as a ſecurity for the payment, yet by a great inconſiſtency, whereas notes carry intereſt on bankruptcy for forty years back; yet where there is a bond with penalty, they do not in the Exchequer; for [462] there they conſider the penalty. Per Lord *Mansfield*.

Information.

ON an information againſt printers of a news-paper, for publiſhing a libel, reflecting on a juſtice of peace. The author of the letter had complained at a ſeſſions, at which the plaintiff ſat a judge, "that he had not done him juſtice." The juſtice brought his action upon theſe words.

When this action was to be tried, a paragraph appeared in the paper, and ſtated this ſtory, and the words ſpoken; and a demand of general ſubmiſſion, and aſking pardon of all the world. And then theſe words were added, "It's left at the aſſizes, to be determined whether theſe words, on the circumſtances, were a reflection on his worſhip's honour, or no." This ſeemed to have been added by the printers. The circumſtance urged as the greateſt aggravation was, its coming out againſt the aſſizes.

On the part of the plaintiff—That he did not come prepared for his defence againſt inſinuations of cruelty and oppreſſion in his conduct, as not expecting that perſons ſtanding before the court, under ſuch circumſtances, would have named accuſers. However, that he did not proſecute out of vengeance, but with a public view, to deter men from ſuch perſons on magiſtrates, as would ſet them up as objects of public reſentment, and diſcourage them from doing their duty.

It was farther urged for the plaintiff—That he had the verdict of the jury on his ſide; that he was a gentleman of fortune

fortune and reputation; that he did not proceed upon the indictment on account of a defect of formality, whereas, had he been vindictive, he might eaſily have eaſily purſued it farther.

That the paper complained of ſets out with an attack which the plaintiff is accuſed of having made on that liberty and freedom of ſpeech which every man in this country has right to enjoy.

That this paper "ſtate of facts" ſays, that the defendant ſaid to the proſecutor, in as modeſt terms as any gentleman could do, that he thought he had not done him juſtice; and concludes with leaving it, whether, under theſe circumſtances, the defendant ſpeaking the truth, was a reflection on his worſhip's dignity, or no.

It is ſaid, it would be very hard to puniſh printers, who publiſh every thing they receive.

[463] [Lord *Mansfield*—You need not go on. I did not ſuffer that part of the affidavit to be read.]

That they did not know the authors. The counſel ſaid—I hope no man now exiſts in this kingdom who does not know this to be no excuſe. That they did not know the parties. I believe this is often the caſe: For if they did, the ſcandal thrown out on the higheſt, the moſt reſpected characters, would never have been caſt upon them, even by the moſt wicked of the tribe. And it is no excuſe that, be the character ever ſo innocent or honourable, they knew not but it might be ſo, and therefore aſperſed it by a ſcandalous publication.

The plaintiff ſubmits the mode and meaſure of the puniſhment to the juſtice of the court.

Lord *Mansfield*—There is a delicacy on the part of the proſecutor, in offering to accept any terms, if propoſed to him; but from the court it would have a different appearance. I do not know whether it would not be beſt that they ſhould pay the proſecutor the coſts of the ſuit. The court would not have granted the information on a common trifling libel. This a reflection a magiſtrate, acting right or wrong, and it ends with leaving it to be determined at the enſuing aſſizes, whether this be a libel on his worſhip, or no. On this laſt clauſe we muſt grant the information; as it tends to prejudice the deciſion then depending. But I think the plaintiff does not come quite properly; as he firſt appeals to the tribunal of a public news-paper—A very improper one for a magiſtrate to appeal to.

Bolton

Bolton *againſt* Smith.

In Arreſt of Judgment.

ACTION for toll—four counts.

1ſt, That he is lord of the manor of G. in the county of L. and that he and all his anceſtors have repaired; in conſideration whereof they have time out of mind taken toll of all veſſels unloading within the manor.

2d Count omits the conſideration.

The two other counts were not particularly obſerved upon, as it was admitted they could have no objection againſt them but what went againſt the two firſt. [464]

And the objection was, firſt, that the conſideration laid on the firſt count is inſufficient in law.

2d, That having been laid, it ought to have been proved.

Lord *Mansfield*—How does it come?

Anſwer—By a rule to ſhew cauſe.

Lord *Mansfield*—Why, then they ſhould ſhew cauſe.

3 *Lev.* 734. cited.

Lord *Mansfield*—What they quote from *Levinz* is not precedent; it is the identical caſe.

Another 2d *Lutwyche*, with the *dictum* of Lord Chief Juſtice *Treby*.

Lord *Mansfield*—Never mind that: The *dictum* will not do.

Another in Serjeant *Wilſon*'s Reports, 290. third of his preſent majeſty: That this caſe goes farther, and the conſideration is more extenſive.

That upon the firſt count, declaration is ſufficient to maintain the toll.

On the other ſide, Serjeant *Hill*—That the principles of Serjeant *Wilſon*'s caſe were ſtill for him: That was a toll traverſe, or for paſſing through. There a conſideration muſt be laid; here it needs not, but, as they have laid it, they put themſelves on the proof. I ſubmit, by laying it they make it part of the preſcription: And then I hope, upon the authority of the ſecond caſe, that I may ſay conſideration inſufficient.

I beg leave to ſay, that toll is not now enjoyed; nor ever was, within memory.

Lord *Mansfield*—You cannot to that in arreſt of judgment.

Lord

Lord *Treby*'s opinion quoted, that where consideration is not well alledged, still the plea may be good. The plea in
[465] that case was, *erga reparationem*; instead of alledging actual reparation. Now here actual reparation is alledged.

Serjeant *Hill* objected notwithstanding, that no body ought to be subject to the consideration but those who partake the benefit.

Lord *Mansfield*—Here it does; for you land either upon the wharf, or land within his manor.

The consideration is well alledged, of being bound to repair without actual reparation.

The third objection, that the second count was certainly bad, and that it was all one action: And in action upon the case for words, where one count was bad, though the first was good, the badness of the one vitiates the judgment entered upon it.

Lord *Mansfield*—It is admitted, that, after verdict, consideration will be presumed; either the same as laid, or a good one. The case in *Levinz* was about an hundred years ago: Put a marginal note, and it will serve an hundred years hence.

28 April. Serjeants called, *Grose* and *Adair*, esquires.

Roads.

UPON the act of parliament giving power to commissioners to continue private ways, it was questioned whether they were to repair themselves, or compel others to repair them.

Lord *Mansfield*—What, are they to continue them, and leave them to be impassable?

It is plain who were liable to repair before, shall be bound still. And those who were liable to repair in respect of tenure for the frontage of the side roads, shall continue so.

Berkenshaw *against* Gilbert.

Revocation. Question.

ACTION of trespass. Case stated. Defendant justifies, as by authority under a will by testator, duly executed in 1759.

[466] On special verdict, case for the opinion of the court, on the following circumstances: That testator in 1759 made his will; duly executed, and published at the same day an exact

exact duplicate; the ſubſtance of the will is ſtated. And upon the parol it appears, and is ſtated, that teſtator ſaid to a labouring man, one of the witneſſes, that the will was made to make his wife eaſy. That he ſaid to another, it was not a will to his liking; and he did it becauſe he thought his wife was near her death, and wanted to make her eaſy. The duplicate is found to have been in the cuſtody of his daughter.

That afterwards he ſends for Mr. *S.* his attorney, tears off the ſeals, and orders the witneſſes names to be cut out, which was accordingly done, and in his preſence. That he made a new will in 1761, the ſame day, and gave it to a friend to keep; "for he would not have his heir at law find "it." That he ſent for his ſecond will; and that he ſent, being in his ſenſes, to an attorney, to come and make him a new will; but was out of his ſenſes before he came: That the ſecond will was found cancelled after his death, and the firſt found cancelled after his deceaſe, both in one paper; and the duplicate of the firſt found uncancelled in one of his drawers, after his deceaſe.

Mr. *Morgan*—That the cancelling a duplicate was cancelling the original. 2d *W.* 346. *Onyons* and *Tyers*, and 2 *Vern.* the teſtator cancelled that will with great deliberation, which was in his poſſeſſion; in our caſe the uncancelled part, it is found by the verdict, was in poſſeſſion of the daughter, who claims againſt the heir at law.

This diſtinguiſhes our caſe, in the cleareſt manner, from the caſe cited; where the teſtator meant to cancel only on a miſtaken ſuppoſition, and the deviſes were effectual as to the real eſtate, being ſubſtantially the ſame as to perſonal.

There appears no intention to republiſh, ſuppoſing the court would ſet up an implied publication. The laſt act of ſenſe before his death was ſending for an attorney, to make another will.

3d *Bur.* 1496. A will made by a joint-tenant during the continuance of the joint-tenure, is not good after the ſeverance, though partition before his death, unleſs by expreſs republication.

Lord *Hardwicke* ſaid, that in a caſe where a will was declared void, unleſs the teſtator returned from Ireland, nothing could ſet it up, unleſs ſomething done by the teſtator, after his return, made to defeat the condition. After the ſtatute of frauds, therefore, by this having been once void and annulled, (not merely ſuſpended, for this ſeems the diſtinction)

diſtinction) nothing leſs than republication (which is, as it were, a making of it anew) could be ſufficient. For it could not be once void, and good by after act, other than of remaking, or republiſhing. Therefore a will made by
[467] a *feme ſole*, who afterwards marries, and ſurvives her huſband, is not good by event of his death, unleſs republiſhed becauſe there was a time in which it could not have been good, and the power once merged could never revive of itſelf, but muſt be created again by ſome expreſs act, purporting the intent of the party to uſe it as ſhe had done before her death; by an act after, between the time ſhe becomes capable to uſe it, and her death. The reaſon for the diſtinction of this caſe from a will only obſtructed by a latter will is, becauſe then neither are perfect till death and it is every moment in the teſtator's election and power during life, which ſhall ſtand and be his laſt will: But when he has once fixed his election, by ſaying, this ſhall not be his will, unleſs he does a certain thing, it cannot be ſo againſt his declared intent, till he ſhall have done that thing, or duly revoked that declaration made: And having once ceaſed to be his will at all, it cannot be his laſt will, unleſs he ſhall have taken ſome after notice of it, amounting legally to a declaration of its being ſuch.

3 *Vern.* 741. by Lord Chancellor *Cowper*.

Party claims, as under the heir at law.

Parſons and *Freeman*, 1 *Wilſon*. Determinations upon revocations of wills have always been favourable to the heir at law.

On the other ſide—That the jury have found a due legal will, according to the ſtatute: That the will, thus executed was found after the teſtator's death, in his room.

What has intention or implied revocation to do? The ſtatute requires a cancelling or obliterating by teſtator himſelf. Is it deſtroyed by a ſecond will? Nothing but a ſecond will cancelled againſt it.

Glazier and *Glazier* determines the doctrine of *Eccleſton* and *Speke*, *Onyons* and *Tyers*, and the caſe in *Lev.*

Caſe 10 *G.* 3. the queſtion, whether a ſubſequent cancelled will had the power of revoking a former ſubſiſting will, your Lordſhip determined, the former will, when cancelled, was no will at all: But cancelling the ſecond will the teſtator alſo deſtroyed the revoking part; then the former will ſtands unimpeached.

Where both parts of the duplicate were in the teſtator's poſſeſſion, there can be no reaſon to ſay, that a duplicate cancelled was an effectual cancelling of the original.

2 *Vin.*

2 *Ver. Preced.*

Chancery Proceedings, 64. The caſe there determined was only that the cancelling the part in his own poſſeſſion was no effectual cancelling of the will: And his cancelling was only on the ſuppoſition that he had made a ſecond will at the time.

In this caſe, ſays *Peere Williams*, it was ſaid by Juſtice *Powis*, and not denied by any, that if a man had two wills in his poſſeſſion, the cancelling one was no effectual cancelling of the other. [468]

Now in *Cumberbach*, *Lambrey*, the teſtator ſent for his will out of his eſcrutoire, and cancelled it; and it was held ſufficient cancelling of the other duplicate, which he had not by him.

In *Viner* I find the ſame caſe, with a material difference from *Peere Williams*.

The Equity Caſes abridged, 407. A man makes his will, and duplicate; he then makes a ſecond will, not duly atteſted; he then cancelled the duplicate. Determined, that this was no ſubſtantive independent act, by which he meant to ſet aſide the original will, ſo as to intend to die inteſtate: It was not intended that the ſecond will ſhould be barely a revocation of the firſt; but he intended it ſhould be a form accompanying his making of the ſecond will, which he meant ſhould be a diſpoſing one.

Lord *Mansfield*—There was a caſe, of *Maſon*, I think, before the court of Delegates, that where a man made a will, (and diſpoſing real and perſonal) and concluding, "In "witneſs whereof, &c." and the teſtator had ſigned, but not the witneſſes, this was a good will, as to his perſonalties; but they determined he did not mean it ſhould be a will at all, unleſs it could operate as a general diſpoſition of his property. Here is the ſtrongeſt evidence he never meant to die inteſtate; he made a will and duplicate.

The counſel continued—*Swinburne*, p. 502. cites ſeveral methods of revocation; the two firſt relate to the civil law; the third does not hold ſince the ſtatute of frauds; the fourth is of a contrary ſubſiſting will; the fifth of revocation, notwithſtanding derogatory clauſe; the ſixth, that a will with a greater number of witneſſes, may be revoked by a will with fewer; ſeventh relates to the civil law; eighth revocation good, notwithſtanding oath not to revoke.

Lord *Hardwicke*, 3d *Atk.* 375. This court, upon revocations, muſt go upon the ſame rules as a court of law. A court of equity does not favour revocations againſt the plain intention of the teſtator.

Neale

Neale and *Roberts*, 3d *Bur.* 391. Conſtructive revocations contrary to the intent ought not to be admitted, and caſes of that nature have brought a ſcandal on the law.

[469] Lord *Manſfield*—State the caſe of *Onyons* and *Tyers*. Did he not ſtop in the act of cancelling?

He had made a will in 1707; he made in 1711 a ſecond will, with a clauſe of revocation: He called for his wife, to cancel the former will, and a witneſs ſwears he heard her tear it,

Mr. Juſtice *Aſton*—That is another caſe. I ſuppoſe there was a former will ſubſiſtent.

Where teſtator had torn off ſeven ſeals of a will of eight, the eighth remaining; upon the attorney's deſiring him to ſtop, for the other would not be good, he ſtopped: The ſecond will was bad, the firſt uncancelled then took effect, the other being void.

Glazier and *Glazier* was tried before Lord Chief Baron *Parker*, who was of a different opinion. The ground was, he makes a firſt will; then he makes a ſecond, which he afterwards cancels; and then, undoing what he had done, ſets up the former will.

Mr. Juſtice *Aſton*—There's a caſe in *Perkins*, directly in point.

Mr. *Morgan*—This was not the caſe of *Glazier* and *Glazier*, the duplicate not then being in the poſſeſſion of teſtator, it does not ſignify that it was afterwards in his cuſtody: He cancelled all he could.

The firſt will was not cancelled. 2d Equity Caſes Abridged, 766. *Cummins*, 383. Lord *Cowper* ſaid ſince the ſtatute [of frauds] there can be no deviſe of lands by implied republication: For a paper in which a deviſe of lands is contained ought to be re-executed. Teſtator ſaid to ſeven perſons, "I ſend to you to be witneſſes of my will; (and ſome-"times of the republication of my will)" and holding the will in one hand, and codicil in the other, he ſaid, "This "is my laſt will; and I direct my codicil to be taken as a "part of my will." Witneſſes ſubſcribed the will and codicil, both lying on the table; and he declares in the codicil his intention not entirely to revoke the will before made. But Baron *Parker* thought an expreſs republication neceſſary.

Submitted, that the original will or duplicate being cancelled, is the ſame as if the name of teſtator and witneſſes had been cut off.

Nothing

Nothing could have republiſhed but three witneſſes of the republication, in the preſence of the teſtator.

There is no evidence of teſtator's knowing there was an uncancelled will in his poſſeſſion.

On the whole, the perſon has died inteſtate. [470]

Lord *Mansfield*—I don't believe we have any of us a doubt. There is no caſe in point, I think, to be got, and there needs none; the principles are very clear. *N. Newington* duly made and executed his will in 1759: It is not material to ſtate the circumſtances; I ſhall only ſay it is material to take notice it is not the ſame with that in 1761. And cancelling is an equivocal act, which, therefore, demands evidence, and admits evidence of this kind to explain it, *quo animo*. Witneſs, that it was made to make his wife eaſy. He told a man that it was not a will to his liking, and he made it to make his wife eaſy, as he thought her near her death; "but if he lived he would alter it." The wife died—He ſent in 1761 for his old will, to alter it; he made another will the ſame day; and then tore off his name from the old will, and the ſeal, and deſired Mr. *Samſon*, his attorney to tear off the names of the witneſſes, not contented with an expreſs clauſe of revocation. He ſaid, he deſtroyed the old will becauſe he wanted to give a greater ſhare to his granddaughter, *M. Ingliſs*; otherwiſe his daughter, Mrs. *Weſton*, would have more than her ſhare. That he gave the new will to *Samſon*; and deſired he would keep it as private as poſſible: (From a jealouſy of his daughter.) And he ſaid that Mrs. *Weſton* had got the other part of his will in 1759.

Let us pauſe a moment, and put the queſtion, whether the will of 1759 revoked? Now ſince the ſtatute of frauds, a will cannot be revoked, (except by operation of law) unleſs by an inſtrument with the forms required by the ſtatute; or by tearing, cancelling, and deſtroying. We obſerve, this tearing, cancelling, and deſtroying, is an equivocal act, and it is neceſſary to ſee *quo animo*, to make a revocation.

Suppoſing a man, meaning to throw ſand on his will, throws ink; this is perfect obliterating, but not with an intention of cancelling.

If a man orders a friend to cancel his firſt will, inſtead whereof he cancels the ſecond, this is no cancelling the ſecond. In the caſe of *Onyons* and *Tyers*, it was a doubt, as to fact, whether he did cancel ſecond. That could never mean to revoke the firſt; for all the material deviſes of lands were the ſame, and to the ſame perſon: He thought he

he had made a good and effectual will, according to the ſtatute of frauds.

Lord *Cowper* ſaid, if even the law held it revoked, yet, on the head of accident, a court of equity would relieve. This would be very difficult to maintain; but it ſhews the reaſons on which they went; namely, of the intention:
[471] For though the intention will not ſupply requiſites of poſitive law, ſuch as atteſtation of three witneſſes, *&c.* yet, as to all the reſt, the intention is to be ſhewn to prove revocation.

In order to ſhew intention to revoke (revocation being in itſelf an equivocal act) parol evidence muſt be let in.

He makes a will in 1759—at the deſire, and to pleaſe his wife—He gives a greater ſhare to *A. W.* than he thought ſhe ought to take. This will is left in the hands of Mrs. *Weſton*. He makes a duplicate, which he keeps. He makes in 1761 a legal good will, with a poſitive clauſe of revocation. Not content with revoking the will of 1759, (not only by making another, but by poſitive words) he alſo deliberately cancels the firſt. And it appears by his own declaration, that the counterpart of the will was in Mrs. *Weſton*'s poſſeſſion, and that he could not take it out of her hands, becauſe he meant it to be kept ſecret, and expreſſes a fear, leſt Mrs. *W.* or *A. N.* ſhould come at it. And he clearly never meant the will of 1759 to be made uſe of; and he gives at the ſame time the will of 1761, to be kept ſafe. Let us ſtop here, and ſee whether the will of 1759 was now revoked. Certainly; and it could never be ſet up, but by a new inſtrument of republication. A deviſee (the granddaughter, *Mary Ingleſs*) died; and therefore he wants to cancel the will of 1761: He ſends to make another, and for his old one of 1759, which he is very particular in deſiring may be wrapt up in a piece of clean paper [ſealed]. It muſt be between *Auguſt* 1761, and *December* 1762, the time of his death; it does not appear preciſely when. The will of 1761 is ſent him; the attorney comes in about an hour, upon the ſame day in which the will was ſent for, but too late to receive directions for another will, the teſtator at that time being inſenſible.

If the queſtion was made, whether the cancelling of the will of 1761 were a conditional revocation, it would be a very different queſtion. It is remarkable too, mind this, that he wraps the two cancelled wills in the ſame piece of paper. On his death, the counterpart of the cancelled will of 1759 is found in his drawer, among his deeds, uncan-

celled

telled. It muſt have come from *A. W.* but when, on what meſſage? It may be it was ſent for the day before his death, when he had not time to cancel. It is a very ſtrong and plain caſe, without looking into the time when the other part of the will came into his poſſeſſion; or whether at any time before his death.

POSTEA for the PLAINTIFF.

Harman *et al.* Aſſignees of Fordyce, *againſt* Fiſhar. [472]

Action of Trover upon Notes.

CASE. Defendant, *Fiſhar*, creditor of *Fordyce* and Company, gave credit farther for 7000l. which he borrowed for the ſupport of the ſhop, and which was to be replaced in ſix days, being lent during the holidays.

Before the time fixed, and without demand, Mr. *Fordyce* ſits up all night, delivers the letter to be ſent to Mr. *Fiſhar*, "To Mr. *Fiſhar*," to this effect:

"Mr. *Fordyce*, conceiving that the ſum lodged in his "hands might be liable to diſpute, has the honour of giv- "ing Mr. *Fiſhar* that preference which he thinks he un- "doubtedly deſerves, two notes incloſed, 5,500l. 1,500l."

He gives the letter to his clerk, to deliver to Mr. *Fiſhar*, and about an hour after goes off; after which commiſſion iſſues the ſame day, and Mr. *Fiſhar* receives the notes three days after, and refuſes to return them, legally demanded.

Upon this it was argued for the plaintiff—That here, therefore, on the eve of a bankruptcy, he expreſsly declares a preference intended.

The notes are in Mr. *Fiſhar*'s hands: And whether, on the circumſtances of the caſe, the plaintiff is entitled to recover, is the queſtion. Queſtion.

Whether it was a compliment to Mr. *Fordyce*'s juſtice, on the eve of his bankruptcy, to give that preference, in contemplation of a bankruptcy, is not the point. This queſtion has come before the court in a variety of inſtances, and I know none ſo ſtrong, upon the circumſtances, as the preſent, to determine ſuch act void. Whether this is an act of bankruptcy, might be another queſtion: But that it is ſuch a preference as the laws will not allow, by the principles laid down by your Lordſhip, I beg leave to inſiſt. Argument. Firſt, that ſuch preference, in contemplation of bankruptcy, is void.

Slader and De Matto's.

4 *Bur.* 467. The case was, *James Davis*, an agent of *Dematto's*, knowing *Slader* to be indebted, and that he could not carry on his trade, unless somebody in *London*, a banker, would pay his draughts, negotiated, in J
[473] 1756, an agreement between the said *De Matto's* and *Slad* that *De Matto's* should pay *Slader's* draughts, on havin security.

The nature of the security, and terms of the agree ment, appeared only by a deed of 23 *October* 1773, prep ed and procured to be executed by the agents of *De Ma to's*.

The deed recites *Slader's* title to the mill and premisses his being concerned in merchandize, and frequent occasio to draw, and remit to *London*; and his request that *Matto's* would be his banker there. And, in order to i demnify him for so doing, *Slader* assigns over to *De Mat* all his estate, and interest in the premisses aforesaid; a also all his stock in the trade of brewing and making m and in the business of a corn-factor and miller. Then fo lows general assignment of debts, horses, *&c.* and all oth goods and commodities belonging to the said several trade with defeazance, however, on *Slader's* paying to *De Matt* all the money he should advance on any note, draught, b or writing, of the said *Slader*, and his indemnifying *Matto's* against the same, and all matters any way touchi his agency.

Covenant on breach of failure of the conditions, that *Matto's* may enter upon the premisses, and take the stoc absolutely to his own use.

8th *October Slader* drew on *De Matto's* for 200l. 23 Another bill, both by authority of *De Matto's*. *Matto's* knew *Slader's* affairs to be in a bad situation. *Dav De Matto's* agent, represented *Slader* as a good man to h creditors, and concealed from them colourably the gener assignment.

On the 11th of *November*, *Slader* told *Davis*, and an ther agent of *De Matto's*, that he could not stand, a consulted them what to do. The result of the consultat was, *Sills*, by order of *Slader*, the same day, gave pos sion to *De Matto's*, in the person of *Davis*, his agent, w immediately set out for *London*. Next day, the 12th, *S der* ordered *Sills* to deny him; which *Sills* did on the 13 and told the reason, that it was to commit an act of ban ruptcy.

Slad

Slader had nothing of value but what was comprized in the deed.

After the 13th of *November De Matto's* paid the two bills.

Firſt queſtion, whether *Slader* became a bankrupt?

The ſecond and great queſtion, in that cauſe, was, on what day *Slader* became a bankrupt?

The ground urged againſt him was, that the deed was [474]
fraudulent and colourable, and no poſſeſſion altered. And that, if there had been a debt due, it was an undue preference within the act.

For the defendant—That bankruptcy was a crime, and this not a crime, nor any bad uſe made of the deed. Your Lordſhip delivered the judgment of the court, of which I ſhall cite ſome parts, as particularly applicable to this caſe.

All the acts concerning bankrupts are to be taken together, as making one ſyſtem of law.* They are all to be conſtrued favourably for creditors, and to ſuppreſs fraud.

The law is to judge of fraud upon facts and intents.

The indemnity is a good and valuable conſideration; and the deed valid, as between the parties.

But valid tranſactions between the parties may be fraudulent, by reaſon of covin, colluſion, or confederacy, to injure a third perſon; ſo purchaſe, with notice to the prejudice of the firſt purchaſor, who bought and did not complete his title; ſo marriage, brocage, bonds; ſo *Twyne's* caſe, 3 *Co.* even on a criminal proſecution, and the conſideration undoubtedly ſufficient and true.

Acts valid between the parties may be fraudulent and void againſt a third perſon.

Whether the deed then in queſtion would be fraudulent in that ſort, your Lordſhip ſaid would depend on the purpoſe of it.

It was a falſe ſhew, by colluſion to prejudice a third perſon.

The great objects of the bankrupt laws are, the management of his eſtate, and an equal diſtribution amongſt the creditors: Both would be defeated by ſuch a preference.

An equal diſtribution has been anxiouſly provided for ever ſince the 21 *Ja.* 1. *c.* 19.

It was thought miſchievous to ſuffer priority to be gained by ſecret liens.

* Leges in pari materia conjunctim interpretandæ.
Ea conſtructio veriſſima quæ malum ſupprimat et remedium operetur.

A caſe only of a conveyance, calculated to poſtpone one creditor to the reſt, was held by Lord *Hardwicke* an act of bankruptcy.

[475] A colourable exception of parts does not cover the fraud of the aſſignment.

A conveyance of a part may be public, fair, and honeſt; but a conveyance of all muſt either be fraudulent and kept ſecret, or produce an immediate act of bankruptcy.

It has been argued, that after a reſolution taken by a trader to commit an act of bankruptcy, the trader ſo reſolving may lawfully prefer a juſt creditor, by conveying part of his effects.

It is not neceſſary to determine that queſtion in this cauſe; for here the conveyance is of all: And therefore I will only ſay, that no ſuch propoſition is yet eſtabliſhed; much leſs in the extent whereto it has been urged.

In the caſe of *Cock* and *Goodfellow*, an immediate proſpect of a certain bankruptcy was not the motive.

No deed can be fraudulent in Chancery which is not fraudulent in law. And if fraudulent, it is an act of bankruptcy, and this was the true deciſion of *Leigh*'s caſe.

The diſtance between the deed (which was immediately put in execution) and the act of bankruptcy was, in that caſe, from eighth of *June* to eleventh of *February* following.

2 P. W. 427. T. M. anno 1727. *Small* and *Oudley* was a tranſaction beneficial to the creditors.

Linton and *Bartlet*. I have a copy of this caſe, by the late Mr. Serjeant *Lee*, who was counſel in the cauſe. One brother indebted to another 150l: he had an upper and a lower ſhop. In contemplation of bankruptcy, he aſſigns the goods in the one ſhop, of much leſs value than the extent of the debt, and abſconds the next day. Whether this was a void contract, and an act of bankruptcy?

Lord Chief Juſtice *Wilmot* ſaid, it was a ſubverſion of the principle of all the bankrupt laws, which was equality. And he ſaid, that though the judges, in *Worſley* and *De Matto's*, ſaid the conveyance was of all, yet he knew, in his opinion, and that of the reſt of the judges, that it would have made no difference in the caſe.

Oſtenſible poſſeſſion and a ſecret lien would make an aſſignment void, though otherwiſe it might have been good.

A falſe credit upon a ſecret truſt; if the aſſignment were otherwiſe good, would make it bad.

The

The donor's continuing in poſſeſſion, ſecond argument in *Twynne*'s caſe. [476]

A trader is truſted upon his character, and viſible commerce. That credit enables him to acquire wealth. If, by ſecret liens, a few might ſwallow up all, it would greatly damp that credit.

Every equivocal act may be explained by circumſtances: And the uſe to which it is applied ſhews, *quo animo*, it was done.

On the whole, that the conveyance, though by way of ſecurity, and for a valuable conſideration, is fraudulent, and an act of bankruptcy.

This is the ſubſtance, nearly, of what is reported of your Lordſhip's opinion. It is true it is ſaid the determination there is upon the aſſignment of all; but, on a general view, let me endeavour to ſhew how it applies.

The argument that all the ſtatutes of bankruptcy, as in *pari materia*, are to be taken together, is a general principle of law and reaſon, and applies as much to the caſe now as then before the court. The reſult from all, taken together, is there very truly laid down to be a conſtruction favourable for creditors, and in ſuppreſſion of fraud: It will not be favourable to the creditors that Mr. *Fiſhar* ſhould receive, and Mr. *Fordyce* be permitted to give 7000l. from the reſt of the creditors; eſpecially, which is the ſecond point, when this is done in immediate certain contemplation of a bankruptcy, and when the very loan of this 7000l. had, in its nature and manifeſt conſequences, a tendency to induce the other creditors to be at eaſe under a falſe ſecurity.

Judging of fraud, (I mean legal fraud, which, eſpecially in bankrupt caſes, means an act unwarranted by law, to the prejudice of a third perſon, and not that crafty villainy, or groſſneſs of deceit, to which it is applied in common language) judging of it by facts and circumſtances, there is here an act deluſory, at leaſt, in its natural effect on the creditors, prejudicial to them in an high degree, juſt and fair, indeed, as between the parties, if they only had been concerned, but not warranted by law; not that open, regular, public act, not that equal diſtribution which the law requires in favour of creditors, the ſecurity of commerce, public policy, juſtice, and ſafety. The legal notion of fraud.

The goods (theſe two notes) were never out of Mr. *Fordyce*'s hands till after he became a bankrupt; for the poſſeſſion of his clerk was his own poſſeſſion, and revocable [477]

every moment: And by the act of bankruptcy, immediately following, in fact revoked.

That a ſecret conveyance, tho' of part, is an act of bankruptcy.

It is a ſecret tranſaction: And the reaſon given by your Lordſhip, in the caſe of *De Matto's*, why a conveyance of part may be not an act of bankruptcy is, becauſe it may be public, fair, and honeſt. This is not public; and to permit it to take effect would be injurious to the creditors, to the ſpirit of the bankrupt laws, and to public credit and commerce.

That if fraudulent in equity it will in law, and therefore void againſt creditors.

Such an act would have been fraudulent in Chancery; becauſe ſecret, unwarranted, and againſt the law, and hurtful to honeſt creditors: It will therefore be fraudulent in law; and being fraudulent, will be void, as againſt the creditors, with reſpect of whom it is fraudulent.

The act of bankruptcy immediate after ſending the notes.

The diſtance here between the act of bankruptcy and the ſending the notes (if the ſending itſelf was not an act of bankruptcy) is the diſtance between one moment and the next.

That it does not appear on what conſideration they come to Mr. Fiſhar, and before his acceptance determines the law takes them.

It was thought miſchievous, ever ſince the 21 of *Ja.* to ſuffer priorities to be gained by ſecret liens. This might now be the conſequence: And it is not expreſſed what theſe notes come in payment for; and Mr. *Fiſhar* was not bound to accept them in payment for his 7000l. and before he could accept them (before they came into his hands, or he had knowledge about them) the law took them, and they are in the hands of the law.

But, as it may be ſaid, that the caſe of *De Matto's* is not in point, notwithſtanding the parity of reaſoning, becauſe that was an aſſignment of all, I will proceed to a caſe which was an aſſignment prompted by natural affection, the faireſt conſideration, and as juſt and favourable grounds as can well be ſuppoſed, in this or any caſe, and which yet was void, as againſt creditors, though an aſſignment of part only.

The caſe of *Linton* and *Burtlet*. I will ſhew what this caſe was, and how dangerous it is to rely upon caſes, without attending to circumſtances.

Caſe reſerved laſt ſummer aſſizes; *J. Linton*, trader in *Eſſex*.

The bankrupt, *J. Linton*, carried on the trade on his own account: The money lent to carry on the trade; no intereſt paid upon it. He aſſigns the goods in one of his two ſhops to his brother, who had lent the money, and immediately abſconded.

The

The opinion delivered was to this effect:

" This is a very plain caſe. It is a hard caſe; as all theſe [478]
" caſes are upon particular creditors. Equality is the grand
" object of the bankrupt laws; and partiality to be avoided.
" No man ſhall be permitted to put a fraud upon the court.
" If he may give a preference to one he may to more. This
" was an aſſignment of part of the effects. It has never
" been decided how much might be aſſigned without act of
" bankruptcy. The ſhutting up of one ſhop was giving as
" clear intimation of inſolvency as if he had ſhut up both.
" The aſſignment was the ground of the judgment.

[Mr. Juſtice *Willes*—Was this determined an act of bankruptcy, or void conveyance.

To this it was anſwered, upon both. But Lord *Mansfield* obſerved, it could not affect the queſtion here; as it was impoſſible, to conſider this as an act of bankruptcy. There was no doubt.]

The ſending theſe notes not an act of bankruptc

It may be aſked, at what point, then, ſhall a trader be permitted to make this preference? It is a queſtion not eaſily admitting of a preciſe definitive anſwer. But, I think, one general principle or two may govern it, if rightly applied to particular caſes. If we ſay from the act of bankruptcy, the caſes do not agree with this, the end and ſpirit of the bankrupt laws does not agree with this; and there may be a preference void, as againſt other creditors, where there is no bankruptcy. The caſes, reaſon and policy, and general juſtice, will bear us out in ſaying, that from the time a man is become inſolvent, ſo that he cannot prevent the bankruptcy attaching on him inſtantly, (though ſome happy accident, or providential intervention may) from that time he cannot give this preference, though for a valuable conſideration, and though not yet a bankrupt. Nor, ſecondly, can he give it in contemplation of, and in actual intent to commit, an act of bankruptcy.

That a man actually inſolvent, or ad in contemplation of an act of bankruptcy cannot give preference.

Either of theſe, but particularly the firſt, apply to the caſe in *Temple* and *Alderton*. Though it cannot be an act of bankruptcy, unleſs there be a conveyance by deed, in the ſenſe of the ſtatute, as to this clauſe, yet the court could never ſet up the validity of ſuch a tranſaction.

That tho' not a conveyance by deed, ſo as to be an act of bankruptcy, it may be void as againſt creditors.

I don't ſee the difference between Mr. *Fiſhar* and any other creditor. He would not have truſted ſuch a ſum had he ſuppoſed the houſe in danger, and he truſted like another creditor. And when Mr. *Fordyce* had ſet up all night, declared his preference in his letter, abſconded the next morning, ſurely, this conduct ſufficiently explains how the act is

to

to be underſtood, and what ſhould be the conſequence He is gone before the letter is delivered, and before the uſual office hour. If it ſhould be admitted that ſuch a preference might be given, the moſt opulent creditor, from whom ſer-
[479] vices had been received, and future ſupplies and ſupport of credit was expected, would always be paid off, and the poorer left to come in for their ſhare under the bankruptcy.

I have no doubt your Lordſhip will be much urged by Mr. *Dunning* on the caſe of *Small* and *Oudley*. Your Lordſhip has obſerved, that Sir *Joſeph Jekyll*, in his decree, gave very ſtrong reaſons againſt the decree, and declared himſelf bound by the opinion of Lord Chief Juſtice King, who had decided, that the aſſignment, being not void in equity, would not operate as an act of bankruptcy: The reſt of the court differed very greatly.

That contract void, and therefore aſſignees ſhall recover.

I hope your Lordſhip will think this ſo like the caſe of *Temple* and *Alderton*, that it muſt be determined upon the ſame principles, and the contract cannot be maintained; and therefore the aſſignees ſhall recover.

For the defendant.

Mr. *Dunning*——The firſt queſtion will be, whether a preference in contemplation of bankruptcy, be allowable in any circumſtances?

2dly, Whether if any, this be not the caſe?

I heard not without aſtoniſhment, that my learned friend could find no diſtinction between this and the caſe of a common creditor.

So far from putting the money in order to be ſafe, Mr. *Fiſhar* took it out of his houſe, where there was no danger, into the houſe of another, where, from the very purpoſe of placing it, he underſtood there was danger. I hope he was not ſo far miſtaken in the degree of danger.

Your Lordſhip will ſee what the degree of danger was, and when he expected a reimburſement. In the holidays if bank is ſhut, the bankers ſhops are open, and no relief in the ordinary way. It was foreſeen when the bank would be open, about the middle of the week, and then he meant to call it out. It was meant a loan for temporary purpoſes, to be releaſed on the *Tueſday* following: They agreed to the time of the loan.

That a man in contemplation of an act of bankruptcy may do ſomething, tho' not every thing.

As to the aſſignment of part, that it may be allowed in general. In the caſe of *Worſley* and *De Matto's*, your Lordſhips are reported to have ſaid, that no ſuch propoſition has

cre

ever yet been eſtabliſhed, at leaſt in that extent. That is to ſay, that he may do every thing that he could have done before. I hope the contrary has never yet been eſtabliſhed, that in no circumſtances, a man in contemplation of bankruptcy can do any thing at all.

The point on which Sir *Joſeph Jekyll* conſidered himſelf [480] bound by the authority of Lord Chief Juſtice *King* was, that there cannot be, by the law, an equitable bankruptcy where there was not a legal bankruptcy.

[Lord *Mansfield*—That an aſſignment by a trader cannot be void in equity was the propoſition; if it was bad in equity it was an act of bankruptcy.]

Small and *Oudley*. Transfer of 500l. *South-Sea* annuities they ſold out of the ſtocks. In contemplation of their bankruptcy, they, having ſhut up their ſhop, make an aſſignment of their ſtock, and alſo of ſome ſhare in the wool trade, and ſome leaſehold intereſts, to *Small*, without his privity.

It is ſaid there, "It may be a juſt reaſon for a ſinking "trader to give a preference to one creditor before another; "to one who has been a friend to him in his extremities, "rather than others who, very probably, have been gain- "ers by their trade with him. The ignorance of *Small* is "a circumſtance in his favour; as an undue influence could "not be uſed, or importunity on his part, in order to ob- "tain his debt, which is common in many caſes; eſpecially "as otherwiſe the whole debt muſt be loſt."

I think nothing can more expreſsly apply than this caſe.

"The time of the aſſignment is not material, ſo long as "it be before the bankruptcy; but the juſtice of the caſe "is very material. The ignorance of *Small* is a circum- "ſtance in his favour; becauſe it ſhews he did not obtain the "preference by any importunity." Therefore he is ſo far from making his ignorance of the aſſignment againſt him, that he makes it an argument for him.

Can I ſtate a caſe more exactly in point? The honeſty of the caſe is very material; the time is immaterial, and the want of privity to the aſſignment is in his favour.

I know not an authority to which all the practiſers in the profeſſion are more inclined to aſcribe great weight and great judgment. And as his honeſty was known as remarkable as his learning, he has gone out of the caſe to ſay, that creditors under ſuch circumſtances not only may but ought to be preferred.

Is

Is this shaken in *Worsley* and *De Matto's?* If the point which is grounded upon the opinion of Lord *King* is shaken by the court, no more is shaken: And I don't conceive it affects our part of the question.

It would rather strengthen our case. That case, says your Lordship, was very material. The fraud was against *Small*,
[481] not the creditors: The money was become due by the agreement; so it was here, and payable within six days. All would have gone to the creditors; so here, and they are in no worse situation than they would have been if the money had been never lent. The whole was for the benefit of the creditors; it seems sufficient for us, and all they are entitled to expect, that it's not to their prejudice. It was to save a man from breaking—the clear object of our case. Your Lordship then was so far from considering the case of *Small* and *Oudley* as not law, that, I think, the judgment has given us reason to infer that, in circumstances corresponding, *Small* and *Oudley* will be good authority: And, instead of thinking that it would be now decided otherwise, I readily declare, I can support this case on no other principles than would prove the propriety of that: And, as understanding that to stand as undefeated, I make use of it upon this.

And this is the case which has been understood already decided in favour of the general creditors; and that your Lordship had already given a solemn decision against us.

In the case of *Linton* and *Bartlet*, the shutting up shop was an act of bankruptcy in itself.

Let us see whether the other two cases answer better; which, if the other fails, will be referred to, though not now particularly stated.

It will appear they are substantially distinguished.

There are, therefore, cases where a debtor, in contemplation of bankruptcy, may give a fair preference. And the cases in which he is not allowed to give a preference differ from this, and this will bring us to the second point, whether this is to be a case of allowing such privilege, if any may.

That insolvency or contemplation of bankruptcy are no definite periods to determine when this right of preference must cease.

Before this, I will obviate the inconvenience which is supposed by Mr. *Lee*, and which he supposes will be removed by fixing at the point of insolvency. He saw the necessity of some boundary or other, and did not fear setting it. Every case would be to be determined on its own circum-

stances

ſtances—that is, left to its confuſion, and the chance what right might be ſtruck out of ſuch darkneſs.

As to the inſolvency ——

Many are in that ſtate when they ſet out. Equality is the grand object. Wherever the court draws the line all the ſubſequent creditors are excluded. And in our caſe, thoſe who are contending againſt Mr. *Fiſher* would be moſt part in the ſituation into which they wiſh to put him.

I don't mean to miſrepreſent any part of the idea: For beſides the idea of inſolvency, upon which I preſume he built the miſchief, he ſtated, to correct the miſchief, the reſolution to commit an act of bankruptcy. [482]

But will this be more clear? Will it be poſſible to aſcertain when the reſolution is ſettled?

If other people had manifeſted the reſolution in other caſes, will this be more clear? The ſame day, on a turn of fortune, Mr. *Fordyce* would have altered his intentions, and gone on, with a fair credit. Is it then the contemplation? For this phraſe has been always uſed on this occaſion: It is then the fear, the dread, the expectation. The degree of this expectation, as whether certain, probable, or poſſible. I fear a full information would have convinced the event was certain, though not the time. A leſs degree of information would have made him think it probable; a ſtill leſs not probable, but merely poſſible.

I, who have a degree of timidity from my temper, ſhould never have looked from this horrible object for days and years before it met me in the face, and encountered me. Mr. *Fordyce*, at the time of the loan, was even more ſanguine than Mr. *Fiſher*, in the expectation that the aſſiſtance of Mr. *Fiſher* would be effectual. And thus the ſenſe or nonſenſe of a man's ideas, the coolneſs or the heat of his imagination, will be to decide this queſtion.

That the fairneſs and honeſty of the preference is the only proper criterion.

But what governed *Small* and *Oudley* will govern every caſe to which the principle will apply: And it is very neceſſary this ſhould be ſuch a certainty which is attained by fairneſs, or honeſty in the tranſaction. The rule is known and underſtood alike univerſally. Men's feelings run before their underſtandings, in diſtinguiſhing between a raſcal and an honeſt man. And, notwithſtanding the puzzle of the ſchools, when the rules are once fairly underſtood, and the facts agreed on, no man ever doubted the complexion of an action in that view.

Hague and others, aſſignees of *Scot*. Aſſignment of goods. Letter ſent, ſignifying the purpoſe. They were not

not of the coach warehouſe when the bankruptcy was committed.

That part of the ground of Hague *et al.* aſſignees of Scot, was ſuppreſſion.

Upon ſtating the caſe, it's clear the defendant knew nothing of the tranſaction: It does not appear whether he had them in truſt upon contract, or to what uſe.

The defendant burnt the letter. Queſtion, whether defendant has a right to thoſe goods, or whether overhauled by the bankruptcy? Now, though it has been decided, acceptance ſhall be preſumed, where for a man's benefit, till he diſſent, yet here, when thoſe goods were left with *Street*, what authority had *Rolliſton* over them? No one can ſay: And it is left abſolutely in the breaſt of the party.

[483]

When the defendant came to *Dover*, then he took the reſolution of making it a bargain and ſale; and as ſuch it is void and fraudulent. This was a tranſaction kept ſecret, and not determined whether he was to take them as agent, they being booked in his name in the public warehouſe. Whether and how far, in ſatisfaction; whether as a purchaſor; whether as a ſecret lien, in truſt, to be returned afterwards in fraud of the creditors. All this left undetermined till after the act of bankruptcy had put the goods entirely out of his power.

That the caſe of Le Roche went on ſuppreſſion.

Le Roche—There never was any courſe of dealing between the parties. Judgment of the court there was thus: "Letter incloſed in the note is ſuppreſſed. It does not appear "but the letter might contain an act of bankruptcy."

That the only queſtion there was, whether fraud, or not, and acceptance or not acceptance to be determined accordingly.

Your Lordſhip ſays there, "The only queſtion is, whether an indorſing and ſending this note is fraudulent."

"I chooſe to put it on this ground; for it is of importance in all judicial proceedings, particularly in matters "of commerce and ſuch public concern, that they ſhould "be determined on ſolid grounds of equity, and not on ſubtleties of law. And therefore I ſhall not enter upon the "ground of a contract not complete till aſſent. The principle is this; it is complete when any principles of juſtice "or equity require that it ſhould; otherwiſe not. In the "caſe in *Strange*, though the reaſons are founded upon "great ſubtlety, yet the hardſhip of the caſe undoubtedly "decided with the court."

That the equity of this caſe and the law determines to imply aſſent.

The law and equity of the caſe determines the aſſent, in this caſe, ſhould be implied.

"Mr.

" Mr. Juſtice *Yates*—There is no doubt the preference " might be given on the eve of a bankruptcy, upon fair and " honeſt circumſtances."

That Mr. Juſtice Yates allows a preference on the eve of a bankruptcy, on fair and honeſt circumſtances.

Now compare the caſes. There was in our caſe a friendly intercourſe of lending and ſupplying money; there was no previous intercourſe in general dealings. Here the letter produced; there it was not found. There it is not in ſatisfaction of any debt whatever; here is in ſatisfaction of the 700l. lent.

The letter makes the caſe plain. The notes were to diſcharge the debt, which he could not otherwiſe diſcharge, in order to give the juſt preference which he expreſſes himſelf bound to give. There it did not appear but the letter might expreſs an act of bankruptcy was committed; it appears here in the negative. There the notes were the outſtanding debt to *Everard* and *Briar*, and made uſe of againſt the principles of honeſty and morality. Your Lordſhip expreſsly exploded the ſubtleties of law upon that caſe, and reſted upon the honeſty of the caſe.

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I will now ſtate the caſe alluded to in *Strange*.

Plaintiff, as aſſignee of *Cripps* and *Quarme*, brings trover for ſeveral parcels of ſilks. Defendants dealt with the bankrupts before the bankruptcy, and *April* 7, 1715, ſent the goods, and gave credit in their books. 18 *May Cripps* and *Quarme*, without knowledge of defendants, ſent divers ſilks, the ſame ſent in *April*, for the uſe of the defendants. *June* 4 they became bankrupts; *June* 6 they wrote a letter to the defendants, that, not thinking it reaſonable the laſt parcel of their goods ſhould go to their other creditors, they had not entered them in their books, but left them to the uſe of defendants. *June* 9 commiſſion iſſued; *June* 13 defendants received the letter, and as ſoon as poſſible ſignified their conſent. Lord Chief Juſtice *Pratt* ſays, The aſſent was ſubſequent to the act of bankruptcy: They aſſented as ſoon as they had knowledge; and whether a ſubſequent diſſent was neceſſary, (the property veſting in the mean time) was the queſtion? If by the delivery the property was veſted, I think, upon the circumſtances, *Butler* and *Baker*, 3 Rep. the contract does not ſtand open till agreement, but is complete till there be an actual diſagreement.

Atkins v. Berwick, 1 Str. 165.

The diſtinction is, whether the delivery is with or without conſideration, the preceding debt is ſufficient conſideration: For it being for his benefit, diſagreement ſhall not be preſumed.

A delivery

A delivery precedent to an act of bankruptcy (though to a third perſon, and without knowledge of the party) is, where conſideration exiſts, ſufficient to complete the contract: And diſagreement ſhall not be preſumed. And to that purpoſe the caſe from 3d Reports was applied.

And it's an authority: The perſon to whom delivered was inſtantly a truſtee; and re-delivery would not have been juſtified by an inſtant countermand of the party delivering. And Mr. *Harriſon*, in the caſe of Mr. *Fordyce*, is as the other in the caſe of *Strange*, under control in certain reſpects, to be determined on the juſtice and honeſty of the caſe, and not farther; ſo that if *Fordyce* was wrong in the delivery, he had been juſtified in the re-demanding, and *Harriſon* liable, if he had delivered; and Mr. *Fordyce* might have recovered.

[485] The idea of converting a poſt-boy into a truſtee would have been ridiculous; ſince he knows no more of the contents than a propoſition in algebra. No truſt would be conveyed, without knowledge of the contents: But *Harriſon* knew the nature of his embaſſy, and would have ſinned againſt knowledge had he delivered to any but *Fiſher*.

The four caſes concerned are perfectly right, and upon compariſon their agreement is evident.

I don't find my learned friend meant to contend an act of bankruptcy was committed. I underſtand the court delivered the caſe from that difficulty, which will take the fifth caſe out of the queſtion.

If the caſe has not juſtice, honeſty and morality at the bottom I give it up. I did not think it could have been doubted.

I conceive it will at leaſt entitle it to the wiſhes and inclination of the court; and I hope on principles and authority to their deciſion.

But another diſtinction is taken, Mr. *Fordyce* is taken as under a double capacity as debtor to the houſe, and debtor to the partnerſhip. If Mr. *Fordyce* can leſſen the debt to the houſe by enabling the houſe to go on, either by making uſe of his friends aſſiſtance in the manner he did or negotiating the bills.—If this had been done the ſecurity could not be taken from him. The fund to have been divided among the general creditors would not have been theſe bills; they would have been no part of them. And if Mr. *Fordyce* had ſucceeded, he would have been obliged to pay to the partnerſhip; the general moral obligation then will not vary by the difference of time or form.

Upon

Upon this general conſideration I flatter myſelf, the circumſtances will not be thought material to take this out of the general principles.

If the court think with Sir *Joſeph Jekyll*, that there are caſes in which a man not only may, but ought to give a preference to creditors, your Lordſhip I truſt will think here that it was his duty: And as to aſſent that it will be preſumed when the juſtice of the caſe requires it. And I hope the part we have taken in a caſe which ſeems ſo meritorious, and full of ſo much compaſſion will not be ſo ineffectual, as to fall by the force of general propoſitions which I think have never yet been decided; namely, that in no caſe whatever a creditor may have a preference given him by a debtor in contemplation of bankruptcy; and whatever the circumſtances may be as to the merits and nature of the tranſaction, the effect of law ſhould always be to make it void inſtead of its being underſtood, that ſuch a preference may be juſtified upon circumſtances. [480]

In reply—That whether fraud had been committed in a moral view Mr. *Fordyce* had done what legally he might not do; and what in the Common Pleas was not permitted in favour of a juſt creditor who was a brother.

This is not a contemplation according to the manner in which that word is interpreted by my learned brother, it is an act deliberate, upon knowledge that he muſt be a bankrupt; and he was gone in performance of his reſolution before the letter could be delivered: And if any thing had diverted his reſolution, theſe notes were not ſent to the poſt-office, but were revocable, and were until three days after in his own poſſeſſion; for the poſſeſſion of his clerk your Lordſhip will conſider as his, the caſe determined by Sir *Joſeph Jekyll* was never doubted.

Though my private opinion would have little influence on the deciſion of this queſtion, I muſt ſay if the court had not doubted, your Lordſhip would never have ſaid Sir *Joſeph Jekyll* gave very great reaſons againſt the judgment.

I humbly rely therefore on the judgment of the court in favour of the aſſignees.

Lord *Manſfield*—Mr. *Fiſher* is certainly a very meritorious creditor of Mr. *Fordyce*, and in this laſt act did him a very great ſervice. I therefore was all along ſorry; (as far as one can be ſorry or glad in a caſe of judicial litigation;) I will ſtate the caſe for the bar.

The defendant *Fiſher*, was a creditor, and had done them many acts of friendſhip—and being creditor for 1500l. borrowed

rowed the 6th of *June* 1772, the sum of 7000l. and had it entered in the banker's books in the usual manner (which sum he had borrowed) and told them, he should not draw before the *Friday* following. On the 9th, the *Tuesday* preceding the *Friday*, Mr. *Fordyce* writes.*

He delivered the letter to Mr. *Harrison* his clerk; he absconded at four in the morning, and never returned till the commission had issued—11 o'clock the commission issued: half after 10 the clerk called at Mr. *Fisher*'s, but did not
[487] find any at the office, called at 11 and found no body, but delivered them on *Thursday*, when *Fisher* took and has kept them ever since; notwithstanding a legal demand.

Whether the property was duly and regularly transferred (which always includes without fraud) before the actual commission of the bankruptcy? And whether a bankrupt can give a preference to a *bonâ fide* creditor before and on the eve of a bankruptcy? Are the two questions stated.

As to the latter, the stating as a general question perhaps involves a great impropriety. No trader can do any thing in fraud of the equality which the laws of his country require: He can't assign provisionally; he can't assign in exclusion of a creditor whom he thinks unjust; and if by deed contract is not only void but an act of bankruptcy. If not by deed they are void (as in all questions upon fraud) against those who are prejudiced, however fair between the parties. Wherever the transfer is not complete, wherever there is an executory countermandable action, the act of bankruptcy is a countermand, and takes all the power out of the hands of the party.

What was said in the case of *Worsley* and *De Mattos*, I don't recollect, I have not lately looked; but I think the case of *Small* and *Oudley* was not meant to be held not good law, or declared so at that time; nor did I ever mean to say it could never be good.

Suppose this in the regular course of payment.

Suppose legal diligence is used; suppose an execution in the house; no fraud but merely a suspicion of bankruptcy, it might be good.

Cork and *Goodfellow* in preference of the children; was a fair act done six months before; a great loan to her brother

of

* (The letter stated by Lord *Mansfield* was nearly this) "Mr. *Fordyce*, "conceiving that the money lodged with him was a sum about which perhaps even some pains had been taken to place it there, and that disputes "might arise, gives that preference to Mr. *Fordyce* which he thinks undoubtedly his due." Two notes, one for 5300l. another for 1700l.

of 40,000l. ſhe did what the court of Chancery would have compelled her to have done.

So far I think the caſe of *Small* and *Oadley* goes, it was a very favourable caſe; the ſecurity given only 300l. where 1800l. aſſigned; for if all had been aſſigned it would have made an end; for it would have ſtopt his trade.

But I think the caſe greatly ſhaken in the Common Pleas.

I think that caſe determines, that though the act is complete, yet if the real motive of the trader is a preference in contemplation of bankruptcy, it ſhall be bad as againſt creditors.

The trader had a trade in an upper and an under ſhop. [488] For the purpoſe of carrying on his trade his brother lent him ſeveral ſums and moſt meritoriouſly, as in the caſe here, without intereſt, and had nothing to do with him in his trade. Upon the 13th of *Auguſt* he makes an aſſignment of the goods in the upper ſhop, he delivers the poſſeſſion inſtantly; the brother becomes the viſible owner inſtantly; and acts as ſuch. The money all lent *bonâ fide*; and as ſtated no ſuſpicion by the brother of inſolvency. But it is found there was no threatening of an arreſt, but a preference given. It is found that there was an aſſignment of no more than the one-third, they did not determine upon the diſtinction between part and the whole: but that a preference had been given.

This went farther than any caſe before, for from the time of *Wolſley* and *De Matto's*, it had been ſuppoſed that where the aſſignment was for the benefit of a fair creditor, and of part, and before actual bankruptcy it would be good; but here an aſſignment by deed, of part in immediate contemplation of bankruptcy, though on a valuable conſideration and a moſt meritorious caſe, was of itſelf an act of bankruptcy. And upon the ſame principles if without deed would have been void.

Now ſee the caſe here—A man, with his boots on as I may ſay, without any demand, nor in performance of any obligation, without agreement, not ſo much as even in payment of a debt which then was to be called in, (for the ſame friendſhip had made the ſum not demandable until *Friday*) ſets up all night, this letter delivered at five and the bankruptcy committed at ſix before it could be poſſibly delivered to the defendant. It falls greatly within the caſe of *Rolliſton* and *Scot*; a man in trade directs goods to be booked in the name and in the warehouſe of his creditor, (which is the common way) and it is certainly for the benefit of the creditor

ditor to say this was payment; afterwards he went away; and not until after he declared the intent of booking to have been as payment; which then could not prevail as the property was no longer under his control: Nor did the booking of the goods in the creditors name transfer the property before by any implied assent.

How is this an appropriation? Suppose the stock had risen or fallen, and *Fordyce* by either of these contingencies for I know not which would have served him, had become a very rich man, would *Fisher* have been obliged to accept them, if the drawees, for no fault of his, had become insolvent? What is the letter? It declares that the view is to give him a preference which has been void even without deed before the act of bankruptcy, and by deed would have been an act of bankruptcy itself.

[489] Mr. Justice *Willes*—If this case had come before the court immediately after the determination of *Small* and *Oudley*, I should have had great doubts. But I think that case has been much shaken by *Worsley* and *De Matta's*, *Hagen* and *Rollefton*, and lately in this court *Peters* and *Robinson*; but I think it has been over-turned by the case of *Linton* and *Bartlett*.

But suppose that case of *Small* and *Oudley* to be now law.

The case was a transfer of 300l. to discharge part of a debt of 1800l. but here the payment can't apply to the general debt due to *Fisher*, but must apply to the 7000. Can this be said a payment in the course of trade? 7200l. paid in discharge of 7000l. I thought it had been upon a calculation of interest; but the first note is the 7th of *May*, the other is the 2d of *April*; the first would become due the beginning of *July*, the other the latter end of *June*.

The haste shews it was in contemplation of a bankruptcy; shows a preference; shows an illegal preference.

But says Mr. *Dunning*, suppose this had been paid the *Saturday*, then I think the case would have been good; but the transaction was incomplete as the case is till after the commission issued.

Atkins and *Barwick*, where the mercers refused to accept the silks.

On the grounds of the four prior decisions, and the opinion of his Lordship, I think it cannot be supported.

Mr. Justice *Ashhurst*—This is certainly a very compassionate case; but I think there are many cases which have gone further against preference.

Smith

Small and *Oudley* had been an expreſs ſtipulation; and I think, in dread of coercion; and though, I do not mean to overſet the authority, I queſtion however, if it was determined upon right principles: for though it was an act of generoſity, and if ſucceſsful was for the benefit of the creditors; yet, if unſucceſsful and the ſhop was kept up for a few days, it would draw in probably a great many creditors and to a great amount.

The act of bankruptcy is in the nature of a civil death; and is a countermand of all treaties not executed. The ſervant knew nothing of the contents no more than the poſt boy.

Lord *Mansfield*—I forgot to mention in that caſe in *Strange*; the judgment ſeems very right, though the reaſons wrong. The traders very honeſtly refuſed the goods, and would not enter them in their books, but ſent them back. [490]

A vaſt deal turns upon the principle whether the ſole motive to the act is a preference; or whether done without that motive, but conſequentially gives a preference: There he is entitled as a trader, to the time of his bankruptcy, to do what any other trader may do. In the caſe of *Small* and *Oudley*, the money having become due, if he had paid it immediately (though thereby he would have done what he knew he could not do afterwards) I don't ſee it could have been overſet as being in the way of trade. I am very ſorry for the defendant, but I don't ſee it can be determined otherwiſe, and therefore *poſtea* muſt be returned for the Plaintiff.

Diſtinction between intentional and conſequential preference.

Curia Cancellaria.

Beckford *againſt* Beckford.

ON an appeal from the Maſter of the Rolls—This was a queſtion ariſing upon a deputation procured by the late Alderman *Beckford* for his natural ſon, on a ſecurity of his eſtate in *Jamaica*.

The point was—whether this was a deputation for his own uſe to take the profits, or in truſt for his father.

The value was 800l. *per annum*, during a term of ſeven years, one of which was expired in the life of his father.

It was contended it was too great a proviſion to be made for a natural ſon.

He gave him by his will 5000l. beſides, and an expectancy after the death of fifteen or ſixteen perſons without iſſue, of coming in as general deviſee of the reverſion.

Evidence admitted, to explain the intention as of an abſolute gift in favour of the ſon, and that the ſon took the profits to his own uſe in the life-time of his father, and has continued ſo to do ſince his deceaſe. But the ſame witneſs on croſs interrogation depoſed, that the father was diſpleaſed at his ſon refuſing to go to *Jamaica* upon former propoſals, and ſaid, "If he thinks he can do better for himſelf "than I for him, let him."

And on behalf of Mr. *Beckford* it was contended, that his father had ſufficiently manifeſted his affection by a preſent legacy of 5000l. as already mentioned, and the reverſionary intereſt in the whole given under his will. That what he was
[491] now to contend for was only an annual profit of 800l. for ſix years remaining of the term, out of the immenſe fortunes of his father, who by the largeneſs of his fortune and contingent bequeſt had made it evident that he meant the benefit of his ſon; and not to leave him in a ſo much worſe condition than the reſt of his children, as he would be if he was to ſit down with the 5000l. only; and the remote poſſibility of partaking of the future bounty of his father, as heir to the reverſion of not leſs value than 30,000l. a year. And when he looked forward towards providing him with ſo vaſt an eſtate, it could not be ſuppoſed that he intended to mock him, with this gift which he had given him, and under it ſeen him in the actual enjoyment of the profits.

That he is not made a party to the deed as by way of truſt, but expreſsly named as deputy in the indenture; that if it had been a common leaſehold eſtate he would have been entitled to the rent, if a copyhold to the profits, and in this caſe to the profits of the office.

Thus he ſtands legally entitled, and *primâ facie* equitably entitled; let us now ſee whether there is any reaſon to diſentitle him in equity.

His ſon had refuſed to go to *Jamaica* on propoſals of his father. If it be ſaid the father altered his intentions on this refuſal; (and thoſe very propoſals are evidences of affection and deſire for his advancement,) but if it be ſaid he had altered his intentions, then why name his ſon deputy in this inſtrument, on the effect of which the queſtion ariſes; when he had his other ſon preſent on the iſland, his own agent preſent on the iſland? It cannot be ſaid becauſe it was a better life, for the eſtate was for ſeven years, determinable

minable only on the death of Sir *N. Herbert*. Nor could it be because he was to go over to execute his office; for he had refused it upon the supposition.

That upon the evidence it appears the father had intended the provision for his son.

As for the displeasure of his father and the words said to be spoken, will a court of justice from thence infer the father meant to resume what he had given (and what he had given no right to resume) the legal estate, and take it to himself. He might waive the appointing him agent, which the same evidence says he had intended.

Can a man suppose that a father who by one will had left him 10,000l. by his other will 3000l. *per annum*, by his now will 500l. only; should mean to revoke the legal estate which he had procured him, and convert it into a trust for himself?

That it is against all the rules of evidence (especially where so near a natural relation is a party) to admit of parol evidence to diminish, and not only so but to take away the [492] estate given, and to take away an absolute right, declared and vested by deed, and executed by actual possession: And this above all from circumstances not concomitant but subsequent to the deed. That there is ground of reason law and natural equity, to continue the legal and equitable estate in the son, where the father had placed, where the law had conveyed it; but no ground of equity to presume he was only a trustee.

Where an estate has been purchased by another person for a stranger, the court will require clear evidence of the payment of the money by that person, to whose use the purchase is contended to have been made; but they will not here separate the equitable and legal estate, nor take away the beneficial interest by any implication on parol evidence, which the statute of frauds was meant to obviate.

On the other side Mr. Attorney-General.

Lord *Nottingham*, in the case of *Grey* and *Grey*, held that consideration of blood was a sufficient conveyance to a son named in the deed; but that of a stranger it was otherwise: That there is no case to prove that an illegitimate son would come in any other situation than a stranger; and even the *prima facie* evidence on behalf of a legitimate son may be rebutted by circumstances.

The perception of the profits during infancy has been taken as guardianship; the perception of the profits afterwards by the father has been taken as evidence to rebut the

ground in equity, which otherwiſe would be in behalf of the ſon, but ſtill there might be evidence to control even this.

But where the truſt is not declared to him in the deed where the ſon thus circumſtanced, where the father took the profits (for part of the time at leaſt) equity never conſidered a perſon as other than a truſtee.

Hill and *Barrow* was the ſtrongeſt caſe, but the father and ſon there were joint obligators in the bond, and Lord *Hardwicke* ſaid it might be a fraud upon the marriage to conſider it otherwiſe.

Note, As I underſtand the Lord Chancellor decreed that the ſon took to his own benefit, and not in truſt.

Truſt.

TRUSTEE for children under a marriage ſettlement who was to take the beſt ſecurity, takes perſonal ſecurity, and lodges the money in the hands of a banker without taking bond; for money of his own he took bond. The banker fails. This is groſs negligence in truſtee and
[493] ſhall make him liable, and it is no excuſe to ſay he could get no good mortgage ſecurity; for then he ſhould have placed it on public ſecurity.

Action at Common Law.

For ſeducing away a Journeyman per quod the Maſter ſervitium amiſit.

SHOE-MAKER employs a man to make up ſhoes for him, and retains him by the piece; and this perſon being hired by another, and leaving his ſervice, the work unfiniſhed, the ſhoe-maker brings his action againſt the perſon ſo hiring, for inticing his ſervant out of his ſervice. Such perſon is a ſervant of the ſhoe-maker, (though not within the particular proviſion of the ſtatute of *Eliz.* concerning ſervants to be hired for the year,) ſo that an action at common law will lie for ſeducing him from the ſervice.

On a ſpecial verdict, the jury found the man employed a journeyman of the plaintiff's but not for any certain time.

They found alſo he was hired by the piece.

They did not find particularly whether the perſon who hired

hired him knew of his being retained by the plaintiff at the time of hiring.

Queſtion: Whether this perſon be a ſervant of the plaintiff, ſo that he may maintain an action and recover damages, on his being enticed from his ſervice? And whether there is ſufficient upon the verdict to entitle the plaintiff to recover.

Argued: That this is a caſe entirely at common-law; and not upon the ſtatute which requires the ſervant, for the abduction of whom from his maſter's ſervice an action may be brought to be a ſervant for a time certain.

But ſtill, that wherever there is an injury the law will give a remedy; and the enticing away a ſervant neceſſarily infers damages, and wrongful damages.

Brooke cites a caſe in the Common Pleas, in his 38 page, that for taking away a ſervant by force an action of treſpaſs, *vi et armis*, would lie; for ſeducing a ſervant from the ſervice an action on the caſe; but that if the ſervant left his maſter voluntarily, an action lies only on the ſtatute.

Brooke, title Labourer. If a labourer quits me voluntarily, no action; but if any ſeduces him, action on the caſe.

Leon. 140. 11 *H.* 4. *p.* 17. cited.

As to action at common-law there is no exception to be found, which ſays, that in order to maintain ſuch action, the ſervant muſt be a ſervant for a limited time. [494]

The act of 5 *Eliz. c.* 4. ſays, no perſon ſhall be hired for leſs than one year; and ſpecifies ſhoe-makers; but this is only to provide againſt the voluntarily quitting of the ſervice before the time, and not againſt ſeduction from it by another.

Fitz. Natura Brevium 395. If a man take a ſervant out of my cuſtody, he is liable to an action.

That the defendant knew the perſon to be a journeyman of the ſhoemaker he has not denied; it muſt therefore be taken as admitted, and the jury do not ſay that he did not know.

That as to the objection of time if it were neceſſary to go into it, certainly an hiring without any time particularly mentioned is a retainer for a year.

On the other hand, that the facts found by the jury are not ſufficient to ſupport the declaration, for that the plaintiff declares that he retained the two perſons ſtated in the declaration, to ſerve him as his journeymen in the trade and myſteries of a ſhoemake; and that the defendant, well knowing

knowing of the premiſſes, and intending to defraud and prejudice him in his ſaid buſineſs, craftily and maliciouſly did ſeduce the ſaid perſons, and entice them from his ſervice; *whereby he loſt their ſervice to* his damages, &c.*

The jury find no hiring nor ſervice of any determinate time.

That the jury do not find the defendant well knowing of the premiſſes, &c. did entice, &c. and that this is very material.

That where there was no hiring at all there could be none for a year. †

That the plaintiff had ſtated no agreement to keep their journeymen in conſtant work; or that they were his ſervants.

Lord *Mansfield*—How do you define the word journeyman?

Anſwer: That it was apprehended to mean no more than a man who was out of his time and was no maſter.

[495] Lord *Mansfield*—Does not a journeyman imply the particular relation of ſervant to the man? He might work for a month at once.

Anſwer: My Lord, it would have been ſo if the jury had not found that he worked by the piece, and not for a certain time; ſo that they have found what ſort of a journeyman: And whether, under theſe circumſtances, he were a ſervant, they ſubmit to the court. We truſt that the court will be of opinion he was not, or, at leaſt, that the facts found are not ſufficient for the plaintiff to recover.

Lord *Mansfield*—This is apparently a ſervice. They have found expreſsly he was taken by the piece: And this is a ſufficient retainure.

Journeyman, I apprehend, in the original etymology, is a ſervant for the day; in whoſe ſervice the maſter has certainly an intereſt: And they find defendant inticed this ſervant to leave the work he had undertaken unfiniſhed. And it is very truly obſerved, that many ſervants are taken to work by the piece; if otherwiſe they would often be idle.

It juſt lies upon the circumſtance of his being found a journeyman; otherwiſe it might have been that the maſter took any who pleaſed to work for him, to ſtay as long as he pleaſed, and go when he pleaſed.

The

* The jury I ſuppoſe found generally for the defendant as to the one of theſe perſons.

† Omne majus continet in ſe minus; et qui negat totaliter partem negat.

The counſel was going to have ſaid, that he did not lie or victual in the houſe.

Lord *Mansfield*—This would have been ſtrong evidence, on the trial, to have perſuaded the jury not to have found him a journeyman; But they have found him ſo, and it muſt be taken accordingly.*

Mr. Juſtice *Aſton*—From the general inconvenience that would otherwiſe ariſe, the ſervant muſt be retained by the piece, to very vaſt amount. And that the ſtatute had provided impriſonment, but no action, which ſhewed they recognized every man's right to his action. Every man is entitled to one who has ſuſtained damages by wrong: Therefore, if a ſervant be retained for any ſpecial work, and departs from this unfiniſhed, an action will lie againſt any who ſeduces him to depart.

JUDGMENT for the PLAINTIFF.

WRIT of RIGHT.

Tyſſen, Lord of the Manor of Hackney, *v.* Clarke.

THE court being ſeated, the recognitors of aſſize were called. Four knights appeared, and choſe to themſelves twelve others, which, together, compoſed the grand aſſize of ſixteen jurors.

The oath adminiſtered was in this form:

I do ſwear that I will ſay the truth, whether *George Clarke* hath more mere right to hold the tenement, of *Francis J. Tyſſen* demanded againſt him by his writ of right, or the ſaid *Francis J. Tyſſen* to him as he demands, and for nothing to let to ſay the truth.

So help me God.

And now, upon the motion of Mr. Juſtice *Blackſtone*, order was made by the reſt of the judges, that the galleries of the court be open for the admiſſion of ſtudents of the ſeveral inns of court.

The door-keeper not immediately appearing, and it being apprehended that he meant to take advantage of the public

* Res judicata pro veritate accipitur.
Damnum ſine injuria eſſe poteſt; injuria verum ſine remedio nequaquam poteſt.

public curioſity, by extorting fees for admittance, Mr. Juſtice *Blackſtone* ſaid, he remembered when a gentleman, a counſel, had given a quarter guinea for admittance, the court was about to commit the officer: But he added, I believe, on his aſking pardon, and deſiring to reſtore the money, at the interceſſion of the gentleman, the court did not commit him.

The record was ordered to be read, and then the junior ſerjeant for the tenant, in the aſſize of right, had notice that he was to begin, after the record ſhould be read.

Chairs were ordered to be ſet for ſuch gentlemen as had not room in the gallery.

The record was then read, to this effect:

Middleſex to wit, *Francis J. Tyſſen*, by his attorney, demands of *G. Clarke*, eſquire, (reciting the premiſſes) and ſaith, that his anceſtor was ſeiſed in the time of peace, to wit, in the time of our late Sovereign Lord George——by taking eſplees, &c. and died thereof ſeiſed: Whereupon, on his death, the ſaid premiſſes, in his ſaid writ of right
[427] demanded, deſcended and came to the ſaid *Francis J. Tyſſen*, as ſon and heir of the ſaid *Francis Tyſſen*, who thereby became lawfully ſeiſed thereof, as in fee, till he was thereof diſſeiſſed by the ſaid *G. Clarke*, under colour of a certain leaſe, within ſixty years of the time of bringing the ſaid writ. Whereupon he putteth himſelf on the country, and the ſaid *G. Clarke* doth the like; and thereupon iſſue is joined.

Mr. Serjeant *Walker* opened for tenant—That the father was ſeiſed, &c. and that, after the deceaſe of the father, the lands deſcended to the ſon, &c. And, gentlemen of the grand aſſize, it is yours to enquire whether tenant or defendant have the better right.

I, who am of counſel for tenant, maintain that he hath the better right.

Serj. Davy. On the ſame ſide—The caſe is briefly thus; the tenant's father purchaſed the eſtate, or was rather mortgagee of it, in 1736. And took a mortgage in fee, in conſideration of 1000l. paid to the mortgagor, *Oſbaldiſton*; which mortgage was regiſtered, and ſtood unimpeached till a late action. In which, counting on the ſeiſin of himſelf, he was barred by a thirty years poſſeſſion againſt him, and driven to this writ.

Purchaſe of the equity of redemption.

In 1742, *Clarke*'s father purchaſed the eſtate in fee: And in the deed of purchaſe there were the uſual covenants that party had a right to convey, and for quiet enjoyment, &c

and

and covenant to levy a fine, which was duly levied Michaelmas term, 16 *G.* 2. 1742.

A deed-poll, to which *Oſbaldiſton* and the tenants of the premiſſes were parties (the tenants for the ſake of attornment).

Title commencing in 1736, completed in 1742.

In 1706 Sir *Edward Northey* was ſteward of this manor.

He iſſued precepts to the cuſtomary tenants, to repair to the waſte, and there to ſet out, by *metes* and bounds, how much may be encloſed, holden and enjoyed by *J. Flanders*, to his own uſe, without any prejudice to the other tenants, or any other her majeſty's liege ſubjects paſſing this way.

To this, which was in the nature of an *ad quod damnum*, the tenants return that they, the underwritten, have viewed, and return how much the ſaid *J. Flanders* might enclоſe, with the liberty of the lord of the manor, and conſent of the tenants. [498]

Provided always, that the ſaid *J. Flanders*, his heirs, nor aſſigns, (which the court will tell you are applicable only to tenants in fee) ſhall not build any thing that may prejudice or foreſtall the houſe he holds of Mr. *Halſton*, his heirs or aſſigns.

And this they return as a good return to the precept.

This is returned by the cuſtomary tenants, and ſigned, not by them only, but by Sir *Edward Northey* himſelf; who would never have ſuffered this return to the precept to be made, unleſs it had been a good return, and not injurious to the rights or intentions of the lord.

How, it may be ſaid, does this apply? If there was this eſtate out of the demandant, Mr. *Tyſſen*, more than ſixty years paſt, the tenant who defends needs not ſhew his title farther, but the action is barred.

Court—There is no diſpute about the identity of the premiſſes; what is the quantity?

Anſwer—Rather more than an acre, with ſeven houſes.

Title of *Oſbaldiſton*.

Deed of leaſe and releaſe in 1736, on the 26th of February was pleaded as part of the tenant's title. It imported to between *Oſbaldiſton* and *Clarke*, the father of the tenant in this writ, in conſideration of 1000l. Releaſe of eſtate in poſſeſſion of *Oſbaldiſton*, the leſſee, reciting the dimenſions, to *G. Clarke*, his heirs and aſſigns, for ever, with covenant of right to convey the eſtate in fee ſimple abſolutely, and the ſame to protect indefeaſible, and without incumbrances, except a quit-rent of ten ſhillings *per annum*

annum to the lord of the manor. And all the ſaid within recited premiſſes are, by the ſaid deed, releaſed, granted, and confirmed to the uſes, truſts, and purpoſes therein mentioned; namely, to the uſe, &c. of the ſaid *G. Clarke*, his heirs and aſſigns, for ever.

Proviſo, that on payment of mortgage-money at a certain day, principal and intereſt, the ſaid *G. Clarke* ſhall reconvey.

Certificate of inrollment, according to the ſtatute.

Bargain and ſale 30th December 1742.

[499] Leaſe for years not endorſed.

The deed of bargain and ſale recites the mortgage-money unpaid at the day, and the whole principal and intereſt due 128ol. beſides 22ol. ſince due, after the ſaid mortgage (receipt whereof is endorſed for the ſaid 22ol. on the back of the deed) and the condition being become abſolute of the deed of mortgage, the mortgagor bargains and ſells to the mortgagee, for fuller confirmation of his title in the ſaid premiſſes, all his eſtate, title, intereſt, equity of redemption, claim or demand whatſoever, to the ſaid *G. Clarke* the mortgagee; and for farther aſſurance covenants to levy a fine.

Vide Hitchen and Baſſet.

Fine ſur conceſſit thereupon. Note of the fine read. Proclamation: Theſe were not read; for the court preſumes a fine to be with proclamations, till the contrary be proved.

The tenant is ſon, and heir at law to the ſaid *G. Clarke*.

The tenant called witneſſes to prove his title, and I took a long note of the evidence, which, as far as is not matter of law, I omit.

On the other ſide, for *Francis J. Tyſſen*, who brings this aſſize as demandant, to recover his right to the premiſſes.

Gentlemen of the grand aſſize, I hope I ſhall ſhew, to your ſatisfaction, as concerning the premiſſes in queſtion, that they belong of right to *F. J. Tyſſen*, and that he has more mere right to demand than the tenant hath to hold them, and has a much ſuperior right to that claimed by the tenant.

My brother *Davy* has admitted, that in 1736 the claim originally ariſes. He, knowing always what is beſt for his client, would have ſtopped there, but aſking a direction of the court, and they not chooſing to give him one to ſtop there, he proceeds to ſhew a title, as he ſays, in fee, of the lord, and in a third perſon, as far back as 17[illegible]

D

But all that appears then is, that the fee was in lord with licence to encloſe with the conſent of his tenants.

As to the ſubſequent conveyance, no proof of payment, but as between the parties; but if a real tranſaction, ſtill I ſhall contend it was not ſuch an one as can prejudice the title of the lord, on account of their iniquity.

I mean to ſhew that *Oſbaldiſton* was only a tenant to demandant; and I dare ſay none of you, gentlemen, take the trouble of ſending to the regiſter, to ſee whether your tenants have done as *Oſbaldiſton* did; taken upon themſelves to convey in fee when they have only a term eſtate. [500]

The demandant claims as lord of the manor, where he and his anceſtors have immemorially uſed to have the waſte; and the premiſſes in queſtion are and immemorially have been parcel of the waſte.

Mr. *Tyſſen*'s grandfather died in 1710, father in 1717; and the demandant himſelf was a poſthumous ſon.

Within this manor there hath immemorially been a cuſtom for the lord of the manor, for the time being, having a deſire to grant any part of the waſte, under a certain rent, to iſſue precepts to the tenants, to enquire whether the ground may be encloſed without prejudice. Theſe are generally forty or fifty years leaſes, to encourage tenants to improvements. I ſhall ſhew a great number of theſe precepts; and there never was an inſtance of a precept made to convey in fee.

The intent, I ſhall ſhew, was only to grant for a term of forty-one years, from Michaelmas then next enſuing.

My brother *Davy* has ſaid, that had it not been the intent of the lord to grant a fee, Sir *Edward Northey* was ſo very learned and accurate, that he would not have ſuffered any thing ſo improper in his office as words to be uſed and ſigned with his name; which import, my brother *Davy* ſays, a conveyance in fee to have been intended. But I am afraid ſome of us now at the bar are ſo extremely accurate; nor was Sir *Edward Northey*, or any man, always aware, and always in the right. At moſt, it's no proof a conveyance in fee; and goes no farther than evidence of ſuch a thing in agitation.

J. Flanders died inteſtate, leaving ſeveral brothers, in 1720; the widow took out adminiſtration, and became entitled to all the perſonal eſtate, and took this amongſt the reſt.

She made a will in 1721, reciting that her late huſband, by conſent of the lord, had built four ſmall meſſuages on the

the waſte, in the place in queſtion; and ſhe directs them t
be ſold by her executors. She makes *R. Oſbaldiſton* an
R. B. her executors.

And, by a codicil dated 28 July 1725, ſhe revokes th
part of the will, and appoints *R. Oſbaldiſton* ſole executor.

Oſbaldiſton came in as executor, paid the ten ſhillings ren
which had been paid all along: He himſelf paid it the firſ
year. The demandant was then in his minority; the re
[501] ceivers charge themſelves with the receipt. I ſubmit to m
lord, the receipts even of a common bailiff are evidenc
when he charges himſelf; much leſs can there be a queſtio
in this caſe.

Under theſe circumſtances the tenant, *Oſbaldiſton*, mak
the conveyance. This even, as by a tenant for life, wa
fraudulent and void; and good for nothing, but as by w
of eſtoppel between the parties.

Though my brother *Davy* would avail his client as a fai
purchaſor, without notice, I apprehend this will not ſer
him. Indeed he rather recommends his client upon th
ground than pretends to avail himſelf of this ſuppoſed ci
cumſtance as a ground in law. If this were upon an equi
able queſtion it might have been a ground; but we are no
on the mere right: And you are to find only upon a ſtri
legal eſtimation which has the greater right. Thoug
upon the circumſtances, it does not appear (if it was at a
material) that there was not fraud; but the contrary: For
is far from evident that the tenant came in as a fair purchaſ

I rely, therefore, that I have ſhewn a better and ſuperio
and more ancient title, whereon, in juſtice to your oath
you will find for the demandant.

Witneſſes called for the demandant.

E contra for the tenant, in replication.—That as to th
obſervation, that it had always been cuſtomary to gra
term eſtates in the waſte of the manor, but never in f
the right of a perſon claiming under the lord of the man
by his grant, ſhall not be prejudiced by any cuſtom of a m
nor. He ſhall never qualify his own grant made, in any ſin
inſtance, in fee, by any cuſtom which has obtained in t
manor. Now here, I ſubmit, there is evidence of a t
granted, by the precept and return.

Court—You have not ſhewn the precept. However, t
recital of it on the return is ſufficient for your argument.

I contend then, my lord, I have brought evidence of
grant in fee: And what ſays the lord? "It has been uſu
"for me and my anceſtors to grant otherwiſe."

For the demandant—I do agree, if you had produced a grant in fee, the lord cannot qualify his own eſtate. But if you produce preſumptive evidence upon the *præcipe*, I only deſire to ſhew that the effect upon that *præcipe* has only been a leaſe for years.

E contra Serjeant *Davy*, for the tenant—That from the [502] time of the return of the *præcipe*, in 1706, to 1736, it does not appear any way how poſſeſſion ſtood: But thence there appears a poſſeſſion under a ſuppoſed tenancy in fee, againſt the lord. And he repeated that the words "heirs "and aſſigns" are not applicable to leſs than a fee.

Lord Chief Juſtice *De Grey*—I own, for myſelf, I have no doubt of the competency of the evidence. The lord is found out of poſſeſſion, except by taking the rent a part of the time. I take the poſſeſſion, for the preſent, to be as upon the return.

It was very properly compared to a writ of *ad quod damnum*, and will have the ſame effect. I don't ſpeak what weight it will have with the jury, as preſumptive evidence. When this writ iſſues, and the jury make a return, this does not amount to a grant.

It is not collateral evidence which is here offered, to avoid an actual grant, but evidence to explain a doubtful matter, and to ſhew upon the cuſtom, (of which we muſt underſtand this præcipe and return to be part) that no greater eſtate has been wont to be granted; and, then the farther evidence will come out.

Mr. Juſtice *Gould*—I think it material—I think this cauſe would be cloſed by this evidence. I take it that this is not now competent, admiſſible evidence. It appears *J. Flanders* was in poſſeſſion of a particular ſpot of ground, and wanted to acquire more: And there is evidence, as Serjeant *Davy* obſerves, that he was intended to take a fee. Confining ourſelves to the inſtrument, and not going into the extrinſical circumſtances, by conjecture, we find they had in contemplation to grant a fee. I apprehend this is evidence. From the year 1706 there has been an enjoyment of *J. Flanders*, and thoſe deriving under him ever ſince. This I take to be evidence which amounts to proof of above ſixty years poſſeſſion under a conveyance in fee. If this were an ejectment, twenty years poſſeſſion would induce the bar; and here, where the poſſeſſion has ſtood for above ſixty years out of the lord, I conceive preciſely the ſame inference will ariſe.

This

This is not properly a cuſtom as a foundation of a perſon title; but it is uſage only. And as every man's grant m be taken moſt ſtrongly againſt himſelf;* and it is not pr tended the lord might not grant a fee, therefore I thi preſumption on uſage cannot be ſet up againſt it.

[503] Mr. Juſtice *Blackſtone, contra*—That the return was or preſumptive evidence of the grant of a fee; againſt wh other preſumptive evidence might be ſet up. The ſteva by his ſigning, does not give any aſſent to the propriety the return; and the men who made it were ignorant m and falſe grammar and bad ſenſe are in the outſet. To t preſumptive evidence of a grant in fee, may very properly ſet againſt it preſumptive evidence of a grant for years.

Mr. Juſtice *Nares, contra*—I wiſh they would have gon farther, which would have taken away my brother *Gould* doubt; but, on the preſent ſtate of the queſtion, I thi there is no ground to admit the evidence.

Lord Chief Juſtice—I think it very proper to let in preſumption. The lord grants a power to grant to *Flande* This is not compulſory on the lord; it is only executor and the lord may or may not make ſuch a grant in futur Does it appear executed? Is there any rent reſerved Any thing concluſive? No: But they ſay evidence of poſ ſeſſion, conſiſtent with the grant, is concluſive. But wh is the evidence? It will apply to poſſeſſion in fee; it wi apply to poſſeſſion of a term: *Percipitur ad modum percip entis.* There is to be ſure a faint preſumption; but ther ought to be ſome evidence of conſtant poſſeſſion. Ther where is the difference if they go on and ſhew the inſtances, that on ſuch a precept the uſual way is, to grant for years beneficially for the lord. And it is indeed very ſtrang that the lord ſhould grant in fee, without reſervation o rent or ſervices.

Mr. Juſtice *Gould*—I only deſire to be underſtood. M ground is on the poſſeſſion, of which my Lord *Holt* ſays, twenty years makes and proves a ſeiſin in fee upon ejec ment; and ſo ſay I: And, therefore, I ſay ſixty in an aſſize.

Preſentment given in evidence on a præcipe, to ſet ou waſte tenement to *A. et hæredibus*—no condition added.

Counterpart of the leaſe upon that return; the lord leaſe out for years. This ſeemed to be deſigned to empower the lord himſelf.

Evidence

* Verba fortius accipienda contra proferentim.

Evidence of applications to renew leaſe on ſurrender of the old.

16 Dec. 1661. Return. Queſtion, whether original return; ſteward examined. He was aſked, whether it appeared on the books? No; there were no books farther than May 1661. Which book begins 1658.

When does the chaſm begin?—From May 1661, and [504] ends 1664.

Is this an original præcipe, though it does not appear in the book?

I believe it is a copy.

Have you ſearched whether there are more books, with proper diligence?

I can't ſay I have.

Where did you find the papers?

Delivered with other leaſes.

Beſides this, ſaid the court, there is a record of a return, ſigned by the ſteward himſelf, ſtating return how much he may convert to his own uſe. No words of heirs or aſſigns.

Indenture of releaſe between the lord and cuſtomary tenants, reciting the preciſe term, from Michaelmas 1751; heir's rent 6s. 8d.

Court—Are any of the leaſes entered upon the court books?

Anſwer—No, my Lord.

Nor any memorandum?

No, my Lord.

Return ſets out waſte, with dimenſions; leaſe 28 December 1711. This an approvement.

It was obſerved by the court, how important it was, as well for juſtice, as for ſaving of time, to have had the books: returns ſtated at the diſtance of ten or eleven years from one another; and it does not appear how many intermediate ſentences there may have been in fee.

The learned Serjeant vindicated himſelf, as not having been retained till the day before the trial.

Leaſe granted before the court day, which was held 18 April 1707.

Return. Waſte of the manor, view, and ſetting out by [505] limits and bounds. How much the lord may incloſe for his own uſe, by conſent of the cuſtomary tenants. Houſe in the occupation of *G. Clarke.* Indenture 1706.

A term of forty-one years granted.

Another term of ninety-nine years granted, in the waſte, at the yearly quit-rent of 3s. 6d.

The

The will of *Catabrine Flanders*, in 1726, read.

The court obſerved, that it could not be much relied on what the expreſſions were in ſuch wills; but that ſhe did not conſider this eſtate in queſtion as perſonalty: For ſhe gives the houſes in caſe her perſonal eſtate ſhould fail.

Anſwer—That ſhe did not take his goods for perſonalty; for ſhe couples them with the houſes, in the ſame clauſe. And at leaſt the meaning may be, my other perſonal eſtate.

Oſbaldiſton, the grandſon of *Oſbaldiſton* who conveyed to *Clerke*, examined.

Have you found any leaſe amongſt your father's papers?

Anſwer—Yes; I have.

On being called on to produce it, he produced the draught of a leaſe.

Serjeant *Davy*—Queſtion, whether what they offer in evidence is admiſſible, to prove any leaſe?

Firſt, If a paper were to be read coming from a grantor on valuable conſideration to impeach the grant, it would be very bad. And next, ſuppoſing this draught were evidence, it is evidence only of an intention to leaſe. This is not a copy; but a draught only. Even if it were a copy I ſhould take objections: But it does not import to be a copy of a leaſe ever made, or even meant to be made.

They ſay there is a counterpart of a draught; I know not on what evidence: But take it ſo, and it only proves that ſuch leaſe was ever executed; for then why keep the draught.

Serjeant *Hill*—I ſubmit, my Lord, we have already given evidence ſufficient to ſhew ſome leaſe or other: And
[506] apprehend the queſtion is, not whether a grant in fee, or a leaſe; but what kind of leaſe: For that there has been ſome leaſe, of ſome kind or other, is plain; for it has gone in a courſe in which it could not otherwiſe have deſcended to perſonal repreſentatives, and not to heirs.

Rent has been paid, it appears from their own inſtrument. And no pretence of its being a quit-rent.

That perhaps this was a copy, and not a draught of a leaſe.

That the loſs of a deed could only be proved by probable circumſtances collectively, and not by poſitive direct evidence in general. That the leaſe, having been carried with other papers, during a long minority, backwards and forwards into the court of Chancery, might probably be loſt.

If loſt, the beſt evidence will be received of the kind which the caſe admits. That here there was evidence of hand

hand-writing, and ſufficient proof of execution, from the manner of poſſeſſion, and courſe of deſcent.

Serjeant *Groſe*—That the paper was admiſſible, according to the rules of evidence, whatever weight it might merit.

That undoubtedly it was admiſſible, on proof of the loſs of the original.

2dly, That, it being an ancient tranſaction, loſs would be preſumed when the courſe and nature of the poſſeſſion ſhewed that it muſt have been as of a chattel real, and not an eſtate of freehold.

3dly, That it might be good to rebut the preſumption of an eſtate of freehold; though it might not, of itſelf, have been good to eſtabliſh an original demanded.

That, on all hands, it muſt be admitted, the preſumption of a leaſe is open; becauſe the demandant has not made good his title, by ſhewing a conveyance in fee. That, therefore, ſuch evidence muſt be produced in a dark caſe, to maintain probability upon circumſtances, and try what might can be had.

The evidence will apply to all he has offered: For it proves at leaſt a leaſe intended, but not executed; which is juſt the caſe of the grant in fee, which he claims on the receipt and return, which are only executory, and not evidence ſufficient to prove a grant executed. And where is only preſumptive evidence of a freehold, this will go to repel that preſumption, by ſhewing there was a communication about a leaſehold; and then the obſervation will apply in its full force. They ſay words have been uſed in [507] that only imports an intent to grant; words only good, if they, to paſs a fee. We ſhew an intention againſt that argument, which preſumes an intent to convey a fee, by having evidence of an intent to grant a leaſe. And it will have weight, that it is the only paper which appears, in this caſe, to ſhew a grant of any kind made or intended in conſequence of the præcipe.

Serjeant *Davy*—My learned friend ſeems to miſunderſtand the grounds of the objection. The rule of evidence (I mean to reaſon upon the ſuppoſition of the facts, which they will prove afterwards if it be neceſſary) that every thing ſhall be proved by the beſt evidence which the nature of the caſe will admit. Books of an attorney, memorandums of an attorney, have been admitted in evidence, even of a recovery: But inferior evidence never was admitted in proof a fact, not done at the time, but ſubſequent, and not at all neceſſarily dependent on it; and, for any thing

that appears, if it ever did exiſt at all, ſtill proveable by evidence of itſelf, and from the nature of the evidence brought to prove it, as well as from the evidence on the other ſide, unlikely ever to have exiſted.

Court—That the ground was laid down too largely; for that draughts have been admitted in proper caſes.

Serjeant *Davy*—My Lord, I did not mean to ſay that evidence of a draught was inadmiſſible; but only that it never went alone to prove. And that here, as to proof of intention, it proves nothing; for it does not appear which party produced, or which rejected it. That it would be irrelevant: That the ſearching for the leaſe, and not finding it, would never go to prove its exiſtence: That it rather concluded it never was.

Court—To prevent the failure of juſtice, the law has laid down a rule that no one ſhould ſuffer what he cannot help.

V. Leyfield's caſe. Co. Rep.

But in order to give evidence of an inſtrument as loſt, you muſt prove ſuch an inſtrument did once exiſt; you muſt prove contents; and you muſt prove deſtruction, or loſs.

But it is not neceſſary to prove actual preſent exiſtence by the deed itſelf; (which, if you could do, you would generally prove contents) but you muſt give reaſonable ground to the court to believe its once exiſtence. Neither need you prove authentically the contents; for that would imply power of production.

It was alſo ſaid, that if this was an independent queſtion, it would not be right to admit the bare draught to prove a leaſe, of which there was no evidence that it had been loſt,

[508] or even that it ever had exiſted. But that here rent paid had been proved; enjoyment proved as under a leaſe; and that the eſtate had been applied as part of the perſonal aſſets.

That correſpondent inſtances had been produced of many leaſes granted on building terms, and no evidence hitherto on the contrary of a fee having paſſed. Evidence that there poſſibly might be, not evidence that there was.

That there ſeemed to be a caſe where evidence had been refuſed of an inferior nature, becauſe the party applying had not made a ſearch in the archiepiſcopal court of York for the proper evidence in that cauſe. But that here it appeared that the ſame ſearch has been made in the court of Chancery, and no counterpart has been found. But a copy has been produced, and another copy was produced:

duced: And it appears to have been a precedent for draughts of this nature, with change of names.

Whether it will be more for the demandant or againſt him, I ſhall not now remark: But though it may go farther than former caſes, yet, upon the circumſtances, I think it ought to be admitted on the foot of preſumptive evidence.

It appeared in evidence, that two years rent had been paid by *Oſbaldiſton* for the premiſſes, after the death of *Catharine*, widow of *J. Flanders*.

But it was farther obſerved from the Bench, that ſhe makes *Oſbaldiſton* executor of her real and perſonal eſtate. (Or both.)

Witneſs called to prove an obliteration of an indorſement on one of the two papers given as evidence of a leaſe. The indorſement was, "Another draught made;" and the witneſs acknowledged ſtriking out theſe words. Obſervation, that, from the appearance, theſe words were firſt eraſed, and then ſtruck through with the ink.

Court—This ſhould have been mentioned before: For it might have prevented its being admitted in evidence. For a draught manufactured, though the eraſure afterwards explained, might have been refuſed.

The witneſs examined.

Did you conſider yourſelf as attorney againſt *Clarke?*

Yes.

At the time when you did this you was concerned for Mr. [509]
Tyſſen againſt Mr. *Clarke?*

I ſuppoſe I was.

Had you not for ſeveral months before been concerned?

I believe I was.

April 1770. Was it not?

I do not know.

Is that your hand-writing?

It is my clerk's, and I ſigned it.

This was a letter in May, threatening an ejectment: In July the alteration was made; and Mr. *Tyſſen* never employed him afterwards.

Was it on account of this?

Anſwer—I gave the papers, and I ſaid I would appear whenever it came before the court.

Obſervations to the recognitors of the grand aſſize, on the part of the tenant.

Evidence on the part of the tenant of a purchaſe in fee, for a valuable conſideration, 1000l. lent upon mortgage of the premiſſes, ſix years before. That they had endea-

voured to ſuggeſt fraud, becauſe *Clarke*, at thirty-eight years diſtance from the mortgage, could not prove payment.

The term they would ſpeak of expired in 1747, commencing in 1706, and continuing, they ſay, forty-one years. The demandant, Mr. *Tyſſen*, was then thirty years old. This leaſe is not ſaid to have been cancelled: It was a ſtanding precedent, they ſay. Mr. *Tyſſen* then knew the term was expired. Why, then, not call for a ſurrender, and make a new leaſe? For the eſtate was improved very much by the erection of houſes upon it; an improvement natural to be made by a tenant in fee, but not very uſual, or eaſily accountable, in a tenant for years. If this had been a term eſtate eſtate the lord might have demanded, and was highly intereſted in demanding, a ſurrender, when the term expired. He might have done it then; and would have done it certainly: But he has not. What is the conſequence? That there never was a leaſe granted—That ſome propoſals there might be.

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Laying down this *poſtulatum*, that poſſeſſion is the beſt guarantee, perhaps, of half the inheritances of this country, and ought to be ſo, and eſtates ſo held ought not to be ſhaken but for ſtrong cauſe, the application ſtrikes of itſelf irreſiſtibly.

But, independent of poſſeſſion, what evidence is there here, not only of what the poſſeſſion has been, and is, but that it ought to be as it is and has been?

The præcipe directing a view to enquire and return whether ſuch a piece parcel of the waſte, and admitted to be the premiſſes in queſtion, may be encloſed by *J. Flanders* to be holden and enjoyed by *T. Flanders*, his heirs and aſſigns.

Anſwer—That it may; and *T. Flanders*, his heirs and aſſigns, ſhall not do ſo and ſo.

Both præcipe, therefore, and return go to a fee ſimple. If there be other precepts and returns, of like kind with this, and yet for years, I grant it a full anſwer.

But they ſay there is another inſtance, where the præcipe and return ſpeaks the ſame language with this; whether ſuch a piece may be encloſed, to be held by the lord and his heirs, and they anſwer yes. Certainly; it was his fee ſimple. What they conſent he ſhould incloſe was his fee ſimple before.

This is 21 April 1704. There are two more ſuch, 1707 and 1711, both to the lord.

1758. To know how much a cottager may encloſe without prejudice; not a word to his heirs and aſſigns.

1761. To enquire what part *Flanders* may encloſe for his own uſe; they anſwer he might ſo much for his own uſe. Leaſe fifty-one years granted, third of April, 1741, how much Mr. *Clarke* may incloſe; but no mention of heirs and aſſigns.

What does this prove? That the word heirs and aſſigns has never been made uſe of but when it ſhould.

The reaſon of relying on ſixty years poſſeſſion is, that it was thought neceſſary ſixty years poſſeſſion ſhould be proved. They were reſolved to try a method of precluding us; when, in all common inſtances, twenty years poſſeſſion is ſufficient: And I believe no body in court remembers an [511]
action of this nature. However, if ſixty years poſſeſſion be not proved, which would abſolutely bar an action, yet, if a poſſeſſion of about fifty years be proved, a continued, undiſturbed poſſeſſion, ſuch as it is highly improbable could have ariſen but under an eſtate in fee in the tenant, and thoſe under whom he claims; if this poſſeſſion ſtood many years after the preſent demandant came of age, unſhaken, unmoleſted, unqueſtioned; if it be imprudent, in the higheſt degree unnatural to ſuppoſe, and even incredible, unleſs upon demonſtration, That Mr. *Tyſſen* ſhould ſuffer a poſſeſſion ſo long, deceitfully to others, and injuriouſly to himſelf; if the precept by the ſteward of the lord himſelf, and ſuch a ſteward, of ſuch learning and accuracy, Sir *Edward Northey*, whom you will not preſume to have erred, only becauſe it is neceſſary to my friend to deſire you to preſume it, and becauſe he ſays it's poſſible, a præcipe iſſued, to inquire of the premiſſes how much *J. Flanders*, under whom the tenant claims, might incloſe to his heirs and aſſigns—If they return that he may incloſe the very premiſſes in queſtion to his own uſe, to hold and enjoy to himſelf, his heirs and aſſigns: If it is uſed as real eſtate; paſſed as real eſtate, by ſeveral deeds, by fine, by will—There is all authority, and the higheſt reaſon, to preſume that it did (as theſe circumſtances, precedent and ſubſequent, this evidence of record, evidence of poſſeſſion, evidence of the lord himſelf concur in proving) actually paſs in fee; and was meant and underſtood ſo to paſs.

As to no inſtances of eſtates in fee paſſing in the waſte of the manor, there are no inſtances of ſuch words uſed, except in the caſe of the lord himſelf, where it could paſs no otherwiſe, and here.

But

But this eſtate, ſay they, went in the courſe of perſonalty. *Oſbaldiſton* took by two titles, as perſonal repreſentative and reſiduary legatee, under the will *Catharine Flanders*. You will judge whether ſhe meant to give it to him as perſonalty, when the words of the will contradiſtinguiſh it clearly from the perſonal eſtate.

But the receivers have charged themſelves with the receipt of the rents. The queſtion is, whether quit-rents or conventionary rents. They take no notice which of theſe it is.

That they are not accurate is plain; for they take notice of three years received of *Catharine Flanders*, at a time when ſhe was dead. (It was objected, that the receiver had diſtinguiſhed this from quit-rent.) What does it import whether the receivers thought it quit-rent, or annual rent? And what mattered it to them which it was?

Let me cloſe all with the objection with which I began. You have before you a perſon claiming under a fair purchaſor, for good and valuable conſideration, who paid
[512] for the full value of a fee; never queſtioned for about fifty years, and never diſputed in the life of *Oſbaldiſton*, and his aſſigns, on whom they might have come for value. I ſubmit, from the hazard of eſtates in general, and the inequality of the riſque in this particular caſe, you would not have been inclined, even if the evidence had been nearly equal, to decide againſt a poſſeſſion ſo dearly purchaſed, enjoyed with ſuch expence, and carrying with it ſuch tokens and evidences of right. Very precarious, indeed, will be the condition of almoſt every man's eſtate, if the evidence by which it is to fall needs be no ſtronger than that offered by the demandant; and if evidence ſo various, ſo clear, unexceptionable as that on the part of the tenant, ſhall be inſufficient to ſupport it. Thus much to the general juſtice and ſafety. As to the particular juſtice of the caſe; if Mr. *Tyſſen* loſes any thing, he loſes what he and his anceſtors have overlooked at leaſt, and treated as not their own for a long courſe of years; and what he now claims not very favourably at leaſt. If Mr. *Clarke* loſes any thing, it will be that which came to him from his father, as by legal deſcent from a fair honeſt purchaſer; what at leaſt appears to have been intended for him in the manner in which he claims it by the father of Mr. *Tyſſen*, the now demandant. what he, and thoſe under whom he claims, have enjoyed openly, peaceably, continually, without diſpute or doubt of their title, for ſuch a number of years, as has been already ſtated

ſtated: What has been brought to its preſent ſtate of value at great coſts and trouble on the part of thoſe from whom it is now attempted to be taken by your verdict; what thoſe who claim cannot ſhew any title to have; and what has been enjoyed hitherto without any evidence of any other title of enjoyment, except in the manner and in the extent in which they ſtill hope the juſtice of your deciſion will enable them to retain it, if intent of parties, poſſeſſion, and the ſtrongeſt preſumption of law and reaſon are ſufficient to entitle them.

Lord Chief Juſtice *De Grey*—

Gentlemen, You are the recognitors of the grand aſſize, on a writ of right, to try the right to a piece of ground, now become valuable by houſes built upon it: And you are to decide upon the mere right, without regard to the poſſeſſion.

I think you will better underſtand the evidence if I bring hiſtorically the facts before you.

Mr. *Tyſſen* was lord of the manor of *Hackney*, where, I ſuppoſe, there was more waſte formerly than now.

By the common law, a lord of the manor may encloſe, leaving ſufficient to the tenants; and this is called approvement: But he muſt ſhew he does leave ſufficient. A grantee cannot do the ſame. This, probably, introduced the [513] mode of providing him beforehand with the acknowledgment of the tenants.

This cuſtom has been prevalent in the manor about a century, and, with a few ſcattered inſtances, in the former century.

Here is a precept, iſſued by the ſteward, to enquire how much *J. Flanders* may encloſe of the waſte in ſuch a place, being the premiſſes in queſtion, to the uſe of himſelf, his heir and aſſigns; and the return is, "That he may encloſe "the premiſſes in queſtion, to hold and enjoy to himſelf, "his heirs and aſſigns for ever: But provided, that neither "his heirs nor aſſigns ſhall build any thing againſt a certain "houſe."

It appears *Flanders* was in poſſeſſion of the premiſſes after this return: No grant appears, nor leaſe.

He died about 1720, his wife took out adminiſtration; and, as adminiſtratrix, ſhe enjoyed the premiſſes. There was an houſe at that time.

She gives by her will her houſe, and by the latter part all her real and perſonal eſtate, to *Oſbaldiſton*; whom ſhe appoints her executor and reſiduary legatee. Whether therefore,

fore, for years or in fee, it would paſs. She paid rent, and *Oſbaldiſton* pays rent for two years afterwards.

Two years before Mr. *Tyſſen*, the now demandant, came of age, Mr. *Oſbaldiſton*, with no title but under the will, as far as appears, mortgages in fee. The mortgagee does not appear to have enquired into the title, and pays 1000l. upon it. In 1742 he pays 500l. more, and purchaſes the equity of redemption; and a fine is to be levied for further aſſurance. A fine is accordingly levied, and it goes upon the poſſeſſion, and what effect he might ſuppoſe the fine had.

It is obſervable, that in this conveyance no notice is taken of *Oſbaldiſton*'s title; and he ſets forth the houſe as partly built by himſelf and part before, without ſaying by whom. You will judge how far this ſeems to effect the fairneſs of the title.

You will conſider farther, whether in 1706 there was a leaſe for years, or a grant in fee: One or other you are to preſume.

It is obſerved on the præcipe and return, that not only *Flanders* perſonally, but his heirs are intereſted; and his heirs are to comply with the condition expreſſed in the return.

[514] As to the rent made payable, it is ambiguous: In point of quantity, it is what we ſee reſerved on the building leaſes; but it might be reſerved upon a grant in fee.

Another objection, if it had been a grant for forty-one years, in the year 1747 Mr. *Tyſſen* was much above a minor, and ſuffers poſſeſſion till 1773. This is not a bar, nor uſed as ſuch; but only as evidence, upon the tacit acknowledgement for twenty-five years, and to ſhew that it was not a term of forty-one years; and no middle caſe is ſtated: If it was not a term it was a fee.

The fine is no farther than as proof that *Oſbaldiſton* meant to convey a fee; for it is no bar when tenant for years levies a fine.

Mr. *Tyſſen* deſires you will obſerve how far this ſuppoſition of a conveyance in fee agrees with the general uſage, before, at the time, and after. This is only a circumſtance againſt their circumſtances of preſumption.

They deſire you would conſider that poſſeſſion has gone accordingly, as of fee. But to this contrary preſumption is ſet up, that it does not appear how the wife took it; ſhe might take it as perſonalty: That *Oſbaldiſton*, who took from her, might take a perſonal repreſentative. And as to

the

the words of the will, perhaps much ſtreſs is not to be laid on them, as it is certainly very inaccurately worded.

Another thing, they rely, that if *Clarke* ſuffers, he ſuffers by his own fault; for he relied on the poſſeſſion, and had no title deeds. And he waited till 1742 before he relied on the fine, which could not be good if it had been from one ſeiſed of the freehold, right or wrong, before 1747: And if by one, as they ſay, poſſeſſed of a term only, it was void from the beginning, and non-claim could not make it good.

The receiver's account is only made up for Mr. *Tyſſen* by his agents, and bars no one elſe.

I will now ſtate the evidence. Conveyance by leaſe and releaſe from *Oſbaldiſton* and wife to *G. Clarke*. This is a mortgage in fee, and recites that he has a good, abſolute, and indefeaſible eſtate of *fee* ſimple in the premiſes, and has good and lawful power right and title, to convey the ſame in fee except only a quit-rent of ten ſhillings, due to the lord of the manor, and he covenants to convey accordingly.

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* His Lordſhip proceeded with the reſt of the evidence: That in 1742 *Oſbaldiſton* releaſed the equity of redemption in fee to *George Clarke*, no evidence of fraud. Covenant that eſtate is free from incumbrances; and to levy a fine. In 1742 a fine levied by *Oſbaldiſton* and his wife, to the uſe of *George Clarke*, (the father of the tenant) in fee: The tenant is admitted to be his heir. Poſſeſſion proved in the father and ſon from that time to this; a deed poll of attornment of *Oſbaldiſton* and the tenants, to *George Clarke*: This, as is preſumed, might be a fee.

Evidence on the part of the demandant—That his anceſtors have been in poſſeſſion, and lords of the manor of *Hackney* before 1706. Uſage to iſſue precepts, and make returns, in the nature of writs of *ad quod damnum*. And if return that it would not be prejudicial for lord to encloſe, uſed to encloſe ſo much as was ſet out in ſuch returns, and make leaſes for years; and to be ſure he might grant in fee if

* The trial laſted, I believe, about eleven hours. Vide this caſe and the form of proceedings in the third volume of Serjeant *Wilſon*, from whoſe learned Report I have taken the liberty to borrow the ſubſtance of the ſumming up, from this mark.* I was preſent at the whole of the trial, but my paper failed me, and I did not take notes (or at leaſt not that I can make out) at the latter end, ſo far as from the above mark.

Vide alſo Sir *William Blackſtone* on the writ of right, and its incident trial by *Battel*, vol. 3. c. 10. Ch. 22. ſ. 5. Vol. 4. c. 27. ſ. 3. Ch. 33. ſ. 2. in 4 & 5.

if he pleaſed; but by the uſage it appears they were all leaſes, and no inſtance of a grant in fee.

As to the draught which came out of *Oſbaldiſton*'s hand, that if one were to conjecture, one might, that Mr. *Tyſſen*'s attorney at that time made the draught. A draught the leaſt kind of evidence—leſſee might refuſe becauſe he wanted a fee, or did not like the covenants and conditions. Nothing appears to have been done in conſequence, and doubtful whether ever any leaſe.

Strange how both parts of a leaſe (if ever there was one) could be loſt or deſtroyed; if *Oſbaldiſton* had deſtroyed the original, one would think he would alſo have deſtroyed the draught; but no evidence of deſtruction, becauſe no poſitive evidence of a leaſe; nothing but circumſtances. That the counterpart, ſuppoſed to be in the hands of the lord of the manor, is alſo loſt. (If there ever was one.) That if there was a leaſe, it might be for ninety-nine years, for anything that appeared, and ſo, that way, the right would be ſtill in *Clarke*, the tenant to the writ.

[516] That theſe draughts appeared to be the weakeſt poſſible evidence to prove that a leaſe exiſted. If they preſumed a leaſe, upon the ſlender evidence of theſe draughts, they muſt preſume it to have been according to the draughts, that is, for forty-one years.

This is the ſubſtance of the evidence on both ſides; on which you are to determine whether the tenant has a greater right to hold the tenements in queſtion to him and his heirs, or the demandant to hold the ſame to him and his heirs, as he has demanded them.

The recognitors of the grand aſſize withdrew for about the ſpace of half an hour, and then brought in

VERDICT for the DEMANDANT.

B. R.

Caſe of Sir John Carter.

ON a motion for an information, in the nature of a *quo warranto*, againſt Sir *John Carter*, to ſhew cauſe why he exerciſes the office of burgeſs in the borough of *Portſmouth*.

The charter gives power to the majority of the mayor and aldermen to elect ſuch and ſuch like as they ſhall chooſe to be burgeſſes of the corporation.

On

One of the objections was, that at the time of his being choſen, Sir *John Carter* was an infant, under the age of diſcretion, and that he was then admitted a burgeſs; which election and admiſſion was illegal and void.

And it was contended, that all the elections of mayors and recorders ſince this election of Sir *John Carter* were illegal and void, in conſequence, ſuppoſing he was illegally choſen burgeſs of the corporation.

With reſpect to the firſt objection, it was ſaid that in two caſes which had been cited on the other ſide, (one from *Barnardiſton*) in both Lord *Hardwicke* is ſaid to have declared, that he did not know it had ever been determined: And that it does not appear that either of thoſe caſes have been determined to this hour.

That, on the other ſide, to repel this objection, it did not ſeem neceſſary to cite many caſes, and that there ſeemed no reaſon againſt the infant's being elected into ſuch an office; [517] for that the right was derivable upon him then from thoſe who had the power to confer this privilege, and might be exerciſed afterwards.

That this was a miniſterial office; and miniſterial offices may be executed by an infant; and that by deputy an infant may execute even a judicial office in moſt caſes.

Caſe of the Duke of *Bedford*, on an information to ſhew cauſe why he exerciſed the office of the *Bedford* company.

Firſt objection, that he was not ſworn before the proper officers, nor in the proper place. On this the rule was made abſolute.

Second, that he was a minor; and upon this latter the court did not determine, but conſidered the objection in a manner that infers, if it had been neceſſary to have determined, it would not have prevailed.

Beſides this caſe, (which at leaſt ſhews the objection was far from thought concluſive, or very ſtrongly founded) on the conſideration that the practice in a vaſt variety of boroughs, and even in this, has gone in ſupport of this kind of elections, it is to be preſumed the objection will not now meet with any great degree of favour.

As to the ſecond objection, that this election muſt neceſſarily be preceded by ſummons, and that there was no good mayor to make a ſummons, and therefore no good election. The anſwer, that all who could have been within the reach of the ſummons came, and but one of the body was abſent, who

who was out of the reach of the ſummons, and came not, by reaſon of particular buſineſs.

That here was not a caſe of filling up theſe elections with infants, to the prejudice of others, who might otherwiſe have been choſen, the number being indefinite.

As to the majority of the mayor and aldermen, that this was ſufficiently anſwered, if when ſix aldermen, and the mayor being preſent, the aldermen voted; nay, even if the mayor had been abſent.

It is certain as to the former objection, of age, that the king can confer a peerage on a perſon under age; and a peerage certainly infers a judicial truſt.

Lord *Mansfield*—How is it when they are entitled by ſervitude? Are they ever admitted before of age?

[518] [*Note*, It ſeemed that in ſome caſes the ſons of freemen were freemen by deſcent, even before the admiſſion of their parents.]

Cro. Car. 576.

Infants are capable of taking of their own private benefit any thing that is not prejudicial to the public. This is a mere perſonal franchiſe, with no adminiſtration of the court buſineſs; nor has he any thing upon the choice of a mayor.

If they ſay an infant cannot be elected burgeſs, they muſt ſay the king cannot appoint an infant burgeſs; nor could he have done it upon the original conſtitution. If the king could, he has given them full power; for he has given them power to elect ſo many and ſuch as they ſhall chooſe.

That acquieſcence for many years, even down from 1751, when Sir *Thomas Gibbons* was elected a burgeſs, and many others ſince, ought to be grounds to avoid diſturbing the matter farther.

Statute *W.* 3. That no perſon under the age of twenty-one ſhall be elected to ſerve in parliament, and that if any be, ſuch election ſhall be null and void; and a penalty if any under age preſume to ſit. This ſhews that before the act it was not thought or underſtood by the legiſlature, that ſuch election was void; but that a ſpecial proviſion was thought neceſſary, to make void for the future, as to that particular caſe of elections to ſerve in parliament; which would not have been if it was void generally before.

Burgeſs not within the teſt-act, *Fitz-Gibbons*, 193. And the reaſon aſſigned is, becauſe he does not exerciſe a magiſterial office in the corporation.

There

There were ſix counſel ſpoke againſt the rule, and ſix were going to ſpeak on the other ſide.

Lord *Mansfield*—The only thing we are now conſidering is, whether the rule ſhall be made abſolute; that is, whether it ſhall go to trial.

The only thing which ſtruck me is what concurred in the latter part of the argument. It was ſaid, upon circumſtances, that the court would not interpoſe, to diſturb the peace of the corporation. And if there had been a great courſe of years, and it had been likely to go to the extinction of the corporation, it might have been ſo.

This being on a point of doubtful law, the argument from [519]
lapſe of years (there not being any danger of extinction of the corporation, and the party complaining not being a member) does not apply, as beyond matter of fact.

Indeed in a caſe of a dubious fact, whether reſidence or not reſidence, they were not permitted to proceed, having ſtaid an unreaſonable time, till the proofs of reſidence might reaſonably be preſumed to be extinct.

As to the queſtion in law, whether an infant is capable of being choſen a burgeſs, it may be a very conſiderable queſtion. To be ſure, an infant is capable of all grants of intereſt and property.

Suppoſe the crown had appointed an infant on the firſt inſtitution, admiſſion would not have been neceſſary.

The nature of the privileges of burgeſſes may make a great difference.

But it goes concluſively to grant the rule abſolute: It is ſaid, don't grant the rule abſolute, becauſe it has never been decided; becauſe it is a point of very great conſequence, and may diſturb the corporation. But it is therefore that the court will grant the rule abſolute; becauſe it is of great conſequence; becauſe it has never been decided; becauſe almoſt all the corporations in the kingdom are intereſted.

It is ſaid the caſe before Lord *Hardwicke* ſtands upon a demurrer. Is not this a reaſon why it ſhould go to trial, and not be decided in a ſummary manner, where there can be no error againſt our judgment?

But it ſeems (it is ſaid) it's determined in this court; there is a ſolemn judgment: And *Barnardiſton* is cited. The ground of the determination and the nature of the burgeſs's office there is not ſtated: And I believe that it was a matter of property and intereſt rather than of truſt.

The

The court was clear, as to the firſt objection: Then, ſays the ſerjeant, the court declared the other objection was not material; that is, I ſuppoſe, becauſe the rule went abſolute on the firſt objection; and therefore not material to conſider the other.

No meeting of the aldermen without a mayor could be good.

And he muſt act, *eo nomine*, as mayor.

[520] It is a clear caſe to make the rule abſolute, indeed as of courſe.

RULE ABSOLUTE accordingly.

Recordari facias loquelam.

THE writs of *recordari facias loquelam* are conditional.—If the cauſe be true, then he is to return the writ.

Plaint.

DEFENDANT cannot legally remove plaint without cauſe; plaintiff may.

Coſts on the Statute.

WHERE an indictment is removed by *certiorari* from the quarter-ſeſſions, the maſter ſhall tax the proſecutor his coſts; and if not paid within ten days an attachment ſhall iſſue: And alſo the recognizance ſhall ſtand as a ſecurity.

Error.

IT ſeems bail are not anſwerable for coſts in error.

Outlawry.

IT being on a felony, the defendant was brought to aſſign error in perſon.

And he aſſigned for error ſeveral cauſes.

1. That no public proclamation is mentioned to have been made.

2. That

2. That it is not mentioned he dwelt out of the pariſh, and therefore proclamation was made in the next adjoining pariſh.

3. Nor that it was made immediately after the ſermon.

4. Nor forthwith after the ſervice, as directed, if no ſermon.

That there was a miſnomer of the coroner.

That he is ſtated to be within the kingdom; whereas, in truth and in fact, he was abroad the whole time.

[521]

Lord *Mansfield*—This laſt of the objections is an error in fact, which the attorney-general will agree to confeſs. As to errors in point of law, it may be material to conſider them.

The next day Mr. Attorney-general prayeth aſſignment of the error in fact might be read, and it is read accordingly.

Judgment, that the OUTLAWRY be REVERSED, and DEFENDANT RESTORED to all that he demands.

New Trial.

IN a caſe where a verdict had been found againſt evidence, but according to the merits. The court will not grant a new trial where the jury have found according to the juſtice of the caſe, tho' they may have found againſt the form, and may have been wrong in ſo doing: For when the ſubſtantial juſtice appears to have been anſwered, the court will not ſuffer the chance of its being defeated; nor the parties to be turned round to a ſecond trial, when the merits have been decided.

Lord Archer *againſt* Whitehouſe.

TRESPASS for digging the ſoil of the plaintiff's heath.

Defendant juſtifies, under a conveyance from *Sherlock*, late Lord Biſhop of *London*, who demiſed the ſoil in queſtion, as of his own purchaſe, to Sir *Thomas Gooch*, under whom the defendant juſtifies.

The jury found for the plaintiff.

This was on a motion for a new trial.

Evidence from the report, that the plaintiff had brought action for damages done by cattle on the warren, which was the place in queſtion.

That

That there had never been any rent paid to the biſhop.

[522] That the lands had been always held, and reputed to belong to the lord of the manor.

That rents were regularly paid to Lord *Archer*'s father.

That ejectment was brought againſt one of the tenants, who refuſed to pay rent, and his lordſhip turned him out of the manor.

That he never heard of any rents paid to the biſhop; but about fifty years ago rent had been demanded by the ſteward of Sir *Thomas Gooch*, who claimed in the biſhop's right.

Another witneſs, as to the reputation of the ownerſhip of the ſoil, and the ejectment againſt the tenant refuſing to pay rent as above.

They ſet forth a leaſe of *H.* 8. and a grant of *Philip* and *Mary*, which recites the leaſe, and grants *totam warrenam cuniculorum ac unum* tenementum *noſtrum* ſuper *eandem* warrenam *ac univerſum ſtagnum noſtrum ſuper eandem warrenam continens per æſtimationem, &c.*

Evidence for the defendant, that the ſoil of the heath had always been reputed to belong to the biſhop: That only the biſhop's tenants had a right to fiſh in *ſtagno prædicto.*

That rent had been paid to the biſhop.

That about fourteen years ago an acknowledgment had been taken of encroachment upon the heath.

At the trial Serjeant *Sayer*, who then ſat in the commiſſion of aſſize, obſerved the preſumption was in favour of the owner of the ſoil; and that an ejectment was a ſtrong aſſertion of ownerſhip. That the fiſhing might well agree with the ſoil, being in another; but not ſo well the cutting of turf, whereby the feed of the rabbets was diminiſhed.

In point of law it was contended by Serjeant *Davy*, at the aſſizes, that by grant of the term the ſoil was ſevered from the manor.

Serjeant *Hill*—That *warrena cuniculorum* was different from *warrena* ſimply, and that after the term the ſoil would reunite to the manor, and according well paſſed under the grant of the reverſion by *Philip* and *Mary*.

The new trial was moved upon two grounds.

[523] 1ſt, That one as for a ſuppoſed miſdirection of the jury.

2dly. The other as for a verdict againſt evidence.

The

The warren was in another perſon at the time the manor paſſed, but the grant of the reverſion of the warren was under the ſame inſtrument by which the manor paſſed.

On the other hand it was relied on, that nothing leſs than the ſoil paſſed with the franchiſe, *unum tenementum ſuper eandem warrenam.* Now this tenement could be only upon the ſoil, and not upon the incorporeal franchiſe, and metaphyſical ſubſtance of the warren.

Lord *Mansfield*—What title do you ſet up? It certainly comes to the manor by the leaſe from *H.* 8. it could not come to your hands but by a leaſe from the lord of the manor: I ſhould like to ſee ſome ſuch leaſe. You have no ground. It is the cleareſt caſe in the world. *H.* 8. granted a term; *Philip* and *Mary* grant the reverſion of the warren, together with the manor: They clearly paſſed jointly.

You have the enjoyment of the warren; you muſt have it by ſome written title; you have not ſhewn it: We ſhall preſume it was becauſe either the words were not ſuch as would paſs the ſoil, or expreſsly nothing but the franchiſe.

Here you have ſhewn no title—the verdict will be no bar whenever you can ſhew one.

Replevin.

HERIOT. Cuſtom ſet forth; namely, that the lord is entitled to the ſecond-beſt beaſt at every death or alienation of a tenant.

And farther, that if the tenant has but one beaſt, then he is to pay the beaſt; and if he has no beaſt, then proviſion for a certain compenſation in lieu of it.

In the evidence of the cuſtom it appeared there was an exception of *meſne ſigniories* and manors, lands holden in ancient burgage; and alſo of alienation to the uſe of *alienor* and his heirs, or to the uſe of the laſt will and teſtament, or as jointure to his wife.

Mr. *Bearcroft*—The queſtion ſubmitted to the court is, whether the cuſtom ſet forth on the cognizance is agreeable to evidence. The cuſtom is ſet forth as a general cuſtom in the manor, that the lord is entitled to take after the death of every tenant who died ſeiſed, (&c. as above.) He called many witneſſes to prove the cuſtom exactly as it was laid. The parol evidence not being full, the decree in the court of the duchy of *Lancaſter* was produced in evidence. And, taking the cuſtom as it appears on the face of the de-

cree, it will appear firſt to your Lordſhip, that the exception only extends to the laſt inſtances, reſpecting alienation.

The firſt words are as general as can be. "Upon all "and every alienation of all and every piece or parcel of "land, freehold or cuſtomary." And I apprehend the exception only extends to the laſt inſtances, which do not affect our caſe. As to the exception, where there is no beaſt, it is very reaſonable; but it makes no part of our caſe.

Mr. Juſtice *Aſton*—How do you confine the exception to the laſt particular?

Anſwer—The decree goes on ſeveral caſes; firſt, where there are two beaſts; ſecond, where but one; laſt, where none. And then it takes up a new branch, and ſeparates the caſe of death, or alienation, and of this it makes a diſtinct ſentence, and goes upon points to which this caſe of ours does not extend—Alienation to uſe of alienor and his heirs, laſt will and teſtament, and ſettlement for his wife.

As to lands, they except only *meſne* ſignories, lands holden by knights ſervice, and ancient burgage.

Lord *Mansfield*—I am ſenſible in point of form the exception is good, though there is nothing upon the merits.

There is an exception of lands in ancient burgage, or *meſne* ſignories. As to knights ſervice, it is at an end.

Leave to have a new trial, on payment of coſts, and that the defendant be at liberty to amend.

Fenton's Caſe.

Eſcape.

DECLARATION ſtates a debt, arreſt, and ſubſequent eſcape.

It was objected, that there was no proof of the *capias ad ſatisfaciendum* delivered. But the *non eſt inventus* return
[525] ed by the ſheriff was held by Mr. Juſtice *Willes*, the judge who tried, ſufficient evidence againſt the ſheriff to conclude him.

It was farther inſiſted, that here was no arreſt; for that no warrant was ſhewn; and that the perſon who actually made the arreſt was ſon to the bailiff; and that the bailiff was within about thirty yards, but not in ſight.

Under

Under the directions of the court, it was left to the jury, who conſidered the ſon as aiding and aſſiſting his father.

6 *Mod.* 211. No determination; it was where the bailiff's aſſiſtant went up ſtairs. The bailiff did not go up ſtairs, but ſtaid at the bottom.

It was ſaid, that the diſtinction of law ſeemed to be, that the bailiff muſt be *quodam-modo* preſent.

On the objection taken that no warrant was ſhewn, and that the arreſt was not made by any ſheriff's officer.

This it was intimated had not been ſpoken to at the trial.

As to the bailiffs not being preſent, that there was evidence ſufficient before the jury for them to find him preſent, at leaſt ſo far as was legally neceſſary. And that the taking need not be expreſsly and manually by the bailiff; but the act of the ſon or ſervant is the act of the bailiff, within the ſtatute.

It was argued *ab inconvenienti* if the doctrine ſhould be held otherwiſe.

That there was a caſe in *Salkeld*, and in 3 *Modern*, upon this ſubject, with this difference only in *Salkeld*, that he ſays the bailiff was no way preſent.

As to non-appearance of the warrant, if this had been an action of falſe impriſonment every thing muſt have been ſtrictly purſued, and the authority clearly ſhewn; but otherwiſe here, where the ſheriff is charged civilly.

Lord *Mansfield*—Was this objection mentioned on the trial?

Mr. Juſtice *Willes* ſaid he had taken no note of it.

It ſeemed to be agreed at laſt, that it was curſorily mentioned at the trial, but not much relied upon.

It was ſaid, that it appeared in evidence that upon the inſtant eſcape, *Fenton*, the bailiff, ſaid, "Then I myſelf "muſt pay the debt." [526]

That as to the father's not being preſent, all evidence is to be conſidered according to the perſons to whom it applies, and the manner in which it is anſwered. If the father was not by, why did they not call the ſon, and prove he was not? If they denied the warrant, why not diſprove it by the officer? They having done nothing to negative the evidence, it ſtands in its full force.

Another counſel ſaid, that it appeared, as to the caſe in 3d *Mod.* that a verdict was given for the plaintiff; and that it did not appear that verdict had been complained of.

The ſheriff has no right to ſay to the plaintiff in this action, "I did not give a warrant in writing, becauſe, as between me and my officer, I proceeded as upon his diſcretion."

If he cannot ſay it, there is no evidence either way; ſo that the court cannot ſay there was a warrant. A writ delivered to the ſheriff, and endorſed by the officer to whom he gives it, to execute that proceſs.

Mr. *Wallace*—That it was very true, the plaintiffs alledged in their declaration, and were very ſtudious to prove an arreſt; and with reaſon; for if no legal arreſt no eſcape.*

Now to prove the arreſt, it muſt be proved either that he arreſted perſonally;

Or ſome body in his preſence, or by his command, or delegated authority.

Now as to the ſecond, no leſs authority than under hand and ſeal will be good, nor can any man be juſtified for making ſuch arreſt.

Your Lordſhip on ſuch a caſe, properly before you, would have diſcharged the priſoner; and it is ſtrange if the ſheriff ſhould abide the conſequences of the arreſt as legal, where, for want of legality, the priſoner muſt have been diſcharged.

They are obliged to prove two things; authority from the ſheriff to the bailiff, and an arreſt by the ſon, under that authority, and in preſence of the bailiff, or at leaſt by his command.

[527] Could not they have called up the ſheriff's officer, to have produced the warrant? Then, upon a refuſal, they might have called in parol evidence, to prove ſuch a warrant had exiſted.

But farther, had they proved the warrant, I ſubmit, this is no arreſt to charge the ſheriff.

The ſheriff may authorize a bailiff to arreſt; the bailiff may act ſolely, or with others; but they muſt act under his authority, and, as I conceive, in his preſence.

The evidence is, that the old man was in the houſe, and continued there—And your Lordſhip will find rods inſtead of yards, which makes it about two hundred yards.

Mr. *Cox*—That it would be extremely hard and inconvenient if this were to bind the ſheriff: For that this man ſtaid in a different part of the town from the bailiff, in whom the ſheriff

* Sublatâ cauſâ tollitur effectus.

riff placed his confidence; the ſon made the arreſt in his abſence, and in an improper place; and no attempt to ſhew *Fenton* heard of it till ſome time after.

Mr. *Morgan* objected, that the authority being demanded by defendant, and none ſhewn, therefore the arreſt bad.

6 *Rep.* 54. It was reſolved, that the ſheriff, or any other, by his authority, ought to ſhew at whoſe ſuit, for what debt, out of what court, and when proceſs returnable.

And ſo was Lord *Holt*'s opinion in the great caſe before him.

Lord *Manſfield*—It's a very hard action, and to be ſure, in an action attended with ſo much hardſhip, the jury has a leaning, as far as the juſtice of the caſe will permit.

One of the objections taken is, that the arreſt was not by the ſheriff's officer himſelf, the father being the officer, and the ſon the hand arreſting.

That the officer muſt be a party by preſence, giving authority, or ſome way, is certain. He need not be actually in ſight. The exact diſtance is not neceſſary; but he muſt be upon that buſineſs at that time.

A witneſs proved that he went out of the public houſe on purpoſe to arreſt him.

There is no certain ſpeaking of the diſtance at a particular time; only when the witneſs ſaw him he was about that diſtance. Now all evidence is to be weighed according to the evidence produced on one ſide, with what might have been produced on the other. Now the ſon was a very proper perſon to have been called by the plaintiff, to have given evidence againſt his father; for, in fact, they have brought this evidence againſt *Fenton*; for the bailiff always gives ſecurity. [528]

It was very fairly left to the jury, who have found upon a caſe not probable in its circumſtances: And if we granted a new trial we ſhould ſay that, upon the weight of the evidence, they ought to have found for the defendant, which in doubtful circumſtances we will not do.

As to the other objection, I think the return to the writ is ſufficient evidence againſt the ſheriff; for he ſhews thereby the *capias ſatisfaciendum* was delivered.

Mr. Juſtice *Aſton*—That there was great reaſon the bailiff ſhould be preſent, or ſo nigh as to be ſuppoſed in readineſs to act. Now he might have been out of the houſe; for they make the houſe three hundred yards diſtant at leaſt, and he could not be more—taking it thirty or forty rods—than

150 or 200 yards. It is certain he need not be in sight, because he may stand to watch.

Mr. Justice *Ashhurst*—That the arrest was good, though not by the hand of the bailiff, he being near enough to act.

That the slightest evidence of the existence of a warrant would have been sufficient. Now *Fenton*'s name appears indorsed on the writ, which is stated to be the custom of sheriffs, with respect to the officer to whom they deliver the warrant.

RULE for granting a NEW TRIAL DISCHARGED.

New Trial.

Covenant.

ACTION for breach of covenant. Defendant replies *non fregit conventionem.* The question turned upon repairs; and it appearing in evidence that there were thirty-eight years to run on the premisses, out of a term of forty, the jury thought the injury was rather to the possession than to the landlord. They found for the defendant; whereupon the plaintiff moved for a new trial: And for the rule they contended, "That whereas the defendant covenanted to
[529] "and with the plaintiff to keep the premisses, from time to "time, in good and sufficient repair." Now if the landlord was to wait till the end of the term, defendant might assign, and landlord be at a loss for his remedy. That if nominal damages had been found, so as to oblige the tenant to repair, it would have been sufficient.

Notice had been given to tenant to repair. The lead, it appeared, had been stolen off the house, and the tiles, to come at it. But the damage had been repaired in a great measure; and the jury said they believed there was not above a shilling damages upon what was left unrepaired. Mr. Justice *Aston* said, upon so small an occasion, they would not: And the court never was used to grant a new trial.*

Rule discharged. Absent Lord *Mansfield.*

Whitebread

* De minimis non curat lex.
Interest reipublicæ ut sit finis litium.
Res judicata pro veritate accipitur.
Periculosum est quod non bonorum virorum comprobatur exemplo.

Whitebread *againſt* Brookſbanks.

ACTION for money had and received, againſt an exciſe officer.

Queſtion, Whether the bounty to be allowed on exportation was to be determined by the average price, ſettled in the manner preſcribed by the ſtatute of his preſent majeſty, or the price at the exporting port.

Special Verdict, that the plaintiff drew from malted corn 2600 barrels of beer, when barley was under the price of twenty-four ſhillings per quarter: That the beer paid all the duties; that plaintiff claimed to be allowed one ſhilling per barrel on exported beer when barley was at or under the price above-mentioned.

The preamble of the ſtatute recites,

" Foraſmuch as it hath been found by experience that the " exportation of corn and grain, when the price thereof is " at a low rate in this kingdom, hath been a great advan- " tage, not only to the owners of land, but to the trade " of this kingdom in general:

" Be it therefore enacted, &c."

Then the act goes on to provide, that when malt or barley, Wincheſter meaſure, is or ſhall be at four and twenty ſhillings per quarter, or under (and ſo of rye and wheat, when at the prices in the act mentioned) in any port or ports of this kingdom, or of the dominion of Wales, every merchant, or other perſon, who ſhall put on ſhip-board in Engliſh ſhipping, the maſter and two-thirds of the mariners at leaſt being the king's ſubjects, any ſorts of the corn aforeſaid, with intent to export the ſaid corn, every ſuch merchant, or other perſon, ſhall bring a certificate in writing (in the manner the act directs) upon bond given of two hundred pounds at leaſt, for every two hundred tons of corn ſo ſhipped, and ſo proportionably, that the ſame ſhall be exported to parts beyond the ſeas, and not again landed in Ireland, Wales, Guernſey, Jerſey, or Berwick upon Tweed, ſhall be allowed by the farmers, commiſſioners, &c. in any port where the corn ſhall be ſhipped, for every quarter of barley or malt, ground or unground, two ſhillings and ſix pence.

[530]

The act whereon the defendant reſts his caſe is the tenth of his preſent majeſty, *c.* 39. intitled an act for regiſtering the prices at which corn is ſold in the ſeveral counties of Great Britain, and the quantity exported and imported.

And

And it recites, that "whereas a regiſter of the prices at "which corn is ſold in the ſeveral counties will be of public "and general advantage, be it enacted, &c." And it empowers the juſtices, at their general or quarter ſeſſions, after the 29th of September, yearly, to order and direct weekly returns of the prices of wheat, rye, barley, oats, and beans, from not leſs than two or more than ſix markets, and appoint a proper perſon, inhabitant of ſuch market-town, to make ſuch returns. And the lord high treaſurer is to appoint a proper perſon to receive ſuch returns, who is to enter them in a book, and publiſh them, or an abſtract, weekly, in the London Gazette, and four times a year make certificate of ſuch returns to the clerk of the peace of every county, &c.

And an account of the quantities of corn exported and imported from and to Great Britain to be tranſmitted annually, and kept by the perſon appointed to receive and publiſh the returns of the prices above-mentioned.

13th of his preſent majeſty, *c.* 43. The preamble re- "cites, that whereas the ſeveral acts of parliament hereto- "fore made, concerning the duties and bounties reſpectively "payable on the importation and exportation of corn and "grain, have greatly tended to the advancement of tillage "and navigation, yet nevertheleſs, it having been of late "years found neceſſary, on account of the ſmall quantities "of corn and grain in hand, and the ſhortneſs of the "crops, to ſuſpend the operation of thoſe laws by tempo- "rary ſtatutes; whereby the benefits derived from the ſaid "acts of parliament have been, during ſuch emergencies, "withheld and ſuſpended: And whereas the regulating the "importation and exportation of corn and grain by a per- "manent law, under ſuch general rules and proviſions as "might render, for the time to come, ſuch temporary laws "unneceſſary, would afford encouragement to the farmer, [531] "be the means of encreaſing the growth of that neceſſary "commodity, and of affording a cheaper and more con- "ſtant ſupply to the poor, and preventing abuſe in that ar- "ticle of trade; be it enacted, *&c.*"

The act goes on, that whenever the prices of ſeveral grains, *&c.* mentioned in the act, ſhall appear, according to the methods directed by the ſeveral acts of parliament, or after directed by the ſaid act, to be mentioned in the act, *viz.* middling barley at or above twenty-four ſhillings a quarter, all duties and cuſtoms payable reſpectively on wheat, *&c.* barley, bear, ſhall reſpectively ceaſe, determine, and be no longer paid, or payable, during the reſpective continuance

mance of ſuch reſpective prices as aforeſaid. And certain duties, mentioned in the act, are to be in lieu; to wit, ſix pence *per* quarter on wheat, two pence *per* quarter on all barley and bear, *&c.* and ſuch wheat, *&c.* barley, bear, *&c.* may be carried coaſtwiſe, and entered or landed in any other ports of this kingdom, where the prices of middling corn, grain, or flour, are at or above the reſpective rates aforeſaid, and aſcertained in the manner aforeſaid; under ſuch regulations as at the time of making the ſaid act.

That by the act of his preſent majeſty, the act of *W.* & *M.* is referred to, and the exportation is regulated at the prices at the port of London, and that the uſage down to 1770 has been ſo, and is found by the verdict; but that the act of 1770 altered the rule.

That the regiſtering act of the tenth had a different object than the bounty on importation or exportation—to fix permanently the limits of exportation or importation.

The act of the thirteenth of his preſent majeſty recites the convenience of a permanent law.

Then the practical rule of the ſtatute of *W.* ſtood unaltered, of eſtimating the price at the exporting port, which here was London.

It was contended, that the price of corn has ever varied in different parts of the kingdom; but it was not meant the average plenty or ſcarcity ſhould be the rule of the bounty to be allowed at a particular port. That it might be the rule for ſtopping exportation in a diſcretionary way; but till the exportation was prohibited, the bounty annexed would ſtand on the price at the particular port from whence the barley, bear, or other articles mentioned in the act were to be exported.

As to the policy, that if an exporter from a plentiful market were to be confined to the price at a ſcarce market, corn would remain a drug; it would be uſeleſs to the owner, and to the public in general: Whereas otherwiſe it might [532] turn the balance in favour of this kingdom, in commerce with others.

That as to any combination which it might be ſuggeſted might take effect, againſt this the parliament had provided. If the price falls it cannot be raiſed but by freſh ſupply. When there is an exportation largely made the price muſt riſe, and then there muſt be an importation, and the price will ſink to the exporting level again; ſo that the evil will cure itſelf.

That

That if the crude commodity is beneficial to a commercial nation, the manufactured muſt be a great deal more beneficial. Duty large upon the malt: on the beer, when made; and a great multitude of hands employed in the working of it.

If the tenth of his preſent majeſty has made no alteration if the thirteenth reſumes the former wiſely eſtabliſhed rule the plaintiff is entitled. It would be very hard, without an expreſs alteration; that a man ſhould be working, at a great expence, with ſuch an uncertainty who ſhould reap the benefit.

That the candour of the commiſſioners of excife was to be acknowledged, in putting the plaintiff to this eaſy way of trial: And that they hoped, from the juſtice of the court, that he ſhould recover by it. Mr. *Davenport* argued for the plaintiff.

Lord *Manſfield*—You have omitted ſtating this in the ſpecial verdict; though I thought it had been by conſent as you ſay. As the verdict ſtands the action could not be maintained. Commiſſioner takes as money due to the crown. It is an error upon the ſpecial verdict, which might have been cured by words of conſent inſerted. You can't have an action of this nature (but on payment) againſt an officer.

Mr. Juſtice *Aſton* ſaid, that it did not appear whether this was ſtrong beer or ſmall, and the bounty was allowed only on the ſtrong.

Mr. Juſtice *Willes* ſeemed to propoſe an amendment by conſent.

On the other ſide, Mr. Serjeant *Walker*—That this is not the caſe of corn, but beer.

The firſt act of parliament material to be conſidered upon this ſubject, ſince the ſtatute of *W.* is the firſt of *G.* 3. which, though it refers to the firſt of *W.* 3. does not drop an expreſſion whether at the price of the port of exportation, or at the average price. But till the tenth, I will take for granted, it was by reference confined to the port of exportation.

[533] But at the making of the latter act the legiſlature perceived the inconvenience. The price from the place of exportation would be a very uncertain ground of the bounty; there might be a very good market in London; there might be a glut of corn; they might be obliged to ſink the price. And then, on this conſtruction for which the plaintiff contends, they might be at liberty to export with the encouragement

ment of a bounty, and great quantities might be exported, while, in the mean time, there might be a great ſcarcity of corn in the other parts of the kingdom.

Lord *Mansfield*—Does the tenth of this king vary the bounty on corn, according to the average price?

Anſwer—No, my lord: It alters nothing.

In anſwer to theſe objections it was contended, that average price was merely an ideal price: That though the act does not ſpeak of the price of the beer itſelf, it ſpeaks of the commodity from which it is raiſed.

That the act of the tenth of his preſent majeſty is merely an act of enquiry: Varies no price; reſtrains no bounty; makes no alteration of any law exiſting.

That by the 13th they found they had gained the clear exporting and importing rules.

That if the conſtruction contended for againſt the plaintiff was to prevail, either a variation in the act or proclamation ſhould have been made; for that otherwiſe the exporter is brewing to a loſs, expecting profit,

Lord *Mansfield*—My only difficulty is, to ſee the ground on which the exciſe has gone: I mean in varying the former rate.

By the act of King *William*, giving a bounty on the exportation of corn at ſuch a price, the rule is by the exporting port.

The act of the firſt of the preſent king has been governed by the price of barley at the port.

The tenth goes on a very different ground; but whether politically or not has been ſince doubted, and it is not material to ſay.

The parliament determined to ſee, perhaps, how far exportation or importation might be allowed; and, perhaps, to make new laws.

Then the 13th determines the price of barley; and the bounty upon beer is to be governed by it.—If the parliament had meant to make a difference, it would have coſt them but three words; they could have ſaid "the average price" was to regulate the bounties. [534]

The revenue laws are generally attended to. They have ſaid no ſuch thing. If the original rule was (as admitted) by the port exporting, I ſee nothing ſince that can have varied it.

Mr. Juſtice *Aſton* obſerved, that the rule was according to the ſtatute of 1 *W.* which was recited by 1 *G.* 3. Then, as to the acts on the 10th and 13th, what has a man at the port

port of London to do with knowing the average price o barley?

The ſame words are to receive the ſame conſtruction, i nothing appears to alter; which, I confeſs, I am not ingenious enough to find.

Mr. Juſtice *Willes*—That the 13th purſued the forme rule.

Mr. Juſtice *Aſhhurſt*—That the caſe would be the ſame as if it had ariſen a year after the firſt of the preſent kin which is evidently governed by the firſt of *W.* and nothin ſince which can vary.

Curia—You muſt take it by conſent, without exceptio to the form of the action, or the circumſtance of its no being ſaid whether ſmall beer or ſtrong. I mention it fo the ſake of the precedent: For it would be attended wit terrible inconveniences if an action for money had and received could be brought againſt an officer acting under the circumſtances.

Note, For ſtatutes reſpecting corn, vide 51 *H.* 3. *ſt.* *anno* 1266. 34 *E.* 3. *c.* 20. 1 & 2 *P.* & *M.* *c.* 5. *R.* 2. *c.* 7. 4 *H.* 6. *c.* 5.

At what prices exportation to be permitted, vide 15 *H.* 6. *c.* 2. *anno* 1436. which allowed exportation when whe was at ſix ſhillings and eight pence a quarter, and barle three ſhillings, which is rather leſs than a ſixth part of th price at which wheat is forbidden to be exported by the 1 of his preſent majeſty; and rather leſs than a ſeven of the price at which barley is permitted to be exported the ſame act of his preſent majeſty: So great an effect h been produced in 337 years, by the encreaſe of ſpecie, an other cauſes, in lowering the value of money; and ſo litt at the ſame time does the relative value of wheat, compare
[535] with barley, appear to have altered. Vide alſo 20 *H.* *c.* 6. 23 *H.* 6. *c.* 5. 5 & 6 *E.* 3. *c.* 14. 1 & 2 *P.* *M.* *c.* 5. And it is very ſurprizing, that this laſt ſtatute a points preciſely the ſame price at which corn may be expor ed as the 15 *H.* 6. *c.* 2. had done, ſix and eight pence quarter for wheat, and three for barley, at the diſtance 118 years from the ſtatute of *H.* and not more than 2 from the 13th of the preſent reign. This no difference the firſt period, and a difference of ſix to one in the latt within leſs than double the ſpace of time, I ſuppoſe mu be aſcribed partly, as to the former, to the plenty a cheapneſs of corn, which the politic expedient of *Hen* the Seventh, in encouraging ſmall farms, had produce

and in great meaſure, as to the latter, to the vaſt introduction of commerce in the reign of Queen *Elizabeth*, and ſince, which has ſo exceedingly diminiſhed the value of money.

1 *Eliz. c.* 11. *ſ.* 11. makes no difference as to wheat, but as to barley, refers the ſtandard of allowing exportation to the 5th and 6th *Ed.* 6. which had placed it at 3s. 4d.

5 *Eliz. c.* 5. entitled an act touching politic conſtitutions for the maintenance of the navy, advances the ſtandard of exportation to ten ſhillings for wheat, and ſix and eight pence *per* barley: So that, as to barley, it doubled in only five years; and of wheat it raiſed the ſtandard of exportation one fourth: And the relative value between them, inſtead of two to one, and rather more, appears to have ſtood at three to two. This was in the year 1562; but in thirty-one years after, *anno* 1593, the ſtandard for exportation of wheat had doubled, and was riſen to twenty ſhillings; and barley was nearly doubled, for from ſix and eight pence it was riſen to twelve ſhillings.

In 1604, four years after the eſtabliſhment of the Eaſt India company, 1 *Ja.* 1. *c.* 25. *ſ.* 26. the ſtandard for wheat roſe to twenty-ſix ſhillings and eight pence, (an encreaſe of above one-fourth in thirteen years) and barley to fourteen ſhillings, which advanced the ſtandard of that one-ſeventh, and brought their relative value pretty near to the old proportion of two to one.

Anno 1623, in nineteen years more the ſtandard of wheat was carried on to thirty-two ſhillings *per* quarter, (an advance of one-ſixth) and barley to ſixteen ſhillings, (an advance of one-ſeventh) and their relative proportions ſtood now preciſely as two to one, as they had done in the 4 & 5 *Edw.* 6. and as they had nearly done in 15 *H.* 6. In 3 *Car.* 1. *c.* 4. *ſec.* 24. it ſtood unaltered; there was but four years between this and the precedent ſtatute; but in five years of Queen *Elizabeth*'s reign how great the variation is already remarked.

But in 12 *Car.* 2. *c.* 4. *ſec.* 11. *Anno* 1160, we find the [536]
ſtandard for exportation of wheat at forty ſhillings, and for barley twenty; ſo that in thirty-ſeven years the ſtandard of wheat had riſen near one-fourth, and of barley one fourth above its former height: And in one hundred and eleven years from 4 & 5 *E.* 6. it had riſen as to wheat to ſix times, and as to barley the ſame. And by 15 *Car.* 2. *c.* 7. *anno* 1663, entitled an act for the encouragement of trade, the ſtandard of wheat ſtood ſo high as forty-eight ſhillings,

ſhillings, or ſeven times the ſtandard of 15 *H.* 6. and barley twenty-eight or above eight times the ſame ſtandard.

Cole *againſt* Ingold.

Bill of Exchange.

ACTION upon a bill of exchange by the drawee of a promiſſory note againſt the acceptor.

Objection upon demurrer to the firſt count that a drawee upon a bill of exchange may come as indorſee againſt the acceptor; but it muſt be when acceptor has effects of drawer in his hands as acceptor is entitled to recover over againſt drawer if not ſatisfied.

On the other ſide that the count was good, and they were going to argue.

Lord *Mansfield*—Nothing in it: The acceptor ſays he has value: and if he has not effects our law is very good, he will not recover on the bare ſignature. I don't know that "VALUE RECEIVED" was neceſſary upon the count; *prima facie* acceptance is evidence of value received; though you may ſhew, as in all caſes, why the plaintiff is not intitled. Upon action on the caſe, the plaintiff muſt always recover upon the juſtice of his caſe.* Don't you bring a thouſand actions upon a promiſſory note, and they ſhew there was no conſideration; and that the plaintiff had notice there was no conſideration.

Note, The doctrine of bills of exchange being important and in frequent uſe; I hope I ſhall be excuſed in adding the following note concerning it, conſiſting of rules collected from deciſions in the books.

[537] Indorſee of a bill of exchange may be a witneſs. For mere indorſement of the name only does not transfer property. Vide *Salk.* 130. *Lucas* v. *Haynes*, *Paſch.* 2 *Ann. B. R.* and vide *ſupra Clark* v. *Pigot*, *Salk.* 126. 8. *W.* 3. to the ſame effect.

Bill

* Sunt jura ſunt formulæ de omnibus rebus conſtitutæ ne quis aut in genere injuria aut ratione actionis errare poſſit; expreſſæ ſunt enim ex unius cujuſque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ ad quas privata lis accommodatur. Vide the paſſage of Cicero pro Q. Roſc. cited in the motto to the 2d vol. of the Dialogues on the Law and Conſtitution of England.

Actio ad privatam litem ex æquitate legis accommodata quæ actio caſus noſtratibus dicitur ſemper prout juſtitia ex æquo et bono temperata poſtulat operatur.

Bill thus "pay to me or order" is a bill of exchange without more if accepted. *Sed* vide caſe below.

Butler v. *Crips*, *Tr.* 2 *Ann. B. R. Salk.* 130. Declaration on firſt bill want of averment, that 2d and 3d not paid would be fatal; but ſhall be aided after verdict. 1 *Salk.* 130.

Of bills of exchange that they need not be ſtamped. Vide 5 & 6 *W. & M. c.* 21. *ſec.* 5.

Of inland bills proteſt for non-payment. Vide 9 & 10 *W.* 3. *c.* 17.

Proteſt needs not be ſet forth in the declaration. *Salk.* 131. *Mic.* 2 *Ann. B. R. Borough* v. *Perkins.* 6 *Mod.* 80. S. C.

For non-acceptance, vide 3 & 4 *Ann. c.* 9. *ſec.* 4. which act gives the like effect and remedy to promiſſory notes.

Bill of exchange is not diſcharge of a precedent debt, unleſs it is part of the contract that it ſhould be ſo—*Clarke* v. *Mundal*, 3. *W. & M. Salk.* 124. But by the laſt mentioned act it is non-payment unleſs acceptor takes due courſe to obtain payment, and make his proteſt as there provided. Vide *ſec.* 7.

Bill payable to *A.* or bearer not aſſignable to charge the drawer; but good as between indorſor and indorſee; and the indorſement in the nature of a new bill. Drawer of a bill is a merchant *pro iſtâ vice* and for that purpoſe. *Hodges* v. *Steward*, *Paſch.* 3 *W. & M. Salk.* 125.

But *quære* as to the 5th point of a general *indebitatus* not lying upon ſuch bill of exchange for want of conſideration averred, and its being but *nudum pactum*; for though a promiſe by parol without conſideration is but *nudum pactum*, and will not bind in law (Vide Doctor and Student.) Yet when it is cloathed in writing (I do not mean by deed) the law will ſee ſufficient certainty and will enforce the payment. Vide the caſe in Sir *James Burrow*, of *Pillans* and *Roſe*, v. *Van Merop* and *Hopkins*, and the whole doctrine very fully and excellently laid down from page 1670 to 1672. And upon the authority of that caſe, one ſimilar was determined a term or two ago, which I propoſe to inſert in its place.

Acceptance of a bill by one partner binds both, if it concerns the joint trade; otherwiſe not. *Pinkey* v. *Hall*, *Salk.* 126. [538]

That indorſor is liable only on default of drawer, reſolved by *Holt* Chief Juſtice. *Mic.* 10 *W.* 3. *ibidem.*

Drawer not chargeable, unleſs he hath notice of drawee's non-payment in a convenient time. *Allen* v. *Dockwra*, *Mic.* 10 *W.* 3. *Treby* Chief Juſtice. *Salk.* 127.

Promiſe

Promiſe to pay *ſecundum tenorem billæ* after the day pro impoſſible: Yet it ſhall be performed expreſs, for it operates as a general promiſe to pay the money. *Jackſon* v. *Pigot*. 10 *W.* 3. *Salk.* 127. And vide *Mitford* v. *Wallicot*. 12 *W.* 3. *Salk.* 129.

Paſch. 11 *W.* 3. Held by *Holt* Chief Juſtice, that on an action on a bill of exchange there was no need to prove the drawer's hand; becauſe if the bill was forged, ſtill indorſor was bound to pay it.

But 2dly, the plaintiff muſt prove he demanded of drawer or drawee, and he refuſed; or that he ſought, and could not find him.

3dly, That in a convenient time; which, for foreign bills, he held to be three days, and no allowance for Sundays or holidays.

4thly, That in fairneſs he ſhould give notice; and, as it now ſeems, in law he muſt.

5thly, Demand muſt be proved ſubſequent to indorſement.

6thly, That if a man indorſes on a blank bill, he puts it in the power of indorſee to make what uſe of it he chooſes, either as an acquittance to diſcharge the bill, or as an acceptance to diſcharge the indorſor.

7thly, That in bills purchaſed by diſcount, bill payable to *A.* or bearer, is an abſolute purchaſe; but to *A.* or order, and indorſed blank, and filled up with an aſſignment, indorſor muſt warrant, as if no diſcount. *Lambert* v. *Pack.* 11 *W.* 3. *Salk.* 127.

Declaration againſt drawer good without an expreſs promiſe; for there is an implied promiſe in law. *Starkey* v. *Cheeſeman.* 11 *W.* 3. *Salk.* 128.

Clark v. *Martin*, and *Pollet* v. *Pearſon*. *Salk.* 129.

[539] Theſe two caſes, a promiſſory note not binding before the ſtatute, ſeem not to have been law, and the principle *ex nudo pacto non oritur actio* miſtaken, *v. ſupra* to the contrary of thoſe caſes.

Courſe of foreign uſance muſt be averred upon foreign bills, *Salk.* 131. *Buckley* v. *Cambell. Hil.* 7 *Ann. B. R.*

A. indorſes notes in ſatisfaction of a debt, which notes are accepted; and before receipt of the money drawer breaks; indorſor ſhall be liable, and not acceptor.

And by general law every indorſement is a new bill, and all and every the indorſers are liable as a new drawer; but that by cuſtom the indorſor may be only liable on default of the firſt drawer.

Indorſor

Indorsor is not discharged but by actual payment; or neglect or default of indorsee to receive in convenient time, which in foreign bills was held usually three days, and that it ought to be the same of inland; but that this would vary according to the usage amongst traders, and the circumstances to be considered by the jury.

And lastly, that assignment of note payable to *A.* without the words "or order," charges indorsor, and not the drawer. *Hill et al.* v. *Lewis. Salk.* 132.

Indorsor makes himself liable in the same manner as drawer; and therefore no need to aver that money was demanded against drawer or first indorsor, in order to charge a second. *Harry* v. *Perrit, Tr.* 9 *Anne.*

On an action on a bill of exchange it is not necessary but rather superfluous to set forth the custom at large. *Soper* v. *Dible. Raym.* 175. 8 & 9 *W.* 3.

Note payable to *A.* or bearer; bearer cannot maintain an action in his own name, because of the inconvenience; for then any who finds it might; otherwise of note payable to *A.* or order, for that is certain. *Nicholson* v. *Sedgewick.* 9 *W.* 3. *C. B. Raym.* 180.

Special custom of merchants ought to be pleaded on action on a bill of exchange; otherwise of general. *Bellasis* v. *Hester. Raym.* 280. 9 *W.* 3.

Bill not indorsable of part without acknowledging satisfaction of the rest; for a man cannot apportion a personal contract, to make a man liable to two actions, where by law he was liable to one only. *Hawkins* v. *Cardy. Mic.* 10 *W.* 3. *Raym.* 360. *Sed v. Wegerstoffe* and *Keene. Str.* 214. which seems to the contrary.——Before declaration of ac- [540
ceptance the bill was due, and evidence of acceptance after the day of payment. Plaintiff shall not recover; for his evidence does not maintain his case. *Jackson* v. *Pigot. Raym.* 364.

Indorsee of a bill receives money for it; this is a sale of the bill: But if he had indorsed it, he would have become a new security. *Governor and Company of the Bank of England* v. *Newnham. Easter.* 11 *W.* 3. *Raym.* 443.

Of days of grace, vide *Mutford* v. *Walcot. Raym.* 574.

No protest for non-payment before the day. *Anon. Raym.* 743. But for better security it may. If indorsee accepts the smallest sum from the acceptor he can never resort to the drawer. *Tassel* v. *Lewis. Raym.* 743.

A foreign bill ought to be proteſted on the laſt day of payment; or if the laſt be an holiday, then on the ſecond of the three days. *Ibid.*

Bill payable to *A.* or order held not a bill of exchange by Lord *Holt. Raym.* 757. *Clerke* v. *Martin:* But I take it that is not now held to be law, but the contrary.

A ſervant cannot receive a note inſtead of money, without his maſter's conſent. *Ward* v. *Evans. Tr.* 2 *Ann. Raym.* 930.

A bill payable upon a contingency, not a bill of exchange for to be a bill exchange it muſt be negotiable. Vide *Jenand others* againſt *Herle. E.* 10 *G. Raym.* 1361. So if out of a particular fund. *Ibid.*

Promiſſory note to be accountable to *A.* or order, for 100l. value received, held a good bill of exchange. *Mar* v. *Lee. E.* 11 *G. Raym.* 1396.

So to pay 101l. value received of the premiſſes in Roſemary-lane. *Burchell's* caſe. *Mic.* 2 *G.* 2 *Raym.* 1545.

Bill to pay out of fifth payment when it ſhould become due held not a good bill of exchange. *Haydock* and *Lynch. M.* 3 *G.* 2. *Raym.* 1563.

Declaration need not aver that defendant ſigned the note [or bill.] *Elliot* v. *Cooper. M.* 11 *G. Raym.* 1376.

[541] Promiſſory note jointly or ſeverally, in the alternative held bad, *M.* 2 *G.* 2. *Raym.* 1544. *Neale* and *Ovington.*

What will amount to acceptance. *Wilkinſon* v. *Lutwidge. M.* 12 *G. St.* 648.

A man cannot be ſued here on acceptance of a bill of exchange abroad, after he has been diſcharged by the law of the country. *Burrows* v. *Jemino. M.* 13 *G.* 2. 2 *Str.* 733.

Indorſee indulges acceptor with time; This is at his own riſque, and not of the drawer. *Gee* v. *Brown. Str.* [illegible]

Not neceſſary to aver acceptance of a bill in writing. *Erſkine* v. *Murray. M.* 2 *G.* 2. *St.* 817.

Parol acceptance ſufficient in an action againſt acceptor. *Lumley* v. *Palmer. M.* 8 *G.* 2. *Str.* 1000.

Acceptance to pay when goods ſold held good. *Simſon* v. *Abbot. E.* 14 *G.* 2. *Str.* 1152.

Acceptance to pay as remitted not good. *Banbury* v. *Liſſet.* 14 *G.* 2. *Str.* 1212.

Indorſor may be charged without reſorting to anſwer. *Str.* 411. *Bromley* v. *Frazier*, and a very good reaſon given that this ſeems to have been one of the ends of making them aſſignable.

Contem

Contempt to take out execution both againſt drawer and indorſer. *Windham* v. *Wither*. E. 8 G. 2. *Str.* 515.

The order of an indorſee may ſue, as upon a general indorſement to himſelf. *Acheſon* v. *Fountain*. 9 G. *Str.* 557.

Intereſt on bill not allowed without proteſt. *Harris* v. *Benſon*. T. 5 G. 2. *Str.* 910.

Where a man has owned his hand to an indorſement he ſhall not ſet up forgery, by ſimilitude of writing. *Cooper* v. *Le Blanc*. *Str.* 1051.

In actions upon inland bills, brought by indorſee againſt indorſor, plaintiff ſhould prove demand, or due diligence, to get the money from the acceptor; but he needs not from the firſt drawer. *Heylin* and *Adamſon*. 4 *Bur.* 675, 678.

Evidence of cuſtom receivable to explain doubtful law, [542] but not to countervail eſtabliſhed. *Edie and another* againſt *Eaſt India Company*. 4 *Bur.* 1228.

Upon death of indorſee the intereſt goes to his executor. Vide the ſame caſe.

Bill of exchange forged and paid by drawer to indorſee, on valuable conſideration, he cannot recover againſt indorſee. *Price* v. *Neale*. 4 *Bur.* 1357.

To ſhip fortune or bearer negotiable. *Grant* v. *Vaughan*. 1516.

Mortgage.

ON an application upon the ſeventh of *G.* 2. that upon payment of mortgage-money, principal and intereſt, proceedings in ejectment might be ſtaid. Vide Herle's caſe, 1 P. W.

Againſt the motion—That this was a leaſehold eſtate, ſubject to a bond debt, and conſiderable ſimple contract debts; which deſcended to executors holding from the mortgagor: And that, as in caſe of an heir who was liable upon a bond debt, applying to a court of equity for redemption, he would not be ſuffered to redeem without paying what was due upon bond as well as upon mortgage, principal and intereſt, ſo here, the court exerciſing under the ſtatute an equitable juriſdiction, would not ſuffer the payment of principal and intereſt on the mortgage debt only to be good, ſo as to releaſe from the mortgage without payment of the debt alſo upon bond. And that it is ſo in the caſe of executors ſucceeding a leſſee.

The act of parliament of 7 *G.* 2. has a clauſe, that this power of the court of law, given by the act, ſhall not be

extended unless mortgagee gives notice of what he insists on. Application upon motion is not notice, within the meaning of the act.

The only case in a court of law was that in *Strange*; was that of *Stafford*.

Pr. Ch. 89.

Lord *Mansfield*—That is the very case in *Strange*. They don't take debt upon bond, unless against the heir; but no two characters can be more different than purchasor and heir. I don't see that case would decide on this; for they are very different.

[543] Mr. *Buller* further argued—That they could not see what was due.

Lord *Mansfield*—I suppose you have the title deeds in your possession, on the part of the plaintiff. Have you any case of taking debt against executors?

Mr. *Buller* said he thought the rule so general, that he did not cite.

Lord *Mansfield*—I believe so far otherwise, that it has many qualifications. What! take simple contract debt against judgment and bond creditors!

1 *Peere Williams*, 777, was cited. [Which is the case of *Coleman* and *Winch*; and Lord *Macclesfield* is there reported to have said, that if testator, being possessed of a term, mortgages to *A.* and also becomes indebted to *B.* upon simple contract, and dies, his executor, bringing a bill to redeem, shall pay both the mortgage and the debt by simple contract, because the very equity of redemption is assets to pay simple contract debts.]

Lord *Mansfield* desired the case might be sent for out of Chancery. And, on looking into the case, he said it was confined to the instance of there being no creditors of superior nature.

He added farther, that the court would say on what terms he ought to redeem; and the terms would be just the same as in equity.

Here is an attorney; the deeds are in his possession; the money upon bond; the bond, I think, he states to be for money lent to carry on business. Has the bill been delivered?

Enlarge the rule: Your debt is sufficiently secure. Let the executors make affidavit of the assets in their hands.

Mr. *Buller* desired they might know what past, or whether the whole of the premisses was subject to the mortgage, which as executors they could not know.

Lo

Lord *Mansfield*—They won't let you ſee their title unleſs you agree to pay the money.

Mr. *Buller*—That they might ſhew an abſtract.

Lord *Mansfield*—You won't get that without agreeing to pay. [544]

If you find it was money charged for procurement of a mortgage, which was his own money, it will be very ſtrong: It will be like the ſtory of the man who charged porterage for the turkey which his client ſent him as a preſent out of the country.

Inſolvent Act.

IN a caſe of inſolvency, Lord *Mansfield* ſaid, he remembered Lord *Hardwicke* directed the city marſhal to ſell his place.

[So that it ſeems where places can be ſold by permiſſion they are to uſe their endeavour to obtain that permiſſion, before they can claim the benefit of the inſolvent act; for the act, it was obſerved, diſcharges them on theſe terms; doing all in their power.]

Information.

Libel.

UPON motion for an information for a libel publiſhed againſt the Hon. Mr. *Charles Fox*, on ſhewing cauſe to the rule, the printer declared he was not privy to the contents, nor to its being put into the paper; and was greatly concerned it ſhould ever have been publiſhed, and ſtopped the ſale immediately when he diſcovered it: And hoped, therefore, that the court would not grant the information.

Lord *Mansfield*—It goes for nothing, and would be an excuſe for all ſorts of infamy.

RULE ABSOLUTE.

Certiorari.

MOTION for a *certiorari* to remove an order of ſeſſions, and an order of two juſtices confirming that order.

Objection—That it does not appear on the affidavits that application was within ſix months.

Anſwer—The juſtices are ſerved with notice.

Rule to ſhew cauſe. But on its appearing by the affidavits that it was a rule to remove an order of the laſt quar- [545]

ter-

ter-sessions, and of course must have been within six months.

Rule absolute *instanter*.

Bail.

In a case concerning discharge of bail the court was of opinion, that the bail never went farther than as a security in the original action. Therefore, when judgment cannot be opened in the original action, the bail shall not be liable.

In the case of bail above, though you declare upon the condemnation money, you never recover more than the debt.

Attorney.

Motion, that attorney shew cause why debt and costs should not be recovered against him for neglect.

Mr. Justice *Aston*—We cannot make ourselves judge and jury: An action is open. We will not try it in a summary way, and take the decision of debt and costs in our own breasts.

Mr. Justice *Ashhurst*—If there were any thing corrupt that might have been a ground: But it is in a jury's breast upon the circumstances. Perhaps they would think the man who was sued was worth nothing; and therefore nothing to be got from him, and they might not make the attorney liable to the whole debt and costs.

Injunction out of the Exchequer.

It was observed, that where an injunction is moved in the court of Exchequer, you may move to try the cause staying execution till the merits of the injunction be determined.

Lord *Mansfield*—The general injunction in the Exchequer stays trial. And where the defendant is beyond sea, there though his cause were ever so plain, the court of Exchequer granted an injunction till his answer came in. The exceptions to be sent to Rome, Grenada, or elsewhere, to be answered. And thus, where most ample justice ought to be done, in the case of foreigners, a man might be kept out of the clearest and plainest justice of the case. But of late years

years the barons, I believe, have corrected this. And now they will not grant an injunction in the caſe of a foreigner, unleſs upon hearing affidavits on the merits.

ON a motion to ſhew cauſe why defendant ſhould not be diſcharged on debt and coſts having been paid, and why a common bail ſhould not be accepted.

Arreſt on meſne proceſs; and defendant contended that he had been arreſted again for the ſame debt.

And that he is detained in cuſtody contrary to an agreement of the plaintiff.

Contended on the other hand, that they were ſeparate debts; for that he had aſſigned his effects to the plaintiff, and then the ſame day gives a warrant of attorney to confeſs a judgment; whereupon another creditor entered, and had execution of all the effects.

Mr. *Dunning*—That the nature of the proceedings ſhews the defendant is not under an arreſt for the ſame debt; the one being a joint action, and the other a ſeparate.

As to agreement—That on application at judge's chambers to be diſcharged, as having been twice under arreſt for the ſame debt, he failed.

That the plaintiff has only got 500l. for 2,700l. and has no hopes of any further remedy, unleſs by keeping his ſecurity, and retaining the defendant in cuſtody.

That the defendant is endeavouring to defeat all the ends of the agreement, ſo far as it was beneficial to the plaintiff, and to make his own advantage of it, without complying with the terms.

That all his creditors, as well as the plaintiff, would be diſappointed; the aſſignment being for the common benefit of all.

That he ſhould rather have moved to have diſcharged the rule with coſts, but that the plaintiff was already creditor for ſo large a ſum, and far from likely to recover the whole, much leſs coſts: So that he feared that part of the motion would be troubling the court in vain.

Lord *Mansfield*—There is no diſpute between the parties previous to this application, but upon delivery of the books. Another thing ſet up ſince is, defendant receiving the debt, and ordering creditors not to pay. Now the only thing [547] worn to (farther than information and relief) is a ſingle ſum: And the ground, after all, on which they went was, that the books were not delivered according to the agreement. So ſays the plaintiff; and on the other ſide, the defendant

fendant ſays they were; but the plaintiff would not comply with the agreement upon the delivery up, and diſcharge him.

I think the plaintiff has been wrong. The defendant might have been obliged to aſcertain the books by a ſchedule; and farther, to have delivered them upon oath. Therefore, upon delivering the books before maſter, upon oath, the defendant ſhould be diſcharged out of cuſtody.

Blandford *againſt* Froſt.

MOTION to ſtay proceedings on a *capias ad ſatisfaciendum*, and that defendant might be diſcharged out of cuſtody, for want of proceeding, within two terms after judgment.

This motion was grounded upon a rule, Trinity term. 2 *G.* 1, that priſoner, if not declared againſt within two terms, ought to be diſcharged; or if declared, and no farther proceedings within three terms; or if execution not taken out within two terms after judgment.

Like rule in the Common Pleas, 8 *G.* 1. twelve years after another rule to diſcharge from arreſt.

Caſe cited, *Boulter* and *Salmon*, defendant ſuperſeded for want of being charged in execution.

Contended, that no party can after a *ſuperſedeas* be taken in cuſtody, on any after judgment, by an action brought by the ſame plaintiff upon the former judgment. And that the practice was univerſal.

Mr. Juſtice *Aſton*—That the practice, ſo far from being univerſal, the officer ſays there is no inſtance. And the two caſes from the books go to the contrary. *Bonyton* againſt *Howlett*, 13 *G.* 2. never determined. Queſtion, whether the body of the defendant was liable to be detained, he having been before in cuſtody, and diſcharged out of execution. Juſtice *Lee* thought that his body ſhould never be liable again. Mr. Juſtice *Denniſon* doubted there being a judgment upon coſts alſo, whether the court could prevent his body being taken in execution.

[548] I will conſider of it.

Mr. Juſtice *Willes*—It ſeems to ſtand upon the ſame reaſon as a *ſuperſedeas* before judgment.

Afterwards, on the 14th of May, in the ſame term.

Lord *Mansfield*—We have looked into this caſe; which was a rule to ſhew cauſe why defendant ſhould not be diſcharged out of cuſtody, *&c.*

In

In the caſe of *Wright*, adminiſtrator, againſt *Keſwell*, a diſtinction is taken between execution upon meſne proceſs, and after judgment. And the court, on the whole, thought defendant chargeable after a *ſuperſedeas* upon meſne proceſs; but not after final judgment was ſuperſeded.

Boulter and *Salmon*. There the caſe was exactly the ſame as in this caſe; but nothing done, becauſe there was no application to bring him up.

Upon looking into the rule *Hil.* 8 *G.* 2. I think nothing more was meant than to prevent defendant being held to bail; becauſe it provides for a common appearance to be entered.

In the caſe *Mic.* 1745. defendant was not charged in due time: And upon being diſcharged, queſtion, whether he ſhould be charged in cuſtody upon action upon the former judgment. *Lee*, *Ryder*, and *Denniſon*, thought plaintiff ſhould not have the benefit taken from him: *Wright* otherwiſe; for ſo the Lords act might be evaded. Adjourned.

Str. 943. It appears no ſuch evaſion was allowed. But in the caſe in the year 1745. At nine o'clock, on the adjourned day, the court determined he might be charged in execution, having never been charged before.

Therefore, upon the authority of that caſe, and the ſenſe of the rule, my brothers are of opinion that this RULE ought to be DISCHARGED.—*Quære amplius, amice lector.*

Mandamus. [549]

ON a motion for a *mandamus*, to reſtore to the office of maſter of a free-ſchool in Northampton,

The application ſet forth the manner of chooſing, and that he was accordingly choſen, and had continued in the faithful execution of his office; and that he ought not to be removed, unleſs for fault or miſdemeanor properly ſignified, and the removal thereon regularly made, whereas there had been no ground of fault or miſdemeanor made out againſt him: And that he was diſcharged without any previous information or defence. And therefore he prayed of the court that he might be reſtored. Certificate of approbation of parents, and affidavit of a witneſs who did not approve the removal, and went away before it was done.

Mr. *Mansfield*, againſt the rule—That the ground made to the court to maintain the application for a *mandamus* to reſtore, reſts only on the ſingle affidavit of one of the burgeſſes.

That

That he does not ſhew he has a freehold in the office; nor what his title; nor whether removable at pleaſure, or not.

That by the 14 & 15 *C.* 2. he ſhould have ſubſcribed a declaration of his conformity to the liturgy of the church of England: And on non-compliance the election is void, and he does not ſhew that he has ſubſcribed.

And farther, that it appeared, on his own declaration, that he did not trouble himſelf about the ſchool, which was not worth his notice; but for indulging a pleaſure he had in giving trouble to thoſe who removed him. And whether the court would allow him a diſcretionary means of indulging his deſires on ſuch grounds.

That if he obtained the *mandamus*, all he could get, as of right, was only 7l. 10s. *per annum*; all the reſt depending upon the pleaſure of the corporation.

That they diſcharged the precedent maſter at pleaſure, and that they have always been ſo accuſtomed to remove. And if they might remove at pleaſure, the court will find they had very good reaſon to exerciſe their pleaſure in removing this man, and that he very well deſerved to be removed.

The whole corporation, who were preſent, removed him, the perſon who joins with him in the affidavit only excepted.

[550] They thought he was, as he had repreſented himſelf, a married man, about thirty; that, however, it turned out, upon his own confeſſion, being charged therewith, that he was not a married man, but cohabited with another man's wife. And thus it is ſtated upon the order itſelf, whereby they remove him.

As to the certificates, it's ſworn he told the people he wanted their names as a matter of form only.

[Lord *Mansfield*—I ſee one of them who ſigns the certificate is a marksman; who gives his opinion of the proficiency of the children in learning.]

Argued farther, by the counſel againſt the rule—That he had ſet forth no proper title; nor did it appear his intereſt in the office was a freehold, or any permanent eſtate; but that the expreſs contrary appeared by the affidavits on the other ſide. And that, as it appears by them, he is removable at pleaſure; and that the court muſt ſee he groſsly deſerved to be removed. They will not, it is hoped, grant a *mandamus*, to which the return would be "he was not a "proper perſon:" And no other effect could follow.

On

On affidavits it appeared, that one of the deponents, who ſwears he never ſaw a free-ſchool where the children had made ſo little proficiency, aſked the ſchool-maſter, on whoſe behalf the *mandamus* was applied for, the reaſon of this. And that he ſaid he did not think it a ſchool worth his notice; and believed, ſhould he be reinſtated, he ſhould not execute the office, as his only view was to give trouble to the corporation.

Affidavit of the burgeſſes, ſtating the conſtitution of the charity, and that the maſter is, and hath been always ſince the foundation of the ſchool, removable at their pleaſure. And they ſtate the removal of the precedent maſter; and ſtate the other facts mentioned by the counſel opening; and particularly that he wrote them a letter that he was a married man; but they ſay he cohabited with the woman, whom he pretended to be his wife, and then left her, and married another woman. And they ſay that they are informed, and verily believe, the pretended former wife was the wife of another man: And that it came out that ſhe was not really his wife, and that ſhe went off, on a quarrel, with an uſher. And then they charge him with being addicted to tippling and low company, and telling extravagant ſtories, and talking ſo of himſelf that his veracity was ſuſpected.

They ſpeak to ſavings of an hundred pounds made to the charity, by refuſing payments to a maſter who did not execute his duty; and an accumulated ſum of 400l. which they veſted in the funds, for the benefit of the charity. And [551] that, for the better encouragement of a man of proper learning and qualifications to undertake the ſchool, they had encreaſed the ſalary, and enlarged the number of ſcholars from twelve to twenty-five.

They ſtate that, at a meeting of the corporation, he was charged by the mayor of theſe offences of tippling, keeping low company, being a romancer, and cohabiting with another man's wife; which laſt (and moſt material) charge he acknowledged; and endeavoured to juſtify himſelf from being a romancer: But a circumſtance, they ſaid, was related by one of the burgeſſes, in proof of that charge from which he endeavoured to clear himſelf, but gave no ſatisfactory anſwer, and was therefore diſmiſſed by all the burgeſſes, except *Lloyd*, who made the affidavit in his favour, and went out before they came to vote.

That afterwards *W. J.* was duly elected, in his room, one of their body; a man of unblemiſhed character, and of

Queen's

Queen's college, Oxford, as they are informed and believe.

Two of the burgeſſes farther ſwear, that *R. B.* the ſchoolmaſter, who applied for the affidavit, deſired an inſtrument might be drawn, to continue him in his office for a certain time. And that they told him it would not be permitted, but he muſt take it as his predeceſſors had done.

The mayor acknowledges *W. J.* above-mentioned was his ſon-in-law; but ſays that he never uſed any influence in his behalf, to the beſt of his recollection and belief.

Affidavits of parents of the children, charging him with tippling and romancing.

Another, who believes he greatly neglected the ſchool.

Lord *Mansfield*—As to the objection on the ſtatute 13 & 14 *C.* 2. how does it appear he did not ſubſcribe?

Mr. *Dunning* argued, that as a ſufficient ground of a *mandamus*, it was only neceſſary a man ſhould be removed from a freehold not competent to be determined by that removal: And then, whether in fee or for an hour, if that hour unexpired he ſhould be entitled to a *mandamus*.

Lord *Mansfield*—There is no doubt that is right. And I ſtopped Mr. *Bearcroft*, when arguing the neceſſity there ſhould be a freehold.

[552] It has been urged, the diſcovery of his cohabiting with another man's wife was made in Auguſt.

It is admitted that the diſcovery was made in Auguſt of his cohabiting with another man's wife, and that thereon in October he was diſcharged. If this be true, he was guilty of romancing, in ſetting himſelf forth as a married man when he was not, but lived in adultery with the wife of another. And with what authority could he talk to his boys of morality? I think the giſt of their ground lies here: And I don't ſee why it ſhould go farther, if this be acknowledged, becauſe the only intereſt that can ariſe is from his character, and doing credit to the ſchool.

This will be an expence much greater, perhaps, than the whole property from whence the ſupport is to ariſe.

I underſtand the matter went back to be more fully anſwered by the party applying for the *mandamus*, and more fully ſtated on the other part: But I believe the court hear no more of it on the part applying for the *mandamus*.

Rule

Bribe.

IF I lay a wager of five guineas with *A.* that he does not vote for me, it is a bribe.

Borough of Portsmouth.

ON a motion, in the nature of a *quo quarranto*, against several, requiring them to shew cause why they claimed to be burgesses.

Objections, that there was no sufficient majority to elect.

2dly, No summons.

3dly, That the day on which they were elected was a day appointed by the charter itself for other business, and not for election.

Mr. *Buller* cited the case of the King and the Borough of Radnor, where the court refused the information after seven years elapsed, on an objection taken by the presiding officer. The King and Borough of Malmesbury, on the objection being made by the town clerk.

On the other side—That there was no universal rule that [553] the court should refuse an information because the person who objected was present and privy, and did not immediately apply.

Lord *Mansfield*—The court has established, that after twenty years quiet and peaceable possession, they will not grant an information under their discretionary power. It does not bar the attorney-general, if he pleases. This was done by analogy to many other cases.

The time has been thought too large; and application has been made to parliament to narrow it: But the rule was not disturbed. In the case of the Borough of Winchelsea the court was struck so much by their going against a possession of thirty or forty years, that the rule was then established. But the court told the bar at the same time, that though this should be a bar, without any other circumstances, they would not say that, upon circumstances, they would not refuse the information within less time. No circumstances have been expressly laid down as a bar; but it depends upon a variety of circumstances.

A man shall not avail himself of an iniquity or blunder of his own. *Allegans turpitudinem suam* shall not be heard. Maxim.

Another

Another objection has ariſen, by ſuffering a length of time to elapſe, though under twenty years, when evidence might be loſt, as in the caſe of reſidence.

Another, where there have been many derivative rights; and ſtill more material where the overhauling proceedings for many years would amount to the diſſolution of the corporation.

All or ſome of theſe circumſtances have operated in the caſes ſince that of Winchelſea.

Now let us conſider the circumſtances of this caſe. The perſon who gives the evidence does not come diſhoneſtly to diſturb the peace of the corporation: There is nothing before us of derivative title; there is no ground from the danger of the diſſolution of the corporation; there is no difficulty to prove, as to any evidence of fact. As to the general cuſtom, they may eaſily prove it.

It does not appear that the town clerk is intereſted in the election; it does not appear that he gets his intelligence other than officially.

With reſpect to the want of ſummons, there is no ſuggeſtion.

[554] What is moſt material of all, the town clerk does not come as proſecutor: They introduce him as a witneſs.

Bail.

A Man brought up as an accomplice of felony, the principal not being taken, may be bailed.

Award.

AWARD under general terms of ſubmiſſion; motion to ſet aſide for a miſtake.

Per curiam—That the miſtake muſt be plain and groſs, in order to ſet aſide the award.

Trinity Term, [555]

14 Geo. 3. 1774. K. B.

ON a motion to ſtay proceedings on payment of debt and coſts.

This was upon a bond entered into with truſtees, under a very laudable charity, lately inſtituted for the loan of money to put out apprentices to ſmall trades.

In truſt to lend for five years upon bond, any ſum or ſums not leſs than one, or more than three hundred pounds, for putting out apprentices to ſmall trades; one pound *per cent.* to be paid for the ſaid loan for the firſt year, and two the four following.

Condition of forfeiture of the double ſum in caſe any one of the ſureties become inſolvent, or the principal; or if he change his condition, and give no notice within a month: With divers other conditions.

The truſtees ſued for the penalty on this bond.

Lord *Mansfield* was of opinion, and delivered himſelf to the effect, as follows:

Though in common inſtances the debt is the ſubſtance and real demand, and the penalty only the ſecurity and ſhadow; yet here this being a regulation to ſecure the fund to a public charity, lending money on very kind and beneficial terms, for the encouragement of induſtry and advancement of young perſons in trade, and by the ſmallneſs of the intereſt, and poſſibility of loſſes, the fund being likely, in its nature, to fail, were it not for the incidental aid of the penalties, the penalties themſelves were all ſubſtance, and not [556] form: And a forfeiture of the bond ſubjected to the penalties, and not to payment of the mere ſum only; becauſe theſe were ſpecial conditions, by which they received a ſpecial benefit.

Motion

Motion.

MOTION to enlarge a rule to the laſt day of term. not granted; but the court gave them leave to enlarge to the laſt day but two.

Error.

From the Common Pleas.

DECLARATION againſt a corporation, for not repairing banks, &c. of a river, as from time immemorial they had been uſed, and ought, whereby the courſe of the river became obſtructed, and the plaintiff was obliged to carry his corn farther about. Second count charging as above, and that thereby he had not ſufficient uſe of the navigation; *prout conſuevit et debuit.*

Exception, that they have not ſtated the ſpecial injury by not repairing, which they ought to ſtate, in order to entitle themſelves.

A river certainly is as the king's highway. And ſo it is laid down in *Hawkins.*

Davies, 76. Every navigable river, ſo far as the ſea flows, is a royal river, and the king has the fiſhery by his prerogative.

1 *Mod.* 105. Where the tide flows and reflows, it is an arm of the ſea; and therefore common to all.

And vide *Salkeld*, [I ſuppoſe *Smith* v. *Kemp.*]

Vide Co. Lit. f. 68. 5 Rep. 73. Williams's caſe, and 3 & 4 Commentaries, title Nuſance.

The plaintiff, therefore, has no particular right, in preference to other ſubjects. If this is a public highway, the plaintiff ought to have ſhewn ſome particular damage to himſelf, to juſtify his action. And for a common nuſance a man ſhall not have a private action.†

[*557] * On the firſt count, indeed he has ſtated a particular injury, in ſome meaſure, by alledging his being obliged to carry corn farther.

But on the ſecond count, only that he has not had ſufficient uſe of the navigation, as he ought to have had.

Carthew.

† Lex non amat ſupervacuum.
Eſt boni judicis lites dirimere.
Expedit reipublica ut ſit finis litium propter communem omnium ... tatem

Carthew, 130. *Paine* v. *Patrick*, for not keeping a ferry boat, as defendant had been accuſtomed, and ought of right to do, &c. whereby plaintiff loſt his liberty of paſſage from ſuch a time to ſuch a time. Held, that no private action would lie; but that in ſuch caſes there muſt be a public proſecution by indictment.

Cro. Eliz. 664. *Fineux* v. *Hovenden*. The principal caſe not determined: But a caſe is there cited of *Williams* and *Johns*, that where a chapel lies within a manor, and the perſon of the adjoining church uſed to read divine ſervice every Sunday, for the lord and tenants, in the ſaid chapel, and had failed; and the lord brought his action on the caſe. Adjudged, that it lay not: For otherwiſe every one of the tenants might (ſeverally) bring the like action, which would be inconvenient; but he ought to be puniſhed by the ordinary.

5 *Co.* [which ſeems to be the caſe of *Williams* and *Johns*, mentioned by *Croke*] held bad, becauſe not a private chapel for himſelf and family: For his tenants were not part of his family.

Obſtruction of a watercourſe, whereby he loſt the uſe of his mill. Here it appearing that it was a public river, a private conſequent loſs will not maintain the action; but the loſs muſt be immediate and direct.

Lord *Mansfield*—How do you prove this a navigable river? The water runs here into many people's cellars, but is that a navigable river? I don't ſee it's any where ſtated to be a navigable river. *Ex facto oritur jus*. Shew me upon the pleading this is a navigable river.

2d *Raym.* 1089. *Tenant* v. *Goldwin*. This caſe was cited as I take it, to anſwer the objection, that plaintiff had not ſhewn a title.

E contra, *Salk.* 360. [*S. C.*] If the hundred be indicted it needs not be ſtated how it is chargeable; but otherwiſe of a private perſon, who is not bound of common right to repair. And where defendant ought of common right to repair, plaintiff needs not to ſhew a title, nor to charge ſpecially. Now here,* therefore, the corporation, who are the defendants, ſhould be chargeable, eſpecially as being liable to repair of common right. [558]

* Quære, How this action was brought? for a corporation cannot be indicted with a nuſance: And indeed, probably, the ground of the judgment might be in part, that the corporation, as being ſuch, was not indictable of nuſance; and therefore the plaintiff muſt have his private remedy.

Lord *Mansfield*—They ſtate, that from time immemorial they have been uſed to repair; which preſumes an obligation to repair.

This is a corporation by preſcription: And by the ſame preſcription they are bound to do theſe things; and it might be the original condition of their exiſtence. They muſt have had their exiſtence as a corporation by charter; and preſcription is evidence of what was in the charter, and does not now appear.

JUDGMENT AFFIRMED.

Error. From the Court of Common Pleas.

Harwood *againſt* Goodright.

MR. *Davenport* began with ſtating the judgment in the Common Pleas, and the ſpecial verdict, as ſtated above.

Error brought againſt the judgment, in favour of the leſſor of the plaintiff.

This caſe muſt be argued upon two or three leading propoſitions.

1ſt, After a clear title, by the will of 1748, another good title is required, to take Mrs. *Harwood*'s eſtate from her.

2dly, The mere act of making a ſecond will does not, in itſelf revoke the firſt, unleſs by expreſs words of revocation or direct inconſiſtency, or repugnancy.

To prove this he cited the caſes already cited and obſerved upon in the Common Pleas, *Cro. Eliz.* 721. *Cro. J.* 49. And the famous caſe of *Hitchin* and *Baſſet*, as contained in *Cumberbach*. *Hardreſs*, *Siderfin*, *Salkeld*, *Modern Reports*, and *Shower*'s Parliament Caſes, 146, under the name in the laſt, of *Hungerford* and *Noſworthey*.

That in this caſe a bill had been filed in the court of Exchequer, to remove an extent, whereon an iſſue was directed, and a general verdict found; with which the court was much diſſatisfied. Afterwards, in the Exchequer, they did not find a deviſe of lands, and ſubmitted to the court. In the King's Bench a ſpecial verdict was found: That he made a will, particularly ſtated, and exiſting; afterwards he made another will, in writing. What was contained in that will the jury know not. Determination, that finding a latter will not revoke the former.

T

That even in Lord *Hale's* opinion it must appear a substantive independent will; that is, it must appear what it is.

A different disposition here is finding no more than *aliud testamentum* there.

Lord *Mansfield*—Were any of you here when it was tried before me? They gave evidence of a second will at Uxbridge. I left it whether the will was revoked.

No evidence, but a woman, who said she was subscribing witness; and a boy, who was present, he said.

His Lordship said he left it to the jury; if they found she had destroyed the will, they must presume the contents, and put it upon the others to prove the contents.

Mr. *Davenport* proceeded—They did not find that he did not destroy the will of 1756: They only find negatively, that they did not find he did. And if revoked, it would set up the former.

2d *Atk.* 272. That the statute was an express revocation of all other revocations, except express.

The first will must stand, either for the part unaltered, or for the whole, according to the construction upon seeing the contents.

The doctrine then has been, since and before the statute, that twenty devises of lands, by different instruments, might stand together, if not inconsistent.

The law must arise upon the facts found upon the special verdict simply. I have no conception of any arguments on the other side that will meet with these rules, or of force enough to over-rule them.

The first trial in the *C. P.* was before Judge *Blackstone*. General verdict as before Lord *Mansfield*, and they brought a new ejectment. On the verdict they declared themselves very desirous to have found the other way, but they thought the law too strong.

Lord *Mansfield*—This is the strongest verdict possible.

Have you considered whether upon a writ of error this Court would grant a *venire facias de novo?* In the House of Lords they do: And I can't see the difference: (Two cases were stated in which this was done, *Haswell* and *Challice*, *Tynaston* and Corporation of *Shrewsbury*.) [560]

The superior court upon a writ of error can do what the inferior court ought to have done.

Mr. *Davenport* continued—They should find whether his will was revoked at the death; the most trifling legacy would make it different *aliud testamentum* must mean a difference;

ference; if they had found ſhe had deſtroyed the latter will, they ſhould have preſumed any thing, but they find nothing.

Mr. Juſtice *Aſton* doubted whether there could be a *venire facias de novo*, and mentioned whether they might not try it by conſent—but then he ſaid there muſt be a new trial.

The evidence of a different diſpoſition was explained to have been by parol teſtimony, as it came out before in Common Pleas; however ſhe might expect all ſhe was miſtaken, there would be very little for her.

Argued, It was no evidence; he was a very paſſionate peeviſh man, and uſed often to ſay ſuch things contrary to his expreſs knowledge at the time.

Lord *Mansfield*—The queſtion upon the ſpecial verdict will be whether the court will find for the plaintiff; it will not conclude them from a ſecond ejectment.

It is impoſſible the Houſe of Lords can do this, of ordering a *venire facias de novo*, if this court can't; becauſe they ſend back the record, and make it a judgment of the court.

Stood over to the next paper day.

Serjeant *Hill*, for the defendant in error—Queſtion whether upon the whole verdict taken together, there does appear a title out of the whole.

Special verdict was ſaid to be too much; but the learned Serjeant ſaid, he now thought there was too little.

1688, a private act of parliament for ſale of the ſettled eſtates.

He was tenant in tail—if three ſiſters the whole to the three; if two 6000l. if one 4000l. if none ſurvived then the whole in him.

[561] He would have been tenant in tail, reverſion to him in fee.

He was unmarried at the time of making the will; he had two ſiſters who would have had the chance of the eſtate if they had ſurvived: He is ſtiled of Lincoln's Inn from whence, if there are to be preſumptions, I hope, may preſume him a lawyer. Will ſtated in 1756, ſeveral nephews and nieces in the mean time born. No alteration at all in his property; and then they find he did make and publiſh and execute another will in writing, with all the ſolemnities required by the ſtatute. That the diſpoſition made by the ſaid *John Lacy* in 56, was different from the diſpoſition in 48; but in what reſpects they are entirely ignorant, they don't know the circumſtantial difference.

T

The circumſtances of the family were neceſſary to be taken in; he had the abſolute reverſion.

The election whether the money ſhould be laid out in lands or not was in him, *Letchmore* v. *Letchmore*. *P. Will.*

Lord *Mansfield*—It is very clear, except in the caſe of *Bowes* and Lord *Shaftesbury*, where the laying the money out in lands, would have defeated the whole intent, the deviſee being a papiſt.

Lord *Mansfield* cited a caſe adjudged between Lord *Trelawney* governor of Jamaica and Booth. Booth wanted to borrow 500l. he borrowed upon a ſum of 4000l. ſtock in Chancery to be laid out in land.—Lord *Hardwicke*, with the ſtrongeſt deſire to the contrary, declared it was land to all intents and purpoſes, and could not be liable to a ſimple contract debt.

Serjeant *Hill* continued—If it be to be ſuppoſed money, he had no real eſtate, except the eſtate in queſtion the chambers. His will in 1756, was ſubſcribed by three witneſſes who duly atteſted the ſame; duly I ſuppoſe means, according to the ſtatute of frauds.

Here then is a different diſpoſition made of the ſame property.

The rules of evidence, notwithſtanding what has been ſaid, are not altered by the ſtatute of frauds.

If ſhe had it and produced it not, why this makes againſt her; if ſhe had it not, why had ſhe not, but becauſe it was againſt her.

None need ſhew the contents, but thoſe who claim under the will, which the heir does not.

The jury might have found generally for the heir, and very reaſonably I think: But they may find facts and leave the law to the court, who will find whether revocation or not upon circumſtances, and even fraud may be preſumed in circumſtances. [562]

Hardr. 218.

But I do not deſire deſtruction or ſpoliation to be preſumed: Your Lordſhip will preſume the will is now extant; and without imputation upon the heir or plaintiff in error, be the accident what it may, the heir has no need of producing it; unleſs he were in fault by not producing it.

If nothing may be preſumed, I think there is enough for the defendant in error upon the verdict.

Before

Before the ſtatute of *H.* 8. there was no ſuch thing as wills in this court,* except by particular cuſtom: The notion and the word was borrowed from the civil law. The will therefore by the authority given by the ſtatute muſt be the laſt will; and it has in ſuch reſpects been interpreted with ſome ſtrictneſs: *Habet* is a word uſed in it, and therefore a man can't, it is held, deviſe lands which he had not at the time of the deviſe.

The notion of the civil laws was that where there were two wills, the latter revoked the former; if the firſt was meant to ſtand, it was a codicil and not a will.

Swinb. 15. No man can die with two teſtaments, becauſe the latter does always infringe the former; yet a man may die with diverſe codicils.

Swinb. 501.

Perk. 478. A latter teſtament does always revoke a former.

In the books of civil law, *Swinburne* and *Godolphin*, are many caſes improperly called exceptions.

The latter does not make void the former when the latter imperfect.

When the teſtator was compelled—

When by fraud.

When by undue influence.

[563] Where there are two wills and the teſtator takes up the firſt, and ſays that is his will.

When the ſecond teſtament does not diſſent from the former.

Where there are no executors for the latter, for then it is only a codicil.

Shep. 410. and this not only of chattels.

Parol revocations allowed in favour of the heir.†

Lord *Hale*, *Hardr.* 376.

That a deviſe of lands does import a revocation of a former will of lands. If he had been ſatisfied, it was a ſubſtantive independent will, he ſhould have held it a revocation whether it contained a deviſe of lands or no. Now here it muſt be of lands.

There is no diſtinction between a man's will and the whole of his will; and then a ſecond will is expreſsly and by neceſſity a revocation of the firſt.

Cr.

* It means in contradiſtinction to Chancery, where wills were conſidered as an appointment to uſes binding upon the conſcience.

† But not ſince the ſtatute I believe and parol revocations in his favour that had any obſcurity or uncertainty have been diſallowed even before.

Cro. Eliz. this is no judgment; and the caſe I preſume to have been ended by arbitrament.

In our caſe now before the court—This is not a recent will, it was made at the diſtance of eight years, it is found to contain a different diſpoſition; it makes the whole of his will; and therefore revokes the former.

If it revokes not the will but produces an uncertainty or obſcurity, if this uncertainty or obſcurity had been in one apparent inſtrument, what would have been the conſequence? And what in reaſon ſhould make the difference when upon two? One of the common caſes a perſon is named, and two or three are of the name and deſcription, they can't take, but the heir; though never meant to take.

No perſon in his conſcience can ſay with certainty, Mrs. *Harwood* was entitled.

The caſe upon Sir *Harry Killigrew*'s will I think, as far as we can ſee from the reaſons and arguments, is in favour of the heir. The authority of the diſſentient judge, and the importance and difficulty of the queſtion, I hope, will give me your Lordſhip's pardon, for entering ſo largely upon [564] the caſe, and taking up ſo much of your Lordſhip's time, as I fear, I muſt.

[Lord *Mansfield*—We are very glad to hear you.]

Aliud teſtamentum is no more than *aliud* as to the form. It does not imply with certainty *aliud* as to the contents, I have brought down the caſes upon all the reports.

Perk. 54. *Plow* 581. 4 *Rep.* 61. ſtated by counſel for the plaintiff, and ſhe had ſaid that the will being in writing the court will preſume lands.

Finch replied, that as *animus teſtandi* was neceſſary to make, ſo *animus revocandi* was neceſſary to revoke.

That revocation was not *vocabulum artis*, ſo as to conclude from evidence on circumſtances of their conſiſtency; for the ſecond will might be different and not of lands, and then even the civilians held it would not have been a revocation. 1 *C.* 291.

The court, I apprehend, held that if the deviſe had been of lands, it would have been a revocation.

The concluding reaſon is, it may be a confirmation.

I ſubmit it cannot be here; if there is the leaſt difference as to the property itſelf diſpoſed of to Mrs. *Harwood*, the variation is fatal; and it cannot be a matter of form merely as alteration of a truſtee, there was none in the firſt; there be no need of any in the ſecond, without a total change in the beneficial intereſt.

What

What can they mean by different diſpoſitions upon a general deviſe but a general difference?—Unleſs the following words be ſuppoſed to reſtrain, in what particulars they don't know; this only means they don't, who may be object, otherwiſe it would be repugnant.

Mr. Serjeant *Hill*, with an apology went into the evidence upon the trial—a ſubſcribing witneſs to prove that the ſecond will was long and the other ſhort; and that the teſtator almoſt to his dying moment declared, the defendant ſhould take very little: Then is there any thing to make it different from the caſes of two perſons one not meant to take, the other you don't know who, the heir ſhall take,

General rules muſt decide upon property; and your Lordſhip will not depart from them, unleſs upon particular circumſtances they would do an injuſtice. Can you do this by
[565] giving it to the heir who has no body capable of ſaying poſitively, in this caſe that their right is clear againſt him? But a degree of injuſtice muſt be done, and we know not to what extent, by giving the deviſee under the firſt will her whole claim; who could never be meant to take entirely the ſame under the ſecond, and might be meant not to take at all.

In one of the caſes alluded to—deviſe not revoked, though the leaſe and inheritance were to commence at the ſame time; for it was only a revocation *pro tanto*, ſo as to poſt-pone the inheritance given by the firſt will, to the leaſe given by the ſecond, and it was apparent it was not meant to revoke the former deviſe, other than partially: And therefore the court confirmed the former deviſe, ſo far as it was not altered: according to the meaning of the teſtator, apparent upon both the wills.

Here the will cannot be, I ſubmit, of other lands, as in *Salkeld*.

No land at all—I have ſubmitted in the beginning of the argument this cannot be here.

Lord *Mansfield*—You need not go through the caſes as I went thirty years; the bar will take a note of them; and the court will go through them all.

You are right in ſaying this cannot be a total confirmation, or of no lands at all; there are ſome arguments in that caſe which do not tally with this.

Mr. Serjeant *Hill* continued—I ſee, next there is an argument upon the inconvenience and danger of ſuffering exiſtent will to be ſworn away; which is the concluding argument. This might have been a very good reaſon at the

time of the trial, for admitting evidence with great caution: But it can be no concluſion againſt evidence upon the verdict; and by the rules of evidence it may be taken as a deed loſt, and proved in the ſame manner, and there was no demurrer at the time; no point reſerved.

The danger is an argument in all caſes, and in order to avoid what was ſuppoſed fraud, the ſtatute reſtrained the evidence that might have been given before; but your Lordſhip will lay no farther reſtrictions than was then done; your Lordſhip has obſerved that thoſe reſtrictions have been of leſs ſervice than expected:* Nor need there be the ſame evidence as of the atteſtation, one witneſs is certainly ſufficient to prove the atteſtation; and it will always be under the directions of the court, who will take care that no improper evidence be admitted.

* V. Wyndham and Chetwynd, 4 Bur. vol. 1.

Holt Ch. J. Deviſe of lands in *A.* afterwards another [566] will, and deviſe of the lands in *D.* That this was a revocation of the lands in *A.* but otherwiſe *Finch.* And it was adjourned.

The inconvenience, if ſeveral diſpoſitions ſhould be made, by any whimſical notions or forgetfulneſs, of the ſame property, if the laſt be not a revocation of the firſt, they muſt be all proved.

For the defendant in error Mr. *Davenport,* in reply—*Cro. Eliz.* 721, was in ejectment ſtrictly. In that caſe the teſtator's intent was plain, that the eſtate deviſed to his younger ſon ſhould ſtill go to the younger ſon, only letting in a deviſe to his wife, paying a rent to the younger ſon.

Cr. 49. ſhewed an intent that the ſon ſhould have the reverſion.

Deviſe in fee; twelve years after the ſame land left to the ſiſter, for fifty years; the indenture delivered to a ſtranger, and not to be given till after his death; and then the ſiſter did not accept, but refuſed.

A deviſe to *A.* in fee, after to *B.* in fee, in the ſame inſtrument, is not a revocation; but they were joint tenants. All the judges, but *Walmſley,* held it not a revocation longer than for a term.

Lord *Mansfield*—This is nothing to the caſe; but it is clear when to a ſtranger, being inconſiſtent with the deviſe.

Mr. *Davenport*—It was only to ſhew the court would look into an inſtrument, to ſee whether it agreed with the former.

The court obſerved, that if in this caſe the ſecond will had been brought before them, and it had been ſhewn that there

was

was a demiſe for five years to Mrs. *Harwood*, it would have ſtood upon ſtrong grounds.

Serjeant *Hill*—Contents of a latter will unknown will not be a revocation of the former, I agree; but if any thing appears of difference, then it lets in the uncertainty I have objected. They argued in the court of Common Pleas as if the ſecond will was ſuppoſed produced, though certainly not.

The finding ſome difference is no more than your Lordſhip would have preſumed. How will this conſiſt with what was ſo ſtrongly relied on, upon authority of caſes, that your Lordſhip will preſume nothing, and muſt not ſee the evidence upon the circumſtances, however ſtrong?

[567] That a negative found, that the defendant had not deſtroyed the will. This is not preciſely ſo; they only ſay they do not find ſhe did, which is as if they had ſaid neither way.

[Lord *Mansfield*—The jury can't find a negative, unleſs ſuch an one as is proved by an affirmative. One may juſtly ſay they have not ſaid a word about it.]

Glazier and *Glazier* is clearly diſtinguiſhed; becauſe your Lordſhip cannot here preſume the deſtruction of the ſecond will.

It is ſaid revocations are not to be preſumed. It was never contended that they were; any more than diſheriſons of the heir.

The title of the plaintiff in error, under the firſt will, is not ſubſiſtent now.

Shepp. 410. tit. *Teſtam.* 17, 18, and *Atk.* may ſhew that before the ſtatute revocations of lands might be by parol.

"It cannot be ſuppoſed the deviſee of the firſt will would cancel the ſecond." Why ſo? Her caſe can't be better, it may worſe, by the ſecond. The heirs cannot be worſe, it may be better. But it has been already admitted, that no preſumptions are to be made, on either ſide.

It is the wiſe doctrine inforced by *Coke*, in his commentaries on *Littleton*, that the learning of the law is complex and linked together;* that by knowing one caſe thoroughly you will be led to the knowledge of many others. And Lord *Somers*, that this principle runs through all the books. And, in truth, the laws cannot otherwiſe be a ſcience.

A

* Scientia legis eſt complexa et concatenata;
Tum demum vere decimur *ſcire* cum reſpon. *cauſas* invenerimus.

As to implied revocations, the ſtatute has made no alterations.

Upon the words of the ſtatute, which requires writing ſigned in the preſence of three witneſſes, in the preſence of the teſtator, a writing with the requiſites of the act would be good, as a revocation without containing any deviſe of lands.

The writing is found; the due atteſtation; and no cancelling to be preſumed. Therefore the ſtatute of frauds does not alter the caſe at all.

"Preſumptive revocations before the ſtatute are now taken away." They were taken away before as much as now. The only difference is, that the revocation cannot now be in words, without writing.

I have not deſignedly miſrepreſented any part of the argument. [568]

What my Lord *Couper* ſaid, in the caſe of *Onions* and *Tryers*, was in part diſallowed by Lord *Hardwicke*, in ſeveral caſes in *Vez.*

Lord *Manſfield*—We have no queſtion upon it in this caſe. It is not an application to relieve in equity, upon an accidental cancelling.

Serjeant *Hill* continued—We have then moral certainty, not mathematical certainty, that the ſecond will did not agree. The ſecond is therefore a revocation, or neceſſary as part of the title. I am ſure I have no objection to conſider of a *venire facias de novo*,

Lord *Manſfield*—I have no doubt we can grant a *venire de novo*, if the caſe warranted; but I obſerve you do not pray, as holding the evidence upon the ſpecial verdict ſufficient to defeat the title of the plaintiff in error.

Mr. *Davenport*—I hope the court and Serjeant *Hill* will excuſe me for being ſhort in my reply, as I was in ſetting out. The jury have profeſſed themſelves ignorant of the contents; I conclude your Lordſhip will not go out of the verdict, or know any thing of them.

I admitted before that there were three ways of revocation.

Expreſs revocation by the ſtatute.

Inconſiſtence of two wills.

Revocation by act of law.

The will, it muſt be ſuppoſed, the jury concluded to differ; becauſe it was another, and therefore not a tranſcript merely.

I only

I only cited *Cro. Eliz.* to ſhew the court muſt ſee the contents, to ſee the inconſiſtency.

It is then as in *Hitchin* and *Baſſet*, and the caſe of a will is not, as by the civil law, the ſubſtituting another to ſucceed in to the inheritance and rights of the deceaſed; but it is an appointment of uſes, which may be created to ſeveral perſons; and a revocation of any one ſhall not affect the reſt: So that a ſecond will not neceſſarily implying a general alteration, or perhaps any at all, as it may be of eſtates acquired ſince the firſt, or if of the ſame eſtates, yet not in prejudice of a former deviſee, cannot operate as a revocation, till it be ſhewn that it expreſsly revokes, or is inconſiſtent; and to revoke entirely it muſt be inconſiſtent throughout. But no inconſiſtency is to be preſumed, or [569] can be extended farther than it appears by conjectures or reaſon or probability.

If another will does not diſſent from the former—is the ſixth ground laid down by *Swinburne*.

It ſtood over for a third argument.

Lord *Mansfield*—It will be very proper to look into the hiſtory, and that caſe which has been decided.

I will ſtate ſhortly what principally ſtrikes me at preſent. Though as to perſonal eſtate, the law of England has adopted the Roman law, and the conſequences of it, yet in deviſes of lands they differ. A will, in the civil law, is an inſtitution of the heir; in our law it's the appointment of a particular perſon as deviſee to a particular eſtate: And upon that principle, before the ſtatute of wills, when lands were deviſeable by cuſtom, a man could not deviſe any which he had not at the time of making his will.

It's upon the ſame principles but carried too far by ſubtlety, that there have been revocations contrary to the intent; where the teſtator has made a feoffment or the like, becauſe he has made a new appointment.

With regard to land, a ſubſequent deviſe, muſt be inconſiſtent for a former deviſe, or the former muſt ſtand, unleſs expreſsly revoked; and if it is an appointment to take effect at his death, and no contrary appointment, it muſt take effect.

If there be an inconſiſtency in part, this revokes as to that part, but no farther. If a man has given an eſtate in fee, and afterwards gives an entailed eſtate, or for years, in the firſt caſe it is a qualification, in the other an expreſs revocation of the former eſtate; becauſe he evidently meant not to give him the ſame eſtate as before, but a different one.

What

What is the queſtion upon this caſe? We are upon a ſpecial verdict; the argument is preſumed. A vaſt deal has been ſaid upon the verdict, and I can't think what was meant by ſtating the nature of Mr. *Lacy*'s eſtate. We are to ſee the concluſions upon the verdict: The heir is entitled by deſcent; there is a will, which, as *A.* ſtood at that period, defeats his title; and then a ſecond will, not known, or the contents: They do not find whether it was revoked, or ſubſiſted to his death.

On the third argument, for the deviſee, the plaintiff in error, it was argued—By the caſe of *Hitchin* and *Baſſet*, even in the opinion of Lord *Hale*, a ſubſtantive will, unleſs it relates to lands, or appears to revoke, will not revoke lands. 10 June, 1774. [570]

It might affect perſonalty, or realty, or the mode of diſpoſing.

Mere evidence of a ſecond will having been made does not revoke the firſt.

It ſeems the caſe of *Hitchin* and *Baſſet* proves this, and agrees.

Cro. 51.

In wills, (before the ſtatute) therefore, ſolemnly made, the revocation of them muſt be expreſs, or the diſpoſition abſolutely inconſiſtent, or there is no revocation.

The ſtatute requires that no will be revoked by intendment, or conſtruction, or verbal evidence, if not revoked by a ſolemn inſtrument in writing, according to the ſtatute, or by another will.

If it be by a will, the will muſt be another, altering and diſpoſing of the ſame property as the firſt, in a different perſon.

The diſpoſition, ſurely, was not to the heir.

Upon the whole, is there any point, upon the circumſtances, found in the verdict, taken together, which can amount to a revocation.

On the other ſide, for the heir at law, defendant in error—To be a good will, in favour of the deviſee, it muſt be the laſt will.

The anceſtor muſt have continued in this diſpoſition of his property, ſo unfavourable to the heir, to his death.

With reſpect to the firſt will in this caſe, it's plain he did not continue in that mind from the making of the firſt will; for he changes his intent, and diſpoſes differently by the ſecond. And as a will once made is preſumed to continue till the contrary is found, ſo that the firſt could not have been

preſumed

presumed not to have continued, had it not been for a finding which shews it does not, so the second will shall have the same presumption in its favour; or rather it shall not be presumed against its existence, and continuance to the death of the testator; it having been found to have been made, and nothing found to the contrary of its existence, once so proved.

When a subsequent will is made, it has been held that it revokes the first of course; and it has been strongly argued, a general substantive will is a revocation. And of this opi-
[571] nion was Baron *Hale*. But this seems lost and overthrown by the decision of *Hitchin* and *Basset*. And the court must find a change of the intent.

In this case, as there was but one general devisee, why should the testator have made another will, if he had not changed the intent with respect to her?

But it's said the jury don't find this. They find that the disposition is different: To what persons in particular, or in what proportions he has given his estate, we don't know; but this we know, that whereas he had formerly made a will, and given every thing, within a few pounds, to Mrs. *Harwood*, he has now made a different disposition.

It is said in *Hitchin* and *Basset*, that they held the second will no revocation, because it did not appear it was of lands.

In the case now before the court the attestation proves this.

There it was said, it might concern other: He had no other; for as to the 10,000l. three witnesses were not necessary; he being tenant in tail, remainder in fee to himself, might make the money, to be laid out in lands, to pass as money again.

2 *Peere Williams*, 271. And a man in such circumstances, I take it, may apply to a court of equity, and obtain, as of course, to have the money released, and to dispose of it not as lands, but money, since the whole interest is in him.

[Lord *Mansfield*—After he has made his election.]

Serjeant *Hill*—I think before he has made his election it is land to all intents and purposes.

Loan of money, where Lord *Hardwicke* determined that the money which stood as lands, under settlement, with limitation in tail, and a fee, expectant to the same person, were not liable to the loan, it being a simple contract, and the election not determined.

Lord

Lord *Mansfield*—This was a case where the person, whose representative refused to pay, had borrowed the sum upon the security of lands, declaring by letter he had money in Chancery to answer the debt. And yet they were considered as lands, notwithstanding this declaration.

Serjeant *Hill*—If the jury have not found that he destroyed the second will, they presume its existence; they will not find that he destroyed it.

And whether the will, if it should appear, and we could [572]
know what it was, agree or disagree, since it does not appear, unless Mrs. *Harwood* can shew it does not disagree with her claim by the former, which is now an imperfect title without the second, the heir shall take for the uncertainty; for he makes no title under a will, but takes by act of law, unless there be a clear title against him: And no party shall be obliged to shew an instrument to support his title, except he who claims under it. Now the devisee, who has no claim but by the last will of the testator, continued by him, in her favour, to his death, must shew, that a will, afterwards proved to be made, and which, *primâ facie*, cannot be in her favour, (especially when she was general devisee of the first) did not defeat or alter her title: for unless she shews how much she can take, she shall take nothing. But the heir does not want any act of the testator in his favour, but shall take, often when there was the clearest intention he should not take, if that intention is impossible or illegal, or there is any failure in the execution of it.

The case in *Lev.* Tenant in tail devising in fee, suffers a recovery, and takes back an estate to himself in fee, with the express design of effectuating his will; this shall revoke it, and let the heir in to the estate.

It is not at all material whether the heir was named; nor even if he was expressly disinherited by the second will, unless that will can take effect; for he must take, unless somebody else evidently appears on the will. If one can suppose another devisee, but it cannot be told who that devisee was, the heir shall take. Suppose the lands given in mortmain to a monk, or to a papist, the heir shall take.

Gilbert. "I give all to my mother."—This will not take from the heir; because it does not appear how, or of what estate the mother should take.

Suffer me to repeat; your Lordship cannot do an injustice by giving to the heir, who has a clear title, as heir, against a doubtful one; but if you give to Mrs. *Harwood*, it will be against the right of the heir; and it must be concluded,

in

in part or the whole, againſt the intention of the teſtator. If he meant to give her the chambers, and the reſt to ſome body elſe, or the contrary, your Lordſhip gives her all, to anſwer the intention of giving her a part; and perhaps he might mean her nothing.

It cannot be a confirmation; for the jury have found it different.

Lord *Mansfield*—The ſubject is exhauſted: It has been extremely well argued, and can admit of no new light.

[573] This is an ejectment brought for chambers in Lincoln's-Inn, of which *J. Lacy* was ſeiſed in fee. He is alſo found by the ſpecial verdict to have had a reverſion in fee, expectant on an eſtate tail in himſelf of 10,000l. remaining to be ſettled, in hands.

April 1748. A will was made, which is found by the verdict to be now exiſtent, of all his real and perſonal eſtate to Mrs. *F. Harwood*, on payment of certain legacies. They find another will, duly atteſted in 1756, and farther ſay, that the diſpoſition made by the ſaid will of 1756 was different from the diſpoſition of 1748, but in what particulars they know not; and *J. Lacy* died in 1767.

They find the title of the leſſor of the plaintiff in ejectment, as niece and heir at law of Mr. *Lacy*.

On this ſpecial verdict each part ſays there is a clear title found. The defendant in ejectment ſays for her, as deviſee, and the other part ſays there is a deviſe inconſiſtent or repugnant, or at leaſt uncertain, on the finding, ſo that the court cannot give judgment; nor have either prayed for a *venire facias de novo*; which this court, as a court of error could have granted.

The court muſt conclude from facts found; they cannot find upon evidence. Preſumption is a ground of evidence: That preſumption cannot now be received, as being evidence, and therefore proper to have been found by the jury, not by us.

The jury have found this for the plaintiff; they have found her heir at law. It is rightly ſaid, the heir at law, having a clear title, cannot be defeated by a preſumption. You cannot gueſs him out of his title.

When there is a will, and you don't know to whom the teſtator has intended, you can't conjecture he meant to give from the heir. Something, therefore, muſt be found againſt his title, of the ſame certainty and clearneſs with that title itſelf.

What

What have the jury found to this title of the heir? A clear title under the will. No doubtful expreſſions upon the will: For if the will were not clearly intelligible the heir ſhould not loſe his right.

The heir then muſt repel this from facts, ſhewing this will to have been taken away; for the deviſee's clear title, like that of the heir at law, muſt be taken away by as clear an one againſt her. And this title of the heir, or any deviſee, againſt the firſt will, muſt have continued to the death of the teſtator: For it was lately determined, that where a will was made with expreſs words of revocation, and that will and that revocation taken away by the teſtator, by the cancelling of the inſtrument, the former will revives. [574]

What is found in this ſpecial verdict? They ſay a clear deviſe of the chambers in Lincoln's-inn. In the caſe of *Hitchin* and *Baſſet* the jury ſay they do not find the teſtator deviſed lands by the ſecond will. If the jury had not ſaid it, the court would not have preſumed it. And here, the court would not preſume this different diſpoſition to be of the chambers, if the jury had not ſaid any thing; but the jury ſay, (becauſe they know nothing of the matter, they ſay) that the diſpoſition, &c. was different. If he had made a verbal declaration of the difference, this would warrant the finding of the jury, but could make no revocation, had it been ever ſo expreſsly ſaid by him that he meant to give her nothing, or had given her nothing.

It is a different diſpoſition diſtinguiſhes the finding from that of *Hitchin* and *Baſſet*, *aliud teſtamentum*. This muſt have been another will, differing in diſpoſition, not on another piece of paper; for then it would be the ſame will. Neither can another will be a confirmation, for the ſame reaſon; becauſe it muſt have ſome difference, to be another will; and if no difference it is not another will, but a republication.

A new will, or more properly teſtament, of perſonal eſtate, by the civil law, muſt be a revocation; becauſe it carries with it the making of a new executor; and the making of a new executor gives him the reſidue, and puts him in the place of the heir. But a deviſe of lands, in our law, declaring the diſpoſition the teſtator means to be made of his property after his death, is an appointment of uſes; therefore muſt be of lands in poſſeſſion. And it conſtitutes no univerſal heir; but there may be ſeveral deviſes, by ſeveral inſtruments, and of ſeveral eſtates, all of which may ſtand together. And this diſtinction is as old as *Plowden*.

Vide *Brett* and *Rigden*.

And becauſe a teſtator can only deviſe ſuch eſtate as he has, upon this legal ſubtlety, if he make any change in that eſtate, ſo as to make it another eſtate, in law, though with a deſign to effectuate his will, this is a revocation in law. The ſuffering a recovery by tenant in tail, in order to give effect to his will, and ſo expreſsly declared by him, was a revocation, becauſe a change of the eſtate; but there is no ground contended of ſuch circumſtances here.

There is no revocation then; for I can't ſee any difference between this and the caſe of *Hitchin* and *Baſſet*.

[575] The whole turns upon a fallacity, the ground of uncertainty. The caſe is, the heir ſhall not be defeated by any uncertainty: And when there is an uncertain deviſe to another perſon, it is void.

But when a will appears certain on the face of it, this is as clear a title by deviſe as the other by deſcent, and muſt be overſet by a certainty againſt it. And therefore, I think, in this caſe, the ſpecial verdict has not found a revocation, nor, conſequently, a title in the heir againſt the deviſee.

Mr. Juſtice *Aſton*—I can add nothing to what has been ſo fully ſaid by his Lordſhip, and am entirely of the ſame opinion.

The two other judges of the ſame opinion.

JUDGMENT of the COMMON PLEAS REVERSED.

Afterwards, on an APPEAL to the HOUSE of LORDS JUDGMENT of the KING'S BENCH AFFIRMED.

[Note, A worthy friend, to whom I am in many reſpects obliged, has given me a note of *Glazier* and *Glazier*, which is alluded to in the argument, and ſeems to have been a leading caſe in the Judgment; and I know not that it is anywhere reported, and therefore hope it will not be unacceptable here. It was thus; *B. R.* Hilary term, 10 *G.* 3. 1770.]

This cauſe came before the court on a motion for a new trial, a verdict having been given for the defendant at Eaſt Grimſtead. In ejectment, and upon argument, it appeared,

That *John Glazier*, having made his will, deviſed lands to his firſt, ſecond, and third ſon, and a pecuniary legacy to his daughter; but the girl ſoon after marrying, the father found it neceſſary to make ſome alteration in his will. He accordingly ſolemnly revokes his will by a ſubſequent one, which made only this ſimple alteration in the deviſes and legacies, *viz.* a legacy to the huſband of the daughter.

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At the old man's death the ſecond will was found cancelled. The eldeſt ſon, therefore entered, as heir at law; againſt whom this ejectment was brought, by the advice of counſel, for the lands deviſed by the firſt will to the ſecond and third ſons.

Mr. Baron *Smythe*, before whom the cauſe was tried, was of opinion, that the firſt will being ſolemnly revoked, it could not revive without republication, by cancelling the [576] ſecond. And accordingly a verdict was found for the defendant.

Upon a motion for a new trial, *Dunning*, ſolicitor-general, contended, ſhewing cauſe againſt a new trial, that the law was as ſtated by the learned judge. That to ſet up any other rule, would be to open a door to thoſe inconveniences which the ſtatute of frauds meant to guard againſt. That the will muſt be preſumed to be cancelled by the teſtator; and therefore he was fairly taken to be dead inteſtate.

Lord *Mansfield*, Chief Juſtice—(without ſuffering the counſel to go on who were on the other ſide, contending for a new trial)—It's impoſſible this verdict ſhould ſtand. The caſe of wills ſeems to be exactly within the reaſon of the rule relative to acts of parliament. If a repealing ſtatute be repealed; by the repealing only, the firſt ſtatute is revived: So a revoking will, by revoking or cancelling, revives the firſt revoked will.

Beſides, if the cancelled will could never be given in evidence to eſtabliſh ſuch a will, (by reaſon of the cancellation) it cannot be produced as a revocation of the firſt will: So that, that will muſt neceſſarily be ſtanding; and the plaintiff has a right to the deviſes under that will.

Yates, Juſtice—I am of the ſame opinion: There is a caſe of *Onions* v. *Tryers*, directly in point.

Aſton, Juſtice, abſent, as one of the lords commiſſioners in *cancellaria*.

Willes, Juſtice, concurred, *in omnibus*.

Corporation of Kingſton upon Hull *againſt* Horner.

DECLARATION ſtates the borough of Kingſton upon Hull to be a very ancient borough: And that from and before 1772, to wit, from time whereof the memory of man runneth not to the contrary, the ſaid corporation had been accuſtomed to receive, and of right ought to receive,

a certain rateable toll, to wit, 8d. for every laſt of lea and of ſome other articles, according to proportions ſtate in the declaration.

Entry on the corporation books as far back as *E.* 3.

[577] There was a great variety of evidence from the corpor tion books, *&c.* relative to the perſon appointed from tin time to receive the toll, and the payment of it.

Lord *Mansfield* left it to the jury, whether they wou preſume a charter, with directions that variance in the ra ing of the articles would not be an objection to the claim.

The jury found for the corporation.

On a motion for a new trial it was objected by Mr. *Da ning*, that upon the evidence the jury ought not to ha found for the plaintiff; for that they were not warranted preſume a charter, as directed in this caſe; the inſtitutio of the corporation having been within time of legal m mory.

2dly, Becauſe the thing preſcribed for was ſubſequent the exiſtence of the corporation, which was itſelf with time of memory; ſo that there could be no legal preſcr tion.

That as to the caſe where a recovery was preſumed, fr a charge in an attorney's bill; it was nothing but evidenc ſurrender of tenant for life, for the purpoſe of makin tenant to the *precipe*. But a record and deed in *pais* very different.

The caſe of the Earl of *Leiceſter*, I know not wha was.

[Lord *Mansfield*—If it was *Sidney* Earl of *Leiceſter*, loſt the eſtate, I think, for want of preſuming.]

Beſides theſe caſes we were informed of an opinion which I ſhall always pay all poſſible reſpect and defere ſomething which has been ſaid to have dropt from Lordſhip at *niſi prius*, and other cauſes: Your Lord will inform us of the circumſtances of thoſe caſes, therefore I ſhall not cite them. I only ſubmit, that, as I have been ever able to learn, there have been n lemn deciſions againſt us.

[Lord *Mansfield*—I remember, before our laſt *a tempus* bill was ever dreamt of, a caſe where long poſſe (ſuppoſe an hundred years) ſuppoſing the eſtate could a legal commencement, though it could not operate as might be evidence for preſumption of title. And in caſe of *Maidſtone*, ſuppoſing the title could have a goo lawful commencement, poſſeſſion of eighty years migh

preſum

preſumptive evidence; though no title is a preſcription againſt the church, any more than againſt the king.]

Mr. *Dunning*—I did not maintain in the full extent that a charter cannot be preſumed, antecedent to the date of legal preſcription. [578]

The attention the law pays to the periſhing nature of charters, however politic it might be if the law would extend it farther, deſcends no lower than 1123, the year of *R.* 1. acceſſion. Till thoſe to whom it belongs ſhall think fit to reduce the time, I apprehend the courts of law will not amend the law.

The caſes before your Lordſhip might be where the whole field of poſſible time was open; but here they muſt preſume a title ſubſequent to the term of preſcription.

A charter of confirmation is produced, which is a thing now conſidered not neceſſary in law, and yet the eſſential original charter is to be preſumed loſt, without proof that it ever exiſted.

At one particular period they uſe in their entry [this I think was 1681] the words, "and the following rates added," then certain rates are ſpecially ſtated. They then thought themſelves poſſeſſed of the legiſlative authority to add to the quantum or encreaſe the number of theſe tolls. If it ſhall appear to the court they have not better ground to go on for the tolls they now claim, I ſuppoſe the court will hardly aid them in this ſingular idea, whatever may be thought of the other point of preſcription, which by this variance they ſeem to abandon.

But the corporation received a charter from *Charles* the 2d, which in conſideration of repairs confirms the duties with certain exceptions; if the corporation had been in poſſeſſion of a claim without reſtrictions, would they have accepted one with ſo many ſuch reſtrictions.

I conceive that no fiction of law will make merchants trading liable to theſe duties ſo varied, ſo different from the ſuppoſed authority; and that this authority cannot commence by preſumption in modern times.

Lord *Mansfield*—Had you inſpection of all their entries?

Anſwer—We had a certain confined inſpection from the entry 1575, and a little antecedent, and ſome papers relative to their entries.

Had you any inſpection of entries from 1441, and between that time to 1575?

Mr.

[579] Mr. *Dunning* in anſwer to this ſaid—There was a boo
which he thought related to *R.* 2. written in court hand, b
in very bad court hand, otherwiſe he ſaid, he fancied
would not have been very difficult to him.

Lord *Mansfield* ſaid farther, that great length of poſſe
ſion, though not operating within the ſtatute of limitatio
is yet ſtrong evidence of a right beginning if there can
any.

It is very properly anſwered on your part, ſaid his Lo
ſhip to Mr. *Dunning*, by obſerving, that not even the
rough itſelf is a borough by preſcription.

One ground ſupports the verdict, if any proof of it; u
on which I have no opinion. The evidence is ſtated of
port before 5 *R.* 2. And if a port, and there were any
ties, thoſe duties muſt be in conſideration of the po
Sayreriffe was the name, *dudum* of what? Not the river,
ſerved Mr. Juſtice *Aſton*, but certainly the port.

Mr. *Dunning* contended—That the *Hull*, formerly ca
Sayreriffe, meant the river of *Hull*, from whence the to
took its name; and not the port.

Then ſaid Mr. *Dunning*, as to the ſecond ground,
preſumption comes within very narrow limits—A very
cial kind of preſumption; that there was ſuch a charter
tween 1382 and 1441, and that this charter is loſt, and
others are preſerved.

[Lord *Mansfield*—Are the duties now in queſtion of
ſame ſpecies with thoſe granted by any of the charters?

Note, I underſtand it appeared that as to moſt part
were; but not as to all.

Lord *Mansfield*—ordered to ſtand over till the next
he being to go to the Houſe of Lords.

It was further argued accordingly on the 10th of Ju
and Mr. *Wallace* contended, that a charter might prop
be preſumed in this caſe.

Impropriation preſumed to have been made and the
ſumption taken within the reign of *Ed.* 4. Grant of
crown preſumed within the time of legal memory, nam
in the reign of *Ed.* 3.

[580] The poſſeſſion appears to have been undiſturbed for th
hundred years; there is expreſs evidence almoſt through
that time, and implied evidence as to the reſt, there be
none to the contrary.

Will a recent addition of duties by the mayor and al
men annihilate duties, to which they were entitled near th
hundred years before.

He concluded with repreſenting the ruinous ſtate in which the harbour would be, if the court ſhould determine no grant of theſe duties was preſumable.

Lord *Mansfield*—I fancy Lord *Leiceſter*'s caſe was, no recovery upon record to be found; upon aſking the jury what they believed of the recovery upon evidence they preſumed.

And this was *Grenville*'s caſe, and the recovery preſumed in the year 1700.

Mr. *Dunning* ſaid, (as to the Earl of *Leiceſter*'s caſe I believe) that the rolls were wanting during that year.

Lord *Mansfield*—That makes it a very clear caſe indeed.

Lord *Mansfield*—You know in the famous caſe of Lord *Parbeck*, they could not find the exiſtent patent; but the entry was admitted as evidence upon an excellent ſpeech of Lord *Nottingham*, though entry cannot create the title of viſcount, though it might of baronet]

King and *Carpenter* was cited of preſumption, where the article affected by the preſumption was introduced within time of memory.

Mr. *Wallace* again urged—That if the firſt propoſition laid down as the foundation of his argument was right, that a grant was preſumable, it ought here to be preſumed; and the jury not to ſit twenty-four hours longer without any proſpect of new evidence, to try whether they could find a poſſibility to think otherwiſe. That if there ever was a ground of preſumption there was in this caſe.

Mr. *Dunning*, *contra*—that he had nothing to add upon the caſe to the propoſition, whether the grant, if it be preſumable, ought to be here preſumed.

As to the deplorable diſtreſs of their corporation and their all at ſtake, and they fighting *pro aris et focis*, if there was any truth in his inſtructions on the part of his client, the other undiſputed tolls were twenty times more valuable, and adequate to the building and repair of the port. [581]

That this was not the firſt caſe of the kind that had been diſputed with this corporation; for that there had been another conteſt upon tolls, only with different plaintiffs a few years ago; and they then put their right upon the charter of *R.* 2.

That it was not impoſſible on time given on either ſide to amend their caſe, that he thought a careful inſpection of the books would produce ſomething material.

It is alſo very extraordinary, that every reign has ſupplied charters down to *Elizabeth*; and yet this charter is unfortunately not to be found.

As

As to Lord *Leiceſter's* caſe, Mr. *Dunning* ſaid he underſtood the deciſion had been about an attorney's bill, which gave evidence ſatisfactory in point of fact, if it had been competent in point of law. And upon inſpection the whole rolls, either of that reign or of that year, were found wanting; that this was what had been repreſented to him, though he believed not by any body who had a very accurate knowledge of the caſe, and that, if ever looked into, he thought it would be found ſomewhat like this ſtate of it, whether it were a *niſi prius* caſe, or more ſolemnly determined.

That he hoped, the more antient caſes would be of ſtill leſs importance as applied againſt him.

That the caſe in *Shower*, on a claim of coals imported, turned upon other points.

The firſt objection was, that in a *quo warranto* the crown is concluded upon the mere right; but upon an information not.

Another, as to the competency of the witneſſes, for that on an hue and cry the hundred could not be witneſs.*

Nor for pariſh dues, pariſhioners.

Nor legatees of however ſmall ſums, witneſſes upon will. [It is uſual now to releaſe.]

Another, that a verdict in the caſe of a private perſon was not evidence againſt the crown.

[582] They came to the caſe by compariſon of nuiſances, with preſcriptive rights allowed and recognized by law, and whatever within time of memory has been judicially, or by parliamentary authority, conſidered as a nuiſance, fails of preſcription, which muſt be an immemorial continued right uninterrupted, at leaſt not otherwiſe interrupted than by wrong.† They find that in the time of *Edward* coals were complained of as a nuiſance; they do not therefore think there is evidence of an exiſtent preſcriptive right: Nor is there in that caſe any attempt to ſupport the claim, by preſumption of a grant.

The caſe in *Coke*, I think, will not diſagree with my ideas, or with the cauſe ſhewn for a new trial, when I ſhew what I do admit.

I never meant to ſay, that grants of the crown were not preſumable; for the law always founds preſcriptive corporations upon preſumption.

But

* Teſtis in cauſâ ſui privatâ non eſt audiendus.

† Conſuetudo ſemel reprobata non poteſt amplius induci.

But I only maintained that it was not competent to presume a grant, in a case where usage was not referred, or referrable, to a time beyond memory.

The first case cited on the other side Mr. *Dunning* just spoke to, and then proceeded to the second, which he said was of much greater importance. Namely, supposing the crown when granting the manor was seized of the advowson, whether it should pass by a grant of the manor *cum pertinentiis*—that the court held not, and perhaps upon some old statutes.

[Lord *Mansfield*—I suppose upon the ground that the crown must grant by express words; for in case of a private person it would be acknowledged good.]

Mr. *Dunning* continued—That neither in this case last mentioned, nor in the case before, was there any thing to confine the presumption to a time within legal memory.

As to the charter of *R.* 2. that if the court could translate it as granting to a port then existing, all presumption would then be unnecessary and out of the question; the duties would follow of course, and be incidents necessarily carried with the port. But that considering the charter he could not, either in grammar or reason, think it less than a creation of the port. The king, speaking to the corporation, [583] declares—*concessimus quantum in nobis*; what is the meaning of this qualifying clause, if the corporation had at that time a port and the duties incident? He added, I imagine it was then doubted, whether the king could grant to others to make a port, though he could make one himself.

And besides the charter farther says, "*in meliorationem ejus villæ, quod ipsi et hæredes habeant portum*, is it the phrase in granting an existent thing? *Concessimus portum* would have been intelligible; all the rest is surplusage; or contrary to the idea maintained against us.

I took notice yesterday, that the limits of the port were described by the charter, which would have been of no use if this was antient port.

Whether the port was created by the charter or not, Sayrcreek [or Sayrcriffe qu.] was the name of the stream which was called Hull, at the time of that charter.

If the corporation had the port before, could it have been *annexum villæ* by the instrument? But if the crown intended an annexation in future, and the result of the instrument, then the court will see the crown had the erecting a port in contemplation, which, when granted, was to be annexed to the town of Hull.

Granted,

Granted, that they were to have a port *ita quod possint ædificare domos kaias et staiethas*, these are things without which a port cannot exist—quays and wharfs; therefore they were to do what was necessary to make a port, there not having been one antecedently.

They were to this port, and to what purposes? *Ad defensionem augmentationem emendationem et salvationem ville prædictæ.* This was to be to the preservation and encouragement of the town, by giving them commerce, which then they had not; and a port, which till then they had not.

They are to do this, which the charter authorises them to do, without impeachment from the king and his heirs; these words import not simply an authority to make a port, to raise staithes and quays; but that the works of their own hands should be fully enjoyed by them, without any further recourse to the regal prerogative; which would have been unnecessary and very unusual, if he had granted them a port already known and defined by certain limits.

Charter of 1 *E.* 3.—*quod concessimus in auxilium ville nostra prædictæ paviendæ*, a toll *de rebus venalibus ad eandem venientibus* without any distinction between alien or citizen.

[584] The goods are of various sorts; some by land, some by sea; some of this country's growth, some of foreign.

28 *E.* 1. No such word as port—no idea answering to importation; no such word as landing, or any word equivalent to any of these.

It is unaccountable how the word port should have escaped those charters if ever thought of, or how not thought of if there was a port before the time of *R.* 2.

In the charter of *R.* 3. it occurs very frequently when the port, by admission on all hands, did exist; and it would have occurred before in the antecedent charters, of *E.* 1. & 3. if the thing had then existed in the town of Hull.

This information convinces me, and will, I trust, your Lordship, that there was no charter granting duties antecedent to *R.* 2. because, I trust, it will appear, that the port itself did not before exist; and the difference of the words in what I conceive to be the charters antecedent and subsequent to its existence proves this.

E. 3. *Statutum de prærogativa regis*, if the king grants a manor and the appurtenances, the advowson will not pass: so in this case, if the king had the duties, which by the cause before the court he neither had, nor could have in this case, they

they would not have paſſed by the grant of the port with its appurtenances.

Submitted farther, that the king could not have the duties, unleſs by act of parliament. That in the time of *James* the Firſt, by the arguments of Sir *John Davie*, and *Yelverton*, it appeared, if it were decent to ſay it, where two ſo great men differed, that what are there called common law duties were never in the crown by common law, but aroſe by the ſtatute. And Lord *Vaughan* ſays, he wonders how ſo great a man as Sir *John Davie* could doubt. Lord *Hardwicke* cited this caſe. Vide *Vez.*

12 *Co.* 34. Caſe of cuſtoms, ſubſidies, and impoſitions, Lord *Coke* refers to the ſtatute 34 *E.* 1. *de tallagio non concedendo*, to *magna charta*, and to divers ſtatutes and precedents in the books, expreſsly againſt new impoſitions by the crown. And by the ſtatute of 7 *R.* 2. juſt after the charter now in queſtion, *magna charta*, and the other charters of the liberties of the people, were confirmed.

There are many inſtances, in which the power of the crown is now underſtood reſtrained, in which it before was not ſo underſtood. There were in ſeveral borough towns preſcriptions contrary to the natural * and civil rights of ſubjects, and detrimental to trade. Theſe are not maintainable now, nor were three hundred years ago: There muſt be a ſtrict preſcription to ſupport them. [585]

It has been ſaid (and if this had been a caſe where the crown might have had the duties in conſideration of repairs, it might have been applied to this if to any caſe). It has been ſaid, as your Lordſhip's opinion, that if there was a ſtrict legal preſcription, even an act of parliament ſhould be preſumed: But this would not be a caſe of ſuch preſumption; nor a caſe in which, I apprehend, the crown could have granted duties. The crown has the opening and ſhutting of the ports for the defence of this kingdom; but not to make gain of them: The one is protection, the other expilation.

It was very natural in the time of *James* the Second they ſhould apply, at that nice juncture, for new duties to be granted; when they might foreſee their uſurped duties were in probable danger of falling.

It was ſtated, that King *Richard* had the port and duties in fee: I inſiſt that he never had the duties at all. If he had, they

* There are natural rights, againſt which there cannot even be a preſcription.

they muſt have been granted to the corporation, under the term profits or cuſtoms, or ſomething implying a burthen to the ſubject and profit to the corporation.

I ſubmit, as to the claim of duties, under this ſuppoſed preſcription, that it was founded in uſurpation, and could have no legal commencement in the time of *R.* 2. unleſs by ſtrict preſcription, or rights plainly incidental; neither of which, I contend, have place here.

Lord *Mansfield*—You go upon a ground which quite overthrows one of the points: For if this claim could never have a good commencement there could be no preſcription.

Argument continued,

Vaughan, 158. [*qu.*]

2d *Vez.* 621. Corporation of Exeter. My Lord *Hardwicke* ſays, "It has been doubted, whether the crown can "have theſe duties, other than by an act of parliament pre-"ſumed to be loſt." And that was the argument between Sir *John Davie* and *Yelverton*. If, then, the crown muſt have it by act of parliament, which muſt be within time of memory, how can a corporation or private perſon claim it by preſcription?

[586] Mr. *Wilſon*—That it was hardly poſſible to add any thing to what had been ſaid: And therefore that he ſhould only make an obſervation or two.

The preſumption of a grant cannot be but where there is room for preſcription, nor preſcription within time of memory, he argued from 10 *Co.* 88. treſpaſs. Juſtification under letters patent. The court would not admit the juſtification for failure of production of the letters patent; and there the danger is ſhewn of preſuming a deed, when it might, for ought that appears, ſome way or other be apparent, if it ever exiſted; if ſhewn in evidence interlineations, eraſures, or the like, might appear; or conditions or limitations on the deed: And it would be ſubverſive of the true reaſon of the common law to let in ſuch evidence of a deed. And that was a determination in which Lord *Coke* himſelf deſires the reader to obſerve, that all the judges of England concurred.

Beſides, the corporation have referred to their own ordinance; which they would not have done if they had known of a grant intitling them.

COURT

Court—It is not an ordinance, but a liſt preſcribed and ſet down. I don't, however, object to this obſervation; becauſe they ought to refer to the original grant rather than to inferior evidence.

Argued farther by Mr. *Wilſon*—That their petition to *Cromwell* proved they had then no ſuch right: And if ſo, all antecedent evidence muſt be out of the caſe.

That the corporation would not be conſidered in the light of a private perſon, who, by accident happening in the family, might naturally loſe the evidence of their title, without the loſs being a matter of public notoriety, or even known amongſt themſelves, in a courſe of years after it has happened. That this was not the caſe of the corporation of Hull; and that in fact if they loſt, as appeared, none of their other grants, how is it that they have loſt this only? And ſtill more, how can it be taken for granted, and with nothing but conjecture, that it ever exiſted? and that defeated by very ſtrong preſumption to the contrary.

[Lord *Mansfield*—The ground upon which this application has been made for a new trial (and which has been very ably ſupported) is this—that there was no title made out by the plaintiff, for the port duties, which ought to have been left to the jury: And if any part of what was left to the jury was not proper, to be ſure a new trial ought to be granted.

1ſt, That there was a port exiſtent before the time of *R.* 2. with the ſame duties; and to prove this they alledge, that if there was antecedently ſuch a port in the crown, the duties might certainly be granted, and by evidence of uſage muſt be preſumed to have been granted from time immemorial. [587]

If this be true, there is an end of the new trial; the jury had that left them which was proper to be left.

2d, Suppoſing it to be clear that there was no port before the time of *R.* 2. and then an erection of a port without duties; it is contended, that the claim of the plaintiff's may be ſupported by preſumption of a grant of duties between 1382 and 1441.

I meant to ſay when I began the ſingle ground left to the jury was, whether upon the evidence they would preſume ſuch a grant between 1382 and 1441. If it had come out that there was no inſpection before I ſhould have ordered a new trial for farther light. On bare allegation where there has been an inſpection, and you have not ſince the term deſired to ſee the deeds, the court cannot take it up on a

ſurmiſe

ſurmiſe of ſpoliation, they can only take it upon the judges report.

Now as to the charter of *R.* 2. From the year 1441, to the time when the queſtion aroſe, there is very ſtrong evidence (including a prodigious period of three hundred and fifty or ſixty years) of theſe duties taken without ſuit or diſturbance.

An hundred years ago 13 *Car.* 2. they apply ſtating they have a right immemorial which *Charles* confirms.

Another 4 *J.* 2.

It is ſaid—"This charter relates to duties, and they lay "their claim by immemorial uſage and not by charter." I am well aware why Mr. *Wallace* waived inſiſting upon the charter; becauſe the grant founded upon ſuch charter of *R.* 2. muſt have been within time of memory. But if the poſſeſſion of the crown, and the title of the crown, be taken as the ſource of the grant; then it will be as a preſcriptive right in the crown to theſe duties, and from thence derived to the corporation as claiming under that preſcription.

As to the obſervation, that the difference of the claim was the ground, this makes no difference; they reſt their title upon a preſcription however they make it out.

[588] Then we come to the charter: And it is ſo far from clear, that this was a creation of the port by the charter, that, if left to me, upon reading the charter, I ſhould conceive the port exiſted before.

The water and the port are ſynonymous.

The port of London, the port of Harwick, go miles into the ſea.

What is called Sayrcreek? The port: You cannot put another conſtruction upon Sayrcreek, but as the name of the port. It could not be called Sayrcreek, meaning the town, in the 27 *E.* 1. where the name is Hull, and the town called *villæ de Kingston ſupra* Hull; and yet it ſays, *dudum vocat'* Sayrcreek, that it was called Sayrcreek, a great while before, which the town was plainly not for the reaſon juſt given; but the port might. And the very name of creek implies ſomething in the nature of a port, at leaſt it does not imply a town. What ſort of port, what trade or merchandize, what quays and ſtaithes, in another queſtion: Probably few, and of very little conſequence.

Annexum villæ they had the port before, but now *habeant portum in perpetuum annexum villæ.*

Other words ſupport the conſtruction rather than the contrary. They ſhall have the port "without the interrup-

"tion

" tion of our officers and miniſters," which was very important if the port exiſted before, and the king's officers had been accuſtomed to collect for the crown: But if the port had been then erected, it would have been underſtood that giving it to the corporation in *perpetuum*, would have been giving all that could paſs by ſuch a grant, ſeverally and excluſively.

But there are other arguments, and ſome of them not without weight and force, to prove that the port did not exiſt before. There are arguments therefore of ſome conſideration on both ſides, to prove that it did exiſt before, and on the other hand that it did not At leaſt then it is doubtful; and if doubtful, what more proper to be left to the jury.

What evidence have they given? Above three hundred and fifty years uſage, the ſtrongeſt evidence poſſible.

Another queſtion was made, whether the grant could have a legal commencement.*

If the queſtion were whether ſuch charter would ſupport the claims as a grant in conſideration to repair, I would take time to conſider. It ſeems to be taken in the common [589] pleas by all the judges;† and Lord *Hale* was cited *de jure regio*, ports are like markets; and the king may create ports and make a new grant of them; and authority cited of a grant 21 *E.* 1. to the Counteſs of Devonſhire.—But without this there is enough left with regard to the granting or refuſing of a new trial.

All evidence is according to the ſubject matter to which it is applied. There is a great difference between length of time which operates as a bar, and length of time which goes in preſumptive evidence of a right, ſtill liable to be overthrown by contrary evidence, and not concluſive. V. the S. P. reſolved in C. B. caſe of Tyſſen and Clarke ſupra.

If length of time is pleaded in bar upon the ſtatute of limitations, the jury is bound by the bar; though they and the court are convinced in their conſciences, the money was never paid.

The date of preſcription is fixed (and was firſt fixed five centuries ago) from the acceſſion of *R.* 1. but this will be ſufficiently proved by the evidence of no perſon living, nor any written evidence running to the contrary: But any written evidence will go againſt this preſumptive and implied preſcription; but the poſitive ſtrict and ſettled legal preſcription Difference between poſitive preſcription, and evidence of a preſumptive preſcription.

* Quod non habet initium non petitur finem.

† Qu. the caſe and time to which his Lordſhip refers.

ſcription will operate effectually in bar, be the title or the evidence which way it will.

No poſitive rule what length of time ſhall operate as a preſumptive preſcription. Vide Rex v. Stephens M. 31 G. 2. Bur. 343—4.

Length of time with circumſtances has no poſitive rule. Length of time is no bar in an action upon a bond; a great number of years without any intereſt paid upon the bond, may be a preſumption that the bond was diſcharged by antecedent payment: But if the jury ſee on evidence that the man was not able to pay, or that he acknowledged the obligation within a recent time, the preſumption is taken off.

A charter loſt may certainly be preſumed: I don't know that exiſtent thing which may not be ſupplied by evidence.

Preſumption, when the exiſtence of a thing is proved, and the thing loſt; preſumption where the antecedent exiſtence of a thing is proved implicatively, by the exiſtence of ſomething which could not have exiſted without it. Note, this is one of the ways of proving the higheſt, moſt important and cleareſt of all poſſible truths.

A record (if you can ſhew it ever exiſted) and has been loſt, you may ſupply it.

Suppoſe you cannot ſhew it ever exiſted; yet enjoyment upon a title, which could not be unleſs by the record, is evidence of the exiſtence of ſuch a record, to let the party claiming into the benefit of it as if it had actually been produced.

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In Lord *Purbeck*'s caſe there was no proof of loſs of record. He ſat in parliament as viſcount, levied a fine of his honour as viſcount, and enjoyed the title to his death as viſcount. But there was no actual proof upon record of his peerage. It happened the argument was made unneceſſary; for the patent was found: Yet that was only preſumptive evidence, for the letters patent might have been never executed; and there are caſes, within my memory, of patents granted and not made out, which did not bind the king.*

† called Καθ' ανθιφρασιν the nullum tempus act; it appears to be one of the inſtances in the preſent reign, where the crown has been pleaſed voluntarily to make a beneficial reduction of its prerogative.

It would be very pernicious (eſpecially before the late act †, when no time was a preſcription againſt the crown) that no preſumptive evidence ſhould be admitted in ſupport of the title of a ſubject.

There is a caſe of great authority in Lord *Coke*, determined by the chancellor, who called the judges to his aſſiſtance: and

* There is a very recent and melancholy inſtance, of a patent granted and not executed, within every ones memory.

and there is not a poſſibility in that caſe of the preſcription having been before time of memory.

Grant of the manor of Kimbolton, *anno* 31 *E.* 1. The king was ſeiſed of the ſaid manor, to which the advowſon of the church of Kimbolton was appendant, and granted the manor, with the appurtenances, to *H. de Bohune*, earl of Hereford, in tail general. Tho' the grant did not paſs, for the reaſons there given, an impropriation is made, as under this grant, which muſt have been within time of memory; and reſolved by Lord *Ellesmere*, and all the judges, that the plaintiff ſhall enjoy the ſaid rectory, for though, by any thing which can now be ſhewn, the impropriation is defective,* for that the iſſue had nothing in the advowſon to paſs to impropriee at the time of his grant, yet that a lawful grant ſhall be intended for the ancient and continual poſſeſſion; and that all ſhould be preſumed to make the ancient impropriation good, on account of the waſte occaſioned by time, whereby records, letters patent, and other writings, are conſumed or loſt. And it is obſerved in that caſe, that ancient poſſeſſion would hurt inſtead of ſerving, if after the death of the parties, and a ſucceſſion of ages, any objection or exception ſhould prevail; which, if made in the life-time of the parties, might have been anſwered but at ſuch a diſtance not.

Beadle *againſt* Read and others, Hil. 4 Ja.

* The advowſon not paſſing by the words cum pertinentibus.

There is a caſe from the duchy of Lancaſter, (I don't recollect the circumſtances) where I left it to the jury, whether they ſhould not preſume there was a grant from the crown. I then thought it was a principle in law, that upon circumſtances you may leave to the jury (and the caſe cited is an authority) to conſider whether they will preſume a grant: and they will conſider upon the circumſtances, or a court of equity, if it properly comes before them; but here, on ſo narrow a compaſs as fifty-nine years, whether upon circumſtances they ſhould preſume, would have been very proper to be conſidered by the jury.

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Poſſeſſion is very ſtrong; rather more than nine points of the law. Very great ſtrides have been made in favour of it: Some which Serjeant *Draper* has mentioned, of the preſumption of a bye-law, invented to ſupport uſage which would not have been good without it.

To be ſure, it was a great ſtride, when firſt introduced, to ſuppoſe there was immemorial cuſtom that copyhold lands ſhould be entailed, though, certainly, there was no ſuch cuſtom earlier than the ſtatute of *E.* 1. but this was done in favour of poſſeſſion: And it ſeems very dangerous to the ſubject, that there ſhould be no preſumption againſt the

Namely, by 2d Weſt. de donis an. 13 E. 1. A. D. 1285.

claim either of the crown or of the church, be the circumſtances what they may.

Upon both grounds, I think, it might be properly left to the jury. But I ground it principally upon the firſt, that there was an old port, formerly called Sayrcreek, with duties thereto belonging, before the time of *R.* 2. time out of memory.

But even was it more doubtful, I ſhould be very unwilling to diſturb a verdict, upon poſſeſſion of 350 years. It is not concluſive evidence, and I don't think it's much to grant them the benefit of a verdict, ſubject to obſervations upon circumſtances which hereafter may come out, and probably be in farther ſupport of their title.

CURIA OMNIBUS ASSENSIT: Whereupon RULE to ſhew cauſe why a NEW TRIAL ſhould not be granted, in the above caſe, DISCHARGED.

[*Priddle* and *Nappiers*, 11 *Rep.* 8. *Mic.* 10 *Jac.* In an attachment upon prohibition in the Common Pleas, the plaintiff declares againſt the defendant proprietor of the rectory of Tittenhul, in Somerſet; and makes title from Robert Sherburne, and his predeceſſors in the Priory of St. *Peter* and *Paul* in the ſaid county, as rectors of Tittenhul aforeſaid; for that the ſaid Robert and all his predeceſſors in the ſaid priory being ſeiſed, and in poſſeſſion of the ſaid rectory and of twenty-two acres of land, as parcel and appurtenant to the ſame, in the right of his ſaid priory, on the 20th of March 1530, the ſaid prior with his convent did give grant and ſurrender the ſaid priory, the ſaid rectory, &c. and the ſaid twenty-two acres of land to King *H.* 8. his heirs and ſucceſſors. And that by force thereof, and of the ſtatute of diſſolutions 31 *H.* 8. King *H.* 8. was ſeiſed of the ſaid rectory
[592] in his demeſne, &c. as in right of his crown diſcharged of payment of tithes, and being ſo ſeiſed, conveyed the inheritance of the ſaid twenty-two acres to Sir *Thomas Freke* and others; who *anno* 38 of *Eliz.* demiſed to the plaintiff for ninety-nine years, if three of his ſons or any of them ſhould long live; and averred their lives, and that the defendant proprietor of the ſaid rectory, ſued the plaintiff for tithe of corn growing on the ſaid twenty-two acres.

And defendant, *Napper*, alledged a grant, by letters patent of Queen *Elizabeth*, *anno regni* 2d, of the ſaid rectory to *Rive* and *Evelyn*, and their heirs, and by meſne conveyances to himſelf, the defendant in fee: Whereupon he demurred for the ſaid tithes, as he lawfully might, with

at

abſque hoc, that the ſaid *Robert*, late prior, or his predeceſſors, from time whereof memory runneth not, &c. held the ſaid twenty-two acres, diſcharged of tithes. On iſſue joined the jury found a ſpecial verdict, in ſubſtance thus: That the prior and his predeceſſors, from time whereof, &c. to the diſſolution, &c. were ſeiſed of the ſaid twenty-two acres in their demeſne, as of fee, in right of their ſaid priory, and that one *Thomas* was ſeiſed of the advowſon of the ſaid church of Tittenhul, *jure prioratus*. And he being ſo ſeiſed, *H.* 8. in the twentieth of his reign, by letters patent of his ſpecial favour, certain knowledge, and mere motion, granted licence to the ſaid *Thomas*, then prior, and the convent in his and their ſucceſſors, to impropriate, conſolidate, incorporate, annex and unite the ſaid church of Tittenhul, and the ſame ſo impropriate, &c. to hold to their uſe, &c. charged with proviſo to endow a vicarage, and a competent annual allowance for the poor. And that *John*, biſhop of Bath and Wells, 4 September 1529, by indentures *tripartite*, inform as ſet forth by the verdict, did annex, appropriate, and unite the ſaid church to the ſaid priory, with the aſſent of the dean and chapter, party to the indenture. And afterwards the parſon of the ſaid rectory died, and *Thomas*, the ſaid prior, entered, and was well ſeiſed of the ſaid rectory, and of the ſaid twenty-two acres in his demeſne, &c. *jure*, &c. and afterwards the ſaid prior *Thomas* died, and prior *Robert* ſucceeded him. And after the ſaid appropriation ever held and had the ſaid rectory, with the twenty-two acres in right, &c. and found the ſurrender. And that the ſaid King *H.* by deed of indenture, as ſtated in the verdict, 24 July, *anno* 36 *regni*, demiſed the ſaid rectory to *W. P.* doctor of law, for twenty one-years, who aſſigned to *Edward Napper*, and that no tithes were paid till the ſaid *Napper* had a ſentence in the court of audience, *anno* 2 Mar. *reg.* againſt one *Thomas Gull*, then farmer of the ſaid twenty-two acres; and after the ſaid ſentence till the eighth of Queen *Elizabeth*, tithes were paid,—and convey the ſaid rectory to Queen *Elizabeth*. And by the ſaid letters patent and divers meſne conveyance to *Napper* to the defendant, and conclude in the uſual way, praying the judgment of the court on the premiſes, whether the plaintiff or defendant have a better right.

Reſolved, *inter alia*, that the information upon which the prohibition was granted was ſufficient in matter; for although every pariſh church is ſuppoſed preſentative, and the incumbent ought to come in by admiſſion, inſtitution, [593]

and induction, yet the plaintiff, in this case, may prescribe that the prior and his predecessors, &c. from time whereof memory, &c. have been rectors; for that amounts that it was impropriate: And the beginning of a thing before time of memory can't be known whether it came by union or impropriation. And therewith agrees 21 *E.* 4. 65.

And second, it was resolved, that an appropriation defective at common law, yet if the rectory was in reputation appropriate, and so used, would pass to the king under the statute of 27 *H.* c. 38. or 31 *H.* c. 13. even though the statute of 35 *Eliz.* c. 3. could not aid it. And then the case of *Kimbolton* is cited, and 19 *Eliz.* *Dyer*, 368, where an appropriation under a grant of an advowson by a person only tenant in tail at the time of the grant, *videlicet*, 13 *R.* 2. was resolved by Lord Chancellor *Bromley*, with the Master of the Rolls, and Justices *Shute* and *Wyndham*, to be good. And note, there the presumption had its commencement thirteen years lower than here, in the principal case of the corporation of *Kingston*, and instead of 350, could have been but of 183 years continuance. And vide *Crimes* and *Smyth*, 12 *Co.* 30 *Eliz.* where the original grant had been on condition to endow a vicarage. Alledged the condition had never been performed; the court presumed the performance on the maxim, *ex diuturnitate temporis omnia præsumuntur solemniter esse acta.* And note there was but 16 years.]

Crosser *against* Miles.

ON a motion to stay proceedings on payment of debt and costs.

Affidavit that defendant paid the debt and costs to a person who called himself the plaintiff's clerk, whom he understood authorized to receive the same, for the use of the plaintiff's attorney, in consequence of a letter which the said person brought from the plaintiff, with an account of the debt and costs, and desiring that defendant would pay the same. And that the said person accordingly gave a receipt for the plaintiff; notwithstanding which payment the action has proceeded.

Against the rule—The messenger sent is not stated to have intimated at all that he had any authority to receive the money. In fact, he was a man merely employed to carry errands, but, by his very appearance, so poor as not likely to be trusted by any one as a proper person to receive

money

money. And that the plaintiff intended only by ſending him to give notice that he expected the defendant to pay in convenient time, either to himſelf or ſome proper perſon, but by no means to this errand-man. And that he never truſted him with more than five ſhillings at a time.

For the rule—That the money was in due courſe, and, according to the practice of law, paid to the clerk, (for ſuch he affirmed himſelf to be) of the plaintiff. And that the plaintiff's attorney had ſo far acknowledged him to be his clerk as to call him a hackney writer, employed by him in doing buſineſs.

Lord *Mansfield*—Don't you foiſt in a propoſition which is not allowed; that is, that the perſon was his clerk. If this was a perſon uſually entruſted to receive money: But the perſon who ſends ſwears that he never entruſted him with more than five ſhillings.

Mr. Juſtice *Aſhhurſt*—That it might be the ground of an action, if they could prove before a jury that he was a perſon uſually employed to receive money.

The counſel, upon this, moved that the rule might ſtand till ſuch matter was proceeded on, if any ground was found to proceed.

Lord *Mansfield*—This will not be allowed upon motion merely, without evidence that this perſon was uſually employed to receive money. If either party ſuffers, on a miſtake, they ſuffer hardly: The one, if this be taken as an authority, for giving it imprudently; the other if it be not, for paying.

The maſter ſays it is far from a general practice to pay debt and coſts to the clerks. They don't uſually do it for a ſum of any conſequence.

RULE DISCHARGED.

Knotting *againſt* Miles.

ON a motion to ſtay proceedings in ejectment till a ſufficient perſon be appointed, who ſhall undertake for coſts, the leſſor of the plaintiff being an infant.

On the other ſide, it was contended, that the rule, inſtead of being made abſolute, ought to be diſcharged with coſts: For that where there was a real plaintiff in ejectment, no ſuch application was ever made. Now here there is a real plaintiff, who appears to be huſband to the mother of the infant. The huſband declares he is able, and will undertake to pay the coſts.

On

On the other ſide—That this was an ejectment to turn the mortgagee out of poſſeſſion, without payment of his principal and intereſt: That at all events, the rule ought to be made abſolute; becauſe they might know that the plaintiff was indeed an exiſtent perſon, and not ideal, as *John Doe*, or *Richard Roe*; but that it did not follow that he was at all more reſponſible.

Lord *Mansfield*—There is no ground: Here is a real plaintiff, and the rule was obtained upon a falſe ſuggeſtion.

Let it be DISCHARGED WITH COSTS.

New Trial.

Floyer *againſt* Edwards.

ON a motion for a new trial, upon ſpecial verdict.

Sale of gold and ſilver wire to the defendant by the plaintiff, who was a dealer in that buſineſs, and three months credit, the uſual credit in the courſe of that trade, and with an encreaſed price, if not paid within the time, amounting to more than the rate of five *per cent.* but not more than the ordinary rate in that way of buſineſs, upon non-payment at the time ſtipulated. The goods were not paid for at the time; and, upon theſe facts found, the queſtion was, whether the contract was uſurious, and therefore void.

Argued, that the credit being to ſtand enlarged as long as the money ſhould be unpaid beyond the three months, the tranſaction could appear no other than a colourable contrivance to lend money on uſurious terms.

Agreement upon an illegal contract is entirely void; and not only ſo, but uſury by the ſtatute.

Reynolds v. Clayton.

Moore, 397, if one comes to borrow money, and the other ſays he will not lend, but he will ſell corn, or the like, with an advance of more than ten ſhillings the hundred, which was then legal intereſt,* this is uſury.

* There was no intereſt then that was legal; but intereſt above ten per cent. ſubjected to the penalty; intereſt under was liable to be forfeited.

[596] Lord *Mansfield*—The caſe which you argued very well (*Macey* and *Lovell*) about two years ago, was only from what time the action accrued, and agrees not with this. Can you make any argument in this caſe to ſhew the agreement is good, but there is uſury beyond?

Anſwer—No, my lord: If the agreement is good, I cannot eſtabliſh my point.

Againſt the rule—The lender of the money might fix a price for three months credit; and if he was to give a doubtful credit beyond, might contract to receive an advanced price.

This is not an agreement for an uſurious purpoſe.

It is a commiſſion for *bonâ fide* ſale of goods; it is not a pretence to cover a loan, upon uſurious terms; for I admit the caſe cited by Mr. *Buller* to be good law, that being merely an evaſion.

Here the contract gives the party an option to pay the money without any encreaſed uſe.

How many leaſes has your Lordſhip ſeen, *nomine pœnæ*, of twenty ſhillings or five pounds for every day's holding over and keeping back rent longer than the time.

The nature of uſury is ſuch, that it muſt be a certain compenſation ſtipulated at the time, and which, by the agreement, muſt be paid by the borrower, at all events exceeding the legal allowance; not a contingent encreaſe, from which the borrower may diſcharge himſelf by payment at the day.

Burton's caſe, 5 Rep. [69. Mic. 33 & 34 *Eliz. B. R.*] The court, it being in the election of the grantor to have paid, and fruſtrated the rent, this is not uſury; [vide alſo *Clayton's* caſe, the next in the book] but if it had been agreed, notwithſtanding power of redemption, the money ſhould not be paid at the day, this had been uſury: For this had been an evaſion. And no colour ſhall defeat the remedy of the ſtatute; for the ſtatute gives him an averment.

Cro. Ja. 509. *Roberts* v. *Tremaine*. A caſe put by Mr. Juſtice *Doddridge*. If I ſecure both intereſt and principal, and it be at the election of the party to pay within the time, and ſo avoid paying the encreaſed intereſt, this is not uſury. *Hawkins's* Pleas of the Crown, 247.

Cumberbach, that where the party has his election to pay [597]
within the time, but on failure he muſt pay ſuch a ſum, this is not uſury, but *nomine pœnæ*. I admit this to be a *dictum*, but it is a *dictum* of Lord *Hale's*.

In this caſe the ſeller might have had his action at the end of three months, and have compelled payment; the buyer, at the end of three months, might have tendered the money, and inſiſted on its being accepted as payment, without being liable to the encreaſed ſum.

Mr.

Mr. *Bearcroft*—That it was rightly ſaid uſury was a crime, and not to be preſumed. Have the jury found it? If the ſubſtance had been uſury, and the form a contract for ſale, no colour, no contrivance, no ſhift, to uſe the words of the ſtatute, ſhall ſerve.

All the trade in the kingdom is carried on by this kind of credit.

On the other ſide, in reply, Mr. *Dunning*—I had argued this was the caſe of all the trades on credit in this kingdom, becauſe if this particular trade might do this, the reſt might. I did not expect to be contradicted; for I knew it was impoſſible, upon facts: But I did not expect ſo candid a conceſſion; from whence it will follow if this trade has done right, which hitherto has alone uſed this, and not without the exception of a perſon who ſaid he thought the laws would not ſuffer him, and therefore did it not, all the other trades will do the ſame.

If the jury have not found what, upon evidence of facts, they ſhould have found, this is a ground for a new trial.

This does not agree with the caſes *nomine pœnæ*, becauſe the recompence was certain.

The caſe in *Cro. Ja.* ſuppoſing the agreement lawful, is to ſecure a punctual payment, with a groſs ſum of 30l. as penalty, which will be the ſame whether the withholding be a month, a day, or a year.

But here is a ſum accumulated in proportion to the time of withholding, and which accumulation is far beyond the proportion of legal intereſt.

That a penalty is a very different thing: For in the caſe of a penalty upon bond courts of law now relieve upon the ſtatute, and courts of equity always.

[598] They did not mean by the original contract the payment ſhould be regular: Why ſhould they, when the ſeller could never get ſo much by payment at the day? And if the buyer had been likely to pay at the day, he would not have been entangled in ſuch a contract. It may be ſaid he might have paid at the day, but he had not money ſo plenty: The wiſdom of theſe laws is the protection they afford to indigent men.

That an encouragement of uſury tends to the encouragement of trade is quite a new propoſition.

The court can draw no line; for ſixty *per cent.* may as well be taken as ſix: And then too all the arguments might be uſed which are now uſed of the poſſibility of payment at the day.

The

The queſtion ſeems very ſhort, whether there be any law againſt uſury? whether it be founded in policy? and whether it be wiſe or proper in the court to repeal it?

Lord *Mansfield*—The ſtatute againſt uſury prohibits any man from taking, directly or indirectly, on the loan of money, goods, or merchandize, for the forbearance of payment of intereſt above five *per cent.* by the year; and ſo in proportion for a greater or leſs ſum, and a longer or ſhorter time, all bonds, contracts and aſſurances whatever for payment of any principal or money to be lent, &c. upon any uſury whereupon or whereby there ſhall be reſerved or taken above the rate of five pound in the hundred, as aforeſaid, ſhall be utterly void. V. 37 H. 8. c. 9. 13 Eliz. c. 3. 12 Car. 2. c. 13 12 Ann. ſt. 2. c. 16.

I cited the words on the prohibition and annulling clauſe, becauſe it is upon a loan of money, or the like, where, upon the forbearance of the principal, more than five *per cent.* is taken. And the ſtatute ſays directly or indirectly; and therefore you muſt get at the ſubſtance of the tranſaction. What is the commiſſion? what is the intent?

You muſt come at the diſcovery; that it is borrowing on one ſide, and lending on the other. And then, if the ſubſtance be a loan of money, no contrivance in the wit of man, nothing applied to any appearance of ſale, will allow the taking of more than five *per cent.* or ſupport, from the penalty. And though the ſtatute mentions goods or money, yet that was mentioned as the oldeſt kind of uſury; but an annuity, or any other kind of invention, would fall under the ſame.

Mr. *Dunning* found it ſo material, that in his reply he called him the lender. How does it appear? It is in the courſe of trade, in a ſeller of gold and ſilver wire, otherwiſe a refiner. The borrower, as he is called, cannot juſtify forbearance upon demand a moment beyond the day. [599]

Farther, it is not a contrivance. This is the conſtant uſage of the trade; and ſo near univerſal, that but one exception can be produced; and that very exception proves the general practice: For the witneſs who ſaid he took but five *per cent.* ſaid that the reſt of the trade were accuſtomed to take according to the rate here ſtated.

If an encreaſe of the ſum to be paid, though made only on the contingency of the money withheld beyond the day, be uſury, then the Bank of England, and all the merchants in London, are guilty of uſury: For they diſcount at five *per cent.* but if not paid, they advance the money; not immediately, but upon the expiration of a few days it advances,

upon

upon a nice calculation, and would not have occurred to me if I had not been put in mind of it; but if this were uſury, ſo is that.

Is this man a lender of money, under colour of dealing in ſilver wire? No ſuch thing.

Is it worth any man's while; in truth could he live by his trade, if he took five *per cent.* inſtead of the money, to carry on his trade?

If the money was unpaid, there is no agreement for hour's forbearance. "I have in view to get my m
"back in three months: If you don't pay me in
"months you ſhall pay me an advanced price. I
"given you three months credit for nothing: I don't ch
"to have my money unpaid; and will, therefore, hav
"ſanction to inforce the payment."

How does it ſtand upon authorities? An actual borrowin of money with a penalty on forbearance is no uſury, if t borrower can diſcharge himſelf by payment within the ti And that caſe in *Croke*, which ſays this is much ſtronger than this caſe, by the difference of the penal ſum which is greater.

Not uſury where it is in the election of the borrower, at the time of entering into the contract, to avoid paying any more than five per cent. by paying at the day.

In the caſe of *Hawkins* it is expreſsly, that where in the election of the perſon borrowing to diſcharge himſelf thi is no uſury. And ſo the other authority.

It is of great force to prove a contract not uſurious, that it is in the ordinary courſe and practice of trade.

I rely moſt ſtrongly upon the original contract being in the way of trade; becauſe both parties will then take care that the terms be reaſonable in the outſet.

[600]

The miſchief is when there muſt a forbearance or the like, whether the borrower will or not, as a colour to draw more than the legal intereſt.

The miſchief is, when on the very making of the agreement there muſt be a forbearance; which ſhews that the object was originally, not the ſale of the goods, or ſecurity againſt detaining the money due, and not paying for them in a reaſonable time agreed, but the credit given by a contrivance to raiſe an undue intereſt upon the loan agreed on.

Though it was very well argued at the trial and very ably ſince, I cannot help thinking the jury did right, in thinking the contract not uſurious becauſe in the courſe of trade; and

and it was in the power of the borrower to have avoided the encreaſed payment.

Naſh *againſt* Cox.

MOTION for a new trial—Dealings between plaintiff and defendant concerning reſpondential bonds, the exiſtence of ſome of which was out of diſpute; but as to one its exiſtence was diſputed.

Amongſt various other evidence the clerk of defendant was called as a witneſs, to prove that he had looked into his maſter's book, (which appeared to have been loſt by an accident of the houſe being robbed) and that there were entries of a great many other reſpondential bonds but not his.

Objection to the *competency* of this witneſs in point of law, namely, that being agent to the party he could not be evidence in his behalf. The anſwer was—" you are very " right; it is an objection generally: But there is no rule " that does not admit of exceptions, and this is a caſe " upon the circumſtances which appears to have been a " miſtake; and it is evidence very neceſſary." On this evidence the jury found for defendant.

Mr. *Bearcroft* ſaid he had taken a great deal of pains to get rid of his bias; he was of counſel for the plaintiff.

Lord *Mansfield*—Upon ſuch a caſe it was not only your general duty but you were bound, whatever your private opinion might be, to move for a new trial. It is an objection of great nicety.

Mr. *Bearcroft* ſaid, that at the trial he admitted it as evidence, if his Lordſhip thought it evidence; and that he believed, he added farther, that if it was evidence in any caſe it was not fit it ſhould be left out in this.

Lord *Mansfield*—I left it to the jury that this evidence [601]
was not legal evidence; I left it to them on the other evidence from other books on both ſides; and you are always candid in complying with the juſtice of the caſe. But if it had been contended pertinaciouſly that ſuch evidence ought not to be admitted, I ſhould have told the jury that they would do right to preſume, the party who refuſed to admit ſuch evidence, felt it would go againſt him.

Mr. *Cowper*—That it was a very nice tranſaction and very dark, and of much importance; and no prejudice ariſing, except the farther expence, it would be very right to grant a new trial.

Lord

Lord *Mansfield*—If you had made any new diſcovery, or had a glimpſe of new light it would have been a ground; but you had, or might have had inſpection. And as in the caſe of *Hull*, if you had applied for an inſpection the court would have granted it.

But what new evidence can come out? There is no certainty: It is upon conjecture; but they muſt find one way or other.

The reſt of the court agreed that, in ſo uncertain a tranſaction, the point once ſettled by a verdict on either ſide ought not to be diſturbed,

Larceny.

IF indigo be ſold in the groſs, and as ſuch (the buyer chooſing to have it in groſs,) and be changed by the ſeller's taking part out and putting in indigo duſt, though it be in his own ware-houſe; if after the contract was complete by payment, it appears that ſuch taking is a felony, if the value taken be ſuch as would make it more than petty larceny ſuppoſing it had been ſtolen out of the actual poſſeſſion of the buyer. I ſuppoſe becauſe the poſſeſſion of the ſeller is the poſſeſſion of the buyer after the contract is compleated; and it was held by Lord *Mansfield* at *niſi prius*, and repeated in court, that ſuch taking would be felony, upon occaſion of evidence offered of this kind which Lord *Mansfield* held improper, (the action, I think, was an action of trover) becauſe if it proved any thing it proved a felony. And the ſeller, I apprehend, cannot be conſidered as bailee of the goods, becauſe they are not delivered to him by the defendant to keep or convey to him. And even if a bailee take part out, as a miller, who has corn to grind, part of the corn out of the ſack with an intent to ſteal, it ſeems this hath been held felony; and ſo of a carrier taking part of the goods out of a pack; for ſuch a ſpecial bailment of a part, diſtinct from the whole, was not given him. Though perhaps this latter reaſon when it was firſt introduced was
[602] a little refined and aſtute, if not over ſubtile in the caſe of life: But probably the ground of this ſubtilty was this, that if the whole be taken the injury is more apparent, and the direct remedy for the breach of truſt eaſier; farther too, if the bailment is determined by the goods arriving at the place of delivery, though they be ſtill in the poſſeſſion of the bailee, it is felony if he takes them. V. *Wood's Inſt.* Title Larceny.

On

ON a motion upon a rule to ſhew cauſe why, on filing common bail, a writ of *ſuperſedeas* ſhould not iſſue on ſuggeſtion by affidavit, that the original debt was under 10l. but by coſts was increaſed to 17l. and that therefore ſpecial bail ought not to be required.

To this it was anſwered that defendant agreed to pay debt and coſts, and by ſo doing made the coſts part of the debt, and was liable upon aſſumpſit.

Lord *Mansfield*—Can you turn a judgment debt into a ſimple contract one by the ſame perſon? If it had been a third perſon this would have a conſideration.

But what was his promiſe? To pay a debt to which he was liable on record.

Anſwer—Not to the ſame ſum.

Lord *Mansfield*—He is liable by the judgment to the coſts. Rule diſcharged.

Mr. Juſtice *Aſhhurſt*—This muſt be one thing or the other. Do you ſay by the promiſe the judgment debt is gone? Does it not remain ſtill a lien upon the lands?

Doe on the Demiſe of Mears.

14 June.

EJECMENT T.

Special Caſe reſerved.

DEMISE of a rectory by indenture for ninety-nine years if grantee ſhould ſo long live.

The execution of the deed proved; but the ſubſcribing witneſs did not ſee the money paid, the grantor acknowledged the payment.

Pleaded againſt the deed that the demiſe was fraudulent; and alſo that the defendant was guilty of non-reſidence.

In ſupport of the firſt point, 13 *Eliz.* was pleaded to [603] avoid the transfer of livings by corrupt and indirect agreement.

Objected, that there was no corrupt agreement or indirection ſtated.

As to the point of reſidence it was contended that the abſence muſt be voluntary, and not unvoluntary.*

21 *H.* 8. on non-reſidence.

Moore

* Neceſſitas excuſat legem.
Lex non cogit ad impoſſibilia.

Moore 343.

6 *Co.* 21. *b.* lawful impriſonment without covin, is a good excuſe.

Now here the plaintiff is under ſequeſtration, which is a good excuſe.

Lord *Mansfield*—Why the ſequeſtration is for the neglect, is it not?

Anſwer—No, my Lord, it's a proceſs upon debt.

Sequeſtration not a legal excuſe for non-reſidence.

Lord *Mansfield*—You have not ſtated this in your caſe, and ſequeſtration is no legal hindrance from his reſidence, or ſerving the cure; only if he does not attend when the profits are taken away, another muſt be provided.

The abſenting appeared on the dates afterwards in the caſe to be in 1770, and the ſequeſtration not until 1772.

As to the abſenting, *Bunbury* 210—11. and *Cro. Eliz.* were cited.

Lord *Mansfield*—It ſeems a very clear point; the only difficulty was, upon the ſtate of the caſe it appears to be between two creditors.

JUDGMENT for DEFENDANT.

Moved, that the plaintiff may be non-ſuited.

Lord *Mansfield*—This follows of courſe; let a nonſuit be entered againſt the plaintiff.

[604]
14 June.

Heeling *againſt* Heeling.

CASE for certificate out of Chancery, teſtator, *anno* 1732, being ſeiſed of divers premiſes particularly ſtated, makes his will and deviſes all his freehold and copyhold eſtate in Eſſex to his wife, without impeachment of waſte; remainder to his ſons; remainder to his own right heirs in tail ſucceſſively; the reſt and reſidue to his wife. At the time of making this will he was entitled to the three-fourth parts of a copyhold in that county as mortgagee, which he purchaſes after the making of the will; and afterwards, in 1735, purchaſes another four-fifths of the ſame eſtate, and ſurrenders it to the uſes declared by his laſt will and teſtament in writing. And in February 1736 he ſtrikes out of his will a legacy to the poor of Hexham, and enters a memorandum, ſubſcribed by two witneſſes, that it was ſtruck out by his the teſtator's order and in his preſence, he having paid the legacy in his wife's time: Upon theſe facts the queſtion out of Chancery was directed.

Whether

Whether any and what eſtate paſſed in the three-fifths of the copyhold under the mortgage, and in the other four-fifths ſince purchaſed, and to what uſes?

Upon the argument of the caſe it was relied againſt the deviſee, that lands could not paſs by force of the ſurrender, to uſes of a will made before the ſurrender and purchaſe. And 2dly, if the words of the ſurrender were proper, admitting that by proper words they might paſs; next that the ſtriking out the legacy after the purchaſe and ſurrender was no republication.

Laſtly, that lands in mortgage at the making of the will could not be intended to paſs in ſettlement, and therefore would not though after purchaſed in fee.

On the firſt point it was ſaid in ſupport of the argument againſt eſtates ſubſequently purchaſed, paſſing under a ſurrender made after the will, that if copyholds are to be conſidered as freehold, none can paſs which were purchaſed after the will; for a will is conſidered as limitation of uſes, and no man can limit an uſe which he has not.

Bunker and *Cook*, *Salk. Fitz-Gibb.* lands deviſable by the cuſtom, lands deviſable *ut bon. et cat.* will not paſs purchaſed after the will.

Cutter and *Harriſon*, the will diſpoſes of all his real and perſonal eſtate in the reſiduary clauſe.

In this caſe, ſurrender to ſuch uſes as he ſhall declare in his will. This, indeed, is ſpeaking in the future time, but not improperly, perhaps, if the will be underſtood as ſpeaking at the time of his death, the uſes which ſhould then appear to be declared; but nothing would paſs which had been purchaſed after. If they can in any caſe, though ſubſequently purchaſed to the will, they will not paſs under the words of the ſurrender. [605]

There is no diſpoſition in the will which muſt include theſe lands: The deviſes are in ſtrict ſettlement, and cannot include after purchaſed lands, nor lands holden by the teſtator in mortgage. The reſt and reſidue is to his widow; it may refer to that uſe: It is impoſſible to ſay to which uſe it ſhall paſs. Nothing in the ſurrender diſtinguiſhes to which of theſe two different uſes the ſurrender ſhall operate. Then the eſtates will deſcend according to the title ſtated.

It is ſtated, as to the ſecond principal point, that after the purchaſe the teſtator ſtruck out a legacy he had given to a charity, as having ſince the making of the will paid it. This cannot be anſwered till it appears what is intended to

be

be made of it: as no caſe ſeems to go ſo far as to call it a republication.

On the other ſide, Mr. *Dunning*—I can put no other conſtruction upon the words declared, or hereafter to be declared, than a proviſion for a will already made, and a will hereafter to be made. And the ſurrender will attach either to the paſt will, or to another, which the teſtator ſhould leave as his laſt.

The teſtator, when he made this ſurrender, could not but know he had a will already executed; and by the ſurrender as fully connected the will with the ſurrender, and incorporated it, as if he had recited it. And then, if this will ſhould finally be his will, when he came to die, then that the paſt; and if he made another, and left that, then the other ſo made ſhould limit the uſes of the ſurrender.

In the limitation of powers it is not neceſſary to refer to the powers. Can any man doubt, that even of freehold a man may ſo diſpoſe that the uſe ſhall attach to a precedent will. If a man ſays "All the lands I have purchaſed, or ſhall here- "after purchaſe, ſhall go to the uſe of my will," can they not? If in a conveyance he recites the intent to be to the uſe of a former will? Will this, or has it ever been held it would, exceed his power?

The caſe cited was candidly acknowledged to have affirmed that a ſurrender may effectuate a paſt will, but that in the caſe there the ſurrender was not in ſuch terms as could refer to a paſt will, it was to ſuch uſes as he ſhould declare. This was a future will: And it was ſo expreſſed that it could with no propriety be applied to a will already
[606] made. And your Lordſhip only determined that, when a man ſpeaks of what he ſhall do, he does not mean what he has done. The words are here declared, which is a recognition of a declaration of uſes already made.

When it is ſaid the uſes are doubtful, it muſt be conſidered that theſe copyholds are in Eſſex, and this will refer to lands in Eſſex, and not to other deviſes not under that deſcription. Your Lordſhip, as to the admiſſion, will refer that back to the date of the ſurrender.

Lord *Mansfield*—This will do no good; theſe are certainly money: If it had been purchaſed it might be different.

Mr. *Dunning*—I alluded not as thinking it neceſſary to the caſe, but becauſe it was a circumſtance which the court of Chancery thought proper to be inſerted.

As to the circumſtance of republication, he adverted to his will, and ſhews he did by ſtriking out the legacy he had paid in his life-time. Therefore he altered what he meant

to

to alter, and meant the reſt ſhould ſtand according to the preſent circumſtances of his eſtate. And *Ver.* 230, obſerves that republications are very much favoured, and very ſlender evidence will do to ſupport them. If this was ſlender, this authority decides the effect even of ſlender evidence upon that head: But I take this not to be ſlender evidence; for it is manifeſt by it that he meant his will to ſtand as it was, and take effect at his death (according to the circumſtances at the time of ſtriking out the legacy, as ſtated) in all reſpects, but for that deviſe, which was ſtruck out.

1 *Roll's Abr.* 617.

The whole effect I contend for is upon the ſurrender, conſidering the will as incorporated with it; and upon that I moſt confidently rely the court will be of opinion for my client.

Mr. *Mansfield*, in reply—I ſubmit, that the caſes cited were not of lands. An alteration of a perſonal bequeſt, amounting to a republication, to ſupport a ſuppoſed deviſe of real property, muſt be very new. But beſides what is this? Does it make any alteration in the operation his will would have had if the legacy ſtruck out had ſtood there, except only retrenching that legacy? Even a codicil, with three witneſſes, has been held no republication. *Rogers* and *Gibſon. Vezey*: "I deſire this may be taken as a part of my laſt will," yet no republication.

Lord *Mansfield*—Was this ever queſtioned? It is impoſſible to make a doubt. You don't ſtate the caſe. It is *juris tritiſſimi*: There may indeed be a will ſo made that a codicil can have no effect upon it, as to new purchaſed lands. A man may make a will, and deviſe *A. B.* and *C.* a codicil [607] can have no effect upon this to paſs a new purchaſe, not lying in *A. B.* or *C.*

As to the uſes declared, or hereafter to be declared, Mr. *Mansfield* ſaid it is mere form, put in by the attorney, or poſſibly by the ſteward, and no proof of his adverting to a precedent will, which is contended to be meant by the expreſſion "declared."

Lord *Mansfield*—If there had been no foreclоſure of the equity of redemption, the mortgage would have gone to the widow. The money due was perſonalty, and the eſtate is a ſecurity, therefore it ſhews his intent upon the will, that it ſhould paſs when the will was made.

His Lordſhip gave the judgment of the court to this effect.

The teſtator by his will, in 1732, deviſed to a number of uſes; all the reſt and reſidue to his wife, her heirs and aſſigns, and appoints her ſole executrix.

Afterwards he purchaſes other copyholds, and in October 1735 ſurrenders to the uſes, intents and purpoſes, declared, or to be declared by his laſt will and teſtament in writing.

In February 1736 the legacy to the poor of Hexham ſtruck out, and a memorandum ſubſcribed by two witneſſes, that it was ſtruck out by the teſtator's order, and in his preſence, he having paid the legacy in his life-time. The queſtion comes from Chancery, whether any and what eſtate paſſed in the one-fifth of the copyhold under the mortgage, and in the other four-fifths ſince purchaſed, by the will and ſurrender, and to what uſes?

In this queſtion, upon reading the caſe, I never had a doubt.

When a man, having made his will upon a ſubſequent day, republiſhes it, what is the conſequence? That the property he is ſeiſed of at the date of the republication is as if he had been ſeiſed of it at the date of the will; therefore if the will be of *B. C.* and *D.* republication has no effect, as to other lands, becauſe the will does not ſpeak of any other lands.

The caſe in *Vez.* muſt be upon a queſtion of a codicil merely of perſonalty. I have not had time to look into the caſe quoted as before me; but, as to ſurrender, I am quite of opinion as Mr. *Mansfield* ſays I was in that caſe. A ſurrender may be by reference, and every reference takes in the thing referred to, and the ſurrender is the form of conveyance. Here the teſtator, having made his will, and declared the uſes of all his copyholds in the county of Eſſex, makes a ſurrender to uſes declared, and to be declared, to cure the difficulty of lands after purchaſed, *verba relata inesſe videntur.* [608] It ſpeaks as if the lands had been purchaſed at the making of the will. As if it had been, "Whereas "I have made a will, and deviſed copyhold lands in Eſſex "to certain uſes, I deviſe theſe lands in Eſſex to the "ſame uſes."

As to republication, it is unneceſſary to the caſe, and it may be made a queſtion whether he meant any more than to ſtrike off the particular legacy, without intending any thing farther. Though, on the other hand, it appears as if he had a mind that in all other reſpects the will ſhould operate as to every thing which he had at the time of the alteration made.

Mr.

Mr. Juſtice *Aſhhurſt* mentioned the caſe in *Vez.* alluded to, which he ſaid was thus: He recited, "Whereas he had, "by his laſt will, given a legacy, in truſt to *A.* and another "to *B.* he revokes this legacy, and deſires this may be con- "ſidered as a part of his will."

The reporter ſays that thoſe on the part of the heir ſeemed to give it up, who argued againſt its being conſidered as a republication.

Action on Promiſes.

Set-off.

SEVERAL counts; for goods ſold and delivered, work and labour done, and money had and received.

Plea of ſet-off.

It being in the caſe of a bankrupt, it was argued, that it is a principle, that a defendant owing money to the aſſignees of a bankrupt, cannot ſet off a debt due upon the eſtate of a bankrupt againſt the aſſignees, on the 3 *G.* 2. for all ſet-offs muſt be mutual debts, and the bankrupt cannot ſue for a debt.

Lord *Mansfield*—Why?

To this it was anſwered, that upon the general doctrine it has been contended, (*Wilſ.* 158.) that wherever there are mutual debts there muſt be mutual remedies; and the defendant can have no action of debt upon the bankrupt.

Statute 5 *G.* 2. That the commiſſioners may adjuſt the difference, and ſettle the balance. Debts accruing before the ſuing the commiſſion are alone provided for by that ſtatute, and not debts ſince.

Lord *Mansfield*—It won't do them juſtice: The aſſignees are the bankrupt. Except in caſes where the ſtatute interpoſes you can't bring your action; you muſt go before commiſſioners; the aſſignees are in a ſummary authority for the diſtribution and ſettling of the debts. [609]

It was a narrowneſs in the law, or rather in the determination of the law, that you could not ſet one mutual demand againſt another formerly, in common caſes.

Mr. Juſtice *Aſhhurſt* cited a caſe where the defendant gave notice of ſet-off againſt the aſſignees,

Mr. *Cowper* ſtill urged, upon the ſecond ground, that it was a demand of a debt due ſince the bankruptcy, which was therefore a debt due to the aſſignees.

Bankruptcy is in the nature of a civil death; the assignees are exactly in the place of the bankrupt. If the principle contended for were admitted, the bankrupt's estate would be encreased by his bankruptcy, which the law will never allow.

2 *Vernon*, 173 (Qu. for there is no such case in that page). In the case of a bankruptcy, where there are dealings upon account, the creditor shall not be put to account. *Decst aliquid.*

Lord *Mansfield*—Never trust any note cited, when not consonant with the general principles of law, justice, and equity—It must be wrong.

As to the debt due to the assignees since the bankruptcy there was one of the counts charging before the bankruptcy but argued on the general rule, that both pleas went to the whole declaration, and that the last was bad, being of goods sold and delivered to them, as assignees, since the bankruptcy, and would effectually vitiate the whole.

LEAVE TO AMEND the PLEA; both the pleas going to the whole of the declaration, and one being inapplicable.*

Curia Cancellaria. Baron Apsley Chancellor.

Jenkinson *against* Watts.

From the Master of the Rolls, in Form of an Appeal, but Nature of a Re-hearing.

[610] WILL made by Mr. *Watts*; devise of capital mansion-house and estate, in strict settlement. Afterwards he makes a new contract with the Duke of Kingston for Hansworth manor, and in Bucks, for 40,000l. cou to dispose of the estates newly purchased to the same uses those in the will.

After this, having the equitable estate in himself by contract, he takes the legal interest to it by absolute purchase. And the question was, whether this was not such a change of estate as amounted to a revocation of the u under the will.

For the appellants—This, if it be a revocation, cann be express, but must be constructive. There are two sor one importing a difference of intent, from the circumstan of a new instrument made, though that instrument in it

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* Quæras ulterius velim amice lector.

void; or else upon reasons to suppose that the estate given was annihilated. The first cannot be the case here; nor most clearly can the second, in any propriety, be affirmed.

Montague and *Jefferys*, reported in *Moore*, which is the case of *Roll's Abr.* "None of the acts intended to complete, "perfect, and carry into execution the intent of the testator is a revocation." The attornment of a tenant to another, for the testator, who had made a will; this, though it changes the estate, is no revocation; partition no revocation.

This, it is remarkable, was a trust strictly executory, as in the case of *Bagshaw* and *Spencer*: This was a trust to be executed immediately. The court would have considered the benefit of the contract as devisable, and would have executed it.

And a contract made by the testator would have been executed. 2d Chancery Cases, 144, *Prideaux* and *Gibbons*. *Amery*, the testator, devises all his lands to be sold for the payment of debts; the lands in question were afterwards purchased by him. And the court decreed they well passed; and that if a man devises lands after purchased, a decree should go for a sale for payment of debts. What Lord *Hardwicke* determined, as to change of estate operating a revocation, was law; but the *dictum* goes much farther, and is not, I dare say, in the register.

Lord *Nottingham* decided the case, that a trust for a particular purpose was no revocation.

Lord *Hardwicke* [*Parsons* and *Freeman*] said, that the same rule holds of revocation of an equitable interest as of a legal estate, and it would be very dangerous to property if it were otherwise. And that a trust for a particular purpose should be a revocation *pro tanto* only.

Trust executory is distinguished strongly by his Lordship [611]
in *Bagshaw* and *Spencer*.

In our case what was done was a step to complete the purchase, as in *Parsons* and *Freeman*, *Sparrow* and *Hardcastle*. And it is like livery and attornment, and the other steps to complete the purchase.

3d *Atkins*. The principle on which Lord *Hardwicke* determined goes with us. He recognizes the case of *Montague* and *Jefferies*, and says it appears to him that *Roll* had a much better note than any of the other reporters.

On the same side, Mr. Solicitor-general—That this was a devisable interest, and was devised by the codicil in such a manner

manner as was ſufficient to paſs it. The only queſtion therefore is, whether there were a revocation?

As in the caſe of *Elton* and *Harriſon*, in the caſe before Lord *Nottingham*, upon appointment of a new truſtee.

If it be any it muſt be a virtual revocation, *Lamb* and *Parker*. Virtual revocations muſt be by expreſs implication.

Intention is leading upon all caſes of revocation; and the court will require that *animus revocandi* ſhould appear: And therefore a revocation, on the idea of a valid will made, which turned out not valid by the ſtatute, was held to be conditional only. *Onyons* and *Tyrers*. [*P. W.* and *Vern.*]

He directs payment of the purchaſe-money out of his perſonal eſtate, and declares the uſes ſhall be the ſame as in the will.

The conveyance was no voluntary act, as that in the caſe of *Elton* and *Harriſon*; but was an obligation upon him, which he was under a neceſſity to perform, when he made the codicil.

Mr. *Reade*, *contra*—We ground ourſelves upon the ſaying of Lord *Hardwicke*, as is done on the other ſide, that the ſame rule of revocation applies to equitable intereſts as to a legal eſtate.

A great deal of doubt has been endeavoured to be thrown upon the conſtruction of a revocation at common law.

Partition is only the poſſeſſion of the ſame eſtate, in a more reſtrained degree. The parcener is ſeiſed *per my* and *per tout*.

[612] As to diſſeiſin, it would hardly have been a doubt, if it had been conſidered that a diſſeiſor has his election, whether he will conſider himſelf as in his eſtate, or out of it: and by his entry he determines his election.

In the caſe of the ſettlement of my Lord *Lincoln*, the eſtate had been diſplaced in the ſettlement to an uſe reſulting to my Lord *Lincoln* himſelf, in the uſual manner; whereupon the ſpringing uſes which are limited in marriage ſettlements in general, upon a future contingency, were defeated.

An equitable intereſt was conſidered as a mere choſe in action, ſo it was originally; but at this time it is deviſeable, deſcendible, and indued with thoſe other properties which belong properly to the legal eſtate.

And this court has ſo proceeded, and provided for what is originally called an equitable intereſt, and eſtabliſhed a perpetual analogy between the legal eſtate and that intereſt.

As

As to the caſe in *Rolls Abr.* I can't help underſtanding the third *placitum* as repeating the law upon the ſecond, with an expreſs contradiction to it. The ſecond caſe was of uſes continuing as well after the conveyance as before, whereas the other was he had a legal eſtate not deviſeable; afterwards he has an uſe deviſeable by the ſtatute.

It has been argued that a partial alteration of the eſtate would be a revocation only *pro tanto*. The caſe of *Coles* and *Hancock* was cited. There was an after-born ſon. In order to ſubject the eſtate to the will, the court decreed the deed ſhould be ſet aſide, upon the clear reaſon of inſanity in the former part of the caſe reported.

It was ſaid in this caſe there can be no poſſible argument of intention; whereas, in one of the caſes cited by himſelf, the ſame learned gentleman takes notice the queſtion was, whether a deed, made to give effect to his will by the teſtator, would operate as a revocation.

The purpoſe they have ſtated, of the intent (this was ſuggeſted *extr. cauſ.* to have been to avoid dower) is not evidence; and I only ſtate it as a mark of their anxiety, and ſenſe that if they can't rebut the evidence of a different intent, ariſing from a different diſpoſition of truſt, they muſt fail.

The will has particular truſtees; theſe are changed by the deed.

The nature of the eſtate in equity is different: The eſtate in the contract was a conſtructive equity; the equity by the ſubſequent inſtrument was an expreſs equity. [613]

On the ſame ſide, Mr. Attorney-general—It is the doctrine of my Lord *Hardwicke*, that where the teſtator does any thing inconſiſtent with or working upon the thing deviſed, this is underſtood a revocation; that is to ſay, a change of deſign, implying and amounting to a revocation.

Here the truſtees under the will were neceſſarily the ſame under the codicil, as there was no new appointment of truſtees in the codicil; therefore the conveyance muſt be change of deſign, as it introduces new truſtees.

Swinburne 545. A teſtator deviſes a houſe, and pulls it down and builds another; the legacy is extinct, caſe mentioned of truſtees by will to pay his debts, truſtees to the ſame uſes by his deed; this a revocation.*

The

* This caſe ſeems curious and extraordinary enough and worth looking into; if there were other legacies or deviſes ſurely it could not affect them it

The reaſons why a leaſe partition and the like were no revocations, is that a partial change of diſpoſition went no farther than to import a change of intent coextenſive only with that of diſpoſition, and not beyond it, that is to ſay, produced only the effect of a revocation *pro tanto*. But the parting with the whole fee of a man, that is to ſay legal and equitable eſtate, is a revocation.

Courts of Equity have in all caſes of ſpecial purpoſe (and there is no difference in the rules of common law) determined, that the revocation was partial: Only ſo far as was neceſſary to anſwer the ſpecial purpoſe; but the change of truſtees amounts to an intention of acquiring a new eſtate, and in the conſtruction of law this is the effect: and if this
[614] ſeem artificial reaſoning, and be therefore objected againſt, it is not to be wondered if this reaſoning be applied in favour of the heir, who has a right to avail himſelf of every inaccuracy and breach of the rules of law, whether founded on principles of general reaſon, or particular and technical refinements, reſulting from its peculiar principles of conſtruction.

Mr. *Maddocks*—I cannot help quoting the ſentiments of Lord *Mansfield*, *Swift* and *Neale*, 3 *Bur.* 391, where he ſays, conſtructive revocations againſt the intent ought not to be indulged; and ſome deciſions of that ſort miſunderſtood or over-ſtrained, have brought a ſcandal upon the law.

On the ſide againſt the revocation, it was put in a very fair light by Mr. *Maddox*, if the appointing of new truſtees argued an intention to alter or revoke the will, this is a revocation; was this, to which he was compellable, taking the conveyance and paying the money, an intent to ſet aſide his will? But the ſame argument was attempted on the will of Sir *G. Amiens*, before the Lords Commiſſioners; there

it appears indeed clearly enough a revocation *pro tanto*; that is to ſay with reſpect to the truſtees and *quoad* them merely. If indeed the object of the will was merely the payment of debts when new truſtees were appointed, perhaps this was of a revocation; but yet not in the ſenſe of letting in the heir: For the ſecond will would operate in the place of the firſt, with the alteration only of truſtees; as if the ſecond truſtees had been perſons incapable. I ſhould not have conceived, without expreſs revocation of the former will, this change of appointment would have been ſo conſidered to revoke the former, as for want of its capacity to take effect to let in the heir: But rather that the firſt will would have ſtood which had taken means good in law to execute the ſame object. Whatever doubt this latter remark may have, there ſurely can be none that it muſt be very extraordinary if an appointment of truſtees to pay, and afterwards new truſtees appointed for the ſame end, be a general revocation of all parts of the former will.

there it was contended a legal eſtate acquired, after an equitable intereſt given by a will, would not paſs; but without effect.

I will ſubmit to your Lordſhip, that the conſtruction upon equitable intereſts is in many palpable inſtances different from that in legal deviſes; but, admitting the propoſition, how far will it go?

A recovery, a fine ſuffered.

A bargain and ſale (not for money) though the uſes are reſerved to himſelf, is a revocation; but where is the caſe determined at law, which affects the caſe before your Lordſhip? none, but the caſe in *Roll's Abr.* This is not the caſe of a deliberate conveyance changing the uſes; in this caſe here is an equitable intereſt at the making of the will; an equitable intereſt after the will; only the perſon changed who holds the uſes in truſt.

In a former caſe the court has held, where the uſes were reſerved upon the conveyance, and the ſame ſubſtantially continued only to different perſons, this was not a revocation. Truſts, it has been often ſaid, were ſubſtituted inſtead of uſes, with equitable intereſts; this is the ſame caſe, and the change of an uſe in like manner would not have been a revocation.

I don't agree that a court of equity is bound entirely by the ſame rule as a court of law; which may underſtand itſelf bound by a caſe decided, though on wrong principles, rather than ſhake the precedent and introduce uncertainty.

A man at the execution of his will makes a mortgage in [615]
fee; the money is paid and he takes back the eſtate: It might have been a dangerous queſtion at law, whether the new eſtate thus created would paſs: [Qu. whether this or near was not determined in *Heeling* and *Heeling*.] And yet it would be very extraordinary if a court of equity ſhould ſay, that if the money had not been paid at the death of the mortgagee it would have deſcended, ſubject to the equity of redemption; but as he has paid the money this ſhall be a revocation.

Lord Chancellor—This queſtion, when firſt it came on, was treated as a matter quite of courſe; and to be ſure it ſtruck one very much, that when a teſtator, having contracted, makes his will, and afterwards, in conſequence of ſome agreement, makes a conveyance to truſtees in truſt for himſelf, that the uſe ſhould paſs juſt as it would have done.

The

The caſe of *Elton* and *Harriſon* ſtruck me, and I deſired it might be argued; declaring, I ſpoke no opinion, but only, as a queſtion of ſome property, deſired it might not paſs over without argument.

The caſe is a very common one. A man having an equitable intereſt deviſes it by will; and afterwards takes back a legal eſtate; whether this ſhall paſs or not.

In the caſe before Lord *Hardwicke* when it was argued, (*Parſons* and *Freeman*) Mr. Solicitor-General (now Lord *Mansfield*) argued, that there might be a difference between the conſtruction of a legal eſtate and an equitable intereſt, —Lord *Hardwicke* in making the decree ſaid, A doubt was made whether there might not be ſome difference between a legal and equitable eſtate. But I am of opinion the caſe would be the ſame; and it would be of very dangerous conſequence if it were otherwiſe.

The queſtion then will be—whether it would be a good deviſe of a legal eſtate; for, if not, I doubt very much whether the court here ought to decide it as good upon an equitable intereſt.

Mr. Solicitor-General very ably argued for his client, that the rule of law and equity went upon the ſame principles; and therefore this court has decided upon the ſpirit of that of the law.

A different diſpoſition is to operate on the eſtate as a revocation *pro tanto* only, in conſtruction of the law; and therefore this court, where the deviſe was of the legal eſtate, would preſerve the equitable intereſt ſo far as was not altered.

[616] If this was an alteration of the entire equitable intereſt, I very much incline that it would be a revocation; and if no diſtinction could be taken from the caſe before Lord *Nottingham*, I ſhould think ſo. And in *Parſons* and *Freeman*, the eſtate in truſtees being altered by appointment of new truſtees, without any particular purpoſe appearing, was held a creation of new uſes, in ſuch manner as to make a revocation.

In the caſe of *Rolles* it does not clearly appear whether it was by the direction or with the knowledge of the teſtator; and by every rule of law, if done without his conſent, it cannot amount to a revocation.

It is very clear, where the equitable intereſt was in the teſtator, who after takes a legal eſtate, that ſuch legal eſtate, annexing to the equitable intereſt, makes no alteration in the will, whereby the equitable intereſt has been deviſed.

Does

Does this come up to that? Upon due conſideration I am very clear it does. Mr. *Watts* contracts with the Duke of *Kingſton* for the purchaſe of this eſtate.

The vendor, in the eye of this court, is ſaid to be a truſtee; but not in the idea of truſtee to create a revocation, by conveying the truſt out of his hands into another's. He is only a perſon on whom the purchaſer may call to compel a conveyance, and where a bill is brought for a ſpecific performance the decree is, that he ſhall convey to the vendee, or ſuch perſon as he ſhall appoint; what then does the vendor? No more than the court would have done for him.

It is exactly the caſe where a man makes a feoffment before a will, and makes livery after. This is no alteration of his intent; but only carrying the former intention into execution. The court, unleſs intent could be implied, will never deem it a revocation. The parting with the whole legal eſtate is a total revocation at law; the parting with the legal eſtate in part, is only *pro tanto*; but in equity the court here would conſider it equitable and decree it a revocation *pro tanto* only, or no revocation, or total, according to the proportion of the equitable eſtate deviſed.

The argument is very artificial, that becauſe he meant the conveyance ſhould be firſt made to truſtees by the Duke of *Kingſton*; (who might have taken it in truſt by the powers) and therefore in the mean while until the conveyance the appointment was in him, that for this cauſe the will of the teſtator is revoked, though the Duke is but the hand to hold the eſtate for the purpoſe of paſſing it expreſsly to the ſame uſes; it ſeems therefore not to agree with the intent, and this artificial argument is ſometimes uſed in favour of the [617] intent; but hardly againſt it.* And if I underſtand right, it was not intended the Duke of *Kingſton* ſhould himſelf immediately convey to the truſtees. Mr. *Watts* takes on the contrary the legal eſtate in fee, and the heir at law ſhall be deemed truſtee for the deviſes.

I am not ſorry it has been argued; I am very much obliged to the aſſiſtance of my Lord Chief Juſtice with whom I have ſpoken and the very able manner in which you have all argued. The prayer of the appellants muſt be refuſed.

If I underſtood *Rolles* Abridged right, the laſt caſe put there was determined after the other.

Mr.

* Durum eſt per divinationem tacitæ mentis a mente teſtatoris in verbis apertâ recedere; durius etiam ubi neque tacita neque expreſſa mens.

Mr. Solicitor-General—My Lord I rather believe they were neither determinations; but caſes put and reſolved by the court.

Coſts.

MR. Juſtice *Willes* acquainted the court, that in caſe where he had doubted whether proceſs in original, on which coſts accrued, were a creation of a new debt, all his brethren informed him that it partook of the nature of the original debt.

COSTS out of pocket is a term for the largeſt coſts.

Bail.

MOTION to diſcharge bail on the recognizance upon a commiſſion of lunacy, which had iſſued againſt the principal.

Mr. *Wallace*—That this is not the caſe of a commiſſion of bankruptcy; that it is not certain he cannot diſcharge himſelf: But if an *exoneretur* be entered, if he ſhould become ſane the next moment, the bail would be diſcharged for ever.

Lord *Mansfield*—There ſeems to be no ground. They have been at the expence of the commiſſion; why does not the committee pay the debt? The debt muſt be paid out of his effects; it was one of the riſques for which they had undertaken.

At this rule we ſhould have ſham commiſſions of lunacy.

[618]

Attorney.

SHALL not be called "to anſwer matters of an affi- "davit" charging an irregularity but not a crime; for this motion is of a criminal nature.

Overſeers.

ON a motion to ſet aſide ſeveral appointments of juſtices, conſtituting certain perſons named in the ſeveral appointments to be overſeers in the borough of Bridgewater.

There

There were counter appointments on one ſide; one appointment made on a Saturday at ten minutes after twelve, and half an hour after twelve another; and on Sunday evening and Monday evening two other ſeveral appointments at the ſame time reſpectively. On the other ſide they appointed preciſely at twelve, and continued the appointment every minute till one; and at eight o'clock on Sunday morning another.

The appointments on the former ſide was made by the recorder and two of the juſtices; the latter, by the two others, juſtices.

Contended that the appointments on each ſide on Saturday after twelve, until one, ſynchronizing with each other; the appointment by the latter party at eight o'clock on the Sunday morning would ſtand; and that the caſe of *Milbourn* port was the ſame in material circumſtances as this.

On Lord *Mansfield*'s aſking whether they went by the ſame clock, it appeared they went by all the clocks and watches in the town, according to their affidavits on both ſides.

On the other ſide—that in the caſe of *Milbourn* port his Lordſhip determined that this raiſing on one another with appointments, was a proſtitution of the office and a profanation of the day of the Sabbath.

Againſt this it was contended, that it had never been ſtrictly ſaid and laid down as law in any caſe, that Sunday was a bad day for appointment of overſeers.

Swan and *Croke*, Error from the Common Pleas upon a common recovery ſuffered; by conſent the error aſſigned was that the † day of the return of the writ of ſummons was Sunday the 13th of May, 1750; on which day the tenant in tail male who was vouchee, died without iſſue male of his body. This ſeems to be Swan and Broome. Bur. 1525. [†619]

There were two points made in this caſe, of which the ſecond in principle, though the deciſion was not on our ſide, the circumſtances differing, applies ſtrongly to the caſe now before the court, and applies *a fortiori*; it was—" whether by law a valid judgment could poſſibly be given on the day of the return, being Sunday."

In the judgment of the court it is there ſaid, It is clear, if the court could not ſit on Sunday, judgment could not be given before the death of the tenant in tail; for he died upon the Sunday. And then your Lordſhip decides the caſe upon the hiſtory of the law and uſage as to courts of juſtice, that

that now they cannot ſit on a Sunday. But your Lordſhip farther adds that antiently they did, and that it was the practice of the antient chriſtians for the reaſons there given, namely, amongſt others to do juſtice to their brethren, and prevent their reſorting to heathen judicatures where they muſt have ſworn by idols: And in contradiction to the ſuperſtitious obſervances of paganiſm,* but afterwards reſtrained by the canon, (517) and extended to all other holidays and faſt days of the church by the canon of the year 932. And that our *Saxon* kings received and adopted them, but that they were afterwards relaxed by the ſtatute *W.* 1. [3 *E.* 1. *c.* 51.] And farther that writs were returnable on Sundays, and notice to appear on Sunday; and that the form ſtill continues, though the true return and appearance is now on the Monday: And that Wakes were held on Sundays, until reſtrained by particular acts of parliament.

Now in this caſe of appointment of overſeers for the benefit of the poor and pariſh, if there be no affirmative uſage to appoint on Sundays, there is no uſage to negative ſuch appointment, there is no act of parliament againſt it; there is no adjudged caſe againſt it; and though courts of law do not now ſit on Sundays, this is no reaſon why an appointment by juſtices of overſeers ſhould be void if made on a Sunday; and the act ſays generally the appointment ſhall be in Eaſter week, which includes Sunday.

Lord *Mansfield*—All I am thinking is how I can contrive for ſome-body to undertake to proſecute both ſets of juſtices.

I don't know whether you would not have ſtood upon better ground if you had waited for a legal appointment on Monday, and ſuffered them to have gone againſt you by ſurpriſe on the Sunday. You would have had a much better foundation both for the appointment and proſecution.

The poor are ſacrificed while they ſtruggle.

[620] The behaviour of the juſtices is a ſhameful proſtitution of their office for ill purpoſes; if one ſide had lain by it would have been much better. It is an horrible abuſe, and I wiſh any could undertake to proſecute all four.

I don't know there is any caſe determined, that Sunday is a day for ſuch purpoſes; the act appears to exclude it by ſaying it ſhall be in Eaſter week or a month after, which ſeems to

* Though this contrary extreme was likely to produce no leſs dangers of its own unleſs it were merely temporary, and perhaps it was never very general amongſt them.

to exclude Sunday; for Eaſter week does not begin until Eaſter Monday; and the general reaſons given by Mr. *Hodgkins* go ſtrongly againſt it.

I will not give my ſanction for ſuch an act to any of them. It is all Sunday employed to fraudulent purpoſes.

Let all the appointments be ſet aſide; and let a *mandamus* go to the juſtices to make a new appointment, and give notice of the time and place of making the appointment; two days notice to be given by the mayor to the other juſtices.

Suggeſted that one of them lives twenty miles from the place.

Lord *Mansfield*—Then I will ſhorten the notice: For I had rather he was not there—a man who comes for ſuch purpoſes! Let it be one day's notice.

I hope the note-takers will obſerve the appointments were both bad, and not determined by the clocks.

Juſtice of Peace.

A Man who acts as attorney, is not entitled to act as juſtice of peace. Vide 5 *G.* 2. *c.* 18. *ſ.* 2. but by the words of this this act does not extend to charter juſtices.

Judgment.

ON a motion to ſet aſide judgment upon a warrant of attorney, upon the ground that the perſon was in cuſtody at the time of ſigning the warrant, to confeſs judgment; and that no attorney was preſent on his behalf at the time of the ſaid ſigning.

By rule, *E.* 15 *Car.* 2. *B. R.* it is ordered by the court, [621] "That no bailiff nor ſheriff's officer ſhall preſume to exact or take from any perſon, being in his cuſtody by arreſt, any warrant to acknowledge a judgment but in the preſence of an attorney for the defendant; which attorney ſhall then ſubſcribe his name thereto; which ſaid warrant ſhall be produced when the ſaid judgment ſhall be acknowledged. And if any bailiff or ſheriff's officer ſhall hereafter offend, or do contrarywiſe, he ſhall be ſeverely puniſhed for ſo doing."

And it is farther ordered, "That no attorney ſhall enter or cauſe to be acknowledged or entered, any judgment, by colour of any warrant gotten from any defendant being under an arreſt, otherwiſe than as aforeſaid." S. R. in C. B. Hil. 14 & 15 Car. 2.

The

The defendant in this case, who entered into the warrant to confess judgment, declared, upon his own affidavit, that he knew what it was, but did it because it would be void.

It was argued, that the court had been so anxious to secure this benefit to the defendant (which, to be a benefit, must be certain and general, and not to be limited by circumstances of what a particular defendant might or might not know) that by a rule of 4 *G.* 2. the court, apprehensive that the former rule might be so construed that the plaintiff's attorney might be thought sufficient, provided that, for the future, none should be good unless an attorney named by the defendant was present, and signed.

No rule or statute shall be suffered to be an instrument of fraud.

Lord *Mansfield*—I shall say to the rule what the court of Chancery said of the statute of frauds, that no rule shall be made an instrument of fraud; nor employed contrary to the ends for which it was made. *

This rule was made to prevent fraud by the defendant, otherwise ignorant or fearful of the plaintiff, being drawn in or terrified to confess a judgment; and therefore has admitted of many exceptions on the circumstances: As in the case where a man in prison at one man's suit executes a warrant to confess a judgment to another; this is within the letter, but not within the intent of the rule.

The court will never suffer this rule should be made an instrument to cheat the plaintiff; which was introduced to prevent the plaintiff from cheating the defendant, or by any
[622] undue influence misleading or overpowering him. He knew the nature of a warrant of attorney; he was privately reminded of the consequences; he has the effrontery to set before the court, upon his own affidavit, that he knew that the warrant would not be good, being executed without his attorney being present. I am not at all afraid for the rule; for this will be a precedent only when it is applied as an engine of fraud, to subvert that justice which it was made to defend.

Mr. *Waller*, in his defence before the House of Commons, explains the precept of the Bible, "Thou shalt not "seethe a kid in his mother's milk," thus—You shall not turn what was designed to support and benefit mankind into their destruction†. Therefore the court will never sut-

* Frustra legis auxilium implorat qui legem ipsam subvertere conatur. Ratio est anima legis.

† Leges in bonum & salutem hominum nata pessimum est in fraudem & perniciem hominum converti.

for

fer a rule introduced to prevent fraud to be applied to the purpoſe of effecting it.

Archbiſhop of Canterbury *againſt* Houſe.

Adminiſtration Bond.

ON a motion to ſhew cauſe why proceedings on adminiſtration bond, ſued in the name of the archbiſhop, ſhould not be ſtaid, with coſts to be paid by the defendant.

The defendant, a creditor, obtains from the proper officer of the biſhop authority to ſue in the name of the biſhop on the adminiſtration bond, on ſuggeſtion that the eſtate of the inteſtate was not likely to anſwer the debts; that his widow, the adminiſtratrix, was going to abſcond; and that ſhe had not given in a true and perfect inventory.

The objection was, that it was not competent to the biſhop to give his name at the inſtance of a creditor.

Secondly, that if it were competent, they have commenced proceedings in this cauſe without authority from the biſhop.

Lord *Mansfield*—Surely it is competent for the archbiſhop to grant, at the inſtance of a creditor, where the executor has not delivered in an inventory, or has delivered in a falſe one.

28 June, 1745, *Greenſide* and *Ward*. Bill to be relieved againſt a bond given to the commiſſioners of the eccleſiaſtical court, and in favour of a creditor, for want of a complete inventory. The bond was maintained by my Lord *Hardwicke*, who would not relieve againſt it. [623]

On the ſide of the creditor, Mr. *Dunning*—That though the complaint was nominally and formally againſt the archbiſhop, and the rule drawn up accordingly to ſhew cauſe why he ſhould not pay the coſts, yet there were other parties, who underſtood that it was virtually and ſubſtantially againſt them, and who defended accordingly.

That the reaſon why no authority is ſuppoſed to have been given by the archbiſhop is, that upon the defendant's being introduced to his Lordſhip's ſecretary, to enquire whether the proceedings were by the authority of his Lordſhip, he was informed by the ſecretary that there was no ſuch authority given: And that, by the advice of Dr. *Ducarell*, who had informed him no ſuch authority could be given at the inſtance of a creditor, he had refuſed the application.

And that they received a second answer, of the like nature, from the archbishop himself.

There could be no day afterwards, in which it could be conceived the archbishop was otherwise informed, or had changed his mind.

Whether the authority was really applied for personally will not be necessary to decide the merits; both they and the archbishop, by their conduct, evidently took the application to him personally would not be improper.

Farther, it does not appear whether the bond was not applied for, and consequently obtained, after the action commenced; if so, subsequent to the action, it can never maintain it.

Besides, if there be no oppression from the archbishop, the court will not listen to such a complaint in this kind of proceeding, where the other party has been oppressive.

The next question is, whether the bond be warrantable? It will depend on the nature, the conditions, and the object of the bond, whether it were competent to make use of such a kind of bond at the instance of a creditor.

What is the bond? If *A. B.* administrator, do make a good inventory, true account, and distribution, according to the act "for the better settling of intestates estates."* For this the administratrix in this case, the widow of the intestate, is made liable, and her sureties,

[624]

Perfect

* *Vix.* 22 & 23 *Car.* 2. *c.* 10. the provision of which is thus: "That all ordinaries, as well the judges of the prerogative courts of Canterbury and York, for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may, upon their respective granting and committing of administration of the goods of persons dying intestate, after the first day of June one thousand six hundred and seventy one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary with the condition, in form and manner following, *mutatis mutandis*, viz.

"The condition of this obligation is such, that if the within bounden *A. B.* administrator of all and singular the goods, chattels, and credits of *C. D.* deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come into the hands, possession, or knowledge of him the said *A. B.* or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of court, at before the day of next ensuing; and the said goods, chattels, and credits, and all other the goods, chattels and cre-

Perfect account and diſtribution is required—to thoſe who are by law entitled; that is, the next of kin: The creditors have no concern in it.

Your Lordſhip, in the caſe of *Greenſide* and *Watts*, argued on the reaſons why it was competent for a creditor to make uſe of an adminiſtration bond. Your Lordſhip argues in a manner unanſwerable, or at leaſt I find unanſwered. The court did not ſtay execution fully; but only reſtrained the uſe of it to ſuch inſtances as were thought competent to a creditor. The breach aſſigned in that caſe was on the circumſtance of not exhibiting an inventory.

The condition in the bond in the caſe now before the [625] court cannot make the adminiſtratrix liable to *devaſtavit* againſt her from the next of kin.

As to the aſſignment of a breach here for not making an inventory, it could not be aſſigned, conſiſtently with the truth and juſtice of the caſe. The real injury has been aſſigned, that the adminiſtratrix did not make a true and perfect inventory, which the ſtatute requires.

As to the merits, the circumſtances of this caſe preclude the application of the other caſe.

I ſubmit, therefore, the ground remains entire on both parts of the rule; though I am much leſs ſolicitous upon the firſt than the ſecond point.

On the other ſide, in reply, in behalf of the defendant, *Houſe*—That this application is well founded, and the rule ought to be made abſolute.

of the ſaid deceaſed at the time of his death, which at any time after ſhall come to the hands or poſſeſſion of the ſaid *A. B.* or into the hands and poſſeſſion of any other perſon or perſons for him, do well and truly adminiſter according to law; and farther do make or cauſe to be made a true and juſt account of his ſaid adminiſtration at or before the day of . And all the reſt and reſidue of the ſaid goods, chattels, and credits which ſhall be found remaining upon the ſaid adminiſtrator's account, the ſame being firſt examined and allowed of by the judge or judges for the time being of the ſaid court, ſhall deliver and pay unto ſuch perſon or perſons reſpectively as the ſaid judge or judges, by his or their decree or ſentence, purſuant to the true intent and meaning of this act, ſhall limit and appoint. And if it ſhall hereafter appear, that any laſt will and teſtament was made by the ſaid deceaſed, and the executor or executors therein named do exhibit the ſame into the ſaid court, making requeſt to have it allowed and approved accordingly, if the ſaid *A. B.* within bounden, being thereunto required, do render and deliver the ſaid letters of adminiſtration (approbation of the ſaid teſtament being firſt had and made) in the ſaid court, then this obligation to be void and of none effect, or elſe to remain in full force and virtue."

The archbiſhop did not underſtand himſelf as perſonally knowing and refuſing, but officially, without his private knowledge, giving them authority: The proceedings go upon a direct contrary ground.

The queſtion then is, whether the party to this rule, Mr. *Houſe*, ought, upon the circumſtances, to proceed upon this bond.

And whether he has not made an improper uſe of the bond?

An inventory was litigated, and therefore more exact taken in this caſe, and there could be no breach aſſigned upon that.

As to the formal breach of the condition, your Lordſhip will never ſuffer him to avail himſelf of that who was originally (being a creditor) intended to take the benefit.

The order to an eccleſiaſtical judge, in matters ſubject to his juriſdiction, does not apply to a creditor, who, if he take any advantage, it muſt be a caſual advantage, by being able to charge the adminiſtratrix from the inventory ſo far, with aſſets in her hands.

The non-payment of a debt cannot be a breach of this bond.

The condition to abide by the ſentence of an eccleſiaſtical judge (which is the third object of the adminiſtration bond, provided by the act) muſt be for the benefit of the next of kin.

626] But farther, then, if the creditor may avail himſelf of any of theſe conditions, the claim being rather foreign to the original deſign, it ought to be on a very equitable ground; and no ſuch ground has been yet aſſigned.

Lord *Manſfield*—No next of kin ever ſtruggled for the adminiſtration of inſolvent aſſets, with an honeſt view.

The adminiſtratrix in this caſe ſhews manifeſtly what ſhe wanted by adminiſtration: She wanted to ſell it to the creditor.

She gets adminiſtration—Upon this all the chicanery and falſe pleas that could be made uſe of are applied, to defeat the creditor: And, to complete all, and ſhew theſe obſervations are not ill founded, ſhe abſconds.

A creditor (or creditors) takes out adminiſtration.

I chooſe to take as the firſt ground what is ſaid, "That "no creditor can have the benefit of this bond; it ought "not to be aſſigned to him."

Next

Next comes that the archbiſhop of Canterbury (in his private perſon) has not aſſigned to him.

To be ſure, the archbiſhop of Canterbury and his ordinary are in the nature of official not of private perſons. But, waiving that for the preſent, what is it that the archbiſhop is to do? Ought he to have aſſigned, in this inſtance, to the creditor?

What is it that the act requires of him? He is to take a bond of the proper parties that they ſhall account, make a full and perfect inventory; and diſtribution is to be made to the next of kin.

In doing of this or any part of it the ordinary has no intereſt of his own; it is *ex debito juſtitiæ* to grant the bond, on proper circumſtances, and to the proper parties. If it ſhould be abuſed, it would be a good reaſon to ſet aſide the bond, as an abuſe of public truſt.

It is ſaid this point has been litigated in 1745, but it does not appear upon what authority.

Two caſes were cited from that argument; which, it appears, were held then not to the point.

Let us ſee what are the points, as to which a creditor is intereſted in the adminiſtration.

Intereſt of creditor in adminiſtration bond.

† It is plain the creditor has no intereſt in the diſtribution after debts paid; but he has an intereſt in a good and perfect inventory being given in, and a true inventory. [†627]

And he is intereſted in the diſtribution before payment of his debt, to ſee that it is not ſo made as to exhauſt the fund out of which his debt is to be anſwered.

The name of the archbiſhop is his official name, not the name of the perſon.* To one who has a right it is *ex debito juſtitiæ* to grant it; to one who has no right it is *ex debito juſtitiæ* to refuſe.

Archbiſhop name of office and not of perſon: Acting officially, he has no private or perſonal diſcretion, and his acts by his proper officers bind him, though without his perſonal knowledge, or even againſt his private will.

As to what was requiſite on this occaſion, I don't wonder the archbiſhop might not recollect it. He might refer to Dr. *Ducarell*: If Dr. *Ducarell* gave the anſwer which is ſtated he was ill adviſed.

If it reſted upon the anſwer of the archbiſhop it might be a different conſideration, as to coſts: But I am aſtoniſhed at what has paſſed.

Aylett, the attorney, applies to *Criſpin*, and aſks him by what authority he proceeds—who ſays he has no right to expect candour; in which, I think, he did wrong.

He

* Aliud eſt dignitatis & officii publici nomen; aliud perſonæ & rei primæ.

He then receives all the intelligence from *Vernon*—of a bill filed; of the advice by him to the archbiſhop; of the reference to Dr. *G. Hayes*; and that the bond had been permitted to be ſued by the creditor upon that reference; and that he had authority to mention all this, as being informed by him.

What was he then to do if he doubted the truth, which was almoſt impoſſible? A man could hardly have had the impudence to invent all this; and it is ſworn he went to Mr. *Vernon*; if he did not, he ought.

This was on the fourth of June. On the eighth of June, in the morning, he applies for the rule, after all this information received.

And therefore, I think, the rule ought to diſcharged with coſts.

I was only in doubt whether it ſhould be againſt the repreſentative or *Aylett*.

[628] RULE DISCHARGED WITH COSTS againſt *Aylett*; to be paid by *Aylett*.

Statutes and Caſes concerning Adminiſtrators.

Statutes, the foundation of their authority, 31 *E.* 3. *c.* 11. *anno* 1357.

21 *H.* 8. *c.* 5.

22 & 23 *Car.* 2. *c.* 3.

9 & 10 *W.* 3. *c.* 41. Fees of adminiſtration to ſeamen's effects.

Caſes. *Turner* and *Davies*, T. 22 *Car.* 2. *B. R.* 1 *Mod.* 62.

Adminiſtrator cannot have execution after his adminiſtration revoked.

Action for rent incurred in adminiſtrator's own time, *plene adminiſtravit*, is a bad plea. 26 *Car.* 2. *C. B. T.* 1 *Mod.* 185, 186.

Adminiſtrator muſt make diſtribution to the half as well as the whole blood. *Hil.* 27. 8 *Car.* 2. *C. B.* 1 *Mod.* 209. *Smith's* caſe.

Adminiſtration pleaded, granted by the official of *A.* biſhop of Carliſle, good without alledging him to be ordinary. 2 *Mod.* 65. *Daws* v. *Harriſon*. *Hil.* 27 & 8 *Car.* 2. *C. B.* *Temple* v. *Temple*. *Cro. Eliz.* 711.

Hodge v. *Clare*. Adminiſtration granted *durante abſentia* of another good, as well as *durante minori ætate*. 4 *Mod.* *H.* 2 *W.* & *M.* But vide *Slater* v. *May*. 2 Lord *Raym.* 1071.

1071. That such administrator must aver absence specially, to wit, in *partibus transmarinis*.

To be granted where there are executors if they refuse to act, which they may do by act as well as by words. *Broker* v. *Charter*. *H.* 30 *Eliz. Cro.* 92.

Administrator of an executor no administrator of the first testator. *Parsons*, alias *Frowde*, v. *Parsons*, alias *Frowde*. *H.* 31 *Eliz. B. R. Cro.* 211.

By custom administrator may pay debt on simple contract, [629] *pari gradu*, with debt on specialty. *Snelling* v. *Norton*. *T.* 37 *Eliz. C. B. Cro.* 409.

Where *profert litteras administrationis* needs not be pleaded *quia* on record. *Earl of Shrewsbury* v. *Sir Walter Lewson*. *M.* 39 & 40 *Eliz. C. B. Cro.* 592.

Where it must. *Sir John Cutts* v. *Bennet*. *M.* 14 *Jac. Cro.* 409 & 412.

Administration during minority of executor ceaseth at seventeen. *Pigot* v. *Gascoyn*. *Hil.* 40 *Eliz. Cro.* 603.

Administrator during minority of executor hath but a special property, and cannot sell goods, unless they be *bona perituræ*, or for necessity for payment of debts. *Price* v. *Simpson*. *M.* 41 & 42 *Eliz. C. B. Cro.* 719.

Administration granted to a stranger is repealed by administration granted to next of kin; but the mesne acts are good. *Blackborough* v. *Davies*. *T.* 13 *W.* 3. 1 Lord *Raymond*, 685.

Administrator *de son tort* liable to lawful administrator on action of money had and received, waiving the tort. *M.* 4 *Anne*. Lord *Raymond*, 1217.

Mandamus to commit administration. *T.* 9 *G.* 3. *Bro. Str.* 552.

Lies not for administrator *durante minore ætate*. *Hil.* 4 *G.* 2. *Smith's* case. *Str.* 892.

Administration shall relate for some purposes to the death of the testator; but this fictitious relation shall devest a mesne right in a stranger. *Waring* v. *Dewberry*. *T.* 4 *G.* 2. *Str.* 97.

Baron shall have administration though the feme have a power to make a will. *Rex* v. *Bettesworth*. *Hil.* 4 *G.* 2. *Str.* 891. But this seems to be understood where the power is partial, that *pro tanto*, as is not within the power, the husband shall have administration; where he has given her power under which she may dispose her whole interest, and she does it, it is otherwise. Vide 2 *Str. T.* 12 *G.* 2. *p.* 1111 & 1118.

Against

Againſt adminiſtrator *durante minore ætate*, the ſpiritual court may take bond for duly adminiſtering, *Folkes* v. *Dominique*. 2 *Str*. *T*. 31 *G*. 2. 1137.

[630] Adminiſtrator, *pendente lite* about a will, may bring actions. *M*. 5 *G*. 2. *p*. 917.

Adminiſtration, *pendente lite* may be pleaded *pius darrein* continuance to juſtify a retainer. *Vaughan* v. *Browne*. 2 *Str*. 1106. *Hil*. 12 *G*. 2.

Adminiſtrator liable for rent after aſſignment of teſtator's term. *Coghill* v. *Freelove*. *M*. 2 *W*. & *M*. 2 *Ventris*, 209.

For a large comment on the ſtatute of *E*. 3. and the nature of adminiſtration, vide *R*. *Edgecombe*, knight of the bath, againſt *Rowland Dee*, adminiſtrator. *Vaughan*'s Rep.

Vide alſo *Dyer*, 256.

And *Plowden*, 275. *Greyſbrook* v. *Foxe*. And what acts of adminiſtrator *de tort* ſhall bind the executor.

Other caſes relative to adminiſtrators.

Lady *Grandiſon* v. counteſs of *Dover*. 34 *Car*. 2. 3 *Mod*. 2. 3. *S*. *C*. *Skinner*, 155.

Palmer v. *Allicock*. 3 *Mod*. 58.

Newton v. *Richards*. *T*. 6 *W*. & *M*. 4 *Mod*. 296.

Adams v. terretenants of *Savage*. *Paſch*. 3 *An*. 6 *Mod*. 134.

Dorrell v. *Colins*. *T*. 24 *Eliz*. *C*. *B*. *Cro*. 6.

Martin v. *Whipper*. *M*. 30. 1 *Eliz*. *B*. *R*. *Cro*. 114.

Stubbs v. *Rightwiſe*. *T*. 30 *Eliz*. *Cro*. 102.

Atkey v. *Heard*. *Cro*. *Car*. 219.

Skinner, 143.

Petit v. *Smith*. 1 *P*. *W*. 8.

Hook's caſe. *T*. 2 *W*. & *M*. *B*. *R*. *Carthew*, 153.

[631]

Rule on the Sheriff.

WHEN the ſheriff is ruled to bring in the body he has four days, excluſive of the day when the rule iſſued, and was ſerved upon the ſheriff.

Vallezio

Vallezjo and Echalai *againſt* Wheeler.

BARRATRY.

On a Policy of Inſurance.

MOTION for a new trial, on a verdict having been found for the plaintiffs, upon the following facts.

In November 1772 *Darwin* chartered the ſhip Thomas and Matthew of one *Brown*, and agreed by his ſaid charter to freight her for Seville, and back again.

The plaintiffs and many others ſhipped a cargo on board, and inſured the ſame.

The inſurance provides againſt loſſes by ſtorms at ſea, &c. and againſt barratry.

In the policy it is declared that the ſame ſhall not be void by reaſon of any flaw in the veſſel unknown to the aſſured.

The ſhip ſailed in December 1772, and went to Guernſey, took in a quantity of brandy, which the captain meant to run by way of clandeſtine trade; the night following they ſprang a-leak, which drove them into Dartmouth; from whence they went to ———— in Cornwall, where the brandy was ſeiſed, by authority of the cuſtom-houſe.

By the bad weather, &c. the ſhip was rendered unfit for the voyage, which had been partly proſecuted, after putting into Cornwall.

The parties came to an agreement that the inſurance ſhould continue, and protect the goods on their return to London.

The goods were ſpoilt, whereupon this action was brought.

The declaration conſiſted of three counts.

Firſt, That the ſhip ſet ſail, and in ſailing ſprung a-leak, [632] by the ſtorms and perils of the ſea; whereby the maſter was obliged to repair to Dartmouth, to refit the ſhip, and then put forth again: And in proceeding and going to the place of deſtination, by ſtorms, and accidents of the ſea, the bowſprit was ſplit, &c. and the ſhip in divers other parts and places damaged, and rendered wholly unfit to purſue her voyage; by which ſtorms, &c. and by which accidents, &c. the goods were ſpoilt.

Second count, That the ſhip ſprung a-leak in her voyage from Dartmouth, &c. whereby the goods were ſpoilt.

Third

Third count, That by the fraud and barratry of the maſter the goods were deſtroyed, and rendered uſeleſs, and of no value.

The underwriters contended, that this damage was occaſioned by a ſimple deviation of the captain; not fraudulent, as againſt the owners of the goods; and was neither merely accidental, nor barratry, being no fraud againſt the owners.

The inſured inſiſted that either it was an accidental loſs, and then they were entitled to recover, under the general terms of the inſurance againſt loſs at ſea, by ſtorms, &c. or elſe it was barratry.

The jury, at the trial, had found (under the direction of Mr. Juſtice *Aſhhurſt*) that the voyage of the captain to Guernſey, where he took in the brandy, was with the privity of *Willes*, who was the owner of the hulk of the veſſel, but without the privity of *Darwin*, who was, under the charter-party, the owner.

And they found a verdict for the plaintiffs.

And now, upon a motion for a new trial, cauſe was ſhewn againſt the rule by Mr. *Alleyne*.

This caſe was argued more than once, namely, in this term and in Michaelmas term; but I have endeavoured to throw the ſubſtance of both arguments together.

He began his argument by obſerving that Barratry was a word hitherto not preciſely defined in our law, or at leaſt not familiarized by experience: But that it was apparent, from the caſe in *Strange*, that it was far from true that barratry was confined to ſome act of fraud, or injury done *malo animo* immediately againſt the owners; for that any fraudulent act, whereby directly or conſequentially, the owners received damage, would be barratry within the terms of the inſurance, though there might be no ſpecial malice againſt them.

In *Knight* v. *Cambridge*, *E.* 10 *G. B. R. Str.* 581. Inſurance againſt barratry, breach aſſigned, a loſs *per fraudem et negligentiam* of the maſter. Judgment for plaintiff in *C. B.* and general errors aſſigned.

[633]

Objected in argument on error, that fraud and negligence is a general charge, and not ſufficiently preciſe to be within the terms of the inſurance providing againſt barratry.

Per curiam—The negligence certainly is not, but the fraud is barratry; is of a general ſignification, and not confined barely to running away with the ſhip. It comes from *barat*, which ſignifies *fraus et dolus*, and extends to any fraud of the maſter. The end of inſuring is to be ſafe in all events, and it would be very pernicious if we were making loop-holes to get out of theſe policies.

This

This caſe, then, is an authority in point; and upon ſolemn conſideration that fraud is barratry. The caſe of *Stamma* v. *Brown*, 2 *Str.* 1153, applies the principle yet more particularly and directly to the caſe now before the court.

That caſe was thus: The ſhip the Gothic Lion being advertiſed going to Marſeilles, goods were ſhipped on board her on behalf of the plaintiff, and a bill of lading ſigned by the maſter, whereby he undertakes to go *a droite route a Marſeilles*, and the defendant underwrote a policy from Falmouth (where the goods were taken in) to Marſeilles: Before the ſhip departed from the port of London another advertiſement was publiſhed for goods to Genoa, Leghorn, and Naples, and the plaintiff's agent was told it was intended to go to thoſe ports firſt, and come back to Marſeilles; but he (the plaintiff) inſiſted that his bargain was to go firſt or directly to Marſeilles, and that he would not conſent to let her paſs by Marſeilles, or alter his inſurance.

The ſhip, notwithſtanding, did paſs by Marſeilles, and, after delivering her cargo at the other ports, ſet out on her return with the plaintiff's goods; but, in her voyage thither, was blown up, in an engagement with a Spaniſh ſhip. And, in an action upon the policy, the breach was aſſigned for a loſs by the barratry of the maſter. And the plaintiff inſiſted, that any fraud or malverſation was barratry; and *Dufreſne* is there quoted. And the reporter ſets down (as referred to) *Florio*'s Italian dictionary, title *Barrataria Minſhew & Furetier*. And by the &c. which he adds, it appears, that other books were quoted. As to ſome, which I think pertinent to this cauſe, I mean to deſire the favour of the court preſently, and to ſubmit them to their judgment.

The defendants counſel inſiſted this was only a deviation; for that it could not be a crime in the maſter, who was acting all the while for the benefit of the owners.

The chief juſtice, who was Sir *William Lee*, in his direction to the jury told them that this being againſt the expreſs agreement to go firſt to Marſeilles, ſeemed to be more than a common deviation; being a formed deſign to deceive the contractor: Then he ſubjoins what immediately and moſt forcibly applies to this caſe, and compares it to the caſe of a ſhip ſailing out of port without paying duties, whereby the ſhip was ſubject to forfeiture, and which, it is added, has been held to be barratry. [634]

The

The jury ſtaying out ſome time and aſking the chief juſtice whether it would be barratry, if the maſter was to have no benefit for himſelf by paſſing by Marſeilles, and went only to the other places firſt for the benefit of the owners, the chief juſtice anſwered, no: And they found for the defendant.

On a motion for a new trial the verdict was confirmed.

It is needleſs to inſiſt on the agreement between the caſes. That would have been barratry if done for the private benefit, of the maſter; this is done for his private benefit, and for the benefit of no other of the parties concerned: The plaintiff was there informed of the intention; here it was kept from him and is of itſelf a ſecret, clandeſtine fraudulent action: There the deviation was for the benefit of the owners; here it is to the prejudice of *Darwin* who is owner for the voyage.

Though I ſhould think the caſe ſufficiently eſtabliſhed from theſe authorities, and its own reaſon and clearneſs, yet, as mercantile law is a part of the law of nations, your Lordſhips will receive the evidence of that law, and be guided by it in your deciſions: And ſince this word barratry does not ſeem hitherto generally underſtood, it may not be improper to examine what the language and uſage of other commercial nations ſays, in confirmation of thoſe authorities of our own already cited.

And firſt I will begin with foreign books; next I mean, to ſubmit to the conſideration of the court foreign ordinances.

Deniſart, in his collection of new deciſions upon this word, * ſays "this word ſignifies malverſation or deceit by a "captain or maſter of a merchant veſſel, in what concerns "the quality or quantity of the merchandizes."

[635] The definition is general—malverſation or deceit, though the inſtance is particular, as being one of the moſt common and obvious; and he refers for the ſenſe he gives to a decree of the 6th of Sept. 1689, in the journal of audiences.

The next author I ſhall take leave, under the indulgence of the court, to cite is *Ferriere*, † who in his dictionary ſays "barratry,

* Ce mot ſignifie *malverſation* et tromperie par un captain ou patron de navire marchand, dans ce que a rapport à la qualité et à la quantité de merchandizes; voyez ſur ce la un arrêt du 6 Sept. 1689. au journal des audiences. Deniſart, collection des deciſions nouvelles ſur ce mot.

† Barratrie en terme du marine eſt une tromperie ou une malverſation qui ſe commet par patron ou le capitaine d'un vaiſſeau pour faire perdre les merchandizes a ceux à qui'elles appertiennent.

Par exemple, de charger un barque pendant le cours de la navigation eſt une crime de barratrie qui eſt punisſable. Voyez l' Arrêt.

" barratry, in marine language, is a deceit of malverſation " committed by a captain or maſter of a veſſel to cauſe, or " cauſing thoſe to loſe their merchandize to whom it be- " longs."

For example, to load a veſſel during the courſe of the voyage is the crime of barratry, and is puniſhable. See " the decree."

He puts this then as an example and one inſtance of many; and if this be a crime (the crime of barratry) and puniſhable, how much more to go out of the way to load a veſſel with prohibited goods, which is a double offence; an offence againſt public law and private contract, and ſubjects the owner of the goods to a double riſque.

The author whom I ſhall beg leave to cite next is *Savary*, ‡ who ſays " barratry of the maſter, in the language of com- " merce and merchandize, means the larcinies, diſguiſing " and alteration of merchandizes which maſter or crew " may occaſion; and generally all kinds of cheating, tricks " and malverſations, which they often employ to deceive " the merchant, freighter and others who are intereſted in " the veſſel."

Molloy conſiders barratry as affecting the goods on board only by thefts; but this is evidently a ſhort deſcription, and not to the extent of the crime; as appears from the other authorities cited, and thoſe which remain to be cited.

Mortimer ſays, " it is running away with the ſhip, ſink- ing her, deſerting her; or embezzling the cargo.

Of theſe ſeveral definitions ſome are leſs exact, others more; ſome more general, others defective: But they all ſhew barratry to be a crime, and ſome of the moſt conſi- [636] derable ſeem to prove that it is a crime of any ſort of de- ceit or malpractice, injurious to the owners of goods in the veſſel.

I next would deſire the permiſſion of the court to pro- ceed to the ſtill more important and convincing evidence from the ordinances.

And firſt, the celebrated ordinance of *Lewis* the four- teenth, page 254. art. 28. defines it thus—

" The

‡ Barratrie de patron en terme de commerce et merchandize veut dire les larcins, les deguiſemens, et alterations des merchandizes que peuvent cauſer le maitre et l' equipage d'un vaiſſeau; et, generalement, toutes les ſupercheries et malverſations quil s' mettent ſouvent en uſage, pour tromper le merchand chargeur et autres qui ont interêſt au vaiſſeau.

" The deceit or malverſation of the maſter in the voyage, " or in port and harbours; alſo the diſguiſings and altera- " tions cauſed by the maſter or by the crew."*

The ordinance itſelf ſays, the aſſurers ſhall not be anſwer- able for damages by the default of the maſter or mariners, unleſs they be anſwerable for the barratry.

If therefore they inſure againſt barratry, they inſure againſt the fault of the maſter; and can it be queſtioned, whether this conduct of the captain in the caſe now before the court be or be not a fault?

And the commentator in his notes deſcribes barratry to be knavery and deceit.†

Ordinances of Antwerp, No. 4. No barratry to be in- ſured againſt, (perhaps that greater care might be taken in the choice of the maſter.)

Ordinances of Spain, No. 42. Agree with thoſe of France.

Ordinances of Genoa, 1610, refer to a particular code of laws of criminal ſtatutes.

Ordinances of Rotterdam, No. 43. 1721, diſtinguiſh between neglect and barratry; ſo that every wilful fraudu- lent act whereby damage inſues, ſeems to be within the meaning of theſe ordinances, as contradiſtinguiſhed to ne- glect, whether the injury were intended againſt thoſe who ſuffer by it or not.

Ibid. 52. When a captain, without neceſſity, and with- out any orders from the aſſured, hath altered his voyage, or run into or touched at any port or road, the inſurance to remain in force.

[637] Ordinances of Hamburg, No. 6. 1731. deſerve particu- larly to be conſidered.

Ordinances of Stockholm 1750, agree with the ordi- nances of Rotterdam, No. 52.

Ordinances of Copenhagen, No. 38. diſtinguiſh between barratry and neglect.

Ordinances of Bilbo 1738, No. 19. Mention barratry as a thing known.

Mr. *Alleyne* cited two other common law caſes.

Vide Hales Pl. of the Crown, title Homicide, where a man intending one unlawful act, is chargeable for another conſequentially: and Bacon's law tracts.

Elton and *Brogden*, 2 *Str.* 1264, where the ſhip being run away with, but not with an intent to defraud the owners.

* Tromperie et malverſation du maitre dans les routes, portes, et havres enſemble les larcins, les deguiſemens, et alterations cauſés par le maitre ou par l' equipage.

† Roceus in notis, barratria, ribalderia et fraudes.

owners, it was held not barratry: But then it was by the violence of the crew who forced him back, notwithſtanding he told them the orders: Which therefore as is obſerved there, fell within the excuſe of neceſſity, which has always been allowed. But this proves ſtill farther, that barratry is a crime, and if it be a crime, he who commits it, muſt anſwer for the conſequences; though a different miſchief was produced, and to different parties from what he intended;* eſpecially when the probability of miſchief to the owners of the goods, from this fraudulent departure, and taking of prohibited goods on board with theirs, was ſo obvious in a double view.

Lewin and *Swaſſo*, *Part.* 147. by Lord *Hardwicke*. Barratry is an act of wrong done to the ſhip. Now, I think, it cannot be doubted, that this unlawful act of the captain, without the privity and againſt the intereſts of the freightor and againſt his contract, was an act of wrong, and a wrong to the goods ſo endangered by it and afterwards loſt: And he cannot be at liberty to ſay that otherwiſe they would have been loſt. And it is no excuſe to him even if he could, when he has wilfully and fraudulently taken the riſque of loſing them thus, and expoſed them by his unlawful act, and in breach of the faith of his agreement, to deſtruction.

Upon the whole, both from our own caſes and from the concurrent teſtimony of writers and public acts of other countries, I hope, I am warranted in ſubmitting to your Lordſhip theſe two obſervations:

Firſt, That any offence againſt the laws of a country whereby the veſſel or cargo may be ſubjected to a condemnation, is barratry.

Secondly, Any injury done to the veſſel or cargo, with a [638] direct intention to defraud the owners.

I think it is beyond controverſy, that the captain of the veſſel in this caſe falls under the firſt of theſe deſcriptions; and that therefore the inſurers are liable under the clauſe in the policy which inſures againſt barratry, and that the verdict was well given for the plaintiffs, and of courſe that the court will diſcharge this motion for a new trial.

On the part of the motion it was urged by Mr. *Buller*.

I ſubmit, that nothing done by the captain in this caſe could be barratry, unleſs the deviation was without the knowledge of the owner; for he is not charged with running away with the goods or ſhip, burning or deſtroying them,

* In criminalibus ſufficit generalis malitia cum facto paris gradus.

them, or any direct injury to the goods, or any malice to the owners of them.

And upon the deviation, if the plaintiff chooſes he may reſort to an action, and recover againſt thoſe from whom he may be entitled to recover; but not for barratry.

The court in the caſe in *Strange* ſays, to make it barratry, there muſt be ſomething of criminal conduct and not merely a breach of contract.

Where the maſter was by force obliged to deſiſt from his voyage, the plaintiff's counſel would have made barratry of it, but the court would not ſuffer it as it was no act of intention to defraud the owners; here whoever is conſidered as the owner, there is no act done by the captain with an intention to defraud him: And as to the attempt of conſidering this as criminal, becauſe of the unlawful purpoſe of the deviation, it being to take in prohibited goods, it is nothing to the owners; I don't underſtand that it was proved; but if it were it is not criminal *quoad* the owners of the goods.

In *Poſtlethwaite's* Dictionary of trade and commerce, which I underſtand to be generally eſteemed one of the beſt books upon the ſubject, by gentlemen converſant in mercantile tranſactions, barratry is defined to be cheating the owners or inſurers, whether by running away with the ſhip, ſinking it, deſerting her, or embezzling the goods; all clear, direct, poſitive acts of expreſs malice and prejudice to the owners; this is a conjectural conſequential damage with no malice to the owners under any pretence.

But farther with regard to the ownerſhip, I ſhall beg leave to contend that *Willes* was the owner and not *Darwin*,
[639] any more than a man who ſends parcels by a ſtage-coach is the owner of the coach, and *Darwin* only freighted the veſſel for that voyage. And it is found expreſsly with the jury that the deviation was with the privity of *Willes*: If ſo it cannot be barratry; for none can charge barratry but the owner, and he by his privity and aſſent waives the charge.

The diſpute in the caſe of *Knight* and *Cambridge*, was whether it was neceſſary to uſe the technical word barratry, for the fact was a total loſs of the ſhip laid to have happened by the fraud and negligence of the maſter: And there can be no diſpute that ſuch an act of direct injury to the perſons intereſted in the veſſel would be barratry; but there is nothing like it in this caſe.

And upon the queſtion put in the caſe of *Strange*, whether it would be barratry if the maſter went out of the road

by

by the deſire and for the benefit of the owners? The chief juſtice anſwers no; and the jury find their verdict accordingly. Here the jury have found that the deviation was with the privity of *Willes* the owner; and if it were neceſſary, which after this it is not, it might be no difficulty to prove that it was for his benefit.

As to negligence being barratry, the caſe in *Strange* is otherwiſe, at leaſt it muſt be *craſſa negligentia* ſuch as infers malice, and of this, enough has been ſaid already. As to going out without payment of port duties, that is an act which from the beginning openly abandons the goods and ſhews an original deſign of fraud; not ſo a ſubſequent accidental deviation though it may be for an illicit purpoſe.

I muſt object as to the ordinances of Stockholm; they are matter of poſitive municipal law of a foreign country, and ought not to bind the deciſions of this court.

Lord *Manſfield*—It is very proper by way of expoſition of the general law and cuſtom of merchants. *Colbert*'s edict 81. has been quoted an hundred times: And this ordinance goes as part of the general maritime law, which is a branch of the law of nations.

Mr. *Buller* continued—Barratry muſt be, as the ſeveral writers have defined it, a poſitive direct fraud to the owners, either by deſtroying or abandoning the ſhips or embezzling the goods; this is none of theſe, and therefore not barratry, and with this agree the ordinances of Middleburgh, Amſterdam, Schoninberg, Hamburg, Florence, and Rouen. Another point Mr. *Buller* endeavoured to ſupport, that they have laid it as barratry or a loſs by fraud of the maſter; and in another count accidental loſs by ſtorms of the ſea: And that this was repugnant, and therefore they ſhould recover on neither.

Lord *Manſfield*—It is a caſe that has rarely happened: I [640] have not that I remember, had a caſe before me of barratry. I have great doubts of it: It is odd that the inſurers (a third perſon) ſhould inſure the owners againſt the act of their own officer whom they themſelves appoint.

A good deal depends upon the nature of the agreement by the charter party; whether it is an agreement between the owners and freighters that the ſhip ſhall go to a particular place, or whether it is a letting of the ſhip to the freighters.

As to barratry it is agreed by all the books that it muſt ariſe *ex delicto*; but they do not agree as to the nature of the offence: It is ſettled that every deviation is not barratry.

It ſeems that barratry ſhould be a loſs of the ſhip or goods by any crime, negligence or deviation of the maſter directly injurious to the owner, and *malo animo* as againſt him, whether it extends farther to conſequential damages, and ſuch as are not even clearly and directly conſequential, but as it were collaterally emerging, and caſually and remotely incidental, uncertain whether they would or would not have happened otherwiſe, whether this be barratry may be matter of farther conſideration.

It is agreed, that if a ſhip goes out without paying port duties and is ſeized, this is barratry.

I ſhould pay great reſpect to the gentlemen of the ſpecial jury who were conſiderable merchants, the proper judges of a cauſe of this nature.

If the ſhip had been ſeized at Guernſey, this would certainly have been barratry.

I don't ſee it is ſhewn who is the owner. As to the aſſignment of the third count, I think you might have recovered if it had not been barratry, [upon the other counts without.]

Let it ſtand over.

CURIA ADVISARE VULT.

Afterwards on the laſt day of the term Lord *Mansfield* threw out ſome hints, on points material in the cauſe, to this effect.

We have thought of this caſe: I have never met with in my time.

The definition of barratry ſeems to be very looſe. It is pretty extraordinary the inſurer ſhould inſure to the owner for the behaviour of a man put in by himſelf.

[641] Thus much however, I think, appears of barratry; it ſeems to be held that it muſt be a crime.

It is to be conſidered whether the loſs muſt not happen at the time of the barratry.

There was great ſtreſs laid on *Willes*'s knowing it; and to be ſure, if *Willes* be the owner, with great reaſon; for the owner inſures, he cannot recover againſt his own act or conſent.

But it is material, when a ſhip is let to freight, whether the owners of the goods have not the direction; if it be as an houſe to the freighter, then he, the freighter is owner.

If on the other hand it is only a covenant between the that the ſhip ſhall go that voyage for the freighter, then

is only like an hackney-coach or ſtage-waggon; and the freighter has only the uſe for his goods; not the direction.

There appears nothing clear from the opinion of *Stamma* and *Brown* but this—that not every breach of contract is barratry.

Not every deviation is barratry: If there is fraud it is ſaid it will be barratry, and it muſt be it is ſaid *ex delicto* and ſo much appears clear.

But is every offence, is every loſs ſome way or other reſulting *ex delicto*, whether direct or remotely conſequential, whether neceſſarily or probably, or poſſibly occaſioned by the offence, or uncertain whether occaſioned by it or not, barratry? I think, one ground muſt be *ex delicto*, but whether ſuch offence as would ſubject a man to a criminal proſecution, as running away with the ſhip, deſtroying the goods or the like, may be a queſtion.

And ſo it may what kind of loſs, and how far a loſs not direct but conſequential, and what ſhall be held a conſequential loſs to this purpoſe.

Where a deviation was made there is an authority, that going quite out of courſe and delaying is not barratry.

That caſe of *Stamma* and *Brown* was very accurately, it ſeems almoſt *verbatim*, taken by my brother *Willes*.

To order a new trial till we have ſettled our opinions with regard to the law would be quite nugatory.

Of the ordinances, that which ſpeaks moſt ſenſibly is the [642] ordinance of Florence, I believe, which ſays no ſuch inſurance ſhall be made.

A crime with reſpect to the owner of the goods, it is clearly held it needs not be. For if the ſhip go out of the port without payment of duties and is taken, this is barratry. The only queſtion ſeems to be whether the damages muſt be direct or conſequential.

CURIA ULTERIUS ADVISARE VULT.

Afterwards, on Thurſday Nov. the 20th, in Michaelmas term, Lord *Mansfield* delivered the judgment of the court to the following effect:

This caſe has been for ſome time for the conſideration of the court. We are agreed in our opinions. I will firſt ſtate the caſe. You will attend, becauſe I have not got the report, but only a ſhort note, for fear I ſhould omit any material circumſtances.

This is an action on a policy of inſurance upon a voyage from London to Seville, which policy undertakes againſt

barratry; this ſhip was to take in goods for any perſons in the way of general freightage.

The ſhip belonged to *Willes* as owner of the hulk, but was chartered by *Darwin* for that particular voyage; and without the knowledge of *Darwin* went to Guernſey, and there took in brandy in evaſion of the duties. Thence felt into a ſtorm, was much damaged, and driven back to Dartmouth, thence refitted and went on upon the voyage, but in going was ſo much farther damaged as to be incapable of continuing her courſe, and obliged to put in at Helford. The ſhip was not confiſcated on account of the contraband goods. In conſequence of the damage the ſhip ſuffered the goods were ſpoilt. The plaintiffs brought this action to recover on the policy againſt the underwriters, for the loſs of the goods ſo happening as is ſtated, and the terms of the inſurance being as is already ſtated. The jury found a verdict, under the directions of the judge, for the plaintiffs—and they find (as above ſtated) that the voyage to Guernſey for the purpoſes already mentioned, was with the knowledge of *Willes*; but without the knowledge of *Darwin*.

Upon this a new trial has been moved, and the general queſtion is, whether this act of the captain in going the ſmuggling voyage, and taking in the brandy as above ſtated be or be not barratry, ſo as to entitle the plaintiffs to recover.

[643] On the trial the defendants contended this was not a deviation, becauſe it was a new voyage: So far they were right but it was contended by the plaintiffs that it was barratry becauſe a voyage againſt orders for an illegal purpoſe, whereby the goods were expoſed to danger, and were afterwards actually ſpoilt.

Much ſtreſs was laid upon the trial, that if with the conſent of *Willes* it could not be barratry; becauſe barratry could not be when with the conſent of the owner.

To be ſure when the owner orders or conſents to any thing, he cannot recover againſt his own order or conſent given for what has been done.

And this, as it is true in the principle, would have been very true in the application, if *Willes* had been at all concerned in the caſe.

I believe it has never been decided with accuracy what barratry is, in England; and as in all mercantile tranſactions I have held certainty of greater conſequence than perhaps upon what rule originally the caſe was decided. I think general verdicts are not to be regarded, as certainty is not

to be had from them, it not appearing on what grounds the jury found. And in general notes of cases taken at *nisi prius*, though ever so well taken, and decided by judges of ever so high authority, are liable to the same objection for similar reasons.

In *Pole* and *Fitzgerald*, it may be seen how much the different reasons given as the ground of the judgment, in cases of general verdict, tend to exclude certainty from cases of that nature.

Of the common law cases which merit consideration upon this head, there are however *Knight* and *Cambridge*, where it was held that one act of barratry, was going out without payment of port duties. And the court says that barratry is of a general signification, and not confined to running away with the ship; that it signifies *fraus* and *dolus*, and extends to any fraud of the master; that the end of insuring is to be safe in all events.

Stamma and *Brown*, the case from the question there put, and the answer by the chief justice appears very much to the present case.—The vessel was to go straight to *Marseilles*, and it goes out of the way seemingly on a formed design, somewhere, to cheat the contractor in the voyage. He says this is not simply a deviation but somewhat more. The jury ask whether if it were for the advantage of the owner, and not his own, this was barratry. The chief justice tells them no; they find for the defendant: And upon a motion for a new trial it is refused, because it appeared the master acted consistent with his duty to the owners, and the plaintiff's agent knew of the intended alteration; and to make it barratry there must be something criminal. [644]

I don't think either of these cases strong enough to fix the bounds of what is, or is not barratry.

The last case is *Elton* and *Brogden*. There the ship went out with letters of marque insured by the defendant. In her voyage she took a prize and returned to Bristol, and received her proportionable part of the premium. Then another policy was made; she sailed again with express orders from the owners, that, in case of taking another prize, they should put some hands on board the said prize, and send her to Bristol; but the ship in question should continue her voyage with the merchant goods. Another prize was taken, and the captain gave orders to some of the crew to carry the prize to Bristol, and designed to go to Newfoundland; but the crew opposed and insisted he should go back, though he alledged his orders; and they forced him

him out of the way whereby his own ſhip was taken, but the prize got ſafe.

On action brought againſt the inſurers, it was contended this was ſuch a deviation as diſcharged them; but the objection made to this is, that here was a force upon the master ſuch as he could not reſiſt: But the anſwer is, the inſurance is againſt the crew as well as the maſter. I think the more probable ground is, that, as this was a veſſel upon a privateering voyage, it was neceſſary they ſhould take care of the prize when they had taken it, and the crew exerciſed their judgment for the benefit of the ſhip.

I come now to the caſe before the court; which being material, and as it appeared to me a new one, I left it for argument; and it has been very ably argued.

As it was a matter of a commercial nature, and turned greatly upon the uſage and cuſtom of merchants, I conſulted an eminent merchant of whoſe ſkill and experience I have great opinion.*

I do not find the meaning of the word has been ſettled in this country. The books and ordinances of other nations were very properly quoted to come at the underſtanding of their uſe of the word.

The Italians were the firſt great trading nation who introduced the word. *Barrattare* in the Italian dictionaries ſig-
[645] nifies to cheat, defraud, or trick; and this ſeems to have been the general acceptation of the word in other trading nations, who have borrowed the term from thence.

Yet undoubtedly, where the caſe is of the owner of the ſhip conſenting, he cannot recover for what was done by his knowledge and conſent. But in this caſe *Wilkes*, the general owner, has nothing to do with it: *Darwin* engages, puts the goods on board; it was againſt the conſent of the owner, for this purpoſe, if what was done was againſt the conſent of *Darwin*.

What is done? The ſhip is to ſet out from London to Seville; *Darwin* relies upon this; and truſts that the voyage will be immediate, as on the faith of the inſurance he has reaſon. The maſter, inſtead of going directly to Seville, goes upon an iniquitous voyage by which the ſhip was liable to be confiſcated: This is the deceit upon *Darwin*; and the goods, after this fraudulent departure from the courſe of the voyage, the ſhip falling into a ſtorm, are ſpoiled.

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* Cuilibet in arte ſua eſt credendum.

And whether the damages happened directly or not, does not ſignify; nor whether it was an act of immediate intentional injury againſt the owner of the goods.

If the maſter runs away with the ſhip this is barratry, and though the ſhip afterwards returns and purſues the voyage it is ſtill barratry, and the perſon who by ſo offending was once liable, continues liable as to all conſequential damages.

Here I think the damage ſufficiently appears, and upon the general principle falls within the rule of conſequential damage, as it might not have happened but for the illicit voyage; and whether it would have happened or not, if the ſhip had continued in its ſtraight courſe, is not material.

And in this caſe there is great reaſon. *Darwin* has inſured: he loſes by the deviation; the deviation is the voluntary, illegal, fraudulent act of the captain; and therefore it appears to me extremely clear, that this ſmuggling voyage was barratry in the maſter, and conſequently comes within the terms of the inſurance; and of courſe that the verdict is right, and that there ought not to be a new trial.

Mr. Juſtice *Aſton*—One would wonder, when this word was in uſe two hundred years ago, that there ſhould remain now any doubt what barratry is.

I think it has always been the ſame in idea and general meaning, though differing in terms, and not ſettled in practice—deceit, villainy, knavery, fraud.

In Florence it is ſo explained near two hundred years ago, [646]
De barratriâ et contrabandâ venditione."

Where the maſter is acting not for his own advantage, but for the benefit or with the conſent of the owners, it appears, by the caſe in *Strange*, this is not barratry for them to charge him with the loſs.

But who in this caſe is the owner? Verbally, *Willes*, the owner of the hulk of the ſhip; but really, as far as this queſtion is concerned, he has nothing to do with it; the owner is *Darwin*. I think the jury did very right in conſidering *Darwin* as owner, *pro hâc vice*.*

This

* Thus a man who draws a bill of exchange is a merchant, *pro iſta vice*, v. Green's Bankrupt Laws, *c.* 1. and the caſes therein cited. 1 *Salk.* 125. *Hayes* v. *Steward*. *Paſch.* 3d *W.* & *M.* 2 *Ventr.* 295. 1 *W.* & *M.* *Garfield* v. *Witherley*. And 2 *Ventr.* 310. *Cramlington* v. *Evans and Purcell*, 1ſt point in error in *Saccario*.

This is without the knowledge, then, of the owner: It is not for his benefit, but to the danger of the goods, and for an illicit purpoſe.

And it would not ſignify whether the ſhip was ſafe or no from that voyage. There is no ſaying when the miſchief happened to the veſſel which occaſioned the loſs.

I think this is one of the caſes where the underwriter is liable for the act of the maſter; being a criminal act. And the caſe of *Knight* and *Cambridge* ſpeaks of any criminal act, deceit, or fraud; ſo does *Stamma* and *Brown*.

Though this may not be within the ſtatute of *G.* 3. [*qu.* the ſtatute alluded to] it is at leaſt a deviation for an illegal purpoſe, which, I think, is ſufficient to make it barratry, (being without conſent of the temporary owner) and the inſurers liable to anſwer the conſequential loſs, though not directly or neceſſarily conſequential on the deviation.

Mr. Juſtice *Willes*—I think this is barratry. *Darwin* was the freightor: I think its being done without the privity of the freightor is the ſame as if done without the privity of the owner.

The only queſtion that occurred to me was, whether this was a loſs by the act of barratry: For the three common law caſes ſeem to ſay that the loſs muſt happen by the act of barratry.

[647] There is no ſaying here when ſhe might ſuſtain that loſs. By going out of the way ſhe fell into a ſtorm, which ſhe might have eſcaped if ſhe had not gone to Guernſey, as Mr. *Alleyne* very properly obſerved. And this, after a verdict, the court may take as probable, that the loſs may have happened by conſequence of the voyage.

This is certainly a deviation without the conſent of the freightor: And poſſibly the cauſe of the damage ſuffered; and it is a deviation for a bad purpoſe: And in the juſtice of the caſe I am ſatisfied, whatever I might doubt, ſince it does not appear to fall within the caſes. And though it is not a loſs by a fraudulent intent of the maſter or mariners, to hurt or deſtroy, or embezzle or corrupt the goods of the owner, yet the ſubſtantial juſtice has been done, and the jury have found a verdict which, I think, we ought not to ſet aſide.

Mr. Juſtice *Aſhhurſt*—I am of the ſame opinion as at the trial.

I think they have a right to recover upon either count, whether of loſs, ſtorms, and perils of the ſea, or for barratry of the maſter.

As

As to the objection, that the two charges of accident and criminal intent clash with one another, the party ſhall not ſet up his own fault as a defence;* for if it was not accident it was a criminal deviation, or barratry; and it is no anſwer for him to ſay it cannot be both, and therefore it ſhall be neither.

I think there was ſufficient evidence to find it a loſs by ſtorms and perils of the ſea, upon the firſt count, ſuppoſing this to have been not barratry.

And farther, I think it was barratry, being a deviation for an unlawful act, and loſs enſuing; but even without that, upon the firſt ground, I think the verdict good on the firſt count.

[Note, There is a caſe where this doctrine of conſequential damages is very curiouſly diſcuſſed, 3 *Wilſ.* 403, 13. *Scot* v. *Shepherd*. *E.* 13 *G.* 3. Action of treſpaſs and aſſault. Plaintiff declares, that the defendant, on the 28th of October 1770, *vi et armis*, made an aſſault upon the plaintiff, by caſting and toſſing a lighted ſquib, whereby he loſt his eye.

The caſe was, the defendant, on the day laid in the declaration, at Milborne Port, in the county of Somerſet, at a fair, which was then and there held, threw a large ſquib from the ſtreet into the market-houſe, where a large concourſe of people were aſſembled; and the ſaid ſquib thrown by the defendant fell on the ſtanding there of one *W. Yates*, who was then expoſing to ſale gingerbread, *&c.* and one *James Wills*, inſtantly to prevent miſchief to himſelf and to the wares of the ſaid *Yates*, took it up, and threw it acroſs the ſaid market-houſe, when it fell upon another ſtanding there of one *James Ryal*, who was alſo expoſing the ſame ſort of wares to ſale; and the ſame *James*, inſtantly to ſave himſelf and his goods, took up the ſaid lighted ſerpent, and threw it to another part of the ſaid market-houſe, and, in ſo throwing, ſtruck the plaintiff on the face therewith, and the ſquib burſting, put out one of the plaintiff's eyes. [648]

The jury found a verdict, with 100l. damages, ſubject to the opinion of the court: Whereupon, on argument in *C. B.* the Lord Chief Juſtice *De Grey*, and *Nares* and *Gould*, Juſtices, were of opinion that the action well lay againſt the defendant;

* Nemo lucrabitur ex injuria ſua propria.

This maxim was carried to its full extent in the famous caſe of *Coke*, who was indicted on the *Coventry* act, and pleaded an intent not to maim, but murder; but he was convicted on that act, and executed.

defendant; for that the firſt throwing was the unlawful violent act of the defendant, and the ſubſequent throwings were inſtantaneous, and neceſſary thereupon, and as it were, *continuando* the firſt; ſo that the whole was one ſingle unlawful act of the defendant, by force, to the injury of the plaintiff. And the Chief Juſtice held it to be as if the ſquib had bounded and rebounded of itſelf ſeveral times after it was thrown by the defendant, before it reached to the plaintiff's eye. *Blackſtone*, juſtice, *e contra*, that action of treſpaſs lay not, but action on the caſe, for conſequential damages; the two ſubſequent throwings after the firſt being independent acts, giving new directions to the ſquib, and not proceeding from the defendant, his order or direction, but from the throwers, as free agents, abſolutely *diverſo intuitu*, for the preſervation of their goods and perſons.

I cannot leave this caſe without acknowledging my obligations to Mr. *Alleyne*, for his very polite and friendly aſſiſtance, in furniſhing me with his notes of the foreign ordinances to which he referred in his argument; and which notes I have had the pleaſure of uſing in part, as to ſome other branches of the argument, and in a few places of the judgment, where my own were defective.]

Anonymous.

Attachment for Non-payment of Coſts in a criminal Suit.

ON a motion for a rule to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody upon the inſolvent debtors act.

[649]

The defendant had been indicted at the Old Bailey for an aſſault, and had removed the indictment by *certiorari* into this court; and for non-payment of coſts was under an attachment.

V. 21 Ja. 1. c. 8. 13 & 14 Car. 2. c. 6. ſ. 16. 22 Car. 2. c. 12. ſ. 4. and 5 W. & M. c. 11.

The caſe of *Rex* v. *Stokes*, 23 *G.* 2. was cited, who moved to be diſcharged under the general words of the act of grace, 20 *G.* 2. and it was objected, that there was an exception of contempts: That was a caſe alſo of an attachment on recognizance for non-payment of coſts. Lord Chief Juſtice *Lee* ſaid it was not a contempt where the rights of the ſubject only are concerned, *i. e.* where the form is of a criminal public ſuit or proceſs in the name of the crown, but the ſubſtance a civil private remedy. Mr. Juſtice *Wright* quoted a caſe of an attachment upon a recognizance; and Lord Chief Juſtice *Lee* ſaid it was not a contempt

tempt till he was put to anſwer interrogatories; for he might clear himſelf of the contempt, and the attachment was only meſne proceſs to bring him into court.

Mr. Juſtice *Aſton* appeared to compaſſionate the young man's caſe very much, and ſaid he wiſhed to be able to ſatisfy himſelf that it was in the power of the court to diſcharge him: And he thought it a caſe which ought to be interpreted in favour of the liberty of the ſubject.*

Mr. Juſtice *Willes*—He has ſatisfied to the crown by his four months impriſonment: Suppoſing there was a general pardon he could not be diſcharged, for the crown has nothing in it, as it concerns the right between ſubject and ſubject. † And he cannot, it is ſaid, be diſcharged under the Lords act, which is a cleft ſtick indeed.

Afterwards, the next day being the laſt term, after Lord *Mansfield* had left the court, the three other judges delivered their opinions to the following effect:

Mr. Juſtice *Aſton*—I apprehend when the deciſion was made in this court that an attachment was an execution in a civil ſuit; it was not a new deciſion, but it was always ſo.

Now it does not ſtrike me there is any difference in the coſts ‡ upon the civil ſuit. The maſter is to tax, and if not paid within the time an attachment goes. The 9th of *G.* 3. *c.* 26. is, in my opinion, a legal recognition that perſons ſhall be diſcharged from execution on whatever ſuit.

[650]

This ariſes upon an act of parliament, whereby when an indictment is removed by *certiorari* the defendant muſt enter into a recognizance for the coſts to be taxed by the maſter, and if not paid within a time limited (ten days) attachment iſſues. 5 *W.* & *M. c.* 11. *ſ.* 3.

If an attachment for coſts is an execution, whether the coſts are taxed on the ſide of the maſter of the crown office or on the civil ſide, how is he without diſcharge? And yet if he be not within the benefit of the Lords act, becauſe it is an attachment at the ſuit of the crown, he plainly on the other hand is not within a general pardon; ſo it amounts to impriſonment for life.

You can have no more than he has. And I don't ſee, eſpecially ſince the ſtatute of the 9th of *G.* 3. why he ſhould not be diſcharged.

Mr.

* Leges Angliæ omnium libertati favent.

† Rex non poteſt gratiam facere cum injuria alterius.

‡ Acceſſorium ſequitur principale.

Mr. Juſtice *Willes*—Statutes in favour of the liberty of the ſubject ought to be liberally conſtrued.

The ſtatute of 9 *G.* 3. diſcharges all perſons in execution under any ſuit.

There is an end of all the criminal part of the ſuit.

"It is declared and enacted" are the words, which ſeems as if the ſtatute meant to extend the benefit in the fulleſt manner.

Therefore I am willing to adopt the liberal conſtruction, the public having been ſatisfied by the impriſonment; and eſpecially as otherwiſe this would be the caſe of impriſonment without any probability of releaſe—and of a minor.

And whether it has ever come before the court upon motion or not, they will give a liberal and beneficial conſtruction of a ſtatute of this nature.

Mr. Juſtice *Aſhhurſt*—It is very ſtrange he ſhould not be diſcharged becauſe it is a civil ſuit, not even by a general pardon which is certainly the caſe; and then it ſhould be turned againſt him that it's not a civil ſuit, but a ſuit of the crown, and that ſo the act of parliament does not diſcharge him.

Held that attachment for non-payment of coſts, on 5 W. & M. c. 11. on an indictment of aſſault, is diſcharged by the inſolvent act.

CURIA—Let him be DISCHARGED on taking the OATH on the INSOLVENT DEBTORS ACT.

[651]

Elegit.

YOU muſt revive *elegit* by *ſcire facias*. If not proceeded upon within the year the writs muſt be without diſcontinuance; otherwiſe the court will preſume ſatisfaction.

Bail.

ON a motion to ſet aſide execution againſt bail, with coſts, the principal having been diſcharged by certificate under a commiſſion of bankruptcy.

Mr. *Dunning*—That the motion to ſet aſide execution with coſts muſt infer irregularity; and that there was none in this caſe, and therefore coſts out of the queſtion. That formerly the bail muſt have brought in the principal and ſurrendered: That now, if they apply before they are fixed, they may do this without ſuch form; but they have not applied. They ought, without notice, to have watched whether

ther a *capias ad satisfaciendum* was taken out against the principal, which of course would end in a *scire facias* against the bail, to charge them.

There is no reason any more than there would have been if the certificate had issued subsequent to the fixing of the bail.

Lord *Mansfield*—Why did the plaintiff proceed after he had notice of the bankrupt being discharged?

On the other side, Mr. *Cowper* was going to have argued, but Lord *Mansfield* told him it was not necessary.

Lord *Mansfield*—This is a mighty plain case. The bail are to watch the proceedings of the plaintiff, unless upon the ground of their knowing that the plaintiff knows that the defendant has got his certificate. And why, then, does he pursue an iniquitous demand against the bail?

They knew nothing of the *scire facias*. If it were not that they are discharged by the event, they must take notice of the *scire facias* at their peril.

Mr. *Dunning* hoped the proceedings would be set aside without costs, as being regular.

Lord *Mansfield*—The proceedings are irregular, as con- [652] trary to law and justice.

Mr. *Dunning*—It is your Lordship's opinion, then, that the certificate of a bankrupt is to amount to a discharge of bail!

Lord *Mansfield*—Yes; if the plaintiff knows of the certificate, and proceeds.

RULE ABSOLUTE, however, without COSTS.

But the court desired it might not be taken for a precedent of excusing costs upon the like application for the future.

Mr. *Dunning* said they had no means of knowing that such a proceeding was not warrantable; they had received no light in it.

Lord *Mansfield*—They had the light within to tell them. They had no need of any other to shew that it was unjust to come upon them by surprize, when the defendant was discharged, and by that means the bail; and when the certificate had been sued out a year and an half, and the plaintiff had notice.

It was objected by one of the counsel, that, if this was the case, the usual application, that upon pleading to the *scire facias* an *exoneretur* might be entered, would be of no use.

Mr.

Mr. Juſtice *Aſton*—It will not be uſeleſs; as it will ſave them a great deal of expence, which they otherwiſe may often incur. *

Writ of Error.

ON a motion for a rule to ſhew cauſe why execution ſhould not be taken out againſt all the defendants, notwithſtanding a writ of error brought by two of them.

Objection to the motion, that the plaintiff had obtained a confeſſion of damages from three of the defendants in the cauſe, ſuſpected to be by colluſion: That the writ of error exiſts, and muſt have its power while it ſtands.

If it be an irregular writ, the motion ſhould be for a rule to ſhew cauſe why the writ ſhould not be ſet aſide.

[653] Lord *Mansfield* declared he would give no directions: They might get rid of the writ of error if they could; if not, that it would be in force.

RULE DISCHARGED.

Time to Plead.

IT ſeems declaration delivered before the Eſſoign day of the term entitles to a plea within eight days.

Inſpection.

MOTION for liberty to inſpect books of a corporation.

Objection, that it was ſo late moved the corporation would not have time to anſwer.

Lord *Mansfield* aſked whether a cuſtom was not concerned.

And I think it turned out to be a cuſtom concerning freemen's fees.

Lord *Mansfield*—They ought to have inſpection.

RULE ACCORDINGLY.

Witneſs.

* Præſtat cautela quam remedium.

Witneſs.

MOTION to ſtay going to trial, on affidavit that they have been endeavouring to find a witneſs, and cannot.

RULE DISCHARGED.

Irregularity.

WHERE bill filed againſt one as attorney of this court who is attorney of the Common Pleas, and judgment thereon, this ſeems error, and not irregularity.

Writ of Error.

MOTION for execution notwithſtanding a writ of error, on ſuggeſtion that it iſſued before judgment ſigned. Whereas the aſſignment of general error in writs of error is thus: *Quia in recordo et proceſſu ac etiam in redditione* JUDICII *manifeſte eſt erratum*, and therefore the writ of error could not anticipate the judgment.

But it was obſerved the proper way to come at this was by moving to ſet aſide the writ.

And the maſter ſaid whoever ſued out a writ of error had it in his pocket to make uſe of when judgment ſhould be ſigned; and the judgment related to the firſt day of term. *Q. N.*

Inſpection of Books.

ON a rule to ſhew cauſe why the plaintiff ſhould not inſpect the books of the corporation of the city of London, and why he ſhould not have liberty to take copies.

This was an action upon a penal ſtatute of 3 *G.* 3. to prevent perſons voting who are not freemen, and oblige thoſe who have the cuſtody, to produce to the candidates or freemen, the books of the corporation containing admiſſions of freemen.

It was objected, that if the rule were granted in this caſe, the defendants might be made liable by compulſion to accuſe themſelves.

To

To this it was anſwered, that the application is to the defendants not in their private and perſonal, but in their political capacity.

However, it appearing the defendants could not comply with the rule, they not having the power of granting inſpection in themſelves.

RULE DISCHARGED.

Michaelmas

The Cauſe of the Iſland of Grenada.

Campbell *v.* Hall.

THIS cauſe came on to trial before the right honourable *William* Lord *Mansfield*, on Friday the ſecond of July, at the ſittings after Trinity term, for the city of London, at Guildhall, when a ſpecial verdict was found: The proceedings in the cauſe were as follows:

" Trinity term, in the 13th year of the reign of King " *George* the third.

" London to wit, BE IT REMEMBERED, that heretofore, " that is to ſay, in Eaſter term laſt paſt, before our Lord " the King at Weſtminſter, came *Alexander Campbell*, Eſq; " by *Benjaman Roſewell*, his attorney, and brought in the " court of our ſaid Lord the King then there, his BILL againſt " *William Hall*, Eſq; 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; and " there are PLEDGES for the proſecution, to wit, *John Doe* " and *Richard Roe*. Which ſaid BILL follows in theſe words, " to wit, London, to wit, ALEXANDER CAMPBELL, Eſq; " complains of WILLIAM HALL, Eſq; being in the cuſ- " tody of the marſhal of the Marſhalſea of our Lord the " King himſelf, of a plea [of treſpaſs on the caſe; AND " ALSO] FOR THAT WHEREAS the ſaid *William*, on the " firſt day of January, in the year of our Lord 1773, at " London aforeſaid, to wit, in the pariſh of St. Mary-Le- " Bow, in the ward of Cheap, was indebted to the ſaid " *Alexander* in the ſum of 20l. of lawful money of Great " Britain, for the like ſum of money by the ſaid *William* " before that time had and received, for and to the uſe of " the ſaid *Alexander*: And being ſo indebted, he the ſaid

Commencement by bill.

Plea of treſpaſs.

Pledges.

Recital of bill.

Ac etiam.

Indebitatus.

Assumsit. "*William*, in consideration thereof, afterwards, to wit, on "the same day and year aforesaid, at London aforesaid, in "the parish and ward aforesaid, undertook, and to the
[656] "said *Alexander* then and there faithfully promised, that he "the said *William* would well and truly pay and satisfy the "said *Alexander* the said sum of money whenever he the said "*William* should be thereunto afterwards required. YET "the said *William*, not regarding his said promise and "undertaking, but contriving and fraudulently intending "craftily and subtilly to deceive the said *Alexander* in this
Breach assigned. "behalf, HATH NOT PAID the said *Alexander* the said "sum of money, or any part thereof, (although the said "*William* afterwards, to wit, on the same day and year "aforesaid, and often afterwards, at London aforesaid, in "the parish and ward aforesaid, was by the said *Alexander* "required to do) but to pay the same, or any part thereof, "to the said *Alexander* he the said *William* hath hitherto
Damages. "altogether refused, and still doth refuse, to the DAMAGE
Igitur apponit sectam. "of the said *Alexander* of TWENTY POUNDS. And there-"fore he brings his SUIT, &c."

Continuance. AND now on this day, to wit, on Friday next after the morrow of the Holy Trinity, in the same term, (to which said day the said *William* had leave to imparle to the said bill, and then to answer, &c.) before our Lord the King at Westminster, comes as well the said *Alexander*, by his attorney aforesaid, as the said *William*, by *Robert Want*, his attorney; and the said *William* defends the wrong and injury. When, &c. and says he did not undertake and promise in manner and form as the said *Alexander Campbell* above complains against him. And of this he puts himself upon the COUNTRY; and the said *Alexander* doth the like.

Defendant vim et injuriam. Plea of non-assumpsit. Defendant point se super patriam. Plaintiff similiter issue.

Therefore let a jury thereupon come before our Lord the King on Wednesday next after three weeks of the Holy Trinity, by whom the truth of the matter may be better known, [and who neither are of kin to the aforesaid *Alexander* nor to the aforesaid *William*] to recognize the truth of the issue between the said parties, because as well the said *Alexander* as the said *William*, between whom the issue is, have put themselves upon the said jury. The same day is given to the party aforesaid.

Venias jurata. Day of further appearance. Respite for default of jurors. Nisi prius.

Afterwards the process being continued between the parties aforesaid, of the plea aforesaid, by the jury between them being respited (before our Lord the King, at Westminster, until Saturday next after the morrow of All Souls then next following, UNLESS the King's right trusty and well

well beloved *William*, Lord *Mansfield*, his Majesty's Chief Justice assigned to hold pleas before our Lord the King himself, shall first come on Friday the second day of July, at the Guildhall of the city of London, according to the form of the statute in such case made and provided) for default of jurors, because none of them did appear.

At which day, before our Lord the King at Westminster, came the aforesaid *Alexander Campbell*, by the said *Benjamin Kensell*, his attorney aforesaid. And the said Chief Justice before whom issue was tried, sent hither his record had [657] thereof these words, to wit, "Afterwards, that is to say, on the day and at the place within contained, before the right honourable *William*, Lord *Mansfield*, the Chief Justice within written, *John Way*, gentleman, being associated unto him according to the form of the statute in that case made and provided, comes as well the within named *Alexander Campbel*, Esq; by his attorney within named, as the within named *William Hall*, Esq; by his attorney within mentioned.

Continuance.

Postea.

"And the JURORS of the jury within mentioned being summoned, some of them, that is to say, *Anthony Highmore*, *Peter Bostock*, *David Chambers*, *James La Motte*, *John Wilkinson*, *Joshua Bedshaw*, and *Silvanus Grove*, come, and are sworn upon that jury: 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 sheriffs of the city and county aforesaid, at the request of the said *Alexander*, and by the command of the said Chief Justice, are now newly set down, whose names are filed 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, *John Lee*, *William Kersil*, *Charles Hougham*, *John German*, and *Richard Hatt*, being required, come, 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 say,

Names of the jurors.

Tales de circumstantibus.

"That the island of Grenada, in the West Indies, was in the possession of the French king until it was conquered by the British arms in 1762. And that during that possession there were certain customs and impost duties collected upon goods imported and exported into and out of the said island, under the authority of his most Christian Majesty. And that in the said year 1762 the said island was conquered by the King of Great Britain, then "in

Special verdict.

Island of Grenada in the possession of the French king till conquered by Great Britain in 1762.

Customs and duties upon goods imported and exported levied upon the iſland by the French king.

" in open war with the French King: And that the ſa
" iſland of Grenada ſurrendered to the Britiſh arms upo
" the ſame articles of capitulation as had been before gran
" ed to the inhabitants of the iſland of Martinico, up
" the ſurrender thereof to the Britiſh arms. And that
" the articles of capitulation demanded by and granted
" the inhabitants of the ſaid iſland of Martinico, upon th
" ſurrender thereof to the Britiſh arms, dated the ſeven
" day of February, 1762, are the following articles, th
" is to ſay,

Surrender of the iſland of Grenada upon the ſame terms as Martinico.

Articles in the capitulation of Martinico. Article 4.

Article the fourth—" They ſhall be ſtrictly neuter, a
" ſhall not be obliged to take arms againſt his moſt Chri
" Majeſty; nor even againſt any other power."

[658]

They become ſubjects of his Britannic Majeſty.

Anſwer—" They become ſubjects of his Britannic M
" jeſty, and muſt take the oath of allegiance, but ſhall
" be obliged to take arms againſt his moſt Chriſtian M
" jeſty until a peace may determine the fate of the
" land."

Article 5.

Article the fifth—" They ſhall preſerve their civil
" vernment, their laws, cuſtoms, and ordinances: Ju
" ſhall be adminiſtered by the ſame officers who are n
" in employment; and there ſhall be a regulation made
" the interior police between the governor of his Britan
" Majeſty and the inhabitants: And in caſe that at
" peace the iſland ſhall be ceded to the King of Gr
" Britain, it ſhall be allowed to the inhabitants to pre
" their political government, and to accept that of Ant
" or St. Chriſtopher's."

They ſhall be governed by their preſent laws until his Majeſty's pleaſure be known.

Anſwer—" They become Britiſh ſubjects, (as in the
" ceding article) but ſhall continue to be governed by t
" preſent laws until his Majeſty's pleaſure be known."

Article 6.

Article the ſixth—" The inhabitants, as alſo the re
" ous orders, of both ſexes, ſhall be maintained in the p
" perty of their effects, moveable and immoveable, of w
" nature ſoever, and ſhall be preſerved in their privile
" rights, honours, and exemptions; their free neg
" and mulattoes ſhall have the entire enjoyment of their
" berty."

They ſhall

Granted, in regard to the religious orders—" The i
" bitants, being ſubjects of Great Britain, will enjoy th
" proper

" properties, and the ſame privileges as in the other his Ma- " jeſty's Leeward Iſlands."

of their property as his Majeſty's ſubjects, and the ſame privileges as the inhabitants of his Majeſty's other Leeward Iſlands.

Article the ſeventh—" They ſhall not pay to his Majeſty " any other duties than thoſe which have been paid hither- " to to his moſt Chriſtian Majeſty; and the capitation of " negroes upon the ſame footing it is paid at preſent, with- " out any other charges or impoſts: And the expences of " juſtice, penſions to curates, and other occaſional ex- " pences, ſhall be paid by the domain of his Britannic Ma- " jeſty, as they were by that of his moſt Chriſtian Ma- " jeſty."

Article 7. To pay to his Majeſty no other duties than thoſe before paid to the French king.

Anſwered in the ſixth article, as to what regards the inhabitants.

Referred for anſwer to the 6th article.

Article the eleventh—" No other than the inhabitants " reſident in this iſland ſhall, till the peace, poſſeſs any eſ- " tate by acquiſition, agreement or otherwiſe: But in caſe [659] " at the peace the country ſhall be ceded to the King of " Great Britain, then it ſhall be permitted to the inhabi- " tants who ſhall not be willing to become his ſubjects to " ſell their eſtates, moveable and immoveable, to whom " they pleaſe, and retire where they ſhall think proper; " in which caſe they ſhall be allowed convenient time.

Article 11. In caſe of a peace, if the country ſhall be ceded to the King of Great Britain, thoſe who pleaſe may ſell their eſtates to Britiſh ſubjects, and retire out of the iſland.

" [Anſwer] All ſubjects of Great Britain may poſſeſs any " lands or houſes by purchaſe. The remainder of this ar- " ticle granted, provided they ſell to Britiſh ſubjects."

And the jurors aforeſaid, upon their oaths aforeſaid further ſay—That in the definitive treaty of peace and friendſhip between his Britannic Majeſty, the moſt Chriſtian King and the King of Spain, concluded at Paris the 10th day of February 1763, amongſt others are the following articles:

Definitive treaty of peace between the King of Great Britain, the French King, and the King of Spain 10th Febr. 1763.

Article the fourth—" His moſt Chriſtian Majeſty re- " nounces all pretenſions which he has heretofore formed " or might form to Nova Scotia, or Acadia, in all its parts; " and guarranties the whole of it and with all its dependan- " cies to the King of Great Britain: Moreover his moſt " Chriſtian

Article 4th. Ceſſion of Nova Scotia, Canada, and all the dependancies of each to King

crown of Great Britain.

" Chriſtian Majeſty cedes and guaranties to his ſaid Britannic Majeſty in full right Canada, with all its dependencies, as well as the iſland of Cape Breton, and all the other iſlands and coaſts in the Gulph and River of St. Lawrence. And in general every thing that depends on the ſaid countries, lands, iſlands and coaſts, with the ſovereignty, property, poſſeſſion, and all rights acquired by treaty or otherwiſe, which the moſt Chriſtian King and the crown of France have had until now over the ſaid countries, iſlands, lands, places, coaſts, and their inhabitants: So that the moſt Chriſtian King cedes and makes over the whole to the ſaid King and the crown of Great Britain; and that in the moſt ample manner and form without reſtriction, and without any liberty to depart from the ſaid ceſſion and guarranty under any pretence, or to diſturb Great Britain in the poſſeſſions above mentioned.—His Britannic Majeſty on his ſide agrees to grant the liberty of the catholic religion to the inhabitants of Canada: He will conſequently give the moſt preciſe and effectual orders, that his new Roman Catholic ſubjects may profeſs the worſhip of their religion, according to the rights* of the Romiſh church, ſo far as the laws of Great Britain can permit.—His Britannic majeſty further agrees that the French inhabitants or others who had been ſubjects of the moſt Chriſtian King in Canada, may retire with all ſafety and freedom wherever they ſhall think proper, and may ſell their eſtates provided it be to ſubjects of his Britannic Majeſty, and bring away their effects as well as their perſons without being reſtrained in their emigration under any pretence, except that of debts or criminal proſecutions. The term limited for this emigration, ſhall be fixed to the ſpace of eighteen months to be computed from the day of the exchange of the ratifications of the preſent treaty."

* Qu. rites.

[660]

Article 9th. Ceſſion of *Grenada*, &c. to the King of Great Britain.

Article the ninth—" The moſt Chriſtian King cedes and guarrantees to his Britannic Majeſty in full right the iſlands of Grenada, with the ſame ſtipulations in favour of the inhabitants of this colony, inſerted in the fourth article for thoſe of Canada. And the partition of the iſlands called Neutral is agreed and fixed: ſo that thoſe of St. Vincent, Dominica, and Tobago, ſhall remain in full right to Great Britain, and that of St. Lucia ſhall be delivered to France, to enjoy the ſame likewiſe in full right. And the high contracting parties guarranty the partition ſo ſtipulated."

And

And the jurors aforeſaid upon their oaths aforeſaid further ſay, that his Majeſty, by his royal proclamation bearing date at Weſtminſter the 7th day of October, 1703, amongſt other things declared as follows, " And whereas it will greatly " contribute to the ſpeedy ſettling our ſaid new government, " that our loving ſubjects ſhould be informed of our pater- " nal care for the ſecurity of the liberties and properties of " thoſe who are and ſhall become inhabitants thereof; we " have thought fit to publiſh and declare, by this our pro- " clamation, that we have, in the letters patent under our " great ſeal of Great Britain, by which the ſaid governments " are conſtituted, given expreſs power and direction to our " governors of our ſaid colonies reſpectively, that, ſo ſoon as " the ſtate and circumſtances of the ſaid colonies, will admit " therof, they ſhall, with the advice and conſent of the mem- " bers of our council, ſummon and call general aſſemblies with- " in the ſaid government reſpectively, in ſuch manner and " form as is uſed and directed in thoſe colonies and provinces " in America, which are under our immediate government. " —And we have alſo given power to the ſaid governors, " with the conſent of our ſaid councils and the repreſenta- " tives of the people, ſo to be ſummoned as aforeſaid, to " make conſtitutions and ordain laws, ſtatutes and ordi- " nances, for the public welfare and good government of " our ſaid colonies and of the people and inhabitants " thereof, as near as may be. agreeable to the laws of En- " gland and under ſuch regulations and reſtrictions as are " uſed in other countries. And in the mean time and un- " til ſuch Aſſemblies can be called as aforeſaid, all perſons " inhabiting in, or reſorting to our ſaid colonies, may con- " fide in our royal protection for the enjoyment of the be- " nefit of the laws of our realm of England: for which " purpoſe we have given power under our great ſeal to the go- " vernors of our ſaid colonies reſpectively to erect and con- " ſtitute, with the advice of our ſaid councils reſpectively " courts of judicature and public juſtice within our ſaid colo- " nies, for the hearing and determining all cauſes as well " criminal as civil according to law and equity, and as near " as may be agreeable to the laws of England; with liberty " to all perſons who may think themſelves aggrieved by the " ſentences of ſuch courts in all civil cauſes to appeal, un- " der

Proclamation of the King of Great Britain, 7th of October 1763, promiſing a legiſlative aſſembly as ſoon as the ſtate and circumſtances of the new governments will admit; and that in the mean while perſons inhabiting or reſorting may confide in the royal protection for the enjoyment of the benefit of the laws of England; for the adminiſtration of which courts of juſtice ordered to be erected.

" der the uſual limitations and reſtrictions, to us in our pri-
" vy council."

Proclamation 26th March 1764, declaring a ſurvey ordered for the diviſion of the iſland of Grenada, &c. into proper pariſhes and diſtricts; and for providing for the more beneficial culture of the ſaid iſland, &c.

And the jurors aforeſaid, upon their oaths aforeſaid, further ſay—That his Majeſty by his royal proclamation bearing date at Weſtminſter, the 26th day of March 1764, amongſt other things did alſo declare as follows, " Whereas we have " taken into our conſideration the great benefit that will " ariſe to the commerce of our kingdoms and the intereſt " of our ſubjects, from the ſpeedy ſettlement of the iſ- " lands of Grenada, the Grenadines, Dominica, St. Vin- " cent and Tobago, we do therefore think fit, with the " advice of our privy council, to iſſue this our royal pro- " clamation, to publiſh and declare to our loving ſubjects " that we have, with the advice of our ſaid privy council, " given the neceſſary powers and directions, for an imme- " diate ſurvey, and diviſion into proper pariſhes and diſ- " tricts, of ſuch of the ſaid iſlands as have not hitherto " been ſo ſurveyed and divided; and for laying out ſuch " lands in the ſaid iſlands as are in our power to diſpoſe of " into allotments for plantations of different ſize and ex- " tent, according as the nature of the land ſhall be more " or leſs adapted to the growth of ſugar, coffee, cocoa, " cotton, or other articles of beneficial culture; reſerving " to us, our heirs and ſucceſſors, ſuch parts of the ſaid " iſlands as ſhall be neceſſary for erecting fortifications " thereon, and for all other military purpoſes; for glebes " for miniſters, allotments for ſchool-maſters, for wood- " lands, high-roads, and all other public purpoſes: And " alſo reſerving ſuch lands in our iſlands of Dominica and " St. Vincent, as at the time of the ſurrender were and " ſtill are in the poſſeſſion of the French inhabitants of " the ſaid iſlands; which lands it is our will and pleaſure " ſhould be granted to ſuch of the ſaid inhabitants as ſhall " be inclined to accept the ſame upon leaſes for terms ab- " ſolute, or for renewable terms upon certain conditions, " and under proper reſtrictions. And we do hereby far- " ther publiſh and declare, that the allotments for planta- " tions in our iſlands of Grenada, the Grenadines, To- " bago, and St. Vincent, ſhall contain from one hundred " to three hundred acres, with ſome few allotments in each " iſland of five hundred acres; and that the allotments in " our iſland of Dominica, which is repreſented to be not " ſo well adapted to the cultivation of ſugar, and which " from its ſituation requires in policy to be well peopled

" with

" with white inhabitants, ſhall be in general from fifty to
" an hundred acres.—That each purchaſer of lands which
" have been cleared and improved, ſhall within the ſpace
" of three months from the date of the grant ſettle and
" conſtantly keep upon the lot purchaſed one white man or
" two white women, for every hundred acres contained in
" the ſaid lot, and in default thereof ſhall be ſubject to the
" payment of 20l. *per annum* for every white woman, and [662]
" 40l. *per annum* for every white man, that ſhall be want-
" ing to complete the number. That the purchaſer of un-
" cleared lands ſhall clear and cultivate one acre in every
" twenty in each year, until half the land ſo purchaſed ſhall
" be cleared, and in default thereof ſhall pay 5l. *per annum*
" for every acre not cleared purſuant to ſuch condition. And
" ſuch purchaſer ſhall alſo be obliged to ſettle and con-
" ſtantly keep upon the lot ſo purchaſed, one white man or
" two white women for every hundred acres as the ſame
" ſhall be cleared. That each purchaſer, beſides the pur-
" chaſe money, ſhall be ſubject to the payment of an an-
" nual quit-rent to us, our heirs and ſucceſſors, of ſix-pence
" *per* acre, under the penalty of 5l. *per* acre upon non-
" payment thereof. Such quit-rents in the caſe of the pur-
" chaſe of cleared lands to commence from the date of the
" grant, and the firſt payment to be made at the expiration
" of the firſt year; and in caſe of the purchaſe of the un-
" cleared lands, ſuch quit-rents to commence at the expira-
" tion of twelve months from the time each acre is cleared.
" That in caſe of failure in the payment of the purchaſe
" money in the manner above directed, the purchaſer ſhall
" forfeit all right to the lands purchaſed."

And the jurors aforeſaid, upon their oaths aforeſaid, further ſay, That his Majeſty by his letters patent, under his writ of privy ſeal bearing date at Weſtminſter, the 9th day of April 1764, appointed *Robert Melville*, Eſq; Captain General and Governor in Chief in and over the iſlands of Grenada, the Grenadines, Dominica, St. Vincent, and Tobago, in America; and of all other iſlands and territories adjacent thereto: Which ſaid letters patent are as follows.—

Letters patent, 9th of April 1764, appointing Robert Melville, Eſq; Governor of Grenada.

" George the third by the grace of God, of Great Britain,
" France and Ireland, King defender of the faith, *&c.* To
" our truſtee and well beloved *Robert Melville*, Eſq; greet-
" ing: Whereas we did by our letters patent under our
" great ſeal of Great Britain, bearing date at Weſtminſter,
" the 4th day of April, in the firſt year of our reign con-
" ſtitute

" ſtitute and appoint *Charles Pinfold*, Eſq; Captain-Gene-
" ral and Governor in Chief in and over our iſlands of
" Barbadoes, St. Lucia, Dominica, St. Vincent, Tobago,
" and the reſt of our iſlands, colonies and plantations, in
" America, commonly called or known by the name of our
" Caribbee iſlands, lying and being to the windward of Gua-
" daloupe, and which then were or after ſhould be under
" our ſubjection and government, during our will and plea-
" ſure, as by the ſaid recited letters patent, relation being
" thereunto had, may more fully and at large appear:
" Now know you that we have revoked and determined,
" and by theſe preſents do revoke and determine, ſuch part
" and ſo much of the ſaid recited letters patent, and every
" clauſe, article and thing therein contained as relates to
" or mentions the iſlands of St. Lucia, Dominica, St. Vin-
" cent, and Tobago. And further know you, that we,
[663] " repoſing eſpecial truſt and confidence in the prudence,
" courage and loyalty, of you the ſaid *Robert Melville*, of
" our eſpecial grace, certain knowledge, and meer motion,
" have thought fit to conſtitute and appoint, and by theſe
" preſents do conſtitute and appoint, you the ſaid *Robert*
" *Melville* to be our Captain-General and Governor in Chief,
" in and over our iſlands of Grenada, the Grenadines,
" Dominica, St. Vincent, and Tobago, in America, and of
" all other iſlands and territories adjacent thereto, and which
" now are or heretofore have been dependant thereupon.
" And we do hereby require and command you to do and
" execute all things in due manner, that ſhall belong to
" your ſaid command, and the truſt we have repoſed in you
" according to the ſeveral powers and directions granted or
" appointed you by this preſent commiſſion, and the in-
" ſtructions and authorities herewith given to you, or by
" ſuch further powers, inſtructions and authorities, as
" ſhall at any time hereafter be granted or appointed you,
" under our ſignet and ſign manual, or by our order in our
" privy council, and according to ſuch reaſonable laws and
" ſtatutes as ſhall hereafter be made and agreed upon by
" you, with the advice and conſent of the council and aſ-
" ſembly of the iſlands and plantations under your govern-
" ment, in ſuch manner and form as is herein after ex-
To govern according to his inſtructions, and according to ſuch " preſſed. And our will and pleaſure is that you the ſaid
" *Robert Melville* do, after the publication of theſe our let-
" ters patent, and after the appointment of our council for
" our ſaid iſlands, in ſuch manner and form as is preſcribed

" in

" in the inſtructions which you will herewith receive, in " the firſt place take the oaths appointed to be taken by an " act paſſed in the firſt year of the reign of King *George* " the firſt, entitled, " An act for the further ſecurity of his " Majeſty's perſon and government, and the ſucceſſion of " the crown in the heirs of the late Princeſs *Sophia*, being " Proteſtants; and for extinguiſhing the hopes of the pre- " tended Prince of *Wales* and his open and ſecret abettors:" " As alſo that you make and ſubſcribe the declaration men- " tioned in an act of parliament made in the 25th year of " the reign of King *Charles* the ſecond, intitled, ' An act " for preventing dangers which may happen from Popiſh re- " cuſants.'—And likewiſe that you take the oath uſually " taken by governors in the other colonies, for the due exe- " cution of the office and truſt of our Captain-General and " Governor in Chief in and over our ſaid iſlands, and for " the due and impartial adminiſtration of juſtice.—And far- " ther that you take the oath required to be taken by the go- " vernors of the plantations to do their utmoſt, that the " ſeveral laws relating to trade and the plantations be duly " obſerved; which ſaid oaths and declaration our council " of our ſaid iſlands, or any three of the members thereof, " have thereby full power and authority, and are required, " to tender and adminiſter to you: And in your abſence " to our Lieutenant-General of the ſaid iſlands, and to " our Lieutenant-Governors of each of our ſaid iſlands reſ- " pectively, the ſaid oaths mentioned in the ſaid act intitled, " ' An act for the further ſecurity of his Majeſty's perſon and [664] " government, and the ſucceſſion of the crown in the heirs " of the late Princeſs *Sophia*, being proteſtants, and for ex- " tinguiſhing the hopes of the pretended Prince of *Wales*, " and his open and ſecret abettors;' As alſo cauſe them to " make and ſubſcribe the aforeſaid declaration, and to admi- " niſter unto them the uſual oaths for the due execution " of their places and truſts.—And we do further give and " grant unto you the ſaid *Robert Melville*, full power and " authority from time to time, and at any time hereafter, " by yourſelf, or by any other to be authorized by you in " this behalf, to adminiſter and give the oaths mentioned " in the ſaid act, for the further ſecurity of his Majeſty's " perſon and government, and the ſucceſſion of the crown " in the heirs of the late Princeſs *Sophia*, being Proteſtants, " and for extinguiſhing the hopes of the pretended Prince " of *Wales*, and his open and ſecret abettors, to all and " every

reaſonable laws as ſhall be made, with the advice and conſent of the council and aſſembly.

" every ſuch perſon and perſons as you ſhall think fit, who " ſhall at any time or times paſs into any of our ſaid iſ- " lands, or ſhall be reſident or abiding there.

" And we do hereby authorize and impower you to keep " and uſe the public ſeal, which will be herewith delivered " to you, or ſhall hereafter be ſent to you, for ſealing all " things whatſoever that ſhall paſs the great ſeal of our ſaid " iſland.

Power and authority, with the advice of council, as ſoon as circumſtances ſhall admit, and as often as need ſhall require, to call general aſſemblies.

" And we do hereby give and grant unto you the ſaid *Ro-* " *bert Melville*, full power and authority, with the advice " and conſent of our ſaid council to be appointed as afore- " ſaid, as ſoon as the ſituation and circumſtances of our " iſlands under your government will admit thereof, and " when and as often as need ſhall require, to ſummon and " call general aſſemblies of the freeholders and planters " jointly or ſeverally within any of the iſlands under your " government, in ſuch manner as you in your diſcretion " ſhall judge moſt proper, or according to ſuch further " powers, inſtruction or authorities, as ſhall be at any " time hereafter granted or appointed you under our ſignet " and ſign manual, or by our order in our privy council.

Perſons duly elected by the major part of the freeholders to take the oaths, &c.

" And our will and pleaſure is that the perſons thereupon " duly elected by the major part of the freeholders of the " reſpective pariſhes or precincts, and ſo returned, ſhall be- " fore their ſitting take the oaths mentioned in the ſaid act " intitled, 'An act for the further ſecurity of his Majeſ- " ty's perſon and government, and the ſucceſſion of the " crown in the heirs of the late Princeſs *Sophia*, being Pro- " teſtants, and for extinguiſhing the hopes of the pretended " Prince of *Wales*, and his open and ſecret abettors:' As " alſo make and ſubſcribe the aforementioned declaration, " which oaths and declaration you ſhall commiſſionate fit " perſons under the public ſeal of thoſe our iſlands to ten- " der and adminiſter unto them: And until the ſame ſhall [665] " be ſo taken and ſubſcribed, no perſon ſhall be capable of " ſitting, though elected. And we do hereby declare, that " the perſons ſo elected and qualified ſhall be called and " deemed the aſſembly of that iſland within which they " ſhall be choſen, or the aſſembly of our ſaid iſlands in ge- " neral. And that you the ſaid *Robert Melville*, by and " with the advice and conſent of our ſaid council and aſ- " ſembly or aſſemblies, or the major part of them, ſhall " have full power and authority to make, conſtitute, and " ordain laws, ſtatutes, and ordinances, for the public " peace, welfare, and good government of our ſaid iſlands,

And then ſo elected and qualified to be called and deemed the aſſembly of the iſland, or the aſſembly of the ſaid iſlands in general. The gover-

" jointly

" jointly or ſeverally, and of the people and inhabitants " thereof, and ſuch others as ſhall reſort thereunto, and " for the benefit of us, our heirs and ſucceſſors. Which " ſaid laws, ſtatutes, and ordinances, are not to be repug- " nant, but as near as may be, agreeable to the laws and ſta- " tutes of this our kingdom of Great Britain. Provided, " that all ſuch laws, ſtatutes, and ordinances, of what " nature or duration ſoever, be, within three months or " ſooner after the making thereof, tranſmitted to us, un- " der our ſeal of our ſaid iſlands, for our approbation or diſ- " allowance of the ſame; as alſo duplicates thereof by the " next conveyance.

and council, with the ſaid aſſembly or aſſemblies, to have full power to make laws for the ſaid iſlands jointly or ſeverally.

" And in caſe any or all of the ſaid laws, ſtatutes, and " ordinances, not before confirmed by us, ſhall at any time " be diſallowed, and not approved, and ſo ſignified by us, " our heirs and ſucceſſors, under their ſignet or ſign ma- " nual, or by order of our or their privy council, unto " you the ſaid *Robert Melville*, or to the commander in " chief of the ſaid iſlands for the time being, then ſuch " and ſo many of the ſaid laws, ſtatutes, and ordinances, " as ſhall be ſo diſallowed and not approved, ſhall from " thenceforth ceaſe, determine, and become utterly void " and of no effect, any thing to the contrary thereof not- " withſtanding.

" And to the end that nothing may be paſſed or done by " our ſaid council or aſſemblies to the prejudice of us, our " heirs and ſucceſſors, we will and ordain that you the ſaid " *Robert Melville* ſhall have and enjoy a negative voice in " the making and paſſing all laws, ſtatutes, and ordi- " nances, as aforeſaid. And that you ſhall and may like- " wiſe, from time to time, as you ſhall judge neceſſary, " adjourn, prorogue or diſſolve, all general aſſemblies as " aforeſaid."

And the jurors aforeſaid, on their oaths aforeſaid, far- ther ſay, That his Excellency *Robert Melville*, Eſq; arrived in Grenada on the fourteenth of December, 1764, and, in conſequence of the laſt mentioned letters patent, took up- on him the government of the ſame, and of the other iſ- lands therein named. And that, in conſequence of the laſt mentioned letters patent, a meeting of the * governor, council, and aſſembly of the ſaid iſland of Grenada was held there in the latter end of the year 1765.

Arrival of governor Melville in Grenada 14 Dec. 1764. In conſe- quence of the letters patent a meeting of the gover- nor, coun- cil, and aſ- ſembly, held in the latter end of the year 1765.

And

His Majesty's letters patent, dated 20th of July, 1764, ordering and appointing an impost or custom of four and an half per cent. in specie for every hundred weight upon all dead commodities of the produce of the island of Grenada that should be shipped off from the same, in lieu of all customs and imposts before collected upon goods imported and exported under the authority of the French King. The letters patent reciting that such impost is paid by Barbadoes and the Leeward islands of America; and reciting the conquest of Grenada, and the cession thereof by the peace of Paris; and that it is reasonable, expedient, and of importance to the other Sugar islands, that the like should take place on the island of Grenada, and appointing, as above set forth, and under claim of the prerogative royal an impost of four and an half per cent, in specie for every hundred weight of dead commodities, the produce of the island of Grenada, that shall be shipped off from thence, in lieu of all customs, &c. as above, to be collected and paid in such manner and means, and under such penalties and forfeitures, as in the island of Barbadoes and the Leeward islands.

And that his Majesty, by his letters patent under the great seal of Great Britain, bearing date at Westminster the twentieth day of July, in the fourth year of his reign, and in the year of our Lord 1764, did order, direct and appoint, that an impost or custom of four and a half *per cent.* in specie should, from and after the 29th day of September then next ensuing, be raised and paid to his heirs and successors, for and upon all dead commodities of the growth and produce of the said island of Grenada that should be shipped off from the same, in lieu of all customs and impost duties to that time collected upon goods imported and exported into and out of the said island, under the authority of his most Christian Majesty. Which said letters patent are in the words following: "George the third, by the grace of "God, of Great Britain, France and Ireland, king de- "fender of the faith, *&c.* to all to whom these presents "shall come, greeting: Whereas a certain impost or custom "of four pounds and an half in specie for every hundred "weight of the commodities of the growth and produce "of the island of Barbadoes, and of the Leeward Car- "ribbee islands in America, shipped off from the same, or "any of them, is paid and payable to us, our heirs and "successors; and whereas the island of Grenada was con- "quered by us during the late war, and has been ceded "and secured to us by the late treaty of peace; and where- "as it is reasonable and expedient, and of importance to "our other Sugar islands, that the like duty should take "place in our said island of Grenada; we have thought "fit, and our royal will and pleasure is, and we do hereby, "by virtue of our prerogative royal order, direct and ap- "point, that an impost or custom of four and an half *per* "cent. in specie shall, from and after the 29th day of Sep- "tember next ensuing the date of these presents, be raised "and paid to us, our heirs and successors, for and upon all "dead commodities of the growth or produce of our said "island of Grenada that shall be shipped off from the

"same;

" ſame; in lieu of all cuſtoms and impoſt duties hitherto " collected upon goods imported and exported into and " out of the ſaid iſland under the authority of his moſt " Chriſtian Majeſty: And that the ſame ſhall be collected, " paid, and levied in ſuch manner and by ſuch means, and " under ſuch penalties and forfeitures as the ſaid impoſt " or cuſtom of four and an half per cent. is, and may now " be collected, paid, and levied in our ſaid iſland of Barba- " does, and our ſaid Leeward iſlands.

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" And we do hereby require and command the preſent " governor or commander in chief, and the governor or " commander in chief for the time being, and the officers " of our cuſtoms in the ſaid iſland of Grenada, now and " hereafter, for the time being, and all others whom it " may concern, that they do reſpectively take care to col- " lect, levy, and to receive the ſaid impoſt or cuſtom, ac- " cording to our royal will and pleaſure, ſignified by theſe " preſents.

Commanding the governor and officers of the cuſtoms, now and hereafter, for the time being, to collect and receive the ſaid impoſt;

" And whereas a poll-tax was levied and paid by the in- " habitants of our ſaid iſland of Grenada whilſt it was un- " der ſubjection to his moſt Chriſtian Majeſty, it is our " royal will and pleaſure that ſuch poll-tax as was levied, " collected and paid by the inhabitants of the ſaid iſland " whilſt it was under ſubjection to his moſt Chriſtian Ma- " jeſty, ſhall be continued therein during our royal will " and pleaſure; and that the ſame ſhall be collected, le- " vied, and paid to us, our heirs and ſucceſſors, at ſuch " times and in ſuch manner, and by ſuch ways and means " and under ſuch penalties and forfeitures, and upon ſuch " terms, and with ſuch privileges and exemptions as the " ſame was collected, levied, and paid whilſt the ſaid iſland " was under ſuch ſubjection to his moſt Chriſtian Majeſty, " in as much as the ſame are not contrary to the laws of " Great Britain.

And appointing the continuance of the poll-tax paid by the inhabitants of Grenada while under ſubjection to the crown of France; to be collected, levied, and paid in ſuch manner and by ſuch means, and with ſuch penalties and forfeitures, and with ſuch privileges and exemptions as whilſt it was under ſuch objection, in as much as the ſame are not contrary to the laws of Great Britain.

" And that the account and number of the inhabitants " and ſlaves therein ſhall be, from time to time, kept and " delivered in by ſuch perſon or perſons, and at ſuch

And an account of the inhabitants to be taken, kept and delivered, from time to time, in ſuch manner and by ſuch perſons, and with ſuch penalties, &c. as when the iſland was in ſubjection to France, in as much as the ſame are not contrary, as above.

" time

" time and times, and under such regulations, sanctions, " penalties and forfeitures respectively, as and under which " the same were taken, kept and delivered in during the " time the said island was subject to his most Christian " Majesty, as aforesaid, in as much as the same are not " contrary to the laws of Great Britain.

" And we do hereby require and command the present " governor or commander in chief, for the time being, of " our said island of Grenada, and the several officers of our " revenue, now, and for the time being, and all others " whom it may concern, that they do respectively take care " to collect, levy, and receive the money arising and to arise " by the said tax, and to pay and account for the same to " the receiver general and collector of our casual revenue " in our said island, for the time being, according to our " royal will and pleasure signified by these presents."

Registry of the said letters patent. Publication of the said letters Jan. 1765.

Which said letters patent were afterwards duly registred in the said island, and were publicly announced by his Excellency *Robert* **Melville*, Esq; in the month of January, 1765, immediately succeeding his arrival in the said island of Grenada.

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And the jury find that before the making of the said letters patent the said duty of four and a half per cent. was and yet is paid in the island of Barbadoes and the Leeward islands, in pursuance or by virtue of acts of assembly hereinafter set forth.

And the jurors aforesaid, upon their oaths aforesaid, further say, That the said duty of four and a half per cent. before the making of the said last mentioned letters patent, was and yet is paid in the island of Barbadoes, and the Leeward Caribbee islands, in pursuance or by virtue of acts of assembly passed in the same islands hereinafter set forth.

Act of Barbadoes 12 Sept. 1663, for settling an impost on the commodities of the growth of that island; reciting the grant of Car. 1. of the proprietary government of the said island of Barbadoes to the Earl of Carlisle; and that Car. 2. had invested himself by purchase in all the rights of the said Earl in the said island, and had taken the island under his protection, and by letters patent of the 12th of June in the same year 1663, had appointed Francis Lord Willoughby de Parham governor of Barbadoes, and of all the Caribbee islands; and reciting that by virtue of the said Earl of Carlisle's patent divers governors and agents were sent over with authority to make grants to such persons as they should think fit, which they performed; and reciting the loss of many.

And the jurors aforesaid, upon their oaths aforesaid, further say, That by an act of assembly of the island of Barbadoes, in the West-Indies, passed in the said island on the twelfth day of September, 1663, entitled, " An act for " settling an impost on the commodities of the growth of " that island," it is amongst other things recited and enacted as follows:

" Where-

" Whereas our late Sovereign Lord *Charles* the firſt, of " bleſſed memory, did, by his letters patent under the " great ſeal of England, grant and convey unto *James*, " Earl of *Carliſle*, and his heirs for ever, the propriety of " this iſland of Barbadoes; and his ſacred Majeſty that " now is having by purchaſe inveſted himſelf in all the " rights of the ſaid Earl of *Carliſle*, and in all other rights " which any other perſon may claim from that patent, or " any other, and thereby more immediately and particu- " larly hath * taken this iſland unto his royal protection: " And his moſt excellent Majeſty having, by letters patent " under the great ſeal of England, bearing date the twelfth " of June, in the fifteenth year of his reign, appointed " his Excellency *Francis* Lord *Willoughby*, of *Parham*, cap- " tain general and chief governor of Barbadoes, and all " the Carribbee iſlands, with full power and authority to " grant, confirm, and aſſure to the inhabitants of the " ſame, and their heirs for ever, all lands, tenements, and " hereditaments, under his Majeſty's great ſeal appointed " for Barbadoes, and the reſt of the Carribbee iſlands, as " relation being thereunto had, may and doth more at " large appear.

" And whereas, by virtue of the ſaid Earl of *Carliſle*'s " patent, divers governors and agents have been ſent over " hither with authority to lay out, ſet, grant, or convey " in parcels the land within this iſland, to ſuch perſons as " they ſhould think fit, which was by them, in their re- " ſpective times, as much as in them lay, accordingly per- " formed. And whereas many have loſt their grants, *war- " rants, and other evidences for the ſaid lands, and others, " by reaſon of the ignorance of thoſe times, want ſuffici- " ent and legal words to create inheritances to them and " their heirs; and others that never recorded their grants " and warrants; and others that can make no proof of any " grants or warrants they ever had for their lands, and yet " have been long and quiet poſſeſſors of the ſame, and " beſtowed great charges thereon. And whereas the ac- " knowledgment of forty pounds of cotton per head, and " other taxes and compoſitions formerly raiſed to the Earl " of *Carliſle* was held very heavy. For a full remedy for

The want of legal words of conveyance in ſome; the want of having been regiſtered in others; and the long and quiet poſſeſſion of others, with great charges, but without evidence of title; and reciting the acknowledgment of 40 pounds of cotton, as a poll-tax, with other compoſitions, raiſed to the Earl of Carliſle, to have been held very heavy; and, for remedy of theſe ſeveral defects, enacting a ſecurity for the rightful poſſeſſors of land within the iſland.

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* *R.* having.

" all the defects afore related, and quieting the poſſeſſions
" and ſettling the tenures of the inhabitants of this iſland,
" Be it enacted by his Excellency *Francis*, Lord *Willoughly*,
" of *Parham*, and his council, and gentlemen of the aſſem-
" bly, and by the authority of the ſame, That, notwith-
" ſtanding the defects afore related, all the now rightful
" poſſeſſors of lands, tenements and hereditaments, with-
" in this iſland, according to the laws and cuſtoms thereof,
" may at all times repiar unto his Excellency for the full
" confirmation of their eſtates and tenures, and then and
" there ſhall and may receive ſuch full confirmation and
" aſſurance, under his Majeſty's great ſeal for this iſland,
" as they can reaſonably adviſe or deſire, according to the
" true intent and meaning of this act.

And annulling for the future the payment of the above poll-tax, and all other duties, rents, and arrears of rents, which were or might be levied; the inhabitants to hold to them and their heirs for ever in free ſocage, on a nominal rent to his Majeſty, his heirs and ſucceſſors, for all rents and ſevices, in conſideration as expreſſed.

" And be it further enacted, by the authority aforeſaid,
" That all and every the payments of forty pounds of
" cotton per head, and all other duties, rents, and arrears
" of rents, which have or might have been levied, be from
" henceforth abſolutely and fully releaſed and made void;
" and that the inhabitants of this iſland have and hold
" their ſeveral plantations to them and their heirs for ever,
" in free and common ſocage. Yielding and paying, there-
" fore, at the feaſt of St. Michael every year, if the ſame
" ſhall be lawfully demanded, one ear of Indian corn, to his
" Majeſty, his heirs and ſucceſſors for ever, in full and free
" diſcharge of all rents and ſervices for the future, in
" conſideration of the releaſe of the ſaid forty pounds, and
" in conſideration of the confirmation of all eſtates in this
" iſland, as aforeſaid, and in acknowledgment of his Ma-
" jeſty's grace and favour in ſending to and appointing
" over us his ſaid Excellency, of whoſe prudence and mo-
" derate government we have heretofore have had large
" experience, and do reſt moſt aſſured thereof for the fu-
" ture.

And to maintain the honour and dignity of his Majeſty, for the public and private ſecurity, for repairing forts, and other purpoſes expreſſed, they give and grant to his Majeſty, his heirs and ſucceſſors, an impoſt or cuſtom upon the native commodities of the ſaid iſland of Barbadoes, viz. upon all dead commodities exported four and a half in ſpecie for every five ſcore.

" And foraſmuch as nothing conduceth more to the peace
" and proſperity of any place, and the protection of every
" ſingle perſon therein, than that the public revenue there-
" of may be in ſome meaſure proportioned to the public
" charges and expences; and alſo well weighing the great
" charges that there muſt be of neceſſity in the maintain-

" ing

" ing the honour and dignity of his Majeſty's authority " here; the public meeting of the ſeſſions; the often at- " tendance of the council; the reparation of the forts; the " building a ſeſſions-houſe and a priſon; and all other " public charges incumbent on the government; do, in " conſideration thereof, give and grant unto his Majeſty, " his heirs and ſucceſſors for ever, and do moſt humbly " deſire your Excellency to accept theſe our grants: And " we humbly pray your Excellency that it may be enacted, " and be it enacted by his Excellency *Francis*, Lord *Wil-* " *loughby*, of *Parham*, captain general and chief governor " of this iſland of Barbadoes, and all other the Carribbee " iſlands, and by and with the conſent of the council, and the " gentlemen of the aſſembly, repreſentatives of this iſland, " and by authority of the ſame, That an impoſt or cuſtom " be, from and after publication hereof, raiſed upon the " native commodities of this iſland, after the proportions " and in manner and form as is hereafter ſet down and " appointed. That is to ſay, upon all dead commodities " of the growth or produce of this iſland, that ſhall be " ſhipped off the ſame ſhall be paid to our Sovereign Lord " the King, his heirs and ſucceſſors for ever, four and an " half in ſpecie for every five ſcore."

Act of aſſembly of St. Chriſtopher, to ſubject the commodities of the growth of the late French part of the iſland to the payment of th four and an half per cent. duty.

And the jurors aforeſaid, upon their oaths aforeſaid, farther ſay, That by act of aſſembly of the iſland of St. Chriſtopher, in the Weſt Indies, paſſed in the ſaid iſland, in the year of our Lord 1727, intituled, " An act to ſubject all " goods and commodities of the growth and produce of " the late French part of the iſland of St. Chriſtopher, " which are or ſhall be ſhipped off from the ſaid iſland, " to the payment of the four and an half per cent. duty, and " to aſcertain at what places all the duties of four and an " half per cent. ſhall be received."

Reciting an act of the general council or aſſembly of the Leeward iſlands, Nevis, St. Chriſtopher, Antigua, and Montſerrat, for ſettling an impoſt on the commodities of the growth of the ſaid Leeward iſlands, whereby a cuſtom of 4 pounds and an half in ſpecie for every hundred weight was granted by the ſaid iſland, to Car. 2. for the exports of the commodities of all and every the ſaid iſlands.

It is, amongſt other things, recited and enacted as follows: " Whereas in and by an act or ſtatute of the general council " and general aſſembly of the Leeward Carribbee iſlands, in " America, called or known by the names of the iſland " of Nevis, St. Chriſtopher, Antigua, and Montſerrat,

" made in or about the year of our Lord 1663, and entit-
" led, " An act for settling an impost on the commodi-
" ties of the growth of the said Leeward Carribbee islands,"
" a certain duty or custom of four pounds and an half in
" specie for every hundred weight of the commodities of
" the growth and produce of the said Leeward islands then
" afterwards to be shipped off from the said islands, or any
" of them, was given and granted to our late Sovereign
" Lord *Charles* the second, then King of England, Scot-
" land, France, and Ireland, and to his heirs and successors
" for ever, as in and by the same act or statute, relation
" being thereunto had, may more fully and at large ap-
" pear."

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Reciting the treaty of peace at Utrecht, by which the late French part of that island was ceded to Great Britain.

And whereas since the making of the said statute, to wit, in and by the late treaty of peace and friendship concluded at Utrecht between the two crowns of Great Britain and France, an entire cession was made by the most Christian King *Lewis* the fourteenth to our late Sovereign Lady *Anne*, Queen of Great Britain, France, and Ireland, and to her crown for ever, of all that part of the island of St. Christopher formerly belonging to the crown of France; so that the same late French part of the said island of St. Christopher is now become parcel of the realm of Great Britain, and is under the sole dominion and government of the crown of the same.

And that doubts have arisen, whether the said part, late of the French, be subject to the payment of the aforesaid duties.

And whereas some doubts have arisen, whether the said late French part, so yielded up as aforesaid to the said crown of Great Britain, be subject to the payment of the aforesaid duties of four and an half per cent. so as aforesaid in and by the said recited act given and granted to our said late Sovereign Lord King *Charles* the second, his heirs and successors; " for avoiding, therefore, all disputes and con-
" troversies which may for the future arise within the same
" island, touching or concerning the payment of the same
" duties, we, your Majesty's most dutiful and loyal sub-
" jects *John Hart*, Esq; your Majesty's captain general, and
" governor in chief of all your Majesty's Leeward Carib-
" bee islands in America, and the council and assembly of
" the said island of St. Christopher, do humbly beseech
" your Majesty that it may be enacted and declared, and it
" is hereby enacted and declared, by the King's most ex-
" cellent Majesty, by and with the advice and consent of
" the captain general and governor in chief of the said
" Leeward Carribbee islands, in America, and the council
" and

" and aſſembly of the ſaid iſland of St. Chriſtopher, and " by the authority of the ſame, That all and ſingular the " goods and commodities of the growth and produce of " the ſaid late French part of the ſaid iſland of St. Chriſ- " topher, and which at this time are, or hereafter ſhall be " ſhipped off from thence, in order to be carried to any " other port or place whatſoever, are and for ever after " ſhall be ſubject and liable, and the ſame goods and com- " modities, and every of them, are hereby made ſubject " and liable to the payment of the aforeſaid duties and " cuſtoms of four pounds and half a pound per cent. in " ſpecie, to your moſt ſacred Majeſty, your heirs and ſuc- " ceſſors, in ſuch manner and ſort as the goods and com- " modities of the growth and produce of that part of the " ſaid iſland known and called by the name of the Engliſh " part thereof, have heretofore and hitherto been ſubjected " and liable unto by force and virtue of the above recited " act or ſtatute."

And enacting and declaring that the commodities exported from the ſaid part, late belonging to the French, are and ſhall be ſubject to the aforeſaid duty of four and an half per cent.

And the jurors aforeſaid, upon their oaths aforeſaid, farther ſay, That by an act of aſſembly of the iſland of Nevis in the Weſt Indies, paſſed in the ſaid iſland in the year of our Lord 1664, entitled, " An act for ſettling an " impoſt on the commodities of the growth of this iſland," it is, amongſt other things, recited and enacted as follows:

Act of aſſembly of Nevis, 1664. for ſettling an impoſt on the commodities of the growth of the ſaid iſland.

" Whereas our late Sovereign Lord *Charles* the firſt, of [*672]
" bleſſed memory, did, by his letters patent under the " great ſeal of England, grant and convey unto *James*, " Earl of *Carliſle*, and his heirs for ever, the propriety of " this iſland of Nevis; and his ſacred Majeſty that now " is having by purchaſe inveſted himſelf in all the rights " of the ſaid Earl of *Carliſle*, and in all other rights " which any other perſon may claim from that patent, or " any other, and thereby more immediately hath * taken " this iſland and the reſt of the Carribbee iſlands into his " royal protection: And his moſt excellent Majeſty having " by letters patent under the great ſeal of England, bear- " ing date the twelfth day of June, in the fifteenth year " of his reign, appointed his Excellency *Francis*, Lord " *Willoughby*

* *R.* having.

" *Willoughby*, of *Parham*, captain general and chief gover-
" nor of Barbadoes, and the reſt of the Carribbee iſlands
" with full power and authority to grant, confirm, and
" aſſure to the inhabitants of the ſame, and their heirs for
" ever, all lands, tenements, and hereditaments, under
" his Majeſty's ſeal appointed for Barbadoes, and the reſt
" of the Carribbee iſlands, as, relation being thereunto
" had, may and doth more at large appear.

" And whereas, by virtue of the ſaid Earl of *Carliſle's*
" patent, divers governors and agents have been ſent over
" hither with authority to lay out, ſet, grant, or convey
" in parcels the land within this iſland, to ſuch perſons
" as they ſhould think fit, which was by them, in their
" reſpective times, as much as in them lay, accordingly
" performed. And whereas many have loſt their grants,
" warrants, or other evidences for their ſaid lands; and
" others, by reaſon of the ignorance of thoſe times, want
" ſufficient and lawful words to create inheritances in them
" and their heirs; and others that never recorded their
" grants and warrants; and others that can make no proof
" of any grants or warrants they ever had for their lands,
" and yet have been long and quiet poſſeſſors of the ſame,
" and beſtowed great charges thereon. And we do hum-
" bly pray your Excellency that it might be enacted, and
" be it enacted, by his Excellency *Francis*, Lord *Willoughby*,
" of *Parham*, captain general and chief governor of the iſland
" of Barbadoes, and the reſt of the Carribbee iſlands, and by
" and with the advice and conſent of the council and
" gentlemen of the aſſembly, repreſentatives of this iſland,
" and by the authority of the ſame, That an impoſt or
" cuſtom be, from and after the publication hereof, rai-
" ed upon the native commodities of this iſland, after the
[673] " proportion and in manner and form as is hereafter ſet
" down and appointed: That is to ſay, upon all commo-
" dities of the growth or production of this iſland that
" ſhall be ſhipped off the ſame, ſhall be paid to our So-
" vereign Lord the King, his heirs and ſucceſſors for ever,
" four and an half in ſpecie for every [five] * ſcore."

Act of aſſembly of Antigua, 19 May, 1668.

And the jurors aforeſaid, upon their oaths aforeſaid, farther ſay, That by an act of aſſembly of the iſland of Antigua, in the Weſt Indies, paſſed in the ſaid iſland on the 19th day of May, in the year of our Lord 1668. entitled,

* *Note*, "Five" is not in my copy of the verdict, but is ſupplied as omitted by miſtake.

entitled, "An act for the settlement of the custom or "duty of four and a half per cent." it is, amongst other "things, recited and enacted as follows: "Whereas by "reason of the late unhappy war which arose betwixt his "Royal Majesty *Charles* the second, King of Great Bri- "tain, France and Ireland, &c. and the most Christian King, "in France, as well as the States General of the United "Netherlands, several of his Majesty of Great Britain his "territories on this side the Tropic, became subject (through "conquest) unto the said French King and his subjects; "and, amongst others, this island of Antigua also was "so subdued by Monsieur *de Labarr*, lieutenant general "by sea and land to the said French King, being assisted "by the Cannibal Indians; by means whereof all the lands "within this island became forfeited unto his Majesty, "&c. as by an act of this country, bearing date the tenth "day of April last past (reference being thereunto had) "may more at large appear. Know ye, that for and in "consideration of new grants and confirmation of our said "lands, under the great seal appointed for Barbadoes, and "the rest of the Carribbee islands, by his Excellency Lord "*Willoughby*, of *Parham*, &c. we do give and grant to his "said Majesty, his heirs and successors for ever, and most "humbly desire your Excellency to accept these our grants: "And we do humbly pray your Excellency that it may be "enacted, and be it enacted, by his Excellency Lord *Wil-* "*loughby* of *Parham*, captain general and chief governor "of Barbadoes, and the rest of the Carribbee islands, and "by and with the advice and consent of the council, and "gentlemen of the assembly, representatives of this island, "and by the authority of the same, That an impost or "custom be, from and after the publication hereof, raised "upon the native commodities of this island, after the "proportion and in manner and form as above set down, "that is to say, upon all commodities of the growth or "production of this island, that shall be shipped off the "same, shall be paid to our Sovereign Lord the King, "his heirs and successors for ever, four and an half in specie "for every five score."

Reciting the conquest of Antigua by Mr. Labarr, lieutenant general of the French king.

Forfeiture of lands in the island to the King of Great Britain.

And in consideration of new grants, giving and granting an impost of four and an half in specie for every five score as above.

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And the jurors aforesaid, upon their oaths aforesaid, further say, That a custom-house was established in the said island of Grenada, and proper officers appointed thereto.

Establishment of a custom-house in Grenada.

And

The plaintiff, a natural born subject of Great Britain, 3d of the king of March, 1763, purchased a plantationin Grenada. And certain sugars of the plaintiff, of the growth of the said island, subsequent to the granting and registering of the letters patent of the 20th of July, 1764, were shipped off from thence; and the defendant, William Hall, being collector of the said duty, received the monies mentioned to be had and received to the plaintiff's use, as and for the said duty of four and an half per cent. imposed by the said letters patent, and hath not paid them over to his Majesty's use, but they remain in his hands, by the consent of his Majesty's attorney-general, for the purpose of trying this question.

And the jurors aforesaid, upon their oaths aforesaid, farther say, That the plaintiff, being a natural born subject of the King of Great Britain, on the third day of March, 1763, purchased a certain plantation in the said island of Grenada, of the French inhabitants, in pursuance of the said articles of capitulation, and of the said treaty of peace, as many other British subjects had then and since have done.

And the jurors aforesaid, upon their oaths aforesaid, farther say, That certain sugars of the plaintiff's and of the growth and produce of the said island of Grenada, and made from off the plaintiff's said plantation there, subsequent to the granting and registering of the said letters patent of the 20th of July, 1764, were exported from thence. And that the monies in the declaration mentioned to be had and received by the defendant to the plaintiff's use, were paid to and received by the said *William Hall*, in the said island of Grenada, as aforesaid, as and for the duty of four and an half per cent. imposed by the said letters patent of the 20th of July, 1764, he, the said *William Hall*, being then and there the collector of the said duty, for the use of his Majesty. And that the said *William Hall* hath not paid the same over to the use of his Majesty; but, on notice of this action intended to be brought, hath, by and with the consent of his Majesty's attorney-general, kept the same in his hands, for the purpose of trying the question arising upon the facts; and for which this action is brought.

But whether the said impost was lawful or not, the jury are ignorant, and pray the advice of the court.

But whether upon the whole matter aforesaid, found by the said jurors, in manner aforesaid, the said impost or custom of four and one half per cent, in specie, for and upon all dead commodities of the growth or produce of the said island of Grenada shipped off for the same, was lawfully imposed or not, the said jurors are altogether ignorant, and pray the advice of the court in the premisses.

And if, upon the whole matter, the court be of opinion that the said impost was not lawfully imposed, then the said jurors find for the plaintiff.

And if, upon the whole matter aforesaid found by the said jurors, in manner aforesaid, it shall appear to the court here

that

that the ſaid impoſt or cuſtom of four and an half per cent. in ſpecie of and upon all dead commodities of the growth or produce of the ſaid iſland of Grenada ſhipped off from the [675] ſame, was not lawfully impoſed, then the ſaid jurors, upon their oaths ſay, that the ſaid *William Hall* did undertake and promiſe, in manner and form as the ſaid *Alexander Campbell*, by his ſaid declaration, hath declared againſt him; and they aſſeſs the damages of the ſaid *Alexander* on that occaſion, beſides his coſts and charges laid out by him about his ſuit in this behalf, to 5l. and for ſuch coſts and charges 40s.

Damages 5l. Coſts 40s.

But if, upon the whole matter found by the ſaid jurors, it appear to the court here, that the ſaid impoſt or cuſtom of four and a half per cent. in ſpecie of and upon all dead commodities of the growth or produce of the ſaid iſland of Grenada, ſhipped off from the ſame, was lawfully impoſed, then the ſaid jurors, upon their oaths ſay, that the ſaid *William Hall* did not promiſe and undertake in manner and form as in his plea alledged.

But if the court be of opinion the ſaid impoſt was lawful, then they find for the defendant quod non aſſumpſit, in manner and form as in his plea alledged.

This cauſe was firſt argued for the plaintiff by Mr. *Alleyne*, upon the above ſpecial verdict, in Eaſter term, 1774, in ſubſtance nearly to the effect following.

Mr. *Alleyne*—My Lords, if the wiſhes of government, or profeſſional rank, could influence the deciſions of this tribunal, I ſhould now, conſidering the cauſe, and the dignity of thoſe advocates who ſupport it againſt me, adopt the example of the Roman orator, and begin with recommending my client to the grace and protection of his judges; but experience having taught me that here the genuine merits of a cauſe are the judicial guide, I gladly follow the practice of an Engliſh court, where the laws are heard by their own recommendation, and riſe in humble confidence of counſel with the plaintiff, who, through me, ſolicits your Lordſhips juſtice in his behalf.

This long expected and truly intereſting cauſe now comes before the court upon a ſpecial verdict, found at the trial of the general iſſue before your Lordſhip, on an action of *indebitatus aſſumpſit*; nominally, indeed, brought for the recovery of an inconſiderable ſum of money; but ſubſtantially, to take the opinion of your Lordſhips upon a queſtion of the firſt magnitude. The verdict, when relieved from the embarraſſment

Action.

embarraſſment of form, reſolves itſelf into the following caſe.

Caſe. Surrender of Grenada to the Britiſh arms 7th of February.

The conqueſt of the iſland of Grenada, in the Weſt Indies, was one among the many glorious atchievements of the laſt war, and was ſurrendered to the troops of his Britannic Majeſty, under general *Monckton*, on the ſeventh of February, 1762.

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By the articles of capitulation the inhabitants received as Britiſh ſubjects.

The articles under which it capitulated acknowledge the inhabitants from thenceforth as Britiſh ſubjects; require them to take the oath of allegiance, as a reciprocal duty reſulting from their adoption as ſuch; ſecure to them the enjoyment of their religion; aſſure them of protection, in the ſame manner as the colonies receive it; with whom, by this ſurrender, and the conſequent reception into the privileges of Britiſh ſubjects, they are placed upon an equal foot in the poſſeſſion of the common liberty; and permit them to diſpoſe of their own lands, provided it be to Britiſh ſubjects.

Abſolute ceſſion by the treaty of Paris, February 10, 1763.

On the general treaty of peace, ſigned at Paris, February the 10th, 1763, this iſland was ceded by his Chriſtian Majeſty, in full right, to the crown of England, under ſtipulations ſimilar to thoſe on which the province of Canada was ceded; and in general confirmatory of the articles of capitulation. And in this treaty his Majeſty engages, in the moſt ample manner, for the free exerciſe of the Roman catholic religion; and gives his French ſubjects liberty to ſell their goods and retire.

Proclamation of the 7th of October, 1763.

On the ſeventh of October following his Majeſty, to make good, in the fulleſt manner, thoſe engagements, upon the faith of which the iſland had ſurrendered, and to perform at the ſame time the conditions of the treaty of peace, and farther, with a view to the better peopling and cultivating his ſaid iſland, was pleaſed to iſſue his royal proclamation, inviting his Britiſh ſubjects to colonize in his new acquired dominions, and, as an encouragement, aſſuring them and the inhabitants in general already there, of the benefit of the Engliſh laws and conſtitution: And, for that purpoſe, declares to this effect; reciting that it will greatly contribute to the ſpeedy ſettling of his ſaid new governments, that his loving ſubjects ſhould be informed of his paternal care for the ſecurity of thoſe in their liberties and properties who were or ſhould become inhabitants thereof; and farther, for the effectuating of ſuch intent, "We have

have thought fit to publiſh and declare by this our proclamation, that we have, in our letters patent under our great ſeal of Great Britain, by which the ſaid governments are conſtituted, given expreſs power and direction to our governors of our ſaid colonies reſpectively, that ſo ſoon as the ſtate and circumſtances of the ſaid colonies will admit, they ſhall, with the advice and conſent of the members of our council, ſummon and call general aſſemblies within the ſaid governments reſpectively, in ſuch manner and form as in thoſe colonies and provinces in America which are under our immediate government."

Having thus declared his reſolution to execute the engagement in their favour by this firſt ſtep, as early as poſſible, of calling aſſemblies as in the colonies and provinces in America, under his particular protection, and his inclination and deſire to manifeſt his paternal care of his ſubjects. He proceeds to ſhew the extent and juſtneſs of the accompliſhment of his deſign, by a full and particular declaration of the nature, powers and deſign of theſe aſſemblies when called, by adding: And we have alſo given power to the ſaid governors, with the conſent of our ſaid councils and repreſentatives of the people ſo to be ſummoned as aforeſaid, to make, conſtitute and appoint laws, ſtatutes and ordinances, for the public peace, welfare and good government of our ſaid colonies, and of the people and inhabitants thereof, as near as may be agreeable to the laws of England. Here then they ſaw the full idea of their becoming Britiſh ſubjects which they did at the ſurrender, by this clear and perfect image of the beauty, order and freedom of the Britiſh conſtitution imparted to them, and to be the model and foundation of their own.

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Powers of theſe aſſemblies to make laws.

But as it might happen that this benefit, thus pledged and promiſed to them, could not be immediately communicated in its full extent; his majeſty provides thus in the mean time, and until ſuch aſſemblies can be called, all perſons inhabiting or reſorting to our ſaid colonies may confide in our royal protection, for the enjoyment of the benefit of the laws of our realm of England: So that the enjoyment of theſe laws was to anticipate even the calling of the aſſemblies, which was not to be a commencement of their freedom, nor of their exerciſe of the rights of Britiſh ſubjects, nor of their participation in the Britiſh conſtitution but one act, moſt important and illuſtrious indeed, of that freedom,

The calling of aſſemblies not the inchoation of their freedom, nor of the conſtitution; but an act reſulting from theſe already inherent in them as Britiſh ſubjects.

freedom, thoſe rights, and that conſtitution already in their poſſeſſion.

For this purpoſe courts of judicature to be immediately erected, with powers conformable to thoſe of the laws of England.

And it is material to conſider what is the firſt ſtep which the governor is to take upon his arrival in the iſland, for the purpoſe before expreſſed, of giving the inhabitants the benefit of the laws of England. It follows immediately, "We have given power under our great ſeal to our governors of our ſaid colonies reſpectively, to erect and "conſtitute with the advice of our ſaid councils reſpectively, "courts of judicature, and public juſtice within our ſaid "colonies, for the hearing and determining all cauſes, as "well criminal as civil, according to law and equity; and "as near as may be agreeable to the Laws of England."

Here then the laws of liberty and of England are enthroned in the iſland as ſoon as ever the delegate of the executive powers arrives there, and he is ſent to give them effect amongſt thoſe who were already entitled to them as Britiſh ſubjects, and both in criminal and civil cauſes, both in ſtrict law and liberal equity; in the whole, and in the great members and diſtinguiſhing diſtributions, both in the objects and the manner of applying them, the laws of our conſtitution, the laws of England are to prevail, and, as near as may be conſiſtent with local circumſtances, are to be enjoyed as the general privilege of Britiſh ſubjects, there as here.

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Second proclamation of the 26th of March 1764, providing for the ſurvey and cultivation of the iſland, and for the neceſſary ſupport and defence of the iſland; previous to the introduction of the laws of England as to their actual exerciſe.

Conformably to theſe repeated acts, and in proſecution of the ſame intention, on the 26th of March 1764, a ſecond proclamation was iſſued; having the ſame object the eſtabliſhment of the colonies, and declaring the ſame views already wiſely adopted, and firmly engaged as to the means of attaining and perpetuating that eſtabliſhment; and reciting the great benefit which will ariſe to the commerce of the kingdom, and to his Majeſty's ſubjects in general, from a ſpeedy ſettlement of the new acquired iſlands, of which this of Grenada is named the firſt. It gives directions for the ſurvey of the lands, the diſtribution into diſtricts and pariſhes, analogous to the Engliſh diviſions, the culture of the various produce of the country, the apportionment of the ground into due lots for that purpoſe; and in general recognizes the inhabitants as his Majeſty's loving ſubjects, and provides ſuch means as were judged expedient for their neceſſary ſupport and defence, their internal order, plenty and happineſs, previous to the completion of theſe by the enjoyment of the laws of England, which, as they had in right, they were to have ſpeedily in poſſeſſion.

In

In further profecution of this deſign on the 9th of April 764, his Majeſty was pleaſed to grant his royal letters pa- nt to General *Melville*, conſtituting him Captain-General nd Governor of the new iſlands, Grenada, the Grenadines, ominica, St. Vincent, and Tobago.

Patent 9th of April 1764, to Robert Melville, Eſq. conſtituting him Governor.

This patent is ſet forth *verbatim* in the record. In ſub- ance it provides for the good government of the ceded lands, gives directions to take and adminiſter the oaths of legiance and ſupremacy; gives authority to the governor, nd requires and commands him to ſummon an aſſembly, eſcribes the manner of election by the freeholders, and ns called they are to ſit as repreſentatives; and together ith the governor and council to be the legiſlature of the ountry, and to make laws as near as poſſible to the laws f England, with the uſual proviſion that they ſhall be oid if not allowed by his Majeſty within a limited time; nd hereby is finally eſtabliſhed in Grenada a conſtitution, in rinciple and form, in the deſign of the whole, in the diſ- oſition of the parts, in their reſpective functions and joint perations, an exact epitome of the Britiſh form of govern- ent: Yet a conſtitution not given by the patent, but only o be put in full exerciſe.

Commanding him to call the legiſlative aſſembly of repreſentatives.

With theſe powers his excellency arrived in Grenada, and nſtantly took upon himſelf the adminiſtration of the go- ernment; and in obedience to his commiſſion called an ſſembly and opened the ſcene of legiſlation in the year 765.

Arrival of the Governor the 14th of December 1764; aſſembly called 1765.

On the 20th of July 1764, poſterior in point of date to hoſe proclamations and this patent, his Majeſty by his let- ers patent under the great ſeal, reciting an impoſt of four ounds and an half in ſpecie for every hundred weight of he commodities of the growth of the iſland of Barbadoes, nd of the Leeward Carribbee iſlands, paid and payable to is Majeſty and his ſucceſſors; reciting the ſeiſſion of the land of Grenada, and that it is reaſonable and expedient that he like duties ſhould take place there as in the other ſugar ſlands, therefore in lieu of all cuſtoms and duties before paid by the inhabitants of the ſaid iſland to the French, on goods xported and imported, impoſes the above duty of four and n half *per cent.* and requires the governor and officers of the cuſtoms to raiſe, collect, and receive it to his Majeſty's uſe.

Patent poſterior in the date to the two patents already mentioned, and to the proclamation; by which patent the duty of four and an half per cent. is impoſed on every hundred weight exported from the iſland; and the governor and officers of the cuſtoms authoriſed and required to collect it.

Theſe

Regiſtry and promulgation of the above laſt mentioned letters patent Jan. 1765, cuſtom-houſe built, collectors appointed, the defendant one of them.

These letters patent were duly regiſtered and publickly announced by his excellency the governor in Jan. 1765. A cuſtom-houſe was erected, officers appointed to act as collectors of the cuſtoms, amongſt whom the defendant was one.

Many of his Majeſty's ſubjects in the mean while reſort to Grenada, under the aſſurances of the royal proclamation, and purchaſe lands there, and amongſt them the plaintiff. Payment of the impoſt by the plaintiff on demand: Concluſion of the verdict.

During theſe tranſactions ſeveral of his Majeſty's ſubjects, induced by the royal promiſes ſo frequently made, reſorted to Grenada and became purchaſers of land therein. Amongſt the firſt of which was *Alexander Campbell*, Eſq; the preſent plaintiff; whoſe plantations ſucceeded, and he was about to ſhip off his ſugars from the iſland of Grenada to the London market, when he was interrupted by the defendant demanding this payment of the impoſt already ſtated: The jury find he paid it, and that the ſame is the money on which the action is brought: The verdict concludes in the proper form, and leaves to the court whether on the whole of the caſe the impoſt be legal.*

That at the time when this patent of the 20th of July 1764 is dated, ſuch impoſt was incompetent to the crown and illegal.

And my profeſſional duty now leads me to contend, that it was not competent to the crown on the 20th of July 1764, the day on which the patent for raiſing this impoſt is dated, to impoſe a permanent tax, as this, on the iſland of Grenada—of courſe that the preſent ſum in queſtion was improperly exacted; the money erroneouſly paid, or at leaſt without any legal obligation to pay it; and the plaintiff therefore entitled to your Lordſhip's judgment.

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As this claim is founded upon a ſuppoſition of royal prerogative, which ought to be treated with deference and reſpect, it will be perhaps convenient (before I make an effay which the importance of the point renders an anxious one to me of diſcharging that duty) to define what prerogative is, that I may be underſtood not to make any exceptions to it in general; nor to argue againſt an high and beneficial privilege

* Lord *Mansfield* here reminded Mr. *Alleyne*, that he had omitted that part of the verdict which finds that the money is retained in the hands of the defendant, by conſent of the Attorney-General, in order to try the right. I only mention this, becauſe otherwiſe you could not have had your action againſt a cuſtom officer in this form

privilege of the crown, and as I apprehend beneficial to the people in what I conceive to be its true and proper ſenſe. The term is too often received with indignant jealouſy by an Engliſh audience from miſtaken notions of it, which were formerly entertained, and which have excited prejudices ſurviving, as is common, the particular cauſes which gave them riſe. To anticipate any ſuch miſrepreſentations, I beg leave to offer this definition of prerogative, in which, I truſt, I ſhall have your Lordſhip's ſupport: Prerogative is that portion of political power, which the conſtitution has intruſted with the crown for its own and the public honour and ſecurity." *

Prerogative.

There are a few facts in this caſe which areintroductory to the direct point in argument, and thoſe therefore will merit a particular notice and comment.

Firſt, the effect of the proclamation of the 7th of October 1763. The ſubſtance of it is, a recital of the benefit naturally reſulting to the Britiſh empire from a ſyſtem of colonization in Grenada; and in order to invite the natural ſubjects of that country, on whom naturally would be the firſt dependence, and by whom there was the faireſt proſpect of anſwering this deſirable end;—to invite them to ſettle there, it repeatedly aſſures them that a conſtitution as ſoon as poſſible ſhall be formed in exact conformity and repreſentation of the Engliſh government; whereby all powers of ſtate ſhould be duly diſtributed, and lodged in hands competent to execute it to the freedom of the ſubject and the ſecurity of the infant colony, by a full participation of our wiſe and admirable conſtitution. Then follows the proclamation of the 26th of March 1764, putting the country in order, and preparing the face of it to rejoice as it were in the laws it was to receive; then follows the patent to Governor *Melville*, with an immediate execution of theſe engagements, in part, by directing him to conſtitute courts of judicature, for the adminiſtration of the whole internal policy of the country, as near as poſſible to the laws of England; and to call aſſemblies as ſoon after as was poſſible, in the very effigies of the Engliſh conſtitution, with the ſame powers, and to the ſame ends of public freedom, order and happineſs, and of maintaining a ſimilitude between the parent ſtate and the colony.

On the effect of the proclamation of the 7th of October 1763.

Of that of the 26th of March 1764; and the patent of the 9th of April.

How

* Prærogativa eſt jus regis bonum et antiquum, in decus et tutamen regni, ſecundum bonas et antiquas populi libertates, et juris Anglicani leges et conſuetudines.

Observations on their united tendency to support and illustrate, and inforce each other; that the rights of conquest were waived by the proclamation of 1763; the practicability of governing Grenada by the laws of England, recognized by the power to the governor of appointing courts of judicature, on the plan of that law, and the island from a conquest received as a colony.

How wise, how politic the measure! for the crown at that time conqueror of Grenada, the old inhabitants subjected to the laws of conquest it might naturally be presumed that British subjects would be jealous of such a power, and disinclined to settle where, under the circumstances, not only a change of place, but a change of political relation might ensue. To remove these suspicions if any yet remained—for his Majesty, both by the terms under which his General had received the surrender, and by the stipulations of the treaty of peace, had given assurances of better things to the old inhabitants themselves, with whom he had been at war; and had wisely, and as became the honour of a King of Great-Britain, disclaimed to govern in the spirit of conquest when he had sheathed the sword.—But to give the fullest satisfaction to the inhabitants in general, and to those particularly of his own subjects who should be inclined to settle, the proclamation declares that all the inhabitants there, or who should in future resort thither should have the full enjoyment of the laws of England. This construction arises from the true meaning of the words, if any words of our language admit a definite sense; it appears forwarded and enforced by the subsequent acts but now stated. And the necessary effect of this great and solemn instrument is a waivure of the rights of conquest whatever they were before. By the proclamation of 1763, in the most explicit terms a recognition is made, of the practicability of governing this island of Grenada by the laws of England, and a receiving of this sometime conquest as an English colony; and, until I hear the contrary, a short argument shall evince it.

The benefit of the laws of England excludes government by the law of conquest.

A constitution is promised; but that might be a work of time to complete and execute in actual operation. In the mean time however, courts of judicature are erected; they shall administer, and the measure of this judicial conduct shall be the laws of England. Can this be compatible with any principle of conquest? Can the benefit of the laws of England be enjoyed, without laying aside the government of a conqueror? Certainly no. The strong hand of power enforces the laws of arms; the peaceful voice of law, secures the enjoyment of the rights of British subjects.

The same observations will shew that the crown held it neither impracticable nor dangerous, to introduce the laws of England, and establish freedom in this conquered country.

From

From the whole I argue, that the inhabitants of Grenada were conſidered as a colony annexed to the crown of England, and not to be governed by the laws of conqueſt; but on a plan ſimilar to that which iſſues from the common center, and pervades the whole ſyſtem of our American ſettlements.

That the inhabitants of Grenada were conſidered as a colony being ſettled, in a country annexed to the crown of England, and on the ſyſtem of the other American ſettlements.

If this be granted, and I ſee not how it can be queſtioned, conſiſtently with facts, I then conclude by direct and neceſſary inferences from premiſſes which I think clear and uncontrovertible, that every conſtitutional right of the Britiſh ſubject neceſſarily belonged to them; they were entitled to call upon the crown to ſecure thoſe rights, and were competent by every legal means to defend thoſe rights.

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If ſo, that every conſtitutional right of Britiſh ſubjects neceſſarily was theirs, and they were entitled to defend every ſuch right by every legal means.

Of courſe the crown could aſſume no legiſlative power over them; could impoſe no permanent tax; for taxation at leaſt requires an act of legiſlation. Theſe obſervations, which would all reſult, and I ſhould think irreſiſtibly, from the ſingle proclamation of the 7th of October of 1763, receive additional force from the ſecond proclamation, and from the patent to Mr. *Melville* to ſhew the ſame opinion in the royal mind, the ſame purpoſe, the ſame idea, and repeat the ſame aſſurances to the ſubject; and if it were poſſible to make them clearer or more certain they would have this effect: However, at leaſt they cannot weaken what was clear and certain before; they would ſtrengthen it, if it had need of ſtrength.

And that the crown had no legiſlative power over them, and of courſe no authority to inforce a permanent tax.

From them we get to the exact point of argument, "whether the crown, on the 20th of July 1764, poſſeſſed a "legiſlative authority over the iſland of Grenada."

The great general queſtion whether the crown on the 20th of July 1764, poſſeſſed a legiſlative authority over the iſland of Grenada?

The technical learning of Weſtminſter-Hall can give but little aſſiſtance in the inveſtigation of this queſtion. The great principles of the law of empire muſt determine it; to which the political hiſtory of England affords particular illuſtrations.

That the technical learning of Weſtminſter-Hall will but little aſſiſt the enquiry which muſt be determined on the great principles of the law of empire, illuſtrated by the hiſtory of England.

This courſe I ſhall purſue, and as I proceed glean up the learning to be found in the books; from which progreſs, I truſt, I ſhall ſafely draw that concluſion, which forms the ground whereon my client now ſtands hoping ſucceſs, and I truſt, not hoping it in vain; ſince I hope to prove he has on his behalf the moſt powerful advocates, and moſt prevailing in this court, juſtice and right.

The principles of the law of empire in the ſocial nature of man; and the reciprocal conformity of the individual to ſocial regulations and of thoſe to him.

The principles of the law of empire are founded in the ſocial nature of man.—As natural law is derived from natural connections; ſo political law is derived from ſocial connections. That conſiders him as a creature as he came from his mother's hand; this as a member of ſociety paying obedience to the laws of his community, and reciprocally deriving protection from them.

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Change of community induces a change for the time of theſe municipal obligations, and ſo on coming to a country newly acquired by arms though of his own eſtate. But in a newly diſcovered country or colony, the laws of the mother ſtate as far as is compatible with the ſtate of the colony will ſubſiſt, and the rights derived under them to the coloniſts.

From hence ariſes one inconteſtable principle—ſo long as he pays due obedience to the law, ſo long he is entitled to its ſecurity; provided he continue in a place where the exerciſe of that law is practicable; if he quit his native ſoil and reſort to a foreign ſtate, the municipal conſtitutions of his country being not the meaſure of his civil conduct there, protection for a while is ſuſpended, it intermits until his return.

If he reſort to a country newly acquired by arms though by his own ſtate there; if the neceſſity of the ſtate requires that ſuch country be governed by more rigorous means he muſt ſubmit to them: But if he reſort to a newly diſcovered country or colony, and ſettle under the auſpices of the mother ſtate, there the laws of his original country ſtill afford their protection, as far as may be agreeable to the local circumſtances of that country to which he has arrived; ſtill meaſure his civil conduct: The executive magiſtrate ſhall frame a conſtitution for him to ſecure his birth-right, with every appendage of his ancient government.

Mr. Vattell of Neufchattel, B. 1. c. 18. p. 91. Lond. Ed. 1760. That a colony is become part of the ſtate from whence it iſſued, and has the ſame laws and privileges,

This neceſſarily follows from the principle I firſt propoſed; —and it is hardly neceſſary to refort to an authority where reaſon is ſo clear: Yet, I am happy to refer to the illuſtrious name of *Vattell*, and fond of this occaſion of mentioning it with deſerved veneration, and I hope to be excuſed, if I

indulge

indulge the pleaſure of quoting him, with ſome vanity perhaps, when I find my notions graced by his authority. In Q. 10. *ſec. B.* 1. Your Lordſhip will find him expreſſing himſelf in theſe words, " when a nation takes poſſeſſion of " a diſtant country and ſettles a colony there, that country, " though ſeparated from the principal eſtabliſhment or " mother country, naturally becomes a part of the ſtate, " equally with its ancient poſſeſſions. Whenever there- " fore the political laws, or treaties, make no diſtinction " between them, every thing ſaid of the territory of a na- " tion ought alſo to extend to its colonies."

If therefore the political laws are coextenſive with the territory of the ſtate, however disjoined in ſpace, as this excellent author decides they are, then every conſtitutional right of the ſubject of that ſtate is co-extenſive; the fundamental laws of the ſtate equally ſo, and perſonal liberty and private property alike univerſally protected.

Inference that then the conſtitutional rights extend over the whole territories of a ſtate, and perſonal liberty and property alike protected.

This generally follows from his general poſition: But though I illuſtrate my argument by this quotation, I do not ſhelter myſelf under any foreign authority; nor merely under authority of whatever * growth: I appeal to the light of reaſon, that a change of place can never merely as ſuch operate a forfeiture of original ſocial rights. True, as I have before ſaid, it may ſometimes ſuſpend the enjoyment of theſe rights under peculiar circumſtances of policy; or make ſome of the laws of the parent ſtate inapplicable from difference of ſituation: But the mere act of colonization never can ſuſpend whilſt the operation of the law continues practicable; far leſs can it annihilate theſe rights.

That reaſon affirms, a change of place can never of itſelf extinguiſh theſe rights; it may ſuſpend in ſome inſtances, but not in that of coloniſation.

Let us now, to cloſe this part of the argument, hear the legal authorities of our own country. We ſhall find the general learning of Weſtminſter-Hall coincide with this theory. [*684]

In *Blankard* and *Galdy*, 2 *Salk.* 411. Lord *Holt*, Chief Juſtice ſays the reporter and the whole court with him held thus:

Caſes in ſupport of this propoſition, Blankard and Galdy, 2 Salk. T. 5 W. & M.

1ſt. In caſe of an uninhabited country newly found out by Engliſh ſubjects; all laws in force in England are in force there.

That the laws of England take place in a colony ipſo facto; in a conquered country, when declared by the conqueror.

2d. Jamaica being conquered, and not pleaded to be parcel of the kingdom of England; the laws of England did not take place there, until declared so by the conqueror or his successors.

The first point expressly maintains the propositions of *Vattell*, and his Majesty has put Grenada in express terms upon the same footing with "the other colonies;" therefore all the laws of England (so far as is agreeable to that island) are in force there.

But farther as a conquered country, the conqueror has declared that the inhabitants of Grenada shall enjoy the laws and constitution of England, which brings it within the second point.

2 Peere Williams 75. anno 1722.

Agreeable to this is what is reported by the master of the rolls in 2 *H. W.* 75. of a determination before the King in council, upon an appeal from the foreign plantations, that if there be a new and uninhabited country found out by English subjects, as the law is the birth-right of every subject, so wherever they go they carry their laws with them; and therefore such new formed country is to be governed by the laws of England, then in being when they first settled.

As to the second point it goes to be sure on too large a ground, in supposing conquest gives a property to the conqueror in the people conquered.

This principle is taken up by Mr. Justice *Blackstone* in his commentaries, who allows the doctrine, and the exceptions to it which he makes in general such as result from the inconvenience which would fall on the colony, from a general adoption from the laws of the parent state.

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Every day's experience before the council warrants this principle: The laws of descent and of all property are current in Ireland, and in every plantation; in every part of the empire. By what law? By none positive there; but as a necessary consequence of the country being a part of the British empire.

Mr. Campbell, at and before the date of the patent constituting imposts, was a British subject.

If this be so, what was the situation of Mr. *Campbell* and his countrymen at and prior to the 20th of July 1764? They were British subjects; They were settled in a new acquisition: The laws of England were practicable among them: No peculiar circumstances of policy required the suspension of them. His Majesty, the supreme executive

The laws of Great Britain found practicable and expedient and introduced by the executive magistrate.

magistrate

magiſtrate of the ſtate, competent to decide on the propriety of introducing the laws of England into Grenada, has declared ſuch propriety; has introduced them. Then by neceſſary conſequence, they were entitled to them; they wanted no other act to give it to them; and Mr. *Melville* was only to haſten in the performance of this duty to put their conſtitution in act, and ſecure their rights.

By what mode of reaſoning then am I to learn that his Majeſty had at this time a legiſlative authority over the iſland of Grenada? To make temporary regulations on a ſudden until all was finiſhed, was the extent of his prerogative; to impoſe a permanent tax was, as I ſubmit, illegal.

That after this, until the ſettlement of the conſtitution, his Majeſty could interpoſe at moſt temporary regulations, not a permanent tax.

This argument, founded on the evidence of facts, anticipates, I think, every objection that the patent to Mr. *Melville* was executory. It is againſt the words, againſt the ſpirit, againſt the great end of the proclamations to ſuppoſe it was. The court will not give ſuch a narrow and forced conſtruction to a public grant, * founded on the moſt liberal and wiſeſt principles, of policy, and upon which numbers of Britiſh ſubjects have fixed their ſettlement, in confidence of all the rights of freedom in a country ſo remote; a conſtruction ill adapted to its terms, to its plain ſcope, and to the manifeſt reaſon of the thing if it had been a grant not to a nation at large, not to Britiſh ſubjects, to Engliſhmen, invited to ſettle for the encreaſe of commerce, but to a ſingle private individual under any circumſtances. Will the court intend that it was the deſign of the crown that Britiſh ſubjects, Engliſhmen, ſhould be called to croſs the Atlantic by the royal voice itſelf under ſuch aſſurances, and when they arrive find their hopes dependant on a future diſcretionary poſſible grant? It is ſufficient for me to ſay, by the patent, and by the proclamation of the 26th of October, nay, by the very terms of ſurrender and the general treaty of peace, the inhabitants are recognized as Britiſh ſubjects; The laws of England are recognized as practicable and beneficial to the iſland, thoſe who were there and thoſe who ſhould afterwards reſort there are promiſed the enjoyment of them. From that admiſſion, this mutual contract, and theſe acts of of the crown, I draw my argument, and thence derive the rights of the colony to the full benefit of the Engliſh laws and conſtitution.

Argued, that the engagement is not executory.

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And

* It ſeems that in public grants, the rule of the civil law holds, which ſays—*Beneficium imperatoris quam pleniſſime interpretari debemus*, though our law adopts the contrary in private grants.

Arguments from history.

And now, my Lords, from the conſideration of the caſe in the general view of political theory, and from ſuch authority as eminent writers and the deciſions of our courts of our law furniſh more directly to the point, I proceed to the review of the hiſtory of this country; and I truſt, that the account I ſhall give your Lordſhip of our ſeveral acquiſitions by conqueſt or colonization (in which latter conqueſt with us as with ancient Rome hath always terminated) will abundantly prove the antiquity and uniformity of my general argument.

I have ſpared no pains to inform myſelf of the hiſtory of theſe tranſactions; and, after a diligent reſearch through the writings of Dr. *Leland* in his hiſtory of Ireland; of Sir *John Davies* in his diſcoveries, and the caſe of *Taniſtry* in his reports; of Dr. *Harris* in his Hibernia; and of Mr. *Molyneux* in his conteſt with Mr. *Carey*; and laſtly of the noble hiſtorian of the age of *H.* 2. I truſt I am warranted in the principal facts and concluſions I have to offer concerning the hiſtory of the acquiſition of Ireland.

I ſhall not refer to the books by pages, except that in Sir *John Davies's* reports, I would wiſh particularly to ſubmit to your Lordſhip's notice the 37th page B.

Anno 1154.

Ireland, when *Henry* 2. firſt aſcended the throne * of this kingdom, was divided into many ſmall ſtates, and was ſubject to all thoſe evils and convulſions which diſtract ſavage unpoliciſed and divided countries.

Dermot King of Leinſter, being driven from the throne by his rebellious ſubjects, ſolicited the aſſiſtance of *H.* 2. who, covering his ambition under the ſuppoſed ſanction of the papal authority,* and taking the conqueſt of Ireland to be a deſirable object, readily permitted certain of his ſubjects, with Earl *Strongbow* at their head, to land in Ireland, and to engage in the enterprize on behalf of *Dermot.**

Anno 1171.

The ſtipulations were—in caſe of victory *Dermot* was to be reſtored; and in return a grant of lands was to be made to the Engliſh ſubjects.

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The event was proſperous; the terms on the part of *Dermot* were fulfilled.

King

* From Pope *Adrian* the 4th, whoſe name before his acceſſion to the ſee was *Nicholas Breakſpear*, and he himſelf was an *Engliſhman*. The letter authorizing *H.* 2. to conquer *Ireland*, and bring it to the obedience of St. *Peter*, is a very curious one; it is dated 1154, and may be ſeen in Lord *Lyttelton's* hiſtory.

King *Henry* went over, and extending the conqueſt became poſſeſſed of a great part of the ſouth-eaſt of Ireland. Anno 1172.

The natives whom he ſubdued he ruled with the rod of empire, communicating as he thought fit certain privileges, and withholding others; and making as he judged neceſſary certain regulations: But thoſe of his ſubjects whom he found ſettled there he recognized as ſuch; of theſe he demands the performance of the feodal ſervices; and, as a neceſſary conſequence of their being ſubject to the obligations of thoſe laws of England which were in force at their becoming a colony, the laws of England diffuſed their protection over the coloniſts: And he proceeds to ſecure the benefits of thoſe laws by perfecting their conſtitution, and forming their government with every appendage of Engliſh policy. We ſee him dividing the country into counties, eſtabliſhing ſheriffs, erecting courts of judicature, corporations and general aſſemblies.

The conquered part of Ireland governed with ſeverity, as by a conqueror.

The laws and conſtitution of England imparted to the coloniſts.

This account ſurely furniſhes an ancient and illuſtrious inſtance to my general argument.

"The laws of England are communicated at pleaſure "to the conquered natives; but reſult to the Engliſh colo- "niſts as a neceſſary conſequent;" This point is elaborately diſcuſſed by Dr. *Leland*, decided by Sir *John Davies* in page 37; and adopted in the manner I ſtate it by Lord *Hale*, who remarks the colonies of the Romans planted in conquered countries obſerved the Roman law; and takes it as of courſe, not aſſigning any reaſon for it or explaining the manner; the reaſon being indeed the neceſſary nature of the thing. But he gives large explanations how conquered countries may have their laws changed.

The laws of England reſult neceſſarily to the coloniſts of England. V. hiſtory of C. L. c. 5. p. 79.

I own the great authority of Lord *Hale* does not ſeem to agree with me on the whole in this account of the eſtabliſhment of the Engliſh law in Ireland, in the book juſt quoted: And I am aware too that this account is materially different from what Lord *Coke* lays down in his firſt Inſtitutes 141. *b.* and in *Calvin's* caſe 7 *Rep.** as if they were eſtabliſhed by King *John*, and his ſon *Henry* 3. and farther were not the effect of colonization.

*From page 1 to 28. Tr. 6 Jac. K.

This ſtriking difference engaged me to trace the ſubject minutely; and as the learned writers whom I have followed had acceſs to the archives of the city of Dublin, and ſpent much time in every means of information, I chooſe to follow them as my leaders, in a point of hiſtory which they had made the ſubject of their particular attention, rather than the great oracle of the law.

Anſwer to the reaſons to the contrary.

The

The ſubſequent hiſtory is as follows—and will, by ſtating, ſhew how Lord *Coke* fell into his miſtake; for ſuch with deference I call it; and ſuch the facts I think prove it to have been.

That King John enforced, not originally gave the laws of England to the Iriſh.

The laws of *H.* 2. being too much neglected from the intercourſe between the Engliſh colony and the native Iriſh, the latter obſtinately fond of that lewd cuſtom, as it is called, the Brehan law, of which there is much ſaid in the caſe of *Taniſtry* already cited; and this law getting ground in the Engliſh eſtabliſhment, it was found neceſſary in the reign of King *John* to iſſue a proclamation, commanding the due obſervance of the laws of England to his Engliſh ſubjects; and King *John* himſelf went over to Ireland to inforce obedience to them. And King *H.* 3. his ſon ſpeaking of his father as having "ordained and commanded,"* as Lord *Coke* takes it, but I think more conſiſtently with hiſtory "ſettled and required the obſervance" of the laws of England, which had been eſtabliſhed. The letter cited by Lord *Coke*, from whence too this is quoted, ſays King *John* reduced them into writing, and at the inſtance of the Iriſh. It is very natural to admit this, without ſuppoſing either that King *John* was the original founder of thoſe laws in Ireland, or that they were not firſt there in conſequence of colonization. There was very little ſtatute law at that time; and it might be thought adviſeable by the adminiſtration here at that time to digeſt the common law of England into writing, the better to avoid confounding it with the Brehon law; and probably at the requeſt not only of the Engliſh coloniſts, but of the wiſer and more moderate part of the Iriſh who had perceived its excellence. But however fond King *John* or his ſon might be, to ſuppoſe that King *John* himſelf was the founder of theſe laws, (though I think it does not appear that either have aſſerted ſo much) there is no ground from facts to deny this honour to King *Henry* the ſecond; but, I think, abundant to the contrary; And at the ſame time I think there is the ſtrongeſt evidence from facts and reaſon, not without ſupport from the expreſs declaration of great authorities, to prove that they were originally introduced not by conqueſt, but as rights attendant on Britiſh ſubjects ſettling there as a colony.

* Statuit et præcepit.

What is ſtated to have been done by King *John*, and is taken by Lord *Coke* as the indulgent act of that King, communicating the laws of England to the Iriſh, I take it was no more than a proclamation enforcing obedience to the laws already

already eſtabliſhed: A prerogative the crown may exerciſe this day at London.

Indeed the ſettlement which he reſtored was farther improved under King *John's* reign, and enlarged in point of territory.

The ſame policy prevailed in the ſubſequent reigns, and we find King *Edward* the firſt ſummoning members to the Britiſh parliament in the third year of his reign, for the purpoſe of taxing the colony. We find writs returnable into this court, the *aula regis*, and in every inſtance ſimilar protection and laws to the Engliſh and Iriſh ſubjects.

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King E. 1. ſummoning members from Ireland to the Britiſh parliament for the purpoſe of taxing his Iriſh ſubjects anno 1275. Writs returnable in B.R. in England: ſimilar laws for the Engliſh and Iriſh ſubjects.

No inſtance more ſimilar to the preſent caſe of Grenada can be conceived: And, ſurely, the politics of a crown infinitely more ardent to extend its prerogative than the preſent times will allow ſhall not ſurpaſs, in affording protection to the ſubjects, the laws of this day.

Application to the caſe of Grenada, a multo fortiori, from the notion of prerogative in thoſe days.

The next inſtance we find in our political hiſtory is that of Wales: From it I ſhall derive ſtrong argument in ſupport of my general propoſition: And in this I am yet farther ſatisfied that I proceed upon ſolid ground, as I find the reſult of my enquiries to quadrate with the opinion of the court, delivered in the caſe of the King and *Cowle*.

Wales.

T. 32 & 33 G. 2. 4 Bur. 834—64.

King *Edward* the firſt laid claim to Wales, as his feodal principality. The prince refuſing to acknowledge him he treated him as his rebellious vaſſal, reduced the country by arms, cauſed the prince to be puniſhed as a traitor, and took upon himſelf the immediate ſovereignty.

E. 1. claimed Wales as a feodal principality anno 1281, in the 9th year of his reign.

He ſubjects them by arms; but, whatever was the real right, having ſubdued them, he recognizes them as his ſubjects (he could not, indeed, do otherwiſe upon the principle which he profeſſed, of reclaiming Wales as a feodatory ſtate, and declaring it, as he does in the twelfth year of his reign, to have been before ſubject to him of feodal right;) he communicates to them the laws of England, and takes every meaſure to ſecure to them the benefit of the enjoyment of thoſe laws.

The

And was a part of the ſame feodal dominion with England. V Hale's Hiſ. of C. L. c. 7. p. 162.

The hiſtory itſelf of thoſe times (many valuable collections of which are to be found in *Rymer's Fœdera*) proves his conduct towards Wales not to have been as in right of a conqueror indulgently benefitting his ſubjects, but as the act of the feodal ſovereign, and at the ſame time ſupreme executive magiſtrate of this country, ſecuring to his ſubjects that protection which was their due, in return for their feodal homage and ſervices, and ſecuring it by a communication of the laws and conſtitution of England, conſidering Wales as under the general comprehenſion of the Britiſh empire.

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So of Scotland, v. acta regia, from 83 to 91. This claim was made 10 May, anno 1291. V. alſo Hales's Hiſ. of the C. L. c. 10.

Purſuing his magnanimous deſign, of uniting all the adjacent countries to the realm of England, he next turned his thoughts to Scotland: And the hiſtory of the town of Berwick, ſo fully developed by your Lordſhip in the caſe already cited, warrants the like obſervation as on Wales. He claimed Scotland expreſsly as ſovereign lord of the fief, and governed it as a part of the great general fief, the Britiſh empire.

The reign of *Edward* the third next furniſhes matter of a ſimilar nature; and the ever memorable treaty of Bretigny * gave that prince an opportunity of extending his empire upon principles which had animated and directed his forerunners.

* E. 3. 8th of May, 1360, by which were ceded the provinces of Poictou, Saintoigne, Agenois, Perigord, Limoſin, Quercy, the pais of Bigorre, Gaure, Angouleſme, and the territory of Rovergne. Montreuil, Ponthieu, Calais, and all the iſlands adjacent to the countries named. Vide acta regia, 170.

I have not been leſs aſſiduous in examining the ſprings of his government over thoſe countries which were thus ceded to him.

I have purſued this enquiry chiefly through *Rymer's Fœdera*, in which are preſerved all the ſtate papers from the treaty of *Bretigny*, reſpecting the conduct of King *Edward* towards his dominions acquired from the King of France; and from them it appears moſt ſtrikingly how uniform he was in following thoſe principles of government which had been purſued by his predeceſſors *Henry* the ſecond and *Edward* the firſt.

Permit me, however, in this place, to mention the ſources from whence I extract the hiſtory I am about to give. Beſides *Rymer*, *D'Ewes journals*; *notitia parliamentaria*, Ca. 4 *Inſt.* title *Calais*, the year book, 20 *H.* 6. 1 *R.* 3. and *Rot. Parl.* 50 *E.* 3.

As a preliminary obſervation, I would beg of your Lordſhip to remember, that by much the greater part of the country, thus ceded to King *Edward*, was claimed by him under a very different title from that of an appendage to the crown of England.

So

So much as he claimed as in foreign right, this he erected into a principality, and conferred it upon his illuſtrious ſon *Edward* the Black Prince, by the title of Prince of Aquitaine. To this, which was much the greater part, he communicated a conſtitution totally different in form and principle from the Engliſh government, allowing unbounded powers of ſovereignty to his ſon, and ſuch as the Engliſh nation could not have borne: But as theſe countries were claimed by the King, as Duke of Normandy, heir to the houſe of *Anjou*, and to the houſe of France, through his mother, * this nation did not concern itſelf what powers it aſſumed, with regard to countries which he did not hold or claim to hold as part of the realm of England; as the feodal ſovereign of thoſe he acted agreeably to their laws, and to the powers which they allowed their prince; the ſubjects of this country had no right to interfere. [691]

But with regard to Calais the caſe was different: Calais he had conquered as King of England; and, having turned the former inhabitants out of their poſſeſſion, he invites his own ſubjects of England to colonize therein.

Herein we find every principle of law adopted; the inhabitants participating in every ſecurity the Engliſh conſtitution affords: Writs of error returnable into this court; members repreſenting the people of Calais in the Engliſh parliament.

How ſtriking is this diſtinction! Over countries obtained by conqueſt, and claimed by a different title from that of England, he exerciſes an authority according to the title he claimed, very different from the authority of a King of England: Over the countries acquired to the crown of England, and inhabited by Engliſh ſubjects, he claims to himſelf no other power, than the lawful prerogative of a King of England.

This lively diſtinction, firſt adopted by *H.* 2. and continued by *H.* 3. at this time prevails between any American plantation and the electorate of Hanover. To the former all prerogative writs will run, as to the counties palatine of Cheſter and Durham; over the latter what power has your Lordſhip, the great ſeal, or the parliament? The ſame diſtinction between Hanover and the colonies.

The hiſtory of this conntry, then, as to the political government of the lands ceded by the treaty of Bretigny, joined Recapitulation of the evidence from theſe hiſtorical facts.

* Who was ſiſter to *Charles le Beau*, and upon *Edward*'s conſtruction of the Salique law, as excluding females, but not the deſcendants of females, he was entitled by deſcent through his mother *Iſabel* to the crown of France.

joined with the laſt obſervation reſpecting Hanover, furniſhes additional proof to thoſe of Ireland, Wales, and Scotland, already mentioned, and encreaſes the weight of evidence from the experience of the nation corroborating this argument in a ſeries of ages,

Hitherto, my Lord, I have endeavoured to penetrate pretty far into the ancient hiſtory of England, to which the nature of the queſtion directed me, as it depends on the law of empire, evidenced by hiſtorical facts; and as no evidence of this occurred to me ſo proper and unexceptionable on this occaſion as the hiſtory of our nation, in which I purpoſe to advance a ſtep farther yet: And here a modern edifice preſents itſelf to view, much worthy of obſervation, not only for the beauty and order of its ſtructure, and the analogy of its frame to the majeſtic fabric of our own ancient conſtitution, but particularly upon this occaſion; becauſe in all theſe reſpects an examination of it will contribute much, if I am not deceived, to a clear diſcernment of the merits of the preſent cauſe: The object to which I am alluding is the American colonies.

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The American colonies. That they are built upon the foundation of our Engliſh conſtitution, and of the rights of it, inherent in Britiſh ſubjects, anterior to grant or charter.

America has been called, in a ſenſe totally different from what is meant by the ſame words when applied to England, the dominion of the crown. The Americans have been conſidered as a different political ſpecies from the Engliſh; and have been called creatures of the King. Their rights have been ſaid to have been derived from their charters; and it is probable the miſapprehenſion of this particular has produced this very cauſe. Since it is the firſt in which the principles of colony law have been inveſtigated, it is my duty to ſtate thoſe principles very minutely, and endeavour to reſcue them from miſrepreſentation and miſtake.

The crown, by its executive power, may execute any plan for the introduction or eſtabliſhment or maintenance of the laws of the conſtitution in any part of the empire, and it is a branch of its truſt.

To do this I muſt beg leave to draw your Lordſhip's attention to one great leading conſtitutional principle. *The crown by its prerogative may execute any plan whereby the laws of the country may be promulgated or enforced, communicated or ſecured to the ſubjects of the empire.*

And the crown not only may, but it is a branch of the executive truſt.

Thence proclamations, bodies corporate, [illegible] of juſtice, counties palatine.

Founded on this principle, the right of iſſuing proclamations, incorporating bodies politic, for the purpoſes of municipal

nicipal jurisdiction, erecting tribunals, and constituting counties palatine, may strike your Lordships, and certainly on this principle, the American constitutions have been settled.

There is not a single clause in any charter which can impugn this idea; but every part of them holds out the most conclusive evidence of their being legal acts of prerogative, for the purpose of securing constitutional rights to our fellow subjects in distant parts of the empire.

That the charters support this idea, neither defining rights nor establishing laws, nor giving directions, other than for the formal establishment of the original laws of the parent state.

The charters do not define rights, nor establish laws, nor give any other directions than merely for the formal establishment of an internal legislature and government.

Why, then, shall it be argued that the rights of the colonies are emanations of the royal bounty? Not a single constitutional right is granted by charter; and yet every constitutional right is admitted to be the birth-right of the Americans. The idea of the contrary is too frivolous to be argued in this place; and perhaps my contending against it was therefore unnecessary.

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General deduction.

In general I conclude, and propose it as a great constitutional truth, that the American charters and patents are accommodated to protect the anterior rights of the colonists, and not to convey those rights, as dependent on those charters, and derivative from them.

The three species of colony governments.

The colonies in America, it is well known, fall under a threefold description; first proprietary grants, as Pennsylvania and Maryland; second, charter governments, as the Massachusets Bay; third, provincial establishments, as Carolina and most others. In original principle the government is in all the same, though somewhat different in external form.

Proprietary grants assimilated to counties palatine, second to municipal corporations.

The first sort may be assimilated to counties palatine, the second to municipal corporations, the third sort are a species by themselves, as to their external constitution; all, however, flow from the principle I stated; all tend to secure to the subject the enjoyment of the laws of England; all, in the very nature of their establishments, shew that the rights of the colonies are inherent and innate, not derivative, or communicated by charter.

But here I expect I shall be told that the clearest argument possible will rebut me. The objection, if it shall be made, has the sound of something material, and therefore, rather than be thought either to overlook it, or to have feared it more than I can persuade myself I ought, I will now offer to meet it.

It

Appeal to the King in council.

It is certain that in the early charters granted to America the King reſerves to himſelf an appeal to him in council, in the laſt reſort; and from hence the ultimate judicature has been uſually underſtood to be in the King perſonally, and not as in right of the crown of England, nor through his courts, as the Britiſh ſubjects, as to Britiſh ſubjects. From this circumſtance, I ſuppoſe, it will be contended that the King is Sovereign of America, not as King of England, but perſonally; and the colonies are not governed by laws like Ireland, Wales, or Berwick, derived to the inhabitants in conſequence of their being ſubjects of the Britiſh empire; but are like to Jerſey and Guernſey, which belong to the King, and not to the Crown. Hence the argument would be, that all the colonies of America are dependent on the King, not as head of the general conſtitution, but in a very different relation, and my general principle would be much affected.

To obviate all this, I need only deſire it to be remembered that ſuch a circumſtance cannot alter conſtitutional law, or the principles of the law of empire; not even if it ſtood clear and unimpeached by that which I conceive will moſt completely reprobate it, the extreme art with which it was introduced into the charters, and the prevailing policy of the times when it was firſt conceived; I mean the policy of King *James* the firſt.

It is not in the firſt charter.

That it proceeded from the particular notion of King James.

The firſt charter was granted to the Virginian adventurers, in which this reſervation does not appear. In all the other charters it certainly does; and this is owing, I apprehend, to the extreme anxiety of *James*, whoſe favourite idea it was, from the firſt moment in which he aſcended the throne, to conſider every part of the Britiſh empire, not immediately within the actual limits of England in reſpect of local ſituation, as holden of himſelf, and not as component members of one great empire, at the head of which he ſtood as ſovereign, in right of the crown of England, therein directly inverting the principles and practice of *H.* 2. *Ed.* 1. *Ed.* 3. and other princes, his predeceſſors.

To prove this there are many remarkable paſſages in the hiſtory of thoſe times. The firſt is mentioned by Lord *Vaughan*, as being communicated to him by the great Mr. *Selden*.

King *James* aſked Mr. *Selden*, whether Ireland (at that time, as your Lordſhips know, the ſubject of much political ſpeculation) might not be conſidered as belonging to him

him perſonally, as the heir of the conqueror thereof; that the lands therein might be taken to be his own, and the Iriſh themſelves as ſubjugated to the laws of conqueſt, and of courſe not entitled to the rights of Engliſhmen, nor to be conſidered as members of the ſame community, but dependent on his will, and beholden to his indulgence?

Mr. *Selden*'s opinion will be mentioned by and by: It is not reported in *Vaughan*, but that learned judge himſelf there decides againſt the King; "That it cannot be reaſonable "to make the ſuperiority only of the king and not of the "crown of England." In the caſe of proceſs into Wales my Lord *Vaughan* uſes this expreſſion; and adds, the practice has always accordingly, as, ſays he, is familiarly known by reverſal or affirmance of judgments given in the King's Bench in Ireland in the King's Bench here; which, he continues, is enough to prove the law to be ſo in other ſubordinate dominions.

L. Vaughan's opinion to the contrary of King James's. Vaughan's Rep. p. 402.

And in the caſe of *Craw* and *Ramſay*, it is decided that Ireland and the Plantations are holden of the crown as the ſovereign of the Britiſh empire; and the like diſtinction which I took before between Anjou and Calais is made by the Lord Chief Juſtice. The ſame caſe is reported in *Ventris*.

Craw and Ramſay, H. 21 & 22 Car. 2. C. B. Vaughan, 278. V. p. 401. 2 Vent. 1 c.

But to return to King *James*: Another remarkable anecdote of his notions of government, to the ſame point, is to be found in the * journals of the houſe of commons. It occurs in many places, but particularly in the journal of the 25th of April 1621.

Journal of H. of C. 25 Apr. 1621.

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A bill was brought into parliament for the liberty of a free fiſhery on the banks of America, at that time in general called Newfoundland.

Inſtance where the parliament would not ſuffer the private grant of the King to exclude the other ſubjects of Great Britain from a common ſhare in the Newfoundland fiſhery.

Government ſeemed extremely unwilling to ſuffer parliament to meddle. Says Mr. Secretary—I take it from the journals—"What have we to do with America? They "are plantations; they belong to the King." But good old Sir *Edward Coke*, Mr. *Selden*, Mr. *Brooke*, and other great men, reply indignantly, What! when the King grants letters patent to them under the great ſeal are they not part of the empire, and ſhall not we interfere?

Theſe obſervations ſhew the prevailing policy of thoſe times. And are we, then to wonder that the right of ultimate judicature ſhould be claimed by the King, and that he ſhould artfully introduce into charters a reſervation of it. A reſervation indeed ſuperfluous if there had been ſuch a

right

right in the King perſonally; and of no effect if there was no ſuch right; for then the reſervation could not create it, contrary to the principles of the conſtitution.* We ſee what Mr. *Selden*, what the parliament of that time thought of it; what Lord *Vaughan* afterwards; what the practice of ſome of the greateſt antecedent Kings; what the doctrine of the books; what the experience of nations; what the teſtimony of ages; what reaſon itſelf ſpeaks: all concurring that all the parts of the Britiſh empire are under one conſtitution, and have all the rights and immunities which reſult from that conſtitution. The intrigues, therefore, of King *James* muſt not weigh againſt natural reaſon, political theory, legal authority, and the principles of the conſtitution §. The gentlemen who firſt went to the American ſettlements, in ages when the principles of political theory were ſcarcely known to the moſt refined, might not foreſee the tendency, and therefore unwittingly ſubmit to this claim of King *James*. But on any conſideration, knowingly or unknowingly, they could make no conceſſion to the prejudice not only of their conſtitution, but with it of ours.

If ever that queſtion of the relevancy of a writ of error from any ſettlement of the weſtern world, ſhall come into litigation in this court, and it fall to my part to argue it, I hope I ſhall then know my duty, and what to ſay upon it. I hope I ſhall prove that the juriſdiction of the King in coun-
[696] cil, as the ultimate judicature, is unconſtitutional and void: but if the experience of a century and an half ſhall be then held to outweigh arguments founded in principle, your Lordſhips will ſay, "The experience ſupports though the principle denies it," and will take care that neither then nor now it ſhall be carried farther, and argue from a peculiar judicial authority, upon whatever ground, ſupported however by precedent if ſupported, to a legiſlative authority ſupported by no precedents; and, I beg leave to ſubmit, not warranted by the principles of the conſtitution. To meet however, the concluſion which might be attempted to be drawn from this claim of ultimate judicature in council, I have been drawn inſenſibly into this length of diſcuſſion.—The occaſion muſt be my apology.

General recapitulation and concluſion.

I return now to conclude with the immediate point before the court. And in this, on whatever ground I con-

* Reſervatio ut et proteſtatio non facit jus ſed tuetur.

§ Nemini licet quod non per leges licet.

der this cauſe, whether in the general view of reaſon and experience, the opinion of eminent writers of foreign nations; the learning of our books; the principles of the law of empire; the hiſtory and experience of this country for ages; whether as to this particular iſland of Grenada, on the terms of the ſurrender, the treaty of peace, or more eſpecially the proclamations and patents; whether on the great principles of our conſtitution, or the principles of natural juſtice and equity; on all, on any, on every ground I draw this concluſion, that on the 20th of July, 1764, his Majeſty was in no wiſe entitled, by the prerogative of the crown of England, to impoſe the duty of four and an half *per cent.* in manner and form as is laid in the declaration, admitted by the defendant's plea, and found by the verdict: Such being an act of legiſlation, and repugnant to the principles of that government to which the inhabitants of that iſland were at that time entitled, and which belonged particularly to Mr. *Campbell*, the plaintiff, a natural born ſubject of the crown of Great Britain, found ſo and declared by the verdict, and were his by every right, ſecured to him by every ſanction.

And while I have thus contended, and I hope eſtabliſhed my client's intereſt, I further truſt that this general review of our conſtitution, and of the hiſtory of our country, crowned by the deciſion of this court, will warrant me in ſaying of Britain what the Roman orator boaſts of Rome: *Aliæ nationes ſervitutem pati poſſunt; populi Romani propria libertas.**

* Ciceronis Philip. 6ta.

Mr. *Wallace*, for the defendant—The queſtion upon the ſpecial verdict is, whether the impoſt or cuſtom of four and an half upon the exports of the iſland, in the manner found by the verdict, was, under the circumſtances in which that iſland then ſtood, at the time of the impoſt, duly and legally impoſed by the crown, or not?

Mr. *Alleyne* not having gone into the diſpute of the authority and prerogative of the crown at any time to make proclamations, but examining the nature of this, and contending that, whatever might be the ſtate of the iſland before that period, it was incompetent to the King from that time to give any laws whatever to the iſland of *Grenada*, (for if any, there is no doubt of taxation) this has relieved me from laying before your Lordſhips the rights of a King of this country over a conquered country.

That the ground of the proclamation having waived any antecedent rights, makes it not ſo neceſſary to conſider the rights of conqueſt:

But otherwise that conqueſt carries with it a legiſlative authority.

What thoſe rights are is a principle not only of the law of nations, but has been recognized wherever it came under conſideration, even by the judges of this country; by acts of ſtate, and hiſtorians; and, in one great inſtance, declared by all the judges. In *Calvin*'s caſe it is recognized that the rights of conqueſt do belong to the King: And the rights of conqueſt are in that caſe extended farther than I wiſh they ſhould be underſtood; but thus much, I take it, they neceſſarily give, a legiſlative authority. It is not now as formerly, that the conquerors gain captives and ſlaves, and abſolute dominion, but now the conqueror obtains a juſt dominion, under due reſtrictions, and inſtead of ſlaves he acquires ſubjects. Not a propriety, as in goods, but an authority, as over men, reaſonable and ſtill free.

The effect of the letters patent is not to alter the condition of the iſland: It is only to raiſe certain duties raiſed there by the French King, and paid to the King of England by the iſland of Barbadoes and the other Leeward iſlands; but the only thing is, this is done in July, 1764, when it ſhould have been October, 1763, or thereabouts.

[Lord *Mansfield*—It was after the proclamation and commiſſion; for, I think, the proclamation was in October, 1763; the commiſſion in April, 1764; and this is in July: So it is after both.]

That the governor took the patent impoſing the tax with him, and therefore it muſt be taken that it ſhould be impoſed previous to calling an aſſembly.

Mr. *Wallace* continued—The patent is carried out by the governor. At the time he takes upon him the office of governor he promulges this tax: His firſt office as governor is to promulge it. Now the queſtion is, whether the King, by this proclamation, meant immediately to waive the rights he had as conqueror of the iſland, or at a future period, when the ſtate and circumſtances of the iſland would admit of a legiſlature: When that would be was very uncertain. In fact, it does not appear that the firſt aſſembly met earlier than the latter end of the year 1765, (about a year and an half from the date of letters patent) nor does the verdict find that an aſſembly could have met ſooner.

The proclamation begins with a general direction to his Majeſty's four governments, by name of Quebec, Eaſt Florida, Weſt Florida, and Grenada. Then the aſſembly of Grenada, as to that part of the proclamation upon which this caſe turns, is to meet "as ſoon as the ſtate and circumſtances of the iſland will admit." Is it conceivable that in the mean while the King meant to diveſt himſelf of his

right

right of legiſlation? There is no ſuch declaration, it is impoſſible there can be ſuch a conſtruction.

If the King had not continued a right of making laws before the period of their having a legiſlature of their own, who was the legiſlator? Here is no relinquiſhment on the part of the crown in the mean while; but when an aſſembly meets the crown will hand over the powers of legiſlation to that aſſembly.

It is neceſſary in theſe diſtant countries to provide legiſlative conſtitutions within themſelves, when circumſtances will admit; they cannot be governed by ordinances or acts of parliament made for all caſes and inſtances whatever. The beſt judges what laws are neceſſary and proper for the peace, tranquillity, and good order of the iſland, are the perſons locally reſident; therefore it is neceſſary ſome legiſlature of this kind ſhould be eſtabliſhed: But till it be, of neceſſity, every order of the King muſt be obſerved by the governor and the people.

But Mr. *Alleyne* has ſaid the King has waived the right of conqueſt, by introducing courts of judicature; and that it is a part of the benefit of the introduction of the laws of England, that all the laws of the country not agreeable to theſe muſt be abrogated.

It is not uſual in theſe times to take conquered nations under protection upon theſe terms: And as it is unuſual, ſo I find, in the opinion of *Grotius*, it would rather be harſh and rigorous than indulgent. Your Lordſhip will remember that he ſays it is uſual to ſuffer the inhabitants of a country conquered to poſſeſs their own laws, unleſs they are abſolutely neceſſary to be abrogated, for the ſecurity of the conquering ſtate. And ſimilar is the opinion of *Puffendorff*.

Would it be for the ſecurity of the conquering ſtate to introduce ſo dangerous, ſo total, ſo unneceſſary a change: to alter the whole courſe of their law of property, by introducing the law of England to them, a peculiar law of deſcent, differing from all other; intricate and complex modes of conveyance; a new foreign unknown law; its very language unknown to them; by which thoſe rights which have been the ſubject of contract muſt be deveſted; owners under a fair title diſpoſſeſſed of their eſtates; ſettlements in conſideration of marriage overthrown, for want of the forms eſſentially required in our law.

That the introduction of the Engliſh laws would make great confuſion of property.

That no more can be meant than that civil and criminal juſtice was to be eſtabliſhed according to the laws of England for the good order of the ſtate.

I conceive nothing more can be meant than that civil and criminal juſtice according to the laws of England were to be introduced, for the puniſhment of public offences, and the redreſs of private wrongs; and as far as might be for the prevention of both, in which the mode of trial, of conviction, and the whole legal proceſs, is the common benefit to all.*

The lenity and excellence of our criminal laws is known throughout the world: More had been burthenſome; theſe were expedient and neceſſary.

Mr. *Alleyne* has compared the ſituation of this country with the other dependencies of the crown, particularly with Ireland.

It is true my Lord *Coke* held an idea of the laws of Ireland being eſtabliſhed there by an Iriſh parliament, but in this he was ſingular; nor do I think the idea of their having been eſtabliſhed there through the medium of an Engliſh colony is leſs uncommon, or promiſes more ſucceſs.

In *Calvin*'s caſe, before the chancellor, and all the judges, the caſe of Ireland is put as one of the conquered countries, and the title of *Henry* the ſecond was accordingly King of England, and Lord of Ireland, *&c.* diſtinguiſhing between the title by right of conqueſt and his title as King of England. And King *John* gave them laws as a conqueror, and not by act of parliament, and this plainly appears in *Ventris*, in the caſe cited by Mr. *Alleyne*, where it is expreſsly laid down, on the authority of three of the judges, that Ireland was a conquered country, and in King *Henry*'s time remained governed by its own laws, and ſo continued till his ſucceſſor, King *John*, in the twelfth year of his reign, by charter, and not by act of parliament, introduced the Engliſh laws.

That King John gave laws to Ireland as a conqueror.

V. Calv. caſe 23. Sed. v. Tyrrel Juſtice contra in that caſe.

But if your Lordſhip had found that even by act of parliament the laws of England had been introduced into Ireland, would the leaſt inference have followed that the King alone, by his legiſlative authority over a conquered country, could not have introduced them, or others, if he had ſeen expedient?

Wales and Berwick diſtinguiſhed from Grenada, being claimed as parts re-united to the crown of England.

Neither Wales nor Berwick upon Tweed do, as I conceive, apply to the preſent queſtion. They were not pretended to be holden in right of conqueſt, but as immediate fiefs under the crown of England, on the terms of the ſame feodal protection

* Lex Angliæ eſt lex miſericordiæ.

protection and obedience by which England itself was then held, and as members re-united to the entire original fief; [700] for that was the claim, whatever was the fact. Nothing like this can be dreamed concerning Grenada; no dependance on England or Great Britain till the late conquest. And by all the difference between what is claimed as a re-union and what can only be claimed as a new acquisition, by right of arms, the cases differ.

The colonies distinguished, as being settled in uninhabited countries.

Indeed, not relying on this, it has been thought necessary to endeavour a comparison between the case of this island of Grenada and the American colonies, of which, in general, the rise is known to have been from new discoveries of uninhabited countries, in which the discoverers were encouraged to settle by charter from the crown. No pretence of conquest: They could not live without laws; they could find no laws in an uninhabited country; what laws should they have, then, but the laws of England?

That in a country already settled with different laws the English laws cannot enter as into a vacant possession.

But is this the case of a country already settled, where they find a people and laws? Will the laws of England expel those laws already established, fitted to the circumstances of the place, known and familiar to the inhabitants, to pass themselves into a country where they will be strangers, and for which they are not locally adapted?

Is it possible that British subjects, coming into a country where there are other laws, should carry the British laws with them thither, and not be governed by the laws of the country to which they are gone? Can it be supposed of a British subject going to Hanover, for instance?

That the appellant jurisdiction reserved to the King in council has never been called in question till now.

As to the circumstance of an appeal to the King in council, as I do not think it necessary to lay any particular stress upon it, it may suffice to say, when the crown granted the charters under which the settlements were made, it was competent to the crown to prescribe the mode of appeal, which, in some form or other, by the royal prerogative, and for the benefit of the subject, necessarily lay in all the variety of disputes concerning the rights of the colonies. Narrowly as prerogative has been looked into, never has this branch been questioned, as not legal and constitutional.

When a writ of error shall be brought before this court, to reverse a judgment given in the colonies, or a re-hearing moved, or by what name shall I call it, to examine in this court a decree in council, then will be the proper time for this question; but I believe that time will never arrive. They will look to that jurisdiction as they always have done:

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They will find that redreſs which never yet has failed them. It would be a conſiderable acquiſition to the buſineſs of this court if your Lordſhip were to ſit here to exerciſe that appel-
[701] lant juriſdiction upon writ of error from the plantations, or in whatever form, for the practice is unknown to our books as much as the theory was to me till this day, in which ſo much ingenuity and argument has been employed to raiſe it.

And here I cannot help obſerving, that it is a great change in the language of America to inſiſt as they have done, and do, that the parliament of England has no right to tax them, but that they derive their conſtitution from the King only; and now to ſay, in this cauſe, that the King has no power over them but as the head of the Britiſh conſtitution.

That the King did not waive his right of legiſlation over the conquered iſland of Grenada till an aſſembly could be called; for that in the mean while it could not be out of the King, the body into which it was to be tranſmitted not being in eſſe.

But in this caſe, if the King by conqueſt had a legiſlative authority over Grenada till the aſſembly could be called, he has waived it. It is not ſaid he has parted with it, (for how could it, when there was no body to take it) but he has waived the right.

I own, by what I can underſtand of the books, I have no idea of the poſſibility of the crown waiving a right. It muſt be more or nothing; it muſt be transferred to ſomebody elſe, or it remains in the crown; for in the crown is no laches, no negligent abandonment, leaſt of all in ſuch a point as this, ſo eſſential to order and good government.

But, not excepting to the meer term, at what period, to whom? To the aſſembly if to any body, for that is the condition of the grant. That when the ſtate and circumſtances of the iſland ſhall admit the calling of an aſſembly they ſhall be called, and ſhall meet and make laws; in conſequence of which legiſlative power tranſmitted to him by the crown, and to be exerciſed by them, the King will *then* depart from his right of taxing them by his ſole prerogative without an aſſembly. But this aſſembly did not meet till *after* the patent to the governor for raiſing this impoſt; they were therefore, liable to the impoſt; and it was *eſtabliſhed* by the *proper* and *only* authority *then* in the iſland long before the aſſembly *did* or could meet.

I truſt,

I truſt, therefore, the court will think from the principles of reaſon and juſtice, that the proclamation for calling an aſſembly was, both in the words and intent of it, and in the neceſſity of the thing, executory; that the duty of four and an half per cent. was not executory, but immediate, and by legal authority, by virtue of the patent. And that it could not be meant that the calling of the aſſembly, under the authority and by the voluntary grant of the crown, ſhould defeat the duty firſt legally impoſed by the ſame authority, and therefore that the plaintiff is not entitled.

That the proclamation was executory, and the impoſt veſted as it were in the mean while by the patent.

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Mr. *Alleyne*, in reply—It is not to be wondered that I ſhould have expreſſed myſelf inaccurately; but ſo I certainly muſt, ſince I appear to be ſo much miſunderſtood by Mr. *Wallace*; the whole tenor of whoſe argument has been calculated to meet a ſuppoſed idea of mine, that the laws of England were introduced into Grenada ſolely by the proclamation of 1763. This was by no means the object of my argument.

Replication.

I contended that the proclamation was a recognition of the right of the inhabitants of Grenada, as Britiſh ſubjects, to be governed by the laws and conſtitution of England; of the practicability of reducing that right to practice, and the reſolution of bringing in all its parts into actual execution as ſoon as poſſible: Therefore I cited the caſe of Ireland, and upon authorities, I hope, of more weight at this day, than *Calvin*'s caſe: And I did infer that Britiſh ſubjects, ſettling in a conquered country, conquered by the arms of a King of Great Britain, carried with them their own laws and privileges; and that the moment the crown recognizes a colony of Britiſh ſubjects to have been ſettled, from that inſtant it engages its authority for ſecuring to them all the rights and exemptions belonging to that character. And I thought I had proved that the practice of the crown had been conformable to this principle.

That the proclamation recognized rights of Britiſh ſubjects, and provided for the execution of them.

That Britiſh ſubjects recognized as a colony have all the rights of the original conſtitution.

But, to meet Mr. *Wallace* upon his own ground, who aſked, ſuppoſing the crown entitled to exerciſe taxation over the inhabitants of Grenada, who were there, or ſhould reſort thither, indiſcriminately, by right of conqueſt, how the crown had parted with this right, I acknowledge not

That if anterior to the proclamation the crown had a legiſlative authority

over the inhabitants and Britiſh ſubjects reſorting to Grenada, that authority was renounced and given away by the proclamation.

properly

properly waived it? I anſwer, let us ſuppoſe for a moment that, anterior to the proclamation, the crown, as conqueror, had a power to raiſe a permanent tax on the then and future inhabitants of Grenada; and had the *vitæ necisque poteſtas*, the legiſlative authority in the fulleſt ſenſe, when the crown declares they ſhall have a legiſlation of their own, and in the mean while be governed by the laws of England, I contend from that moment the King had parted with the right, ſuppoſing he had that right till then of impoſing upon them himſelf, by his ſole authority, a permanent tax. And I contend that the patent to Governor *Melville* repeated and enforced the grant, taking it as ſuch for the preſent, in the moſt ſolemn manner.

In vain would it be argued that theſe grants of the laws of England were executory, and therefore might be ſuſpended: Proclamations and patents ſuch as theſe are not of ſuch a flimzy nature, to be ſuſpended, that is, virtually repealed, to be granted to-day, and reſumed to-morrow. And if this cannot be denied, then the Engliſh laws were the laws of Grenada, either by prior right, or, as I have been willing to argue, ſince Mr. *Wallace* has laid ſo much
[703] ſtreſs upon the executory nature of the proclamation, by actual, immediate grant. And there is no one principle of Engliſh more decidedly clear than that the crown cannot, by its ſole prerogative, enact a law.

That principles of equity, from the conſideration of the other iſlands, would not maintain the impoſt upon Grenada, becauſe this is under claim of prerogative, theſe by act of their own aſſemblies.

It was next argued, that principles of equity require this duty to be impoſed; becauſe it is recited in the patent of the 20th of July that the Leeward Carribbee iſlands pay it.

To this there is firſt one general and concluſive anſwer—whatever equity, wiſdom, or expedience there may be in the meaſure, it muſt be executed by legal means. The propriety of the object can never, in a legal view, ſanctify the means taken;* but a particular anſwer is likewiſe ready.

The firſt place in which this tax was ever thought of was the iſland of Barbadoes; but there not impoſed under claim of prerogative, but by a national act of their own internal legiſlature: And it was a grant for ſpecial purpoſes expreſſed, of building their priſon, their courts of juſtice, their fortreſſes, and keeping them for the future in repair. And farther, in conſideration of the confirmation of their

* Nil cuiquam expedit quod non per leges licet
Nil utile aut honeſtum quod legibus contrarium.

titles

titles which had been loſt, or were become obſcure in conſequence of the confuſion of the iſland during the troubles of the preceding reign of *Charles* the firſt.

I muſt be particular in ſtating this. The firſt grant of Barbadoes was to the Earl of *Carliſle* from *Charles* the firſt: He divided the lands by ſubinfendation amongſt various purchaſors.

During the troubles Lord *Carliſle* abandoned the iſland; the protector *Cromwell*, took poſſeſſion, and made ſeveral grants of different parts of it; on the reſtoration the King made a new grant to Lord *Willoughby*, of *Parham*. In conſequence of theſe ſeveral changes of property, and the violent and ſudden revolution of affairs in the iſland, much confuſion aroſe. The creditors of Lord *Carliſle* aſſerted their claim; the grantees of *Cromwell* held by very uncertain claims; and Lord *Carliſle*'s creditors ſucceeding would neceſſarily have defeated the grantees of Lord *Willoughby*. To ſettle theſe diſputes the crown agreed to purchaſe the whole; and for the purpoſe of raiſing a fund to diſcharge Lord *Carliſle*'s debts, and the other purpoſes already mentioned, this duty was granted by the aſſembly of Barbadoes.

Your Lordſhip will find theſe particulars in the act ſet forth on the record, but more fully in Lord *Clarendon*'s anſwer to the ſeventh article of his impeachment, which is [704] in the continuation of his hiſtory, lately publiſhed.

I dare ſay Mr. *Wallace* will find the principles of equity not very cogent on Grenada, in a compariſon with Barbadoes in this particular.

As to Nevis, Montſerrat, and Antigua, with the Engliſh part of St. Chriſtopher's, the ſame obſervations, in great meaſure, will occur. The grants of four and an half per cent. in theſe iſlands were likewiſe on ſpecial purpoſes, and were granted by their own aſſemblies.

As to the part of St. Chriſtopher's conquered from the French, and ceded by the treaty of Utrecht, the very ſame claim was made in the reign of Queen *Anne*, aſſerted by an act of privy council, and exemplified under the great ſeal, the ſame which is now made upon Grenada, of impoſing this duty by prerogative. The act was withdrawn; the duty never collected; the people warmly oppoſed; adminiſtration yielded, and conſented to take it by act of aſſembly; a circumſtance incredible, if they had not been convinced that the meaſure was unwarranted by law, and

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the oppoſition juſt. And when the duty was finally granted to the crown it was not only by aſſembly, but under terms.

So much, therefore, for an argument built on the principles of equity, comparing the impoſition of this duty by act of prerogative in Grenada with the ſame duty in the other Leeward iſlands, by act of their own aſſemblies.

[Mr. *Wallace* obſerved the duty was impoſed in 1703.

Lord *Mansfield* ſaid it could not vary this queſtion an *iota*: That the cauſe was put upon its proper footing; that he took it as admitted the duty was laid on in 1703, and added, it was raiſed long before the act, which was in 1727.

Mr. *Wallace* ſaid the whole duty in that time amounted to but 30l. Mr. *Alleyne* obſerved on this that 30l. raiſed in 24 years was a ſtrong argument that hardly any planter, at leaſt any conſiderable planter, had ſubmitted to pay.]

That not only as to the ſubſtantial difference in the authority levying, but in the ability to pay, Grenada was diſtinguiſhed greatly to its diſadvantage,

Mr. *Alleyne* continued—But farther, as to equality, beſides the reaſon given, common obſervation will ſhew in what manner theſe new ſettlements in the iſland have been made. Large intereſt on loans payable yearly out of their eſtates. So far from additional burden, it might have been hoped from government that they would have aſſiſted this infant colony, always much below the other ſettlements * when in the hands of its former poſſeſſors; and now, if this impoſt ſhould prevail, miſerably below indeed.

* being a new ſettlement.

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But, not to want an argument, which cannot readily happen to the ingenuity of the learned counſel who ſupports the defendant's cauſe, if it be true that the proclamation in words appears fully either a conveyance or recognition of all the rights of Britiſh ſubjects to the inhabitants who were in Grenada, or ſhould reſort thither; and that the iſland is not under circumſtances which ſhould make a conſtruction to ſupport the impoſt favourable in equity, independent of higher conſiderations ſtill againſt ſuch a conſtruction; yet Mr. *Wallace* argues that it muſt mean this, that there ſhould be ſuch an impoſt; becauſe if there is not, the enjoyment of the laws of England is ſecured to the inhabitants, which will be an unwiſe and cruel conſtruction. I believe Mr. *Wallace* is the firſt politician who ever thought that waiving the claim of conqueſt, and inſuring to the conquered the bleſſings of a free government,

That communicating the benefits of a free conſtitution was never thought cruel in a conqueror, and ſeldom unwiſe.

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was cruel. And how would it have aſtoniſhed the wiſdom of imperial Rome to hear that it was unwiſe!

Nor do our own writers omit to admire the policy of King *Edward* the third, in planting a colony in Calais, and of courſe communicating to that place the wiſe and beneficial laws of England, ſo firm a ſupport of public order; ſo productive of ſecurity and happineſs to every individual living under them.

I have the authority of the great and excellent Sir *Matthew Hale*, affirming this to have been his practice in his conqueſts, I have already obſerved, both in Scotland and Wales, and applauding it highly. At leaſt this objection may be obſerved till the inhabitants of Grenada think this benefit a burthen, and complain of it as ſuch. Mr. *Campbell*, certainly, for his part, does not complain, for he comes to claim the benefit of thoſe laws, as his deareſt birth-right: And it will be ſingular if it ſhall happen that any eloquence ſhall perſuade any individual of Grenada that it is a reproach to the conquered to partake equally in thoſe laws and conſtitution which are the glory and happineſs of the conquerors, and the admiration of mankind; the Engliſh laws: And if they ſhould rather chooſe to ſink again into the ſtate of a people under the hand of conqueſt than enjoy that equal liberty which aboliſhes all invidious diſtinctions between the conquerors and conquered.

That the inhabitants appeared not to have any ſuch objection, nor could it be ſuppoſed, and certainly not the plaintiff.

The particular cruelty, however, which Mr. *Wallace* ſuggeſts is this; eſtates have been ſettled, contracts made, and things done with a view to the regulations of the law then prevailing; to alter this by the proclamation would haraſs and diſappoint the parties, and annull their deeds.

Nothing can be more fallacious than this; for if at any time poſterior to the proclamation any deed, contract, ſettlement, or any other matter of law had been brought into litigation, and appeared to have been tranſacted in conformity to the French laws, previous to the proclamation, and while the laws of *France* were in the iſland, thoſe laws would have been adopted, and the inſtrument would have had its intended effect according to them; and the law of England would have taken notice of them, as it does of all foreign laws, where contracts are made under the authority of thoſe laws; exactly as in caſes which have happened in chancery and in this court—All mercantile contracts have this effect: And ſo it is allowed, as a ſettled rule of law, in

* 2 P. W. 429. Ter. Paſch. 1728.

in the caſe of *Freemoult* and *Dedire*. * The line, therefore, is ſufficiently broad, and, at the ſame, ſufficiently clear. And defined from the proclamation; the Engliſh ſhall prevail as to all ſubſequent tranſactions; till the proclamation, the French laws.

But in ſupport of his general propoſition, concerning the nature of the rights of a conquered people, Mr. *Wallace* has cited two illuſtrious names, names which I ſhall ever mention with the greateſt reverence. Yet I have ever wiſhed to argue from the ſentiments of writers who have ſurmounted prejudices, and reaſoned liberally, not devoting myſelf to the greateſt name with an unlimited attachment. Great and extenſive as their genius, their learning, their application was, it is well known to thoſe who are converſant in their writings, that they have adopted in moſt places the poſitive conſtitutions of the imperial law, as abſtract general truths of nature; hence in moſt places their reaſoning is ſomewhat too confined for the univerſality of the ſubject, and in many liable to exceptions. Far be it from me, however, to ſpeak irreverently of them; they have broken the ground, though they diſcovered not all the treaſures of the ſoil; and though they might in ſome inſtances be miſtaken in the true quality of the ore itſelf. And to their great labours the refinement of public law is originally owing.

With reſpect to the inſtances of prerogative intended to have been adduced to juſtify this I find only one mentioned, which, ſurely, cannot be ſuppoſed to ſupport it in the compariſon; the ſeizure of the Maſſachuſet's charter 1683, in the reign of *James* the ſecond. No man will wonder at the violence: The impriſonment of the ſhops; the campaign of *Jefferies*; the ſeizures of every charter left by his brother were then as acts of ordinary juſtice at home. And when the city itſelf was not ſafe, we ſhall not wonder the Maſſachuſet's bay was invaded.

Mr. *Wallace* has not choſen to argue the right of ultimate judicature in this court and in the Houſe of Lords.

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He leaves me, therefore, at large with the obſervations made on that point; and with a conceſſion thus far at leaſt that there is no argument from experience to the contrary.

The laſt ſtreſs, on the cloſe of the argument, was placed on the expedience and neceſſity of the power of legiſlation continuing in the crown till the legiſlature of the iſland actually ſat.

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This argument would go far indeed; it would ultimately prove that in the receſs of parliament the crown is arbitrary legiſlator of this empire, and may impoſe a permanent tax on Great Britain itſelf.

But the conſtitution has happily provided a power in the crown, by which it is enabled to obviate ſudden emergencies; or in caſes not provided, bills of indemnity have always confirmed, by an act of ſtate, what was required as an exertion of extraordinary power.* *Ne quid detrimenti caperet reſpublica*; affirming and ſtrengthening the general rule by the very means uſed to protect the neceſſary deviation, and which nothing leſs but ſuch a ſolemn judgment of the collective body of the ſtate allowing its neceſſity, can protect.

So in Grenada, from the firſt proclamation in October, 1763, to the ſeſſion of the aſſembly in 1765, the crown had ſimilar powers for obviating ſudden emergencies, amongſt the number of which powers a permanent tax cannot be eſteemed.

I have now had the honour of ſubmitting to your Lordſhips what conſiderations occurred to me in reply to Mr. *Wallace*'s argument, of which it would ill become me to ſpeak with diſreſpect; I ſhall only ſay that it appears fairly anſwerable in the manner I have ſubmitted.

And now, I truſt, I may take leave of this ſubject by congratulating my client (for if better arguments were to have been found Mr. *Wallace* had diſcovered them) with being ſecure, and ſtanding on a ground which will warrant my application to the court for judgment for the plaintiff.

CURIA ULTERIUS ADVISARE VULT.

[Note, After the argument Lord *Mansfield* ſaid, the cauſe has been very well argued, There is one thing, however, which neither of you have defined preciſely. Have you any idea a colony can be ſettled by Britiſh ſubjects without the intervention of the crown?

Mr. *Alleyne*—If ſubjects ſettle on an iſland uninhabited, [708] for inſtance a ſhipwrecked crew, they cultivate, they inhabit. If the crown claims this iſland as a ſettlement by its own ſubjects, they have a right to ſay, give us a conſtitution, govern us by the laws of England or not at all. If it demands

* Salus populi ſuprema lex eſto.

mands a tax they have a right to ſay, no: Till it be demanded legally in a conſtitutional mode.

Lord *Mansfield*—All colonies have been eſtabliſhed by grants from the crown—I do not mean it as material to this queſtion, but that it ſhould be underſtood no colony can be ſettled without authority from the crown. As to the doctrine of thoſe caſes in *Salkeld*, I do not think much of it; it is very looſe.

Mr. *Alleyne*—To meet the whole argument in the cauſe I at firſt ſtated, that this colony was ſettled by authority of the crown.

Lord *Mansfield*—I underſtood you ſo; let it ſtand for another argument.]

Afterwards in the ſame term on the 5th of May 1775, it was argued by Mr. *Macdonald* for the plaintiff, and Mr. *Hargrave* for the defendant, nearly to the effect following:

Mr. *Macdonald*—This is an action brought againſt a cuſtom-houſe officer in the iſland of Grenada for money had and received. The object is to recover a ſum of money levied by the defendant as a duty, and paid by the plaintiff; but paid, he contends, without legal conſideration.

There is a ſpecial verdict, which, after what has been argued ſo fully and with ſo much perſpicuity, it will be only neceſſary for me in point of form to ſtate very ſhortly.

The jury find the iſland of Grenada in the Weſt Indies, was in the poſſeſſion of the French King, and conquered by the Britiſh arms; that there were ſeveral cuſtoms paid and payable to the French Monarch, upon goods exported and imported into the iſland. They find the ſurrender of the iſland to the King of Great Britain, in February 1762; in the articles of which the inhabitant are recognized as Britiſh ſubjects, and the ſame protection and privileges granted as to the other colonies of America. And that they ſhould not be obliged to bear arms againſt his Moſt Chriſtian Majeſty, while the then war continued, and the fate of the iſland remained undetermined; that they ſhould take the oath of allegiance; that they ſhould be governed by their own laws, until his Majeſty's pleaſure ſhould be further known.

[709] They find the treaty of the 10th of February 1763, by which the French King renounces Nova Scotia, Canada, and other countries to the King of Great Britain; and in 1763, the King of Great Britain, by his proclamation, aſ-

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ſuring the inhabitants of his new conqueſts, and amongſt them Grenada, of his paternal care; and that he has given order to his governors that, ſo ſoon as may be, they ſhall call aſſemblies, with power to the governor, with conſent of the council and repreſentatives ſo aſſembled, to make laws as near as may be conformable to the laws of Great Britain: In the mean time all perſons may confide in his Majeſty's royal protection, and the benefit and enjoyment of the laws of England. Then the proclamation proceeds, and conſtitutes a council to determine all civil and criminal cauſes according to the laws of Great Britain; the jury find a ſecond proclamation in March 1764, reciting the benefit of a ſpeedy ſettlement of the iſland of Grenada and the other iſlands; directing a ſurvey of lands, and a certain number of men and women to be maintained on the lands under penalties; they further find that his Majeſty, by his letters patent in April 1764, made *Robert Melville*, Eſq; his governor in the iſland, in the room of Governor *Pinfold*, to act under inſtructions given and to be after given, ordering him as ſoon as ſituation and circumſtances will admit to call aſſemblies, with full power to make and ordain laws, ſtatutes and ordinances, for the welfare and good government of the people of the iſland of Grenada.

Afterwards by letters patent the 20th of July, 1764, they find a tax impoſed by claim of prerogative in the ſame manner as in the iſland of Barbadoes the 20th of July 1764, of four and an half *per cent.* on commodities exported; they find the defendant levied the tax, and plaintiff paid.

The verdict farther finds the action brought by conſent of the attorney-General.

I am humbly to contend before your Lordſhip, firſt, that no ſuch tax could be impoſed by prerogative.

And ſecondly, that admitting the crown by prerogative was intitled to have impoſed ſuch a tax, his Majeſty by his proclamation of October 1763, prior to the inſtrument for raiſing ſuch tax, has waived that right.

Your Lordſhip finds by the ſpecial verdict that the iſland of Grenada was conquered by the Britiſh arms in February 1763, and by treaty ſurrendered.

I take it to be clear that the ſovereign of the ſtate conquers not for himſelf perſonally, but for the ſtate: And according to this I have a great authority, which I ſhall beg leave to cite to your Lordſhip.

Vattell—He ſays, it is aſked to whom the conqueſt belongs, the Prince or ſtate? This queſtion ought never to have

B. 3. § 102.

have been asked. Whose are the arms; whose the expence? If he conquered at his own, yet whose blood is shed? If he used mercenary troops, does not he expose his state to the resentment of the enemy?

I collect from the same author, who lays it down as a principle of the law of nations, if an uninhabited country be planted by British subjects, all the English laws which are the birth-right of every subject are there immediately; but if it be a conquered state which has laws of its own, those laws remain there until others are provided.

Lord *Mansfield*—Does he quote any authorities?

Mr. *Macdonald* continued—After a country is become part of the state he seems to take it, as a principle that it partakes of its constitution; and therefore not to think authorities necessary.

Lord *Coke*'s reports—*Calvin*'s case—That the King may alter or change the laws of a conquered country, but till he doth the former laws remain. This can only mean *flagrante bello* that he may do it; or in countries when the whole legislation is in the King.

Salk. 411. the difference of the facts in that case, prevents my quoting to your Lordship the decision itself; but upon the general principle what the court laid down was thus: In the case of an uninhabited country, all laws in force in England are in force there; but Jamaica having been a conquered country, and not found parcel of the British dominions, the laws of Jamaica stand in power till others are appointed.

[Lord *Mansfield* said upon this, the opinions are very loose and with a total ignorance of facts: Jamaica was conquered by *Oliver Cromwell*; I believe none of the conquered subjects remained.

It is absurd, that in the colonies they should carry all the laws of England with them; they carry only such as are applicable to their situation: I remember it has been determined in the council: There was a question whether the statute of charitable uses operated on the island of Nevis: It was determined it did not; and no laws but such as were applicable to their condition, unless expressly enacted.]

I would farther remark, that where the words "king "or sovereign" in treatises of general law are introduced, I would understand them according to the nature of the state of which they are spoken, or to which to be applied.
[711] Those words of *Gratius*, *Rex et regnum*, translate them into Dutch, I should call the states general the king or sovereign;

reign; and if into Engliſh "king and parliament." I don't commend the formal part of the law of England, but the legiſlative part goes thither. If I am right in my idea of the law of nations, it confines the power of the conqueror, merely within the time of conflict, and whilſt the ſword is the only law to which either ſide can reſort; but when a country ſurrenders to the Britiſh arms, when military government ceaſes, what can come in but the law which governs every particular ſubject; the legiſlation of Great Britain? When the ſword is once ſheathed, I cannot conceive of the exiſtence of any other power but the legiſlative power, the conſtitutional law, or government. The forms of their conſtitution may and muſt remain till the executive power diffuſes thoſe which obtain in his other dominions. I take it laying on impoſts without conſent of parliament was one of the great points on which the revolution turned; and another revolution much earlier; and *Magna Charta*, and almoſt innumerable ſtatutes. When we talk upon this ſubject the preſent ſtate of things is always out of the queſtion, I ſhall therefore diſcuſs the topic freely.

Lord *Coke* in his treatiſe on the ſtatute of talliage ſays, no ſubject ſhall have money levied on him without conſent of parliament; and after goes farther and ſays, no man, that is I conceive who can call himſelf a Britiſh ſubject, though in another country, ſhall be taxed without his repreſentatives.

Here upon the principle of the law of conqueſt, by what reaſon can the power extend over the conquering people themſelves; ſhall thoſe who conquered with him ſhare the fate of the conquered? It would be repugnant to every principle of reaſon, and to every writer upon the law of nations.

Vattell, page 92, a principle of the law of nations, that wherever a nation ſettles and eſtabliſhes a colony, that colony becomes a part of the dominion, and all that is ſaid of the parent ſtate applies to the colony.

Grotius ſays, that ſubjects ſettled in a country carry the ſame privileges they left behind them.

What is the difference between ſettling in a country uninhabited or inhabited? As to the executive power they muſt wait the directions of that power; as to the legiſlative the law is the ſame to them as that which governs me, and every man who hears me.

1624, March 17th, 25th, a bill brought into council.—It was that which reſtrained the fiſhery.

[712] The journal of the houſe ſays—The ſecretary ſaid this is a conquered country, 'tis the King's; you have nothing to do with it: The parliament held they were part of the dominions of the ſtate; they ſay the penalties and forfeitures are void, as not being by authority of parliament.

Sir *E. Coke* ſaid, how not ſubject to parliament, why they paſs by the King's letters patent?

To be ſure it is true the King cannot grant penalties and forfeitures, for that would be impoſing a tax under colour; and it is proved demonſtrably the prerogative of the crown had not that power over them.

[Lord *Mansfield*—I take it thoſe penalties were recoverable here.]

The conſequence in the very next charter was a grant of a free fiſhery.

In the charter granted to Mr. *Penn* there is this remarkable clauſe, that no impoſition ſhall be levied on the colony without conſent of the proprietor and aſſembly, but by act of parliament in England. Calais was a colony.

[Lord *Mansfield*—Was Calais a colony? It was ceded by the treaty of Bretigny.]

Lord *Vaughan* 290 ſtates writs of *non moleſtando*, iſſuing out of chancery to the mayor of Calais, and divers writs of error.

With regard to the other parts not colonized, all mandatory writs iſſued hence as they might do to any part of the King's dominions. Lord *Vaughan*, but without precedent, ſays, writs of error might iſſue to Ireland; I don't find however that remedial writs ever iſſued, but mandatory writs.

The conqueſt of Wales, by *Edward* the firſt, has already been very fully conſidered, and I find no reaſon to depart from the ground then taken. The language of that King was that every part of his dominions not in his poſſeſſion was feudatory to him, *quia in proprietatis dominium totaliter converſa et tanquam pars corpori annexa et unita.*

From the conqueſt no inſtance of any but the legal authority exerciſed.

The conqueſt of Ireland is the next. *Co.* 4th *Inſt.* ſays that *H.* 2. ordered the laws kept in England to be obſerved
[713] in Ireland, and that he ſent a tranſcript. *Leland* conſidered this as merely declaratory of the neceſſary conſequences of the laws already received.

In *Harris's Hibernia*, from the records, a grant of *Felix Stephens*, with the wardſhips: This could not have been conſtituted

conſtituted without manner of recovering according to the laws of England.

Lord *Holt* ſays, which concurs with this argument, it was not the mere conqueſt, but the ſubſequent ſettling, which let them into the ſame rights with the other ſubjects.

In Mr. *Petit*, 80, to ſhew the commons of England ſat ſeparate before the 37 *H.* 3. a regiſter is cited.

In the 28th of *Henry* the third, by the queen regent to the archbiſhops, biſhops, &c. of Ireland, to aſſemble. Therefore Ireland, Wales, Scotland, all partook of the conſtitution; all were and are exempt from taxation by prerogative. I have ſpoken already of Pennſylvania; the ſame argument will apply to the other colonies; the ſame to Grenada.

But ſecondly, even if the colonies are not exempt from ſuch taxation by prerogative, except the King waive and renounce it, has not the King barred his right?

The capitulation requires liberty of ſelling lands. They are allowed to ſell them to Britiſh ſubjects.

They deſire the laws of Antigua and St. Chriſtopher's, which, except a few local ordinances, are the ſame as in England, and they are promiſed in anſwer that they ſhall be conſidered as Britiſh ſubjects.

7. October, 1763, That all perſons may rely on the royal favour of Great Britain till the aſſembly can be got together, courts of juſtice are to be erected, with authority over cauſes criminal and civil, as near as may be to the laws of England.

Then in March it takes for granted they have relied on the encouragement and aſſurances of the former proclamation, and a ſurvey and diſtribution of lands is ordered.

Then by the patent creating Mr. *Melville* governor of Grenada and the other iſlands he is ordered to call an aſſembly as ſoon as poſſible, for the purpoſe of making laws. I can ſee nothing ſtronger than the language of the proclamation.

That proclamation was ſaid to be executory. "The [714]
"calling an aſſembly is merely diſcretionary in the gover-
"nor." Shall the effect of the proclamation be ſuſpended on that event? Muſt we conſtrue "I give the law of "England until you have an aſſembly" to this, "You ſhall "not have the laws of England till you have an aſſem-"bly."

The legiſlature of the colonies might make ſuch addition of local ordinances as they ſhould think fit.

One of the benefits is this proclamation.

On what authority was the proclamation? The King had no right to levy the tax 20 July 1764, unleſs under the patent in April. We need only compare the dates.

But it is ſaid there is no law at all. If the King has not, who has? I anſwer, the ſupreme legiſlative power of the ſtate. The ſtamp-act prevailed at that time.

It is a principle in contracts between political bodies contracting, ſtill more neceſſary than between private perſons, that the grant once made, can never be recalled, and cannot be releaſed till the conditions of the contract are broken by one or the other.

This compact is what every ſpeculative writer requires in his cloſet; what practice requires in all ages between nations; and which mutually and irreverſibly bound both parties.

As to the iſland of St. Chriſtopher's, the opinion of Lord *Hardwicke* and Sir *E. Northey* is obſervable.

Argument ab reſponſis prudentum.

They certify they have prepared a draught of ſeveral laws of four and a half per cent. on the conquered part of St. Chriſtopher's, as far as they thought the condition would permit, conformably to the proclamation 1703, which was in the time of the war.

That Sir Philip Yorke and Sir Clement Worge ſaid that if Jamaica be conſidered as a conquered country the King can impoſe a tax by prerogative, otherwiſe not.

Sir *Philip Yorke*, 22, and Sir *Clement Worge*, attorney and ſolicitor-generals, were aſked how far the King could, by his prerogative, levy a tax on the iſland of Jamaica. If Jamaica is ſtill to be conſidered as a conquered country, the King has that right; but if it be in the ſituation of the other iſlands the tax cannot be levied, unleſs by act of aſſembly, or of Engliſh parliament.

[Lord *Mansfield*—I believe your report is wrong.]

* It was ſaid the tax was expedient; if it is meant it is expedient to them to have their money taken from them (but I can't conceive how that ſhould be) the tax is very expedient: But I have no doubt the court will conſider whether it is lawful, and upon that ground reſt, with good expectation, the cauſe of the plaintiff.

[*715]

[Lord *Mansfield*—They allow the validity of the letters patent of 1764, ſo far as they annul the poll duty; this comes in lieu of it.

Note, It ſeems they were never paid after the conqueſt, and there was an interval of two years.]

Mr.

Mr. *Hargrave*, on the other ſide—When I conſider the great importance of the queſtion which ariſes on the caſe, and how ably and learnedly it has been argued, I feel a great difficulty, and wiſh the burthen of anſwering ſo learned an argument had been left to an abler perſon, in a queſtion of ſo great importance. However, I am the leſs anxious ſince it is certain that the law muſt decide, and not the abilities of the ſpeaker.

The two queſtions in the caſe.

There are two queſtions; firſt, Whether the King has a right to levy impoſitions on the iſland of Grenada by prerogative?

2dly, Whether if there be ſuch a right, it was not, in this caſe, barred by the proclamation?

It is not neceſſary to argue what are the rights over a conquered country. To deſtroy, to kill, to commit depredation, are what I ſhall not argue. But the making of laws I apprehend to be one certainly. Expreſs ſtipulations are undoubtedly to be rigidly obſerved: But where there are none the conquered country becomes ſubject to the legiſlative power of the conqueror; not liable to any reſtrictions but thoſe of natural juſtice and equity.

That the right of making laws is one eſſential right of conqueſt.

This will not go far towards deciding the general queſtion, in whom that legiſlative power reſides.

I apprehend the authorities concur in attributing that power to the King, as a part of his prerogative.

That this is in the King.

Your Lordſhip obſerved the authorities were ſo confuſed as not much to be depended on. True, as to the hiſtory of facts; but as to the principles of law they are clear.

The earlieſt is *Calvin*'s caſe, 7th *Coke*, 17. A diſtinction between counties veſting by conqueſt and deſcent. The doctrine imputed to the judges by my Lord *Coke* is not entirely extra-judicial.

He takes a difference between the conqueſt of a chriſtian kingdom and the kingdom of an infidel: This has been long enough juſtly exploded, but will not prejudice the reſt.

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Diſtinction in Calv. between chriſtian and infidel country reprobated; but that the principal points are not.

[Lord *Mansfield*—Don't quote the diſtinction, for the honour of my Lord *Coke*.]

He goes on—he might at his pleaſure alter and change the laws of that kingdom; but till he doth make an alteration, the laws of that kingdom remain.

When

Admitted that when he has given the laws of England the legislative power of the King folelyceases.

When he has given the laws of England his legislative power ceases, and they are only subject to the legislation of the parliament.

The doctrine so given is the opinion of all the judges, and is not entirely extra-judicial, as given in answer to what was said by counsel taking a distinction.

Sir John Wytham v. Sir Richard Ditton. 3 Mod. 159.

Before and since the revolution the same prerogative has been acknowledged in the crown. The first case 3d *Mod.* 159. *Shower's* P. Cases, 24, against the governor and council of Barbadoes, for false imprisonment. Counsel for the plaintiff argued that, according to *Calvin's* case, the King might impose laws on a conquered country, but denied that Barbadoes was a conquered country: The judgment for the plaintiff was reversed in the House of Lords.

Blanchard v. Galdy.

The next case, *Blanchard* and *Galdy*, after the revolution, *Cumberbach*, 128, the court held that the statute did not extend to Jamaica; because, being a conquered country, the laws of England did not extend to it till introduced by the conqueror or his successors.

2 *Peere Williams*, 75, said by the master of the rolls to have been determined in council, that in an uninhabited country they carry the laws of England with them. And in the case where the King of England conquers a country, the conquerors, by saving the lives of the people conquered, gains a right and property in such a people; in consequence of which he may impose on them what laws he pleases. The principle may be wrong, but not the general inference.

Doctrine in 2 P. W. that a conqueror by saving their lives gains a property in the people conquered reprobated.

[Lord *Mansfield*—It is very ill expressed in the report. The master of the rolls never expressed himself so.]

Then, as to other countries; first, as to Ireland, there are very different opinions. *Coke* holds the laws were introduced by *John*, and that *Henry* the second gave laws to them as a conquered country; * but that now no King can alter them without authority of parliament.

4 *Inst.* 304, allows *Henry* brought them in.

[*717] The opinions of Lord Coke, Sir John Davies, and Molyneux, concerning the conquest of Ireland.

Molyneux argues against the authority of the English parliament, "They were not introduced by conquest, but by "their own desires and consent." *Davies* seems to argue more conformably to historical facts, that the laws were not introduced *simul & semel*, but gradually, and were not universally prevalent till the third year of *James* the first. It is remarkable, however, though the writers are different in opinion, not one denies the introduction of the English laws

ws to belong to the King by prerogative over a conquered country, except *Molyneux*.

The next inſtance is the conqueſt of Wales by *Edward* he firſt. There is a doubt whether the firſt act was an ct of parliament or a charter. *Coke* calls it a ſtatute, ſo oes *Plowden*, 126, ſo does *Hale*; but *Vaughan* doubts it, nd *Barrington* denies it. *Vaughan* allows (and he was not prerogative lawyer) that *Edward* the firſt might inſtitute aws without parliament. P. 400. Wales.

[Lord *Mansfield*—*Edward* the firſt conſidered Wales as an ancient fief of the crown. My Lord *Vaughan* does not make hat diſtinction.]

I now come to America and the colonies there. All of them derive the whole form of their government from an exertion of the royal prerogative. Their courts of juſtice, their aſſemblies, their power of taxation, flow from the ſame ſource, however impure it may be thought. Colonies. That they flow from royal prerogative.

10 April, 1606. The King veſts the power of government in perſons who ſhall be appointed by conſent, and alſo impoſes two and an half per cent. impoſt. This was before the revolution; but even ſince there have been authorities: The caſe of *Blanchard* and that in *Peere Williams* have been always cited. Impoſt in 1606 by prerogative.

In 1686, the government of New England having been ſeized into the hands of the crown, King *James* the ſecond appoints governors to regulate taxes: They were to continue the old till other ſhould be ſettled. I ſhould be aſhamed to quote an inſtance of prerogative in *James*'s reign if not ſupported by lawyers who lived ſoon after the revolution. Tax impoſed by Ja. 2. ſupported by an opinion, after the revolution, of Ld. Somers.

In 1689 the Lord *Somers* gave an opinion, when attorney-general, in the caſe of *Uſher*, who denied the legality of the tax, and ſaid the revenue officers were liable to an action. This caſe, unleſs the difference be of taxes to continue or new created, is very ſtrong. [718]

[Lord *Mansfield*—But it did not clearly appear whether their opinion came officially or upon a private caſe.]

" I conceive Mr. *Uſher* would not be liable to an action, " at a time when the corporation was in the King's hands, " and the former government ceaſed." Lord Mansfield—That it did not appear this was an official opinion. Opinion ſtated.

[Lord *Mansfield*—They conſidered the charter, being vacated, the ſame as if it had never exiſted, and they went on without charter till 1694 or 1695.] Lord Mansfield—That the opinion went on the diſſolution of the charter.

The other opinion was, that if the judgment was good, which remained unreverſed, the tax would be good: This

was

was Sir *G. Treby*, I think. Some don't go so largely, but they make no difference between a conquered country.

[Lord *Mansfield*—You mistake: The charter being vacated, they held they were to be taxed, as the province, by commission.]

Sir E. Northey's opinion for the impost.

Sir *E. Northey*, as to the conquered part of St. Christopher's, held the Queen by commission might impose taxes; for that by prerogative she might impose laws of every kind on a conquered country,

Sir Philip Yorke and Sir Clem. Worge.

A more recent case. In the reign of the late King Sir *Clement Worge* and the then solicitor-general were consulted, whether taxes might be imposed by prerogative; their answer was, if Jamaica was to be considered as a conquered country they might.

Objection, that argument from ideal analogy will not do, nor from what prerogative should be, but what is the fact and the law.

We are not to compare the case with analogy to the English constitution. It might be more conformable to the general constitution, it might be more convenient, it certainly would be more uniform, were the colonies on the foot of Ireland; but we are not to enquire what ought to be law, but what actually is. We are not to enquire whether the prerogative is broader than it ought by that analogy, but how it really stands. If it requires restraining, that is the business of parliament.

As to the conquered part of St. Christopher's, the opinion was, the law extending to such part of St. Christopher's as belonged to Great Britain when the law was made, they cannot be subject to the law; but the Queen might, if she pleased, issue letters patent, which would be law there, and would bind conquered countries.

This was the opinion of the now chief justice of the Common Pleas when attorney-general.

[719]

By the articles of capitulation they were to become British subjects, but be governed by their own constitutions till the King's pleasure be farther known.

The great question arose on the proclamation and letters patent, whether both were executed or executory, and to what the calling of assemblies extended.

That the proclamation is not a gift, but a promise to give.

The proclamation was not a gift, but a promise to give. I insist upon it the legislative power was not transferred from the crown till there was an assembly capable of receiving it. The principal point argued last time was what I am now considering, and was then so ably argued by Mr. *Wallace*, that I think it not necessary to add any thing. The question was, whether not only the English laws passed in the

the form of adminiſtering juſtice, but the Engliſh conſtitution.

[Lord *Mansfield*—There are three inſtruments.

Proclamation.

Survey.

Commiſſion to the governor.]

Mr. *Hargrave*—I don't quote the ſecond, becauſe only regulating the lands.

[Lord *Mansfield*—It recites the proclamation, and engages perſons to come and ſettle.]

I wiſh there had been authorities clearer on the ſubject. They are, perhaps, very much weakened by hiſtorical inaccuracies; but ſtill, I ſubmit, they are uniform in their principle, and fully juſtify the defendant.

Mr. *Macdonald*, in reply—The queſtion of prerogative in the time of *James* the firſt was ſhort. *James* meaſured the underſtandings of his ſubjects by the rule of three, and found they were to thoſe of the King as the braſs ſtuds in a ſaddle to the ſtars in the firmament. Perhaps he meaſured their right to liberty and his of command by the ſame proportion.

But, as to what has been done under claim of prerogative, I conceive it to be ſtronger that it was done and revoked than if it had never exiſted.

All the other precedents talk of a conquered country [720]
without diſtinguiſhing.

[Lord *Mansfield*—*Nevis* is mentioned as one of the inſtances that the conquered country is in the power of the King; not excluſive of the conſtitution, becauſe the King has no power excluſive of parliament.]

My Lord, they would be ſubject to all the inconveniences of a double government.

[Lord *Mansfield*—Why, are they not? They are ſubject to their own acts—and are they not at the ſame time ſubject to parliament?]

Mr. *Macdonald*—My Lord, I hold that is a queſtion detached from this.

And which ever way it be held, the plaintiff is not contending it before the court; I hope ſo far as he is he has the opinion of the court on his ſide.

Mr. Juſtice *Willes*—I think as ſoon as ever the King has paſſed an act he gives up his authority, whatever it was before.

On one ſide they prayed a farther argument, on the other the judgment of the court. As being a revenue queſtion it ſtood

ſtood over. It was argued about two hours and an half. Lord *Mansfield*, immediately after the argument, expreſſed his readineſs and inclination to give judgment.

On Monday the ſixth of June it was moved for farther argument. Stood over till the Tueſday ſe'ennight.

Tueſday 14th of June.

It was entreated it might ſtand over till Friday.

Lord *Mansfield*—I don't ſee any inconvenience in going over till next term. It is your own delay. It is abſolutely impoſſible to give judgment this term. Suppoſe we were all agreed, many matters are thrown out in argument which are not abſolutely neceſſary in the deciſion, but of which it would be neceſſary to the court to take notice.

What the value of the French duties may be I don't know: It does not appear in the caſe. Suppoſe the court
[721] ſhould be againſt the impoſition of thoſe duties which are impoſed in lieu of the French, there would ariſe a queſtion concerning thoſe duties.

Can you have any doubt upon the moſt material argument of all?

The importance of the firſt queſtion made by Mr. Macdonald.

The firſt queſtion made in the ſecond argument by Mr. *Macdonald*, I think, is one of the greateſt conſtitutional queſtions that, perhaps, ever came before this court. As my brother *Aſton* is abſent, I wiſh, principally upon that account, that it may ſtand over. It is impoſſible it ſhould ever be paſſed over in ſilence.

Mr. *Campbell* moved that judgment might be given upon the former argument, but Lord *Mansfield* reminded him that he could get no farther, becauſe it muſt neceſſarily come into the Exchequer; and even if that were not the caſe judgment could not have been given in the term, both on account of the abſence of Mr. Juſtice *Aſton*, and as the laſt day would be a Wedneſday.

7th of November, 1774.

The Grenada cauſe came on for the third argument: Mr. Attorney-general on the part of the crown, and Mr. Serjeant *Glynn* for the plaintiff.

Mr. Serjeant *Glynn*—This caſe, one of the moſt important in its principles, and in the conſequences dependent on the deciſion, that was ever argued, comes before the court on a ſpecial verdict, ſtating that the iſland of Grenada was in poſſeſſion of the French King, and conquered by his Britannic Majeſty's arms in 1762. The inhabitants permitted to ſell their lands to the ſubjects of Great-Britain only by the articles of capitulation in 1763.

Proclamation,

Proclamation, reciting the benefits from a regular coloization; promising that assemblies shall be called, with ower to make laws: In the mean while the subjects to conde they shall be governed by the laws of England.

Provision made of legislation to be executed by the go- or 9th of May, 1764. Patent to the governor to call sembly as soon as convenience shall admit.

Proclamation 20th of July, 1764, for levying an impost fourand an half *per cent.*

Stated—Assembly called about the end of the year 1765.

State of custom of the other islands. The impost by [722] levy.

State of St. Christopher's, only where there's a difference collection; part having been subject to the King of

They find the impost levied on the plaintiff by the de- , and that it is upon the impost so levied this action brought. And on the whole matter if the money legally ed, then they find for the defendant; if not not then find for the plaintiff.

The question is—whether the King has a power, without is of assembly or parliamentary regulation, to impose any upon the inhabitants of the island of Grenada?

The provision for peopling the island, the commission to vernor *Melville* for the well governing of the island, are th material.

I cannot help taking notice of the principle, on which the aim of the King is founded, to the raising of this impo- ion, which is, that the King has a right to exercise a des- ic power over a conquered country, annexed to the do- inion of Great Britain; and that this power is legally, rmanently and uncontrollably in him. I think, though t necessary to this decision, it will throw light upon many ints contained in it.

The argument for the defendant built on an absolute power in the crown over a conquered country, annexed to the dominion of England.

If it could be shewn that the law had asserted this, and contrary decisions had denied it; that the course of his- ry proved it; that it had ever been asserted; that there re no times in which the exercise of it had been disputed, if there were that it had never been judicially contradict- ; and that the King had always exercised it: However agreeing with our principles it might appear, and how- er dangerous to the constitution that the King should have dependent dominion; yet if it were so upon the authori- s as stated, I should hold it a very formidable argument; t I hold that the opinions have been silent, that there have

have been no decisions; that the course of our history has no vestiges of it, that it never has been exercised; and that every hint of it has been rejected with disgust.

That of *Calvin* was a question, whether a *post-natus* of Scotland was a natural-born subject of the King of England, after the union; it was held he was, because the centre of unity was in the person of the King. No necessity of entering into the discussion whether it be Lord *Coke's* opinion, or of the judges.

The general definition is—of a King of a conquered people, and a proposition is laid down generally.

723] "If the King make a conquest of a christian country, "their laws remain till he gives them others; but if he "make a conquest of an infidel country, they are presum- "ed to have no laws, he may give them what laws he "pleases; but guided by natural justice and equity." I quote this not for the sake of any thing but the use I shall make of it by and by, shewing, that a subsequent authority went to that only; and this was an idea which was not received by your Lordship the last term, but rejected with a declaration, that for the honour of Lord *Coke* it ought not to be spoken of; as I hope it never will.

That the term King must mean the sovereign power, whether in one or many.

He is speaking of a King, not particularly the King of this country; if it were to be understood to belong to any King it would be evidently wrong as to Poland, or as to the constitution of Sweden. If a conquest be made by a King of Poland by a Popish army, it is made not to the King personally, but to the King and Senate of Poland; and so of Sweden at that time.

A very respectable author was cited to your Lordship, by Mr. *Macdonald*, who very ably argued from his book, that all acquisitions by conquest are made for the state; and are therefore at the disposal of those who make them, that is to say, the state according to its several constitutions, and the different distributions of legislative power.

In agreement with this author, who states the doctrine in a decisive manner, I think it clear the conquest made for the state, for the benefit of the state. Execution and administration of all laws in England is in the crown; the power of making laws according to the constitution of the state which he governs here is in the crown, with the other parts of the legislature. When Lord *Coke* gives his opinion, he must have taken it from writers of general law, and those for the most part of absolute monarchies; and so [illegible]

took the word King as a general word, which in their ſenſe of it comprehends the whole conſtitution.

Objected, That Lord *Coke*'s authority muſt be taken otherwiſe, becauſe it has been underſtood in other caſes to belong to the ſole powers of the King; and it was taken on this authority, the King had the right of making independent laws over a conquered country; and that a King was in the ſame ſtate even as to a colony, unleſs otherwiſe provided by charter.

It is ſaid in *P. W.* the ſame point was determined. *P. W.* inſtead of ſpeaking of the bare power of the King, ſpoke of the power of a conqueror.

The conceſſion ſaid to be made by Sir *B. Shower*; and [724] that it was of conſequence to them to have denied the poſition, if capable of being denied; was in the caſe of an iſland not inhabited when firſt paſſed by patent; ſo if a conqueſt gave any right, he ſaid it muſt be over the perſons of the conquered people, not over the country.

Upon a ſtate of the hiſtory of *Jamaica*, ſuppoſition of fact being miſtaken, the argument that is applied fails. That poſition, ſo juſtly reprobated in *Calvin*'s caſe, is the point affirmed.

The opinion contended to be ſettled in that caſe of *Blanchard* and *Galdy*, is founded on my Lord *Coke*'s taking them, without civil policy, to be governed arbitrarily, according to the pleaſure of the King, as he ſhould think equity and juſtice; if the conceſſion be any thing it is to be applied to that point; which ought not to be named in a court of juſtice. This is the principal ground of a caſe which, from its inaccuracy, gained ſo little weight with your Lordſhip upon the laſt argument; if there had been others, the induſtry of the learned gentlemen who made the beſt of the laſt argument for the defendant, would have produced them. Taking the expreſſion from a public writer, I apprehend my Lord *Coke* meant merely to ſtate the principle, not applied to any particular country; and then the King, when applied to England, means not the King ſolely, but the King and parliament. It is the moſt natural and rational conſtruction, and is ſuch, I think, as the argument admits.

I think it can never eſcape your Lordſhip, that by Lord *Coke* writing without precedents or authority, muſt neceſſarily refer to the writers of public law. Mr. *Macdonald* has well obſerved, thoſe writers generally uſed the word Emperor or King as an arbitrary power including the whole.

If

If Lord *Coke* is ſuppoſed to have laid down the point, muſt have been from the hiſtory of his country, and the King from the earlieſt times exerciſed this prerogative. Though I ſhould not have laid great ſtreſs upon authorities deduced from dark and unſettled times; nor from *Henries*, or even our *Edwards*, to prove, from the exercise of an act of power, the legality of the claim; (when in that reign, when the great charter was given, there were ſo many violations of it, and ſo many afterwards, and ſo many confirmations otherwiſe not neceſſary.) Though to theſe reaſons, I cannot allow much weight to acts in claim a prerogative in thoſe reigns, there is no inſtance of an abſolute authority by the King over a conquered country. I don't mean to waive the benefit of what has been ſo ingeniouſly argued, with reſpect to the introduction of laws into Ireland by the charter: But I think Mr. *Macdonald* has produced an argument in proof, that the laws of England exiſted before that time, as it refers to them.

[725] That it is part of the duty of the King of England, to provide for the eſtabliſhment of the conſtitution of England, over every country ſubject to the crown of England, however acquired or wherever ſituated.

I think, therefore, an Engliſh conſtitution had paſſed and in general that it's part of the duty of the King to provide, that the Engliſh conſtitution ſhall be exerciſed every where over all the ſubjects of England, however conquered, however acquired, or wherever their ſituation.

The power of promulgation of laws, iſſuing of laws, the making preparations and proper regulations, for the introduction and execution of thoſe laws in a country ſo lately receiving them, is the peculiar prerogative. Though there is an antecedent title by birth or ſituation, it can only be exerciſed by means of the truſt repoſed in the crown, ſo as to be applied to the benefit of the public.

The enquiry is not what is expedient for the peculiar good of mankind ſo much as what is neceſſary or capable of being admitted. Where new laws have been to be introduced or old ones altered, it has always been by the act of the ſupreme legiſlation openly either here or over the ſtate in Ireland. If the providing for the execution of an antient right be called legiſlation, we will readily allow this legiſlation to have always exiſted in the King. But it is neceſſary to prove this authority that the King has abrogated, altered or introduced laws. This has not been done, the King has never; and the very expreſſion of an idea of ſuch a right

a right has been rejected with resentment and indignation as againſt the conſtitution.

And to ſay, if allowed, that the King legiſlatively introduced laws in Ireland, by providing for their being received and executed, is to ſay that he performed this executive truſt, which we all allow; and if this be meant a legiſlation, it is a ſalutary and neceſſary legiſlation. I know if it be, it hardly will be ſo interpreted as belonging to that name.

With regard to Wales, (I preſume many other inſtances will not be found of conquered countries,) the ſtatute has always been conſidered as an act of parliament.

The peculiar authority given to King *Edward*, which could have been by no means neceſſary, if there had been a legiſlative power abſolutely and dependently in him (and which power was never exerciſed, and held by the judges ſo ill agreeing with the conſtitution, as to be confined to the perſon of King *Edward* I.) is a ſtrong inference the regulation was not originally and properly in him, as of his own independent right, but derivatively from the parliament; and that in ſuch a manner as to be at leaſt confined to himſelf, and not extend to his ſucceſſors.

If King Edward had been poſſeſſed of the power, he would not have received it from parliament.

The King would never have furniſhed ſuch an argument againſt the exerciſe of legiſlative authority, had that power then reſided in him. [726]

All the caſes have been the objects of parliamentary regulations. If he had underſtood it to be of his right to give laws over thoſe countries arbitrarily, and parliament had recognized this claim; the power of making and altering, the power of abrogating would have been in him, and we ſhould not have had the interpoſition of parliament.

From the author cited by Mr. *Macdonald*, I will ſtate the poſition.

That all conqueſts are made for the benefit of the conquering ſtate; and wherever the people are compoſed and pay allegiance, inſtead of conſtrained ſubmiſſion, then they are ſubjects; and owe obedience to the laws of the conquering ſtate, and hold their property from them.

When this conqueſt was made, from that hour when the King's right was recognized and a compoſition made, it was for the benefit of the people of this country. Here particularly, its conqueſt being made with a view to colonization, it is eſtabliſhed by the beſt authority, that of Lord *Vaughan*, on the queſtion, whether a naturalization in Ireland made a man a natural-born ſubject of Great Britain?

Lord

Vattel's proposition concurs with Lord Vaughan.

Lord *Vaughan*—A conqueſt is not ſolely for the benefit of the conqueror, but of the ſubjects; and thoſe who come to reſide there have a right to acquire property; lands by purchaſe;—and be protected in all thoſe particulars, by the laws of their mother country.

The inhabitants then of Grenada, are the objects of all thoſe proviſions.

They may acquire property, with the right of reſidence and purchaſe; and have the other rights of Britiſh ſubjects.

As to expedience or value, we are not ſpeaking to the equality but the legality; and what has taken a part has the ſame claim, to half or the whole.

The authority is inconſiſtent with that right which Mr. *Campbell* had as a reſident, if nothing elſe were affected by it.

[727]

It will be incumbent, by new arguments, to prove a power in the crown of diſpoſal of theſe acquiſitions, without the concurrence of the conſtitution.

Will this right bear the examination of the laws of England.

That this is not a temporary ordinance.

Ordinances of neceſſity, on inſtant emergencies, proviſions for the adminiſtration of conſtitutional rights—I ſhall not preſume to ſay how far theſe may be maintained: But they muſt expire with that neceſſity, and be occaſional and temporary only.

No pretence of neceſſity.

In the preſent caſe, no pretence of a neceſſity.

A conqueſt of the people, and not of the lands, muſt mean a power moſt extenſively taken in the times of barbariſm, but qualified in theſe times.

On a conqueſt, the laws of the conquerors are immediately conveyed as the common right of all the ſubjects, conquerors, and conquered.

Both in the caſe of the conquered and conquering people, the laws of the general government are upon the conqueſt conveyed thither, as a common right of all the ſubjects: But they require to be actually carried into effect, maintained and executed by that power in which the execution of the laws is lodged, which with us, is in the King. The title is there before the enjoyment; when the King has executed that truſt, then is the enjoyment.

But they require the executive power to inforce the actual exercise.

The colonies cannot have the power of enforcing thoſe laws, they have the right, though the truſt is repoſed in the King to effectuate them.

The

The King has given assurance that they shall be protected in all their rights, honours and possessions, and the free exercise of the Roman catholic religion—this to the conquered; shall the conquerors be in a worse state?

The King has provided, that, as immutable laws may become inconvenient, therefore there shall be a local one, subject to alteration by their own legislature.

A distinction is taken between Grenada and the other islands; I answer the grant is not a matter of grace and favour, but the discharge of a trust. If it be a gift it is not revocable, but an irrevocable right; what distinction then between the other islands, whose rights the King has recognized by receiving the imposts as a benevolence.

No distinction between Grenada and the other islands; the matter not being of favour, but the grant.

of right antecedently, or at least by

What power antecedent to the patent had existed in the King is annihilated then. Even considering them as subject before to the sole law of the conqueror, and not as subject to the legislative power of the state, the King has waived the power of taxation if it were admitted he had it before, by granting them assemblies to tax themselves.

[728]

Second point, that the power of taxation if in the King before, is relinquished by granting them assemblies to tax themselves.

The construction cannot be that the inhabitants are not to reap the benefit till a future time: This is so inconsistent with the end, with the construction in which the grants of the King are always received, and the benefit designed, that it will find no weight with your Lordship.

Taking it by way of argument that the conquest has annihilated their antient laws, their law cannot have been annihilated and none given them in their place.

If their ancient constitution is gone, the laws of England by their proper force introduce themselves.

It is a future grant, it is said—when the power is given them to call assemblies, they have a provision for a legislature: I dont mean to derogate from the supreme legislature.

The assembly is to be called when circumstances will admit and convenience shall require: So it is here; but yet it is the unalterable privilege of this country.

The people to come, in confidence of the promise of the rights of British subjects, would in this construction come, and find themselves without one of the most remarkable of those rights, and that which secures all. They would, on coming to reside, find themselves subject to an arbitrary disposal of their property, and might have the whole taken away without their own consent.

My Lord, on the whole of the caſe I preſume, whether as a conquered people or as colonies, they had a right to tax themſelves, and were not ſubject to impoſts under any claim of prerogative, without their own conſent.

Secondly, If they had been ſubject to taxes by prerogative, that the King, by his proclamation, has concluded himſelf from this right.

Mr. Attorney-General for the defendant.

[729]

Mr. Attorney-General—I have ever looked on this as one neceſſary ground of argument to a doubtful queſtion, that we ſhould ſee and attend to the nature of the claim, its fitneſs and expediency; and not confound the idea of it by ſubſtituting, in its place, ſomething of a very different nature, and ſuppoſing that to be the right which is inſiſted on and intended to be proved.

That the claim is not of an abſolute legiſlative power; but a ſubordinate legiſlation.

If I had been to contend for an abſolute independent legiſlative power in his Majeſty, I have not that idea of authorities, or of the duties of my profeſſion, that I could have engaged myſelf in the taſk of ſupporting it. Nor ſhould I have thought it a propoſition fit to be ſpoken of in any place, much leſs in a court of juſtice.

Without taking that for my ground, I mean to inſiſt that his Majeſty, as an article of executive power, has an authority, legiſlative in its nature, but ſubordinate to the ſupreme legiſlature: A right of impoſing laws, and impowering others to impoſe them.

Such power delegated by the King to a corporation.

When I ſhall refer to corporations in England inveſted with powers to provide laws over part of the dominions of the King of England, from which they were diſtant, and not natives or inhabitants, I ſhall think myſelf entitled to contend that a power which he can delegate he can exercise in his own perſonal authority.

A method has been taken which requires the right to be conſidered in rather a different view, and examined in a different mode.

I think it has been endeavoured to be inſinuated, or rather declared, that in the article of conqueſt the laws of England inſtantly take place in the conquered country, and the conquering people carry the Engliſh laws with them. At the ſame time this point has been contended it was argued that the King, by his executive power, was to eſtabliſh thoſe laws.

By the ſubordinate authority to the Lords and Commons which I conſider as much ſubordinate with regard to the dominions acquired to the King, as to the ſtate and domin-

ons of the ſtate here, the King regulates the government, and requires impoſts from the country, in ſuch manner as he ſees requiſite.

But it is ſaid "only particular neceſſity juſtifies this claim, "and it muſt be only occaſional and temporary: When the "ſovereign authority has found it expedient to give laws for "particular local neceſſity, every individual carries with "him all the laws of England;" that is, it may frequently happen laws ſubverſive of the laws given, the individual then will have a power denied to the Sovereign.

I have the authority of the ſame celebrated author (quoted on the other ſide) that there is no difference between a country conquered by the arms of another, and diſcovered. *Vat. f.* 203—10.

It was ſtated in the laſt argument, in order to ſhew wher- [730]
ever a country is conquered it becomes part of the conquering people, and their laws are introduced with the conqueſt, that in *Calvin's* caſe this point had been decided. The queſtion there was, whether the dominion of the conqueror or only the realm is included.

The laws of the conquered remain till altered. They have been accuſtomed to them as modes of regulating and diſpoſing property. They know no other: If there be better, and more complete in their own nature, they are ſatisfied with their own; they have been accuſtomed to look up to theſe for protection on all occaſions, and to enjoy under them all the bleſſings and comforts they have enjoyed.

The queſtion is, whether by the laws of Great Britain, which are the only rule here, the King has been adviſed juſtly, and acted within the compaſs of thoſe laws; or whether thoſe laws are exceeded? This is merely the queſtion.

My reaſon for ſtating that dominion and property were acquired by conqueſt was, becauſe I ſhall infer that the conſtitution has intruſted the King with the diſpoſition of the property, and with the ordering of that dominion conquered; ſubject to the legiſlation of the country.

The King, both in conqueſts and colonies, has had this right: There has not been an inſtance in which the King has not exerciſed the diſpoſition of the laws and property of the conquered country.

He has granted by his charter the iſland of St. John.

The King may exerciſe the right of diſpoſing the lands conquered. With reſpect to the laws, if we ſhould be carried

ried back to the conqueſt of Ireland, (which, I think, remains in great doubt, whether by *Edward* or King *John*, or whether indeed completely till the reign of *Elizabeth*, at any period) the great loſs of the records of Ireland has made it impoſſible to go into an accurate diſcuſſion. Lord *Coke* is of opinion that, in point of fact, *Henry* the ſecond did give the laws of England to Ireland. King *John* was not, in truth, the Sovereign of Ireland; the actual Sovereign was *Henry* the third. It was not till after two deſcents had been caſt that King *Henry* the third granted the Engliſh laws.

That this legiſlative power of the King was exerciſed over Ireland.

Suppoſing King *John* gave them thoſe laws, or that they were eſtabliſhed there before. It is contended this was a mere act of executive power. It will appear to what extent this power, called executive, was carried.

[731] On the ſubject of the Engliſh laws another ambiguity runs: That it is not only the laws of property and puniſhment of crimes, but the political laws and conſtitution of the country.

Suppoſe the King could not make, nor authorize to make laws occaſionally, the authority of parliament would be neceſſary to make the change.

So of Scotland. With reſpect to Scotland, whenever they did call a parliament, it was by the King's command and inſtance, as at Newark; and it is too much to ſay that the King, in the character of an executive magiſtrate, has a right not only to create aſſemblies, but to appoint their meeting; and alſo that he carries with him, as a part of merely executive power, the power to alter laws.

So of Wales. With reſpect to Wales, though I believe in my conſcience it was in fact obtained by no better pretence than by that of the ſword, yet *Edward* did not conſider it as ſuch.

That in the town and caſtle of Calais the Engliſh laws were not uſed, but in the ſtaple, for convenience.

Plowden, 126. There is no pretence that the ordinance then made was by King, Lords, and Commons: The King conſidered it as a fief under his own perſonal dominion.

With regard to many places in France taken certainly by right of conqueſt, and ceded by the treaty of Bretigny, my doubt is, whether the Engliſh laws came thither.

With reſpect to the market of Calais, the reſort of Engliſh introduced the laws there, for convenience, but not in the caſtle, nor in the town of Calais.

With reſpect to Minorca, the laws of England do not take place there.

In the year 1713 they were referred to certain of the council, the archbiſhop of Canterbury, and others; in the year

1715

1727 somewhat was done; in the year 1740 a little more: In 1752 the privy council sent over a great multitude of laws, but the war interfered.

[Lord *Mansfield*—This, I think, was after the complaint against Governor *Melville*.]

1606. King *James* grants a charter, with a power of making laws, and an exclusive fishery, from 34 to 35 degrees of latitude, to the corporation of Plymouth. Grant in 1606 to the corporation of Plymouth.

* It is said this charter came into parliament. They came because an exclusive fishery had been granted to a corporation residing at Plymouth, with a power of imposing penalties. [*732]

The objection was, that at the time the corporation of Plymouth had not sent colonies.

Charter of Massachuset's bay, with power to call assemblies, granted by the King; vacated and granted a-new after the revolution by King *William*.

I observe when a passage has been cited from the history of former times it is the custom to say they were bad times. Where are we to look for the history of this country but in those times, separating the bad from the good?

In the case of St. Christopher's there were given by eminent lawyers very distinct opinions, in favour of the right in the crown to impose duties. I don't recollect there was any evidence of want of exercise of that right, yet it was contended against because an act of assembly twenty-five years after granted the duties. St. Christopher's.

Yet if one was to infer from every act that has been made in any of the political constitutions of this country there was no law before that act was made, it would subvert most of the most important laws of this country.

It was said the King might have enacted a law, but only before the times of the actual surrender; but that after it surrendered to the sovereignty it becomes part of the conquering state in a different right; and the ordinances must be only temporary till the King and parliament provides others.

From the moment the conquest has established itself, from the instant in which he has compelled the inhabitants to give up their arms, there is not any hour in which the parliament cannot bind it.

Suppose this ordinance had been before the capitulation and cession, would it have ceased because by the treaty of peace the King of France says he cedes all his right to the

King

King and crown of Great Britain. What does the treaty more than affirm the right of Great Britain, by ceding all right or pretenſions of right. If his Majeſty thought fit, after having impoſed one ſort of laws, to give another repugnant ſort of laws, or the parliament were to do this, it would be by an authority acting in ſubverſion of the firſt.

[733] This drives on to another inconſiſtency upon the claim of political liberty.

The King by his conqueſt acquired a power to provide laws for his ſubjects, a power which has been ſo repeatedly and extenſively exerciſed in other inſtances.

Has the King ſuperſeded that right? The proclamation, it is ſaid, gives the Engliſh laws to all the ſubjects. It was ſaid that it preſumed the laws of England prevailed in the country, and that it made a proviſion in the commiſſion to be given to the judges. What, that they ſhould bring thoſe laws which, by this hypotheſis, were there before!

That the proclamation did not convey the political conſtitution of this kingdom.

The proclamation might convey the Engliſh laws, but not the political and conſtitutional ſyſtem in general in this kingdom.

The promiſe is ſaid to be the ſame which the King gives here. I don't know by what record it appears that the King has engaged himſelf to his ſubjects of this country, that, when convenience ſhall permit, or occaſion ſhall require, he will permit a parliament to be called.

That by the proclamation it was left diſcretionary, whether the five iſlands ſhould form one aſſembly, or each apart.

The King, by his commiſſion, empowers the governor to call a parliament when he ſhall think convenient, or receive inſtructions: And his authority was ſo much executory, that he might have eſtabliſhed aſſemblies either of the five iſlands together, or Grenada apart and ſeverally.

It would be of the utmoſt danger to this conſtitution to ſay, till the King or parliament gives them a conſtitution he might act in full power, without any laws to decide.

The commiſſion to call aſſemblies not executed till above a year after the duties impoſed.

The commiſſion to call aſſemblies was not executed till above a year after the patent impoſing the duty.

In the caſe of chartered governments the argument would, undoubtedly, take a different turn. It might be ſaid a charter is a grant of an intereſt to perſons named in the grant; but in this nothing could paſs, but the conſtitution exiſting till ſome new grant.

The

The special verdict has not found the time in which the commission passed the great seal. The patent passed for raising the tax in July; the governor did not go over till October; both came together. The King, therefore, had introduced his claim to the impost on the country prior to the time in which any assembly could be called; for his right was introduced the very instant of the governor's landing: And the elder right, in the King especially, will be preferred above all, when it appears the proclamation could not be intended to waive the impost.

The patent for raising the impost arrived with the governor.

[734]

In reply Mr. Serjeant *Glynn*—Before I go into the general question I shall speak upon two important points, though an end is made of the case, and the object satisfied to the plaintiff by the decision of the last. The other is so great and important an one in the general consideration that I am persuaded your Lordship will not pass over in judgment.

Serj. Glynn.

The tax is contended to be legally levied, upon a claim of which the very stating of the case proves the illegality.

My learned friend has set out with disavowing the claim of an absolute independent sovereignty in the crown; but he has maintained his argument and was obliged to maintain his argument upon it.

He says it is a subordinate legislature. A subordinate legislature, in this sense at least, is difficult to be conceived to those who know not how to make dependence consist with independence: But the state of Grenada distinguishes itself. It is a tax imposed by an act of legislative power, which includes the entire legal sovereignty; but it is not an uncontrolled authority, because the King, with consent of parliament, may depart from this claim, so as to bind his successors: The supreme legislature may repeal it. The King makes an essential part of that legislature. Is it a mark of a limited subordinate authority, that he can impose without them what they cannot take away without him? And that he may depart from this is what any man may do in any instance of the most uncontrolled legislative authority.

That the idea of its being a subordinate authority, because the King with the parliament may annul it, is fallacious, the King himself being one essential part of the parliament.

My learned friend says it is a subordinate act of legislation; an act of execution, not of legislation. It does not depend upon the King whether the laws of England introduce themselves, because the parliament may alter or appoint laws. The King may levy taxes by his sole authority, which shall

stand

ſtand in force till parliament repeals them, which they cannot without him.

That there can be no medium in this thing between an abſolute legiſlative power in the perſon of the King and an executive truſt.

I believe my learned friend will hardly prove this power veſted in the perſon of the King. It was the great point our Hampden contended, that no tax can be impoſed by the authority of the King. It muſt, therefore, depend ſolely upon the queſtion, whether the King has an abſolute independent legiſlation; or whether the power of the crown is not truly executive.

[735]

The promulging and introducing adminiſtration of the laws of England we admit to be in the King, as his peculiar and neceſſary truſt; the making, altering, or ſuſpending of thoſe laws, we deny.

Notwithſtanding the obſervation on the government of Scotland, the ſtates were convened in the firſt inſtance of *Edward*'s claim: And if he claimed it as a fief, and obtained as a conqueror, ſtill he governed it as a King of England, with executive and not legiſlative authority.

Wales in proprietatis dom. totaliter cum integritate converſa et tanquam pars corpori annexa et unita.

As to the claim of a feodal duchy in Wales, it does not appear that the King ever introduced any laws but the laws of England: And when he conſiders it expreſsly, as intimately and vitally connected with England, as a part to the body, in one entire dominion, can it be doubted whether he underſtood that he was to govern it by the laws of England.

That it does not appear any prince made laws for Ireland independently of the Engliſh parliaments.

Whether Lord *Coke* is right in ſuppoſing King *John*, or any other prince, introduced the laws of England into Ireland, I don't think is material; unleſs it appears ſome prince by his authority, made laws and regulations there, without the concurrence of the Engliſh parliament.

The caſe of the corporation of Plymouth was a power delegated to make laws to bind themſelves.

The King has the power becauſe it has been delegated. The caſe was not that the King, in the grant to the corporation, made laws to bind others without their conſent; but he empowered them to make laws which ſhould bind themſelves. The caſe is ſo far from proving a power to make laws contradictory to the laws of England, that it only proves the power of the King to convey the laws of England.

And becauſe the King can erect a corporation which ſhall make bye-laws obligatory upon the particular community, therefore

therefore the King, it is inferred, can make laws which ſhall bind thoſe who never gave their conſent to them.

The ſtrongeſt authorities, uniform experience, as well as the principles of the conſtitution, and rules of law, are againſt it.

Authorities.

Selden's opinion is againſt it, and the other great lawyers. It has the teſtimony of the beſt conſtitutional lawyers, of which no age was ever more fruitful than that of *James* the firſt, to negative it. It ought to have been not unſupported by precedents. The character of the prince who is made the example of the claim ought to have been other: He ought to have been a prince who hated prerogative; who was deſirous of keeping the right of the crown within its conſtitutional limits, and by no means of extending it beyond.

The next are mere private opinions given by great lawyers, but in private. Though they will have great weight, as far as extra-judicial opinions in courts of law, they are not leading principles of deciſion: And had any private opinion been deciſive this cauſe had never been now before the court. No man reveres opinions of men of great abilities more; but there is not the opinion of any man which, ſtanding ſimply on the footing of authority, I ſhall not think it permitted to queſtion: And even the greateſt have been heretofore queſtioned ſucceſsfully. I never could be deterred by great opinions when I conſidered by what authorities the liberty of the preſs has been oppoſed; by what authorities the claim of ſhip-money was ſupported; and what the event was upon both thoſe queſtions.

[736]

What was done upon the forfeiture of the charter, before the revolution, is no authority; but rather an argument of error. After the revolution ſome lawyers gave their opinion for collecting the revenues as they uſed to be collected; this was done only in the interval of ſuſpenſion of legiſlature.

What was done after the revolution only a temporary proviſion.

A queſtion of this nature, a power of a kind like this is not to be gathered from authorities and circumſtances ſuch as have been ſtated. Mr. Attorney-general was ſuppoſing an inſtant abrogation of all former laws. I did not ſay ſo when it was a conqueſt. There are ſome unalterable laws to continue. As to the objection made of claiming of property, the mode muſt remain till the King appoints by his executive power.

My Lord *Vaughan* ſays the ſubjects don't acquire a property in the ſoil. If the inhabitants had been turned out of it

No argument or diſpute

about the property of the ſoil.

it it would have been in the King. In the idea of this country the property was originally in the King of all lands. If Mr. Attorney-general has been contending on this as a feodal right, the argument would have had weight; but we are not arguing for the property of the ſoil.

The ſubjects of England have a right to the Engliſh laws: They have a right to aſſemble: And the reaſon why the King never ſays to them that he will call aſſemblies as ſoon as convenience permits and occaſion ſhall require is, becauſe in this country convenience always permits, and occaſion requires. But ſtill the truſt of calling them is repoſed in the King.

Mr. Attorney-general, after having diſcuſſed the point of ſovereignty in the caſe of Ireland, with reſpect to their aſſemblies, has ſaid this is in execution of authority in the King; if ſo then the laws were there before, and aſſemblies called upon the ſame terms as in England. And that the acts concerning them were by authority of parliament.

[737]

With reſpect to the power of the King to make laws. He can make no other laws than what ſhall have been made by the conſtitutional aſſemblies; he can repeal none; nor alter without them.

Mr. Attorney-general ſays that by his proclamation the King promiſes that he will grant them the privileges of Britiſh ſubjects; but then this promiſe cannot take effect before the governor lands, and an aſſembly is called: and immediately on his landing, and before an aſſembly can be called, he has a right to levy impoſts.

That the promiſe is obligatory from the time of iſſuing it.

I take the conſtruction to be, that the promiſe takes place from the time of iſſuing it: A conſtitution takes place immediately. We are not leſs governed by the laws of this country becauſe a parliament is not conſtantly ſitting.

This cannot be diſtinguiſhed from the caſe of any other colony; and if the power claimed be in this caſe diſallowed, the colonies in general will then act all of them with the ſame dependence on the ſupreme legiſlature, and the ſame conformity in the principles of the Britiſh conſtitution. If otherwiſe, there will be Britiſh ſubjects under the ſame name, and with the ſame nominal rights, ſome free and others in unconſtitutional ſubjection.

Lord *Mansfield*—I don't remember its being argued on this caſe on the queſtion whether there is any authority which conſiders *Bretigny* as a part of the dominions of the crown of England. *Aquitaine* and *Poictou* he held as heir to the houſe of *Anjou*.

The

The parts ſeparated from the crown, and conſidered as feodal, were governed by a deſpotic authority. It appears that Calais had the proceſs and judicial writs of this court. Writs of error returnable to this court.

How do you underſtand the capitulation?

A ceſſion is not neceſſary to a conqueſt; it is not neceſſary for the right. Jamaica never has been ceded, I believe, to this hour.

How do you underſtand the capitulation? There is an article that they ſhall pay no other duties but what they paid to the King of France.

Mr. Juſtice *Aſton*—Firſt of all in this ſpecial verdict the articles of capitulation, ſome of them, are ſtated. I don't underſtand how the capitulation and treaty of peace agree. [738] But I am to judge upon the verdict.

28 November. *Campbell* and *Hall.*

Judgment of the court was this day given by Lord *Mansfield.*

In this cauſe of *Alexander Campbell* againſt *William Hall.*

This is an action brought by the plaintiff, who is a natural-born ſubject of Great Britain, and who, upon the third of May, 1763, purchaſed lands in the iſland of Grenada. And it is brought againſt the defendant, *William Hall*, who was collector for his Majeſty at the time of levying the impoſt, and of the action brought, of a duty of four and an half *per cent.* upon goods exported from the iſland of Grenada. And it is to recover a ſum of money which was levied by the defendant and paid by the plaintiff, as for this duty of four and an half *per cent.* for ſugars which were exported from the iſland of Grenada, from the eſtate and by the conſignment of the plaintiff. Caſe.

And the caſe is laid upon money had and received; and plaintiff, as for money paid without conſideration, the duties having been impoſed without ſufficient or lawful authority to warrant the ſame, demands judgment to recover the ſame againſt the defendant.

And it is ſtated in the ſpecial verdict that the money is not paid over, but continues in the defendant's hands, by conſent of the attorney-general, for his Majeſty, in order that the queſtion may be tried.

The ſpecial verdict ſtates Grenada to have been conquered by the Britiſh arms from the French King on the ſeventh of February, 1762. The iſland of Grenada ceded by capitulation;

tulation; and the capitulation upon which they ſurrendered was by reference to the capitulation upon which the iſland of Martinico had been ſurrendered.

The ſpecial verdict then ſtates ſome articles of that capitulation, particularly the fifth, which grants that Grenada ſhall be governed by its own laws till his Majeſty's pleaſure be known.

Continuance of property, religion, honours, privileges, and exemptions, is demanded. They are referred to the article laſt ſtated for anſwer, which is, that the inhabitants being ſubjects of Great Britain, will enjoy their property and the ſame privileges, derived from their ſubjection, as his Majeſty's other iſlands.

[739] Eighth article, That they ſhall be ſubject only to the capitation tax impoſed by his Majeſty the King of France, expences of juſtice and public government to be paid out of the King's domain.

Referred to the 7th article, which ſtates the rule—and refers to the duties paid by the inhabitants of the Leeward iſlands.

The next inſtrument is the treaty of peace the 10th of February, 1763, which ſtates the ceſſion, and other articles not material.

The next and material inſtrument which they ſtate is a proclamation under the great ſeal, the 7th of October 1763, reciting thus:

"Whereas it will greatly contribute to the ſettling of our "ſaid iſlands, of which Grenada is one, that they be in- "formed of our love and paternal care for the liberties and "rights of thoſe who are or ſhall be inhabitants thereof; "we have thought fit to publiſh and declare by this our "proclamation, that we have by our letters patent under "our great ſeal of Great Britain, whereby our ſaid govern- "ments are conſtituted, giving expreſs power and direc- "tion to our governors of our ſaid colonies reſpectively, "that ſo ſoon as the ſtate and circumſtances of the ſaid co- "lonies will admit thereof, they ſhall, with the advice and "conſent of our ſaid council, call and ſummon general aſ- "ſemblies, in ſuch manner and form as is uſed in the other "colonies under our immediate government. And we "have alſo given power to the ſaid governors, with the ad- "vice and conſent of our ſaid council and aſſembly of re- "preſentatives as aforeſaid, to make, conſtitute and ordain "laws, ſtatutes and ordinances for the public peace, wel- "fare,

" fare and good government of our ſaid colonies and the " inhabitants thereof, as near as may be agreeable to the " laws of England, and under ſuch regulations and re- " ſtrictions as are uſed in our other colonies."

Then follow letters patent under the great ſeal, or rather a proclamation of the 26th of March 1764, whereby the King recites, that he had ordered a ſurvey and diviſion of the ceded iſlands, as an invitation to all purchaſers to come and purchaſe upon terms and conditions ſpecified in the proclamation.

The next inſtrument ſtated in the verdict, letters patent on the 9th of April 1764, gives commiſſion and authority to *Robert Melville*, Eſq; appointed Governor of this iſland of Grenada, to ſummon aſſemblies as ſoon as the ſituation and circumſtances of the iſland would admit; and to make laws in all the uſual forms, with reference to the other plantations where aſſemblies are eſtabliſhed.

The Governor arrived in Grenada the 14th of December [740] 1764; before the end of 1765, particular day not ſtated, the aſſemblies actually met: But before the arrival of the Governor in Grenada, indeed before his commiſſion, and before his departure from London, there is another inſtrument upon the validity of which the whole turns.

Letters patent under the great ſeal, bearing date the 20th of July 1764, reciting that in Barbadoes, and all other of the Britiſh Leeward iſlands, a duty of four and an half per cent. is paid upon goods exported; and reciting farther:

" Whereas it is convenient and expedient, and of great " importance to our other ſugar colonies, that the like du- " ties ſhould take place in Grenada; we do hereby by vir- " tue of our authority and prerogative royal ordain that an " impoſt of four and an half per cent. in ſpecie ſhall, from " and after the 29th day of September next, be raiſed and " paid to us, our heirs and ſucceſſors, for and upon all " dead commodities of the growth or produce of our ſaid " iſland of Grenada that ſhall be ſhipped off from the " ſame, in lieu of all cuſtoms and impoſt duties hitherto " collected upon goods imported and exported into and out " of the ſaid iſland, under the authority of his moſt Chriſ- " tian Majeſty, and that the ſame ſhall be collected: Then " it goes on with reference to the iſland of Barbadoes and " the other Leeward iſlands."

The jury find that in fact ſuch duty of four and an half per cent. is paid to his Majeſty in all the Britiſh Leeward iſlands.

And

And they find ſeveral acts of aſſembly which are referrible to the ſtate of the ſeveral iſlands, and which I ſhall not ſtate, as they are public, and every gentleman may have acceſs to them.

Theſe letters patent of the 20th of July 1764, with what I ſtated in the opening, are all that is material in this ſpecial verdict.

Upon the whole of the caſe this general queſtion ariſes, being the ſubſtance of what is ſubmitted to the court by the verdict: "Whether theſe letters patent of the 20th "of July 1764, are good and valid to abrogate the French "duties, and in lieu thereof to impoſe this duty of four "and an half per cent." which is paid by all the Leeward iſlands ſubject to his Majeſty.

That the letters are void has been contended at the bar, upon two points.

[741]

1ſt Point. 1ſt. That although they had been made before the proclamation, the King by his prerogative could not have impoſed them.

2d Point. 2dly, That although the King had ſufficient authority before the 20th of July 1764, he had diveſted himſelf of that authority by the proclamation.

Propoſitions. A great deal has been ſaid and authorities cited—relative to propoſitions in which both ſides exactly agree, or which are too clear to be denied. The ſtating of theſe will lead us to the ſolution of the firſt point.

1ſt. That a country conquered by the Britiſh arms becomes a dominion of the King in right of his crown, and therefore neceſſarily ſubject to the legiſlative power of the parliament of Great Britain.

1ſt. A country conquered by the Britiſh arms becomes ſubject to the crown, and therefore ſtate or legiſlation of Great Britain.

2d. The conquered are ſubjects, not aliens or enemies. 2dly, The conquered inhabitants once received into the conquerors protection become ſubjects; and are univerſally to be conſidered in that light, not as enemies or aliens.

3d. Articles of capitulation and ceſſion ſacred and inviolable. 3dly, Articles of capitulation upon which the conqueſt is ſurrendered, and treaties of peace by which it is ceded, are ſacred and inviolable, according to their true intent.

4th. The law and legiſlation of 4thly, The law and legiſlation of every dominion equally affects all perſons and property within the limits thereof, and

and is the true rule for the decision of all questions which arise there: Whoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants. An Englishman in Minorca or the Isle of Man, or the plantations, has no distinct right from the natives while he continues there.

every country equally affects every subject within its limits.

5thly, Laws of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim is uncontrovertible; and the absurd exception as to pagans, in *Calvin's* case, shews the universality of the maxim. The exception could not exist before the Christian æra, and in all probability arose from the mad enthusiasm of the Croisades.—In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their present laws, until his Majesty's pleasure be further known.

5th. The laws of a conquered country, christian or pagan, continue until altered by the conqueror.

6thly, If the King has power (and when I say the King, I mean in this case to be understood "without concurrence "of parliament") to make new laws for a conquered country, this * being a power subordinate to his own authority, as a part of the supreme legislature in parliament, he can make none which are contrary to fundamental principles; none excepting from the laws of trade or authority of parliament, or privileges exclusive of his other subjects.

6th. That the King solely can make no laws for a conquered country, contrary to fundamental principles; against the laws of trade or authority of parliament, or giving privileges exclusive of his other subjects.

The present proclamation is an act of this subordinate legislative power: If made before the 11th October 1763, it would have been made on the most reasonable and equitable grounds; putting the island of Grenada on the same footing as the other islands. [*742]

If Grenada paid more duties, the injury would have been to her; if less, to the other islands.

It would have been carrying the capitulation into execution, which gave *hopes*, if any new duties more were laid on, their condition would be the same as that of the other Leeward Islands.

The only question which remains then is, whether the King had power after the 4th of February 1763, of himself, to impose this duty.

Taking these propositions to be granted, he has a legislative power over a conquered country, limited to him by the constitution, and subordinate to the constitution of parliament; and a power to grant or refuse capitulation.

If

That the jus belli et pacis is intrusted with the King, property in the conquered lands and terms of conquest, and the constitution of the conquered country.

If he refuses, and puts to the sword or extirpates the inhabitants of a country, obtaining it by conquest, the lands are his; and if he plants a colony, the new settlers share the land between them, subject to the prerogative of the conqueror. If he receives them into obedience and grants them property, he has power to fix a tax. He is intrusted with the terms of making peace at his discretion; and he may retain the conquest or yield it up, on such condition as he shall think fit to agree.

This is not a matter of disputed right; it has hitherto been uncontroverted that the King may change part or all of the political form of government, over a conquered dominion.

Historical application of these principles.

To go into the history of conquests made by the crown of England. The alteration of the laws of Ireland, has been much discussed by the lawyers and writers of great fame. No man ever said the change was made by the parliament; no man, unless perhaps Mr. *Molyneux*, ever said the King could not do it.

[743]

The fact, in truth, after all the researches that could be made, comes out clearly to be as laid down by Lord Chief Justice *Vaughan*.

Ireland.

"Ireland received the laws of England by the charters "and command of *H.* 2. King *John*, *H.* 3. and he adds, "&c. to take *Edward*, and the successors of the princes "named. That the charter 12 King *John*, was by assent "of parliament in Ireland, he shews clearly to be a mis-"take. Whenever a parliament was called in Ireland, "that change in their constitution was without an act of "parliament in England, and therefore must have been "derived from the King."

Mr. *Barrington* is well warranted. The 12th of *Edward* 1st. called the statute of Wales, is certainly no more than a regulation made by the King as conqueror, for the government of the country, which the preamble says was then totally subdued; and however for purposes of policy he might think fit to claim it as a fief, appertaining to the realm of England, he could never think himself intitled to make laws, without assent of parliament, to bind the subjects of any part of the realm. Therefore, as he did make laws for Wales without assent of parliament, the clear consequence is, he governed it as a conquest: Which was his title in fact, and the feodal right but a fiction.

Berwick,

Berwick, after the conqueſt of it, was governed by charters from the crown, till the reign of *James* the 1ſt, without interpoſition of parliament.

Whatever changes were made in the laws of Gaſcony, Guyenne and Calais, muſt have been under the King's authority; if by act of parliament that act would be extant, for they were conquered in the reign of *Edward* the third; and all the acts from that reign to the preſent time are extant; and in ſome acts of parliament there are commercial regulations, relative to each of the conqueſts which I have named; none making any change in their conſtitution and laws. Gaſcoigne, Guyenne and Calais.

Yet as to Calais, there was a great change made in their conſtitution, for they were ſummoned by writ to ſend burgeſſes to the Engliſh parliament; and as this was not by act of parliament, it muſt have been by the ſole act of the King.

With regard to the inhabitants, their property and trade, at Gibraltar, the King, ever ſince that conqueſt, has from time to time made orders and regulations ſuitable to the condition of thoſe who live, trade, or enjoy property in a garriſon town. Gibraltar.

Mr. Attorney-General has alluded to a variety of inſtances, ſeveral within theſe twenty years, in which the King has exerciſed legiſlation over Minorca. In Minorca it has appeared lately, that there are and have been for years back a great many inhabitants of worth, and a great trade carried on. [744] Minorca.

If the King does it there as coming in the place of the King of Spain, becauſe their old conſtitution continues (which by the by is another proof that the conſtitution of England does not neceſſarily follow a conqueſt by the King of England) the ſame argument applies here; for before the 7th of October, 1763, the conſtitution of Grenada continued, and the King ſtood in the place of their former Sovereign. That as in Minorca the Spaniſh conſtitution ſubſiſts, ſo in Grenada, before the 7th of October 1763, the French.

After the conqueſt of New York, in which moſt of the old Dutch inhabitants remained, King *Charles* the ſecond changed their conſtitution and political form of government, and granted it to the Duke of *York*, to hold from his crown under all the regulations contained in the letters patent. New York.

Reaſon aſſigned why there are no caſes. That there never was a doubt but the King had a legiſlative power over a conquered country.

It is not to be wondered that an adjudged caſe in point is not to be found; no diſpute ever was ſtarted before upon the King's legiſlative right over a conqueſt: It never was denied in a court of law or equity in Weſtminſter-Hall, never was queſtioned in parliament.

Lord *Coke*'s report of the arguments and reſolutions of the judges in *Calvin*'s caſe lays it down as clear. (And that ſtrange extrajudicial opinion, as to a conqueſt from a pagan country, will not make reaſon not to be reaſon, and law not to be law, as to the reſt.) And the book ſays,* that if a King—I omit the diſtinction between a chriſtian and infidel kingdom, which as to this purpoſe is wholly groundleſs, and moſt deſervedly exploded—" If a King come to " a kingdom by conqueſt, he may, at his pleaſure, alter " and change the laws of that kingdom; but, until he " doth make an alteration, the ancient laws of that king- " dom remain: But if a King hath a kingdom by de- " cent, there, ſeeing by the laws of the kingdom, he " doth inherit the kingdom, he cannot change the laws " of himſelf without conſent of parliament. (Plainly " ſpeaking of his own country where there is a parlia- " ment.")

* page 17.

" Alſo, if a king hath a kingdom by conqueſt, as King " *Henry* the ſecond had Ireland, after King *John* had " given to them, being under his obedience and ſubjec- " tion, the laws of England for the government of their " native country, no ſucceeding King could alter the ſame " without parliament. Which is very juſt, and it neceſ- [745] " ſarily includes that King *John* himſelf could not alter " the grant of the laws of England."

Beſides this, the authority of two great names has been cited, who took the propoſition for granted. And though opinions of counſel, whether acting officially in a public charge or in private, are not properly authority to found a deciſion, yet I cite them;—not to eſtabliſh ſo clear a point, but to ſhew that when it has been matter of legal enquiry the anſwer it has received, by gentlemen of eminent character and abilities in the profeſſion, has been immediate and without heſitation, and conformable to theſe principles.

In

In 1722, the assembly of Jamaica refusing the usual supplies, it was referred to Sir *Philip Yorke* and Sir *Clement Worge*, what was to be done if they should persist in their refusal.

The opinion of Sir Philip Yorke and Sir Clement Worge in 1722, with respect to Jamaica.

Their answer is—" that if Jamaica was still to be con-
" sidered as a conquered country, the King had a right
" to lay taxes upon the inhabitants; but if it was to be
" considered in the same light as the other colonies, no
" tax could be imposed upon the inhabitants, but by an
" assembly of the island, or by an act of parliament."

The distinction in law between a conquered country and a colony they held to be clear and indisputable; whether, as to the case before them of Jamaica, that island remained a conquest or was made a colony they had not examined.

Hardly any of the old inhabitants.

I have, upon former occasions, traced the constitution of Jamaica as far as there are books or papers in the offices: I cannot find any Spaniard remained upon the island so late as the restoration; if any, they were few.

A gentleman, to whom I put the question on one of the arguments in this cause, said he knew of no Spanish slave of the white inhabitants of Jamaica; but there were amongst the negroes.

Original constitution of the colony in Jamaica.

The King, I mean *Charles* the second, after the restoration invited settlers by proclamation, promising them his protection. He appointed at first a governor and council only; afterwards he granted a commission to the governor to call an assembly.

The constitution of every province immediately under the King has arisen in the same manner; not by the grants, but by the commission subsequent to call an assembly. And therefore all the Spaniards having left the island, or having been killed or driven out of it, the first settling was by an English colony, who under the authority of the King planted a vacant island, belonging to him in right of his crown.

[746]

The like is the case of the islands of St. Helena and St. John's, mentioned by Mr. Attorney-General.

A maxim of constitutional law with all the judges in *Calvin's* case, and two such men in modern times as Sir *Philip Yorke* and Sir *Clement Worge*, I take it for granted will acquire some authority, even if there were any thing which otherwise made it doubtful; but on the contrary no book,

no saying of a judge, no not even an opinion of any counsel public or private, has been cited; no instance is to be found in any period of our history where it was ever questioned.

Opinion on the second point.

The counsel for the plaintiff undoubtedly laboured this point from a diffidence what might be our opinion on the second.

But upon full consideration we are all of opinion that before the 20th of July, 1764, the King had precluded himself from an exercise of the legislative authority by virtue of his prerogative, which he had before over the island of Grenada.

The first and material instrument is the proclamation of the 7th of October 1763. See what it is that the King says, and with what view he says it; how and to what he engages himself and pledges his word, "whereas it will "greatly contribute to the speedy settling our said new "governments, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are and shall become "inhabitants thereof; we have thought fit to publish and "declare by this our proclamation, that we have in the "letters patent under our great seal of Great Britain, by "which the said governments are constituted, given express power and direction to our governors of our said "colonies respectively, that, so soon as the state and "circumstances of our said colonies will admit thereof, "they shall with the advice and consent of the members "of our council summon and call general assemblies (and "then follow the directions for that purpose.) And to "what end? To make, constitute and ordain laws, statutes, and ordinances, for the public peace, welfare and "good of our said colonies (of which this of Grenada is "one) and of the people and inhabitants thereof, as near "as may be agreeable to the laws of England."

With what view is the promise reciting the commission actually given? To invite settlers; to invite subjects. Why? The reason is given. They may think their liberties and properties more secure when they have a legislative assembly. The governor and council depending on the King he can recall them at pleasure, and give a new frame to the con-
[747] stitution; but not so of the other which has a negative on those parts of the legislature which depend on the King.

Therefore

Therefore that assurance is given them for the security of their liberties and properties, and with a view to invite them to go and settle there after this proclamation that assured them of the constitution under which they were to live.

The next act is of the 26th of March 1764, which, the constitution having been established by proclamation, invites further, such as shall be disposed to come and purchase, to live under the constitution. It states certain terms and conditions on which the allotments were to be taken, established with a view to permanent colonization and the increase and cultivation of the new settlement. The 26th of March 1764.

In farther confirmation, on the 29th of April 1764, three months before the impost in question was imposed, there is an actual commission to Governor *Melville*, to call an assembly as soon as the state and circumstances of the island should admit.—You will observe in the proclamation there is no legislature reserved to be exercised by the King, or by the governor and council under his authority, or in any other method or manner until the assembly should be called: The promise imports the contrary; for whatever construction is to be put upon it, (which perhaps it may be somewhat difficult to pursue through all the cases to which it may be applied) it apparently considers laws then in being in the island, and to be administered by courts of justice; not an interposition of legislative authority between the time of the promise and of calling the assembly. Patent of the 9th of April 1764.

It does not appear from the special verdict when the first assembly was called; it must have been in about a year at farthest from the governor's arrival, for the jury find he arrived in December 1764, and that an assembly was held about the latter end of the year 1765. So that there appears to have been nothing in the state and circumstances of the island to prevent calling an assembly.

We therefore think by the two proclamations and the commission to Governor *Melville*, the King had immediately and irrevocably granted to all who did or should inhabit, or who had or should have property in the island of Grenada—in general to all whom it may concern—that the subordinate legislation over the island should be exercised by the assembly with the governor and council, in like manner as in the other provinces under the King.

And therefore, though the right of the King to have levied taxes on a conquered country, subject to him in

right

[748] right of his crown, was good, and the duty reaſonable, equitable and expedient, and according to the finding of the verdict paid in Barbadoes, and all the other Leeward iſlands; yet by the inadvertency of the King's ſervants in the order in which the ſeveral inſtruments paſſed the office, (for the patent of the 20th of July 1764, for raiſing the impoſt ſtated ſhould have been firſt) the order is inverted, and the laſt we think contrary to and a violation of the firſt; and therefore void.

How proper ſoever the thing may be reſpecting the object of theſe letters patent, it can only now be done (to uſe the words of Sir *Philip Yorke* and Sir *Clement Worge*) "by "act of aſſembly of the iſland, or by the parliament of "Great Britain."

The conſequence is Judgment for the Plaintiff.

[*Note.* I have here again the pleaſure of returning my thanks to Mr. *Alleyne*, by whom I have been favoured with the copy of the ſpecial verdict in this remarkable cauſe. I have alſo uſed ſome materials largely with which I have been obliged in the firſt day's argument; the crowd being then ſo great that I was hindered in taking notes of my own; and for the ſame reaſon I have uſed the liberty in the judgment of ſupplying what I found imperfect or miſtaken in my own notes in ſeveral places, from a printed note of it which has been publiſhed; and correcting that in ſome places where I found it miſtaken.]

Habeas Corpus.

Bliſſets Caſe.

ON a return to an *habeas corpus* iſſued at the ſuit of the father of the child.

Cauſe was ſhewn that the detainure of the child was at the deſire of herſelf who was about ſix years old, and with the mother who lived ſeparate from her huſband. At chambers before Mr. Juſtice *Aſton*—The father inſiſted upon the child's being delivered up to him or he would take her by force. The judge on this told him he would commit him. It appeared that the huſband was become a bankrupt, and that the mother was forced to live ſeparate from him on account of ill treatment: And that the child was likely to receive an improper education with her father, and was not well uſed.

Lord

Lord *Mansfield*—The court, if the parties are agreed, will make no determination.

If the parties are disagreed, the court will do what shall appear best for the child; fix on a boarding school and the court will have no objection: Let the child in the mean time stay, so that the rule may be made with the concurrence of the family.

[749]

The power of the assigning the custody of a child brought before this court if the the family disagree about the custody, and the child be not of years of determining for itself is discretionary; if the father appear on circumstances improper to be permitted to take the child.

The natural right is with the father; but if the father is a bankrupt, if he contributed nothing for the child or family, and if he be improper, for such conduct as was suggested at the Judge's chambers, the court will not think it right that the child should be with him.

[It appeared to be held in a late remarkable cause of *Giffard* and *Giffard* before the Lord Chancellor, that the paternal authority as to its civil force was founded in nature, and the care presumed which he would take for the education of the child; but if he would not provide for its support, he abandoned his right to the custody of the child's person, or if he would educate it in a manner forbidden by the laws of the state, the public right of the community to superintend the education of its members, and disallow what for its own security and welfare it should see good to disallow, went beyond the right and authority of the father.* And this perhaps, is the meaning of that passage in the famous epistle of *Brutus* to *Cicero*. "*Sed dominum ne parentem* "*quidem majores nostri voluerunt esse.*"

That the power of a father over a child, however despotic the law allowed it to be in other respects as to the child itself, was yet subordinate to the power and constitution of the state, so as not to justify any thing *contra rempublicam*.

Upon this construction, I think the argument drawn from this very passage to prove those epistles not genuine will have little weight.]

Dow on demise of Davy.

SECOND of November 1767, after several pecuniary legacies and real devises, the following residuary clause.

All

* Nullum jus privatum juri publico potest derogare.

All the reſt and reſidue I give, deviſe, and bequeath to my brother *W. D.* his heirs, executors and aſſigns, according to the nature of their reſpective eſtates.

Admittance in fee to a copyhold eſtate ſurrender, to the intents and purpoſes which he the ſaid *W. D.* ſhould by
[750] his laſt will and teſtament direct, limit and appoint. Admittance to a piece of waſte, which he ſurrenders in the ſame manner.

Codicil atteſted by three witneſſes.

Deviſe of annuity to Mrs. *C. D.* widow of his late brother, to commence from the legal day of payment after his deceaſe.

Houſe at *H.* and furniture. And I do ratify and confirm all the deviſes and bequeſts which I have made in my laſt will and teſtament, except what I have hereby altered; and I do direct that it may be annexed and taken as a codicil to my will. He had no copyhold lands at the making of the will, but had at the codicil.

Whether the copyholds paſs?

It was argued, that if theſe had been purchaſed antecedently, no doubt the reſiduary deviſe would have paſſed them.

9 *Mod.* 96. A copyhold will paſs under a deviſe of all the teſtator's real eſtate.

Whether the codicil meant real and perſonal eſtate, ſo as to paſs theſe copyholds?

The execution of the codicil is a republication by reference, and operates as if he had made it a will of that date.

He confirms, and ratifies his former will in all reſpects not altered by the codicil, and he has not altered it with reſpect to the copyhold eſtates.

Caſes to prove this not a revocation—*Heeling* and *Heeling* —The teſtator expreſſes a legacy given to the poor of Rexham.

The caſe of *Potter* and *Potter* was cited.

Codicil not dated, but it appeared to be four or five days before his death.

1 *Vez.* 438. and Sir *John Strange* quoted; this codicil amounts to a republication; the codicil being indorſed, and the atteſtation according to the ſtatute. No preciſe form is neceſſary: But when he alters part and confirms the reſt, this ſhall be good as to what he appears not to have changed his intent.

So Lord *Northington* appears to have held.

In

In the caſe of *Jackſon* and *Hurlock*, in chancery there was a will. Marriage contended as a revocation. Codicil afterwards. [751]

The Chancellor decreed the codicil was a republication, and would paſs after purchaſed lands.

The codicil here being made part of the will, the will is part of the codicil, and therefore ſufficient to eſtabliſh the relation.

The will is very ſhortly ſtated, only the reſiduary clauſe.

Lord *Mansfield*—Any thing particular in the ſurrender?

Nothing at all.

It was argued on the other hand, that the eſtate goes to the heir at law. If the deviſor had no copyhold eſtate at the time, and could have none in contemplation therefore by the will when it was made, he could have no intention to paſs any copyhold eſtate; after, he purchaſes and ſurrenders to ſuch uſes, intents and purpoſes as he ſhall limit and appoint, with a ratification of all deviſes and requeſts but what he ſhall alter.

It is contended that the eſtate paſſes in the codicil by reference to the will.

Your Lordſhip muſt be clear of the intent to paſs them, and the legal manner of performing it.

Is this intent clear? *Den* on the demiſe of *Harris* againſt *Cutler*. Surrender to ſuch uſes as he ſhould declare; determined that the lands will not paſs. And in the caſe of *Heeling* and *Heeling*, the words being "declared, and to be "declared," your Lordſhip determined upon the word "declared" that the eſtate ſhould go according to the deviſe already made.

Not a word of that kind here; or any words in a will, by which it appears the teſtator had an intention to paſs copyhold lands.

The general deviſe of lands might have paſſed copyholds, with reference to the circumſtances of his eſtate at the time of making the will; but at the time in this caſe he had none to paſs.

As to the codicil, what is there that ſhows any deſign about deviſing the copyhold lands? He alters in ſome reſpects, and as to the reſt ratifies and confirms; then he leaves his will as to the reſt. He gives it no new effect, it ſtands as it did before; and can paſs no copyhold lands, becauſe they did not paſs then. And he has not expreſſed any intent

[752] intent that any thing ſhould paſs which could not when the will was made, but the contrary.

There is nothing, then, that takes from the heir at law.

Lord *Mansfield*—Did you look into the caſe of *Atcherley* and *Vernon?* 1 *P. W.* 703.

"I ratify and confirm my will, except in alterations." This was held a republication.

Lord *Mansfield*—This is a republication by the ſtatute. The codicil being ſubſcribed by three witneſſes that caſe is deciſive: And the will ſpoke by the republication as if it ſpoke at the date of the codicil. No doubt but the copyhold lands will paſs.

Mr. Juſtice *Aſton* cited *Cumm.* 383.

Superſedeas.

ON a motion to ſet aſide a writ of poſſeſſion, and *fieri facias* executed, pending a writ of error. The writ is no *ſuperſedeas*, unleſs bail be put in within four days.

Felony.

WHERE the party eſcapes into another county, and the goods are found, the juſtices of the county where the goods are found may commit in order to trial in the county where the goods were found.

Vide 24 *G.* 2. *c.* 55. And vide 13 *G.* 3. *c.* 31. *ſ.* 4.

Vide 2 & 3 *Ed.* 6. *c.* 24.

Lord *Mansfield* obſerved, if a capital offence is committed in the colonies, Ireland, or Scotland, the court will ſend them back, and not ſuffer them to be tried here. And his Lordſhip ſaid there was a caſe in *Strange*, meaning I ſuppoſe the caſe 1 *Str.* 646. *M.* 12 *G. Shelling* v. *Farmer* for ſeizing an houſe in the Eaſt Indies, which it was held being local, could not be tried here.

[753]

Smith's Caſe.

Smith *v.* Dennis, *or* Denniſon.

ACTION for money had and received. Special verdict found at the aſſizes, ſtating that the defendant is poſt-maſter of the town of Hungerford, and that the plaintiff

plaintiff is a reſident in the ſaid town. And that in the ſaid town there has been a poſt-office for the conveyance of letters ever ſince and long before the ſtatute of Queen *Anne*. And that the reſidents in the ſaid town paid for the delivery of letters at their houſes a penny, over and above the rate of poſtage, for each letter ſo delivered. And that this had been paid by all the inhabitants of the town, except one family, who refuſed to pay, and, after five years refuſal, had the letters delivered without payment of the ſaid additional penny. And the jury find that the ſaid penny, over and above the rate of poſtage, uſed not formerly to be paid, but the letters were delivered gratis. And that the ſaid demand of an additional penny was introduced on a change of poſt-maſters.

And that the plaintiff had a letter delivered at his houſe, and the additional penny, as aforeſaid demanded by the defendant, over and above the rate of poſtage, which he refuſed to pay; whereupon the defendant refuſed to deliver the letter, until the plaintiff ſhould have paid the ſaid penny, which the ſaid plaintiff did afterwards, upon the defendant's ſaid demand. And that the ſame is the money for which the action is brought.

And the jury farther find, that the defendant deſerved the ſaid penny, as a reaſonable recompenſe for the delivery of the ſaid letter, unleſs he were bound to deliver the ſame to the plaintiff, ſo reſident in Hungerford, at his houſe within the ſaid town of Hungerford, gratis. But whether he were bound ſo as above by the plaintiff in his plea alledged they ſubmit to the court, and conclude in the uſual form.

The ſtatutes relative to the poſt-office were cited, which are principally 12 *Car.* 2. *c.* 35, *anno* 1660, the original act, but repealed by 9 *Anne*, *c.* 10. which is that ſtatute upon which the caſe principally turns, and 3 *G.* 1. *c.* 7. making the ſaid ſtatute of Queen *Anne* perpetual, and part of a general fund; and 4 *G.* 2. *c.* 33. which was relied upon greatly in this cauſe.

Objected againſt the demand, that within the town the poſt-maſter ought to deliver gratis; and there will be no objection reſulting from the extent of the town, for the larger it is the more letters will probably arrive, the reve- [754]
nue will encreaſe, and with it the profits of the poſt-maſter.

Argued for the plaintiff—This is a queſtion whether the poſt-maſter is bound to deliver letters to the inhabitants

of

of a poſt-town reſident in the town, without any recompence.

This queſtion muſt be determined by a view of the acts of parliament relative to the ſubject taken together. §

Letters ought certainly not to be detained till the fee is paid.

The proviſions concerning the penny poſt-office illuſtrate the queſtion.

* 4 Bur. 1. Hill. 8. G. 3. p. 2149. Poſtmaſter cannot detain a letter on demand of any thing

The poſt-maſter does what in *Barnes*'s caſe* it is expreſsly decided they cannot do. He was bound to deliver the letter according to the direction, and could not retain it, inſiſting upon a fee.

for the delivery of the ſame beyond the act of parliament.

Lord *Mansfield* ſaid to the counſel on the other ſide what do you think of the judgment of the Common Pleas in *Browning* and *Goodchild*, upon the general queſtion? Surely it was deciſive. But if the parties are diſſatisfied I will not exclude them.

The poſt-town is the limit of delivery gratis.

The town or place is the word uſed; the town is taken as the place of delivery, where there is a town.

If the great caſe is right it is deciſive; for this was within the town.

And he demands it as a duty; which in *Barnes*'s caſe it was determined he could not do: No man can demand a duty without an act of parliament.

Mr. Juſtice *Aſton*—That within the poſt-town the poſtmaſter muſt deliver: For that otherwiſe there would be no limits; he might refuſe at the next houſe. The inconvenience would be great to all; and I cannot diſcover the reaſon.

Mr. Juſtice *Willes*—That the court hitherto had avoided determining upon the general queſtion: But that, now it came before them, he could not forbear ſaying there was no doubt upon that, and concurred with his brethren.

JUDGMENT for the PLAINTIFF.

[755] Note, The caſe of *Browning* and *Goodchild* was in Trinity term, 13 G. 3.

Stock and *Harris* was alſo mentioned, which, it ſeems by *James Burrow*'s note, was decided on the ſpecial uſage of the place rather than on the general rule, which appears to have

§ Quæ in pari materia ſunt conjunctim operantur.

have been now firſt ſettled in this court, conformably to the opinion in the Common Pleas.

Harrington's Caſe.

THREE bonds upon a gaming contract, payable at different dates, with warrant of attorney to confeſs a judgment.

The obligee, to whom theſe bonds were given, put them into Mrs. *Harrington*'s hand, without notice of the illegal conſideration for which they were given, and without its appearing ſhe was any way privy to the ſaid illegal contract. Whereupon ſhe ſwears, in her affidavit, that ſhe wrote to the defendant, the obligor, to know whether it was agreeable to him ſhe ſhould accept the ſaid bonds, and, receiving no anſwer, took out execution upon the ſame.

And now, a motion being made to ſet aſide judgment and execution, and that the bonds might be delivered to the defendant, as being void by the ſtatute of Queen *Anne*.

Lord *Manſfield*—It is true this has been decided on the ground of a negociable bill.

Securities upon a gaming contract coming into the hands of a third perſon, without privity, void, tho' for a bona fide debt.

It is very ſevere: And I don't know whether it does not do more harm to an innocent perſon than good againſt gaming. But ſo it has been decided: And if you came in the formal way we would not alter.

But when you come for a favour, we will not grant it againſt an innocent perſon; and if ſhe wrote that letter ſhe is innocent.

But the court in ſuch a caſe will not relieve upon motion.

[Of games and penalties 12 *R.* 2. *c.* 6. *anno* 1388. 11 *H.* 4. *c.* 4. 17 *E.* 4. *c.* 3.

33 *H.* 8. *c.* 9. *anno* 1541. 2 & 3 *P.* & *M. c.* 9. 16 *Car.* 2. *c.* 7. 9. *Anne, c.* 14. 2 *G.* 2. *c.* 28. *ſ.* 9. 12 *G.* 2. *c.* 28. 13 *G.* 2. *c.* 19. *ſ.* 3. 18 *G.* 2. *c.* 34. 25 *G.* 2. *c.* 36. 30 *G.* 2 *c.* 24. *ſ.* 14.]

Clarke *againſt* Johnſon and Co.

[756]

THIS was upon an action of *aſſumpſit* for money had and received, brought by the plaintiff, a brewer, to recover a ſum of money, againſt the defendant, keeper of a lottery office, upon the following caſe, which was ſettled before his Lordſhip at Guildhall, by counſel on both ſides, a verdict being found for the plaintiff, under his Lordſhip's directions, for 459 pounds four ſhillings and four pence.

CASE.

Case.

"*J. W.* being a clerk to the plaintiff, a brewer, and receiving money from the plaintiff's customers to his use, and also negociable notes, in the ordinary course of the plaintiff's trade, for the use of the plaintiff, paid several sums, (ascertained in the verdict) and amounting in the whole to 459l. 4s. 4d. to the defendant, upon chances of the coming up of tickets in the state lottery of the year 1772, contrary to the act of parliament of the said year. The plaintiff has given a release to his clerk, and to the sureties of the clerk, for the said money, no part of which has come to the plaintiff's use, but the same is detained by the defendant, and not returned upon demand."

The question is, 1st, Whether the plaintiff had a right to recover?

2dly, Whether the witness is admissible?

It was contended that, to justify against the plaintiff, in an action for money had and received, upon an implied contract to return, you must shew the money was the plaintiff's property, and that it came into the hands of the defendant, by a good right; and that he has a better title to keep it than the plaintiff has to take it back.

12 *G.* 3.

Contract upon the chance of tickets coming up declared null and void.

That the defendant had it by no title.

He had it expressly against the law, which forbade to receive the money, and expressly punished by penalty.

[757] The defendant's claim can't well hold.

The plaintiff's claim against them is a fair and honest claim, and he has a right to hold.

As to the witness.

An objection to credit to be left to a jury.

The plaintiff's calling of him was necessary: And he had a right to call him, as bankers their clerks, to prove a mistake in payment, though the clerk responsible.

Qui tam, informer against *Ellison*.

As to the objection that this witness is not admissible, because *particeps criminis*, in some cases *participes criminis* are admissible.

A man may shew his own turpitude. *Tomkins* and *Barnett*.

Besides, the defendants have performed their agreement: they insured upon chances of coming up; the object of the insurance is complete, and for ever done with.

Lord

Lord *Mansfield*—That case of *Tomkins* and *Barnett* has been a thousand times denied.

Mr. *Buller*—A man insuresa ship, and, supposing it to be lost, pays. The ship not lost; he shall recover upon an *assumpsit*. But if a man give money to bribe, and the agent bribes, he shall not recover: For he gave it for an illegal purpose; he parted with it. *Volenti non fit injuria. Ex malefitio non oritur contractus.* If any case they should have had *trover* upon *tort*; for there was no contract to ground an *assumpsit*.

Lord *Mansfield*—There was a case where the person who had taken the oath against bribery was called to prove the bribe.

This is an action to recover 459l. 4s. 4d. upon *assumpsit*. *J. W.* clerk to his master, received cash and negociable bills to his master's use, and, without the knowledge of his master, laid them out in lottery tickets.

The act prohibits the thing, inflicts a penalty for the doing of it, and declares all acts to the contrary null and void.

The jury find a verdict subject to the opinion of the court whether *W.* was admissible. [758]

He was released both by his master and his sureties.

But at large the general question is, Whether the plaintiff can recover upon this evidence, or upon any in this case?

I know no rule that a man who says something that is not proper of himself, is not to be heard where he goes to prove any material turpitude in another. The rule *non est audiendus* is, the jury will not credit him easily: There can be no stronger case than the man who had taken the oath against bribery admitted to swear the bribe he had sworn against.

This is in the nature of *conditio indebiti*, where you come to recover what in conscience ought not to be kept from you. It is an action in the nature of a bill in equity.

Nor is the rule of *particeps* as Mr. *Buller* states it.

There are two sorts of rules calculated to defeat fraud, one to protect good and innocent people, by rescinding a fraudulent agreement, into which they are drawn; the other to prevent persons dealing upon equal terms from falling into agreements prohibited, by preventing such persons from taking relief against such contracts.

Two rules against fraud, one applied to protect innocent people; the other to prohibit those who have acted on equal terms, mutually against a prohibition juris positivi, from proving an offence with which they are equally chargeable, and take benefit, against their own crime.

In the one case there is an indiscretion; and as we don't apply the idea of abstract absolute goodness to cases of this nature, which will not bear it, there is a fault. But you don't

apply

apply the rule of *par iceps criminis non eſt audiendus*, but *in pari delicto patior eſt conditio defendentis*. The crimes are not equal. Shall the judges not enforce and execute the act? The act was meant to protect incautious people. The caſe of *Tenkins* and *Barnet*, to be ſure, is a precedent. I won't ſay that the argument is weak, but it is not very ſtrong; for it's ſaying that a perſon who avails himſelf of the neceſſities of a man to take 10,000l and the innocent perſon are in the ſame condition. And where it is not *par delictum*, the perſon comparatively innocent ſhall not, for his fault or indiſcretion, be made a ſcreen to cover the guilty, nor be deprived of redreſs.

The caſe of *Boſanquet* and *Daſhwood* is extremely ſtrong. Lord *Hardwicke* is reported to have declared that to ſay the crimes were equal would be to ſay that the cheator and cheated were the ſame.

[759] But where it is paris gradus the defendant hath the better ſide. And in this caſe if the clerk had ſued for himſelf he could not have recovered.

In the caſe of a breach of a poſitive ſtatute, made for political reaſons, no body is drawn in to inſure. The ſhops are open; the offence equal: And at firſt it ſtruck me that the plaintiff came in the caſe of his ſervant, could not recover. But thinking of it that night and next morning I altered my opinion very greatly. And we have talked together upon it ſince.

Where the lawful property may be aſcertained the owner ſhall come and recover, tho' the thing has been unlawfully changed.

Vide ſupra.

Whoever enters into an illegal contract takes the benefit of it, ſubject to all rights known or unknown at the time, which are againſt the contract.

Now whenever money, or any thing that can be aſcertained, paſſes without conſideration, the plaintiff, the true owner, comes in his own right, no matter whether it be paper or caſh, provided it be aſcertained. And in this caſe notes were more eaſily aſcertained than the bank-note the highwayman had put off at Hatfield, and the poſt-boy changed it.

You remember the caſe of *Reynolds* and *Goligtly*, where the money was traced through ſeveral hands. In all theſe caſes the original owner may come as plaintiff, and ſay, "You came improperly by it; you have no right; you "cannot retain it againſt me, who have the right."

I think this deciſion may be of great ſervice to the public. It may be ſomewhat difficult to trace, but wherever it can be traced it ſhall be recovered. In prohibited contracts, illegal contracts without conſideration, you take the money, if it be the money of the maſter, ſubject to his right to recover it when it ſhall be aſcertained. And I think this contract was null; the property always continued, and he ought to recover.

Judgment accordingly.

The

The King *againſt* Williams.

THIS cauſe came on firſt at Guildhall, at the ſittings for London, on the ninth of July, 1774, before Lord *Mansfield*.

Information againſt *John Williams*, publiſher of the *Morning-Poſt*.

Setting forth that he publiſhed a wicked and ſeditious libel in the *Morning-Poſt*, 15 ——, 1774: "Let the "world know that Lady ——— (with the name at full "length) is far gone with child by her hopeful nephew."

Argued for the proſecution.

Mr. Serjeant *Glynn*—Though a libel may be one though it be true, yet, I think, it cannot be the more innocent and leſs malignant for being falſe. This ſeems ſo falſe, that I believe there is not a man in the kingdom who believes it, or thinks there is the leaſt ground to believe the ſuggeſtion. [760]

Whenever I read a paper of this nature (for ſo malignant a one I never yet read) it always occurs to me, and I hope it will to you, that the author muſt be ſome enemy of the liberty of the preſs: For no man can read ſuch papers without doubting whether the preſs does not do more harm than good; and whoever gives cauſe to thoſe doubts is its worſt enemy.

And if ſome means be not found for reſtraining the exceſs of ſuch privilege within the bounds of decency and juſtice, its moſt zealous friends, as I ſaid, muſt begin to doubt whether it does not do more harm than good: And our property, with all our valuable connections, will be without protection. The caſe is before you, and I dare ſay you will think the proſecutor has done a duty highly incumbent on him. And if you believe this paper to be a libel, and the evidence which charges it, you will inflict that puniſhment by your verdict which juſtice requires.

Paper proved to have been bought at the ſhop of Mr. *Williams*, and the duty paid by Mr. *Williams*.

Lord *Mansfield* obſerved they had a right to read the whole if they pleaſed, becauſe it might explain.

It appeared in evidence the defendant received a yearly ſtipend of ſixty guineas, as publiſher of this paper, from the editors.

Counſel for the defendant Mr. *St. John*—I believe the noble Lord on the bench will ſupport me in ſaying that when the defendant calls witneſſes, to take off the preſumption which at firſt ariſes, the effect will be, if his teſtimony is credited, that the guilt imputed to him is removed by the taking away of this preſumption, which in ſome degree ſtands againſt every man charged with an offence.

In this caſe, as they were obliged to give ſome evidence in ſupport of the charge, they called a perſon who proves he bought the paper of Mr. *Williams*, which is a ground of preſumption to affect Mr. *Williams* as the publiſher till we prove the contrary.

If we prove Mr. *Williams* is not the author, is not the printer, is not the editor of this paper, is only the agent, and ſells them at his ſhop, at the ſame price as the original
[761] editors; if a paper of this ſort has been left at his ſhop before he was up, and without his knowledge of the contents, and he, as ſoon as he comes down, on looking into the contents, expreſſes the greateſt concern and indignation that ſuch a libel had been ſold, ſends back all the papers in his ſhop unſold, not even lends one to a friend, but refuſes this, though particularly requeſted, you will clear him of the intention, and conſequently of the guilt and puniſhment.

The law as ſoon as the fact is fixed infers the guilt, and leaves the defendant to ſhake the preſumption off by evidence. In the caſe of murder, a man is killed, and found to have been killed by the defendant: The law will never preſume one man killed another innocently, in time of peace and without legal authority from juſtice; but it puts him on his defence, and he may prove that he did it neceſſarily, for the protection of his own life; or that he did it accidentally without malice or wilful negligence. And in either caſe he will be acquitted.

So far from malice to any character aſperſed in this paper, he ſhews a juſt and honourable reſentment at the malice of another; ſo far from negligence, from the moment he knows the contents, and on the very morning the papers came to him, he does every thing in his power to ſuppreſs the publication.

Mr. Serjeant *Glynn*, in reply.—Gentlemen of the jury, that Mr. *Williams* is not the printer, Mr. *Williams* is not the proprietor, may be facts, certainly true and conſiſtent with the charge before you. It is not a queſtion whether the evidence is inſufficient to prove him a publiſher; or whether

ther there has been ſufficient to repel the preſumption at firſt ariſing. As the publiſher he ſtands forth; as the publiſher only he is charged. They are ſold at *Williams*'s; they are alſo ſold at two coffee-houſes; and alſo at the editor's.

For ſixty guineas annuity Mr. *Williams*, then, is content to take the chance of publiſhing what was given him to publiſh.

The author is mentioned—who is the author? The printer—who is the printer? Who, then, brings all this miſchief to light? *J. Williams* alone. The miſchief, however, is not extenſive: If ſome have got abroad the defendant cannot help it. They are all ſold early in the morning:* This I believe. And this order of not publiſhing might have been repeated by *Williams* at nine in the morning without harm to the ſale daily. And indeed if in this inſtance any part of the ſale was ſtopped, Mr. *Williams* ſuffers nothing by the ſale ſtopped, for he has a certain ſtipend. The proprietors are no ſufferers, for they have ſold a ſufficient quantity. The miſchief is not ſtopped, for the publication is complete in the morning, and no body who thinks but is apt to believe, when he has once read ſuch a paper, that he has read it once too much. A paper of ſuch a ſort is ſeldom looked into a ſecond time, any more than a ſecond day.

* Five o' clock in the morning they ſupply the coffee-houſes, as a witneſs for the defendant ſaid.

[762]

This is, therefore, juſt the caſe of the common publication of a libel.

Lord *Mansfield*—Gentlemen of the jury, this is an information againſt the defendant for publiſhing a libel, ſet out by the information.

That it was publiſhed is not diſputed; that it was a very grievous and infamous libel is not diſputed.

That the meaning is clear is not diſputed.

But it is ſaid the publiſher did not know what it was, and ſtopped it when he did. This is ſet up as a juſtification if any thing; for nothing in mitigation comes before you; that ariſes in judgment.

There are a thouſand things might have been a juſtification, but this is not one of them.

Williams is the oſtenſible publiſher; the author does not appear; the printer does not appear. At five in the morning it's publiſhed; at nine Mr. *Williams* comes down; he did not read it: I dare ſay they never read a thouſandth part of what they publiſh. Are they, therefore, to juſtify

their publications, be they what they will, becauſe they publiſh they know not what?

If his ſorrow was honeſt and ſincere it may go very far in mitigation. There is no certain puniſhment affixed; it depends upon the circumſtances and malice of the criminal; but it can be no legal juſtification. If you are ſatisfied with the evidence that he was the publiſher you will find him guilty; if otherwiſe you will acquit him.

Jury, without going out, found the defendant guilty.

And now, in this preſent term, 22d of September, 1774, judgment of the court was prayed.

In mitigation it was offered by his counſel, that he is not publiſher, but takes a ſtated ſalary of 60l. that he always uſed to inſpect the papers at five in the morning, but was, unfortunately, later that morning. That on reading he diſcovered and was much hurt with the contents; that he immediately forbade the ſale, and refuſed to let any body ſee it. That he deteſts the publication; that he knew not till nine on that morning of the publication that there was
[763] ſuch an one in that or any other paper in the world. That he delivers it out, and is not the only publiſher, for that they are delivered at the printer's.

On the other ſide—That he took the ſalary from the publiſhers; that he muſt take it ſubject to all the riſque and all the conſequences: And that inſpection came too late for an excuſe, when he had let the papers go out of his ſhop. That if he was unfortunately ſo late upon that particular morning he would have an opportunity now of profiting by the judgment of the court, and either lie in bed quietly, without being concerned as an agent for newspapers, or elſe take care at leaſt to publiſh nothing for the future without reflecting, that if he choſe to ſuffer a publication to be made through his hands, he muſt ſee that it was innocent, or abide the event of its being otherwiſe at his peril.

Mr. Juſtice *Aſton* delivered the judgment of the court. You ſtand convicted of a ſcandalous libel, charging a gentleman and a lady with a very atrocious crime; without ground, and, as you acknowledge in your own belief, unjuſtly.

I am not at all clearly ſatisfied that a number of people, with a doctor of divinity at the head of them, are authorized to publiſh ſuch writings, by hiring a perſon to ſtand out for them.

The liberty of the preſs is a very great advantage and ſecurity to our public liberty: But it is frequently abuſed

to

to the purpoſe of the moſt injurious attacks upon private liberty and tranquillity.

It is not ſufficient that a man riſes later than his uſual time, ſees a pernicious publication has gone out of his ſhop by the hand of his ſervants, acting in the courſe of ſale under his authority, and then endeavours to ſtop the reſt. However, though it does not juſtify, yet, as it appears you were ſorry when you found it was publiſhed, and ordered no more ſhould be ſold, and refuſed to ſuffer it to be read, on this conſideration the court mitigates the fine. But, in order to example, and to reſtrain ſuch licentious attacks upon characters, and to prevent the general miſchief, the judgment of the court is, that you pay a fine of 100l. and be impriſoned for one calendar month, and until the ſaid fine be paid.

Goodright, on Demiſe of Carter, *v.* Straphan and others.

THIS was before his Lordſhip at the ſittings after Trinity term laſt at Guildhall, and now came before this court on a motion for a new trial, which the court took time to conſider upon ſuggeſtion of the counſel who attended.

Ejectment as widow of one *Carter*, title from one *Roberts*, 1710. Plaintiff had been in poſſeſſion: To prevent bar from length of time they offered evidence of a variety of acts to prove that the poſſeſſion of the plaintiff was a ſpecial qualified poſſeſſion, as receiver under the defendant's title. [764]

On the other ſide—That by indenture between *Carter*, and his wife on the one part, and *Greeney* on the other, reciting that *E. Carter*, from and after the deceaſe of *Mary Trevor*, widow and relict of *Roberts*, was, under the will of *Roberts*, entitled to a meſſuage on Thames wharf, in the city of London, and alſo to three meſſuages in Reading, and truly indebted to *Greeney* in a ſum. And *Greeney* had farther agreed to ſupply 144l. for the ſupport, ſubſiſtence, ſupply, and maintenance of them and their family ſo long as *Mary Trevor* ſhould live. They grant for a term of ninety-nine years the houſe and premiſſes at Reading to *Greeney*, his heirs and aſſigns. Covenant by the huſband that he will pay the ſums mentioned, principal and intereſt, and that until ſuch payment it ſhall and may be lawful to and for the ſaid *W. Greeney*, his heirs and aſſigns, to have, hold and

and enjoy, and to receive the rents and profits thereof, for the term of ninety-nine years after the death of *Mary Trevor*.

After the death of the husband Mrs. *Carter* gives a receipt.

" 24th of June, 1760, from 1755, cash received from " *H.* and *T.* estates, deducting taxes and repairs—12*l.* " from the Reading—due to me, 79*l.*"

She afterwards gives an order to her tenant to attorn to *Saunders* and *S.* executors of *Greeney*, the mortgagee of the premisses, who had not before possession of the houses in Reading; and to pay rent.

She surrenders possession of an house to the executor of *Greeney* by indenture, and she calls him mortgagee thereof.

Lord *Mansfield*—This was contended as very satisfactory evidence of an acceptance of *Greeney* as tenant during the term.

On the conscience and right of the case it struck me very strongly. To be sure no woman can join with her husband in a deed without a fine; but no man who can persuade his wife to join in a deed, would not persuade her to join in a fine, therefore it is mere form, and the defect of form she may supply by her acquiescence and actual acceptance when in her own power.*

[765] The money borrowed and lent for the support supply and maintenance of them and their family; and lent with a very kind intention.

I thought it very much against conscience that she should take the benefit and avoid the charge.

I am extremely glad it has been moved. I think it very candid the counsel should advise a motion upon the verdict, rather than a new ejectment.

When this came first before me, Mr. *Wallace* argued upon the authority of leases whether with or without rent, that by action of waste in one case, and acceptance of rent in the other, she may confirm a lease which she might have disallowed?

It is said that these cases are exceptions to the general rule, which says, that the deeds of a woman are not voidable but void; and that thus, though a great many years ago, the court would have said they could look no farther, they should now

* Licet dispositio de interesse futuro plerumque sit inutilis, tamen fieri potest.

Declaratio præcedens quæ sortiatur effectum interveniente novo actu.

now ſee the ſubſtance, it is not a leaſe but a mortgage. It was for the advantage of agriculture, and benefit of tenants, that the leaſes were allowed. This diſtinction we think true: That the woman ſhould only ſet aſide leaſes when diſadvantageous to her; and that we are to look with the ſame eyes upon this as other caſes, and ſee into the ſubſtantial* nature.

* Vide the caſe of Tracey Atkins, in Sir James Burrow.

What then is this caſe in ſubſtance and real juſtice? And what is it with reference to law and authorities?

Perk. 154. "If a femme deliver to me a deed as her deed "it is void, and if her huſband afterwards die and ſhe deli- "ver the ſame deed, then it is good."

Are then the acts here amounting to a delivery? I think we have authority they are: *Co. Litt.* that a deed may be delivered by words without actual delivery.*

* Comment on B. 1. ſec. 41. p. 36 a and vide the caſe ſupra where this was determined.

Roll's Abr. If a femme covert execute a deed with her huſband, and after the death of her huſband he delivers this deed, it is good.

What then is the caſe?

The defendant is in poſſeſſion of the mortgage, ſhe declares her ſurrender, ſhe accounts to him as mortgage; the act with reſpect to the poſſeſſion of the houſe at Reading, is a confirmation of the deed as to that; and a confirmation of part is a confirmation of the whole. We think therefore, there are grounds enough upon this caſe to ſay, that the deed is ratified and confirmed by the wife after the death of the huſband; not upon the diſtinction of leaſes, but upon the delivery of the deed.

[766]

Taylor *againſt* Fiſher and Others.

LORD *Mansfield* reported the caſe.—Ejectment of an undivided moiety claimed under the will of one *Perkins*, he gives to each of his two daughters the undivided moiety—to them and their children of their bodies begotten or lawfully to be begotten; and if either ſold her ſhare, the other was to have the moiety, nothing turns upon that; after this there was a deed of partition 1705, by which *F. T.* agreed to hold during the life of *M. T.* and *E. S.* *M. T.* died ſome years before *E. S.* and he in 1734. *F. T.* held over, under whom the plaintiff now claimed as being entitled from the length of time to preſume an actual ouſter.

From 1734, this eſtate had been held ſolely without any claim by *M. T.* or any claiming under her.

In 12 or 14 the eſtate at *Tottenham* came into other hands. I left it to the jury that they might preſume actual ouſter upon the circumſtances.

Argued

Argued for the plaintiff—Theſe parties were tenants in common without an eſtate, the others were joint-tenants. And upon forty years poſſeſſion the jury did right to preſume an actual ouſter. There is no need to ſtate caſes of preſumption from length of time ſurrender on a leaſe, livery and ſeiſin.

In this caſe of tenancy in common poſſeſſion is no bar for the limitation to run upon without actual ouſter; but it is good to leave to a jury as preſumptive evidence.

Epſon againſt *Shackleton*, Yorkſhire aſſizes.

It was contended there, that being an eſtate where the defendant was entitled to the whole, the evidence of an adverſe poſſeſſion by receipt of rents and profits of a moiety was not ſufficient, when the father had been admitted and his anceſtor to another moiety. And Mr. Juſtice *Blackſtone* ſaid, that the ſtatute of Queen *Anne*, in caſe of freehold, was a material circumſtance in the caſe, and length of time a poſſeſſion for forty years. I am perſuaded the court will
[767] be of opinion, preſumption of ouſter was well warranted in this caſe.

Will made 1690, agreement 1705, to take during the life of *H.* ſurrender about thirty-four.

That there was no perception of profits during forty years.

Tenants in common are as if ſeized of ſeveral eſtates as to this conſideration.

It is argued that the one of two daughters held poſſeſſion fifty years, and contended that the daughters were tenants in common, and therefore the poſſeſſion of one is the poſſeſſion of the other; but this does not hold againſt the ſtatute of limitations.

Lord *Holt* ſays, forty years receiving rent, with no demand, ſeems very ſtrong.

Mr. *Dunning* on the other ſide—There is no diſtinction I think can be made, to take this out of the general rule. I think the poſſeſſion of one tenant in common is the poſſeſſion of the other.

The party in queſtion being under age and a minor, ſhe could not in 1715 do any act to the prejudice of the eſtate.

The law does not ſay the poſſeſſion of one ſhall be that of the other for a limited time, but to the end of the world if neceſſary.

There is here no adverſe poſſeſſion from 29 at leaſt, if not 21.

How can a copyhold differ from a freehold? The copyholder admitted only to a moiety, this proves his title. The defendant was only entitled to a moiety, which in the year

1734 is ſhewn to have been in him, and the other moiety in my client.

An unlawful and tortious act as in this caſe of one tenant againſt another, cannot be preſumed forty years after his death.

If your lordſhip be ſtill of opinion, the jury, who exerciſed no judgment, did right in finding by preſumption an actual ouſter, and that it can be preſumed, and that there were circumſtances to preſume it, then the finding is right. But, with all poſſible deference, I muſt ſay the jury were miſdirected.

This is my opinion; and if your lordſhip upon conſideration ſhould be of that opinion, I ſhould pay your lordſhip a very ill compliment, in ſuppoſing you would not be as ready to decide on that ſide as on the contrary. [768]

Reeding and *Royley Salk.* 423.. Limitation never runs againſt a man but where he is actually ouſted or diſſeized; and therefore a tenant in common may diſſeiſe a man: it muſt be actual ouſter and not perception of profits.

Lord *Mansfield*—It is moſt certainly true, that I told the jury they were warranted to preſume an adverſe poſſeſſion and ouſter of the other tenant in common. Some ambiguity ariſes from the term of actual ouſter, as if puſhing him by the ſhoulder was neceſſary.

Actual ouſter does not mean putting out by force of hand proved in evidence; but holding over by ſuch poſſeſſion as muſt have been adverſe to the tenancy, is full preſumptive evidence of actual ouſter.

The ſingle act of holding over a length of time can give him no title; but tenant *pur auter vie* holding for twenty years after the death of *ceſtuy que vie*, is a bar. Tenant in common holding *eo nomine* can never bar, becauſe he holds only in ſupport of his right. If he acknowledges the other party as tenant, and ſays he will pay him the money, there is no adverſe poſſeſſion; nor is ſaying he will not pay him at the time without denying the title: But where he denies the title and keeps poſſeſſion againſt it, there is an adverſe poſſeſſion and ouſter. Has he held in this caſe by adverſe poſſeſſion? The poſſeſſion has run numberleſs years.

I continue of the ſame opinion as I was at the trial.

That the forty years poſſeſſion on the circumſtances of this caſe was a bar.

Mr. Juſtice *Aſton*—There have been various opinions what ſhall be an actual ouſter; and what poſſeſſion ſhall be the poſſeſſion of one tenant in common for another: I think it is while he takes the profits as tenant in common. The difficulty ariſes from there being a time in which there certainly was a tenancy in common. What is the bar? A forty years poſſeſſion; and very rightly, for otherwiſe nothing would be a bar.

This is not a bare preſumption, I think, but an actual bar.

I think

I think that the evidence is proper to be left to a jury; and there is not a tittle of evidence to find a tenancy in common for forty years back.

Mr. Juſtice *Willes*—This caſe muſt be determined upon its own circumſtances. If there was a right it was at the time of the death of *T. S.* and if for thirty ſix years there has been no claim, how dangerous, after ſo long quiet enjoyment, to receive a claim.

[769] Force of the ſtatute of Queen Ann as to what ſhall be actual.

Whatever the old ideas might be of an actual ouſter, I think adverſe poſſeſſion is now actual ouſter. And the idea not to be extended ſince the ſtatute of Queen *Anne*, which has changed the remedy, and does not require actual entry to give remedy.

Thirty ſix years poſſeſſion, evidence of agreement diſſolving the tenancy.

I take adverſe poſſeſſion for thirty-ſix years without actual ouſter, in the ſtrict antient ſenſe of an agreement which diſſolved the tenancy in common.

That ſuch poſſeſſion was ground of any preſumption againſt the defendant's title.

Mr. Juſtice *Aſhhurſt*—Here is a poſſeſſion of forty years without any rent or profits taken, I think that this was good ground for a jury to preſume any thing to deſtroy the defendant's title. They might either preſume an actual ouſter, or, if neceſſary, a conveyance. In the Yorkſhire caſe, it is not neceſſary for me to ſpeak what would have been my opinion. It did not come properly before the court. It was whether the plaintiff was barred by the ſtatute of limitations. The court were not to preſume, the jury were to preſume. And I think they did very right in this caſe, to preſume every thing which might deſtroy the plaintiff's title.

Witneſſes.

IF you come to enlarge trial for want of witneſſes on your ſide, you ſhould be ready to admit all neceſſary facts, which are of a nature to be proved without witneſſes on theirs.

You muſt ſhew clearly the want of material witneſſes has not been contrived and thought of, as an argument to put off the trial. If they might have applied earlier, or there be any apprehenſion the objection has ariſen juſt time enough to avoid the trial, it will be refuſed. And ſo, wherever this want of evidence might have been diſcovered, and application made for the relief of it originally, and this has not been done, it may expect from the practice and juſtice of the court to be refuſed.

Jones *againſt* Cowper.

GOODS ſold in conſideration that *A.* by parol promiſed *B.* the vendor, that if *C.* the vendee did not pay for the goods he would pay for them. The goods are delivered by *B.* to *C.* accordingly, and *B.* ſues *A.* for the money.

Contended that this not being a promiſe in writing, was by the ſtatute 29 *Car.* 2. not binding, for that the ſaid ſtatute *c.* 3. *ſec.* 4. in the ſecond clauſe ſays—that no action ſhall be brought to charge any defendant upon any ſpecial promiſe, to anſwer for the debt of another, unleſs the agreement upon which the ſaid action is brought, or ſome memorandum or note thereof ſhall be in writing. [770]

To this it was anſwered, that the ſtatute meant where the promiſe to be anſwerable for the debt of another, was not the original promiſe upon which credit was given; but that here the original credit was given to the defendant, who, before the goods were ſold promiſed to pay on failure of payment of the vendee, upon the credit of which promiſe of the defendant's the goods were ſold; and therefore that this action was well brought.

Caſe, *Hil.* 1773, at the ſittings of *niſi prius* K. B. *Mawbridge* and *Cunningham*, where the goods were delivered in conſequence of a promiſe made to be anſwerable for another; this promiſe was held to bind the defendant in law.

Mr. *Dunning*—There the party undertaking was alone liable originally, and not the party to whom the goods were delivered.

But here, laying the ſtatute of frauds out of the caſe, you ſhould have proved, that you had firſt applied to the vendee and could not get your money of him; for he was firſt liable. I do not know what can be a collateral or conditional engagement if this be not; and you have not ſhewn that the condition was become abſolute in your favour by default of payment from the original debtor the vendee.

Lord *Mansfield*—There is a clear diſtinction between an undertaking for another, before a debt contracted and a promiſe afterwards.

Undertaking before delivery, "you may truſt to me or I will ſee you paid;" there the party who undertakes becomes the debtor.

But where the undertaking is before the goods are delivered in caſe he does not pay I will pay you, there is a nicety; and I would not decide without looking into the caſes. But what

what Mr. *Dunning* ſays is deciſive, as to the caſe now before the court.

The promiſe is conditional, and they have not ſhewn they uſed due diligence to have the debt from the perſon firſt liable.

[771] Gilbert *againſt* Berkinſhaw.

ACTION againſt the defendant for maliciouſly indicting the plaintiff for perjury.

Second and third count for defaming the plaintiff, and ſaying of him—he is a ſcoundrel and I will prove it.

It was left to the jury that if there appeared a probable cauſe, the action would not lie.

The plaintiff was an attorney.

The jury found for the plaintiff (who had laid his damages at 5000l.) 400l. The plaintiff took the verdict upon the ſecond and third count.

A new trial was moved upon the ground that the damages were exceſſive.

And alſo that the verdict was againſt evidence, and againſt the directions of the judge, for that there was a probable cauſe.

The judge on the report of the caſe ſaid, he thought there was evidence of the malice, becauſe the defendant ſaid "I will attack him again."

Argued againſt the rule—that the court will not ſet aſide a verdict becauſe of exceſſive damages. Where they have ſet aſide a verdict in which the damages may have appeared exceſſive, it has been for mal-practices, and not for the largeneſs of damages fairly obtained.

Stiles 166. where 1500l. was given.

1 *Lev.* 9. That the ground of the deciſion in *Stiles* was not the largeneſs of the damages, but ill management with the witneſſes.

The court cannot meaſure the ground on which the jury find damages that may be thought large; they may find upon facts within their own knowledge: And in order to enable them to this, it was that the old common law writ appointed them to be *de vicenet'*.

Twelve jurors are not to be ſuppoſed to give a verdict contrary to their conſcience; and both parties put themſelves upon the jury to abide their deciſion, as to the quantity of the damages, as well as whether any or not.

A man's

A man's reputation is hurt, and that very eaſily, be it ever ſo ſound; his character in his profeſſion, which concerns him highly, both with regard to his good name and comfort, and to his means of ſubſiſtence, is injured—no man can ſay how far: Nor can any man eſtimate the ſenſibility of the perſon injured, and reduce the compenſation to a ſtrict ſum, not to be exceeded, in pounds, ſhillings and pence, let twelve honeſt men think of it as they may. [772

Second—Whether this were a malicious proſecution without foundation, the jury were competent judges, and have found that it was; and malice needs not be expreſſed but may be implied from circumſtances. The declaration after verdict that he would attack him again ſeems evidence of malice, and of a deſign to ruin him in his profeſſion.

Wilford and *Berkeley*, the damages were extremely high; but the court would not interfere.

The perſon who brought this indictment to trial had heard all the evidence againſt the plaintiff upon a former cauſe; in which the plaintiff in this cauſe was defendant, and knew that it was ſo inſufficient as to end in a non-ſuit, and yet has harraſſed the plaintiff with an indictment.

Shall there be a right without a remedy? Shall the party who comes here for a new trial have purſued malevolently and in an illegal manner, and not ſatisfy in the manner which the law requires in damages?

To ſend it down to a new trial will reprobate, in the circumſtances of this caſe, the deciſion of the jury, and will be telling whatever jury ſhall try it again, that the plaintiff's reputation is not worth any damages in the leaſt conſiderable; or it may be thought to ſignify to them, that they ſhould find no damages at all.

On the other ſide—That the jury will not take it as a reflection upon their verdict ſince they had evidence, which if they could have read it upon the trial, might have made it unneceſſary to come for a new trial.

That with a proper aſſignment the indictment might have been ſupported; and that it had never been decided upon the merits.

That as to damages for the injury done the plaintiff in his profeſſion theſe were out of the action; for the declaration ſtated no ſpecial damages, and if the jury took any into conſideration they went out of the action, and did that which would vitiate their verdict, and make it void throughout.

The

[773] The jury therefore, it is ſubmitted, were miſtaken; the damages much too great; and the verdict ill founded: And therefore that a new trial ought to be granted.

If want of inſtructions to counſel is objected, it was the defendant's choice, who thought it the right of an Engliſhman to plead his own cauſe. And what counſel could have induced the court or jury to form a different opinion upon the caſe, than that which the jury formed, and which the judge who tried reports they had ground to form?

In reply to this Mr. *Lad* ſaid—that the defendant had relied upon his innocence, and therefore choſe to ſpeak for himſelf; that as to the indictment of perjury there had been an acquittal by miſtake, but no trial upon the merits.

Mr. Juſtice *Willes*—I would not interrupt Mr. *Lad* while he was ſpeaking, but I think I am called upon perſonally: I tried the cauſe; and the acquittal was certainly upon the merits.

The perjury aſſigned turned out to be a mere ſurprize. In examination he immediately recollected and corrected himſelf conſiſtently with his former evidence; his behaviour was thought to be extremely candid, and acknowledged as ſuch. And the counſel on the other ſide, upon this evidence, and other witneſſes concurring with it, not having any thing to oppoſe, his client was nonſuited.

Upon the indictment for perjury, five of the witneſſes called ſaid they did not hear him correct himſelf, others ſaid they did. I directed the jury upon the general appearance of the queſtion, that it appeared the now plaintiff had given his evidence fairly: I did not direct the jury to find him perjured.

I told them, the parties, they were gentlemen of the ſame profeſſion, and wiſhed the matter was dropt, and hoped to think both miſtaken.

I thought he would carry no great damages, by carrying his cauſe down to trial.

Lord *Mansfield*—This rule to ſhew cauſe why there ſhould not be a new trial, comes before the court ſingly on the judge's report.

Not on the ground of ſurprize, material evidence ſince diſcovered, or miſtake in the jury.

[774] Verdict taken upon two counts, one of which is, for ſaying of the plaintiff, "He is a ſcoundrel, and I will prove "it;" the other count alſo charges words of defamation.

The

The only ground is of exceſſive damages: And though I would be very ſorry to lay down a rule that no new trial would ever be granted on account of exceſſive damages, where they might be ſo enormous that it would appear their minds muſt have been unjuſtly and unreaſonably heated, or otherwiſe under a corrupt influence, or have taken in ſomething by miſtake to the damages which by law they could not; yet I do not think it fit that this court ſhall ſay, in a matter of uncertain damages, there ſhall be a new trial, becauſe if the court had been to fix the damages they might have given leſs, or a jury might have given leſs.

The court will not judge by a meaſuring caſt, where matters, properly for all parties, have been left to the ſound diſcretion of a jury, in a ſubject of which they are competent and proper judges.

It is enough that it may be ſupported upon the general circumſtances, (and there are no ſpecial damages aſſigned) the nature of the injury, the feeling which the plaintiff may have of it, the degree of evidence of malice, are all circumſtances properly left to a jury.

I remember, ſince I ſat here, an action by a very poor man, for a charge of criminal converſation with the plaintiff's wife. On a motion for a new trial, on account of exceſſive damages, new trial was refuſed. ‡ And ſo in the caſe of a very poor ſervant of Sir ——————'s, who had received from his maſter 150 laſhes, and there was evidence that he had ſaid that for a very trifling ſum he would receive them again. The jury found the plaintiff 100l. damages. They reſented the behaviour of his maſter; they exerciſed their judgment accordingly; and the court would not grant a new trial.

This is not the caſe of the greyhound, * of the value of which the court could form an eſtimate, and ſay they have found forty times too much. And it was upon evidence, and the judge not diſſatisfied.

Mr. Juſtice *Aſton*—That he thought the caſe of the greyhound went upon this, that they had thrown in aſſault and battery, and other matters which the plaintiff had not laid [775] in

‡ Alluding, I believe, to *Berkeley* and *Wilford*, above quoted, where the jury gave 500l. damages. The defendant had a place of 50l. a year, as clerk of the Exchequer, during pleaſure, which was his whole ſubſiſtence.

* *Seale* and *Hunter*, about two years before, where the jury found eighty pounds damages.

in his declaration, and of which they ſhould not have received evidence.

That damages might, indeed, be ſo evidently exceſſive as to be ſet aſide: But that the court had frequently refuſed it where there was no ground of miſtake or unreaſonableneſs.

The damages here are ſaid to be exceſſive; I don't know they are. In truth who will prove it. He ſays, that the plaintiff, is a ſcoundrel, and he will prove it, and this of a man in a profeſſion—an attorney, and in that public manner, and after verdict.

Rule diſcharged.

Curia Cancellaria.

Before Lord Chancellor Apſley, *aſſiſted by Mr. Juſtice* Blackſtone.

ON a bill praying an injunction againſt an edition by Mr. *Newbery* of an abridgment of Dr. *Hawkeſworth's* Voyages.

The Lord Chancellor was of opinion that this abridgment of the work was not any violation of the author's property whereon to ground an injunction.

That to conſtitute a true and proper abridgment of a work the whole muſt be preſerved in its ſenſe: And then the act of abridgment is an act of underſtanding, employed in carrying a large work into a ſmaller compaſs, and rendering it leſs expenſive, and more convenient both to the time and uſe of the reader. Which made an abridgment in the nature of a new and a meritorious work.

That this had been done by Mr. *Newbery*, whoſe edition might be read in the fourth part of the time, and all the ſubſtance preſerved, and conveyed in language as good or better than in the original, and in a more agreeable and uſeful manner. That he had conſulted Mr. Juſtice *Blackſtone*, whoſe knowledge and ſkill in his profeſſion was univerſally known, and who as an author himſelf had done honour to his country.

That they had ſpent ſome hours together, and were agreed that an abridgment, where the underſtanding is employed in retrenching unneceſſary and unintereſting circumſtances, which rather deaden the narration, is not an act of plagiariſm upon the original work, nor againſt any property of the author in it, but an allowable and meritorious work.

work. And that this abridgment of Mr. *Newbery*'s falls within theſe reaſons and deſcriptions.

Therefore the bill praying an injunction ought to be diſ- [776]
miſſed.

Bill diſmiſſed.

The King *againſt* Woodfall.

THIS cauſe came on at Guildhall 11th of July, 1774, before Lord *Mansfield*, at the ſittings for London, in the King's Bench.

It was an indictment for a libel on the revolution, and on the perſons of King *William* and Queen *Mary*.

It was argued by Mr. *Hardinge* for the defendant, to this effect—I never yet heard that barely to attack the government is a ſcandalous and ſeditious libel.

That it is not a libel barely to reflect on government if it be done in ſuch a manner as is not likely to excite ſedition.

I can't ſeparate from the idea of a ſeditious libel the tendency to excite ſedition. I may be on very ſlippery ground, being not ſo verſed in the niceties of law as to be able to pronounce poſitively; but I take it there is no certain definition, from the nature of the thing, what ſhall be a libel: That will be ſo at ſome times which is not at others. But that in general a libel muſt be calculated to excite ſedition.

Juſt at the time of the revolution it might have had this effect, when men's eyes were not ſufficiently opened; it can now have no other than to make the readers laugh at the abſurdity of it, or pity the weakneſs.

An author of note ſays it is a very groſs miſtake to ſay the King is the third eſtate; biſhops are the third eſtate, and the King is ſupreme over all.

However improper, this is ſo nonſenſical a diviſion that it can never excite ſedition. And of what is ſaid here the ſame may ſafely be affirmed.

As to perſonal reflections upon *William* the third, it is conceivable he might have been a very bad man, and yet the revolution a very excellent and neceſſary work. Sir *John Dalrymple* has not been arraigned, and yet nothing can be more injurious to the character of *William*. Throughout he gives him two ſuppoſed reaſons for every thing he does, and conſtantly aſſigns the worſt as the true.

As to the reflections upon the revolution, they are intro- [777]
duced by an if. If ſuch things be a curſe the revolution is a curſe. The connection being thus, if the things did not

exiſt then the revolution is not a curſe, if they are neceſſary and beneficial then the revolution is a bleſſing.

Reflections upon King *William* can be no reflection upon his preſent majeſty.

A work has been publiſhed of the higheſt merit, and by an author than whom no body, I believe, has a greater reſpect for the conſtitution.

It is the beſt work that ever has been publiſhed upon the laws and conſtitution; a moſt elegant, accurate, and ſyſtematical work; yet he conſiders the revolution on very confined principles, but without blame.

An author of very great merit, and attachment to the government, has ſaid a thing more injurious to the revolution, where he calls it a precedent in point of fact; yet this author is not puniſhed or cenſured.

However I may ſucceed upon the other grounds, there is one, I am perſuaded, I ſhall ſucceed in at all events.

That the things and perſons intended are not ſufficiently certain, and ſome falſe.

You are to be ſatisfied that all the innuendoes laid in the information muſt be exactly as they are explained: Some are not neceſſarily true, and ſome neceſſarily falſe. If this be ſo you muſt acquit him: For your verdict muſt go upon the whole; the judgment muſt follow it; and there can be no ſeparating the guilt afterwards: So that you cannot find but on the whole.

This day eighty-four years is not an æra applicable to the revolution, which is known to have commenced in 1690.

Glorious revolution, g———s r————n, at the end of the information. How glorious revolution? Is it not more conſiſtent with the purport of his letter that he ſhould call it graceleſs rebellion, ſuppoſing him to take his premiſſes as admitted?

A paper cannot tend to excite ſedition, of which Mr. Attorney-general could not find out the meaning. And I contend the meaning of theſe words and dates is ſometimes palpably miſtaken, and at other times far from clearly diſcovered.

[778] I apply to you as friends of the liberty of the preſs, which appears in ſome degree of danger, when ſuch a ſtupid performance is ſo ſolemnly attacked as dangerous; as friends of the government, as unjuſt ſentences caſt an odium upon that; as friends of law and of liberty, which alike require that no man ſhould ſuffer upon a vague and doubtful interpretation of his words.

Lord *Mansfield*—Gentlemen of the jury, this is a paper charged

charged in the information as a falſe and ſeditious libel on the revolution.

The revolution is the baſe on which the preſent conſtitution reſts; if that fall the whole ſuperſtructure falls with it, and all the bleſſings that have been and are enjoyed in conſequence of it.

It does not follow that the libel muſt be ſo cleverly written as to have its effect. The dulneſs of the author, or the good ſenſe and honeſty of the readers, with the firmneſs of government, may all equally fruſtrate this: But the author is not the leſs criminal for doing all the miſchief he could, and intending more.

If you find that it arraigns King *William* the third and Queen *Mary*, not in their perſonal character, but as dethroning their father, as being an unjuſt and wicked act, this, certainly, arraigns the revolution.

The evidence is very clear. Mr. *Hardinge* has rightly argued that you muſt ſee the author meant what was imputed to him. It is not that he is accurate as to dates and hiſtorical facts. You muſt ſee what ideas the author meant to convey, according to your ſenſe of what he has wrote.

If the dates do not preciſely anſwer it is not material, if the meaning is clear.

I don't know as to the point of hiſtory what day preciſely King *William* and Queen *Mary* were proclaimed. King *William* landed in November; but it was not till after the convention, ſome months after his landing, that they were proclaimed *. If you think the meaning of K. *W*—— and Q. *M*——, g——s r——n, and ſo of the reſt imputed to him by the information, be the true one, you will find him guilty; if not you will acquit him. What will be the conſequence of your finding is matter of another judicature.

As to many other things which were argued, they may properly go into conſideration upon the judgment paſſed on this letter, which, I think, is, as it has been ſtated to be, a very ſtupid one.

The jury went out, and returned ſome time after, and found defendant guilty.

The ſame day another information was tried againſt the other *Woodfall*, as I underſtand it, and I believe for the ſame paper. [979]

For the proſecution—That the paper in queſtion is one of the moſt general libels ever written. That it traduces every magiſtrate in this kingdom, and almoſt every profeſſion; and throws odium upon the revolution, as the ſource of all the

* I believe Feb. 13, 1689.

curſes and calamities of this nation. That one would wonder any Engliſhman ſhould hope to give an ill impreſſion of that event, to which every Engliſhman owes the higheſt bleſſings, and the greateſt ſhare of liberty any nation ever enjoyed.

It is ſaid it is a ſtupid work. "The characters and things "ſlandered are out of the reach of ſlander."

The author has been as ſcandalous and malignant as his underſtanding would ſuffer him to be, and his dulneſs has been no great hindrance in this, as it ſeldom is. As to the effect—Where is the merit of having been diſappointed in a plain avowed purpoſe of prepoſſeſſing men's minds againſt the revolution, and of courſe the preſent government?

I never yet heard that the weakneſs of the writing, and the brightneſs of the character which was impotently attacked, ſhould be an argument in favour of the writer. Of both you will judge.

As to the application, every attempt concerning that, either to juſtify or to alter it, would prove alike uſeleſs, as that has been already made. Nor can argument make the interpretation on which the proſecution inſiſts clearer than it is.

The letter ſpeaks of the curſe denounced on that day againſt him who curſeth his father, and then infers the judgment againſt him who proſcribes his father, and hires others to murder him with his money.

He imputes all the taxes that have ſince been introduced, penſions, ſtanding armies, corruption of religion and morality, to that period, and ſays the "church of England was "flouriſhing before, and now, without the ſpirit of prophe-"cy, a man may ſay is periſhing."

"Who can ſay that the rebellion againſt *James* was not a "g——s r——n?"

The ſtreſs was endeavoured to be laid that he was in cuſtody: But there appeared to be acceſs to him by any who pleaſed.

[780] The letter ſays, "If theſe taxes are a bleſſing the revolution is a bleſſing; if not, a curſe." When he has told you religion and morality are corrupted, the church periſhing, the ſtate falling, in conſequence of the revolution, which he does, only in more words, can it be ſaid that he leaves it hypothetically, and without deciding one way or the other, whether the revolution was a bleſſing or the contrary.

For the defendant. Mr. *Lee*—It is not my purpoſe to defend the paper, if it contains reflections upon the revolution, and upon the character of King *William* and Queen *Mary*, whom

whom I have been ever accuſtomed to hold from infancy as moſt illuſtrious princes, for their public and private virtues. And I hold the revolution to have been the æra from whence our moſt valuable liberties were ſecured to us, for permanent enjoyment; and that the right and privileges to which we owe all our bleſſings were then better aſcertained than at any former period.

But you are now not upon the paper or author, but the publiſher. If you find him innocent of the intention to publiſh you muſt acquit him: For if his mind is innocent the man is innocent. You are not to find that the paper was publiſhed, or libellous in itſelf; both are admitted: but that Mr. *Woodfall* was the publiſher: And he cannot be the publiſher if he knew not of the publication. His life and character go againſt it. And though he might have offended perſons, and poſſibly ſometimes offended the laws, yet he has always been the defender of this glorious revolution.

There is no title of evidence he knew it, except that it was publiſhed and ſold in his ſhop. Upon this general evidence the proſecution reſts: And though it may be good and ſufficient in general caſes, yet not in this particular one, when Mr. *Woodfall* was in confinement, and not in power of converſing with thoſe from whom he could naturally aſk information upon ſuch ſubjects.

It is extraordinary that the accidental publiſher of ſo dull a paper ſhould be expected to incur the puniſhment and cenſure demanded againſt him, when *Sidney* and *Ruſſell* have been inſulted, and no enquiry after the author by way of puniſhment. A writer ought to relate facts. Let him; and if he credits his intelligence let him, and thoſe of his readers who are diſpoſed: But let him not cloſe his narration with obſerving that he feels the ſame emotion he ſhould have done at the ſight of his ſon turning his back on the day of battle.

What is there in the work now before you to catch the humour, or, as ſome may call it, the faſhion of theſe times; What is there to hurt the principles of the revolution, to [781] ſhake the preſent government, or diſturb any man? But, above all, what is there to fix it on the defendant, who was in priſon, and ignorant of the publication?

Lord *Mansfield*—Gentlemen of the jury, whether this be an object of magnitude enough to demand this mode of enquiry is not before you or me: We muſt do juſtice upon that which is now before us.

Mr. *Lee* has very properly acknowledged the criminality of the ſentences conveyed in this letter upon the revolution and the inſtruments of it.

Whenever

Whenever a man publiſhes he publiſhes at his peril: For there is no entering into the ſecret thoughts of a man's heart.

If he had been in cloſe cuſtody, ſo that his ſervant could have no acceſs there, I ſhould have thought it a difference very proper to have been left to you; but it is juſt the ſame as in his own houſe; for his ſervants and all the world had acceſs: And the boy brought the paper to him every day.

Otherwiſe I ſhould have thought the particular circumſtances very proper to have taken it out of the general caſe; but here it is juſt as in the caſe of laſt Saturday. He either did or did not know it; if he did he is anſwerable, upon that caſe; if not he ought to have known it. What may be the conſequence is a farther conſideration; and what the magnitude of the crime, or the wiſdom and prudence of bringing it to this mode of deciſion. We are bound to do juſtice on it, whatever may be the conſequence, or importance of the queſtion, more or leſs. If you believe the evidence, as to the publication, and the intent of the paper, as ſtated in the information, you will find the defendant guilty; otherwiſe you will acquit him.

Jury came in after ſome hours, and found the defendant guilty of publiſhing the paper ſtated in the information; but did not find it a libel.

Lord *Mansfield*—You muſt either find the defendant generally guilty, or find what you do find.

They found him guilty of publiſhing the paper.

Lord *Mansfield*—That is, you find the defendant guilty.

Verdict taken accordingly.

[782] Judgment. And now, Michaelmas term, 26th of November, 1774, Mr. Juſtice *Aſton* delivered the judgment of the court againſt *S.* and *H. Woodfall.*

You are brought up to receive judgment for printing and publiſhing a very ſeditious and ſcandalous libel, which appears to the court of a very pernicious and dangerous nature. A libel on the revolution; on the King and Queen who reigned at that happy time.

The army repreſented as locuſts, the church as periſhing, religion and morality as utterly extinguiſhed in all ranks of men, and a general curſe upon the nation in conſequence of the revolution. The weakneſs and ſtupidity of the libel is no excuſe; that it will not affect wiſe and conſiderate men; it is not thoſe on whom it was meant to operate.

The court has conſidered the nature of your offence, and the circumſtances offered in mitigation.

And

And as to you *Woodfall*, your particular ſituation at that time, which ought to have made you more cautious; and to ſuffer it to be an excuſe would be opening a door for all libels with impunity.

The court ſets a fine of 300 marks upon you, and that you be impriſoned till paid.

The ſame fine upon the other.

Mace againſt Cammel.

A Woman lives with a perſon as his wife, and, upon execution levied on the goods for the debts of his creditors, ſhe denies that ſhe is his wife, though ſhe had always paſſed, and been acknowledged and reputed to be his wife. And ſhe contends the goods are her ſole and ſeparate property, and bought with her money.

By the 21 *James c.* 19. *ſec.* 11. It is enacted in caſe of bankrupts "*that if at any time any perſon or perſons ſhall become bankrupt, and at ſuch time as they ſhall ſo become bankrupt ſhall, by the* conſent *and* permiſſion *of the true* owner *and proprietary have in their poſſeſſion, order, and diſpoſition, any goods or chattels whereof they ſhall be reputed owners, and take upon them the ſale, alteration or* diſpoſition *as* owners, *that in every "ſuch caſe the ſaid commiſſioners, or the greater part of them, "ſhall have power to ſell and diſpoſe the ſame, as and for the benefit "of the creditors which ſhall ſeek relief by the ſaid commiſſion, as "fully as any other part of the eſtate of the bankrupt; and* for the "better payment of debts, *and diſcouragement of men to become "bankrupts.*"

[783]

The principal queſtion ſeemed to be whether this could be extended to a diſpoſition of the goods of another, in the caſe of a perſon not within the ſtatute of bankrupts; ſo as thoſe goods, of which the debtor had acted as oſtenſible owner, ſhould be taken under an execution for the benefit of his creditors.

And I think it was chiefly argued, they could not upon theſe two points.

1ſt. That the preamble limits and declares the meaning of every ſtatute, and the preamble of the ſtatute of *James* ſpeaks of bankrupts only.

2d. That the enacting clauſe ſpeaks only of bankrupts.

3d. That this is a penal ſtatute and muſt be conſtrued ſtrictly to the letter, and not carried beyond to what is neither within the words nor profeſſed view of the act.

On

On the other ſide—1ſt. That many times a law was made to remedy a particular inconvenience declared in the preamble; but then the intent of the legiſlature, on the enacting part, went on to remedy or prevent evils of a ſimilar nature.*

* Vide Green's preface to the ſpirit of the bankrupt laws.

2d. That one expreſs object is for the better payment of debts. And that it would be ſtrange if a perſon by not being a trader, and therefore not obliged to run the ſame riſque of his fortunes, ſhould not only eſcape all the penalties of the bankrupt laws himſelf, but ſhould have it farther in his power to ſhelter the property of others, uſed by him as his own; and lent him with a fraudulent purpoſe to deceive his creditors, by an oſtenſible ownerſhip and a falſe ſecurity.

3d. Next that at common-law a ſecret transfer of moveable goods was always a badge of fraud; and ſo in all caſes where the apparent ownerſhip was ſeparated from the real; and in ſuch caſe it is better that the owner who has equivocated thus againſt good faith and mutual credit—by outwardly abandoning his claim or giving it over to another, and by a covert reſervation retaining it—ſhould ſuffer, than the innocent and abuſed creditors.

4th. That in this caſe, the woman who claims theſe goods, having aſſumed to herſelf the character of the wife of him whoſe goods were taken in execution, having been acknowledged by him as his wife, having been generally and conſtantly reputed to be his wife, upon the faith of the appearances and declarations held forth both by him and her, ſhall not now ſay to his creditors, I am not his wife. The goods on which you relied as part of your ſecurity for your juſt debts, which you knew to be in the houſe; which I, by calling myſelf his wife, and gaining credit as ſuch, did more ſtrongly than by any words aſſure you were his, and would be yours if your legal demands were not otherwiſe anſwered, are not his but mine. And though I had the advantage of paſſing for his wife, and helping him to deceive you by that advantage, to the detriment and perhaps ruin of yourſelves, I will not ſuſtain any part of the burthen: "I will be his wife for all purpoſes of my own convenience, and I will not be his "wife for any purpoſe of doing you juſtice." She can never be permitted to uſe a conduct which ſpeaks this language, and produces theſe conſequences.

[784]

The court was of opinion, and Lord *Mansfield* delivered the judgment to this effect.

After ſtating the caſe.

It is queſtioned whether the enacting clauſe of the ſtatute of *James* went farther than the preamble. If it did not it would

would be ſtrange, becauſe ever ſince the caſe of * *Twynne*, the apparent fraud would make ſuch an act void † as this, which, ſince that caſe and ſince the ſtatute of *James*, is now contended to be good. * Paſch. 24. Eliz. 3. Rep. 80.

But one point makes this very clear in this caſe which is—ſhe paſſed as his wife, and carried on affairs as ſuch; and it ſhall never lie in his mouth, nor in hers, afterwards, to ſay ſhe was not his wife.

In a caſe at Guildhall, where a woman had paſſed as ſingle. I would not permit her afterwards to ſay ſhe was married, when dealings and trade had been carried on upon the faith of her being ſingle, and upon the credit of her ſolvency, and not that of the man whom ſhe was pleaſed afterwards to ſet up to the creditors as her huſband, and the perſon on whom they muſt be content to rely for payment of the debts. So that we think upon this point the caſe is clear.

Indictment. [785]

ON an indictment for perjury in an affidavit; the perjury was charged that the defendant ſwore in his ſaid affidavit to the purport * and effect following.

And it ſets forth the affidavit; but there is inſtead of the word "underſtood" undertood, that he the defendant ſwore he undertood that, &c. whereas in truth and in fact, &c.

They came after verdict to quaſh the indictment, and ſet aſide the verdict upon this exception.

It was argued, 1ſt. That this was a flaw in the indictment, in the material part of the charge in the aſſignment itſelf of the perjury, and therefore fatal in an indictment.

2dly, That a verdict would not help it; for though for the ſake of ſettling civil property, the law had permitted ſuch faults to be cured by a verdict; yet no law had ever yet been thought proper to be introduced by the legiſlature to leave

† 1. Dona clandeſtina ſunt ſemper ſuſpicioſa.
2. Fraus et dolus nemini patrocinari debent.
3. Qui alium rebus per vim aut dolum ſpoliare vult ſuas amittito.
Fraus contra alios irrita contra fraudatorem valet.

Nihil calliditate ſtultius.
Decipi quam fallere eſt tutius.

* So, I think, it was; not tenor, vide the diſtinction in *Will.'s* caſe, Sir *James Burrow*, part 4. vol. 4. And Note, I underſtand that theſe laſt ſittings after Michaelmas term 1676, before Lord Chief Juſtice *De Grey*, Lord *Chatham* was non-ſuited in a proſecution againſt a printer for publiſhing a pretended letter of his Lordſhip's; the indictment ſetting forth that the tenor of the ſaid pretended letter was as follows: And in the ſetting forth of the ſame the word "vigour" was uſed inſtead of "rigour." And I hear Lord Chief Juſtice ſaid, he would not ſay whether purport would have done. But in that caſe there was this farther difference, that vigour was a word not inſenſible.

leave any thing at large, where the property, life and liberty, of the ſubject was concerned.

On the other ſide, that this "undertood" being totally inſenſible, was not a word, but would become a word, according to the ſenſe and truth by reſtoring the s, which had eſcaped the pen; therefore, that this was no caſe of one word for another, or of a word too much or too little, but only of a letter omitted; by the omiſſion of which no doubt or new ſenſe was introduced; and caſes were cited to ſhew the difference.

The court took time to conſider; after which the judgment of the court was delivered by Lord *Mansfield*.

This is the caſe of an indictment for perjury, and it comes before the court on the reading of "undertood" for "under-
[786] "ſtood." The jury read it underſtood, and this comes before the court to cure that verdict and ſet it aſide.

Some of the caſes are very nice, and to be ſure there is a great deal of nicety in criminal proſecutions, and the law ought to be certain. And the caſe of *Hunt* is brought: But the authority of *Hawkins* denies that caſe.

And the diſtinction ſeems to be where the word is made a different word, *admittat* inſtead of *amittat*; there the indictment is bad. But a difference in the ſpelling of the word whereby no new word is produced, nor the real one poſſible to be miſtaken, will not vitiate the indictment.

Though the criminal proceedings ought to be extremely accurate and ſtrict; yet to ſet a judgment of the jury upon ſuch a nicety would be very bad.

RULE DISCHARGED.

His Lordſhip cited the caſe of the *Queen* and *Drake*.

Peremptory.

Vide The motion in the caſe of General Moſtyn, ſuper.

PEREMPTORY will not have effect, where without fault of the party a witneſs cannot be had.*

Popham *againſt* Eyre.

Curia Cancellaria.

ON an appeal from the decree of Sir *Thomas Sewell*, now maſter of the rolls, for performance of a ſpecific agreement.

It

* Lex neminem cogit ad impoſſibilia.

It was on a bill brought againſt Mr. *Popham*, as heir of his father; Lord *Mansfield* as mortgagee of the eſtate, and the purchaſers after the treaty was broke off between *Eyre* and Mr. *Popham*, to enable them to compell Mr. *Popham* the heir to a ſpecific performance of the agreement between his father and Mr. *Eyre* the plaintiff. And his honour, after ſeveral hearings, decreed a ſpecific performance, and made directions accordingly; from this *Eyre* and the other parties (excepting Lord *Mansfield*) appealed. But Lord *Mansfield* was not included in the decree before the maſter, they having dropt his Lordſhip's name before.

The caſe ſtated on behalf of the appellant *Eyre* was this. [787]

That his father thought himſelf deceived by change of the name of the purchaſer, and that therefore he did not execute, and refuſed unleſs the money were paid down.

And that he cannot execute the conveyance, becauſe already made and complete with his father.

That the defendant is ſon and heir to his father.

Diſpute which ſide ſhould begin to ſtate.

Wherever it is an appeal from a particular part of the decree, the appellant goes on firſt.

But where the bill and anſwer is opened, there, *per Cancellariam*, it ſhould ſeem the plaintiff in the original cauſe ſhould begin; becauſe he is called to ſhew his cauſe againſt the appeal, and the ſpecific agreement is to be enforced on hearing all the evidence.

Argued, for the reſpondent, that he is heir to his father, and the eſtate of which his father had propoſed to diſpoſe.

That 16500l. was the price on which they entered into treaty.

That 17000 was the price underſtood.

That the agreement was declared by the plaintiff's agent in writing, to be conſidered by him as actually completed.

That the alteration of the name of the purchaſer was made by conſent of the defendant and approved.

That Mr. *Popham* ſaid, the reaſon of his refuſal to execute the agreement was, becauſe he underſtood the agent meant to purchaſe for himſelf; and he did not know whether Lord *Mansfield*, the mortgagee, would give up the deed, or whether the money was ready to be paid.

A very idle objection; becauſe the money was ſecured him at any rate; and upon payment there was no reaſon to doubt the deeds would be delivered.

The defendant before the maſter was ordered to put in an anſwer, and then to put in a farther anſwer; and before this

there

there came out further evidence which made it neceſſary to
[788] amend the bill. The defendant, the covenantor, made a new agreement with Mr. *H.* for the ſale at the original price propoſed to the other; there was no poſſibility of including this in the bill, becauſe it was after the bill brought. The ſecond covenantees intereſt depends on the indemnity given; yet 16500l. is to repay them, and the eſtate to be ſecured.

The objections before the maſter, That this is a verbal agreement not in writing, and therefore within the ſtatute of frauds.

Two letters (the ſecond ſubſcribed) that he would not take leſs than 17000l. this underwriting, and he confeſſes the agreement in his. The anſwer, and this would take it out of the ſtatute of frauds upon a full evidence. Though there was a verbal agreement which the court would not have decreed, yet if the defendant admits in his anſwer, the court will decree a performance. *Groſton* and *Laves*, Eq. Ca. abridged, if there be a parol agreement, yet, if admitted in anſwer, the defendant ſhall be compelled to perform it, for there is no danger of perjury, which is what the ſtatute meant to prevent.

[Lord Chancellor—*Worſley*—4 *G.* 2. *E. T.* bill brought for ſpecific performance of an agreement; the defendant pleaded the ſtatute of frauds and perjuries. It was doubted whether he ought to ſet out the ſtatute of frauds and perjuries, the chancellor at firſt thought he ſhould be farther heard: but afterwards that it was exceedingly improper, for then he muſt admit the agreement, and there would be an end of the ſtatute of frauds and perjuries.]

The argument was continued upon the objection of Mr. *Popham*, to inforce this agreement; that it is a conditional agreement, becauſe the money was to be paid at a certain day and has not been paid.

That the agreement had been varied ſince the writing; that inſtead of 16500l. to be paid down, 10000l. was to be paid, and the 7000l. taken as a ſecurity on the eſtate. This is by the agreement of the covenantor himſelf, and then ſhall he ſet up his own act as a bar?

He underſtood Mr. *Baldwin* was to be the purchaſer, and was deceived in this, is another objection. And that he thought *Eyre* could not pay the money, and then upon Mr. *Baldwin*'s undertaking for the money he ſtill continues the objection, though he has what he deſired.

Philips v. Duke of *Buckingham*, 1 *Ver.* 227.

The caſe in *Vernon* was a treaty with the Duke of *Buckingham*, the treaty broke off, and Mr. *Philips* contrived that the ſecretary to Lord Chancellor *Nottingham* ſhould enter into a treaty with the Duke and not name him; and that Mr. [789] *Nicolls* would ſay he was treating for Lord *Nottingham*, or Mr. *Finch* his ſon. It turned out that there was no authority from Lord *Nottingham* or his ſon, and therefore the court would not decree a performance.

There the purchaſe was pretended for Lord *Nottingham* or his ſon the Solicitor-General. The Duke, being willing to oblige any of that family, offered the eſtate at his own price. Afterwards he entered into a treaty, and on diſcovery refuſed to ſign the articles, or make conveyance. The Lord Keeper decreed that there had not been fairneſs uſed; that Lord *Buckingham* having a great regard to Lord *Nottingham* and his ſon, declared he would ſell cheaper than to any other purchaſer.

But if Mr. *Finch* had appeared, and affirmed the purchaſe he would have decreed, and he might have ſold the next moment to Mr. *Philips*.

From the defendant's Anſwer.

The defendant acknowledges that he was informed of an intention of Mr. *Eyre* to purchaſe, and anſwers in that paper which he confeſſes writing, that he would not ſell for leſs than 17000l.

Mr. *Eyre*'s agent writes in anſwer to this, Sir, I have communicated what you write, that you would not take leſs than 17000l. and though Mr. *Eyre* conſidered the agreement as abſolute for 16500l. yet to ſave farther trouble he will give 17000l. and this concludes the agreement. However, for my ſatisfaction, I deſire you would give me a line under your hand.

Lord Chancellor—Read the ſecond anſwer.

Objected by counſel.

Lord Chancellor—If you read the confeſſion of an agreement out of an anſwer, you muſt read all that is relative to the agreement.

[In the ſecond anſwer—The deponent begs leave to refer to his letter.]

Mr. *Baldwin* complains to Mr. *Popham*, is ſurprized to find by Mr. *Stokes*'s letter that the affair is not completed, and that he appears not apprized of the ſcarcity and value of money at this time. However it is very well, as he is concluding an affair which may prove much more beneficial: If Mr.

Stokes

Stokes and you ſhould after all ſettle, as I apprehend certainly you will, I ſhall be at the Crown and Anchor.

[790] Lord Chancellor—Does any thing appear in Mr. *Stokes*'s anſwer?

Letter importing Lord *Mansfield*'s agreement to accept of 10000l. and the eſtate as ſecurity for the remaining 7000l.

Reciting the contract and that it was not reduced into writing.

And he brings an action for non-performance of this very agreement.

Mr. *Eyre* brings an action for non-performance of this agreement. Inſtead of 17000l. the eſtate is ſold now at laſt for 16500l.

The caſe referred to proves the ſeller was impoſed upon. He meant to favour the family with whom he lived, and underſtood himſelf to be treating. That gentleman did not claim as a purchaſer, therefore no body could. This is a ſale by public auction; he only wanted the money; if he had the money this was enough.

Argued on the other ſide—that the maſter of the rolls was wrong, in decreeing the ſpecific performance of the agreement.

The eſtate is like all others in the Weſt of England, continually increaſing in value, becauſe the rents in the eſtate are upon lives, and conſiderably leſs than the real value; while the agreement is in ſuſpenſe the lives are wearing out.

Seven years from the treaty they come for a ſpecific performance, on payment of 17000l. for the eſtate, which they were to have paid ſeven years ago. It is an application againſt an heir—the diſadvantage would be to the heir 5000l.

It has been thrown out that we have been ſo fooliſh to ſell the eſtate for 16500l. the eſtimate made ſufficiently ſhews, that a perſon who had an eſtate in mortgage gained by ſelling as early as poſſible; and the perſon who comes for an equitable relief does not come very favourably when he objects a ſale under value, to which he has driven the party againſt whoſe heir he claims.

It is ſtated there are certain general rules for performance of ſpecific agreements. If the court were to lay down general rules, without exception of circumſtances, for performance of a ſpecific agreement by which a party ſhould be compelled, it would in truth compel to a greater hardſhip than thoſe of common law. From their generality and rigour the court would then be a legiſlation ſuperior to the common law, and much ſeverer. Indeed if the court were to lay down any rules whatever in this matter then circumvention would be favoured,

voured, and the rules of the court would be made the inſtrument of mere fraud.

There is a great deal of difference between an agreement which will entitle to damages at common law for non-performance, and an agreement which will be carried into execution. [791]

Where the damages would be greater to a party by carrying an agreement into execution, than any damages a jury would give, then equity will not decree. This I argue with the more confidence, becauſe your lordſhip laid it down in the caſe of *Pope* and *Harris*, and it was affirmed, and taken on the ſame grounds by the Houſe of Lords.

As to the remark that courts of equity have made rules that where an agreement is admitted, it ſhall be ſame as in writing; equity will always take care not to ſuperſede any object deſigned to be ſecured by an act of parliament.

The end of the ſtatute of frauds was, that the truth of the articles ſhould be known.

If the anſwer be taken as an agreement in writing, the anſwer of a perſon of a delicate conſcience will make a great difference to his diſadvantage, from the anſwer by a perſon of an hard and ſtubborn one, who would ſwear away the agreement. This difference a court of equity will not be anxious to introduce.

The terms of payment will not appear with that preciſion and certainty: And wherever the time would be very material (as in the caſe of performing an agreement to a mortgagee) your Lordſhip will not decree againſt one of the moſt important terms of the agreement; ſince he cannot pay the mortgage, and muſt pay a greater intereſt than he ſhall receive rent.

Unleſs the anſwer could be ſo particular as to ſatisfy all the objects of the agreement, had it been reduced into writing, equity will not decree. Beſides it muſt be ſeen firſt, that this is an agreement proper ever to have been put into execution.

Very early Mr. *Eyre* propoſed, which alarmed Mr. *Popham*, who declared he would not deal with him or any gentleman of his profeſſion (he was an attorney) unleſs the money were laid down.

Mr. *Eyre* prevailed upon ſome body of the name of *Baldwin* to enter into this treaty. Mr. *Popham* would have been ready to enter into the treaty, provided the whole treaty had been to be performed on their part. The whole money was to be paid at Lady-day following. This is the firſt treaty; it was varied afterwards. They muſt ſhew which of the ſpecific agreements remains to be performed.

Mr. *Popham*, as having been diſappointed of receiving the 10000l. being obliged to pay the intereſt from the time in which

which he ſhould have paid the money, little ſtreſs is to be laid on his bringing an action.

Suppoſing the action (which was dropt) could have been maintained for damages, does it follow from thence that they were entitled to the ſpecific performance of an agreement, for the non-performance of which Mr. *Popham* was to have had damages? Are there any caſes which ſay a perſon who has been dilatory, and expoſed himſelf to an action by his delay, ſhall have a right to compel a ſpecific performance of that agreement which was delayed by himſelf.

The doctrine is rather contrary to this poſition in *Hare* and *Carrell*, Viner, title contract, pl. 18. where a party has trifled, or ſhown any backwardneſs in performance of his part a court will not interpoſe; and eſpecially if circumſtances are altered.

Can there be a greater alteration of circumſtances than an agreement for 17000l. which would have ſatisfied inſtantly, and the ſame 17000l. with the loſs of all the intereſt to which Mr. *Popham* by that delay was made liable, on inability to pay off the mortgage.

The memorandum on which they ſay this agreement was entered into is thus; propoſal of 16500l. Anſwer—He would not take leſs than 17000l. Had it ſtood there could it have been contended in this court that this was a complete agreement according to the ſtatute of frauds?

No farther was proceeded in the agreement on one ſide than propoſal of a ſum, and on the other the ſum laid down under which he would not part with the eſtate. Is this an agreement in writing? If the ſtatute of frauds were to be thus contrived it would be virtually revoked. If the haſty tranſactions of perſons in the commencement of a treaty were to be taken as a complete agreement, the caſe would be worſe ſince the ſtatute than it ever was before.

The anſwer is thus—Mr. *Finch* has communicated the contents of what you wrote with your pencil under Mr. *Baldwin's* letter, that you would not take leſs than 17000l. And although he conſidered it as an actual bargain for 16500l. yet as he had acquainted ſeveral of his friends upon the ſubject, notwithſtanding your refuſal to take leſs than 17000l. he will be ready to give that ſum which concludes the agreement.

[793] "But, for my ſatisfaction, I deſire you would give me a "line under your hand." Was not this to draw him within the ſtatute?

Mr. *F.* the agent for *Baldwin*, propoſes an agreement for 17,000l. and deſires him to ſign a writing, which would be

be more to the ſatisfaction of Mr. *Baldwin* than any thing he could ſay.

And Mr. *Popham*, finding it to be inſiſted on as an abſolute agreement, refuſes, as it wanted the moſt important article, the time.

The agreement, ſays Mr. *Baldwin*, Mr. *Eyre*, and his agent, is concluded by the rules of this court, as we are adviſed; they wanted abler adviſers. "The day is not at "all material; if you loſe 12,000l. before the agreement "ſhould be completed it is not material; it is a complete "agreement for us. You will be to go into the Exche- "quer; we ſhall have an opportunity of getting rid of the "eſtate in parcels, which, I tell you, is a very good bar- "gain; and therefore we are both tied, but we with a looſer "chain; and you will have to run through a court of "equity before we are obliged to pay the money. And if "you ſell it to any perſon elſe we will make you hear of it in "the court of Chancery." This is the kind of language ſpoken by the conduct of theſe gentlemen who come for a ſpecific performance.

The agreement was ready for Lord *Mansfield*'s acceptance; Lord *Mansfield* accepted; Mr. *Popham* was ready; they were not ready at the firſt day; nor on the 22d of June, which laſt day is ſubſequent to all the evidence they read in the caſe.

They propoſed the conveyance on the 28th of June, with Mr. *Eyre*'s name, but not the money. And then he might well ſay, "If I am to be driven to an agreement "with Mr. *Eyre*, with whom I have declared I would not "treat, inſtead of Mr. *B.* with whom I had declared I would "treat, I will not go farther."

This caſe is ſaid to be diſtinguiſhed from the caſe of the Duke of *Buckingham*. The diſpute there was not whether the whole value had been offered; and I refer your Lordſhip to the report of the caſe, where the parties would not go into the queſtion of the value.

And the court determined they would leave the election to the vendor, and he would enter into an agreement with a perſon in whom he had a confidence, and not another, with whom he had not; which is the very determination the heir of the vendor now prays and expects.

It cannot conſiſt either with that common ſenſe to which, [794]
in an idle way, we are accuſtomed to appeal, or with the more circumſtantial and certain rules of equity and juſtice, that an executory agreement with the one ſhould be the

ſame as with the other. And there is here this farther difference between an inſtant agreement, which he, the defendant, expected in this caſe, and which was neceſſary for his circumſtances, and an executory agreement, which in his circumſtances was ruinous.

They have not ſtated any one certain ſettled explicit agreement, like that which the ſtatute ever expected to ſee in writing; like that which this court will expect to ſee ſome way, in order to entitle to a ſpecific agreement.

And if the ſtatute is to be conſtrued liberally (this is the only rule by which parties are to be bound, if they are to be bound, in equity) they are not to be in a worſe condition than if bound in law. What is the agreement by which they are to ſhew title to a ſpecific performance?

Mr. *Eyre* had ſaid he wanted to buy the eſtate to ſell again to advantage. This in the outſet of the affair: And it was a pretty ſtrong objection, eſpecially when he did not pretend to have more than 6000l. to pay for it.

Mr. *F.* to enquire whether Mr. *B.*'s purchaſe was completed, and if not, to know what obſtructed it.

March 17.

Application to Mr. *B.* when he would complete, and to fix a day, as the eſtate was offered a thouſand pounds cheaper than it would have been to any other perſon, on account of prompt payment.

"Mr. *Popham*, thinking himſelf bound in honour to "diſcharge his debt to Lord *Mansfield*, if you do not give "a peremptory anſwer, he ſhall think himſelf at liberty to "treat with another purchaſor."

Treaty reſpecting the ſale was in ſubſtance this: It was offered at 18000l. at Michaelmas, 1766. Offer to Mr. *B.* without any other than a verbal agreement, March, 1767, for 17000l.

The agreement which the court would enforce muſt fully, exactly and completely appear: And not only this, but it muſt be ſuch as the court will decree a ſpecific per-
[795] formance, from the reaſonableneſs and fairneſs of it, both at the time of agreeing and when it is prayed to be enforced.

There muſt be full evidence, and the court may exerciſe their juriſdiction as a court of conſcience, as in caſe of an additional remedy beyond what the parties can have at law. If the agreement not complete; if fraud intended, with reſpect to purchaſors; or circumſtances or eſtate altered; or the agreement, though equal at firſt, is ſuch as would

would be injurious by a ſubſequent event; the court will not decree.

Mr. *Baldwin* does not underſtand it a complete agreement; for after this writing he writes and aſks whether it's ſettled?

He talks of a more advantageous treaty. The agreement drops.

Mr. *Popham* ſays he would not take leſs than 17000l. he does not ſay what he will take.

1 *Equity Caſes abridged*, 27. * On a marriage treaty the lady's father agreed to give 4500l. portion, the ſettlement to be made four or five hundred pounds per annum; the proper heads ſet down by a clerk. The father fell ſick and died; the match completed; and then the performance of the agreement was inſiſted. Lord Chancellor ſaid he never knew an inſtance in which it had been decreed an agreement ſhould bind where nothing had been done by the parties ſigning, or in part executing, though wrote by their orders. They were only heads ſet down, which might have been altered or rejected.

* Bawdes *and* Amhurſt.

Mr. *Popham*'s agent, Mr. *Stokes*, has done nothing to approve of Mr. *Eyre*. Whatever the motive, a court of equity will not decree for Mr. *Eyre* a ſpecific performance of an underhand agreement, carried on in the name of another perſon.

This court has been ſo jealous of giving a ſpecific performance of agreement as an additional remedy to what they might have had at law, that they have declared they would not carry them into execution, where there appeared to be fraud, trifling, or improper conduct.

In the caſe of the Duke of *Buckingham* they were ſtamped and inrolled, and yet the court would not execute them. It appears in this caſe there was a tranſaction in favour of a party all along with whom Mr. *Popham* had declared he would not treat. This will, therefore, take it out of the benefit of an equitable conſtruction of the ſtatute of frauds; eſpecially where there are ſubſequent circumſtances, which render the ſpecific performance extremely hard and unjuſt, and perhaps impoſſible.

If a party making an agreement may be delayed for a day more than the time on which he inſiſted in the agreement, he may be delayed a year, or for ever. The party on the other ſide may pay when he pleaſes, and inforce the agreement when he pleaſes, in ſpite of juſtice, equity, and the true underſtanding and object of the contract.

[796]

Wherever the time is material to the party it is an eſſential part of the agreement, and muſt be obſerved. Vide *Hayes*——

Raym. Agreement to convey over if the title be approved by defendant or defendant's counſel at a time. The time material.

Gilb. 15. Covenant to make a good eſtate on a day certain. Decree in the Exchequer for a ſpecific performance of the agreement, but refuſed in the Houſe of Lords, the party applying not having proved that he tendered a title at the time ſtated, which was material, with reſpect to performance of the agreement.

It does not appear he was even on the 30th of June, even then ready. Therefore he is left to ſuch remedy, if any, as he may have at common law: Having delayed Mr. *Popham*, who did not intend him to be the purchaſor, and having not complied with his agreement to pay the money, which was neceſſary for Mr. *Popham*.

There was as much occaſion to include Lord *Mansfield*, that he would accept the money.

To conſider it now as it would have ſtood independent of the ſtatute of frauds.

Before the ſtatute the court would not execute if not ſigned by one party, or in part executed.

But if drawn up in writing, ſigned and ſealed, they would. *Marquis of Normandy* againſt *Duke of Devonſhire*. Execution of agreement by one of the parties ſhould bind both.

In this caſe there was no time where agreement was complete, nor was it ſigned by either party.

The party who applies for a ſpecific remedy has not conducted himſelf with that fairneſs and candour which the court expects.

When Mr. *Popham* diſpoſed of the eſtate he was to put nothing in his pocket, but merely to have money to pay off the mortgage: Therefore he refuſed Mr. *Eyre*, as not a ready money bargain.

[797] After the diſtance and delays in Chancery he would be to loſe, even if intereſt were given him.

Sometimes a ſpecific performance has been decreed making a compenſation; but how is this to be made? There is not merely the loſs of intereſt, the ſale is hindered: The mortgagee holds. There is every delay and every inconvenience.

If

If you did not keep the propoſals the court will ſay you ſhall have no advantage.

The intereſt the court will give him after ſeven years is four per cent. againſt five, which is to pay the mortgagee on failure of payment on the day incurred by the fault of thoſe who come for a ſpecific performance.

This caſe depends much more upon facts than any reaſoning or nice points of law.

If this be to be taken as an abſolute agreement what will be the fate of propoſals from henceforth in the way of treaty? No perſon will ſay what he meant to ſell his eſtate for, as thereby the bargain ſhall be concluded at once.

Where the articles were ſtamped, drawn out, deliberately examined, the court would not ſuffer a perſon to come in who was not the intended purchaſor, but left him to his remedy at law.

The caſe of the Duke of *Buckingham* goes upon the deceit; the parties would not go to ſettle the value. The only difficulty was the reſcinding of a ſolemn deliberate legal act, which yet was reſcinded for the fraud; juſt ſuch a kind of fraud as in this caſe.

Scott and *Langſtaffe*, before Lord *Camden*, was to reſcind the agreement. Lord *Camden* thought fit to oblige *Langſtaffe* to pay the coſts. A bill brought to give up a leaſe on the hands of *Langſtaffe*, as obtained by fraud.

Lord *Camden*—The principle in equity is clear: But upon the evidence of the caſe the queſtion is ſomewhat nice. *Scott*, an illiterate gardener, having purchaſed an houſe of Mr. *P.* next to one in which Mr. *P.* intended Mr. *Garrick* ſhould ſucceed, and Mr. *P.* being unwilling Mr. *Garrick* ſhould have a diſagreeable neighbour, it is agreed between them, but not made part of the contract, that *Scott* ſhould not grant a leaſe of the houſe to any body not agreeable to Mr. *P.* or Mr. *Garrick* afterwards, if he ſhould ſucceed, to prevent Mr. *Garrick* having a diſagreeable neighbour. *Scott* [798] was applied to by one *Langſtaffe* for a leaſe, but refuſed, unleſs *Langſtaffe*, who applied, had *P.*'s conſent. *Langſtaffe* ſaid he knew him intimately, and that there would be no objection. *P.* in fact diſapproved, and had never conſented to his being tenant, and, ſo far from knowing him intimately, he had only ſeen him at a tavern.

Lord *Camden* ſays, "*Langſtaffe*, a knowing attorney, has "been miſtaken in his ideas of fraud: Becauſe *Scott* did "not ſay he was bound, and he, *Langſtaffe*, did not ſay "he had *P.*'s conſent; that therefore there is no fraud. "*Scott*, it is true, did not ſay he was bound (he was en-

"gaged

" gaged in honour), and *Langstaffe* did not say he had *P.*'s " consent; but he said (which was a deceit, that he knew " him intimately, when he had only seen him once at a " tavern.

" *Scott*, a gardener, afraid of a suit with *Langstaffe*, a " substantial attorney, is very uneasy. He delays the sale " till he has an indemnity from *Garrick*, then he joins. " This is the case of *Philips* and the Duke of *Buckingham*. " No body who has read that case can easily forget it. Let " the agreement be set aside with costs."

What would have been the situation of Mr. *Popham* if no body would have bid upon the bill brought? He must have paid interest upon 17,000l. and received but 40l. rents for seven years, till the suit in chancery should be ended. He was content, the strongest proof of the hardship, to sit down with the loss of seven hundred pounds.

If no positive law had ever been made, and the case had stood without it, a court of equity would have said it is impossible to assist this contract, obtained by deceit against a person in difficulty and necessity.

Considering it upon the statute of frauds, where is the agreement signed by the party? Is it the writing with the pencil? Is it a writing not offering any general sum, but telling him Mr. *Baldwin* would be at the Crown and Anchor? This the consideration for Mr. *Popham*'s taking 17,000l.!

But the agreement is confessed in the answer.

The only ground of this being a general rule is in *Equity Cases abridged*.

But it must be an agreement set forth in the bill, confessed and plainly appearing; and the statute not insisted upon.

[799] What is the confessed agreement? Not to take 17,000l. at any time, but a certain day. It is not executed, nor can now, nor a compensation be given.

The unexpected and surprizing event in their favour may save the dismission of the bill with costs, which is all they can expect.

Wales and *Baynall*.

Mr. *B.* could not have been compelled. Mr. *F.* is a subscriber to this pencil; he does not call himself a witness to it: It does not appear by what authority he subscribed, though it may pretty clearly be guessed with what meaning. Six days after the last day, 30th of *June*, the deeds

deeds are delivered to be executed by Mr. *Popham*, who ſays he will have nothing to do with it.

The contract with the purchaſors for 16,500l. was with honour, tand the indemnity open, and with candour, to ſecure them at all events.

The ſubſtantial party is conſidered to be *Eyre*; ſo he was all along in effect.

Eyre is rejected in November, 1766.

The agreement offered to be ſigned proves they thought it not executed.

Caſe where the want of candour and fairneſs, and not dealing with honeſt methods, occaſioned the court to refuſe enforcing an agreement.

Barebone and *Barnes*, 2 Chancery Caſes, 121.

B. poſſeſſed and intereſted in lands for a term of ſixty years, paying 5l. *per annum*, and indebted and in danger of an arreſt, by articles ſealed, aſſigned his eſtate to the plaintiff for 290l. and his tools and utenſils on the premiſſes, then employed in making brick. Articles dated 16th of March.—Proviſo to be void if money not paid in five days. Articles not performed, nor money tendered; but there being no proviſo in the articles for diſcharge of defendant, *Barnes*, for the rent in future, agreed, on advice, that Mr. *Barebone* ſhould purchaſe the inheritance, or procure a ſufficient perſon to take the aſſignment from *Barnes*, and ſecure him, and to that end fourteen days farther time. *Barebone* treated with the reverſioners, but they would have nothing to ſay to him. However, he entered; when does not appear, but it ſeemed within the fourteen days. On the fourteenth day *Price*, a hawker came, and brought [800]
290l. no writing was offered or prepared.

One went, treats for the eſtate, but would not diſcover the name of the intended purchaſor, but carried on the treaty as for himſelf; but the articles were filled up with the name of *Barebone*. *Barnes* ſells to *Price* for 290l. and on *Barebone*'s bringing a bill to have an aſſignment, it was diſmiſſed.

Though equity will relieve on account of fraud, yet not him who is *particeps criminis*; ſtill leſs him on whoſe ſide the whole of the fraud lies, and againſt an innocent perſon.

Lord Chancellor—Mr. *Ambler*, your client is in poſſeſſion of a decree of the maſter of the rolls. I ſhall always pay great attention to any ſolemn determination of his; and therefore, as I confeſs myſelf ſhaken by the arguments

ſo

ſo very forcibly urged againſt the decree, I would like to have a little time to recollect the arguments; and I will give you till Saturday.

I will throw out a few hints how it ſtrikes me, as a queſtion of equity, not only important to the parties in this cauſe, but as a precedent: Though, probably, it would go on, and then be a precedent.

This is a bill brought for the ſpecific performance of an agreement. Let us firſt ſee whether there be any agreement in writing within the ſtatute of frauds.

It is a wiſe and beneficial ſtatute, and I adopt Lord *Nottingham's* opinion, that it is ſo wiſe and beneficial to the public that it deſerved a ſubſidy, as was the language of thoſe times.

I will adopt the propoſition of Lord *Hardwicke*, that this court can't repeal an act of parliament.

Fraud is a cauſe on which this court would interpoſe to ſet aſide a contract; as in *Scott* and *Langſtaffe*, and many others. I don't mean fraud that would make the party liable to an indictment,

I wiſh you would ſee, notwithſtanding what Mr. *Bacon* has ſo widely laid down, whether there is any precedent of the court enforcing execution of an agreement, under circumſtances like this.

Lord Middleton againſt *Wilſon and others.*

1741. Lord *Hardwicke* ſaid he thought the court had already gone too far, in taking agreements out of the ſtatute
[801] of frauds, and therefore he would never go a ſtep farther, unleſs warranted by authorities. I wiſh, therefore, Mr. *Ambler* would ſhew me I am warranted by authorities in confirming this decree.

A letter has been an agreement; and any writing almoſt may be an agreement, upon circumſtances.

In the caſe alluded to by my Lord *Hardwicke*, Marquis of Normandy and Duke of Devonſhire, I took a note of Lord *Hardwicke's* decree, and had an opportunity of looking into Lord *Hardwicke's* book, and am glad to find my note agree with it in moſt circumſtances.

Lord *Hardwicke* makes Lord *Somers* ſay, "It is very true "that the court has frequently inforced the execution of an "agreement on notes and letters, as in the caſe upon a me-"morandum, but it is where the agreement is full and com-"plete, and the time fixed. If not fully and completely ſet "forth this court will no decree." *Coles* and *Maſters.*

Treaty

Treaty of Lord *Middleton* with Mr. *Wilſon*. Agreed to give ten years purchaſe for the land. And for the houſe—there were rents upon five cow gates, doubtful whether they were five ſhillings or one. 3600l. and there was an offer on payment of 4000l.

Caſe where execution of an agreement for an eſtate at 3600l. was refuſed to be decreed on account of a rent left unſettled, and doubtful whether five ſhillings or one.

It was upon the letter they principally founded themſelves; the agreement appeared, and nothing ſeemed doubtful but this cow gate. Lord *Hardwicke* decreed that ſomething being left behind it is not ſettled, and he decided for a ſpecific performance for Mr. *Wilſon*, againſt the prior purchaſor.

I ought not, therefore, to go farther than the authorities will warrant me to go. I think this court is not authoriſed to repeal an act of parliament in this or any other caſe; but they may relieve againſt fraud, becauſe the ſtatute was made againſt it. As when a father charges his ſon with 1000l. for his daughter, the ſon ſays you need not charge, I will pay; he ſhall not avail himſelf of the ſtatute againſt frauds to withhold payment. Mr. *Baldwin* is not in the circumſtances.

Shew me the ſtatute, ſhew me the preciſe agreement which he has a right to demand. Mr. *Popham* has all along acted with the greateſt honour, candour, and fairneſs.

I ſhould be ready to affirm any decree of his honour's that I could. He has acted with great ability in a court of equity. But if I ſhould be perſuaded I am to decree a ſpecific performance, there is another point; here is a conveyance to be made, on payment of 17000l. The court always effectuates payments as if it was at the inſtant; and this is the reaſon why the court is ſaid not always to conſider time, becauſe they can make a compenſation. It is to be conſidered what is to be made. [802]

I ſhould be very ſorry to decree in ſuch a caſe before I had thoroughly conſidered, and before every thing had been argued, as well for the appellant as in ſupport of the decree; I therefore give till Saturday.

Farther adjourned, on account, I believe, of Mr. *Ambler*'s indiſpoſition, till the firſt day after the firſt ſeal.

5 December, 1774. At Lincoln's Inn.

Mr. *Ambler*, in ſupport of the decree—It is argued that this decree is wrong, becauſe not warranted by precedents.

Becauſe Lord *Mansfield* named as a party.

It was very proper to make Lord *Mansfield* at firſt a party; very improper afterward: Becauſe it was not known Lord *Mansfield* had made an actual conveyance, and the bill muſt have been diſmiſſed as to him.

Coming too late for a ſpecific performance is objected.

Coming

Coming too ſoon is objected; a very inconſiſtent objection. But this could not be when a ſpecific performance had been refuſed; and the objection would have been very ſtrong if the ſpecific performance had not been demanded early.

Objected, that the maſter of the rolls ought not to have decreed a ſpecific performance.

If it had been right to decree a ſpecific performance, yet that a compenſation ſhould have been decreed to Mr. *Popham*.

It is ſaid that decreeing a ſpecific performance is diſcretionary in the court. Stating properly, I admit it, that it is not a thing of courſe. Diſcretion in common converſation and in a court of juſtice are very different: For if the party makes a proper title, it is no more diſcretionary. In a common ſenſe the court muſt do it, which is the legal ſenſe to do whatever they ſhall diſcern to be juſt.

Not within the ſtatute of frauds is one objection.

[803] Not complete, another.

Not fair, a third.

It is proper firſt to conſider the true ground of the ſtatute of frauds; and what was the law before; and how this caſe can be affected.

Before the ſtatute parol agreements were executed by this court; but to avoid fraud writing was required.

In conformity to the reaſon for which writing was required, equity has formed ſeveral rules.

The court will decree performance of an agreement in writing, though not formally drawn.

1ſt. The court will decree agreements collected from letters. *More* and *Hart*, *Ch. Rep.* 284.

2d. The court will decree performance of an agreement ſigned by one only; nothing more common than to ſee a leaſe ſigned by one only, and performance decreed.

3d. The court will decree if agreement not put into writing at that time, but agreed to be put into writing.

Leake and *Morris*, 2 *Ch. R.* 135.

1 *Ver.* 151. The bill was to have execution of a parol agreement for a leaſe; the defendant pleaded the ſtatute of frauds; the plea was allowed; but Lord Keeper held, if the plaintiff had laid in his bill that it was part of the agreement, that it ſhould be put into writing it would alter the caſe.

Suppoſe parol agreement confeſſed in anſwer, the court will decree as if in writing.

The ſtatute of frauds was intended to prevent a particular inconvenience; if the agreement is confeſſed, the inconvenience can never happen which the ſtatute meant to prevent.

The

The moment he confeſſes, the agreement is executed according to the ſtatute.

Attorney-General *Vez.* May 3, 1748—9. for putting an agreement into execution; the ſtatute requires an agreement executed by the party or his agent: Yet where the agreement [804]
appears, there is no danger of perjury, and it is taken out of the ſtatute. And, in ſuch caſe, I ſhould have no doubt to decree againſt the heir, though I can find no caſe as the reaſon goes throughout.

And ſecondly, his Lordſhip ſays, if the agreement had been in part executed.

2 *Vern.* 455. *Pyke* v. *Williams*.

Wanley and *Sowbridge*, Exchequer, *G.* 2.

Plaintiff's huſband deviſes an annuity to his wife of 400l. a year, in caſe ſhe ſhould releaſe jointure.

Said by all the court except one, though you ſhould not be compelled to confeſs a promiſe, yet it was neceſſary to confeſs things done to carry the promiſe into execution. And if ſuch a confeſſion was required to take it out of the ſtatute of frauds, much more ſhall a voluntary confeſſion be effectual.

Attorney-General and *Ray*, *Liſter* and *Fox*.

Lord Chancellor—Is there any caſe in which there has been a decree founded upon confeſſion? [generally without a part performance.] In ſome of the caſes the Chancellor has been mentioned to have ſaid it, but I never found a decree.

Mr. *Ambler* continued—My Lord, I take it as a principle where there is an agreement in writing;

Agreement confeſſed by the anſwer;

Agreement in part performed;

That in any one of theſe three caſes the court will decree a ſpecific performance.

That there is an agreement in writing I muſt reſort to this letter.

Letter which Mr. *Popham* admits to contain an offer of 16500l.

He wrote under with a pencil not leſs than 17000l.

This is not merely enquiring about the price.

By the anſwer which ſays it concludes the bargain, it was ſo taken.

All the letters to Lord *Mansfield*; the anſwers; the di- [805]
rections for conveyances; all evidence in writing.

Is this in part performed?

In caſe of *Liſter*, tenant began to repair.

Gulter and *Halſey*, there muſt be ſome act clear, with a view to the performance of the agreement.

What

What is done here? Settling of the mode of payment; conveyances proffered, certainly with a view to the performance of the agreement.

There is another caſe where plea over-ruled, becauſe not ſaid whether defendant had tendered a conveyance, for this would have been a part performance.

The purchaſer proceeded on his part; ſold out ſtock.

Whether this a certain and complete agreement is to be conſidered.

I will not take leſs than 17000l. I will give 17000l. Many other things may be added, but more is not neceſſary to make a certain agreement. The letter, conveyance, draughts—is not all certain? I don't ſee how any of the parties can make a doubt.

The defendant Mr. *Popham* acted upon it as a bargain.

It is objected, performance not to be compelled, becauſe no time fixed for the payment.

If the day had been neceſſary, then no agreement before a maſter would ever have been executed, and the inconvenience is exceeding in fixing a day. Diſputes about intereſt would ariſe; it would be ſaid you have paſſed the day.

Objected, this is not the agreement originally made, the agreement was varied; therefore the court will not decree a performance.

Suppoſe it ſufficient as it ſtood originally.

The alteration is for the accommodation of parties, not material in its nature, and by the conſent of the parties themſelves.

If the agreement had been carried into execution by the parties themſelves or the court, and the 17000l. never had been paid to Mr. *Popham*, it was not neceſſary he ſhould diſpoſe of
[806] it; it was to be paid to the uſe of the fund, it might have been proper and ſufficient to pay it to the mortgagee, to whom Mr. *Popham* muſt have paid.

Objected, that it is a conditional agreement, and condition not performed: and therefore agreement void.

How does this agree with the objection that no day fixed? I know of no caſe but of a creditor accepting a leſs ſum on condition of payment at a certain day; there the court will not decree a performance when the day is paſſed.

No day fixed here; but if it had, what was done by the parties?—The delay is allowed.

On account of engagement to pay Lord *Mansfield*, notice given. This is not the fact, and Lord *Mansfield* did not demand, and it is not in evidence. Mr. *Popham* has ſuffered

very

very much by the delay, leaſes, improvement of the eſtate. This, if it be true, is another queſtion.

Next the head of defraud and deceit. If this could have been conducted fraudulently and deceitfully no doubt it ſhould not have availed the perſon guilty of fraud. But I beg permiſſion to aſk whether there has been any fraud or deceit. What is the difference? May not the perſon treated with convey over to the other the next day? The caſe of *Philips* and the Duke of *Buckingham* ſays he may.

If a party were to ſay, I have treated with you as a principal, I find you are agent for another, I therefore will not execute; the court would diſmiſs the bill with coſts.

Lord Chancellor—Mr. *Popham* had expreſsly declared, he would not treat with them.

Mr. *Ambler* proceeded—I come to that part.—Where is the fraud, when Mr. *Popham* had ſaid he would not treat perſonally with Mr. *Eyre*, that he ſhould treat with him by another perſon?

The only caſe in which a man can be ſaid to act deceitfully is, where the purchaſer ſhall not be bound.

The reaſon why Mr. *Popham* refuſed to treat with Mr. *Eyre* was, becauſe Mr. *Eyre* had not the money ready. The money was ready. If Mr. *Popham* had not been too haſty, had and waited till the Tueſday, he had ſeen it.

The letter written by Mr. *Stokes*, I think, is concluſive of the affair.

" When you treated for 17,000l. ready money to be [807]
" paid at Lady-day, Mr. *Popham* had already refuſed you
" for a purchaſer. Mr. *Popham* therefore will not treat
" with you, nor any of your profeſſion, for the profeſſed
" purpoſe of felling out in parcels, becauſe he foreſees an
" inconvenience both to him and Lord *Mansfield*. How-
" ever if Mr. *Baldwin* will pay the money within the
" courſe of this week, with intereſt at four per cent. from
" Lady-day, Mr. *Popham* will be ready to accept it."

Suppoſe he had waited to ſee.

Upon the Saturday preceding he gives the anſwer; if he had waited till the Tueſday, he might have made the objection if the money was not ready.

As to the caſes cited, I think, that I ought not to go into them.

I know but of one upon which the gentlemen have not much relied, upon which, I beg leave to rely as a caſe in point for Mr. *Eyre*.

Barebone

Barebone and *Barnes*. This was not the case of a substantial man, but a man worth nothing, and rents reserved upon the estate, which the seller would have been liable to pay if the other could not.

Mr. *Garrick*'s case. A particular person whom the person treating with, would not turn out this not in writing, the purchaser said that he had talked with the person and no objection. Here was a direct fraud, not merely a treaty without saying for whom, which neither Mr. *Baldwin* nor his agent were obliged to do.

Philips and Duke of *Buckingham*, a case which does not apply: For neither one nor the other of the parties allowed the contract. But if the person whose name was used had taken up the case, and said that he meant it to be purchased in his name, and he would have it the court would have decreed. If Mr. *Eyre* says *Baldwin* treated for him, this is the very case. The bill is brought in the name of Mr. *Eyre* and Mr. *Baldwin*. If Mr. *Baldwin* declares he will pay he has a right to insist for himself.

Next, suppose the decree of a specific performance whether any, and what compensation to Mr. *Popham*? I wish he would have said what kind of compensation.

A court has never said, the seller shall take the rents and profits, and interest for his money.

[808] When a man is let into possession, he often pays the rent from the last pay day, and the court often divides.

It is suggested the estate is greatly improved; lives are dropt; Mr. *Eyre* will be a gainer; Mr. *Popham* ought to have something for the loss;—no evidence of any great loss. He pays interest to his mortgagee, this is his own fault; he keeps the rents and profits of his estate. In what manner or what kind of compensation shall he have?

He sells at 500l. loss, then how can he gain? He is rather interested that Mr. *Eyre* should be purchaser.

Lord Chancellor—This is a bill brought by *Eyre* and *Baldwin* against Mr. *Popham*, in order to prevail on this court to decree a specific performance of the agreement, which it is said Mr. *Popham* has entered into with the plaintiff *Baldwin*, for the sale of an estate for the sum of 17,000l.

The first question in this cause will be, what was that agreement which is now prayed to be specifically performed. And I was in hopes the counsel for the plaintiff would have stated specially what this agreement was.

Next, supposing there was such an agreement whether it ought to be performed?

As

As to the firſt, I examined the anſwer and depoſitions, and if there was an agreement it was on the 30th of June, that in conſideration of 17,000l. to be paid 10,000l. to Lord *Mansfield*, (and which Lord *Mansfield* accepted) and 7000l. to be left as a ſecurity upon the eſtate, the defendant ſhould convey to *Eyre*: And they aver on their part, that the deed was tendered to Lord *Mansfield* who accepted.

Equity will not decree upon a bare parol agreement ever ſo clear, not in part performed.

This is not an agreement in writing upon the ſtatute of frauds; but the queſtion is, whether it is an agreement which ſo appears as that the court will decree a performance. It has been ſaid that it is a known rule in this court that where an agreement appears confeſſed, the court will decree a performance, though no part has been performed; ſome dictums there have been: But Mr. *Ambler* confeſſes that he has found no decree.—That where the ſubſtance clearly appears though in parol without any part performed this court will decree an agreement to be executed. I think it cannot be poſſible; this court cannot repeal the ſtatute of frauds nor any ſtatute. The King has no ſuch power by the conſtitution entruſted in him; and therefore, there can be no ſuch power in his delegates.

The only caſe I know that takes a contract out of the [809] ſtatute is of fraud. And the juriſdiction of this court is principally intended to prevent fraud and deceit; where a party has given ground to another to think he had a title ſecured, the court will ſecure it to him.

The ground therefore in making or refuſing decrees has been fraud. It can never have been laid down by the court that where the ſubſtance appears, it ſhall be executed. It would not have been ſo at common law.

In reading of *Bracton*, about forty years ago I made a ſelection; of which the following is a part.

De acquirendo rerum dominio, l. 2. cap. 27.

Emptio vero et venditio contrahitur cum de pretio convenerit inter contrahentes; dum tamen a venditore arrarum nomine aliquid receptum fuerit: Quia quod arrarum nomine datum eſt argumentum eſt emptionis et venditionis contractæ. Et in ſcriptura intervenire debeat non erit perfecta emptio et venditio miſi cum fuerit partibus tradita *et abſoluta. Et cum* ARRAE non intervenerint *vel* SCRIPTURA, *nec* TRADITIO *fuerit ſubſequuta*, locus erit pœnitentiæ *et impune recedere poſſunt partes contrahentes a contractu* ſed ſi pretium *ſolutum fuerit vel ejus* pars, *et traditio ſubſequuta*, perfecta *eſt emptio et venditio*; nec poteſt *poſtea aliquis contrahentium a* contractu reſilire, *prætextu pretii non ſoluti in* parte *vel in toto, ſed agere poterit venditor,*

ad

ad recuperandum id quod de pretio defuerit, per actionem competentem sed non ad ipsum rehabendum. *

This court never alters the common-law; but in particular circumstances it extends relief, which the common-law from its generality had not provided. But for fraud and circumvention there would have been at common-law a relief similar to that which courts of equity give, either by dissolving or affirming the contract as the conscience of the case requires; for at common-law a man should not take advantage of his own wrong. And common-law would have given the party injured by such contract damages at least; equity restores him to that state in which he would have been if no unfair practices had been used. Common-law in many instances considers a fraudulent contract absolutely void; except as against the author of the fraud, or those who knowingly contributed to it: But as against such persons valid. And equity in this court
[810] has peculiar means and rules for the purpose of this relief, and to guide the court in extending or withholding it.

Let us see how far the court has gone where there has been a contract clear though not in writing, yet if afterwards the party has refused to execute, there if any fraud the court have not permitted the refusal, where the agreement has been very explicit, and the other party has acted upon the faith of it.

Lord *Somers* is said, in the note I have out of Lord *Hardwicke*'s note-book, to have expressed himself thus.

Lord *Hardwicke* stated the case of the Marquis of *Normandy*, and then cited Lord *Somers*. "It is true the court has "frequently and justly interposed for the execution of an "agreement, though the agreement only contained in a "letter. As in the case of *M.* and *Hart* where the plaintiff had married upon the credit of it. So where the "agreement is confessed upon the defendant's answer, but "such answer must contain the full and complete agreement; for if any thing remains unsettled, the court will "refuse as in the case of *Coke* and *Mostyn*, before Lord "*Jefferies*."

Lord

* These leading rules, which prevail still, were therefore received and in settled practice, as it is reasonable to collect from hence in the reign of *Hen.* 3, more than five hundred years ago; and the statute of frauds four hundred years after the times of *Bracton*, did, as to this part of it, little more than declare them.

Lord *Somers* ſeemed therefore to think upon the caſe of *M.* and *Hunt*, that there muſt be ſomething done. The plaintiff had married upon the credit of it. In the caſe of the Marquis of *Normandy*, part of the money had been paid. Is this agreement complete and proved? And is it ſuch, upon the circumſtances, that the court will execute it? Suppoſe there had been an agreement to pay the money, and on the other to receive; but the time did not appear. (Which is always material, but particularly in the caſe of a mortgagor, where the mortgagee takes four per cent. and was to take five if not paid.) This is ſo material that Mr. *Ambler* admits, if Mr. *Popham* had waited till Tueſday and not been paid, he would have had a right to refuſe.

What performance then? If the defendant paid to Lord *Mansfield* 10,000l. upon the 30th of June, he would execute the conveyance, and take the ſecurity for the reſt. No money upon the 30th of June.

Mr. *Baldwin*'s agent writes, that he is ſurprized the treaty does not go on; but it is very well, as Mr. *Baldwin* is on the eve of a purchaſe which may be more advantageous. And that Mr. *Stokes* muſt be apprized of the ſcarcity and value of money. After all, if Mr. *Stokes* and he ſhould agree, he will be at the Crown and Anchor. No treaty ſettled then, only that it was very well; if they ſhould conclude, he ſhould be at the Crown and Anchor. Mr. *Popham* writes, he wont take leſs than 17,000l. perhaps then he will take 17,000l. if you will pay on a day mentioned; and ſome time after Mr. *Baldwin* writes back that he will [811] give 17,000l. "which concludes the bargain." Was this ſufficient? No day. Was it an agreement complete? The diſtinction in the caſe of *Gulter* and *Halſey* was in this very different.

Does Mr. *F.* the agent for the plaintiffs, conſider it as an agreement, though he ſays, it concludes the bargain? He wants a line for his ſatisfaction.

An abſtract delivered; what is this? Only evidence of a treaty in contemplation which might come to be executed.

The terms are altered the 13th of May; application to Lord *Mansfield*. Lord *Mansfield* approves. Mr. *Stokes* hopes Mr. *Baldwin*'s money will be ready in ten days; agrees to wait. 17th of June, Lord *Mansfield*'s agent writes, his Lordſhip has appointed Monday at five in the afternoon to execute, as Mr. *Stokes* fixed upon that day; Mr. *Popham* writes that he hopes Mr. *Baldwin* will be punctual, as he has ſo

often been disappointed, and that he shall think himself at liberty, and obliged to treat with another purchaser, if the money be not paid by Monday next. Here then Mr. *Popham* was bound to the Monday.

However they are not ready on the 28th of June. And it is said for the plaintiffs that the deeds were necessary to be transcribed, and on or about the 30th of June was appointed for executing the conveyance. Appointed; by whom? I suppose by those who thought it best the conveyance should be re-ingrossed; and this was so material, that Mr. *Ambler* confesses, if they had not paid on the 30th of June, this would have been sufficient to have put it off.

Mr. *Stokes* writes—As Mr. *Popham* agreed to defer for your accommodation, if the money be not paid immediately, Mr. *Popham* will take such measures as he shall be advised.

Mr. *Ambler*, though he admits Mr. *Popham* would have been at liberty, if payment were not made on the 30th of June, yet in another place says the time of payment is not material; it was very material when five per cent. interest was to be paid if the mortgage not discharged. It is always material.

The 22d of June is the last day that appears. But something afterwards was done. They went and caused the conveyance to be re-ingrossed. Mr. *Stokes*, the person who engrossed for the plaintiffs, has done what I am sorry to say all the parties applying for a specific agreement and their agents have done, endeavoured to impose on the court. One would understand that the engrossment was
[812] offered with the name of *Eyre* instead of *Baldwin*. It cannot be; because the very purpose of the re-ingrossment was to change the names, and put *Eyre* instead of *Baldwin*. It is denied by *Stokes*, and not sworn by *S.*

He says that, according to the best of his remembrance and belief, the deeds were ready the 21st of June for execution by Mr. *Popham*, who wanted to go out of town directly. And the deeds were re-ingrossed for the purpose of putting in *Eyre*'s name instead of *B.* and there were several blanks in the said re-ingrossments.

Mr. *Stokes* helped to fill up the blanks in the re-ingrossments with the name of the said *F. Eyre*, instead of *Baldwin*. As I read it you would think it was, helped to fill up the blanks with the name; but it is to be read, helped to fill up the blanks of date and sums in the re-ingrossments; which re-ingrossments had the name of *Eyre* instead

ead of *B.* (that is) afterwards inſerted. It is not poſſible, n the ſenſe in which it was meant to be taken; if it had hey ſhould have produced the re-ingroſſments, and ſhewn hat Mr. *Stokes* was capable of ſwearing to deny his own and.

It is a moſt ſcandalous effort to impoſe upon the court.

Mr. *Eyre*'s clerk ſwears in the ſame manner.

Mr. *Eyre* ſwears he has 4000l. in his banker's hands, exluſive of 3000l. The proper manner would have been, f this could have been ſworn, to ſay that he had 7000l. n the banker's hands; but it does not appear where the 3000l. were. It cannot be in his banker's hands, becauſe he notes in his own hands were certainly not with his anker. And he adds, and of bills and notes in his own poſſeſſion.

And this is very material, with regard to what I ſhall dd. I ſaid they were all in the ſame evaſive manner. The gent for the plaintiff ſwears he had inſtructions from he complainants, or one of them, to treat for the purhaſe. He might never have a ſingle inſtruction from *Baldwin*, and yet this be true.

Excluſive of 3000l. the produce of ſtock ſold out—this money was borrowed, and it was not his own. And yet who would not have taken, from the ſwearing, that it was his own?

But the material thing is, the 30th of June was not the day agreed upon between the parties; the 22d of June was the laſt day.

What are the circumſtances, from beginning to end, to make a court of equity compel an agreement, upon conſiderations of equity not within the ſtatute?

What are offered are theſe. Part performed, becauſe the [813] abſtract was delivered, conveyances drawn, and money borowed. This was never the meaning; it is where the party does ſomething as owner.

Mr. *Popham*, very much indebted, wants to ſell his eſtate, in order to leſſen his debt. Lord *Mansfield* agrees o take as much as this eſtate will ſell for, in order to leſſen he debt. *Eyre* propoſed; *Stokes* writes. *Eyre* ſays he has ot ready money ſufficient. This will not anſwer Mr. *Pop*m's purpoſe; he will have nothing to do with him. Then acts behind the curtain: He treats in Mr. *Baldwin*'s me. There is an evaſion. This agent ſaid he had orrs from the complainants, or one of them, it might be

from *Eyre*. And he makes *Baldwin* write a letter. Is this generous?

But it goes farther, the agent for the plaintiff, writes a letter.

He goes away to Mr. *Popham* (I can't help using an hard expreſſion) in order to draw him in. He carries the letter; he furniſhes the pencil; *Popham* ſays I will not take leſs than 17000l. He then writes back that Mr. *Baldwin* will give that price; ſo now the bargain is concluded. A ſhort concluſion.

"But pray, Sir, for my ſake, only write a line." No circumvention, no deſign, to enable counſel to ſay it's in writing, it's an agreement within the ſtatute.

Two days after the agent goes, with a writing ready ſigned, and proffers it. Mr. *Popham* ſays, "I will do nothing till I ſee Mr. *Stokes*." Was this fair? A country gentleman, unacquainted with law, to get him to ſign by himſelf, in the abſence of his attorney, a writing with no ſpecified time of payment? Is it candour to entitle to a relief in a court of equity? However, Mr. *Popham* wanted his money; he ſends his abſtract; the time is put on, not by Mr. *Popham*. On the fourth of March the money to be paid; on the 25th of March not paid; then they enter into a new bargain. Now, therefore, it was all in treaty: And this was that the money ſhould be paid 2d June, 10,000l. to Lord *Mansfield*.

Deed carried to Mr. *Stokes*, with the names, that is as already explained. After this Mr. *Popham* ſees it; he is thunderſtruck to diſcover he has been treating all the while with Mr. *Eyre*, in the name of *Baldwin*.

Has Mr. *Popham* been guilty of any fraud or circumvention? Has he not ſuffered moſt materially, by paying intereſt at five per cent. from the 25th of March? Was he not forced to ſell, with 500l. loſs?

[814] The bill was brought immediately, but it was diſmiſſed two or three times, and made as late as it could, by the delay of the plaintiffs. And this is extremely material, when a ſpecific agreement is inſiſted on, and the party to be compelled to ſuffer all the while for the delay.

It is incredible what Mr. *Popham* muſt ſuffer; he muſt pay all the money back, with intereſt. On the part of the purchaſors he has engaged with them, and bound himſelf to pay back, and given ſecurity, and he muſt pay five per cent. from 1767, to the mortgagee.

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I am ſorry to have ſaid ſo much. The maſter, I have no doubt, thought himſelf bound by the rules: There can be no other reaſon. I ſee the rules in another light. And the court has never compelled an agreement but upon the caſe of fraud, to take it out of the ſtatute of frauds, where no part has been performed; unleſs it has been clearly proved in writing ſubſequent, either by anſwer or otherwiſe.

But here the moſt material part has not been proved, which is the time; which is neceſſary to be proved whenever the parol agreement is to be executed.

The next material thing, that he had the money ready, is not proved; but the reverſe is proved. There is no fraud in the defendant; nor is it ſuch an agreement, taking this as proved, which the court would execute.

I am, therefore, of opinion, that the decree of the maſter ought to be reverſed.

My only doubt—indeed the only heſitation that I have, is upon the manner of ſwearing to the filling up the blanks; the ſwearing to the money, and the other evaſive circumſtances, whether I ought not to reverſe the coſts.

The only reaſon that induces me not to do it is this, I ſhould be very ſorry to add coſts which could not afterwards be diſcharged, where they have had a decree.

If it had regularly come before me I would have diſmiſſed it with coſts: And, as I differ from the maſter, I wiſh they may appeal; becauſe I think there is a judicature which can diſmiſs it with coſts.

Bill diſmiſſed.

PRÆFATIO.

PRÆFATIO.

INTER has tempeſtates, atque turbines quibus reſpublica noſtra jam diu jactatur, nullum adeo mali ſolatium præſentius invenio, quam ut vitali quodam genio conditam credam: Et id ſane, non tantum ob diuturnitatem acti jam imperii, neque vim et robur populi, neque inſulæ ipſius molem fere inexpugnabilem et hoſtibus inacceſſam; ſed ob alia majora; religionem nempe, et leges; et principi, ejus a formamque veterem.

Nam diuturnitas per ſe enimvero, bene conſtitutam compagem, felicem ſortem, auſpicatum cœlum affuiſſe plerumque monſtrat; et venerationem et dignitatem quandam præfert: Sed in humanis rebus tantum abeſt futuram incolumitatem ſpondeat ut imminentem interitum verius inde ominemur. Cernimus quotidie ſaxa ingentia vetuſtate ſublapſa; ſilvarum immenſas umbras arborumque reginam quercum, autæ vi aut humanis manibus concidiſſe: Urbes ſubrutas; terram ſubinde labefactatam: Flumina exarnerunt; mare ipſum ac ſidera communem ſortem patiuntur. Naſci nova, vetera interire, mutari omnia. Animantia autem omnia ſi his conferantur immaniſſimas etiam beſtias et ponti monſtra, imbecilla, caduca, infinitis caſibus obnoxia: Ac quamvis minutis maxima interire. Nos vero, miſerum ac incertiſſimum, inter incerta omnia, humanum genus qui bellis concertamus, qui æterna molimur, ita vivimus ut quod longiſſimum vitæ noſtræ ſpatium concedatur, centeſimus ferme annus, (et quoti hactenus) alii voluptatibus, alii ambitione, plurimi inertia, innúmeri ſeriis nugis, at tamen nugis, conteramus. Ita fluxo corpore et labili in-

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ter cœli, ponti, terræ discordia elementa, inter animantium insidias et ferociam aliorum, vel quod maximum et teterrimum, inter propria humanitatis vitia constituti, et interea vel tegulæ lapsu, vel vermiculi morsu, vel pulviculo illapso spiramentis animæ intercluſis tam nullo negotio confecti, ut in dieculam si liceat perdurare prope instar habendum sit æternitatis.

Militum igitur robur et ducis maximi vis intra pauciſſimos annos, ne dicam puncto temporis, quo recidant non ignaros alloquor. Homines enim alloquor: Neque ullum clarius aut majus mutationem terrestrium fragiliſque spei pignus quam si memineris hominem te esse quo; verbo omnia incerta concluſa esse videantur.

Romam igitur concidiſſe ita non mirer ut potius stupeam, tam vastam, et ad extrema subitam potentiæ molem, ubi eo usque excreviſſet stare potuiſſe. Perſidos, Germaniæ, Galliarum res, non attonitum eum habebunt, neque in tanta instabilitate partim fuiſſe nec tam sæpe non concuſſas modo, sed subverſas, non immutata imperia, sed sedibus et radicibus convulsa alio ceſſiſſe si cogitet hominum illud robur fuiſſe; et plerumque unius homuncioli humeris niſum. Urbes commercio ampliſſimo quondam insignes, Tyron, Sidona, Athenas, Corinthos, Carthaginem, mundi olim quædam emporia, video alias partium studio, alias dominandi aviditate, plurimas maximasque luxu, socordia, deorum hominumque contemptu, ex nimiis opibus et magnitudine orto, ita evanuiſſe ut vestigia ipsa ægre requiras, et sæpe ne id quidem.

Propugnacula vero, arces commeatus, classes, non vis et fortitudo sunt, sed fortium tantum et bonorum instrumenta: Et adeo non in omnia secura ut sæpe tutius fuerit spreta ea, quam credita. Alia igitur quærenda externis magis certa, humanis viribus magis duratura: Quæ sane non alia usquam videre videor, præter rerum divinarum cultum, et

bene

bene conditum, atque conſtitutum, reipublicæ ſtatum.

De religione non hujus eſt inſtituti multa dicere: Talem vero habemus iis probationibus fundatam, iis ad vitam moreſque preceptis, exemplis, auctoritate, ea denique ad civis inſtruendos optimis artibus, ad rempublicam conſervandam, ad generis humani pacem et utilitatem, ea pulchritudine eâ ſpe, ut ſatis pro dignitate explicare ejus nimirem ſit qui condiderit *Dei*. Leges vero et reipublicæ ſtatum ab eodem Deo, per ſapientiam optimorum virorum, tot ſæculorum curſu, tot exemplis, tot demum etiam caſibus indita, firmata, defenſa, aucta, tanta hæc et tam præclara, tam noſtræ reipublicæ propria, mira quadam tum Dei providentia, tum majorum noſtrorum conſilio, virtute, diligentia, fide, deducta, et nobis tradita, ſancita, commiſſa video.

Vix aliam rempublicam aliumve imperii ſtatum inveneris, tam diuturnæ pulchritudinis, tam non imminuti roboris, tam non mutatæ formæ, tam ejuſdem ab antiquo ingenii: Ita apte diſtributis partibus; tam præclare proviſis legibus; tantæ auctoritatis, clementiæ, æquitatis; Ea juſtitiâ, ea in publicam utilitate, in privatos temperantiâ, opinor, nullum. Ut conſtitutio hæc noſtra non jam Angliæ, ſed libertatis; non hominum ſed ſapientiæ nomen, non legum alicujus civitatis, ſed ipſius juſtitiæ exemplar, et quædam divinæ pulchritudinis quaſi retecta facies habeatur.

Mitto multas paſſim conſuetudines ab intimâ Vetuſtate antè conſpectas Romanas Aquilas, pulſum que Cæſarem nobis cognitas, neque adhuc vi temporis aut rerum continuo orbe exeſas vel dejectas, atque obtritas. Hæreditatum dico; dotis a marito in uxorem (quod contra Romæ et Athenis factitatum) aliaque ejus generis; quorum conſtantiam tempus, prudentiam uſus comprobavit. Mitto quod ſupplicia illa fœda, equleos, cruces, ardentas laminas, et prodigia cætera crudelitatis et ſtultitiæ

humanæ

humanæ neque leges noſtræ agnoſcant, neque unquam fere agnoverint: Si druidas forte excipias, et Romæ illius tyrannidem a cervicibus noſtris, ægre, at fortiſſime, depulſam. Ejus inquam Romæ quæ veterem ſuperbiâ pravoque cultu ſuperavit; et utinam meliora ejus aſſecuta eſſet. Præterea pauciſſima, quæ non legum, ſed temporum monumenta memoria rerum noſtrarum detulit. Statim enim fere ac pullulare incepiſſent denata ſunt, vel per domita.

Quinimo non modo nocentes meminimus ſaltem homines eſſe cujuſcunque gentis fuerint; etiam illud majus nefas vix per bis mille annos fere apud nos extitiſſe repertum eſt, crimina per tormenta eliciendi, ut pœnâ judicium ante cedat et minore ſupplicio aperte noxius quam innocentia et fortitudo viri plectatur falſo crimini inter ignes tortoreſque renitentis; habemus et hoc noſtrum, hoc vere noſtrum *judicium parium!* judices ex ipſius rei aſſenſu lectos, domicilio vicinos, conditione proximos, ipſos inter ſe, ac reo, *pares.*

Horum non niſi unanimi conſenſu, de capite civis Anglicani, de exiſtimatione vel fortunis ullum erat aliquando judicium. Et jam non adeo interciderit pulcherrimum inſtitutum, quin ad hoc quaſi præſidium libertatis columen juſtitiæ, aram innocentiæ ſapientiæ que oraculum, maxima fere quotidie deducantur. Habemus *magnum concilium* illud *ſenatus populique Anglicani* vetuſtate ante omnium monumentorum fidem; quæ antiquiſſima tamen ei ſuffragantur. Hinc Areopagum, hinc curiam Romanam, inde Spartanam Democratiam conferes; non modo diviſas ſuperamus, etiam conjunctas vincimus. Tum vero etiam illud cogitandum: Romam nunc reges, deinde conſules, poſt tribunos, dictatores, imperatores denique rexiſſe. Tanta ſubinde viciſſitudo, ea calamitas, ea moles in ſe ruentis imperii dominam gentium Romam conculit, afflixit, ſolo demum æquavit. Athenas optimi cujuſque

juſque nomine paucos opibus fretos ita rempublicam habuiſſe, ut non *magiſtratus*, ſed *domini* viderentur: Penes populum ſæpe numero ſpecie fuiſſe poteſtatem, ſummam re vero apud *plebem rapacem, credulum, indocilem ſævum*; vel ſui ipſius motibus vel flatu oratorum jactatam, tumultuantemque. Spartæ vero virtutes, fere omnes eo induratas, ut in *vitia* pervenerint; et ne quid alieni cuperetur, ne illa quidem propria fuiſſe, quæ natura maxime voluiſſet: Conjugia et patrium nomen. Ut potius diverſa ſervitutis genera, diverſa vitia, pravæque rerum publicarum ſpecies, quam uſquam vera reſpublica eſſe videretur.

Recentiora et hodiernæ intuenti quam paucæ mentem incurrunt vere rerum publicarum et libertatis effigies. Magna orbis pars ſub tyrannide confeſſa et aperta ſqualet, quibus pro libertate eſt *bona ſervitus*, et ſumma felicitas *debere* non *pati infortunium*, *ſuiſque* ex conceſſo tanquam *alienis*, et quantum vis precario uti. Conjunctam rempublicam ſeptem provinciarum ex pluribus Hiſpanienſi jugo pene infra patrum memoriam ereptam, quo nunc redactam! Ubi jura leges, libertas prior! Venetum ſenatum an Genuenſem adeamus libertatem quæſiturum! Etiam parvulæ, at nobiles iſtæ reſpublicæ (non enim mole ſed *intus* virtutem verumque pretium metimur) neſcio quo evaſerint Luccenſis, et Marinenſium antiquiſſimæ. Ultra Pyrenæos an ſit ſcandendum, lacuſtre Lemanus viſendus, ſi forte deliciæ generis humani et amor cœli, libertas, etiam num illic habitet? Fruſtra ſcrutamur extra: Nos ſuos alumnos, Britanniam *ſuam*, *ultimos que* noſtri imperii *fines Libertas* eſſe *voluit* ac *juſſit*, *ſuos*.

Et mihi quidem cogitanti non ſine divino ope, et ſingulari quodam favore, maximis que majorum in publicum meritis fieri potuiſſe animo ſedet, ut quam rempublicam ætas noſtra vidit, orbiſque obſtupuit virique fere omnium gentium *ſapientiſſimi* in cœlum

cœlum laudibus et nuper et olim extulerint ullam tam diu habuiſſemus. Regiam poteſtatem pulchre *ornatam*, tam *legibus exſequendis* proviſam, tam imperio *tuendo* armatam, tam provide, et ſibi non minus quam publico, utiliter *circumſtriptam*! optimatum auctoritatem, populi vim, univerſæ reipublicæ *Majeſtatem*, hæc adeo velut cœleſti artificio apta atque librata. Leges vero ipſas tam graves, tam antiquas, æquas, *omnium conſenſu factas* atque comprobatas: Judicia eo uſque *ſancta* a *vi*, *metu*, *odio*, *amore*, *dolo*, *errore* etiam, quantum in humanis licere videatur, clauſa et circumſepta: Eadem, in auxilium omnia, aperta; eadem quæ habenda quæque patienda cuique eſſent; non ex *ſuo arbitrio*, ſed ex legibus definiſſe, *quæ eadem vere omnibus loquerentur ſemper*. Dei cultum ſimplicem in pleriſque purum optimum intreamur: Non coactum immanibus inſtitutis, atque ſupplicio; non præſtigiis jactitatum, non in caligine ac ſordibus latentem, non legum auxilio in perniciem hominum irruentem, ſed legibus ſociatum.

Religionem caſtam, moderatam, gravem, libertatis fautricem, pacis amantem; benevolentiæ, juſtitiæ, *bene parendi et recte imperandi*, *magiſtram*. Hujus ævi ducem et ſolamen; et æternitatis portas referantem. Quæcunque Deo accepta, hominibus charu, publice honeſta privatim bona, univerſis utilia eſſe cenſeantur, ea prope omnia mea ſane ſententia (neque mea tantum, ſed optimis judiciis, et conſenſu maximo) leges videntur Anglicanæ amare atque complecti. Ea hæreditas nobis a majoribus non augenda (ſatis enim magna atque ampla eſt) ſed retinenda atque ſanctiſſime tradelida poſteris, ut a patribus accepimus, devenit.

Longum eſſet, et prope infinitum neque mei ingenii vel ſcientiæ, *omnes* leges Anglicanas recenſere; et multi modam illam variamque ſapientiam vel mirari ſatis nedum enarrare queant. Sed ſi cujus unquam juriſconſulti domus, tanquam Scævolæ illius, civibus

civibus unquam patuisset ubi adiretur, ubitanquam ad delphicam sedem confluerent homines, "suarum "rerum incerti quos ille ope sua ex incertis certis "compotesque consili dimittat, ut ne res temere "tractent turbidas." Quam id in legibus nostris aptum, proprium, et verissime dictum videatur. Quæ enim unquam legis humanæ tam castæ, tam gravitatis plenæ, tanta auctoritate extiterunt ac *olim* nostræ. Quæ tam *lites* calumnias, vim, dolos, *ambitum*, cæteraque reipublicæ pestes oderint ac vetarint omnino necio: Et diu sane his omnibus restiterunt, neque adhuc non resistunt.

Et olim sane sapientum domus, jurisprudentiæ hospitia atque scholas, nobilium juvenum cœtus stipasse non miraculo nobis sed rubori fortasse, cum jam aliquando desierit, esse debeat. Nempe ex illo uberrimo fonte instituta patria, mores, disciplinam, parere legibus constitutis et novas si qua opus esset, ferre, si patria ad id summum munus capessendum jussisset, *simul* discebant. Seniores venerari, magistratus colere; *libertatem* et *vere* scire et incorrupto amare, et fortiter retinere. Neque usquam fere in veteri nostrâ republicâ major modestia quam in potestate summa; neque major potentium in humiles amor, tenuiorum in optimatis observantia ex veteribus institutis et ex *publico bono* reperietur. *Corrumpere* vero ac *corrumpi* maximis imperiis semper exitiosa, adeo tum sæculo aliena, ut legum-latores præterirent: Credo ne non tam cavisse quam *monuisse* viderentur. Ferme enim quingenis a Gulielmo primo annis ad Elizabetham reginam neminem ambitus damnatum comperio: et multo difficilius invenires qui summa in republica munia summamque potestatem delatam vellent accipere quam qui æquo animo privati degerent. Nunc, quoniam pleraque obsolevere, saltem elementa quædam et principia legum, usu atque auctoritate *maxima* vere dicta statui referre; et etiam *placita* quædam et legis et æquitatis *regulas*: eaque ut plurimum non *probare*

(per

(per se *enim* probant non probantur) sed adjunctis tum nostri sæculi tum priorum exemplis illustrare, et quam fuerint in judiciis agnita et quanti ponderis fructusque sint experimentis allatis (quæ maxima rerum bonarum laus) ostendere. Sed hæc si vita longior et propitius annuerit Deus. Nunc tantum ipsa per se utcumque collecta, fasciculum neque magnum neque forte per otium versanti (otium enim nostratibus non in inertia sed in mitiore studio positum reor) omne inutilem. Quo autem proposito et consilio hoc qualecunque aggressus sim breviter liceat aperire. Videor palam facturus, quanquam id neminem fere latere attentiorem arbitror jus nostrum non recens natum sed inaccessæ vetustatis, non temere congestum sed pulcherrime ordinatum, non calliditate quadam ac minutula solertia sed *summa prudentia* constare et ex intimis naturæ ac veritatis fontibus haustum: denique, quod plerosque forte lateat non *chartis* traditum aut in statutis præcipue situm; non forte, non vi aut dolo fictum, sed maxima ex parte ex *jure naturali* pendere, ex sinu *libertatis* fluxisse, *justitiæ adytis adoleviſſe*: Publice comprobatum, ingenuum, spiritus verique ut ita dicam, sanguinis et succi plenum, in se compositum teres, rotundum. De lege autem Angliæ *communi* non jactanter neque falso dictum eam esse *summam rationem*; quod, nisi qui *principia* ejus obliti sunt facile confitentur.

Illud vero vereor ut sim probaturus quod Anglus Anglos, de laudibus legum Angliæ dicturus, latio sermone (illoque forte barbariæ quam vero latio propiori) alloquar. Ejus vero, sive consilii sive temeritatis nostræ, habeo auctores maximos, antiquos, nostros cives, summa legum lumina, qui idem aliquando fecerint: Quos citando metuo ne potius arroganter defendere quam stulte cepisse consilium arguar. Deinde, quod propius attinet, *maxima* ea ipsa et *regulas*, latio ore plerumque invenias locutas, idque arbitror non sine gravibus causis a sapientissimis

entiſſimis viris factitatum. Primum ut ne temere prolata ſed *enunciata* graviter eſſent et *infixa* mentibus hærerent: alterum ut quaſi togæ Romanæ inditis inſignibus non intra linguæ noſtræ limites et imperii, olim ſane anguſtis tenerentur, ſed ut cives Romani olim, ubicunque terrarum incidiſſent *civitatem* reperirent et *domi* eſſent. Maxime autem ut perenni memoriæ pro dignitate ipſorum mandarentur. *Veterem* enim linguam illam, quæ non ita propria *Gallica* eſt dicta jam diu faſtidimus, qua legum monumenta vetuſtate ampliſſima, uſu et auctoritate *ſummæ* continentur, et id *ſolum* ex omnibus quæ aliquid *Gallici* ſapere videantur inter ineptias et quisquilias cenſemus. Anglicana autem lingua non tantum ab uſu quotidiano remotiorem dico ſed vulgarem et communem qua ternis quatuorve adhinc ſæculis omnes utebantur, non modo alia jam eſt ſed prope omnium ubique gentium minime nobis cognita. Romanam vero doctiſſimi et prudentiſſimi viri prævidebant, cum *latiſſime pertinere* tum *minime* humanis vicibus *obnoxium*, eâque ſe *breviter*, *plane*, *graviter*, quæ vellent poſſe eloqui et quaſi quibuſdam cancellis ſeptam ſapientiam (non invidia ſed ne uſu obſoleſceret atque dilaberetur) continere. Neque tam elegantiæ quam veritatis ſtudioſi neque *amari* ac *ſuſpici* verba quam *mentem intelligi* pluris æſtimantes, quæ *propriis* vocabulis Latinis *deſtituta* eſſent non magis veriti ſunt *ſuis* efferre quam diſertiſſimus illæ Tullius Græca uſurpare ubi Romana ſatis commoda deeſſent.

Ea *maxima* ſive *principia* vis ſive *axiomata* igitur quæ lingua Latina tradita ſunt, aliâ vulgare niſi illa prius retuliſſem *religio* mihi fuit; neque præfari lectorem aliter volui quam ac ipſa conſcripta ſunt ac devenere. Pauca quædam de meo addidi longe fateor auctoritate inferiora: ſed tamen e ſapientium juriſconſultorum noſtratum arbitror ducta libris et judiciis firmata.

Exempla

Exempla ipsa *Anglicè* afferre alio libro jam paro: modo fautricem habeam sapientium prudentiam: Et si aliquid juventuti idem iter capessenti commodi allaturum liceat sperare. Eaque prope eisdem verbis ac memoriæ mandata sunt ab iis, gravissimis plerumque viris, qui in libros retulerunt: tantum, pro ratione instituti hujus, *succinctius*.

Totum hoc opusculum boni consulas oro; non mei causa sed legum quas amore saltem si minus ingenio ac scientia complectar; quæ tecum, bone lector, hic ipsa colloquentur. Mihi, aliquid attulisse præsidii vel etiam lucis vel denique *ornatis* legibus nostris optimis, et clarissimis instar summi muneris ac præmii fuerit: Voluisse et conatum esse, utcunque res evenerit, certe non parum.

MAXIMS

MAXIMS AND RULES

OF THE

LAW OF ENGLAND,

AND

PRINCIPLES OF EQUITY;

Which may be found in the Inſtitutes and various Reports, in Bacon's Law Tracts, and in the Book called the Grounds of the Law, or appear founded in ſelf-evident Deductions of Reaſon.

1. SALUS POPULI SUPREMA LEX ESTO.

2. DEUM ESSE ex conſenſu omnium communis orta lex in legibus Angliæ plurimum valet.

3. Religio Chriſtiana pars eſt legis Angliæ communis.

4. Populus Anglicanus nemini ſervire aut conſuevit aut debuit niſi Deo et legibus.

5. Nemo poteſt niſi quod de jure poteſt.

6. Rex præſumitur omnes legis regni tenere in ſcrinio pectoris ſui.

7. Prerogativa eſt jus regis bonum & antiquum in decus & tutamen regni ſecundum bonas & antiquas populi libertates & legis Anglicani juris & conſuetudines.

8. Lex facit regem.

9. Rex non eſt ubi voluntas dominatur.

10. Ignorantia legum neminem excuſat, omnes enim præſumuntur eas noſſe quibus omnes conſentiant.

11. Non eſt lex ſed ſervitus ad ea teneri quibus non conſenſeris.

12. Lex communis Angliæ ita regis prerogativam admetita eſt & circumſcripſit ut ne hæreditatem alicujus tollat lædatve.

13. Nullum tempus occurrit regi: Rex numquam moritur.

14. Rex nil aliud eſt quam lex agens.

15. Proprium eſt regis gratiam delicti facere.

16. Non poteſt rex gratiam facere cum injuria alterius.

17. Populus Anglicanus non niſi ſuis legibus quas ipſe elegerit tenetur obtemperare.

18. Miſera eſt ſervitus ubi jus eſt vagum aut incognitum.

19. Poteſtas regia eſt facere juſtitiam.

20. Rex nil poteſt jubere niſi per curiam legitime conſtitutam.

21. Rex non poteſt malum vel injuriam facere.

22. Regis Curia & Curia Populi Anglicani ſive Parliamentum non ex ſcripto ſed ex communi lege ſunt.

23. Rex nunquam infra ætatem eſt.
Rex ad juſtitiam faciendam non cogitur.

24. Dominus omnium in regno terrarum rex habendus; & ab eo omnes tenent: ita tamen ut *ſuum cuique* ſit.

25. Tenens domino fidem præſtare & debita ſervitia tenetur; & dominus invicem tenenti protectionem & jura ſua omnia.

26. Non minus ſunt turpia principi multa ſupplicia quam medico multa funera.

27. Qui parcit nocentibus innocentibus minatur.

28. Lex Angliæ eſt lex miſericordiæ.

29. Nemo poteſt contra recordum verificare per patriam.

30. Allegans contraria non eſt audiendus.

31. Turpes tribunalibus arcentur.

32. Res judicata pro veritate accipitur.

33. Diſcretio eſt per legem diſcernere quid ſit juſtum.

34. Quiſque præſumitur optime in ſua cauſa dicere.

35. Certa res oportet in judicium deducatur.

36. Nullum damnum ſine remedio.

37. Actio non facit reum niſi mens ſit rea.

38. Vigilanti non dormienti jura ſubveniunt.

39. Affectio tua nomen imponit operi tuo.

40. Nemo rem ſuam amittat niſi ex facto aut delicto ſuo aut neglectu.

41. Intereſt reipublicæ res judicatas non reſcindi.

42. Judicis eſt jus dicere non dare.

43. Ratio eſt anima legis.

44. Qui hæret in litera hæret in cortice.

45. Qui peccat in ſyllaba peccabit in tota cauſa.

46. Perjurii poena divina exitium; humana dedecus.

47. Judicium duodecim proborum & legalium hominum veritatis dictum eſſe per communem Angliæ legem cenſetur.

48. Ad queſtionem facti non reſpondent judices ſed juratores.
Ad queſtionem legis non reſpondent juratores ſed judices.

49. Boni judicis eſt ampliare juſtitiam.

50. Sequi debet potentia juſtitiam non præcedere.

51. Judicia ſunt tanquam juris dicta.

52. Melior eſt conditio poſſidentis.

53. Nemo factum a ſe alienum tenetur ſcire.

54. Quiſquis ſua facta ſcire & preſumitur & debet.

55. NIHIL CALLIDITATE STULTIUS.

56. Periculoſum eſt quod non bonorum virorum comprobatur exemplis.

57. Judicandum

57. Judicandum est legibus non exemplis.
58. Qui prior in tempore potior in jure.
Vicinus facta vicini præsumitur scire.
59. Odio & amore judex careat.
60. Ubi eadem est ratio idem est jus.
61. Lex uno ore omnes alloquitur.
62. Cessante ratione legis cessat ipsa lex.
63. De non apparentibus & non existentibus eadem est ratio.
64. NULLI VENDEMUS NULLI NEGABIMUS AUT DIFFERREMUS JUSTITIAM VEL RECTUM.
65. Lex est tutissima cassis.
66. Quod lege tuum est amplius esse tuum non potest.
67. De minimis non curat lex.
68. Ad ea quæ frequentius accidunt jura adaptantur.
69. Consensus tollit errorem.
70. Interest reipublicæ ut sit finis litium.
71. Multitudo imperatorum perdidit curiam.
72. Accipere quid ut justitiam facias non est tam accipere quam extorquere.
73. Consensus facit jus.
74. Culpa est immiscere se rei ad se non pertinenti.
75. Pendente lite nihil innovetur.
76. Idem est nihil dicere ac insufficienter dicere.
77. Ignorantia judicis calamitas innocentis.
78. Quando aliquid prohibetur, prohibetur & omne per quod devenitur ad illud.
79. Quando aliquid cui conceditur; conceditur & id per quod pervenitur ad illud.
80. Sub clypeo legis nemo decipitur.
81. Sua cuique domus arx esto.
82. Judicis officium est opus diei in die suo perficere.
83. Fatetur facinus qui judicium fugit.
84. Qui non negat fatetur.
85. Lex delatores semper exhorret.
86. Dilatio quæ pro justitia faciat acceptissima; quæ contra justitiam maxime invisa.
87. Nefarium est per formulas legis laqueos innectere innocentibus.
88. Justitia debet esse *libera* quia nihil iniquius venali justitia; *plena*, quia non debet claudicare & *celeris* quia dilatio est quædam negatio.
89. Fraus legibus invisissima.
90. Dolus circuitu non purgatur.
91. De fide & officio judicis non recipitur quæstio; sed de scientia sive error sit juris sive facti.
92. Non accipi debent verba in falsum quæ competunt in verum.
93. Nil cuiquam expedit quod per leges non licet.
94. Quodlibet in lege eodem modo dissolvitur quo ligatum est.

95. Nil utile aut honeſtum quod legibus contrarium.
96. Ex malis moribus bonæ leges oriuntur.
97. Improbi rumores diſſipati ſunto.
98. Lex injuſta non eſt lex.
99. Quicquid per ſe malum eſt id leges omnibus vetant.
100. Ubi damna dantur victus victori in expenſis condemnari debet.
101. Lex eſt ſanctio juſta jubens honeſta & prohibens contraria.
102. ACTUS DEI NEMINI FACIT INJURIAM.
103. ACTUS LEGIS NEMINI FACIT INJURIAM.
104. Præſtat cautela quam medela.
105. Pereat unus ne pereant omnes.
106. Rerum ordo confunditur ſi unicuique juriſdictio non conſervatur.
107. Omnia præſumuntur legibus facta.
108. Stabitur præſumptioni donec probetur in contrarium.
109. Semper pro legitimatione præſumitur.
110. Cuilibet in arte ſua credendum.
111. Plus valet oculatus teſtis unus quam auriti decem.
112. Damnum ſine injuria eſſe poteſt.
113. Par in parem imperium non habet.
Neceſſitas vincit legem.
114. Lex neminem cogit ad impoſſibilia.
115. Turpe impoſſibile.
116. Fraus & dolus nemini debent patrocinari.
117. Lex certa eſto pœna certa & crimini idonea & legibus præfinita.
118. Omnis nova conſtitutio futuris temporibus formam imponere debet; non *præteritis*.
119. Carcer non ſupplicii cauſa ſed cuſtodiæ conſtitutus.
120. Pœna non debet anteire crimen.
121. Omnis indemnatus pro innoxio legibus habetur.
122. Dormiunt aliquando leges, *nunquam moriuntur*.
123. Lex non conſilia nuda ſed actus apertos reſpicit.
124. Qui animo peccandi aliquid facit videtur peccaſſe ab initio.
125. In favorem vitæ libertatis & innocentiæ omnia præſumuntur.
126. Pejus eſt judicio quam per vim injuſte facere.
127. Recedituſ a placitis juris potius quam delicta remaneant impunita.
128. Omnia honeſte & ordine fiant.
129. Melius eſt ut decem noxii evadant quam ut unus innocens pereat.
130. Nulla unquam de morte hominis cunctatio longa eſt.
131. Judicium redditur in invitos.
132. In civilibus voluntas pro facto reputabitur.
133. In criminalibus voluntas pro facto non reputabitur.

134. Intereſt

134. Intereſt reipublicæ ut judicia debitæ executioni mandentur.

135. Executio eſt executio legis ſecundum judicium.

136. Malitia ſupplet ætatem.

137. Qui ſuſpicionem peccati inducit peccat.

138. Furioſus ſolo furore punitur.

139. Pœna ad paucos metus ad omnes perveniat.

140. Probationes debent eſſe evidentes, perſpicuæ & faciles intelligi.

141. Repellitur a ſacramento infamis.
Qui non luit in crumena luat in corpore.

142. Nemo eſt ſupra leges.

143. Fruſtra legis auxilium implorat qui leges ipſas ſubvertere conatur.

144. Impius & crudelis judicandus qui libertati non favet.

145. Angliæ jura in omni caſu libertati dant favorem.

146. Mitius imperanti melius paretur.

147. Juri non eſt conſonum ut aliquis acceſſorius convincatur antequam aliquis de facto fuerit attinctus.

148. Rex non poteſt ſubditum renitentem onerare impoſitionibus.

149. Quod rex contra leges jubet pro injuſſu reputabitur.

150. Inter arma ſilent leges.
In republica maxime ſunt conſervanda jura belli.

151. Mortuus eſt quem leges non agnoſcant.

152. Omnibus infra regnum morantibus legis remedium patet.

153. Exterus non habet terras; habet res ſuas & vitam & libertatem.

154. Par in parem imperium non habet.

155. Nemini in alium plus licet quam conceſſum eſt legibus.

156. Protectio trahit ſubjectionem & ſubjectio protectionem.

157. Ligeantia naturalis intra nullos locorum limites coercetur.

158. Vim vi repellere licet modo cum moderamine inculpatæ tutelæ.

159. Quid ſit jus & in quo conſiſtat injuria legis eſt definire.

160. Summa caritas eſt facere juſtitiam ſingulis & omnibus omni tempore.

161. Qui inſcienter læſit ſcienter emendat.

162. Intereſt reipublicæ ut bonis bene ſit & male malis & ſuum cuique.

163. Qui facit per alium facit per ſe.

164. Ubi ex jure poſitivo alicujus gentis res conceditur vel prohibetur leges Angliæ jus ejus gentis in judicio reſpiciunt ubi actio accrevit.

165. Quod

165. Quod in se malum ubicunque factum fuerit nulla juris positivi ratione valebit.

166. Quod ab initio non valuit tractu temporis non potest convalescere.

167. Rerum suarum quilibet est moderator & arbiter.

168. Qui non prohibet quod prohibere potest consentire videtur.

169. Quod fraude factum est in alios infectum est; contra *fraudatorem valet*.

170. Qui non obstat cum possit *facere* videtur.

171. Qui non vetat cum debeat & possit *jubet*.

172. Omnes in defensionem reipublicæ vitæ bonisque omnibus cives tenentur.

173. NEMINEM OPORTET LEGIBUS ESSE SAPIENTIOREM.

Maxims of real Property.

174. Hæreditates recta linea debent descendere sed non ascendunt.

175. Possessio fratris de fœdo simplici facit sororem esse hæredem.

176. Liberum tenementum non potest *vendere*.

Of personal Property, and Property in general.

177. Actio personalis moritur cum persona.

178. Qui *alienas* res negligenter perdit, aut vi vel dolo malo aufert, *suas* amittito.

179. Aer, lux, aqua profluens, feræ, nulli propria omnibus communia.

180. ITA TUO UTERE UT ALIENUM NON LÆDAS.

181. Ex maleficio non oritur contractus.

182. Nemo proprietatem rei sibi quærat invito domino.

183. Interest reipublicæ ut nec quis re sua male utatur.

184. Cujus est dare ejus est disponere.

185. Ex nudo pacto non oritur actio.

186. Ex maleficio non oritur contractus.

187. Dona clandestina sunt semper suspiciosa.

188. Traditiones pacta firmantur.

189. Non valet pactum de re mea non alienanda.

190. Omnis contractus turpitudinis legibus invisus.

191. Quod fieri non debuit factum valet.

192. Pacta vel ex naturæ & sanguinis vi vel ex mutuo fructu vel ex auctoritate & præsumptione legis obligant.

193. Pacta reciproca vel utrosque ligant vel neutrum.

194. In restitutionem non in pœnam hæres succedit.

195. Pœna ex delicto defuncti hæres teneri non debet.

196. Qui sensit commodum sentire debet & onus.

197. Nemo

197. Nemo judex esse debet in propria causa.
198. Pœna vel remedium ex incremento quod prius erat non tollit.

Of Religion.

199. Dies Dominicus non est Dies juridicus.
200. Qui serviunt Christo faciunt leges pro Christo.
201. Nemo militans Deo implicet se negotiis secularibus.
202. Qui dat pauperibus Deo dat.
203. SUMMA RATIO EST QUÆ CUM RELIGIONE FACIT.
204. Ecclesiæ ecclesiæ decimas solvere non debet.

Of Morals.

205. Omne crimen ebrietas & incendit & detegit.
206. Omnis lascivia legibus vetita.
207. Alea & ganeo res turpissimæ.
208. Res stulta est nequitiæ modus.
209. Principiis obstiendum.
210. Qui bonis viris pauperibus dat legibus opitulatur; qui malis & inertibus segetem malorum fovet & legum opprobrium.
211. Qui inertibus dat industrios nudat.
212. Veritas a quocunque dicitur a Deo est.
213. Extrema potius pati quam turpia facere.
214. Servile est expilationis crimen.
214.* SOLA INNOCENTIA LIBERA.

Of Husbands.

215. Omnia Uxoris durante conjugio Mariti sunt.
216. Uxor et Maritus unum in lege.
217. Maritus in delicto uxoris tenetur.
218. Consensus non concubitus facit matrimonium.
219. Uxor sub potestate viri.
220. Charta ejus quæ sub potestate viri sit in lege nulla.

Of Parents.

221. Pater est quem nuptiæ demonstrant.
222. Parentum est liberos alere etiam nothos.

Children.

223. Nothus nullius est filius.
224. Liberi parentibus qui nequeant victum tolerare opitulantor.

Servatorum

Servants.

225. Non omnia domino in ſervos licita.

226. Dominus vel cauſam ſervi vel perſonam inculpato defendet; etiam ubi alii non liceret.

227. Actus ſervi in iis quibus opera ejus communiter adhibita eſt actus domini haberur.

228. In civilibus miniſterium excuſat in criminalibus non item.

229. Injuria ſervi dominum pertingit.

Of the Interpretation of Statutes.

230. Contemporanea expoſitio eſt optima.

231. Maledicta expoſitio quæ textum corrumpit.

232. Lex beneficialis rei conſimile remedium præſtat.

233. Quæcunque intra rationem legis inveniuntur intra ipſam legem eſſe judicantur.

234. Confirmatio eſt poſſeſſionis jure defectivæ per eos quorum jus eſt ratihabitio.

235. Generale dictum generaliter eſt intelligendum.

236. Abſoluta ſententia expoſitore non indiget.

237. Optima interpres legum conſuetudo.

238. Ubi lex eſt ſpecialis et ratio ejus generalis generaliter eſt accipienda.

239. Leges poſteriores priores abrogant.

240. Reſervatio ut et proteſtatio non facit jus ſed tuetur.

Of Deeds.

241. Verba fortius accipiuntur contra proferentem.

242. Ubi duo pugnantia in charta concurrunt prius ratum eſto.

243. Benigne faciendæ ſunt interpretationes chartarum ut res magis valeat quam pereat.

244. Nimia certitudo certitudinem ipſam deſtruit.

245. Nullius charta legibus poteſt derogare.

246. Verba legis non ex vulgari ſenſu ſed ex legis ſenſu, neque laxam et precariam ſed certam et legibus præfinitam interpretationem requirunt.

247. Lex noſtra neminem abſentem damnat.

248. Ambiguitas verborum latens verificatione facti tollitur.

249. Ambiguitas verborum patens nulla verificatione excluditur.

Of Wills.

250. Teſtamenta propter inopiam conſilii ad mentem teſtatoris interpretanda etſi verba ſolemnia deſint.

251. Si

251. Si duo in teſtamento pugnantia reperientur ultimum eſt ratum.
252. Teſtamentum niſi poſt mortem teſtatoris vim non habet.
253. Ubi ſuſtuleris revocationem renatum eſt teſtamentum.

Rules common to Wills and Deeds.

254. Verba generalia reſtringuntur ad habilitatem rei vel perſonæ.
255. Verba relata id maxime operantur ut ineſſe videatur.
256. Intentio legitime cognita et legibus conſentanea maximi habenda.
257. Donatio quælibet ex vi legis ſortitur effectum.
258. Non dat qui contra leges dat.

Rules concerning public Rights concurring with private.

259. Neceſſitas publica major eſt quam privata.
260. Quando jus regium et ſubditi concurrunt jus regium præfertur.

Other general Maxims and Rules.

261. Res inter alios acta alteri nocere non debet.
262. Dignus mercede operarius.
263. Periculoſum eſt res novas et inuſitatas inducere.
264. Plus peccat auctor quam per quem agitur.
265. Poſſeſſio contra omnes valet præter eum cui jus ſit poſſeſſionis.
266. Prohibetur ne quis faciat in ſuo quod nocere poſſet alteri.
267. Panis egentium vita pauperum et qui defraudat eos vir ſanguinis.
268. Nunquam recurritur ad extraordinarium ubi valet ordinarium.
269. Lex ſpectat naturæ ordinem.
270. Quod remedio deſtituitur ipſa re valet ſi culpa abſit.
271. Debitum ſequitur perſonam.
272. Qui prior in tempore potior in jure.
273. Cujus eſt ſolum ejus eſt uſque ad cœlum.
274. Infantes de damno præſtare tenentur; de pœna non item.
275. Non minor eſt proditio legis quam regem velle perdere.

276. Majus

276. Majus trahit ad se minus.
277. Certum est quod certum reddi potest.
278. Accessorium non ducit sed sequitur suum principale.
279. Quædam in majus malum vitandum permittet lex quæ tamen nequaquam probat.
280. Multa non vetat lex quæ tamen tacite damnat.
281. Multa non legibus humanis sed foro divino pertinent.
282. Omnia Deo *grata*, hominibus *utilia*, reipublicæ *honesta*, privatis *justa* et *commoda* probant leges: Ex pro viribus cuique imponunt.
283. Quando plus fit quam fieri debet videtur etiam illud fieri quod faciendum fuit.
284. Quod semel placuit in electionibus amplius displicere non potest.
285. Ubi factum nullum ibi fortia nulla.
286. Terra transit cum onere.
287. Nemo forestam habet nisi rex.
288. Præscriptio non datur in bona felonum nisi per recordum.
289. Non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a quibus constituuntur.
290. Persona conjuncta æquiparatur interesse proprio.
291. Ubi duo jura concurrunt in eadem persona idem est ac si esset in diversis.
292. In jure non remota causa sed proxima spectatur.
293. Potius est privatum incommodum quam publicum malum.
294. Quilibet renunciare potest juri pro se introducto.
295. Solus Deus hæredes facit non homo.
296. Modus et conventio vincunt legem.

Bodies Corporate.

297. Collegium seu corpus corporatum nisi regiis constitutionibus non potest existere.
298. Rex nil dat nisi per recordum.
299. Corpus corporatum non habet hæredes neque executores neque mori potest.
300. Si quid universitati debetur singulis non debetur, neque quod debet universitas singuli debent.
301. Sodales legem quam volent, dum ne quid ex publica lege corrumpant sibi ferunto.
302. Corpus corporatum ex uno potest consistere.
303. Corpus corporatum neque in lite sisti neque utlagari, neque bona forisfacere, neque attinctum pati, attornatum facere, neque excommunicari potest.
304. Rex non potest conjunctim tenere cum alio.

305. Rex

305. Rex neque solvit damna in lege neque recipit.
306. Rex lege cadere non potest.

Infants.

307. Infans est qui propter defectum ætatis pro se fari nequeat.
308. Contractus infantis invalidus si in damnum sui spectet.

Of the Church.

309. Ecclesia semper in regis est tutela.
310. Qui altari serviunt ab altari vivant.
311. Nemo potest episcopo mandare præter regem.
312. Ubi remedium in foro seculari ejus rei jurisdictio curiis secularibus tantum datur, nisi servato jure ecclesiæ ipsis verbis.
313. Meliorem conditionem ecclesiæ suæ facere potest prælatus deteriorem nequaquam.

Other general and particular Maxims.

314. Ubi non est lex ibi non est transgressio.
315. Jura sanguinis nullo jure civili dirimi possunt.
316. Uxor in mariti potestate cum sit non obnoxia est in causis reatus minoribus; aliter in majoribus proditione et homicidio.
317. Jurata debet esse omni exceptione major.
318. Mandata licita strictam interpretationem recipiunt; sed illicita latam et extensivam.
319. Parum proficit scire quid fieri debet, si non cognoscas quo modo sit faciendum.
320. Qui omne dicit nihil excludit.
321. Exceptio probat regulam.
322. Nemo contra factum suum venire potest.
323. Derivativa potestas est ejusdem jurisdictionis cum primitiva.
324. Quod fieri vetatur ex directo, vetatur etiam ab obliquo.
325. In fictione juris semper subsistit æquitas.
326. Causa publica vicarium non recipit.
327. Respondeat superior.
328. Caveat emptor; caveat venditor.
329. Non est deleganda reipublicæ cura personæ non idoneæ.

330. Ex

330. Ex diuturnitate temporis omnia præſumuntur ſolleniter acta.

331. Jus accreſcendi inter mercatores locum non habet.

332. Jus accreſcendi præfertur oneribus.

333. DIGNITATES REX DAT, VIRTUS CONSERVAT, DELICTA AUFERUNT.

334. Dignitas ſupponit officium et curam et non eſt partibilis.

Cuſtom.

335. Conſuetudo eſt bonus rationabilis *certus* et *communis* loci alicujus uſus cui memoria hominis non currat in contrarium.

336. Conſuetudo totius Angliæ eſt lex totius Angliæ communis.

337. Conſuetudo non præjudicat veritati.

338. Conſuetudo alicujus loci lex eſt ejus loci; legi communi ſpecie diverſa ſed non in genere contraria.

339. Conſuetudo manerlorum domini voluntatem regit.

340. Conſuetudo neque injuria oriri neque tolli poteſt.

341. CONSUETUDO POPULI ANGLICANI ET COMMUNIS LEX LIBERTAS.

342. Libertas eſt cum quiſque quod velit faciat modo ſecundum leges, bonas, *communi conſenſu latas, certas, præfinitas, apertas.*

343. Nolumus leges Angliæ mutari quæ hucuſque uſitatæ ſunt atque approbatæ.

344. Majus eſt delictum ſeipſum interficere quam alium.

345. Libertas nullo pretio penſabilis.

346. Minima pœna corporalis eſt major quavis pœna pecuniaria.

347. Volenti non fit injuria.

348. Pirata communis omnium hoſtis.

349. Verba homicidium non excuſant.

350. Verba temere prolata parum curat lex.

351. Generalis gratia proditionem et homicidium non excipit pœna.

352. Lex orbis, inſanis, et pauperibus, pro tutore atque patente eſt.

353. Hæreditas ex dimidio ſanguine non datur.

354. Cuſtos corporis cujuſque infantis eſt is eſto ad quem hæreditas nequeat pervenire.

355. In præſentia majoris ceſſat poteſtas minoris.

356. Omne jus et omnis actio injuriarum tempore finita et circumſcripta ſunt.

357. RADIX ET VERTEX IMPERII IN OBEDIENTIUM CONSENSU.

358. Quoties

358. Quoties aliquid dubitatur vel male eſt, ad principia recurrendum.

359. Qui beneficium legis extra ordinem quærit puras manus afferto.

360. Qui alterum incuſat ne in eodem ſaltem genere æque ſit incuſandus.

361. Nemo tenetur ſeipſum accuſare.

Of Equity.

362. Æquitas ex lege generaliter lata aliquid excipit.

363. Æquitas ſequitur legem.

364. Fraus æquitati præjudicat.

365. Quod fieri debuit pro facto cenſetur.

366. Præſenti periculo ſuccurrendum nequa oriri poſſit injuria.

367. Quod conſcientia vult ubi lex deficit æquitas cogit.

368. Æquitas nunquam contravenit legi.

369. Æquitas non medetur defectu eorum quæ jure poſitivo requiſita alium.

370. Culpa vel pœna ex æquitate non intenditur.

371. Qui æquitatem petit æquitatem faciat.

372. Æquitas uxoribus, liberis, creditoribus maxime favet.

373. Æquitas rem ipſam intuetur de forma et circumſtantiis minus anxia.

374. Æquitas vult ſpoliatos, vel deceptos, vel lapſos ante omnia reſtitui.

375. Æquitas non vaga atque incerta eſt ſed terminos habet atque limites præfinitos.

376. Æquitas non vult res novas atque inuſitatas inducere.

377. Ubi lex communis et æquitas in eadem re verſantur æquitas alia via agit ſed non aliter ſentit.

378. Æquitas eſt quaſi æqualitas.

379. Æquitas non facit jus ſed juri auxiliatur.

380. Æquitas vult omnibus modis ad veritatem pervenire.

381. Suppreſſio facti tollit æquitatem.

382. Æquitas ſupervacua odit.

383. Æquitas nil ſtatuit niſi in partes.

384. Æquitas ignorantiæ opitulatur ſcitantiæ non item.

385. Æquitas in paribus cauſis paria jura deſiderat.

386. Æquitas rei oppignoratæ redemptionibus favet.

387. Æquitas non ſinet eum qui jus *verum* tenuit *extremum* jus perſequi.

388. Æquitas non ſinit ut eandem rem duplici via ſimul quis perſequatur.

389. Omnia

389. Omnia præſumuntur in odium ſpoliatoris.

390. Æquitas in eum qui vult ſummo jure agere ſummum jus intendit.

391. Æquitas non ſupplet, ea quæ in manu orantis eſſe poſſunt.

392. Æquitas non tenetur adjuvare ubi non eſt nodus dignus vindice.

393. Æquitas juriſdictiones non confundit.

394. Nil iniquius quam æquitatem nimis intendere.

395. MELIUS EST JUS DEFICIENS QUAM JUS INCERTUM.

396. DECIPI QUAM FALLERE EST TUTIUS.

397. Æquitas neminem juvat cum injuria alterius.

Of Pleas and Indictments.

398. Placitorum alia dilatoria alia peremptoria.

399. In capitalibus quid, quomodo, quando, ubi, a quo factum, cum circumſtantiis ſollenibus, debet exponi.

400. In capitalibus ſufficit generalis malitia cum facto paris gradus.

401. Placitum nemo caſſabit niſi melius dando.

402. Qui ordine ulteriora admittit præcedentia affirmat.

403. Utlagatus non poteſt placitare.

404. Duplex placitum non admittitur.

405. Ubi lex cogit aliquem oſtendere cauſam, neceſſe eſt quod cauſa ſit juſta atque legitima.

406. Circuitus in lege odioſus.

407. Qui non vult intelligi debet negligi.

408. Qui cauſa decedit cauſâ cadit.

409. Qui tempus prætermittit cauſam perdit.

410. Placitum mendax non eſt placitum.

411. Ut ne quid *nimis* cavendum; ut ne quid deficiens *duplo* cavendum.

412. Superflua obſtant; defectiva perimunt.

413. Placitum debet eſſe verum, ſufficiens, certum, ſimplex, et *brevi* congruens, et præcedentibus conſtans et ordinem ſpectans.

414. Placitum affirmativum ſine negativo exitum non facit.

415. Placita negativa duo exitum non faciant.

416. Placita debent apte concludere.

417. Placita ex directo eſſe debent et nil per inductionem ſupponere.

418. Habendum in charta vel auget vel reſtringit ſed non novum inducit.

419. Clauſula generalis de reſiduo non ea complectitur quæ non ejuſdem ſint generis cum iis quæ ſpeciatim dicta fuerant.

Of

Of Actions of Slander on the Caſe.

420. Innuendo non facit verba per ſe actioni obnoxia ſi aliter non eſſent.

421. Ubi duo ſenſus occurrunt mitiori ſtandum.

422. Aperte impoſſibilia cum dicuntur non faciunt calumniam.

423. Debet eſſe vel aliquod ſpeciale damnum emergens vel ſaltem aliquod gravamen quod nocere poſſit et videatur probabiliter nociturum.

Of Inheritances and incorporeal Rights.

424. Non eſt exhæredatio niſi hæreditas alia transferatur.

425. Preſcriptio eſt titulus qui ſequitur perſonam, ex uſu et tempore ſubſtantiam capiens ex authoritate legis.

426. Modus debet eſſe certus rationabilis et perantiquus.

427. Modus de non decimando non valet.

Other Maxims of civil and criminal Juſtice, Order and Policy.

428. Crimen omnia ex ſe nata vitiat.

429. In civilibus *proxima* et directa præſtare quis tenetur; in criminalibus etiam *conſequentia*.

430. Nemo bis punitur pro eodem delicto.

431. Nemo bis in periculum veniet pro eodem delicto.

432. Crimen ex poſt facto non diluitur.

433. In capitalibus minor eſt pœna cogitationis manifeſtæ quam conatus ex actu directo; et minor conatus quam patrati facinoris: Ut ſit pœnitentiæ locus. Sed in proditione in terrorem aliter ſtatutum eſt.

434. Cruciatus legibus inviſi.

435. Particeps criminis non eſt audiendus.

436. In pari delicto potior eſt conditio defendentis.

437. Nemo procerum vel in jurata poni vel ſeneſchallus maneriі eſſe debet propter dignitatem.

438. Beneficium clericale omnibus patet ubi pœna capitalis ſtatuto inducitur niſi ex expreſſo tollatur.

439. Nemo qui non ſit clericus beneficium clericale habebit bis.

440. Metus quem agnoſcunt leges in excuſationem criminis eſt talis qui cadere poſſit in conſtantem virum.

441. Fama eſt conſtans virorum bonorum de re aliqua opinio.

442. Ubi lex eſt ſpecialis et ratio ejus generalis generaliter eſt accipienda.

443. Ceſſante

443. Ceſſante cauſa ceſſat effectus.

444. Unuſquiſque paci et juſtitiæ publicæ tenetur ſuccurrere.

445. QUAMVIS ALIQUID EX SE NON SIT MALUM TAMEN SI MALI SIT EXEMPLI NON EST FACIENDUM.

446. JURISCONSULTI OPERA EST HONORARIUM QUIDDAM NON MERCENARIUM.

447. Qui extra cauſam divagatur calumniando, punitor.

448. Communiter unum officium eſt excuſatio alterius.

449. Spoliatus debet ante omnia reſtitui.

450. Summum jus ſumma injuria.

451. Apices juris non ſunt jura.

452. Par ſcientia pares contrahentes facit.

453. Rex non poteſt invitum civem regno depellere.

454. NEMO IDONEUS PUBLICUM MUNUS IMPOSITUM POTEST RECUSARE.

455. Ubi ſubſtituti vicarius poteſt non eſt cogendus quis ad ſubſtituendum ſed ſi ſubſtituere velit inveniat idoneum.

456. Fœminis et infantibus per vicarium multis muneribus licet fungi.

457. Miniſteria recipiunt vicarium ſed non item pleraque judiciaria.

458. Actus judiciarius coram non judice irritus habetur; de *miniſteriali* autem a quocunque provenit, ratum eſto.

459. Quæcunque lex vult fieri non vult fruſtra fieri.

460. Actionum genera maxime ſunt ſervanda.

461. Infinitum in jure reprobatur.

462. Exceſſus in re qualibet jure reprobatur communi.

463. Quiquid contra bonos mores facit jure communi vetitum.

464. Ubi verat quid lex neque pœnam ſtatuit pœna in diſcretione judicis eſt.

465. Nil tam proprium imperii ac libertatis quam legibus vivere.

466. Nulla pœna capitis nulla quæ hominem remve ejus deſtruat eſſe poteſt niſi legibus præfinita.

467. Non crimen per ſe neque privatum damnum ſed publicum malum leges ſpectant.

468. Venia non poteſt ante venire delictum.

469. Excambium non poteſt eſſe rerum diverſæ qualitatis; neque excambium inter tres partes datur.

470. Satisfactio non fit de minori.

471. Venia privatim læſi non ſufficit legibus.

472. Non eſt dives rex ubi ſubditi pauperes.

473. FIAT JUSTITIA RUAT CŒLUM.

474. Verba intelligenda ſecundum ſubjectam materiem.

475. Quæ in partes dividi nequeunt ſolida a ſingulis præſtantur.

476. Utile per inutile non vitiatur.

477. Remoto impedimento emergit actio.

478. Actis

478. Actus legitimi non recipiunt modum.
479. Admiralitas jurisdictionem non habet super iis quæ communi lege dirimuntur.
480. Curia ecclesiastica locum non habet super iis quæ juris sunt communis.
481. Æquum et bonum est lex legum.
482. Allegari non debuit quod probatum non relevat.
483. Conscientia legi nunquam contravenit.
484. Ira hominis non implet justitiam Dei.
485. Ephemeris annua pars legis Anglicanæ.
486. Universus terminus in lege dies unus.
487. In lege omnia semper in præsenti stare censentur.
488. Benedicta est expositio quando res redimitur a destructione.
489. Beneficium non datur nisi officii causa.
490. Benigne faciendæ sunt interpretationes ut res magis valeat quam pereat, et ut voletur repugnantia et supervacua.
491. Bonum necessarium extra terminos necessitatis non est bonum.
492. Cessa regnare si non vis judicare.

Of Chancery.

493. Curia Cancellaria non nisi parliamento subdita.
494. Curia Cancellaria contractibus in plenum redigendis favet.
495. Æquitas nomine pœnæ constitutis remedium ex æquo et bono præstat.
496. Æquitas Curiæ Cancellariæ quasi filia conscientiæ obtemperat secundum regulas curiæ.
497. Æquitas pars legis Angliæ.
498. Æquitas erroribus medetur.
499. Æquitas casibus medetur.
500. Æquitas defectus supplet.
501. Æquitas nunquam liti ancillatur ubi remedium potest dare.
502. Æquitas vult donum quod alteri obsit ex causa æque favorabili esse ac id quod aufert.
503. Æquitas opitularur ubi pensationi damni locus est.
504. In maxima potentia minima licentia.
505. Quilibet ex virtute sua non imbecillitate adversarii debet vincere.
506. Ex nuda submissione non oritur actio.

Other General Maxims.

507. Elemosynæ ad mentem donatoris præcipue servandæ.
508. Clerici non ponantur in officio seculari.
509. Communis error facit jus.

510. Conditio ex parte extincta ex toto extinguitur.

511. Conditio ad liberum tenentum auferendum non niſi ex facto placitari debet.

512. Conditiones præcedentes ſtricte interpretandæ ſed non ita de ſubſequentibus.

513. Conſcientia legalis ex lege fundatur.

514. Conſenſus eſt voluntas plurium ad quos res pertinet ſimul juncta, et in criminalibus ſilentium præſentis conſenſum præſumit; in civilibus nonnunquam vel abſentis et ubi ejus intereſt etiam ignorantis.

515. Conſentire matrimonio non poſſunt infra annos nubiles.

516. Conſtructio ad principia refertur rei.

517. Conſtructio ad cauſam refertur.

518. Conſtructio eſt ſecundum æqualitatem rationis.

519. Conſtructio eſt ſecundum æquitatem.

520. Conſuetudo ſemel reprobata non poteſt induci.

521. Incertum ex incerto pendens lege reprobatur.

522. Contractus ad mentem partium verbis notatam intelligendus.

523. Corpus humanum non recipit æſtimationem.

524. Cui licet quod majus non debet quod minus eſt non licere.

525. Quod dubitas ne feceris.

525*. Deſcenſus tollit intrationem.

526. Deſignatio unius eſt excluſio alterius.

527. Expreſſum facit ceſſare tacitum.

528. Patefactio rei trahit ad ſe remedium.

529. Deficiente uno non poteſt eſſe hæres.

530. Diſpenſatio eſt mali prohibiti provida relaxatio utilitate communi penſata.

531. Diſtinguenda ſunt tempora.

532. Doloſus verſatur in univerſalibus.

533. Dona clandeſtina ſunt ſemper ſuſpicioſa.

534. Donatio Principis intelligitur ſine præjudicio tertii.

535. Equitas naturam rei non mutat.

536. Æquitas liberationi & feizinæ favet.

537. Expreſſio illorum quæ tacite inſunt nihil operatur.

538. Feodum ſimplex ex feodo ſimplici pendere non poteſt.

539. Scire proprie eſt rem ratione & per cauſam cognoſcere.

540. Fictio cedet veritati.

541. Filiatio non poteſt probari.

542. Flumina & portus publica ſunt.

543. Parcenarii fortunam faciunt judicem.

544. Fraus eſt celare fraudem.

545. Fruſtra expectatur cujus effectus nullus ſequitur.

546. Libertatis eſt ſui quemque juris dimittendi ac retinendi eſſe dominum.

547. Hæres eſt eadem perſona cum anteceſſore.

548. Donatio

548. Donatio ex charta non fit ei qui non eſt pars chartæ niſi per remanere.
549. Hæredi favetur.
550. Qui non peccavit pœnam non feret.
551. Qui teſtamenti ex parte beneficium vult univerſo aſſentire tenetur.
552. Ignorantia juris ſui non præjudicat juri.
553. Ignorantia facti excuſat.
554. Simplicitas eſt legibus amica; vis & fraus inviſiſſima; nimia ſubtilitas ſuſpecta.
555. Incerta pro nullis habentur.
556. Incidentia rei tacite ſequuntur.
557. Incivile eſt niſi tota ſententia perſpecta de aliqua parte judicare.
558. In teſtamentis ratio tacita non debet conſiderari.
559. Durum eſt per divinationem a verbis recedere.
560. Judicum eſt iis quæ pro religione faciant favere etſi verba deſint.
561. Judices recenter & ſubtiliter excogitatis minime favent contra communem legem.
562. Jura eccleſiaſtica ſunt limitata.
563. Jura naturæ ſunt immutabilia.
564. Summa charitas eſt facere juſtitiam ſingulis & omni tempore quando eſt neceſſe.
565. Juſtitia liberalitati prior.
566. Jus accreſcendi inter mercatores locum non habet.
567. Rex eſt miſta perſona.
568. Fundi non debent inalienabiles eſſe.
569. Lex neminem cogit oſtendere quod neſcire præſumitur.
570. Perpetuitatibus lex obſiſtit.
571. Lex minori per jus quam majori per injuriam potius favet.
572. Fractionem diei non recipit lex.
573. Lex contra id quod præſumit probationem non recipit.
574. Lex vult potius malum quam inconveniens.
575. Linea recta ſemper præfertur tranſverſæ.
576. Malum quo communius eo pejus.
577. Error placitandi æquitatem non tollit.
578. Moneta eſt juſtum medium & menſura rerum commutabilium.
579. Multa tranſeunt cum univerſitate quæ per ſe non tranſeunt.
580. Negatio deſtruit negationem.
581. Negatio non poteſt probari.
582. Nemo eſt hæres viventis.
583. Diſtrictio non poteſt eſſe niſi pro certis ſervitiis.
584. Non valet impedimentum quod de jure non ſortitur effectum.

585. Pacta privata publico juri derogare non possunt.
586. Pendente lite nihil innovetur.
587. Personalia transferri in alium nequeunt.
588. Possessio terminum tenentis, possessio reversionarii est habenda.
589. Propinquior excludit propinquum; & propinquus remotum; & remotus remotiorem.
590. Quæ incontinenti vel certo fiunt inesse videntur.
591. Quæ non valerent singula juncta juvant.
592. Quicquid solvitur solvitur secundum modum solventis & secundum modum recipientis recipitur.
593. Quod tacite intelligitur deesse non videtur.
594. Simplicitas legibus amica.
595. Statuta ita interpretanda ut innoxiis ne obsint.
596. Nullum simile est idem.
597. Traditio loqui facit chartam.
598. Verba currentis monetæ tempus solutionis designant.
599. Verba relata hoc maxime operantur ut inesse videatur.
600. Veredictum in lege æquitati objicitur.
601. Ubi concurrunt commune jus & jus scriptum communi juri standum.
602. Cum confitente mitius est agendum.
603. Cui plus licet quam par est plus vult quam licet.
604. Gravius est æternam quam temporalem lædere majestatem.
605. Satius est petere fontes quam sectari rivulos.
606. Uno absurdo dato infinita sequuntur.
607. Non morbus plerumque sed curatio neglecta interficit.
608. Æstimatio præteriti delicto ex post facto nunquam crescit.
609. Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio præcedens quæ fortiatur effectum interveniente novo actu.
610. Actus inceptus cujus perfectio pendet ex voluntate partium revocari potest; sin ex voluntate tertiæ personæ vel ex contingenti revocari non potest.
611. Clausula vel dispositio inutilis per præsumptionem remotam vel causam ex post facto non fulcitur.
612. Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit.
613. Nimia subtilitas in lege reprobatur.
614. Veritas est justitiæ mater.
615. Rex est pater patriæ.
616. Male res se habet cum quod virtute effici debeat pecunia tentatur.
617. Nulla res vehementius rempublicam continet quam fides.
618. Summi cujusque bonitas commune perfugium omnibus.

619. Ne

619. Ne licitatorem venditor apponat.

620. Ne in craſtinum quod poſſis hodie.

621. Quod civile jus non idem continuo gentium; quod autem gentium idem civile eſſe debet.

622. Actio caſus apud noſtrates ea eſt quâ ut inter bonos bene agier oporteat & ſine fraudatione.

623. Fraus adſtringis non diſſolvit perjurium.

624. Qui ſtatuat aliquid parte inaudita altera æquum licet ſtatuerit haud æquus cluet.

625. ÆQUUM ET BONUM EST LEX LEGUM.

626. Beneficium non datur niſi officii cauſâ.

627. Conditio partim extincta in omnibus extinguitur.

628. Mandata legis ad literam caſu aliquo impoſſibilia proxime ad mentem legis exſequenda.

629. Conditio neminem juvabit niſi qui pars fuerit aut privus.

630. Conditio liberum tenementum caſſans non per nuda verba ſine chartâ valebit.

631. Conditiones præcedentes ad normam legis ſevere exigendæ; aliter de ſubſequentibus ubi æquitati licet damnum rei infectæ penſari.

632. Conſcientia legis ex lege pendet.

633. In actis publicis collegii ſive Corporis alicujus corporati conſenſus eſt voluntas multorum ad quos res pertinet ſimul juncta.

634. Eadem mens uniuſcujuſque præſumitur quæ eſt juris, quæque eſſe debeat; præſertim in dubiis.

635. VITA REIPUBLICÆ PAX ET ANIMUS LIBERTAS ET CORPUS LEGES.

636. ÆQUITAS VERITATIS FILIA, BONITATIS ET JUSTITIÆ SOROR.

637. In brevi aut chartâ generalia præcedunt ſpecialia ſequuntur.

638. Qui ab alio derivatum jus habet non alia lege obtinebit ac is unde derivatum eſt.

639. Qui ex parte teſtamenti aliquid donatum accipit univerſo teſtamento ſtabit.

640. Ad electionem non cogitur qui ſtatim mortuo teſtatore eligere non potuit.

641. Lex hæreditates liberas eſſe vult non in perpetuum aſtrictas.

642. Incidentia nolunt ſeparari.

643. Qui libenter, & ſæpe, & parvula de re juramento ſe obſtringit, perjurio proximus eſt.

644. Conditiones quælibet odioſæ; maxime autem contra matrimonium & commercium.

645. MALUM QUO COMMUNIUS EO PEJUS.

646. Quod

646. Quod nullo interno vitio laborat at objecto impedimento ceſſat remoto impedimento per ſe emergit.

647. Ubi diverſo jure in eandem rem venire quis potuit eo jure veniſſe præſumitur quod fortius ac melius ſit.

648. Si mulier, per matrimonium nobilis, nupſerit ignobili definit eſſe nobilis.

649. Terminus et feodum non poſſunt conſtare ſimul in una eademque perſona eodem jure.

650. Prætextu legis injuſta agens duplo puniendus.

651. OPTIME CONSTITUTA RESPUBLICA QUÆ EX TRIBUS GENERIBUS REGALI OPTIMO ET POPULARI CONFUSI MODICE NEC PUNIENDO IRRITET ANIMUM IMMANEM AC FERUM NEC OMNIA PRÆTERMITTENDO LICENTIA CIVES DETERIORES REDDAT.*

* Ex Ciceronis Fragmento.

A TABLE

A

TABLE

OF THE

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May be brought where there is a tort, which is a proper ground for trover or treſpaſs. 208.

Action of Aſſumpſit.

J. W. being a clerk to the plaintiff, a brewer, " and receiving money from the plaintiff's cuſtomers, to the uſe of " the plaintiff, and alſo negotiable notes in the ordinary " courſe of the plaintiff's trade, for the uſe of the plaintiff, " paid ſeveral ſums aſcertained in the verdict, and amounting in the whole to 459l. 4s. 6d. to the defendant upon " chances of the coming up of tickets in the ſtate lottery " of the year 1772, contrary to the act of parliament of " the

" the ſaid year. The plaintiff had given a releaſe to his " clerk, and to the ſureties of the clerk, for the ſaid money, " no part of which came to the plaintiff's uſe, and not re- " turned upon demand. Verdict for the plaintiff, ſubject " to the opinion of the court upon this foregoing caſe."
The queſtion ſubmitted to the court was, whether the plaintiff had a right to recover in this action.
Second, whether the witneſs was admiſſible?
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The court will not permit an attorney to declare that his client told him before action brought he would waive his action, thereby defeating the client of his remedy. 27.
Not to be held to bail in civil caſes, for he is always in *curia*. 149.
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Attorney it ſeems, being ſworn of a particular court, may be under the controul of the court in matters not directly in his buſineſs as attorney, becauſe he gains credit as an officer of the court; and therefore the court may call on him as ſuch, to rectify miſconducts which he may have committed acting under that credit, though he acted not as attorney. 271, 272.
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Notice that *A. B.* and *C.* or two of them will juſtify bad. 26.
It is uſual to require four bail in felony; but it appears to be in the diſcretion of the court to take fewer if they think them ſufficient. v. 50.
Cannot juſtify upon effects abroad out of reach of the proceſs of the court. 34. 147.
Pariſh of their reſidence is too wide a deſignation in notice of bail. 72. 194.
Irregular notice does not make bail bad; but entitles to farther day to juſtify. *ibidem.*
Not preſent at the ſitting of the court, muſt wait until the riſing. 88.
If property of the bail be ſufficiently proved to the extent in which they are to juſtify, the value of the houſe rented by bail is immaterial; for the only purpoſe of knowing whether they have an houſe is to ſee that they have a fixed reſidence. 148.
No ſheriff's officer or perſon concerned in the execution of proceſs ſhall be bail. 153.
Deſcribed a hatter, diſcovered to be ſervant to a hatter, and living in a ſeparate houſe; the court rejected him. 187.
Bail ſurnames omitted; time given to juſtify. 187.
Not knowing in how many actions, or for what ſums he is bail—to be rejected. 194.
In the name of one of the plaintiffs only, when they are joint plaintiffs—bad. 237.

In error cannot ſurrender the principal; but muſt pay the money if judgment is affirmed. v. 238.
Notice of three (generally) to juſtify is good; provided they can all juſtify. v. 252.
Exception to bail ſtiling himſelf "gentleman," it appearing he had a commiſſion in the *Birmingham* way. The exception held bad. 281.
It is not a ground to reject bail that he has not been aſſeſſed to the poor's rate; for it is only evidence of his being an houſe-keeper. 328.
Notice in *Hatton-ſtreet, Middleſex*, held ſufficient. 418.
Juſtification when out of time. 438.
Bail goes no farther than ſecurity in the original action. 545.
A man brought up as an accomplice of felony, the principal not taken, may be bailed. 554.
Motion to diſcharge bail on a commiſſion of lunacy iſſued againſt the principal not good. 617.
Held that when the plaintiff knows the defendant is diſcharged by certificate, he ought to know the bail are diſcharged of courſe, unleſs firſt fixed by judgment on ſcire facias.
V. Superſedeas.

Bailiff.

Held that he need not be preſent at the ſpot where the arreſt is made, nor actually within ſight, nor the exact diſtance material, provided that he came with purpoſe to arreſt, and that the arreſt is made under his authority and direction. 527.

Bills of Exchange.

For rules concerning them vide 536 to 542.

Bank.

Secret truſt againſt him who has open legal title will not affect the bank. 66.
Liable to action if they diſparage title. ibid.

Bankrupt.

1. Commiſſioners have a right to enquire whether one who comes in to prove a debt under a commiſſion means to proceed at law. 52.
2. *A.* has an eſtate to his wife for life; remainder to himſelf for life; remainder to his iſſue by the wife; remainder to himſelf in fee: With power of revocation in himſelf. The wife dies without leaving any iſſue of the marriage. *A.* commits

commits an act of bankruptcy, the assignees have the estate: And so it seems they would have had if the bankruptcy had been committed and commission issued in the life of the wife; for the act of bankruptcy would have been a revocation. 71. And if it was a power dependent on a contingency the assignees took the contingency. 71.

3. Held that inspection of the proceedings shall not be granted before the trial to a bankrupt who means to litigate; but at the trial the clerk of the commission shall attend.

But creditor shall have inspection. 80.

4. Agreement to keep execution secret, and that the person against whom it is executed shall retain the goods is not an act of bankruptcy, where the execution itself is adverse, but is void against the creditors. 121, 122.

An act of bankruptcy is a crime by positive law, and must not be extended by construction to a mischief against which provision was not made.

5. Whether an innkeeper sending out wine deals as a chapman within the statute is proper to be left to the jury upon the quantity. 118.

6. Farmer not a trader within the statutes of bankrupts. 323.

Wherever a man is a trader within any of the statutes of bankrupt it is actionable to say he is not worth a groat. ibidem.

7. The statutes of bankruptcy, perhaps, do more mischief than good; but whilst they continue courts of justice must decide according to them. 341.

8. Bankrupt may not give money to a creditor to obtain a certificate; but if he has given it the law will enable him to oblige the creditor to refund. 345. v. Contract.

9. The parties who have proceeded as in case of a bankruptcy are concluded from saying, to the prejudice of others, that there was no bankruptcy, but it was a matter concerted between them. 427.

10. Certificate pending suit operates in nature of release. 437.

11. *A.* being a creditor of *F.* and Co. gives farther credit for 7000l. which he borrowed for the support of the shop, and which was to be replaced in six days, being lent during the holidays.

Before the time fixed, and without demand, *F.* sits up all night, and writes the following letter to *A.* the creditor.

" Mr. *F.* conceiving that the money lodged with him was a " sum about which, perhaps, even some pains had been taken " to place it there, and that disputes might arise, gives " that preference to Mr. (*A*) which he thinks undoubtedly " his due."

Two notes inclosed—one for 5,500l. the other 1,700l.

He gives this letter to his (*F*s) clerk, to carry to *A.* the creditor, and at four in the same morning absconds. The same day

day the commiſſion iſſued. The letter was not delivered till two days after, and which beſides was a day before the day of payment.

12. Determined, that if by deed this preference, though honeſt and meritorious if it had been in his power, would, under the circumſtances of this caſe, have been itſelf an act of bankruptcy in *A.* 2d, that it was void, as againſt the other creditors, being a countermandable action till delivery at leaſt, and before delivery countermanded by the act of bankruptcy.

13. That had it been in the regular courſe of payment; had legal diligence and ſolicitation been uſed by the creditor to obtain it; had the notes been ſent to ward off an execution iſſued againſt the debtor, without fraud or colluſion; it would have been good.

14. But here it was bad; and would have been, even if the act had been complete before the bankruptcy; being done in immediate contemplation of an act of bankruptcy to be committed by the doer, and done with a deſign to deprive the other creditors of that benefit of an equal diſtribution of all the bankrupt's effects, to which the law entitled them.

15. That it was not neceſſary to make it void that it ſhould be an aſſignment of the whole: That an aſſignment of the whole muſt, indeed, either be under a fraudulent truſt, or ſtop all trade, and produce an immediate bankruptcy; but an aſſignment of part might be void as againſt creditors, though it were not, upon the circumſtances, as an act of bankruptcy.

16. That farther it was bad and void, it not appearing on what conſideration, or for what debts the notes were paid; and becauſe *A.* the creditor was not bound to have accepted them as payment; and becauſe the expreſs declared purpoſe was void.

17. To which it was added, that the ſum of the loan and of the notes differed, one amounting to 7000l. the other to 7200l. and that, upon calculation, it could not be for intereſt. 472 to 490.

Bar.

Difference between bar and preſumption againſt a title. v. 505 to 8. 589.

Twenty years quiet and peaceable poſſeſſion ſhall be a bar to informations in the caſe of corporation elections. 553.

Barratry.

What it is. v. Inſurance.

Book.

Vide Abridgment.

Bond.

Debt is the ſubſtance, penalty the form of recovery. 361.
But the court, in the caſe of a penal ſum, provided upon Mr. *Wilſon*'s excellent charity, held otherwiſe upon the particular reaſons of that caſe that both the original ſum and penalty were ſubſtance. 555, 556.

Bribe.

If I lay a perſon five guineas he will not vote for me, this is a bribe. 552.
He who employs an agent for the purpoſe of bribing cannot recover the money given to the agent for that purpoſe. v. Illegal Contract.
A perſon who has taken the oath againſt bribery may be witneſs of the bribe given.
It ſeems alſo the bribor may recover againſt the bribee; for in doing this he ſubverts the illegal contract, which the law will permit him to do, though not to maintain it. v. Illegal Contract.

Bridges.

Vide ſtatutes concerning repair of.
When it does not appear who ſhould repair it is upon the inhabitants of the county for 300 feet beyond the bridge—and the ſtatute giving juriſdiction to the juſtices in their ſeſſions does not take away the common law juriſdiction of the court of B. R. in this caſe. 239.

Caſes.

Settling of caſes, the order and diſpatch to be obſerved in it. 82, 83.
As a caſe is ſettled before a jury ſo it muſt ſtand. 83.
Putting off by conſent not to be allowed without good cauſe. 83.

Doubted or denied to be law.

Tomkyns and *Bernet* denied. 345.

Certiorari.

Will not be granted, eſpecially where the city of *London* is concerned, without full cauſe. 61.

Circuity.

Odious in the law. v. 227, 389.

Children.

Grandchildren take by implication, as children. v. *Pits* v. *Herlin.* p. 19, 20.

Common Law.

Supports morality. 385.
Is the beſt bulwark of every man's liberty and property. v. the caſe of General Warrants, and p. 378.
Is the aſylum of the good and juſt; but not of wrong-doers, to protect their wrong. 382.

Compoſition.

Upon penal ſtatutes the court will admit cautiouſly, to avoid collufion. 372, 395, 400.

Condition v. *Covenant.*

Conſequential Damages.

Vide Inſurance.

Conſolidation of Cauſes.

Where there is an agreement that ſeveral cauſes ſhall abide the event of one, ſuch event is to be underſtood as ſhall do juſtice to the full ſatisfaction of the court. 147. 151, 152.

Conſpiracy.

In an indictment for a conſpiracy it is not neceſſary to prove an actual conſpiracy or expreſs malice; but conſpiracy and malice are to be inferred from the circumſtances of the fact, according to the law upon it.

Contempt.

Where there are faults on both ſides, and the officer executing proceſs has behaved unjuſtifiably as well as the parties who reſiſted him, the court generally will not grant extraordinary proceſs of contempt. 36.

Contract.

If *A.* has a ſlave in *Virginia*, or any country where ſlavery is eſtabliſhed by law, and enters into a contract with *B.* (both *A.* and *B.* then being in *England*) that he will ſell him this ſlave, the court here will give *B.* his remedy on action upon breach of this contract. 17.

But where the perſon of the ſlave himſelf is the object of the action, that perſon, if he be in *England*, is under the protection of our laws here, and the maſter ſhall not uſe him as his ſlave, nor recover him by action as his ſlave. v. *Negro v. S.* 19.

Where a perſon comes to demand upon an illegal contract to have the performance of it, he ſhall not be aſſiſted; but where he comes in ſubverſion of the contract, the law will relieve him, though *particeps criminis*. v. 345.

Vide *Aſſumpſit*.

Conſtruction of Words in a Will.

"Eſtates for the purchaſe whereof I have already contracted and agreed:" Held that purchaſed eſtates would paſs under this deviſe as well as eſtates in contract. v. *Will.* p. 113. *B. R. contra* in the Common Pleas, and v. p. 349 to 351.

Where words of locality are uſed eſtate is reſtrained from ſignifying the entire intereſt of the owner, which it might otherwiſe impart to a life intereſt given by him out of the thing ſo deſcribed by its local ſituation. v. 224.

Deviſe of an houſe to ſeven perſons, equally to be divided amongſt them, paſſed an eſtate of inheritance, becauſe otherwiſe the deviſees could take no ſuch benefit as ſeemed intended for them. 223.

The beſt rule in the conſtruction of wills is to find the general intent; and then, as much as grammar and language will permit, to interpret particular expreſſions accordingly. v. 270.

Vide Will.

Conſideration.

What is ſimply a good conſideration;

What valuable;

A Table of the Principal Matters.

What fraudulent or voluntary. v. 216 to 218.
Goods ſold to *C.* in conſideration that *A.* promiſed *B.* the vendor, that, if *C.* the vendee, did not pay, he *A.* would.
Determined that the vendor could not come upon *A.* for payment till they had uſed diligence to have the debt from the perſon firſt liable. 769, 770.
But the court would not ſay whether on this caſe they could have come againſt *A.* then. 770.
Where before delivery *A.* ſays to *B.* "you may deliver the "goods to *C.* I will be your paymaſter," *A.* is the original debtor; but there is a nicety where he ſays, "if he "does not pay I will." 770.

Conſtables.

Held that the reſiants of a leet are not excuſed from ſerving as conſtables to the hundred. 420.

Contingency.

Double contingency, or contingency with a double aſpect, what. 174.

Conviction.

Muſt agree with the affidavit that ſupports it. 184.
Does not hinder evidence till a man be attainted by judgment. 376.

Copyhold.

The tenant by admittance is only according to the quality of his eſtate: And the lord, through his ſteward, only an inſtrument to convey. 390.
Cuſtom of copyhold. v. 398.

Corporation.

The court will not intend any thing to make an election void after an acquieſcence of many years. 44.
That the mayor of common right has no caſting vote, but muſt maintain his claim to it by charter or uſage. 315.
In a charter to a corporation words in reſtraint of trade are very unfavourable, and where they are doubtful the court will take them in that ſenſe which makes leaſt againſt the liberty of commerce: Even where they are clear the court

will presume a renunciation of such privileges, where there is no evidence of usage to support them. 334, 339.
After a distance of time the court will not try rights of persons elected when the evidence is probably lost, and the question turns on a point of fact, and by annulling the elections the corporation, consisting of a definite number, might be extinct. 519. Otherwise where a question of law, and the burgesses indefinite. 519.
Held that an infant might be chosen, but could not be admitted till of age. ibidem.
By prescription presumes a charter. 558.

Costs.

In ejectment where judgment against defendant by default no costs; because the defendant is nominal: But you may bring an action in consequence of judgment to recover mesne profits and costs. 451.
Costs partake of the nature of the original debt. 617.
Costs out of pocket the largest costs. ibidem.
Costs in full where party will not admit fact not tending to the merits but form only and creates great expence. 248.

Counts v. *Pleading.*

Plaintiff counts that defendant, being sheriff of *M.* suffered the plaintiff's debtor to escape—*per quod* he lost his debt.
2d, That defendant, being sheriff, *ut supra*, might have arrested the plaintiff's debtor, and did not.
Judgment for the plaintiff in C. B. Error for repugnancy of the counts. Judgment affirmed. 69, 70. v. Maxim.

Courts.

Every court ought to maintain its own jurisdiction, and mutually each others. v. 160.

Covenant.

Lessee covenants to leave sufficient compost on the soil of the landlord at the end of the term, he, the lessee, having the yard, barn, and a room to lodge in, and dress diet. This is a mutual covenant, and not a condition. 57.
Plaintiff covenants to be the defendant's hired servant for a year and a quarter, and that he, the plaintiff, would pay at the expiration of the term 200l. and that at the end of the term he, the defendant, would surrender his trade and busi-

neſs to *J. P.* the plaintiff's nephew, or ſuch perſon as the plaintiff ſhould appoint; and thereupon breach aſſigned, "that he did not ſurrender, &c."

Seven different counts pleaded to this by the defendant, of which five went *en pais* to a jury, and two were in demurrer at law.

The principal in demurrer was, that plaintiff did not find ſufficient ſecurity for the payment of the ſum ſtipulated.

The finding the ſecurity is a condition precedent, to be firſt performed before the plaintiff was intitled to the ſurrender. 198.

Independent covenants cannot be ſet off againſt one another. ibid.

Reciprocal covenants are where one is to do ſuch an act, the other doing ſuch an one, and both are ſimultaneous. There each is to be ready to do his part before he can come againſt the other. ibid.

Where covenants are ill arranged the court will marſhal them according to the intent and nature of the contract. ibid.

And whether condition is precedent or not is to be learned from the nature of the tranſaction and meaning of the parties. ibid.

Covenant to ſecure poſſeſſion is generally to be underſtood againſt diſturbance by lawful title: For the covenantee may have treſpaſs for unlawful diſturbance, and the law will not intend that another covenants to do for him what he can do and ought to do for himſelf. 460, 461.

Coverture.

Advantage not allowed upon motion of evidence offered to prove that the defendant was a married woman, in order to obtain a diſcharge from arreſt; but if ſhe had any thing of this kind, whereof ſhe might avail herſelf, ſhe was left to plead it. 228, 395, 396.

Creditor.

His intereſt in adminiſtration bond. v. 622 to 628.

Cuſtom.

There is a diſtinction where the cuſtom is pleaded as a defence to the action, and where as a ground of the action. 138.

When a feme covert, by the cuſtom of London, has authority to trade as a feme ſole, and enters up judgment as a feme ſole, it does not appear that this extends to impower her

her to contract a debt by bond without her husband, and the debt ought to appear to have been in the course of her business, as a sole trader, and not otherwise, and she cannot give a warrant of attorney to enter up judgment upon her debt, as sole trader, in a court of common law, without her husband's name being joined, nor can she sue or be sued in a court of common law without her husband; for tho' where the right is established by custom of a foreign court the court here will give judgment according to that right, yet the form of recovery must be according to the course of proceedings in the court in which you sue for judgment.

And indeed it did not appear that, even by the custom in the city, in the case before the court, she could have sued or been sued in the city courts without using the name of her husband for form, though for his security he was not to be charged with her debt, contracted in her separate trade.

Of merchants, vide Merchants.

Custom-House.

Held *Easter* term, 13 *G.* 3. that custom-house officer had not a right to a second gauging of a vessel before he granted a permit. v. 204 to 205.

Damages.

Excessive. See *Verdict.*

500l. for breach of promise of marriage given.

Damages to be estimated according to the rank and ability of the offender, the nature of the offence, and the circumstances aggravating or extenuating. ibid.

Where damages are given not beyond the declaration, nor for matters not within the action, the jury are the proper judges, and the court will not incline to unsettle them; unless the matter admits of a certain estimation, and the jury have violently and extravagantly exceeded it: But where the cause is an injury to person or reputation there is no certain measure of damages, and the jury ought to decide. 773, 774.

Debt.

Vide Insolvent Act.

Declaration.

To whom to be delivered. v. Delivery.
Before appearance declaration de bene esse. 333.
Declaration against a corporation for not repairing banks of a navigable river, as from time immemorial they had been used and ought, whereby the course of the river became obstructed, and the plaintiff was obliged to carry his corn about: 2d count charging as above, and that thereby he had not sufficient use of the navigation, *prout consuevit & debuit*. Judgment for plaintiff affirmed on error. v. 556 to 558.
V. Evidence.

Deed.

On valuable consideration shall be construed liberally; especially where on a marriage settlement, and in favour of issue, 33.
Held that the court would reject words or supply words to give effect to such a deed, according to the intent apparent from the words and nature of the conveyance. 33, 34.
Difference between a will and a deed is, that technical words are required in a deed, which are dispensed in a will; but in both the intent must be equally preserved. 34.
Deed of covenant in consideration of marriage; estate for life to the husband and wife; covenant to renew leases for the benefit of the issue, in which leases the name of the wife is always to be one during her life; and in case either of the *cestuy que vies* (the husband and wife being two of the first) became sick or infirm the husband to renew such lease or leases.
Determined that on the death of the husband the executor should renew, and so *toties quoties* during the life of the wife, the survivor. 86.
Delivery of deed. v. Delivery.
You cannot go into evidence that a deed absolute upon the face of it was in truth conditional. 457 to 460.
But there may be such fraud as will vitiate it, *ab initio*, and this it seems would be good evidence on a plea of *non est factum*. ibid.
But if there is an agreement subsequent to the deed, or at least not contained in it, though you cannot aver it against the deed, the court will let you in to have justice some other way. ibid. v. Construction, Consideration, Habendum, &c.

Delivery.

Of declaration ſhould be to the attorney, and not to the party himſelf, where there is an attorney. 332.
Delivery of a deed may be by words or actual tradition of it. 340. v. Feme. 3.
Where goods countermanded by act of bankruptcy before delivery. v. Bankruptcy. 12. And v. p. 484, 487.

Deviation.

There is no certain line to be drawn what ſhall be deviation; but it depends upon the circumſtances. 421 to 423.

Deviſe.

Bad in original can never afterward be made good. 161.

Duty.

Vide Letters, Taxes, Parliament.

Ejectment.

Notice of ejectment muſt be fair and honeſt, and fairly and honeſtly interpreted to the tenant in poſſeſſion; otherwiſe it will ſerve only to inform the perſon who uſes it deceitfully that nothing is ſo filly as cunning. 53.

Embroidery.

Made up into wearing apparel, and ſeized on landing, held not within the ſtatute of 22. G. 2. ſo as to be liable to the penalty. 200 to 201.

Entry.

Held to be neceſſary only to ſave a fine. 360 to 362.
Diſtinction between execution upon meſne proceſs and final judgment. 548.

Equity.

Vide Specific Performance.

Eſſoign Day.

Declaration on. v. 358.

Eſtoppel.

Suit againſt a woman by the name of *Clariſſa*: She puts in bail in that name; ſhe ſhall not plead, in abatement of the action, that her name is not *Clariſſa* but *Clara, Elizabeth.* 82. v. Abatement, Bankrupt, Fraud. Feme. 3.

Evidence.

The beſt muſt always be had of which the caſe will admit. v. 328. 363.
Copy from the minute-book of the Houſe of Lords good evidence. 387, 428, 429.
Where a deed is loſt or deſtroyed without the fraud of the party who deſires to prove title under it, evidence ſhall be admitted of its contents in the beſt manner that it can, that there may be no failure of juſtice: But firſt you muſt prove ſuch a deed once exiſted, and is loſt; and you muſt prove contents, not identically indeed, but as well and truly as you can. 507.
Muſt agree with the declaration, in order to entitle to a verdict. 523, 524.
All evidence is to be weighed according to what is produced on one ſide balanced againſt what is produced on the other. 528. And to the ſubject to which it applies. 589.
The jury are to find the evidence, not the court. 573.
Preſumption is a ground of evidence, and therefore it is for the jury, but not the court. ibid.

Examinations.

Where a conviction is removed by *certiorari* the juſtices are not ordered to return examinations; nor is it done but in the caſe of a coroner's inqueſt, where the court, as ſupreme coroner of the kingdom does it. 348.

Exchange.

Eſtates paſſing in exchange muſt be reciprocally of equal quality. v. 416.
Cannot be between more than two parties. ibid.
Bills of. v. Bills of Exchange.

Executor.

Payment of intereſt evidence of aſſets againſt an executor, but not concluſive evidence. 68, 69.
Will before probate ſufficient title to the goods; probate only neceſſary to enable him to ſue for debts. 81.
Feme poſſeſſed of chattels *in auter droit*, as executrix, the huſband ſhall not take them by gift of law though he ſurvive her. 83.

Execution.

Never to be taken out but for what is actually and *bonâ fide* due. 280.
Of goods haſty and unreaſonable diſallowed. 52.
Levied by attorney after debt ſatisfied. Goods ordered to be reſtored with coſts. 84.

Exportation.

The exportation price of barley held to be determined by the price at the port of exporting. 554.

Felony.

Taking out letters of adminiſtration to ſeamen upon falſe oath. 321.

Feme.

1. May plead without her huſband where the huſband is tranſported: For tranſportation is a temporary death. 142.
2. Warrant of attorney to confeſs a judgment given by a feme ſole; ſhe afterwards married: The court gave leave to enter up the judgment in the name of the huſband and wife. 329.
3. May affirm a deed which was void, being made during her coverture, and make it good when ſhe becomes ſole by re-delivery; or by words or acts of affirmance, without actual delivery. v. 763 to 766.
Feme ſole marrying between original proceſs and appearance. v. Abatement.
Vide Coverture, Marriage, Revocation.

Fine.

Fine levied by tenant for years is no bar to the freehold. 514.

A Table of the Principal Matters.

Final Juriſdiction.

Where a ſentence is made final by act of parliament, or otherwiſe, it is to be underſtood with the reſerve if it be not palpably unjuſt or illegal upon the face of it. 189.

Where a ſentence has been paſſed not unjuſt or illegal but improper, by a court having final juriſdiction, another court, though ſuperior, may not ſet it aſide: But it will influence the diſcretion of the court when their aſſiſtance is aſked towards the execution of it. 190.

Foreign Judgment.

You can't bring an action upon a foreign judgment as judgment; but you may action of debt, and give the judgment in evidence. 148.

Foreign Laws.

Where a contract is made abroad, grounded on foreign law, the court here will receive evidence of that foreign law, and give judgment accordingly, on an action brought here in due form upon the contract, 154.

Fraud.

If a charge is ſimple, and the denial coupled with circumſtances, it is a great preſumption of fraud. 155.

The very title and ground of the ſtatute of frauds has been the reaſon of many exceptions from the letter. 331.

Every conſtruction of the ſtatute of frauds which would be good in equity will be good in law. 331.

The note of an agent will be the note of the party, ſo as to take it out of the ſtatute: Though the agent has not an expreſs authority to ſign, but a general authority. 332.

A falſe or colluſive action ſhall conclude againſt the parties to the fraud; but all the world beſides is permitted to controvert it. 427.

Fraud, in the legal ſenſe, is any act unwarranted by law prejudicial to third perſons. 476. v. Bankruptcy.

Vide more under Inſurance, Conſequential Damages, Malice implied.

Rules concerning fraud of two kinds; one to protect good and innocent people, at leaſt comparatively innocent to thoſe who have deceived them, by reſcinding fraudulent agreements.

The

The other to prevent perſons dealing upon equal terms from falling into agreements prohibited, by precluding them from taking relief againſt ſuch contracts. 758.
Where the offence is *paris gradus* the defendant has the better ſide.
Whoever enters into an illegal contract does it ſubject to all rights known or unknown at the time, which are againſt the contract. 759. v. Owner.
Where a woman has paſſed as a married woman, and given herſelf out as ſuch, and been accordingly reputed, and has goods in the houſe of the man with whom ſhe cohabits, and is oſtenſibly his wife, and the goods oſtenſibly his, neither he nor ſhe ſhall ſay, upon the goods being taken in execution by a creditor for a juſt debt, that ſhe is not his wife, and the goods not his. 782 to 784.
Secret transfer of moveable goods always a badge of fraud. 784.

Game Act.

Keeping a greyhound, without uſing him for the purpoſe of deſtroying the game, not within the act. 179.
Going out with a qualified perſon not within the act. ibid.

Gaming.

1. An evil too big for poſitive law. 152.
Well when both parties loſe by it. ibid. and 153.
2. Securities on a gaming conſideration coming into the hands of a third perſon innocent, without privity, for a *bonâ fide* debt, are yet void. 755.
3. Inſurances on the chances of tickets coming up, prohibited. v. 776.

General Warrants.

Vide Warrants.

Grammar.

The proper and legal conſtruction of what is commonly called the preterit tenſe. 440.

Grandchildren.

Vide Children.

Habendum.

Limits, enlarges, aſcertains, and fixes the meaning of the premiſſes, but cannot contradict them. 191, 192.

Heir.

Cannot be of the half blood. 396 to 398.
Formerly this was otherwiſe, and the heir by the half blood might inherit of lands by deſcent from the father, though not by purchaſe. 396. v. Prerogative.
The heir ſhall not be diſinherited but by neceſſary implication. Vide Will *et paſſim*, and v. Implication.

Holding over.

If an action be brought on the ſtatute for double rent for two years holding over, the jury may find for ſo much as, upon the evidence, the tenant appears to have overheld beyond the term, provided they find not beyond what is laid in the declaration. 276.

Houſe.

Every man's houſe is his caſtle. v. the caſe of General Warrant.
This maxim confined to thoſe whoſe domicile it is; for it is not the ſanctuary of a ſtranger.
Held that the privilege of the door belongs to the outer door, and not to the other doors, though of the ſeparate apartments of lodgers. 382.
The maxim not to be extended by any latitude of conſtruction againſt arreſts upon legal proceſs. 382.

Houſes.

Diſorderly, the ſource of evil, public and private. 275.

Implication. (Neceſſary.)

Explained to be a certain and undoubted implication; but not ſuch as left it ſtrictly impoſſible to be otherwiſe. 444.
Implication of malice. v. Malice implied.

Indictment.

Setting forth that on ſuch a day plaintiff was a juſtice of peace, and that the defendant at a ſeſſions holden at *B.* for the county *A.* then and there ſaid ſuch words, bad for want of certainty of time. 129.

That two may be included in indictment for an aſſault againſt two. v. 271.

Where in an indictment by the accidental omiſſion of a letter a ſenſible word is made inſenſible, though in the very gift of the charge if the jury may be clear of the meaning, held that it ſhall not vitiate the indictment; otherwiſe when one word which has a meaning, though improper and nonſenſical in the place is ſubſtituted for another. 785, 786.

Injunction.

Does not determine the title or merits; but is to ſtay preſent waſte or miſchief *pendente lite.* 149.

Inſolvent Act.

A. owes money to *B.* and *C.* is diſcharged under the inſolvent act; and gives a note to *D.* truſtee for the benefit of *B.* this is no extinguiſhment of the old debt and creation of a new; but an additional ſecurity for the old: And the perſon of the debtor remains free under the benefit of the act. v. 37.

Court never grants the inſolvents leſs than the full allowance, which is in their diſcretion by the ſtatute. 348.

Where a perſon has a beneficial poſt though not ſtrictly aſſignable, he ſhould do his beſt to diſpoſe of it before he claims the benefit of the inſolvent act. 348.

Serjeant of the militia does not ſeem to be a place within the inſolvent act. 349.

Time of payment on Monday, is put by way of inſtance in the act; another day will do, provided it be weekly. 349.

Debt due before diſcharge, but to be paid after he is diſcharged by the act. v. 433, 434.

It ſeems the place of waiter to the commiſſioners of the cuſtoms, is not within the act. 436. *ſed quære.*

Held that attachment for non-payment of coſts in a criminal ſuit on 5 *W. M. c.* 11. was diſcharged by the inſolvent debtors act. 650.

Information.

Court will not grant information upon doubtful evidence. 65.
Party applying for an information againſt another, ſhould come pure hands. 73. v. Maxims. v. 148.
The court will not aſſiſt a complainant in an extraordinary way, where he has been obliged to do that juſtice he ought to have done himſelf, though irregularly obliged, and has been the cauſe of the act complained, and it does not appear to have been done *malo animo*. 147.
Not proper to be granted in the caſe of a very poor perſon. 155.
Not proper to try a civil right; unleſs the parties ſtand out againſt a trial at law. 184.
Court will not grant an information when the matter charged, if proved, will amount to a felony which ought to be tried in the courſe of common-law. 253.
He who applies for an information muſt not have lain behind. 273.
Upon a motion for an information, the original papers ſhould not be annexed to the affidavit; but a copy.
Court will not grant it where information is offered under falſe or ambiguous colours; where the words fairly admit a favourable interpretation; where the complainer comes late; where he comes equally chargeable; where the party charged is ſo poor that he would be overborne by the expence; where the matter itſelf is not of importance, for public example in an extraordinary manner. Vide the places cited above, and p. 393, 394.
Will be granted againſt papers publiſhed to prejudice a cauſe. 465.

Inſurance.

Where a perſon inſures and afterward the veſſel is loſt, and he writes after the loſs to increaſe the inſurance, and the letter is dated on a night where no poſt goes out from the place, and the next day in the public papers of the place, the loſs appears, and the perſon applying to increaſe the inſurance, does not withdraw the letter nor give notice of the loſs, this is ſo ſuſpicious, that in a caſe with theſe circumſtances where there had been a verdict for the defendant, who obtained the increaſed inſurance, the court granted a new trial. 212, 213.
In November 1722, *A.* chartered the ſhip *Thomas* and *Matthew*, and agreed to freight her for Seville, and back again.
The plaintiffs and many others ſhipped a cargo on board and inſured the ſame, with proviſions againſt loſs by ſtorms and perils of the ſea, &c. and againſt barratry. In the policy

policy it is declared, that it ſhall not be void by reaſon of any flaw in the veſſel unknown to the aſſured.

The ſhip ſailed in December 1772, and went to Guernſey, where the captain took in a quantity of brandy, which he meant to run by way of clandeſtine trade; the night following they ſprung a-leak, which drove them into Dartmouth, from whence they went to ——— in Cornwall, where the brandy was ſeized by the authority of the cuſtom-houſe.

By the bad weather, &c. the ſhip was rendered unfit for the voyage, which had been partly proſecuted after putting into Cornwall.

The parties came to an agreement that the inſurance ſhould continue, and protect their goods in their return to London.

The goods were ſpoilt whereupon this action was brought.

Three counts were laid.

Firſt of damage to the ſhip by ſtorms, &c. whereby the goods were ſpoilt.

2d. Of the ſhip ſpringing a-leak in her voyage from Dartmouth, whereby, &c.

3d. That by the fraud and barratry of the maſter the goods were ſpoilt.

The underwriters contended that this was only a ſimple deviation of the captain, not fraudulent as againſt the owners, and was neither merely accidental nor barratry, being no fraud againſt the owners.

The inſured inſiſted that it was either accidental loſs, and then they were entitled to recover under the general terms of the inſurance againſt ſtorms, &c. or elſe it was barratry.

It came out upon the trial, and was found by the jury under the direction of the judge, that the voyage of the captain to take in the brandy was with the privity of *Willes* the owner of the hulk, but without the privity of *Darwin* who chartered the veſſel.

And they found a verdict for the plaintiffs.

On a motion for a new trial, the court was of opinion that the verdict was right.

What was charged on the captain and found, it was agreed, could not have been barratry as under the inſurance, if it had been with the privity of the owner, for he ſhould not have recovered againſt his own order or conſent; but that here *Willes* was not the owner; but *Darwin* who freighted under the charter party was the owner, *pro iſtâ vice.*

That barratry, in the general ſenſe of commercial nations, and in our books as far as it had been touched, ſeemed to mean ſomething fraudulent or criminal, whereby the intereſts of perſons concerned in the voyage or in the ſhip were prejudiced;

But

But that it was not neceſſary it ſhould be a fraudulent or criminal act intended againſt the perſons who ſuffered; it was enough if it was a fraud and a crime, and they ſuſtained damage, though the damage not intended againſt them;
And farther (though Mr. Juſtice *Willes* ſeemed to doubt, but agreed the ſubſtantial merits were anſwered and ought not to be diſturbed) the court was clearly of opinion that the ſupervenient damages need not reſult directly and immediately from the criminal act, but that all damages afterwards happening, which might by any poſſibility otherwiſe not have happened, ſhall relate back to the original fraud, and be imputed as its conſequences. v. 631 to 648.

Irrevelancy.

Opprobrious words, ſpoken by party, counſel or witneſs, irrevelant to the cauſe, will be puniſhed. 56.

Irregularity.

May be waived if you continue the proceſs on the other ſide, as if it had not been committed. 236.
On a common appearance, proceeding to plead admits regularity of the appearance. 237.
You ſhould complain of it on the firſt opportunity. 323, 333.
Where there had been an irregularity, and the party who ſuffered by it came late and without merits complaining of ſurprize, the court diſmiſſed the application, telling them that they came out of ſeaſon, to inform the court they were ſurprized into doing juſtice. 333.
Where a bill is filed againſt one as attorney of *B. R.* who is attorney of *C. B.* this ſeems error, and not irregularity. 653.

Judge.

Words ſpoken by a juſtice of peace to a grand jury very improper, not ſubject to an indictment becauſe ſpoken in the execution of his office; but if he had been a county juſtice, they might have a ground to apply to the great ſeal to remove him from his office. 56.
Words ſpoken by a judge in the execution of his office are not actionable. 56.

Judgment.

Where there are two defendants convicted under the ſame indictment for the ſame offence, the court will not proceed

to judgment againſt one ſeparately, unleſs the other cannot appear by any reaſonable intendment. 44.
Suffering judgment by default, admits the fact and the law to be againſt you; and you cannot offer affidavits in denial or juſtification, but you may to extenuate and mitigate. 82.
Judgment in *Ireland* upon a bill of exceptions; held that it ought not to have been given; but when given the court would not reverſe it. 34.
Judgment foreign. v. Foreign judgment.
Judgment of B. R. and execution thereon ſet aſide, the plaint in the writ being laid "before our juſtices at Weſtminſter," whereas it ought to have been "before ourſelves at Weſtminſter or whereſoever, &c." p. 184.
Of corporal puniſhment not to be pronounced againſt a perſon in his abſence. 400.
Judgment relates to the firſt day of term. v. 654.

Judgment Interlocutory.

A regular judgment not to be called a ſnapping judgment where there is no fraud. 145.

Jury.

Juryman put upon the pannel above eighty years of age, diſcharged by the court. 213, 214.

Juſtices of Peace.

The court will not ſuffer them to be haraſſed under colourable pretences. 38 to 42.
But where any thing doubtful appears in their conduct, tho' the court in a doubtful matter will intend favourably for magiſtrates in the truſt of public juſtice, they will not puniſh the complainant with coſts. v. 42.
Not protected by law in acts done under pretence or colour of office. 243.
A juſtice may commit on complaint, but in ſtrict form the complaint ſhould be in writing. 243.
He may commit on his view without complaint, if he has reaſon to apprehend the peace will be broken, though not actually broken. 243.
All officers acting under a juſtice's warrant, within the juriſdiction of the juſtice, are within the protection of the ſtatute 24 G. 2. v. 252.
They muſt ſhew a juſt and reaſonable cauſe for refuſing licences. 315.

May plead the general iſſue to actions brought againſt them, and give the ſpecial matter in evidence; and if verdict is for them they ſhall have double coſts. 373.
A man who acts as attorney ſhould not act as juſtice of peace; but this extends not to charter juſtices. 620.
For more concerning the juriſdiction of juſtices v. Bridges. Conviction, &c.

Latitat.

Perſonal ſervice neceſſary in the firſt proceſs in *latitat*. 253.

Larciny.

If after goods are ſold, and earneſt or the whole ſum paid, a perſon takes out part, though before actual delivery to the buyer, or to any to convey to him, this is grand or petty larciny, according to the value taken out, tho' the goods may be remaining in the warehouſe of the ſeller: For, after the ſale is completed by earneſt paid, the poſſeſſion of the ſeller is the poſſeſſion of the buyer. 601, 602. v. Trover and Specific Performance.

Leaſe.

From the firſt of *June* for three years begins on the ſecond and ends on the firſt. 276.

Leſſee.

If leſſee hold over after notice from the landlord that in caſe of holding over beyond the day in the notice he ſhall pay an increaſed rent, the holding over is an aſſent to the new rent, and the landlord ſhall recover it in an action for uſe and occupation. 154.
Vide Holding over. v. Rent.

Legacy.

Double.
Where a leſs ſum is given by will, and afterward a greater by codicil, or in general a leſs ſum by one inſtrument and a greater by a ſubſequent, as where there are two codicils, and different ſums given in both to the ſame perſon, the preſumption is in favour of the deviſee as to both: And if the heir would take either ſum from the deviſee he muſt

prove an ademption of it; and ſo it ſeems if a greater ſum be given firſt and afterwards a leſſer. Otherwiſe where in the ſame inſtrument, or equal ſums in different inſtruments; for then the proof lies on the deviſee that both were bequeathed. 130 to 133.

Letters.

Where there is a poſt-town that town conſtitutes the limits of delivery; and the maſter of the office there is bound to deliver letters to all perſons within that town. And he cannot charge any thing beyond what is provided by the act of parliament. 753 to 755.

Vide Parliament.

Libel.

Where being in cuſtody is not an excuſe. 778 and 780.

That publiſher is ignorant of the contents goes for nothing. 544. It may indeed on circumſtances be a mitigation, but it cannot juſtify to the action. 762, 763.

The impotence of the libel, both in the writing itſelf and in the ſtrength of the characters it attacks, is no excuſe for it. 778.

A libel on King *William* and Queen *Mary*, eſpecially as inſtruments of the revolution, is puniſhable now. 778.

If the meaning is clear to the jury, miſdating of facts or omiſſion of letters in words will not make it leſs a libel. 778. v. 780.

Liberty.

For violation of liberty no price is a compenſation; whether it be by confining a perſon, or beating, wounding, or otherwiſe ill treating him, in his body or reputation, which he has a right to enjoy freely, or by oppreſſing him and depriving him of his juſt rights, in any kind. v. 774, and v. Damages, Libel, General Warrants, Maxims, &c.

The laws of this country will not endure the violation of liberty in the perſon of a ſtranger, no, nor of a ſlave reſident here; for they know not ſlavery, nor ſuffer it to breathe in the air of *England*. v. Negro, and the exception of villenage, now obſolete.

Limitation of Time.

A year obſerved to be the common limitation in penal ſtatutes where a moiety goes to the informer and a moiety to the poor. 330.

Vide Statutes of Limitation.

Literary Property.

Vide Abridgment.

Madhouſes.

Private, not authorized by law (note, this was before the late act). The keepers of them excuſed by acts of neceſſity under the judgment of proper perſons in a proper manner. 73—75. 79.

Madman.

Any man may commit a perſon who, under the viſitation of God, is a lunatic furiouſly mad, to prevent miſchief. 243.
But the removal of a lunatic is under a ſpecial power given to two juſtices. ibid.

Malice.

Implied. What it is, and its conſequences. v. 645. and v. Inſurance.

Majority.

The majority at common law is not of the whole body, but of thoſe preſent. 266.

Mandamus.

Will not be granted to do that which is likely to be done without it by conſent. 148.
The court refuſed to grant a mandamus to admit a deputy pariſh-clerk. 434.
Mandamus will go to reſtore a perſon removed from a freehold before it was competent to remove him. 551.

Marriage.

Bond with penalty engaging not to marry any but the obligee void, becauſe againſt policy and reaſon; the obligee not engaging

engaging to marry him. v. the caſe of *Long* v. *Dennis*, in Sir *James Burrow*'s Reports, publiſhed ſince the page was printed which is referred to in the note above, and particularly ſee 2055 to 2057. And vide alſo the caſe of *Lowe* and *Peers*. 2225 to 2234, which ſeems the very caſe meant.
Vide Feme.

Maſter.

Maſter may juſtify in aſſault that he interpoſed in defence of his ſervant, whom the plaintiff was beating; for the duties of the relation are reciprocal. 215, 216.

Maſter and Fellows.

Diſputes concerning election to be tried in the King's court. v. 25.

Maxims.

No man ſhall be a judge in his own cauſe. 63.
Extreme niceties very proper in furtherance, very bad in hinderance of juſtice. 70. v. Table of Maxims.
Que peccat in ſyllaba peccabit in toto cauſa is not to be taken generally, and it is leſs to be admitted in civil cauſes than in criminal charges, and leſs in civil upon the defenſive ſide, which is favourable, than upon the adverſe, in which greater nicety ſhould be uſed. 146.
1. *Apices juris non ſunt jura.*
2. *Summum jus ſumma injuria.* v. 327, 328.
3. LIBERTAS NON RECIPIT ÆSTIMATIONEM.
4. *Ceſſante cauſâ ceſſat cauſatum.* 401.
5. *Nemo lucrabitur de injurâ ſuâ propriâ.* v. 645.
6. *Allegans turpitudinem ſuam non eſt audiendus* to be taken in a reſtrained ſenſe. v. 342. 757, 758.
Vide *paſſim*, and v. The Table of Maxims.

Merchants.

Cuſtom of, part of the general law of nations. 639. v. Inſurance.

Morality.

Whatever offends againſt the order and good morals of ſociety is an offence againſt the law of *England*, and puniſhable at common law. 385.

Mortgage.

Ejectment by mortgagee not conſidered as adverſe againſt the tenant. 364, 365.

Motion.

What regularly is to be had on plea ought not to be taken upon motion. 65.
What is hard and unfavourable, in a view to conſcience and equity, the court will not not ſuffer to be taken upon motion. v. Gaming, 2. and v. Coverture.

Naval Stores.

Vide ſtatutes concerning, and v. Broad Arrow.

Negro.

Cannot be ſent out of the kingdom of *England* againſt his will. 19.

New Trial.

Will not be granted in every caſe where the verdict is againſt evidence. 146. 391, 457, 529.
To grant a new trial ſuppoſes at leaſt that the verdict was againſt evidence, or the evidence improper to have been laid before the jury. 158.
Upon a new diſcovery never too late to move, if you apply in regular time after the diſcovery. 160.
Inſufficiency of counts ground for arreſt of judgment; not of new trial. 371.
Ought not to be granted where the charge is of a criminal nature, and the defendant has been once acquitted. 391.
The court will not grant a new trial where the jury have found againſt the form, though they have been wrong in ſo doing, if they have found according to the merits and ſubſtantial juſtice. 521.

Non-Reſidence.

Sequeſtration of the benefice no excuſe. 602, 603. v. Statutes.

Notice.

Name of plaintiff's attorney not inſerted in notice of a writ of *latitat* vitiates the notice. 58.
A motion for judgment, as in caſe of a nonſuit, upon the 14 G. 2. c. 17. held to be notice within the ſtatute. 265.
If no body can be found on whom to ſerve notice of ejectment you may ſtick it up at the door. 266 and 272.
Of ejectment, held good at the houſe, though the premiſſes lay in another county. 301.
Held that where there were joint owners notice ought to be ſerved upon both; at leaſt where they lived in ſeparate houſes. 301.
Of declaration in ejectment not to be delivered to ſervant of inſane, but to committee. 401.

Nuſance.

A man ſhall not have a private action for a common or public nuſance. 556.

Order of Niſi Prius.

Explanatory words not to be added to the order when it is made a rule of court; but if neceſſary they muſt be made a ſeparate rule. 151.

Order of Seſſions.

Application to remove by *certiorari* within what time. 544.

Original (Writ.)

Suit by, where bad. 52.

Ouſter. (Actual.)

Held that it may be preſumed. 768. v. Tenants in common.

Outlawry.

When you come to reverſe you muſt have the record in court. v. 348.
Vide 370.
Perſonal appearance not neceſſary to reverſe, except in treaſon and felony. 372, 520, 521.

Error in fact the attorney-general may be permitted to allow, though the error alledged be not true; otherwiſe error in law. v. 521.

Owner.

Wherever the lawful property may be identified and traced out the owner ſhall come and recover, when the thing has been unlawfully converted and changed: For though the poſſeſſion has been changed the property is not. Nor will ſeizure into the hands of the crown, in ſuch caſe, be a bar. v. 759. Trover. 2, 3.

Parent.

If the father appears improper to have the cuſtody of the child, and the child be of too tender years to chooſe for itſelf, the power of the court of B. R. is diſcretionary in aſſigning the cuſtody of the child. 749.

The power of the parent is ſubordinate to the power and authority of the ſtate, in education of the child, as in other reſpects. 749.

Pariſh-Clerk.

It ſeems appointment of pariſh-clerk needs not to be in writing. 434.

Parliament.

Motion to ſtay proceedings till the event of a petition touching the cauſe depending in parliament refuſed. 436.

Powers derogatory to private property, though by act of parliament by one's own repreſentatives, to be very ſtrictly conſtrued, and not extended. 442.

No man can demand a duty without an act of parliament. 754. v. Letters. v. Taxes.

Partnerſhip.

Every partner is liable jointly and ſeverally. 82.

Patent.

It does not ſeem to hold true that a patent cannot be granted for a new invention ſuperadded to an old one. 395.

Pauper.

Conviction of return of pauper ſhould appear to have been by confeſſion, oath, or view of the juſtice himſelf; and it ſhould appear that he returned without certificate. 84.

Peerage.

Privilege of peerage will be noticed without pleading. 49.

Penal Action.

Vide Tythes. v. Statutes.

Peremptory.

A peremptory is always underſtood ſo as to be without prejudice to juſtice. 262, 263.

Perjury.

Muſt not only be a falſe ſwearing upon oath, and in a court having authority to adminiſter an oath, and in a matter which is material to the cauſe, but it muſt be a wilful and deliberate falſe ſwearing: For if a man in the hurry of evidence, or from defect of memory, ſwears falſe, by error or ſurprize, this is not perjury; for there muſt be the mind of ſwearing falſe to make it perjury; and then it will be perjury, even if a man ſwears to a true fact, if it can be proved that he believed it to be falſe.
Vide 773. *et alibi.*

Pew.

In preſcribing for a pew it is not neceſſary to alledge that he and his anceſtors have always been accuſtomed to repair; for it is only evidence: And perhaps the pew never wanted repair. 423.

Plaint.

Defendant ought to remove with cauſe; plaintiff may without. 520.

Pleading.

Action againſt a tenant for breach of covenant in not repairing the demiſed premiſſes. Plea that the landlord did not aſſign him materials—bad; for he ſhould have ſhewn that he aſked: And ſo plea that there were none proper to which he had a right; for this is putting the iſſue not upon the fact but upon the law. 43.

Plea of *riens per deſcent*, how given by the ſtatute. v. 264.

Plea.

It ſeems to be the practice that delay to demand a plea does not hinder your ſigning judgment the inſtant after you have demanded it. 333.

Poſſeſſion.

Long, the effects of it. 315.

Poſſeſſion is very favourable as a rule of certainty and an evidence of right, and for quieting diſputes. 334.

Poſſibilities.

Aſſignable under circumſtances. v. 43.

Poſthumous.

Held that the ſtatute of *W.* aids only in caſe of remainders. 398.

Poſt-Office.

Vide Letters, and v. Statutes.

Powers.

Expreſſion of what the law implies though not expreſſed, in the deed under which the powers are derived, or by which they are reſerved; ſhall not prejudice the execution of powers. 319.

Preamble.

Vide Statutes, Conſtruction of.

Prerogative.

The rule that the half blood ſhall not inherit does not affect the ſucceſſion to the crown. 398.
Will never prejudice juſtice, or the rights of the ſubject. 90.

Preſcription.

Cannot be where the creation of the thing in which it is claimed is within time of memory. 76, 77.

Preſumption.

Held that putting in the name of a nephew in a leaſe renewable for lives carried *prima facie* a preſumption only that his name ſtood as truſtee; but that this might be repelled by parol evidence, ſhewing that he was intended to take for his own benefit. 230 to 232.
Preſumption from non-payment of intereſt upon a bond is within no ſtatute of limitations; but will depend upon circumſtances and evidence. 320.
Of right of ſoil in an highway through a manor held to be in favour of the lord. 358. But it is not concluſive. Where there are owners of each ſide, and no body can ſpeak to the antiquity of the road, or the property, the preſumption changes, and is in favour of the owners on each ſide. 358 to 360.
Preſumption that he who has ſeparate fiſhery is owner of the ſoil. 364.
On a writ of right that may be a preſumption which is not a bar.
Preſumption of ſatisfaction by diſcontinuance on elegit. 651.
Every thing (not contrary to the known fact) is to be preſumed againſt a perſon who will not ſhew his title. 523.
Vide Evidence.

Priſon.

The court of B. R. has power over all the priſons in the kingdom; and they are all of them the priſons of the court. 436.

Privilege.

Of a member of parliament. v. 156.

Of a party or witneſs attending proceſs in going, continuing, and returning; and this protection afforded a lady, brought up by *habeas corpus*, againſt her huſband. v. 434, 435.

Prohibition.

Where the foundation and principal ſubject of the ſuit is an eccleſiaſtical matter, and the temporal right only an incident, the eccleſiaſtical court ſhall proceed as long as they will try the matter as the common law would have done in ſuch caſe, in reſpect of that which is temporal (for there is no defect of original juriſdiction); but if they refuſe to try it as the common law would have it tried a prohibition ſhall iſſue.

Property.

Vide Owner.

Re-Entry.

Shall only operate as a ſecurity for the rent. 319.

Relation.

Vide Judgment.

Remainder.

Croſs-remainders may be between more than two where the intent is plain. 112.

Between two the preſumption is in favour of croſs remainders; between more than two preſumption is againſt them: But either may be repelled by evidence of intent.

Reporters.

The concurrent teſtimony of reporters, be they good or bad, is of great weight. 420.

Republication.

A codicil with three witneſſes, and theſe words, "I deſire "this may be taken as part of my will," amounts to a republication of the will. 608, 609.

A. has

A. has lands in *A. B.* and *C.* which he deviſes; afterwards he purchaſes lands in *D.* and makes a republication of his will. This can have no effect on the after purchaſed lands in *D.* where he had none at the making of the will. 609. v. Revocation. 6.

A. makes his will, with a general reſiduary clauſe; and afterwards is admitted in fee to a copyhold eſtate, which he ſurrenders to ſuch uſes as he ſhould by his laſt will and teſtament direct, &c.

After the ſurrender he makes a codicil, atteſted by three witneſſes, and having thereby given an annuity and his houſe and furniture at *H.* to Mrs. *C. D.* he goes on, "And do ratify "and confirm all the deviſes and bequeſts which I have "made in my laſt will and teſtament, except what I have "hereby altered: And I do direct that it may be annex-"ed and taken as a codicil to my will."

He had no copyholds at the time of making the will.

Held a republication by the ſtatute, the codicil being ſubſcribed by three witneſſes. 752.

Reputation.

Vide Damages, Libel.

Reſtitution.

Vide Trover. 2.

Return.

Of two *nihils* and judgment thereupon is not good without real notice, where it is to charge an executor with aſſets. 305 to 313.

The court not ſo ſtrict upon the returns of inferior courts as formerly. 431.

Diſtinction between returns of meſne proceſs and returns in execution. 332, 333.

Reverſion.

Powers given under a ſettlement to make leaſes of preſent and not of future intereſt, and ſo as the ſame go with and be incident to the remainder and reverſion. Reſervation, with a view to the execution of theſe powers, held good, being made to the tenant in poſſeſſion of the freehold, his heirs and aſſigns: For that, both by reaſon and authorities, heirs and aſſigns meant thoſe to whom the remainder and reverſion ſhould go under the ſettlement. 319.

Revocation.

1. As to make a will there muſt be *animus teſtandi*, a mind and intention to make, ſo to revoke a will there muſt be *animus revocandi*, a mind and intention to revoke. And though ſince the ſtatute a will can neither be made nor revoked without performance of the requiſites preſcribed by the ſtatute, yet all the forms of making or of revoking muſt be accompanied by a ſound and free mind (ſo far free as to be under no compulſion, terror or deception, as to the act done, in doing of it): And there muſt be an intention in the teſtator, in making or revoking his will, to make or revoke; which muſt in both inſtances accompany and direct the form to make either a good will or a good revocation. 470, 471.

2. A revoking will revoked ſets up the former, as a repealing ſtatute repealed. 575, 576.

3. *A.* deviſes eſtates in ſtrict ſettlement; he afterwards makes a new contract, and then by his codicil paſſes the eſtates purchaſed under that contract to the ſame uſes.

After this he unites the equitable eſtate which he had before by truſtees to his uſe to the legal eſtate, by making an abſolute purchaſe to himſelf in fee. This is not ſuch a change of eſtate as will operate a revocation. 609 to 617.

4. Conſtructive revocations againſt the intent ought not to be indulged: And ſome deciſions of that ſort, miſunderſtood, or overſtrained, have brought a ſcandal upon the law. 614. v. alſo 293 and 297.

5. *A.* declares his will void unleſs he return from Ireland; held that it was not revived by his return, but required a poſitive republication to ſet it up.

So when a feme ſole makes her will and marries, the act of marriage merges her will, and it does not revive by the death of her huſband without republication. 667.

Of revocations on change of eſtate by act of law. 299.

Marriage, with birth of a child, held a revocation. v. p. 171. v. the caſe of *Chriſtopher* v. *Chriſtopher*, mentioned in 4 *Bur.* 2171, and again 2182, to have been determined by Lord Chief Baron *Parker*, Mr. Baron *Smythe*, and Mr. Baron *Adams*, *diſſentiente* Mr. Baron *Perrott*; and afterwards to have had the concurrence of Sir *Eardley Wilmot* and Lord Chief Juſtice *De Grey*, that marriage and a child is a revocation of lands, which is ſtronger than of perſonalty. Of perſonalty there are ſeveral caſes, as *Lugg* and *Lugg*, *Overbury* and *Overbury*, and *Eyre* v. *Eyre*, that marriage and iſſue are a revocation: For which v. 4 *Bur.* 2169.

[*Note*,

[*Note*, The caſe of *Glazier* v. *Glazier*, when I ſent the note to the preſs, mentioned 575, 576, and in this table, was not then publiſhed by Sir *James Burrow*, I believe. But it is in his fourth volume. 2512 to 2515.]

River.

A navigable river is the king's highway for the uſe of himſelf and his ſubjects. 556.

Rules of Practice.

It ſeems four days to put in bail mean excluſive of the return day: And if the laſt day is a Sunday then the whole of Monday. 190.

If time of exception againſt bail is out, and you have not juſtified, you cannot juſtify after the time allowed; but you may avail yourſelf to ſtop an attachment againſt the ſheriff. v. 224.

New trial to be moved within four days. 230.

A perſon who refuſes to admit evidence which is only formally neceſſary to be ſhewn incurs coſts. v. 248.

When a rule is made abſolute you can't anſwer it, but muſt move to have it diſcharged if you want to be clear of its effect, and have ſufficient grounds. 265.

There muſt be exceptions from the literal meaning of every rule, where the letter would work an injuſtice, or contradict the ſpirit of the rule: And therefore the court refuſed to diſcharge out of cuſtody, for want of proceeding againſt a priſoner within two terms, where there was a miſtake by two being of the ſame ſurname. 274.

Time of trial will be enlarged where a witneſs cannot be come at, and the other party, though the witneſs was abroad before the action commenced, and not returned ſince, refuſes to admit the effect of his evidence.

Not to have a *non-precedendo* for want of tranſcribing; till you have firſt a certificate there is no tranſcript. 329.

No ſpecial arguments to be entered the laſt paper day of the term. 370.

When you move for a rule to ſhew cauſe the day before the laſt of the term the rule muſt be drawn ſpecially for the laſt day. 436.

Rules deſigned to prevent fraud ſhall never be applied to the purpoſe of effecting it. 622.

When the ſheriff is ruled to bring in the body he has four days excluſive. 631.

Vide alſo 653. and v. Amendment, Notice, Declaration, Plea, Judgment, Sheriff, New Trial, Superſedeas, &c.

Scandalum Magnatum.

A peer may lay his action for this offence againſt him where he pleaſes: But on juſt ground of ſuſpicion that there cannot be a fair trial the venue ſhall be changed: otherwiſe not. v. 210, 211.

Servant.

Shoemaker employs a man to make up ſhoes for him, and retains him by the piece, and this perſon being hired by another, and leaving his former ſervice, the work unfiniſhed, an action will lie (though not on the ſtatute of *Eliz.*) for ſeducing him from that his former ſervice. 493 to 495.

Settlement.

Marriage. v. Deed, Conſideration.
Pariſh hiring from ſtatute fair to ſtatute fair ſeems a good hiring by the year to gain a ſettlement. 54.

Sheriff.

Anſwerable for the acts of his deputy. 81.
Return *non eſt inventus* with the name of ſheriffs of the laſt year is a falſe return by the ſheriffs of the preſent. 83. v. Return.
Indemnity given for a year to ſecure the ſheriff againſt the acts of his bailiff. Afterwards the perſon undertaking gives notice, diſliking the perſon employed, that if the warrants are delivered to that perſon he will not abide by his indemnity, this notice left at the office of the under clerk to the under ſheriff. Held that the ſheriff was not bound: And that the perſon who had given this indemnity could not diſcharge himſelf, unleſs by the conſent of thoſe in whoſe behalf it was given. 225 to 228.
Not entitled to poundage if judgment irregular. 253.
His return not traverſable; but you may have action for falſe return. 371.
Not entitled to poundage till the goods are ſold. 333.

Slander.

A woolcomber not ſtated to be a labourer muſt be intended to buy wool, and to be a trader. 322.

Declaration, whereas he is a woolcomber, and a perſon had agreed with him for a certain quantity of wool, the defendant well knowing, &c. and intending, &c. ſpoke of him (laying a colloquium) "he, inuendo the plaintiff, is "not worth a penny, and he will run away." The court ſeemed to think the declaration ſufficient, and the words actionable, and would not take away from the plaintiff the benefit of the verdict in his favour. 322, 323.

Slavery.

Cannot be ſupported by moral or political reaſons; and in this country can be no further maintained than poſitive law will ſupport it. *Somerſet's* caſe. p. 19.

The only ſpecies of ſlavery which can now exiſt in England is, if a man will confeſs himſelf a villain in groſs in a court of record. v. p. 12 and 19. v. Villenage.

A ſlave in another country is not a ſlave in England; and the judges will not from analogy to any ſpecie of ſlavery that ever did exiſt in England, conſtrue him to be a ſlave in a certain qualified degree; for this country knows of no ſlavery in any degree not expreſsly limited and preſcribed by the poſitive law of England. p. 17 to 19. v. Contract.

Specification.

Vide Patent.

Specific Performance.

Equity will not decree upon a bare agreement by parol, not in part performed though it appear ever ſo clearly. 808. unleſs upon the ground of fraud. 814.

Part performance is not the tendering of conveyances, but it muſt be ſome act done as in actual execution of the contract; not towards the execution. 813.

(Letter) I will give 16500l. Anſwer—I will not take leſs than 17000l. Anſwer returned, I will give 17000l. This is not an agreement executed in writing within the ſtatute of frauds. v. 786 to 814.

The time of payment is very material, and where the time has been over paſſed, equity will not aſſiſt the perſon who has overpaſſed it in his demand of a ſpecific performance. 813.

Where circumſtances are greatly altered ſince an agreement, equity will rather leave the party injured by non-performance to his damages at law, than decree a ſpecific performance.

If you read the confeſſion of an agreement by anſwer, you muſt read all relative to the agreement. 789.

Where an agreement appears in notes or letters, or by confeſſion in defendant's anſwer, the court frequently enforces the ſpecific performance; but then it muſt appear fully and completely, ſettled in all points. 801.

Where a perſon has declared he will not ſell to ſuch an one but for ready money, and another clandeſtinely attempts to purchaſe for the perſon ſo refuſed, and the money is not ready; ſuch tranſaction is fraudulent, and the court will not inforce the performance of an agreement ſo obtained. v. 786 to 814.

Payment of earneſt or delivery of poſſeſſion of part, comes under the idea of part performance. v. 809 and v. Trover.

Stamps.

Vide p. 155.

Want of ſtamps does not avoid a deed; but only hinders its being given in evidence until ſtamped. 341. v. Statutes concerning bills of exchange.

Statutes.

General Rules of Conſtruction.

1. Statutes on the ſame ſubject are to be conſtrued together. 371.
2. The conſtruction of private acts of parliament is to be governed by the principles of common-law, applied to the ſubject in a manner analogous to the rules of interpretation in a private deed or conveyance. v. 416.
3. Preſumption of a general meaning not expreſſed, nor naturally implied, is very unfavourable and not to be received, at leaſt upon a penal ſtatute. 534.
4. In favour of the liberty of the ſubject ought to be liberally conſtrued. 650.

Though the preamble be generally a key to the ſtatute, yet it does not always open all the parts of it, but ſometimes the legiſlature having a particular miſchief in view to prevent, which was the firſt and immediate object of the ſtatute recites that in the preamble, and then goes on in the body of the act, to provide remedy for general miſchiefs of the ſame nature, but of different ſpecies not expreſſed in the preamble, nor perhaps then in contemplation. 783.

Concerning bail and bail-bond. v. 4 & 5 Ann. p. 395.

Bills of exchange. v. 5 & 6 W. & M. c. 21. ſ. 5. 9 & 10 W. 3. c. 17. 3 & 4 Ann. c. 9. ſ. 4.

Concerning building. 12 G. 3. v. 330.
Concerning churchwardens. v. 3 Car. 1. c. 3. f. 2. 21 J. 1. c. 7. f. 5. v. p. 209.
Concerning coſts. v. 23 G. 2. c. 33. f. 19.
Coſts on attachment. v. 5 W. & M. c. 11. f. 3.
Againſt fraudulent conveyances. 27 Eliz.
Concerning diſtreſſes. v. 51 H. 3. ſt. 4. 52 H. 3. ſt. 1. c. 15. 9 E. 2. ſt. 1. c. 9. 52 H. 3. c. 4. 3 E. 1. c. 16. 1 & 2 P. & M. c. 12. 52 H. 3. c. 22. 3 E. 1. c. 23. 28 E. 1. c. 12. 17 Car. 2. c. 7. f. 4. 2 W. & M. c. 5. 8 Ann. c. 14. 11 G. 2. c. 19. 20 G. 2. c. 43. f. 23. 27 G. 2. c. 20 & c. 43. f. 23. v. p. 201 to 203.
Of Exemption from ſerving on juries. v. 13 E. 1. c. 38. 52 H. 3. c. 3.
Concerning eſtates *pur auter vie*. v. 29 Car. 2. c. 3. v. p. 237.
Concerning exportation of corn. v. 51 H. 3. ſt. 6. 34 E. 3. c. 20. 1 & 2 P. & M. c. 5. 17 R. 2. c. 7. 4 H. 6. c. 5.
Vide alſo 20 H. 6. c. 6. 23 H. 6. c. 5. 5 & 6 E. 6. c. 14. 1 Eliz. c. 11. f. 11. 5 Eliz. c. 5. 1 J. 1. c. 25. f. 26. 3 Car. 1. c. 4. f. 24. 12 Car. 2. c. 4. f. 11. 15 Car. 2. c. 7. 1 W. 3. c. 12. 10 G. 3. c. 39. v. p. 530 to 536.
Concerning the Exciſe and cuſtoms. v. 12 Car. 2. c. 23. 1 G. 3. ſt. 1. c. 1. 15. Car. 2. c. 11. f. 17. 22 & 23 Car. 2. c. 5. f. 9. 15 Car. 2. c. 11. f. 2. 10. 16. 17. 19. 21. 16 & 17 Car. 2. c. 4.
Additional exciſes expired. v. 22 & 23 Car. 2. c. 5. 29 Car. 2. c. 2. 1 W. & M. c. 24. 2 W. & M. ſt. 2. c. 3. & c. 10. 3 W. & M. c. 1. 5 W. & M. c. 7. 7 & 8 W. 3. c. 30.
Vide For other matters. 22 & 23 Car. 2. c. 5. f. 8 & 14. 1 W. & M. ſt. 1. c. 24. 2 W. & M. c. 3. 4 W. & M. c. 8. 5 W. & M. c. 20. 4 A. c. 6. 1 G. 1. c. 12. 7 & 8 W. 3. c. 30. 8 & 9 W. 3. c. 19. 18 G. 2. c. 26. f. 8. 10 G. 3. c. 44.
For further matters. v. 12 & 13 W. 3. c. 12. 6 G. 1. c. 4. 10 A. c. 19. f. 122. c. 26. f. 75. 6 G. 1. c. 27. f. 7. 11 G. 1. c. 30. f. 2. 10. 32. 12 G. 1. c. 28. 1 G. 2. c. 16. f. 4. 10 G. 2. c. 17. 19 G. 2. c. 34. 11 G. 3. c. 51. 20 G. 2. c. 52. 32 G. 2. c. 17. 33 G. 2. c. 9. f. 16. 1 G. 3. c. 7. f. 1. 5 G. 3. c. 43. 8 G. 3. c. 32. 10 G. 3. c. 32. 12 G. 3. c. 4.
Againſt embroidery imported from abroad. v. 3 E. 4. c. 4. 4 E. 4. c. 1. 22 E. 4. c. 3. 1 R. 3. c. 10. 5 Eliz. c. 7. 13 & 14 Car. 2. c. 13. 22 G. 2. c. 36. v. p. 199.
Againſt fraud 21 J. c. 19. f. 11. 29 Car. 2. c. 3. 13 Eliz. c. 5. 10. 20.
Vide 30 G. 2. c. 4. v. p. 271. of the abuſe made of this ſtatute againſt gaming. v. 12 R. 2. c. 6. 11 H. 4. c. 4. 17 E. 4. c. 3. 33 H. 8. c. 9. 2 & 3 P. & M. c. 9. f. 16. Car. 2. c. 7. 9 A. c. 14. 2 G. 2. c. 28. f. 9. 12 G. 2. c. 28. 13 G. 2. c. 19. f. 3. 18 G. 2. c. 34. 25 G. 2. c. 36. 30 G. 2. c. 24. f. 4.

Concerning

Concrening juſtices. 7 J. 1. 24 G. 2. c. 44.
Vide 5 G. 2. c. 18. ſ. 2. that they ſhall not be attornies.
Concerning inſolvent debtors. v. 32 G. 2. and v. 5 G. 3. 9 G. 3. c. 26. 12 G. 3.
Of limitation.
21 Ja. c. 16. v. Aſſumpſit.
Concerning mortgages. v. 7 G. 2. c. 20.
Naval ſtores. 9 G. 1. c. 8. ſ. 3 & 4.
Non-reſidence. 21 H. 8. c. 13.
Concerning overſeers. v. 43 Eliz. 24 G. 2. c. 44. 27 G. 2. c. 20.
Concerning poor and pariſhes. 13 & 14 Car. 2.
Concerning pawnbrokers. v. 13 E. 1. ſt. 5. 1 J. 1. c. 21. 21 J. c. 17. ſ. 3. 12 A. ſt. 2. c. 16. ſ. 2. 6 & 7 W. 3. c. 17. ſ. 7. 8 & 9 W. 3. c. 20. ſ. 60. 6 G. 1. c. 18. ſ. 25. & ſ. 24. 27, 28. 7 G. 2. c. 8. ſ. 9. 24 G. 2. c. 40. ſ. 12. 30 G. 2. 24. 32 G. 2. c. 24. ſ. 2.
For the preſervation of animals. v. 37 H. 8. c. 6. 9 G. 1. c. 22. 31 G. 2. c. 42. v. p. 204.
Concerning pleading. v. 7 J. 1. c. 5. 21 J. 1. c. 12. v. p. 236.
Concerning the poſt-office. 12 Car. 2. c. 35. 9 A. c. 10. 3 G. 1. c. 7. 4 G. 2. c. 33.

Statutes Penal.

Vide 23 G. 2. againſt ſeducing artificers. p. 394.
Concerning repair of bridges. v. 22 H. 8. c. 5. v. Juſtices. v. p. 238.
Concerning rogues incorrigible. v. 12 A. 13 G. 1. c. 23. ſ. 8. v. p. 342.
Concerning ſervants. 5 Eliz. c. 4.
Set off 2 G. 2. c. 22. ſ. 13. 5 G. 2. c. 30. ſ. 28.
Concerning tythes. v. 18 E. 3. ſt. 3. c. 7. 45 E. 3. c. 3. 1 R. 2. c. 13. 5 H. 4. c. 11. 7 H. 4. c. 6. 27 H. 8. c. 20. 32 H. 8. c. 7. 27 H. 8. c. 21. 37 H. 8. c. 12. 2 & 3 E. 6. c. 13. ſ. 12. 31 H. 8. c. 13. ſ. 1. 22 & 23 Car. 2. c. 15. 3 W. & M. c. 3. 11 & 12 W. 3. c. 16. 1 G. 1. ſt. 2. c. 16. ſ. 2. 7 & 8 W. 3. c. 6. 4 A. c. 27.
Trial 14 G. 2. c. 17.
For felony where the party eſcapes into another county and the goods are found. v. 24 G. 2. c. 55. 13 G. 3. c. 31. ſ. 4. v. alſo 2 & 3 E. 6. c. 24.
Concerning uniformity. 13 & 14 Car. 2. c. 4.

Summary Proceedings.

Muſt proceed upon mutual benefit and equity. 329.

Sunday.

Appears not a good day for appointment of overſeers. v. 618 to 620.

Superſedeas.

Writ of error is not a ſuperſedeas to execution, unleſs bail be put in within four days. 752.

Sweeping Clauſe.

Will not carry eſtates of a different nature from thoſe expreſſed in the premiſſes. v. 398, 399.

Taxes.

On a ſpecial verdict; action for money had and received.
The jury find the iſland of Grenada in the poſſeſſion of the French, and conquered by the Britiſh arms in 1762: They find it ſurrendered upon articles of capitulation, on the 7th of February in the ſaid year.
And that by thoſe articles they are recognized as Britiſh ſubjects and to be governed, by their then preſent laws, until his Majeſty's pleaſure ſhould be farther known; they are to enjoy their property and the ſame privileges as in the other leeward iſlands. And to what relates to taxes and impoſts, they are referred to, the 6th article, which gives them as above mentioned the ſame privileges with the leeward iſlands. And the natives may ſell their lands, provided it be to Britiſh ſubjects, and retire.
They find the treaty of peace of the 10th of February 1763, ceding Canada & Acadia, and the iſlands amongſt which Grenada, to the King and crown of Great Britain.
And they find a proclamation of the King of Great Britain the 7th of October 1763, promiſing a legiſlative aſſembly as ſoon as the ſtate and circumſtances of the new governments (amongſt which Grenada is included) would admit; and that in the mean-while perſons inhabiting, or reſorting to the ſaid colonies may confide in the royal protection, for the enjoyment of the benefit of the Engliſh laws, for the adminiſtration of which courts of judicature are ordered to be erected.
They find alſo a proclamation of the 26th of March 1764, directing a ſurvey of the iſland, and a diviſion into pariſhes and diſtricts; with other proviſions for the ſettlement and beneficial culture thereof.

And farther they find Letters Patent of the 9th of April 1764, appointing Robert Melville, Esq; to be a governor of Grenada, the Grenadines, Dominica, Tobago and St. Vincent's; and directing him to govern according to his instructions received and to be received, and according to such reasonable laws as shall be made, by the advice and consent of the council and assembly of the islands under his government; and empowering him with the advice and consent of council, and as soon as circumstances shall admit, and when, and as often as need shall require to summon and call general assemblies of the said islands, jointly or severally, to be chosen by the authority of the freeholders respectively; and to the governor and council, with the advice and consent of the assembly, to make laws for the welfare, peace and good government of the said islands, jointly or severally, as near as may be according to the laws of England.

And they find that Governor Melville arrived in the island on the 14th of December 1764.

And that an assembly of the said island was held in the latter end of the year 1765.

But they farther find that his Majesty by his letters patent of the 20th of July 1764, ordered and appointed an impost or custom of four and an half in specie for every hundred weight of all dead commodities of the produce of the said island of Grenada, that should be shipped off from the same, in lieu of all customs and imposts upon goods exported and imported under the authority of the French King; reciting that such impost is paid by Barbadoes and the other leeward islands, and commanding the governor and officers of the customs from time to time, for the time being to collect and receive the same under such penalties and forfeitures; and in such manner as in the above mentioned leeward islands, and appointing the continuance of the poll-tax levied under the French King.

And the jury find the said imposts of four and a half per cent. as above mentioned was and is paid in the island of Barbadoes, and in the leeward Carribee islands, by virtue of acts of assembly of the said islands set forth in the verdict.

And they find the establishment of a custom-house and officers in the island of Grenada.

And they farther find that the plaintiff is a natural born subject of the King of Great Britain; and that on the 3d of March 1763, he purchased a plantation in the said island, in pursuance of the articles of capitulation and treaty of peace.

And they also find that certain sugars of the plaintiff of the growth of the said island subsequent to the grant, and re-

differing

giſtering of the letters patent of the 20th of July above mentioned, were ſhipped off from thence; and that the defendant, being then and there a collector of the ſaid duty for the uſe of his Majeſty, received the ſame; and that the ſame is the money mentioned to be had and received to the plaintiffs uſe for which the action is brought; and that the defendant hath not paid over the ſame to the uſe of his Majeſty, but on notice of the action intended to be brought hath with the conſent of his Majeſty's attorney-general kept the ſame in his hands, for the purpoſe of trying the queſtion ariſing upon facts.

And whether the ſaid impoſt were lawfully impoſed or not, the jurors are ignorant and pray the advice of the court.

And if upon the whole matter found it ſhall appear to the court, that the impoſt or cuſtom aforeſaid was not lawfully impoſed; then they ſay the defendant did undertake and promiſe, as the defendant has in his plea alledged; and aſſeſs the plaintiff's damages at 5l. and coſts at 40s.

But if the court be of opinion the impoſt was lawful, then they find the defendant did not undertake in a manner and form as by the plaintiff in his plea alledged. v. the caſe and arguments from 655 to 738.

Determined by the court,

1ſt. That the King by his prerogative might, before the proclamation of the 7th of October 1763, have laid the impoſt in queſtion upon Grenada as a conquered country,—without conſent of the parliament of England, or act of the people of Grenada, in their aſſembly or otherwiſe,—by his prerogative.

But 2d. that after the ſaid proclamation, and before the patent of the 20th of July 1764, for laying on the impoſt, the King had precluded himſelf from ſo doing; and therefore that the ſaid impoſt was void. 738 to 748.

Tenants.

1. In common, though ſeveral, are but as one perſon or party in law. 401.

2. The poſſeſſion of the one is the poſſeſſion of the other, and will prevent a bar being incurred under the ſtatute of limitations; but not ſo where the poſſeſſion of one has been adverſe to the title by tenancy. 768, 769. v. Actual ouſter.

Teſtament.

Diſtinction between will and teſtament. v. Will.

Toll.

Toll.

Toll for corn malt ſhall be conſidered as corn; becauſe acts of parliament have ſo conſidered it, otherwiſe the ſpecification makes it a new thing; and therefore flour was not liable. 72.
Of a lighthouſe not rateable, becauſe the toll is not locally related to the pariſh. 78.
For toll traverſe a conſideration muſt be laid. 464.
Where a conſideration is laid you muſt prove it as laid; even in caſes where it was unneceſſary to have laid any. 464.
Conſideration of being bound to repair good, without alledging actual reparation. 465.
After verdict conſideration will be preſumed, either the ſame as laid, or a good one. 465.

Trial.

Slight cauſes of delay will not be allowed after notice given of trial. 58.
Where the evidence is poſitive, and greatly preponderates on one ſide, the court will not incline to grant a new trial in the firſt inſtance, but you may indict the witneſs of perjury. 87, 88.
Trial at bar will not be granted where the party applying refuſes to conſent to the uſual terms of mutual juſtice and convenience. 159.
Granted, and will be granted out of an iſſuable term upon proper occaſion. 159.

Trover.

1, Suppoſes a lawful coming by the goods demanded, and an unlawful converſion. 89.
Detention againſt lawful demand preſumes converſion. ibid.
2. Trover is good to recover where a felon has ſtolen goods, and changed them into notes, if the note clearly appears to be the product of the ſpecific goods; and the owner of the goods, who has proſecuted to conviction, and has omitted to pray reſtitution, ſhall recover them in trover, though ſeized into the hands of the King, by an action againſt the ſheriff. 89, 90.
3. *A.* buys plate of *B.* the defendant, and gives him a draft; for which *A.* gives receipt as for caſh. *A.* pawns the plate to *C.* the plaintiff, who was a pawnbroker, ſhewing him the receipt as evidence of his title, on which *C.* took the goods,

goods in pawn. The draft turned out afterward to be a bad one; for *A.* had no money with the banker. *A.* was tried on the ſtatute for procuring under falſe pretences on an indictment preferred by the defendant *B.*; he was convicted, *C.* the plaintiff producing the goods. *B.* the defendant, upon this took and detained them; *A.* brought his action of trover thereupon—And held, "that he ſhould "recover; for that the property was not changed as "againſt the right owner, either at common-law, or by "the ſtatute of *James* reſpecting pawnbrokers." 187.

4. *A.* the plaintiff agrees to exchange the Folly, his own veſſel, with the Roker, the plaintiffs, and to give twenty-five guineas to boot; and, if the Folly was loſt in the voyage ſhe was then upon, thirty guineas: Beſides the plaintiff paid a guinea earneſt.

Defendant wrote to excuſe himſelf, that he could not make the exchange becauſe he had ſold the veſſel; plaintiff tenders twenty-four guineas, deducting one for earneſt; defendant refuſes. Afterwards in another voyage the Folly is loſt, and plaintiff brings the action for the value. Held the action well lay for the delivery was complete by payment of the earneſt, and the defendant's detention of the veſſel afterward was tortious. 219 to 221.

5. Plea of general releaſe ſufficient in bar of trover. 323.

6. *A.* aſſigns to *B.* and *C. B.* ſells to *D.* who gives a promiſſory note payable in fourteen days; after this *D.* aſſigns to *E.* all his goods. The note never having been paid, *B.* refuſes to deliver. The poſſeſſion of the ſeller, after the agreement and note, is the poſſeſſion of the buyer, and trover will well lie for the goods, eſpecially as *B.* being deſired by *D.* to take back the goods, ſaid, "I will not, I "will have payment," which affirmed the ſale. 325, 326.

v. Larciny.

Truſtee.

Cannot vary the mode of ſale preſcribed. 66, 67. nor the ſecurity preſcribed. 492, 493.

Tythes.

Modus ſet up ſince the 13th of *Eliz.* binds not the ſucceſſor. 66.

Temporary compoſition requires notice to determine. 66.

Endowment of tythes without uſage fails. ibid.

Claim of more tythes than there are tytheable goods. ibid.

Miſpleader of a modus it ſeems produces a decree in kind but without prejudice. ibid.

Action for double damages for tythes, uſed as a method of trying the right, and not conſidered as a penal action. 232 to 234.

Undertaking.

Held ſo far revocable before ſigning, that an attorney, who had written but refuſed to ſign it, ſhould not be liable to action for non-performance. 193.

Univerſity.

The court will have an eye to its diſcipline, where it takes cognizance of a cauſe from it, as out of its juriſdiction 42. Vide Maſter and Fellows.

Uſage.

Good to explain doubtful words in a charter. 77.

Uſury.

Compenſation upon an uſurious contract held good from the the time of payment, to take the cauſe of action out of the ſtatute of limitations. 51.

Where the object of a contract is borrowing and lending of money at more than the legal intereſt, no ſhift, colour or contrivance, will take the agreement out of the ſtatute; but if the ſubſtance be a ſale or other fair tranſaction, and the party buying may pay whenever he pleaſes at a fair price, and has credit given him in the courſe of trade, but if he does not pay within the time, then he is to pay an advanced ſum of ſo much per cent. this will not be uſury becauſe it is contingent, and in the nature of a penalty for the delay, and a compenſation for the riſque. 595 to 600.

Vagabond.

Who he is, how to be puniſhed, and by whom. v. 85.

Variance.

Between judgment and writ of error, the addition in the writ being "Eſquire," and in the judgment "Gentleman." v. 272.

A Table of the Principal Matters.

Venue.

That not in tranſitory only but in local actions the court will change the venue, if there be an urgent call of juſtice, not otherwiſe to be anſwered. Per Lord *Mansfield*. 50.

After your plea pleaded, you are not to move to change it. 321.

The plaintiff has his election in tranſitory actions; the defendant cannot change to a county where the cauſe did not ariſe, except upon ſpecial circumſtances. 395.

Change not to be ſo granted as to operate unneceſſary delay. 395.

Verdict.

A verdict ſhall be ſet aſide for exceſſive damages, where the jury have gone out of the caſe. v. 28, 29.

Difference of opinion amongſt the jury, and they agree the majority ſhall decide—verdict good. 71.

Where the verdict is miſtaken in bar, form or mere circumſtance by the miſpriſion of the clerk it ſeems this may be amended; otherwiſe where it is a variance of ſubſtance, as to the point of law or form eſſential to maintaining the caſe. 147.

It ſeems where a ſpecial caſe has been reſerved, a new trial has been granted without previouſly ſetting aſide the verdict. 451.

Court muſt judge upon facts found. 573. v. Evidence.

Villenage.

The laſt confeſſion of villenage 335 years, from this preſent year 1776. v. p. 19. v. Slavery. v. *Harris's Juſtinian*, l. 1. tit. 3.

Wager.

Equal wager between parties to a cauſe touching its event, with a view to mutual indemnification in ſome degree againſt the loſs, held not a contempt of the court in which the cauſe was depending; not immoral; not illegal. 383 to 388.

Warrants.

To break open houſes under a general warrant for apprehending the authors, printers and publiſhers, of a ſeditious libel, without names of the offenders, is illegal. v. *Wilkes's* caſe. 17 to 20.

Warrant under due authority excuſes the officer, 236, otherwiſe where the perſon who iſſued the warrant had no authority over the matter.

A Table of the Principal Matters.

Warranty of Goods.

General warranty that an horſe is found, is without exception of ignorance of the ſeller at the time of ſale. 146.

Wheat.

If a man, who practices keeping of barley for the purpoſe of diſtilling contrary to the prohibition of the ſtatute, mixes wheat with it, he is liable to have both ſeized; (and was before the ſtatute had made expreſs proviſion) and ſetting up a mill for colour will not exempt him. 179 to 182.

Will.

Will operates by our law as an appointment of uſes, according to which the teſtator means the lands ſhould go after his death, and therefore muſt be of lands in poſſeſſion at the making of the will, unleſs he expreſsly ſays, (or whereof I ſhall be hereafter ſeized) and it is not like a ſubſtitution of an executor by teſtament of perſonal, or of univerſal heir, as to realty as by the Roman civil law; and therefore a new will does not with us neceſſarily import a revocation of the old. v. 574.

Where a fee paſſes without expreſs words of limitation. 95, 96, 100.

Intention to be found out from the whole of the will. 97.

A deviſe over ſhall take effect where a contingency, ſuppoſed, precedent has never happened. 97.

1. *T. M.* ſeized of lands in diverſe counties holden in common fee, and of certain cuſtomary lands in 1723, makes a ſettlement in conſideration of marriage to himſelf for life, remainder to truſtees for the uſual purpoſes, remainder to his heirs male by his wife, reverſion to himſelf in fee, with proviſion for raiſing portions for younger children.

After the marriage he purchaſes diverſe other lands freehold and copyhold, and in 1725 mortgages a part of his freehold, and in 1731, having four children, two of each ſex, makes his will, gives his jewels to his wife for life, remainder to his ſon *W.* and if he die without iſſue, remainder to his ſon *E.* abſolutely; like limitation of the furniture of his capital manſion-houſe—his perſonalty to be applied in payment of debts and legacies.

Directs his ſon to ſurrender the cuſtomary eſtates in borough Engliſh to his brother; gives to his youngeſt, *Edward*, the eſtates in gavel-kind in tail-male; remainder to the eldeſt ſon in tail-male; remainder to ſuch ſon as ſhall be born to the teſtator after his deceaſe: like limitation of his freehold eſtates in *M.* and *G*; only the elder preferred before the younger;

younger; and if it ſhall ſo happen that his ſaid ſons *W.* and *E.* and any after-born ſon ſhall did without iſſue-male of their bodies, then and in ſuch caſe, and for want of ſuch iſſue of his ſons then living, and of any ſon or ſons lawfully begotten and hereafter to be born, the reſt and reſidue not before diſpoſed to his brother *J. M.* for life, remainder to truſtees (for the uſual purpoſes), remainder to *J. M.* the younger for life, remainder to the heirs-male of his body; remainder to *C.* the ſecond ſon of his brother, with remainders as before; remainder to his own right heirs in fee.

And he appoints his wife executrix and guardian of the children together with her and his own brother.

Power to his eldeſt and alſo to his youngeſt ſon to make leaſes for payment of portions, and raiſing jointures, when they come into poſſeſſion reſpectively; and ſo, in like manner, to his brother, &c. and his heirs-male, as they ſhould reſpectively come into poſſeſſion.

Words relating to the after-born iſſue were interlined, and not noticed in the atteſtation.

No after-born iſſue came into being; nor any iſſue but thoſe at the time of making the will.

Held, that the deviſe over to his brother was good, either as an immediate deviſe of the reverſion under the ſettlement, after failure of iſſue of the marriage;

Or elſe as a remainder after eſtates-tail, by implication to after-born ſons of another marriage.

Or 3dly, as a deviſe upon a double contingency; namely, if my ſons by the now marriage die without iſſue, and if my ſons by this or any other marriage die without iſſue, then over to my brother, and the latter contingency having never happened, that the deviſe over ſhould be good. v. from 160 to 178.

The beſt rule in the conſtruction of wills, v. Conſtruction.

2. *J. L.* makes his will in 1748, being ſeiſed of chambers in Lincoln's Inn, and a conſiderable ſum of money ariſing from lands which were ſold under an act of parliament, and were to have been re-veſted in land, but were not, and he was tenant in tail, reverſion to himſelf, in fee under the ſettlement in the intended lands; and he deviſes to his dearly beloved friend Mrs. *F. H.* all his real and perſonal eſtate, whatſoever and wherefoever, ſubject only to two or three ſmall pecuniary legacies, one of which is to his niece and heir at law.—Afterwards in 1756 the jury find that he made another will in writing, duly executed, and atteſted by three ſubſcribing witneſſes, and that the diſpoſition of the ſaid will of 1756 was different from the will of 1748, but in what reſpects they know not; and what is become

of

of it they know not: and they further ſay, that they do not find the teſtator cancelled, or the defendant; the general deviſe deſtroyed it.

The Lord Chief Juſtice *De Grey*, Mr. Juſtice *Gould*, and Mr. Juſtice *Nares*, held this a revocation; and that the firſt will was barred by the ſecond; that the heir not claiming under either will was not bound to ſhew it, but the deviſee muſt ſhew the ſecond was not againſt her, and that the will being ſubſcribed by three witneſſes muſt be taken to have been of real eſtate, and therefore to be a revocation of the former real deviſe; and the difference found muſt be taken to be a general difference, or at leaſt would put the deviſee to her title, which if ſhe did not prove in what extent it ſubſiſted, would be bad for the whole for the uncertainty; for that the heir having a clear, certain, abſolute title, it muſt be defeated by a certainty, and the will which defeats it muſt appear to be the laſt will of the teſtator.

On the other hand, Mr. Juſtice *Blackſtone* and all the judges of the court of King's Bench were of opinion,

That the finding muſt be taken as it is, being as full as the jury could make it upon the evidence.

That, by the caſe of *Hitchins* and *Baſſet*, another will does not neceſſarily revoke the former; it may conſiſt with it. That a difference does not import a revocation; for it may be as to ſome particular not affecting the general ſcope of the will nor the title of the general deviſe; that when the deviſee ſhews a title by deviſe, that title is a clear certain title, no leſs than of the heir by deſcent; and muſt ſtand, as his did before, till certainty be ſhewn againſt it;

That the ſtatute of frauds meant to guard againſt all conſtructive deviſes, not reſulting from the neceſſary act of law, or the declared ſolemn intent of the party duly expreſſed and atteſted according to the ſtatute; and that therefore revocations, which were ſtrictly interpreted even at common law, and not extended by latitude of conſtruction to defeat an eſtabliſhed will, were not now to be implied and collected by conjecture, ſince the ſtatute. v. 282 to 300, and 558 to 576. And the Houſe of Lords affirmed the judgment of B. R. ibid.

3. Limitation to all and every my daughter and daughters, and the heirs of her and their bodies, and on failure of all and every the daughters aforeſaid, and all and every their iſſue, limitation over—held, they took croſs remainders, 443 to 450.

4. "In caſe my perſonal eſtate, which I have before deviſed to "my wife, ſhall not be ſufficient, I deviſe my lands in *A.* "for payment of debts: and, if not ſufficient, the reverſion "of my wife's jointure to be liable; all the reſt and reſi-"due of my real and perſonal eſtate I give to my wife;"

The

The perſonalty was ſufficient for payment of debts.

Held, that either the wife took the real eſtate as not deviſed from her at all, being only deviſed on a contingency which never happened of the perſonalty being inſufficient for payment of debts;

Or 2d, that there was a reſulting truſt for her benefit in ſo much of the real, as ſhould be ſurplus after payment of debts not ſatisfied by the perſonal. And that this in the event being the whole, ſhe was intitled to the whole. 452 to 455.

5. "Whereas my wife is now pregnant, if ſhe bring forth a "ſon, I deſire he may have my eſtate when he comes to "21 years, paying (certain annuities expreſſed in the "will): but if ſhe has a daughter, a moiety to my wife; the "other moiety to my two other daughters, ſhare and "ſhare alike; if either of them die before twenty-one, "then ſurvivorſhip to the daughter; but if both die before "twenty-one, then the whole to my wife."

No ſon was born, nor any daughter: the daughters in being died without iſſue under age.

Held, that the wife ſhould take the whole, as if the contingency of a ſon or daughter being born and dying as expreſſed above, had happened, the intent being, that on want of iſſue the wife ſhould take, whether on failure of ſuch as were expreſſed, after they ſhould have come into being, or on their never exiſting. 455—457.

6. *A.* makes his will in 1759, and at the ſame time executed and publiſhed an exact duplicate: the teſtator was a labouring man, and ſaid he did it to make his wife eaſy who was near her death, but that it was not a will to his liking. The duplicate was left with his daughter.

He afterwards ſends for his attorney, tears off the ſeals, and orders the witneſſes names to be cut out; which was done in his preſence. He made a new will the ſame day, with expreſs clauſe of revocation, and gave it the attorney to keep, ſaying he would not have the heir find it.

Afterwards, being in his ſenſes, he ſent for his ſecond will, and ordered the attorney to come and make a new one: the will is ſent; but before the attorney came, the teſtator was out of his ſenſes, and died the ſame day without making any other will.

The ſecond will was found cancelled after his death, together with the firſt cancelled, both in one paper: the duplicate of the firſt was found uncancelled in one of his drawers after his death, but uncertain when or how it came there;

Held, that the cancellation of the firſt will in his own poſſeſſion was a full and effectual revocation both of it and of the duplicate; both being but one will, and the duplicate out of his poſſeſſion: and farther, that the revocation of

the

the ſecond will did not in this caſe ſet up the firſt, the firſt not being ſimply revoked, but deſtroyed by the cancellation. 465 to 471.

7. *A.* in 1732 being ſeiſed of diverſe premiſſes, freehold and copyhold, and intitled to other copyhold as mortgagee, makes his will, and deviſes all his freehold and copyhold, &c. to his wife; afterwards he purchaſes the copyhold which he had as mortgagee, and in 1735 ſurrenders to uſes declared and to be declared by his laſt will and teſtament in writing. And in February 1736, he ſtrikes out of his will a legacy to the poor of *H*——, and enters a memorandum, atteſted by two witneſſes, that it was ſtruck out by his order and in his preſence, he having paid it in his life-time;

Held, that by the ſurrender the copyhold purchaſed after the will made, well paſſed, as amongſt the uſes which the teſtator in his will had ſaid were declared.

That as to the ſecond point, it was unneceſſary to conſider whether republication or not; nor equally clear; but that it ſeemed the ſtriking out of the legacy was a republication of the will as to the reſt not altered. 604 to 608.

Vide Deviſe, Double Legacy, Croſs Remainder, Revocation, Republication, Reſiduary Clauſe, Sweeping Clauſe, Codicil, Conſtruction, Executor, &c.

Witneſs.

Who may be a witneſs. v. 183.

A man may be received as a witneſs who proves his own turpitude: it goes not to his admiſſibility but his credit. 757—758.

Affidavit to put off trial for abſence of material —— That *A.* is a material witneſs in the cauſe, and is major of a regiment, which regiment is beyond ſea at ſuch a place, held bad—though perhaps it might have done, if there had appeared to have been merits. 187 to 188.

Affidavit to put off trial for want of a material —— muſt be full to the cauſe, and ſhew that you have ſuch a witneſs who is material to the cauſe, and that there are reaſonable hopes of producing him, if the trial be put off. v. 653. *et alibi*; and you ſhould be ready to admit neceſſary facts that only are of form to be proved by witneſſes. 769.

Words.

Moſt of the diſputes in the world rather about words than things. 176.

Affidavit that they the deponents nor any of them never received—held a good and ſufficient denial; and that if falſe, and they had received, the words were full enough to ſubject to an indictment of perjury. 275.
General words after ſpecial uſually refer to things *ejuſdem generis*, of the ſame nature with the antecedent. 324 and 325.

Writ.

Writs, double, not allowed by the court. 248.
Of enquiry—in a caſe to determine what was due from a maſter to his clerk; ſuggeſtion, that the jury at Guildhall were low and indigent and not proper judges, and therefore prayer, that it might be executed in London—diſcharged. 65.
Of error—where faulty, whether to amend, or ſue out a new one. 272.
Ought not to be diſturbed on motion. 653, 654.
Sued out before judgment. v. Judgment.

FINIS.