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REPORTS

OF

CASES

ARGUED AND ADJUDGED

IN THE

King's Courts at Westminster.

By GEORGE WILSON, Esq.
SERJEANT AT LAW.

IN THREE VOLUMES.

VOL. II.

CONTAINING

CASES in the Court of COMMON PLEAS, &c. beginning in HILARY TERM in the 26th Year of the Reign of KING GEORGE the SECOND, and ending in TRINITY TERM in the 9th Year of the Reign of His preſent Majeſty KING GEORGE the THIRD.

THE THIRD EDITION:

With General and Improved TABLES of the PRINCIPAL MATTERS, and of the NAMES of the CASES, ſome Account of the Lords the Judges, Serjeants at Law, and moſt eminent Counſel attending the Bar during the Period of theſe Reports, with other Alterations and Additions.

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HILARY TERM,

26 *Geo.* II. 1753.

Stevens, of the Demiſe of Wiſe, *verſus* Tyrell. C. B.

A cuſtom for a feme covert to ſurrender her copyhold lands without the aſſent of her huſband is bad.

IN an ejectment of copyhold lands this caſe was reſerved at the aſſizes for the opinion of the court, which ſtates, That *J. Jennings*, being ſeiſed in fee according to the cuſtom of the manor of the copyhold lands in queſtion, died, and the ſame deſcended to his heir at law *Frances* the wife of *William Geary*, ſubject to *J. Jennings*'s widow *Henrietta*'s eſtate; that *Frances* the wife of *William Geary* was admitted, and being ſolely examined, ſurrendered the premiſes to the uſe of herſelf for life, remainder to *Henry Wiſe* in fee; and that *William Geary* her huſband then living did not join with her, that *Henry Wiſe* was admitted to remainder in fee, that *William Geary* died in 1739, and *Henrietta* the widow is alſo dead; and that there is a cuſtom in this manor that a feme covert ſeiſed in fee of copyland lands may diſpoſe of her eſtate without her huſband's joining. A verdict was taken for the plaintiff, who claims under the ſole ſurrender of *Frances* the feme covert, which is void if the cuſtom be not a good one.

After ſeveral arguments, the whole court were clearly of opinion that this was a bad cuſtom; and *Willes* Lord C. J. in giving the judgment of the court ſaid, that Juſtice *Burnett* (who was now lately dead) was of the ſame opinion.

It is not ſtated whether the feme covert by the cuſtom was to be ſolely and ſecretly examined, though in fact ſhe was ſo; nor is it ſtated that the huſband by the cuſtom was to conſent though he did not join, and therefore it muſt be taken for granted he did not conſent.

In ſupport of the cuſtom was cited 2 *Danv. Abr.* 430. *pl.* 10. where it is ſaid that it is a good cuſtom in a copyhold manor, that a feme covert, *with or without the conſent* of her huſband, may deviſe her copyhold lands to her huſband, or whom ſhe

pleaſes; but this is not rightly abridged, and ſhews what little credit ought to be given to abridgments. The caſe abridged is anonymous in *Moor* 123. *pl.* 268. and the cuſtom there found on a ſpecial verdict is, that a feme covert *with the aſſent* of her huſband may deviſe her copyhold lands to her huſband or any other, which the court thought was not an unreaſonable cuſtom; but that is not the preſent caſe, which muſt be taken to be without the aſſent of the huſband.

Dyer 363. b. Davis 30. 50. b.

3 Leon. 81. Godb. 143.

It was ſaid, that if a feme covert levies a fine it ſhall bind her and her heirs, if the huſband does not enter and avoid the eſtate of the conuſee, becauſe ſhe was examined, and had power over the land, 10 *Rep.* 43. *a.* But the reaſon given in *Hob.* 225. is, that ſhe is eſtopped to ſay ſhe was covert; and a fine levied by a feme covert of freehold lands was compared to a ſurrender by her in fee of copyhold lands entailed, whereof no fine can be levied, and which would bar the iſſue; and this at firſt ſeemed to have ſome weight with the court; but at length they reſolved that this cuſtom cannot be ſuppoſed to have had any reaſonable commencement, that it is contrary to law and the policy of the nation, and tends to make wives independent of their huſbands; that no tolerable reaſon was given at the bar for this cuſtom. And the verdict was ſet aſide, and judgment given for defendant, the heir at law of *Frances* the wife of *William Geary*.

Watſon Demandant *et* Lockley Tenant. C. B.

Recovery amended in the return of the writ of ſeiſin.

THE writ of ſeiſin upon a common recovery was teſted *ſecundo die Junii anno* 13 *Georgii*, returnable *tres Trin.* The return made by the ſheriff was thus, "*Virtute iſtius brevis mihi* "*directi duodecimo die Junii anno infraſcripto habere feci infra-* "*nominato Willielmo Watſon plenariam ſeiſinam de acris infraſcriptis* "*cum pertinentiis prout interius mihi præcipitur Johannes Lock* "*miles, & Willielmus Ogborne miles, vicecomes Middleſexiæ.*" Now the words *anno infraſcripto* refer to the teſte of the writ, which was in the 13th year of K. *Geo.* 1., but the 12th of *June* was in the firſt year of his preſent Majeſty; ſo the court, upon reading the writ and the return, ordered the year to be amended as a miſpriſion of the clerk without any rule to ſhew cauſe.

EASTER TERM,

26 *Geo.* II. 1753.

Roberts *verſus* Pierſon. C. B.

THE plaintiff, who is a married woman, entered into a bond as ſecurity for the defendant for 100*l.*; and by way of counter-ſecurity, the defendant executed a bond and warrant of attorney to confeſs judgment to her. She having been obliged to pay 50*l.* for the defendant, has entered up the judgment upon the warrant of attorney, and taken out execution thereupon. It was now moved to ſet the judgment aſide, and to have the money paid into the hands of the ſheriff reſtored to the defendant.

A judgment confeſſed to a feme covert is void, and ſo is her bond.

Per curiam—A judgment at the ſuit of a feme covert is void, and ſo is her bond; and the money ſhe paid for the defendant was her huſband's, and he may ſue for it; ſo the judgment muſt be ſet aſide, and the money in the ſheriff's hands reſtored.

Whereupon the parties compromiſed the matter, and a rule was entered into by conſent that no action ſhould be brought on either ſide.

Scott *verſus* Dixon & al. C. B.

ACTION of aſſault and falſe impriſonment. The defendant pleads Not guilty as to all the treſpaſs in the declaration except the aſſault, impriſonment, and detaining the plaintiff in priſon; and as to that he pleads, that *Dinah Scott* ſued out of this court a writ of *capias ad reſpondendum*, directed to the ſheriff of *Camberland* to take *Jonathan Scott* (the now plaintiff) to anſwer *Dinah Scott* in a plea of treſpaſs, and alſo of a plea of treſpaſs upon the caſe upon promiſes, *&c.*, which writ was delivered to the ſheriff, who made a warrant thereupon to two of the defendants *James* and *William Scott*, and the other defendant *Dixon* (who is the keeper of the county gaol) aſſiſted, which is the ſame aſſault and impriſonment complained of.

Aſſault and impriſonment. Defendant juſtifies under a capias ad reſpondendum. Plaintiff replies the defendant releaſed him from the arreſt and afterwards arreſted him; and prays judgment, becauſe the defendant has acknowledged the treſpaſs; this is naught, and the plaintiff ought to have made a new aſſignment.

The plaintiff replies, and admits the proceſs iſſued to the ſheriff of *Cumberland*, and that he made a warrant thereupon directed to two of the defendants, who arreſted the plaintiff thereby, and delivered him to the other defendant *Dixon* the gaoler, who releaſed him from the arreſt, and permitted him to go at large out of his cuſtody, and that afterwards the defendants took him again; wherefore, as the defendants have acknowledged the ſaid aſſault and impriſonment, he prays judgment and his damages; defendant demurs generally, and plaintiff joins in demurrer.

It was objected for the defendants, that the replication was bad, becauſe it does not confeſs and avoid, nor traverſe the material facts in the defendant's plea, which is a complete juſtification of the aſſault and impriſonment in the declaration, which facts are all admitted, and none of them denied or avoided; and if there were two aſſaults and impriſonment, the plaintiff ought to have made a new aſſignment; as in treſpaſs where the defendant juſtifies under a licence for the putting in of his cattle into the plaintiff's cloſe, the plaintiff may come and reply, that it is very true I did licence you at the time you ſay, but you put in your cattle at another time without my leave, which muſt be anſwered by a juſtification, or Not guilty: ſo in the caſe of a way.

For the plaintiff it was ſaid, that the replication was well enough, and the defendant might have denied that he permitted the plaintiff to go at large after the arreſt, and a new aſſignment is not neceſſary; but if it is, it ought to have been ſhewn for ſpecial cauſe of demurrer.

In reply for the defendant it was ſaid, if he had taken iſſue upon the latter part of the replication, it would have been a departure.

Curia—The defendant's plea is a complete anſwer to, and juſtification of, the treſpaſs, aſſault, and impriſonment laid in the declaration, which the plaintiff has admitted to be true: now if there was any aſſault and impriſonment beſides that which is juſtified, the plaintiff ought to have ſet it forth by way of new aſſignment; but inſtead of doing ſo, he has only ſaid that the defendant *Dixon* the gaoler diſcharged him from the arreſt, and the defendants afterwards took him; wherefore inaſmuch as the ſaid defendant has acknowledged the ſaid treſpaſs, he prays judgment and his damages. Now it is moſt plain the treſpaſs acknowledged is the treſpaſs in the declaration, which has been fully juſtified by the plea; and therefore it is abſurd for the plaintiff to pray judgment of the treſpaſs acknowledged, ſeeing the defendant has confeſſed, and avoided it. And they inclined to give judgment

Grn. Car. 228.

judgment for the defendant, becauſe they thought the replication was naught for want of a novel aſſignment. *Sed adjournatur.*

Serjeant *Poole* for the defendant, Serjeant *Wynne* for the plaintiff.

Adams *verſus* Freeman. B. R.

ASSAULT and impriſonment. Defendant juſtifies under a *capias* iſſued out of a baſe court in an action of debt, and ſhews that a plaint was levied, & *taliter proceſſum fuit* that a *capias* iſſued, &c. Plaintiff demurs; and it was objected, that the plea was naught, becauſe it does not appear that any ſummons iſſued before the *capias*. *Sed per totam curiam, taliter proceſſum fuit* that a *capias* iſſued is well enough, and we will ſuppoſe every thing regular below. Judgment for the defendant.

Impriſonment; defendant juſtifies under a capias in debt in a baſe court, without ſhewing any ſummons, and well enough.

Ante, Murray and Wilſon.

Cooke & al. *verſus* Pettit. C. B.

DEBT upon a bond brought by the plaintiffs as churchwardens of the pariſh of *A.* The defendant craves *oyer* of the bond, and ſets out the condition, which is, that if he keeps the pariſh harmleſs, and maintain a certain baſtard child, then the obligation to be void, otherwiſe to remain in force; and then pleads *non damnificatus*. The plaintiffs reply, that the defendant did not provide for and maintain the child from ſuch a day till ſuch a day, and that the pariſh have been obliged to pay 5 *l.* to maintain the child during that time; and this they are ready to verify; wherefore they pray judgment. Rejoinder, that the defendant provided for the child during that time; and iſſue thereupon, which was found for the plaintiffs. And in arreſt of judgment it was objected for the defendant, that it does not appear upon the record that the child was born in the pariſh of *A.*, and therefore the pariſh is not chargeable, and could not be damnified; and cited 2 *Saund.* 80. *Richards & al.* v. *Hodges*, where it appears on the record in that caſe, that the baſtard child was born in the pariſh: and it was ſaid, that orders of baſtardy are frequently quaſhed in *B. R.*, when they do not ſtate that the child was born in the pariſh.

Debt upon a bond to ſave the pariſh harmleſs from keeping a baſtard child. Plea, Non damnificatus. Replication, plaintiffs paid 5 l. to keep the child from ſuch a time to ſuch a time. Rejoinder, that defendant maintained it for that time; iſſue and verdict for plaintiff. Objected, it does not appear the child was born in the pariſh, but over-ruled.

To this it was anſwered, that it appears upon the record that the plaintiffs are churchwardens of the pariſh of *A.*, and the court will intend that it was proved at the trial that the baſtard child was born in the pariſh of *A.* And of that opinion was Juſtice *Gundry*, (only in court,) and gave judgment for the plaintiffs.

On the other ſide it was inſiſted, that the executor is not entitled to coſts upon the rule, it being merely perſonal; and if there had been a verdict for the defendant he could have had no coſts; and there can go no attachment againſt an executor for non-payment of coſts in this caſe, nor will any action lie for coſts in this caſe on either ſide; and of that opinion was the court.

MICHAELMAS TERM,

27 Geo. II. 1753.

Long *verſus* Jackſon. C. B.

Departure. New matter may be rejoined by the defendant to explain or fortify his bar.

DEBT upon a bond: the defendant craves *oyer*, and ſets out the condition, That whereas *A. B.* had put himſelf apprentice to the plaintiff: Now the condition of this obligation is ſuch, that if the ſaid *A. B.* ſhall not run away or depart from his ſaid maſter during the time of his apprenticeſhip, then this obligation to be void, otherwiſe to remain in full force; and avers that *A. B.* did not run away or depart from the plaintiff during the term of his apprenticeſhip. The plaintiff replies, that *A. B.* put himſelf apprentice with the plaintiff, to ſerve him as ſuch from ſuch a day for the term of ſeven years, and aſſigns for a breach that *A. B* departed from his ſervice before the end of the ſaid term of ſeven years. The defendant rejoins, that the agreement between the plaintiff, defendant, and *A. B.*, was, that *A. B.* ſhould ſerve the plaintiff only for the term of five years, and concludes with an averment. The plaintiff demurs, and aſſigns for cauſe, that the matter in the defendant's rejoinder is a departure from his plea.

Upon the argument it was objected for the plaintiff, *1ſt*, That here is a departure; and, *2dly*, That the rejoinder ought to have concluded to the country.

Co. Litt. 304. a.

For the defendant it was ſaid, as to the firſt objection, That although it be true in debt upon a bond where the defendant

pleads conditions performed, the plaintiff replies and aſſigns a breach, and the defendant rejoins new matter in *excuſe*, that this is a departure; yet it is as true that the defendant may introduce new matter *in explanation or fortification* of his bar, and it will be no departure: and this is the preſent caſe; for it does not appear by the condition ſet out, or upon the defendant's plea, for how long the term was to be; and this rejoinder is only an *explanation or fortification* of the bar, and not new matter of *excuſe*.

As to the ſecond objection, it was anſwered for the defendant, that the plaintiff in his replication diſcloſes new matter, that the term was for ſeven years; he might have replied to the country that *A. B.* departed during the term, and then that would have come before the jury, whether the term was for ſeven years; but not having done ſo, but introduced new matter which did not appear before, the defendant has fully anſwered that new matter, and concluded rightly with an averment; and cited *Vere* v. *Smith*, 1 *Ven.* 121. 2 *Lev.* 5. S. C. as directly in the point to this objection; the defendant had no occaſion to diſcloſe in his plea that the term was for five years, as no mention was made thereof in the condition of the bond. The court overruled both the objections, and gave judgment for the defendant. Serjeant *Agar* for the plaintiff, Serjeant *Poole* for the defendant.

Julian *verſus* Shobrooke. C. B.

A CTION upon a bill of exchange brought by the payee againſt the acceptor, who only accepted it in a conditional manner; *viz.* upon account of the ſhip *Thetis* when in caſh for the ſaid veſſel's cargo; and the plaintiff avers in his declaration that at the day when the bill became payable the defendant was in caſh for the ſaid ſhip's cargo. Upon *non aſſumpſit* there was a verdict for the plaintiff; and now Serjeant *Agar* in arreſt of judgment objected that the defendant was not liable by this conditional acceptance. *Sed per curiam*—The objection was over-ruled; and they ſaid there is a difference between this ſort of acceptance when the bill is drawn upon the perſon, and where it is drawn upon goods; and it is now ſettled that a parol acceptance of a bill of exchange is ſufficient to charge the acceptor. 2 *Stra.* 1009. 1152.

A conditional acceptance of a bill of exchange is good, and ſo is a parol acceptance.

Anonymous. C. B.

Nil debet to a bond is bad on a general demurrer.

DEBT upon a bond, *nil debet*, and a general demurrer: it was inſiſted by Serjeant *Draper* for the defendant, that *nil debet* to a bond was good upon a general demurrer, and was only a jeofail and matter of form; that after a verdict it would make a final end between the parties, let the verdict be which way it will. *Sed per curiam*—It is nought upon a general demurrer, though perhaps it might be helped after a verdict. Judgment for the plaintiff.

Bell *verſus* Simpſon. C. B.

An award helped after a verdict.

DEBT upon an award, whereby it was awarded that *Simpſon* ſhould pay *Bell* 22 *l.*, and that they ſhould give mutual releaſes of all actions and demands until the date of the ſaid recited bond of arbitration. In arreſt of judgment after a verdict it was objected by Serjeant *Poole* for the defendant, that it does not appear in the declaration, or in any part of this record, that there ever was any bond of arbitration, ſo that it is impoſſible to ſay till what time this award makes an end of matters in difference between the parties, and for any thing that appears this might be a parol ſubmiſſion. *Curia*—The defendant has pleaded no award; the plaintiff has replied, and aſſigned a breach for non-payment of the money; this might have perhaps been a good objection at the trial, but after a verdict we will ſuppoſe that the arbitration bond was ſhewn at the trial, and was agreeable to the releaſe; ſo there muſt be judgment for the plaintiff. Serjeant *Willes* for the plaintiff.

HILARY TERM,

27 *Geo.* II. 1754.

Everall *verſus* Maſon, a Priſoner. C. B.

DEBT upon a judgment: the defendant appeared by attorney and pleaded *nul tiel record*, and iſſue thereupon *quod habetur tale recordum*; the plaintiff ſigned judgment for non-payment of the iſſue; and now it was moved to ſet it aſide, for that a priſoner is not obliged to pay for the iſſue-book; but by all the ſecondaries then in court it was reported that the practice is, where a priſoner appears by an attorney he ſhall pay for the iſſue, or judgment may be ſigned; otherwiſe it is where he appears in perſon. *Curia*—If this had been an iſſue to the country we would have ſet aſide the judgment upon paying the coſts of the motion, and for the iſſue; for we will not let final judgment go where the merits have not been tried, and where the plaintiff cannot ſuffer any inconvenience by any affected delay, and here he has the defendant's body in priſon; but as this is debt upon a judgment, there is no doubt but there is ſuch a judgment; ſo there is nothing of merits to be tried, and the judgment muſt ſtand.

If a priſoner appears in perſon he is not bound to pay for the iſſue; otherwiſe if he appears by attorney.

Simmons, Vicar of Kendall, *verſus* Langhorne. C. B.

DEBT upon a bond: the defendant craves *oyer* thereof, and ſets out the condition: Whereas the inhabitants of *Selſide* have threatened to ſue *Simmons* for nominating *William Langhorne* to be curate of *Selſide* chapel in the pariſh of *Kendall*: Now the condition of this obligation is ſuch, that if the above-bounden *William Langhorne* ſhall ſave harmleſs and indemnified the ſaid *Thomas Simmons* from all damages, expences, and ſums of money, which the ſaid *Thomas Simmons* or his executors ſhall be obliged to pay by reaſon of the ſaid *Thomas Simmons*'s making ſuch nomination, or ſhall ſave him harmleſs and indemnified from all ſuits, *&c.* by reaſon thereof, or, *&c.* then this obligation to be void,

Debt on bond to ſave harmleſs from expences by reaſon of naming one to a curacy, or from ſuits by reaſon thereof. Non damnificatus; plaintiff replies, and aſſigns for breach that he was obliged to pay ſuch a ſum by reaſon of ſuch nomination, but does not ſay how he was obliged; and well enough.

void, otherwiſe, &c. and pleads *non damnificatus*: the plaintiff replies, and aſſigns for breach that he was obliged to pay and did pay ſo much money by reaſon of ſuch nomination of *Thomas Langhorne* to the ſaid curacy of *Selſide*: the defendant demurs generally, and the plaintiff joins in demurrer.

It was objected by Serjeant *Poole* for the defendant, that the replication is not iſſuable; that the breach aſſigned is ill, becauſe the plaintiff only ſays he has been obliged to pay, and did pay ſo much money by reaſon of ſuch nomination of *Langhorne* to the curacy, but does not ſay *how he was obliged to pay it*, whether by ſuit, or how, and the condition is to ſave him harmleſs from ſuits; and cited *Cro. Car.* 363. *Bro.* tit. *Condition, pl.* 36. 2 *Bulſ.* 115. *Reeve* v. *Harris.* 2 *Vent.* 261. *Lutw.* 470. 1 *Brown's Ent.* 194. *Tomſon's Ent.* 145. *Winch. Ent.* 271. 375. 2 *Saund.* 81. 1 *Saund.* 114.

On the other ſide it was anſwered by Serjeant *Draper*, that ſince all the caſes cited the *ſtat.* 4 & 5 *Ann.* for amendment of the law was made, and if the breach be ill aſſigned, it is only in *form* not in *ſubſtance*, and this is upon a general demurrer; but he inſiſted the breach was well aſſigned and iſſuable; for where the condition is in the disjunctive, as it is here, if any one breach be aſſigned, *that* is ſufficient; and here it is aſſigned in the very words of the condition, That the plaintiff was obliged to pay and did pay ſo much money by reaſon of ſuch nomination of *Langhorne* to the curacy; and there is no occaſion to ſay how he was obliged to pay it, whether by ſuit in Chancery, (which was the truth,) or how otherwiſe.

Curia—The objection ought not to prevail, for this is only matter of *form*; but if it was matter of *ſubſtance*, the breach is well enough aſſigned and iſſuable, and it might be tried by the country whether the plaintiff has been damaged by reaſon of the nomination to the curacy. Judgment for the plaintiff *per tot. cur.*

In *Hilary* vacation Mr. Juſtice *Gundry* died upon the weſtern circuit, and Lord Chief Juſtice *Lee* died at *Lamden* about the ſame time.

EASTER TERM,

27 *Geo.* II. 1754.

THIS term began upon the firſt day of *May*: upon the ſecond of *May*, Sir *Dudley Ryder*, knt. the Attorney-General, and the honourable *Henry Bathurſt* eſq. were called to the degree of ſerjeants at law, and the ſame day kept their feaſt in *Lincoln's Inn* hall; the former was appointed Lord Chief Juſtice of the King's Bench, and the latter a Juſtice of the Common Pleas, and took their places in the reſpective courts on *Monday*, *May* 6, 1754.

Roe, of the Demiſe of Jeffereys & al. *verſus* Hen. Hicks Mil. & al. C. B.

EJECTMENT: verdict for the plaintiff ſubject to the opinion of the court upon this caſe: *Joſeph Jeffereys* being ſeiſed in fee of the copyhold lands in queſtion, (which he held of the manor of *Higwell*, whereof the defendant Sir *H. Hicks* is lord,) by his will, dated in *October* 1746, deviſed the ſame in fee to *Elizabeth Jeffereys*, and ſurrendered the ſame to the uſe of his will; that upon the 19th of *March* 1752, *Elizabeth Jeffereys* was tried and convicted for the murder of the teſtator, and was afterwards hanged; that the teſtator died ſeiſed, and *Eliz. Jeffereys* was never admitted tenant, nor ever did any act to ſhew ſhe was the lord's tenant; that Sir *H. Hicks* never entered, but the homage preſented the attainder of *Eliz. Jeffereys*, and the premiſes in queſtion have been granted to the defendants, as being forfeited to the lord by the attainder. The leſſors of the plaintiff claim one as heir at law to the deviſor, and the other as heir of *Eliz. Jeffereys*, and the defendants as lord of the manor and purchaſors under him. Three queſtions were made upon this caſe, 1*ſt*, Whether the lands were forfeited to the lord? 2*dly*, Whether the ſurrender to the uſe of *Eliz. Jeffereys* did not prevent the deſcent to the teſtator's heir at law? and, 3*dly*, Whether the attainder did not hinder the deſcent to her heir?

A ſurrender to one who is convicted of felony and hanged before admittance, the lands are not forfeited to the lord, but deſcend to the heir of the ſurrenderor.

But upon the argument, the three queſtions were reduced to one, to wit, Whether Miſs *Jeffereys* by the will and ſurrender had ſuch eſtate or intereſt in the premiſes as ſhe could forfeit to the

the lord of the manor? for if she had not, either the heir of the deviſor, or the heir of Miſs *Jeffereys*, will have title.

It was argued by Serjeant *Willes* for the plaintiff, that the heir at law of the deviſor had title, and that nothing was ever in Miſs *Jeffereys*, and that by the ſurrender alone without admiſſion ſhe never was tenant to the lord either in law or in deed; and that before admiſſion a purchaſor of copyhold lands cannot bring an ejectment for them, as an heir who is by deſcent may do; and the reaſon is, becauſe the admiſſion of the anceſtor is, in law, conſidered as the admiſſion of the heir to many purpoſes; but the admiſſion of the ſurrenderor is not the admiſſion of the ſurrenderee, and the ſurrenderee cannot do any legal act before admiſſion; there never was any privity between Miſs *Jeffereys* and the lord, ſhe never had any eſtate in the lands, and it is abſurd to ſay ſhe forfeited what ſhe never had; the eſtate deſcended to the deviſor's heir, who, in ſuppoſition of law, was the tenant to the lord immediately upon the death of the deviſor. *Cro. El.* 349. *Yelv.* 144, 145. 2 *Bulſt. Foord* v. *Hoſkins*. Theſe caſes prove that the ſurrenderee has neither *jus in re* nor *ad rem* before his admittance.

For the defendants it was admitted by Serjeant *Prime*, that if Miſs *Jeffereys* had nothing in her, neither *jus in re* nor *ad rem*, ſhe certainly could forfeit nothing. But he inſiſted that upon the death of her uncle the deviſor, and before her attainder, ſhe had a capacity to take under the will and ſurrender, and had a right to be admitted tenant, although ſhe would have forfeited upon being convicted; for a perſon may have a capacity to take, though not to hold, 1 *Inſt.* 2. *a. b.* and a perſon incapable to take for himſelf ſhall be capable and preſumed to take for the benefit of the crown, ſo may Miſs *Jeffereys* be preſumed to take for the benefit of the lord.

But it is objected ſhe was never admitted, and ſhe could not be tenant without it. In anſwer to this, ſhe certainly had a right from the inſtant the deviſor died, and after admittance could recover the profits and rent from the time of his death; and to ſay the heir ſhall have the profits until the deviſee ſhall be admitted is very ſtrange. Miſs *Jeffereys* certainly had *jus ad rem*, for upon the will and ſurrender the lord was bound to admit her upon that title.

Suppoſe a ſurrender be made to the uſe of *J. S.*, and the lord receives the ſurrender, but refuſes to hold a court to admit *J. S.*, and inſtead thereof enters and takes the profits, the ſurrenderee *J. S.* ſhall upon this title maintain an ejectment againſt the lord without any admittance, for the lord ſhall not take advantage of his own wrong; this could not be if there was no title in a ſurrenderee before admittance (this was ſaid *arguendo*, and I heard no caſe cited to ſupport it; *ideo quære*).

Upon

Upon the death of the deviſor before the attainder, the heir at law could not have maintained an ejectment, unleſs Miſs *Jefferey's* in the Lords' Court had firſt refuſed to accept, and be admitted tenant.

Berneford v. *Packington*, 1 *Leon.* 1. he cited as a caſe in point; where the grandfather of the plaintiff died ſeiſed in fee of a copyhold, leaving a widow who was admitted to her free-bench of the whole by the cuſtom, and a ſon *A.*, who in his mother's life was convicted of felony; and this was held to be a forfeiture, though *A.* was never admitted, and though the lord could not ſeiſe during the widow's life.

Curia—The ſingle queſtion is, Whether if a man ſurrenders a copyhold to one who is attainted and hanged before admittance, the lands ſhall be forfeited to the lord?

Miſs *Jefferey's* never entered, never was admitted, nor ever did any act to ſhew ſhe was tenant; and a ſurrender and admittance make but one conveyance, ſo how could the right heir loſe the eſtate?

It is ſaid for the defendant, it is otherwiſe in the caſe of the heir who is *in* by deſcent, and that he can bring an ejectment before admittance. This is very true; but a ſurrenderee cannot.

It is ſaid that a ſurrenderee may recover the meſne profits from the time of the ſurrender. That is true, after he is once admitted; and ſo may a feoffee from the date of the feoffment after livery and ſeiſin, and a bargainee after inrolment. The reaſon is, becauſe they are conſidered as one conveyance.

A will and ſurrender to the uſe thereof would not be ſufficient to maintain an ejectment againſt the heir at law.

If the lord was to accept a ſurrender, and the ſurrenderee enter thereupon, and afterward the lord was to diſſeiſe him before admittance, an action lies againſt the lord, becauſe he ſhall not take advantage of his own wrong.

As to the caſe 1 *Leon.* 1. the anſwer to it is, that the heir at law was *in* of his reverſion, which differs totally from this caſe. The eſtate, upon the death of the deviſor, deſcended to his heir, who is the plaintiff's leſſor in the firſt demiſe; and he muſt be conſidered in law as tenant to the lord until ſomebody elſe be admitted.

In the caſe of a deviſe of a copyhold, nothing veſts in the deviſee or ſurrenderee, nor in the lord; and until admittance, the eſtate

admittance is as neceſſary to a ſurrender, as inrolment to a bargain and ſale, or livery to a feoffment.

Note; The whole court inclined to give judgment for the plaintiff upon this firſt argument, but gave no abſolute opinion. *Adjournatur. Vide poſt.*

TRINITY TERM,

27 & 28 *Geo.* II. 1754.

Roe, of the Demiſe of Jeffereys, & al. *verſus* Hicks & al. C. B.

THIS caſe was argued a ſecond time this term, when the court was ſtill of opinion for the plaintiff, That Miſs *Jeffereys* had no legal intereſt in the eſtate, ſo could have no legal remedy to recover it; and having no legal *jus in re* nor *ad rem*, could not forfeit any thing.

Waldock *verſus* Cooper. C. B.

In a baſe court the declaration muſt alledge that the goods were ſold and delivered within the juriſdiction, as well as that the defendant promiſed within it.

WRIT of falſe judgment brought by *Waldock* againſt *Cooper* upon a judgment in the borough court of *Ayleſbury*. *Cooper* being plaintiff below, declares that *Waldock* was indebted to him at *Ayleſbury* for divers goods ſold and delivered by him to *Waldock* (not ſaying that they were ſold and delivered *there*, or within the juriſdiction); and being ſo indebted, he the ſaid *Waldock* promiſed within the juriſdiction to pay. Upon *non aſſumpſit*, there was a verdict and judgment for the plaintiff below. And now it was objected, that the declaration does not alledge that the goods were *ſold and delivered within the juriſdiction*, but only

HILARY TERM,

28 *Geo.* II. 1755.

Pendock, of the Deviſe of Mackender, *verſus* Mackender. C. B.

One convicted of petit larceny and whipped cannot be a witneſs. And it is the crime and not the puniſhment which makes a man infamous.

THIS is an ejectment for lands in *Kent*. The ſubſtance of the caſe reſerved at the aſſizes for the opinion of the court is ſhortly this: That *J. M.* being ſeiſed of the lands in queſtion, by his will executed in *September* 1750, deviſed the lands to the defendant; that there were three witneſſes to the will, *viz. Thomas Turner*, *Joſ. Jeffery*, and another; that *Joſ. Jeffery*, one of the witneſſes, before the time of atteſtation thereof, was indicted, tried, and convicted for ſtealing a ſheep, and was found guilty to the value of ten pence, and had judgment of whipping.

The plaintiff claims as heir at law to the teſtator; and therefore the ſingle queſtion is, Whether one convicted and whipped for petit larceny be a competent witneſs within the ſtatute of frauds and perjuries.

After three arguments at the bar, the whole court were clearly of opinion that *Joſeph Jeffery* was not a competent witneſs, and laid it down as a rule, that it is the crime that creates the infamy, and takes away a man's competency, and not the puniſhment for it; and it is abſurd and ridiculous to ſay it is the puniſhment that creates the infamy.

5 Mod. 75.

The pillory has always been looked upon as infamous, and to take away a man's competency as a witneſs; but to put one caſe (amongſt many that might be put) to ſhew this is a very abſurd notion, is ſufficient: if a man was convicted upon the *ſtat.* 4 *W.* & *M.* againſt deer-ſtealing, there is a penalty of 30*l.* to be levied by diſtreſs, and if he has no diſtreſs, he is to be put in the pillory; ſo that if the pillory be infamous, the perſon convicted (according to this notion) will be ſo, if he has not 30*l.*, but if he has 30*l.* he will not be infamous.

In the preſent caſe both the crime and puniſhment are infamous; and he that ſteals a penny has as wicked a mind as he that ſteals a larger ſum, if not a more wicked mind, for he has the leſs temptation. Petit larceny is felony, 1 *Hawk.* 95. *ſ.* 36. And no caſe has been cited where a perſon convicted thereof was ever admitted to be a witneſs. Judgment for the plaintiff *per totam curiam.*

3 Inſt. 218. 1 Hale 503. 2 Hale 277. 2 Bulſ. 154. Co. Litt. 158. a.

Armſtrong, of the Deviſe of Neve, *verſus* Wolſey. C. B.

EJECTMENT, tried at *Norwich* before *Parker*, Ch. Baron, who reſerved this ſhort caſe for the opinion of the court. *A. B.* being in poſſeſſion of the lands in queſtion, levied a fine *ſur conuſans de droit come ceo*, &c. with proclamations to the conuſee and his heirs, in the 6th year of the preſent King, without any conſideration expreſſed, and without declaring any uſe thereof; nor was it proved that the conuſee was ever in poſſeſſion.

So that the ſingle queſtion is, Whether the fine ſhall enure to the uſe of the conuſor or the conuſee? And after two arguments, the court was unanimous, and gave judgment for the plaintiff, who claimed as heir of the conuſor.

A fine levied without any conſideration or uſes declared ſhall enure to the old uſe in whomſoever it was.

Curia—In the caſe of a fine *come ceo*, &c. where no uſes are declared, whether the conuſor be in poſſeſſion, or the fine be of a reverſion, it ſhall enure to the old uſes, and the conuſor ſhall be *in* of the old uſe; and although it paſſes nothing, yet after five years and non-claim it will operate as a bar.

And in the caſe of a recovery ſuffered, the ſame ſhall enure to the uſe of him who ſuffers it, (who is commonly the vouchee,) if no uſes be declared; but he gains a new eſtate to him and his heirs general; and although before the recovery he was ſeiſed *ex parte maternâ*, yet afterwards the eſtate will deſcend to his heirs *ex parte paternâ*, as was determined in *Martin* v. *Strachan*, *ante*. *Sed vide* that caſe, 2 *Stra.* 1179.

In the caſe at bar, the ancient uſe was in the conuſor at the time of levying the fine; and it ſeems to have been long ſettled before this caſe, that a fine without any conſideration, or uſes thereof declared, ſhall enure to the ancient uſe in whomſoever it was at the time of levying the fine; and as it was here in the conuſor at that time, the judgment muſt be for the plaintiff.

Anonymous. C. B.

A declaration of a ſurgeon for curing the foul diſeaſe ought to be referred for ſcandal.

THIS was an action for a ſurgeon's demand; and in every count in the declaration it was laid to be for curing the defendant of the foul diſeaſe. The court expreſſed great diſpleaſure that ſuch language was uſed in a declaration when there was no occaſion for it, and intimated their deſire that whenever the like ſcandal is inſerted in a declaration, that ſomebody would move to ſtrike the words out, and to refer it for ſcandal and impertinence, and that they ſhould direct the prothonotary to tax exemplary coſts; that the rule for referring ſcandal, *&c.* ought to be the ſame at law as in equity; and they remembered 350*l.* coſts taxed in Chancery for ſcandal.

Baldwin *verſus* Tudge. C. B.

Any amerciament of a freeholder muſt be aſſeered by freeholders of the manor, or debt will not lie for it.

DEBT for an amerciament in a court-baron againſt a freehold tenant of the manor. Upon *nil debet*, it appeared in evidence at the trial at *Worceſter*, before Mr. Juſtice *Clive*, by an entry upon the court-rolls, that the defendant was amerced, and that the ſame was aſſeered by two aſſeerors, whoſe names were ſet down there; but it was objected that it did not appear in proof that the two aſſeerors were freeholders of the manor; and that point was reſerved for the opinion of the court.

After argument at the bar by Serjeant *Prime* for the plaintiff, and Serjeant *Willes* for the defendant, the whole court were clear of opinion that an amercement of a freehold tenant in a court-baron muſt be aſſeered by his peers, that is to ſay, by free tenants of the manor; and founded their judgment upon *Magna Charta*, *c.* 14. and *F. N. B.* 8vo. *Moderata miſericordia*, *fol.* 185. whereby it appears that the aſſeerment ſhall be *per probos & legales homines de vicineto*, which means *per pares de vicineto*: and none can be peers of a freehold tenant but a freehold tenant of the ſame manor in this particular caſe. *Fitzherbert* was a very great lawyer, and the cleareſt writer in the law; and where he ſays, that by the ſtatute of *Magna Charta* every amerciament in a court-baron ought to be aſſeered by two tenants of the manor, he muſt mean freehold tenants, for they are properly the tenants of the manor; for the court-baron at common law is the freeholders' court, of which they are the ſuitors and judges; and when all the freehold tenants are gone except one, the court-baron is gone too.

And

And therefore, as it did not appear that the amereiament ſet upon the defendant was affeered by his peers, they held that this action did not lie, and gave judgment for the defendant.

Note; Probi & legales homines de vicineto, muſt be taken and conſtrued *ſecundum ſubjectam materiam*; they may mean the freeholders of a manor, or of a county, *&c.*

EASTER TERM,

28 *Geo.* II. 1755.

Ford *verſus* Parr & al. C. B.

TRESPASS, tried at *niſi prius* before Mr. Juſtice *Foſter*, who omitted to certify in court at the trial that the treſpaſs was wilful and malicious upon the *ſtat.* 8 & 9 *W.* 3. *c.* 10. in order to entitle the plaintiff to full coſts; and afterwards upon application he certified out of court. The queſtion now was, Whether the judge had power to certify out of the court of *niſi prius? Per curiam*—The certificate is void, and contrary to the ſtatute, which enacts that it ſhall be made in open court at the trial.

A judge of niſi prius cannot certify for coſts out of court.

Law qui tam *verſus* Crowther. C. B.

THE defendant moved to plead *nil debet* to the whole; and, 2*dly*, a recovery as to the ſecond count: but *per curiam*— The *ſtat.* 4 & 5 *Anne*, for pleading double, does not extend to *qui tam* actions; and this has been often refuſed *here* as well as in *B. R.*

Stat. 4 & 5 Anne does not extend to qui tam actions.

TRINITY TERM,

28 & 29 *Geo.* II. 1755.

Doe, on the Demiſe of Milbourne & Ux. *verſus* The Purchaſers under the Aſſignees of a Commiſſion of Bankrupt awarded againſt George Simpſon. C. B.

What deed ſhall amount to a covenant to ſtand ſeiſed to uſes.

IN ejectment of lands in *Northumberland* the following caſe was made at the aſſizes for the opinion of the court:

George Simpſon being ſeiſed in fee of the lands in queſtion, in conſideration of a marriage to be had between him and *Ann Storey*, by indenture between him the ſaid *George Simpſon* of the one part, and the ſaid *Ann Storey* and *William Storey* of the other part, gives, grants, enfeoffs, aliens, and confirms to *Ann Storey* and *William Storey* and their aſſigns, the lands in queſtion, then in the poſſeſſion of *George Simpſon*, *habendum* to the uſe of the ſaid *Ann Storey*, for life, remainder to the heirs of her body begotten by the ſaid *George Simpſon*, who covenants that the lands ſhall remain to the ſaid uſes clear of all charges: the marriage took effect; *George Simpſon* afterwards became bankrupt, and the aſſignees ſeiſed the land and ſold it to the defendants, as taking this deed to be void in law; or if it was not void, that *George Storey* was ſeiſed in tail by it.

After argument at the bar by Serjeant *Poole* for the plaintiff, (who claims under this deed,) and Serjeant *Prime* for the defendants, it was reſolved by the whole court that this deed cannot operate as a bargain and ſale, becauſe no pecuniary conſideration was paid, nor as a releaſe, becauſe there was no leaſe for a year, nor were the grantees in poſſeſſion; nor as a feoffment, becauſe there was no livery and ſeiſin; and therefore the ſingle queſtion was, Whether it ſhall not operate as a covenant to ſtand ſeiſed?

And although it was objected that there wants a conſideration of blood between the covenantor and *William Storey*, and that it ſeemed to be the intent of the parties that the deed ſhould operate as a common law conveyance, yet it was reſolved by the whole court, that it ſhall operate as a covenant to ſtand ſeiſed, whereby an

an eſtate in ſpecial tail is clearly in the ſaid *Ann Storey*; and *George Simpſon*, (who is now dead,) had only an eſtate for life by implication with a reverſion in fee; and they ſaid that judges had been *aſtuti* to conſtrue deeds to take effect according to the intent and meaning of the parties, *ut res magis valeat quam pereat.* 2 *Inſt.* 672. *Hob.* *Shep. Touch.* 87. 1 *Lutw.* 782. 1 *Mod.* 175. 1 *Vent.* 137. 2 *Lev.* 213. 3 *Lev.* 370. *Carth.* 2 *Stra.* 934.

Judgment for the plaintiff.

Biddulph, Eſq. *verſus* Ather. C. B.

TROVER for a ſloop, upon Not Guilty, was tried before Mr. Juſtice *Wilmot* at the laſt aſſizes for the county of *Suſſex*. Upon a motion for a new trial the judge certified that the plaintiff's title to the ſloop was, that he is lord of the manor of *Lancing* in the county of *Suſſex*, and being ſo, is entitled by preſcription to all wreck of the ſea thrown upon *that* manor, and that the ſloop for which this action is brought was wrecked upon that manor.

Two allowances in eyre, and a judgment in treſpaſs 400 years ſince, are not concluſive evidence againſt uſage for 92 years laſt paſt to have wreck of the ſea.

And to prove his preſcriptive right, the plaintiff by court-rolls and parol evidence proved that the lords of the manor of *Lancing* had taken and enjoyed wreck thrown upon that manor from the 23d day of *April* 1663, until the time of bringing this action, without any interruption.

For the defendant, (who is bailiff or ſervant to the Duke of *Norfolk*, and ſeized this ſloop as wreck on behalf of his Grace,) it was inſiſted that the Dnke of *Norfolk* was entitled to all wreck thrown upon any lands lying within the rape, or barony, or honour of *Brambre* in the county of *Suſſex*; and it was proved that the manor of *Lancing* lies within the hundred of *Brightford*, which lies within the rape, or barony, or honour of *Brambre*.

It was alſo proved for the defendant by records, that at a court of eyre held at *Chicheſter* in *Suſſex*, in the 7th year of King *Edw.* 1. *Adam de Bavent* claimed free chaſe in his manor of *Rocking*, and wrecks of the ſea in his manor of *Hay*, which liberties he and his anceſtors had enjoyed time immemorially; and it was found by the jury that he and his anceſtors had and ought to have free chaſe in his manor of *Rocking*, and that he and his anceſtors never had wrecks of the ſea, nor ought to have in his manor of *Hay*, *eò quòd domini barones de Brambre ſemper ibidem & alibi per totam baroniam prædictam eâ libertate uſi fuerunt & eam habere debent*, and therefore as to the wreck of the ſea he was amerced for his falſe claim.

It was alſo proved for the defendant by record, that at the ſame court *Nigel de Brock* and *Hugo de Buſey* claimed wreck of the ſea in their manors of *Lancing* and *Kingſton* near *Shoreham*, and that they and their anceſtors had time immemorially uſed the ſaid liberties, and it was found by the jury *quod prædicti Nigellus et Hugo nunquam utebantur prædictis libertatibus, nec wreccum illud habere debent ſed Dominus Willielmus de Breuſe illud wreccum habere debet ſi acciderit per coſteram maris in rape de Brambre, ideo conſideratum eſt quod prædicti Nigellus & Hugo de cætero non habeant prædictum wreccum, ſed quia illud clamabant ſint in miſericordia pro falſo clamore.*

It was likewiſe proved for the defendant by record, that in the 7th year of *Edw.* 3. *John Odrich* and ſeveral others were attached to anſwer *John de Mowbray quare cum ipſe dominus honoris de Brambre exiſtat, idemq; Johannes de Mowbray habeat & ipſe & anteceſſores ſui domini honoris prædicti a tempore quo non extat memoria hucuſq; habere conſueverunt infra honorem prædict. wreccum maris & quicquid ad hujuſmodi wreccum pertinet, præfati Johannes Odrich* (and many other perſons) took and carried away divers quantities of goods caſt by the ſea upon the land at *Hone, Wortbyng, Lancing, Pende, Shoreham*, and *Kyneſton*, within the honour of *Brambre*, and which ought to belong to the ſaid *John de Mowbray* as wreck; and upon Not Guilty pleaded, the jury found, that ſeveral of the defendants in the pleadings mentioned were guilty of taking and carrying away the ſaid wreck to the plaintiff's damage of 100 *l.*, and judgment is entered againſt them for the ſaid 100 *l.*

Then Mr. Juſtice *Wilmot* further reports, that it was inſiſted for the defendant at the trial that theſe three records proved that the uſage ſet up by the plaintiff muſt have commenced within the time of memory, ſince the reign of *Richard* the Firſt, and that therefore the plaintiff's preſcriptive right claimed by him was defeated, and that he (the judge) ought to have directed the jury to find for the defendant.

But upon the trial, (ſays the judge,) I was of opinion, and did deliver it as my opinion to the jury, that the records produced were not concluſive, but were matter of evidence to be left to their conſideration: and unleſs the ſaid records are concluſive, I think the verdict was agreeable to the evidence, which was for the plaintiff, damages 50 *l.*

Upon this motion for a new trial, the court ordered this cauſe to be ſet down in the paper to be argued ſolemnly: and now it was inſiſted by Serjeant *Prime* for the defendant, that theſe records of judgments or determinations in eyre, and judgment in

in treſpaſs being in proper courts, having competent juriſdiction of the matter in queſtion, are concluſive evidence for the defendant, and that the judge was miſtaken in his opinion and direction to the jury, and ought not to have left the matter to the jury in the manner he did, but ſhould have directed them to find a verdict for the defendant; and for this purpoſe he cited *Carth.* 225. 1 *Salk.* 290. 2 *Stra.* 960, 961.; and ſaid, that the records given in evidence in the preſent caſe ſeemed to him ſtronger than a ſentence in the ſpiritual court in the caſe of a marriage, which is always holden to be concluſive. If a vicar's endowment be within the legal time of memory, the parſon cannot preſcribe againſt it, though he has ancient uſage of his ſide in proof. *Moor* 761. *pl.* 1055. 2 *Rol. Abr.* 269. *p.* 17.

On the other ſide for the plaintiff it was inſiſted by Serjeant *Willes*, and reſolved by the whole court, that neither theſe two allowances in eyre, nor the judgment in treſpaſs, were concluſive; and ſome of the judges doubted whether they were any evidence at all; but all agree that uſage for the plaintiff for 92 years laſt paſt was much ſtronger proof of the plaintiff's right, and the whole was fit to be left to the jury; and they all ſaid the jury and the judge had both done right.

They admitted that a ſentence in the eccleſiaſtical court, in a matter whereof they have the ſole cogniſance, is concluſive evidence, and parol evidence ſhall not be received againſt it; but that is, becauſe *that* court hath the ſole cogniſance thereof; and that an endowment of a vicar deſtroys the preſcriptive right to tithes in the parſon; but that the preſent records were no more concluſive than an inquiſition *poſt mortem*, or a verdict (in many caſes) touching the ſame matter, which is often *res inter alios acta*, as in the action of treſpaſs by *Mowbray*, it might perhaps be brought by the perſon then in poſſeſſion againſt perſons who were mere wrong-doers, for any thing that appears; and in pleading an allowance in eyre, the true way, *per Holt* C. J., is to alledge an immemorial uſage, and then alſo to produce the allowance in *B. R.* or in eyre. 1 *Salk.* 184.

Rule to ſhew cauſe why a new trial ſhould not be granted was diſcharged, and judgment given for the plaintiff.

Farmer, of the Demiſe of Earl, *verſus* Rogers. C. B.

A ſurrender of a leaſe for years, may be by writing without a deed, or ſealing, or ſtamp duty paid.

IN ejectment the following caſe was made for the opinion of the court; *viz. A. B.*, by deed indented, mortgaged the lands in queſtion to *C. D.* for 500 years, with a proviſo that the term ſhall ceaſe and be void upon payment of 500*l.* and intereſt upon a certain day; ſome time after the day limited for payment thereof *A. B.* paid to *C. B.* all principal and intereſt due to him upon this mortgage; *A. B.* is dead, and *Earl*, the leſſor of the plaintiff, as his heir at law, has brought this ejectment againſt the defendant, who has got the ſaid mortgage-deed in his hands, and is in poſſeſſion of the premiſes: at the trial the defendant produced this deed, upon the back whereof there is this indorſement in writing, without any ſeal or ſtamp to it; *viz.* "Received this — day of *March* 1738, (being after the day limited "by the proviſo,) of *A. B.* ſo much money for all principal "money and intereſt till this day; and *I do releaſe the ſaid* A. B. "*and diſcharge the within mortgaged premiſes from the term of* 500 "*years*," ſigned by *C. D.* the mortgagee. That the defendant at the trial did not prove that he had any intereſt in the term, but inſiſted that it was ſtill ſubſiſting, and that poſſeſſion was ſufficient againſt the plaintiff, who muſt recover upon the ſtrength of his own caſe.

This caſe was argued twice; the firſt time in *Michaelmas* term laſt by Serjeant *Wynne* for the plaintiff, and Serjeant *Draper* for the defendant; the ſecond time by Serjeant *Prime* for the plaintiff, and Serjeant *Willes* for the defendant, in *Eaſter* term laſt.

It was argued for the plaintiff that the term is not ſubſiſting, but is ſurrendered by the memorandum on the back of the mortgage-deed. That a ſurrender of a term at common law might have been by parol without a deed. *Perk. ſurrender, ſec.* 583, 584. and that whether the term was created by deed or not, *Perk. ſec.* 607, 608. *Cro. Eliz.* 488. That the word *ſurrender* is not neceſſary to make a ſurrender, but any other words tantamount will be ſufficient; as if leſſee for life ſay to the leſſor, that he grants that he ſhall enter into the land, and that he is willing that he ſhall have the land. 2 *Rol. Abr.* 497. H. *pl.* 1. 498. *pl.* 2. Theſe authorities ſhew that at common law a term for years, whether created by deed or not, might have been ſurrendered by parol without deed, and that words which are not ſo ſtrong as the words *releaſe and diſcharge*, in the preſent caſe, ſhall amount to a ſurrender.

2*dly*, It was contended for the plaintiff, that the ſtatute of frauds and perjuries had not ſo much altered the common law, but that leaſes

leaſes for long terms of years may be ſtill made without deed, by writing, and the ſame may be ſurrendered by a note in writing, without a deed; and a ſeal is not neceſſary to this indorſement or memorandum in writing, which in conſideration of law is a parol ſurrender reduced into writing, and was proper evidence at the trial to prove a ſurrender of the term.

For the defendant it was admitted, that at common law terms which were created by parol might be ſurrendered by parol, but denied that a term created by deed could be ſurrendered by parol, and that the term was ſtill ſubſiſting, and might be aſſigned and kept on foot to protect the inheritance, and that as the payment was after the day, and the legal eſtate is ſtill in the mortgagee, there ought to be judgment for the defendant.

After time taken to conſider until this term, judgment was given for the plaintiff by the whole court.

And it was reſolved by the court, that before the ſtatute of frauds a leaſe for years, either by deed or parol, might have been ſurrendered without deed, by parol; that the words *releaſe and diſcharge the term of* 500 *years*, are much ſtronger than words which in many caſes have amounted to a ſurrender, *ut res magis valeat quam pereat.*

2. It appears by the ſtatute of frauds and perjuries, that a leaſe for any term of years may be created by writing without deed, and that the ſame may be ſurrendered by deed or *note in writing*. *Vide ſec.* 3. of that ſtatute. And the court held that there was no occaſion for any ſtamp-duty upon this note or indorſement, it not being a deed. Gilb. 235, 236.

MICHAELMAS TERM,

29 *Geo.* II. 1755.

Fryer *verſus* Johnſon. C. B.

Cuſtom to bury as near as poſſible to anceſtors is bad.

SPECIAL action upon the caſe againſt the parſon of the pariſh, ſetting out that there has been a cuſtom in the pariſh, time out of mind, that every pariſhioner has a right to bury his dead relations in the church-yard as near to their anceſtors as poſſible, and that the defendant refuſed to permit the plaintiff to bury a relation as near as poſſible to his anceſtor. After a verdict, this was held clearly to be a bad cuſtom by the whole court upon the firſt argument.

Loyd, Eſq. *verſus* Winton. C. B.

Coſts. Seiſure for a heriot-cuſtom is not within the ſtat. 11 G. 1. c. 19. in reſpect to double coſts.

REPLEVIN for taking an ox and detaining him againſt gages, *&c.* The defendant avows that he is ſeiſed of the manor of *A.*, and ſets out a cuſtom, that upon the death of a tenant he is entitled to a heriot by cuſtom, and ſo ſeized the ox, which was the property of the plaintiff's late father, who was his tenant, and lately died. The plaintiff replies that the ox was his own, and not his father's, and traverſes that the ox was his father's property. Upon this iſſue the plaintiff was nonſuited at the trial, and the prothonotary taxed the avowant double coſts, upon the ſtat. 11 *Geo.* 2. *c.* 19. And now Serjeant *Poole* moved that the prothonotary was miſtaken, and ought to review his taxation, and allow only ſingle coſts, inſiſting that the ſtatute did not extend to this caſe, which was not a *diſtreſs for a heriot-ſervice, but a ſeizure for a heriot-cuſtom*, for the words of the ſtatute are, Diſtreſſes for rent, quit-rents, reliefs, heriots, *and other ſervices*. And of that opinion was the court, and ordered the prothonotary to review his taxation; although it was inſiſted by Serjeant *Wilſon* for the avowant, that this caſe was within the equity and meaning of the ſtatute, though not within the very words.

EASTER TERM,

29 *Geo.* II. 1756.

Goodright, of the Demiſe of Priſcilla Larmer, Widow, *verſus* William Searle and Sarah his Wife. C. B.

EJECTMENT for lands in the county of *Southampton*: upon Not guilty, iſſue was joined, which is entered of *Trinity* term, in the 27th and 28th years of his preſent Majeſty, *Roll.* 735. and was tried at *Wincheſter* at the then next aſſizes, when a ſpecial verdict was found by the jury, who on their oath ſay, that long before the within-written time when the within-mentioned treſpaſs and ejectment are ſuppoſed to have been committed, one *George Paynter* in his lifetime was ſeiſed of and in certain freehold meſſuages, lands, tenements, and hereditaments, with the appurtenances, in *Odiham* and *Northwarnborough* in the pariſh of *Odiham* in the county aforeſaid, parcel of the premiſes in the declaration within-written mentioned, in his demeſne as of fee; and that the ſaid *George Paynter* in his lifetime, and long before the ſaid within-written time when, *&c.* was likewiſe ſeiſed of and in the reverſion of certain copyhold meſſuages, lands, tenements, and hereditaments, with the appurtenances, ſituate, lying, and being in *Hall-place* in the county aforeſaid, parcel of the manor of *Hall-place* in the ſame county, and reſidue of the premiſes in the declaration within-written mentioned, expectant on the death of *Catherine Paynter*, mother of the ſaid *George Paynter*, in his demeſne as of fee and right, at the will of the lord of the ſaid manor, according to the cuſtom of the ſame manor; and being ſo reſpectively ſeiſed thereof, he the ſaid *George Paynter*, in the lifetime of the ſaid *Catherine*, and before the within-written time when, *&c.* to wit, on the 26th day of *September* in the year of our Lord 1750, at *Odiham* aforeſaid, made his laſt will and teſtament in writing, and thereby gave and deviſed (among other things) the ſame freehold and copyhold premiſes (the ſaid copyhold premiſes being firſt duly ſurrendered to the uſe of his will) in theſe words following, to wit; And as to, for, and concerning all and ſingular other my cuſtomary or copyhold meſſuages, lands, tenements, and hereditaments, with their appurtenances, ſituate, lying,

An executory deviſe in fee is like to (though not) a contingent remainder, and is transferrable to the heir of the executory deviſee, who dies before the contingency happens.

S. P. was determined in the caſe of Goodtitle, of the demiſe of Gurnell v. Wood, in C. B. Trin. 13 & 14 G. 2. upon a caſe made at Appleby.

Special verdict.

lying, and being in the tithing of *Yately* within the manors of *Condall* aforeſaid and *Hall-place* in the ſaid county of *Southampton*, the ſame being alſo ſurrendered to the uſe of my will; and alſo as to, for, and concerning all and ſingular my freehold meſſuages, lands, tenements, and hereditaments, ſituate, lying, and being in *Odiham* and *North Warnborough* in the pariſh of *Odiham* in the ſaid county of *Southampton*, now in the tenure or occupation of *John Collins* and *John Raggett*, their undertenants and aſſigns, "I give and deviſe the ſame copyhold and freehold hereditaments "and premiſes unto my ſaid ſon *George Paynter*, his heirs and "aſſigns for ever; but if he my ſaid ſon *George Paynter* ſhall "happen to die before he ſhall attain his ſaid age of 21 years, "leaving no iſſue living at the time of his death, then I give and "deviſe the ſaid premiſes unto my ſaid mother *Catherine Paynter*, "and to her heirs and aſſigns for ever," as by the laſt will aforeſaid to the jurors aforeſaid ſhewn in evidence fully appears: And the jurors aforeſaid on their ſaid oath further ſay, that afterwards, to wit, on the ſaid 27th day of *September* in the ſame year 1750, at *Odiham* aforeſaid, the ſaid *George Paynter* the teſtator, without altering or revoking his ſaid will, died ſeiſed of ſuch eſtates in the premiſes in which, &c. leaving iſſue the ſaid *George Paynter* the deviſee, his only ſon and heir, and that the ſaid *Catherine Paynter* widow, mother of the ſaid *George Paynter* the teſtator, ſurvived the ſaid *George Paynter* the teſtator; and afterwards, to wit, on the 5th day of *January* in the year of our Lord 1754, at *Odiham* aforeſaid died; and the jurors aforeſaid on their ſaid oath further ſay, that the ſaid *George Paynter*, ſon and heir of the ſaid *George Paynter* the teſtator, was the grandſon and next heir of the ſaid *Catherine*, to wit, the ſon and heir of the ſaid *George Paynter* the teſtator, which ſaid *George Paynter* the teſtator was the only ſon and heir of the ſaid *Catherine*; and that the ſaid *George Paynter*, ſon and heir of the ſaid *George Paynter* the teſtator, and grandſon and next heir of the ſaid *Catherine*, afterwards, to wit, on the 6th day of *January* in the ſaid year of our Lord 1754, at *Odiham* aforeſaid, died before he had attained his ſaid age of 21 years, to wit, at his age of 19 years, and without ever having had any iſſue of his body lawfully begotten: and the jurors aforeſaid on their ſaid oath further ſay, that *Priſcilla Larmer* widow, in the declaration named to be the leſſor of the plaintiff, is, and at the ſame time when, &c. was couſin and next heir on the part of the father *George Paynter*, ſon of the ſaid *George Paynter* the teſtator, that is to ſay, the daughter and heir of *George Paynter* the brother of *William Paynter*, which *William Paynter* was the father of the ſaid *George Paynter* the teſtator, the father of *George Paynter* the deviſee in the will abovementioned, to the ſaid jury ſhewn in evidence, who died under age as aforeſaid, and without leaving any iſſue of his body lawfully begotten living at the time of his death aforeſaid: and the jurors aforeſaid on their ſaid oath further ſay, that the ſaid *Sarah*, the wife of the

The leſſor of the plaintiff's claim by deſcent.

the ſaid *William Searle* in the declaration within-written mentioned, is, and at the ſaid time when, &c. was the ſiſter and next heir of the ſaid *Catherine Paynter*, and the couſin and next heir of the ſaid *George*, the grandſon of her the ſaid *Catherine*, on the part of her the ſaid *Catherine*, that is to ſay, the ſiſter and next heir of the ſaid *Catherine Paynter*, which *Catherine Paynter* was the mother of the ſaid *George Paynter* the teſtator, the father of the ſaid *George Paynter* the deviſee in the will above mentioned: and the jurors aforeſaid on their ſaid oath further ſay, that before the within-written time when, &c. to wit, on the 8th day of *April* in the 27th year of the reign of his preſent Majeſty, the ſaid *Priſcilla Larmer* entered into the tenements aforeſaid, with the appurtenances, in the declaration aforeſaid mentioned, and was thereof ſeiſed as the law requires; and being ſo thereof ſeiſed, ſhe the ſaid *Priſcilla Larmer* afterwards upon the ſaid 8th day of *April* in the ſaid 27th year of his Majeſty's reign, at *Odiham* aforeſaid, demiſed the tenements aforeſaid, with the appurtenances, to the ſaid *Peter Goodright*, to hold the ſame to the ſaid *Peter Goodright* and his aſſigns from the 25th day of *March* then laſt paſt unto the full end and term of ſeven years from thence next enſuing and fully to be complete and ended; by virtue of which ſaid demiſe the ſame *Peter Goodright* into the tenements aforeſaid, with the appurtenances, entered, and was thereof poſſeſſed until the ſaid *William Searle* and *Sarah* his wife afterwards, to wit, on the ſaid 8th day of *April* in the 27th year aforeſaid, into the tenements aforeſaid, with the appurtenances, which the ſaid *Priſcilla Larmer* to the ſaid *Peter Goodright* in form aforeſaid demiſed for the term aforeſaid, which is not yet elapſed, in and upon the poſſeſſion of the ſaid *Peter* entered, and ejected him the ſaid *Peter* out of his farm aforeſaid, (his term aforeſaid therein not being ended,) as the ſaid *Peter* within thereof complains againſt them: but whether upon the whole matter aforeſaid by the jurors aforeſaid in form aforeſaid found, the ſaid *William Searle* and *Sarah* his wife are in law guilty of the treſpaſs and ejectment aforeſaid in the tenements aforeſaid, with the appurtenances, in the declaration aforeſaid mentioned, the jurors aforeſaid are entirely ignorant, and therefore pray the conſideration of the juſtices of our lord the King of the Bench; and if upon the whole matter aforeſaid by the jurors aforeſaid in form aforeſaid found, it ſhall appear to the ſame juſtices of the Bench that the ſaid *William Searle* and *Sarah* his wife are in law guilty of the treſpaſs and ejectment aforeſaid in the tenements aforeſaid, with the appurtenances, in the declaration aforeſaid mentioned, then the jurors aforeſaid ſay on their oath aforeſaid, that the ſaid *William Searle* and *Sarah* his wife are thereof guilty in manner and form as the ſaid *Peter Goodright* within againſt the ſaid *William Searle* and *Sarah* his wife thereof complains, and they aſſeſs the damages of the ſaid *Peter Goodright* on the occaſion aforeſaid, beſides his coſts and charges by him about his ſuit in this behalf expended

The defendant's claim by deſcent.

expended to one ſhilling, and for thoſe coſts and charges to 40*s.* But if upon the whole matter aforeſaid by the jurors aforeſaid in form aforeſaid found, it ſhall appear to the ſame juſtices of the Bench that the ſaid *William Searle* and *Sarah* his wife are not guilty in law of the treſpaſs and ejectment aforeſaid in the tenements aforeſaid, with the appurtenances, in the declaration aforeſaid above mentioned, then the ſame jurors ſay on their oath aforeſaid, that the ſaid *William Searle* and *Sarah* his wife are not thereof guilty in manner and form as the ſaid *William Searle* and *Sarah* his wife within for themſelves by pleading have alledged: and becauſe the juſtices here are willing to adviſe themſelves of and upon the premiſes before they give their judgment thereon, a day is given to the parties aforeſaid here until in eight days of Saint *Hilary* of hearing their judgment thereon, for that the ſame juſtices here are thereof not yet adviſed, *&c.*

This ſpecial verdict was twice ſolemnly argued at the bar; 1*ſt*, by *Poole* Serjeant for the plaintiff, and *Hewit* Serjeant for the defendant, in *Trinity* term in the 28th year of his preſent Majeſty; the 2*d* time by *Davy* Serjeant for the plaintiff, and *Wynne* Serjeant for the defendant, in *Hilary* term following: the ſhort ſtate of the verdict is,

That *George Paynter* being ſeiſed in fee of the freehold lands, and in reverſion in fee of the copyhold lands in queſtion expectant on the death of *Catherine Paynter* his mother, on the 26th of *September* 1750 by his will deviſed the freehold and copyhold to his ſon *George Paynter*, his heirs and aſſigns for ever; but if he happen to die before he attain the age of 21 years, leaving no iſſue, then he deviſes the premiſes to his (the teſtator's) mother *Catherine Paynter* in fee.

That the teſtator died in *September* 1750, leaving iſſue *George* his only ſon and heir; that *Catherine Paynter* widow, and mother of the teſtator, ſurvived the teſtator, and afterwards died *January* 5, 1754.

That *George*, the ſon and heir of the teſtator, was alſo grandſon and next heir to *Catherine*, and died *January* 6, 1754, before he attained the age of 21, and without iſſue.

That *Priſcilla Larmer* the plaintiff's leſſor, was couſin and heir to *George Paynter* the deviſee on the part of his father.

And that *Sarah* the wife of *William Searle* the defendant was ſiſter and next heir of *Catherine Paynter*, and couſin and next heir of *George* the deviſee, grandſon of the ſaid *Catherine*, on the part of the ſaid *Catherine*.

In

In arguing this caſe, it was admitted and allowed that this was a good executory deviſe to *Catherine Paynter*; but for the plaintiff it was inſiſted, that the demiſe to *George* the ſon in fee, who was heir to the teſtator, was void, becauſe it was only giving him what the law gave him; and therefore it was the ſame thing as if he had not been named in the will, and the executory deviſe could never have taken place ſo long as he had heirs; and many caſes of executory deviſes lay it down, that until the contingency happens, the eſtate ſhall deſcend to the heir. *Smith* v. *Clark*, *Salk.* 241. S. C. *Lutw.* 797. *Comyns* 72.

Taking it that *George Paynter* the deviſee was *in* by deſcent of a fee, and that *Catherine Paynter* had an intereſt or poſſibility that was tranſmiſſible, according to the caſe of *Goodtitle of the demiſe of Gurnell* v. *Wood* in this court, *Trin.* 13 & 14 *Geo.* 2. upon the death of *Catherine Paynter* that intereſt, whatever it was, deſcended to *George* her grandſon, and merged in his greater eſtate which he had by deſcent from his father. If this be ſo, then the leſſor of the plaintiff, who is heir to *George* on the part of his father the teſtator, is entitled to recover. Carth. 257.

On the other ſide it was inſiſted that an executory deviſe, as this moſt certainly is, is a deſcendible intereſt, and that *Catherine* and her heirs were *in* of ſuch contingent executory and deſcendible intereſt, which could never deſcend to *George* her grandſon, becauſe while he was living, under age, and without iſſue, no man could poſſibly know whether he would die under age and without iſſue.

That *Catherine* and her heirs were the firſt purchaſer, and whoever claims as heir by deſcent muſt ſhew himſelf of the blood of the firſt purchaſer; but *Priſcilla Larmer* is not of the blood of *Catherine*. *Finch* 117. *Hale's Hiſt. Com. Law*, *cap. Deſcents*, 239.

It is objected for the plaintiff that *George* the grandſon took an abſolute fee-ſimple; but he certainly only took a conditional or determinable fee, otherwiſe the executory deviſe could not be good, which it is admitted on all hands it certainly is.

It is objected, that in the caſe of *Smith* v. *Clarke*, that the heir *there* did not take by deviſe though it was on a condition. To this it may be anſwered, that there was no deviſe over, ſo nobody to take advantage of the condition.

It is objected, that the intereſt or contingency of *Catherine* upon her death deſcended to *George* her grandſon, and ſo merged in his fee. To this it is anſwered, that her intereſt was like a

contingent remainder of a pure fee, which could not merge in one that was conditional.

In reply it was said for the plaintiff, that *Catherine* took a deſcendible intereſt like a contingent remainder in fee, which upon her death, until the contingency happened, deſcended to *George* her grandſon, and merged in his fee, which was not a baſe fee.

Upon the firſt argument the court broke the caſe.

Willes C. J.—It may be proper to ſay ſomething by way of breaking the caſe; but I would not be underſtood to be bound by any opinion I may now give, as it is to be argued again.

It was candid in my brother *Poole* to admit that this is a good executory deviſe. It certainly is ſo; and they are now ſettled known eſtates tranſmiſſible, and like to (though they are not) contingent remainders.

But brother *Poole* for the plaintiff inſiſts, that although the eſtate is deviſed to *George* the grandſon and his heirs upon condition, yet that it ſhall deſcend to him as if no condition had been mentioned. But I take it to be certain that it did not deſcend at the time of the death of the teſtator, but is deviſed to him upon condition that he and his heirs ſhall have it in caſe he lives to 21, or leaves iſſue; but if he does not, then the teſtator's mother and her heirs ſhall take; it does not ſay "*living the mother:*" and as to what is ſaid that here is a merger, there never ſhall be a merger to hurt another. Does the plaintiff claim under the firſt deviſe? That is gone; for *George* the deviſee died under age and without iſſue. If plaintiff claims under the executory deviſe, ſhe muſt take as heir to *Catherine*, if at all; and that ſhe cannot do, becauſe *Priſcilla Larmer* is not of her blood.

Clive J.—I would be underſtood not to be bound by my preſent opinion. The leſſor of the plaintiff claims by deſcent; and whoever does ſo, as hath been rightly inſiſted upon, muſt be of the blood of the firſt purchaſer. The teſtator having carved out his whole eſtate in this manner, has thereby broke the deſcent. If *Catherine* had ſurvived her grandſon ſhe would have been a purchaſer, for ſhe would have taken it by deviſe from her ſon, and there would have then been no doubt at all but it would have gone to the defendant her ſiſter; and I think it is the ſame thing notwithſtanding ſhe died before her grandſon; and there can be no merger where the intent of the parties appears that the eſtate ſhould not merge. *Lewis Bowles*'s caſe, 11 *Rep.* 80.

Fees

Fees are every day in abeyance, as a remainder after an eſtate for life to the right heirs of *J. S.* I do not ſay a freehold can be in abeyance. The eſtate to *Catherine* ſeems to me to be the greater eſtate, and could not merge in *that* given to her grandſon.

Birch J.—The teſtator has not ſaid any thing about the time of the death of *Catherine*; and as he has not, we cannot. Here is an abſolute executory deviſe in fee to *Catherine*, which muſt take effect in her or her heir on the death of her grandſon under age and without iſſue; and I am of opinion with my Lord Chief Juſtice, and my brother *Clive*.

Bathurſt J.—I ſhall be glad to have this matter argued again, becauſe I think the ſon took by deſcent and not by the will. Suppoſe the deviſe had been to *Catherine* after the death of *George* the teſtator's ſon under age and without iſſue, he would then certainly have taken by deſcent until the contingency had happened. Suppoſing then the ſon *in* by deſcent, I am inclined to think his grandmother's intereſt or eſtate ſhall deſcend to him, and he ſhall be in of a better eſtate; *viz.* a pure fee, which ſhall deſcend to his heirs *ex parte paterna*.

This caſe was argued a ſecond time in *Hilary* term 29 *Geo.* 2., but little or nothing new was ſaid upon it.

In *Eaſter* term 29 *Geo.* 2. the court were all agreed, and the Chief Juſtice was ready to deliver their opinion, but deferred it, the parties being trying to make an end by way of accommodation. They were all of opinion for the defendant, *ut audivi*.

MICHAELMAS TERM,

30 *Geo.* II. 1756.

Lynall *verſus* Longbothom. C. B.

A foot-race is a game within the ſtat. 9 Ann. againſt gaming. But it muſt appear that a man was playing at ſuch game, or elſe a wager above 10 l., laid upon his ſide, is not a betting within the ſtatute.

Middleſex. THOMAS *Longbothom*, late of the pariſh of Saint *Andrew Holbourn* in the county of *Middleſex*, ſhoemaker, was ſummoned to anſwer *Thomas Lynall* of a plea that he render to the ſaid *Thomas Lynall* the ſum of 47 *l.* of lawful money of *Great Britain*, which he owes to the ſaid *Thomas Lynall*, and unjuſtly detains from him, *&c.*; and whereupon the ſaid *Thomas Lynall*, by *William Pryor Johnſon* his attorney, ſays, for that the ſaid *Thomas Longbothom* after the firſt day of *May* in the year of our Lord 1711, to wit, on the 11th day of *November* in the year of our Lord 1754, at *Weſtminſter* in the county aforeſaid, received to the uſe of the ſaid *Thomas Lynall* the ſum of 47 *l.*, being ſo much money loſt at one time by the ſaid *Thomas Lynall* to the ſaid *Thomas Longbothom* within the ſpace of three months next before the commencement of this ſuit, by betting on the ſide of one *John Clarke*, at a certain game called a foot-race, and which money ſo loſt before the commencement of this ſuit was paid to the ſaid *Thomas Longbothom* the winner thereof, whereby and by force of the ſtatute lately made for the better preventing exceſſive and deceitful gaming, an action hath accrued to the ſaid *Thomas Lynall* to demand and have of the ſaid *Thomas Longbothom*, according to the form of the ſaid ſtatute, the ſaid ſum of 47 *l.* ſo loſt as aforeſaid; yet the ſaid *Thomas Longbothom*, although often requeſted, hath not paid to the ſaid *Thomas Lynall* the ſaid 47 *l.* or any part thereof, but to pay the ſame to him hath hitherto refuſed, and doth yet refuſe, whereupon the ſaid *Thomas Lynall* ſaith that he is injured, and hath damage to the value of 50 *l.*; and therefore he brings this ſuit, *&c.*

The defendant pleaded *nil debet per patriam*, which iſſue came on to be tried before Lord Chief Juſtice *Willes* at the laſt ſitting in *Eaſter* term 1755.

The facts proved at the trial on the behalf of the plaintiff, and upon which he relied to ſupport his declaration, were, That on the

the 2d day of *November* 1754, the plaintiff laid a wager with the defendant of 47 *l.* to 29 *l.* that *John Clarke* in the declaration mentioned *could not*, on that day, run four miles in 21 minutes and an half: that the plaintiff then depoſited the 47 *l.* in the hands of one *Thomas Cannon*, as the ſtakeholder of that wager, and at the ſame time the defendant depoſited 29 *l.* in the ſame hands, which ſums were to be paid to the winner of the wager; that the ſaid *Clarke* did, on that day, run the four miles within 21 minutes and an half, and that thereupon the ſaid *Thomas Cannon*, on the ſame day, paid the 47 *l.* ſo depoſited by the plaintiff, to the defendant *Longbothom*.

On the part of the defendant it was inſiſted by his counſel at the trial, that the plaintiff had not proved his declaration, that this running by *John Clarke* was not a foot-race, as deſcribed in the declaration; that it was not a game within the *ſtat.* 9 *Ann. c.* 14., upon which the plaintiff had founded his action; and that this wager was not a betting on the ſide or hand of any perſon playing at any game or games within that ſtatute, and therefore the plaintiff was not entitled to a verdict upon this declaration.

Upon theſe objections there was a verdict for the plaintiff, ſubject to the opinion of this court, upon theſe three points; *viz.*

1*ſt*, Whether the running by *Clarke* alone was properly a foot-race, as laid in the declaration?

2*d*, Whether ſuch running be a game within the ſtatute 9 *Ann. c.* 14.?

3*d*, Whether the wager was or was not a betting on the ſide or hand of any perſon playing at any game or games within the ſaid ſtatute?

This caſe was argued in laſt *Eaſter* term by Serjeant *Poole* for the plaintiff, and Serjeant *Hewitt* for the defendant, and in this term by Serjeant *Willes* for the plaintiff, and Serjeant *Prime* for the defendant.

For the plaintiff it was ſaid, that *John Clarke*'s running againſt time was a foot-race, and it is well known that a ſingle horſe has frequently run alone for the king's plate, which is ſtill called a horſe-race, though he runs alone. Serjeant Poole.

2*dly*, That a foot-race is a game within the *ſtat.* 9 *Ann. c.* 14., though it is not mentioned therein, for the words, *other game or games*, ſhall relate to games or plays in former ſtatutes againſt gaming; and foot-races are mentioned in the *ſtat.* 16 *Car.* 2. *c.* 7.

between *Goodburn* and *Marley*, 2 *Stra.* 1159. horſe-races were held to be within the ſtatute 9 *Ann.* though not mentioned therein.

3*dly*, If this was a foot-race, and a foot-race be within the *ſtat.* 9 *Ann.* there is no doubt but the defendant betted on the ſide of *Clarke*, who ran againſt time.

Serjeant Hewitt. For the defendant it was admitted that a foot-race is within the *ſtat.* 9 *Ann.* and has been ſo determined; and it was ſaid by the defendant's counſel, and agreed by the court, that although here were three queſtions made by the caſe for the conſideration of the court, yet in truth they were all reducible to, and contained in this ſingle queſtion; *viz.* Whether the wager was a betting on the ſide of any perſon playing at a game called a foot-race? And they inſiſted that it was not, for it does not appear by the caſe but that *Clarke* might be running merely for his own diverſion, or that he himſelf was at all concerned in the wager, or knew any thing of it; neither is it laid in the declaration, or ſtated in the caſe, that *Clarke* was *playing* at a game called a foot-race; ſo that if there had been no caſe ſtated, the judgment muſt have been arreſted upon this declaration; for to bring it within the ſtatute, it muſt be a betting on the ſide of a perſon or perſons playing, and ſo it ought to have been laid.

Upon the firſt argument the court broke the caſe.

Willes C. J.—Neither of my brothers are diſtanced, ſo a ſecond heat may be run, and therefore I give no opinion. As at preſent adviſed, I am inclined to think that this is not a foot-race as laid in the declaration, for *Clarke* might run for his diverſion or exerciſe, and it does not appear he contended for any bet with any body, or againſt time; and *Clarke* can never be ſaid to be *playing* unleſs it had been laid in the declaration, or ſtated in the caſe, that he was *playing*; and we can intend nothing, for I think this is a penal law: there is no doubt but horſe-races are within the *ſtat.* 9 *Ann.* according to *Stra.* 1259. who is a faithful reporter; and foot-races muſt alſo be ſo too, for they are mentioned in *ſtat.* 16 *Car.* 2. to which the *ſtat.* 9 *Ann.* muſt relate.

Clive J. and *Birch* J. to the like effect.

Bathurſt J.—Courts of juſtice have done very right in putting a liberal conſtruction upon theſe ſtatutes againſt gaming, and if it were poſſible, I ſhould be for bringing this caſe within the *ſtat.* 9 *Ann.* One perſon running alone againſt time may be properly called a foot-race, as well as one horſe ſtarting alone to be an horſe-race, which has often been the caſe; but as it does

does not appear that *Clarke* was running for any wager, or knew any thing of this bet, or was at all concerned in it, and might for ought appears be running for exercise or his diversion; I fear it is not within the statute: it is like principal and accessary, if there be no principal there can be no accessary; so if there be no person *playing* at a game, there can be no betting within the statute.

Second argument. Serjeant *Willes* for the plaintiff.

The single question is, Whether *Clarke* was *playing* at a game called a foot-race? for if he was, this wager is within the statute, it being above ten pounds; and a foot-race being now admitted to be a game within the act, the plaintiff must have judgment.

It was objected, that it does not appear that *Clarke* was running against time, or was contending with any person, but might be running for his own diversion or exercise, so that he cannot be said to be playing at a game called a foot-race.

In answer to this it is stated in the case, that the plaintiff laid the wager with the defendant that *John Clarke could not* on that day run four miles in 21 minutes and an half; this shews clearly that he contended against time; and this running alone is undoubtedly a race, if the gentlemen of the turf may be allowed proper judges of what is properly a race, who always have held, that if one single horse walks round the course alone, and no other contends or runs with him, he wins the race; if therefore this be a race, no doubt but the betting thereon is within the statute. And although *Clarke* might be running against time for his own diversion, yet I contend that this betting upon his side is within the statute; as if two persons were playing a game at piquet, for no money, only for their own diversion, and a wager of above 10 *l.* was to be laid on the side of one of them, such wager would be within the statute.

Serjeant *Prime* for the defendant.

I admit a foot-race is a game within the *stat.* 9 *Ann.* and has been so determined, but insist that *Clarke* was not *playing* at any such game, from any thing that is said either in the declaration or case stated.

On the 2d of *November* 1754, plaintiff laid a wager of 47 *l.* to 29 *l.* that *Clarke* could not run four miles in 21 minutes and an half; does it follow from thence that *Clarke* might not be a porter, or a running footman, sent upon some message, and set forward either before or after the bet was laid? or might not the plaintiff and defendant see him setting forward upon full speed,

not knowing whither he was going, and the plaintiff lay the wager with the defendant that *Clarke* did not run the first four miles in 21 minutes and an half? this might be the case for any thing that appears; if so, surely this is not a betting upon a game: it does not appear that *Clarke* was at all concerned or interested in the event, so how could there be a betting upon his side; or, for any thing that appears, he might be interested to lose the wager, as many jockies have been. The court will intend nothing that is not stated in the case, so that if it is not clear that *Clarke* was playing at a game, there could be no betting on his side.

Judgment of the court.

Willes C. J.—We are all of opinion that judgment must be for the defendant.

It is agreed on all hands that a foot-race is a game within the *stat.* 9 *Ann.*, and therefore the single question is, Whether it appears that *Clarke* was playing at a game called a foot-race? for if he was, this was a betting within the statute; but it is neither laid in the declaration, nor stated in the case, that he was playing at a game called a foot-race, and we can intend nothing that does not appear: there must be a betting on the side of a person playing; and if no case had been stated, the judgment must have been arrested upon this declaration, because it is not laid that *Clarke* was *playing*. I think this is a penal law, and not merely remedial. As it does not appear that *Clarke* was playing at any game, there could be no betting on his side within the statute, so the *postea* must be delivered to the defendant, and he must have the costs of a nonsuit.

Rex *versus* Chase. B. R.

One advances a sum of money in the trade of a brewer, becomes a partner, but does not meddle in the manual exercise thereof, is not within the stat. 5 Eliz. though he never served any apprenticeship.

INDICTMENT upon the *stat.* 5 *Eliz.* for exercising the trade of a brewer, the defendant not having served an apprenticeship of seven years; the jury found a special verdict, the substance whereof was, that the defendant was partner in the trade with a person who had served a regular apprenticeship to the trade, that the defendant advanced and paid a certain sum of money to become a partner, and was to stand to the profit and loss therein, but was not to intermeddle, and in truth did not intermeddle in the manual or working part of the trade. Upon the arguing of this special verdict the whole court were clear of opinion, that the defendant was not within the statute, which they said was made early in the reign of Queen *Elizabeth* to encourage manufacturers in trade, which was then in its infancy in this kingdom, and until trade became more flourishing it might perhaps be good policy to stick close to the letter of the statute; but about the end of that queen's reign, when trade was much improved,

improved, the judges began to give a more liberal conſtruction of, and, in a great meaſure, to explain away the ſtrict letter of the ſtatute, which *law* is certainly in reſtraint of the common law, and of the freedom and liberty of the ſubject in general, who ought to be allowed to get their living in any honeſt induſtrious trade; and they alſo ſaid, that although the words of the ſtatute are, that a man ſhall not exerciſe a trade unleſs he has ſerved as an apprentice *in manner aforeſaid*, yet it has been over and over determined in *Weſtminſter-hall*, that if a man has worked at a trade ſeven years as a journeyman, with one maſter or ſeveral, either in this kingdom or abroad, or as a maſter for himſelf ſeven years, he may afterwards exerciſe the trade, and is not within the ſtatute; ſo may a woman follow the trade of her huſband after his death, if ſhe has been married to, and lived with him ſeven years, although, it may be, ſhe never intermeddled in it in his lifetime; and ſo it is (they ſaid) in many ſuch like caſes. Lord *Manſfield* cited 4 *Leon.* 9., and ſaid, that although that caſe is not law, yet it ſhews the judges towards the end of Queen *Elizabeth*'s reign were willing to go as far as they could to explain away the penalty of this ſtatute.

Judgment for the defendant *per totam curiam.*

Waterman *verſus* Yea, in Replevin. C. B. Lyde, Eſq. Sheriff of Somerſetſhire, *verſus* Lawrence and two others.

IN *April* 1755, *Yea* diſtrained the cattle of *Waterman* damage-feaſant, who immediately replevied them and gave the uſual bond to proſecute, ſo the cattle were delivered to him.

If plaintiff in replevin be nonſuited for want of a plea in bar, the avowant may ſue the ſureties on the bond, and need not execute a writ of inquiry for his damages.

Upon the 7th of *May* 1755, *Waterman* levied his plaint againſt *Yea* in the ſheriff's court, and removed it by *re. fa. lo.*, and declared *here* in replevin in *Trinity* term 1755, for taking his cattle; to which *Yea* put in an avowry for damage-feaſant, and *Waterman* not putting in any plea in bar, there was judgment by default for the avowant that the plaintiff be amerced, and that the avowant ſhould have a *return. habend.* *Yea* did not execute a writ of inquiry of damages, as he might have done by the *ſtat.* 17 *Car.* 2. *cap.* 7.*, but rather choſe to cauſe three actions upon the replevin bond to be brought againſt the plaintiff and his bondſmen, in order to force him to pay the avowant his damages and coſts; whereupon Serjeant *Hayward* now moved on the behalf of *Waterman* and his ſureties, that proceedings might ſtay in all the three actions, becauſe the avowant might have recovered his damages and coſts by executing a writ of inquiry, which he had omitted to do. *2dly*, If the court ſhould not think fit to ſtay the proceedings

*Sed quære, for the ſtatute only extends to diſtreſſes for rent. 1 Ld. Raym. 97.

proceedings for this reaſon, that they might be ſtayed upon payment of the ſingle penalty of the replevin bond (which was ten pounds) into court.

Serjeant *Prime* for the avowant—This application is without precedent: the avowant in this caſe has two methods of proceeding in his election; *viz.* either to execute a writ of inquiry, or to ſue upon the replevin bond, the plaintiff not having proſecuted his ſuit with effect. And of this opinion were *Birch* and *Bathurſt* Juſtices, (only in court,) and ſaid, they could not interpoſe; whereupon *Prime* for the avowant offered to refer the damages and coſts in the original action, and the coſts in the actions on the replevin bond to be ſettled by the prothonotary, which the court thought was very fair and reaſonable; and if the plaintiff would not comply therewith, the avowant to be at liberty to proceed as he thought fit on the replevin bond.

HILARY TERM,

30 *Geo.* II. 1757.

Gardner *verſus* Jeſſop, an Attorney. In C. B.

Aſſumpſit for goods ſold and delivered.

IN *Trinity* term in the 28th year of the reign of his preſent Majeſty, the plaintiff exhibited his bill againſt the defendant, in an action upon the caſe, and declared for 5 *l.* upon an *indebitatus aſſumpſit*, and alſo for other 5 *l.* upon a *quantum valebant*, which the defendant refuſed to pay, to the damage of the plaintiff of 10 *l.*, and thereupon he prayed relief, *&c.*

Non aſſumpſit as to all except 2*l.* 3*s.* 8*d.* and as to that ſum, that he is liable to be ſued for it in the county court of Middleſex.

And the ſaid *Thomas* in his proper perſon comes and defends the wrong and injury when, *&c.*, and as to the promiſe and undertaking in the ſaid declaration laſt mentioned, and alſo as to the promiſe and undertaking in the ſaid declaration firſt above mentioned, except as to the ſum of one pound three ſhillings and eight pence, parcel of the ſaid ſum of five pounds therein ſpecified; ſays, that he did not promiſe and undertake in manner and form as the ſaid *Joſiah* hath above thereof complained againſt him;

him; and of this he puts himſelf upon the country, and the ſaid *Joſiah* doth the like; and as to the ſaid promiſe and undertaking in the ſaid declaration firſt above mentioned, as to the ſaid 1 *l.* 3 *s.* 8 *d.*, parcel of the ſaid 5 *l.* therein contained, the ſaid *Thomas* ſays, that the ſaid *Joſiah* ought not to have his ſaid action in *this court* againſt him, by reaſon of the non-performance of the ſaid promiſe and undertaking in the ſaid declaration firſt above mentioned as to the ſaid 1 *l.* 3 *s.* 8 *d.*, becauſe he ſays, that he the ſaid *Thomas* at the time of the exhibiting the ſaid bill of the ſaid *Joſiah*, and long before, lived and reſided, and ſtill doth live and reſide within the county of *Middleſex*; that is to ſay, at *Enfield* in the county of *Middleſex*: and the ſaid *Thomas* further ſays, that he the ſaid *Thomas* always from the time of the promiſe and undertaking of the ſaid *Thomas* in the ſaid declaration firſt above mentioned, and ſuppoſed to have been made, as to the ſaid ſum of 1 *l.* 3 *s.* 8 *d.*, parcel of the ſaid 5 *l.* therein contained, hitherto hath been, and ſtill is liable to be ſummoned to the county-court of *Middleſex*, within the true intent and meaning of the ſtatute made in the 23d year of the reign of his preſent Majeſty, for preventing delays and expences in the proceedings in the county-court of *Middleſex*, and for the more eaſy and ſpeedy recovery of ſmall debts in the ſaid county-court; and this he is ready to verify: wherefore he prays judgment if the ſaid *Joſiah* ought to have his ſaid action in *this court* againſt him by reaſon of the non-performance of the ſaid promiſe and undertaking in the ſaid declaration firſt above mentioned, as to the ſaid 1 *l.* 3 *s.* 8 *d.*, parcel of the ſaid 5 *l.* therein ſpecified. *W. Hayward.*

Replication that the defendant being an attorney is not liable to be ſummoned to the ſaid county-court.

And the ſaid *Joſiah*, as to the plea of the ſaid *Thomas* above pleaded in bar as to the ſaid 1 *l.* 3 *s.* 8 *d.*, parcel of the ſaid 5 *l.* in the ſaid firſt promiſe and undertaking in the ſaid declaration mentioned, ſays, that he, by any thing in that plea alledged, ought not to be barred from having his aforeſaid action thereof maintained againſt the ſaid *Thomas*, becauſe he ſays, that in and by the ſaid act of parliament mentioned in the ſaid plea of the ſaid *Thomas*, it is provided, that no perſon or perſons ſhall be liable to be ſummoned to the ſaid county-court at the ſuit of any plaintiff or plaintiffs, other than ſuch perſon or perſons as was or were liable to be ſummoned to the county-court of *Middleſex* before that act was made, and that *that* act ſhould not extend to give the county-court any juriſdiction to hold plea of, or to hear and determine any action, cauſe, or ſuit, other than ſuch action, cauſe, or ſuit, as the county-court of *Middleſex* might have held plea of, by plaint, before the making of the ſaid act, as by the ſaid act amongſt other things more fully appears. And the ſaid *Joſiah* further ſaith, that the ſaid *Thomas* before and at the time of the making of the ſaid act was, and ever ſince hath been one of the attornies of the court of our lord the now King of the Bench here; and therefore the ſaid *Thomas* neither at the time of

of the making of the ſaid act, nor at the time of the exhibiting of the ſaid bill of the ſaid *Joſiah*, was a perſon liable to be ſummoned to the ſaid county-court of *Middleſex*; and this he is ready to verify: wherefore he prays judgment and his damages in this behalf to be adjudged to him, *&c.* *W. Davy.*

Demurrer. And the ſaid *Thomas*, as to the ſaid plea of the ſaid *Joſiah* above in reply pleaded to the ſaid plea of the ſaid *Thomas*, above pleaded in bar to the ſaid promiſe and undertaking in the ſaid declaration firſt above mentioned, as to the ſaid 1 *l.* 3 *s.* 8 *d.*, parcel of the ſaid 5 *l.* therein contained, ſays, that the replication aforeſaid, and the matters therein contained, are not ſufficient in law for the ſaid *Joſiah* to have and maintain his ſaid action in *this court* againſt him; to which ſaid plea in manner and form aforeſaid above in reply pleaded, he the ſaid *Thomas* need not, nor is he in anywiſe bound by the law of the land to anſwer; and this he is ready to verify, wherefore he prays judgment, and that the ſaid *Joſiah* may be barred from having his ſaid action in *this court* againſt him; and for cauſes of this demurrer in law the ſaid *Thomas*, according to the form of the ſtatute in ſuch caſe lately made and provided, ſhews to the court here theſe cauſes following; to wit, that the ſaid replication is no anſwer to the ſaid plea of the ſaid *Thomas*, and is in itſelf incertain, repugnant, foreign, and argumentative.

Continuance. And thereupon the ſaid *Joſiah Gardner* prays time to join in demurrer with the ſaid *Thomas Jeſſop* here, until *Thurſday* next after the morrow of *All Souls*, and he has it, *&c.* The ſame day is given to the ſame *Thomas Jeſſop*, &c.; at which day here come as well the ſaid *Joſiah Gardner* by his aforeſaid attorney, as the ſaid *Thomas Jeſſop* in his proper perſon; and the ſaid *Joſiah Gardner* prays further time to join in demurrer with the ſaid *Thomas Jeſſop* here until *Friday* next after the *octave* of *St. Hilary*, and he has it, *&c.* (After ſeveral of the like continuances entered, the plaintiff in *Trinity* term 30 *Geo.* 2. joins in demurrer, and after continuances until this preſent *Hilary* term 30 *Geo.* 2. by *curia adviſare vult.*) This caſe was at laſt now argued by Serjeant *Hayward* for the defendant, and Serjeant *Davy* for the plaintiff; and after ſome time taken to conſider, the court gave judgment for the plaintiff.

Joinder in demurrer.

And 1*ſt*, It was reſolved by the court, that an attorney may be ſued *here* for any ſum under forty ſhillings, though it be ever ſo ſmall.

2*dly*, That an attorney cannot waive his *privilege*, becauſe he is not allowed *it* in reſpect of himſelf, but for the ſake of this court and the ſuitors here; and if he could waive his *privilege*, how doth the plaintiff know that he will waive *it?*

3*dly*,

3*dly*, That the replication is well enough, although it doth not alledge *that the plaintiff ought not to be barred from having his action* IN THIS COURT.

So the court over-ruled the demurrer, and ſaid the plaintiff might have what judgment was proper: *Quære*, Whether it muſt be judgment in chief; or *quod defendens reſpondeat ouſter?* for the court did not mention what judgment.

Jenkins, on the Demiſe of James Harris and Ann his Wife, *verſus* Prichard and others. C. B.

UPON the iſſue not guilty in ejectment the following caſe was reſerved for the judgment of the court, which ſtates,

Whoever claims as heir by deſcent muſt make himſelf heir to the perſon laſt actually ſeiſed and in poſſeſſion of the inheritance

An actual entry is not neceſſary to be made to avoid a fine without proclamations.

That this action is brought for recovering the poſſeſſion of lands and tenements in the pariſh of *Michaelchurch Eſkley* in the county of *Hereford*; that it appeared in evidence at the trial, that *David Smith* was ſeiſed in fee of the premiſes, and being ſo ſeiſed, by indentures of leaſe and releaſe, dated the 29th and 30th days of *Auguſt* 1716, made between the ſaid *David Smith* of the one part, and *Rowland Prichard* and *Charles Price* of the other part, in conſideration of 180 *l.* paid to the ſaid *David Smith* by *Sarah Madey* ſpinſter, and in conſideration of a marriage then intended to be had between the ſaid *David Smith* and *Sarah Madey*, and for ſecuring a maintenance for her in caſe ſhe ſhould ſurvive the ſaid *David*, and for ſettling and aſſuring the premiſes to the uſes thereafter mentioned, and for other good conſiderations, the ſaid *David Smith* did grant and convey the premiſes in queſtion to the ſaid *Rowland Prichard* and *Charles Price*, and their heirs, to hold to them and their heirs to the uſes following, (that is to ſay,) to the uſe of the ſaid *David Smith*, his heirs and aſſigns, until the ſaid intended marriage ſhould take effect; and from and after the ſolemnization thereof, to the uſe and behoof of the ſaid *David Smith* and the ſaid *Sarah* his intended wife, for and during their natural lives, and the life of the ſurvivor of them; and from and after the deceaſe of the ſurvivor of them, to the uſe and behoof of the heirs of the body of the ſaid *Sarah* lawfully to be begotten by the ſaid *David*, and for want of ſuch iſſue, to the uſe and behoof of the ſaid *David*, his heirs and aſſigns for ever.

That the marriage was afterwards ſolemnized, and there was iſſue thereof one daughter named *Elizabeth*, and no other iſſue.

That in the year 1734 the ſaid *Sarah* died, and in *February* 1736 the ſaid *David* intermarried with one *Sarah Griffiths*, and by her had iſſue *Anne*, one of the leſſors of the plaintiff, (now an infant,) and no other iſſue; and the ſaid *Anne* married the other leſſor of the plaintiff before the demiſe laid in the declaration.

That in *April* 1738 the ſaid *Elizabeth*, the daughter of the ſaid *David*, by the ſaid *Sarah* his firſt wife, intermarried with *John Waters*, and upon that marriage the ſaid *David* delivered up the poſſeſſion of the premiſes to the ſaid *John Waters*, but did not execute any conveyance thereof to him.

That in *January* 1738 the ſaid *David* died, leaving iſſue only *Elizabeth* by the firſt venter, and the ſaid *Anne* by the ſecond venter, and about 12 months afterwards the ſaid *Elizabeth* died, leaving iſſue only one ſon, (born after the death of *David* the grandfather,) who died ſoon after the death of the ſaid *Elizabeth* his mother, an infant, and without iſſue; and the ſaid *John Waters* held the premiſes till his death, which happened in or about the year 1743, and the ſaid *John Waters* and *Elizabeth* his wife never did any act to deſtroy the ſaid eſtate-tail veſted in her.

That the ſaid *David* had no brother, but left a ſiſter (named *Jane*, who married *Job Gilbert*, and) who was heir at law to *Elizabeth* the daughter of the ſaid *David* by the firſt venter, and to her ſon, and upon the death of the ſaid *John Waters* the ſaid *Job Gilbert* and *Jane* entered upon the premiſes, and being in poſſeſſion in *Trinity* term, in the 22d year of the reign of his preſent Majeſty, levied a fine thereof without proclamations, and no actual entry was made by the leſſors of the plaintiff to avoid ſuch fine.

The defendants claim under the ſaid *Job Gilbert* and *Jane* his wife; in *November* 1754 the leſſors entered and made the leaſe to the plaintiff, and the defendants ouſted them, as mentioned in the declaration; and upon the trial a verdict was found for the plaintiff, ſubject to the opinion of the court, whether the plaintiff ought to recover the premiſes, or any part thereof.

And if the opinion of the court ſhall be that the plaintiff ought to recover the whole premiſes, then the verdict is to ſtand, with liberty for the plaintiff to take out execution thereon; and if the court ſhall be of opinion that the plaintiff ought only to recover part of the premiſes, then the verdict is to be entered for the plaintiff for ſuch part only, and as to the reſidue for the defendants: but if the opinion of the court ſhall be, that the plaintiff ought not to recover any part of the premiſes, then the verdict obtained by the plaintiff is to be void, and inſtead thereof a judgment of nonſuit is to be entered up for the defendants.

The eſtate-tail being ſpent, the leſſors of the plaintiff claim the reverſion in fee of the whole premiſes in right of *Anne*, as heir to *David Smith*, or, at leaſt, a moiety of the premiſes, as the reverſion thereof, upon the death of *David Smith*, deſcended in moieties to his two daughters *Anne* and *Elizabeth*.

Upon

Upon the argument of this case two points were made; 1*st*, Whether the lessors of the plaintiff had any title at all? And 2*dly*, If they had any title, whether an actual entry was not necessary to have been made in order to avoid the fine without proclamations?

As to the first point, it was objected for the defendant, and adjudged by the court, (*absente Birch* J.) that whoever claims as heir in fee by descent must make himself heir to him that was last seised of the actual freehold and inheritance; that is to say, who was last actually in possession of the lands in fee-simple; and the reversion or remainder in fee (be it which it will) which was in *David Smith* and his heirs on the failure of issue in tail, is not such a seisin whereof there can be a *possessio fratris*, &c.; and therefore *Anne*, not being heir to the person last actually possessed of the fee, the court were very clear that the lessors had no title to any part of the premises. Co. Lit. 11. b.

As to the second point, the court adjudged that an actual entry is not necessary to be made in order to avoid a fine at common law, as this is, it being without proclamations. Judgment for the defendants. Plowd. 265.

Burslem *versus* Fern. C. B.

False imprisonment. An attorney fills up the sheriff's warrant on a capias ad respondendum after it is signed, sealed, and sent to him with a blank, this is bad.

IMPRISONMENT. The defendant justifies under the sheriff's warrant directed to the gaoler, and to one *Samuel Jordan* and the defendant *Josiah Fern*, upon a *capias* to take the defendant to answer *Jos. Jones* in a plea of trespass upon the case upon promise. The plaintiff replies, and traverses that the sheriff made such warrant directed to the gaoler, *Samuel Jordan* and *Josiah Fern*. The defendant takes issue upon the traverse; and upon the trial before Mr. Justice *Denniſon* at the assizes in the Midland circuit, it appeared in evidence, that the attorney for *Jos. Jones* sent to the under-sheriff for a warrant upon the *capias ad respondendum* sued out against *Burslem*; that the under-sheriff sent to *Jones*'s attorney a warrant thereupon, directed to the gaoler and *Samuel Jordan*, with a blank space for another bailiff's name; that *Jones*'s attorney, without the privity or knowledge of the sheriff or under-sheriff, put in the name of the defendant *Fern* after the warrant was sealed and sent to him, at the instance and peril of the plaintiff *Jones*, as a special bailiff, who thereupon arrested *Burslem*, and carried him to gaol for want of bail. It also appeared in many other counties this method of sending blank warrants by under-sheriffs to attornies who send for the same is often practised, especially in the northern counties, as Mr. Justice *Denniſon* himself said; and thereupon he was about to sum up the evidence, and direct the jury to find a verdict

verdict for the defendant; but at the preſſing inſtance of Serjeant *Willes* the point was ſaved, and a caſe ſtated, as above, for the opinion of the court, whether the iſſue was proved for the defendant.

It was inſiſted by Serjeant *Hewitt* for the defendant, that the iſſue was well proved for him, (and of that opinion was the judge at the trial); that although the caſe ſtates that the name of *Fern* was put into the warrant after it was ſent to the attorney, without the privity or knowledge of the ſheriff or under-ſheriff, yet it doth not ſtate that the attorney had not authority from the ſheriff for that purpoſe; and the general uſage of delivering out blank warrants to attornies authorizes this practice. The ſame kind of practice prevails in other caſes: the filacers give out blank writs, and the plaintiff's attorney conſtantly fills them up after they are ſigned and ſealed; marriage-licences are given out to ſurrogates, *blank*, and filled up by them after they are ſealed; and *ſo*, in many other inſtances. The *ſtat.* 6 *Geo.* 1. *c.* 21. *f.* 53., which recites, that whereas under-ſheriffs deliver out blank warrants and other warrants, *&c.* to attornies for arreſting perſons without having any writ, *&c.*, doth not condemn the practice of delivering out blank warrants, but ſeems to allow the ſame, and only condemns the delivering out of blanks, or any warrants by the ſheriff before he hath received the writs. In a *Weſtmorland* caſe in *B. R.* upon a motion by way of complaint againſt an attorney for filling up a warrant after it was ſent to him, exactly like the preſent caſe, the court did not cenſure the attorney, but ſaid it was the conſtant uſage. (This was mentioned by Mr. J. *Denniſon* at the trial.)

On the other ſide, it was ſaid by Serjeant *Willes* for the plaintiff, that if this practice be permitted to go on, it will be of bad conſequence; for then, inſtead of ſheriff's officers, who give ſecurity to do their duty, plaintiff's attornies may put into warrants men of infamous characters, who may be guilty of great oppreſſions; and formerly the perſons who executed proceſs were duly ſworn and admitted for that purpoſe, to prevent oppreſſion.

Per curiam (*abſente Birch* J.)—We have no doubt but this practice ought to be condemned; and although we do not puniſh attornies for it by granting attachments againſt them upon complaints, yet we conſtantly diſcharge the party arreſted by ſuch warrant out of cuſtody. Such warrant is always held to be illegal; and if *Burſtem* had killed *Fern* in reſiſting him, it would not have been murder, becauſe *Fern* had no legal warrant to arreſt him. And a parcel of ſailors, who were tried before Mr. Juſtice *Bathurſt* for killing a bailiff who had ſuch a warrant as the preſent for arreſting one of them, were acquitted of murder. As to the *ſtat.* 6 *Geo.* 1. *c.* 21. *f.* 53. we think it rather condemns blank

blank warrants than otherwiſe; but if it does not, it leaves them as before the ſtatute was made, and we think ſuch warrants were always bad. As to filacers they are officers for that purpoſe, and they may authoriſe attornies to fill up their writs. As to ſurrogates we do not know what they do, but we are all very clear that the defendant has not proved his iſſue, and there muſt be judgment for the plaintiff.

Villers *verſus* Hanley. C. B.

DEBT upon a bond for 52*l.* 16*s.* againſt the heir of the obligor. The defendant confeſſes the bond and debt, and pleads that he has nothing by deſcent but a ſmall cottage in *Tamworth*, except a reverſion after a term of 500 years, commencing the 16th of *October* 1746, now to come and unexpired; and this he is ready to verify. To this plea there is a general demurrer, which was argued by Serjeant *Willes* for the plaintiff, and Serjeant *Hewitt* for the defendant.

A term for 500 years muſt be pleaded to be by deed.

For the plaintiff it was objected, 1*ſt*, That the plea is ill in ſubſtance, becauſe it is not alledged therein that the leaſe for 500 years is by deed, nor that the leſſee by virtue thereof entered; and if the leaſe for 500 years be without deed, it is void by the ſtatute of frauds and perjuries *. And of this opinion was the court (*Clive* and *Bathurſt* Juſtices only preſent), and upon this point gave judgment for the plaintiff.

A reverſion after a term for 500 years is immediate aſſets in the hands of the heir by deſcent.

* But quære as to this, and ſee Farmer of the demiſe of Earl againſt Rogers, ante, Trin. 28 & 29 G. 2. C. B. ſeems contra. Lil. Ent. 180. Vide 1 Stra. 665. Vide 1 Ro. Rep. 57.

2*dly*, It was objected that a reverſion after a term for years is not pleadable in this manner; but the defendant in this caſe ought to have admitted aſſets; and cited *Smith* and *Angel*, 2 *Ld. Ray.* 783. and *Salk.* 354. S. C., where *Holt*'s opinion is, that the heir could not plead a term in delay of preſent execution, but ought to confeſs aſſets, (notwithſtanding there are ſome precedents otherwiſe, that he may,) for the reverſion is aſſets, and the common law had no regard to a term for years; and there is no miſchief in this; for though in conſequence a *levari* may go, yet a leſſee may maintain himſelf againſt an ejectment by virtue of his leaſe; and of this opinion was the court now in the preſent caſe; but they declared they gave judgment for the plaintiff upon the firſt point.

But *quære* how the judgment is entered, whether general or ſpecial?

Shipman *verſus* Stevens. C. B.

Practice. Where the defendant is an infant the plaintiff ought to apply to him to name his guardian, and in default thereof, the plaintiff muſt apply to the court to oblige defendant ſo to do.

ASSAULT and battery, whereby the plaintiff loſt her leg. The defendant being ſerved with a *capias ad reſpondendum*, did not enter his appearance at the proper day after the return thereof, therefore the plaintiff's attorney made an affidavit of the ſervice, entered an appearance for the defendant according to the ſtatute in perſon, left the declaration in the office, gave notice to the defendant thereof, and to plead; whereupon the defendant employed Mr. *Waldo* an attorney of *B. R.* to take the declaration out of the office and plead the general iſſue, who did ſo in the name of one *Palmer* an attorney of *C. B.* Thereupon the plaintiff's attorney made up and delivered the iſſue, gave notice of trial, ſet down the cauſe, ſubpœnaed witneſſes, and gave briefs to his counſel; but when the cauſe was juſt coming on to be tried, the plaintiff's attorney diſcovered that the defendant was an infant of about 17 years old, ſo that he ought to have appeared and pleaded by guardian; and therefore if the plaintiff had proceeded to trial and judgment upon this record, it would have been error.

Wherefore it was now moved on behalf of the plaintiff, that the defendant or his attorney might ſhew cauſe why the appearance in the filacer's book ſhould not be ſtruck out, and the defendant be obliged to appear and plead by his guardian, and why the record ſhould not be amended conformably thereto, and why the plaintiff ſhould not have his coſts occaſioned by the defendant's attorney, who muſt be ſuppoſed to know his client was an infant, and ſo had led the plaintiff's attorney on to proceed thus far erroneouſly; upon an affidavit of theſe facts, and that Mr. *Waldo* was a truſtee for the defendant in a ſettlement, and muſt know he was not of age when he pleaded.

On ſhewing cauſe for the defendant, it appeared by affidavit that Mr. *Waldo* acquainted the plaintiff's attorney that the defendant was an infant, but this was after the plea pleaded, and he not believing it, proceeded ſo far as above ſaid.

Per curiam—In this caſe the plaintiff's attorney ought to have applied to the defendant to name a guardian, and if he did not do ſo in ſix days, then plaintiff ought to have applied to the court to oblige him ſo to do; and it was the plaintiff's attorney's own fault to proceed erroneouſly, although no notice had been given to him that the defendant was not of full age; and if the plaintiff had proceeded to judgment, and error had been brought, and afterwards the plaintiff had moved here to have made the

record right, this court would not have done it; and therefore as to costs there is more reason that the plaintiff should pay costs for being permitted to have the record made right, than that the defendant should pay costs to the plaintiff; however, as costs have not been prayed by the defendant, let the defendant plead by guardian in six days, and let the record be made agreeably thereunto without costs of either side. Serjeants *Prime*, *Willes*, and *Davy* for the plaintiff, *Hewitt* for the defendant. *Abſente Capitul. Juſtic. Willes.*

EASTER TERM,

30 *Geo.* II. 1757.

Cope *verſus* Marſhall & al. B. R.

THE record is of *Hilary* term in the 27th year of his preſent Majeſty, *Roll.* 145. The declaration contains nine counts, but as the queſtion debated aroſe ſingly on the 8th count, it will be only neceſſary to write *that* down, which is thus, *viz.*

Declaration in treſpaſs for digging up coney burrows in the plaintiff's ſoil.

And alſo that they the ſaid *Charles Marſhall*, *W. B.* *J. M.* *J. W.* *T. W.* *J. S.* *W. T.* *J. V.* *W. S.* and *W. H.* on the 11th day of *June* in the year of our Lord 1753, and on divers other days and times between that day and the day of exhibiting this bill, with force and arms broke and entered the cloſe and free warren of the ſaid *John Cope* called *Sugar's Lodge Warren*, otherwiſe *Cope's Warren*, at the pariſh of *Rugeley*, otherwiſe *Rudgely*, otherwiſe *Ridgely* aforeſaid, in the ſaid county of *Stafford*, and trod down and conſumed with their feet in walking the graſs of the ſaid *John Cope* there growing, of the value of twenty pounds, and the ſoil of the ſaid *John Cope* there, to wit, five acres of his ſoil did turn up and ſubvert with ſhovels, ſpades, corves, pickaxes, and mattocks, and did dig up, fill up, and deſtroy divers coney burrows, to wit, 1000 coney burrows then and there made and kept up for the harbouring and breeding of conies, and the

conies then found in the ſame cloſe and free warren, to wit, 1000 conies of the value of fifty pounds, did take and carry away, and converted and diſpoſed thereof to their own uſe, and other injuries to the ſaid *John Cope* did, againſt the peace of our lord the preſent king, and to the damage of the ſaid *John Cope* of 100 *l.* and therefore he brings ſuit, *&c.*

Not guilty to the whole. And a juſtification by the defendant as having a right of common and that the ſame was ſurcharged with conies to the nuſance of the defendant, and therefore he abated the nuſance.

And the ſaid *Charles* (and other defendants) plead firſt the general iſſue Not guilty to the whole, and thereupon iſſue is joined; and by leave of the court here for this purpoſe to them granted, according to the form of the ſtatute in ſuch caſe lately made and provided, for further plea, as to breaking and entering the cloſe in the ſaid declaration mentioned, called *Sugar's Lodge Warren*, otherwiſe *Cope's Warren*, and treading down and conſuming the graſs there lately growing with their feet in walking, and the turning up and ſubverting with ſhovels, ſpades, corves, pickaxes, and mattocks, the ſaid ſoil there, and digging up, filling up, deſtroying, and ſpoiling the ſaid coney burrows there made and kept up for the harbouring and breeding of conies, above ſuppoſed to be done, ſay, that the ſaid *John Cope* ought not to have or maintain his ſaid action thereof againſt them, becauſe they ſay that the ſaid *Charles*, at the ſaid ſeveral times when, *&c.* and long before, was and ſtill is ſeiſed in his demeſne as of fee of and in divers, to wit, twenty acres of land, with the appurtenances, lying and being in the pariſh aforeſaid, and that the ſaid *Charles*, and all thoſe whoſe eſtate he hath, and at the ſaid ſeveral times when, *&c.* had of and in his ſaid land, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, and have uſed and been accuſtomed to have, and of right ought to have had, and the ſaid *Charles* ſtill of right ought to have common of paſture in and upon the ſaid cloſe called *Sugar's Lodge Warren*, otherwiſe *Cope's Warren*, in which, *&c.* for all his and their commonable cattle levant and couchant on the ſaid land now of the ſaid *Charles*, with the appurtenances, every year at all times of the year, at his and their wills and pleaſures, as to the ſaid land now of the ſaid *Charles*, with the appurtenances, belonging and appertaining; and the ſaid *Charles*, *William Emery*, *J. M.*, (and the other defendants,) further ſay, that the ſaid coney burrows, in the ſaid declaration mentioned, before the ſaid ſeveral times when, *&c.* had been wrongfully and injuriouſly made, and at the ſaid times when, *&c.* were wrongfully and injuriouſly kept up and continued for the harbouring and breeding of conies in the laſt-mentioned cloſe, called *Sugar's Lodge Warren*, otherwiſe *Cope's Warren*, in which, *&c.* and the conies, to wit, 100,000 conies harboured and bred in thoſe coney burrows at the ſaid times when, *&c.* eat up and fed on the graſs in that cloſe growing, by means of which the ſaid common at the ſaid times when, *&c.* was ſurcharged, to the great nuſance of the ſaid *Charles* in the enjoyment of his ſaid common of paſture, ſo that the ſaid *Charles*, at the ſaid times when,

when, *&c.* could not have and enjoy his laſt-mentioned common of paſture in the ſaid cloſe called *Sugar's Lodge Warren*, otherwiſe *Cope's Warren*, in which, *&c.* in ſo beneficial a manner as of right he ought to have had and enjoyed the ſame; therefore the ſaid *Charles* in his own right, and the ſaid *W. E.*, *J. M.*, (and other defendants,) as his ſervants, and by his command, in order to abate the ſaid nuſance, and to prevent the continuance of the increaſe of conies there, at the ſaid ſeveral times when, *&c.* entered the ſaid cloſe called *Sugar's Lodge Warren*, otherwiſe *Cope's Warren*, in which, *&c.* and with ſhovels, ſpades, corves, pick-axes, and mattocks, dug up, filled up, deſtroyed, and ſpoiled the ſaid coney burrows ſo there wrongfully and injuriouſly made, kept up, and continued for the harbouring and breeding of conies, and thereby did abate the ſaid nuſance, as it was lawful for them to do; and in ſo doing they the ſaid *Charles* (and others) did neceſſarily and unavoidably tread down and conſume with their feet in walking a little of the graſs there then growing, and did neceſſarily turn up and ſubvert with the ſaid ſhovels, ſpades, corves, pick-axes, and mattocks the ſaid ſoil there, doing as little damage as on that occaſion they poſſibly could, which are the ſame breaking and entering the ſaid cloſe in the ſaid declaration mentioned, called *Sugar's Lodge Warren*, otherwiſe *Cope's Warren*, and treading down and conſuming the ſaid graſs there lately growing with their feet, in walking and turning up and ſubverting with ſhovels, ſpades, corves, pick-axes, and mattocks the ſaid ſoil there, and digging up, filling up, deſtroying, and ſpoiling the ſaid laſt-mentioned coney burrows there made and kept for the harbouring and breeding of conies there, whereof the ſaid *John Cope* hath above thereof complained againſt them; and this they are ready to verify; wherefore they pray judgment if the ſaid *John Cope* ought to have or maintain his ſaid action in that reſpect againſt them, *&c.*

To this plea the plaintiff has demurred generally, and the defendants have joined in demurrer.

There was a verdict for the plaintiff upon the general iſſue, and afterwards this demurrer was ſeveral times argued before Lord Chief Juſtice *Ryder & ſociis ſuis*, and it was argued in this term before Lord Chief Juſtice *Mansfield & ſociis ſuis* by Mr. *Moreton* for the plaintiff, and Mr. *Aſton* for the defendants.

In ſupport of the demurrer and to ſhew the plea was bad, ſeveral caſes were cited; firſt, *Coney's* caſe, *Godb.* 122. 4 *Leon.* 7. S. C. where the plaintiff declared in treſpaſs for digging the plaintiff's cloſe, and killing 18 conies there; the defendant pleaded as to all the treſpaſs but killing of two conies Not guilty; and as to killing the two conies juſtifies as having a right of common, and that he found them eating the graſs, and that he

killed them. Judgment for the plaintiff. To this it was answered by the counsel for the defendant, that the case cited is not applicable to the present case, for the plea now under consideration does not justify the killing of conies.

The second case cited for the plaintiff was *Bellew* v. *Landon*, *Cro. Eliz.* 876. and *Owen* 114. S. C. which was trespass for killing conies; the justification is the same as the case in *Godb.* and the same judgment, so the counsel for the defendant submitted the same answer, that this case is not applicable to the present.

The third case cited for the plaintiff was *Haddesden* v. *Greysel*, *Cro. Jac.* 195. *Yelv.* 104. S. C. which was trespass *quare clausum fregit*, and took, killed, and carried away conies: the defendant justifies, for that he is seised in fee of a messuage and land, and had common by prescription appertaining thereto in the place where, &c. and that he was ready to use his common; and many conies being there *damage feasant* and spoiling the grass, he entered to chase them out least they should increase: the plaintiff demurred, and after argument the court adjudged that the plea was not good, for the commoner has nothing to do with the land but to put in his cattle, and may not meddle with any thing of the lord's there; and if the lord surcharge the common, the commoner shall have an assise or an action on the case; and he may not kill the conies, for so long as they are on the land of the lord they are his property; and when the defendant shews that his intent was to enter to chase the conies, that entry was tortious; and so there was judgment for the plaintiff. The counsel for the defendant now admitted this case was good law, but said it was not like the case at bar.

The fourth case cited for the plaintiff was Sir *Jerome Horsey* v. *Hagberton*: the question was, Whether a commoner may cast down and fill up coney burrows which were made in the common waste where he was to have common? and this being pleaded in justification, and a demurrer thereupon, it was resolved and adjudged without argument, that the commoner had not any other interest than to take the common by the feeding there of his cattle; and may not destroy the conies nor coney burrows; wherefore without argument it was adjudged that the plea was not good. In answer to this case it was observed by the counsel for the now defendants, that the case cited was determined without argument, and is so mentioned by the reporter twice: 2*dly*, That it does not appear what the nature of the justification was; and it might be a justification merely by the defendant, as having a right of common, without stating or alledging any Surcharge; and if so, the case was admitted to be law; and that this was the nature of the justification is most probable, or otherwise it would have been further stated; and the defendant's counsel

counſel agreed, that the lord may lawfully erect coney burrows on the warren, and may encourage the increaſe of conies, ſo that he do not ſurcharge the common; but when *that* is done, the coney burrows (it was inſiſted) were a nuſance; and they ſaid that in the preſent plea the ſurcharge is inſiſted upon, and that the erection of the coney burrows was the cauſe of ſuch ſurcharge, which is admitted by the demurrer; and therefore the preſent caſe is very different.

The fifth and laſt caſe cited for the plaintiff was, 2 *Bulſt.* 116. *Carril* v. *Pack and Baker*, 1 *Brownl.* 227. S. C. treſpaſs *quare clauſum & liberam warrennam fregit & intravit*, and for digging the ground, *&c.* The defendants plead Not guilty, except as to entering the warren, chaſing the conies, and digging the land; and as to chaſing the conies and digging the land they juſtify, as having a right of common; that the plaintiff's father ſtored the place with conies; that the plaintiff made new holes, by reaſon whereof defendant's ſheep often fell into them, and ſo were hurt; by reaſon whereof defendant with ferrets chaſed the conies, and digged down the burrows, and filled up the holes for the better preſervation of the common: demurrer to the plea, and judgment for the plaintiff. To this caſe it was anſwered by the defendant's counſel, that the judgment was given upon the inſufficiency of the plea, and, as it ſeems, principally upon this reaſon, becauſe the defendant hath not denied but admitted the free warren; for *Crooke* J. ſays, "If the plaintiff hath a free "warren, the defendant cannot juſtify the killing the conies." (*Haughton* J.)—Coney burrows are incident to a warren; and *per Dodderidge* J.—If the defendants had pleaded Not guilty to the treſpaſs in the warren, this had been then well pleaded, and the plaintiff muſt then have made it appear to the court that he had a free warren; but by this plea they have confeſſed that he had a free warren; ſo the court was clear of opinion that the juſtification was not good, and judgment was entered for the plaintiff. According to the report of this caſe by *Brownl.* as of *Trin.* 11 *Jac.* 1. the ſuit was held to be diſcontinued by reaſon of a defect in the pleading, and ſo no judgment given in this caſe on the merits. The pleading ſtood thus: declaration in treſpaſs for breaking the plaintiff's free warren, digging his land, and chaſing his conies, and taking them. Defendants to all except entering the warren, chaſing the conies, and digging the land, plead Not guilty; then as to digging and chaſing the conies they juſtify, and ſay nothing as to the entering the warren, neither by confeſſion nor traverſe, and ſo all was diſcontinued; and cites 4 *Rep. Harlekenden's* caſe: this aroſe from an objection taken by Mr. Juſtice *Haughton*, of which ſome mention is made in the report of this caſe in *Bulſtrode*; but however this may be, ſuppoſing the judgment to be given on the merits for the plaintiff as reported by *Bulſtrode*, that determination

(the defendant's counſel inſiſted) cannot affect the caſe now at bar, for here the defendants have purſued the advice of Mr. Juſtice *Dodderidge*, and have juſtified entering into the cloſe, but (by the general iſſue to the whole) have denied the entering into the free warren, ſo that the preſent juſtification does not admit the cloſe to be a free warren, and therefore the reaſon given for the inſufficiency of the plea doth not hold in the preſent caſe; that coney burrows are incident to a warren doth not ſhew this juſtification to be bad, which does not admit the place in which, *&c.* to be a warren. But it was admitted by the counſel for the defendants, that this caſe was rather an authority *for*, than againſt them; for in the argument thereof by Sir *Robert Hitcham* in ſupport of the juſtification, he agreed that killing of conies was not juſtifiable; that in *Simon de Harcourt*'s caſe, 13 *H.* 8. *fo.* 15. which was treſpaſs for digging a trench upon the common, which the commoners juſtified to prevent the common being annually overflown, in which caſe the court were divided in opinion two againſt two: the Chief Juſtice went upon this difference, where the commoner meddles with the ſoil *de novo*, and where he only reforms a misfeaſance; in the caſe of *Simon de Harcourt* the commoner meddled with the ſoil *de novo*; but if the tertenant do incloſe, the commoner may pull down, becauſe this is only done to reform a misfeaſance. If the lord do make a pond upon the common, if the commoner notwithſtanding this hath common ſufficient, this is good; but if all the common be taken up in the pond, they may lawfully let out the water, and ſo enjoy their common, and this they may well juſtify; and cites the ſame caſe. Then he inſiſts that the tertenant ought not to take advantage of his own wrong, and that it is lawful for every man to remove what is hurtful or a damage to him. After this argument the court determined the caſe of *Carril* v. *Pack and Baker*, upon the reaſon that it was charged in the declaration that the defendants had broke the plaintiff's free warren, and done the treſpaſs complained of there; and this was admitted by the juſtification; and therefore the court were of opinion that the juſtification was bad, becauſe coney burrows are incident to a warren; from hence (the now defendant's counſel ſubmitted) may be very fairly drawn this almoſt neceſſary conſequence, *viz.* That if in that caſe the defendants had pleaded Not guilty to the *treſpaſs in the warren*, the juſtification had been good; for Mr. Juſtice *Dodderidge* expreſsly ſays, if the defendants had pleaded Not guilty to the treſpaſs in the warren, *this had been then well pleaded*, and the plaintiff muſt then have made it appear to the court that he had a free warren, but by this plea they have confeſſed he had a free warren: in the caſe at bar the free warren is denied by the general iſſue, and therefore the defendant's counſel now ſubmitted to the court that this caſe cited by the plaintiff is a ſtrong authority for the defendants.

They

They who argued for the defendants did not deny the authorities cited for the plaintiff, nor diſpute the principles upon which thoſe caſes are founded, but contended that the plea in the caſe at bar may be good conſiſtently with thoſe principles; and to diſtinguiſh this from all the caſes cited for the plaintiff as to the intereſt of the commoner, it was firſt admitted by the defendant's counſel, that his intereſt conſiſts in the feeding on the herbage, and that he has no other intereſt in the ſoil, that the lord or owner of the ſoil may feed the herbage with his cattle, and is not reſtrained to any ſpecies of cattle, but may depaſture it with beaſts of warren; that the commoner has no right to diſtrain, chaſe, or kill the beaſts of the lord. Theſe are the general rules which they (for the defendants) ſaid they did not diſpute, but ſubmitted to the court that theſe rules admitted of ſome exceptions or reſtrictions, and that although the lord may put what ſpecies of cattle he pleaſes upon the common, or may uſe the ſoil in what manner he pleaſes as his own ſoil, yet that muſt be underſtood *ſub modo:* that he uſes the ſoil or feeds the herbage with cattle in ſuch manner as may be conſiſtent with the rights of the commoners; and here this rule of law ought to be obſerved, *ſic utere tuo ut alieno non lædas;* and therefore it was contended, and inſiſted by the defendant's counſel, that if the lord or owner of the ſoil puts ſuch a number of cattle upon the common ſo as to ſurcharge it, that is to ſay, if by means of ſuch number of cattle turned *on* by the lord, the commoner has not a ſufficient common of paſture for the cattle he has a right to feed on the common, or by means of any erections on the common, the commoner is diſturbed, hindered, or reſtrained in the enjoyment of his right, ſo that he cannot enjoy his common in ſo ample and beneficial a manner as he has a right to do from the nature of his grant, cuſtom, or preſcription; theſe are injuries done to the commoner, and which the law calls nuſances, and for which the commoner has a right to a redreſs by law; and there are a variety of caſes in the books to prove this. Then they ſtated the plea, the facts wherein diſcloſed are admitted by the demurrer, ſo that it appears that an injury has been done to the commoners by the making and continuing of the coney burrows, which is the cauſe of the ſurcharge upon the common: if this be an injury, the commoner has a right to redreſs; but how and in what manner *is the queſtion*, Whether by abating the cauſe of the nuſance, or by an action againſt the lord? It was inſiſted for the plaintiff, that the remedy is by action only, and that the defendant has no right to abate it, and by taking this method or courſe of redreſs is a treſpaſſer; and this is the ſubſtance of what has been contended for on the part of the plaintiff; but what is now inſiſted upon on the behalf of the defendant is,

Intereſt of the commoner.

Intereſt of the lord.

Commoner cannot chaſe or kill the lord's cattle.

Lord's uſe of the ſoil ſub modo.

He ought not to ſurcharge,

nor make erections.

Theſe are nuſances, and the commoner to have redreſs.

But in what manner is the queſtion.

May abate the nuſance.

That the abatement of the cauſe of the nuſance, as in the preſent caſe, is a legal method of redreſs; that it is agreeable to the

the reaſon and policy of the law, and that by purſuing this courſe the defendants are not treſpaſſers, but that their plea contains a legal juſtification; that this is a legal courſe of redreſs, and agreeable to the reaſon and policy of the law, appears from hence:

Nuſances are public or private.

Nuſances are conſidered either as public or private nuſances; public nuſances are ſuch as affect the public, all the king's ſubjects, as the ſtopping up an highway; private nuſances are ſuch as only affect certain particular perſons.

Public.

Public nuſances may be abated by any of the king's ſubjects, but no action will lie by a private perſon for a public nuſance, becauſe this would tend to create an infinite number of ſuits, one man being as well entitled to bring ſuch action as another.

Private.

General rule as to nuſances.

Private nuſances may be abated by the perſons injured by them, or the party injured may bring his action to recover damages for the injury he ſuſtains; and this is the general rule of law with reſpect to nuſances; and how the caſe at bar comes to differ from that general rule of law, the defendant's counſel were at a loſs (as they ſaid) to underſtand; that the party in this caſe of a private nuſance may bring an action to recover damages, but cannot abate it; for if there is any reaſon to differ this from all other caſes of private nuſance, the rule to prevail according to the general reaſon and policy of the law ought to be the very reverſe, *viz.* That theſe kind of nuſances may be abated, but that no action would lie; for if actions are to be brought by every perſon injured by this kind of nuſance, it muſt tend to create a multiplicity of ſuits, for every commoner has the ſame right of action as another; and in the caſe before the court may produce thouſands of ſuits.

Abating the nuſance in this caſe moſt reaſonable.

Beſides, abating the nuſance in this caſe is the moſt reaſonable, proper, and moſt adequate courſe of redreſs: by an action on the caſe againſt the lord, the commoner can only recover damages, but ſuch action will not reform the nuſance; that notwithſtanding ſuch action the nuſance continues, and by the continuance of a private nuſance pending an action, a perſon might in ſome caſes ſuffer irreparable injury; therefore the abating the nuſance is the moſt reaſonable and proper courſe of redreſs, and beſt adapted to the nature of the injury.

But that this courſe of redreſs ſhould not be lawful in this particular caſe of a private nuſance, and yet allowable in all others, (as was contended for on the ſide of the plaintiff,) is neither agreeable to common ſenſe and reaſon, nor to the reaſon and policy of the law; and therefore the defendant's counſel now took into conſideration the reaſon upon which this diſtinction, this exception

tion to the general rule of law, is contended for on the other side; and it is only this, *viz.* That the commoner has no intereſt in the ſoil, is not to meddle with the ſoil of the lord; all he has to do, is to take the graſs with the mouths of his cattle. In anſwer to which the defendant's counſel inſiſted, that the commoner's having no intereſt in the ſoil, is no reaſon why he may not enter into the common and dig the ſoil to abate a nuſance; for if I have a cloſe lying contiguous to another cloſe through which a watercourſe runs, and my neighbour makes a dam acroſs the watercourſe by which my cloſe is overflowed, ſurely I may enter into my neighbour's cloſe and dig up the dam in order to abate the nuſance, and *that*, although I have not, nor claim to have, any kind of intereſt in the ſoil. This is every day's practice in juſtifications for abating of nuſances, and is ſo well known and eſtabliſhed that there is no need to cite authorities to prove it. 2 *Inſt.* 405, 6. That the party injured may enter into the land of the wrong-doer to abate the nuſance, whether it be in his own poſſeſſion or in the poſſeſſion of his alienee; and to the like purpoſe are many caſes put in the year-book, 9 *Ed.* 4. 35. If a watercourſe to my mill be diverted by making a ditch in another man's ſoil, I may enter and fill up the ditch; this cannot be diſputed, and therefore it may be fairly concluded, that in the preſent caſe the commoner may lawfully abate the nuſance. A right of common is certainly an intereſt in the produce of the ſoil, though not in the ſoil itſelf, and is ſuch an intereſt as gives the party a remedy to recover (if deprived of it) by an aſſize; it is ſuch an intereſt as enables the commoner to diſtrain the cattle of ſtrangers depaſturing the graſs as damage-feaſant; it is ſuch an intereſt as enables the party to abate a nuſance erected to his prejudice in the enjoyment of his common, as appears from the caſe of *Maſon* v. *Cæſar*, 2 *Mod.* 65. which was treſpaſs for pulling down of hedges; the defendant pleads that he had a right of common in the place where, &c. and that the hedges were made upon his common, ſo that he could not *in ea parte* enjoy his common *in tam ample modo*, &c. and ſo juſtifies the pulling them down; and upon a motion in arreſt of judgment after a verdict for the defendant, the court were of opinion that the defendant might abate the hedges, for thereby he did not meddle with the ſoil, but only pulled down the erection. The ſame point laid down 15 *H.* 7. 10. *b.* *Bro.* tit. *Common*, *p.* 9. 2 *Inſt.* 88. Theſe caſes were ſtrongly inſiſted upon as in point for the now defendants. The erection of the hedge to incloſe part of the common by the lord or owner of the ſoil is not in itſelf an unlawful act: the lord as general owner of the ſoil may lawfully incloſe and hold in ſeveralty, leaving ſufficient paſture in the reſidue of the common for the cattle of perſons having a right of common, and that of common right by the common law, and not as frequently underſtood, by virtue of the ſtatute of *Merton*, which (it was ſaid) is only declaratory of the common law; the injury and

nuſance

nuſance thereof becomes ſuch by incloſing ſo much of the common as to deprive the commoner of the enjoyment of his right of common; ſo the erecting of coney burrows is not of itſelf unlawful in the lord as owner of the ſoil, but as they are the means and occaſion of a ſurcharge on the common, ſo as to prejudice the commoner in the enjoyment of his right of common. The injury is the ſame in both caſes, and therefore the redreſs ought to be the ſame.

The counſel for the defendants concluded, that there is not one caſe of authority, or any principle of law that will ſupport the doctrine contended for by the plaintiff; but on the contrary, the firſt principles of law and common ſenſe tell us, that it is lawful for every man to remove what is hurtful to himſelf; that every nuſance of every kind, whether private or public, may be removed by the perſon injured by it; that the coney-burrows in the preſent caſe are a nuſance to every commoner, as being the cauſe of a ſurcharge, which is an injury to the right of the commoners; that though the ſurcharge is the immediate injury, yet the coney burroughs being the cauſe of its being ſo, are removable as a nuſance; as the erecting of a dam acroſs a watercourſe is not the nuſance, but the cauſe of it. The erection of the coney burrows is ſurely *ad nocumentum* of the commoners as being the cauſe of the ſurcharge, and as a nuſance, by every rule and principle of law may be abated and removed.

Upon a former argument of the caſe at bar, *Denniſon* J. took an objection to the plea, that the defendant did not thereby alledge, that by the increaſe of conies he was deprived of a ſufficiency of common; and cited 1 *Lutw.* 101. *Haſſard* v. *Cantrell.* In anſwer to that objection, it was now ſaid by the defendant's counſel, that the defendant by his plea alledges, that the common was ſurcharged by the conies; that the word *ſurcharge* is a technical term, and, in law, underſtood to mean (when applied to the lord) that he has not left a ſufficiency of common to the tenants, who have common right; and the plea avers, that the defendant could not have and enjoy his common of paſture in ſo ample and beneficial a manner as of right he ought to have had and enjoyed it; and *that* beneficial manner, that, of right, the commoner ought to enjoy his common, with reſpect to the owner of the ſoil, is only ſufficiency of common; and when it is alledged that he cannot have and enjoy ſuch common as he ought, of right, to have, it is the very ſame as to aver that he could not enjoy a ſufficiency of common.. With reſpect to the caſe in 1 *Lutw.* 101. which was an action upon the caſe by a commoner againſt the lord and owner of the ſoil of a waſte, for putting into the waſte divers cattle, and for erecting coney burrows and feeding the graſs with conies, whereby the plaintiff could not enjoy his common *in tam amplo & beneficiali modo & forma* as before, it was objected

objected for the defendant, that the plaintiff had not charged the defendant with any ſurcharge of the common, but only that thereby he the plaintiff could not enjoy his common, &c. In anſwer to this, the counſel in the caſe at bar ſaid, that the preſent caſe is very different from that in *Lutw.*, for the plaintiff here is charged with an actual ſurcharge in terms, and it is alledged that thereby the defendant could not enjoy his common of paſture in ſuch manner as by right he ought to have done. But notwithſtanding this good argument for the defendants, judgment was given for the plaintiff upon the merits. The objection to the plea was given up.

Filewood *verſus* Popplewell and Turner. C. B.

Scire facias againſt bail to a new original to be ſued out in a cauſe removed from the palace court by an habeas corpus.

Cooke. *HILARY* term, in the 30th year of the reign of King *George* the Second. Elſewhere as it appears of *Eaſter* term laſt paſt upon the 308th and 309th Rolls it is thus contained: *Middleſex*, to wit, The ſheriff has been commanded, that whereas on the 25th day of *October*, in the year of our Lord 1755, *Thomas Popplewell*, of *Carnaby-ſtreet* in the pariſh of *Saint James*, *Weſtminſter*, hoſier, came in his own perſon before *Henry Bathurſt* eſq. then and ſtill one of the juſtices of our lord the now king, of the bench here, at his chambers ſituate in *Serjeants-Inn* in *Chancery-lane*, and acknowledged himſelf to owe to *James Filewood* the ſum of 12 *l.*, which ſaid ſum of 12 *l.* he the ſaid *T. P.* for himſelf and his heirs did will and grant to be made of his lands and chattels, and to be levied to the uſe of the ſaid *J. F.* And on the 12th day of *November*, in the year aforeſaid, *Richard Turner*, of *King-ſtreet*, *Saint Margaret's*, *Weſtminſter*, victualler, came in his own perſon before the ſaid *Henry Bathurſt*, then and ſtill one of the ſaid lord the king's juſtices of the bench here, at his chambers ſituate in *Serjeants-Inn* in *Chancery-lane* aforeſaid, and acknowledged himſelf to owe to the ſaid *James Filewood* the ſum of 12 *l.*, which ſaid ſum of 12 *l.* he the ſaid *R. T.* for himſelf and his heirs did will and grant to be made of his lands and chattels, and to be levied to the uſe of the ſaid *J. F.* under the condition following, that is to ſay, that one *John Smith* ſhould appear in the king's ſaid court of the bench here in his proper perſon, or by his ſufficient attorney to a certain original writ in a plea of treſpaſs upon the caſe to the ſaid *J. F.* his damage of 16 *l.*, to be brought by the ſaid *J. F.* againſt the ſaid *J. S.* before the end of two terms then next following, and to be proſecuted in the ſaid court here, to anſwer the ſaid *James Filewood* in the plea aforeſaid; and if it ſhould happen that judgment ſhould be given in the ſaid court here for the ſaid *J. F.* againſt the ſaid *J. S.* in the aforeſaid plea, that then the ſaid *J. S.* ſhould ſatisfy the ſaid *James Filewood* the damages which ſhould be

be adjudged to him in the court aforesaid in the said plea, or render his body to the king's prison of the *Fleet* on that occasion, which said recognizance taken and acknowledged before the said justice in form aforesaid, he the said justice afterwards, on the 28th day of *November*, in the 29th year of the reign of the said lord the now king, delivered into the said court here to be recorded, and the same was recorded in the said court accordingly, as by the record thereof in the said court here remaining more fully appears, which said recognizance still remains in the said court here in full force, no way satisfied, set aside, cancelled, or made void: and although the said *J. F.* before the end of the said two terms did sue and prosecute a certain original writ in a plea of trespass on the case to the said *J. F.* his damage of 16*l.*, out of the court of the said lord the king of his Chancery at *Westminster*, against the said *J. S.*, by the name of *J. S.*, late of the parish of *Saint James*, *Westminster*, in the county of *Middlesex*, victualler, returnable before the king's justices here, to which the said *J. S.* by his attorney appeared in the said court here by his sufficient attorney; and although afterwards, to wit, in *Michaelmas* term, in the 29th year of the reign of the said lord the now king, judgment in the said plea of trespass on the case was given in the said court here for the said *J. F.* against the said *J. S.* in the aforesaid plea, and the said *J. F.* then and there, by the consideration and judgment of the said court here, recovered against the said *J. S.* in the said plea 25*l.* 10*s.* which were then and there in the said court here adjudged to the said *J. F.* in the said court for his damages, which he the said *J. F.* had sustained on occasion of the not performing of certain promises and undertakings then lately made by the said *J. S.* to the said *J. F.* at *W.* aforesaid, in the said county of *M.**; whereof the said *J. S.* was convicted, as by the record and proceedings thereof remaining in the said court here in full force, not reversed, annulled, paid off, or satisfied, more fully and at large appears; yet the said *J. S.* hath not paid the said damages so recovered against him in form aforesaid, or any part thereof, nor rendered his body to the said prison of the *Fleet* on that occasion, as the said lord the king hath received information from the said *J. F.*, and because the lord the king was willing that those things which were right done and acknowledged in the said court here should be carried into due execution, he commanded the said sheriff of *M.*, that by good and lawful men of his bailiwick he should give notice to the said *T. P.* and *R. T.* that they might be here from the day of *Easter* in three weeks, to shew if they had or knew of any thing to say for themselves, to wit, the said *T. P.*, why the said 12*l.* by him in form aforesaid acknowledged should not be made of his lands and chattels, and the said *R. T.* why the said 12*l.* by him in form aforesaid acknowledged should not be made of his lands and chattels, and levied to the use of the said *J. F.* according to the form and effect of the aforesaid

* "As for his costs and charges about his suit in that behalf laid out and expended," (these words are omitted,) but no notice taken thereof in the argument of the case.

aforesaid recognizance, if, *&c.* And now here at this day, to wit, from the day of *Easter* in three weeks, the said *J. F.* cometh by *William Pryor Johnson* his attorney, and offereth himself on the fourth day against the said *T. P.* and *R. T.* in the plea aforesaid; and they being solemnly called do not come, neither doth either of them come; and the sheriff, to wit, *William Beckford* esq. and *Ive Whitebread* esq. now sheriff of *M.* aforesaid, returneth, that the said *T. P.* and *R. T.* have not, nor hath either of them any thing in his bailiwick where or by which he can give them or either of them notice, nor are the said *T. P.* and *R. T.*, nor is either of them found in the same; therefore, as before the sheriff is commanded, that by good, *&c.* he should give notice to the said *T. P.* and *R. T.* that they be here on the morrow of *the Ascension of our Lord*, to shew in form aforesaid, *&c.* if, *&c.* At which day the said *J. F.* cometh here by his attorney aforesaid, and offereth himself on the fourth day against the said *T. P.* and *R. T.* in the plea aforesaid; and they being solemnly called by *William Kinsley* their attorney come; and thereupon the said *J. F.* prays execution against the said *T. P.* and *R. T.*, to wit, against the said *T. P.* of the said 12*l.* by him in form aforesaid acknowledged, and against the said *R. T.* of the said 12*l.* by him in form aforesaid acknowledged, according to the form and effect of the recognizance aforesaid to be adjudged to him, *&c.* Second scire facias.

And the said *T. P.* and *R. T.*, by the said *William Kinsley* their attorney, come and pray leave to imparl here until on the morrow of the *Holy Trinity*, and they have it, *&c.*; the same day is given to the said *J. F.* here, *&c.*; at which day come here as well the said *J. F.* as the said *T. P.* and *R. T.* by their attornies aforesaid; and the said *T. P.* says, that the said *J. F.* ought not to have execution against him of the said 12*l.* in form aforesaid acknowledged by virtue of the said recognizance, because he says, that the said *John Smith* in the said judgment mentioned before the issuing of the said first writ of *scire facias*, and before the return of any writ of *capias ad satisfaciendum* against him, died, that is to say, at *W.* aforesaid; and this he is ready to verify: wherefore he prays judgment if the said *J. F.* ought to have execution against him for the aforesaid 12*l.* by him aforesaid acknowledged, by virtue of the said recognizance: and the said *R. T.* says, that the said *J. F.* ought not to have execution against him of the aforesaid 12*l.* by him in form aforesaid acknowledged by virtue of the said recognizance, because he says, that the said *John Smith* in the said judgment mentioned, before the issuing of the said first writ of *scire facias*, and before the return of any writ of *capias ad satisfaciendum* against him, died, that is to say, at *W.* aforesaid; and this he is ready to verify: wherefore he prays judgment if the said *J. F.* ought to have execution against him for the aforesaid 12*l.* by him aforesaid acknowledged by virtue of the said recognizance. *W. Hayward.* Plea that the defendant in the original action died before any ca. sa. returned against him.

And

Replication shews a ca. sa. against the original defendant returned in his lifetime.

And the said *J. F.* thereupon prayeth leave to reply to the said pleas of the said *T. P.* and *R. T.* by them above pleaded here until on the morrow of *All Souls*, and he hath it, *&c.*; the same day is given to the said *T. P.* and *R. T.* here, *&c.*; at which day come here as well the said *J. F.* as the said *T. P.* and *R. T.* by their attornies aforesaid; and the said *J. F.* says, that he by any thing by the said *T.* above in pleading alledged, ought not to be barred from having execution against him of the said 12*l.* by virtue of the said recognizance, because he says, that after the recovery of the aforesaid judgment against the said *J. S.*, at the suit of the said *J. F.*, and long before the suing forth the said writ of *scire facias* first above mentioned, to wit, on the 23d day of *January*, in the 29th year of the reign of our said lord the now king, he the said *J. F.* sued and prosecuted out of the court of our lord the now king of the bench here at *Westminster* in the county of *Middlesex*, of and upon the said judgment, his majesty's writ of *capias ad satisfaciendum*, directed to the then sheriff of *M.*, by which said writ our said lord the now king commanded the then said sheriff, that the said sheriff should take the said *J. Smith*, if he should be found in his bailiwick, and safely keep him, so that he might have his body before his majesty's justices of the bench here in eight days of *the Purification of the Blessed Mary*, to satisfy the said *J. F.* his damages aforesaid in form aforesaid recovered; at which day *William Beckford* esq. and *Ive Whitebread* esq. then sheriff of *Middlesex* aforesaid, returned here upon the said writ, that the said *John Smith* was not found in his bailiwick, as by the said writ, and the said return thereof duly affiled in this court here on the file of writs of *capias ad satisfaciendum* of the term of *St. Hilary*, in the 29th year aforesaid, may more fully and at large appear: and the said *J. F.* further says, that the said *J. S.* at the said return of the said writ of *capias ad satisfaciendum*, and long afterwards, was living and in full life, to wit, at *Westminster* aforesaid; and this he is ready to verify: wherefore he prays judgment, and that execution of the said 12*l.* against the said *Thomas* by virtue of the said recognizance may be awarded to him, *&c.* And the said *J. F.* says, that he by any thing by the said *R.* above in pleading alledged, ought not to be barred from having execution against him of the said 12*l.* by virtue of the said recognizance (and so replies exactly in the same manner to the plea of the defendant *R.*). *D. Poole.*

Demurrer.

And the said *T. P.* as to the said plea of the said *J. F.* above in reply pleaded to the said plea of the said *Thomas P.* by him above pleaded says, that that plea in manner and form aforesaid above pleaded, and the matter therein contained, are not sufficient in law for the said *J. F.* to maintain his having execution against him the said *T. P.* of the aforesaid 12*l.* by virtue of the said recognizance, to which said plea in manner and form aforesaid

above

above in reply pleaded, he the ſaid *T. P.* need not, nor is he bound in anywiſe by the law of the land to anſwer; and this he is ready to verify; wherefore for want of a ſufficient replication in this behalf, the ſaid *T. P.* as before prays judgment, and that the ſaid *J. F.* may be barred from having his execution againſt him for the aforeſaid 12 *l.* by him aforeſaid acknowledged, by virtue of the recognizance aforeſaid; and the ſaid *T. P.* for cauſes of demurrer in law in this behalf, according to the form of the ſtatute in ſuch caſe lately made and provided, ſhews to the court here theſe cauſes following, to wit, that the ſaid replication is no anſwer to the matter in the ſaid plea of the ſaid *T. P.* above pleaded, and that the ſame is double, uncertain, and inſufficient in law, and tends to put in iſſue matter altogether that is not iſſuable, and the ſaid *R. Turner* (the other bail) put in the like demurrer to the replication to his plea.

Joinder in demurrer.

And thereupon the ſaid *J. F.* prays leave to join in demurrer to the above demurrers of the ſaid *T. P.* and *R. T.* here, until in eight days of St. *Hilary*, and he hath it, *&c.* The ſame day is given to the ſaid *T. P.* and *R. T.* here, *&c.* at which day come here as well the ſaid *J. F.* as the ſaid *T. P.* and *R. T.* by their attornies aforeſaid; and the ſaid *J.* ſays, that the ſaid plea of the ſaid *J.* above in reply pleaded to the ſaid plea of the ſaid *T. P.* by him above pleaded in bar, and the matter therein contained, are ſufficient in law for the ſaid *James* to maintain his having execution againſt the ſaid *T. P.* for the aforeſaid 12 *l.* by him in form aforeſaid acknowledged by virtue of the ſaid recognizance, which ſaid plea ſo pleaded in reply, and the matter therein contained, he the ſaid *James* is ready to verify and prove, as the court here ſhall direct; and becauſe the ſaid *Thomas* hath not anſwered the ſaid replication, nor hath hitherto in anywiſe denied the ſame, he the ſaid *James* as before prays judgment and his execution againſt the ſaid *T. P.* for the ſaid 12 *l.* by him in form aforeſaid acknowledged by virtue of the ſaid recognizance, *&c.* and the ſaid *James* alſo puts in the like joinder in demurrer to the demurrer of the other bail *R. Turner*: and becauſe the juſtices here will adviſe themſelves of and upon the premiſes before they give their judgment thereon, a day is given to the ſaid parties here until from the day of *Eaſter*, in fifteen days, to hear their judgment, for that the ſaid juſtices here are not yet adviſed thereof, *&c.*

Filewood *verſus* Popplewell and Turner. C. B.

Scire facias upon a recognizance againſt bail.

SCIRE *facias* upon a recognizance againſt bail, ſetting forth the ſame, and that *Filewood* recovered judgment againſt *Smith* the principal defendant, which ſtill remains in full force *prout patet per recordum*; yet *Smith* hath not paid the damages recovered by the plaintiff againſt him, nor rendered his body to the priſon

of the *Fleet*, therefore the ſheriff was commanded to give notice to the now defendants *Popplewell* and *Turner*, the ſaid *Smith*'s bail, that they be here on ſuch a day to ſhew cauſe why the plaintiff ſhould not have execution againſt them according to their ſaid recognizance.

Defendants plead that the principal died before the iſſuing the firſt ſci. fa. and before the return of any ca. ſa.

Popplewell and *Turner* plead ſeverally that the plaintiff ought not to have execution againſt them, becauſe they ſay that *John Smith* in the ſaid judgment mentioned, before the iſſuing of the ſaid firſt writ of *ſcire facias*, and before the return of any *capias ad ſatisfaciendum* againſt him, died; and this he is ready to verify, *&c.*

Plaintiff replies and ſets out a ca. ſa. and return, and that the principal was then living and long afterward.

The plaintiff replies that he ought not to be barred from having execution againſt the defendants, becauſe he ſays, that after the recovery of the ſaid judgment againſt *John Smith*, and before the ſuing forth the ſaid firſt *ſcire facias*, *viz.* the 23d of *January*, in the 29th year of the preſent king, he ſued out a *capias ad ſatisfaciendum*, (and ſets it out,) whereupon the ſheriff returned a *non eſt inventus*, as appears by the writ on the file; and plaintiff further ſays, that at the time of the return of the ſaid *ca. ſa.* and long afterward, the ſaid *John Smith* was living, to wit, at *W.* in the county of *M.*; and this he is ready to verify: wherefore he prays judgment and execution to be awarded againſt the ſaid bail.

Demurrer.

To this replication the defendants have demurred, and the plaintiff hath joined in demurrer.

This caſe was argued this preſent term by Serjeant *Hayward* for defendant and Serjeant *Poole* for the plaintiff.

It was objected that the replication is bad, becauſe it is an affirmative upon an affirmative, and that it concludes with an averment without denying or traverſing the death of *John Smith*, as alledged in the defendant's plea; and to prevent prolixity in pleadings the defendant ought to have denied the death of *Smith*, and to have concluded to the country, or with a traverſe.

It was anſwered for the plaintiff and reſolved by the court, (*abſente Noel* J.) that the replication is very right, in concluding with an averment; and it would undoubtedly have been bad, if, after ſetting forth a *ca. ſa.* it had concluded to the country by denying the death of *Smith*, or had traverſed his death; for if the plaintiff had replied in that manner, the defendant would have been deprived of the right he had to rejoin that there was no ſuch writ of *ca. ſa.* which he might and had a right ſo to rejoin if he had thought fit; and it is an eſtabliſhed rule in pleading, that where either party introduces new matter, the other ſide ſhall have an opportunity of anſwering to that new matter; and

A rule in pleading when new matter is introduced.

and here the plaintiff by ſetting forth the *ca. ſa.* in his replication has introduced *that* as new matter; and if he had concluded to the country, or with a traverſe of the death of *Smith*, the defendants would have been deprived of an opportunity of anſwering to the *ca. ſa.* and in that caſe the replication would have been bad; and *Carth.* 40. was allowed to be in point; ſo judgment was given for the plaintiff upon the firſt argument.

N. B. In the argument of the above caſe it was agreed both by the bench and the ſerjeants at the bar, that if the principal defendant dies after the return of the *capias ad ſatisfaciendum*, although his death be before the ſuing forth the firſt *ſcire facias*, the bail are fixed with the debt and coſts in point of law, and the *ſcire facias's* are only an indulgence of the court; and ſo it was lately ruled in this court.

Young *verſus* Moore. C. B.

Defendant arreſted for money won at play diſcharged on entering a common appearance.

IN order to hold the defendant to ſpecial bail the plaintiff makes affidavit that the defendant *is juſtly indebted to him* in the ſum of 47 *l.* for ſo much money won of him by the plaintiff at divers plays or games called *bragg*, and toſs up, which ſum of money the defendant hath ſeveral times promiſed to pay to the plaintiff.

The defendant being arreſted and in cuſtody of the ſheriff, it was moved by Serjeant *Wynne* that he might be diſcharged upon entering a common appearance, this appearing to be above the ſum of 10 *l.* money won at play, at one time, as is ſworn by the defendant. Upon ſhewing cauſe by Serjeants *Martin* and *Davy* for the plaintiff, it was inſiſted that the defendant's affidavit ought not to be received in this caſe, and that as the plaintiff had ſworn that the defendant was *juſtly indebted* to him in 47 *l.* the court would preſume that the money was won at ſeveral times, and leſs than 10 *l.* at each time, and therefore a lawful debt. 2*dly*, That although the *ſtat.* 9 *Ann. c.* 14. has made all writings and ſecurities for money won at play void, yet they inſiſted that it had not made parol contracts for money won at play void; and cited 2 *Strange* 1249. To this it was anſwered and reſolved by the court, (the Lord Chief Juſtice and *Noel* J. being abſent,) That the defendant's affidavit in this caſe ought not totally to be rejected, for it doth not deny the plaintiff's affidavit, but only ſwears that the money was all won at one time, and the plaintiff does not ſwear it was won at ſeveral times; and as the ſtatute hath made all ſecurities for money won at play void, *à fortiori* all parol contracts of this ſort are void; and if the money had been paid to the plaintiff, the defendant, or any other perſon, might have recovered treble the ſum and

costs, so that this cannot possibly be a debt: besides, bail is a matter in the discretion of the court; the case in 2 *Stra.* 1249. was for money lent, which is different from the present case, Defendant was discharged upon a common appearance.

1 Salk. 100.
2 Stra. 1079.

Fitzpatrick *versus* Pickering. C. B.

Middlesex. Verdict for less than 40 *s.* the defendant has leave to suggest that he resided in Middlesex.

THIS was an action upon the case for the use and occupation of the plaintiff's house, for above the sum of forty shillings, and upon several other counts; upon *non assumpsit*, the plaintiff at the trial, by reason of the absence of a witness, failed in proving the use and occupation; but got a verdict for twenty-eight shillings upon another count; and now it was moved on the behalf of the defendant for leave to enter upon the roll, by way of suggestion, that the defendant was resident in the county of *Middlesex*, in order to have the benefit of the late statute touching the jurisdiction of the county court; and 1 *Stra.* 46. 2 *Stra.* 974. 1120. were cited, and an affidavit of defendant's resiancy in *Middlesex* was read.

2 Barnes 283.

For the plaintiff it was said, that this is a very hard case, and therefore it is in the discretion of the court whether they will give leave to enter the suggestion prayed on the defendant's behalf; and if they do, the plaintiff will be in a worse case than if he had suffered a nonsuit, for then he might have brought another action, when he could have had his witness to prove the use and occupation. And in the case of mutual debts and a set-off, the plaintiff shall have judgment, although upon the trial he recovers less than 40 *s.*

Per curiam—We are bound by the act of parliament to give the defendant leave to enter the suggestion prayed, and the plaintiff may traverse it if he pleases; and it is not in our discretion whether we will grant this or not; and the case of a set-off differs widely from this case, for there it is wholly in the defendant's power and knowledge whether he will insist upon and prove his set-off at the trial or not; and the case of *Pitt* v. *Carpenter* in *B. R.* was rightly determined. But here by the verdict we must take it that there was no more money originally due to the plaintiff than twenty-eight shillings; and therefore the *postea* must be delivered to the defendant, with leave to enter the suggestion prayed.

Ante, Trin. 16 & 17 G. 2. B. R.

Serjeant *Martyn* for the defendant, Serjeant *Davy* for the plaintiff.

Norden *verſus* Horſley. C. B.

THIS is an action of debt for 24 *l.* 18 *s.* upon a Palace-court bail-bond. The defendant pleads the ſtatute 12 *Geo.* 1. *c.* 29. for preventing frivolous and vexatious arreſts, whereby (amongſt other things) it is enacted, That in all caſes, in order to hold the defendant to ſpecial bail, the plaintiff ſhall make affidavit of his cauſe of action, and that the ſum ſpecified in ſuch affidavit ſhall be indorſed on the back of the writ or proceſs, for which ſum ſo indorſed the ſheriff or other officer to whom ſuch writ or proceſs ſhall be directed ſhall take bail, *and for no more;* that the cauſe of action or ſum ſworn to be due to the plaintiff in this caſe is 12 *l.* and no more; and that the Palace-court officer to whom the proceſs was directed took the bail-bond in this caſe for 24 *l.* 18 *s.* which is more than double the ſum ſworn to by the plaintiff's affidavit. To this plea the plaintiff demurred, and the defendant joined in demurrer.

A bail-bond taken in more than double the ſum ſworn to by the plaintiff, is good.

It was now objected by the counſel for the defendant that the bail-bond was void, being taken for more than double the ſum ſworn to be due to the plaintiff, and contrary to the ſtatute.

But it was anſwered by the plaintiff's counſel, and reſolved by the court, that the bond in the preſent caſe is a very good bond, for it doth not appear but the defendant gave and executed it freely and voluntarily, and that it is neither unreaſonable by the ſtatute of 23 *H.* 6. *c.* 10. nor made void by the ſtatute of 12 *Geo.* 1. now pleaded; and it has always been the practice to take bail-bonds for more than the ſum ſworn to, *viz.* in double the ſum; and if the bond in this caſe were void, it would be void in every caſe where it was taken in double the ſum. Indeed it might have another conſideration with reſpect to the ſheriff or officer, how far ſuch officer would be puniſhable by action or otherwiſe, if he ſhould refuſe to ſet a defendant at large, unleſs he would give very unreaſonable ſecurity for his appearance and putting in bail above. But in the preſent caſe the bond is not unreaſonable, being taken only for 18 ſhillings more than double the ſum ſworn to, and which ſeems to be only a mere miſtake, and not with any deſign to oppreſs the defendant. Judgment for the plaintiff.

Cooke's Caſes of Practice, Hil. 1 G. 2. 43.

TRINITY TERM,

30 & 31 *Geo.* II. 1757.

Buxton *verſus* Mingay. C. B.

Game. Queſtion on the ſtat. 4 & 5 W. & M. c. 23. ſec. 10. who is or is not an inferior tradeſman.

TRESPASS *quare clauſum fregit*; the plaintiff declares that the defendant being an inferior tradeſman, to wit, an apothecary, ſuch a day committed the treſpaſs by hunting in the plaintiff's cloſe; upon the general iſſue Not guilty, this cauſe was tried at *Thetford*, *March* 13, 1752, before Mr. Juſtice *Denniſon*, when a verdict was found for the plaintiff, and 1 *s.* damages and 40 *s.* coſts, ſubject to the opinion of this court, upon a caſe made, which ſtates, that it was proved at the trial, that the defendant at the time of the treſpaſs was a ſurgeon and an apothecary, and not qualified to hunt or kill game within the intent of the ſtatutes; that on the 27th of *December* 1751 he was hunting with divers others not qualified, in company with a perſon who was properly qualified to kill game, and committed a treſpaſs in the plaintiff's cloſe.

The queſtion for the conſideration of the court is, Whether upon the facts above ſtated the defendant ſhall be deemed an inferior tradeſman within the intent and meaning of the ſtatute 4 & 5 *W. & M. c.* 23. *ſec.* 10.? which runs thus: "And whereas "great miſchiefs do enſue by inferior tradeſmen, apprentices, "and other diſſolute perſons neglecting their trades and em- "ployments, who follow hunting, fiſhing, and other game, to "the ruin of themſelves and damage of their neighbours; for "remedy whereof be it enacted by the authority aforeſaid, "that if any ſuch perſon as aforeſaid ſhall preſume to hunt, "hawk, fiſh, or fowl, (unleſs in company with the maſter of "ſuch apprentice duly qualified by law,) ſuch perſon or perſons "ſhall be ſubject to the penalties of this act, and ſhall or may "be ſued and proſecuted for their wilful treſpaſs in ſuch their "coming on any perſon's land, and if found guilty thereof, the "plaintiff ſhall not only recover his damages thereby ſuſtained, "but his full coſts of ſuit; any former law to the contrary "notwithſtanding." So that, if the defendant be a perſon within the

the meaning of this clauſe of the ſtatute, the plaintiff ſhall have his full coſts, otherwiſe no more coſts than damages.

This caſe was three or four times argued at the bar; and in this term by *Hewitt* Serjeant for the plaintiff, and *Poole*, one of the King's Serjeants, for the defendant. It was ſaid for the plaintiff, that there is no ſuch diſtinction as ſuperiority or inferiority between trades or tradeſmen, either in legal or common apprehenſion; and that therefore the legiſlature could never mean to conſider one trade as ſuperior to another, or to make any diſtinction in trades; but that by the words inferior tradeſmen, they meant every perſon in trade not qualified by law; and that this was a reaſonable conſtruction *& ſecundum ſubjectam materiam*, that ſtatute being made for preſervation of the game.

For the defendant it was inſiſted, that to entitle one to go a hunting there is no qualification neceſſary, and therefore a qualification is not the criterion to determine or try who is, or is not, an inferior tradeſman within the true meaning of this ſtatute; but that every caſe of this kind ought to be left to a jury, who might, with certainty ſufficient, determine under the particular circumſtances of the caſe, what perſon is, or is not an inferior tradeſman, otherwiſe the lord mayor, or richeſt tradeſman in *London*, could not lawfully go a-hunting without a qualification in lands, which could never be the meaning of the legiſlature. 2 Stra. 1126. Comyns 576.

The court being equally divided in opinion, delivered the ſame *ſeriatim* the laſt day of this term, the puiſne judge beginning firſt.

Noel J. for the defendant—I think it would be hard for me to ſay that every tradeſman in this kingdom, (though never ſo rich in money,) who hath not a qualification in lands, ſhall pay full coſts in a caſe like this; nor can I prevail upon myſelf to ſay that the defendant, becauſe he is merely ſtated to be an apothecary, is therefore an inferior tradeſman, or a diſſolute perſon.

It was argued for the plaintiff, that amongſt tradeſmen, *as ſuch*, there can be no line drawn with reſpect to who are ſuperior, and who are inferior, but that they are all upon an equal footing as tradeſmen, and that therefore the legiſlature by the words inferior tradeſmen, meant ſuch as were not qualified; but I think if this conſtruction was to prevail, it would bring every gentleman, (though of the beſt families in *England*,) as well as rich tradeſmen who have not a qualification, within the meaning of this clauſe.

It was argued for the defendant at the bar, that a qualification was not neceſſary to authorize a perſon to go a-hunting; I ſhall

ſay nothing to that point; but however that may be, I think a perſon going out with a gentleman qualified to kill game, cannot be convicted for killing game as an unqualified perſon.

It is ſaid for the plaintiff, that if the qualification be not the true diſtinction, no line can be drawn between *ſuperior* and *inferior*; but I anſwer, there is a known diſtinction univerſally agreed to be between tradeſmen with reſpect to ſuperior and inferior, as maſter, and journeymen, and apprentice; and this is a natural ſubordination, which anſwers the act of parliament in every reſpect, for journeymen and apprentices are plainly inferior, and within the miſchief intended to be remedied: I do agree that the ſtatute ſays, "*unleſs in company with a maſter qualified,*" and that every apprentice being out a-hunting not in company with a maſter qualified is within the ſtatute.

I think the jury at the trial ought to determine, under the particular circumſtances of every caſe of this kind, whether the defendant be or be not an inferior tradeſman, or diſſolute perſon; and it is too much for me to ſay that this defendant, who is an apothecary and ſurgeon, is an inferior tradeſman, or a diſſolute perſon. In my own private opinion a ſurgeon is the fitteſt perſon in the world to be in the field with gentlemen a-hunting, for I remember the maſter of a pack of hounds had his neck diſlocated by a fall from his horſe when out a-hunting, and if a ſurgeon had not been near him when the accident happened, who pulled his neck right, the gentleman would moſt certainly have loſt his life.

It generally happens that near every great town in *England* ſome gentleman keeps a pack of dogs, and it is well known that he never goes out without being accompanied by many tradeſmen as well as others not qualified; if therefore judgment in this caſe was to be for the plaintiff to have his full coſts, it would lay a foundation for an infinite number of ſuits.

Upon the whole, I am of opinion the defendant cannot be ſaid to be an inferior tradeſman, nor a diſſolute perſon, and that the plaintiff ought to have no more coſts than damages.

Bathurſt J. for the plaintiff—I think this a queſtion of law and not of fact, and that the judges and not the jury are to determine who are inferior tradeſmen, or diſſolute perſons, within this law. In order to find out the true conſtruction of this ſtatute, we muſt take the intent of the makers into conſideration, which was plainly to ſecure the game from being deſtroyed by perſons neglecting their lawful employments, as appears by the preamble. There may be an inferior and ſuperior between maſter

ter and journeyman, and apprentice, but I can never be of opinion that the legiſlature intended to permit every maſter of every little mechanic trade to neglect his trade and go a-hunting. The clauſe under conſideration (it muſt be admitted) is a little obſcure, but I am of opinion that every tradeſman is inferior who is not qualified, and that is the only line we can poſſibly draw between inferior and ſuperior. And I am inclined to think the parliament purpoſely penned the act in this obſcure manner not to diſoblige their conſtituents, many of whom are tradeſmen. In *Bennet* and *Talbois*, *Comyns* 26, it was objected, that a clothier was not an inferior tradeſmen; *ſed non allocatur*, (ſays the book,) for the ſtatute ſeems to prohibit all trades.

Upon the whole, I am of opinion that all qualified tradeſmen are not inferior tradeſmen, and that all unqualified tradeſmen are inferior.

Clive J. for the plaintiff—I entirely agree in opinion with my brother *Bathurſt*. (*Nota;* he delivered his opinion to the ſame effect.)

Willes L. C. J. for the defendant—I think myſelf unfortunate whenever I differ in opinion with any of my brethren; however, I have the pleaſure to reflect, that in the 20 years I have ſat here, this is but the third time I have differed with any of my aſſociates.

The ſingle queſtion here is, Who is that tradeſman ſhall pay full coſts in a twelvepenny treſpaſs, in hunting in company with a gentleman qualified?

I do not think it neceſſary to draw any line at all in this caſe, but it ought to be conſidered upon its own circumſtances; and I am clear of opinion the legiſlature could never intend that a ſurgeon is an inferior tradeſman within this clauſe. I think the caſe conſiſts both of matter of law and matter of fact; and if I had been to try this cauſe, I ſhould have told the jury my opinion, upon hearing the evidence and the circumſtances of the defendant, and have aſked them, Whether upon their oaths they could ſay that this defendant was an inferior tradeſman, a diſſolute perſon, or neglected his trade? And in this manner I ſhould have ſpoke to them, and then left them to ſay what was their verdict upon the whole evidence and circumſtances of the perſon and caſe of the defendant. For my own part, I cannot upon my oath ſay that this defendant, merely as an apothecary and ſurgeon, is an inferior tradeſman, or a diſſolute perſon, and agree entirely with my brother *Noel*, that the plaintiff ought to have no more coſts than damages; therefore as the court is equally divided there can be no rule, but let the *poſtea* remain in court.

French, an Attorney, *verſus* Watſon. C. B.

Whether the defendant has been always ready to pay is not iſſuable.

CASE, ſix ſeveral counts upon *aſſumpſit;* as to the ſecond, fourth, fifth, and ſixth counts, the defendant pleads *non aſſumpſit* generally, and iſſue thereon is joined; and as to the firſt and third counts, which are each for 20 *l.*, he pleads, that as to all except 6 *l.* in one, and 4 *l.* 10 *s.* in the other, *non aſſumpſit*, and that he owes the plaintiff no more than 10 guineas, and ſays, *he is ready and has always been ready to pay the ſame*, and brings it into court if the plaintiff will accept thereof; and prays judgment if the plaintiff ought to have his action for more than 10 guineas. General demurrer; defendant joins in demurrer, and *prays plaintiff may be barred from having his action.*

It was objected for the plaintiff that this plea is bad, for here is no tender pleaded; and whether the defendant has been always ready to pay, is not iſſuable, and every plea ought to contain iſſuable matter; and of that opinion was the court *abſente Cap. Juſtic.* And they ſaid the joinder in demurrer was alſo bad (but gave no reaſon why it was ſo). Judgment for the plaintiff.

Simpſon *verſus* Neale, Eſq. C. B.

Pleading. The plea of nul tiel record muſt have a ſerjeant's hand.

CASE on ſeveral promiſes in *aſſumpſit;* the defendant pleads a recovery in *B. R.* for the ſame demands; plaintiff replies *nul tiel record* without a ſerjeant's hand. Rule to ſhew cauſe why the replication ſhould not be ſet aſide for want of a ſerjeant's hand to it. On ſhewing cauſe it was inſiſted by *Prime* and *Davy* Serjeants for the plaintiff, that the rule ought to be diſcharged; and cited *Reports and Caſes of Practice* in folio, publiſhed in 1742, *p.* 41. *Upton* v. *Pullyn*, where amongſt other pleas it is reported by Sir *George Cooke*, that the plea of *nul tiel record* needs not a ſerjeant's hand. In anſwer to which it was anſwered by the ſerjeant for the defendant, that all pleas whatever, except the general iſſue, ought to be ſigned by a ſerjeant; and that it appears by the year-books for ages ſucceſſively, that this plea of *nul tiel record* was always pleaded by a ſerjeant at the bar; and cited 19 *H.* 6. 79. *b.* 80. *a.* and many other caſes from the year-books; and ſaid, that the caſe cited out of *Cooke*'s book is not agreeable to the rule pronounced by the court in *Upton* and *Pullyn:* but the catalogue of pleas inſerted by Sir *George Cooke* there, ſeems to be intended to draw practiſers into the Common Pleas. (See the affidavit and rule in Mr. *Foley*'s, the ſecond prothonotary's office.) But what was chiefly inſiſted upon was, that as the plea of a recovery in *B. R.* in this caſe was pleaded and ſigned

ſigned by a ſerjeant, the ſame ought to be replied to, or anſwered by a ſerjeant *propter dignitatem*, for that no *attorney* or *apprentice* can anſwer a ſerjeant, or plead any plea in the court of Common Pleas; and of that opinion was the court, *viz. Clive*, *Bathurſt*, and *Noel*, Juſtices; *abſente* Ch. Juſt. who was in the court of Chancery this day, *June* 15, 1757. And the rule was made abſolute for ſetting aſide the replication of *nul tiel record* for want of a ſerjeant's hand.

Roe, on the Demiſe of Wilkinſon, *verſus* Tranmer & al.

Ejectment for lands in Yorkſhire. C. B.

What deed of conveyance ſhall or ſhall not operate as a covenant to ſtand ſeiſed to uſes.

UPON the trial of this cauſe it appeared in evidence, that *Thomas Kirby*, being ſeiſed in fee of the lands in queſtion, made and executed certain deeds of leaſe and releaſe. The leaſe, dated *November* 9, 1733, made between the ſaid *Thomas Kirby* of the one part, and *Chriſtopher Kirby* his brother of the other part, whereby it is witneſſed that the ſaid *Thomas Kirby*, in conſideration of 5 *s.*, did grant, bargain, and ſell to the ſaid *C. Kirby*, his executors, adminiſtrators, and aſſigns, the lands in queſtion; to have and to hold the ſame unto the ſaid *C. Kirby*, his *executors*, *adminiſtrators*, *and aſſigns*, from the day before the date thereof for the term of one year under a pepper-corn rent, to the intent that by virtue of theſe preſents, and by force of the ſtatute for transferring uſes into poſſeſſion, he the ſaid *Chriſtopher* may be in the actual poſſeſſion of all the premiſes, and be enabled to take and accept of a grant and releaſe of the reverſion and inheritance thereof to them and their heirs, to, for, and upon ſuch uſes, intents, and purpoſes, as in and by the ſaid grant and releaſe ſhall be directed or declared. In witneſs, *&c.* executed by *Thomas Kirby*.

The releaſe, dated *November* 10, 1733, made between *Thomas Kirby* of the one part, and *C. Kirby* his brother of the other part, witneſſeth, that for the natural love he beareth towards his ſaid brother, and for and in conſideration of 100 *l.* to the ſaid *Thomas Kirby*, paid by the ſaid *C. Kirby*, he the ſaid *Thomas Kirby* hath granted, releaſed, and confirmed, and by theſe preſents doth grant, releaſe, and confirm unto the ſaid *C. Kirby*, in his actual poſſeſſion thereof now being, by virtue of a bargain and ſale for one whole year to him thereof made by the ſaid *Thomas Kirby*, by indenture dated the day next before the day of the date hereof, and by force of the ſtatute made for transferring of uſes into poſſeſſion, *after the death of the ſaid* Thomas Kirby, all that one cloſe, *&c.* (the premiſes without any words of limitation to the *releaſee*); *to have and to hold* the ſaid premiſes unto the ſaid *C. Kirby*

Kirby and the heirs of his body lawfully begotten, and after their deceaſe to *John Wilkinſon*, eldeſt ſon of my well-beloved uncle *John Wilkinſon* of *North Dalton* in the county of *York*, gentleman, to him and his heirs and aſſigns, and to the only proper uſe and behoof of him the ſaid *John Wilkinſon* the younger, his executors, adminiſtrators, or aſſigns for ever, he the ſaid *John Wilkinſon* the younger paying or cauſing to be paid to the child or children of my well-beloved brother *Stephen Kirby* the ſum of 200 *l.*; and for want of ſuch child or children, then to the child or children of my well-beloved ſiſter *Jane Kirby*; and for want of ſuch iſſue, then to the younger children of my well-beloved uncle *John Wilkinſon* of *North Dalton* aforeſaid; and for want of ſuch younger children, then the ſaid eſtate above mentioned to be free from the payment of the above-named ſum of 200 *l.* Then the releaſor covenants that he is lawfully ſeiſed in fee, and that he hath good right and full power to convey the premiſes to the ſaid *C. Kirby*, and alſo that it may and ſhall be lawful to and for the ſaid *C. Kirby*, *or* the ſaid *John Wilkinſon* the younger, from and after the death of him the ſaid *Thomas Kirby*, peaceably and quietly to have, hold, uſe, occupy, poſſeſs, and enjoy the ſaid meſſuage, lands, and premiſes, with the appurtenances, not only without the lawful let, ſuit, *&c.* of him the ſaid *Thomas*, but all others claiming under him, *&c.* free from all incumbrances. Then it is covenanted by all the parties, that all fines and recoveries, and deeds of the premiſes, levied, ſuffered, or executed by the parties or any of them, or by any other perſons, ſhall be and enure to the uſe of the ſaid *C. Kirby* and his heirs of his body lawfully begotten; and for want of ſuch iſſue, then to the uſe of the ſaid *John Wilkinſon* junior, his heirs and aſſigns for ever, according to the true intent of theſe preſents. In witneſs, *&c.* executed by *Thomas Kirby*.

It further appeared in evidence, that *C Kirby* on the 10th of *November* 1733, paid to the ſaid *Thomas Kirby* 20*l.* in money, and gave him his note for 80 *l.*, payable to the ſaid *Thomas Kirby*, who ſigned a receipt on the backſide of the ſaid deed of releaſe in theſe words; *viz.* Received the day and year within written of the within-named *C. Kirby* the ſum of one hundred pounds, being the full conſideration-money within mentioned to be paid to me. I ſay, received by me, *Thomas Kirby*. Witneſs *M. J. S. T.*

It further appeared in evidence, that *C. Kirby* died without iſſue in 1740, and that *John Wilkinſon* the leſſor of the plaintiff is the ſame *John Wilkinſon* named in the deed of releaſe; but it did not appear that the ſaid *John Wilkinſon* had notice of the ſaid deeds of leaſe and releaſe until a ſhort time before this ejectment was brought.

This

This being the caſe for the conſideration of the court, the general queſtion is, Whether the leſſor of the plaintiff has a title to recover upon the leaſe and releaſe?

It has been argued at the bar three times, the firſt time by Serjeant *Willes* for the leſſor of the plaintiff, and Serjeant *Poole* for the defendant, and the ſecond and third times (becauſe of a new judge) by Serjeant *Hewitt* for the plaintiff, and Sir *Samuel Prime*, the King's firſt Serjeant, for the defendant.

It was admitted by the ſerjeants who argued for the plaintiff, that the leaſe and releaſe being made to convey to *C. Kirby* an eſtate in fee-tail, to commence *in futuro, viz.* after the death of the releaſor, cannot operate as a common law conveyance, or as a leaſe and releaſe; but they inſiſted that the releaſe ſhould take effect as a deed of covenant to ſtand ſeiſed to uſes, *ut res magis valeat quam pereat*; and cited a variety of caſes to prove it had every requiſite neceſſary to conſtitute ſuch a deed of covenant to ſtand ſeiſed to uſes; that is to ſay, 1. Here is a ſufficient and proper conſideration; 2. A deed; 3. The covenantor was ſeiſed in fee; 4. Here are apt words, for the word *grant* of itſelf is ſufficient in ſuch a deed; and 5. Here is a manifeſt and plain intent.

On the other ſide it was inſiſted for the defendant; 1. That it plainly appears to be the intent of the parties that this conveyance ſhould be by a leaſe and releaſe, and therefore ſhall not operate as a covenant to ſtand ſeiſed to uſes. *Co. Lit.* 49. *a.* And as the releaſe is admitted on all hands to be void for the reaſon above, nothing paſſes thereby to *Wilkinſon* the leſſor of the plaintiff. 2. It was objected for the defendant that *Wilkinſon* is not a party to the deed. 3. That there was not a proper conſideration of blood to raiſe an uſe to him. 4. That no eſtate at all paſſed by this deed to *Chriſtopher Kirby*, out of which the eſtate *in futuro* could ariſe or come to *Wilkinſon* the plaintiff's leſſor.

After time taken to conſider, the court were all of opinion that the releaſe was void as a common law conveyance, it being to convey a freehold to commence *in futuro*, but that it ſhould have the effect and operation of a covenant to ſtand ſeiſed to uſes; and in *Hilary* term, 31 *Geo.* 2. Lord Chief Juſtice *Willes* gave the judgment of the whole court for the plaintiff.

The judgment of the court was given in Hilary term 31 G. 2. 1758.

Willes C. J.—It is admitted and agreed on all hands that this deed is void as a releaſe, becauſe it is a grant of a freehold to commence *in futuro*; and therefore the only queſtion is, Whether it ſhall take effect as a covenant to ſtand ſeiſed to uſes? and we are all of opinion that it ſhall (my brother *Bathurſt*, not being here, authorized me to ſay he is of the ſame opinion).

Many

Many caſes have been cited on both ſides, ſome of which are very inconſiſtent with one another, and to mention them all would rather tend to puzzle and confound, than to illuſtrate the matter in queſtion; and therefore I ſhall only take notice of thoſe things we think moſt material, and of ſome few caſes neareſt in point for our judgment.

It appears from the caſes upon this head, in general, that the judges have been *aſtuti* to carry the intent of the parties into execution, and to give the moſt liberal and benign conſtruction to deeds *ut res magis valeat quam pereat.* I rely much upon *Sheppard's Touchſtone of common aſſurances*, 82, 83. (which is a moſt excellent book,) where he ſays, when the intent is apparent to paſs the land one way or another, there it may be good either way.

By the word *intent* is not meant the intent of the parties to paſs the land by *this* or *that* particular kind of *deed*, or by any particular mode or form of conveyance, but an intent that the land ſhall paſs at all events one way or other.

Lord *Hobart*, (who was a very great man,) in his *Reports*, *fo.* 277. ſays, "I exceedingly commend the judges that are curious and almoſt ſubtil, *aſtuti*, to invent reaſon and means to make acts according to the juſt *intent* of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act;" and my Lord *Hale* in the caſe of *Croſſing* and *Scudamore*, 1 *Vent.* 141. cites and approves of this paſſage in *Hobart*.

Although formerly, according to ſome of the old caſes, the mode or form of a conveyance was held material, yet in later times, where the intent appears that the land ſhall paſs, it has been ruled otherwiſe, and certainly it is more conſiderable to make the *intent* good in paſſing the eſtate, if by any legal means it may be done, than by conſidering the *manner* of paſſing it, to diſappoint the intent and principal thing, *which* was to paſs the land. *Oſman* and *Sheafe*, 571. Upon this ground we go.

We are all of opinion that in this caſe there is every thing neceſſary to make a good and effectual covenant to ſtand ſeiſed to uſes. *Firſt*, Here is a deed. *Secondly*, Here are apt words, the word *grant* alone would have been ſufficient, but there are other words beſides which are material; *viz.* A covenant that the grantor has power to grant, and a covenant that all fines, recoveries, *&c.* of theſe lands ſhall enure to the uſes in the deed. *Thirdly*, The covenantor was ſeiſed in fee. *Fourthly*, Here appears a moſt plain *intent* that *Wilkinſon* the leſſor of the plaintiff ſhould have the lands in caſe *C. Kirby* died without iſſue. And

laſtly,

laſtly, Here is a proper conſideration to raiſe an uſe to the leſſor of the plaintiff, for the covenantor in the deed names him to be the eldeſt ſon of his well-beloved uncle; theſe are all the circumſtances neceſſary to make a good deed of covenant to ſtand ſeiſed to uſes.

In ſupport of their opinion the Chief Juſtice only cited and obſerved upon theſe caſes; *viz.* *Croſſing* and *Scudamore*, 1 *Mod.* 175. 2 *Lev.* 9. 1 *Vent.* 137. *Walker* and *Hall*, 2 *Lev.* 213. *Coultman* and *Senhouſe*, *Tho. Jones*, 105. *Carth.* 38, 39. *Baker* v. *Hil.* 2 *W.* & *M. B. R.* *Oſman* and *Sheaſe*, 3 *Lev.* 307.

The Chief Juſtice laſtly cited two of the ſtrongeſt caſes mentioned for the defendants, as *Hore* and *Dix*, 1 *Sid.* 25. *Samon* and *Jones*, 2 *Vent.* 318. and ſaid he did not (for his own part) underſtand them; and that if he had ſat in judgment in thoſe caſes, he ſhould have been of a different opinion in both; however, he ſaid the preſent caſe differed from theſe two caſes. Laſtly, he ſaid the whole court were clear of opinion that a man ſeiſed might covenant to ſtand ſeiſed to the uſe of another perſon after the covenantor's death. *Poſtea* delivered to the plaintiff.

Campbell Clerk *verſus* Aldrich Clerk. C. B.

Prohibition to a ſuit in ſpiritual court for marrying without banns or licenſe.

THIS is a rule to ſhew cauſe why a *prohibition* ſhall not iſſue to the conſiſtory court of the biſhop of *London*, grounded upon a ſuggeſtion that the defendant hath libelled the plaintiff in the ſpiritual court for marrying without banns or licenſe, and ſeveral inſtances are ſet forth, "as appears by the regiſter book;" alſo that the plaintiff has baptized ſeveral children, and performed other miniſterial offices in the pariſh of *St. John*, without any licenſe from the biſhop.

Againſt the prohibition it was ſaid, there was no plea put in below, ſo the libel is confeſſed to be true; and thereupon it was inſiſted that the matters therein contained were of ſpiritual juriſdiction, and ſo the rule ought to be diſcharged.

For the prohibition it was ſaid that the ſpiritual court were taking conuſance of a matter proper at law; for now ſince the late marriage-act it is felony to marry without banns or licenſe, and there muſt firſt be a trial at common law before a clerk in ſuch caſe can be deprived or degraded; and ſo is *Hob.* 290.

The whole court were of opinion that the rule ſhould be made abſolute as to the marrying without banns or licenſe, that the plaintiff may declare, and this matter upon the late marriage-act may be more ſolemnly debated; and as to the other miniſterial acts in the libel the rule was diſcharged. Serjeant *Prime* for the plaintiff, Serjeant *Poole* and Serjeant *Hewitt* for the defendant.

MICHAELMAS TERM,

31 *Geo.* II. 1757.

Roe, of the Demiſe of Kirby, *verſus* Holmes. C. B.

EJECTMENT, of two meſſuages in *Yorkſhire:* at the trial in 1756 this caſe was made for the opinion of the court.

William Hardiſty being ſeiſed in fee according to the cuſtom of the foreſt of *Knareſborough*, of the copyhold lands in queſtion in *Memwith cum Darley*, ſurrendered the ſame to the uſe of his will, which he made in theſe words, *viz.* " Whereas I have ſurren-
" dered, or intend to ſurrender, all my copyhold lands and tene-
" ments to the uſe of my laſt will, I do hereby give and deviſe
" the ſame to my daughter *Jane*, her heirs and aſſigns for ever;
" *but in caſe my ſaid daughter dies before ſhe attain the age of*
" *21 years, and have no iſſue, then my will is, that my nephew* John
" Hardiſty *ſhall have my ſaid copyhold lands and tenements:*" Whereas my eſtate in *Birſtwith* is ſurrendered to me and my wife, our heirs and aſſigns for ever, my will is, that ſhe ſurrender the ſame after her deceaſe to my ſaid daughter *Jane* and her heirs within ſix months after my deceaſe. And whereas I believe my nephew *John Hardiſty* is heir at law to my daughter in caſe ſhe die without iſſue, my will therefore is, that he ſurrender the laſt premiſes to my nephews the ſons of my brother *Croſby* in fee, or elſe to have no benefit of this my laſt will and teſtament; and I will that my ſaid nephews, ſons of my brother *Croſby*, have my lands in *Memwith with Holme and Darley*, their heirs and aſſigns, ſhare and ſhare alike.

What words in a will create an eſtate for life.

Upon the 31ſt of *January* 1750, the teſtator died ſeiſed in fee, leaving *Jane* his only child, who died afterwards on the 2d of *March* 1752, without iſſue, and under twenty-one years of age. *John Hardiſty*, the nephew of teſtator, ſurvived *Jane*, and died the 25th of *June* 1753, without iſſue, was never admitted tenant, nor ever made any diſpoſal of the lands in queſtion.

John Hardiſty, the father of *John Hardiſty* the teſtator's nephew, is heir at law to *Jane*, and brother and heir at law to

William the teſtator, and ſurrendered the lands in queſtion to the uſe of the leſſor of the plaintiff 15 *Auguſt* 1754, and alſo granted the ſame according to the cuſtom of the foreſt, in fee.

The defendant's title is only poſſeſſion.

This caſe was argued twice at the bar, and the ſingle queſtion in the caſe was, Whether *John Hardiſty* the nephew, by the will, took an eſtate in fee, or for life? If he took a fee, then the leſſor of the plaintiff has no title; but if he took only a life-eſtate, then the plaintiff's leſſor has a good title under *John Hardiſty*, the brother and heir of the teſtator.

The whole court were clear of opinion for the plaintiff, that the nephew only took an eſtate for life; that the teſtator, by his deviſe to *Jane*, plainly underſtood the force of words of limitation, and if he had intended to give his nephew more than an eſtate for life, he knew how to have done it; that there were no expreſs words in the will that gave the nephew a fee, nor any manifeſt intention to do ſo, or to diſinherit the heir at law.

Judgment for the plaintiff.

TRINITY TERM,

31 *Geo.* II. 1758.

Knight, Eſq. *verſus* Lillo. C. B.

Treſpaſs. Judgment for the plaintiff becauſe the whole treſpaſs in the declaration is not covered by the defendant's juſtification.

TRESPASS for breaking and entering the cloſe of the plaintiff called *Stow-Hill*, and for treading down the graſs there, and *for eating other graſs with cattle.*

The defendant pleaded three pleas: *Firſt*, Not guilty to the whole declaration; *2dly*, A juſtification in bar, that the plaintiff ought not to have his action againſt him for entering the ſaid cloſe and treading down the graſs there, becauſe he ſays, that the cloſe lies in the hundred of *Parſlow* in the county of *Salop*, and that long before the time when, *&c.* *John Walcott* eſq. was

and ſtill is ſeiſed in fee of the ſaid hundred, with its appurtenances, and that the ſaid *John Walcott*, and all thoſe whoſe eſtate he now hath, and at the ſaid time when, &c. had of and in the ſaid hundred, with its appurtenances, time out of mind have been accuſtomed to have and uſe, and ſtill of right ought to have and uſe the benefit, liberty, and privilege of entering into the ſaid cloſe for the purpoſes of ſeeking, taking, and killing game there within the ſaid cloſe in which, &c. and of ſeeking, taking, and killing game there as belonging and appertaining to the ſaid hundred; wherefore the ſaid defendant as ſervant of the ſaid *John Walcott*, and by his command, at the ſaid ſeveral times when, &c. entered into the ſaid cloſe in which, &c. for the purpoſes of ſeeking, taking, and killing game there, and then and there ſhot at and killed game there found for the ſaid *John Walcott*, as it was lawful for him to do, and in ſo doing unavoidably and neceſſarily trod down, ſpoiled, and conſumed a little of the graſs there, which is the ſame treſpaſs, &c.; and this he is ready to verify: the third plea is a like juſtification, only it does not ſay, "As belonging and appertaining to the ſaid "hundred;" the plaintiff joins iſſue upon the Not Guilty, and traverſes the two preſcriptions ſeverally, whereupon iſſues are likewiſe joined. At the trial there was a verdict for the plaintiff upon the general iſſue, and a verdict for the defendant upon the other two iſſues upon the preſcriptions.

Preſcription for a liberty and privilege of entering the cloſe to ſeek for and kill game there as appurtenant to a hundred.

It was now moved by Serjeant *Poole* that the plaintiff ought to have judgment upon the whole record as to all the iſſues joined, alledging that both the preſcriptions were bad in point of law.

But the court ſaid there was no occaſion to debate whether the preſcriptions were good or not, for that the plaintiff at all events muſt have judgment upon the general iſſue, becauſe there is a treſpaſs laid in the declaration; *viz. the eating graſs with the defendant's cattle*, of which he is found guilty, and which is not covered or anſwered by the juſtifications. And unleſs the plaintiff would waive that part of the finding of the jury as to the general iſſue and eating the graſs, the court refuſed to hear any argument touching the preſcriptions. So the counſel being deſirous to have the validity of the preſcriptions determined, took time to know whether the plaintiff would waive his verdict upon the Not guilty; and if he would not, then judgment was for the plaintiff.

Blayer *verſus* Baldwin. C. B.

An execution cannot be continued on the Roll which was never returned or filed.

WITHIN a year after final judgment given in this cauſe, a *fieri facias* was ſued out in *Eaſter* term 1757, and returnable on the morrow of the Aſcenſion of our Lord in that term, and was continued upon the roll down till this term by *vicecomes*

non missit breve; and the defendant being this term taken upon a *capias ad satisfaciendum* issued upon the judgment, it was moved by Serjeant *Poole* that this is irregular, there neither being any *fieri facias* to revive the judgment, it being above a year old, nor any execution returned by the sheriff to warrant the entry of the continuances on the roll.

Per curiam—The defendant must be discharged out of custody, and the plaintiff must pay the costs of this application, for it is irregular to continue an execution on the roll which was never returned or filed. Serjeants *Prime* and *Davy* for the plaintiff.

MICHAELMAS TERM,

32 *Geo.* II. 1758.

Cutfield *versus* Coney and others. C. B.

Plaintiff in replevin dies after a declaration and before avowry, no return habend. can be issued.

AFTER the plaintiff in replevin had declared, he died before the defendant made any avowry, so that the suit was abated by the act of God, after the declaration and before any avowry: whereupon it was moved on the behalf of the defendants, (who were overseers of the poor, and had distrained as being so,) that they might have a writ *de retorno habendo*. This being a nice question, the court ordered the cause to be put in the paper, and this point to be more solemnly debated.

After hearing counsel on both sides, the court took time to consider, and in this term gave judgment that there ought not to be any return of the goods; they said that many cases had been cited on both sides, but that they founded their determination upon Lord Chief Baron *Gilbert's Law of Distresses and Replevins*, *fo.* 231, 232. and that it would be absurd to grant a *return. habend.* where there is no avowry. By the declaration the defendant is charged with an unjust caption and detention, and he must purge himself thereof by an avowry before he can

be entitled to have a return, for a return is adjudged by the court on the juſtice of the original caption, and therefore the defendant muſt firſt ſhew the juſtice of this caption before he can have a return; and they ſaid the party may diſtrain again. Serjeant *Hewitt* for the plaintiff, Serjeant *Prime* for the defendant.

Graves *verſus* Wiſe. C. B.

Practice. Notice of declaration muſt ſet forth the nature of the action.

THIS was a motion to ſet aſide an interlocutory judgment for irregularity: the irregularity complained of was, that notice of a declaration was given to the defendant, "that it was left in "the office of Mr. Prothonotary *Jones*, in an *action for work and* "*labour done by the plaintiff for the defendant*," without ſpecifying technically the nature of the action; for the words ought to have been *in an action of treſpaſs upon the caſe*, and not being ſo, the judgment was ſet aſide (the Chief Juſtice abſent).

N. B. This ſeems a very hard caſe; for the words, "in an "action for work and labour," are more intelligible to the lay gents, than the words *treſpaſs on the caſe*. However, the court ſaid they muſt abide by their rules; and the rule in this caſe is, that *the nature of the action* muſt be ſpecified in the notice. See the rule *anno* 1 *Geo.* 2. Serjeant *Hewitt* for the plaintiff, Serjeant *Davy* for the defendant.

HILARY TERM,

32 *Geo.* II. 1759.

Coke *verſus* Sayer. In B. R.

THIS was an action againſt the defendant for criminal converſation with the plaintiff's wife. The defendant pleaded two pleas, Not guilty, and Not guilty within ſix years: iſſue to the country was joined upon the firſt plea, and a demurrer was to the latter. There was a verdict for 20 *l.* upon the iſſue tried by the country; and now the demurrer to the plea of the ſtatute of limitations was argued, and that plea was held good. *Per totam curiam*—There muſt be judgment on the demurrer for the defendant, and the plaintiff muſt have no damages, nor muſt coſts be paid on either ſide upon account of the trial.

Not guilty, and Not guilty within ſix years, to an action for crim. con.; iſſue to one and demurrer to the other; verdict for plaintiff on the iſſue; judgment for defendant on demurrer.

Vanderplank *verſus* Banks. C. B.

THE defendant pleaded a variance between the writ and the declaration, without craving or ſetting forth *oyer* of the writ; the plaintiff demurred, and it was held that the defendant ſhould anſwer over, agreeable to the caſe of *Bragg* v. *Digby*, 2 *Salk.* 658. which is in point.

Variance.

EASTER TERM,

32 *Geo.* II. 1759.

Preſton *verſus* Chriſtmas. C. B.

Pleading. Accord and ſatisfaction where to be by deed.

DEBT upon a bond; defendant pleads accord and ſatisfaction; *viz.* That he releaſed to the plaintiff all his equity of redemption of certain tenements in ſatisfaction of all bonds wherein the defendant was bound to the plaintiff: the plaintiff demurred, and the defendant joined in demurrer.

2 Rol. Abr. 221. p. 7, 8.

It was argued by Serjeant *Poole* for the plaintiff, that this plea was bad in two reſpects; 1*ſt*, That it is an accord without any legal ſatisfaction; that an equity of redemption was conſidered of no value at law; and ſo is *Lit. ſec.* 332. where it is laid down, that if the mortgagor doth not pay the money at the day in the condition, the land which is put in pledge is taken from him for ever, and ſo is dead to him upon condition; ſo that, at law, an equity of redemption is of no value.

2*dly*, That this is an action of debt upon a deed, and being ſo, the accord and ſatisfaction ought to be by deed, and not being pleaded to be by deed, the plea for this reaſon alſo is bad; for wherever a certain debt is created by deed, it cannot be diſcharged but by matter of as high a nature, and not by an accord or matter *in pais*. 6 *Rep.* 43. *Blake's* caſe, and *Cro. Jac.* 254. And though perhaps where there appears to be a condition for payment of money, an accord may be pleaded in ſatisfaction of the money or condition, yet it cannot be pleaded in ſatisfaction of the deed or obligation; and for any thing that appears on this record, this is a bond without any condition at all.

Serjeant *Hewitt* inſiſted in anſwer to the firſt objection, that wherever an advantage accrued to the plaintiff, if he received and accepted of that advantage in ſatisfaction, it might be well pleaded, that a pot of wine had been deemed a good ſatisfaction of all actions. 1 *Rol. Abr.* 128. *p.* 9. That an equity of redemption was a beneficial thing, and it was not material what the value of it was.

In answer to the second objection, that the plea is bad because pleaded in satisfaction of a bond, he said he thought it was the same thing whether it was pleaded in satisfaction of the bond, or of the money or debt owing upon the bond; and that it would have been a good plea if it had been pleaded in satisfaction of the money, seems to be admitted by the cases cited on the other side.

The whole court were clearly of opinion with the plaintiff in both points; *1st*, That a release of an equity of redemption was nothing at all in the eye of the law; and *2dly*, That this being a debt upon an obligation without any condition, satisfaction must be pleaded to by deed; and that 6 *Rep.* 43. and *Cro. Jac.* 254. are directly in point.

Judgment for the plaintiff.

Jones *versus* Herne. C. B.

ACTION of slander for these words; *viz.* "You (meaning "the plaintiff) are a rogue, and I (meaning the defendant) "will prove you a rogue, for you forged my name." No special damage was laid in the declaration; there was a verdict for the plaintiff upon Not guilty; and it was now moved by Serjeant *Nares* in arrest of judgment, that these words are not actionable; to prove which he cited 3 *Leon.* 231. *pl.* 313. where the words, "Thou hast forged my hand," were held not actionable. But *per totam curiam*—The saying a man is a forger, or has forged one's hand, is actionable; and they over-ruled this case in 3 *Leon.* *Willes* C. J. also said, that if it was now *res integra*, he should hold that calling a man *a rogue*, or a woman *a whore*, in public company, were actionable.

Slander. "You are a rogue, and I will prove you a rogue, for you forged my name," are actionable.

Judgment for the plaintiff.

White *versus* Willis. C. B.

TRESPASS for taking the plaintiff's cattle; the defendant pleaded in bar that he distrained for rent, and that the plaintiff levied a plaint in *replevin* before the sheriff of the county, and that the process thereon is still depending in the county court; the plaintiff demurred, and the defendant joined in demurrer.

Whether a replevin below can be pleaded in bar to trespass in C. B.

Serjeant *Poole* for the plaintiff insisted the plea was bad for two reasons; First, Because a suit depending in an inferior court cannot be pleaded in bar to an action *here*. 5 *Report* 62. *b.*

7 *H.* 4. 8. *a.* 7 *H* 4. 44. *a. b. Brinsham's* case. 43 *Ed.* 3. 22. 27. 4 *H.* 6. 15. *a. b.* and *Trin.* 6 *Geo.* 2. *Dudfield* v. *Warden, Fitzgib.* 3. 19.

2*dly*, If this matter could well be pleaded, it ought to have been pleaded in *abatement*, and not in *bar*; for by pleading in *bar* the defendant admits the cauſe of action and the writ to be good, but ſays ſomething more to deſtroy the plaintiff's cauſe of action; *abatement* is to ſome matter which ſhews the action is ill conceived, but does not go to deſtroy the action abſolutely; and the *replevin* does not bar *treſpaſs*, but the court in this caſe may give a general judgment that the plaintiff ought to have damages. 2 *Mod.* 63, 64. 1 *Mod.* 214. 1 *Lev.* 312. 2 *Rol. Rep.* 64. *Doct. Placitandi* 10. tit. *Pleas in abatement in matters of record in point.*

Hewitt Serjeant, *è contra*, for the defendant as to both the objections ſaid, that a *replevin* differed much from all other actions in inferior courts, and might be pleaded in bar to *treſpaſs* here; and cited *Doct. Placitandi* 65. 68. 22 *Hen.* 6. 15.

The court were of opinion that they could give a proper judgment for the plaintiff, although the defendant's plea concluded improperly; and were about to give a general judgment for the plaintiff; but the defendant deſired he might withdraw his plea and plead *de novo*, which was granted upon payment of coſts to the plaintiff.

Nota; *Willes* C. J. ſaid, there is more law and learning in *Doctrina Placitandi* than in any book he knew; that it contained the ſubſtance of all the pleadings in the *Year-books* and *Coke's Reports.*

Driver, of the Demiſe of Richard Standring, *verſus* Mary Standring, Widow, and John Hoole. C. B.

An executory deviſe was never made good but for the ſake of the intention of the teſtator.

EJECTMENT of a meſſuage and lands in *Epworth* in the county of *Lincoln*, was tried in *Lincoln*, *March* 6, 1758, before Baron *Legge*: verdict for the plaintiff, ſubject to the opinion of the court upon this caſe.

John Standring being ſeiſed in fee of the premiſes in queſtion, by his will of the 17th of *June* 1753 deviſed to his brother *Richard* in fee other lands than theſe now in queſtion, and alſo other lands to his niece *Eliz. Read*, and then follows the clauſe upon which the preſent queſtion depends, in theſe words: "*Item*, "*I give and deviſe all the reſt of my lands, tenements, and hereditaments*,

" *ments*, (including thoſe now in queſtion,) *unto the child or* " *children of which* Mary *my wife is now pregnant, and the heirs* " *of ſuch child or children for ever, to be held and enjoyed by them,* " *if more than one, as tenants in common and not as jointenants;* " *provided always nevertheleſs, and my will and mind further is,* " *that if all ſuch child or children ſhall not be born alive, or ſhall* " *happen to die without lawful iſſue and under the age of* 21 *years,* " *then in either of the ſaid caſes I give and deviſe the houſe wherein* " *I dwell, and my nearer cloſe in the* Haverthwaites, *with the ap-* " *purtenances, to my brother* Richard Standring *and his heirs for* " *ever; and alſo in either of the ſaid caſes I give and deviſe my further* " *cloſe in the* Haverthwaites *to* Mary *my wife during the term of* " *her natural life, and from and after her deceaſe to my ſaid brother* " Richard *and his heirs for ever;*" and then the teſtator gives his perſonal eſtate to his wife and his brother *Richard.*

The will was duly executed and atteſted, and was proved at the trial; it was alſo proved, and is further ſtated in the caſe, that at the time the teſtator made his will he was very ſick and ill, and that his wife was pregnant, and on the 5th of *September* 1753 was delivered of a ſon, and that this ſon died in the life-time of the teſtator without iſſue and under age; that afterwards in the life of teſtator he had another child by his ſame wife born alive, which alſo died ſoon after its birth in teſtator's life-time, and that the teſtator himſelf afterwards, on the 17th of *September* 1756, died ſeiſed in fee of the premiſes without revoking or altering his will, leaving his wife with child of a daughter, who was ſoon after born, and is now living.

The ſingle queſtion is, Whether *Richard Standring*, the teſtator's brother, has any title under this will to the houſe, *&c.* wherein the teſtator dwelt at the time of making his will?

This caſe was argued twice at the bar; the firſt time in *Michaelmas* term laſt, and again in this term.

The ſerjeants of counſel with the leſſor of the plaintiff contended, that this was a good executory deviſe to teſtator's brother *Richard*, it being to take place within a reaſonable time; that is to ſay, if the child then *in ventre ſa mere* ſhould die without iſſue, or under the age of one-and-twenty years.

On the other ſide, for the heir at law it was argued, that wills are to be conſtrued according to the intention of teſtators, if that can poſſibly be found out, that it is impoſſible to conceive that when a man is providing for a child *in ventre ſa mere*, he could ever intend that if *that* child died, any after-born child ſhould

ſhould be diſinherited. It was alſo argued, that the contingencies which happened after the making the will, in the teſtator's family, amounted to a *revocation* of the will; but the court were clear of opinion that ſuch alterations in families cannot revoke a will of lands by the laws of *England*, however it may be otherwiſe by the civil law.

Upon both the arguments the whole court declared, that if by any conſtruction whatever they could be warranted in giving judgment for the defendants in favour of the heir, they would do it; at length, after time taken to conſider, they all ſeverally declared in court that they would not conſtrue this to be an executory deviſe; they ſaid that executory deviſes are contrary to the ſtrict rules of law, and were at firſt invented in furtherance of juſtice, and to carry into execution the manifeſt intention of teſtators; and that to conſtrue this to be an executory deviſe, would be to defeat the teſtator's deſign, which muſt certainly be, to provide for any after-born child, and not to diſinherit an heir of his own body.

Beſides, it was ſaid by Mr. Juſtice *Bathurſt*, and agreed by the whole court, that unleſs ſome words were added to the *proviſo* as to the child or children dying without iſſue, it could not be conſtrued to be an executory deviſe, as not being certainly to take place within a reaſonable time; for (as he ſaid) there is a great deal of difference between dying without iſſue, and dying without iſſue *living at the time of the death or deaths* of ſuch child or children; the firſt caſe may not happen in many generations, the latter caſe will be known within the compaſs of a life; and they agreed they would not in this hard caſe ſupply the want of the words "*living at the time of the death of ſuch child or children*," which would deſtroy the intent of the teſtator.

2 Vern. 760. 758, 759.

However, although this was the declaration, and ſeemed to be the opinion of the whole court, yet they did not give judgment one way or other, but deſired the leſſor of the plaintiff would conſider of it, and if he had any humanity or goodneſs in him, they were ſure he would give the poor infant heir no further trouble. With reſpect to the caſes cited on both ſides, they are ſo little to the purpoſe that it would be impertinent to put them down; and this caſe is ſo particular and ſingular, that it muſt be determined merely upon its own circumſtances. *Adjournatur.*

Witham *verſus* Hill and others. C. B.

Coſts. The plaintiff ſhall have coſts in an action on the riot-act 1 G. 1. c. 5. and in hue and cry.

THIS was an action upon the *ſtat.* 1 *Geo.* 1. *c.* 5. *ſ.* 6. for demoliſhing houſes, barns, *&c.* of the plaintiff at *Sheffield*, in a certain hundred in the county of *York*, brought againſt the inhabitants of the hundred, in which the plaintiff had a verdict for damages according to this ſtatute.

The words of the ſtatute are, "The inhabitants of the hundred "ſhall yield damages to the perſons damnified by ſuch demolition, "*&c.* to be levied on the inhabitants, and paid to ſuch plaintiff "by ſuch ways as are provided by 27 *Eliz. cap.* 13. for reim-"burſing any money recovered by any party robbed." No mention being made of coſts in the ſtatute, it now became a queſtion, Whether the plaintiff ſhould have coſts taxed *de incremento* by the prothonotary?

This being a new caſe was debated twice at the bar, and many caſes cited on both ſides, not neceſſary to be put down here.

After time taken to conſider, the court this term gave their unanimous opinion that the plaintiff was entitled to full coſts.

Lord Chief Juſtice *Willes*—The plaintiff is entitled to coſts; 1*ſt*, By the ſtatute of *Glouceſter*, 6 *Ed.* 1. *c.* 1. *ſ.* 2. whereby it is provided that the demandant may recover againſt the tenant the coſts of his writ purchaſed, together with his damages, "and "this act ſhall hold place *in all caſes* where the party is to reco-"ver damages;" *in all caſes* are very general words, and in my opinion extend to all actions at common law, and to all actions upon any former or later ſtatutes where *damages* are to be recovered; and although the coſts of the writ purchaſed are only mentioned, yet the demandant or plaintiff ſhall have his whole coſts of all the proceſs in the cauſe. 2 *Inſt.* 288.

2*dly*, The word *damages* in this *ſtat.* 1 *Geo.* 1. means coſts of ſuit as well as damages found by the jury; and this conſtruction agrees with all the entries, for when the *damna*, *miſæ*, *& cuſtagia* are all added together, the entries all conclude thus, "*Quæ* "*quidem damna in toto ſe attingunt*" to ſo much.

3*dly*, The intent of the ſtatute was to reimburſe the party injured, and to give him an adequate ſatisfaction for the damages he had ſuſtained; but unleſs we were to adjudge to him his coſts of ſuit, he would not be reimburſed, as the ſtatute intended he ſhould be.

4*thly*, This *ſtat.* 1 *Geo.* 1. as to this matter, is planned from the *ſtat.* 27 *Eliz. c.* 13. of *hue and cry*, and ſays, that damages in the preſent caſe ſhall be levied by ſuch ways as are provided by this ſtatute of *Eliz.* for reimburſing any party robbed: and although no coſts are mentioned in the ſtatute of *Eliz.* yet coſts have been always allowed in actions upon that ſtatute. 2 *Saund.* 379. in point. Alſo another caſe in *B. R. anno* 21 *Geo.* 2. a copy of which record was now ſhewn in court.

As to ſtatutes which give double or treble damages, they are conſidered in a different light from the preſent, which only gives ſingle damages.

Pilfold's caſe, 10 *Co. Rep.* 116. ſeems to me an extraordinary caſe; however, I do not over-rule it, but think this caſe very different from it: for in the preſent caſe the plaintiff might have had an action againſt the particular perſons who actually pulled down his houſes and barns, and have recovered his damages and coſts againſt them, if they might have been known and found; and certainly the ſtatute intended to give the party injured the ſame remedy againſt the hundred, as he might have had againſt the treſpaſſers themſelves, if they could have been found and come at; and therefore this is very different from *Pilfold*'s caſe.

Clive J.—I think the rule in *Pilfold*'s caſe, 10 *Rep.* is good law, which ſays, "That in all caſes where a man either before, "or by the ſtatute of *Glouceſter*, 6 *Ed.* 1. ſhould not recover "damages, if after the ſaid ſtatute another ſtatute in a new caſe "gives damages either ſingle, double, or treble, *&c.* there the "plaintiff ſhall not recover coſts:" this I hold to be good law.

But what is the preſent caſe? The *ſtat.* 1 *Geo.* 1. which we are now conſidering, does not create damages in a caſe where there was none before, for the party, plaintiff in the preſent caſe, was entitled to damages againſt the particular perſons who pulled down his houſes, at common law; therefore I ſay damages in this caſe are not newly created, but the object againſt whom they are to be recovered is only changed; and therefore I am of the ſame opinion that the plaintiff muſt have his coſts.

Bathurſt J.—I am of the ſame opinion. It was objected for the defendants that all the caſes and precedents for coſts in *hue and cry* have paſſed *ſub ſilentio*; but that is hardly poſſible: it will never appear on the face of this record that this matter has been debated, and ſo may as well be ſaid hereafter that it paſſed *ſub ſilentio*. The ſtatute of *hue and cry* did not, in my opinion, create damages, but only gave the party robbed a different remedy from what

what he had before; for the party robbed before thoſe ſtatutes might have had an action againſt the hundred for not keeping *watch* and *ward*.

The *ſtat.* 27 *Eliz. c.* 13. ſays, the inhabitants of the country ſhall be anſwerable for the robberies done and the damages; this word *damages* in this ſtatute means coſts, and the preſent ſtatute under conſideration being planned upon it, I am clear of opinion that the plaintiff muſt have his coſts. I think *Pilſold's* caſe is very good law, and am deſirous it ſhould not be ſhaken.

Noel J.—I am of the ſame opinion. This *ſtat.* 1 *Geo.* 1. is only auxiliary to the party, and not newly creating damages where there were none before. Beſides, the *ſtat.* 8 *Geo.* 2. *c.* 16. of *hue and cry* expreſsly recognizes that the plaintiff ſhall have coſts by the ſtatutes of *hue and cry*.

The prothonotary was ordered to tax the plaintiff his coſts. The declaration in this caſe was of *Hilary* term 1758.

Crutchfield *verſus* Seyward. C. B.

Practice. Plaintiff having done an act to waive his bail in the original action, ſhall not have bail in an action on the judgment.

PLAINTIFF had bail in the original action, declared in a different county from the writ, ſo waived his bail; verdict for plaintiff for 98 *l.* Defendant has brought error, and threatens to go away to *Ireland*, ſo plaintiff has brought an action on the judgment and held him to bail for 129 *l.* debt and coſts; defendant has put in bail and juſtified; it is now moved by Serjeant *Hewitt*, that the recognizance of bail may be diſcharged, which was oppoſed by Serjeant *Davy*, who inſiſted as there was no bail in the original action, ſo this caſe is not within the rule of practice that a man ſhall not be twice held to bail for the ſame debt. But *per curiam*—This is like the caſe of a priſoner who is ſuperſedeable for want of proceeding, and afterwards is held to bail for the ſame debt, which he ſhall not be, for a plaintiff ſhall not take advantage of his own act or laches. The recognizance was diſcharged.

TRINITY TERM,

32 & 33 *Geo.* II. 1759.

Fiſh *verſus* Hutchinſon. C. B.

Promiſe within the ſtatute of frauds.

IN an action upon the caſe upon an *aſſumpſit* the plaintiff declares, that whereas one *Vickars* was indebted to him in a certain ſum of money, and he had commenced an action for the ſame; the defendant in conſideration that the plaintiff would ſtay his action againſt *Vickars* promiſed to pay plaintiff the money owing to him by *Vickars*: to this there is a demurrer and joinder in demurrer.

Vide Ld. Raym. 1087.

For the defendant it was inſiſted, that this being a promiſe to pay the debt of another perſon, was void by the ſtatute of frauds and perjuries.

It was anſwered for the plaintiff, that this was an original contract between the plaintiff and defendant, ſo not within the ſtatute; and the caſe of *Read* v. *Naſh* in *B. R.* in *Trinity* term, 24 & 25 *Geo.* 2. was cited as in point.

But *per totam curiam*—This caſe at bar is very clearly within the ſtatute, for here is a debt of another perſon ſtill ſubſiſting, and a promiſe to pay it: and it is not like the caſe of *Read* v. *Naſh*, for that was an action of aſſault and battery brought by the plaintiff's teſtator againſt one *Johnſon*; the cauſe was at iſſue, the record of *niſi prius* entered and juſt coming on to be tried, when the defendant *Naſh* being preſent in court, in conſideration that plaintiff's teſtator would not proceed to try his cauſe, but would withdraw his record, promiſed to pay him 50 *l.* and coſts to be taxed in that ſuit; ſo in that caſe there was no debt of another, it being an action of battery, and it could not be known before trial whether the plaintiff would recover any damages or not; but in the preſent caſe here is a debt of *another* ſtill ſubſiſting, and a promiſe to pay it.

Judgment for the defendant.

The Mayor of Exeter *verſus* Trimlet. C. B.

Judgment of the court delivered by Willes *C. J.*

THIS is an action upon the caſe upon an *aſſumpſit*, brought to recover a certain ſum of money owing by the defendant to the plaintiff for *petit cuſtoms*; the declaration contains two counts; the firſt ſets out a preſcriptive right to petit cuſtoms, and that defendant was liable to pay the ſame, and being ſo liable promiſed payment thereof. The ſecond is a general *indebitatus aſſumpſit* for a certain ſum due to plaintiff for petit cuſtoms, and that the defendant being ſo indebted promiſed payment.

Aſſumpſit lies for petit cuſtoms.

To this declaration the defendant has demurred generally, and the plaintiff has joined in demurrer.

For the defendant it has been objected, that the plaintiff hath not ſhewn any title to have petit cuſtoms; that they could not be granted, ſo plaintiff could not properly preſcribe for them: 2*dly*, That there is no conſideration whereon to ground an *aſſumpſit*, and this is a demand againſt common right; and many caſes have been cited, all which I ſhall lay out of the caſe.

We are all of opinion that petit cuſtoms may well be granted, and plaintiff entitled by preſcription, and have no doubt at all but that the firſt count is good, and would have been ſo, even upon a ſpecial demurrer. We give no poſitive opinion as to the ſecond count; but we incline to think, that this is alſo well enough, upon a general demurrer; and if the defendant had pleaded *non aſſumpſit*, the plaintiff at the trial would have been obliged to ſhew his right to petit cuſtoms. This caſe is like the caſe of an *indebitatus aſſumpſit* for money had and received for the plaintiff's uſe, which has often been brought in order to try a right to an office, in which the plaintiff, upon *non aſſumpſit* pleaded, muſt, at the trial, ſhew his right to the office. We are all of opinion to over-rule the demurrer.

Judgment for the plaintiff.

Nota; There was a ſimilar determination in the caſe of *The Town of Yarmouth* v. ——, *B. R.* in *Trinity* term 3 *Geo.* 3. 1763, and the caſe of *The City of Exeter* and *Trimlet*, held to be good law. *Vide* 3 *Lev.* 37. *Mayor and Com. of London* v. *Hunt.*

Palmer *verſus* Stone and another. C. B.

Declaration in treſpaſs for impounding plaintiff's mare.

THIS is an action of treſpaſs, in which the plaintiff declares, that on the 15th of *June* 1758, at *Barking* in *Eſſex*, the defendants with force and arms took and impounded the plaintiff's mare, and detained her in the pound from that day till the commencement of this action.

The defendants' plea. Damage-feaſant to the king in his foreſt of Waltham.

The defendants plead in bar, that the plaintiff ought not to have his action againſt them, becauſe they ſay that before the time the treſpaſs is ſuppoſed to have been done, his preſent Majeſty was, and ſtill is ſeiſed in fee of the foreſt of *Waltham* in right of his crown; and being ſo ſeiſed, becauſe the mare was in the king's foreſt eating up, treading down, depaſturing, ſpoiling, and conſuming the graſs growing in the foreſt, and doing damage there to the king, the defendants (as his ſervants) ſeiſed and took the mare ſo doing damage, and impounded her at *Barking* as ſuch diſtreſs; and this they are ready to verify, *&c.*

Plaintiff's replication. That A. F. is ſeiſed of meſſuage and land near the foreſt, and has a right of common in the foreſt for one mare or one gelding, in reſpect of every 80 s. rent, every year, at all times of the year, except in the fence-month: that A. F. demiſed to the plaintiff, who entered and is poſſeſſed. And that at the time of the treſpaſs, the rent of the farm exceeded 60 l. per annum, and that (out of the fence-month) plaintiff put his mare into the foreſt to uſe his common, when defendants of their own wrong took and impounded her.

The plaintiff replies, that he ought not to be barred from having his action againſt the defendants, becauſe he ſays, that *Ann Francia* widow, long before, and at the time this treſpaſs was done, was, and ſtill is, ſeiſed in fee of an ancient meſſuage and ſeventy acres of land in *Dagenham* near the foreſt of *Waltham*, and that ſhe and all thoſe whoſe eſtate ſhe now hath, and had (at the time of the treſpaſs) in the meſſuage and lands, have immemorially had, and have been uſed and accuſtomed to have, and of right ought to have for themſelves, their farmers and tenants, of the meſſuage and lands, common of paſture in the foreſt of *Waltham* for one gelding, or for one mare in the place and ſtead of one gelding, for and in reſpect of every eighty ſhillings annual rent of the meſſuage and lands, every year, at all times of the year, except in the fence-month, as belonging and appertaining to the meſſuage and lands: that *Ann Francia* being ſo ſeiſed of this farm, upon the 7th of *September* 1757, demiſed the ſame to the plaintiff, to hold from the 29th of that month for the term of one year, and from the end of that year from year to year, as tenant at will; by virtue of which leaſe the plaintiff entered upon the farm, and at the time of the treſpaſs was, and ever ſince hath been, and now is poſſeſſed thereof. And the plaintiff further ſays in reply, that at the time when the treſpaſs was done, the yearly rent of the farm exceeded ſixty pounds, and that upon the 15th of *June* 1758 (and out of the fence-month) he put the mare

into

into the foreſt of *Waltham* to depaſture there, and to uſe his common, and that ſhe was eating the graſs there with other of his cattle until the defendants, of their own wrong, took and impounded her; and *this* the plaintiff is ready to verify; wherefore ſince the defendants have acknowledged *that* treſpaſs, he prays judgment and his damages.

The defendants rejoin that the mare, at the time when they took and impounded her, was ſick, ill of, and labouring under a certain catching infectious diſtemper called the mange, and certain other catching and infectious diſtempers; and being ſo ſick, ill, and diſtempered, was wrongfully and unlawfully in the foreſt eating up, treading down, depaſturing, ſpoiling, and conſuming the graſs, and doing damage there, and therefore the defendants ſeized the mare ſo doing damage there as a diſtreſs for that damage, and impounded her as ſuch diſtreſs, as they have before alledged in their plea; and *this* they inſiſt was lawful for them to do; and ſay they are ready to verify it: wherefore they pray the judgment of the court. Defendants' rejoinder. That the mare was mangy, and doing damage, and therefore defendants took and impounded her, becauſe ſhe was wrongfully and unlawfully in the foreſt.

The plaintiff ſurrejoins, that notwithſtanding any thing alledged by the defendants in their rejoinder, he ought not to be barred of his action, becauſe he ſays that the mare was lawfully depaſturing in the foreſt in the manner which the plaintiff has before alledged; *without this*, that the mare was wrongfully and unlawfully in the foreſt of *Waltham*, eating up, treading down, and conſuming the graſs, and doing the damage there, in manner and form as the defendants in their rejoinder have alledged; and this he is ready to verify: wherefore (as before) he prays judgment and his damages. Surrejoinder of the plaintiff. Traverſe abſq. hoc that the mare was wrongfully and unlawfully in the foreſt, &c.

The defendants by their *rebutter* take iſſue on the traverſe, that the mare was wrongfully and unlawfully in the foreſt, eating up, treading down, depaſturing, ſpoiling, and conſuming the graſs there growing, in manner and form as the defendants have in their rejoinder alledged; and conclude to the country. Rebutter takes iſſue on the traverſe.

The plaintiff does not join iſſue to the country, knowing very well that if ſuch an iſſue had gone to a jury, and they had found a verdict one way or other, it would have been a miſtrial, as it refers a matter of law to the lay gents; and therefore (to prevent delay, which muſt otherwiſe have happened) the plaintiff demurred, and the defendants have joined in demurrer. Demurrer. Joinder in demurrer.

This is a ſtate of the pleadings ſo far as they concern the preſent iſſue in law before the court; and although it muſt be admitted that the plaintiff's *ſurrejoinder* is bad, as it traverſes a matter of law, yet if it can be ſhewn that the defendants' *rejoinder* is likewiſe bad, then the plaintiff muſt have judgment, unleſs it Counſel for plaintiff.

can be ſhewn on the other ſide that the *declaration* or the *replication* are bad; for it is an eſtabliſhed rule, that whoever makes the firſt fault in pleading ſhall have judgment againſt him.

This rule being premiſed, the principal point firſt inſiſted upon for the plaintiff is, that the *rejoinder* of the defendants is a *departure* from their plea, and therefore bad; and if it be neceſſary, ſhall further ſhew that it is bad upon the merits in point of law.

A departure, what it is.

A *departure* in pleading is, when a man quits or departs from one defence which he has firſt made, and has recourſe to another; it is when his ſecond plea contains matter not purſuant to his firſt plea, and which does not ſupport and fortify it. *Co. Lit.* 304. *a.*

One good reaſon why a *departure* in pleading is never allowed is, becauſe records would by ſuch manner of pleading be ſpun out into endleſs prolixity; for if it were to be allowed, then he who has departed from and relinquiſhed his firſt plea or defence, might reſort to a ſecond, third, fourth, or fortieth defence; pleading in this manner would become infinite: he who has a bad cauſe would never be brought to an iſſue, nor could he who has a good one ever obtain juſtice, the end of his ſuit. Other reaſons might be given why a *departure* in pleading is never allowed, but *this* alone is ſufficient.

Having ſhewn what is a *departure*, and why it is bad in pleading, it ſhall now be my endeavour to ſhew that the defendants have in their rejoinder departed from their firſt defence made by their plea.

The defendants in their plea juſtify the taking and impounding the mare, doing damage *to the king, the owner of the ſoil* of *Waltham* foreſt, which is a private treſpaſs: but they have departed from *that* defence and reſorted to *another*; that is, they ſay in their rejoinder that the mare was ſick and ill of a catching infectious diſtemper called the *mange*, and of other infectious diſtempers, and being ſo ſick, ill, and diſtempered, was wrongfully and unlawfully in the foreſt eating up the graſs and doing damage; this is not a private treſpaſs, but is an offence of a public nature, is a common nuſance, and puniſhable as ſuch, as appears by the *ſtat.* 32 *H. 8. c.* 13. *ſ.* 11. whereby it is enacted, "That no perſon or perſons after *Michaelmas* then next ſhall "have or put to paſture any horſe, gelding, or mare infect with "ſcab or mange, in, to, or upon any foreſts, chaces, moors, "marſhes, heaths, commons, waſte grounds, or common fields, "upon pain to forfeit for every horſe, gelding, or mare, *ſo* infect, "paſturing in any of the ſaid grounds, ten ſhillings; which "offence ſhall be inquirable and preſentable before the ſteward

" on every leet, as other common annoyances be; and the for-
" feiture therefore to be to the lord of the same leet where the
" said offences shall be presented."

Again; the defendants by their plea directly and positively affirm the mare was distrained and impounded, because she was doing damage *to the king*, by eating up, treading down, and consuming the grass growing upon his freehold; but in their rejoinder they do not affirm any such thing, they only say the mare was mangy, *and being so*, was doing damage *there*; damage!—To whom?—Not to the king, or his freehold, they have not said so—but would have the court conclude by way of argument or inference that this was a private trespass on the king's freehold, and not a public nusance or common annoyance; this being an argumentative rejoinder as well as different from the plea is bad, for that matters of fact ought to be certainly and positively alledged in pleadings, and are not to be made out to the court by argument or inference.

A *departure* in pleading is so very well understood, that it would be impertinent to cite cases; if the court should be of opinion that this is a *departure*, it will not be necessary for me to say any thing more at present, or to shew that the rejoinder is also bad in other points of law; but if the court should incline to think this is not a departure, after they have heard my brother, then I shall beg leave to be at liberty further to shew that the plea is in other respects ill pleaded and bad in point of law.

Counsel for the defendants—Notwithstanding what has been insisted upon on the other side, I shall shew that the *rejoinder* is not a departure from the plea, but discloses new matter in fortification thereof; that the mare was infected with the mange, and consequently the plaintiff, though he had a right of common, was a trespasser *ab initio*, from the time he put her into the forest. A right of common for cattle, is no more than a *profit apprendre* in *alieno solo*, a liberty for a man to take the grass by the mouths of his beasts, not by beasts that are not commonable, not by mangy and infected beasts, not by the mouths of pigs not rung, *sic utere tuo ut alieno non lædas*, every man must so use his own as not to injure another. Will the other side venture to say that if a man, who has a right of common upon my soil for horses, mares, or geldings, puts into it mad, wild horses, which bite, strike, and destroy every creature they come near; that these are commonable cattle, and that I cannot take and drive them to a pound overt as damage-feasant?

It was determined in the King's Bench, that pigs put upon a common without being rung may be distrained *damage-feasant*, *à fortiori* you may distrain a mangy mare; the case was *Kenchin*

and *Knight*, which was determined in *Michaelmas* term in the twenty-third year of his preſent majeſty, a note whereof I took with my own hand: it was an action of treſpaſs for taking and impounding the plaintiff's pigs; the defendant juſtified for *damage-feaſant*; as in the caſe now at bar; the plaintiff replied, and preſcribed for a right of common exactly like the preſcription in the preſent caſe; the defendant rejoined by alledging the pigs ought to be rung before they were turned on to the common, which they were not, and ſo were treſpaſſers; to this rejoinder the plaintiff demurred, and the defendant joined in demurrer; this was held to be a good rejoinder, and not a departure, and judgment was given for the defendant; and the plaintiff's pigs not being rung, the court held he was a treſpaſſer; and Mr. Juſtice *Denniſon* ſaid, and the reſt of the court agreed, that no man need to alledge more in his plea at firſt than what amounts *prima facie* to a ſufficient anſwer to the declaration.

Lord Chief Juſtice—I have heard enough to convince me there are faults in the pleadings on both ſides; each ſide ſhall amend without payment of coſts.

Counſel for plaintiff—My lord, I do not deſire to amend any tittle of the pleadings on my ſide, for (with deference to the court) the queſtion is not, Whether there are faults in the pleadings on both ſides? but who made the firſt fault? for it is an eſtabliſhed rule in pleading, that whoever makes the firſt fault ſhall have judgment againſt him; and this is ſo univerſally true, that a ſingle caſe to the contrary cannot be ſhewn; beſides, every one knows that nothing is more common (among good pleaders) than to give a frivolous anſwer to a bad plea (which deſerves no better). Beſides, this I ſhall ſhew the court, that the caſe of *Kenchin* and *Knight*, cited by my brother, has been miſ-ſtated by him, by miſtake, (I am ſure,) without any deſign to miſlead.

Lord Chief Juſtice to the plaintiff's counſel—If you inſiſt upon replying, to be ſure we will hear you; ſo go on

Counſel for the plaintiff—Your lordſhip being ſo good to hear me in reply, it ſhall be my endeavour to give an anſwer to what my brother has inſiſted upon as law, and to the caſe he has cited.

I ſhall begin with this caſe, which, if I am not very much miſtaken, he has not ſtated rightly. He has inſiſted that the rejoinder in the caſe at bar is not a *departure*, but diſcloſes new matter purſuant to the plea; and, to prove this, has cited a note of *Kenchin* and *Knight*, which he took with his own hand. My brother indeed is a very good note-taker, but in this particular caſe he

he has not been ſo accurate as he generally is, unleſs I have much miſtaken it.

*The caſe of *Kenchin* and *Knight*, according to my own note of it, was argued twice in the King's Bench; the laſt argument was in *Michaelmas* term, in the 23d year of his preſent majeſty, by two of the (then) moſt learned gentlemen at the bar, Mr. *Ford* for the plaintiff, and Mr. *Henley* (the preſent Lord Keeper of the Great Seal) for the defendant; and upon *that* argument, the court gave judgment without taking further time: it was an action of treſpaſs *quare clauſum fregit*, for ſeveral treſpaſſes, but the only treſpaſs then in queſtion was for the defendant's putting in his ſwine into the plaintiff's cloſe. The defendant pleaded a cuſtom, that all the tenants and occupiers of certain ancient meſſuages in the tithing of *Woodmancott* in *Hampſhire* had a right of common in the place where the treſpaſs was ſuppoſed to be done, as belonging to the ſame, for all their cattle and ſwine *levant and couchant* on thoſe meſſuages, and under that cuſtom the defendant juſtified the putting his ſwine into the plaintiff's cloſe. The plaintiff replied, and admitted the cuſtom in the very words it was alledged in the plea, ſo far as the defendant had pleaded it; but then the plaintiff went on farther, and alledged that there was another cuſtom beſides, and *that* was, "That the tenants "and occupiers in *Woodmancott* have been uſed and accuſtomed "time out of mind to ring, and of right ought to ring their "ſwine *ſo* put upon the common, to prevent their rooting up the "ſoil; and that the defendant put his ſwine into the common "without ringing them, and therefore the plaintiff alledged he "was a treſpaſſer." To this replication the defendant *Knight* demurred generally, and the plaintiff joined in demurrer. This is a true ſtate of the record of *Kenchin* and *Knight*, ſo far as it relates to the treſpaſs by the ſwine, which was the only matter in debate.

*The record of Kenchin and Knight is entered of Hilary term, 22 Geo. 2. B. R. Roll. 179.

The principal objection in the caſe was made to the replication. Mr. *Henley* inſiſted it was bad, becauſe the plaintiff had therein ſet out a different cuſtom from *that* which was alledged by the defendant in his plea, without traverſing *that firſt cuſtom pleaded*, which, he ſaid, tended to make pleadings endleſs; and cited many caſes for his purpoſe, not now neceſſary to mention. But the court notwithſtanding gave judgment for the plaintiff. Ld. C. J. *Lee* ſaid, "That (generally ſpeaking it is true) when "a particular cuſtom is pleaded, another cuſtom repugnant to "it cannot be replied without traverſing the cuſtom (inſiſted "upon) in the plea; for if it were otherwiſe, pleadings would "run out to an infinite length; but *that* is not the caſe, (ſaid "he,) for the plaintiff in his replication admits the cuſtom in the "plea ſo far as it goes, and then ſays there is another thing to "be done, (which is very conſiſtent with the cuſtom alledged

" in the plea,) and *that* is, you muſt ring your ſwine, and you " have not done ſo, therefore you are a treſpaſſer. This is not " different from, but only a qualification of the cuſtom in the " plea, and reduces the merits of the cauſe to one ſingle point, " the true end of good pleading."

The other three judges, *Wright*, *Denniſon*, and *Foſter*, gave their opinions to the ſame effect. Mr. Juſtice *Foſter* (indeed) at firſt doubted, but at length he ſaid he conſidered the cuſtom in the replication as another cuſtom conſiſtent with *that* in the plea, and agreed with the reſt of the court, that judgment ſhould be given for the plaintiff, and *ſo* it was.

This is the true ſtate of the caſe of *Kenchin* and *Knight*, and is not at all like the caſe at bar. My brother cited it to prove that it was lawful to diſtrain ſwine *damage-feaſant* upon a common (that were commonable cattle by the cuſtom of the place) doing damage, if they were not rung, and that the rejoinder was not a departure; and taking his ſtate of the caſe to be right, would induce the court to think it extremely like the preſent caſe; for (ſays my brother) though I admit you have a right of common for your mare, yet if ſhe is mangy ſhe is not commonable, and you are a treſpaſſer againſt the owner of the ſoil, juſt as the owner of the ſwine in the caſe cited was, becauſe he put them upon the common without ringing them; and therefore the mare has been legally diſtrained, becauſe ſhe was doing damage by being mangy.

With great deference to the court, if the caſe cited was really as my brother has ſtated it, yet it differs much from the caſe at bar; for the caſe cited depended entirely on the particular cuſtom of the place in which, &c., and on the circumſtance of ringing the ſwine, which were not commonable unleſs they were rung; but the caſe at bar depends upon the general law of the kingdom with reſpect to common of paſture, and is touching cattle commonable of common right; a ſwine unrung roots up the ground, and ſo does real damage to the owner of the ſoil; a mangy mare does no hurt to the owner of the ſoil.

It is very ſtrange that my brother and I ſhould differ totally in the ſtate of this caſe of *Kenchin* and *Knight*, for there is not a ſingle tittle of it we agree in. My brother ſays it was an action for taking and impounding the plaintiff's ſwine; I ſay it was treſpaſs *quare clauſum fregit*, and that they were the defendant's ſwine: he ſays, the defendant *Knight* juſtified taking the ſwine of the plaintiff *damage-feaſant*; I ſay, there was not a word about *damage-feaſant*, but that the defendant juſtified putting in his ſwine into the plaintiff's cloſe under a cuſtom of right of common for his ſwine. My brother ſays, the court gave judgment for

for the defendant, (which indeed muſt have been ſo, if his ſtate of the caſe be right,) but I ſay, judgment was given for the plaintiff; and to prove the truth of what I ſay, I have a copy of the record of *Kenchin* and *Knight*: this caſe was cited to ſhew, that under certain circumſtances commonable cattle may be diſtrained *damage-feaſant* on a common where they have a right to be put, which it by no means proves, becauſe there is not one word of a diſtreſs *damage-feaſant* in the record of *Kenchin* and *Knight*, nor was there one word ſaid in it about a *departure*.

I have now done with my brother's caſe, and if it was as he ſtates it, yet, with great deference to the court, and my brother's pardon, it is not appoſite to the queſtion now before the court, which is, Whether the plaintiff, who confeſſedly has a right of common for his mare in *Waltham* foreſt all the year, except in the fence-month, can be a treſpaſſer in point of law for putting his mare at a proper ſeaſon upon the foreſt, merely by her becoming mangy afterward? for unleſs this, in point of law, be a private treſpaſs againſt the owner of the ſoil, the mare could not be legally diſtrained *damage-feaſant*: and therefore whether the rejoinder be a *departure* or not, yet it is bad upon the merits in point of law.

The plaintiff's right of common for a mare is not denied, and therefore muſt be conſidered as admitted. It is not alledged in any part of this record at bar, that the mare was mangy at the time ſhe was put upon the foreſt; nor does it appear that, after ſhe became mangy, the plaintiff had any notice thereof before ſhe was diſtrained and impounded, and the court will not preſume any man guilty of an offence which is neither alledged nor proved againſt him: the mare might be found when ſhe was firſt put into the foreſt, and might catch the diſtemper *there* of other cattle, for any thing that appears to the contrary.

In further ſupport of what I before ſaid, that a diſtreſs for *damage-feaſant* as ſet forth in the plea, and ſuch a diſtreſs as is in the rejoinder (if any ſuch can be legally made) are very different: a diſtreſs for *damage-feaſant* is by the common law or cuſtom of the whole realm, as appears in *Fleta*, *lib.* 2. *cap.* 47. *ſec.* 25. *fo.* 101. where it is ſaid, if he who takes and impounds cattle has an action brought againſt him, he may ſay by way of plea or defence that he took the beaſts juſtly, "*quia invenit illa in domi-*"*nico ſuo & ſecundum legem & conſuetudines regni imparcavit illa* "*donec dampnum ſuum fuerit emandatum*;" ſo that *diſtreſs damage-feaſant* is confined ſingly to a private treſpaſs, and cannot be made for any other cauſe or offence whatever; and the law is very ſtrict with reſpect to this kind of diſtreſs, for however reaſonable it may be, that the owner of the land may defend his property by taking or impounding the cattle or thing doing the

treſpaſs, until ſatisfaction in damages be made, yet if the cattle are but gone one inch from (off) his land when he ſeizes them, he becomes a wrong-doer; they muſt be *infra dominium ſuum* when he takes them; and this kind of diſtreſs can be only for a treſpaſs upon private property or poſſeſſion. But what is the diſtreſs pleaded in the rejoinder? it is not for a private treſpaſs, but for a public nuſance; it is not for a ſingle particular treſpaſs done to the owner of the ſoil alone, but for a common annoyance to all the commoners upon *Waltham* foreſt, and if (in any part of the kingdom) a diſtreſs for this kind of nuſance or annoyance can be lawful, it can only be ſo under ſome particular cuſtom of the place, and not by the common law, or general cuſtom of the realm; and therefore if any ſuch cuſtom or law of the foreſt exiſts, it ought to have been pleaded, otherwiſe the court can take no notice of it: the foreſt law is not the general law of the
Manwood. land, and the king's courts *here* are not bound to take notice of it, unleſs it be pleaded.

The offence in the rejoinder is declared by the *ſtat.* 32 *H.* 8. (as mentioned before) to be a common annoyance, and is preſentable and fineable in the leet, *that* is the proper remedy, and with great deference there is no *other*. No action of treſpaſs in this caſe will lie for the lord or any one commoner; for if one may have an action, a thouſand commoners may, and this would be inconvenient, and create an infinite number of ſuits. I rely upon this, that where an action of treſpaſs *vi & armis* will not lie, a diſtreſs for *damage-feaſant* cannot be made. Whether a commoner may not have an action of *treſpaſs upon the caſe*, is another conſideration; it is ſufficient for my purpoſe if he cannot have *treſpaſs vi & armis*, for if he cannot, neither can he diſtrain for *damage-feaſant*.

I have now done, and ſubmit it with great deference to the court, that the defendant's rejoinder is a *departure*, as it contains matter very different from *that* inſiſted upon in the plea in bar, and that it does not ſupport or fortify the ſame; or if the court ſhall be of opinion that it is not a departure, I apprehend it is bad upon the merits in point of law, for that it is no where alledged in this record that the mare was mangy at the time when ſhe was put into the foreſt, or that the plaintiff ever had notice that ſhe was mangy before ſhe was diſtrained; and for any thing that appears to the contrary, ſhe was very ſound and well when firſt put into the foreſt, and might *there* catch the diſtemper from the cattle of the defendants themſelves; and for theſe reaſons I pray judgment for the plaintiff.

Ld. C. J. to plaintiff's counſel—Will you be content to take 40*s.* coſts, and let the defendants amend their pleadings?

Plaintiff's

Plaintiff's counſel—I have no authority to conſent, and humbly pray your lordſhip's judgment; or if the court thinks the defendants ought to have leave to amend their pleadings, I am willing to conſent they ſhall amend them, upon paying the plaintiff his coſts, to be taxed by the prothonotary.

C. J.—If you will not conſent to take 40*s.* coſts, the cauſe muſt ſtand over for further conſideration.

Then the clerk to plaintiff's attorney being in court, ſtood up, and ſaid, that rather than his maſter could conſent to take 40*s.* coſts, or the cauſe be further delayed, he ſhould deſire the coſts might attend the final event of the cauſe, and deſired the plaintiff's counſel to conſent that the defendants might amend their pleadings, and the coſts abide the end of the ſuit.

Afterwards the defendants (by conſent that the coſts already incurred ſhould attend the event of the cauſe) withdrew all their pleadings, being convinced at length, that they were all bad from beginning to end; and pleaded a cuſtom of the foreſt for ſeizing and impounding mangy cattle being thereon; and alledged that the plaintiff's mare was mangy when ſhe was put into the foreſt, and juſtified the impounding her under the cuſtom; the plaintiff replied, that the mare was ſound and well, and not labouring under any catching or infectious diſtemper whatſoever; and traverſed *without this*, that the mare at the time when, &c. was ſick and ill of, and labouring under a catching and infectious diſtemper called the mange, as the defendants have alledged in their plea; and thereupon iſſue was joined, and tried at the aſſizes for *Eſſex*, when a verdict was found for the plaintiff, and he had judgment for his damages, and *all* his coſts at laſt.

Whitworth qui tam, &c. *verſus* The Hundred of Grimſhoe. C. B.

Cooke.

Norfolk, to wit. THE men inhabiting the hundred of *Grimſhoe* in the ſaid county were attached to anſwer as well to our lord the now king as to *John Whitworth*, in a plea of treſpaſs and contempt, againſt the form of the ſtatute of *hue and cry* in ſuch caſe made and provided, and ſo forth; and whereupon the ſaid *John*, who ſues as well for our ſaid lord the king as for himſelf, by *John Mayer* his attorney complains, that two certain malefactors, to the ſaid *John Whitworth* unknown, on the 13th day of *February* in the year of our Lord 1759, in the king's highway, to wit, at the pariſh of *Hockwold with Wilton* in the ſaid hundred of *Grimſhoe*

Declaration in hue and cry.

Grimſhoe in the ſaid county of *Norfolk*, with force and arms aſſaulted him the ſaid *John Whitworth*, and feloniouſly took and carried away from the ſaid *John Whitworth* the monies of the ſaid *John Whitworth* to the value of 82 *l.* 12 *s.* 9 *d.*, and alſo three canvas purſes of the value of one ſhilling, and one ſilver watch of the value of five pounds, of the proper goods and effects of the ſaid *John Whitworth* then and there found, againſt the peace of our ſaid lord the king; and the ſaid *John Whitworth* immediately after the ſaid felony and robbery was committed, to wit, on the ſame day and year at the village of *Methwold* in the hundred aforeſaid, near to the place where the ſaid robbery was committed, made *hue and cry* of the ſaid robbery, and gave notice thereof to the inhabitants of *Methwold* aforeſaid, and alſo with as much convenient ſpeed as might be after the ſaid robbery was committed, to wit, on the ſame day and year, at *Feltwell* within the hundred aforeſaid, and near to the place where the ſaid robbery was committed, gave notice thereof to *Ambroſe Whiteman*, then a conſtable of *Feltwell* aforeſaid; and in the ſaid notice ſo given to the ſaid conſtable deſcribed, as far as the nature and circumſtances of the caſe did admit, the ſaid felons and the time and place of the ſaid robbery, and alſo within the ſpace of twenty days next after the ſaid robbery was committed, to wit, on the 24th day of *February* in the year aforeſaid, cauſed public notice thereof to be given in the *London Gazette*, and therein deſcribed, as far as the nature and circumſtances of the caſe did admit, the ſaid felons, and the time and place of the ſaid robbery, together with the ſaid money, goods, and effects whereof the ſaid *John Whitworth* was ſo robbed, as aforeſaid; and afterwards and before the day of the iſſuing of the original writ of him the ſaid *John Whitworth*, to wit, on the 25th day of *May* in the year aforeſaid, he the ſaid *John Whitworth* went before *William Ward*, deputy to *George Greene*, ſilazer of the ſaid county of *Norfolk*, and entered into a bond to *John Stallon* and *John Froſt*, then high conſtables of the hundred of *Grimſhoe* aforeſaid, in the penal ſum of 100 *l.*, with two ſufficient ſureties, to wit, *John Booth* and *William Wildman*, approved by the ſaid *William Ward*, with condition for ſecuring to the ſaid high conſtables the due payment of their coſts after the ſame ſhould be taxed by the proper officer, in caſe that he the ſaid *John Whitworth* ſhould happen to be nonſuited, or ſhould diſcontinue his action in this behalf, or in caſe that judgment ſhould be thereon given againſt him on demurrer, or that a verdict ſhould be given againſt him thereon, according to the direction of the ſtatute in ſuch caſe lately made and provided: and the ſaid *John Whitworth* after the ſaid felony and robbery was committed, and within twenty days next before the day of the iſſuing of the ſaid original writ of him the ſaid *John Whitworth*, to wit, upon the 16th day of *May* in the ſame year, was examined upon his corporal oath before *Andrew Taylor*

Taylor eſq. then one of the juſtices of our lord the king, aſſigned to keep the peace of our ſaid lord the king in and for the ſaid county, inhabiting near unto the ſaid hundred of *Grimſhoe*, according to the form of the ſtatute in ſuch caſe made and provided: and the ſaid *John Whitworth* upon his oath then ſaid, that that he did not know either of the ſaid perſons who committed the ſaid robbery, and 40 days and upwards have paſſed ſince the ſaid robbery was committed, and the ſaid public notice thereof given in the ſaid *London Gazette*, and before the iſſuing of the ſaid original writ, yet the ſaid men inhabiting within the ſaid hundred of *Grimſhoe*, have not hitherto made amends to the ſaid *John Whitworth* for the ſaid robbery, nor have taken the bodies of the ſaid felons, nor the body of either of them, nor have they hitherto anſwered for the bodies of them, or the body of either of them, but have permitted the ſaid felons to eſcape, in contempt of our ſaid lord the king, and to the great damage of him the ſaid *John Whitworth*, and againſt the form of the ſtatute in ſuch caſe made and provided: and alſo that afterwards, to wit, on the day and year firſt aboveſaid, two other maleſactors, to the ſaid *John Whitworth* unknown, in the king's highway at the ſaid parish of *Hockwold with Wilton* within the ſaid hundred of *Grimſhoe* in the ſaid county of *Norfolk*, with force and arms aſſaulted him the ſaid *John Whitworth*, and felonioufly took and carried away from the ſaid *John Whitworth* other monies of the ſaid *John Whitworth* to the value of 82*l.* 12*s.* 9*d.*, and alſo other three canvas purſes of the value of one ſhilling, and one other ſilver watch of the value of five pounds, of the proper goods and effects of the ſaid *John Whitworth* then and there found, againſt the peace of our ſaid lord the king; and the ſaid *John Whitworth* immediately after the felony and robbery laſt mentioned was committed, to wit, on the ſame day and year, at the village of *Methwold* in the hundred aforeſaid, near to the place where the ſaid laſt-mentioned robbery was committed, made hue and cry of the ſaid robbery, and gave notice thereof to the inhabitants of *Methwold* aforeſaid, and alſo with as much convenient ſpeed as might be after the ſaid laſt-mentioned robbery was committed, to wit, on the ſame day and year, at the town of *Brandon* in the county of *Suffolk*, near to the ſaid hundred of *Grimſhoe*, and near to the place where the ſaid laſt-mentioned robbery was committed, gave notice thereof to *John Newton*, then a conſtable of *Brandon* aforeſaid; and in the ſaid notice ſo given to the ſaid conſtable deſcribed, as far as the nature and circumſtances of the caſe did admit, the ſaid laſt-mentioned felons, and the time and place of the ſaid laſt-mentioned robbery, and alſo within the ſpace of twenty days next after the ſaid laſt-mentioned robbery was committed, to wit, on the 24th day of *February* in the year aforeſaid, cauſed public notice thereof to be given in the *London Gazette*, and therein deſcribed, as far as the nature and circumſtances of the caſe did admit, the ſaid laſt-mentioned felons, and the time

and

and place of the ſaid laſt-mentioned robbery, together with the ſaid laſt-mentioned money, goods, and effects whereof he the ſaid *John Whitworth* was ſo robbed, as is laſt abovementioned; and afterwards and before the day of the iſſuing of the original writ of him the ſaid *John Whitworth*, to wit, on the twenty-fifth day of *May* in the year aforeſaid, he the ſaid *John Whitworth* went before *William Ward*, deputy to *George Greene* then filazer of the ſaid county of *Norfolk*, and entered into another bond to *John Stallon* and *John Froſt*, then high conſtables of the hundred of *Grimſhoe* aforeſaid, in the penal ſum of 100*l.*, with two ſufficient ſureties, to wit, *John Booth* and *William Wildman*, approved by the ſaid *William Ward*, with condition for ſecuring to the ſaid high conſtables the due payment of their coſts, after the ſame ſhould be taxed by the proper officer, in caſe that he the ſaid *John Whitworth* ſhould happen to be nonſuited, or ſhould diſcontinue his action in this behalf, or in caſe that judgment ſhould be given againſt him on demurrer, or that a verdict ſhould be given againſt him thereon, according to the direction of the ſtatute in ſuch caſes lately made and provided: and the ſaid *John Whitworth*, after the ſaid laſt-mentioned felony and robbery was committed, and within twenty days next before the day of the iſſuing of the ſaid original writ of him the ſaid *John Whitworth*, to wit, upon the 16th day of *May* in the ſame year, was examined upon his corporal oath before *Andrew Taylor* eſq. then one of the juſtices of our ſaid lord the king, aſſigned to keep the peace of our ſaid lord the king in and for the ſaid county of *Norfolk*, inhabiting near unto the ſaid hundred of *Grimſhoe*, according to the form of the ſtatute in ſuch caſes made and provided; and the ſaid *John Whitworth* upon his ſaid oath then ſaid, that he did not know either of the ſaid perſons who committed the ſaid robbery laſt mentioned, and forty days and upwards have paſſed ſince the ſaid laſt-mentioned robbery was committed, and the ſaid public notice thereof given in the ſaid *London Gazette*, and before the iſſuing of the ſaid original writ, yet the ſaid men inhabiting within the ſaid hundred of *Grimſhoe* have not hitherto made amends to the ſaid *John Whitworth* for the ſaid laſt-mentioned robbery, nor have taken the bodies of the ſaid laſt-mentioned felons, nor the body of either of them, but have permitted the ſaid felons to eſcape, in contempt of our ſaid lord the king, and to the great damage of him the ſaid *John Whitworth*, and againſt the form of the ſtatute in ſuch caſes made and provided, whereby the ſaid *John* ſaith that he is injured, and hath damage to the value of one hundred and fifty pounds; and thereupon he brings ſuit.

Plea Not guilty.

And the ſaid men inhabiting the hundred of *Grimſhoe* aforeſaid, by *Robert Moxen* their attorney, come and defend the force and injury when, &c. and all contempt, and whatſoever, &c. and ſay, that they are in nowiſe guilty of the premiſes above laid to their

their charge, againſt the form of the ſaid ſtatutes, as the aforeſaid *John Whitworth*, who as well, *&c.* above complains againſt them; and of this they put themſelves upon the country, and the ſaid *John* likewiſe.

At the trial of this cauſe the following caſe was made for the opinion of the court of Common Pleas.

HILARY TERM,

33 *Geo.* II. 1760.

Whitworth qui tam, &c. *verſus* The Hundred of Grimſhoe in Norfolk. C. B.

Hue and cry.

IN an action upon the ſtatutes of *hue and cry*, wherein the plaintiff obtained a verdict for 85 *l.* 16 *s.* 9 *d.* damages and 40 *s.* coſts at *Norfolk* ſummer aſſizes 1759, on the iſſue tried before Mr. Juſtice *Denniſon*, ſubject to the opinion of the court upon the following caſe.

Caſe for the opinion of the court.

Upon evidence it appeared that on the 13th of *February* 1759, about half an hour after four o'clock in the afternoon, the plaintiff ſet out on horſeback from *Brandon* in *Suffolk* for *Weſt Wynch* near *Lynn* in *Norfolk*, and after having paſſed through *Weeting*, (a village about a mile from *Brandon*,) and gone about two miles beyond *Weeting*, he was ſtopped on the highway in the evening while it was light, about five o'clock, by two men on foot in ſailors' habits, unknown to plaintiff, who had large clubs in their hands, one of which men caught hold of plaintiff's horſe's bridle, and demanded his money; and on plaintiff's ſtriking him with the great end of his whip, he fell down with his arms entangled in the bridle, and the horſe fell down, upon which the other man (being the talleſt) then knocked plaintiff off his horſe with a club, and gave him ſeveral blows on the head, which ſtunned him for ſome time, and then the ſaid two men robbed him of 82 *l.* 12 *s.* 9 *d.* in money, conſiſting of 36 *s.* pieces, moidores, half moidores, 18 *s.* pieces, guineas, and half guineas, in three canvas

canvas bags or purſes, and ſome looſe money amounting to 3 *s.* 6 *d.* in ſilver, and ſome halfpence, and alſo of ſome other money as hereafter mentioned, and alſo of the ſaid three canvas bags or purſes, and a ſilver watch, the maker's name *Clay*, *London*, but the number forgotten, and the point of the hour-hand was broke off, to which was affixed a black ribband and a watch key; that one of the ſaid three bags or purſes was a double bag or purſe, and that part of the ſaid money was at one end of it, and that the other end was quite worn through, and had a hole in it; that one of the ſaid men was tall and luſty, had a brown woollen cap or bonnet on, and a blue jacket, was of a freſh complexion, had particular large red eye-brows, and full ruddy cheeks, by either of which plaintiff thinks he could have known him from any other perſon; that the other was a middle ſized man, of a dark complexion, had on a narrow cut brimed hat bound round with black ferret, and a blue jacket; that they turned his horſe looſe, and went off towards *Hockwold with Wilton*; that he followed his horſe to *Methwold Lodge*, being about a mile from the place where the robbery was committed, and which is in the pariſh of *Methwold*, and about a mile from the town of *Methwold* in the road from *Weeting* to *Weſt Wynch*; but being much bruiſed and weak through loſs of blood, he was half an hour in getting there; and that at the ſaid lodge he gave notice to *Thomas Hepworth*, (who lived there, and who from the deſcription given by the plaintiff ſaid he had ſeen the robbers that day in the way to *Brandon*,) and to ſeveral other perſons then aſſembled there, of the ſaid robbery, and deſired ſome of the ſaid perſons to purſue the robbers, but that nobody cared to go as the night was coming on; that thereupon the ſaid *Thomas Hepworth* helped him to his horſe, and adviſed him to go to *Methwold*, (being then the neareſt village or town,) which is about a mile further on towards *Weſt Wynch*, and get people to go after the robbers, but that the plaintiff knowing Mr. *Oſborn Denton, ſen.* of *Weeting*, whom he knew to be an active man, turned back and went to *Weeting* with *Oſborn Denton, jun.* his ſon, and ſome other perſons who were at *Methwold Lodge*, but that *Oſborn Denton, ſen.* not being at home, he there called at two alehouſes, and told ſeveral people of the robbery, as ſet forth in the *Gazette*.

That it appeared in evidence there were two conſtables in *Weeting* living near the road ſide where plaintiff paſſed, but that he did not give any notice of the robbery to either of them, nor leave any notice thereof in writing at either of their houſes, but the plaintiff did not know nor had been informed that there were ſuch conſtables till after he arrived at *Lynn* the day afterwards; that from *Weeting* he went immediately back to *Brandon*, the next pariſh to and about a mile from *Weeting*, and arrived there much diſordered with his wounds, loſs of blood, and fatigue, at the *Chequer inn*, between

between 6 and 7 o'clock that night, and immediately told one *John Hookham* of the robbery, and ordered him to go and purſue the robbers, and take what method he could to apprehend them, at his expence; that thereupon *Hookham*, with a ſoldier who was furniſhed with a horſe by plaintiff for that purpoſe, and who is now on duty in the army, went to *Weeting*, *Wilton*, *Hockwold*, and *Feltwell*, and ſearched about thoſe towns for the robbers, but could not find them; that when *Hookham* was at *Feltwell*, which is five miles from *Brandon*, and not before, he inquired for and told one *Ambroſe Whiteman*, the conſtable of that pariſh, of the robbery in the manner deſcribed in the *Gazette*, and alſo that immediately after plaintiff's arrival at *Brandon*, he ſent one *John Brown*, the hoſtler of the ſaid inn, for *John Newton*, one of the conſtables of *Brandon*, to inform him of the robbery; that the ſaid *Brown* went to the ſaid conſtable's houſe and called at the window, and aſked for the ſaid *John Newton*: that a perſon, whom by the voice he took to be a woman from within the ſaid houſe, aſked what he wanted with him, to which the ſaid *Brown* anſwered, "I want to tell him that *John* the drover, (who was "known to *Newton*,) has been robbed, and wants him;" and thereupon the ſaid perſon within replied that the ſaid *Newton* was not at home; that the ſaid *Brown* returned and told plaintiff that *Newton* the conſtable was not at home; that plaintiff did not inquire for any other conſtable of *Brandon*, though there was another conſtable of that town, (one *Secker*,) but who had never acted in his office, and the plaintiff was not informed of him till the next morning; that the plaintiff being that morning about ſeven o'clock, at the ſurgeon's who dreſſed his wounds, *Newton* the conſtable came to him and told him that he had heard that the plaintiff had been robbed, and had ſent for him (*Newton*) the night before, and was ſorry he was not at home; that thereupon plaintiff gave *Newton* an account of the robbery as in the *Gazette*: that that morning, in order to make out the exact ſum he was robbed of, he not being able to write or read, ſent for one Mr. *John Brewſter* to reckon up his money, (from his written accounts or marks,) and on ſuch reckoning he found that he had been robbed of 82 *l.* 12 *s.* 9 *d.*; but that two days afterwards, and before the notice in the *Gazette*, upon further recollection, plaintiff diſcovered that he had been robbed of 2 *l.* 16 *s.* in one parcel and 1 *l.* 10 *s.* in another parcel, over and above the ſaid 82 *l.* 12 *s.* 9 *d.*, which ſums were likewiſe contained in the ſaid three canvas bags. That it appeared further, both from the examination of the plaintiff and the evidence of the two conſtables of *Weeting*, that if notice on the night of the robbery had been given to them thereof, in order to make immediate purſuit after the robbers, and it had been known the robbers had intended to paſs the river, (as the robbers who were on foot made their way toward *Hockwold with Wilton*, which village is ſo bounded by a river that it could not eaſily be got

over

over but by a ferry,) there was great probability that the robbers might have been taken that night.

That the plaintiff on the 24th of the ſame *February* publiſhed an account of the robbery in the *London Gazette*, in the words and figures following: " Notice is hereby given purſuant to an " act of parliament made in the 8th year of the reign of his " preſent Majeſty King *George* the Second, intitled, An act " for the amendment of the law relating to actions on the ſta- " tute of *hue* and *cry*, That *John Whitworth* of the pariſh of " *Weſt Wynch* in the county of *Norfolk*, drover, on *Tueſday* the " 13th day of this inſtant, *February* 1759, about five of the " clock in the afternoon of the ſame day, on the king's highway " leading from *Weeting* to *Methwold* in the ſaid county, between " the 82d and 83d mile ſtones in the high road leading from " *London* to *Lynn* in the hundred of *Grimſhoe* in the pariſh of " *Hockwold with Wilton*, or *Feltwell*, (but the ſaid *John* rather " thinks it in the pariſh of *Feltwell*, being ſo lately informed,) " in the ſaid county of *Norfolk*, was aſſaulted, wounded, ſtopped, " and robbed by two men on foot unknown to the ſaid *John* " *Whitworth*, in ſailors' dreſſes, one whereof was a tall luſty " man of a freſh complexion, had a brown woollen cap or bon- " net on, and a blue jacket; and the other a middle-ſized man " of a dark complexion, wearing a ſmall brimed hat and a blue " jacket, who took from the ſaid *John Whitworth* 82*l.* 12*s.* 9*d.* " in money, moſt part whereof was in guineas, the reſt in *Por-* " *tugal* pieces, ſome ſilver, and ſome halfpence, and three can- " vas bags or purſes, in which was contained all the ſaid money " except ſome ſilver and halfpence, which were looſe in his " pocket, and alſo a ſilver watch, the maker's name *Clay*, *Lon-* " *don*, to the beſt of the ſaid *John Whitworth*'s remembrance, " number forgot, but the point of the hour-hand was broken " off, with a black ribband and the watch key, and then they " made off towards *Hockwold with Wilton* aforeſaid towards " *London*, and by the deſcription the ſaid *John Whitworth* re- " ceived afterward by inquiring believes they went for *London*."

The plaintiff was examined, gave bond, and commenced his action within the time limited by law, and neither of the felons have ſince been apprehended.

The queſtions reſerved for the conſideration of the court are,

1*ſt*, Whether there was ſufficient notice given of this robbery to enable plaintiff to maintain his action?

2*d*, Whether the perſons who committed the robbery, and the money and things of which the plaintiff was robbed, were ſufficiently deſcribed in the *Gazette*?

This

This case was argued in this term by *Hewitt* the King's Serjeant for the plaintiff, and Serjeant *Foster* for the defendants.

1. It was insisted for the plaintiff, that considering the miserable situation he was in, after the robbery, he, with as much convenient speed as might be, gave notice of the robbery, both to the inhabitants of a village near the place where the robbery was committed, and also to a constable of the hundred of *Grimshoe*, according to the statutes of 27 *Eliz. c.* 13. *s.* 11. and of the 8 *Geo.* 2. *c.* 16. *s.* 1. And to shew what notice was sufficient for plaintiff to ground his action upon, were cited 4 *Leon.* 18, 19. *pl.* 63. *Noy* 155, 156. *March* 10, *p.* 28. 2 *Ibid.* 45. 1 *Show.* 94. And to shew what is a good notice within the *stat.* 8 *Geo.* 2. *c.* 16. cited 2 *Stra.* 1170. 2*dly*, It was argued for the plaintiff, that the felons, the time, place, and the goods and effects, were sufficiently described in the *Gazette*.

For the defendant it was insisted, that the whole sum whereof the defendant was robbed was not mentioned in the *Gazette*; and 2*dly*, that a very material description of one of the robbers whose eye-brows were sworn to be red (on the trial) was not taken notice of in the *Gazette*, which was much insisted upon by Serjeant *Foster* as most material for the defendant; and of that opinion was the court, and gave judgment for the defendant.

Sandford *versus* Rogers, Esq. C. B.

THIS was an action upon the case upon promises. The defendant pleaded a recovery in *B. R.* in bar; the plaintiff replied *nul tiel record & hoc paratus est verificare*, &c.; the defendant demurred, and shewed for special cause that the averment in the replication was ill.

Nul tiel record is replied to a plea of recovery in B. R. and concludes with an averment, and good.

Poole for the defendant insisted, that when the plaintiff had replied *nul tiel record* there was a complete issue joined, and that it ought to have concluded with giving a day to the defendant to produce the record, and not with an averment, and this being shewn for cause of demurrer, the replication is bad; and to prove this, cited 1 *Barnes* 240. and *Cooke's Practice in C. B.* 56. as directly in point; and said, that unnecessary prolixity in pleadings was to be discountenanced; that this was the same thing in effect as if a defendant was to plead the general issue, and conclude with an averment instead of going to the country.

Hewitt for the plaintiff—The law of pleading is to be determined by precedents, and therefore I have looked into the books of entries which must govern, or the rules of pleading will be at

ſea. In *Lilly's Entries*, *fol.* 7. 182. 393. 404. 473. 498. the plea or replication of *nul tiel record* is concluded with an averment; ſo is 2 *Lutw.* 945. and the precedents are uniformly ſo, where the record pleaded is of another court; but where it is of a record of the ſame court, I do own there are ſome precedents where the concluſion is to the record, and not with an averment. 1 *Ld. Raym.* 550. *Cremer* v. *Wickett*, *Carthew* 517. S. C.; and *vide Carth.* 517. *Dyer* 227, 228. 3 *Lev.* 243. 2 *Salk.* 566. *Moor* v. *the Bail of Garrett*. Hence it appears that the precedents are in favour of the concluſion with an averment when the record pleaded is of another court. *Nota;* The caſe in *Cooke*'s book does not ſay whether the record pleaded was of this or another court; and in anſwer to 1 *Barnes* 240. he cited *Comyns* 533. *Newbury* v. *Strudwick*.

Poole in reply—Many precedents have been cited which are certainly ſo as my brother *Hewitt* has ſaid; but ſurely there are an infinite number of precedents in the books which at this time would be held very ill, as in trover a variety of ſpecial pleas may be found which now would be very bad, and held to amount to the general iſſue: what I rely upon is, that there was a complete iſſue without any rejoinder.

The court (*abſente* C. J.) were of opinion that the replication was very well, eſpecially as this was a record of another court; and ſeemed to think that either way was well enough.

Judgment for the plaintiff.

Tindall *verſus* Moore. C. B.

Words.

THIS was an action of ſlander upon ſeveral ſets of words ſpoke by the defendant of the plaintiff; verdict for the plaintiff upon the firſt and fifth ſets of words, damages 40*s.* The firſt ſet were theſe, *That rogue Jo. Tindall* (meaning the plaintiff) *that ſet the houſe on fire* (meaning the ſummer-houſe that was burnt, in the occupation of one Mr. *Cotton*); *and if any body will give me charge of him, I will carry him to New Priſon.*— The fifth ſet of words were theſe: *Jo. Tindall* (meaning the plaintiff) *ſet the houſe on fire* (meaning the ſame houſe).

2 Sho. 77. 7. Skin. 183.

It was now moved in arreſt of judgment that the latter ſet of words were not actionable, for that every count in a declaration is a ſubſtantive count, and the *innuendo* (meaning the ſame houſe) ſhall not relate to the ſummer-houſe mentioned in the firſt ſet of words.

Per

Per curiam—Although the latter ſet of words be not of themſelves actionable, yet they ſhall have relation to the former ſet; and we muſt take them to have been ſpoken *maliciouſly*, as the jury have found for the plaintiff.

Judgment for plaintiff. *Davy* for the defendant, *Nares* for the plaintiff.

Watts plaintiff, Birkett deforcient. C. B.

THIS fine was ſet aſide and vacated after it had paſſed all the offices and was completed, becauſe the conuſor died before the return of the writ of covenant, as appeared to the court upon affidavits. *Per curiam*—The crown has a right to the *poſtfine* at the return of the writ of covenant, and not before, and the *poſtfine* is for licenſe to accord, and is the *king's ſilver*; the *preſine* is not the *king's ſilver*, ſo that as the king's ſilver became due and was paid *after* the death of the conuſor, the fine is void; and therefore though it has paſſed through all the offices we will ſet it aſide, and not put the parties to the trouble and expence of a writ of error. *Vide Barnes's Supplem.* 32. *Barber* v. *Nunn.*

Conuſor dies before the return of the writ of covenant. 2 Inſt. 511. 517. Dy. 246. The poſtfine is the king's ſilver, and the preſine is not.

Holdfaſt *verſus* Morris. C. B.

THIS was an action of treſpaſs brought againſt the tenant in poſſeſſion for the meſne profits (after a judgment againſt the caſual ejector); for it was lately reſolved by all the judges, that this action lies for the meſne profits from the time the tenant in poſſeſſion has notice of the leſſor's title, though the tenant lets judgment go by default, and his name does not appear in the record of the judgment againſt the caſual ejector.

In an action for the meſne profits after a recovery in ejectment, defendant ſhall not pay money into court.

Now it was moved by Serjeant *Hewitt* for the defendant for leave to pay a ſum of money into court, who compared this action to an action on the caſe for the uſe and occupation, in which action money may be paid into court. *Sed per totam curiam*—This is treſpaſs for a *tortious* occupation, but the action on the caſe is upon a *contract* either expreſſed or implied, and denied the motion; and it was ſaid the like motion had been lately denied in *B. R.*

EASTER TERM,

33 *Geo.* II. 1760.

Bayley *verſus* The Univerſity of Oxford. C. B.

A recovery ſuffered of an advowſon in groſs and one acre of land on a writ of entry ſur diſſeiſin in le poſt, is good.

THE queſtion in this caſe was, Whether a *common recovery* ſuffered of an *advowſon in groſs*, and one acre of land on a writ of entry *ſur diſſeiſin in le poſt*, was good in point of law? Upon ſearching for precedents, ſixteen were found where recoveries of advowſons in groſs, and a little land had been ſuffered upon writs of entry *ſur diſſeiſin in le poſt*, and no caſe was to be found where ſuch a recovery was ever held bad; and *Dormer's* caſe is in point. And the court refuſed to hear any argument againſt this recovery; and ſaid, that if this was *res integra*, it might not be right, (perhaps,) yet *quod fieri non debuit factum valet*. And the court gave judgment for the plaintiff; *viz.* that the recovery was good, without argument.

Cooper *verſus* Sherbrooke, Eſq. in Replevin. C. B.

Nonſuit in replevin, avowant executed a writ of inquiry after a writ of ſecond deliverance, and good.

THIS was a judgment of nonſuit for want of a declaration, and a writ *de retorno habendo* was awarded the 12th of *July* 1759. On the 2d of *October* following the plaintiff ſued out a writ of ſecond deliverance, and afterward the avowant executed a writ of inquiry of damages; and now it was moved by *Hewitt* and *Davy* Serjeants for the plaintiff, that the writ of inquiry was ſuperſeded by the ſuing out the writ of ſecond deliverance; but upon ſhewing cauſe, it was anſwered by *Whitaker* and *Nares* Serjeants for the avowant, that although a writ *de retorno habendo* was awarded, (which is the common courſe in the caſe of a judgment of nonſuit in *replevin*,) yet by the *ſtat.* 17 *Car.* 2. *c.* 7. the avowant had his election to ſue out a writ of inquiry of damages to recover againſt plaintiff the arrearages of rent, and that although a writ of ſecond deliverance is a *ſuperſedeas* to the writ *de retorno habendo*, yet it is not a *ſuperſedeas* to the writ of inquiry, agreeable to the note in *Palm.* 403. and of that opinion was the whole court, and diſcharged the rule to ſhew cauſe why the writ of inquiry and the inquiſition taken thereon ſhould not be ſuperſeded.

And

And *Bathurſt* J. ſaid, that by the *ſtat.* 17 *Car.* 2. the legiſlature intended that the proceeding upon that ſtatute by *writ of inquiry, ſieri facias*, and *elegit*, ſhould be final for the avowant to recover his damages, and that the plaintiff was to keep his cattle, notwithſtanding the courſe of awarding a writ *de retorno habendo*, which is a right judgment; for the ſtatute hath not altered the judgment at common law, but only gives a further remedy to the avowant. *Vide Carth.* 253. *Baker* v. *Lade*, 1 *Salk.* 95. *Latch* 72. and *F. N. B.* 156. *margine*. *Quere*, Whether the writ of ſecond deliverance in this caſe is not taken away by the ſtatute?

Lowfield *verſus* Jackſon. C. B.

Practice. As to being bound to plead iſſuably by an order of a judge.

THE plaintiff declared in covenant of laſt term: the defendant obtained a judge's order for three weeks time to plead, and on the firſt of *March* laſt obtained another order for one week's further time upon pleading iſſuably and taking ſhort notice of trial for the then next aſſizes if neceſſary. The defendant pleaded a recovery in another court, whereupon the plaintiff ſigned judgment; and now it was moved to ſet aſide the judgment by Serjeant *Davy*, who inſiſted that the defendant had complied with the terms of the judge's order, and that this was an iſſuable plea. But *per curiam*—Although this be an iſſuable plea within the letter of the judge's order, (yet it is not ſuch within the true intent and meaning of it, which was to ſpeed the plaintiff in the trial of his cauſe by the country,) and although we will ſet aſide the judgment, and the plaintiff ſhall reply *nul tiel record*, yet if it be not produced within the proper time there ſhall be judgment for the plaintiff, and the defendant ſhall be bound to take ſhort notice of executing a writ of inquiry within the preſent term. *Hewitt* Serjeant for the plaintiff, *Wedneſday* 30th *April*, being the 8th day in term.

Atkinſon *verſus* Taylor. C. B.

Practice. There muſt be 15 days between the teſte and return of a capias ad reſpondendum.

IT was moved to ſet aſide a *capias ad reſpondendum*, becauſe there was not fifteen days between the *teſte* and return thereof; to this it was anſwered, that it is error, (if any thing,) and not an irregularity; to prove which was cited 1 *Barnes* 295. *Williams* v. *Faulkner*. But, *per curiam*, this caſe was over-ruled, and the *capias* ſet aſide, but without coſts.

Reppington, Executor, *verſus* The Guardians and Governors of Tamworth School.

Declaration in quare impedit mended.

IN *quare impedit* of a donative vicarage, the defendant craved *oyer* of the original writ, which he ſet forth in his plea, and ſhewed a variance between the writ and the count; and now it was moved for leave to amend the declaration, which was granted on payment of coſts, and the defendant is to plead *de novo*. *Hewitt* for plaintiff, *Poole* for defendant.

Robins, Widow, *verſus* Crutchley and his Wife and another in Dower.

Entered among the pleas of land of this term. Roll 44.

Declaration in dower.

Staffordſhire, to wit. ANN *Robins* widow, who was the wife of *John Robins* eſq. deceaſed, by *Thomas Vaughan* her attorney, demandeth againſt *Brooke Crutchley*, *Catharine* his wife, and *Jane Robins* ſpinſter, the third part of thirty meſſuages, fifty barns, fifty ſtables, thirty orchards, thirty gardens, three hundred acres of land, two hundred acres of meadow, and three hundred acres of paſture, and common of paſture with the appurtenances in *Bilſton*, *Wolverhampton*, and *Willen-hall* in the ſaid county of *Stafford*; and alſo the third part of nine coal-mines in *Bilſton*, *Wolverhampton*, and *Willen-hall* aforeſaid, as her dower of the endowment of the ſaid *John Robins* heretofore her huſband, by writ of our lord the king of dower whereof ſhe hath nothing, &c.

Plea.

1ſt, Ne unques accouple.

And the ſaid *Brooke*, *Catharine* his wife, and *Jane*, by *Robert Pardoe* their attorney, come and ſay, that the ſaid *Ann* ought not to have her dower in this behalf, as having been the wife of the ſaid *John Robins* deceaſed; becauſe they ſay, that the ſaid *Ann* never was accoupled to the ſaid *John Robins* deceaſed, in lawful matrimony; and this the ſaid *Brooke*, *Catharine*, and *Jane* are ready to verify; wherefore they pray judgment if the ſaid *Ann* ought to have her dower of the tenements, common of paſture, and mines aforeſaid; and the ſaid *Brooke*, *Catharine* his wife, and *Jane*, for further plea in bar, by leave of the court here for this purpoſe firſt had and obtained, according to the form of the ſtatute in ſuch caſe lately made and provided, ſay, that the ſaid *Ann* ought not to have her dower of the tenements, common of paſture, and mines aforeſaid, with the appurtenances, of the endowment of the ſaid *John Robins* deceaſed, becauſe they ſay that the ſaid *John Robins* deceaſed, neither on the day on which he

2d, Plea, ne unques ſeiſie que dower.

he is above ſuppoſed to have eſpouſed the ſaid *Ann*, nor at any time afterwards, was ſeiſed of the tenements, common of paſture, and mines aforeſaid, with the appurtenances, whereof, *&c.* of ſuch eſtate whereby he could thereof endow the ſaid *Ann*; and of this they put themſelves upon the country.

Replication ſets forth a decree in the court of Arches, that the demandant was the wife and is the widow of John Robins.

And the ſaid *Ann* ſaith, that as to the ſaid plea of the ſaid *Brooke, Catharine* his wife, and *Jane*, by them firſt above pleaded in bar, ſhe the ſaid *Ann*, by reaſon of any thing in that plea above alledged, ought not to be barred from having her dower aforeſaid, as not having been the wife of the ſaid *John Robins*, becauſe ſhe ſaith that heretofore, to wit, on the twelfth day of *February* in the year of our Lord 1754, in the court Chriſtian held at *Litchfield* in the county of *Stafford*, before the worſhipful *Richard Smalbrooke*, doctor of laws, official principal of the right reverend father in God *Frederick* by divine permiſſion lord biſhop of *Litchfield* and *Coventry*, one Sir *William Wolſeley*, bart. did implead the ſaid *Ann* in a cauſe of divorce by reaſon of adultery, and did then and there in the ſaid court Chriſtian exhibit a libel againſt the ſaid *Ann*, thereby charging and alledging that the ſaid *Ann* was the wife of him the ſaid Sir *William Wolſeley*, and thereby alſo charging and alledging that ſhe the ſaid *Ann* had committed adultery with the ſaid *John Robins* after ſhe was the wife of him the ſaid Sir *William Wolſeley*; and the ſaid Sir *William Wolſeley* did by his ſaid libel, amongſt other things, pray that the ſaid *Ann* might be divorced from him as his wife from bed and board and mutual cohabitation, by reaſon of adultery with him the ſaid *John Robins*; to which ſaid libel ſhe the ſaid *Ann* did plead in bar, that ſhe was the lawful wife of him the ſaid *John Robins*, and not the wife of the ſaid Sir *William Wolſeley*, and that ſhe was lawfully married to him the ſaid *John Robins*, according to the rites and ceremonies of the church of *England*, on the 16th day of *June* 1752, in the pariſh-church of *Caſtle* in the county of *Stafford*, and by her ſaid plea in bar did pray, amongſt other things, that ſhe might be decreed and pronounced to be the lawful wife of him the ſaid *John Robins*, and to have been lawfully married to him on the ſaid 16th day of *June* 1752, and ſuch proceedings were had upon the ſaid libel and plea in bar; that afterwards and before any definitive ſentence was pronounced in the ſaid court Chriſtian of the ſaid biſhop of *Litchfield* and *Coventry*, to wit, on the 24th day of *June* in the year of our Lord 1754, the ſaid cauſe was removed into the Arches court of *Canterbury* before Sir *George Lee*, knt. doctor of laws, official principal of the ſaid court of Arches, by proper and legal proceſs which iſſued out of the ſaid court of Arches for that purpoſe, upon the appeal, and at the inſtance of her the ſaid *Ann*, but before any definitive ſentence or judgment was given or pronounced in the ſaid cauſe by the ſaid court of Arches, to wit, on the 31ſt day of *December* in the year

of our Lord 1754, he the ſaid *John Robins* died, to wit, at *Stafford* in the county aforeſaid; and afterwards, to wit, on the firſt day of *December* in the year of our Lord 1757, the ſaid cauſe came on to be heard, and the queſtion put in iſſue by the ſaid plea, Whether ſhe the ſaid *Ann* had been the lawful wife and was then the widow of him the ſaid *John Robins?* came on to be determined by the ſaid court of Arches; and the ſaid Sir *George Lee*, judge of the ſaid court, did on the firſt day of *December* in the year of our Lord 1757, upon full evidence and hearing of advocates and proctors on both ſides, by his interlocutory decree, having the form of a definitive ſentence, pronounce, decree, and declare, that ſhe the ſaid *Ann* had been the wife, and then was the widow of him the ſaid *John Robins*, and was lawfully married to him on the 16th day of *June* 1752, to wit, at the pariſh-church of *Caſtle* in the ſaid county of *Stafford*, which ſaid ſentence is in full force and effect, not reverſed, vacated, or otherwiſe annulled, as by the ſaid proceedings and ſentence remaining in the ſaid court of Arches at *Doctors Commons* in the city of *London* may more fully and at large appear; and the ſaid *Ann* doth aver, that the ſaid court of Arches had full juriſdiction of the ſaid cauſe, and that the ſaid ſentence was fairly and juſtly obtained upon full evidence, and upon hearing of advocates and proctors on both ſides; and the ſaid *Ann* doth aver, that *Ann Robins*, mentioned in the ſaid libel ſo exhibited by the ſaid Sir *William Wolſeley* againſt the ſaid *Ann* as aforeſaid, and the ſaid *Ann*, the now demandant in this action, are one and the ſame perſon, and not different perſons; and that the ſaid *John Robins*, mentioned in the ſaid libel, and alſo named in the ſaid ſentence of the ſaid court of Arches, and the ſaid *John Robins*, the huſband of the ſaid *Ann* in the ſaid declaration mentioned, is one and the ſame perſon, and not different perſons; and this the ſaid *Ann* is ready to verify; and therefore prays judgment for her dower aforeſaid, and if the ſaid ſentence can be gainſayed; and whether the ſaid *Brooke*, *Catharine* his wife, and *Jane* are not eſtopped by the ſaid ſentence to ſay that ſhe the ſaid *Ann* was never accoupled to the ſaid *John Robins* in lawful matrimony; and as to the ſaid plea of the ſaid *Brooke*, *Catharine* his wife, and *Jane*, by them ſecondly above pleaded in bar, whereof they have put themſelves upon the country, ſhe the ſaid *Ann* doth ſo likewiſe.

Demurrer. And the ſaid *Brooke*, *Catharine* his wife, and *Jane*, as to the ſaid plea of the ſaid *Ann* above in reply pleaded to the ſaid plea of the ſaid *Brooke*, *Catharine* his wife, and *Jane*, by them firſt above pleaded in bar, ſay, that the ſaid plea in manner and form as the ſame is above pleaded by way of reply, and the matters therein contained, are not ſufficient in law for the ſaid *Ann* to have her dower of the tenements, common of paſture, and mines aforeſaid in this behalf, as having been the wife of the ſaid *John Robins* deceaſed; to which plea, in manner and form aforeſaid above pleaded,

by

by way of reply they the ſaid *Brooke, Catharine* his wife, and *Jane* need not, nor are they obliged by the law of the land to anſwer thereto; and this they are ready to verify; wherefore, for want of a ſufficient replication in this behalf, the ſaid *Brooke, Catharine* his wife, and *Jane*, as before, pray judgment if the ſaid *Ann* ought to have her dower of the tenements, common of paſture, and mines aforeſaid.

And the ſaid *Ann*, ſince that ſhe hath above, by replying to the plea of the ſaid *Brooke, Catharine* his wife, and *Jane*, firſt above pleaded, alledged ſufficient matter in law to have her dower aforeſaid, as having been the wife of the ſaid *John Robins*, which ſaid matter ſhe is ready to verify, and which ſaid replication and the matter therein contained, the ſaid *Brooke, Catharine* his wife, and *Jane* have not denied, nor in anywiſe anſwered thereto, but the verification thereof to admit do wholly refuſe, prays judgment for her dower aforeſaid to be adjudged to her, *&c.* And becauſe the juſtices here will adviſe amongſt themſelves of and upon the premiſes, whereon the ſaid parties have put themſelves upon the judgment of the court, before they give their judgment thereon, day is given unto the ſaid parties here until the morrow of the Aſcenſion of our Lord, to hear their judgment of and concerning the ſaid premiſes, for that the ſaid juſtices here are not yet adviſed thereof, *&c.* And as to the trying of the ſaid iſſue above joined between the ſaid parties to be tried by the country, the ſheriff is commanded to cauſe to come here on the ſame day twelve, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* At which day here come as well the ſaid *Ann Robins* by her attorney aforeſaid as the ſaid *Brooke, Catharine* his wife, and *Jane*, by their ſaid attorney, and the ſheriff did nothing upon the ſaid writ, nor did he ſend back the ſame: and becauſe the juſtices here will further adviſe amongſt themſelves of and concerning the premiſes whereon the ſaid parties have put themſelves upon the judgment of the court before they give their judgment thereon, further day is therefore given to the parties aforeſaid here until on the octave of the *Holy Trinity*, to hear their judgment of and concerning the premiſes, for that the ſaid juſtices here are not yet adviſed thereof, *&c.* And as to trying the iſſue aforeſaid above joined between the parties aforeſaid to be tried by the country, the ſheriff, as before, is commanded that he cauſe to come here on the ſame day twelve, *&c.* to recognize in form aforeſaid; at which day here come as well the ſaid *Ann* by her attorney aforeſaid, as the ſaid *Brooke, Catharine* his wife, and *Jane*, by their ſaid attorney, and the ſheriff did nothing upon the laſt-mentioned writ, nor did he ſend back the ſame; whereupon the premiſes aforeſaid whereon the parties aforeſaid have put themſelves on the judgment of the court here having been ſeen, and by the juſtices here fully underſtood, and mature deliberation being thereupon had, for that it appears to

Joinder in demurrer.

Curia adviſare vult on the demurrer.

Award of a venire facias to try the iſſue to the country.

Vicecomes non miſit breve.

Ulterius concilium on the demurrer.

Alias ve. fa. awarded.

Judgment for the defendants on the demurrer,

to the juſtices here that the ſaid plea of the ſaid *Ann Robins* above in reply pleaded to the plea of the ſaid *Brooke, Catharine* his wife, and *Jane*, by them firſt above pleaded in bar, and the matters therein contained, are not ſufficient in law for the ſaid *Ann* to have her dower of the tenements, common of paſture, and mines aforeſaid; therefore, no reſpect being had to the iſſue aforeſaid above joined between the parties aforeſaid to be tried by the country, it is conſidered that the aforeſaid *Ann Robins* take nothing by her writ aforeſaid, but be in mercy for her falſe claim thereof; and that the aforeſaid *Brooke, Catharine* his wife, and *Jane* do recover againſt the ſaid *Ann* twenty-two pounds two ſhillings and three pence, for their coſts and charges by them about their defence in this behalf ſuſtained, to the ſaid *Brooke, Catharine* his wife, and *Jane*, by the court of our ſaid lord the king now here with their aſſent, according to the form of the ſtatute in ſuch caſe made and provided, adjudged, and that the ſaid *Brooke, Catharine* his wife, and *Jane* have thereof execution.

no reſpect being had to the iſſue to the country.

Robins, Widow, *verſus* Crutchley and his Wife and another. C. B.

Dower. Marriage muſt be tried by the biſhop's certificate.

DOWER of lands in the county of *Stafford*: the defendants plead two pleas; 1ſt, *Ne unque accouple in loyal matrimonie & hoc*, &c.; 2dly, *Ne unque ſeiſie & de hoc pon. ſe ſuper patriam*: the plaintiff replies to the firſt plea that ſhe ought not to be barred of dower, becauſe ſhe ſays that on the 12 *Feb.* 1754 Sir *William Wolſeley* exhibited a libel in the ſpiritual court of *Litchfield* and *Coventry* againſt her as being his wife, charging therein that ſhe had committed adultery with *John Robins*, and prayed a divorce from her *a menſâ & thoro*, to which libel ſhe pleaded that ſhe was the wife of *John Robins* and not of Sir *William Wolſeley*, and was lawfully married to *Robins* the 16th of *June* 1752, and prayed that ſhe might be decreed to be the wife of *Robins*; and before any definitive ſentence in the court of *Litchfield* and *Coventry*, *viz.* the 24th of *June* 1754, the cauſe was removed into the court of Arches upon the appeal of the ſaid *Ann*; but before any definitive ſentence in the court of Arches, *viz.* the 31ſt of *December* 1754, the ſaid *John Robins* died; and afterwards, on the 1ſt of *December* 1757, the cauſe was heard in the court of Arches, and upon full evidence, and hearing advocates and proctors on both ſides, the court agreed that the ſaid *Ann* had been the wife, and then was the widow of the ſaid *John Robins*, and was lawfully married to him on the 16th of *June* 1752, which ſentence is in full force; and the ſaid *Ann* avers, that the ſaid court of Arches had full juriſdiction of the cauſe, and that the ſentence was fairly and juſtly obtained upon full evidence, &c.; and ſhe further avers, that *Ann Robins* in the libel mentioned, and *Ann* the now demandant, are one and the ſame perſon, and that

John

John Robins mentioned in the libel and ſentence aforeſaid, and *John Robins*, the huſband of the ſaid *Ann* in the declaration mentioned, is one and the ſame perſon; and this ſhe is ready to verify; and therefore prays judgment for her dower, and if the ſaid ſentence can be gainſayed, and whether the defendants are not eſtopped by the ſentence to ſay that ſhe was never accoupled to the ſaid *John Robins* in lawful matrimony; and as to the ſecond plea of *ne unque ſeiſie*, ſhe the plaintiff joins iſſue to the country.

The defendants demur to the replication of plaintiff to the plea of *ne unque accouplé*, and the plaintiff joins in demurrer.

This caſe upon the demurrer was argued in this preſent term by Serjeant *Hewitt* for the demandant and Serjeant *Nares* for the tenants.

It was inſiſted for the demandant that the ſentence pronounced in the court of Arches (touching the marriage of the demandant with *John Robins*) having a competent juriſdiction of that matter, was an abſolute bar to, and concluded all perſons whatſoever to ſay they were not lawfully married, until the ſame ſhould be reverſed, and notwithſtanding that *Robins* was not party to the ſuit in the ſpiritual court; and to prove that this was the law, cited 4 *Rep.* 29. *Bunting's* caſe; which was thus: *J. Bunting* and *Agnes Adingſhall* contracted matrimony *per verba de præſenti*, and afterwards, 1 *December* 1555, *Agnes* took to huſband *Thomas Twede*, and afterwards, 9*th July* 1556, *John Bunting* libelled againſt *Agnes* upon the ſaid contract (without naming her huſband *Thomas Twede*) for a divorce, upon a pre-contract between the ſaid *J. Bunting* and *Agnes*, whereupon *decretum fuit quod prædicta* Agnes *ſubiret matrimonium cum præfato* J. Bunting *et inſuper pronunciatum decretum et declaratum fuit dictum matrimonium fore nullum*, &c. And further it was decreed that the ſaid *John* and *Agnes* ſhould intermarry, which they did, and had iſſue the plaintiff (the ſaid *Thomas Twede* then living). And it was adjudged that although *Twede*, then being, *de facto*, the huſband of the ſaid *Agnes*, was not party to the ſaid ſuit, nor to the ſentence in the ſpiritual court which diſſolved the marriage between him and the ſaid *Agnes*, but the ſaid *Agnes* only; yet the ſentence againſt the wife only being but declaratory, was good, and ſhould bind the huſband *de facto*; and foraſmuch as the conuſance of the right of marriage belongs to the ſpiritual court, and they have given ſentence in this caſe, the judges of the common law ought (although it be againſt the reaſon of our law) to give faith and credit to their proceedings and ſentences as conſonant to the law of holy church, for *cuilibet in ſua arte perito eſt credendum*; and ſo it was adjudged that the plaintiff *Bunting* was legitimate.

In

In aſſize the tenant pleaded baſtardy in the plaintiff, and he eſtopped him by reaſon that he was at another time certified *Mulier* by the biſhop in a replevin between a ſtranger and the bailiff of the plaintiff, who acknowledged the taking in right of the plaintiff, in which the bailiff had aid of the now plaintiff, and there was certified *Mulier*; judgment, &c. and a good eſtoppel, as was adjudged there. *Bro. Eſtoppel, pl.* 78. And many other caſes were cited to prove that ſentences in the ſpiritual court were binding. 2 *Salk.* 437. 3 *Mod.* 164. 1 *Salk.* 290. *Carth.* 225. 2 *Stra.* 960, 961. 6 *Mod.* 155. 2 *Lev.* 15. *and Hatfield and Hatfield, cited in* 2 *Stra.* 961.

Serjeant *Nares* for the defendants admitted that a ſentence in the ſpiritual court in a cauſe of marriage was concluſive evidence, generally ſpeaking; but inſiſted that matter of evidence cannot be pleaded but only matter of fact; that the law, in this particular caſe, knows of no other trial of the legality of a marriage beſides the biſhop's certificate, and there is no precedent of ſuch a replication as this, which attempts to draw the trial *ad aliud examen*. It has been urged that the defendants are concluded or eſtopped by this ſentence; but this is no record, the whole of it may be by colluſion, is ſtill liable to be reverſed by a third perſon any ways intereſted, who was no party to the cauſe even after the concluſion of the cauſe. *Vide Oughton. Ordo Judic.* 28. *tit.* 14. *quod tertius poteſt intervenire pro intereſſe ſuo*; decrees in eccleſiaſtical courts are not (even there) conſidered as concluſive, as appears by the ſame book, *fol.* 306. *f.* 3 & 4. *In cauſa matrimoniali non obſtat exceptio rei adjudicatæ, vel quod ſententia tranſit in rem judicatam; quia ſententia lata, in cauſa matrimoniali, contra matrimonium nunquam tranſit in rem judicatam. Et quoties eccleſia decipitur pronunciando ſententiam contra matrimonium, ex novis probationibus (etiam aliquando ex eiſdem) poteſt revocari prior ſententia*; ſo that Sir *William Wolſeley* may ſtill controvert the marriage, and the ſpiritual court may hereafter reverſe their ſentence for any thing the court here knows. And *vide Bracton* 304.

In breaking the caſe upon this firſt argument *Willes* C. J. ſaid, That at firſt he thought this a very plain caſe for the defendants, but that now he found there were different opinions about it; however, if 10,000 great men's opinions were againſt the known law of the land, he ſhould pay no regard to them; that he ſhould never be for ſetting up the ſpiritual courts above the temporal courts, that no determination in the high courts touching lands ſhall bind ſtrangers, much leſs ought a ſentence in the ſpiritual court (to which Mr. *Robins* was party) to bind his heirs; that this ſentence was nothing like an eſtoppel; evidence it may be, but nothing elſe; if upon an iſſue joined, *married or not married*, the biſhop had certified to us that they were married, there could be no doubt but the biſhop's certificate muſt prevail.

Clive

Clive J.—There can be no other trial in this caſe but the biſhop's certificate, and no method of pleading whatever can ouſt the biſhop of his certificate. *Robins* was no party to the ſuit, and why his heirs ſhould be concluded by the ſentence, I cannot conceive; it is mere matter of evidence, which I never thought could be pleaded. This is a replication of evidence, and therefore I think it is bad.

Bathurſt J.—The caſes cited by brother *Hewitt* for the demandant prove nothing more than that the courts of law receive a ſentence as concluſive evidence; but the biſhop hath an excluſive right, and nothing but his certificate can try this matter; whether the biſhop can certify contrary to a ſentence we cannot ſay, for we are not competent judges of that matter: the caſe in *Bracton* makes me think we muſt ſend to the biſhop, and whether he is bound by the ſentence he knows beſt.

Noel J. of the ſame opinion; but as counſel were retained to take notes for a ſecond argument, and demandant deſired it might be debated again, the court deferred giving judgment, and ordered an *ulterius concilium*. *Poſt*, 127.

Roe, on the Demiſe of Newman, *verſus* Newman. C. B.

IN ejectment: upon a caſe ſtated for the opinion of the court, it appeared that the place in queſtion was part of the waſte ground of the manor of *Teddington* in the county of *Middleſex*, and that the cuſtom of the manor is, that copyhold lands ſhall deſcend to the youngeſt ſon, or youngeſt brother, and that the lord of the manor in the year 1722 granted the place in queſtion to an anceſtor of the leſſor of the plaintiff, (who claims as heir in *Borough Engliſh*,) to hold according to the cuſtom, *&c.*; but the caſe does not ſtate this material fact, *viz. that it has time out of mind been demiſable by copy of court-roll.* Upon arguing this caſe the court were all clear of opinion, that what was ſtated was only evidence; and if it had been ſtated that it was demiſed by the lord *ad voluntatem domini ſecundum conſuetudinem manerii tempore E.* 3. and that it had been granted by copy of court-roll ever ſince, it would not have been ſufficient, for it muſt be ſtated, or found, or pleaded to be demiſable by copy of court-roll time out of mind, or it will not be adjudged copyhold; therefore, as the court cannot ſay that this is *copyhold*, the plaintiff has no title, and there muſt be

Copyhold muſt be pleaded to be ſuch time out of mind, and cannot be created in time of memory.

Judgment for the defendant.

TRINITY TERM,

33 & 34 *Geo.* II. 1760.

Hulland *verſus* Malken and Briſtow. C. B.

Debt on bond to indemnify the plaintiff from charges of a baſtard child. Plea, that the mother took the child away. Replication, that it has ſince been chargeable to the pariſh, and plaintiff has been obliged to pay.

DEBT upon a bond; defendants craved *oyer* of the condition, which was, that if they ſhould indemnify plaintiff, &c. as to a baſtard child, then the obligation to be void, otherwiſe, &c. And then plead that the child is an infant in the arms of its mother, and that defendants, while the child and mother was with them, (which was four days,) took care of it and provided for it every thing, but that the mother hath taken away the child from defendants, and that the child hath not ſince been delivered to them by plaintiff; *et hoc*, &c. The plaintiff replies, that it is true that the child was carried away by the mother, who for ſome time provided for it; but for replication ſays, that it afterwards became chargeable to the pariſh, and that plaintiff has been obliged to pay ſuch charges to the pariſh, whereby he is damnified; *et hoc*, &c. Defendant's rejoinder inſiſts, that the child was an infant under ſeven years of age, and in the keeping of the mother, and that it was not in their power to take it from her and keep it, ſo as to indemnify plaintiff. To this the plaintiff demurred, and ſhewed for cauſe that the rejoinder is argumentative, neither confeſſes and avoids, or traverſes or denies, and is alſo a *departure* from the plea.

The caſe was this: *Ann Parker* having charged the plaintiff with being the father of a baſtard child, he was obliged to give bond to indemnify the pariſh; but in order to get rid of the child, and to be clear of the pariſh, he paid the defendants 14*l.* in conſideration whereof they entered into the ſaid bond to indemnify the plaintiff againſt all damages, charges, &c. which he might be liable and put to on account of the ſaid child.

Upon arguing this caſe, the whole court were clearly of opinion that the plea was bad. They ſaid, this was a general bond to indemnify the plaintiff, as to the child, againſt all the world; and

and they can plead nothing but one of these two things, either that plaintiff hath not been damnified, or (in excuse) if he has been damnified, he himself was the occasion thereof, neither of which they have done; for the mother's taking away the child is no excuse at all. Moreover, they said, the replication had shewn how plaintiff was damnified; and the rejoinder in effect had admitted it, because it had not denied it: and they said, we need not in this case say whether the father or the mother hath a right to have the child while under seven years of age, because the defendants have bound themselves to keep the plaintiff harmless against all the world: they have confessed in their plea that they had the child in their keeping, and why did they let the mother carry it away? it was the defendant's own fault, and cannot excuse them to the plaintiff. Judgment for plaintiff.

N. B. The Chief Justice said, he would give no opinion whether the father has any power over the child, who is *nullius filius*. *Grotius* says, truly the mother is the only certain parent; and an order of justices to remove the mother always removes the child.

Biscoe, Esq. *versus* Kennedy and his Wife. C. B.

IN debt upon a bond entered into by the wife *dum sola*, the husband is gone abroad and *outlawed*, and the wife, although she appears publicly, is *waived*; and now it was moved to set aside the outlawry against the wife, and to restore her the goods taken upon the *capias utlagatum* which are sworn to be her separate goods. But *per curiam*—We must take the goods to be the husband's in point of law; and if she has any equitable right to them, she must go to a court of equity. As she appears publicly, she has been wrongfully outlawed, therefore let the rule be absolute for setting aside the outlawry against the wife, and be discharged as to the restoring the goods. *Davy* for plaintiff, *Hewitt* for defendant.

Debt upon a bond by the wife dum sola, she and her husband outlawed, and her separate goods taken in execution.

Robins *versus* Crutchley and others. C. B. Ante, 125.

THIS case was again argued this term by Serjeant *Stanniford* for the demandant, and Serjeant *Poole* for the tenants; what was urged for the demandant was, in substance, very much the same with what was said upon the former argument; for the tenants it was now said, that *ne unques accouple*, &c. was the general issue, to which no new matter can be replied; and this was principally relied upon by *Poole*, that there must be such a replication as will join the issue, and the awarding the writ to the bishop is joining the issue. *Nul tiel record* is a general issue, although

Bishop's certificate the only trial of marriage in dower.

though it concludes with an averment (like this), if it could be tried by the country it must have concluded to the country. But I do admit that in case where the bishop has already certified, such certificate may be replied; for to award a second writ to the bishop, would be to try the matter twice. *J.* and *M.* his wife brought a writ of account against *W.*, who pleaded that *M.* was a nun professed in the order of minors in *London*, and prayed judgment, &c. Plaintiffs replied, that at another time they the said *J.* and *M.* brought a writ of entry against one *B.*, who alledged that *M.* was professed, whereupon a writ issued to the bishop of *London*, who certified that she was not a nun professed, and shewed an exemplification of this record, and prayed judgment if the defendant should not be estopped to say that *M.* is professed. The defendant said, they were strangers to that record; but the court said, we cannot send to the bishop to certify to us that which already hath been done, and appears to us upon record, which is conclusive against all. And the court gave judgment for the plaintiff, that the defendant should account. *Fitz. Abr.* tit. *Estoppel*, *pl.* 282. This shews that the bishop's certificate is the only trial. *W. C.* and *M.* his wife brought dower; the tenant pleaded that the wife having married *A.*, and while he was living married *B.*, of whose endowment she now demands, and that *A.* is still living; but the court would not allow this manner of pleading, which was an attempt to oust the bishop of his certificate, and to draw it to the country, so the tenant was obliged to plead *ne unques accouplè*, &c. and a writ was awarded to the bishop. *Bro. Dower*, 54. Many more cases were cited on both sides, which upon giving judgment were laid quite out of the case.

Ld. C. J. *Willes*—I am of opinion that there can be no replication to a general issue to oust a person of his legal trial. Here the bishop has the only right of trial by his certificate to this court, and if this replication be allowed, the bishop will be ousted: a sentence in the spiritual court is not a record, and if it comes in question here, must be tried by the country; neither is it final in the parties, for (as *Oughton* says rightly) they may at any time apply to have it reversed; but the bishop's certificate is conclusive and final to all intents.

Clive J.—There never was a precedent of such a replication as this. I think *ne unques accouple in loyal matrimonie* is a general issue, and such a replication as this cannot be allowed, for it endeavours to draw the trial to the country, which the law doth not permit. I admit that sentences by proper courts having competent jurisdiction are conclusive evidence to every body, but it is well known you cannot plead evidence. This is like *nul tiel record*, which is a general issue although it concludes with an averment; to which you can reply nothing but *habetur tale recordum*.

I think

I think the ſentence is nothing but evidence, which may be proper to be laid before the biſhop; and that the tenant muſt have judgment.

Bathurſt J.—I am of opinion with my lord and my brother, that judgment muſt be for the tenant in this caſe; but I think that although this plea hath been ſaid to be a general iſſue, yet there may be ſome caſes where a ſpecial replication to it muſt be allowed: in an aſſize the tenant pleaded baſtardy in the plaintiff, who by replication eſtopped him becauſe he was before certified legitimate by the biſhop in a *replevin* between a ſtranger and the bailiff of the plaintiff, who acknowledged the taking in right of the plaintiff, in which the bailiff had aid of the then plaintiff, and there he was certified *Mulier*; judgment that this was a good *eſtoppel*. *Bro. Eſtoppel*, 78. *Sed nota* *, *that* replication did not draw the matter to be tried by any other than the biſhop, but only inſiſted, that the fact had already been legally tried and determined that the plaintiff was legitimate; ſo in the preſent caſe the demandant might have replied that the biſhop had formerly certified to this court that ſhe was married to *Robins*, (if ſhe could ſhew any record of ſuch a certificate,) which would be an eſtoppel to all mankind to ſay ſhe was not married to *Robins*. But a ſentence in the ſpiritual court is not final, even in that court; and ſhall this court be bound by a ſentence which the ſpiritual court themſelves are not bound by?

* By the reporter.

Noel J.—I am of the ſame opinion for the tenant: this is a new device to alter the legal trial in this caſe, and neither ſide have been able to ſhew any precedent like the preſent replication.

Judgment for the tenants.

Nota; There are three caſes of trial at law by the biſhop's certificate, and which cannot be tried by the country, *viz.* Marriage, baſtardy, and profeſſion of ſome order of religious.

Roe, on the Demiſe of Parry, *verſus* Hodgſon. C. B.

Whether a leaſe for 21 years made by a teſtamentary guardian of an infant be void, or only voidable.

IN ejectment: upon a caſe ſtated for the opinion of the court the principal queſtion was, Whether a leaſe for 21 years made by the teſtamentary guardians of an infant Mr. *Spencer* to *Parry* was abſolutely void, or only voidable? it appeared upon the ſtate of this caſe that Mr. *Spencer* himſelf has done no one act ſince he came of age, either towards eſtabliſhing the leaſe, (ſuppoſing it voidable,) or to avoid it; upon the firſt argument the court agreed in one point; *viz.* that a teſtamentary guardian by ſtatute till an infant was 21 years of age, and a guardian in ſocage till an infant was 14, were the ſame; and therefore what-

ever intereſt the latter had in lands till the infant was 14, the guardian by ſtatute has the ſame until he is 21. *The Duke of Beaufort* againſt *Berty*, 1 *Wms. Rep.* 703, 4. But as to the main queſtion. whether the leaſe was void or only voidable, they all (except *Noel* J.) doubted much, and gave no opinion; the Chief Juſtice ſeemed inclined to think the leaſe was void, from what he ſaid. *Clive* J. ſaid, he was far from ſaying it was either void or voidable; *Bathurſt* J. gave no opinion, but from what he ſaid he ſeemed to think that, whether the leaſe was void or not at firſt, it certainly became void or at an end when Mr. *Spencer* came of age, ſo could not be now a ſubſiſting leaſe to give leſſor of plaintiff title. *Noel* J. was of opinion that the leaſe was a good leaſe, and only avoidable by the infant when he came of age, and that he might then affirm it if he thought fit, but ſaid that he ſhould be very willing and ready to depart from this opinion, if he ſhould find he had come into it too readily. *Ulterius concilium.*

Knipe *verſus* Palmer. C. B.

Covenant upon a leaſe made by the committee of a lunatic, by plaintiff as the committee will not lie, for a committee cannot make ſuch leaſe at law.

ACTION of covenant brought by the plaintiff as *committee* of one *John Wright* a lunatic, upon covenants in a leaſe made by the plaintiff as *committee* in his own name, and aſſigns ſeveral breaches; the defendant pleads *nil habuit in tenementis*; the plaintiff replies the commiſſion of lunacy and proceedings thereupon, demurrer and joinder.

Serjeant *Poole* for the defendant inſiſted, that even the king himſelf, by his prerogative, cannot take the profits of a lunatic's eſtate to his own uſe, as was reſolved in *Frances*'s caſe, *Moor* 4. Where it was found by office that *William Frances* was a lunatic, wherefore the king ſeized his lands and his body; and the cuſtody of his perſon and his lands was committed to one *Holmes* for ſo long a time as he ſhould be a lunatic, to take the profits to his own uſe, rendering rent, &c. And in treſpaſs *Holmes* prayed the aid of the king *et non allocatur*, becauſe the patent is void, for the king cannot grant the lands of a lunatic to another to take the profits to his own uſe, becauſe the king himſelf is not entitled to them, otherwiſe than to ſupport the perſon of the lunatic, his iſſue, wife, and family, and to give the ſurpluſage to the lunatic when he recovers his memory; but otherwiſe it is of an idiot, for the king there ſhall have the profits to his own uſe, making allowance to the idiot for his keeping. From hence it is clear a committee of a lunatic cannot make a leaſe of the lunatic's eſtate; and ſo is 1 *Vern* 262. *Foſter* v. *Merchant*. And in *Blewit*'s caſe, *Ley* 47. it was reſolved by Lord *Hobart* and Baron *Tanfield*, that the committees of a lunatic cannot grant any copyhold eſtate, for that they themſelves by law have no eſtate

eſtate in the manor of the lunatic, nor are lords thereof for the time being, but that the lunatic by his ſteward may grant copyhold eſtates. And in *Hutt.* 16. *Drury* v. *Finch*, the opinion of the court was, that the committee of a lunatic was but as a bailiff, and hath no intereſt, but for the profit and benefit of the lunatic, and is as his ſervant; and it is contrary to the nature of the committee's authority to have an action in his own name, for the intereſt and eſtate, and all power of ſuits, is remaining in the lunatic. And it was ruled that a lunatic ſhall have a *quare impedit* in his own name, *vide Beverlie's* caſe, 4 *Rep.*, ſee alſo *Cox* v. *Dawſon*, *Noy* 27. to the like purpoſe; from theſe authorities the Serjeant, in the outſet, concluded that the leaſe was void, as the plaintiff had nothing in the land, ſo that the plea of *nil habuit in tenementis* was a good plea.

Serjeant *Hewitt* for the plaintiff argued that the king by the ſtatute of *Prærog. Regis*, 17 *Ed.* 2. *cap.* 10. has a right to take care of the lunatic's lands, and conſequently muſt have an authority, or intereſt, or both, ſo that ſomething may be made of them for the benefit of the lunatic, by leaſing the ſame to tenants; otherwiſe the lands may lie uncultivated, for in ſome countries, by the cuſtom, no man will farm lands for leſs than three years, and *there*, if the lunatic or the committee cannot let for three years, it would be a detriment to the lunatic. He ſaid the caſe in 1 *Vern.* 262. is only a *dictum* there; but it proves that a committee may make a leaſe by order of the court of Chancery, that is to ſay, the king himſelf may do it by the mouth of his Chancellor. The defendant has taken and accepted a leaſe from the plaintiff, and has held the land two years: it is unjuſt in him to ſay to the plaintiff, "I own I have "held the land, but you had no power to demiſe." Juſtice is therefore with us, ſo the court will go as far as they can to give it us. He inſiſted that the committee had power to let, but that it was at his own peril if he does it without an order of the court of Chancery, or underlets.

Lord Chief Juſtice *Willes*.—The courſe of the court of Chancery is, to refer it to a Maſter to conſider and report whether it will be for the benefit of the lunatic to make a leaſe? if it be, the court will order that the committee ſhall make a leaſe.

Serjeant *Hewitt* proceeded to make a ſecond point, and inſiſted that as this is an action of covenant founded in contract, the action well lies whether the plaintiff had any thing in the land or not, and that it may be good as a contract, although the leaſe be bad; and cited *Owen* 136. 3 *Bulſt.* 154, 158.

Willes C. J.—But, brother! that was a covenant which was collateral to the land; and all the covenants in the caſe at bar

are such as run along with the land, and so those cases are not to the point in question.

Hewitt then insisted, that although this was not a *lease*, yet it ought to operate as a *licence* to defendant to enjoy, and that the defendant having enjoyed under this licence, the covenants may operate thereupon; and cited 2 *Salk.* 588. 2 *Keb.* 8. *Hob.* 53. 2 *Vent.* 99. 1 *Salk.* 199. And that this is a bad plea in covenant.

Serjeant *Poole* in reply—My brother has made two points; 1*st*, He says this is a good lease. 2*dly*, If it is not, yet this being an action of covenant, it shall be considered as a licence to enjoy, and that *nil habuit in tenementis* is a bad plea to an action of covenant. As to the first he says, that the authority in *Vern.* 262. is only a *dictum*; but I insisted that a committee is only a mere bailiff, and that whatever is committed to him by the crown is only at the will and pleasure of the crown, so that a committee cannot possibly be more than a bare tenant at will of the crown; and it is well known that a tenant at will cannot make a lease, and this I very much rely upon; it is said by my brother that the crown must be considered as having a power to lease by the *stat. de prærog. regis.* I think the crown has no such power; but that is not the present case; the question now is, whether the committee, during the pleasure of the crown, has power to make a lease; I have proved he has not. But it is objected that this is a bad plea; I say it is both good law and sense, for if it is not in the power of the committee to make the lease, it is a fraud upon the lessee, who is liable to be ousted. This lease is by deed-poll, so that *nil habuit*, &c. is the proper plea; if it had been by indenture, the defendant might have pleaded *non demisit*. As to the second point, and to the cases cited to support it, I answer that this action is founded upon covenants that run along with the land, and if the lease be void, the covenants depending upon the estate are gone; what is meant by a licence to enjoy I do not well understand, when it appears the action is upon covenants in a lease; and that *nil habuit*, &c. is a good plea in covenant upon a lease. 3 *Lev.* 193. *Aylett* v. *Williams.*

Nil habuit, &c. to a lease by deed-poll. Non demisit to one by indenture.

Chief Justice *Willes*—I think the lease is void, for the committee has no legal power to make a lease; if this had been a lease made by order of the court of Chancery, they would have made the defendant pay costs; but yet if this had been a lease made by their order, I think it would not have been good at law. I think a covenant in the lease to do a collateral thing in a lease might bind, though the plaintiff had no power to make a lease. A committee is certainly no more than a bailiff, but whether he could not well covenant that the defendant might hold the land for two years, and whether the defendant could not have an action of covenant against him if he was ousted, is worth considering.

Clive

Clive J.—1. The leaſe is certainly void at law. *Moor* 4. is in point. 2. *Nil habuit*, &c. is a good plea in covenant: as to covenants which run or do not run with the land, ſee *Spenſer's* caſe, 5 *Rep.* 16, 17, 18.; but all the covenants in this caſe run with the land, and the deed being void, all the covenants fall to the ground. I have no doubt at all but this is a void leaſe. Though this is a deed-poll, yet there is a covenant on defendant's part, ſo they are the words of the defendant.

Bathurſt J.—I am of opinion the committee has no power to make a leaſe. The word *dimiſit* is a covenant in law, and here ſeems to be covenants on both ſides. Defendant might bring covenant againſt plaintiff on the word *dimiſit*, ſo the ſecond point not determined. *Ulterius concilium* as to ſecond point.

Memorandum: King *George* the ſecond died ſuddenly at his palace at *Kenſington* on *Saturday* the 25th day of *October* 1760, about ſeven o'clock in the morning. He fell down in his own chamber when no perſon was preſent with him, and was heard to fall by the page in waiting without. *Ut audivi.*

HILARY TERM,

1 *Geo.* III. 1761.

Stackpole *verſus* Earle, Eſq. C. B.

Aſſumpſit to pay plaintiff 2*l.* per cent. to procure a purchaſer of plaintiff's place of ſurveyor of the baggage of the port of London, is bad and contrary to the ſtatute againſt ſale of offices.

IN an action upon the caſe upon *aſſumpſit* the plaintiff declared, that whereas the defendant before and at the time of making the promiſe aforementioned, and afterwards, was ſurveyor of the baggage of the port of *London*, and was greatly deſirous of ſelling and diſpoſing of his ſaid place, and being ſo deſirous to ſell and diſpoſe of the ſame, on the 1ſt of *January* 1758, at *Weſtminſter* in the county of *Middleſex*, in conſideration that the plaintiff, at the defendant's requeſt, would uſe his endeavours to procure, and would procure a proper perſon to purchaſe the ſaid place of the defendant, he undertook and promiſed to pay the plaintiff 2*l.* for every

ſaid place; and the plaintiff avers, that confiding in the ſaid defendant's promiſe and undertaking, afterwards on the ſame day and year, at *Weſtminſter* aforeſaid, he, at the defendant's requeſt, uſed his endeavours to procure, and by means thereof on the 1ſt of *March* 1758, at *Weſtminſter*, procured one *John Gunſton*, being a proper perſon to purchaſe of the defendant the ſaid place for 1200*l.*, and that the ſaid *Gunſton* did give to the defendant 1200*l.* for the purchaſe of the ſaid place, whereby the defendant became liable to pay to the plaintiff 24*l.* for the purchaſe of the ſaid place. There are other general counts on *aſſumpſit* for work and labour done, *&c.* but all that ever the plaintiff did for defendant was the procuring a purchaſer for the place. Upon *non aſſumpſit*, the caſe reſerved for the opinion of the court was as above ſtated in the declaration.

Upon debating this caſe at the bar, it was urged by the council for the plaintiff, that he was neither a buyer nor ſeller of the place or office, and that what he had done was at the defendant's requeſt, and was neither *malum in ſe*, nor *malum prohibitum*, and therefore he ought to be ſatisfied for his labour and trouble; but the whole court were of opinion that it was *malum prohibitum*, and within the ſtatute of 5 & 6 *Ed.* 6. *cap.* 16. *ſec.* 2. And though the plaintiff himſelf was neither buyer or ſeller, yet this appears to be a promiſe to pay him money, to the intent that a perſon ſhould have an office belonging to the cuſtoms, which is within the very words of the ſtatute; but Mr. Juſtice *Clive* ſaid, he thought the ſelling of offices was *malum in ſe* at common law, and that if the ſtatute had never been made, he thought the procuring a perſon to buy the office of the defendant was not a good conſideration in law to raiſe an *aſſumpſit*, (which was not denied by any of the judges,) becauſe it was illegal; as if a gaoler permits a priſoner to go at large upon his promiſing to ſatisfy the debt for which he is impriſoned; he eſcapes by the conſent of the gaoler, and does not pay the debt according to his promiſe, the gaoler brings *aſſumpſit*, but ſhall not recover becauſe the conſideration was illegal; for it is a moſt certain principle that every conſideration to ground an *aſſumpſit* upon muſt be lawful. *Vide Tomkins* and *Bennett*, 1 *Salk.* 22. *Co. Lit.* 234. *a.* Sir *Arthur Ingram*'s caſe, 16 *Viner* 126. *pl.* 3. *Smith* v. *Coleſhill*, 1 *Roll. Abr.* 116. 1 *Roll. Rep.* 313. *Dyer* 18. *pl.* 13.

Judgment for the defendant.

Roe, on the Demiſe of Parry, *verſus* Hodgſon. C. B. Ante, 129.

SEE this caſe before in *Trin.* 33 & 34 *Geo.* 2. The court were now all clearly of opinion, that a guardian of an infant cannot make a leaſe of the infant's lands, and that the leaſe in this caſe was abſolutely void.

Judgment for the defendant.

TRINITY TERM,

1 *Geo.* III. 1761.

Anonymous. C. B.

Bankrupt. Indorſee of a note after the act of bankruptcy may be the petitioning creditor.

A. A trader, before he commits any act of bankruptcy, draws a promiſſory note for 200*l.*, payable to *B.* or order; then *A.* commits an act of bankruptcy, and afterwards *B.* indorſes the note over to *C.*, who is the petitioning creditor; and it was held *per totam curiam*, that he may well be ſo, for the 200*l.* was a debt due from the bankrupt before he committed the act of bankruptcy to ſomebody, *viz.* to *B.* *June* 1, 1761.

plea or not, but only upon a demurrer; upon which the Chief Juſtice ordered the matter to be debated at another day, as to this point, whether it was in the diſcretion of the court to reject this plea; whereupon it was ſpoken to a ſecond time, when the court were all clearly of opinion that they had it not in their power to reject the plea; and the Chief Juſtice ſaid, that ſuch diſcretion was contrary to the genius of the common law of *England*, and would be more fit for an Eaſtern monarchy than for this land of liberty; *nulli negabimus*, &c. *juſtitiam*; and there is no difference between a plea *puis darrein continuance* and any other defence, but this, *viz.* that the fact which warrants this plea firſt exiſted or happened ſince the laſt, and before the next continuance; it is a defence which the party could not poſſibly make when he firſt pleaded, and which he is bound to make after the laſt continuance, and before the next. It muſt be verified by affidavit, for if it was not to be ſo, great delays would enſue by pleas of this kind. The caſe in *Yelv.* was relied upon by Serjeant *Nares*, that it was in the diſcretion of the court to reject this plea, but the books in general are to the contrary; and the doubt in *Yelv.* was, whether he had a power to receive this plea at the aſſizes; and the judges determined that the plea ought to be received; but ſee the ſame caſe in *Cro. Jac.* 261. which ſays, the plea may be received at the diſcretion of the juſtices, if they perceive any verity therein; and the caſe in 1 *Stra.* 492. proves that the plea muſt be received, if it be verified by an *affidavit*, for in that caſe the plea was frivolous and untrue, ſo was rejected. *Clive* J. ſaid, he thought the plea in the preſent caſe was a bad plea, but was of opinion that it could not be determined but upon a demurrer. *Bathurſt* J. ſaid, the court muſt receive this plea as it is verified by affidavit, and that there was no caſe to be found wherever this ſort of plea was rejected, becauſe not good in point of law. *Noel* J. of the ſame opinion.

So the plea was received, and the rule diſcharged.

EASTER TERM,

2 *Geo.* III. 1762.

Paris *verſus* Salkeld. C. B. Ante, 137.

THE defendant pleaded *puis darrein continuance*, viz. that on ſuch a day he became a bankrupt, and that the cauſe of action accrued before ſuch time as he became a bankrupt, and concluded with an averment in bar; the plaintiff demurred; and now it was objected by Serjeant *Nares* that the plea was bad, becauſe it is not alledged by the defendant that he had conformed himſelf to the ſtatutes of bankrupt, nor obtained his certificate. *2dly*, It is not ſaid that this plea is *vigore ſtatuti*; to which it was anſwered by Serjeant *Hewitt* that the plea was general, and exactly as the *ſtat.* 5 *Geo.* 2. directs, the words whereof are, That in caſe any bankrupt be impleaded for any debt due before ſuch time as he became bankrupt, he ſhall be diſcharged upon common bail, and may plead in general that the cauſe of action accrued before ſuch time as he became a bankrupt, and may give the ſtatute and the ſpecial matter in evidence; ſo that he inſiſted the defendant had no occaſion to alledge that he had conformed and obtained his certificate, which certificate (he ſaid) was matter of evidence; and as this plea concludes in bar, the plaintiff might have replied that the defendant hath not conformed, *&c.* nor obtained his certificate. Indeed he admitted, that if the ſtatute had not chalked out this general manner of pleading, he ſhould have thought it neceſſary for the defendant to have alledged that he had conformed, *&c.* To the ſecond objection, that the plea is not ſaid to be *vigore ſtatuti*, it was anſwered, *that* was mere matter of form, and is not ſhewn for cauſe of demurrer.

Plea puis le darrein continuance that defendant became a bankrupt, &c. the plea muſt alledge that he hath conformed, or it is bad.

Pratt C. J. inclined to think that the plea was bad, and ſaid, that whenever a party comes to excuſe or entitle himſelf, he ought to alledge every circumſtance that entitles him to that thing; and this, he ſaid, was a general rule in pleading: ſo here he thought it neceſſary to have been alledged by the defendant that a commiſſion iſſued againſt him, that he ſurrendered and conformed himſelf; the words of the ſtatute are, *ſuch* bankrupt

ſhall

ſhall be diſcharged on common bail, &c.; the word *ſuch* muſt mean a bankrupt who has conformed himſelf. He ſaid it was clear law that a bankrupt cannot be diſcharged abſolutely before he obtains his certificate. He ſaid, he thought it ought to be pleaded *vigore ſtatuti*, otherwiſe the court muſt conſider the plea as at common law, and then every thing ought to be alledged; but this plea only ſays that the defendant has ſubmitted to be examined, &c. and is ready to conform, &c. not that he has conformed.

Bathurſt J. ſaid, he thought the court muſt take notice whether the plea be within the ſtatute, although it be not ſaid *vigore ſtatuti*, &c. but ſeemed to be clear in opinion that the plea was bad, becauſe it did not aver that the defendant had conformed, &c. and that the plaintiff ought to have judgment; but the caſe was adjourned for further conſideration. *Vide* 2 *Ld. Raym.* 1546, *Comyns* 205. 1 *Wms.* 249. *Henderſon* and *Winter*, *Hil.* 11 *Geo.* 2. *B. R.* ——— v. *Tomlin*, *Mich.* 5 *Geo.* 2. *B. R.* 1 *Stra.* 492.

Afterwards at another day in this term the Chief Juſtice ſaid, we are clear of opinion that the plea is bad, becauſe the defendant hath not averred that he has conformed, &c according to the ſeveral ſtatutes concerning bankrupts. Judgment for the plaintiff, *Clive* and *Neel* Juſtices *abſentibus*.

Henchett *verſus* Kimpſon. C. B.

Landlord entitled to one year's rent before a defendant can ſell upon an execution for coſts on a nonſuit.

C. J. *Pratt*. THE defendant had judgment of nonſuit againſt the plaintiff, and upon a *fieri facias* took the plaintiff's corn in execution, which was unthreſhed; the landlord immediately gave the ſheriff's bailiff notice that there was 30*l.* due to him from the plaintiff for one year's rent, and after *this*, the bailiff proceeded to threſh the corn, and ſold the ſame for 21*l.* and upwards; and now the ſheriff and defendant upon ſhewing cauſe why they ſhould not pay the landlord one year's rent, inſiſted that a defendant's execution was not within the *ſtat.* 8 *Annæ*, which was made in favour of landlords, but that the ſtatute only extends to executions at the ſuit of plaintiffs; *ſed non allocatur*, for the words of the ſtatute are, "No goods upon any "tenements leaſed ſhall be taken by any execution, unleſs the "*party* at whoſe ſuit the execution is ſued out ſhall, before the "removal of ſuch goods, pay to the landlord of the premiſes all "money due for rent for the premiſes, provided the arrears do "not amount to more than one year's rent; and in caſe the "arrears ſhall exceed one year's rent, then the party at whoſe "ſuit, &c. paying the ſaid landlord one year's rent, may proceed "to execute his judgment; and the ſheriff is required to levy

"and

" and pay to the *plaintiff* as well the money paid for rent as the " execution money." And the ſtatute ſhall have a liberal conſtruction; and the words, " *Party* at whoſe ſuit the execution " is ſued out," *&c.* ſhall be conſtrued to mean either plaintiff or defendant, whoſe judgment and execution it is. It is further inſiſted, that in all events the ſheriff ſhall not be anſwerable to the landlord for more than 21 *l.* which the corn was ſold for. This is a matter of importance which ſheriff's officers ought to underſtand. Before this ſtatute, executions took place of all debts that were not *ſpecific liens*, even of rents due to landlords: it was thought hard that landlords ſhould not have ſomething like a *ſpecific lien*; ſo the parliament have given them this remedy for one year's rent, but for no more, becauſe *vigilantibus et non dormientibus jura ſubveniunt*. Neither a plaintiff or defendant has any right to go upon the premiſes; the law gives this entry to the ſheriff only by virtue of the execution, but after he has notice of rent being due to the landlord, he cannot remove the goods before he has ſatisfied the landlord one year's rent; the landlord ſhall have the like benefit of diſtreſs for one year's rent as if there had been no execution at all; unleſs the rent be paid the ſheriff muſt quit, and if he does not quit, a ſpecial action on the caſe lies againſt him after notice of the rent due; but there is a ſhorter way by motion to the court, as in the preſent caſe, that the landlord may have reſtitution to the amount of the goods the ſheriff has ſold; the bailiff in this caſe became a wrong-doer immediately after he had notice of rent being due to the landlord. *Per curiam*—Let the prothonotary take an account of the goods taken in execution, and what they were ſold for, and let the ſheriff be allowed ſuch coſts as incurred before notice given him of the rent due to the landlord, and after all juſt allowances, let the reſt of the money be paid by the ſheriff to the landlord. Brother *Hewitt* for the landlord, brother *Nares* for the ſheriff.

Marriott *verſus* Liſter. C. B.

CASE upon eight ſeveral counts in *aſſumpſit*; upon the general iſſue there was a general verdict and damages given for the plaintiff upon all the counts. And now it was moved in arreſt of judgment that one of the counts was bad, and therefore as intire damages were taken upon this count as well as the reſt, judgment ought to be arreſted: the count objected to runs thus —" Whereas *James Liſter* (ſuch a day and year, at ſuch a place) " was indebted to *Thomas Marriott* in 20 *l.* for the like ſum be- " fore that time lent and advanced by the ſaid *Thomas* to *James* " *Dalrymple*, at the ſpecial inſtance and requeſt of the ſaid *James* " *Liſter*; and being ſo indebted, he the ſaid *James Liſter* in con- " ſideration thereof afterward, to wit, at ſuch a time and place, " promiſed

Aſſumpſit againſt defendant for money lent to a third perſon, bad after verdict, and judgment arreſted.

"promiſed to pay to the plaintiff the ſaid 20*l.* when requeſted." *Per curiam*—The word *lent* is a technical term, and no man can be indebted to another for money lent, unleſs the money be actually lent to that perſon himſelf; but this count alledges, that the defendant is indebted to the plaintiff for money lent to a ſtranger, *James Dalrymple*. Now *James Dalrymple* is certainly indebted to the plaintiff, becauſe the money was lent to *James Dalrymple*, and the law raiſes the promiſe which is not neceſſary to be proved; therefore if *James Dalrymple* is indebted to the plaintiff for this ſum lent to him, the defendant cannot be alſo indebted to him for it, becauſe there cannot be a double debt upon a ſingle loan. This is a ſpecial undertaking or promiſe to pay a ſum of money lent by the plaintiff to a ſtranger, which the law does not raiſe, and therefore ſuch ſpecial promiſe is traverſable, and muſt be proved; but upon an *indebitatus aſſumpſit* for money lent to a defendant, the law raiſes the promiſe, which is not traverſable, and need not be proved. In ſhort, it is abſurd to affirm *A.* is indebted to *B.* for money lent to *C.*, for the ſame money cannot be lent to two perſons ſeverally; and ſo is 1 *Salk. Butcher* againſt *Andrews*. And the judgment was arreſted. *Hewitt* Serjeant for the defendant, *Davy* and *Burland* Serjeants for the plaintiff.

TRINITY TERM,

2 *Geo.* III. 1762.

How *verſus* Denin. B. R. June 18, in error from C. B.

Want of pledges cannot be taken advantage of in error.

THIS was an action upon the caſe on ſeveral promiſes by bill againſt an attorney of the Common Pleas. Judgment was given there by *nil dicit*, and upon error brought the common errors were aſſigned; and alſo that there were no pledges to proſecute appearing upon the record.

It was inſiſted for the plaintiff in error, that the want of pledges is matter of ſubſtance, and in this caſe, being a judgment by default, was not aided by any ſtatute; and many caſes were cited to ſhew it was ſubſtance, and not mere matter of form, as

as *Dyer* 288. *Cro. Car.* 91. *Hutton* 92. *Hetley* 59. *Rol. Rep.* 205. 12 *Mod.* 198. 16 *Viner* 396. *p.* 13. But *per curiam* (without hearing counsel for the defendant in error)—By the *ſtat. of* 4 & 5 *Ann.* for the amendment of the law, this is become mere matter of form, and cannot be taken advantage of in error now, whatever it might have been before that ſtatute; and if the defendant had thought fit to have taken advantage of this defect of form, he ought to have demurred and ſhewed it for cauſe in C. B. and then the plaintiff there might have moved to amend; but not having done ſo, we will not reverſe the judgment for this mere defect of form; And the judgment was affirmed.

Brudnell *verſus* Roberts. C. B.

Covenant as heir, and breach aſſigned for want of repairs, on a leaſe for years; plea that leſſor was only tenant for life, and traverſes that the reverſion was in him and his heirs, good.

COVENANT brought by the plaintiff upon a leaſe for years, as heir in reverſion in fee to his father, and breach aſſigned for want of repairs; defendant pleads that the father when he made the leaſe to him was only tenant for life, and that the father being dead the leaſe is determined, *abſque hoc* that after the making of the ſaid indenture of leaſe the reverſion belonged to *James Brudnell*, (the father and his heirs,) as the plaintiff hath alledged in his declaration. Demurrer and joinder.

It was argued by Serjeant *Hewitt* for the plaintiff, that this plea was bad, becauſe wherever a leſſee accepts a leaſe for years by indenture, he ſhall be eſtopped to ſay that the leſſor *nil habuit in tenementis*, and the plaintiff need not reply *that eſtoppel*, but may demur, becauſe the declaration is on the indenture, and the *eſtoppel* appears upon the face of the record; otherwiſe if he had declared *quod cum demiſiſſet*, &c. 1 *Salk.* 277. *Kemp* v. *Goodall*; and this is clearly law, for ſo is *Co. Lit.* 47. *Cro. Jac.* 312. *Cro. Eliz.* 362. And not only the leſſor himſelf, but the grantee of the reverſion, and all parties claiming under them, will have the benefit of the eſtoppel, which (he ſaid) ran along with the lands; and that the plaintiff claiming as heir under the leſſor, his anceſtor ſtands in his place. 2*dly*, It was urged for the plaintiff that the traverſe was defective and uncertain; but I heard nothing ſaid to ſhew that it was uncertain.

On the ſide of the defendant it was argued by Serjeant *Nares*, That this was an action of covenant brought by the plaintiff upon an indenture of leaſe for years made by the father of the plaintiff to the defendant, and breach aſſigned for want of repairs, upon a covenant in the leaſe; the defendant pleads that the plaintiff's father the leſſor was only tenant for life, that he is dead, and the leaſe is determined, and traverſes as above; that the leaſe being now at an end, there is an end of all the covenants therein, and

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of this action; a leaſe for years by tenant for life is ſo abſolutely determined, that no acceptance of rent by the ſucceſſor to the land can make it good. *Co. Lit.* 341. *b.* *Nares* Serjeant admitted that during the life of tenant for life, (of the leſſor,) and the continuance of the leaſe, the defendant would have been eſtopped to ſay he had not the reverſion in him, but he being dead, and the leaſe thereby at an end, the leſſee is, as it were, unmuzzled, and is not eſtopped to plead the truth, which he has done by this plea, in confeſſing the leaſe and avoiding it: and of that opinion was the whole court; they alſo held that the traverſe was well taken; and judgment was given for the defendant *per totam curiam.* See *Co. Lit.* 47. *b. ſi non que le leaſe ſoit per fait indent.*, &c. very appoſite to the point of eſtoppel. *Note; Clive* J. ſaid, the defendant might either traverſe that the father was not ſeiſed of the reverſion in fee, or that it did not deſcend to the plaintiff; *quod fuit conceſſum.*

Handaſyde *verſus* Morgan in Debt on a Bond. Same *verſus* Same upon a Note of Hand. } Error.

Time refuſed to perfect bail in error, becauſe no real error could be ſuggeſted, ſo court thought it brought for delay.

AFTER verdict plaintiff in error put in bail in due time; a rule for better bail was ſerved upon the maid-ſervant of Mr. *Cox* the attorney for plaintiff in error upon a *Tueſday*. On *Saturday* following this notice came to the knowledge of Mr. *Cox*, and not before, as appeared by the affidavit of himſelf and two of his clerks. Upon this I moved for two days to perfect the bail; but the court abſolutely refuſed to give any time, unleſs I would ſhew them there was ſome real error in the record; which, as I was not able to do, they took it for granted that the writ of error was brought merely for delay, and the rule to ſhew cauſe why the plaintiff ſhould not have two days to perfect his bail was diſcharged.

Davy for defendant in error.

Crowder *verſus* Rooke. C. B.

Trial had after the day of niſi prius, the jurata is not amendable, and ve. fa. de novo awarded the trial being coram non judice.

THIS cauſe was at iſſue, and the record of *niſi prius*, *habeas corpora*, and *jurata*, were all made up for trial at a certain ſittings; but the cauſe not coming on to be tried at that day, the plaintiff's attorney ought to have altered the record of *niſi prius*, *writ*, and *jurata*, for a future day of ſitting, but neglected ſo to do, or to re-ſeal the ſame, although he was apprized thereof, ſo the cauſe was tried at a future day, and it appeared upon the face of the *jurata*, &c. that the cauſe was tried after the day of *niſi prius.* mentioned therein; and there was a verdict for the plaintiff;

plaintiff; and now the plaintiff moved to amend the *habeas corpora* and the *jurata*, and the defendant moved to set aside the verdict. A rule was made to shew cause why the amendment should not be made; and upon shewing cause the whole court were clearly of opinion that the trial was *coram non judice*, and discharged the rule for an amendment; but were of opinion that they ought *ex officio* to order a *venire de novo* to be awarded; which was ordered accordingly.

MICHAELMAS TERM,

3 Geo. III. 1762.

Chapman *versus* Pickersgill. C. B.

ACTION upon the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff, who declared upon three counts; in the first, having stated his honesty, he alledges that the defendant did falsely and maliciously exhibit a petition to the Lord Chancellor that the plaintiff was indebted to him in 200 *l.* and had committed an act of bankruptcy, that the commission thereupon issued, and the defendant was declared a bankrupt, and that afterwards the commission was superseded; and the plaintiff avers that he never committed any act of bankruptcy: the second count is much the same, with the like averment; the third count is much the same, but without such averment. To this the defendant pleaded the general issue, and there was a general verdict and damages for the plaintiff, taken upon all the three counts: whereupon it was moved that the judgment might be arrested for two reasons; first, because this action will not lie, there being in this case a particular remedy given by the statutes of bankrupt, 5 *Geo.* and 5 *Geo.* 2. which enact, that before any commission shall issue, the petitioning creditor shall (among other things) give bond to the Lord Chancellor in the penalty of 200*l.* to be conditioned for proving his debt, and the party a bankrupt before the commissioners, and upon a trial at law, &c. and if it shall appear that the commission was taken out fraudulently or maliciously, the Chancellor may

Case for falsely and maliciously suing out a commission of bankruptcy which was afterwards superseded, is a very proper action at law, though the Chancellor has power to give 200 *l.* damages by statute.

order ſatisfaction to the party grieved, or may aſſign the bond to the ſaid party, who may ſue the ſame in his own name. The ſecond point on which the judgment was moved to be arreſted was, becauſe it is not averred in the third count, that the plaintiff was not indebted to the defendant in 200*l.*, or that he never committed any act of bankruptcy.

This caſe was argued twice at the bar, in two former terms, by Serjeant *Hewitt* and Serjeant *Burland* for the defendant, and by Serjeant *Whitaker* and Serjeant *Nares* for the plaintiff; and in this term the Lord Chief Juſtice gave the opinion of the whole court, that judgment muſt be for the plaintiff.

Lord Chief Juſtice—Upon the arguing of this caſe, the firſt objection was, that this action will not lie, there being a remedy given by ſtatute, that a proceeding on a commiſſion of bankruptcy was a proceeding in nature of a civil ſuit; and that no action of this ſort was ever brought: but we are all of opinion that this action is maintainable.

The general grounds of this action are, that the commiſſion was *falſely* and *maliciouſly* ſued out; that the plaintiff has been greatly damaged thereby, ſcandalized upon record, and put to great charges in obtaining a *ſuperſedeas* to the commiſſion. Here is *falſehood* and *malice* in the defendant, and great wrong and damage done to the plaintiff thereby. Now wherever there is an injury done to a man's property by a *falſe* and *malicious* proſecution, it is moſt reaſonable he ſhould have an action to repair himſelf. See 5 *Mod.* 407, 8. 10 *Mod.* 218. 12 *Mod.* 210. I take theſe to be two leading caſes, and it is dangerous to alter the law. See alſo 12 *Mod.* 273. 7 *Rep. Bulwer's* caſe, 1. 2 *Leon.* ——. 1 *Roll. Abr.* 101. 1 *Ven.* 86. 1 *Sid.* 464. But it is ſaid, this action was never brought; and ſo it was ſaid in *Aſhby* and *White*. I wiſh never to hear this objection again. This action is for a *tort: torts* are infinitely various, not limited or confined, for there is nothing in nature but may be an inſtrument of miſchief; and this of ſuing out a commiſſion of bankruptcy *falſely and maliciouſly*, is of the moſt injurious conſequence in a trading country.

It is further ſaid, the *ſtat.* 5 *Geo.* 2. has given a remedy, and therefore this action will not lie; but we are all of opinion, that in this caſe the plaintiff would have been entitled to this remedy by action at common law, if this act had never been made, and that the ſtatute being in the affirmative, hath not taken away the remedy at law. 2 *Raym.* 163. And this is an univerſal rule, that an affirmative ſtatute is hardly ever repealed by a ſubſequent affirmative ſtatute, for if it is poſſible to reconcile two ſtatutes, they ſhall both ſtand together. If they cannot be reconciled, the

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laſt ſhall be a repeal of the firſt: but the moſt deciſive anſwer is, that this ſtatute-remedy is a moſt inadequate and uncertain remedy; for though there be the moſt outrageous malice and perjury, and the party injured ſuffer to the amount of ten or twenty thouſand pounds, yet the Chancellor has no power to give him more than the penalty of 200 *l.* Beſides, the method of applying to the Chancellor is more tedious, expenſive, and inconvenient than this common law remedy; and this caſe, in its nature, is more properly the province of a jury than of any judge whatever.

It is further objected, that in the third count there is no averment that the plaintiff was not indebted to the defendant, or ever committed an act of bankruptcy; but no caſe was cited to ſhew ſuch averment to be neceſſary. The ground and ſubſtance of the declaration is *falſehood and malice*: there are no inſtances of ſuch averments *in conſpiracy*, that the party was innocent, or did not do the fact on which he was indicted; but the precedents are the other way. In an action for words; as, for ſaying a man is a thief, the plaintiff has no occaſion to aver he is not a thief; and this caſe is analogous; for after the plaintiff has alledged that the commiſſion was *falſe and malicious*, it would be tautology to make ſuch averment that he was not indebted, *&c.*; and this declaration would have been good on a demurrer; more clearly it is ſo, after a verdict.

Judgment for the plaintiff.

Marriot *verſus* Liſter. C. B.

Amendment of declaration after verdict refuſed.

THIS was an *indebitatus aſſumpſit* againſt defendant for money *lent* and advanced by the plaintiff to a third perſon at the defendant's requeſt; and after a verdict for the plaintiff, the judgment was arreſted in *Eaſter* term laſt. *Vide* this caſe before, *Eaſter*, 2 *Geo.* 3. Now the plaintiff (having brought a writ of error) produced an original writ, wherein it appeared that this count was for money *paid* and advanced to a third perſon at the requeſt of the defendant; and it was moved by Serjeant *Nares* that the count might be amended by the writ, by ſtriking out the word *lent*, and inſerting the word *paid* inſtead thereof; who alledged, that it was the conſtant practice in the King's Bench, when a declaration happened to be faulty, to file a bill which was right, and to amend thereby, and that the court *there* never inquired whether the bill was filed *before* or *after* the declaration; and cited 2 *Stra.* 1151. *Wilder* v. *Handy*, which was treſpaſs for killing a dog. After a verdict for the plaintiff, it was moved in arreſt of judgment, that the declaration ran by recital, "Where-"as," *&c.* but a bill being filed right, (the time of filing, the court refuſed to inquire into,) ordered it to be amended; and

in *Mich.* 23 *Geo.* 2. *Smith* v. *Ledbury*, it was laid in trover that the *defendant* was poſſeſſed of a horſe inſtead of the *plaintiff*: it was moved to amend, but *Lee* C. J. ſaid, there muſt be a bill filed right to amend by: afterwards a bill made right was filed, and the court amended the declaration by it, though the poſſeſſion was the very *giſt* of the action. But *per* C. J. *Pratt et tot. curiam*—We muſt preſume the plaintiff proved money *lent*, for your verdict is for money *lent* to a third perſon, and no precedent can be ſhewn wherever ſuch an amendment as this prayed was ever made: the amendment now prayed is at the common law; the ſtatutes of amendment lead us to ſee what power we had at law to amend; we had no power to amend after the firſt term, when the record was made up and the roll carried in; but ſince the ſtatutes, courts have gone a great way further. See 3 *Lev.* 347. But there is no ſtatute goes ſo far as to empower us to make an amendment, which would alter the trial, or the iſſue; the iſſue at the trial was, Whether the plaintiff lent a third perſon money at the defendant's requeſt? and you would now make the iſſue to be, Whether the plaintiff paid a third perſon money at defendant's requeſt? This would be to alter and change the record in a moſt ſubſtantial point. We are bound by the record and the verdict, and muſt take it to be true, that every part of the declaration was proved at the trial. The plaintiff has miſtaken his action; and if we were to allow this amendment, great inconvenience would enſue; for then we ſhould lay down a rule, that whenever the plaintiff had obtained a verdict in a caſe where he had no legal cauſe of action, he might afterwards ſue out an original writ, wherein he had good and legal cauſe of action, and amend his record thereby, and recover upon an iſſue which had never been tried; for it has never been tried in this cauſe whether plaintiff *paid* money to a third perſon at the inſtance of the defendant, but only whether he *lent* money to a third perſon at the defendant's requeſt: and for theſe reaſons the amendment was refuſed, notwithſtanding the practice of the King's Bench was very much inſiſted upon by the plaintiff. Brother *Nares* for the plaintiff, brother *Hewitt* for the defendant.

Wills *verſus* Maecarmick. C. B.

Debt upon an award, nil debet. Partiality in the arbitrators not allowed to be given in evidence.

DEBT upon an award, whereby it was awarded that the defendant ſhould pay to the plaintiff 150*l.* 16*s.* 9*d.* &c. The defendant pleads that he doth not owe to the plaintiff the ſaid 150*l.* 16*s.* 9*d.*, and thereupon they were at iſſue, which was tried before Mr. Juſtice *Noel* on the weſtern circuit, and a verdict was found for the plaintiff. And now it was moved for a new trial by Serjeant *Davy*, becauſe the judge refuſed to permit the defendant to give in evidence *partiality* in the arbitrators in making the award. *Davy* inſiſted, that in this caſe the defendant could plead

plead nothing but *nil debet*, and might thereupon give in evidence any matter that deſtroys the action; that partiality and corruption in the arbitrators made the award void, and being ſo, the action was deſtroyed. But *per curiam*—The plea of *nil debet*, *prima facie* admits the award, and there never was an inſtance where this kind of evidence was permitted to be given; it would be to ſuffer evidence that affects third perſons, the arbitrators themſelves: an award is a judgment by judges choſen by the parties themſelves, and a jury in a ſpecial verdict cannot find any matter or fact *dehors* the award: by parity of reaſon, nothing *dehors* the award (as partiality is) can be given to them in evidence. If this evidence was permitted, the plaintiff would be wholly unprepared at the trial; for all that he has to do, is to prove the ſubmiſſion and the award; the corruption or partiality of the arbitrators may be wholly unknown to the plaintiff; it concerns the arbitrators themſelves. In a trial at law, this matter of partiality and corruption can never be got at; there is no precedent at law of any *writ* to ſet aſide an award, and we muſt go by precedent; there is no caſe wherever this matter hath been pleaded: the *ſtat. W.* 3. ſhews that an award at law muſt ſtand, for that ſtatute ſays, that with reſpect to awards made according to that ſtatute they ſhall ſtand, unleſs controverted and ſet aſide in two terms. The remedy in this caſe is in equity, or at law by action againſt the arbitrators, if they have been corrupt. New trial refuſed, and judgment for plaintiff. Serjeant *Stanniford* and *Hewitt* for plaintiff, *Davy* and *Burland* for defendant.

HILARY TERM,

3 *Geo.* III. 1763.

JANUARY the 24th, 1763, the honourable Sir *Henry Gould*, knight, one of the barons of the court of Exchequer, having lately been appointed by the king one of the juſtices of his court of the Bench, took his place there this day.

Anonymous.

Debt on bond, payment before the day pleaded is ill.

DEBT on a bond with condition for the payment of a certain ſum of money on a certain day; defendant pleads payment before the day; plaintiff replies, that the defendant did not pay before the day, *et de hoc ponit ſe ſuper patriam*: defendant demurs, and plaintiff joins in demurrer.

Nares Serjeant for the defendant admitted that the plea at firſt was bad, but inſiſted the plaintiff had made it good by replying and tendering iſſue upon it, or that if the iſſue was immaterial, there ought to be a repleader.

Hewitt Serjeant *contra*—This is a caſe where defendant has not joined iſſue to the country, but has put himſelf upon the judgment of the court; and though the replication be bad, yet whenever the caſe is upon a demurrer, the court looks for the firſt fault, which is in the plea here; and therefore judgment ought to be for the plaintiff; and of that opinion was the court, and gave judgment for plaintiff.

EASTER TERM,

3 *Geo.* III. 1763.

Repington, Eſq. Executor, &c. *verſus* The Governors of Tamworth School, and Collins, Clerk. C. B.

A. B. being ſeiſed of the advowſon of a donative, the church, in his lifetime, becomes void; then *A. B.* dies, (the church being ſtill void,) having firſt made his will and the plaintiff his executor, who has brought this *quare impedit*, ſuppoſing himſelf entitled to this turn, as an executor is, in the caſe of a preſentative benefice: after two arguments in the *C. B.*, the whole court was clearly of opinion that the right of donation deſcended to the heir of

of *A. B.*, and that his executor had no title, which he would have had, if it had been a preſentative benefice.

It was ſaid by the court, in giving this judgment, that before the council of *Lateran* all benefices were like what donatives are now, that no lapſe could have incurred in antient times, and that biſhops had no right of inſtitution before the time of *Ric.* 2. *Ante concilium Lateranenſe* (ſays *Bracton*) *nullum currebat tempus contra præſentantes. Seld. Hiſt. Tithes, cap.* 12. *fo.* 380. And the Chief Juſtice ſaid, the author of the *Codex*, never read this chapter of *Selden*, or he has impoſed upon the public; he ſaid there is no caſe in the books to exclude the heir of a donative from his turn in this caſe, that a patron of a donative can never be put out of poſſeſſion by an uſurpation. After a verdict for the plaintiff executor, *&c.* judgment was arreſted, and the title to the turn adjudged to be in the heir at law *per totam curiam.*

The King *verſus* John Wilkes, Eſq. Member of Parliament for Ayleſbury. C. B.

ON *Saturday*, *April* 30, 1763, in the morning, the defendant *Wilkes* was arreſted by two of the king's meſſengers, by virtue of a warrant from the ſecretary of ſtate; the * TENOR of which warrant is in the words following: "George Montagu "Dunk *Earl of* Halifax, *Viſcount* Sunbury *and Baron* Halifax, "*one of the lords of his majeſty's moſt honourable privy council, lieute-* "*nant-general of his majeſty's forces, and principal ſecretary of ſtate:* "*Theſe are in his majeſty's name to authorize and require you* (*taking* "*a conſtable to your aſſiſtance*) *to make ſtrict and diligent ſearch for* "*the authors, printers, and publiſhers of a ſeditious and treaſonable* "*paper, intitled,* THE NORTH BRITON, NUMBER XLV. SATUR- "DAY, APRIL 23, 1763, *printed for* G. Kearſley *in* Ludgate- "ſtreet, London, *and them, or any of them, having found, to appre-* "*hend and ſeize, together with their papers, and to bring in ſafe* "*cuſtody before me to be examined concerning the premiſes, and fur-* "*ther dealt with according to law; and, in the due execution thereof,* "*all mayors, ſheriffs, juſtices of the peace, conſtables, and all other* "*his majeſty's officers civil and military, and loving ſubjects whom* "*it may concern, are to be aiding and aſſiſting to you as there ſhall* "*be occaſion; and for ſo doing this ſhall be your warrant. Given* "*at* St. James's *the twenty-ſixth day of* April *in the third year of* "*his majeſty's reign.*

"Dunk Halifax.

"To *Nathan Carrington, John Money, James Watſon*, and "*Robert Blackmore*, four of his majeſty's meſſengers in "ordinary."

A member of parliament diſcharged without bail, being committed for writing a ſeditious libel.

* The word TENOR is put by the author in contradiſtinction to the word PURPORT. The general warrant.

The same morning, a copy of the above warrant having been obtained from the messengers, who then had Mr. *Wilkes* in their *own* custody, and an *affidavit* being made of the truth of such copy, and that Mr. *Wilkes* was *then* in custody of two of the above messengers at his house in *Great George-street* in *Westminster*, the same were produced in the court of Common Pleas the same 30th day of *April* at twelve o'clock at noon, or a few minutes before or after that hour; whereupon, at the same time, it was moved by my learned brother *Glynn*, that a writ of *habeas corpus* might be allowed to issue *instantly*, returnable *forthwith*. The Lord Chief Justice *Pratt* was pleased to say that *this* was a most extraordinary warrant; and the court ordered an *habeas corpus* to be issued instantly, returnable forthwith. It being now about one o'clock, the rule of court for the issuing the *habeas corpus* could not possibly be drawn up and entered, nor could the writ be made out, signed, and passed under the seal of the court before four or five o'clock in the afternoon: and although it was certainly known by the officers under the crown, particularly by Mr. *Webb**, then solicitor to the treasury, that this writ had been ordered to issue by the court between twelve and one o'clock, while Mr. *Wilkes* was in the custody of the messengers at his house in *Great George-street*; yet, before the coming of the writ to the messengers, (the same afternoon about five o'clock,) Mr. *Wilkes* was hastily (I had almost said in contempt of the king's high court) committed to the *Tower* of *London*.

* Who had been a common attorney all his life before.

Mr. *Wilkes*'s solicitor, and one of his counsel, soon after they heard of such commitment, went to the *Tower* in order to consult and advise with him, but were denied admittance to him; Major *Ransford* informing them that he had received orders from the † secretary of state not to admit any person whatsoever to speak with, or see Mr. *Wilkes*; and further informed them, that he had just before refused the Right Honourable Earl *Temple* such admittance, *ut audivi*.

† Lord Halifax.

On *Sunday May* the first, the same gentlemen went again to the *Tower*, between the hours of twelve and one, on the same occasion, but were again denied admittance to see or speak with Mr. *Wilkes*; and soon afterwards, several noblemen and gentlemen of the first distinction were refused admittance to see or speak to Mr. *Wilkes*, and particularly his own brother was refused, *ut audivi*.

After such denial, Mr *Wilkes*'s solicitor demanded of *Major Ransford* a copy of the warrant of commitment of Mr. *Wilkes* to the *Tower*, which was readily granted by the major, the TENOR whereof is in the words following: "Charles *Earl of* Egremont, "*and* George Dunk *Earl of* Halifax, *lords of his majesty's most* "*honourable privy council, and principal secretaries of state: These* "*are in his majesty's name to authorize and require you to receive*

"*into*

" *into your cuſtody the body of* John Wilkes *eſq. herewith ſent you,*
" *for being* THE AUTHOR AND PUBLISHER OF A MOST INFAMOUS
" AND SEDITIOUS LIBEL, INTITLED, THE NORTH BRITON,
" NUMBER XLV. TENDING TO INFLAME THE MINDS AND
" ALIENATE THE AFFECTIONS OF THE PEOPLE FROM HIS
" MAJESTY, AND TO EXCITE THEM TO TRAITOROUS INSUR-
" RECTIONS AGAINST THE GOVERNMENT, AND TO KEEP HIM
" SAFE AND CLOSE, *until he ſhall be delivered by due courſe of*
" *law; and for ſo doing this ſhall be your warrant. Given at*
" St. James's *the* 30*th day of* April 1763, *in the third year of his*
" *majeſty's reign.* Egremont, Dunk Halifax.

" *To the Right Honourable* John *Lord* Berkley *of* Stratton, *con-*
" *ſtable of his majeſty's* Tower *of* London, *or to the lieutenant*
" *of the ſaid* Tower, *or his deputy.*"

Mr. *Webb*, ſolicitor to the treaſury, being preſent in Major *Ranſford*'s room when the copy of the ſaid warrant of commitment was granted, Mr. *Wilkes*'s counſel and ſolicitor applied to Mr. *Webb* for admittance to Mr. *Wilkes*, whereupon (it is true) Mr. *Webb* deſired the *major* to allow ſuch admittance, and ſaid he would be anſwerable and indemnify the *major*; but the *major*, with the true ſpirit of an excellent officer, anſwered, " *he would* " *not, or he could not diſobey orders;*" Mr. *Webb* replied, and ſaid he imagined, or he believed there muſt have been ſome miſtake in the orders, and that if either of the ſecretaries of ſtate were in town he would apply and endeavour to obtain the deſired admittance, and that if he could ſucceed therein he would ſend or bring an order for that purpoſe in the afternoon of the ſame *Sunday*, *May* the firſt; whereupon Mr. *Wilkes*'s counſel and ſolicitor departed from the *Tower* for ſome hours, and between the hours of eight and nine in the evening of the ſame day returned again to the *Tower*, and applied for admittance to Mr. *Wilkes*; but the *major* not having received any orders or meſſuage from either of the ſecretaries of ſtate, or from Mr. *Webb*, refuſed admittance, as he had done before, *ut audivi.*

On *Monday* the 2d day of *May*, at the ſitting of the court of Common Pleas in the morning, the meſſengers returned the writ of *habeas corpus* which had iſſued and been delivered to them on the 30th of *April* in the afternoon after Mr. *Wilkes* was out of their cuſtody, and committed to the *Tower* as above; the TENOR of which return, indorſed on the ſame writ, runs thus; *viz.* " In obedience to the within command, we humbly certify " to his majeſty's juſtices of the court of Common Pleas at " *Weſtminſter*, that at the time of the coming of this writ to us " the within-named *John Wilkes* was not, nor at any time ſince " hath been in our cuſtody, or in the cuſtody of either of us; " ſigned by two of the meſſengers to whom the writ was di-" rected."

Upon

Upon reading the writ and the return thereof, it was moved by the king's ſerjeant that the ſame might be affiled of record.

To which Serjeant *Glynn* for Mr. *Wilkes* objected, and inſiſted that the return was too general in this particular caſe, (although it might be a good return in another caſe not circumſtanced like the preſent,) for that it clearly appeared to the court by ſufficient evidence, *viz.* the affidavit and warrant of arreſt and ſeizure of Mr. *Wilkes*, upon which the writ was founded and granted laſt *Saturday* at noon, that Mr. *Wilkes* was *then* in the cuſtody of the meſſengers, and therefore they ought to have returned and certified to the court in *what manner, when and by what authority he was taken out of their cuſtody, and what was become of his body.*

Some of the king's ſerjeants replied, that all the precedents of returns of writs of *habeas corpus* in the crown-office, where the party therein named was not in the cuſtody of the meſſengers (to whom the writ was directed) at the time of the coming of the writ, were like the *return* in the preſent caſe; which aſſertion, at firſt, ſeemed to have weight with the Lord *Chief Juſtice and two others of the Judges*, who thereupon thought the return well enough; but Mr. Juſtice *Gould* was pleaſed to ſay he much doubted whether the precedents in the crown-office of *returns* to writs of *habeas corpus* were like the preſent *return*, as had been aſſerted by the king's ſerjeant; and ſaid, if the precedents were not ſo, he ſhould be of opinion that this was an inſufficient return, becauſe he thought, from what appears in evidence in the caſe, the court has a right to know what is become of the king's ſubject Mr. *Wilkes*, ſince he was in the meſſengers cuſtody laſt *Saturday* at noon; whereupon (*hæſitante curia*) the writ and return were not permitted to be affiled of record upon this motion; and precedents were ordered to be looked into, and the matter of the *return* was ordered to be debated at another day; but I never heard that it was.

In the caſe of Sir William Morris, who had a habeas corpus for his wife, the return was like the preſent. The like in Holmes's caſe for his wife. B. R. about Michaelmas term 1765.

Afterwards, the ſame *Monday*, *May* 2, a motion was made to the court, grounded upon a copy of the aforeſaid warrant of commitment of Mr. *Wilkes* to the *Tower*, and an affidavit of the truth thereof, for another *habeas corpus* to be directed to the conſtable, *&c.* of the *Tower* of *London*, which was granted, returnable *without delay.*

Tueſday, *May* 3. At the ſitting of the court (which was crowded to ſuch a degree as I never ſaw it before) in the morning Mr. *Wilkes* was brought to the bar, and ſat among the ſerjeants, (next to the reporter, on his left hand,) when the lieutenant of the *Tower* returned upon this ſecond writ of *habeas corpus* the warrant of commitment of Mr. *Wilkes* to the *Tower* by the two ſecretaries of ſtate, (before ſet forth,) which being read, Serjeant *Glynn* moved the court that Mr. *Wilkes* might be diſcharged

diſcharged out of cuſtody without bail; and grounded his motion on three points, two whereof were objections to the legality of the warrant of commitment (the reader will obſerve that the general *warrant* of *arreſt and ſeizure* was not now before the court, and therefore the legality of *that* could not *now* be debated); the third point was, that Mr. *Wilkes* was a member of parliament, and therefore was privileged from being arreſted for any crime except *treaſon*, *felony*, and *breach of the peace*; and that ſuppoſing him the author of the preſent ſuppoſed libel, (which he abſolutely denies,) it is only a miſdemeanor, and none of the three abovementioned crimes or miſdemeanors.

The firſt objection taken to the warrant of commitment was, that it doth not appear to the court that Mr. *Wilkes* was charged by any evidence or information upon oath before the ſecretaries of ſtate, that he was the author or publiſher of the *North Briton*, Number XLV.; that, for any thing that appeared to the court to the contrary, the ſecretaries of ſtate committed Mr. *Wilkes* to the *Tower*, upon their own mere imagination or ſuſpicion that he was the author and publiſher of this ſuppoſed libel.

See 2 Jones 13. Buſhel's caſe. 2 Inſt. 55. a. Bacon, title Commitment, cap. 3.

The ſecond objection taken to the warrant of commitment was, that it was too general, and doth not ſet forth ſufficient, ſubſtantial matter, whereupon the court can judge whether the *North Briton*, Number XLV. (ſuppoſing Mr. *Wilkes* the author and publiſher thereof) is a moſt infamous and ſeditious libel, tending to inflame the minds and alienate the affections of the people from his majeſty, and to excite them to traitorous inſurrections againſt the government; that the warrant not having ſet forth the *North Briton*, Number XLV. or ſuch parts thereof as the ſecretaries of ſtate deemed infamous, ſeditious, *&c.* the court cannot judge whether any ſuch paper ever exiſted, it not being before them, or if it does exiſt, whether it be an infamous libel or not.

In the third place, ſuppoſing the warrant of commitment to be good, yet that Mr. *Wilkes*, *being a member of parliament*, (which was admitted by the king's counſel,) is privileged from arreſts in all caſes except *treaſon*, *felony*, *and* ACTUAL *breach of the peace*, therefore ought to be diſcharged without bail; that libels may, and often do tend to the breach of the peace was admitted, and therefore the court of King's Bench frequently grants informations againſt the authors, printers, and publiſhers thereof; but this is never done but upon affidavits laid before that court, aſcertaining the ſaid authors, printers, or publiſhers; for ſurely that matter which only tends to a breach of the peace cannot with any propriety be ſaid to be an actual breach of the peace; and it was ſaid, that it is univerſally agreed a libel is not an actual breach of the peace, therefore it was inſiſted for Mr. *Wilkes*,

Wilkes, that upon this point alone (although the others ſhould be over ruled) he ought to be diſcharged from his impriſonment in the *Tower*, without bail.

Mr. Serjeant *Hewitt* for the crown, in anſwer to the firſt objection, ſaid, that it was not neceſſary to ſet forth the evidence, or information upon which the warrant of commitment was made, in the warrant; but as to the ſecond objection, he admitted that it muſt appear upon the face of ſuch warrant for what particular *ſpecies* of a crime or miſdemeanor the party was committed, according to the caſe of the *King* v. *Roe and Kendall*, 1 *Salk.* 345. 5 *Mod.* 78.; and that in the preſent caſe, if the commitment had been for writing and publiſhing a libel *generally*, without ſpecifying the nature and tendency thereof, it would have been *ill*; but here it is ſaid to be "for being the "author and publiſher of a moſt infamous and ſeditious libel, "tending to inflame the minds, and alienate the affections of "the people from his majeſty, and to excite them to traitorous "inſurrections againſt the government." This he thought was a ſufficient ſpecification of the nature of the libel, and of the miſdemeanor ſuppoſed to be committed by Mr. *Wilkes* againſt the government; but he ſaid he would not be underſtood to affirm that the paper called the *North Briton*, *Number* XLV. (which was not before the court) was a libel; that he had found no caſe upon a libel like this, and therefore could not ſay *what* was a ſufficient and preciſe certainty in a warrant of commitment for a libel; but he thought it not neceſſary to ſet forth the whole, or any part thereof, in the warrant.

As to the third objection of privilege, Serjeant *Hewitt* admitted that Mr. *Wilkes* was a member of parliament, and could not legally be arreſted but for *treaſon, felony, or breach of the peace:* he cited *Hob.* 215. *Hick*'s caſe, to ſhew that a libel tends to the breach of the peace; but whether the preſumed libel in the preſent caſe was a breach of the peace or not, he would not take upon himſelf to ſay; nor would he ſay that the arreſting Mr. *Wilkes* in the preſent caſe was *not a breach of privilege of the Houſe of Commons.*

Serjeants *Whitaker*, *Nares*, and *Davy*, for the King, ſpoke to the like effect; but none of them affirmed that the writing or publiſhing a libel was an actual breach of the peace, (as I underſtood,) or that the arreſt of Mr. *Wilkes*, in the preſent caſe, was not a breach of privilege of parliament, and (I think) they all declined ſaying any thing more about the privilege of parliament than what Serjeant *Hewitt* had ſaid before. When the king's ſerjeants had concluded, Mr. *Wilkes* made the following ſpeech to the court:

"*My*

" *My Lord! I am happy to appear before your lordſhip and this* " *court, where liberty is ſo ſure of finding protection and ſupport, and* " *where the law (the principle and end of which is the preſervation* " *of liberty) is ſo perfectly underſtood. Liberty! my Lord! hath* " *been the governing principle of every action of my life; and, actuated* " *by it, I always have endeavoured to ſerve my gracious ſovereign* " *and his family, knowing his government to be founded upon it; but* " *as it has been his misfortune to have employed miniſters who have* " *endeavoured to caſt the odium and contempt ariſing from their own* " *terrible and corrupt meaſures on the ſacred perſon of their ſovereign* " *and benefactor, ſo mine has been the daring taſk to reſcue the royal* " *perſon from ill-placed imputations, and fix them on the miniſters,* " *who alone ought to bear the blame and the puniſhment due to their* " *unconſtitutional proceedings. For the proof of my zeal and affection* " *to my ſovereign I have been impriſoned, ſent to the* Tower, *and* " *treated with a rigour yet unpractiſed even on* SCOTTISH " REBELS; *but however thoſe may ſtrive to deſtroy me, whatever* " *perſecution they are now meditating againſt me, yet to the world I* " *ſhall proclaim, that offers of the moſt advantageous and lucrative* " *kind have been made to ſeduce me to their party, and no means left* " *untried to win me to their connection: now, as their attempts to* " *corrupt me have failed, they aim at intimidating me by perſecution;* " *but as it has pleaſed God to give me virtue to reſiſt their bribes, ſo* " *I doubt not but he will give me ſpirit to ſurmount their threats in* " *a manner becoming an* Engliſhman *who would ſuffer the ſevereſt* " *trials rather than aſſociate with men who are enemies to the liberty* " *of this country: their bribes I rejected, their menaces I defy, and I* " *think this is the moſt fortunate event of my life, when I appear be-* " *fore your lordſhip and this court, where innocence is ſure of protec-* " *tion, and liberty can never want friends and guardians.*"

Then the court took time to conſider, and appointed *Friday* following to give their opinion, and ordered Mr. *Wilkes* to be remanded to the *Tower*, and to be brought up again to the bar on *Friday* the 6th of *May*; and upon that day, Mr. *Wilkes* being again at the bar, the Lord Chief Juſtice delivered the opinion of the whole court.

Lord Chief Juſtice *Pratt*, after ſtating the warrant of commitment, ſaid, there are *two* objections taken to the legality of this warrant, and a *third* matter inſiſted on for the defendant, is privilege of parliament.

The firſt objection is, that it does not appear to the court that Mr. *Wilkes* was charged by any evidence before the ſecretaries of ſtate, that he was the author or publiſher of the *North Briton*, Number XLV. In anſwer to this, we are all of opinion, that it is not neceſſary to ſtate in the warrant that Mr. *Wilkes* was charged by any evidence before the ſecretaries of ſtate, and that this objection

jection has no weight. Whether a juſtice of peace can, *ex officio*, without any evidence or information, iſſue a warrant for apprehending for a crime, is a different queſtion: if a crime be done in his ſight, he may commit the criminal upon the ſpot; but where he is not preſent, he ought not to commit upon diſcretion. Suppoſe a magiſtrate hath notice, or a particular knowledge that a perſon has been guilty of an offence, yet I do not think it is a ſufficient ground for him to commit the criminal; but in that caſe he is rather a witneſs than a magiſtrate, and ought to make oath of the fact before ſome other magiſtrate, who ſhould thereupon act the official part, by granting a warrant to apprehend the offender, it being more fit that the accuſer ſhould appear as a witneſs than act as a magiſtrate. But that is not the queſtion upon this warrant; the queſtion here is, Whether it is an eſſential part of the warrant that the information, evidence, or grounds of the charge before the ſecretaries of ſtate, ſhould be ſet forth in the warrant? And we think it is not. *Thomas Rudyard*'s caſe, 2 *Vent.* 22. cannot be applied to this caſe, for in the caſe of a conviction it is otherwiſe. It was ſaid that a charge by witneſs was the ground of a warrant; but we think it not requiſite to ſet out more than the offence, and the particular ſpecies of it. It may be objected, if this be good every man's liberty will be in the power of a juſtice of peace. But *Hale*, *Coke*, and *Hawkins* take no notice that a charge is neceſſary to be ſet out in the warrant. In the caſe of the *ſeven biſhops* their counſel did not take this objection, which no doubt but they would have done if they had thought there had been any weight in it. I do not rely upon the determination of the judges who then preſided in the King's Bench. I have been attended with many precedents of warrants returned into the King's Bench; they are almoſt univerſally like this; and in Sir *William Wyndham*'s caſe, 1 *Stra.* 2, 3. this very point before us is determined. And *Hawkins*, in his 2 *Pl. Coron.* 120. *ſect.* 17. ſays, "It is ſafe to "ſet forth that the party is charged upon oath; *but this is not* "*neceſſary*; for it hath been reſolved that a commitment for "treaſon, or for ſuſpicion of it, without ſetting forth any par-"ticular accuſation, or ground of ſuſpicion, is good;" and cites Sir *William Wyndham*'s caſe, *Trin.* 2 *Geo. Dalt. cap.* 125. *Cromp.* 233. *b.*

The ſecond objection is, that the libel ought to be ſet forth in the warrant *in hæc verba*, or at leaſt ſo much thereof as the ſecretaries of ſtate deemed infamous, ſeditious, *&c.* that the court may judge whether any ſuch paper ever exiſted, or if it does exiſt, whether it be an infamous and ſeditious libel or not. But we are all of a contrary opinion: a warrant of commitment for felony muſt contain the *ſpecies* of felony briefly, "as for "felony for the death of *J. S.*, or for burglary in breaking the

" houſe of *J. S.* &c.; and the reaſon is, becauſe it may appear " to the judges upon the return of an *habeas corpus*, whether it " be felony or not." The magiſtrate forms his judgment upon the writing, whether it be an infamous and ſeditious libel or not, at his peril, and perhaps the paper itſelf may not contain the whole of the libel; *inuendoes* may be neceſſary to make the whole out: there is no other word in the law but *libel* whereby to expreſs the true idea of an infamous writing; we underſtand the nature of a libel as well as a *ſpecies* of felony; it is ſaid the libel ought to be ſtated, becauſe the court cannot judge whether it is a libel or not without it; but that is a matter for the *judge and jury* to determine at the trial. If the paper was here, I ſhould be afraid to read it. We might perhaps be able to determine *that it was a libel*, but we could not judge *that it was not a libel*, becauſe of *inuendoes*, &c. It may be ſaid, that without ſeeing the libel we are not able to fix the *quantum* of the bail; but in anſwer to this, the nature of the offence is known by us; it is ſaid to be an infamous and ſeditious libel, *&c.*: it is ſuch a miſdemeanor as we ſhould require good bail for, (moderation to be obſerved,) and ſuch as the party may be able to procure.

The third matter inſiſted upon for Mr. *Wilkes* is, that he is a member of parliament, (which has been admitted by the king's ſerjeants,) and entitled to privilege to be free from arreſts in all caſes except *treaſon, felony, and actual breach of the peace*, and therefore ought to be diſcharged from impriſonment without bail; and we are all of opinion that he is entitled to that privilege, and muſt be diſcharged without bail. In the caſe of the *ſeven biſhops* the court took notice of the privilege of parliament, and thought the biſhops would have been entitled to it if they had not judged them to have been guilty of a *breach of the peace*; for three of them, *Wright*, *Holloway*, and *Allybone*, deemed a ſeditious libel to be an actual breach of the peace, and therefore they were ouſted of their privilege moſt unjuſtly. If Mr. *Wilkes* had been deſcribed as a member of parliament in the return, we muſt have taken notice of the law of privilege of parliament, otherwiſe the members would be without remedy where they are wrongfully arreſted againſt the law of parliament; we are bound to take notice of their privileges, as being part of the law of the land. 4 *Inſt.* 25. ſays, the privilege of parliament holds unleſs it be in three caſes, *viz. treaſon, felony, and the peace*; theſe are the words of *Coke*. In the trial of the ſeven biſhops the word *peace*, in this caſe of privilege, is explained to mean where ſurety of the peace is required. Privilege of parliament holds in informations for the king, unleſs in the caſes before excepted; the caſe of an information againſt Lord *Tankerville* for bribery, 4 *Annæ*, was within the privilege of parliament. See the reſolution of the Lords and Commons, *anno* 1675. We are all of opinion that a libel is not a breach of the peace: it tends to the breach of the peace, and that is the utmoſt. 1 *Lev.* 139.

But

But that which only tends to the breach of the peace cannot be a breach of it. Suppoſe a libel be a breach of the peace, yet I think it cannot exclude privilege, becauſe I cannot find that a libeller is bound to find *ſurety of the peace*, in any book whatever, nor ever was, in any caſe, except one, *viz.* the caſe of the *ſeven biſhops*, where three judges ſaid, that *ſurety of the peace* was required in the caſe *of a libel*: Judge *Powell*, the only honeſt man of the four judges, diſſented, and I am bold to be of his opinion, and to ſay that caſe is not law; but it ſhews the miſerable condition of the ſtate at that time. Upon the whole, it is abſurd to require ſurety of the peace or bail in the caſe of a libeller, and therefore Mr. *Wilkes* muſt be diſcharged from his impriſonment: whereupon there was a loud *huzza* in *Weſtminſter-hall*. He was diſcharged accordingly.

Leeman *verſus* Allen and others. C. B.

Impriſonment for a few hours, 300l. damages not exceſſive, and new trial refuſed.

Verdict not ſet aſide for a variance between the iſſue delivered and the record of niſi prius after a defence.

TRESPASS, aſſault, and impriſonment, to the plaintiff's damage of 300 *l.* The defendant pleaded the general iſſue; upon the trial the jury gave a verdict for the plaintiff, and 300 *l.* damages; in the paper-book of the iſſue, delivered to the defendant with notice of trial, the damages (by miſtake) were laid only 200 *l.*, but the record of *niſi prius* was right and agreeable to the roll, which was 300 *l.* damages; after a defence made at the trial, it was now moved by Serjeant *Nares* for the defendants to ſet aſide the verdict upon two matters; 1*ſt*, becauſe there is a variance between the iſſue-book delivered; and, 2*d*, becauſe the damages are exceſſive,

It appeared in evidence at the trial, that the plaintiff kept the *Rummer* tavern in *Chancery-lane*; that the defendants are perſons called reforming conſtables, and under pretence of a warrant from one *Kinaſton*, a juſtice of peace, entered the plaintiff's houſe with ſtaves, there ſeized and carried her into the yard, and ſaid, "*now we have got her, and will carry the bitch to new priſon.*" The defendants would not ſay what crime ſhe was guilty of, or charged with. *Allen*, the conſtable, had a warrant, but he did not ſhew it; that the next morning the plaintiff went to Mr. *Kinaſton's* houſe, but he was not at home; then ſhe went to Juſtice *Cox's*, and again to Mr. *Kinaſton's*, but none of defendants appeared to proſecute her. *John Slade*, the waiter at the tavern, proved, that a man and a woman came to plaintiff's houſe (who looked like fellow-ſervants) between nine and ten o'clock one evening in *Eaſter* week, a few minutes before this impriſonment was done; that they appeared to be honeſt, ſober perſons, and came to refreſh themſelves; that he ſaw the defendants armed with bludgeons, take and ſeize the plaintiff his miſtreſs; that *Allen* laid hold of her, and ſaid, "*Now damn you for a bitch we*

"*have*

"*have got you, and we are determined you ſhall go to New-Priſon;*" other witneſſes gave evidence to the like effect; that theſe defendants called themſelves reformers; about twenty witneſſes proved the *Rummer* tavern to be a houſe of good repute, and nobody proved the contrary; it was alſo proved that one of the defendants ſtruck the plaintiff. That the defendants never proſecuted the plaintiff, nor did they appear againſt her when ſhe went before the juſtice next day. For the defendants, one *William Gardiner*, who was accidentally preſent in court at the trial, ſwore he was at the *Rummer* when this affair happened, and that he heard no oaths, nor the word *bitch*, &c. It appeared that the warrant was granted and ſigned by Juſtice *Kinaſton*, to enter this houſe, upon an allegation that the plaintiff kept a lewd and diſorderly houſe; that they had two warrants, one for *London* and another for *Middleſex*, becauſe this houſe ſtands partly in and out of the city, which they kept five weeks before they executed them; that they frequently watched the houſe, and when they imagined any lewd perſons went into the houſe they took that opportunity to execute the warrant; this is the ſubſtance of the evidence, whereupon the jury found for the plaintiff, and 300*l.* damages.

Chief Juſtice—1*ſt*, As the defendants made a defence at the trial, the court will not ſet aſide the verdict for the variance between the iſſue-book delivered in paper, and the record of *niſi prius*, which was not mentioned or objected to at the trial; and if the record of *niſi prius* had been wrong, the court would have mended it by the roll, after a verdict and a defence made.

2*d*, As to the exceſſiveneſs of damages, courts ſhould be very cautious how they overthrow verdicts that have been given by twelve men upon their oaths; however, if damages be unreaſonable and outrageous indeed, as if 2000*l.* or 3000*l.* was to be given in a little battery, which all mankind might ſee to be unreaſonable at firſt bluſh; certainly a court would ſet aſide ſuch a verdict, and try whether a ſecond jury would not be more reaſonable. The rule in the caſe of *Aſh* and *Aſh*, *Comb.* 357. laid down by Lord *Holt*, is a good one: "That the jury are to "try cauſes with the aſſiſtance of the judges, and ought to give "their reaſons, when required, that if they go upon any miſ-"take they may be ſet right;" and for their not doing ſo, and for exceſſiveneſs of damages, a new trial was granted. And this rule is univerſal, and extends to all ſorts of actions. But it may be ſaid, What rule has the court to govern themſelves by as to matters of *tort*? I anſwer, the court muſt be able to ſay the damages are beyond all meaſure unreaſonable, though they cannot ſay exactly what damages ought to be given. I do not think the damages exceſſive in the preſent caſe; here are a number of perſons like a new ſort of grand jury, who meet once or twice

in a week, and take upon themſelves to preſent, correct, reform and commence proſecutions; a warrant is granted by *Kinaſton*, a reforming juſtice, on the information of one *Triſtram*, who is fled for an abominable crime; there was no account given at the trial of the matter of his information to *Kinaſton*, who did not appear, though he was *ſubpœnaed*; the warrant is pocketed five weeks; the defendants watch and wait till they can dodge a lewd woman into the out-rooms of this houſe, where they had not been five minutes, before the defendants entered with bludgeons, and ſeized upon the perſon of the plaintiff, and would have carried her to priſon that night, if her neighbours had not then interpoſed and undertaken that ſhe ſhould appear before Juſtice *Kinaſton* next morning, which ſhe did, but the defendants never purſued the warrant one ſtep farther. I think the King's Bench would grant an information againſt theſe perſons for ſetting themſelves up as a kind of grand jury; an informer is a moſt odious character; and I am glad of an opportunity of declaring my diſlike towards theſe reformers. The whole court refuſed to ſet aſide the verdict; and the plaintiff had judgment.

Roe, on the Demiſe of Aſhton, *verſus* Hutton and others. C. B.

Copyhold ſurrendered to the uſe of a will, is deviſed to ſix perſons, one offers to be admitted, the lord refuſes to admit him, the lord cannot ſeize quouſq. &c.

EJECTMENT of copyhold lands, tried at *Lincoln*; verdict for the plaintiff, ſubject to the opinion of the court, upon the following caſe:

The *Dean and Chapter of Peterborough* being ſeiſed of the manor of *D.* by leaſe, dated the 21ſt of *May* 1759, demiſed the ſame (to one *Ch. Aſtroppe*, who died 21ſt *May* 1760, and) to the leſſor of the plaintiff for 21 years; afterwards, one *Martin* being tenant of the copyhold lands in queſtion, ſurrendered to the uſe of his will; and thereby deviſed the ſame to *John Hutton* and five other perſons in truſt, *&c.* and died. *John Hutton* went to the lord's court, and deſired to be admitted tenant, upon paying his proportionable part of the fine, but the lord refuſed to admit him, unleſs he would pay the whole fine for himſelf and all the other five truſtees, which he refuſed; another of the truſtees appeared in court, but refuſed to be admitted upon any terms at all; the other four never appeared in court, and ſent word by theſe two, that they diſſented, and would not be admitted; whereupon three proclamations were made for all the ſix truſtees to come and be admitted, or the whole land would be ſeiſed into the lord's hands as forfeited, and afterwards the lord entered for the forfeiture ſuppoſed; this is the title of the leſſor of the plaintiff.

The

The whole court held, that the lord ought to have admitted *J. Hutton*, who offered himſelf, and then the lord might have proceeded to recover his fine for all the ſix truſtees, if it was either due by law or the cuſtom of the manor, and he has been too haſty in entering for a ſuppoſed forfeiture before admittance, a ſeizure *quouſque* is until ſomebody comes to be admitted; one comes and offers to be admitted; ſo it is clear the lord had no right to ſeize. Tho. Raym. 41, 42. Latch 14. Johnſon's caſe. 3 Lev. 308, 309. Styles 141. Litt. Rep. 262.

Judgment for the defendants.

Palmer *verſus* Johnſon. C. B.

TRESPASS for cutting down the plaintiff's trees at *Branton* common in the county of *Huntingdon*; upon not guilty, there was a verdict for the plaintiff, ſubject to the opinion of the court, upon a caſe reſerved, the ſhort ſtate whereof is as follows: At the trial the plaintiff, in order to prove he was in poſſeſſion of the place in which, *&c.* produced in evidence a paper writing, purporting to be an admiſſion of the plaintiff to the place in queſtion as being copyhold, in truſt for *J. S.* by the lord of the manor of *B.* It was ſtated that the trees were cut down on *Branton* common by the defendant, and that the plaintiff himſelf was not a commoner, but was a truſtee for *J. S.* who has a right of common.

In a caſe for the opinion of the court the facts proved at the trial ought to be ſtated, and not the evidence of facts only.

Serjeant *Foſter* for the plaintiff.

The queſtion is, Whether the plaintiff, being a truſtee for *J. S.* who is a commoner, can maintain treſpaſs againſt the defendant for cutting down trees there; and unleſs the plaintiff in this caſe has treſpaſs, none elſe has. *Cro. Eliz.* 349. *Coke's Copyh.* 70. It was objected at the trial, How could the plaintiff call the trees *his trees?* In anſwer to this, *Bro.* tit. *Tenant per Copy. p.* 2.; tenant at will of a copyhold brought treſpaſs for cutting trees, and he had damages and judgment, although there be another frank-tenant; *quod nota*, ſays *Bro.* and cites 2 *H.* 4. 12. and 12 *Mod.* 379. is treſpaſs by a copyholder againſt the lord. Suppoſe this had been a feoffment to uſes at the common law, the action of treſpaſs muſt have been brought by the feoffees. *Hil.* 15 *H.* 7. *fo.* 2. *pl.* 4. *ceſtuy que uſe* cannot diſtrain in his own name. *Gilb. Ten.* 180. the ſtatute of uſes does not extend to copyholds, ſo the plaintiff is to be conſidered as a feoffee to uſes at common law.

Serjeant *Whitaker* for the defendant.

Upon the trial of this cauſe there was neither proof of title or poſſeſſion in the plaintiff, of the place in queſtion, nor does the caſe ſtate any fact of title or poſſeſſion in the plaintiff, it only

2 Rol. Abr. 553. S. pl. 1.

ſtates that a paper writing, importing to be an admiſſion of the plaintiff in truſt, *&c.* was proved; but this does not prove that the eſtate is copyhold; it is only preſumptive evidence that it is copyhold; the fact that the place in which, *&c.* was copyhold ought to have been ſtated; ſo that neither of the facts that the plaintiff had *title* or *poſſeſſion* are ſtated, and therefore the plaintiff cannot have this action. And of that opinion was the court, and ſet aſide the verdict, but without coſts.

Anſon *verſus* Jefferſon. C. B.

An attorney appearing on the face of the entry to have caſt an eſſoin for a defendant, it is void.

THIS was a plaint in replevin levied in the county court of *Norfolk*, which was removed by the plaintiff into the *C. B.* by a *recordare facias loquelam*, returnable on the morrow of the Purification of the Bleſſed *Mary*. The plaintiff ſued out a *pone* to compel the defendant to enter his appearance; but inſtead of appearing, he (by attorney) caſt an *eſſoin*, which is entered with the clerk of the *eſſoins* in the following words, *viz.* "On the "morrow of the Purification of the Bleſſed *Mary*, *Norfolk*, "*eſſoin* for *John Jefferſon* at the ſuit of *Anſon* by *Henzell* and "*Lodge*;" and the defendant's attorney, Mr. *Lodge*, entered a rule, that unleſs the plaintiff ſhould adjourn the *eſſoin*, a *non proſ.* would be ſigned. The plaintiff did not adjourn the *eſſoin*, ſo a *non proſ.* was ſigned. Upon ſhewing cauſe why the *eſſoin* and the *non proſ.* ſhould not be ſet aſide, it appeared upon affidavit that *Henzell* and *Lodge* were agents or attornies for the defendant, and had entered, or *caſt the eſſoin*; and therefore it was inſiſted that the defendant was in court by his attorney; and it would be abſurd to ſay a man can *eſſoin* when he really appears by attorney, or that he has a legal excuſe for not appearing when it is plain he has acted in the cauſe by his attorney. It was alſo ſaid that no *eſſoin* lies in perſonal actions, *Symonds* v. *Mayor of Totneſs*, *Sr. Geo. Cooke's caſes of practice*, 8. In the caſe of *Barclay* v. *Earle*, *B. R.* 2 *Stra.* 1194. The defendant being ſued by original, and arreſted on a ſpecial *capias*, caſt an *eſſoin*, and for want of the plaintiffs adjourning it, ſigned a *non proſ.* The court declared there was no colour for the *eſſoin*; and though the plaintiff had proceeded to judgment after he was *non proſed* for not adjourning the *eſſoin*, yet the court would not ſet aſide the judgment, notwithſtanding it was alledged that the plaintiff was out of court, as the *non proſ.* had never been ſet aſide.

Pratt, Lord Chief Juſtice—I cannot ſay that *eſſoins* may not be allowed in perſonal actions, becauſe *Coke* in 2 *Inſt.* on the *Stat. of Marlbridge*, *fo.* 125, 126. 137. ſays that *eſſoins* are allowed in perſonal actions; but this is a very obſolete practice, and a great abuſe of the law, as it is an unneceſſary delay of juſtice; and if the practice is to be revived, it will be neceſſary to make a new order of court.

Bathurſt

Bathurſt J.—By the ſtatute of *eſſoins*, 21 *Ed.* 2. *ſect.* 12. an eſſoin lieth not where the party hath an attorney in his ſuit; and by *ſect.* 4. an *eſſoin* lieth not where the party was ſeen in court. An *eſſoin* lies for an attorney though he is an officer of the court; but if he be ſeen in court he cannot *eſſoin*, as was the caſe of Mr. *George Wheeler*, who was ſecondary to prothonotary *John Borrett* eſq. and an attorney, and attended the holding the *eſſoin* upon the *eſſoin*-day of the ſame term, wherein he eſſoined. *Lord Chief Juſtice*—It was ſaid, the *pone* was a ſummons, and therefore the defendant might well *eſſoin*; but it is not ſo, it is only a prefixing of the day for the defendants to appear at *Weſtminſter*; here is an attorney appears to have entered the *eſſoin*, and therefore it is void, and muſt be ſet aſide, and all proceedings thereon.

An attorney may eſſoin, but if ſeen in court he cannot.

TRINITY TERM,

3 *Geo.* III. 1763.

Freeman, on the Demiſe of Vernon alias Bund, *verſus* Weſt. C. B.

EJECTMENT of a toft and certain lands in *Charlton* in the pariſh of *Cropthorne* in the county of *Worceſter*, tried at the laſt ſummer aſſizes before Mr. *Baron Smythe*, when a verdict was found for the plaintiff, ſubject to the opinion of the court upon this caſe, (*viz.*) It appeared in evidence that the dean and chapter of *Worceſter* were ſeiſed in right of their church of one of the manors of *Charlton* in the ſaid pariſh of *Cropthorne*, and being ſo ſeiſed, by indenture bearing date the 26th day of *November* 1750, between the dean and chapter of the one part, and the plaintiff's leſſor of the other part, the dean and chapter for a valuable conſideration granted the ſaid manor of *Charlton* (of which the premiſes in queſtion are part) to the plaintiff's leſſor, to hold to him and his heirs *from the day of the date* thereof, for the lives of three perſons who are ſtill living, under the yearly

A leaſe for lives to begin from the day of the date thereof, and ſeiſin delivered afterwards is good, and ſhall not be ſaid to convey a freehold to commence in future.

rents therein reſerved; and in the leaſe power is given by the dean and chapter to *William Bund*, as their attorney, to take poſſeſſion of the premiſes, and to deliver ſeiſin thereof to the plaintiff's leſſor, according to the tenor, effect, and true meaning of the ſaid leaſe; in purſuance of which power, *ſeiſin* was delivered of the premiſes by the ſaid *William Bund* to the plaintiff's leſſor on the 28th day of *May* 1751.

It was objected on behalf of the defendant, that this is a leaſe of a freehold; and being made to commence *in futuro*, is therefore void.

The queſtion for the opinion of the court is, Whether this leaſe, as it is made to commence from the day of the date thereof, and ſeiſin being afterwards delivered on the 28th day of *May* following, is good or not?

This caſe was twice argued at the bar, in *Eaſter* term laſt by Serjeant *Nares* for the defendant, and Serjeant *Hewitt* for the plaintiff; and in this preſent term, by Serjeant *Aſpinal* for the defendant, and Serjeant *Burland* for the plaintiff. After time taken to conſider, the Lord Chief Juſtice delivered the opinion of the whole court, and gave judgment for the plaintiff.

Lord Chief Juſtice *Pratt*—We muſt not overthrow eſtabliſhed principles of law. That a *freehold* cannot be conveyed to paſs *in futuro*, is a certain principle, and was grounded on the feudal law; for if a *freehold* could paſs to commence *in futuro*, there would be an *abeyance* and want of a tenant againſt whom to bring a *præcipe*, and the law will not ſuffer the land to be in *abeyance* a ſingle day, if poſſible to prevent it, for if it might be without a tenant of the freehold for one day, why not for a year, or 50 years; indeed, at this day, there is not ſuch abſolute neceſſity that there ſhould be an actual tenant of the freehold, as formerly when real actions were the only way of trying titles to land, and which *real writs* can only be brought againſt the *tenant* of the *freehold*, becauſe at this time, and for 200 years paſt, the fictitious action of *ejectment* againſt the tenant in poſſeſſion is, and has been the univerſal practice of trying titles to lands and tenements; and therefore if ever there was a caſe where the *aſtutia* of judges (to overlook niceties in the law, and to get over difficulties of firſt principles which ſtood in their way) was commendable, this is *that* caſe. The old principle of law, that a *freehold* cannot paſs to commence *in futuro*, has no good reaſon or ground to ſtand upon at this day; but without ſaying any thing againſt that old law, we may in this particular caſe, with the authority of our foreſathers, determine this to be a good leaſe.

The

The objection to it is not much to be favoured; it is to overturn a deed made upon good consideration; it would make void a great number of church leaſes, which are penned in the ſame way, and occaſion much inconvenience; *ut res magis valeat quam pereat* is a good ground for us to ſtand upon; and therefore we are of opinion with the caſe in *Moor* 637. 759. that the *freehold* remained in the *dean and chapter* after the *date* and making of the leaſe, and until *ſeiſin* was delivered by the attorney to the plaintiff's leſſor, according to the tenor, effect, and true meaning of the ſaid leaſe, and *then*, and not *before*, the *freehold* paſſed out of the *dean and chapter* to the plaintiff's leſſor. The *livery of ſeiſin* is the only powerful operative tranſaction; for if, in this caſe, nothing had been ſaid of livery, either *in*, or *dehors* the deed, nothing would have paſſed by the leaſe till the day of judgment. Courts have determined, that if livery be made by the leſſor himſelf, after the date in the deed, it ſhall controul the expreſs day in the deed, and make ſuch a leaſe as this, (*habendum a die datûs*,) good; What difference therefore can there be between this, and when it is done by the leſſor's attorney, according to the tenor, effect, and true meaning of the leaſe, ſix months after the date, as is ſtated? No difference at all. *Vide Palm.* 30. *Dean and Chapter of Worceſter's* caſe there cited, was a leaſe for life to commence *a die datûs*, and a letter of attorney to make livery the next day, which was made accordingly, and adjudged a good leaſe. By the warrant of attorney to deliver ſeiſin in the preſent caſe, the intention of the parties was, that the deed ſhould be ſubſtantiated by the livery, and in the mean time the freehold was in the grantor; ſo that without ſaying any thing againſt the old law, *that a freehold* cannot paſs to commence *in futuro*, we give judgment for the plaintiff, and order the *poſtea* to be delivered to him.

Caſes cited by Serjeant *Nares* upon the firſt argument. 1 *Ld. Raym.* 84. 3 *Lev.* 438. *Salk.* 413. 1 *Rol. Rep.* 229. *Hob.* 314. 2 *Bulſ.* 304, 5. &c. 2 *Rep.* 55.

Caſes cited by Serjeant *Hewitt*. *Co. Litt.* 52. *b.* 48. *b.* as to feoffment and ſeiſin. *Moor* 636. *Rol. Rep.* 402. By Judge *Bathurſt*. *Palm.* 30. *Cro. Jac.* 153.

Caſes cited by Serjeant *Burland*: *Perk. ſec.* 187. 1 *Rol. Abr.* 828. in point. *Cro. Jac.* 153. 563. *Hob.* 314. *margin.* 3 *Rep.* 55. By Serjeant *Aſpinal*, 30 *Ed.* 3. 31., &c.

N. B. The court ſaid they would preſume that the power given to the attorney was to make *livery* at any day ſubſequent to the leaſe; which they ſaid was the true meaning of the deed.

N. B. Mr. Juſtice *Wilmot*, at a trial of an ejectment formerly upon this ſame leaſe, was of opinion, that *from the date*, and *from the day of the date*, was the very ſame, and both included the day. *Vide Ld. Raym. Kello* and *May*, *contrà Ld. Coke.*

N. B. Mr. Baron *Smythe* at the trial was of the ſame opinion with the Common Pleas, and that the leaſe was good for the ſame reaſons nearly.

French qui tam, &c. *verſus* Adams. C. B.

A man may exerciſe as many trades as he has worked at or ſerved to ſeven years.

THIS was an action of debt upon the *ſtat.* 5 *Eliz. cap.* 4. *ſ.* 31. againſt the defendant for exerciſing the trade of a *carpenter*, contrary to the ſtatute, he not having ſerved an apprenticeſhip to that trade; iſſue was joined upon *nil debet*, and tried before Lord Chief Juſtice *Pratt* at *Weſtminſter*. It appeared in evidence at the trial, that the defendant had worked or ſerved as a ſervant for ſeven years in the trade of a *glazier*, and for ſome time afterwards exerciſed that trade as a maſter; that afterwards he exerciſed the trade of a *carpenter* for the ſpace of nine years, and it was proved that he well underſtood that trade.

It was objected by Serjeant *Nares* for the plaintiff at the trial, that the defendant being originally firſt bred up to the trade of a *glazier*, he could not now follow two trades, both *carpenter and glazier*; and whether he could or not, was the queſtion reſerved for the conſideration of the court.

Curia—All the judges of *England* at a meeting lately reſolved, That if any man as a maſter had exerciſed and followed any trade as a maſter without interruption or impediment for the term of ſeven years, he was not liable to be ſued or proſecuted upon the ſtatute of the *5th* of *Eliz.* Alſo if a man hath followed two or more different trades for the term of ſeven years, or more, he ſhall not be liable to be ſued or proſecuted upon this ſtatute. There is no law againſt one man's following ſeveral trades at this day; there was an ancient ſtatute made the 37 *Ed.* 3. *cap.* 6. that artificers or handicraftſmen ſhould uſe but one myſtery, and that none ſhould uſe any myſtery but *that* which he had before that time choſen and uſed; but this reſtraint of trade and traffic was immediately found prejudicial to the commonwealth, and therefore, at the next parliament, it was enacted, that all people ſhould be as free as they were at any time before the ſaid ordinance. 11 *Rep.* 54. *a.* And *Coke* ſays, it is to be obſerved, that acts of parliament that are made againſt the freedom of trade, merchandizing, handicrafts, and myſteries, never live long. 4 *Inſt.* 31. Without the leaſt doubt in the court, a man

may

may follow twenty trades if he has worked at or followed each trade ſeven years; *Mr. Harriſon of Red-Lyon-Square* ſerved an apprenticeſhip to the trade of a *carpenter*, but for twenty-ſix years he has been a watch-maker, and though he never ſerved as an apprentice to the trade of a watch-maker, is the beſt maker of time-pieces in the world, and the parliament has given him 5000 *l.* towards finding out the longitude by the help of his watches or time-meaſurers; and ſhall this man be hindered from making watches, and exerciſing the trade of a carpenter alſo if he pleaſes? *Per totam curiam*—There muſt be judgment for the defendant, and the *poſtea* muſt be delivered to him. Serjeant *Nares* for the plaintiff, Serjeants *Burland and Glynn* for the defendant.

Port, Eſq. *verſus* Turton & al., Aſſignees of Sparrow, a Bankrupt. C. B.

TROVER for a certain quantity of coals; upon *Not guilty*, there was a verdict for the plaintiff, ſubject to the opinion of the court, upon the following caſe made at the aſſizes:

One who buys a coal-mine, works it, and ſells the coals, is not a trader within the ſtatute of bankrupt.

J. S., in conſideration of 1600 *l.*, grants, bargains, and ſells to *Sparrow*, his executors, adminiſtrators, and aſſigns, a certain mine of coals, reſerving a rent and a certain quantity of coals to be delivered to the ſaid *J. S.* every year, with power of re-entry in caſe of non-payment: there is no limitation of *time* or *term*, but it is a ſale and purchaſe of the whole mine ſo long as any coals are to be gotten therein; *Sparrow* worked the mine and ſold the coals, and then committed an act of bankruptcy; afterwards, 13 *Oct.* 1761, he aſſigned all the coals he had got to the plaintiff; the defendants, as aſſignees of *Sparrow*, under a commiſſion of bankruptcy claimed and took away the coals, and Whether the buying the coal-mine, working it, and ſelling the coals, can make him liable to be a bankrupt within any of the ſtatutes concerning bankrupts? was the queſtion.

Serjeant *Davy* for the defendants—*Sparrow* is a buyer, and not a farmer: I admit the buyer of an eſtate is not a trader, but the buyer of part of the profits of an eſtate, if he ſells the ſame again and endeavours to get his living thereby, is a trader; as ſuppoſe a man upon the exchange buys the produce of a plantation, all the *canes* which ſhall grow upon it next year, and ſells the ſame; or a timber-merchant buys wood growing, and ſells it. Or the like as to hops, corn, *&c.*

Chief

Chief Juſtice—When he buys the timber, the corn, *&c.* ſtanding, what does he buy, ſomething real or perſonal?

Davy—When one buys as much coal as he can get in a certain field, it is a perſonal thing in the buyer.

Gould J.—Would not an ejectment lie for this?

Chief Juſtice—Moſt certain, an ejectment would lie.

Davy—*Sparrow* did not buy the mine, only the profits of it.

Chief Juſtice—It is a *chattel intereſt* in the land, and would go to executors.

Davy—*December* 19, 1707, Lord *Cowper* determined that a buyer of coals in the mine is not a trader within the ſtatutes of bankrupt, but if he ſells them together with others that he bought at market, then he becomes a trader within the ſtatutes of bankrupt.

July 1757, *Newton* and *Newton*. A buyer or farmer of alum-works cannot be a bankrupt; held *per* Lord *Mansfield*.

Chief Juſtice—How many witneſſes are requiſite to a will of this intereſt in the coal-mine? Three, certainly; it being an intereſt in land. Before the ſtatute of *Geo.* 1. *c.* 24. it was a doubt whether a farmer could be a bankrupt; now by that ſtatute it is clear that he cannot. I think we can have no doubt in this caſe; and that we have no occaſion to hear my brother *Nares* on the other ſide, unleſs it is deſired to be argued a ſecond time; I never was ſo clear in any caſe in all my life, as that *Sparrow* was not a trader liable to bankruptcy.

This intereſt in the coal-mine is a chattel, it is quite an uncertain intereſt, becauſe nobody can tell how long coals can be got; it is like an eſtate by *elegit*, or *ſtatute-ſtaple*, which laſts as long as the debt is not wholly ſatisfied; ſo this intereſt will laſt as long as there are any coals to be had. A *mine* is a temporary intereſt in the land, yet ſtill it is a chattel intereſt, and will go to executors; for it is a certain rule, that uncertain intereſts always go to executors, they can go no other way, if undiſpoſed of by will.

Uncertain intereſts go to executors.

Gould J. having ſome little doubt, the plaintiff's counſel were ordered to go on.

Serjeant

Serjeant *Nares* for the plaintiff.

1*ſt*, This is a bargain and ſale of all the mine, deſcribed to be ſtaked, and marked out with boundaries, with a clauſe of re-entry in the ſeller, in caſe of non-payment, *&c.* *Mines* are things of inheritance, and cannot poſſibly be deemed merchandize, ſo that a trader or dealer in *mines* can never be deemed liable to bankruptcy. 2 *Wms.* 240, 1, 2. *Ejectment* lies of *mines*, 2 *Stra.* 1142. a fine may be levied of mines, *tit. De conventione* in the *Regiſt.* 165. *b. Shep. Touchſtone*, 10. *Brown's Fines*, 15.

Chief Juſtice—A fine may be levied of water-works, and a recovery may be ſuffered of every thing whereof a fine may be.

Nares—2dly, He who is liable to be a bankrupt, muſt be "a perſon uſing the trade of merchandize by way of bargaining, "exchange, bartering, cheviſance in groſs or by retail, or ſeeking his living by buying and ſelling." See *ſtat.* 13 *Eliz. c.* 7. 1 *Jac.* 1. *c.* 15. 21 *Jac.* 1. *c.* 19. It ſurely is not merchandize to buy a coal-mine, no more than it is to buy any other eſtate, or chattel intereſt in land whatever.

Lord Chief Juſtice—The ſingle queſtion is, Whether *Sparrow* can be deemed to be a trader within the true meaning of any of the ſtatutes made concerning bankrupts? I am very clearly of opinion he cannot. The ſtatute of 21 *Jac.* 1. *cap.* 19. is the ruling ſtatute whereby this matter muſt be determined: the perſon who ſhall be deemed a bankrupt is thus deſcribed, *viz.* 1*ſt*, He muſt be a perſon uſing trade of merchandize, *&c.* Or, 2*dly*, One ſeeking his living by buying and ſelling. By buying and ſelling what? Surely, not by buying an intereſt in land, and ſelling the profits thereof. This can never come within the *idea* of uſing the trade of merchandize, or getting a living by buying and ſelling in the ſenſe of the legiſlature. From the *idea* we have of merchandize, the line may be drawn between the landowner and the merchant; one would wonder there could ever have been any doubt about a farmer; for if every buyer and ſeller was liable to be a bankrupt, many of the firſt perſons in the kingdom might be liable to be ſo. Whatever the owner of land in fee may do, ſurely he who rents it may do the ſame: if the former may be a buyer and ſeller, and not be liable to be a bankrupt, Why may not the farmer be ſo alſo? His tilling the land, huſbandry, and ſtock on his farm, are known to every body; yet he ſeeks his living by buying and ſelling. So an *innkeeper*, a *victualler*, and an *ale-houſe-keeper*, get their living by buying and ſelling; but their way of buying and ſelling is not within the meaning of any of the ſtatutes of bankrupt. The buying and

ſelling

ſelling which is within thoſe ſtatutes is to be confined to perſons who live by a credit gained on an uncertain capital ſtock.

The caſe at bar is this: One buys, another ſells ſo many feet of coals, to the buyer, his executors and adminiſtrators, for a groſs ſum; the buyer works the mine and ſells the coals; and now it is ſaid he uſes merchandize, becauſe he is a coal-maſter; but I think there is no difference between a leaſe for years and this caſe of the coal-mine; *Sparrow* clearly had a chattel intereſt in the land, like an *elegit*, as was ſaid. Though a *mine* be an inheritance, yet it may be ſevered from the inheritance by the grant now made; but it is certainly an intereſt in the land; if it is not ſo, how is it to be conſidered or received? There is no doubt but an ejectment will lie of it, that a fine may be levied of it, and that a will of it requires three witneſſes; things annexed to the land while ſtanding and inherent in it, as trees, lead, coals, *&c.* while they are ſo, are real eſtate and inheritable, but as ſoon as ſevered they are perſonal eſtate; while a *coal-mine* is undug it is part of the inheritance; a *gravel-pit* granted would be a chattel intereſt in the land until it was worked out, and if the grantee were interrupted in working it, he could have nothing but treſpaſs. If *Sparrow* was neither the farmer, nor owner of this *coal-mine*, Who was he? He muſt be one or the other; and neither the owner or farmer of an intereſt in land by buying and ſelling the ſame, or profits thereof, are liable to bankruptcy. The caſe of the *alum-works* is much ſtronger than this. The caſe of a *brickmaker* is very different; the earth is manufactured and turned into quite another thing; but coals carried to market are the ſame as they were found in the earth. Upon the whole, it is impoſſible to make this man a trader within the meaning of the ſtatutes concerning bankrupts.

Clive—I am of the ſame opinion. If the owner of a colliery ſells coals, he cannot be a bankrupt; *per Lord Sommers.*

Bathurſt—I am of the ſame opinion.

Gould—I am of the ſame opinion as at preſent adviſed, but am not againſt having the matter argued a ſecond time, if the parties deſire it.

But it never was argued again that I have heard of; ſo that the plaintiff muſt have entered his judgment upon the verdict, which was for him.

Hawkins, Eſq. *verſus* Wallis, Eſq. C. B.

Treſpaſs. Whoever claims an eaſement muſt plead it ſpecially.

TRESPASS for nailing trees up againſt the plaintiff's wall; Not guilty pleaded; verdict for the plaintiff, ſubject to the opinion of the court upon this ſhort caſe.

The facts of the trial were, that the plaintiff was poſſeſſed of a certain greenhouſe, the back wall whereof adjoined to the defendant's cloſe, and that the defendant nailed the trees growing in his cloſe to the wall of the plaintiff's greenhouſe, which was the abſolute property of the plaintiff, and that the defendant had uſed ſo to nail his trees to the ſame wall for 30 years laſt paſt, without interruption; it was inſiſted that this long uſage was a poſſeſſion of the back part of the wall in the defendant, though the property of the wall was in the plaintiff. But *per curiam*— It was reſolved that this was no poſſeſſion in the defendant, but an *eaſement* only, and cannot be given in evidence upon the general iſſue; for whoever claims an *eaſement* muſt plead it ſpecially; and judgment was given for the plaintiff. *Gould* J.— Suppoſe the wall falls down, it being the plaintiff's property and fence next to defendant's cloſe, the plaintiff muſt rebuild it, or the defendant might have an action againſt him.

Anonymous. C. B.

Debt on a bond to pay money on or before ſuch a day, payment before the day, ſcilicet, ſuch a day, is good.

DEBT on a bond with condition to pay a certain ſum of money *on or before ſuch a day*; the defendant craves *oyer* of the bond, and ſets forth the condition, and pleads payment of the money before the day, to wit, that he paid it on ſuch a day; the plaintiff demurs, and defendant joins in demurrer.

Burland for the plaintiff objected, that the defendant ought not to have put in iſſue the particular day whereon he paid the money, but ought to have pleaded that he paid the money on or before the day. But *per curiam*—The defendant has pleaded that he paid the money *before* the day, according to the condition, which is in the diſjunctive, to pay *on* or *before* the day; and the demurrer admits the plea to be true, and confeſſes the money was paid before the day, ſo the defendant muſt have judgment; but the plaintiff moved for leave to withdraw his demurrer, and to reply, upon payment of coſts; which was granted.

Cro. Jac. 434.

Wolferſtan *verſus* The Biſhop of Lincoln and Whitehead, Clerk. C. B.

Quare impedit.

QUARE impedit to permit the plaintiff to preſent to the north mediety of the church of *Great Sheepy* in the county of *Leiceſter*; the plaintiff's title ſet forth in the declaration is, that *Elizabeth Vincent*, widow, was ſeiſed in fee of the advowſon of the north mediety of the ſaid church in groſs, and being ſo ſeiſed, preſented *William Vincent* her clerk to the ſame, it being vacant, who was thereupon admitted, inſtituted, and inducted thereto; and the ſaid *Elizabeth* being ſo ſeiſed, and the ſaid north mediety being full of the ſaid *William Vincent*, ſhe (*Elizabeth*) on the firſt day of *May*, in the year of our Lord 1722, died ſeiſed of ſuch her eſtate in the advowſon, upon whoſe death the ſame deſcended to the ſaid *William Vincent* her ſon and heir, whereby the ſaid *William* was ſeiſed thereof in groſs in fee; and he being ſo ſeiſed, and being ſo incumbent of the ſaid north mediety, afterwards, on the 1ſt day of *October* 1740, made his will in writing, and thereby deviſed the ſaid advowſon unto *Elizabeth Vincent* and *Hannah Vincent*, ſpinſters, his daughters, and their heirs, equally to be divided between them; and afterwards, on the 1ſt day of *March* 1740, died ſeiſed of ſuch his eſtate in the ſaid advowſon, and incumbent of the north mediety of the ſaid church, upon whoſe death the ſaid *Elizabeth* and *Hannah Vincent*, ſpinſters, by virtue of the ſaid deviſe, became and were ſeiſed of the ſaid advowſon in groſs in fee; and the ſaid north mediety of the ſaid church became vacant by the death of the ſaid *William*; and the ſaid *Elizabeth* and *Hannah Vincent*, ſpinſters, being ſo ſeiſed, and the ſaid north mediety of the ſaid church being vacant by the death of the ſaid *William*, it belonged to the ſaid *Elizabeth* and *Hannah Vincent*, ſpinſters, to preſent a fit perſon to the ſaid north mediety of the ſaid church ſo vacant, and one *Hannah Vincent*, widow, uſurping upon the ſaid *Elizabeth* and *Hannah Vincent*, ſpinſters, preſented to the ſaid north mediety of the ſaid church ſo vacant *Silveſter Vincent* her clerk, who upon the preſentation of the ſaid *Hannah Vincent*, widow, was admitted, inſtituted, and inducted thereunto; and the ſaid *Elizabeth* and *Hannah Vincent*, ſpinſters, being ſo ſeiſed of the ſaid advowſon, to wit, the ſaid *Elizabeth* of one undivided moiety thereof, and the ſaid *Hannah Vincent*, ſpinſter, of the other undivided moiety thereof, ſhe the ſaid *Elizabeth Vincent*, ſpinſter, afterwards, to wit, on the 22d day of *January* 1757, at *Great Sheepy*, by an indenture then and there made between *Thomas Greſley*, Gent. of the firſt part, the ſaid *Elizabeth Vincent*, ſpinſter, of the ſecond part, Sir *Nigell Greſley* bart. and *Francis Vincent* eſq. of the third part, and *Silveſter Vincent*, clerk, of the fourth part, (the ſecond part of which indenture ſealed with

The record is entered of Michaelmas term in the ſecond year of the preſent king.

the ſeal of the ſaid *Elizabeth Vincent*, ſpinſter, the ſaid plaintiff now brings into court,) in conſideration of a marriage then intended between the ſame *Elizabeth* and the ſaid *Thomas Greſley*, ſhe did grant to the ſaid Sir *Nigell* and *Francis* her undivided moiety of the ſaid advowſon of the north mediety of the ſaid church; to hold to them and their heirs, to the uſe of the ſaid *Elizabeth* in fee, until the ſaid intended marriage, and from and after the ſaid marriage, to the uſe of the ſaid *Elizabeth* for her life, and from and after the determination of that eſtate, to the uſe of the ſaid Sir *Nigell* and *Francis* and their heirs during the life of the ſaid *Elizabeth*, and from and after the deceaſe of the ſaid *Elizabeth* to the uſe of the ſaid *Silveſter Vincent*, his executors, &c. for the term of 200 years; and from and after the determination of the ſaid term to the uſe of the ſaid *Thomas Greſley* for his life, and from and after the deceaſe of the ſurvivor of the ſaid *Elizabeth* and *Thomas Greſley* to the uſe of the ſaid Sir *Nigell* and *Francis* and their heirs for ever; which ſaid marriage afterwards on the firſt day of *March*, in the year laſt mentioned, at *Great Sheepy* was had, whereby and by virtue of the ſaid deed, and by force of the ſtatute for transferring uſes into poſſeſſion, the ſaid *Thomas Greſley* and *Elizabeth* his wife became and were ſeiſed of the ſaid moiety of the ſaid advowſon in right of the ſaid *Elizabeth* as of freehold, for the term of her life, the remainder belonging to the ſaid Sir *Nigell* and *Francis* and their heirs during the life of the ſaid *Elizabeth*, the further remainder thereof belonging to the ſaid *Silveſter Vincent*, his executors, &c. for the term aforeſaid, the further remainder thereof belonging to the ſaid *Thomas* for his life, and the ultimate remainder thereof belonging to the ſaid Sir *Nigell* and *Francis* and their heirs; and the ſaid *Thomas* and *Elizabeth* being ſo ſeiſed of the ſaid undivided moiety, the remainder thereof belonging as aforeſaid, and the ſaid *Hannah Vincent*, ſpinſter, being ſo ſeiſed of the ſaid other moiety, the ſaid north mediety of ſaid church became vacant by the death of the firſt above-mentioned *Silveſter Vincent*, whereupon the laſt-mentioned *Elizabeth*, and *Hannah Vincent*, ſpinſter, preſented the ſaid *Thomas Greſley* their clerk, who upon the ſame preſentation was admitted, inſtituted, and inducted into the ſaid north mediety; and the ſaid plaintiff further ſays, that the ſaid *Thomas Greſley* and *Elizabeth* his wife being ſo ſeiſed of one moiety, the remainder belonging as aforeſaid; and the ſaid *Hannah Vincent*, ſpinſter, being ſo ſeiſed of the other moiety, afterwards on the 9th day of *November* 1759, at *Great Sheepy*, by indenture between *Thomas Greſley* and *Elizabeth* his wife of the firſt part, the ſaid Sir *Nigell* and *Francis* of the ſecond part, the ſaid *Hannah Vincent*, ſpinſter, of the third part, the ſaid *Hannah Vincent*, widow, of the fourth part, and the ſaid *Edward* (the plaintiff) of the fifth part, (which indenture the plaintiff brings into court,) the ſaid *Thomas* and *Elizabeth*, Sir *Nigell* and *Francis*, did grant the ſaid moiety whereof the ſaid *Thomas* and *Elizabeth* were ſo ſeiſed as aforeſaid, and the ſaid remainder

remainder thereof ſo limited to the ſaid Sir *Nigell* and *Francis* and the ſaid *Thomas*, to the ſaid *Edward* (the plaintiff); to have and to hold the ſaid laſt-mentioned moiety to the ſaid *Edward* and his heirs; and the ſaid *Hannah Vincent*, ſpinſter, by the ſame indenture, did grant to the ſaid *Edward* the ſaid other moiety of the ſaid advowſon; to have and to hold the ſame to ſaid *Edward* and his heirs; by virtue of which ſaid indenture he became and is now ſeiſed of the ſaid advowſon in groſs, as of fee and right. And the ſaid *Edward* further ſays, that by a ſtatute made in the 21ſt year of *Henry* the 8th, it was enacted, (among other things,) that if any perſon or perſons having one benefice with the cure of ſouls of the yearly value of 8*l.* or above ſhould take any other with cure of ſouls, and be inſtituted and inducted in poſſeſſion of the ſame, that then immediately after ſuch poſſeſſion had thereof the firſt benefice ſhould be adjudged to be void; and that it ſhould be lawful to every patron, having the advowſon thereof, to preſent another, and the preſentee to have the benefit of the ſame in ſuch manner as though the incumbent had died or reſigned; any licence, union, or other diſpenſation to the contrary thereof obtained notwithſtanding; as by the ſaid act (among other things) more fully appears; and the ſaid *Edward* ſays, that the ſaid benefice, at the time of making the ſaid act, and at the time the ſaid *Thomas Greſley* was admitted, inſtituted, and inducted thereto, was and ſtill is a benefice with cure of ſouls of the yearly value of 8*l.*, and the ſaid *Thomas Greſley* being ſo admitted, inſtituted, and inducted into the ſaid north mediety of the ſaid church, and the ſaid *Edward* being ſo ſeiſed of the ſaid advowſon, afterwards, on the 22d day of *December* 1759, the ſaid *Thomas Greſley* accepted and took another benefice, with cure of ſouls of the yearly value of 8*l.*, to wit, the rectory of the pariſh church of *Seale* in the ſaid county of *Leiceſter*, and afterwards, to wit, on the 22d day of *December* laſt mentioned, the ſaid *Thomas Greſley* was admitted, inſtituted, and inducted into the ſaid church of *Seale*, whereby and by force of the ſaid ſtatute the north mediety of the ſaid church of *Great Sheepy* became void, and the ſaid *Edward* was ſeiſed of the advowſon of the ſaid north mediety of the ſaid church of *Great Sheepy* as aforeſaid, at the time the ſame ſo became void, and ſtill is ſo ſeiſed thereof; and by reaſon of the premiſes, and by force of the ſaid ſtatute, it now belongs to the ſaid *Edward* to preſent a fit perſon to the ſaid north mediety of the ſaid church of *Great Sheepy*, and the ſaid *Biſhop* and *Thomas Whitehead* unjuſtly diſturb the ſaid *Edward* therein, to the damage of the ſaid *Edward* of 300*l.*, and therefore he brings this ſuit, *&c.*

Grant to the plaintiff in fee of the advowſon.

Statute 21 H. 8. againſt pluralities.

The biſhop by his plea ſays, that the north mediety of the church of *Great Sheepy* is in the dioceſe of *Lincoln*, and that he claims nothing therein, or in the advowſon thereof, except the admiſſion, inſtitution, and induction of parſons thereinto, and the

Plea, that the biſhop claims nothing but as ordinary.

the amoval of them therefrom, and all ſuch other things belonging to, and as ordinary of that place; and the *biſhop* further ſays, that the plaintiff ought not to have his action againſt him, becauſe he ſays that the ſaid *Elizabeth Vincent*, widow, was ſeiſed, &c. (and admits the title as ſet forth in the declaration, down till the preſentation of the ſaid *Thomas Greſley*,) and (then he ſays) that by the ſaid act of parliament it is enacted, (as in the ſaid declaration mentioned,) and that the ſaid benefice of *Great Sheepy*, at the time of the making of the ſaid act, and at the time of the admiſſion, inſtitution, and induction of the ſaid *Thomas Greſley*, and from thence was and ſtill is a benefice with cure of ſouls of the yearly value of 8*l.* as the plaintiff has above alledged; * but the ſaid *biſhop* further ſays, that the ſaid *Thomas Greſley* being ſo admitted, inſtituted, and inducted into the ſaid north mediety of the church of *Great Sheepy*, and being incumbent thereof, he the ſaid *Thomas Greſley*, on the 31ſt day of *October* 1759, accepted and took the ſaid rectory of the pariſh church of *Seale*, and was then and there *admitted and inſtituted* into the ſame rectory, as by the plaintiff is alledged, which ſaid rectory of *Seale* then was, and is, a benefice with cure of ſouls of the yearly value of 8*l.*, whereby and by force of the ſtatute aforeſaid the north mediety of the church of *Great Sheepy* became vacant; and the *biſhop* further ſays, that the ſaid north mediety of the church of *Great Sheepy* was, remained, and continued ſo vacant from the time that the ſaid *Thomas Greſley accepted and took* the ſaid rectory of the church of *Seale*, and was *admitted and inſtituted* into the ſame as aforeſaid, for the ſpace of ſix whole months then next following, whereby the right of collating to the ſaid north mediety of the church of *Great Sheepy* devolved to the ſaid *biſhop* as ordinary of that place, by reaſon of the lapſe of time aforeſaid; wherefore the ſaid biſhop, after the ſaid ſix months from the time that the ſaid *Thomas Greſley* accepted and took the ſaid rectory of *Seale*, and was *admitted and inſtituted* into the ſame, were lapſed, collated the ſaid north mediety of the church of *Great Sheepy* on the ſaid *Thomas Whitehead* his clerk, and cauſed the ſaid *Thomas Whitehead* to be inſtituted and inducted into the ſame, by reaſon whereof the ſaid *Thomas Whitehead* from thence hitherto hath been, and ſtill is, parſon of the ſaid north mediety of the church of *Great Sheepy* imparſoned in the ſame; and this the ſaid *biſhop* is ready to verify; wherefore he prays judgment if the ſaid plaintiff, without aſſigning ſome ſpecial impediment in the power of him the ſaid *biſhop*, ought to have his ſaid action againſt him. *D. Poole.*

* See the note at the end of the caſe.

Biſhop pleads the church was void on inſtitution to the ſecond living, and continued void ſix months, and after that time he collated by lapſe.

And the ſaid *Thomas* makes defence and ſays, that he is parſon imparſonee of the ſaid mediety, of the collation of the ſaid *biſhop*; and further ſays, that the ſame became vacant by the ſaid *Thomas Greſley*'s accepting and taking the rectory of *Seale* aforeſaid, on the 31ſt day of *October* 1759, and ſo remained vacant until

Incumbent's plea that the biſhop collated the church on him by lapſe.

until on the 20th day of *June* 1760, on which day, at *Great Sheepy*, the ſaid *biſhop* as ordinary by lapſe of ſix months collated the ſaid *Thomas Whitehead* to the ſaid mediety of *Great Sheepy* then vacant; and this he is ready to verify; wherefore he prays judgment if the plaintiff ought to have his ſaid action againſt him. *G. Nares.*

Replication to the biſhop's plea.

That the late incumbent was not inducted to ſecond living till 22 Dec. 1759, and within ſix months after he preſented his clerk to the biſhop, who refuſed to inſtitute him.

The plaintiff replies to the biſhop's plea, that he ought not to be barred thereby from his action againſt the *biſhop*, becauſe proteſting that he the plaintiff had not any notice that *Greſley* had accepted the church of *Seale*, and was admitted and inſtituted thereto before the ſaid 22d day of *December* 1759, for replication ſays that *Greſley* was *inducted* in poſſeſſion of the ſaid rectory of *Seale* on the ſaid 22d day of *December* 1759, *and not before*, and that within ſix months after the ſaid 22d day of *December* 1759, *viz.* the 29th of *March* 1760, by writing under his hand and ſeal dated the ſame day laſt mentioned, he did preſent to the ſaid *biſhop* one *Thomas Hall*, his the ſaid plaintiff's clerk, and requeſted the *biſhop* to admit and inſtitute the ſaid *Hall* to the ſaid north mediety of *Great Sheepy* ſo vacant as aforeſaid, whom the *biſhop* refuſed to admit and inſtitute thereto on the ſaid preſentation of the plaintiff, and hindered him in the ſaid preſentation thereto; but the *biſhop* afterwards, on the 20th of *June* 1760, collated to the ſaid north mediety (being vacant) on the ſaid *Thomas Whitehead*, as the ſaid *biſhop* hath in his plea above alledged; and this the plaintiff is ready to verify; and prays judgment and his damages by occaſion of the ſaid hindrance, and alſo a writ to the ſaid biſhop to be adjudged to him the ſaid plaintiff.

Replication to the incumbent's plea.

The replication to the incumbent *Whitehead*'s plea is exactly the ſame as the replication to the biſhop's plea (only changing the biſhop's name for the incumbent's name).

The biſhop's rejoinder.

The *biſhop* rejoins, and admits that *Greſley* was *inducted* into the church of *Seale* the 22d of *December* 1759, and that the plaintiff within ſix months from that day preſented *Hall* his clerk, as the plaintiff has alledged in his replication; but the *biſhop* further ſays, that before the ſaid 22d of *December* 1759, *Greſley* accepted the church of *Seale*, *viz.* on the 31ſt of *October* 1759, and on that ſame day was *admitted* and *inſtituted* to the ſaid church of *Seale*, whereby and by the ſaid ſtatute the ſaid north mediety of *Sheepy* became void; and the *biſhop* further ſays, that the ſaid *Hall* did not within ſix months from the time that *Greſley* was *admitted and inſtituted* to the church of *Seale*, or at any time before the collation of the north mediety of *Great Sheepy* on *Whitehead*, and his being *inſtituted and inducted* into the ſame, preſent, or offer himſelf, or appear before the ſaid *biſhop* to be examined in order to his being admitted to the north mediety of *Great Sheepy*, but neglected ſo to do, wherefore the *biſhop*, after the ſaid ſix months from the time *Greſley* was admitted

mitted and inſtituted to the church of *Seale* were elapſed, collated *Great Sheepy* on *Whitehead*, and cauſed him to be inſtituted and inducted into the ſame, as the biſhop has above alledged; *without this*, that the biſhop before he collated the north mediety of *Great Sheepy* on *Whitehead* did refuſe to admit and inſtitute *Hall* to the ſaid north mediety of the church of *Great Sheepy* upon the ſaid preſentation of the ſaid plaintiff, as the ſaid plaintiff hath above alledged; and this the *biſhop* is ready to verify; wherefore he prays judgment if the ſaid plaintiff ought to have his ſaid action againſt him, *&c.*

The incumbent rejoins and ſays, it is true the ſaid *Thomas Greſley* was inducted in poſſeſſion of the ſaid rectory of *Seale* on the 22d day of *December* 1759, and not before; but ſays that the mediety of the ſaid church of *Sheepy* became vacant by the ſaid *Greſley*'s accepting the ſaid church of *Seale* on the 31ſt day of *October* 1759, and ſo remained void until on the 20th day of *June* 1760, on which day the *biſhop* collated *Sheepy* on this incumbent by lapſe; and the ſaid incumbent further ſays, that on the 31ſt day of *October* 1759 the plaintiff had nothing in the advowſon of the church of *Sheepy*; and this he is ready to verify; wherefore he prays judgment, and that the plaintiff may be barred from having his action againſt him, *&c.* The incumbent's rejoinder.

The plaintiff demurs to the *biſhop*'s rejoinder, and ſhews for ſpecial cauſes: 1. That it is a *departure* from his plea. 2. That it traverſes matter not alledged by the plaintiff. 3. That it does not traverſe the *induction*. 4. Nor does the *biſhop* ſay whether he did or did not collate to *Sheepy* before the end of ſix months after the *induction* of *Thomas Greſley* to *Seale*. 5. That the rejoinder tends to put in iſſue matter of law to the country. Demurrer.

The plaintiff's demurrer to the incumbent's rejoinder is much the ſame as to the biſhop's.

The biſhop and the incumbent ſeverally join in demurrer.

This caſe was argued three times at the bar: the firſt time in *Hilary* term 2 *Geo.* 3.; the ſecond time in *Trinity* term following; and the third argument for the plaintiff in *Eaſter* term 3 *Geo.* 3.; and in *Trinity* term following for the defendant.

A note taken of the firſt argument for the plaintiff. It appears upon the pleadings that *Thomas Greſley* being incumbent of the church in queſtion, on the 31ſt of *October* 1759, was inſtituted to a ſecond benefice with the cure of ſouls, of the yearly value of 8*l.*, and that on the 22d of *December*, and not before, he was inducted into the ſame; that the *biſhop* (ſuppoſing the

preſent living in queſtion to be void upon *Greſley*'s inſtitution to the *ſecond, before induction*) on the 20th of *June* 1760 collated the defendant *Whitehead* to the church of *Great Sheepy* by lapſe without notice to the plaintiff.

2 Ro Abr. 353. pl. 6. Hob. 165, 166. Vaugh. 131.

Therefore the queſtion is, Whether the church was void upon the *inſtitution* to the ſecond benefice, or not before *induction* to it, ſo as the biſhop could collate without notice; for if it was not void before *induction*, then the *biſhop* has collated two days too ſoon; for by the *ſtat.* 21 *H.* 8. *c.* 13. *ſ.* 9. it is clear that the firſt benefice ſhall not be void before induction to the ſecond.

Agar v. *The Biſhop of Peterborough and Denn, in quare impedit.* For title to the avoidance, the *ſtat.* 21 *Hen.* 8. was pleaded the taking of a ſecond benefice, with cure, the iſſue was taken upon the *induction* to the ſecond benefice, whereby (ſays the book) it ſeems to be allowed that *admiſſion* and *inſtitution* do not make the firſt void, without *induction*. *Moor* 12. *pl.* 45.

Watſon in fol. page 12. W. Jones 337. Codex 945, 946.

A note of the firſt argument for the defendants. This queſtion depends upon the *ſtat.* 21 *H.* 8. which ſays, that if *one* having a benefice with cure of 8*l. per ann.* accepts another with cure, and be *inſtituted and inducted* in *poſſeſſion* of the ſame, then and immediately after ſuch *poſſeſſion* had thereof, the firſt benefice ſhall be adjudged void. The word *poſſeſſion* in this ſtatute is very material, for a parſon is in *poſſeſſion* immediately upon *inſtitution* and before *induction*; the point I put this caſe upon is, that to the ſecond, induction is not neceſſary to take the firſt benefice void; but if it is, it is only that the patron may have notice, *Moor* 443.; but as to every body but the patron, it is void by inſtitution to the ſecond benefice; and for this I rely upon *Digby*'s caſe, 4 *Rep.* 78. *b.* 79. *a.*; and the patron may preſent without any ſentence of deprivation.

Dyer 283. a. pl. 28.

Owen 131.

The patron, upon the inſtitution to the ſecond benefice, might have preſented, becauſe, I inſiſt, the church, thereupon, was void; and being a *choſe in action*, it could not paſs by the grant of the advowſon afterwards made to the plaintiff on the 9th of *November* 1759, which was nine days after the inſtitution to the ſecond benefice, as appears by the declaration. *Cro. Eliz.* 811. And ſuppoſe notice neceſſary to be given to the patron, yet it is not ſo to the grantee, becauſe it is uncertain to whom it muſt be given.

Plaintiff's counſel—I agree that *induction* and notice are much the ſame thing; and if notice be neceſſary, induction muſt be ſo too; the incumbent cannot ſue for tithes before *induction*.

Lord

Lord Chief Juſtice—He can do every thing elſe. I want to know how this matter was at common law, whether upon the incumbent's taking a ſecond benefice the patron could or could not preſent before ſentence of deprivation. I have great difficulties, and ſhall be glad to hear another argument.

The ſecond argument for the plaintiff, at firſt ſetting out, was much to the ſame effect as the firſt argument.

The ſecond argument for the defendants by Serjeant *Wilſon*.

It appears upon this record, that on the 31ſt of *October* 1759 the late incumbent of this church in queſtion was inſtituted to a ſecond benefice.

That on the 9th of *November* 1759 the patron of this church in queſtion granted the advowſon thereof to the plaintiff.

That on the 22d of *December* 1759 the late incumbent thereof was inducted to the ſecond benefice; and

That on the 20th of *June* 1760 the biſhop collated the defendant *Whitehead* to the church in queſtion, without notice to the late patron, or to the plaintiff, his grantee of the advowſon.

Two general queſtions are made: 1*ſt*, Whether the firſt living became ſo abſolutely void upon inſtitution to the ſecond living, that the patron, or the plaintiff his grantee, were bound to take notice, without notice given to them?

2*d*, Whether the firſt benefice was *ſo* void, upon inſtitution to the ſecond, that by the grant of the advowſon in fee nine days afterwards this turn could be transferred to the plaintiff?

If it appears upon this record that the plaintiff hath no title, he cannot have judgment, be the title of the defendant ever ſo defective.

It is on the defendant's part to contend, that as ſoon as the late incumbent was inſtituted to the ſecond, this firſt living was void, inſomuch that the patron could not afterwards transfer the right of preſentation for this turn, by his grant of the advowſon in fee to the plaintiff; and that the biſhop had a right to collate, after ſix months elapſed from the time of the inſtitution, without giving notice to any body.

How the law ſtood concerning pluralities before the ſtatute of 21 *H.* 8. *c.* 13., and whether that ſtatute hath made any and what alteration in the preſent caſe, may be firſt conſidered.

* Anno 1179. 5 Hen. 2. under Pope Alexander 3.

One cannot well trace this matter farther back than the third council of *Lateran**; for, but a few years before that time, there was no ſuch thing as a lay patronage in this kingdom. It appears from the moſt authentic eccleſiaſtical writers, that from the latter end of the ſixth century until about the Conqueſt, all oblations, tithes †, *&c.* of a whole dioceſe were the voluntary gifts of Chriſtians, brought into one public ſtock, and divided by order of the biſhop into ſeveral portions for the ſupport of himſelf, his clergy, the poor, and the reparation of churches.

The parochial clergy in general lived with the biſhop in the city, who ſent them out occaſionally to preach the goſpel throughout his dioceſe, and every prieſt received the oblations, *&c.* within his own circuit, and brought them into the public ſtock.

In this manner were the clergy *inſtituted* by the biſhop; and in whatſoever part of the dioceſe a prieſt *was* (by his order), he was (properly ſpeaking) reſident upon his cure; for reſidence *then* was relative to the whole dioceſe, as it is now to a ſingle pariſh. *Sherlock the Biſhop of London's Charge to his Clergy, anno* 1759, touching pluralities and non-reſidence, *page* 25.

Although ſome writers aſcribe the diviſion of *pariſhes* to Archbiſhop *Honorius* about the year 636, from the authority of Archbiſhop *Parker*, who ſays, That *Honorius provinciam ſuam in parochias diviſit*; yet Mr. *Selden* ſays, "The paſſage means that he "divided his *province* into *dioceſes*;" and Biſhop *Sherlock* ſeems to agree with him, in his *charge to his London clergy* 1759, *fo.* 25. where he ſays that the word *pariſh* in the old canons uſed to ſignify a *dioceſe*, as appears by injunctions given to biſhops not to invade the *pariſhes* of each other.

Leges Alfred. No. 24.

The clergy were then no other than collectors and ſtewards of the tithes and oblations till about the 10th or 11th century, and their reſidence was in any part of the dioceſe as the biſhop ordered. *Kennett's Paroch. Antiq.* 78, 79. *they were inſtituted, but could not properly have any *induction* or *ſeiſin* of any church in the dioceſe.

*Glanvil 29. See a declaration in recto advocation.

† The firſt council that mentions *tithes* is *that* of *Lateran, anno Domini* 1119, under Pope *Caliſtus* 2. and there they are only ſpoken of, as received by ſpecial conſecrations. There was no canon before *that* of the fourth council of *Lateran, anno Domini* 1215. held under Pope *Innocent* 3. that even ſuppoſed tithes due of common right.

This

This being inconvenient, as chriſtianity ſpread, great encouragement was given to lords of manors, and other great men, to build churches for themſelves and tenants on their own lands; and for this purpoſe the biſhop yielded part of his right to ſuch founders, permitting them to name a perſon to ſerve the living, provided he was well qualified; the judgment of which the biſhop reſerved to himſelf. And his judgment, whether fit or not, is concluſive to this day. *Sher. Charge in* 1759, 26. And this is the origin of lay patronages, and the firſt beginning of the diviſion of *pariſhes* into the limits we now find them; which (it ſeems) began about the time of the Conqueſt, or a little after, and was a work of ſome ages.

Before this period there ſeems to have been no law againſt *pluralities* and *non-reſidence*, ſo that every prieſt who loved the *fleece* more than the *flock* got poſſeſſion of as many churches as he could; and if he had forty there was no law to the contrary; this accounts for what is often mentioned in our books, "That "at common law a man might have held forty livings if he "could have got them."

This avaricious behaviour of the clergy occaſioned the making of ſeveral canons and conſtitutions againſt pluralities and non-reſidence. It is proper only to take notice of ſuch of them as have been received here, and are now part of the law of the land, and which moſt materially concern the preſent queſtion.

By the 3d council of *Lateran* *, held under Pope *Alexander* 3. *anno domini* 1179, 5 *Hen.* 2. Whoever took a 2d benefice, his inſtitution to it was void; and every perſon admitted *ad eccleſiam vel eccleſiaſticum miniſterium* is bound *reſidere in loco, et curam per ſeipſum exercere.*

* The biſhops of Durham, Norwich, Hereford, and Bath, were ſent to this council. - Seld. Note on Drayton's Polyolbion, 3d vol. 1793.

Theſe are words of the 43d canon:

"Quia nonnulli, modum avaritiæ non ponentes, dignitates "diverſas eccleſiaſticas, et plures eccleſias parochiales contra "ſacrorum canonum inſtituta nituntur ACCIPERE, ut cum unum "officium vix implere ſufficient, ſibi vendicent ſtipendia pluri- "morum: ne id de ceterò fiat, diſtrictius inhibemus. Cum "igitur eccleſia, vel eccleſiaſticum miniſterium committi de- "buerit, talis ad hoc perſona queratur quo reſidere in loco, et "curam ejus per ſeipſum valeat exercere; quod ſi aliter actum "fuerit et qui receperit quod contra ſacros canones accepit, "amittat, et qui dederit, largiendi poteſtatem privetur. *Extra* "*lib.* 3. *tit.* 4. *de clericis non reſidentibus. Can.* 43."

The 3d Lateran council made the ſecond living void.

4th Lateran council made the first void. Present, 4 patriarchs, 71 archb. 340 bishops, 800 abbots and priors. 1215 total.

By the 4th (which is called the great) council of *Lateran*, if any person having one benefice with cure of souls, accepts a second, the first is declared void *ipso jure*; this was held under Pope *Innocent* 3. *anno* 1215. 6 *Ric.* 1.

These are the words of the 28th canon of this council: "Quicunq. receperit aliquod beneficium curam habens animarum annexam, si prius tale beneficium habebat, eo sit ipso jure privatus, et si forte illud retinere contenderit, etiam alio spolietur. Is quoque ad quem prioris spectat donatio, illud post receptionem alterius liberè conferat cui meritò viderit conferendum: et si ultra sex menses conferre distruerit, non solùm ad alios secundùm Laterensis concilii statutum ejus collatio devolvatur, verumetiam tantum de suis cogatur proventibus in utilitatem ecclesiæ cujus est illud beneficium assignare, quantum a tempore vacationis ipsius constiterit esse perceptum. Hoc idem in personalibus esse decernimus observandum, addentes ut in eadem ecclesia, nullus, plures dignitates aut personatus habere presumat, etiam si curam animarum non habeant. Circa sublimes tamen et literatas personas, quæ majoribus beneficiis sunt honorandæ, cum ratio postulaverit, per sedem apostolicam poterit dispensari." *Extra lib.* 3. *tit.* 5. *de Prebendis*, *Can.* 28.

So that by this canon whoever took a 2d benefice was deprived *ipso jure* of the 1st, and the patron might present to it immediately, and if he did not within six months, the bishop might collate, *and order the profits received since the avoidance to be assigned to the collatee.*

2d council of Lyons makes one or both livings void.

By the 2d council of *Lyons* held under Pope *Gregory* 10*th anno* 1274, 3 *Ed.* 1. upon taking a 2d living, the first was void, and if he was not contented with the 2d but endeavoured to keep both above a month, he was deprived of both.

This canon was received here. Latch 243. England sent bishops to it. Mod. 119.

The constitution of *John Peccham* upon the canon made at this council of *Lyons* runs thus: "Qui plura beneficia curam animarum habentia, sine dispensatione, ultimo contentus sit; & decernimus, & perpetua stabilitate firmamus, ut quicunq. in posterùm plura beneficia curam animarum habentia, sèu alias incompatabilia, absque sedis apostolicæ dispensatione, RECEPERIT, vel assecutus fuerit per modum INSTITUTIONIS, vel commendæ, seu custodiæ, vel unum, titulo institutionis, aliud, titulo commendæ vel custodiæ, præter modum illum quem constitutio Gregoriana edita in concilio Lugdunensi permittit, EO IPSO sit privatus omnibus sic obtentis beneficiis, ipsoq. facto sententia excommunicationis permaneat innodatus: a qua, non, nisi per nos, aut successores nostros, vel sedem apostolicam absolutionis gratiam valeat promereri. Lind. lib. 3. tit. 6. fo. 136, 137. de præbendis."

Observe the words, "Qui verò assecutus fuerit per modum "INSTITUTIONIS," was to lose both livings; but notwithstanding these well-intended canons, the pope's dispensing power (reserved to him thereby), rendered them of little effect.

To redress the grievance of holding pluralities by dispensations, there is to be found among the *extravagantes* printed at *Paris* 1505. 4*to*. a decretal of Pope *John* the 22d, beginning *execrabilis quoriundum tam religiosorum quam secularium ambitio*; which (after reciting the many evils of pluralities and non-residence) decrees that whoever holds a plurality by dispensation shall make his election within a month after notice of the decree, which benefice he chuses to keep, and shall resign the others; and if he does not, all his livings shall be void. *Extra lib.* 3. *tit. de Prebendis & Dignitatibus, fo.* 19, &c. dated at *Avignon*, 13 *Kal. Decemb.* in the 2d year of his pontificate. This was in the year 1277, 6 *Ed.* 1. three years after the council of *Lyons*.

One instance of a title made under this decretal. 10 E. 3. 1. Watson 21.

From hence it appears,

(1.) That by a canon in the 3d council of *Lateran*, the second living was void *by deprivation*. 1172, 5H.2.

(2.) By a canon in the 4th council of *Lateran*, the first living was *ipso jure* void, by accepting a second, *without deprivation*. 1215, 6R.1.

(3.) By a canon in the second council of *Lyons* the first was void, and if he endeavoured to keep both, he was to lose both. 1274, 3E.1.

(4.) By the decree of Pope *John* 22. no one could hold two dignities or benefices by dispensation, except he was a cardinal, or the relation of some prince. 1277, 6E.2.

These canons have all been received here, as appears from a multitude of cases in our law-books: but the * canon of the 4th *Lateran* council for making the 1st benefice void, has been the law most generally used and approved here, and was certainly the law of the land long before the statute of 21 *H.* 8. So that before the statute (it seems pretty clear) the church in question would have been void by the canon law upon the incumbent's acceptance of *institution* to the 2d benefice, without any sentence of *deprivation*; for the words "ipso jure sit privatus" in the 4th council of Lateran was a general sentence of deprivation. Sir W. Jones 377.

*Is as strong as an act of parliament. Hard. 101. Lynd. 5 Ed. 3. 9. 25 E. 3. 49. 11 H. 4. 60. 4 Rep. 75. 79. Canons not contrary to law, here received. Continued Watson 23.

*cr. 25 H. 8. c. 19. s. 7. No canons since bind laics. 5 Rep. 9. 32.

It

Not a word of induction in any of these canons. 3. Lateran. 4. Lateran. 2. Lyons.

It is observable that there is not a word said of *induction* in any of these canons, but the words are "qui nituntur accipere "plures ecclesias, &c. Quicunq. receperit aliquod beneficium, "&c. Quicunq. plura beneficia receperit, vel affecutus fuit per "modum INSTITUTIONIS," &c. And the words *accept and take* in the statute of 21 *H.* 8. seem to be copied from them.

If it may be allowed to cite Doctor *Ayliffe's Parergon Juris Canonici Anglicani*; he lays it down in fol. [416] that all benefices with cure of souls are by the constitution of the fourth council of *Lateran* void *ipso jure* (without a dispensation) by an admission to a second benefice *though they are not inducted to either, but have only institution thereunto.*

Such part of the canon law as hath been received here is not the pope's law, but the law of the land, which no ecclesiastical power could ever lawfully dispense with. *Vau.* 21. So there is no occasion for a sentence of deprivation, by our law.

And although this part of the argument is drawn from the canon law, and the law of the popes, yet it must be owned those laws were never acknowledged to be laws of *England*; and therefore they are no further of authority than as they agree with the law, or common law of *England*, and so have been received here.

The common law ever sets its face against *pluralities, non-residence*, and the *pope's usurped dispensing power*; and Lord *Vaughan* scouts the distinction made between a cession by an incumbent's accepting a bishopric, and an incumbent's taking a second benefice. It passes for current (says he) in our new books, that in the case of pluralities the avoidance is by the canon law, and therefore may be dispensed with by that law; but that in case of a bishop made, the avoidance is by the common law. He seems to smile at the distinction, and says, the patron may present as soon as the incumbent is instituted to the second living, *without deprivation*; and the law was antiently so. *Vau.* 21.

The great council 1215.

Mr. *Selden* in his notes upon *Drayton's Polyolbion*, 3*d vol.* 1793, published by Dr. *Wilkins*, says, that *England* used to send four bishops to general councils. By this course canons have been received into our law. As of *bigamy* in the council of *Lyons*, interpreted by parliament under *Ed.* 1., of *pluralities* in the council of *Lateran* under Pope *Innocent* 3. The law of *lapse* had its ground in the council of *Lateran*, *anno* 1179, under Pope *Alexander* 3. where laymen were only allowed four months, though the clergy or religious, who had title, had six months; but this was never allowed or agreed *to* here; for every patron has six months in *England.*

From

From hence (says *Selden*) "You cannot but perceive that "canons and constitutions in the pope's councils never bound "us in other form than fitting them by the square of *English* "law and policy." Our reverend sages and baronage allowed and interpreted them; and in framing their writs would mention them * *as law and custom* of the kingdom, and not otherwise.

* Reg. 42. in a writ of prohibition lapse is mentioned to be by the common law.

With respect to the ceremony of *induction*, it is observable, that in our most ancient precedents of declarations and pleadings in writs of right of advowson touching the inheritance, or in *quare impedit*, and *darrein presentment*, touching the possession or turn, there is no mention made of *induction*; but in order to shew seisin or possession in the demandant or plaintiff, or of him under whom he claims, he only alledges that he *presented* his clerk, who was *instituted*.

Though it is said that induction of his clerk must be alleged who brings writ of right of advowson, Ro. Ab 383. yet there is a quære pat 38 H. 6. 17.

To prove this, *Glanvil*, *lib.* 4. *de Advocationibus Ecclesiarum*, *cap.* 6. *temp. H.* 2. *Bishop Nicholson's Hist. Library* 223. "Is "qui petit jus suum in hæc verba versus adversarium suum "proponet.

"Peto advocationem illius ecclesiæ sicut jus meum, et perti-"nentem ad hereditatem meam, et de quâ advocatione ego fui "seisitus, (vel aliquis antecessorum fuit,) tempore regis Henrici "avi domini regis (vel post coronationem domini regis): et adeò "seisitus ad eandem ecclesiam vacantem præsentavi personam "(aliquo prædictorum temporûm): et ita presentavi, quod ad "presentationem meam persona fuit in eâ ecclesia INSTITUTA; "et si quis hoc voluerit negare, habeo probos homines qui hoc "viderunt et audierunt et parati sunt hoc diracionare secundùm "considerationem curiæ, et maximè illum *B.* et illum, et illum.

"Audito autem clameo ipsius petentis, is qui tenet poterit se "defendere per duellum vel ponere seipsum in assisam magnam.

The following is a record in *quare impedit*, copied truly from a MS. in parchment in the possession of the reporter, which is presumed to be part of the original year book of 18 *Edward* 2. it being written in the court hand of that time; it being curious for its antiquity is inserted here at length.

To shew that induction was not used in pleadings.

De termino Trinitatis anno Regni Regis Edwardi decimo octavo.

" Edmundus de Appelby ſummonitus fuit ad reſpondendum
" priori de * Lithom de placito quod permittat ipſum preſentare
" ydoneam perſonam ad eccleſiam de Appelby, quæ vacat & ad
" ſuam ſpectat donationem, &c. et unce idem prior per I. de
" A. attornatum ſuum dicit quod quædam Margeria Banaſter
" quondàm fuit ſeiſita de manerio de Appelby, ad quod prædicta
" advocatio tunc pertinebat, quæ ad eandem eccleſiam preſenta-
" vit quendam Ricardum Midde clericum ſuum, qui ad preſen-
" tationem ſuam fuit admiſſus & † *inſtitutus* tempore pacis tem-
" pore Henrici regis avi domini regis nunc; et poſtea eadem
" Margeria per cartam ſuam dedit & conceſſit advocationem
" prædictam cuidam Willielmo priori de Lithom, tenendum
" eidem priori et ſucceſſoribus ſuis et eccleſiæ ſuæ ſancti Cuth-
" berti, in puram et perpetuam elemoſinam in perpetuum; et
" dicit quod vacante eccleſiâ prædicta per mortem dicti Ricardi,
" quidam Willielmus, filius Willielmi Vernon oppoſuit ſe pre-
" ſentationi prædicti prioris; per quod idem prior tulit breve
" quare impedit verſus ipſum Willielmum, de advocatione præ-
" dicta coram juſticiariis prædicti Henrici regis avi, &c. hic de
" Banco, anno regni ſui quinquageſimo, et preſentationem ſuam,
" per judicium ejuſdem curiæ verſus eum recuperavit; ità quod
" epiſcopus Lincoln. tunc, per lapſum temporis eandem eccle-
" ſiam contulit cuidam Thomæ Mandeville clerico ſuo, et eum
" inſtituit in eadem ut in jure ipſius prioris & eccleſiæ ſuæ præ-
" dictæ, &c.; et poſtmodùm vacante prædictâ eccleſiâ per mor-
" tem prædicti Thomæ, quidam Ricardus Vernon conſangui-
" neus & hæres prædicti Willielmi filii Willielmi oppoſuit ſe
" preſentationi cujuſdam Ambroſii tunc prioris de Lithom, pre-
" deceſſoris ipſius prioris nunc, per quod idem Ambroſius venire
" fecit coram Radulpho de Hengham et ſociis ſuis juſticiariis ad
" placita regis recordum prædicti placiti habiti hic inter prædic-
" tum Willielmum quondam priorem, &c. et prædictum Wil-
" lielmum filium Willielmi anteceſſoris prædicti Ricardi; ita
" quod iidem juſticiarii præmuniri fecerint prædictum Ricardum
" per breve de *ſcire facias* eſſendi coram domino Edwardo rege
" patre domini regis nunc anno regni ſui decimo ſexto, oſtenſum
" ſi quid pro ſe haberet vel dicere ſciret quare prædictus prior
" præſentationem ſuam habere non debet; ita quod in octabis
" ſancti Johannis Baptiſtæ anno regni regis Edwardi ſupradicto
" conſideratum fuit quod prædictus prior haberet breve epiſcopo
" quod (non obſtante reclameo prædicti Ricardi) ad præſenta-
" tionem ipſius prioris ad prædictam eccleſiam ydoneam perſonam
" admitteret, et dicit quod epiſcopus illa vicè eandem eccleſiam
" per lapſum temporis contulit cuidam Johanni de Arraiins de-
" cano

* Lythom or Lethum in Lancaſhire, a priory of Benedictine Monks. Dr. Tanner's Not. Monaſtica 233.

† There is not a word of induction in the whole record.

A recovery by a former prior in quare impedit in C. B. againſt a ſtranger.

Hob. 154.

The record of that recovery removed into B. R. and a ſcire facias to ſhew cauſe why the prior ſhould not preſent on another avoidance. Judgment for him in B. R. on the ſcire facias, and a writ to the biſhop.

" cano clerico ſuo et eum * *inſtituit* in eadem ut in jure ipſius " prioris et eccleſiæ ſuæ prædictæ, per cujus mortem prædicta " eccleſia modò vacat, et, êa ratione, nunc ad ipſum priorem " ad prædictam eccleſiam pertinet preſentare, prædictus Edmun- " dus eum injuſtè impedit, unde dicit quod deterioratus eſt et " damnum habet ad ducentas libras, et inde producit ſectam.

*Not a word of induction.

" Et prædictus Edmundus venit & defendit vim, &c. et dicit " quod ad ipſum Edmundum, et non ad prædictum priorem, ad " prædictam eccleſiam pertinet præſentare, quia dicit quod cum " prædictus prior ſumat titulum ſuum præſentandi ad prædictam " eccleſiam de dono prædictæ Margeriæ, quam idem prior aſſerit " præſentaſſe ad prædictam eccleſiam prædictum Ricardum " Midde clericum ſuum qui ad præſentationem fuit admiſſus & " *inſtitutus* tempore pacis regis Henrici, quidam Henricus Ap- " pelby avus ipſius Edmundi cujus hæres ipſe eſt ultimò præſen- " tavit ad eandem eccleſiam quendam magiſtrum Henricum " Lovel clericum ſuum, qui ad præſentationem ſuam fuit ad- " miſſus & *inſtitutus* tempore pacis tempore prædicti regis Hen- " rici, per cujus mortem, ut per mortem ipſius qui ultimò fuit " præſentatus per verum patronum, prædicta eccleſia modò vacat, " et hoc pretendit verificare, &c. unde petit judicium.

Plea.

That the grandfather of defendant preſented a parſon the laſt.

" Et prior dicit quod cum ipſe narrando verſus ipſum Edmun- " dum ſumat titulum ſuum de dono prædictæ Margeriæ de ad- " vocatione prædicta, poſt quod donum, vacante eccleſiâ per " mortem prædicti Ricardi Midde, prædictus Willielmus filius " Willielmi oppoſuit ſe præſentationi prædicti Willielmi quondam " prioris. &c. quam ipſe tunc fecit ad eandem eccleſiam, et " verſus quem idem prior recuperavit præſentationem ſuam per " judicium curiæ domini regis, et habuit breve prædicto epiſcopo " ut prædictum eſt; ita quod collatio ejuſdem eccleſiæ, quæ " prædictus epiſcopus fecit prædicto Thomæ de Mandeville, " fuit, & computari debet in jure ipſius prioris et eccleſiæ ſuæ " prædictæ; et poſtmodùm vacante prædictâ eccleſiâ per mor- " tem ipſius Thomæ de Mandeville, prædictus Ricardus de " Vernon oppoſuit ſe præſentationi prædicti Ambroſii quondàm " prioris, &c. verſùs quem idem prior iteratò, per conſidera- " tionem curiæ domini regis habuit breve epiſcopo ut premittitur; " ita quod collatio quam epiſcopus tunc fecit prædicto Johanni " de Arraiins ſimiliter fuit in jure ipſius prioris; qui quidem " Johannes de Arraiins ultimò obiit perſona in eadem eccleſia, " prout ipſe eſt paratus verificare; ad quas collationes in præ- " dictis duabus ultimis vacationibus ejuſdem eccleſiæ factas, " prædictus Edmundus non reſpondit vel oſtendit quod ipſe vel " aliquis anteceſſorum ſuorum in eiſdem duabus ultimis vaca- " tionibus ejuſdem eccleſiæ aliquem clericum ſuum ad eandem " præſentaverint, vel aliquod clameum tunc oppoſuerint; per " quod breve hoc haberi debet pro conceſſo, unde petit judi- " cium, &c.

Replication maintains the declaration.

" Et

Rejoinder.

" Et Edmundus dicit ut priùs, quod prædictus Henricus avus " ſuus tanquam verus patronus eccleſiæ prediætæ ultimò præ- " ſentavit ad prædictam eccleſiam prædictum magiſtrum Henri- " cum Lovel clericum ſuum, qui ad præſentationem ſuam fuit

Traverſes that any clerk was ever inſtituted on the preſentation of the prior or his predeceſſors, and demurs to the pleadings had between the former prior and the Vernons being ſtrangers.

" admiſſus et *inſtitutus*, *abſque hoc* quod unquam aliquis clericus " exſtiterit admiſſus & *inſtitutus* in prædictâ eccleſiâ ad præſenta- " tionem prædicti prioris vel alicujus predeceſſorum ſuorum poſt " præſentationem factam de ipſo magiſtro Henrico Lovel, et " hoc pretendit verificare, *&c.* ad quam verificationem non re- " ſpondit, unde petit judicium, quòd curia, hoc habeat pro " conceſſo, *&c.* dicit præterea quod non habet neceſſe reſpondere " ad collationes quas prædictus prior dicit prædictum epiſcopum " feciſſe ad prædictam eccleſiam, neç etiam ad placita ſeu ad " judicia quæ prædictus prior allegat fuiſſe inter predeceſſores " ſuos et prædictos Willielmum filium Willielmi, & Ricardum " de Vernon qui ipſi Edmundo ſunt extranei, unde petit judi- " cium et breve epiſcopo, *&c.* Dies datus eſt eis hic a die

Defendant cognovit, &c.

" ſancti Michaelis in quindecim dies; ad quem diem prædictus " Edmundus venit et dicit quod non poteſt dedicere quin præ- " dictus epiſcopus præſentavit jure ipſius prioris ad prædictam

Judgment and writ to the biſhop for the plaintiff.

" eccleſiam in omnibus ut prænotatum eſt. Ideò conſideratum " eſt per curiam quod prædictus prior habeat breve epiſcopo ut " prædicta eſt, *&c.*"

This record, ſhews that *induction*, in ancient times was not uſed or thought of; that it is an authentic record appears by *Fitzherbert*'s Grand Abridgment, title *Darrein Preſentment*; where it is pleaded in another cauſe between the ſame parties in a *Darrein Preſentment* brought by *Appelby* the defendant againſt the *prior*, for the ſame church, debated the ſame term, which was compromiſed upon the prior's paying *Appelby* a ſum of money, whereupon the prior had a writ to the biſhop.

Whether induction augments the title to a benefice? *Lynd. lib.* 3. *tit.* 6. *cap.* 2. *fol.* 109. *note* (c) upon the words " *Inſti-* " *tutus fuerit.* Cum enim inſtitutus fuerit, Tunc enim habet " jus, non ſolum ad rem, ſed in re, Et hac enim inſtitutione, " acquiritur titulus, *etiamſi poſſeſſio nondum ſit adepta*: Nam in " beneficialibus, *beneficiorum traditio, non auget affectum tituli* " *precedentis; et ſine traditione transfertur dominium.*"

So that induction (is only a ceremony and) does not increaſe the title to a benefice. S. P. *Lynd.* 141. *note* (u), *Induction* is not part of the title where there is *inſtitution*, but only where *induction* or *inſtallation habetur pro ipſo titulo.*

Having endeavoured to ſhew, that by inſtitution to a ſecond, the firſt living was void by the canon law (which became part of our law) *ipſo jure* without deprivation; and that antiently the ceremony

ceremony of induction was not uſed; it ſhall next be ſhewn, that by the common law a church is completely full upon *inſtitution* thereto, againſt *all* perſons but the king; conſequently any perſon having received *inſtitution* to a ſecond benefice, *has accepted and taken it*, and in ſuch caſe the firſt would have been void, before the 21 *H.* 8.

At common law, before the *ſtat. Weſtm.* 2. (which does not mention the word *induction*) if one had preſented to a church whereunto he had no right, and the biſhop had admitted and *inſtituted* his clerk, the incumbent could not be removed except by the king. 2 *Inſt.* 357. *Co. Litt.* 344. *b.* 6 *Rep.* 49. *Beſwell's* caſe; for theſe good reaſons, Anno 1285, 13 Ed. 1. ten years after the council of Lyons.

1*ſt*, Becauſe he was *in* by a judicial act of the biſhop.

2*d*, The law had its end when the church was filled with a fit perſon.

3*d*, That the incumbent having the care of ſouls might attend his charge in peace; ſo that after *inſtitution* (ſays *Coke*) he ſhould not be ſubject to any action to be removed at the ſuit of any common perſon on any account whatever; and if he could not be removed after *inſtitution*, ſurely he had thereby *accepted and taken* the living.

Where a common perſon preſents his *clerk*, and he is admitted and inſtituted, he cannot revoke his preſentation though before *induction*. *Bro. Quare Impedit*, *pl.* 65.

If a gift be made to a parſon before *induction*, it is good; ſo if he alien with conſent, *&c.* before *induction*, it is good. *Goldſb.* 163.

No lapſe can incur after *inſtitution*, though no induction be ever made, becauſe the church is full by *inſtitution*. *Goldſb.* 164. And Lord *Hob.* 154. in the caſe of *Colt and Glover* verſus *Biſhop of Coventry*, ſays, I hold it clear that if the patron preſent, and his clerk be *inſtituted*, and remain without *induction* eighteen months, the king ſhall not preſent upon him by lapſe, for the king cannot have a lapſe but where the ordinary might have had it before. This proves moſt clearly that the church is full by *inſtitution*; and even againſt the king, where the king has no right to the church as patron. Hitchin v. Glover, S.P. 13 Jac.

The *ſtat.* of 21 *H.* 8. *c.* 13. *f.* 9, 10. comes next to be conſidered; whether it has made any, and what alteration of the law in this caſe, as it ſtood before.

Sect.

" inſtituted and *inducted in poſſeſſion of the ſame; then and immediately after ſuch poſſeſſion had* thereof, the firſt benefice ſhall be " adjudged in law to be void."

Sect. 10, " And it ſhall be lawful to every patron having the " advowſon thereof to preſent another, and the preſentee to " have the benefit of the ſame, in ſuch like manner and form as " though the incumbent had died or reſigned; any licence, " union, or other diſpenſation to the contrary hereof obtained " notwithſtanding."

* Perhaps this may be better done from the hiſtory and circumſtances of the times than ex viſceribus of the ſtatute.

The true key for conſtruing a ſtatute, is to conſider the ſubject-matter of it, and the ends and purpoſes for which it was made*.

The preamble of the ſtatute itſelf tells us it was " For the " more quiet and virtuous increaſe and maintenance of divine " ſervice, the preaching and teaching the word of God, with " godly and good example giving, the better diſcharge of curates, " the maintenance of hoſpitality, the increaſe of devotion, and " good opinion of the lay fee toward the ſpiritual perſons."

Colt and Glover v. Epiſ. Coventry, fo. 157.

Lord *Hobart* ſays, " It was a moſt religious and politic " church-law, and almoſt a redintegration of thoſe holy antient " canons, and a reſtoration of the church, ruined by the pope's " *tot quots*, diſpenſations, *&c.*"

This ſtatute, from the temper of the time when it was made, ſeems to have been intended to knock down the pope's uſurped power to diſpenſe with pluralities, and was one great ſtep towards it.

" It was the firſt ſtatute or law which gave allowance to plu- " ralities." *Latch* 244. Though it was made to prevent that multitude of them which exiſted through the pope's uſurped diſpenſing power, it doth not ſeem to have been made to introduce any new law *as to the point in queſtion*, but was rather made in affirmance of the antient law of the church uſed in *England* long before this ſtatute. *Davis* 69. *Caſe of Commenda.*

There are no negative words in it, that ſay the firſt benefice ſhall *not* be void until the incumbent be *inducted* into the ſecond.

It is in the affirmative; whoever *accepts and takes* another with cure, *&c.* and the words that follow ſeem to be *ex abundanti.*

It

It was made to vindicate the king's prerogative, and to reſcue this part of the law of the land from the pope's intolerable uſurped power, and was not calculated to alter the law as it ſtood in this point.

It was certainly the intent of the makers of this ſtatute, that whoever *accepted and took* a ſecond cure ſhould void the firſt, unleſs he was properly qualified as this ſtatute requires.

The words of ſtatutes are not only to be conſidered, but rather the *intent of the makers is to be weighed;* for the intent is the principal thing to be conſidered, *per curiam.* *Plowd.* 464. *a. b.* 5 *Rep.* 5. S. P. *Plowd.* 231. S. P. The intent of a ſtatute is to be principally conſidered.

And ſometimes ſtatutes are to be expounded againſt the letter, to preſerve the intent. *Per Eyre* C. J. *Shower* 491. cites 3 *Rep.* 59. and *W. Jones* 105.

What Lord *Hob. fo.* 157. ſays, is very ſtrong to this purpoſe: "It is (ſays he) the office of judges to advance laws made for "religion, according to their end; otherwiſe if a man take "twenty benefices, and enter and take the profits of them all, "but take no formal *induction*, he ſhall be out of the law. "*Durus eſt hic ſermo!*" 3 *Rep.* 7. *b.* S. P. *Hob.* 97. S. P.

And again; Lord *Hob.* 346. ſays, "Judges have liberty and "authority over ſtatutes to mould them to the trueſt and beſt "uſe, according to reaſon and beſt convenience."

And therefore, notwithſtanding by the letter of this ſtatute the firſt living ſeems not to be void until *induction* into the ſecond, "Yet to avoid the great inconvenience that otherwiſe would "follow, it has been held that the firſt living is void upon the "bare *inſtitution* into the ſecond; and ſo (it ſhould ſeem) was "the law before the making this act, where the party had no "diſpenſation." *Degge* 34. *Dr. Godolph. Rep. Can.* 294. both allowed *per* Lord C. J. *North.*

But the words *inducted*, &c. have created the difficulty in this caſe; and it is objected on the other ſide, that this ſtatute was not only made to deſtroy the pope's uſurped power, but alſo the ſentence of *deprivation*, which (it is ſaid) our ſpiritual courts had always held to be neceſſary in caſes of pluralities; and therefore it has been argued, that *induction* was to be in the place and ſtead of a ſentence of *deprivation;* and if ſo, the *firſt* (it is ſaid) cannot be void before *induction* to the ſecond living. Objection.

Anſwer. In anſwer to this: it is very clear from the reſolutions in *Holland's* caſe, and *Digby's* caſe, 4 *Rep.* 75. 79. *b.* that the firſt living in the preſent caſe was void upon *inſtitution* to the ſecond, before *induction*, without ſentence of *deprivation*.

What Lord *Popham* ſays, was agreed to by the whole court, viz. "*That* although *by the inſtitution to the ſecond benefice, the "firſt is void by the eccleſiaſtical law without any deprivation, or "ſentence declaratory*, yet no lapſe ſhall incur againſt the patron "*unleſs notice be given him*, no more than if the church became "void by reſignation or privation; *and* yet *the patron may take "notice if he will, and may preſent according to the conſtitution of "Lateran, held under Pope Innocent* 3." But the patron is not forced to take notice, at his peril, unleſs he is inducted; *quod fuit conceſſum per totam curiam.*

If this be law, the firſt living was abſolutely void by *inſtitution* to the ſecond, before *deprivation*, and before *induction*; and the patron may take notice if he will, and may preſent. May preſent! to what? Not to a living that is full; *that* cannot be. And the common form of every preſentation to the biſhop ſhews it. The patron (thereby) humbly prays the biſhop to admit (ſuch a man) his clerk *ad eccleſiam jam vacantem*, &c. *W. Jones* 337. *Rex* v. *Prieſt.*

Objection. It is further objected, "That if an incumbent takes a ſecond "benefice with cure, by which the firſt is void by the canon "law againſt the patron, ſo that he may preſent before any *de-"privation*; yet until *deprivation*, it is not void as to a ſtranger, "for if he ſue for tithes againſt a pariſhioner, it is no bar againſt "him that he had taken a ſecond benefice." 2 *Ro. Abr.* 353. *pl.* 6. *Trin.* 13 *Car. B. R.* ſaid by Juſtice *Barkley*, that *Yelverton* in his argument of the caſe of *Priſt* ſaid that it was ſo adjudged.

Cro. Car. 357. is contra, by the greater number of the judges in The King and Priſt.

Anſwer. 1*ſt*, In anſwer to this, it is no more than a *dictum* of one judge of what another ſaid *arguendo*.

2*dly*, It proves for the defendants that the firſt is void as to the patron, and that he may preſent before *deprivation*.

After inſtitution he has a right to oblations. 3*dly*, But the *dictum* is, that it is not void as to a ſtranger, for if he ſue for tithes againſt a pariſhioner, it is no bar againſt him that he had taken a ſecond benefice.

Caſes temp. Annæ, 11 Mod. 46. Viner, Preſentment, 356. May enter into the glebe againſt any ſtranger, 2 Ro. Rep. 192. Hitchin v. Glover, before induction. And a perſon inſtituted ſhall have the profits againſt every common perſon. F. N. B. 60. margin, cites 31 Ed. 3. 4.

This ſeems to be laid down too largely, and to prove too much: for ſuppoſe an incumbent *inſtituted* to a ſecond living, and the true patron of the firſt, the very next day, preſents his clerk, (which it ſeems he may,) who is immediately *inſtituted* and *inducted* into the firſt, and on that very day, corn is ſevered, and then the firſt incumbent, not yet *inducted* but only *inſtituted* to the ſecond living, ſues a pariſhioner for tithes of that corn, will it not be a bar to his demand for the pariſhioner to ſay, You have taken another living by *inſtitution*, and I have paid my tithes to the new parſon of our pariſh who was *inſtituted* and *inducted* before the tithe accrued, and ſince your inſtitution to the ſecond living. This (with great deference) would be a good anſwer, either at law or in equity.

4thly, But ſuppoſing, for argument's ſake, he can recover the tithes of the firſt benefice before *that* church is filled; yet whenever it is filled, he will be obliged by the *ſtat.* 28 *H.* 8. *c.* 11. to pay over and make ſatisfaction to the new incumbent from the very time the firſt church became void, which (as hath been before ſubmitted) is upon *inſtitution* to the ſecond living.

Mr. *Watſon*, (or Mr. *Place* of *Gray's Inn*, who indeed was the true author,) in his *Compl. Incumb.* 8*vo.* *vol.* 2. 748, 9. in his comment on the *ſtat.* 28 *H.* 8. ſays, "I find but little in all the "books relating to this ſtatute, yet I will venture to give my "thoughts on queſtions that may riſe upon it: (*int. al.*) If the "incumbent of one church of the yearly value of 8*l.* accept "another, the firſt is void, ſo that if he doth continue as in"cumbent, by ſerving or providing for the cure, taking the "profits, &c. I conceive that he is in the ſame caſe, as if upon "the death of the incumbent of another church he ſhould of "his own authority enter upon the profits, and ſerve the cure "thereof, as if lawful incumbent, that is to ſay, that he is ac"countable to the next incumbent for the profits received by "him, and liable to an action upon this ſtatute, if he refuſe to "ſatisfy the next incumbent for the ſame."

So that ſuppoſing the pluraliſt can receive, or ſue for the tithes of the firſt living, it by no means proves that it was not void on his *inſtitution* to the ſecond, for it is for the benefit of his ſucceſſor that he ſhould take the tithes of the firſt, until the church be filled, otherwiſe they might rot upon the ground, when they are ſet out; and he is plainly obliged by this ſtatute to account for the ſame to his ſucceſſor, from the very day of the avoidance.

But it is ſaid the church was not void but only voidable, and that the patron had it in his power to make it void or not. Objection.

Anſwer. It muſt be ſubmitted, with great deference, that the word *voidable* in this caſe muſt neceſſarily mean, that the church may be made void by action or judgment of law in a proper court, and not by any act *in pais* by the patron; for it is laid down by *Coke* in 1 *Ro. Rep.* 213. that before a preſentation can be made to a church it muſt be actually void, and its being voidable only is not ſufficient; and he cites *Small's* caſe, 17 *Ed.* 3. 59. in theſe words, "L'Egliſe doit eſtrè void devant poet preſenter, "car ſi l'egliſe ſoit voidable nul preſentation poit eſtrè, mes ſi "ſoit void *in facto* outrement eſt."

The true patron in the caſe at bar might have preſented, therefore the church was void the moment *that* right accrued, and not voidable *only*, for then he could not have preſented.

Having thus endeavoured to ſhew, that accepting *inſtitution* to a ſecond, is an abſolute ceſſion of the firſt, before *induction* and before *deprivation*, and that the patron might preſent to it, as *ad eccleſiam jam vacantem*, and that the *ſtat.* 21 *H.* 8. has not altered the law in this point, it may fairly be inſiſted that the church in queſtion was *ſo* void on the 31ſt of *October* 1759, the day of the inſtitution to the ſecond benefice, that the patron thereof could not afterwards, on the 9th of *November* following, transfer the right of preſentation (to the church in queſtion) by a grant of the advowſon in fee to the plaintiff.

This point was ſo very clear upon breaking the caſe on the former argument, that there is not much occaſion to ſpeak to it; the caſes then cited ſeem to put the matter out of doubt. *Jenkins Cent.* 236. *Dyer* 282. 1 *Leon.* 67. *Co. Lit.* 120.

Jenkins Cent. 236. Dyer 282. S. P. Shepard T. S. P. 283. The patron of an advowſon of a church being void, grants to *B. proximam præſentationem* to the ſaid church *jam vacantem*, ſo that it ſhall be lawful for *B.* to preſent to the church for this turn. Reſolved by all the judges that this grant is void by a ſubject; for this avoidance is a thing in action and privity, and veſted in the perſon of the grantor, and is as a relief, or arrearage of rent, or an obligation, or a debt; *preſentation* is only a commendation of a clerk to the biſhop, to be admitted to a church being void. *Dyer* 282. S. P.

1 Leon. 167. S. C. 3 Leon. 256. S. C. Owen 85. S. C. *Cro. Eliz.* 173. *Brookeſby's* caſe, *Quare impedit:* upon the declaration it appeared, that a grant of the next avoidance was made to him and one *H. B.*, and after the church became void *H. B.* releaſed to the plaintiff all his eſtate, right, and title; and he being diſturbed, brought a *quare impedit* in his own name only; and after verdict, this matter was alledged in arreſt of judgment; that

that the releaſe after avoidance was void, for it is a thing in action which cannot be granted or releaſed from one to another; *and ſo it was adjudged.* *Adams*'s caſe, 16 *Ed.* 3. *in quare impedit* cited in *Boſwell*'s caſe, 6 *Rep.* 50. *b.* which was thus: *D.* was ſeiſed of a manor to which an advowſon was appendant, and died; the manor deſcended to *E.* an infant; *Adams* uſurped during the infancy of *E.*; *E.* at full age enfeoffed *F.* of the manor, afterwards the church became void, and *F.* preſented, and the aſſignee of *Adams* brought a *quare impedit*; and it was adjudged, that by the uſurpation the infant was out of the poſſeſſion of the advowſon; ſo that by his feoffment of the manor at full age, nothing in the advowſon paſſed to the feoffee, becauſe the feoffor had but a right, and the uſurpation was voidable by action, which could not be transferred to a ſtranger.

To apply this to the preſent caſe. At the time of the inſtitution to the ſecond living the patron had a *right to preſent*, and might have had his *quare impedit* if he had been diſturbed; and this *right* cannot *after* be transferred by a grant of the advowſon in fee to plaintiff.

If a man be ſeiſed of an advowſon in groſs, or in fee appendant to a manor, and the church voids, and he dieth, his executor ſhall preſent and not the heir. *Bro.* tit. *Preſentation*, *pl.* 34. S. C. F. N. B. 72. 4to. F. N. B. 79. S. P. as to heir in tail.

In the appendix to the *Regiſter*, tit. *Brevia Vetera in Officiis Clerici Coronæ, et clericorum de curſu in Cancellaria*, *fol.* 43. there is a writ of *quare impedit* for an executor to preſent to a church which became void in the life of the teſtator.

Bro. tit. *Preſentment*, *pl.* 22. If baron is ſeiſed of an advowſon in *jure uxoris*, (as her dower by a former huſband,) and the church voids, and the feme dies before diſturbance, and after the baron is diſturbed, he ſhall have this preſentation, though he be not tenant by the curteſy.

But if the ſame perſon be parſon of the church, and alſo be ſeiſed in fee of the advowſon and dies, the preſentation belongs to the heir, and not to the executor, becauſe the deſcent and avoidance happened the ſame inſtant, and the elder right ſhall be preferred. 3 *Lev.* 47. *Holt* v. *Epiſc. Winton.*

Cro. Eliz. 811. *Leak* v. *Biſhop of Coventry and Dr. Babington.* *A.* and *B.* ſeiſed in fee of every other turn; *A.* preſented, then *B.* preſented, and after induction his clerk is deprived, but no notice is given. The biſhop collates; *A.* grants his fee to *J. S.* The collatee dies; it is now *B.*'s turn, for *A.*, before his grant

to *J. S.*, (having the right,) might have removed the collatee for want of notice; but he dying incumbent, *A.*'s turn is ſerved. But after *A.*'s grant to *J. S.* neither *A.* nor *J. S.* could preſent; and the collation is good againſt all but the very patron, who after the grant, could not have action; but he has deſtroyed it by his grant, and ſo none can have it.

To apply this to the preſent caſe.

Upon the 31ſt of *October* the true patron might have preſented, therefore he had a right to preſent immediately and before his grant of the advowſon to the plaintiff; what is this then? but a grant to a ſtranger of an immediate right to preſent; which ſeems to be the ſame thing in other words as a grant of a preſent avoidance, and with great deference the biſhop's collation is good againſt the plaintiff, *who was a ſtranger to the advowſon on the* 31 *October, when the right of preſentation firſt accrued to the then true patron*; for it ſeems to be very clear that the true patron *then* had a right to preſent if he pleaſed.

From hence it appears, that by the law as it ſtood before 21 *H.* 8. and by many reſolutions ſince that ſtatute, that upon the *inſtitution* to the ſecond living the patron of the firſt had a right to preſent.

That he can only preſent to a church which is *void in fact*, and not to one that is only *voidable*.

That a patron having an *immediate* right to preſent cannot convey that right, for in other words it would be conveying a preſent avoidance.

And ſo the plaintiff has not any title, and therefore cannot have judgment.

Another queſtion is, whether the firſt living became ſo void by inſtitution to the ſecond *that the patron* was bound to take notice without notice given?

This point was not much debated upon the former argument; and though it may be doubtful whether the biſhop has collated rightfully or not, for want of notice to the patron, yet if the plaintiff has ſhewn no title in his count, he cannot have judgment.

But it is ſubmitted the biſhop has collated rightfully without giving notice to the former patron or his grantee, if the firſt living was void by the inſtitution to the ſecond.

The

The inſtitution to the ſecond living was a ceſſion of the firſt by the common law, without any deprivation. *Vaugh.* 21. And if this was a ceſſion at common law, the patron is to take notice and preſent, without expecting notice from the biſhop. *Cod.* 834.

It is further ſubmitted, that as this living is above 8 *l. per ann.* it is void by the *ſpirit* of the ſtatute of 21 *H.* 8. which is a public law, and if it is a public law the patron is bound to take notice, (without notice given him,) and to preſent within ſix months at his peril. *Holland's* caſe, and *Vaugh.* 131. Perhaps it might be otherwiſe if the living was under 8 *l. per ann.*, becauſe the ſtatute does not extend to thoſe livings.

Upon the whole, the defendants ſubmit it with great deference to the court that the church was void upon inſtitution to the ſecond living, that the patron was obliged to take notice without notice given to him, and to preſent within ſix months after the inſtitution to the ſecond living; and that although both theſe points ſhould be againſt the defendants, yet if the plaintiff has no title, he cannot have judgment, for if he recovers, it muſt be on the ſtrength of his own and not on the weakneſs of the defendants' title, who are in poſſeſſion. *Vaugh.* 8. 58. 60.

In reply for the plaintiff it was objected, that it did not ſubſtantially appear upon this record that the church was void at the time of the grant of the advowſon to the plaintiff, becauſe the day of the date thereof (9th of *November* 1759) mentioned in the count is not material, but mere form coming under a *videlicet*; and it not being material, the not denying it by defendants is no admiſſion of it; for *non-denial* only admits thoſe facts which are materially alledged; and it would be extremely hard upon the plaintiff that ſuch an immaterial thing which the defendant may not deny ſhould conclude him; that the time of ſeiſin in a *quare impedit* is immaterial; and ſeiſin generally, in the time of peace, in the reign of ſuch a king, being alledged, is ſufficient; and it is the conſtant courſe to alledge ſeiſin generally. *Skin.* 660. That which is alledged by way of conveyance or inducement to the ſubſtance of the matter need not to be ſo certainly alledged as that which is the ſubſtance itſelf. *Co. Lit.* 303. *a.* The grant to and ſeiſin of the plaintiff in the preſent caſe is the ſubſtance, and if the defendants had choſe to controvert the plaintiff's title, and inſiſt upon the church being void on the inſtitution to the ſecond living, they ought to have firſt admitted the grant and ſeiſin of the plaintiff, as alledged in the count, and then gone further and alledged that before the plaintiff *had any thing in the advowſon*, the church in queſtion became void, and ſhewn when and how it became ſo, and that it continued

Serjeant Burland.

Bro. Conſet. 35.

tinued void until and at the time of the grant to the plaintiff, and afterwards until the end of ſix months from the time it became void; whereupon the biſhop on ſuch a day collated the church on the defendant *Whitehead*, and then the incumbent *Whitehead* to have traverſed, *abſq. hoc*, that the late incumbent *Thomas Greſley* was *inſtituted* to the ſecond benefice after the advowſon of the church in queſtion was granted to the plaintiff in manner and form as by the declaration is alledged; *& hoc paratus eſt verificare*, &c. If the defendants had thus pleaded, and the plaintiff had taken iſſue upon the traverſe, it muſt have been found for him, if the grant was made before the *inſtitution* to the ſecond living; if it had been found ſpecially (which moſt probably would have been the caſe) that the grant was really made on the day alledged in the count, which was 12 days before the *induction* to the ſecond living; the matter of plaintiff's title would have come fairly before the court, and the queſtion would have been, whether the church was *ſo* void upon the inſtitution to the ſecond living that this *turn* could not paſs to the plaintiff after that time by the grant? but as the pleadings now are, the plaintiff has a good title before the *inſtitution* to the ſecond living, notwithſtanding the day of the date of the deed of grant be after it, becauſe the time of the grant is not made material by pleading properly, but the defendants have entirely relied that lapſe of time runs from the time of *inſtitution* and not of *induction* to the ſecond living, that the day in the declaration is not material. 2 *Stra.* 806. 5 *Mod.* 286. and many other caſes.

It was further inſiſted in reply, that admitting the church was ſo far void upon the *inſtitution* to the ſecond living before *induction*, and the patron may take notice of it if he pleaſes, and preſent, yet no lapſe ſhall incur in this caſe againſt him unleſs notice be given to him; no more than if the church be void by reſignation; according to Lord *Popham* in *Digby*'s caſe, 4 *Rep.* 75. 79.

Upon this argument the whole court ſeemed to be of opinion that the church was *ſo* void upon *inſtitution* to the ſecond living, that the patron might have taken notice thereof, and preſented if he pleaſed, but inclined to think that lapſe ſhall not incur from the time of the *inſtitution* againſt the patron unleſs notice be given him, but they thought that lapſe would run from the time of *induction* without notice given him.

The plaintiff's counſel not being aware of the objection with reſpect to the immateriality of the day of the date of the grant, which is under a *videlicet* in the count, was not prepared to anſwer it, and therefore that ſingle point was adjourned to be ſpoke to again.

This

This term the point reſerved for further argument was ſpoken to again; after which the court were clearly of opinion, that the day of the date of the deed of grant in the count coming under a *videlicet*, and being never taken notice of again in any part of the pleadings, was totally immaterial, and ſo the plaintiff had ſhewn a good title; and they were alſo clearly of opinion that the church was ſo void upon *inſtitution* to the ſecond living, that the patron might preſent immmediately thereupon if he pleaſed; but that the biſhop had no right to collate by lapſe without giving notice; and therefore, without ſaying more, they unanimouſly gave judgment for the plaintiff: which was afterwards *affirmed upon a writ of error in the King's Bench.*

Pro quer. Bro. tit. Confeſſion, pl. 41. 2 H. 7. 16. Hob. 199. 1 Leon. 41. 1 Inſt. 352. 12 Mod. 578. Cro. Car. 501. Yelv. 123. Cro. Ja. 202. 2 Ro. Rep. 22. Judgment for the plaintiff. Brownl. 140. 1 Carth. 389. Yelv. 142. 2 Salk. 560, 561.

Before judgment was given in the above caſe, the defendants moved for leave to amend their pleas, in order to have put their defence upon the plaintiff's defect of title, and not upon lapſe of time; but the court refuſed it, becauſe it was a total changing of their defence, and was not like an amendment, but was making new pleas; the amendment intended to have been made was, to have concluded the biſhop's plea in the following manner: and the ſaid biſhop further ſaith, that the ſaid *Thomas Greſley* being ſo admitted, inſtituted, and inducted into the ſaid north mediety of the ſaid church of *Great Sheepy*, and being incumbent thereof, he the ſaid *Thomas Greſley* afterwards,, and *before the making of the ſaid indenture in the ſaid declaration laſtly mentioned, and before the ſaid Edward had any thing in the ſaid advowſon of the ſaid north mediety of the church of Great Sheepy aforeſaid*, to wit, on the 31ſt day of *October* in the year of our Lord 1759, at *Great Sheepy* aforeſaid, accepted and took the ſaid other benefice with cure of ſouls of the yearly value of 8*l.*, to wit, the ſaid rectory of the pariſh church of *Seale* aforeſaid, otherwiſe called *Nether Seale* in the ſaid county of *Leiceſter*, and the ſaid *Thomas Greſley* was afterwards admitted and inſtituted into the ſame before the making of the ſaid indenture in the ſaid declaration laſtly mentioned, and before the ſaid *Edward* had any thing in the ſaid advowſon of the ſaid north mediety of the ſaid church of *Great Sheepy* aforeſaid, to wit, on the ſaid 31ſt day of *October* in the year of our Lord 1759, that is to ſay, at *Great Sheepy* aforeſaid, whereby and by force of the ſtatute aforeſaid in ſuch caſe made and provided, the ſaid north mediety of the ſaid church of *Great Sheepy* aforeſaid became vacant, and remained, continued, and was ſo vacant until and at the time of the making of the ſaid indenture in the ſaid declaration laſtly mentioned, and afterwards until the end and expiration of ſix months from the time that the ſaid *Thomas Greſley* accepted and took the ſaid rectory of the ſaid church of *Seale*, otherwiſe *Nether Seale*, and was admitted and inſtituted into the ſame as aforeſaid, whereby the right of collating the ſaid north mediety of the church of *Great Sheepy* aforeſaid

Pro def. Bro. tit. Obligation, pl. 60. Traverſe 368. Yelv. 52. Cro. Car. 501. The court refuſed to permit the defendants to alter their pleas ſo as to change their firſt defence.

ſaid devolved to the ſaid biſhop as ordinary of that place by reaſon of the lapſe of time as aforeſaid, wherefore the ſaid biſhop after the ſaid ſix months from the time that the ſaid *Thomas Greſley* accepted and took the ſaid rectory of the church of *Seale*, otherwiſe *Nether Seale*, and was admitted and inſtituted into the ſame, were lapſed, that is to ſay, on the 20th day of *June* in the year of our Lord 1760, at *Great Sheepy* aforeſaid, collated the ſaid north mediety of the church of *Great Sheepy* aforeſaid, ſo being vacant on the ſaid *Thomas Whitehead* his clerk, and cauſed the ſaid *Thomas Whitehead* to be inſtituted and inducted into the ſame, in the time of peace in the time of the Lord *George* the Second, late King of *Great Britain*, &c. by reaſon whereof the ſaid *Thomas Whitehead* from thence hitherto hath been and ſtill is parſon of the ſaid north mediety of the ſaid church of *Great Sheepy* impariſoned in the ſame; and this the ſaid biſhop is ready to verify; wherefore he prays judgment if the ſaid *Edward* ought to have his aforeſaid action againſt him, &c.

Note: The defendant *Whitehead*'s plea ought to have concluded in like manner as the biſhop's plea, only with this difference, that it ought to have traverſed (at the latter end thereof) *abſque hoc*, that the ſaid *Thomas Greſley* was inſtituted into the ſaid rectory of the church of *Seale* aforeſaid, after the ſaid moieties of the ſaid advowſon of the north mediety of the ſaid church of *Great Sheepy* were or either of them was granted to the ſaid *Edward*, in manner and form as by the ſaid declaration above is ſuppoſed; *et hoc*, &c.; wherefore, &c.

MICHAELMAS TERM,

4 *Geo.* III. 1763.

Wilkes, Eſq. *verſus* Wood, Eſq. Member of Parliament. C. B.

THIS was a proceeding by bill againſt the defendant, which was of *Eaſter* term laſt, and in *Trinity* term laſt the defendant pleaded the general iſſue, whereupon iſſue was joined *that* term; the paper book of the iſſue has been delivered to the defendant's attorney, whereby the whole proceedings in this cauſe appear to be of *Trinity* term, without any *continuance* from *Eaſter* to *Trinity*, or any *alias prout patet*, which is irregular; this being a proceeding by bill of *Eaſter* term; and therefore it is now moved that the iſſue as delivered may be ſet aſide for this irregularity. On ſhewing cauſe,

Want of a continuance in the iſſue book delivered may be entered at any time on the roll. 2 Vent. 69. 1 Brown's Entr. 26.

Curia—This is a nice objection, it is mere matter of form; and we think the continuance, or *alias prout patet*, are not neceſſary in the iſſue paper, it may be entered at any time upon the roll. The rule to ſhew cauſe was diſcharged.

White *verſus* Shaw. C. B.

THIS was treſpaſs, aſſault and battery, whereupon the plaintiff declared, that *whereas* the defendant 4 *December* 1762, at *Leeds*, made an aſſault upon the plaintiff, *&c.* The defendant demurred, and ſhewed for ſpecial cauſe, that the ſuppoſed aſſault in the *count-part* of the declaration is not charged expreſsly or poſitively, but only by way of recital.

Quod cum in treſpaſs well enough on a ſpecial demurrer. 2 Lev. 206. 2 Bulſ. 206. 2 Show. 27. 295. 447. 2 Salk. 636.

Serjeant *Hewitt* for the defendant inſiſted that this, being ſhewn for ſpecial cauſe of demurrer, is bad; and cited *Amyon* v. *Shore*, 1 *Stra.* 624. *B. R.* where it was ill after a verdict and judgment arreſted; and 2 *Barnes* 360, 361. *C. B.* where this is held to be ill upon a ſpecial demurrer, though the court in that caſe held it well enough after a verdict.

Serjeant

1 Sid. 187. 150. 1 Lut. 1509. Cro. El. 185. 198. 2 Vent. 153. 2 Lut. 1280.

Serjeant *Sayer* for the plaintiff inſiſted, that although this might be bad in a proceeding by bill in the King's Bench, yet in this court where the writ is ſet forth in the declaration, and is part thereof, the count is helped and made good by the writ; the caſe cited from *Burnes* 360. of *Douglas* and *Hall*, was argued in *B. R.* upon a writ of error, *Trinity* 18 & 19 *Geo.* 2. by Mr. *Stracey* for the plaintiff, and Serjeant *Draper* for the defendant in error, when the court were very much inclined to get over this objection, and ſaid that they thought the count was helped by the writ; and *Denniſon* J. ſaid, he thought they might reject the word *whereas* as ſurpluſage, as the court frequently does where a man's name is miſtaken in the declaration, and that he was glad to ſee the court inclined to get over this frivolous objection; it was not then determined, but ordered to be ſpoken to a ſecond time; but it never was, the plaintiff in error ſeeing the court ſo ſtrongly inclined to affirm the judgment of the *C. B.* (See my report of this caſe in *B. R.*)

2 Jones 197.

Curia—Perhaps if this had been a proceeding by bill in *B. R.* it might have been ill, according to the caſe in *Stra.* 621. where it was ill after a verdict; but in this court where the writ is ſet out in the declaration, the count (we think) is helped thereby, and the plaintiff muſt have judgment.

Wilkes, Eſq. *verſus* Wood, Eſq. Member of Parliament. C. B. 10th of November.

Leave to withdraw the general iſſue, and plead a ſpecial plea upon terms, and waiving privilege of parliament.

IN treſpaſs, aſſault and impriſonment, the defendant pleaded the general iſſue, whereupon iſſue was joined laſt term, and notice of trial given for to-morrow the 11th of *November*. On *Monday* laſt, the 7th of *November*, the defendant moved for leave to withdraw his plea of the general iſſue, and to plead again the general iſſue, and a ſpecial juſtification under a warrant of Lord *Halifax*, ſecretary of ſtate; and relied upon the caſe of *Taylor* againſt *Joddrell*, *B. R. Mich.* 23 *Geo.* 2. where, in impriſonment the defendant had pleaded the general iſſue, the court gave him leave to withdraw that plea, and plead a juſtification that he was maſter of a ſhip, that plaintiff was making a mutiny therein, and ſo he impriſoned him, upon terms of taking ſhort notice of trial, and giving plaintiff judgment of the ſame term. The like was done in *Blackburn* and *Matthews*, *Trin.* 23 *Geo.* 2. *B. R.* and in many other ſimilar caſes, where the court could prevent the plaintiff from being delayed, or ſuffering any inconvenience.

Serjeant *Glynn*, for the plaintiff, objected that the defendant could not, by coming into the uſual terms, put the plaintiff into the ſame ſituation he was now in, the privilege of parliament taking

taking place next *Monday*; whereupon defendant agreed to waive his privilege; but it was anſwered by *Glynn*, that the privilege of a member was the privilege of the whole houſe, and that he could not waive it without leave of the houſe; and that the houſe might inſiſt upon the privilege.

Curia—We will not ſuppoſe any thing ſo diſhonourable in the Houſe of Commons; let the rule be made abſolute upon defendant's taking ſhort notice of trial, and that if the plaintiff has a verdict, he ſhall have judgment of this term.

Wilkes againſt *Webb* eſq. member, *&c.* the like motion, and the like rule.

Huckle *verſus* Money. C. B.

A new trial for exceſſive damages in aſſault and impriſonment refuſed.

TRESPASS, aſſault and impriſonment; iſſue joined upon the general iſſue Not guilty, tried before the Lord Chief Juſtice, when it was proved for the plaintiff that he is a journeyman printer, and was taken into cuſtody by the defendant (a King's meſſenger) upon ſuſpicion of having printed the *North Briton*, Number 45; that the plaintiff kept him in cuſtody about ſix hours, but uſed him very civilly by treating him with beef-ſteaks and beer, ſo that he ſuffered very little or no damages; the defendant attempted to juſtify under the general warrant of a ſecretary of ſtate, to apprehend the printers and publiſhers of the ſaid *North Briton*, Number 45, (which is before ſet forth at length in the caſe of *The King* and *Wilkes*, *Eaſter Term*, 3 *Geo.* 3.) by virtue of the *ſtat.* of *Jac.* 1. and the *ſtat.* 24 *Geo.* 2. *cap.* 44. but was over-ruled by the Lord Chief Juſtice; whereupon the king's counſel, who were advocates for the defendant, tendered a bill of exceptions, which has not yet been argued; the jury gave 300*l.* damages.

It was now moved by Serjeant *Whitaker* that the verdict might be ſet aſide, and a new trial had; for that it appeared upon the evidence the plaintiff was only a journeyman to *Leech* the printer at the weekly wages of a guinea, that he was confined but a few hours, and very civilly and well treated by the defendant, ſo that 300*l.* were moſt outrageous damages in this caſe, and a new trial he hoped would be granted; and cited *Chambers* v. *Robinſon*, 1 *Stra.* 691. which was an action for a malicious proſecution upon an indictment wherein the jury gave 1000*l.* damages, and the court granted a new trial for the exceſſiveneſs of the damages. Several other ſimilar caſes were cited to induce the court to grant a new trial.

Serjeant

Serjeant *Burland*, for the plaintiff, inſiſted that in caſes of *tort*, which found merely in damages, and are not like *debt* or *aſſumpſit*, the court will never interpoſe in ſetting aſide verdicts for exceſſive damages; that in the caſe of *Leeman* againſt *Allen* and others, reforming conſtables, *C. B.* in an action of treſpaſs and impriſonment, the jury gave 300*l.* damages; and this court refuſed to grant a new trial, though the plaintiff had not been impriſoned above 24 hours. And in a late caſe in *B. R.* for criminal converſation 500*l.* damages were given againſt a man in very poor circumſtances, as appeared to the court by affidavit, and yet they would not grant a new trial, but ſaid they could not interpoſe in caſes of tort, unleſs the damages were very outrageous; but that the jury were the ſole judges of the damages.

Lord Chief Juſtice—In all motions for new trials, it is as abſolutely neceſſary for the court to enter into the nature of the cauſe, the evidence, facts, and circumſtances of the caſe, as for a jury; the law has not laid down what ſhall be the meaſure of damages in actions of *tort*; the meaſure is vague and uncertain, depending upon a vaſt variety of cauſes, facts, and circumſtances; *torts* or injuries which may be done by one man to another are infinite; in caſes of criminal converſation, battery, impriſonment, ſlander, malicious proſecutions, *&c.* the ſtate, degree, quality, trade, or profeſſion of the party injured, as well as of the perſon who did the injury, muſt be, and generally are, conſidered by a jury in giving damages. The few caſes to be found in the books of new trials for *torts*, ſhews that courts of juſtice have moſt commonly ſet their faces againſt them; and the courts interfering in theſe caſes would be laying aſide juries. Before the time of granting new trials, there is no inſtance that the judges ever intermeddled with the damages.

I ſhall now ſtate the nature of this caſe, as it appeared upon the evidence at the trial: a warrant was granted by Lord *Halifax*, ſecretary of ſtate, directed to four meſſengers, to apprehend and ſeize the printers and publiſhers of a paper called the *North Briton*, Number 45, without any information or charge laid before the ſecretary of ſtate, previous to the granting thereof, and without naming any perſon whatſoever in the warrant; *Carrington*, the firſt of the meſſengers to whom the warrant was directed, from ſome private intelligence he had got that *Leech* was the printer of the *North Briton*, Number 45, directed the defendant to execute the warrant upon the plaintiff, (one of *Leech*'s journeymen,) and took him into cuſtody for about ſix hours, and during that time treated him well; the perſonal injury done to him was very ſmall, ſo that if the jury had been confined by their oath to conſider the mere perſonal injury only, perhaps 20*l.* damages would have been thought damages ſufficient; but the ſmall injury done to the plaintiff, or the inconſiderableneſs of

of his ſtation and rank in life did not appear tot-he jury in that ſtriking light in which the great point of law touching the liberty of the ſubject appeared to them at the trial; they ſaw a magiſtrate over all the king's ſubjects, exerciſing arbitrary power, violating *Magna Charta*, and attempting to deſtroy the liberty of the kingdom, by inſiſting upon the legality of this general warrant before them; they heard the king's counſel, and ſaw the ſolicitor of the treaſury endeavouring to ſupport and maintain the legality of the warrant in a tyrannical and ſevere manner. Theſe are the ideas which ſtruck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's houſe by virtue of a nameleſs warrant, in order to procure evidence, is worſe than the *Spaniſh* inquiſition; a law under which no *Engliſhman* would wiſh to live an hour; it was a moſt daring public attack made upon the liberty of the ſubject. I thought that the 29th chapter of *Magna Charta*, *Nullus liber homo capiatur vel imprisonetur*, &c. *nec ſuper eum ibimus*, &c. *niſi per legale judicium parium ſuorum vel per legem terræ*, &c. which is pointed againſt arbitrary power, was violated. I cannot ſay what damages I ſhould have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages againſt the ſolicitor-general's argument. Upon the whole, I am of opinion the damages are not exceſſive; and that it is very dangerous for the judges to intermeddle in damages for *torts*; it muſt be a glaring caſe indeed of outrageous damages in a *tort*, and which all mankind at firſt bluſh muſt think ſo, to induce a court to grant a new trial for exceſſive damages.

Bathurſt J.—I am of my lord's opinion, and particularly in the matter of damages, wherein he directed the jury that they were not bound to certain damages. This is a motion to ſet aſide 15 verdicts in effect; for all the other perſons who have brought actions againſt theſe meſſengers have had verdicts for 200*l.* in each cauſe by conſent, after two of the actions were fully heard and tried. *Clive* J. abſent.

Per curiam—New trial refuſed.

HILARY TERM,

4 *Geo.* III. 1764.

Syllivan *verſus* Stradling. C. B.

Replevin. Avowry for rent for enjoyment of land under a parol demiſe.

IN replevin for taking and unjuſtly detaining two heifers of the plaintiff. The defendant firſt avows that the place in which, &c. is two acres of meadow-land lying and being at a place called *Taps Corner*, in the pariſh of *Lyng* in the county of *Somerſet*, and that one *James Harris* for two years, ended the ſecond day of *February* 1761, and from thence until and at the ſame time when, &c. enjoyed the land in which, &c. as tenant thereof under a demiſe made to him by the defendant at the yearly rent of 2*l.* 2*s.* payable to the defendant yearly on the 2d day of *February* in every year, and becauſe 4*l.* 4*s.* of the rent for the ſaid two years ended on the 2d day of *February* aforeſaid in the year laſt aforeſaid on that day and year, and alſo at the ſaid time when, &c. were in arrear and unpaid to the defendant, the defendant well avows the taking of the cattle in the place in which, &c. and juſtly, &c. for and in the name of a diſtreſs for the rent ſo in arrear and unpaid, which rent ſtill remains due and in arrear to the defendant; and the defendant for further cognizance by leave of the court, &c. as bailiff of *John Phillips*, well acknowledges the taking of the cattle in the place in which, &c. and juſtly, &c. becauſe he ſays that the ſaid place at the time when, &c. and long before, was two acres of meadow-land lying and being at a place called *Taps Corner* in the county aforeſaid, and that the ſaid *James Harris* for two years, ended on the 2d day of *February* 1761, and from thence until and at the time when, &c. enjoyed the ſaid land in which, &c. under a demiſe thereof before made to him by the ſaid *John Phillips*, at the yearly rent of 2*l.* 2*s.* payable yearly on the 2d day of *February* in every year, and during all that time held the ſame of the ſaid *John Phillips* by virtue of the ſaid demiſe as his tenant thereof at the rent aforeſaid, payable as aforeſaid, and becauſe 4*l.* 4*s.* of the rent for two years, ended on the 2d day of *February* in the year laſt aforeſaid, and alſo at the ſaid time when, &c. were in arrear and unpaid to the ſaid *John Phillips*, the ſaid defendant as bailiff

Cognizance for the like by leave of the court.

of

of the ſaid *John Phillips*, well acknowledges the taking of the ſaid cattle in the place in which, &c. and juſtly, &c. for and in the name of a diſtreſs for the ſaid rent ſo in arrear and unpaid, and which rent ſtill remains due in arrear and unpaid to the ſaid *John Phillips*, &c.

Plea to the avowry that defendant took the cattle of his own wrong.

And the ſaid plaintiff as to the defendant's avowry ſays, that the defendant, for any thing by him therein alledged, ought not to avow the taking of the cattle in the place in which, &c. to be juſt, becauſe he ſays that the defendant at the time when, &c. of his own wrong, and without any ſuch cauſe as the defendant hath in his avowry alledged, took the cattle of the plaintiff in the place in which, &c. and unjuſtly detained them in manner and form as the plaintiff hath above complained againſt him; and this the plaintiff prays may be inquired of by the country, and the defendant doth the like. And the plaintiff, as to the cognizance of the defendant, ſays, that the plaintiff for any thing by the defendant in that cognizance alledged, ought not as bailiff of the ſaid *John Phillips* to acknowledge the taking of the cattle in the place in which, &c. to be juſt, becauſe he ſays, that the defendant at the time when, &c. of his own wrong and without any ſuch cauſe as he hath in his cognizance alledged, took the cattle of the plaintiff in the place in which, &c. and unjuſtly detained them, in manner and form as the plaintiff hath above complained againſt him: and this the plaintiff prays may be alſo inquired of by the country; and the defendant doth the like, &c. And the plaintiff, for further plea as to the avowry of the defendant, by leave of the court, &c. further ſays, that the defendant for any thing by him in that avowry alledged, ought not to avow the taking of the cattle in the place in which, &c. to be juſt, becauſe he ſays, that at the time when the defendant is above ſuppoſed to have made the demiſe in the avowry mentioned, of the ſaid meadow land, he had not any eſtate in the ſaid meadow land, whereby he could make ſuch demiſe to the ſaid *James Harris*; and this he is ready to verify: wherefore, inaſmuch as the defendant hath acknowledged the taking of the cattle in the place in which, &c. he prays judgment and his damages by reaſon thereof to be adjudged to him, &c. And the plaintiff for further plea, as to the cognizance of the defendant, by leave of the court, &c. ſays, that the defendant, for any thing by him in that cognizance alledged, ought not as bailiff of the ſaid *John Phillips* to acknowledge the taking of the cattle in the place in which, &c. to be juſt, becauſe he ſays, that at the time when the ſaid *John Phillips* is ſuppoſed to have made the demiſe in the cognizance mentioned of the ſaid meadow land, he the ſaid *John Phillips* had not any eſtate in the ſaid meadow land whereby he could make ſuch demiſe to the ſaid *James Harris*; and this he is ready to verify: wherefore, inaſmuch as the defendant hath acknowledged the taking of the ſaid cattle in the place in

Iſſue to the country.

The like plea to the cognizance.

Iſſue to the country.

Plea in bar to the avowry by leave, &c. that the defendant nil habuit in tenementis.

The like plea in bar to the cognizance by leave, &c.

which, &c. he prays judgment and his damages, by reaſon of the taking and unjuſtly detaining the cattle, to be adjudged to him, &c.

Demurrer to the plea in bar to the avowry.

And the defendant ſays, that the plea of the plaintiff by him ſecondly pleaded in bar to the avowry, and the matters therein contained, are not ſufficient in law to bar the defendant from avowing the taking of the cattle in the ſaid place in which, &c. to be juſt; to which ſaid plea, in manner and form as the ſame is pleaded, the defendant has no neceſſity, nor is bound by the law of the land to anſwer; and this he is ready to verify: wherefore, for want of a ſufficient plea in bar, the defendant prays judgment and a return of the cattle, together with his damages, &c. according to the form of the ſtatute, &c. to be adjudged to him, &c.

Special cauſe of demurrer.

And for cauſes of demurrer in law, the defendant ſhews to the court the following cauſes, *viz.* for that the plaintiff hath not by his ſaid plea in bar admitted, traverſed, or denied the demiſe mentioned in the avowry to have been made by the defendant, but hath attempted to introduce a collateral iſſue that the defendant had not power to demiſe the premiſes; and for that the ſaid plea is only argumentative, uncertain, inſufficient, and wants form, &c.

Demurrer to the plea in bar to the cognizance.

And the defendant as to the plea of the plaintiff by him ſecondly pleaded in bar to the cognizance of the defendant ſays, that he by reaſon of any thing by the plaintiff in that plea alledged, ought not to be barred from acknowledging as bailiff of the ſaid *John Phillips* the taking of the ſaid cattle in the place in which, &c. to be juſt, &c. To which plea, in manner and form as the ſame is pleaded, the defendant hath no neceſſity, nor is bound by the law of the land to anſwer; and this he is ready to verify: wherefore, for want of a ſufficient plea in this behalf, the defendant prays judgment and a return of the cattle, together with his damages, &c. according to the form of the ſtatute, &c. to be adjudged to him, &c.

Special cauſes of demurrer.

And for cauſes of demurrer in law, the defendant ſhews to the court the following cauſes, *viz.* For that the plaintiff hath not by his ſaid plea admitted, traverſed, or denied the demiſe mentioned in the cognizance to have been made by the ſaid *John Phillips*, but hath attempted to introduce a collateral iſſue that the defendant had no power to demiſe the premiſes; and for that the ſaid plea is only argumentative, uncertain, inſufficient, and wants form, &c.

Joinder in demurrer as to the avowry.

And the plaintiff ſays, that the plea by him ſecondly above pleaded in bar to the avowry, and the matters therein contained, are good and ſufficient in law to bar the defendant from avowing the taking of the cattle in the place in which, &c. to be juſt; which plea, and the matters therein contained, the plaintiff is ready to verify; and becauſe the defendant to the ſaid plea hath not anſwered, nor the ſame in any manner denied, the plaintiff prays judgment, &c. And the plaintiff ſays, that his plea ſecondly

The like as to the cognizance.

above

above pleaded in bar to the cognizance of the defendant, and the matter therein alledged, are good and ſufficient in law to bar the defendant from making cognizance as bailiff of the ſaid *John Phillips*, of taking the cattle in the place in which, &c. to be juſt; which ſaid plea, and the matter thereof, the plaintiff is ready to verify; and becauſe the defendant to the ſaid plea hath not anſwered, nor in any manner gainſayed, the plaintiff as before prays judgment, &c.

This caſe was twice ſolemnly argued at the bar, by Serjeant *Burland* for the defendant, and Serjeant *Glynn* for the plaintiff, in *Trinity* term laſt; and in this term by Serjeant *Davy* for the defendant, and Serjeant *Hewitt* for the plaintiff.

Nil habuit in tenementis is no plea in bar to an avowry under the ſtat. 11 Geo. 2. c. 19.

Serjeant *Burland*—The avowry and cognizance in this caſe is given to landlords by the *ſtat.* 11 *Geo.* 2. *cap.* 19. intitled, An act for the more effectual ſecuring the payment of rents, and preventing frauds by tenants, whereby it is enacted, "That whereas "great difficulties often ariſe in making avowries or conuſance "upon diſtreſſes for rent, quit-rents, &c., it ſhall and may be "lawful to and for all defendants in replevin to avow or make "conuſance generally, that the plaintiff in replevin, or other "tenant of the lands and tenements whereon ſuch diſtreſs was "made, enjoyed the ſame under a grant of demiſe at ſuch a cer-"tain rent during the time wherein the rent diſtrained for in-"curred, which rent was then and ſtill remains due." This clauſe in the ſtatute has taken away the tenant's right to controvert the defendant's title in replevin; if it has not, and he be obliged to ſhew his title in the replication to the plea in bar, it has occaſioned a greater prolixity in pleadings in replevin than there was before, for at common law the landlord or avowant was obliged to ſet out his title in his avowry or conuſance at firſt.

It may be ſaid perhaps that the avowant might have replied, that at the time of the demiſe he had a good and ſufficient eſtate in the land whereby he could make ſuch demiſe, and that this would have been a good iſſue, without ſetting out the title; but this would have been a bad replication, according to *Gyll* againſt *Glaſs*, *Yelv.* 227. *Cro. Jac.* 312. S. C. In debt, the plaintiff declared upon a leaſe for years made by himſelf to the defendant of lands in *E.*, rendering ſo much rent, and for ſo much in arrear at ſuch a feaſt he brought the action. The defendant (the leaſe not being by indenture) pleaded that the plaintiff at the time of the demiſe had nothing in the tenements whereof he could make the ſaid demiſe; the plaintiff replied and ſaid, that at the time of the demiſe he had a good and ſufficient eſtate in the ſaid tenements whereof he could make the demiſe, and thereupon being at iſſue and found for the plaintiff, he had his judgment. The defendant brought error, and aſſigned for error, that this replication was not good, for he ought to have ſhewn ſpecially

what eſtate he had at the time of the demiſe, ſo that the court might judge that he had ſufficient in the lands whereof to make the leaſe; and the court held that the replication was not good, and that the defendant might well have demurred for that cauſe; but judgment was affirmed, for the verdict found for the plaintiff hath made the replication good, for the court is now aſcertained that the plaintiff had an eſtate whereof he could make the demiſe. And in 3 *Lev.* 193. *Aylett* againſt *Williams*, in covenant upon a deed not indented, and declared upon a leaſe of land to defendant rendering rent, and a covenant to pay it, and aſſigned a breach in non-payment of the rent; the defendant proteſting that he did not enter and enjoy the land as the plaintiff had ſuppoſed, for plea ſaid, that the plaintiff *nil habuit in tenementis tempore dimiſſionis*; the plaintiff replied, that *habuit bonum titulum unde potuit dimittere*; the defendant demurred generally, and the court held the replication ill in not ſhewing what title he had; according to 2 *Cro.* 312. this was not by indenture

The *ſtat.* 11 *Geo.* 2. was made for the benefit of landlords, "and to obviate ſome difficulties that many times occur in the "recovery of rents where the demiſes are not by deed; that it "ſhall and may be lawful for landlords, where an agreement is "not by deed, to recover ſatisfaction for the tenements occupied "by the defendant or defendants in an action on the caſe for the "uſe and occupation of what was ſo held or enjoyed; and if in "evidence on the trial of ſuch action any parol demiſe, or any "agreement (not being by deed) whereon a certain rent was "reſerved, ſhall appear, the plaintiff in ſuch action ſhall not "therefore be nonſuited, but may make uſe thereof as an evi- "dence of the *quantum* of the damages to be recovered." Before this ſtatute, landlords were under great difficulties in getting their rents of tenants who had enjoyed under a parol demiſe, or ſome little memorandum in writing; and in actions on the caſe for the uſe and occupation, were often nonſuited, which difficulty this ſtatute has removed, and now they are ſafe, and may either bring an action on the caſe for the uſe and enjoyment, or may diſtrain upon theſe parol demiſes, and avow according to the ſtatute without ſetting out a title.

This plea of *nil habuit in tenementis* is bad in this caſe, as it alſo certainly is, in an action on the caſe upon an *aſſumpſit* for the uſe and occupation of lands; as was determined in *Lewis* againſt *Willis*, *B. R. Hilary*, 25 *Geo.* 2. and in *Richards* againſt *Holditch*, *Hilary*, 13 *Geo.* 1. *Newſome* againſt *Dugdale*, *B. R.* —— term 1761, was the like avowry to the preſent; the plaintiff pleaded in bar to it *nil habuit in tenementis*, &c.; defendant replied *quod habuit* a ſufficient eſtate to demiſe, and concluded to the country. The court held the plea bad, and judgment was for the avowant. This was between landlord and tenant.

Serjeant

Serjeant *Glynn* for the plaintiff—The main queſtion is, Whether the *ſtat.* 11 *Geo.* 2. was intended to take away the leſſee's right at common law to controvert the leſſor's title and authority to make the demiſe in caſes where the leaſe is not by deed indented? I conceive that it was not; it has given the leſſor a new avowry, but has not taken away the leſſee's right to plead this plea of *nil habuit*, &c. and to put the leſſor to ſhew he had ſuch an eſtate, whereof he could make the demiſe; according to *Litt. ſec.* 58. "In caſe of a diſtreſs or debt for rent, it behoveth that "the leſſor be ſeiſed of the ſame tenements, at the time of his "leaſe; for it is a good plea for the leſſee to ſay, that the leſſor "had nothing in the tenements at the time of the leaſe; and "*Co. Litt.* 47. *b.* ſays, the reaſon of this is, for that in every "contract there muſt be *quid pro quo*, and if the leſſor hath no-"thing in the land, the leſſee hath not *quid pro quo*, nor any thing "for which he ſhould pay any rent; and in that caſe he may "alſo plead that the leſſor *non dimiſit*, and give in evidence the "other matter; but *Littleton* ſays, this is the plea, *except* the "leaſe be made by deed indented, in which caſe this plea lieth "not for the leſſee to plead, for then are both parties concluded; "but if it be by deed-poll, the leſſee is not eſtopped to ſay that "the leſſor had nothing at the time of the leaſe made. *Co.* "*Lit.* 47. *b.*" It is abſolutely neceſſary that the leſſor have ſeiſin of the land at the time of making the leaſe, and a leaſe made by a man before entry was held to be void. 2 *Ld. Raym.* 853. *Weſt* v. *Sutton.* I do admit that in an *aſſumpſit* for the uſe and occupation, *nil habuit in tenementis*, &c. is no plea, for that depends merely upon an implied contract, and the promiſe is raiſed by implication of law, upon proof of the uſe and enjoyment by the defendant; but *per Lee* C. J.—In caſe of a demiſe it is otherwiſe, becauſe a ſeiſin and a right to make the leaſe, is the foundation of the action for rent. *Richard* v. *Holdin*, 13 *Geo.* 2. *B. R.* And I alſo conceive that in this caſe a general replication that the defendant had ſuch an eſtate whereby he could make the demiſe, would be a good iſſue, at the trial whereof the ſingle queſtion would be, Whether he had ſuch a ſeiſin as would entitle him to the rent?

Burland Serj.—This is an improper plea to come out of the mouth of one who has received the profits and enjoyed the land.

Lord Chief Juſtice—I deſire I may be underſtood not to be bound by what I ſhall now ſay, becauſe the caſe is to undergo a ſecond argument. This is not a caſe between the landlord and tenant, but between a ſtranger and the landlord, a replevin for taking the cattle of a ſtranger, and therefore I doubt whether the landlord ſhall have this general avowry, by the *ſtat.* 11 *Geo.* 2. againſt a ſtranger to the demiſe, but am inclined to think he ſhall, becauſe the words of the ſtatute are general and univerſal, *viz.*

" It shall be lawful for *all defendants in replevin* to avow or make " conusance generally," &c.; and therefore whether the plaintiff be tenant or not, the form and manner of the avowry given by the statute is the same. It was said by my brother *Glynn*, that *nil habuit in tenementis* was a good plea to a demise without deed, and that if the lessor has nothing, the tenant is not safe in paying him the rent, because he may be sued for it again by the right owner of the land, and that the statute could never intend to take away the right to controvert the lessor's title and subject the lessor to the danger of being liable to pay his rent twice; but yet when I consider the form of the avowry which the legislature has marked out to be full, perfect, and complete, I cannot help thinking but they intended to take away the plea of *nil habuit*, &c. as if they had said, after a tenant has enjoyed the land by a demise or permission of the landlord, he shall not be permitted to pry into the title, and pick holes in settlements and wills; what has a tenant to do with the title, as between him and his landlord after enjoyment? I suppose also, that this form of avowry was given, to prevent the difficulty the landlord was under to recover his rent when the estate was in mortgage, and therefore it seems to me that this plea of *nil habuit*, &c. is taken away.

But it is said that a general replication *quod habuit in tenementis* a sufficient estate whereof he could demise, would be good, but this has been determined to the contrary; the issue would be too large, and the inconvenience to landlords would be the same, if not greater. It is very true that *nil habuit*, &c. is no plea in an action for the use and occupation, because that is only upon a mere contract or agreement, not upon a demise. Upon the whole, as at present advised, I think this plea of *nil habuit*, &c. a bad one, as it is taken away by the statute, in my opinion.

Clive J.—This is a new case. If *nil habuit*, &c. be a good plea, and a general replication *quod habuit*, &c. whereof he could demise, without setting out what estate he hath, would be a good replication, it would be impossible for a landlord whose estate at the time of the demise was in mortgage to get any rent; and the statute was made to prevent that difficulty, as well as many other mischiefs to landlords, as prying into titles, family-settlements, and wills, to pick holes in them, as my lord has well observed; and I am very clearly of opinion, that this is a good avowry, and that the statute has taken away the plea of *nil habuit*, &c. in this case of a replevin.

Bathurst J.—This statute was made for the benefit of landlords, d to prevent tenants from putting them to difficulties (after enent of the lands) in recovering their rents under parol des or agreements; for before this statute, in actions for the use occupation, landlords were continually nonsuited, by the tenants

tenants proving ſome parol demiſe, or memorandum in writing, amounting to a demiſe at the trial, for in that caſe the landlord ought to have brought an action of debt, and not caſe on *aſſumpſit*, which is now remedied by this ſtatute. It is very certain that *nil habuit*, &c. is no plea at law to an *aſſumpſit* for the uſe and occupation; and in the preſent caſe the plaintiff might have pleaded to this avowry, that the tenant *Harris* did not enjoy, *&c.* under any demiſe of the avowant; and that is the only honeſt defence, in my opinion, that can be ſet up in this caſe. In *replevin*, where the avowant in caſe of diſtreſs for rent ſet out his title ſpecially in his avowry, I think the plaintiff at common law could not plead *nil habuit in tenementis*, &c. but was obliged to traverſe or deny his title ſet out in the avowry, or to confeſs and avoid it by ſhewing a title paramount in himſelf, or ſomebody elſe, or by pleading that no rent was in arrear; and indeed *nil habuit*, &c. in ſuch a caſe would be nonſenſical and abſurd; for it would be to call upon the avowant to ſet out his title again in his replication, which he had before done in his avowry; and would be no anſwer at all to the avowry, becauſe *nil habuit*, &c. to an avowry upon title at common law, neither confeſſes and avoids, or traverſes and denies the avowant's title. Upon the whole, as at preſent adviſed, I am of opinion that the plea in the preſent caſe is ill, and that if it was not ſo, yet that a general replication *quod habuit*, &c. whereby he could make the demiſe, would be ill.

Gould J.—As this matter is to be ſpoke to again, it will be proper to conſider the occaſion of making the ſtatute.

Upon the 2d argument in this term,

Serjeant *Davy* for the avowant, argued to the like effect as *Burland* had done before; as he cited no new caſes, his argument need not be repeated, though, I muſt ſay, it was a very good one.

Serjeant *Hewitt* for the plaintiff—The ſtatute of 11 *Geo.* 2. is confined to difficulties which often ariſe in making avowry or conuſance upon diſtreſſes for rent; that it ſhall be lawful for all defendants in replevin to avow or make conuſance generally, that the plaintiff in replevin, or other tenant of the lands, whereon ſuch diſtreſs was made, enjoyed the ſame under a demiſe, *&c.* but in the preſent caſe, the plaintiff is a ſtranger, and never enjoyed the lands.

Curia—The ſtatute is in the disjunctive, *or other tenant*, &c. and *Harris* was *other tenant*, and enjoyed the lands.

Hewitt—This plea of *nil habuit in tenementis*, &c. in debt or covenant for rent upon a leaſe by deed-poll, is good, and there is no

doubt but that the tenant might controvert the leſſor's title; and if he had no title, the diſtreſs for rent could not be juſtified or ſupported, for he ought not to have the rent, which in truth belonged to another perſon. The ſtatute was made to remedy difficulties in making avowries and conuſances, but not to alter the law ſo much as to give a man a title to rent when he had none. By *Co. Lit. ſec.* 58. & 47. *b.* there muſt be *quid pro quo*, and if the leſſor had nothing, he could give nothing; the ſtatute could not intend to ſtrip the tenant of his defence from being liable to pay the rent twice.

In the caſe of *Wilſon* and *Field*, *Skin.* 624. at *Guildhall*, in debt for rent upon a demiſe for years, the defendant pleads *nil habuit in tenementis*; the plaintiff replies, that he had a good and ſufficient eſtate to make the demiſe to the defendant *modo et forma*, &c. *ſcilicet*, that he was ſeiſed in his demeſne as of fee; upon which iſſue is joined; and upon evidence it was objected that he ought to ſhew an eſtate in fee; *ſed non allocatur*; for the iſſue is joined upon the good and ſufficient eſtate to make the demiſe; and any eſtate is ſufficient for this purpoſe, out of which the eſtate demiſed is derived; and all added after the *ſcilicet* is but form; but if he had not ſaid, that he had a good and ſufficient eſtate, but only had ſaid that he was ſeiſed in his demeſne as of fee, then he had been reſtrained to prove ſuch eſtate. *Per Holt* C. J.

The caſe of *Newſome* againſt *Dugdale*, *Mich.* 30 *Geo.* 2. *B. R.* I argued; it was in replevin, and the avowry was like this; the plaintiff pleaded in bar, that the defendant took the cattle *de injuria ſua propria*, &c. and that he had not any thing in the lands whereby he could make the demiſe mentioned in the avowry; the defendant replied, that he had a good and ſufficient eſtate to make the demiſe to the plaintiff *modo et forma*, &c. *ſcilicet*, that he was ſeiſed in his demeſne as of fee, exactly as in the caſe in *Skin.* 624. before mentioned. The plaintiff demurred to the replication, and ſhewed for cauſe, that it ſhews no certain title in the defendant at the time of the demiſe; but the court held it ſufficient, and there was judgment for the avowant. The court did not determine upon the avowry, or replication, but ſaid they thought them both good, and therefore whether *nil habuit*, &c. was good or ill, *quâcunquè viâ data*, the avowant muſt have judgment. This caſe ſhews, that a general replication *quod habuit*, &c. like the caſe in *Skin.* 624. is good; but I own they did not determine whether *nil habuit*, &c. was a good plea in this caſe.

Chief Juſtice—Surely, either the plea was good, and the replication ill, or the plea was bad, and the replication good in that caſe.

Hewitt

Hewitt—The ſingle queſtion was, Whether the replication was good or not? and the *ſtat.* 11 *Geo.* 2. was not mentioned. Upon the whole, if the leſſee cannot have this plea, and the leſſor had not title at the time of the demiſe, the leſſee may be liable to pay the rent twice over.

Lord Chief Juſtice—This is a new and important caſe; and before we give judgment, we muſt well conſider this ſtatute of 11 *Geo.* 2. and take care that the landlord may have every advantage which is thereby given to him, and that the tenant alſo may have every advantage of pleading which he had at law, if it be not taken from him by the ſtatute.

It is admitted on both ſides, that *nil habuit in tenementis* in debt or covenant for rent upon a leaſe (not by deed indented) is a good plea; if the landlord has no title to demiſe, the tenant hath not *quid pro quo*, and muſt pay the rent to the true owner of the land; is it juſt that I ſhall be bound to pay the rent twice over? It is no anſwer to ſay, I can recover my money back again; and unjuſt to compel a man to pay money which is not due: if the leaſe be by indenture the leſſee is concluded, and his mouth is ſtopped to ſay the leſſor *nil habuit*, &c. Eſtoppels are not much favoured in the law, becauſe they go through juſt and unjuſt caſes. Why did the legiſlature confine this matter to an avowry upon a diſtreſs for rent, and not extend it to debt and covenant upon a leaſe (not indented) for rent? Did they intend to overturn juſtice and the common law in one caſe, and not in the other, which is not ſo much as hinted at in the ſtatute? It ſays the avowant may avow as before is mentioned; does it follow that if the tenant by his plea in bar calls upon the lord to ſet out his title, that he is not ſtill obliged to ſet it out in his replication?

It is objected, that the plaintiff ſhall not call upon the landlord to ſet out that matter in his replication, which the ſtatute ſays he need not do in his avowry for rent diſtrained. Before this ſtatute, if the landlord had replied *quod habuit*, &c. as in *Cro. Jac.* 312. *Yelv.* 227. 3 *Lev.* 193. *Skin.* 624. and upon that iſſue a verdict had been, it would have been a good replication, though perhaps bad upon a demurrer; the ſtatute having varied the avowry in a diſtreſs for rent, why may not the court introduce a new way of pleading in reply? At common law *nil habuit*, &c. would have been a bad plea to an avowry, becauſe it had ſet out the title before, but good in debt and covenant for rent (on a leaſe not indented); and I think it ought to be held good in the preſent caſe ſince the ſtatute, and that the general replication *quod habuit*, &c. ſhould be held good alſo. If I am right, we muſt adopt this new plea and replication. As to the

caſe of an *aſſumpſit* for the uſe and occupation, I lay that out of this caſe, it being upon a mere perſonal contract, and not like a demiſe which paſſes an intereſt in land. Upon the whole, I think the plea is good, and that the ſtatute has not deprived the leſſee of his right at common law, of calling upon the landlord to ſhew his title and power to demiſe.

Clive J.—I am ſtill of opinion that *nil habuit*, &c. is a bad plea in this caſe, and that the tenant is eſtopped by the ſtatute, to call upon the landlord to ſhew his title in reply.

Bathurſt J.—Before I heard my Lord Chief Juſtice give his opinion, I was clear this is a bad plea; and I am ſtill of the ſame opinion as at preſent adviſed; but it will be proper to take further time to conſider, as it is a matter of great conſequence.

This ſtatute was made for the advantage of landlords; but if this be a good plea, and the general replication *quod habuit*, &c. be good, the iſſue will be too large, and the landlord may be turned about by any little flaw, and it would have been better for him that this clauſe had not been in the ſtatute; for before the ſtatute the iſſue upon title turned upon a ſingle point of fact, but by introducing this manner of pleading, every fact in the landlord's title will be in iſſue, which will put him under infinite difficulties, which I think the ſtatute was made to prevent.

Gould J.—I admire the principle my lord founds his opinion upon, but muſt own I am of opinion with my brothers *Clive* and *Bathurſt*. This ſtatute was not calculated for demiſes by deed, but aimed at other demiſes: enjoyment was the matter in the contemplation of the makers of this ſtatute; it meant that a landlord in caſes of diſtreſs for rent where there has been an enjoyment ſhall not, in *replevin*, be obliged to ſet out his title in his pleadings, though they ſhould go on as far as a ſurrebutter, *&c. &c.* Pleadings from the beginning to the end in one cauſe muſt be upon one and the ſame thing; and if this plea was to be admitted good, it would overthrow the ſtatute. Perhaps there may be one caſe in a thouſand where a tenant may have taken a farm upon a bad title; but in anſwer to *that*, he may recover his rent back again and damages: if a man ſells, affirming he has a good title, if he has not, the buyer may recover his purchaſe-money back again. It is objected by my Lord Chief Juſtice, Why has not the ſtatute taken away this plea in debt and covenant for rent? The anſwer is, they are grounded on deeds; but this ſtatute relates to parol leaſes, or leaſes in writing, not by deed. After time taken to conſider, the Lord Chief Juſtice altered his opinion, and agreed with the other three judges, *ut audivi*, that this plea of *nil habuit*, &c. in this caſe was bad; and *per totam curiam*, judgment was given for the defendant.

William Stevens, of the Demiſe of Mary Coſtard, alias Bigg, *verſus* Sarah Winning, Widow, Sarah Coſtard, Widow, Henry Stevens, Eſq. Timothy Pearſe, and Francis Steele. C. B.

EJECTMENT of lands in *Bradfield* in *Berkſhire*; verdict for the plaintiff, ſubject to the opinion of the court upon the following caſe:

Whether a tenant in tail having committed murder, can, between the time of the ſtroke and his conviction, bar the tail by a fine.

James Coſtard being ſeiſed in fee of the lands in queſtion, by leaſe and releaſe of the 4th and 5th of *April* 1721, in conſideration of a marriage to be had between him and *Sarah* ———, and of 300*l.* her portion, ſettled the ſame to the uſe of himſelf for life, remainder to his intended wife for life, remainder to the heirs of the body of *S.* his wife by the ſaid *James* to be begotten, remainder to the ſaid *James* in fee. The marriage took effect, and they had iſſue *James* the *ſon*, and a daughter *Sarah*, now *Sarah Winning*, one of the defendants. *James Coſtard* the father, by will of the 10th of *June* 1731, deviſed the premiſes to his ſon *James C.* after the death of *Sarah* his mother, and died in *April* 1739. *James C.* the ſon, 16th of *July* 1750, married *Sarah Higgs*, now *Sarah Coſtard*, another of the defendants.

James Coſtard the ſon, on the 16th of *September* 1752, (his wife now living,) married the leſſor of the plaintiff *Mary Coſtard*, alias *Bigg*, and hath iſſue by her a natural ſon about two years old.

That by leaſe and releaſe of the 11th and 12th of *June* 1753, reciting that *James C.* the ſon had married *Mary Bigg* when he had another wife living, that the ſaid *James* being conſcious of the injury he had done to the ſaid *Mary*, in conſideration of the ſaid injury, and of 100*l.* paid to him by *Edward Bigg* her father, he the ſaid *James C.* the ſon conveyed the premiſes to the uſe of himſelf for life, remainder to the leſſor of the plaintiff for life, remainder to the uſe of ſuch child or children of the body of the leſſor of the plaintiff begotten or to be begotten by the ſaid *James C.*, remainder to himſelf in fee.

On the 23d of *April*, *James Coſtard* the ſon murdered his mother, who was tenant for life of the premiſes, and before he entered into the lands, *James C.* by deed of the 24th of *June* 1762, between himſelf of the firſt part, the leſſor of the plaintiff of the ſecond part, and *Ann Bigg* her mother (adminiſtratrix of *Edward Bigg* her father) of the third part, reciting the ſaid deed

deed of the 11th and 12th of *June* 1753, it is witneſſed, that for docking the eſtate-tail, and for making the ſaid laſt deed good, he the ſaid *James C.* covenanted to levy a fine of the premiſes *ſur conuſance de droit come ceo*, &c. to the ſaid *Ann Bigg* with proclamations, to the uſe of himſelf for life, remainder to the leſſor of the plaintiff for life, remainder to *James Coſtard* the reputed ſon of the ſaid *James C.* the conuſor by the ſaid *Mary Bigg* the leſſor of the plaintiff, remainder to his own right heirs in fee. In *Trinity* term 1762, the fine was levied accordingly, and afterwards *James Coſtard* the conuſor was convicted of the murder of his mother at *Oxford* aſſizes.

The defendant *Henry Stephens* is lord of the manor, *Sarah Coſtard* is the widow of the conuſor, *Timothy Pearſe* and *Francis Steele* are tenants in poſſeſſion of the premiſes, and *Sarah Whinning* is ſiſter and heir of the conuſor, and heir in tail under her father's marriage-ſettlement in 1721, and has made an actual entry into the premiſes; that the leſſor of the plaintiff had no notice of the marriage of the ſaid *James Coſtard* to the defendant *Sarah* previous to her own marriage with him.

The queſtion was, Whether a tenant in tail having committed murder, can afterwards, before conviction, levy a fine and bar the next heir in tail, his ſiſter? and if he cannot, the judgment of the court muſt be with the defendants.

1. It was argued for the plaintiff, that the eſtate-tail was extinct by the fine, as much as if tenant in tail were dead without iſſue, becauſe two fees expectant one upon another cannot ſubſiſt in the ſame perſon. 2. Becauſe by the 32 *H.* 8. *c.* 36. the fine is declared to be a bar, and a diſcharge of the eſtate-tail. 3. Becauſe the *ſtat. Weſtm.* 2. having made eſtates-tail a kind of particular eſtate, they are, (the protection of the ſtatute being gone by the fine,) like all other particular eſtates, ſubject to merger and extinguiſhment when united with the abſolute fee. *Symond* v. *Cudmore*, 1 *Salk.* 338. it was admitted that if tenant in tail makes a leaſe for years, and is attainted, the king ſhall avoid the leaſe where he is intereſted; but where the king is not intereſted, as here he is not, all the acts (as was ſaid) done by a felon murderer, tenant in tail, between the ſtroke and the attainder, are valid to convey.

On the other ſide, for the defendants it was objected, that the operation of the fine veſted a fee in the conuſor, which inſtantly became forfeited. To this it was anſwered by *Gould* J. that the deed to lead the uſes of the fine is to be conſidered as part of the fine itſelf, and that in deeds of uſes the intention of the parties muſt always govern; that here the intention of the parties is

is clear, that a fee ſhould not veſt in the conuſor; and that ſuch intention ſhall repel the preſumption of law. The court inclined to give judgment for the plaintiff, but a ſecond argument being deſired, there was an *ulterius concilium*; but I never heard this caſe was argued again.

Hope *verſus* Colman, Eſq. C. B. Hilary, 4 Geo. 3. Rolls 401, 402.

Debt for an annuity granted by defendant to plaintiff in conſideration of faithful ſervice for her life.

ELLEN Hope brought a writ of annuity againſt *Philips Colman*, and declared againſt him of a plea that he render to her 40*l.* which are in arrear to her of a certain annuity or yearly rent of 40*l.* and which the ſaid *Philips* owes to her, and unjuſtly detains, *&c.* and whereupon the ſaid *Ellen* by *M. B.* her attorney complains, that whereas the ſaid *Philips* on the 6th of *May* 1748, at *Iſlington* in *Middleſex*, by his deed-poll, (which the ſaid *Ellen* brings here into court ſealed, *&c.*) for the better ſupport, proviſion, and maintenance of the ſaid *Ellen*, then a faithful ſervant of him the ſaid *Philips*, and for other good cauſes and conſiderations, *&c.* did for himſelf, his heirs, executors, and adminiſtrators, grant to the ſaid *Ellen* one annuity or yearly payment of 40*l.* clear of all taxes, charges, and deductions whatſoever; to have, hold, perceive, take, and enjoy the ſaid annuity of 40*l.* to the ſaid *Ellen* or her aſſigns, from the 29th day of *September* then next, during the term of her life, to be paid at the manſion-houſe of the ſaid *Philips* in *Ipſwich*, by quarterly payments, *viz.* on the 25th of *December*, the 25th of *March*, the 24th of *June*, and the 29th of *September*, by equal portions; the firſt payment to be made on the 25th of *December* then next, and from thenceforth to continue and yearly to be paid to her during her life, upon the days and at the place aforeſaid, as by the ſaid deed-poll (among other things) appears. By virtue whereof the ſaid *Ellen*, then and there became, and was ſeiſed of the ſaid annuity or yearly rent of 40*l.* *in her demeſne* as of freehold, *viz.* for the term of her life; and the ſaid *Ellen* in fact ſays, that 40*l.* of the ſaid annuity or annual rent for one year ended on the 5th day of *April* 1763, according to the ſtyle or computation of time now uſed in this realm, on that day became and were due and in arrear from the ſaid *Philips* to the ſaid *Ellen*, and ſtill are unpaid and in arrear to her, whereby an action hath accrued to her to demand and have of the ſaid *Philips* the ſaid 40*l.*, yet the ſaid *Philips* (although often requeſted) hath not yet rendered or paid to the ſaid *Ellen* the ſaid 40*l.* of the yearly rent aforeſaid, but hath withheld the ſame, and hath hitherto altogether refuſed, and ſtill refuſes to render or pay the ſame to the ſaid *Ellen*, whereupon ſhe ſays that ſhe is injured, and hath ſuffered damage to the value of 20*l.* and therefore ſhe brings ſuit, *&c.*

And

Plea.

Oyer of the deed.

And the defendant *L. K.* his attorney, comes and defends the wrong and injury, when, &c. and prays *oyer* of the ſaid deed-poll; and it is read to him in theſe words, (to wit) To all people to whom theſe preſents ſhall come, *Philips Colman*, of, &c. eſq. ſendeth greeting, (ſo ſets out the *grant*, *habendum*, and *times* and place of payment of the annuity as in the declaration; and then goes on and ſets out the reſt of the deed as follows,) ſubject nevertheleſs to determination as hereinafter is mentioned; and the ſaid *Philips Colman* for himſelf, his heirs, executors, and adminiſtrators, doth hereby covenant, promiſe, and agree to and with the ſaid *Ellen Hope*, her executors, adminiſtrators, and aſſigns, that he the ſaid *Philips Colman*, his heirs, executors, adminiſtrators, or aſſigns, ſhall and will yearly and every year, from the ſaid 29th day of *September* next, during the natural life of the ſaid *Ellen*, well and truly ſatisfy and pay, or cauſe to be ſatisfied and paid unto the ſaid *Ellen Hope*, or her aſſigns, the ſaid annuity or yearly payment of forty pounds, without any deduction whatſoever, upon the days and at the place aforeſaid, (*if the ſame be perſonally demanded by the ſaid Ellen Hope*,) according to the purport, true intent, and meaning of theſe preſents; provided nevertheleſs, and it is the true intent and meaning of theſe preſents, and of the parties hereunto, that if the ſaid *Ellen Hope* ſhall and do intermarry with any perſon whomſoever in the life-time of the ſaid *Philips Colman*, without his approbation and conſent in writing firſt had and obtained, that then and immediately upon her intermarriage without ſuch conſent as aforeſaid, the ſaid annuity hereby given and granted ſhall abſolutely ceaſe and determine, and the ſaid *Philips Colman*, his heirs, executors, adminiſtrators, or aſſigns, ſhall be no longer ſubject or liable to the payment thereof, but this preſent deed, and every clauſe, matter, and thing therein contained, ſhall from thenceforth be utterly void and of none effect; (any thing herein contained to the contrary notwithſtanding;) in witneſs whereof the ſaid *Philips Colman* hath hereunto ſet his hand and ſeal the *6th* day of *May* in the year of our Lord 1748, which being read and heard, the ſaid *Philips* ſays that the ſaid *Ellen* ought not to have or maintain her ſaid action againſt him, becauſe proteſting that he the ſaid *Philips*, on the ſaid *5th* day of *April* in the year of our Lord 1763 aforeſaid, and continually from thenceforth hitherto was ready and willing to have paid to the ſaid *Ellen* the ſaid annuity of 40 *l.* above demanded, if the ſame had been perſonally demanded by the ſaid *Ellen*, according to the true intent and meaning of the ſaid deed-poll; for plea in this behalf the ſaid *Philips* ſays, that the ſaid *Ellen* did not on the ſaid *5th* day of *April* in the ſaid year 1763, or on any other of the days hereinbefore mentioned, whereon the ſame annuity, or any part thereof, is made payable as aforeſaid, perſonally demand, nor hath at any time ſince all or any of the ſaid ſeveral and reſpective days perſonally demanded the ſaid annuity of 40 *l.* above ſuppoſed to be due, in arrear and unpaid to her as aforeſaid, or any part thereof,

Defendant covenants to pay the annuity (if the ſame be perſonally demanded by the plaintiff).

Proviſo that if the grantee marry, the annuity ſhall ceaſe, and the deed ſhall thereupon be void.

Proteſtando that defendant was always ready to pay the annuity.

For plea ſays, that the plaintiff did not perſonally demand the annuity at the defendant's houſe.

thereof, at the ſaid manſion-houſe of him the ſaid *Philips*, ſituate in *Ipſwich* aforeſaid, according to the true intent and meaning of the ſaid deed-poll, that is to ſay, at *Iſlington* aforeſaid in the ſaid county of *Middleſex*; and this he is ready to verify; wherefore he prays judgment if the ſaid *Ellen* ought to have or maintain her ſaid action thereof againſt him, *&c.* And the ſaid *Philips* for further plea by leave of the court, *&c.* ſays, that the ſaid *Ellen* ought not to have or maintain her ſaid action againſt him, becauſe proteſting that the ſaid *Philips* on the ſaid *5th* day of *April* 1763, and continually from thenceforth hitherto, was ready and willing to have paid to the ſaid *Ellen* the ſaid annuity of 40*l.* above demanded, if the ſame had been perſonally demanded by the ſaid *Ellen*, according to the true intent and meaning of the ſaid deed-poll; for plea in this behalf the ſaid *Philips* ſays, that the ſaid *Ellen* did not on the ſaid *5th* day of *April* 1763, or on any other of the days hereinbefore mentioned, whereon the ſaid annuity, or any part thereof, is made payable as aforeſaid, perſonally demand, nor hath at any time ſince all or any of the ſaid ſeveral and reſpective days perſonally demanded the ſaid annuity of forty pounds, above ſuppoſed to be due, in arrear and unpaid to her as aforeſaid, or any part thereof, according to the true intent and meaning of the ſaid deed-poll, that is to ſay, at *Iſlington* aforeſaid in the ſaid county of *Middleſex*; and this he is ready to verify; wherefore he prays judgment if the ſaid *Ellen* ought to have or maintain her ſaid action thereof againſt him, *&c.*

Second plea, that the plaintiff did not demand the annuity perſonally of the defendant.

The plaintiff demurred generally to each of the defendant's pleas, and he joined in demurrer.

Upon the argument of this caſe it was objected for the plaintiff, that the demand of the annuity is not traverſable in this action, that the plaintiff has in her declaration ſet out the grant of the annuity, and how and when it is payable, and that the ſame is in arrear; that this is ſubſtantive matter, and ſufficient to ſhew the plaintiff's right to this action; that the covenant to pay the annuity, (if the ſame be perſonally demanded by the plaintiff,) which is in a parentheſis, is diſtinct from, and independent upon the grant, and extends no farther than the covenant itſelf; but perhaps, if an action of covenant had been brought, it might have been neceſſary for the plaintiff to have made a perſonal demand in that caſe; the grant is clear and certain, and there are no words in it that want any explanation by the words of the covenant.

1. For the defendant it was ſaid, that the whole deed now was before the court, and ought to be taken together, and the perſonal demand to be coupled with the grant. 2. That in the declaration

claration it is laid, that by virtue of the grant, the plaintiff became and was ſeiſed of the annuity *in her demeſne* as of freehold, which is ill, this being a grant of a mere perſonal thing, and not a rent iſſuing out of land.

Per totam curiam—1. The grant is ſubſtantive, and ſo is the covenant ſubſtantive, and the demand in this action is not traverſable, whatever it might have been if an action had been brought upon the covenant; but we think it would not be traverſable in that caſe, as it is contained in a parentheſis in the deed. 2. As to the manner of pleading in the declaration, that the plaintiff was ſeiſed of the annuity *in her demeſne*, &c. that is mere matter of form, and this being upon a general demurrer, it is helped by the *ſtat.* 4 & 5 of Queen *Anne*.

There was an inſinuation thrown out by the defendant's counſel that this deed was made and obtained upon an immoral conſideration, but the court ſaid no ſuch matter appeared to them; and gave judgment for the plaintiff.

Reeks *verſus* Groneman. C. B.

What is a proper affidavit to hold to bail, and what is not ſuch.

THE affidavit to hold to bail was made by the plaintiff in theſe words, (*viz.*) *Thomas Reeks* (of ſuch a place) merchant, *make* oath that *Jodocus Groneman* of the ſame place muſician, *is* juſtly indebted to this deponent in the ſum of twelve pounds ſixteen ſhillings and eight-pence, for meat, drink, and lodging, and other neceſſaries found and provided by this deponent for the ſaid *Jodocus Groneman*.

I objected that this was no oath of the debt, it being ſaid that the defendant *in* juſtly indebted, inſtead of *is* juſtly indebted; upon ſhewing cauſe for the plaintiff why a common appearance ſhould not be entered; Serjeant *Burland* ſaid, that it was a mere ſlip of the clerk in a ſingle letter, and offered a ſupplemental affidavit to the court to make it good.

For the defendant it was inſiſted it ought not now to be received, for if the firſt was no affidavit, the arreſt was illegal by the *ſtat.* 12 *Geo.* 1. for preventing frivolous and vexatious arreſts, and that this was no affidavit, as no perjury could be aſſigned upon it; and if the arreſt was illegal, no ſubſequent act could make it legal.

Lord Chief Juſtice *Pratt* and *Bathurſt* J., at firſt, were inclined to receive the ſupplemental affidavit to make the arreſt good;

good; but *Clive* and *Gould* Juſtices, were clearly of a contrary opinion; and ſaid, as the firſt was no oath at all, it could not be made good by any ſupplemental affidavit. The court being divided, the rule was enlarged till a future day, when the matter was ſtirred again; and Serjeant *Burland* cited ſeveral caſes to ſhew that ſupplemental affidavits had frequently been received in like caſes in this court, both in the treaſury, and at the judges' chambers: that where executors or adminiſtrators had made affidavit of a debt due to their teſtator or inteſtate (as it appeared by the books, *&c.*) without ſaying *as the affidavit-man verily believed*, (which is always neceſſary,) thoſe words, *as he verily believed*, had often been ſupplied with leave of the court after the arreſt.

In anſwer to which I took this difference, that in the caſes cited, there was ſome poſitive oath upon which a perjury might be aſſigned, *viz. as appeared by the books*, &c. but in the preſent caſe there is no oath at all. *2dly*, That the court of King's Bench never did admit any ſupplemental affidavit whatever, nor would ever go out of the firſt affidavit to hold to bail ſince the *ſtat.* 12 *Geo.* 1. and have always held, if *that* be inſufficient, it can never be made good by any affidavit after the arreſt. 2 *Stra.* 1157. *Heathcote* v. *Goſlin* is directly in point. Alſo the caſe of *Huſſey* v. *Baſkerville* in *B. R.* about ſeven years ago; Mr. *Nares* there moved that the defendant might be diſcharged upon common bail, there being no affidavit to hold to bail filed with the proper officer when the writ was ſued out. Mr. *Gould* for the plaintiff ſhewed cauſe, and produced an affidavit of the debt proved to be actually made and ſworn before the writ was ſued out; but the clerk, when he took out the writ, had forgotten to file it *then*; and the court diſcharged the defendant from the arreſt on filing common bail, becauſe the affidavit of the debt ought to have been filed with the proper officer before, or at the ſame time the writ was ſued out: alſo the caſe of *Nichols* v. *Dallyhunty*, 1 *Barnes* 77. One convicted of felony made affidavit of the debt to hold to bail; this court held it was not to be received, and was as if no affidavit, and refuſed to receive a ſupplemental one.

It was alſo inſiſted, that treſpaſs and falſe impriſonment would lay in this caſe for the defendant againſt the plaintiff and the filazer, or either of them, though it would not lie againſt the ſheriff, who might juſtify under the writ which was indorſed to hold to bail by the filazer, and that any affidavit of the debt now to be made could not in point of law make the arreſt lawful, as to the plaintiff or the filazer.

Lord Chief Juſtice *Pratt*—I own, that upon the firſt debate of this matter, I was inclined to receive a ſupplemental affidavit to make this good, which is nothing more than a mere ſlip of the pen in a ſingle letter. When I conſider it again upon what has been further ſaid, it appears to be a matter of great conſequence in a point of liberty upon a ſtatute made in favour of the liberty of the ſubject, which in effect ſays, that no man for the future ſhall be arreſted before ſuch affidavit of the debt be made and filed with the proper officer. Now it is certain this is no affidavit, becauſe a perjury cannot be aſſigned upon it, therefore this is an arreſt contrary to law; and ſhall this court (or can it) make *that* lawful, which the law ſays is unlawful? I do not find this court has ever gone ſo far as to admit a ſupplemental affidavit, where the firſt amounted to no oath at all, but has only ſupplied ſmall defects in affidavits which have not been quite full enough; as in the caſes cited of executors and adminiſtrators, and which the King's Bench has never come into; and therefore I have changed my opinion, and agree with my brothers *Clive* and *Gould*, that the rule muſt be abſolute for a common appearance. *Clive* and *Gould* Juſtices were ſtill of the ſame opinion as at firſt, and thought that an action for falſe impriſonment would lie againſt the plaintiff or the filazer; but *Bathurſt* J. was of opinion it would not lie: as to the matter of a common appearance, he ſeemed to agree with the reſt of the court; and the rule was made abſolute for a common appearance.

EASTER TERM,

4 *Geo.* III. 1764.

Swithin and his Wife *verſus* Vincent and his Wife: Swithin and his Wife *verſus* Vincent only. C. B.

Two actions by a man and his wife, one againſt a man and his wife, and the other againſt the man only, cannot be conſolidated.

TWO actions for words, and two declarations, each containing ſix counts. In the firſt cauſe the words were laid to be ſpoken by the wife of *Vincent*, in the latter by *Vincent* himſelf. It was moved for the defendants, that theſe two actions might be reduced or conſolidated into one; becauſe (as was ſaid) both required the ſame pleas; that the huſband and wife were one perſon in law in civil ſuits, and the huſband was liable to pay all the damages, both for his own and his wife's ſlander, and it would ſave expence to the parties. But *per curiam*—This cannot be done, for it would be error to join the wife in a declaration for words ſpoken by the huſband *only*; and the declaration would be ill, either upon a demurrer, or in arreſt of judgment; ſo the motion was refuſed.

Brett, at the Suit of Wadham. C. B.

Affidavit of ſervice of a rule with an allocatur of coſts and a demand thereof, on or about ſuch a day, is inſufficient.

A Motion was made for an attachment for non-payment of 8*l.* 8*s.* coſts, according to a rule upon the plaintiff for that purpoſe and the prothonotary's *allocatur*; upon an affidavit that *on or about* the 9th day of *February* laſt he ſerved the rule with the *allocatur*, and demanded the coſts of the plaintiff, who refuſed to pay the ſame. *Per curiam*—The affidavit is inſufficient, for the words *on or about* leave the day of the ſervice and demand uncertain; and it might be upon a *Sunday* for any thing that appears to the contrary, which is *dies non juridicus*; ſo you muſt mend the affidavit, for there is no rule to ſhew cauſe in this caſe, but an attachment goes at once if the affidavit be ſuffic[illegible].

Goldſmith *verſus* Baynard. C. B.

Aſſumpſit.

ACTION upon the caſe upon ſeveral promiſes, to the plaintiff's damage of forty pounds.

Plea of privilege for a ſixth clerk in Chancery.

And the defendant by *E. D.* his attorney comes and defends the wrong and injury, &c. and ſays, that this court here ought not to take, nor will take cognizance of the ſaid plea, becauſe he ſays that he the defendant, long before the ſuing forth of the original writ of the plaintiff, and at the time of ſuing forth the ſame was, and from thence hitherto hath been, and ſtill is, one of the clerks of *Chriſtian Zincke* eſq. one of the ſix clerks of the high court of Chancery of our lord the king, (the ſaid court then being, and ſtill held at *Weſtminſter* in the county of *Middleſex*,) and that he doth ſerve and intends to ſerve our lord the king and his people as ſuch clerk of the ſaid *Chriſtian Zincke*, one of the ſix clerks of the high court of Chancery of our ſaid lord the now king, to wit, in the ſaid high court of Chancery; and the ſaid defendant further ſays, that as well for the royal dignity of our lord the now king and his progenitors, heretofore kings of *England*, from an ancient cuſtom in the ſaid high court of Chancery of our ſaid lord the now king and his progenitors aforeſaid, time out of mind obtained, and hitherto allowed and approved of, the Chancellor of *England*, or Keeper of the great ſeal of *England* for the time being, and other officers, clerks and miniſters of the ſame court of Chancery in their own perſons, and in their menſervants, lands, tenements, eſtates, goods, and chattels, ought to be free and quieted, as anciently they uſed to be; and the defendant as ſuch clerk of the ſaid *Chriſtian Zincke* now ought to be free and quieted, according to the privilege and liberties of the ſaid court of Chancery time immemorially uſed, and ought not by any means to be arreſted, impleaded, or impriſoned, or drawn or compelled to appear or anſwer before any of our lord the king's juſtices, officers, or ſecular miniſters whomſoever, except before the Chancellor of *England*, or Keeper of the great ſeal of *England* for the time being, upon any pleas, plaints, treſpaſſes, or demands whatſoever which do not touch the king's perſon, (pleas of freehold, felonies, and appeals only excepted,) elſewhere than in the ſaid high court of Chancery, whereby they might be withdrawn from the ſaid high court of Chancery of our ſaid lord the king againſt their will; contrary to what they formerly uſed to be; and this the defendant is ready to verify; wherefore he prays judgment if he ought to be compelled to anſwer to the plaintiff in the ſaid plea here in court, &c.

J. Burland.

And

And the plaintiff ſays, that for any thing by the defendant above in pleading alledged this court here may and ought to take cognizance of the ſaid plea againſt the defendant, becauſe proteſting that the ſaid plea of the defendant by him above pleaded, and the matter therein contained, are inſufficient in law, and that the plaintiff has no occaſion, nor is bound by the law of the land to make any anſwer thereto. For replication in this behalf the plaintiff ſays, that the defendant having been a priſoner for debt in actual cuſtody of the gaol or priſon of the King's Bench on the 25th day of *October* in the year of our Lord 1760, and ſo continuing and being long before the ſuing out of the ſaid original writ of the plaintiff againſt him, to wit, on the 15th day of *July* in the year of our Lord 1761, in conformity to a certain act of parliament made in the parliament of our ſovereign lord the preſent king, at a ſeſſion thereof holden at *Weſtminſter* in the county of *Middleſex*, in the firſt year of his reign, intitled, "An "act for the relief of inſolvent debtors," at the general quarter-ſeſſions of the peace, holden at *Guildford* in the county of *Surry* in and for the ſame county, before Sir *Anthony Thomas Abdey* baronet, *George Onſlow* and *John Evelyn* eſquires, and others their fellows, then juſtices of our ſaid lord the preſent king, aſſigned to keep the peace, and to hear and determine divers felonies, treſpaſſes, and other miſdemeanors committed in the ſame county, made and delivered into the ſaid court of general quarter-ſeſſions, ſo held as aforeſaid, a certain ſchedule ſubſcribed by the ſaid defendant of all the eſtate and effects whatſoever of him the ſaid defendant, excepting his wearing apparel, bedding for himſelf and family, working tools and implements for his occupation and calling, and thoſe in the whole not exceeding the value of ten pounds; and amongſt other the eſtate and effects of the ſaid defendant, a certain ſeat or office of the defendant in a certain office belonging to the high court of Chancery, called the ſix clerks office, to which ſeat or office the defendant was then entitled as one of the clerks of the ſaid *Chriſtian Lincke* in the ſaid plea named, ſo being one of the ſix clerks of the high court of Chancery; and the defendant afterwards on the ſame day at the ſaid general quarter-ſeſſions of the peace ſo held as aforeſaid, was duly diſcharged by virtue of the ſaid act of parliament as an inſolvent debtor, and then and there had and took the benefit of the ſaid act; by reaſon of which premiſes, and by virtue of the ſaid act, the ſaid ſeat or office of the defendant, and all his right, title, intereſt, and benefit of, in, and to the ſame, and all the ſaid other eſtate and effects of the defendant (except as aforeſaid) contained and ſpecified in the ſaid ſchedule, then and there became and were veſted in *John Lawſon* eſq. then clerk of the peace of the ſaid county of *Surry*, for the ends and purpoſes in the ſame act of parliament in that behalf mentioned: and the plaintiff further ſays, that the defendant hath not at any time ſince been reſtored to the poſſeſſion and enjoyment of his ſaid ſeat or office,

Replication, the defendant was diſcharged out of priſon on the inſolvent debtors' act, and aſſigned his office to the clerk of the peace.

nor hath acted or practiſed as one of the clerks of the ſaid *Chriſtian Zincke* as aforeſaid, at any time ſince the making and delivery of the ſchedule aforeſaid, and the taking of the benefit of the ſaid act of parliament by the defendant as aforeſaid; by reaſon of which premiſes the defendant at the time of ſuing forth of the ſaid original writ of the plaintiff was not, nor hath at any time ſince been entitled to the ſaid pretended privilege; and this the plaintiff is ready to verify; wherefore he prays judgment, and that the court here will take cognizance of the ſaid plea, and that the defendant may be compelled to anſwer further to the plaintiff in the ſaid plea, *&c.* *Ja. Hewitt.*

The defendant has demurred generally, and the plaintiff has joined in demurrer.

This caſe was argued twice at the bar. Two queſtions were made, 1ſt, Whether this office of a 60th clerk is aſſignable purſuant to the inſolvent debtors' act of the firſt year of the king? 2d, Whether the defendant can be entitled to privilege, it appearing by the replication, that he has not acted or practiſed ſince his diſcharge and taking the benefit of the act.

1. For the defendant it was ſaid, that a 60th clerk in Chancery is certainly entitled to be ſued in the petit bag office, and that his office is not aſſignable by law, and therefore the defendant ſtill remains a 60th clerk. That it is a mere perſonal office of truſt under the 6th clerk, and before any one is admitted to it he muſt ſerve a clerkſhip, and undergo an examination by the Maſter of the Rolls, and that it could not veſt in the clerk of the peace by the aſſignment of his effects under the ſtatute: that the 6th clerk is not obliged to admit the aſſignee: that it cannot be taken in execution. *Vaugh.* 181. It would not go to aſſignees under a commiſſion of bankrupts, nor would copyholds if they had not been mentioned in the *ſtat.* 13 *Eliz.* This office is a freehold: if the clerk of the peace dies, who muſt it go to? What muſt become of the buſineſs of his office, if the aſſignee be an unfit perſon? and a woman may be an aſſignee under this ſtatute. The office of clerk to the dyers' company was determined in this court not to be aſſignable in the ſchedule. In the caſe of *North* againſt *Calf*, *B. R.* about 14 or 15 years ago, the court determined that the office of provoſt-marſhalman was not aſſignable, and that he muſt have leave to reſign. In *Bacon's Abr.* tit. *Offices*, there is a *quære* whether a 60th clerk can ſell his office or not; *Verney*, Maſter of the Rolls, thought he could not; they have indeed ſometimes been permitted to ſell, but that has always been to perſons who have ſerved regular clerkſhips in the office, and have been properly qualified; the aſſignment of the office of a filazer would be void; this is an office of truſt and confidence under the 6th clerk, and cannot be aſſigned for years, be-

cauſe

cauſe then it might go to executors and adminiſtrators, never truſted or confided in. *Vaugh.* 181.

2. As to the ſecond queſtion; the plaintiff has only alledged that the defendant has not practiſed ſince his diſcharge; they have not denied that he is ſtill a clerk, and conſequently entitled to privilege; the plaintiff ought to have traverſed *abſque hoc*, that the defendant before the ſuing out the original writ was, and ſtill is one of the clerks of *Chriſtian Zincke*, one of the ſix clerks of the court of Chancery; for though he has not exerciſed his office ſince the time of his diſcharge, that may have been by reaſon of ſickneſs, or for want of buſineſs in the office, for any thing that appears on this record, and therefore he is ſtill entitled to his privilege.

1. For the plaintiff it was objected, that the defendant's plea is bad, becauſe it alledges only that he is clerk to *Chriſtian Zincke*, and that he ſerves and intends to ſerve as ſuch clerk; but it does not alledge that he is *attendant* upon that office and duty; ſo is *Bro. Traverſe, pl.* 27. *Bro. Privilege*, 40. and that is the material fact to be traverſed.

2. It was objected that the plea is bad in another reſpect, for that it alledges a cuſtom for the Chancellor to be ſued before himſelf, which is void, becauſe he cannot be ſued before himſelf. 3 *Keb.* 352. *Fawkner* v. *Annis*; for theſe two reaſons a *reſpondeas ouſter* was prayed.

Curia—This ſort of plea is to be diſcouraged. We ſee the defendant is not in actual *ſervice and attendant* upon the court of Chancery; the replication alledges that the defendant put this office in his ſchedule, and has aſſigned it; this is confeſſed by the demurrer, and therefore the defendant is concluded to ſay he has not aſſigned it; this plea is a mere dilatory, and we look nicely into ſuch pleas; the defendant ought to have alledged that he is *actually attendant* on the office, for *attendance* is the ground and foundation of the privilege *that they may not be drawn into other courts*. The defendant has ſaid in his plea that he ſerves and intends to ſerve the king and his people as clerk to Mr. *Zincke*, but a man may be ſaid to ſerve and be a ſervant, and yet not be attendant.

Another objection is to the cuſtom; it is bad to ſay that the Chancellor himſelf is to be impleaded before himſelf; it is idle, and contrary to the fundamental laws of all nations upon earth, for a man to be judge and party in his own cauſe; Lord *Hobart* ſays, an act of parliament could not make ſuch a law.

Serjeant *Mead* pleaded his privilege in the court of King's Bench, that he ought to be ſued in this court, after he had long retired from this bar; and for the reaſon that he was not attendant here, his privilege was diſallowed. Some of the court doubted whether this office was aſſignable or not, and thought it could only be ſurrendered to the Maſter of the Rolls, who is bound to receive ſuch ſurrender; they gave no abſolute opinion whether the replication was good or bad; but the whole court were of opinion that the plea was bad for the reaſons above, and gave judgment that the defendant ſhould anſwer over.

Note; In *Hilary* term, 30 *G.* 2. *B. R.* one *Maynard* an attorney was arreſted on a *latitat* for 270*l.* and gave a bail-bond. He moved to have the bail-bond given up, and that proceedings ſhould ſtay, for that he was an attorney, and ought to have the privilege of being ſued as an attorney by bill, and ought not to have been arreſted. Upon ſhewing cauſe it appeared that he had left off practice, and was called *eſquire*, ſo the court refuſed the motion, and diſallowed his privilege; cited *per Gould* J.

Reſpondeat ouſter.

Heatherley, on the Demiſe of Worthington and Tunnadine, *verſus* Weſton and others. C. B.

Tenants in common cannot make a joint leaſe.

EJECTMENT of lands in the county of *Warwick*. Verdict for the plaintiff, ſubject to the opinion of the court upon a very ſpecial caſe of a title which was twice argued at the bar, wherein ſeveral points were debated, but at laſt were narrowed and reduced to the ſingle queſtion, Whether tenants in common can make a joint demiſe? The leaſe in the declaration being laid to be of the joint demiſe of the plaintiff's leſſors, who appear to be tenants in common upon the ſtate of the caſe; and after time taken to conſider, *the whole court* were of opinion, that tenants in common cannot join in making a leaſe, for their eſtates are ſeveral and diſtinct, and there is no privity between them, and for that reaſon, one tenant in common may enfeoff another. *Bro. Feoffm. de Terre, pl.* 45. in the caſe of *Hiuxam on the demiſe of Fagg & al.* v. *Moon, B. R.* 15 *Geo.* 2. this point was determined; and ſee *Show.* 342. *Cro. Jac.* 83, 166. *Comb.* 2, 190. 1 *Brownl.* 39. 134. *Co. Lit.* 200. Judgment for the defendants, and the *poſtea* delivered to them.

James Wallwyn, Esq. *verſus* Richard Biſhop of Landaff, Wallwyn Cecil, Clerk, and John Davis, Clerk.

1401

Quare impedit. Declaration of Michaelmas term 1 Geo. 3. Roll 702, &c.

QUARE impedit of the vicarage of the church of *Skenfreth* in the county of *Monmouth*; the plaintiff in his count makes title, that *Philip Cecil* being ſeiſed of the advowſon of the vicarage in groſs as of fee and right, on the 24th of *December* 1706, by indenture between the ſaid *Philip Cecil* and *Walter Cecil* of the firſt part, *John Triſt* eſq. and *Thomas Evans* eſq. of the ſecond part, *John Kyrle* eſq. and the ſaid *James Wallwyn* (the plaintiff) of the third part, *William Powell* eſq. *William Bennett*, and *Walter Roberts*, of the fourth part, and *Elizabeth Wallwyn*, ſpinſter, of the fifth part; in conſideration of a marriage to be had between the ſaid *Philip Cecil* and *Elizabeth Wallwyn*, did grant the advowſon (among other things) to *Triſt* and *Evans*, their heirs and aſſigns, to the uſe of *Philip Cecil*, *Walter Cecil*, and *William Powell*, their reſpective heirs, executors, and adminiſtrators, until the marriage, and after, to the uſe of *Philip Cecil* for the term of 99 years, if he ſhould ſo long live; then to the uſe of the ſaid three truſtees to preſerve contingent remainders, and after his deceaſe, then to the uſe of the ſaid *John Kyrle* and *James Wallwyn* for the term of 500 years, then to the uſe of the firſt and every other ſon of the body of *Philip Cecil* upon the body of *Elizabeth Wallwyn* to be begotten, and the heirs male of the body of ſuch firſt and every other ſon; and in default of ſuch iſſue, in caſe the ſaid *Elizabeth* ſhould happen to be *enſient* with child of the ſaid *Philip Cecil* at the time of his death, then to the uſe of the ſaid *Elizabeth* until ſhe ſhould be delivered, or ſhould die, whichſoever ſhould firſt happen, in truſt for ſuch child or children, when it ſhould be born; and if a ſon or ſons, then from and after the birth of ſuch ſon or ſons, to the uſe and behoof of ſuch after-born ſon or ſons, and the heirs male of his and their bodies, one after the other, as they ſhould be in priority of birth, and the reſpective heirs male of the body and bodies of ſuch after-born ſon and ſons, and for want of ſuch iſſue, to the uſe of all and every the daughters of the ſaid *Philip* and *Elizabeth* in ſpecial tail; and for want of ſuch iſſue, to the uſe of the ſaid *Philip Cecil*, his heirs and aſſigns for ever; that on the ſaid 24th of *December* 1706 the ſaid marriage took effect, whereby and by force of the ſtatute for transferring uſes into poſſeſſion, *Philip Cecil* became poſſeſſed of the advowſon for the term of 99 years, determinable as above (the remainder thereof belonging as above); and *Philip Cecil* being ſo poſſeſſed of the advowſon, and the church being then full of one *James Philips*, the ſaid *Philip Cecil* afterwards, on the firſt day of *June* 1724, by deed granted the then next preſentation

A marriage-ſettlement made by Philip Cecil the 24th of Dec. 1706,

under which he was tenant for 99 years, if he ſhould ſo long live. And the church being full of James Philips on the 1ſt of June 1724,

he granted the next turn to John Stephens.

The church became void by the death of J. Phillips, and J. Stephens presented W. Stephens.

That Philip Cecil died poſſeſſed, and John Kyrle alſo died 1 Oct. 1731, whereupon plaintiff became ſolely poſſeſſed of the advowſon for the term of 500 years, and the church being void by the death of W. Stephens, he preſented R. Reece, ſen. who reſigned, and then he preſented R. Reece, jun. who has reſigned, whereupon it belonged to him the plaintiff to preſent, and one R. Whomsley uſurpation preſented W. Cecil the defendant, who has reſigned, and the church is now vacant, and it belongs to plaintiff to preſent, and defendants hinder him.

preſentation to *John Stephens*, in caſe the church ſhould become vacant during the ſaid term of 99 years; by virtue whereof *John Stephens* was poſſeſſed of the advowſon for the next preſentation to the church in caſe it ſhould become vacant during the ſaid term of 99 years; and being ſo poſſeſſed, the church during that term became vacant by the death of *James Philips*, which was the next avoidance after the ſaid grant to the ſaid *John Stephens*; whereupon *John Stephens* preſented to the vicarage of the ſaid church, being vacant, *William Stephens* his clerk, who was thereupon admitted, inſtituted, and inducted, *&c.*; and the ſaid *Philip Cecil* being ſo poſſeſſed of the advowſon for the remainder of the term of 99 years, determinable as aforeſaid, (remainders as above); and the church being full of *William Stephens*, *Philip Cecil* afterwards, on the firſt day of *October* 1731, died ſo poſſeſſed, and the ſaid *John Kyrle* then alſo died, whereupon by ſurvivorſhip the ſaid *James Wallwyn* became poſſeſſed of the advowſon for the remainder of the ſaid term of 500 years then to come, and being ſo poſſeſſed thereof the church became vacant by the death of *William Stephens*, whereupon *James Wallwyn* preſented *Richard Reece* the elder his clerk, who was thereupon admitted, inſtituted, and inducted in time of peace, *&c.*; and the ſaid *James Wallwyn* being ſo poſſeſſed of the advowſon, the church became vacant by the reſignation of *Richard Reece* the elder, whereupon the ſaid *James Wallwyn* preſented *Richard Reece* the younger his clerk, who was thereupon admitted, inſtituted, and inducted in time of peace, *&c.*; and the ſaid *James Wallwyn* being ſo poſſeſſed of the advowſon, the church became vacant by the reſignation of *Richard Reece* the younger; whereupon it belonged to the ſaid *James Wallwyn* to preſent a fit perſon to the vicarage of the church ſo vacant, and one *Robert Wheeler* clerk, uſurping upon the ſaid *James Wallwyn*, preſented to the vicarage of the church ſo vacant *Wallwyn Cecil* the now defendant his clerk, who upon that preſentation was admitted, inſtituted, and inducted into the ſame; and the ſaid *James Wallwyn* being ſo poſſeſſed of the advowſon, the church became vacant by the reſignation of the ſaid *Wallwyn Cecil*, and yet is vacant, by reaſon thereof it belonged and ſtill belongs to the ſaid *James Wallwyn* to preſent a fit perſon to the vicarage of the ſaid church ſo being vacant; and the ſaid *Richard* Biſhop of *Landaff*, *Wallwyn Cecil*, and *John Davis*, unjuſtly hinder him from preſenting a fit perſon to the vicarage of the ſaid church; whereupon the ſaid *James Wallwyn* ſays he is injured, and hath ſuſtained damage to the value of 300*l.*, and therefore he brings ſuit, *&c.*

Imparlances. The biſhop claims but as ordinary.

All the defendants imparl from *Michaelmas* term 1760 till *Hilary* 1761, from *Hilary* till *Eaſter* 1761, and from *Eaſter* to *Trinity* term 1761, 1 *Geo.* 3.; then the biſhop comes and pleads that he claims nothing but as ordinary, to which the plaintiff replies

replies in the common form, and prays a writ to the biſhop, which is granted by the court with ſtay of execution thereof till the plea between the plaintiff and the other two defendants be determined, *&c.*

Imparlances by the patron and incumbent, defendants.

The defendants *Cecil* and *Davis* further imparl till *Michaelmas* 1761, from *Michaelmas* till *Hilary* 1762, from *Hilary* till *Eaſter* 1762, and from *Eaſter* till *Trinity* term 1762, 2 *Geo.* 3.; and then the defendant *Wallwyn Cecil* comes and ſays that the plaintiff ought not to have his action againſt him, becauſe he ſays, that *Philip Cecil* the elder, father of the ſaid *Philip Cecil*, in the declaration named, long before the making the ſaid indenture of marriage ſettlement, while the church was full of a clerk, *James Philips*. the then incumbent, to wit, on the 5th of *January* in the 10th year of King *William* the Third, *William Powell* and *Walter Cecil* eſq. proſecuted out of the ſame king's court of Chancery a writ of *entry ſur diſſeiſin in le poſt* againſt *Henry Probart* eſq. and *Robert Price* eſq. (amongſt other things) of the ſaid advowſon of the vicarage of the ſaid church, returnable from the day of *St. Hilary* in fifteen days, (which is ſet forth at length in the plea,). whereupon a common recovery was ſuffered the firſt day of the ſame *Hilary* term with triple voucher, when all the parties appeared in perſon at the bar, and wherein the ſaid *Philip Cecil* the elder was firſt vouchee, who further vouched *Philip Cecil* his ſon, who vouched over the common vouchee, and judgment was thereupon given, and a writ of ſeiſin awarded and executed the ſixth day of *February*. the 10th year of King *William* 3. (which recovery is ſet forth at length,) as by the record thereof in the court of the Bench appears; which recovery was ſo had and ſuffered as to the ſaid advowſon, to the uſe of the ſaid *William Powell* and *Walter Cecil*, their executors, adminiſtrators, and aſſigns, from thenceforth for the term of 1000 years, and after the end or ſooner determination of that term of 1000 years, to the uſe of the ſaid *Philip Cecil* the younger in tail male; and for want of ſuch iſſue, to the uſe of the ſaid *Philip Cecil* the elder in fee; by virtue of which recovery, and by force of the ſtatute of uſes, the ſaid *William Powell* and *Walter Cecil* afterwards, and long before the making the ſaid indenture *quinquepartite* in the declaration, became and were poſſeſſed of the advowſon as in groſs by itſelf for the ſaid term of 1000 years, which term, at the time of the making of the ſaid indenture *quinquepartite*, was and ſtill is ſubſiſting and unexpired, and by reaſon whereof, nothing of or in the ſaid advowſon ever paſſed by the ſaid indenture *quinquepartite* into the poſſeſſion of the ſaid *John Kyrle* and *James Wallwyn*; and this the ſaid *Wallwyn Cecil* is ready to verify; wherefore he prays judgment if the ſaid *James Wallwyn* ought to have his action againſt him, *&c.*

The patron of the incumbent's plea. That P. Cecil, ſen. father of P. Cecil, in the declaration before the ſettlement while the church was full of James Philips, 10 W. 3. ſuffered a common recovery of this advowſon (int. al.) wherein he and his ſon were ſeverally vouched, which was executed; to the uſe of Wm. Powell and Walter Cecil for the term of 1000 years, which is prior to the plaintiff's title in the declaration, and is ſtill ſubſiſting, and that nothing paſſed to the poſſeſſion of Kyrle and the plaintiff by the ſettlement.

And

The other defendant Davis's plea that he is the parſon imparſonee, derives a title down to his patron prior to plaintiff's title, thus: That P. Cecil, ſen. being ſeiſed in fee, preſented Ja. Philips to the church, being vacant temp. Car. 2. That before the ſettlement, 18 Jan. 1698, P. Cecil ſen. and his wife granted, and Philip Cecil the ſon confirmed, the advowſon (among other things) to Henry Probart and Ro. Price, to the uſe of Phil. Cecil jun. for his life, and after his death to the uſe of the heirs male of his body,

and for want of ſuch iſſue, to the uſe of P. Cecil ſen. in fee, whereby P. Cecil jun. was ſeiſed in tail;

And the ſaid *John Davis* ſays that he is parſon of the ſaid church imparſoned in the ſame on the preſentation of the ſaid *Wallwyn Cecil*, and that the ſaid *James Wallwyn* ought not to have his action againſt him, becauſe he ſays that long before the ſaid indenture *quinquepartite* in the declaration mentioned, and before the ſaid *Philip Cecil* in the ſaid declaration named had any ſeiſin of the ſaid advowſon, one *Philip Cecil* the elder, father of the ſaid *Philip Cecil* above-named, was ſeiſed of the ſaid advowſon of the vicarage of the ſaid church as in groſs by itſelf as of fee and right; and being ſo ſeiſed thereof preſented to the ſame, being vacant, *James Philips* his clerk, who on that preſentation was admitted, inſtituted, and inducted into the ſame church in the time of peace in time of the Lord *Charles* the Second, late king of *England*; and that afterwards and before the making of the ſaid indenture *quinquepartite* in the above declaration mentioned, to wit, on the 18th day of *January* in the year of our Lord 1698, at the pariſh aforeſaid, by a certain indenture of bargain and ſale then and there made between the ſaid *Philip Cecil* the elder and *Anne* his wife, and the ſaid *Philip Cecil* the ſon, in the ſaid declaration mentioned on the firſt part, one *Henry Probart* and *Robert Price* of the ſecond part, and *William Powell* and *Walter Cecil* of the third part, (which is brought into court,) in conſideration of certain ſums of money to the ſaid *Philip Cecil* the elder and *Philip Cecil* the ſon paid, he the ſaid *Philip Cecil* the elder, being ſo ſeiſed of the ſaid advowſon as aforeſaid, granted, bargained, ſold, and releaſed, and the ſaid *Philip Cecil* the ſon in the ſaid declaration mentioned confirmed to the ſaid *Henry Probart* and *Robert Price*, (in their actual poſſeſſion then being by virtue of a bargain and ſale to them thereof made for the term of one whole year, by indenture bearing date the day next before the day of the date of the ſaid indenture, now brought here into court, and made between the ſame parties laſt mentioned,) and their heirs and aſſigns, (amongſt other things,) the advowſon, donation, free diſpoſition, and right of patronage of, in and to the ſaid vicarage of the pariſh church of *Skenfreth* aforeſaid, with all its rights, members, and appurtenances; to have and to hold the ſaid advowſon with the appurtenances, (amongſt other things,) to the ſaid *Henry Probart* and *Robert Price*, their heirs and aſſigns for ever, to the uſe and behoof of the ſaid *Philip Cecil* the ſon for and during the term of his natural life, and from and after his deceaſe, to the uſe of the heirs male of his body lawfully begotten, and for want of ſuch iſſue, then to the uſe and behoof of the right heirs of the ſaid *Philip Cecil* the elder for ever; by virtue whereof, and by force of the ſtatute of uſes, the ſaid *Philip Cecil* the younger became and was ſeiſed of the ſaid advowſon as in groſs by itſelf as of fee-tail and right, that is to ſay, to him and the heirs of his body iſſuing; and the ſaid *John Davis* further ſaith, that the

ſaid

ſaid *Philip Cecil* the younger being ſo ſeiſed of the ſaid advowſon, and the church being full of the ſaid *James Philips* clerk, he the ſaid *Philip Cecil* the ſon, by a certain writing under his hand and ſeal granted unto the ſaid *John Stephens* in the declaration mentioned, the then firſt and next preſentation to the church whenſoever the ſame ſhould then firſt and next become vacant, (if the ſame ſhould happen to become vacant in the lifetime of the ſaid *Philip Cecil* the ſon,) by virtue of which grant the ſaid *John Stephens* became and was poſſeſſed of the advowſon for the then firſt and next vacancy thereof, in caſe the ſame happened to become vacant in the lifetime of the ſaid *Philip Cecil* the ſon; and the ſaid *John Stephens* being ſo poſſeſſed thereof, the church became vacant in the lifetime of *Philip Cecil* the ſon by the death of the ſaid *James Philips*, which vacancy of the church was the firſt and next vacancy thereof after the grant aforeſaid to the ſaid *John Stephens* by *Philip Cecil* the ſon made as aforeſaid; whereupon the ſaid *John Stephens*, by virtue of the ſaid grant, preſented the church ſo vacant the ſaid *William Stephens*, in the ſaid declaration named, his clerk, who thereupon was admitted, inſtituted, and inducted in the time of peace, *&c.* and afterwards, at *Shenfreth*, *Philip Cecil* the ſon died ſo ſeiſed of the ſaid advowſon as in groſs by itſelf, leaving iſſue male of his body iſſuing the ſaid *Wallwyn Cecil*, one of the defendants, whereby the ſaid *Wallwyn Cecil* became and was ſeiſed of the advowſon of the vicarage of the church aforeſaid as in groſs by itſelf as of fee-tail and right, (that is to ſay) to him and the heirs male of his body iſſuing; and being ſo ſeiſed thereof, the church became vacant by the death of the ſaid *William Stephens*; and the ſaid *James Wallwyn* having no right to preſent to the ſaid church, but uſurping upon the ſaid *Wallwyn Cecil*, to whom of right it did belong to have preſented a fit perſon to the church, preſented the ſaid *Richard Reece* the elder, in the declaration mentioned, his clerk, who was thereupon admitted, inſtituted, and inducted in the time of peace, *&c.* and the church afterwards became vacant by the reſignation of the ſaid *Richard Reece* the elder; and the ſaid *James Wallwyn* having no right to preſent to the church, but uſurping again upon the ſaid *Wallwyn Cecil*, to whom of right it did then belong to have preſented a fit perſon to the church, preſented to the church then vacant *Richard Reece* the younger, in the declaration mentioned, his clerk, who was thereupon admitted, inſtituted, and inducted in the time of peace, *&c.*; and the ſaid *John Davis* further ſays, that the ſaid *Wallwyn Cecil* being ſo ſeiſed of the advowſon, and the church being full of the ſaid *Richard Reece* the younger, he the ſaid *Wallwyn Cecil*, by writing under his hand and ſeal, granted to the ſaid *Robert Wheeler* in the declaration mentioned, the then firſt and next preſentation of the church whenſoever the ſame ſhould then firſt happen to become vacant in the lifetime of the ſaid *Wallwyn Cecil*; by virtue of

and the church being full of Ja. Philips, P. Cecil jun. granted the next turn to J. Stephens.

That the church became void by the death of James Philips in the lifetime of P. Cecil jun. and Jo. Stephens preſented Wm. Stephens. Afterwards P. Cecil jun. died, and the defendant Wallwyn Cecil is his heir male, and is ſeiſed of the advowſon in tail.

That the church became void by the death of W. Stephens, and the plaintiff by uſurpation preſented R. Reece ſen. who reſigned, and the plaintiff again by uſurpation preſented R. Reece jun.

That the church being full of R. Reece jun. Wallwyn Cecil granted to Rob. Wheeler the next turn.

of

That the church became void by resignation of R. Reece jun. and Robert Wheeler presented Wallwyn Cecil the defendant, who resigned, and he being seised of the advowson in tail-male, and the church being void by his resignation, he presented this incumbent Davis the other defendant,

of which grant the said *Robert Wheeler* became and was possessed of the advowson of the church for the then first and next vacancy thereof, in case the same happened to become vacant in the lifetime of the said *Wallwyn Cecil*; and the said *Robert Wheeler* being so thereof possessed, the church became vacant in the lifetime of the said *Wallwyn Cecil* by the resignation of the said *Richard Reece* the younger, which said vacancy of the church was the first and next vacancy thereof after the said grant to the said *Robert Wheeler* by the said *Wallwyn Cecil* made as aforesaid; whereupon *Robert Wheeler*, by virtue of the said grant, presented to the church so vacant the said *Wallwyn Cecil* his clerk, who thereupon was admitted, instituted, and inducted in the time of peace in the time of *George* the Second, King of *Great Britain*, &c. and the church afterwards became vacant by the resignation of the said *Wallwyn Cecil*; and the said *Wallwyn Cecil* being so seised of the advowson as in gross by itself as of fee-tail and right as aforesaid, he presented to the church so vacant by the resignation of himself the said *John Davis* his clerk, who thereupon was admitted, instituted, and inducted into the same, and long before the suing out of the original writ of the said *James Wallwyn* was and yet is parson of the same church imparsoned in the same on the said presentation of the said *Wallwyn Cecil*; *without this*, that the said *Philip Cecil* the son in the said declaration named was seised of the said advowson of the vicarage aforesaid as of fee and right in manner and form as the said *James Wallwyn* hath above alledged; and this the said *John Davis* is ready to verify; wherefore he prays judgment if the said *James Wallwyn* ought to have his said action against him, *&c.*

G. Nares.

and then traverses the seisin in fee of Philip Cecil the son, in the declaration.

The plaintiff imparls from *Trinity* 1762 till *Michaelmas* 1762, from *Michaelmas* till *Hilary* term 1763, 3 *Geo.* 3. and then the plaintiff replies as follows:

Replication to the plea of Wallwyn Cecil, the patron of the other defendant. Alledges that Philip Cecil being seised in tail, anno 5 Annæ R. levied a fine with proclamations.

And the said *James Wallwyn* as to the plea of the said *Wallwyn Cecil* says, that by reason of any therein alledged, he ought not to be barred from having his action against him, because he says, that after the suffering of the said recovery in the same plea mentioned, and after the death of the said *Philip Cecil* the elder, the said *Philip Cecil* the younger, then being the heir-at-law of the said *Philip Cecil* the elder, and then being seised in fee-tail of the advowson of the said church, a *certain fine with proclamations*, according to the form of the statute in that case made and provided, was levied in the court of the Lady *Ann*, late queen of *England*, &c. of the Bench, here, from the day of the *Holy Trinity* in three weeks in the fifth year of her reign, before *Thomas Trevor*, &c. justices of the same Bench and others, *&c.* between *John Tryst* esq. and *William Powell* esq. plaintiffs, and the said *Philip Cecil* the younger, deforcient (amongst other

The word vicarage is not in the fine

other things) of *the advowſon of the ſaid church of Skenfreth*, whereof a plea of covenant was ſummoned between them in the ſame court, that is to ſay, that the ſaid *Philip Cecil* the younger, did acknowledge the ſaid advowſon to be the right of the ſaid *John*, as that which the ſaid *John* and *William* then had of the gift of the ſaid *Philip*, and he remiſed and quit-claimed the ſame from himſelf and his heirs to the ſaid *John* and *William*, and the heirs of the ſaid *John* for ever; and moreover the ſaid *Philip* granted for himſelf and his heirs, that they would warrant to the ſaid *John* and *William*, and the heirs of the ſaid *John*, the advowſon aforeſaid, againſt him the ſaid *Philip* and his heirs for ever; and for that acknowledgment, remiſſion, quit-claim, warranty, fine, and agreement, the ſaid *John* and *William* gave to the ſaid *Philip* 900 pounds ſterling; which ſaid fine ſo levied was engroſſed, and was afterwards ſolemnly read and proclaimed in the ſaid court of the Bench, according to the form of the ſtatute in that caſe made and provided, in manner and at the times following, that is to ſay, the firſt proclamation thereof, and thereupon made, was made on the 12*th* day of *July* in the term of the *Holy Trinity* in the 5th year of the reign of the ſaid late queen; the ſecond proclamation thereof, and thereupon made, was made on the 19*th* day of *November* in the term of *Saint Michael* in the ſaid fifth year of the reign of the ſaid late queen; the third proclamation thereof, and thereupon made, was made on the 3d day of *February* in the term of *St. Hilary* in the 5th year of the reign of the ſaid late queen; and the fourth proclamation thereof, and thereupon made, was made on the 2d day of *May* in the term of *Eaſter* in the 6th year of the reign of the ſaid late queen, as by the ſaid fine and proclamations thereupon made, now remaining of record in the ſaid court of Bench at *Weſtminſter*, may more fully appear; which ſaid fine ſo had and levied as aforeſaid, was had and levied to the uſe of the ſaid *Philip Cecil* and his heirs; by virtue of which ſaid fine, and by force of the ſtatute for transferring of uſes into poſſeſſion, the ſaid *Philip Cecil* the ſon became and was ſeiſed of the ſaid advowſon as of fee and right; and being ſo ſeiſed thereof did grant the ſaid advowſon, in manner and form as in and by the ſaid declaration is above alledged; and the ſaid *James Wallwyn* further ſays, that no entry, claim, or action was ever made or brought in due time, or at any time whatſoever by the ſaid *William Powell* and *Walter Cecil*, or either of them, or any perſon or perſons whatſoever claiming under them, or either of them, to avoid the ſaid fine, and that by reaſon of the ſaid premiſes, the ſaid term became and was barred and of no effect; and this the ſaid *James Wallwyn* is ready to verify; wherefore he prays judgment, and a writ to the biſhop, *&c.* together with his damages, on occaſion of the ſaid impediment, to be adjudged to him, *&c.*

whereby he became ſeiſed in fee before the making the indenture in the declaration, and that the term of 1000 years is thereby barred for want of entry and claim, et hoc, &c.

James Hewitt.

And

Replication to the incumbent's plea takes iſſue on the traverſe.

And the ſaid *James Wallwyn*, as to the ſaid plea of the ſaid *John Davis* by him above pleaded, as before ſays, that the ſaid *Philip Cecil* in the ſaid declaration above named, was ſeiſed of the ſaid advowſon of the vicarage aforeſaid, as of fee and right in manner and form as the ſaid *James Wallwyn* hath above alledged; and this the ſaid *James* prays may be inquired of by the country.

James Hewitt.

Demurrer to the plaintiff's replication to patron's plea.

And the ſaid *Wallwyn Cecil*, as to the plea of *James Wallwyn* above pleaded in reply to the ſaid plea of the ſaid *Wallwyn Cecil*, ſays, that the ſame replication, and the matters therein contained, are inſufficient in law for the ſaid *James Wallwyn* to maintain his ſaid action againſt him the ſaid *Wallwyn Cecil*, and that he the ſaid *Wallwyn Cecil* needs not to anſwer the ſaid replication ſo pleaded as aforeſaid; and this the ſaid *Wallwyn Cecil* is ready to verify; wherefore for want of a ſufficient replication in this behalf, the ſaid *Wallwyn Cecil* prays judgment, and that the ſaid *James Wallwyn* may be barred from maintaining his ſaid action againſt him, *&c.*; and as to the plea of the aforeſaid *James Wallwyn* by him above in reply pleaded to the plea of the ſaid *John Davis*, and whereof the ſaid *James Wallwyn* puts himſelf upon the country, he the ſaid *John Davis* does ſo likewiſe.

Incumbent Davis joins iſſue.

G. Nares.

The plaintiff imparls till *Eaſter* term 1763, and then joins in demurrer.

The plaintiff joins in demurrer.

And the ſaid *James Wallwyn* ſays, for that he has above by replying alledged ſufficient matter in the law for him the ſaid *James Wallwyn* to have and maintain his ſaid action againſt the ſaid *Wallwyn Cecil* and *John Davis*, which the ſaid *James Wallwyn* is ready to verify; which matter the ſaid *Wallwyn Cecil* doth not deny, nor any ways anſwer thereto, but entirely refuſeth to admit the verifying thereof, the ſaid *James Wallwyn* as before prays judgment, and a writ to the biſhop, *&c.* together with his damages, on occaſion of the ſaid impediment to be adjudged to him, *&c.* (*James Hewitt.*) And becauſe the juſtices here will adviſe themſelves of and concerning the premiſes, whereof the ſaid *James Wallwyn* and *Wallwyn Cecil* have put themſelves upon the judgment of the court here, before they give judgment thereon, a day is therefore given to the ſaid parties here, until the morrow of the *Holy Trinity*, becauſe the ſaid juſtices are not yet adviſed, *&c.* and as well to try the ſaid iſſue above joined to be tried by the country, as to inquire what damages the ſaid *James Wallwyn* hath ſuſtained by reaſon of the premiſes of and concerning which the ſaid *James Wallwyn* and *Wallwyn Cecil* have put themſelves upon the judgment of the court here, if it ſhall happen that judgment thereon ſhall be given for the ſaid *James Wallwyn*; therefore the ſheriff is commanded

Curia adviſare vult.

Venire as well to try the iſſue as to inquire of damages if judgment be for plaintiff on the demurrer.

manded that he cauſe to come here twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c.

This caſe was twice argued at the bar, the firſt time in *Trinity* term laſt, by Serjeant *Hewitt* for the plaintiff, and Serjeant *Nares* for the defendants: the ſecond time by Serjeant *Burland* for the plaintiff, and Serjeant *Aſpinal* for the defendants.

The plaintiff's title in his declaration ſhortly ſtated.

To ſhew the plaintiff's title, the declaration ſets forth, that *Philip Cecil* on the 24th of *December* 1706, being ſeiſed in fee of the advowſon of the vicarage of the church of *Skenfreth* in groſs, as of fee and right by deed of that date, upon his marriage, ſettled the ſame to the uſe of himſelf for 99 years, if he ſhould ſo long live, remainder to truſtees to preſerve contingent remainders, remainder to *John Kyrle* and the plaintiff *James Wallwyn* for 500 years, remainder in ſtrict ſettlement; that the marriage was had, and *Philip Cecil* thereby became poſſeſſed of the advowſon for the term of 99 years, and on the 1ſt of *June* 1724 (the church being then full) granted the next turn to *John Stephens*, who upon the next vacancy preſented his clerk *William Stephens*; that afterwards on the 1ſt of *October* 1731, the church being full of *William Stephens*, *Philip Cecil* died ſo poſſeſſed, and *John Kyrle* died, whereby *James Wallwyn* (the plaintiff) by ſurvivorſhip became poſſeſſed of the term of 500 years, and upon the death of *William Stephens*, preſented *Richard Reece* the elder, upon whoſe reſignation he preſented *Richard Reece* the younger, upon whoſe reſignation, one *Robert Wheeler* by uſurpation preſented *Wallwyn Cecil*, one of the defendants, who has reſigned, and that the church is now void, and it belongs to the plaintiff to preſent.

which is rebutted by the defendant Wallwyn's plea, which ſets up a prior term of 1000 years ſtill ſubſiſting.

The defendant *Wallwyn Cecil* ſets up a prior title, and pleads that *Philip Cecil* ſenior, the father of *Philip Cecil* in the declaration, in *Hilary* term in the 10th year of King *William*, ſuffered a common recovery of this advowſon (among other things) with triple voucher (wherein *Philip Cecil* the father was vouched, who vouched *Philip Cecil* the ſon) to the uſe of *William Powell* and *Walter Cecil* for the term of 1000 years, which term was ſubſiſting before and at the time of the making the deed of marriage-ſettlement, and is ſtill ſubſiſting and unexpired; by reaſon whereof nothing in the advowſon ever paſſed by the deed of marriage-ſettlement, into the poſſeſſion of *Kyrle* and the plaintiff *James Wallwyn*.

Plaintiff replies a fine, and no entry or claim made to avoid it, and ſays the term of 1000 years is thereby barred.

The plaintiff's title in the declaration being rebutted by this plea, the plaintiff in anſwer thereto replies that after the ſuffering the recovery in the plea, and after the death of *Philip Cecil* the elder, the ſaid *Philip Cecil* the younger, then being his heir at law, and then being ſeiſed in fee-tail of the advowſon, levied a fine of the *advowſon of the church of* Skenfreth wherein he was conuſor,

conuſor, to the uſe of himſelf and his heirs; by virtue of which fine and the ſtatute of uſes *Philip Cecil* the younger became ſeiſed in fee of the advowſon; and being ſo ſeiſed, made the marriage-ſettlement in the declaration, and that no entry or claim by the ſaid *William Powell* and *Walter Cecil* or either of them, or by any other perſon whatſoever, claiming under them, or either of them, was made to avoid the ſaid fine, and therefore the term of 1000 years is barred and of no effect. To this, the defendant *Wallwyn Cecil* has demurred, and the plaintiff has joined in demurrer.

The general queſtion made in this caſe was, upon both the arguments, Whether a fine of an advowſon in groſs with proclamations, and non-entry or claim, will bar a term of years? But as the court at laſt did not determine this queſtion, it is not neceſſary to ſet down the arguments, but only the judgment of the court after time taken to conſider, which was given this term.

Curia—It was admitted by the defendant's counſel on the outſet of the argument, that a fine of lands with proclamations, according to the *ſtat.* 4 *H.* 7. *c.* 24. and five years paſſed without entry or claim, will bar the leſſee for years. 5 *Rep. Soffyn's* caſe, *Cro. Jac.* 60. S. C. 1 *Lev.* 272. *Freeman* v. *Barnes* *Cro. Car.* 110. *Iſham* v. *Morris.* *Carth.* 100. *Smith* v. *Pearce.* But this is only in the caſe of lands where the leſſee for years is ouſted; for no fine ſhall bar any but thoſe who are out of poſſeſſion, and whoſe eſtate is turned to a right, according to *Margaret Podger's* caſe, 5 *Rep.* 105. *b.* If leſſee for years is ouſted, and *he* in reverſion diſſeiſed, and the diſſeiſor levies a fine with proclamations, and five years paſs, as well the leſſor as leſſee are barred by their non-claim, and the leſſor ſhall not have five years after the leaſe for years expired; ſo if a copyholder for life or in fee be ouſted, and the lord diſſeiſed, and the diſſeiſor levies a fine with proclamations and five years paſs, as well the lord as the copyholder are barred; and the lord in ſuch caſe ſhall not have five years after the death of the copyholder for life. The difference ariſes from the words of the two ſavings in the *ſtat.* 4 *H.* 7. The firſt ſaving extends to thoſe who have preſent right, and therefore the five years begin to run from the time the fine was levied, becauſe they might enter or bring their action immediately. The ſecond ſaving extends to thoſe who, at the time of the fine levied, cannot immediately have an action, or make an entry, and therefore they ſhall have five years after their action, right, title, *&c.* firſt accrues. But the caſe at bar is not the caſe of a fine of lands, or of an advowſon appendant to a manor, but of an advowſon of a vicarage of a church in groſs by itſelf, which, at the time of the fine levied, appears by the pleadings to be in the poſſeſſion of *William Powell* and *Walter Cecil* for a *then* and *preſent* ſtill ſubſiſting long term of years, which has never been deveſted or turned

turned to a right; for none of the parties to the fine, at the time of the levying thereof, had any thing in this advowſon; at that time *Philip Cecil* the conuſor in the fine had never preſented to the church, nor did his grantee preſent till 25 years afterwards, and the conuſees are mere ſtrangers. It was inſiſted for the defendants, that an eſtate in an advowſon in groſs could not be deveſted or turned to a right; and that if it could, yet no fine can be levied of it, and if it could, yet no entry or claim could be made within five years after the fine levied, for the church was full at the time of the fine, and continued full for above 20 years, as appears upon this record: to which 2 *Roll. Abr.* 352. *pl.* 10. was cited in anſwer, to ſhew that a fine may be levied of an advowſon in groſs: and *Plowd.* 435. a claim may be made at the church. It is certain that a fine bars nothing that is not deveſted or turned to a right. It is ſtrange there is nothing in all the books to ſhew whether a fine with proclamations, according to the *ſtat. H.* 7. will bar a right to an advowſon *in groſs*; but whether it will or will not, we have now no occaſion to determine in this caſe, for it appears moſt clearly that the parties to the fine at the time of the levying thereof had nothing in the advowſon; and therefore upon that ſingle point we are all of opinion, that the plaintiff has no title, and judgment muſt be for the defendant.

The ſing'e point upon which the court gave judgment.

Note; Many caſes were cited on both ſides; but as none of them are applicable to the point upon which the court gave judgment, it would be perplexing the reader to ſet them down here.

Mather *verſus* Brinker. C. B.

IT was moved on the behalf of the defendant to ſet aſide a verdict for the plaintiff without defence at the trial, becauſe the paper-book of the iſſue delivered and paid for, varied from the record of *niſi prius* in this, *viz.* in the iſſue delivered in the beginning of the declaration the plaintiff's name was *James*, but in the record of *niſi prius* it was *John*, which was the plaintiff's right name; and in the iſſue delivered, in that part where the breach is aſſigned, it was, *not regarding his promiſes*, &c. but in the record of *niſi prius* it was *regarding his promiſes*, &c. the word *not* being omitted.

Though the iſſue delivered varied from the record of niſi prius, the court refuſed a new trial.

Curia—This is a mere *vitium clerici*, and could not poſſibly prejudice the defendant at the trial; and the caſe in 2 *Stra.* 1131. is a ſtronger caſe; ſo the rule to ſhew cauſe why the verdict ſhould not be ſet aſide was diſcharged.

Arthur Beardmore, an Attorney, - Plaintiff,

verſus

Nathan Carrington, James Watſon, Thomas Ardran, and Robert Blackmore, four of the King's Meſſengers in ordinary, - - } Defendants.

A new trial was refuſed in an action of treſpaſs and impriſonment under a ſecretary of ſtate's warrant, where 1000*l.* damages were given for ſix days impriſonment, and the entering plaintiff's houſe and ſeizing his books and papers.

THIS was an action of treſpaſs and falſe impriſonment: the plaintiff declared, that on the 11th of *November* 1762, the defendants broke and entered his dwelling-houſe at *London*, in the pariſh of *St. Stephen Wallbrooke*, in the ward of *Wallbrooke*, and continued therein four hours, diſturbed him in his poſſeſſion, broke and forced open ſeveral doors of the rooms, and broke and ſpoiled the locks, bolts and bars thereof, and broke and forced open many boxes, cheſts, bureaus, ſcrutores, writing-deſks, drawers, and cupboards of the plaintiff in his houſe, and the locks thereof, and ſearched and examined all the rooms in the houſe, and all the boxes, *&c.* ſo broke open; and read over, pryed into, and examined all the private papers, books, letters, and correſpondences of the plaintiff and his clients, whereby the ſecret and private affairs, concerns, buſineſſes, and circumſtances of the plaintiff and his clients, became and were wrongfully diſcovered and made public; and then and there ſeized, took, and carried away 500 printed charts, and a great many other papers, printed and written, (particularly mentioned,) and took and cloſely impriſoned the plaintiff for nine months, whereby he was hindered from following and tranſacting his lawful affairs and buſineſs, and was thereby put to great expences in his maintenance during his impriſonment, and in obtaining his legal diſcharge and releaſe therefrom, againſt the peace, *&c.* to the damage of the plaintiff 10,000 *l.*

The defendants pleaded firſt Not guilty; and 2dly, by leave of the court, as to the breaking and entering the dwelling-houſe, continuing there, diſturbing the plaintiff in his poſſeſſion, forcing open the ſaid doors, forcing open the boxes, cheſts, *&c.* and examining his private papers, *&c.* and carrying away the goods, *&c.* and impriſoning the plaintiff and detaining him for ſix days and an half. They plead, that the plaintiff ought not to have his action againſt them; becauſe they ſay, that before the treſpaſs, *&c.* was ſuppoſed to be committed, on the 6th of *November* 1762, the Earl of *Halifax* was, and yet is, one of the lords of the king's privy council, and one of his principal ſecretaries of ſtate, and that he on the 6th of *November* 1762, made his warrant under his hand and ſeal, directed to the defendants, four of the king's meſſengers in ordinary, by which warrant the earl did, in the king's

king's name, authorize and require them (the defendants), taking a conſtable to their aſſiſtance, to make ſtrict and diligent ſearch for the ſaid *Arthur Beardmore*, mentioned in the ſaid warrant to be the author, or one concerned in the writing of ſeveral weekly very ſeditious papers, intitled, *The Monitor or Britiſh Freeholder*, Number 357, 358. 360. 373. 376. 378, 379, and 380; *London*, printed for *J. Wilſon* and *J. Fell* in *Paternoſter-Row*, which contained groſs and ſcandalous reflections and invectives upon his majeſty's government, and upon both houſes of parliament, and him the ſaid *Arthur Beardmore* having found, to ſeize and apprehend, and to bring him together with his books and papers in ſafe cuſtody, before the ſaid Earl of *Halifax*, to be examined concerning the premiſes, and further dealt with according to law, &c. That the ſaid warrant was, that day, delivered to the defendants to be executed: that they took *C. W.* a conſtable to their aſſiſtance, and on the ſame day in the declaration, they went towards the plaintiff's houſe and found him near to it, and did there ſeize and apprehend him by virtue of the warrant; and immediately on the ſame day about 10 o'clock in the forenoon, being the time when, &c. entered his dwelling-houſe, (the door being then open,) to ſearch for, and ſeize the books, papers, &c. of the plaintiff, and to bring them with the plaintiff, before the Earl of *Halifax*, according to the exigency of the warrant; and ſo the defendants go on and juſtify the treſpaſs aforeſaid, and ſay they delivered the books, papers, &c. to *Lovel Stanhope*, an aſſiſtant of the Earl of *Halifax*, and a juſtice of peace for *Weſtminſter*, to be examined; and that they kept the plaintiff in cuſtody till he gave bail for his appearance in the King's Bench the then next term, to anſwer to ſuch matters as ſhould be objected againſt him, and then the defendants by order of the Earl of *Halifax* diſcharged the plaintiff; and they ſay, that he was neceſſarily put to expences by ſuch detainer, which is the ſame treſpaſs complained of. There is another juſtification much to the ſame purpoſe. The plaintiff replied *de injuria ſua propria*, whereupon iſſue was joined; and at the trial the jury were directed to aſſeſs damages under an idea that the treſpaſs and impriſonment committed under this warrant could not be juſtified by any plea whatſoever; and they found a verdict for the plaintiff, and gave him 1000 *l.* damages.

It was moved by the King's Serjeants that the verdict might be ſet aſide for exceſſive damages. Upon ſhewing cauſe, the Lord Chief Juſtice ſtated the ſubſtance of the evidence given at the trial as follows:

The plaintiff called his clerk *David Merideth*, who proved that on the 11th day of *November* 1762, he found all the defendants in the plaintiff his maſter's houſe, and in the private office *there*, opening the drawers and taking out papers; that they demanded

the plaintiff's file of letters, and examined them back till the year 1752; defendant *Carrington* then ſaid, "that was ſuffi-"cient." Afterwards they went into the public office, and there opened the deſk, took out the books, and looked into the ledgers, but did not break any deſks or drawers open, becauſe the plaintiff opened the ſame for them; afterwards they took the plaintiff and this witneſs away in a coach. This witneſs proved, that the plaintiff was then concerned in a great many cauſes depending, as an attorney; that he ſent for Mr. *Wimbolt* to manage his buſineſs while he ſhould remain in confinement; that no violence was offered to the perſon of the plaintiff, and that his wife was permitted to be with him; that this witneſs had actions depending againſt the defendants and Lord *Halifax*; that the defendants refuſed to permit one Mr. *Collet*, who was a client of the plaintiff, to converſe privately with him about his buſineſs; that while the plaintiff and this witneſs were confined in the houſe of the defendants, he the plaintiff was ſuffered to go into any part of the houſe, and after ſix days impriſonment, they were both diſcharged, upon entering into recognizances to appear in the King's Bench the then next term, and for their good behaviour, without paying any fees.

Mr. *Collet*, a client of the plaintiff, ſwore that the plaintiff was concerned in ſome cauſes for him at that time, and that he deſired to ſpeak with him in private about his buſineſs, but he was refuſed by the defendants to ſpeak to the plaintiff privately, and to write down what he wanted to ſay; that pen and ink were refuſed to him, but the defendants told him he might ſpeak publicly to the plaintiff in the hearing of the defendants, if he pleaſed. It was alſo proved, that the plaintiff was then refuſed the liberty of writing a letter to Mr. Alderman *Beckford*, one of the members of parliament for the city of *London*. This was the ſubſtance of the plaintiff's evidence.

For the defendants, *Lovel Stanhope* eſq. deputy ſecretary of ſtate, aſſiſtant to Lord *Halifax*, was called, who ſwore that his buſineſs was to look into, and examine all papers touching the government; that he took an oath of office, and was to pay obedience to the orders of the ſecretary of ſtate: he ſaid, that on theſe occaſions when the meſſengers have a man in cuſtody, they are not to do any thing without his orders; that Lord *Halifax* ordered the plaintiff to be bailed, and that he was continued upon his recognizance from term to term for ſeveral terms. It was admitted on all ſides at the trial, that there have been a great many precedents of warrants of the like ſort with the preſent for ſeizing perſons and papers, *&c.* and for all ſorts of crimes or offences, let the offence be what it would; and this was the ſubſtance of the defendants' evidence.

For

For the defendants it was ſaid, that for ſix days and an half confinement in a meſſenger's houſe, where little or no injury had been done either to the plaintiff's perſon, houſe, or goods, 1000*l.* were exceſſive and outrageous damages; and that if the court ſaw that they were exceſſive, they had power to grant, and would grant a new trial, even in caſes of *tort*. It is ſaid the caſe of *Wood* and *Gunſton*, *Styles* 466. *Mich.* 1655, is the firſt inſtance of granting a new trial; but this ſeems to be a miſtake, for there were new trials granted long before, as appears from this, *viz.* that it is a good challenge to a juryman to ſay that he hath been a juror before in the * ſame cauſe. *Per Holt* C. J. 2 *Salk.* 648. It is true that in *Roe* and *Hawkes*, 1 *Lev.* 97. it is ſaid by *Twiſden* Juſtice, that the new trial in *Wood* and *Gunſton* was not merely granted for exceſſiveneſs of damages, but for tampering with the jury; but in 1 *Sid.* 131. and in 2 *Mod.* 151. it is ſaid that the new trial in *Wood* and *Gunſton* was for exceſſiveneſs of damages; that was an action for words, and is a caſe in point, that the court has power to grant new trials in caſes of *tort* for exceſſive damages. Suppoſing new trials firſt began in the reign of *Charles* the Firſt, yet it appears from the year-books long before that time, that courts of juſtice, (not having then come into granting new trials,) when they ſaw reaſon for it, either leſſened or increaſed the damages, as they do in the caſe of *maihem* to this day, upon view of plaintiff's *maihem* and identifying his perſon; and for this purpoſe theſe caſes were cited from the year-books, *Mich.* 22 *Ed.* 3. *fol.* 11. *c.* 10. which was a battery; *Mich.* 3 *Hen.* 4. *fol* 4. *c.* 16. *Mich.* 7 *H.* 4. 31. *b. c.* 15. in conſpiracy, where the plaintiff releaſed part, or the court would have abridged the damages according to their conſcience; *Eaſter*, 8 *Hen.* 4. *fol.* 23. *c.* 9. the juſtice of *niſi prius* thought the damages too little, yet they would not increaſe them without ſeeing the *maihem*; *Mich.* 19 *H.* 6. 10. *b. c.* 28. *Trin.* 32 *H.* 6. 1. *a. c.* 2.; in debt, the parties were at iſſue, and the jury found for the plaintiff damages 6*s.* 8*d.* and coſts 20*s.*, the court increaſed the damages to 13*s.* 4*d.* more; *Dyer* 105. *Palm.* 314. From theſe ancient caſes it was argued, that courts of juſtice have in all times conſidered themſelves authorized to review the damages given by juries in all kinds of actions, and either to abridge or increaſe them; and ſince that practice has been diſuſed, and abridging damages by the court has been looked upon as unconſtitutional, new trials have been granted for exceſſive damages.

* *Note*; This might be in the caſe of a venire facias de novo awarded, where a miſtrial has been had.

For the plaintiff it was ſaid, that new trials can only be granted in caſes where the court can clearly ſee that the jury is miſtaken, or have miſbehaved themſelves; all the caſes of new trials tend to prove, that where the court have no meaſure to direct them, they cannot grant a new trial; there muſt be ſome infallible mark for them to go by, in the caſe; no two judges in the

world can agree what damages ought to be given in the preſent caſe, for damages here lie in ſpeculation. That the miſconduct of juries ſeems to have been the firſt occaſion of new trials. It is ſaid new trials were firſt introduced to prevent attaints; but an attaint would not lie in this caſe, for there is no poſſibility of pointing out how far the damages are exceſſive or not. The caſe in *Styles* 466. was not for exceſſive damages, but for tampering with the jury; it was ſaid in that caſe to be a *packed buſineſs*; in the caſe of Lord *Townſend* for words, 2 *Mod.* 150. the court ſaid they had no ground whereby they could meaſure the damages, and refuſed a new trial. *Aſh* and *Aſh*, *Comb.* 357. is not to the purpoſe: Lord *Holt* aſked the jury upon what ground they went, which they refuſed to anſwer him, and ſo were guilty of a miſconduct.

Curia—We are called upon, on our oaths, to ſay, whether theſe are exceſſive damages or not, and ought to have very clear evidence before us, before we can ſay they are exceſſive. The jury were directed to aſſeſs damages for the plaintiff according to the evidence given, under an idea that the defendants could not by law juſtify the treſpaſs under this warrant by any manner of plea whatſoever. It is clear that the practice of granting new trials is *modern*, and that courts anciently never exerciſed this power, but in ſome particular caſes they corrected the damages from evidence laid before them. There is great difference between caſes of damages which be certainly ſeen, and ſuch as are ideal, as between *aſſumpſit*, *treſpaſs for goods*, where the ſum and value may be meaſured, and actions of *impriſonment*, *malicious proſecution*, *ſlander*, *and other perſonal torts*, where the damages are matter of opinion, ſpeculation, ideal; there is alſo a difference between a principal verdict of a jury, and a writ of inquiry of damages; the latter being only an inqueſt of office to inform the conſcience of the court, and which they might have aſſeſſed themſelves without any inqueſt at all: only in the caſe of *maihem*, courts have in all ages interpoſed in that ſingle inſtance only: as to the caſe of the writ of inquiry in the year-book of *H.* 4. we doubt whether what is ſaid by the court in that caſe be right, *That they would abridge the damages unleſs the plaintiff would releaſe part thereof*, becauſe there is not one caſe to be found in the year-books where ever the court abridged the damages after a principal verdict, and this is clear down to the time of *Palmer's Rep.* 314. much leſs have they interpoſed in increaſing damages, except in the caſe of *maihem*; one ſide ſays no *attaint* lies (in caſes of tort) for exceſſive damages; the other ſide ſays it does. We give no opinion as to that point; but it is ſaid in an hundred caſes in the books that an attaint does lie. See 10 *Rep.* 119. Lord *Cheney's* caſe.

All,

All, or moſt of the caſes of new trials, are where juries have * miſdemeaned themſelves contrary to their oath; in the caſe in *Stiles* 466. the miſconduct of the jury was certainly an ingredient, and ſo it appears from the caſe in 1 *Lev.* 97. Some books ſay it was a trial at bar, and it is highly probable there was ſome evidence that the jury had been tampered with; and this was certainly the very firſt caſe of a new trial, and from that period the courts have exerciſed the power of granting new trials in ſeveral caſes; as when the jury find contrary to the judge's directions in point of law, when they find directly contrary to the evidence, (that is to ſay) againſt evidence all on one ſide, for if there be evidence on both ſides, the court never interpoſes in that caſe; as to granting the firſt new trial in *Stiles* 466. there is great reaſon (as was ſaid before) to think it was for miſbehaviour in the jury; it was an action for words; ſo was the the caſe of Lord *Townſend*, 2 *Mod.* 250. for words, and 4000*l.* damages, where the court refuſed to grant a new trial; and if a court could not ſay that thoſe damages were exceſſive, they can hardly ſay that damages are exceſſive in any caſe of ſlander whatever; and this caſe has never been contradicted or denied to be law. The caſe of *Aſh* and *Aſh*, *Comb.* 357. was plainly for the miſdemeanor of the jury in refuſing to anſwer the judge when he aſked what ground or reaſon they went upon: to be ſure judges are to adviſe, but not to control juries; and my Lord *Holt* and the King's Bench did right, in granting a new trial in that caſe. In the caſe of *Wilmot* v. *Berkley*, *Trin.* 31 & 32 *G.* 2. *B. R.* which was an action for criminal converſation, the jury gave 500*l.* damages againſt the defendant, and upon affidavits that he was only a clerk in low circumſtances, and unable to pay ſo large a ſum, it was moved for a new trial; but the court refuſed to grant even a rule to ſhew cauſe, becauſe in caſes of *tort* the jury are the only proper judges of the damages. We are now come to the caſe in 1 *Stra.* 691. *Chambers* v. *Robinſon*, which ſeems to be the only caſe where ever a new trial was granted merely for the exceſſiveneſs of damages only: we are not ſatisfied with the reaſon given in that caſe, and think it of no weight, and want to know the facts upon which the court could pronounce the damages to be exceſſive. The principle on which it was granted, mentioned in *Strange*, was *to give the defendant a chance of another jury:* this is a very bad reaſon; for if it was not, it would be a reaſon for a third and fourth trial, and would be digging up the conſtitution by the roots; and therefore we are free to ſay this caſe is not law; and that there is not one ſingle caſe (that is law) in all the books to be found, where the court has granted a new trial for exceſſive damages in actions for *torts*.

* The judge who tried the cauſe uſed to certify to the court the miſbehaviour. Cro. El. 289. 411. 616. 3 Keb. 351. Styl. 448. Moor 451, 452. Bacon v. Hutchinſon, Eaſter term 8 Ann. C. B. a rule to ſtay the judgment until the judge's certificate. Palm. 325. Concerning miſdemeanor of juries, ſee 2 H.P.C. 306, 307, &c. Cro. Jac. 210. c. 2.

Markham v. Middleton, Trin. 19 Geo. 2. B. R. Per curiam, the jury are the ſole judges of the damages in caſes of torts.

It

It was ſtrongly argued at the trial of this cauſe, that the jury were to meaſure the damages by what the defendant had ſuffered by this treſpaſs and ſix days and an half impriſonment; but this was thought a groſs abſurdity by the judge who preſided there.

We deſire to be underſtood that this court does not ſay, or lay down any rule that there never can happen a caſe of ſuch exceſſive damages in *tort* where the court may not grant a new trial; but in that caſe the damages muſt be monſtrous and enormous indeed, and ſuch as all mankind muſt be ready to exclaim againſt, at firſt bluſh.

The nature of the treſpaſs in the preſent caſe is joint and ſeveral; and the plaintiff has ſtill another action againſt Lord *Halifax*, who, it is ſaid, is more culpable than the defendants, who are only ſervants, and have done what he commanded them to do, and therefore the damages are exceſſive as to them: but we think this is no topic of mitigation, and for any thing we know the jury might ſay, "We will make no difference between the "miniſter who executed, and the magiſtrate who granted this "illegal warrant;" ſo the court muſt conſider theſe damages as given againſt Lord *Halifax*: and can we ſay that 1000*l.* are monſtrous damages as againſt him, who has granted an illegal warrant to a meſſenger who enters into a man's houſe, and prys into all his ſecret and private affairs, and carries him from his houſe and buſineſs, and impriſons him for ſix days. It is an unlawful power aſſumed by a great miniſter of ſtate. Can any body ſay that a guinea *per diem* is ſufficient damages in this extraordinary caſe, which concerns the liberty of every one of the king's ſubjects? We cannot ſay the damages of 1000*l.* are enormous; and therefore the rule to ſhew cauſe why a new trial ſhould not be granted muſt be diſcharged. *Per totam curiam.*

Note; Hil. term 8 G. 2. B. R. Smith v. Boucher. In treſpaſs and impriſonment damages on a writ of inquiry, 200 l. Skinner moved to ſet it aſide for exceſſive damages; but, per curiam, in tort the jury are the proper judges.

TRINITY TERM,

4 *Geo.* III. 1764.

Grey *verſus* Jones, Executrix, &c. C. B.

To a ſcire facias to ſhew cauſe why plaintiff ſhould not have execution on a judgment, the defendant pleads that plaintiff ought not to have his action inſtead of ought not to have execution, and well enough.

THIS was a *ſcire facias* againſt the defendant, to ſhew cauſe why the plaintiff ſhould not have execution of his debt and damages recovered by judgment of the court againſt her teſtator; the defendant pleaded, that the plaintiff ought not to have his *action* againſt her, becauſe ſhe ſays, that ſhe the defendant, after the recovery of the judgment, and before the ſuing forth the writ of *ſcire facias*, to wit, on the firſt day of *October* in the year of our Lord 1763, at *K.* in the county of *S.*, paid to the plaintiff the debt and damages in form aforeſaid recovered; and this ſhe is ready to verify; wherefore ſhe prays judgment if the plaintiff ought to have his ſaid action againſt her, *&c.* The plaintiff demurred, and the defendant joined in demurrer. It was objected for the plaintiff, that the plea was bad, in alledging that the plaintiff ought not to have his *action*, &c. for that a *ſcire facias quare executio non*, &c. is not an *action*. To this it was anſwered for the defendant, that a releaſe of all *actions* will bar a *ſcire facias* upon a judgment. 1 *Inſt.* 190. *b.* That all writs, whether *original* or *judicial*, which require an anſwer by way of plea, are properly actions or ſuits. 2 *Salk.* 603. 2 *Inſt.* comment on *ſtat. Weſtm.* 2. *c.* 45. A *ſcire facias* to repeal a patent is an original action.

Curia—This plea is a little informal. The old way of pleading was for the defendant to ſay, that the plaintiff ought not to have *execution*, &c. by virtue of the recovery aforeſaid, becauſe, &c.; but as we muſt take this plea to be true, and not a ſham plea, we will ſupport it if poſſible. Lord *Coke* ſays, that albeit a *ſcire facias* be a judicial writ, yet becauſe the defendant may thereupon plead, this *ſcire facias* is accounted in law to be in nature of an action, and therefore a releaſe of all actions is a good bar of the ſame. *Co. Lit.* 290. *b.* Wherever a writ requires a

plea, it is an action; and though a plea be informal in its concluſion, or beginning, yet if it prays a right judgment, courts have always rejected the informal words, and given judgments according to the right and merits of the cauſe. So the plaintiff moved for leave to withdraw his demurrer on payment of coſts, and to reply *de novo*, which was granted.

Grey againſt Sir Alexander Grant, Bart. a Member of Parliament. C. B.

In a Title aſſault and battery 200 l. damages not exceſſive, and a new trial was refuſed.

THIS was an action of aſſault and battery, tried at *Guildhall, London*, wherein the jury gave a verdict for the plaintiff, and 200*l.* damages; and now it was moved to have the verdict ſet aſide, and a new trial, for exceſſiveneſs of damages. The caſe upon the evidence was as follows:

Captain *Holland* of the ſhip *Nancy*, having brought from the *Weſt-Indies* a turtle for the plaintiff Mr. *Grey*, and which was his property, and it having been, by miſtake, delivered to the defendant, the plaintiff went to him and demanded it of him; but he ſaid he had invited ſome friends to dine with him upon it, and refuſed to deliver it, or to pay for it, and that the plaintiff might take his remedy; and pointing at the plaintiff, ſaid, "If "*that man* was to aſk a turtle of me I would give him one." The plaintiff anſwered and ſaid, this is very ungenteel; and the defendant ſhoved the plaintiff out of his houſe with his elbow, who thereupon aſked the defendant if he would waive his privilege of parliament, but the defendant refuſed to do it; plaintiff then ſaid to him, "You are a ſcoundrel;" and defendant gave him a blow upon the face, which cauſed a black eye: the plaintiff alſo demanded the turtle by a letter, and required the defendant to reſtore it: Captain *Holland* alſo informed the defendant that the turtle had been delivered to him by miſtake, and deſired him to reſtore it; but the defendant ſaid, "*A turtle I have got, and what* "*I have got I will keep.*" The captain told the defendant, if he wanted a turtle to entertain his friends, there was one then at the *Jamaica* coffee-houſe to be ſold, and he might buy *that;* the defendant anſwered, "You may buy it yourſelf, I will keep *that* "I have got." Then the plaintiff ſaid to the defendant again, "I come here to demand my right, and if you will not give it "me I will take my remedy at law, if you will waive your pri-"vilege." The defendant anſwered and ſaid, "In ſuch a "trifling buſineſs as this I will not waive my privilege, but in a "matter of property I would waive it." One *Falconer* was called as a witneſs to prove he was preſent at this diſpute, and could not remember that any blow was ſtruck by the defendant; he had forgot every thing which made in favour of the plaintiff, but remembered

membered every thing which made for the defendant; ſo it was a meaſuring caſt whether a blow was ſtruck or not; however, the jury found for the plaintiff, and 200*l.* damages.

Curia—This was a quarrel between two gentlemen, and has been properly tried by a ſpecial jury of merchants of *London*, who are the proper judges of the damages; when a blow is given by one gentleman to another, a challenge and death may enſue, and therefore the jury have done right in giving exemplary damages; the plaintiff has been uſed unlike a gentleman by the defendant in ſtriking him, withholding his property, and inſiſting upon his privilege, all of them tending to provoke him to ſeek his revenge in another way than by law, and therefore we think the damages are not exceſſive. Rule to ſhew cauſe why a new trial ſhould not be had diſcharged *per totam curiam.*

MICHAELMAS TERM,

5 *Geo.* III. 1764.

Cox *verſus* Rolt. C. B.

Practice. The court refuſed to permit a defendant to add the plea of the ſtatute of limitations.

THIS was a ſpecial action upon the caſe againſt the defendant for deflowering the plaintiff's daughter *per quod ſervitium amiſit*; the defendant having pleaded the general iſſue, now moved for leave to withdraw that plea, and to plead the ſame plea again, together with the plea of the ſtatute of limitations; upon an affidavit made by the defendant's attorney, that at the time when he was bound to plead by the rule of the court, and then pleaded the general iſſue only, he was not fully inſtructed by his client what to plead; and upon citing a ſimilar caſe in *B. R.* of *Vile* v. *Barry*, wherein that court permitted *this*, upon an affidavit made by the very ſame attorney, that he was preſſed for a plea, and was obliged to plead before he was inſtructed, and therefore pleaded the general iſſue to prevent judgment.

Upon

Upon ſhewing cauſe it was inſiſted for the plaintiff, that the general rule of both the courts of *B. R.* and *C. B.* is to permit a defendant to withdraw a ſpecial plea, and plead the general iſſue, but not *vicè verſâ*; and many caſes were cited to ſhew this to be the practice, which was agreed to be ſo by the court; and it was ſaid that in the caſe of *Vile* v. *Barry* the attorney was ſurpriſed, not inſtructed, and pleaded the general iſſue to prevent judgment; and for that reaſon the court of King's Bench deviated from the general practice in that particular caſe; but here the affidavit made by the ſame attorney does not go ſo far, and therefore the rule ought to be diſcharged.

Curia—It is a good maxim, that the law will rather ſuffer a particular miſchief than a general inconvenience; general rules of practice muſt be ſtrictly obſerved for the ſake of certainty, or practiſers will be negligent. Indeed, under very ſpecial circumſtances, the court will permit a defendant to add a ſpecial plea; in a late caſe of public concern, the defendant being adviſed by his counſel that he might give the ſecretary of ſtate's warrant in evidence upon the plea of the general iſſue, pleaded *that* plea only; the judge before whom that cauſe was tried, having been of a contrary opinion, it was afterwards moved in a ſimilar caſe of *Wilkes* v. *Webb*, to withdraw the general iſſue, and plead the ſame plea again, and a ſpecial juſtification under the ſecretary of ſtate's warrant, which was allowed by the whole court; the defendant, at the time of pleading the general iſſue only, being ill adviſed by his counſel, and not knowing then the opinion of the judge who tried the former ſimilar cauſe; beſides, *that* ſpecial plea was allowed to try the real merits of the caſe, but the plea of the ſtatute of limitations is not to be favoured, becauſe it excludes the merits; the court gives leave to add a plea for the furtherance of juſtice, but to permit this plea of the ſtatute of limitations would not be ſo. The rule was diſcharged *per totam curiam.* Serjeant *Hewitt* and *Davy* for the defendant, Serjeant *Burland* for the plaintiff.

Firebraſs, on the Demiſe of Jane Symes, Widow, *verſus* Pennant. C. B.

The grant of a lord of a manor of copyhold lands to his wife immediately is void.

EJECTMENT of lands in the county of *Somerſet*, tried at the aſſizes, 1 *April* 1763; verdict for the plaintiff, ſubject to the opinion of the court upon this caſe; which ſtates, that the premiſes in queſtion are parcel of the manor of the rectory of *Compton Martin* in the county of *Somerſet*, and have been held by copy of court-roll of that manor time out of mind, of which manor the rector of the ſame rectory for the time being is the lord.

That

That the Reverend *William Symes* clerk, on the 20th of *February* 1726, was rector of the ſaid rectory, and lord of the manor of the ſame rectory; that the premiſes in queſtion, being in the hands of the ſaid *William Symes* the lord upon the death of the laſt tenant thereof, as rector of the ſaid rectory, and lord of the manor, did, on the 20th of *February* 1726, demiſe the premiſes in queſtion to the leſſor of the plaintiff *Jane Symes*, by copy of court-roll; to hold to the ſaid *Jane Symes*, *Richard Symes*, and *Chriſtian Symes*, for the term of their lives, and the life of the longeſt liver of them ſucceſſively, according to the cuſtom of the ſaid manor, as they were named in the ſaid copy.

That at the time of the demiſe to the ſaid *Jane Symes*, ſhe was the wife of the ſaid *William Symes* lord of the manor; that the ſaid *William Symes* died in the year 1756, and that the defendant upon his death became, and ſtill is, rector of the ſaid rectory and lord of the manor, and thereupon entered into the premiſes in queſtion, and is in poſſeſſion thereof.

The queſtion is, Whether the demiſe by copy of the court-roll, by a lord of a manor to his wife, be good in law or not?

This caſe was argued twice at the bar; and being quite new, no authority could be cited to ſhew, whether the grant of this copyhold immediately from the huſband (lord of the manor) to his wife was good or bad; nor did it appear to the court, that there was ever any ſuch cuſtom in *this*, or any other manor, for a lord to grant lands by copy of court-roll to his wife immediately, without the intervention of a third perſon, and therefore it would be nugatory to ſet down the caſes cited by the counſel who argued; for the court cited no caſe that I heard.

Curia—As this was a proviſion by a huſband for his wife, we ſhould be glad (if poſſible) to get over that maxim in law, "*that* "*a huſband and wife are one perſon*," and therefore cannot grant lands to one another; ſo where there is no particular cuſtom in a manor, the common law muſt take place; this is an original voluntary grant by the huſband to the wife, who cannot by law take immediately from him, any more than a monk who is dead in law, and conſidered as no perſon; ſo here is no perſon to take, for the wife and huſband are only one perſon. We are dealing with a fundamental maxim of the common law, and might as well repeal the firſt ſection of *Littleton*, as determine this grant from the huſband immediately to the wife to be good, and where there is not ſo much as the ſhadow of a perſon intervening. The *poſtea* was ordered to be delivered to the defendant, *reluctante totâ curia.*

Wilkes, Esq. against The Earl of Halifax.

The title of the declaration made agreeable to the truth of the fact.

THE *pluries distringas* to compel the earl to enter his appearance was returnable on the morrow of *Saint Martin* in this term; who then appeared, after having delayed the plaintiff by essoining and privilege of parliament for several terms, whereupon the plaintiff declared of this term of *Saint Michael* generally, which is considered by relation as a declaration of the first day of the term in law. During the delay in this cause, and before the earl could be compelled to appear, Mr. *Wilkes* was outlawed upon an information filed by the attorney or solicitor-general, and therefore the defendant wanted to plead the outlawry in abatement, which, being a dilatory plea, must be pleaded within four days from the time of the filing the declaration, or it cannot be pleaded at all; and if the declaration is to be considered as of the first day of the term, (which it seems it is in point of law,) then the defendant was too late to plead this dilatory, and it cannot now be received; and therefore it was moved on the part of the defendant, that the plaintiff might be obliged to intitle his declaration, "Of the morrow of *Saint* "*Martin* in the term of *Saint Michael* in the 5th year of the "king," according to the truth of the case; for the earl did not appear till that day, and before he was in court the plaintiff could not declare against him.

Upon shewing cause, it was said for the plaintiff, that the intitling his declaration as he has done, of the term generally, is not erroneous, and therefore he has a right to intitle it in this manner; that the court pays great regard to legal fictions. The plaintiff died the first of *December*, judgment was entered the 6th, and held good by relation. 2 *Barnes* 205. The defendant died the 13th of *February*, the judgment signed the 21st held good. 2 *Barnes* 208. and S. P. 209. defendant died 20th of *April*, on the 21st of *April* application was made on an affidavit from *Essex* (sworn 19th of *April*) for leave to enter up judgment on an old warrant of attorney, a rule was made, and judgment was signed the 21st of *April*. 2 *Barnes* 212. That the defendant here having delayed, the plaintiff is not entitled to favour, and if he had done as he ought to have done, he would have been in court four terms ago.

For the defendant it was said, that they did not ask this as a favour, but that the court would order the records to be made and entered according to the truth of the facts in the proceedings, and they have often done this. 2 *Barnes* 271. That the plaintiff who is an outlawed person is no more entitled to be favoured than the defendant; the words in the titles of declarations

tions are the words of the court, and they will ſee that they are true according to the act done in court. 1 *Barnes.* 10.

Curia—The defendant does not aſk this alteration to be made in the title of the plaintiff's declaration as a matter of favour, but of right; and if he has that right, we are bound *ex debito juſtitiæ* to make this rule abſolute. Can it be ſaid that the defendant has forfeited his right of pleading in *abatement*, or any *dilatory*, when four days are not paſſed ſince he was in court, and before *that* time the plaintiff could not, by law, declare againſt him, and the defendant may plead whatever plea he pleaſes; therefore the rule muſt be made abſolute, and the title of the declaration, according to the truth, and fictions in law ſhall never do injuſtice, for *in fictione juris ſemper eſt æquitas.*

EASTER TERM,

5 *Geo.* III. 1765.

Smyth *verſus* Reynolds. C. B.

TROVER for 150 caſks of butter. Upon Not guilty, there was a verdict for the plaintiff, ſubject to the opinion of the court upon this ſhort caſe: the plaintiff's ſhip lying in the river *Thames* with the butter on board brought from *Ireland*, the defendant (a cuſtom-houſe officer) went on board, and before the hatches were opened, or bulk broken, or any goods landed, or offered to ſale, ſeized the butter as contraband. The ſingle queſtion was, Whether the ſeizure was lawful?

There is no right to ſeize contraband goods in the river before the goods are landed or offered to ſale.

Curia—We are all of opinion that the ſeizure was unlawful, and that there is no right to ſeize, unleſs the goods be landed, or offered to ſale; the mere bringing the ſhip into port gives no right to ſeize; and this is our opinion grounded on the *ſtat.* 18 *Car.* 2. *c.* 2. and 20 *Car.* 2. *c.* 7.; ſo there was judgment for the plaintiff *per totam curiam.*

Bartlet *verſus* Robins. C. B.

Coſts not allowed where defendant pleads a tender of half-a-guinea, which is found againſt him, if the judge certifies upon the 43 Eliz. that damages are under 40 s.

CASE upon *aſſumpſit*. The defendant pleaded a tender of half-a-guinea which the plaintiff took out of court, and proceeded for more. There was a verdict for the plaintiff, damages 1 *l.* 1 *s.*; and the judge certified under the *ſtat.* 43 *Eliz. cap.* 6. that the damages to be recovered in this action did not amount to 40 ſhillings, but to 1 *l.* 1 *s.* and no more. And now Serjeant *Burland* moved that the prothonotary might tax the plaintiff full coſts *de incremento*; alledged that the judge ought not in this caſe to have certified, becauſe the defendant has pleaded a tender, which being found falſe, he has by his own wrong pleading increaſed the coſts; ſo on the other ſtatutes which ſay that the plaintiff ſhall not recover coſts if the judge does not certify, yet where there is ſpecial pleading he is entitled to his coſts; and if a defendant remove a cauſe out of an inferior court, he is not entitled to this certificate. becauſe it was his own fault to remove the cauſe, and thereby put the plaintiff to greater expences.

Chief Juſtice—I believe that in ſome caſes ſuch a rule has obtained, becauſe the defendant by his own fault has rebutted his right to coſts, by bringing another matter in queſtion.

Clive Juſtice—In an action for words, "that the defendant ſtole a hen," the defendant juſtified, there was a verdict for the plaintiff, and damages leſs than 40 *s.* The court of King's Bench refuſed to allow more coſts than damages.

Chief Juſtice—This action is clearly frivolous, and the plea of tender does not alter the caſe; ſo the rule for full coſts was denied.

Engliſh *verſus* Burnell and Ingham. C. B.

Replevin. Avowry that defendants were owners and occupiers of certain meſſuages, and preſcribe for common in the locus in quo, and avow damage feaſant, this is a bad preſcription.

REPLEVIN for taking plaintiff's cattle: avowry that *Burnell* was ſeiſed in fee and in poſſeſſion of a certain ancient meſſuage, and that *Ingham* was tenant and occupier of another ancient meſſuage, and that *Burnell* as owner and occupier of the meſſuage then in his poſſeſſion, and *Ingham as owner and occupier* of the meſſuage then in his poſſeſſion, and all other occupiers of the ſaid meſſuages have had time out of mind, and of right ought to have common of paſture in the *locus in quo*, &c. and avow they took the cattle *damage feaſant*; the plaintiff pleads in bar, and traverſes the right of common; and thereupon iſſue is joined, and a verdict was found for the defendants,

Serjeant

Serjeant *Nares* for the plaintiff moved in arreſt of judgment, and objected that the avowry is ill, the preſcription for right of common being confined to the *occupiers* of the meſſuages, who have but a mere temporary, and not a permanent intereſt therein; for that ſuch preſcriptions ought to be made by thoſe who have a permanent intereſt. 22 *E.* 4. 17. Tenant for life cannot preſcribe, and where there is no perpetuity there can be no preſcription. *Bro. Preſcription, pl.* 77. 6 *Rep.* 60. *a. Gateward's* caſe, the third reſolution. This is contrary to the nature and quality of common, for every common may be either ſuſpended or extinguiſhed, but ſuch common as this ſhall be *ſo* incident to the perſon (the occupier) that no certain perſon can extinguiſh it; but *as* ſoon as *he* who releaſes it, *&c.* removes, the new occupier ſhall have it. *Gateward's* caſe, 6 *Rep.* 60. *a.* the fourth reſolution. *Hunt* v. *Beaucham*, in *Eaſter* term 32 *Geo.* 2. *B. R.* treſpaſs; plea, that every *inhabitant* of the pariſh reſiding and dwelling in the pariſh, and being an *occupier* of an ancient meſſuage, had a right of common, *&c.* this was determined by *Gateward's* caſe to be a bad preſcription. *Aubye* v. *Fawkner*, *Cro. Eliz.* 445. replevin; the defendant avows for *damage feaſant*; the plaintiff juſtifies, for that he had a cloſe adjoining to the defendant's cloſe, and that the defendant and all the *occupiers* of the ſaid cloſe from time whereof, *&c.* had uſed to repair the fences, and for not ſufficiently repairing, the beaſts entered, *&c.* Iſſue was taken upon the preſcription, and found for the avowant, and in arreſt of judgment it was held, that the preſcription, *that every occupier*, &c. was too general. Indeed it is ſaid in that caſe, that it was aided by the ſtatute of jeofails, but in ſubſequent determinations *that* rule is not allowed *Crouther* v. *Oldfield*, 1 *Salk.* 364. That a title defectively ſet forth, may be cured by a verdict; but a bad title ſet forth never can be cured. A preſcription that the poſſeſſors ought to repair fences, was held bad, and judgment arreſted after verdict. 2 *Roll. Rep.* 288. *Palmer* 331. S. C. *Cro. Jac.* 665. S. C. *Weekly* v. *Wildman*, 1 *Ld. Raym.* 405. He obſerved the particular manner of joining the two defendants in one avowry, that though it might be good as to one of them, (*Burnell*,) who is ſeiſed in fee, yet it cannot be good as to the other, and a plea cannot be good in part, and bad in part. 1 *Stra.* 509. 1 *Saund.* 28. 2 *Cro.* 27.

Bro. Preſcription, pl. 76. in treſpaſs; the *inhabitants* preſcribe for *common*, &c. *Per totam curiam*—Tenants at will cannot preſcribe *in jure proprio, ſed in jure domini ſui*; but the defendant may ſay, that the uſage of the vill of *D.* hath been from time whereof, *&c.* that the inhabitants have had a way over the land of the plaintiff to the church, *&c.* or that they have been quit of toll to the mill, *&c.* Tenants at will cannot preſcribe in a thing which endureth *in perpetuum*, &c. but in the uſage and cuſtoms of the vill; *ſo nota de diverſitie.* See alſo *Bro. Preſcription, pl.* 28. Cro. Jac. 152. 2 Show. 195.

Burland Serjeant *contrà*—In this avowry, one of the defendants avows as *owner* and *occupier* of a tenement, and the other as *occupier*; the iſſues are found for the defendants; the plaintiff did not take advantage by demurring, as he might have done, therefore he is not entitled to favour. Admitting the argument on the other ſide, we have ſufficiently ſet forth a title in the avowants; where the plaintiff complains of an injury done to his ſoil, there the defendant, in his juſtification, muſt preſcribe in a *que eſtate*, becauſe the plaintiff complains of an injury done to his ſoil, but in *treſpaſs* for taking goods, it is ſufficient for the defendant to ſay, that he was *poſſeſſed* of the *locus in quo*, and the goods were *damage feaſant*: ſo for taking cattle, a juſtification that the defendant was *poſſeſſed* of a cloſe and entitled to common, and took the cattle *damage feaſant* is good, and there is no difference between *replevin* and *treſpaſs* for taking cattle only; for replevin is only an action for taking the cattle. In eaſements, &c. it is ſufficient to declare upon the poſſeſſion. If an avowry ſhews the
1 Vent. 187. *locus in quo* belongs to the plaintiff, it muſt ſet forth a *que eſtate*, otherwiſe it need not; and though an avowry is informal, it is cured by verdict; our title is only defective in the ſetting it forth, and ſo is cured, as in *Cro. Eliz.* 445.

Hewitt Serjeant of the ſame ſide with the defendant—There are two queſtions; 1. Whether the avowry be good? 2. Whether it be aided by the ſtatute after verdict? Here the injury complained of, is only for taking the plaintiff's cattle, no right to the cloſe is ſet forth; againſt a wrong doer it is ſufficient to ſet forth
1 Salk. 335. a *poſſeſſion*, as in the caſe of a *way*, *common*, &c.; ſo in all declarations, and an avowry is in the nature of a declaration. 2 *Ld. Raym.* 923. In actions againſt wrong-doers, it is enough to ſhew *poſſeſſion*.

Ld. Ch. J.—Have you any caſe to ſhew that an avowry is conſidered as a declaration? Do you argue only on principle?

Hewitt Serjeant—Only on principle. Diſtreſs is the firſt proceſs in this *replevin*, and the avowry is the declaration. 11 *Mod.* 219. *Harrington* v. *Buſh*, *ſtat.* 32 *H.* 8. *c.* 30. Here the true giſt of the action has been tried, and it appears the plaintiff has been a wrong-doer, *Brown* v. *Bookill*, *Skin.* 115. 213. The reaſon there given is, that it muſt be ſuppoſed the judge at the trial made him ſhew his title. 1 *Saund.* 216, 19. By pleading over, the plaintiff here has waived the objection. In *Gateward's* caſe, the title was ſuch as he could not have as an *inhabitant*, but might as an *occupier*. *Freeman* v. *Jugg*, *B. R.* *replevin*, for taking a horſe; the defendant avowed that he was *poſſeſſed* of the *locus in quo*, and took the horſe *damage feaſant*; plea in bar, iſſue joined, and trial had. In arreſt of judgment, it was objected, that the defendant in his avowry ought to have ſhewn the owner of the fee; but the court held the avowry was cured by the plaintiff's pleading over.

Nares

Nares Serjeant in reply—It ſeems to be admitted by the laſt caſe cited by my brother, that *poſſeſſion* is not ſufficient in an avowry. I admit that in treſpaſs for taking cattle *poſſeſſion* is a good plea, but in *replevin* it is otherwiſe, for there the avowant muſt ſhew a title in fee, or derive his title from him who has the fee, to entitle him to have a return of the cattle; and the *ſtat.* 11 *Geo.* 2. *c.* 19. was made to excuſe the avowant from ſhewing his title in an avowry for a diſtreſs for rent. 2 *Stra.* 847. though in the caſe of eaſements you may declare upon the *poſſeſſion*, yet you muſt prove a preſcriptive right at the trial. After a trial, the court will only preſume every thing was proved *to make good the title pleaded*, but not to make a *good title*.

Chief Juſtice—Is there any caſe to ſhew that poſſeſſion is ſufficient in an avowry? The court took time to conſider till the latter end of the term, when the Lord Chief Juſtice delivered the opinion of the court.

Lord Chief Juſtice—It is objected that the right of common is laid in the *occupiers* only. The defendant's counſel did not pretend it would be good where it is neceſſary to ſet forth a title; for it is now ſettled law, and the reaſon in *Gateward's* caſe is convincing. The anſwer given is, that in *treſpaſs* there is no occaſion to ſet forth a title againſt a ſtranger, but the defendant's counſel produced no caſe to ſhew that *replevin* is ſimilar to *treſpaſs*.

In *replevin* the avowant muſt juſtify, and ſhew by what authority he diſtrains; the power of diſtreſs is an extraordinary power, and almoſt the only caſe wherein a party is his own carver. There are many caſes directly in point, *Yelv.* 148. there is a great difference between *replevin* and *treſpaſs*, becauſe the avowant being to have a return of the cattle muſt ſhew a title *in omnibus*; otherwiſe in *treſpaſs*, in which the defendant need only plead an *excuſe*. 2 *Lutw.* 1231. the avowant muſt alledge what eſtate he is ſeiſed of, therefore this avowry is bad; the queſtion is, whether the verdict will cure it? the diſtinction is between a *title defectively ſet forth*, and a *defective title*; where a title is *defective*, the ſtatutes of *jeofails* do not extend to it, and the jury cannot examine into what was not ſet forth; the ſtatutes therefore cannot aid it, and *per totam curiam*—The judgment muſt be arreſted.

Johnson *versus* Kennion. C. B.

Bill of exchange. In an action by the indorsee against the drawer, though the indorsor has paid part of the money to the indorsee, he may recover the whole sum in the bill against the drawer.

ACTION upon the case upon a bill of exchange brought by *Johnson* the indorsee against *Kennion* the drawer thereof, payable to *Benson*, or his order, who indorsed it to plaintiff in order to get it discounted; plaintiff delivered the bill to *Baldwyn*, who advanced the whole money; *Benson* paid 232 *l.* to the plaintiff, then *Baldwyn* re-delivered the bill to the plaintiff, who repaid him the residue. There was a verdict for the whole 1000 *l.* in the bill. Upon shewing cause why there should not be a new trial, the plaintiff the indorsee having been paid part of the sum in the bill;

Chief Justice—Consider the nature of these contracts; they are negotiable bills passing through the hands of divers persons; and though there are many indorsements on the bill, yet there is but one security for one sum of money, and he who has the possession of the bill may bring his action; where there are many indorsors, the indorsees have a right of action in succession; but there is but one right of action under the bill against one person at one and the same time. The bill being in one indorsee's hand, the indorsor pays a part, and the objection is, that this ought to be considered as a payment for the drawer; but I think *toto cælo* it is otherwise, because the indorsor is no servant, nor is agent to the drawer. Suppose *Benson* had paid the whole 1000 *l.* to *Johnson*, and *Benson*'s name had not been struck out, and an action had been brought in *Johnson*'s name against the drawer, will you say the action will not lie? Suppose after a recovery against *Kennion* he had run away, could *Benson* have had a right to come against *Johnson* before any satisfaction? the bill is a security for every indorsor as *cestuy que trust*; I think it is a plain case that *Johnson* has a right to recover the whole money, and when he receives it, he will have received 232 *l.* of *Benson*'s money; the defendant has no reason to complain.

Bathurst J. of the same opinion. You cannot split the bill so as to subject the party to different actions.

Gould J.—The thing is very clear, when the defendant has paid the 1000 *l.* there is an end of the contract. Where the *drawer* of the bill has paid part, you may indorse it over for the residue; otherwise not, because it would subject him to variety of actions. A new trial was denied.

Doe, on the Demiſe of Neale, *verſus* Roe. C. B.

Proceſs. Service of an ejectment what is good.

IN ejectment: Serjeant *Jephſon* moved for judgment againſt the caſual ejector upon an affidavit that a perſon tendered a copy of the declaration to the wife of the tenant in poſſeſſion in the ſhop, and would have read to her the notice to appear, but ſhe refuſed to hear it, or to receive the declaration, and ſaid ſhe would have nothing to do with it, and turned out of the ſhop, and ſhut the door after her, whereupon the declaration was left in the ſhop.

Bathurſt and *Gould* Juſtices (only in court) thought this not quite ſufficient ſervice, as the notice ought to have been read aloud in the ſhop, though no perſon was there; but as this was a hard caſe, they made a rule to ſhew cauſe why this ſhould not be deemed good ſervice.

In a few days afterwards the court made a like rule, on an affidavit that the tenant kept out of the way to prevent being ſerved, on the motion of Serjeant *Hewitt*.

TRINITY TERM,

5 *Geo.* III. 1765.

Roſs *and* Walker. C. B.

Prohibition. A pilot is a mariner, but cannot ſue in the Admiralty, if his work be within the body of a county.

A PILOT was ſent for to *Graveſend*, to come on board the ſhip *Oxford*, being in *Sea-Reach*, who accordingly went on board of her there and piloted her from thence to her moorings at *Deptford*, and for his wages due to him upon that account has inſtituted a ſuit in the court of Admiralty; and now it was moved for a prohibition upon a ſuggeſtion that both the contract and the work done were within the body of the county, and an affidavit that *Sea-Reach* is within the body of the county.

Againſt a prohibition it was ſaid that a pilot is a mariner, and a prohibition ſhall not go to the Admiralty to ſtay a ſuit there, for mariners wages, though the contract was upon the land. 1ſt, Becauſe it is more convenient for them to ſue there, becauſe they may all join. 2dly, According to their law, if the ſhip periſh, the pilot loſes his wages. 1 *Vent.* 146. 1 *Salk.* 31. 1 *Ld. Raym.* 632. 1 *Vent.* 343. 2 *Vent.* 181. That if a contract be with ſailors on the land to enter on board and go an intended voyage, and they according enter on board, rig the ſhip, and do work and labour there in the river, though the voyage never proceeds, they may ſue in the Admiralty for their wages, and a prohibition ſhall not go, notwithſtanding both the contract and the labour was done within the body of the county. 2 *Ld. Raym.* 1044, 5. *Wells* v. *Oſman.* 6 *Mod.* 238. S. C. In 2 *Stran.* 858. the maſter cannot ſue in the Admiralty for his wages, but all the mariners may. In 1 *Ld. Raym.* 632. the ſame diſtinction is taken, and it is out of compaſſion to theſe poor men that they may all join in the court of Admiralty; they do not know who is the maſter, or is to pay them, ſo they proceed againſt the ſhip. That there is no doubt but a pilot is a mariner: the maſter covenants with the owners to find a pilot, and they to pay him. *Molloy, cap.* 9. *ſ.* 2. *Malyn's Lex Mercat.* 104. ſpeaks of a pilot's being a mariner, a ſurgeon during the

the voyage is a mariner. Suppoſe an *Indiaman* in diſtreſs in the river, and 40 mariners are neceſſary to be had from the land, muſt theſe poor men be obliged to bring ſeveral ſuits at common law? it would be very hard.

For a prohibition it was ſaid, that as it was now clear on all hands that both the contract and the labour were within the body of the county, the Admiralty had no juriſdiction in this caſe, yet that it muſt be admitted, that if the contract be at land for an intended voyage, and the mariners go on board, rig the ſhip, *&c.* though the voyage never proceeds, the Admiralty ſhall have juriſdiction; but where both the contract and the whole voyage or work is within the body of the county, as it is in the preſent caſe with reſpect to the pilot, the Admiralty has no juriſdiction. *Litt. Rep.* 166. *Aſhton's* caſe. 2 *Brownl.* S. C. *Hob.* 213. 4 *Inſt.* 136, &c. *Godbolt* 261. and the caſes in 2 *Ld. Raym.* 1044, 5. 6 *Mod.* 238. cited on the other ſide, were relied on for a prohibition, S. C. 12 *Mod.* 405.

Curia—We are much inclined to favour the pilot (who is a moſt neceſſary mariner) if we could do it without breaking through the rules of law, becauſe it would be for the benefit of trade, and ſave great expence to theſe poor men; it is eſtabliſhed that every officer and common man who aſſiſts in navigating the ſhip, (except the maſter,) even the ſurgeon, is a mariner, and may ſue for wages in the court of Admiralty; for the ſurgeon preſerves thoſe who preſerve the ſhip, and whether he is to be paid a groſs ſum, or ſo much *per* month, it is the ſame thing. Though both the contract, and work done on board, in the caſe of *Wells* and *Oſman*, 6 *Mod.* 228. were within the land; yet that caſe was very rightly determined, becauſe the contract was to manage the ſhip for an intended voyage, which did not proceed on account of ſome diſagreement among the owners: the mariners were in no fault; and the true reaſon why ſeamen may ſue for their wages in the Admiralty, though the contract be at land, is, that *there* the ſhip itſelf is made liable to them; and beſides, *there* they may all join in the ſuit, neither of which may be at the common law, and yet much for the eaſe of poor ſeamen; *6th Modern* has reported this caſe very fully, and he is the beſt reporter who reports fully.

But there is no inſtance to be found* where the contract was at land, and to do the work on board, within the body of ſome county; that the common law courts have ever permitted the Admiralty to have juriſdiction; and that is this caſe, the contract with this pilot was made at land, and to do work within the body of the county, and not at ſea, or upon a voyage; and though it is (and muſt be) laid in the libel that they were both on the high ſeas, yet we muſt now take the ſuggeſtion to be true, that both the contract and the work were at land. A prohibition was granted *per totam curiam*. Serjeant *Nares* for the plaintiff, Serjeant *Hewitt* for the defendant.

* *Note*; Of all contracts and things done within the bodies of counties as well by land as by water, the admiral's court ſhall have no juriſdiction. Statute of 15 R. 2. c. 3.

Totterdell and Harris, Maſters of the Taylors' Company at Bath, *verſus* Glazby. C. B.

Where there is a cuſtom to exclude foreigners from exerciſing a trade in a corporation, and a by-law to ſupport the cuſtom, gives a penalty to any but the corporation, it is bad. *N. B.* Except in London to the Chamberlain. 5 Rep. 63. Hollings v. Hungerford. Cited in my Reports, B. R. Mich. 22 Geo. 2. 2 Ld. Raym. 1129. Salk. 203. 6 Mod. 21.

ACTION of debt for a penalty upon a by-law. The declaration ſets out that the city of *Bath* is a corporation, and ſtates the charter and power to make by-laws; that there has been a guild and company of taylors, free of the city, and two maſters for the government thereof, and a cuſtom, time out of mind, in that city, that no perſon whatever ſhall exerciſe the trade of a taylor within that city, unleſs he be free of the ſaid trade and city; and that a by-law has been made by the mayor, aldermen, and commons of the city of *Bath*, for the better preſerving the ſaid cuſtom, which gives a penalty of 3*s.* 4*d.* *per* day againſt any one exerciſing the trade not being free thereof, to be levied by diſtreſs, or recovered by action of debt, by the *maſters* of the ſaid company for the time being, for the uſe of the poor of the company of taylors (ſetting forth the by-law exactly); that the defendant not being a freeman of the ſaid trade or city, exerciſed the trade of a taylor there; whereby an action accrued to the plaintiff to have and demand, *&c.*; upon *nil debet* there was a verdict for the defendant; and now it was moved that a new trial might be had for miſdirection by the judge, and for not receiving evidence which ought to have been received.

Without entering into the queſtion, whether the judge had miſdirected the jury, or had refuſed evidence which he ought to have received, it was objected, that, upon the face of the record, the by-law is a bad one; and if the plaintiff had a verdict, he could not have judgment, therefore it would be abſurd and nugatory to ſend this matter to be tried again. The objection is, that theſe taylors are not the corporation of *Bath*, and therefore the by-law is ill in giving the action to the maſters of the taylors' company for the time being, who are ſtrangers to the corporation of *Bath*; the by-law ought to have given the action to the corporation of *Bath*; for to give it to any body elſe, is like aſſigning a *choſe in action*, which the policy of the law will not endure. *Co. Lit.* 214. *a. Bodwick* and *Fennell*, *Mich.* 22 *Geo.* 2. *B. R. Ellington* v. *Cheney*, 9 *Geo.* 2. upon this objection, a new trial was denied by the court.

MICHAELMAS TERM,

6 *Geo.* III. 1765.

Fox *verſus* Smith. C. B.

DEBT upon a bond to perform an award. The defendant prays *oyer* of the condition, which is, that if the defendant ſhall perform the award of *John Thomſon* (and two other arbitrators named therein) choſen between the parties to determine of and concerning all and all manner of cauſes, actions, ſuits, troubles, debts, claims, and demands whatſoever, *&c.* depending between the ſaid parties at any time before the date of the ſaid bond, ſo as the ſaid award, *&c.* of the ſaid arbitrators be made in writing, *&c.* on or before ſuch a day, then, *&c.*; which being read and heard, the defendant pleads that the arbitrators made no award between the parties, according to the form and effect of that condition; and this he is ready to verify; wherefore, *&c.*: the plaintiff replies, that the arbitrators before the day in the condition for that purpoſe ſpecified, to wit, on ſuch a day made a certain award in writing under their hands, *&c.* of and concerning the premiſes in the ſaid condition above ſpecified, and by their award ordered and awarded that the defendant ſhould pay to the plaintiff 16*l.* 10*s.*, and all ſuch coſts, charges, and expences as the plaintiff had been put unto in a certain cauſe then depending between the parties, at a certain day then to come, and that thereupon they ſhould give each other general releaſes; and then the plaintiff aſſigns a breach in the non-payment of the ſaid 16*l.* 10*s.*; upon which replication the defendant demurred in law. And the counſel for the defendant took ſeveral exceptions; 1ſt, that no certain coſts, charges, and expences are ſet down and averred; 2dly, that the award doth not mention any cauſe between the parties depending in any certain court, and it might be in an inferior court, *&c.*; and 3dly, that there is nothing awarded to the defendant but a releaſe, and that is not to be made until all the reſt be performed; and although the award is good for the 16*l.* 10*s.*, which is certain, yet the coſts, charges, and expences of the ſuit are totally uncertain and void, and the award in that part can never be performed, and ſo the releaſe to the defendant can never be made, for it is to be made *thereupon*.

Debt upon an arbitration-bond. Plea, No award. Replication ſhews an award to pay 16l. 10s. and coſts, *&c.* Breach aſſigned for non-payment of the 16l. 10s. only, good.

Poſt, Hil. 6 Geo. 3. Addiſon v. Gray, S. P.

3 Lev 413. and Nott and Long, B. R. — 9 Geo. 2. 1 Salk. 75.

It

1 Lut. 524. 2 Vent. 242. Comyns 328.

It was anſwered by the counſel for the plaintiff, that the breach is well aſſigned in the replication for non payment of the 16*l.* 10*s.* only; and in that part the award is good and certain, whether it be void or not as to the coſts and charges is not material, for an award may be good in part and bad in part, and the breach is aſſigned in the non-performance of that part which is good.

Ld. Ch. Juſt.—If the award be good in that part, whereof the breach is aſſigned, (the defendant having admitted the breach by his demurrer,) the plaintiff muſt have judgment. The firſt objection goes too far; a benign conſtruction of awards hath taken place in modern times, though formerly courts of juſtice looked nicely and critically into them. We will intend, that by coſts, charges, and expences, are meant ſuch coſts, &c. as courts take notice of by their officer. It might be ſaid, that all coſts between the attorney and client are meant thereby, but we will take the words of the arbitrators to mean the ſame as if they had been the words of the court. The ſecond objection is, that it does not appear in what court the cauſe was, and it might be in an inferior court, where there may be no proper officer to tax the coſts ſo as to aſcertain them to this court; but we will preſume the cauſe was in a ſuperior court, and the rather, becauſe the defendant might have ſhewn by pleading, that the cauſe was in an inferior court. As to the third objection, a recovery in this action will be a bar to any future action brought on this bond for the non-payment of the coſts, &c. after they are aſcertained.

Clive J.—I am of the ſame opinion.

Bathurſt J.—There is no doubt but an award may be good in part, though bad in part; and if the plaintiff in his replication ſets out the award, and aſſigns a breach in the non-performance of that part which is good, and the defendant demurs, the plaintiff muſt have judgment, for the whole penalty of the arbitration-bond is forfeited by ſuch non-performance. In this caſe the plaintiff might have applied to the court to have his coſts taxed and ſettled, and then he might have extended the breach to the non-payment thereof alſo; but if he has judgment now, he can never have thoſe coſts, becauſe a recovery in this action will be a bar to any future action upon the ſame bond. And I am of opinion the breach is well aſſigned, and the plaintiff ought to have judgment.

Gould J.—I have a little doubt whether the plaintiff ought not to have got his coſts taxed before the day appointed by the award for the payment thereof, and of the 16*l.* 10*s.*, and before he could bring this action; for the defendant is not to have a releaſe until he pays both the debt and coſts according to the award.

And therefore I am inclined to think the breach is not well aſſigned; and if the plaintiff be not barred of any future action for the coſts, he cannot be entitled to judgment.

Ld. Ch. Juſt.—My brother *Gould*'s objection is, that the breach is not well aſſigned; but if it is well aſſigned, the plaintiff muſt have judgment for the whole penalty of the bond, and when he has once recovered the whole penalty, he certainly can never have another action upon the ſame bond to recover the penalty twice over: that would be unjuſt, and therefore it is moſt clear, a recovery in this action will be an eternal bar to any future action on the ſame bond. Surely it is not neceſſary to aſſign breaches of every matter in an award; the breach of any *one*, is a forfeiture of the penalty of the bond. Whether the coſts be taxed or not, paid or not, I think the breach in non payment of the 16*l.* 10*s.* is well aſſigned, and being confeſſed by the demurrer, the plaintiff muſt have judgment. (*Gould* Juſtice at laſt not diſagreeing,) judgment was given for the plaintiff.

Catherine How, Widow, *verſus* Edward Strode. C. B.

REPLEVIN for taking the cattle of the plaintiff in a certain place called *Banbury's Furlong*, otherwiſe *Woolſbrook* in the county of *Somerſet*. The defendant avows and ſays, that the place in which, &c. is called *Banbury's Furlong*, and contains five acres and an half, which place is, and at the time when, &c. was the ſoil and freehold of the defendant; and becauſe the cattle at the time when, &c. were in the ſaid place in which, &c. depaſturing on the graſs there then growing, and doing damage to the plaintiff, he well avows the taking of the ſaid cattle *damage feaſant*, &c. the plaintiff pleads in bar to the ſaid avowry, and ſays, that the place in which, &c. is and at the time when, &c. was parcel of *Eaſtfield* in the pariſh of *Butleigh* in the ſaid county; and that long before the time when, &c. ſhe was and ſtill is ſeiſed in her demeſne, as of fee, of ten acres of land, with the appurtenances, in the pariſh of *Butleigh*; and that ſhe and all thoſe whoſe eſtate ſhe hath, &c. from time whereof, &c. have had and uſed, and have been accuſtomed to have and uſe, and ſtill of right ought to have and uſe common of paſture in *Eaſtfield*, whereof, &c. (her and their own lands in the ſame field excepted,) for all her and their commonable cattle levant and couchant on the ſaid ten acres of land, every year when the ſame field hath been ſown with any kind of corn or grain, from the time that the corn or grain in that year, growing therein, hath been cut down and carried away, until the ſame field, or ſome part thereof, hath been re-ſown with ſome kind of corn or grain, as to the ſaid ten acres of land, belonging and appertaining; and further the plaintiff ſays,

Replevin.

Avowry that defendant took the cattle damage feaſant.

Plea in bar the place in which, &c. is part of Eaſtfield, that plaintiff is ſeiſed of ten acres of land in B. and claims common of paſture in Eaſtfield when the ſame is ſown with corn, and it is cut and carried away until it be reſown;

ſays, that in the year of our Lord 1764 the ſaid *Eaſtfield* was ſown with corn, and that before the time when, &c. all the corn in that year growing, had been cut down and carried away, wherefore the plaintiff before the time when, &c. the ſame field, or any part thereof, then or at the time when, &c. not being reſown with any kind of corn or grain, put her ſaid cattle into the ſaid piece of land called *Banbury's Furlong*, being part of the ſaid *Eaſtfield*, to feed on the graſs there, and to take her common there. And the cattle remained there until the defendant of his own wrong took them, &c.; wherefore ſhe prays judgment and her damages, &c. The defendant replies to the plea in bar, and ſays, that in the ſaid pariſh of *Butleigh* there are, and from time immemorial have been two common fields, one called *Eaſtfield* and the other *Weſtfield*, and the *Eaſtfield* is the ſame *Eaſtfield* in the plea in bar mentioned whereof, &c.; in which common fields the lands of divers perſons for the time being now do lie, and from time immemorial have laid diſperſedly and in ſeveral parcels, and that all and every perſon and perſons, ſeiſed in fee of any lands lying in the ſaid common fields reſpectively, and unincloſed from the reſt of ſuch common fields reſpectively wherein ſuch lands have laid, or do lie, from time whereof, &c. have had and been uſed and accuſtomed to have for him, her, and themſelves, his, her, and their farmers and tenants, occupiers of ſuch lands reſpectively, ſo lying in ſuch common fields, and unincloſed from the reſt of ſuch common fields reſpectively, common of paſture for his, her, or their commonable cattle levant and couchant in and upon ſuch his, her, or their reſpective lands, in the ſaid reſpective common fields, in which his, her, or their ſaid lands ſo reſpectively lie as aforeſaid, in and throughout all the unincloſed parts of the ſaid common fields reſpectively, (his, her, or their own lands in ſuch common fields reſpectively excepted,) in manner following, (to wit,) in every year, when the ſaid common fields reſpectively, wherein his, her, or their ſaid lands in ſuch common fields reſpectively lie, have been ſown with any kind of corn or grain, then in every ſuch year, from the time that the corn and grain, growing in ſuch year, in ſuch reſpective common field, hath been cut down and carried away, until ſuch common field, or ſome part thereof, hath been reſown with ſome kind of corn or grain, in reſpect of ſuch his, her, or their reſpective lands: And the defendant further ſays, that the ſaid lands of the plaintiff mentioned in her plea in bar do now lie; and from time whereof, &c. have laid in *Eaſtfield*, and unincloſed from the reſt of the unincloſed lands in *Eaſtfield*: And the defendant further ſays, that within the ſaid pariſh of *Butleigh* there now is, and from time whereof, &c. there hath been an ancient cuſtom there uſed and approved of, (that is to ſay,) that every perſon or perſons having any lands in the ſaid common fields, or either of them for the time being, and being willing to incloſe the ſame, or any part thereof, from the reſt of ſuch common fields reſpectively, have reſpectively from time to time

and at a proper time put in her cattle.

Replication to the plea in bar, that there are in B. two fields, Eaſt and Weſtfield,

and that the owners thereof intercommon while they lay not incloſed

for a certain time.

A cuſtom to incloſe,

time incloſed, and have been uſed and accuſtomed to incloſe, and of right ought to have incloſed, and ſtill of right ought to incloſe ſuch his, her, or their reſpective lands in ſuch reſpective common fields, or any part thereof, from the reſt of ſuch reſpective common fields, and in ſuch caſe, during all the time aforeſaid, from the time of ſuch reſpective incloſures, have had and held, and have uſed and been accuſtomed to have and hold, and of right ought to have had and held, and ſtill of right ought to have and hold ſuch his, her, or their reſpective lands ſo incloſed as aforeſaid, free and diſcharged from any common of paſture of any other perſon whatſoever therein; and that in ſuch caſe by the cuſtom aforeſaid, every perſon and perſons ſo incloſing as aforeſaid, hath and have during all the time aforeſaid, thereby from the time of ſuch reſpective incloſures freed and diſcharged, and have been uſed and accuſtomed to free and diſcharge, and of right to have freed and diſcharged, and ſtill of right ought to free and diſcharge, all the reſt of the unincloſed lands in the ſaid common fields, or either of them, in which he, ſhe, or they were entitled to common as aforeſaid, from all and all manner of common of paſture, in reſpect of ſuch lands ſo by him, her, or them incloſed as aforeſaid: And the ſaid defendant further ſays, that he long before the ſaid time of the ſaid taking, &c. to wit, on the 1ſt day of *October* in the year of our Lord 1761, was ſeiſed in his demeſne as of fee, of and in the ſaid place in which, &c. lying in and parcel of *Eaſtfield*, and unincloſed from the reſt of the ſaid field; and that the ſaid defendant, and all thoſe whoſe eſtate he then had in the ſaid place in which, &c. for the time being, from time whereof, &c. had then had, and had been uſed and accuſtomed to have, and of right ought to have had for himſelf and themſelves, his and their farmers and tenants, occupiers of the ſaid place in which, &c. common of paſture for all his and their commonable cattle levant and couchant in and upon the ſaid place in which, &c. in and throughout the then unincloſed parts of *Eaſtfield*, (his and their own lands in ſuch common field excepted,) in manner following, (that is to ſay,) in every year when the ſaid *Eaſtfield* hath been ſown with any kind of corn or grain, then in every ſuch year from the time that the corn and grain growing in ſuch reſpective year in ſuch common field called the *Eaſtfield* hath been cut down and carried away until the ſame field, or ſome part thereof, hath been re-ſown with ſome kind of corn or grain, in reſpect of the ſaid place in which, &c., and being ſo ſeiſed thereof, he the defendant afterwards and before the time when, &c. to wit, on the ſame day and year laſt aforeſaid, at the pariſh aforeſaid, did incloſe, the ſaid place in which, &c. from the reſt of the ſaid field called *Eaſtfield*, according to, and by force of the ſaid cuſtom, and hath kept and continued ever ſince, and ſtill keeps and continues the ſame ſo incloſed from the reſt of the ſame common field, whereby according to, and by

and that ſuch incloſure is freed from common of any other perſon, and that the perſon ſo incloſing thereby frees and diſcharges all the unincloſed from all common in reſpect to ſuch land incloſed.

That he incloſed the place in which, &c. to which he had a right of common before,

whereby all the uninclosed lands were freed from his said right of common,

by force of the said custom, all common of pasture of every person whatsoever, in respect or right of any land lying in the *Eastfield*, and all right of common of pasture of the said defendant, in all and every the then uninclosed lands in the said field in right of the said place in which, &c. from thence wholly ceased and was determined, and of right ought to have ceased and be determined, and still of right ought to cease and be determined; and

and that the place inclosed ought to be free from common of any other person.

the said defendant from the time of the said inclosure hitherto ought to have had and held, and of right ought to have had and held, and still of right ought to have and hold the said place in which, &c. freed and discharged from any common of pasture of any other person whatsoever: And the said defendant further says, that the said cattle, long after such inclosure was so made as aforesaid, and during the time that the said place in which, &c. so was and continued so inclosed from the rest of the said common field called the *Eastfield* as aforesaid, to wit, at the said time when, &c. were of the said plaintiff's own wrong in the said place in which, &c. feeding and depasturing on the grass there then growing, and doing damage there to the defendant, in manner and form as he hath above in his avowry alledged; and this he is ready to verify: Wherefore he prays judgment and a return of the said cattle, together with his damages, costs and charges, &c. according to the form of the statute in such case made and provided, to be adjudged to him, &c.

Plaintiff rejoins that she put in the cattle till defendant took them of his own wrong,

The plaintiff rejoins and says, that she having such right of common in the *Eastfield* whereof, &c. as in her plea in bar is set forth, she at the said time and in such manner as in her plea in that behalf mentioned, put her cattle into the said piece of land called *Banbury's Furlong*, being part of the said *Eastfield*, to feed on the grass there growing, and to take her said common there, and the same cattle remained there for the cause aforesaid, until the defendant at the time when, &c. of his own wrong took her said cattle and unjustly detained them, against sureties and pledges in manner and form as the said plaintiff hath in her plea in bar in

and traverses the custom to inclose, &c.

that behalf alledged; *without this*, that within the parish of *Butleigh*, there now is and from time whereof, &c. there hath been an ancient custom there used and approved of, that every person or persons having any lands in the said common fields, or either of them for the time being, and being willing to inclose the same, or any part thereof, from the rest of such common fields respectively, have respectively from time to time inclosed, and have been used and accustomed to inclose, and of right ought to have inclosed, and still of right ought to inclose such his, her, or their respective lands in such respective common fields, or any part thereof, from the rest of such respective common fields, and in such case during all the time aforesaid from the time of such respective inclosures have had and held, and have used and been accustomed to have and hold, and of right ought to have had and

held,

held, and ſtill of right ought to have and hold ſuch his, her, or their reſpective lands ſo incloſed as aforeſaid, free and diſcharged from any common of paſture of any other perſon whatſoever therein; and that in ſuch caſe by the cuſtom aforeſaid, every perſon and perſons ſo incloſing as aforeſaid, hath and have during all the time aforeſaid, thereby from the time of ſuch reſpective incloſures freed and diſcharged, and have been uſed and accuſtomed to free and diſcharge, and of right ought to have freed and diſcharged, and ſtill of right ought to free and diſcharge, all the reſt of the unincloſed lands in the ſaid common fields, or either of them, in which he, ſhe, or they were entitled to common as aforeſaid, from all and all manner of common of paſture, in reſpect of ſuch lands ſo by him, her, or them incloſed as aforeſaid, as the ſaid defendant in his replication to the ſaid plea in bar of the plaintiff hath above alledged; and this the plaintiff is ready to verify: wherefore, as before, ſhe prays judgment and her damages by reaſon of the taking and unjuſtly detaining her ſaid cattle, to be adjudged to her, &c. The defendant ſurrejoins, and as before ſays, that within the pariſh of *Butleigh* there now is, and from time whereof, &c. there hath been an ancient cuſtom, &c. (and ſo takes iſſue upon the traverſe,) as the ſaid defendant hath in his ſaid replication to the ſaid plea in bar of the ſaid plaintiff above alledged; and of this he puts himſelf upon the country, and the ſaid plaintiff doth ſo likewiſe: Therefore, &c.

The defendant ſurrejoins, and takes iſſue on the traverſe.

This cauſe was tried at the laſt aſſizes for the county of *Somerſet*, the iſſue lying upon the defendant to prove the cuſtom. It was reported by the judge, that the defendant produced five very old deeds, and ſeveral other deeds which *proved the cuſtom to incloſe;* he alſo called ſeven old witneſſes, three of the oldeſt proved the cuſtom to incloſe of their own knowledge for a great number of years, and that they had been told (when they were young) by very old perſons then living, that it was the cuſtom for the land-owners in theſe fields to incloſe, and ſaid that they thought any man might incloſe his land. As to the right of common whilſt the lands laid unincloſed, ſome of the witneſſes ſaid that ſuch owners of the unincloſed lands had a right of common without ſtint; *but that after any of them had incloſed his land, ſuch perſon had no right of common at all in the ſaid fields, or either of them.* Another witneſs ſaid, if a man incloſed all his lands in the fields, he loſt his right of common totally; but that if he left any bit, only an acre unincloſed, he uſed to enjoy his common in regard to that acre unincloſed, juſt as before, and uſed to put in any number of cattle without ſtint. Several other old witneſſes ſwore to the ſame effect, and here the defendants reſted their caſe; whereupon the judge was of opinion that the defendant had not proved the cuſtom, which he ſaid was entire, that ſeveral of the witneſſes had proved that if a man incloſed 19 acres out of 20, it was the cuſtom for him in reſpect to the one acre not incloſed,

New trial for miſdirection of the judge upon the evidence given for the defendant at the trial.

to put on to the uninclosed lands as many cattle as he pleased *without ſtint*, and as he had done before he inclosed the 19 acres, and therefore the judge was pleased to tell the jury, that he thought the defendant had not proved the cuſtom *entirely*, and that if they believed the land inclosed in queſtion was diſcharged and freed from any perſon having a right of common thereon, they ſhould find for the defendant; if not, that they ſhould find for the plaintiff; whereupon the jury gave a verdict for the plaintiff.

It was now moved for a new trial, for the miſdirection of the judge; 1ſt, for that the cuſtom to incloſe was fully and clearly proved; and 2dly, that the right of common before incloſure made, was for cattle *levant* and *couchant* upon each perſon's uninclosed lands; and this matter is not at all in iſſue, but is admitted on the pleadings by both ſides; the right of incloſure with its conſequence, *viz.* its being freed from any perſon's former right of common thereon, was the only matter in iſſue, the other was a legal conſequence, and not traverſable, (to wit,) that the owner of ſuch incloſed land is barred of any future right to common on the uninclosed land in theſe fields, and what ſome of the witneſſes ſaid of common *without ſtint* is nothing to the purpoſe, for there is no ſuch thing as common *without ſtint* belonging to land; common belonging to land can only be for cattle *levant* and *couchant* thereon: that the cuſtom to incloſe was clearly proved, as appears by the evidence before ſtated; and when the land is incloſed, it is freed and diſcharged from any perſon's former right of common thereon: and of this opinion was the whole court, and ſaid, 1ſt, that the parties agree by the pleadings, that while the lands in theſe open fields are uninclosed, all have a right of common for cattle *levant* and *couchant*; 2dly, the cuſtom to incloſe, and that the land as ſoon as, and while incloſed, is free from common, is fully proved; the 3d matter is a conſequence in law, and wanted no proof, *viz.* that as ſoon as any perſon has incloſed, he has excluded himſelf from any right of common on any of the uninclosed lands; and any judgment given upon this record cannot be a bar to any other party who may claim common in theſe fields *without* levancy and couchancy. *Per totam curiam*—The verdict muſt be ſet aſide for miſdirection of the judge, and there muſt be a new trial.

John Entick, Clerk, *verſus* Nathan Carrington and three others, Meſſengers in ordinary to the King. C. B.

Treſpaſs for breaking and entering plaintiff's houſe, &c.

IN treſpaſs; the plaintiff declares that the defendants on the 11th day of *November* in the year of our Lord 1762, at *Weſtminſter* in *Middleſex*, with force and arms broke and entered the dwelling-houſe of the plaintiff in the pariſh of *St. Dunſtan Stepney*, and continued there four hours without his conſent and againſt his will, and all that time diſturbed him in the peaceable poſſeſſion thereof, and broke open the doors to the rooms, the locks, iron bars, *&c.* thereto affixed, and broke open the boxes, cheſts, drawers, *&c.* of the plaintiff in his houſe, and broke the locks thereto affixed, and ſearched and examined all the rooms, *&c.* in his dwelling-houſe, and all the boxes, *&c.* ſo broke open, and read over, pryed into, and examined all the private papers, books, *&c.* of the plaintiff there found, whereby the ſecret affairs, *&c.* of the plaintiff became wrongfully diſcovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, *&c. &c.* of the plaintiff there found, and other 100 charts, *&c. &c.* took and carried away, to the damage of the plaintiff 2000 *l.* The defendants plead, 1ſt, Not guilty to the whole declaration, whereupon iſſue is joined. 2dly, As to the breaking and entering the dwelling-houſe, and continuing four hours, and all that time diſturbing him in the poſſeſſion thereof, and breaking open the doors to the rooms, and breaking open the boxes, cheſts, drawers, *&c.* of the plaintiff in his houſe, and the ſearching and examining all the rooms, *&c.* in his dwelling-houſe, and all the boxes, *&c.* ſo broke open, and reading over, prying into, and examining the private papers, books, *&c.* of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration firſt mentioned there found, and alſo as to taking and carrying away the goods and chattels in the declaration laſt mentioned, the defendants ſay, the plaintiff ought not to have his action againſt them, becauſe they ſay, that before the ſuppoſed treſpaſs, on the 6th of *November* 1762, and before, until, and all the time of the ſuppoſed treſpaſs, the Earl of *Halifax* was, and yet is, one of the lords of the king's privy council, and one of his principal ſecretaries of ſtate, and that the earl, before the treſpaſs on the 6th of *November* 1762, made his warrant under his hand and ſeal directed to the defendants, by which the earl did in the king's name authorize and require the defendants, *taking a conſtable to their aſſiſtance*, to make ſtrict and diligent ſearch for the plaintiff, mentioned in the ſaid warrant to be the author, or one concerned in the writing of ſeveral weekly very ſeditious papers, intitled *The Monitor, or Britiſh Freeholder*, No. 357, 358, 360, 373, 376, 378, and 380;

Special juſtification under a warrant of the ſecretary of ſtate.

London, printed for *J. Wilſon* and *J. Fell* in *Paternoſter-Row*, containing groſs and ſcandalous reflections and invectives upon his majeſty's government, and upon both houſes of parliament, and him the plaintiff having found, to ſeize and apprehend and bring together with his books and papers in ſafe cuſtody, before the Earl of *Halifax* to be examined concerning the premiſes, and further dealt with according to law; in the due execution whereof all mayors, ſheriffs, juſtices of the peace, conſtables, and all other his majeſty's officers civil and military and loving ſubjects, whom it might concern, were to be aiding and aſſiſting to them the defendants, as there ſhould be occaſion: And the defendants further ſay, that afterwards and before the treſpaſs, on the ſame day and year, the warrant was delivered to them to be executed, and thereupon they on the ſame day and year in the declaration, in the day time about 11 o'clock, being the ſaid time when, &c. by virtue and for the execution of the ſaid warrant, entered the plaintiff's dwelling-houſe, the outer door thereof being then open, to ſearch for and ſeize the plaintiff and his books and papers in order to bring him and them before the Earl of *Halifax*, according to the warrant, and the defendants did then and there find the plaintiff, and ſeized and apprehended him, and did ſearch for his books and papers in his houſe, and did neceſſarily ſearch and examine the rooms therein, and alſo his boxes, cheſts, &c. there, in order to find and ſeize his books and papers, and to bring them along with the plaintiff before the ſaid earl, according to the warrant; and upon the ſaid ſearch did then in the ſaid houſe find and ſeize the goods and chattels of the plaintiff in the declaration, and on the ſame day did carry the ſaid books and papers to a houſe at *Weſtminſter*, where the ſaid earl then and long before tranſacted the buſineſs of his office, and delivered the ſame to *Lovel Stanhope* eſq. who then was, and yet is an aſſiſtant to the earl in his office of ſecretary of ſtate, to be examined, and who was then authorized to receive the ſame from them for that purpoſe, as it was lawful for them to do; and the plaintiff afterwards, (to wit) on the 17th of *November* in the ſaid year, was diſcharged out of their cuſtody, and in ſearching for the books and papers of the plaintiff the defendants did neceſſarily read over, pry into, and examine the ſaid private papers, books, &c. of the plaintiff in the declaration mentioned then found in his houſe; and becauſe at the ſaid time when, &c. the ſaid doors in the ſaid houſe leading to the rooms therein, and the ſaid boxes, cheſts, &c. were ſhut and faſtened ſo that the defendants could not ſearch and examine the ſaid rooms, boxes, cheſts, &c. they, for the neceſſary ſearching and examining the ſame, did then neceſſarily break and force open the ſaid doors, boxes, cheſts, &c. as it was lawful for them to do; and on the ſaid occaſion the defendants neceſſarily ſtayed in the houſe of the plaintiff for the ſaid four hours, and unavoidably during that time diſturbed him in the poſſeſſion thereof, they the defendants doing as little

damage to the plaintiff as they poſſibly could, which are the ſame breaking and entering the houſe of the plaintiff, &c. (and ſo repeat the treſpaſs covered by this plea) whereof the plaintiff above complains; and this, &c., wherefore they pray judgment, &c. The plaintiff replies to the plea of juſtification above, that (as to the treſpaſs thereby covered) he, by any thing alledged by the defendants therein, ought not to be barred from having his action againſt them, becauſe he ſays, that the defendants at the pariſh of *Stepney*, of *their own wrong*, and without the cauſe by them in that plea alledged, broke and entered the houſe of the plaintiff, &c. &c. in manner and form as the plaintiff hath complained above; and this he prays may be inquired of by the country; and the defendants do ſo likewiſe. There is another plea of juſtification like the firſt, with this difference only, that in the laſt plea it is alledged, the plaintiff and his papers, &c. were carried before Lord *Halifax*, but in the firſt, it is before *Lovel Stanhope*, his aſſiſtant or law clerk; and the like replication of *de injuria ſua propria abſq. tali cauſa*, whereupon a third iſſue is joined. This cauſe was tried in *Weſtminſter-hall* before the Lord Chief Juſtice, when the jury found a ſpecial verdict to the following purport:

Replication de injuria ſua propria.

The jurors upon their oath ſay, as to the iſſue firſt joined, (upon the plea of Not guilty to the whole treſpaſs in the declaration,) that *as to the coming with force and arms, and alſo the treſpaſs in declaration, except the breaking and entering the dwelling-houſe of the plaintiff, and continuing therein for the ſpace of four hours, and all that time diſturbing him in the poſſeſſion thereof, and ſearching ſeveral rooms therein, and in one bureau, one writing-deſk, and ſeveral drawers of the plaintiff in his houſe, and reading over and examining ſeveral of his papers there, and ſeizing, taking and carrying away ſome of his books and papers there found, in the declaration complained of, the ſaid defendants are not guilty.* As to breaking and entering the dwelling-houſe, &c. (*above excepted*,) the jurors on their oath ſay, that at the time of making the following information, and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the Earl of *Halifax* was, and ſtill is one of the lords of the king's privy council, and one of his principal ſecretaries of ſtate, and that before the time in the declaration, *viz.* on the 11th of *October* 1762, at *Saint James's*, *Weſtminſter*, one *Jonathan Scott* of *London*, bookſeller and publiſher, came before *Edward Weſton* eſq. an aſſiſtant to the ſaid earl, and a juſtice of peace for the city and liberty of *Weſtminſter*, and there made and gave information in writing to and before the ſaid *Edward Weſton* againſt the ſaid *John Entick* and others, the tenor of which information now produced and given in evidence to the jurors followeth in theſe words and figures, to wit, "The voluntary information of *J. Scott*, in the "year 1755. I propoſed ſetting up a paper, and mentioned it to "Dr. *Shebbeare*, and in a few days one *Arthur Beardmore*, an

Special verdict.

Scott's information before a juſtice of peace.

"attorney at law, ſent for me, hearing of my intention, and de-
"ſired I would mention it to Dr. *Shebbeare*, that he, *Beardmore*,
"and ſome others of his friends had an intention of ſetting up a
"paper in the city. *Shebbeare* met *Beardmore*, and *myſelf* and
"*Entick* (the plaintiff), at the *Horn Tavern*, and agreed upon
"the ſetting up the paper by the name of *The Monitor*, and that
"Dr. *Shebbeare* and Mr. *Entick* ſhould have 200 *l.* a-year each.
"Dr. *Shebbeare* put into *Beardmore*'s and *Entick*'s hands ſome
"papers, but before the papers appeared *Beardmore* ſent them
"back to me (*Scott*). *Shebbeare* inſiſted on having the proportion
"of his ſalary paid him; he had 50 *l.* which I (*Scott*) fetched
"from *Vere* and *Aſgills* by their note, which *Beardmore*
"gave him. Dr. *Shebbeare* upon this was quite left out, and the
"monies have been continued to *Beardmore* and *Entick* ever
"ſince, by ſubſcription, as I ſuppoſed, raiſed, I know not by
"whom; it has been continued in theſe hands ever ſince.
"*Shebbeare*, *Beardmore*, and *Entick* all told me that the late Alder-
"man *Beckford* countenanced the paper; they agreed with me,
"that the profits of the paper, paying all charges belonging to
"it, ſhould be allowed me. In the paper of the 22d *May*, called
"*Sejanus*, I apprehend the character of *Sejanus* meant Lord
"*Bute*; the original manuſcript was in the hand-writing of
"*David Meredith*, Mr. *Beardmore*'s clerk: I before received the
"manuſcript for ſeveral years till very lately from the ſaid hands,
"and do believe that they continue ſtill to write it. *Jona.*
"*Scott*, *St. James*'s, 11th *October* 1762."

The above information was given voluntarily before me, and ſigned in my preſence, by *Jona. Scott.* *J. Weſton.*

And the jurors further ſay, that on the 6th of *November* 1762, the ſaid information was ſhewn to the Earl of *H.* and thereupon the earl did then make and iſſue his warrant directed to the defendants, then and ſtill being the king's meſſengers, and duly ſworn to that office, for apprehending the plaintiff, *&c.* the tenor of which warrant produced in evidence to the jurors, follows in theſe words and figures: "*George Montagu Dunk*, Earl of *Ha-*
"*lifax*, Viſcount *Sunbury*, and Baron *Halifax*, one of the lords
"of his majeſty's honourable privy council, lieutenant-general of
"his majeſty's forces, lord lieutenant-general and general gover-
"nor of the kingdom of *Ireland*, and principal ſecretary of ſtate,
"*&c.* Theſe are in his majeſty's name to authorize and require
"you, *taking a conſtable to your aſſiſtance*, to make ſtrict and dili-
"gent ſearch for *John Entick*, the author, or one concerned in
"the writing of ſeveral weekly very ſeditious papers, intitled
"*The Monitor, or Britiſh Freeholder*, No. 357, 358, 360, 373,
"376, 378, 379, and 380; *London*, printed for *J. Wilſon* and
"*J. Fell* in *Paternoſter-Row*; which contain groſs and ſcanda-
"lous

The ſecretary of ſtate's warrant to ſeize plaintiff and his books and papers

" lous reflections and invectives upon his majesty's government,
" and upon both houses of parliament, and him having found,
" you are to seize and apprehend, and to bring, together with
" his books and papers, in safe custody before me to be examined
" concerning the premises, and further dealt with according to
" law; in the due execution whereof all mayors, sheriffs, justices
" of the peace, constables, and other his majesty's officers civil
" and military, and loving subjects whom it may concern, are
" to be aiding and assisting to you as there shall be occasion; and
" for so doing this shall be your warrant. Given at *St. James's*
" the 6th day of *November* 1762, in the third year of his majesty's
" reign. *Dunk Halifax.* To *Nathan Carrington*, *James Watson*,
" *Thomas Ardran*, and *Robert Blackmore*, four of his majesty's
" messengers in ordinary." And the jurors further say, the earl caused this warrant to be delivered to the defendants to be executed, and that the defendants afterwards on the 11th of *November* 1762, at 11 o'clock in the day-time, by virtue and for the execution of the warrant, *but without any constable taken by them to their assistance*, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there, and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing-desk, and several drawers of the plaintiff there, in order to find and seize the same, and bring them along with the plaintiff before the earl according to the warrant, and did then find and seize there some of the books and papers of the plaintiff, and perused and read over several other of his papers which they found in the house, and chose to read; and that they necessarily continued there in the execution of the warrant four hours, and disturbed the plaintiff in his house, and then took him and his said books and papers from thence, and forthwith gave notice at the office of the said secretary of state in *Westminster* unto *Lovel Stanhope* esq. then before, and still being an assistant to the earl in the examinations of persons, books, and papers seized by virtue of warrants issued by secretaries of state, and also then and still being a justice of peace for the city and liberty of *Westminster* and county of *Middlesex*, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined; and they then and there, at the instance of the said *Lovel Stanhope*, delivered the said books and papers to him: And the jurors further say, that, on the 13th of *April* in the first year of the king, his majesty, by his letters patent under the great seal, gave and granted to the said *Lovel Stanhope* the office of law-clerk to the secretaries of state; and the king did thereby ordain, constitute, and appoint the law-clerk to attend the offices of his secretaries of state, in order to take the depositions of all such persons whom it may be

delivered to the defendants to be executed, who on the 11th of Nov. 1762, did execute the same without a constable,

and carried the books, &c. to Lovel Stanhope, the law clerk's, who is appointed to that office by the king's letters patent, and is a justice of peace.

necessary to examine upon affairs which might concern the public, &c. (and then the verdict sets out the letters patent to the law-clerk *in hæc verba*,) as by the letters patent produced in evidence to the jurors appears. And the jurors further say, that *Lovel Stanhope*, by virtue of the said letters patent long before the time when, &c. on the 13th of *April* in the first year of the king was, and ever since hath been, and still is law-clerk to the king's secretaries of state, and hath executed that office all that time.

That the like warrants have issued since the Revolution.

And the jurors further say, that at different times from the time of the Revolution to this present time, the like warrants with *that* issued against the plaintiff, have been frequently granted by the secretaries of state, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the king, &c. in the place of a messenger in ordinary, &c.

That no demand was made by plaintiff of a copy of the warrant; nor did plaintiff bring his action within six months after the facts done by defendants.

And the jurors further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent, in writing, of the perusal and copy of the said warrant so issued against the plaintiff as aforesaid, neither did the plaintiff commence or bring his said action against the defendants, or any of them, within six calendar months next after the several acts aforesaid, and each of them were and was done and committed by them as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, the said defendants are guilty of the trespass hereinbefore particularly specified *in breaking and entering the house of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing-desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found*; or the said plaintiff ought to maintain his said action against them, the jurors are altogether ignorant, and pray the advice of the court thereupon; and if upon the whole matter aforesaid by the jurors found, it shall seem to the court that the defendants are guilty of the said trespass, and that the plaintiff ought to maintain his action against them, the jurors say upon their said oath, that the defendants are guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them; and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out, to 300 *l.*; and for those costs and charges to 40 *s.*; but if upon the whole matter by the jurors found, it shall seem to the court that the said defendants are not guilty of the said trespass, or that the plaintiff ought not to maintain his action against them, then the jurors do say upon their oath that the defendants are not guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them: and as to the

Special verdict concludes in the common form.

Damages 300 *l.*

last

last issue on the second special justification, the jury found for the plaintiff, that the defendants in their own wrong broke and entered, and did the trespass as the plaintiff in his replication has alledged. The last issue found for plaintiff.

This special verdict was twice solemnly argued at the bar; in *Easter* term last by Serjeant *Leigh* for the plaintiff, and *Burland*, one of the king's serjeants, for the defendants, and in this present term by Serjeant *Glynn* for the plaintiff, and *Nares*, one of the king's serjeants, for the defendants.

Counsel for the plaintiff—At the trial of this cause the defendants relied upon two defences; 1st, That a secretary of state is a justice or conservator of the peace, and these messengers acting under his warrant, are within the statute of the 24th of *Geo.* 2. *c.* 44. which enacts, (among other things,) That "no action "shall be brought against any constable *or other officer, or any "person* acting by his order and in his aid, for any thing done "in obedience to the warrant of a justice, until demand hath "been made or left at the usual place of his abode by the party, "or by his attorney in writing signed by the party demanding "the same, of the perusal and copy of such warrant, and the "same hath been refused or neglected for six days after such "demand," and that no demand was ever made by the plaintiff of a perusal or copy of the warrant in this case, according to that statute, and therefore he shall not have this action against these defendants, who are merely ministerial officers acting under the secretary of state, who is a justice and conservator of the peace. 2dly, That the warrant under which the defendants acted is a legal warrant, and that they can well justify what they have done by virtue thereof, for that at many different times, from the time of the revolution till this time, the like warrants with *that* issued against the plaintiff in this case have been granted by secretaries of state, and executed by the messengers in ordinary for the time being. Easter term 5 Geo. 3.

1. It is most clear and manifest upon this verdict, that the Earl of *Halifax* acted as secretary of state when he granted the warrant, and not merely as a justice of the peace, and therefore cannot be within the statute 24 *Geo.* 2. *c.* 44. neither would he be within the statute if he was a conservator of the peace, such person not being once named therein; and there is no book in the law whatever that ranks a secretary of state *quasi secretary* among the conservators of the peace; *Lambert*, *Coke*, *Hawkins*, Lord *Hale*, &c. &c. none of them take any notice of a secretary of state being a conservator of the peace, and until of late days he was no more indeed than a mere clerk; a conservator of the peace had no more power than a constable has now, who is a conservator of the peace at common law. At the time of making this statute, a justice of peace, constable, headborough, and other As to the first.

other officers of the peace, borſholders and tithingmen, as well as ſecretary of ſtate, conſervator of the peace and meſſenger in ordinary, were all very well known; and if it had been the intent of the ſtatute, that a ſecretary of ſtate, conſervator of the peace, and meſſenger in ordinary, ſhould have been within the ſtatute, it would have mentioned all or ſome of them, and it not having done ſo, they cannot be within it. A meſſenger certainly cannot be within it, who is nothing more than a mere porter, and Lord *Halifax*'s footmen might as well be ſaid to be officers within the ſtatute as theſe defendants. Beſides, the verdict finds that theſe defendants executed the warrant *without taking a conſtable to their aſſiſtance*; this diſobedience will not only take them out of the protection of the ſtatute, (if they had been within it,) but will alſo diſable them to juſtify what they have done, by any plea whatever; the office of theſe defendants is a place of conſiderable profit, and as unlike that of a conſtable or tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in perſon, and cannot ſubſtitute another in his room, though he may call perſons to aſſiſt him. 1 *Hale's P. C.* 581. This warrant is more like a warrant to ſearch for ſtolen goods and to ſeize them, than any other kind of warrant, which ought to be directed to conſtables and other public officers which the law takes notice of. 2 *Hale's P. C.* 149, 150. How much more neceſſary in the preſent caſe was it to take a conſtable to the defendants' aſſiſtance? The defendants have alſo diſobeyed the warrant in another matter, being commanded to bring the plaintiff and his books and papers before Lord *Halifax*; they carried him and them before *Lovel Stanhope*, the law-clerk, and though he is a juſtice of peace, that avails nothing, for no ſingle juſtice of peace ever claimed a right to iſſue ſuch a warrant as this, nor did he act therein as a juſtice of peace, but as the law-clerk to Lord *Halifax*. The information was made before juſtice *Weſton*; the ſecretary of ſtate in this caſe never ſaw the accuſer nor the accuſed; it ſeems to have been below his dignity; the names of the officers introduced here are not to be found in the law-books, from the firſt year-book to the preſent time.

4 Inſt. 176.

As to the ſecond.

2. A power to iſſue ſuch a warrant as this, is contrary to the genius of the law of *England*, and even if they had found what they ſearched for, they could not have juſtified under it; but they did not find what they ſearched for, nor does it appear that the plaintiff was author of any of the ſuppoſed ſeditious papers mentioned in the warrant, ſo that it now appears that this enormous treſpaſs and violent proceeding has been done upon mere ſurmiſe; but the verdict ſays ſuch warrants have been granted by ſecretaries of ſtate ever ſince the Revolution; if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end; it is the publiſhing of a libel which is the crime, and not the having it locked up in a private drawer in a man's ſtudy; but if having it in one's cuſtody

body was the crime, no power can lawfully break into a man's houſe and ſtudy to ſearch for evidence againſt him; this would be worſe than the *Spaniſh* inquiſition; for ranſacking a man's ſecret drawers and boxes to come at evidence againſt him, is like racking his body to come at his ſecret thoughts. The warrant is to ſeize all the plaintiff's books and papers without exception, and carry them before Lord *Halifax*; What? has a ſecretary of ſtate a right to ſee all a man's private letters of correſpondence, family concerns, trade and buſineſs? this would be monſtrous indeed; and if it were lawful, no man could endure to live in this country. In the caſe of a ſearch warrant for ſtolen goods, it is never granted, but upon the ſtrongeſt evidence, that a felony has been committed, and that the goods are ſecreted in ſuch a houſe, and it is to ſeize ſuch goods as were ſtolen, not all the goods in the houſe; but if ſtolen goods are not found there, all who entered with the warrant are treſpaſſers. However frequently theſe warrants have been granted ſince the Revolution, that will not make them lawful, for if they were unreaſonable or unlawful when firſt granted, no uſage or continuance can make them good; even cuſtoms which have been uſed time out of mind, have been often adjudged void, as being unreaſonable, contrary to common right, or purely againſt law, if upon conſidering their nature and quality they ſhall be found injurious to a multitude, and prejudicial to the common wealth, and to have their commencement (for the moſt part) through the oppreſſion and extortion of lords and great men. *Davis.* 32. *b.* Theſe warrants are not by cuſtom; they go no farther back than 80 years, and moſt amazing it is they have never before this time been oppoſed or controverted, conſidering the great men that have preſided in the King's Bench ſince that time; but it was reſerved for the honour of this court, which has ever been the protector of the liberty and property of the ſubject, to demoliſh this monſter of oppreſſion, and to tear into rags this remnant of Star-chamber tyranny.

Counſel for the defendants—I am not at all alarmed, if this power is eſtabliſhed to be in the ſecretaries of ſtate; it has been uſed in the beſt of times, often ſince the Revolution. I ſhall argue, 1ſt, That the ſecretary of ſtate has power to grant theſe warrants, and if I cannot maintain this, I muſt 2dly ſhew that by the ſtatute 24 *Geo.* 2. *c.* 24. this action does not lie againſt the defendants the meſſengers. 1. A ſecretary of ſtate has the ſame power to commit for treaſon as a juſtice of peace. *Kendale* and *Roe*, *Skin.* 596. 1 *Salk.* 346. S. C. 1 *Ld. Raym.* 65. 5 *Mod.* 78. S. C. Sir *Wm. Wyndham* was committed by *James Stanhope*, ſecretary of ſtate, to the *Tower* for high treaſon the 7th of *October* 1715; ſee the caſe 1 *Stra.* 2; and Serjeant *Hawkins* ſays, it is certain that the privy council, or any one or two of them, or a *ſecretary of ſtate*, may lawfully commit perſons for treaſon, and *for*

other

other offences againſt the ſtate, as in all ages they have done. 2 *Hawk. P. C.* 117. *ſect.* 4. 1 *Leon.* 70, 71, *Carth.* 291. 2 *Leon.* 175. If it is clear that a ſecretary of ſtate may commit for treaſon and *other offences againſt the ſtate*, he certainly may commit for a ſeditious libel againſt the government, for there can hardly be a greater offence againſt the ſtate, except actual treaſon. A ſecretary of ſtate is within the *habeas corpus* act, but a power to commit without a power to iſſue his warrant to ſeize the offender and the libel would be nothing; ſo it muſt be concluded that he has the ſame power upon information to iſſue a warrant to ſearch for and ſeize a ſeditious libel, and its author and publiſher, as a juſtice of peace has for granting a warrant to ſearch for ſtolen goods, upon an information that a theft has been committed, and that the goods are concealed in ſuch a place; in which caſe the conſtable and officers aſſiſting him in the ſearch, may break open doors, boxes, *&c.* to come at ſuch ſtolen goods. Suppoſing the practice of granting warrants to ſearch for libels againſt the ſtate be admitted to be an evil in particular caſes, yet to let ſuch libellers eſcape who endeavour to raiſe rebellion is a greater evil, and may be compared to the reaſoning of Mr. Juſtice *Foſter* in the caſe of preſſing, 159. where he ſays, "that "war is a great evil, but it is choſen to avoid a greater. The "practice of preſſing is one of the miſchiefs war brings with it; "but it is a maxim in law and good policy too, that all private "miſchiefs muſt be borne with patience, for preventing a na-"tional calamity," *&c.*

2. Suppoſing there is a defect of juriſdiction in the ſecretary of ſtate, yet the defendants are within the *ſtat.* 24 *Geo.* 2. *c.* 44. and though not within the words, yet they are within the reaſon of it; that it is not unuſual in acts of parliament to comprehend by conſtruction a *generality* where expreſs mention is made only of a *particular*; the ſtatute of *circumſpecte agatis* concerning the Biſhop of *Norwich* extends to all biſhops. *Fitz. Prohibition* 3. and 2 *Inſt.* on this ſtatute. 25 *Ed.* 3. enables the incumbent to plead in *quare impedit* to the king's ſuit; this alſo extends to the ſuits of all perſons. 38 *Ed.* 3. 31. the act 1 *Rich.* 2. ordains, that the warden of the *Fleet* ſhall not permit priſoners in execution to go out of priſon by bail or baſton, yet it is adjudged that this act extends to all gaolers. *Plowd. Com.* caſe of *Platt* 35. *b.* the *ſtat de donis conditionalibus* extends to all other limitations in tail not there particularly mentioned, and the like conſtruction has been put upon ſeveral other ſtatutes. *Yho. Jones* 62. The *ſtat.* 7 *Jac.* 1. *c.* 5. the word *conſtable* therein extends to a deputy conſtable. *Moor* 845. Theſe meſſengers in ordinary have always been conſidered as officers of the ſecretaries of ſtate, and a commitment may be to their cuſtody, as in Sir *W. Wyndham*'s caſe. A juſtice of peace may make a conſtable *pro hac vicé* to execute a warrant, who would be within the *ſtat.* 24 *Geo.* 2.

So

So if these defendants are not constables, yet as *officers* they have power to execute a warrant of a justice of peace; a constable may, but cannot be compelled to execute a warrant out of his jurisdiction; officers acting under colour of office, though doing an illegal act, are within this statute. *Vaugh.* 113. So that no demand having ever been made of the warrant, nor any action commenced within six months, the plaintiff has no right of action. It was said that a conservator of the peace had no more power than a constable has now. I answer, they had power to bind over at common law, but a constable has not. *Dalton, cap.* 1.

Counsel for the plaintiff in reply—It is said this has been done in the best of times ever since the revolution; the conclusion from thence is, that it is the more inexcusable, because done in the best of times, in an æra when the common law (which had been trampled under the foot of arbitrary power) was revived. We do not deny but the secretary of state hath power to commit for treason and other offences against the state, but that is not the present case, which is breaking into the house of a subject, breaking into his drawers and boxes, ransacking all the rooms in his house, and prying into all his private affairs; but it is said if the secretary of state has power to commit, he has power to search, *&c.* as in the case of stolen goods. This is a false consequence, and it might as well be said he has a power to torture. As to stolen goods, if the officers find none, have they a right to take away a man's goods which were not stolen? Pressing is said to be a dangerous power, and yet it has been allowed for the benefit of the state; but that is only the argument and opinion of a single judge, from ancient history and records, in times when the lower part of the subjects were little better than slaves to their lords and great men, and has not been allowed to be lawful (without an act of parliament) since the time of the Revolution. The *stat.* 24 *Geo.* 2. has been compared to ancient statutes, naming particular persons and districts, which have been construed to extend to many others not named therein; and so the defendants, though no such officers are mentioned, by like reason, are within the statute 24 *Geo.* 2.; but the law knows no such officers as messengers in ordinary to the king. It is said the *habeas corpus* act extends to commitments by secretaries of state, though they are not mentioned therein: true; but that statute was made to protect the innocent against illegal and arbitrary power. It is said the secretary of state is a justice of peace, and the messengers are his officers; why then did the warrant direct them to take a constable to their assistance, if they were themselves the proper officers? it seems to admit they were not the proper officers; if a man be made an officer for a special purpose to arrest another, he must shew his authority; and if he refuses, it is not murder to kill him; but a constable or other known officer in the law need not shew his warrant.

Lord

Eaſter term 5 Geo. 3.

Lord Chief Juſtice—I ſhall not give any opinion at preſent, becauſe this caſe, which is of the utmoſt conſequence to the public, is to be argued again; I ſhall only juſt mention a matter which has ſlipped the ſagacity of the counſel on both ſides, that it may be taken notice of upon the next argument. Suppoſe a warrant which is againſt law be granted, ſuch as no juſtice of peace, or other magiſtrate high or low whomſoever, has power to iſſue, whether that magiſtrate or juſtice who grants ſuch warrant, or the officer who executes it, are within the *ſtat.* 24 *Geo.* 2. *c.* 44.? To put one caſe (among an hundred that might happen); ſuppoſe a juſtice of peace iſſues a warrant to ſearch a houſe for ſtolen goods, and directs it to four of his ſervants, who ſearch and find no ſtolen goods, but ſeize all the books and papers of the owners of the houſe, Whether in ſuch a caſe would the juſtice of peace, his officers or ſervants, be within the *ſtat.* 24 *Geo.* 2.? I deſire that every point of this caſe may be argued to the bottom; for I ſhall think myſelf bound, when I come to give judgment, to give my opinion upon every point in the caſe.

Mich. 6 Geo. 3.

Counſel for the plaintiff on the ſecond argument—If the ſecretary of ſtate, or a privy counſellor, juſtice of peace, or other magiſtrate whatever, have no legal power to grant the warrant in the preſent caſe, it will follow, that the magiſtrate uſurping ſuch an illegal power can never be conſtrued to be within the meaning or reaſon of the ſtatute of 24 *Geo.* 2. *c.* 44. which was made to protect juſtices of peace, *&c.* where they made blunders, or erred in judgment in caſes within their juriſdiction, and not to give them arbitrary power to iſſue warrants totally illegal from beginning to end, and in caſes wherein they had no juriſdiction at all. If any ſuch power in a ſecretary of ſtate, or a privy counſellor, had ever exiſted, it would appear from our law-books; all the ancient books are ſilent on this head; *Lambert* never once mentions a ſecretary of ſtate; neither he, nor a privy counſellor, were ever conſidered as magiſtrates; in all the arguments touching the Star-chamber, and petition of right, nothing of this power was ever dreamt of; ſtate commitments anciently were either *per mandatum regis* in perſon, or by warrant of ſeveral of the privy counſellors in the plural number; the king has this power in a particular mode, *viz.* by the advice of his privy council, who are to be anſwerable to the people if wrong is done; he has no other way but in council to ſignify his mandate. In the caſe of the Seven Biſhops, this matter was inſiſted upon at the bar, when the court preſumed the commitment of them was by advice of the privy council, but that a ſingle privy counſellor had this power was not contended for by the crown lawyers then. This court will require it to be ſhewn that there have been ancient commitments of this ſort; neither the ſecretary of ſtate or a privy counſellor ever claimed a right to adminiſter an oath (but they employ a perſon as a law-clerk, who

who is a juſtice of peace, to adminiſter oaths, and take recognizances); Sir *Barth. Shower* in *Kendale* and *Roe*'s caſe, inſiſted they never had ſuch power. It would be a ſoleciſm in our law to ſay, there is a perſon who has power to commit, and has not power to examine on oath, and bail the party; therefore whoever has power to commit has power to bail; it was a queſtion formerly, Whether a conſtable as an ancient conſervator of the peace could take a recognizance or bond? In the time of Queen *Eliz.* there was a caſe wherein ſome of the judges were of one opinion and ſome of another. A ſecretary of ſtate was ſo inconſiderable formerly, that he is not mentioned in the ſtatute of *ſcandalum magnatum*; his office was thought of no great importance; he takes no oath of office as ſecretary of ſtate, gives no kind of ſecurity for the exerciſe of ſuch judicial power as he now uſurps. If this was an ancient power it muſt have been annexed to his office anciently, it cannot now be given to him by the king; the king cannot make two chief juſtices of the Common Pleas, nor could the king put the great ſeal in commiſſion before an act of parliament was made for that purpoſe. There was only one ſecretary of ſtate formerly, there are now two appointed by the king; if they have this power of magiſtracy, it ſhould ſeem to require ſome law to be made to give that power to two ſecretaries of ſtate which was formerly in one only. As to commitments *per mandatum regis*, ſee *Stamf. Pl. Coron.* 72. 4 *Inſt. c.* 5. *Court of Star-chamber.* Admitting they have power to commit in high treaſon, it will not follow they have power to commit for a miſdemeanor; it is of neceſſity that they can commit in high treaſon, which requires immediate interpoſition for the benefit of the public. In the caſe of commitment by *Walſingham* ſecretary of ſtate, 1 *Leon*, 71. it was returned on the *habeas corpus* at laſt, that the party was committed *ex ſententia & mandato totius concilii privati dominæ reginæ*; becauſe he found he had not that power of himſelf, he had recourſe to the whole privy council's power; ſo that this caſe is rather for the plaintiff. Commitment by the high commiſſion court of *York* was declared by parliament illegal from the beginning; ſo in the caſe of ſhip-money the parliament declared it illegal.

Counſel for the defendants on the ſecond argument—The moſt able judges and advocates ever ſince the Revolution, ſeem to have agreed that the ſecretaries of ſtate have this power to commit for a miſdemeanor. Secretaries of ſtate have been looked upon in a very high light for two hundred years paſt. 27 *H.* 8. *c.* 11. their rank and place is ſettled by 31 *H.* 8. *c.* 10. 4 *Inſt.* 362. *cap.* 77. of precedency. 4 *Inſt.* 56. *Selden's Titles of Honour C. Officers of State*; ſo that a ſecretary of ſtate is ſomething more than a mere clerk, as was ſaid. *Minſhew* verb. *Secretary*; he is *é ſecretioribus conciliis domini regis.* Serjeant *Pengelly* moved that Sir *Wm. Windham* might be bailed; if he could not be committed

committed by the ſecretary of ſtate for ſomething leſs than treaſon, why did he move to have him bailed? this ſeems a conceſſion that he might be committed in that caſe for ſomething leſs than treaſon. Lord *Holt* ſeems to agree that a commitment by a ſecretary of ſtate is good. *Skin.* 598. 1 *Ld. Raym.* 65. There is no caſe in the books that ſays in what caſes a ſecretary of ſtate can or cannot commit; by what power is it that he can commit in the caſe of treaſon, and in no other caſe? The reſolution of the Houſe of Commons touching the petition of right, *Selden*, laſt volume, *Parliamentary Hiſtory*, *vol.* 8. *fol.* 95, 96. Secretary *Coke* told the lords, it was his duty to commit by the king's command. *Yoxley's* caſe, *Carth.* 291.: He was committed by the ſecretary of ſtate on the ſtatute of *Eliz.* for refuſing to anſwer whether he was a Romiſh prieſt; *The Queen* and *Derby*, *Forteſcue's Rep.* the commitment was by a ſecretary of ſtate, *Mich.* 10 *Annæ*, for a libel, and held good. (*Note*; *Bathurſt*, J. ſaid, he had ſeen the *habeas corpus* and the return, and that this was a commitment by a ſecretary of ſtate). *The King* and *Earbury*, *Mich.* 7 *Geo.* 2. 2 *Bernard.* 346. was a motion to diſcharge a recognizance entered into for writing a paper called the *Royal Oak*. Lord *Hardwicke* ſaid it was ſettled in *Kendale* and *Roe's* caſe, that a ſecretary of ſtate might apprehend perſons ſuſpected of treaſonable practices; and there are a great number of precedents in the Crown-office of commitments by ſecretaries of ſtate for libels againſt the government. After time taken to conſider, the whole court gave judgment this term for the plaintiff.

Curia—The defendants make two defences; *firſt*, That they are within the *ſtat.* 24 *Geo.* 2. *c.* 44.; 2*dly*, That ſuch warrants have frequently been granted by ſecretaries of ſtate ever ſince the Revolution, and have never been controverted, and that they are legal; upon both which defences the defendants rely.

A ſecretary of ſtate, who is a privy counſellor, if he be a conſervator of the peace, whatever power he has to commit is by the common law: if he be conſidered only as a privy counſellor, he is the only one at the board who has exerciſed this authority of late years; if as a conſervator, he never binds to the peace; no other conſervator ever did that we can find: he has no power to adminiſter an oath, or take bail; but yet it muſt be admitted that he is in the full exerciſe of this power to commit, for treaſon and ſeditious libels againſt the government, whatever was the original ſource of that power; as appears from the caſes of the *Queen* and *Derby*, *The King* and *Earbury*, and *Kendale* and *Roe's* caſe.

We muſt know what a ſecretary of ſtate is, before we can tell whether he is within the *ſtat.* 24 *Geo.* 2. *c.* 44. He is the keeper of the king's ſignet wherewith the king's private letters are ſigned.

2 *Inſt.*

2 *Inſt.* 556. *Coke upon Articuli ſuper chartas*, 28 *Ed.* 1. Lord *Coke*'s ſilence is a ſtrong preſumption that no ſuch power as he now exerciſes was in him at that time; formerly he was not a privy counſellor, or conſidered as a magiſtrate; he began to be ſignificant about the time of the revolution, and grew great when the princes of *Europe* ſent ambaſſadors hither; it ſeems inconſiſtent that a ſecretary of ſtate ſhould have power to commit, and no power to adminiſter an oath, or take bail; who can commit and not have power to examine? the Houſe of Commons indeed commit without oath, but that is nothing to the preſent caſe; there is no account in our law-books of ſecretaries of ſtate, except in the few caſes mentioned; he is not to be found among the old conſervators; in *Lambert*, *Crompton*, *Fitzherbert*, &c. &c. nor is a privy counſellor to be found among our old books till *Kendall* and *Roe*'s caſe, and 1 *Leon.* 70, 71. 29 *Eliz.* is the firſt caſe that takes notice of a commitment by a ſecretary of ſtate; but in 2 *Leon.* 175. the judges knew no ſuch committing magiſtrate as the ſecretary of ſtate. It appears by the petition of right, that the king and council claimed a power to commit; if the ſecretary of ſtate had claimed any ſuch power, *then* certainly the petition of right would have taken notice of it; but from its ſilence on that head we may fairly conclude he neither claimed nor had any ſuch power; the *ſtat.* 16 *Car.* 1. for regulating the privy council, and taking away the court of Star-Chamber, binds the king not to commit, and in ſuch caſe gives a *habeas corpus*; it is ſtrange *that* Houſe of Commons ſhould take no notice of the ſecretary of ſtate, if he then had claimed power to commit. This power of a ſecretary of ſtate to commit was derivative from the commitment *per mandatum regis*: *Ephemeris parliamentaria*. *Coke* ſays in his ſpeech to the houſe, "If I do my duty to the king, I muſt commit without "ſhewing the cauſe;" 1 *Leon.* 70, 71. ſhews that a commitment by a ſingle privy counſellor was not warranted. By the licenſing ſtatute of 13 & 14 *Car.* 2. *cap.* 33. *ſec.* 15. licence is given to a meſſenger under a warrant of the ſecretary of ſtate to ſearch for books unlicenſed, and if they find any againſt the religion of the church of *England*, to bring them before the ſecretary of ſtate; the warrant in that caſe expreſſed that it was by the king's command. See *Stamford*'s comment on the mandate of the king, and *Lambert*, *cap. Bailment.* All the judges *temp. Eliz.* held that in a warrant or commitment by one privy counſellor he muſt ſhew it was by the mandate of the king in council. See *Aud.* 297. the opinion of all the judges; they remonſtrated to the king that no ſubject ought to be committed by a privy counſellor againſt the law of the realm. Before the 3 *Car.* 1. all the privy counſellors exerciſed this power to commit; from that æra they diſuſed this power, but then they preſcribed ſtill to commit *per mandatum regis*. *Journal of the Houſe of Commons* 195. 16 *Car.* 1. *Coke*, *Selden*, &c. argued that the king's power to commit, meant that

he had such power by his courts of justice. In the case of the seven bishops all the court and king's council admit, that supposing the warrant had been signed out of the council, that it would have been bad, but the court presumed it to be signed at the board; *Pollexfen* in his argument says, we do not deny but the council board have power to commit, but not out of council; this is a very strong authority; the whole body of the law seem not to know that privy counsellors out of council had any power to commit, if there had been any such power they could not have been ignorant of it; and this power was only in cases of high treason, they never claimed it in any other case. It was argued that if a secretary of state hath power to commit in high treason, he hath it in cases of lesser crimes: but this we deny, for if it appears that he hath power to commit in one case *only*, how can we then without authority say he has that power in other cases? he is not a conservator of the peace; Justice *Rokeby* only says he is in the nature of a conservator of the peace: We are now bound by the cases of *The Queen* and *Derby*, and *The King* and *Earbury*.

The secretary of state is no conservator nor a justice of the peace, *quasi* secretary, within the words or equity of the *stat.* 24 *Geo.* 2. admitting him (for argument's sake) to be a conservator, the preamble of the statute shews why it was made, and for what purpose; the only grantor of a warrant therein mentioned, is a justice of the peace; *justice* of *peace* and *conservator* are not convertible terms; the cases of construction upon old statutes, in regard to the warden of the *Fleet*, the bishop of *Norwich*, &c. are not to be applied to cases upon modern statutes. The best way to construe modern statutes is to follow the words thereof; let us compare a justice of peace and a conservator; the justice is liable to actions, as the statute takes notice, it is applicable to him who acts by warrant directed to constables; a conservator is not intrusted with the execution of laws, which by this act is meant statutes, which give justices jurisdiction; a conservator is not liable to actions; he never acts; he is almost forgotten; there never was an action against a conservator of the peace as such; he is antiquated, and could never be thought of when this act was made; and *ad ea quæ frequenter accidunt jura adaptantur.* There is no act of a constable or tithingman as conservator taken notice of in the statute: will the secretary of state be ranked with the highest or lowest of these conservators? the statute of *Jac.* 1. for officers acting by authority to plead the general issue, and give the special matter in evidence, when considered with this statute of 24 *Geo.* 2. the latter seems to be a second part of the act of *Jac.* 1. and we are all clearly of opinion that neither the secretary of state, nor the messengers, are within the *stat.* 24 *Geo.* 2. but if the messengers had been within it, as they did not take a constable

with them according to the warrant, that alone would have been fatal to them, nor did they purſue the warrant in the execution thereof, *when* they carried the plaintiff and his books, *&c.* before *Lovel Stanhope*, and not before Lord *Halifax*; that was wrong, becauſe a ſecretary of ſtate cannot delegate his power, but ought to act in this part of his office perſonally.

The defendants having failed in their defence under the ſtatute 24 *Geo.* 2.; we ſhall now conſider the ſpecial juſtification, whether it can be ſupported in law, and this depends upon the juriſdiction of the ſecretary of ſtate; for if he has no juriſdiction to grant a warrant to break open doors, locks, boxes, and to ſeize a man and all his books, *&c.* in the firſt inſtance upon an information of his being guilty of publiſhing a libel, the warrant will not juſtify the defendants: it was reſolved by *B. R.* in the caſe of *Shergold* v. *Holloway*, that a juſtice's warrant expreſsly to arreſt the party will not juſtify the officer, there being no juriſdiction. 2 *Stran.* 1002. The warrant in our caſe was an execution in the firſt inſtance, without any previous ſummons, examination, hearing the plaintiff, or proof that he was the author of the ſuppoſed libels; a power claimed by no other magiſtrate whatever (*Scroggs* C. J. always excepted); it was left to the diſcretion of theſe defendants to execute the warrant in the abſence or preſence of the plaintiff, when he might have no witneſs preſent to ſee what they did; for they were to ſeize all papers, bank bills, or any other valuable papers they might take away if they were ſo diſpoſed; there might be nobody to detect them. If this be lawful, both houſes of parliament are involved in it, for they have both ruled, that privilege doth not extend to this caſe. In the caſe of *Wilkes*, a member of the Commons Houſe, all his books and papers were ſeized and taken away; we were told by one of theſe meſſengers that he was obliged by his oath to ſweep away *all papers whatſoever*; if this is law it would be found in our books, but no ſuch law ever exiſted in this country; our law holds the property of every man ſo ſacred, that no man can ſet his foot upon his neighbour's cloſe without his leave; if he does he is a treſpaſſer, though he does no damage at all; if he will tread upon his neighbour's ground, he muſt juſtify it by law. The defendants have no right to avail themſelves of the uſage of theſe warrants ſince the Revolution, and if that would have juſtified them they have not averred it in their plea, ſo it could not be put, nor was in iſſue at the trial; we can ſafely ſay there is no law in this country to juſtify the defendants in what they have done; if there was, it would deſtroy all the comforts of ſociety; for papers are often the deareſt property a man can have. This caſe was compared to that of ſtolen goods; Lord *Coke* denied the lawfulneſs of granting warrants to ſearch for ſtolen goods, 4 *Inſt.* 176, 177. though now it prevails to be law; but in that caſe the juſtice and the informer muſt proceed with great caution; there muſt be an oath that the

party has had his goods ſtolen, and has ſtrong reaſon to believe they are concealed in ſuch a place; but if the goods are not found *there*, he is a treſpaſſer; the officer in that caſe is a witneſs; there are none in this caſe, no inventory taken; if it had been legal many guards of property would have attended it. We ſhall now conſider the uſage of theſe warrants ſince the Revolution; if it began then, it is too modern to be law; the common law did not begin with the Revolution; the ancient conſtitution which had been almoſt overthrown and deſtroyed, was then repaired and revived; the Revolution added a new buttreſs to the ancient venerable edifice: the *K. B.* lately ſaid that no objection had ever been taken to general warrants, they have paſſed *ſub ſilentio:* this is the firſt inſtance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's houſe, ſearch for and take away all his books and papers in the firſt inſtance, to be law, which is not be found in our books. It muſt have been the guilt or poverty of thoſe upon whom ſuch warrants have been executed, that deterred or hindered them from contending againſt the power of a ſecretary of ſtate and the ſolicitor of the treaſury, or ſuch warrants could never have paſſed for lawful till this time. We are inclined to think the preſent warrant took its firſt riſe from the licenſing act, 13 & 14 *Car.* 2. *c.* 33. and are all of opinion that it cannot be juſtified by law, notwithſtanding the reſolution of the judges in the time of *Cha.* 2. and *Jac.* 2. that ſuch ſearch warrants are lawful. *State Trials, vol.* 3. 58. the trial of *Carr* for a libel. There is no authority but of the judges of that time that a houſe may be ſearched for a libel, but the twelve judges cannot make law; and if a man is puniſhable for having a libel in his private cuſtody, as many caſes ſay he is, half the kingdom would be guilty in the caſe of a favourable libel, if libels may be ſearched for and ſeized by whomſoever and whereſoever the ſecretary of ſtate thinks fit. It is ſaid it is better for the government and the public to ſeize the libel before it is publiſhed; if the legiſlature be of that opinion they will make it lawful. Sir *Samuel Aſtry* was committed to the *Tower*, for aſſerting there was a law of ſtate diſtinct from the common law. The law never forces evidence from the party in whoſe power it is; when an adverſary has got your deeds, there is no lawful way of getting them again but by an action. 2 *Stran.* 1210. *The King* and *Cornelius*. *The King* and *Dr. Purnell, Hil.* 22 *Geo. B. R.* Our law is wiſe and merciful, and ſuppoſes every man accuſed to be innocent before he is tried by his peers: upon the whole, we are all of opinion that this warrant is wholly illegal and void. One word more for ourſelves; we are no advocates for libels, all governments muſt ſet their faces againſt them, and whenever they come before us and a jury we ſhall ſet our faces againſt them; and if juries do not prevent them they may prove fatal to liberty, deſtroy government and introduce anarchy; but tyranny is better than anarchy, and the worſt government better than none at all.

Hob. 253. 1 Vent. 31. Carth. 409. 2 Salk. 418.

Judgment for the plaintiff.

HILARY TERM,

6 *Geo.* III. 1766.

Addiſon *verſus* Grey. C. B.

DEBT upon an arbitration-bond. The defendant craves *oyer* of the condition, which is, that if the defendant *Gray* and one *Mary Birkwood* ſhall perform the award of *William Bradley* and *John Bellamy*, arbitrators, choſen between the ſaid *Gray* and *Birkwood*, and the plaintiff *Addiſon*, concerning all matters in difference between them, ſo as the award be made in writing on or before the firſt of *September* then next, then, *&c.* which being read and heard, the defendant pleads no award was made. The plaintiff replies, and ſets out an award, whereby the arbitrators awarded that all actions, ſuits, quarrels, and diſputes to the day of the date of the bond ſhould ceaſe between the parties, and that the plaintiff ſhould hold and enjoy three acres of meadow in *Glatton* till the 10th of *October* then next, and then he ſhould quit the ſame to the ſaid *Gray* and *Birkwood*; and that the ſaid *Gray* and *Birkwood* ſhould on or before the 10th of *September* then next pay to the plaintiff the ſum of 4*l.* 15*s.*, and that they ſhould pay all coſts and charges due to the ſteward and attornies on account of an action of replevin depending in the court of the hundred of *Norman Croſs*, and ſhould pay all the coſts and charges of the ſaid arbitration-bonds and of that their award, and that the parties ſhould execute mutual general releaſes on or before the 29th of *September* then next; and the plaintiff avers, that the ſaid *Gray* and *Birkwood*, or either of them, have not paid to the plaintiff the ſaid ſum of 4*l.* 15*s.* or any part thereof, on, or at any day before the ſaid 10th day of *October* then next after the making of the award, according to the form and effect thereof; and this, *&c.* the defendant demurs, and the plaintiff joins in demurrer.

Debt upon an arbitration-bond; an award good in part and bad in part.

Ante, Mich. 6 Geo. 3. Fox v. Smith, S. P.

It was objected for the defendant, that this award was void in awarding coſts in an inferior court unſettled and uncertain, and did not make a final end between the parties. But *per curiam*—The award is good for the payment of the 4*l.* 15*s.*, and

3 Lev. 413 in point for plaintiff.

the mutual releaſes make a final end between the parties, and though other parts of the award be bad, yet the breach is well aſſigned. Judgment for the plaintiff.

Ravenſcroft *verſus* Eyles, Eſq. Warden of the Fleet. C. B.

Action upon the caſe for an eſcape upon meſne proceſs; the priſoner returns to the Fleet the ſame day, and the plaintiff proceeds to final judgment, yet, the action lies againſt the warden for damages.

ACTION on the caſe againſt the warden of the *Fleet*, for the eſcape of one *William Warren*. The defendant pleaded not guilty, and the iſſue was tried before Mr. Juſtice *Gould* at *Guildhall* the 13th of *June* laſt, when a verdict was found for the plaintiff, damages 18*l.* 3*s.*, coſts 40*s.*, ſubject to the opinion of this court upon the following caſe, *viz.*

The ſaid *Warren* being indebted to the plaintiff in the ſum of 18*l.* 3*s.* upon his promiſſory note of hand, and alſo for goods ſold and delivered. The plaintiff, in *Trinity* term in the 4th year of the king having made an affidavit of his cauſe of action, delivered a declaration againſt the ſaid *Warren* to the turnkey of the *Fleet* priſon, he the ſaid *Warren* being a priſoner in the cuſtody of the defendant the warden at the ſuit of one *Palmer*, as is ſet forth in the plaintiff's declaration.

That afterwards, upon the firſt of *October*, the defendant *voluntarily permitted the ſaid* Warren *to eſcape* out of the ſaid priſon, and go at large out of his cuſtody, the ſaid plaintiff not being ſatisfied his damages in the ſaid declaration.

That the plaintiff *knowing of ſuch eſcape*, on the ſaid firſt of *October* did notwithſtanding *afterwards proceed in his ſaid cauſe againſt the ſaid* Warren, *and in the then next* Hilary *term obtained judgment* againſt him for the ſum of 30*l.* 16*s.* for his damages and coſts, as is ſet forth in the declaration.

That after having ſo obtained judgment againſt the ſaid *Warren*, the plaintiff commenced his preſent action againſt the defendant the warden.

That *Warren* having ſo eſcaped on the ſaid firſt of *October*, returned to the *Fleet* priſon on the ſame day, and has ever ſince continued a priſoner therein in the cuſtody of the defendant.

The queſtion therefore ſubmitted to the court is, Whether the plaintiff is entitled to recover in this action againſt the defendant, he the plaintiff having proceeded to judgment againſt the ſaid warden, as is above mentioned.

This

This caſe was argued by Serjeant *Davy* for the defendant, and by Serjeant *Hewitt* for the plaintiff, in *Hilary* term in the 6th year of King *George* the Third.

Judgment of the court.

Lord Chief Juſtice *Wilmot*—The queſtion is, Whether this action upon the caſe lies, the plaintiff having proceeded to final judgment againſt the priſoner *Warren*, after he the plaintiff knew that the warden had voluntarily permitted him to eſcape? The *quantum* of the damages is nothing to the purpoſe; for if the jury had power in this caſe to give damages, we muſt now take it that they have done right; and I am of opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and diſcretion to aſſeſs what damages they thought proper; for this being an action upon the caſe, the damages were totally uncertain and at large, and *Warren* eſcaped by the permiſſion of the warden before final judgment. But it is objected for the defendant the warden, that the eſcape was but for a ſingle day, that the plaintiff knew thereof, and proceeded to final judgment, and might have charged the defendant in execution, as he returned again to the *Fleet* the ſame day, and is now there. But to this I anſwer, that whenever a gaoler permits a voluntary eſcape, from that moment he commits a tort, and the plaintiff has a right of action to recover ſuch damages as a jury ſhall pleaſe to give for the ſame. The priſoner when voluntarily ſuffered by the gaoler to eſcape, is inſtantly at large; the gaoler cannot afterwards retake and detain him for the ſame matter; the plaintiff may retake him by an eſcape warrant, but has his option to proceed as he pleaſes either againſt *Warren* to judgment and execution in this caſe, or againſt the warden. I ſay *Warren* is not now a priſoner at the plaintiff's ſuit although he be locked up every night, and though the plaintiff might lawfully proceed to judgment againſt him, yet he could not charge him in execution; and the caſe of *Key* and *Briggs*, *Skin.* 582. is directly in point; I have not the leaſt doubt but that judgment muſt be for the plaintiff, and if we ſhould do otherwiſe we ſhould permit every gaoler in *England* to let his priſoner go at large, as much as if they had never been arreſted; if an eſcape be voluntary in the gaoler, nothing afterwards will purge it. *Salk.* 271. Judgment for the plaintiff *per totam curiam.*

EASTER TERM,

6 *Geo.* III. 1766.

Truman *verſus* Walgham and Key. C. B.

Treſpaſs. Preſcription for toll through the ſtreets of Gainſbrough in conſideration of repairing divers ſtreets there, ill, becauſe does not ſay he repaired all the ſtreets there, and the plaintiff might be paſſing with his waggon through a ſtreet which he did not repair, for any thing that appears to the contrary.

IN treſpaſs the plaintiff declares that the defendants, on the 5th of *November* 1764, with force and arms, *&c.* at *Gainſbrough* in the county of *Lincoln*, ſtopped the waggon of the plaintiff drawn by his cattle in and along the king's highway there, and ſeized and took from the cattle drawing the waggon the geers of the plaintiff, *viz.* one pair of his iron geers, and carried away, kept, and detained the ſame, and alſo that the defendants, on the 5th of *November* 1764, with force and arms, at *Gainſbrough*, ſeized, took, and carried away other geers of the plaintiff, to wit, one pair of iron geers, at *Gainſbrough* lately found, and converted and diſpoſed thereof to their own uſe, to the plaintiff's damage of 10*l.*

The defendants as to coming with force and arms, *&c.* plead Not guilty, and thereupon iſſue is joined; and as to the reſidue of the treſpaſſes above ſuppoſed, that the plaintiff ought not to have his action againſt them, becauſe they ſay, that Sir *Nevile George Hickman* baronet, at the time when, *&c.* long before, and yet is ſeiſed of the manor of *Gainſbrough* in his demeſne as of fee, the ſaid town of *Gainſbrough* (which is an ancient market town and a borough) being ſituated in, and parcel of the ſaid manor, and that the ſaid Sir *Nevile*, and all thoſe whoſe eſtate he hath, and at the ſaid time had in his ſaid manor, from time whereof, *&c.* have at their own proper coſts and charges repaired, cleanſed, and maintained, and have uſed and been accuſtomed, and ought to repair, cleanſe, and maintain *divers and many ſtreets* belonging *to the ſaid town or borough* as often as was neceſſary, and by reaſon thereof have for and during all the time before mentioned of right enjoyed, received, and taken, and have uſed and been accuſtomed to receive and take as belonging to the ſaid manor a certain toll, of and for every cart and waggon coming from out of any other lordſhip or manor, and paſſing over any part of the manor of *Gainſbrough* into the town or borough

rough of *Gainſbrough* at all times in the year, except ſuch times during which the common marts or fairs are held at *Gainſbrough* aforeſaid, (that is to ſay,) for every cart or waggon of any perſon or perſons whatſoever, except the carts and waggons of the burgeſſes or inhabitants of the ſaid town or borough, and the carts and carriages loaded with fuel for the uſe of the inhabitants within the ſaid manor, and the carts and waggons of other perſons otherwiſe exempted, according to the rate of one penny a wheel for every wheel of ſuch cart or waggon, the ſaid toll being payable and to be paid by the perſon or perſons who ſhall drive or conduct ſuch cart or waggon into the ſaid town or borough, and in default of payment of the ſaid toll, then they have uſed and been accuſtomed, from and during all the time aforeſaid, to diſtrain any part of the harneſs of the cattle drawing ſuch carts or waggons, and to keep and detain ſuch diſtreſs until the ſaid toll was ſatisfied and paid to them. And the defendants further ſay, that at the ſaid time when, *&c.*, and not being the time when any of the ſaid common marts or fairs were held, a certain waggon of the plaintiff having four wheels coming from out of another lordſhip or manor, that is to ſay, the lordſhip or manor of *Lea* in the county aforeſaid, and paſſing over the manor of *Gainſbrough* was driven and conducted by the ſervant of the plaintiff, and paſſed into the town or borough of *Gainſbrough*, the ſaid plaintiff not being at the time when, *&c.* a burgeſs or inhabitant of the ſaid town or borough, nor a perſon otherwiſe exempted from the payment of the ſaid toll, and his ſaid waggon not being then loaded with any kind of fuel; whereupon the defendants, being collectors of the toll and ſervants of Sir *Nevile* on that behalf, then and there requeſted the ſervant of the plaintiff ſo driving and conducting the ſaid waggon as aboveſaid to pay the toll on that behalf due for the ſaid waggon, (that is to ſay,) four pence for the ſaid time when the ſaid waggon of the plaintiff was ſo driven and conducted by the ſervant of the plaintiff, and came from out of another manor or lordſhip, and paſſed over part of the ſaid manor of *Gainſbrough* into the town or borough of *Gainſbrough* as aforeſaid; which ſaid toll the ſaid ſervant of the plaintiff did then and there refuſe to pay, and did not pay, and the ſaid toll is actually yet unpaid; wherefore the defendants, as ſervants of the ſaid Sir *Nevile*, and by his command, at the time when, *&c.* at *Gainſbrough* aforeſaid, did in the name of a diſtreſs for the ſaid toll ſtop the waggon of the plaintiff drawn by his cattle in the king's highway at *Gainſbrough* within the manor and town or borough aforeſaid, and in the name of a diſtreſs for the ſaid toll, did then and there ſeize and take from the ſaid cattle drawing the ſaid waggon the ſaid iron geers of the plaintiff in the declaration ſpecified, and did carry away, keep, and detain the ſame, as it was lawful for them to do; which is the ſame reſidue of the treſpaſſes whereof the plaintiff above complains againſt them; and this, *&c.*

And

The plaintiff replies de injuria ſua propria, and traverſes the preſcription.

And the plaintiff, as to the ſaid reſidue of the treſpaſs in the above plea, ſays, he ought not to be barred, &c. becauſe he ſays that the defendants at the time when, &c. at *Gainſbrough*, of their own wrong ſtopped the plaintiff's waggon drawn with his cattle, &c. and ſeized and took from the cattle, &c. the geers of the plaintiff in the declaration firſt mentioned, and carried away, kept, and detained the ſame, and alſo at *Gainſbrough* ſeized, took, and carried away the other geers of the plaintiff in the declaration ſecondly mentioned, there found and converted and diſpoſed thereof to their own uſe, as the plaintiff has above complained againſt them; *without this*, that the ſaid Sir *Nevile George Hickman*, and all thoſe whoſe eſtate he hath, and at the ſaid time had in his ſaid manor, from time whereof, &c. have at their own proper coſts and charges repaired, cleanſed, and maintained, and have uſed and been accuſtomed and ought to repair, cleanſe, and maintain *divers and many ſtreets belonging* to the town and borough of *Gainſbrough* as often as was neceſſary, and by reaſon thereof have for and during all the time aforeſaid of right enjoyed, received, and taken, and have uſed and been accuſtomed to receive and take, as belonging to the ſaid manor, a certain toll of and for every cart and waggon coming from out of any other lordſhip or manor, and paſſing over any part of the manor of *Gainſbrough* in the ſaid town or borough of *Gainſbrough*, at all times in the year, except ſuch times during which common marts or fairs are held at *Gainſbrough*, (that is to ſay,) for every cart or waggon of any perſon or perſons whatſoever, except the carts and waggons of the burgeſſes or inhabitants of the ſaid town or borough, and the carts and carriages loaded with fuel for the uſe of the inhabitants within the ſaid manor, and the carts and waggons of other perſons exempted, according to the rate of one penny a wheel for every wheel of ſuch cart or waggon, the ſaid toll being payable and to be paid by the perſon and perſons who ſhall drive or conduct ſuch cart or waggon into the ſaid town or borough, as the ſaid defendants have by their ſaid plea in that behalf above alledged; and this he is ready to verify; wherefore inaſmuch as the defendants have acknowledged the ſtopping the ſaid waggon of the plaintiff, &c. the plaintiff prays judgment and his damages by reaſon of thoſe treſpaſſes, to be adjudged to him, &c. The defendants take iſſue on this traverſe of the preſcriptive right, and thereupon iſſue is joined; which was tried at the laſt *Lincoln* aſſizes, when a verdict was found for the defendant.

It was moved for the plaintiff in arreſt of judgment, that this is a bad preſcription, being for a *toll thorough*, which cannot be good without a good conſideration, which is not ſhewn or pleaded in this caſe, for it is not alledged that the lord of the manor repairs, cleanſes, and maintains *all the* ſtreets in *Gainſbrough*, *but only divers and many ſtreets*, ſo that for any thing that appears on theſe

theſe pleadings the plaintiff's waggon might be paſſing through a ſtreet in *Gainſbrough* which the lord of the manor doth not repair; this is clearly a toll thorough a ſtreet which the lord has not ſhewn that he repairs; and this objection alone was relied upon.

For the defendant it was admitted, that a toll thorough cannot be taken where there is no conſideration, but inſiſted the conſideration here alledged is ſufficient, and need not be ſo large as the preſcription; that it is ſufficient, if there be a charge to the lord, and a benefit to the king's ſubjects, that the repairing *divers and many* ſtreets is a benefit to the inhabitants and all perſons whoſe particular buſineſs calls them thither, and to all the king's ſubjects who paſs through that town. Many caſes were cited touching toll thorough and toll traverſe; but as none of them are exactly in point, it is unneceſſary to ſet them down. The court took time to conſider, and in this term arreſted the judgment.

Curia—This is a preſcription for a toll through the king's highway, the ſtreets of *Gainſbrough*, which cannot be taken without a good conſideration be alledged. The reaſon is, becauſe it is to deprive the ſubject of his common right and inheritance to paſs through the king's highway, which right of paſſage was before all preſcriptions. *Moore* 574, 575. Toll traverſe, or for going through a man's private land, may be preſcribed for, without any conſideration; and payment time out of mind is ſufficient, and will ſupport the preſcription. In the caſe at bar toll is demanded of the ſubject in the king's highway for paſſing there; the ſubject ought to have a benefit for paying it; the conſideration here is for repairing, cleanſing, and maintaining *divers and many ſtreets* in *Gainſbrough*, not for repairing, *&c. all* the ſtreets there; how, therefore can we ſay that the plaintiff's waggon was paſſing through any ſtreet repaired by the lord of this manor; the waggon might be paſſing over ſome ſtreet not repaired by him when the diſtreſs was taken, for any thing that appears to the contrary, and we muſt take it that it was ſo; we cannot let the defendant have judgment upon this record. Courts are exceeding careful and jealous of theſe claims of right to levy money upon the ſubject; theſe tolls began, and were eſtabliſhed by the power of great men. The defendant's plea is as bad as can be; the lord has artfully tried to make it doubtful, whether this be a toll thorough or toll traverſe, for he has confounded them together; the conſideration he claims it for, is for mending the highway, and he would have us believe it is for paſſing through his own manor or land. The judgment was arreſted upon the merits, *per totam curiam.*

Beavor *verſus* Hides. C. B.

Words. He was put in the round-houſe for ſtealing ducks at Crowland, are actionable.

ACTION for ſcandalous words. Five ſets were laid in the declaration, and upon the general iſſue, there was a general verdict for the plaintiff upon the whole declaration. One of the ſets of words were theſe, *viz.* *He* (meaning the plaintiff) *was put into the roundhouſe for ſtealing ducks at* Crowland, which were alledged to be ſpoken of the plaintiff by the defendant *falſely and maliciouſly*. And it was moved in arreſt of judgment that the words were not actionable, for the defendant doth not ſay expreſsly that he ſtole the ducks, like the caſe in *Cro. Eliz.* 234. "*I have ſerved thee with the queen's letter for ſtealing goods in my* "*mother's houſe,*" were held not actionable. "*Thou art a falſe* "*knave, thou waſt arraigned for two bullocks,*" held not actionable. *Cro. Eliz.* 279. and it was ſaid, if the words had been, "*Thou art a falſe knave, thou waſt arraigned for ſtealing two bul-*"*locks;*" theſe words would not have been actionable, for a man may be arraigned for felony, and yet no felon. "*James Steward* "*is in* Warwick *gaol for ſtealing a mare and other beaſts;*" after verdict the whole court gave their opinion *ſeriatim*, that theſe words would not bear an action, for they do not affirm directly that he did ſteal the beaſts. *Hob.* 177.

1 Ro. Abr. 64. p. 6.

In anſwer, it was ſaid for the plaintiff, that theſe words are alledged to be *falſely and maliciouſly* ſpoken of the plaintiff by the defendant, and the jury have found that they were ſo *maliciouſly and falſely* ſpoken, like the caſe in *Cro. Car.* 268. "*He was* "*arraigned at* Warwick *for ſtealing of twelve hogs, and if he had* "*not made good friends it had gone hard with him;*" *ubi re verâ* he never was arraigned for felony. After a verdict, theſe words were held to be actionable, being laid to be ſpoken *falſely and maliciouſly*. "*Thou art a clipper, and thy neck ſhall pay for it;*" after a verdict held actionable, though the word *clipper* be ambiguous. *Skin.* 183. "*You are a rogue, and broke open a houſe* "*at* Oxford, *and your grandfather was forced to bring over* 40l. *to* "*make up the breach;*" held actionable, though the word *rogue* is not; and breaking open a houſe is only a treſpaſs. *Skin.* 364. "*He was ſent to priſon for running wool;*" held to be actionable by *Lee* C. J. at *Guildhall*. "*He was whipt about* Taunton *caſtle* "*for ſtealing ſheep;*" were held actionable. 1 *Roll. Abr.* 50. *pl.* 9.

This motion in arreſt of judgment was made in *Michaelmas* term laſt, when the court thought the caſes cited for the defendant were in point, that theſe words are not actionable.

Lord *Camden* ſaid, if we ſhould judge theſe words actionable, many actions would ariſe at every aſſizes in the kingdom, where the

the common topic of converſation is, that ſuch a man was ſent to gaol for ſuch a crime, and ſuch a one was arraigned, and tried, *&c. &c.*; and if ſuch words are true, where is the ſlander? ſaying "*a man was whipt*," if the words are true, is no ſlander.

Bathurſt J. alſo inclined to think the words were not actionable, but thought that if this particular ſet of words were not proved at the trial, the *poſtea* (upon the judge's certificate that they were not proved) might be amended, and a verdict for the defendant entered as to this ſet of words, if any precedent for it could be found; for he ſaid, if they were not proved, the plaintiff ought not to have had a verdict upon them; but if this cannot be done, he thought the caſes cited for the defendant ſo ſtrongly in point that the court were bound by them. *Gould* J. was of the ſame opinion, and ſaid the caſe in *Hob.* 177. was ſo ſtrong for the defendant, and ſo ſolemnly determined, that he could not well get over it.

Lord *Camden* (in anſwer to Mr. Juſtice *Bathurſt*) ſaid, it would be very dangerous after a verdict of twelve men recorded by the court, to refer to the judge's notes in order to alter it; and he thought there was no precedent of ſuch a caſe, and that a verdict cannot be varied. And the court at this time pronounced that the judgment muſt be arreſted, unleſs cauſe the laſt day of the term (*Hilary* term laſt). But at *that* day they adjourned it for further conſideration; and after having taken time till this term, the court changed their opinion, and gave judgment for the plaintiff, that the words were actionable.

Lord *Camden*—Upon conſidering this caſe more fully, we are now all of opinion that theſe words being laid in the declaration to be ſpoken *falſely and maliciouſly* of the defendant, are actionable; we muſt take it upon this record, that the plaintiff was really not put in the roundhouſe or impriſoned for ſtealing of ducks, becauſe the jury have found that the words were *falſely* ſpoken; the words clearly import that the plaintiff had been guilty of a crime, and if the fact had been true the defendant might, and ought to have juſtified; if we ſhould arreſt the judgment, the *malevolent* would think the plaintiff had been guilty of the crime falſely imputed to him, and the *good-natured* could not help ſuſpecting him to have been ſo. We lay great ſtreſs upon the word *falſe*; if words are true they are no ſlander, but may be juſtified. The objection here is, that the words do not expreſsly alledge that the plaintiff ſtole ducks; but words are to be taken according to the common *parlance*, and to be ſpoken in the worſt ſenſe according to the common underſtanding of the by-ſtanders. *Cro. Jac.* 154. "*I know what I am, I know what* Snell *is, I never buggered a mare.*" It was objected theſe words were not actionable, for they do not charge the plaintiff with buggery; but

Cro. Jac. 247 263. 1 Lev. 82. Moor 868.

but the court ſaid they implied a charge of buggery, and gave judgment for the plaintiff. 2 *Lev.* 150. The words in the preſent caſe muſt be taken to be *falſe*, and to throw a ſtain upon the plaintiff's character.

Judgment for the plaintiff *per totam curiam.*

Goſſin *verſus* Wilcock. C. B.

An action lies for ſuing plaintiff in an inferior court maliciouſly, and arreſting him, when that court had no juriſdiction of the cauſe.

SPECIAL action upon the caſe, wherein the plaintiff declares, that whereas by the laws of this realm no perſon ought to be arreſted, impleaded, or impriſoned without a probable cauſe of action againſt him, yet the defendant *falſely and maliciouſly*, without any *probable cauſe* of action, in the king's court of record held at and for the borough of *Bridgwater* in *Somerſetſhire*, on the 30th of *September* 1765, levied a plaint againſt the plaintiff in a plea of treſpaſs upon the caſe to the damage of 10 *l.*, and afterwards at the ſame court on the ſame day ſued out upon the ſaid plaint a writ of *capias ad reſpondendum* directed to the bailiffs of the borough, to take the plaintiff, and have his body before the judges of that court on *Monday* after the ſervice of that writ, to anſwer the defendant in the ſaid plea; which writ the defendant *falſely and maliciouſly* cauſed to be indorſed for bail 5 *l.* 3 *s.* 11 *d.* againſt the plaintiff; and the defendant further *falſely and maliciouſly*, and without any probable cauſe, afterwards, on the 3d of *October* 1765, at the ſaid borough, cauſed the plaintiff to be arreſted and kept in cuſtody twenty-four hours, without *any probable cauſe, when in truth and in fact the defendant had not at the time of the levying the plaint, or of the ſaid arreſt and impriſonment, any juſt or probable cauſe of action againſt the plaintiff for which he ought to have been arreſted and impriſoned*; and the defendant hath not declared againſt the plaintiff in that plea, nor further proſecuted his ſaid plaint, but hath diſcontinued the ſame, and the ſame ſuit is long ſince ended and determined; and the plaintiff in fact ſays, that by means of the premiſes he is greatly injured and damnified, and hath been put to great charges in freeing himſelf from the ſaid impriſonment, and forced to undergo grievous pains of body and mind, and during his impriſonment was hindered from exerciſing his lawful employment, trade and buſineſs, and loſt the whole profit thereof at the borough aforeſaid to his damage of fifty pounds. The defendant pleaded Not guilty of the premiſes laid to his charge, and thereupon iſſue is joined.

A new trial was refuſed, though the declaration was faulty in not alledging that the defendant knew the inferior court had no juriſdiction of the cauſe.

This cauſe was tried at the laſt *Somerſetſhire* aſſizes before Mr. Juſtice *Aſton* at *Taunton*, when the jury gave a verdict for the plaintiff and 5 *l.* damages. The judge reported that it appeared in evidence at the trial, that the plaintiff and defendant both lived at *Taunton* a quarter of a year together; that the plaintiff being

all

all that time indebted to the defendant in about 5 *l.* upon a contract at *Taunton*, where the plaintiff appeared publicly, and might have been arrested for the same there at any time; that the defendant said, that if he could not do for the plaintiff at *Taunton* he would do for him at *Bridgwater*; that afterwards at the fair at *Bridgwater*, when the plaintiff was standing at his stall *there* exposing his goods to sale, the defendant came along with the bailiffs to the stall, and said to the bailiffs, *there is the rogue, there is your prisoner*, whereupon they instantly arrested the plaintiff in the fair; the *plaint* levied, and the *capias* indorsed for bail, were also proved; there was also evidence of the injury the plaintiff suffered, and the expences he was put to on this occasion; there was no witness called for the defendant, but it was admitted that he discontinued his action in the borough, when he knew it would not lie there, and that he brought another action against the plaintiff for what he owed him, and had got a verdict at that assizes for the same, so that there really was a debt owing by the plaintiff to the defendant, at the time the plaintiff was arrested at the suit of the defendant in the borough court of *Bridgwater*, though it was not contracted within that jurisdiction; but the judge was of opinion, that the arrest *there* at the time of the fair was done maliciously, and was satisfied with the verdict.

It was moved for a new trial, because the evidence did not support the declaration (with leave given to the defendant at the same time to move in arrest of judgment in case he should not succeed in this motion); it was objected that the gist of this kind of action is *malice*; as where a man *maliciously* arrests another when there is really no debt at all owing, or where one maliciously arrests another for a far larger sum than is really due, with an intent to oppress him and prevent his friends from being bail for him; but the *malicious intention* must clearly be made to appear, and must be expresly averred in the declaration; in the present case it appears there was really and *bonâ fide* a debt of 5 *l.* and upwards owing from the plaintiff to the defendant at the time of the arrest at *Bridgwater*, and that the defendant not knowing but that he might lawfully sue plaintiff *there* caused him to be arrested there; but as soon as he was informed that court had no jurisdiction, he discontinued his action, and brought another in a superior court, and has recovered; so there appears no malice in the case. 2dly, It was objected that an action will not lie either against the judge, officer, or party, for arresting a man in an inferior court, when there is no cause of action within that jurisdiction; and the case of *Temple* v. *Killingworth*, *B. R. Hil.* 2 *W. & M. Rotulo* 725. *Carth.* 189. 1 *Show.* 254. S. C. 12 *Mod.* 4. S. C. was cited as in point, wherein the plaintiff declared thus: *viz.* "Petrus Temple "queritur de Samuele Killingworth in custodia marescalli mares- "caltiæ, *&c.* pro eò videlicèt quod prædictus Samuel machi- "nans & malitiosè intendens eundem Petrum magnoperè prægra-

"vare

" vare & minùs juſtè opprimere 25 die Aprilis anno regni domini " regis & dominæ reginæ nunc primo, injuſtè & malitioſè apud " London prædictum in parochia, &c. in warda, &c. prætextu " & colore cujuſdam prætenſæ querelæ in curiâ dictorum do- " mini regis & dominæ reginæ ad tunc tenta coram Johanne " Flint, milite tunc uno vicecomitum civitatis Londini prædicti " in computatorio ſuo ſcituato in parochia & warda prædictis " intratæ & levatæ ad ſectam ipſius Samuelis ſuper quandam " prætenſam actionem ad magnum prætenſum damnum ipſius " Samuelis arreſtari & impriſonari ibidèm cauſavit & procuravit, " ac prædictum Petrum in priſona & cuſtodia ibidèm ratione " arreſtationis prædictæ per magnum tempus ſcilicèt per ſpatium " ſex dierum detineri fecit pro defectu ſufficientium manucap- " torûm & ſecuritatis ad prætenſam actionem prædictam pro " prædicto prætenſo damno, ubi re verâ & in facto prædictus " Samuel tempore arreſtationis & impriſonamenti ipſius Petri " prædicti ut præfertur, vel ad aliquod tempus anteà, nullam ha- " buit cauſam actionis verſus præfatum Petrum infra jurifdictio- " nem ejuſdem curiæ; ratione quorum quidem injuſtè malitioſè " arreſtationis & impriſonamenti prædicti ipſius Petri ipſe idem " Petrus non ſolùm in priſona & cuſtodia per totum tempus præ- " dictum detentus & de libertate ſua deprivatus fuit ſuper præ- " dictam prætenſam actionem ob prætenſum damnum prædictum " verùmetiàm magnos labores et expenſas pro relaxatione ſua ab " arreſtatione & impriſonamento illis erogavit ac ſubire & ero- " gare compulſus fuit, unde dicit quod deterioratus eſt & dam- " num habet ad valenciam quingentarum librarum et inde pro- " ducit ſectam," &c. The defendant pleaded the general iſſue Not guilty, and there was a verdict for the plaintiff. It was moved in arreſt of judgment, that the plaintiff (when he was defendant below) ought to have pleaded to the juriſdiction of the ſheriff's court, and if the plea had been refuſed, then a prohibition would have been granted: the court inclined to that opinion, and judgment was ſtayed till the plaintiff ſhould move it again; and afterwards the plaintiff moved for judgment, and the caſes in the * margin were cited to maintain the action, but the court was not ſatisfied with the action. There does not appear any judgment entered upon the roll. In *Shower* 254. S. C. *Holt* C. J. ſaid, the point was fit to be conſidered by all the judges; and in 12 *Mod.* 4. S. C. *Holt* C. J. ſaid, that of late it is held that *caſe* will not lie for proſecution in an inferior court where the court has not juriſdiction: that the firſt caſe in point was at *Huntingdon* aſſizes, and referred to the *C. B.*, and there adjudged that for ſuing one without any cauſe of action at all no action lies, unleſs it appears to be with a *malicious* and *vexatious* deſign. Eight of the judges ſeemed to think the action would not lie.

* Hob. 105. Cro. Jac. 667. Cro. El. 628, 636. Stat. 3 Ed. 1. cap. 38. Regiſt. 98. F. N. B. 45. (F). 2 Sand 221. Bid. 463. 4 Rep. 14 b, 2 Vent. 369.

It was anſwered by the counſel for the plaintiff, that it appears by the judge's report, in this caſe at bar, the time, place, and every circumſtance attending the arreſt at *Bridgwater*, that it was done with

with a *malicious* deſign to injure the plaintiff in the ſale of his goods at the fair, and to expoſe him to his cuſtomers: the defendant muſt certainly know that the borough court at *Bridgwater* had no juriſdiction, and his diſcontinuing the action after he had executed his malicious deſign will not avail him: and 2dly, that it is a rule in law, that whereſoever a man ſuffers an injury, joined with a loſs, the law ſhall give him a remedy and recompence, *Heb.* 45.; and no remedy or ſatisfaction can be had in this caſe unleſs this action will lie; for falſe impriſonment certainly will not lie. *Gwinne* v. *Poole & al.* 2 *Lutw.* 935. 1571, 1572. And that an action will lie for ſuing in an inferior court without any cauſe of action within the juriſdiction, was held good, was cited 2 *Shower* 328. *Hudſon* and *Cooke*.

In reply to the caſe of *Hudſon* and *Cooke*, was cited what Sir *John Powel* ſaid in his learned argument in the caſe of *Gwinne* v. *Poole*, 2 *Lutw.* 1571, 2. In regard to the caſe of *Hudſon* and *Cooke*: "I was preſent (ſays he) when the caſe of *Hudſon* and *Cooke* was "adjudged; it was an action upon the caſe brought againſt the "defendant for commencing an action in an inferior court "where the cauſe of action aroſe out of the juriſdiction of that "court; Not guilty was pleaded, and a verdict for the plaintiff; "and an exception was taken in arreſt of judgment, for that it "was not ſhewn that the defendant knew that the place where "the action aroſe was out of the juriſdiction. But it was held "by *Jefferys*, *Holloway*, and *Walcot*, that it was aided by the ver-"dict; *Withens* J. being of a contrary opinion—I confeſs (ſays "he) that I then thought it ſtrange that the *giſt* of the action "ſhould be aided by the verdict;" therefore the defendant's counſel inſiſted this caſe of *Hudſon* and *Cooke* is not law.

Lord *Camden*—Baron *Powell* in his argument of *Gwinne* and *Poole*, has ſtated the learning of caſes of this kind, but hath not laid down any preciſe rule of law: this is a nice caſe, and is to be looked into with preciſion. There are no caſes in the old books of actions for ſuing where the plaintiff had no cauſe of action; but of late years, when a man is *maliciouſly* held to bail where nothing is owing, or when he is *maliciouſly* arreſted for a great deal more than is due, this action has been held to lie, becauſe the coſts in the cauſe are not a ſufficient ſatisfaction for impriſoning a man unjuſtly, and putting him to the difficulty of getting bail for a larger ſum than is due. Whenever this kind of action is brought, the particular *gravamen* muſt be alledged in the declaration, and it muſt be laid that it was done *maliciouſly, and with an intent to injure and oppreſs*: the fact of the evidence in the preſent caſe is, that the defendant at *Bridgwater* ſaid, "*I know I can catch you here though I could not at* Taunton;" but this doth not prove that he might not think that the action

would lie at *Bridgwater*, and it seems to me that he did not know to the contrary when he levied his plaint, because as soon as his attorney informed him that it would not lie *there*, he discontinued his suit; I think the declaration is ill, because it is not alledged in the declaration, that the defendant knew that the place where the cause of action arose was out of the jurisdiction of the borough court of *Bridgwater*, and that the case proved at the assizes is different from the case stated in the declaration, and if it be so, we ought to grant a new trial.

Clive J.—This is the first action of the kind I have ever seen brought for suing in an inferior court which has not jurisdiction, and I am inclined to think the declaration will not support the evidence.

Bathurst J.—This is a motion for a new trial, as being a verdict against evidence. I cannot help agreeing with the judge who tried this cause, that the arrest at *Bridgwater* was *maliciously* done; it then comes to this question, whether an action upon the case will not lie for suing in an inferior court which has not jurisdiction, with the circumstances of *malice*, which manifestly appear; and I am very clear that it will lie, but think this declaration is not rightly drawn; it ought to have alledged, that the defendant knew that the cause of action did not arise within the jurisdiction of the court at *Bridgwater*, and then it would have been right enough. But the court can see in this case that justice and equity are with the plaintiff, and they never will grant new trials, where the verdict is on the honest side of the cause. The case of *Smith* v. *Page*, 2 *Salk.* 644. is a very strong case to this purpose. In ejectment, the plaintiff was a mortgagee and claimed by surrender, whereas the land was not copyhold, and the defendant claimed only by a voluntary conveyance, the verdict was for the plaintiff, and the court of *B. R.* would not set it aside, and grant a new trial against the honesty of the cause; so in the present case, I think the honesty of the cause is with the plaintiff, and therefore I am for supporting the verdict if possible. When a defendant has got a verdict in a hard action, the court will not grant a new trial, and in many cases, as in *qui tams*, no new trial is ever granted, where the defendant has got a verdict.

Gould J.—I am of the same opinion with my brother *Bathurst*, as to the malice in the defendant, and the justice of the plaintiff's cause, and think the defendant was conscious that he had no right to arrest the plaintiff at *Bridgwater*; and the court will be *astute* to support this verdict, as they see it is on the side of justice, and will not grant a new trial. I am inclined to think this declaration is well enough, for it is alledged, *That the defendant maliciously, without any probable cause, at the said borough*

cauſed the plaintiff to be arreſted; when in truth and in fact the defendant had not at the time of levying the plaint, or of the arreſt and impriſonment, any juſt or probable cauſe of action, for which he ought to have been arreſted and impriſoned. I think this is a ſubſtantial diſcloſure and allegation of his cauſe of action, and was ſufficient notice to the defendant to come with proof, and ſhew at the trial that he had a cauſe of action ariſing within the juriſdiction of the court at *Bridgwater*, and that the plaintiff in his declaration was not obliged to aver, that the defendant knew that his cauſe of action did not ariſe within the juriſdiction of that court, for this is matter of evidence, which no man is obliged to ſet out in his pleadings. As at preſent adviſed, I think this declaration is ſubſtantially good: but ſuppoſing it is not, *yet* in ſuch a caſe as this we ought not grant a new trial. The court being divided, took time to conſider; and afterwards, in this ſame term, Lord *Camden* and Mr. Juſtice *Clive* agreed in opinion with Mr. Juſtice *Bathurſt* and Mr. Juſtice *Gould* to refuſe a new trial.

Lord *Camden*—I think, upon further conſideration, that as the juſtice and equity of the cauſe is on the ſide of the verdict, we ought not to grant a new trial. I ſhall always be willing to grant a new trial, where the equity and juſtice of the caſe is with him who prays it, if the law and circumſtances of the caſe will permit; and ſhall be as willing to refuſe a new trial, where I am warranted to do ſo by precedents. The granting new trials began within time of memory, and I will not extend the practice of granting them further than precedents have already gone. This is an action for bringing a ſuit at law; and courts will be cautious how they diſcourage men from ſuing. Where a party has been *maliciouſly* ſued and held to bail, *malice, and that it was without any probable cauſe*, muſt be alledged and proved. Upon more mature conſideration, we are all now of opinion, that if you hold a man to bail in an inferior court when you know it hath not juriſdiction, and *with malice*, an action upon the caſe will lie. And that if the plaintiff had averred, that the defendant knew that his cauſe of action did not ariſe within the juriſdiction of the court of *Bridgwater*, we are all clear of opinion the declaration would have been good; *that ſingle averment*, together with *malice*, would have been ſufficient without any other. The plaintiff and defendant lived in the ſame town of *Taunton* a quarter of a year together, and the defendant to whom he was indebted all that time, never ſued him there, (though it is not pretended but the plaintiff always appeared publicly,) but the defendant follows him to *Bridgwater* and abuſes him *there* publicly, and arreſts him in the fair at his ſtall, when the defendant muſt know that the court *there* had no juriſdiction; we are forced to ſay the verdict is according to the juſtice of the caſe, and on a motion for a new trial we are deſired to grant it for a fault in the declaration

againſt the juſtice of the caſe; but if I had only the caſe of *Deerly* v. *The Ducheſs of Mazarine*, 2 *Salk.* 646. to warrant me, (though the jury were liable to an attaint in that caſe,) I would not grant a new trial in the preſent caſe. So a new trial was refuſed by the whole court.

Williams *verſus* Leaper. C. B.

What is or is not a promiſe within the ſtatute of frauds and perjuries.

ONE *Taylor* was indebted to the plaintiff *Williams* in 45 *l.* for three quarters of a year's rent for a meſſuage which he held of him; and *Taylor* becoming inſolvent, made a bill of ſale to the defendant *Leaper* of all his goods in the ſaid meſſuage in truſt, to be ſold for the uſe of his creditors. While the defendant was in poſſeſſion of the goods upon the premiſes, the plaintiff (the landlord) came there to diſtrain for his rent, whereupon the defendant, in conſideration that the plaintiff would not diſtrain, undertook and promiſed to pay the plaintiff the ſaid ſum of 45 *l.*, and upon that promiſe this action is brought againſt the defendant for non-payment of the money, and was tried before Lord *Mansfield* at *Guildhall*, *London*; verdict for the plaintiff, ſubject to the opinion of the court, whether this promiſe (not being in writing) was within the ſtatute of frauds and perjuries, as being a promiſe to pay the debt of another perſon. This point was debated by Mr. *Morton* for the plaintiff, and Sir *Fletcher Norton* and Mr. *Wallace* for the defendant. To ſhew that it was not within the ſtatute was cited *Read* v. *Naſh*, *Trin.* 24 & 25 *G.* 2. *B. R.* And that it was within the ſtatute was cited *Fiſh* v. *Hutchinſon*, *Trin.* 32 & 33 *G.* 2. *C. B. ante.*

Curia—This is not a promiſe to pay the debt of another, the goods were debtor, and the defendant was in nature of a bailiff for the landlord, and if the defendant had ſold the goods and received money for them, an action for money had and received for the plaintiff's uſe would have laid in this caſe by all the juſtices except *Aſton*, who thought if the goods had not ſold for ſo much money as the plaintiff's rent, he would have been liable for no more than what they ſold for; but *per Yates* J.—The defendant's promiſe is an admiſſion that the goods were ſufficient to ſatisfy the plaintiff's demand, and it was a new contract upon a good conſideration; the defendant had an intereſt, and the plaintiff gave up his right to diſtrain. Judgment for the plaintiff *per totam curiam.*

Blaxton *verſus* Pye. C. B.

AN action of *aſſumpſit* upon a wager of fourteen guineas to eight guineas by the plaintiff with the defendant, upon two races to be run by two horſes called *Elephant* and *Granby*, that *Elephant* would win one of the races, *viz.* that if *Elephant* won one of the races, defendant promiſed to pay plaintiff eight guineas, and in conſideration thereof if *Elephant* won neither of the races, plaintiff promiſed to pay defendant eight guineas; the event was, that *Elephant* won one race, ſo the defendant loſt the wager. After verdict it was moved in arreſt of judgment, that the conſideration of laying fourteen guineas to eight guineas in this caſe is *nudum pactum*, becauſe the laying above ten pounds upon a horſe-race is a bet within the ſtatutes againſt gaming; if the ſtatute of 16 *Car.* 2. *c.* 7. and the *ſtat.* 9 *Ann. c.* 14. be taken together; ſo that plaintiff could not poſſibly loſe the fourteen guineas, and therefore ought not be allowed to win the eight guineas of the defendant; and of that opinion was the whole court, and the judgment in this caſe was arreſted; and the court ſaid they ought to extend the ſtatute of 9 *Ann.* to prevent exceſſive betting upon all *ſports* as well as games, and that although horſe-racing is not mentioned in that ſtatute, yet it is within the general words *other game or games*, as in the caſe of *Goodburn* v. *Marley*, 2 *Stra.* 1159. See *Lynell* and *Longbottom*, *ante*, *fo.* 36. and *Lovit* and *Thompſon*, 3 *Geo.* 3. *C. B.*

Horſe-race is gaming within ſtat. 9 Ann.

Alcinbrook *verſus* Hall. C. B.

ACTION upon an *aſſumpſit*, for money paid by the plaintiff for the defendant at his inſtance and requeſt. The caſe was this, *viz.* The defendant having loſt a ſum of money above ten pounds, upon a bet at a horſe-race, requeſted the plaintiff to pay it for him, which he did; the defendant objected, that this money being loſt at gaming, and recoverable back again by the *ſtat.* 9 *Ann. c.* 16. this action would not lie; but the court held this was not a caſe within the ſtatute, for there is not the word contract as in the ſtatute of uſury; *Stra.* 1249. So the court here held this was not a caſe within the *ſtat.* 9 *Ann.* and gave judgment for the plaintiff.

Money loſt by the defendant on a bet upon a horſe-race, and paid by plaintiff at his requeſt, an action lies for it.

TRINITY TERM,

6 *Geo.* III. 1766.

Mary Hayes *verſus* Samuel Long, Clerk. C. B.

Action for a malicious proſecution on an indictment.

ACTION upon the caſe, wherein the plaintiff declares, that whereas ſhe is an honeſt ſubject, and never was guilty of keeping a bawdy-houſe, yet the defendant well knowing this, *falſely and maliciouſly, without any probable cauſe*, on the 13th of *April* 1765, at *Benſon* in the county of *Oxford*, charged and accuſed her of being known to keep a lewd and diſorderly houſe, and of permitting ſeveral young gentlemen from *Oxford* frequently to reſort to her houſe at late and unſeaſonable hours, and letting them ſtay with her all night, and of behaving in a riotous and indecent manner at *Benſon*, and of being a public nuſance to the inhabitants thereof, and then and there falſely and maliciouſly, without any probable cauſe, cauſed the plaintiff to be arreſted for the ſame ſuppoſed offences, and carried from thence to *Oxford*, in cuſtody before *Thomas Randolph* D. D. a juſtice of peace for the ſaid county, and there at *Oxford* falſely and maliciouſly, and without any probable cauſe, cauſed the plaintiff to be examined before him, and on that occaſion to be kept in cuſtody for five days, when in truth and in fact the plaintiff never was guilty of any of the ſaid offences; and the defendant afterwards, at the general quarter-ſeſſions holden at *Oxford* for the ſaid county the 16th of *April*, in the 5th year of the king, before *Theophilus Leigh* D. D. and others, juſtices of peace of the ſaid county, *falſely and maliciouſly without any probable cauſe*, indicted the plaintiff, for that ſhe on the 1ſt of *May* in the 4th year of the king, and on divers days between that day and the day of preferring the indictment at *Benſon*, did keep and maintain a common ill-governed diſorderly houſe, and in her houſe for lucre and gain permitted drinking and whoring, to the common nuſance of the public, and againſt the peace *&c.*; and the defendant maliciouſly, *&c.* proſecuted the indictment until the plaintiff, at the quarter-ſeſſions held at *Oxford* the 23d of *July* in the 5th year of the king, was thereof by a jury of the ſaid county lawfully acquitted, on account of which indictment and premiſes the plaintiff has been

been much damnified and obliged to pay large ſums of money, to the plaintiff's damage of 1000*l.*

Claim of conuſance refuſed to the univerſity of Oxford, the party, though a member, not being reſident at Oxford.

The univerſity of *Oxford* come and claim conuſance, ſetting forth the privileges of the univerſity, under a charter of 14 *H.* 8. by which the king grants to the univerſity the conuſance of all cauſes, where either plaintiff or defendant is a member thereof, though the cauſe of action ariſe in any part of the kingdom, with an excluſive clauſe that no juſtice (and particularly mentions the judges of this court) ſhall preſume to intermeddle in any caſe ariſing within the juriſdiction of the univerſity, which charter and privileges are confirmed by an act of parliament of 13 *Eliz.* The defendant makes an affidavit, and ſwears he is, and for 21 years paſt has been, a member and ſtudent of the college of *Chriſt-Church*; that he is now reſident there; whereupon the court made a rule for the plaintiff to ſhew cauſe why the claim of conuſance ſhould not be allowed.

Upon ſhewing cauſe, an affidavit was produced by the plaintiff, which ſwears that the defendant generally reſides, and is obliged to reſide at *Benſon*, where he has a college living, and though his name remains upon the books of the college, and he is ſtill a member thereof, yet he has no room or chamber there to reſide in; thereupon it was inſiſted for the plaintiff, that conuſance of pleas ought not to be allowed to the univerſity for two reaſons: 1ſt, Becauſe the cauſe of action aroſe at *Benſon* out of the univerſity: 2dly, That the defendant had no right to the privilege of the univerſity, he having ceaſed to reſide there as a ſtudent and member thereof, and being obliged to reſide upon his living at *Benſon*; like the caſe of an attorney, after he has left off practiſing, and no longer attends this court, he ſhall not be entitled to privilege, notwithſtanding his name remains upon the roll of attornies.

In anſwer, it was ſaid for the defendant, that the plaintiff was indicted at *Oxford* for keeping a bad houſe at *Benſon*, and therefore the cauſe of action aroſe at *Oxford*; but however that was, the privilege extends all over the kingdom; and 2dly, he is ſworn to be a member of the univerſity, and ſometimes reſides there, and ſometimes upon a college curacy at *Benſon*.

Lord *Camden*—The charter extends to actions ariſing in any part of *England*; but ſurely it could never intend that ſcholars as plaintiffs ſhould have the privilege of ſuing in the univerſity in cauſes of action ariſing in any part of *England*; but when they are defendants, this privilege extends all over *England*. The charter was granted and confirmed by parliament to the members of the univerſity in conſideration of their being *reſident* there, and the privilege extends from the higheſt member to the loweſt ſervant

vant there reſiding. The ſuperior courts conſtrue this privilege very ſtrictly, therefore it ought to be made to appear clearly to the court that the defendant is a ſcholar reſiding. Great numbers of perſons remain on the books long after they have left the univerſity, on purpoſe to vote for members, *&c.* Many who are fellows of colleges never go thither at all; I myſelf was one a long time, and never went there at all: it would be ſtrange if this court ſhould allow conuſance in caſes where ſuch perſons are defendants; it is therefore abſolutely neceſſary that reſidence ſhould be proved to the court. The claim under the ſeal of the univerſity ſays not one word of the reſidence of this defendant, and ſo we can ſee why the courts have required affidavits of the reſidence; yet if the chancellor ſhould certify falſely that a perſon is reſident who is not, there is no doubt but an action upon the caſe would lie againſt him, and therefore the chancellors do not chooſe to certify reſidence; and I am inclined to think the chancellor knew that this defendant was not reſident, and ſo did not certify that matter. *Long*'s affidavit is a ſubterfuge under the word *reſidence*, which is indefinite. If a man reſides for one night, and ſwears he was reſident, he could not be convicted of perjury. It is certain he is curate of *Benſon*, and has a family there, and frequently reſides at *Oxford*, but he does not ſay how long together.

In ſimilar caſes, as that of an attorney leaving off to practiſe, though his name remains on the roll, he is no longer entitled to the privilege of the court. I am of opinion that conuſance ought not to be allowed.

Clive J.—I am of the ſame opinion. The caſe of an attorney's privilege is ſimilar to this. I think there needs no affidavit of the reſidence, but that the chancellor ought to certify reſidence, or the conuſance ought not to be allowed; however, it appears to the court that the defendant is not reſident at *Oxford*, but upon his curacy at *Benſon*.

Bathurſt J.—If we were to ſay that every member whoſe name is in the books of the univerſity was entitled to this privilege, it would be very inconvenient; reſidence of the party ought to appear upon record, and muſt be entered before it can be allowed. The univerſity of *Cambridge* claimed conuſance, and produced the certificate of the chancellor, that the parties were of the univerſity; and upon the rule to ſhew cauſe, it was objected that the claim ought to be entered on the roll, and an affidavit to verify the certificate ſhould be produced; and of that opinion was the court, and diſcharged the rule. *Paternoſter* v. *Graham*, 2 *Stra.* 810. And in the caſe of *Kenrick* and *Kinaſton* *B. R.* the claim was entered on record. The claim of conuſance is tantamount to a plea in abatement of the ſuit here, the truth whereof muſt be verified

verified by affidavit; *ſtat.* 4 *Ann.* This ſeems to be the reaſon why affidavits were firſt introduced, and required in theſe motions for allowing conuſance. An affidavit therefore ſeems neceſſary as well as the chancellor's certificate of reſidence, and we cannot allow this claim of conuſance, before it appears to us upon record that the party is reſident in the univerſity.

Gould J.—I am of the ſame opinion; where the ſuggeſtion for a prohibition is defective, you cannot have a prohibition.

Claim of conuſance diſſallowed *per totam curiam.*

Gates *verſus* Bayley. C. B.

TRESPASS for taking and impounding the plaintiff's cattle, and keeping them in the pound ſo cloſely confined together, that by reaſon thereof one of the beaſts died; the defendant firſt pleads the general iſſue to the whole declaration, and thereupon iſſue is joined; and, ſecondly, a juſtification under the corporation of *London* that he took the cattle *damage-feaſant*, and put them into the pound, as it was lawful for him to do; the plaintiff replies *de injuria ſua propria*, and thereupon iſſue is joined. The jury gave a verdict for the plaintiff upon the general iſſue, and the value of his beaſts that died in damages; upon the other iſſue on the juſtification they found for the defendant.

Treſpaſs for impounding cattle, and keeping them ſo cloſe that one died. Juſtification for damage feaſant; the dying of the beaſt is only gravamen, and need not be anſwered in treſpaſs.

And now it was moved that judgment might be entered for the defendant, becauſe the jury have found for him upon the juſtification, which covers the whole treſpaſs in the declaration; and the beaſts dying after being put into the pound is only *gravamen*, and does not make the defendant a treſpaſſer *ab initio*; if the plaintiff can have any action for the loſs of his beaſts it muſt be *caſe* and not *treſpaſs*; the difference between treſpaſs and caſe is, that in *treſpaſs* the plaintiff complains of an immediate wrong, and in *caſe* of a wrong that is the conſequence of another act: *per Forteſcue* J. and by *Raymond* J.—That diſtinction is perfectly right: and, by the *Chief Juſtice*—We muſt keep up the boundaries of actions, otherwiſe we ſhall introduce the utmoſt confuſion; if the act, in the firſt inſtance, be unlawful, *treſpaſs* will lie; but if the act is *primâ facie* lawful, (as it was in the caſe at bar,) and the prejudice to another is not immediate but conſequential, it muſt be an action upon the *caſe*; and this is the diſtinction. 1 *Stran.* 635. *Reynolds* v. *Clarke*; 2 *Ld. Raym.* 1402. S. C. 8 *Mod.* 272. S. C. That the *per quod* the cattle died, after impounding in treſpaſs, is only aggravation. 1 *Vent.* 54. The only act done by the defendant in this caſe was the taking and impounding the cattle in the common pound, for doing damage; *this* the law gave him authority to do, and he did no other

The difference between caſe and treſpaſs.

other act whatever; and he cannot be charged in treſpaſs for the death of the beaſt, which was a conſequence, and not an immediate malfeaſance by the defendant; no man can be a treſpaſſer for a *nonfeaſance*: the law gave the ſix carpenters authority to go into the tavern, but the *not paying* for the wine did not make them treſpaſſes *ab initio*; the taverner might have his action of debt for the wine. 8 *Rep.* 146, 147. Treſpaſs will not lie for taking an exceſſive diſtreſs, becauſe the entry at firſt is lawful; the remedy in that caſe is by the ſtatute of *Marlbridge*, 2 *Stra.* 851. 3 *Lev.* 48. So that it is not every abuſe of a diſtreſs that makes a man a treſpaſſer *ab initio*.

For the plaintiff it was ſaid, that the juſtification gives no anſwer to the putting the cattle ſo cloſely together, whereby one died; and therefore the plaintiff ought to have judgment upon the iſſue found for him on the Not guilty; that it was a miſfeaſance in the firſt inſtance, and made the defendant a treſpaſſer *ab initio*. *Sed non allocatur*.

Curia—The juſtification is in anſwer to the whole treſpaſs in the declaration, which is only the taking and impounding; all the reſt, as the dying of the beaſt, is only aggravation; if the plaintiff would have inſiſted that the defendant had abuſed the diſtreſs, he ought to have replied that after the ſaid diſtreſs the defendant abuſed *it ſo and ſo*, and have concluded with an averment, and this would not have been a *departure*, becauſe he who abuſes a diſtreſs is a treſpaſſer *ab initio*, according to the caſe of *Gargrave* v. *Smith*, 1 *Salk.* 221. and *Bagſhaw* v. *Gaward*, *Yelv.* 96, 97. Judgment for the defendant *per totam curiam*.

Barwis *verſus* Keppel, Eſq. C. B.

Caſe for reducing a ſerjeant of the guards to a common ſoldier in Germany does not lie at common law, it being out of the king's dominions.

ACTION upon the caſe, wherein the plaintiff declares, that the defendant at the time, *&c.* was an officer, *viz.* The ſecond major in the firſt regiment of guards, and as ſuch, in the abſence of all the ſuperior officers of the ſaid regiment, had the command, government, ordering and direction of all the inferior officers and ſoldiers of the ſecond battalion of the ſaid regiment; and the plaintiff was then and there an inferior officer called a ſerjeant, and doing duty in the capacity of a ſerjeant in the ſaid ſecond battalion, and always during his continuance in the ſame office and ſervice of a ſerjeant, demeaned himſelf with great prudence, propriety, honeſty, and obedience, as well towards his ſuperior officers of the ſaid battalion, as alſo to the inferiors of the ſaid battalion, and by means thereof had deſervedly acquired the good opinion, credit, and eſteem, as well of all the officers and ſoldiers in the ſaid battalion, as alſo of all other perſons

perſons to whom he was known, and did lawfully and honeſtly acquire great gains, profits, and emoluments by his ſaid office, to his comfortable ſupport; yet the defendant, well knowing the premiſes, but contriving and maliciouſly intending to hurt and injure the plaintiff, and to ruin him in his character and fortune, and to deprive him of the good opinion, credit, and eſteem as well of the officers and ſoldiers in and of the ſaid battalion, as if the ſaid other perſons to whom he was known, and to deprive him of the profits, emoluments, and advantages ariſing to him from his office and ſtation aforeſaid, on the 28th day of *September* 1761, *wrongfully, unlawfully, and maliciouſly, and without any reaſonable ground or cauſe whatſoever*, under the falſe, ſcandalous, and malicious pretence that the plaintiff had before that time behaved himſelf improperly in his ſaid office and ſtation, and had been guilty of a breach of orders in the exerciſe thereof; and that the defendant might therefore ſuſpend and remove him from his ſaid office and ſtation, the defendant did then and there ſuſpend and remove, and cauſe the plaintiff to be ſuspended and removed from his ſaid office and ſtation of a ſerjeant, and reduced him, and cauſe him to be reduced to the poſt and ſtation of a common ſoldier in the ſaid battalion, and wrongfully and maliciouſly kept and continued him, and cauſed him to be kept and continued ſo ſuſpended and removed and reduced as aforeſaid for a long time, to wit, from thence until the ſuing out of the original writ of the plaintiff; by means whereof the plaintiff hath during all that time unlawfully and injuriouſly, and under the falſe and malicious intent aforeſaid, been hindered and prevented from exerciſing his ſaid office of a ſerjeant, and his pay thereof, and has been deprived of great gains, profits, and emoluments, which otherwiſe would have accrued and ariſen to him therefrom, and is greatly leſſened in the good opinion, credit, and eſteem of all the officers and ſoldiers in the ſaid battalion, and of the ſaid other perſons to whom he was known, to the plaintiff's damage of 1000*l.*

The defendant pleaded Not guilty, and the iſſue was tried at the ſitting after *Hilary* term 1765, at *Weſtminſter*, by a ſpecial jury, before the Lord Chief Jeſtice, when a verdict was found for the plaintiff, damages 70*l.*, coſts 40*s.*, ſubject to the opinion of the court upon the following caſe, *viz.*

Caſe for the opinion of court.

That in the year 1760, the plaintiff being one of the ſerjeants of the ſecond battalion of the firſt regiment of foot-guards, and the defendant the ſecond major of the ſaid battalion, that battalion was ordered to *Germany* in the ſervice of his majeſty againſt his enemies then at war with this kingdom, and remained abroad in *Germany* till the end of the war.

That

That this regiment conſiſted of three battalions, whereof Lord *Ligonier* was the colonel and commanding officer; that the firſt and third battalion remained in *England*, as did alſo the ſaid colonel Lord *Ligonier*, the lieutenant-colonel, and the firſt major of the ſecond battalion; and the defendant being the ſecond major, was, during the abſence of his ſuperior officers, the then commanding officer of the ſaid ſecond battalion in *Germany* for the time being in the army, under his majeſty's commander in chief his *Serene Highneſs Prince Ferdinand*.

That in *September* 1761, the army being in hourly expectation of a battle, the advanced guard of the enemy being within a ſmall diſtance of the *Engliſh* army, a certain order was given by the ſaid *Prince Ferdinand*, that all deſerters from the enemy ſhould be immediately ſent to the head-quarters without being detained one moment.

That the plaintiff had full notice of ſuch order, and that after ſuch notice of the ſaid order, *viz.* on the —— day of *September* 1761, and while the armies were in ſuch expectation of an engagement, three *French* deſerters came and ſurrendered themſelves to the plaintiff, then being the ſerjeant commanding the quarter-guard, who, notwithſtanding ſuch order of his ſerene highneſs as aforeſaid, detained the ſaid deſerters ſix hours without bringing, or attempting to bring them, or either of them, to the head-quarters, or even making a report of ſuch deſerters to the defendant, the then commanding officer of the battalion.

That the plaintiff being a ſerjeant as aforeſaid, and as ſuch a non-commiſſioned officer of the ſaid regiment, on the 28th of *September* 1761, was duly tried by a regimental court-martial for the ſaid offence, which found the defendant guilty of the ſaid charge, and by their ſentence ordered him to be ſuſpended from his office of ſerjeant for the ſpace of one month, and to do the duty and receive the pay of a private ſoldier during that time.

That by the articles of war no ſentence of ſuch court-martial is to be executed, till the commanding officer (not being a member of the court-martial) ſhall have confirmed the ſame; that the defendant then being the commanding officer, and no member of the court-martial, did not confirm the ſentence of that court, but on the contrary, thinking the ſentence of the court-martial not a ſufficient puniſhment for an offence of ſo dangerous a conſequence, and while the army ſo remained in expectation of a battle, made an order in writing under his hand, ſubſcribed at the foot of the ſaid ſentence, *viz.* "But "as ſerjeant *Barwis* could not be ignorant of the duke's order "concerning deſerters, and colonel *Keppel* thinking his neglect "might

" might have been attended with the utmoſt bad conſequences, " orders that he be broke, and that corporal *Billow* be appointed " ſerjeant in his room."

That the defendant being ſuch commanding officer of the ſaid battalion, his ſaid orders were executed, and the plaintiff was accordingly removed totally from his office of ſerjeant, and reduced to the ſtation and pay of a private ſoldier, and was thereby forced and did perform the duty and receive the pay of a private ſoldier in the ſaid battalion in *Germany*, and afterwards in this kingdom, until the time of the trial of this iſſue.

That by articles of war, non-commiſſioned officers may be diſcharged as private ſoldiers, either by order of the colonel of the regiment, or by the ſentence of a regimental court-martial: that it is generally and univerſally underſtood in the army, that the whole power of the colonel devolves, in his abſence, on the commanding officer for the time being, and that in fact ſuch commanding officer ranks as colonel, and always acts as ſuch. That by the conſtant cuſtom and practice of the army, the commanding officer for the time being hath always made ſerjeants, and broke or reduced them in the ſame manner as the colonel himſelf might have done if actually preſent; that the defendant continued in the ſaid regiment till the 3d of *January* 1762, before which time he was appointed to command an expedition to the *Havannah*, and never returned to the ſaid regiment; that the plaintiff continued in *Germany* till ——, at which time he came to *England*; that the plaintiff never complained to any ſuperior officer during the time the defendant remained in *Germany*, or during the time the plaintiff remained with the army in *Germany*, nor after his return to *England*.

The queſtion ſubmitted to the court is, Whether under the particular circumſtances of this caſe the plaintiff is entitled to recover in this action?

It was objected for the defendant, that this is in the nature of an action for a malicious proſecution; and unleſs malice appears upon the ſtate of the caſe, the plaintiff cannot recover; the defendant being the commanding officer, had power to remove the plaintiff, (as he did,) who it appears had diſobeyed the orders of the commander in chief, and the leaſt malice does not appear in the caſe: *falſity* and *malice* are the ground and foundation of actions of this kind. 1 *Leon.* 107. and 1 *Lev.* 119. Action upon the caſe for making a falſe affidavit againſt the plaintiff, touching a malfeaſance in his office, and getting him turned out of it thereby; the falſehood *was an evidence of the malice*, which was the ground of that action. A condemnation of goods, for not entering

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ing them and paying duty by ſub-commiſſioners, was reverſed by commiſſioners of appeal in *Ireland*. An action for a malicious proſecution does not lie againſt the informer, for the judgment of the ſub-commiſſioners ſhews there was a foundation for the information and proſecution. *Reynolds* v. *Kennedy*, *Mich.* 22 *Geo.* 2. *B. R.* upon error from *Ireland*. So in the preſent caſe, the court-martial's ſentence ſhews that the plaintiff diſobeyed orders, and that there was a good foundation for the commanding officer to reduce him, without having any falſehood or malice at all (againſt him), according to the conſtant practice of the army, as ſtated in the caſe.

For the plaintiff it was ſaid, that he had been tried by a court-martial, who thought ſuſpenſion for a month a ſufficient puniſhment for his offence, and therefore it was malicious in the defendant to reduce him abſolutely to a private man, and malice being laid in the declaration, the jury have found it to be maliciouſly done.

Curia—By the act of parliament to puniſh mutiny and deſertion the king's power to make articles of war is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the ſtatute or articles of war; and therefore you cannot argue upon either of them, for they are both to be laid out of this caſe, and *flagrante bello*, the common law has never interfered with the army: *inter arma ſilent leges*. We think (as at preſent adviſed) we have no juriſdiction at all in this caſe; but if the plaintiff's counſel think proper to ſpeak more fully to this matter, we are willing to hear him. But plaintiff ſeeing the opinion of the court againſt him, acquieſced, and the judgment was for the defendant, *ut audivi*.

In the vacation after this term, the Right Honourable *Charles* Lord *Camden*, Baron of *Camden-Place* in the county of *Kent*, Lord Chief Juſtice of the court of Common Pleas, was appointed Lord High Chancellor of *Great Britain*.

MICHAELMAS TERM,

7 *Geo.* III. 1766.

THE Honourable Sir *John Eardley Wilmot*, Knt. one of the judges of the King's Bench, was appointed in the laſt vacation Lord Chief Juſtice of the court of Common Pleas, and took his place the beginning of this term.

Dickon the younger *verſus* Clifton. C. B.

Caſe for a miſfeaſance and negligence may be joined with trover in the ſame declaration.

IN an action upon the caſe, the plaintiff declares, that whereas he the plaintiff on the 28th day of *Auguſt* 1764, at the caſtle of *York*, was owner and proprietor of a certain boat or veſſel called a keel, and being ſo, he afterwards on the ſame day and year there, at the inſtance and requeſt of the defendant, retained and employed him in the ſervice of the plaintiff to be maſter and commander of the veſſel, and to receive and take on board thereof from one *Matthew Johnſon*, at a place called *Brough* in the county of *York*, fifty-ſix quarters of malt of the plaintiff of the value of 100*l.*, and to carry and convey the ſame by water in the veſſel from thence to *Horbury* in *Yorkſhire*, and at *Horbury* to deliver the ſame to one *Jonathan Croſland* for certain wages, hire or reward, to be therefore paid by the plaintiff to the defendant as maſter of the veſſel; and although the defendant afterwards on the 29th of *Auguſt* in the year aforeſaid, at *Brough* in *Yorkſhire*, had and received from the ſaid *Matthew Johnſon* the whole 56 quarters of malt of the plaintiff, and afterwards on the ſame day and year laſt aforeſaid ſet ſail and departed with the veſſel from the ſaid place where he the defendant had ſo received the malt from *Matthew Johnſon*, towards and for *Horbury*; and afterwards on the 21ſt of *September* in the year aforeſaid arrived with the veſſel at *Horbury*, and afterwards on the ſame day and year laſt aforeſaid at *Horbury* delivered to the ſaid *Jonathan Croſland* a part, to wit, forty quarters of the ſaid malt; yet the defendant not regarding the duty of his employment, ſo badly, careleſsly, negligently, and improvidently behaved himſelf in his ſaid employment, and took ſuch little and ſuch bad care of ſixteen quarters of malt, reſidue of the ſaid fifty-ſix quarters of malt ſo by him received as aforeſaid, that the defendant did not deliver the ſame

ſame 16 quarters of malt, or any part thereof, to the ſaid *Jonathan*, at *Horbury* or elſewhere, (although often requeſted ſo to do,) but the defendant on the contrary thereof, by and through his own mere neglect and default, and through his careleſſneſs and improvidence ſuffered the ſame, and every part thereof, while the ſame were and continued in his poſſeſſion and cuſtody for ſuch carriage, to be embezzled and wholly loſt, to wit, at the caſtle of *York* aforeſaid.

Second count.

And whereas the ſaid plaintiff on the 1ſt day of *Auguſt* 1764, and from thence until the 1ſt day of *October* in the ſame year, at the caſtle of *York*, was owner and proprietor of another veſſel, and the defendant was during all that time maſter of the ſame veſſel, retained and employed as ſuch by the plaintiff, and in his ſervice, to navigate the ſame from place to place, and to take care of the laſt-mentioned veſſel, and of all goods delivered to him as ſuch maſter, or put on board the ſame for carriage from place to place, for wages, hire or reward, to be therefore payable and paid by the plaintiff to him as ſuch maſter of the veſſel, to wit, at the caſtle of *York*; and whereas within the time aforeſaid, and while the plaintiff was owner of the laſt-mentioned veſſel, and while the defendant was maſter thereof in the ſervice of the plaintiff, to wit, on the 29th of *Auguſt* in the year aforeſaid, he the defendant, as maſter of the ſame veſſel, received from the ſaid *Matthew Johnſon*, by order of the plaintiff at *Brough* aforeſaid, other fifty-ſix quarters of malt of the plaintiff of the value of other 100*l*., to be carried and conveyed by the defendant in the laſt-mentioned veſſel to *Horbury* aforeſaid by water, to be there delivered to the ſaid *Jonathan Croſland* for the plaintiff; and although the defendant afterwards, on the 29th of *Auguſt* in the ſaid year, had and received from the ſaid *Matthew Johnſon* the ſaid whole fifty-ſix quarters of other malt of the plaintiff, and on the ſame day and year ſet ſail and departed with the ſaid laſt-mentioned veſſel from the ſaid place where he had ſo received the ſaid malt from *Matthew Johnſon*, towards and for *Horbury*, and afterwards, on the 21ſt of *September* in the year aforeſaid, arrived with the ſame veſſel at *Horbury*, and afterwards on the ſame day and year there delivered to *Jonathan Croſland* a part, to wit, 40 quarters of the laſt-mentioned malt; yet the defendant not regarding the duty of his employment, ſo badly, careleſsly, negligently, and improvidently behaved himſelf in his ſaid employment, and took ſuch little and bad care of 16 quarters, reſidue of the ſaid 56 quarters of malt ſo by him received as laſt aforeſaid; that the defendant did not deliver the ſame 16 quarters, or any part thereof, to the ſaid *Jonathan*, at *Horbury* or elſewhere, although often requeſted ſo to do; but the ſaid defendant on the contrary thereof, by and through his own mere neglect, careleſſneſs, and improvidence, ſuffered the ſame while it continued

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in his poſſeſſion and cuſtody for ſuch carriage, to be embezzled and wholly loſt, to wit, at the caſtle of *York* aforeſaid. There is another count in trover for ſixty quarters of malt, laid to be the property of the plaintiff, and converted by the defendant to his own uſe, to the plaintiff's damage of 40*l.* The defendant pleaded the general iſſue, and there was a general verdict for the plaintiff on all the counts in the declaration.

And now it was moved in arreſt of judgment, and objected that the two firſt counts are in the nature of an action on the cuſtom of the realm, which is founded in *contract*, and therefore cannot be joined with a count in *trover* which is a *tort*. 2dly, That this action ought to have been laid upon a promiſe and undertaking, and not being ſo laid is ill; and to ſhew that theſe counts could not be joined, many old caſes were cited from *Viner's Abr.* title *Action*, (joinder,) which the court over-ruled, and therefore ſhall not be ſet down here.

Lord Chief Juſtice *Wilmot*—This motion is after the merits have been tried, and a verdict found for the plaintiff, which the court will ſupport, if poſſible. It is objected, that the firſt count is laid *quaſi ex contractu*, and cannot be joined with trover: ſuppoſing it was ſo, yet I ſhould lay no great ſtreſs upon old caſes to this point at this day; but I think the firſt count is laid to be *ex delicto* of the defendant, and as a miſfeaſance, which may undoubtedly be joined with *trover*. The true *teſt* to try whether two counts can be joined in the ſame declaration, is to conſider and ſee whether there be the ſame judgment in both, and not whether they both require the ſame plea, and wherever there is the ſame judgment in both, I think they may well be joined. I own, that in many books it is reported, that trover and a count againſt a common carrier cannot be joined, but common experience and practice is now to the contrary. This is laid as a *miſfeaſance* wherein there is the ſame judgment as in trover, and therefore I am of opinion the plaintiff muſt have judgment.

Two counts may be joined where there is the ſame judgment in both.

Clive J.—The firſt count is as plainly a tort as trover is. Suppoſe I truſt a ſhepherd with my ſheep, and he puts his own dog among them, which worries them, this would be a *tort*, although I contract with him for wages to take care of my ſheep, and he undertakes accordingly; and I am of my lord's opinion, that the true *teſt* is to ſee whether both counts require the ſame judgment; in *this* caſe they do, and the plaintiff muſt have judgment.

Gould J.—I think trover and caſe againſt a carrier may be joined, notwithſtanding what is ſaid in the books. In the caſe put of the ſhepherd, he might either be charged upon the contract, or as a wrong-doer; and ſo might the defendant in the preſent caſe. I am of the ſame opinion for the plaintiff.

Chief Juſtice—I have a doubt whether *treſpaſs vi & armis* and *trover* can be joined, but think they cannot, becauſe they have different judgments. Judgment for the plaintiff.

HILARY TERM,

7 Geo. III. 1767.

Roe, on the Demiſe of George Dodſon, Eſq. *verſus* Grew and others. C. B.

Deviſe to G. G. for life, and after his death to the iſſue of his body, and heirs of the body of ſuch iſſue, is an eſtate-tail in G. G.

EJECTMENT for lands in *Middleſex*, tried before Lord *Camden* at the ſitting after *Eaſter* term laſt; verdict for the plaintiff upon the following caſe, ſubject to the opinion of the court. The caſe ſtates, that *Daniel Dodſon* being ſeiſed in fee of the lands in queſtion, by his will deviſed the ſame in theſe words, *viz.* "I give, deviſe and bequeath unto my nephew *George* "*Grew*, all my lands, (naming and deſcribing them particular-"ly,) to hold the ſame with their appurtenances unto him the "ſaid *George Grew*, for and during the term of his natural life, "and from and after his deceaſe to the uſe of the *iſſue* male of "his body lawfully to be begotten, and the heirs male of the "body of ſuch iſſue male; and for want of ſuch iſſue male, then "I give all and every the aforeſaid premiſes unto my nephew "*George Dodſon*, his heirs and aſſigns for ever."

That in the deviſe to *George Grew*, the words "heirs male "of his body" were originally written, but that the word *heirs* was ſcratched out, and the word *iſſue* inſerted in its ſtead, in the ſame hand with the body of the will, but in different ink.

That *George Dodſon*, the deviſee in remainder in the will, is the leſſor of the plaintiff.

That the teſtator deviſed other lands to the leſſor of the plaintiff in fee.

That

That *George Grew* and the leſſor of the plaintiff were the teſtator's nephews, and he deviſed the reſidue of his eſtates both real and perſonal, equally between his ſaid two nephews.

That *George Grew* had no child at the time of making the will; that he entered on the premiſes in queſtion, and ſuffered a common recovery thereof, and died without iſſue male.

The queſtion upon this caſe is, Whether *George Grew* took an eſtate-tail, or for life only, under the ſaid will?

This caſe was argued by Serjeant *Leigh* for the plaintiff, and Serjeant *Burland* for the defendant. After time taken to conſider, judgment was given for the defendant by the whole court the 28th of *January* in this term, that *George Grew* took an eſtate-tail, and that the leſſor of the plaintiff was barred by the recovery.

Judgment of the court.

Lord Chief Juſtice *Wilmot*—The teſtator had no iſſue at the time of the will; his intention is to be followed, provided it does not claſh with the rules of law; the ſtatute of wills gives a man power to deviſe his lands, but he cannot by his will create a perpetuity, nor reſtrain tenant in tail from ſuffering a recovery, *&c. &c.*, theſe being contrary to the rules of law. The intention of the teſtator clearly was to give *George Grew* an eſtate for life only, but his intention alſo clearly was, that all the ſons of *George Grew* ſhould take in ſucceſſion; both theſe intentions cannot take place, for if the deviſee *George Grew* took only an eſtate for life, his ſons could never have taken; and although it eventually happened that he had no ſons, yet we muſt conſider this caſe as if he had had iſſue; therefore the court muſt put themſelves in the place of the teſtator, and determine as he would have done, if he had been told that both of his intentions in the will, by the rules of law, could not take place, and had been aſked which of them he deſired ſhould take effect and ſtand, as both could not, he certainly would have anſwered, "that ſo long as *George Grew* "had any iſſue male, that the premiſes ſhould not go to the leſſor "of the plaintiff;" and if we balance the two intentions, the weightieſt is, that all the ſons of *George Grew* ſhould take in ſucceſſion; and therefore to enable them to take, *George Grew* muſt be adjudged to have been tenant in tail, for the teſtator's great intention moſt clearly was, that the lands ſhould never go over to the leſſor of the plaintiff in remainder, but upon a failure of iſſue of *George Grew*.

The word *iſſue* in a will, is either a word of purchaſe or of limitation, as will beſt effectuate the intention of the teſtator; it is a plural word, and takes *in* all the ſons of *George Grew*, and the words "*iſſue male of his body, and the heirs male of the body of ſuch*

"*iſſue*" mean only that they were not all to take at a time but in ſucceſſion, as if he had ſaid *to his firſt and every other ſon*, &c. As to the ſcratching out the word *heirs*, I lay no ſtreſs at all upon that, becauſe the teſtator's chief and predominant intent was clearly, that the lands ſhould go in ſucceſſion to all the ſons of *Geirge Grew*.

Caſes in the books upon wills have no great weight with me, unleſs they are exactly in the very point, and there has not one been cited in every thing like this; the intention is the great thing which governs me, which is, that *George Grew*'s ſons ſhould take in ſucceſſion, which they could not do if he was only tenant for life, and therefore I am of opinion he was tenant in tail, and judgment muſt be for the defendant.

Clive J.—The word *iſſue* is one of the moſt vexed words in the books; ſometimes it is *nomen ſingulare*, ſometimes *plural*, ſometimes a word of *limitation*, ſometimes of *purchaſe*, but it muſt always be conſtrued according to the intent of the will or deed wherein it is uſed; if one grants to a man and his iſſue (who has iſſue at the time of the grant) the iſſue ſhall take jointly with him. In the preſent caſe the great intention is to give in ſucceſſion to all the ſons of *George Grew*, which cannot be without conſtruing it an eſtate-tail in him. I think too great regard has been paid to the ſuperadded words, "*heirs male of the body of ſuch iſſue*," and am of the ſame opinion with my Lord Chief Juſtice.

Bathurſt J.—It is a rule, that where an anceſtor takes an eſtate of freehold, if the word *iſſue* in a will comes after, it is a word of limitation; where there appears a particular intent, and a general intent, the general muſt take place; the great view here was, that the land ſhould not go over to *Dodſon* ſo long as *Grew* had iſſue, but that general intent cannot take effect unleſs *Grew* be tenant in tail; and I am of opinion he was, and agree with my lord and brother.

Gould J.—I am of the ſame opinion. The word *iſſue* is uſed in the ſtatute *de donis* promiſcuouſly with the word *heirs*. The term *iſſue* comprehends the whole generation, as well as the word *heirs*; and in my judgment the word *iſſue* is more properly, in its natural ſignification, a word of *limitation* than of *purchaſe*. Judgment for the defendant.

Ruſſell *verſus* Palmer, an Attorney. C. B.

Middleſex, to wit. *JAMES Ruſſell*, by *Thomas Bennett* his attorney, complains of *Charlton Palmer*, gentleman, one of the attornies of the court of our lord the now king of the bench here, preſent here in court in his own proper perſon, of a plea of treſpaſs on the caſe, for that whereas the ſaid *James* heretofore in *Hilary* term in the fifth year of the reign of our ſovereign lord the now king, in the court of our lord the now king, before the king himſelf, the ſaid court then being held at *Weſtminſter* in the ſaid county of *Middleſex*, by bill without his majeſty's writ recovered againſt one *John Stewart* as well a certain debt of 5322 *l.* 13 *s.* 2 *d.*, as 17 *l.* for his damages which he had ſuſtained as well on occaſion of the detaining of that debt, as for his coſts and charges by him expended about his ſuit in that behalf, as by the record and proceedings thereof remaining in the ſaid court of our lord the now king, before the king himſelf at *Weſtminſter* aforeſaid, more fully and at large appears, which ſaid judgment ſtill remains in its full force and effect, not reverſed, annulled, ſet aſide, paid, or ſatisfied: And the ſaid *James Ruſſell* further ſaith, that while the ſaid ſuit was depending in the ſaid court, to wit, in *Trinity* term in the fourth year of the reign of our lord the now king, in the ſaid court of our lord the now king before the king himſelf, the ſaid court then being held at *Weſtminſter* in the ſaid county of *Middleſex*, came perſonally *Andrew Grant* of *King's-Arms-yard*, *Coleman-ſtreet*, *London*, merchant, and *Robert Bogle* of *Love-lane*, *Eaſtcheap*, *London*, merchant, and then and there in the ſaid court became pledges and bail, and each of them by himſelf became pledge and bail for the ſaid *John Stewart*, that if it ſhould happen that judgment in the ſaid plea of debt ſhould be given for the ſaid *James Ruſſell* againſt the ſaid *John Stewart*, that then the ſaid *John* ſhould ſatisfy the ſaid *James Ruſſell* the ſaid debt and all ſuch damages as ſhould be adjudged to the ſaid *James Ruſſell* in the ſaid plea, or render himſelf on that occaſion to the priſon of the marſhal of the *Marſhalſea* of our lord the king before the king himſelf, as by the record of the ſaid recognizance remaining in the ſaid court of our ſaid lord the king before the king himſelf may more fully and at large appear: And the ſaid *James* further ſaith, that after the recovery of the aforeſaid judgment, (that is to ſay) on the 18th day of *May* in *Eaſter* term, in the fifth year of the reign of our ſaid lord the now king, before the honourable Sir *Richard Aſton*, knight, then one of the juſtices of our lord the now king, aſſigned to hold pleas in the court of our lord

Special action upon the caſe againſt an attorney for negligence.

The declaration ſets forth, that whereas the plaintiff, in Hilary term in the fifth year of the king, recovered againſt one John Stewart a judgment for 5322 l. 13 s. 2 d. debt, and 17 l. coſts in B. R.

And while that ſuit was depending, in Trinity term in the fourth year of the king, A. G. and R. B. became bail for ſaid Stewart in the ſaid plea of debt.

That after recovery of the ſaid judgment on the 18th day of May in Eaſter term in the fifth year of the king, before Juſtice Aſton of B. R. at his chambers in Chancery-lane, the ſaid Stewart rendered himſelf in diſcharge of his bail to the priſon of B. R. and there continued till the time of his being ſuperſeded.

lord the now king before the king himſelf, at his chambers ſituate in *Serjeants'-Inn*, *Chancery-lane*, the ſaid *John Stewart* rendered himſelf in diſcharge of his ſaid bail in the ſaid plea at the ſuit of the ſaid *James Ruſſell*, and was thereupon committed to the priſon of the marſhal of the *Marſhalſea* of our lord the now king before the king himſelf, on that occaſion, at the ſuit of the ſaid *James Ruſſell*, and there continued in cuſtody of the ſaid marſhal in the aforeſaid priſon, from thence until the time of his being ſuperſeded out of cuſtody, as hereafter is mentioned: And the ſaid *James Ruſſell* further ſaith, that he the ſaid *Charlton Palmer* from the firſt commencement of the ſaid ſuit until the diſcharge of the ſaid *John Stewart* out of the cuſtody of the ſaid marſhal hereafter mentioned, was by the ſaid *James Ruſſell* retained or employed as attorney or agent of the ſaid *James Ruſſell* in the ſaid ſuit, and employed by him as ſuch to proſecute the ſame ſuit againſt the ſaid *John Stewart* for hire and reward, to be paid by the ſaid *James Ruſſell* to the ſaid *Charlton* for his fees, work and labour in that behalf, and that the ſaid *John Stewart* being ſo ſurrendered and committed as aforeſaid, and ſo being and continuing in the cuſtody of the ſaid marſhal of the *Marſhalſea* of our ſaid lord the king, before the king himſelf, at the ſuit of the ſaid *James* in the ſaid plea, by virtue of the ſaid render and commitment thereon as aforeſaid, he the ſaid *John Stewart* by the rule and practice of that court ought to have been charged in execution in the ſaid plea, at the ſuit of the ſaid *James Ruſſell*, for the debt and damages aforeſaid, in the ſaid court of our lord the now king before the king himſelf, on or before the laſt day of *Trinity* term, in the fifth year aforeſaid, in order to prevent his the ſaid *John Stewart*'s being diſcharged out of the ſaid cuſtody, without firſt paying off or making ſatisfaction to the ſaid *James Ruſſell* for the debt and damages aforeſaid, of all which ſaid premiſes the ſaid *Charlton Palmer* afterwards, to wit, on the ſaid eighteenth day of *May* in the fifth year aforeſaid, at *Weſtminſter* aforeſaid, had due notice; and the ſaid *Charlton Palmer*, ſtill being and continuing agent or attorney of and for the ſaid *James* in the ſaid ſuit, did then and there undertake and faithfully promiſe to the ſaid *James*, that he the ſaid *Charlton* the buſineſs and duty of ſuch agent or attorney in the ſaid ſuit would well and faithfully perform and execute: And the ſaid *James* ſaith, that it was thereupon the buſineſs and duty of the ſaid *Charlton Palmer*, as ſuch attorney or agent of and for the ſaid *James Ruſſell* in the ſaid ſuit, to have cauſed the ſaid *John Stewart* to be ſo charged in execution as aforeſaid for the debt and damages aforeſaid in the ſaid plea, on or before the ſaid laſt day of *Trinity* term, in the fifth year aforeſaid, to prevent the ſaid *John Stewart* from being ſo ſuperſeded and diſcharged as aforeſaid, of all which ſaid premiſes the ſaid *Charlton* there, to wit, at *Weſtminſter* aforeſaid, had due notice; and although the ſaid *Charlton* had not any orders or directions from the ſaid *James Ruſſell* to the contrary, yet the ſaid *Charlton*

That the defendant was retained as attorney for the plaintiff in the ſaid ſuit.

And that Stewart being ſo rendered as above, by the rule and practice of B. R. ought to have been charged in execution on or before the laſt day of Trinity term in the fifth year of the king, to prevent his being diſcharged.

And the ſaid Palmer, ſtill being the attorney of the plaintiff, undertook and promiſed to do his duty, and the plaintiff avers that it was the duty of Palmer to have cauſed the ſaid Stewart to be charged in execution on or before laſt day of Trinity term aforeſaid;

Charlton not regarding the duty or buſineſs of his ſaid office and employment of ſuch attorney and agent of the ſaid *James* in the ſaid ſuit as aforeſaid, after that the ſaid *John* was ſo rendered and committed as aforeſaid, to wit, from thence until and on and throughout the ſaid laſt day of *Trinity* term in the fifth year aforeſaid, at *Weſtminſter* aforeſaid, ſo negligently and inadvertently conducted and behaved himſelf in his ſaid employment, that the ſaid *Charlton* wholly neglected and omitted to cauſe the ſaid *John* to be ſo charged in execution as aforeſaid, and by means of which ſaid neglect and omiſſion of the ſaid *Charlton* afterwards, to wit, on the 21ſt day of *November* in *Michaelmas* term in the ſixth year of the reign of our lord the now king, the ſaid *John* was ſuperſeded and diſcharged out of the cuſtody of the ſaid marſhal by the ſaid court of our ſaid lord the now king, before the king himſelf at *Weſtminſter* aforeſaid, the debt and damages aforeſaid being wholly unpaid to the ſaid *James*, whereby the ſaid *James* hath been wholly hindered and obſtructed from obtaining of his debt and damages aforeſaid, in form aforeſaid recovered, and hath wholly loſt the ſame, to the ſaid *James* his damage of 3500*l.* and therefore he prays relief, *&c.* The defendant pleaded the general iſſue, and the cauſe having been tried before Lord Chief Juſtice *Wilmot*, there was a verdict for the plaintiff and 500*l.* damages.

but that he Palmer neglected ſo to do, by reaſon whereof Stewart, on the 21ſt November in the ſixth year of the king, was diſcharged by ſuperſedeas;

to the plaintiff's damage of 3500*l.*

The plaintiff's declaration fully ſtates his caſe: for the defendant it was ſaid that the rule of the court of King's Bench made in *Trinity* term in the 2d year of *Geo.* 1. touching this matter, is in very doubtful words, which are thus, *viz.* "If "any plaintiff ſhall obtain judgment in the court here in any "action againſt any defendant a priſoner, and ſhall not charge "the ſaid defendant ſo in priſon remaining, in execution upon "the judgment ſo obtained *within two terms next after ſuch* "*judgment* ſo had and obtained, then ſuch defendant ſo in pri"ſon remaining ſhall have leave to file common bail, or to ſue "out a writ of *ſuperſedeas* for his diſcharge out of cuſtody;" that from the words of this rule it ſeems as if the plaintiff had two terms next after, and excluſive of the term wherein judgment was obtained againſt the priſoner, to charge him in execution; and therefore it was moved on the behalf of the defendant that judgment might be ſtayed; for two reaſons; firſt, becauſe if the defendant *Palmer* had two terms excluſive of the term wherein judgment was obtained againſt *Stewart*, and wherein he rendered himſelf to priſon, to charge *Stewart* in execution, then this action is miſconceived; and 2*dly*, although the meaning and conſtruction of the ſaid rule be, that Mr. *Palmer* ought to have cauſed *Stewart* to be charged in execution, the very next term after the term wherein judgment was obtained againſt *Stewart*, and wherein he rendered himſelf, yet the words of the rule are ſo doubtful, that it can only be conſidered as an error in judgment in Mr. *Palmer*, and not a negligence in the

duty of his office as an attorney. Upon ſhewing cauſe, the Lord Chief Juſtice reported that ſeveral eminent practiſers were examined upon the trial as to the conſtruction and practice upon the ſaid rule, who ſaid, that of late years it was well underſtood, that a perſon ſurrendering in diſcharge of his bail after judgment muſt be charged in execution the very next term after ſuch ſurrender: Some of them ſaid they believed this was not univerſally known by the city attornies, and that they thought that it was an omiſſion in Mr. *Palmer*, proceeding from want of judgment, and not from any wilful negligence in regard to his client Mr. *Ruſſell*. *John Lambert*, Mr. *Palmer*'s clerk, ſwore that in all the time he had ſerved Mr. *Palmer*, they never had one render after judgment; that the friends of Mr. *Stewart*, while he was a priſoner, were in treaty about an accommodation with Mr. *Ruſſell*, in order to get *Stewart* diſcharged; that he *Lambert*, before the end of *Trinity* term in the 5th year of the king, propoſed to his maſter *Palmer*, to charge the priſoner *Stewart* in execution, at the ſuit of the plaintiff *Ruſſell*; but Mr. *Palmer* then informed him (this witneſs) that the ſaid parties were in treaty for an accommodation, and that he believed the matter would be ended; that upon a ſummons before Lord *Mansfield*, to ſhew cauſe why *Stewart* ſhould not be diſcharged by *ſuperſedeas*, Lord *Mansfield* thought the ſaid rule did not extend to this caſe; another eminent practiſer was called for the defendant, and ſaid, that upon a ſummons before Mr. Juſtice *Foſter* in 1753, upon this very point of practice, that the judge thought a plaintiff had two terms to charge a priſoner in execution, excluſive of the term wherein the judgment was obtained againſt the priſoner, and wherein he ſurrendered himſelf. There was ſome evidence that *Stewart* was not totally inſolvent, and that *Ruſſell* probably might be able in time coming to obtain ſome part of his debt by execution againſt his goods; upon this evidence the jury gave a verdict for the plaintiff, and 500 *l.* in damages.

Curia—This cauſe was firſt tried before Lord *Camden* about half-a-year ago, when a verdict was given for the plaintiff for 3000 *l.* the whole debt, by my lord's direction; but afterwards a new trial was granted, my lord and the court being of opinion that he had miſdirected the jury in telling them they ought to find a verdict for the whole debt; whereas this action ſounds merely in damages, and the jury ought to have been left at liberty to find what damages they thought fit. And upon the laſt trial the jury were told they might find what damages they pleaſed, and accordingly found only 500 *l.* as it appeared to them in evidence, that *Stewart* was not totally inſolvent. We are all of opinion that this action is well conceived, and lies againſt Mr. *Palmer* for negligence; and we have authority to ſay that Lord *Camden* is of the ſame opinion. Judgment for the plaintiff.

EASTER TERM,

7 *Geo.* III. 1767.

Goodright, of the Demiſe of Francis Hoole, *verſus* Joſeph Sales. C. B.

EJECTMENT, of certain meſſuages or tenements in the county of *Derby*; verdict for the plaintiff as to one meſſuage in the poſſeſſion of *Francis Butcher*, part of the premiſes in the declaration; and as to the meſſuages in the declaration in the poſſeſſion of *John Pritchard*, *Samuel Walton*, *Thomas Hodgkinſon*, *and Thomas Clifton*, *being the reſidue of the premiſes in queſtion*; a verdict for the plaintiff, ſubject to the opinion of the court upon the following caſe, which ſtates, That *John Cooke* was ſeiſed in fee of the ſaid reſidue of the premiſes in queſtion, that an indenture of three parts, dated the 18th of *December* 1751, was made and executed between *Samuel Crompton*, ſole executor of the will of *Abraham Crompton*, *deceaſed*, of the firſt part, *John Hoole* of the ſecond part, and *Thomas Sheppard* of the third part, whereby, after reciting an indenture of mortgage which had been before made by the ſaid *Cooke* to the ſaid *Abraham Crompton* of a meſſuage, with the appurtenances, in *Sadler Gate* in *Derby* for 500 years, for ſecuring 60*l.* and intereſt; and alſo reciting an aſſignment of ſuch mortgage term from the ſaid *Crompton* to one *Giſborne*, and a re-aſſignment thereof from the ſaid *Giſborne* to the ſaid *Crompton*; and after reciting that *Cooke* afterwards borrowed of the ſaid *Abraham Crompton* 40*l.* and 10*l.* on his bonds, and deed-poll, whereby he alſo charged the ſaid meſſuage with the payment thereof; and after reciting, that ſince the making of the ſaid indentures three new meſſuages had been erected on part of the ſaid premiſes, and that *Abraham Crompton* and *John Cooke* were both dead; the ſaid *Samuel Crompton*, in conſideration of 76*l.* 1*s.* paid him by the ſaid *John Hoole*, and by the appointment of the ſaid *Hoole*, and of 5*s.* paid him by the ſaid *Thomas Sheppard*, aſſigned to the ſaid *Sheppard*, his executors, *&c.* the meſſuage in *Sadler Gate*, and alſo the three new-built meſſuages and appurtenances, being the ſaid reſidue of the premiſes in queſtion, for the reſidue of the ſaid term of 500 years, in truſt for the ſaid *Hoole*, his executors, *&c.* but

A. being ceſtui que truſt of a term in Blackacre, afterwards purchaſes the fee in his own name, and deviſes Blackacre in fee to his heir, whom he makes executor and reſiduary legatee, who dies, the term ſhall go with the fee to the heir, and not to her perſonal repreſentative.

but ſubject to ſuch equity of redemption, as the heirs or aſſigns of the ſaid *Cooke* had therein.

That by indentures of leaſe and releaſe (the releaſe *tripartite*), and dated the 11th of *January* 1752, made between *John Cooke*, ſon and heir of the before-named *John Cooke* deceaſed, *Catherine Jerome* widow, and *Elizabeth Port* widow, daughters of the ſaid *Cooke* deceaſed, of the firſt part; the ſaid *John Hoole* of the ſecond part, and *Richard Roſe* of the third part; in conſideration that the ſaid *Hoole* had paid to the ſaid *Crompton* 76 *l.* 1 *s.* in diſcharge of the ſaid mortgage, and other conſiderations, the ſaid *John Cooke*, *Catherine Jerome*, and *Elizabeth Port*, granted and conveyed the ſaid reſidue of the premiſes in queſtion to the ſaid *Roſe*, his heirs and aſſigns, to the uſe of the ſaid *John Hoole*, his heirs and aſſigns for ever, ſubject to two annuities of 13 *s.* 4 *d.* each, to *Catherine Jerome* and *Elizabeth Port* for their lives, both ſince deceaſed.

That *John Hoole*, being ſo ſeiſed and entitled, received the rents till his death, which happened on the 16th day of *Auguſt* 1757, leaving *Mary Launder*, his grand-daughter and heir at law, and next of kin, ſhe being the only child of *Mary Launder* (then deceaſed), who was the only child of the ſaid *John Hoole*.

That on the death of the ſaid *John Hoole*, the ſaid *Mary Launder*, his grand-daughter, entered upon and received the rents of the ſaid premiſes in queſtion up till the time of her marriage with the defendant *Sales*, from which time ſhe, or her ſaid huſband in her right, continued in the poſſeſſion and receipt of the rents and profits of the premiſes to the time of her death, without iſſue, on the 13th day of *March* 1766.

That *John Hoole* made his will, dated the 3d of *February* 1756, whereby he deviſed the meſſuage recovered in this ejectment, and the reſidue of the premiſes in queſtion, and all other his meſſuages, houſes, tenements, and real eſtate whatſoever to the ſaid *Mary* his grand-daughter in fee, and appointed her reſiduary legatee and executrix of his ſaid will; that *Francis Hoole*, the leſſor of the plaintiff, is nephew and heir at law of the ſaid *John Hoole*, and alſo heir at law of the ſaid *Mary Sales* on the part of her mother; therefore whether the ſaid *Francis Hoole*, the leſſor of the plaintiff, is entitled to recover the ſaid reſidue of the premiſes is the queſtion?

John Hoole being ſeiſed in fee, and having this term of years in *Sheppard* in truſt for himſelf, by his will deviſes all his real eſtate whatſoever (entire) to his grand-daughter, his heir at law, in fee, and appointed her reſiduary legatee and executrix; ſhe was *in* of the fee by deſcent and not by the will; *Sales*, her huſ-

band, produced at the trial the ſaid aſſignment of the mortgaged term to *Sheppard* in truſt for *John Hoole*. It is objected, that the leſſor of the plaintiff cannot recover becauſe of the ſubſiſting term for years which is in *Sheppard*, in truſt for *John Hoole* the teſtator, who by his will had deviſed it to his grand-daughter, who was his reſiduary legatee, and therefore the defendant her huſband ſhall have the benefit thereof, and it ſhall not attend the inheritance, there being no mention made in the aſſignment thereof to *Sheppard* that it was in *truſt* for *John Hoole to attend the inheritance*; ſo whether this term can be ſet up to bar the plaintiff the heir at law to the fee from recovering poſſeſſion in this ejectment,

Lord Chief Juſtice—It is obſervable there are no creditors in this caſe to incline a court of law or equity to ſever this term of years from the fee; it is a queſtion between the perſonal repreſentative of the wife under a ſatisfied mortgage, and her heir at law. When *John Hoole* purchaſed the fee, he became both the hand to receive, and the hand to pay off the mortgage-money; it wrought an extinguiſhment of the debt due on the mortgage; when *Hoole* purchaſed the fee the mortgaged term was gone, though it did not extinguiſh the *term in point of law*, (becauſe *that* was in *Sheppard*,) yet it became attendant upon the inheritance, and muſt follow it in point of law, as much as if it had been made to do ſo by the act of the party *John Hoole* himſelf.

But it is objected, that although this will is void as to the deviſe of the fee, yet that the deviſe will have ſome effect, becauſe it is evidence that the teſtator intended to give his grand-daughter ſome intereſt in his real eſtate by his will, and if ſhe cannot take the whole fee by deviſe, why ſhall ſhe not take part, *viz.* the term? In anſwer to this, it is plain he had no intention to ſever the term from the fee, but he intended to give her the whole inheritance intire; the words are, *All* my meſſuages, *&c.* to her and her heirs for ever, not having it in contemplation to divide the term from the fee; and the caſe of *Whitchurch* v. *Whitchurch*, 2 *Wms.* 236. *Gilb. Eq. Caſes* 168. S. C. 9 *Mod.* 124. S. C. is in point. *A.* being poſſeſſed of a term of 500 years in *Blackacre*, afterwards purchaſes the fee-ſimple in *B.*'s name, and deviſes *Blackacre* to *J. S.* in fee, but if the will is not atteſted by three witneſſes, the term ſhall not paſs, becauſe attendant on and part of the inheritance; the intention of the teſtator in that caſe was to give the inheritance; the attendant term could not paſs, but was conſidered as part of the inheritance. It is obſervable in the preſent caſe, there is but a month between the aſſignment of the mortgage and the purchaſe of the fee; it is admitted that if it had been mentioned in the aſſignment of the *term that it was to attend the inheritance*, it could not be ſet up againſt the heir at law: now I conſider ſuch (as much as if it had been ſo expreſſed)

preſſed) upon legal principles, and it ſhall not be ſet up againſt the heir. *Lit. ſect.* 464. *ceſtuy que uſe* at common law was conſidered as the owner of the land, and was ſworn in aſſizes and other inqueſts in pleas real and perſonal; and feoffee to uſes was to make ſuch conveyance or eſtate as *ceſtuy que uſe* directed, or he would have been guilty of a breach of truſt; and, by Lord *Hobart*, an action would lie againſt him at law to recover damages for breach of truſt, 1 *Vern.* 344.; therefore it would be very abſurd to ſanctify a thing, for which an action would lie at law; for when a truſtee accepts of a truſt, he agrees in effect, that *ceſtuy que truſt* ſhall enjoy the land; and it would be againſt the truſt to hinder him from having *that* which is his own by law. The *poſtea*, *per totam curiam*, muſt be delivered to the plaintiff.

Knight *verſus* Preſton. C. B.

Debt upon a bond. 1ſt plea, Non eſt factum. 2d plea, That the defendant by force and reſtraint of impriſonment executed the bond.

DEBT upon a bond for 781 *l.* 14*s.*, dated the 27th of *November* 1762. The defendant pleads *non eſt factum*; and 2*dly*, by leave of the court he pleads and ſays, that he by virtue of the writing obligatory ought not to be charged with the debt, becauſe he ſays, that he, at the time of the making the ſaid writing obligatory, was wrongfully and unlawfully impriſoned by the plaintiff and others in colluſion with her, and was wrongfully and unlawfully kept and detained in priſon, until he through the force and reſtraint of that impriſonment ſealed, and as his act and deed, delivered the ſaid writing obligatory to the plaintiff; and this he is ready to verify; wherefore he prays judgment if he by virtue of the ſaid writing obligatory ought to be charged with the ſaid debt, *&c.* And 3*dly*, for further plea by leave of the court he craves *oyer* of the bond, and of the condition thereof, and it is read to him in theſe words: (to wit,) The condition of this obligation is ſuch, that if the above-bounden *James Preſton*, his heirs, *&c.* ſhall and do well and truly pay, *&c.* unto the ſaid *Elizabeth Knight*, her executors, *&c.* the ſum of 319 *l.* 17*s.* of lawful money, *&c.* with legal intereſt for the ſame, at, in, or upon the day of demand, then this obligation to be void, or elſe to remain, *&c.* Which being read and heard, the defendant ſays, that he cannot deny the ſaid action of the plaintiff, nor but that the ſaid writing obligatory is the deed of the ſaid defendant, nor but that the plaintiff ought to recover her debt aforeſaid, together with her damages by her ſuſtained on occaſion of the detaining thereof againſt him the defendant; but he further ſays, that he the defendant long before, and upon the 25th day of *October* 1760, mentioned in a certain act made at the parliament of our lord the now king of *Great Britain*, &c. holden at *Weſtminſter* in *Middleſex* by prorogations, on the 18th day of *November* in the firſt year of his reign, intitled "An act for relief of inſolvent "debtors,"

3d plea confeſſes that the bond is his deed.

Put that the defendant before the 25th of October 1760, was a fugitive beyond the ſeas at Canada.

"debtors," was abroad and beyond the ſeas in foreign parts, to wit, at *Canada* in *North America*, and at the time of the making of that act, and from thence until the ſurrender and diſcharge of the ſaid defendant hereafter mentioned, was a perſon entitled by the ſaid act to return into this kingdom, and to ſurrender himſelf to priſon as a fugitive, and a perſon abroad and in foreign parts, on the ſaid 25th day of *October* in the firſt year aforeſaid, and as ſuch to take and receive the benefit of the ſaid act; and thereupon he the defendant, after the making of the ſaid act, and during the continuance of the ſaid act, and within the time limited and appointed in and by the ſaid act for ſuch fugitives to return and ſurrender themſelves to priſon, in order to have and take the benefit of the ſaid act, to wit, on the firſt day of *February* in the year of our Lord 1762, did return from the ſaid foreign parts beyond the ſeas into this kingdom, in order to and with intent to have and take the benefit of the ſaid act; and the defendant further ſays, that he, before ſuch time as he ſo went abroad and beyond the ſeas as aforeſaid, and long before the ſaid 25th day of *October* in the ſaid act mentioned, was indebted unto the ſaid plaintiff *in a large ſum of money, to wit, the ſaid ſum of money in the ſaid condition mentioned*, and being ſo indebted, the plaintiff, after the return of the defendant into this kingdom from the ſaid parts beyond the ſeas, and before ſuch time as the ſaid defendant had ſurrendered or could ſurrender himſelf to priſon, in order to take the benefit of the ſaid act, in order and with intent to deprive the defendant of the benefit of the ſaid act, impleaded the ſaid defendant for the recovery of the ſaid debt ſo due and owing from the ſaid defendant before the ſaid 25th day of *October* 1760, to the plaintiff in a certain court of *John* lord biſhop of *Wincheſter*, commonly called the *Cheney Court*, held before *George Preſcod* eſq. bailiff of the ſaid biſhop of his ſaid court, holden at —— in the county of *Southampton*, within the juriſdiction of the court, in a certain plea of treſpaſs upon the caſe upon promiſes, and by virtue of the proceſs of that court in the ſaid plea, cauſed and procured the defendant to be taken and arreſted by his body, and to be impriſoned at *Wincheſter* in the ſaid county of *Southampton*, in a certain priſon there called the *Soke Priſon*, then and ſtill being the priſon of the ſaid court called the *Cheney Court*, and then cauſed and procured him to be kept and detained in the ſaid priſon until he the defendant afterwards (to wit) on the ſaid 27th day of *November* 1762, in the declaration mentioned at *Weſtminſter* aforeſaid, in order to obtain his releaſe and diſcharge from the ſaid impriſonment; and by and through the force and reſtraint of that impriſonment ſealed, and as his act and deed delivered the ſaid writing obligatory in the ſaid declaration mentioned to the plaintiff; and the defendant further ſays, that he being diſcharged

And on the firſt day of February 1762, returned to take the benefit of the inſolvent debtors' act. That before the act he was indebted to plaintiff in the ſum in the condition, who arreſted him and put him in priſon for it before he could take the benefit of the act,

where he continued until he executed the bond the 27th of November 1762.

Whereupon being diſcharged, he on the 21ſt of February 1763, ſurrendered himſelf to the King's Bench priſon, in order to take the benefit of the act, and on the 31ſt of March 1763, he was diſcharged at the quarter ſeſſions.

from

from his impriſonment in the ſaid *Cheney Court* priſon, did afterwards, to wit, on the 21ſt day of *February* 1763, in compliance with the ſaid act, and according to the form and effect thereof, ſurrender himſelf to *John Aſton* eſq. then and ſtill being marſhal of the *Marſhalſea* of our lord the now king, before the king himſelf, and the keeper of the priſon of the King's Bench mentioned in the ſaid act, in order to take the benefit of the ſaid act, and remained and continued ſo in cuſtody of the ſaid *John Aſhton* in the ſaid priſon as aforeſaid, until the ſaid defendant afterwards, (to wit,) at the general quarter-ſeſſions of the peace of our lord the now king, holden at *Southwark* by adjournment, in and for the ſaid county of *Surry*, on *Thurſday* the 31ſt day of *March*, in the third year of our lord the now king, before certain of the king's juſtices aſſigned to keep the peace, *&c.* in and for the ſaid county, *&c.* was duly by virtue of and according to the form of the ſaid act of parliament diſcharged by the ſaid juſtices in open court at the ſaid ſeſſions; and this he is ready to verify; wherefore he prays judgment, and that his perſon may be diſcharged from the execution of the judgment to be obtained againſt him by the ſaid plaintiff in this action, according to the form of the ſaid act, *&c.*

Iſſue on the non eſt factum.

Replication to the 2d plea.

The plaintiff replies, and joins iſſue upon the plea of *non eſt factum*; and as to the plea of the defendant by him ſecondly above pleaded in bar, the plaintiff ſays, that ſhe by reaſon of any thing in that plea alledged, ought not to be barred from having her action againſt the defendant to charge him with the ſaid debt, becauſe ſhe ſays that the defendant made the ſaid bond in the ſaid declaration mentioned of his own free will, and not through the force and reſtraint of impriſonment, as the defendant hath above in that plea alledged; and this he prays may be inquired of by the country; and as to the plea of the defendant by him laſtly above pleaded in bar, the plaintiff ſays, that ſhe, by reaſon of any thing in that plea alledged, ought not to be barred from having execution againſt the perſon of the defendant, becauſe ſhe ſays that the ſaid plea, and the matters therein contained, are not ſufficient in law, *&c.* (ſo demurs generally,) and the defendant joins iſſue to the country to the replication to the ſecond plea, and joins in demurrer as to the third plea.

Demurrer to the 3d plea.

A ſhort ſtate of the caſe, upon the demurrer.

The caſe upon the demurrer to the defendant's third plea is ſhortly this: The defendant being a fugitive for a ſimple contract debt owing by him to the plaintiff before, and on the 25th day of *October* 1760, returned to *England* the 1ſt of *February* 1762, in order to take the benefit of the inſolvent debtors' act made in the firſt year of the king, and before he ſurrendered himſelf for that purpoſe, was arreſted by the plaintiff for the ſaid debt, and continued in gaol under that arreſt four or five months, until he executed the bond the 27th of *November* 1762, for the payment of

the

the ſaid debt, whereupon he was diſcharged from that arreſt, and afterwards on the 21ſt of *February* 1763, within the time limited by the act, he ſurrendered himſelf to the King's Bench priſon, in order to take the benefit of the ſaid act, and at the quarter-ſeſſions for *Surry* on the 31ſt of *March* 1763, was diſcharged; and now the plaintiff has brought this action upon the bond; the defendant confeſſes the bond, but ſays it was given to the plaintiff *for a large ſum of money, to wit, the ſum of money in the ſaid condition mentioned*, owing to her before the ſaid 25th of *October* 1760, and therefore he pleads that his perſon ought to be diſcharged from any execution againſt him. Upon demurrer to this plea, three exceptions were taken:

1*ſt*, That the defendant ſays, he was indebted to the plaintiff *in a large ſum of money*, (*to wit*,) *the ſaid ſum of money in the ſaid condition mentioned;* and that this coming under a *videlicet* is not directly alledged, and therefore is not traverſable. But *per cur.* —The office of the *videlicet* is to explain what went before, and where it is *not repugnant* or contradictory, it is material and traverſable. 1 *Saund.* 170. 118. *Hob.* 172. *Salk.* 561. And they held the plea good in this point.

The 2*d* exception was, That the new bond has extinguiſhed the old debt, and therefore the defendant is not entitled to be diſcharged from the bond, which is a debt created in 1762. As to this point the court ſeemed to differ among themſelves, but gave no opinion.

The 3*d* exception was, That it appeared that the defendant had been returned from *Canada* to *England* above a year, *viz.* from *February* 1, 1762, till *February* 21, 1763, before he ſurrendered himſelf. This was held a good exception by the whole court, for the defendant ought to have ſurrendered himſelf in a reaſonable time, but he laid by, was arreſted, and continued in gaol five months, when he might have brought his *habeas corpus*, and been ſurrendered to a proper priſon in order to have taken the benefit of the inſolvent debtors' act; but inſtead of doing *that*, he gave this bond; and upon this exception alone, judgment was given for the plaintiff.

Roe, on the Demiſe of Thomas Buxton and Mary his Wife, *verſus* Thomas Dunt. C. B.

Power under a marriage-ſettlement to give to the children of the marriage, in ſuch ſhares, &c. and for ſuch eſtate, &c. and there is but one child of the marriage, ſuch child muſt have the whole eſtate which was ſettled.

EJECTMENT of one meſſuage and lands in *Hetherſet*, *Great Melton*, and *Little Melton* in the county of *Norfolk*. On the trial thereof at the laſt ſummer aſſizes a verdict was for the plaintiff, ſubject to the opinion of the court, upon the following caſe:

Sarah Smith, widow, in the year 1744, was ſeiſed in fee of the premiſes according to the cuſtom of the manor, being copyhold, of *Hetherſet Cromwells*, and being ſo ſeiſed, at a court held for the ſaid manor on the 25th of *March* 1746, ſurrendered the premiſes to the uſe of her ſon *John Smith* and *Elizabeth* his wife, during their lives and the life of the longer liver of them; and after the deceaſe of the ſurvivor of them, to the child or children, whether male or female, of the ſaid *John Smith* and *Elizabeth* his wife, in ſuch proportion and proportions, and for ſuch eſtate and eſtates as the ſaid *John Smith* and *Elizabeth* his wife, or the ſurvivor of them, ſhould by any ſurrender or ſurrenders thereof, and according to the cuſtom of the manor; or by his or her laſt will and teſtament direct, declare, limit, or appoint; and for want of ſuch direction, declaration, limitation, or appointment, then to all and every the child and children of the ſaid *John Smith* and *Elizabeth* his wife, and their heirs, equally to be divided between them as tenants in common, and not as joint-tenants; and for want of ſuch iſſue, then to the right heirs of the ſaid *John Smith* for ever. *John Smith* and *Elizabeth* his wife were at the ſame court admitted tenants thereof, to hold the ſame, according to the uſes aforeſaid; and the ſaid *John Smith* immediately at the ſame court ſurrendered the premiſes to the uſe of his laſt will and teſtament.

Elizabeth Smith the wife died, and *John Smith* her huſband ſurvived her, and by his will duly executed the 19th of *March* 1764, deviſed as follows, *viz.* "I give and deviſe unto *Sarah* "*Smith* my daughter, and her heirs for ever, when ſhe attains "the age of twenty-one years, all my meſſuages, lands, tene-"ments, and hereditaments whatſoever, ſituate, lying, and being "in *Hetherſet* aforeſaid; and if my ſaid daughter *Sarah* ſhall "depart this life before ſhe attain the age of twenty-one years, "then I give and deviſe the ſaid meſſuages, lands, tenements, "and hereditaments unto my ſiſter *Ann Dunt*, the wife of "*Thomas Dunt* of *Hetherſet* aforeſaid, maſon, and her heirs for "ever, ſubject nevertheleſs to the condition following, that is to "ſay, in caſe my ſaid ſiſter *Ann* ſhall at any time when ſhe is "poſſeſſed of the ſaid meſſuages and lands, make ſale thereof "to any perſon or perſons, then my will is, that the ſaid *Ann*

"my

" my ſiſter do pay to *Samuel Smith* my brother, the ſum of fifty " pounds out of the money ariſing by ſuch ſale."

John Smith died in *May* 1764, and left only one child, his daughter *Sarah Smith*, by his ſaid wife *Elizabeth*, who on her father's death took poſſeſſion of the premiſes, and died ſeiſed thereof on the 4th of *Auguſt* 1765, an infant of the age of 19 years and 38 days; and *Mary* the wife of the leſſor of the plaintiff; *Thomas Buxton* is the couſin and heir at law of *Sarah* the infant, as being the only child and daughter of *Thomas Smith*, the eldeſt uncle of *Sarah* the infant, and grand-daughter and heir of *Sarah Smith* mentioned as the ſurrenderer in the ſurrender of the 25th of *March* 1746, and *Thomas Dunt* the defendant is huſband of the ſaid *Ann Dunt*, the ſiſter and deviſee of the teſtator. The queſtion for the opinion of the court is, Whether the plaintiff, as leſſee of *Thomas Buxton* and *Mary* his wife, in right of the ſaid *Mary*, as heir at law to *Sarah Smith* the infant, is entitled to recover in this ejectment?

The whole court were clearly of opinion, that *Smith* the teſtator had no power or authority to make the will and ſurrender as above, but that there being only one child of the ſaid teſtator by his late wife, *that* child was entitled to the whole of the premiſes in fee; and Mrs. *Buxton* being her heir at law, the leſſor of the plaintiff had judgment.

Note; It was ſaid by the Lord Chief Juſtice, that he had known a caſe where there has been one child only, that *that* child under ſuch a power as *this* had been made tenant for life, with remainder in tail to its iſſue, but he much doubted whether it could be legally done. He ſaid, he thought a ſingle child in ſuch a caſe as this might be made tenant in tail. But *quære*, as to this matter.

This caſe of *Roe, on the demiſe of Buxton and his wife* v. *Dunt*, was argued by Serjeant *Foſter* for the plaintiff, and Serjeant *Whitaker* for the defendant. The principal caſe cited and relied upon on the part of the plaintiff was, *Doe on the demiſe of Brownſmith and his wife* v. *Denny*, in *B. R. Hilary* term, 29 *Geo.* 2. in which *Rider* C. J. delivered the opinion of the whole court. The caſe was this—By indentures of leaſe and releaſe of the 23d and 24th of *June* 1727, between *Mary Hammond* of the firſt part, *Henry Tampion* of the ſecond part, and *James Hailes* and *Samuel Dynes* of the third part, reciting that a marriage was then intended to be had between the ſaid *Henry* and *Mary*. In conſideration of the ſaid intended marriage, they the ſaid *Henry* and *Mary* releaſe and convey unto the ſaid *Hailes* and *Dynes* and their heirs, the *premiſes in queſtion*, lying in *Swilland* in the county of *Suffolk*, then the eſtate in fee of the ſaid *Mary*, and alſo a certain

Doe v. Denny, B. R. Hil. 29 G. 2. the like caſe.

other eſtate in *Somerſham*, then the eſtate in fee of the ſaid *Henry*, to the uſes following, *viz.* As to the premiſes in *Swilland*, (being the premiſes in queſtion,) to the uſe of the ſaid *Mary* in fee until the marriage, and as to the premiſes in *Somerſham*, to the uſe of *Henry* till the marriage; and after the marriage, then, as to the ſaid eſtates as well of the ſaid *Mary* as of the ſaid *Henry*, to the uſe of the ſaid *Henry* for life, and after his deceaſe, to the uſe of the ſaid *Mary* for life in bar of dower, and after the deceaſe of the ſurvivor of them, to the uſe of ſuch child or children, on the body of the ſaid *Mary* by the ſaid *Henry* to be begotten, and for ſuch eſtate and eſtates, and ſubject to ſuch powers, proviſoes, conditions, and limitations as the ſaid *Mary*, notwithſtanding her coverture, ſhould by any writing under her hand and ſeal, atteſted by three or more credible witneſſes, or by her laſt will and teſtament in writing ſo atteſted, ſhould limit, direct, and appoint the ſame; and for want of ſuch limitation, &c. to the uſe of ſuch child or children on the body of the ſaid *Mary* by the ſaid *Henry* to be begotten, and his and their heirs equally, as tenants in common, and not as joint-tenants; and for want of ſuch iſſue, to the uſe and behoof of ſuch perſon and perſons, and for ſuch eſtate and eſtates, &c. as the ſaid *Mary* during her coverture, or at any other time, and as well married as ſole, ſhall in and by her laſt will and teſtament, or by any deed duly executed in the preſence of three or more credible witneſſes, give and appoint the ſame, and as the eſtate and eſtates ſo to be appointed (if any ſuch ſhall happen to be) ſhall reſpectively end and determine; and for want of ſuch gift and appointment, the premiſes (in queſtion) in *Swilland* to the right heirs of the ſaid *Mary*, and the premiſes in *Somerſham* to the right heirs of the ſaid *Henry*. The marriage took effect, and they had iſſue only one ſon *Henry*. The huſband died in 1729, leaving his widow and the ſon an infant. Afterwards in 1733, *Mary* the wife died, leaving her ſaid ſon an infant, but before her death made her *will* in due form, and therein (reciting her power under the ſaid marriage-ſettlement) by virtue of the ſettlement aforeſaid, and of other powers in her veſted, (as it is expreſſed in the will,) gives and deviſes unto the ſaid *Henry Tampion* her ſon, and his heirs for ever, all the ſaid premiſes in *Swilland* and *Somerſham*; but in caſe her ſaid ſon ſhall die before his age of 21 years and without iſſue, then ſhe gives the *Swilland* eſtate to her brother *Joſeph Clarke*, and to her ſiſter *Ann Proctor*, and to their heirs for ever, as tenants in common; and on the like contingency ſhe gives the premiſes in *Somerſham* to *Robert Shearcroft* and *John Hailes* and their heirs, as tenants in common. *Henry Tampion* the infant ſon ſurvived his mother about five years, and died in 1738, an infant and without iſſue. The wife of *Brownſmith* the plaintiff's leſſor is heir at law to the infant on the part of his father; and the defendant *Denny* claims under the will of *Mary* the widow. Lord Chief Juſtice *Rider* declared, that it was the opinion of the whole court

and

and of the late Chief Juſtice *Lee*, that the title was in the heir at law of the infant, and that the deviſe by *Mary* was void, and that there being a ſon living at the time of the mother's appointment, the appointment was void; for as there was iſſue living at the time of her death, the ſecond power to give it to a ſtranger could never ariſe, for ſhe had no power to diſpoſe of it to a ſtranger, but upon failure of iſſue. If indeed (ſaid the Chief Juſtice) the ſon had died in the lifetime of the mother without iſſue, then perhaps ſhe might have had the power of diſpoſing of it, agreeable to the caſe of *Holt* and *Burleigh* in *Chancery Precedents*, 293. 2 *Vern.* 65. (which was like our caſe, but the child died in the lifetime of the parent,) as ſhe had a ſon living, ſhe could not diſpoſe of the eſtate from him, nor alter his eſtate, and gave judgment for the plaintiff. Upon the authority of this caſe, the preſent caſe at bar of *Roe* and *Dunt* was determined, and judgment given for the plaintiff by the whole court, *May* 13, 1767. *Per Wilmot* C. J. who ſaid, that the caſe cited was directly in point, and that he could not diſtinguiſh one from the other; but he thought the caſe at bar was a ſtronger caſe, for if this power could have taken place, and the child had died under twenty-one and left iſſue, that iſſue would have been diſinherited.

Catharine Turner, Spinſter, *verſus* Thomas Vaughan. C. B.

DEBT upon a bond, dated the 23d of *March* 1764, for 250*l.* The ſaid *Thomas*, by *Matthew Coulthurſt* his attorney, comes and defends the wrong and injury when, &c. and prays *oyer* of the ſaid writing in the declaration mentioned; he alſo prays *oyer* of the condition of the ſaid writing, and it is read to him in theſe words: (to wit,) Now the condition of this obligation is ſuch, that in conſideration of cohabitation had by the ſaid above-bounden *Thomas Vaughan* with the ſaid *Catharine Turner*, he the ſaid *Thomas Vaughan* hath hereby agreed to ſecure to the ſaid *Catharine Turner* during her natural life, the yearly ſum of 30*l.* a-year, to commence from the day of the date of theſe preſents, and made payable on the four moſt uſual feaſts or days of payment in the year, (that is to ſay) the birth of our Lord *Chriſt*, the Annunciation of the bleſſed Virgin *Mary*, the Nativity of St. *John* the Baptiſt, and St. *Michael* the Archangel, by even and equal portions; the firſt payment to begin and be made on the feaſt-day of St. *John* the Baptiſt next enſuing the date of the above-written obligation: Now if the above-bounden *Thomas Vaughan*, his heirs, executors, adminiſtrators, or aſſigns, pay or cauſe to be paid to the ſaid *Catharine Turner*, her executors, adminiſtrators, or aſſigns, the ſaid annuity or yearly ſum in the manner and on the days and times aforeſaid, then this obligation to be void, or elſe to remain in full force and virtue; which being

Bond to a lady in conſideration of paſt cohabitation is good in law.

Oyer of the condition.

Demurrer.

read and heard, the said *Thomas* saith, that the declaration aforesaid, and the matter therein contained, is not sufficient in law to maintain the said action of the said *Catharine* against the said *Thomas*; to which said declaration the said *Thomas* need not, nor is he in any way bound by the law of the land to answer; and this he is ready to verify: wherefore, for want of a sufficient declaration, the said *Thomas* prays judgment of the said declaration, and that the same may be quashed, &c.

Joinder in demurrer.

And the said *Catharine* saith, that by any thing by the said *Thomas* above alledged, the declaration of her the said *Catharine* ought not to be quashed, because she saith, that the declaration aforesaid, and the matter therein contained, are sufficient in law to maintain the said action of the said *Catharine* against the said *Thomas*, which said declaration, and the matter in the same contained, she the said *Catharine* is ready to verify and prove, as the court shall award: and because the said *Thomas* doth not answer to the said declaration, nor doth otherwise gainsay the same, she the said *Catharine* prays judgment and her said debt, together with her damages occasioned by the detaining of that debt, to be adjudged to her, &c. But because, &c.

It was objected, 1*st*, That it appeared by the condition of the bond, that it was executed and given upon an illegal, flagitious consideration of having cohabited with the plaintiff, who appears to be a spinster, being so named in the declaration, and therefore the court would not assist her to recover any debt thereupon; and cited the *Digest, lib.* 45. *sec.* 123. and *Cicero de Senectute*, 12. where he explains the word *flagitium* to mean *stuprum*, (thus,) *Stupra & adulteria & omne tale flagitium nullis aliis illecebris excitantur nisi voluptatis*; and *Cic. Verr.* 5. 10. *Noctis longitudo stupris & flagitiis conturbatur.* 2*dly*, That this bond appears to be given for a consideration *past*, and therefore is no consideration at all; and cited 1 *Roll. Abr.* 11, 12. *Moor* 642, 643. S. P. 2 *Stra.* 933. S. P.

Judgment for the plaintiff.

Per Clive, Bathurst, and *Gould*, Justices, (*absente capitali justic. Wilmot*) without hearing the other side—There must be judgment for the plaintiff.

Clive J.—I am in a court of common law, and not in an ecclesiastical court. If a man has lived with a girl, and afterwards gives her a bond, it is good. Suppose this bond had been given by the defendant to the plaintiff for being his mistress, it would have been good in point of law, although in a court of equity it would be postponed to creditors. Sir *Joseph Jekyll*, Master of the Rolls, in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond; and where it is *præmium pudoris*, a court of equity will not relieve

relieve againſt ſuch a bond. This condition is incapable of an explanation to make the bond an illegal act.

Bathurſt J.—Where a man is bound in honour and conſcience, God forbid, that a court of law ſhould ſay the contrary; and wherever it appears that the man is the ſeducer, the bond is good. *Bracton* ſays, when a man cohabits with an unmarried woman it is *legitima concubina*, and *Exodus, cap.* 22. *v.* 16. "If a "man entice a maid that is not betrothed, and lie with her, he "ſhall ſurely endow her to be his wife." See alſo *Deuteronomy, cap.* 22. *v.* 28. "If a man find a damſel that is a virgin which "is not betrothed, and lay hold on her, and lie with her, and "they be found, then the man that lay with her ſhall give unto "the damſel's father fifty ſhekels of ſilver, and ſhe ſhall be his "wife, becauſe he hath humbled her, he may not put her away "all his days." Honour and conſcience ought to bind every man in point of law. In an action in the King's Bench upon a promiſe of marriage, the evidence upon the trial was, that the defendant had bragged and boaſted that he had debauched the plaintiff, by promiſing her marriage; this cauſe being tried before me in the circuit, I left it to the jury upon that evidence only, and they gave a verdict for the plaintiff, and 500*l.* damages, which I thought right; the court of King's Bench approved of my opinion, refuſed to ſet aſide the verdict, and thought 500*l.* damages were little enough.

Gould J.—The court may take this for a lawful and conſcientious conſideration. We muſt preſume that the defendant hath done what in honour and conſcience he ought to have done, and that he thought himſelf a wrong-doer, and gave the plaintiff this bond to make her amends.

Collins *verſus* Blantern. C. B.

This record is of Hilary *term in the ſeventh year of the reign of King* George *the Third. Roll* 326.

Shropſhire, to wit. ROBERT *Blantern* late of *Rodenhurſt* in the ſaid county, yeoman, was ſummoned to anſwer *Edward Collins* of a plea, that he render to him ſeven hundred pounds which he owes to and unjuſtly detains from him, *&c.* Whereupon the ſaid *Edward Collins* by *John Leake* his attorney ſays, that whereas the ſaid *Robert Blantern* on the 6th day of *April*, which was in the year of our Lord 1765, at *Rodenhurſt* aforeſaid in the county aforeſaid, by his certain writing obligatory acknowledged himſelf to be held and firmly bound unto the ſaid *Edward Collins* in the aforeſaid ſum of ſeven hundred pounds, to be paid to the ſaid *Edward Collins* when he ſhould be thereunto required;

Debt upon a bond for 700*l.* dated the 6th day of April 1765.

required; nevertheleſs the ſaid *Robert Blantern* (although often thereunto required) hath not paid the ſaid ſeven hundred pounds to the ſaid *Edward Collins*, but hath hitherto refuſed and ſtill doth refuſe to pay the ſame to the ſaid *Edward Collins*, wherefore he ſays that he is the worſe, and hath damage to the value of ten pounds, and therefore he brings ſuit, and ſo forth; and he brings here into court the aforeſaid writing obligatory, which teſtifies the ſaid debt in form aforeſaid, the date whereof is the ſame day and year abovementioned.

1ſt Plea ſets forth oyer of the obligation wherein four others with the defendant were jointly and ſeverally bound to the plaintiff in 700l.

And the ſaid *Robert*, by *George Greene* his attorney, comes and defends the wrong and injury, when, &c. and craves *oyer* of the ſaid ſuppoſed writing obligatory, and it is read to him in theſe words: (to wit,) Know all men by theſe preſents, that we *John Walker* of *Forton* in the county of *Stafford*, yeoman, *Thomas Walker* of *Draycott-in-the-Moors* in the ſaid county of *Stafford*, yeoman, and *Robert Blantern* of *Rodenhurſt* in the county of *Salop*, yeoman, are held and firmly bound to *Edward Collins* of *Brecond* in the ſaid county of *Stafford*, ſurgeon, in the ſum of ſeven hundred pounds of good and lawful money of *Great Britain* to be paid to the ſaid *Edward Collins*, or his certain attorney, executors, adminiſtrators, or aſſigns, for which payment, to be well and faithfully made, we bind ourſelves and each and every of us jointly and ſeverally, our and each and every of our heirs, executors, and adminiſtrators, firmly by theſe preſents, ſealed with our ſeals; dated this ſixth day of *April*, in the fifth year of the reign of our ſovereign lord *George* the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland* king, defender of the faith, and ſo forth, and in the year of our Lord one thouſand ſeven hundred and ſixty-five; he alſo craves *oyer* of the condition to the ſaid ſuppoſed writing obligatory, and it is read to him in theſe words: (to wit,) The condition of this obligation is ſuch, that if the above-bounden *John Walker*, *Thomas Walker*, and *Robert Blantern*, our heirs, executors, or adminiſtrators, ſhall and do well and truly pay or cauſe to be paid unto the above-named *Edward Collins*, his executors, adminiſtrators, or aſſigns, the full ſum of three hundred and fifty pounds of good and lawful money of *Great Britain*, upon the ſixth day of *May* next, without fraud or further delay, then this obligation to be void and of none effect, or elſe to remain in full force and virtue; which being read and heard, the ſaid *Robert* ſaith, that the ſaid *Edward* ought not to have his aforeſaid action thereof againſt him the ſaid *Robert*, becauſe he ſays that the ſaid ſuppoſed *writing obligatory is not his deed*, and of this he puts himſelf upon the country, &c. And for further plea in this behalf the ſaid *Robert*, by leave of the court here for this purpoſe firſt had and obtained, according to the form of the ſtatute in ſuch caſe made and provided, ſays, that the ſaid *Edward* ought not to have his aforeſaid action thereof

And alſo oyer of the condition for the payment of 350l. to the plaintiff on the 6th of May next.

Non eſt factum pleaded.

thereof againſt him, becauſe he ſays that before, and at the time of the making of the abovementioned ſuppoſed writing obligatory, and alſo before and at the time of the making of the promiſſory note hereafter mentioned, (to wit,) at *Rodenhurſt* aforeſaid, the ſaid *John Walker* and *Thomas Walker* in the ſaid ſuppoſed writing obligatory named, and alſo one *Robert Walker*, one *Thomas Scilletoe*, and one *John Cullick*, ſtood reſpectively indicted in a due courſe of law on the proſecution of one *John Rudge*, by five ſeveral and reſpective indictments for wilful and corrupt perjury, to which ſaid ſeveral and reſpective indictments the ſaid *John Walker*, *Thomas Walker*, *Robert Walker*, *Thomas Scillitoe*, and *John Cullick*, had reſpectively pleaded the ſeveral pleas of Not guilty before the making of the ſaid ſuppoſed writing obligatory, and alſo before the time of the making of the ſaid note hereafter mentioned; and the traverſes of the ſaid *John Walker*, *Thomas Walker*, *Robert Walker*, *Thomas Scillitoe*, and *John Cullick* reſpectively on the reſpective indictments were, at the time of the making of the unlawful, wicked, and corrupt agreement hereafter mentioned, and of the note hereafter mentioned, and alſo of the above ſuppoſed writing obligatory, (to wit,) on the day whereon the ſaid ſuppoſed writing obligatory was made, about to come on to be tried at the aſſizes then, (to wit,) on that day being, and continuing to be held at *Stafford* for the county of *Stafford*, and that the ſaid *John Walker*, *Thomas Walker*, *Robert Walker*, *Thomas Scillitoe*, and *John Cullick*, ſo ſtanding indicted on the proſecution of the ſaid *John Rudge*, and the ſaid traverſes ſo being about to be tried as aforeſaid, it was on the ſaid ſixth day of *April* in the year 1765, in the ſaid writing obligatory mentioned, (to wit,) at *Rodenhurſt* aforeſaid, unlawfully, wickedly, and corruptly agreed by and between the ſaid *John Rudge*, the proſecutor of the indictments aforeſaid, the ſaid *Edward Collins* the plaintiff, and the ſaid *John Walker*, *Thomas Walker*, *Robert Walker*, *Thomas Scillitoe*, and *John Cullick*, the defendants in theſe reſpective indictments, that the ſaid *Edward Collins* the now plaintiff ſhould give to the ſaid *John Rudge* the proſecutor of the indictments aforeſaid, his note in writing, commonly called a promiſſory note, as and for value received, to bear date on a certain day and in a certain year now paſt, (to wit,) on the day and year laſt mentioned, for a large ſum of money, (to wit,) the ſum of three hundred and fifty pounds, payable to the ſaid *John Rudge* thereafter, (to wit,) one month after the date thereof, as a conſideration for his the ſaid *John Rudge*'s not appearing to give evidence as proſecutor on the trial of any or either of the traverſes aforeſaid, againſt any or either of the defendants, and that in conſideration thereof the ſaid *John Rudge* ſhould not, nor would appear at the trial of the traverſes aforeſaid as proſecutor, and ſhould not, nor would give evidence on any or either of the ſaid indictments

1ſtly, The defendant pleads, that before and at the time of making the bond, and the note after mentioned, two of the obligors, John and Thomas Walker, and three others, ſtood indicted by John Rudge, on five indictments for wilful and corrupt perjury, and had ſeverally pleaded Not guilty before the making the bond and note.

And the ſeveral traverſes on the indictments were at the time of making the unlawful agreement after mentioned, and the note and the ſaid bond, viz. on the ſame day the bond was made, were about to come on to be tried at Stafford.

Whereupon it was then corruptly agreed between Rudge the proſecutor, the plaintiff, and the five perſons indicted, that the plaintiff ſhould give the proſecutor Rudge his note for 350l. in conſideration for not appearing to give evidence at the trial of the ſaid traverſes,

against any or either of the parties ſo ſtanding indicted as aforeſaid, and that the ſaid *John Walker*, *Thomas Walker*, and *Robert Blantern* the now defendant, ſhould ſeal, and as their deed deliver unto the ſaid *Edward Collins* their bond or obligation of the ſame date with the ſaid note in the penal ſum of ſeven hundred pounds, with a condition thereunder written for the payment of three hundred and fifty pounds on the 6th day of *May* then next and now elapſed, as an indemnity to him the ſaid *Edward Collins* for the giving of ſuch note; and the ſaid *Robert Blantern* further ſaith, that in purſuance and in part of performance of the ſaid unlawful, wicked and corrupt agreement, the ſaid *Edward Collins* did then and there, before the trial of the ſaid traverſes, or of any or either of them, (to wit,) on the ſaid 6th day of *April* in the year 1765 aforeſaid, at *Rodenhurſt* aforeſaid, make, give, and deliver unto the ſaid *John Rudge* his certain note in writing, commonly called a promiſſory note, bearing date as aforeſaid, (to wit,) on the day and in the year laſt mentioned, for the ſum of three hundred and fifty pounds, as for value received, payable to the ſaid *John Rudge* thereafter, (to wit,) one month after the date thereof, according to the tenor and effect of the agreement aforeſaid, as a conſideration for his the ſaid *John Rudge*'s not appearing as proſecutor, and for his not giving evidence as proſecutor on the trial of any or either of the traverſes aforeſaid, againſt any or either of the parties ſo indicted as aforeſaid; and that in purſuance of the ſaid unlawful, wicked, and corrupt agreement, and according to the tenor and effect thereof, the ſaid *John Rudge* then and there accepted, had, and received the ſaid note of and from the ſaid *Edward Collins* for the purpoſe aforeſaid; and in part of performance of the aforeſaid unlawful, wicked and corrupt agreement; and that in further purſuance and completion of the ſaid unlawful, wicked and corrupt agreement, and according to the term and effect thereof, the ſaid *John Walker*, *Thomas Walker*, and *Robert Blantern* the now defendant, did then and there immediately after the giving of the ſaid note, and before the trial of the traverſes aforeſaid, or of any or either of them (to wit,) on the ſaid fifth day of *April* in the year 1765 aforeſaid, ſeal, and as their deed deliver unto the ſaid *Edward Collins* the ſaid writing, now brought here into court, with the condition above ſpecified, as an indemnity to him the ſaid *Edward Collins* for the giving of ſuch note ſo given for the cauſe aforeſaid; and the ſaid *Robert Blantern* further ſaith, that the ſaid *Edward Collins* then and there at the time of the giving of the ſaid note to the ſaid *John Rudge* well knew for what cauſe and conſideration the ſame was ſo given, and that the ſaid *Edward Collins*, at the time of the ſealing and delivering to him of the writing now brought here into court, took, accepted, and received the ſame of and from the ſaid *John Walker*, *Thomas Walker*, and *Robert Blantern* the now defendant, as an indemnity againſt the aforeſaid note, with this, that the ſaid *Robert Blantern* doth aver, that the ſaid ſuppoſed writing obligatory

And that the obligors ſhould execute the bond to the plaintiff of the ſame date of the note as an indemnity to the plaintiff for giving ſuch note.

That plaintiff gave to Rudge the proſecutor the note for 350*l.*

for not appearing as proſecutor and giving evidence.

And that the obligors on giving the note executed this bond.

as an indemnity to the plaintiff for giving ſuch note.

tary now brought here into court, was given for such consideration as aforesaid, and no other whatsoever; and that he the said *Robert Blantern* and the said *John Walker* and *Thomas Walker* mentioned in the said supposed writing obligatory were not, nor were, or was any or either of them, at the time of the making of the aforesaid note, or at the time of the sealing or delivering of the said supposed writing obligatory to the said *Edward Collins*, or at the time of his acceptance of the said supposed writing obligatory, in anywise indebted to the said *Edward Collins* or to the said *John Rudge* in any sum of money, or in any other respect whatsoever; and so the said *Robert Blantern saith, that the said* supposed *writing obligatory* so made and given by them the said *Robert Blantern*, *John Walker*, and *Thomas Walker*, for the cause aforesaid, *is void in law*; and this he is ready to verify; wherefore he prays judgment if the said *Edward Collins* ought to have his aforesaid action thereof against him, &c. And for further plea in this behalf, the said *Robert Blantern* by like leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *Edward* ought not to have his aforesaid action thereof against him, because he says, that the said supposed writing obligatory was given by the said *Robert Blantern*, *John Walker*, and *Thomas Walker*, to the said *Edward*, (to wit) at *Rodenburst* aforesaid, to indemnify the said *Edward* against a certain note in writing of the said *Edward's*, commonly called a promissory note, then, (to wit) on the said sixth day of *April* in the year 1765 aforesaid, (to wit) at *Rodenburst* aforesaid, given by the said *Edward Collins* to the said *John Rudge*, as for value received, bearing date on a certain day and in a certain year now past, (to wit,) on the day and year last aforesaid, whereby the said *Edward* promised to pay to the said *John Rudge* a certain sum of money, (to wit,) the sum of three hundred and fifty pounds, as for value received, at a certain time thereafter, (to wit,) one month after the date of the said note, which said note still remains unpaid, and that the said *Edward Collins* hath not been in anywise damnified by means of the said note, or of the giving of the same; and this the said *Robert Blantern* is ready to verify; wherefore he prays judgment if the said *Edward* ought to have his aforesaid action thereof against him, &c. *John Glynn.*

An averment that the bond was given for the said consideration, and no other;

and that the obligors were not indebted to the plaintiff, and therefore the bond is void in law; et hoc, &c.

3d Plea, that the bond was given by the obligors to indemnify the plaintiff against a note given by him to the prosecutor, and that the plaintiff has not been damnified by the note; et hoc, &c.

And the said *Edward Collins*, as to the said plea of the said *Robert* by him first above pleaded in bar, and whereof he hath put himself upon the country, says, that he the said *Edward* doth the same likewise; and the said *Edward*, as to the said plea of the said *Robert* by him secondly above pleaded in bar, says that he, by reason of any thing by the said *Robert* above in that plea alledged, ought not to be barred from having and maintaining his said action against the said *Robert*, because he says that the said plea, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law

Replication and issue to the 1st plea.

Demurrer to the 2d plea.

law to bar the ſaid *Edward* from having his ſaid action againſt the ſaid *Robert*; to which ſaid plea, in manner and form above pleaded, the ſaid *Edward Collins* hath no need, nor is he bound by the law of the land in any manner to anſwer; and this he is ready to verify: Wherefore, for want of a ſufficient plea in this behalf, the ſaid *Edward Collins* prays judgment and his debt aforeſaid, together with his damages, by occaſion of the detaining that debt, to be adjudged to him, *&c.*; and the ſaid *Edward Collins*, as to the ſaid plea of the ſaid *Robert* by him laſtly above pleaded in bar ſays, that he by reaſon of any thing, by the ſaid *Robert*, above in that plea alledged, ought not to be barred from having and maintaining his ſaid action againſt the ſaid *Robert*, becauſe he ſays that the ſaid plea, in manner and form as the ſame is above pleaded, and the matters therein contained, are not ſufficient in law to bar the ſaid *Edward* from having his ſaid action againſt the ſaid *Robert*; to which ſaid plea, in manner and form above pleaded, the ſaid *Edward Collins* hath no need, nor is he bound by the law of the land in any manner to anſwer; and this he is ready to verify: wherefore, for want of a ſufficient plea in this behalf, the ſaid *Edward Collins* prays judgment, and his debt aforeſaid, together with his damages, by occaſion of the detaining that debt, to be adjudged to him, *&c.*

Demurrer to 3d plea.

G. Nares.

And the ſaid *Robert* ſaith, that the ſaid plea by him the ſaid *Robert* ſecondly above pleaded in bar, in manner and form as the ſame is above pleaded, and the matters therein contained, are ſufficient in law to bar the ſaid *Edward* from having his ſaid action againſt the ſaid *Robert*; which ſaid plea, and the matters therein contained, he the ſaid *Robert* is ready to verify and prove, as the ſaid court ſhall award; and becauſe the ſaid *Edward* hath not, in any manner anſwered thereto, nor in anywiſe denied the ſame, he the ſaid *Robert* prays judgment, and that the ſaid *Edward* may be barred from having his ſaid action thereof againſt him the ſaid *Robert*, *&c.*; and becauſe the juſtices here will adviſe of and upon the premiſes before that they give judgment thereupon, day is given to the parties aforeſaid here until ——— to hear their judgment thereupon, ſo that the ſaid juſtices here are not yet ready to give judgment theron: And the ſaid *Robert* further ſaith, that the ſaid plea by him the ſaid *Robert* laſtly above pleaded in bar in manner and form as the ſame is above pleaded, and the matters therein contained, are ſufficient in law to bar the ſaid *Edward* from having his ſaid action againſt him the ſaid *Robert*; which ſaid plea, and the matters therein contained, he the ſaid *Robert* is ready to verify and prove, as the court ſhall award; and becauſe the ſaid *Edward* hath not in any manner anſwered thereto, nor in anywiſe denied the ſame, he the ſaid *Robert* prays judgment, and that the ſaid *Edward* may be barred from having his ſaid action thereof againſt him the ſaid *Robert*, *&c.*

Joinders in demurrer.

John Glynn.

And

And becauſe the juſtices here will adviſe of and upon the premiſes before that they give judgment thereupon, day is given to the parties aforeſaid here until ——— to hear their judgment thereupon, for that the ſaid juſtices here are not as yet ready to give judgment thereon; and in order to try the iſſue between the parties aforeſaid above joined to be tried by the country, the ſheriff is commanded that he cauſe to come here in eight days of the Purification of the bleſſed *Mary* twelve, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.*

Collins *verſus* Blantern. C. B.

THIS caſe was well argued laſt *Hilary* term by Serjeant *Nares* for the plaintiff, and Serjeant *Glynn* for the defendant, and in this term by Serjeant *Burland* for the plaintiff, and Serjeant *Jephſon* for the defendant.

On the ſide of the plaintiff it was inſiſted, that the condition of the bond being ſingly for the payment of a ſum of money, the bond is good and lawful; and that no averment ſhall be admitted that the bond was given upon an unlawful conſideration not appearing upon the face of it, and therefore that the ſpecial plea is bad: Upon the firſt argument theſe caſes were cited for the plaintiff, *Carth.* 252. *Comb. Thomſon* v. *Harvey*, *Lady Lowning* v. *Chapman*, C. B. *Mich.* 6 *Geo.* 2. (now depending in error in *B. R.*) 1 *Leon.* 73. 203. *Jenk.* 106. *Carth.* 300. *Comb.* 245. *Empſon* v. *Bathurſt*, 1 *Mod.* 35. *Hutton* 52. *Vent.* 331. *Cro. Jac.* 248.

For the defendant it was inſiſted, that the averment of the wicked and unlawful conſideration of giving the bond might well be pleaded, although it doth not appear upon the face of the deed; and that any thing which ſhews an obligation to be void, may well be averred, although it doth not appear on the face of the bond, as *dureſs*; that it was delivered as an *eſcrow* to be delivered upon a certain condition to the obligee; *infancy*, *coverture*, or upon a *ſimoniacal contract*, *maintenance*, &c. and although it is ſaid, there is a difference between bonds being void at common law, and by ſtatute, yet it is otherwiſe; for the common law was originally by ſtatutes which are now not in being: The general rule that you cannot plead any matter *dehors* the deed, doth not apply to this caſe; the true meaning of that rule is, that you cannot alledge any thing inconſiſtent with and contrary to the deed, but you may alledge matter conſiſtent with the deed: The bond in the preſent caſe is for the payment of money; the plea admits this, and the averment alledges upon what conſideration that money was to be paid, and therefore is not inconſiſtent or contradictory to the condition

of

of the bond; this rule of pleading, applied to the caſes of *ſimony, dureſs, coverture, infancy*, &c., is on the ſide of the defendant in this caſe. In bonds not to follow a trade the defendant may aver the conſideration to avoid the bond. *Downing* v. *Chapman* is not like this caſe; that was an averment contradictory to the condition of the bond, and amounted to a defeaſance: the preſent condition is conſiſtent with the condition, which is for payment of money, and only ſhews the bad conſideration upon which the money was to be paid.

Upon the firſt argument the Lord Chief Juſtice broke the caſe, and ſaid that this was very different from the caſe of *Lady Downing* v. *Chapman*, and therefore he would conſider it wholly independent thereof; and ſaid, as he was then adviſed, he thought there was no difference between an act being void by ſtatute or by the common law; that the principle the judges heretofore have gone upon for making the diſtinction (in the books) is not a ſound one; for wherever the bond is void at law or by ſtatute, you may ſhew how it is void by plea, and that in truth it never had any legal exiſtence. That the ſtatute law is the will of the legiſlature in writing; the common law is nothing elſe but ſtatutes worn out by time; all our law began by conſent of the legiſlature, and whether it is now law by uſage, or writing, it is the ſame thing: a ſtatute ſays ſuch a thing ſhall be avoided by plea; why therefore may not a deed executed upon a conſideration againſt the common law be avoided by plea? In *dureſs, ſimony, infancy, coverture*, &c. the plea diſcloſes that in truth there never was any obligation. The principle, upon which courts of juſtice muſt go, is, to enforce the performance of contracts not injurious to ſociety; and it would be abſurd to ſay that a court of juſtice ſhall be bound to enforce contracts injurious to, and againſt the public good. No man ſhall come into a court and ſay, "give me a ſum of money which I deſire "to have contrary to law;" there can be no doubt but that the compounding a proſecution for wilful and corrupt perjury is a very great offence to the public, and whether it was between ſome perſons who are ſtrangers to this action, it is not material.

Dr. & Stud. 12. 2 Vent. 107. Godb. 29.

Bathurſt J. (upon breaking this caſe) ſaid, that the caſe of *Lady Downing* v. *Chapman* was not like it.

Gould J. (upon the breaking this caſe) ſaid, that he differed with the reſt of the court in the judgment given in *Lady Downing* v. *Chapman*, and that upon the whole of that caſe he thought the averment that the bond *there* given was upon a wicked conſideration, ought to have been admitted. He ſaid that if this caſe at bar had been upon a ſimple contract, the court would not have heſitated a moment, but would have given judgment that it was bad; and ſhall the court ſanctify a deed made upon a wicked

wicked conſideration becauſe it is ſealed? To have a deed, which ought to be for a man's good, turned to evil purpoſes, he thought very wrong, and that there was no diſtinction, whether a deed be void at law or by ſtatute.

Upon the ſecond argument of the caſe at bar in this term, the Lord Chief Juſtice delivered the opinion of the whole court (and pronounced judgment for the defendant) to the following effect:

Lord Chief Juſtice *Wilmot*—Four queſtions are to be conſidered:

1*ſt*, Whether it doth not appear from the facts alledged in the ſecond plea, that the conſideration for giving the bond is an illegal conſideration?

2*d*, Whether a bond given for an illegal conſideration is not clearly void at common law *ab initio*?

3*d*, Suppoſing the bond is void, whether the facts diſcloſed in the plea to ſhew it void, can, by law, be averred and ſpecially pleaded?

4*th*, If they can be pleaded, then, whether this ſecond plea is duly, aptly, and properly pleaded?

1. As to the firſt queſtion, it hath been inſiſted for the plaintiff, that he was not privy to the bargain and agreement, ſo (as to him) there appears to be nothing illegal done by him. But we are all clearly of opinion, that the whole of the tranſaction is to be conſidered as one entire agreement; for the bond and note are both dated upon the ſame day, for payment of the ſame ſum of money on the ſame day; the manner of the tranſaction was to gild over and conceal the truth; and whenever courts of law ſee ſuch attempts made to conceal ſuch wicked deeds, they will bruſh away the cobweb varniſh, and ſhew the tranſactions in their true light. This is an agreement to ſtifle a proſecution for wilful and corrupt perjury, a crime moſt detrimental to the commonwealth; for it is the duty of every man to proſecute, appear againſt, and bring offenders of this ſort to juſtice. Many felonies are not ſo enormous offences as perjury, and therefore to ſtifle a proſecution for perjury, ſeems to be a greater offence than compounding ſome felonies. The promiſſory note was certainly void; what right then hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the conſideration for giving them being wicked and unlawful.

2. As to the ſecond point, we are all of opinion that the bond is void *ab initio*, by the common law, by the civil law, moral law, and

and all laws whatever; and it is ſo held by all writers whatſoever upon this ſubject, except in one paſſage in *Grotius, lib.* 2. *cap.* 11. *ſect.* 9. where I think he is greatly miſtaken, and differs from *Puffendorf, lib.* 3. *cap.* 8. *ſect.* 8. who, in my opinion, convicts the doctrine of *Grotius*. In *Juſtin. Inſtit. lib.* 3. *tit.* 20. *de turpi cauſa, ſect.* 23. *Quod turpi ex cauſa promiſſum eſt, veluti ſi quis homicidium vel ſacrilegium ſe facturum promittat, non valet.* And *Vinnius*, in his commentary, carries it ſo far as to ſay, you ſhall not ſtipulate or promiſe to pay money to a man not to do a crime, *Si quis pecuniam promiſerit, ne furtum aut cædem faceret, aut ſub conditione, ſi non fecerit, adhuc dicendum, ſtipulationem nullius eſſe momenti; cum hoc ipſum flagitioſum eſt, pecunium paciſci quo flagitio abſtineas. Dig. lib.* 1. *tit.* 5. *Code, lib.* 4. *tit.* 7. to the ſame point.

This is a contract to tempt a man to tranſgreſs the law, to do *that* which is injurious to the community: it is void by the common law; and the reaſon why the common law ſays ſuch contracts are void, is for the public good. *You ſhall not ſtipulate for iniquity.* All writers upon our law agree in this, no polluted hand ſhall touch the pure fountains of juſtice. Whoever is a party to an unlawful contract, if he hath once paid the money ſtipulated to be paid in purſuance thereof, he ſhall not have the help of a court to fetch it back again, you ſhall not have a right of action when you come into a court of juſtice in this unclean manner to recover it back. *Procul O! procul eſte profani.* See *Doct. & Stud. fo.* 12. and *chap.* 24.

3. The third point is, Whether this matter can be pleaded? It is objected againſt the defendant that he has no remedy at law, but muſt go and ſeek it in a court of equity: I anſwer, we are upon a mere point of common law, which muſt have been a queſtion of law, long before courts of equity exerciſed that juriſdiction which we now ſee them exerciſe; a juriſdiction which never would have ſwelled to that enormous bulk we now ſee, if the judges of the courts of common law had been anciently as liberal as they have been in later times: to ſend the defendant in this caſe into a court of equity, is to ſay there never was any remedy at law againſt ſuch a wicked contract as this is: we all know when the equity part of the court of Chancery began. I ſhould have been extremely ſorry if this caſe had been without remedy at common law, *Eſt boni judicis ampliare juriſdictionem*; and I ſay, *eſt boni judicis ampliare juſtitiam*; therefore, whenever ſuch caſes as this come before a court of law, it is for the public good that the common law ſhould reach them and give relief. I have always thought that formerly there was too confined a way of thinking in the judges of the common law courts, and that courts of equity have riſen by the judges not properly applying the principles of the common law, but being too narrowly governed by old caſes and maxims, which have too much prevented the public from having the benefit of the common law. It is now objected

objected as a *maxim*, that the law will not endure a fact *in pais debors* a ſpecialty to be averred againſt it, and that a *deed* cannot be defeated by any thing leſs than a *deed*, and a *record* by a *record*, and that if there be no conſideration for a bond it is a gift. I anſwer, that the preſent condition is for the payment of a ſum of money, but *that* payment to be made, was grounded upon a vicious conſideration, which is not inconſiſtent with the condition of the bond, but ſtrikes at the contract itſelf in ſuch a manner as ſhews, that, in truth, the bond never had any legal entity, and if it never had any *being* at all, then the rule or maxim that a *deed* muſt be defeated by a *deed* of equal ſtrength doth not apply to this caſe. The law will legitimate the ſhewing it void *ab initio*, and this can only be done by pleading: nothing is due under ſuch a contract, then the law gives no action, the *debitum* never exiſted; as much as if it had been ſaid it ſhall be void, becauſe there is no debt: but if this wicked contract be not pleadable, it will be good at law, be ſanctified thereby, and have the ſame legal operation as a good and an honeſt contract, which ſeems to me moſt unreaſonable and unrighteous, and therefore, unleſs I am chained down by law to reject this plea, I will admit it, and let juſtice take place. What ſtrange abſurdity would it be for the law to ſay that this contract is wicked and void, and in the ſame breath for the law to ſay, you ſhall not be permitted to plead the facts which clearly ſhew it to be wicked and void. I am not for ſtirring a ſingle pebble of the common law, and without altering the leaſt tittle thereof, I think it is competent, and reaches the caſe before us. For my own part, I think all the caſes upon acts of parliament, with reſpect to making bonds, *&c.* void, do warrant the receiving this plea and averment; there is no direction in ſuch acts of parliament given for the form and manner of pleading in thoſe caſes; the *end* directs and ſanctifies the means: I think there is no difference between things made void by act of parliament, and things void by the common law: ſtatute law and common law both originally flowed from the ſame fountain, the *legiſlature*; I am not for giving any preference to either, but if to either, I ſhould be for giving it to the common law. If there had ever been any idea or imagination, that ſuch a contract as this could have ſtood good at common law, ſurely the legiſlature would have altered it. There has been a diſtinction mentioned between a bond being void by ſtatute, and at common law; and it is ſaid, that in the firſt caſe if it be bad, or void in any part, it is void *in toto*; but that at common law it may be void in part, and good in part, but this proves nothing in the preſent caſe. The judges formerly thought an act of parliament might be eluded if they did not make the whole void, if part was void. It is ſaid, the ſtatute is like a tyrant, where he comes he makes *all* void, but the common law is like a nurſing father, makes only void that *part* where the fault is, and preſerves the reſt. 1 *Mod.* 35, 36. 1 Lev. 209. Hard. 464. The caſe of a ſimoniacal contract may be reached by a plea; this proves

proves the contract in the preſent caſe is to be avoided at common law. The two caſes in *Leon.* I ſet one againſt the other, and lay no ſtreſs upon either; *infancy*, *coverture*, *dureſs*, &c. apply directly to this caſe; the plea ſhews a fact, which if true, the bond never had any legal exiſtence at all: as to a bond being a gift, that is to be repelled by ſhewing it was given upon a bad conſideration; you may thereby repel the preſumption of donation. It has been objected, that the admiſſion of ſuch plea as the preſent will ſtrike at ſecurities by deed; the anſwer is, that ſuch a plea in the caſe of *infancy*, *gaming*, *dureſs*, &c. &c. is admiſſible; what is the plea of *non eſt factum?* Ninety-nine in one hundred of them are falſe; why then is ſuch a plea to be received, and not the preſent plea? I ſee no reaſon why. I want no caſe to warrant my opinion, it is enough for me if there be no caſe againſt me, and I think there is not. In 1 *Hen.* 7. 14. 16. *b.* *Brian* was then the Chief Juſtice, and his opinion there is founded upon what I have now ſaid: *Brian* ſays, "I do not ſee in any caſe in the "world how a man can avoid a ſpecialty by a bare matter of "fact concerning the ſame deed, *if ſo be that the deed was good* "*at the commencement*;" but the preſent deed was never good. *Moor* 564. is a ſimoniacal contract pleaded to a bond, which was held a bad plea, becauſe *ſimony* was not *then* conſidered as contrary to our law, but at this day, *ſimony* being againſt our law, ſuch a plea would be good. The caſe in *Comb.* 121. is nothing but an *obiter dictum* of a judge, to which I pay very little regard.

Cro. Eliz. 623. 697. Jenk. 108. Moor 564.

4. As to the fourth point, I think, the plea is rightly pleaded, and concludes very properly in ſaying, "And ſo the ſaid bond is "void." It ſeems to me that *non eſt factum* could not have been properly ſaid at the concluſion of this plea after the ſpecial matter before alledged; *non eſt factum* means nothing but that, "I "did not ſeal and deliver the bond;" and why *non eſt factum* may be pleaded by a *feme covert* I do not clearly ſee the reaſon, unleſs the law unites the huſband and wife ſo cloſely, that it conſiders them as one and the ſame perſon, ſo that ſhe without the huſband cannot execute the deed. If two be jointly bound, and only one ſued, he cannot plead *non eſt factum*, but ought to plead that another was bound with him. 5 *Rep.* 119. *a. b.* It is fair to tell the party what is your defence, upon what point you put your caſe: I think the right way is to conclude the plea as it is, *And ſo the ſaid writing obligatory is void, et hoc*, &c. and ſo pray judgment if the plaintiff ought to have his action, &c. and do not ſee how he could ſay *non eſt factum*, when he ſealed the deed: but ſuppoſing the plea might have been more aptly concluded, yet it is well enough upon a general demurrer, as this is, and we are all of opinion that judgment muſt be for the defendant; that the averment pleaded is not contradictory, but explanatory of the condition; that the bond was void *ab initio*, and never had any exiſtence. Judgment for the defendant *per totam curiam*.

TRINITY TERM,

7 *Geo.* III. 1767.

Chamberlyn *verſus* Delarive. C. B.

ACTION upon the caſe for work and labour done by the plaintiff for the defendant, upon the general iſſue, tried before Lord Chief Juſtice *Wilmot*. At the trial it appeared in evidence that the defendant being indebted to the plaintiff in 18*l.* for work done, the defendant gave the plaintiff a note or draught upon one *Heddy*, whereby the defendant deſired *Heddy* to pay to the plaintiff a few days after date 18*l.* for value received; the plaintiff took and held this note or draught four months, and never applied to *Heddy* to demand the money of him; *Heddy* afterwards broke and became inſolvent; the note or draught not being payable to the plaintiff *Chamberlyn, or order*, the jury looked upon it as not a negociable bill of exchange or draught, and found a verdict for the plaintiff, damages 18*l.*, contrary to the directions and opinion of the Lord Chief Juſtice; and therefore it was now moved for a new trial without payment of coſts.

A creditor accepts a note or draught of his debtor upon a third perſon, to be paid a ſum of money for value received; if he holds it an unreaſonable time before he demands the money, and the perſon upon whom it is drawn becomes inſolvent, it is the creditor's own loſs, though this draught be not a bill of exchange or negotiable.

Curia—1*ſt*, It was objected for the plaintiff, that this is not a bill of exchange, becauſe it is not negociable; that it is of the very eſſence of a bill of exchange to be payable to ſuch a one, *or order*, and therefore the plaintiff ſhall not loſe the value thereof, as he would have done if it had been negociable, by reaſon of his holding it ſo long without demanding the money of *Heddy*; 2*dly*, That the plaintiff was no more than a ſervant or agent to the defendant in this caſe, and could not receive the money for his own uſe. As to the firſt objection, we think it is not neceſſary in this caſe to give any opinion, whether this be a bill of exchange or not, becauſe we are of opinion that when the plaintiff accepted and took from the defendant this note, draught or order upon *Heddy* for 18*l.*, to be paid to the plaintiff for value received, the plaintiff acquired an intereſt in the 18*l.*, and if he had received it of *Heddy*, he would have received the ſame for his own uſe, and not for the uſe of the defendant the drawer; the plaintiff by accepting this note or draught, undertook to be duly

diligent in trying to get the money of *Heddy*, and to appriſe the defendant, the drawer, if *Heddy* failed in payment; the plaintiff ſubſtituted himſelf in the place of the defendant the drawer, who has been deluded into a belief that the plaintiff had got the money of *Heddy*. The common law deteſts *negligence* and *laches*; there is no reaſon applicable to the caſe of holding a bill of exchange, that is not applicable to this caſe; the plaintiff by holding this order four months, hath diſcharged the defendant of his debt, and credited *Heddy* in his ſtead and place: if this verdict ſhould ſtand, it would be miſchievous: if a jury can ſay that a man may hold ſuch an order or draught as this is ten weeks after it is due, they may as well ſay he may hold it ten years. Here appears to be groſs negligence in the plaintiff, and we think the jury ſhall not pronounce the law in ſuch a caſe as this is, and therefore there muſt be a new trial upon payment of coſts.

MICHAELMAS TERM,

8 *Geo.* III. 1767.

Walton *verſus* Kerſop and another. C. B.

Replevin, and declares for taking his cattle at *M.* Defendant pleads non cepit modo & forma; plaintiff proved the cattle were in the defendant's cuſtody at *M.*; defendant proved they were originally taken at *H.*

REPLEVIN: The plaintiff declares for taking his cattle in *Market-ſtreet* ward; the defendant pleads the general iſſue *non cepit modo & forma*. This cauſe was tried before Mr. Juſtice *Gould* at the laſt aſſizes for *Northumberland*, when the plaintiff proved that the cattle were in the cuſtody and poſſeſſion of the defendant at *Market-ſtreet*, where he was driving them to the pond; the defendant proved that he firſt and originally took them at *Hardhall* in the pariſh of *Warden*, and was driving them through *Market-ſtreet* unto the pond. It was inſiſted at the trial, that the plaintiff had not proved his declaration, that the cattle were taken at *Market-ſtreet*, as it was alledged therein, for that the defendant had proved they were firſt taken at another place, *viz.* at *Hardhall* in the pariſh of *Warden*. There was a verdict for the plaintiff, ſubject to the opinion of the court.

Judgment for the plaintiff.

Serjeant

Serjeant *Glynn* for the plaintiff inſiſted that the plaintiff had well proved the taking at *Market-ſtreet*, as laid in the declaration, for he proved the cattle were *there* in the defendant's cuſtody; and although it may be true that the defendant originally took them at *Hardhall*, yet as he the plaintiff was unable to prove the taking there, it would be very unreaſonable and inconvenient if he was obliged to lay the taking *there*. That the defendant ought to have pleaded in abatement, and alledged that they were taken at *Hardhall*, *abſque hoc* that they were taken at *Market-ſtreet*, upon which the plaintiff might have taken iſſue, or confeſſed the plea, and juſtified the taking at *Hardhall*, and driving them to *Market-ſtreet* towards the pond; and he inſiſted that wherever the defendant has the cattle wrongfully in his cuſtody, *that* is a wrongful taking at that particular place; as in the caſe of larceny committed in one county, and the felon flies with the goods into another county, it is a felony in both counties, and he may be tried in either county.

Serjeant *Burland* for the defendant inſiſted, that upon the plea of *non cepit modo et forma*, the defendant may prove the taking was at a different place from *that* laid in the declaration; and for that purpoſe cited *Johnſon* v. *Wollyer*, 1 *Stra.* 508. 2 *Mod.* 199. *Anonym.* by Lord *North* C. J. If the plaintiff alledges the taking at *A.*, and they were taken at *B.*, the defendant may plead *non cepit modo & forma*, but then he can have no return, for if he would have a *retorn. habendo*, he muſt deny the taking where the plaintiff hath laid it, and alledge another place in his avowry. He alſo ſaid, that in replevin the firſt place of taking is the only material place, and muſt be laid in the declaration, and it is not like the caſe of *larceny* above mentioned.

Wilmot C. J.—At this day it is very clear that the vill and place where the cattle are taken muſt be laid in the declaration; if there is no place defendant may demur, but here is a place laid; and it was proved the cattle were in defendant's poſſeſſion *there*; and though originally defendant took them at another place, yet if he took them wrongfully at firſt, the wrong is continued to any place where the defendant has them. 1 *Stra.* 508. is only a caſe at *niſi prius*, and 2 *Mod.* 199. a *dictum* of Lord *North*; and neither of thoſe caſes are like this, for here is a ſufficient proof (in my opinion) of the plaintiff's declaration, to wit, that the cattle were taken at *Market-ſtreet*. This caſe is very clear, and like the caſe mentioned of *larceny*, the wrong continues wherever the defendant has the cattle; and I am quite ſatisfied the defendant's evidence was irrelevant and immaterial on this iſſue, and ought not to have been admitted, unleſs the defendant had pleaded in abatement. And of this opinion was the whole court, and the *poſtea* was ordered to be delivered to the plaintiff.

See *Cro. Eliz.* 896. *Hob.* 16. *Moor* 678. See the case of *Riley* v. *Parkhurſt*, *ante*, *Trin.* 21 & 22 *Geo.* 2. cited by *Bathurſt* J.

Roe, on the Demiſe of Hamerton *verſus* Mitton and others. C. B.

What act of a parent ſhall be a good conſideration to ſupport a limitation in a marriage-ſettlement by way of remainder to the younger brothers of the intended huſband, eldeſt ſon of that parent.

THIS was an ejectment for lands in *Yorkſhire*: the jury found a ſpecial verdict, which ſtated very long deeds and conveyance, *fines ſur conceſſit*, *ſur conuſance de droit come ceo*, &c. &c. &c. containing ſeveral hundreds of copy ſheets, which was argued twice at the bar, and in this term the judgment of the court was given by the Chief Juſtice.

Lord Chief Juſtice *Wilmot*—The queſtion in this caſe is a very ſhort one, but it is ſo involved and covered by the length of this ſpecial verdict, that it is more difficult to find it out than to determine it. This ſhameful prolixity puts the parties to an unneceſſary and immoderate expence, and therefore it was that *caſes reſerved* were firſt introduced inſtead of ſpecial verdicts; but ſurely ſpecial verdicts may be drawn out and ſtated as ſhortly as caſes for the opinion of the court; I therefore recommend it to gentlemen who have the drawing of ſpecial verdicts, to ſtate them as ſhortly as poſſible, and if they ſhould have any doubt whether they are fully and ſufficiently ſtated, and the facts found be properly inſerted, the judge who tried the cauſe will always be ready to lend his aſſiſtance, in order to prevent this moſt ſhameful prolixity, which is a ſcandal to the profeſſion, and to the law itſelf. I have often thought of, and been grieved at this matter, and therefore was determined to mention it publicly, to prevent it for the future, if it poſſibly can be done; and I can ſee no reaſon why it may not, as the judges themſelves, I am ſure, will all be willing to aſſiſt counſel in ſo good a work.

The caſe is ſingly this—*John Hamerton* in 1706 being ſeiſed in fee of the lands in queſtion, and at the ſame time having a mother living, who had an annuity of 50 *l.* iſſuing out of the whole lands, and *John* having two brothers, *Thomas* and *Vavaſor*, *John* being about to be married to *Mary Kelly*, his mother previous to the marriage conſents to part with her ſecurity upon the *whole* lands for her annuity, and to take, inſtead thereof, a ſecurity for the ſame upon *part* of the lands; and accordingly ſhe and her ſaid ſon *John* (the intended huſband) join in a fine to deliver the whole lands from the ſaid annuity; and in conſideration of the marriage, and a portion of 1300 *l.*, and of the ſaid grant and releaſe of the ſaid annuity, *John Hamerton* conveys to truſtees that they ſhould pay 50 *l. per ann.* to the mother, out of part of the lands, for her life, then as to the whole of the lands to the uſe of *John Hamer-*

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ton for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and every other ſon in tail male, remainders to *Thomas Hamerton* and *Vavaſor Hamerton* ſeverally one after the other in tail male in ſtrict ſettlement, remainder to the daughter and daughters of the marriage of *John Hamerton* and *Mary Kelly*, remainder to *John Hamerton* in fee.

There was no iſſue of the marriage: afterwards *John Hamerton* mortgaged the eſtate to *Monkton*, and acknowledged a *fine* to him *ſur conceſſit*; then *Monkton* purchaſed of *John Hamerton* for a valuable conſideration in fee, and took a fine from him *ſur conuſance de droit come ceo*, &c. and *John Hamerton* died without iſſue; but *Thomas Hamerton* his brother has left a ſon *Vavaſor Hamerton* the leſſor of the plaintiff, a very poor man, (who it is ſaid was or is a common ſoldier).

The ſingle queſtion is, Whether there is a good and valuable conſideration to ſupport the limitation in the ſettlement to *Thomas Hamerton*, the late father of the leſſor of the plaintiff? or whether that limitation is merely voluntary under the ſtat. of 27 *Eliz. cap.* 6. and bad againſt a purchaſer for a valuable conſideration?

I am very clearly of opinion that this ſettlement is fair and honourable, and that there is a good and valuable conſideration to ſupport the limitation therein to *Thomas Hamerton*, the late father of the leſſor of the plaintiff, and that it is quite out of the ſtat. 27 *Eliz. c.* 6. which was only made againſt covinous and fraudulent conveyances, and which makes the parties avowing ſuch fraudulent conveyances criminal; whether the purchaſer for a valuable conſideration had notice of this ſettlement or not, is not material (I think) in this caſe; but if he had notice, I am clearly of opinion that the purchaſe is fraudulent.

The whole of this queſtion turns upon the mother's joining in the ſettlement: the friends and relations of *Mary Kelly*, the intended wife of the marriage, (muſt he ſuppoſed to ſay,) to the mother of *John* the intended huſband, "*Mary* ſhall not marry "your ſon unleſs you will give up, or take off your annuity from "the *whole* of the lands, and let it be charged upon a *part* "thereof; the mother anſwers, if you want my aſſiſtance you "ſhall pay for it, that is to ſay, you ſhall limit the eſtate to my "younger ſons in preference and priority to the daughters of "the marriage in failure of iſſue male;" this is a good conſideration to *John* the ſon (and the *quantum* is not at all material); he purchaſes his wife by his mother's concurrence.

But it was objected that *John* was ſeiſed, and could have made the ſettlement without the mother, and that in truth no real or good conſideration moved from her at all, for that ſhe ſtill had her annuity charged upon *part* of the lands; in anſwer to this, the applying to the mother ſhews that *John Hamerton* could not have made a ſettlement agreeable to the lady's friends without the mother; and I am of opinion that any conſideration given by the mother would have made her a purchaſer for her younger ſons; by the limitation to the daughters of the marriage, after *that* to the two brothers of *John Hamerton*, it is plain the mother intended her ſons ſhould be preferred to the daughters of the marriage: and this is as plain to me as if I had heard the mother ſay, "I will not part with my annuity ſecured upon the *whole* "lands, and take a ſecurity for it upon *part* of the lands, unleſs "you will prefer my ſons to your daughters;" the ſettlement can have no other meaning, and any conſideration moving from a parent to a child is good. The whole court were of the ſame opinion, and judgment was given for the plaintiff.

* The following ſtatement of the foregoing caſe has been communicated to be inſerted in the preſent edition. It will be found much fuller, and more explicit as to the point determined.

Roe, on the Demiſe of Hamerton *verſus* Mitton & al.

[Tried before *Eyre*, at the Summer Aſſizes, 6 *Geo.* 3.]

SPECIAL verdict ſtated, that *John Hamerton* being ſeiſed in fee by leaſe and releaſe, 27 and 28 *January* 1706, (whereto *Frances* his mother, who had a rent-charge of 50*l.* *per ann.* iſſuing out of all the eſtates for her life, was a party,) reciting that a marriage was ſhortly to be had between *John Hamerton* and *Mary Kelly*, party thereto; and that *Frances* the mother, for the better enabling him to ſettle a jointure on the wife, had, by another indenture, releaſed her rent-charge; the ſaid *John Hamerton*, in conſideration of the marriage to be had, and of a marriage-portion, and for ſettling a jointure on the wife, and that the eſtates might continue in the name and blood of *John Hamerton*, and for ſecuring portions for younger children, and in conſideration of 5*s.* paid to *John Hamerton* by *Frances*, and in conſideration of the ſaid grant and releaſe of the ſaid rent-charge of 50*l.* and for divers other good cauſes and conſiderations, granted and releaſed to truſtees the premiſes in queſtion, to the uſe and intent that *Frances* ſhould have and receive a rent charge of 50*l.* *per ann.* for her life out of certain part of the premiſes: And as to all the ſaid premiſes ſubject to the ſaid rent-charge to the uſe of *John Hamerton* for life, to truſtees to preſerve, &c. to the wife for her life, to the firſt, &c. ſons of the marriage in tail-male; remainder to all and every the ſons of *John Hamerton* by any other wife in tail-male, remainder to his brother *Thomas Hamerton* for life, remainder to truſtees to preſerve, &c. remainder to the firſt, &c. ſons of *Thomas* in tail-mail, with a like-remainder to *Vavaſor Hamerton*, another brother of *John*, and to his ſons; remainder to all the daughters of *John Hamerton* in tail, remainder to his own right heirs. The marriage was had, and afterwards *John Hamerton* and his wife, *Thomas Hamerton*, and *Vavaſor Hamerton*, there being at that time no iſſue of either of them, by leaſe, releaſe, and fine, conveyed the premiſes to *Monkton*, under whom the defendant claimed. *John H.* died without iſſue; *Mary* his wife died; *Thomas* died, leaving his wife enſient with a ſon, *viz.* *Vavaſor Hamerton*, the leſſor of the plaintiff, who claimed under the ſettlement. The leſſor of the plaintiff made an actual entry, and it was ſtated that *Monkton*, at the time of the purchaſe, had notice of the ſettlement.

Serjeant

Serjeant *Nares* for plaintiff made two queſtions.

1ſt, Whether the conſideration of marriage and portion does not operate to ſubſtantiate every part of a marriage-ſettlement.

2d, Whether when an anceſtor parts with any conſideration or beneficial intereſt, ſo as to induce or enable the party ſettling to make ſuch ſettlement, the relation of ſuch anceſtor claiming under ſuch ſettlement is not to be conſidered as a purchaſer.

He cited *Jenkins* and *Kenys*, 1 *Lev.* 150. *Hardreſs* 398.; when the queſtion being, Whether a limitation to the heirs of the body of the huſband ſhould be good as to the iſſue of a ſecond marriage? and *Hale*, C. J. was of opinion that the conſideration of the marriage and portion applied to all the eſtates raiſed by the ſettlement; and he cited the caſe of *Oſgood* v. *Strode*, 2 *Wms.* 245. where a ſpecific performance of marriage-articles, in favour of the nephew of the huſband, was decreed againſt the heir.

As to the ſecond queſtion, he inſiſted that the concurrence of the mother was neceſſary to enable the ſon to make ſuch a jointure as he choſe to make. That the taking a leſs ſecurity for her rent-charge was parting with a valuable conſideration, which ſhould be applied to the limitation in favour of her younger ſons, for whom ſhe might be ſuppoſed to ſtipulate, and make that limitation the condition of giving up her former rent-charge.

Serjeant *Lee* for defendant argued that the only purpoſe of the mother's parting with her rent-charge muſt be taken to be the enabling her ſon to make the ſettlement, becauſe that is the only purpoſe recited in the ſettlement; and where one conſideration is expreſſed, no other can be preſumed. In the caſe of *Bedford* v. *Gibſon*, 1743, Lord *Hardwicke* expreſsly laid it down, that where expreſs conſiderations are named in a deed, and there are no general words, as "for other good purpoſes," or the like, no proof can be admitted of any other conſideration, though conſiſtent with that which is expreſſed. He ſaid that in fact the mother parted with nothing, that her agreement was not neceſſary. As to the firſt queſtion, he ſaid that notwithſtanding the caſes cited, it is now ſettled that the marriage and portion apply as conſiderations only as to the huſband, wife, and iſſue, and all other limitations are fraudulent againſt purchaſers by ſtatute 27 *Eliz.*

Wilmot C. J. ſaid, this is now ſettled law, though often very hard; that whatever reaſons there may be to hold a contrary opinion, if the queſtion was open, the court cannot now go into it; that the point had been carried ſo far in conſtruction of the ſtatute, that the voluntary limitations of a ſettlement have been held fraudulent, even where the purchaſer had full notice upon the ground that what was void by the ſtatute could not be of any effect. He ſaid that Lord *Talbot*, in a caſe before him, expreſſed great diſſatisfaction at theſe determinations, and went ſo far in oppoſition to them, that the queſtion being, Whether in a ſettlement made after marriage, by which a very large eſtate was ſettled, the conſideration whereof was an additional portion of 100*l.*, the ſettlement ſhould not be conſidered as voluntary, the portion being ſo much out of proportion to it? He ſaid he would not weigh conſiderations in diamond-ſcales; that there was a moral obligation to provide for a wife and children, and he would not ſuffer the deed to be infected with doctrine of voluntary eſtates. He ſaid it would be unneceſſary, in the next argument, to go into the queſtion, Whether the conſideration of marriage and portion extend to any limitations beyond thoſe to the huſband, wife, or iſſue? it being a ſettled point that all other limitations in the ſettlement are voluntary in regard to thoſe conſiderations. Of later times the courts have laid hold of every twig of conſideration to get rid of theſe determinations. In a caſe before Lord *Hardwicke*, where a marriage-ſettlement, after providing for the iſſue of the marriage, had a limitation in favour of iſſue of a future marriage, on the faith of which the ſecond wife married; he inclined ſo much againſt theſe determinations, as to hold the limitation not to be voluntary. In the preſent caſe there ſeems great reaſon to believe that the limitations to the brothers muſt have been a ſtipulation on the part of the mother as a conſideration of her giving up her rent charge and becoming a party to the ſettlement, as there are no other parties who can be preſumed to have made this ſpecial ſtipulation in their favour; the giving a larger for a leſs ſecurity is a valuable conſideration. And the court will not go one inch further in avoiding ſuch limitations than they are obliged to do by prior determinations directly in point, and will lay hold of very inconſiderable circumſtances to get out of their reach.

This term the queſtion was argued a ſecond time *per Foſter* and *Glynn*, Serjeants, and *Wilmot* C. J. delivered the opinion of the court. He ſaid he thought it a very clear caſe, and within a narrow compaſs; the only point being, Whether the limitation to

the brother is void by the ſtatute of 27 *Eliz.* as againſt a purchaſer for a valuable conſideration? That previous to the ſtatute the law did not avoid any acts on the ground of fraud againſt ſubſequent purchaſers, but only ſuch as were in fraud of a former conveyance. *Upton* v. *Baſſett*, *Cro Eliz.* 444. The ſtatute was made in favour of ſubſequent purchaſers, paying a valuable conſideration for their purchaſes, as againſt perſons whoſe title is not ſupported by ſuch conſideration. Many caſes have been determined; theſe I do not mean to ſhake. The ſtatute itſelf plainly ſhews that the object which the legiſlature had in view was conveyances made with actual intent to defraud. It conſiders the parties as criminal; and not only avoids the act, but it ſubjects the offender, on conviction, to impriſonment for half-a-year, and to forfeit one year's value of the lands; and though the remedy of the act is extended by conſtruction in favour of *bona fide* purchaſers againſt all voluntary conveyances; yet, whenever there is any ſort of real conſideration, it ought to take it out of the act, and all the caſes upon it.

The ſettlement in this caſe, by the elder brother upon the younger brother, is in every reſpect fair, proper, honourable, and meritorious; as between themſelves, it is certainly good. And the point in queſtion now is, Whether it is ſo likewiſe againſt purchaſers for valuable conſideration.

At firſt, ſome of the caſes inclined to extend the conſideration of marriage, and the marriage portion, to all the limitations in the ſettlement, where, from the nature of the tranſaction, no fraud could be ſuſpected. But for many years back all the courts have agreed that the conſiderations ſhall apply only to the limitations of the marriage; ſo that whatſoever collateral limitations there may be, they are conſidered, as againſt purchaſers, to be merely voluntary.

Another queſtion aroſe ſoon after the ſtatute, which was, Whether notice of the ſettlement or conveyance at the time of the ſubſequent purchaſe ſhould not take the purchaſer out of the benefit of the ſtatute? This queſtion occurred five years after the ſtatute. *Goach's Caſe*, 5 *Co.* 60. And the court held, that, notwithſtanding the notice, the prior conveyance was abſolutely void; for that the purchaſer had at the ſame time notice of the ſtatute, and knew it to be void thereby. This ſettlement was followed, and confirmed by many caſes, ancient and modern. I believe, however, that no cautious conveyancer ever did or ever will adviſe his client to purchaſe in the face of a prior conveyance, unleſs ſome very particular reaſon made it convenient or proper for him to buy the land. But I do not mean to impeach any of the caſes; it is clear that ſuch ſettlements, though with notice, are fraudulent as againſt purchaſers.

In the preſent caſe, the limitation to the daughters of the marriage, ſubſequent to the limitations in queſtion, is very material, and diſtinguiſhes this caſe from all other the caſes on this ſtatute. It is true, indeed, that the limitations of a ſettlement may be partly good and partly void; but here the firſt is good, the laſt is good, and the intermediate one only is attacked. The caſe muſt be conſidered as if the daughters were now living, and if ſo, the purchaſer would be obliged, at the ſame time that he contends the limitation to the brothers is void, to protect himſelf by that limitation againſt the perſon next in remainder. He would have an intereſt of a very ſingular nature, to exiſt during the exiſtence of the brothers or their iſſue, and to expire on the failure of ſuch iſſue—A fee determinable. If the caſe had turned upon the effect of the ſubſequent good limitation, I would have taken time to conſider, whether that limitation might not give ſome validity to the former one? The caſe of *Mungey* and *Clerk*, which was cited to have been before Lord *Northington*, *February* 1761, does not apply to this difficulty. That was a caſe upon articles: All that the court did was, to decree them to be carried into execution, to accommodate the daughters of the firſt marriage; but not to ſet aſide any of the limitations as void. But this caſe turns upon the actual intereſt parted with by the mother, and the purchaſer has decided it againſt himſelf, by making the brothers parties to the fine. The mother certainly gave up a greater and accepted a leſs ſecurity. What has ſhe in return for it? to herſelf nothing; ſo that, unleſs the limitations to her ſons are ſupported by that conſideration, ſhe departs with an intereſt, and derives no benefit whatſoever by the ſettlement. The elder ſon receives a material benefit from her releaſe of the rent-charge, as the friends of the wife would not conſent to the marriage unleſs ſhe had a ſecurity for her jointure clear of every other incumbrance. The mother very properly avails herſelf of that opportunity to ſtipulate in favour of her younger children. The *quantum* of this conſideration is immaterial; what proves to a demonſtration that the limitations to the brothers muſt

have

have been ſtipulated for by the mother is, the priority of them to that of the daughters of the marriage; as it cannot be ſuppoſed that the huſband or the friends of the lady would have conſented to poſtpone the daughters to the brothers, if the mother had not made it the condition of her renouncing the ſecurity ſhe then had. The caſes of *Scott* and *Bell*, 2 *Lev.* 70. and *Oſgood* v. *Strode*, are ſtrong authorities to ſupport this idea, that the mother would not have conſented if the limitations to her ſons had not been agreed on. But if no ſuch caſe had before occurred on the circumſtances of this caſe, I ſhould have been of the ſame opinion.

It is objected, that there being an expreſs conſideration, none other can be preſumed. But it may be anſwered, that the enabling the ſon to make a jointure, though a good conſideration to him, was no conſideration to her. The releaſe of the rent-charge is expreſsly ſtated as one of the conſiderations, and muſt be applied to that only part of the ſettlement in which ſhe takes any benefit, *viz.* the ſtipulation in favour of her younger children. "Wherever the court ſees any conſideration moving from the parent, it will not conſider limitations to the children as voluntary, even againſt purchaſers." Judgment for leſſor of plaintiff.

Bibbins & al. *verſus* Mantel, a Priſoner in the Fleet. C. B.

ACTION upon the caſe upon ſeveral promiſes; the plaintiff declared in *Eaſter* term laſt, and in *Trinity* term laſt obtained an interlocutory judgment, whereupon a writ of inquiry was *then* awarded, returnable and executed in this preſent term; but after the ſaid judgment, and the awarding the writ of inquiry, and before the ſame was executed, the plaintiff became bankrupt; whereupon it was now moved on the behalf of the defendant, that the writ of inquiry and inquiſition taken thereon might be ſet aſide; for that by the ſtat. of *Jac.* 1. of bankrupts, the debt owing to the plaintiff is immediately veſted in the aſſignees upon his becoming a bankrupt, and therefore they ought to have ſued out a *ſcire facias* againſt the defendant, to ſhew cauſe why they ſhould not have had a writ of inquiry of damages; upon ſhewing cauſe, it was ſaid for the plaintiff, that the defendant is a priſoner, and will be diſcharged by *ſuperſedeas* if the plaintiff cannot be permitted to proceed to final judgment, this term, upon the writ of inquiry.

After the interlocutory judgment, and awarding the writ of inquiry, the plaintiff becomes a bankrupt, and afterwards in his own name the inquiry is executed, and good, without ſuing out a ſcire facias at the ſuit of the aſſignees.

Curia—We will conſider this as a writ of inquiry executed by the aſſignees in the name of the bankrupt, and the objection coming out of the mouth of the defendant is very unfavourable; beſides, the writ was awarded in laſt term before the plaintiff was a bankrupt, and the inquiſition ought, in juſtice, to be ſupported, otherwiſe the defendant would get out of gaol, and the creditors thereby might be greatly injured, ſo the rule muſt be diſcharged. *Nota*; There is no caſe in the point to be found in the books; but the ſtatute 21 *Jac.* 1. *c.* 19. enacts, that the laws againſt bankrupts ſhall be in all things largely and beneficially conſtrued for the relief of the creditors.

Slater *verſus* Baker and Stapleton. C. B.

Special action on the caſe againſt a ſurgeon and an apothecary for unſkilfully diſuniting the callous of the plaintiff's leg after it was ſet.

SPECIAL action upon the caſe, wherein the plaintiff declares that the defendant *Baker* being a ſurgeon, and *Stapleton* an apothecary, he employed them to cure his leg which had been broken and ſet, and the callous of the fracture formed; that in conſideration of being paid for their ſkill and labour, *&c.* they undertook and promiſed, *&c.*; but the defendants not regarding their promiſe and undertaking, and the duty of their buſineſs and employment, ſo ignorantly and unſkilfully treated the plaintiff, that they ignorantly and unſkilfully broke and diſunited the callous of the plaintiff's leg after it was ſet, and the callous formed, whereby he is damaged. The defendants pleaded not guilty, whereupon iſſue was joined, which was tried before the Lord Chief Juſtice *Wilmot*, and a verdict found for the plaintiff, damages 500*l.* The ſubſtance of the evidence for the plaintiff at the trial was, firſt a ſurgeon was called, who ſwore that the plaintiff having broken both the bones of one of his legs, this witneſs ſet the ſame; that the plaintiff was under his hands nine weeks; that in a month's time after the leg was ſet, he found the leg was healing and in a good way; the callous was formed; there was a little protuberance, but not more than uſual: upon croſs examination he ſaid he was inſtructed in ſurgery by his father, that the callous was the uniting the bones, and that it was very dangerous to break or diſunite the callous after it was formed.

John Latham an apothecary ſwore he attended the plaintiff nine weeks, who was then well enough to go home; that the bones were well united; that he was preſent with the plaintiff and defendants, and at firſt the defendants ſaid the plaintiff had fallen into good hands; the ſecond time he ſaw them all together the defendants ſaid the ſame; but when he ſaw them together a third time there was ſome alteration; he ſaid the plaintiff was then in a paſſion, and was unwilling to let the defendants do any thing to his leg; he ſaid he had known ſuch a thing done as diſuniting the callous, but that had been only when a leg was ſet very crooked, but not where it was ſtraight.

A woman called as a witneſs, ſwore, that when the plaintiff came home he could walk with crutches; that the defendant *Baker* put on to the plaintiff's leg an heavy ſteel thing that had teeth, and would ſtretch or lengthen the leg; that the defendants broke the leg again, and three or four months afterwards the plaintiff was ſtill very ill and bad of it.

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The daughter of the plaintiff ſwore, that the defendant *Stapleton* was firſt ſent for to take off the bandage from the plaintiff's leg; when he came he declined to do it himſelf, and deſired the other defendant *Baker* might be called in to aſſiſt; when *Baker* came he ſent for the machine that was mentioned; plaintiff offered to give *Baker* a guinea, but *Stapleton* adviſed him not to take it then, but ſaid they might be paid all together when the buſineſs was done; that the third time the defendants came to the plaintiff, *Baker* took up the plaintiff's foot in both his hands and nodded to *Stapleton*, and then *Stapleton* took the plaintiff's leg upon his knee, and the leg gave a crack, when the plaintiff cried out to them and ſaid, "you have broke what nature had "formed;" *Baker* then ſaid to the plaintiff, *You muſt go through the operation of extenſion*, and *Stapleton* ſaid, we have conſulted and done for the beſt.

Another ſurgeon was called, and ſwore, that in caſes of crooked legs after they have been ſet, the way of making them ſtraight is by compreſſion, and not by extenſion, and ſaid he had not the leaſt idea of the inſtrument ſpoken of for extenſion: he gave *Baker* a good character, as having been the firſt ſurgeon of *St. Bartholomew's* hoſpital for 20 years, and ſaid he had never known a caſe where the callous had deoſſified.

Another ſurgeon was called, who ſwore, that when the callous is formed to any degree, it is difficult to break it, and the callous in this caſe muſt have been formed, or it would not have given a crack, and ſaid extenſion was improper; and if the patient himſelf had aſked him to do it, he would have declined it; and if the callous had not been hard, he would not have done it without the conſent of the plaintiff; that compreſſion was the proper way, and the inſtrument improper: he ſaid the defendant *Baker* was eminent in his profeſſion. Another ſurgeon was called, who ſwore, that if the plaintiff was capable of bearing his foot upon the ground, he would not have diſunited the callous if he had been deſired by him, but in no caſe whatever without conſent of the patient: if the callous was looſe, it was proper to make the extenſion, to bring the leg into a right line. A ſervant of the plaintiff ſwore the plaintiff had put his foot upon the ground three or four weeks before this was done.

The counſel for the defendants at the trial, for *Baker*, relied upon the good character which was given him, and objected there was no evidence to affect the other defendant *Stapleton* the apothecary; but the Lord Chief Juſtice thought there was ſuch evidence againſt both the defendants as ought to be left to the jury, as the nodding, the adviſing *Baker* not to take the guinea offered to him by the plaintiff; beſides, the apothecary firſt propoſed ſending for *Baker*: the plaintiff was in no pain before they extended

extended his leg, and he only ſent to *Stapleton* to have the bandage taken off. The Lord Chief Juſtice aſked the jury whether they intended to find the damages againſt both the defendants? and they found 500 *l.* againſt them jointly, and he ſaid he was well ſatisfied with the verdict.

It was now moved that the verdict ought to be ſet aſide, becauſe the action is upon a joint contract, and there is no evidence of a joint undertaking by both the defendants: the plaintiff ſends for *Stapleton* to take off the bandage, who declines doing it, and ſays, I do not underſtand this matter, you muſt ſend for a ſurgeon; accordingly Mr. *Baker* is ſent for, who enters upon the buſineſs as a ſurgeon unconnected with *Stapleton*, who, it does not appear, ever undertook for any ſkill about the leg, ſo the jury have found him guilty without any evidence. That *Baker* has been above 20 years the firſt ſurgeon in St. *Bartholomew*'s hoſpital, reads lectures in ſurgery and anatomy, and is celebrated for his knowledge in his profeſſion as well as his humanity; and to charge ſuch a man with ignorance and unſkilfulneſs upon the records of this court is moſt dreadful. All the witneſſes agreed Mr. *Baker* doth not want knowledge, therefore this verdict ought not to ſtand. 2*dly*, It was objected that the evidence given does not apply to this action, which is upon a joint contract: the evidence is, that the callous of the leg was broke without the plaintiff's conſent; but there is no evidence of ignorance or want of ſkill, and therefore the action ought to have been treſpaſs *vi & armis* for breaking the plaintiff's leg without his conſent. All the ſurgeons ſaid they never do any thing of this kind without conſent, and if the plaintiff ſhould not be content with the preſent damages, but bring another action of treſpaſs *vi & armis*, could this verdict be pleaded in bar? The court, without hearing the counſel for the plaintiff, gave judgment for him.

Curia—1*ſt*, It is objected, that this is laid to be a joint undertaking, and therefore it ought to be proved, and we are of opinion that it ought: the queſtion therefore is, Whether there is any evidence of a joint undertaking? We are of opinion there is; Mr. *Stapleton* declines acting alone, but in concurrence with Mr. *Baker* attends the plaintiff every time any thing is done, and aſſiſts jointly with Mr. *Baker*. This appears in evidence, and is ſufficient, for there is no occaſion to prove an expreſs joint contract, promiſe, or undertaking. When an offer is made to *Baker* of a guinea, *Stapleton* ſays, you had better be paid all at laſt: they both attended plaintiff together every time, and *Stapleton* ſaid, we have conſulted and done for the beſt: when the plaintiff complained of what they had done, *Stapleton* conſidered himſelf as one of the perſons to join in the cure of the leg, for he put his hand on the knee when *Baker* nodded, and then the bone cracked; he is the original perſon aiding in this matter, and there is no ground

ground for this objection. When we consider the good character of *Baker*, we cannot well conceive why he acted in the manner he did; but many men very skilful in their profession have frequently acted out of the common way for the sake of trying experiments. Several of the witnesses proved that the callous was formed, and that it was proper to remove plaintiff home; that he was free from pain, and able to walk with crutches. We cannot conceive what the nature of the instrument made use of is: Why did *Baker* put it on, when he said that plaintiff had fallen into good hands, and when plaintiff only sent for him to take off the bandage? It seems as if Mr. *Baker* wanted to try an experiment with this new instrument.

2*dly*, It is objected, that this is not the proper action, and that it ought to have been trespass *vi & armis*. In answer to this, it appears from the evidence of the surgeons that it was improper to disunite the callous without consent; this is the usage and law of surgeons: then it was ignorance and unskilfulness in that very particular, to do contrary to the rule of the profession, what no surgeon ought to have done; and indeed it is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to enable him to undergo the operation. It was objected, this verdict and recovery cannot be pleaded in bar to an action of trespass *vi & armis* to be brought for the same damage; but we are clear of opinion it may be pleaded in bar. That the plaintiff ought to receive a satisfaction for the injury, seems to be admitted; but then it is said, the defendants ought to have been charged as trespassers *vi & armis*. The court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case, when they can see the plaintiff has obtained a verdict for such damages as he deserves, they will establish such verdict if it be possible. For any thing that appears to the court, this was the first experiment made with this new instrument; and if it was, it was a rash action, and he who acts rashly acts ignorantly: and although the defendants in general may be as skilful in their respective professions as any two gentlemen in *England*, yet the court cannot help saying, that in this particular case they have acted ignorantly and unskilfully, contrary to the known rule and usage of surgeons.

Judgment for the plaintiff *per totam curiam*.

Drinkwater *verſus* The Corporation of the London Aſſurance. C. B.

Covenant upon a policy of inſurance from fire, proviſo that defendants ſhall not be liable in caſe the houſe be burnt by reaſon of any invaſion, foreign enemies, or any military or uſurped power. The houſe was burnt by a mob at Norwich; this is not within the proviſo.

THIS is an action of covenant againſt the defendants upon a policy of inſurance of a malting-office of the plaintiff at *Norwich* from fire, in which policy there is a proviſo that the corporation ſhall not be liable in caſe the ſame ſhall be burnt by any invaſion by foreign enemies, or any military or uſurped power whatſoever; and the plaintiff in the declaration avers, that on the 28th of *September* 1766 the ſaid malting-houſe was burnt not by any invaſion, by foreign enemies, or any military or uſurped power whatſoever, and that defendants have not kept their covenant, to the plaintiff's damage. The defendants plead firſt the general iſſue, that they have not broke their covenant, and thereupon iſſue is joined. 2*dly*, The defendants plead that it was burnt by an *uſurped power*; the plaintiff replies that it was not burnt by an *uſurped power*, and thereupon iſſue is alſo joined. This cauſe was tried at *Norwich* aſſizes; verdict for the plaintiff and 469*l.* damages, ſubject to the opinion of the court, upon the following caſe; *viz.* That upon *Saturday* the 27th of *September* laſt a mob aroſe at *Norwich* upon account of the high price of proviſions, and ſpoiled and deſtroyed divers quantities of flour; thereupon the proclamation was read, and the mob diſperſed for that time: afterwards another mob aroſe, and burnt down the malting-office in the policy mentioned. The queſtion is, Whether the plaintiff is entitled to recover in this action?

This caſe was twice argued at the bar, and after time taken to conſider, Mr. Juſtice *Gould* was of opinion, that the malting-office being burnt by the mob who roſe to reduce the price of proviſions, the ſame was burnt by an *uſurped power*, within the true intent and meaning of the proviſo in the policy; that it is an uſurped power for any perſons to aſſemble themſelves, to alter the laws, to ſet a price upon victuals, *&c.* He cited *Poph.* 122. where it is agreed by the juſtices, that to attempt ſuch a thing by force is felony, if not treaſon; and therefore he was of opinion that judgment ought to be for the defendant.

Mr. Juſtice *Bathurſt* was of opinion, that the words "*uſurped power*" in the proviſo, according to the true import thereof, and the meaning of the parties, can only mean an invaſion of the kingdom by foreign enemies, to give laws and uſurp the government thereof, or an internal armed force in rebellion aſſuming the power of government, by making laws, and puniſhing for not obeying thoſe laws: he ſaid, the plea alledges the malting-office was burnt by an *uſurped power* unlawfully exerciſed, but does not charge

charge *that* uſurped power as a *rebellion*: that a mob roſe at *Norwich* on account of the price of victuals, and as ſoon as the proclamation was read they diſperſed; ſo he was of opinion that judgment ought to be given for the plaintiff.

Clive J. was of opinion, that the words *uſurped power* in the proviſo, muſt mean ſuch an uſurped power as amounts to high treaſon, which is ſettled by the 25 *Ed.* 3. That the offence of the mob in the preſent caſe was a felonious riot, for which the individuals might have ſuffered, but cannot be ſaid to be an *uſurped power*; therefore he was of opinion that judgment ſhould be given for the plaintiff.

Wilmot C. J.—Upon the beſt conſideration I am able to give this caſe, I am of opinion, that the burning of the malting-office was not a burning by an *uſurped power* within the meaning of the proviſo: policies of inſurance like all other contracts muſt be conſtrued according to the true intention of the parties, although the counſel on one ſide ſaid, that policies ought to be conſtrued liberally; on the other ſide, that they ought to be conſtrued ſtrictly. In a doubtful caſe, I think the turn of the ſcale ought to be given againſt the ſpeaker, becauſe he hath not fully and clearly explained himſelf. The imperfection and poverty of language to expreſs our ideas, is the occaſion that words have equivocal meanings, and it is often very uncertain what the parties to a contract in writing mean. When the ideas are ſimple, words expreſs them clearly; but when they are complex, difficulties often ariſe, and men differ much what ideas are occaſioned by words. In the preſent caſe, what is the true *idea* conveyed to the mind by the words "*uſurped power?*" The rule to find it out, is to conſider the words of the context, and to attend to the popular uſe of the words, according to *Horace*, *Arbitrium eſt, et jus, & norma loquendi.* My *idea* of the words *burnt by uſurped power*, from the context, is, that they mean burnt, or ſet on fire by occaſion of an invaſion from abroad, or of an internal rebellion, when armies are employed to ſupport it. When the laws are dormant and ſilent, and firing of towns is unavoidable, theſe are the outlines of the picture drawn by the idea which theſe words convey to my mind. The time of the incorporation of this ſociety of the *London Aſſurance Company* was ſoon after a rebellion in this kingdom, and it was not ſo romantic a thing to guard againſt fire by rebellion as it might be now; the time therefore is an argument with me that this is the meaning of theſe words. Rebellious mobs may be alſo meant to be guarded againſt by the proviſo, becauſe this corporation commenced ſoon after the riot-act; and if common mobs had been in their minds, they would have made uſe of the word *mob.* The words "*uſurped power*" may have great variety of meanings, according to the ſubject matter where they are uſed, and it would be pe-

dantic to define the words in all their various meanings; but in the preſent caſe they cannot mean the power uſed by a common mob. It has not been ſaid, that if one or fifty perſons had wickedly ſet this houſe on fire, that it would be within the meaning of the words *uſurped power*. It hath been objected, that here was an *uſurped power* to reduce the price of victuals, and that this is part of the power of the crown, and therefore it was an *uſurped power*; but the king has no power to reduce the price of victuals. The difference between a rebellious mob and a common mob is, that the firſt is high treaſon, the latter a riot or a felony. Whether was this a common mob or a rebellious mob? The firſt time the mob riſes the magiſtrates read the proclamation, and the mob diſperſe; they hear the law, and immediately obey it: the next day another mob riſes upon the ſame account, and damages the houſes of two bakers; thirty people in fifteen minutes put this army to flight, and they were diſperſed and heard of no more. Where are the *ſpecies belli* which Lord *Hale* deſcribes? This mob wants a univerſality of purpoſe to deſtroy, to make it a rebellious mob, or high treaſon. *Hale's Pl. Coron.* 135. there muſt be a univerſality, a purpoſe to deſtroy *all* houſes, *all* incloſures, *all* bawdy-houſes, *&c.* Here they fell upon two bakers and a miller, and the mob chaſtized theſe particular perſons to abate the price of proviſions in a particular place; this does not amount to a rebellious mob. When the laws are executed with ſpirit, mobs are eaſily quelled. Sometimes a courageous act done by a ſingle perſon, will quell and diſperſe a mob, and ſometimes the wiſdom of an individual will do the ſame, as is thus beautifully deſcribed by *Virgil*,

Ac veluti magno in populo cùm ſæpè coorta eſt
Seditio, ſævitque animis ignobile vulgus,
Jamque faces & ſaxa volant: furor arma miniſtrat.
Tùm pietate gravem, ac meritis, ſi fortè virum quem
Conſpexêre, ſilent, arrectiſque auribus adſtant:
Ille regit dictis animos, & pectora mulcet.

But amongſt armies, great guns and bombs, the laws are ſilenced, and the wiſdom or courage of an individual will ſignify nothing. Upon the whole, I am of opinion there muſt be judgment for the plaintiff; and accordingly the *poſtea* was ordered to be delivered to him, by three judges againſt one.

Sparrow *verſus* Turner. C. B.

THIS cauſe being at iſſue, the plaintiff moved for a ſpecial jury, when the cauſe came on to be tried, all the jury did not appear, and neither ſide prayed a *tales*, ſo the cauſe went off, for that time, for want of jurors; at another day it came on to be tried, when a verdict was found for the defendant; but the prothonotary did not allow to the defendant his coſts occaſioned by the attendance of his attorney, counſel and witneſſes, when the cauſe went off for want of jurors; and therefore it was now moved on behalf of the defendant, that the prothonotary might review his taxation, and be directed to allow the defendant his coſts occaſioned by the cauſe going off as above, that this was the practice of the court of King's Bench, and very reaſonable. For the plaintiff it was ſaid, that in this court the practice was otherwiſe, and that coſts in ſuch caſe had never been allowed here, which was agreed to be ſo by all the officers of the court preſent.

Coſts for the future are to be allowed when a cauſe goes off and remains to be tried pro defectu juratorum.

1 Stra. 300. Price v. Birch, Trin. 16 Geo. 2. B. R. Standen v. Hall, Eaſter 29 Geo. 2. B. R.

Curia—As it is the practice *here* not to allow coſts in this caſe, the prothonotary has done right, and therefore we will not order him to review his taxation in this particular caſe; but for the future it may be reaſonable to make the practice of this court conformable to that of the King's Bench, and therefore for the future we order that the practice be altered accordingly. The default was equal, for either the plaintiff or defendant might have prayed a *tales*; they both acted upon a preſumption that the practice was not to allow any coſts on either ſide, and that ſeems to be the reaſon why neither of them prayed a *tales*.

The practice of this court altered as to coſts, when a cauſe remains for want of jurors.

Tillard *verſus* Shebbeare. C. B.

QUARE impedit, verdict for the plaintiff. Upon a motion for a new trial, the queſtion was, whether the *copy* of an entry of an *inſtitution*, in the biſhop's inſtitution-book, be evidence admiſſible and ſufficient to prove a *preſentation* by the patron to the living. It was objected for the defendant, that the preſentation under the hand and ſeal of the patron ought to have been produced, or upon evidence that a proper ſearch had been made for the *preſentation* itſelf, and that it could not be found; then the biſhop's inſtitution-book itſelf (which is the next beſt evidence) ought to have been produced, but neither of theſe things hath been done. For the plaintiff it was ſaid, that the court will not grant a new trial in *quare impedit*, becauſe the plaintiff can recover no coſts, nor more damages than half an year's value of the benefice; whereupon the counſel for the defendant

Evidence. A copy of the biſhop's inſtitution-book is not evidence of a preſentation by the patron to a living. 1 Vent 14. Clarke v. Heath. 1 Sid. 425. S. C.

propoſed to pay the plaintiff coſts, and to account for the profits of the living in caſe there ſhould be another verdict againſt the defendant.

Curia—There muſt be a new trial. The true point is, might not the plaintiff have produced better evidence? He has neither produced the *preſentation*, nor ſhewn that he hath made a proper ſearch for it, and that it could not be found: beſides, the biſhop's inſtitution-book might have been produced, which would have been better evidence than a copy from it. Let there be a new trial, the defendant undertaking to pay plaintiff his coſts, and to account to him for the profits of the living, if another verdict be found againſt the defendant.

HILARY TERM,

8 *Geo.* III. 1768.

Eichorn *verſus* Le Maitre. C. B.

Iſſue on a plea in abatement found againſt the defendant, the judgment ſhall be peremptory. A writ of inquiry ſhall not be awarded to ſupply the omiſſion of the jury at the trial where an attaint lies.

Yelv. 112. 2 Vent. 22.

ACTION upon the caſe upon ſeveral promiſes for goods ſold and delivered; the defendant pleaded *miſnomer* in his chriſtian name in *abatement:* the plaintiff replied, that the defendant was called and known as well by the name of *A. L.* as by the name of *B. L.*, and thereupon iſſue was joined. Upon the trial, the jury found a verdict for the plaintiff, but did not aſſeſs any damages. And now it was moved on the behalf of the plaintiff, that a writ of inquiry might iſſue to aſſeſs the damages; for that the defendant's plea being found to be falſe, the judgment to be given againſt him in this caſe muſt be peremptory and final; and there is no difference whether the plea pleaded be in bar or abatement; and for this purpoſe was cited *Bro.* tit. *Peremptorie, Long 5to Ed.* 4. 90. *b.* where it is agreed for clear law, "That if a dilatory plea be pleaded to the *writ*, or to the "*count*, or to the *action vel hujuſmodi*, and they join iſſue, there "always, if the iſſue paſs againſt the tenant or defendant in an "action

" action real or perſonal, it is peremptory to the tenant or de-
" fendant." And the *Long 5to Ed.* 4. 90. *b.* ſays, " it is pe-
" remptory, be the iſſue upon matter dilatory or upon matter in
" bar." For the defendant it was ſaid, that although in real actions when iſſue is joined upon a dilatory plea, and tried by a jury, the judgment ſhall be final, according to 1 *Lev.* 163. 1 *Sid.* 252. yet in a perſonal action as this is, there ſhall be a *reſpondeas ouſter*; and therefore a writ of inquiry of damages cannot be awarded. But 2*dly*, it was ſaid for the defendant, that ſuppoſing the judgment to be given upon this iſſue found againſt the defendant muſt be final and peremptory, yet the omiſſion of the jury in not finding damages in this caſe cannot be ſupplied by a writ of inquiry of damages, becauſe if the jury upon the writ of inquiry ſhould aſſeſs outrageous damages, an attaint would not lie, that being only an inqueſt of office; whereas an attaint would lie againſt the jury who tried the iſſue, if they had given outrageous damages in this caſe; and the rule laid down in *Cheney's* caſe, 10 *Rep.* 119. is, that the court will never *ex officio* award a writ of inquiry to ſupply the omiſſion in the finding of the jury upon the trial, in a matter whereupon an attaint may be brought; and therefore if the judgment in this caſe is to be final and peremptory, the verdict is inſufficient for the court to give judgment upon, and a writ of *venire facias de novo* ought to be awarded.

2 Stra. 1021. 1 Vent. 40. Skin. 595. 1 Sid. 380. Ld. Ray. 59. 11 Rep. Bentham's caſe. 2 Roll. Abr. 722. pl. 14, 15, 16, 17, &c. Carth. 362.

Curia—The firſt queſtion is, whether the court upon this iſſue muſt pronounce a final and peremptory judgment, and if they muſt, the ſecond queſtion is, whether they can *ex officio* award a writ of inquiry to ſupply the omiſſion of the jury, or whether a writ of *venire facias de novo* muſt not go? and we are all of opinion that the judgment muſt be peremptory, and that there is no difference whether the iſſue be joined upon a fact in a plea in abatement, or in a plea in bar, for wherever a man pleads a fact that he knows to be falſe, and a verdict be againſt him, the judgment ought to be final, and every man muſt be preſumed to know whether his plea be true or falſe; but upon a demurrer to a plea in abatement there ſhall be a *reſpondeas ouſter*, becauſe every man ſhall not be preſumed to know the matter of law, which he leaves to the judgment of the court.

As to the 2*d* queſtion, we are all of opinion that a writ of inquiry cannot be awarded to ſupply the omiſſion of the jury in not finding damages, but that a *venire facias de novo* muſt go; " for
" where a man may have an attaint, there no damages ſhall be
" aſſeſſed by the court if they be not found by the jury." 4 *Leon.* 245. *Godb.* 207. This is an *aſſumpſit* in which damages are the whole object of the writ and ſuit, and though iſſue be joined upon a fact in abatement, yet as to the defendant it is concluſive to all intents and purpoſes, and involves the damages upon finding the

21 Ed. 3. 56. b. 57. Lib. Aſſiſ. fo. 80. a. b. Bro. Inqueſt pl. 84.

fact againſt him, and if outrageous damages had been given, an attaint would have laid. "In treſpaſs, the defendant pleaded an "arbitrement, and it was found againſt him; the court held, that "in treſpaſs the whole recovery is damages, which cannot be "taxed but by the inqueſt who paſſed upon the principal iſſue." 11 *H.* 4. 57. *b.* A *venire facias de novo* was awarded.

Goldſb. 49. 44 Ed 3. 6 b. 2 Roll. Abr. 688.

Ellis qui tam, &c. *verſus* ———. C. B.

Where a defendant pleads a ſham plea, the court will not let him withdraw it and plead the general iſſue.

ACTION upon the ſtatute for ſelling coals ſhort in meaſure, to recover 50 *l.* penalty. The defendant laſt term pleaded a recovery in *B. R.* for the ſame offence, and now he moved to withdraw *that* plea, to plead the general iſſue, and take ſhort notice of trial; but *per curiam*—The defendant has delayed the plaintiff by this ſham plea; he has produced no affidavit that he has any merits, and deſerves to pay the 50 *l.* for pleading a ſham plea, ſo the rule muſt be diſcharged.

Goodtitle, on the Demiſe of Ruſſel, Clerk, and two others, *verſus* Weal, Widow, and others. C. B.

Power under a marriage-ſettlement to appoint to the children of the marriage, is ſtrictly confined to thoſe children.

IN ejectment, of three-fourth parts of certain lands in *Trebandy* and *Marſton Court* in the county of *Hereford*, verdict for the plaintiff, ſubject to the opinion of the court upon the following caſe; which ſtates, that *Thomas Philpot* the elder, great grandfather of the leſſors of the plaintiff, being ſeiſed in fee of the premiſes in queſtion, by indenture of the 2d of *February* 1666, made between himſelf of the one part, and *J. C.* and *W. M.* of the other part, in conſideration of a marriage between his ſon and heir *Thomas Philpot* the younger and *Jane Chin*, covenanted to ſtand ſeiſed to the uſe of himſelf *Thomas Philpot* the elder for 14 years, for raiſing portions for the daughters of the marriage, remainder to the uſe of *Thomas Philpot* the elder for life, remainder to the uſe of *Thomas Philpot* the younger, and of ſuch child or children of his body upon the body of the ſaid *Jane* to be begotten, in ſuch manner and form, and for ſuch eſtate and eſtates in *fee or in tail*, upon ſuch proviſoes or conditions, and paying ſuch legacies or proportions to the other children of the ſaid *Thomas Philpot* the younger, as he ſhould by his laſt will and teſtament in writing, or by any other writing under his hand and ſeal, in the preſence of two or more credible witneſſes, nominate, appoint, limit, expreſs, and declare; and for want of ſuch nomination, appointment, limitation, or declaration, to the uſe of the heirs of the body of the ſaid *Thomas Philpot* the younger, on the body of the ſaid *Jane* to be begotten; and for want of ſuch child

or

or children or iſſue, to the uſe of the heirs of the body of the ſaid *Thomas Philpot* the younger, lawfully to be begotten, remainder to the right heirs of the ſaid *Thomas Philpot* the elder, his heirs and aſſigns for ever.

Thomas Philpot the younger, the grandfather of the leſſors of the plaintiff, had iſſue by *Jane Chin*, *Richard*, *Thomas*, *John*, and *Mary*; and by his will of the 22d of *June* 1688, reciting his power under the ſaid ſettlement, deviſed the premiſes in *Trebandy* and *Marſton Court*, and did thereby limit and appoint that the ſame ſhould remain and come to his ſon and heir *Richard Philpot* and the heirs of his body begotten for ever; and for want of ſuch iſſue, to the right heirs of the teſtator *Thomas Philpot* the younger. *Thomas Philpot* the elder died in 1682, whereupon *Thomas Philpot* the younger entered, and afterwards died ſeiſed in 1695, upon whoſe death *Richard* his ſon entered, and afterwards died ſeiſed in 1708 without iſſue. *Thomas*, the ſecond ſon of *Thomas* the grandfather of the leſſors of the plaintiff, died young without iſſue; *John* the third ſon, upon the death of his brother *Richard*, entered in 1708, and by his will of the 28th of *January* 1741, deviſed the premiſes in queſtion to *Hugh Ruſſel* his nephew, who was the eldeſt ſon of *Hugh Ruſſel*, who married *Mary* the ſiſter of the teſtator *John Philpot*, and afterwards the ſame teſtator *John Philpot* died without iſſue in 1748.

Mary, the ſiſter of *John Philpot*, and daughter of *Thomas Philpot*, the grandfather of the leſſors of the plaintiff, had iſſue by *Hugh Ruſſel*, the ſaid *Hugh* the deviſee of *John*, and *Richard*, *Thomas*, and *William Ruſſel* the leſſors of the plaintiff, and a daughter *Mary* now living, and *John Ruſſel*, who died in the lifetime of his brother *Hugh*; the eldeſt brother *Hugh*, on the death of his uncle *John Philpot* in 1748 entered, and by his will deviſed the premiſes in queſtion to his nephew *Thomas Ruſſel*, eldeſt ſon of his late brother *John*, whoſe tenants the defendants are; and afterwards the ſaid teſtator *Hugh Ruſſel* died 1765, without iſſue.

The queſtion is, whether the contingent remainder to the uſe of the heirs of the body of the ſaid *Thomas Philpot* the younger, upon the body of *Jane Chin* his intended wife begotten, created by the deed of ſettlement of the 2d of *February* 1766, hath been in any manner deſtroyed or barred.

Curia—This is a covenant to ſtand ſeiſed to uſes, and therefore we can give it the moſt liberal conſtruction, according to the intent and meaning of the covenantor, which plainly was, that his ſon ſhould have power to limit the premiſes to his children of the marriage in fee or in tail, as he ſhould think fit. The firſt queſtion therefore is, Whether *Thomas Philpot* the younger has in fact made an appointment to any of his children of the marriage in fee; if he has, the whole fee is gone, and the ſettlement could

never take place. 2*dly*, Suppoſe his appointment is not an appointment of a fee, then the queſtion is, Whether an eſtate-tail appointed is a complete appointment within the power?

1*ſt*, The children of the marriage are the ſole objects of the ſettlement; and we are all of opinion, that *Thomas Philpot* the younger has not appointed the fee to any of his children, for he has deviſed the premiſes to his ſon *Richard* in tail general, with remainder *in fee to his own right heirs*, and his own right heirs might not have been any of his children of the marriage, ſo that this is not an appointment within the power, which is wholly confined to the children of the marriage.

2*dly*, We are of opinion, that the appointment of an eſtate-tail to *Richard* is not ſufficient to defeat the ſettlement, the intent whereof is plain and clear; the old man the covenantor meant that the father ſhould have power over the whole eſtate, and to diſpoſe of it among his own children as he thought fit, to keep them dutiful to their parents; as if he had ſaid, "If you think "fit to diſpoſe of the *whole* eſtate, do it in ſuch manner as you "pleaſe, but you ſhall diſpoſe of the *whole* among the children "of the marriage; if you do not, the ſettlement and the remain-"ders therein ſhall take place." This is the true meaning of the deed of ſettlement, and we do not confine ourſelves to the mere words of it.

We are clear of opinion, that the contingent remainder to the heirs of the body of *Thomas Philpot* the younger, upon the body of *Jane* to be begotten, has not in any manner been barred, defeated, or deſtroyed; and the *poſtea* muſt be delivered to the plaintiff.

Beal *verſus* Langſtaff and his Bail. C. B.

Upon a parol promiſe to ſave bail harmleſs, the court will not interfere in a ſummary way, and when an affidavit has been read and filed, it cannot be taken off the file.

THE defendant's bail, and ſeveral other perſons, made an affidavit that the bail entered into the recognizance at the inſtance and requeſt of the defendant's attorney, who in conſideration thereof promiſed to the bail to ſave them harmleſs, notwithſtanding which promiſe their goods were taken in execution on a judgment upon the bail-bond for 170*l.* and upwards; and now it was moved that the defendant's attorney might be obliged to make the bail ſatisfaction for the value of their goods taken; but *per curiam*—This is only a breach of a parol promiſe, and we cannot interfere in a ſummary way, here being nothing criminal, but you muſt bring your action; ſo the bail took nothing by the motion: then it was moved that the bail might have the affidavit returned to them; but *per curiam*—It has been read, and is now filed and become a record of the court, and cannot be taken off the file.

In

In the Common Pleas.

Nota; *Eaſter* term in the 8th year of King *George* the Third, began upon the 20th day of *April* 1768, when this court declared, that from this day forward all meſne proceſs ſerved upon the return-day thereof ſhall be deemed regular, agreeable to the practice of the court of King's Bench.

EASTER TERM,

8 *Geo.* III. 1768.

Hewit and others, Aſſignees of Bibbins and others, Bankrupts, *verſus* Mantell. C. B.

BIBBINS and others before they became bankrupts brought an action upon the caſe upon ſeveral promiſes againſt the defendant *Mantell*, and obtained an interlocutory judgment by *nil dicit* againſt him in *Trinity* term laſt, and thereupon a writ of inquiry of damages was awarded, returnable in *Michaelmas* term laſt. On the 8th of *September* laſt, before the writ of inquiry was executed, the then plaintiffs *Bibbins* and others became bankrupts, a commiſſion iſſued, and the now plaintiffs *Hewit* and others were choſen aſſignees; and afterwards the bankrupts *Bibbins* and others proceeded to execute a writ of inquiry of damages, and to final judgment in *Michaelmas* term laſt, and thereupon recovered 648 *l.* 7 *s.* for damages *in tota*; whereupon the aſſignees, the now plaintiffs, for the benefit of themſelves and the reſt of the creditors of *Bibbins*, brought a *ſcire facias* againſt *Mantell*, to ſhew cauſe why they ſhould not have execution upon the ſaid judgment againſt him, returnable the firſt return in laſt *Hilary* term; to which *Mantell* in that term pleaded the whole matter before ſtated, in bar, and prayed judgment if the aſſignees ought to have execution againſt him for the damages on the ſaid judgment. The aſſignees demurred generally to this plea, and *Mantell* joined in demurrer.

After the interlocutory judgment the plaintiff becomes a bankrupt, and afterwards proceeds to final judgment. The aſſignees bring a ſcire fa. to have execution, and upon demurrer judgment for the aſſignees.

1. It was objected for the defendant, that the moment when *Bibbins's* became bankrupts, the debt owing to them by *Mantell* was veſted in the aſſignees, and therefore the proceedings of *Bibbins's* to execute the writ of inquiry, and to final judgment after they became bankrupts, was contrary to law and the ſeveral ſtatutes of bankrupt, and that the aſſignees ought to have ſued out a *ſcire facias* upon the interlocutory judgment obtained by *Bibbins's* againſt *Mantell* in *Trinity* term laſt, for him to ſhew cauſe why the aſſignees ſhould not have a writ of inquiry of damages, and be at liberty to proceed to recover final judgment thereon for the benefit of themſelves and the reſt of the creditors. 2. It was alſo objected, that bankruptcy before the final judgment was an abatement of the ſuit; that *Bibbins's* were then dead in law, and could not proceed one ſtep further.

For the plaintiffs the aſſignees it was anſwered, 1*ſt*, That all the ſtatutes concerning bankrupts are one ſyſtem of laws made for the benefit of creditors, and that a bankrupt may act for their benefit, although he cannot do any thing to the contrary. The judgment hath been fairly obtained, and the preſent writ of *ſcire facias* ſhews the aſſent of the aſſignees to what the bankrupts have done in proceeding to final judgment. In the caſe of *Priddle* v. *Thomas* laſt *Hilary* term *B. R.* the parties were at iſſue, and notice of trial was given; before the trial *Priddle* became a bankrupt, and Mrs. *Pritchard* was choſen aſſignee; the court upon motion permitted the trial to go on in the name of the bankrupt *Priddle*, upon the aſſignees undertaking to pay the coſts of ſuit in caſe a verdict ſhould be given for the defendant. *Alexander Holt* recovered a judgment *anno* 17 *Car.* 2. againſt the defendant, and had a *teſtatum ſcire facias* to the tertenants; they appear and plead, and there was a verdict againſt them at the aſſizes in *Suffolk*, and judgment thereupon; afterwards *Holt* became a bankrupt, and the commiſſioners aſſigned the original judgment to *Plummer*, who in *Michaelmas* term 7 *W.* 3. moved the court that it might be entered to entitle him to the benefit of the judgment upon the *ſcire facias*, which was ruled accordingly without bringing a new *ſcire facias*, (*quod nota* ſays the reporter,) 5 *Mod.* 88. *Plummer* v. *Lea*; which caſe ſhews that the courts will give the creditors all the aſſiſtance they can for the ſpeedy recovery of debts owing to the bankrupt, without turning them about. A man has a judgment in debt, then becomes a bankrupt, and afterwards ſues out execution; the money is levied and brought into court, the aſſignee moves that it may not be paid to the plaintiff the bankrupt, ſurmiſing that the judgment was aſſigned to him; the court detained the money until the aſſignee brought a *ſcire facias* to try the bankruptcy. From this caſe it appears, that if it had appeared on record to the court that the plaintiff was a bankrupt, they would have ordered the money to be paid to the aſſignee. In the caſe at bar it appears by the defendant's own plea

that

that *Bibbins's* are bankrupts, and whether *Mantell* is in execution at the ſuit of *Bibbins's*, or the aſſignees, it can make no difference to him. After a writ of inquiry executed, the defendant moved to ſtay the proceedings; the plaintiff ſince the action brought having been diſcharged by the inſolvent debtors' act, and having aſſigned his debts and effects for the benefit of his creditors, the court refuſed to make any rule, and ſaid, the action brought before the diſcharge and aſſignment muſt proceed. *Hedley* v. *Brown*, 2 *Barnes* 308. This caſe ſhews, that the court permitted the aſſignee for the benefit of the creditors to proceed in the name of the debtor to recover judgment in his name.

Wilmot C. J.—When a motion was made in the cauſe of *Bibbins* v. *Mantell* in laſt *Michaelmas* term, I had ſome little doubt whether the aſſignees ought not to have ſued out a *ſcire facias* upon the interlocutory judgment, but upon further and more mature conſideration I think we may, with juſtice, give judgment for the aſſignees in this caſe. Courts of law have interfered equitably in many caſes of bankrupts, and if they can ſee upon the face of the whole record that the aſſignees are entitled to recover, they will uſe their utmoſt ſagacity and *aſtutia* to give them judgment. That they are entitled to this debt is as clear as the ſun, and the bankrupt has no right to receive this money; therefore unleſs we are bound down by the rules of law and former determinations, we will not turn the aſſignees round; it is truly ſaid, that the ſtatutes of bankrupt form one body or ſyſtem of law made for the benefit of creditors, and every act done by the bankrupt for the benefit of his creditors, the courts will liberally conſtrue to be right and juſt, but contrary of acts done to the injury or diſadvantage of creditors. It has been objected, that the right and property of this debt was ſo abſolutely diveſted out of the *Bibbins's* when they became bankrupts by the ſtatutes, that they could not ſtir one ſtep further in the cauſe againſt *Mantell*. In anſwer to this, it appears on this record that *Bibbins's* had obtained an interlocutory judgment, and the court awarded a writ of inquiry before the bankruptcy. The defendant *Mantell* afterwards had no day in court, nor could he afterwards plead any thing to the action. The taking the inquiſition and entering final judgment were only the concluſion and neceſſary conſequence of the interlocutory judgment, for the court themſelves, if they had ſo pleaſed, might, upon the interlocutory judgment, have aſſeſſed the damages, and thereupon given final judgment before *Bibbins's* became bankrupts, and the inquiſition is only a matter of courſe taken to inform the conſcience of the court. There is no foundation to ſay that the bankruptcy was an abatement of the ſuit againſt *Mantell*, for ſuppoſe the effects of the bankrupts ſhould amount to pay 20*s.* in the pound and more, ſurely they might afterwards proceed to final judgment: the final judgment cannot be void, for the interlocutory judgment entitled *Bibbins's* to recover ſomething, which by the inqueſt was aſcertained; the aſſignees

by

by bringing this *scire facias*, have expreſsly affirmed the act of *Bibbins's* proceeding to final judgment. There is no doubt but a *scire facias* lies upon an interlocutory judgment; and it was objected that the aſſignees ought to have taken up the cauſe at that period, but if they had, this plea does not lie in the mouth of the defendant in anſwer to the aſſignees; indeed if the bankrupts themſelves had brought a *scire facias*, this plea might have been good, becauſe after they became bankrupts, perhaps they could have no legal right to have execution. Upon the whole, the defendant's plea diſcloſes ſuch facts as ſhew the aſſignees ought to recover, and therefore I am very clearly of opinion they muſt have judgment. The caſe of *Priddle* and *Thomas* is not ſo ſtrong as this.

12 Mod. How v. Tuton.

1 Mod. 93.

Bathurſt J.—The action certainly doth not abate upon the plaintiff's becoming a bankrupt, nor doth it abate if a defendant becomes a bankrupt; we *here* muſt look on this judgment as a right judgment while it remains unreverſed by another court, we cannot ſay that a judgment of our own pronouncing is nul and void in law.

Judgment for the aſſignees *per curiam*, *abſente Gould* J.

—— *verſus* Cooper. C. B.

Leſſee for years aſſigns his term, he cannot diſtrain for rent.

IN replevin, the defendant avows under a diſtreſs for rent due from the plaintiff to him upon an aſſignment of a leaſe of a term for years to the plaintiff, in which aſſignment there is no clauſe of diſtreſs; the ſingle queſtion is, Whether this is ſuch a rent for which a diſtreſs lies, there being no reverſion in the defendant. It was ſaid for the defendant that although rent be incident to the reverſion, yet it is not an inſeparable incident, and therefore it may be ſevered from the reverſion; and although there is no clauſe of diſtreſs in the aſſignment of the term, yet the rent reſerved thereupon may be conſidered as a rent-ſeck, and diſtrained for by the ſtatute 4 *Geo.* 2. *c.* 28. *ſec.* 5. and that it appears clearly to be the intent of the parties that the plaintiff ſhould pay rent to the defendant; this caſe was ſo clear, that the court gave judgment for the plaintiff without hearing his counſel.

Curia—There are two ways of creating a rent; the owner of the lands either grants a rent out of it; or grants the lands and reſerves a rent; there is no ſuch thing as a rent-ſeck, rent-ſervice, or rent-charge iſſuing out of a term for years. *Bro. Dette*, *pl.* 39. cites 43 *Ed.* 3. 4. *per Fynchden* Ch. Juſt. *C. B.* If a man hath a term for years, and grants all his eſtate of the term rendering certain rent, he cannot diſtrain if the rent be in arrear: This caſe is law and in point; therefore if the avowant will recover what is owing to him from the plaintiff, he muſt bring his action upon the contract.

Judgment for the plaintiff *per totam curiam.*

Smith *verſus* Cattel. C. B.

Action for holding to bail in an inferior court when no more than 30 *s.* was due.

SPECIAL action upon the caſe, wherein the plaintiff declares that whereas by the laws of this realm no perſon ought to be arreſted without a probable cauſe, yet the defendant falſely and maliciouſly, without any probable cauſe, in the court at *Daventry* ſued out a precept againſt the plaintiff in an action upon the caſe, which the defendant falſely and maliciouſly cauſed to be indorſed for bail for 2 *l.* 14 *s.* againſt the plaintiff, and thereupon cauſed the plaintiff to be arreſted and held to bail for that ſum; and the plaintiff avers that he only was indebted to the defendant in 30 *s.* and no more, and that the defendant had no right to hold him to bail by the law and cuſtom of that court for that ſum, whereas he maliciouſly held the plaintiff to bail for 2 *l.* 14 *s.* in order to oppreſs him, to his damage. Upon not guilty there was a verdict for the plaintiff; and now it was moved in arreſt of judgment, that it did not appear upon the face of the declaration for what ſum the court at *Daventry* could hold to bail; but *per curiam*, ſince the ſtatute of 12 *Geo.* 1. for preventing frivolous and vexatious arreſts, no perſon can be held to bail in an inferior court for leſs than 40 *s.* and here it is averred that no more than 30 *s.* was due to the defendant, and that he had no cauſe of action whereby, by the law or cuſtom of the court of *Daventry*, the plaintiff ought to be held to bail. The declaration is well enough; the ſting of all theſe kind of actions is *malice* and *falſehood*, and injury done in purſuance thereof.

Judgment for the plaintiff.

Rogers *verſus* Payne. C. B.

Covenant for payment of money cannot be diſcharged without deed. Yelv. 192. Cro. Jac. 254.

IN covenant, breach aſſigned for non-payment of a ſum of money; the defendant pleads a diſcharge (in the nature of a releaſe) without deed, in ſatisfaction of all demands. Upon demurrer it was objected for the plaintiff, that the plea is ill; for that a covenant to pay money which is by deed cannot be diſcharged without deed, 6 *Rep.* 44. *a.* *Blake's* caſe; and of that opinion was the court, and gave judgment for the plaintiff.

Drage, Eſq. *verſus* Brand. C. B.

Debt for a penalty in articles; the jury ought to aſſeſs damages upon the breach aſſigned, according to the ſtat. of 8 & 9 W. 3. cap. 10. and ſhall not find the debt; or a venire facias de novo ſhall be awarded.

THE defendant's leaſe of a farm belonging to the plaintiff, ending at *Lady-day* 1766, and being deſirous to hold the farm another year, articles of agreement were executed between the plaintiff and defendant, dated the 26th of *March* 1766, that the defendant ſhould hold the farm from the 25th *March* 1766, for one year longer, and the defendant thereby agreed to hold the ſame for that term, and not to cut any tree or trees growing thereupon under the penalty of 500 *l.*, and would leave the fences in good repair. The defendant having very much miſuſed the farm, and cut down almoſt every tree growing thereupon, the plaintiff brought an action of debt for the penalty of 500 *l.*, and alledged that the defendant had cut down a great many trees, (mentioning them,) and that he did not leave the fences in good repair, whereby an action hath accrued to the plaintiff to have and demand of him the ſaid penalty of 500 *l.* Upon *nil debet*, there was a verdict for the plaintiff, that defendant owed the debt, and they found one ſhilling damages and 40 *s.* coſts.

Whereupon it was moved for the defendant upon the 8th and 9th of *W.* 3. *cap.* 10. that the jury ought to have taken into conſideration and aſſeſſed the real damages done to the farm, upon the breach aſſigned in the declaration, and if this verdict is to ſtand, the plaintiff may take out an execution for the whole penalty of 500 *l.* and his coſts, and the defendant will be obliged to go into Chancery to ſeek relief, which the ſtatute was made to prevent. After hearing counſel on both ſides, and time taken to conſider, the court was of opinion, that a *venire facias de novo* ought to be awarded; that the ſtatute was made for the benefit of defendants; that the plaintiff was bound down by the ſtatute, and obliged to aſſign as many breaches in this caſe as he pleaſed; that the damages might be aſſeſſed by the jury upon each breach; and it is not in the plaintiff's election to take a verdict for the whole debt, as he has done in the preſent caſe; and there muſt go a *venire facias de novo*, the verdict being defective.

Bibbins and others *verſus* Mantell, a Priſoner. C. B.

THE plaintiffs having proceeded to final judgment in laſt *Michaelmas* term, when the defendant was a priſoner, and the plaintiffs not having charged him in execution in laſt *Hilary* term, according to the rule of the court, it was now moved on the behalf of the defendant that he might be diſcharged out of priſon by *ſuperſedeas*; to which it was anſwered and admitted, that the plaintiffs did proceed to final judgment againſt the defendant in laſt *Michaelmas* term, but the plaintiffs being then bankrupts could not legally charge him in execution, neither could the aſſignees under the commiſſion of bankrupt charge him, without firſt ſuing out a *ſcire facias* to ſhew cauſe why they ſhould not have execution upon the judgment againſt the defendant, which they accordingly with due diligence ſued out returnable the firſt return of laſt *Hilary* term, to which the defendant pleaded a plea which was held to be bad upon a demurrer, in this very term, (ſee the caſe of *Hewit & al. Aſſignees*, &c. v. *Mantell* before,) and therefore the defendant himſelf by pleading a bad plea has hindered the aſſignees from charging him in execution in laſt *Hilary* term, which they might have done if he had not pleaded.

Final judgment againſt a priſoner in Michaelmas term laſt, the plaintiffs being then bankrupts, aſſignees could not charge him in execution in Hilary term laſt, being prevented by the defendant's plea to their ſcire facias.

Curia—*Bibbins's* the bankrupts could not charge the defendant in execution in laſt *Hilary* term, becauſe the aſſignees were entitled to the benefit of the judgment, had then brought a *ſcire facias* upon it, and, if *Mantell* has any lands, (which he may have for any thing we know) they may perhaps chooſe an *elegit* againſt his lands, and not to charge his perſon in execution. The rule to ſhew cauſe why the defendant ſhould not be diſcharged by *ſuperſedeas* was diſcharged, the aſſignees having proceeded with due diligence.

1 Mod. 93.

Denny *verſus* Trapnell, Eſq. C. B.

TRESPASS for taking and carrying away an anchor of the plaintiff at *Ipſwich*, of the value of 6 *l.*, judgment by *nil dicit* was of laſt *Hilary* term, and a writ of inquiry of damages executed in the laſt vacation, *April* the 14th, (returnable the firſt return of the preſent term,) before two perſons under-ſheriffs extraordinary appointed by deputation under the hand and ſeal of the high-ſheriff of *Suffolk* for that purpoſe; the jury aſſeſſed 77 *l.* for the plaintiff's damages. This term began upon *Wedneſday* the 20th of *April*, and upon *Saturday* the 23d, being the 4th day in term, at three o'clock in the afternoon, the plaintiff might have ſigned final judgment if he had pleaſed, but not having ſo done, the defendant on *Monday* the 26th of *April* moved the court that the inquiſition

An inquiſition taken before two under-ſheriffs extraordinary ſet aſide, for the high-ſheriff can appoint no more than one under-ſheriff extraordinary.

inquiſition might be ſet aſide for two reaſons, firſt, becauſe the high-ſheriff cannot depute two perſons to take an inqueſt, for if he can appoint two, he can appoint twenty-two, or any other number; 2*dly*, becauſe the damages of 77*l.* aſſeſſed for an anchor worth no more than 6*l.* are exceſſive; whereupon a rule was made to ſhew cauſe why the inquiſition ſhould not be ſet aſide. Upon ſhewing cauſe for the plaintiff it was objected, that this motion was like a motion in arreſt of judgment, or for a new trial, and therefore the defendant not coming to move it within the firſt four days in term, according to the courſe of the court, this rule ought not to have been made; *ſed non allocatur*, *per curiam*—The defendant made the motion before final judgment was ſigned, and ſo came ſoon enough. 2*dly*, It appeared by affidavits on the behalf of the plaintiff, that he was a fiſherman; that his veſſel was lying at anchor in the port of *Ipſwich*, and ready to ſail in order to fiſh for ſprats; that ſuch fiſherman, in the ſprat ſeaſon, can get 20*l.* *per* week clear; that the defendant diſtrained the anchor worth 6*l.* for a toll of 8*d.* pretended to be due for every fiſhing veſſel there, and that by the taking away the anchor the plaintiff was delayed in his voyage about two weeks, and that the defendant upon the executing the writ of inquiry made a defence, and therefore it was ſaid the damages were not exceſſive. 3*dly*, It was ſaid, that the practice of appointing an under-ſheriff extraordinary upon ſuch occaſion as this, had been often allowed by the court of King's Bench; and 4*thly*, That the plaintiff's moſt material witneſs was gone to ſea, and he did not know when he would return, and therefore the inquiſition ought not to be ſet aſide. For the defendant it was replied, that the practice of the King's Bench of allowing the appointment of *one* under-ſheriff extraordinary was right enough, but there is no inſtance of an appointment of *two* under-ſheriffs extraordinary in *one cauſe*; and that the defendant would admit the evidence before given by the now abſent witneſs.

If final judgment be not before ſigned, a motion to ſet aſide an inquiſition may be made the 6th day in term after the writ of inquiry is returnable.

Curia—We ſhall ſay nothing as to the damages, whether they are, or are not exceſſive. There is no inſtance of deputing two under-ſheriffs extraordinary to take an inqueſt, for if the high-ſheriff may appoint two, he may appoint twenty or more, if he can exceed one, no line can be drawn to limit the number: beſides, it appears that the ſworn under-ſheriff lived in the ſame town, and therefore the writ of inquiry ought to have been executed before him. Let the inquiſition be ſet aſide, and the writ of inquiry be executed before the judge at the next aſſizes for the county of *Suffolk*, and the evidence of the abſent witneſs be admitted at the defendant's requeſt.

Serjeant *Leigh* for the defendant; Serjeant *Foſter* for the plaintiff.

Garratt *verſus* Mantell, a Priſoner. C. B.

RULE to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody by writ of *ſuperſedeas*, the plaintiff not having charged him in execution according to the courſe of the court. Upon ſhewing cauſe it appeared to the court that final judgment for 6000 *l.* debt, after a verdict was ſigned and entered in the vacation after laſt *Michaelmas* term, that upon the 27th day of *January*, the 4th day in the laſt term, the defendant was brought up in order to have been charged in execution, but a writ of error was then brought and allowed, but no bail was put in thereupon until the 30th of *January*; that an injunction bill was filed by defendant againſt the plaintiff, but no injunction was ſued out.

A priſoner brings a writ of error, the plaintiff is not obliged to charge him in execution the 2d term after judgment.

Curia—The plaintiff ſhall have the *whole*, *viz.* every day of the ſecond term after final judgment ſigned, to charge a priſoner in execution, and it appears the defendant has hindered the plaintiff from ſo doing, ſeveral days in the laſt term, by bringing a writ of error; therefore the rule muſt be diſcharged.

for a plaintiff ſhall have every day in the 2d term to charge a priſoner.

Freeland *verſus* Hunt. C. B.

IN covenant, on a deed of aſſignment by the defendant of particular debts, and he covenants that none of thoſe debts were ſatisfied; judgment by default, and a writ of inquiry executed; a fatal miſtake being now found out in the declaration, it was moved that the interlocutory judgment might be forthwith entered upon record agreeable to the declaration delivered, and the roll be brought into the proper office, and that the defendant might have four days to move in arreſt of judgment after the roll is brought in. Upon ſhewing cauſe, it appeared that the defendant attended the executing the writ of inquiry by counſel, and croſs examined the plaintiff's witneſſes.

After a defence made on a writ of inquiry, the defendant not allowed to take advantage of a miſtake in the declaration.

Curia—We lament that entries on the roll are not made at the times when they ought to be made; the rule muſt be diſcharged, becauſe the defendant did not rely on the miſtake, but has made a defence on the executing the writ of inquiry.

In the Common Pleas.

Nota; Trinity term in the 8th year of king *Geo.* 3. began on the 3d day of *June* 1768, when the court ordered, that upon proceſs returnable the *firſt, ſecond, or third* return of any term, if the plaintiff declare within four days before the end of the term, the defendant ſhall plead without an imparlance.

TRINITY TERM,

8 *Geo.* III. 1768.

Bates *verſus* Barry, Eſq. C. B.

A defendant was held to bail a ſecond time for the ſame cauſe of action, after plaintiff had diſcontinued the firſt writ, by reaſon of a miſtake.

THE plaintiff brought a former action againſt the defendant, held him to bail for 70 *l.* declared againſt him in an action upon the caſe upon a ſpecial agreement in writing under the defendant's hand and ſeal, not ſtamped; and the cauſe being at iſſue, the plaintiff's attorney found out he had made a miſtake in declaring in an action upon the caſe, the writing being made and executed in *Ireland*, where no ſtamps are neceſſary, was a good deed, and the plaintiff ought to have declared in *covenant*, therefore he diſcontinued that action upon payment of coſts; and having now brought this ſecond writ for the ſame cauſe of action, and arreſted the defendant a ſecond time, whereupon the ſheriff hath returned a *cepi corpus*: it was moved that the defendant might be diſcharged out of the cuſtody of the ſheriff upon entering a common appearance, for that it was oppreſſing and haraſſing the defendant to arreſt him, and oblige him to put in ſpecial bail twice for the very ſame cauſe of action.

Curia—This ſeems to have been a mere miſtake, and not done with any intent to oppreſs or haraſs the defendant; if any ſuch intent had appeared, the court would certainly have diſcharged

the defendant upon entering a common appearance; but it would be too much to say the plaintiff in this case should lose his bail by a mere slip of his attorney? so the rule was discharged. *Absente Bathurst* J.

Evans *versus* P——, an Attorney of the C. B.

EVANS and one *C.* made an affidavit against *P.* that he had been guilty of some malpractice with respect to a bill of costs for business done in the county court of *Monmouth*, whereupon it was moved that he might answer the matters of the affidavit; to which it was objected on the behalf of *P.* that this was a transaction in an inferior court, and this court would not intermeddle therein; and cited a case of *Henderson* v. *Ilderton*, *Hilary*, 3 *Geo.* 3. *C. B.* when upon an application of this sort, this court thought they had no power to proceed against an attorney of the court in a summary way, charged with a misbehaviour in his practice in an inferior court, (the Mayor's court of *Newcastle*,) to make him answer the matters of an affidavit, because they could do nothing with the cause, but must leave *that* in *statu quo*.

If an attorney of this court doth any thing wrong quatenus an attorney, in an inferior court, this court will oblige him to answer the complaint.

Curia—An attorney cannot practise in an inferior court if he is not an attorney of a superior court, and that is the reason why this court interferes: where deeds are put into an attorney's hand (who happens to be concerned for the adverse party) and not re-delivered, this court interferes; and if an attorney of this court doth any thing wrong *any where quatenus* attorney, this court interferes, whereupon Mr. *P.* agreed to accept of a less sum than he had demanded in the county court of *Monmouth*, and the matter was compromised at the bar.

Perkin *versus* Proctor and Green. C. B.

TRESPASS for entering the plaintiff's house, and disturbing him in his possession thereof; the second count is for expelling him from the possession thereof; upon the general issue this cause was tried before the Lord Chief Justice *Wilmot* last *Easter* term at *Westminster*: verdict for the plaintiff, damages 40 *l.*

Trespass lies against the assignees under a commission of bankruptcy sued out against a victualler, or any other person not liable to be a bankrupt.

The evidence given at the trial was as follows; *viz.* That the plaintiff on the 8th of *April* 1763, purchased of one *William Goodall*, a publican, his interest in a term of years in a house he was then in possession of, and held by lease (being the house in which, &c.) which lease had been some time before deposited in the hands of the defendants, who are brewers, (of whom *Goodall*

bought his beer,) as a *ſecurity* for a debt due to them from *Goodall*: that *Goodall* granted to the plaintiff an under-leaſe, for which he paid *Goodall* 40 *l.* for the good-will of the houſe, and paid him 35 *l.* for the goods in the houſe; that upon the 26th of *April* 1763 a commiſſion of bankrupt iſſued againſt *Goodall*; he was thereupon declared a bankrupt, and the meſſenger ſeized all the goods in the houſe, which were bought by the plaintiff of *Goodall* with the knowledge and upon the recommendation of the defendants; the plaintiff continuing in poſſeſſion under his under-leaſe, and the defendants being aſſignees of *Goodall*, brought an ejectment as aſſignees againſt the plaintiff, recovered, and put one of their ſervants in poſſeſſion of the houſe: that the plaintiff having at an expence got another public houſe in the ſame ſtreet, applied for a licence, which was much oppoſed by the defendants; but the juſtices being informed how the plaintiff had been treated by the defendants, did remove the licence to the plaintiff, and ſaid they never would licenſe the houſe ſo taken poſſeſſion of by the defendants; and within twelve months afterwards the defendants ſurrendered their poſſeſſion under the judgment in ejectment to the original landlord, by which the plaintiff's intereſt in the houſe was loſt: that the plaintiff hearing of the late determination in the court of King's Bench, that a victualler or common alehouſe-keeper is not liable to a commiſſion of bankrupt, brought *trover* for the goods and recovered 35 *l.* the ſum he paid for the ſame, and has now brought *treſpaſs* and recovered the ſum of 40 *l.* damages. *Nota*; the commiſſion of bankruptcy was ſuperſeded the 2d of *February* 1768.

It was now moved for a new trial, for two reaſons; firſt, that treſpaſs *vi & armis* doth not lie in this caſe; 2*dly*, that 40 *l.* damages are exceſſive; upon ſhewing cauſe it was anſwered for the plaintiff that treſpaſs *vi & armis* is the proper action, and that this is like the caſe where an execution has been executed upon an irregular judgment, which is afterwards vacated; treſpaſs *vi & armis* lies againſt the plaintiff in that judgment. 2*dly*, The damages in this caſe are what the plaintiff hath really ſuſtained, for he gave 40 *l.* for the good-will of the houſe; they belong to the jury, and are not exceſſive. In anſwer, it was ſaid for the plaintiff, that this action was brought before the commiſſion was actually ſuperſeded, for the Lord Chancellor's order for ſuperſeding it was only made two days before the trial, and that while the commiſſion was ſubſiſting they acted under a proper authority, and could not be treſpaſſers; 2 *Roll. Abr.* 555. 6 Y. *pl.* 4. he who comes to a thing lawfully cannot be a treſpaſſer: to which it was anſwered, that the cauſe determined in *Banco Regis*, *Eaſter* term 1767, of *Rolls* v. *Rawlinſon*, was *trover* brought in a ſimilar caſe to this, before the commiſſion was ſuperſeded; *per Clive* J. *Turner* v. *Felgate*, 1 *Lev.* 95. upon a judgment vacated an officer

officer is excuſed for executing an execution, but the party is not; the court took a few days time to conſider, and then gave judgment to the following effect:

Curia—If the late reſolution in *B. R.* that a victualler cannot be a bankrupt, had not happened, probably the preſent action would never have been brought; and the Chief Juſtice, who tried the cauſe, thought it a very hard caſe, and did recommend it to the jury to find ſmall damages; but they found 40 *l.*, which he thought they meaſured by the ſum which the plaintiff paid *Goodall* for the good-will of the houſe. It is now moved that, in point of law, treſpaſs will not lie; 2*dly*, that the damages are exceſſive; the preſent action is againſt the perſons themſelves who ſued out the commiſſion of bankrupt, who are bound to ſupport the legality of their acts, and is not like the caſe of an officer executing a writ of execution upon a judgment, which is afterwards vacated. We are all of opinion, that the commiſſion of bankruptcy is void, and of no avail; the juriſdiction concerning bankrupts is confined to particular perſons and caſes; as, that the perſon ſubject to a commiſſion muſt be a trader, muſt be indebted in ſuch a ſum, muſt do ſome particular act, *&c. &c.* The court of Chancery acts herein ſolely upon the application of the party petitioning, at whoſe peril the commiſſion iſſues; and if he ſues it out upon any falſe ſuggeſtion, the law gives a remedy againſt him to the party whoſe liberty and property is thereby invaded; there are a variety of commiſſioners whoſe power and juriſdiction are limited and confined, which if they exceed, the law will give remedy againſt them; and where courts of juſtice aſſume a juriſdiction which they have not, an action of treſpaſs lies againſt the officer who executes proceſs, becauſe the whole proceeding was *coram non judice*, the caſe of the *Marſhalſea*, 10 *Rep.* 76. *a. b.*; where there is no juriſdiction at all, there is no judge; the proceeding is as nothing. This is the very caſe of the *Marſhalſea*; the party in this caſe is no trader, there is no foundation to build a commiſſion upon, the commiſſioners had no power at all. Where a rate is unduly taxed, the warrant of the juſtices of peace for levying thereof will not excuſe the churchwarden or overſeer of the poor who diſtrains for it; *Nichols* v. *Walker and Carter*, *Cro. Car.* 395. And it is not like where an officer makes an arreſt by warrant out of the King's court, which if it be error the officer muſt not contradict, becauſe the court hath general juriſdiction; but here (ſays Juſtice *Croke*) the juſtices of the peace have but a particular juriſdiction. The caſe of *Terry* v. *Huntington & al. Hard.* 480. is a very ſtrong caſe. In trover for goods levied by warrant of the commiſſioners of exciſe, the queſtion was, if they adjudge low wines to be **ſtrong waters* perfectly made, upon the *ſtat.* 12 *Car.* 2. *c.* 23. Whether an action lies againſt the officer? *Per Hale* Lord Chief Baron—The commiſſioners have only

* Wines in Hardr. 480. which ſeems to be a miſtake in the preſs.

only a ſtinted, limited juriſdiction, and if they exceed it, that does not take away the juriſdiction of this court. Special juriſdictions are circumſcribed: 1. With reſpect to *place*, as a *leet* or a *corporation*: 2. With reſpect to *perſons*, as 10 *Rep.* the caſe of the *Marſhalſea*: 3. With reſpect to the ſubject-matter of their juriſdiction; and the ſtatute limits their juriſdiction in all theſe three reſpects; and therefore if they give judgment in a cauſe ariſing in another place, or betwixt private perſons, or in other matters, all is void and *coram non judice*, as if they ſhould adjudge *roſe water* to be *ſtrong water*. Where a judgment is vacated for irregularity, the party is never excuſed, if an execution is executed thereupon; yet the ſheriff's officer is excuſed, becauſe he has the king's writ to warrant him. *Turner* v. *Felgate*, 1 *Lev.* 95. 1 *Sid.* 272. Though theſe caſes have been ſometimes grumbled at, yet they are good law. *Carth.* 275. 2 *Stra.* 509. In the caſe of an irregular judgment againſt the plaintiff, and a *capias ad ſatisfaciendum* executed thereupon, in treſpaſs and impriſonment the party and the officer joined in a plea of juſtification under the writ; and the officer was therefore held guilty as well as the party; but where a judgment is reverſed for error it is different, and ſtands good until reverſed; one caſe is the fault of the party himſelf, the other is the error of the court. *Smith* v. Dr. *Bouchier* and others, vice-chancellor, judge, gaoler, and party, in a cauſe in the chancellor's court of the univerſity of *Oxford*: the queſtion aroſe upon a cuſtom, that a plaintiff making oath that he has a perſonal action againſt any perſon within the precincts of the univerſity, and that he *believes* the defendant will not appear, but run away, the judge may award a warrant to arreſt him and detain him till ſecurity be given for his anſwering the complaint. On the 7th of *Auguſt* 1731, the defendant *Bouchier* having the privilege of the univerſity, made a complaint to the defendant *Shippen* the vice-chancellor of a perſonal action againſt the plaintiff *Smith* to his damage of 1000*l.* according to his eſtimation, and that he *ſuſpected* the plaintiff *Smith* would run away; that he took his oath of and upon the truth of the premiſes, upon which a warrant was granted to the other defendants, who arreſted *Smith* and kept him in priſon eight days for want of ſureties. The court held, that the party muſt ſwear to his *belief* of the defendant's deſign to run away, in order to give the chancellor's court this juriſdiction, and that ſwearing that he *ſuſpected* the defendant would run away was not ſufficient, and that nothing but *belief* would do, therefore the whole was *coram non judice*; and Lord *Hardwicke* was of opinion, that *treſpaſs and falſe impriſonment* well laid againſt the vice-chancellor, judge, gaoler, officer, and all of them; and though Sir *John Strange* in his report of this caſe, 2 *Stra.* 994. ſays, that the officer and gaoler might have been excuſed if they had juſtified without the bailiff or vice-chancellor, yet it ſeems they could not, as the whole proceeding was *coram non judice*, and a mere nullity

(there-

(therefore *quære* as to that point). See the case of *Martin* and *Marshall*, (the mayor of *York*,) and *Key*, a serjeant at mace, *Hob.* 68. in trespass and false imprisonment, where the prescription was for the mayor of *York* to direct precepts for appearance in the court of Chancery *there*; the court held such precepts must be intended to be made in writing, and because the justification did alledge that the command given by *Marshall* the mayor to *Key* the officer to take *Martin* was by *word*, the plea was held ill. This is against a judge of a court acting where he had a limited jurisdiction, but had no jurisdiction of process *ore tenus*, To the action well laid against him: there must be a jurisdiction of the *process* as well as of the *person* and cause.

In the case at bar we lay the superseding the commission of bankruptcy entirely out of the case, as if it had never been superseded at all. The commissioners had no more power to act under the commission of bankrupt against *Goodall* who was a victualler, than if he had been a divine, a lawyer, or a physician: although it may be thought hard to adjudge a man a trespasser in a case heretofore doubtful, yet the law cannot bend to particular cases, and it is more for the general utility to suffer particular hard cases, than to give usurped authority any effect at all; the hardship of particular cases is thereby most amply compensated to the public. Hard. 478.

As to the damages, the Lord Chief Justice was pleased to say, he wished they had been 40*s.* instead of 40*l.*; that he thought there was a foundation for the jury to have lessened them, but they thought otherwise, and they (he said) are the constitutional judges as to damages; and there must be some very extraordinary conduct in a jury to induce the court to meddle with damages. So the *postea* was ordered to be delivered to the plaintiff, who had judgment.

John Connor *versus* John Connor. C. B.

JOHN Connor of *Barnett* was summoned to answer *John Connor* of a plea that he render to him 68*l.* which he owes to him and unjustly detains, *&c.* and whereupon the said *John Connor* declares upon a bond; the defendant craves *oyer* of the bond and condition, which is set forth; whereupon the defendant demurs in law, and shews for special cause of demurrer that it does not appear that the plaintiff hath any cause of action, or that the defendant is indebted, or that he executed the bond. It was objected, that it did not appear to the court which *John Connor* executed the bond, because there is no distinction by way of addition to the name of *John Connor* after the first line of the declaration: to which it was answered and resolved by the court, that

What is sufficient certainty in a declaration.

Dyer 70. b. margin. Cro. Eliz. 267.

Bro. Addition, pl. 47. pl. 16. Bar. pl. 76.

that ſufficient certainty appears upon the record that *John Connor* of *Barnett* is indebted upon a bond executed by him to *John Connor* of *Friday-ſtreet*, the *oyer* whereof is ſet forth; and therefore *John Connor* of *Friday-ſtreet* muſt have judgment againſt *John Connor* of *Barnett*.

MICHAELMAS TERM,

9 *Geo.* III. 1768.

Rogers *verſus* Carter, Eſq. C. B.

A game-keeper of a lord of a manor has a right to carry a gun any where out of the manor.

TRESPASS againſt the defendant, a juſtice of the peace, for taking and carrying away the plaintiff's *gun* from him. Upon the general iſſue Not guilty, which was tried before Lord *Mansfield* upon the home circuit laſt ſummer, there was a verdict for the plaintiff; and Serjeant *Nares* having moved for a new trial, Mr. Juſtice *Gould* now reported to the court the facts proved at the trial, as they had been ſtated to him by Lord *Mansfield*; *viz.*

That Lord *H.*, lord of the manor of *Ringwood*, by writing under his hand and ſeal, on the 26th day of *Auguſt* laſt, made and appointed the plaintiff his *game-keeper* within the ſaid manor, which appointment or deputation was duly entered and regiſtered with the clerk of the peace where the manor lies on the 27th of *Auguſt*; that on the 10th of *October* laſt the plaintiff hunted and beat for game in the ſaid manor, and in a large field *there* ſprung a covey of partridges; after their firſt flight he ſhot at them within the manor; they took a ſecond flight, and the plaintiff purſued them out of the manor, but could not find them; as he was returning again to the manor of *Ringwood*, he was met by the defendant about three quarters of a mile diſtant from that manor, who aſked him if Lord *H.* had qualified him; the plaintiff anſwered, "I have a deputation from the lord of the manor of "*Ringwood*;" the defendant replied, "You are now out of *that* "manor,"

"manor," and demanded his *gun*, and took it from him; that the defendant did not ſhoot out of the manor, but was three quarters of a mile *out* of the manor with his gun and dog with an intention to ſhoot at game.

By the ſtat. 3 *Geo* 1. *c.* 11. it is enacted, That no lord of a manor ſhall make any perſon to be a *game-keeper* with power to kill game, unleſs ſuch perſon be qualified by the laws of this realm ſo to do; or unleſs ſuch perſon be truly and properly a ſervant to the ſaid lord; or be immediately employed and appointed to take and kill the game for the ſole uſe of the ſaid lord, and not otherwiſe.

It alſo appeared that the plaintiff was neither a qualified perſon to kill game by the laws of the realm, nor was properly a menial ſervant to the lord of the manor; whereupon two queſtions aroſe at the trial; 1*ſt*, Whether, from the facts proved, the plaintiff had been guilty of any offence againſt the game-laws, ſo as to ſubject him to have his gun ſeized and taken from him by the defendant? 2*d*, Whether, as the defendant was neither a qualified perſon, nor a menial ſervant to the lord, he could be appointed his *game-keeper?* Lord *Mansfield* thought the defendant had no right to ſeize the gun; and that it was not neceſſary that the plaintiff ſhould be a qualified perſon, or a menial ſervant to the lord, in order to make him capable of having a deputation as a game-keeper from the lord of the manor: So the jury found for the plaintiff. But as the lords of manors and country gentlemen preſent at the trial were of different opinions about this matter, Lord *Mansfield* ſaid he thought the beſt way was to move the court for a new trial without coſts, and if he had thought this could not have been done, he would have made a caſe for the opinion of the court, or have directed the jury to have found a ſpecial verdict.

This matter was debated on *Friday November* the 18th, by Serjeant *Leigh* for the plaintiff and Serjeant *Nares* for the defendant, and on *Monday* the 21ſt of *November* the court diſcharged the rule to ſhew cauſe why there ſhould not be a new trial.

Curia—There are two queſtions; 1*ſt*, Whether the plaintiff was a perſon qualified to receive a deputation from the lord of the manor to be a *game-keeper* at all.

2*d*, Suppoſing he is, Whether the juſtice of peace (the defendant) under the *ſtat.* 5 *Ann. c.* 14. *ſ.* 4. had a right to take his *gun* from him, while he was ſporting, for the purpoſe of killing game, for we think it will make no difference in the caſe, whether he *ſhot*, or not, out of the manor.

The *ſtat.* 22 & 23 *Car.* 2. *c.* 25. is the firſt act that introduces *game-keepers*, whereby it is enacted, that lords of manors, *&c.* may by writing under their hands and ſeals authorize *game-keepers* within their royalties to ſeize guns, *&c.* or other engines for taking or killing game. See this ſtatute.

The *ſtat.* 4 & 5 *W.* & *M.* *c.* 23. *ſ.* 4. puts *game-keepers* upon a footing with the antient keepers of parks, whereby it is enacted, that all lords of manors or their *game-keepers* may within their royalties reſiſt offenders in the night-time in the ſame manner, and be equally indemnified as if ſuch fact had been committed within any antient chaſe, park or warren. See this ſtatute.

The *ſtat.* 5 *Ann.* *c.* 14. *ſ.* 4. adds power to the *game-keeper* to kill game upon the manor. See the ſtatute.

The *ſtat.* 9 *Ann.* *c.* 25. *ſ.* 1. enacts, That no lord or lady of a manor ſhall make above *one game-keeper* within *one* manor with power to kill game, and the name of ſuch perſon ſhall be entered with the clerk of the peace; ſuch entry to be made and viewed without fee. See the ſtatute.

The *ſtat.* 3 *Geo.* 1. *c.* 11. reciting the *ſtat.* 5 *Ann.* *c.* 14. and the *ſtat.* 9 *Ann.* *c.* 25. and the abuſe of thoſe ſtatutes, by lords of manors granting deputations to the farmers, tenants, and occupiers of the lands within their reſpective manors to be *game-keepers*, with power to kill and deſtroy the game, which practice tended to the deſtruction of the game; for remedy whereof it was by this ſtatute enacted, that no lord or lady of a manor ſhall appoint any perſon to be a *game-keeper* with power to kill game, unleſs ſuch perſon be qualified, or be truly a ſervant to the ſaid lord or lady, or immediately employed to kill game for the ſole uſe of ſuch lord or lady, *&c.* See the ſtatute.

As to the firſt queſtion, we are all of opinion that the plaintiff was a perſon properly qualified to receive a deputation from the lord of the manor to be a game-keeper, although he was neither a qualified perſon, nor a menial ſervant to the lord of the manor; that this *ſtat.* 3 *Geo.* 1. never was meant to check or hinder lords living at a diſtance (from their manors) from appointing any perſon whatſoever to kill game for the immediate uſe of the lord; if it was otherwiſe, this act would take away the right of every lord living at a great diſtance from his manor; we therefore are of opinion that the plaintiff was well qualified to kill game in the manor of *Ringwood*, and conſequently to carry a gun for that purpoſe.

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The plaintiff being ſo qualified, the ſecond queſtion ariſes upon the *ſtat.* 5 *Ann. c.* 14. *ſec.* 4. Whether the juſtice of peace under *that ſtatute* had a right to take his *gun* from him while he was ſporting for the purpoſe of killing game in *another manor*, out of the *manor of Ringwood?* for we take it to be true that the plaintiff intended to kill game when he was out of that manor of *Ringwood*, and when the gun was taken from him; and think it makes no difference in the caſe whether he ſhot at game out of that manor of *Ringwood* or not; if he had killed game *where* he was not a game-keeper, he might have been convicted in the penalty of 5 *l.*; but he was entitled to keep and have dogs, guns, and nets for the taking and killing of game *any where:* upon the debating this caſe at the bar, caſes were cited from the civil law-books and our law-books touching the *property* of game and other creatures *feræ naturæ*, and the lawfulneſs of *purſuing* the ſame; but we ſhall not take notice of thoſe matters, becauſe we are now to judge upon a law of penalties, and the words of penal laws muſt in all caſes be ſtrictly purſued; if the words be *doubtful*, courts of juſtice will explain and conſtrue them in favour of the *ſubject;* if they be *plain and clear* words, the office of the court is *jus dicere et non dare*, and we muſt not rack and torture words to puniſh the ſubject.

The firſt part of *ſec.* 4. of this *ſtat.* 5 *Ann.* gives a penalty of 5 *l.* againſt any perſon not qualified for keeping an engine to kill game, and then proceeds to give juſtices of peace and lords of manors power to take away the *game*, and *ſuch engine* in the cuſtody of ſuch perſon not qualified to keep the ſame: but *game-keepers* are all qualified to keep ſuch engines, therefore are not the objects of this clauſe.

But it is objected, the plaintiff was uſing the gun to kill game out of the manor of *Ringwood;* the anſwer is, he had a right to keep it *any where;* and if he killed game with it out of the manor, he might have been convicted in the penalty aforeſaid, but the juſtice had no right to take the gun from him; it would be confounding the right of *keeping* with the right of *uſing* the *gun* to ſay otherwiſe; we cannot think the legiſlature had any ſuch meaning.

The acts of parliament come from lords of manors themſelves, who moſt commonly furniſh their game-keepers with dogs, guns, nets, *&c.:* we cannot think their property was intended to be put in the power of their *game-keepers* to forfeit the ſame, whenever they might pleaſe to exceed their authority under the deputations. By the *ſtat.* 22 & 23 *Car.* 2. *game-keepers* themſelves are empowered to *ſeize guns.* What! ſhall a *game-keeper* in the very next manor to mine have a power to take my *game-keeper's gun*, if he happens to be treſpaſſing in my neighbour's manor?

this

this would be a humiliating disgrace indeed, and could never be meant by the legislature; and if *game-keepers* were permitted to seize one another's guns, there would be a kind of a *border-war* among them: if this was a doubtful case, we should incline to the same opinion we are of, to prevent breaches of the peace; but it is a clear case, and the *game-keeper* is neither within the words or meaning of the *stat.* 5 *Ann. c.* 14. *s.* 4. Upon the whole we are all of opinion that the *gun* of a *game-keeper* of a manor cannot be seized either *eundo* or *redeundo*, or any *where else*, and that the defendant the justice of peace had no right to take away the plaintiff's gun from him: the rule to shew cause why there should not be a new trial was discharged. *Per totam curiam.*

HILARY TERM,

9 *Geo.* III. 1769.

Freeman *versus* Jones, a surviving Partner with one Napleton.

The court refused to give the defendant leave to withdraw a special plea, and plead the general issue.

CASE upon promises for goods sold and delivered to the defendant and one *Napleton* his late partner deceased; the declaration was of *Easter term* last; in *Trinity term* last the defendant pleaded a bond given by him and *Napleton* in satisfaction: in *Michaelmas term* last the plaintiff replied to the country: now in the beginning of the present term Serjeant *Burland* moved that the defendant upon payment of costs might have leave to withdraw his *special plea* and plead the *general issue*, upon an affidavit that the special plea was pleaded by the mistake of the defendant's attorney, and that the defendant had a good defence to make upon the general issue; upon shewing cause Serjeant *Jephson* for the plaintiff produced an affidavit that the plaintiff's only material witness was gone to the *West-Indies* since the issue joined last term. Serjeant *Burland* in answer said this had often been done, where the plaintiff had not been delayed, as in this case he had not, for the plaintiff could not have tried his cause before this term.

Per

Per curiam—This has frequently been granted after a replication in ſome caſes; but here the plea goes to the action: it was pleaded ſo long ago as laſt *Trinity term*, and the defendant has *laid by all* laſt *Michaelmas* term, and there is no reaſon to let the defendant withdraw this ſpecial plea and plead the general iſſue: the rule was diſcharged, *abſente Clive* J.

Callaghan, an Attorney, Executor, &c. *verſus* Harris and his Wife. C. B.

THE plaintiff ſued out an *attachment of privilege* whereby the ſheriff was commanded to attach the defendants to anſwer the plaintiff in a plea of treſpaſs, *and alſo* that the defendants anſwer the plaintiff according to the cuſtom of the ſaid court *in a certain plea of trover*, and for converting of the goods and chattels of the ſaid plaintiff as executor as aforeſaid for one hundred and twenty-four pounds.

Ac etiam to anſwer the plaintiff in a plea of trover, &c. is well enough, though it would have been more clerk-like to have ſaid in a plea of treſpaſs upon the caſe, for converting the plaintiff's goods to his uſe.

The defendants having been arreſted upon this writ and held to ſpecial bail, Serjeant *Nares* moved for a rule to ſhew cauſe why a common appearance ſhould not be accepted for the defendants, alledging that the *ac etiam* in this writ doth not *particularly* expreſs the cauſe of action as the ſtatute of 13 *Car.* 2. *c.* 2. *ſ.* 2. directs; for that there is no ſuch cauſe of action as *a plea of trover*; but it ought to have been in a *certain plea of treſpaſs upon the caſe* for converting the goods and chattels of the plaintiff to the defendants' uſe to the plaintiff's damage of 124 *l.*

Upon ſhewing cauſe it was ſaid by Serjeant *Glynn* for the plaintiff, and reſolved by the court, that the cauſe of action is fully and clearly expreſſed; and although the *ac etiam* be not exactly clerical, yet nobody who reads it can doubt of the cauſe of action; beſides, ſince the ſtatute of *ac etiam* 13 *Car.* 2. the ſtatute of 12 *Geo.* 1. *cap.* 29. hath enacted, that no perſon ſhall be held to ſpecial bail before an affidavit be made and filed of the cauſe of action, which hath been done in this caſe, ſo that the defendants have had notice from *the* affidavit of the cauſe of action; and if *that* affidavit be ſufficient, the court cannot admit of a common appearance. The rule was diſcharged.

Nota; The *4th ſect.* of the *ſtat.* 13 *Car.* 2. *c.* 2. was not mentioned, which ſays, "This act ſhall not extend to any *attachment of privilege* at the ſuit of any privileged perſon, and upon ſuch writs of attachment ſuch courſe ſhall be taken for ſecurity for appearance as hath been uſed;" ſo that it ſeems there is no occaſion

occaſion to inſert an *ac etiam* of the particular cauſe of action in an attachment of privilege at the ſuit of an attorney who is a privileged perſon, in order to hold a defendant to bail.

Joſeph Hole *verſus* John Finch. C. B.

The defendant was ſerved with a copy of a *teſtatum capias ad reſpondendum* by the name of *Richard Finch*; and having entered a *common appearance* by his right name *John Finch*, the plaintiff declared againſt him by his right name *John Finch*. Upon an affidavit made by the defendant that he was ſerved as aforeſaid, and with a notice at the bottom of the ſaid *capias* directed thus, *viz. Richard Finch*, you are ſerved with this proceſs to the intent that you may appear, *&c.* and that he had not been ſerved with any other proceſs at the ſuit of the plaintiff, Serjeant *Nares* moved that all proceedings might be ſtayed for irregularity, and had a rule to ſhew cauſe.

The defendant was ſerved with a capias by the name of Richard, and appears by his right name, John, and the plaintiff declares againſt him by his right name, John; the court will not interpoſe in a ſummary way and ſet aſide the proceedings of the plaintiff for irregularity.

About the ſame time a ſimilar motion was made in a cauſe of *Jackſon* verſus *Doleman*, doctor in phyſic, *C. B.*

So where a defendant has a wrong addition given him in a capias, puts in bail by his right addition, and the plaintiff declares againſt him by his right addition, the court will not interpoſe upon motion.

The defendant was arreſted upon a *capias ad reſpondendum*, wherein his addition was *eſquire*, and he gave a bail-bond by the name and *addition* of *Robert Doleman, doctor in phyſic*, the plaintiff declared againſt him by his right addition of *doctor in phyſic*, whereupon it was moved that all proceedings might be ſtayed for irregularity. A rule to ſhew cauſe being made, the court ordered that both the above caſes ſhould come on to be debated at the ſame time; and now

Serjeant *Burland* ſhewed cauſe for the plaintiff *Hole*.

The objection is, that the *capias* is againſt *Richard Finch*, that the defendant has appeared by the name of *John*, and the plaintiff has declared againſt him by the name of *John*, and now the court is deſired to ſtay the proceedings for irregularity. This is an unfavourable caſe; the merits are not at all in queſtion; it is a motion to delay juſtice; and if the plaintiff's proceedings be bad in point of law, the defendant may take advantage thereof by pleading; in the preſent caſe he may crave *oyer* of the original writ; and if there be a *variance* between *that* and the count, he may plead it; and there is no caſe like this to be found wherever the court ſtayed proceedings as for an irregularity upon a motion; if there is, it is incumbent on the other ſide to ſhew it.

6 Mod. 28. 2 Salk. 658. 498. 4 Mod. 246.

Serjeant *Jephſon* ſhewed cauſe for the plaintiff *Jackſon*.

Where the *return* of the *capias ad reſpondendum* is wrong; where there are not 15 days between the *teſte* and return; where the notice for the defendant to appear is wrong and not agreeable to the act of parliament, or where there is no attorney's name to the writ, the court *upon motion* generally ſets the ſame aſide for irregularity; but I cannot find that the court ever ſet aſide proceedings in a cauſe *upon motion*, for a *variance* between the *capias*, or the *writ* and the *count*; the old way of declaring was to ſpread out and repeat the whole original writ in the declaration in all actions whatſoever, until the order made by this court in *Michaelmas* term 1664, *ſect.* 16. whereby it is ordered, "For avoiding of long and unneceſſary repetitions of the original writ in actions upon the caſe, and perſonal actions upon penal ſtatutes, that declarations in actions of treſpaſs upon the caſe, or perſonal actions upon any general ſtatute, namely hue and cry, monopolies, and for ſuits in the Admiralty, and ſuch like other than *debt*, repeat not the original writ, but only the nature of the action, *viz. A. B. was attached to anſwer C. D. in a plea of treſpaſs upon the caſe; or in a plea of treſpaſs and contempt againſt the form of the ſtatute.*" And when the whole *original writ* was ſo ſpread out on the roll, together with the *count* thereupon, if the *count* varied from the *writ* in any thing material, it was uſual for the defendant to plead in *abatement* or demur for the *variance*. In this caſe the defendant ought to have craved *oyer* of the *original writ*, and pleaded the *variance* if there was any.

Curia—At this day the courts of juſtice interpoſe in a ſummary way, and in many caſes ſet aſide proceedings upon motion, where the law hath provided other remedy; as where they ſee that a plea is frivolous and dilatory, and that there is no ground or foundation for pleading ſuch ſham plea, they will ſet it aſide; ſo they will upon motion ſet aſide executions irregularly iſſued and executed, and order the money levied thereon to be reſtored to the party, where the only remedy formerly was by *audita querela*; but neither of the caſes at bar are ſuch as ought in juſtice to induce the court to interfere in a ſummary way, and ſtay or ſet aſide the proceedings for irregularity.

Formerly, when the whole *original writ* was ſpread in the ſame roll with the *count* thereupon, if a *variance* appeared between the *writ* and *count*, the defendant might have taken advantage thereof, either by *motion* in arreſt of judgment, writ of *error*, plea in *abatement*, or *demurrer*. *Cro. Eliz.* 829. 185. 198. 330. 2 *Lutw.* 1181. S. P.—But afterwards it was determined, that if the

If a defendant will take advantage of a variance between the writ and count he muſt crave oyer of the writ and ſpread it on the record. Ante, 85. in B. R.

the defendant will take advantage of a *variance* between the *writ* and *count*, he muſt demand *oyer* of the writ and ſhew it to the court. 4 *Mod.* 246. *Ellery* v. *Hicks & Ux.* 2 *Salk.* 701. 658. 6 *Mod.* 303. And a caſe in MS. of *Groſs* v. *Lee*, which was replevin by *writ* for taking his *cattle*, the *count* was for taking a *grey horſe*, there was a demurrer for the *variance*, but judgment was for the plaintiff. *Parker* C. J. cited *Salk.* 701., and the court held that defendant cannot take advantage of a *variance* between the *writ* and *count* without ſhewing *oyer* of the writ.

There is no equity to authoriſe us to interpoſe in either of theſe caſes; and if the defendants in either caſe can take any advantage *rigore juris*, let them take it. One reaſon why the court ſhould not interpoſe is, that after the defendant hath appeared and is in court, there is an end of the *meſne proceſs*; and if the defendant craves *oyer*, it muſt be of the *original writ*, he cannot have it of the *meſne proceſs*; and if application was to be made to the Maſter of the Rolls, he certainly would not refuſe to order right *originals* to be made out in both theſe caſes. The rules muſt be diſcharged, but without coſts, this being a new caſe. *Per totam curiam.*

Rigg *verſus* Curgenven. C. B.

In an action upon the ſtatute for bribing a perſon to give his vote at an election for members of parliament, it is not neceſſary to prove that the perſon bribed had a right to vote.

ACTION of debt for 27,000*l.* brought againſt the defendant (upon the *ſtat.* 2 *Geo.* 2. for the more effectual preventing bribery and corruption in the election of members to ſerve in parliament) for corrupting and procuring 54 voters to give their votes at the laſt election for the borough of *Mitchell* in the county of *Cornwall*, wherein the plaintiff declares, that whereas *Mitchell* is an antient borough, and, for a long time paſt, two burgeſſes thereof have been elected and ſent, and ſtill of right ought to be elected and ſent to ſerve in parliament for the ſaid borough; and whereas, on the 12th of *March* in the eighth year of his preſent majeſty's reign, the king's writ under his great ſeal iſſued out of his court of Chancery, directed to the then ſheriff of *Cornwall*, reciting that whereas by the advice of his council, &c. he had ordered a *parliament* to be holden at *Weſtminſter* on the 10th day of *May* then next enſuing, the king by his ſaid writ commanded the ſheriff to make proclamation (ſo ſets out the whole writ); which writ on the 14th of *March* in the ſame year was delivered to *Francis Kirkham* eſq. then and ſtill ſheriff of *Cornwall*, to be executed in due form of law; by virtue whereof the ſheriff, on the ſaid 14th of *March*, made his precept in writing, ſealed with the ſeal of his office, directed to the *portreeve* of the borough of *Mitchell*, for the election there of two burgeſſes; by virtue of which precept, on the 21ſt day of *March*

March in the ſame year at *Mitchell*, an election of two burgeſſes for the ſame borough was had, which ſaid election was the firſt and next election of burgeſſes of the ſaid borough to ſerve as burgeſſes of the ſaid borough in the parliament of this kingdom after the committing of the ſeveral offences hereafter mentioned; and the ſaid *James Rigg* further ſays, that at the time of committing the ſeveral offences hereafter mentioned and before, and from thenceforth until, and at the ſaid election, *James Scawen* and *John Stephenſon* were candidates, that they might be elected and choſen to ſerve as burgeſſes for the ſaid borough at the aforeſaid then next parliament, that is to ſay, at the borough of *Mitchell* aforeſaid; and the ſaid *James Rigg* further ſays, that the ſaid *William Curgenven*, not regarding the ſtatute in this caſe lately made and provided, nor fearing the penalty contained therein, after the 24th day of *June* 1729, and before the ſaid election of burgeſſes in and for the ſaid borough, and whilſt the ſaid *James Scawen* and *John Stephenſon* ſo were and continued candidates as aforeſaid, and before the ſuing out the original writ of the ſaid *James Rigg*, to wit, on the *firſt* day of *March* in the eighth year of the reign of his preſent majeſty, at the borough of *Mitchell* aforeſaid in the ſaid county, did corrupt one *Peter Buddle*, the ſaid *Peter* being then and there and from thenceforth until and at the time of the election aforeſaid *having a right to vote in the ſaid election*, to give his vote in the ſaid election for the ſaid *James Scawen* and *John Stephenſon*, that they might be choſen burgeſſes to ſerve as burgeſſes for the ſame borough in the ſaid then next parliament of this kingdom, by then and there giving to the ſaid *Peter Buddle* a large ſum of money, to wit, the ſum of five pounds and five ſhillings of lawful money of *Great Britain*, as a gift or reward for his the ſaid *Peter Buddle's* giving his vote as aforeſaid for the ſaid *James Scawen* and *John Stephenſon* at and in the ſaid election, contrary to the form of the ſtatute in ſuch caſe lately made and provided; whereby, and by force of the ſaid ſtatute, an action hath accrued to the ſaid *James Rigg* to demand and have of the ſaid *William Curgenven* 500*l.*, part of the ſaid 27,000*l.* And the ſaid *James Rigg* further ſays, that the ſaid *William Curgenven*, not regarding the ſtatute in this caſe lately made and provided, nor fearing the penalty contained therein, after the 24th of *June* 1729 and before the ſaid election of burgeſſes in and for the ſaid borough, and whilſt the ſaid *James Scawen* and *John Stephenſon* ſo were and continued candidates as aforeſaid, and before the ſuing out the ſaid original writ of the ſaid *James Rigg*, that is to ſay, on the ſaid firſt day of *March in the ſaid* eighth year of his ſaid majeſty's reign, at the borough of *Mitchell* aforeſaid in the ſaid county, did corrupt one *Peter Buddle*, he the ſaid *Peter Buddle* then and there, and from thenceforth until and at the time of the election aforeſaid, having *a right to vote* at the ſaid election, to give his vote for the ſame *James Scawen* and *John Stephenſon* in the ſaid election, that they

Second count.

they might be chosen burgesses to serve as burgesses for the said borough in the said then next parliament of this kingdom, by then and there *agreeing to give the said *Peter Buddle* a large sum of money, to wit, the sum of 5*l.* and 5*s.* of like lawful money, as a gift or reward for his the said *Peter Buddle*'s giving his vote as aforesaid for the said *James Scawen* and *John Stephenson* at and in the said election, contrary to the form of the statute in such case lately made and provided; whereby, and by force of the said statute, an action hath accrued to the said *James Rigg* to demand and have of the said *William Curgenven* other 500*l.* other part of the said 27,000*l.* (there are 52 other counts in the declaration exactly the same as the two counts above mentioned respecting *Peter Buddle*, differing only in the names of 26 other persons corrupted by the defendant, among whom is one *William Hockin* in the 11th count, for which the plaintiff had a verdict): Nevertheless the said *William Curgenven*, although often requested, hath not rendered to the said *James Rigg* the said 27,000*l.* or any part thereof, but hath hitherto altogether denied and still doth deny to render him the same, whereupon the said *James Rigg* saith that he is injured, and hath damage to the value of 100*l.*; and therefore he brings suit, &c. The defendant pleads *nil debet*, whereupon issue is joined.

* Varies from the first count.

Breach.

This cause came on to be tried before Mr. Justice *Willes* at the last summer assizes for *Cornwall*, when a verdict was given for the plaintiff on the first and eleventh counts, subject to the opinion of this court on the following case, *viz.*

That the plaintiff on the trial of this cause proved the writ and precept as mentioned in the declaration, and that *James Scawen* and *John Stephenson*, esquires, were candidates, as therein mentioned, and that the right of voting for representatives for the said borough was in the inhabitants paying *scot* and *lot*, and that before the said return of burgesses, and whilst the said *James Scawen* and *John Stephenson* so were and continued candidates, and before the suing out the original writ of the plaintiff, to wit, the *first day of March* in the eighth year of his present majesty, the defendant did corrupt the said *Peter Buddle* and *William Hockin* to give their votes in the said election for the said *Scawen* and *Stephenson* that they might be chosen to serve as burgesses for the said borough, by then and there giving to the said *Peter Buddle* and *William Hockin* the sum of 5*l.* 5*s.* as a gift or reward for the said *Peter Buddle* and *William Hockin* giving their votes as aforesaid; that the said *Peter Buddle* and *William Hockin* afterwards voted at the said election for the said *James Scawen* and *John Stephenson*; but the defendant's counsel having objected to the aforesaid evidence, as not sufficient evidence of the said two persons' right to vote, a verdict was given for the plaintiff upon the two counts wherein the defendant is charged for having

having corrupted the ſaid *Peter Buddle* and *William Hockin*, ſubject to the opinion of this court, whether the evidence of the defendant's having bribed the ſaid two perſons to vote as aforeſaid, and their having actually voted accordingly without producing the *poor rates*, be evidence of their right to vote, as againſt the defendant.

This caſe was argued the 27th of *January* in this term, by Serjeant *Davy* for the plaintiff, and Serjeant *Glynn* for the defendant.

For the plaintiff it was inſiſted, that it was not neceſſary to alledge in the declaration that *Buddle* and *Hockin had a right to vote*, for the words of the ſtatute are, "Any perſon who hath "or claimeth to have, or hereafter ſhall have or claim any right "to vote," &c. So that if *A.* applies to *B.*, who has no right to vote, and bribes him to vote for *C.* and *D.*, and *B.* actually gives his vote for them, *A.* is equally guilty under this ſtatute as if *B.* had had a right to vote. The caſe of *Comb* v. *Pitt*, *B. R.* tried at *Wells* in 1763 before Mr. Juſtice *Wilmot*, was cited, which was a motion for a new trial, and was ſaid to be exactly like this caſe; that the declaration in *that* caſe was *verbatim* (except in dates and names) the ſame as this; it charged that *A. B.* had a right to vote, and did vote, but it was not proved at the trial that he had a right to vote; it was proved that *A. B.* voted and was received upon the poll, and that the defendant *Pitt* gave him money to give his vote. The court of *B. R.* held clearly it was concluſive evidence againſt the defendant *Pitt*, and gave judgment for the plaintiff. Lord *Mansfield* ſaid, Shall the defendant be allowed to defend himſelf by ſaying that *A. B.* had no right to vote, when it is clearly proved that the defendant gave him money for his vote? Certainly he ſhall not. *Wilmot* J. ſaid there could be no ſtronger evidence than *A. B.*'s being admitted to vote. This caſe in *B. R.* was relied upon, as directly in point for the now plaintiff.

For the defendant it was inſiſted, that the averment or allegation in the declaration "*that the perſons corrupted had a right to* "*vote*," is *material*, and *ſubſtantive*, and muſt be proved; that an *intention* to commit an offence cannot be puniſhed; but if theſe perſons had no right to vote, the offence is not committed, therefore it was neceſſary to prove they had a right, by proving they were inhabitants of *Mitchell*, and paid *ſcot* and *lot* there. That ſuppoſe an action of *ſcandalum magnatum* was brought for ſpeaking ſlander of a *peer* or a *judge*, &c. it muſt be proved that the plaintiff was *that great perſon* which the declaration alledges him to be, or he will fail in his action. That ſuppoſe it had appeared that *Buddle* and *Hockin* had no right to vote, the declaration would fail, becauſe the averment therein would not be ſupported. That the poll-book is not evidence of a perſon's

right to vote, for although he voted, it does not follow that he had a right to vote. Suppoſe in an action for criminal converſation it be proved that the defendant had ſaid that he had laid with the plaintiff's wife, *that* would not be evidence to be left to a jury, without proving the marriage of the plaintiff and his wife; and ſo it was ſaid to be determined in a caſe of Dr. *Smith* v. *Miller*, which was an action for criminal converſation with the plaintiff's wife. The proof at the trial was, that when the defendant was caught in bed with her, he begged the Doctor might not know it, and ſaid, "For God's ſake let it not be "known." The plaintiff could not prove his marriage, and it was held that the defendant's apprehenſions that the perſon, with whom he was caught in bed, was the plaintiff's wife, was not ſufficient to convict him, as there was no proof that he knew her to be ſuch, of his own knowledge. From this caſe it was ſaid, it follows that no belief or report that a perſon has a right to vote is evidence.

Curia—We are of opinion that it is not neceſſary in this caſe to alledge in the declaration, or to prove that *Budale* and *Hackis* had a right to vote; that the giving money to a man for his vote, and he ſtanding by the preſiding officer at the election, and giving his vote, which is received, and not objected to, or controverted, is concluſive evidence againſt the defendant, and that, as againſt *him* it is the moſt deciſive and beſt evidence that can be; and the caſe cited of *Comb* v. *Pitt* governs this caſe, and is exactly like it. As to the caſe mentioned of criminal converſation, to be ſure a defendant's ſaying in jeſt, or in looſe rambling talk, that he had laid with the plaintiff's wife, would not be ſufficient alone to convict him in *that* action; but if it were proved that the defendant had ſeriouſly or ſolemnly recognized that he knew the woman he had laid with was the plaintiff's wife, we think it would be evidence proper to be left to a jury, without proving the marriage. We think that the proof that theſe two perſons voted at the election, and their votes not then diſputed or controverted, is evidence of their having a right to vote, proper to be left to a jury; although it be not *concluſive* evidence of ſuch their right. Judgment for the plaintiff *per totam curiam*.

EASTER TERM,

9 *Geo.* III. 1769.

Holder, on the Demiſe of Sulyard, Eſq. Lord of the Manor of Haughley in Suffolk, *verſus* Preſton. C. B.

EJECTMENT of copyhold lands held of the manor of *Haughley*, tried at the laſt aſſizes held for the county of *Suffolk*, when a verdict was given for the plaintiff, ſubject to the opinion of this court upon the following caſe; which ſtates,

A copyholder ſurrenders to the uſe of his will, and by his will orders and directs two perſons to ſell, and to apply the monies ariſing thereby, for the purpoſes in the will; they may ſell without being admitted, and the lord ſhall admit the vendee, and ſhall have but one fine.

That *James Andrews* clerk, being ſeiſed in fee of certain copyhold lands held of the manor of *Haughley* with its members in the county of *Suffolk*, on the 1ſt of *September* 1752 duly ſurrendered the ſame in open court to the uſe of his will; and afterwards by his will duly executed did *order* and *direct*, that *John Canham* eſq. and *Edward Coldham*, or the ſurvivor of them, or the executor or adminiſtrators of ſuch ſurvivor, ſhould (among other things) make ſale of the ſaid copyhold premiſes, and apply and diſpoſe of the monies ariſing thereby for the intents and purpoſes in the ſaid will mentioned. That the ſaid *John Canham* and *Edward Coldham*, by virtue of the ſaid will and ſurrender to the uſe thereof, did by deed indented bargain and ſell the ſaid copyhold premiſes to *Richard Ray* eſq. and his heirs, to hold to him the ſaid *Richard Ray*, his heirs and aſſigns, of the lord of the ſaid manor, according to the cuſtom thereof, by the rents and ſervices due and accuſtomed for the ſame; that at a general court-baron holden for the ſaid manor, the death of the ſaid *James Andrews* was preſented, and at *that* and two ſubſequent courts proclamations were duly made for his heirs to come in and be admitted to the ſaid premiſes; that at the laſt of the ſaid three courts the ſaid *Richard Ray* perſonally attended with the ſaid deed of bargain and ſale, and craved admittance thereon, which the lord of the ſaid manor refuſed to grant, inſiſting that the ſaid *truſtees* ſhould have come into court and been admitted to the ſaid premiſes previous to their making ſale thereof, and paid a fine for ſuch their admiſſion; that a fourth proclamation

was made at a ſubſequent court, and a warrant of ſeizure awarded, and duly executed.

That the firſt perſon admitted under ſuch bargain and ſale was in the year 1703, and that between *that* time and the year 1760 ſeveral perſons have been admitted under ſuch bargains and ſales, without the truſtees of ſuch wills having been previouſly admitted; and that during that period no perſon claiming under ſuch bargain and ſale appears to have been refuſed.

This caſe was argued laſt term by Serjeant *Leigh* for the plaintiff, and Serjeant *Glynn* for the defendant; and in this term Serjeant *Whitaker* argued for the plaintiff, and Serjeant *Forſter* was prepared for the defendant; but the court without hearing him gave judgment for the defendant.

Curia—The queſtions for the conſideration of the court are, Whether Mr. *Ray*, the purchaſer of theſe copyhold lands, was entitled (under the ſurrender, will, bargain, and ſale) to be admitted to the ſame on payment of one fine? or, Whether the truſtees under the will muſt firſt be admitted, and then ſurrender to Mr. *Ray*?

We are all of opinion that the lord of the manor ought to have admitted Mr. *Ray* to the copyhold lands in queſtion; we had very little doubt of this upon the firſt argument; but as counſel were retained on both ſides to take notes, and the parties deſired a ſecond argument, we permitted an *ulterius concilium*; and having now heard brother *Whitaker*, who has ſaid all that can be ſaid for the plaintiff, we are all very clear (without hearing brother *Forſter*) that judgment muſt be for the defendant, and that the lord in this caſe is only entitled to one fine.

Copyholders, antiently, were little better than ſlaves, or the cattle upon the land; their tenure originally (moſt probably) was in *villenage*; by the help of reaſon, true religion, and ſcience, we by degrees emerged from that ſtate of barbarity; *villenage* became *copyhold*, but ſtill the tenure was at the mere arbitrary will of the lord; at length copyholders got more permanent eſtates, like freeholds: antiently their lord might ouſt and turn them out when he pleaſed: his fines were arbitrary; but ſince we are become more civilized and free, the lord cannot at this day ſet a fine at more than two years value upon an admittance on an alienation; *admittance* formerly was of *grace* and *favour*, now it is of right: the lord took his *fine* for the *admittance* in nature of a *relief*; it was a *boon* for having admitted the tenant, and the *admittance* is the true parent of the *fine*, for he could have no *fine* without admittance. 4 *Rep.* 28. *a.*

If

If a copyholder ſurrenders to the uſe of his will, and deviſes to *A. B.* and his heirs, the will *only* doth not paſs the eſtate, but the ſurrender and will together transfer the eſtate. The legal eſtate in *this* caſe was in Mr. *Andrews* the deviſor until his death, when it deſcended to his heir, in whom it now continues until the admittance of Mr. *Ray* the vendee under the *order* and *direction* of the will. So in the caſe of an alienation the copyhold eſtate always reſts in the ſurrenderor until the ſurrenderee be admitted tenant. 4 *Rep.* 23. *a.* *Fitche's* caſe.

It is objected for the plaintiff, that the truſtees (who have no eſtate or intereſt given them by the will, but are only *ordered* and *directed* to ſell) ought firſt to have been admitted, before they could have power to ſell to Mr. *Ray*. In anſwer to this we are of opinion, that when the deviſor died the power to ſell was inſtantly in the truſtees, and that where a man by his will gives power to ſell, the lands deſcend to his heir until that power be executed. There is a great difference between a *naked power* and a veſted *intereſt*; upon a *naked power* given to a *wife*, ſhe may ſell to her *huſband*: in the preſent caſe, a mere naked power is given by the will to the truſtees to ſell, and when the vendee comes in, he is *in* under the ſurrender and the will, as much as if he had been expreſsly named in the will.

Cro. Jac. 199
4 Mod. 318.
Co. Lit. 111. b. 271. b.

But it is objected, How can a man ſell when he has nothing in the lands? In anſwer to this, ſee *Co. Lit.* 271. *b.* The commiſſioners (in the caſe of a bankrupt ſeiſed of copyhold lands) by their bargain and ſale put an eſtate therein in the aſſignees, although the commiſſioners were never admitted, and the aſſignees who are bargainees or vendees take from the original owner of the eſtate.

See Atkins 95.
1 Burro. 206.
Co. Copyh. 50, &c.

We think theſe truſtees have no right to be admitted tenants either in law or equity, becauſe they have no intereſt, but only a mere naked power or authority. We ſhall not take notice of the caſe in *Cro. Jac.* 199. becauſe we think our determination wants no caſe to ſupport it; as Mr. *Ray* the vendee came *in* upon the third proclamation and deſired to be admitted, he ought to have been admitted upon paying a reaſonable fine to the lord, who has no hardſhip in this caſe. Judgment for the defendant *per totam curiam.*

Villers *versus* Monsley. C. B.

Case upon a libel, for writing a letter that plaintiff stunk of brimstone, and had the itch.

ACTION upon the case against the defendant for maliciously writing and publishing a libel upon the plaintiff in the words following, *viz.*

"Old *Villers*, so strong of brimstone you smell,
"As if not long since you had got out of hell;
"But this damnable smell I no longer can bear,
"Therefore I desire you would come no more here;
"You old stinking, old nasty, old *itchy old toad*,
"If you come any more, you shall pay for your board,
"You'll therefore take this as a warning from me,
"And never more enter the doors, while they belong to *J. P.*
"*Wilncote*, *December* 4, 1767."

The defendant pleaded Not guilty: a verdict was found for the plaintiff and sixpence damages, at the last assizes for the county of *Warwick*. And now it was moved by Serjeant *Burland*, in arrest of judgment, that this was not such a libel for which an action would lie; that the itch is a distemper to which every family is liable; to have it is no crime, nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection; the *small pox*, or a *putrid fever*, are much worse distempers; the *itch* is not so detestable or so contagious as either of them, for it is not communicated by the air, but by contact or putting on a glove, or the clothes of one who has the *itch*: and although it be an infectious distemper, yet it implies no offence in the person having it, and therefore no action will lie for saying or writing that a man has got the *itch*. It is not like saying or writing that a man has got the *leprosy*, or is a *leper*, for which an action upon the case will lie, because a *leper* shall be removed from the society of men by the writ *de leproso amovendo*, 1 *Roll. Abr.* 44. *Cro. Jac.* 144. *Ibid.* 219. although it be a natural infirmity.

See 2 Burro. The King v. Bingfield.

Wilmot Lord C. J.—I think this is such a libel for which an action well lies; we must take it to have been proved at the trial that it was published by the defendant *maliciously*; and if any man *deliberately or maliciously* publishes any thing in writing concerning another which renders him *ridiculous*, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher. I see no difference between this and the cases of the *leprosy* and *plague*; and it is admitted that an action lies in those cases. The writ *de leproso amovendo* is not taken away, although the distemper is almost driven away by cleanliness,

or

or new-invented remedies; the party must have the distemper to such a degree before the writ shall be granted, which commands the sheriff to remove him without delay *ad locum solitarium ad habitandum ibidem prout moris est, ne per communem conversationem suam hominibus dampnum vel periculum eveniat quovismodo.* The degree of *leprosy* is not material; if you say he has the leprosy it is sufficient, and the action lies: the reason of that case applies to this. I do not know whether the *itch* may not be communicated by the air without contact; it is said to be occasioned by *animalcula* in the skin, and must be cured by outward application. Nobody will eat, drink, or have any intercourse with a person who has the *itch* and stinks of brimstone; therefore I think this libel actionable, and that judgment must be for the plaintiff. Registrum Brevium 267. b.

Clive—I am of the same opinion, that this is a very malicious and scandalous libel.

Bathurst J.—I wish this matter was thoroughly gone into, and more solemnly determined; however, I have no doubt at present but that the writing and publishing any thing which renders a man ridiculous is actionable; and whether the *itch* be occasioned by a man's fault or misfortune, it is a cruel charge, and renders him both ridiculous and miserable, by being kept out of all company: I repeat it, that I wish there were some more solemn determination, that the writing and publishing any thing which tends to make a man ridiculous or infamous ought to be punished; for saying a man has the *itch*, without more, perhaps an action would not lie without other malevolent circumstances. I am of the same opinion, that judgment must be for the plaintiff.

Gould J.—What my brother *Bathurst* has said is very material; there is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable in either way; for speaking the words *rogue* and *rascal* of any one, an action will not lie; but if those words were written and published of any one, I doubt not an action would lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them *maliciously*, as in the present case, I have no doubt at all but the action well lies. What is the reason why saying a man has the *leprosy* or *plague* is actionable? it is because the having of either cuts a man off from society; so the writing and publishing *maliciously* that a man has the *itch* and stinks of brimstone, cuts him off from society. I think the publishing any thing of a man that renders him ridiculous is a libel and actionable, and in the present case am of opinion for the plaintiff. Judgment for the plaintiff *per tot. cur.* without granting any rule to shew cause. 5 Rep. 125.

Redſhaw *verſus* Brook and others. C. B.

Treſpaſs againſt cuſtom-houſe officers for entering plaintiff's houſe and ſearching for prohibited goods where they found none; the jury find 200l. damages againſt them, though they did very little or no damage. A new trial refuſed.

TRESPASS againſt the defendants (who are cuſtom-houſe officers) for breaking and entering the plaintiff's houſe, and ſearching every place therein for prohibited and uncuſtomed goods, but they found none. Upon Not guilty pleaded, this cauſe was tried before Lord Chief Juſtice *Wilmot*, when the jury gave a verdict for the plaintiff and 200 *l.* damages.

Serjeant *Davy* now moved for a new trial, alledging that the damages were exceſſive, for that it appeared upon the trial that the defendants had not done damage to the plaintiff to the value of 10 *s.*, whereupon the Lord Chief Juſtice reported as follows, *viz.*

It was proved for the plaintiff, that on the 2d of *May* the defendants came to the plaintiff's houſe, and deſired to ſee every place therein, and to ſearch for prohibited goods, which they did, and opened many bundles of goods, but found none ſuch; then they deſired to go into the cellar, but the door thereof being locked, and the plaintiff himſelf being from home, and having the key of the cellar door with him, his ſon ſent for a blackſmith, and had the door opened, whereupon the defendants entered the cellar to ſearch for cambrics and prohibited goods, but found none: plaintiff's ſons then told the defendants they had done the plaintiff great wrong, and would be brought to juſtice: the defendants continued the ſearch about twenty minutes, and then departed. It appeared they did very little damage, and behaved well enough. They did not pretend to have been informed by any body that the plaintiff had any prohibited goods in his houſe, nor was there any proof of any ſuch information at the trial. This is the ſubſtance of the evidence given at the trial. And

Although I myſelf may think 200 *l.* too large damages, yet how can we draw the line to fix the meaſure of damages in this caſe? I cannot ſay the jury have done wrong; and perhaps if I had been one of the jury, ſome of them might have convinced me that 200 *l.* damages are little enough. I am not diſſatisfied with the verdict.

Clive J.—As my Lord Chief Juſtice is not diſſatisfied, how can we ſay that theſe damages are too large? A rule to ſhew cauſe why there ſhould not be a new trial was refuſed *per totam curiam*, and Serjeant *Davy* took nothing by his motion.

TRINITY TERM,

9 *Geo.* III. 1769.

Leaſingby *verſus* Smith, Savilian Profeſſor of Geometry in the Univerſity of Oxford and Doctor in Phyſic. C. B.

Conuſance of pleas refuſed to the univerſity of Oxford, becauſe it was neither claimed in due form, nor in due time.

THIS was a rule to ſhew cauſe why *claim of conuſance* of this cauſe, prayed by the *Earl of Litchfield, Chancellor of the univerſity of Oxford*, ſhould not be allowed, which was made upon the motion of Serjeant *Jephſon* the 14th of *April*, the 3d day in the laſt term. Upon proof by affidavits that the defendant was a matriculated member of the univerſity, *Savilian* profeſſor in geometry, and reſident there, and upon producing to the court a letter or warrant of attorney, under the hand and ſeal of the *Earl of Litchfield*, appointing *A. B.* his attorney to claim *conuſance* in this caſe for the univerſity; alſo the letters patent under the great ſeal of King *Hen.* 8. bearing date the 1ſt day of *April* in the 14th year of his reign, whereby (amongſt other things) he granted to the then chancellor, maſters and ſcholars of the univerſity of *Oxford* and their ſucceſſors, that the ſaid chancellor and his ſucceſſors, or his deputy or commiſſary for the time being, ſhould have the full conuſance and examination, hearing and determination of all pleas, as well of debt, treſpaſs *contra pacem*, and other miſdemeanors, as of miſpriſions, extortions, conſpiracies, confederacies, maintenances, falſe allegiances, accounts, contracts and injuries whatſoever, and of all other articles which may fall into fine or redemption, or into other pecuniary puniſhment, and of all other perſonal contracts, pleas, and plaints, and other cauſes and matters whatſoever, by whatſoever name they are called or may be called, although they might concern the ſaid late lord the king, his heirs or ſucceſſors, (aſſizes and pleas of freehold only excepted,) within the vill of *Oxford*, &c. or elſewhere within the kingdom of *England*, after what manner ſoever ariſing, done or committed, as well at the ſuit of the ſaid late king, his heirs and ſucceſſors, as at the ſuit of the party, or in any other manner whatſoever where the ſcholars, or their ſervants or miniſters, or any other perſons who ought to enjoy any

any privilege of the ſaid univerſity of *Oxford*; which, for the privileged perſon the ſaid chancellor, commiſſary, or his *locum tenens*, or their ſucceſſors for the time being, ſhall or will claim, *&c. &c. &c.* And alſo upon producing to the court an exemplification of an act of parliament made in the 13th year of Queen *Elizabeth*, confirming the ſaid letters patent; and alſo an entry of the claim of conuſance in this cauſe upon a roll of laſt *Eaſter* term, wherein the charter and the act of parliament are ſhortly *not fully* ſtated, and it is ſet forth, that no ſcholar ſhall be ſued, arreſted, or impleaded any where out of the univerſity, for whom the chancellor ſhall claim this privilege; then recites that this action was commenced, and the defendant ſerved with a *capias* (as hereafter is mentioned, the copy of which writ is annexed to the ſaid roll); then ſets forth, that the defendant is a matriculated perſon, *Savilian* profeſſor, and reſident in the univerſity, and concludes with praying that this court will remit the conuſance of this cauſe to the chancellor of the univerſity, without ſetting forth the declaration which had been before delivered in the cauſe.

June the 3d in this term, the plaintiff, on ſhewing cauſe, produced affidavits that he is a builder, and that the defendant was indebted to him in the ſum of 229*l.* 11*s.* 6½*d.* for work and labour, and materials found, in building and repairing the houſe of the defendant in *Oxford*, who has paid the plaintiff 91*l.* in part thereof, but has refuſed to pay the remainder; that the work has been fairly meaſured and valued, and there reſts due to the plaintiff 138*l.* and upwards; that in order to recover this debt, the plaintiff,

On the 21ſt of *January* 1769, ſued out a common *capias ad reſpondendum* againſt the defendant, to anſwer the plaintiff *de placito quare clauſum fregit* at *Oxford*, teſted the 23th of *November* 1768, the laſt day of laſt *Michaelmas* term, and returnable on *the morrow of the Purification of the Bleſſed Mary, the 3d of February* 1769.

That on the 24th of *January* 1769, a copy of the *capias* was ſerved upon the defendant, who entered his appearance with the filazer of *Oxford* on the 6th of *February* 1769.

That on the 3d of *April*, in the *vacation after Hilary term* laſt, the plaintiff's attorney delivered to the defendant's attorney a declaration intitled of that term, in an action upon the caſe upon *aſſumpſit*, for work done and materials found as above.

On the 12th of *April* 1769, the firſt day of *Eaſter term*, a rule to plead was given, and that

On

On the 14th of *April*, the *third day* of the ſame term, and *not before*, application was made to this court by the attorney of the chancellor of the univerſity, claiming this conuſance, and praying the ſame might be allowed, when the rule to ſhew cauſe before-mentioned was made on the motion of Serjeant *Jephſon* as above, and on the 3d of *June in the preſent term* this matter was debated by *Glynn* and *Jephſon* Serjeants, on behalf of the univerſity, and by *Nares* Serjeant for the plaintiff; and after time taken to conſider whether the claim of conuſance ſhould be allowed, the court on the 14th of *June*, the laſt day of this term, gave judgment againſt allowing thereof to the effect following:

Wilmot Lord C. J. (after ſtating all the facts exactly as above) ſaid to this effect: Judgment of the court.

The queſtion is, Whether this claim has been made in *due form*, and in *due time?* and we are all of opinion that it is defective in both.

The courts of *Weſtminſter-hall* have in all times been anxious to reſtrain and curb inferior juriſdictions, and to bring the ſubject to the common law courts *here*, for the obtaining of juſtice, I can eaſily diſcern very proper motives in the courts for ſuch their conduct: there had been great power given from the crown to great men, which occaſioned much oppreſſion, and made people look up to the king, and deſirous to have juſtice in his courts, which is more impartially adminiſtered there than in inferior juriſdictions; this is the reaſon that induced the ſuperior courts to take defendants out of inferior courts, and to lay down very ſtrict and ſevere rules to keep the plaintiff to the ſuperior juriſdiction, which he had elected and choſen, although the inferior juriſdiction proceeded in the ſame manner according to the rules and maxims of the common law; *à fortiori* to be more ſtrict to ſee that the claim be made in *due form and time*, when it is to fetch the party, and conuſance of the cauſe to an inferior juriſdiction that proceeds by a different law and mode of trial.

This grant of conuſance of pleas to the univerſity would have been void without an act of parliament, for the crown cannot grant conuſance of pleas to proceed by any other manner than by the rules of the common law, and therefore the ſtatute of 13 *Eliz.* was made to confirm this charter to the univerſity. Hard. 503.

Although I regard the *civil law*, yet I hold it as *nothing* in compariſon to the law of the land and a trial by a jury, therefore am inclined to keep a tight hand upon this claim, according to the rules laid down by our predeceſſors.

None

None whoſoever have greater regard for the univerſities than we *all* have; I may ſay, we have filial piety towards them; they excel in all ſcience whatever, and ſhine with brighter luſtre than either the *Roman*, *Grecian*, *Egyptian*, or *Alexandrian* ſchools; they are ſtars of the firſt magnitude, and although I ſee ſome ſpecks in them, yet I ſee more in others; and if there could be any partiality in this matter we ſhould *all* have been with them, but we are bound to determine by the ſtrict rules laid down by our predeceſſors.

As to this claim, at firſt reading thereof it ſeemed to me to be *imperfect*, and not entered in *due manner and form*; it is drawn after the entry of the claim in the caſe of *Hayes* v. *Long*, *C. B. Trin. 6 Geo.* 3; and if the claim in that caſe had been allowed upon debate, I ſhould have been weighed down with the authority; but the only point in queſtion there was, Whether the defendant *Long* was *reſident* in the univerſity? and whether the claim was made in due manner and form, or in due time? was not at all debated by the counſel or the court. *Long* was not reſident, and *that* claim was diſallowed.

Ante, 310.

The entry of the claim on the roll in the caſe of *Kendrick* v. *Kynaſton*, in *Hilary* 4 *Geo.* 3. *B. R.*, was exactly like *that* in *Hayes* v. *Long* (which ſeems to be drawn from it). I was in that court when a rule to ſhew cauſe was made why the claim of conuſance ſhould not be allowed; but nothing further was done, nor was the rule ever made abſolute; ſo that whether the claim in the caſe of *Kendrick* v. *Kynaſton* was duly made and entered or not, was never determined.

I ſhall now conſider this claim, how it ſtands, and how and when it ought to have been made.

The claim of conuſance in this caſe, is an intervention of a third perſon demanding judicature in the cauſe, againſt the plaintiff who has choſen to commence his action *here*, and it is telling this court they have no right to try the cauſe; and if the univerſity have a right to ſuch judicature and conuſance, they have a right to tell this court ſo; but yet the court and the crown are intereſted, becauſe the claim is made againſt the general juriſdiction of the king's ſuperior court, and againſt the adminiſtration of juſtice therein, the fineſt garland in the crown; therefore the court, as judges between the crown and the univerſity, muſt look into the claim nicely, and ſee whether it be made in due *form* and *time* according to the ſtrict rules laid down by our predeceſſors.

This claim is a demand of ſomething *quod ſibi debetur*, the conſequence whereof is, that it muſt be perfectly entered upon record,

cord, muſt ſtate every thing that is to take away the general juriſdiction of this court; it may be demurred to, or the facts therein alledged may be controverted by pleading; the whole ought to be ſet forth, with all the proceedings in the cauſe that have been *here*, with great preciſion. In this caſe the claim was made after the declaration was delivered.

The period and ſituation of the cauſe at the time when the claim was made, is very material. A declaration had been delivered on the 3d of *April*, a rule to plead given the 12th of *April*, and the claim was made the 14th of *April*, ſo that it was neceſſary to ſet forth the declaration in the entry of the record of the claim, which is not done; there ought to be no diminution of any part of the proceedings in the cauſe, but the whole progreſs thereof, till the inſtant of the making the claim, ought to have been entered on the roll, ſo that the proceedings and declaration in this cauſe ought to have been entered on the roll; and then upon the ſame roll the entry goes on thus; *viz.* And the ſaid defendant by *A. B.* his attorney comes, (but the defendant ſays no more, nor makes any defence,) and hereupon comes *George Henry Earl of Litchfield*, chancellor of the fair univerſity of *Oxford* by *C. D.* his attorney, to demand, claim, proſecute, and defend his liberties and privileges thereof; that is to ſay, to have the conuſance of the plea aforeſaid, (and ſo the whole claim is entered in due form to the end thereof, which concludes thus,) and the aforeſaid chancellor demands his liberties and privileges aforeſaid, according to the form and effect of the letters patent aforeſaid, and the confirmation aforeſaid, in this plea between the parties aforeſaid here in the court of the lord the king now depending to be allowed to him, **as heretofore hath been allowed.*

* Theſe words ſeem to be unneceſſary in this caſe, becauſe this is a franchiſe given by an act of parliament.

In the caſe of *Wells* and *Traherne*, the claim was diſallowed, ſo that the roll wherein the entry was made was taken away and never filed; but I have been favoured with a ſight of a copy of that entry by Mr. *Wilmot*, who was concerned in that cauſe, wherein the proceedings in the cauſe are ſtated in the manner and form as I have ſaid; in *Ryley and Appleby* v. *Storey*, *Eaſter* 9 *Ann. Roll* 330. the proceedings are there ſtated as in *Wells* and *Traherne*. In *Chapman* and *Wiſh*, *Trinity* 3 & 4 *Geo.* 2. *Roll* 356. *C. B.* the entry is the like as in *Wells* and *Traherne*; ſo alſo in ——— v. *Fawcet*, *Mich.* 1 *Geo.* 1. *Roll* 613. all theſe caſes ſhew what is to be entered on the roll in making a claim of conuſance.

The proceedings in the cauſe ſo far as they have gone ought to be ſtated in the ſame roll with the claim; becauſe the court, if the claim be allowed, does not ſo abſolutely diſmiſs the cauſe that it can never be brought back again; but it is plain from many of the old entries that the parties have a day given them in

the court of the party claiming conuſance, and if *that* inferior court ſhall not do them *full and ſpeedy* juſtice, they ſhall return again to the king's court for juſtice; after the entry of the allowance of the claim, the further entry upon the ſame roll runs thus, *viz.* "Et ſuper hoc idem attornatus eorundem abbatis & conventus hic in curia præfixit diem partibus prædictis coram "ſeneſchallo ipſorum abbatis & conventus apud T. infra hunc dredum prædictum die lunæ proximo poſt feſtum Pentecoſtes "proximum futurum: *Et dictum eſt eidem attornato prædictorum "abbatis & conventus quod partibus prædictis pleno & celeris juſtitia inde exhibeatur, alioquin redeant*, &c. *Paſch.* 17 *Hen.* 7. *Rot.* 33. *Raſt. Ent.* 119. ſo it appears, that for good cauſe ſhewn to this court, the cauſe may be brought back again, and a re-ſummons may be awarded, and the parties may go on *here* again from the period or ſituation the cauſe was *in* at the time of the allowance of the claim; but in ſuch caſe, if the ſtate of the proceedings at the time of the allowing the claim was not to be entered upon record, the plaintiff would be obliged to commence another action, and to declare again for the ſame cauſe, which would occaſion great delay and expence; but in theſe claims there muſt be no delay whatever; this ſhews the neceſſity of ſtating the declaration in the entry on the roll.

It was objected at the bar on behalf of the univerſity, that the declaration being of *Hilary term*, and delivered in the vacation a few days before *Eaſter term*, they could not take notice of the declaration, becauſe in that caſe the claim would have appeared to have been made after an *imparlance*, which was never allowed, for an imparlance annihilates a claim, and therefore they were obliged to grant the claim upon the writ of *capiat quare clauſum fregit*, and that they came to the court to make it in due time before the rule for pleading was out, *viz.* on the 3d day in the term.

But in anſwer to this, we think that under the preſent circumſtances of the cauſe, notwithſtanding this kind of imparlance, the claim might have been entered upon a roll of *Hilary term*, and an allowance thereof prayed upon the firſt day of *Eaſter term*, for the delivery of a declaration, (intitled of *Hilary term*,) in the vacation after *Hilary term*, is a mere *fiction*, and the right way would have been to have ſet one *fiction* upon another, for the ſake of juſtice, and to have feigned that the claim was made in *Hilary term*, as the plaintiff had feigned that the declaration was delivered in *Hilary term*, when in truth it was delivered after *that* term in time of vacation. *Fiction* in the law is a great magician, who never makes uſe of his magic but for the ſake of juſtice, for *in fictione juris ſemper eſt æquitas*; ſo that we think the declaration and claim might have been entered on a roll of *Hilary term*.

But

But ſuppoſe the claim could not be entered as of *Hilary term*, and that after a *ſpecial imparlance* it might be made and entered of *Eaſter term* following; in that caſe, it is as clear as the ſun, that you muſt have come the very *firſt day* of the term to make the claim; and there is good reaſon for this, becauſe you come to ſtop a plaintiff who is proceeding to obtain juſtice in a ſuperior court at great expence.

It was ſaid for the univerſity, that as the firſt *four days* in the term by the rules of the court are allowed to the defendant for time to plead, that the claim being made on the *third day* of the term, was in due time; in anſwer to this we ſay, the time to plead after an *imparlance* is ſtrictly on the *firſt day* of the next term, being the *dies datus*, and that the four days allowed in that caſe for pleading are *ex gratia*, and by the practice of the court as to time for pleading; but this rule does not at all apply to the time for claiming conuſance.

In this entry of the claim it is difficult to lay one's finger on any part of it without pointing out ſome objection thereto; the charter and the ſtatute (being a private act of parliament) ought to have been fully ſet forth; the court is not bound to look into every private charter and act of parliament, and here they are neither of them fully ſet out upon this record. The caſe of *Caſtle v. Litchfield, Hard.* 505. ſeems to be almoſt the firſt claim of conuſance allowed to the univerſity of *Oxford:* diligent ſearch has been made for the record thereof, but we are informed it cannot be found.

The conuſance of pleas is granted by *act of parliament* to the univerſity of *Oxford*, and therefore it does not ſeem to be neceſſary to ſhew that this charter has ever, at any time before, been allowed by the king's writ, or by any of his ſuperior courts.

The perſon who drew this entry of the claim has taken the cauſe up at the return of the writ, as if it had ſtood at that period at the time when the claim was made, and when the court was moved to allow it, *viz.* the 14th of *April*, a declaration as of *Hilary* term having been delivered before on the 3d of *April*; perhaps he ſaw the objection upon the imparlance, and remembered the caſe of *Booth* v. *Graham*, *B. R.* ——— 2 *Geo.* 2. *Bernard.* 65. where *Page* J. obſerving that the claim was not entered on record, the counſel for the univerſity moved that it might be entered *nunc pro tunc*, which was refuſed by the court, and the claim was diſallowed becauſe of *laches*.

But in the preſent caſe it is ſaid there is no laches, for that the declaration was not delivered until after *Hilary term*, and that the

Between John Weller and Elizabeth his Wife, John Mercer and Suſannah his Wife, Thomas Fry and Elizabeth his Wife, Benjamin Fry and Sarah his Wife, Ann Cripps Widow, William Okill the younger and Ann his Wife, Plaintiffs; *and* Dorcas Baker Spinſter, Defendant. C. B.

Kent, ſſ. THIS is an action of treſpaſs upon the caſe, wherein the plaintiffs declare, that whereas at the time of the ſeveral grievances hereinafter firſtly, ſecondly, and thirdly mentioned, and alſo at the time of the making of the agreement and the act of parliament hereinafter mentioned, and for a long time before, there were and ſtill are certain ſprings or wells of medicinal water called *Tunbridge Wells* within the manor of *Ruſthall* in the ſaid county of *Kent*, to which ſaid ſprings or wells divers perſons have during all the time aforeſaid reſorted, and ſtill do reſort, at proper ſeaſons of the year, to drink the water thereof for the benefit of their health; and whereas before and at the time of the agreement hereinafter mentioned certain perſons called *dippers* uſed to attend at the ſaid ſprings or wells, and deliver the water thereof to ſuch perſons as reſorted thereto to drink the waters thereof, and had and received from ſuch perſons ſo reſorting divers ſums of money for ſuch their attendance and *employment* as ſuch *dippers*; and whereas before and until the time of making the agreement hereinafter mentioned there ſubſiſted between *Maurice Conyers* eſq. then lord of the ſaid manor, and the ſeveral freehold tenants of the ſaid manor hereinafter mentioned, divers diſputes and controverſies touching and concerning the ſaid ſprings or wells; and whereas before the ſeveral grievances hereinafter *firſtly*, *ſecondly*, and *thirdly* mentioned, and alſo before the making of the act of parliament hereinafter mentioned, (to wit) on the 21*ſt day of November* in the year of our Lord 1739, at *Speldhurſt* in the ſaid county of *Kent*, the ſaid *Maurice Conyers* then being lord of the ſaid manor, and the right honourable *William* lord *Abergavenny*, *Sydney Stafford Smythe* eſq. *&c. &c. &c.* then being freehold tenants, who then held lands and tenements of the ſaid manor, by certain articles of agreement then and there made between the ſaid *Maurice Conyers* of the one part, and the ſaid freehold tenants of the other part, and ſealed with their reſpective ſeals, the ſaid *Maurice Conyers* and the ſaid freehold tenants did determine and finally adjuſt the ſaid diſputes and matters in difference between them, and amongſt other things in the ſaid articles contained, the ſaid *Maurice Conyers* and the ſaid freehold tenants did in and by the ſaid articles agree, *That no perſon ſhould be permitted to*

Joinder in action.

The dippers at Tunbridge Wells all join, and with their huſbands, in an action againſt the defendant, for exerciſing the buſineſs of a dipper, not being duly appointed and approved according to private ſtatute.

attend and follow the employment of a dipper of the ſaid medicinal waters, but ſuch as ſhould be choſen by the homage at the courts baron to be held for the ſaid manor, and APPROVED *by the lord of the ſaid manor; in which choice and* APPROBATION *the wives, widows, and daughters of freehold tenants of the ſaid manor ſhould be preferred, and ſhould not exceed the number of twelve*, as by the ſaid articles, amongſt other things, more fully appears; and *whereas* afterwards and before the time of the grievances hereinafter *firſtly*, *ſecondly*, and *thirdly* mentioned, by a certain act made in the parliament of our late ſovereign lord king *George* the Second, at a ſeſſions thereof, holden in the 13th year of his reign at *Weſtminſter* in the county of *Middleſex*, intitled An act for confirming and eſtabliſhing certain articles of agreement made between *Maurice Conyers* eſq. lord of the manor of *Ruſtall* in the county of *Kent*, and the right honourable *William* lord *Abergavenny*, and other freehold tenants of the ſaid manor, relating to certain buildings and incloſures made and erected in and upon part of the waſtes of the ſaid manor, and for making the ſaid agreement more effectual for the purpoſes thereby intended, it was and is amongſt other things enacted, that the ſaid articles of agreement ſo made and entered into by and between the ſaid *Maurice Conyers* and the ſaid *freehold tenants* of the ſaid manor, and in the ſaid act before ſet forth and recited, and every article, clauſe, covenant, and agreement therein inſerted and contained ſhould be, and were by the ſaid act ratified, eſtabliſhed, and confirmed, according to the tenor, purport, and true meaning of the ſame, as by the ſaid act of parliament more fully appears; and whereas before the time of the ſeveral grievances hereinafter *firſtly*, *ſecondly*, and *thirdly* mentioned, (to wit) at a court-baron of Sir *George Kelly* knt. then lord of the ſaid manor of *Ruſthall*, held at *Speldhurſt* aforeſaid in and for the ſaid manor, on the 26th day of *May* in the year of our Lord 1768, before *Thomas Scoones* gent. then ſteward of the courts of the ſaid manor, the ſaid *Elizabeth Weller*, *Suſannah Mercer*, *Elizabeth Fry*, *Sarah Fry*, *Ann Cripps*, and *Ann Okill*, were duly *choſen* by the homage of the ſaid court at the ſaid court to be ſuch *dippers* at the ſaid wells as aforeſaid; and afterwards, to wit, on the ſame day and year aforeſaid at *Speldhurſt* aforeſaid, were *approved of* by the ſaid Sir *George Kelley*, then being lord of the ſaid manor as aforeſaid, and then and there took upon themſelves the ſaid *employment* of *dippers* at the ſaid wells; and by reaſon thereof, and of the ſaid agreement and the ſaid act, the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* became, and at the time of the ſeveral grievances hereinafter *firſtly*, *ſecondly*, and *thirdly* mentioned were, and from thenceforth hitherto have been and ſtill are *dippers* at the ſaid wells; yet the ſaid *Dorcas Baker* well knowing the premiſes, but contriving and fraudulently intending to injure the ſaid *plaintiffs* whilſt the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were ſuch *dippers* as aforeſaid, (to wit) on the firſt day of *June* in

In the year of our Lord 1768, and on divers other days and times between that day and the day of ſuing out the original writ of the ſaid plaintiffs, *did uſe and exerciſe the employment of a dipper* at the ſaid wells, and *did take and receive divers ſums of money for exerciſing ſuch employment* from divers perſons, who during that time reſorted to the ſaid wells to drink the waters thereof, ſhe the ſaid *Dorcas Baker not being a dipper duly choſen by the homage* at any court-baron of the ſaid manor, and *approved* of by the lord of the ſaid manor, nor having any right to exerciſe ſuch *employment* as aforeſaid, and by reaſon thereof the ſaid * *plaintiffs* loſt and were deprived of divers large ſums of money, which otherwiſe they would have received from the ſaid perſons ſo reſorting to the ſaid wells as aforeſaid; and the ſaid † *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were greatly injured in their *employment* of ſuch *dippers* as aforeſaid, (to wit) at *Speldhurſt* aforeſaid; and alſo whereas whilſt the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were ſuch *dippers* ſo *choſen* and *approved* of as aforeſaid, (to wit) on the firſt day of *June* in the year of our Lord 1768, and on divers other days and times between that day and the day of ſuing out the original writ of the ſaid plaintiffs, the ſaid *Dorcas Baker* well knowing the premiſes, and contriving and injuriouſly intending as aforeſaid, did uſe and exerciſe the *employment* of a *dipper* at the ſaid wells, ſhe the ſaid *Dorcas Baker* not being a *dipper duly choſen by the homage* at any court-baron of the ſaid manor, and *approved* of by the lord of the ſaid manor, nor having any right to exerciſe ſuch *employment* of ſuch *dipper* as aforeſaid, by reaſon thereof the ſaid *plaintiffs* loſt and were deprived of divers large ſums of money which otherwiſe they would have received from divers perſons who during that time reſorted to the ſaid wells as aforeſaid, and the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were greatly injured in their ſaid *employment* of dippers as aforeſaid, (to wit) at *Speldhurſt* aforeſaid; and alſo whereas whilſt the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were ſuch *dippers* as aforeſaid, (to wit) on the firſt day of *June* in the year of our Lord 1768, and on divers other days and times between that day and the day of ſuing out the original writ of the ſaid *plaintiffs*, the ſaid *Dorcas Baker* well knowing the premiſes, and contriving and injuriouſly intending as aforeſaid, did uſe and exerciſe the *employment* of a *dipper* at the ſaid wells, ſhe the ſaid *Dorcas Baker* not being a *dipper duly choſen* by the homage at any court-baron of the ſaid manor, and *approved* of by the lord of the ſaid manor, nor having any right to exerciſe ſuch *employment* of ſuch *dipper* as aforeſaid, and by reaſon thereof the ſaid ‡ *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were greatly injured in their ſaid *employment* of *dippers* as aforeſaid, (to wit) at *Speldhurſt* aforeſaid; and alſo whereas at the time of the ſeveral grievances hereinafter mentioned there were, and for divers (to wit, fifty) years now laſt paſt there have been and ſtill are, certain medicinal wells or ſprings of water called *Tunbridge Wells* at *Speldhurſt*

* The huſbands and the dippers.

† Dippers only.

Second count.

Third count.

‡ Nota; This count does not ſay the plaintiffs the huſbands were injured.

Fourth count.

hurſt within the manor of *Ruſthall* in the ſaid county of *Kent*; and whereas during all the time aforeſaid there have been and ought to have been and ſtill are and ought to be certain women called *dippers*, not exceeding twelve in number, *choſen* and to be *choſen* by the *homage* at the courts baron of the ſaid manor, and *approved and to be approved* by the lord of the ſaid manor for the time being, to attend at the ſaid wells, and deliver the water thereof to ſuch perſons as during all the time aforeſaid have reſorted or do or ſhall reſort to the ſaid wells to drink the waters thereof, and during all the time aforeſaid the ſaid women ſo *choſen* and *approved* as aforeſaid have received from ſuch perſons ſo reſorting as aforeſaid divers ſums of money for ſuch their *attendance and employment* as ſuch *dippers*, to the comfortable ſupport of themſelves and their families; and whereas before the time of the ſeveral grievances hereinafter mentioned, (to wit) at a court-baron of Sir *George Kelly* knt. then lord of the ſaid manor of *Ruſthall*, held at *Speldhurſt* aforeſaid in and for the ſaid manor, on the 26th day of *May* in the year of our Lord 1768, before *Thomas Scoones* gent. then ſteward of the courts of the ſaid manor, the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were duly *choſen* by the *homage* of the ſaid court at the ſaid court to be ſuch *dippers* at the ſaid wells as aforeſaid, and afterwards, (to wit) on the ſame day and year aforeſaid, at *Speldhurſt* aforeſaid, were *approved* by the ſaid Sir *George Kelly*, then being lord of the ſaid manor as aforeſaid, and then and there took upon themſelves the ſaid *employment* of *dippers* at the ſaid wells, and by reaſon thereof the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* became, and at the time of the ſeveral grievances hereinafter mentioned were and from thenceforth hitherto have been and ſtill are *dippers* at the ſaid wells; yet the ſaid *Dorcas Baker*, well knowing the premiſes, but contriving and wrongfully intending to injure the ſaid **plaintiffs* whilſt the ſaid †*E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were ſuch *dippers* as aforeſaid, (to wit) on the firſt day of *June* in the year of our Lord 1768, and on divers other days and times between that day and the day of ſuing out the original writ of the ſaid *plaintiffs*, did uſe and exerciſe the *employment* of a *dipper* at the ſaid wells, and did take and receive divers ſums of money for exerciſing ſuch *employment* from divers perſons who during that time reſorted to the ſaid wells to drink the waters thereof, ſhe the ſaid *Dorcas Baker* not being a *dipper* duly *choſen* by the *homage* at any court-baron of the ſaid manor, and *approved* of by the lord of the ſaid manor, nor having any right to exerciſe ſuch *employment* as aforeſaid, and by reaſon thereof the ſaid ‡*plaintiffs* loſt and were deprived of divers large ſums of money, which otherwiſe they would have received from the ſaid perſons ſo reſorting to the ſaid wells as aforeſaid, and the ſaid ‖ *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were greatly injured in their ſaid *employment* of ſuch *dippers* as laſt aforeſaid, (to wit) at *Speldhurſt* aforeſaid; and alſo whereas,

* All the plaintiffs, both huſbands and dippers.

† The dippers only.

‡ All the plaintiffs.

‖ The dippers only.

whereas, whilſt the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were ſuch *dippers* as aforeſaid, (to wit) on the firſt day of *June* in the year of our Lord 1768, and on divers other days and times between that day and the day of ſuing out the original writ of the ſaid *plaintiffs*, the ſaid *Dorcas Baker* well knowing the premiſes, and contriving and injuriouſly intending as aforeſaid, did uſe and exerciſe the *employment* of a *dipper* at the ſaid wells, ſhe the ſaid *Dorcas Baker* not being a *dipper* duly *choſen* by the *homage* at any court-baron of the ſaid manor, and *approved* of by the lord of the ſaid manor, nor having any right to exerciſe ſuch *employment* of ſuch *dipper* as aforeſaid, and by reaſon thereof the ſaid *plaintiffs* loſt and were deprived of divers large ſums of money, which otherwiſe they would have received from divers perſons who during that time reſorted to the ſaid wells as aforeſaid, and the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were greatly injured in their ſaid *employment* of *dippers* as aforeſaid, (to wit) at *Speldhurſt* aforeſaid; and alſo whereas, whilſt the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were ſuch *dippers* as aforeſaid, (to wit) on the firſt day of *June* in the year of our Lord 1768, and on divers other days and times between that day and the day of ſuing out the original writ of the ſaid *plaintiffs*, the ſaid *Dorcas Baker*, well knowing the premiſes, and contriving and injuriouſly intending as aforeſaid, did uſe and exerciſe the *employment* of a *dipper* at the ſaid wells, ſhe the ſaid *Dorcas Baker* not being a *dipper* duly *choſen* by the *homage* at any court-baron of the ſaid manor, and *approved* of by the lord of the ſaid manor, nor having any right to exerciſe ſuch *employment* of ſuch *dipper* as aforeſaid, and by reaſon thereof the ſaid *E. W.*, *S. M.*, *E. F.*, *S. F.*, *A. C.*, and *A. O.* were greatly injured in their ſaid *employment* of *dippers* as aforeſaid, (to wit) at *Speldhurſt* aforeſaid, whereupon the ſaid *plaintiffs* ſay they are injured, and have ſuſtained damage to the value of 100*l.*, and thereof they bring ſuit, &c.

Fifth count.

Sixth count.

The defendant has pleaded the general iſſue, that ſhe is not guilty of the premiſes above laid to her charge, and thereupon iſſue is joined, which is entered of *Hilary* term laſt.

This cauſe was tried at *Maidſtone* the 6th day of *March* 1769 before Mr. Juſtice *Clive*, when a verdict was found for the plaintiffs upon the ſecond, third, fifth, and ſixth counts in the declaration, and 5*s.* damages, ſubject to the opinion of the court upon the following caſe, which ſtates,

That the plaintiffs gave in evidence a private *act of parliament* paſſed in the 13*th year of king Geo. the* 2*d*, confirming certain articles of agreement inſerted in the ſaid act, in which are contained the two following clauſes, (*viz.*)

The caſe ſtated for the opinion of the court.

"Fifthly; It is also further agreed between the said parties, "that the said *Maurice Conyers* and his heirs and assigns, and "the several freehold tenants parties hereto, and their re- "spective heirs and assigns, shall and will from time to time, "and at all times for ever hereafter, permit and suffer the said "medicinal springs or wells of water called *Tunbridge Wells*, "the place or shed near the said springs called *Dippers-hall*, and "the walks called *Tunbridge Wells Walks*, and all ways, "passages, and open pieces of ground, part of the said premises, "or leading thereto, which are particularly set forth and distin- "guished in the plan of the premises hereto annexed, to re- "main always open and free for the public use and benefit of "the nobility and gentry and other persons resorting to, or fre- "quenting *Tunbridge Wells*, in the manner the same now are, "or lately have been used, and that the said *Maurice Conyers*, "his heirs and assigns, shall and will from time to time join and "concur in doing all such acts and things as shall be necessary "for the preparing and keeping the same open and free, accord- "ing to the true intent and meaning of this agreement.

"Thirteenthly; Also it is hereby further agreed by and be- "tween the parties hereto, that no person shall be permitted to "attend and follow the employment of a *dipper* of the said me- "dicinal waters but such as shall be *chosen* by the *homage* at the "*court-baron* to be held for the said manor, and *approved* by the "*lord of the manor*; in which choice and approbation the *wives*, "*widows, and daughters of freehold tenants of the said manor shall* "*be preferred*, and shall not exceed the number of twelve."

It did not appear in evidence that the homage and lord had ever acted under the said act of parliament, or that there had ever been any *dippers chosen* by the *homage*, and *approved* by *the lord* from the time the said act passed until the 26th of *May* 1768, when, at a *court-baron* then holden, the *homage chose*, and the *lord approved*, &c. *prout* the following entry upon the rolls of the said court, (*viz.*)

"At a court-baron of Sir *George Kelly* knt. lord of the manor "of *Rusthall*, held at *Speldhurst* in and for the said manor on the "26th day of *May* in the year of our Lord 1768, before *Thomas* "*Scoones* gent. steward of the court of the said manor.

"Also the homage aforesaid do choose *Elizabeth Weller* the "wife of *John Weller*, *Ann Cripps* widow, *Sarah Fry* the wife of "*Benjamin Fry*, *Susanna Mercer* the wife of *John Mercer*, *Eliza-* "*beth Fry* the wife of *Thomas Fry*, *Ann Okill* the wife of *William* "*Okill*, *Mary* the wife of *William Friend*, and *Dorcas Baker* "spinster, to attend and follow the employment of *dippers* of the

"medicinal

" medicinal waters within this manor, commonly called *Tun-*
" *bridge Wells*, ſubject nevertheleſs to the *approbation* of the lord
" of the ſaid manor.

" *The lord's approbation:* At this court Sir *George Kelly* knt.
" *lord* of this manor, *approves* of all the perſons ſo *choſen* by the
" *homage* for *dippers* aforeſaid, *Dorcas Baker* only excepted."

It did not appear in evidence that any *notice* was given, previous to the holding of the ſaid court, of any *intention* to appoint *dippers* there.

It appeared in evidence that *Dorcas Baker* the defendant was the daughter of a freehold tenant of the manor, and alſo a freehold tenant in her own right, but no evidence was given by the plaintiffs that they or either of them were, or was reſpectively the wife, widow, or daughter of a freehold tenant.

It appeared that the defendant *Dorcas Baker* had acted as a *dipper* during the laſt ſummer, but there was no proof of her having received any gratuity, other than general evidence, that the employment of a *dipper* is attended with profits which ariſe from the voluntary contributions of the company reſorting to *Tunbridge Wells*.

This caſe was twice argued at the bar; the firſt time in *Eaſter term* laſt by Serjeant *Jephſon* for the plaintiffs and Serjeant *Nares* for the defendant, and the ſecond time in this term by Serjeant *Leigh* for the plaintiffs and Serjeant *Forſter* for the defendant. After a few days time taken to conſider, judgment was given for the plaintiffs *per totam curiam*, to the following effect:

Curia—There are two general queſtions in this caſe; 1*ſt*, Whether the defendant *Dorcas Baker*, the daughter of a freehold tenant of the manor, and *choſen* by the *homage* to be a *dipper* at the *Wells*, but not *approved* of by the *lord* of the manor, can juſtly follow or exerciſe the *employment* of a *dipper*?

2*dly*, Suppoſing ſhe cannot, Whether the plaintiffs have a right to recover in this action?

As to the firſt queſtion, we are all of opinion that the defendant cannot juſtly follow or exerciſe the employment of a dipper; the words of the agreement between the lord and his freehold tenants are, " That no perſon ſhall be permitted to attend and
" follow the employment of a *dipper* of the medicinal waters,
" but ſuch as ſhall be *choſen* by the *homage* at the court-baron to
" be held for the manor, and *approved* by the lord, *&c.*" which are now the words of an act of parliament, and as clear and

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plain as words can poſſibly be; none ſhall be *dippers* but ſuch perſons as ſhall be *choſen* by the *homage* and alſo *approved* of by the lord; *Dorcas Baker* (it appears) was not *approved* of, but on the contrary was excepted againſt by the lord; therefore by the clear words of the ſtatute ſhe ſhall not be permitted to attend and follow the employment of a *dipper*.

The intention of this ſtatute is alſo plain: before the making thereof, there was a great conteſt between the lord and his tenants touching their right of common, theſe wells, and other matters; the lord was much benefited by the great reſort of the nobility and gentry to drink the waters, and the tenants thought themſelves injured in their right of common, *&c.*; at length the articles of agreement were made and executed, and being found to be for the mutual advantage of the lord and tenants, were confirmed by parliament and made firm and permanent; the benefit of theſe waters being thereby given freely to the public, it was neceſſary to eſtabliſh a rule, how, and in what manner, they ſhould be dealt out to the public, the tenants having loſt part of their common, thought they ought in conſideration thereof to have ſome benefit, therefore to prevent ſtrife, confuſion, and a kind of civil war amongſt the tenants, which muſt neceſſarily follow if every body who pleaſed was ſuffered to exerciſe the employment of a *dipper*, it was agreed that the homage ſhould *chooſe* and the lord ſhould *approve*, not more than twelve perſons to be *dippers*; ſo that, by this law, all diſſolute idle perſons are prevented, and no perſon ſhall come to be a *dipper* at the wells, but whom the lord pleaſes, who is the owner of the ſoil where they are; *cujus eſt dare ejus eſt diſponere*; it was a very right meaſure, that every perſon ſhould be (as it were) ſtamped with the ſeal of both the lord and the homage, before ſhe ſhould be permitted to exerciſe this employment of *dipper*; ſo that we have no doubt but the lord muſt *approve*.

Another *matter* was mentioned at the bar as to this firſt queſtion, and *that* was, whether theſe-words in the articles and the ſtatute, (*viz.*) "*In which choice and approbation the wives, widows, and daughters of freehold tenants of the manor ſhall be preferred,*" are *mandatory* or *directory*; but this not being an action againſt the lord for refuſing to *approve* of *Dorcas Baker* after ſhe was *choſen* by the homage, we need not determine this matter. There are many caſes where the words of a ſtatute ſeem to be *mandatory*, yet have been held to be only *directory*; and ſo *è contra*, where words which ſeem to be *directory*, have been held to be *mandatory*, the ſubject-matter of a ſtatute muſt explain the true meaning thereof. The words in the preſent caſe ſeem to be *mandatory*, and yet, on the other hand, if they be *abſolutely compulſory*, it will take away the *choice* and *approbation* of any other perſons but the *wives, widows, and daughters of freehold tenants*; we give no opinion

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as to this matter, but think that if the homage do chooſe the *wife, widow,* or *daughter of a freehold tenant* to be a *dipper,* the lord ought to *approve* of ſuch perſon, unleſs he has ſome good exception againſt her: if *Dorcas Baker* could have an action againſt the lord for not *approving* of her after the homage had *choſen* her, ſhe could only recover *damages,* and *not a ſpecific relief;* but let her right of action againſt the lord be what it will, it does not apply to our caſe; at preſent we are of opinion ſhe cannot juſtly follow or exerciſe the employment of a *dipper,* which brings us to the

Second queſtion, which is, Whether the plaintiffs have a right to recover in this action?

Several objections were made by the counſel for the defendant: 1*ſt*, It was ſaid, that there muſt be both an *injury* and a damage done to, and ſuſtained by the plaintiffs, to ſupport an action upon the caſe: in anſwer to this, we ſay here is both an *injury* and a *damage;* an *injury,* by the defendant's diſturbing the *dippers* in the exerciſe of their *right* or *employment,* and a *real damage* in depriving them of ſome *gratuity* which they would otherwiſe have received, perhaps more than they might truly deſerve, for their labour and pains: beſides, an action upon the caſe will lie for a poſſibility of a damage and injury; as for perſuading *A.* not to come and ſell his wares at the market of *B.*, the lord of the market may have this action.

2*dly*, It was ſaid, that this is not ſuch an *office* or *employment* for which an aſſize would lie, and therefore this action will not lie: in anſwer, we think this may be an *employment for life* determinable upon miſbehaviour; and if ſo, it is a freehold, has a certain place where it is to be exerciſed, and may be put in view to the *recognitors;* however, we think it ſuch an *intereſt* or *employment* that an action upon the caſe will lie againſt a ſtranger for a diſturbance therein.

3*dly*, It was ſaid, that no notice was given previous to the holding of the court-baron on the 26th of *May,* of any intention to appoint *dippers* there, which ought to have been done: in anſwer to this it is ſtated in the declaration, that the *dippers* were *choſen* and *approved* at *that* court-baron; and Mr. Juſtice *Clive* has reported, that it was proved at the trial, that the uſual notice of holding the court-baron was given; it is the court of the *freeholders* who are the judges thereof; the *ſteward* is only their *prothonotary,* and *notice* is never given of any particular buſineſs to be done at a court-baron; if any body is to give notice, it muſt be done by the *freeholders,* for it is their court, and they are the ſuitors thereof. What? muſt the *freeholders* give notice to the *freeholders?* It is nonſenſe to ſay ſo; and perhaps the greateſt part of them may be diſperſed all over *England,* or many of them

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may be abroad in other countries. But here is the *act of parliament* which gives them all *notice*; so we are of opinion that *notice* of this particular buſineſs to be done was not neceſſary to be given by, or to any body.

4thly, It was ſaid the plaintiffs cannot join in this action. But we think they muſt join, for although the *dippers* are *ſeverally* entitled to receive for their own ſeveral uſe ſuch voluntary gratuities as the nobility and gentry are pleaſed to give them reſpectively, yet with regard to a ſtranger's diſturbing them in their *employment*, they are all *jointly* concerned in point of intereſt; it is a *tort* as done to them all, like the caſe of the two mills in 2 *Saund.* 215, 216, 217., whereof the two plaintiffs were ſeverally owners, and joined in action againſt the defendant for not grinding at one or either of their mills, which he was obliged to do by the cuſtom of the manor; the principal objection *there* was, that the plaintiffs had joined in *one* action, where it appeared their intereſts were *ſeveral*. *Hales* C. J. and the whole court were of opinion that they might well join in action, for although their intereſts are *ſeveral*, yet the not grinding at either of their mills is one *entire* joint damage to both the plaintiffs, for which they ſhall have their *joint* action, or otherwiſe the damages would be twice recovered, if they ſhould bring their ſeveral actions. 1 *Vent.* 167, 168. S. C. 2 *Lev.* 27. S. C. this caſe is directly in point as to this objection.

5thly, It was objected that the plaintiffs ought to have alledged in their declaration that the *dippers* were ready to dip at the wells; but they have alledged that they took upon themſelves the ſaid employment of *dippers* at the wells, and that the defendant well knowing thereof diſturbed them, *&c.* that is well enough.

Laſtly, It was objected that the *huſbands and wives* ought not to have *joined* in this action. In anſwer to this, it is very difficult to reconcile all the caſes in the books touching this matter of *joinder in action*; at preſent it is ſufficient for us to ſay that this action is not grounded on any contract expreſs or implied, but the *huſbands* are *joined* to aſſert the *right and intereſt* of their *wives*, which has been diſturbed and injured by the defendant; whatever be the nature of this *right*, *intereſt*, or *employment*, it is her own, the *huſband* hath nothing at all to do with it, he only *joins* for conformity; it is a ſtronger caſe than an action by *baron and feme* touching the wife's lands where they muſt join, 1 *Bulſt.* 21., or than the caſe of a debt due to the *feme dum ſola* wherein they muſt join. *Moor* 422. *Baron* poſſeſſed of tithes in right of the *feme*, they muſt join in the action of debt upon the *ſtat.* 2 *Ed.* 6. for not ſetting forth tithes, becauſe the *feme* is proprietor. *Cro. El.* 608. 613. So in the caſe at bar the *feme* is the proprietor; and if ſhe muſt *join* in a caſe where the huſband has

Cro. Car. 418, 419.

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an intereſt in her lands, *à fortiori* ſhe muſt *join* in the preſent caſe; they may join in treſpaſs *de clauſo fracto* and cutting their graſs, *Cro. Eliz.* 96.; and this ſame point was ruled in the caſe of *Willy and his wife* v. *Hawkſmore, B. R.*, that they may *join* in treſpaſs *quare clauſum fregit* of the wife's land. Wherever the wife is the meritorious cauſe ſhe may *join* in action: a very ſtrong caſe to this purpoſe is 2 *Sid.* 128., and ſo is *Cro. Jac.* 77., which was caſe by baron and feme upon an *aſſumpſit* for curing a wound by the wife, and alledged *in facto* that ſhe cured it, reſolved ſhe was the cauſe of the action, and ſo the action brought in both their names was well enough. The caſe of *Holmes and wife* v. *Wood* (argued in *Mich.* term 3 *Geo.* 2. but not determined till *Eaſter* term following) was an action upon the caſe wherein the plaintiffs declared upon a *quantum meruit* for a cure done by the plaintiff's wife; and upon another count for medicines and plaſters found and provided for the defendant; upon a general demurrer it was objected that the *wife* could not *join*, for that ſhe was not the ſole cauſe of the action, becauſe *the medicines and plaſters* were the *huſband's own property*, and the damages could not be ſevered; and of *that* opinion was the court; but they ſaid that if the action had been brought for the *labour* of the *wife only*, ſhe might well have joined. Carth. S. P.

THE END OF THE SECOND VOLUME.

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