John Adams.

I See, through your whole Life, one uniform Plan, to enlarge the Power of the Crown, at the Expense of the Liberty of the Subject. – To this Object, your Thoughts, Words and Actions, have been constantly directed. In Contempt or Ignorance of the common Law of England you have made it your Study to introduce into the Court, where you preside, Maxims of Jurisprudence, unknown to Englishmen. The Roman Code, the Law of Nations, and the opinions of foreign Civilians, are your perpetual Theme, – but who ever heard you mention Magna Charta or the Bill of Rights, with approbation or Respect? By such treacherous Arts, are the noble Simplicity and free Spirit of our Saxon Laws were first corrupted. – The Norman conquest was not compleat, untill Norman Lawyers, had introduced their Laws, and reduced Slavery to a System. – vid Hurds Dialogues V. 2 from p. 178. to 229. Blacks. Disc. 40. Observ. on Stat.

Even in Matters of private Property, we See the same Bias and Inclination to depart from the Decisions of your Predecessors, which you certainly ought to receive as Evidence of the common Law, instead of those certain, positive Rules, by which the Judgment of a Court of Law should be invariably determined, you have fondly introduced your own unfixed Notions of Equity and Justice. Decisions given upon such Principles do alarm the public so much as they ought, because the Consequence and Extent of each particular Instance is not observed or regarded. In the meantime the Practice gains ground; the Ct. of K. B. becomes a Ct. of Equity, and the Judge instead of confulting Strictly the Law of the Land, refers only to his Wisdom of the Court, and to the Purity of his own Conscience

No Learned Man, even among your own Tribe, thinks you qualified like in a Court of Common Law. yet it is confessed, that under Justice you might have made an incomparable Prætor. It is remarkable enough, but I hope not ominous, that the Laws you understand be the Judges you affect to admire most, flourished in the decline of an Empire, and are supposed to have contributed to its fall.

Letter to Ld. M.

John Adams

REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench

Since the *Death* of LORD RAYMOND;

In FOUR PARTS,

Distributed according to the Times of his four Successors,
LORD HARDWICKE, SIR WILLIAM LEE,
SIR DUDLEY RYDER, and LORD MANSFIELD:

By JAMES BURROW Esq;

PART the FOURTH.

VOLUME the FIRST.

Beginning with *Michaelmas* Term 30 *G.* 2. 1756.

LONDON:

Printed for JOHN WORRALL, near *Lincoln's Inn.*

MDCCLXVI.

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LORD HARDWICKE, SIR WILLIAM LEE,
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By JAMES BURROW Eſq;

Maſter of the *Crown-Office*, and One of the *Benchers* of the Honourable Society of the *Inner Temple.*

With TWO TABLES,

One, of the NAMES of the CASES; the Other, of the MATTER contained in them.

LONDON:

Printed by His Majeſty's Law-Printers;

For JOHN WORRALL, at the *Dove* in *Bell-Yard*, near *Lincoln's Inn.*

M DCC LXVI.

PREFACE.

IT may naturally be aſked—" Why I publiſh *at* " *all?*" " Why I begin from Lord RAYMOND's " *Death*, rather than from any *prior* Æra?" " Why " I have *poſtponed* the three former Parts of this Work; " and publiſhed the *fourth* Part, *firſt*" *?* " Why I " venture to print, without the Sanction of a *Licence*, " to authenticate my Reports"?

In ANSWER to the *firſt* Queſtion.—

I found myſelf reduced to the Neceſſity of either *deſtroying* or *publiſhing* theſe Papers; (which were intended for my own private Uſe, and not for public Inſpection.) For as it was become generally known " that I had taken *ſome* Account, (good or bad,) of " all the Caſes which had occurred in the Court of " King's Bench for upwards of 40 Years", I was ſubject to continual Interruption and even Perſecution, by inceſſant Applications for Searches into my Notes; for Tranſcripts of them; ſometimes for the Note-books themſelves, (not always returned without Trouble and Solicitation;) not to mention frequent Converſations upon very dry and unentertaining Subjects, which my Conſulters were *paid* for conſidering, but I had no Sort of Concern in. This Inconvenience grew from bad to worſe, till it became quite inſupportable: And from thence ariſes the preſent Publication.

IN ANSWER to the *ſecond* Queſtion—

My Notes taken *at the Bar*, previouſly to my becoming *Clerk of the Crown*, had no particular Claim to

a the

the leaſt Degree of AUTHENTICITY:—Therefore I do not preſume to expoſe *them* to public View. But when I entered upon that Office, I thereby came to have all the Records and Rule-books on the *Crown*-ſide of the Court in my own Power, and could inſpect or tranſcribe them at Pleaſure: Beſides which, as I never after that Time ſtirred out of Court till it roſe, I was ſure to miſs nothing that paſſed in it. Add to this, That I had *now*, by my Situation in the very Middle of the Court, better Convenience both of Hearing and Writing, than I had had at the Bar, in the outermoſt Rows. I then came to have alſo better Opportunities of procuring true States of the Caſes on the *Civil* Side of the Court.

Lord RAYMOND and my immediate Predeceſſor in Office happening both to die in the * ſame Vacation, I was ſworn into my preſent Office as ſoon as the Court ſat after Lord RAYMOND's Deceaſe, *viz.* on the firſt Day of *Eaſter* Term 6 *G.* 2. 1733. LORD RAYMOND's *Death* ſeems therefore to be the fitteſt *Æra* from whence to begin: and the rather, becauſe his Lordſhip's *own* Reports (ending with *Trinity* Term 5° & 6° *G.* 2. 1732.) have been publiſhed ſince his Death.

* *Hilary* Vacation, 6 *G.* 2. 1732-3. *viz.* Mr. *Bellamy*, on the 9th and Lord *Raymond* the 18th of *March*.

* At *this* Time alſo, the Garb of Common-law Pleadings was entirely changed, and modernized. * A Statute took Place, for converting them from a fixed dead Language to a fluctuating living one; and for altering the ſtrong ſolid compact Hand (calculated to laſt for Ages) wherein they were uſed to be written, into a Species of Hand-writing ſo weak, flimſy and diffuſe that (in Conſequence and Corruption of this Statute, though undoubtedly contrary to it's Intention,) many a modern Record will hardly out-live it's Writer, and few perhaps will ſurvive much above a Century.

* From 25th *March* 1733.

* 4 *Geo.* 2. *c.* 26.

IN

In Answer to the *third* Queſtion.—

There are *many* Reaſons which induced me to follow the Example ſet by the Publiſher of Croke's Reports. *

* See Sir *Harebotle Grimſton's* Preface to *Cro. Car.*

Late Caſes are moſt ſought after: And therefore that Deſire of being delivered from daily Importunity, which obliged me to publiſh, is a ſtrong Motive to my publiſhing in *this* Order.

As my Reports can be of *no Authority*, Gentlemen may ſupply that Defect, where the Caſes are ſo recent, from their *own* Notes: And my Book may be of Uſe, as an *Index*.

By Beginning with *this* Part, (where many Gentlemen now alive can ſet me right,) I ſhall make an Experiment "Whether my Faults and Miſtakes are ſo "great, as to make it adviſeable for me to ſuppreſs the "Reſt."

I the rather begin with this Part, to prevent the Publication of worſe and more inaccurate Notes. Some Encouragement to the moſt faulty might be expected, from the Impatience of the Profeſſion, for Reports during this Period. And their Impatience is not to be wondered at. There never was more Buſineſs. The Reaſoning and Opinions of the Judges never gave more Satisfaction. *All* the Seats were never ſo filled together. And (what never happened before, during a like Period,) ſince the 11*th* Day of *November* 1756 to this Day, there never has appeared in Court the leaſt Difference of Opinion: Every Rule, Order, Certificate and Judgment have been *unanimous*. The Books of Reports are ſo full of frequent Difference of Sentiments in the Court, (both haſty and deliberate,) that for *All* to agree

agree ſo long, through ſuch an infinite Variety of Buſineſs, in every Concluſion upon every Queſtion of every Kind, argues uncommon Knowledge, Capacity and Temper in *All*. The Authority of right Judgments, upon right Principles, given unanimouſly by Magiſtrates who *add* Weight and Dignity to the higheſt Offices, inſtead of *deriving* any from them, is ſo great, that the direct Point determined becomes a RULE for ever, and eſtabliſhes *Certainty*, the Mother of Security and Peace.

The extraordinary Ability with which *every* Seat upon the Bench has been filled during this Period, has ſuffered nothing to *hang undecided*. A *new* Plan of *Diſpatch* has brought every Matter *ſpeedily* to a *Concluſion*; in Spite of the Parties themſelves, their Counſel and Attornies; in Spite of mutual Dilatorineſs, Negligence and Complaiſance; in Spite of Artifice by that Side which finds an Intereſt in protracting; in Spite of every Contrivance which can be ſuggeſted to a Defendant who means only Delay.

Some hundred Cauſes end, every Year, at the Sittings, which are not heard of *in Court*; (For the Judgment is conſequential, and of Courſe:) Many of them, within a few Months after their Commencement. Where there is a *ſpecial* Caſe or Verdict at the Sittings, it is dictated by the Court, and ſigned by the Counſel *before* the Jury is diſcharged. If, in ſettling it, any Difference ariſes about a *Fact*, the Opinion of the Jury is taken, and the Fact is ſtated accordingly: Whereas they *uſed* to be left to *future* ſettling; which often occaſioned much Altercation and many Attendances before the Judge; ſometimes, a new Trial, to fix a Fact; always, a great *Delay*. They muſt *now* be ſet down in the Paper, for Argument, within *four* Days; They muſt be argued in *Courſe*, as they ſtand: Altho' both Sides ſhould *conſent*; they cannot be put off, but for ſpecial and ſufficient *Reaſons* appearing by *Affidavit*

(if neceſſary,) and upon *Motion* a Day or two before. Nothing ſtops on Account of the *Abſence* of any of the Judges: Whereas nothing (of this Kind) uſed to come on, unleſs the Court was *full*.

The Judges being apprized of the Caſe and Queſtion, from their Paper-books, give Judgment, in many Caſes, *immediately*, upon the *firſt* Argument; and refuſe a *ſecond*, unleſs they themſelves think the Queſtion *requires* more Examination. It very ſeldom happens that there are more than *two* Arguments: Whereas I remember three or four to have been common; and it was not thought proper, to refuſe hearing a ſecond, third, or even fourth Argument, if *either* Side preſſed for it, though the Court themſelves had no Doubt.

All Motions or Rules in Matters of *Length* or *Conſequence* are appointed for *particular Days*, and called on *firſt*: Whereas they uſed to take their *Chance* of being moved by Counſel in their Turn; and thereby were often kept back till the laſt Day of the Term, and then (for Want of Time) neceſſarily put off to the *next Term*, and ſo on (with good Management) from Term to Term.

Beſides theſe *ſpecial* Appointments, *all enlarged* Rules muſt come on, peremptorily, during the *firſt Week* of the Term.

There are *more* OPINIONS of the *Court*, during this Period, upon *important* Points, than ever were given during the like Number of Years: And I do not remember a ſingle Inſtance where the Determination did not give general Satisfaction. In every Caſe which the Anxiety of Parties has carried to the Houſe of Lords, it has been *unanimouſly affirmed*.

Sir John Strange was obliged to omit many of the beſt and moſt intereſting Arguments; becauſe they were in Cauſes *not adjudged*, and therefore of no Uſe to the Public: But during *this* Period, that Reaſon does not hold for omitting ſuch Arguments *cloſed*. And among the Queſtions decided, there are ſome that had laſted *very long* indeed.

As the Public are *already* poſſeſſed of Sir John Strange's Reports, comprehending *all* my *firſt*, and a great Part of my *ſecond* Period, That is another Reaſon inducing me to publiſh mine in the Order I have choſen: Though I think the Authority of Sir Harebotle Grimston, and the Reaſons he * urges, are *alone* ſufficient to juſtify it.

* Pref. to *Cro. Car.*

In Answer to the *fourth* Queſtion.—

This Difficulty alarms me *moſt*.

I know it is a Contempt of *this* Court to publiſh their Proceedings: It is againſt a ſtanding Order of the Houſe of Lords to publiſh Proceedings there, upon Appeals or writs of Error. They ought to be publiſhed under *authoritative* Care and Inſpection: But since the *Year-books*, no judicial Proceedings have been ſo publiſhed, either by the Houſe of Lords, or by any Court in *Weſtminſter-Hall*, except State-Trials.

Licences by the Chancellor and Judges proceed upon the Character of the Reporter *only*; without ſaying a Word of the *Work* itſelf, or that the Licenſers ever *ſaw* it. Such Licences (to allow and approve of the printing and publiſhing) took their *Riſe* from the Neceſſity of a Licence to print, as the Law *formerly* ſtood; and have *continued* in the *ſame* Form of Words (without any Meaning,) *ſince* the *Reaſon* of them has *ceaſed*. I have

I have been assured that SOME now possessed of judicial Offices have declared "They *never would* sign "one; because it hangs out false Colours, and mis-"leads those who think it gives the least Approbation "or Authority to the WORK."

SUCH a Licence, could it have been obtained, would still have left my REPORTS to stand upon their *own* merit: And I flatter myself that I am too well known in *Westminster-Hall*, to want a Testimonial to my CHARACTER.

I had not the Impudence to *attempt* getting an Approbation of the WORK. It is impossible that the *Judges* should find the Time or take the Trouble to revise it; or that they would do it, upon any Application whatsoever. (Which makes it the more to be lamented that the Usage of Year-books hath ceased.)

UPON *these* Considerations, I have ventured to follow the Example of *Mr. Justice* FOSTER, and to publish my Notes WITHOUT *any* Leave or Licence.

There are many Instances where Men who have published Matter relative to a Cause *depending*, or *soon* after it was over, have been punished as guilty of a Contempt; most justly and wisely, for many Reasons: But a Publication of Reports at a *Distance of Time*, merely as Matter of *Science*, has not been animadverted upon; though within the *Letter* of the Law. Where they have been published *surreptitiously*, without Consent of the Reporter, the Printers have been proceeded against *civilly* upon the Foundation of his Property; but *not criminally:* And after the surreptitious Edition has been stopped by an Injunction, the Book has been published, with

with Conſent of the Reporter, *without* Leave or Licence; and NO *Notice* taken, or *Complaint* made of it.

I truſt my Excuſe, (as Mr. Juſtice *Foſter* did) to my INTENTION. If I find I have done wrong, or that I give Offence, I will certainly put a *Stop* to *this* Part, and *ſuppreſs* the *other three.*

The Work muſt make it's *own* Way in the Profeſſion. It's Merit conſiſts in the Correctneſs of the *States* of the Caſes. In *this* Reſpect, it muſt be of *ſome* Uſe; eſpecially when compared with other Notes. In all *other* Reſpects, I know it is very faulty: And I do moſt humbly beg Pardon of the *Bar*, and much more of the BENCH, for innumerable Injuries I muſt have done them, as to Language and Argument. I do not take my Notes in Short-hand. I do not always take down the *Reſtrictions* with which the Speaker may *qualify* a Propoſition, to guard againſt it's being underſtood univerſally, or in too large a Senſe. And therefore I caution the Reader, always to *imply* the Exceptions which ought to be made, when I report ſuch Propoſitions as falling from the Judges. I watch the *Senſe*, rather than the *Words*; and therefore may often uſe ſome of my own. If I chance not to underſtand the Subject, I can then only attend to the *Words*; and muſt, in *ſuch* Caſes, be liable to Miſtakes. If I do not happen to know the Authorities ſhortly alluded to, I muſt be at a Loſs to comprehend (ſo as to take down with Accuracy and Preciſion) the *Uſe* made of them. Unavoidable Inattention and Interruptions muſt occaſion Chaſms, Want of Connexion, and Confuſion in many Parts of my Notes: which muſt be patched up and tied together as well as one can, by Memory, Gueſs or Invention; or thoſe Paſſages totally ſtruck out, which are ſo inexplicably puzzled, that no Glimpſe of their Meaning remains to be ſeen.

I am thoroughly aware of all these Faults. I am conscious too, that not having had the good Fortune of acquiring that Knowledge in the Science of the Law, which is gotten only by a lucrative Experience at the Bar, (from which I was very early removed;) and not being blessed with the quickest natural Parts, I may have misapprehended Topics and Allusions; I may have made Blunders in the Sense, by endeavouring to rectify those of my Pen. *These* are Imperfections which Diligence could not cure. I am only concerned, lest my Errors should be imputed, not to myself, but to those whose Discourses I may happen (through my own Infirmities) to misrepresent.

Therefore let me, once for all, caution the Reader, especially the young Student: I pledge my Credit and Character, ONLY "that the *Case* and *Judgment*, and "the *Out-lines* of the Ground or Reason of Decision "are right." As to the *Rest*—I took the Notes, for my own Amusement and Use, as correctly as I was able: where the Matter or Manner is liable to Objection, I may and probably *have* mistaken.

I have *omitted* all Cases where the Question turned upon FACTS and EVIDENCE *only*; or where the Order followed almost of *Course*, in Consequence of Maxims fully settled; or was *not contested*.

I have *omitted* common *Sentences* in ordinary criminal Prosecutions; and, in short, every thing which I thought could not be of general Use: (though I took Notes of all these.)

Before I conclude, I must again entreat the Indulgence and Forgiveness of the *Bar*, and still more, of the BENCH, for the wrong I may have done them.

And I hope likewiſe for *another* Favour from all who have honoured me with their Acquaintance: which is, that they will be ſo good as to excuſe my not ſending them Books.

Such a NUMBER have a Right to *expect* Preſents, *if* I make ANY, that I have been adviſed to make NONE.

It is not juſt that I ſhould *loſe* by the Pains I have taken for the Service of the Profeſſion: I am *not* ſolicitous to *gain*.

If the Candid and Judicious ſhall give a favourable Reception to *this* Part, it will encourage me to finiſh my Deſign, and publiſh the preceding Periods.

INNER TEMPLE,
29th November 1765.

JAMES BURROW.

ADVERTISE-

ADVERTISEMENT.

THE BODY of this Book is calculated for such as may be inclined to look into it at their Leisure: The ABRIDGMENT, for such as desire only a *Summary* Account of the Determinations.

The FORMER is therefore designedly *copious:* For "IMPERFECT Reports of Facts and Circumstances, "especially in Cases where *every* Circumstance weigh-"eth *Something* in the Scale of Justice, are the Bane "of all Science that dependeth upon the Precedents "and Examples of former Times *." The LATTER was meant to be as *concise* as the Nature of a *complete* Abridgment would bear.

* See Mr. Justice *Foster's Discourses on the Crown-Law, pa.* 294.

It is hoped that Nothing very trifling is *inserted* in the *One*; Nor any Thing very material *omitted* in the *Other*.

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Errors

Errors of the Preſs.

SOME Deviations from the *exact Nicety* of accurate PUNCTUATION have eſcaped the Corrector's Attention, and may ſcarce be thought worthy of the Reader's. But

As to the following Errors, The Reader is requeſted to correct the more material of them, with his *Pen*: They are marked thus ☞

Page	Line	
10.	23.	Dele *was:* Or add *which*
19.	13.	For *quiſition:*) r. *quiſition*"; And for *But—it.* r. " *But — " it.*"
21.	12, 13.	For *Sheriff* r. *Sheriffs*
☞170.	20.	For *q'vis* read *qd Is*
☞172.	9.	For *eundem* read *eum dum*
☞173.	16.	For *comone fieri* r. *commonefieri*
☞176.	18.	For *prohibuiſſe* r. *perhibuiſſe*
	22.	For *extra* r. EXTRA—
☞177.	30.	For *exiſtant*; *à Magiſtro* r. *exiſtant, ac Magiſtro*
191.	27.	For 1647. r. 1747,
206.	15.	Dele) [after Admittance:]
213.	28.	For *Adminiſtration*; r. *Adminiſtrator*;
216.	10.	For *proves* r. *prove*
223.	ult'.	For *If ſo the* r. *If ſo, The*
246.	5.	Dele *to me*
247.	5.	For *concurred, They* r. *concurred. They*
	27.	For *Queſtion which* r. *Queſtion; which*
249.	in margine, line penult'.	For *-cate to this* r. *-cate as to this*
273.		For *Him, ſo* r. *Him: So*
295.	10.	Dele *that*
315.	2.	For *Aycliffe* r. *Ayliffe*
	23.	For *they* r. *He*
320.	20.	For *Reſidio* r. *Reſiduo*
357.	19.	For *in* r. *into*
363.	14.	For *waive* r. *wave*
378.	24.	For *laying* r. *lying*
383.	32.	Dele *B. R.*
☞399.	7.	For *or aſſiſting* r. *And aſſiſting* And dele the following Words—*John Cheſterton the Tenant of Sir Thomas Fleetwood,*
☞401.	24.	For *Defendant* r. *Plaintiff*
402.	16.	For *Country* r. *County*
421.	18.	For *come* r. *came*
425.	12.	For *Seige* r. *Siege*

Errors of the Preſs.

Page	Line	
442.	ult'.	For 518.] *Watſon* 709.] r. 518.] *Watſon.* 709.
449.	23.	For *was* r. *were*
452.	5, 6.	For *any further* r. *any thing further*
465.	27.	r. *adjoin to*
467.	14.	r. *Plaintiffs*
☞476.	9.	After *-ſary*, put a *Semi-colon*; After *firſt*, a *Comma*. For, *here*, the *juſt* Pointing is neceſſary, to preſerve Perſpicuity of Meaning: (Which is the Caſe much oftener than moſt People are aware of.)
477.	2.	r. *is anxiouſly*
	16.	r. *Mortgagee*
	31.	r. *declining*
513.	2.	*Indictment*, *for* dele the *Comma*.
☞527.	34.	[Marginal Note.] Dele *all the Note:* And inſtead of it, put *V. Poſt.* 540.
595.	26.	For *and having* r. *had*
616.	5.	Add (after *Nares*) *Who argued for the Plaintiff*,
618.	4.	For *John Hitchins's* r. *Thomas Lewis's*
627.	11.	For *Twyden* r. *Twyſden*

☞ Delete the Word "*Short*" in the Title of the Table, or Reference: For, after Title Offices, that Epithet is far from being applicable to it.

Michaelmas

Michaelmas Term

30 Geo. 2. 1756.

The Court of KING's BENCH

(When it became complete, on the 3d Day of the Term, as below,) was compoſed of

(*a*) *Lord* Mansfield,
(*b*) *Sir* Thomas Deniſon,
(*c*) *Sir* Michael Foſter, *and*
(*d*) *Sir* John Eardley Wilmot.

(a) His *Lordſhip* was ſworn in upon the 8th of *November* 1756: And took his Seat upon the Bench on the 11th of the ſame Month.

(b) Mr. Juſtice *Deniſon* was ſworn in upon the 11th of *February* 1741: And took his Seat the next Day.

(c) Mr. Juſtice *Foſter* was ſworn in upon the 22d of *April* 1745: And took his Seat upon the 1ſt of *May* following, (being the firſt Day of *Eaſter* Term 1745.)

(d) Mr. Juſtice *Wilmot* was ſworn in upon the 11th of *February* 1755: And took his Seat upon the Bench the next Day.

Michaelmas Term 1756. 30 Geo. 2. B.R.

Monday 8th *November* 1756,

His Majeſty's Attorney General, the Honourable *William Murray*, was, this Morning, called Serjeant; and about eight in the Evening, was ſworn in Lord Chief Juſtice of this Court, (in the Room of the late Lord Chief Juſtice, Sir *Dudley Ryder*, who died on 25th *May* 1756) before the Lord Chancellor (the Earl of *Hardwicke*,) at his Houſe in *Great Ormond-ſtreet*, in the Preſence of the three Judges and of moſt of the Officers of the Court of King's Bench.

His Lordſhip took the Oaths of Allegiance and Supremacy on his Knee; and the Oath of Office, ſtanding. Immediately afterwards, the Great Seal was put to a Patent, which had before paſſed all the proper Offices, creating his Lordſhip BARON of MANSFIELD in the County of *Nottingham*, to Him and the Heirs Male of his Body.

Thurſday 11th *November* 1756. Lord *Mansfield* took his Place, as Lord Chief Juſtice.

Friday 12th *November* 1756.

Raynard *verſus* Chace.

THIS was an Action of Debt for a Penalty on 5 *Eliz. c.* 4. for exerciſing the *Trade of a* BREWER, without having ſerved an Apprenticeſhip. In the Declaration there were two Counts. To the former "*nil debet*" was pleaded: And there was a general Verdict for the Defendant; (*viz.* "That "the Defendant does not owe, *&c.*") But on the 2d Count there was a Special Verdict: Which was to the following Effect; *viz.* that the Defendant *Chaſe* and one *Coxe*, were, and have been, during

ring all the Time charged in this Count, Partners in the Trade; and that the Trade was carried on, and had been for 4 Years carried on, in their *joint* Names; that *Coxe* did ſerve an Apprenticeſhip, *&c.* but *Chaſe* never did; and that COXE *is a working Brewer*, and was paid a Salary for his Labour; which Salary was always deducted, and allowed to him, *previous* to a Diviſion of the Profits; and the Entries at the Exciſe-office were in their *joint* Names: But that the Defendant *John Chaſe* NEVER *exerciſed the Trade* HIMSELF; (which was wholly managed and carried on by *Coxe*;) but *only ſhared the Profits*, and *ſtood the Riſques* of the Partnerſhip. And they find it to be a Trade within 5 *Eliz. c.* 4.

Queſtion, on 5 *Eliz. c.* 4. § 31. " Whether the Defendant *John* " *Chaſe* is within the Act, upon this ſpecial Finding".

Mr. *Morton pro Quer'.*

This Attempt to evade the Force of the Act by the Scheme of a PARTNERSHIP *with a qualified* Trader, would entirely fruſtrate the *Intention*, and is directly contrary to the *Words* of the Act.

The ſhort of this Caſe is,—*Chaſe not being* HIMSELF *qualified*, takes a PARTNER *who* IS *qualified:* which qualified Partner is the only *acting* Perſon in carrying on the Trade; and *Chaſe never interfered* in it.

There was the like Point before the Court in *P.* 18 *G.* 2. *B. R. Rex* v. *Driffield.*

But, *per Deniſon* and *Foſter* Juſtices, that Caſe was never determined: it went off upon an Objection to the Juriſdiction.

Morton: — But the Lord Ch. J. *Lee* then ſaid, " that he had " never known a Perſon exempted from the Statute, who had not " ſerved an Apprenticeſhip."

And as to his not interfering in the Trade, the Caſe of *Hobbs qui tam, &c.* verſ. *Young*, reported in 2 *Salk.* 610. and in *Carthew* 162. and in 3 *Mod.* 313. is a Determination in Point, and not to be diſtinguiſhed from the preſent Caſe.

Therefore he prayed Judgment for the Plaintiff.

Mr. *Biſhop contra, pro* Defendant, ſaid, He would firſt conſider how this matter ſtood *before the Statute*, with regard to the free and unlimited Right that every Man naturally and legally had, of exerciſing whatever Trade he pleaſed; *2dly*, The *Conſtructions* that have

been *favourably* made upon it, *in Extenſion* of the Qualifications to exerciſe Trade; and 3*dly*, Diſtinguiſh this Caſe from the Caſes cited.

And firſt, The Liberty of Trade is a natural and Common-law Right; and was long unreſtrained. The Statute of 37 *E.* 3. *c.* 5. which *firſt reſtrained* it, was very ſoon *repealed* by 38 *Ed.* 3. *c.* 2. And Lord *Coke* in 4 *Inſt.* 31. ſays, "That *ſuch* Acts of Parliament never live long." He cited the Caſe in 2 *Bulſtr.* 186. *Dominus Rex and Allen Plaintiffs* againſt *Tooley*, *Defendant*, as an Authority for him; tho' the Court did not indeed formally pronounce any final Judgment therein. And he alſo cited 11 *Co.* 53. the Caſe of the Taylors of *Ipſwich*. Secondly, The before mentioned Caſe in 2 *Bulſtr.* 186. *The King and Allen* v. *Tooley*, proves the Conſtructions to have been favourable. *Jenk. Cent. caſe* 15. *pa.* 284. "A pri-"vate Brewer is not within the Statute." *Keilwey* 96. *pl.* 6. proves that the Statute ought to be taken ſtrictly; being penal, and in Derogation of the Common Law. And Judges have diſpenſed with the Rigor of it: As in *Froth*'s Caſe, 1 *Salk.* 67. where 7 Years Apprenticeſhip beyond Sea, though without binding, was holden ſufficient. So *Queen* v. *Maddox*, 2 *Salk.* 613. S. P. accordingly: And the Court there call this Statute of the 5th of *Eliz.* a hard Law. *Comberb.* 254. *Rex* v. *Coller*, *per Eyre* Juſtice, One Brother living with another 7 Years (at the Trade of a Tallow-chandler) though not bound, may ſet up the Trade. 1 *Mod.* 26. *pl.* 69. *Dominus Rex* v. *Tarnith*, proves too that this Statute ought not to be extended further than Neceſſity requires.

Now it is not found by the preſent Special Verdict, in the Affirmative, "That this Man has occupied, uſed and exerciſed the "Trade:" But it is found, (on the contrary,) negatively, "That "he has NOT *interfered* in it; but it was wholly carried on by "*Coxe*." And *Hob.* 298. ſays the Rule is, "That Affirmatives in Statutes that introduce new Laws, imply a Negative, *&c.*" However, here is an *expreſs* Negative.

Thirdly, with regard to the Caſes cited.—

As to *Rex* v. *Driffield*, Whatever was found in the Affirmative in that Caſe, is found in the Negative here. And as to the Caſe of *Hobbs* v. *Young*, there was *no Partner* ſkilful in the Trade; but only *Servants:* Whereas here, is a ſkilful Partner to conduct it; and the Servants are employed and ſet to work BY *this Partner*, who is ſkilful; and are *not* employed and ſet on work *by* the Defendant.

Then he added, (4thly,) ſome Arguments *ab inconvenienti*.

Firſt, This will affect all great Undertakings: for it ſeldom happens, in ſuch great Undertakings, that *all* the Partners are duly

qualified, in Strictneſs. So likewiſe, it would affect all Caſes where *Infants* and *Truſtees* are intituled to Shares of profitable Trades. So, where *Creditors* have Shares in them.

And *Apprenticeſhips*, in *great Breweries*, are not, in Fact, uſual or cuſtomary.

Mr. *Morton*, in Reply, premiſed that the Rule of Conſtruction upon this Act muſt be *uniform*, with regard to *all* the Trades within it: And *Breweries* cannot be diſtinguiſhed from the reſt.

In anſwer to Mr. *Biſhop*'s Argument, He obſerved,

1ſt, It is of no Importance what was the Right before the Statute: The Statute was made, *expreſly*, to RESTRAIN ſuch Right in future, for the Good of the Public.

2dly, He ſaid, He did not want to *extend* this Law: this Caſe is fully and completely *within* it, without ſtraining it at all. And the Conſtructions that Mr. *Biſhop* calls favourable, in the Inſtances which he has cited, are no more than juſt and reaſonable upon the Circumſtances of the reſpective Caſes in which they were made.

3dly, As to the NEGATIVE *Finding* in the preſent Caſe, it amounts to no more than "that this Man did *not mind his Buſineſs*;" (which the other Partner did.)

And as to ſetting to work, it is plain that *Coxe* is ſet to work by *Chaſe:* and, *virtually*, He ſets all the Servants to work. Indeed, *Coxe* is here both a Journeyman and a Partner to *Chaſe:* For *Chaſe* pays him as a Journeyman; and, beſides that, gives him a Share of the Profits. And my Lord Ch. J. *Holt*'s Opinion in the Caſe of *Hobbs* and *Young* is quite applicable to the preſent Caſe.

4thly, He endeavoured to ſhew that the conſtruing this Man to be within the Penalty of the Statute, could not be attended with any ſort of Inconvenience.

Therefore He prayed Judgment for the Plaintiff.

As this was the firſt Argument, it was expected (as of Courſe) that it would be argued again: But Lord *Mansfield* gave his Opinion immediately, to the following Effect.

Lord *Mansfield:* Where We have no Doubt, We ought not to put the Parties to the Delay and Expence of a farther Argument; nor leave other Perſons who may be intereſted in the Determination of a Point ſo general, unneceſſarily under the Anxiety of Suſpence.

The Defendant is to ſhare the Profits with *Coxe*, in Moieties; and is liable to the Debts of the Partnerſhip: But it is *poſitively and expreſly* found, " That during all the Time charged, *He* NEVER ACTED *in or* EXERCISED *the Trade*." He was not, by the *Terms* of his Agreement, to act in the Trade: The *Other* Partner was to do the Whole, and had a particular Salary on that Account. It is not found that either *Coxe* or any Servant under him was ſet to work *by* CHASE; nor that *Chaſe* did *any Act* whatever of exerciſing the Trade: He was only concerned in the *Profits*.

Now though this may be, to SOME *Purpoſes*, exerciſing a Trade, in reſpect of third Perſons who deal with the Partnerſhip as *Creditors*, and within the Meaning of the *Statutes concerning Bankrupts*; yet the preſent Queſtion is, " Whether it be exerciſing a Trade, " CONTRARY TO THIS ACT."

I think Mr. *Biſhop* has laid his Foundations right, againſt extending the penal Prohibition beyond the expreſs Letter of the Statute.

1ſt, This is a *penal* Law;

2dly, It is in *Reſtraint of natural* Right; And

3dly, It is *contrary to the general* Right given by the *Common Law* of this Kingdom: I will add

4thly, The *Policy*, upon which the Act was made, is, from *Experience*, become doubtful.—Bad and unſkilful Workmen are rarely proſecuted.

This Act was made early in the Reign of Queen *Elizabeth*. Afterwards, when the great Number of Manufacturers who took Refuge in *England* from the Duke *D'Alva*'s Perſecution, had brought Trade and Commerce with them and inlarged our Notions, the Reſtraint introduced by this Law was thought ſo *unfavourable*, that in 33 *Eliz.* in the Exchequer, 4 *Leon.* 9. *pl.* 39. it was conſtrued away: For it was holden clearly, by the Judges, in that Caſe, (which Conſtruction, however, I take *not* to be law *now*,) that " if One " hath been an Apprentice for 7 Years at *any* One Trade men- " tioned within the ſaid Statute, he may exerciſe ANY *Trade named* " *in it*, though He hath *not* been an Apprentice to IT."

All theſe Obſervations only ſhew " That this Act, as to what " inforces the *Penalty* of it, ought to be taken *ſtrictly*." And accordingly, the Conſtructions made by former Judges have been favourable to the Qualifications of the Perſons attacked for exerci-

ſing the Trade; even where they have not *actually* ſerved Apprenticeſhips. They have, by a liberal Interpretation, *extended the Qualifications* for exerciſing the Trade, *much beyond* the Letter of the Act; and have *confined* the *Penalty and Prohibition* to Caſes *preciſely within* the expreſs Letter.

Let Us conſider whether the *preſent* Caſe be within the *Letter*, or even the *Meaning* of this Act.

The *General Policy* of the Act was to have Trades carried on, by Perſons who had *Skill* in them.

Now here, the *perſonal* Skill of the Defendant makes no *real* Difference in the Caſe. For the Perſon who *is* ſkilful, *acts every* Thing, and *receives no Direction* from this Man: He neither did, nor was to interfere.

The Caſe of *Hobbs* and *Young* is not parallel. There, the Defendant, a *ſingle* Man, directed the whole Trade; was the *Maſter*; and *directed* All the Servants. *As between Maſter* and *Servant*, no doubt, it is the *Maſter*, who carries on the Trade; and NOT *the Servant*. But in *Hobbs* and *Young* there was *no Partnerſhip*; nor (what is the diſtinguiſhing Character of the preſent Caſe) a *mere naked* ſharing of the Profits, and riſquing a Proportion of the Loſs; without his acting or directing at all, in any Manner whatſoever.

In many conſiderable Undertakings, it is abſolutely neceſſary to take in Perſons as Partners, to ſhare the Profits and riſque the Loſs. And the general Uſage and Practice of Mankind, ought to have Weight in Determinations of this Sort, affecting Trade and Commerce, and the Manner of carrying them on.

It is notorious that many Partnerſhips are entered into, upon the Foundation of one Partner contributing Induſtry and Skill, and the other, Money.

Many great Breweries and other Trades have been carried on for the Benefit of Infants and Reſiduary Legatees, under the Direction of the Court of Chancery.

Now if the Plaintiff's Conſtruction was to hold, the whole Direction and Decree of the Court of Chancery was contrary to Law and to an expreſs Act of Parliament.

So it is likewiſe practiſed in *other* great Trades. The late Mr. *Child* directed his Buſineſs of a *Banker*, to be carried on for the Benefit of his Children and other Perſons.—Many other Inſtances might be mentioned.

It

It would introduce the utmoſt Confuſion in Affairs of Trade and Commerce, if this Conſtruction ſhould prevail.

On the *other* Hand, I ſee no Inconvenience: It is exactly the ſame Thing as to the Trade, in every Iöta, " whether this Partner " has or has not ſerved an Apprenticeſhip."

Therefore I think the Defendant *not* liable to the *Penalty* of 5 *Eliz.*

Mr. Juſt. *Dexiſon* ſaid That this was a new Caſe.

For though the Caſes of *Rex* v. *Driffield*, and *Adcock* v. *Gell*, were indeed before the Court, yet *no Opinion* was delivered in either of thoſe Caſes.

He concurred that it was *not* an *Exerciſe* of the Trade *within* 5 *Eliz.*

The true Intent of that Act was, That no Man ſhould *exerciſe* any of thoſe Trades, unleſs He had *Skill* in them. It has never been extended, by any liberal Conſtruction of it, in Point of inforcing the *Penalty*.

And the preſent Queſtion is, " Whether this Man has *exerciſed* " the Trade, within the Meaning of it; ſo as to be *liable to the* " PENALTY."

Now it is here found, " That He *never* did *interfere* in the " Trade, *Himſelf*." In the Caſe of *Hobbs* v. *Young*, the Defendant was the *Super-Intender* of the Work; and *did exerciſe* the Trade, without having any Skill in it.—And *this* is the *Point in Queſtion*, and the principal Determination, in that Caſe of *Hobbs* v. *Young*; whatever elſe might drop from the Judges in giving their Opinion. But *here*, the Defendant *never meddles at all*; but leaves *all the Management* to a Partner, who had Skill: He himſelf *never acted*, in carrying on the Trade.

It may be ſaid indeed, " that *Chaſe* is liable to the *Statutes of* " *Bankrupts*."—True: But the Conſtruction of *thoſe* Acts, made for the Benefit of the Bankrupt's Creditors, is very different from the Conſtruction of this *prohibitory* and *penal* Act; which ought to receive a *ſtrict* Conſtruction, in Point of extending the *Penalty*.

Therefore, for theſe Reaſons, and thoſe given by the Lord Ch. Juſt. He held " That this was *not* an *exerciſing* the Trade *within* " *the Act*."

Mr. Juſt. *Foſter* concurred; and ſaid He had prepared Himſelf to give his Reaſons *at large:* But as the Lord Chief Juſtice had gone through them ſo fully, and inforced them in ſo clear and ſatisfactory a Manner, He would only, *in general,* declare his Concurrence.

Mr. Juſt. *Wilmot* of the ſame Opinion.

By the Court unanimouſly Judgment was given for the Defendant.

REGULA GENERALIS.

THE Court declared, That all *enlarged Rules* to ſhew Cauſe, which were made in the laſt Term, ſhould be moved *before the laſt Week* of the preſent Term; *Unleſs Leave* for poſtponing them ſhould be particularly applied for, and granted: And this Rule to prevail hereafter, in all future Terms, in the ſame Manner.

Monday 15th *November* 1756. Lord *Mansfield* took the Oaths: He was (as is uſual) ſworn firſt and *alone.*

Roades *verſus* Barnes.

Tueſday 16th *November* 1756.

THIS was a Plea of a *ſtated Account,* pleaded to an Action upon *Simple Contract*; To which Plea there was a bad Replication, and a Demurrer to that Replication: Conſequently, the Queſtion was only upon the Validity of the *Plea.*

After a long Argument for the Defendant in ſupport of the Plea, The Court, without hearing the other Side, held the Plea *bad in Subſtance:* And ſo, they ſaid, it had been determined in this Court, laſt *Hilary* Term, in a Caſe of *Atherley v. Evans.* A promiſſory *Note* cannot be pleaded in Bar to an Action upon Simple Contract: Though a *Bond* may, becauſe it extinguiſhes the Debt. One Bond cannot be pleaded to an Action brought upon another Bond.

Judgment for the Plaintiff.

Wedneſday 17th November 1756.

Rex *verſ.* Fonſeca.

MR. *Norton*, on Behalf of the Proſecutor, ſhewed Cauſe againſt diſcharging the Defendant's Recognizance.

This was a Recognizance entered into by the *Defendant* and two other Perſons, upon his removing this Indictment (which was for an Aſſault, with Intent to raviſh) from *Hicks's Hall*, where it was originally found.

The Defendant had been tried, convicted, and fined in this Court; and had paid his Fine.

After which, Mr. *Morton* had moved to diſcharge the Defendant's Recognizance; it being a Recognizance at *Common Law*, and all the Terms of it having been complied with. For he inſiſted,

1ſt, That it is not within the Statute of 5 & 6 *W. & M. c.* 11. § 2. being from the Court of *Oyer and Terminer*, not from the Seſſions: And this Statute relates only to Indictments found *at the Seſſions*.

2dly, That the *Principal* is here bound, as well as the Securities: Therefore alſo, it is not within the ſaid Act; which requires only Two Manucaptors, *without* the Principal.

3dly, The *Sum* is alſo different: For it is not a Recognizance in 20 *l.* but in 100 *l.* Himſelf, and each Security 50 *l.* Therefore for this Reaſon too, it is not within the ſaid Act. In Proof of which, he cited 2 *Salk.* 564. *Regina* v. *Ewer*, was a *Scire facias* on a Recognizance taken before a Judge, upon granting a *Certiorari* to remove an Indictment from the Seſſions of the Peace, in the Sum of 40 *l.* whereas the Sum preſcribed by the Statute, is 20 *l.* And there, Lord Ch. J. *Holt*, held this Recognizance to be good at Common Law; but not to be a Recognizance according to this Statute.

M. 15 *G.* 2. *B. R. Rex* v. *Sidney*, was alſo cited and relied upon by Him, as in Point to the preſent Caſe.

In anſwer to which Mr. *Norton* urged,

1ſt, That the Court at *Hicks's Hall* is both a Court of *Oyer and Terminer*, and ALSO a Court of *Quarter Seſſions*. And as to the

2d

2d and 3d Objections. The Defendant has availed himſelf of this Recognizance; and has, *upon it*, removed the Record: And therefore he ought to be bound by it, *as* by a proper Recognizance.

And *Sidney*'s Caſe was, He ſaid, upon different Circumſtances.

Here, he is not to depart the Court WITHOUT LEAVE: Therefore the Court will firſt oblige Him to do Us Juſtice, and pay the *Coſts*, in the ſame Manner *as if* the Recognizance had been *regularly* taken under this Act.

N. B. The Seſſions at *Hicks's Hall* ſit in *both* Capacities, *viz.* of Seſſions, and alſo of *Oyer and Terminer*; and they draw up their Orders with the *One* Title, *or* with the *other*, according to the DEGREE of the Offence; (*viz.* Common Aſſaults, and Offences of a low Nature, under the Title of a Court of *Seſſions*, and Aſſaults with Intent to raviſh, Riots, *&c.* and Offences of a high Nature, under the Title of a Court of *Oyer and Terminer*:) And the *Certiorari's* are directed accordingly. And the preſent *Certiorari* was directed to them AS a Court of *Oyer and Terminer*.

The Court looked upon that Caſe of *Rex* v. *Sidney* to be in Point:

And accordingly, Mr. *Morton*'s Rule for diſcharging the Defendant's Recognizance, was made abſolute.

Macrow *verſ.* Hull.

THE Defendant's Council ſhewed Cauſe againſt the Court's granting a new Trial upon Payment of Coſts; which had been moved for, by the Plaintiff's Council, upon the Foot of the Verdict's being *againſt Evidence:* (Which Verdict was for the *Defendant*; and, conſequently, the Application to ſet it aſide, had been made on the Part of the Plaintiff.)

Mr. Juſt. *Foſter* (who tried the Cauſe) reported it to be an Action of Treſpaſs, *extremely frivolous*; but ſufficiently proved. He ſaid that the Defence was a very ſtrong One indeed, in *Mitigation of Damages*; but yet was NOT *a ſufficient Denial of the Treſpaſs:* ſo that, in Strictneſs, the Verdict was undoubtedly againſt Evidence. However, he thought the Action *ſo trifling*, *frivolous*, and *vexatious*, that he ſhould have thought Sixpence Damages to have been enough.

Whereupon

Whereupon The Court held, that, NOTWITHSTANDING *it's being a Verdict* AGAINST *Evidence*, (which in general is a good Reaſon for ſetting aſide a Verdict and granting a new Trial,) yet the Action appearing, in *this* Caſe, to be *frivolous*, *trifling*, and *vexatious*, and the REAL *Damages* little or none, they ought to refuſe, and accordingly did refuſe to ſet aſide the Verdict: And

Lord *Mansfield* added that it would even be a Cruelty to the Plaintiff, to grant his Motion: As he muſt pay the Coſts of the former Trial, if he ſhould prevail in it; and yet could hope for ſuch very ſmall Damages upon a new One.

Rule diſcharged. *Vide Poſt*, *Farewell* v. *Chaffey*, S. P. *accord'*.

Thurſday 18th *November* 1756.

Harriſon Knt. Chamberlain of London *verſ.* Godman.

MR. Serjeant *Poole* and Mr. *Eliab Harvey* ſhewed Cauſe againſt the iſſuing of a *Procedendo* in this Cauſe.

It came into this Court, upon the Return of a *Habeas Corpus cum Cauſa*, directed to the Mayor, Aldermen and Sheriffs of *London*, commanding them to bring up the Body of the Defendant, together with the Cauſe, *&c.*

The Return was to the following Effect, *viz.* That there is a Cuſtom in *London*, " that if any *ancient Cuſtom*, *hard and defective* " in any Thing *newly ariſing*, wants Amendment, the Mayor and " Aldermen, with the Conſent of the Commonalty, have always, " *&c. appointed fit Remedy*, for the common Good of the Citizens: " So as ſuch their Ordinances be conſonant to Faith and Reaſon, " and in no wiſe prejudicial to the King or his People, nor repug- " nant to the Laws or Statutes of *England*." And that the Cuſtoms of *London* are confirmed by Act of Parliament, 7 *R.* 2.

They then certify, that there is within the City of *London*, a Company of *Butchers*; and that at a Common Council holden on the 27th of *June* 20 *G.* 2. they (the Lord Mayor, Aldermen and Common Council) made an *Ordinance*, " That whereas many Per- " ſons who *exerciſe the Trade of Butchers*, have obtained *Freedoms* " *of* OTHER *Companies*, by Redemption or otherwiſe; by Reaſon " whereof the *Company of Butchers* is much *diminiſhed and fallen* " *into Decay*; For *Remedy* THEREOF, It is Ordained That every " Perſon, not being already free of the City, occupying, uſing or " exerciſing, or who ſhall occupy, uſe or *exerciſe the Art*, *Trade* " *or Miſtery of a Butcher* within the ſaid City or its Liberties, ſhall

" take upon Himſelf the Freedom of the COMPANY *of Butchers*; " and that no Perſon now uſing, or who ſhall hereafter uſe or *exer-* " *ciſe the Trade of a Butcher* within the ſaid City or Liberties, " ſhall be admitted into the Freedom of the ſaid City, by the " Chamberlain thereof, *of or in any* OTHER *Company than* the ſaid " Company of *Butchers:* Provided always That every Perſon not " being already free of the ſaid City, who are or ſhall be *intitled to* " *Freedom of any* OTHER *Company* by Patrimony or Service, *ſhall* " *be* ADMITTED *into* THIS *Company of Butchers*, upon Payment " of like Fine and Fees as are uſually paid upon Admiſſion of a " Child or Apprentice."

And that it was then and there further enacted, " That if any " Perſon or Perſons, (except ſuch as are already free, *&c.*) ſhall " *uſe the Trade of a Butcher*, not being free of THIS *Company of* " *Butchers*, He, *&c.* ſhall pay 5 *l.*" And Directions are given how the Penalty of 5 *l.* ſhall be levied, and alſo concerning Coſts.

They then further certify " That the Defendant was taken, on " an Action brought againſt him in the Mayor's Court of *London*, " for the Penalty of this By-Law."

Upon this Return, Mr. *Williams*, on Behalf of the Plaintiff in the Mayor's Court, had moved for a *Procedendo*.

Mr. Serjeant *Pool* and Mr. *Eliab Harvey*, of Council for the Defendant, objected to this By-Law, as being a bad one: And they principally relied on *the following Objection to it*; *viz.* " That it " was a By-Law in RESTRAINT *of Trade*; and therefore could " not be good, WITHOUT ſetting forth a SPECIAL *and* PARTI- " CULAR *Cuſtom* to ſupport it:" Which is NOT *done* by the preſent Return. And they argued that this By-Law is by no Means ſupported by the Authority which is ſet forth in the Return, as it's Foundation; *viz.* " A Cuſtom to apply fit Remedy for the Com- " mon Good of the Citizens, where any ancient Cuſtom, hard and " defective in any Thing *newly ariſing*, wants Amendment:" For *neither* is here any *ſuch ancient Cuſtom ſet forth*, and ſpecified, which wanted Amendment; nor any Hardſhip or Defect ſtated; *Nor* is there any Pretence to ſay that this is " a Matter *newly ari-* " *ſing*;" *Nor* does the *Return ſo much as even alledge*, *either* that there was any ſuch ancient Cuſtom wanting Amendment, or any Hardſhip or Defect, or that the Subject of this By-Law was a Matter newly ariſen.

The Caſes adduced by Each of them in Proof of their Poſitions, were as follow:

That it is a bad By-Law, and void, as being in RESTRAINT *of Trade*, appears by *Waganor*'s Caſe, 8 *Co.* 125. *a. b.*

Therefore it is bad, without a Cuſtom to ſupport it. *Ibid.* in Point.

Yet NO *Cuſtom* is here *returned*, for Support of any *Reſtraint of Trade* at all: And therefore the Court *cannot take Notice* that there *is* any ſuch Cuſtom. 2 *Strange* 1187. *Sir John Hartop* v. *Hoare & al'*. The Court could not *judicially* take Notice "that every Shop "in *London* is a Market Overt;" that Cuſtom *not* being *found nor ſtated*. 1 *Strange* 187. *Argyl* v. *Hunt* (there cited) is in Point, to the ſame Purport. 5 *Mod.* 108. *Robinſon* v. *Groſcourt* is in Point with the preſent Caſe. *Carthew* 75. *Watſon* v. *Clerke*. The Court cannot, *ex Officio*, take Notice of the Cuſtoms of *London*. *Salk.* 125. *Hodges* v. *Steward*, the fourth Reſolution, is very ſtrong to the ſame Purport. And *Co. Lit.* 175. *b.* proves the ſame Poſition.

Now here, though the *general* Cuſtom "to make By-Laws," is ſet out; yet, the *particular* Cuſtom "to make *ſuch* a By-Law as "*this* is, in Reſtraint of Trade," is NOT ſet out.

As to the Caſe of *Wannel* v. *Camerar' Civit' London*, in 1 *Strange* 675. There the particular Cuſtom *was* ſet forth, as appears upon ſearching the Record of that Caſe: (Though it has been called, AS cited from Sir *J. S.* a Caſe in Point.) In Sir *T. Raym.* 289. *Player* v. *Vere*, The By-Law made for the better and more regular Ordering of Cars and Carts, was holden to be good: But in 1 *Ro. Abr.* 364. *pl.* 5. (*inter Payne* v. *Hawghton*) a By-Law for reſtraining the Liberty of the Trade of a Carman, was holden *bad*.

Mr. *Williams* and Mr. *Norton*, on the other Side, argued for the *Procedendo*, and conſequently for the Validity of the By-Law.

This, they ſaid, is *not* a By-Law *in* RESTRAINT *of Trade*: 'Tis only in *Regulation* of it. And the *Court* WILL *take* NOTICE of the Cuſtom of *London*, "That no Man can exerciſe a Trade in "*London*, without being *free* of the City, and of ſome Company "of it." 2 *Stowe*, *B.* 4. *C.* 9.

We have returned a Cuſtom, "That we have Power to alter "and amend any ancient Cuſtom, and to appoint fit Remedy for "the Common Good of the Citizens, *where* there is Hardſhip or "Defect in it."

1 *Strange* 675. is this very Caſe, in the Joiners Company: And there is *no* Return there mentioned or hinted at, of any particular

Cuſtom; though it is indeed returned " That by the Cuſtom, no " Perſon can be free of the City, without being free of *One* of the " Companies."

In 5 *Co.* 62. *Chamberlain de Londres* Caſe, The By-Law about bringing Broad-Cloths to *Blackwell-hall* to be ſearched, *&c.* was held a good By-Law: And yet there is no particular Cuſtom ſet forth, on which to found the By-Law.

In 2 *Rol. Abr.* Tit. *By-Laws*, *pa.* 365. *pl.* 9. " That none ſhall " make, or uſe a Hot-Preſs in *London*." There is no particular Cuſtom, on which the By-Law is founded: Yet it was holden a good By-Law.

8 *Co.* 126. *a. Waganor*'s Caſe, and alſo Sir *T. Raym.* 288. *Player* v. *Vere*, prove that Cuſtoms in *London* may *partially* reſtrain Trade.

They admitted that a particular Cuſtom impowering them to make *this particular* By-Law, is *not* minutely ſet out: But at the ſame Time inſiſted that they had ſet forth *enough* of a particular Cuſtom, to warrant this By-Law. For it is ſet forth, " That if " any ancient Cuſtom, hard or defective, *&c.* wants Amendment, " the Mayor and Aldermen with the Conſent of the Commonalty, " have by Cuſtom a *Power* of appointing *fit Remedy* for the Com- " mon Good of the Citizens: So as, *&c.*" Which is a *general* Power of making By-Laws by Cuſtom: And this Power, confirmed too by Act of Parliament.

Now the preſent By-Law falls within the Proviſion of this *general* Power.

The Subſtance of this By-Law is, " That no Butcher by Trade, " though free of the City, ſhall exerciſe this Trade in the City, " without being free of the Butchers Company." And it was both a *Hardſhip* and *Defect*, that they *might do ſo, previouſly* to this By-Law.

Here is a Cuſtom ſhewn, " to *reſtrain* ALL *grown or growing* " *Evils*, within the City:" Which *is* a Cuſtom *to reſtrain Trade*. And there are Hundreds of By-Laws in *London*, founded upon this *general* Power.

And *Wannell*'s Caſe, is, in Subſtance, *in Point:* It is a general Return of an Authority to make By-Laws under their *general* Power; and the ſame Sort of By-Law with the preſent one, is eſta- bliſhed as a *good* One.

Lord

Lord *Mansfield:* I ſuppoſe it is a *Slip* in the Return.

I don't take the Objection to be " that it is neceſſary that it " muſt be a particular Cuſtom to make a *particular* By-Law:" But, " that there is *no general* Power here ſhewn, under the Cuſtom, to " lay ſuch a Reſtraint upon Trade."

This By-Law *is* a *Reſtraint* of Trade; and *not* a MERE *Regulation of it:* The Preamble *don't pretend* it to be made to regulate the Trade; but *merely* for the *Benefit of the Butchers Company*. It is founded upon the *general* Power of making By-Laws in the City of *London*.

Now under a GENERAL *Power to make By-Laws*, it is certain, that a By-Law cannot be made " *to* RESTRAIN *Trade*."

And by the general Cuſtom of *London*, *every* Freeman may exerciſe *any* Trade, *without* being free of a *particular Company:* Which this By-Law requires Him to be.

The Caſe in 1 *Strange* 675. *Wannell*'s Caſe, is not a full State of the Pleadings. But it appears that the Return ſtated " that no " Perſon could be a Freeman of the City, till he was a Member of " one of the Fraternities;" then ſtated a Power to make By-Laws; (but *how* that Power was ſet out, don't appear:) Then the By-Law itſelf is there ſet out; which profeſſes to be a *Regulation* of Trade, and recites " that ſeveral Perſons not free of the Joiners " Company had exerciſed the Trade of a Joiner in an *unskilful* and " *fraudulent* Manner, which could not be redreſſed whilſt ſuch " Perſons were not under the Orders and Regulations of the Com- " pany;" and *therefore* it enacts that no Perſon ſhall uſe that Trade, who is not free of the Company.

The By-Law for ordering and diſpoſing of Carts and Cars, in Sir *Tho. Raym.* 288, 289. is a *mere Regulation* of Trade.

And as this Power to make By-Laws to *reſtrain* Trade, is NOT *ſet out*, in the preſent Caſe, We *cannot preſume* it, from any printed Book, or any other way whatſoever. We cannot take *judicial* Notice of any *particular* Cuſtom ſupporting ſuch a By-Law as this; when no ſuch particular Cuſtom is ſet out: And it certainly is not good under the *general* Power, which *is* ſet out.

Mr. Juſt. *Deniſon* concurred, that the Court could not take *judicial Notice* of any ſuch particular Cuſtom to warrant this By-Law, without it's being *ſet out*.

And the Cuſtom here ſet out, of a Power " to mend any hard " or defective Cuſtoms," is *not ſufficient:* For here is *no* hard or defective Cuſtom particularly ſet out. And every Man, free of the City, had a Right to ſet up any Trade: Which original Right is here taken away by this By-Law.

Indeed they may make By-Laws to *regulate* Trade; but *not* to *reſtrain* it, unleſs they have a particular Cuſtom to ſupport ſuch By-Laws. As to the Caſe of the ordering and diſpoſing of Carts, Cars, Carters and Carmen, in *Raym.* 288. *Player* v. *Vere*, *That* was a By-Law for Regulation of Trade, and Prevention of Nuſances in the Streets and Lanes: But *this* is a By-Law to RESTRAIN Trade, not warranted by any particular Cuſtom. Therefore he held it bad.

Mr. Juſt. *Foſter* concurred; and ſpoke to the ſame Effect.

Mr. Juſt. *Wilmot* expreſſed Himſelf to the ſame Purport.

By the Court unanimouſly The By-Law was holden a *bad* One: And the Rule for ſhewing Cauſe " why a *Procedendo* ſhould not " go," was diſcharged.

Rex *verſ.* Killinghall.

MR. Serjeant *Poole* and Mr. *Clayton* ſhewed Cauſe againſt a Rule which had been moved for by Mr. *Norton*, " to quaſh " a Preſentment or Inquiſition found by the *Grand Jury* of the " County of *York*, at the General Seſſions of *Oyer and Terminer*, " for that County:" Which Mr. *Norton* objected to, as being *coram non Judice*; For, he ſaid, the Grand Jury had no Authority to make ſuch a Preſentment, or find ſuch an Inquiſition, *under their* GENERAL *Charge* from the Judge of Aſſize; whatever might be the Caſe if the Judge had *particularly* directed and preſided over an Inquiſition of this kind, on the Neglect of the Coroner.

The Fact found, was " That the Mare of *John Killinghall*, " Eſq; was the Cauſe of the Death of one *William Steilling*; and " was of the Value of 10 *l.*"

It happened that the Coroner had not taken any Inquiſition at all, upon this Death: So that the Lord of the Manor finding Himſelf likely to loſe his Deodand, had made this Application at the Aſſizes; where the Grand Jury found this Inquiſition or Preſentment; which was afterwards removed hither, by *Certiorari*.

Mr. Serjeant *Poole* and Mr. *Clayton* endeavoured to ſupport it.

This Inquiſition, they ſaid, before a Grand Jury is *traverſable*, (which a *Coroner*'s Inquiſition is *not*;) and therefore does No Body any Injury. And as the Coroner had taken *none*, at all, upon the preſent Occaſion, *this Method* was *neceſſary* to be taken, in order to come at the Deodand.

1 *H. H. P. C.* 419. *c.* 32. Of Deodands, ſhews moſt expreſly that this may be done, before Commiſſioners of Gaol Delivery, *Oyer and Terminer*, or of the Peace, if omitted by the Coroner. So does 1 *H. P. C.* 414. in treating of Inquiſitions; where *Laughton*'s Caſe, *H.* 37 *Eliz.* is cited; and it is ſaid to be " inquiſible before " the Juſtices of *Oyer and Terminer*; yea, or of the Peace; and " that it had been adjudged accordingly, *M.* 1656. in *Greeve*'s Caſe.

3 *Inſt.* 55. *c.* 8. *Note b. in Margine*, makes a Difference between Inquiſitions taken before the Coroners, and Inquiſitions taken before Juſtices of the Peace, as to having a Traverſe.

2 *Ro. Abr.* 96. *pl.* 3. proves that an Indictment may be taken before Juſtices of Peace, and of *Oyer and Terminer*.

2 *Lev.* 140. *Rex* v. *Parker* is in Point, " that the Coroner's " Omiſſion may be ſupplied by Commiſſion of Inquiry; or the " Juſtices of Peace, or of Aſſize may inquire of it, without Com- " miſſion."

2 *H. H. P. C.* 58. *cap.* 8. concerning the Coroner and his Court, and his Authority in Pleas of the Crown, proves that Grand Juries have this Juriſdiction in Caſe the Coroner neglects it.

2 *H. H. P. C.* 59. *Ad idem.* It is there ſaid " that Juſtices of " Peace, or *Oyer and Terminer*, or of the King's Bench may in- " quire, if the Coroner do not: But that THAT Preſentment is " traverſable; which the Preſentment of the Coroner of a *Felo de* " *ſe*, is *not*."

Upon theſe Authorities, they ſaid, my Lord *Falconbridge* (the Lord of the Manor) was adviſed to take this Method: But the Judge of Aſſize (Mr. Juſt. *Birch*) declined to meddle with it, or to have the Inquiſition taken before him *particularly*, or to give any *particular* Direction about it.

They added theſe Caſes alſo, 1 *Ventr.* 352. in the Note at Bottom. *Poph.* 209. *Anon' :* and S. C. (apparently,) in *Noy* 87. " It *may* " be done *before Juſtices of Peace*." 1 *Ventr.* 181, 182. *Stanlack*'s Caſe. " If a Coroner omits to inquire, this Court may do it, as " ſupreme

" ſupreme Coroner of *England*; or may make Commiſſioners to " inquire: Or Commiſſioners of *Oyer and Terminer* may inquire. " But then it is not *ſuper viſum Corporis*; and therefore may be " traverſed."

Mr. *Norton contra.*

This is a Preſentment *ex parte*; and a Preſentment of *intitling*, in order to found an *odious and ſuperſtitious* Claim; and *all tranſacted* IN SECRET.

The Caſes cited only prove, " That, in Default of the Coroner's " having inquired, the Juſtices of *Oyer and Terminer*, and of the " Peace, may make the Inquiry; and that it is traverſable."

They ſay " That we could not have traverſed the *Coroner*'s In- " quiſition:" (Which, however, I *deny:)* But this we may traverſe; and therefore can't be injured by it.

But will it be ſaid " that the *putting* a Man to a Traverſe, is *no* " *Injury?*

4 *Inſt.* 196, 197, 198. enters largely into the Subject of Traverſes; and condemns ſecret Inqueſts and Offices.

Now this is an Office of Intitling; and therefore ought to be *publickly and openly* found.

Lord *Mansfield*: By expreſs Statutes.

And I remember a Caſe of the late Duke of *Buckingham*'s Heirs; where, upon Application to the Court of Exchequer, Notice was directed to be given: Though, in general, *Notice* is *not* neceſſary.

Therefore I think *this* Inquiſition can't be ſupported.

And Inquiſitions before the Coroner *are* traverſable. [*V.* 2 *H. H. P. C.* 416. where that Author declares his own Opinion accordingly.]

Mr. Juſt. *Deniſon:* I think it cannot be ſupported.

Mr. Juſt. *Foſter:* I am of the ſame Opinion.

By the Court, Rule to quaſh the Preſentment made abſolute.

Friday

Friday 19th *Novemb.* 1756.

MEMORANDUM, On this Day, The GREAT SEAL was put into COMMISSION; being delivered by his Majeſty (immediately upon the Earl of HARDWICKE's Reſignation of it,) to SIR JOHN WILLES Lord Ch. J. of the Common Pleas, SIR SIDNEY STAFFORD SMYTHE third Baron of the Exchequer, and SIR JOHN EARDLEY WILMOT youngeſt Judge of this Court: Which prevented Mr. Juſtice WILMOT from ſitting much in *this* Court, during the Remainder of the preſent Term and the Whole of the two ſubſequent Terms.

Oppenhein qui tam *verſ.* Harriſon.

Saturday 20th *November* 1756.

THE Proceedings were ſet aſide, for Irregularity, in the want of an *Attorney's Name* being duly ſet to them: It appearing that although they had the Name of a regular Attorney, *in Fact*, ſet to them; yet it was ſo ſet, WITHOUT *any Authority from Him.*

And the Court alſo granted an *Attachment* againſt one *Habin*, who acted as Attorney for the Plaintiff, and had ſo put Mr. *Granger*'s Name (an Attorney of this Court) *without* Authority or Leave from Mr. *Granger*.

Cooper and Another, Aſſignees of William Johns, a Bankrupt, *verſ.* Chitty and Blackiſton Eſquires, Sheriffs of London. *Hil.* 27 *G.* 2. *Rot.* 869.

Tueſday 23d *November* 1756.

THIS Cauſe was twice argued: It came firſt before the Court, on *Monday* 9th *June* 1755; and again, upon *Tueſday* the 16th Inſtant. It was an Action of Trover brought by the Aſſignees of *William Johns*, a Bankrupt, AGAINST *the* SHERIFFS of *London*, who had taken *and ſold* the Goods of *Johns* in Execution under a *Fieri facias* which had iſſued againſt *Johns*, at the Suit of one *William Godfrey*.

On the Trial, a ſpecial Caſe was ſettled:

Which Caſe ſtates, That *Johns* was regularly *declared a Bankrupt* on the 8th of *Decemb.* 1753. And as to the Reſt, the following Times and Facts were ſtated; *viz.* That on the 5th of *December* 1753. one *Godfrey* obtained Judgment in the Common Pleas, againſt the ſaid *Johns*; and on the ſame Day (5th *December* 1753)

Execution upon the ſaid Judgment was taken out againſt Him by *Godfrey*, and the *Goods ſeized* by the Sheriffs, under it; That *Johns* committed the Act of Bankruptcy *4th December* 1753, and on the 8th of the ſame *December*, a Commiſſion of Bankruptcy was taken out againſt Him; and on the very *ſame Day*, the Commiſſioners of Bankruptcy *executed an* ASSIGNMENT; and afterwards, *viz.* on the 28*th* of *December*, a *Bill of Sale* of the Goods was made, by the Sheriffs. The Plaintiffs are the Aſſignees under the Commiſſion: The Defendants are the Sheriffs of *London*, who ſeized the Goods under the Execution.

The Point was, Whether the Aſſignees under the Commiſſion of Bankruptcy can maintain an Action of Trover, againſt the SHERIFF (who executed this Proceſs under a regular Judgment and Execution;) for *ſeizing* the Goods, under a *Fieri facias* iſſued and executed *after* the Act of Bankruptcy was committed; and *ſelling* them, *after* the Aſſignment was executed.

The Counſel, who argued for the Plaintiffs, made two Queſtions, *viz.* Argument for the Plaintiffs.

1ſt, WHOSE *Property* the Goods were, *when ſeized* by the Sheriffs, by Virtue of this *Fieri facias*;

2dly, *Whoſe* Property they were, *when* SOLD by the Sheriffs.

1ſt Queſtion. *After* the *Act* of Bankruptcy, they ceaſed to be the Property of the *Bankrupt Himſelf*, they ſaid; whereſoever elſe, the Property might be between the Act of Bankruptcy and the Aſſignment.

This *Relation* to the Act of Bankruptcy is like that of *Adminiſtrations* to the Time of the Death: And they cited *Kiggil* v. *Player*, 1 *Salk.* 111. as S. P. with the preſent Caſe, exactly.

The utmoſt that the Bankrupt Himſelf could be pretended to have, was a ſpecial Property, *defeazible* by the Aſſignment. It is like the Caſe of a Diſtreſs for Rent; where the Seizor may ſell the Diſtreſs, after 5 Days; but if the Money be paid within the 5 Days, he can't ſell: So that in the *Interim*, the Right is defeazable.

Here, the Plaintiffs have declared as Aſſignees under the Commiſſion of Bankruptcy: Therefore their Intereſt *veſts* as *from the Time of the* ACT *of Bankruptcy*.

If the Bankrupt *Himſelf* had delivered the Goods to a Stranger, it had been the ſame Thing: The Stranger would be anſwerable to the Aſſignees.

Sheriffs execute Proceſs *at their Peril:* They are anſwerable *civiliter*, for what they do upon it. 11 *H.* 4. 90. 14 *H.* 4. 25.

A Man may, without his own Fault, be poſſeſſed of a Horſe which has been ſtolen: But nevertheleſs he is anſwerable, *civiliter*, to the true Owner, for it.

The Sheriff had no Authority to take any Goods in Execution, *but* the Goods of the *Defendant:* If he does take any *other* Goods, he is a Treſpaſſer.

In Writs of Execution, it is at their Peril, if they take *another* Man's Goods. In *Carthew* 381. *Hallett* v. *Byrt*, 'Tis ſo laid down by Ch. J. *Holt*, expreſly.

Now theſe were Goods of the Aſſignees. And they may maintain an Action, *either* againſt the *Plaintiff* in the Cauſe, *or* the *Sheriff*, OR the *Vendee* of the Goods: And the Sheriff is the *propereſt* Perſon, againſt whom to bring the Action.

The *Giſt* of an Action of Trover is the CONVERSION: The *Finding* is not the material Part.

And they cited ſeveral *Niſi prius* Caſes, of Actions brought by Aſſignees of Bankrupts: *Viz.*

M. 11 *G.* 1. Trover by *Vanderhagen & al.* Aſſignees of *Daniel*, a Bankrupt, v. *Rewiſe*, a Serjeant at Mace of the City of *London*; S. P. with the preſent. Lord Ch. J. *Pratt* held the Action maintainable.

The S. P. was alſo before Lord Ch. Juſt. *Lee*, in a Caſe of *Bloxholm*, Aſſignee of *Mills* a Bankrupt, v. *Oldham & al.* at the Sittings after *Tr.* 1750. at *Guildhall:* In Trover againſt a Sheriff, and the former Plaintiff, and the Vendee, (all of them together.) It was objected "That the *Sheriff* ought to be acquitted:" But overruled; and Verdict againſt *all three*.

The Seizure there was *before* the *Commiſſion*, but AFTER *the* ACT of Bankruptcy.

The ſecond Queſtion is, "*Whoſe* the Goods were, *at the* TIME "OF THE SALE." The Writ only commands the Sheriff, "to "ſell the DEFENDANT'S Goods:" And if he ſells the Goods of *another* Perſon, it is a CONVERSION.

It is beyond Doubt, that the Aſſignment has *Relation to the Act* of Bankruptcy: And the Aſſignees ſtand in the Bankrupt's Place, *from that Time*. 1 *Ventr.* 193. *Monk* v. *Morris and Clayton* proves this.

Here then the *Aſſignees* had *all* the Property that the *Bankrupt had, at the Time of his Act* of Bankruptcy. Conſequently, the *abſolute Dominion* was in *them:* And the Sheriff could not, AFTER ſuch Aſſignment, *ſell* them, *as* the Defendant's. Indeed Sheriffs ſeldom do, *in Fact*, ſell the Goods, without Indemnity. But the Sheriff has here *committed an Error*, in ſelling them *at all:* For they were *not* the Defendant's. He might, it is true, have ſummoned a Jury to inquire "*Whoſe* Goods they were." But ſtill, even their Verdict cannot affect the Right of the *true* Owner of the Goods.

The Point about *Relation* backwards, does not at all affect the Queſtion, *as to the* SALE. For the Aſſignment was *prior* to the SALE, though not to the *Seizure*.

And they affirmed that the Sheriff not only might, but even ought, in this Caſe, to have returned "*Nulla bona:*" *That* would have been the proper, and the true Return. And if it had been diſputed, he then might have *brought the Money into Court*. There is a Caſe, of *Rex* v. *Brein* Bailiff of the *Savoy*, 1 *Keb.* 901. where the Goods were claimed under a Bill of Sale; the Sheriff returned "*Nulla bona*;" and the Money was Ordered to be brought into Court by the Sheriff; and the Return to be made agreeable to the Event of a Trial of the Validity of the pretended Bill of Sale, after ſuch Validity ſhould be tried in an Action.

In the preſent Caſe, the Defendants *knew of* the Aſſignment, BEFORE *they* SOLD *the Goods*; whatever they might do, when they *ſeiſed* them. And they could not poſſibly be *obliged* to ſell them: It is contrary to an expreſs Act of Parliament, which veſts the *Property in the Aſſignees*. So that here the Sheriff has ſold the Goods, not of the Bankrupt, but of the *Aſſignees*.

And ſuppoſing that the Plaintiffs may bring an Action againſt the Plaintiff in the original Action, OR againſt the Vendee of the Goods; yet they ſeem, Both of 'em, to have better Excuſes than the *Sheriff* has; and are more innocent. Therefore why ſhould the Aſſignees be turned round to *them*, when they can undoubtedly maintain either Treſpaſs or Trover againſt the Sheriffs, who have *ſold* the Goods; which is a Converſion, and will ſupport an Action of Trover? That the Plaintiffs have this Election, to bring either

Treſpaſs

Treſpaſs or Trover, appears from *Cro. Eliz.* 824. *Biſhop* v. *Lady Montague*, and *Cro. Jac.* 50. S. C.

Therefore they concluded that the Action was well brought.

Argument for the Defendants.

The Counſel who argued for the Defendants, the Sheriffs, agreed that the Matter would turn upon the Solution of the two Queſtions made by the other Side.

As to the firſt Queſtion, They ſaid it would be very hard, if this Action ſhould lie AGAINST *the* SHERIFFS; and *they* be put to controvert the Act of Bankruptcy, which is a Matter not at all within their Knowledge.

They argued that the Sheriffs ſhall not be conſidered as WRONG-*Doers:* And to prove it, cited 1 *Lev.* 95. *Turner* v. *Felgate*. *Raym.* 73. S. C. 2 *Siderf.* 126. S. C. and 1 *Keble* 822. S. C. 1 *Lev.* 173. *Bayly* v. *Bunning*. 1 *Siderf.* 271. S. C. 2 *Keble* 32, 33. S. C. and 2 *Siderf.* 126. and *Raym.* 73. *Turner* v. *Felgate*.

The only Acts of the Sheriffs that can be conſidered as a *Converſion*, are the Acts of *Seizure* and *Sale*.

Now They were compellable by the Writ of *Fieri facias* to *ſeize* the Goods and *levy* the Debt.

For TILL *the Commiſſion and Aſſignment*, the *Property was in the Bankrupt:* And it did *not appear* that a Commiſſion EVER WOULD *be taken out*.

1 *Salk.* 108. *Cary* v. *Criſp*, is expreſs in Point, "that the Pro-"perty is in the Bankrupt, *till* Aſſignment." It was there reſolved "that the Property of the Goods is *not* transferred out of the Bank-"rupt *till* Aſſignment. 2 *Str.* 981. *Braſſey & al'* v. *Dawſon & al' accord'*.

1 *Lev.* 173. *Baily* v. *Bunning*. Judgment was for the Officer; He being obliged to execute the Writ; and could not know of the Act of Bankruptcy, or that any Commiſſion would ever be ſued: And the Sheriff was holden not to be liable, although he had Notice of the Aſſignment.

1 *Siderf.* 272. S. C. The *Taking* was holden lawful.

Comberb. 123. *Lechmere* v. *Thorowgood*. The Officer ſhall not be made a Treſpaſſer, by Relation. 3 *Mod.* 236. S. C. 1 *Shower* 12. S. C.

The

The *Commiſſion* of Bankruptcy makes no Alteration, TILL *Aſſignment:* And AFTER *Aſſignment* there ſhall be a *Relation*, ſo far as to avoid all meſne Acts of the Bankrupt, and *even to over-reach this Judgment*-Creditor. Thus far, they admitted.

But they inſiſted that the Action *ought not* to have been brought againſt the SHERIFF.

The Sheriff is to *ſeize*, *ſell*, and *return his Writ*. In Proof of this, they cited 2 *Ld. Raym.* 1072, 1074. *Clerk* v. *Withers*. 1 *Salk.* 322, 323. S. C. (3d Point.) 6 *Mod.* 293, 299. S. C. 1 *Siderf.* 29. *Harriſon* v. *Bowden*. *Cro. Eliz.* 235. *Mountney* v. *Andrews*. 1 *Ro. Abr. Execution* 893. Letter B. *pl.* 2. *Dyer* 98. *b.* and 99. *a.* § 57. and the two Caſes there cited in the Margin. And *Cro. Eliz.* 597. *Charter* v. *Peeter*. From all which Caſes, it appears that the SHERIFF is not liable to be moleſted.

1 *Salk.* 321. *Kingſdale* v. *Mann* proves that the *Seizure* is the *Eſſential* Part of the Execution: And an Execution is an *entire* Thing; and *cannot be ſtopped*, after it is once begun. 2 *Show.* 79. *Cockram* v. *Welbye*.

And after the Sheriff had ſeized theſe Goods, the original Plaintiff, (*William Godfrey*) could oblige the Sheriff to return his Writ: And yet, upon the Principles advanced, the Sheriff muſt be put under the greateſt Hardſhips: And he had NO METHOD *to make the Aſſignees* of the Bankruptcy to give him any *Aſſiſtance towards proving* the Act of Bankruptcy.

Indeed the Execution is *good*, though the Writ be *never* returned. 5 *Rep.* 90. *a. Hoe*'s Caſe: (1ſt Reſolution.)

The only Return the Sheriff could make muſt be, "That he "*had levied* the Money:" (which could only be by Sale.) Therefore he was OBLIGED *to ſell*. Conſequently the Law will not make him a Wrong-doer, *by* ſelling.

The following Caſes, they ſaid, were in Point for them; *viz.* 1 *Lev.* 173. *Baily* v. *Bunning*. 2 *Keble* 32, 33. S. C. 1 *Siderf.* 271. S. C. 3 *Lev.* 191. *Philips* v. *Thompſon*. 1 *Show.* 12. *Lechmore & al'* v. *Thorowgood & al'*. *Comb.* 123. S. C. 3 *Mod.* 236. S. C. and *Cole* v. *Davies & al'*, 1 *Ld. Raym.* 724. *per Holt* in Point, as againſt the Sheriff, moſt expreſly.

And the preſent Plaintiffs may have an *adequate and complete Remedy*, againſt the *Plaintiff* in the original Action.

As to the Cafes cited, The Gentlemen who have argued on the other Side, put it upon the Queftion, " Who had the *Property* of " the Goods."

Now the Property was in the *Bankrupt*, *at the* TIME of the Execution: It was NOT *in Abeyance*; as it is in the Cafe of an Adminiftration. (Which is an Anfwer to the Cafe of *Kiggil* v. *Player*.)

The Sheriff is not in the Cafe of a *Stranger*. For he was OBLIGED *to execute and return* the Writ.

Indeed the Sheriff is to execute the Writ at his Peril; and *Carthew* 381. is fo: The Reafon is, becaufe the Sheriff may impanel a Jury, to inquire " whofe the Goods are." But here, there were *no* Means for the Sheriff to indemnify himfelf: The Goods were undoubtedly THEN the Goods of *William Johns*; even though he had then committed an Act of Bankruptcy.

The Affignees have not a Right to recover the SPECIFIC Goods; but *only Damages*.

Trefpafs will lie againft the *Plaintiff* in the original Action, even *before* he receives the Money: though *Trover* indeed would not, *till* AFTER.

It is not certain that an Action will lie againft the *Vendee* of the Sheriff.

As to *Vanderhagen*'s Cafe, it is not fufficiently clear, how it was; or why it was determined.

But as to the Cafe of *Bloxham* v. *Oldham*, Mr. *Henley* did not * inift on the Objection, " That the Action would not lie *againft* " the Sheriff;" becaufe it would *not help* his Client: For in that Cafe, the Sheriff, and the Plaintiff in the Original Action, were *Both* of them Defendants. And the Cafe of 1 *Lee*. 173. was not indeed by Lord Ch. J. *Lee*, thought appofite to that Cafe: But it was *not* over-ruled by Him. And the Goods were certainly the Goods of the Bankrupt, *till* Affignment.

* *N. B.* Mr. *Hume*, who was Counfel for the Defendant in that Cafe of *Bloxham* v. *Oldham*, agreed, " That the Objection " againft the Sheriff's being a Defendant," was NOT *inifted upon*; becaufe the Plaintiff in the Original Action (who was alfo a Co-Defendant with the Sheriff there) had *indemnified*

the Sheriff: So that it was, really, a Point quite *immaterial* to the Plaintiff; (who was at *All* Events liable to the Action.)

They added, that this was a Point of great Conſequence to all Sheriffs and Officers: On the other Hand, Creditors cannot be injured, though Sheriffs ſhould be excuſable, and the Original Plaintiff *only* ſhould be liable to the Action.

As to what has been ſaid of *Security* taken by the Sheriff. The Court can take no Notice of a Sheriff's taking Security; nor can they ſuppoſe Him conuſant of a *private* unknown Act of Bankruptcy: And it would be very hard if an innocent Officer ſhould be hurt by *Retroſpection* and *Relation*.

They agreed that this Execution may be avoided, *as againſt the Original Plaintiff:* 2 *Strange* 981. *Braſſey & al.* v. *Dawſon & al.* is a Proof "that it may." But they denied it, *as* to rendering the *Officer* liable to an Action: For *He* is excuſable; as appears from the Caſes before cited.

As to the ſecond Queſtion. The Foundation of this Action of Trover, is *Property in the Plaintiff*, at the *Time* of the Seiſure; and a *Tortious and Illegal Act* of *Converſion:* For without *both* theſe Circumſtances, *this* Action will not lie.

Now the PROPERTY *is in the* BANKRUPT, TILL *Aſſignment:* And the *ſubſequent Sale* cannot make the Sheriff a Wrong-doer, by a *fictitious Relation*. *Raym.* 161. *Bilton* v. *Johnſon & al'*. "The "Relation of a Teſte ſhall not juſtify a Tort."

It is ſaid that "this Relation is given *by Act of Parliament*." But there are no Words in the Act of Parliament that can make the Sheriff a *Wrong-doer*.

IF *the Seiſure* was lawful, the *Sale* was ſo too. 2 *Ld Raym.* 1074, 1076. *Clerk* v. *Withers*. *Cro. Jac.* 515. *Sly* v. *Finch*. *Cro. Eliz.* 440. *Boucher* v. *Wiſeman*. *March* 13. *Parkinſon* v. *Colliford & al' Executors of a Sheriff*. *Cro. Car.* 539. S. C. 1 *Jones* 430. S. C. *Hob.* 206. *Speake* v. *Richards*. *Cro. Eliz.* 237. *Mounteney* v. *Andrews*. The Law conſiders the *whole Execution*, as one *entire* Act: The intermediate Days are only allowed for the Sake of the Sheriff. Conſequently, He may execute the Whole *at once:* He may ſeiſe, and ſell directly. The Execution is an *entire* Thing; and can *not be ſtopped*. *Cro. Eliz.* 597. *Charter* v. *Peeter*. 6 *Mod.* 293. *Clerk* v. *Withers*. Therefore the *Officer* ſhall be protected.

Suppoſe

Suppoſe an *Action* ſhould be brought *againſt the Sheriff* for the *Money*. He might avail Himſelf perhaps by ſpecial Pleading; *provided* He was able to make out the Facts he ſhould ſpecially plead: But *how* could He be able to *prove* the Act of Bankruptcy, Trading, or Aſſignment; to all which, He is an entire Stranger? Therefore it would be hard to ſuffer ſuch an Action to be maintained againſt *Him*. But *all* theſe Matters are in the *Privity of the Original Plaintiff*: Againſt *whom*, therefore, the Action ought to be brought.

It is ſaid, "the Sheriff acts at *his Peril*."

But it is admitted that the Method of impanelling a Jury would be *no Protection* to Him.

Reply. The Counſel for the Plaintiffs replied, That it is ſtated "That "the *Aſſignment* by the Commiſſioners of Bankruptcy was *previous* "to the *Bill of* SALE by the Sheriffs."

The Sheriff's being always a *reſponſible* Perſon, and therefore moſt likely to be made Defendant, is the very Reaſon why He *ought* to be liable to the Party who has received the Injury.

The *Finding*, or even the *Taking Poſſeſſion* of Goods found, is *no* Wrong: But 'tis the CONVERSION that makes the Perſon a *Tort-feaſor*.

They admitted that the Sheriff is *not* anſwerable for the *Irregularity of a Judgment*: (For He is bound to execute the Command of the Writ.) But if He take the *Goods of* ANOTHER PERSON, *inſtead of* the Goods of the Defendant, He *is* anſwerable for THAT.

It has been ſaid indeed, that "they were *at* THAT *Time* the "Goods of the *Bankrupt* Himſelf."

But be the TAKING lawful, or not lawful, yet here is an *actual* CONVERSION, an *actual* DISPOSITION of the Goods: Which makes him a Treſpaſſer *ab initio*.

It has likewiſe been ſaid, that "the Court will protect the She-"riff." But the *Relation* goes back, *quite up to the* ACT *of Bankruptcy*.

They denied that the Execution is *ſo entire* that the Sheriff can *not ſtop* in it, after Seiſure and before Sale of the Goods. Suppoſe the Sheriff had confeſſedly ſeiſed *another Perſon*'s Goods, ſhould He be obliged to ſell *them*? *Dalton's Office of Sheriff* ſays "The She-"riff

" riff may impanel a Jury; and *after that*, ſhall not be anſwer-
" able." Now here He might either have impanelled a Jury; or have kept the Money in his Hands, or brought it into Court, till the Property of the Goods had been determined.

They admitted the general *Principle* of the Caſes cited on the Head of Executions; but *denied the Application* of them to the preſent Caſe. They alſo denied the Principle, " That a Sheriff " ſhall never be a Tort-feaſor *by Relation*." For He ſhall in *ſome* Caſes be ſo; as where He takes the Goods with a *bad Original Intention*.

As to *Baily* v. *Bunning*, They endeavoured to diſtinguiſh it. In order to which, they remarked, that there is *no Finding* of an ACTUAL *Converſion*, or of what could be called ſo by the Court: It is only a *Demand and Refuſal*; which is ONLY EVIDENCE to a Jury. And the Opinion of the Court there went upon the *Taking*; which they held to be legal: Whereas here is an ACTUAL *Converſion ſtated*. An Action would lie, One would think, againſt the *Vendee* of the Sheriff, in Point of Reaſon: And the *Practice* does ſtrongly ſupport it; for Nine in Ten of theſe Actions *are* brought againſt the *Vendees* of the Sheriff.

In the Caſe of *Bloxham* v. *Oldham*, there was a very *material Difference*, " Whether the Sheriff ſhould have a Verdict *for* Him, " or a Verdict *againſt* him:" For in the *one* Caſe, He would *receive* Coſts; in the *other*, He muſt *pay* them.

The Plaintiffs had no Right to call upon the Sheriffs, TILL *the* RETURN of the Writ: And they might *then* have returned " *Nulla bona*." Therefore this is *not* ſuch a hard Caſe upon the Sheriffs, as is ſuggeſted. And this is not the only Caſe where the Sheriff is to act at his *Peril:* For in taking of Bail, *&c.* He muſt do ſo, as well as here.

If the Sheriff had returned " *Nulla bona*," the *Onus probandi* would have lain upon the Original Plaintiff.

In the Caſe of *Turner* v. *Felgate*, the Sheriff was certainly excuſable, by Virtue of his Writ.

In the Caſe of *Cole* v. *Davies & al'* in 1 *Ld. Raym.* 724. The Goods were ſold *before* the Commiſſion and Aſſignment. For the Caſe is there put, of a Commiſſion and Aſſignment, *both* of them SUBSEQUENT to the Sale of the Goods. The Words are, " If He " ſeizes AND *ſells*," and THEN a Commiſſion is granted, and the " Goods aſſigned, the Aſſignee may maintain Trover againſt the

" Vendee: But No Action will lie againſt the Sheriff, becauſe " he obeyed the Writ." But our Reaſoning in the preſent Caſe is founded upon the *Sale's* being an *unlawful* Act.

In the Caſe of *Braſſey & al'* v. *Dawſon & al'* there was no Aſſignment, previous to the Seizure.

They did not deny that the Bankrupt had in the preſent Caſe, a *Sort* of Property, a *defeazable Property*, in Him at the Time of taking the Goods. But in the Caſe of *Clerk* v. *Withers* (reported in 6 *Mod.* 290. and in 1 *Salk.* 323. and in 2 *Ld. Raym.* 1072.) the Defendant in the Action had the whole *indefeazable Property* in Him; and the Sheriff ought to have gone on: But that Caſe is not applicable to the preſent Caſe; where the Property was only *defeazable*.

As to the Caſes cited from *Hob.* 206. and *March* 13. They agreed to them.

The *Time* allowed to the Sheriff makes no Difference, (they ſaid;) becauſe He has done Wrong.

And however *entire* a Thing an Execution, in general, may be; yet here it was *irregularly executed*.

The Truth of the Return of " *Nulla bona*," in this Caſe, depends upon the preſent Queſtion.

It is very frequent for Sheriffs to be intangled in Difficulties about their Returns. Here, he might have taken a Writ *de Proprietate probandâ*.

Bailey v. *Bunning* turned upon the *Taking*.

Lechmere & al' v. *Thorowgood* only proves " That the Goods " were *in Cuſtodia Legis*." And ſo they were: But to the Purpoſes of the Law; which, in the preſent Caſe, is for the Benefit of the Creditors of the Bankrupt.

CURIA ADVISARE VULT.

And now (*Tueſday* 23d *Novem.* 1756.) Lord MANSFIELD, delivered the Opinion of the Court; and ſaid They were *All* agreed, as well his two Brethren then preſent in Court, as his Brother *Wilmot*; (who was at preſent engaged in another Place,) in their Opinion.

There are *few* Facts *eſſential* to this Caſe; and it lies in a *narrow* Compaſs.

He

He then ſtated the Caſe, (which ſee in *p.* 20. *ante*:) And was very particular in ſpecifying the *Dates* of the ſeveral Tranſactions.

The General Queſtion is, " Whether or no the Action is maintainable by the Aſſignees, againſt the *Defendants*, the *Sheriffs*, who have taken AND SOLD the Goods.

It is an Action of TROVER.

The bare Defining the Nature of this kind of Action, and the Grounds upon which a Plaintiff is intitled to recover in it, will go a great Way towards the Underſtanding, and conſequently towards the Solution of the Queſtion in this particular Caſe.

In *Form*, It is a Fiction: In *Subſtance*, a Remedy to recover the Value of Perſonal Chattels *wrongfully* converted by another to his own Uſe.

The Form ſuppoſes the Defendant *may* have come lawfully by the Poſſeſſion of the Goods.

This Action lies, and has been brought in many Caſes where, in Truth, the Defendant has got the Poſſeſſion *lawfully*.

Where the Defendant takes them wrongfully, and by Treſpaſs, The Plaintiff, if He thinks fit to bring *this* Action, waves the Treſpaſs, and admits the Poſſeſſion to have been *lawfully* gotten.

Hence, if the Defendant delivers the Thing upon Demand, No Damages can be recovered in *this* Action, for having *taken* it.

This is an Action of Tort: And the whole Tort conſiſts in the *wrongful Converſion*.

Two Things are neceſſary to be proved, to intitle the Plaintiff to recover in this kind of Action: 1ſt, *Property* in the Plaintiff; and 2dly, A wrongful *Converſion*, by the Defendant.

As to the firſt, It is admitted in the preſent Caſe, that the *Property* was in the Plaintiffs, as on and from the 4*th* of *December*, (which was *before* the Seizure,) by *Relation*.

This *Relation* the Statutes concerning Bankrupts introduced, *to avoid Frauds*. They veſt in the Aſſignees, All the Property that the Bankrupt had, at the Time of what I may call the *Crime* committed, (for the old Statutes conſider him as a Criminal:) They make

make the Sale by the Commiſſioners good againſt All Perſons who claim by, from, or under the Bankrupt, *after* the Act of Bankruptcy; and againſt all Executions not Served and Executed *before* the Act of Bankruptcy.

Diſpoſitions by Proceſs of Law are put upon the ſame Foot with Diſpoſitions by the Party: To be valid, they muſt be *completed* before the Act of Bankruptcy.

Till the making of 19 *G.* 2. *c.* 32. If the Bankrupt had *bonâ fide* bought Goods, or negotiated a Bill of Exchange; and thereupon, or otherwiſe in the Courſe of Trade, *paid* Money to a fair Creditor, *after* He himſelf had committed a *ſecret* Act of Bankruptcy, Such *bonâ fide* Creditor was liable to *refund* the Money to the Aſſignees, after a Commiſſion and Aſſignment: And the Payment, *though* really and *bonâ fide* made to the Creditor, was avoided and defeated by the *ſecret* Act of Bankruptcy.

This is remedied by that Act, in Caſe *No Notice* was had by the Creditor, (prior to his receiving the Debt,) "That his Debtor was "become a Bankrupt, or was in inſolvent Circumſtances."

Therefore as to the *firſt* Point, It is moſt clear, that the *Property* was *in the Plaintiffs*, as ON *and from the 4th* of *December*, when the Act of Bankruptcy was committed.

2dly, The only Queſtion then is, "Whether the Defendants are guilty of a wrongful CONVERSION."

That the Converſion itſelf was wrongful, is manifeſt.

The Sheriffs had *no* Authority to SELL the Goods of the *Plaintiffs*; but of *William Johns*, only: They *ought* to have *delivered* theſe Goods to the Plaintiffs the Aſſignees. Upon the Foundation of the legal Right, the Chancellor, even in a ſummary Way, would have ordered them to be delivered to the Aſſignees.

It is *admitted* on the Part of the Defendants, That the innocent *Vendee* of the Goods ſo ſeized can have no Title under the Sale, but is liable to an Action; and that *Godfrey* the Plaintiff would have no Title to the Money ariſing from ſuch Sale, but if He received it, would be liable to an Action to Refund.

If the Thing be clearly wrong, the only Queſtion that remains is "Whether the Defendants are *excuſable*, *though* the Act of "Converſion be Wrongfull."

Though the Statutes concerning Bankrupts reſcind all Contracts and Executions not completed before the Act of Bankruptcy, and veſt the Property in the Aſſignees by Relation, in order to an equal Diviſion of his Eſtate among his Creditors, yet they do *not* make Men *Treſpaſſers or Criminal by Relation*, who have *innocently* received Goods from Him, or executed legal Proceſs, not knowing of an Act of Bankruptcy: *That* was not neceſſary, and would have been unjuſt.

The Injury complained of by this Action, for which Damages are to be recovered, is *not the Seizure*, but the *wrongful* Converſion.

The *Aſſignment* was made upon the 8*th* of *December*; the *Sale*, not till the 28*th* of *December*; the *Return*, not till the Octave of Saint *Hilary*, (which is the 20*th* of *January*.)

The Sheriff acts at his *Peril*; and is *anſwerable for any Miſtake*: Infinite Inconveniences would ariſe, if it were not ſo.

At the *Time* of the Sale and Return, it was more notorious "that theſe Goods belonged to the Plaintiffs," than it could probably have been in the Caſe of any third Perſon; becauſe Commiſſions of Bankruptcy and the Proceedings under them are *public* in the Neighbourhood, and indeed all over the Kingdom.

This Converſion is 20 *Days after* the Aſſignment.

The Defendants have here made a direct *falſe Return*: They have returned "That they took the DEFENDANT's Goods, *&c.*" whereas they were, (at the *Time of the Return*,) notoriouſly the *Goods of the* ASSIGNEES, when they were *taken*. They certainly might, and ought to have returned, "*Nulla bona*;" which was the Truth: For the Goods taken, were, beyond all Manner of Doubt, the Goods *of the Aſſignees*, at the *Time when* the Sheriffs *took* them; and the Bankrupt *could* have *no* Goods, after the 4*th* of *December*, when he had committed an Act of Bankruptcy. They would have been juſtified by the Truth of the Fact, if they had made this Return: For the *Bankrupt* neither had nor could have any Goods of his *own*, at *that* Time. It is arguing in a Circle, to ſay "That they could not return *Nulla bona*, *becauſe* they were obliged "to ſell; and they were obliged to ſell, *becauſe* they could not "return *Nulla bona*."

The *Seizure* is, here, out of the Caſe: For the Point of *this* Action turns upon the *injurious* CONVERSION.

Therefore We are All of Opinion that the Plaintiff is intitled to recover, in *this* Action.

But Objections have been made, by the Gentlemen who have argued this Caſe on Behalf of the Defendants.

Objections. It has been ſaid " That the Execution is *entire*; for the Debt is diſcharged by a Seizure in *Fi. fa.* That being entire, if once lawfully begun it *muſt* be completed; for Goods taken by a *Fi. fa.* ſhall be ſold by the Repreſentative of the Sheriff."

" That they ſhall be ſold, though the Plaintiff dies; and the Money ariſing by the Sale ſhall not be recovered back by the Defendant: Which is the Caſe of *Clerk* v. *Withers*, 1 *Salk.* 323. 2 *Ld. Raym.* 1072. S. C. and 6 *Mod.* 290. S. C."

" That a Writ of Error is no *Superſedeas.*"

" That the Sale by the Sheriff ſhall not be avoided againſt the Vendee, by a ſubſequent Writ of Error and Reverſal: Which is the third Point in *Matthew Manning*'s Caſe in 8 *Co.* 96."

Anſwer. All this is true, (and upon the plaineſt Reaſon,) *as between* the Plaintiff and Defendant, *Parties* to the Judgment in Conſequence of which the Execution iſſues; but no way applicable to the Caſe of a *third* Perſon.

None of theſe Caſes authorize the *Sheriff to ſell* the Goods of a THIRD *Perſon:* And it is admitted that the *Vendee* is not protected, here; becauſe at the Time of the Sale the Sheriff had no Authority to ſell.

[He then went minutely through the Caſes; ſhewing the Grounds upon which the Determinations proceeded, as againſt the *Parties* to the Judgment, who are *bound* by it and every Thing done in Conſequence of it.]

But the Argument from theſe Principles to the preſent Caſe, is this: " Here the *Taking* was *lawful*; and *therefore* the Sheriff was " *bound* to complete the Execution, by a Sale." Anſwer. The Premiſſes are not true; and if they were, the Concluſion would not follow.

The Taking was *not* lawful; becauſe they were *then* the Goods of a third Perſon.

2

But

But if the Taking were lawful, the Sheriff ought not to go on to a Sale, *after* a full Diſcovery that the Goods then belonged to a third Perſon.

To prove the Taking lawful, and that therefore the Sheriffs ſhall not be liable to an Action, were cited the Caſes of *Bailey* v. *Bunning*, reported in 1 *Leon.* 173, 174. 1 *Siderf.* 272. and 2 *Keble* 32, 33. [*V. Ante* 24, 25.] *Lechmere* v. *Thorowgood*, in *Comb.* 123. 1 *Shower* 12. and 3 *Mod.* 236. [*V. Ante* 24, 25.] and *Cole* v. *Davies & al'*, 1 *Ld. Raym.* 724. [*V. Ante* 25.]

The Fallacy of the Argument from the Authority of theſe Caſes, turns upon uſing the Word "*lawful*," Equivocally in two Senſes.

To *ſupport* the Act, It is *not* lawful; but to *excuſe* the Miſtake of the Sheriff through unavoidable Ignorance, It *is* lawful. Or, in other Words, The Relation introduced by the Statutes, binds the *Property*; but Men who act innocently at the Time, are not made *Criminals* by Relation; and therefore they are excuſable from being puniſhable by Action or Indictment, as *Treſpaſſers:* What they did, was Innocent, and in *that* Senſe, lawful; but *as a Ground* to ſupport a wrongful Converſion, by Sale after a Commiſſion publickly taken out and an actual Aſſignment made, It was *not* lawful.

In the Caſe of *Bailey* v. *Bunning*, the Goods were clearly *bound by the Teſte*. It is beſt reported in *Levinz*. The Queſtion referred by the Special Verdict was upon the TAKING; *viz.* "Whether "the Party was guilty in the TAKING:" and the Court excuſe the Bailiff for his *innocent executing* his Writ. The Caſe of *Philips* v. *Thompſon*, in 3 *Levinz.* 192. expreſly ſays "that this Reſolution in "the Caſe of *Baily* and *Bunning* was *only in Excuſe* of the *Bailiff* "for executing the Writ."

Siderfin does not ſeem to know what the Court was going upon: For the Court tied it up to the *Taking*; whereas he does not ſeem to diſtinguiſh between the *Trover* and the *Treſpaſs*. [*V.* 1 *Siderf.* 272.]

The Caſe of *Lechmere* v. *Thorowgood* is beſt reported in 1 *Show.* 12. And this Report (which is the only clear State of it in any of the Reports) puts it *ſingly* upon the making the Officers, who had *good Authority* and took the Goods *lawfully*, *Treſpaſſers by* RELATION.

Comber-

Comberbach, in *giving the* JUDGMENT of the Court, which is the only ſenſible Part of his whole Report, (for it is plain to me, that he did not underſtand the *former* Argument on the *former* Day, which is the firſt Part of his Report of the Caſe,) agrees with *Shower*; and ſays that " the Court were of Opinion that a Con- " ſtruction ſhould not be made, to make the Officer a *Treſpaſſer by* " *Relation:* For the *Taking* was *lawful, at the Time.*" But He muſt be miſtaken in the firſt Part of this Report: For Lord Ch. Juſt. *Holt* could never ſay " That the Property of the Goods is " veſted by the *Delivery* of the *Fieri facias*; and the Extent for " the King afterwards comes too late." No *Inception* of an Execution can bar the Crown: This Matter was lately very fully diſcuſſed in the Court of Exchequer in the Caſe of the *King* and *Cotton*.

As to the Caſe of *Cole* v. *Davies & al'*, reported in 1 *Ld. Raym.* 724. " That *no* Action will lie againſt the *Sheriff*, who, *after* the " Bankruptcy, ſeiſes *and ſells* the Goods, under a *Fieri facias* to him " directed;" (which is there ſaid to be ruled by Lord Ch. Juſt. *Holt* at *Niſi prius*, in *Hil.* 10 *Wil.* 3.) Theſe Notes were taken in 10 *W.* 3. when Lord *Raymond* was young, as ſhort Hints for his own Uſe: But they are too incorrect and inaccurate, to be relied on as Authorities. The Note ſtates four general Reſolutions upon Evidence, in a Trial at *Niſi prius*; but does not ſtate the Caſe or Queſtion to which the Reſolutions were applied: (Though, by the Particularity of the fourth Reſolution, I conjecture *that* to have been moſt immediately adapted to the Caſe then in Judgment.) The firſt Reſolution is an *Obiter* Reference to the Determination in *Baily* and *Bunning*; and it might not be at all material, to attend to the Diſtinction between Trover and Treſpaſs. Beſides, the Caſe there put is of a Sale by the Sheriff, *before the Commiſſion*; and the Converſion might be as excuſable as the Taking, *becauſe he obeyed the Writ:* Whereas here, the Goods were not *ſold*, till AFTER *both* Commiſſion and Aſſignment. It is a looſe Note of what was ſaid *Obiter:* It manifeſtly refers to the Caſe of *Baily* and *Bunning*; but is no Authority applicable to the preſent Caſe.

There are in the Courſe of Trade, numberleſs Acts of Bankruptcy *in Fact committed*, where no Commiſſion is ever taken out. Therefore it would be very hard, to make the Sheriff a TRESPASSER for TAKING the Goods of a Perſon who might *privately* and *ſecretly* have committed an Act of Bankruptcy, and perhaps many *Years before* too, and on which no Commiſſion might ever afterwards iſſue, and which the Sheriff could not poſſibly know. But None of theſe Reaſons hold, to juſtify the making a *falſe Return*, and *Selling the Goods after* a Commiſſion and an Aſſignment.

Argu-

Arguments have been urged from Inconvenience, if the Sheriff ſhould be made liable; becauſe He is *obliged* to ſell.

But the Sheriff may take an *Indemnity* from the Plaintiff, in Caſe there be a Doubt concerning the Property of the Goods. Poſſibly, *this Court* might interfere, if the Sheriff was reaſonably doubtful about the Property: At leaſt, they would have given him *Time* to make his Return. Or he might have put it on the Parties concerned in Intereſt, to litigate their Right, by filing a Bill in Chancery againſt them, to oblige them to interplead, in order to *aſcertain to whom* the Property belonged. Or He might *oblige* the Aſſignees to prove the Act of Bankruptcy, and the Aſſignment.

And notwithſtanding what has been urged as to the Hardſhips that Sheriffs will be under, there can hardly a Caſe exiſt, where there will be any Hardſhip upon the Sheriff, where the Taking *and* Sale, or even the *Sale only*, are SUBSEQUENT *to the Aſſignment*. But in the preſent Caſe the Sheriffs *knew* of the Bankruptcy, *before they ſold* the Goods.

There are much *greater* Hardſhips upon *other third* Perſons concerned in pecuniary Tranſactions with Bankrupts: Which Hardſhips they are nevertheleſs left ſubject to; becauſe it was neceſſary that they ſhould be ſo, in order to ſecure the *End* and Intention of the Acts relating to Bankrupts; namely, the Securing their Effects for the equal Satisfaction of their Creditors.

The Commiſſion and Aſſignment are, both, *notorious* Tranſactions; ſo that a Sheriff cannot well be hurt, by being left liable to this Action: Whereas there would be Danger, if it were otherwiſe, of great Colluſion being practiſed by Sheriffs, on theſe Occaſions; which might be encouraged by a contrary Reſolution. The *Seizure* here is after the Act of Bankruptcy committed, and and therefore after the Property by Relation is veſted in the Aſſignees: But *that* was *innocent*, and *excuſable*; and the Sheriff ſhall *not* be *liable by Relation*, as a WRONG-*Doer*. The Giſt of *this* Action is the *wrongful* CONVERSION, by the *Sale*; and *falſe Return*, long *after* the Commiſſion and *Aſſignment*.

Therefore *per Cur.* unanimouſly, The Action is maintainable, in *this* Caſe, againſt the Defendants; and there muſt be Judgment for the Plaintiffs.

Judgment for the Plaintiffs.

Robinſon *verſ.* Robinſon.

Was a Caſe out of Chancery, on a Will.

ON the 27th of *July* 1723. *George Robinſon* of *Bochym* in the County of *Cornwall* Eſq; duly made his Will: And, after giving his Wife one Guinea, and his Father-in-Law a Groat, He deviſed as follows—" I bequeath ALL *my real Eſtate* (excepting " my Eſtate in the Pariſh of *Endellyon*, late Mr. *Newman*'s, and " all my Preſentations in the ſaid County,) to *Lancelot Hicks* of " *Plymouth* in the County of *Devon* Gentleman, for and during the " Term of his natural Life, AND NO LONGER: Provided that " He alter his Name, and take that of *Robinſon*, and live at my " Houſe of *Bochym*."

" And after his Deceaſe, to SUCH *Son* as he ſhall have, lawfully " to be begotten; taking the Name of *Robinſon*. And for Default " of SUCH *Iſſue*, Then I bequeath the ſame to my Couſin [the " Defendant] *William Robinſon*, Rector of *Landewedneck* and his " Heirs for ever."

" *Item.* My Will and Deſire is, That *He* [meaning *William R.* " Rector of *Landewedneck*,] have Liberty to preſent whom he " pleaſes to any Vacancy that ſhall happen in any of my Preſenta- " tions, during his Life; and in Caſe any of his Children ſhall " take or be deſigned for Holy Orders, Then it is my Deſire that " in Caſe of any Vacancy in either of my Preſentations, that Bonds " of Reſignation be taken, to ſuch Child or Children, if the Va- " cancy happen before He or They attain ſuch Orders: And after " the ſame ſhall be diſpoſed of as aforeſaid, Then I give *the* PER- " PETUITY *of the ſaid Preſentations*, to the ſaid Mr. *Lancelot* " *Hicks*, in the *ſame Manner*, and to the *ſame Uſes*, as I have given " my Eſtate."

And after bequeathing ſome Legacies, He gave all the Reſt of his Goods and Chattels, together with his Eſtate at *Endellyon*, to his ſaid Kinſman *William Robinſon*; and made him ſole Executor.

This *William Robinſon* was Heir at Law to the Teſtator.

On the 30th of *September* 1728. The Teſtator died without Iſſue; leaving the ſaid *William Robinſon* his Heir at Law.

Lancelot Hicks was then living; and took the Name of *Robinſon*: And, *after the* Teſtator's Death, had two Sons; *George*, his eldeſt;

and the Plaintiff *Edmund*; Both of them born after the Teſtator's Death. And *Lancelot Hicks* entered upon the Eſtate, and lived at the Teſtator's Houſe at *Bochym*. And his *Eldeſt* Son, *George*, was called by the Name of *Robinſon*; and DIED *in March* 1738, an Infant; in the Life-time of the ſaid *Lancelot Hicks*, his Father, and of the Plaintiff his younger Brother.

Lancelot Hicks, alias Robinſon, died in *July* 1745; leaving the Plaintiff *Edmund Hickes, alias Robinſon*, his ONLY SURVIVING Son, an Infant: Who brought his Bill in Chancery, to have a Conveyance.

Short State of the Caſe—The Title of the Plaintiff appears to be ſtated thus—That *Lancelot Hicks* took the Eſtate, and complied with the Condition; and then had two Sons born: The *Eldeſt* Son died an Infant, *in his Life-time*. Then *Lancelot* himſelf died: On whoſe Death, *William Robinſon* claims the Eſtate; the *firſt* Deviſe " to the *Son* of the Body of *Lancelot*," being already SATISFIED by the BIRTH *and* DEATH of *George*, *Lancelot's Eldeſt* Son, as the Claimant ſuppoſes.

Queſtion. " *Whether* ANY, *and* WHAT *Eſtate or Intereſt* is veſted " in the Plaintiff *Edmund Robinſon*, the Infant, (*Lancelot*'s ſecond " Son,) by Virtue of the ſaid Will."

This Caſe was thrice argued: 1ſt in *P.* 26 *G.* 2. on 15 *May* 1753. by Mr. *Pratt* for the Plaintiff, and Mr. *Yorke* for the Defendant. Again, in *P.* 29 *G.* 2. on 14th *May* 1756. by Mr. *Norton* for the Plaintiff, and Sir *Antony Abdy* for the Defendant. And laſtly, in *M.* 30 *G.* 2. on 23d *November* 1756. by Sir *Richard Lloyd* for the Plaintiff, and Mr. *Perrott* for the Defendant.

Argument for the Plaintiff.

For the Plaintiff (*Edmund Robinſon*,) it was urged that the Teſtator certainly *meant* to give an Eſtate-Tail to Mr. *Lancelot Hicks* and *all* his Iſſue: And the INTENTION *ſhall prevail, where it may. Ow.* 29. *Coſen*'s Caſe. *Cro. Jac.* 448. *King* v. *Rumball. Doe ex dimiſſ. Barnard* v. *Reaſon, Tr.* 28 *G.* 2. *B. R.* That the Eſtate to *Lancelot Hicks* was *intended* to be an Eſtate TAIL: But, at leaſt, here is either an Eſtate in *Fee*, or for *Life*, in his SON, the Plaintiff.

As to the Condition, " to take the Name of *Robinſon*;" the Eſtate muſt *firſt* VEST, before the Condition can be performed.

This is a Condition *ſubſequent*; as appears by *Plowd.* 23. *Colthirſt v. Beinſhin*; and therefore has Nothing to do with the *veſting* of the Eſtate. *Caſes in Chancery in Lord Talbot's Time* 166. *Sir John Robinſon* v. *Comyns.* " No particular technical Words are requi- " ſite, to make either precedent or ſubſequent Conditions." And it

it was holden by the Lord Chancellor, in the Caſe of *Trafford & Ux'* v. *Sir Ralph Aſhton & al'*, 2 *Vern.* 661. That this Clauſe in a Will, " Taking on Him the Name and Arms of *Vavaſor*," was a Condition *ſubſequent*, to defeat the Eſtate; and NOT *precedent*. Therefore They ſhould lay this Condition out of the Caſe.

And then the ſimple Limitation will ſtand thus: It will be To *Lancelot Hicks* for Life; Remainder to SUCH SON *as he ſhall lawfully have of his Body, &c.* Remainder (for Default of *ſuch* Iſſue) to the Teſtator's Couſin *William Robinſon*, in Fee. This is the *ſimple* Limitation; putting the Condition ſubſequent, out of the Caſe.

First Point. And this is intended to be an Eſtate *Tail* in *Lancelot Hicks*.

It may be objected, that this cannot be an Eſtate Tail in *Lancelot*; becauſe here are *no Words of Limitation:* For that the Word Son is a Word of *Purchaſe, not of Limitation*, even if it was in the plural; and that here, " Son" is in the *ſingular* Number, " (and to " ſuch SON as he ſhall have, lawfully begotten;") which, it may be urged, cannot be conſidered otherwiſe than as a Word of Purchaſe.

Another Objection may be raiſed, becauſe it is limited to *Lancelot Hicks* himſelf for *his Life*, " *And* NO *longer:*" And therefore it may be urged that the Court cannot raiſe an Eſtate Tail by *Implication*, contrary to theſe *negative* Words.

But 1ſt, The Word " *Son*" muſt here be taken as a Word of LIMITATION: Becauſe otherwiſe it would not be agreeable to the Teſtator's *manifeſt Intention*, " that the *Iſſue* of ſuch Son ſhould " have it afterwards, and that *William Robinſon* ſhould not take, *till* " the Iſſue of *Lancelot Hicks* ſhould be *All* of them extinct".

The *Change of Name* ſhews that the *Intention* of the Teſtator extended to the *whole Family* of the *Hickſes*. So do the Words " *law-* " *fully to be begotten*": Which Words properly belong to Eſtates Tail. So, " for *Default of ſuch Iſſue.*"

The Words will *bear* this Conſtruction. They are, " To *ſuch* " Son as he ſhall have, lawfully to be begotten:" *i. e.* lawfully iſſuing from his Body.

" *Son*" is, *here* Nomen COLLECTIVUM. *King* v. *Melling* is in Point: And ſo is *Byfield*'s Caſe, there cited. (1 *Ventr.* 231.) And many other Caſes there cited.

So that *William Robinſon* was not to have it, TILL *Lancelot Hicks* ſhould be dead *without* ANY *Iſſue.*

2dly,

2dly, As to the Words " for Life, *and* NO *longer :*" There had been no Difficulty or Impediment, if the latter Words " *and no* " *longer*" had not been added. 1 *Ld. Raym.* 203. *Luddington* v. *Kime*. 1 *Peere Wms.* 605. *Blackborn* v. *Hewer Edgeley*. 9 *Co.* 127. *b. Sunday*'s Caſe.

And yet they have really no Force at all in them, beyond the former Words: They are certainly tautologous, and have no additional Effect. An Eſtate for Life was given by the former Words: And ſuch an Eſtate can laſt no longer than that Life laſts.

In *Archer*'s Caſe, 1 *Rep.* 66. *b.* it was ruled to be an Eſtate for Life in *Robert Archer*; Becauſe it was an *expreſs* Eſtate for Life, deviſed to Him. But Tautology does not make it MORE *expreſs*.

1 *Ro. Abr.* * 837. is, in Point, contrary to what my Lord Ch. J. *Hale* is reported in 1 *Ventris* 231. in the Caſe of *King* v. *Melling*, to have ſaid. He there cites from *Rolle* 839. (as that Report ſays) the Caſe of a Deviſe " to the Teſtator's Eldeſt Son, for Life, & " *non aliter*;" (For ſo, ſays he, were the Words, tho' not printed in the Book;) and after his Deceaſe, to the Sons of his Body. This, ſays my Lord Ch. J. *Hale* was but an Eſtate for Life, *by reaſon* of the Words " NON ALITER."

* *Note*; This Caſe is cited in 1 *Ventr.* 231. as from *Rolle* 839: But that is a Miſtake of the Page; for it is really in 1 *Ro. Abr.* Title *Eſtate*, Letter P. *page* 837. *pl.* 13.

But the *true* Reaſon of the Determination of that Caſe in *Rolle's Abridgment*, appears from what *Levinz* ſays in his own Argument of *King* v. *Melling*. [*V.* 2 *Lev.* 58, 59.] For *Coleman*, who argued " that *Bernard* took only for Life," had cited that Caſe from *Rolle* as an Authority on his Side. *Levinz*, *contra*, argued that *Bernard* took an Eſtate Tail. And in anſwering the Caſes cited againſt him, He ſays, " And as to the Caſe 1 *Rol.* It there appear- " ed, the *Deviſor's Intent* was that the Father ſhould be only Te- " nant for Life, the Eſtate Tail to the Son: *For* that the *Clauſe to* " *reſtrain Alienation* is added *only* to the Eſtate of the *Son*." So that if this was not a Miſtake of the Reporter, it is, at the moſt, but an extrajudicial Opinion of a ſingle Judge, and not the Point of the Caſe then under Conſideration. Therefore *that* could not be the Principle of Law upon which that Caſe was determined: It muſt have been a *Regard* to the *Intention* of the Teſtator; and the particular Words muſt have been conſidered as a *Key* to that Intention. And the ſame Obſervation will hold with regard to the Caſes of *Lodington* v. *Kime*, *Backhouſe* v. *Wells*, *Lomax* v. *Homeden*, *Plunket* v. *Holmes*, and *Shaw* v. *Weigh*; and will ſerve to reconcile them.

The true Rule is, That where the Iſſue cannot take an Eſtate Tail, without taking it *through* the Father, the Father ſhall have an

Eſtate Tail: Otherwiſe not. *Archer*'s Caſe, 1 *Rep.* 66. Where the Eſtate is given over. *Cro. Eliz.* 313. *Clerk* v. *Day*. 1 *Ro. Abr.* 139. Letter U. *pl.* 4. S. C.

Backhouſe v. *Wells*, in *Equity Caſes Abr.* 184. *pl.* 27. in *Trin.* 11 *Ann. B. R.* "Deviſe to *J. B.* for *his Life* ONLY, without Impeachment of Waſte." *J. B.* was *not* MEANT to be Tenant in Tail. [See *Forteſcue's Reports* 133. and *Lucas* 181. S. C.]

Langley v. *Baldwin*, is in *Equity Caſes Abr.* 185. *pl.* 29. ſaid to have been certified to be an Eſtate for *Life only*. But this is a Miſtake: For it was certified, [and ſo it appears, as Lord *Mansfield* ſaid, by the Regiſter's Book,] to be an Eſtate *Tail*.

However, the Principle of that Determination was to purſue the Teſtator's Intention: Which was "that it ſhould go to *all* the "Children of his Grandſon."

Loddington v. *Kime*, 3 *Lev.* 432. 1 *Ld. Raym.* 203. was an Eſtate deviſed to the *Iſſue of* the Iſſue Male. So no Violence done to the Intention by conſtruing the *firſt* Eſtate to be an Eſtate for Life.

Shaw v. *Weigh*, *P.* 1 *G.* 2. *B. R.* reverſed *in Dom' Proc':* And determined to be an Eſtate Tail. [See *Modern Caſes in Law and Equity* 252, 382. *Fitz-Gibbons* 7. and *Parliament Caſes*, of *April* 1729. and *Forteſcue's Reports* 58.]

Be the Circumſtances as they may, yet the Teſtator plainly means, *not merely* an Eſtate for Life to *Lancelot Hicks*; but he *alſo* means to give an Eſtate *Tail to the Hicks* FAMILY. Therefore let the Intention of a Life-Eſtate be never ſo ſtrong, yet the Court will conſtrue his plain and clear *Intention for the Benefit of the* FAMILY, to prevail.

Second Point. 2dly, But if it be not conſtrued an Eſtate *Tail*, but "*Son*" be conſidered as a Word of *Purchaſe*; Then theſe Queſtions will ariſe: 1ſt, WHO ſhall be the Taker? 2dly, At WHAT TIME? 3dly, WHAT ESTATE?

1ſt, The preſent Caſe *was* indeed uncertain *at the Creation*; though *rendered certain*, by the Event. And perhaps it was not a *veſted* Remainder; from the Uncertainty who ſhould take.

2dly, But ſuppoſing it to be a *contingent* Remainder, yet the original Uncertainty was removed within ſufficient Time. The Limitation over ſeems to confine it to the Time of the Father's Death:

Death: And *then* the Plaintiff *Edmund was the* ONLY *Son.* And the contingent Remainder veſts, Time enough, if it veſt *then.*

3dly, It is a Deviſe of all his Real Eſtate, except that at *Endellyon:* which alone would paſs the Fee-ſimple. 6 *Mod.* 109. *Counteſs of Bridgwater* v. *Duke of Bolton.* 1 *Salk.* 236. S. C. *Scott* v. *Alberry. Comyns* 337, 340. *Ibbetſon* v. *Beckwith*, reported by Mr. *Forreſter*, in his *Caſes in Equity, pa.* 157.

And the Exception ſhews that He did not mean the *Reſt* to go to his Heir at Law.

The Teſtator plainly meant it to be a *Fee:* He would never oblige the Deviſee to part with his Family-Name, and take his *Name*, only for an Eſtate for *Life.*

Then He gives the *Perpetuity* of all his Preſentations in the ſame Manner as he had given his Eſtate: Which muſt mean a PERPETUITY in *both*; and conſequently proves him to have *meant a* FEE in the Land.

And the Limitation over proves the ſame; *viz.* "That *William* "*Robinſon* was never to take, *but* on *L. Hicks's dying* WITHOUT "ISSUE." However, If this was not a Deviſe of a Fee, it muſt then be an Eſtate *Tail.* 1 *Ventr.* 225 *to* 232. *King* v. *Melling. Moore* 397. *pl.* 15. 1 *Anderſon* 43. N° 110. S. C. *Bendloe* 30. *pl.* 124. S. C.

But it is at leaſt an Eſtate *for Life:* Otherwiſe, all this Part of the Will muſt be rejected.

Argument for the Defendant.

The Counſel for the Defendant *William Robinſon* made two Queſtions—Firſt, What Eſtate is deviſed *to Lancelot Hicks*, the Father of the Plaintiff; *viz.* Whether for *Life*, or in *Tail?*

Secondly, IF for *Life*; then whether the contingent Remainder is to *veſt* UPON *the Birth of a Son, during* the Life of *Lancelot Hicks* the Father; (which if it be ſo, has been *ſatisfied* by the Birth of *George Hicks*, the Son;) Or whether it veſted ON *the* DEATH *of the Father*, in his THEN eldeſt Son; (which *then* eldeſt Son is the now Plaintiff.)

They laid out of the Caſe—

1ſt, The Words of Condition annexed to the Eſtate of the Father; conceding that they were Conditions *ſubſequent*, to defeat the Eſtate, and not precedent, to hinder it from veſting.

2dly,

2dly, The *Son*'s taking the Name: For they allowed that the Conſtruction of the Words, *as* to the *Son*, muſt be the *ſame* as of thoſe relating to the *Father*.

But they conſidered as material,

First Queſtion. 1ſt, Whether the Eſtate to *Lancelot Hicks* be an Eſtate for *Life*, or in *Tail*. Which they ſubdivided into two other Queſtions; *viz.*

Firſt, "Whether the Court CAN *raiſe* an Eſtate *Tail by* IMPLICATION, *at all*, in *this Caſe*; This being an EXPRESS Eſtate for "Life, and even confirmed by *negative* Words."

Secondly, "Whether the Court can raiſe an Eſtate Tail *by Implication, upon* EITHER *of theſe Expreſſions*; *viz.* "After his "Deceaſe to ſuch SON as he ſhall have;" or, "and for Default "of *ſuch* Iſſue."

Firſt—In the Caſe of *King* v. *Melling*, Lord Ch. Juſt. *Hale* was the firſt great Judge, who put the Caſes together, to raiſe an Eſtate Tail *by Implication*. But ſucceeding Judges differed from Him: And in the Caſe of *Luddington* v. *Kime*, in 1 *Ld. Raym.* 204. Mr. Juſt. *Powell* argued againſt Lord *Hale*'s Opinion; Ch. Juſt. *Treby* agreeing with Lord Ch. Juſt. *Hale*.

In 1 *Peere Wms.* 605. *Blackborn* v. *Hewer Edgely*, *& è contra*, Lord Chancellor *Parker* explodes that Opinion, "That Words of "Implication ſhould *not* turn an expreſs Eſtate for Life into an "Eſtate Tail:" And ſays "That a Deviſe to *A.* for Life; and "after his Death without Iſſue, then to *B. will* give an Eſtate Tail "to *A.* Yet this Conſtruction would be directly contrary to the Words of the Teſtator.

But the preſent Caſe is within Lord Ch. Juſt. *Hale*'s Diſtinctions. He ſays that "*Non aliter*" is ſufficient to make it an Eſtate for Life *only*; *viz.* where the Deviſe is, "to *A.* for Life, *& non aliter.*" 1 *Ventr.* 231.

In *Backhouſe* v. *Wells*, *Forteſcue* differs from Lord *Raymond* in the Account of it; and lays Streſs upon the Word "*only*," as being explanatory and reſtrictive in a doubtful Caſe. [See *Backhouſe* v. *Wells* reported by *Lucas*, *fo.* 181. and *Forteſcue* 181. and cited in 2 *Ld. Raym.* 1439, 40.] And in *Bagſhaw* v. *Spencer*, Lord Chancellor ſaid it was determined upon the Word "*only*," in that Caſe of *Backhouſe* v. *Wells*.

In

In *Bamfield* v. *Popham*, 1 *Peere Wms.* 54, 55. Lord Ch. Juſt. *Trevor* reaſons againſt Lord Ch. Juſt. *Hale*. So alſo does Mr. Juſt. *Powell*, in the ſame Caſe, *fo.* 57. And ſurely Nothing can be ſtronger than *expreſs* Words, *with* NEGATIVE *Ones* ADDED *to them*. And they ſhall not be rejected; according to 2 *Bulſtr.* 176. *Mirrill* v. *Nichols*; and 2 *Peere Wms.* 282. *Barker* v. *Giles*. *Plowden* 523.

In the Caſe of *Humphry* v. *Taylor*, 5th *February* 1752. The Court of Chancery held reſulting Truſts to be rebutted by negative Words.

Goodtitle ex dimiſſ. Croſs v. *Wadhold*, *Mich.* 19 *G.* 2. *C. B.* was a Deviſe to the Teſtator's eldeſt Son, ONLY *for Life*; and in Caſe of *Failure of Iſſue*, *&c.* it ſhall deſcend and come to his (the Teſtator's) Male Children, *&c.* And they held this to be an Eſtate for LIFE ONLY; becauſe being expreſſed to be given for Life *only*, with *Negative* Words, it could not be *enlarged by Implication:* And Lord *Hale*'s Opinion in the Caſe of *King* v. *Melling*, and the Determination in *Backhouſe* v. *Wells*, were there relied on by the Court of Common Pleas.

2d Subdiviſion of the firſt Point, *viz.* Whether the Court can raiſe an Eſtate Tail by Implication *upon either of theſe Expreſſions*; *viz.* " After his Deceaſe, to ſuch *Son* as he ſhall have;" or, " and " for Default of *ſuch* Iſſue."

And they argued that they could *not*. For

Firſt, The Word " *Son*" muſt be taken as a Word of PURCHASE: " And from and after his Deceaſe, to ſuch *Son* as he ſhall " have, lawfully to be begotten." " *Son*" is here a Word of *Purchaſe*; Whether it be taken ſingularly, or collectively.

If ONE *Son* ONLY be meant, Then the Words " for Default of " *ſuch Iſſue*," *refer* TO SUCH *Son*, taking an Eſtate for Life. And the Word " *Son*" is *ſingular:* Not collective *here*. He might have uſed the Terms " Heir," " Heir Male," *&c.* 1 *Ventr.* 230. *Burley*'s Caſe, there cited: Where the Remainder is limited to the next Heir Male. *Miller* v. *Segrave*, *M.* 10 *G.* 1. *B. R.* cited in *Robinſon's Treatiſe of Gavelkind* 96. The Remainder was " to the " next *Heir* Male:" (Which Caſe was cited, to ſhew the Conſtruction of the Word " *Heir*," in the ſingular Number.)

In *Trollop* v. *Trollop* in *C. B.* (*V. Robinſon on Gavelkind* 96.) *Eyre* argued againſt the Opinion of Lord *Coke* in the Caſe of *Clerke* v. *Day*, *Moore* 593. (the beſt Report of that Caſe.)

They cited 2 *Ventr.* 311. *Burchett* v. *Durdant,* only to ſhew that no Application can be made of thoſe Caſes to the preſent.

2d Branch of this 2d Subdiviſion, *viz.* As to the Word "*Iſſue.*"

This Word, taken *Technically*, is indeed a Word of *Purchaſe.*

King v. *Melling* was the firſt Caſe where it was holden to operate as a Word of *Limitation in a* WILL.

The Word "*Children*" is leſs operative than the Word "*Iſſue.*" Each of theſe is a *Nomen Collectivum:* But "*Son*" is *Deſignatio Perſonæ*; unleſs other Words explain it. 1 *Ro. Abr.* 837. Letter P. *pl.* 12, 13.

As to *Byfield*'s Caſe, mentioned only in Lord Ch. Juſt. *Hale*'s Argument in 1 *Ventr.* 231. and in no other Book—It comes the neareſt to the preſent Caſe, of any other cited on the Part of the Plaintiff. The Word "*Son*" was there holden *to be Nomen Collectivum.* But there was *no* EXPRESS Deviſe to the Son: It is a Deviſe to *A.* "And if he dies, *not having a Son,* then to remain, "*&c.* Whereas here, the Words are, "*to ſuch Son* as he ſhall "have, lawfully iſſuing from his Body."

But if "Son" be taken as a Word of Purchaſe—It is aſked WHAT *Son* is meant? And *what Eſtate?*

Anſwer. It can mean *but* ONE Son: The Sons of *Lancelot Hicks* could not *all* take as Tenants in Tail, or as Joint-tenants. In the Caſe of *Lodington* v. *Kime,* 1 *Ld. Raym.* 206. Lord Ch. Juſt. *Treby* is very expreſs on his Head, "That if it had been the Word *Son,* "it had been without Controverſy."

2 *Leon.* 35. *Leonard Lovelace*'s Caſe, [*Cro. Eliz.* 40. S. C. *Savile* 75. S. C.] and *Moore* 371. S. C. cited, is very ſtrong to the ſame Effect. Deviſe to *A.* and to his *Eldeſt* Iſſue Male *de Corpore ſuo exeunti*; (or "*ſeniori exitui maſculo ſuo,*" according to *Moore:*) 'Tis only an Eſtate for Life in *A.* Remainder to his *Eldeſt* Son, *&c.* for Life.

In Canc': In another Part of this very (preſent) Caſe, on this very Will, 17th *April* 1733. Sir *Joſeph Jekyll* held *Lancelot Hicks* to be intitled to an Eſtate for Life; Remainder to his Eldeſt (and but One) Son, for Life; Remainder to *William Robinſon,* the Deviſee over. This Cauſe was between the Widow of the Deviſor; and *Lancelot,* the firſt Deviſee. And the Deeds were brought *into Court:*

Court: Whereas they muſt have been delivered to *Lancelot*, if he had been Tenant in Tail. In 1734, Lord *Talbot*, on a Rehearing, was of the ſame Opinion. And We cite it for *their Opinion* only: We do not ſay that the preſent Plaintiff is *bound* by this Decree.

Then *if* ONE Son *only* could take, it follows, of Courſe, that the Words "And for Default of *ſuch* Iſſue," are *reſtrained to* SUCH *One Son* ONLY.

And as to the Eſtate, It is only an Eſtate for *Life*, in that *One* Son: For here are *no Words of Limitation*, at all.

As to the Arguments drawn from the *Advowſon*, and the Obligation to take the *Name* of the Teſtator.—The *Advowſons* are given for the Benefit of any of *Lancelot*'s Children that ſhould go into Orders. And then the Teſtator gives the *Perpetuity* of them to *Lancelot Hicks for his Life*; and afterwards, to *ſuch Son* as he ſhall have, lawfully iſſuing from his Body. Now it can never be ſuppoſed that the Teſtator meant to give *Lancelot* a Fee in the Land; *becauſe* he gives Him the Perpetuity of the Livings. And the *latter* Deviſe ſhall he conſtrued by and agreeable to the *former:* Conſequently, neither did He mean to give *Lancelot*'s Son a Fee, *becauſe* he gave Him the Perpetuity of the Livings.

As to taking the *Name*—No Caſe has been determined, on *that* Point. And *Lancelot Hicks* is here injoined to take the Name of *Robinſon*; tho' the Eſtate is expreſly given to Him "for Life "and no longer."

By Mr. *Shepheard* of *Cambridgeſhire*'s Will, the Name of *Shepheard* is to be taken by the Tenant *for Life*. The Caſe of *Ibbetſon* v. *Beckwith*, reported in Mr. *Forreſter's Caſes*, *pa.* 157, was a Deviſe to Teſtator's Mother for Life; after which, to his Nephew *Tho. Dodſon*, IF he will take his Name of *Beckwith*; if not, only 20*l.* Lord *Talbot* thought *that* alone to be *too ſlight* a Ground for a Conſtruction "that it ſhould be a Fee to *Tho. Dodſon*."

In order to make it an *Eſtate Tail*, the Expreſſion ought to be *ſuch* as will put it BEYOND *all Poſſibility of Doubt:* According to the Caſes of *Langley* v. *Baldwin*, *Shaw* v. *Weigh*, and *Bamfield* v. *Popham*.

The Caſe of *Coulſon* v. *Coulſon*, 2 *Str.* 1125. was *by way of* REMAINDER; not by giving the Father an Eſtate Tail; and is diſtinguiſhable from *all* thoſe that have been mentioned.

The

Second Question (made by the Defendant's Counsel.)

The next Question is, "*When* the Remainder shall vest;" *viz.* Whether this contingent Remainder in the Son is to *vest* upon the *Birth* of a Son, during the Life of *Lancelot Hicks*; or not till *upon* or *after the Death* of *Lancelot Hicks*, (the Father.) [*V. ante, p.* 43.]

"After the Decease of *Lancelot Hicks*," (the Father) are the Words of the Will. Which can suspend it *no longer* than till the *Birth* of his FIRST *Son:* For here are no Words to lead to a contrary Determination.

It must vest, either before the immediate Estate ceases, or *eo instante* that it does cease. *Hutton* 119, *Napper* v. *Sanders. Chancery Cases* 33. *Sackville* v. *Lockwood.*

Swinburn, part 7. *c.* 11. proves "that the Words shall *not* relate "to the Time of the *Testator*'s DEATH; but to the Time of "MAKING *the Will.*" And at that Time *Lancelot Hicks* had *no* Son; nay, nor even at the Time of the *Testator's Death.* A contingent Remainder must take Effect, as soon as any Person is born, who comes within the Description: It can remain no longer contingent. Therefore *it here* VESTED *by the* BIRTH *of a Son*; *and was* THEN *and* THEREBY SATISFIED: The Estate for Life vested in Him, on his Birth; and ceased with Him, on his Death; and then went over to the Defendant *William Robinson,* the Devisee over.

Indeed the Son *might* have been born between the making the Will, and the Death of the Testator; and have died before the Testator. *Thrustout* v. *Peak & al'*, 2 *Strange* 12. And so, in the Case of *Lomax* v. *Holmden*, 2 *July* 1749, *in Canc.*' A Son was born and died, in the Life-time of the Testator. But here, the Testator died *before* either of *Lancelot Hick*'s Sons was born. Here, the Elder Brother (*George* was the first who could take, after the Death of the Testator.

And as to the Intention of the Testator—It is out of the present Case: For the INTENTION *of the Testator* CANNOT be pursued by ANY Construction upon *this* Will, *without straining the Rules of Law.*

Therefore the Plaintiff can take Nothing by it.

Reply.

The Plaintiff's Counsel replied, That the Word "*Son*" is here a Word of *Limitation.*

Some Words are Words of Purchase; and may, by *Circumstances*, be turned into Words of Limitation: Others are, *primâ facie*

facie, Words of Limitation; and may, *by Circumſtances*, be *turned into* Words of Purchaſe. The Words "Son, Children, Iſſue, and "Heir," in a Will, where no Son is in in Being at the Time of the Deviſe, are *nomina Collectiva*, and ſufficient (in a Will) to create an Eſtate of Inheritance.

Now, *here* ARE *ſuch Circumſtances* as ſhall determine the Word "*Son*" to be, HERE in this Will, a Word of *Limitation*.

The Caſe of *Tayler* v. *Sayer*, 41 *Eliz.* is not Law: Lord Ch. Juſtice *Hale* ſays, "it is too rank." [1 *Ventr.* 229.]

They agreed to the Caſe of *Trollop* v. *Trollop*; as the Words ſtand ſingly there: But alledged the Rule to be, "That the INTENTION of the Teſtator ſhall *fix the Conſtruction* of ſuch "Words, as MAY be conſtrued *either* as Words of Limitation, *or* "of Purchaſe."

And if this Word "Son" be a Word of *Limitation*, then what hinders this from being an *Eſtate Tail?* And they inſiſted that this was ſo. And They ſaid that though here was a neceſſary Implication, yet they needed not to rely ſingly on it's being an Eſtate-Tail by IMPLICATION: For here is even an EXPRESS *Eſtate Tail* deviſed.

In the Caſe of *Shaw* v. *Weigh*, The Intention was plain: But the *apparent Intention* "to *give an Eſtate Tail* to the Iſſue," overruled it. And this is the laſt Caſe, in Point of Time.

In the Caſe of *Backhouſe* v. *Wells* it is not agreed, *which* of the two Expreſſions the Court went upon: *Viz.* "*without Impeach-*"*ment* of Waſte; or, "for his natural Life *only*."

Therefore they concluded that the Plaintiff is intitled to an Eſtate Tail, in the preſent Caſe.

2dly, The Son muſt be *ſuch* a Son as could *take*.

They ſaid they never contended, that the Sons ſhould take as Joint-tenants, or Tenants in Common: They were to take *in Succeſſion*.

They Word "*Son*" may be here enlarged into "*Iſſue*." It does not at all appear that the Teſtator meant *Lancelot's Eldeſt* Son, and his *Eldeſt Son* ONLY: On the contrary, His Intention appears to be the ISSUE MALE of *Lancelot*, *Generally*.

And the Caſes cited by the other Side do not prove their Point. For in 2 *Leon.* 35. *Leonard Lovelace*'s Caſe, the Word "*Eldeſt*"

was expreſly added to the Words " *Iſſue Male*;" (the Deviſe being " to the Father, and to his Eldeſt Iſſue Male:") So that it was the ſame as " Eldeſt *Son*;" and it better anſwered the Teſtator's Purpoſe, that the Children of this Deviſee ſhould take as *Purchaſers*.

As to the Determination ſaid to have been made in 1733 and 1734 of this Point, *upon this ſame Will*, by Sir *Joſeph Jekyll*, and Lord Chancellor *Talbot*, The Widow of the Teſtator there claimed *paramount* the Will; She brought a Bill to eſtabliſh her Jointure: And there was indeed a Croſs-Cauſe. But *Non conſtat what Lancelot claimed*; nor does it appear how it was defended. However, it is plain, that the *preſent* Lord Chancellor does *not* reſt ſatisfied with theſe Opinions: Becauſe *He* has ſent it hither for the Opinion of *this* Court.

The Words, " Such Son" muſt let in *All* Sons; and cannot exclude ALL *Sons* BUT the Eldeſt. It was a contingent Remainder, that the Court will keep open, till there is a Neceſſity to determine it. And there is no Need to determine it, (for there is no Need that the Remainder ſhould veſt,) TILL *the Death* of the Tenant for Life: *Then* indeed it muſt veſt, *eo inſtante*.

In *Hutton* 119. and in *Chancery Caſes* 33. It *was* an *Eldeſt* Son: Whereas here it is not neceſſarily an *originally Eldeſt* Son; but may be any *other* Son, who BECOMES *Eldeſt* before the contingent Remainder veſts.

ALL the Sons of *Lancelot* could *not* take, *unleſs* the Father took firſt: A *poſthumous* Son certainly could not.

As to the contingent Remainder veſting—It is *enough* if it veſted *eo inſtante* that the particular Eſtate determined.

And as to the Deviſe of the *Perpetuity* of the Advowſons, the latter Deviſe is not to be conſtrued *by the former:* But both the former and the latter Words are to be taken *together*, and a reaſonable Conſtruction made upon them, agreeable to the General Intention of the Teſtator.

Upon the whole, This is an Eſtate either in *Fee*, or in *Tail*; or at loweſt, for *Life*.

The JUDGES OF THIS COURT, on the 1ſt of *December* 1756, unanimouſly CERTIFIED to the Court of Chancery, in the Words following:

" We are of Opinion, That, Upon the true Conſtruction of the " ſaid Will of the Teſtator *George Robinſon*, the ſaid *Lancelot Hicks* " muſt, by *neceſſary Implication*, to *effectuate* the *manifeſt general*

" *Intent* of the ſaid Teſtator, be conſtrued to take an Eſtate in " *Tail Male*, He and the Heirs of his Body taking the Name of " *Robinſon*; NOTWITHSTANDING *the* EXPRESS Eſtate deviſed to " the ſaid *Lancelot Hicks* " for his LIFE and NO LONGER." "

Note; The Courſe has always been, for the Judges not to give any *Reaſons*, *in Court*, upon a Caſe ſent out of Chancery for their Opinion. But the above Certificate ſeems carefully penned, to mark the Grounds upon which it was founded.

The Eſtate Tail is ſaid to veſt in *Lancelot Hicks*, the Father. The *manifeſt Intent* of the Teſtator, expreſſed by his Will, was, that the Eſtate ſhould *not* go over to his *Heir at Law*, till Failure of Iſſue Male of *Lancelot Hicks*.

The Difficulty was, how to mould an Eſtate *agreeable to the Rules of Law*, to effectuate the Teſtator's Intent; and to conſtrue his Senſe and Meaning into *apt* Words of *Limitation*.

IF the Father could have taken an Eſtate for Life, and the Sons ſucceſſively an Eſtate in Tail Male, the whole Intention of the Teſtator would have been *better* anſwered: For by *ſuch* Conſtruction, *All* the Words in the Will would have received their natural Senſe and Meaning, *without rejecting* any Words; and None ſhould be rejected, *unleſs* the Teſtator's Intent cannot be otherwiſe attained. But THAT could *not* be, by Law. An Eſtate to the Heirs Male of the Body of *Lancelot Hicks* is *implied*, though an Eſtate for Life only is *given* to Him; becauſe the Teſtator's Heir was not to take, *till Failure* of ſuch Heirs Male. But by Law the Teſtator could, by *no* Words, have made the Father Tenant for Life, and the Heirs Male of his Body *Purchaſers*.

If He had deviſed " to the Father for Life, Remainder to the " Son for Life, Remainder to the Heirs Male of the Body of " the Father;" Or " to the Father for Life, Remainder to " the Son, and the Heirs Male of the Body of the Father:" In *either* of theſe Caſes, the *Father* muſt have taken an Eſtate in *Tail Male*. The Caſe put in *Lit. Sec.* 30. and the Determination mentioned in Lord *Coke*'s Comment upon that Section, (in *pa.* 26. *b.*) on the Gift " to *Roberge* and to the " Heirs of *John de Mandevile*, her *late* Huſband, on her Body " begotten," are no Exception to this Rule: For in *both* Caſes, the *Father* was DEAD at the Time of creating the Entail.

It is ſaid too, " That he muſt, by neceſſary Implication, to *ef-* " *fectuate* the manifeſt *general* Intent of the Teſtator, be con-

" ſtrued

" ſtrued to take an Eſtate in Tail Male; NOTWITHSTAND-
" ING the *expreſs* Eſtate deviſed to him, for his Life, and
" no longer."

Thoſe Words ſeem intended to expreſs the *governing Reaſon* in this Caſe, to have been the *manifeſt main Intent* of the Teſtator, collected from all the Parts of his Will taken together; *without ſhaking* the Authority of *Backhouſe* v. *Wells*, and other Caſes, which have laid a Streſs upon the Words " *only*," " *not otherwiſe*," or *like* Expreſſions, after an Eſtate for Life, together with other Clauſes and Circumſtances; in Favour of the manifeſt Intent of a Teſtator, to make the Iſſue or Heir take as a Purchaſer, deſigned by a Perſonal Deſcription.

This Certificate was confirmed in Chancery; and a Decree made accordingly.

ON APPEAL to the Houſe of Lords from that Decree, The Opinion of *All the Judges* was aſked; which was delivered by Lord Ch. Baron *Parker*, with the Reaſons at large: And they unanimouſly agreed with the above Certificate, *upon* the above Grounds ſuggeſted thereby.

Whereupon the *Decree* was *affirmed* by the Lords on the 14th of *February* 1758.

Friday 26th November 1756.

The Court declared a new Order concerning *Special Cauſes* in the Paper: Which was, in Subſtance, That all Cauſes ſhould come on to be argued, in the *ſame Order* that they were entered; and that they ſhould *continue* to ſtand in the Paper, in the ſame Order, *till* they ſhould be argued, (without being entered anew:) And that no Cauſe ſhould be put off, without a ſpecial Application to the Court, upon ſome ſufficient Ground, before the Day upon which it ſtood in the Paper for Argument.

Note;
It may not be amiſs, to premiſe a general Rule for *intitling* all Caſes ariſing upon ORDERS OF REMOVAL: The Want of knowing, or the Want of attending to which general Rule, has been the Occaſion of infinite Confuſion in tabling and citing Caſes of this Sort.

The conſtant Method of entering them in the *Rule-Book* is to name the *King* as *Proſecutor*; and the Pariſh *laſt charged* with the Paupers, and conſequently *appealing* to this Court, as *Defendants*. For inſtance—Two Juſtices remove a Pauper from *A.* to *B.*: And

B.

B. appeals to the Seſſions. If the Seſſions *confirm* the Order, and *B.* brings the *Certiorari*, the Rule thereupon is intitled " *Rex* " verſus *Inhabitantes de B:*" But if the Seſſions *diſcharge* the original Order, and conſequently *A. remains charged* with the Pauper, and brings a *Certiorari* to remove the Orders, then the Rule bears for it's Title, " *Rex* verſus *Inhabitantes de A.*"

Rex *verſ.* Inhab. de Aythrop Rooding.

[Mr. Juſtice *Wilmot* was abſent; ſitting in Chancery as one of the Commiſſioners of the Great Seal.]

TWO Juſtices removed *Suſanna Gates*, *Wife* of *William Gates*, and her 4 Children, from *Aythrop Rooding*, to *White Rooding*: Which Order was quaſhed by the Seſſions, upon an Appeal. *Monday 29th November 1750.*

The Subſtance of the Caſe was, That *William Gates*, this Woman's *Huſband*, having been legally ſettled at *White Rooding*, went away and left his Wife and Children. Whereupon, She and her Children went and lived for 40 Days, WITHOUT *her Huſband*, in a Copyhold Tenement of her *Huſband's* OWN, at *Aythrop Rooding*. But legal Notice " to depart" was given to Her, within the 40 Days, by *Aythrop Rooding:* Which She not doing, two Juſtices made this Order for removing Her, (AS *being* LIKELY to become chargeable,) from *Aythrop Rooding* to *White Rooding*; which they adjudged to be the laſt legal Settlement of her Huſband. But the Seſſions, conceiving that the Wife, *though* WITHOUT her Huſband, *could not* be removed from her Huſband's OWN Eſtate, quaſhed the Order.

Sir *Richard Lloyd*, who was for quaſhing the Order of Seſſions, argued, That though the Huſband had it in *his Power* indeed to have gained Himſelf a Settlement at *Aythrop Rooding*, by going and *reſiding there* 40 *Days* upon his own Eſtate; yet it could never be his laſt legal Settlement, UNLESS he Himſelf *had reſided there for* 40 *Days*: Becauſe, if it ſhould be otherwiſe, a Man who had Property in various Pariſhes, might be laſt legally ſettled in ALL *of them* at the SAME Time.

But The Court (*viz.* Lord *Mansfield*, Mr. Juſtice *Deniſon*, and Mr. Juſtice *Foſter*,) were unanimous and clear, That the two Juſtices had no Power to remove Her from her *Husband's* OWN *Property*, upon her being *only* LIKELY *to* become chargeable to the Pariſh where it lay. And accordingly they

Affirmed the Order of Seſſions, and quaſhed the Order of two Juſtices.

Farewell Eſq; *verſ.* Chaffey and others.

THIS Cauſe was tried upon the Weſtern Circuit, the laſt Summer Aſſizes, before Mr. Serjeant *Willes*; who certified "That the *Weight of the Evidence* was *againſt* the Verdict." But a *new Trial* was denied, upon the *Nature* of the Action, the *Value* of the Matter in Diſpute, and *other Circumſtances* of the Caſe. *

* *V. Ante, pa.* 11, 12. *Macrow* v. *Hull* S. P. and *Poſt* Dr. *Burton* v. *Thompſon, M.* 1758. S. P.

Lord *Mansfield* ſaid, A NEW TRIAL ought to be granted, to attain REAL *Juſtice*; but *not*, to gratify litigious Paſſions, upon every Point of *Summum Jus*; and cited *Smith* v. *Bramſton*, and *Smith* v. *Frampton*, in 2 *Salk.* 644; and an anonymous Caſe there alſo mentioned, of *P.* 8 *W.* 3. *B. R.* and likewiſe *Smith* v. *Page*, *M.* 8 *W.* 3. *B. R. ibidem*; alſo *Deerly* v. *The Dutcheſs of Mazarine*, *H.* 8 *W.* 3. *B. R.* 2 *Salk.* 646. and *Sparks* v. *Spicer*, *H.* 10 *W.* 3. *B. R.* in the ſame Book, *pa.* 648. To which may be added, What is ſaid by the Court, in the Caſe of *Dunkly* v. *Wade*, *P.* 5 *Ann.* 2 *Salk.* 653.

In theſe Caſes, the Verdicts were againſt Evidence and the ſtrict Rule of Law, or obtained through Surprize: But the Court would not give a Second Chance of Succeſs to a *hard Action*, or an *unconſcionable Defence*.

Therefore the Court, upon the *ſame Principles*, refuſed to grant a New Trial in the preſent Caſe, and diſcharged the Rule to ſhew Cauſe why there ſhould not be One.

Rex *verſ.* Joſeph Smith.

AN Indictment for a Nuſance had been removed by *Certiorari* from the Quarter-Seſſions in *Devonſhire*, into this Court, by the Defendant: Which Indictment was afterwards tried, and the Defendant was found Guilty. He then moved in Arreſt of Judgment: But his Objections were over-ruled. After which, the Proſecutor moved for his Coſts; and obtained a Rule to ſhew Cauſe. And now Mr. Serjeant *Hewitt*, on Behalf of the Defendant, ſhewed Cauſe, "Why the *Proſecutor* ſhould not have his *Coſts*, before the "Recognizance ſhould be diſcharged; and why it ſhould not be "referred to me, to tax ſuch Coſts."

His Cauſe was this, That *No Name* of any Perſon, *as being* either the Party grieved or injured, or a *public civil Officer*, is INDORSED upon the Indictment, according to the Directions of 5, 6 *W.*

6 *W. & M. c.* 11. § 2 & 3. And He argued that *without ſuch* INDORSEMENT, no Coſts were payable to the Proſecutor.

Mr. *Huſſey contra*, for the Proſecutor, acknowledged that there was no Name indorſed: But, at the ſame Time, inſiſted that an INDORSEMENT of the Name of the Proſecutor, as being the Party grieved or injured, or a civil Officer, is *not at all neceſſary*, in order to the Court's giving Him Coſts; though the 2*d* Section does indeed *direct* the Recognizance to be certified into this Court, with the *Certiorari* and Indictment, and the Name of the Proſecutor (if he be the Party grieved or injured) or ſome public Officer to be indorſed on the Back of the Indictment.

He ſaid He had an AFFIDAVIT "That the Proſecutor *was* a "civil Officer, *&c.*" And the Words of the 3*d* Section of the Act "are that *if He* BE *ſo*, the Recognizance ſhall not be diſcharged, "*till* the Coſts ſhall be paid." But the Act does *not* ſay "That "the Proſecutor ſhall *not* have his Coſts, *unleſs* his Name be "INDORSED."

Lord MANSFIELD: It is enough if it be PROVED "That the "Proſecutor was a civil Officer, *&c.* And here it *is* proved, by *Affidavit:* Which is ſufficient.

Rule made abſolute for the Proſecutor's having his Coſts, (to be taxed by Me *ut ſupra*,) before the Recognizance ſhould be diſcharged.

Shadwell Eſq; *verſ.* Angel Eſq;

THIS was a long Litigation concerning the Regularity of a Judgment; which on Mr. *Nares*'s Motion (*ex parte Def'*) had been referred to the Maſter, who thought it irregular: And now Mr. *Norton* (*ex parte Quer'*,) appealed to the Court, from the Maſter's Opinion.

The Queſtion depended upon the Meaning of a Rule of this Court, made *M.* 10 *G.* 2. 1736. And upon the Practice of the Court, purſuant to that Rule.

The Import of this Rule was, that upon Proceſs returnable the 1ſt or 2d Return of a Term, a Plaintiff may (in certain Caſes) deliver a Declaration *de benè eſſe*, at the Return of the Proceſs; *with* NOTICE "for the Defendant to plead within *Eight Days after* "*Delivery* of the Declaration:" And if the Defendant ſhall not file Common Bail, and plead within ſuch Eight Days after, *&c.* the Plaintiff

Plaintiff (having firſt filed Common Bail for ſuch Defendant according to the then late Act for preventing frivolous and vexatious Arreſts,) may ſign Judgment for want of a Plea, a Rule to plead being duly entered.

The preſent Fact was, That the Proceſs was returnable on *Saturday* 15th *November* (the 2d Return of the Term.) The Declaration, with Notice " to plead in 8 Days," was LEFT *in the* Office on *Monday* the 24th of *November*: And upon the Defendant's not pleading within the 8 Days, nor even before the Time of ſigning the Judgment; the Plaintiff on the 3d of *January* (6 Weeks afterwards) filed Common Bail for the Defendant, and (a Rule to plead having been duly entred) ſigned Judgment *upon the* SAME Day.

The Maſter, Mr. *Clarke*, thought this to be irregular; For that when the Defendant was once in Court, the Plaintiff ought to proceed againſt him *as being* in Court: By which Expreſſion he ſeemed to mean, either that the Plaintiff ſhould deliver a Declaration *afreſh*; or that He ſhould give a *freſh* Rule to plead.

And Mr. *Nares* (in ſupport of the Maſter's Opinion) urged that when the 8 Days (the Time for pleading) are out, the *de benè eſſe* Declaration is at an End. And he mentioned a Caſe of *Llewellin* v. *Skyrm*, as in Point.

But Mr. *Norton* denied this; and ſaid that the 8 Days were *not* out; but the Declaration *de benè eſſe* was delivered *within Time*, (though not indeed till the 9th Day;) becauſe there were *two Sundays* included, *viz.* 16th and 23d of *Nov.* And that the Plaintiff might have ſigned his Judgment on *Tueſday* the 25th.

Maſter *Clarke* was at firſt, inclined to think that the *Sunday* was no Excuſe, and that this was not a ſufficient Reaſon to allow the Plaintiff Time till the 9th Day, for delivering the Declaration *de benè eſſe*. But all the Officers thought otherwiſe; And the Court ſeemed to think ſo too: Whereupon Maſter *Clarke* ſeem'd to give that Point up.

The COURT were of Opinion that the Judgment was regular.

Lord *Mansfield* was clear, that No *further* Notice (beſides that given on delivering the Declaration *de benè eſſe*) was neceſſary.

Mr. Juſt. *Deniſon* ſaid the Defendant had 8 Days AFTER *the Delivery* of the Declaration *de benè eſſe*, *whenever* it may be delivered, (either ſooner or later.)

And

And this was *left in the Office*, (which He held to be a good Delivery,) on the 24th, which was *within Time*; And the Defendant did *not* plead within 8 Days; Whereupon, the Plaintiff files Common Bail for Him, upon the 3d of *January*; and ſigns Judgment the *ſame* Day: Which is regular; For the Rule is *complied with*, And the Defendant is not at all hurt; on the contrary, He has had *longer* Time than he was intitled to.

Mr. Juſt. *Foſter*: The whole Objection is "That the Plaintiff "has not proceeded with ſo much Speed as He *might* have done:" For he *might* have ſigned his Judgment on the 25*th* of *November*. The Defendant might have filed Common Bail for *Himſelf*, if he had thought proper: And then he might have had a freſh *Rule* to plead.

By the COURT unanimouſly, The Rule of Reference to Maſter *Clarke*, for Irregularity in this Judgment, was diſcharged.

MEMORANDUM.

The new Lord Chief Juſtice, at his firſt ſetting out, inſtituted a *different Method* of going through the MOTIONS *at the Bar*, from that which had been uſually (and indeed almoſt univerſally) practiſed heretofore: Which new Method was not only advantageous to the younger Part of the Barriſters, but alſo exceedingly convenient to the Suitors, as it took away that Delay to Buſineſs which aroſe *from the* unreaſonable Preference hitherto given to Gentlemen within the Bar. For the *repeated* Pre-Audience, hitherto allowed them, had thrown almoſt the whole Buſineſs into their Hands: Which, as they were intitled to move only once in a Day, could not be ſufficiently diſpatched.

The Courſe had been, ever ſince I remember, and was in Lord Ch. Juſt. *Holt*'s Time, (as the late Mr. Juſtice *Page* has often told me,) "*to* BEGIN, EVERY DAY, with the *Senior* Counſel within "the Bar, and then to call to the next Senior, in Order, and ſo on, "as long as it was convenient to the Court to ſit; and to proceed "again in the ſame Manner, upon the *next*, and EVERY *ſubſequent* "Day; although the Bar had not been half, or perhaps a quarter "gone through, upon any One of the former Days: So that the "Juniors were very often obliged to attend in vain, *without being* "*able* to bring on their Motions, for many ſucceſſive Days."

This was the *ſettled* and *general* Rule: Though perhaps the Judges, out of mere Compaſſion to the Juniors, would 2, or 3

Times in a Term, give them Leave to move, upon the next Day, ſuch Motions as were real *Remanets* of the former Day.

Whereas Lord *Mansfield* profeſſed and moſt punctually practiſed the *going* QUITE THROUGH the Bar, even to the youngeſt Counſel before he would begin again with the Seniors; even though it ſhould happen to take up two or three or *more* Days, before all the Motions which were ready at the Bar upon the firſt Day, could be heard.

The End of *Michaelmas* Term 30 *Geo.* 2. 1756.

Hilary

Hilary Term

30 Geo. 2. B. R. 1757.

(Lord Commiſſioner *Wilmot* abſent, in Chancery.)

Kilwick *verſ.* Maidman.

TIME was given by a Judge's Order, to plead; (*viz.* until 2 Days before the Eſſoin-Day of this preſent Term;) on the uſual Terms, " of pleading *iſſuably*, *&c.* This Order was not obtained till after the Four-Days Rule for pleading was expired. BEFORE *the* Term, and *within* the Time allowed by the Judge's Order, the Defendant pleaded a Plea of *Tender:* Which Plea was intitled (as it was agreed that it regularly might,) as of the *preceding* Term. *Monday* 24th *January* 1757.

Mr. *Aſpinall* moved, *ex parte Quer'*, to ſet *aſide* this Plea, with Coſts, as irregular; and for Leave to ſign Judgment; and cited 1 *Barnes* 246. *Davenhill* v. *Barritt*, in Point.

Mr. *Winn pro Def.* ſhewed Cauſe; *viz.* That it was a *fair honeſt Plea*, in it's own Nature; And that it was *within Time*, not being after Imparlance, but AS *of the* LAST *Term*; And alſo that it was an ISSUEABLE *Plea*, within the Meaning of the Judge's Order: Though He acknowledged that a Plea in *Abatement*, (though in Strictneſs indeed iſſueable,) would *not* be ſo; becauſe it tended to delay the Plaintiff.

The COURT concurred entirely in what Mr. *Winn* had urged in Support of the Regularity of the Plea: And the Motion was denied.

Taylor

Taylor, ex dimiſſ. Atkyns Eſq; *verſ.* Horde Eſq; & al'.

Tueſday 25 Jan. 1757.

IN Ejectment brought in *Michaelmas* Term 1752. by *John Atkyns* Eſq; (in the Name of *Cyprian Taylor*) againſt *Robert Atkyns* Eſq; the Heir at Law, and Others; Upon the General Iſſue pleaded, and Iſſue joined thereon, and tried at the Bar of this Court, the Jury find a Special Verdict: Which was, in Subſtance, as follows.

That Sir *Robert Atkyns* the Elder, Knight of the *Bath*, on 8th *June* 1669. was (amongſt divers other Meſſuages, Lands, Tenements, *&c.* in *Glouceſterſhire*,) ſeiſed in Fee of the Manor of *Lower Swell* and the other Premiſſes in Queſtion; and being ſo ſeiſed, made and executed Three ſeveral Indentures, (which are ſet out in the Special Verdict:) One of which is dated on the 11th and the two others on the 12th of *June* 1669.

By One of theſe Indentures, which was dated on the 12th of *June* 1669. (which the Counſel on both Sides, for Diſtinction's Sake, called the *leſſer* Deed,) made between Sir *Edward Atkyns* Knt. One of the Barons of the Exchequer, Sir *Robert Atkyns* Knight of the *Bath*, Solicitor General to the Queen and Son and Heir apparent of the ſaid Sir *Edward*, and Dame *Mary* (Wife of the ſaid Sir *Robert*) *Atkyns*, of the one Part; and Sir *Edward Carteret* Knt. and *John Lowe* Gentleman, of the other Part; It is witneſſed that in Conſideration of a Marriage thentofore had and ſolemnized between the ſaid Sir *Robert Atkyns* and Dame *Mary* his Wife, and of her *releaſing and acquitting a former Jointure* to Her made before Marriage, and of a *new Proviſion* to be had and made for Her the ſaid Dame *Mary*, for and in the Nature of a Jointure, in Bar and Recompence of her Dower and Thirds at the Common Law, in Caſe She ſhould happen to ſurvive and over-live the ſaid Sir *Robert Atkyns* her Huſband, He the ſaid Sir *Robert Atkyns* did thereby covenant and grant to and with the ſaid Sir *Edward Carteret* and *John Lowe*, That He the ſaid Sir *Edward Atkyns*, and the ſaid Sir *Robert Atkyns* and Dame *Mary* his Wife, ſhould and would, before the End of *Michaelmas* Term then next enſuing, levy and acknowledge before the Juſtices of the Court of Common Pleas at *Weſtminſter*, One or more Fine or Fines *Sur Conuſance de Droit come ceo*, *&c.* unto the ſaid Sir *Edward Carteret* and *John Lowe*, with Proclamations, of the ſaid Manor of *Lower Swell* and the other Premiſſes in Queſtion: Which ſaid Fine or Fines ſo as aforeſaid or in any other Sort to be had, levied and executed, of the ſaid Manor and Premiſſes alone or together with any other Lands, Tenements or Hereditaments, by or between the Parties to the ſaid Indenture

or any of them, alone or together with any other Perſon or Perſons, were to be and enure, and were thereby declared to be and enure, as to the ſaid Manor and all other the Premiſſes, To the Uſe of the ſaid Sir *Robert Atkyns* for Life, without Impeachment of Waſte; and from and after his Deceaſe, To the Uſe of the ſaid Dame *Mary* for Life for her Jointure and in Bar of her Dower; and from and after the Deceaſe of the ſaid Sir *Robert* and Dame *Mary*, To the Uſe of Sir *Robert Atkyns* Knt. Son and Heir apparent of the ſaid Sir *Robert*, and the *Heirs Male of the Body* of the ſaid Sir *Robert* the Son, *on the Body of Lovis Carteret* his intended Wife lawfully to be begotten; and for Default of ſuch Iſſue, To the Uſe of the *Right Heirs* of the ſaid *Sir Robert* the *Father* for ever.

And the ſaid Sir *Edward Atkyns* and Sir *Robert* the Father did by this Deed covenant with the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, That in Caſe any Defect ſhould happen in the ſaid Fine and that Aſſurance, Or in Caſe there ſhould not be ſome good Conveyance in the Law made according to the Intent of that Indenture, ſo that by Reaſon of ſuch Defect or Failure of ſuch Conveyance and Aſſurance in Law, the ſaid Manor and Premiſſes or any Part or Parcel of them ſhould not, before the thirtieth Day of *November* then next enſuing, be ſufficiently conveyed according to the Intent of the ſaid Indenture, then they the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, and all and every other Perſon and Perſons and their Heirs, ſtanding or being ſeiſed, or which ſhould ſtand or be ſeiſed of and in the ſaid Manor and Premiſſes, ſhould and would from Time to Time and at all Times from thenceforth for ever ſtand and be ſeiſed of and in the ſaid Manor and Premiſſes, or ſo much and ſuch Part and Parts thereof whereof or concerning which any ſuch Defect ſhould happen to be, To the Uſes Behoofs Intents and Purpoſes therein before declared, limited and contained, according to the true Intent and Meaning of the ſaid Indenture, and to *none other Uſe*, Intent or Purpoſe whatſoever.

One Other of theſe three Indentures was a Leaſe, dated 11th *June* 1669: And the Remaining One was a Releaſe, dated 12th *June* 1669. This *Releaſe* bore the very *ſame Date* with the Deed already recited (called the leſſer Deed:) And the Counſel on both Sides agreed in calling *this Deed of Releaſe* (for Diſtinction's Sake) the *greater* Deed, as this contained the Settlement of the whole Eſtate.

By theſe Indentures of Leaſe and Releaſe, dated 11th and 12th *June* 1669. the Releaſe being Tripartite, and made between the ſaid Sir *Edward Atkyns*, the ſaid Sir *Robert* the Father and Dame *Mary* his Wife, *Philip Sheppard* Eſq; Sir *Clement Farnham* Knt. and *Ed-*

ward Atkyns Eſq; (ſecond Son of the ſaid Sir *Edward Atkyns*,) of the firſt Part; the Right Honourable Sir *George Carteret* Knt. and Bart. Vice-Chamberlain of his Majeſty's Houſehold, and One of his Majeſty's moſt Honourable Privy Council, the ſaid Sir *Edward Carteret* and the ſaid *John Lowe*, the Right Honourable *Edward Montagu*, commonly called Lord *Hinchinbrooke* (Son and Heir apparent of the Right Honourable the Earl of *Sandwich*,) Sir *Philip Carteret* Knt. (Son and Heir apparent of the ſaid Sir *George Carteret*,) and *Edward Swift* Eſq; of the ſecond Part; and the ſaid Sir *Robert Atkyns* Knt. (the Son and Heir apparent of the ſaid Sir *Robert Atkyns*,) and *Lovis Carteret* (one of the Daughters of the ſaid Sir *George Carteret* and of Dame *Elizabeth* his Wife,) of the third Part; It is witneſſed that in Conſideration of a Marriage thentofore had and ſolemnized between the ſaid Sir *Robert Atkyns* the Father and Dame *Mary* his Wife, and alſo of a Marriage then ſhortly to be had and ſolemnized between the ſaid Sir *Robert Atkyns* the Son and the ſaid *Lovis Carteret*, and of the Sum of 6500 *l. paid to Sir Robert the Father* by the ſaid Sir *George Carteret*, for the Marriage Portion of the ſaid *Lovis Carteret*, and of 5 *s.* a-piece to the ſaid Sir *Edward Atkyns*, Sir *Robert Atkyns* the Father, *Philip Sheppard*, Sir *Clement Farnham*, and *Edward Atkyns*, paid by the ſaid Sir *Edward Carteret* and *John Lowe*, and for a Proviſion to be had and made *to and for the ſaid Dame Mary* (Wife of the ſaid Sir *Robert Atkyns* the Father,) for and in the Nature of a *Jointure*, in Bar and Recompence of her Dower and Thirds at the Common Law; and alſo for a Proviſion for the ſaid *Lovis Carteret*, for and in Nature of a Jointure, in Bar and Recompence of her Dower and Thirds at the Common Law; and for ſettling All the Manors, Lands, Tenements and Hereditaments therein after mentioned, to the ſeveral and reſpective Uſes, upon the Truſts, to the Intents and Purpoſes, and with under and ſubject to the Proviſoes Declarations Limitations and Agreements therein after declared; The ſaid Sir *Edward Atkyns* and Sir *Robert* the Father did grant releaſe and confirm unto the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, the ſaid Manor of *Swell* and other the Premiſſes in Queſtion (as deſcribed in the leſſer Deed,) and ſeveral other Manors Lands and Hereditaments therein mentioned, To hold the ſaid Manor of *Swell* and other the Premiſſes in Queſtion, to the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, to the ſeveral Uſes therein mentioned; which Uſes, (as to the ſaid Manor of *Swell* and other the *Premiſſes in Queſtion*,) are the ſame as thoſe before ſet forth in the leſſer Deed; *viz.*

To the Uſe of Sir *Robert* the Father, for Life, without Impeachment of Waſte;

Remainder,

Remainder, as to the ſaid Premiſſes (except Timber-Trees,) to Dame *Mary* for Life, for her Jointure, and in Bar of Dower;

Remainder to Sir *Robert* the Son, and the Heirs Male of his Body by the ſaid *Lovis Carteret*;

Remainder to the Right Heirs of Sir *Robert* the Father.

And ſeveral other Parts of the Eſtates were limited thereby, to Sir *Robert* the Son, for Life; Remainder to Truſtees, to preſerve contingent Remainders; Remainder to the ſaid *Lovis Carteret* for Life, for her Jointure and in Bar of Dower; and upon the Iſſue of the ſaid intended Marriage, in ſtrict Settlement.

In which Indenture of Releaſe is contained a Proviſo, in the following Words—

" Provided always that it ſhall and may be lawful to and for the " ſaid Sir *Robert Atkyns* the Father, the ſaid Sir *Robert Atkyns* the " Son, and the ſaid *Lovis Carteret*, reſpectively, when they are or " ſhall be reſpectively ſeiſed in Poſſeſſion of the Freehold of ſuch of " the Premiſſes as by Virtue of and according to the Limitations " aforeſaid are reſpectively limited to them for their reſpective " Lives, by their reſpective Deed or Deeds in Writing ſealed and " delivered in the Preſence of two or more credible Witneſſes, *to* " *make any Leaſe or Demiſe*, Leaſes or Demiſes, of all or any of the " ſaid Premiſſes whereof they ſhall be ſo reſpectively ſeiſed in Poſ- " ſeſſion for Life as aforeſaid, (Except of the Capital Meſſuage of " *Sapperton* aforeſaid, and the ſaid Lodge in *Pinbury* Park afore- " ſaid,) unto any Perſon or Perſons, for One, Two or *Three Lives* " in Poſſeſſion Reverſion or Remainder, to end or determine upon " the Death of One Two or Three Perſons, Or for the Term of " 21 Years abſolute; So as there be not, in the reſpective Pre- " miſſes or any Part thereof, any Eſtate exceeding the Term or " Time of *three Lives* or 21 Years, in Being at the ſame Time; " and ſo as ſuch reſpective Leaſes be not made without Impeach- " ment of Waſte; *And* SO AS *the* USUAL RENTS of ſuch of the " Premiſſes reſpectively as ſhall be ſo leaſed or demiſed upon Fines, " And the BEST *Rents that* CAN BE *reaſonably gotten* for ſuch of " the Premiſſes reſpectively as ſhall be ſo leaſed or demiſed without " Fines, BE *reſpectively* RESERVED upon *every* ſuch reſpective " Leaſe or Leaſes Demiſe or Demiſes, *to be* PAYABLE DURING " *the reſpective Terms* in the ſaid reſpective Leaſes or Demiſes to be " contained; Any Thing herein before contained to the contrary " notwithſtanding."

And another Proviſo is therein alſo contained, in the following Words, *viz.*

" Provided alſo that it ſhall and may be lawful to and for the ſaid " Sir *Robert Atkyns* the Father, at any Time or Times during his " natural Life, *After* the Deceaſe of the ſaid Dame *Mary* his Wife, " by any Writing or Writings indented, under his Hand and Seal, " teſtified by two or more Witneſſes, to grant, aſſign, limit or ap- " point the ſaid Manor of *Swell inferior alias Nether Swell*, and " the Lands Tenements and Premiſſes in *Swell inferior* otherwiſe " *Nether Swell*, *Upper Swell*, and *Stowe in the Would*, and in either " or any of them, or ſuch Parts and Parcels thereof as He ſhall " think fit, unto or to the Uſe *of ſuch Woman or Women* as He the " ſaid Sir *Robert Atkyns* the Father *ſhall marry or take to Wife*, " after the Deceaſe of the ſaid Dame *Mary* his now Wife; for and " during the Term of the *natural Life* or Lives of ſuch Wife or " Wives only, for her or their Jointure or Jointures; Any Thing " herein contained to the Contrary thereof in any wiſe notwith- " ſtanding."

And by another Proviſo in this Deed, the like Power is given to Sir *Robert* the Son, " to make a Jointure of all or any of the Lands " thereby limited to *Lovis Carteret* for her Jointure, on any *future* " Wife or Wives whom He ſhould marry, after the Death of the " ſaid *Lovis Carteret* without Iſſue."

And by the ſame Deed, Sir *Robert* the Father covenants with Sir *George Carteret*, That Sir *Edward Atkyns*, He, and Dame *Mary* his Wife, would, before the End of *Michaelmas* Term then next, levy one or more Fine or Fines *ſur Conuſance de droit*, *&c.* with Proclamations, of the Premiſſes contained in this Indenture, unto the ſaid Sir *Edward Carteret* and *John Lowe*: Which, it was thereby declared, ſhould be and enure to the ſeveral and reſpective Uſes, upon the Truſts, and to the Intents and Purpoſes, and with, under and ſubject to the Proviſoes Declarations and Agreements therein before declared limited and expreſſed concerning the ſame. And reciting " that Sir *Clement Farnham* and *Edward Atkyns* were poſ- " ſeſſed of the Premiſſes in Queſtion, or ſeveral Parts thereof, for " ſeveral Terms of Years then in Being, in Truſt for Sir *Robert* the " Father," It was thereby declared and agreed by Sir *Robert* the Father, That Sir *Charles Farnham* and *Edward Atkyns* ſhould ſtand poſſeſſed of the Premiſſes comprized in the ſaid Terms, during the Reſidue thereof, Upon Truſt and to the Uſe and Benefit of the Perſon and Perſons to whom the Premiſſes (by Virtue of the Limitations therein) ſhould belong.

The

The Jury found that the firſt of the ſaid Indentures was executed by Sir *Edward Atkyns*, Sir *Robert Atkyns* the Father and Dame *Mary* his Wife, and *John Lowe*; The ſecond of the ſaid Indentures was executed by Sir *Edward Atkyns*, Sir *Robert* the Father, *Philip Sheppard*, Sir *Clement Farnham*, and *Edward Atkyns* Eſq; And the ſaid Indenture of Releaſe, by Sir *Edward Atkyns*, Sir *Robert* the Father, Dame *Mary* his Wife, Sir *Clement Farnham*, *Edward Atkyns* Eſq; Sir *George Carteret*, Sir *Philip Carteret*, *Edward Swift*, Sir *Robert Atkyns* the Son, and *Lovis Carteret*; and that the Leaſe for a Year was executed before the Releaſe.

That in *Trinity* Term 1669, a Fine was levied; wherein the ſaid Sir *Edward Carteret* and *John Lowe* were Plaintiffs, and the ſaid Sir *Edward Atkyns* Sir *Robert* the Father and Dame *Mary* his Wife Deforciants, of the Premiſſes in Queſtion (amongſt the ſaid other Lands contained in the greater Deed:) But no Fine was ever levied of the Lands contained in the little Deed only.

Afterwards, on the 6th of *July* 1669, Sir *Robert* the Son was married to the ſaid *Lovis Carteret*.

Dame *Mary* (the Wife of Sir *Robert* the Father,) *died* on 2d *March* 1680.

After which, *viz.* on 26th *April* 1681, Sir *Robert* the Father, being ſeiſed of the Premiſſes in Queſtion, as of Freehold, for the Term of his natural Life, without Impeachment of Waſte, (and being then on the Point of marrying a ſecond Wife, Mrs. *Ann Dacres*,) duly executed an Indenture under his Hand and Seal, atteſted by three Witneſſes, bearing Date the ſame 26th of *April* 1681, and made between Himſelf of the one Part, and Sir *Robert Dacres* Knt. *John Dacres* and *Ann Dacres* Spinſter (Siſter of Sir *Robert Dacres* and *John Dacres*) of the other Part: By which Indenture, (after reciting the abovementioned Indenture of Releaſe Tripartite of the 12th of *June* 1669, and the Power thereby reſerved "for the ſaid "Sir *Robert Atkyns* the Father, after the Death of Dame *Mary*, to "limit all or any Part of the Manor and Premiſſes in Queſtion, to "any future Wife or Wives He ſhould happen to marry, for the "Term of the natural Life or Lives of ſuch Wife or Wives only, "for her or their Jointure or Jointures,") it is witneſſed that in Conſideration of the then intended Marriage between the ſaid Sir *Robert Atkyns* the Father and the ſaid *Ann Dacres* and of her Marriage-Portion, The ſaid Sir *Robert Atkyns* the Father, IN PURSUANCE *of the ſaid Power to Him reſerved* and of all and every Power and Authority whatſoever, did grant aſſign limit and appoint the ſaid Manor of *Swell* and other the Premiſſes in Queſtion,

unto the ſaid ANN DACRES, *for and during the Term of her* NATURAL LIFE, for her Jointure, and in Bar and Recompence of her Dower and Thirds at the Common Law.

On 28th *April* 1681, the ſaid Sir *Robert Atkyns* the Father married the ſaid *Ann Dacres*.

On 31ſt *May* 1698, Sir *Robert Atkyns* the Father, being ſeiſed of the Premiſſes in Queſtion, as of Freehold for Life, without Impeachment of Waſte, executed an Indenture of *Leaſe*, under his Hand and Seal, atteſted by 3 Witneſſes, dated on the ſame 31ſt Day of *May* 1698, and made between Himſelf of the one Part, and *Thomas Dacres* Eſq; *Robert Dacres* Gent. and *John Dacres* Gent. (the 3 Sons of the before named Sir *Robert Dacres* Knt. and Nephews of Dame *Ann Atkyns* then Wife of Sir *Robert Atkyns* the Father) of the other Part. This Indenture of Leaſe recites the Indenture Tripartite of Releaſe of the 12th of *June* 1669; Whereby Sir *Edward Atkyns* and Sir *Robert Atkyns* the Father did (amongſt other Lands) grant releaſe and confirm to the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, the ſaid Manor of *Swell inferior* otherwiſe *Nether Swell*, with the Appurtenances, and all thoſe Rents of Aſſize of the Free Tenants of the ſaid Manor extending to One Halfpenny and One Pound of Pepper; and all the Rents of Cuſtomary Tenants of the ſaid Manor; and the Capital Meſſuage and Farm of the *Bold*; and the Park called *Swell Park*, otherwiſe *Abbot's Wood*; and all and all manner of Tenths or Tithes of the ſaid Park; and the Barcary or Sheep-houſe called *Gannow*, and the Grounds or Cloſes of Meadow or Paſture adjoining or belonging thereto; and the Water-Mill called *Bold Mill*, with the Dams, Streams, Waters, Attachments, Fenders, Soak, Suit, Mulcture, Griſt and Appurtenances thereunto belonging; All the Tolns of the Cuſtomary Tenants of the ſaid Manor, and all and all manner of Tenths and Tithes of all the Premiſſes whatſoever, which unto the late diſſolved Monaſtery of *Hales* did belong; All that Common of Paſture for 400 Sheep and 20 Beaſts, upon the Hills and Fields of *Nether Swell*, at all Times in the Year except in the open Time, and in the open Time Common of Paſture within the ſaid Fields for all Manner of Beaſts without Number Rate or Stint; and the ſeveral Paſtures called *Murden Leaſows*; all that Barcary or Sheep-houſe within the ſaid Paſture; all that Paſturage or Feeding for 600 Sheep, or for more or leſs at the Will and Pleaſure of the Tenant of the ſaid Paſtures called *Murden Leaſows* for the Time Being, in and upon the Demeſne Lands Waſte Lands and other Lands belonging to the ſaid Farm of the *Bold* or elſewhere, in ſuch ample Manner as the late Abbot of the ſaid diſſolved Monaſtery of *Hales* aforeſaid and his Predeceſſors had kept and occupied the ſame within the Manor of *Swell* aforeſaid; All thoſe Grounds in *Nether Swell*

Swell aforeſaid thentofore in the Tenure of *John Winſmore* or his Aſſigns; All that Half-Acre of Land in *Nether Swell* ſometimes in the Tenure of the Curate of the Church of *Stowe* in the ſaid County of *Glouceſter*; All that Fiſhing of the River or Water of the whole Manor of *Nether Swell*, with all Profits and Commodities to the ſame belonging; All thoſe Portions of Tithes whatſoever, and all and all manner of Tithe of Corn Grain Blade Sheaf Hay Wool Lambs Paſture and other Tenths and Tithes whatſoever in and upon the Premiſſes or any Part of them growing renewing or increaſing; (being the Premiſſes in Queſtion;) To the ſeveral Uſes by the ſaid Indenture limited as aforeſaid: And it alſo recites the Power to the ſaid Sir *Robert Atkyns* the Father, " for leaſing the Premiſſes, " as it is ſet forth in the ſaid Indenture. Then it is witneſſed by this Indenture of Leaſe, That the ſaid Sir *Robert Atkyns* the Father, in Conſideration of the *Rent* thereby reſerved; IN PURSUANCE *of the Power to Him reſerved* in and by the ſaid recited Indenture, and by Virtue thereof *and of* ALL AND EVERY *Power and Authority whatſoever*, did, by that his preſent Writing indented, under his Hand and Seal, teſtified by the ſeveral Witneſſes whoſe Names are thereupon indorſed, demiſe leaſe grant and to Farm let, to the ſaid *Thomas Dacres Robert Dacres* and *John Dacres* and their Aſſigns, the ſaid Manor, and all and ſingular the ſaid Lands, Tithes, Tenements, Hereditaments and Premiſſes, with their and every of their Rights Members and Appurtenances, in *Swell inferior* otherwiſe *Nether Swell*; AND *all and every the* RENTS RESERVED *upon any Leaſes or Grants*; To hold to them the ſaid *Thomas*, *Robert* and *John Dacres*, from the making thereof, for and during the *natural Lives* of them the ſaid *Thomas Robert* and *John Dacres* and the Life of the LONGER LIVER *of them*; YIELLDING AND PAYING THEREFORE, during the ſaid Term, unto the ſaid Sir *Robert Atkyns* Party thereto, and after his Deceaſe, to ſuch Perſon or Perſons reſpectively to whom the ſaid Manor and Premiſſes were limited, according to their reſpective Eſtates and Titles, the *Yearly Rent of* THREE HUNDRED AND THREESCORE *Pounds*, at *Michaelmas* and *Lady-day*, by even and equal Portions.

In which ſaid Indenture of Leaſe is contained a Clauſe, in theſe Words; *viz.* " *The* TRUE INTENT AND MEANING *of this* " *Eſtate or Term for Lives*, ſo hereby granted and made to the ſaid " *Thomas Dacres Robert Dacres* and *John Dacres* and the Survivor " of them, being TO PRESERVE *the ſaid Remainder* ſo limited in " the Premiſſes by the ſaid recited Indenture, TO *the Right Heirs* " *of the ſaid Sir Robert Atkyns Party to theſe Preſents*, AND TO " SUCH PERSON OR PERSONS TO WHOM *the ſaid Sir Robert* " *Atkyns Party to theſe Preſents ſhall* ANY WAY DISPOSE OF " *the ſame*, FROM BEING BARRED *of any* RECOVERY *to be ſuf-* " *fered, or by any other Act to be attempted or done for the* BAR- " RING *of the ſame.*"

On 8th *June* 1698, *John Dacres, One of the Leſſees* in the laſt abovementioned Indenture of Leaſe, *alone*, executed a *Letter of Attorney*, under his Hand and Seal, reciting the ſaid laſt Indenture of Leaſe, and impowering and authorizing *Thomas Barker* Gent. as his Attorney, *to take Livery and Seiſin* of the Premiſſes laſt above mentioned, from the ſaid Sir *Robert Atkyns* the Father; *for* HIMSELF (the ſaid *John Dacres*) *and* FOR *the ſaid Thomas and Robert Dacres* and every of them, *in* THEIR *Names and for their Uſe*, according to the Purport and true Meaning of the ſaid recited Indenture of Leaſe; and to enter and take Poſſeſſion of the ſaid Manor and Premiſſes in the ſaid Indenture contained, *to the Uſe of* THEM AND EVERY *of them*; He the ſaid *John Dacres* allowing of all and every the Act and Acts ſo done by the ſaid Attorney, to be as effectual and ſufficient in Law, as if He had been perſonally preſent and had done the ſame.

On 5th *July* 1698, Sir *Robert Atkyns* the Father, being ſo ſeiſed as aforeſaid, and then in the actual Poſſeſſion of the ſaid Manor and Premiſſes, did, in his own Perſon, *deliver* Seiſin and Poſſeſſion thereof *unto the ſaid Thomas Barker*, TO THE USE *of the ſaid* THOMAS ROBERT AND JOHN *Dacres and of* EVERY *of them*, and of the Survivor of them, according to the Purport and true Meaning of the ſaid Indenture; He the ſaid *Thomas Barker* being authorized and appointed, by a Letter of Attorney under Hand and Seal of the ſaid *John Dacres*, and by Him duly executed, " for " Him and to his Uſe and in his Name, AND *for the ſaid* THOMAS " AND ROBERT *Dacres and to* THEIR *Uſe and in* EVERY OF " THEIR *Names*, to take and receive the ſaid Livery and Poſſeſſion " of the ſaid Capital Meſſuage Manor and Premiſſes, accordingly:" As by an Indorſement on the ſaid Letter of Attorney (which is ſet out in the Verdict) appears.

But the Jury found that the ſaid *Thomas Dacres Robert Dacres* and *John Dacres*, the Leſſees named in the laſt mentioned Indenture, or either of them, NEVER WERE IN POSSESSION of the Premiſſes in Queſtion, otherwiſe than by the ſaid Livery and Seiſin ſo given by the ſaid Sir *Robert Atkyns* the Father as aforeſaid; And that they or either of them *did* NOT *receive or pay any* RENT for or in reſpect of the ſaid Premiſſes; and that the ſaid *Indenture of Leaſe was* NOT FOUND IN THE CUSTODY *of Thomas Dacres the Surviving Leſſee*, at the Time of his Death.

On 27th *May* 1708, Sir *Robert Atkyns* the Father, being ſo ſeiſed of the ſaid Premiſſes and of the Remainder and Reverſion thereof as aforeſaid, made his Will, dated the ſame 27th Day of *May* 1708, atteſted by four Witneſſes; And thereby confirmed his Wife's Join-

ture; and then recited " that He was ſeiſed of the Remainder and " Reverſion in Fee, of the ſaid Manor and other the Premiſſes in " queſtion; and that ſuch Remainder or Reverſion, after the " Death of his Wife, was alſo further expectant upon an Eſtate " in ſpecial Tail, ſettled upon his Son Sir *Robert* upon his Marriage, " by the abovementioned Deed of 12th *June* 1669; And that He " had made a Leaſe to the ſaid *Thomas Robert* and *John Dacres*, for " their Lives and the Life of the longer Liver of them, according " to the Power He had reſerved to Himſelf upon the ſaid Settle- " ment:" After which Recital, He diſpoſed of his ſaid Remainder or Reverſion in Fee, to the Leſſor of the Plaintiff, in Tail Male.

The Whole Deviſe was in the following Words—*viz.* " I give " and confirm unto my ſaid Wife Dame *Ann Atkyns*, All thoſe " Lands Tenements and Hereditaments in *Lower Swell* aforeſaid, " which were ſettled upon Her for her Jointure, before our Mar- " riage: And I hereby further give and deviſe to Her, for Term of " her Life, my Manor of *Lower Swell*, and all the Reſt of my " Lands Tenements and Hereditaments whatſoever in *Lower Swell* " aforeſaid, for Term of her Life, as an Addition to her Jointure. " And whereas I am ſeiſed of the Remainder and Reverſion in " Fee, of the ſaid Manor of *Lower Swell*, and of the Reſt of the " ſaid Lands Tenements and Hereditaments in *Lower Swell*, ſo " ſettled, and by this my Will given and confirmed to my ſaid " Wife for her Life; Which Remainder or Reverſion, after the " Death of my Wife, is alſo further expectant upon an Eſtate in " the ſaid Manor and Lands in Special Tail ſettled upon my Son Sir " *Robert Atkyns* upon his Marriage, by Deed dated the 12th of " *June* 1669, and upon his Sons by his now Wife and no other " Wife; And whereas I have made a Leaſe, dated * the 8th Day of " *June* in the Year of our Lord 1698, executed by Livery and " Seiſin, to *Thomas Dacres* Eſq; and to *Robert* and *John Dacres* " Gentlemen, for the Lives of the ſaid *Thomas Robert* and *John* " *Dacres* and the Life of the longer Liver of them, according to a " Power I reſerved to Myſelf upon the ſaid Settlement made upon " the Marriage of my ſaid Son Sir *Robert Atkyns*; Now I give and " deviſe the *ſaid* REMAINDER *or* REVERSION, and the BENEFIT " OF THE TRUSTS *of the ſaid Leaſe for Lives*, to my *Grandſon* " *John Tracy*; (the now younger and ſecond Son living of my Son- " in-Law *John Tracy* of *Stanway* in the ſaid County of *Glouceſter* " Eſq; by my Daughter *Ann Tracy* his Wife,) and to the Heirs " Male of the body of my ſaid Grandſon by Him to be begotten. " And if my ſaid Grandſon happen to die without Iſſue Male, then " I give and deviſe the ſaid Remainder or Reverſion, to the next " younger Son of the ſaid *John Tracy* my Son-in-Law, called *Fer-* " *dinando Tracy*, and to the Heirs Male of the body of the ſaid " *Ferdinando*. And for Default of ſuch Iſſue, then I give and de-

* The Teſtator miſtakes the Date of this Leaſe: It was 31ſt *May*. *V. Ante, pa.* 66.

" viſe the ſaid Remainder or Reverſion to the next Younger Son " my ſaid Son-in-Law *John Tracy* may happen to have by my ſaid " Daughter, and to the Heirs Male of the body of ſuch next " younger Son;" and ſo on, to other ſtill younger Sons, *&c.* (Theſe Deviſes were All upon Condition that the ſaid Sons reſpectively ſo inheriting the ſaid Manor and Lands, ſhould conſtantly uſe to call and write themſelves by the Name of *Atkyns* only, for their Surname, and by no other Surname.) And then the Will proceeds thus—" I do further give and deviſe all my Houſes and all " Lands Tenements and Hereditaments ſituate lying and being in " or near *Curſitor's Alley* in *Holbourn* within the City of *London* or " the Suburbs thereof, or within the County of *Middleſex*, or in " either of them;" in like manner, and upon the like Condition, *&c.* And, reciting that the Reverſion or Remainder of his Manor and Lands in and of *Sapperton* aforeſaid, and of the Advowſon of the Church of *Sapperton*, and of and in his Manor of *Pinbury* and of the Lands thereto belonging, as alſo of *Pinbury-Park*, was in Him and his Heirs; and alſo of the 7 Hundreds of *Cirenceſter*, and of the Hundred of *Biſley*, (all in the ſaid County of *Glouceſter*;) He deviſed the ſame in like manner. The Words of his Will are theſe—" I having alſo made a Leaſe for Lives, of the ſaid Manors " of *Sapperton* and *Pinbury*, and of the ſaid Advowſon of *Sapper-* " *ton*, and of the ſaid *Pinbury-Park*, and of all the ſaid ſeveral " Hundreds, the better to preſerve and ſupport the ſaid Remainders " and Reverſions from being cut off or barred by any Recovery. " And if my ſaid younger Grandſons happen to die without Iſſue " Male, then I give and deviſe the ſame Reverſions and Remainders " to my Nephew *Richard Atkyns* (Eldeſt Son of my late Brother " Sir *Edward Atkyns* deceaſed) and to his Heirs."

On 9th *February* 1709, Sir *Robert Atkyns*, the Father, died, ſeiſed of the Premiſſes in Queſtion.

Upon his Death, Dame *Ann*, his Widow and Relict, entered thereupon; claiming the ſame for her Life, for her Jointure, under and by Virtue of the above mentioned Indenture of 26th *April* 1681: And was *in Poſſeſſion* thereof.

The Jury then find an Indenture Tripartite dated the 18th of *May* 1710; made between *Richard Atkyns* Eſq; Eldeſt Son and Executor of Sir *Edward Atkyns* (the Surviving Truſtee in whom the Terms for Years mentioned in the greater Deed were veſted,) on the 1ſt Part; *Joſeph Walker*, Gent. on the 2d Part; and the ſaid Sir *Robert Atkyns*, (the Son) on the 3d Part: By which, after reciting the Indenture of Releaſe of 12th *June* 1669. and that it was therein mentioned that Sir *Clement Farnham* and *Edward Atkyns* were poſſeſſed of ſeveral Terms for Years in the Premiſſes in queſtion,

ſtion, and that they were to ſtand poſſeſſed thereof in Truſt for ſuch Perſon and Perſons to whoſe Uſe and Uſes the ſame were limited by the ſaid Indenture; and reciting that the ſaid Sir *Robert Atkyns* (the Son) then claimed the ſaid Manor and Premiſſes BY AND UNDER *the* SAID *Indenture*; and that Sir *Clement Farnham* was dead, and the ſaid *Edward Atkyns* (afterwards Sir *Edward Atkyns* Knt. Lord Ch. Baron of the Exchequer) ſurvived Him, and was alſo then dead, having firſt made his Will and the ſaid *Edward Atkyns* Executor thereof, and that He had proved the ſame; The ſaid *Richard Atkyns*, at the Inſtance and Requeſt of the ſaid Sir *Robert Atkyns* (the Son) teſtified by his executing the ſaid Indenture, and in Conſideration of 5 *s.* paid to Him by the ſaid *Joſeph Walker*, aſſigned over the ſaid Manor and Premiſſes in queſtion, to the ſaid *Joſeph Walker*, To hold to Him his Executors Adminiſtrators and Aſſigns, for all the then Reſidue and Remainder of the ſaid Terms, whereof the ſaid Sir *Clement Farnham* and *Edward Atkyns* or either of them were poſſeſſed; In Truſt for the ſaid Sir *Robert Atkyns* (the Son) and the Heirs Male of his Body by the before-mentioned Dame *Lovis* his Wife; (the ſaid Premiſſes being ſo limited in and by the ſaid Indenture of Releaſe of 12th *June* 1669.) In which ſaid Indenture, there is a Covenant from Sir *Robert* (the Son) to indemnify the ſaid *Richard Atkyns* his Heirs Executors and Adminiſtrators againſt any Damages he or they might ſuſtain by reaſon of his making the ſaid Aſſignment to the ſaid *Joſeph Walker* as aforeſaid.

The Jury further find That Dame *Ann Atkyns* being *ſo* in Poſſeſſion of the Premiſſes as aforeſaid; In *Trinity* Term 1710. 9 *Ann.* an Ejectment was brought in the Court of Common Pleas, for the Recovery of the ſaid Premiſſes, againſt Her the ſaid Dame *Ann* and the Tenants in Poſſeſſion of the ſame Premiſſes, by *John Philips*, upon the ſeveral Demiſes of the ſaid Sir *Robert Atkyns* the Son, and of the ſaid *Joſeph Walker*: In which Ejectment, the Demiſes were laid upon the 22d Day of *May* 9 *Ann.* To hold from the 20th Day of the ſame *May*, for 7 Years. And the ſaid Ejectment was tried at the Bar of the Court of Common Pleas, in *Michaelmas* Term following: And a general Verdict was found for the Plaintiff; and Judgment was entered up thereupon, againſt Her and the reſt of the Defendants therein, for the ſaid *John Philips*; and he recovered TERMINUM *ſuum predictum*, and had an *Habere facias Poſſeſſionem.*

The Jury further find That upon this Trial, the ſaid two Indentures, called greater and leſſer Deeds, of 12th *June* 1669, were, BOTH *of them*, read and given in Evidence to the Jury: *But* that the Deed of *Aſſignment*, of 18th *May* 1710. was NOT produced, nor given in Evidence, to the Jury.

They

They find that ſoon after the ſaid Judgment in Ejectment, and during the Life of Dame *Ann*, Sir *Robert Atkyns* (the Son) entered into and was in Poſſeſſion of the Premiſſes in queſtion, and in the ſaid Declaration in Ejectment mentioned.

They find that on 1ſt *January* 1710, *John Philips*, the ſaid Plaintiff in Ejectment, *ſurrendered* the two Terms mentioned in the ſaid Declaration in Ejectment to be demiſed to him by the ſaid Sir *Robert Atkyns* (the Son) and *Joſeph Walker*, to the ſaid Sir *R. A.* (the Son) *then in Poſſeſſion* of the Premiſſes.

They further find that on 17th *January* 1710, the ſaid Sir *R. A.* the Son, being *ſo in Poſſeſſion as aforeſaid*, and *during the Life-time of the ſaid Dame Anne Atkyns, Widow*, made a Feoffment to *James Earle*, of the Premiſſes in queſtion, in Fee; by Indenture Tripartite of that Date, made between Himſelf on the 1ſt Part; *James Earle*, Yeoman, on the 2d Part; and *John Holmden*, Gent. on the 3d Part: Which Feoffment in Fee is therein declared to be *for the docking, barring and deſtroying* ALL ESTATES TAIL, *Uſe and Uſes, Reverſions* and Remainders, at any Time thentofore made created or limited of and in the Manor and Premiſſes in queſtion; and for the veſting and ſettling an Eſtate in *Fee Simple* therein, to and in the ſaid Sir *Robert* the Son. Sir *Robert* (the Son) did therefore, in Conſideration of 5 *s.* thereby grant bargain ſell enfeoff and confirm unto the ſaid *James Earle* his Heirs and Aſſigns, the Premiſſes in queſtion, To hold to and to the Uſe of the ſaid *James Earle* his Heirs and Aſſigns for ever; To the *Intent* and *Purpoſe* that the ſaid *James Earle* might become perfect *Tenant of the Freehold* of the ſaid Premiſſes, in order for the ſuffering a *Common Recovery* in *Hilary* Term then next; wherein the ſaid *John Holmden* was to be Demandant, the ſaid *James Earle* Tenant, and Sir *Robert* Himſelf Vouchee. Which Recovery, it was thereby declared, was to be and enure to the Uſe and Behoof of the ſaid SIR ROBERT ATKYNS (*the Son*) *his Heirs and Aſſigns for ever*; and to or for no other Uſe Intent or Purpoſe whatſoever. And by this ſame Deed, Sir *Robert Atkyns* (the Son) conſtituted *Edward Carter* and *John Longford* his Attornies and Attorney, either jointly or ſeverally to enter upon and take Seiſin and Poſſeſſion of the Premiſſes, and to give and deliver Seiſin and Poſſeſſion thereof to the ſaid *James Earle* and his Heirs and Aſſigns for ever, according to the Purport and true Meaning and for the Purpoſes in the ſaid Deed mentioned.

And the Jury find that on 20th *January* 1710, *Edward Carter*, One of the ſaid Attornies, entered upon the Premiſſes, and gave Seiſin and Poſſeſſion thereof to the ſaid *James Earle*, by Virtue of the ſaid Warrant of Attorney contained in the ſaid Indenture; As

appears by a Memorandum indorſed upon the ſaid Indenture, and found by the Verdict.

They find that in *Hilary* Term 9th *Ann.* (1710) a Recovery was ſuffered of the Premiſſes; wherein *John Holmden* was Demandant; *James Earle*, Tenant; and Sir *Robert Atkyns* (the Son) and *Lovis* his Wife, Vouchees; And Seiſin executed thereon: Which Recovery they find to be proſecuted had and executed to the ſeveral Uſes mentioned in the ſaid Deed of Feoffment. And they find that after this Recovery, Sir *Robert* the Son *continued in Poſſeſſion* of the Premiſſes till the 9th of *November* 1711.

They find the Death of the ſaid Sir *R. A.* (the Son) on 9th *November* 1711, without Iſſue Male by the ſaid *Lovis* his Wife, who ſurvived Him.

They alſo find that an Ejectment was brought for the Premiſſes, againſt the preſent Defendant *Robert Atkyns* Eſq; and his Tenants of the Premiſſes in queſtion, in *Hilary* Term 1711, 10 *Ann.* by *John Miles*, as Plaintiff, on the ſeveral Demiſes (both laid to be made on 14th *February* 8 *Ann.* 1709. which is 5 Days after Sir *R. A.* the Elder's Death) of Dame *Ann Atkyns* the Jointreſs, and of *Thomas Dacres*, the ſurviving Leſſee under the Indenture of Leaſe of 31 *May* 1698. And in *Eaſter* Term 1712, 11 *Ann.* a general Verdict was given for the Plaintiff, on both Demiſes, on a Trial at Bar in this Court: and Judgment was entered up accordingly, "that the "Plaintiff do recover his ſeveral Terms aforeſaid." And the ſaid Dame *Ann Atkyns* entered upon the Premiſſes in queſtion, immediately after this laſt Judgment; and continued in Poſſeſſion thereof till 9th *October* 1712: When She died.

Soon after the Death of Dame *Ann*, the (original) Defendant *Robert Atkyns* Eſq; Nephew and Heir at Law to Sir *R. A.* the Son (and alſo Heir at Law to Sir *R. A.* the Father) entered upon the Premiſſes, and continued in Poſſeſſion thereof till his Death; which happened on 16th *March* 1753. [*Robert*'s Death was juſt 3 Months after the now Leſſor of the Plaintiff's actual Entry: And it was after Iſſue joined in this preſent Ejectment.]

John Dacres, one of the Leſſees in the Indenture of Leaſe dated 31ſt *May* 1698, died in 1705.

Robert Dacres, another of them, died in 1706.

Thomas Dacres, the third of them, *ſurvived* the other Two; and *died on* 23*d July* 1752.

They find that *John Atkyns*, the *Leſſor of the Plaintiff*, NEVER WAS IN POSSESSION of the Premiſſes in queſtion or any Part thereof, nor in Receipt of the Rents and Profits thereof or of any Part thereof; NOR ENTERED thereupon, TILL *the* 15th of *December* 1752; *When* He *made an* ACTUAL ENTRY into and upon the ſame; claiming the ſame as *Deviſee* thereof under and by Virtue of the Will of the ſaid Sir *Robert Atkyns* the Father; and ejected, drove out, and removed the ſaid *Robert Atkyns* Eſq; *Charles Coxe*, *Thomas Horde*, *&c.* therefrom; and was *ſeiſed thereof*, *as the Law requires*; and being ſo *ſeiſed* thereof, made the Demiſe to the ſaid *Cyprian Taylor* the now Plaintiff, on the 16th of *December* 1752, to hold from thence for 15 Years: By Virtue whereof, the ſaid *Cyprian Taylor* entered on the 18th, and was ejected by the Defendants on the 19th.

And then they conclude generally, as uſual; ſubmitting the Matters of Law to the Judgment of the Court, upon the above Facts.

Yorke, Knowler. Pratt, Perrott. Caldecot, Prime Caldecot, Knowler,

This Caſe was argued four ſeveral Times; Firſt, on *Tueſday* 3d *June* 1755, by Mr. *Yorke*, for the Plaintiff, and Mr. *Knowler* for the Defendants; Again, on *Tueſday* 11th *November* 1755, by Mr. *Pratt* for the Plaintiff, and Mr. *Perrott* for the Defendants; a 3d Time, on *Tueſday* 11th *May* 1756, by Mr. *Caldecot* for the Plaintiff, and Mr. Serjeant *Prime* for the Defendants; and a 4th Time, on *Friday* 19th *November* 1756, by Mr. *Caldecot* for the Plaintiff, and Mr. *Knowler* for the Defendants: But it is unneceſſary to repeat the three firſt Arguments particularly; Becauſe the laſt includes the general Subſtance of them.

The Sum of what was urged on the Part of the Plaintiff was, That the Leaſing and Jointuring Powers *exiſted* at the Time when they were executed by Sir *Robert Atkyns* the Father; That thoſe Powers were *well executed* by Him; That the Leaſe and Jointure made by Him, in Purſuance of thoſe Powers, were an *Impediment* to his Son Sir *Robert* the Younger's Suffering a Common Recovery; That even ſuppoſing that *James Earle* was a good Tenant to the *Præcipe*, Yet the *Entry of Dame Ann* the Jointreſs, within the 5 Years, *avoided* this Recovery; and conſequently, That the Remainder or Reverſion in Fee, deviſed to the Leſſor of the Plaintiff by Sir *Robert* the Father, was *Not barred* by the Recovery thus ſuffered by Sir *Robert* the Son.

Theſe Points were entered into very largely, by Mr. *Caldecot* and the Gentlemen who had ſpoken before Him, on the ſame Side.

1ſt, They endeavoured to prove that the Powers reſerved to Sir *R. A.* the Father by the Two Deeds of 12th *June* 1669 were *in being*

being and *valid* at the Time of the Execution of the Leaſe to the *Dacres*; and ſecondly, that they were *well executed*; and conſequently, that there were Eſtates of Freehold ſubſiſting at the Time when Sir *R. A.* the Son made the Feoffment to *Earle*; *viz.* Dame *Ann*'s Jointure, and the Leaſe to the *Dacres*. And therefore thirdly, They inſiſted that theſe Life-Eſtates were Impediments to Sir *R. A.* the Son's Suffering the Common Recovery. For they denied that Sir *Robert Atkyns* the Son was Tenant in Tail in *Poſſeſſion*, at the Time that He made the Feoffment to *James Earle*: So that *Earle* could not be a good Tenant to the *Præcipe*.

And They inſiſted that even admitting that Sir *R. A.* the Son was Tenant in Tail in Poſſeſſion, Yet He could not upon this *naked* Poſſeſſion, without the Freehold, make a good Tenant to the *Præcipe* without the *Jointreſs* and the *Leſſee for Life's* joining: And that the Court *cannot*, (under 14 *G.* 2. *c.* 20. § 1.) PRESUME *a previous Surrender or Conveyance* of the Eſtates for Life, in order to make the Recovery good.

4thly, They further inſiſted, that ſuppoſing Sir *Robert Atkyns*, the Son, was Tenant in Tail in Poſſeſſion, and alſo that there was a good Tenant to the *Præcipe*; (ſo that the Recovery was good, as a Common Conveyance;) Yet the *Re-Entry* of Dame *Ann Atkyns*, the Jointreſs, within the 5 Years (in 1712) actually *avoided* this Recovery; which, if not void, was at leaſt *voidable* by the Tenant for Life: And this Re-Entry of the Tenant for Life *re-veſted* all the ſubſequent Eſtates.

The *great* Streſs of the Queſtion lies (as they ſaid) upon the *Tenant to the Præcipe*.

The 1ſt Point, in Order of *Time*, is the *Validity of the two* 1ſt Point.
Powers created by the greater Deed of 1669.

But there is no Ground, either for the Suppoſition of a *Fact*, " That the leſſer Deed muſt have been executed *laſt*;" nor for any *Inference* in Point of Law, " That it operates to the *Extinction* of " theſe Powers."

The *Fact* concerning the Priority of Execution of the two Deeds cannot, *now*, be determined by any Evidence: Therefore *Preſumption* muſt determine it.

Now One of theſe Deeds is an Agreement to execute the other: Conſequently, muſt have been prior to it. The leſſer Deed *covenants*; The greater *performs* that Covenant: Therefore the leſſer was prior. If it had been executed *laſt*; *that* would have deſtroyed the

the very Effect of it and the Powers raiſed by it: Dame *Mary* was giving up and exchanging her former Jointure: And therefore *She* might deſire a ſingle diſtinct Deed, to ſecure her own Intereſt. For which Purpoſe, a Deed of Covenant was the moſt proper: And there was no Need to incumber this Leſſer Deed, with the Powers inſerted in the Greater Deed; which Powers did not concern *Her*. Whereas, in order to ſupport a contrary Argument, it is neceſſary to ſuppoſe a *new* Agreement (without, and even againſt, any Reaſon for it,) to alter and deſtroy the former Agreement. But if the Parties had *meant* ſo, they would have ſo *expreſſed* it.

However, ſuppoſing the leſſer Deed to have been *actually* executed *laſt*; Yet being all *Uno Flatu*, the *Law* will order the Time, ſo that the proper Deed ſhall be *taken* to be anterior, and the other ſubſequent, *according to* the *Reaſon of the Thing* and the *Intent of the Parties*. *Digges*'s Caſe, 1 *Co. Rep.* 173. *Albany*'s Caſe, 1 *Co. Rep.* 107. and 2 *Rep.* 75. the Lord *Cromwell*'s Caſe.

And the operation of the *Fine* will *follow* the *Conſtruction of the Deed.*

Counteſs of *Rutland*'s Caſe, 5 *Co.* 26. *a.*

2d Point. Therefore the Exiſtence of the Powers being eſtabliſhed, The next Queſtion is, "Whether they have been WELL *executed.*" Dame *Mary's Jointure* has *not* been objected to: But the Leaſe made to the *Dacres* has; (1ſt) As being *without a ſubſiſting Power* in Sir *R. A.* the Elder, the Leſſor, to make it; (2dly) As being FRAUDULENT, even ſuppoſing Him to have had Power to make it; (3dly) As the Livery and Seiſin was made to the Attorney of ONE *only* of the three Leſſees, and not to *All* 3, or their Joint-Attorney.

Now it is true that a Tenant in Tail *in Poſſeſſion* may ſuffer a Recovery: So alſo may a Tenant in Tail in *Remainder*, if he can *get in* the *Tenant for Life*.

But the Original Donor may interpoſe as many Eſtates for Life, as he pleaſes, before and prior to the Tenancy in Tail. And this Leaſe to the *Dacres*, under the Power, is juſt *the ſame* as if it had been ORIGINALLY *interpoſed.* And the *Declaration of the Intention* will NOT *vitiate the Eſtate* limited to theſe *Dacres:* If it had been even a *Condition* annexed, in Reſtraint of Alienation, ſuch a Condition would have only been void; and the *Eſtate*, good. *Co. Litt.* 24. *a. Corbet*'s Caſe, 1 *Co.* 84. *Mary Portington*'s Caſe, 10 *Co.* 35. *b.*

As to Fraud—There is Nothing fraudulent in this Leaſe. And both the Terms have been actually recovered at Law.

If Sir *R. A.* the Father's ſuperfluous Declaration has any Effect, it makes the Leaſe Good: And it would have been adjudged good, if it had been called in queſtion whilſt it ſubſiſted. 2 *Leon.* 132. *Moore* and *Savill*'s Caſe.

And No *One* is hurt or defrauded by this Leaſe. *Not the Jointreſs:* For the full and beſt Rent is reſerved. Therefore *Cro. Eliz.* 5. *The Counteſs of Suſſex's Caſe* does not affect *this* Caſe: For there, the Jointreſs ſuffered. Nor is the *Tenant in Tail* hurt: For the ſame Reaſon, as to his *Rent*; And as to the *poſtponing* his Power to ſuffer a Recovery, it was legal, and might have been done by a real actual Demiſe for Life or Lives. And the Eyes of this Court do not pierce further than the *Shell* of the Conveyance; Not to the *Deſign* of it. As in Caſes of Terms to preſerve contingent Remainders, This Court cannot hinder the Truſtee from deſtroying them: So, of Terms to attend Inheritances; Which this Court cannot hinder the Mortgagee from getting in. *Cro. Car.* 190. *The Caſe of Naſh* v. *Preſton*, is a ſtrong Caſe to ſhew that the Court of *Law* will not meddle with the *Equity* of the Caſe.

Now this Leaſe has *purſued the Power:* And this Court will not meddle with the *Intent*.

Leaſes made by Churchmen, for the Benefit of their Families, are generally as fictitious as this: And yet they are always allowed to be good.

As to the Livery and Seiſin—This Livery to *Thomas Barker* enured to the Uſe of all the *three Dacres*, according to the Purport and true Meaning of the Letter of Attorney, moſt explicitly therein expreſſed, and ſo declared at the Time of the Livery, by Sir *R. A.* the Elder who gave it.

This ſufficiently appears (as the preſent Infeoffment was *by* Deed,) from *Bro. Abr.* Title *Feffements de terres*, *pl.* 16, 67, 72. and *Co. Litt.* 48. *b.* 49. *a.* But 2 *Anderſ.* 196. *pl.* 14. *The Caſe of Davy* v. *Abbot*, is in Point: 'Tis moſt exactly the ſame Caſe as this.

So that the *Life*-Eſtates of Dame *Ann* and of the 3 *Dacres* appear to have been *well created.*

Conſequently therefore, a *double* Freehold is ſufficiently eſtabliſhed; *viz.* One, in Dame *Ann*; the Other, in the *Dacres.*

3d Point. From hence it follows, Thirdly, That Sir *Robert Atkyns* the Son, was by them precluded from ſuffering this Recovery: As he was not Tenant in Tail *in Poſſeſſion*, at the Time of his making the Feoffment to *James Earle*. Therefore He was to gain a Freehold as he could; by Right, or Wrong: And it may be ſaid that *Either* of them will do.

But even ſuppoſing Him to have been Tenant in Tail in *Poſſeſſion*, Yet *James Earle* was *no good Tenant to the Præcipe*.

When he recovered againſt Dame *Ann*, He was *not* Tenant in Tail in Poſſeſſion: But he recovered againſt Her, upon a Suppoſition "that he *was*." Which Suppoſition was grounded therefore upon a Miſtake. And the Terms which *Philips* recovered as his Leſſee, and ſurrendered to Him, were Both of them *fictitious*. So that the Feoffment to *Earle* muſt fall to the Ground; having no Foundation to ſupport it. And though Livery was given to Him by Sir *Robert*, yet Sir *Robert* Himſelf CONTINUED in Poſſeſſion *till his Death*.

Which Obſervations being premiſed, this Part of the Caſe may be conſidered, 1ſt on Sir *Robert*'s Verdict and Judgment againſt Dame *Ann*; and 2dly on his ſubſequent Feoffment to *Earle*.

Firſt—His Entry under the Judgment cannot amount to a *Diſſeiſin:* Nor had He thereby, an Eſtate *purſuant to his Title*, as there claimed by Him; It could *not be more* than an Eſtate in Tail, EXPECTANT *upon two Freeholds*. It could not be a Diſſeiſin: Becauſe it was an Entry UNDER *a Verdict*. In Truth, He gained only a bare *naked Poſſeſſion, without* the Freehold. And ſo is the Writ of *Habere facias Poſſeſſionem:* And the Judgment is "to recover the *Term*" *only*. And *Cro. Eliz.* 438. *The Caſe of Bateman* v. *Allen*, (upon a Deviſe the ſame with that in the Caſe of *Newys and Scholaſtica his Wife*, v. *Larke*, in *Plowd.* 403.) alſo proves this.

Therefore the Entry under the Judgment in *Ejectment* could give no Title to Sir *R. A.* the Son, to ſuffer a Recovery: It was a LAWFUL ENTRY; but an UNLAWFUL HOLDING. *Co. Lit.* 57. *b.* A wrongful Withholding is not a Diſſeiſin; but a Deforcement. *Co. Litt.* 277. *b.* 331. *b.* 354. *b.* 355, 356. And this is without the Freehold.

'Tis like the Caſes of Tenant at Sufferance: 12 *Aſſiſe* 22. *Co. Lit.* 57. *b.* 1 *Ro. Abr.* 659. Title *Diſſeiſin*, Letter C. *pl.* 10, 11. *Cro. Jac.* 169. *The Caſe of Butler* v. *Duckmanton*. *Co. Lit.* 270, 271. *Cro. Eliz.* 238. *The Caſe of Allen* v. *Hill*. All which Caſes concur

concur to prove " That Nothing ſhall operate by way of Diſſeiſin, but a TORTIOUS ENTRY."

And there is NO MIDDLE *kind of Holding*, between a *naked Poſſeſſion*, that diſturbs nothing; and a *Fee*, which diſturbs every Thing.

Then, ſecondly, as to the Feoffment to *James Earle*. It gained no Eſtate to *Earle*. This is a very great Point to Families, for the Preſervation of Intails.

If the contrary Conſtruction ſhould prevail, even Tenants *at Will* might do the ſame thing.

But the Line is drawn thus, *viz.* " That a Tenant in Tail, " WITH *the Freehold*, may bar: But *without* it, He can NOT."

A *Real* Feoffment indeed *may* do it: But a *fictitious* One can *not*; but ſhall be conſidered as fraudulent and void, like that in *Savile* 126. *Leon. White* v. *William Bacon*. It is not a Diſcontinuance: *Swift v. Heath*, *Carthew* 109, 110.

Sir *R. A.* the Son, gained no Fee by it, to himſelf; nor any to *Earle*: And the Court will conſider it as merely *colluſive*.

That He gained None, *to himſelf*, appears from 1 *Brownlow* 230. *Dame Pett's Caſe*. 2 *Inſt.* 412, 413. *Cro. Car.* 302. *Blunden* v. *Baugh*. *Bracton Lib.* 4. *pa.* 161, 162. *Co. Litt.* 153. *Dy.* 62. 11 *Aſſize* 6. *Powſby* v. *Blackman*, *Cro. Jac.* 659. *Bull* v. *Wyat*, *Cro. Car.* 388.

That He gained None *to Earle*, is equally true. *Earle* gained no Eſtate of Freehold, by this Feoffment; either as a Wrong-Doer, or as a Diſſeiſor. 1 *Ventr.* 360. Serjeant *Maynard*'s Argument in *Moor* v. *Pitt*.

He might indeed be taken as a Diſſeiſor, *at* the Election of the right Owner; but *not* againſt it. And here was *no Intention* of a Diſſeiſin. *Cro. Jac.* 643. *Ferrers v. Farmer*. 1 *Mod.* 107. *Fountain* v. *Cooke*. In fact, here was NO *Actual Diſſeiſin*: For Sir *R. A.* the Son *continued* in Poſſeſſion. Neither was here any Force or Expulſion. And it is not *every* Entry, that is a Diſſeiſin: 'Tis no Diſſeſin, unleſs there be an Expulſion. *Co. Lit.* 181. 1 *Salk.* 246. *pl.* 2. moſt expreſly.

Conſidering this Feoffment AS *part* of the CONVEYANCE *of a Common Recovery*, as a *Common Aſſurance*, Sir *Robert* the Younger had no Power to make a Feoffment.

It is not hereby meant that he could not *in Fact* make a Feoffment: *Every* Man in *Poſſeſſion may* do it. But this Sir *R. A.* the Son, could not convey an Eſtate of Freehold, by any *rightful* Conveyance, as Fine, Releaſe, or Bargain and Sale. And if He cannot do it by a *rightful* Method, will the Law permit him to do it by a *wrongful* One? Surely not. The Poſſeſſion of a Tenant *at Sufferance* is not ſufficient to build a Title upon. *Co. Litt.* 278. *Cro. Jac.* 169. *Cro. Eliz.* 238.

Common Recoveries are now conſidered as a *mere Conveyance:* And the Recoveror is a *mere Inſtrument and Creature* of the Tenant in Tail. 2 *Rep.* 77. *Cromwell's Caſe. Poph.* 23. *The Caſe of Crocker and York* v. *Dormer. Cro. Jac.* 643. *Sir John Ferrers and Sir John Curſon* v. *Sir Richard Fermor and others.* 2 *Ro. Rep.* 247. S. C. (at the End of it.) 1 *Mod.* 107. *Fountain* v. *Coke.* So, the known Caſe of Copyholds, 4 *Co.* 28. *a. Coke's Compleat Copyholder*; And the Caſe in 1 *Ro. Rep.* 223. *Herbert* v. *Binion.*

From all which Caſes it is clearly to be inferred, That the whole Tranſaction is *One Common Aſſurance*; that the Recoveror is a *Creature* and *Inſtrument* of the Tenant in Tail; and that it ſhall not be conſidered as a *tortious* Entry and a *Diſſeiſin*, *in* a *Common* Aſſurance.

Such a Feoffment as this, may be made by *any* Perſon in Poſſeſſion: And, if this ſhould be eſtabliſhed, it may be of very miſchievous Conſequence; and will introduce a *new* Law, contrary to all *former* Rules and Doctrines.

The *Stat.* 14 *G.* 2. *c.* 20. conſiders a Common Recovery as a *Common Aſſurance*; and has a Proviſo, "That the Perſon *had a* "*Title to make a Tenant to the Præcipe.*" And here is not the leaſt Ground to preſume that the Tenants for Life either joined or ſurrendered their Eſtates.

Now if the Law conſiders that ſome Perſons *have* this Power, and others *have not*; the Law will never ſuffer that to be done by *Fraud*, which can *not* be done *fairly and regularly.* And this whole Tranſaction is *fraudulent* and *colluſive*, and done *eo animo* to bar the ſubſequent Eſtates; and is therefore VOID, *as a* FRAUD, within the Rule and Reaſon of *Fermor*'s Caſe. 3 *Co.* 77. *b.* which conſiders an Eſtate made by Colluſion and Fraud, as *no* Eſtate.

4th Point. Laſtly. Admitting the Facts of Sir *R. A.* the Son's being Tenant in Tail in Poſſeſſion; and alſo that there was a good Tenant to the *Præcipe*; Yet THE RE-ENTRY *of the Jointreſs* actually *avoided* it, and *reveſted* all the ſubſequent Eſtates.

If the Recovery was not abſolutely void, but good AS *a* COMMON *Conveyance*, yet it was VOIDABLE: And if it was voidable, then it was *actually* AVOIDED by the Entry of Dame *Ann*, upon Demiſes laid as far back as the 14th of *February* 1709.

To prove this, they applied the Caſes in 11 *Co.* 51. *b.* *Lifford*'s Caſe; *Cro. Eliz.* 540. *Holcomb* v. *Rawlyns*; 1 *Anderſon* 352. *Butler* v. *Baker*; *Fitz-Gibbon* 225. *Bunker* v. *Cooke*; *Holt's Caſes* 748; 1 *Co.* 14. *b.* Sir *William Pelham*'s Caſe; and a Caſe in *C. B.* in *H.* 12 *Ann.* *Goodtitle* v. *Riſden.*

It is like the *Regreſs of a Diſſeiſee:* Which avoids all intermediate Acts, by *Relation.*

Mr. *Knowler* who twice argued this Caſe for the Defendants, included in his laſt Argument all that had been or could be urged on that Side of the Queſtion: And it was to the following Effect.

The *main Queſtion* upon this Caſe is, "Whether the Recovery "ſuffered by Sir *R. A.* the Son, be a GOOD *Recovery.*"

For 'tis inſiſted by the Leſſor of the Plaintiff, "That the Re-"covery is *void*, as being ſuffered by a Perſon who had *only a* "BARE Poſſeſſion, and had *no Power* to make a Tenant to the "*Præcipe.*"

But *if* the Recovery is *good*, the Leſſor of the Plaintiff can have no Title: Becauſe *he* claims under a Limitation in Fee, expectant on the Determination of an Eſtate Tail, which is *barred* by the Recovery.

The *Limitations*, under which *All* the Parties derive their Title, are contained in two Deeds, dated 12th *June* 1669: Which, from their Bulk, and for Diſtinction's Sake, have been called the *great* Deed and the *little* Deed.

The *great* Deed is a Releaſe, grounded on a Bargain and Sale for a Year: The *little* Deed is a Covenant to levy a Fine, and a Declaration of the Uſes of the Fine.

In ſpeaking to the Queſtion,

Four Matters muſt be taken into Conſideration, *viz.*

Firſt, The *Order* in which the two Deeds were executed; and in what manner they *influence* each other. And from this Con-

ſideration it will appear, Whether the Leaſing and Jointuring *Powers* did EXIST at the Time when they were exerciſed by Sir *Robert Atkyns* the Father.

Secondly, Suppoſing the Leaſing and Jointuring Powers did then exiſt, Then whether thoſe Powers were WELL EXECUTED by the ſaid Sir *Robert* the Father.

Thirdly, Suppoſing they were well executed, Then Whether the *Leaſe* or the *Jointure*, made purſuant to theſe Powers, were AN IMPEDIMENT *to Sir Robert Atkyns the* SON's *ſuffering the* RECOVERY.

Fourthly, If the Recovery was good, Then Whether the RE-ENTRY *of Dame Ann*, under the ſecond Ejectment, *did* AVOID *it*.

1ſt Point. Firſt, As to the *Order* in which the two Deeds were executed; and in what manner they *influence* each other.

It is found by the Verdict, That Sir *R. A.* the Father, being ſeiſed of the Eſtate in queſtion and of ſeveral other Eſtates, on 12 *June* 1669, made and executed 3 Indentures. By the firſt, He, in Conſideration of a Marriage before that Time had with Dame *Mary* his then Wife, and of her releaſing a former Jointure made to her before their Marriage, covenanted that He and the ſaid Dame *Mary* his Wife and Sir *Edward Atkyns* (his Father) would levy a Fine to *Edward Carteret* and *John Lowe*, of the Eſtate in queſtion *only*; To the Uſe of Sir *R. A.* the Father for Life, *ſans* Waſte; Remainder to the ſaid Dame *Mary*, for Life, for her Jointure; Remainder to Sir *R. A.* the Son, and the Heirs Male of his Body by *Lovis Carteret* his intended Wife; Remainder to the right Heirs of Sir *Robert* the Father.

By the 2d Indenture (taken in the Order as they ſtand in the Verdict) The Eſtate in queſtion is bargained and ſold by Sir *Edward A.* and Sir *R. A.* the Father, to Sir *Edward Carteret* and *John Lowe*, for a Year.

By the 3d Indenture, Sir *Edward A.* and Sir *Robert A.* the Father, in Conſideration of a Marriage before that Time had between Sir *R. A.* the Father and Dame *Mary* his then Wife, and of a Marriage to be had between Sir *R. A.* the Son and *Lovis Carteret*, and of her Marriage Portion, and for a Proviſion to be made for Dame *Mary*, of a Jointure, releaſe the Eſtate in queſtion (*inter alia*) to *Carteret* and *Lowe* and their Heirs, To the Uſe of Sir *R. A.* the Father for Life, *ſans* Waſte; Remainder (except Timber) to Dame *Mary* for Life, for her Jointure; Remainder to Sir *R. A.* the

Son and the Heirs Male of his Body on the Body of *Lovis Carteret*; Remainder to the right Heirs of Sir *R. A.* the Father. (Theſe are all the Limitations in this Indenture, concerning the Eſtate in queſtion.) Sir *R. A.* the Father covenanted with Sir *George Carteret* (the Father of *Lovis C.*) That for the better ſecuring the Eſtate in queſtion to Sir *Edward C.* and *John Lowe* and their Heirs, He and Dame *Mary* his Wife and Sir *Edward Atkyns* would levy a Fine to *Carteret* and *Lowe* and their Heirs, to the Uſes before declared.

In *Trinity* Term 1669, a Fine with Proclamations was levied, of the Eſtate in queſtion (together with other Eſtates) by Sir *Edward A.* Sir *R. A.* the Father, and Dame *Mary* his then Wife, to Sir *Edward Carteret* and *John Lowe.*

It is NOT found, *which* of the two Deeds was executed *firſt*; (though it was a Matter of *Fact*:) So that the Priority of Execution muſt be determined by the Court, from *Circumſtances* and *Preſumptions.*

The Order in which the Two Deeds ſtand *in the Verdict*, concludes Nothing, One way or the other: Since they are placed there, *as* they were given in Evidence.

Then He proceeded to compare the two Deeds, and to reaſon upon them; and argued very elaborately, That *either* the *little* Deed was executed AFTER *the great Deed*; Or that the little Deed was made with a *View to control or correct the great* Deed; Or that the *great* Deed, and the *little* Deed, and the *Fine*, muſt be conſidered as *One* ASSURANCE, (though *not* as incorporated, and as one ſingle *Act*:) And in either Caſe, there is an *End* of the *Leaſing* Power, and alſo of the *Jointuring* Power.

And He argued very ſtrenuouſly, That the *Fine* would *extinguiſh* both thoſe Powers; becauſe they were Powers *appendant* and *annexed* to Sir *R. A.* the Father's Eſtate for Life, and NOT *collateral* to his Eſtate.

Second Point or Head—Suppoſing the *great* Deed was *laſt* exe- 2d Point.
cuted, Or that it *controls* or *corrects* the little Deed, Then

Whether the Leaſing and Jointuring *Powers* were *well* EXECUTED by Sir *R. A.* the Father.

He choſe to ſay nothing as to the Execution of the *Jointuring* Power; No Circumſtances attending the Execution of *it*, having been laid before the Jury: But confined Himſelf to the *other*, (the * *Leaſing* Power.)

* See the Note at the End of the Reply, *pa. 105* accounting for curtailing this Part of the Argument.

Now

Now this Leaſe is *void*, as againſt Law; being made for no other Purpoſe than *to reſtrain Sir R. A. the Son from ſuffering a Recovery*. For *that Reſtraint is againſt Law*.

The Power to *ſuffer a Common Recovery*, is a Privilege *inſeparably incident* to an Eſtate Tail: It is a *Poteſtas alienandi*, which is *not reſtrained* by the Statute *de Donis*; and has been ſo conſidered ever ſince *Taltaram's* Caſe. [12 *E.* 4. 14. *b. pl.* 16.] And this Power "to ſuffer a Common Recovery" *cannot be reſtrained* by *Condition*, *Limitation*, *Cuſtom*, *Recognizance*, *Statute*, or *Covenant*.

That it cannot be reſtrained by *Condition*, appears by *Co. Litt.* 223. *b.* 224. *a.* and *Sonday's* Caſe, 9 *Rep.* 128.

That it cannot be reſtrained by *Limitation*, appears by *Cro. Jac.* 696. *Foy* v. *Hinde*; and by *Sonday's* Caſe, and other Books.

That it cannot be reſtrained by *Cuſtom*, appears by the Caſe of *Taylor* and *Shaw*, in *Carter* 6 & 22.

That it cannot be reſtrained by *Recognizance*, or by *Statute*, appears by *Poole's* Caſe cited in *Moore* 810.

That it cannot be reſtrained by *Covenant*, appears by the Caſe of *Collins* v. *Plummer*, 1 *Peere Wms.* 104.

That an ATTEMPT *to ſuffer a Common Recovery* cannot be reſtrained, appears by *Corbet's* Caſe, in the 1 *Rep.* 83. *Mildmay's* Caſe, in the 6 *Rep.* 40. And the Caſe of *Pierce* v. *Win*, in 1 *Ventr.* 321.

And that a CONCLUSION *to ſuffer a Recovery* cannot be reſtrained, appears by *Mary Portington's* Caſe, in the 10 *Rep.* 35.

So that the Queſtion is reduced to this, "Whether *that* can be "effected by a LEASE *made purſuant to a Power*, which can *not* "be attained by a Condition, Limitation, Cuſtom, Statute, Re-"cognizance, or Covenant."

Since the Law has been thus careful to preſerve this incidental Privilege of ſuffering a Common Recovery, to a Tenant in Tail, Surely it will not permit this *new* Experiment, *equally deſtructive* to that Privilege, to take Place. This is the *firſt Attempt* of the Kind: And it is a found Rule of Law, "That what *never has been*, ought *not to be* permitted."

The LEASE is alſo *void*, as being *fraudulent:* For it was made, to deprive Sir *R. A.* the Son, of the Profits of the Eſtate, and of an incidental Power over it. And the Fraud which made it void, was *apparent*. And as the Eſtates affected by the Leaſe, ſubſiſted before the Leaſe was made, the Leaſe was *fraudulent at Common Law*.

To prove the Leaſe to be fraudulent, He relied on *Savile* 126. *The Caſe of White* v. *Bacon*, *H.* 32 *Eliz.* In a *Formedon*, the Tenant pleaded Non-tenure: On which, the Parties were at Iſſue. The Jury found "That the Tenant made a Feoffment to ſeveral Per-"ſons, to their own proper Uſe, before the Writ purchaſed; and "that the Feoffees *never took the Profits* of the Land; but that the "Feoffor took them, until the Day of purchaſing the Writ." And the Doubt was, Whether the Feoffment was fraudulent, as againſt the Demandant. And the Judgment of the Court was, "That it "*was* fraudulent and void." Now if the Feoffee's *not* taking the Profits, but the FEOFFOR'S *taking them*, was a Reaſon for adjudging the Feoffment to be fraudulent againſt the Demandant in *that* Caſe; The Leſſee's *not taking the Profits*, *not paying the reſerved Rent*, *nor having the Leaſe in his Cuſtody*; but the LESSOR'S CONTINUING *in Poſſeſſion* and taking the *Profits to the Day of his Death*, ſeem in the *preſent* Caſe, to be full *as cogent* Reaſons for determining this Leaſe to the *Dacres* to be fraudulent, againſt Dame *Mary* and Sir *R. A.* the Son.

If this Caſe ſhould be anſwered by ſaying "The Feoffment "therein mentioned was made void by 13 *Eliz. c.* 5. made againſt "fraudulent Grants;" The Reply would be "That that Statute "was made in Affirmance of the Common Law;" as appears by *Twine*'s Caſe in the 3 *Rep.* 82. *b.* But He argued that the Leaſe was fraudulent not only at *Common Law*, *but likewiſe* by the Statute. For the Marriage of Dame *Mary* with Sir *R. A.* the Father, and Dame *Mary*'s Releaſing her former Jointure, were a *valuable Conſideration* for the Eſtate limited to Dame *Mary* for Life: And the Marriage-Portion of *Lovis Carteret* was a *valuable Conſideration*, which extended to the Limitation to Sir *R. A.* the Son and the Heirs Male of his Body by *Lovis Carteret*.

Here it hath been obſerved, "That if the Leaſe had been called in queſtion *whilſt it ſubſiſted*, it could *not* have been avoided; but *would have been adjudged abſolute*, for the Benefit of the Leſſees:" And 2 *Leon.* 132. *Moore* and *Savill* and other Books were cited as Authorities to ſupport the Obſervation.

Anſwer — The Objection to the Leaſe is, "That it NEVER "DID *ſubſiſt*," for the Reaſons which have been mentioned: And

if the Leaſe was *void* from the Beginning, 'tis a *Contradiction*, to ſay " it ſhall be adjudged abſolute." And the Authorities cited are, All, of Conditions ſubſequent to the Eſtate created at the ſame Time with the Condition. In which Caſes, there was no Objection to the Eſtate; (for the Eſtate was allowed to be well created:) But the Objections were to the Conditions, which were *ſubſequent* to the Eſtate.

It has been obſerved farther, " That the Eyes of the Court do " not pierce further than the Shell of a Conveyance; *not* to the " *Deſign* of the Maker of it." Here indeed One muſt be at a Loſs for an Anſwer; for want of knowing what the *Shell* of a Conveyance is. But there is one Thing that appears upon this ſpecial Verdict, which very much favours, if it does not directly eſtabliſh what We have been contending for: And that is the *Verdict* which is found to have been *obtained* BY *Sir R. A. the Son, againſt Dame Ann* the Second Wife of Sir *R. A.* the Father; which Verdict is a *Diſaffirmance* of the *Leaſing* and *Jointuring* Powers; and *could not have been obtained*, if thoſe Powers *had ſubſiſted*. 'Tis true, there is a Deed found alſo in the ſpecial Verdict, which was made between the Death of Sir *R. A.* the Father and the Bringing the Ejectment, and to which Sir *R. A.* the Son is a Party; In * which Deed there is a *Recital* " That Sir *R. A.* the Son then claimed the Eſtate in " queſtion, BY *and* UNDER *the* GREAT *Deed:*" Which Deed was not given in Evidence on the Trial of the Ejectment. But this Finding is a Matter of no Moment: For the little Deed was executed either before, or at the Time, or elſe ſubſequent to the Time of executing the great Deed. If it was executed *ſubſequent* to the Execution of the great Deed, then the little Deed and Fine control the great Deed, by *extinguiſhing* the Powers. If it was executed *before* or *at* the Time of executing the great Deed, then the two Deeds and the Fine may be taken *as One Aſſurance*; (*V. Ante* 83.) And in that Caſe, the little Deed *corrects* the great One, by limiting the Eſtate in queſtion, to Sir *R. A.* the Father, *diſcharged* of the Powers. And in *either* Caſe it may be ſaid, with great Truth, " That Sir *R. A.* the Son *claimed under the* GREAT *Deed*." However, ſuppoſing the Perſon who drew the Deed, had miſtaken the Law, and made a *falſe* Recital, ſurely a *Miſ-Recital* of Matter of *Law* will *not conclude a Court of Juſtice*. And what Sir *R. A.* the Son's *own* Opinion upon the Matter was, will appear by the recent Purſuit of his Title againſt Dame *Ann*; for Sir *R. A.* the Father died in *February* 1709: And in *Trinity* Term following Sir *R. A.* the *Son* brought his Ejectment againſt Dame *Ann*, who was then in Poſſeſſion of the Eſtate under the Jointuring Power.

* The Indenture Tripartite dated 18th *May* 1710. *V. pa.* 70.

But it having been found, " That afterwards Dame *Ann* brought " an Ejectment, and recovered the Eſtate, upon two Demiſes, one " made

" made by Herſelf and the other by the ſurviving Leſſee for Life;" It hath been inſiſted that Dame *Ann* COULD NOT *have obtained that Verdict*, UNLESS the *Two Powers*, or *One* of them at leaſt, *had then exiſted.*

To which It may be anſwered, That it does not appear that the *little* Deed was PRODUCED *in Evidence*, upon the Trial of that Ejectment. Or perhaps the *Jointuring* Power *only* might then be in queſtion: Or there might have been *other Reaſons* for the Difference in Opinion. But however it might happen ſtill, That Verdict is *not concluſive.*

Here, Mr. *Knowler* argued that the Leaſe to the *Dacres* muſt have determined in 1711, upon the Death of Sir *R. A.* the Son, without Iſſue Male: And that the Leſſor of the Plaintiff was *barred of his Remedy* by *this* Action of Ejectment, (being an Action grounded on an Entry;) becauſe it was not brought within 20 Years after his Title accrued; and conſequently, his *Entry was not lawful*, by 21 *Jac.* 1. *c.* 16.

But theſe Parts of his Argument are omitted, for the Reaſon given in the Note *pa.* 105.

Third Point or Head.—But ſuppoſing the Leaſing and the Jointuring Powers *did exiſt*, and *were well executed by* Sir *R. A.* the Father; The Matter which falls next under Conſideration is, " Whether the Leaſe or Jointure made in Execution of the Pow- " ers, were an IMPEDIMENT to Sir *R. A.* the Son's *Suffering the* " *Recovery.*" 3d Point.

The Point We ſhall endeavour to eſtabliſh, is That *James Earle*, the Perſon againſt whom the Writ of Entry was brought, *was Tenant of the Freehold* when Judgment was given againſt him in the Common Recovery. And We ſhall begin with obſerving that the *Jointure* or the *Leaſe* could be *no* Impediment to Sir *R. A.* the Son's ſuffering the Recovery; *Becauſe* neither of the Leſſees or Dame *Ann* were *in Poſſeſſion* of the Eſtates, at the *Time* when Sir *R. A.* the Son made the Feoffment to the ſaid *James Earle.*

* *If* the Court ſhould be of Opinion, on the Authority of 2 *Anderſon* 196. " That the Livery under the Letter of Attorney of " *John Dacres*, veſted the Freehold in his Co-*Leſſees* as well as in " Himſelf; and *not* in himſelf *only*;" Then We inſiſt that the *Livery was void*, becauſe the Leſſees were in Poſſeſſion BY *the* DEED. For

* Note—Upon his firſt Argument, He had urged (upon the Authority of *Bro. Abr.* Title *Feffements de terres, pl.* 67.) " That no Freehold paſſed by the Livery, to any of the 3 Leſſees, *except John* " Dacres who executed the Letter of Attorney to take it:" Which *John* dying in 1705, the Leaſe expired *then.* But He did not *now* inſiſt upon this Point: But ſeemed, rather, to give it up.

if Tenant for Life has a Power to make Leaſes for Lives, and makes a Leaſe for Life *by Livery*, the *Livery is void*; becauſe the Leaſe *takes Effect* BY *the* DEED: For *by Sealing the Deed*, the Power is executed. 2 *Levinz* 149. *Wigſon* and *Garrett*. 1 *Ventris* 291. *The Earl of Leiceſter's Caſe*. And the *Livery being void*, the Leſſees were NEVER *in* POSSESSION: For it is found by the Verdict, " That the Leſſees or Either of them were never in Poſſeſſion *other-* " *wiſe* than BY *the* LIVERY.

And as the *Leaſe* was no Impediment, ſo the *Jointure* could be none. For it is found " That Dame *Ann* being in Poſſeſſion by " Virtue of the Deed of Appointment, and claiming the Eſtate for " her Life for her Jointure, an Ejectment was brought on the De- " miſe of Sir *R. A.* the Son and *J. Walker* his Truſtee, againſt " Dame *Ann* and the Tenants in Poſſeſſion, for the Recovery of " the Eſtate; and that there was a Verdict for the Plaintiff, and " Judgment on it," And " That a Writ of Poſſeſſion was award- " ed; and that ſoon after the Judgment, and during the Life of " Dame *Ann*, Sir *R. A.* the Son *entered* into, and was *in Poſſeſſion* " of the Eſtates; and that He *continued in Poſſeſſion* to the Day of " his Death." By this, it appears that the *Jointure and Poſſeſſion of Dame Ann* was REMOVED *out of the Way*.

It can be NO Objection to the Legality of Sir *R. A.* the Son's Poſſeſſion, " That the Judgment was not executed by a *Writ* of " Poſſeſſion:" Since ſomething equivalent to it is found, *viz.* " That ſoon after the Judgment, Sir *R. A.* the Son entered into " and *was in* Poſſeſſion of the Eſtate." And there is no Rule of Law more uncontroverted, than " that a Recoveror may enter *with-* " *out* a Writ of Execution, where the Demand is certain." The Demandant after Judgment in a Common Recovery, may enter, *or* take out Execution at his Election. *Shelley*'s Caſe, 1 *Rep.* 106. *Mary Portington*'s Caſe, 10 *Rep.* 38. Conuſee may execute a Fine executory (which does not take Effect *till* Execution) *by Entry*. *Bro.* Tit. ——— The Plaintiff may have a Rediſſeiſin, on the Statute of *Merton*, *c.* 3. (which gives it after a Recovery in an Aſſize of *Novel Diſſeiſin* and *Delivery of Seiſin by the Sheriff*,) as well where He executes the Recovery by *Entry*, as where the Sheriff delivers Seiſin to him. The Patron who recovers in *Quare Impedit*, may preſent, without a Writ to the Biſhop. *Hutton* 66. *Rudd* v. *Biſhop of Lincoln*. And the Leſſor of the Plaintiff may *enter*, after Recovery in Ejectment. 2 *Sid.* 156. *Sir Robert the Son* being *thus in Poſſeſſion* of the Eſtate; and the Poſſeſſion which is found to *have been* in *Dame Ann*, having *been removed*; The Effect and Operation of the Feoffment, comes next in Order, to be conſidered.

But

But Mr. *Knowler* ſaid, He would, out of the Reſpect due to what came from the Court, take Notice of an * Intimation of one of their Lordſhips, expreſſing a Deſire to hear it argued hypothetically, *ſuppoſing* the leſs Deed to have been firſt Executed, and *ſuppoſing* the Powers to have ſubſiſted and to have been well executed, and conſequently that Sir *R. A.* the Son was only Tenant in Tail *in* REMAINDER; What would be the *Effect* of the *Entry* of ſuch Tenant in Tail *in Remainder*, under or in Conſequence of a Judgment in Ejectment.

* This had been intimated by One of the Judges, at the End of the ſecond Argument.

And He hoped, He ſaid, to make it appear beyond Controverſy, That Sir *R. A.* the Son, after his Entry in conſequence of the Judgment in Ejectment, became Tenant in Tail *in* POSSESSION; *i. e.* became ſeiſed of an Eſtate Tail EXECUTED.

The Gentlemen who have argued for the Leſſor of the Plaintiff, have called the Poſſeſſion of Sir *R. A.* the Son a *naked* Poſſeſſion. But He, to maintain *his* Poſition, would ſhew that the RIGHT of Poſſeſſion was in Sir *R. A.* the Son.

There is a ſound Diſtinction in Law, between a *naked* Poſſeſſion, and a *Right* of Poſſeſſion. A *Diſſeiſor* has only a *naked* Poſſeſſion: The *Diſſeiſee* has the *Right* of Poſſeſſion; For he may enter upon the Diſſeiſor. But when a *Deſcent* is caſt, the Right of Poſſeſſion is no longer in the Diſſeiſee; but is in the Heir of the Diſſeiſor: For the Diſſeiſee cannot enter upon the Poſſeſſion of the Heir. So that a *Right of Poſſeſſion*, and a *Right of Entry*, are convertible.

A *Judgment* is an *Act of Law:* And WHILST *it continues in Force*, it *deſtroys the Title* of the *Adverſe* Party. A *Judgment in Ejectment*, by which only the *Poſſeſſion* is recovered, not only *deſtroys* the Right of Poſſeſſion which *was* in the adverſe Party; but GIVES *a Right of Poſſeſſion* to the Recoveror. And if the Judgment in Ejectment did not produce this Effect, the Leſſor of the Plaintiff could not *enter*, or be *intitled to the Writ* of *Habere facias Poſſeſſionem:* But his having a *Right to enter* and to *ſue out that Writ*, *infers* his Right to the *Poſſeſſion*. WHILST *the Judgment ſtands in* FORCE, it *removes* an intervening Eſtate out of the Way: And *during* that Time, 'tis the ſame thing *as if it had never exiſted*. And the Recoveror's Right to the Poſſeſſion will *continue* till the Judgment is *reverſed* by Error, or *falſified* in another Action. Like the Caſe where the Tenant in Tail ſuffers an erroneous Recovery; ſo long as the Recovery remains in Force, it is a Bar to the Tail, and the Iſſue in Tail has no Right to the Eſtate Tail: For if the Tenant in Tail ſhould diſſeiſe the Recoveror, and die, the Iſſue would not be remitted; becauſe he has but One Title to the Land, (which is the

Title by Deſcent;) And there muſt be two Titles in the ſame Perſon to make a Remitter. *Co. Litt.* 349. *a.*

Now the Conſequence of this is, That the *Right to the Poſſeſſion*, and the *Remainder in Tail*, meeting in the SAME *Perſon*; and that Perſon being Sir *R. A.* the Son; the Poſſeſſion and the Remainder in Tail UNITED, and Sir *R. A.* the Son became ſeiſed of an Eſtate Tail EXECUTED, or (in other Words) of an Eſtate Tail in *Poſſeſſion*.

If the *Nature of an Action of Ejectment*, and the Conſequence reſulting from a Recovery in it, be conſidered, this will appear in a clearer Light.

An Ejectment is a *poſſeſſory Action*; in which almoſt all Titles to Land are tried: Whether the Party's Title is, to an Eſtate in Fee, Fee Tail, for Life, or for Years, the Remedy is by One and the ſame Action. In an Action of Ejectment, the Plaintiff recovers *only* the Poſſeſſion of the Land: And the Execution is, of the Poſſeſſion *only*. But if the Leſſor of the Plaintiff recovers ONLY *the Poſſeſſion* of the Land, It may be aſked "*How* he becomes ſeiſed *ac-*" *cording to his Title*." To which it may be anſwered, That when a Perſon is in Poſſeſſion *by Title*, (as every Perſon is, who enters in Execution of a Judgment in Ejectment, becauſe the Law does no wrong,) the Poſſeſſion and Title *unite*. For it is a Rule of Law, "That when a Man, having a Title to an Eſtate, comes to the "Poſſeſſion of it *by lawful means*, He ſhall be in Poſſeſſion ACCOR-" DING *to his Title*:" As where the Title is to have a Fee, He becomes ſeiſed in Fee; Where the Title is to have an Eſtate Tail, he becomes ſeiſed of an Eſtate Tail; and ſo on; The *Law* caſting the Eſtate upon him *according* to his Title. And were it not ſo, an Ejectment would be the moſt ineffectual Remedy for the Trial of *Titles* to Eſtates: And it would never anſwer the Purpoſe for which it was brought into Uſe, if (as the Counſel on the other Side would have it) the Leſſor of the Plaintiff had *no more than a bare* Poſſeſſion, *after* an Execution or Entry on a Judgment in Ejectment. But this is not all. For a great *Abſurdity* would follow, were it otherwiſe: A Man would have a rightful Poſſeſſion, with an *immediate* Remainder to *himſelf in Tail*; A Notion which never exiſted, till this Caſe came to be debated.

What is it that converts an Eſtate Tail in Remainder into an Eſtate Tail *executed*, in any Caſe? Certainly, Nothing more or leſs than the POSSESSION's *coming* to the Remainder in Tail. For if there is Tenant for Life with Remainder to a third Perſon in Tail, Nothing comes to the Remainder-Man upon the Death of the Tenant for Life, *but* the Poſſeſſion: For the Eſtate Tail was in him *before*.

And *whilſt* the Eſtate Tail *continued* EXECUTED, Sir *R. A.* the Son made the Feoffment to *James Earle:* which diſcontinued the Tail, and veſted a defeaſible Fee in Him: And the *Præcipe*, upon which the Common Recovery was ſuffered, being brought againſt him; and Sir *R. A.* the Son being a Party to the Common Recovery, as Vouchee; The Common Recovery, thus circumſtanced, *barred* the Eſtate Tail and the Remainders over.

And though Dame *Ann* falſified the Recovery *in Ejectment* brought by Sir *R. A.* the Son, by the Judgment in the Ejectment afterwards brought by herſelf, Yet that Falſification had *no other* Effect upon the Eſtate, than to revive HER *Right to the Poſſeſſion*. Like the Caſe juſt now cited, of an erroneous Common Recovery ſuffered by the Tenant in Tail; where, if the Iſſue in Tail reverſes the Common Recovery by a Writ of Error, the Reverſal revives *his Title to the Eſtate Tail*; and conſequently He is then Tenant in Tail, by Remitter. So that Dame *Ann*, by Means of the Recovery in the Ejectment brought by herſelf, having the Right to the Poſſeſſion, *became Tenant for Life* AGAIN, in Poſſeſſion; with a *Remainder* IN FEE thereupon expectant TO *the* RECOVEROR in the *Common* Recovery, or to the Perſon to whoſe uſe the *Common* Recovery was declared.

That Eſtates may *open and ſhut*, or be *ſpread and expand*, AS *Events happen*, is not unuſual in our Law. If an Eſtate is limited to *A.* for Life; Remainder to his firſt and other Sons in Tail; Remainder to *A.* and the Heirs of his Body; *Till A.* has Iſſue, He is ſeiſed of an Eſtate Tail *executed:* Upon the Birth of a Son, that Eſtate *opens*, and lets in the Son; and *A.* thereupon becomes Tenant for *Life*, with Remainder to his Son in Tail. And this was *Lewis Bowle*'s Caſe, 11 *Co.* 80. So if Lands are limited to *All* the Children, either in Poſſeſſion, or Remainder; Upon the Birth of the *firſt* Child, the whole Eſtate veſts in Him or Her: Upon the Birth of *another* Child, the Eſtate *opens*, and takes in *that* Child; and opens in like manner on the Birth of *every* other Child. 1 *Ld. Raym.* 310, 311. *Earl of Suſſex* v. *Temple.* 2 *Vern.* 525. *Cook* v. *Cook.*

But the Reſolution of the Queſtion now under Conſideration does not altogether depend on the QUANTITY *of the Eſtate* which Sir *R. A.* the Son *had*, at the Time when he made the Feoffment: It depends on the QUALITY *of the* CONVEYANCE he *made Uſe of.*

All the Gentlemen who have argued this Caſe on the other Side, *have blended and confounded* the SEVERAL OPERATIONS *of* DIFFERENT CONVEYANCES; and have not conſidered them with that

that *Diſtinction and Preciſion* that is neceſſary for the Solution of the preſent Queſtion. If due Attention were given to the *Operation* of the ſeveral Conveyances which the Law has eſtabliſhed, the ſeeming Difficulties of this Part of the Caſe would be removed.

ALL *Conveyances* OPERATE AS *a* FEOFFMENT, OR AS *a* GRANT.

A FEOFFMENT operates on the *Poſſeſſion*; *without* any Regard to the Eſtate or Intereſt of the Feoffor: A GRANT operates on the Eſtate or Intereſt which the *Grantor has* in the Thing granted. But, to be more particular—According to Lord *Coke*'s Enumeration, a Man may purchaſe or convey Lands by *Ten* Manners of Conveyance; *viz.* by *Feoffment*, *Grant*, *Fine*, *Common Recovery*, *Exchange*, *Releaſe*, *Confirmation*, *Grant of Reverſion with Attornment*, *Bargain and Sale*, *Will*.

To make a *Feoffment* good and valid, Nothing is wanting, but *Poſſeſſion*: And where the Feoffor has Poſſeſſion, though it be *as* BARE *and* NAKED as the Gentlemen would have it, yet a Freehold or Fee-Simple *paſſes*, by reaſon of the *Livery*. *Poph.* 39. *Litt.* § 595, 599, 611, 698. *Co. Litt.* 366. *b.* 367. *a.*

A *Grant* paſſes Nothing but what the Grantor may LAWFULLY *grant*. *Poph.* 39. *Litt.* § 608.

A *Fine* and *Common Recovery* are likened to a Feoffment: For One is *called* a Feoffment of Record, and the other is ſaid to be in *Nature* of a Feoffment of Record. That which *occaſions the Likeneſs* between a Feoffment Fine and Recovery, is, That they ALL PASS A FEE; THOUGH the Feoffor, Conuſor, or Tenant HAVE none. *Co. Litt.* 9. *b.* But, to give them this uniform Operation, the Conuſor in the Fine, and the Tenant to the *Præcipe*, muſt be ſeiſed of a *Freehold*; *i. e.* an Eſtate for Life, at leaſt: Otherwiſe, the Fine may be avoided, by the Plea of "*Partes Finis nil habuerunt*;" and the Recovery, by the Plea of Non-tenure, *i. e.* "That "the Perſon againſt whom the Writ was brought, was not Tenant "of the Freehold, by *Right*, or by *Wrong*." By this, it appears that a *Fine* and a *Common Recovery* are both void, for *want of a Freehold*: But it no where appears, notwithſtanding what has been urged, that an *Eſtate* in the Feoffor, is neceſſary, to ſupport a FEOFFMENT. But it does appear, and I have a great Authority for it, that it is *no Plea*, in Avoidance of a Feoffment, to ſay "That the *Feoffor has Nothing* in the Land, at the time of the "*Feoffment*;" becauſe the *Land paſſes by the* LIVERY: If the Operation of the Feoffment is queſtioned, the *only* Plea is "*N'en-* "*feoffa pas*;" which puts in Iſſue *only the* LIVERY. This is the Opinion, and this is the Language of *Littleton*: 10 *Ed.* 4. 8, 9.

ALL

ALL OTHER *Conveyances*, as *Exchange*, *Releaſe*, *Confirmation*, *Grant of Reverſion*, *Bargain and Sale*, *Will*, paſs nothing but what the Grantor may LAWFULLY *convey*, WITHOUT *Livery*; and, on that Account, are in the *Nature of a Grant*. *Litt.* § 606, 607, 609, 610. *Hardr.* 410. *Edwards* v. *Slater*. It is the Operation of THESE Conveyances, that the Gentlemen, in the Courſe of their Argument, have APPLIED *to a* FEOFFMENT: But with what *Propriety*, is ſubmitted to the Court, upon what is now diſcloſed.

But it has been ſaid, "That ſuch a Feoffment as this, may be "made *by* ANY *Perſon in* POSSESSION; and if eſtabliſhed, will in-"troduce a NEW *Law* in *Weſtminſter-Hall*, CONTRARY *to all* FOR-"MER Rules and Doctrines."

To which Objection, The Anſwer is, "That it is moſt clear that "a Feoffment MAY *be made by* ANY *Perſon in* POSSESSION:" For 'tis the Doctrine the *Law* teaches; and it has been the Language of the *greateſt Profeſſors* of it. Lord *Coke*, in his Comment on the 25th Chapter of *W.* 2. (which gives a Writ of *Novel Diſſeiſin*, where Tenant for Years aliens in Fee, by Feoffment,) grounds his Diſtinction between Caſes which are within the Act and Caſes which are not within the Act, *on* POSSESSION ONLY. For he ſays, "Though the Act ſpeaks of an Alienation by Feoffment, by a "Tenant for Years; Yet it *extends* to Tenant by *Elegit*, Statute-"*Merchant*, Statute-*Staple*, Tenant at *Will*, and Tenant at *Suf-*"*ferance*; BECAUSE All theſe have a POSSESSION: But it is other-"wiſe of a Bailiff; FOR he hath *no* POSSESSION *at all*." This ſhews how greatly One of the Gentlemen is miſtaken, when He aſſerts "That a Conveyance of an Eſtate of Freehold, by a Tenant *at Sufferance* would be VOID*:" Since it appears by the Statute, and by the Comment upon it, "that a Feoffment by a Tenant *at Suf-*"*ferance* (who has no more than a bare Poſſeſſion) will unque-"ſtionably paſs a Freehold." And the Caſe of *Butler* v. *Buck-manton*, *Cro. Jac.* 169. proves no more than that the Releaſe of Tenant in Tail to a Tenant at Sufferance, is not good for want of a Privity between them. Beſides, a Releaſe, as has been already obſerved, paſſes no greater Eſtate than the Releaſer can *lawfully* convey.

* *V. ante, pa.* 80.

Lord Ch. Juſt. *Holt* lays it down as clear Law, in the Caſe of *Hunt* v. *Burn*, *H.* 1 *Annæ*, "That if Leſſee for *Years* makes a "Feoffment *with Livery*; though the Leſſor be on the Land, "proteſting againſt it, yet the Land paſſes; *becauſe* the Leſſee "was intitled to the *Poſſeſſion*." And Lord Ch. Juſt. *Holt* is ſupported in his Opinion, by the Caſe of *Read and Morpeth* v. *Errington*, *Cro. Eliz.* 321. where the Queſtion was, "if a Feoffment "by Leſſee for *Years*, the Leſſor being upon the Land, was a good

" Feoffment:" For it was pretended that his being upon the Land guarded the Land, ſo that no Feoffment could be made. But the Court was of Opinion that the Feoffment was good; " *becauſe* the " Leſſee had the ſole Right to the POSSESSION; and Livery ought " always to be given to the *Poſſeſſion*."

Notice has been already taken, that it is *no Plea* in Avoidance of a Feoffment, to ſay " that the Feoffor had Nothing in the Land at " the Time of the *Feoffment*." Let Us here add the *Form of Pleading a Feoffment*, by Tenant for *Life*, and Tenant for *Years*; Good Pleading being an infallible Teſt of the Law. If Feoffment in Fee is pleaded by Tenant in Fee, the Concluſion is " That the Feoffee " was by virtue thereof ſeiſed in Fee:" And the *ſame* Concluſion is made on the Feoffment in Fee of the Tenant for Life and Tenant for Years, " that by Pretext thereof the Feoffee was ſeiſed *in Fee*." The Entry of *Albany*'s Caſe in 1 *Rep.* 108. is a Proof of this.

It appears by *Jenning*'s Caſe in the 10th *Rep.* 43. " That the " Feoffee of Leſſee for *Years* was a *good* Tenant to the *Præcipe*." In the Caſe of *Smith* v. *Parkhurſt*, or *Dormer* and *Forteſcue*, it was admitted that there *would have been* a good Tenant to the *Præcipe*, *if* Mr. Juſt. *Dormer* had made a Feoffment. And the Queſtion in Sir *William Pelham*'s Caſe, 1 *Co.* 14. *b.* is an Admiſſion " that the " Feoffment of Leſſee for *Years* will *paſs a Freehold*."

" That *Poſſeſſion* ONLY would ſupport a Feoffment," was the Doctrine at *Weſtminſter-Hall*, in *Elder* Times. In *Perkins*, (a Book of no mean Authority,) Section 200. it is laid down as a Rule, " that WITHOUT *Poſſeſſion*, a Man cannot make Livery." A Feoffment by the Leſſee for Years, though the Leſſor be upon the Land, paſſes the Land: And the Reaſon for this is rendred in the Book; " *becauſe* the Leſſor had nothing to do with the POSSESSION."

It was the Law, when Lands were deviſable only by Cuſtom, that a Man might deviſe " That his Lands ſhould be ſold by his " Executors." In which Caſe, the Lands deſcended, upon the Death of the Teſtator, to his Heir at Law: And the Executors took no Intereſt by the Will. *Babington*, a learned Judge, in putting this Caſe, and taking Notice of the Feoffment of the Executors, makes this Remark: " *And ſo*," ſays He, " A Man may have a " *lawful Freehold*, from a Perſon who *had Nothing* in the Land; as " a Man may have Fire from a Flint, which has no Fire in it." And He further illuſtrates his Concluſion, with the Inſtance, " that " a Woman ſhall recover her Dower (which is an Eſtate for Life) " againſt a Guardian in Chivalry, who *has no* Freehold." 9 *H.* 6. 24.

In

In 10 *H.* 8. 10. It is mentioned as a Thing notorious, " That " thoſe *who have no* Freehold *may convey* a Freehold." The Conveyance which will paſs a Freehold from a Perſon who has none, *muſt neceſſarily* be a *Feoffment:* Since there is NO OTHER *Conveyance* in the Law, which will produce the like Effect.

Before the Statute of Uſes, a *Ceſtuy qui Uſe* conveyed the Uſe by Bargain and Sale; and afterwards levied a Fine to a Stranger. And the Queſtion was, Whether the Fine was not void; as neither of the Parties had any thing in Uſe or in Poſſeſſion: For by the Bargain and Sale, the Uſe was in the Bargainee; And Nothing was in the Bargainor, or in the Stranger. It was argued that if this Fine was not good, great Inconvenience would follow: For that many Recoveries had been ſuffered againſt the Bargainor, after he had conveyed the Uſe. To this *Fitzherbert* replied, " It is the " Folly of Purchaſors, that they do not take a FEOFFMENT from " the *Ceſty qui Uſe*, before the Fine is levied: For IF they do, the " FINE *will be* GOOD. I, for my part, ſays He, will never purchaſe " any Land WITHOUT *taking a Feoffment*; SO THAT I may be in " *Poſſeſſion*, when the Fine is levied: For *then* the Fine will un- " doubtedly be good." 27 *H.* 8. 20. The POSSESSION here ſpoken of, muſt be a *Freehold* at leaſt; becauſe *Nothing leſs* than a *Freehold will ſupport a Fine:* For if neither Conuzor or Conuzee have an Eſtate of Freehold in *Poſſeſſion Remainder* or *Reverſion*, at the Time of levying the Fine, the Fine is void. The FEOFFMENT here ſpoken of, is the Feoffment of a *Ceſtuy qui Uſe*, *after* He had parted from the Uſe, and whilſt the *Freehold and Inheritance* of the Eſtate was in the *Feoffees:* So that it was the Feoffment of a Perſon who had ONLY *a* BARE *and* NAKED Poſſeſſion (*unaccompanied with* RIGHT,) to a Stranger. The Feoffment could not have been made good by the Statute of 1 *R.* 3. *c.* 1: becauſe, *after* the Bargain and Sale, the Uſe was in the Bargainee; and the Feoffor was no longer *Ceſtuy qui Uſe*. This was the Opinion, and this was the Practice of one of the greateſt Lawyers of the Age in which He lived: For it is ſaid that *Fitzherbert* and *Baldwyn* were the greateſt Lawyers of that Age. The Obſervations upon the Opinion of *Fitzherbert*, are, That *if* a Feoffment from the *Ceſtuy qui Uſe* to a Stranger, *after* He had conveyed the Uſe, would have made the *Fine undoubtedly good*; the LIKE *Feoffment* would have made a *good* TENANT TO THE PRÆCIPE: And for this plain Reaſon; " becauſe the *Feoffment* PASSED *a* FREEHOLD." How would this great Judge have been ſurprized, to have heard the Operation of a Conveyance which *He* relied on as the *Baſis* of his Titles to his Eſtates, doubted and debated! This Caſe is an additional Authority, " that the Feoffment of a Tenant *at Sufferance* will paſs a " Fee." For *after* the *Ceſtuy qui Uſe* had conveyed the Uſe by Bar-

gain and Sale, He was *no longer* a Tenant at *Will*, to his Feoffees. It is likewiſe a Proof " That the Feoffment of a *Deforceor*, who " is a *wrongful With-holder*, *paſſes a Fee*." For *after* the Bargain and Sale, the *Ceſtuy qui Uſe* had *no Right to the Poſſeſſion*; but was a *wrongful With-holder*. Upon this, It is ſubmitted, Whether the *Confirmation* of this Doctrine, by the Judgment of the Court, will *introduce a* NEW Law into *Weſtminſter-Hall*, CONTRARY *to all* FORMER Rules and Doctrines; Or whether it will not rather REVIVE *a Doctrine* almoſt worn out of Memory. It is ſo long ſince a Feoffment was in Common Uſe, that it is no wonder the Gentlemen ſhould think the Doctrine NEW; and that the PROPERTIES *of a Feoffment* ſhould be ſo little known.

But it has been ſaid " That the Feoffment of Tenant in Tail *in* " *Remainder expectant* upon an Eſtate for Life, will NOT *make a* " DISCONTINUANCE; *though* the Feoffment was made with the " Conſent of the Tenant for Life:" And for this, the Caſe of *Swift v. Heath*, *Carthew* 109, 110. was cited. This muſt be admitted: Becauſe a Feoffment does *not* make a *Diſcontinuance*, *unleſs* the Tenant in Tail is ſeiſed of the Eſtate Tail, in *Poſſeſſion*. But does this Caſe prove " That a Feoffment by a Remainder-Man with the " Conſent of the Tenant for Life, *is* VOID?" Nothing leſs. The Queſtion, in the Caſe cited, " Whether the Feoffment *made a Diſ-* " *continuance*," *admitted* the Feoffment to *be* GOOD: For the Doubt was upon the *Operation* of it.

To put an End to the Queſtion, There is a Caſe, in which it was determined " That the *Feoffment of him in Reverſion or Re-* " *mainder*, in the ABSENCE *of the Tenant for Life*, IS *a* GOOD " Feoffment." It is in *Dyer* 340. The Caſe was That he in Remainder in Fee enfeoffed a Stranger, in the Abſence of the Tenant for Life; who neither attorned, nor aſſented to the Feoffment, but occupied the Eſtate, during his Life: And it was holden to be *a* GOOD *Feoffment* for the Fee-ſimple. Where is the Difference between this Caſe, and the preſent? In the Caſe before the Court, was not the Feoffment made by the Remainder-Man, in the Abſence of Dame *Ann*, the Tenant for Life? Did ſhe ever attorn, or aſſent? And did not She occupy the Eſtate, during her Life? The only Difference that can be pretended between the two Caſes, is, that in One, the Remainder-Man was Tenant in Fee; in the other, Tenant in Tail. But will *that* make any Difference? 'Tis impoſſible it ſhould: Becauſe the Feoffment in both Caſes, took Effect by the *Livery*.

It has been further ſaid, " That Sir *R. A.* the Son could not " convey a Freehold by a *rightful* Conveyance; as by Fine, Re- " leaſe, or Bargain and Sale: And *if not* by a rightful, he could " not do it by a *wrongful* One."

Here

Here is a Diſtinction made, which was never met with. According to their Notion of Inſtruments of Conveyance; a Fine, Releaſe, and Bargain and Sale, are *rightful* Conveyances: A Feoffment, a *wrongful* One. Whereas it is moſt manifeſt, that ALL *Conveyances* are, in themſelves EQUALLY *rightful*, and are to be made uſe of, according to the Nature of the Caſe to which they are applicable: And their being rightful, or wrongful, does not depend upon their Names or their Properties. That a Freehold will not paſs, by a *Fine*, *Releaſe*, or *Bargain and Sale*, from a Perſon who has ONLY a BARE *and* NAKED *Poſſeſſion*, (for *that* is the Subject We are now upon.) does not proceed from thoſe Conveyances being *lawful* Ones; but from the *Nature* of thoſe Conveyances; whoſe *Property* it is, to convey Nothing but what the Maker of them may *lawfully* convey; *becauſe they operate* as a GRANT. Therefore, to infer *from thence*, "That a Freehold will not paſs by a FEOFFMENT," a Conveyance of a *different Operation*, and *whoſe Property* is to paſs a Freehold and Fee, by *Force of the* LIVERY, is an inconcluſive Argument.

Another Obſervation has been made, "That if the Law conſiders that *ſome* Perſons have this Power, (to make a Feoffment,) "and *others* have not; the Law will never ſuffer that to be done "by *Fraud*, which cannot be done fairly and regularly."

Anſwer. *Every* one who *can* GET INTO POSSESSION, has and ever had a POWER *to make a Feoffment:* And the Law makes no Diſtinction of Perſons. And whenever a Tenant *in Tail in Remainder* has *obtained the* POSSESSION, (*whether by Right*, OR *by Wrong*,) and has done an Act, *whilſt in Poſſeſſion*, to make a Tenant to the *Præcipe*, in order to ſuffer a Common Recovery; No Inſtance can be produced, where ſuch Act has been *adjudged fraudulent*, *unfair*, or *irregular*.

It is very common, in Practice, for Tenant for Life to ſurrender his Eſtate to the Remainder-Man in Tail, *conditionally*; in order to give the Tenant in Tail in Remainder an Opportunity to bar the Eſtate-Tail and the Remainders over: And though ſuch Surrender is a *mere Contrivance* between the Tenant for Life and the Remainder-Man in Tail, yet no Common Recovery was *ever avoided* on *that* Account.

If Tenant in Tail in Remainder *diſſeiſes* the Tenant for Life, and during the Continuance of the Diſſeiſin ſuffers a Common Recovery; By their own Admiſſion, the Common Recovery is NOT *avoidable* by reaſon of the *Diſſeiſin*. So, where Truſtees to preſerve contingent Remainders during the Life of a Tenant for Years, have conveyed the Freehold, to make a Tenant to the *Præcipe*, in order to

give the Remainder-Man in Tail an Opportunity of ſuffering a Recovery; there is no Inſtance of *ſuch* a Recovery being *ſet aſide* at Law, upon a *ſuppoſed Practice* between the Tenant for Years, the Truſtees, and the Remainder-Man in Tail. And if a Remainder-Man in Tail, who comes *to the Poſſeſſion* by a *wrongful Act*, or by *Stratagem* and *Contrivance*, may make a Tenant to the *Præcipe*, in order to ſuffer a Recovery; Surely, a Remainder-Man in Tail who comes to the Poſſeſſion by a *lawful* Act, may do the ſame.

Where *Tenant in Tail is Party* to the Recovery as Tenant or as Vouchee, Such Recovery is not in the Eye of the Law either fraudulent or colluſive: Becauſe THE LAW *has made* the Eſtate Tail, and all the Remainders, and the Reverſion expectant on it, SUBJECT *to the* PLEASURE *of the Tenant in Tail*, and *given* HIM *a* RIGHT *to* BAR THEM ALL. *If* a Reverſioner expectant upon an Eſtate Tail *could avoid* a Recovery ſuffered by the Tenant in Tail, AS *fraudulent*, *colluſive*, *unfair*, or *irregular*; the *Law would have* deviſed ſome *Means* for avoiding it: And the Reaſon why there *are* NO ſuch Means, is, becauſe a *Reverſion* expectant on an Eſtate Tail is of *no Conſideration* in Law. A Reverſion expectant on an Eſtate Tail is *no Aſſets*. The Reverſioner cannot FALSIFY a Common Recovery ſuffered by Tenant in Tail: Neither is *Reſceit* given by the Statute of *W.* 2. *c.* 3. to a Reverſioner on an Eſtate Tail. The Reaſon of all this is, *becauſe* the Eſtate *Tail* is an Inheritance which *may* continue for ever. There is *no Proviſion* by the Statutes of 32 *H.* 8. *c.* 31. and 14 *Eliz. c.* 8. to *preſerve* a Remainder or Reverſion expectant on an Eſtate *Tail*; as there is, when they are expectant on an Eſtate *for Life*, and the Tenant for Life is only vouched.

But *Fermor*'s Caſe, 3 *Co.* 78. has been objected: As if there was no Difference between a Fine or Recovery *by* Tenant for *Years*, Tenant for *Life*, or a *Copyholder*, by Covin, to the Intent to bar the Reverſioner or the Lord, of his *Inheritance*; and a Recovery ſuffered by *Tenant in Tail*, to the Intent to bar the *Eſtate Tail and the Reverſion*.

It has been Matter of Surprize, to hear the Gentlemen mention the Statute of 14 *G.* 2. *c.* 20. Becauſe that Statute is made in *Aid* of Recoveries; and *not* to invalidate them; and more eſpecially, as there is a Proviſo in the Act, "That it ſhall not be conſtrued to prejudice or affect any Queſtion in Law, which may ariſe upon Common Recoveries not remedied or intended to be remedied by it: But all *ſuch* Common Recoveries are to remain and be of ſuch Force and Effect as they would have been, if the Act had not been made." Beſides, there is a Proviſo in the Act, "that no Common Recovery ſhall be called in queſtion *after* 20 *Years*."

The

The principal Argument which the Gentlemen have oppoſed to the Doctrine which We have been endeavouring to ſupport, may be reduced to the Head of INCONVENIENCE: And they have argued upon it, as if the Deciſion of the Queſtion depended on *private Opinion*, and not on the LAW. But the Queſtion is *not*, "*What* "INCONVENIENCE will attend the Determination, either Way:" But "WHAT *is the* LAW." The Inconvenience, (if there be One,) *ariſes* from the NATURE *and* OPERATION *of a* FEOFFMENT; and cannot be avoided, but by *taking away* that Conveyance, or *depriving* it of an Operation which it has been allowed to have, by All the Sages of the Law. But to do *this*, is NOT *in the* POWER of a Court of Juſtice: Since no Maxim of the Common Law can be abrogated or aboliſhed, *but* by a LEGISLATIVE *Authority*.

It was *once* thought to be a great Inconvenience, "that a De- "ſcent, *immediately after* a Diſſeiſin, *ſhould take away the* ENTRY "of the Perſon diſſeiſed." At another Time, It was thought to be no ſmall One, "that the Son ſhould *loſe his Patrimony*, becauſe "he happened to be *born out of Time*." And till lately, an *Heir might have been deprived of his Family-Eſtate*, by the *Warranty* of an Anceſtor who *was never in Poſſeſſion* of it.

The Inconveniences occaſioned by the Maxims I have juſt now hinted at, were *as great* as that which is pretended to ariſe from the Feoffment of a Tenant in Tail in Remainder expectant upon an Eſtate for Life: And yet they continued through Ages of the Law, *till* the LEGISLATURE took them away. The Inconveniences which attended the Law in thoſe Inſtances were as *univerſal* as any that can be ſuggeſted to follow from the Doctrine We have been endeavouring to ſupport: And yet *Courts of Juſtice* never thought themſelves *warranted* to *depart from the Law*.

Could the Courts of Common Law have determined "that a "Deſcent, after a *recent* Diſſeiſin, did *not* take away an Entry;" without determining at the ſame time, "That a Deſcent does NOT "take away an Entry?" *Could* they have determined that a Poſt- "humous Child *ſhould take*, though the Eſtate which was the "Support of the Limitation to It, determined before It's Birth;" without reſolving at the ſame time "that a *contingent* Remainder "ſhould take Effect, though it did *not* VEST *during* the Continu- "ance or upon the Determination of the Eſtate created for its Sup- "port?" Or *could* they have determined "that an Heir ſhould "take an Eſtate, *notwithſtanding the Warranty* of his collateral "Anceſtor;" without determining "That Collateral Warranties "did *not* bind?" And *can* the Court determine, in the preſent Caſe,

Caſe, " That the Recovery is *void*;" without adjudging " That " a Feoffment has *not* the Operation, which it HAS HAD *ever ſince* " *it* became a Common Aſſurance?"

When the Law is *doubtful*, it is allowable to draw an Argument from Inconvenience: But where the Law is *clear* and *preciſe* (as it is " That the Feoffment of a Perſon in Poſſeſſion, let him come " to that Poſſeſſion *how* he will, *paſſes a Fee*;") *An Argument from Inconvenience* is NOT *admiſſible*; becauſe it tends to undermine and overthrow the *Law*.

Much has been ſaid of DISSEISIN; and many critical Obſervations have been made upon that Subject, in Order to ſhew that Sir *R. A.* the Son could not be a *Diſſeiſor*. All that needs be ſaid to them, is, That Sir *R. A.* the Son entered by *Right* OR by *Wrong*; (For there is *no* Medium:) And " that He entred and took the " Profits," is admitted. Now IF He entred of his *own Wrong*, He was a *Diſſeiſor*; For He ouſted the Tenant for Life: And *if* He was a Diſſeiſor, it is agreed there was a good Tenant to the *Præcipe*. IF He entered by *Right*, then (for the Reaſons already offered) He *had Power* to make a Tenant to the *Præcipe* by his Feoffment. So that in *either* Caſe, *James Earle* was *a* GOOD Tenant to the *Præcipe*, at the *Time* when Judgment was given in the Common Recovery. And ſo He was warranted, He ſaid, to conclude, That the Recovery is good, and barred the Eſtate Tail limited to Sir *R. A.* the Son; And conſequently, the Remainder in Fee, which was limited to Sir *R. A.* the Father, and by him deviſed to the Leſſor of the Plaintiff.

4th Point. The Fourth Point or Head.—Suppoſing the Recovery to be good, Whether the RE-ENTRY *of Dame Ann*, under the Recovery and Judgment in the ſecond Ejectment, did AVOID it.

The Gentleman who made this Queſtion, ſaid " It ſeemed to be " of conſiderable Weight." Whether it be ſo or not, We ſhall ſee preſently. What He undertook to maintain, was " That the Entry " of Dame *Ann* after She had recovered in the ſecond Ejectment " REVESTED her Eſtate for Life and the Remainder in Fee, and " put the Eſtate in the SAME *Plight* it was in before the Common " Recovery was ſuffered." And to make this out, He compared the Entry of Dame *Ann* to the Regreſs of the *Diſſeiſee*, which avoids all intermediate Acts by Relation; and made that Inſtance the Foundation of his Argument.

Mr. *Knowler* here obſerved, how inconſiſtent *this* Argument of the Gentleman was with his *former*. The Direction and Force of his Argument under the laſt Head was to ſhew " That Sir *R. A.* the

" Son entered *by Title*, and could *not poſſibly* be a *Diſſeiſor*." The Drift of *this* Argument is to prove him to *have been* a Diſſeiſor. This ſhews how difficult it is to be conſiſtent, when a Perſon would reconcile Matters not ſupportable.

The Queſtion is not to be determined by the Rule or Inſtance which the Gentleman has applied to it; but upon *this Diſtinction*, " Where the *entire* Eſtate is defeated," and " Where ONLY *Part* " of the Eſtate is defeated, by One who has a prior Title." The Caſe which the Gentleman puts, falls under the *firſt* Member of the Diſtinction: The *preſent* Caſe falls under the *ſecond* Member of it.

The ſubſiſting Eſtate, at the Time when Dame *Ann* entered under the Judgment in the ſecond Ejectment, was an Eſtate in *Fee* in *Robert Atkyns*, the Nephew and Heir of Sir *R. A.* the Son. *All* the Intereſt that *She* could derive to *herſelf* by Force of the Judgment in the ſecond Ejectment, was an Eſtate for LIFE: For She could recover no otherwiſe than *according to her Title*. And therefore Dame *Ann*'s Entry under that Judgment *could have no other Effect* than to *diminiſh* and *leſſen* the Intereſt of *Robert Atkyns*, *by taking out of it* an Eſtate *for* HER *Life*. This will appear by ſome Inſtances which ſhall be mentioned. Tenant for Life ſurrenders his Eſtate to the next Remainder-Man in Tail, *conditionally*; to enable the Remainder-Man to ſuffer a Common Recovery: A Recovery is ſuffered; And, the Condition being broken, the Tenant for Life re-enters; The Re-Entry of the Tenant for Life will *not* avoid the Recovery, and revive the Eſtates that were barred by it. This appears by every Day's Experience. One of the Gentlemen ſeemed to admit the Law to be ſo; and accounted for it, by ſaying, " It " is becauſe the Tenant to the *Præcipe* was made by Force of a " rightful Eſtate." But *that* is *not* the Reaſon. The *true* Reaſon is (what has been already mentioned) " That ONLY *Part* of the Eſtate is defeated by the Entry of the Tenant for Life; and *not* the ENTIRE Eſtate. A Tenant for *Years*, or by *Elegit*, can avoid or falſify a Recovery, *during* their particular Eſtates *only*. A *Wife* can avoid a Recovery ſuffered by her Huſband alone, as to her Title of *Dower* only, and *no further*. Remainder-Man in Tail, expectant on an Eſtate for Life, diſſeiſed the Tenant for Life, and levied a Fine with Proclamations; The Tenant for Life entered on the Conuſee: And it was determined " that notwithſtanding the Re- " greſs of the Tenant for Life, the *Reverſion* remained in the Conuſee, *not defeated*." And this was the Caſe of *Okes ex dimiſſ. Lord Sturton*; which is cited in *Popham* 65, 66. Leſſor diſſeiſes his Leſſee for Life, and makes a Leaſe for Life to another; The firſt Leſſee re-enters: He leaves the *Reverſion* in the ſecond Leſſee for

Life; who ſhall have the Rent reſerved on the firſt Leaſe. Earl of *Glouceſter*'s Caſe, cited in Sir *Moyle Finch*'s Caſe. *More* Proofs might be brought, to confirm this Part of the Argument: But in ſo plain a Caſe, *theſe* may ſuffice. And with them We may conclude, That the RE-*Entry of Dame Ann*, under the Recovery and Judgment in the ſecond Ejectment, *did* NOT *avoid* the Common Recovery ſuffered by Sir *Robert Atkyns* the Son.

And let it be obſerved that the Arguments made Uſe of, have *not* been drawn from *General* Reaſons and Reflections; but have been ſuggeſted from AUTHORITIES, and from the EXPERIENCE AND PRACTICE *of Learned Men.*

Upon the Whole, He prayed Judgment for the Defendants.

Reply. In Reply—It was urged on Part of the Plaintiff—

1ſt Point. 1ſt, As to the great and little Deeds—That the little Deed did *not* revoke the greater One, or *deſtroy the Powers* thereby given. Which was ſupported chiefly by Arguments drawn from the Deeds themſelves.

2d Point. As to the * Leaſe to the *Dacres* being fraudulent, (*V. ante* 85.) The Caſe in *Savile* 126. is not like the preſent: For *here* were *expreſs legal Motives* for making the Leaſe; whereas there were none, in that Caſe, for making the Feoffment.

* Here is a like Omiſſion as to the Argument concerning the Validity and Determination of the Leaſe to the *Dacres*, as in the adverſe Argument. See the Notes on *pa.*

As to *Livery*—It was not neceſſary: And therefore void. 1 *Ventr.* 291.

3d Point. As to the Recovery—The Authorities are not *ad idem:*

Nor as to the *Feoffment*. For this is a FICTITIOUS *Poſſeſſion*, and in *Nubibus:* NOT an *actual* Poſſeſſion. NO *Freehold* is recovered in Ejectment. So that Sir *R. A.* the Son was *not* Tenant in Tail *in* POSSESSION, for *want* of the *Freehold.* And without being Tenant of the Freehold, the Recovery could not be valid. Mr. *Knowler* admits "That the Poſſeſſion of the *Bailiff* would not do." (*V. ante* 93.) And ſurely, this Caſe is ſtronger than that of Bailiff.

As to *Cro. Jac.* 169. the Caſe of *Butler* v. *Duckmanton.* (*V. ante* 80. & 93.) The Poſſeſſion of the Tenant at *Sufferance* was conſidered as *no* Poſſeſſion at all, in that Caſe. Therefore We may admit all Mr. *Knowler*'s Caſes: Becauſe they do not come up to the preſent Caſe of Sir *R. A.* the Son's Poſſeſſion. Conſequently, The

Remainder is not affected by any thing done under this *nugatory* Poſſeſſion.

Dame *Ann* was Tenant of the Freehold: And without diſſeiſing Her, there could be no Tenant to the *Præcipe*, who would be Tenant of the Freehold. Sir *R. A.* the Son did not enter *as* a Diſſeiſor; but as having a Title. And he had a Title under the Judgment, to enter. And the Eſtate which paſſed by the Feoffment, was according to his Right. 2 *Ro. Abr.* 5. *Co. Lit.* 52. *b.* And the Warranty extended only to the Fictitious Title in Ejectment. The Poſſeſſion *only* was transferred to Him; *not* the Freehold: And this was a mere *naked* Poſſeſſion; an *accidental* Poſſeſſion. *Carthew* 110. proves that the Remainders were not diſcontinued for want of a Tenant to the Freehold. Dame *Ann* was never out of Poſſeſſion of the *Freehold.*

So that the Eſtate which Sir *Robert* gained by his Entry upon Dame *Ann* could *not* be an Eſtate Tail in *Poſſeſſion*; becauſe there was a prior rightful Eſtate for *Life* in ANOTHER Perſon. Therefore it muſt be an Eſtate Tail in REMAINDER.

It is aſked, "*When* He *firſt* began to hold over unlawfully?" The anſwer is—From his *firſt Entry.*

His ENTRY was *not wrongful:* Therefore He cannot be conſidered as a *Diſſeiſor.* But He HELD OVER, *unlawfully.* 'Tis like a Tenant by Sufferance; or a Man who enters upon the King, (who cannot be put out of Poſſeſſion;) or a Man after the Death of his Wife, *&c.* And it is not eaſy to apprehend the Diſtinction between entering "*under* the Ejectment;" and entering "in *purſuance* of the "Ejectment." Conſequently, his was a *mere naked Poſſeſſion:* And the Freehold remained undiſturbed in Dame *Ann.*

As to the Fraud and Colluſion of Suffering a Recovery—There is ſurely ſuch an *Inſufficiency of Eſtate* in a Tenant in Tail in Remainder, that He cannot ſuffer a Common Recovery. And ſurely the Court will not permit a Perſon who cannot be a Tenant to the *Præcipe Himſelf*, to MAKE a Tenant to the *Præcipe.* And they ſtrongly urged the vaſt *Inconvenience* that muſt attend this Doctrine now advanced, "That a Tenant in Tail in *Remainder* only, who "can obtain a mere *naked* Poſſeſſion, may legally ſuffer a Recovery "and bar the ſubſequent Remainders."

Fourth Point.—As to the RE-*Entry* of Lady *Ann*—The Verdict did nothing: It is the *Entry* that reveſts. It *reveſted* HER *Eſtate*, which was an Eſtate for *Life:* Whereas Sir *R. A.* the Son's Entry under his Verdict only operated to give him a *naked Poſſeſſion*; He having 4th Point.

having no Right to an Eſtate Tail IN POSSESSION. And He could not be Tenant in Tail in *Poſſeſſion*, to *One* Purpoſe; and in *Remainder*, to *Another*. Then Her Re-Entry left him Tenant in Tail in Remainder, as it found Him.

In the Caſe in 2 *Ro. Abr.* 421. Title *Remitter*, Letter i. *pl.* 1. The Wife entered under an Act of Parliament, which remitted Her.

5th Point. * The Reſt of this Argument is omitted; for the Reaſons given in the ſubſequent Note.

5th Point, (as to the Remedy.) The Plaintiff is * NOT *barred* of his Entry, by the Statute of Limitations 21 *J.* 1. *c.* 16. For the Recoveree was not intitled to ſuffer a Recovery; Not being Tenant in Tail in *Poſſeſſion*.

As to Dame *Ann*'s Recovery in the Ejectment brought by *Miles*— The Demiſe was laid ſo far back as to over-reach the whole Term which Sir *R. A.* the Son had recovered: It was laid ſo far back as to 5 Days after the Death of Sir *R. A.* the Father. And Her Eſtate had never been diſcontinued; nor her Right of Entry taken away. So that Sir *Robert* the Son was never Tenant in Tail in Poſſeſſion. The Leſſor of the Plaintiff could not therefore enter till the Jointure of Dame *Ann* was at an End, and her Life-Eſtate determined. Neither could He enter, ſo long as the Leaſe *to the* DACRES was in being: Which did not expire *till* the Death of *Thomas Dacres*, the Surviving Leſſee, on 23d *July* 1752.

Note—The laſt of the four Arguments of this Caſe was intended chiefly for the Information of Lord *Mansfield*, who had not heard any of the former.

Before it came on, his Lordſhip (having read the Caſe, and ſeen Notes of all the former Arguments,) ſent for the Counſel and Agents on both Sides; and told them that a Point occurred to Him, which did not ſeem to have been particularly attended to in drawing up the ſpecial Verdict, and which He obſerved had been very little gone into in any of the former Arguments; That it ſeemed to Him material; And therefore He wiſhed to have it ſpoken to: And He choſe to apprize them of it before-hand, to avoid further Expence and Delay to the Parties; becauſe if He ſhould defer mentioning it, till after He had heard them in Court, and if they ſhould omit going fully into that Point in their Argument, and His Lordſhip ſhould continue to think it material, it muſt occaſion a new Argument.

The Point was, " Whether, *ſuppoſing* the Recovery to be bad, yet " the Plaintiff's EJECTMENT was not *barred* by the Statute of " *Limitations*."

That depended, He ſaid, upon many Conſiderations, which He deſired them to think of: As, firſt, Whether the *Leaſe* was made *purſuant to the Power*, or, (in other Words,) Whether the *Leaſe* was *void*, as *not* being made purſuant to the Power; (2dly) Whether it was not *determined*, upon the Extinction of the Eſtate Tail in 1711; (3dly) Whether, *as* this Special Verdict was found, an Objection from the Statute of Limitations was *now* open to be made. And He mentioned ſome Caſes to them, which he deſired them to look into.

Accordingly, upon this laſt Argument, the ſaid Queſtion was very fully diſcuſſed, on both Sides: But, to avoid Prolixity, I have omitted to report *theſe Arguments of the Counſel*; becauſe every thing material upon * this Point will appear from the following unanimous Reſolution of the Court, given by Lord *Manſfield*.

* They fell under the 2d Point. See *ante*, *pa.* 83. in the Margin; and *pa.* 87. & 102.

Curia.

Lord *Manſfield* now delivered the Reſolution of the Court; (Having firſt ſtated the Caſe and Special Verdict.)

Sir *Robert Atkyns* the Son being dead without Iſſue Male, the Reverſion in Fee, deviſed to the Leſſor of the Plaintiff, is come into Poſſeſſion: And conſequently, he muſt be intitled to Judgment in this Ejectment; unleſs the Defendant can ſet up a *Bar* to his RIGHT, or to his REMEDY by an Ejectment.

They ſet up a B[illegible] to BOTH.

In Bar of his RIGHT, they inſiſt upon the *Common Recovery* ſuffered in *Hilary* Term 9 *Ann. A. D.* 1710. In Bar of his REMEDY, they inſiſt upon the *Statute of Limitations*.

The *Common Recovery*, if duly ſuffered, certainly deſtroyed the RIGHT of the Leſſor of the Plaintiff. The *Statute of Limitations*, if his Title of Entry accrued above 20 Years before the 15th of *December* 1752, has certainly taken away the REMEDY BY EJECTMENT.

The Merits therefore muſt depend upon two General Queſtions.

1ſt, Whether the ſaid *Common Recovery* was *duly ſuffered*.

2d, Whether this *Ejectment* is barred by the *Statute of Limitations*.

As to the firſt, The Objection is, That there was *not* a good *Tenant to the Præcipe*: For Lady *Atkyns*, the Widow of Sir *Robert* First General Queſtion.

the Father, had an Eſtate for Life in the Premiſſes; and did not join, by Surrender or otherwiſe, in any Conveyance of the Freehold to *James Earle*, the Tenant againſt whom the *Præcipe* was brought. (There is no Occaſion to entangle this Part of the Caſe with the Demiſe to the 3 *Dacres*.)

The Defendants contend that there *was* a good Tenant to the *Præcipe*, upon two Grounds; (1ſt) Becauſe Lady *Atkyns* had no Eſtate for Life; and ſo Sir *Robert* the Son, was Tenant in Tail in *Poſſeſſion*; (2dly) Suppoſe She had an Eſtate for Life, yet *Earle* was a good Tenant to the *Præcipe*, by *Diſſeiſin*: Which they endeavour to prove two Ways, *viz.* 1ſt, That Sir *Robert Atkyns*, by his Entry, was *Himſelf* a *Diſſeiſor*, and by his Feoffment the 17th of *January* 1710. conveyed the Freehold he had *acquired by Diſſeiſin*, to *James Earle*; and 2dly, Suppoſe Sir *Robert* the Son was not a Diſſeiſor, yet his ſaid *Feoffment was a Diſſeiſin*, and made *James Earle* a good Tenant of the Freehold *by Diſſeiſin*.

As to the firſt Ground, " That Lady *Atkyns* had *no Eſtate for* " *Life*,"—The whole Argument depends upon this Propoſition, " That the Leſſer Deed was executed *after* the Greater Deed; and " conſequently, the Power to Sir *Robert Atkyns* the Father, to make " a Jointure, was *extinguiſhed* by the Fine levied in *Trinity* Term " 1669." But the Jury have not found the Fact, " *which* was " *firſt* executed." Both Deeds bear the ſame Date. They are both conſiſtent. They are both manifeſtly but one Agreement, executed by different Inſtruments, to anſwer different Purpoſes, and to ſuit (probably) the Convenience of one Party, who was intereſted only in a ſmall Part of the Tranſaction.

The Fine levied in *Trinity* Term 1669 purſued both Deeds, and comprizes all the Premiſſes in the Greater Deed, by which the Powers were created.

It never could be the Intent, to revoke theſe Powers, at the Inſtant they were created; by the leſſer Deed, which makes no Mention of them; or by a Fine levied, agreeable to the greater Deed, in which they are contained.

Sir *Robert Atkyns*, who ſurvived the Tranſaction above 30 Years, has ſhewn by many Acts, that he underſtood the Powers to be well created and ſubſiſting.

If it was neceſſary, We ought to preſume the leſſer Deed firſt executed, to ſupport the clear Intent of Parties, in a Family Settlement made for valuable Conſideration: For it is impoſſible to ſup-

poſe, they could really mean to revoke or extinguiſh theſe Powers, and take this way of doing it. But, in this Caſe, there is no Room for Preſumption: The internal Evidence of the thing itſelf, ſpeaks them to be one Tranſaction; and the ſame, to all Intents and Purpoſes, as if expreſſed in one Inſtrument.

As the Jointreſs clearly had an Eſtate for Life, the *next* Ground is " That *James Earle* was a good Tenant to the *Præcipe*, by *Diſ-* " *ſeiſin.*"

The better to judge of this Queſtion, It may be proper to try to find out What the *old Law* meant by a *Diſſeiſin* which conſtituted the Tenant of the Freehold, in reſpect of every Demandant ſuing out a *Præcipe*; although the Owner's Entry was *not* taken away: (For where the *Right of Poſſeſſion* was acquired, and the Owner put to his real Action; *there* without doubt the Poſſeſſor had got the Freehold, though by Wrong.)

All the Law concerning Diſſeiſins, which is any way applicable to the preſent Inquiry, exiſted, and was in Uſe and Practice, *before* the Aſſize of Novel Diſſeiſin. The *Aſſize* was introduced, (probably from the Uſage of *Normandy*, for the Grand Couſtumier treats of Aſſizes,) in or before the Reign of *Henry* the 2d. *Glanville*, who wrote in that Reign, calls the Great Aſſize a Benefit, *Clementiam Principis, de Conſilio Procerum, Populis indultam*:" And the * *Myrrour* *fo.* 93. ſays " *Glanville* introduced it." * C. 2. § 25. *pa.* 150. Edit. 1642.

Seiſin is a technical Term, to denote the Completion of that Inveſtiture, by which the Tenant was admitted into the Tenure; and without which, no Freehold could be conſtituted or paſs. *Sciendum eſt Feudum, ſine Inveſtitura, nullo modo conſtitui poſſe. Feud. Lib.* 1. *Tit.* 25. *Lib.* 2. *Tit.* 1. 2 *Craig. Lib.* 2. *Tit.* 2.

Disseisin therefore muſt mean ſome Way or other turning the Tenant *out of* his Tenure, and *uſurping* his Place and Feudal Relation. At the Time I ſpeak of, *No* Tenant could alien *without Licence of the Lord.* When the Lord conſented, the only Form of Conveyance, was by Feoffment publicly made, *coram paribus Curiæ*, with the *Lord's Concurrence.* Homage, or Fealty, was ſolemnly ſworn; And Suit of Court and Services were frequently done.

The Freeholder repreſented the whole Fee, did the Duty to the Lord, and defended the whole Fee againſt Strangers.

The Freehold *never* could be in *Abeyance*; becauſe the Lord muſt never be at a Loſs to know upon whom to call, as his Tenant; nor a Stranger, at a Loſs to know againſt whom to bring his *Præcipe.*

cipe. From the Neceſſity of there being always a *viſible* Tenant of the Freehold, and the Notoriety *who* acted, and did Suit and Service *as ſuch*, many Privileges were allowed to innocent Perſons deriving Title from the Freeholder *de facto*.

If the *Diſſeiſor died*; after one Year's Nonclaim, the Deſcent to his Heir gave *him* the *Right of Poſſeſſion*, and took away the true Owner's *Entry*. The Stat. of 32 *H.* 8. *c* 33. requires 5 Years Nonclaim. The Feoffee of a Diſſeiſor acquired Title of Poſſeſſion, at the Time I ſpeak of, by one Year's Non-claim. The Deſcent to *his* Heir remains privileged as it was at Common Law: For the 32 *H.* 8. *c.* 33. extends not to any Feoffee of the Diſſeiſor, immediate or mediate. *Co. Lit.* 256. *a.* The *Feoffee* of a Diſſeiſor was favoured; becauſe he came innocently into the Tenure, by a ſolemn and public Inveſtiture, with the *Lord's Concurrence*.

* 18 *E.* 1. *V. Introduction to the Law of Tenures, fol.* 153 to 157.

But the Statute * "*Quia Emptores Terrarum*," (which took away Subinfeudations, and gave free Liberty of Alienation to the Tenants of Subjects, and to thoſe who held of the King, as of an Honor or Manor;) and other Statutes which extended the Power of Alienation to the King's Tenants *in Capite*; The frequent Releaſes of Feudal Services; The Statutes of Uſes, and of Wills; and, at laſt, the total † Abolition of all military Tenures; have left us little but the Names of *Feoffment*, *Seiſin*, *Tenure*, and *Freeholder*; without any preciſe Knowledge of the *thing originally ſignified* by theſe Sounds: The Idea *modern* Times annex to *Freehold*, or *Freeholder*, is taken merely from the *Duration* of the Eſtate.

† *V.* 12 *C.* 2. *c.* 23. and 13 *C.* 2. *c.* 7.

Copyholds, and the *cuſtomary Freeholds* in the North, retain faint Traces in Imitation of the old Syſtem of Feudal Tenures. It is obvious how a Man may viſibly be the Copyholder, or cuſtomary Freeholder *de facto*, in Prejudice of the rightful Tenant. It is obvious too, that *Uſurping* ſuch Copyhold or cuſtomary *Tenure*, is a different Fact, from a *naked* Poſſeſſion, or Occupation of the *Land*.

But, whoever will look into the Practice of *other* Countries, where Tenures ſubſiſt with all the Solemnities of Feoffments and Seiſins, upon every Change of a Tenant by Deſcent or Alienation, and upon every Uſurpation of the Real Right; will eaſily comprehend, that at the time I ſpeak of, It might be as notorious *who was the Feudal Tenant de facto*, as who is now *de facto* Incumbent of a Living, or Mayor of a Corporation.

|| *V. Lib.* 4. *c.* 1, 2.

Disseisin was a complicated Fact, and differed from *Diſpoſſeſſing*. The *Freeholder by Diſſeiſin*, differed from a *Poſſeſſor by Wrong*. *Bracton* || *c.* 2. *De Aſſiſa Novæ Diſſeyſinæ*, *fo.* 160. puts many Caſes of Poſſeſſion wrongfully taken, which he calls *Intruſion*; becauſe there

there is no Diſſeiſin: " Poſſeſſio quæ nuda eſt omnino, & ſine " aliquo *Veſtimento*; quæ dicitur Intruſio." *Veſtimento* is Seiſin, Inveſtiture; (from whence, the *Saxon* Term Veſt;) a Metaphor, the Feudiſts took from Clothing: By which, they meant to intimate, " that the *naked Poſſeſſion* was *clothed* with the *Solemnities of the Feudal* " *Tenure*." A particular Tenant, according to Feudal Notions, was *in* as of the *Seiſin of the Fee*, of which his Eſtate was a Part. If he aliened the Fee, (which he could only do by ſolemn Feoffment, with the Concurrence of the Lord of whom the Fee was held,) He forfeited his particular Eſtate, for having betrayed his *Seiſin* with which he was intruſted: But on account of the *Privity* and *Confidence* between him and the Reverſioner; and the *notorious Solemnity* of the Act of Inveſtiture, *His* Feoffment DISSEISED the Reverſioner.

Bracton who wrote in the Reign of *Hen.* 3. (before Tenants could alien without Licence,) mentions the *Diſſeiſin* in this Caſe, as a *neceſſary Conſequence*, and as a thing which *could not poſſibly be otherwiſe*; *c.* 3. *De Aſſiſa Novæ Diſſeyſinæ*, 161. *b.* " Item facit quis Diſ- " ſeyſinam, *cùm Quis in Seyſina fuerit* ut de libero Tenemento & " ad Vitam, vel ad Terminum Annorum, vel nomine cuſtodiæ, vel " aliquo alio modo; ALIUM *feoffaverit*, *in* PRAEJUDICIUM VERI " *Domini*, *& fecerit* ALTERI *liberum Tenementum*; CUM DUO " SIMUL ET SEMEL, *de eodem Tenemento & in ſolidum*, *eſſe non poſ-* " *ſunt in Seyſina*." He conſiders it as impoſſible for the true Te- " nant not to be put out, when the other actually came into his Place.

So late as the 32d of *Eliz.* in the Caſe of *Matheſon* v. *Trot*, 1 *Leon.* 209. The Diſtinction upon which the Judgment turns is " That *Henry Denny* gained *a wrongful Poſſeſſion in Fee*; but did " *not* gain any SEISIN; ſo *no Diſſeiſor*: Therefore the Deſcent to " his Heir is not privileged."

No-Body can *diſſeiſe* the King; neither can any One be diſſeiſed to the Uſe of the King. The King may be wrongfully *diſpoſſeſſed*: But the Intruder's injurious Poſſeſſion is *ſine aliquo Veſtimento*, and called *Intruſion*. The King cannot be made a Diſſeiſor; not becauſe it is wrong; (for He may, in Fact, with-hold the Poſſeſſion of Land from a Subject contrary to Right:) But the Reaſon ſeems, according to the Feudal Syſtem, to be this; A Subject never could ſtand in the King's *Seiſin* or *Tenure*; and the King never could be in the *Seiſin*, *Tenure*, or *Feudal Relation* of a Subject. By that Policy, all real Property was held, mediately or immediately, *of* the King: In the King himſelf, All real Property was *allodial*.

The preciſe Definition of what conſtituted a Diſſeiſin which made the Diſſeiſor the Tenant to the Demandant's *Præcipe*, though the right Owner's Entry was not taken away, was *once* well known: But it is not *now* to be found. The more We read, unleſs We are very careful to diſtinguiſh, the more We ſhall be confounded. For, *after* the Aſſize of *Novel Diſſeiſin* was introduced, the Legiſlature, by many Acts of Parliament, and the Courts of Law, by liberal Conſtructions in Furtherance of Juſtice, *extended* this Remedy, for the ſake of the Owner, to *every* Treſpaſs or Injury done to his real Property; if, by bringing his Aſſize, He thought fit to *admit* himſelf diſſeiſed.

It lay againſt Adviſers, Aiders, or Abettors, who were not Tenants. *Co. Lit.* 180. *b.* It lay againſt the Tenant who was no Diſſeiſor; as the Heir of a Diſſeiſor, or his Feoffee. *Stat. Gloceſter.* It lay for the Owner, againſt the Diſſeiſor of the Diſſeiſor. The Tenant's not being ready to pay a Rent Seck when demanded, was, for the Benefit of the Owner's Remedy, a Diſſeiſin. *Lit.* § 233. It lay for outrageous Diſtreſs. 2 *Inſt.* 412. It lay againſt Guardian, or particular Tenant who made a Feoffment, as well as againſt their Feoffees. 2 *Inſt.* 413. The Stat. of *Weſtm.* 2. *c.* 25. extends it to a Man's Depaſturing the Ground of another; or taking Fiſh in his Fiſhery. If One receives my Rent without my Conſent, I may elect to make him a Diſſeiſor. *Style* 407. If a Guardian aſſigns Dower to a Woman not Dowable; the Owner may elect to make her a Diſſeiſoreſs. 24 *Ed.* 3. 43. (cited in *Cro. Car.* 203.) In a Word; For the ſake of the Remedy, as between the true Owner and the Wrong-doer, to puniſh the Wrong; And, as between the true Owner and naked Poſſeſſor, to try the Title; The Aſſize was *extended* to almoſt every Caſe of Obſtruction to an Owner's full Enjoyment of Lands Tenements or Hereditaments.

The Reports of Aſſize can only relate to Caſes, where the Owner *admits* himſelf diſſeiſed.

The Law-Books treat of Diſſeiſin, with a View to the *Aſſize*; which was the common Method of trying Titles, till Ejectment came in Uſe.

Littleton, who wrote long after the Remedy by Aſſize was enlarged by Statutes and by an equitable Latitude of Conſtruction, ſpeaks of Diſſeiſins principally as between the Owner and Treſpaſſer or Poſſeſſor, with an Eye to the Remedy by *Aſſize*.

Theſe are the common Places from whence many Deſcriptions have been cited of a DISSEISIN. But ſuch Authorities can give little

little Light to the *preſent* Queſtion, which depends upon the Nature of *ſuch* a Diſſeiſin as made the Diſſeiſor Tenant to every Demandant, and Freeholder *de facto*, IN SPITE *of the true Owner*. Yet the Definitions in the Books, (though very imperfect,) ſavour often of that which originally was an actual Diſſeiſin, *in ſpite* of the Owner.

Littleton, in § 279. defines Diſſeiſin, with an *&c:* " Where a " Man enters into Lands or Tenements (where his Entry is not " congeable,) and ouſteth him which hath the Freehold, *&c.*"— The Comment ſays, " *Every* Entry is no Diſſeiſin, unleſs there be " an *Ouſter of the Freehold.*" And *Co. Lit.* 153. *b.* ſays, " *Diſſeiſin* is putting a Man out of *Seiſin*, and ever implies a Wrong: " But *Diſpoſſeſſion* or *Ejectment*, is putting out of *Poſſeſſion*, and " may be by Right *or* Wrong. *Diſſeiſin eſt un perſonal Treſpaſs de* " *tortious* Ouſter del Seiſin."

Though the *Term* " DISSEISIN," uſed, happens to be the ſame; the *Thing ſignified* by that Word, as applied to the two Caſes of *actual* Diſſeiſin, or Diſſeiſin *by Election*, is very different. This Diſtinction of Diſſeiſin *at Election*, is made in the Caſe of *Blunden* v. *Baugh*, *Cro. Car.* 303. of which Caſe, We have ſeen a Manuſcript Report, fuller than the printed One. The three Judges, with whom agreed the four Judges of the Common Pleas, argued and held " That the Leſſee for Years of the Tenant at Will, was " a Diſſeiſor at the *Election* of the Original Leſſor, for the ſake of " his Remedy; but never could be looked upon as the Freeholder, " or a Diſſeiſor *in ſpite* of the Owner, or with regard to *third* Per- " ſons." The Manuſcript Report ſays, if a *Præcipe* was brought againſt him, He might ſay " I am not Tenant to the Freehold." A Variety of like Caſes are put in *Cro. Car*; (to which I refer—:) In the Manuſcript Report, there are more.

When the eaſy ſpecific Remedy was by *Aſſize*, where the Entry was not taken away, the injured Owner might, for his Benefit, elect to conſider the Wrong as a *Diſſeiſin*. So, ſince an *Ejectment* is become the eaſy ſpecific Remedy, He may elect to call the Wrong a *Diſpoſſeſſion*.

Where an *Ejectment* is brought, there can be *no Diſſeiſin*; becauſe the Plaintiff may lay his Demiſe when his Title accrued, and recover the *Profits* from the *Time* of the Demiſe. The Entry confeſſed is previous to making the Leaſe: But there is *no* real or ſuppoſed *Re-Entry*, after the Ejectment complained of. If it was conſidered as a Diſſeiſin, No *meſne Profits* could be recovered without an *actual* Re-Entry.

If the Leſſee for Life, or Years, makes a Feoffment, the Leſſor may ſtill diſtrain for the Rent; or charge the Perſon to whom it is paid, as a Receiver; or bring an Ejectment; and *chooſe* whether he will be conſidered *as diſſeiſed*. *Metcalf on the Demiſe of Kynaſton* v. *Parry and others*; A Caſe reſerved at *Salop* Aſſizes 25th *March* 1742, for the Opinion of the Court of Exchequer; (who gave Judgment in it, on the 24th of *November* 1743,) was this. Tenant in Tail, of Lands leaſed by his Father, to a Second Son, for Lives, (under a Power,) upon his Father's Death received the Rent from the Occupier, as Owner and as if no ſuch Leaſe had been made, during his whole Life. He ſuffered a Common Recovery. It was holden "That this was only a Diſſeiſin of the Freehold *at Election*; "and that therefore He could *not* make a good Tenant to the "*Præcipe*:" And the Recovery was adjudged *bad*.

Except the Special Caſe of Fines with Proclamations, (which ſtands entirely upon diſtinct Grounds,) and the Conſtruction of the Stat. of 4 *H.* 7. *c.* 24. for the ſake of the Bar; I cannot think of a Caſe, where the true Owner, whoſe Entry is not taken away, *may not* elect, (by purſuing a poſſeſſory Remedy,) to be deemed as *not* having been *diſſeiſed*.

The Conſequences of *actual* Diſſeiſins, conſidered *as ſuch*, continue Law to this Day. The Diſſeiſee cannot diſpoſe, or deviſe: The Deſcent takes away his Entry. There are two Caſes cited in the Caſe of *Blunden* v. *Baugh*, material to this Point. *Pouſley* v. *Blackman*, *B. R. Trin.* 18 *Jac. Rot.* 1230. *Palmer* 201. which is more fully ſtated in the Manuſcript Report, than in * *Croke*. The Caſe (in Effect and Operation) was this. Tenant at Will made a Leaſe for Years: The Original Leſſor deviſed. Though the Leaſe by Tenant at Will, at the *Election* of the Original Leſſor was a *Diſſeiſin*, Yet they adjudged his Deviſe good; becauſe he had *not elected* to *admit* himſelf diſſeiſed; and, by making a Will, intimated the *Contrary*.

* *V. Cro. Jac.* 659 S. C.

Another Caſe, (not in the Report in *Cro. Jac.* but cited in the Manuſcript,) was in the 14th of *Eliz.* Sir *Ambroſe Cone*, of his own head, entered into Lands of Sir *William Hollis*; and paid Sir *William*, afterwards, a certain Rent, claiming to hold as Tenant at Will; and died. His Heir entered: Upon whom, Sir *William* entered. It was adjudged "That at the *Election* of Sir *William* "Sir *Ambroſe* was a Diſſeiſor: But as Sir *William* had not deter- "mined his Election before the Death of Sir *Ambroſe*, and entered "upon his Heir, It was *no Diſſeiſin*; and conſequently, the De- "ſcent no Bar to his Entry."

In

In the Case of *Pously* v. *Blackman*, *Palmer* 205, It is said, " If " a Disseisee devise, and afterwards enter; the Devise is good:" Which *Dodderidge* denied, and said there must be a new Publication. Which seems right, *if* there ever *was* a Disseisin: For, where an *actual Entry* is necessary, it will not make good a Conveyance made *before*; as was holden in *B. R. & Dom. proc.* in the Case of * *Berrington* v. *Parkhurst*. The *actual Entry could not support* the Lease made *before*. Yet in † *Salk.* 237. It is agreed, " the Devise is good, because he was *seised ab initio*, so as he might " bring Trespass:" *i. e.* He *never* was *disseised* at all, *by his Election*; and he might make *that Election*, without an Entry; He might bring his Ejectment, he might bring Trespass, *without* a Re-Entry. If it was not for this Doctrine of *Election*, what a Condition would Men be in!

* *May* 1738.

† 1 *Salk.* 237. *Bunter* v. *Coke.*

In the Case of *Pousley* v. *Blackman*, there was *no Entry:* And after much Argument, it was at last resolved unanimously by the whole Court, from the Inconveniences which would be introduced if a Lessee by a secret Contract with a Stranger could defeat the Will of his Lessor, " *That the Devise was good.*" And in the Manuscript Report where it is cited, One Point said to have been resolved, is " That the Owner, *by making a Devise*, shewed his " ELECTION, NOT *to be disseised.*"

I will now consider Whether *James Earle* can be deemed a good *Tenant of the Freehold by Disseisin.*

DISSEISIN is a *Fact*. It is *not found:* All the Jury say, is " That soon after the Judgment in Ejectment, Sir *Robert entered* " *and was in Possession.*" This must be taken to be an Entry *in consequence of the Judgment*—It was so considered upon settling the Special Verdict: Otherwise the Defendants have no Case; For it is not found, That Lady *Atkyns* was ever ousted, or quitted the Possession, or that Sir *Robert* ever was seised.

Taking Possession, *under a Judgment in Ejectment*, never could be a *Disseisin of the Freehold.*

Suppose it a *real* Proceeding—The Termor of a Disseisee might, at the old Law, recover against the Disseisor: He might recover against the Feoffee of his Lessor. But he never could thereby become a *Disseisor of the Freehold:* He never could be other than a Termor, enjoying, in the Nature of a Bailiff, by Virtue of a real Covenant. In respect of the Freehold, his Possession enured always by *Right*, and never by *Wrong*. If the Lessor had infeoffed, it enured to the *Alienee*; If the Lessor was disseised and might enter,

It enured to the *Diſſeiſee*; If his Entry was taken away, it enured to the *Heir or Feoffee of the Diſſeiſor*, who in *that* Caſe had the Right of Poſſeſſion.

Suppoſe the Proceeding (as it is) a *fictitious* Remedy. Then in Truth and Subſtance, a Judgment in Ejectment is a Recovery of the *Poſſeſſion*, (not of the *Seiſin* or *Freehold*,) without Prejudice to the *Right*, as it may afterwards appear, even between the Parties. He who enters under it, in Truth and Subſtance can only be *poſſeſſed according to Right, prout Lex poſtulat.*

If He has a Freehold, He is in as Freeholder. If He has a Chattel-Intereſt, He is *in* as a Termor; and in reſpect of the Freehold, his Poſſeſſion enures *according to Right*. If He has no Title, He is *in* as a Treſpaſſer; and, without any Re-Entry by the true Owner, is liable to account for the Profits.

It is found, That the Ejectment was brought by Sir *Robert Atkyns*, to recover the *Poſſeſſion:* But it is not found, that He claimed the *Freehold.*

The Title muſt *now* be taken as in *this Special Verdict.* Therefore it appears he had *no Right* to the *Poſſeſſion.* His *Feoffee* could be in no other Condition than *himſelf:* He had a Poſſeſſion, without Prejudice to the *Right*; and could convey *no other*. He was not *in* as a particular Tenant;—There was no Privity of any Seiſin;—He had only a *naked* Poſſeſſion.

But the Caſe is ſtill ſtronger. The true Owner cannot even elect to make a Perſon in Poſſeſſion *under a Judgment in Ejectment*, a Disseisor. He could not bring an Aſſize of *Novel Diſſeiſin:* The Entry is *not injuſtè & ſine Judicio*; but *under* Authority of a Court of Juſtice, and *lawful*; therefore not liable to Puniſhment by Fine, (as every Diſſeiſin was.)

The true Owner may enter upon a Diſſeiſor: But after a Judgment in Ejectment, an actual Entry would not be permitted. If there *had* been any Election in this Caſe; the true Owner elected "*not to be diſſeiſed*," and recovered by Ejectment: Which, if there had been a Diſſeiſin, would have purged it.

But there is ſtill behind, (though it happens not to be neceſſary,) a *larger Ground*, upon which to determine this Queſtion; and more ſatisfactory, becauſe more intelligible; from the *Nature of a Common Recovery now*, and a Feoffment to make a Tenant to the *Præcipe*, with *that* View *only*.

The Senſe of wiſe Men, and the general Bent of the People in this Country, have ever been againſt making Land perpetually unalienable. The Utility of the *End* was thought to juſtify any *Means* to attain it.

Nothing could be more agreeable to the *Law of Tenures*, than a Male Fee unalienable. But this Bent " to ſet Property free" allowed the Donee, *after* a Son was born, to deſtroy the Limitation, and break the Condition of his Inveſtiture.

No ſooner had the *Statute de Donis* repeated what the Law of Tenures ſaid before, " that the Tenor of the Grant ſhould be ob- " ſerved;" than the ſame Bent permitted Tenant in Tail of the Freehold and Inheritance, to make an Alienation, *voidable* only, under the Name of a *Diſcontinuance*. But *this* was a ſmall Relief.

At laſt, the People having groaned for 200 Years under the Inconveniences of ſo much Property being unalienable; and the Great Men, to raiſe the Pride of their Families, and (in thoſe turbulent Times) to preſerve their Eſtates from Forfeitures, preventing any Alteration by the *Legiſlature*;—The ſame Bent threw out a * *Fiction*, in *Taltarum*'s Caſe; by which, Tenant in Tail of the Freehold and Inheritance, or with Conſent of the Freeholder, might alien abſolutely.

* *Pigott, of Common Recoveries, pa.* 7, 8, 9, 10.

Public Utility adopted and gave a Sanction to the Doctrine; for the *real* political Reaſon, " to break Entails:" But the *oſtenſible* Reaſon, " from the fictitious *Recompence*," hampered ſucceeding Times, how to diſtinguiſh Caſes which were within the falſe Reaſon given, but not within the real Policy of the Invention. 'Till, at laſt, the *Legiſlature* applauded Common Recoveries, and *lent their Aid* by the Acts of 11 *H.* 7. *c.* 20. 33 *H.* 8. *c.* 31. 34 & 35 *H.* 8. *c.* 20. 14 *Eliz. c.* 8. and lately 14 *G.* 2. *c.* 20: (Which is a retroſpective and declaratory Law, and ſeems to have reſtored the Original Tenant to the *Præcipe.*) Before the Statute of *Quia Emptores terrarum*, *Subinfeudations* whereupon Rents and Services were reſerved, did not prevent the *Præcipe's* lying againſt the Freeholder of the Seignory. When common Leaſes to Farmers, for One or more Life or Lives, reſerving Rent, came in Uſe; They, for that Purpoſe, *reſembled Subinfeudations*, and ought not to prevent the *Præcipe* being brought againſt the Owner of the Freehold, under which ſuch Leaſes were granted.

As the *Legiſlature* has, for Ages, *avowed* the Propoſition; We may *now* ſay " that Common Recoveries are a mere *Form of Con-* " *veyance.*"

" *veyance.*" All neceſſary Circumſtances of Form and Ceremony, are taken from it's fictitious Original.

The Policy of *this Species* of Alienation meant to take a *middle* Way as to Entails, between Perpetuities and abſolute Property.

Alienations were *allowed*; yet in ſuch a Shape as neceſſarily required *Deliberation* and *Delay:* And they were only allowed to be made by Tenant in Tail in *Poſſeſſion*; or by Tenant in Tail in Remainder, *with Conſent* of the Owner of the firſt Eſtate for Life. The Eldeſt Son was reſtrained in the Life-time of his Father, or Mother, or any other Anceſtor or Relation, ſeiſed for Life, under a Family Settlement.

The Act of 14 *G.* 2. proceeds, upon the Parties to a Recovery having *Power to ſuffer it.* Sir *Robert Atkyns* the Son had *no* Right to ſuffer a Common Recovery, without the *Concurrence* of the Jointreſs. Any Contrivance to do it *without* her Joining, is Artifice and Evaſion.

If Tenant in Tail in Poſſeſſion is diſſeiſed; though the *Præcipe* be brought againſt the Diſſeiſor, yet, if *he* is vouched, the Recovery ſhall bar; Becauſe *he* had *Power to bar.*

In *Lincoln* College Caſe, 3 *Co.* 59. The Judges ſupport the Collateral Warranty of *Sibil*; *becauſe* She and *Edward* had *Power to bar.*

In *Jenning*'s Caſe, 10 *Co.* 44. The Recovery is ſupported, *becauſe* the Parties had *Power.*

By Parity of Reaſon, *this* Recovery ought *not* to be ſupported, *becauſe* the Parties had NO Power: If it was; the Law muſt be overturned.

Every Remainder-Man in Tail might eaſily get a *naked* Poſſeſſion, and make a *ſecret Feoffment.*

The Plan of Marriage and other Family Settlements, is " to " limit a Remainder to the firſt, and every other Sons in Tail." The *Negative* which the Father now has upon the eldeſt Son's ſuffering a Common Recovery, is the very *Means* and *Conſideration* of getting the Eſtate re-ſettled, upon the Marriage of the Eldeſt Son. By *this* Method, the Moment he attains to the Age of 21 Years, He may ſet his Father at Defiance, ſuffer a Common Recovery, and bar all the reſt of the Family. *This Conſequence alone,* in a Caſe *unprecedented,* is a ſufficient Objection.

2 When

When a Termor, after the 4th of *H.* 7th, made a Feoffment, and levied a Fine with Proclamations, and inſiſted upon 5 Years Non Claim, the Judges, with ſtrong Senſe, ſaid, though a Feoffment by Tenant for Life, or Years, or at Will, is a Diſſeiſin; It ſhall *not* operate as a Diſſeiſin, to enable the *Termor himſelf* to bar the Inheritance, by a Fine with Proclamations according to the 4 *H.* 7. *c.* 20. For, ſay they, "It was never the Intent of the Makers of "the Act, that thoſe who could not levy a Fine, ſhould by making "an Eſtate *by Wrong and Fraud*, be enabled to bar thoſe who had "Right. For if they themſelves, *without ſuch fraudulent Eſtate*, "could not levy a Fine to bar them who had the Freehold and "Inheritance; Certainly the Makers of the 4th of *H.* 7. *c.* 20. did "not intend that by making of an Eſtate *by Fraud and Practice*, "they ſhould have Power to bar them: And ſuch *fraudulent* Eſtate "is as *no* Eſtate, in the Judgment of the Law." So ſay I, in the preſent Caſe. It was never the Intent, that thoſe *who could not ſuffer a Recovery*, ſhould, by making an Eſtate *by Wrong and Fraud*, be enabled to bar thoſe in Remainder or Reverſion who had Right. For if they themſelves, *without ſuch fraudulent Eſtate*, could not ſuffer a Recovery to bar thoſe in Remainder and Reverſion; Certainly, the Framers of this qualified Species of Alienation, did not intend, that by making an Eſtate *by Fraud and Practice*, they ſhould have Power to bar them: And ſuch *fraudulent* Eſtate is as *no* Eſtate, in the Judgment of the Law.

The Judges then put many Caſes, where a Recovery in Dower, or other real Action; a Remitter to a Feme Covert, or an Infant; a Warranty; a Sale in Market Overt; the King's Letters Patent; a Preſentation; an Adminiſtration;—In ſhort, all Acts Temporal and Eccleſiaſtical, ſhall be *avoided by Covin*: And from thence argue that a Fine which the Parties had *no Power to levy directly*, ſhall not be ſupported *indirectly* by Covin. So argue I, in the preſent Caſe: A Common Recovery which the Parties had *no Power* to ſuffer *directly*, ſhall *not* be made good *by Wrong and Fraud*.

In the Spirit of the Makers of the 14 *G.* 2, I ſay the Parties to this Recovery had *not* Power to ſuffer it: *Therefore* it is *ſubſtantially bad*.

This is *not* the Caſe of a Feoffment to a *third* Perſon, for *his own* Benefit: It is, in Effect, to the Uſe of Sir *Robert*, the *Wrong-Doer*, *himſelf*. The Law conſiders a *Feoffee to the Intent to be Tenant to the Præcipe*, as a *mere Inſtrument* for *one* Purpoſe of *Form only*. His Wife ſhall *not* be endowed; His Statutes or Judgments ſhall *not* affect the Land; If he had a Term for Years, it ſhall *not* merge. Let me appeal then to the oldeſt Authorities, in thoſe Times when

the Solemnity and Notoriety of Feoffments, and the Feudal Veneration in which they were held, gave them all that wonderful Efficacy We read of: Could a Man, by *his own injurious* Feoffment, have acquired an Advantage to himſelf? *Littleton* ſhall anſwer: He tells us what was eſtabliſhed long before he wrote. *Lit.* § 395. " If a Diſſeiſor infeoff his Father in Fee, and the Father die ſeiſed " of ſuch Eſtate, by which the Lands deſcend to the Diſſeiſor as " Son and Heir, *&c*; In this Caſe, the Diſſeiſee may well enter " upon the Diſſeiſor, notwithſtanding the Deſcent: For that as to " the Diſſeiſin, the Diſſeiſor ſhall be adjudged in *but as a Diſſeiſor*, " notwithſtanding the Deſcent; *Quia Particeps Criminis.*"

After the Statute *De Donis*, Tenant in Tail in Remainder, with the *Concurrence* of the Freeholder, might make a *voidable* Alienation, by *Diſcontinuance:* But he could not acquire to himſelf that Privilege, by an *injurious* Entry and Feoffment. " He in Remain- " der in Tail diſſeiſes Tenant for Life, and makes a Feoffment, and " dies without Iſſue, and the Tenant for Life dies; He in Rever- " ſion may enter: It is no Diſcontinuance." *Co. Lit.* 347. *a. b.* It is no Diſſeiſin of the Reverſion. " If Remainder-Man for Life " diſſeiſe the immediate Tenant for Life; after the Death of the " immediate Tenant, he is in as Tenant for Life." Neither ſhould a Reverſioner, by an injurious Entry upon the Tenant for Life, be, in reſpect of Strangers, allowed to tranſmit to his Heir the Privilege of Deſcent. If the Reverſioner diſſeiſes Tenant for Life, and dies ſeiſed; the Deſcent ſhall not take away the Entry of a Stranger. *Hob.* 323.

From the Whole, We may conclude—*If, before* the Introduction of Common Recoveries as a Conveyance, this Queſtion had been agitated in an *Adverſary* Real Action, upon a Plea " that " *Earle* was not Tenant of the Freehold;" It would have been adjudged, from the Law and artificial Learning of Tenures, " that " He could *not* be ſo conſidered." *If* the Queſtion had been, " Whether Tenant in Tail in Remainder ſhould, by ſuch *injurious* Entry and Feoffment, acquire a *Benefit to himſelf*, to the *Prejudice of his Reverſioner*; It would have been adjudged, from eternal Principles of Juſtice, " that an Act founded in Wrong ſhould *not*, by " *Virtue of the Crime itſelf*, become legal, for the *Author's Advantage.*

As it is *now* agitated, when Common Recoveries are eſtabliſhed, as a *Species of Alienation*;—The only Queſtion is, " Whether the " *Rule* of Law which *requires the Concurrence* of the Owner of the " firſt Eſtate for Life, ſhall be *overturned.*" 'Tis better to ſubvert the Rule directly, than ſuffer it to be done by a *ſecret injurious* Entry and Feoffment; which cannot be prevented, and which the Owner may never hear of.

There

There is no Injury or Wrong for which the Law does not provide a Remedy. But if this Stratagem ſhould prevail, Redreſs muſt follow *too late*; unleſs the Entry of the Tenant for Life ſhall *avoid* the Recovery. If it would, there is an End of the preſent Queſtion: For the Jointreſs entered, and was intitled to the Profits from Sir *Robert Atkyns* as a Treſpaſſer *ab initio*.

In *every* Light, and upon *every* Ground of Law, this Recovery is *bad*.

As there is no Bar to the RIGHT of the Leſſor of the Plaintiff—

Second General Queſtion.

The ſecond General Queſtion is "Whether the Leſſor of the "Plaintiff is, by the *Statute of Limitations*, barred from recovering "in THIS *Ejectment*.

This Point was certainly not inſiſted upon at the Trial: And therefore the Special Verdict is not adapted to it. The abſtruſe Learning, upon which the Validity of the Common Recovery depended, might engroſs the whole Attention at the Trial: And the Special Verdict having no Facts, (which eaſily might have been found,) particularly applicable to an Objection from the Statute of Limitations, might occaſion the Queſtion not having been made at the Bar, till the laſt Argument. The Point however is certainly *open*, upon this Special Verdict.

An Ejectment is a *poſſeſſory* Remedy, and only competent where the Leſſor of the Plaintiff *may enter*: Therefore it is always neceſſary for the Plaintiff to ſhew, that his Leſſor had a *Right to enter*; by *proving* a Poſſeſſion within 20 Years, or *accounting for the want* of it, under ſome of the Exceptions allowed by the Statute. *Twenty Years* adverſe Poſſeſſion is a *poſitive Title* to the Defendant: It is not a Bar to the *Action* or *Remedy* of the Plaintiff, only; but takes away his *Right of Poſſeſſion*.

Every Plaintiff in Ejectment muſt ſhew a *Right of Poſſeſſion*, as well as of *Property*: And therefore the Defendant needs not *plead* the Statute, as in the Caſe of Actions.

The Queſtion then is, Whether it appears upon this Special Verdict, "that the Leſſor of the Plaintiff *might* ENTER, when he "brought this Ejectment."

On the 9th of *November* 1711, Sir *Robert Atkyns* died without Iſſue Male.

On the 9th of *October* 1712, Lady *Atkyns*, the Jointreſs, died. *Then* accrued the *Title of Entry* of the Leſſor of the Plaintiff. His only *Excuſe for not entering* is, " That He was *prevented* by the " ſaid LEASE of the 31ſt of *May* 1698, *to the three Dacres.*"—That upon the Death of *Thomas Dacres* the Surviving Leſſee, on the 23d of *July* 1752, a *new Title of Entry accrued: Upon which*, He entered on the 15th of *December* 1752; and brought this Ejectment.

Three Anſwers are given: Any one of which, if well founded, is ſufficient.

1ſt. That the ſaid Leaſe was abſolutely *void*, and of no Effect.

2d. If good, It *determined* by the Eſtate Tail being ſpent; by the expreſs Tenor of the Demiſe.

3d. If ſubſiſting, yet, upon the Extinction of the Eſtate Tail, It was a *Truſt to attend the Inheritance* in the Leſſor of the Plaintiff, and made *part of his Title Deeds:* Therefore could not ſtop the Statute's running, to protect an adverſe Poſſeſſion, nor give Him any new Right of Entry.

Firſt. That the *Leaſe* was *void.*

1ſt Anſwer to the Excuſe for not entering.

Sir *Robert Atkyns* the Father, being only Tenant for *Life*, could, by Virtue of his *Ownerſhip*, make no Eſtate to continue after his Death. This Leaſe, therefore, after his Death, can only be ſupported by his *Power*; if it was made purſuant to it.

" Whether it *was* made purſuant to his Power," is the Queſtion.

The Limitation and modifying of Eſtates, by Virtue of Powers, came from Equity into the Common Law, with the Statute of Uſes. The *Intent* of Parties who gave the Power, ought to govern every Conſtruction. He to whom it is given, has a Right to enjoy the full Exerciſe of it: They over whoſe Eſtate it is given, have a Right to ſay " It ſhall not be exceeded." The Conditions ſhall not be evaded; It ſhall be *ſtrictly purſued*, in Form and Subſtance: And all Acts done under a Special Authority, *not* agreeable thereto, nor warranted thereby, muſt be *void.*

Of all kinds of Powers, the moſt frequent is that " to *make* " *Leaſes.*" For the Encouragement of Farmers, to occupy, ſtock, and improve the Land, It is neceſſary they ſhould have ſome *permanent* Intereſt. *Unleſs* the Owner of the Eſtate for Life was enabled to make a *permanent* Leaſe, He could not enjoy to the beſt

Advantage, during his *own* Time: And they who come *after*, muſt ſuffer, by the Land being un-tenanted, out of Repair, and in a bad Condition. The Plan of this Power is for the *mutual* Advantage of Poſſeſſor and Succeſſor. The Execution thereof is checked with many Conditions, to guard the Succeſſor; that the Annual Revenue ſhall not be diminiſhed; nor Thoſe in Succeſſion or Remainder, at all prejudiced in Point of Remedy, or other Circumſtance of full and ample Enjoyment.

There are *two* Methods of Leaſing, in common Uſe in this Kingdom: At the beſt Rent; And upon Fines; which, as the Lives or Leaſes drop, are conſidered among the annual Profits. This Power is always adapted to *both*. It is inſerted in almoſt every ſtrict Settlement of every kind. It is inſerted in the Greater Deed of the 12th of *June* 1669; and given indiſcriminately to Sir *Robert* the Father, Sir *Robert* the Son, and *Lovis* his Wife.

The Nature and View of a Power, ſo uſually given, is well underſtood: And Courts of Juſtice have always looked with a jealous Eye, to ſee that the Conditions in Favour of the next Taker be *purſued*; not literally only, but *ſubſtantially*. It is not ſufficient that the antient Rent be reſerved: It muſt be reſerved with all the *Beneficial Circumſtances*. If payable before, at four, It cannot be reſerved at two Payments. Lord *Mountjoy*'s Caſe, 5 *Co.* 3. *b.* The whole Rent muſt be payable annually during the whole Term. In that Caſe, It was holden that leſs could not be reſerved, even to the Leſſor himſelf, during his own Life.

One of the Reaſons in *Elmer*'s Caſe, 5 *Co.* 2. ſhews the Rent muſt be payable annually during the Term.

In the Caſe of *Lady Charlotte Orby & al'* v. *Lady Mohun*, 2 *Vernon* 531, 542, Lord *Cowper*, *Holt*, and *Trevor*, All three held clearly, that a Leaſe "reſerving the *beſt Rent*," though good againſt an Owner of the Inheritance, was *void under a Power:* And *Cowper* and *Trevor* held, That reſerving "the *Ancient Rent*," where Lands had been uſually demiſed; though good and certain enough by Reference, againſt an Owner of the Inheritance, was void *under a Power*; Becauſe it put the Remainder-Man *under Difficulties* in avowing.

"The Intent was," ſay they, "that the Tenant for Life in "Poſſeſſion might leaſe: So it was, on the other hand, that the "Revenue ſhould not be diminiſhed; but the ancient Rent, at leaſt, "reſerved; and in *ſuch beneficial Manner*, as might with Certainty, "and without any Difficulty be recovered."

" The Queſtion here is not," ſay they, " Whether the Leaſe is " void for Incertainty, as between the Leſſor and Leſſee; but whe- " ther *All Requiſites* are obſerved, and *ſuch beneficial Clauſes and* " *Reſervations* as ought to have been, for the *Benefit of a third* " Perſon, the Remainder-Man."

In the Caſe of the *Earl of Cardigan* v. *Montague*, 6th *June* 1755, A Decretal Order on the Maſter's Report; The Duke of *Montague*, Tenant for Life, without Impeachment of Waſte, had Power to leaſe, reſerving ancient Rent where uſually demiſed, and beſt Rent where not uſually demiſed: He made 24 Leaſes. The Maſter's Report, as to many of the Leaſes, which He reported bad, was ſubmitted to: As where ancient Covenants " to grind at Mills, " or to pay Land Tax," were not in the new Leaſe;—Where ſome Part, not within the Power, is included in the Leaſe;—Where many Manors were included in the Leaſe, reſerving a Sum certain, as the beſt Rent; which laid the Remainder-Man under Difficulties, to find out whether it was the beſt Rent or not. As to Five of them, which the Maſter reported to be good, Exceptions were taken. Their Validity turned upon this Caſe. The Words in the Power were " Reſerving ancient, uſual, and accuſtomed " Rents, Herriots, *Boons*, and Services." In the former Leaſes, the Tenants covenanted " to keep in Repair:" That Covenant was *omitted* in this. The Lord Chancellor was of Opinion, that that Covenant was a *Boon*, and *beneficial to the Remainder-Man*; and held theſe Leaſes *void, for Want of it*. He took ſome Days to conſider; and declared He was clear upon the Argument, but took time, becauſe there was no Caſe in Point. The more He thought of it, the more he was convinced. The Principle He reſted upon was, that the Eſtate muſt come to the Remainder-Man, in *as beneficial* a Manner, as ancient Owners held it.

I have gone ſo far at large into the General Doctrine, not from any Difficulty; but becauſe the Point is of ſo much Conſequence to the Leſſor of the Plaintiff. For this Writing of the 31ſt of *May* 1698, has not Colour enough to make a Queſtion.

1ſt. It is *no Leaſe* at all. The very Definition of a Leaſe, is a Contract between Landlord and Tenant, by which *Both* are bound in *mutual* Stipulations.

A Sale and Leaſe are defin'd to be the ſame Species of Contract. A Sale cannot be, unleſs ſome-body agrees to pay the Price: Nor can there be a Leaſe, unleſs ſome-body agrees to hire, and to pay the Rent. This Writing *purports* to be ſuch a Contract. It is an *Indenture*: which implies reciprocal Inſtruments, tallying One with

the Other. It *profeſſes* being made by Sir *Robert Atkyns* on the One Part, and the three *Dacres* on the Other Part. But *it is not*: The *Dacres* are *not bound*: They *never executed* this, or any Counterpart. It does not appear they *knew* or *conſented* to the Making of it.

Livery of Seiſin was *immaterial*. A Leaſe by Virtue of a *Power*, takes Effect *out of the Settlement* that gives the Power. But *John Dacres*, who gave the Letter of Attorny to take Livery, died in 1705. *Robert* died in 1706. Sir *Robert Atkyns*, the Father, lived till 1709. Suppoſe, at his Death, 360 *l.* a Year a beneficial Rent: Thoſe in Remainder *could not demand it*. *Thomas Dacres* had *not executed* the Leaſe; He had *not accepted* it; He *never had entered* under it: *No Diſtreſs* could be taken from him; *No Action* could be brought againſt him.

One Man cannot oblige another to be his Tenant, at a high Rent, *without his Conſent*. This is ſo plain, that on the Part of the Plaintiff, they have argued that *Thomas Dacres* was bound by Acceptance; 3 Ways—

1ſt. Becauſe Livery of Seiſin was taken in the *Name* of *John Robert and Thomas*.

Anſwer. THOMAS *gave no Authority ſo to do:* It does not appear that he knew of it. But the *mere* Taking Livery of Seiſin, if he *never entered or occupied*, would *not* be ſufficient to *charge* him with the Rent reſerved.

2d. In the Ejectment brought in *Hilary* Term 1711, a *Demiſe* was laid *from Thomas Dacres*, as well as the Jointreſs: And the Plaintiff had Judgment to recover "*Separales Terminos*."

Anſwer. The two Titles are *inconſiſtent:* So there *could not* be really a Recovery upon *both*. But the Judgment purſued the Declaration; and was *mere Form*. It does not appear that *Thomas Dacres knew* his Name was made Uſe of: And He *never entered*, or *took Poſſeſſion*.

3d. That Acceptance ſhall be *preſumed*. And it is compared to Grants: And *Thompſon* v. *Leach* is cited. [*V.* 3 *Lev.* 284.]

Anſwer. The Ground of *Thompſon* v. *Leach*, and of All the Caſes there put, is, "That *a Gift imports a Benefit: And Conſent to receive* "*a* BOUNTY *may fairly be preſumed, till the contrary appear.*" But the Offer of Lands to a ſubſtantial Man at a *Rack* Rent, does *not* import ſuch a Benefit, as No-body in his Senſes could refuſe. And here, there is *no Room to preſume:* For the *Contrary* appears. *Thomas*

mas Dacres diſſented, during his whole Life; and *never took Poſſeſſion*. The Contrary appears too, from the *Writing itſelf*. It never was the *Intent*, that the *Dacres* ſhould take Poſſeſſion or pay Rent. It was to be a Conveyance only of the *Ideal* Freehold: Which might Non-ſuit the Remainder-Man, in Caſe he brought an Ejectment againſt third Perſons; or prevent his ſuffering a Recovery; but never could be any Security to him for his *Rent*.

It is immaterial, whether an Owner of the Inheritance could convey an Ideal Freehold, to delay the Tenant in Tail, claiming under his Grant, from ſuffering a Recovery.

The Queſtion *here* is, Whether it be that *uſual* Huſbandry Leaſe, reſerving a *Rack* Rent, which is *intended* by every Power of Leaſing.

It is very clear that *None of the Leſſees were bound* by this Writing; more eſpecially, that *Thomas Dacres* was not. But I go further: Sir *Robert Atkyns*, the nominal Leſſor, was *not bound* by it. The *Deed* never was out of his *own Poſſeſſion*. The declared Intent proves it a *Truſt for Sir Robert himſelf*. His Will, under which the Leſſor of the Plaintiff claims, avers it to be a *Truſt*, and deviſes it *as ſuch*.

It is no Objection to a Leaſe under a Power, "That it is *in* "*Truſt for him who executes the Power*:" PROVIDED the *legal Tenant be bound*, during the Term, in all requiſite Covenants and Conditions. But here, at the Death of Sir *Robert* the Father, Thoſe in Remainder had *no Tenant* to reſort to: And the nominal Tenant never did in Fact enter, nor could either in Law or Equity, ever have been *compelled* to *enter*, or pay One Farthing *Rent*. So that this Writing, calling itſelf an Indenture, and purporting to be a Contract, is Waſte Paper only, by which *No-body ever was bound*.

BUT ſuppoſe it had been executed by the 3 *Dacres*; It could not be ſupported as a Leaſe *within the Meaning of the Power*; upon a Variety of plain Objections, in reſpect of the *Premiſſes*, the *Rent*, and the *Remedy*.

1ſt. As to the *Premiſſes demiſed*—It comprizes too much; and lays the Remainder-Man under Difficulties to know whether the beſt Rent is reſerved. It extends to Things out of which no Rent can be reſerved; as Tithes, Rents of Aſſize, Rents of Cuſtomary Tenants, Commons, Feedings, and Lands in the ſeveral Tenures of particular Perſons.

The Condition of the Power is, That there ſhould be no Term exceeding 3 Lives in Being at the ſame Time: Yet the Demiſe extends to all and every the Rents reſerved upon *any* Leaſes or Grants.

2dly.

2dly. As to the *Rent reſerved*—The Power requires " The *beſt* " Rent that can be reaſonably got, to be reſerved *payable during* " the Term."

There is *no Covenant for Payment*. Under a mere Reſervation, it could not be payable *till Entry:* And therefore, in Fact, might *never* be payable, *during* the Term. It is not found " to be the " *beſt* Rent."

3dly. As to the *Remedy*—There being *no Covenant to pay* the Rent, the Leaſe might be aſſigned to a Succeſſion of Beggars. There being *no Clauſe of Re-Entry*, the Ground might lie unoccupied without any, or not ſufficient Diſtreſs upon it: So that the Remainder-Man could neither have his Rent nor his Land. There is *no Counterpart*; an unuſual Omiſſion, and very prejudicial.

Therefore the Leaſe could *not* have been ſupported, *if it had been executed by the* 3 *Dacres:* Which is *not* the Caſe.

Every fraudulent, unfair, prejudicial Execution of ſuch a Power, in reſpect of *thoſe in Remainder*, is *void* at Law.

If the Leaſe be a void Execution of the Power, againſt ALL *claiming under the Settlement*, It cannot be made good againſt the *Reverſion in Fee*, whereof Sir *Robert Atkyns* the Father was ſeiſed, either by Virtue of the Livery, or by way of Eſtoppel, ſuppoſing the 3 *Dacres* to have executed: Becauſe an *Intereſt* would have paſſed, during the Life of Sir *Robert Atkyns* the Father; and there is no *Eſtoppel* where any *Intereſt paſſes*; and, to make it operate *by Virtue of the Livery*, *out of the Reverſion in Fee*, would be *contrary to the whole Intent* of the Deed plainly expreſſed. Which brings Me to a ſecond Anſwer given.

2d Anſwer. Suppoſe this Pocket undelivered Grant of the Ideal incorporeal Freehold, a good Execution of the Power; They have argued that it DETERMINED *with the Eſtate Tail*; That the *only Cauſe* of the Grant being to preſerve the Reverſion *during* the Eſtate Tail muſt *qualify the Grant*, and *amount to a Limitation*; That there is *no technical* Form of Words neceſſary to expreſs a Contingency, upon which an Eſtate for Lives may ſooner determine. 2d Anſwer to the Excuſe for not entering.

The Deed might have ſaid expreſly, " If the Heirs Male of Sir " *Robert Atkyns* the Son continue ſo long;" or, " that the Leaſe " ſhould determine, if, during the Lives, the Eſtate Tail ſhould be " ſpent." That the Intent of the Deed, *plainly expreſſed*, is *tantamount*.

3d Answer to the Excuse for not entering.

3d Answer. Suppose it to subsist;—It is as a *Trust*, and devised as such, to *attend the Inheritance* of the Lessor of the Plaintiff; which came into Possession the 9th of *October* 1712: His Title and Right of Entry *then* accrued.

This Lease was One of his Muniments; a mere Weapon in his Hands: And it would be going a great Way, to say "such a *Form* "should take from an adverse Possession the Benefit of the Statute."

But as we are All clear, "That at the Trial, a *Surrender* of such "a Lease might, and ought to be *presumed*, to let in the Statute "of Limitations;" The Special Verdict, here, *not having found such Surrender*, We cannot come at the Justice of the Case in *that* Shape.

It is unnecessary to go into this Point, or the former: And it would be very improper, unnecessarily to do it.

If the *Dacres* had *no Estate* by Virtue of this Demise, upon the 9th of *October* 1712, Then this Ejectment was *not* brought *within* 20 *Years* after the Lessor's Title accrued: And no Facts are found, to excuse him within any of the Exceptions.

Therefore We are *All* of Opinion that there should be
JUDGMENT *for the* DEFENDANTS.

A WRIT OF ERROR was brought in the House of Lords; and came on upon *Thursday* 26th *January* 1758. The Counsel agreed, and were allowed, to argue the *last Point*, for the Judgment of the House, first: Because, *if* their Lordships should be of the same Opinion with the Court of King's Bench, "That *this Ejectment* was *barred* by the Statute of Limitations," It would be quite unnecessary to go into the *first* Question.

All the Judges were ordered to attend. To whom, after the Argument at the Bar was over, the House proposed the following Question, *viz.*

"Whether Sufficient appears by the Special Verdict in this "Cause, to prevent the Lessor of the Plaintiff, by Force of the "Statute of Limitations, of the 21st of King *James* the First, from "Recovering in this Ejectment.

Whereupon, the Lord Chief Justice *Willes*, having conferred with the Rest of the Judges, delivered their Unanimous Answer, "That Sufficient DOES appear by the Special Verdict in this Cause,

" to prevent the Leſſor of the Plaintiff, by Force of the Statute of " Limitations of the 21ſt of King *James* the Firſt, from Recover- " ing in this Ejectment.

Then the Judgment of the Court of King's Bench was AFFIRMED, with 5 *l.* Coſts.

Green *verſ.* Mayor of Durham.

Wedneſday 26th January 1757.

Mr. Juſt. Wilmot *abſent* (*in Chancery.*)

THIS Caſe was ſet down in the Crown-Paper, as a Special Verdict, and was ſo called; and was argued by One Counſel on each Side, in the ſame Manner as if it had been a Special Verdict: But it was only a Verdict upon Six ſeveral Traverſes to the Return of a *Mandamus* (on 9 *Ann. c.* 20.) directed to the Mayor of *Durham*, commanding Him to *ſwear* and admit *Robert Green* into the Place and Office of a Freeman of the *Company* or Fraternity of Free-Maſons, *&c.* of the City of *Durham.*

The Right ſet up by *Robert Green* was his having been duly *Elected* AND ADMITTED a Freeman of the *Company:* But the Objection to his being SWORN *by the Mayor*, was, " that He had NOT " *conformed* to certain *By-Laws* particularly ſpecified in the Return " and found by the Verdict."

The Return was—That *Durham* is and from Time immemorial hath been an Ancient City, *&c.* and alſo that a Power is given by a Charter of *Tobias* then Biſhop of *Durham*, in 44 *Eliz.* confirmed by King *James* Firſt, to the Mayor Aldermen and COMMON COUNCIL for the Time being, or the major Part of *them*, (of *whom the* MAYOR AND SIX *of the Aldermen to be* SEVEN,) to make By-Laws, in the *Stead*, *for*, and in the *Name* of the *Whole* Corporate Body of the City of *Durham* and *Framwelgate.*

Then the Return ſets forth that certain By-Laws were *duly made* by the Mayor Aldermen *and* COMMONALTY, in due Manner met and aſſembled at the Guildhall, *&c.* on 8th *November* 1728. And it particularly ſets forth and ſpecifies three ſeveral By-Laws, as having been then there *made* BY THEM; to wit—

That for the effectual preventing all Perſons being made free, that have not a Right or Title to their Freedom in the ſaid City, and for the better regulating of the ſame, The Mayor, One or more Alderman or Aldermen of the ſaid City, and the Wardens and Stewards of the ſeveral and reſpective Companies for the Time being, 1ſt By-Law.

being, SHALL *from henceforth* MEET at the Guildhall or Tollbooth in the ſaid City, *four Times* in every Year, *viz.* on the firſt *Monday* after *Martin-mas*, the firſt *Monday* after *Candle-mas*, the firſt *Monday* after *May-day*, and the firſt *Monday* after *Lam-mas*. And *Every Perſon* that is hereafter to be admitted a Freeman of the *ſaid* CITY *and* BOROUGH of *Framwelgate*, ſhall be THEN AND THERE CALLED, at *Three* of the ſaid ſeveral Meetings, BEFORE *ſuch his Admittance* to be a Freeman; AND *to be* APPROVED *of by* the ſaid Mayor and One or more Alderman or Aldermen, and the Wardens and Stewards of the ſeveral and reſpective Company or Fraternity (for the Time being) whereof He or They is or are to be made and admitted a Freeman or Freemen reſpectively, or the Majority of the ſaid Mayor Alderman or Aldermen and Wardens of ſuch reſpective Company then and there preſent.

2d By-Law. That *any Warden Steward* or *other* Freeman *that ſhall* MAKE any Perſon a *Freeman* of the ſaid *City* or of any *Company therein*, contrary to the ſaid laſt Ordinance or By-Law above-mentioned, ſhall reſpectively FORFEIT and pay the Sum of 30 *l.* to the Mayor Aldermen and Commonalty of the ſaid City of *Durham*, to be by them recovered by Action, or Diſtreſs of the Offender's Goods, or otherwiſe, and to be paid into the Cheſt or Hutch, for the Uſe of the ſaid Mayor Aldermen and Commonalty, to defray any public Expence that may happen to the ſaid Corporation or Fraternity.

3d By-Law. That in Caſe the Mayor of the ſaid City for the Time being ſhall ſwear any Perſon that has not actually ſerved Seven Years as an Apprentice with a Freeman of one of the ſaid Companies or Fraternities belonging to or uſed in the ſaid City, or ſhall not be *juſtly intitled* to the ſame by ancient Uſage or Cuſtom within the ſaid City, He ſhall forfeit and pay the Sum of 30 *l.*: Which ſaid Sum ſhall be recovered *&c. ut ſupra*, and to be paid *ut ſupra*.

All which ſaid ſeveral Ordinances and By-Laws the Return alledges to have, ever ſince the Making thereof, been conſtantly obſerved and kept *&c.* and to be ſtill in their *full Force and Virtue*, *&c.*

That *Robert Green* was NOT *elected and admitted a Freeman of the ſaid* COMPANY of Free Maſons, Rough Maſons, Wallers, Paviours, Plaiſterers, Slaters and Bricklayers.

That *Green* was *never duly called* to be a Freeman of *the ſaid City* of *Durham* and *Framwelgate*, *nor* EVER APPROVED *of by the Mayor* and one or more Alderman or Aldermen of the City of *Durham* and *Framwelgate* aforeſaid, and the Warden and Stewards of the ſaid Company or Fraternity of Free Maſons *&c.* BEFORE his ſuppoſed Election and Admiſſion to be a Freeman of the ſaid Company

or Fraternity, according to the firſt Ordinance or By-Law above mentioned, as he ought to have been.

And for *theſe Reaſons* the ſaid Mayor has not ſworn and admitted him, nor adminiſtred the Oaths to him uſually taken for the due Execution of the ſaid Office.

Upon this Return, *Green* takes 6 ſeveral Traverſes: On which, Iſſues were tried.

1ſt Iſſue. That the Mayor Aldermen and Commonalty *did* NOT *duly meet &c.* on 8th *November* 1728. in Order to make By-Laws *&c. Modo & Forma &c.*

2d Iſſue—That they did not in due Manner *make the firſt* By-Law mentioned in the Return.

3d Iſſue—That they *did* NOT in due Manner *make the ſecond* By-Law mentioned in the Return.

4th Iſſue—The *like Denial* of their *making the third* By-Law mentioned in the Return.

5th Iſſue—That He *was elected and admitted* a Freeman of the ſaid Company or Fraternity of Free Maſons *&c.* as in the Writ is alledged.

6th Iſſue—That he was *duly called* to be a Freeman of the ſaid City of *Durham* and *Framwelgate* aforeſaid, and *was approved* of by the Wardens and Stewards of the ſaid Company to be a Freeman of the ſaid City of *Durham* and *Framwelgate*.

The Jury find, As to the 1ſt Iſſue—That upon the 8th of *November* 1728, the then Mayor and Aldermen and Commonalty *did in due Manner meet and aſſemble*, at *&c.* in order *&c.* in ſuch Manner and Form as the ſaid Mayor by his Return hath alledged.

As to the 2d Iſſue—That the ſaid Mayor Aldermen *and Commonalty* did then and there, IN DUE MANNER, make the 1ſt By-Law in the Return mentioned, in ſuch Manner and Form as is therein by the ſaid Mayor alledged.

As to the 3d Iſſue—That they did in *due Manner* make the 2d By-Law, in Manner and Form *&c.*

As to the 4th Iſſue—The like Finding, with regard to the 3d By-Law.

As to the 5th Iſſue—That *Green was* elected and admitted a Freeman of the *Company*, as in and by the Writ is alledged: But that BEFORE SUCH *his Admittance*, He was *not called* at any Meeting held according to the ſaid By-Law in the ſaid 2d Iſſue mentioned, *nor approved* of by the then Mayor and one or more Alderman or Aldermen and Warden and Stewards of the ſaid Company or Fraternity, nor by a Majority of them, according to the ſaid By-Law.

As to the 6th Iſſue—That the ſaid *Robert Green* was NOT *duly called* to be a Freeman of the ſaid *City* of *Durham* and *Framwelgate*, *and approved of* by the Wardens and Stewards of the ſaid Company or Fraternity of Free Maſons, Rough Maſons *&c.* to be a Freeman of the ſaid *City* of *Durham* and *Framwelgate*.

This Caſe was argued on the 24th of *November* 1756, by Mr. *Ambler* for the Plaintiff, and Mr. *Clayton* for the Defendant, when the Court ordered it to ſtand for Judgment the then next Term.

And Lord *Mansfield* now delivered the Reſolution of the Court.

The General Queſtion depends upon *Robert Green's Right* to the Franchiſe which He claims.

The Objection to his Right ariſes from his not being *qualified according to the By-Law*.

If the By-Law is good, and binding, and He appears to be an Object of it; He is certainly not qualified, and the Mayor has returned a ſufficient Reaſon for not admitting and ſwearing him.

All the Objections which have been made, therefore, tend to *ſet aſide the By-Law*: Or, if the By-Law be good, to ſhew that *Robert Green*'s Caſe is *not within it*.

It has been argued that the By-Law is *void*, upon two Grounds;

1ſt. From *Want of Authority* to make it;

2dly. From the *Subject-Matter*.

As to the Firſt—The Objection is, That the By-Laws are returned to be made by the Mayor, Aldermen, *and* COMMONALTY; whereas the Power is given to the Mayor, Aldermen, and 24 COMMON COUNCIL or the major Part of *them*; of whom, the Mayor and Six Aldermen ſhould be Seven.

Anſwer. The Power to the ſelect Number is, " to make By-Laws " in the *Stead*, *for*, and *in the Name of the whole corporate Body*." Theſe By-Laws *might* be made by the ſelect Number, *acting* IN THE NAME *of the whole* corporate Body; and muſt be ſo *intended:* For the Jury find, " that they did in *due Manner* meet, and in *due* " *Manner* make the By-Laws."

As to the Second—That the By-Law is *unreaſonable* and *void:* For it is likened to the Caſe of the Taylors of *Ipſwich*, 11 *Co.* 53. A By-Law " that None ſhould work at his Trade, until he had " preſented himſelf to the Company of Taylors, and proved that " he had ſerved 7 Years as an Apprentice, and admitted by them " to be a ſufficient Workman."

Anſwer. In *that* Caſe, the By-Law was *againſt Law:* It was againſt the 5th of *Eliz*; and a farther Reſtraint than that Act had made.

But *this* By-Law is *not* againſt any Law—It is *not* a Reſtraint upon Trade; but ſeems a *reaſonable Regulation*, to prevent Perſons being unduly made Free, who are not intitled by Birthright, Service, or Purchaſe. It provides a Method for previouſly examining into the Right of thoſe who claim to be made free.

Obj. " That there is *no Method to compel a Meeting* of the Mayor " Alderman or Aldermen and the Wardens and Stewards of Com- " panies."

Anſwer. This Objection extends equally to *all corporate* Aſſemblies, by Cuſtom, Charter or By-Law. But there *is* a known Method, by *Mandamus*.

Obj. If a Perſon has a *Right* to be admitted a Freeman, yet unleſs He be *approved of* by the Mayor *&c.* He is not to be admitted: And there is *no Method to compel* them to *approve*.

Anſwer. If the Mayor *&c.* diſapprove, without Cauſe, a *Mandamus* will lie, ſuggeſting the Qualification and Right of the Perſon claiming to be a Freeman, and commanding the Mayor to approve and admit.

BUT Suppoſing the By-Law *good*, it has been argued, that this Caſe is *not within* it.

1ſt Obj. The *Mandamus* is, to admit *Green* to the Freedom of the *Company:* The By-Law relates only to the Freedom of the *City*.

Anſwer.

Anſwer. It appears from the ſecond By-Law, to be the *ſame* thing.

2d Obj. The By-Law prohibits indeed the Election of Perſons not called, and approved *&c.* and ſubjects Diſobedience to a Penalty; but does *not* make the Election *void*, and cannot transfer the Right of Election *veſted* in the Electors, to the Mayor *&c.*

Anſwer. Theſe Objections are founded upon a *Miſunderſtanding* of the By-Law, and a *Miſconception* of the Nature of the Caſe. The Writ recites "that *Green* had been duly elected and admitted "a Freeman;" and therefore commands the Mayor to ſwear him—The Mayor returns the By-Law *&c.* and "that *before Green*'s ſup-"poſed Election and Admittance (by the Company) to be a Free-"man, He was not called and approved by the Mayor *&c.*:" And the Fact found by the Jury is, "That He was Elected and Ad-"mitted by the Company; but not called and approved by the Mayor *&c.*" So that it appears upon this Record, that the Intent of the By-Law was, that no Perſon ſhould be Elected and admitted a Freeman of the *Company*, unleſs He was called at the Aſſembly and approved *&c.* which was a *previous* Act to be done before the Company could elect him; the way to *prevent* the Abuſe "that the Company *unduly* admitted Perſons to their Freedom:" And the ſecond By-Law inflicts a *Penalty on the Company*, who ſhould make any One free, *without* the previous Calling and Approbation; And the third By-Law inflicts a Penalty on the Mayor, who ſhould ſwear any *ſuch* Perſon.

The *Stating the Fact* anſwers both the Objections. For the By-Law makes the Appearance and Approbation a *neceſſary Qualification*, to the being made free by the *Company*, and a Reſtraint upon *them* to elect any one to his Freedom, before his conforming to the By-Law: And the Right of Election is *not transferred* to the Mayor, but *remains* where it was.

Obj. It is *Not* returned "that there *was* any Aſſembly, at which "*Green* might appear, to be called."

Anſwer. It ſhall be *intended*,—And if in Fact there was no Aſſembly, *Green* might have *pleaded* it as an Excuſe.

Obj. He might have been elected and admitted, BEFORE *the making* this By-Law.

Anſwer. The Jury have found, "that He was elected and ad-"mitted: But that He was not called and approved PURSUANT *to*

" *the By-Law.*" So that the By-Law *was in being*, at the Time of his Election &c.

It is to be obſerved, that it is *not ſtated*, what is the *Method* of the Company's Electing Freemen, nor any thing in the Charter concerning it. For aught that appears, the firſt By-Law *may* be agreeable to the ancient Uſage, and *revived* by this By-Law and enforced with Penalties. But ſuppoſing it to be *introductory* of a previous Qualification, it ſeems to be *reaſonable* and well calculated to prevent improper Perſons, not intitled, being made free. It is much more reaſonable than the Cuſtom of *London*, " that no Broad " Cloth ſhould be ſold, but what was brought to *Blackwell-hall* to " be examined; 5 *Co.* 62. Yet this Cuſtom was held good; becauſe it was to *prevent Fraud.*

We are of Opinion that *None* of the Objections are well founded; and therefore that the RETURN ought to be ALLOWED.

Conſequently, as this was the Caſe of traverſing a Return to a *Mandamus*, purſuant to the Statute of 9 *Ann. c.* 20. the Rule was taken,

That JUDGMENT be entered for the DEFENDANT.

Goodtitle, ex dimiſſ. Cheſter, *verſ.* Alker & Elmes.

Friday 28th *Jan.* 1757.

Tr. 26, 27 *G.* 2. *Rot.* 590.

THIS Caſe was firſt argued on *Tueſday* the 4th of *February* 1755, when there were only 3 Judges; Mr. Juſt. *Wright* having (two Days before) reſigned, and Mr. *Wilmot* (who was appointed to ſucceed Him) not being then called a Serjeant: And it was again argued, and determined, on this Day, (when Mr. Juſt. *Wilmot* was alſo abſent, in the Court of Chancery.)

It was a Special Verdict in Ejectment for *an Acre of* LAND lying in the Pariſh of St. *Philip and Jacob* in the County of *Glouceſter*. It finds, as to *One* Piece of Land, containing 14 Inches in Length, and 33 Feet in Breadth, (Parcel of the Premiſſes;) And as to *One Other* Piece of Land, containing 3 Feet 6 Inches in Length, and 7 Feet in Breadth, (other Parcel of the Premiſſes;) And as to *One Other* Piece of Land, containing 2 Feet in Depth and 14 Feet in Length, (other Parcel of the Premiſſes contained in the Declaration;) That *Thomas Cheſter* Eſq; was in 1648 ſeiſed in his Demeſne as of Fee, of and in the Manor of *Barton Regis* in the County of *Glouceſter*, with the Appurtenances. That the ſaid *T. C.* Eſq; being ſo ſeiſed, certain Articles of Agreement were, on 24th *June* 1648,

made between the ſaid *Thomas Cheſter* and One *John Gotley* otherwiſe *Dowle*, reciting a Preſentment by the Homage, at a Court Leet of the ſaid Manor, holden 10th of *April* 1648, " That the " ſaid *John Gotley alias Dowle*, in the new Building of a Houſe at " *Lafford's Gate*, had *encroached upon the Waſte* of the ſaid *Thomas* " *Cheſter* then and yet Lord of the ſaid Manor, 14 Inches in Length " and 33 Feet in Breadth, without his Houſe; together with a " Porch, without the Wall adjoining to the ſaid Houſe, of 3 Feet " and an half; for the which Encroachment, the ſaid *John Gotley* " *alias Dowle* was by the ſaid Jury amerced; as by the Preſentment " aforeſaid, in the Rolls of the ſaid Court, appeared;" The ſaid *Thomas Cheſter* and *John Gotley* thereby agreed, not only concerning the ſaid Amerciament, (whereof the ſaid *Thomas Cheſter* thereby acquitted and diſcharged the ſaid *John Gotley*,) But alſo the ſaid *Thomas Cheſter*, for the Conſideration thereafter mentioned, agreed to permit and ſuffer the ſaid *John Gotley* his Executors and Adminiſtrators, to continue the peaceable Enjoyment of the ſaid Ground and Waſte encroached, without his Diſturbance; And alſo to have Liberty to ſet and place a Poſt in the Street *&c.* and 3 other Poſts *&c.* without any Diſturbance or Trouble by him the ſaid *Thomas Cheſter &c*; for the Term of 100 Years from the Day of the Date of the ſaid Articles. In Conſideration whereof the ſaid *J. G. alias D.* for Him his Heirs Executors *&c.* covenanted and agreed to pay to the ſaid *T. C.* his Heirs or Aſſigns, the Sum of 6 *s.* 8 *d. per Annum* yearly *&c.* during the ſaid Term: In Conſideration whereof, the ſaid *T. C.* granted and agreed to let the ſaid Encroachment or Encroachments to ſtand, for and during the ſaid Term, without any Diſturbance *&c*; So as the ſaid yearly Rent or Sum of 6 *s.* 8 *d.* be duly paid *&c.* And it was further found, That the *two firſt* Pieces of Land particularly mentioned and deſcribed in the Verdict, are the two ſeveral Pieces of Land mentioned in the ſaid Articles to be encroached on by the ſaid *John Gotley* otherwiſe *Dowle*; and Parcel of the Waſte, and Part of the Tenement in the Declaration mentioned; and *were* ſo encroached and taken in by the ſaid *J. G.* otherwiſe *D.* IN *the building or erecting* the Meſſuage or Houſe mentioned in the ſaid Articles, ſome ſmall Time before the Date of the ſaid Articles; and then were lying in and part of the ſaid Manor, and were *part of a* PUBLIC STREET *and* KING'S HIGHWAY, called *Weſt-Street*, in the Pariſh of St. *Philip and Jacob* in the ſaid County of *Glouceſter*, and leading from the City of *London* to the City of *Briſtol*.

The Jury likewiſe find That the ſaid yearly Sum of 6 *s.* 8 *d.* was *duly and conſtantly paid*, in Purſuance of the ſaid Articles, by the Defendants and thoſe whoſe Eſtate they have, to the ſaid *Thomas Cheſter* and the ſucceſſive Lords of the ſaid Manor, (his Deſcendants,) *during all* the ſaid Term of 100 Years; *and from* the End thereof, *till Lady-Day* 1750.

Then

Then they find That the *Defendants Alker and Elmes, ſometime in the Year of our Lord* 1748, erected certain *Paliſadoes* before the Front of the ſaid Houſe, and thereby *took in and incloſed* the *third* Piece of Land, above particularly mentioned and deſcribed, then lying in and being part of the ſaid Manor, and being then other part of the ſaid *public Street and Highway*; and have kept the ſame ſo incloſed, ever ſince, to this Time: And that *that part of the ſaid Street* where the ſaid Encroachments were ſo made, at the ſeveral Times of the ſaid Encroachments, contained in Breadth (including the ſaid Encroachments) 60 *Feet and no more.*

The Jury find *Thomas Cheſter* Eſq; the Leſſor of the Plaintiff, to be Heir at Law to that *Thomas Cheſter* Eſq; deceaſed, who executed the Articles; and, as ſuch, to be ſeiſed of the ſaid Manor with the Appurtenances, as the Law requires; And that, being ſo ſeiſed He made the Demiſe to the Plaintiff: By Virtue of which Demiſe, He entered *&c.* and was ejected *&c.* But whether upon the whole Matter aforeſaid in Form aforeſaid by the ſaid Jurors found, the ſaid *G. A.* and *L. E.* are guilty *of the ſaid Treſpaſs and Ejectment*, AS TO *the ſaid three Pieces or Parcels of Land*, Parcel *&c.* by them ſuppoſed to be done, or not, the ſaid Jurors are wholly ignorant *&c.* And ſo the Verdict concludes in the ordinary Form.

Argument for the Plaintiff.

The Counſel for the Plaintiff made two Queſtions; *viz.*

1ſt Queſtion—Whether an Ejectment will *lie* for theſe Premiſſes AS DESCRIBED in the Declaration.

2d Queſtion—Whether the Defendants are at Liberty to *controvert the Title* of the Plaintiff; or are ESTOPPED from ſo doing.

Firſt—It may be objected, " That no Ejectment will lie of " Land which is *part of the King's Highway*." But it is plainly and beyond Controverſy part of the *Lord's Soil*; though it is indeed ſaid to be part of the *Highway*. This Highway is found to be 60 Feet wide. Therefore *if enough be left* for a publick Way, the *Reſt* belongs to the Lord: At leaſt, He is *not* guilty of a *Nuſance*, if he ſhould erect any thing upon the *Overplus Part of it*.

Now 60 Feet is much more than enough for any Highway: And the Encroachment is only from the Front of the Houſe; *Not in the Middle of the Highway.*

The Overplus of the Soil is not veſted in the Crown; but in the *Owner of the Soil.* 2 *E.* 4. 9. *Bro. & Fitzh. Abr.* Tit. *Chimin.* In *Tr.* 13, 14 *Geo.* 2. *C. B.* and at *Serjeants Inn*, *Selman* v. *Courtney*

Courtney (concerning giving in Evidence, a Right to a Highway,) It was unanimouſly holden " That, in Treſpaſs, the Defendant " may juſtify that it was a Highway, but cannot give it in Evi- " dence; and That the *Right to the Soil* was *not* in the Crown."

If the Highway was taken out of the Lord's Waſte, the Right and Property of it is clearly in the *Lord*; And the Lord may *diſtrain* in it: So is 17 *E.* 3. 43 *Pl.* 31. If it was not taken out of the Waſte, it belongs to the Owners of the Soil on each Side. The Caſe of *Selman* v. *Courtney (ſupra)* was ſo determined by all the Judges.

The Owner of the Soil may cut *down the Trees*, and may have an Action for *digging* the Soil. So is 1 *Ro. Abr.* 392. *Pl.* 2. and 1 *Ro. Abr.* 392. *Pl.* 3. Title *Chimin private*, Letter B.

In the Caſe of Sir *John Lade* v. *Sheppard*, *H.* 8 *G.* 2. *B. R.* The Land was the Property of the Plaintiff, who made it a Street; and the Defendant's Bridge reſted upon it; and He had (by Leave of the Commiſſioners of Sewers) arched over the Ditch, and dug the Ground, and fixed Poſts upon it. It was holden " That this " making a Street was only a Dedication of it to the Public, for the " particular Purpoſe of *paſſing and repaſſing*; but that the *Soil* be- " longed to the OWNER." *V.* 2 *Strange* 1004. S. C.

The General Queſtion is " Whether a *Part of a* HIGHWAY *be* " *recoverable in an Ejectment.*"

The Deſcription of a Highway is laid down in *Co. Litt.* 56. *a.* The *Property* of the Soil of the Highway (as has been already proved) is in the *Lord of the Soil.* An Action of Treſpaſs muſt be founded on *Poſſeſſion:* And an Ejectment is an Action of Treſpaſs. In *Cro. Eliz.* 339. *Jordan* v. *Cleabourne*—*per Popham* and *Gawdy*, It was holden to be but a perſonal Action, and a Treſpaſs in it's Nature. Therefore the Plaintiff might be *poſſeſſed* of it; and conſequently may *recover Poſſeſſion* of it, in an Ejectment: For if he has a *Right* to the Poſſeſſion, he *muſt* have a *Remedy* for it.

It is not *every* Encroachment, that is a Nuſance to the *Public:* *Some* Encroachments may ſtand. *Fitzh. Abr.* 77. *a.* N° 447. 8 *E.* 3. is one Inſtance of it. But there, the *King* muſt be intended to be the *Owner* of the Soil: Otherwiſe, the Rent would have belonged to the Owner of the Soil; not to the King.

The Sheriff *may* deliver full Seiſin of the Thing here demanded. In Proof of which, they mentioned a Note of a Caſe before Lord Ch. Baron *Pengelley*, in *Wiltſhire*; where an Ejectment was brought

for a *Cottage in the Highway*; And it was objected "That it would "not lie, *becauſe* the Sheriff could not deliver Poſſeſſion:" But Ld. Ch. B. *Pengelly over-ruled* the Objection; and ſaid that Mr. Juſtice *John Powell* had been of that Opinion which Himſelf then went upon, and had done the like.

They inſiſted very ſtrongly, that the Sheriff CAN give Seiſin of the Thing; SUBJECT TO *the Rights* of others, upon this Property, for particular *Eaſements*. *Co. Litt.* 4. *a*. *Cro. Eliz.* 421. *Welden* v. *Bridgewater*. *Co. Litt.* 48. *b*. For the Rights of others are *not* to the POSSESSION; but to *mere* EASEMENTS, which are *collateral* to the Thing itſelf. *Cro. Jac.* 263. *Sir William Wrey* v. *Veſper*. And there is no Reaſon for making any Difference between *public* and *private* Eaſements. This Argument might as well be uſed in Regard to ſuch an Eaſement, as a Right to ſet up Stalls in a Fair or Market. But the Caſe of the *Mayor of Northampton* v. *Ward* in 2 *Strange* 1238, is a full Proof "that Treſpaſs is the *proper* "Remedy for erecting *Stalls in a Market*." Now if a Perſon ſhould build a *Houſe*, inſtead of ſetting up a *Stall*; Would not an Ejectment lie, by the Owner of the Soil?

Secondly, (under the firſt Queſtion,) It will alſo be objected here, "That the Thing demanded is *not ſufficiently deſcribed*;" The Ejectment being only "for an Acre of LAND."

The Plaintiff's Counſel ſaid they did not diſpute the Caſe of *Knight* v. *Syms*, *Carth.* 204. 4 *Mod.* 97. S. C. [*V.* alſo 1 *Salk.* 254. S. C. and 1 *Shower* 338. S. C.] "That an Ejectment of "ſo many Acres of *Arable and Paſture*, without ſhewing the "*Quantum* of *each* Sort, is *not* good:" But they obſerved that in the preſent Caſe, two Anſwers may be given to this Objection; *viz.* 1ſt. That this is *no* Part of the *Doubt* of the Jury: Therefore the Court will not lay any Streſs upon it. 2dly. That the Special *Verdict has aſcertained* the Nature and the Quantity and the Situation of this Land; For it is found to be *part of the Waſte*, and is deſcribed even to *Inches*: So that *the Sheriff can have no Doubt*, WHAT to deliver Poſſeſſion of.

Second General Queſtion—The Plaintiff's Counſel ſaid that This is an *unconſcientious* Defence; as the Defendants have already enjoyed this a hundred Years under theſe Articles and have *conſtantly paid* the Rent: And therefore they are ESTOPPED from controverting the *Leſſor's Title*. They cited 1 *Salk.* 276. *Trevivan* v. *Lawrence & al'*, and 2 *Ld. Raym.* 1036, 1048. S. C. in ſupport of this Poſition; and likewiſe to prove that not only the Parties, but alſo the *Court* and *Jury*, are *bound* by this Eſtoppel: In further Confirmation whereof, they alſo cited *Co. Litt.* 352. and 231. and *Litt.* § 374.

And therefore they prayed Judgment for the Plaintiff.

Argument for the Defendants.

The Counſel for the Defendants began with obſerving upon particular Parts of the Verdict, which they thought to be material. As that it is expreſly found "That part of this Land is part of the "Street, which is *part of the King's Highway:*" And the third Parcel is expreſly found to be "*Other* Part of the ſaid Street or "*Highway.*" And the Jury likewiſe find, "That the Way is in "Breadth (including the Encroachments) 60 Feet, *and* NO *more:*" Which is FAR *from* Finding a *Surplus.* That it is *not* found "That the Defendants claim *under Gotley.*" That the Ejectment "is for "*one Acre of* LAND with the Appurtenances: But the Verdict deſcribes Three Parcels by Inches and Feet. The Plaintiff is found to be Lord of the Manor of *Barton Regis*; in which Manor this Waſte lies: And the two Pieces firſt mentioned are found to be encroached upon and taken in, by erecting a *Houſe*; And that upon the third, certain Paliſadoes were erected. And the Doubt of the Jury is "Whether the Defendants were guilty of a Treſpaſs upon "theſe *Parcels of* LAND."

Then they proceeded to their Objections.

1ſt Objection—The Plaintiff's *Demand*, and the *Finding* of the Jury, are *not agreeable* to each other; ſo as to intitle the Plaintiff to recover, upon this Verdict. For the *Demand* is of an *Acre of* LAND, *merely:* Whereas it is found "That a HOUSE is built upon "the former two Parcels." And this was a Fact within the Plaintiff's *Privity:* And therefore the Ejectment ought to have been brought *for the* HOUSE; not for the Land. So is *F. N. B. pa.* 192: Though with a *Qu.* indeed *there.* But, however, 39 *H.* 6. 8. and *Bro. Demaunde, pl.* 14. S. C. and alſo *pl.* 5. *&* *pl.* 33. ſufficiently prove "that the Demand ought to be, OF *an* HOUSE; not "of *Arable* Land;" (as the Term "*Land*" imports.) So alſo do *Plowden* 168, 170. *Hyll* v. *Graunge. Jenkins* 6th Century, *pl.* 83. *fo.* 268. *Cro. Eliz.* 234. *Hayes* v. *Allen. Co. Entr.* 642. S. C. 2 *Roll. Abr.* 704. Title *Trial, pl.* 22. and *Dyer* 47. *b. Baniſter* v. *Benjamin (in margine.)*

And if it was not to be thus *ſpecifically* demanded, *as* it is *at the Time*; there could be no Certainty how to *deliver Poſſeſſion.* And ſuch Specification would be liable to no Objection: For in *P.* 12 *G.* 1. *B. R. Sullivan* v. *Segrave,* 1 *Strange* 695. An Ejectment "de *parte* Domûs" was holden to be Good.

But here, the Verdict *finds* What the Plaintiff's Words of Demand are *not* apt and fit to intitle Him to recover.

The Sheriff may break open a Houſe, to deliver Poſſeſſion of *Part* of it. 5 *Co.* 91. *Semaine*'s Caſe, 2d Reſolution. *Style* 238: *More* than enough, is Error: And *Leſs* is bad. In 2 *Ld. Raym.* 1470. *Bindover* v. *Sindercomb*, A Deſcription of "*Part* of a Houſe" was holden to be good; becauſe it ſufficed to deſcribe it *to the Sheriff*.

Where the Land may be aſcertained, by being at the Plaintiff's Peril ſhewn to the Sheriff; yet even there, it muſt be Land of the *ſame Quality*, as was demanded; *(ejuſdem generis.)* *Savile* 28. *Caſe* 67. *The Queen* v. *Ayleworth*. *Cro. Eliz.* 265. *Scriven* v. *Prince*. *Cro. Eliz.* 465. *Portman* v. *Morgan*. A Demand of Land muſt (in *our* Law) be *certain*. *Luttrel*'s Caſe, 4 *Co.* 87. *b.*

There was a Caſe of one *Degony Green* v. *William Johns*, in 1715, where a Houſe was actually *ſawn aſunder*: (They ſaid they had the Declaration from the Heir of the Defendant.) It was an Ejectment of an Acre of Land, (but *further* deſcribed indeed,) Of which the Dean of *Exeter* was the Claimant: And, though there was no Judgment or Execution; Yet, by Conſent, the Houſe was *ſawn aſunder*, in Order to deliver Poſſeſſion.

Though *ſtrict* Nicety has of late Years been gotten over, yet *ſufficient* Accuracy and Preciſion is *ſtill* neceſſary: And *part of a* HOUSE can never be ſaid to be within the Deſcription of *Land*. *Co. Litt.* 4. *a.* is no Authority againſt this; Nor 4 *Co.* 87. *b.* And in *Cro. Jac.* 654. *Royſton* v. *Eccleſton*—Ejectment "de unâ *Domo* "& de uno *Pomario*" was holden good, upon the Principle of their conveying a *ſufficient Certainty*, ſo as that the Sheriff might deliver Poſſeſſion. *Palm.* 337. S. C. 11 *Co.* 55. *Savel*'s Caſe. 1 *Salk.* 254. *Knight* v. *Syms*. 1 *Show.* 338. S. C.

And it would be very dangerous, if *Certainty* of Deſcription ſhould not be *ſtrictly* kept to.

Second Objection. This appears to have been *Parcel of the Waſte*; and ought to have been *ſo* deſcribed: And alſo it is *part of the King's* HIGHWAY. Therefore *No Poſſeſſion*, or no *full* Poſſeſſion, at leaſt, can be delivered of it.

P. 15 *G.* 2. *B. R.* In the Caſe of *Popple* v. *Dobſon*, "*Waſte*-"*Ground*" was thought a good Deſcription: *Sed Adjourn'*. [*Cur' advif'*] *Cro. Car.* 511. *Mulcarry and*——v. *Eyres and Others*, on Error in Ejectment, from *Ireland*, "*Bogge*" was holden a good Deſcription.

And

And it being the *King's public Highway*, the Plaintiff can *never* have *Poſſeſſion* delivered of it. The Owner cannot levy a Fine of it: Nor can he *diſtrain* in it; as may be ſeen in 2 *Inſt.* 131.

In Caſes of Encroachments or Purpreſtures on it, theſe Encroachments are *upon* the *King:* And ſo is 2 *Inſt.* 272. expreſly; "Dici- "tur Purpreſtura, quando aliquid *ſuper Dominum Regem* injuſtè oc- "cupatur, ut &c. vel in *Viis publicis obſtructis.*" And the Remedy is by *Preſentment* or *Indictment.* 9 *Co.* 113. 5 *Co.* 73. *a.* 27 *H.* 8. 27. *a.* But an *Action* lies, *only* where a Man receives a *ſpecial* Injury.

How can the Plaintiff have PLENAM *Seiſinam* of this? In 1735. 8 *Geo.* 2. There was a Caſe of *Well-adviſed, ex dimiſſ. Sir Bourchier Wray & al'* v. *Foſs & al'* in Ejectment, at the Summer Aſſizes at *Exeter.* The Declaration deſcribed a Piece of Land, containing 40 Feet in Length and 4 Feet in Width, part of the Manor of *J.* But the Plaintiff was nonſuited. For The Land was part of the *Waſte:* And upon Evidence, it appeared to be *part of the* HIGHWAY, on which the Defendant had built. Lord *Hardwicke* held "That No POSSESSION *could be* DELIVERED *of the* SOIL *of the* "HIGHWAY; and therefore no Ejectment would lie of it: And if "it was a *Nuſance*, the Defendant might be indicted."

In the preſent Caſe, *All* theſe three Pieces of Land are part of the *King's Highway*, and are encroached upon: And the two former have *ſubſiſting* Nuſances upon them.

If a Highway lies within a Manor, It muſt be agreed (eſpecially as found here) that the Lord *has the Propriety of the Soil*; to be uſed *conſiſtently* with the Privileges of the Subject: But the Queſtion is, *What* REMEDY the Lord has, in Caſe of a *Nuſance* upon *ſuch Part* of his Property as lies in the *King's Highway.* We ſay He has *no ſpecific* Remedy, by Ejectment. The Caſe of Sir *John Lade* v. *Shepherd*, 2 *Strange* 1004. does not prove that an *Ejectment* will lie: That was *not* an Ejectment; but an Action of Treſpaſs. And perhaps an Action of *Treſpaſs* might have been *here* maintained: But not an *Ejectment.* And if the Lord of the Soil ſhould recover and *continue it*, He would thereby become a *Wrong-Doer:* Whereas, according to 2 *Inſt.* 294. It is the Wiſdom of the Law, ſo to reſolve, "*ut ſit Finis Litium.*"

As to *Fitzh. Abridgment* 77. *a.* It is the Caſe of *the King*: And by his Prerogative, *He* may continue it, if it be no Injury to the Subject. But a Highway muſt *always continue* a Highway. *Cro. Jac.* 446. *Fowler* v. *Sanders*, fully proves "That it *cannot be* nar- "rowed:" Neither can it be incloſed.

Second

Second General Queſtion. As to the *Eſtoppel*—It does not appear that the Defendants claim *under Gotley*, therefore that Point is out of the Caſe.

It was urged by the Counſel for the Plaintiff, by way of Reply— That as to the *Eſtoppel*, the Court muſt neceſſarily *intend*, upon this Finding, that the *Defendants themſelves* paid the Rent, and erected the Paliſades in 1748: And the Rent which was paid *from* the End of the Term *till* 1750, muſt be preſumed to be paid BY THEM; they being *then* in Poſſeſſion. A Special Verdict is not to be taken ſtrictly; like a ſpecial Pleading. Reply.

As to the * 1ſt Objection made by the Counſel for the Defendants—*Non conſtat* that this Land is built upon: 'Tis only found " That in the new building of a Houſe at *Lafford's Gate* aforeſaid, " *Gotley* had ENCROACHED upon the Lord's Waſte, ſo many Feet " *&c.* But it does not follow that *Gotley* actually BUILT upon the Land, which He ſo encroached upon; For there are very many *other* Ways of encroaching upon Another's Land, *beſides* building upon it: For Inſtance, a Penthouſe *overhanging* and dropping upon it, may be an Encroachment. *No expreſs* Fact of *building* upon this Land is found. Indeed it is ſaid in the Finding, that the third Piece of Land is *taken in* and encloſed with Paliſadoes, by the ſaid *J. Gotley*. But the Paliſadoes anſwer this Expreſſion: He *incloſed* it with *them*.

[* Obſerve, that the two Diviſions of the firſt Queſtion were *counterchanged*, in the Courſe of this Argument: The Counſel for the Defendants having begun *firſt*, with that Objection which the Plaintiff's Counſel had taken up (by way of Prolepſis) in the *ſecond* Place. *V. pages* 137, and 138]

They agreed to the Doctrine of the Neceſſity of *ſufficient* Certainty in the Demand: But ſaid and inſiſted that it is *ſufficient*, if the Sheriff may know *how to deliver Poſſeſſion*.

The Term " *Land*" is ſaid by Lord *Coke*, legally to include *Caſtles*, *Houſes*, and other Buildings. *Co. Litt.* 4. *a*. And by a Grant of " all a Man's *Lands*," All his *Houſes*, Mills and Woods would *paſs*: As appears in *Luttrel's* Caſe, 4 *Co.* 87. *b*. And by the Civil Law, " Appellatione *Fundi*, omne *Ædificium* & omnis Ager conti- " netur." *ibidem*. Therefore, as they would paſs in a *Conveyance*, there is no Reaſon why they ſhould not be included in an *Ejectment*, upon a *ſuppoſed* Leaſe; Which Leaſe, if it was a *real* Leaſe, would undoubtedly carry them.

None of the Things deſcribed in the Declaration differ from the Deſcriptions of them in the Verdict.

Indeed it is only 14 Inches in Length, that it is *pretended* any part of the Houſe now covers. But the Words are That " whereas " it was preſented that the ſaid *J. G. had encroached* upon the

" Waſte of the Manor of the ſaid *T. C. &c.* 14 Inches in Length " and 33 Feet in Breadth, *without his Houſe*; together with a *Porch* " of 3 and $\frac{1}{2}$ Feet in Length and 7 Feet in Breadth, *without the* " *Wall* adjoining to the Houſe." Now it is *not* neceſſary that the *Court* ſhould conſider theſe two Pieces of Land, as a *Houſe*; eſpecially the latter, upon which the Porch is erected.

It is *not* found to have been a Meſſuage at the *Time* of the Demiſe laid. On the contrary, the Pieces of Land incroached upon are found to be Parcel of the Waſte, and part of the *Tenement* in the Declaration mentioned: Which Tenement is not a Houſe, but an *Acre of Land.* However, this Objection cannot overthrow the *whole* Verdict: For the *third* Parcel is clearly *Land*, and *not Houſe.*

If a Man builds upon my Land, It would be very hard if I might not, notwithſtanding this, demand my *own* LAND.

If the Ejectment was brought *de parte Domûs*, (which they did not admit that it could be,) how would the Sheriff know WHICH Part to deliver Poſſeſſion of? The Plaintiff muſt, in *both* Caſes, *ſhew* him, at his *Peril.*

Though " *Pomarium*" be good, yet it would equally be good, if called " *Land.*"

* See the Note in *pa.* 141.

As to the * ſecond Objection made by the Counſel for the Defendants, The Plaintiff's Counſel replied that the Right is *admitted to remain in the Owner of the Soil*, to be uſed conſiſtently with the Privilege of the Subject: Which Admiſſion is ſufficient for our Purpoſe. He may dig Sand or Stones; provided He do not commit a Nuſance in the manner of doing it. Therefore 'tis plain that He has a private Right remaining in Him.

An *ad quod dammum* alters no Property: The Owner retains the old Road, *diſcharged* of the Eaſement, which is *transferred* to another Part of his Land.

The Court have nothing to do with the *Nuſance*, in this Caſe: It does not appear to the Court, to be any Nuſance to the Highway; or that Mr. *Cheſter* will continue it, if he ſhould recover the Land.

Cro. Jac. 446. was for a ſpecial Injury received from the Defendant's laying Logs in the Highway: But though the King can't narrow his Prerogative, to the Injury of the Subject, yet it does not follow from that Caſe, that the Property of the Highway is not in Owner of the Soil.

Lord *Mansfield* aſked Whether they had any Note or Report of that Circuit-Caſe which was ſaid to have been determined by Lord *Hardwicke*; and by whom it was taken. But there was no Note or Report of it; And it ſeemed to have been mentioned at the Aſſizes, from ſome imperfect Recollection. He therefore proceeded to give his Opinion immediately; putting this Caſe of Sir *Bourchier Wray* out of the Way entirely; as being ſo looſely remembred and imperfectly reported, as to deſerve no Regard, or be at all clear and intelligible as to what it really was. He ſaid it was impoſſible to ſuppoſe that Lord *Hardwicke* had any Note or Memory of ſuch a Point ariſing at the Aſſizes: Otherwiſe, he would wait till he could know the true State of it from his Lordſhip, from the Deference he paid to ſo great an Authority. But from the Manner in which it is quoted, there is no Ground to ſay what the State of that Caſe or Determination *really* was.

As to the Queſtion "Whether an *Ejectment will lie*, by the "*Owner of the Soil*, for Land which is *ſubject to Paſſage over it* as "the King's *Highway*."

1 *Ro. Abr.* 392. Letter B. *pl.* 1, 2. is expreſs—"That the *King* "has *Nothing but the Paſſage* for Himſelf and his People: But the "*Freehold and all Profits* belong to the *Owner* of the Soil." So do all the *Trees* upon it, and *Mines* under it (which may be extremely valuable.) The Owner may carry Water in Pipes *under* it. The Owner may get his Soil *diſcharged* of this Servitude or Eaſement of a Way over it, by a Writ of *Ad quod damnum*.

It is like the Property in a Market or Fair.

There is no Reaſon why he ſhould not have a Right to ALL *Remedies* for the *Freehold*; ſubject ſtill indeed to the Servitude or Eaſement? An *Aſſize* would lie, for if he ſhould be diſſeiſed of it: an Action of Treſpaſs would lie, for an Injury done to it?

I find by the Caſe of *Selman* v. *Courtney*, *Tr.* 13, 14 *G.* 2. that a Point which had been before the Court of Exchequer in the Caſe of the Ducheſs of *Marlborough* v. *Gray*, *M.* 2 *G.* 2. is now ſettled; *viz.* "that it's being a Highway cannot be given in Evidence by the "Defendant, upon the General Iſſue:" Which proves that the Ownerſhip of the Soil is *not* in the King. I ſee no Ground Why the Owner of the Soil may not bring *Ejectment*, as well as *Treſpaſs*? It would be very inconvenient, to ſay that in this Caſe He ſhould have NO *ſpecific* legal Remedy; and that his only Relief ſhould be repeated Actions of Damages, for Trees and Mines, Salt-Springs, and other Profits under Ground. 'Tis true indeed that he muſt recover the Land, SUBJECT TO *the Way*: But ſurely He ought to have a

ſpecific

ſpecific Remedy, to recover the LAND ITSELF; notwithſtanding it's being ſubject to an Eaſement upon it.

Second Queſtion—As to the *Deſcription*—

I don't know whether it is not even *better* deſcribed by the Name of the *Land*, than of a *Houſe*, or *part of a Houſe*.

I think it would have made the Objection much *ſtronger*, if the Plaintiff had only claimed the NUSANCE, inſtead of the Land on which the Nuſance is erected.

Here He does not claim the *Nuſance:* He claims the *Land*. And the Tenants in Poſſeſſion of it defend themſelves by ſaying "That they have *erected a Nuſance* upon it." Now it would be a ſtrange thing, if *that* ſhould be a good Defence againſt the Owner's recovering his *Land*.

But however, this is not a *Houſe* (which perhaps ought, if it were ſo, to be particularly named;) but merely a *Wall* or PART *of a Wall* or Building: And there is not ſuch Preciſeneſs required in *Ejectments*, as there is in *real* Actions.

The Courts will go to the utmoſt Extent, in *ſupport of Ejectments*; that People may have *ſpecific* Remedies for their Rights.

Dyer 47. *a. pl.* 6. is very ſtrong. There, the Recovery was, of "100 Acres of Land, 20 Acres of Meadow, and 40 Acres of "Paſture, in *D.*" without mentioning any Houſe or Garden: And the better Opinion ſeems to be "That the Plaintiff ſhould thereby "recover the *Buildings* built thereupon."

That was an Action of a *higher* kind than an Ejectment: It was a *real* Action, a Writ of Intruſion, in which *that* Recovery was had.

But here, the Building erected is only PART of a Houſe or Wall: And it is erected, *by Incroachment*, upon the Plaintiff's Land.

The Caſe of the Defendant is moſt unfavourable: For he inſiſts upon holding the Thing demanded without any Pretence of Title; and inſiſts that the Plaintiff ſhall have no ſpecific Remedy for his Land.

Therefore I am of Opinion that the Plaintiff ought to recover upon this ſpecial Verdict.

Mr. Juſt. *Deniſon* concurred.

The Difficulty at the Aſſizes aroſe (as the Judge who tried the Cauſe has * declared) merely upon an Apprehenſion that there had been a Determination at the Aſſizes formerly, by Lord *Hardwicke*, "That an Ejectment would *not* lie for a Property in Soil, over "which there was a *Highway*; becauſe the Sheriff could not de- "liver Poſſeſſion of the Highway."

But the *Reality* of this Authority has not been at all proved, to any kind of Satisfaction.

Treſpaſs would undoubtedly lie: Why then ſhould not an Ejectment?

It is ſaid "That the Sheriff cannot deliver *full* Poſſeſſion."

But why not? Indeed, it muſt be *ſubject* to the Eaſement: But there is *no other* Difficulty in the Matter.

Therefore I take it for granted, that there was ſomething more in that cited Caſe of Sir *Bourchier Wray*'s, than We are now apprized of.

As to the ſecond Queſtion—

It might have been perhaps difficult to have deſcribed this *part* of a Houſe.

In that Caſe in *Dyer* 47. *a.* I take it that the Formedon in Reverter was well brought for the LAND, *ſecundùm formam doni:* The Plaintiff had nothing to do with what the Defendant had done with it, or built upon it. And I think the four Judges who held on that ſide of the Queſtion, were in the Right.

And upon this ſpecial Verdict, the Sheriff would have no Difficulty to deliver Poſſeſſion; for any thing that I can ſee, to raiſe any.

I think that Caſe in *Dyer* is good Law. That was in a *real* Action: And much more will the ſame Reaſon hold upon *Ejectment*, (which would even lie for *Tithes.*) [*V. Cro. Car.* 301.]

And I think this Ejectment was *better* and more properly brought for *Land*, than it would have been for "*part of a Houſe.*"

Mr. Juſt. *Foſter* agreed that the Caſe in *Dyer* was good Law.

* Note; Mr. Juſtice *Foſter*, who tried the Cauſe, had declared this, during the Courſe of the Argument. He ſaid He ſhould have had no doubt about it, at the Trial; but upon it's being alledged "that Lord *Hardwicke*, (for whom every One has and ought to have a Veneration,) had made ſuch a Determination:" And he would not take upon Himſelf, to over rule the Opinion of ſo great a Man.

And He repeated that He had no Doubt of the preſent Caſe, when it was before Him at the Aſſizes, *but* from the *then*-apprehended Authority of the cited Caſe, *ſaid* to be determined by Lord *Hardwicke*. [*V. ante* 145.]

The Owner of the Soil has a Right to ALL ABOVE *and* UNDER *Ground*, *except* only the Right of Paſſage, for the King and his People.

And the Caſe in 1 *Ro. Abr.* 392. Letter *B.* proves this. [*V. ibid. pl.* 1, 2, 3, 4, 5 & 6.]

Therefore He entirely concurred with his Lordſhip and his * *V. ante* 133. Brother *Deniſon*, (for *N. B.* Mr. Juſtice *Wilmot* was * not preſent in Court at either of the two Arguments of this Caſe) that there ſhould be

JUDGMENT for the PLAINTIFF.

Tooker *verſ.* Duke of Beaufort.

A New Trial had been moved for, on a ſuppoſed *Miſdirection* by the Judge who tried the Cauſe, in *admitting* a Commiſſion under the Seal of the Court of Exchequer, *P.* 33 *Eliz. Rotulo.* 290. to be given in *Evidence*; although it was objected at the Trial, " That this Commiſſion was " *Res inter* ALIOS *acta*; of which " the *Beaufort* Family could have *no Notice*, nor *Opportunity to de-* " *fend it*; And therefore it could NOT *affect* them: Conſequently, " it *ought* NOT *to have been* AT ALL *admitted as Evidence*; for the " ſame Reaſon that a *Verdict* in a Cauſe between *other* Parties can- " not be given in Evidence in a Cauſe between Strangers to the " former Cauſe."

N. B. This Commiſſion ('*P.* 33 *Eliz. Rotulo.* 290, *in Scacc*') was directed to 5 Commiſſioners therein named, *ad inquirendum, tam per Sacr'um proborum & legalium hominum Com' nr'i Southt'ton, quam per Depoſitiones querumcunque teſtium, ac omnibus aliis viis mediis & modis quibuſcunque,* " *Si Prior aut Prio-* " *ratus Sci' Swithini Winton, in jure Domûs ſive Prioratûs,* " *fuit ſeiſitus in quibuſdam terris vocat' Woodcrofts &c.* UT " Parcell' *de Manerio de Hinton-Dawbney*;" *Nec non,* " *Si* " *Henricus, Pater noſter, (in ejus vita,) Dominus Edwardus ſex-* " *tus, Regina Maria, aut Nos ipſi, à tempore Diſſolutionis* " *Prioratûs Sci' Swithini &c. &c.*" with an Order for the Sheriff to ſummon a Jury, *&c.*

To this, is returned An Inquiſition taken the 9th of *April* 33 *Eliz:* Whereby it is found " That the Prior of St. *Swithin*, in " right of his Priory, WAS *ſeiſed* of the ſaid Lands called *Wood-* " *crofts &c.* AS *Part and Parcel of the* Manor of *Hinton-Dawbney*; " and that, *from* the Diſſolution of the ſaid Priory, King *H.* 8. " King *E.* 6. and Queen *Mary* were ſeiſed, and Queen *Elizabeth* " Herſelf, in the ſame Right, to the 27th of *May* then laſt paſt."

There are alſo returned The Interrogatories adminiſtred on her Majeſty's Behalf, and the Depoſitions taken thereon.

The Subſtance of the Judge's Report was, That He *admitted* this *Commiſſion* and the *Return* to it, and the *Depoſitions*, to be read in Evidence; Holding them to be *admiſſible* Evidence, though *not* concluſive. That there was likewiſe much *Parol*-Evidence of the Poſſeſſion of *both* Parties; and that there had been a *mixed* Poſſeſſion: But that He, in his Direction to the Jury, did lay great *Streſs* on this *Commiſſion*, *&c.* And that WITHOUT *it's Aſſiſtance*, He ſhould have thought the Verdict for the Plaintiff to have been a very hard One.

The Report concluded, " That He Himſelf (the Lord Ch. " Baron) thought this Piece of Evidence to be *admiſſible*, but *not* " concluſive; That it had great Weight with the Jury; And that " if the Court ſhall be of Opinion that it was *not* admiſſible, He " thinks there ought in *that* Caſe to be a new Trial.

This Matter having been largely debated at the Bar, and afterwards fully conſidered by the Bench; And the Court having been of Opinion " That the Evidence *was* ADMISSIBLE, though NOT " *concluſive*; and therefore that it was well and properly received;" And conſequently, " That the Rule for ſhewing Cauſe why there " ſhould not be a new Trial, ſhould be diſcharged;" The ſaid Rule had been accordingly diſcharged.

But in the Interim, whilſt this Queſtion was depending before this Court, (who took Time to adviſe upon it,) The Duke of *Beaufort*, the Defendant DIED.

Whereupon, (on *Saturday*, 13th *November* 1756) Mr. *Gould*, on Behalf of the Plaintiff, moved for Leave to *enter up his Judgment*, as of the *next Term after the Verdict*; Which was the Term in which He *might* have entered it up, if the Motion had not obſtructed it. 1 *Leon.* 187. *Iſley*'s Caſe.—It is diſcretionary in the Court to grant this or not. 1 *Sid.* 462. *Criſpe and Jackſon* v. *Mayor of Berwicke*, in Point. 1 *Ventr.* 58, 90. S. C. in Point. And in *Hilary*

Hilary Term laſt, the Caſe of *Wyndham* v. *Chetwynd* S. P. (though a premature Application.)

Lord *Mansfield*—It ſeems reaſonable: Take a Rule to ſhew Cauſe.

And

On *Friday*, 28th *January* 1757, On Mr. *Gould*'s Motion, This laſt Rule (for entering up the Judgment, as of the Term next after the Verdict,) was made * abſolute, without Defence.

* *V. poſt. pa.* S. P.

Saturday 29th *January* 1757.

Rex *verſ.* Maurice Jarvis.

THIS was a Conviction, (which ſtood in the Crown-Paper) upon 5 *Ann. c.* 14.

It was made by *John Bytheſea* and *John Turner* Eſq; two Juſtices of the Peace for the County of *Wilts*; and was to the Effect following—

Be it remembred, That on *&c. John Webb* of the Pariſh of *Hilperton* in the County of *Wilts* aforeſaid, Yeoman, in his own proper Perſon, cometh before Us *&c.* Juſtices *&c.* And now he giveth us the ſaid Juſtices to underſtand and be informed That One *Maurice Jarvis* of *Trowbridge* in the County of *Wilts* Labourer, within three Months now laſt paſt, that is to ſay, on the 4*th* Day of *September* now laſt paſt, in the 28th Year *&c.* with Force and Arms, in a certain Field commonly called *&c.* lying and being within the Pariſh and Manor of *Hilperton* aforeſaid in the County of *Wilts* aforeſaid, did unlawfully keep and uſe, and had in his Cuſtody and Poſſeſſion One Setting-Dog and Setting-Net for the Deſtruction of the Game; and did *then* and there ride with and hunt the ſaid Setting-Dog, with an Intent to kill and deſtroy Game; He the ſaid *Maurice Jarvis* at the Time and Place when he ſo kept and uſed the ſaid Setting-Dog and Net and had the ſame in his Cuſtody and Poſſeſſion, *was* NOT *qualified* BY ANY LAWS OR STATUTES OF THIS REALM, *to kill Game or to keep or uſe any* Nets Dogs or other Engines for the Deſtruction of the Game; contrary to the Form of the Statutes in that Caſe made and provided. And thereupon afterwards, that is to ſay on the ſaid 12*th* Day *&c.* at *&c.* aforeſaid, *Thomas Webb*, Servant and Game-keeper to *Edward Eyles* Eſq; for the Manor of *Hilperton* aforeſaid in the County of *Wilts* aforeſaid, a credible Witneſs in this behalf, in his own proper Perſon, cometh before Us *&c.* and taketh his Corporal Oath on the Holy Goſpel of God, to ſpeak the Truth of and concerning the Premiſes abovementioned and ſpecified in the ſaid Information be-

fore Us the ſaid &c. the Juſtices aforeſaid, having ſufficient Power and Authority to adminiſter the ſaid Oath to the ſaid *Thomas Webb* in this behalf: And the ſaid *Thomas Webb* being ſo ſworn as aforeſaid, afterwards, that is to ſay, on the ſaid 12*th* Day &c. upon his ſaid Oath ſo taken before Us the ſaid Juſtices as aforeſaid, ſaith depoſeth and ſweareth, of and concerning the Premiſſes aforeſaid in the ſaid Information abovementioned and ſpecified, " That &c. [fully " proving the Fact;] He the ſaid *M. Jarvis*, at the *Time* and " Place *when* he ſo kept and uſed the ſaid Setting-Dog and Net and " had the ſame in his Cuſtody and Poſſeſſion, *was* NOT QUALI- " FIED *by* ANY *Laws or Statutes of this Realm, to kill Game, or to* " *keep or uſe any Nets Dogs Guns or other Engines for* the Deſtruc- " tion of Game, contrary to the Form of the Statutes in that Caſe " made and provided."

Whereupon the ſaid *M. J.* having firſt been duly ſummoned in this behalf to anſwer the Premiſſes, and having had due Notice thereof, afterwards, that is to ſay, at the Houſe of &c. appearing and being preſent in his proper Perſon before Us the ſaid &c. And the ſaid *Thomas Webb* the Witneſs aforeſaid alſo appearing and being preſent before Us the ſaid Juſtices; And the Information aforeſaid and the Matter therein contained, and alſo the ſaid Evidence thereupon given, having been heard and underſtood by the ſaid *M. J.* in the Preſence of the ſaid *Thomas Webb* the Witneſs aforeſaid and of Us the ſaid Juſtices, He the ſaid *Maurice Jarvis* is aſked by Us the ſaid Juſtices, " If he the ſaid *M. J.* hath, knoweth, or can ſay " any thing for himſelf in his own Defence, touching and concern- " ing the Premiſſes aforeſaid; and why he the ſaid *M. J.* ſhould " not be convicted of the Premiſſes aforeſaid, charged on him in " and by the ſaid Information."

And the ſaid *Maurice Jarvis*, now here before us the ſaid Juſtices, DENIES *that he did* KEEP AND USE the ſaid Setting-Dog and Net, and had the ſame in his Cuſtody and Poſſeſſion, in Manner and Form as is above charged on him: But *ſhews* NO *ſufficient Cauſe before Us* the ſaid Juſtices, *why he ſhould not be convicted* of the Offence aboveſaid charged on him in the ſaid Information. And upon hearing and examining the whole Matter aforeſaid, and every thing alledged by the ſaid *Maurice Jarvis* touching and concerning the Premiſſes aforeſaid, It manifeſtly and plainly appears unto Us the ſaid Juſtices, That the ſaid *M. J.* was not THEN *any wiſe qualified impowered licenſed or authorized, by or according to the* LAWS OF THIS REALM, to kill Game; And that the ſaid *M. J.* is guilty of the Premiſſes aboveſaid charged on him in and by the ſaid Information.

Therefore it is now here considered and adjudged by Us the said Justices, that the said *M. J.* upon the Testimony of the said *Tho. Webb* the Witness aforesaid, on his Oath before Us the said Justices so taken as aforesaid, be and is convicted of the Premisses aforesaid, according to the Form of the Statutes in such Case made and provided; And that the said *M. J.* do forfeit the Sum of 5 *l.* for the Offence aforesaid, as the Statute directs, *&c.*

Mr. *Gould*, for the Defendant, took Exceptions to this Conviction.

1st. The Justices have *not* SHEWN *that they had* JURISDICTION *over* this Defendant. For they have not sufficiently shewn his DEFECTS *of Qualification*; which ought to have been SPECIFICALLY *particularized*, with an Allegation " that he had not *any One* of " them :" I mean the Qualifications mentioned in 22 & 23 *C.* 2. *c.* 25. To prove this to be necessary, he cited *Rex* v. *Ellers*. [*Qu.* what, or where, or when.] *H.* 12 *G.* 1. 2 *Ld. Raymond* 1415. *Rex* v. *John Hill* most directly in Point. *Bluet Qui tam* v. *Needs*, *P.* 9 *G.* 2. in *C. B.* (entered *Tr.* 7, 8 *G.* 2.) *Comyns* 522, 523. *Post.* 9 *G.* 2. (which he also cited, to shew the Distinction between a Declaration and a Conviction;) A *General* Averment is sufficient in a Declaration: But *Convictions* must set forth WHAT *was the* WANT *of Qualification.*

M. 19 *G.* 2. *B. R. Rex* v. *Pickles*, [the 2d Exception in that Case;] Where it was indeed holden that it was not necessary to insert the *inferred or argumentative* Qualification (collected from 5 *Ann. c.* 14. but not mentioned in 22 & 23 *C.* 2.) " of his not " being Lord of a Manor :" But it was there agreed, that those required by the Act *of* 22, 23 *C.* 2. *c.* 25. *ought* to be negatively specified.

1 *Strange* 497. *Rex* v. *Sparling*, *H.* 8 *G.* 1. *B. R.* which was a Conviction for swearing: And his Occupation was therein said to be a Leather-dresser; but it was not shewn that he was not a Servant, Labourer, Common Soldier, nor Seaman. The Court held that giving Him the Addition of Leather-dresser was not enough; and instanced the *Necessity of specifying the Particulars* of the Defendant's want of Qualification, in *Convictions on the Game-Act*; in order to give the Justices a Jurisdiction which they, otherwise, *have not:* And they also held that Conviction naught, because the particular Oaths and Curses were not set forth. And that Conviction was accordingly quashed.

2d Exception. The Witness was examined privately and *ex parte*, *prior to the Appearance* of the Defendant, and *in the Absence*

of the Defendant: So that the Defendant had *no Opportunity of Croſs-examining* Him.

3d Exception. The *Time when* the Defendant was unqualified is not at all aſcertained, in the Adjudication of his being guilty. For it is only averred " That he was THEN unqualified: But *ſeveral* Days and Times, *diſtinct from* each other, have been antecedently mentioned. [*V.* 148, 149, 150.]

Mr. *Norton contra*, for the Conviction, begun with the 2d Exception—It was *neceſſary* for the Juſtice to take a *previous* Examination, as a Ground and Foundation for his iſſuing the Summons: And when the Defendant attended, after having been ſummoned, the Evidence was then read to him; and the Witneſs alſo attended; and the Defendant was aſked " what he had to ſay for " himſelf;" and did not deſire to croſs-examine the Witneſs.

To the 1ſt Exception—He anſwered—firſt, by citing *Rex* v. *Chandler*, in 1 *Ld. Raym.* 581. Where *Holt*, in delivering the Opinion of the Court upon a Conviction for Deer-Stealing, ſays " that " it is *ſufficient* for the Juſtices, to purſue the WORDS of the Sta- " tutes; and they are not, in theſe ſummary Convictions, confi- " ned to *nice and ſtrict legal* FORMS; it is enough, if they purſue " the *Intent* of the Statutes."

If the Defendant is *really* qualified, *he* may ſhew it: But how can the PROSECUTOR *prove the* NEGATIVE? Some of the Qualifications are ſuch *as cannot* well be proved in the *Negative*: But it is eaſy for *him* to prove the *Affirmative*.

Tr. 9 *G.* 2. *Rex* v. *Ford*—Conviction for keeping an Alehouſe, without Licence. Objected, That there was another former Law upon which He might have been convicted: And in 3 *C.* 1. *c.* 3. there is a Proviſo to exempt ſuch as have been ſo. But *Cur'*. held that if the Defendant had been before puniſhed upon 5, 6 *E.* 6. *c.* 25. he might have ſhewn this. *V.* 1 *Strange* 555. S. C.

Rex v. *Theed*, 1 *Strange* 608. Conviction for obſtructing an Exciſe-Officer, who came to weigh Candles. Objection, That the Exciſe-Officer's Entry might have been by Night, (by 8 *Ann. c.* 9.) And then there ought to have been a Conſtable preſent. *Cur.*' That might have been ſhewn on the Part of the Defendant, if in Fact ſo; And then he would not have been convicted: But they would not preſume it.

Now here, the Defendant did not inſiſt upon being any way qualified: but only denied the Commiſſion of the Fact.

This

This Conviction *follows the very Words* of the Act of Queen *Anne*; which does *not* enumerate the Qualifications, as that of *C.* 2. does: And this Conviction is on the * Act of Queen *Anne*; and not on 22, 23 *C.* 2. *c.* 25.

* 5 *Ann. c.* 14.

10 *Mod.* (*Lucas*) *pa.* 27. *Queen* v. *Matthews*, *Tr.* 10 *Ann. B. R.* [1ſt Exception.]

Viner's Abr. Tit. *Game*, Letter A. *fo.* 3. S. C.

Burn, Tit. *Game*, *fo.* 304. S. C. Which was a Conviction on 5 *Ann. c.* 14. Where one of the Qualifications (*viz.* not being a Game-keeper, *&c.* being a new Qualification allowed by that Act) was omitted. And *Cur.* held that it was *not neceſſary* to enumerate ANY: But *as* SOME of them were enumerated, it was fatal to omit *another* of them. [*N. B.* This Caſe was *adjourned*.]

Rex v. *Marriot*, 4 *G.* 1. 1 *Strange* 66. was the very Point. It was holden indeed that the WITNESS cannot take upon *Himſelf* to adjudge the Qualification: But no Notice at all was taken, in the Determination of that Caſe, of the JUSTICES not having adjudged it.

Clearly, this Defect can, at the utmoſt, be only *Form*: For in Subſtance, 'tis the ſame thing. And it follows the Act of 5 *Anne* in Terms.

As to the Caſe cited by Mr. *Gould*, of *Rex* v. *Ellers*—It does not appear what the State of the Caſe was.

And the Caſe in *Comyns* 522, 523. rather makes for Us. It is as reaſonable that the Defendant ſhould make it out that he was qualified, and ſhew how, on a *Conviction*, as in an *Action*.

In the Caſe of *Rex* v. *Pickles*,—The Conviction was affirmed: And yet a Qualification within the Acts was omitted.

And this Law can never, or hardly ever, be executed, if the Court ſhould think themſelves bound down by the Caſe of *Rex* v. *Hill* [in 2 *Ld. Raym.* 1415.]

3dly. As to the third Exception—

But Lord *Mansfield* ſtopt Him from proceeding, and alſo Mr. *Gould* from replying; For he ſaid it was needleſs to enter into *many* Reaſons for quaſhing this Conviction, when *One* alone is *fully* ſufficient.

It is now settled by the uniform Course of Authorities, that the Qualifications MUST *be All* negatively set out: Otherwise, the Justices have *no Jurisdiction* over the Persons killing Game, or keeping Dogs or Engines for the destruction of it. (1st Exception.)

The *Obiter* Saying in 10 *Mod.* (if it was a Book of better Authority than it is,) would signify Nothing, when the *Determinations* are the other way.

There is a great Difference between the *Purview* of an Act of Parliament, and a *Proviso* in an Act of Parliament.

In the Case of *Rex* v. *Marriot*, *Mich.* 4 *G.* 1. *B. R.* [1 *Strange* 66.] Where the *Witness swears* only generally; it was holden insufficient: And the *Justices* who convict *upon the Evidence* of the Witness, can have no other or FURTHER Ground to go upon than what the Witness swears.

In the Case of *Rex* v. *Hill*, 2 *Ld. Raym.* 1415. in this Court, *H.* 12 *G.* 1. It is the very Point established and settled, "That the "*General* Averment is NOT sufficient; and that it must be averred "that the Defendant had NOT the particular Qualifications mentioned in the Statute, as to Degree, Estate *&c.*"

In the Case of *Bluet Qui tam* v. *Needs*, *Comyns* 525. The *general* Averment "of the Defendant's not being qualified," was holden to be sufficient upon an *Action*; though *insufficient* upon a *Conviction*.

The Distinction is obvious between an *Action* and a *Conviction*. And there it was agreed (and it is given as the Reason why it is not good upon a Conviction,) "that it must be made out, before the "Justice, That the Party had *no* such Qualification as the Law re"quires," before the Justice can convict Him: And the Justice must return "that he had no manner of Qualification."

Here, the Witness *swears* only *generally*, "That the Defendant "was *not* qualified *&c.*" The Justices *adjudge* it GENERALLY, *only*. The *Stream* can go no higher than the *Spring-Head*. So the Conclusion which the Justices draw from the Testimony of the Witness must be as general as that Testimony.

In the Case of *Rex* v. *Pickles*, It was laid down as a Rule, "that "the Want of the particular Qualifications required by 22 & 23 *C.* 2. *c.* 25. *ought* to be *negatively* set out in Convictions:" And the only Question there was, Whether it was necessary to add—"Nor "Lord of a Manor." *Exceptio probat Regulam:* Nor was the *general* Rule, at all, doubted or disputed, in that Case.

In Indictments upon 8, 9 *W.* 3. *c.* 26. for having a Coining-Preſs, Every thing which ſhews that the Defendant had no Authority, muſt be negatively ſet out. And ſo it was done, in the Indictment of *Bell*, which was lately argued before all the Judges.

I take the Point to be SETTLED *by the conſtant Tenor* of *all* the Authorities; And I think upon very good Reaſon, (if there was need to enter into the Reaſon at large, after it has been *fully ſettled* already.)

Therefore I am of Opinion that the Conviction ought to be quaſhed.

Mr. Juſt. *Deniſon* concurred with Lord *Mansfield*.

(1ſt Exception.) He ſaid it was a clear Caſe; And that it was fully ſettled and eſtabliſhed, " That in theſe *Convictions*, the Want of the particular " Qualifications mentioned in the Act of 22 & 23 *C.* 2. *ought* to " be *negatively* ſet out:" If not, the Juſtices have *no* Juriſdiction to convict the Defendant as an Offender. And the Evidence and Adjudication ought, *both of them*, to be, " That he has *not* theſe " Qualifications, which are ſpecified in that Act, nor any of them."

Indeed you are not obliged to go *further* than the *Words* of *this* Act of Parliament of 22 & 23 *C.* 2. and that was the Caſe of *Rex* v. *Pickles*. But however, in that Caſe, the *preſent* Point was eſtabliſhed and taken to be indiſputable.

It is ſaid, that " It is ſufficient to lay the Offence *in the* WORDS " *of the Act of Parliament*."

But that is *not* ALWAYS ſufficient: It *may* be neceſſary to go *further*.

P. 28 *G.* 2. *B. R. Rex* v. *Chapman*, about robbing an Orchard, was a Caſe where the mere purſuing the Words of the Statute was *not* ſufficient.

But this Point now before Us is a *ſettled* Caſe: And therefore there is no Need to enter into *Arguments* about it.

The Conviction ought to be quaſhed.

(1ſt. Exception.) Mr. Juſt. *Foſter* concurred.

On

On Negative Acts of Parliament, the Point is fully settled and eſtabliſhed, " that the particular Qualifications mentioned in the " Purview of them, muſt be negatively ſpecified in Convictions " made upon them."

By the Court unanimouſly,

CONVICTION QUASHED.

Royal-Exchange Aſſurance Company *verſ.* Vaughan.

Tueſday 1ſt February 1757.

THIS Caſe was juſt mentioned to the Court, on 18th *November* 1755; and again, on 3d *February* 1756: But was firſt argued on 7th *May* 1756; and now, laſtly, on this Day.

It was an Action of Treſpaſs, brought by the Company: And the Queſtion (upon a ſpecial Verdict) was, " Whether this Company are " *at all*, or *how far*, they are *liable to be* ASSESSED *to the* LAND-*Tax*."

The Special Verdict was very long. In it were found, at large, the *Statute* of 6 *G.* 1. *c.* 18. which gave Riſe and Eſtabliſhment to this Company; and the ſeveral *Charters* from the Crown which increaſed its Fund, and enlarged its Powers beyond what they were originally intended (or at leaſt explicitly eſtabliſhed) by that Act of Parliament; The Original Foundation of it being only for Inſurance of *Ships*, with a ſmaller Fund: But the ſubſequent Charters extended their Powers, to Inſurances of *Houſes* and *Goods* from Fire, and upon *Lives*; and alſo increaſed their *Fund*.

In the abovementioned Act of Parliament, the *Original* Fund was *expreſly exempted* from being taxed.

Several Facts were alſo found: Particularly, the Manner in which this Company have carried on their Buſineſs, under *all* theſe Powers *jointly*, and *not* under each *ſeparately*.

The preſent Aſſeſſment is for their *whole* Stock, and in their *Corporate* Capacity.

They *never had* been taxed *at all*, till now. And they were now taxed, in their *Corporate* Capacity, under the Land-Tax Act of 27 *G.* 2. *c.* 4: (of which, ſee *pages* 48, 64 & 75.)

By the Act of 6 *G.* 1. *c.* 18. their Capital was 1,500000 *l.* And they were thereby *exempted from All Parliamentary Taxes*. This was only a Power to inſure Ships and Goods at *Sea*.

A few Years after, the very ſame Perſons obtained a Charter to extend their Power to inſure Houſes and Goods at *Land*, and upon *Lives*; and alſo to *extend their Capital* 500000 *l.* farther than the former Sum.

Upon the firſt Argument—

The Court ſeemed, All of them, to ſee this Matter pretty much in the ſame Light: And they all made two Queſtions; into which, they divided the whole of this Caſe; *viz.*

1ſt. Whether the *Original* Capital that was raiſed under the Act of Parliament of 6 *G.* 1. *c.* 18. (§. 2.) and was *now become* part of the Fund of the PRESENT CHARTER-*Corporation*, was exempted from Parliamentary Taxes, *by Virtue* of the exempting Clauſe *contained in* 6 *G.* 1. *c.* 18. (§ 10.) which Act of Parliament related *only* to the *Original* Company for Inſurance of *Ships*; but did not extend to the *preſent* Corporation eſtabliſhed by *Charter*; which Charter has extended their Powers and *enlarged* their Capital.

2dly. Whether this *Original* Capital was the perſonal Eſtate *of the* COMPANY; and liable to be taxed *as* the COMPANY's perſonal Eſtate, in their *Corporate* Capacity: Or whether the Tax ought to have been laid upon *each individual Member* of the Company, for his *reſpective Share*, in his *own proper Ward*.

As to the 1ſt Queſtion—The Court were unanimous and clear, That the Exemption under the Act of Parliament of 6 *G.* 1. was *confined* to the *Original* Fund and Company eſtabliſhed by that Act; and could *not* be extended to the preſent Corporation, which was founded upon a ſubſequent *Charter* of the Crown, which neither did nor could give any ſuch Exemption.

And they thought that this *Original* Capital having been part of the *Statute*-Company's Fund, and only *continued* by the *Charter*-Corporation, made no Difference in the Caſe.

As to the 2d Queſtion, They thought it a Point of Importance and extenſive Conſequence; and therefore deſired a further Argument: Though they ſeemed inclined to think that it was PROPERLY *taxed*, as part of the *Company*'s Perſonal Eſtate, in their CORPORATE Capacity, by Virtue of the Clauſes in *fo.* 48 & 64 of 27 *G.* 2. *c.* 4. It therefore ſtood over, for an

ULTERIUS CONCILIUM.

Upon which further Argument, Lord *Mansfield* was ſo extremely clear, that He ſaid he had been endeavouring (to the utmoſt of his Power) to *raiſe* a Doubt; but could not.

In 4, 5 *W. & M.* the Diſtricts and Diviſions were allotted. So that the Queſtion here is only between the DIVISIONS: Not between the *City*, and the *Company*.

And this ſpecial Verdict was only meant, (as it is plain by the Finding,) to try the *firſt* Point. Nothing is found about Shares of Proprietors: Nor was this ſecond Point then thought of.

It's plain they are to be rated AS *a* CORPORATE Body, by *fo.* 76. And to rate the *Individuals*, would be *almoſt impoſſible*. The Argument would prove too much; *viz.* that *No* Corporation could be taxed.

The *Hudſon's Bay Company* are ſaid to be rated *for their Stock*: And there is a particular Direction given, *where* the Bank of *England* are to be rated.

Mr. Juſt. *Deniſon* concurred.

The *Original* Capital raiſed under 6 *G.* 1. *c.* 18. was intended for *another Purpoſe*. The Queſtion was certainly made upon the *firſt* Point: And this ſecond Point was not, I dare ſay, at that Time, thought of. And here is nothing ſtated, to bring this ſecond Point within the Clauſe in *fo.* 75 & 76 of the Act of 27 *G.* 2. *c.* 4. Therefore We cannot take this to be any more than the Common Caſe. They are taxed as a *Corporate* Body, within the Clauſe in *fo.* 48: And I do not ſee how they could have been taxed otherwiſe.

Therefore Judgment ought to be for the Defendant.

Mr. Juſt. *Foſter* was of the ſame Opinion.

The 1ſt Point, He obſerved, was determined before the preſent Argument, and rightly. The Company had impoſed both upon the Crown, and upon the Adventurers, by blending their different Stocks together.

As to this ſecond Point, It can't bear a Queſtion "Whether they "ſhould be taxed in their *Corporate* Capacity, *or as Individuals*." It was intended, and it is the natural and proper Way, to tax the *Corporation*, in their CORPORATE Capacity. And this is what the Act manifeſtly meant: The Tax is to be paid out of the Stock; and this will occaſion a proportionable Deduction out of the Dividends.

By the Court unanimouſly, (Except that Lord Commiſſioner *Wilmot* was, at the Time of the ſecond Argument, abſent in Chancery,)

JUDGMENT for the DEFENDANT.

Thurſday 3d *February* 1757. Maſter and Senior Fellows of St. John's College, Cambridge, *verſ.* Todington, Clerk.

A Prohibition had been prayed by the College, to be directed to the Biſhop of *Ely*, to prohibit Him from proceeding upon a Monition iſſued by Him againſt them, upon Mr. *Todington*'s Application and Appeal to Him, AS VISITOR *of the College:* And the College had thereupon obtained a Rule to ſhew Cauſe why a Prohibition ſhould not go. Which Rule to ſhew Cauſe was made upon a Suggeſtion " That the Biſhop was NOT *Viſitor* of the College, " AS TO *Elections* into Fellowſhips and other Offices;" and alſo, " that admitting him to be ſo, yet the *preſent* Matter (which related " to a SOUTHWELL-Fellowſhip) was NOT *within his Juriſdiction:*" For the Suggeſtion ſet forth a Deed of Covenants (all on the part of the College,) relating to a Foundation of 2 Fellowſhips and 2 Scholarſhips by Dr. *Keton*; in which Deed and Covenants, a Power is reſerved to Dr. *Keton*, to make Statutes (to which his Fellows and Scholars were to be ſworn,) ſo as they ſhould be conformable to the Statutes of the Foundreſs of the College. And there is alſo a PENALTY and Forfeiture given to Dr. *Keton* and his Truſtee, and alſo to the Church of *Southwell*; and a *Clauſe of* DISTRESS, for the ſaid Forfeiture or Penalty, upon two of the College Manors, in Caſe the College ſhould break the Covenants. The Suggeſtion adds " That Dr. *Keton*, in Fact, never gave any Statutes, or made any " Declaration, in relation to theſe Fellowſhips."

The Gravamen complained of, is a Citation from the Biſhop of *Ely* to the Maſter and Senior Fellows, upon the Complaint of the ſaid *Tho. Todington*, Clerk, on his being refuſed an Election into One of theſe two *Southwell*-Fellowſhips; ſhewing, " That *he was* " within the Deſcription of the Endowment; whereas they had " choſen one *William Craven*, who (as Mr. *Todington* alledged) " was NOT *ſo*; and that the Biſhop had alſo cited the ſaid *William* " *Craven*, as well as the ſaid Maſter and Senior Fellows, to appear " before Him at *Ely*-Houſe *&c.*

In Order to have a clear and full Conception of this Caſe, it may be neceſſary to ſpecify this Suggeſtion at large; and alſo to premiſe ſome other Particulars which are requiſite to be known: Which are, 1ſt. The *Deed* between the Executors of *Margaret* Counteſs of *Richmond* (the Foundreſs) and Biſhop *Fiſher*, confirmed by the Prior and Convent of *Ely*; 2dly. Some Extracts from Biſhop *Fiſher's Statutes*; and 3dly. Some Extracts from *thoſe Statutes* which Queen *Elizabeth* afterwards gave to this College, and under which the College have ever ſince acted.

Hilary

The SUGGESTION, (at large—)

Hilary Term in the 29th Year of the Reign of King *George* the Second.

England to wit. BE it remembered that on the Eleventh Day of *February* in this ſame Term, came into Court here *John Newcome* Doctor in Divinity Maſter of the College of Saint *John* the Evangeliſt in the Univerſity of *Cambridge*, and the Senior Fellows of the ſaid College; and give the Court here to underſtand and be informed that whereas all Pleas of and concerning any Lands and Tenements, and of and concerning any Eſtate or Intereſt of Freehold, and alſo of and concerning the Conſtruction and Operation of Deeds and Writings under Seal, and of Debts ariſing thereby, and the Cognizance of the ſame Pleas, to the Lord the King and his Royal Crown eſpecially appertain and belong, and at the Common Law in the Courts of Record of our Lord the King and not in the Eccleſiaſtical Court nor by any Eccleſiaſtical Judge ought to be tried diſcuſſed and determined and always hitherto have been ſo accuſtomed to be tried diſcuſſed and determined; and whereas the Biſhop of *Ely* for the Time being is *not Viſitor* of the ſaid College, *as to Elections into Fellowſhips or other Offices* in the ſaid College, nor hath any Viſitatorial Power or Juriſdiction whatſoever over the Maſter and Fellows of the ſaid College or any of them in *that* reſpect; and whereas by an Indenture Tripartite made the Twenty-ſeventh Day of *October* in the Twenty-ſecond Year of the Reign of our Sovereign Lord King *Henry* the Eighth, Between Sir *Anthony Fitzherbert* Knight then one of the King's Juſtices of his Common Pleas and *John Keton* Doctor of Divinity and Canon of the Cathedral Church of *Saliſbury* upon the one Part, The Chapiter of *Southwell* within the County of *Nottingham* upon the ſecond Part, and the then Maſter Fellows and Scholars of the College of Saint *John* the Evangeliſt in the Univerſity of *Cambridge* upon the third Part, it was covenanted condeſcended and agreed between the ſaid Parties for them their Heirs and their Succeſſors for ever in the Form following that is to wit, Firſt, The ſame Maſter Fellows and Scholars of the College of Saint *John* aforeſaid had granted for them and their Succeſſors for ever unto the aforeſaid *Doctor Keton*, that *he* for himſelf, at the Nomination and Appointment as thereafter expreſſed, ſhould have *two Fellows* and two Diſciples founded and ſuſtained at the Coſts only of the ſaid Maſter Fellows and Scholars within the College of Saint *John* aforeſaid, there *to continue for ever* of his Foundation, over and above other Fellows Scholars or Diſciples then founded or thereafter to be founded

founded by the Foundreſs of the ſaid College or any other Perſon or Perſons that then had given or thereafter ſhould give Lands or Goods to ſuch Purpoſe and Intent; And the ſaid Maſter Fellows and Scholars of the ſaid College thereby covenanted and granted unto the ſaid Sir *Anthony Fitzherbert* Doctor *Keton and to the ſaid Chapiter*, and to their Heirs and Succeſſors, that the ſaid Fellows and Scholars or Diſciples of the Foundation of the ſaid Doctor *Keton* ſhould have and enjoy all Manner of Profits, as well Meat Drink and Wage as all other Commodities Eaſments and Liberties, *like and in as large Manner as other* Fellows and Scholars of the ſame College by the Foundreſs' Foundation of the ſame College then had or in Time then coming ſhould have in any Manner of wiſe, at the proper Coſts and Charges of the ſame Maſter Fellows and Scholars of the College of Saint *John* the Evangeliſt aforeſaid and of their Succeſſors for ever; And the ſame Maſter Fellows and Scholars by the ſaid Indenture covenanted and agreed unto the ſaid Sir *Anthony Fitzherbert* Doctor *Keton and Chapiter of Southwell* and to their Heirs and Succeſſors, that the ſame two Fellows of the Foundation of the ſaid Doctor *Keton* ſhould have receive and perceive of the ſaid Maſter Fellows and Scholars and their Succeſſors every Year twenty-ſix Shillings and eight Pence Sterling over and above the Wage limited to other Fellows of the Foundreſs' Foundation, that is to ſay, to either of them eight Shillings and four Pence Sterling, at the Feaſts of *Eaſter* and Saint *Michael* yearly, by even Portions: Furthermore, the ſaid Maſter Fellows and Scholars of Saint *John* aforeſaid thereby covenanted and granted for them and their Succeſſors unto the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton* or the longer liver of them, that they from thenceforth ſhould have the *Nomination and Election of the ſaid Fellows* and Scholars or Diſciples during their Lives natural, and after the deceaſe of the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton* then the ſaid Fellows and Scholars or Diſciples ſhould be at the Nomination and Election of the ſaid Maſter Fellows and Scholars of the College of Saint *John* aforeſaid and of their Succeſſors for ever, *after and according to* ſuch Ordinance and Writing as the ſaid DOCTOR KETON *ſhould thereof make and declare by his laſt Will or otherwiſe*; PROVIDED ALWAY that the ſaid Fellows and Scholars or Diſciples ſhould be elect and choſen *of thoſe Perſons* that be or had been *Queriſters of the Chapiter of Southwell* aforeſaid, if any ſuch able Perſon in Manners and Learning could be found *in Southwell* beforeſaid; And in Default of ſuch Perſons *there*, then of ſuch Perſons as had been Choriſters of the ſaid Chapiter of *Southwell*, which Perſons ſhould be then Inhabitant or abiding *in the ſaid Univerſity* of *Cambridge*; and IF NONE SUCH ſhould be found able in the Univerſity aforeſaid, *then* the ſame Fellows and Scholars or Diſciples to be elected and choſen of *ſuch* Perſons that ſhould be moſt ſingular in Manners and Learning, *of what Country ſoever* they ſhould be, that

2. ſhould

ſhould be then abiding in the ſame Univerſity. Furthermore the ſame Maſter Fellows and Scholars covenanted and granted by the ſaid Indenture unto the abovenamed Sir *Anthony Fitzherbert* and Doctor *Keton and to the ſaid Chapiter* their Heirs and Succeſſors, that when the ſaid two Fellows and two Scholars or Diſciples of the Foundation of the ſaid Doctor *Keton* or any of them ſhould chance to *die or otherwiſe depart* from the ſaid College and leaved or leaſed his or their Title or Profits of the ſame, that then immediately after that leaſing leaving departing or ceaſing, at the then next time of Election of Fellows or Diſciples of the ſaid College limited by the Statutes of the College of Saint *John* aforeſaid, *other Fellow or Fellows* Diſciple or Diſciples, as the Caſe ſhould require, ſhould be *elected named and choſen* by the ſaid Maſter Fellows and Scholars, ACCORDING *to thoſe then preſent Covenants and Agreements, according to ſuch Ordinances or Will* as the ſame *Doctor Keton* SHOULD *thereof make and declare.* And alſo it was covenanted and agreed by the ſaid Indenture, that the ſaid Maſter Fellows and Scholars of Saint *John* aforeſaid, and alſo the Fellows and Scholars of the Foundation of the ſaid Doctor *Keton*, at the Time of their Admiſſion, ſhould be *ſworn to obſerve and keep* the Statutes and Ordinances that then were made *or thereafter* ſhould be ordained and made by the ſaid Doctor *Keton* for the Foundation of the ſaid Fellows and Scholars; *ſo that* the ſaid Statutes ſhould be conformable with the Statutes of the *Foundreſs* of the ſaid College. For the which all and ſingular the Premiſſes well and truly to be obſerved and kept by the ſaid Maſter Fellows and Scholars and their Succeſſors in Manner and Form as is aforeſaid, that is to ſay, *as well for the Elections and Admiſſions of the ſaid Fellows* and Scholars and for their Finding, as for Wages yearly to be paid to the ſame, with all other Liberties Commodities and Profits likewiſe pertaining unto them, *as for all other Covenants and Agreements* with all and ſingular the Premiſſes according to the Ordinance above rehearſed, the ſaid *Doctor Keton had contented given and paid* to the ſaid Maſter Fellows and Scholars, in Money Plate and other Jewels, the Value of four hundred Pounds Sterling. Further it was covenanted and agreed by the ſaid Indenture, between the ſaid Parties, for them and their Succeſſors, that *if* the ſaid Maſter Fellows and Scholars and their Succeſſors *did fail in taking admitting or receiving of the ſaid Fellows* and Scholars in any Time of Election next after the Avoidance, and not choſen nor admitted into the ſaid College according to the Ordinances and Agreements above rehearſed, or had not nor enjoyed not their full Commodities and Profits as is aforeſaid, then the aforeſaid Maſter Fellows and Scholars and their Succeſſors *ſhould* FORFEIT as well to the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton as to the Chapiter of Southwell*, and to their Heirs and Succeſſors, in the Name of a PENALTY or Pain *for every Default made or no due Election of the ſaid Fellows* and

Scholars or any of them, TWENTY SHILLINGS *for every Month* that it ſhould happen the ſaid Fellows and Scholars not to be choſen nor admitted into the ſaid College as is aforeſaid, or reſtrained of any Profits Commodities or Eaſements as is aforeſaid; and that then it ſhould be lawful as well to the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton* on their Party, *as to the Chapiter of Southwell*, and to their Heirs and Succeſſors for their Party, *into the Manors of Marſkete and Myllington* in the County of *York*, and *into the Manor of Little Markham* in the County of *Nottingham*, *to Enter*, *and* DISTRAIN *for the ſame* Twenty Shillings and the Arrears of the ſame for every Time or Times of Forfeiture, and the *Diſtreſs to withhold until* the ſaid Twenty Shillings with the Arrearages of the ſame ſhould be to them well and truly Satisfied Contented and Paid. Alſo the ſaid Maſter Fellows and Scholars by the ſaid Indenture Covenanted and Granted unto the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton*, that they the ſaid Maſter Fellows and Scholars and their Succeſſors, at every Time and Times during the Life Natural of the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton*, ſhould give Notice and Knowledge to the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton* or to the longer Liver of them, within ſix Days, when and as often as it ſhould fortune any of the ſaid Fellowſhips or Diſcipleſhips to be void or vacant; ſo that the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton* or the longer Liver of them might nominate and appoint other Fellow or Fellows Diſciple or Diſciples apt and able to have receive and take the ſaid Fellowſhips or Diſcipleſhips ſo then being void. And Whereas the ſaid *Doctor Keton did* NOT *at any Time*, *by his laſt Will or otherwiſe*, MAKE *or* DECLARE *any Statute or Ordinance*, other than what was contained in the ſaid above recited Indenture, *of or concerning the ſaid Fellowſhips* called *Southwell* Fellowſhips, or of or concerning either of them; Nevertheleſs the Right Reverend *Matthias* by Divine Permiſſion Lord Biſhop of *Ely*, well knowing the Premiſſes, but contriving and intending to aggrieve and oppreſs the ſaid *Maſter and* SENIOR *Fellows* of the College aforeſaid, againſt the due Courſe of the Law of this Realm, and to Diſinherit our Lord the King and his Crown, and to draw the Cognizance of a Plea which belongs to his Majeſty's *Temporal Courts* and ought there to be tried diſcuſſed and determined, to *another Triál before the ſaid Lord Biſhop*, hath lately drawn into a Plea the ſaid Maſter and Senior Fellows of the College aforeſaid, before the ſaid Lord Biſhop, by a certain Inhibition Citation and Monition bearing Date the Twenty-ninth Day of *January* in the Year of our Lord One thouſand Seven hundred and fifty-ſix, Reciting that " Whereas " on the Part and Behalf of the Reverend *Thomas Todington* " Clerk, of the ſame College, Batchelor of Arts, it had been " (with grievous Complaint) alledged and ſhewn to the ſaid Lord " Biſhop, that the Reverend *John Newcome* Doctor in Divinity,

" Maſter of the ſaid College, and the Senior Fellows of the ſame, " *Unjuſtly and Unduly Proceeding in the Election of Fellows of* " the ſaid College, did on or about the Seventeenth Day of *March* " laſt *Chooſe and Elect the Reverend William Craven*, Bachelor of " Arts, *into a Fellowſhip* in the ſaid College commonly called a " *Southwell Fellowſhip*, founded by the Reverend *John Keton* Doctor " in Divinity, Vacant by the Reſignation of the Reverend *Theophi-* " *lus Lindſey* Bachelor of Arts late one of the *Southwell* Fellows of " the ſaid College as aforeſaid, and did REFUSE *to elect and admit*, " at leaſt *did* NOT *admit and elect the ſaid Thomas Todington* into " the ſaid vacant *Southwell* Fellowſhip, notwithſtanding the ſaid " *Thomas Todington* who was an *Inhabitant abiding within* the ſaid " College and *had been Choriſter of the Church of Southwell* in the " County of *Nottingham* ſeveral Years, OFFERED *himſelf a Candi-* " *date and* PRAYED *to be elected and admitted into the ſaid Fellow-* " *ſhip*, and NO OTHER *Choriſter of the ſaid Church of Southwell* " offered himſelf a Candidate for the ſaid vacant Fellowſhip; And " that he the ſaid *Thomas Todington*, apprehending himſelf to be " greatly *injured and aggrieved by the pretended Election aforeſaid* " and other pretended *Proceedings of the ſaid Maſter and Senior* " *Fellows*, as well by Virtue of their pretended Office as at the un- " juſt Inſtigation Solicitation Procurement and Petition of the ſaid " *William Craven*, and juſtly fearing that he might be further in- " jured and aggrieved thereby, had FROM *the ſame* and every of " them, and ESPECIALLY *from the ſaid pretended Choice and Elec-* " *tion of the Perſon of the ſaid William Craven into the aforemen-* " *mentioned vacant Fellowſhip* in the ſaid College, ſo made or pre- " tended to be made by the ſaid Maſter and Senior Fellows, not- " withſtanding the ſaid *Thomas Todington* offered himſelf a Candi- " date and prayed to be Elected and Admitted into the ſaid vacant " Fellowſhip, and no other Choriſter of *Southwell* offered himſelf a " Candidate for the ſame, and FROM *their refuſing to elect and ad-* " *mit*, at leaſt *not Electing and Admitting the ſaid Thomas Toding-* " *ton into the ſaid vacant Fellowſhip*, and *from* all and every thing " that did or might follow therefrom, and *from* all and ſingular " other Grievances Nullities Iniquities and Errors in Proceeding, " and *from* All other Acts Facts and Things illegally done, that " might be collected from the pretended Proceedings of the ſaid " Maſter and Senior Fellows in the ſaid pretended Election, To " *the ſaid Lord Biſhop, the* VISITOR OF THE SAID COLLEGE, " rightly and duly APPEALED, and of and concerning the Nullity " and Iniquity of all and ſingular the Premiſſes aforeſaid had equally " and alike principally alledged and complained;" And alſo reci- ting That " whereas the ſaid Lord Biſhop, rightly and duly pro- " ceeding, had at the Petition of the Proctor of the ſaid *Thomas* " *Todington* (Juſtice ſo requiring,) *Decreed the Inhibition Citation* " *and Monition* thereunder written, The ſaid Lord Biſhop did there-

" fore

" fore thereby authorize impower and ſtrictly injoin and command " all and ſingular Clerks and Literate Perſons whomſoever and " whereſoever, jointly and ſeverally, that they ſhould *inkibit or* " *cauſe to be inhibited*, perſonally, if they conveniently could ſo do, " otherwiſe, by publickly affixing the ſaid Monition for ſome Time " on the outward Door of the Chapel belonging to the ſaid College " and by leaving there affixed a true Copy thereof, the ſaid *Maſter* " *and Senior Fellows*, and *alſo the ſaid William Craven*, in Special, " and all others in General, who by Law were required to be In- " hibited in that Behalf; All and every of whom, the ſaid Lord " Biſhop alſo by the Tenor of the ſaid Monition did inhibit and in- " join, that they nor any or either of them ſhould innovate or at- " tempt or cauſe or procure to be done innovated or attempted " any thing to the Prejudice of the ſaid *Thomas Todington* or his ſaid " Cauſe of Appeal or the Authority or Juriſdiction aforeſaid of the " ſaid Lord Biſhop, pending the ſaid Cauſe of Appeal and Com- " plaint and ſo long as the ſame ſhould remain undecided before " the ſaid Lord Biſhop, ſo that the ſaid *Thomas Todington* the Ap- " pellant might have free Liberty and Power (as in Juſtice he ought) " to proſecute that his ſaid Cauſe of Appeal and Complaint, under " Pain of the Law and their Contempt; And alſo that they ſhould " in like Manner CITE *the ſaid Maſter and Senior Fellows* and alſo " the ſaid *William Craven*, or cauſe them to be peremptorily cited *to* " APPEAR *before the ſaid Lord Biſhop* at his Manſion Houſe com- " monly called *Ely* Houſe ſituate in the Pariſh of Saint *Andrew Hol-* " *bourn* in the County of *Middleſex*, on *Monday* the ninth Day of *Fe-* " *bruary* then next enſuing, between the Hours of Three and Six in " the Afternoon of the ſame Day, then and there *to* ANSWER *to* " *the ſaid Thomas Toddington* in his ſaid Buſineſs of Complaint; and " further to do and receive as to Law and Juſtice ſhould appertain, " under Pain of the Law and their Contempt; And Moreover that " they ſhould Moniſh or cauſe to be moniſhed Peremptorily, in " like Manner, the ſaid *Maſter and Senior Fellows and Officers* of " the ſaid College in Special, and all Others in general, that they " ſome or one of them ſhould *tranſmit or cauſe to be tranſmitted* " to the ſaid Lord Biſhop, at the Time and Place aforeſaid, All " and ſingular the Statutes Acts Original Exhibits Books Indentures " Miniments Inſtruments and Proceedings in or any wiſe concern- " ing the ſaid pretended Election or the ſaid Cauſe of Appeal and " Complaint, and more eſpecially the Statutes Books and Inden- " tures in the thereunderwritten Schedule mentioned, under Pain " of the Law and their Contempt; And what they ſhould do in " the Premiſſes, they ſhould duly certify to the ſaid Lord Biſhop, " together with the ſaid Monition: And the ſaid Lord Biſhop hath " annexed the following Schedule to the ſaid Monition, (To wit) " The Original Statutes of the College given by Queen *Elizabeth* " or an authentic Copy thereof, The Indenture bearing Date the

" twenty ſeventh Day of *October* in the twenty ſecond Year of the " Reign of King *Henry* the Eighth relating to Doctor *Keton*'s or " the *Southwell* Fellowſhips founded in the ſaid College, The Book " or Books wherein the Election of Fellows and the Proceedings " thereon are entered, The Book of Battles or Buttery Book for " the Months of *February* and *March* laſt;" as by a Copy of the ſaid Monition, and Schedule thereto annexed, here in this Court read, more fully appears. And although the ſaid Maſter and Senior Fellows of the ſaid College *have pleaded and alledged* all and ſingular the Matters aforeſaid by them above ſuggeſted and alledged, before the ſaid Lord Biſhop, in their Diſcharge of and from the Premiſes aforeſaid; and have *offered to prove* the ſame by undeniable Teſtimony and Proof; Yet the ſaid Lord Biſhop hath wholly REFUSED *to receive or admit the ſaid Plea Allegation and Proof*, and them by Definitive Sentence of the ſaid Lord Biſhop, in the ſaid Premiſes, with all his might doth endeavour and daily labour to condemn; in great Contempt of our Lord the now King and his Laws, and to the great *Damage and Injury of the ſaid Maſter and Senior Fellows* of the ſaid College: All which ſaid Premiſes the ſaid Maſter and Senior Fellows of the ſaid College are ready to verify and prove as this Court here ſhall direct. Wherefore the ſaid *Maſter and Senior Fellows* of the ſaid College, imploring the Aid and Munificence of this Court, here, pray Relief and His Majeſty's *Writ of* PROHIBITION to be directed to the ſaid Lord Biſhop in this Behalf, *to prohibit him that he do not any further hold Plea before him*, touching the Premiſes aforeſaid or any Part thereof. And it is granted to them *&c.*

The *Deed.*

Suppreſſio Domûs Sancti Johannis in Cantab.

THIS Indenture made the twelfth Day of *December* in the ſecond Year of the Reign of our Sovereign Lord King *Henry* the Eighth, Between the Reverend Father in God *Richard* Biſhop of *Wincheſter John* Biſhop of *Rocheſter* Sir *Charles Somerſet* Knt. Lord *Herbert* Sir *Thomas Lovell* Knight Sir *Henry Marney* Knt. Sir *John Saint John* Knight *Henry Horneby* Clerk and *Hugh Aſheton* Clerk, *Executors of the Teſtament of the* excellent Princeſs *Margaret late Counteſs of Richmond and Derby* and Grand-Dame to our ſaid Sovereign Lord King *Henry* the Eighth, on the one Party, and the Reverend Father in God *James Biſhop of Ely* and ORDINARY *of the Houſe or Priory of Saint John in Cambridge*, on the other Party, Witneſſeth That Whereas our Holy Father the Pope, by his Bulls under Ledd, for the Increaſe of Virtue Learning and Doctrine and Preaching of the Word of God, and to the eſtabliſhing of Chriſt's

Faith, and for divers Conſiderations expreſſed in the ſaid Bull, Hath *ſuppreſſed* extinguiſhed and determined the Foundation and Religion of the *ſaid Houſe and Priory*, by the Royal Aſſent of our ſaid Sovereign Lord the King that now is, by his Letters Patents under his Great Seal, and alſo by the *Aſſent and Agreement* of the ſaid Reverend Father *James Biſhop of Ely*, confirmed by the Prior and Convent of the Cathedral Church of *Ely*, as in the ſaid Bulls Letters Patents and other Writings thereof made, more plainly appeareth; It is now covenanted betwixt the ſaid Parties and fully concluded, and *by the ſaid Reverend Father Biſhop of Ely granted*, that *he*, for the better Execution and Aſſurance of the Premiſes, ſhall before the ſixteenth Day of *January* next enſuing after the Date of theſe Preſents, avoid and cauſe to be voided and removed out of the ſaid Houſe and Priory, all ſuch and as many religious Perſons as now be incorporated and poſſeſſed in the ſaid Houſe and Priory of Saint *John*, or that can or may pretend or claim any Right Title or Intereſt in or to the ſaid Houſe or Priory or to the Poſſeſſions thereof, by reaſon of their Profeſſion or Incorporation within the ſame; and utterly make void and diſpoſe the ſaid religious Perſons from the ſaid Houſe and Priory, and all ſuch Right Title Claim and Intereſt as they or any of them have pretended or claim to have within the ſame Houſe and Priory or to the Poſſeſſions or to any thing thereunto belonging; and alſo cauſe the ſame religious Perſons and every of them, by Authentic Inſtrument, in ſure and ſufficient Form to be made, to reſign and renounce all ſuch Right Title Claim and Intereſt as they or any of them have or in any manner of wiſe may have to the ſaid Houſe or Priory or to the Poſſeſſions or to any thing thereunto appertaining; And that the ſame Biſhop ſhall tranſlate or cauſe to be tranſlated all the ſame religious Perſons into other Houſe or Houſes of the ſame Religion, and cauſe them and every of them clearly to renounce relinquiſh and leave the ſame Houſe and Priory and all the Poſſeſſions thereof, and clearly to depart and to be utterly excluded from the ſame for ever, and to be really and effectually accept and incorporate in ſome other Houſe or Houſes of the ſame Religion; and cauſe the ſaid Houſe and Priory of Saint *John* and the Foundation and Corporation thereof to be clearly diſſolved and determined for ever, before the ſaid ſixteenth Day of *January* next enſuing. And alſo the ſaid *Biſhop of Ely covenanteth* and granteth to the ſaid Executors, by theſe Preſents, that *he*, before the Feaſt of the Purification of our Lady next enſuing, and at all Times after, when he ſhall be reaſonably required by the ſaid Executors or any of them, *ſhall make and cauſe to be made all ſuch Grants and Aſſurances* TO THE SAID EXECUTORS *their Heirs and Aſſigns*, OF *the ſaid Houſe and Priory* of Saint *John*, and *of all* the Manors Lands Tenements and Poſſeſſions and all other that belongeth and at any time belonged thereunto, To have and hold *to the ſame Executors their Heirs and Aſſigns*, as ſhall be adviſed by the

Learned Counſel of the ſame Executors, their Heirs and Aſſigns or any of them, at their Coſts and Charges; and *cauſe* all the ſame Grants and Aſſurances *to be confirmed* by the Prior and Convent of the ſaid Cathedral Church of *Ely*, by their Deed and Deeds ſealed with their Common Seal, in ſuch wiſe as ſhall be adviſed by the ſaid Executors or any of them; ſo that the ſaid Executors or ſome of them, by Reaſon and Authority of the ſaid Bulls and of the ſaid Letters Patents and other Premiſes, may make lawful perfect and ſure Tranſlation of the ſaid Houſe and Priory of Saint *John* and the Poſſeſſions thereof, unto a perpetual COLLEGE, of a perpetual Maſter and Fellows, and there *erect found and eſtabliſh a perpetual* COLLEGE, of a perpetual Maſter and Fellows, *according to the Will Mind and Intent of the ſaid Princeſs, and according to the Ordinances and Statutes of the ſaid Executors*, thereof to be made by Virtue and Authority of the ſaid Bulls and Letters Patents, there perpetually to endure: And on this, the ſaid *Biſhop of Ely covenanteth and granted to the ſaid Executors*, by theſe Preſents, that the ſame Biſhop and his Succeſſors, and alſo the ſaid Prior and Convent of the ſaid Cathedral Church of *Ely* and their Succeſſors, ſhall at all times do and cauſe and ſuffer to be done all things neceſſary and requiſite for the ſaid Tranſlation and for the Foundation and eſtabliſhing of the ſaid College for ever to endure, as by the Learned Counſel of the ſaid Executors or any of them ſhall be adviſed, at the Coſts and Charges of the ſaid Executors. And the ſaid *Executors*, by theſe Preſents, *permit and grant to the ſaid Reverend Father Biſhop of Ely*, that the ſaid *Maſter and Fellows*, within one Month next after that they ſhall be founded and have real and corporal Poſſeſſion of the ſame Houſe and Priory and of the Manors Lands and Tenements and Poſſeſſions of the ſame, *ſhall grant*, by their ſufficient Writing under their Common Seal, for the Exhibition and Finding of the ſaid religious Perſons during their Lives, to every of them or to other Perſons at their Nomination, an Annuity of 6 *l.* 13 *s.* 4 *d.* by the Year, to be had and perceived to every of them during their Lives, out of the ſaid Houſe, Manors Lands and Tenements, at Two Feaſts of the Year, that is to ſay *Eaſter* and *Michaelmas*, by even Portions, with a ſufficient Clauſe of Diſtreſs in the ſame Houſe and in all the ſaid Manors Lands and Tenements, for ſake of Payment of the ſame. And the ſaid *Executors covenant and grant to the ſaid Reverend Father in God Biſhop of Ely*, by theſe Preſents, that after the ſaid Tranſlation of the ſaid Houſe and Priory and Foundation of the ſaid College, the ſame Executors, in their Statutes and Ordinances thereupon to be made and ordained for the Ordering and Continuance of the ſame College, *ſhall ordain and eſtabliſh* (among other things) that the *Juriſdiction Ordinary of the ſame College* and of the ſaid Churches and Chapels thereunto belonging *ſhall appertain and belong to the ſame Biſhop and his Succeſſors for evermore*, and that the Maſter and Fellows ſhall pray for the good Eſtate

Eſtate of the ſaid Biſhop during his Life, and for his Soul after his Deceaſe, *as the* SECONDARY *Founder* Benefactor and Partner in the ſaid Holy and Meritorious Work, And alſo for the good Eſtate of all his Succeſſors in Time to come Biſhops of *Ely*, during their Lives, and for the Souls of his Predeceſſors Patrons and Founders of the ſaid Houſe and Priory, and for the Souls of his Succeſſors *as ſecondary Founders of the ſaid College*; And on that, the ſaid Executors ſhall provide and make Statutes and Ordinances of the ſaid College; in ſuch Manner that there ſhall not be any Ambiguity in the Elections of the Maſters and Fellows of the ſaid College. And alſo the ſame Executors granten to the ſaid Reverend Father in God Biſhop of *Ely*, by theſe Preſents, that the ſame Reverend Father in God, during his Life, ſhall name and chooſe three apt and able Perſons, Scholars; And his Succeſſors, after his Deceaſe, one apt and able Perſon, Scholar; to be made Fellows of and in the ſaid College, and there to be accepted and admitted Fellows of the ſame College, at their Nomination and Election; and that to be renewed and uſed, as oft as the Place of any of them ſhall happen to be void: And on that, the ſaid Executors granten to the ſaid Reverend Father in God Biſhop of *Ely*, that they ſhall ordain and provide in the ſaid Statutes, that the Maſter and Fellows of the ſaid College ſhall be bounden to pray for all ſingular Perſons as well alive as dead, for the which the ſaid religious Brethren of the ſaid Houſe and Priory were bound to pray, in likewiſe as the ſaid Executors have before this time promiſed and covenanted with the ſame Reverend Father in God to be done. In Witneſs whereof, the ſaid Parties to theſe Preſent Indentures interchangeably have ſet their Hands and Seals, the Day and Year abovewritten.

The Confirmation of the above Indenture, by the Prior and Convent of the Cathedral Church of *Ely*.

AND We the Prior and Convent of the Cathedral Church of *Ely*, having and taking theſe preſent Indentures and all and ſingular Premiſſes contained therein, freely agreed accept and approve; And the Indenture, and all the ſame Premiſes contained and ſpecified therein, unto the ſaid Executors their Heirs and Aſſigns, for Us and our Succeſſors, ratify approve and confirm, by theſe Preſents, (Rents Conſuetudes and *all other Rights* of our Monaſtry and Priory of *Ely*, to Us and our Succeſſors, in all Things, always *ſaved and reſerved*.) In Witneſs whereof, We the ſaid Prior and Convent to theſe Preſents have ſet our Common Seal. Given in our Chapter Houſe, the fifth Day of *January* in the Year of our Lord God 1510.

EXTRACTS from Biſhop *Fiſher*'s Statutes.

Statuta pro Collegio Divi Johis Evangeliſtæ infra Gimnaſium Cantabrigienſe ſito.

Preamble—

UT conſtet univerſis qui Statuta præſentia lecturi ſunt, quânam Auctoritate ſancita fuerint, hoc Frontiſpicio locandum cenſuimus Inſtrumentum quoddam Sigillis et Subſcriptionibus omnium Executorum præſtantiſſimæ Viraginis Dominæ Margaretæ Richmondiæ, Fundatricis Collegij divi Johannis Evangeliſtæ in Cantabrigia: Quo Inſtrumento per eoſdem Executores confecto, planè conſtat plenariam Auctoritatem mihi Johanni Epiſcopo Roffenſi traditam, pro condendis Legibus et Statutis, quibus tam Magiſter quam Socij et Scholares pariter et Diſcipuli teneantur obedire. Cujus quidem Inſtrumenti Tenoris eſt, qui ſequitur.

" Univerſis Chriſti fidelibus præſentes literas inſpecturis, Ricar-
" dus Winton. Epiſcopus Carolus Somerſet Comes Wigorniæ Tho-
" mas Lovel Miles Henricus Verney Miles Johannes Seynt John
" Miles Henricus Horneby et Hugo Aſheton Clerici, Executores
" Teſtamenti et ultimæ Voluntatis nuper excellentiſſimæ Principiſſæ
" Margaretæ Comitiſſæ Richmondiæ et Derbiæ, Matriſque et Aviæ
" duorum Regum nimirum Henrici Septimi et Octavi, ſalutem in
" Domino, et fidem indubiam præſentibus adhibere. Quum ſit
" optandum potiùs ut non erigerentur Collegia, quam ut erecta
" malè gubernarentur, nos Executores antedicti, qui Sumptibus et
" Impenſis præfatæ Principiſſæ Collegium Sancti Johannes in Can-
" tabrigia extrui curavimus, ſimul et dotari, magno Affectu cupi-
" mus id ipſum juſtis Legibus ſanctiſq; adminiſtrari Sanctionibus.
" Verùm quoniam omnes Nos unà adeſſe commodè non poſſumus,
" ut vel novam Electionem Sociorum in Collegio prædicto faciamus
" vel Sociis ita electis Leges et Sanctiones juſtas ac ſanctas exhibe-
" amus, denique Juramentum ab eiſdem exigamus pro Legibus
" hmoi inviolabiliter obſervandis, Idcircò *noſtras Vices committimus*
" Reverendo Patri *Johanni Roffen. Epiſcopo*, ut *ille* tàm noſtrâ
" quàm ſuâ Auctoritate poſſit numerum Sociorum ibidem augere,
" *Magiſtroq; et Sociis omnibus Statuta ſalubria noſtro Nomine exhi-*
" *bere*, atque ab eiſdem Juramenta exigere pro eorundem inviola-
" bili Obſervatione, Recuſantes verò (ſi qui fuerint) amovere, vio-
" lantes corrigere, ac cætera omnia et ſingula peragere quæ pro ſa-
" lubri Gubernatione ejuſdem Collegij ſibi opportuna viſa fuerint,
" æquè ac ſi nos illic omnes præſentes eſſemus: Quæ omnia et ſingula
" Univerſitati ſignificamus per Præſentes. In quorum omnium et
" ſingulorum Fidem ac Teſtimonium, Sigilla noſtra præſentibus

" appoſuimus. Dat. vigeſimo Die Menſis Martij Anno Domini " Milleſimo quingenteſimo quinto decimo."

Ad Cultum optimi maximi Dei, ad honorem divi Johannis Evangeliſtæ, ac mox ad Fidei Chriſtianæ Incrementum, *Nos Johannes Roffen. Epiſcopus*, unus Executorum ultimæ Voluntatis Nobiliſſimæ Viraginis Dominæ Margaretæ Richmondiæ Derbiæque Comitiſſæ Genitricis et Aviæ duorum Regum Henrici ſeptimi pariter et octavi, *Nomine et Autoritate cæterorum Co-Executorum* ejuſdem Comitiſſæ, nempe Ricardi Wintonienſis Epiſcopi Caroli Somerſet Comitis Wigorniæ Thomæ Lovell Henrici Verney Johannis Seynt John Equitum Henrici Horneby Hugonis Aſhton Clericorum, *Leges et Statuta quæ ſequuntur* EDIDIMUS, Magiſtroq; et Sociis ac Scholaribus Collegij Divi Johannis Cantabrigiæ *tradidimus*, quatenùs eiſdem omninò ſe conforment, tam hi qui jam ſunt Magiſter Socij et Scholares, quam eorum Succeſſores quotquot futuri ſint in perpetuum.

De Electione Magiſtri.

Qd̄ ſi tunc per Viam Spiritus ſancti concordibus animis, Nemine diſſidente, in quempiam ejuſmodi Virum conſenſerint, qualis in Statuto ante lecto deſcriptus eſt; aut ſi major Pars omnium ſuper aliquo ejuſmodi conſenſerit; Volumus et ſtatuimus q'vis abſque Mora, (nullâ prorſùs Licentia Patroni Ordinarij *Viſitatoris* aut alterius cujuſcunque juriſdictionem ordinariam prætendentis, nec Ceſſionis aut Reſignationis hujuſmodi eis vel eorum alicui exhibiaſne, aut ab eorum aliquo ejuſdem Approbatione expectatâ aut requiſitâ,) per Præſidentem Magiſter Collegij pronuncietur, his Verbis—

De juramento Magiſtri.

Ego N. in Magiſtrum Collegij Sancti Johannis Evangeliſtæ in Univerſitate Cantabrigiæ nominatus electus et præfectus Juro, tactis et inſpectis per Me hiis ſacro-ſanctis Evangeliis, dictum Collegium omnia Beneficia Terras Tenementa Poſſeſſiones Reditus ſpirituales et temporales Jura Libertates Privilegia et Bona quæcunq; ejuſdem, nec non omnes et ſingulos Socios et Scholares et Diſcipulos ipſius Collegij, juxta Statuta et Ordinationes dicti Reverendi Patris Domini Johannis Fiſher Roffen. Epiſcopi, abſque Perſonarum Scientiarum Facultatum Generis et Patriæ acceptione quacunque, pro mea virili regam cuſtodiam dirigam et gubernabo, et per alios regi cuſtodiri dirigi et gubernari faciam; Nec ero factioſus, magis favens uni quam alii, contra Juſtitiam et Fraternitatis Amorem; nec eorum alicui Gravamina vel Moleſtias injuſtè inferam; Correctiones quoq; Punitiones et Reformationes debitas juſtas rationabiles

nabiles de quibuſcunq; delictis Criminibus et Exceſſibus Sociorum et Scholarium et Diſcipulorum dicti Collegij, quoties ubi et quando opus fuerit, ſecundùm Rei Qualitatem et Quantitatem omnemq; Vim Formam et Effectum Ordinationum et Statutorum per dictum Reverendum Patrem editorum, abſq; Favore aut Odio Affectione Conſanguinitatis Affinitatis aut aliâ quacunq;, diligenter et indifferenter faciam et procurabo: Et ſi hujusmodi Correctiones Punitiones et Reformationes ut præfertur debitè et juſtè exequi non potero, propter Metum et Potentiam ſeu Multitudinem Delinquentium, ipſorum Nomina et Cognomina, cum Qualitate et Quantitate Delictorum et Exceſſuum hujuſmodi, quam citò potero, intra Menſem, *Domino Epiſcopo Elienſi qui pro tempore fuerit*, aut Domino Cancellario Univerſitatis vel ejus Vicem-gerenti, denuntiabo et revelabo, et *per eos* hujuſmodi Correctiones Punitiones et Reformationes juxta Statuta et Ordinationes Collegij in omnibus ſolerter et celeriter fieri procurabo.

Item quoties Electio vel Aſſumptio alicujus Socij ac Scholaris vel Diſcipuli in Collegium prædictum fuerit facienda, intendam et enitar ut ſolùm tales eligantur et aſſumantur quos ſecundùm Conditiones et Qualitates in Statutis dicti Collegij expreſſas habiles et idoneos reputaverim, et quos in Virtutibus et Scientiis ad Honorem et Utilitatem Collegij prædicti plus poſſe proficere et ac profecturos crediderim, ſine Perſonarum vel Patriæ Acceptione, Amore Favore Odio Invidia Timore Prece et Pretio poſt poſitis quibuſcunq;. Item ſi ab Officio meo amovear, aut ſi ſpontè ceſſero, Bona Collegij per Me recepta aut apud me remanentia, Præſidenti et Theſaurariis Collegij aut (Præſidente abſente) Socio maximè ſeniori in Univerſitate præſenti et dictis Theſaurariis, ſi commodè potero continuò, ſin minùs ſaltem infra quindecim Dies ex tunc prox. ſequen. ſine Contradictione ſeu Diminutione, per Inventarium inde inter me et illos, ſub Teſtimonio et Subſcriptione eorundem et meâ, reſtituam.

Item, ſi per me ſeu Occaſione meâ, aliqua Materia *Diſſenſionis* Iræ vel Diſcordiæ in dicto Collegio (quod abſit) *ſuſcitata fuerit*, et per Præſidentem Decanos vel Theſaurarios et duos alios ex ſeptem Collegij Senioribus finis rationabilis ſeu placabilis infra quinq; Dies factus non fuerit, tunc *Cancellarii Univerſitatis* Cantabrigiæ qui pro Tempore fuerit, *præpoſitique Collegii regalis*, ac *Magiſtri Collegij Chriſti* in eadem Univerſitate, ſi tunc infra eandem præſentes fuerint, ac, dicto Cancellario præpoſito aut Magiſtro extra Univerſitatem Agentibus, abſentis aut abſentium Vices in Univerſitate gerentium, unà cum totidem ex prenominatis quot in Univerſitate præſentes fuerint, *Ordinationi Arbitrio Decreto et Auctoritati* perſonaliter et effectualiter me ſubmittam: Et quicquid duo ex illis pro tempore, ſecundùm Formam infra limitatam pro tempore conſulti, arbitrati fuerint ſtatuerint ordinaverint vel diffinierint in eâ

Parte, id omne fideliter obſervabo et iiſdem cum effectu parebo, ſine Contradictione quacunque, ceſſantibus Provocationibus Appellationibus Querelis Exceptionibus et aliis Juris et Facti Remediis quibuſcunq;, quibus omnibus et ſingulis in Vim pacti renuncio in his Scriptis.

Item, omnia et ſingula Statuta et Ordinationes dicti Collegij per dictum Reverendum Patrem Dominum Johannem Roffen. Epiſcopum, Executorem ultimæ Voluntatis Dominæ Margaretæ Comitiſſæ Richmondiæ et Derbiæ, edita, et per eundem Superſtes fuerit edenda, quantum me concernunt, ſecundùm literalem et grammaticalem Senſum et Intellectum inviolabiliter tenebo exequar et obſervabo, et quantum in me fuerit faciam ab aliis obſervari.

Itemque *nulla Statuta ſeu Ordinationes* Interpretationes Mutationes Injunctiones Declarationes aut Expoſitiones vel Gloſſas aliquas, præſentibus Ordinationibus et Statutis vel qualitercunq; vero Senſui et Intellectui eorundem repugnantes vel repugnantia derogantes vel derogantia contrarias vel contraria, per quemcunq; ſeu quoſcunq; alium vel alios *quam per* Reverendum Patrem Dominū Jonannem Roffen. Epiſcopum prædictum faciendas vel facienda, quomodo libet ſcienter *acceptabo*, vel ad ea *conſentiam*, aut ipſa aliqualiter *admittam*, nec eiſdem *parebo* ullo tempore, vel *intendam*, nec illis vel illorum aliquo ullo Modo *utar* in Collegio prædicto vel extra, tacitè vel expreſſè; ſed eis et eorum cuilibet *contradicam* et etiam *reſiſtam* expreſſè, ipſaq; fieri viis et modis omnibus quibus potero *obſtabo et impediam.*

Item, Juroque, quantum in Me fuerit et quatenùs meam perſonam concernat aut concernere poterit, me laudatas ac probas hujus Collegij Conſuetudines *obſervaturum*, unà cum aliis Ordinationibus per Magiſtrum et Socios ac Scholares editis pro Suſtentatione quorundam Sociorum ac Diſcipulorum, juxta Tenorem cujuſdam Juramenti quo Magiſter olim et Socij ſe devinxerunt *oraturos* tam pro dicto Domino Johanne Roffen. Epiſcopo quam Henrico Ediall Archidiacano Roffen. Hugone Aſhton Archidiacano Eboracenſi Johanne Ripplyngham in ſacrâ Theologia Doctore et Roberto Dokket in eadem Baccalaureo ac Marmaduco Conſtable Equite aurato et Roberto Symſon in Artibus Magiſtro cæteriſq; qui privatas aliquas aut Sociorum aut Diſcipulorum fundationes fecerint aut in poſterum facturi ſint; ſimulq; et curabo, quantum in me fuerit, à cæteris omnibus tam Sociis quam Diſcipulis idem fieri; neque extortas eorundem Interpretationes (per quemcunque factas) admittam, aliter quam Senſus eorum apertus patitur et mea Conſcientia magis conformem indicabit *animo Conditoris.*

3

De

De Sociorum Qualitatibus.

Nunc itidem et Leges dabimus reſiduo Corpori; quod nimirùm ex Sociis, quocunq; numero eos fore contigerit, tanquam ex potioribus et ſolidioribus Membris, volumus integrari. Pro Fundatrice verò, tametſi Rex illuſtriſſimus, in Carta Licentiæ ſuæ quam Aviæ ſuæ, Dominæ Fundatrici, conceſſit, mentionem fecerit de quinquaginta Sociis ac Scholaribus, Nos tamen, qui ob Subtractionem redditauum Annuorum ad Valorem quadringentarum Librarum, ipſum numerum implere non poſſumus, quantum ad præſentem Ordinationem ſpectat (ſi fieri poteſt) octo ſuper viginti deputari volumus et ordinamus.

De Sociorum Electione, ac ipſius Circumſtantiis.

Et quò poſſit exactior fieri Sociorum Delectus, convocari volumus et ſtatuimus, per Magiſtrum vel (ipſo abſente) præſidentem, cunctos Socios in Univerſitate præſentes, primo Die Lunæ cujuſq; Quadrageſimæ, ſimul et comone fieri " quatenùs quiſq; ſolitam Inqui- " ſitionem faciat de Juvenibus quibuſdam, tàm Moribus quàm " Eruditione magis idoneis, qui in Sociorum numerum cooptentur; " et ut repertorum Nomina, ſimul cum Nomine Comitatûs quo " quiſq; fuit oriundus, in Scedula conſcribatur, unà cum aliis Do- " tibus quibus ipſe Juvenis fuerit præditus;" Ad quam Inquiſitionem teneri ſingulos volumus, in Vim Juramenti ſui: Cujus autem Nomenclatura non ante ſeptem Dies Electionis futuræ, tradita magiſtro fuerit aut ejus Vice-gerenti quando Magiſter aberit, hunc, pro eâ Vice, ineligibilem Pronunciamus. Porrò, Delectum hunc, quoties eveniet, celebrari volumus et ordinamus quâq; Die Lunæ quæ proximè ſequitur Dominicam Paſſionis: Quo Die, Magiſter et Socij cuncti præſentes conveniant in Sacellum, quum Horologium inſonuerit octavam; et illic, primùm lecto Statuto de Cooptandorum Qualitatibus, Magiſter primùm, deinde reliqui per Ordinem Socij, jusjurandum quod ſequitur, tactis Sacris Evangeliis, præſtabunt. " Ego N. N. Deum teſtor et hæc ſancta ipſius Evangelia, me ne- " minem in Socium hujus Collegij electurum, *niſi quem* juxta Sta- " tutum antelectum me *Conſcientia magis idoneum indicabit*; neq; " iſtud faciam Pretio vel Mercede quâvis, à quopiam aut datâ aut " expectatâ." Juratis itaq; ſingulis, fiat è veſtigio Scrutinium, per Magiſtrum et duos è Sociis maximè Senioribus, (ſic tamen ut hi non fuerint de Numero Septem Seniorum conſcriptorum,) qui priùs etiam tactis ſanctis Dei Evangeliis promittant " ſe veraciter " et abſq; dolo Scrutinium ipſum pro futuro Sociorum Electione

" tractaturos, et secretum penitùs habituros, neq; Signo aut Nutû " aut alio quovis pacto rem indicaturos." Auditis ergò singulorum Votis et Suffragiis, illum vel illos in Socium vel Socios dicti Collegij Magister pronunciabit, in quem vel in quos ipse Magister, cum majori aut æquali parte Sociorum, consenserit. Et si Magister, cum majori aut æquali parte Sociorum, in aliquem aut aliquos eligendum vel eligendos haudquaque convenerint, sed in eâ Dissensione triduum ab incepto Delectu perseveraverint, tùm Volumus ut hujus Negotij diffinitio, pro hac Vice, ad septem conscriptos Seniores referatur: itaque pro his de quibus non est consensus factus, Electio septem illis Senioribus deferenda sit, ad hunc Modum ut sequitur. Quarto igitur Die post inchoatam Electionem conveniant iterùm omnes in Sacellum, et primitùs, per septem ipsos Seniores Juramento præstito " quòd illum vel illos, de quibus fit dissi- " dium, in Socium vel Socios cooptabunt, qui suis Conscientiis " magis videbitur aut videbuntur idonei;" Præstito igitur hoc Juramento, fiat alterum iteratò Scrutinium, in quo Magister et duo prædicti Scrutatores Suffragia Septem illorum Seniorum scrutabuntur, et is vel ij in quem vel quos major Septem Seniorum Pars consenserit, pro electo vel electis habeantur, atq; ita a cæteris acceptentur. Quòd si forte Conscientiis eorum septem Seniorum non videatur inter eligendos aliqua Disparitas, aut forsitan inter se major eorum Pars haudquaquàm consenserit, tum Volumus ut is vel ij qui à Magistro priùs nominatus aut nominati fuerant, pro Socio vel Sociis protinùs declarabitur aut declarabuntur. Proviso ut neque in hac Electione neq; aliâ quacunq; cujuscunq; Personæ infra dictum Collegium faciendâ, suam Vocem aut Suffragium alterius Personæ cujuscunq; Arbitrio et Dispositioni quovis Modo committat, aut incertam Personam aut pro incerto Comitatu vel Dioceſi sub Disjunctione vel Conditione quovis Modo nominet aut eligat: contra faciens, et Suffragium deinde suum et etiam dicti Collegij Societatem, ipso Facto, ex tunc imperpetuum amittat. Nec liceat, sub pœna Perjurij, cuique ex illis Scrutatoribus, nomina aliorum eligentium, alii cuipiam, quovis modo per se vel per interpositam Personam Nutu Verbo Signo vel Scripto, ante completam et publicatam Socij Electionem, ostendere.

De Morum Honestate servandâ, et Dissentionibus sedandis.

Quòd si inter Magistrum et alium aut alios hujus Collegii Socios, aut illius Causa, aliqua Materia Dissensionis Iræ Rixæ vel Discordiæ in dicto Collegio suscitata fuerit, et per Magistrum Decanos et majorem partem Septem Seniorum Finis rationabilis seu placabilis infra octo Dies proximè sequentes factus non fuerit, tunc Volumus ut Partes

Partes diſſentientes, Virtute Juramenti ſui, triduum poſt illos octo Dies, duos Socios eligant, qui electi, in ſui Virtute Juramenti, infra biduum poſt eorum ad hoc Electionem et deputationem, *Præfectum Collegij Regalis, et Magiſtrum Collegij Chriſti, et Magiſtrum ſive Cuſtodem Collegij divi Michaelis*, aut dictis Præfecto Magiſtro et Cuſtode vel eorum aliquo extra Univerſitate agentibus, tunc eorum Vices Abſentium in dictis Officiis infra Univerſitatem gerentes, ac etiam reliquos prænominatos ſiqui fuerint in Univerſitate præſentes, adeant; et eiſdem hujuſmodi Diſſenſionis Cauſam ſive Materiam, in Scriptis ſignificent et referant: Et quicquid *duo ex illis*, pro tempore conſulti, *arbitrati fuerint et decreverint*, illi omnes *pareant* et in ſui Virtute Juramenti *obediant*.

De Modo procedendi contra Magiſtrum &c.

His Ordine diſpoſitis, ad errata quæ accedere poſſunt pervenimus, adhibituri quæ poterimus Remedia, incipientes a Magiſtro ut Duce et Principe, quo bono et provido ut nihil eſt utilius, ita imprudenti inepto indigno criminoſo nihil eſt deteſtabilius. Quo circa ſtatuimus ut Magiſter quicunq; propter Terrarum Tenementorum Reddituum Poſſeſſionum ſpiritualium ſeu temporalium ſua Culpa Diminutionem ſeu Alienationem, vel propter Detractionem Oblationum Alienationem illicitam Bonorum et Rerum ipſius Collegij infamiam incontinentiamq; notabilem Negligentiam intolerabilem Homicidium voluntarium aliamve Cauſam enormem ipſum Magiſtrum omninò reddentem criminaliter irregularem vel aliter inhabilem, nec non propter infirmitatem infectivam et contagioſam perpetuam, cujus occaſione non poterit abſque Scandalo hujuſmodi Officium exercere, ab eo penitùs amoveatur: Ad cujus Amotionem hoc modo procedatur; videlicet, ut ſtatim, vel ſaltem infra quindecim dies poſtq;[m] aliquod Præmiſſorum commiſerit vel in eorum aliquod inciderit, primò per Præſidentem, aſſiſtentibus ei aliis duobus Officiariis Clavi-geris et quatuor aliis Sociis ex Septem Senioribus dicti Collegij, vel ſaltem cum Aſſenſu et Aſſiſtentia duarum tertiarum Partium omnium Sociorum dicti Collegij (ſic quòd inter eos ſint quatuor Seniores ex Septem electi,) vel, Præſidente nolente aut negligente, per Decanum Theologiæ cum prædictorum Aſſiſtentia, moveatur Magiſter ut ſuadeatur ad voluntariè recedendum ab Officio. Quòd ſi ſponte infra triduum cedere noluerit, tunc infra octo Dies poſt hujuſmodi Monitionem, Præſidens, Aſſenſu et Teſtimonio omnium Sociorum dicti Collegij vel ſaltem omnium prædictorum modo aliquo prædicto ſibi in Magiſtri Monitione Aſſiſtentium, vel, ipſo nolente aut negligente, dictus Decanus Theologiæ, cum Aſſenſu et Teſtimonio prædictorum, DENUNCIABIT *Domino* EPISCOPO ELIENSI, aut, eo in remotis agente, *Vicario* in Spiritualibus

generali, seu (Sede vacante) *Custodi* in Spiritualibus EJUSDEM, per duos aut tres Socios ipsius Collegij Seniores, cum literis aliquo Sigillo authentico ac Signo et Subscriptione alicujus Notarij publici signatis, vel saltem loco Sigilli authentici Subscriptione dicti Præsidentis vel Theologiæ Decani et prædictorum Assistentium ac Notarij Publici Signo communitis, Causas Defectus Crimina excessus vel enormia Magistri continentibus. Proviso quòd omnes hujusmodi Assistentes et Testimonium perhibentes, priùs tactis sacro sanctis Dei Evangeliis, coram Præsidente aut Decano Theologiæ, ipso primùm id coram eis præstante ac deinde à singulis illorum exigente, jurabunt " quòd non per Invidiam Malitiam Odium vel Timorem " ipsius Magistri, Amorem vel Honorem alicujus promovendi ad " illud Officium, nec per Conspirationem Æmulorum aut Con- " fœderationem, nec per Procurationem alicujus vel aliquorum, nec " Prece aut Pretio aut alio quocunq; Modo illicito inducti, sed " pro bono Zelo et Utilitate prædicti Collegij et pro utiliori et con- " venientiori Regimine ejusdem et Honore, Testimonium illud " prohibuisse." EPISCOPUS VERO ELIENSIS, vel, ipso in remotis agente, SUUS VICARIUS in Spiritualibus Generalis, aut (Sede Elien si vacante) CUSTOS SPIRITUALITATIS EJUSDEM, de Causis criminosis Criminibus Excessibus et Defectibus contra dictum Magistrum expositis, SUMMARIE *et de plano et extra* JUDICIALITER COGNOSCAT: et si, per Informationes sufficientes ministratas, hujusmodi suggesta quæ ad dicti Magistri amotionem sufficere debeant, *recipiat esse* VERA, statim, aut saltem infra triduum proximè sequuturum, *ipsum* AB OFFICIO *suo et ab* ADMINISTRATIONE *suâ* AMOVEAT *sine ulteriori Dilatione*; dicti quoq; Collegij Sociis DENUNCIET *et* INJUNGAT *ut ad Electionem novi Magistri liberè procedere valeant et debeant*, juxta Formam in Statuto superiùs expressam; CESSANTIBUS APPELLATIONIS RECUSATIONIS QUERELÆ AUT CUJUSCUNQUE ALTERIUS *Juris aut Facti* REMEDIIS, *quibus hujusmodi* AMOTIO VALEAT IMPEDIRI AUT DIFFERRI; *quæ omnia* IRRITA *esse, volumus statuimus et decernimus.*

De Modo procedendi contra Socios Scholares et Discipulos in majoribus Criminibus.

Et Præmissa, vel eorum aliquod in præsenti Statuto contentorum, coram Magistro assistentibus et Præsidente Decanis et Thesaurariis, vel saltem uno Decano Thesaurario et aliis quatuor ex Septem Senioribus, publicè confessus fuerit, vel per Testes idoneos prædictorum Judicio comprobandos, aut per Facti coram eis evidentiam, manifeste reus eorum Judicio et Sententia convictus fuerit; eum statim à dicto Collegio, præsentis Vigore Statuti, nullâ aliâ Monitione Præmissâ, exclusum et privatum fore ipso facto decernimus, absq; cujuscunq; Appellationis vel Querelæ Remedio.

De ambiguis et obſcuris interpretandis.

Diſtribuiſſe igitur jam univerſis Collegij Membris Officia ſimul et Officiorum Leges nobis videmur, et exactè quidem: quæ ſi ſerventur ad amuſſim et inviolatè, (quod utiq; vehementer optamus,) ex eodem viros haud dubiè ſperamus prodituros, qui magnæ tùm Utilitati tùm Honori non ſolùm huic Collegio, verùm etiam toti Regno futuri ſint. Proviſum etiam eſt, quoad fieri poteſt per uniuscujuſq; Juramentum, quo nihil apud Chriſtianos firmius aut antiquius haberi debet, ut Statuta hæc per Nos jam tradita et Auctoritate Sedis Apoſtolicæ corroborata, exactiſſimè ſerventur à ſingulis, quatenùs unumquemque concernant. Cæterùm quia mihi Johanni Roffenſi, per quem hæc edita ſunt, tàm à Summo Pontifice Julio ſecundo, quàm a Fundatrice cæteriſq; omnibus Co-Executoribus, Auctoritas eſt tributa non ſolùm condendi Statuta quæ mihi viderentur huic Collegio conducibilia, verùm etiam Magiſtro ſimul et Sociis eadem exhibendi, Juramentaq; à ſingulis tam Sociis quam Diſcipulis pro illorum inviolabili Obſervatione diſtrictiùs exigendi, ſed et cætera cuncta peragendi quæcunq; pro ſalubri Collegij hujus Moderamine mihi viſa fuerint opportuna, atq; id tam efficaciter quam ſi cuncti ſimul hic eſſemus Præſentes; Ego igitur horum omnium pariter et meo ipſius nomine caſſatis aliis quibuſvis Statutis prius excogitatis, quatenùs præſentibus adverſantur, hæc præſentia ceu vera et Salubria pronuncio: Quibus obſervandis, tàm Magiſtrum quàm Socios et Diſcipulos adſtringi volo; reſervatâ mihi nihilominus Poteſtate quoad vixero, vel adjiciendi vel minuendi ſeu reformandi interpretandi declarandi mutandi derogandi tollendi diſpenſandi novaq; rurſum alia (ſi licebit) ſtatuendi ſimul et edendi, non obſtantibus his Statutis factis et Juramento firmatis; Cæteris autem omnibus, cujuſvis Dignitatis Auctoritatis Statûs Gradûs aut Conditionis exiſtant; à Magiſtro quoq; et Scholaribus tam Sociis quam Diſcipulis omnibus hujus Collegij, prorſus inhibens ne cum aliquo dictorum Statutorum diſpenſent, aut quævis nova Statuta ſive pro Collegio ſeu pro quovis ejuſdem Membro, quæ dictorum Statutorum alicui repugnabunt, condant aut decernant. Quòd ſi fortè Cancellarius aut Vice-Cancellarius *aut Reverendus Pater* ELIENSIS EPISCOPUS aut demùm quivis alius contrarium attemptaverit, et *novum aliquod Statutum aliud à prædictis* adhibere molitus fuerit, ab ejus Obligatione, per hanc Autoritatem ab Executoribus aliis mihi commiſſam, Magiſtrum et cæteros omnes tam Socios quam Diſcipulos penitùs abſolvo, eiſque omnibus et ſingulis interdico ne cuivis hujuſmodi Statuto aut Ordinationi pareant admittantve quovis Pacto, ſub Pœna Perjurij atq; etiam Amotionis perpetuæ à dicto Collegio ipſo Facto. Cæterùm quia Nihil eſt uſq; adèo luculentum quod

non à Captiosis verti poterit in Quæstionem, ob eam Rem volumus quòd si quicquam in aliquo Statutorum prædictorum aut Obscuritatis aut Ambiguitatis Magistro et Majori Parti Sociorum occurrat quoad nos vixerimus, eorum singulos in Christi Visceribus obtestamur ut ea dubia nobis proponant quoties oriantur, quemadmodum et hactenus fecerunt; nosq; libenter (ut et ante non semel fecimus) illorum dubiorum Obscuritatem excutiemus: Quòd si postquam Nos ab hac Luce migraverimus, novi quidem Scrupuli reperti fuerint aut de novo suscitati, volumus et Ordinamus ut rectus et laudabilis Statutorum Usus interea juxta Mentem nostram observatus, et qui maximè congruat Instituto Pientissimæ Fundatricis, sit Magistro pariter et Sociis Norma quædam et Regula quam cum Puritate Conscientiarum suarum sequantur in ejusmodi Scrupulis et Ambiguitatibus omnibus. Neque tamen per hoc intendimus, ut si præter Notitiam nostram quispiam abusus in Statutis ipsis, aut in quavis eorundem Parte, per Magistrum aut Officiarios aut quemlibet cæterorum in Cursu fuerit, qd̄ iis pro recto et laudabili Statutorum Usu recipiatur; aut si nos cum ipso Magistro qui nunc est, aut cum alio quovis Sociorum, in ulla Statutorum Parte dispensaverimus, Nolumus tamen ut hoc Privilegium, uni aut alteri ex causis nos moventibus concessum, pro communi quadā Licentia teneatur: Sed et cunctos oramus et per Christi Vulnera precamur, ut Juramentorum suorum meminerint, atq; nostram Mentem in ipsis Statutis respiciant, màgis quàm aliquem qui præter Assensum nostrum clàm irrepsit eorundem Statutorum Abusum; Nam omninò prohibemus, ne per aliquam Declarationem aut Consuetudinem ullam aut diuturnum quemlibet Abusum vel demùm Actum aliquem, Verbis aut Intentioni dictorum Statutorum in aliquo derogetur. VISITATIONEM *autem hujus Collegij Reverendis in Christo Patribus* EPISCOPIS ELIENSIBUS COMMENDAMUS: Quibus et concessimus cujusdam idonei Præsentationem, qui sit futurus in hoc Collegio Socius. Idoneum autem intelligimus, qui Qualitates habeat eas quæ describuntur in Statuto de Qualitate Sociorum: Neq; enim alium quempiam recipi volumus à Collegio. Eosdem etiam oramus et per Dominum Jesum obsecramus, ne quenquam præsentent nisi talem qui pro suis Meritis hoc Sodalitio dignus fuerit, et cui cum Statutis per omnia conveniat.

De Visitatore.

Nihil adeò bonis Legibus firmari muniriq; potest, quin ab his qui licenter vivere et Luxui Libidiniq; Fræna laxare studeant, aliquo Fraudis Commento facilè queat eludi. Nos igitur Fiducia Benignitatis Reverendissimorum Patrum *Episcoporum Elienſium* freti, et cum primis amantissimi Domini Dn̄i Nicolai West qui Sedem Episcopalem jam suis Meritis obtinet, nempe quòd tam ipse quàm Successores

ceſſores ejus, pro Zelo quem ergà rem publicam Chriſtianam gerunt, *nullis futuris Temporibus* PATIENTUR hæc Statuta contra noſtram Mentem et contra ſanctiſſimum Pientiſſimæ Fundatricis Inſtitutum violari, ſtatuimus ordinamus et volumus quòd *Epiſcopo cuivis Elienſi qui pro Tempore fuerit*, QUOTIES *per Magiſtrum et Præſidentem Decanoſq; et Theſaurarios, ſive per Magiſtrum et quatuor è ſeptem Senioribus deputatis, ſive per quinq; ex eiſdem Senioribus reluctante Magiſtro aut Præſidente, ſeu per duas tertias Sociorum Partes, requiſitus fuerit, ſed et* CITRA *quamvis Requiſitionem*, DE TRIENNIO IN TRIENNIUM *ſemel ad Collegium accedere liceat*, per Se, vel per Commiſſarium ſuum Specialem quem duxerit deputandum, præterquam per Cancellarium Univerſitatis Cantabrigiæ ſeu Vice-Cancellarium aut Procuratores Univerſitatis ejuſdem, et præterquam per alios qui ex dicto Collegio pro aliquo Crimine aut Delicto amoti ſint aut Amotionem hujuſmodi fugientes receſſerunt, ac præterquam per Magiſtrum aut aliquam aliam Perſonam dicti Collegij aut alios quoſcunq; in Univerſitate per unam quindenam anno proximo eam Viſitationem præcedenti Studentes, et præterquam per religioſos qualeſcunq; prædictorumve aliquem aut Conſanguineum alicujus Socij dicti Collegij; *liceat* inquam, *ad ejus* VISITATIONEM *liberè accedere, Magiſtrumq; ac alios ſingulos Socios Scholares ac Diſcipulos ejuſdem Collegij in Sacellum ejuſdem* CONVOCARE: *Cui quidem Reverendo Patri* aut ejus Commiſſario, Vigore præſentis Statuti, PLENAM CONCEDIMUS POTESTATEM, *ut ſuper omnibus et ſingulis Particulis et Articulis in noſtris Statutis contentis, ac de quibuſcunq; Articulis Statum Commodum aut Honorem dicti Collegij concernentibus, aut quæ in dicto Collegio aut aliquâ illius perſona fuerint reformanda aut corrigenda*, præterquam de Secretis et Occultis, Magiſtrum Socios Scholares et Diſcipulos *interroget et inquirat*, COGATQUE *eorum unumquemq; in Virtute Juramenti*, ET PER *Cenſuras* ſi Opus fuerit, ad dicend. Veritatem de Præmiſſis omnibus et ſingulis, præterquam (ut prædictum eſt) de ſecretis et occultis; exceſſuſq; ac negligentias crimina et delicta quorumcunque dicti Collegij, qualitercunq; commiſſa, in eâ Viſitatione comperta, *ſecundùm Exceſſûs Exigentiam et Criminis aut Delicti Qualitatem debitè* PUNIAT *et* REFORMET; CÆTERAQUE OMNIA ET SINGULA FACIAT ET EXERCEAT, *quæ ad eorum Correctionem et Reformationem ſint neceſſaria aut quoviſmodo opportuna, etiam ſi ad* PRIVATIONEM *aut* AMOTIONEM *Magiſtri aut Præſidentis aut alterius cujuſcunq; ab Adminiſtratione ſuâ vel Officio, ſeu ſi ad Amotionem alicujus Socij Scholaris vel Diſcipuli ab eo Collegio*, ſi tamen hoc ipſum Statuta et Ordinationes exigant, procedere contingat. Quos quidem Magiſtrum Socios et Scholares Diſcipulos, ac præterea Miniſtros quoſcunq; etiam Famulos, prædicto Domino Epiſcopo et ejus Commiſſario, quoad omnia et ſingula Præmiſſa, volumus et præcipimus effectualiter intendere et parere; Statuentes inſuper, ut nullus in *Viſitationibus prædictis* ſeu aliis Scrutiniis faciendis in dicto Collegio, contra Magiſtrum aut

aliquem alium ipſius Collegij quicq^m dicat deponat ſeu denunciet, niſi quod verum crediderit, ſeu de quo publica Vox et Fama laboraverit contra eundem, in Virtute Juramenti ab eis Collegio præſtiti; Ordinantes præterea quòd Dominus *Epiſcopus Elienſis cùm in Perſonâ propriâ viſitare et præmiſſa facere dignetur*, Magiſter et Theſaurarij unicam ei intra Collegium Refectionem faciant; ſi verò per Commiſſarium Epiſcopus viſitaverit, Commiſſario duæ Refectiones intra Collegium exhibeantur: Quibus tam Reverendum ipſum Patrem q^d ejus Commiſſarium oramus ut contenti ſint. Cæterùm inceptam aliquam Viſitationem ultra duos Dies proximè ſequentes, aut ex Cauſis urgentiſſimis et rariſſimis ultra quinq; Dies, prorogari aut continuari nullo Pacto volumus: Sed lapſo et exacto illo triduo, et quando ex Cauſis prædictis ulterius prorogatur ſexto die tranſacto, eo ipſo Viſitatio illa pro terminatâ et diſſolutâ habeatur. Et ſi quæ in ea Parte compererit corrigenda et reformanda, quæ Brevitate Temporis corrigere et reformare non potuit, ea Magiſtro in Scriptis tradat: Qui ea omnia, ſecundùm Formam et Exigentiam Statutorum, quam primùm corrigere et reformare, in Virtute Juramenti et ſub Pœna Privationis ab Officio ſuo ipſo facto, teneatur. Prædictorum quoq; Reverendorum Patrum Elienſium Epiſcoporum et Commiſſariorum ſuorum quorumcunq; Conſcientias, apud altiſſimum (quantum poſſumus) graviùs oneramus, ac in Viſceribus Domini noſtri Jeſu Chriſti hortamur et obſecramus, ut in faciendo et exequendo Præmiſſa, ſecundùm Apoſtoli Doctrinam " non quærant quæ ſua " ſunt ſed quæ Jeſu Chriſti," ſolumq; Deum habentes præ Oculis Mentis, Favore Timore Odio Prece et Pretio Coloribus Occaſionibus poſt poſitis quibuſcunq; Inquiſitionis Correctionis et Reformationis Officium diligenter impendant et fideliter in omnibus exequantur, ſicut coram Deo in ejus extremo Judicio in hoc Caſu voluerint reddere Rationem; Statuentes præterea ut Magiſter Socius Scholaris aut alius quiſpiam hujus Collegij, ſuper Exceſſibus vel Delictis, *in Viſitationibus et Inquiſitionibus per dictum Reverendum Patrem vel ejus Commiſſarium ut præmittitur faciendis*, accuſatus vel detectus, copiam compertorum vel detectorum hujuſmodi ſibi tradi dedi dari oſtendi, ac Nomina detegentium vel denunciantium ſibi exponi aut declarari, nullo Modo petat; neq; ipſa comperta et detecta, aut Nomina detegentium, tradantur eidem aut oſtendantur; ſed ſuper eiſdem compertis et detectis, *ſtatim coram ipſo Domino Epiſcopo vel ejus Commiſſario perſonaliter reſpondeat, ac Correctionem debitam ſubeat pro eiſdem*, ſecundùm noſtrarum Ordinationum et Statutorum Exigentiam et Tenorem, *ceſſantibus quibuſcunq; Provocationibus Appellationibus Querelis et aliis Juris et Facti Remediis*, per quæ ipſius Correctio et Punitio differri valeat ſeu alias quoviſmodo impediri. Si tamen ad *Privationem* aut *Inhabilitatem* Magiſtri aut *Expulſionem* Socij aut Scholaris per Epiſcopum aut ejus Commiſſarium agatur, *tunc oſtendantur* ei detecta: Quæ ſi non poterit rationabiliter et probabiliter

babiliter evitare, et juſtâ Defenſione propulſare, *amoveatur ſine Appellatione aut ulteriori Remedio*; dummodò ad ejus Expulſionem concurrat conſenſus quatuor è ſeptem deputatis Senioribus tunc in Univerſitate præſentibus, *ſine quorum Conſenſu* irritata ſit hujuſmodi Expulſio et nulla ipſo facto. Et inſuper, ſi contra Magiſtrum, ad Amotionem ab Officio, per hujuſmodi Domini Epiſcopi Commiſſarium, etiam conſentientibus ut præfertur quatuor illis Senioribus, procedatur, non negamus ei omnes Querelas et Defenſiones juſtas et honeſtas *apud ipſum Dominum Epiſcopum Elienſem, dummodo ulteriùs non appellet*; non obſtante noſtrâ Ordinatione prædictâ, aut aliis quibuſcunq;. PRÆTER HUNC *Viſitationis Modum, nos* ALIUM NULLUM *Elienſibus Epiſcopis concedimus*; ſed nec a Sociis tolerari permittimus, aliquo Pacto: Quod etiam eis mandamus, in Vim Juramenti ſui. Scimus enim quòd eximia virago Domina Fundatrix, dum in humanis egit, *impetravit ab Elienſi Epiſcopo qui tunc fuerat, Jus Fundationis, eâ quidem Ratione ut* ex deſolatis Ædiculis tam illuſtre Collegium erigeret: Quod cum effecerit et conſummaverit magno ſuo Sumptu, *par eſt ut Elienſes Epiſcopi* NIHILO * MAJOREM *in hoc Collegio ſibi vindicent Autoritatem quàm in* CÆTERIS *Academiæ Collegiis ubi non ſunt Fundatores.* His itaq; dictis Legibus, quas tùm ſalubres tùm juſtas exiſtimamus, Magiſtrum et Scholares omnes tam Socios quam Diſcipulos Collegij divi Johannis in Cantabrigia, regi volumus et gubernari: Quibus ſi ſeſe diligenter attemperent, nihil dubitamus quin afflatus aderit divini Spiritûs, qui rectà perducet obſequentes ad magnam Eruditionem cum pari conjunctâ Sanctimoniâ. Neque enim fas eſt ambigere, quin ſacer ille Spiritus qui in quâvis Congregatione Chriſtianorum reſidet, præſto ſit adjuturus cunctos qui cum Fide et purâ Conſcientiâ converſari conantur, juſtiſq; et ſalubribus Monitis obtemperant; præcipuè tamen eos qui Studio ſacrarum Literarum inſudant. Nam ob has potiſſimùm reſerandas ille miſſus fuit; Quum inquit, "Venerit ille qui "eſt Spiritus Veritatis, ducet vos in omnem Veritatem." At quos ducet? Nimirùm, humiles et obſequentes. Super hujuſmodi requieſcit, fovens eos, et indicibilibus eos Conſolationibus reficiens: Sed et iſtis quum ſit oſtiarius, aperit ac reſerat Arcana Scripturarum. Nihil igitur vobis hæſitandum eſt, Fratres, quin ſi ſtudueritis has Leges obſervare, pariter et unanimes in Charitate jugiter converſari, Patri noſtro complacitum erit ſuo vos tandem afflare Spiritu: Quod ut faciat, ipſe, tametſi Peccator ſim, aſſiduè precabor; et vos viciſsim, quæſo, pro me precemini.

☞ * *V. post*

De quatuor Sociis et duobus Discipulis per Johannem Roffensem Episcopum fundatis.

Quinetiam decerno quòd ad Exercitamenta Scholastica, et ad ea quæ per Statuta Collegij cæteri Socii perimplere tenentur, similiter obstringantur; et ad ea perimplenda, pariter et ad has meas Ordinationes fideliter observandas, protinùs ut electi fuerint, Juramentum præstent corporale, et cætera faciant quæ ad hunc Effectum exiguntur; et si deliquerint, simili modo per omnia subjaceant Correctioni: Et idem etiam, quantum ad duos illos Discipulos attinet, fiat, juxta Modum et Formam quâ cæteri tractantur Discipuli. Postremò volo quòd ad has meas Ordinationes citra Fraudem observandas, tam Magister quam cæteri Socij, mox ut electi fuerint, Jurejurando sint obstricti; ne fortè per Negligentiam et Incuriam suam, ob Indenturarum inter nos confectarum Violationem, Collegio gravis inferatur Jactura.

EXTRACTS from Queen *Elizabeth*'s Statutes.

Preamble—

Elizabetha Dei Gratia.

Itaq; *multis superioribus Statutis abrogatis, multis mutatis et emendatis, nonnullisq; novis additis, hæc,* Authoritate nostrâ, inviolabiliter ab omnibus qui in hoc Collegio commorantur et commoraturi sunt, custodiri et observari volumus, quem ad modum uniuscujusq; Officium in Statutis sequentibus descriptum designatumq; fuerit; * reservat. semper nobis et Successoribus nostris &c.

* Note. This Clause of Reservation is not complete, in the Original; but it is more fully expressed in the 50th Chapter.

Chap. 2d. De Electione Magistri.

Quod si tunc per viam Spiritûs sancti concordibus animis, nemine dissentiente, in unum quempiam ejusmodi Virum consenserint, qualis in Statuto antelecto descriptus est; Aut si major Pars Præsentium super uno aliquo hujusmodi consenserint, Volumus et Statuimus absq; morâ (nullâ prorsus Licentia Ordinarij Visitatoris aut alterius cujuscunq; Jurisdictionem ordinariam prætendentis expectatâ) Magister Collegii pronuncietur: Quòd si quinq; illorum de uno

aliquo non consenserint, tum *ad* COLLEGII VISITATOREM *veniatur*; et ille pro Magistro habeatur, *quem solus* VISITATOR *duxerit præficiendum*, modò is Statuto de Qualitatè et Officio Magistri in omnibus respondeat.

CHAP. 11th. De Electione Præsidis.

Quòd si post tria aperta Scrutinia, ipse Magister cum quatuor de uno non convenerint, tùm is electus erit in quem ipse Magister cum tribus maximè Senioribus, ex dictis octo Senioribus Sociis Domi præsentibus aut majori eorundem Parte, consenserint. Quod si ne ii quidem ante horam tertiam ejusdem Diei de uno cooptando (ut dictum est) concordare possint, omnes tamen octo Seniores vel septem ex his de uno eligendo unanimiter consenserint, eo Casu volumus Magistrum illis Octo vel Septem sic consentientibus Assensum suum accommodare. Quod si ne Septem quidem sic ut prædictum est unanimiter consenserint, tùm is pro electo habeatur quem IPSE MAGISTER SOLUS nominaverit.

CHAP. 13th. De Sociorum Electione, ac ipsius Circumstantiis.

Porrò, delectum hunc, quoties eveniet, celebrari volumus et ordinamus quâq; Die Lunæ quæ proximè sequitur Dominicam quintam Quadragesimæ: quo die Magister et octo Seniores convenient in Sacellum, cum Horologium insonuerit octavam; et illic, primùm lecto Statuto de Cooptandorum Qualitatibus, Magister primùm, deinde reliqui per Ordinem Seniores, Jusjurandum quod sequitur, tactis sacris Evangeliis, præstabunt. " Ego N. N. Deum testor, et " Sancta ipsius Evangelia, me Neminem in Socium hujus Collegij " electurum, nisi quem juxta Statutum antelectum mea Conscientia " magis idoneum judicabit; neq; illud faciam, Pretio vel Mercede " aliquâ à quopiam aut datâ aut expectatâ, neq; ullâ aliâ sinistrâ aut " pravâ Affectione." Juratis singulis, fiat statim apertum Scrutinium. Seniores vero, ut Simulatio promittendi et Spes decipiendi è medio tollatur, juxta Senioritatis Ordinem, publicè, et ut cæteri exaudire possint, Suffragia conferant; Et de quo Magister et quatuor ex dictis Senioribus consenserint, is pro Socio habeatur: Quòd si post alterum aut tertium Scrutinium, de uno, quatuor cum Magistro non consenserint, tùm *eodem Modo* procedatur, quo in Electione Præsidis et Lectorum et aliorum Officiariorum dictum est; Et is Socius habeatur, qui *eo* modo electus fuerit.

CHAP.

Chap. 14th. Jusjurandum electi Socii.

" Quòd si contingat me posthac propter Contemptum, Rebelli-
" onem Inobedentiam, malos Mores, vel alia Merita, vel propter
" Causas in præsentibus Statutis contentas, per Magistrum vel alios
" in hujusmodi Negotiis habentes interesse, corrigi aut puniri aut à
" dicti Collegii Sustentatione et Societate secundùm Formam Sta-
" tutorum excludi expelli vel amoveri, ipsum Magistrum aut aliam
" Personam ullam, Occasione Expulsionis aut Amotionis hujus-
" modi nunquam persequar seu inquietabo, per me, alium, vel
" alios; nec ab aliis molestari, vexari seu inquietari procurabo in foro
" Ecclesiastico, seu Seculari, seu alio quocunq; Modo: Sed contrà,
" ex certa meâ Scientiâ purè, sponte, simpliciter et absolutè, omni
" Actioni, Occasione Correctionis, Punitionis, Exclusionis, seu
" Amotionis hujusmodi, adversùs Magistrum, seu alios dicti Colle-
" gii Socios et Scholares, mihi quomodolibet conjunctim sive divi-
" sim competenti, Appellationi quoque et Querelæ in eâ Parte fa-
" ciendis, ac quarumcunq; Literarum Impetrationi, etiam Preci-
" bus Principum Procerum, Magnatum, Prælatorum et aliorum
" quorumcunq; (quantumcunq; mihi aliàs Probitatis et Vitæ Me-
" rita suffragabuntur,) in Vim Pacti renuntio."

Chap. 50th. De ambiguis et obscuris interpretandis.

Distribuimus jam universis Collegii Membris Officia simul et Officiorum Leges: quæ si serventur ad amussim et inviolata, (quod utiq; vehementer optamus,) ex eodem viros haud dubio speramus profituros, qui magnæ tum Utilitati tum Honori, non solùm huic Collegio, verùm etiam toti Regno futuri sunt: Provisum etiam est, quoad fieri potest per uniuscujusq; Juramentum, (quo nihil apud Christianos firmius aut antiquius haberi debet,) ut Statuta hæc per Nos jam tradita exactissimè serventur à singulis, quatenùs unumquemq; concernant.

Abrogatis igitur quibusvis aliis Statutis pro hujus Collegii Gubernatione priùs excogitatis, hæc Præsentia cum vera tum salubria pronunciamus; quibus observandis, tam Magistrum quàm Socios et Discipulos astringi volumus; *reservatâ nobis* nihilominus Potestate, vel adjiciendi vel minuendi, seu reformandi, interpretandi, declarandi, mutandi, derogandi, tollendi, dispensandi, novaq; rursus alia, si Opus erit, Statuendi et edendi, non obstantibus his Statutis factis et Juramento firmatis; *Cæteris autem omnibus*, cujuscunq; Dignitatis, Authoritatis, Statûs, Gradûs, aut Conditionis existant, ac Magistro

giſtro quoq; ac Scholaribus tam Sociis quam Diſcipulis omnibus hujus Collegii *inhibentes*, ne cum aliquo dictorum Statutorum diſpenſent, aut ulla nova Statuta ſive pro Collegio ſive pro quocunq; ejuſdem Membro, quæ dictorum Statutorum alicui repugnabunt, condant et decernant. Quòd ſi forte Cancellarius, aut Vice-Cancellarius, aut *Reverendus Pater Elienſis Epiſcopus*, aut demùm quivis alius contrarium attentaverit, et novum aliquod Statutum [aliud] à prædictis adhibere molitus fuerit; ab ejus Obligatione, Authoritate noſtrâ, Magiſtrum et cæteros omnes tam Socios quam Diſcipulos penitùs abſolvimus, eiſq; omnibus et ſingulis interdicimus, ne ulli hujuſmodi Statuto aut Ordinationi pareant, admittantve quovis pacto, ſub Pœna Perjurii atq; etiam Amotionis perpetuæ, à dicto Collegio ipſo Facto.

Quòd ſi inter Magiſtrum et Socios, aut inter Socios ipſos, alioſve noſtri Collegij, ſuper aliquo Articulo Statutorum noſtrorum, Dubium aliquod, aut Ambiguitas, Controverſia ſeu Opinionum Varietas, vel Diſcordia oriatur, cujus Deciſio ſeu ſanus et planus intellectus, intra octo Dies, à Tempore exorientis emergentis et commotæ Dubitationis computandos, nequiverit inter eos haberi; tunc Volumus ut Partes diſſidentes duos ex Collegio Socios eligant qui ita electi quam citò poterint, REVERENDUM EPISCOPUM ELIENSEM *pro tempore exiſtentem*, (in quo ſinceram fiduciam ponimus, quemq; juxta planum, communem, literalem et grammaticalem Senſum et ad Dubium prætenſum aptiorem, omnes hujuſmodi Ambiguitates interpretaturum, diſſoluturum, declaraturum, arbitramur,) ubicunq; intra Regnum Angliæ fuerit, *adeant*; vel ſaltem totam Controverſiam, in duobus Scriptis, ſuâ ipſorum Manu aut Notarii Publici Subſcriptione, vel alicujus Sigilli authentici Appoſitione, munitis, *eidem Reverendo Patri* ſignificent.

Cujus quidem Reverendi Epiſcopi Determinationi, Interpretationi et Declarationi, ſuper prædicto Dubio ita ut præfertur diſputato ac ad eum delato, faciendis, Magiſtrum Præſidem Socios et cæteros omnes dicti Collegii obtemperare Volùmus, et cum effectu parere; ſub ipſorum debito Juramento Collegio præſtito, et Pœna Amotionis perpetuæ à dicto Collegio, ſi contra fecerint, ipſo Facto; Nolentes quod per Conſuetudinem ullam, aut diuturnum quemlibet Abuſum, aut demùm Actum aliquem, Verbis aut Intentioni dictorum Statutorum in aliquo derogatur: Illud autem imprimis mandamus, ut Juramentorum ſuorum meminerint, atq; noſtram Mentem in ipſis Statutis reſpiciant, magis quam aliquem (qui præter Aſſenſum noſtrum clàm irrepſit,) eorundem Statutorum Abuſum. VISITATIONEM *autem hujus Collegij Reverendis in Chriſto Patribus* EPISCOPIS ELIENSIBUS, COMMENDAMUS; quibus et *conceſſimus cujuſdam idonei Præſentationem*, qui ſit futurus in hoc Collegio Socius: idoneum autem intelligimus, qui Qualitates habeat eaſdem quæ deſcribuntur in

Statuto de Qualitate Sociorum; *neq; enim alium quempiam* RECIPI *Volumus à Collegio*; neminem autem illi præsentent, nisi talem qui pro suis Meritis hoc Sodalitio dignus fuerit, et cui cum statutis per omnia conveniat.

CHAP. 51st. De Visitatore.

Nihil adeo bonis Legibus firmari muniriq; potest, quin ab iis qui licenter vivere et Luxui et Libidini Fræna laxare studeant, aliquo Fraudis Commento facilè queat illudi. Nos igitur Fiducia Benignitatis Reverendi in Christo Patris *Episcopi Elienſis* qui nunc est, *et Succeſſorum ſuorum*, freti, confisiq, quod Orthodoxæ Fidei et Reipublicæ Christianæ Zelo hæc nostra Statuta perpetuis futuris Temporibus inviolabiliter, ad Laudem Dei et Honorem Collegii, observari procurabunt et nitentur: et ea vel eorum aliqua, contra nostram Mentem et sanctissimum piæ Fundatricis Institutum, minime violari patientur;

Statuimus ordinamus et volumus ut EPISCOPUS ELIENSIS *qui pro tempore fuerit*, QUOTIES per Magistrum et quinque ex Senioribus, sive per septem Seniores, reluctante Magistro, REQUISITUS *fuerit*, ad Collegium valeat et *possit accedere*; Magistrum, Præsidem, Decanos, Thesaurarios, Socios, Scholares et Discipulos Collegii, in Ecclesiam ejusdem convocare; *Collegium tam in Capite, quàm in Membris* VISITARE; ac de et super omnibus et singulis, Statum Commodum et Honorem dicti Collegii, Statuta, Magistri, Præsidis, Decanorum, Thesaurariorum, Sociorum, Discipulorum vel Ministrorum Reformationem et Correctionem, concernentibus, diligenter inquirere; Juramentum, "de dicendo Veritatem in Præmissis "omnibus et singulis," ab iisdem exigere; Crimina, Excessus, Delicta et Negligentias quorumcunq; dicti Collegij, qualitercunq; Commissa in eâ Visitatione comperta, secundùm Criminum, Excessuum, Delictorum et Negligentiarum Qualitatem et Exigentiam, debitè *punire corrigere* vel *reformare*, ac JURISDICTIONEM SUAM ORDINARIAM, *quam volumus et hoc Statuto noſtro ordinamus* ad eundem Episcopum Elienſem et Successores suos in perpetuam spectare et pertinere, in Magistrum et Socios dicti Collegij *exercere*, CÆTERAQUE OMNIA ET SINGULA *facere et exercere quæ ad eorum Correctionem et Reformationem ſunt neceſſaria aut quovis modo opportuna*; *etiam ſi ipſum ad Privationem ſeu Amotionem* Magistri Præsidis aut alterius cujusCunq; ab Administratione vel Officio, seu ad Amotionem alicujus Socii Scholaris vel Discipuli ab eo Collegio, (Si tamen hoc ipsum Statutum et Ordinationes exigant,) procedere contingat. Eum autem volumus, Visitatione semel inceptâ atq; inchoatâ, ut quam citò commodè poterit, causas omnes dijudicet et determinet, ac Fi-

nem Visitationis suæ omninò *intra quindecim* post ejus ad Collegium Accessionem Dies faciat.

Statuimus insuper, ut *in Visitationibus Collegij per Reverendum Patrem Elienſem Episcopum* quemcunq; pro tempore existentem, nullus Sociorum aut Scholarium contra Magistrum aut aliquem alium illius Collegii quicquam dicat, deponat, detegat, vel denunciat, nisi quod verum credat, seu de quo publica Vox et Fama contra eundem laborat, sub Pœna Violationis Juramenti ab iisdem Sociis et Scholaribus Collegii præstiti: Et super Excessibus vel Delictis in Visitatione et Inquisitione hujusmodi, Detecti, denunciati vel accusati, (Copiis detectorum et compertorum, nominibusq; detegentium iis minimè traditis vel ostensis,) super Excessibus et Delictis hujusmodi constituti coram Domino Elienſi Episcopo, summariè et de plano procedente respondeant et eorum quilibet respondeat per se, Correctionem debitam pro iisdem subeant et eorum quilibet subeat, secundùm nostrarum Ordinationum et Statutorum Exigentiam et Tenorem; cessantibus quibuscunq; Provocationibus, Appellationibus, Querelis, et aliis Juris et Facti Remediis, per quæ ipsorum et cujuslibet eorundem Correctio et Punitio differri valeat, seu aliàs quomodolibet impediri—Si tamen ad Privationem Magistri, aut Expulsionem Socij Scholaris vel Discipuli agatur, tunc volumus et statuimus ut ostendantur ei Detecta: Quæ si rationabiliter et probabiliter evitare et justâ Defensione propulsare non potest, volumus ut amoveatur, sine Appellatione aut ulteriori Remedio.

Et si quæ alia in Membris corrigenda et reformanda fuerint, quæ Brevitate Temporis corrigi et reformari non poterunt, ea omnia et singula Magistro in Scriptis tradet: qui, secundùm Formam et Exigentiam Statutorum, et in virtute sanctæ Obedientiæ ac Juramenti sui, sub Violationis Pœnâ, hujusmodi corrigenda et reformanda diligenter et fideliter corrigere et reformare studebit, et tenebitur. Dissolutâq; Visitatione, pro Esculentis, Poculentis, Expensis, Oneribus, et Procurationibus ratione Visitationis hujusmodi debitis, volumus et statuimus ut Summa pecuniaria, in bonæ Memoriæ Domini Jacobi olim Elienſis Episcopi Concessionibus et Ordinationibus limitata et declarata, absq; dilatione quâlibet solvatur. Reverendi vero Patris Episcopi Elienſis cujuscunq; pro Tempore existentis Conscientiam apud altissimum oneramus, et in Visceribus Domini nostri Jesu Christi hortamur, ut in faciendo et exequendo Præmissa, secundùm Apostoli Doctrinam " non quærat quæ sua sunt, sed quæ Jesu " Christi", solumq; Deum habens præ Oculis Mentis, Favore, Timore, Odio, Prece, aut Pretio Coloribus aut Occasionibus post habitis quibuscunq; Visitationis, Inquisitionis, Correctionis, Reformationis Officium diligenter impendeat et fideliter, in omnibus exequatur, sicut coram Deo, in ejus extremo Judicio, in hoc Casu voluerit reddere Rationem.

His

His igitur dictis Legibus, &c. (ſicut in Concluſione Capitis de * *V. pa.* Viſitatore, in Epiſcopi Fiſheri Statutis.) *

Chap. 25th. De Modeſtia, et Morum urbanitate.

Omnes Lites domeſticæ INTRA *Collegium* et cognoſcantur et dijudicentur. Qui *foràs* aliquem in Jus vocaverit, ſine Conſenſu Magiſtri, aut (eo abſente) Præſidis et majoris Partis Seniorum, Collegio amoveatur. Diſſentiones inter Socios Diſcipulosve ortæ intra biduum, ſi fieri poſſit, à Magiſtro, aut (èo abſente) Præſide et octo Senioribus, ſedentur: Sin fieri non poſſit, quatuor Socij per diſſentientes eligendi, cum Magiſtro, aut (eo abſente) Præſide, Litem audiant, et cum Æquitate dirimant; et quam illi omnes, vel Magiſter (aut ſi ille abſit,) Præſes, cum duobus ſic electis, Sententiam tulerint, in eâ conquieſcant diſſentientes: qui ſecùs fecerit, Collegio privetur. Lis verò inter Magiſtrum et Socium unum aut plures orta, à Præſide et reliquis Senioribus, aut (ſi Præſes unus litigantium ſit) à Socio maximè Seniore, qui unus litigantium non ſit, et cognoſcatur et (ſi fieri poſſit) tranquilletur: Sin intra biduum hoc fieri non poſſit, ad *Præpoſitum Collegij Regalis, Magiſtros Collegiorum Trinitatis et Chriſti*, per duos Socios utrinq; eligendos, Lis deferatur; et quod duo ex illis ſtatuerint, juxta Formam Statutorum aut Leges Regni noſtri, id ratum eſto. Qui non paruerit, Collegio amoveatur.

Alſo

In the Chapter relating to the Election of the Maſter,

It is ordained That if Five of the Fellows, after two Scrutinies (to be ended upon the ſame Day) ſhould not agree upon One Perſon, Then they are to come to the *Viſitor of the College*; And He is to be eſteemed as Maſter, Whom the VISITOR *only ſhall* THINK FIT *to ſet over them:* Provided He anſwers to the Statute, in all Points, concerning the Quality and Office of Maſter; And the ſaid Viſitor ſhall ſignify to the Fellows of the ſame College, within 20 Days from the Day of ſuch Devolution upon Him, by an Inſtrument ſealed with the Seal of his Paſtoral Office, the ſame Perſon ſo promoted to the Maſterſhip.

In the Chaper relating to the Election of Preſident Lecturers and other Officers,

It is ordained that if the Maſter and Fellows ſhould not agree in the Election; And the Maſter ſhould be out of the Kingdom; Then *He whom the Biſhop of Ely*, VISITOR *of the ſaid College*, being

ing within the Kingdom, *ſhall nominate*, is to be elected into the Office.

N. B. By the *annexed* Foundation, (i. e. the before mentioned Foundation of the two *Southwell*-Fellowſhips,) *Some* Objects of Election were made preferable to *others:* And *Todington*'s Right, upon the Merits, depended upon his being a PREFERABLE Object; whereas *Craven* was only a *general* One. But the Exception taken to *Todington*, againſt electing *Him* into the Fellowſhip, though otherwiſe a preferable Object within Dr. *Keton*'s Deſcriptions, was his being MUTILATED, and *thereby* excluded, by the Foundation, from being *capable* to be choſen: For that by One of the old Statutes, (prior to Dr. *Keton*'s Deed, which refers to them,) it is Ordained "That "the Perſons eligible as *Scholars*, ſhould be *Corpore* nullis "contagioſis aut incurabilibus Morbis vitioſo, aliaſve deformi "*aut* MUTILO." From whence it was inferred that though this Clauſe is not indeed repeated as One of the Qualifications of a *Fellow*, yet it muſt be ſo *intended:* For the Statutes could never mean to require leſs Perfection in the Fellows than in the Scholars; ſince the Fellows are expreſly deſcribed as *Potiora et ſolidiora* Membra Collegij, and are to be elected *out of the Scholars*; and are conſidered as deſigned for the Miniſtry and Holy Orders, into which no deformed or mutilated Perſons are admiſſible.

The Counſel who ſhewed Cauſe againſt the Prohibition, and who argued (at firſt) only from Queen *Elizabeth*'s Statutes, (for Biſhop *Fiſher*'s were not laid before the Court, till ſome time afterwards,) made three Points upon them; *viz.*

1ſt. Whether the Biſhop's General Viſitatorial Authority does not extend to the Election of Fellows, upon the *Original* Foundation.

2d. Whether it extends to this *annexed* Foundation.

3. Whether the Clauſe which gives *Diſtreſs* upon the Eſtates of the College, *excludes* the Viſitor.

And ſeveral of Queen *Elizabeth*'s Statutes were read, on Behalf of the Viſitor; particularly, the 50th (de ambiguis et obſcuris interpretandis,) And C. 51ſt. (de Viſitatore) And alſo C. 2. (de Electione Magiſtri.)

Contra, on Behalf of the College, were read and relied on, C. 25th. (de Modeſtia &c.) C. 13th. (de Electione Sociorum) and C. 11th. (de Electione Præſidis).

N. B. All theſe were Queen *Elizabeth*'s Statutes: And it was ſaid by the Counſel for the Viſitor, that though *Biſhop Fiſher* AS *ſurviving Executor* of *Margaret* Counteſs of *Richmond*, gave Statutes; Yet He had no Power, AS *Executor*, to do ſo; and that therefore *Queen Elizabeth* afterwards gave *freſh* Statutes.

Cur'. Let it ſtand over till to Morrow: And Let Us have Copies of the material Statues, in the mean time.

On *Friday* the 26th of *November* 1756. This Motion proceeded. And on Behalf of the Viſitatorial Power, it was argued, 1ſt. That the Biſhop had a GENERAL *Right of Viſitation of the College*; which *included the* ELECTION OF FELLOWS, as well as *other* Matters that concerned the College; 2dly. That this General Right extends to the ANNEXED, as well as to the *Original* Foundation; and 3dly. That the *Clauſe of* DISTRESS, (which had been urged to be a *diſtinct and particular Remedy* given by the annexed Foundation,) *did* NOT *exclude* the general Right of the Biſhop to viſit.

Firſt—The original Foundation of the College was upon *expreſs Condition* "That the Biſhop of *Ely* ſhould be Viſitor." And Dr. *Keton*'s Foundation is incorporated with the Original Foundation: He was, in Effect, *only a Purchaſer* of two Fellowſhips and two Scholarſhips.

And the new Statutes (of Queen *Elizabeth*) were *ſubſequent* to Dr. *Keton*'s Foundation: And Dr. *K.*'s Fellows were *Part* of the College, at the Time when theſe Statutes commend the Viſitation of *the College*, i. e. of the *whole* College, *to the Biſhops of Ely* for the Time being. Theſe Statutes conſtantly ſpeak of the Biſhops of *Ely*, AS *General* Viſitors of the College at *that* Time, and *already* ſo; and *not* as being conſtituted ſo, merely and only BY *thoſe Statutes* of Queen *Elizabeth*. And his *General* Viſitatorial Power *includes* the Election of Fellows, as well as other Matters.

The *General* Viſitor upon *Lay*-Foundations, is the *Founder*: Upon *Spiritual* Foundations, the *Ordinary*.

The *general* Power of Viſitation of the College is given to the Biſhop of *Ely*, *eo nomine* of "*Viſitor*."

No particular ſet Form of Words is neceſſary to the Appointment of a Viſitor. *Fitz-Gib.* 305. *Dr. Bentley* v. *Biſhop of Ely*—"*Viſitator ſit* Epiſcopus Elienſis," was the Biſhop's *whole* Right to be general Viſitor of *Trinity* College.

And He is complete Viſitor: And ſuch Power may ceaſe and revive again. The Caſe of *The King* v. *Biſhop of Cheſter*, Warden of *Manchester* College, 2 *Strange* 797. proves this.

The late Caſe of *Dr. Green* v. *Dr. Rutherford* in Chancery, was only a Truſt, given upon another Footing.

No Objection can ariſe, as to executive Part, from the legiſlative Power being reſerved to the Crown.

Deprivation and Admiſſion of Fellows are incidental and eſſential to the General Power of a Viſitor. Sir *T. Jones* 175. *The King* v. *Warden of all Souls College*, in *Oxford*.

Neither is it any Objection "that particular Times and Occaſions of going to the College, are ſtated and ſpecified:" For upon particular Gravamens, He may exerciſe the Power of Admiſſion and Deprivation, *eo nomine as Viſitor*.

Second Point—The Biſhop's General Viſitatorial Authority extends to the ANNEXED Foundation, *as well as* to the *original* Foundation. *Both* are within the ſame Reaſon: And theſe ingrafted Fellows are to be bound by, and even to ſwear to the Statutes then in being. And here, No new Statutes are given by the annexed Founder: And the Power he reſerved was only to give additional Ones *conformable* to the old Ones. And the Indenture *refers*, throughout, to the Original Foundation: Which is a ſtrong Implication. In 5 *Mod.* 421. indeed this Point, "Whether the Viſitor appointed by the Founder, can be extended to the new Fellows," was doubted. This is called Mr. *Jenning*'s Caſe, of *Clare-Hall:* It was then adjourned, and does not appear ever to have been determined. But on 21ſt *March* 1647. in the Caſe of the *Attorney General, at the Relation of Mapletoft*, v. *Talbot*, (the Caſe of the Maſter and Fellows of *Clare-Hall* in *Cambridge*,) Lord *Hardwicke* held "That the *annexed* Foundation, *where no new Statutes* are "given, muſt *follow the Original* Foundation."

Third Point.—This Deed giving *another* Remedy, *viz.* by DISTRESS, does NOT *preclude the Viſitor*. It is *not ad idem:* It is given TO *the Church of Southwell*; NOT *to the Party injured* in Point of Election and Admiſſion. But however, *if it* HAD been given to the Party injured, it could not have taken away his *Appeal to the Viſitor*, for Relief: For the One is in Order to *obtain Election and Admiſſion*; the Other, for the *Profits*. The SPECIFIC *Relief* muſt come from the *Viſitor:* The Diſtreſs would be only for the *Delay*.

2 *Strange*

2 *Strange* 1061. *Middleton et Ux.* v. *Croft in B. R.* (the third and laſt Queſtion) It was reſolved " That the Statute of 7 & 8 *W.* 3. " *did not*, by inflicting a Penalty, take away the Juriſdiction of the " Spiritual Court." The Diſtreſs may be intended, to *prevent Colluſion* between the College and the Viſitor; And as a Method to bring the Matter *collaterally* in Queſtion: For notwithſtanding what may be ſaid in the Books, particularly in the Caſe of *Philips* v. *Bury* (*Exeter College Caſe*,) it would be very difficult to maintain a *direct* Action for ſuch Colluſion.

Theſe new Fellowſhips were, by the Deed, to have *All* the Rights of other Fellows. Now *one* of theſe was a Right of Appeal. And ſhall the *Nomine Pœnæ* and Clauſe of Diſtreſs given to the CHURCH *of Southwell*, take away the DISTINCT *Rights* of the CANDIDATE, and of the BISHOP? No: *They* have a Right to the *Remedy*; but *none* to the *Penalty*; The Penalty belongs *to the* CHURCH of *Southwell*. But *if* the Penalty had been given TO *the* CANDIDATE; Would that have DISCHARGED the College's Obligation to perform their Contract? And the Reſtriction from going " *foras*," does not exclude the *Viſitor*, (for He is *domeſtic*;) but it only excludes *forenſic* Juriſdictions, *Courts of* LAW.

And the *collateral Penalty* cannot hurt the SPECIFIC *Remedy*: For it is *not adequate* to the Injury; Nay, It is *not* even given to the PERSON *injured*; and it is *temporary*. However, the *ſame* Perſon may have SEVERAL *Remedies*. And this is not the firſt Inſtance of the preſent Queſtion, in this very College; For Mr. *Pegg*'s Caſe in 1726 was in Point; and there the College ſubmitted. The Caſe was exactly the ſame with the preſent, excepting only that it was upon Dr. *Beresford*'s Foundation; which alſo was by *Deed*, and with a *Clauſe of Diſtreſs*, as this is. His Foundation was likewiſe of two Fellowſhips and two Scholarſhips in this College, by Indenture tripartite, made 12 *February* 11 *H.* 8. between the College, the Dean and Chapter of *Litchfield*, and Himſelf; in Conſideration of 400 *l.* given by Him to the College: In which Indenture a Forfeiture is fixed; And a Right of Entry into the College-Lands, given to the Dean and Chapter of *Litchfield*, to diſtrain for it. Mr. *Pegg* was elected. Mr. *Burton* appealed to the Biſhop of *Ely*, as Viſitor. Mr. *Pegg* proteſted againſt his Juriſdiction. Civilians and Common Lawyers were heard, upon the Point of the Juriſdiction. The Viſitor pronounced for his own Juriſdiction; and afterwards gave Sentence for Mr. *Burton*, the Appellant; and iſſued his Monition to the Maſter Preſident and Six Senior Fellows, to admit Mr. *Burton*. This Monition was *obeyed*; and Mr. *Burton admitted* into the Fellowſhip, by the Preſident: By whom a Certificate thereof was duly returned to the Viſitor.

The

The Right of Viſitation ariſes from the Common Law; as Ld. Ch. J. *Holt* held in the Caſe of *Philips* v. *Bury*: * (though Biſhop *Stillingfleet* ſaid it aroſe from the *Canon* Law.) There was a Caſe of this very College, which is reported in 4 *Mod.* 233. *Rex & Regina* v. *St. John's College, Cambridge*; and *Comb.* 279. S. C. and *Skinner* 359, 368, 393, 546. S. C. Where the Court thought they ought to ſee that the Law be executed. And another Caſe alſo, relating to this ſame College, was Dr. *Rutherford*'s Caſe; which was upon a ſpecial Truſt. But the Courts of Juſtice will not interfere, unleſs the Viſitor abuſes his Power, in exerting it where He ought not.

* *V. Skinner* 483, 484.

Then the Counſel for the Biſhop and Mr. *Todington offered* AFFIDAVITS, as to Matters of Fact.

But Lord *Mansfield* ſaid, This Court cannot enter into the MERITS *of the* ELECTION: For the Queſtion *before* Us is "Whether the Biſhop of *Ely* appears to have a *Right to judge* "in this Caſe, as Viſitor." If He has, there is No Ground to prohibit: If He has no ſuch Juriſdiction, He ought to be prohibited.

The Counſel who argued for the Prohibition, begun with laying down ſome *General Poſitions*—As, that *Fundatorial Right* takes its Riſe from the Property of the Donor; That a *Founder* may give Statutes; That *if* He does *not*, the Right of viſiting remains in the Founder or his Heirs; That He may appoint a Viſitor, either *general*, or *partial*, (with Regard to his Powers,) as He himſelf pleaſes; That if He gives him *only partial* Powers, the Viſitor *cannot exceed* them; That if the Viſitor ſhould attempt it, the Court will by Prohibition *reſtrain the Exceſs* of Juriſdiction; That the Court will never refuſe *Liberty to declare* in Prohibition, wherever there is the *leaſt Doubt*, (in order that the Matter may be ſolemnly determined upon Record, and ſo be ſubject to a regular Courſe of Appeal;) That a Viſitatorial Power is not to be inferred by *Implication*, but muſt be given by *expreſs and direct* Words; (as was determined by Lord Chancellor *King*, aſſiſted by two great Judges of the Common Law, in the Caſe of *Eden* v. *Foſter*, reported in 2 *Peere Wms.* 325. the Caſe of *Birmingham* School.

Then they entered upon their Argument, to the following Effect. 1ſt. The Biſhop of *Ely* is *not* GENERAL Viſitor of this College; but *only* Viſitor in *particular* Inſtances: And the *General* Right of Viſitation in *all other* Inſtances, remains in the *Crown*. This, they ſaid, will appear from the 50th, 51ſt and 25th Chapters of Queen *Elizabeth*'s Statutes.

C. 50th. "*Reſervatâ* NOBIS Poteſtate vel adjiciendi vel minuendi, ſeu reformandi interpretandi &c. "*Cæteris* autem OMNIBUS &c. inhibentes &c. And immediately after, the Biſhop of *Ely* is PARTICULARLY *there named*, as One of the Perſons *prohibited* from counteracting the Statutes. And it concludes with giving the Biſhop of *Ely* a *Compenſation*, *viz.* the Nomination of a Fellow; who muſt be *idoneus:* And the *College* are appointed to *judge* of the Idoneity; For it is ſaid "*Neque* enim alium quempiam *recipi* "volumus *à Collegio.*" Indeed the Biſhop is immediately afterwards admoniſhed to offer no Other than a proper Perſon: But ſtill the *College* are to be the Judges, even of the *Biſhop*'s own Nominee.

C. 51ſt. (de Viſitatore) gives him Power *accedere*, only *quoties* he ſhall be requeſted *&c.* and He is thereby reſtrained to cloſe his Viſitation within 15 *Days:* And there are many *particular* Powers, minutely given him; *Which exclude* the Suppoſition "That He has "the *General* Power."

C. 25th. (de Modeſtia) directs that omnes Lites domeſticæ *intra* Collegium et cognoſcantur et dijudicentur; and orders Expulſion to Him qui *foras* vocaverit &c; and refers their Domeſtic Diſputes to be ſettled either amongſt themſelves, in College; or by the reſident *Maſters of other Colleges* particularly therein named.

They denied that in Dr. *Bentley*'s Caſe, the Expreſſion "*Sit* "*Viſitator*," was the *Ground* of the Reſolution: (Which Words, however, are *not*, as they obſerved, in the preſent Caſe.) But in that Caſe the *Intent* of the Crown fully appeared, *throughout*, "to "give the *whole* Power to the Biſhop of *Ely*. Whereas here, the Crown *reſerves* Powers to itſelf, of various Kinds; and might have appointed *new* Viſitors: But there, on the contrary, the Right was *perpetually* given to the Biſhops of *Ely*. Here, the Biſhop's Viſitatorial Power is *limited* and *circumſcribed:* Whereas a *General* Viſitor might do *all that a Founder* could do. Here, He cannot viſit *ex Officio*, in leſs than 5 Years.

As to *Strange* 797. The Biſhop of *Cheſter*'s Caſe, as Warden of *Manchester* College—They agreed that in certain Caſes, the Viſitatorial Right may be ſuſpended, and revive again. But that Caſe, they ſaid, was not at all like the preſent Caſe.

As to the Caſe of *Dr. Green* v. *Dr. Rutherford*—It was only a Conſtruction of a Will, containing a *Truſt*; which was not an Object of the Viſitatorial Juriſdiction. Beſides, the Point of Judgment in that Caſe, they ſaid, was with them.

And

And they concluded that therefore No Appeal lies to the Biſhop of *Ely* in the *preſent* Caſe, upon the Foot of its being, *in general*, ONE of the Fellowſhips of this College.

2dly. Much leſs does it lie, in this Caſe of an ANNEXED Fellowſhip given by a *ſubſequent* Foundation. The Law will NOT *imply* that Dr. *Keton*'s Foundation is ſubject to any *other* Viſitor than Himſelf and his Heirs. An *ingrafted* Foundation does not fall under the former Powers, IF the annexed Founder gives *other* Laws.

Now this is not a *Co*-Foundation, but a *New* Foundation.

It is not true, " That Dr. *Keton knew* the Biſhop of *Ely* to be " General Viſitor." On the contrary, the Biſhop was NOT *ſo*, by Biſhop *Fiſher*'s Statutes: For by thoſe Statutes, the Biſhop had no Right to intefere in the * *Election of Fellows*. And Dr. *Keton reſerved* a Power to give Statutes conſiſtent with the Statutes of the College: And this Right is either *ſtill ſubſiſting* in Dr. *Keton*'s Heir; or *devolved* to the Crown. Now at *that Time* of Dr. *Keton*'s Foundation, the Biſhop of *Ely* had *no* Right of Viſitation *as to* the *Election of Fellows*.

* *V. ante, pa. Poſt.* 196.

3dly. Here is a COMMON-LAW *Redreſs* given: Which No *Viſitor* can have a Right to *diſcuſs*. And the *ſpecific Remedy* is not to come from the *Biſhop of Ely* at leaſt; Whatever it may be, or from whomſoever it is to come. They may go to a proper Juriſdiction, for it. And as to the Caſe of *Burton* v. *Pegg*, perhaps the Biſhop of *Ely* was appointed Viſitor by Dr. *Berisford:* Or the Party concerned might not think proper to oppoſe, or not be able to oppoſe the Biſhop's Proceeding. However, the Submiſſion of the *College* cannot take away the *Right* of the *Founder*, nor the Right of *this Court*; *nor give to the Biſhop* a Right which He has not in Him.

As to 4 *Mod.* 233. *Rex et Regina* v. *The Maſter and Fellows of St. John's College*, and *Skinner* 359. *&c.* S. C. (Dr. *Gower*'s Caſe,) and *Comberb.* 279. S. C. The Return was not the Dictum of *the College:* And ſuch General Terms were out of the Caſe and improper. And the Caſe of *Middleton & Ux'* v. *Croft* is not applicable. *The Regiſter of Writs*, Title *Prohibitiones*, *pa.* 38. is ſimilar to this Caſe, as to the being a Common-Law Contract: " Cum placita de " annualibus redditibus &c. &c. &c. ad nos et Coronam et Digni" tatem noſtram ſpecialiter pertineant &c.

The Viſitor is *bound by the Deed*; And He cannot have any Pretence to proceed in this Caſe, *until* the Covenants are broken, and the College have incurred the Penalty: And of THIS, the Courts

of *Common* Law are to judge. If *both* Juriſdictions ſhould proceed *together*, their Determinations may directly claſh—Therefore the Common-Law Courts will prohibit Him from proceeding at all.

Dr. *Keton* was a PURCHASER of theſe two Fellowſhips: And He reſerved a *Power of Diſtreſs*. The Requiſites to his Fellowſhips are, being a *Choriſter of Southwell*, if, *&c.* and having *Learning*, and *Morals*. If the College ſhould fail to chooſe *ſuch* Perſons, *&c.* they are ſubjected to a *Forfeiture*; for which, a *Diſtreſs* may be taken: This is the Sanction annexed; And this is an *adequate Remedy*. And upon this Deed, the Chapter of *Southwell* are only *Truſtees for* the Candidate; And they would be anſwerable to Him. And this would ſubject the Matter to the Court of Chancery, as a Truſt; and might alſo ſubject it to this Court; as to granting a *Mandamus* to admit him. And therefore, *though* the Biſhop ſhould even be conſidered as *general* Viſitor of the College, Yet this Court would prohibit Him, from proceeding in this particular Affair, or at leaſt, give the College Leave to *declare* in Prohibition. This Court will prohibit Juriſdictions who are proceeding without Right; *although* they themſelves cannot, perhaps, give an *adequate* Remedy. However, here, the Founder conſiders the Diſtreſs AS an adequate Remedy.—They concluded with ſaying that they only deſired Leave to *declare* in Prohibition; not an *abſolute* Prohibition.

Mr. Juſt. *Foſter* ſaid He had not ſeen Biſhop *Fiſher*'s Statutes; which *though now* repealed, were yet in Force *at the Time* of this annexed Foundation: And they are ſaid * *to reſtrain* the Biſhop from exerciſing any Powers relating to the *Election of Fellows*. Now THAT may deſerve Conſideration, *though* theſe Statutes ſhould be *now* expired: For they were underſtood to be IN FORCE at *that* Time when Dr. *Keton* made his Foundation.

* *Vide ante.*

On the Day following (*viz. Saturday* 27th *November* 1756.) Ld. *Mansfield* ſaid that upon looking into the Papers left with Him, He found it neceſſary, towards coming to a complete Underſtanding either of the Statutes or of the Deed, " That the PRIOR *Conſtitution* " of the College, antecedent to *Both*, ſhould be laid before the " Court;" As both the Deed and alſo Queen *Elizabeth*'s Statutes *expreſly* REFER to this *prior Conſtitution* of the College, and conſequently muſt be (in ſome meaſure) unintelligible and inexplicable, unleſs it be alſo known, " WHAT that prior Conſtitution *was*." He propoſed therefore that the Parties ſhould, in the beſt manner they could, lay this Conſtitution before the Court; and that the Caſe ſhould be ſpoken to again in the next Term; not by all the Counſel arguing it over again, but by only *One* Counſel on each Side, who ſhould apply themſelves to *ſuch Concluſions* as might ariſe from ſuch prior Conſtitution of the College, and be applicable to Queen *Elizabeth*'s Statutes or to the Deed of Covenants.

The Caſe was accordingly Adjourned till next Term, to be then ſpoken to by One Counſel on each Side, on the *prior* Conſtitution of the College, antecedent to Dr. *Keton*'s annexed Foundation and Deed, and conſequently to Queen *Elizabeth*'s Statutes likewiſe.

On this Day (i. e. *Thurſday*, 3d *February* 1757,) this Caſe was again ſpoken to, by One Counſel on each Side.

Mr. *Yorke*, Solicitor General, on the Part of the Biſhop and Mr. *Todington*, made 3 Queſtions, *viz.*

1ſt. Whether the Biſhop is not *as extenſive a Viſitor*, under the *Old* Conſtitution, as under the *New*.

2dly. Whether the *College* are not *bound* by the *Acceptance of the new* Statutes.

3dly. Whether Dr. *Keton's Fellowſhips* are not *bound* by the *Acceptance of the new* Statutes, *as well as the Reſt* of the College.

Firſt—He inſiſted that the Biſhop is as extenſive and complete a Viſitor under the *Old* Statutes, as under the *New*. This he endeavoured to make out, from the Old Statutes of the College. [And upon theſe, the Queſtion muſt depend.]

Secondly—The *College* are *bound by the Acceptance* of the *New* Statutes.

Ld. *Mansfield*—The College *will not* (moſt undoubtedly,) agitate *that* Queſtion: For if they do, they muſt give up All their Livings, *&c.* and all other Advantages that they claim UNDER them.

Mr. *Norton*, on the part of the College, readily agreed to this; ſaying that they *ſhould not* (certainly) make a Queſtion of *this*; having *acted* 200 *Years* UNDER *theſe new Statutes*.

Mr. Solicitor General then proceeded to his 3d Queſtion—

Thirdly—He inſiſted that Dr. *Keton's Fellowſhips* are *bound* by the *New* Statutes, *as well as the Reſt* of the College: For as He has *not given new* Statutes, theſe Fellowſhips are to be conducted and bound by the *ordinary* Statutes of the College; And the rather, for that *theſe* Fellows enjoy All Privileges, and come into the Seniority, in the *ſame Manner as the Reſt* of the Fellows do.

Mr. *Norton*, *contrà*,—for the College.

This Caſe ſtood over, in Order to ſee what was the State of the College, *at the Time* when Dr. *Keton*'s Deed of Covenant was made: *At which Time, Biſhop Fiſher*'s Statutes *ſubſiſted.*

The Biſhops of *Ely* were Owners, originally, of the *Site* of the College; And, As *Biſhops of Ely*, were *ordinary* Viſitors of this Place: From One or both of which Circumſtances, they might poſſibly ſet up a Right of Viſitation. Now Biſhop *Fiſher*'s Statutes profeſſedly mean to obviate any ſuch Pretenſion; and to prevent the Biſhops of *Ely* from claiming a Right of Viſitation, *as General* Viſitors of the College. Which Poſition Mr. *Norton* endeavoured to prove from Biſhop *Fiſher*'s Statutes. And He ſaid that if the Statutes were to be conſtrued otherwiſe, it would occaſion a Claſhing of Juriſdictions and the utmoſt Confuſion in the College. As to any Power of Viſitation that the Biſhops of *Ely* may have *at Common Law*, He ſaid He did not mean to diſpute *that*, with them: But as to the Claim of a General Viſitatorial Power over the College, He prayed Leave to *declare* in Prohibition; that it might be ſolemnly determined upon Record, and that each Side might have an Opportunity of appealing elſewhere, if diſſatisfied with the Determination of the Court.

He ſtrongly contended, That it was *premature*, to determine *now*, "Whether the Biſhop of *Ely* had Juriſdiction;" That there ought to be a Rule for the Plaintiffs to *declare*; That ſuch was the Courſe of the Court, and it had not been uſual to examine the Matter upon *ſhewing Cauſe: After a Declaration* in Prohibition, the whole would appear upon Record, be ſolemnly judged, and the Judgment might be reviewed upon a Writ of Error.

Lord *Mansfield*—*If* the Party who applies for a Prohibition has a Right to declare, though the Court ſhould ſee *no Ground* for the the Motion; A Rule "to ſhew Cauſe why the Prohibition ſhould "not be granted," is to no Purpoſe; and Hearing Counſel upon the Sufficiency of that Cauſe is Time miſpent.

When the Matter ſeems *doubtful* to the Court, upon a Queſtion of Fact or Law, the Plaintiff has Leave to declare that the Parties may have the Fact properly tried by a Jury, or the Law ſolemnly conſidered, as in a Cauſe.

When the Court is clearly of Opinion that there *is* ſufficient Ground for the Prohibition, the Defendant has a Right to put the Plaintiff to declare; that his Juriſdiction may not be taken from him, in a ſummary Way, where no Writ of Error will lie. But

if the Court be *clearly* of Opinion That there is NO *Ground* for a Prohibition, It ought to be denied, *without* putting the Defendant to Expence, and delaying, in the mean Time, the Exercise of what appears to them a *lawful* Jurisdiction.

This Denial is *not conclusive* to the Plaintiff. *If* there is *no* Jurisdiction, the Sentence will be a *Nullity*; and upon any Attempt to execute or inforce it, the whole may be tried in an Action. The Plaintiff may also apply to any *other* Court in *Westminster-Hall*, for a Prohibition; and take *their* Opinion.

If, in Cases of this Kind, the Court should too easily yield to hang up the Matter, by letting the Plaintiff declare in Prohibition; Redress would come too late, and cost too much.

I was very desirous, as there is no Fact disputed, to go fully into the Argument *now*; and if I saw no Ground to doubt of the Bishop's Jurisdiction as Visitor, to stop unnecessary *Delay*, *Vexation*, and *Expence*.

The *Subject-Matter* of the Complaint to the Visitor is a Competition for *present* Maintenance and Education; upon an Eleemosynary Foundation: The *Cause* of the Contention is a *controverted Election*; which is too apt to engage and animate the Electors.

In Compassion to the Candidates, and for the Peace of this learned Body; the Dispute *ought not* to be suffered to continue longer than is absolutely unavoidable.

If the Plaintiff might, *as of Right*, demand to declare in Prohibition, the *Consequences* would be fatal, in both Universities. The College, as here, (i. e. the Majority which determines the Body,) wou'd support the Election they had made, and may easily keep the Visitor off for Years; their public Stock would be applied to defray the Charge: In the mean Time, Elections of new Fellows might come on; their Validity might depend upon the Rights in Dispute; the Election of Masters might come on; Great Abuses, in such a State of Confusion, would naturally creep in; Discipline could not be kept up; Intestine Heats and Divisions would counteract the whole Intention of the Founder. The Reason of a Visitor would be destroyed. He is appointed and made absolute upon this Principle; "That, in these Societies, Error of Judgment, the Chance of Par-"tiality, or Injustice, is a *less Evil* than the Duration of Conten-"tion:" But if, by disputing His Jurisdiction without Ground, His Exercise of it may be protracted as long as a Cause can be kept up for Delay, by Parties who do not regard the Costs, The Members of every College in both Universities who complain of an Injury

jury done, muſt be ſubjected to *both* Inconveniences; 1ſt. To the Law's Delay, in the moſt deliberate Method of Judicial Proceeding; And, at laſt, To the Award of an abſolute Judge, in the moſt ſummary Method of Trial.

If We are clear that the Biſhop *has* Juriſdiction, We ſhould do Injuſtice in the preſent Caſe, and ſet a bad Precedent for keeping up Groundleſs Strife, if We did not *diſcharge* the Rule. And therefore I think, the Merits ſhould be fully gone into *now*.

As to the *Merits*—

The 1ſt Queſtion is " Whether the Biſhop of *Ely* is Viſitor of " *St. John's* College, *as to* the ELECTION *of Fellows* and other " Officers:" (For ſo is the Suggeſtion; where the Averment is " That He is not Viſitor *in* THAT *Reſpect*;" And the Maſter and Senior Fellows make the Complaint.)

The 2d Queſtion is, " Whether, ſuppoſing Him to have this " Power, as to the Fellows of the OLD Foundation, He has alſo " the *like Power*, as to Fellows of this NEW ANNEXED Foundation " of Dr. *Keton's*."

The Viſitatorial Power, if properly exerciſed, without Expence or Delay, is *uſeful* and *convenient to Colleges*. However, (be that as it may,) We muſt take it, as it is now *eſtabliſhed* by Law: And it is now ſettled and eſtabliſhed, (ſince the Caſe of * *Philips* and *Bury in Dom'. Proc'.*) " That the Juriſdiction of the Viſitor is " *ſummary* and *without Appeal* from it."

* *V.* 4 *Mod.* 106. *Skinner* 447. *Show. P. C.* 35, *&c.*

Theſe *Foundations of Colleges* are to be conſidered in *two Views*, *viz.* as they are *Corporations*, and as they are *Eleemoſynary*.

As Eleemoſynary, They are the Creatures *of the Founder:* He may delegate his Power, either *generally*, or *ſpecially*; He may preſcribe *particular* Modes and Manners, as to the Exerciſe of *Part* of it. If he makes a *General* Viſitor, (as by the general Words "*Viſitator ſit*,") the Perſon ſo conſtituted has all incidental Power: But he may be *reſtrained as to* PARTICULAR *Inſtances*. The Founder may appoint a *ſpecial* Viſitor *for a particular* Purpoſe, *and no farther*. The Founder may make a *general* Viſitor; And *yet* appoint an inferior *particular* Power, to be executed without going to the Viſitor in the firſt Inſtance.

No *technical preciſe* Form of Words is neceſſary for the Appointment of either General or Special Viſitor. In a Caſe before Lord *Hardwicke*, on 21ſt *March* 1747. *Attorney General* v. *Talbot*, in

Chancery, " The Chancellor of the Univerſity was held to be " general Viſitor of *Clare-Hall without* expreſs Words of Appointment: But it was *implied*, from various Branches of the Viſitatorial Power being expreſly given to Him; from his having the Interpretation of the Statutes; and from an expreſs Excluſion of the Founder's Heir." Therefore it muſt be collected from the *whole Purview* of the Statutes conſidered together, " WHAT Power the " *Founder* MEANT to give to the Viſitor."

Under theſe general Rules, I will now conſider the preſent Caſe, as it ſtands upon the Statutes of this College.

The Foundation of this College is to be taken (as to *this* Queſtion) from the Statutes of Queen *Elizabeth:* Which are the *now* governing Conſtitution of this College. Theſe Statutes *reſerve* to the Crown the *Legiſlative* Power: So that the Caſe of ALTERING *the Statutes* is certainly excepted; *if* ſuch Power *be included* in the Office of Viſitor. But where *a Body of Statutes has been given* by the Founder, I ſhould doubt extremely, " Whether a Viſitor *can* " *alter* thoſe Statutes, or *give new* Laws:" (Whatever may have been the Notion in former Times.)

ALL OTHER Viſitatorial Power is given to the Biſhop of *Ely*, by the Statutes; and principally by the 2d Chap. De Electione Magiſtri, the 50th. De ambiguis interpretandis, And the 51ſt De Viſitatore; (For the *Reſt* of the Statutes are leſs clear and explicit than theſe are, as to the Proof of this Point.)

And His Lordſhip then went minutely through theſe three Statutes, and ſhewed that they gave the Biſhop of *Ely* the *general Power* of Viſitation: Which He *ſpecified* in many Inſtances, and particularly in the Words, " *Viſitationem* hujus Collegij Epiſcopis Elienſibus " *commendamus.*"

In the Caſe of *Green* v. *Rutherforth*, in Chancery, 23d *May* 1750. Upon ſo much of theſe Statutes as was *then* ſhewn, Ld. *Hardwicke* gave his Opinion, " That the Biſhop of *Ely* was *general* Viſitor of " this College; but that He could *not* make *new* Statutes; and if " He ſhould attempt it, the Juriſdiction would *devolve* to the " King's Courts, as in the *King* v. *Biſhop of Cheſter*, the Caſe of " *Mancheſter* College, *Paſch.* the 1ſt of his preſent Majeſty." * * *V.* 2 *Strange* 797.

More Statutes are *now* ſhewn; but nothing ariſes from them to vary this Conſtruction.

Nothing appears upon the *old* Foundation or the *other* Statutes, to impeach this Conſtruction.

The Viſitatorial Power is almoſt as ſtrongly given Him by the old Statutes, as by the new: The Difference is, that in the new Statutes the Ambiguous Clauſe in Reſtraint of the Biſhop's Power, towards the End of the old Statute de Viſitatore, is * omitted.

* *V. ante* 188. compared with 181.

What is there ſaid does not reſtrain the Power of the Biſhop of *Ely*, ſo ſtrongly as may at firſt Sight appear.

The Meaning of the Proviſion ſeems to be, that he ſhall claim no Right As *a Co-Founder*, though he was Owner of the Site; but only act as in other Colleges, *where He is not* Founder. And in Colleges where He is not Founder, He may act under Powers of Viſitation *delegated* to Him. However; be the Meaning as it may, this Clauſe is *totally omitted* in Queen *Elizabeth*'s Statutes.

This is *not* the Caſe of *Expulſion*; where the Maſter and four ſenior Fellows are to * conſent. The Power of *judging* and giving *Relief* upon *Complaints* and *Appeals*, is incident to the Office of General Viſitor: And if this Caſe related to one of the *old* Fellowſhips, the Statutes have laid the Viſitor under no Reſtraint, as to the Mode and Manner of exerciſing it.

* *V. ante* 181.

As *General* Viſitor therefore of this College (which I think clearly the Biſhop is,) He would certainly have Juriſdiction, if this Appeal related to One of the old *Fellowſhips*. Which brings me to the

Second Point—"Whether the Viſitor of an *old* Foundation, has "the *like* Power and Juriſdiction over a NEW ANNEXED Founda-"tion, as he has over the *Old* One."

It is a Queſtion of Extent and Conſequence.

In this College, there are 32 Original Fellowſhips; and 27, upon annexed Foundations.

I find that the *General Method* of *ingrafting* Fellowſhips, is by *Indenture*, and *with a Clauſe of Diſtreſs*. I apprehend that this Method took its riſe from the old Tenures by Divine Service, (which differ ſomewhat from Tenures in Frank Almoigne;) where the Donor had a Power of Diſtreſs, of Common Right, when the Service was certain. (But this is only a Conjecture.)

I have procured Information, concerning *moſt* of the Colleges in *Oxford* and *Cambridge*; And I find that *moſt of the* OLD *Colleges*, in *both* Univerſities, conſiſt and are made up, (leſs or more,) of INGRAFTED Fellowſhips; and *ingrafted* BY INDENTURES, too:

And all these are considered as PART *of the old Body*; *Unless* there be any particular Exception, by the Terms of the new Foundation.

There was a Case (6th *July* 1740.) of University College in *Oxford* (founded by King *Alfred*;) where *Wm.* of *Durham* afterwards founded two Fellowships, "de proximis Dunelmiæ Partibus." A Complaint was made to My Lord Chancellor, *as* GENERAL *Visitor* of the College in Right of the King: And it was determined *against* the College. Yet *Wm.* of *Durham* had in that Case, *given* NO *Statutes Himself:* But these *ingrafted* Fellowships were considered as subject to the general Visitor of the *old* Foundation. In *that* Capacity, Lord *Hardwicke* took Cognizance: And the College never made any Objection.

In the Case of the *Attorney General* v. *Talbot*, which I mentioned before, The Countess of *Clare* was Foundress of *Clare-Hall*. One Freeman annexed 2 Fellowships *by Indenture*, (I don't observe there is any Clause of Distress in it.) The Contest was for one of *these* Fellowships. Lord *Hardwicke* held "That the Question be-"longed to the *general* Visitor of the College; that *new* Fellow-"ships ingrafted must be subject to the Jurisdiction and Discipline "exercised over the *original* Foundation."

In the Case of Dr. *Green* v. *Rutherforth & al.* (which I mentioned before,) both Lord *Hardwicke* and Sir *J. Strange* expressly laid it down, "That *new ingrafted* Fellowships, if no Statutes were "given by the Founders of them, must follow the *original* Foun-"dation, and be subject to the *same* Discipline and Judicature."

I am satisfied that, upon mature Reflection, the College would tremble at the *Consequence* of leaving every Election into any of these ingrafted Fellowships, or any other Disputes concerning them, open to Courts of Law, and the Expence and Delay attending Suits in them.

I think clearly, that Dr. *Keton did* so *consider* and *intend* "that "his new and annexed Foundation SHOULD BE *subject* to the old "Statutes and Constitution of the College, in Case he Himself "should happen to die without making any Ordinance by Will "or otherwise." These Fellows of his Foundation are to be elected *as* the other Fellows; and at the *Time* limited by the Statutes. They are to enjoy the *same Liberties*, *&c.* as the other Fellows. The Oath they were to take during the Life of Dr. *Keton*, "to obey "such Statutes and Ordinances as should be made by Him," is qualified with this Restriction, "*So that* the said Statutes "should be conformable with the Statutes of the *Foundress* of the "said

* *V. ante* 161.

" ſaid College": Which neceſſarily implies that they were, in the firſt Place, to *obey* the Statutes of the Foundreſs of the College.

He explained this, by many other Paſſages in the ſaid Indenture.

Beſides, Eo NOMINE, the *ingrafted Fellow* becomes *ſubject and liable* to the Juriſdiction of the Viſitor *over the Fellows* of the College. Theſe *ingrafted* Fellows are exactly *the ſame* as all the *Reſt* of the Fellows, except as to the *Money* ariſing to them *from* the *New* Foundation; and are intitled to *all* the *like Privileges* as the *Old-Foundation Fellows* are intitled to.

The Objection to the Biſhop's Right of viſiting in the preſent Caſe, ariſes from the Power of *Diſtreſs* here given for the Forfeiture, in Caſe the College do not obſerve certain Terms which are preſcribed to them.

But *ſeveral other ingrafted* Fellowſhips are juſt in the *ſame* Situation: And therefore it would go a great Way, (in Point of *Conſequence*,) if, upon this Ground, We were to determine them NOT *to be Part* of the old Foundation.

Theſe are Proviſions DIVERSO INTUITU. And indeed the *Diſtreſs* would be a very INADEQUATE *Remedy*, to the *Perſon injured*: Nor is it even *given* TO *the Perſon injured*, but to *other* Perſons. So that it is manifeſt, that this Clauſe of Diſtreſs, given to the *Church of Southwell*, ought not to take away the SPECIFIC *Remedy from the* PERSON INJURED.

It ſeems to me very clear, that the Biſhop is as much Judge of *this* Complaint, as if it related to One of the *Old* Fellowſhips: And if it related to One of the *Old* Fellowſhips I think the Juriſdiction of the Biſhop, as Viſitor, *moſt evident*. Therefore I am of Opinion, that the Cauſe ſhewn againſt this Rule is ſufficient; and it ought to be *diſcharged*.

Mr. Juſt. *Deniſon* concurred, in the whole, with Lord *Mansfield*.

He thought clearly, that the Biſhop of *Ely* was *General* Viſitor, except in the Inſtances particularly excepted.

No *particular technical Words* are neceſſary to create a Viſitor. And ſo was the Opinion of the Court, in Dr. *Snape*'s Caſe *H.* 2. *G.* 2. *B. R.* as well as in the Caſe of *Philipps* v. *Bury*. And the main Buſineſs of a Viſitor, is to interpret the Statutes.

Now this *Deed*, though with a *Clauſe of Diſtreſs*, *cannot* take away the Authority of the Viſitor: It is for *another Purpoſe*. And Dr. *Keton never meant to exclude* his Scholars and Fellows from the *Benefit of an Appeal*, which the *other Fellows of the College enjoyed*. And *his* Fellows are ſworn *to obſerve* ALL *the Statutes of the College*.

The Diſtreſs is very little more than the *Form* of the Conveyance; And it is given to the *Church of Southwell* too: But ſurely it is *not an* ADEQUATE *Satisfaction* TO *the* REJECTED *Fellow*, who has a Right to be elected into the Fellowſhip.

The Viſitor has a Right to the Interpretation of the Statutes; And the ingrafted Fellow has a Right to appeal to Him; And the Clauſe of Diſtreſs does *not take it away* from Him. And there is no manner of Reaſon why the *ingrafted Fellow* ſhould not have the *ſame Privileges*, as the *other* Fellows have.

I am ſo clear about this Matter, that I think there is no Reaſon for ſuffering the Party applying for the Prohibition to *declare* in Prohibition: But the Rule ought to be *diſcharged*.

Mr. Juſt. *Foſter* alſo concurred.

He took particular Notice of the 50th Chapter of Queen *Elizabeth*'s Statutes, about interpreting what might be ambiguous or obſcure. Which Statute, he agreed, does reſerve to the Queen a Power to add or diminiſh, reform, interpret, declare, change, alter or diſpenſe, *&c: But the* DOCTRINALIS *Expoſitio* is expreſsly given to the *Biſhop of Ely*, in the very *ſame* Statute; and the College are thereby injoined, in virtue of their Oath, and under Penalty of perpetual Amotion, to * obey his *Determination*, *Interpretation*, and *Declaration*.

* *V. ante* 185.

He declared that He had no Doubt that the *General* Power of Viſitation *is* given to the Biſhop: And He ſaid, He ſaw no Inconſiſtency in the Statutes. As to the Clauſe of *Diſtreſs*—*That* would give no Sort of *adequate Satisfaction* to *this* REJECTED *Fellow*; who comes for a *ſpecific Remedy* for the Injury done to him. Therefore He declared his Concurrence with Lord *Mansfield* and Mr. Juſt. *Deniſon*.

And *Per Cur.* * unanimouſly

The RULE was DISCHARGED.

* N. B. Mr. Juſtice *Wilmot* was not preſent at any one Part of this Motion; being engaged in the Court of Chancery during the whole of it.

Friday, 4th February, 1757.

Earl of Bath *verſ.* Abney, Spinſter.

A Caſe out of Chancery for the Opinion of this Court.

The Queſtion was, Whether an Executor of a COPYHOLDER *for* a TERM OF YEARS, was obliged to be *admitted*; (and, conſequently, liable to *pay a Fine* upon ſuch Admittance.)

The Manor in which the Lands lay, was *Stoke Newington*, in *Middleſex*; the Defendant, Mrs. *Abney*, is Lady of this Manor; the Premiſſes demiſed, were 60 Acres of Meadow, let at 125*l.* per Annum.

The State of the Caſe was pretty long and particular: but the Queſtion was ſhort; *viz.* "Whether an EXECUTOR *of a Tenant* "*for* YEARS, coming into the Copyhold, as a Chattel Real, under "his Teſtator's Will, is obliged to be *admitted*." (For the Counſel for the Plaintiff, acknowledged that the being liable to a *Fine* would *conſequentially* follow a Neceſſity of Admittance:) That is to ſay, they admitted that *if* he was *compellable* to come in and be admitted, he would alſo be compellable to pay a Fine.)

The full State of the Caſe was in Subſtance this —

That *Henry Guy* being ſeiſed in Fee of 60 Acres of Meadow in the Manor of *Stoke Newington*, let at 125*l.* *per Annum*, the ſaid *Henry Guy* ſurrendered the ſame to the Uſe of his Will: And having ſo ſurrendered (in a proper Manner) to the Uſe of his Will, He died ſeiſed in Fee; Having firſt duly made his Will and thereby deviſed to *John Taylour* and *Arthur Lake* their Executors and Adminiſtrators for 99 Years, if three Perſons (in his ſaid Will named) or any of them ſhould ſo long live; upon ſeveral Truſts, *viz.* firſt, to the Uſe of the preſent Earl of *Bath*, for Life; then to his Iſſue Male, (*viz.* firſt and other Sons, *&c.*) in ſtrict Settlement; then in the like Manner, to the uſe of the Earl's Brother, General *Pulteney*; then to the late Mr. *Daniel Pulteney*, in like Manner; then to the Uſe of the Earl of *Bath* in Fee. And after the Death of the ſaid Teſtator, the ſaid *Taylour* and *Lake*, the Truſtees, claimed to be admitted *according to the Tenor of the Will*; [*V.* poſt.] and were thereupon admitted according to the Cuſtom of the ſaid Manor; did Fealty; and *paid a Fine of* 280*l.* to the then Lord of the Manor, on ſuch Admittance.

One

One of the three Lives is ſince dead; the other two, living; And both of the ſaid two Leſſees, *John Taylour* and *Arthur Lake* are dead; but *John Taylour* ſurvived *Lake*. *Taylour*, the ſurviving, (but now deceaſed) Leſſee, appointed Dr. *John Taylour* and Another Perſon his Executors; and Dr. *Taylour* is now the ſurviving Executor of *John Taylour*, the Original and Surviving Co-Leſſee.

Mrs. *Abney* is now Lady of the Manor.

It did not appear to the Lord or Lady of the Manor, that the Leſſees, *Taylour* and *Lake*, were dead, till 1752: When this Fact was found by the Homage.

Then the Executor of the Survivor, (which was Dr. *John Taylour*, the ſurviving Executor of the ſaid *John Taylour* the original Co-Leſſee) was ſummoned to come in, and be admitted; the Jury having found that the original Leſſees were both dead. And Proclamations iſſued &c. [*N. B.* The Proclamation was for the *Heir* of *Taylour* or other Perſon claiming &c. to come in &c.]

It is ſtated that the General Cuſtom of the Manor is, to grant the Copyholds for Life, or in Fee; and that No OTHER *Inſtance* of a *Grant for* YEARS, beſides the preſent Inſtance (now before the Court,) has been known in the ſaid Manor of *Stoke-Newington*.

The Caſe further ſtates, that *Fines* have been uſually paid *upon Admiſſion*; And that the uſual *Rate* of ſuch Fines has been 1 $\frac{1}{2}$ Years improved Rent of the Premiſſes to which the Tenant is admitted.

And by the Uſage of this Manor, the Fine uſually taken for two Lives, is as much *and* half as much, as the Fine for one Life: And the Fine uſually taken for three Lives, is as much *and* half as much, as the Fine for two Lives.

The two Queſtions made upon this Caſe, and ſent to this Court for their Opinion upon them, were 1ſt. Whether the ſurviving Executor of *John Taylour* (the Surviving Truſtee of the *Term* for 99 Years) ought to come in, TO BE ADMITTED Tenant of the Copyhold Premiſſes in Queſtion: 2dly. In Caſe he ought, then Whether the Lady of the Manor will be intitled to any FINE upon ſuch Admittance.

This Caſe was twice ſpoken to, in this Court: firſt, on *Tueſday* 18*th May* 1756, by Mr. *Pratt* for the Plaintiff, and Mr. *Sewell* for the Defendant; and a ſecond Time, on *Friday* 4*th Feb.* 1757,

by Mr. *Norton* for the Plaintiff, and Mr. *Gould* for the Defendant.

And the two Queſtions being reduced into one, as is abovementioned, (it being agreed " that if the Executor was compellable to " be admitted, he would conſequently be liable to pay a Fine ;")

It was argued on the part of the Plaintiff, the Earl of *Bath*, That the Fine becomes due to the Lord (or Lady) of the Manor, upon every *Change of the* ESTATE ; not upon the *Change of the* TENANT, where there is *no* Change of the Eſtate.

For where there are ſeveral Remainders, to ſeveral Perſons, the *Admiſſion of the* FIRST *Taker* is the Admiſſion of EVERY Perſon in Remainder. 4 *Co.* 22. *b. Copyhold Caſes* ; and 4 *Co.* 23. *a.* Caſe the 6th. *Cro. Eliz.* 504. *Gyppyn* v. *Bunney. Kitchin* 122.

And here, *Taylour* and *Lake* were admitted *according to the Tenor* of their Teſtator's Will : Which muſt have been to the *whole Eſtate* comprized in the Will. And therefore the *Fine* muſt have been *proportionable* to the Value of the *whole* Term of 99 Years : And 'tis againſt Conſcience that the Executor of the deceaſed Leſſee ſhould pay *another* Fine for the *ſame* Eſtate. Neither is He compellable to come in and be admitted afreſh ; it being the ſame Eſtate.

And that *no* freſh Admittance is neceſſary, nor any *farther* Fine payable, appears from the Caſe of *Dell* v. *Higden* in *Moore* 358. and the Caſe of *Tiping* v. *Bunning*, *Moore* 465. In both which Caſes it was holden and reſolved " that the Admittance of a Tenant for " Life, of a Copyhold, is an Admittance of Him in Remainder ; " and that no new Fine is due from him in Remainder ;" And in *Cro. Eliz.* 504. *Gyppin* v. *Bunney* (which is S. C. with *Moore* 465.) *Popham* and *Fenner* held accordingly ; and that, becauſe They have but One Eſtate in Law : And they held that ONLY *One* Fine is due ; which the firſt Taker ſhall pay.

In 3 *Lev.* 308. The Caſe of *Barnes* v. *Corke—Tr.* 1 *W. & M. in C. B.* It came directly in queſtion ; And Ld. *Coke's Dictum* in 4 *Rep.* 23 *a.* was taken into Conſideration, and explained to be reſtrained to SPECIAL Cuſtoms only : But the *general* Principle of Law was ſettled to be, " That NO *Fine* is due to the Lord, from the Remain- " der-Man, *without* a *ſpecial Cuſtom* for it."

And the Reaſon is, (as *Popham* ſaid, in the Caſe of *Gyppyn* v. *Bunney*,) " becauſe Both have but one Eſtate in Law, And the " Lord has already admitted to the *whole :*" Which Reaſoning is quite applicable to the preſent Caſe.

If a Copyholder in Fee grants his Copyhold upon Condition, and enters for the Condition broken; There ſhall be no freſh Admittance, nor Fine: becauſe he is *in ſtatu quo priùs*. *Coke's Compleat Copyholder* § 56. So, if there be two Joint-tenants, And one die; the Survivor needs no Admittance, nor ſhall pay a Fine. *ibidem.* So the Widow of a Copyholder, for her Cuſtomary Free-bench: Becauſe 'tis Part of the Old Eſtate, and is caſt upon Her and veſted by Law.

So it is alſo in Dower, and Tenancy by Curteſy; though there a *new Tenant* intervenes.

Noy 29. *Rennington* v. *Cole*, is full in Point. Alſo *Hutton* 18. *Jurden* v. *Stone*, S. C. *Hob.* 181. *Howard* againſt *Bartlet* S. P. 2 *Danv.* 184. Title *Copyhold*, Letter M. *pl.* 1. in Point. *Cro. Jac.* 573. *Waldoe* v. *Frances Bertlet Wid.* S. C. with *Hob.* 181. [but not this ſame Point.] 2 *Ro. Rep.* 178. *Walter* v. *Bartlet*, S. C. It is conſidered only as an *Excreſcence* out of the Original Eſtate, by Ld. *Hobart*, *pa.* 181. And an Executor of a Copyholder for *Years* is within the ſame Reaſon; For 'tis only the *Old Eſtate* continued.

But the Caſe of DESCENTS may be objected: For there the ESTATE is the *ſame*; Only the *Tenant* altered.

Now it may be difficult to enter into the true Reaſon of this. But it may be conſidered as a Change of *Eſtate*; and as a new Grant: The Lord gave a new Admittance, a new Grant.

But perhaps that Caſe of Deſcents may be an *Exception* from the General Rule.

There are ſeveral Caſes in Point, for the Plaintiff: And no Authority againſt Him, except *Weſton*'s Opinion in *Dedicott*'s Caſe. *Dedicott*'s Caſe itſelf, in 3 *Leon.* 9. is moſt expreſs in Point: And *Dyer* 251. is S. C. [But *Dyer* does not mention this Point at all.] The Wife's Intereſt was there a Chattel-Intereſt; And She was to have it for 16 Years: And her ſecond Huſband, who ſurvived her, had it as her Aſſignee, *without* paying any Fine, or being admitted. And in 3 *Leon.* 9. *Brown* and *Dyer* put the very preſent Caſe in Terms, of an Executor of a Copyholder for Years; and agree that He ſhall have the Term *without* Admittance. And the Caſe of *Otlery* Monaſtery, in 1 *Leon.* 4. and 4 *Leon.* 118. S. C. (twice printed, *verbatim* alike, almoſt,) mentions a Determination of the preſent Queſtion, in Point: Agreeable to which, is another Report of it, called *Heydon*'s Caſe, in *Moore* 128. S. C. *Egerton*, in his Argument, of that Caſe of *Otlery* vouches a Caſe as determined

in 8 *Eliz.* in *C. B*: Which Caſe is expreſly in Point with Us: But the Caſe *itſelf*, of 8 *Eliz.* in *C. B.* which he ſo cites, is not to be found. 2 *Danv.* 190. Letter Y, mentions S. C. *Sheppard's Court-Keeper's Guide*, 5th Edit. *pa.* 136. And *Calthrop's Readings on Copyholds*, 2d Edit. *pa.* 67. is expreſs in Point: And ſo again, in *pa.* 72. Tenant in Dower and Freebench. *Tenures* 272, 273. S. P. accordingly: (the Book of Tenures that has no Name to it.) And *Comberbach* 445. expreſs "that the Executors of a Termor for "Years of a Copyhold ſhall pay *no* Fine for Admittance."

They ſaid that the Caſe of *Dell* v. *Higden* in *Moore* 358. was but a looſe Note: And *Cro. Eliz.* 372. which is a Report of the very ſame Caſe, does not mention any ſuch Queſtion in it.

And as to what was cited out of the Caſe of *Gyppyn* v. *Bunney*, *Cro. Eliz.* 504. and *Moore* 465. They ſaid it was no more than a Dictum of *Popham*'s.

Then, *if* the Executor is *not* obliged to be *admitted*, No *Fine* is due: For no Fine is due, BUT UPON *Admittance.*

But the Inconvenience may be objected, "That a Lord may be "ſtripped of his Inheritance, by Copyholder's ſurrend'ring for *long* "Terms (as even for a Term of 1000 Years:") And ſo the Lord might loſe his Fines.

But 1ſt. This Inconvenience does *not really* exiſt at preſent. And 2dly. The Lord might, in *ſuch* Caſe *refuſe* to admit; And could not be forced to it, either in Law, or Equity.

2 *Bulſt.* 336. *Foorde* v. *Hoſkins* proves "that the Copyholder can-"not bring an Action at *Law*." [It is a moſt expreſs Determination in Point.]

And in *Equity*, they would not aſſiſt the Copyholder in *ſuch* an Attempt. *Comberb.* 445.

The preſent Caſe is a Leaſe to *Two* Perſons, for 99 Years, determinable upon 3 Lives: In which, the Fine might eaſily, in *Fact*, be ſettled by a *proportional Computation*, if it could be done *by Law.*

The Copyholder derives his Eſtate, *not* from the Lord, but from the *Cuſtom* of the Manor: For a Lord who is only Tenant for Life, may admit in Fee.

And that the Lord would *not be bound*, either in Law or Equity, to admit, upon a Surrender by a Copyholder in Fee, for 1000

Years; *Comberb.* 445. * expreſly proves: And *alſo* proves "That "in ſuch a Caſe, an *Executor* ſhall pay NO *Fine* for Admittance:" Which it muſt be ſuppoſed was taken down by the Reporter, as Lord *Holt*'s Opinion. [* This is no part of the Caſe of *Sandwell* v. *Sandwell*; but, manifeſtly, a quite diſtinct Caſe; probably, at *Niſi prius.*]

The Lord's Intereſt in his Fine is ſacred: An Act of Parliament ſhall not be conſtrued ſo as to deprive Him of it. [*V. Manwood's Diverſity*, in *Moore* 128.]

It would be very hard on our Side, if 1½ Years Rack-Rent was to be paid upon every Change of an Executor.

Therefore they prayed a Certificate in the Plaintiff's Favour.

On the Part of Mrs. *Abney*, Lady of the Manor, It was agreed that, in this particular Caſe, the Fine and the Admittance muſt depend on *each* other; i. e. that *either Both* might be required, *or neither could.*

But it was ſaid that the Reaſon of Admittance, in general, depends upon the Relation that ſubſiſts between Lord and Tenant: And that the *Admiſſion* of the Tenant, in theſe Caſes, was only *perſonal* to the Tenant Himſelf only; And the *Eſtate* depended upon the Will and Pleaſure of the Lord. He might, originally, admit *whom he pleaſed*, on the Deceaſe of a Tenant. Indeed, at length, a *Sort of Claim* in the Heir at Law, to ſucceed to his Anceſtor, became eſtabliſhed by *Cuſtom.* However, a *great deal* STILL *remains* in the Lord's Power and Diſcretion: And the Tenure is ſtill (ſtrictly) at the *Lord's Will.*

It was always neceſſary that the new Tenant ſhould *perſonally appear:* And it ſo remains ſtill, to this Day; He muſt pay his Fine, and do Fealty *in Perſon.* *Co. Copyholder*, § 19. and 4 *Rep.* 22. *b.* &c. to the like Effect.

And they forfeit if they grant Leaſes without Licence. 4 *Co. Copyhold Caſes.* 9 *Rep.* 76. *a. Combe*'s Caſe.

And they muſt be Perſons *capable* of being admitted: For it is impoſſible to admit One who is *incapable* of Admiſſion.

Now *No Man* is Heir or Executor to the Tenant, *during* the Tenant's Life. Therefore the Thing itſelf is impoſſible, "that the "Admiſſion of the firſt Tenant ſhould be an Admiſſion *of* THEM "*alſo*, *as* Heir or Executor to ſuch firſt Tenant."

"The

The " Change *of* ESTATE, and *not* of Tenant, cannot be the " *true Ground* of the Fine to the Lord." For that Notion would let in many Inconveniences: And it would be moſt unreaſonable that One *ſingle* Fine to the Lord ſhould anſwer to *all* Changes of the Tenant.

The Remainder-Man may be Tenant for *One* Purpoſe; *Not* for another. *Co.* 4 *Rep.* 23. *a. b.*

Admittance *precedes* the Fine; and is the *Cauſe* of it. It is neceſſary, in order to intitle the Lord to a Fine. And this appears to be the Senſe of the Legiſlature, by 9 *G.* 1. *c.* 29. " An Act to en- " able Lords of Manors more eaſily to recover their Fines *&c.*" And upon Admittance, a Fine is due. And 1 *Mod.* 102 *&* 120. *Blackburn* v. *Graves* proves that the Lord ſhall *ſtill* have his Fine; *although* the Admiſſion of the particular Tenant *be* the Admiſſion of the Remainder-Man. It does not follow, that becauſe the Eſtate is *veſted*, therefore there ſhall be *no* Admittance or Fine: For upon *Deſcents*, (where there is no doubt but that a Fine is payable,) Yet the Eſtate *is undoubtedly* VESTED *in the Heir*. And *Coke's Complete Copyholder* § 56. * *page* 63, is expreſs in Point " that he inRemain- " der ſhall be admitted, *and pay* a Fine; *although* his Eſtate was " veſted by the Admittance of the Tenant for Life."

In the Caſe of *Barnes* v. *Corke*, 3 *Lev.* 308. The principal Queſtion, they ſaid, was upon the *Forfeiture*; and that the other Points were only * *incidental*. [But the 1ſt Point was (in Terms) " Whe- " ther a Fine was due."]

In the Caſe juſt now mentioned, ſtiled *Batmore & Ux'* v. *Graves*, in 1 *Ventr.* 260. Or * rather *Blackburn* v. *Graves*, as it is called in 1 *Mod.* 102 *&* 120. S. C. It was determined " That the Admiſſion " of Tenant for Years was an Admittance of him in Remainder, " and occaſioned a *Poſſeſſio Fratris*:" And it is there reſolved that the Admiſſion of the Tenant for Years, though it is an Admittance of Him in the Remainder, yet ſhall NOT *prejudice the Lord*, as to the Fine from the *Remainder*-Man. And 1 *Ventr.* 260. is expreſs and plain, " That the Remainder-Man *muſt pay* a Fine, *when* his " Eſtate comes *in Eſſe*."

* *V.* 3 *Keble* 263, 329. S. C.

Indeed, where the WHOLE Fine *has been already* PAID to the Lord upon the *firſt* Admiſſion, there is no Reaſon why it ſhould be paid *over again:* And the Remainder-Man is in fact admitted, in *ſuch* Caſe. But where the Fine is NOT paid for the WHOLE, upon the *original* Admiſſion; there, the Remainder-Man muſt *pay* a Fine, and muſt be admitted. [*V.* 1 *Vent.* 260. and 1 *Mod.* 120.

where this Matter ſeems to be put upon a right and reaſonable Foot.]

If the Remainder-Man dies during the Life of the Tenant for Life, *his Heir* ſhall be admitted and muſt pay a Fine. Therefore the Payment is for Lives *in being*; And the Fine is payable upon the Change of the *Tenant:* And the Admittance *does not extend* beyond the PERSONS of the Tenants admitted. They are *ſtill* only Tenants at WILL. *Co. Copyholder*, § 14. § 32. § 41. expreſly. 4 *Rep.* 22. *b.* S. P. in Point, accordingly. And the Eſtate is only veſted in the Tenant *perſonally.*

In the preſent Caſe, The Perſons originally admitted, prayed to be admitted " *according to* the Tenor of the Teſtator's Will;" and it was granted to them, according to the Cuſtom of the Manor: There is nothing ſaid of *their Executors.* And they were admitted *as Truſtees*, and not for their own Benefit: And their Admiſſion was only *perſonal.*

The Admittance of an *Heir* is very different. *Compleat Copyholder*, § 41. 4 *Rep.* 22. *b.*

The *Heir* has a very conſiderable Intereſt, *before* Admiſſion: Yet *he* muſt be admitted.

As to Tenants *pour autrè vie*, they ſhall be admitted, and pay Fines. *Co. Copyholder*, § 56.

All who allow of a *general* Occupant, ſay *he* muſt be admitted: And there is no Doubt but that a *Special Occupant muſt* be admitted and pay a Fine.

Wherever a Right is transferred, upon *Death*, there muſt be an Admittance.

A Termor may die *inteſtate*, and have *no* Adminiſtration; Or may make a Will, and the Executor *renounce:* And ſhall the Lord have *no* Tenant? Surely, in theſe Caſes, the Lord ſhall not be *without* ANY *Tenant at all.*

An *Aſſignee* of a Term ſhall pay a Fine; So, a *Deviſee* of a Term; Indeed *every new Tenant* ſhall pay: A *Mortgagee*; An *Aſſignee* of a Bankrupt; the *Heir of the Aſſignee*; In ſhort, *Whereever* there is a *Change of* TENANT.

If it depended upon the Change of *Eſtate* only, an Eſtate in *Fee* would NEVER pay.

Dedicott's Caſe is ſtrong for the *Defendant*.

Dyer 251 explains 3 *Leon.* 9. The Huſband, it appears by *Dyer*, was not the perſonal Repreſentative of his Wife: For ſhe had an Adminiſtrator, appointed by the Ordinary. In 3 *Leon.* 9. there was *as* he reports it, an *Obiter Dictum* of two Judges, indeed; but contradicted by another. In *Dyer*, it appears that the Huſband held in, in Right of his Wife: And the Diſpute was between the Wife's Adminiſtrator and the Huſband. The Huſband was poſſeſſed jointly with the Wife, on his Marriage; And He only *continued* in Poſſeſſion. *Executors* may be conſidered *as Aſſignees*, (the rather as Copyhold-Eſtates are not Aſſets:) But the Huſband could not, in this Caſe of *Dedicott*, be conſidered as Aſſignee. In 5 *Rep.* 18. *a.* Lord *Coke* cites 29 *E.* 3. 48. and 30 *E.* 3. 14. *Simpkin Simeon*'s Caſe; By which it appears "that the Baron is *not Aſſignee* to his Wife;" In *Dediott*'s Caſe, there was *no Tranſmiſſion* of Eſtate. It is like the Caſe of *Joint-tenants*; where the Survivor ſhall not pay. *Co. Copyholder*, § 56.

Calthrop's Reading 67. is plainly the ſame Caſe with 3 *Leon.* 9. and *Dyer* 251. *Hauchet* v. *Roſe*; As appears by the Margin of *Dyer*. And by the End of the Caſe itſelf too. It is only a Scrap, out of *Leonard*.

As to the Caſe of *Otlery* Monaſtery, reported in *Moore* 128. and in 1 *Leon.* 4. and 4 *Leon.* 117. (S. C. in Terms) and the Caſe of 8 *Eliz.* there cited by Mr. Solicitor General *Egerton*, there was no Queſtion between Tenant and Lord: And *Egerton* plainly means *Dedicott*'s Caſe, and the Dictum there mentioned. For *Dedicott*'s Caſe was in *C. B.* and was in 7 *Eliz.* according to 1 *Leon.* 9. and *H.* 8 *Eliz.* according to *Dyer*.

As to *Noy* 29. *Rennington* againſt *Cole*—The Cuſtom of the Manor was for the Wife to hold *durante Viduitate:* And the Wife's Eſtate *durante Viduitate* was "but a *Branch* of the *Huſband's Eſtate*," (*as is rightly there ſaid by Hobart.*)

As to *Hob.* 181. The Caſe of *Howard* v. *Bartlet*,—The ſame Cuſtom is ſtated: And the Huſband's Eſtate was holden not to be merged; And the laſt mentioned Caſe, of *Rennington* v. *Cole* was there taken Notice of and cited by Lord *Hobart*.

As to *Comberb.* 445. it is a mere ſhort, looſe, *Niſi-prius* Note: Neither the Book itſelf, nor this Note in it, are of any Authority. And *non conſtat whoſe* Opinion it is, that the Note mentions. If it were good Law, it would render All Family-Settlements ineffec-

tual: For he aſſerts "that the Surrender may be for a thouſand "Years, and that the Executor ſhall pay no Fine." At this Rate, the Granting Copyholds for Terms of Years would be, in Effect, infranchiſing them.

We are not now upon any *ſpecial* Cuſtom of a Manor; but upon the GENERAL *Cuſtom of Manors:* Therefore the Caſes upon *particular* Cuſtoms are not applicable to the Preſent. The Collateral Qualities of Dower, Freebank, *&c.* are not incident to Copyholds; but depend upon Special Cuſtoms. In *this* Manor, the Fines are uncertain: But 1 ½ Years Value of the Nett Year's Rent has been *generally* taken, for One Life; 2 ½ Years, for two Lives; And for 3 Lives, half as much more.

And Regard ought to be had to the Fine paid on the laſt Admittance.

This Eſtate was of the Value of 125 *l. per Ann.* when the two Tenants *Taylour* and *Lake*, the firſt Lives, were admitted; And the Fine paid (*viz.* 280 *l.*) anſwers to the two Lives admitted, according to the abovementioned Rule: And the Length of the Term is of no Conſequence. *Theſe two* Perſons therefore were the Tenants: *After their* Death, the Lord has *no* Tenant: It makes no Difference, Whether the Admittance be for *Lives*; or for a Term of Years *determinable on Lives.*

Upon the Uſage ſtated on this Caſe, a proportionable Sum is to be paid for a Fine, according to the Number of Lives. And this is a juſt Rule, and the beſt Rule: And it is better to keep to *this* Rule, than to form a *new* Rule, upon a Suit in Equity "to compel "the Lord to admit."

The Point turns merely and entirely upon the Change of *Tenant.* If it were otherwiſe, Lords of Manors, nay even jointured Ladies of Manors, might make voluntary Grants, and incumber their Poſterity, *ad libitum.* The Lady of *this* Manor is Leſſee under a Prebendary: And Conſequently, ſuch Leſſee (though ſhe were only ſo for one Year) might admit for 500 Years, without any freſh Fine, upon *their* Principles; and ſo *defraud* the original Owner of the Manor in Fee. It would take it out of the reſtraining Statutes of Queen *Elizabeth.*

The firſt Admiſſion was in 1709; [*viz.* the Admiſſion of the two Lives who were admitted according to the Tenor of the Teſtator's Will.]

REPLY,

REPLY, on the Part of the Plaintiff.

The Diſpute between Us is, "*Upon* WHAT *Principle, Fines are due* "to the Lord."

They ſay, "On the Change of *Tenant*:" We ſay, "On the "Change of *Eſtate*, only."

They argue the Admittance to be *perſonal*; And urge it, from the doing *Fealty*, at the time of Admiſſion.

We agree this was ſo *originally*: But We ſay the Admittance is not always perſonal *now*. The Caſes of Dower, and of Tenant by Curteſy proves this: For *neither* of *theſe* Tenants appear perſonally, or do Fealty. And the Caſe of *Barnes* againſt *Corke*, in 3 *Lev.* 308. alone proves the ſame thing.

And Ld. *Coke*, in his *Copyholder*, agrees "that the *Heir* would not "need to be admitted, if it were not on Account of the Lord's Fine."

And all the Remainder-Men are admitted under the original Admittance, *till* a Deſcent: But We agree that *Whenever* a DESCENT happens, the Lord *ſhall* have a Fine.

The gradual Diminution of Fines, on admitting for ſeveral Lives, ſeems to ſhew that only one Fine is due; And that that Fine is payable on the *firſt* Admiſſion.

The Caſe of an *Occupant pour autre vie*, is a NEW *Eſtate*: For the old Eſtate is gone; though the Grantor is *eſtopped* to take againſt his *own* Grant, (which extended beyond the Life of the Grantee himſelf.)

As to the *Aſſignee of a Term*—He can only come in by Surrender and Admittance: Which is a *new Eſtate*; And he can have *Nothing* TILL *Admittance*.

So, in Caſe of a *Mortgage*, The Mortgagee comes in *under a Surrender*: Which makes a new *Eſtate*.

So, in Caſe of an *Aſſignee of a Bankrupt*. And the Act of Parliament of King *Jac.* 1. requires the Aſſignees coming in thus: It takes expreſs Care of the Lord's Intereſt: [*V.* 13 *Eliz. c.* 7. 1 *J.* 1. *c.* 15. 21 *J.* 1. *c.* 19. and alſo *Co. Copyholder*, § 56. *pa.* 62. at the very Bottom.]

The Caſe of a *Deviſee*, is likewiſe undoubtedly a *new* Eſtate.

And

And in the Caſe of Executor's renouncing, or of no Adminiſtration being taken out, ſtill the Lord will *not loſe* his Fine.

In Caſe of a Woman's *Free Bench*, there is a Change of *Tenant*. So, in a Tenant *by Curteſy*'s Caſe.

As to the Caſe in *Dyer* 251. the Huſband is a *new Tenant* 'tis true: But the *Eſtate* is the *ſame*.

Juſt ſo here, in the Caſe of an *Executor*, the ESTATE remains the *ſame*.

Probably the Caſe mentioned by Mr. *Calthrop is* the ſame Caſe with that in *Dyer*. But ſtill Mr. *Calthrop's Opinion* ſtands uncontradicted: And it is confirmed by Lord Ch. J. *Holt*'s Dictum, and by the *Tenures*, and by *Danvers*. [*V. ante* 210.]

As to the *Quantum* of the Fine—They ſay the original Fine was taken *only* as an Equivalent for *two* Lives; and that therefore *another* ought now to be paid, as an Equivalent for a third.

But the Fine uſually taken in this Manor, where a third Life is added to two former ones, is *only* the Fine upon two Lives, *and* HALF *as much more*.

[*N. B.* The Fine for 2 Lives, is the Seſqui of that taken for One; and the Fine for 3 is Seſqui of that taken for Two; by the Uſage of this Manor. *V. ante* 207.]

Whereas they *now* demand a WHOLE Fine: And they might juſt as well demand it, if only a few Years of the Term remained unexpired.

As to the *Inconveniences*, The Lord *cannot* be compelled to admit, either by Law, or in Equity, without the Tenant's paying a reaſonable Fine to the Lord.

And a *temporary* Lord *can never infranchiſe* the Tenants Eſtates, *by Colluſion*: For that would be a VOID *Grant*, and would be conſidered as a *voluntary* Admiſſion, which would not prejudice the Capital Lord.

This is owing to the Modern Faſhion of introducing long Terms, unknown to our Anceſtors and to our old Law: Which None but the Parliament can change.

Perhaps it would be no bad Policy, if *All* Copyholds were infranchiſed. However, though a Lord *may* grant a Copyhold for a Term of Years, Yet He is *not compellable* to do ſo: It is voluntary, the Lord is NOT *obliged* to admit for *Terms of Years*.

Here, They are admitted " *according to the Tenor of the* " *Will:*" For *ſo* they pray it; And their *Prayer is granted.* [*V. ante* 206.]

The Law is clear, " That *no Admiſſion* of the Remainder-Man " is neceſſary."

And there are no Inconveniences attending ſuch a Determination, but what the Lord himſelf may obviate.

The COURT took Time to adviſe; and after adviſing, to certify.

And, about a Fortnight after the End of this Term, they gave their Certificate: Which is here ſubjoined.

N. B. What is ſaid by *Hales* and *Wylde*, in 1 *Mod.* 120. and 1 *Ventr.* 260: Seems to be the Juſtice of the Caſe.

The Opinion of the Court of King's Bench on the Caſe ſtated, upon the following Queſtions, *viz.*

1ſt. Whether the ſurviving Executor of *John Taylour*, (the ſurviving Truſtee of the Term of 99 Years,) *ought* to come in, to be *admitted* Tenant of the Copyhold Premiſſes in Queſtion?

2d. In Caſe he ought, Whether the Lady of the Manor will be intitled to any *Fine* upon ſuch Admittance?

Having heard Counſel on both Sides, and conſidered of this Caſe, We are of Opinion " That the ſurviving Executor of " *John Taylour*, (the ſurviving Truſtee of the Term of 99 " Years,) OUGHT *to come in to be admitted* Tenant of the " Copyhold Premiſſes in Queſtion; And that the Lady of " the Manor WILL *be intitled to a Fine* upon ſuch Admit- " tance."

24th *February* 1757.

MANSFIELD.
T. DENISON.
M. FOSTER.
J. E. WILMOT.

Sir

Sir John Trelawny Bart. *verſ.* Biſhop of Wincheſter. *Saturday 5th February 1757.*

Hil. 26 *G.* 2. Roll 868.

(*Lord Commiſſioner* Wilmot *abſent in Chancery.*)

IT was an Action of Debt for 600 *l.* for 5 Years Salary of ſeveral Offices, *viz. Great or Chief Steward to the Biſhoprick*, and all it's Caſtles Lordſhips Manors *&c.* and *Conductor of the Men and Tenants of the Biſhop thereof*, with a Salary of 100 *l. per Annum*; And of Maſter *Keeper or Preſerver of the wild Beaſts in all the Foreſts, Parks*, Chaſes and Warrens belonging to the Biſhop, and Chief Governor of all Birds Fiſh and Beaſts of Warren *&c.* (commonly called *Chief Parker*;) with a Salary of 20 *l. per Annum*: Which Offices and Salaries were granted to the Plaintiff by Sir *Jonathan Trelawney* Bart. late Biſhop of *Winton*, by Letters Patent, with Clauſe of Diſtreſs if unpaid.

The Biſhop pleads the * Statute of 1 *Eliz. c.* 19. And alſo that the Offices aforeſaid are *not ancient* Offices of the Biſhoprick, nor were *uſually granted for Life*; and that the ſaid Fees are *not the ancient Fees*; and that the ſaid Offices are *uſeleſs and merely nominal*, and *no Duty or Service* to be done for or in reſpect of them; And that the Grants are Grants of Hereditaments Parcel of the Poſſeſſions of the Biſhoprick *&c.*

* See the laſt Clauſe of that Statute: Which He pleads *verbatim*, as *infra* 220 and 221.

The Plaintiff replies That they *are ancient* Offices; and the Fees, the *ancient Fees*; and that they have been *uſually granted for Life*: *abſq; hoc* that they are *uſeleſs and merely nominal.*

The Biſhop rejoins That the Offices *are uſeleſs and merely nominal*, and without any Duty or Service to be done for or in reſpect of them; in Manner and Form as *&c.* And Iſſue is joined thereon.

The Special Verdict finds That the Offices of *Chief Steward*, and of *Conductor* of the Men and Tenants of the Biſhoprick, ARE ANCIENT *Offices* of the Biſhops; and HAVE *been* ANCIENTLY AND USUALLY *granted for Life*, with an Annuity; and that the Annuity of 100 *l.* IS *the* ANCIENT FEE.

That the ſame were granted to the Plaintiff, by *Jonathan* late Biſhop of *Wincheſter*, on the 4th *July* 10 Qu. *Anne*: Which Grant was *approved* by the Dean and Chapter, and *confirmed* by them.

That

That the Plaintiff thereby became ſeiſed, and is ſtill ſeiſed thereof; and RECEIVED *the Annuity* during the Life of *Jonathan* late Biſhop of *Winton* (the Grantor,) and of his Succeſſor *Charles (Trimnell,)* and of his Succeſſor *Richard (Willis,)* and alſo *during the* FIRST ELEVEN *Years* of the *preſent* Biſhop's Time (Dr. *Benjamin Hoadley:)* And that five Years Annuity, ending at *Michaelmas* 1751, remains unpaid.

* 'Tis N°. 40.

Then they find (verbatim) the * private Statute of 1 *Eliz. c.* 19. [See *Moore's* Reports 107: and *poſt* 221.] By the laſt Cauſe of which Act, " All Gifts, Grants, *&c.* made by any Arch-Biſhop or " Biſhop, of any Honours, Caſtles, Manors, Lands, Tenements, " OR OTHER *Hereditaments*, being Part of the Poſſeſſions of his " Arch-Biſhoprick or Biſhoprick, or united *appertaining or belonging* " to any the ſame Arch-Biſhopricks or Biſhopricks; to any " Perſon or Perſons, Bodies Politic or Incorporate, (Other than to " the Queen's Highneſs her Heirs and Succeſſors;) *whereby any* " *Eſtate or Eſtates ſhall or may paſs from the ſaid Arch-Biſhops or* " *Biſhops* or any of them, (other than for the Term of 21 Years " *or* THREE *Lives*, from ſuch Time as any ſuch Leaſe, Grant or " Aſſurance ſhall begin, and whereupon the old accuſtomed yearly " Rent or more ſhall be *reſerved and payable* yearly during the ſaid " Term of 21 Years or three Lives;) ſhall be *utterly* VOID and " of none Effect, to all Intents Conſtructions and Purpoſes; " any Law Cuſtom or Uſage to the contrary in any wiſe notwithſtanding."

That theſe Offices, at the *time of the making* of this Act, and *now*, are MERELY NOMINAL, and NO *Duty* Attendance or Service to be done for or in reſpect of them or either of them; in Manner and Form as the Biſhop has alledged.

But Whether, *&c.*

As to the *other* Office (of *Maſter-Keeper* of all the Beaſts in the Parks, or *Chief Parker,)* They find That *that* is NOT *an* ANCIENT Office; and that the Biſhop for the time being hath NOT *anciently and uſually granted* it, nor the Annuity for the Life of the Grantee; And that *that* Office alſo was, at the time of making the Act, and ſtill is an Office MERELY NOMINAL; And that *no Duty*, Service, Work, Labour, Attendance or Buſineſs ever was or is, *&c.*

The Queſtion upon this Special Verdict, was, " Whether Sir " *John Trelawney*, the Grantee was intitled to hold the two firſt " mentioned Offices, and to recover theſe Arrears againſt the *preſent* Biſhop." As to the laſt-mentioned Office (of Chief Parker)

the Facts found by the ſpecial Verdict made an End of any Queſtion concerning it: And the Point was given up.

This Caſe was firſt argued, upon *Tueſday* 27th of *January* 1756, by Mr. *Brereton* for the Plaintiff, and Mr. *Pratt* for the Defendant.

Note—Sir *John Trelawney*, the Plaintiff, * *died* during the Time of the firſt Argument: But, as the Demand was for Arrearages, this Event did not prevent the Court from proceeding to hear the Arguments.

[* 8, 9 *W.* 3. *c.* 11. § 6. relates only to Plaintiffs or Defendants dying *after interlocutory* Judgment, and before final.]

On *Tueſday*, 1ſt *February* 1757. It was again very fully argued by Mr. *Norton* for the Plaintiff, and Mr. Solicitor General *(Yorke)* for the Defendant.

Lord *Manſfield* ſaid he was ready to give his Opinion *Now:* But as Mr. Juſtice *Wilmot* had heard the firſt Argument, He choſe to report to him what had paſſed upon this, and to know his Sentiments, before Judgment ſhould be given: And therefore ordered it to ſtand over till *Saturday* next.

And, this Day, His Lordſhip gave the Reſolution of the whole Court; after having firſt ſtated the Caſe, to the Effect as above, *&c.*

Lord *Manſfield*—At *Common Law*, a Biſhop, *with the Confirmation* of his Dean and Chapter, might exerciſe *every Act of abſolute Ownerſhip*, over the Revenues of his See; and *bind his Succeſſor*, as much as Tenant in Fee can bind his Heir.

By the *Statute of* 1 *Eliz. c.* 19. "All Gifts, Grants, Feoffments, Fines and other Conveyance, or Eſtates, FROM the firſt Day of that Parliament, had, made, done or ſuffered, or to be had, made, done or ſuffered, by any Arch-Biſhop or Biſhop, of any Honors, Caſtles, Manors, Lands, Tenements, or other Hereditaments, being *parcel of the Poſſeſſion* of his Arch-Biſhoprick or Biſhoprick, or *united, appertaining or belonging*, to any of the ſame; to any Perſon (other than to the Queen, her Heirs or Succeſſors;) *whereby any Eſtate ſhould or might paſs* from the Arch-Biſhop or Biſhop OTHER *than for the Term of* 21 *Years, or three Lives*, from ſuch Time as any Leaſe, Grant or Aſſurance ſhall begin; *and whereupon the old accuſtomed yearly Rent or more*, ſhall be reſerved payable yearly during the ſaid Term of 21 Years or three Lives; ſhall be UTTERLY VOID; any Law, Cuſtom, *&c.* notwithſtanding."

Patents or *Grants of Offices*, with Fees, Salaries, or Profits annexed to them, are *not mentioned* in the Act: There are no general

Words adapted to the Caſe of *Offices*. And yet, there was not a ſingle Biſhoprick, at that Time, *without* ſome Office *granted*.

Had the Legiſlature meant to reſtrain the *Re-granting* them, as they ſhould drop in, It muſt have been done by a *Special Proviſion*, with an *Exception* of ſome, at leaſt of Judicial Offices. As the *general Reſtraint* is *not extended* to the Caſe; there was no Occaſion to make *Exceptions*.

CONTINUING *ancient Offices*, with the *ancient Fee*, in the *uſual* Manner, was *not a Dilapidation* of the Revenue of the Biſhoprick. Every Biſhop left this Power to be exerciſed by his Succeſſor, *as* his Predeceſſors left it to be exerciſed by *him*. *Such* Grants bring *no new Charge* upon the Biſhoprick: Which only remains liable to the *ſame Fees or Salaries*, to which it was *liable before*.

The Act has *no Retroſpect*, as to any Charges or Incumbrances whatſoever, brought upon the Revenues of the Biſhoprick, *before* the firſt Day of that Seſſion (23 *January* 1558.)

So little were OFFICES thought within it, that the Biſhop of *Ely*, on the 20th of *April* 1558, made a *new Grant* of the *Office of keeping his Houſe and Garden*, (Which was *never granted before*,) with a Fee or Salary of 3*l.* a Year. This came in Judgment in *H.* 10 *Eliz. Ro.* 758. As cited in *Ley* 78.* It was holden *good*; becauſe the Office was thought to be a *neceſſary Office*, and the *Fee reaſonable*. Which is the proper Meaſure whereby to judge, "whether it was "an *indirect* Alienation, under *Colour* of a new Grant:" Though it was extraordinary, to hold this Office neceſſary, or the Fee reaſonable; or indeed, to imagine that any Office could be *neceſſary*, which *never exiſted before*. However, that Determination has been eſteemed good, and acquieſced in.

* *Moore*, Pa. 88. reports this Caſe (though he calls the Plaintiff *Howſe*, and the Manſion *Downham*,) as of the ſame Term, 10 *Eliz. rot'lo* 758. But in *Cro. Car.* 48. it is cited as of *H.* 10 *Jac. ro.* 758: And 2 *Brownlow* 137. reports it as of *M.* 9 *Jac.* 1611.

† *Ley*, 75.

The next Caſe was in *Trinity* 30 and *Hilary* 31 *Eliz.* (cited in 10 *Co.* 61. *b.* and *Ley* 72 & 75.) The Biſhop of *Cheſter* granted five Marks for Life, *pro Concilio, &c.* to *Bolton:* and *Bolton* averred that his Predeceſſors had granted reaſonable Fees, but did not aver this Fee ever to have been granted *before*. The Opinion of the Court was againſt the Plaintiff; So he never had Judgment: And the † Reaſon of the Opinion was, "that this was a voluntary Thing, and *not an Office*."

At laſt, in the 43d of *Eliz.* the *true Diſtinction* ſeems to have been taken, (in *Ley* 75;) Where the Arch-biſhop of *Canterbury* granted the Office of Surveyorſhip, with the ancient Fee, *and more:* It was holden void, *on account of the* NEW *Addition*. That *was* an Injury to the Succeſſor.

In

In the firſt Year of the Reign of King *James* the Firſt, The Legiſlature had this Act, and the ſubject Matter of it under Conſideration. The 1 *Jac.* 1. *c.* 3. extends to the *King*, that Reſtraint which the firſt of *Eliz.* laid upon Grants made by a Biſhop to a *Subject*. But *though* Queſtions had ariſen upon Grants of Offices; *though* in Fact, during the whole long Reign of Queen *Elizabeth*, the Biſhops had re-granted their ancient Offices as they fell in;— *Yet*, the Legiſlature did not interpoſe; and therefore meant that *this Power ſhould continue*. They were ſatisfied with the Diſtinction of the Arch-Biſhop of *Canterbury*'s Caſe, in the 43d of *Eliz.* "That "no *new* Charge could be brought upon the See."

From the 10th of *Eliz.* (the Time of the Biſhop of *Ely*'s Caſe,) to this Day, No Grant of a *new* Office, with a *new* Fee, ever was held to be good. *Such* a Grant is within the Meaning of the 1ſt of *Eliz.* by Conſtruction, becauſe it is a *colourable Alienation*; and under that Pretext, the whole Statute might be *evaded*.

From the 1ſt of *Eliz.* to this Day, there is no Caſe, where the *Re-Grant* of an *Office in Being before the firſt of Eliz.* in the *uſual* Manner, with the *ancient Fee*; was adjudged to be within the Reſtraint of that Statute.

If theſe Grants are not within the Statute, but ſtand as they did at Common Law; the *Utility* or *Neceſſity* of them can never be material. A Biſhop at Common Law, with the Confirmation of his Dean and Chapter, might bind his Succeſſors by Grants from which they could have no Benefit.

There is no Caſe ſince the 10th of *Eliz.* that has judicially turned upon the *Utility* or *Neceſſity* of the Office: The only Queſtion has been "Whether the Grant was agreeable to the *Uſage* before the "firſt of *Eliz.*"

The Biſhop of *Saliſbury*'s Caſe (10 *Co.* 58. *b.*) *T.* 11 *Jac.* 1614, came before the Court upon a Demurrer. It is not alledged in the Pleadings of either Side, "that the Office was, or was not, *neceſ-* "*ſary*." The Plea in Bar to the Avowry was ſingly, "that the "Office *never* was granted *before*, beyond *one* Life:" And the Grant was holden good. In the 5th Reſolution, * It was reſolved *10 *Co.* 62. *a.* "That the Grant of an *ancient Office* to One, with the *ancient* "*Fee*, by a Biſhop, ſhall not bind his Succeſſor; *unleſs it be confir-* "*med* by the Dean and Chapter: For SUCH Grants are *not*, as ap- "pears before, reſtrained by the Statute of the firſt of *Eliz*; and "therefore *remain at the Common Law*, and by Conſequence *ought* "*to be confirmed* by the Dean and Chapter." If ſo the *Utility* or *Neceſſity*

Neceſſity of the Office was not at all material: For, by the *Common Law*, the Utility or Neceſſity of an Office was *no* Requiſite towards Rendring the Biſhop's Grant of it (confirmed by his Dean and Chapter) good and valid.

* *Gee, Biſhop of Chicheſter,* v. *Freedland.*

The Biſhop of *Chicheſter*'s Caſe, * in *Cro. Car.* 47. and *Ley* 71. (2 *Car.* 1. *Anno Dom.* 1626.) came before the Court upon a Demurrer too—There is no Allegation in the Pleadings on either Side, as to the Office being *neceſſary*, or not: The Queſtion turned *ſolely* upon the *Addition* of a *new Fee*.

[* *Young* v. *Fowler, Cro. Car.* 555. *March* 38. 2 *Ro. Abr.* 153. *pl.* 7, 8. 154. *pl.* 5. See alſo Sir *William Jones* 311. *Yonge* v. *Stowell, Tr.* 8 *Car.* (in an Action upon the Caſe, for diſturbing the Plaintiff in the ſame Office,) S. P. *accord*.]

The Caſe of the * Regiſter of *Rocheſter*, in *Cro. Car.* 557. *Hil.* 14 *C.* 1. *Anno Domini* 1639. came before the Court upon a Special Verdict. There is not a Word as to the Office or Reverſionary Grant being *neceſſary*: but it is found to have been *uſually* granted in Reverſion; And *therefore* the Court adjudged ſuch a Grant in Reverſion to be good againſt the Succeſſor.

Thus ſtood the Conſtruction of this Statute, upon the Reaſon and Words of the Law, Practice, and Judicial Determinations. But it happened that, *beſides the real Ground of the Judgment*, in the Biſhop of *Saliſbury*'s Caſe, they echoed the *Reaſoning* of the Biſhop of *Ely's*, *without diſtinguiſhing* the eſſential Difference between the two Caſes; and * laboured to prove, "that the Office was *neceſſary*."

[* *V.* 10 *Co.* 61. *a. b.*]

Under the great Authority of the Reporter, the ſame Reaſoning is repeated in the ſubſequent Caſes: and where the Grant is good, becauſe it was *warranted by the Uſage* before the 1ſt of *Eliz.* they needs muſt *ex abundanti* labour to ſhew, "that the Office is *neceſſary*," by Arguments ſo inconcluſive, and ſo contradictory, that One is ſorry to read, or repeat them. "It is neceſſary to grant for one "Life; but not neceſſary to grant for two, or in Reverſion:" And then, "It is neceſſary to grant in Reverſion; that when the firſt "Life drops, there may be another immediately to fill the Office." Whereas in *real Truth*, Few of theſe Patent Offices (except the Judicial) are *uſeful*, or *neceſſary* in *any* Senſe; Fewer are neceſſary, or even expedient, to continue *beyond* the Biſhop's *own* time: None neceſſary, (by any Colour of Argument,) to be granted in *Reverſion*, or for *more than One Life*. But if they *exiſted before the* 1ſt *of Eliz.* they are NOT *within* the Statute, they are governed by the *Common* Law: And *therefore*, Grants of them bind the Succeſſors, *how uſeleſs ſoever* they may happen to be.

The next Case that was mentioned, was the Case of *Ridley* v. *Pownall*, 2 *Lev.* 136. 27 *C.* 2. * There the *Special Verdict found* the Office to be a *necessary* Office; (which is the *first Instance* where it appeared Judicially to the Court, "that the Office was necessary;") and that it had been *separatibus temporibus*, since the Foundation of the Bishoprick, granted for 3 Lives.

[* This was an Action upon the Case, in *B. R.* for disturbing the Plaintiff in his Office of Register to the Bishop of *Bristol*, (a new Bishoprick founded *temp. H.* 8.) See 3 *Keble* 472, 506, 540, 560. S. C.]

My Lord *Hale* who distinguished what He read, and thought and reasoned from Himself says "*Before the first of Eliz.* there was "*no Difference* between the Grant of Offices, of *ancient* and *new* "Bishopricks: *Both* made *their Grants*, As Owners; and if they "usually granted for Three Lives, *before* the Statute, they may "grant so *after*. But the Verdict is defective, because it does not "find that it was usually so done *before the 1st of Eliz.*" And on Account of the Incertainty, there was a *Venire de novo*: *Otherwise*, Judgment would have been given *for the Defendant*. So that You see, Finding the Office to be *necessary*, was *totally immaterial*.

In the Case of *Jones* v. *Beau*, in *B. R.* 3 *W. & M.* 1691, reported in 4 *Mod.* 16. The Issue directed out of Chancery was, "Whether the Office of Chancellor of *Landaff*, had been *usually* granted to *Two*, before the 1st of *Eliz.*" And the Jury finding "*that* "it *had*;" the Court held the Grant of the Office to Two to be Good. And no Man alive will say, "that it was *necessary* that the "Office of a Bishop's Chancellor should be granted to *Two*."

The Office in question in *this* Cause, is found "*never* to have "been more useful or necessary than it is *now*:" And yet *All* the Bishops of *Winchester*, from the 1st of *Eliz.* have thought the Grants of it valid; and Every succeeding Bishop has submitted to the Grant made by his Predecessor; And † the greatest Men of the Kingdom, or the nearest Relations to the Bishops, have successively held the Office. The *present* Bishop thought this Grant good, for *Eleven Years*; but has conceived a Doubt, from the Mis-application and Repetition of inconclusive and contradictory Arguments about the Office being *necessary*, which are to be found in the Reports of the Cases I have mentioned, before the 27th of *C.* 2d.

† Sir *John*'s Grant was—"To hold *in tam amplo modo*, as *Richard* Earl of *Portland*, *Thomas Carr*, *George* Duke of *Buckingham*, *Charles* Earl of *Nottingham*, *Thomas* Duke of *Norfolk*, *Philip* Earl of *Pembroke* and *Montgomery*, *James* Duke of *Ormond*, or *Henry* Earl of *Clarendon* had holden."

Whereas we are All unanimously of Opinion, That an *Office* and *Fee*, which existed before the first of Eliz. is *not* within the Statute; but may be granted *since*, precisely in the *same Manner*, in which it was granted *before*: And that the *Utility*, or *Necessity* of such an Office, is no more material *since* the 1st of *Eliz.* than it was *before*. And this Opinion We think agreeable to the *Words* and *Intent* of the Act, and *every Precedent* since the Statute.

* *V. ante* 219, 221. And in this Opinion, my Brother * *Wilmot* concurs with Us. And therefore there muſt be

JUDGMENT for the PLAINTIFF.

Which Judgment was ordered, at Mr. *Norton*'s Requeſt, to be entered *as of the Term* in which the *Poſtea* was returnable: Becauſe † *V. ante* 221. Sir *John Trelawney* was † dead, between that Time and the preſent Time of pronouncing the Judgment.

Saturday 5th *February* 1757.

Goſs *verſ.* Nelſon.

MR. *Gould pro Quer'*, ſhewed Cauſe why the Judgment obtained by the Plaintiff againſt the Defendant in an Action upon a promiſſory Note ſhould not be arreſted: The Note having been objected to, as contingent, uncertain, and not negotiable within the Act of 3, 4 *Ann.* Mr. *Gould*'s Anſwer was that the Sum payable by this Note, is *Debitum in* PRÆSENTI; though *Solvendum in futuro.*

‡ *V. poſt.* — *Roberts* v. *Peake*; a like Point, (*viz.* payable on the Death of *G. H.*)

The Queſtion depended entirely upon the Validity of this Note: Which was a promiſſory Note given *to* an Infant, ‡ payable "WHEN *He* (the Infant) *ſhall come* OF AGE;" and SPECIFYING *the* TIME *when* THAT *was to be, viz.* 12th *June* 1750. The Defendant's Counſel had moved to arreſt the Judgment, for that this *was* not (as they alledged) a good Note, within 3, 4 *Ann. c.* 9. § 1. for giving like Remedy, upon promiſſory Notes, as upon Bills of Exchange.

In anſwer to which, Mr. *Gould* now cited 2 *Strange* 1217. the Caſe of *Cooke* v. *Colehan:* Where a Note, "To pay in 6 Weeks "after the Defendant's Father's Death," was holden a *good* Note.

Mr. *Caldecot contra pro Def':* Here are, in this Declaration, 2 Counts on Notes of Hand indeed: But the Notes ſet forth in the Declaration, are not Notes for the *Benefit of Trade*; Nor is the Money made CERTAINLY *payable.* The Note was given to the Plaintiff, 13 YEARS *before* the Time when he was to come of Age: And it was *not* at all certain that he *would live* to attain that Age.

He cited 2 *Strange* 1151. The Caſe of *Beardſley* v. *Baldwyn:* Where a Note "to pay within ſo many Days after the Defendant "ſhould *marry,*" was held *not* to be a negotiable Note within the Statute.

The Caſe of *Cooke* v. *Colehan* (cited by Mr. *Gould*) 2 *Strange* 1251. was payable Six Weeks after *a Death:* Which was a certain Event.

In order to have the Effect of a promiſſory Note within this Statute, it ought to be a *Caſh-Note*, and payable *at* ALL *Events*.

No Note is negotiable, which is not for the Payment of Money *abſolutely*. 1 *Strange* 629. *Morris* v. *Lee*. That was a Note promiſing "to be *accountable* to the Plaintiff or Order for 100 *l.* Value "received."—And held good. But a "*Quære tamen*" is added by Sir *John Strange*. All Notes payable *on Contingencies* are bad, within this Act: And *this* is a *Contingency*, "Whether he *may* arrive at the Age of 21; OR *not*."

Lord *Mansfield*—It would have been clearly good, if it had been made payable on the 12th of *June* 1750. (that is to ſay, on a *Day certain*;) *without mentioning* the Plaintiff's being then to come of Age: And ſurely it is *not the leſs certain*, for *adding* that Circumſtance.

Legacies are of a different Nature: And they are determined by different Rules. They are Directions to the Executor to pay: And in Legacies there is a known Diſtinction between the Time being annexed to the *Subſtance* of the Gift, or to the *Payment*. If complete Words of Gift direct the Executor to pay; the *other* Words only *fix the* TIME of ſuch Payment: And then the Legacy veſts, and is tranſmiſſible, though the Legatee ſhould die before the Day of Payment: As a Legacy given, "*to be* paid at 21." But if the Time is annexed to the *Subſtance* of the Gift, as a Legacy "*if*" or "*when*" he ſhall attain 21; it will not veſt before that Contingency happens.

But *here* the *Words of Engagement* MAKE *the Debt*; And 'tis *no* Direction *to another* Perſon. The former part of the Note is a Promiſe to pay the Money: And the Reſt is only fixing the *particular* TIME *when* it is to be paid. It is enough, if it be CERTAINLY and at all Events *payable* at that Time, *Whether* he lives till then, *or* dies in the Interim. Therefore it is a GOOD Note, within this *Remedial* Statute.

Indeed a *Contingent* Note, where it is *uncertain* "Whether the "Money ſhall *ever* become payable *at all*, or not," is another Caſe: SUCH a Note is *not* within the Statute.

Mr. Juſt. *Deniſon* concurred.

For

For here is *no Condition* or UNCERTAINTY: But it is *to be paid certainly*, and *at all* Events; only the TIME *of Payment* is *poſtponed.*

And the Caſe of *Cooke* v. *Colehan* was the Opinion of the whole Court.

And He alſo cited *Boraſton*'s Caſe, 3 *Co. Rep.* 19. [Which proves "that where the Words refer to what *muſt neceſſarily* happen, 'tis "no Contingency, but a Remainder *executed.*" *V. Equity Caſes Abridged, fo.* 190. *pl.* 16. S. C.]

Mr. Juſt. *Foſter* concurred.

A Legacy may be given upon *any* Terms.

But upon a promiſſory Note, the *Time* of Payment is only for the Benefit of the *Debtor*. Here, the Time of Payment is CERTAINLY *fixed:* And the particular Day ſpecified for Payment of the Money, being mentioned to be the Day *on which the Infant is to come of Age*, makes no Difference, from what it would have been, if that Circumſtance had been omitted.

And They *All* agreed That this was *Debitum in præſenti*, though *Solvendum in futuro.*

Per Cur' unanimouſly RULE DISCHARGED:
And the *Poſtea* ordered to be delivered to the Plaintiff.

Tueſday 8th *February* 1757.

Goodtitle ex dimiſſ. Hayward *verſ.* Whitby.

(*Mr. Juſt.* Foſter abſent.)

THIS was a Caſe from *Lancaſter* Aſſizes, upon an Ejectment.

R. P. being ſeiſed *&c.* deviſed All his Meſſuages, Lands, Tenements, and Hereditaments whatſoever and whereſoever ſituate, to the Reverend Mr. *Thomas Hayward* and *John Bates* and the Survivor of them, and the *Heirs* of ſuch Survivor; "In Truſt, that they and the "Survivor of them, his *Heirs* and Aſſigns ſhould lay out employ "and beſtow the Rents and Profits of the deviſed Premiſſes, for the "*Maintenance*, *Education*, *Bringing up* and *putting forth* into the "World, of *Thomas* and *John Hayward*, Sons of the Teſtator's Siſ-"ter *Elizabeth Hayward*, DURING *their* MINORITIES: *And* WHEN "*and* AS *they ſhould reſpectively* ATTAIN *their Ages of* 21, Then to

" the Uſe and Behoof *of the ſaid Sons* of his Siſter *Hayward*, the ſaid " *Thomas Hayward* and *John Hayward, and their Heirs, equally.*" And the Teſtator made the ſaid two Truſtees, the Reverend *Thomas Hayward* and *John Bates*, his Executors.

It is ſtated that *Thomas Whitby*, the Defendant, is the Teſtator's Heir at Law.—

That *Thomas* and *John Hayward* are the Teſtator's Siſter's Sons.

Thomas Hayward the Elder of the Teſtator's ſaid two Nephews died *under the Age* of 21, and *without Iſſue.*

Upon his Death, his Brother *John* being then under Age, *Thomas Whitby* the Teſtator's Heir at Law, was let into the MOIETY *of the* DECEASED *Nephew, Thomas Hayward*, by the Truſtees.

John, the ſurviving Brother brings the Ejectment, being now come of Age; and claiming the *Moiety of his deceaſed Brother, as well as* his own proper Moiety.

Queſtion — " Whether this *Moiety of Thomas* the deceaſed Bro- " ther, belongs to *John Hayward*, either *as Heir* to his Brother, *or* " *as* ſurviving Joint-tenant; Or whether it belongs to *Thomas Whit-* " *by*, as Heir at Law of the Teſtator, AS *an undeviſed Eſtate.*"

Mr. *Perrott* for the Plaintiff, (*viz.* for *John Hayward*, the ſurviving Nephew of the Teſtator.)

This Point is ſettled by many Reſolutions.

1ſt. This is only a *Chattel*-Intereſt in the Truſtees, (*though* given to them and *their Heirs:*) Becauſe it is to laſt ONLY DURING THE MINORITIES of his Nephews.

The Queſtion is, " Whether the Remainder VESTED *in Thomas* " and *John Hayward*;" Or " Whether it remained in CONTIN- " GENCY, *till* their reſpective *Coming of Age.*"

All that the *Teſtator had in View*, in this Truſt, was to provide for the Care of his Nephews DURING *their* MINORITIES: And He only meant that the Time *of their Coming of Age, ſhould determine the* TIME when they ſhould be capable of *Acting for themſelves*; NOT to make it CONTINGENT *till* they ſhould come to 21. For at that rate, *if* they had *married*, and *died under* 21, THEIR CHILDREN *could* NOT *have taken:* Which the Teſtator, moſt undoubtedly, could *never mean.*

Boraſton's Caſe, 3 *Co.* 21. was held a *veſted* Remainder.

The Caſe of *Taylor* v. *Biddal*, 2 *Mod.* 289. is in Point.

The Caſe of *Edwards* v. *Hammond*, 3 *Lev.* 132. (Where the Eſtate's being contingent or not, depended on it's being a Condition precedent or ſubſequent,) was only held a Condition ſubſequent and a *preſent* Deviſe to the Eldeſt Son.

Equity Caſes abridged, *H.* 1713. *fo.* 195. *pl.* 4. The Caſe of *Manſfield* v. *Dugard*, is almoſt the ſame with the preſent Caſe.

So here, the Eſtate *veſted immediately* in the two Nephews, upon the Death of the Teſtator; And therefore, upon the Death of *Thomas* his Brother *John* is intitled to this Moiety; either as Heir at Law to Him, or as Survivor.

Mr. *Norton pro Def*. *Thomas Whitby*, the Teſtator's Heir at Law.

The Will is, in Subſtance, no more than this—

The Teſtator gives to *A.* and *B*, and the Survivor of them and the Heirs of ſuch Survivor, All his Meſſuages, Lands, Tenements, *&c.* IN TRUST that they ſhall diſpoſe of the Rents and Profits of the deviſed Premiſſes for the Maintenance, Education, Bringing up, and putting forth into the World, of his two Nephews (his Siſter's Sons) *Thomas* and *John Hayward*, *during their Minorities:* And WHEN and AS they ſhould reſpectively attain to 21; then to the Uſe and Behoof of them the ſaid *Thomas* and *John Hayward* his two Nephews, and their Heirs, equally.

The Caſes on this Head appear indeed *inconſiſtent* and *repugnant:* But the *true Method of ſolving* them is, to attend to the INTENTION *of the Teſtator*.

Now here The Teſtator *intended* his Nephews a *Fee*, IF they ſhould *live* to make uſe of it, IF *not*, then *only* a *Proviſion during their Minority*.

And it is a Rule, " that the Heir at Law ſhall NOT *be diſinherited* " by *Uncertain* Words of a Deviſe."

Here, NOTHING VESTED *in either of the two Nephews, during* their *Minorities*.

IF

If *the Teſtator had intended* a Benefit of Survivorſhip, to his two Nephews, He *knew how* to do it; as appears by *another Part* of his Will.

The two Nephews were not Each of them *intitled to a Moiety* of the *Profits during their Minority:* For they were *only* to be *maintained at the* Discretion *of the Executors.*

The Queſtion is, "Whether this be, or be not, a *Condition* precedent; or an Eſtate depending upon a future Event that makes "it uncertain whether it ſhall ever take Effect."

Sheppard's Touchſtone of Common Aſſurances, 117. defines a Condition precedent, to be "Where the Condition muſt be fulfilled, "ere the Eſtate can take Effect."

A Gift to *A.* "if he comes from *Rome*," does not veſt *till* He comes from *Rome.*

Juſt ſo, a Deviſe to *A.* if he comes *of Age*; cannot veſt *till* he comes of Age.

And he was not to have the Fee, *till* then.

In Gifts of *perſonal* Eſtate or Legacies, it is the ſame. For if the Time is annexed to the *Legacy* itſelf, and not to the Payment of it, then, if the Legatee dies before the Time of Payment, it is a lapſed Legacy: But if annexed to the *Payment*, then 'tis not. 1 *Lev.* 167. *

* *V. ante* 226. S. P. *accord.*

2 *Salk.* 415. *Pl.* 2. The Caſe of *Smell contra Dee* 6 *Ann.* in Chancery. 2 *Vern.* 349.

As to the Executors taking only a Chattel-*Intereſt*; The being *defeaſible* does not make it the leſs a *Fee.*

In the Caſe of *Gardner* v. *Sheldon* [*Vaughan* 259.] it is ſo laid down by Ld. *Vaughan.*

This is a Fee to the Truſtees and *their Heirs*; though *liable indeed to a Contingency.* 'Tis the Word "*Heirs*," that makes it a Fee. *Littleton* § 1.

If ſo, then it *cannot* be a veſted Remainder; but muſt be an Executory Deviſe, a *mere contingent Intereſt.* 10 *Co.* 85. *Leonard Lovis*'s Caſe.

As to Mr. *Perrott*'s Cafes—

Boraſton's Caſe, 3 *Co.* 23. is not at all applicable to the preſent Caſe: And it was there *neceſſary*, towards forwarding the *Intention of the Teſtator*, that it *ſhould be* a *veſted* Intereſt. And that was an *expreſs* Deviſe of a *Chattel:* So that the *Fee veſted immediately*. But here are *no* ſuch Circumſtances, in *this* Caſe.

As to the Caſe of *Taylor* v. *Biddal*, 2 *Mod.* 289. *There* alſo was an *expreſs Deviſe* of a *Chattel*, to *Elizabeth Wharton:* And the Fee deſcending to Her, *would have* MERGED *the Term*, *contrary* to the *Intention and Words* of the Teſtator.

As to the Caſe of *Edwards* v. *Hammond*, 3 *Lev.* 132. It is no more applicable to the preſent Caſe, than the other two are. That was a Condition *ſubſequent*.

But *here* are *no* Words to ſhew the *Intention* of the Teſtator to have been, " that if either of his Nephews ſhould die, his Heir at Law " ſhould not inherit."

And here it is ſtated that the Teſtator's Heir at Law was let into and held this Moiety by *Conſent of all the Parties*, TILL this *John* came of Age. [*V. Ante* 229.]

As to the Caſe of *Mansfield* v. *Dugard*, It is diſtinguiſhable from the preſent Caſe.

Mr. *Perrott* was going to reply—But Lord *Mansfield* ſtopt him, and ſaid it was unneceſſary.

The Caſe is no more than this. *R. P.* being ſeiſed in Fee, makes his Will to the following Effect—" I give and deviſe All my Meſſuages Lands Tenements and Hereditaments *&c.* unto the Reverend *Thomas Hayward* and *John Bates* and the Survivor of them, and to the *Heirs* of ſuch Survivor, In TRUST to and for the Benefit of my Nephews *Thomas* and *John Hayward*; That is to ſay, upon Truſt and Confidence That the ſaid *Thomas Hayward* and *John Bates* and the Survivor of them, his *Heirs* and Aſſigns, ſhall lay out and employ the Rents and Profits of the ſaid Premiſſes for the *Maintenance*, *Education*, *Bringing up* and *Putting out* in the World, of the ſaid *Thomas* and *John Hayward*, the Teſtator's two Nephews, DURING *their* MINORITIES: And WHEN and AS they ſhall attain their reſpective Ages of 21. My Will and Deſire is that the ſame Premiſſes ſhall be and remain to them the ſaid *Thomas Hayward* and *John Hayward*, and their Heirs equally." And He makes the ſame *T. H.* and *J. B.* his Executors.

It

It is ſtated that the Defendant *Whitby* is the Teſtator's Heir at Law: But the Caſe does not ſtate *how* and in what Courſe of Conſanguinity, *Thomas Whitby* is Heir at Law. 'Tis probable that He is *not* of the *Male* Line; becauſe his Name is *Whitby*.

The Teſtator died. *T. H.* and *J. B.* the two Truſtees, entered into Poſſeſſion. Then *Thomas Hayward*, one of the two Nephews and Deviſees died, under Age, and without Iſſue. Then, the Truſtees let the now Defendant, the Teſtator's Heir at Law, into Poſſeſſion of his Moiety. But it is not material What *they* did among *themſelves*; that will not affect the *Right* of the Plaintiff.

The Queſtion is, " Whether the Eſtate *veſted* immediately in " the two Nephews, upon the Death of the Teſtator; Or *remain-* " *ed in Contingency*, till their reſpective Coming of Age:" And conſequently, " Whether this Moiety belongs to *John Hayward*, " upon the Death of his Brother *Thomas*, *either* as his Heir at Law, " or as Survivor; or whether it deſcends to the Heir at Law of the " Teſtator, as being *undeviſed*."

In the Conſtruction of Wills, adjudged Caſes may very properly be argued from; if they eſtabliſh General Rules of Conſtruction, to find out the *Intention of the Teſtator:* Which Intention ought to *prevail*, if *agreeable* to the Rules of Law.

Here it is agreed that a *Fee is deviſed* to the Nephews: but it is made a Queſtion, " Whether it be a Fee depending upon a *prece-* " *dent Contingency*; or, an *immediate* Fee."

He ſaid He would lay down a Rule or two of Conſtruction, previouſly to giving his particular Opinion on this Caſe.

1ſt. Wherever the *whole* Property is deviſed, with a particular Intereſt given *out of it*, it operates by way of *Exception* out of the abſolute Property.

This Rule is laid down in *Matthew Manning*'s Caſe, 8 *Co.* 95. *b.*

2d. Where an *abſolute* Property is given; And a particular Intereſt given, in the *mean time*, as " UNTIL the Deviſee ſhall come " of Age *&c*: And *when* he ſhall come of Age *&c.* then to Him " *&c.*" The Rule is that that ſhall *not* operate as a Condition *precedent*; but as a Deſcription of the Time when the Remainder-Man is to take *in Poſſeſſion*.

And to this Purpoſe is *Boraſton*'s Caſe, 3 *Co.* 21. *a. b.* Where this Doctrine is fully laid down and explained.

And this is ſufficient to anſwer the Intention of the Teſtator: For the Deviſee *does not want it* in the *mean* Time.

The Caſe of *Mansfield* v. *Dugard*,—in the *Abridgment of Equity Caſes* 195. *pl.* 4. is alſo very ſtrong to prove the general Rule.

Here, upon the *Reaſon* of the Thing, the *Infant* is the *Object* of the Teſtator's Bounty: And the Teſtator does not mean to deprive him of it, in *any Event*. Now ſuppoſe that this Object of the Teſtator's Bounty *marries*, and *dies before his Age of* 21 *leaving* CHILDREN; *could the Teſtator intend* in ſuch an Event, to *diſinherit Him*. Certainly, He could not. And as to the Teſtator's Heir at Law, *His* Heir at Law is only to take what the Teſtator has not deviſed away from Him.

But in the preſent Caſe, the Teſtator takes no Notice of this *Thomas Whitby*, who is indeed ſtated to be (but it doth not appear *how*) his Heir at Law. And He does not except any Thing out of the Intereſt he has given to his Nephews: He only makes a Truſt, to be executed for THEIR *Benefit*; And deviſes *nothing* for the Benefit of the *Truſtees*, who were *alſo* his Executors. And this is *only a* CHATTEL-Intereſt, which CAN NOT *laſt* 21 *Years*.

On the Rule in *Matthew Manning*'s Caſe, here is (at the utmoſt) only an *Exception*, by this Deviſe to the Truſtees, *out of* the abſolute Property given to his Nephews.

'Tis ſo plain upon the true Intent and Meaning of this Will, that it is a Shame to cite Caſes upon it. But yet I remember an appoſite Caſe in *H.* 17 *G. in Canc. Tomkins* v. *Tomkins* where the Deviſe was "to his Brother, in Truſt for his eldeſt Son *B. till* he "ſhould attain 21 Years; and if he ſhould die before 21; then a "Deviſe over."

Cur. held the Age of 21 to be no Limitation of *B's* INTEREST; but only a Limitation of the *Truſt*, during his Minority; And that *B.* took the whole by Implication.

So here, the *Property* is *abſolutely given:* And the Limitation is only of the *Truſt*.

Therefore upon the whole, He held the preſent Caſe to be

An *immediate* Gift to the two Nephews; with a Truſt to be executed for their Benefit, during their Minority.

Per Cur. Let the *Poſtea* be delivered to the Plaintiff.

Maſter, &c. of the Vintners Company *verſ.* Paſſey.

THIS was an Action of Debt brought upon a By-Law of this Company.

The Declaration (after a proper Introduction) ſet forth the By-Law, which was made on 24 *April* 1656, intitled "An Ordinance "of Election of Men into the Livery of the Corporation or Mi-"ſtery of Vintners of the City of *London*": Whereby it was ordained and eſtabliſhed, That the Maſter and Wardens of the Corporation or Miſtery of Vintners of the City of *London*, for the Time being, ſhould have a decent Livery, comely for themſelves, and meet to attend upon the Lord Mayor and his Brethren the Aldermen of the ſaid City, from Time to Time and at all Times, as Need ſhould require; and upon the ſaid Maſter and Wardens, at all ſuch Time or Times thereafter, and in ſuch Gowns and Liveries, as they ſhould be lawfully warned and ſummoned to come and be in, upon any neceſſary Occaſions concerning the Credit and Worſhip of the ſaid Company; And alſo that once in every Year, or oftner if Occaſion ſhould ſerve, the ſaid Maſter Wardens and Aſſiſtants, or the Major Part of them which ſhould be then preſent at a Court of Aſſiſtants for the Time being, to be holden for the ſaid Miſtery, *ſhould and might* ELECT *and chooſe into the* LIVERY *or* CLOATHING of the ſaid Corporation or Miſtery, SUCH AND SO MANY *of the Yeomandry* of the ſaid Miſtery, *as ſhould ſeem moſt meet and convenient* unto them; And that EVERY SUCH PERSON *of the ſaid Yeomandry ſo choſen into the ſaid Livery* as aforeſaid, *ſhould* AT *or* BEFORE *his Admiſſion into the ſaid Livery*, PAY to the ſaid Maſter Wardens and Freemen and Commonalty of the Miſtery of Vintners of the City of *London*, to their Uſe the Sum of 31*l.* 13*s.* 4*d.* of lawful Money of *England*. And then and there, at the ſame Aſſembly, the ſaid Maſter, *&c.* did make another By-Law, That *Every Perſon and Perſons* of the ſaid Corporation, *which at any Time thereafter ſhould be* by the ſaid Maſter Wardens, *&c.* for the Time being, at any Court, *&c.* ELECTED OR CHOSEN *into the Livery* of the ſaid Miſtery; and *ſhould not, upon Notice* given to Him or them in that Behalf, by the Clerk or Beadle, ACCEPT *of* the ſame; or, upon Acceptance thereof, ſhould, before his Admiſſion into the ſaid Livery, REFUSE *to* PAY to the ſaid Maſter, *&c.* the *Sum of* 31*l.* 13*s.* 4*d.* that then *every particular ſo refuſing* to accept, *&c.* or to pay as aforeſaid, *ſhould* FORFEIT, *&c.* to the ſaid Maſter, *&c.* the *Sum of* 25*l.* to be recovered by Action of Debt, Bill, Plaint, or Information, to be brought in any Court of Record within the Commonwealth of *England*, by the ſaid Maſter, *&c.*

Then

Then the Declaration avers both the ſaid By-Laws to be reaſonable, *&c*; And alſo, that at the Time of the making them, and ever ſince, All the Freemen of the ſaid Miſtery, before their Admiſſion to the Livery, were known by the Name of the Yeomandry; And that the Defendant was a fit and able and proper Perſon to be elected into the Livery and Cloathing of the ſaid Company. Then it ſets forth his Election upon the Livery; And that He refuſed, *&c.*

To this Declaration—

The firſt Plea was "*Nil debet.*" And there was alſo, by Leave a 2d Plea, That there are 12 *greater* Livery-Companies, in *London*, and other inferior Companies; And that an Order was made at a Court holden before the Lord Mayor and Aldermen *&c.* on *&c.* at *&c.* At which Court it was enacted *&c.* "And that no Perſon ſhould take "upon himſelf the Livery of any Company being *one of the ſaid* 12 "Companies, *&c.* Unleſs he ſhould have an Eſtate of 1000*l. &c.*" And the Plea avers,

That this *was One of the* 12 Companies; And that he had *not* an Eſtate of 1000*l.&c.* And therefore he ſays, that he was *not duely elected* upon the ſaid Livery of this Company of Vintners.

The Plaintiff demurs to this 2d Plea: And the Defendant joins in Demurrer.

Mr. *Williams pro Quer.* made three Objections to the Plea.

1ſt Objection—That it is not ſet out *by what Authority* the Court which made this Order, was holden. *Clift.* 186, 196.

2d Objection. The Court is *uncertain:* For *many* Courts are holden before the Mayor and Aldermen; And *Non conſtat which* of them this is.

3dly *Non conſtat what Authority* the Court of the Lord Mayor and Aldermen had *to make* this Order.

Mr. Serjeant *Martin pro Def.* ſaid—

It was not known, *at the Time of the Plea*, nor can *now* be known, WHAT *Authority* the Court of Lord Mayor and Aldermen had to make this Order: Therefore He gave up the Plea.

But he objected to the Declaration, in two Reſpects.

1ſt. The By-Laws are bad.

2d. The Defendant was *not duly ſummoned* to *attend at the Court of Aſſiſtants*, to take upon him the Livery.

Firſt—The By-Laws are *arbitrary*, *illegal*, *oppreſſive*, and *not warranted* by Cuſtom or Charter.

They are, " That the Company may elect *ſuch* of the Yeomandry of their Members as ſhould *ſeem moſt meet and convenient to them*, upon the Livery of their Company;" And " that every " Perſon ſo elected, who ſhould refuſe *&c.* ſhall forfeit *&c*; And " EVERY *Perſon ſo elected*, ſhall accept the ſame, and ſhall upon " or before Admiſſion, pay 31*l.* 13*s.* 4*d.* for an Admiſſion Fee, " on Forfeiture of 25*l.*" (which Penalty of 25*l.* is made payable abſolutely and in all Events.)

Now the Livery-Men ought to be *Perſons of Subſtance*, *capable* of being at the Expence of ſerving or paying the Fine.

And the Averment " That he was a fit and able and proper Per- " ſon," goes only to the juſt *Execution* of the By-Law; But will not make the By-Law *itſelf* good, which is in itſelf void.

3 *Lev.* 293. Mayor *&c.* of *Oxford* v. *Wildgooſe:* [in Point, as to this.]

The Right to have a Livery, muſt be founded, either on Charter or Cuſtom.

Paſch. 30 *G.* 2. Innholders Company *v. Gledhill*, *B. R.*—was ſo determined; And that the Court can't preſume it: And the want of ſhewing this, was holden to be ſuch a Fault in the Declaration, as might be taken Advantage of upon General Demurrer.

In *Lilly*'s Entries there is a Precedent of ſuch a Pleading upon ſuch a By-Law.

On 27 *July* 1697. The Mayor and Aldermen made an Order (ſet forth in the Pleadings,) which ſhews the Opinion of that Court upon this Head of *Sufficiency* of the Perſons elected.

In *Raym.* 446. *Taverner*'s Caſe 33 *C.* 2. (which he cited for the Sake of the Return,) This very Company made it Part of their Return to the Mandamus, " That every Livery-Man of this very Company

" was uſed and ought to be *de bono Statu et Subſtantia*," &c. [But N. B. the Fine of 31*l.* 13*s.* 4*d.* was there allowed to be good.]

Comberb. 221. The Caſe of the Stationers Company *v. Saliſbury:* (which was cited, as to the 1ſt Objection of it, and applied to the 1ſt Objection here.) Alſo the 2d Exception there, anſwers (as the Serjeant obſerved) to the 2d Objection here. [But that Caſe was not determined.]

2d. Objection to the Declaration—*Non conſtat* that He was *ſummoned* to attend at the Court of Aſſiſtants, to take upon him the Livery.

The Declaration ſhews that the Maſter and One Warden may appoint a Court *whenever* they pleaſe: So that the Time of holding this Court, is *uncertain*. And they only ſhew that He was ſummoned to attend at the *next* Court, *generally*; without ſpecifying WHEN *it was to be holden*.

Mr. *Williams* in Reply.

1ſt. Theſe By-Laws are now of above 100 Years ſtanding: And they have been holden good, notwithſtanding all Objections. Vide *Raym.* 446. *Taverner*'s Caſe: [Where the Return of them was allowed.] And they ought to receive a favourable Conſtruction.

If they chooſe a Perſon unfit, it may be taken Advantage of in Pleading, or upon Evidence.

City of *London*, v. *Vanacker*. *Carthew*, 480. 483. A Power " to " elect ſuch Perſons as ſhould *ſeem* to them to be fit and able"—gives them a Diſcretion. 5 *Co.* 100. *a. Rooke*'s Caſe.

This is a diſcretionary Power; and is confined to ſuch as are fit and able; though it muſt be legally executed.

It is objected alſo that the Penalty of 25*l.* is made payable *abſolutely:* Whereas it ought to be, *unleſs* he has a reaſonable Excuſe.

But this is implied.

And if he *has* a reaſonable Excuſe he may plead *Nil debet*.

Carthew 483. City of *London*, v. *Vanacker:* [in Point.] 1 *Lutw.* 402. By-Law of the City of *Canterbury:* Where *Non debet* was pleaded. v. fo. 405.

In

In Anſwer to the 2d Objection—

As to the *Time* of holding the Court, the Objection is only to the *Form* of the Declaration. But

It is averred "That Notice was DULY given Him of his Elec-" tion;" And "That Notice was DULY given Him, to attend at " the *next* Court of Aſſiſtants."

Beſides, He AS A MEMBER *of the Company*, was OBLIGED *to* TAKE *Notice* of the *Time* of holding their Courts.

As to 3 *Lev.* 293. The By-Law there does not even *confine* it to the *Inhabitants* of the City: But *this is confined* to the Members of the Company. [Still, This is no Anſwer to the material Objection.]

As to *Comberb.* 221. It was not determined. [No more it was.]

Lord *Manſfield*—

The *Plea* is *admitted* to be bad.

The Objections are to the By-Law: Which has been of 100 Years ſtanding; and, ſeveral Times, judicially before the Court; and yet this Objection has never been hit upon.

However, One Anſwer ſtrikes me: Which is "That NIL DE-" BET *may be pleaded*, if the Party was *really* unfit." *Carthew* 483. *Vanacker*'s Caſe, and 1 *Lutw.* 402. 405. Major, *&c. de Cambridge* v. *Herring*—are Proofs of this.—By the former, it appears that it may be given in Evidence, upon *Nil debet* pleaded: And in the latter, it was actually pleaded; and Iſſue taken upon it. And this equally holds, as to *any* reaſonable Excuſe. And We *will not intend* him to have been an improper Perſon.

Being a Livery-Man of the Company, He *ought to know* when the next Court is: And therefore *this* Objection has not much Weight.

Mr. Juſt. *Deniſon.*

The By-Law gives Power "to elect ſuch and *ſo many* out of the " Yeomandry, upon the Livery, as ſhall ſeem to them moſt meet " and convenient." The main Deſign ſeems to relate to the *Number*. As to the *Ability*—By-Laws ought to have a *reaſonable* Conſtruction: We ought not to conſtrue them ſo ſtrictly, as to take them to be void, if *every particular* Reaſon of making them, does not *appear*.

Now

Now here, it is objected " that the Person elected MAY *be a* " *Beggar.*"

But We can *never intend* that they would choose Persons NOT *meet and convenient.*

And *if* this *be* done, " *Nil debet*" will bring that Question before the Court.

And You cannot, upon *this Record*, take in the Order of the Court of Lord Mayor and Aldermen; because THAT *Plea* is given up.

And the *Notice* shall be *intended* to be regular.

This is an Ancient By-Law; And nothing unreasonable appears upon the *Face* of it.

Per Cur. (*viz.* Lord *Mansfield* and Mr. Justice *Denison*, the Other two Judges being absent,)
JUDGMENT for the PLAINTIFF.

Wilson, Clerk; *verf.* Greaves.

MR. Serjeant *Hewitt* shewed Cause against a Prohibition, which Mr. Serjeant *Poole* had moved for, (on the 6th of *July* last) to be directed to the Arch-Deacon of *Nottingham*, to stay his Proceeding in a Suit against Mr. *Wilson*, (Parson of *Newark*,) for *brawling* in the Church, and also for *smiting* in the Church: But he prayed the Prohibition, only as to the latter Charge, the *smiting* in the Church. *V.* 5, 6 *E.* 6. *c.* 4. § 2: Which Act contains 3 distinct Clauses, levelled against 3 distinct Offences committed in Churches and Church-Yards; *viz.* the 1st against quarrelling, chiding, or brawling, by Words only; the 2d against smiting, or laying violent Hands; the 3d against striking with a Weapon, or drawing One with Intent to strike.

His Objection was, That as to *this* Offence of *smiting* in the Church, there ought to have been a *previous* CONVICTION *at* LAW; though the Statute says " That he shall *ipso facto* be deemed " excommunicate." In Proof of which, he cited *Cro. Eliz.* 224. *pl.* 6. *Dethick*'s Case. Where He was *indicted*, upon this Statute of 5, 6 *E.* 6. for Striking in St. *Paul*'s Church-Yard: Though he got off indeed, for want of being named *Garter*.

1 *Ventr.* 146. The Case of *Dyer v. East*, is full in Point; " That " the Striker in a Church-Yard does not stand *ipso facto* excommu-

" nicated, UNTIL he be thereof convicted at Law, and this tranſ-
" mitted to the Ordinary."

And here having been NO *previous Conviction* at Law, He prayed a Prohibition *quoad the Smiting:* And obtained

A RULE to ſhew Cauſe.

Againſt which Rule, Mr. Serjeant *Hewitt* (on *Monday* 7th *February* 1757.) ſhewed Cauſe, as follows.

On 5, 6 *E.* 6. *c.* 4. there are 3 Sections, and three different Offences: And this Offence charged in the Libel, is not an Offence conſtituted ſo by this Act; But was a Matter within the Juriſdiction of the Spiritual Court, *before* that Act, and *abſtractedly from* it. They have, without Diſpute, Juriſdiction as to the *Brawling*. And as to the ſecond Branch, for *Smiting in the Church*, there needs not be a previous Conviction at *Common* Law: It is enough, if the Excommunication be in the *Spiritual* Court. To prove which, he cited *Hetley* 86. The Caſe of *Viner* v. *Eaton: Cro. Jac.* 462. The Caſe of *Large* v. *Alton*, *pl.* 7: *Cro. Eliz.* 680. The Caſe of *Baker* v. *Brent and Robinſon.* 1 *Hawk. P. C. fo.* 139. *c.* 63. § 27.

2 *Ld. Raym.* 850. The Caſe of *Wenmouth* v. *Collins.* The Court denied a Prohibition; becauſe this Offence was originally and before this Statute, conuſable in the Eccleſiaſtical Court, *ratione loci*; And that the Statute, though it provides a Penalty, does not alter the Juriſdiction.

Therefore, he concluded that notwithſtanding *this* Objection, The Spiritual Court *have* Juriſdiction.

It was then adjourned to the next Day; when it proceeded and was determined. Mr. Juſtice *Foſter* and Mr. Juſtice *Wilmot* were Both abſent.

Mr. Serjeant *Poole*—I cited 1 *Ventr.* 146. *Dyer* v. *Eaſt*, as a Caſe in Point, " That there *muſt be* a previous Conviction by a " Trial *at Law*;" And " that ſuch Conviction muſt be *tranſmitted* " to the Spiritual Court." *Tueſday* 8th *February* 1757.

Cro. Eliz. 224. *Dethick*'s Caſe: Where there was an Indictment actually found and pleaded to.

As to My Brother *Hewitt*'s Caſes—

Hetley 86. *Viner* againſt *Eaton*, is a looſe, incomplete Note; and gives no Reaſon why the Prohibition was denied.

Cro. Jac. 462. *Large* v. *Alton* proves Nothing at all to the preſent Purpoſe: And it was for *brawling, only*; In *which* Caſe, I agree that no Prohibition ſhall go.

Cro. Eliz. 680. is indeed in the Alternative, " after Sentence, *or* " due Trial and Conviction, and not before." But that is only ſaid by *Dodderidge*, then at the Bar, in arguing for the Defendant.

Wenmouth v. *Collins might* be for a Prohibition *generally*. Indeed a Reaſon is given for denying the Prohibition; *viz.* " That the " Spiritual Court originally had Juriſdiction to hold Plea of this " Matter before the Act."

But I deny that they had ſuch *Original* Juriſdiction: And the Act *gives them None*. This is a Force *Vi et Armis*; An Aſſault and Beating: And the temporal Courts will prohibit them from proceeding upon it.

Bro. Prohibition pl. 14. and *Bro. Conſultation* 6. are expreſs, " that " Where a Man ſues in the Spiritual Court; And an Action at " Common Law lies for the ſame Matter; A Prohibition lies, And " No Conſultation ſhall be granted." [Theſe are Both the ſame Caſe; *viz.* 22 *E.* 4. 20.]

Mr. *Taylor White* ſpoke on the ſame Side for Mr. *Wilſon*.

He even attempted to ſhew that a Prohibition would be reaſonable as to the *Brawling*: For that the Fact ſtated could not come within the Notion of brawling; As it was only ſpeaking to a third Perſon, to turn *Greaves* out of the Church.

As to the *Striking* — The Spiritual Court had no Juriſdiction *before* the Statute; And the Statute gives them None: They have only Power to *pronounce the Sentence* of Excommunication; but *not* the Power of *judging*.

As to the Caſe of *Wenmouth* v. *Collins*, It is but a looſe Note; and *Holt* was abſent; and there might have been a Confeſſion.

And there have been many Indictments He ſaid, on this Statute: And *this* Method of Conviction was the *ancient* Method.

Lord *Mansfield*—

The Statute of 5, 6 *Ed.* 6. *c.* 4. has three Degrees of Offences, and three different Puniſhments.

And

And whatever Juriſdiction the Spiritual Court might claim *before* the Act, they are *now* proceeding *ſince* the Act: Therefore it is not very material how the Matter ſtood *before* the Act.

The Puniſhment is given, by this Act, to the Eccleſiaſtical Court: And the Puniſhment is ſuch as can only be executed BY *the Ordinary*.

The Caſe ſtated with regard to the firſt Offence, is ſufficiently a *Brawling*, within the Meaning of the Act.

The ſecond Offence is SMITING *in the Church*, or *Church Yard*. Now this is indeed *ſtill* an Offence at *Common* Law; And He *may* be indicted for it: But, beſides this, He may, by this Act, be *ipſo Facto*, excommunicated. By whom? By the Ordinary. Indeed the Ordinary *may* uſe a Conviction at Law, as a *Proof* of the Fact.

And the Caſe in *Raym.* [2 *Ld. Raym.* 850. *Wenmouth* v. *Collins*,] is a plain Proof that the Eccleſiaſtical Court may proceed upon the two firſt Clauſes, and are not to be prohibited.

But then there is a third Offence and a third Puniſhment mentioned in the Act of 5, 6 *E.* 6. *c.* 4: Which has made all the Confuſion: This Offence is maliciouſly ſtriking with any Weapon, in any Church or Church-Yard, or drawing any Weapon there, with Intent to ſtrike. For this 3d Offence, the Act inflicts a double Puniſhment; One, Temporal; the other, Spiritual: The Temporal Puniſhment is Loſs of an Ear, or Marking in the Cheek, *after Conviction*; the Spiritual is, "And *beſides*, Every ſuch Perſon to be "and ſtand *ipſo facto* excommunicated as is aforeſaid."

Here, indeed, there muſt be a *previous* Conviction; And a Tranſmiſſion of the Sentence; and a Declaration.

But on the ſecond Clauſe, No *previous* Conviction is neceſſary: (though, *if* there is one, it may be uſed AS *a Proof* of the Fact.)

This Libel is upon the *firſt* and *ſecond* Clauſes: NOT upon the *third*.

And the Proceedings of the two Courts being *diverſo intuitu*, it is no Objection, to ſay, "That a Man will at this rate be *twice* "*puniſhed* for the *ſame* Offence."

And this is *common*, in many Caſes: For *We* proceed, to *puniſh*; *They*, *to amend*.

'Tis

'Tis clear that upon the TWO FIRST *Clauſes*, the Eccleſiaſtical Court HAS a Juriſdiction.

And the Caſes upon Words do not apply to the preſent Caſe.

Mr. Juſt. *Deniſon* concurred.

Their Proceedings are *pro Salute Animæ*. Indeed if they proceed for *Damages*, this Court will prohibit them. And that was laid down by the Court in the Caſe of *Large* v. *Alton*, in *Cro. Jac.* 462. where the Coſts being given only *pro Expenſis Litis*, the Court would not prohibit them: But they declared that they would have done other, if it had been *pro damnis*.

And it is plain to me, that the Caſe in 1 *Ventr.* 146. *Dyer* v. *Eaſt*, was really a Determination upon the *third* Clauſe of the Act; and is a Miſtake: I ſuppoſe the Words "*with a Weapon*," are *left out*, *by Miſtake*. The Reporter was then a Young Man.

But however, this is the *only* Caſe to be met with, to this Purpoſe; And it muſt be a Miſtake, either in the State of the Caſe, or in the Opinion: For on the *ſecond* Clauſe, Surely, We can NOT prohibit them; becauſe they are exactly within the *Words* of the Statute, "That if any Perſon or Perſons ſhall ſmite or lay any "violent Hands upon any other, either in any Church or Church-"Yard, they ſhall *ipſo Facto* be deemed Excommunicate."

Per Cur', (*viz.* the only two Judges now preſent)
The RULE was DISCHARGED.

Wedneſday 9th February 1757. Woolley et al' *verſ.* Cobbe et al' (Bail of *Cobbe*, a Bankrupt.)

THE Defendant became Bankrupt, pending the Action. The Bail was *fixed* in *July*. The Bankrupt obtained his *Certificate*, in *Auguſt* following.

The Queſtion was, "Whether the *Bail* ſhould be *diſcharged*, "by this *Certificate*," (which was not obtained *till* AFTER they were *fixed* and the *Debt levied* upon them by *Fi. fa.* and the Money *actually in the Hands of the Sheriff*;) Or "Whether the Bail "were become *abſolutely liable*; And Conſequently, the Certificate "came too late to help them."

2 Lord

Lord *Mansfield* made a Diſtinction, And Mr. Juſt. *Denſon* and Mr. Juſt. *Foſter* agreed to it, " That if the Certificate is obtained " *before* the Bail are *fixed*, they ſhall be *diſcharged*: But if they are " *fixed*, before the Certificate is obtained, they *remain liable*."

V. poſt. Mich. 1757. 31 *G.* 2. *B. R. Cockerill* v. *Owſton* S. P. agreed to by the whole Court.

Rex *verſ.* Gayer Eſq.

MR. *Gould* and Mr. *Willes* ſhewed Cauſe againſt quaſhing an Order of Seſſions, which (upon Appeal to them, by Mr. *Gayer*,) diſcharged an Order of two Juſtices appointing *James Gayer* Eſq; and *Benjamin Cobley* to be *Overſeers* of the Pariſh of *Rockbear in Com. Devon.*

Mr. *Gayer* alone appealed from this Order of Appointment; and the Seſſions diſcharged it, as to the Appointment of Mr. *Gayer* only: [The Words of the Order are — " *It appearing unto* this " Court that *&c.* and alſo *&c. and that &c.* This Court doth " THEREFORE vacate and make void the ſaid Warrant, as to the " ſaid *J. Gayer.*"] It appearing unto them that he had ſome Years been, and was at the Time of the Nomination, and ſtill at the Time of making the Seſſions Order, an ACTING JUSTICE *of Peace* for the ſaid County, reſiding within the ſaid Pariſh of *Rockbear*, and a ſubſtantial Houſekeeper there; And alſo a *Lieutenant of Marines in his Majeſty's Service, on Half-Pay*; And that there are *other ſufficient* ſubſtantial Houſeholders within the ſaid Pariſh, for the doing ſuch Office. The Court " THEREFORE vacated and made " void the ſaid Warrant, as to the ſaid *James Gayer.*"

Mr. *Norton* had, on 13th *November* 1756. moved to quaſh this Order of Seſſions: For that *neither of theſe two Reaſons* were ſufficient to juſtify the Seſſions in quaſhing the Order of two Juſtices, whereby Mr. *Gayer* was legally and regularly appointed One of the Overſeers of the ſaid Pariſh.

A RULE was thereupon granted, to ſhew Cauſe.

On ſhewing Cauſe, The Counſel on both Sides went (at large) into a long Argument, " Whether the Reaſons *given* were ſuffi- " cient:" Particularly, " Whether the *Offices* of Juſtice of Peace, " and of Overſeer, were *compatible*; and " Whether the Objection " could be removed by appointing a *Deputy*-Overſeer;" If it

could, then " Whether a Juſtice of Peace was *liable* to be appoint-
" ed Overſeer, in order to his executing the Office by Deputy."

Lord *Mansfield* ſaid that the *General* Queſtions concerning the *Incompatibility* of Offices, and the *Power of appointing Deputies*, are a large Field indeed: But the *preſent* Queſtion ſeems to me to turn in a very narrow Compaſs.

The *Seſſions*, upon an Appeal, have a Right to exerciſe the *ſame Latitude of Diſcretion*, in judging " Who are fit to be Nominated " Overſeers," as the two Juſtices had. They have given their Opinion " that Mr. *Gayer* was *not a proper Perſon* to be ap-
" pointed Overſeer." They are *not obliged* to give *any* Reaſon for their Opinion: becauſe the Legiſlature has intruſted them, upon an Appeal, with the Power or Authority of appointing Overſeers.

If they had given *no* Reaſon, their Order had undoubtedly been good: We muſt have *preſumed* that they acted upon *proper* Grounds.

It is true, that where the *whole* Reaſon is ſet out, and is *clearly wrong*, We may and ought to quaſh an Order *manifeſtly* made by miſtake, upon an erroneous Foundation.

But then the bad Reaſon given muſt appear to have been their *only* Inducement. If there may have been *other* Grounds, they ſhould be preſumed ſufficient: And the Order ought not to be ſet aſide, becauſe *ſome* of their Reaſons, unneceſſarily given, appear to be bad.

There was *no Neceſſity* for appointing Mr. *Gayer:* The Seſſions ſtate " that there were other ſufficient ſubſtantial Houſeholders " within the ſaid Pariſh." They might think Mr. *Gayer*, under *all* the Circumſtances, improper *unneceſſarily* to be appointed: His being an acting Juſtice of Peace reſiding within the Pariſh, and a Lieutenant of Marines, might be two Circumſtances which weighed among *others*. But it don't follow, neither is it ſaid, that they look-ed upon both or either of theſe Reaſons, as an *Exemption* from being appointed, or a *Diſability* to ſerve the Office of Overſeer; and that they vacated the Warrant of two Juſtices *as illegal* upon *that* Account.

The Execution of a Diſcretionary Power, where it is not neceſſary to give a Reaſon, ought to be ſupported; *unleſs* the *whole* Reaſon is ſet out, and *manifeſtly wrong*. Here, the *whole* Reaſon upon which the Seſſions acted, is *not* given. They ſay there were Other Perſons, qualified. Suppoſing Mr. *Gayer liable* to ſerve the Office, they might think Him *not* ſo *proper* as many *Others*. And there-

fore We are not obliged to ſay that the *whole* Reaſon they went upon, is bad; allowing (for Argument) that there aroſe *no legal* Objection to the Appointment of Mr. *Gayer:* Which, I think, there is no Occaſion now to examine.

Mr. Juſtice *Deniſon* concurred, They were not *obliged* to give *any* Reaſon at all: And if it be *only an imperfect One*, We ought *not* to quaſh their Orders.

I remember a Caſe, (*Rex* v. *Spalding*, I think it was,) Where the Juſtices held a Man ſettled in a Pariſh, by reaſon of an Apprenticeſhip; Not ſaying "That He had *ſerved* 40 *Days* in the Pa-"riſh, under it:" Yet the Court would *not intend* that they did *wrong*.

We will *intend* EVERY *thing in* FAVOUR of the Juſtices, in their Orders.

Now here, the Reaſon *does not appear* to be a *wrong* Reaſon: It is enough, that *they judged* him an IMPROPER *Perſon to be Overſeer*.

Mr. Juſt. *Foſter* concurred.

Per Cur. unanimouſly
ORDER of SESSIONS confirmed;
ORDER of TWO JUSTICES quaſhed.

Rex *verſ.* Inhabitants of Chidingfold.

Thurſday 10th *February* 1757.

MR. *Aſton* had moved to quaſh an Order of Seſſions without ſtating the Caſe, at all, but merely the Queſtion which was "Whether the Tenant's *paying* the LAND-*tax* (which was allowed "Him again by his Landlord,) amounts to ſuch a *Notice*, as ſhall "gain the Tenant a Settlement:" Which the Seſſions held that it did *not*.

Mr. *Aſton* alledged that it *did:* and cited *Paſch.* 7 *G.* 2. *B. R. Rex* v. *Inhab. de Oakehampton*, where a Tide-Waiter being *taxed* to the Land-Tax, for his Salary, was holden to be Notice within 3 & 4 *W.* & *M. c.* 11. § 6. and that he thereby gained a Settlement; even tho' it was *paid* by the Collector.

Hil. 9 *G.* 2. *B. R. Rex* v. *Inhab. de Bramley:* Where the being aſſeſſed AND *paying two Quarters* ONLY to the Land-Tax, was holden to gain a Settlement. [See *Mr. Burn's Juſtice of Peace and Pariſh Officer*, *pa.* 532, 533. S. C.]

And

And now, Mr. *Gould* (who was to have ſhewn Cauſe againſt the Rule for quaſhing this Order of Seſſions,) very candidly acknowledged that He could not ſupport the Order; the Point being already *fully ſettled*, by former Determinations.

Whereupon, the Rule for quaſhing it, was made abſolute.

Saturday 12th *February* 1757.

Plummer *verſ.* Bentham.

THE Recorder of *London* (Sir *William Moreton*) came to the Bar, and CERTIFIED two *Cuſtoms* of that City, ORE TENUS.

Mr. *Williams* moved, (when Sir *William Moreton* was down at the Bar,) that the Recorder of *London* might return two Writs of *Certiorari* directed to the Lord Mayor and Aldermen of *London*, to certify two of the Cuſtoms of their City.

And then Mr. *Williams* opened the Caſe, *viz.* That it was an Action of Treſpaſs on the Caſe brought by the Plaintiff againſt the Defendant, for *obſtructing his ancient Lights*, by a *new Erection or Building* which the Defendant had raiſed againſt them: To which, The Defendant had, (by Leave,) pleaded two Juſtifications, Both of them under the Cuſtom of the City of *London*. One of them was, that there is an ancient Cuſtom in the City of *London*, "That "if any Perſon has a Meſſuage or Houſe in the City of *London*, ad- "joining or contiguous to another MESSUAGE OR HOUSE or to the "Ancient *Foundations of One* in the ſaid City, which former Houſe "has *ancient Lights or Windows* fronting oppoſite to or over ſuch "other adjoining or contiguous MESSUAGE OR HOUSE or ancient "*Foundation of one*; Such *other* Perſon, *Owner of the* LATTER *Meſ-* "*ſuage or Houſe* or ancient *Foundation of One*, may well and law- "fully *exalt* ſuch his *Meſſuage or Houſe*, or *rebuild upon the ancient* "*Foundations* of ſuch his adjacent or contiguous MESSUAGE OR "HOUSE any *new Meſſuage or Houſe, to* ANY HIGHTH *that he ſhall* "*pleaſe, againſt and oppoſite to the ſaid ancient Lights and Windows* "of ſuch firſt-mentioned neighbouring Meſſuage or Houſe to which "his *Meſſuage or Houſe* or ancient Foundations of a *Meſſuage or* "*Houſe* are ſo contiguous or adjoining; and *thereby darken and ob-* "*ſcure* ſuch ancient Lights and Windows of ſuch firſt-mentioned "neighbouring Houſe, having ſuch ancient Lights and Windows: "Unleſs there has been ſome Writing Inſtrument or Record of an "Agreement or Reſtriction to the contrary."

In this Plea, Iſſue was joined: And a *Certiorari* iſſued, directed to the Mayor and Aldermen of the City of *London*, to certify " Whe-
" ther they have or have not ſuch a Cuſtom."

The ſecond Plea, Iſſue, and *Certiorari*, were the ſame with the firſt, only with this Difference or rather *Extenſion* of the Cuſtom pleaded; *viz.* " That the Owner of any ERECTION OR BUILDING,
" or the ancient Foundation of any ERECTION OR BUILDING,
" might well and lawfully exalt ſuch ERECTION *or* BUILDING, or
" erect and build thereon a new ERECTION OR BUILDING to any
" Highth that he pleaſes *&c*;" and ſo on, as in the former Plea: Only that the former Plea confined the Claim of the Privilege, to *Meſſuages* or *Houſes*; which this latter Plea extends to *all Erections or Buildings*.

Sir *William Moreton* Knt. Recorder of *London*, accordingly *certified* ORE TENUS, by Command of the Lord Mayor and Aldermen, (after having recited the Pleadings and *Certiorari*,) " That there *
" *is* ſuch a Cuſtom as is alledged in the *former* Plea: But that there
" is NO ſuch Cuſtom as is alledged in the *latter* Plea."

* See the firſt Caſe in Sir *H. Calthrop's Reports* (prettily reported and worth reading;) where the Queſtion was very like the preſent, and the Determination agreeable to the Certificate, to this firſt Plea.

The Recorder then delivered in both the Writs of *Certiorari*, with *written Copies* of the reſpective Returns annexed; though He had delivered them *Ore tenus* at the Bar: (Which, he told Me, was uſual.) The Returns were worded as follows; *viz.* The Execution of this Writ appears in a certain Certificate by Us the Mayor and Aldermen of the ſaid City of *London*, made by the Recorder of the ſaid City at the Day and Place within contained, according to the Cuſtom of the ſaid City, by Word of Mouth, as is within commanded.

The Anſwer of Marſhe Dickinſon *Eſq*; *the Mayor, and of the Aldermen of the ſaid City.*

We the Mayor and Aldermen of the ſaid City, by Sir *William Moreton* Knt. Recorder of the ſaid City, by Word of Mouth of the ſaid Recorder, according to the ſaid Cuſtom of the ſaid City, Do, in Obedience to the ſaid annexed Writ, humbly certify That there is now had, and from the Time whereof the Memory of Man is not to the contrary there hath been had and received ſuch ancient and laudable Cuſtom in the ſaid City uſed and approved; to wit,
" That if any One hath a Meſſuage or Houſe in the ſaid City, near
" or contiguous and adjoining to *another ancient* MESSUAGE OR
" HOUSE, or to the ancient *Foundations* of *another ancient* MESSU-
" AGE OR HOUSE in the ſaid City, *of another Perſon his Neighbour*

" there; And the Windows or Lights of *ſuch Meſſuage or Houſe* " are looking fronting or ſituate towards upon over or againſt the " ſaid *other* ancient MESSUAGE OR HOUSE or ancient *Foundations* " of ſuch other ancient MESSUAGE OR HOUSE of ſuch *other Per-* " *ſon his Neighbour*, ſo being near adjacent contiguous or adjoining; " *Although* ſuch Meſſuage or Houſe and the Lights and Windows " thereof be or were *Ancient*, YET ſuch *other Perſon his Neigh-* " *bour*, being the Owner of ſuch Other MESSUAGE OR HOUSE or " ancient *Foundations* ſo being near adjacent or adjoining, by and " according to the Cuſtom of the ſaid City in the ſame City for all " the Time aforeſaid uſed and approved, *well and lawfully may* " might and hath uſed, at his Will and Pleaſure, his *ſaid other* " MESSUAGE OR HOUSE ſo being near adjacent or adjoining, by " Building, *to exalt or erect*, or, of new, upon the Ancient *Foun-* " *dations* of ſuch *other* MESSUAGE OR HOUSE ſo being near adja- " jacent or adjoining *to build and erect a new Meſſuage or Houſe* to " SUCH HIGHTH AS THE SAID OWNER SHALL PLEASE, *againſt* " and *oppoſite* to the ſaid *Lights and Windows* near or contiguous to " ſuch OTHER MESSUAGE OR HOUSE, and by Means thereof " TO OBSCURE AND DARKEN ſuch Windows or Lights: Unleſs " there be or hath been ſome Writing Inſtrument or Record of an " Agreement or Reſtriction to the contrary thereof in that Behalf."

The Return to the other Writ of *Certiorari* was in the ſame Form, and to the very ſame Effect as to the Cuſtom certified by the former; and repeated the Return to the former *Certiorari in totidem verbis*, very nearly: But it went on further, with a *Negation* of the Exiſtence of any ſuch Cuſtom as the Defendant had alledged in his *ſecond* Juſtification. The Additional Part was as follows.

And that in the ſaid City of *London* there is NOT now or ever was any *ſuch* Cuſtom, " That if any One hath a Meſſuage or Houſe in " the ſaid City, near or contiguous and adjoining to an ERECTION " *or* BUILDING or to the ancient Foundations of an ERECTION *or* " BUILDING, in the ſaid City, of another Perſon his Neighbour " there; And the Windows or Lights of ſuch Meſſuage or Houſe " are looking fronting or ſituate towards upon over or againſt ſuch " ERECTION *or* BUILDING or the ancient Foundations of ſuch " ERECTION *or* BUILDING of ſuch other Perſon his Neighbour ſo " being near adjacent contiguous or adjoining; Although ſuch Meſ- " ſuage or Houſe and the Lights and Windows thereof be or were " ancient, Yet ſuch other Perſon his Neighbour, being the Owner " of ſuch ERECTION *or* BUILDING or ancient Foundations of ſuch " ERECTION *or* BUILDING ſo being near adjacent or adjoining, by " and according to the Cuſtom of the ſaid City in the ſame City for " all the Time aforeſaid uſed and approved, well and lawfully may

" might and hath uſed, at his Will and Pleaſure, his ſaid ERECTION *or* BUILDING ſo being adjacent or adjoining, by Building " to *exalt and erect*, or, of new, upon the ancient Foundations of " the ſaid ERECTION *or* BUILDING ſo being near adjacent or adjoining, to build and erect a *new Erection or Building*, to SUCH " HIGHTH *as the Owner ſhall pleaſe*, againſt and oppoſite to the ſaid " Lights and Windows of ſuch Meſſuage or Houſe, and by means " thereof to obſcure and darken ſuch Windows or Lights."

The COURT Ordered the *Certiorari* to be filed, and the *Return* RECORDED.

Note—Nothing of this kind has Actually happened, for many Years paſt, (not even ſince *H.* the ſixth's Reign,) in *this* Court; (though it has, in the Court of Chancery.) And a Conſultation was had in the City, concerning the Sort of Gown which it was proper for the Recorder to put on, to make this *Ore-tenùs* Return: In which Conſultation, it was determined that it ought to be the Purple Cloth Robe, faced with black Velvet; and not his Scarlet Gown, his Black Silk One, nor the common Bar-Gown.

See *Viner's Abridgment*; Title *Cuſtoms of London*, Letter P. *placita* 2 & 4. concerning this Manner of trying the Cuſtoms of *London*; and how to *ſurmiſe* " that they ought to be tried thus, " and not by the Country:" 'Tis in *Vol.* 7. *Page* 246. Note—*Without* ſuch a *Surmiſe*, they ſhall be tried by the Country, as other Iſſues in Fact are.

Rex *verſ.* Strong.

MR. Serjeant *Poole* ſhewed Cauſe againſt quaſhing an Indictment on 5 *Eliz. c.* 4. *ſect.* 31. (for exerciſing a Trade, not having ſerved an Apprenticeſhip therein,) found at the Seſſions for the CITY of *Carliſle*.

Mr. *Norton* had (on 27th *November* 1756) moved to quaſh it, upon an Objection, that the *City*-Seſſions had NO *Juriſdiction*. And He had cited, in Proof of it, The Caſe of *Regina* v. *Taylor*, 2 Ld. *Raym.* 767. Where ſuch an Indictment was quaſhed, " becauſe the " BURROUGH Seſſions had *no Juriſdiction* to take ſuch Indict- " ments." He inſiſted that ONLY the *Quarter*-Seſſions of the COUNTY have Juriſdiction. The Indictment in that Caſe of *Taylor*, was found at the Seſſions for the *Corporation* of *Wells*; and moved hither by *Certiorari*.

Lord *Mansfield*, at the Time of the original Motion, looked into the Act of 5 *Eliz. c.* 4. and said that this Act [§ 39.] expresly gives the Power to Mayors or other Head Officers of *Cities* or *Towns Corporate*, at THEIR Sessions.

And now, upon shewing Cause,

The COURT was unanimously of that Opinion.

The Case of the *Queen* against *Taylor* was in *Easter* Term 1702, 1 *Annæ:* And is *contradicted* by that of *Regina* v. *Franklyn*, in 2 Ld. *Raym.* 1038. which was determined in *Mich.* 3 *Ann.* 1704. though it is in 1 *Salk.* 370, by *Mistake*, put under *Mich.* 3 *Will. & Mar.*

Per Cur. RULE DISCHARGED.

MEMORANDUM.

The COURT was not up till near an Hour after Midnight; though many Rules were enlarged, and many long Motions adjourned over till next Term.

AS the Regulation made by the Court concerning VIEWS took it's *Rise* in *this* Term, it may be proper *here* to state every Thing relative to that Subject; which, *at the Time of this Publication*, is a Practice fully settled.

The Granting of Rules for VIEWS in * *Civil* Causes stands † now settled upon the following Foot.

* *N. B.* 4, 5 *Ann. c.* 16. § 8. does not extend to *Criminal* Cases: So that in *them* there can be no Rule for a View, without mutual Consent.

† In 1765.

GREAT INCONVENIENCE had arisen from the *Abuse* of Views and their being perverted into Means of DELAY, to the intolerable Hindrance of Justice. Some late Instances shewed the Mischief in a glaring Light: And the Example being once set, there was no Doubt it would be followed.

After

After the 4 & 5 *Ann. c.* 16. *ſect.* 8. Views were granted, upon Motion, *of Courſe*. And upon this Act and 3 *G.* 2. *c.* 25. *ſect.* 14. a Notion prevailed "That *Six of the firſt Twelve* upon the Pannel "muſt view and appear at the Trial: If they did not, there could "be no Trial, and the Cauſe muſt go off."

Where either Party wiſhed Delay or Vexation, He moved for a View. A thouſand Accidents might prevent a View, or Six of the firſt Twelve from attending the View, or their attending the Trial. He who wiſhed them not to attend, might by various Ways bring it about. Where a Defendant in Poſſeſſion was well liked, and the Plaintiff a Stranger or unpopular, Gentlemen of themſelves found Excuſes; Eſpecially, if the View was troubleſome and at a Diſtance. Cauſes in ſeveral Counties had at a great Expence been repeatedly carried down, and put off; either becauſe there was no View, or becauſe Six of the firſt Twelve did not attend the View or did not attend the Trial. Though Twelve Viewers ſhould appear at the Trial, yet according to the Notion which prevailed, if *Six of the firſt Twelve* upon the Pannel were not among them, the Cauſe could not be tried.

The Tendency of this Abuſe, to Delay, vexatious Expence and the Obſtruction of Juſtice, was ſo manifeſt, that the Court thought it their Duty to conſider of a Remedy: And in *Michaelmas* Term 1757, and at other Times Lord *Mansfield* informed the Bar to the following Effect, "That they had conferred together upon the "Abuse of Views, and conſidered of a Remedy in the Power of "the Court."

Before the 4 & 5 *Ann. c.* 16. *ſect.* 8. there could be no View till *after* the Cauſe had been brought on to Trial. *If* the Court ſaw the Queſtion involved in Obſcurity which might be cleared up by a View, the Cauſe was put off, that the Jurors might have a View before it came on to be tried again. The Rule for a View proceeded upon the previous Opinion of the Court or Judge, *at* the Trial, "that the Nature of the Queſtion made a View not only "proper, but *neceſſary*:" For the Judges at the Aſſizes were not to give way to the Delay and Expence of a View, unleſs they ſaw that the Cauſe could not be underſtood without one. However, it often happened in Fact, that upon the Deſire of either Party Cauſes were put off for want of a View, upon ſpecious Allegations from the Nature of the Queſtion, "that a View was proper;" without going into the Proof, ſo as to be able to judge whether the Evidence might not be underſtood without it.

This Circuity occaſioned Delay and Expence: To prevent which, the 4 & 5 *Ann. c.* 16. *ſect.* 8. impowered the Courts at *Weſtminſter* to grant a View in the firſt Inſtance, *previous* to the Trial.

As a View *might* be of Uſe, and in *this* Shape was attended with *no Delay* and but little Expence, it became the Practice to grant them *of Courſe*, upon the Motion of either Party.

The 3 *G.* 2. *c.* 25. *ſect.* 14. provides "that *where* a View ſhall be "*allowed*, the Jurors who have had the View ſhall be firſt ſworn, "(or ſuch of them as ſhall appear,) before any Drawing:" Which Means in Oppoſition to ſuch other Jurors as are to be drawn by *Ballot*; and *not* to eſtabliſh "that Six at leaſt of the *firſt Twelve* "ſhall be ſworn."

Upon a ſtrict Conſtruction of theſe two Acts, *in Practice*, the *Abuſe* which is now grown into an intolerable Grievance has ariſen.

Nothing can be plainer than the 4 & 5 *Ann. c.* 16. *ſect.* 8. The Courts are *not bound* to grant a View, of *Courſe:* The Act only ſays "they *may* order it, where it ſhall *appear to them* that it will "be *proper and neceſſary*."

It is infinitely better that a Cauſe ſhould be tried upon a View had by *any Twelve*, than by *Six* of the *firſt* Twelve; or by *any Six*; or by *fewer* than Six; or even without any View at all; than that the Trial ſhould be DELAYED *from Year to Year*, perhaps for ever: It can never be *proper or neceſſary* to grant a View which is aſked and uſed for ſo *unjuſt* a Purpoſe.

There have been Inſtances of great Cauſes put off for Years: And though even nine ten or eleven Viewers have attended, yet upon Objection "that they were not Six of the *firſt Twelve*," the Cauſe has been put off, and a View moved for, as of Courſe, again, by the Party who had availed Himſelf of ſo glaring a Chicane.

WE are All clearly of Opinion that the Act of Parliament meant a View ſhould not be granted, *unleſs* the Court was *ſatisfied* that it was PROPER AND NECESSARY.

The *Abuſe* to which they are now perverted makes this Caution our indiſpenſable Duty: And therefore upon every Motion for a View, We will hear both Parties, and examine (upon all the Circumſtances which ſhall be laid before Us on both Sides) into the *Propriety and Neceſſity* of the Motion; Unleſs the Party who applies will conſent to and move it upon *Terms* which ſhall prevent an unfair Uſe being made of it, to the Prejudice of the other Side and the Obſtruction of Juſtice.

His Lordſhip deſired the Gentlemen of the Bar to think of it; and, if any Objections ſhould occur, to mention them.

The Expedient propoſed by the Court was univerſally approved.

The firſt Inſtance happened in *Hilary* Term 1757, in a great Cauſe between *Pierce* and the Earl of *Faulconberg* and Others; which was an Iſſue out of Chancery, often tried at *Durham* by Special Juries, and now ordered to be tried at Bar by a Special Jury from *Yorkſhire*. (See the Rule at large, together with the *Addition* of the Conſent-Part, *infra*, *pa.* 256, 257.)

Subſequent to this, was the Cauſe of the Earl of *Darlington* v. *George Bowes*, Eſq; which was an Iſſue out Chancery, and had been thrice carried down to be tried at *Durham* (where there are Aſſizes only once a Year) at a great Expence, and every time put off by the Defendant, upon Objections on Account of the View. Once, nine Viewers appeared: but they were not Six of the firſt Twelve. Another Time, only four Viewers appeared at the Aſſizes. In 1757, a View was granted, by mutual Conſent, upon Terms: But by an Accident (of a Fall from his Horſe) the Judge of Aſſize was prevented from trying it. The Defendant *Bowes* moved, in *Trinity* Term 1758, for a View; but refuſed to renew his former Conſent, or to come into any Terms; inſiſting that by Law He was intitled to a View, of Courſe. The Plaintiff had likewiſe moved for a View; conſenting to the Terms. Both Motions were adjourned to the laſt Day of the ſame *Trinity* Term 1758: When the Court, upon all the Circumſtances, rejected the Defendant's Motion, unleſs he ſhould conſent (within a Week) to the Terms propoſed. He would not conſent. The Cauſe came on to be tried at *Durham*, without a View, before Mr. Baron *Smythe*. It happened, many of the Jurors had viewed, upon ſome of the former Occaſions. A Verdict was given, for the Plaintiff, to the Satisfaction of the Judge. The Defendant moved the Court of Chancery for a new Trial; becauſe He had been refuſed a View; and becauſe it might be fit to have another Trial, before his Inheritance was bound. Mr. Baron *Smythe* certified "that he was ſatisfied "with the Verdict"; and alſo, "that a View was totally unneceſ- "ſary, there being no Diſpute concerning the Locality Diſcrimi- "nation or Limits of the Premiſſes, but merely a Queſtion To "Whom certain Lands belonged." The Court of Chancery thought proper to grant another Trial; but approved the denying a View, *unleſs* he renewed his Conſent; and made it Part of the Order for a New Trial, "that He *ſhould* conſent to the Terms." It was again tried, before Mr. Juſtice *Bathurſt:* And a Verdict was found for the Plaintiff,

Plaintiff, to his Satisfaction. The Defendant moved the Court of Chancery for a new Trial: Which was refuſed.

Had not the Court put a *Check* to granting Views, from Time to Time, as of *Courſe*, a rich Defendant, conſcious that the Merits were againſt him, might, from Pique or Humour or Litigiouſneſs, have kept off the Cauſe as long as he lived, for want of a View, upon a Queſtion where a View could not be of the leaſt Utility.

The Wiſdom and Fitneſs of what the Court had done to regulate Views was ſo fully manifeſted upon the Occaſion of this Cauſe, and appeared to be ſo well juſtified by the Authority given them by the Act of Parliament and by every Principle of Juſtice and Convenience, that no Party has ever ſince moved for a View, without conſenting to the Terms: And it is found in Experience, that Views are * now regularly had, and a competent Number of Viewers appear at the Trial. A View is not asked † now, except in Caſes where it may probably be of uſe: And as the Non-Attendance of Viewers can now gratify neither Party, Both concur in wiſhing the Duty performed.

* At the Time of this Publication, (1765.)
† *V. ſupra.*

The Rule that was made in the firſt Inſtance that happened after the Expedient was propoſed by the Court, and was received with general Approbation as is above mentioned, was drawn up in the following Words.

* 29th *January* 1757.

" * *Saturday* next after 15 Days of St. *Hilary* in the 30th Year " of King *George* the 2d."

" *Pierce*, Eſq; *v.* Earl *Faulconberg* and Others.

" By Conſent of Counſel on both Sides, It is ordered, that there " iſſue a Writ of *Diſtringas Juratores* to be directed to the She- " riff of the County of *York*; in which ſhall be contained a Clauſe " commanding the ſaid Sheriff to have Six or more of the firſt " Twelve of the Jurors to be impanelled and returned to try the " Iſſue between the Parties, at the Place in Queſtion, before the " Time of the Trial of the ſaid Iſſue, to wit, upon, *&c*; And that " *B. R.* on the Part of the Plaintiff, and *T. W.* on the Part of the " Defendants, ſhall attend on the ſame Day and ſhew the Matters " in Queſtion to the ſaid Six or more of the firſt Twelve of the " ſaid Jurors; And that the Expences of taking the ſaid View ſhall " be equally born by both Parties: And no Evidence ſhall be given, " on either Side, at the Time of taking thereof."

" * And

* " And by the like Conſent, It is further ordered, that in caſe " no *View* ſhall be had; Or if a View ſhall be had by any of the " ſaid Jurors, (whether they ſhall happen to be any of the *twelve* " Jurors who ſhall be first *named* in the ſaid Writ, or not;) yet " the ſaid Trial ſhall proceed; And *no Objection* ſhall be made on " either Side, either for *want* of a View, or that a View was not " had by any of the *twelve Jurors firſt* named, or for that it was " not had by any *particular Number* of the Jurors named in the " ſaid Writ, or for want of a *proper Return* to the ſaid Writ.

" On the Motion of Mr. *Norton*, of Counſel for the Plaintiff; " and Mr. *Gould*, of Counſel for the Defendants."

The Cauſe was tried at the Bar, on the 7th of *May* 1757: And a full Jury of Viewers appeared.

The above recited Rule was for a View to be had by a *Special* Jury; and was made abſolute at once, being conſented to by both Parties: But during the Remainder of the ſame Term (of *Hilary* 1757,) and alſo during the three following Terms (of *Eaſter*, *Trinity* and *Michaelmas* 1757,) The Court, upon proper Affidavits granted like Rules (*mutatis mutandis*) in Caſes that were to be tried by *Common* Juries; making them only to ſhew Cauſe, not abſolute in the firſt Inſtance. The next Term (*Hilary* 1758,) They made ſome of them, to ſhew Cauſe; Others, abſolute in the firſt Inſtance; but none without proper Affidavits. Soon after, *viz.* in *Trinity* Term 1758, They made all theſe Rules abſolute in the firſt Inſtance; Some, upon Affidavit; Others, as of Courſe: Since which Time, they are become Motions of Courſe, without Affidavit.

The Form of them is as follows—

If the Trial is to be by a *Special* Jury, the Rule runs thus—

" It is ordered that there iſſue a Writ of *Diſtringas Juratores*, " *&c. &c.*—taking thereof:" [in the Words of the *firſt* Clauſe of the above recited Rule between *Pierce* and Lord *Faulconberg* and Others.] The *additional* Clauſe is expreſſed in theſe Terms— " The Plaintiff, [or the Defendant, *viz.* the Party who prays the " View"] conſenting that in caſe *no* View ſhall be had; Or if a View " ſhall be had by *any* of the ſaid Jurors, whether they ſhall happen " to be any of the *twelve* Jurors who ſhall be *firſt* named in the " ſaid Writ, or not; Yet the ſaid Trial ſhall proceed; And no Ob-

* Note—The former Clauſe of this Rule was in the *uſual* Form of Rules for Views, where the Trial was to be by a Special Jury.
But this latter Clauſe (" And by the like Conſent it is *further* ordered, *&c.*") was *now firſt added.*

" jection ſhall be made, on either Side, on Account *thereof*, or for " *want of a proper Return* to the ſaid Writ."

The Rule for a View, where the Cauſe is to be tried by a *Common* Jury could not continue the ſame, *ſince* the ballotting Act (3 *G.* 2. *c.* 25.) as it was *before*; nor could it be *exactly* like to that for Views by *Special* Juries, (by reaſon of the particular Directions given by the 14th Section of the balloting Act:) But it uſed to run much like it, only *mutatis mutandis*. The *preſent* Form (*ſince* that Act,) is this—" It is ordered that there iſſue a Writ of *Diſtringas* " *Juratores*, to be directed to the Sheriff of the County of *Y.* in " which, ſhall be contained a Clauſe commanding the ſaid Sheriff " to have Six or ſome greater Number of *the* * *Jurors* to be im- " panelled and returned to try the Iſſue between the Parties, † *Who* " *ſhall be mutually conſented to by the ſaid Parties or their Agents*, at " the Place in Queſtion, before the Time of the Trial of the ſaid " Iſſue, to wit, upon, *&c*; And that *R. R.* on the Part of the " Plaintiff, and *T. W.* on the Part of the Defendant, ſhall attend " on the ſame Day, and ſhew the Matters in Queſtion to the ſaid " Six or ſome greater Number of the ‡ *ſaid Jurors*, *who ſhall be* " *mutually conſented to as aforeſaid*; And that the Expences of " taking the ſaid View ſhall be equally born by both Parties: And " no Evidence ſhall be given, on either Side, at the Time of " taking thereof."

* *N. B.* This Act (of 3 *G.* 2.) does not require them to be Six *of the firſt Twelve*.

† Theſe Words are taken from the ſame Act of Parliament *ſect.* 14.

‡ *V. ſupra*, Note (*) (†).

The *Additional* Clauſe, now added to this Rule, is in theſe Words—" The Plaintiff," or " The Defendant," [the Party at whoſe Inſtance the Rule is prayed] " CONSENTING that in Caſe NO *View* " ſhall be had; Or if a View ſhall be had by ANY of the Jurors, " whether they ſhall happen to be Six § *or any particular Number* " *of the Jurors* § *who ſhall be ſo mutually conſented to as aforeſaid*; " Yet the ſaid Trial ſhall proceed; and no Objection ſhall be made, " on either Side, on Account *thereof*, or for *want of a proper Re-* " *turn* to the ſaid Writ."

§ *V. ſupra*, Notes * & †.

The End of *Hilary* Term 30 *Geo.* 2. 1756.

Eaſter

Eaſter Term

30 Geo. 2. B. R. 1757.

Three Judges preſent, *viz.*

Lord Mansfield,
Mr. Juſt. Deniſon, *and*
Mr. Juſt. Foſter.

(Lord Commiſſioner *Wilmot* abſent, in Chancery.)

Cooper *verſ.* Marſhall.

Friday 29th *April* 1757.

THIS Caſe was the ſame Point with a Caſe of *Cope* v. *Marſhall*, which had been formerly twice argued, (*viz.* on 28th *June* 1754, and 31ſt *January* 1755.) Both of them ſtood now in the Paper for Argument; The preſent Caſe having been never argued at all, and the other having never been argued either before Lord *Mansfield* or Mr. Juſtice *Wilmot*.

This Caſe of *Cooper* v. *Marſhall* ſtood firſt in the Paper, and came on firſt. It was an Action of Treſpaſs for breaking entering and *digging up* the Plaintiff's *Cloſe*, and *filling up and ſpoiling the Coney-burrows* there *&c.* And there was a 2d Count for doing the like in the Plaintiff's *Free Warren*.

Several Pleas were pleaded, by Leave of the Court.

Plea—As to the 1ſt Count was a Juſtification under a *Right of Common* in 20 Acres *&c.* And that the Coney-Burrows were wrongfully unlawfully and injuriouſly newly-erected and kept up there:

By reaſon whereof the ſaid Common was *ſurcharged and ſpoiled*; So that the Defendant could not enjoy *ſufficient* Common in the ſaid 20 Acres as of Right he ought. And therefore He juſtifies the breaking entering and *digging up* the Plaintiff's Cloſe, and *filling up and ſpoiling* the Coney-Burrows, as it was lawful for Him to do, in order to abate the *ſaid Nuſance*.

There was alſo a ſecond Juſtification, much to the ſame Effect.

To the 2d Count—Were Two Juſtifications not much different from the former.

The Plaintiff demurs to theſe Pleas: And the Defendant joins in the Demurrer.

Mr. *Moreton pro Quer.*—The Juſtification ariſes merely from the Plaintiff's having *ſurcharged* the Common: And the Wording of the Plea cannot alter the Matter and Subſtance of it. So that the Defendant's *calling* it a NUSANCE will not *make* it ſo: But it really is a *mere Surcharge of Common*. Therefore the Word "NUSANCE" is here miſapplied.

And He cited *Cro. Jac.* 446. The Caſe of *Fowler* v. *Sanders*: Where the Preſcription was treated as a Preſcription to make a Nuſance, though not ſo expreſſed in *Terms*.

But it is not an illegal Act, for the Lord to *place Conies* upon his *own* Land; though the Land be liable to Right of Common. They are Beaſts of Warren, and profitable to the Lord: And the Commoner *cannot chaſe and kill* them.

Bracton, Lib. 4. 221. makes a Difference between a Nocumentum *juſtum*, and a Nocumentum *injurioſum*.

Fleta, Lib. 4. *c.* 26. *de Nocument' Servitutibus injurioſis*, makes the like Diſtinction: "Nocumentorum aliud, injurioſum *et* dampnoſum; et aliud, dampnoſum et *non* injurioſum."

Theſe Authorities ſhew that the Injury ariſes *only* from the *Exceſs*.

And the Commoner has *no ſuch* Remedy, as the Defendant here relies on.

The Queſtion therefore is "Whether the Commoner has a Right "to DIG UP *the Lord's Soil*; in Order to preſerve his Right of Com-"mon."

The Lord cannot indeed *totally deſtroy* the Commoner's qualified Intereſt, contrary to his own Grant. Yet the Lord has Rights *compatible* with the Commoner's Right: And theſe are legal in their *own Nature*; though they may *become* injurious, by *Exceſs*.

On which Head, he cited *Fleta*, *Lib.* 4. *Pa.* 253. [*V. Pa.* 252, 253, in *Cap.* 18. *de pertinentiis.*]

But this Juſtification puts the latter Caſe upon the ſame Foot with the former: Whereas the Commoner's Remedy is, *really*, adequate only to the Injury done to Him. Now a Surcharge of Common is of the latter kind of Injury: And yet He here claims a Right *to dig up* the Soil and *deſtroy* the Conies. So that the Remedy claimed by the Juſtification EXCEEDS *the Injury done*. And indeed it would go further than a Judgment upon a Writ of Admeaſurement would carry it: for which, He referred to *Fitzh. Nat. Brev.* 295. [276] and *Weſtm.* 2. *c.* 8. [13 *E.* 1.] There, the Tenant who is guilty of a ſecond Surcharge ſhall only pay Damages, and forfeit the Overcharge to the King: Whereas what is here claimed, is a *total Confiſcation* of the Lord's Property, for his firſt Injury done to the Commoner.

Authorities in Point, or nearly ſo, " that the Commoner cannot " do this," are *Godbolt* 122. *Coney*'s Caſe, *H.* 29 *Eliz.* which is full in Point: And the Principal Reſolution is confirmed by 4 *Leon.* 7. *Ould* and *Conye*'s Caſe S. C: In which Caſe it was adjudged " That the Commoner cannot kill or *deſtroy* the Conies which de- " ſtroy his Common:" But it appears by *Godbolt*, that " He may " have other Remedy. And *per Suit* Juſtice, he may have an " Action of the Caſe or Aſſize, againſt the Lord, for putting in " the Conies, if he has not ſufficient Common left." Indeed it is ſaid in 1 *Leon.* 7. " That He hath *not* any *other* Remedy." But *Fleta*, *Lib.* 4. *c.* 23. *de admenſur. Paſturæ*, *pa.* 262, 263. juſtifies Mr. Juſt. *Suit*'s Opinion, " that He *has* Remedy;" *viz.* either Admenſuration, or Aſſize of Novel Diſſeiſin.

A Commoner cannot even *diſtrain* the Lord's Beaſts which ſurcharge a Common. For which Poſition he cited *Godbolt*, *ut ſupra*, *Pa.* 124. as an Authority. [*V.* what is there ſaid *per Godfrey*, *arguendo*; but not any part of the Reſolution of the Caſe.] Much leſs, then, can he *deſtroy* them.

Cro. Eliz. 876. *P.* 43 *Eliz.* The Caſe of *Bellew* v. *Langdon* the ſame Point, and adjudged accordingly; " that the Keeping of Co- " nies by the Owner of the Soil is lawful; And the Killing them, " unlawful." And *Owen* 114. S. C. there called the Caſe of *Pellin* v. *Langden*, S. P. accordingly: Which adds, that the Owner of the

Soil may make a Fiſh-pond upon the Common; and that the Commoner could not deſtroy it.

Yelv. 104. *Hoddeſdon Mil.* v. *Greſil, M.* 5 *Jac. B. R*; and *Cro. Jac.* 195. *P.* 5 *Jac.* S. C. there called *Hadeſden* v. *Griſſel*; It was adjudged "That the Commoner cannot *kill* nor *chaſe* the Lord's "Beaſts off of the Common; But his Remedy is by Aſſize, or "Action on the Caſe."

Agreeably to this Reſolution—In a Caſe in *Cro. Jac.* 229. *M.* 7 *Jac.* 1. there called Sir *Jerom Horſey* v. *Hagberton*, a Plea very like the preſent, was over-ruled without Defence. The Caſe really was between Sir *Jerome Horſey* and *Mead and Havor and his Wife*. The Juſtification was, "of *levelling the Coney-burrows*, and *laying them* "*ſmooth and even with the Ground*:" And the Reaſon given for doing it, was, "that *uti non potuit* his Common, *prout debuit*." Adjudged, without Argument, "that the Commoner could *not* do "this."

After this, the Commoners tried their Chance again, by altering their Manner of Pleading. This was in the Caſe in 2 *Bulſtr.* 116. *Carrill* v. *Pack and Baker*, *Tr.* 11 *Jac.*

Here, the Coney-burrows were treated, by the Juſtification, as *Holes* made upon the Common, by the Plaintiff, into which the Commoners Sheep fell, and that the Sheep of the Commoners often *fell into* thoſe Holes, and were thereby *loſt*: And *therefore* they juſtify the *chaſing* the Conies, and *digging and filling up* the Burrows.

And agreeably to this Caſe, the Pleading in the preſent Caſe is, "That the Plaintiff erected Coney-burrows, *&c.*"

In that Caſe, all the Caſes and Arguments were urged: And yet it was adjudged againſt the Defendant; who had juſtified the *Chaſing* the Conies, and *digging down* the Burrows and *filling up* the Holes.

Since which Time, the Grand Point has never come in Queſtion.

Mr. *Aſton pro Def*.

In the firſt Place, it does *not appear* that the Defendant *did* KILL any of the Conies: though Mr. *Moreton* would ſuppoſe that to be implied in his digging and filling up the Burrows.

The

The Lord may feed or depaſture the Common, I agree: And the Commoner cannot *kill* or *chaſe* his Cattle.

But it does not follow that where *Neceſſity* obliges the Commoner to *abate a* NUSANCE, he may not do it.

And Surcharging a Common with Rabbets in a great Degree, is a private NUSANCE.

1 *Hawk. Pl. Cor.* 197. *c.* 75. treats of Common Nuſances, and how they may be removed. And He ſays "that any One prejudiced "by a private Nuſance may deſtroy it." *Pa.* 199. § 12. is expreſs.

2 *Rol. Abr. Tit. Indictment*, Letter Q. *Nuſance*, *Pl.* 7, 8. A Preſentment of a Surcharge of Common is not good: Becauſe it concerns a private Intereſt. The ſame, of an Incloſure of Common, in Nuſance of the Commoners.

Bracton, Lib. 4. *c.* 21. *Pa.* 221. ſhews that though the Act was *legal at firſt*, the *Exceſs makes it a Nuſance.*

But here the 2d Plea is "That the Lord has erected ſo many "Coney-burrows that the Commoner had *not ſufficient* Common "left." And this Fact is *admitted* by the Demurrer Therefore the Lord has broken through the Bound of Right between the Lord and the Commoner.

The Lord cannot incloſe or build upon the Common.

And there are no *Degrees* of Inſufficiency: The only Queſtion is "Whether there be or be not ſufficient Common left:" As in the Caſe in 2 *Mod.* 7. *Smith* v. *Feverel.*

And the Commoner may in ſuch Caſe abate the Nuſance. 2 *Inſt.* 88. is in Point. 15 *H.* 7. 10. *b.* is alſo in Point. He may ALSO, indeed, if he chooſes it, bring an Action of Treſpaſs or Aſſiſe. But he *may* abate them, *without* Suit. *Hale's Analyſis* 110. [*V. pa.* 125. § 42.] *Robert Mary*'s Caſe, 9 *Co.* 112. *b.* affords the Reaſon: *Viz.* the preventing Multiplicity of Suits.

As to the Doctrine of the Commoner's not meddling with the *Soil.*

The Lord could approve *before* the Statute of *Merton.* 1 *Ro. Rep.* The Caſe of *Sir S. Proctor* v. *Sir J. Mallorie*; *per Coke*; and agreed

agreed to by the Lord Chancellor. *Fitzh.* Title *Approvement*, (there cited.)

And this appears too by the Writ of *Quod permittat*. *Bracton*, *Lib.* 4. *pa.* 227. *b.* (the Writ there) ſhews that the Commoner might pull down Pales *&c.* 2 *Inſt.* 88. *ad idem.*

This is like all other Caſes of Nuſance: A Perſon *may abate* a Nuſance to his Property, though upon the Land of another. 9 *E.* 4. 35. *a.* is ſo.

As to Mr. *Moreton*'s Caſes—There is no material Difference between deſtroying a *Hedge*, and deſtroying a *Coney-burrow*. Now 2 *Mod.* 65. The Caſe of *Cæſar* v. *Maſon* is in Point, "That the "Commoner may proſtrate and abate a *Hedge*:" And ſurely that is meddling with the *Soil*.

And there *may* be Caſes where the Commoner may chaſe off the Lord's Beaſts: As ſuppoſe they are infected.

As to *Cony*'s Caſe, it was very different from the preſent: For there the *Killing and carrying away* was juſtified: Whereas We do not juſtify Killing, chaſing, or taking away.

So, the Caſe of *Bellew* v. *Langden* was *Killing*. There was no Pretence of any Surcharge of Common. It is a Juſtification of Killing the Conies as being Damage-feaſant: And it's only adjudged there "that the Killing them was unlawful."

So *Yelv.* 104. was *chaſing* and *killing*.

And in thoſe Caſes, there *might be ſufficient* Common left, for aught that appears to the contrary, in any One of them.

Sir *Jerome Horſey*'s Caſe is not like this. That is for breaking a *Warren*: And the Coney-Burrows there are not ſaid to be *newly* erected. And it was done *to prevent* the Coney-Burrows increaſing, *ſo as to be* a Nuſance: Not averring "That they were *then* a Nu-"ſance."

Whereas here it is averred *to be* a Nuſance, and a *new* Erection.

As to the Caſe of *Caryl* v. *Pack and Baker*—'Tis for entring the Plaintiff's Free Warren, and digging the Land. And there, in the Juſtification, it is alledged to be done for the BETTER *Preſervation* of the Common. And the free Warren is admitted: And therefore he could not juſtify the *killing &c.*

As to a Pond—If it was ſo large as not to leave ſufficient Common, it would be a Nuſance, and *might* be abated.

1 *Lutw.* 101. The Caſe of *Haſſard* v. *Cantrell* (which was mentioned on a former Argument) was only "that the Commoner "could not enjoy his Common *in ſo beneficial and ample* a Man-"ner as before." But it does not ſay, as here, "that there was "*not ſufficient* Common left:" Which is going a great deal further than that Caſe does.

Mr. *Morton* in Reply—

Mr. *Aſton* agrees that the Act of the Lord is *legal.* Therefore it is not like Acts which are againſt his own Grant; or Caſes which become *manifeſta Diſſeiſina.*

"*Ulterius* Nocumentum" imports a *preſent* Nuſance—

LORD MANSFIELD ſtopped Mr. *Morton* in his Reply.

"Whether it be or be not *hurtful*;" or "how far it may be "ſo;" is not the Queſtion: The Queſtion turns upon the REMEDY; "Whether it is *Abatable*; Whether the Commoner can "do *Himſelf* Juſtice."

It may be *Prejudicial* to the Commoner, yet not *Injurious:* It may be both *Prejudicial and Injurious,* yet not *Abatable.*

The Lord, by his Grant of Common, gives *every Thing incident* to the Enjoyment of it, (as Ingreſs, Egreſs, *&c*;) And thereby *authorizes* the Commoner to remove every Obſtruction to his Cattles Grazing the Graſs which grows upon ſuch a Spot of Ground: Becauſe every *ſuch* Obſtruction is directly *contrary* to the Terms of the Grant. A *Hedge,* a *Gate,* or a *Wall,* to keep the Commoner's Cattle *out,* is *inconſiſtent* with a Grant which gives them a Right *to come in.*

But the Lord ſtill remains *Owner of the Soil*; and is not debarred from exerciſing any *Act of Ownerſhip.*

The *Commoner* has no Right to meddle with the SOIL.

The *true Diſtinction* is taken in the Caſe of *Maſon* v. *Cæſar* in 2 *Mod.* 66: Where the Court was of Opinion "that the Defen-"dant, a Commoner, *might* abate the *Hedges*; FOR thereby He "did *not* meddle with the SOIL, but *only* pulled down the *Erection.*"

The *Hedge* ſtopped the Commoner from entering, and putting in his Beaſts. The Grant gave Him Leave to enter, and put in his Beaſts: Therefore it *virtually authorized* Him to remove any Obſtruction *directly repugnant* to that Liberty.

But in the preſent Caſe, the Lord has done *nothing contrary* to the Grant: He has *not obſtructed* the Commoner from entering and putting in his Cattle.

The Lord has a *Right* to put *Conies* upon the Common: As appears from the Caſe of *Carrill* v. *Pack* and *Baker*, in 2 *Bulſtr.* 115, 116.

The Conies themſelves naturally make the *Burrows*. So that they are *incident* to the Right of putting on the Conies.

If the Lord ſurcharges, the Commoner is *injured* in his Right of Common, it is true: But what is the Commoner's *Remedy?* Not, to *abate: Not* to be his *own Judge*, in a complicated Queſtion, which may admit of Nicety to determine.

There is a certain *Line* to be drawn: The Lord has a Right *ſo far*; but *no further*. Yet the Commoner cannot *deſtroy* or *drive off* the Conies: Nor, conſequently can he *deſtroy the* Burrows; which is, in Effect, deſtroying the *Conies*.

This is founded upon Reaſon, and upon many Authorities.

Sir *Jerome Horſey*'s Caſe. [*V. ante*, 262.] 2 *Bulſtr.* 115, 116. The Caſe of *Carrill* v. *Pack* and *Baker* [*V. ante*, 262.]

And it's being a *Free Warren* makes no Difference.

So that the Queſtion is not, "Whether this be an *Injury*": but, "Whether it is abatable."

I think it ſo clear a Caſe, that I have no Difficulty at all about it.

Mr. Juſt. *Deniſon* declared the ſame Thing: And He ſaid He ſaw no Difference between this Caſe, and the Caſes cited; but *merely* in the *Expreſſion*, *viz.* that in this Caſe it is treated as a *Nuſance*; which is not the Expreſſion, in them. But this *Form of Expreſſion* makes no Difference.

Upon this Record, it muſt be taken, "that the Plaintiff was "*Owner of the Soil*, and *had a Free Warren*; and that there is *not*

" *ſufficient Cammon left*, (by the Increaſe of the Conies) for the uſe " of the Commoner."

The Queſtion then is, " Whether the Commoner ſhall be in- " truſted to *deſtroy the* ESTATE of the Lord, in order to preſerve " his own *ſmall Right* of Common."

1 *Rol. Abr.* 405. *pl.* 2. gives the *Reaſon* why the Commoner cannot * kill the Conies, but ought to bring his Aſſize or Action; *viz.* " becauſe he cannot be his *own Judge*."

* Yet *Roll* ſays, " Dubi- " tatur."

So here, this Juſtification would make him a Judge in his own Cauſe. No: Let him take his *proper Remedy*.

This is plain Reaſon; even if it was *not* ſupported by Authorities: But the Caſes are alſo ſtrong, to prove it.

The only Point of this Caſe turns upon theſe Pleadings CALLING it a *Nuſance*.

But this will *not* MAKE it a Nuſance *abatable by the Defendant Himſelf*; nor can it alter the *Law*.

In Sir *Jerome Horſey*'s Caſe, *Cro. Jac.* 229. It was adjudged " that the Commoner has no other Intereſt than to take the Com- " mon, by feeding his Cattle there: And *may not deſtroy* the Co- " nies nor Coney-burrows."

A Coney-burrow is *not*, of it's *own Nature*, a Nuſance: On the contrary, it is eſſential to a free Warren.

Therefore the *Nuſance* depends upon the *Number* of them: And You can, at the utmoſt, only abate *ſo much* of the Thing as *is* a Nuſance. You can not deſtroy the *Whole*, (which is the Right here claimed;) but only *ſo much* of the Thing as *makes* it a Nuſance.

In 1 Sir *J. S.* 688. In the Caſe of *Rex* v. *Papinneau*, Lord Ch. Juſt. *Raymond* expreſsly declares ſo. Suppoſe a Man builds his Houſe up ſo high, as to be a Nuſance to his Neighbour, by obſtructing his Lights or in any other Reſpect ariſing from it's *Exceſs*; You can't deſtroy the *whole* Houſe; but only *ſo much* of it as by *its Exceſs* above what is allowable, conſtitutes the Nuſance.

Mr. Juſt. *Foſter* was of the ſame Opinion.

This Juſtification is clearly bad. It is founded on a Claim of Right which cannot be maintained.

It

It is admitted "that a Commoner can not, in this Caſe, *deſtroy* the *Conies*." Conſequently, He cannot deſtroy the *Burrows:* For the Effect is deſtroying the Conies.

If the Lord has exceeded the Bounds of his Right, the *Law* is to determine the *Quantum* of ſuch *Exceſs*; and to the Law the Commoner muſt reſort for his Remedy, if He is aggrieved.

Per Cur. unanimouſly
JUDGMENT for the PLAINTIFF.

See the next Caſe—The ſame Point.

Cope *v.* Marſhall.

H. 27 *G.* 2. *Rot'lo.* 145.

THIS being the ſame Point with the laſt preceding Caſe of *Cooper* v. *Marſhall*,

THE COURT without argument at this Time, (but this very Caſe
* *V. ante* 259. had been argued twice before, * though not before Lord *Mansfield* and Mr. Juſt. *Wilmot*,) gave the like Judgment as laſt above, *viz.*

JUDGMENT for the PLAINTIFF.

Hope, ex dimiſſ. Brown et Ux. *v.* Taylor.

THIS came on, upon a Caſe ſtated, upon the Trial of an Ejectment.

The Caſe ſtated was this—

Robert Johnſon, ſeiſed in Fee *(inter alia)* of a *Copyhold* of Inheritance, and having firſt ſurrendered to the Uſe of his Will, deviſed to *John Wedgeborough*, his Siſter's eldeſt Son, his Houſe in the Brook with the Out-buildings; and 30*l.* to be paid within Twelve Months after his Deceaſe; To his Nephew *Robert Taylor*, 50*l.* to be paid within Twelve Months after his Deceaſe; To his Nephews *Charles Taylor*, *Robert Taylor* and *William Taylor*, his Siſters three Sons, 29 Acres of Arable and Meadow Land bought of *B*; not to be parted but to part the Rent equally between them; then, to WILLIAM

TAYLOR, his Siſter's Son, the Houſe in queſtion, by the Deſcription of "his Houſe on the Green; with the Ground and Out-"houſes thereto belonging;" And gives him alſo 10 *l*; And to his *Brother-in-Law Charles Taylor* 5 *l*: And He directs the ſaid Legacies to be paid *within* 12 *Months* after his Deceaſe; And declares his Will and Meaning to be "That *if either* of the Perſons be-"fore named *die without Iſſue* lawfully begotten, then the ſaid "LEGACY ſhall be divided equally between *them that are left alive*."

Note—It was ſtated that the Teſtator had *five* Houſes in all: And that the Will begun with this Expreſſion, "As to ALL "*my worldly Eſtate &c.*" And it concludes thus, "And all "the REST of my Houſes, Goods, Lands, and Cattle, I give "to my Kinſwoman *Elizabeth Wedgeborough*; and make "Her my ſole Executrix."

The Teſtator died ſeiſed of the ſaid five Houſes and Lands.

William Taylor entered, and was admitted, and enjoyed till the 13th of *June* 1755; when He died, leaving the Defendant *William Taylor*, his only Son and Heir at Law.

The Wife of *Brown*, the Leſſor of the Plaintiff, is Heir at Law to the Teſtator; And, as ſuch, brought this Ejectment, againſt the Defendant *William Taylor* the Son, who claims as Tenant in Tail.

In this Caſe, there are made

TWO POINTS, which are [in Subſtance]

1ſt. What Eſtate *William Taylor*, the Deviſee, took by the Will; *viz.* Whether an Eſtate *Tail*, or for *Life* only.

2dly. If only an Eſtate for Life, then Whether the Reſiduary Clauſe did not carry the *Reverſion in Fee*, to the *Reſiduary Deviſee*: (In which Caſe, the Heir at Law could have No Claim.)

Mr. *Clayton* for the Leſſor of the Plaintiff, the Heir at Law.

To the 1ſt Queſtion, He argued that *William Taylor* the Defendant's Father, took only an Eſtate for *Life*; not an Eſtate Tail.

The Deviſe is only to *William Taylor Himſelf*; without any *further* Limitation whatſoever.

The ſubſequent Words are, "that if either of *&c.* ſhall die "without Iſſue, then the ſaid LEGACIES to be divided amongſt "the Survivors."

Now the Word "LEGACIES" will be ſatisfied by the *Money*-Legacies: And there were *Four* Money-Legacies before given. Therefore this Clauſe ſhall not be extended to the Deviſe of *real* Eſtate. For an Heir at Law ſhall *not* be diſinherited, by *doubtful* Words, or by *Implication*.

2d Queſtion, Upon the *Reſiduary* Clauſe.—

The Reſiduary Clauſe does *not* carry the *Reverſion in Fee* of theſe Premiſſes in queſtion, to *Elizabeth Wedgeborough*.

There were OTHER *Lands* beſides theſe, for the Words to operate upon: And theſe Words here are, "all the *Reſt* of my Houſes "Lands *&c.*"

3 *Peere Wms.* 56. The Caſe of *Cheſter* v. *Cheſter* was a Caſe, (and many other Caſes might be mentioned,) where there were *no other* Lands for the Words to operate upon.

But here He had FIVE Houſes; And *only* 3 were deviſed: So that "*Reſt*" means his *other* Houſes.

But (What goes to both Points—)

This was *Copyhold*; And he had likewiſe *Freehold* Lands, diſtinct from the Copyhold: And therefore the Copyhold not being *particularly* named, the Words of the Deviſe ſhall only extend to the *Freehold*. Which is fully proved by two Reſolutions in *Caſes in Equity abridged*, *pa.* 124. *pl.* 13. *&* *pl.* 14.

Mr. *Nares pro Defend'*.

He made the ſame two Points, with Mr. *Clayton*.

1ſt. The Teſtator had no Child, but ſeveral Nephews; *viz.* *J. W.* his Siſter's Son by a former Huſband, and 3 Nephews *Taylors*, her Sons by a latter Huſband: And He gives Houſes and Legacies amongſt them, in different Proportions.

The Word "LEGACY" relates, and the Teſtator intended it to relate, to the Houſes, *as well as* to the Money-Legacies. He could never intend to give ſuch a Trifle as the *Intereſt* of 5 *l.* to his Brother-in-Law, for his Life only. And it may be obſerved, that if this *Charles Taylor*, the Teſtator's Brother-in-Law, (one of the Legatees above named) ſhould happen to die *without Iſſue*, the other 3 Legatees (his 3 *Sons*) muſt conſequently be dead too: And then there would be *no Body* left alive, to divide it amongſt.

And

And if the Word "LEGACY" relates to the *real* Eſtate, it is a clear Eſtate Tail in *William Taylor*. (Which Poſition Mr. *Clayton* agreed to.)

2d Queſtion—The Will begins, "As to *all* my worldly Eſtate." Therefore He meant to paſs *every* thing by this his Will.

The Caſes of *Ibbetſon* v. *Beckwith*, [*Forreſter* 157.] *M.* 1735, *in Canc.* and of *Tanner* v. *Wiſe*, in 3 *Peere Wms.* 295. both of them prove this.

1 *Lev.* 212. The Caſe of *Cooke* v. *Gerrard* is expreſly in Point—"That the Word *Land*" in a Deviſe meant not only the Thing itſelf; but the "*Intereſt* of the Thing."

As to *Caſes in Equity abridged* 124, there was no Surrender of the Copyhold Eſtate: But it is here ſtated "that the Teſtator had "*ſurrendered* the Copyhold Eſtate, to the Uſe of his Will." Which renders his Intention clear, *to diſpoſe* of it.

However, this Reaſoning only reaches the 2d Queſtion: For the *firſt* Deviſe is *expreſs*.

And the Defendant is Son and Heir to *William Taylor*.

Therefore He prayed Judgment of Nonſuit againſt the Plaintiff.

Mr. *Clayton* in Reply—

All the Money-Legacies are to be paid within a *Year*. Therefore the Event muſt happen *within* that Year: Or elſe the eventual Deviſe could not take Effect.

The Word "*Reſt*" clearly *excludes* what He had *before* deviſed.

LORD MANSFIELD—Mr. *Clayton* admits that *if* the Word "LEGACY" *is applicable to Lands*, *W. T.* has an Eſtate Tail.

This is plainly a Will of the Man's *own* drawing.

He profeſſes to diſpoſe of his *whole* Eſtate. He means to make *One* of his Relations his General Heir: The *other* Objects of his Bounty are 4 Nephews. And He gives them Land; And alſo gives ſome pecuniary Legacies, to be paid *within* 12 *Months* after his Death: (Which indeed the *Law* would have implied.)

Then He gives his Brother-in-Law 5 *l.*

And if either of theſe Perſons before named ſhall *die without Iſſue* lawfully begotten, then he gives the "ſaid LEGACY" to thoſe that ſhall be left alive, to be equally divided between them.

The Explanation of this Word "LEGACY" muſt be governed by the *Intention* of the Teſtator: And to this Purpoſe, ſome Streſs may be laid upon this Introduction of the profeſſed Diſpoſition of *All* his wordly Eſtate. A *different* Conſtruction has been ſometimes put upon the very *ſame* Words, as applied to Money and Lands; in order to *ſupport the Intent* of the Teſtator: As in the Caſe of *Forth* v. *Chapman*, by Ld. *Macclesfield*.

It is *moſt agreeable to the Intention* of the Teſtator in this Caſe, to conſtrue this Word "Legacy" to extend to *Lands*.

It would *not* be a *legal* Limitation, if confined to Money.

The Legacies may happen to be *ſpent*, ſoon after the Twelvemonth is expired.

And it could never be intended that ſo *ſmall* a Sum as the 5 *l.* ſhould be put out to Intereſt, and kept liable to this Limitation.

If the Brother-in-Law died *without* Iſſue, there would be *No One left* to divide the Legacies.

Common People do not make ſuch Diſtinction between Money and Land, as Perſons converſant in Law Matters do.

The Teſtator meant this Clauſe as a Reſtraint upon his former Bequeſt; and meant that the Iſſue ſhould have it.

The Word "Legacies" *does* extend to Lands, as well as to Monies. Common Perſons would not think of uſing the Word "*Deviſe*:" (Which is the more uſual *legal technical* Term.)

Therefore upon the 1ſt Queſtion I think it is an Eſtate *Tail*.

But his Lordſhip did not chooſe (it not being at all neceſſary) to declare any Opinion upon the 2d Queſtion: becauſe a third Perſon not now before the Court, might be affected by it.

Mr. Juſt. *Deniſon* concurred—He thought the Word "LEGACIES" extended to *real* Eſtate; And conſequently that it was an Eſtate *Tail*.

Mr.

Mr. Juſt. *Foſter* alſo held That the Teſtator *intended* the Land to go over; and that it was an Eſtate *Tail.*

If the Word "LEGACY" was confined to *pecuniary* Legacies, the Deviſe over could not have taken Effect; being *after* a dying without Iſſue; [*V. Ante P.* 272. Lord *Mansfield* accordingly.]

Beſides, *Charles Taylor* who was One of the Perſons before named, has *no pecuniary* Legacy given *him*, ſo that it *muſt* mean Land; as to HIM.

And theſe are *ſmall* Legacies, (one of them only of 5 *l.*) And payable within a *Twelvemonth.* Therefore the Teſtator cannot be ſuppoſed to apply this Limitation to *them*; but to the LAND which He had deviſed by his Will.

Per Cur. unanimouſly
JUDGMENT for the DEFENDANT
(*viz.* of NONSUIT of the PLAINTIFF.)

Denn *verſ.* Lord Cadogan et al'.

Saturday 30th *April* 1757.

THIS Day having been appointed for a Trial at Bar, in this Cauſe, ONLY 9 *of the Jury appeared.*

Sir *Richard Lloyd pro Quer'* prayed a *Decem Tales.*

By the Courſe of the Court, this Trial could not have come on again, *till Michaelmas* Term; (the immediately next Term being an *Iſſueable* Term, wherein there are *no Trials at Bar.*)

But the Court obſerving the great Expence and Delay which would by this Method of Proceeding be occaſioned to the Parties, aſked "Whether there were Gentlemen of the County enow in "Town, to make a Complete Jury."

And being told "that there *were*;" And the Gentlemen of the Jury who now attended, expreſſing a Deſire "not to be *kept* in "Town."

The COURT ordered the Return of the *Decem Tales* to be on the *Monday following*; (though there had never before been an Inſtance of it.)

And by ſo doing, they ſaved vaſt Expence, as well as ſome Delay to the Parties concerned.

For now, on *Monday* 2d *May* 1757, a full Jury appeared: And the Trial proceeded.

The Cauſe itſelf had no Difficulty in it; And was ſoon over.

For the Leſſors of the Plaintiff claimed as Heirs at Law of *George Smith* Eſq; who died in 1607: And they drew down their Deſcent through two Siſters; who had married *Carlos* and *Underwood*. One of their other Anceſtors, as they pretended, was *Francis Smith*, third Brother of the firſt Lord *Carrington*, (*Charles Smith*, alias *Carrington*:) But they could not by any Means make this out.

Their Claim was as Heirs at Law, under a Family Settlement of the Lord *Carrington*, in 1687. But they could not ſhew the leaſt Probability that *Francis* the third Brother of the Lord *Carrington* (whoſe Eſtate was prior to the Plaintiff's Claim) was *dead without Iſſue*.

Whereupon the PLAINTIFF was NONSUITED.

The COURT, on the Application of the Gentlemen of the Jury, *took off the Fines* (of 20*l.* a-piece) which had been ſet, on *Saturday* laſt, upon the Defaulters.

Tueſday 3d *May* 1757.

Hawkins *verſ.* Colclough.

Trin. 29, 30 *G.* 2. *Rot'lo* 962.

(*Lord Commiſſioner* Wilmot *abſent, in Chancery.*)

IN an Action of Treſpaſs for an Aſſault Battery and falſe Impriſonment an AWARD (made pending the Action) being pleaded to this Action, and a *Tender* of the Sum awarded; The Plaintiff demurred.

The Award (which was made upon a Submiſſion of all Diſputes, &c.) was in theſe Words—" Whereas there has been a Suit at Law " between the Parties, that has run to a great Expence on both " Sides; And it being left to me to make an End of it; I determine " That they ſhall Each of them pay their own Charges at Law; " And that the Defendant pay the Plaintiff five Shillings, for his ma- " king the firſt Breach in the Law."

Mr.

Mr. *Anguiſh pro Quer'* objected to the *Award*, as being

1ſt. *Uncertain*;

2dly. *Not final.*

Firſt—It is *uncertain*. The Submiſſion is of *ſeveral* Matters: And the Award does not at all ſhew, *which* of them it means to determine. 1 *Ro. Abr.* 242. Letter B. *pl.* 1. 252. *pl.* 10.

And an Averment without a Fact to ſupport it is of no Avail. 1 *Ld. Raym.* 246. in the Caſe of *Bacon* v. *Dubarry*, the 4th Reſolution is expreſly ſo.

This is an Action of Treſpaſs. The Submiſſion is of *all* Treſpaſſes: And the Award does not diſtinguiſh *what* Treſpaſſes it determines. 1 *Ro. Abr.* 251. Letter I. *pl.* 1. and *pl.* 3. and the Caſe of *Maw* v. *Samuell* in *Popham* 134. and 2 *Ro. Rep.* 1. the Caſe of *Bacon* v. *Dubarry* (before cited.) The 3d Reſolution ſays "That the "Award was void for the Uncertainty, without Releaſes."

Now *here* are *no* Releaſes. Each is to pay their own Charges. And the Defendant is awarded to pay to the Plaintiff 5 *s.* for his (the Defendant's) having been guilty of the firſt Breach of the Law.

The Injury complained of was Aſſault Battery and falſe Impriſonment. And here is no Satisfaction awarded for the Injury. 1 *Ld. Raym.* 247. The Caſe of *Freeman* v. *Bernard.*

Second Point—'Tis *not final:* Which it ought to be.

An Award muſt be *final.* But this Award was made pending the Action: And it does not put any End to it, at all.

Under this Head, He cited 1 *Ro. Abr.* 252. *pl.* 16, 17. [But One of theſe is marked by the Abridger, "*Dubitatur:*" The other, "*Contra* 15 *H.* 7. 22."] Alſo 2 *Strange* 1024. The Caſe of *Tipping* v. *Smith:* Where the Award was held ill; being uncertain, and not final. And *Cro. Eliz.* 904. The Caſe of *Colſton* v. *Harris:* Where the Award was holden void; becauſe Nothing was awarded to the Defendant, nor to be free from Suits: So no Advantage to Him.

Mr. *Caldecot contra pro Def'.*

This Award is pleaded by Conſent of the Plaintiff, and by Leave of the Court. And though pleaded as being made pending the Action,

Action, *viz.* between the Action brought and the Plea pleaded; yet the Court will determine upon the mere Validity of it.

1ſt. It does appear upon what particular Suit, the Award was.

The Generality of the Submiſſion is not inconſiſtent with the Particularity of the Award. 8 *Rep.* 98. *b. Baſpole*'s Caſe. [2d Reſolution.]

This ſhall be taken to be the *whole* Matter depending between the Parties: And *no other* Suit than this appears to have been depending, between the Parties.

The Caſe of *Bacon* v. *Dubarry*, in 1 *Ld. Raym.* 246. is not like or ſimilar to the preſent Caſe.

After Payment made or tendered, the Action of Treſpaſs is *diſcharged.*

Hob. 49. The Caſe of *Nicholls* v. *Grunnion* is expreſly ſo. [The Words are—" For a *Satisfaction* implies a Diſcharge."]

The preſent Award (which was made by a *Cobler*) recites that there was ſuch a Suit; And that it being left to Him to make an End of the ſaid Suit, He determined as follows, *viz.* " That the " ſaid *J. H.* and *J. C.* ſhould each of them *pay their own Coſts and* " *Charges at Law*; And that the ſaid *J. C.* ſhould *pay the ſaid J. S.* " 5 *Shillings for his making the firſt Breach in the Law.*"

And this may be pleaded in Bar, in another Action.

The Arbitrator certainly *intended* to make an End of this Suit depending between the Parties; and thought 5 *s. adequate to the Injury.*

Mr. *Anguiſh* in Reply—Notwithſtanding the Conſent " to plead " this Award in Bar," Yet all Objections to the Award itſelf are ſtill open.

This is *not ſhewn* to be the *only* Matter between them: And *non conſtat* that the Award was made concerning this *particular* Action.

I agree that *Payment* diſcharges the Treſpaſs. But then it ought to appear that the Payment was in Satisfaction of the SAME *Treſpaſs.* Which does not appear in this Caſe.

Lord Mansfield—

The Queſtion is Whether this be a *good Award.*

Awards are *now* conſidered with *greater Latitude* and *leſs Strictneſs*, than they were *formerly*. And 'tis right that they ſhould be *liberally* conſtrued; becauſe they are made by Judges of the Parties *own Chooſing*. And this is often, (as it is here,) in Caſes of *ſmall* Conſequence, where the Play is not worth the Candle.

Indeed they muſt have theſe two Properties, to be *certain*, and *final.*

But the Certainty may be judged of according to a *common* Intent, and conſiſtent with fair and *probable Preſumption.*

This Submiſſion is, in *general* Terms, "of *All* Actions, Con-"troverſies and Suits between them." The Arbitrator recites One; referring to the Submiſſion, as authorizing him to determine it: And it appears that *this* Suit *was depending* between the Parties. And the Parties have *not deſired to be heard* upon any more than *this One*. Therefore there is *no probable Preſumption* of any *Other*.

2dly, As to its being *final*—It ſeems to be a reaſonable and fair Award.

The Arbitrator, plainly, thought it a mere Trifle; and ſeems to have thought *both* Parties to have been in the wrong; and therefore awarded each to ſtand by his own Coſts.

And the 5*s.* awarded to be paid, is plainly *in Satisfaction* of this *ſame* Action; and therefore is a *Diſcharge* of it, being paid or tendered.

And he declared againſt *critical Niceties*, in ſcanning *Awards* made by Judges of the Parties *own chooſing*, in order to the Determination of Diſputes between them.

Therefore He was clear that the Judgment ought to be for the Defendant.

Mr. Juſt. Denison concurred—

The Submiſſion is *General:* The Arbitration is alledged to be "de et ſuper *Præmiſſis*;" And it *does not appear* that *any Thing elſe* was before the Arbitrator. It's plain that *this* Matter was *ſubmitted:* And We have *no* Reaſon to *preſume* "that there was any "*other.*"

And it *is sufficiently final:* It is to pay 5*s.* FOR having been guilty of the first Breach of the Law. Therefore it is the *same* as if it had said "*in Satisfaction.*" Therefore it is mutual and final.

And *Awards* ought to be construed *liberally* and *favourably.*

Mr. Just. FOSTER concurred, for the Reasons already given.

JUDGMENT for the DEFENDANT.

Perry *v.* Nicholson.

AFTER an unsuccessful Motion, made on the Part of the Defendant, "to set aside an Award;" and an equally unsuccessful One, made on the Part of the Plaintiff, "to enforce it by an "Attachment for Nonperformance;" The Plaintiff found Himself obliged to have Recourse to his *Action* against the Defendant upon it.

And now, upon an Action of Debt brought by Him on this Award, reciting that in an Action of *Assumpsit*, the Parties, at the Trial, had submitted *the* Matters in Difference *in the* SAID CAUSE, to certain Arbitrators, *&c.* so as they should publish their Award IN WRITING concerning the Premisses, before, *&c.* And that they accordingly did publish their Award IN WRITING, *&c.* and awarded "that the Defendant *Nicholson* should pay to the Plaintiff *Perry*, "48*l.* 11*s.* 10*d.* in full Payment Discharge and Satisfaction of all "Money whatsoever or any Ways due or owing unto *Perry*, by "*Nicholson*, at the Time of commencing the said Action; and that "ALL Actions depending between them for *any* Matter, Cause or "Thing *whatsoever* arising before or at the Time of referring, should "*from thenceforth cease*; and that upon Payment of that Sum, they "should within two Days after the *Taxation* of Costs in the Ac-"tion and Payment thereof to *Perry*, seal and execute to each "other, GENERAL Releases of all Matters in difference in the said "Cause."

Then the Plaintiff avers that there was, at the Commencement of the Action, or at the Time of Reference, *no other Money* whatsoever, any Ways due to Him the said Plaintiff *Perry* from *Nicholson*, but the Matter in Difference in the said Cause; And that *No other Action* was depending between them; And that the Costs were *taxed* at 28*l.*

The Defendant pleads "that No such Award was made." Replication—"that there was such an Award, *&c.*" And Issue thereupon.

The Plaintiff gave in Evidence, an Award in Writing, *indented*, under the Hands and Seals of the ſaid Arbitrators named in his Declaration and Replication, with the following *Variations* from and Additions to the Award ſet forth in the Declaration—*viz.* There was in the Declaration,

1ſt. An *Omiſſion* (after the Award "to pay, *&c.*") of theſe following Words— "That *Nicholſon* at the ſame Time *deliver up* "*to* Perry *a Promiſſory Note* of *Perry*'s payable to *Nicholſon* or "Order for 5*l.* 7*s. to be cancelled.*"

2d. A *Miſrepreſentation* of the Releaſe: Which is "that they "ſhould execute MUTUAL *and general* Releaſes of all Actions, *&c.* "Debts, *&c.* for any Matter Cauſe or Thing whatſoever from the "Beginning of the World *unto the Day of the Date* hereof."

3dly. The Award produced in Evidence, is by Deed *indented, under Hand and Seal:* Whereas the Award declared upon is only an Award "*in Writing*," merely.

Upon this Evidence, there was a Verdict for the Plaintiff, ſubject to the Opinion of the Court, on this Queſtion,— "Whether "there be MATERIAL *Variances* between the Award declared upon; "and the Award given in Evidence."

Mr. Serjeant HEWITT— *pro Quer'*.

This Action is an Action of Debt ON *the* AWARD itſelf; Not an Action of Debt *on* the Arbitration BOND: And on *ſuch* an Action, no more needs be ſet out, than is material, and enough *to intitle the Plaintiff* to his Demand. 1 *Leon.* 72. the Caſe of *Smith* v. *Kirfoot*. 1 *Salk.* 72. the Caſe of *Foreland* v. *Marygold*. Both which Caſes are expreſly ſo.

Another Rule concerning Awards is, that the *Generality of the Words* of them may be *reſtrained*, ſo as to be conſtrued to amount to no more than they ought to amount to. One Way of doing this, is by *Averment* connecting the Award with the Submiſſion: As it is ſaid in the Caſe in *Aleyn* 51, 52. *Roſe* v. *Spark* [firſt Point.] "That "the Words *de Præmiſſis* have been newly uſed in pleading Awards; "in order properly to apply the General Words proportionable to "the things ſubmitted."

Another Way of doing this, is by pleading them according to their *legal Operation*.

Another Way of reſtraining the Generality of Words is by *Intendment of Law:* As was done in 1 *Salk.* 74. *Simon* v. *Gavil.*

Another

Another Way is by *pleading the Matter*; (which is the proper Way for the Defendant to take Advantage of of it:) As in *Moore* 885. N°. 1242. The Caſe of *Lea* v. *Paine*.

Another Way is, that an Award may be *good in Part*, and *bad in Part*; if relative to diſtinct Things.

To apply theſe Poſitions—Here are four Things awarded: Which, it is true, are not all particularly ſet forth.

But ALL *that is* NECESSARY *to* THIS *Suit*, *is* ſet forth: The *Other* Things are not relative *to it*. And here is an *Averment* "That "*no* other Thing was in Diſpute."

The Queſtion is, "Whether this Award produced in Evidence "proves the Declaration."

Now *All* that is *material* in the Declaration, upon *this* Action of Debt upon the Award, is the Award of the 48*l*. and the 28*l*. Coſts. So that it is ſufficient to prove the Declaration.

Mr. ANGUISH *contra pro Def*.

1ſt. Here is an *Omiſſion* of that Part which obliges the Defendant *Nicholſon* to deliver up a Note: Which Note compoſes Part of the Sum, and was in Conſideration to make up the 48*l*.

To ſuppoſe it otherwiſe, is inconſiſtent: Becauſe, otherwiſe, they would not have ordered it to be given up.

He cited 2 *Lev*. 235. The Caſe of *Adams* v. *Statham*: Where an Omiſſion vitiated the Award.

LORD MANSFIELD—after ſtating the Caſe, ſaid that nothing was clearer, than that in an Action of Debt UPON *an* AWARD, a Man has *no* Need to *ſtate in his Declaration any more* of the Award, than ſupports his Caſe.

If there be any Thing by way of *Condition precedent* to the Payment of the Money, the *Defendant* may *ſet it out* in pleading.

This has been the Law, ſo long ago as from the Time of the Regiſter: Where there is a Writ which ſets forth only ſo much as is neceſſary. [*V. Regiſter* 111.]

Then with Regard to the *Releaſe*—The Court will *intend* that the *Releaſe* ſhall *extend* ONLY *to the Matter under the Submiſſion.* Beſides here they have averred " that there was *no other* Matter in " Variance."

Therefore I think there is NO *material Variance* between the Declaration and the Evidence.

Mr. Juſt. DENISON—was as clearly of the ſame Opinion: Which he declared to the following Effect.

The Queſtion is " Whether the Award given in Evidence is ſuf- " ficient to ſupport the Award ſet forth in the Declaration."

Now Nothing is claimed by *this* Action, *but* the *Money.*

And the Queſtion is Whether it was neceſſary, in *this* Action, to ſet forth any Thing MORE *than* ſupported his Claim to recover, and *ſhewed his Right to this Money.*

It has been ſettled that in Actions *upon* AWARDS (which are no Specialties,) there is *no* Occaſion to ſet forth the *whole* Award: The Plaintiff *needs not* ſhew any thing *more than* what is neceſſary to ſupport that *particular* Claim; and to intitle him to the *Thing*; And if the *Defendant* will *impeach* the Award for any thing, *that* is to come on HIS Part.

1 *Leon.* 72. *Smith* and *Kirfoot*'s Caſe, is expreſly ſo reſolved.

Littleton's Rep. 312, 313. *Leake* v. *Butler*, is a like Reſolution: Where the Form of declaring is ſaid to be taken from a Writ in the *Regiſter* 111.

And *this Diſtinction* between Debt upon the *Award* itſelf, and Debt upon the Arbitration-*Bond*, was admitted in

1 *Salk.* 72. the Caſe of *Foreland* v. *Marygold:* Which was an Action of Debt upon *Bond* to perform an Award. And 1 Lord *Raym.* 715. *Foreland* v. *Hornigold* is the ſame Caſe: Where alſo it appears to have been an Action of Debt upon the *Bond.*

Here, the Award is " That *Nicholſon* ſhall pay the Money, and " *Perry* deliver up the Note." And this is an Action of Debt brought by *Perry*, UPON *this* AWARD, for the *Money.* It would, as I have already ſaid, have been a quite different Caſe, if it had been an Action *upon the Arbitration*-BOND. But it is *here* good,

even though on the mere Face of the Declaration it ſhould appear *as a bad* Award, by appearing thereupon and as there ſet forth, as if it were only an Award on one Side. For the Plaintiff, in *this* Action upon the Award itſelf, needed only to ſhew *ſuch* Part as he grounds his Action upon.

Then as to the *Releaſes*—The Award "of *General* Releaſes," was *void*, *as to* OTHER Matters not ſubmitted. Here, nothing is ſubmitted, but in *this* particular Action. And in an Action upon the Bond, "a Releaſe as to *all Matters under Submiſſion*," would be a good Plea; though the Award be an Award of "*General* Releaſes."

But here it is *expreſsly averred*, "that there *were* NO OTHER "Matters in Diſpute." However, there was no Occaſion for that Averment, becauſe We *would* NOT *have intended* "that there were "any other."

Mr. Juſt. FOSTER was of the ſame Opinion.

He ſaid it was ſufficient in an Action of Debt *upon* the AWARD ITSELF, to ſet forth *ſo much* only as is neceſſary to ſupport the Plaintiff's Claim: The *other* Part of the Award may, perhaps, *be performed*.

He thought therefore, that the Evidence well proved the Declaration.

Per Cur. unanimouſly (Mr. Juſt. *Wilmot* abſent)
Let the POSTEA be delivered to the PLAINTIFF.

Wright, ex dimiſſ. Plowden Arm. *v.* Cartwright.

ON a Caſe ſtated, from the Aſſizes.

Edmund Plowden being ſeiſed in Fee, demiſed on the 5th of *October* 1676, by Deed, *viz.* by Indenture of Leaſe between Him and *Elizabeth Cartwright*, ONLY, to the ſaid *Eliz. Cartwright* for 99 Years, if ſhe ſhould ſo long live; and after her Death, if She happen to die within the ſaid TERM, or other End or Determination of the ſaid TERM, the Remainder *thereof* to *Rowland Cartwright* her Eldeſt Son, (then under Age,) *for and during the Reſidue* of the ſaid TERM, from thence enſuing and fully to be complete and ended: Yielding and paying, *&c.* and doing Suit at a Mill, *&c*; with a Penalty for every Time that She *or Rowland* ſhall grind at another Mill; and *paying a Heriot* on the Death of *Either*. And

it is covenanted that BOTH of them ſhall repair *&c.* And the Leſſor on his Part covenants that BOTH ſhall quietly enjoy *&c.*

Eliz. Cartwright entred and was poſſeſſed; and died on the 4th of *September* 1694. Whereupon *Rowland Cartwright* entered, and was poſſeſſed, till the ſaid *Rowland* died; which happened on 5th *November* 1753.

The Leſſor of the Plaintiff is Heir at Law to *Edmund Plowden*, the Leſſor. The Defendant is the perſonal Repreſentative of *Rowland Cartwright.*

The Queſtion is "Whether the TERM *exiſts*:" i. e. Whether it *continues* BEYOND *the Life of Eliz. Cartwright.* For *if* the TERM does *not* continue beyond the Life of *E. C.* then the Leſſor of the Plaintiff has a Title to recover: *If* it *does*, then the Defendant hath a Title, as Repreſentative of *Rowland Cartwright.*

Mr. *Aſton pro Quer'.*

Argued that the Term was *expired:* It expired on the *Death of Elizabeth*; the Limitation over, being void. And He cited *Tr.* 8 *Eliz. Dyer* 253. *b. pl.* 102. which is exactly the ſame Limitation; *viz.* "to *W. Cecil pro* Termino 12 *Annorum, ſi tam diu vixerit*; "*et ſi obierit infra prædictum* Terminum, *tunc &c.* The Re- "mainders were holden void; becauſe the *Term* is determinable "upon the Life of *W. C.*" And He alſo cited *Cro. Eliz.* 216. *Tr.* 32 *Eliz.* The Caſe of *Green* v. *Edwards.* That was exactly this Caſe. It was a Leaſe to *J. S.* for 90 Years, if he live ſo long; and if he die within the *Term*, that then his Wife ſhall have it, *durante toto reſid' Termini prædict':* It was held void to the Wife; and that She took Nothing. And He ſaid that 1 *Co. Rep.* 153. *b.* Rector of *Chedington*'s Caſe, is expreſs and full to the ſame Effect; and was agreed *per tot' Cur'.* And that *Co. Litt.* 45. *b.* is expreſs that "*Term*" ſignifies the *Eſtate* and *Intereſt* that paſſes; and *differs* from a Specification of the Number of Years: And ſays, "So note "the Diverſity."

All which Caſes, He inſiſted, prove this Limitation to be *void.*

He cited *Sheppard's Touchſtone of Common Aſſurances* 274. Where it is ſaid, that if a Man makes a Leaſe to *A.* for 80 Years if he ſo long live; And if he die within the ſaid Term, or alien, that then his Eſtate ſhall ceaſe; and by the ſame Deed the Leſſor farther lets to *B.* for ſo many Years as ſhall then remain unexpired after *&c.* for the Reſidue of the ſaid *Term* of 80 Years, if he ſhall ſo long live; In this Caſe the Leaſe to *B.* "during the Reſidue of the "TERM,"

" TERM," is void: For after the Death of *A*, the TERM is at an *End*. But if He ſay, " for and during the Reſidue of the 80 YEARS," it is good.

Mr. *Nares contra pro Def*t was beginning to ſpeak—

But LORD MANSFIELD ſtopped Him; (as not being neceſſary:) And He Himſelf proceeded thus—

LORD MANSFIELD—The Diſtinction juſt cited from *Sheppard*, (which He takes from the Rector of *Chedington*'s Caſe,) makes no Difference; *if* the Word " TERM" may ſignify the *Time*, as well as the Intereſt: For *then* it becomes merely a Queſtion of Conſtruction, " *Which* Senſe the Word ought to be *underſtood*-in."

So *Anderſon* argued, in *Green* v. *Edwards:* He ſaid, " If the " Wife had been a Party to the Deed, *Durante termino* ſhould *not* " be taken for the *Intereſt*, but for the *Time*." He ſaid, " The " Word *Term* cannot be taken to mean the *Intereſt* which the Huſ- " band had for 90 Years." (For if it is *ſo* underſtood, By *his Death* the Whole would be determined; And the Wife could have Nothing: And therefore it could not be uſed in *this* Senſe. But the Leſſor, by the Word " *Term*," muſt mean the *Time* of 90 Years: And the Word " *Term*" ſignifies *as well the Time or Space* of 90 Years, as the *Intereſt*.) The other Judges held the *Limitation by way of Remainder* to be *void*, from the *Uncertainty of Commencement:* And denied that the Wife's being a Party would have made any Alteration.

The *Old* Caſes held " that there could be *no Remainder* or Sub- " ſtitution *of a* TERM, *after an Eſtate for Life*, by *Deed* or *Will*." It was a mere *Poſſibility*. It was *void*, from the *Uncertainty of Commencement*. There was *no particular Eſtate*. The Gift of a Term (like any other Chattel) for an *Hour*, was good *for ever*.

The Objections were ſubtle and artificial.

When *long and beneficial Terms* came in Uſe, the *Convenience of Families* required that they might be ſettled upon a Child, *after the Death* of a Parent. Such Limitations were ſoon allowed to be created by *Will:* And the Old Objections were removed, by changing the Name, from Remainders, to EXECUTORY *Deviſes*.

The *ſame Reaſon* required that ſuch Limitations might be created by *Deed:* As, for Inſtance, Marriage-Settlements, to anſwer the Agreement of Parties, and Exigencies of Families. Therefore, to get out of the literal Authority of Old Caſes, an ingenious Diſtinction was

was invented: A Remainder might be limited for the Reſidue of the *Years*; but *not* for the Reſidue of the *Term*.

Now in *this* Caſe, upon the true Conſtruction of the Leaſe, I am clearly of Opinion, " That the Land is demiſed to the Son *for ſo* " *many of* 99 *Years* as ſhould be unexpired at the Death of his " Mother."

There are many Maxims of Law, That Deeds, eſpecially ſuch as execute mutual Agreements for valuable Conſideration, ſhould be conſtrued *liberally*, *ut Res magis valeat*, according to the *Intent:* which ought always to prevail, unleſs it be contrary to Law.

The Paſſage from *Coke Littleton* 45. cited by Mr. *Aſton*, defines the Word " *Term*" to ſignify, in Underſtanding of Law, " *not only* ' *the Limits and Limitation of Time*, but alſo the Eſtate and Intereſt " which paſſes for that Time."

If in *this* Leaſe, the Word be taken in the *latter* Senſe, The Widow can only have it for ſo many of 99 Years as *She* ſhould live; And the Son have NOTHING afterwards.

But it is manifeſt that an Intereſt was underſtood to *continue after her Death*, to be *enjoyed by her Son*.

From the Courſe of Nature, it could not be ſuppoſed that She would *outlive* the 99 Years. *Rowland* is to *pay a Penalty* for grinding at another Mill. *He* is to *pay a Heriot* on the Death of his Mother. *He* is to *repair*. The Leſſor covenants " that *Rowland* " *ſhall quietly enjoy:*" i. e. for ſo many Years as ſhould not be run, at the Death of his Mother.

The *firſt* Senſe of the Word makes every Thing conſiſtent and effectual: The *ſecond* Senſe deſtroys One Half of the Leaſe, as repugnant and contradictory to the Other. There ought to be no Doubt, therefore, in *Which* Senſe the Word ſhould be underſtood.

Mr. *Aſton* has laid no Streſs upon the only Objection which weighed with *Anderſon*, ſo long ago as the 33d of *Elizabeth*; *viz.* " That *Rowland* was *no Party* to the Leaſe:" And rightly. The Reaſon *why* He was no Party, appears from the Leaſe: He was then an *Infant*. The Mother contracts, and procures this Limitation *for Him*. A Grant may be made to a Perſon, by a Deed to which He is no Party. *Rowland accepted*, and actually *enjoyed*, after his Mother's Death, from the 4th of *September* 1694, to his own Death, the 5th of *November* 1753. The Leaſe was ſo intelligible to every *unlearned* Eye, that no Body doubted of his Title, for 60 Years.

Limitations of Terms are *now* of general Uſe. Their Bounds are ſettled. The Rules concerning them are certain and eſtabliſhed. When they came to be allowed by Will, or by Declaration of Truſt, the *ſubſtantial Reaſon* was the ſame for allowing them by *Deed*. A ſtrained Conſtruction ſhould not be made, to overturn the *lawful Intent* of the Parties. It was *lawful*, to ſecure this Leaſe for the Benefit of the Mother during her Life, and afterwards by way of Proviſion for her Son. *All* the Parties undoubtedly *intended* it. The Covenant here, " that *Rowland* ſhould enjoy from the " Death of his Mother, for the Reſidue of 99 Years," is ſufficiently certain ; and might, of itſelf amount to a Leaſe.

Mr. Juſtice DENISON—This muſt be taken that She ſhould hold it for ſo much of the Term of *Years* as She ſhould live ; and *Rowland*, during the Remainder.

The *Intention* of the Deed is obvious : And it certainly ſhews, (upon the whole Tenor of it,) that the *Intention* of the Parties was " that BOTH ſhould enjoy during the whole Term and Number of " Years." And if We *can* ſupport the *Intention*, by *any* Conſtruction, We will do it.

Mr. Juſt. FOSTER was clear that the INTENTION was that *Both* ſhould enjoy during the whole *Term and Number of Years : Viz. Elizabeth* for ſo long of it, as She ſhould live ; and *Rowland*, during the Remainder. All the Circumſtances ſhew this : And the reſerving a *Heriot* upon the Death of *Rowland* proves the *Intention* to have been " That the *Term* ſhould *continue to Rowland*, *after* " the Death of his Mother." And the Covenants all along run, " That *Rowland* ſhall quietly enjoy."

Therefore He concurred.

Per Cur. unanimouſly (Mr. Juſt. *Wilmot* abſent,)
RULE—That the PLAINTIFF be NONSUITED.

Lant

Lant Eſq; *verſ.* Norris.

Wednesday 4th *May* 1757.

P. 29 *G.* 2. *Rot'lo* 609.

The COURT *full.*

THIS was an Action of Covenant, by *Robert Lant* Eſq; Son and Heir of *Thomas Lant* Eſq; againſt *William Norris*, Adminiſtrator of *John Norris* Eſq; his late Father; which *John Norris* was Aſſignee of *Thomas Wilſon:* And it was upon an Indenture of Leaſe made on 23d *January* 1707, by the ſaid *Thomas Lant* deceaſed, who was ſeiſed of certain Meſſuages Ground and Premiſſes (mentioned in the Indenture,) of the One Part, and the ſaid *Thomas Wilſon*, on the other Part; whereby, in Conſideration of 200 *l.* to be laid out in upon or about rebuilding upon the Ground and Premiſſes thereby demiſed, and other Covenants, the ſaid *Tho. Lant* did demiſe to the ſaid *Tho. Wilſon*, all that Piece of *Ground*, AND *all the Meſſuages* Tenements Houſes *&c. thereon ſtanding*, in *Suffolk Place*, in the Pariſh of *St. George the Martyr &c.* butted and bounded *&c.* from *Chriſtmas* 1715 for 43 Years at 17 *l. per Annum* Rent.

Thomas Wilſon, the Leſſee, covenants to lay out the ſaid Sum of 200 *l.* within 15 Years, in ERECTING *and* REBUILDING of Meſſuages or Tenements or ſome other Buildings, *upon the Ground and Premiſſes*; And from Time to Time, and at all Times, all and ſingular the ſaid Meſſuages or Tenements *ſo* TO BE *erected*, with all ſuch other Houſes Edifices *&c.* as ſhould at any Time or Times THEREAFTER *be erected &c.* to repair *&c*: And THE SAID DEMISED PREMISSES, *with* all ſuch *other* Houſes *&c.* SO WELL REPAIRED *&c.* at the End or other ſooner Determination of the ſaid Term, *to deliver* up *&c.*

Wilſon entered. *Tho. Lant* died 29th *May* 1722, ſeiſed: And the Reverſion deſcended to *John Lant*, his Son and Heir.

On 24th March 1738, *Wilſon* aſſigned the Term to *John Norris:* Who entered.

On 24th *March* 1728. *John Lant* died ſeiſed: And the Reverſion deſcended to the Plaintiff, his Brother and Heir.

The Breaches aſſigned were, firſt, That after the Term came to *J. Norris*, and after the Plaintiff became ſeiſed of the Reverſion, and

and whilſt the ſaid *J. N.* was poſſeſſed, *viz.* on 1 *May* 1745, the ſaid *J. N.* in his Life-time permitted ALL *the ſaid demiſed Meſſuages* to be uncovered *&c*; by reaſon whereof the Walls of the *ſame demiſed Premiſſes* were out of Repair; and goes on to other Damages, ſtill calling them (all along) "*the ſaid demiſed Premiſſes.*" 2dly. That the ſaid *J. N.* did permit 6 Meſſuages, Parcel of *the ſaid* "*demiſed Premiſſes,*" to be *proſtrated*; and to remain ſo, till his Death. 3dly. That the ſaid *J. N.* on 1ſt *March* 1747 did *pull down* 6 other Meſſuages then erected and built on the ſaid demiſed Premiſſes.

Plea as to the 1ſt Breach, That the ſaid *T. Wilſon* or his Executors did not within 15 Years, or at any other Time lay out 200*l.* or any Part thereof, *in erecting or rebuilding* of any Meſſuages: And that the ſaid Meſſuages had *never* been rebuilt. As to the 2d Breach, the ſame Plea. As to the 3d Breach, "*Non infregit Conventionem.*" To all the Breaches, the ſame Plea as above to the 1ſt and 2d over again, "That *T. W.* never laid out 200*l.*" and "That the Meſ-"ſuages never were rebuilt;" and "That *J. N.* after He became "Aſſignee, and after the Plaintiff became ſeiſed of the Reverſion, "1ſt *March* 1753, died inteſtate, ſo poſſeſſed; and Adminiſtration "was granted to the Defendant: By Virtue of which, He entered; "And being ſo poſſeſſed, before exhibiting the Plaintiff's Bill, *viz.* "24th *June* 1754. aſſigned the demiſed Premiſſes to One *John* "*Townſend*, for the Reſidue of the Term; who entered, and is "poſſeſſed."

The Plaintiff demurs generally to the 1ſt Plea to the 1ſt Breach, and alſo to the 1ſt Plea to the 2d Breach; ſpecially, to the 1ſt Plea to the 3d Breach; generally, to the 2d Plea to the 3d Breach; and generally, to the laſt Plea to all the Breaches. There was alſo a Plea of *Non proſtravit*: And a Demurrer to it.

The Defendant joins in Demurrer, to all the Demurrers.

Mr. *Wynn*, for the Plaintiff, urged that the Pleas were no Anſwer; and that they neither confeſſed nor avoided the Charge in the Declaration, nor denied it.

Mr. *Gould contra*—for the Defendant, gave up the Pleas: But He objected to the Declaration, *viz.* That the Intention of the Parties was to confine the Repairs to the Buildings *thereafter* TO BE erected: as it appears that there were *No* Buildings (of any Conſideration) upon the Land, *at the Time* of the Leaſe; nor is there any Averment in the Declaration "That the Leſſee" (*Wilſon*) "*ever did erect* any "ſuch." Which Averment ought to have been made, in order to have maintained this Action: For, *without* ſuch Erection, the De-

fendant *could not be obliged* to repair. And a Plaintiff muſt ſhew every thing in his Declaration, that is neceſſary to maintain his Action.

The Words " the *ſaid demiſed Premiſſes*" muſt relate to thoſe in the beginning of the Covenant; And therefore only mean and intend " That he ſhould leave *them*, *viz.* the new erected and re-" built Edifices, in Repair, at the *End* of the Leaſe."

The Covenant is *future:* And the Leſſor could not have any Action upon it, *till* the *End* of the Term.

It appears by 5 *Rep.* 21. *a.* Sir *Anthony Main*'s Caſe, that if a Man lets a Manor for Years; And the Leſſee covenants to keep the Houſes of the Manor and whatſoever was within the Manor, in as good Eſtate as he found them, during the Term; And the Leſſee makes Waſte in the *Houſes*, and in cutting *Oaks*; the Leſſor may bring an Action of Covenant, before the End of the Term, for the Oaks; For, *for them*, it was impoſſible that the Covenant could be performed: But 'tis otherwiſe, of the *Houſes*.

And with this agrees *Fitzh. Nat. Brev.* 8vo. Edition, 324. Letter I. the ſame Law. Though if he fells Timber, *&c.* [if he do Waſte in Wood] he may have an Action of Covenant DURING *the Term:* " For *that* (ſays the Book) cannot be repaired."

He likewiſe cited 1 *Salk.* 199. The Caſe of *Greſcot* v. *Green*, Where the Leſſee covenanted for Him and his Aſſigns, to rebuild and finiſh a Houſe *within ſuch a Time*; And *after* the Time expired, the Leſſee aſſigned over the Premiſſes, the Houſe *not* being then built and finiſhed according to the Covenant: And *per Holt* Ch. Juſt. This Covenant ſhall not bind the Aſſignee; becauſe it was *broken before the Aſſignment*. *Aliter*, if broken *after* the Aſſignment: As if the Leſſee had aſſigned *before* the Time had been expired. Which Caſe was cited to prove " that the Action did not lie in the preſent Caſe; *becauſe* the Aſſignment was made *after* the 15 Years were expired."

Mr. *Wynn*—The Record is now to be conſidered as upon a General Demurrer to the whole Declaration: And I ſhall rely on the 1ſt and 2d Breaches, and not on the 3d, (which has I own, received a proper Anſwer, by Iſſue being offered.)

Covenants are to be conſtrued for the Benefit of the *Covenantee*; not of the *Covenanter*.

Theſe are Buildings demiſed; And 200 *l.* is agreed to be laid out in Repair of *them*, OR in erecting *New* Ones: Then there is a Covenant " to repair the Buildings *to be* erected on the demiſed " Premiſſes; and the SAID DEMISED PREMISSES, *and others* ſo " to be erected, ſo being well and ſufficiently repaired *&c.* to " leave *&c.*"

This intimates that the *demiſed* Buildings, *as well* as the New Erections, were to be kept in Repair. Here is ſufficient, from whence to collect the Intention and Meaning of the Parties, to be ſo: Which will amount to a Covenant. And upon this General Demurrer, the Court will not intend that the 200 *l.* was laid out only on the *other* Buildings newly to be erected.

LORD MANSFIELD—

I chooſe to look into it, and conſider it a little. No particular technical Words are requiſite towards making a *Covenant*.

Mr. Juſt. DENISON—The Queſtion only is Whether the Words " *demiſed Premiſſes*," are omitted, by Miſtake, in the former Part of the Covenant; or ſuperadded, by Miſtake, in the latter: For there appears to be a Miſtake in either One or the Other, in the Deed itſelf. The Leaſe is a Building-Leaſe.

Now the Premiſſes *then ſtanding* were to be *pulled down*. Therefore it could ſcarce be intended to covenant to repair *them*. The Covenant " to repair," is confined to the Tenements *to be* erected: The Covenant " to leave in Repair" extends to the *demiſed* Premiſſes, *together with* all ſuch Other as ſhall be thereafter erected.

Mr. Juſt. FOSTER—'Tis a Building *and* Repairing Leaſe.

In Order to look into the Leaſe, it ſtood over, with a
CURIA ADVISARE VULT.

And now, having conſidered it till the next Day only, LORD MANSFIELD ſaid, WE are extremely clear, That not only the *Words* of the Covenant, but alſo the *Intent* of the Parties, manifeſtly ſhew that it was *not* meant that any of the Money ſhould be laid out on the *Old* Buildings: But that *they* were to be pulled down; and that whatever He SHOULD *erect*, with the 200 *l.* or otherwiſe, for his own Convenience, ſhould be kept in Repair.

The Words " *demiſed Premiſſes*" are put in *Oppoſition* to the Buildings that were TO BE *erected* thereupon with the 200 *l.*

And

And the Covenant " to deliver up," is agreeable to this Conſtruction: That Covenant being to leave " the demiſed Premiſſes, toge- " ther with all ſuch other Houſes *&c.* as *ſhould be afterwards* " *erected &c.* ſo well repaired."

It is therefore clear againſt the Plaintiff, upon the 1ſt and 2d Breach: And Mr. *Wynn* acknowledges it to be againſt Him on the *third.*

Therefore THE COURT gave
JUDGMENT for the DEFENDANT.

Frazer's Caſe.

Wedneſday 5th *May* 1757.

The COURT *was full.*

THIS *Frazer*, being an Attorney of this Court, had taken for his *Article-Clerk*, One *Smith*, a *Turn-key* of the King's Bench Priſon; a full aged Man, and who ſtill continued to act as Turn-key. It did not appear that any Money was paid; or that the Maſter fed lodged or entertained the Clerk, (though the Articles indeed covenanted " that He ſhould:") Nor did the Clerk officiate for *Frazer*, but in Matters relating to the Priſon. It appeared that *Frazer* had, ſince theſe Articles, (which were dated only two Years ago, in 1755) become concerned in 63 Cauſes, on Behalf of the Priſoners in the Gaol.

This whole Matter being diſcloſed to the Court, upon the Application of Mr. *Moſs*, the Clerk of the Papers of the Priſon,

THE COURT were *All* very clear that theſe Articles were *merely colluſive*, that the Whole was a *Contrivance* between *Frazer* and the Turn-key, to ſecure the Buſineſs ariſing from the Priſoners; that the Exerciſe of the Office of a *Turn-key in a Priſon* was, both in itſelf, and alſo according to the Intent and Spirit of the Act for regulating Attornies, a very improper Education for the Profeſſion of an Attorney; And that theſe Articles ought to be *cancelled.*

And accordingly, they were, by the expreſs Order of the Court,

CANCELLED in Court (by Maſter *Clarke*) and directed to be kept in Court, and not delivered back.

Peirſe

Saturday 7th *May* 1757.

Peirſe, Eſq; *verſ.* Lord Fauconberg.

(Lord Commiſſioner Wilmot *abſent, in Chancery.)*

THIS was a Trial at Bar, on the Civil Side of the Court, by a Special Jury of the County of *York*.

The Queſtion was concerning a Right to track or tow Veſſels, upon the Banks of the River *Tees* (which divides *Yorkſhire* from the County-Palatine of *Durham*) from *Yarum*-Bridge up to *Low Worſall*.

There had been a former Iſſue tried, "Whether the River *Tees* "was a *navigable* River, from *Yarum*-Bridge to *Low Worſall:*" Which Iſſue had been found in the Affirmative.

And the preſent Trial was a new Trial (a ſecond new Trial indeed) directed by the Court of Chancery, upon an Iſſue "Whether the * Plaintiff had a Right to a Track-path on each Side "of the River (alternatively according to the Courſe of its Banks) "for the Convenience of Towing; without Let or Hindrance from, "or paying any Acknowledgement to the reſpective Owners of "the Soil."

The Trial laſted till about Two o'Clock on *Sunday* Morning: At which Time, the Jury (after ſtaying out about a Quarter of an Hour) brought in a Verdict

For the PLAINTIFF.

Monday 9th *May* 1757.

Rex *verſ.* Roger Phillips, Mayor of Carmarthen.

(Lord Commiſſioner Wilmot *abſent, in Chancery.)*

THE Defendant had pleaded to an Information in Nature of a *Quo Warranto* exhibited againſt him, "to ſhew by what "Authority he acted as a Mayor of this Borough," a Title of Election and Swearing *under a* MANDAMUS purſuant to 11 *G.* 1. *c.* 4.

* *N. B.* The Plaintiff did not claim this, as a *diſtinct peculiar* Right of his own; but as a *general* Right claimable by *all* Perſons whoſe Occaſions led them to navigate this River.

But

But the *Swearing* was (by Miſtake) ſet forth to have been in the ſame Manner as it ought to have been in Caſe the Election had been upon the CHARTER-Day.

Upon the Replication, no leſs than 14 Iſſues were joined: Which went down to be tried before Ld. Ch. Baron *Parker*, as Judge of *Niſi Prius*. But one of the Iſſues (the 9th) was taken upon the *Swearing* thus (erroneouſly) alledged to be before ſuch Perſons as were only proper to preſide UPON *the* CHARTER-DAY; *(juſt as if it had in fact been an Election under* THE CHARTER:) Which was a mere *Miſtake* in the Defendant's Plea; For his REAL *Swearing* in Fact was *right*, *viz.* AGREEABLE TO *the Directions of* 11 *G.* 1. concerning the Manner of being ſworn under and purſuant to a Writ of *Mandamus*. The Plea was worded thus, as to his being ſworn in; *viz.* " That after the Defendant had been ſo elected and " choſen to be Mayor, *&c.* and before He took upon himſelf to " execute the ſaid Office, to wit, *at that* SAME *Meeting and Aſ-* " *ſembly* SO *holden* upon the ſaid *Friday* the ſaid 30th Day of *May* " in the 28th Year aforeſaid in Manner aforeſaid, He the ſaid *Roger* " *Phillips*, IMMEDIATELY *after* his ſaid Election, did *then and* " *there*, ACCORDING TO *the* DIRECTIONS *of the* LETTERS " PATENT *of the ſaid late King* Henry *the 8th* TAKE *his Cor-* " *poral Oath*, upon the Holy Evangeliſts of God, BEFORE *John* " *Evans* Merchant, *George Jenkins*, *Daniel James*, *William Sears*, " *Lazarus Thomas*, *Samuel Morgan*, *John Evans* Carpenter, *John* " *Evans* Currier, *Richard Leigh*, *George Bayle*, *Thomas Richard*, " and *Lewis Philipp*, then and there being TWELVE *diſcreet and* " *honeſt Men of the* BURGESSES of the ſaid County-Burrough, " rightly well, and faithfully to execute the ſaid Office of Mayor " of the ſaid County-Burrough, in all Things touching and con- " cerning the ſaid Office; They the ſaid *John Evans* Merchant, " *G. J. D. J. W. S. L. T. S. M. J. E.* C. *J. E.* C. *R. L. G. B.* " *T. R.* and *L. P. then being* TWELVE *diſcreet and honeſt Men of* " *the* BURGESSES *of* the ſaid County-Burrough, *then and there* " APPOINTED ACCORDING *to the* DIRECTIONS *of the ſaid* LET- " TERS PATENT laſt before mentioned, by the ſaid then Com- " mon Council of the ſaid County-Burrough, BEFORE WHOM " the ſaid *Roger Philipps*, ſo elected and choſen Mayor of the ſaid " County-Burrough as aforeſaid, WAS *to* TAKE *his ſaid* OATH: " And that He the ſaid *Roger Philipps* was THEREUPON, then and " there, *in due manner*, *admitted into the ſaid Office* of Mayor of " the ſaid County-Burrough. BY VIRTUE WHEREOF He the " ſaid *Roger Philipps*, on the ſame *Friday* the ſaid 30th Day of *May* " in the 28th Year aforeſaid and from thence continually after- " wards, for, *&c.* was Mayor, *&c.* *And by* THAT *Warrant*, He " the ſaid *Roger Philipps*, on, *&c.* and from, *&c.* until, *&c.* did

" there uſe and exerciſe the ſaid Office of Mayor, *&c.* And for " and during all the ſaid Time, did there claim, *&c.*"

The *Lord Chief Baron*, who tried the Cauſe, reported that He was of Opinion, upon the Trial, " That upon the 9th Iſſue, the " Defendant *could not give Evidence* of a *different* Swearing from " what He had *alledged upon the Record*;" And " That upon the " 10th Iſſue" (taken upon the Allegation of being *by Virtue thereof* Mayor, *&c.*) " He *could not vary* from the *Title before* " *ſet out*, by Virtue whereof He *claimed* to be Mayor." And He had directed the Jury to find for the King: And they found a Verdict accordingly. And he alſo reported " That no Evidence " was entered into, upon *any* of the Iſſues; And that Verdicts were " found for the *King* upon *all* of them: But that this was *agreed* to " be *without Prejudice* in any *future Trial*."

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*—for the Defendant had thereupon moved for and obtained a Rule for the Proſecutors (who had thus gotten a Verdict,) to ſhew Cauſe " why there ſhould " not be a *new Trial*;" upon an Inſinuation " that the Judge who tried " the Cauſe, had *miſdirected* the Jury:" Which *Miſdirection* conſiſted, as they alledged, in this, *viz.* " That the Judge had pre- " cluded the Defendant from giving any Evidence to prove his " Swearing, AS *ſet forth* in the ſaid 9th Iſſue; the Judge appre- " hending and ſo directing the Jury, that it could be of *no Kind* " *of Service to the Defendant*, to be admitted to prove an Iſſue, " which IF *proved or even admitted*, could NOT *at all tend to make* " *out his Right*; For that if this Swearing *as* UNDER *a* CHAR- " TER-Election were to be *admitted*, yet ſtill it would not appear " *in* ANY *Part of the Record*, that He was *regularly ſworn* UNDER " *a* MANDAMUS-Election; Which was the *Species of Election* un- " der which he *claimed*."

Sir *Richard Lloyd*, Mr. Serjeant *Poole*, and Mr. *Aſton* were prepared as they ſaid, to ſhew Cauſe, by convincing the Court " that " the Direction of the *Judge was* RIGHT; and conſequently, that " the Verdict *ought to ſtand*."

LORD MANSFIELD—The Direction of the Judge was certainly *right*. Therefore, if You ſhould prevail in this Application for a new Trial, it could be of no Service: For, AS *the Record ſtands*, the *ſame* Direction muſt be *given again*.

Yet I am very deſirous to *cure* this Slip, if poſſible: For the *Merits* have *never been tried*.

Conſider whether the Verdict may not be ſet aſide; And the Parties admitted to *plead* AGAIN. The

The Rule was enlarged; with this *Addition, viz.* to ſhew Cauſe " why the Verdict ſhould not be ſet aſide, AND *a Repleader* " *awarded.*"

Mr. Serjeant *Poole*, for the Proſecutor, now ſhewed Cauſe againſt ſetting aſide the Verdict and awarding a Repleader. And He alledged that, though there ſhould be a Repleader awarded, yet the *whole Record* muſt nevertheleſs *ſtand* as it is at preſent.

As to Repleaders in General—He cited 6 *Mod.* 1. The Caſe of *Staple* v. *Haydon*—(1ſt. Reſolution:) It can only be on ſuch an impertinent Iſſue, as that the Court can give *no* Judgment upon.

Mr. *Norton*, Mr. *Morton* and Mr. *Price—contra*—for the Defendant—The Iſſues are not all found againſt us, *abſolutely*; but *without Prejudice* to any future Diſpute, except as to the 10th Iſſue.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price* ſtated the Miſtake: Which they ſaid was thus, *viz.* The Defence ſet up was " An " *Election of the Defendant under a Mandamus*, iſſued purſuant to 11 " *G.* 1." And in ſetting out his Oath of Office, he avers it to have *been* DULY *taken*; and ſhews it to be an *Oath*, taken by him *upon this Election*, and ſets out the *right and proper Oath of Office*; but the Plea 'tis true goes on, (following, by Miſtake, a precedent of a Plea of an Oath of Office taken under an Election upon the proper *Charter*-Day,) and alledges it to be a Swearing *at the ſame Meeting ſo holden, &c.* BEFORE *Perſons* who were only proper to preſide upon the CHARTER-*Day*; *viz.* (BEFORE 12 *Burgeſſes, &c.*)

Which Swearing *before* theſe *improper* Perſons, they urged to be totally *immaterial*; And that, for the Sake of attaining Juſtice, it ought to be *ſome* how or other, ſet right; the TRUE *Queſtion* having *never been tried, viz.* " Whether He took the Oath of Office, " *agreeably to the* DIRECTIONS OF 11 *G.* 1."

Therefore it ſhall either be *amended*, OR a *Repleader awarded:* For upon the preſent Record, there is *no* Juſtification *at all*; And therefore the Iſſue joined is *totally immaterial.* The Caſe of *Staple* v. *Haydon.* 6 *Mod.* 1. is almoſt in Point. 1 Ld. *Raym.* 707. S. C. [1 *Salk.* 173, 216. S. C.]

This is a good Plea in *Subſtance*; but ill pleaded in Point of *Form.*

They *ought to have* DEMURRED to this Part of the Plea; and *not* to have taken *Iſſue* upon it: For it is a Matter of *Law*, " Whe- " ther

" ther the taking *this* Oath would have juſtified the Defendant." And a Verdict cannot make that good, which the Court ſees cannot be in Law. Therefore this Verdict is utterly *void:* Juſt like that in *Hobart* 112. *Tasker* v. *Salter.*

And ſuch Repleaders, in Informations, are no Novelties. For in 1 *Ventris* 122. the Caſe of * *Reynell* v. *Heale*; a Repleader was awarded, becauſe the Iſſue was miſ-joined.

And they *offered to pay Coſts*, in order to have this Matter ſet right: And inſiſted that this is but juſt and reaſonable; eſpecially, as many *other* Perſons Rights depend upon the Right of this Mayor.

They alſo cited *Cro. Eliz.* 245. the Caſe of *Love* v. *Wotton*—Where a Repleader was awarded after Verdict; the Defendant having miſpleaded the Statute. The Reaſon of awarding the Repleader there, muſt be, " becauſe the *true Merits* had *never been tried.*"

They even urged farther, that it might well be taken, upon the Face of the Record, " that he *was* ſworn before the *proper* Perſons:" it being alledged " that it was at the SAME Meeting then and " there ſo holden."

But they inſiſted that at moſt, this is *only Form.*

As to Repleaders in general—They cited 1 Sir *J. S.* 394. The Caſe of *Rex* v. *Philips* Mayor of *Bodmyn.* Where the Defendant's Title was *clearly defective*, and confeſſed an Uſurpation; And therefore, as the *Merits appeared* to be againſt the Defendant, the Repleader was not indeed there granted: But the general Poſition ſeems to be, " that it *might*, *otherwiſe*, have been granted."

Mr. Serjeant *Poole*, Sir *Richard Lloyd*, Mr. *Aſton*, and Mr. *Nares pro Rege*—argued that it is needleſs to grant a Repleader, where there is *ſufficient* appearing upon the Record, whereupon to give Judgment *againſt* the Party, *excluſive* of the Part which is pretended to be immaterial.

Nor ſhall a Repleader be awarded, where the Defendant has ſet forth a *defective Title.*

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* *N. B.* This was a *Qui tam* Information, at leaſt; if not a *Qui tam Action:* The Book is inconſiſtent with itſelf; but the Title of the Cauſe ſhews that it was an *Action.*

Now,

Now, certainly, this is a *defective Title:* He appears to be ſworn before *improper* Perſons: And does *not at all* appear to *have been* ever ſworn before the *proper* Ones.

This is *not* a mere *defective* MANNER OF PLEADING; like *Cro. Jac.* 434. the Caſe of *Holms* v. *Broket*—where Iſſue was joined on a Plea of Payment *before* the Day; or *Hob.* 112. the Caſe of *Taſker* v. *Salter*; where the Iſſue, (upon *the Way*,) was in effect no Iſſue at all.

But this is abſolutely a *defective* TITLE; a Swearing before improper Perſons; And is like 6 *Mod.* 1. the Caſe of *Staple* v. *Haydon.* And they cited *Cro. Eliz.* 214. the Caſe of *Lacy* v. *Reynolds*; where though the Iſſue was immaterial, yet; the Plea confeſſing the Words, the Court gave Judgment as upon a Confeſſion. So, *Carthew* 371. The Caſe of *Jones* v. *Bodinner*; and 1 *Salk.* 173. S. C. a like Reſolution. So, 1 Ld. *Raym.* 390. the Caſe of *Pitts* v. *Polchampton.*

But if a Repleader ſhould be granted as to THIS Iſſue, yet *enough* (beſides this) will ſtand upon this Record, to intitle us to Judgment for the King.

Repleaders are never awarded for the Sake of the *Parties*; but for the *Sake of the* COURT.

And this is the Reaſon why there are *no Coſts* upon Repleaders: As appears by 2 *Salk.*—Title Repleader. [Fo. 579. Which is an Abridgment of the Caſe of *Staple* v. *Haydon* in 6 *Mod.* 1. and 1 Ld. *Raym.* 707.]

Nor ſhall Repleaders ever be awarded, where *ſufficient appears upon the Record, whereupon* the Court can *give Judgment.* They ſhall not be awarded, ONLY *becauſe* the Party has MISTAKEN *his Caſe:* They ſhall never be awarded, but where the Iſſue is ſo *immaterial* that the *Court* cannot tell how to give Judgment. In the Caſe of *Serjeant* v. *Fairfax* in 1 *Lev.* 32. it is laid down by *Twyſden*, and agreed by the Ch. Juſtice and *Wyndham*, That "An immate-"rial Iſſue is, where, upon the Verdict, the Court can not know "for whom to give Judgment; whether for the Plaintiff, or for "the Defendant,"

It depends upon the Plea pleaded; not upon the real Merits: For though the Iſſue be *improper*, yet Judgment ſhall be given; as is expreſly laid down in the ſame Caſe of *Serjeant* v. *Fairfax*—1 *Lev.* 32. "If an IMPROPER Iſſue is taken, and Verdict given thereon; "Judgment ſhall be given thereupon; be it for the Plaintiff, or "for the Defendant." *Cro. Jac.* 288. the Caſe of *Tampion* v. *New-*

ſon and Bridget his Wife: The Plea of the Feme, without the Baron was no Plea at all, nor confeſſed any Thing. In *Bro. Repleader* 55. It did not appear how much the Executors had; who pleaded "riens inter maines," which was found againſt them. *Cro. Eliz.* 245. The Caſe of *Love* v. *Wotton*, (where the Statute of Uſury was miſrecited,) was a Caſe where *no Judgment could be given:* For the Court were *bound* to know the Statute; and that there was no ſuch Statute as was pleaded, which was a Statute made the *ſixth* of *February*.

In the preſent Caſe here is NO FAULT *in the Pleadings*. Therefore where ſhall the Repleader begin? This Caſe is NOT *the Subject-Matter of a Repleader:* This is *only a* DEFECTIVE TITLE.

It would be an ERROR, to grant a Repleader, where the Court *can* give Judgment *upon* the Pleadings *already* before them.

Now here, the Defendant who claims to be Mayor has NOT *ſhewn* "That he WAS *ſworn* before the *proper* Perſons:" And the Court *cannot preſume* it. He is aſked "*Quo Warranto*" he acted as Mayor: And his Defence is, *this* "by a proper Election and (*improper*) Swearing;" And that "EO *Warranto*," he acted as Mayor. But this plainly appears to the Court to be NO Warrant at all. Therefore the Court muſt give Judgment *againſt* him.

And the Chief Baron certainly determined right: For a Man cannot plead *One* Caſe, and then prove *Another*.

Hob. 112. The Caſe of *Taſker* v. *Salter* is not like this Caſe. *This* is a *Fact*; on which the Jury *have* judged.

And ſurely it does not follow, nor can it be taken upon the Face of this Record, that becauſe he was ſworn *at* THAT ASSEMBLY, He muſt therefore be ſworn before the *proper* PERSONS.

On the contrary, it is moſt manifeſt that He has *not* ſet out a *complete Title* to exerciſe the Franchiſe: And therefore the Court muſt give Judgment againſt him.

The *other* Iſſues were *never proved:* And even this bad Title, ſet up by this Iſſue, is found *falſe*; *viz.* "That He was NOT ſo "*ſworn* in, as he has pleaded."

And Judgment ſhall be given againſt the Defendant, even upon an Iſſue misjoined, *if found* FOR *the Plaintiff*. *Cro. Eliz.* 778. The Caſe of *Dighton* v. *Bartholomew*. 5 *Co. Rep.* 43. *Nichol*'s Caſe. *Cro. Jac.* 377. The Caſe of *Edward Maria Wingfield* v. *Bell*. 2 *H.* 7. 11. *b. Rex* v. *Herle*. Which Caſe proves that if a Man

Man ſets up a Right, *different* from his true Title, it ſhall be againſt him; And he ſhall *not* ſet up *another* Title, *afterwards*.

The Court may here give Judgment as upon a Confeſſion, when the Iſſue is immaterial, and the Miſtake not amendable: And there ſhall in ſuch Caſe, be no Repleader. *Carthew* 371. The Caſe of *Jones* v. *Bodinner*, expreſly. 5 *Mod.* 226, 227. S. C. *Cro. Jac.* 678. The Caſe of *Johns* v. *Ridler*: Where though the Iſſue was immaterial, yet being found *for the Plaintiff*, it was adjudged for him, upon the Defendant's confeſſing of the Ejecting.

In the Caſe of *Love* v. *Wotton*, *Cro. Eliz.* 245. the Court *could not* give a complete Judgment.

Cro. Car. 25. The Caſe of *Knight* v. *Harvy* Adminiſtrator of *Harvy*, *M.* 1 *C.* 1. (where the Defendant pleaded an impoſſible Judgment, and *riens en ſes maines*, but only to ſatisfy it; and the Plaintiff replying, the Iſſue was found for the Plaintiff, and He had Judgment;) is a Caſe parallel to the preſent: For as the Judgment there pleaded was a bad Judgment, ſo this is certainly a BAD *Swearing in*. Therefore the Court will here give Judgment upon the *Information*; as they did upon the Plaintiff's Declaration there, notwithſtanding that impoſſible Iſſue being found, it being found for the Plaintiff.

Here, *Both* the Election AND Swearing in, ought to have been well pleaded: Neither is a Defence, of itſelf alone.

And the Court cannot take Notice of the *Fact*, *otherwiſe than* As it has been *pleaded*.

Therefore Judgment may be given, as upon a Confeſſion, in the preſent Caſe: For the Defendant *ſhews no Right at all*, to act as Mayor.

So that, upon the Whole, Judgment ought to be entered for the King, *upon the Face* of this Record. To prove which, they cited 2 *Strange* 873. The Caſe of *Broome* v. *Rice & al'* in *C. B.* as in Point: Where, though the Juſtification confeſſed the Cauſe of Action, in Effect, yet the Plaintiff replying "de injuria ſuâ propriâ "abſq; tali Cauſa," Iſſue was thereon joined, and found for the Defendant; But the Verdict was ſet aſide; and Judgment ordered to be entered for the Plaintiff, and a Writ of Inquiry of Damages to iſſue.

Mr. *Norton* in Reply—

The SUBSTANTIAL Part of this Plea, is the "being *ſworn at* "*this Aſſembly*, *immediately after* the Election:" And the PERSONS

" *before whom* the Swearing is alledged to have been," may be conſidered as *Surpluſage*. *If ſo*, We ought to have been let in, at *Niſi prius*, to prove our Plea: *If* it is *not* ſo to be taken, We ought now to be let in, either to *amend*, or to *replead*.

This would plainly be a *good Bar*, IF *well pleaded*. Therefore the Court will, for the ſake of Juſtice, grant a Repleader.

The Title ſet up by the Defendant, is an *Election under a Mandamus*; and the Defendant has accordingly ſtated an Election made purſuant to the Directions of the 11 *G.* 1. and a Swearing in, *purſuant to it*: But He goes on, and particularly ſhews a Swearing in before 12 *Burgeſſes*, the CHARTER-Officers, (which ſhould have been alledged to be before " The Perſons directed by the 11 *G.* 1. *viz.* the then *preſiding Officer*;") And this, upon Iſſue taken thereon, is found *againſt* him. Now ſurely this has *not* tried the MERITS: This Iſſue was *quite immaterial*. And therefore there ſhall be a Repleader: And this muſt be a Repleader of our *whole entire* Title.

But they ſay that " this is a DEFECTIVE Title; not a mere *im-*
" *proper* Title: And that therefore Judgment ſhall be given againſt
" the Defendant."

Now this is *not* the Rule of Repleaders. Indeed if the Bar be evidently NOT *a good Juſtification*, it is idle to grant a Repleader: But *otherwiſe*, a Repleader *ſhall* be awarded. In *Cro. Jac.* 5. The Caſe of *Coxe* v. *Cropwell*, The Huſband pleaded " Not guilty," when no Tort was ſuppoſed in him; So that this was a Caſe where the real Queſtion had not been tried: And *therefore* the Court granted a Repleader.

And the Party who makes the firſt Fault, may, notwithſtanding that, pray a Repleader.

Wherever the Court ſee, upon the whole Record, that the Iſſue joined will *not try the true Queſtion*, the Court will grant a *Repleader*.

The Caſe of *Serjeant* v. *Fairfax*, 1 *Lev.* 32. *P.* 13 *C.* 2. *B. R.* is ſtrongly for Us. It was a *bad Plea*; it proceeded originally *from the Defendant*; an immaterial Iſſue was joined; and a Verdict was * *againſt him*: And *yet* a Repleader was awarded; BECAUSE *the Merits* HAD NOT *been* determined, and the Court could not therefore know *for whom* to give Judgment.

* No: The Verdict was *for* the Defendant; and the Plaintiff moved for a Repleader. Indeed *Twyſden* ſaid that it was the *ſame Thing*, " be the Verdict for the Plaintiff, " or for the Defendant."

But

But they ſay that " Here is *ſufficient* for the Court to give Judg-" ment upon."

I anſwer that theſe are not to be taken as *independant unconnected* Iſſues; but as One ENTIRE TITLE, though conſiſting indeed of various diſtinct *Parts*. And he ſaid He could ſee no Reaſon for the Crown's taking ſuch a Number of Iſſues, upon theſe *Quo Warranto* Informations: Indeed perhaps the ſingle Iſſue of " Not Mayor," would take in the Whole.

LORD MANSFIELD—

General Rules, are wiſely eſtabliſhed, for attaining Juſtice with Eaſe, Certainty, and Diſpatch.

But the Great End of them being " *to do Juſtice*," the Court are to ſee that it be *really* attained.

In order to diſcover what was juſt upon the preſent Occaſion, He ſaid He would conſider this Caſe in two Views; *viz.*

1ſt. Upon the mere Foot of the *Swearing*, as it is here pleaded and put in Iſſue; and

2dly. What Alteration is made by the *other* Iſſues, and the *Verdicts* upon them, found in the Manner as they have here been.

Firſt—If *this* Iſſue upon this Swearing-in, had ſtood alone, this had been an *immaterial and void* Iſſue; as it tends to *prove Nothing*, *either* for the *Crown*, or for the *Defendant*; And from which, *No Concluſion* can be drawn, *either* Way.

It appears too, upon the Record, that this MIGHT *have been* ſo pleaded, *as* to have ſhewn whether he had, or had not a Right: (Suppoſing the Queſtion to be *confined* to this ſingle Iſſue.)
What is the Rule of Law then as to ſuch an *immaterial* Iſſue joined, and *Verdict* upon it?

It is, " That when the Finding upon it does NOT *determine the* " *Right*, the Court *ought* to award a Repleader: *Unleſs* it appears " from the whole Record, that NO *Manner of Pleading* the Matter, " COULD *have availed*."

The principal Caſes to prove this are (amongſt many others to the ſame Effect)

6 *Mod.* 2. The Caſe of *Staple* v. *Haydon*, [1ſt Reſolution;] where the Court held " That a Repleader is to be awarded, when " *ſuch* an Iſſue is joined, as the Court, after Trial thereof, cannot " give a Judgment; as being impertinent, And NOT *determining* " *the Right:*" (I lay the Streſs on theſe Words, " And NOT *deter-* " *mining* the *Right.*")

Moore 867. The Caſe of *Taſker* v. *Salter*, [S. C. with *Hobart* 112.] The Verdict paſſed upon a void Iſſue: And the Court awarded a Repleader. It was as no Iſſue at all, and impertinent, as pleaded.

Here, it MIGHT *have been* pleaded *right:* But *as* there pleaded, it did not conclude; And therefore the Court could not determine the Right.

So the Caſe in *Cro. Eliz.* 245, *Love* v. *Wotton*, (A Plea of the Statute of Uſury, upon the uſurious Bond—) There, as the Statute was pleaded, The Concluſion " that the Obligation was taken " by Uſury *&c.*" was immaterial: But the Statute *might* have been pleaded right; and then it would have been a good Defence. And *therefore* the Court awarded a Repleader.

But there is a later Caſe, (And the Courts have been more liberal of late Years, in their Determinations, and have more endeavoured to attend to the *real Juſtice* of the Caſe, than formerly;) And this is the Caſe of *Tryon* v. *Carter*, *M.* 8 *G.* 2. which is reported in 2 *Strange* 994. and is a very material Caſe: " A Bond Condi- " tioned for Payment of Money, *on or before* 5th *December*. Plea " of Payment *on* 5th *December*; Replication, Iſſue, and Verdict " for the Plaintiff." This was holden to be an immaterial Iſſue; and a Repleader was therefore awarded: Though it would have been concluſive, if found for the Defendant; but did not conclude, when found for the Plaintiff. Therefore, (though that was a Slip of the Defendant) as it did not determine the Queſtion, a Repleader was awarded.

The Caſe that has been mentioned, of *Rex* v. *Philips*, *M.* 7 *G.* 1. in 1 *Strange* 394. is material, for the Reaſon given by Ld. Ch. J. *Pratt*. For if the Juſtification is ſuch in Point of Matter and Subſtance, as could not, if put into *any* Form of Words, be material with regard to the Defendant by Way of Defence, it is in vain to grant a Repleader; It being to no Purpoſe to do ſo, where the *Caſe itſelf cannot be amended*, or would be at all material, if put in *any* Shape whatſoever: Which was that Caſe; For it amounted to a Confeſſion of the Uſurpation, as was there holden. And if it did, then he very rightly

rightly ſaid " that *if* the Court ſhould grant a Repleader, the De-
" fendant *could not mend* his Caſe: For the Plea would ſtand; And
" after the Formality of a Demurrer, the Court muſt give Judg-
" ment upon the Goodneſs or Badneſs of it:" And Ld. Ch. Juſt. *Pratt* went on, and compared it to an ill Juſtification in Treſpaſs, (where *no* Form of Words would have made it a Defence;) And therefore was of Opinion that as the Plea was ill, and contained no Title to the Franchiſe, the Court might give Judgment upon it, as confeſſing an Uſurpation. [*V.* 1 *Strange* 398.]

Now *here*, ſuppoſing (as I ſaid before) the Swearing to be the *only* Iſſue; is it not a Queſtion totally *inconcluſive*, " whether he was, " or was not, ſworn before THESE *Perſons*?" Does it at all *conclude* to the real QUESTION? Is not this, manifeſtly, a *Slip?* Does it not *appear* that this Plea * COULD *have been mended?* Certainly, it COULD; *viz.* by Pleading the Swearing-in, to have been *agreeable to the Statute* of 11 *G.* 1. [*c.* 4. § 4. which directs it to be before the preſiding Officer.] Therefore, the REAL *Juſtice* of the Caſe is, That this *Slip* ſhould *not* be fatal *for ever*.

* *N. B.* This Plea ſeems to have been *good* in FORM; but *inſufficient*, as to *Fact*. See *Forteſcue*'s Diſtinction in 1 *Strange* 398.

This is a Franchiſe of great Importance. It is ſo, in *itſelf:* And, beſides, the Rights and Privileges of *many other* Perſons do depend upon it. And theſe Writs of *Mandamus* iſſuing purſuant to this Act were intended for the *ſettling* and *preſerving* of Corporations.

IF this was the *ſingle* Iſſue, I think they would be *clearly intitled* in this Caſe, to a *Repleader*. Yet

Secondly—It is objected " that here are *many other Iſſues*, *all* " *found for the Crown*, as well as this."

But the Iſſue juſt now ſpoken of as immaterial and void is an Iſſue taken upon an Eſſential Part of an *entire* Defence: For the Defence here pleaded by the Defendant is *One entire* Defence; notwithſtanding that the Crown is at Liberty to take diſtinct Iſſues upon the diſtinct *Parts* of it. And therefore it would be abſurd and inconſiſtent, that the Finding againſt the Defendant upon the *other* Iſſues, the other *Parts* of *One entire* Defence, ſhould ſtand; in caſe we ſhould grant a Repleader upon, or an Amendment of *this* Part: For, if that ſhould be permitted, the Finding would ſtill be *againſt* the Title of the Defendant, it being ſet up and pleaded as *One entire* Title.

I agree that if it appeared upon the whole Record, " that the " Defendant was NOT duly elected," it would be as Ld. Ch. Juſt. *Pratt* ſays, a vain and idle Thing, to grant a Repleader.

But

But if the reſt of the Iſſues are only *Parts* of, and *dependant* upon the WHOLE TITLE; the ſame Reaſon does not then hold.

The Way to do *complete* Juſtice indeed, is to let in the *one* Side, without prejudicing the *other*.

If a *Repleader* was to be granted, (upon the Suppoſition of this being the *only* Iſſue,) it muſt be * WITHOUT *Coſts*. But as this was a *Miſtake* of the *Defendant*; (in which the *Proſecutor* was *not* to blame,) We ought to do the moſt complete Juſtice We can, between Both.

* *V.* 6 *Mod.* 2. 5th Point, accord.

My Ld. Ch. Baron was right in his Opinion, " that He could " not admit Proof *different* from the Iſſue joined;" And alſo " that " this Iſſue was *connected* with the others."

If ſo, the Verdicts were *without Evidence:* And it was agreed " that they were to be *without* PREJUDICE." Therefore ſuch Verdicts ought to be ſet aſide, *as* without Evidence; and not to conclude againſt the Defendant, which *would be* a *Prejudice*.

Therefore He propoſed to ſet aſide theſe whole Verdicts, on *Payment of Coſts*; and to give the Defendant Leave to *amend* his Plea.

If it had been upon a *Demurrer* (which there might have been) the Court *would have given Leave to* AMEND.

This ſeems to be the true Way to come at Juſtice; and what We therefore ought to do: For the true Text is " *boni Judicis eſt*, " *ampliare* JUSTITIAM;" (not " *Juriſdictionem*," as it has been often cited.)

This is what I would *wiſh* to do, if We *can* do it.

Mr. Juſt. DENISON—

Formerly, Verdicts were not uſed to be ſet aſide: And therefore, at that Time, Repleaders uſed very commonly to be granted. But they have been leſs uſual of late, ſince the Practice of ſetting aſide Verdicts has prevailed.

On Repleaders, the Iſſue was conſidered as void; and the Verdict too: And conſequently, the Judgment was, " to *replead*."

An Information in Nature of a *Quo Warranto* does not differ from *other* Caſes. Here

Here is an *entire Plea:* The Replication *ſeparates* it, and takes Iſſue on different *Parts* of it. The Replication *ought* to have *demurred* to this *immaterial* Part of the Plea: But *Iſſue* is joined upon it: And there is a Verdict upon it in the Negative, *viz.* "That the Defen- "dant was *not* ſo ſworn as he has pleaded." What can the *Court* do? The Iſſue and Verdict are *impertinent* and *void.* How then can the Court give *Judgment*, when it *does not appear* whether the Defendant had a Right, OR NOT? (I ſpeak now upon this ſingle Iſſue *only.*)

Well then, If you ſet aſide any *Part* of the Verdict, You muſt ſet aſide the *Whole.*

And this uſed, formerly, to be *one* Iſſue.

I well remember that Caſe of *Rex* v. *Philips, M.* 7 *G.* 1. It went upon an Uſage to hold over. The Point was Whether a Repleader ſhould be granted, when the Caſe could not be varied: And it was holden that that would have been vain and idle. On the contrary, it was ſaid that it would be a different Thing, if the Caſe could have been *mended* upon a Repleader. I don't doubt but that there were great Numbers of *other* Iſſues in that Caſe, as well as in this: And yet a Repleader *would have been there granted* if the Caſe could have been *mended*, on the Uſage.

The *Whole* muſt be ſet aſide, *if Part* is ſet aſide.

It is ſaid "that this is a DEFECTIVE *Title.*

But it is NO *Title at all:* It is *only one Link* of the whole Chain.

I think We may ſet aſide the *whole* Verdict upon *one* of the Iſſues being void. And this is better than granting a *Repleader:* Upon which a Writ of Error may be brought, and may long depend; which will be a much greater Delay of Juſtice.

Mr. Juſt. FOSTER—

This was an Election under a *Mandamus*, upon the Statue of 11 *G.* 1, in order to ſettle the Peace of the Burrough.

Here are 12 *Iſſues* joined, *All* found for the King; and *without Evidence*, on any of them: So that none of them have been yet *really* tried.

It is agreed "that in caſe of a *ſingle* Iſſue which doth not deter- "mine the Right, (which way ſoever found,) a Repleader may "be granted."

The 9th Iſſue, in this Caſe, falls directly within this Rule. It is totally immaterial to the Queſtion of Right.

If therefore the Verdicts on the other Iſſues, *upon which no Evidence was given*, vary the Caſe and ſtand in the Way of a Repleader, they ought to be *All* ſet aſide: Or otherwiſe, complete Juſtice can not be done.

And I think, as this Caſe is circumſtanced, the Agreement mentioned by the Lord Chief Baron, * "that the Verdicts were to be "without Prejudice in any *future Trial*," may without a Strain be extended to any *future Litigation* in the Cauſe.

* *V. ante* 294.

Lord Mansfield—

I am now fully ſatisfied, by what my Brethren have ſaid, that the *whole Verdict* may be *ſet aſide*, on *Payment* of *Coſts* and with *Liberty to amend the Plea.*

But that muſt be upon a particular Motion.

And I have no Doubt but that We may do this without *the Conſent* of the Proſecutors.

Which Motions were accordingly afterwards made by Mr. *Norton*; and granted, after a faint Attempt by Mr. Serjeant *Poole* to ſhew Cauſe, and then to get Coſts as between Client and Attorney; in both which Attempts, he was unſuccefsful: For the Rules were both of them made abſolute, upon Payment of Common Coſts; obliging the Defendant, however, to take ſhort Notice of Trial.

Friday 13th *May* 1757.

Rex *verſ.* Inhabitants of Fremington.

(*Lord Commiſſioner* Wilmot *abſent.*)

TWO Juſtices removed *Mary Bevans* from *Fremington* to *Sherwell* in *Devonſhire:* And the Seſſions, upon Appeal from this Order, diſcharged it.

The Subſtance of the Caſe ſtated was no more than this—*viz.* This Pauper, *Mary Bevans*, had been bound an Apprentice, by a Pariſh Indenture, to one *Richards* in *Fremington:* Who, after ſome Time, declared that he had no Buſineſs for Her; and gave Her *Permiſſion* to go and work elſewhere, *for her* own *Benefit.* Whereupon ſhe went, to one Mr. *Nott*, a Relation of her ſaid Maſter's,

purſuant to her ſaid Indenture—Maſter's Recommendation and * *expreſs and particular Leave* given Her (of his Accord) "*to go* "*to Mr. Nott*, of *Sherwell*, and *live with Him*, if they could agree;" and made an Agreement with Mr. *Nott*, "*to ſerve Him* from 1ſt "*June* 1753. till *Lady-Day* 1754. for the Wages of 32 Shillings:" And She accordingly went and *lived with* Mr. *Nott*, *in Sherwell*, from the ſaid 1ſt of *June* 1753. *till* 15*th* Nov. 1753. and *received Wages* for that Time; and then went *back to her Indenture-Maſter (Richards)* in *Fremington*; with whom She ſtayed 8 *Days*; And *then* her Apprenticeſhip *expired*, by her coming to 21: (For it was a Pariſh-Indenture; And She was bound to ſerve Him till Age or Marriage.) And it was ſtated that She had gained no Settlement ſince.

* *V. poſt* Rex *v.* Inhabitants of *Sudbury*, Pa. 13 *Feb.* 1758. N°.

The Seſſions declared themſelves to be of Opinion "That the "Pauper's Settlement was in *Fremington*:" And they *therefore* vacated the Order of the two Juſtices, (which had removed Her from *Fremington* to *Sherwell.)*

This Court was moved, for a Rule to ſhew Cauſe why the Order of Seſſions ſhould not be quaſhed: For that the Settlement of the Apprentice was in the Pariſh where ſhe had *ſerved the* LAST 40 *Days*, namely in *Sherwell*; And it was a Service UNDER *the Indenture*, being with the *Conſent* of the Maſter, and the Indenture of Apprenticeſhip having *never been diſcharged*. 1 *Strange* 10. 1 *Strange* 554. 1 *Strange* 582. and 2 Ld. *Raym.* 1352. S. C. 2 *Strange* 1001.

The Counſel who were to ſhew Cauſe, in Support of the Order of Seſſions, acknowledged the general Poſition "That the Settle- "ment of an Apprentice is in the Pariſh where the laſt 40 Days "Service was performed:" But, without pretending to controvert this Principle, they raiſed a Doubt "Whether this *was* the pre- "ſent Caſe, upon the Facts ſtated." For here the *Maſter* could *receive no Advantage* from this Service of his Apprentice; but ſeems to have given Her free Leave to make *her own* Advantage of it, in the beſt Manner She could: And therefore ſhe may well be conſidered, as being, by his Permiſſion, SUI *juris*.

It was replied that the Indenture was *never diſcharged:* So far from it, that She returned to her Maſter, and *ſerved out* her Apprenticeſhip. And the intermediate Service, (by his Permiſſion) was *under* it.

LORD MANSFIELD ſaid that, as the general Principle was admitted, the Caſe was reduced to a very ſhort Queſtion. It was very plain, He ſaid, that the Pauper was NOT *diſcharged from her Apprenticeſhip:* Her Maſter only gave her Permiſſion to go elſewhere and ſerve another Perſon, for her own Benefit. She did ſo:

And

And afterwards, She *came back again to Her Maſter*, and was *received by Him*, and ſtayed with him 8 Days, which was *to the End* of her Term of Apprenticeſhip. So that it was no more than a generous Intention of her Maſter, to give Her this Permiſſion to ſerve the other Perſon for her own Benefit: But the Apprenticeſhip neither was, nor was intended to be diſcharged. Conſequently, the Service with Mr. *Nott* in *Sherwell* was a Continuation of the Apprenticeſhip, and performed *under* it.

Mr. Juſtice DENISON and Mr. Juſtice FOSTER expreſſed themſelves to the like Effect: And the latter mentioned the Caſe of a Servant who was * permitted by his Maſter to go away three Weeks before the End of his Year, in order to take the Benefit of the Herring-Fiſhing Seaſon; And was, notwithſtanding his having done ſo, adjudged to have gained a Settlement.

* *Rex* v. *Inhabitants of Goodneſtone, Tr.* 1745. 18 & 19 G. 2. *B. R.*

Per Cur. unanimouſly
ORDER of SESSIONS quaſhed:
ORDER of two JUSTICES affirmed.

Saturday 14th *May* 1757.

Rex *verſ.* Inhabitants of Alton.

(*Lord Commiſſioner* Wilmot *abſent.*)

TWO Juſtices removed *Ann Crockford*, the WIFE *of Richard Crockford jun.* and her four Children by Him, from *Elvetham* to *Alton*, (Both in *Hampſhire:*) Which Order was confirmed by the Seſſions.

The ſpecial Caſe ſtated by the Seſſions was, ſhortly, this. The Father and Mother of *Richard Crockford* Junior (this Woman's Huſband) came *by Certificate* from *Alton* to *Elvetham*; where *Richard Crockford* Junior was born, AFTER the ſaid Certificate. *Richard Crockford* Junior afterwards (on 29th *Auguſt* 1734.) became a *hired Servant to Sir* Harry Calthorpe, *at Elvetham*, (the Place of Sir *Harry's Reſidence*;) and was hired and ſerved Him there, for one Year; and the like, for a ſecond Year: But the LAST *forty Days* Service of the ſecond Year was *at* SCARBOROUGH in *Yorkſhire*. The ſaid *R. C.* Junior did NOT *quit the Service* of the ſaid Sir *H. C.* at the End of the ſecond Year; But *at the Expiration* of the ſaid ſecond Year, (*viz.* on 29th *Auguſt* 1736,) the ſaid *R. C.* Junior *applied to the ſaid Sir* H. C. *to make a* NEW *Agreement for* ANOTHER *Year:* When, the ſaid Sir *H. C.* ſaid, "*It would be* "TIME ENOUGH, *when* THEY RETURNED *Home to Elvetham.*" Whereupon the ſaid *R. C.* Junior CONTINUED ON, *for* ABOUT 6 WEEKS,

WEEKS, until the ſaid Sir *H. C.* returned back from the ſaid Pariſh of *Scarborough* unto the Pariſh of *Elvetham: When*, the ſaid *R. C.* Junior was AGAIN HIRED by the ſaid Sir *H. C.* for a *third* Year, *at advanced Wages*; and *ſerved the ſaid third Year out*, in the ſaid Pariſh of *Elvetham*; and *continued* in the Service of the ſaid Sir *H. C.* for *ſeven Years more*, in the ſaid Pariſh of *Elvetham*; And his Wages were, every Year, by Agreement, advanced. After the ſaid *R. C.* Junior quitted the Service of the ſaid Sir *H. C.* He married *Ann*, the Perſon named in and removed by the Order: By whom, He had the 4 Children alſo named in the Order.

The Seſſions confirm the Original Order; for that the Pariſh of *Alton* gave the *Certificate*, UNDER *which*, the ſaid *R. C.* Junior was born; And neither his Father nor Himſelf did any Act, whereby to gain a Settlement in *Elvetham*.

Upon a Motion to quaſh theſe two Orders, two Objections were made to them: *viz.*

1ſt. That the WIFE *and* CHILDREN, ONLY, are removed; without any Notice at all being taken of the *Huſband:* So that this Removal is, or at leaſt (for Aught that appears to the Contrary) may be, a *Divorce* of the Woman from her Huſband.

2d Objection. That tho' *Richard Crockford* Junior the Huſband could not indeed *originally* gain a Settlement at *Elvetham*, by his Service there, *ſo long as he remained Part of his Father's Family*, (as his Father came thither by Certificate;) Yet he might, and actually did regularly gain a Settlement *for Himſelf* at * *Scarborough*, which was a *third* Pariſh, BY *his ſerving* THERE *above* 40 *Days:* And then, *after* that Time, and *after* having gained a Settlement of his own, he conſequently muſt gain a *ſubſequent Settlement at Elvetham*, under his new Hiring and Service with Sir *H. C.* for the THIRD Year; having been, *before* ſuch Hiring and Service, already EMANCIPATED *from his Father's Family*, BY *having* once already gained a Settlement *for Himſelf*, at *Scarborough*.

* 1 *Strange* 524. *Rex* v. *Inhabitants Sancti Petri Oxon'.*

It was anſwered, upon ſhewing Cauſe—

1ſt. That as the *Huſband*'s Place of Settlement appears, upon the Order, there can be no Doubt but that the *Wife and Children* may be ſent to *it*.

2dly. That the general Poſition upon which this Objection is founded, is contrary to the Intent and Meaning of the Certificate-Act, and would defeat it's End.

Beſides, here was a *Continuation* of the firſt Original Contract: Which *went on*, notwithſtanding this *caſual* Reſidence at *Scarborough*; and was *never diſſolved, or even interrupted.*

And the COURT determined accordingly, upon both Objections; after having taken Time to conſider of the Caſe, with regard to the 2d Objection.

LORD MANSFIELD delivered the Opinion of the Court.

1ſt Objection. 1ſt. *Alton* appears to Us (for the Reaſons I ſhall give in anſwer to the 2d Objection) to be the Huſband's Settlement. He was at *Elvetham*, only under a Certificate from *Alton*; And He is expreſly ſaid to have gained no Settlement in *Elvetham*, by any *other* Act than what is particularly ſtated: And we *can't intend* that He did. Therefore his Wife and Children were * *properly ſent thither*. He *Himſelf* could not be removed *from Elvetham*, if he was not *at Elvetham:* And if he ſhould be found there *in future*, He may be removed by another Order.

* *V.* 1 *Strange* 544.

2d Objection. 2dly. The Original Service at *Elvetham* (to which Pariſh this Man was certificated from *Alton*) *continued* and went on, during the whole Time; *notwithſtanding* the *caſual* intermediate Reſidence at *Scarborough*.

Undoubtedly, a Servant *may* gain a Settlement, by ſerving 40 Days, in a Place where the *Maſter* Himſelf has *none*.

And it *may* ſo happen, that a Servant may gain a Settlement in a Place where the *Maſter* NEVER *comes:* For the Service may be performed, in a Place from which the Maſter, in his own Perſon, is locally abſent; or if the Servant has his Maſter's Leave to be abſent at any Place, for his Health, yet his Service continues.

But in the preſent Caſe, the Servant gained no Settlement at *Scarborough*; either upon the general Grounds of theſe Determinations; or upon the particular Circumſtances of the Caſe itſelf; or upon the Authority of thoſe Caſes that have been imagined to be ſimilar to it.

This Perſon was a Certificate-Man, hired by Sir *H. C.* (a Gentleman of Faſhion,) in a Pariſh where Sir *Harry* lives and reſides. Sir *Harry* goes to *Scarborough*, (a Place of Public Reſort,) for his Health or Amuſement; and not as an Inhabitant, but *only as a Sojourner*. Whilſt they were there, the ſecond Year of his Service ended. This was mentioned by the Servant to his Maſter: And

on

on the Servant's propoſing a new Agreement, for another Year, the Maſter ſaid "It *would be time enough* when they returned Home." When he came Home, He hired the Servant, for another Year: And the Servant continues to live with him ſeven Years.

Now if this Service for 40 Days at *Scarborough* were to acquire a Settlement there, it would be a very *great Hardſhip*, both upon the Pariſh of *Scarborough*, the *Place of Public Reſort*; and alſo upon the Pariſh of *Elvetham*, who *depended upon the Certificate* given them by the Pariſh of *Alton*.

Suppoſe, a Servant was to break his Leg, and be left by his Maſter upon the Road; or ſhould be waiting at a Sea-Port Town, for a Paſſage, above 40 Days; the Service, in both theſe Caſes, *continues:* And yet, *would it be reaſonable* that this ſhould gain a *Settlement* in ſuch Pariſh? This could never be the Intent of the Law-Makers.

The Maſter's Place of *Abode*, his *Domicil*, can never be ſuppoſed to be at *Scarborough:* And if his *caſual ſojourning* there were to obtain a Settlement there for his Servant, attended with the Conſequences drawn from it, this would be a *Fraud* upon the Pariſh to which the *Certificate* is given, and where the Servant was hired *upon the Faith* of ſuch Certificate.

Indeed, the Caſe of the King againſt the Inhabitants of St. *Peter*'s in *Oxford*, reported in 1 *Strange* 524. has been ſtrongly urged, to prove that the Servant ſhall, in the preſent Caſe, gain a Settlement in *Scarborough*, ſince the Maid, in that Caſe, was adjudged to have gained one in *Fawly*, *only* by ſerving her Miſtreſs there *during a Viſit*.

But— [Here, his Lordſhip entered into a very full Diſcuſſion of this Caſe; and expatiated very largely upon it. In doing which, He obſerved that the Report of this Caſe, as it appears in 1 *Strange* 524. is very inſufficient and incorrect, in point of Fact; and that the Reaſon there given, is as incorrect as the Fact: And added that he had looked to ſee how this Caſe was ſtated by Mr. *Burn*, and by Mr, *Foley*; (For it is mentioned in Mr. *Burn*'s Book, Title Poor, Fo. 526. in the Folio Edition, and in *Foley*'s Caſes on the Laws relating to the Poor, Fo. 215.) and found that none of them ſtate it truly. However, out of them all, he ſaid, one might diſcover it: And accordingly he ſtated what he collected, from all theſe Accounts, compared together, to have been * probably the true State of the Caſe; which he took to be this—Mrs. *Cooke* was Mother in Law to Dr. *Clavering*, and alſo to Mr. *Freeman*; and lived, (as a Lodger, or Viſiter, or Friend,) *ſometimes* with Dr. *Clavering* in *Chriſtchurch*,

* *V. infra*, the true State of it, taken from the Record.

Chriſtchurch, and *ſometimes* with Mr. *Freeman* at *Fawly-Court*: So that She had really NO *Place of Abode*; and was *as much at Home*, with Mr. *Freeman*, as with Dr. *Clavering*. Therefore She could not be conſidered upon the Foot of a Perſon who had a *ſettled Dwelling at Chriſtchurch*, and only went on a mere Viſit to *Fawly-Court*. Upon the whole, he concluded that this Caſe did not at all ſtand in the Way of the Court's determining, in the preſent Caſe, that *R. C.* Junior, the Servant of Sir *H. C.* did *not* gain a Settlement at *Scarborough*.

Note—Since there has been ſo much Doubt and Miſapprehenſion concerning the Caſe here cited, I have had the Curioſity to tranſcribe it from the Original Record: And the *true* Caſe is as follows—

" *Rex* v. *Inhabitantes Sancti Petri in Oriente in Civit. Oxon'*.

Two Juſtices removed *Mary Norris* from the Pariſh of St. *Peter* in the *Eaſt* in the ſaid City, to the Pariſh of *Faaly* in the ſaid County of *Oxford:* Which Order was diſcharged by the Seſſions, upon Appeal; It appearing (as it is ſtated in the Order of Seſſions) That the ſaid *Mary Norris* was *hired at Chriſtchurch* in *Oxon*, an EXTRAPAROCHIAL Place, on the 16th of *May* 1717. for one Year, to Mrs. *Cooke*, who *then lived, and ever ſince hath lived* with her Son in Law Dr. *Clavering*, Canon of *Chriſtchurch*-College aforeſaid, *as a Sojourner or Boarder*; and continued in her Service *there*, till the Month of ——— in the ſame Year; when, Mrs. *Cook* went, *upon a* VISIT, to her Son Mr. *Freeman's*, in the Pariſh of *Faaly* aforeſaid, where She *continued three Months*, GIVEN *the ſaid Viſit*; And her ſaid Servant *Mary Norris* was *with Her* at the ſaid Mr. *Freeman*'s and *continued* THERE *in her Service all the three* Months: At the End of which, the *Miſtreſs returned again to Chriſtchurch* aforeſaid; And *there* the Year's *Service expired*, She having ſerved her Miſtreſs the whole Year, *in purſuance* of the *firſt Hiring*.

Die Martis prox' poſt quinden'
Scæ Trin' Anno 8vo. Georgij Regis.

The Rule (which I took from the Rule-Book) is Ordinatum eſt qd *Ordo* SESSIONIS in hac Cauſa facta, de et concernen' Amotion' cujuſdam Mariæ Norris à paroch' Sci Petri Orien' infra Civit' Oxon' ad paroch' de Faaly in Com' prædict', CASSETUR; et qd *Ordo* ORIGINALIS AFFIRMETUR."

Lord

Lord *Mansfield* proceeded to mention another Caſe (which had not been cited at the Bar) from Mr. *Foley*'s Book abovementioned, Pa. * 197. between the Pariſhes of *Biſhop's Hatfield*, and St. *Peter*'s in St. *Alban*'s, *Hertfordſhire:* Where two Juſtices having removed one *Langley* from *Biſhop's Hatfield* to St. *Peter*'s, and their Order being appealed from, it was ſtated, upon the Seſſions-Order, That *Langley*, the Pauper, was a *Huntſman* to one Mr. *Arnold*; And that Mr. *Arnold* lived ſometimes in *Weſtminſter*, and ſometimes at his Houſe in *Northamptonſhire*; but that Mr. *Arnold himſelf had no Settlement in St. Peter*'s in St. *Alban*'s: But that *Langley ſerved the laſt* 40 *Days* of his Year in the Pariſh *of St. Peter* in St. *Alban*'s, WITH *his Maſter Mr. Arnold. This*, the Juſtices at Seſſions thought, gained *no* Settlement for *Langley* in St. *Peter*'s in St. *Alban*'s: And they quaſhed the Order of the two Juſtices, which removed Him thither. But this Court quaſhed that Order of Seſſions; and held *Langley*'s Settlement to be *in St. Peter*'s in St. *Alban*'s, BY SERVING his Maſter, Mr. *Arnold*, the laſt 40 Days of his Year THERE; though Mr. *Arnold*, the *Maſter*, *had no* Settlement there.

* 'Tis Pa. 217 in the 3d Edition. It was in *H.* 1 G. 2.

And that is clearly ſo, " That the *Maſter's having no* Settlement " in St. *Peter*'s, would not at all vary the Caſe." And that is there ſtated, as the *whole* Point of the Queſtion.

But upon the very Face of that Caſe there ariſes *another Diſtinction*. For the Servant was a *Huntſman*; And Gentlemen who are keen after the Diverſion of Hunting, have their Huntſmen and Hounds frequently removing from one Sporting Country to another, and often kept in *other* Places than where they *themſelves* generally reſide: Nothing is more common. And this Huntſman might go from Place to Place, with his Hounds, into various ſporting Countries, and perhaps NEVER live in the *ſame* Place where his Maſter's Reſidence was. Now *if* this was the Caſe, it is no more than the Caſe of the *Oxford* Stage-Coachman's Servant (1 *Strange* 528:) who gained a Settlement in *Chipping-Wicomb*, where He *performed his Service*; *though the Maſter never* reſided there at all.

And there is *no other* Caſe (as far as has come to my Knowledge,) that interferes with our preſent Opinion upon the Caſe now under our Conſideration.

Therefore I think that upon the Caſe now ſtated in the preſent Order; And for that the Servant NEVER QUITTED his Maſter's Service, but returned with Him to Sir *Harry*'s own Habitation, and continued in his Service there for ſeveral Years; this is a Con-

TINUATION *of the Original* Service in *Elvetham*; which was begun under the Certificate from *Alton*.

And I lay great Streſs upon the Circumſtance of Sir *H. C*'s telling the Servant (when he informed his Maſter, at *Scarborough*, of his Year's being ended, and propoſed his being re-hired for another Year,) "that it would be *time enough, when they returned* "Home to *Elvetham:*" Since it appears plainly, by this Anſwer of the Maſter to the Application of his Servant "to make a new "Agreement for another Year," That the Contract between them was NOT *finiſhed* and put an End to, at *Scarborough*; but *adjourned and* CONTINUED over.

I alſo lay great Streſs upon the Circumſtance of the Servant's being (*accordingly*) *re-hired* by his Maſter, upon their Return Home to *Elvetham*; and *continuing* 7 Years more in his Service at *Elvetham*.

And I likewiſe lay great Streſs upon the Circumſtance of this Pauper's having come from *Alton by Certificate*, to *Elvetham*; where Sir *H. C.* originally hired Him; and muſt have hired Him AS a Perſon *not capable* of gaining a Settlement *in Elvetham* by ſuch Hiring and Service under it, by reaſon of his being *under* C *rtificate* from *Alton*.

THEREFORE We are of Opinion that this RULE be diſcharged; And that the ORDER of the two JUSTICES, And alſo the ORDER of SESSIONS confirming it, be BOTH of them AFFIRMED.

And the Rule was drawn up and entered accordingly.

Paxton *verſ.* Knight.

MR. *Norton* ſhewed Cauſe againſt a Prohibition.

This was a Queſtion whether a Prohibition ſhould be granted, to ſtay Proceedings in an Eccleſiaſtical Court in a Suit by a Quaker, for a Seat in a Church; founding his Title upon a *preſcriptive* Right: In which Suit the Eccleſiaſtical Court *had determined* againſt him. And he now came, after Sentence below, for a Prohibition. Note—An *immemorial Preſcription* was alledged on *both* Sides.

Mr. *Norton*—againſt the Prohibition, cited 2 Ld. *Raym.* 755. the Caſe of *Jacob* v. *Dallow*. 2 *Salk.* 551. S. C. 5 *Mod.* 436. S.C. Caſes in *B. R.* temp. *W.* 3. 233. S. C. *Farreſley*, 8. S. C.

As

As to Prohibitions *after Sentence*—

Hetley 94. the Caſe of *Eaton* v. *Aycliffe* (which had been cited on the other Side,) is a Caſe to which the Court will not pay great Attention: It was determined *temp.* C. 1. and is a looſe Note; And even * Mr *Watſon* in his *Complete Incumbent* treats it as a Caſe of no Authority.

* Mr Juſt. *Deniſon* obſerved that the *Complete Incumbent* was not written by *Watſon*; but by Mr. *Place* of *York*.

The Court will not *after Sentence*, grant a Prohibition, unleſs the Defect of Juriſdiction appears upon the *Face of the Libel.*

1 *Strange* 187. the Caſe of *Argyle* v. *Hunt*—is expreſly ſo, in Point. And the Caſe of *Stone* v. *Fowler*, *Mich.* 9 *Annæ*—there cited [Fo. 188.] is to the ſame Effect. 1 Ld. *Raym.* 436. is alſo in Point: The Church-Wardens of *Market Boſworth* v. the Rector of *Market Boſworth*; where the Spiritual Court had adjudged *againſt* the Cuſtom ſet up; though their Law allows a *leſs* Time, than the Common Law, to make a Cuſtom: But the Prohibition was denied. So here, if the Spiritual Court will admit *leſs* Evidence of a Preſcription, than the temporal Courts will; And the Preſcription is *nevertheleſs* found to be groundleſs; it is certain that the Party *who ſets it up*, can have no Reaſon to come for a Prohibition, *after Sentence.* And his only Reaſon for it can be, (as the Court obſerved in the laſt cited Caſe,) to *get clear* of thoſe *Coſts*, which he has by his own *vexatious Suit*, rendered himſelf liable to; And which (as was there adjudged) they ought to pay.

But THE COURT ſeemed to think that *if* the SENTENCE of the Eccleſiaſtical Court was a *Nullity*, their Award of *Coſts* muſt be ſo too. And here are *reciprocal Preſcriptions* alledged: And the preſcriptive Right of the One is determined *for*; though that of the Other is determined *againſt*. They have adjudged the Adverſe Preſcription to be a *good* One: Which they could not try; and which they will eſtabliſh upon leſs Evidence than the Common Law requires.

And My LORD MANSFIELD ſaid that though He was very ſorry that the Court were obliged to grant the Prohibition, (becauſe the Party applied for it, only to get rid of paying the Coſts occaſioned by his own vexatious Suit;) Yet He thought they could not avoid doing it.

Per Cur. RULE for a Prohibition made ABSOLUTE.

Rex

Monday 16th *May* 1757.

Rex *verſ.* Joſeph Chaplin Hankey Eſq;

(*Lord Commiſſioner* Wilmot *abſent.*)

ONE *Ralph Carr* an Attorney, applied for an *Information* againſt the Defendant, for ſending Him a *Challenge.*

Upon hearing the Affidavits, and the Letters that paſſed between theſe two Gentlemen, The Court thought that *Carr* himſelf appeared to have ſent the *firſt* Challenge to the Other; at leaſt, that his Letters manifeſtly *imported* a Challenge: Which the other clearly ſo underſtood, and accordingly accepted, and propoſed to fight with Piſtols.

The COURT held, that though the Defendant had *behaved very improperly*; And though it would have been right for the Court to have granted even CROSS-*Informations*, in caſe Each Party had applied for an Information againſt the other; Yet they thought that when the *Aggreſſor*, who gave the firſt Challenge, came and applied for an Information againſt the Other who *only accepted* it, (however improperly and unlawfully;) it was a very different Caſe; And that the Court had no Reaſon to give him this EXTRAORDINARY Remedy, by way of Information: but ought rather to leave Him to his ORDINARY *Remedy*, by Action or by Indictment.

Therefore the RULE "to ſhew Cauſe why an Information "ſhould not be granted," was DISCHARGED.

Robinſon *verſ.* Raley.

Tr. 25 *G.* 2. *Rot'lo* 775.

THIS was an Action of Treſpaſs. The Declaration contained a great Number of Counts; amongſt the Reſt, One in Treſpaſs for breaking and entering the Plaintiff's Cloſe; and depaſturing it with *&c*; And for breaking and entering his Free-Warren; A 2d Count, to the like Effect; (but in different Years;) So a 3d, 4th, 5th and 6th. And 6 more, for breaking and entering another Cloſe called *Sands's Piece*; a 13th for taking and carrying away the Plaintiff's Trees: and a 14th for taking and carrying away his Goods and Chattels.

The

The Defendant had Leave to plead ſeveral Pleas: And accordingly He pleaded, 1ſt. The General Iſſue, to the whole. 2d Plea (by Leave, *ut ſupra*,) That As to the Cloſe called the *Rabbet-Walks*, " That it is one Rood of Land, Parcel of a Common-Field; And " that Mr. *Finch*, in Right of his prebendal Eſtate, and all *&c.* " have Right of Common *&c.* in certain Fields called Middle " Fields, whereof the Rabbet-Walks are Parcel:" Which Right he derives to Himſelf; and ſo juſtifies under it. The like Plea, to the other 5 next Counts. He pleads, as to the 6 Iſſues relating to *Sand's Piece*, the General Iſſue. To the 13th Count, He pleads Tenancy of another Cloſe, under the Plaintiff; And juſtifies under a *Licence*, and avers that it was uſed for Gates, *&c.* Another Plea was a Right of Common, *&c*, *&c.*

The Plaintiff, in his Replication to the 2d Plea to the 1ſt Count, traverſes the Right of Common: And in his Replication to the like Pleas as to the other five Counts, traverſes the Rabbet-Walks being Parcel of the Middle Fields. In his Replication to the laſt mentioned Plea, he traverſes the Right of Common. All theſe Iſſues were *found* for the Defendant. To the Plea to the 5th Count, the Replication traverſes " That the Cattle were the Defen- " dant's *own* Cattle; and that they were *levant et couchant* upon the " Premiſſes, *and commonable* Cattle." To this there is a ſpecial Demurrer for Cauſe, (*viz.* " that the Replication is multifarious, " and that ſeveral Matters, ſpecifying them, are put in Iſſue; " whereas only *one ſingle* Matter ought to be ſo;") and Joinder in Demurrer. To the Plea to the 13th Count, the Replication traverſes the *Licence*; (after proteſting " that the Tree was not uſed " for Gates *&c.* as is alledged by the Defendant's Plea.") And to this Replication alſo, the Defendant demurs ſpecially; and ſhews for Cauſe, " That it concludes to the Country, whereas it ought to " conclude with an Averment."

Serjeant *Poole*, for the Defendant, complained of the Hardſhip the Plaintiff put upon the Defendant in the 5th Count, by inforcing the Defendant to prove the Cattle to be his *own* Cattle, *and commonable* Cattle; *and levant and couchant* upon the Land: Which Hardſhip had *obliged* him to demur. 1ſt Demurrer.

He argued that *ſome One* Fact only ought to be put in Iſſue; Not *Several.*

He cited *Co. Lit.* 126. *a.* [Letter q, r.] It muſt be One SINGLE certain material Point. And ſo alſo 8 *Rep.* 67. *b. Crogate*'s Caſe [the laſt Reſolution,] lays down the Rule accordingly, " That an " Iſſue ought to be full and SINGLE."

Now here are *three* DISTINCT *Facts* put in Iſſue, by this Replication: Any One of which was ſufficient.

For if the Cattle were not his *own*, or were not *levant and couchant*, they were *not commonable* Cattle. The Plaintiff might as well have put Twenty Facts in Iſſue.

This therefore is, at leaſt, a Fault in *Form:* And We have demurred *ſpecially*, and ſhewn this for Cauſe; "That the Replication "is multifarious, and that *ſeveral* Matters are put in Iſſue (ſpecify-"ing them;) whereas *only One* SINGLE Matter *ought* to be ſo."

2d Demurrer. As to the *Licence*—The Replication (proteſting that the Tree was not uſed for Gates &c.) traverſes the Licence. To this Replication, We have demurred, *out of Neceſſity*: For though We really *have* a Licence, yet the Perſon who gave it to Us (the Plaintiff's Steward) has *denied* it; and We apprehended, would do ſo again, on Oath. Therefore We have demurred ſpecially, and ſhewn for Cauſe "That the Replication concludes to the Country, whereas it ought "to conclude with an Averment."

Now they ought to have traverſed the Licence ſpecially, and to have concluded with an Averment. *Crogate*'s Caſe, 3d Reſolution, [*fo.* 67. *a. b.*] ſhews that this Licence ought to have been ſpecially traverſed, and concluded with an Avermenent." And *Raſt.* 660. *b. bis.* 661, 630, 651. and 1 *Brown*, 353. and *Thompſon's Entr.* 365. And many other Precedents, are ſo.

Indeed where the *whole* of the Plea is traverſed, the Concluſion *may* be to the *Country*. But this is *not* a Traverſe of the *Whole*. So that this is a Departure (by Mr. *Robinſon*) from the common Form of Pleading.

Mr. *Yates contra* for the Plaintiff.

1ſt Demurrer. One Part of the Duplicity (*viz.* the Cattle not being *commonable*) is not pointed out by the Special Demurrer.

However, this Traverſe is *not double:* Though I agree that it *numerally* contains ſeveral Matters; all which TOGETHER make up the Defendant's Plea, and make *One* ENTIRE *Defence*. And it is within the Reaſon of *Crogate*'s Caſe, 8 *Co.* 67.

Whereas *Duplicity* is, where diſtinct Matters, NOT being Part of *one entire Defence*, are put in Iſſue. For there are Caſes where *ſeveral Matters may* be put in One Traverſe: As, for Inſtance, a Cuſtom conſiſting of *ſeveral Parts*.

Now All *theſe* Parts here traverſed, make *One entire Defence.* For the Cattle muſt be *commonable, levant and couchant, and* his *own:* Or elſe, it is no ſufficient Defence. To prove which, he cited 1 *Ro. Abr.* 398. Letter G. *Pl.* 2, 3. Letters H and I, throughout. 1 *Saund.* 227. The Caſe of *Stennell* v. *Hogg*, and 2 *Show.* 328. The Caſe of *Manneton* v. *Trevilian*, in Point.

As to the Licence, the Cauſe of Demurrer ſhewn is, " that he 2d Demurrer.
" ought to have maintained his Declaration; and that he ought
" to have concluded with a Traverſe and *Averment.*"

But Precedents are *both* ways. 2 *Brown's Entr.* 283. concludes as the preſent does. And whoever has ſeen the *whole* of this Record will not think that *either* of the Parties has concluded *too haſtily.* He cited the Caſe of *Clark* v. *Glaſs*, *Tr.* 28, 29 *G.* 2. *B. R.* to prove that where the WHOLE *Contents* of the Plea are denied, the Concluſion muſt be to the *Country:* But where, only a *particular Fact* is denied, the Concluſion muſt be with an *Averment.* He alſo cited 2 *Lutw.* 1399, 1401. The Caſe of *Huſtler* v. *Raines.*

Serjeant *Poole*, in Reply—

1ſt. As to the two Matters making but One entire Defence— 1ſt Demurrer.
Yet being *Variety of Facts*, they ought not *Both* to be put in Iſſue. *Grogate*'s Caſe, 8 *Co.* 67.

And the common Method is, to traverſe " that the ſaid Cattle
" were *levant and couchant.*"

As to the Caſe of *Manneton* v. *Trevilian*, I agree that the Cattle *ought* to be *levant and couchant.* My Demurrer here is in Point of FORM; and is Special.

2dly. I do not know but the Party may go to Iſſue, in *ſome* 2d Demurrer.
Caſes: But I ſay this is not the *common* Form.

The Caſe of *Huſtler* v. *Raines*, 2 *Lutw.* 1399, 1401. proves Nothing againſt Me.

LORD MANSFIELD held both theſe Demurrers to be frivolous.

The SUBSTANTIAL *Rules* of Pleading are founded in *ſtrong Senſe*, and in the *ſoundeſt and cloſeſt Logic*; and ſo appear, when well underſtood and explained: Though, by being *miſunderſtood* and *miſapplied*, they are often made uſe of as Inſtruments of Chicane.

As

1st Demurrer. As to the present Case—'Tis true, You must take Issue upon a *single* POINT: but it is not necessary that this single *Point* should consist *only* of a single FACT. Here, the *Point* is, the Cattle being *intitled to Common:* This is the single POINT of the Defence. But in *Fact*, they must be both his *own* Cattle, and ALSO *levant and couchant*; which are *two different essential* Circumstances, of their being intitled to Common; and *Both* of them absolutely requisite.

2d Demurrer. So, as to the *Licence*—The Licence is the *Point* in Question. And this Point in Question, "Whether the Licence was given, or not," is put in Issue: The *Whole* turns upon *this particular Proposition.* Indeed it may be a different Case, where the *whole* of the Plea is NOT *denied*; but *only some Parts* of it. But that is *not this* Case.

Mr. *Yates* has made right and reasonable and intelligible Distinctions: And He has cited an express Authority.

Mr. Just. DENISON concurred.

1st Demurrer. 1st. As to *Crogate*'s Case—The Replication "*de injuria suâ propriâ absq; tali Causa*," will do, in all Cases where Matter of Title, and other Things of that kind, are not included in the "*absq; tali Causa:*" And if You *admit them*, You may then plead "*De injuria suâ propriâ, absque* RESIDIO *Causæ*;" traversing that Residue. But the Rule in *Crogate*'s Case don't affect *this* Case. For here the Question is *One single Proposition, viz.* the *Measure* of the Common: And the Measure of the Common is the Levancy and Couchancy jointly with the Property.

Skinner 137, is a more sensible Report of the Case of *Molliton* and *Trevilian*, than 2 *Show.* 328. And there, the Levancy and Couchancy, *together with* the Property, were esteemed to be the Measure of the Common; and *not* the Levancy and Couchancy *only.*

So that Nothing more is here traversed, than the Measure of the Common. The Case is in Point.

Besides, I think it is *within Crogate's Case.*

2d Demurrer. As to the *Licence*—It is right, and avoids the Prolixity of Pleading. The *old* Way indeed was otherwise; but it is altered, of late.

And He cited a Case (of an alternate Way of traversing a corrupt Agreement,) which was in *M.* 5 *G.* 1. *B. R. Fen* v. *Alston*—Where it was holden "That the Plaintiff has a Liberty either to reply

" that the Bond was given upon another Account," and to traverſe the Corrupt Agreement with an *Abſque hoc*; *or* to deny the corrupt Agreement *directly*, and conclude to the *Country*. And the Caſe of *Baynham* v. *Matthews*, 2 *Strange* 871. goes upon the very ſame Foundation; and mentions the ſame Alternative.

Mr. Juſt. FOSTER, I am of the ſame Opinion.

Mr. *Norton*, who was alſo of Counſel for the Defendant, deſired the Court not to give Judgment yet; but to give them an Opportunity to move for Leave to withdraw their Demurrers, and amend: Which the Court agreed to. And in a few Days afterwards, Mr. *Norton* moved for Leave to *withdraw* the two Demurrers, and plead to Iſſue; (upon Payment of Coſts:) And a RULE was thereupon granted, to SHEW CAUSE.

And now Mr. *Yates* ſhewed Cauſe, for the Plaintiff, againſt the Defendant's being at Liberty to withdraw the two Demurrers, and plead to Iſſue. And he cited 6 *Mod.* 102. The Caſe of *Croſs* v. *Bilſon*. 6 *Mod.* 1. The Caſe of *Staple* v. *Haydon*. 1 *Ld. Raym.* 668. The Caſe of *Fox* v. *Wilbraham*, and 2 *Strange* 1002. *The Bank of England* v. *Morrice*.

Serjeant *Poole*—and Mr. *Norton contra*, for the Defendant—

The Merits have not been tried upon theſe Demurrers. We move this at *Common Law*; not under any Statute. And the Court are not bound down by any certain Rules. And they cited 2 *Saund.* 402. *Rex* v. *Ellames*, [2 *Strange* 976.] *Dutcheſs of Marlborough* v. *Widmore*, *Hil.* 4 *G.* 2. *B. R.* The Caſe of *Cope* v. *Marſhall*, *Tr.* 28 *G.* 2. *B. R.* [*V. ante* 259. S. C.]

The Caſe of *Giddins* v. *Giddins*, [*Tr.* 29, 30 *G.* 2. *B. R.*] was even after the Court had given their Opinion. *

And here is a Declaration of 20 *Counts*, manifeſtly intended to catch the Defendant, and to ſave Coſts.

If our Motion is granted, the *contingent* Damages aſſeſſed, will be out of the Caſe, and will be as none at all.

LORD MANSFIELD—It is admitted to have been done, *after a* DEMURRER *and Argument:* But this is *after a* TRIAL; and *without any* favourable Circumſtances.

Now as no Caſe of ſuch an Amendment *after a* TRIAL is cited, I take it for granted that *None* EXISTS.

* It was after a Demurrer and Argument only: But the the Court had given *no* Opinion; and the Rule was made abſolute without Defence.

Theſe are frivolous Demurrers: And the only View of this Motion is *to get rid of the Coſts.* But the Plaintiff would have had his Coſts, if the Defendant had done right at firſt, and joined Iſſue upon theſe Facts; *if* they had been found *againſt* him.

So that here is neither Precedent, nor Reaſon for allowing this Motion.

Mr. Juſt. DENISON concurred.

Where the Demurrer is firſt argued, *before* any Trial of the Iſſues, the Court will give Leave to *amend:* As in the Caſe of *Giddins* v. *Giddins.* But this is an Attempt to amend an Iſſue at *Law*, AFTER *a Verdict* has been found on the Iſſues *upon* FACTS, and *contingent Damages found* upon the Demurrers: Of which, there *never was an Inſtance.* And We do not know where it would end; Nor do I well know how the Cauſe *could* be again carried down to Trial.

If this had at firſt gone down to Iſſue; and had been found *againſt* the Defendant; It would have carried Coſts.

The Court cannot help ſeeing that this is *upon* RECORD: Here are *Verdicts* and *contingent Damages* found. Therefore We cannot help this: I wiſh We could; becauſe the Merits ſeem to be with the Defendant.

The Caſes of Amendment cited are where the Whole is ſuppoſed to be *in* PAPER: Or elſe the Court COULD NOT *have done it.* We have no Authority to do this, AFTER 'tis plainly *upon* RECORD.

Mr. Juſt. FOSTER concurred.

Per Cur' unanimouſly JUDGMENT for the PLAINTIFF upon the DEMURRERS.

Roberts

Roberts *verſ.* Peake.

Tueſday 17th *May* 1757.

M. 29 *G.* 2. *Rot'lo* 625.

(Lord Commiſſioner Wilmot *abſent, in Chancery.)*

THIS was a Special Caſe reſerved at *Niſi prius* at *Guildhall*, on a Trial there before the late Ld. Ch. J. *Ryder*.

It was an Action upon a *promiſſory Note*, brought by the Indorſee, againſt *One* Defendant only; though the Note imported, *upon the Face of it*, to have been made by *two* Perſons: And the Declaration was upon the Note, *as if* it had been an ABSOLUTE One, payable on the * Death of a Perſon named in it: Whereas it appeared, upon the Face of it, to have been given *upon* two ſeveral CONDITIONS. For the Note when given in Evidence, came out to be thus "WE (naming the Defendant *Peake* AND *another Perſon*) promiſe to pay to *A. B.* 116*l.* 11*s.* (Value received,) *on the* "* *Death* of *George Henſhaw:* PROVIDED *He leaves Either of Us* "*ſufficient to pay* the ſaid Sum, OR *if We ſhall be* OTHERWISE "*able to pay it.*"

* *V. ante* 226. *Goſs* v. *Nelſon*, on a Note payable when Defendant ſhould come to *Age*; ſpecifying *when* that was to be.

Signed by PEAKE *only.*

And yet it was laid in the Declaration, merely as a Promiſſory Note abſolutely and in all Events payable on the Death of *G. H.*

Mr. *T. Clarke* of *Lincoln's-Inn—pro Quer.*

The two Queſtions upon this Caſe are—

1ſt. Whether this be a NEGOTIABLE *Note.*

2d. Whether *this* Note, given in Evidence, *ſupports* the *Declaration*; which is upon an ABSOLUTE Note payable on the Death of *G. H.*

Firſt Point—There can be no Doubt but that *if* the Note given in Evidence had *not* had the Proviſo added to it; but had merely been made payable *on the Death* of *George Henſhaw*; it had been a good negotiable Promiſſory Note, within the Statute of 3 & 4 *Ann. c.* 9. [§. 1.]

For

For the *Contingency* of the *Death* of *G. H.* is *not* ſuch an uncertain Contingency, as that the Event may poſſibly or probably never happen; And *ſo* the Note might perhaps *never* become payable: But it is an *Event* CERTAIN *and* NECESSARY; and *no otherwiſe*, nor in any other Reſpect uncertain, than merely as to the *particular* TIME *when* it will happen. So that it is no more than the *ordinary* Caſe of a Promiſſory Note payable at a FUTURE Day.

And to prove this Doctrine, and that this is a negotiable Note, He cited 2 *Strange* 1217. the Caſe of *Cooke* v. *Colehan* full in Point; being "to pay, *&c.* within Six Weeks after the Defendant's Fa-"ther's Death." 1 *Strange* 24. the Caſe of *Andrws* v. *Franklin:* ſtill ſtronger; being "to pay, *&c.* within two Months after ſuch "a *Ship ſhall be paid off.*"

Then as to the *Proviſo* or Condition, it is made *abſolutely* payable, on *George Henſhaw*'s Death, an Event which *will certainly happen:* Therefore the Proviſo is repugnant to the Body of the Note. And he endeavoured to ſhew a Reſemblance between this Caſe, and that in 2 *Salk.* 463. the Caſe of *Wells* v. *Treguſan*; and the Caſe in 21 *E.* 4. 36. and *Brooke*, Obligation 58. [S. C. abridged.]

Second Point—The Note produced in Evidence will ſupport the Declaration.

1ſt Objection is "That the Note is only laid, as the Defendant's "*ſeveral* Note:" Whereas it imports upon the Face of it, to be made by *two* Perſons, jointly.

Anſwer. Perhaps One only *ſigned* it: Or if the Other did alſo ſign it, it was, nevertheleſs, equally the Note of the Defendant. It is laid, and muſt be pleaded according to its *legal* Operation. 1 *Strange* 76. the Caſe of *Butler* v. *Maliſſey* is moſt directly in Point.

2d Objection. "That this is laid AS *an* ABSOLUTE Note, *with-*"*out* mentioning the two Conditions," (of being payable) "IF he "ſhall be able;" or "IF *Henſhaw* ſhall leave either of them ſuf-"ficient to pay it."

Anſwer—But I ſay that this Note produced in Evidence, which contains theſe two Conditions, will ſufficiently ſupport the Declaration.

In attempting to ſupport this Aſſertion, he mentioned 6 *Mod.* 228. the Caſe of *Roberts* v. *Harnage.* 2 *Salk.* 659. S. C. 4 *E.* 4. 29. and 1 *Strange* 76. the Caſe of *Butler* v. *Maliſſey*, before mentioned.

Mr. *Norton* for the Defendant was about to ſpeak: But

Lord Mansfield ſtopt Him, and ſaid, I fancy you will hardly argue this: (meaning that it was ſufficiently clear on Mr. *Norton*'s Side of the Queſtion.)

Mr. *Norton*—This was an Action brought by an Indorſee; and is under very particular Circumſtances.

I agree that a Note in the Name of two, and importing to be made by two Perſons, may be actually ſigned by One only and will be good: Alſo that a Note may be declared upon, according to it's *legal* Operation.

As to the reſt—If the Court was clear, He ſaid He would not trouble them.

Lord Mansfield—I am very clear.

This Note was payable *upon a Contingency:* But it is not *an* abſolute Note. What would it ſignify, to have put in all theſe Contingencies, *if* the Party was *abſolutely* and *at* all *Events* bound to pay it upon the Death of *George Henſhaw?* Moſt manifeſtly, it was not intended that he ſhould be bound to pay it upon *George Henſhaw*'s Death, at *all Events*.

Therefore this is *not* a *negotiable* Note: For a Note payable *upon an uncertain Contingency*, is *not* a *negotiable* Note.

Mr. Juſt. Denison concurred.

A Note payable *eventually* upon an uncertain Contingency can *never* be a *negotiable* Note. And if it had been ſo, yet there ought to have been an Averment "that *George Henſhaw did* leave One of "them ſufficient to pay it;" or "that the Defendant was other-"wiſe able to pay it."

And indeed this ſhews plainly that it is *not* a negotiable Note within the Meaning of the Act of Parliament; which means and intends an *abſolute* Note payable *at all Events*.

And I think too, that it is a *Variance* in the Declaration, from the Note itſelf, *for want of ſetting out* theſe Conditions: It ought to have been ſet out, as it *really* was.

But indeed One of theſe Points depends upon the other: And I think this Note is *only eventually* and *conditionally* payable; and by no Means *abſolutely* and at *all* Events.

Mr. Juſt. FOSTER concurred both as to the *Variance*; and alſo that it was NOT a *negotiable* Note, as being payable *eventually*, and *not abſolutely*.

Per Cur. JUDGMENT for the DEFENDANT as upon a Nonſuit.

Denn, ex dimiſſ. Burges, Vid. *verſ.* Purvis et al'.

THIS was a Special Caſe, upon an Ejectment tried at *Maidſtone* Aſſizes, in *Auguſt* laſt.

Richard Burges, being ſeiſed in Fee Simple of divers *Gavel-kind* Meſſuages, Lands, Tenements and Hereditaments in the ſeveral Pariſhes of *L. M. B. M.* and *H.* made his Will in Writing, on 15th *Feb.* 1735: and thereby deviſed his ſaid Meſſuages, Lands, *&c.* to his Wife *Elizabeth* for her Life; with Remainder to his Brother *Thomas Burges*, in Tail Male; with Remainder to *William Burges* (Son of his late Brother *John Burges*) in Tail Male; with Remainder to his own right Heirs for ever. And the ſaid *Richard Burges* died without Iſſue, and without revoking or altering his ſaid Will.

And the ſaid *Thomas Burges* and *William Burges* are ſince dead without Iſſue.

On 8th *September* 1746. the ſaid *Thomas Burges* made his Will: Whereby He deviſed All *his* real Eſtate in the ſeveral Pariſhes aforeſaid, to his Wife *Ann Burges*, for her Life.

On 6th *March* 1755. the ſaid *Elizabeth* Widow of *Richard Burges* died.

In *Eaſter* Term 29 *G.* 2. the ſaid *Ann Burges*, the Deviſee of the ſaid *Thomas B.* brought her Action of Ejectment, for a MOIETY of the above Gavelkind Lands and Premiſſes, UPON A SUPPOSITION "that her Teſtator *Thomas*, (as the Brother of the ſaid *Richard,*) and *William B.* (as the Nephew of the ſaid *Richard,*) "*were the* ONLY *Heirs* of the ſaid *Richard*, at the Time of his "Deceaſe, according to the Cuſtom of Gavelkind; and, *as ſuch*, "*intitled* to the real Eſtate of the ſaid *Richard in* MOIETIES."

On Trial of this Ejectment, it appeared, in the Courſe of the Evidence, " that the ſaid *Richard Burges*, at the Time of his De- " ceaſe, left a *Niece* (named *Mary)* the *only Child of* WILLIAM " *Burges*, One OTHER *Brother* of the Teſtator, who, by the Cu- " ſtom of Gavelkind, was *intitled as* Co-*Heir*, TOGETHER *with* " the ſaid *Thomas* (the Brother) and *William* (the Nephew of the " Teſtator,) to the Premiſſes in Queſtion."

Whereupon, by Conſent of Parties, it was ordered by the Court, that a Verdict ſhould be given for the Plaintiff, *as to One third* Part of the Premiſſes in the Plaintiff's Declaration ſpecified; ſubject nevertheleſs to the Opinion of the Court of *King's Bench*, upon a Caſe to be ſtated upon *this Point—viz.*

" Whether the Plaintiff, *on her Declaration* FOR *a* MOIETY of " the Lands, Tenements and Hereditaments therein mentioned, " *can* RECOVER *One* THIRD *Part* of ſuch Premiſſes."

Which Order of *Niſi prius* was afterwards regularly made a Rule of this Court.

And it came on now, in the Special Paper, to be argued.

Mr. *Knowler*, being Counſel for the Plaintiff argued—

That the Leſſor of the Plaintiff muſt recover ACCORDING *to his Title.*

And this is ſo, Whether the Ejectment be brought for an undivided, or a ſeveral and divided Part: for the *whole*, or for *Part* of a Thing; for an Entierty, or for a Moiety.

In *Plowd.* 420, 424. *b. Bracebridge*'s Caſe—the Reporter blames Himſelf for not having objected to the Verdict. But 3 *Bulſtr.* 184. the Caſe of *Cowper* v. *Frankline*, and many other Caſes explode *Plowden*'s Notion " that the Verdict was liable to Objection " upon that Account."

Here, the Declaration is for *One* undivided Part; and the Verdict, for *another* undivided Part. Which is *not a material Variance* from the Declaration, ſufficient to prevent the Plaintiff's having Judgment.

For there is no Neceſſity that the Verdict ſhould agree *preciſely* with the Declaration. All that is neceſſary is, that the Thing, for which the Verdict is given, ſhould be *comprized in*, and be *Part of* the *Thing demanded* by the Declaration.

And

And it could be upon *no other Foundation*, that the Caſe was determined, which is mentioned in 2 *Ro. Abr.* Tit. *Trial*, *fo.* 704. *pl.* 22: Where an Ejectment was brought of *a* Meſſuage; And it appeared in Evidence, and was ſo found by the Verdict, "That "only a *ſmall Part* of the Meſſuage was built by Incroachment on "the Leſſor's Land; *not* the Reſidue; and yet the Plaintiff had "Judgment."

Here, the Declaration is for a *Moiety*; to which it was then ſuppoſed that the Leſſor of the Plaintiff had a Right, as Deviſee of One of *two* Brothers of the Teſtator. Indeed it came out upon Evidence, that the Teſtator really left *three* Brothers and Co-heirs: So that the Leſſor of the Plaintiff had in Fact a Title to a *third* Part *only*. And the Verdict is accordingly, for a *Third*.

But the *Moiety* INCLUDES the *One Third*. So that what is recovered by the Verdict, being *contained in*, and being *leſs than* what is demanded in the Declaration, this Caſe muſt be ruled by the Ground I have already mentioned, "that the Leſſor ſhall recover "ACCORDING TO *his Title*." And in Point to prove this, is the Caſe in 1 *Siderf.* 229, of *Ablett*, *Leſſee of Glenham*, v. *Skinner*: Where the *Declaration* was of a *fourth Part* of a fifth Part; And the Leſſor's true *Title* was only to $\frac{1}{3}$ *of* $\frac{1}{4}$ of a fifth Part; (which was ONLY A THIRD *Part of what was demanded*:) Yet it was reſolved "that the Verdict ſhould be taken *according to* the Title."

Mr. *Burrell*, for the Defendant, premiſed that this was a hard Caſe; and therefore deſerved Favour, and juſtified the Defendant's inſiſting on all legal Objections. Then He urged that the Plaintiff muſt ſhew a clear Title to make *ſuch* a Leaſe as is confeſſed by the Defendant: And, as he *knows his own Title*, he ought to ſet it forth AS *it is*.

In the Caſe of *Berington ex dimiſſ. Dormer* v. *Parkhurſt*; 10 *G.* 2. *B. R.* and in *Dom. Proc. May* 1738. *H.* 11 *G.* 2. The Court held that the Plaintiff could not recover; becauſe the Demiſe was laid before the Time of Actual Entry: And the Leaſe was holden void in its Creation.

And if the Leaſe is laid *à Die Datûs*, it will not ſupport an Entry *upon* the Day.

Two Tenants in Common cannot declare upon a joint Leaſe. So is *Cro. Jac.* 166. The Caſe of *Mantle* v. *Wollington*.

Comberb. 190. in the Caſe of *Moore* v. *Parndon*, One *Habendum* to two Demiſes, was indeed holden well enough, on Error brought.

3 *Lev.* 334, 335. The Caſe of *Goodwin* v. *Blackman*, was an Ejectment of the tenth Part of a Meſſuage deſcribed as being in *two* Pariſhes, whereas the whole lay in *One* of them only: It was Holden that the Evidence did not maintain the Declaration; which was preciſely, of the tenth Part of an entire Thing.

Hardres 330. In the Caſe of *Wheeler* v. *Toulſon*, The Court inclined that a Demiſe *de Herbagio et Pannagio*, did not maintain a Declaration for the *Land*.

And he ſuppoſed there might be a Difference between Treſpaſs, and Ejectment: And concluded with praying a Rule for a Non-Suit.

Mr. *Knowler* in Reply—Here, the Plaintiff's Title was *not* known to Her: For She ſuppoſed *only two* Brothers; And it comes out that there was a *third*.

And the Queſtion is Whether She can recover under *this* Title.

The Plaintiff here ſtands in the Place of a Coparcener: And therefore She may bring her Action for *her Part*, *by Herſelf*.

The Caſe of *Ablett* v. *Skinner*, in 1 *Sid.* 229, is in Point: 'Tis the very Caſe, as to the Recovery being *leſs* than the Demand.

Therefore He prayed that the Plaintiff might be at Liberty to enter up Judgment on this Verdict.

Lord Mansfield—

This is an exceeding plain Caſe. The Rule is undoubtedly right, "That the Plaintiff muſt recover *according to his Title*." Here, She has *demanded* HALF; And She appears *intitled to a* THIRD: And So much ſhe ought to recover.

Mr. *Knowler*'s Principles, and his Authorities are Both right: And the Caſe of *Ablett* v. *Skinner*, which He cites from 1 *Siderf.* 229, is in Point.

And ſo if You demand 40 Acres, You may certainly recover 20: Every Day's Experience proves this.

And ſo it is, in an Aſſiſe: *Part* may be recovered, on a Demand for the *Whole*. And no poſſible Objection can be made to this. For if MORE is laid, there is no Reaſon, why he ſhould not recover LESS: Though the *Reverſe* indeed will not hold; *viz.* That if he *demands leſs*, he ſhall nevertheleſs be intitled to *recover more*.

Mr. Juſt. DENISON concurred—And ſaid, He thought the Caſe of *Goodwin* v. *Blackman*, cited by Mr. *Burrell* out of 3 *Lev.* 334, 335. was a ſtrange Caſe. And the Caſe therein cited, (*p.* 355.) 44 *Aſſiſe* 27, of an Aſſize of *a* Mill, and a Recovery of only *Part* of it is a ſtrong Caſe * againſt it. And that principal Caſe reported in 3 *Lev.* 334. is contrary to all Experience. And *Levinz* there cited ſeveral good Caſes, on Behalf of the Plaintiff; which the Court did not deny.

* It is put *as ſuch*, by the Reporter; who makes a *Quære*, as to the Authority of the principal Caſe, and cites this old Caſe in order to invalidate the Court's Determination.

Mr. Juſt. FOSTER concurred, And ſaid the Caſe in *Siderfin* was in Point. [1 *Siderf.* 229.]

Per Cur. unanimouſly
Let the *Poſtea* be delivered to the Plaintiff, in order to enter up JUDGMENT for the PLAINTIFF.

Whiſkard, Aſſignee &c. *verſ.* Wilder.

A Demurrer to a *Declaration* on a *Bail-Bond.*

Mr. *Whitaker*, for the Defendant, Objected that the Declaration ought to have particularly *ſet forth* "that the Debt was *ſworn to* "by the Plaintiff; and that the Sum *ſworn to* be due, and for "which the Defendant was holden to bail, was *marked* on the "Writ." For he alledged that without ſhewing this, here was NO SUFFICIENT *Authority to* ARREST the Defendant: And conſequently the Bail-Bond is *not good*, ſince the Act of 12 *G.* 1. *c.* 29; but *void*. And he cited 1 *Strange* 399. The Caſe of *Mills* v. *Bond*; Where the original Proceſs was returnable at a Day out of Term: And it was therefore holden a *void* Proceſs.

Now here it is not ſhewn, "That the Debt was to the Amount "of 10 *l.*" nor is the Sum due ſworn to, or the Writ marked: All which are *eſſentially* requiſite by the ſaid Act of 12 *G.* 1. *c.* 29. Sections 1 & 2.

Serjeant

Serjeant *Poole*, for the Plaintiff, argued *è contra*, That the Declaration is good, in it's preſent Form.

It is an Action brought by an Aſſignee of a Bail-Bond; Which he *properly* ſets forth; and then ſhews the Bond to be forfeited: Which is the *whole* that is neceſſary for the Plaintiff to ſhew.

And if the *Sheriff* has holden the Defendant to Bail, when he ought not, or improperly; the Remedy of the Defendant for that, is *againſt* the *Sheriff*: But the *Bond* itſelf is *good*, and not void; (however voidable it might poſſibly be by Plea.)

And he ſaid he would mention a very late Caſe, in Proof of his Poſition: Which Caſe was, by Name, *Norden* v. *Horſley*, determined laſt Week, in *C. B.* It was an Action on a Bail-Bond, taken for *more* than the Sum *ſworn to*; And this Statute of 12 *G.* 1. was pleaded: But the Court held the Statute to be *only directory*; and over-ruled the Plea.

Nor is it USUAL to inſert this in the Declaration.

Mr. Juſt. DENISON—It is *often* done, and *often* not: I have often ſeen Declarations of BOTH SORTS; ſome, one way; ſome, the other.

Mr. *Whitaker*, in Reply. My Objection is, "That there is *not* "*a ſufficient Authority* ſet forth, for *the Sheriff to* ARREST the De-"fendant." And there is no need to *plead* this: For it is a *void* Bond.

3 *Lev.* 74. The Caſe of *Graham* v. *Crawſhaw*, proves the Bond taken upon an impoſſible Condition, to be contrary to the Statute of *H.* 6. (23 *H.* 6. *c.* 10.) and to be *void* by it.

And ſo, *this* Bond alſo appears, upon the Face of the Declaration to be a *void* Bond, as being contrary to the Statute.

And 12 *G.* 1. makes this Circumſtance *eſſential* to conſtitute a *legal* Proceſs; and muſt have Reference to the Statute of the 23d of *Henry* 6th.

And this is not like the Caſe of *Norden* v. *Horſley* in *C. B:* Where the Bail-Bond was only taken for a *greater* Sum.

Here, the Arreſt was *void:* And conſequently, the Bail-Bond was *void*, too.

LORD

Lord Mansfield—This has not been thought necessary to be set forth, till this Time, ever since the making the Act of 12 *G.* 1. *Nor* does it, upon Reading the Act, appear to be an ESSENTIAL Requisite to *the Validity of the* Bail-Bond, nor in the Nature of a *Condition precedent* to it. But on the contrary, the Statute of 12 *G.* 1. appears to be *only* DIRECTORY to the Sheriff. So that though the *Sheriff may be Himself answerable* for such an Omission, yet the *Bond is* NOT VOID.

And I think, it is *properly likened* to the Case of taking Bail for a *larger* Sum.

In *both* these Cases, the *Sheriff*, (or perhaps the Plaintiff,) may be answerable or punishable: But the *Bond* is *not* VOID.

Mr. Just. Denison concurred—He seemed to wonder that this Point had never yet been determined.

He thought the Plaintiff was *not*, in Point of Law, *obliged* to set this out, in order to intitle him to his Action: Though it certainly *has been often done*, *pro majori Cautela*.

This Original Action appears to have been an *Acetiam* for 50 *l.* And a good Precept is set out. Therefore the Defendant *was liable to be arrested*. And it is set out "that he *was arrested*." This Act of 12 *G.* 1. does *not* make the Proceedings *void*, in Case the Defendant be arrested *without* Affidavit and *marking* the Sum sworn to, upon the Back of the Writ: It *only* PROHIBITS the Sheriff and Plaintiff from doing it. And they may indeed be liable to an Action *upon the Case* for it; (though perhaps not to an Action of *Trespass*:) But it does *not* make the *Bail-Bond* VOID.

Therefore I think there *is enough* set out, in the Declaration, to maintain this Action of Debt upon the Bond.

Mr. Just. Foster concurred. The Act of 12 *G.* 1. is *only directory*: It does *not* make the Process *void*. And as this Objection has never been taken *before* from the Time when the Act of Parliament was made; I think it ought to be discouraged *now*, (after upwards of 30 Years.)

And *if* the Fact was so, "That there *was no* Affidavit," the Defendant might have been relieved in a *much easier* Method; by applying to the Court, or to a Judge to be discharged upon *Common Bail*.

Per Cur. unanimously
JUDGMENT was given for the PLAINTIFF.

Henry Earl of Carliſle *verſ.* Armſtrong et al'.

Wedneſday 18th *May* 1757.

(*Lord Commiſſioner* Wilmot *abſent.*)

THIS was a Trial at Bar on the Civil Side of the Court.

Three Queſtions were to be hereby tried.

1ſt. Whether, upon the Death or Alienation of the Tenants of the Barony of *Gilleſland* in *Cumberland*, *a reaſonable* ARBITRARY *Fine at the* WILL *of the Lord*, be payable to the Lord, or not.

2d. Whether the Tenants have Liberty to let for three Years, or mortgage, *without Licence* of the Lord, and *without paying* any Fine at all.

3d. Whether they had Liberty to *exchange*, *&c. without* Licence or Fine.

But the Defendant's Counſel ſaid they did not intend to inſiſt on the 2d. Queſtion, ſo that the firſt and third only remained in Diſpute.

About Six in the Afternoon this Trial ended in a VERDICT for the PLAINTIFF, upon all the three Iſſues.

Rex *verſ.* White and Ward.

Friday 20th *May* 1757.

THE Defendants had been convicted of a NUSANCE in erecting and continuing their Works at *Twickenham*, for making acid Spirit of Sulphur, Oil of Vitriol, and Oil of *Aqua fortis*. The Indictment run thus, *viz.* That "at the PARISH of *Twickenham*, "*&c. near* the King's Common Highway there, and *near* the "Dwelling-Houſes of ſeveral of the Inhabitants, the Defendants "erected 20 Buildings for making noiſome ſtinking and offenſive "Liquors; and then and there made Fires of Sea-Coal and other "Things, which ſent forth abundance of *noiſome offenſive* and *ſtink-*"*ing* Smoke; and made, *&c.* great Quantities of *noiſome offenſive* "*ſtinking* Liquors; called, *&c.* whereby and by reaſon of which "noiſome offenſive and ſtinking, *&c.* the *Air was impregnated with* "*noiſome and offenſive Stinks and Smells*; to the Common Nuſance "of all the King's Liege Subjects *inhabiting*, *&c.* and travelling "and paſſing *the ſaid* King's Common Highway; and againſt the "Peace, *&c.*"

Sir *Richard Lloyd*—for the Defendants—(on *Monday* 15th *November* 1756,) would have moved a *mixed* Motion; *viz.* both for a *new Trial*, and *alſo* in *Arreſt of Judgment*; or, at leaſt, in Arreſt of Judgment *firſt*, and for a new Trial *afterwards*. But

THE COURT held that neither of theſe Methods could conſiſt with the GENERAL RULE *of the Court*, or with a *particular Rule* made in this Caſe, to give them Leave to move *either* of theſe Motions on this Day, though the 4 Days given upon the *Poſtea* were expired. Whereupon Sir *Richard* was obliged to begin with the Motion for a *new Trial*. And He ſaid that this Indictment was laid for making a Liquor, from whence the Air was impregnated with *noxious*, *hurtful*, *unwholſome*, and ſtinking Qualities: And the *Engliſh* Word "*noxious*" anſwers to the *Latin* "*nocivus*." But it appeared He ſaid, *upon the Evidence*, that the Fumes, however offenſive and diſagreeable to many Perſons, were by no Means in reality *noxious*, *hurtful* or *unwholſome*; but the *contrary*.

Rule to ſhew Cauſe: With this Addition,—"That the Defendants ſhould have 3 Days Time to move in Arreſt of Judgment; *after* the Court ſhall have given their Opinion upon the *preſent* Motion, for a new Trial, as upon a Verdict AGAINST *Evidence*.

On *Tueſday* the 23d of the ſame Month, Mr. Juſt. DENISON reported the Evidence; which was of great Length, He ſaid, there being about 75 Witneſſes on each Side: However He collected the *Subſtance* of it together in his Report. It appeared to be very ſtrong on the Part of the Proſecution: And He declared himſelf *ſatisfied* with the Verdict. And it appeared upon his Report, that the Smell was not only *intolerably* offenſive, but alſo *noxious* and *hurtful*, and made many Perſons ſick, and gave them *Head-Achs*.

Mr. Juſt. FOSTER ſaid that "*Noiſome*" and "*Noxious*," were ſynonymous Terms; and that there was no other *Latin* Word for "*noxious*," but "*nocivus*."

The *Rule* was therefore DISCHARGED, as to *Setting aſide* the *Verdict*.

On the *Saturday* following, Sir *Richard Lloyd*, Mr. *Norton*, Mr. Serjeant *Hewitt*, and Mr. *Nares*, moved in *Arreſt* of Judgment; (which was not yet ſigned.) They objected to the *Indictment*; It being laid *generally*, at the PARISH of *Twickenham*; and only ſaid "*near* the Common Highway;" but not ſaid to be IN the *Town* or *Village*: It may be upon a Heath or Common, for Aught that

appears to the contrary. Though it appears by 2 *Ro. Abr.* 139. Title *Nuſance* Letter *F. pl.* 2. *Rankett*'s Caſe: that making Candles, even *in* a Vill, which cauſed a noiſome Scent to the Inhabitants, has been holden to be *no* Nuſance.

But here, NO OFFENCE is *preciſely* laid. It charges "that by "reaſon of the noiſome offenſive and ſtinking Smoke, the Air was "impregnated with noiſome offenſive Stinks and Smells:" which are vague uncertain Terms. As to "*noiſome*" V. *Minſhew*, and *Skinner's Etymologicon.*

Tremaine's Pl. Cor. 195. *Rex* v. *Brookes* (for keeping a Glaſshouſe) uſes the Words "*unwholſome* and *dangerous.*" *Ibid.* 198. *Rex* v. *Cole*, (for a Nuſance in keeping a Soap-boiler's Furnace,) "*unwhol-* "*ſome*, turpibus, *periculoſiſſimis*, *contagious* and *infectious.*" Here, 'tis only ſaid to be "*noiſome and offenſive.*" It ought to have been laid *preciſely* and *particularly.* * 2 *Hawk. P. C.* 184, 185, 186. "*Hurtful*" is alſo a vague Term. It ought to have been laid to be *inſalubricus.*

* But all this relates only to Indictments for Murder and Manſlaughter; and does not concern Nuſances.

As to the vague Term, "*Near*," there was a Caſe of *Wilkes* v. *Broadbent*, *Paſch.* 1745. *B. R.* where a Cuſtom to lay Rubbiſh *near* the Eye of a Coal-pit was held bad: though that was a *Civil* Suit, and the Cuſtom found by a Verdict. Much more, upon an *Indictment.* And this is a lawful Trade; and can *become* a Nuſance only by Accident, *viz.* by being ſo to a *Town* or *High-road.* It can be indictable only for being exerciſed in the *Heart* of a Town. For, according to 2 *Show.* 327. *Rex* v. *Pierce*, "Such Trades "ought not to be in the *principal* Parts of the City; but in the Out- "Skirts." And the Court will *not here preſume* that this was *in* the Town. Beſides *Hurtfulneſs* is the *Giſt* of this Indictment. *Palm.* 198, 199.

Serjeant *Davy*, Mr. *Aſton*, Mr. *De Grey*, Mr. *Stow*, and Mr. *Thurlow*, *contra*, for the Proſecution, anſwered, that "*Noiſome*" conveys indeed a complex Idea; but ſtill *includes* "Hurtfulneſs." It ſtands in the Place of the Latin Word "*nocivus*," and certainly imports a Nuſance. 2 *Ro. Abr.* 139. Letter *F.* pl. 2. *Rankett*'s Caſe of a Tallow-Chandler is as it has been cited: But 1 *Hawk. P. C. Pa.* 199. *c.* 75. §. 10. *Wonders* at and diſputes that Determination.

"*Near*" is ſufficiently certain; and was as particular as the *Nature of the Thing* would admit: For it was not *equally* near to *all* the Houſes. And *after a Verdict*, it ſhall be *intended* to be *ſo* near as to be a Nuſance.

As to the Caſe of *Wilkes* v. *Broadbent*—A *Preſcription* muſt be certain: Beſides, that was laid too extenſive and arbitrary. But here,

here, it's being laid "at the *Pariſh* of *Twickenham*" is ſufficient. And in Fact, it is a very populous Place.

They cited *Jacob Hall*'s Caſe 1 *Mod.* 76: who had erected a Rope-Dancer's Stage at *Charing-Croſs*. *Per Hale*, Ch. J. "It be- "comes a Nuſance to the *Pariſh*." That was the Foot he put it upon. And this Indictment of ours is laid extenſively enough to be a *Common* Nuſance; though not a *public* One: Nor did it, in Fact, affect *other* Perſons than thoſe living and paſſing *near* it.

Their Objections come too late, after Verdict: For it is a mere Matter of Evidence, "Whether it was noxious, or not." And 'tis plain that the Defendants *underſtood* the Word "Noxious" in the Senſe of "Unwholſome;" becauſe they defended themſelves upon *that* Foot, and examined many Witneſſes *about* the Unwholſome- neſs of the Stench. In *Cro. Car.* 510. *Tobayle*'s Caſe, (there cited in the Caſe of *Morley* v. *Tragnell*,) Erecting a Tallow-Furnace croſs the Street of *Denmark* Houſe in the *Strand* was adjudged a Nuſance, and to be removed. Nay, an *offenſive* Stench is of itſelf a Nuſance; even though it ſhould *not* be ſtrictly hurtful. An Indictment merely for a *Stench* would have been good; even *without any* Epi- thets. It depends upon *rendering the Property of other Perſons in- commodious and uncomfortable* to them: And this Point is to be tried by a Jury, "Whether the Thing be really *ſuch* a Prejudice or In- "commodiouſneſs to the Neighbourhood, as amounts to a Nu- "ſance." And here the Jury have found it ſo.

And as to the *Place*—That alſo is Matter of Evidence. The *Court* can not take Notice, *ex officio*, of the Boundaries of the Pa- riſh of *Twickenham*. It is the *Concourſe of People* that this Point muſt depend upon. And "*near*" is the ſtrongeſt Word that We could uſe, agreeably to the Circumſtances of this Caſe. And the Jury, who have examined it, have found for Us.

Sir *Richard Lloyd* in Reply—Aſſerted that the Epithet "*Offen-* "*ſive*," alone, would not be ſufficient. And as to the Word "*near*," He obſerved that the Jury have not found *how* near it was. And the laying it generally "*in the Pariſh*" at large, does not ſhew that it is a Fact indictable: For it might be at a vaſt Diſtance from any Houſe, or Place of Reſort.

Lord Mansfield thought there was nothing in the Objections: Which, he ſaid, are reducible to 3 Heads; *viz.*

1ſt. That there is no ſufficient Charge of the *Hutfulneſs*;

2dly. That it is not preciſely charged, "*to whom*" the Hurt is done;

3dly. That

3dly. That it is only laid *generally*, "*in the* PARISH of *Twickenham.*"

Firſt—The Jury have *found* "that *it is* to the *Common Nuſance* "of the King's Subjects dwelling, *&c.* and travelling, *&c.*"

And the Word "*noxious*" not only means "*hurtful and offenſive* "*to the Smell*;" but it is alſo the Tranſlation of the *very* TECHNICAL *Term* "*nocivus*;" and has been always uſed for it, ever ſince the Act for the Proceedings being in *Engliſh.*

But it is NOT *neceſſary* that the Smell ſhould be *unwholſome:* It is enough, if it renders the *Enjoyment* of Life and Property *uncomfortable.*

Secondly—The *Perſons* incommoded are *ſufficiently* deſcribed: And the Offence is charged to be to the *Common* Nuſance of Perſons inhabiting and travelling *near, &c.* And unleſs they had been ſo *near* as to be hurt by it, the Indictment could *not* have been *proved.* Whereas in the Caſe of *Wilkes* and *Broadbent*, it was *quite uncertain how near*, the Rubbiſh might be laid.

Thirdly—It is *ſufficiently laid*, and in the accuſtomed Manner. The very *Exiſtence* of the Nuſance depends upon the Number of Houſes and Concourſe of People: And this is a *Matter of Fact*, to be judged of by the Jury. And in the very Caſes in *Tremaine* 195. of a Glaſshouſe, and 198. of a Soap-boiler's Furnace,—they are laid in *Pariſhes*, "*apud Paroch*' &c." Therefore there is no Foundation for the Objections.

1ſt. Mr. Juſt. DENISON—There is a *ſufficient legal Certainty* in this Indictment: So that the Defendants had an Opportunity of making a proper Defence at the Trial.

Upon a former Trial, the Indictment then before the Court charged the Air to be corrupted. *This* preſent Indictment is better expreſſed. The Word "*noxious*" includes the complex Idea, both of Inſalubrity and Offenſiveneſs. And there was no Need to ſpecify particular Inſtances of the Effects of it. There is nothing in
2dly. this Objection. And it is alſo ſufficiently charged, *to whom* the Nuſance is done.

3dly. As to the laying it in a *Pariſh*—It is likewiſe ſufficient. In the Caſe of the *King* v. *Blower*, *Hil.* 27 *G.* 2. *B. R.* The Court declared they would take the Vill and the Pariſh to be co-extenſive: And they held that there were *only* two Caſes where it was neceſſary to

lay a Vill; which were upon the Statute of Additions (where you are tied up to the Vill,) and in an Appeal of Death, upon the Statute of *Glouceſter*, *cap.* 9. The Deſcription of being "PROPE "*altam viam regiam*," is the *Common* Method. And it is laid ad *commune* Nocumentum: And the Jury have *found it*, as it is laid. Therefore I think 'tis in legal Form.

1ſt. Mr. Juſt. FOSTER—The only Queſtion is "Whether the Fact "laid *implies* a Nuſance." I think it *does*. Otherwiſe, the mere *Laying* it to be "*ad commune Nocumentum*," would not perhaps 2dly. help it. This is certainly a *Common* Nuſance. And "NEAR the "Highway and Dwelling-houſes," is properly alledged, in order to ſhew it to be ſo. *V.* 1 *Strange* 686, 687. *Rex* v. *Pappineau H.* 12 *G.* 1. *B. R.* in Point, accord. It never was objected that laying a * *V.* 1 *E.* 6. *c.* 12. §. 10. Robbery "*in* OR NEAR" a * Highway, is bad: No; 'Tis Matter 3dly. of *Evidence*. [Note—Mr. Juſtice *Wilmot* was abſent, in the Court of Chancery.]

So that the COURT were unanimous in *denying the Motion*.

Yet *N. B.* That (according to the uſual Courſe in like Caſes) *no Rule* at all was here taken in the Rule-Book: Only, the Counſel for the Defendants *took nothing by their Motion*, in Arreſt of Judgment.

On *Thurſday* 5th *May* 1757. On a Motion for the Judgment (or rather Sentence) of the Court upon the Defendants, for the Offence whereof they ſtood convicted,—It appearing that the Nuſance was *abſolutely* REMOVED; (the *Works being demoliſhed*, and the Materials, Utenſils and Inſtruments, *all ſold and parted with*;) They were, upon entering (Each for himſelf only, and for ſuch as acted for or under him) into a *Rule* "not to renew them," only *fined* 6*s.* 8*d.* each. But on a Diſpute afterwards ariſing, how the Rule ſhould be drawn up, It was on *Friday* 20th *May* ſettled by the Court, to be thus—"By Conſent of Counſel on both Sides, It is "ordered that, upon the Defendant *Ward*'s undertaking that nei- "ther He nor any other Perſon by *his Conſent or Direction* or for "*his Uſe or Benefit*, ſhall for the Future make or cauſe to be made "in the Works lately carried on by the Defendant *White* at *Twic-* "*kenham*, mentioned in the Indictment in this Cauſe, any acid "Spirit of Sulphur, or Preparations of Vitriol, or Oil of *Aqua fortis*; "a Fine of 6*s.* 8*d.* be ſet upon the ſaid Defendant *Ward*, for the "Nuſance of which He has been convicted." And

The Defendant *White* entered into a like Rule, *mutatis mutandis*.

Bond *verſ.* Iſaac.

Saturday 21ſt May 1757.

THE Defendant being brought into Court, in Obedience to a Writ of *Habeas Corpus* applied for by his *Bail*; and it being agreed that He was in Cuſtody of the Keeper of the *Savoy*, as an *impreſſed Man*; The Counſel on Behalf of the *Bail* inſiſted upon their *Right* TO SURRENDER *him.*

Cur. (namely Lord *Mansfield*, Mr. Juſt. *Deniſon*, and Mr. Juſt. *Foſter*) had no Doubt of their Right: But only heſitated as to the *Diſpoſition of Him*, after He had been ſurrendered. Lord MANSFIELD mentioned the Clauſe in the Preſſing Act (*V.* 29 *G.* 2. *c.* 4. § 14. *p.* 175.) of not taking Him out of the Service. Mr. Juſt. DENISON cited two Caſes; *viz.* 1 *Strange* 641. The Caſe of the Bail of *Boiſe* and *Sellers*, in this Court; Where the Defendants were returned to be charged with two Civil Suits and ſeveral *Exchequer-Informations* for Frauds in the Cuſtoms: And when the Court was ſatisfied of the Reality of the Debts and Priority of the Actions here, The Defendants were ſurrendered, and committed *to the Marſhal.* And a Caſe in *Tr.* 22, 23 *G.* 2. *Rex* v. *Chitty B. R.* where the Defendant was returned to be charged with a *Contempt in the Exchequer:* He was ſurrendered by his Bail here; and committed to the Marſhal; who was immediately ſerved with a new *Habeas Corpus*, to remove him to the *Fleet.*

This Man is a Soldier now: And by this Act *cannot be taken out* of the King's Service, but upon ſome CRIMINAL Matter: (*V.* the Act, as above.) So that it ſeems that He *may* be remanded to the *Savoy*, in the preſent Caſe.

Mr. Juſt. FOSTER—In the Caſes cited by my Brother *Deniſon*, the Proceedings were grounded on 25 *E.* 3. *c.* 19. (which enacts "that the King's Debtors ſhall not be protected from the Pro-"ceedings of their other Creditors againſt them:") And it was a Matter of *Right*. This is an *Indulgence* to the Bail, to permit them to bring in the Defendant and ſurrender him. But We cannot take him out of the King's *Service*; this not being a *criminal* Matter: (*V. ut ſupra*, 29 *G.* 2. *c.* 4. § 14.) So that We *may*, after We have entered an *Exoneretur* upon the Bail-Piece, remand him to the legal Cuſtody at the *Savoy*.

LORD MANSFIELD—We may *firſt* commit him to the Marſhal; And *then* remand him, immediately, to the *Savoy*.

Suppoſe

Suppoſe him to be a Soldier *at Large*, (not in Cuſtody;) and that his Bail were to bring him in, and ſurrender him: He muſt be committed to the Cuſtody of the *Marſhal* upon ſuch Surrender; but *inſtantèr ſet at large:* And ſo We may do here. And accordingly, *'Per Cur.'* He was, upon being ſurrendered by his Bail, firſt committed to the Cuſtody of the Marſhal: But the Marſhal was Ordered to deliver him *inſtanter* to the Keeper of the *Savoy*; And He did ſo, immediately, in Court. And an *Exoneretur* was Ordered to be entered upon the Bail-Piece. *V. Poſt.*

Capron *verſ.* Archer.

UPON a Queſtion concerning the TERMS upon which the *Bail* ſhould have *Time to ſurrender the Principal*, after a Writ of *Error* brought—

Mr. Juſt. DENISON and Mr. Juſt. FOSTER, the only two Judges in Court, held That it was the ALLOWANCE of the Writ of Error, that was a *Superſedeas* to the Proceedings below; And that the NOTICE of its being allowed was only to bring the Party in Poſſeſſion of the Judgment below, into *Contempt*, in caſe he ſhould perſiſt in proceeding thereupon *ſubſequently* to ſuch *Notice*. And therefore, as in the preſent Caſe, the Defendant's Writ of Error was ALLOWED BEFORE the Time was expired within which the Bail had Indulgence to ſurrender the Principal, THOUGH NOTICE of ſuch Allowance was not given to the Plaintiff's Attorney *till* AFTER the Expiration of that Time; The COURT gave the Bail the ſame *Terms* as are uſual where they apply WITHIN *the Time* indulged to them (by the preſent Courſe of the Court) for ſurrendering the Principal. And accordingly, The RULE to ſhew Cauſe "why the Proceedings "upon the Writs of *Scire facias* iſſued againſt the Bail ſhould not "be ſtayed, until the Writ of Error ſhall be determined; The Bail "undertaking to pay the Plaintiff the Damages recovered by the "ſaid Judgment, OR *ſurrender the Defendant* into the Cuſtody of "the Marſhal of the Marſhalſea of this Court within four Days next "after the Determination of the ſaid Writ of Error, in Caſe the "ſame ſhall be determined in Favour of the Defendant in Error," was MADE * ABSOLUTE.

* For the clearer Underſtanding of the *different Terms* granted to the Bail, under *different Circumſtances*, ſee *Myer* v. *Arthur*, 1 *Strange* 419. *Hunter* v. *Sampſon & al'*, 2 *Strange* 781. *Everett* v. *Gery*, 1 *Strange* 443. *Richardſon* v. *Jelly*, 2 *Strange* 1270. *Cole* v. *Buckland*, 2 *Strange* 872: (particularly, the 1ſt and 4th of theſe Caſes; which ſhew *the Diſtinction.*)

Pell

Pelly the Younger *verſ.* Governor and Company of the Royal-Exchange Aſſurance.

Monday 23d May 1757.

THIS came before the Court, upon a Caſe reſerved on a Trial at *Guildhall*, before Lord *Mansfield:* Where a Verdict was found for the Plaintiff, ſubject to the Opinion of the Court. It was an Action of Covenant upon a *Policy of Inſurance*.

Caſe. The Plaintiff being Part-Owner of the Ship *Onſlow*, an *Eaſt-India* Ship, then lying in the *Thames*, and bound on a Voyage to *China* and back again to *London*, inſured it at and from *London*, to any Ports and Places beyond the *Cape of Good Hope*, and back to *London*; free from Average under ten *per Cent.* upon the Body *Tackle Apparel* Ordnance Munition Artillery Boat and other *Furniture* of and in the ſaid Ship: Beginning the Adventure upon the ſaid Ship *&c.* from and immediately following the Date of the Policy; and ſo to continue and endure until the ſaid Ship, *with all* her Ordnance *Tackle Apparel &c.* ſhall be arrived as above, and hath there moored at Anchor 24 Hours in good Safety. And it ſhall be lawful for the ſaid Ship, in this Voyage, to proceed and ſail to and touch and *ſtay* at any Ports or Places whatſoever, without Prejudice to this Aſſurance. The Perils mentioned in the Policy, are the Common Perils; *viz.* of the Seas, Men of War, FIRE, Enemies, Pirates, *&c. &c.* and all other Perils, Loſſes and Misfortunes, *&c.* The Premio was 7 Guineas *per Cent.* with the uſual Abatement of 2 *per Cent.* in Caſe of a Loſs.

The Ship ſailed *&c*; arrived in the River *Canton* in *China*; where She was to ſtay, to *clean and refit*, and for other Purpoſes. Upon her Arrival there, the Sails, Yards, Tackle, Cables, Rigging, Apparel, and other *Furniture* were, by the Captain's Order, *taken out* of her, and PUT INTO *a Warehouſe or Storehouſe* called a Bank-Saul, BUILT FOR THAT PURPOSE on a SAND-BANK *or ſmall Iſland*, lying in the ſaid River, near one of the Banks, called *Bank-Saul Iſland*, about 200 or 220 Yards in Length, and 40 or 50 Yards in Breadth; *in Order* to be there *repaired, kept dry, and* PRESERVED, *till* the Ship ſhould be heeled and cleaned and refitted. Sometime after this, a *Fire* accidentally broke out in the Bank-Saul belonging to a *Swediſh* Ship; and communicated itſelf to another Bank-Saul, and from thence to the Bank-Saul belonging to the *Onſlow*; and conſumed the ſame, with *all the Sails, Yards, Tackle, Cables, Rigging, Apparel*, and other *Furniture* belonging to the *Onſlow*, which were therein.

It was ſtated that it was the univerſal and *well known* USAGE, and has been ſo for a great Number of Years, for all *European* Ships which go a *China*-Voyage, except *Dutch* Ships, (who for ſome Years paſt are denied this Privilege by the *Chineſe*, and look upon ſuch Denial as a great Loſs,) " when they arrive near this *Bank-*
" *Saul Iſland* in the River *Canton*, to *unrig* the Ship, AND *to take*
" *out her Sails*, Yards, *Tackle*, Cables, Rigging, Apparel, and
" other Furniture; and to put them on Shore, in a Bank-Saul built
" for that Purpoſe on the ſaid Iſland (in the Manner that had been
" done on the preſent Occaſion by the Captain of the *Onſlow*,) in
" order to be there repaired kept dry and preſerved until the Ship
" ſhould be heeled cleaned and refitted." And the Caſe further ſtates that it appears that the ſo doing is *prudent*, and for the Common and General *Benefit* of the Owners of the Ship, the *Inſurers*, and Inſured, and ALL *Perſons concerned in the Safety of the Ship.*

The Ship arrived from her ſaid Voyage, in the *Thames*, in *September* 1755; (having been unrigged, and put in the beſt Condition the Nature of the Place and Circumſtances of Affairs would permit.)

Queſtion. Whether the Inſurers are *liable* to anſwer for *this* Loſs, *(ſo happening upon this Bank-Saul,)* within the Intent and Meaning of this Policy.

Mr. *Williams*, for the Plaintiff,—after premiſing that this Queſtion ariſes upon the Conſtruction of a Policy of Inſurance; That theſe Policies of Inſurance are of ancient Date; are beneficial, as they tend to divide the Riſque; and have been every where encouraged, in Trading Countries; made theſe three Diviſions of his Argument.

1ſt. He undertook to prove that the Plaintiff's Demands are founded on ſtrict *Juſtice*;

2dly. That they are agreeable to both the Words and *Meaning* of the Policy; and ſupported by Legal Determinations.—

3dly. He ſaid He would mention the Opinion of *foreign Lawyers*, upon the Subject.

Indeed it has been objected " that this is *not* a Loſs AT SEA;"
Objection. But " A Loſs at *Land*."

Anſwers to it. Firſt, The Policy is *general*: It is *not confined* to Loſſes *at Sea*.

Secondly.

Secondly—This is *not* a Loſs *at Land:* It is what happened upon a *Sand Bank in the River*.

Then he proceeded to his 3 Heads or Diviſions of his Argument.

1ſt. As to the *Juſtice* of the Plaintiff's Caſe— 1ſt. Head of Argument.

The Inſurers have profeſſedly and explicitly inſured the Ship and all her Rigging, Furniture, *&c.* from Fire, *&c. from* her going out, TO her RETURN. And they muſt be taken to be *apprized of the Uſage*; and to have *calculated* their Premium *accordingly*. And what has here been done is ſtated to have been done "for the *Be-* "*nefit of the Inſurers*, and of the *Ship*, and of *all* Perſons con- "cerned in the *Safety* of it;" and alſo "to have been *prudent*."

If the *Body* of the Ship had been burnt in this Interim; and theſe Sails and Furniture, had been *ſaved* BY BEING *in this Ware-houſe*; the Inſurers would then have had the Benefit of *this Sal-vage*. Therefore they ought in the *contrary Event*, to be *anſwer-able* for them, when *they* were by theſe Means burnt, and the *Ship not* burnt. It was the Captain's Duty to perform the Voyage in the uſual and proper Courſe. And this was ſo far from being a Neglect or Miſbehaviour in the Captain, that He is ſtated "to have "*acted* PRUDENTLY, and for the BENEFIT *of the Inſurers and* "*of all concerned.*"

2dly. This is within the *Words* of the Policy—'Tis an Inſurance 2d. Head of Argument. "from *London* to any Ports or Places beyond the *Cape of Good* "*Hope*, and back; and DURING THE VOYAGE:" And *Fire* is expreſly inſured againſt.

And it is alſo within the *Meaning* and *Intent* of the Policy. For this Loſs has happened within the USUAL *Courſe of the Voyage*, and of this Species of Trade. And therefore the Inſurers are liable. And this is the true Diſtinction. To prove which, He cited 2 *Salk.* 445. *Bond* v. *Gonſales:* "Deviation or not, muſt be taken accord- "ing to the Neceſſity and *Uſage*." *Clayton* v. *Simmons* 11th *March* 1741. at *Guildhall. Per Lee*, Ch. J. "If the Maſter puts into a Port "not uſual, or ſtays an unuſual Time, it is a Deviation, and diſ- "charges the Inſurer: *Not*, if he does *as* USUAL." *Tierney* v. *Ethe-rington* 5 *March* 1743. *per Lee*, Ch. J. at *Guildhall*—The Goods were unloaded and put into a *Store-Ship* at *Gibraltar*; and there loſt. The Queſtion was, Whether this was a Loſs at Land; or a Loſs *in the Voyage*. He held "that Policies ought to be conſtrued "largely, and for the Benefit of the *Inſured*; and according to the "Courſe of Trade and the Methods USUAL *at the Place*:" And as

that was the known Course of Trade at *Gibraltar*, He held "the "Insurers to be responsible." And in *Easter* Term following (P. 1744. 17 G. 2.) there was a Motion for a new Trial: Which was *refused*. Now that was not within the *Words* of the Policy: And yet holden to be within the *Meaning* of it.

Where an Insurance is for one entire Voyage, the Contract can *not* be *suspended*, and *revived* again: If it be suspended *at all*, 'tis *determined*. And yet they will hardly argue that this Contract was *absolutely determined* by this Act that is stated.

3d. Head of Argument.

3dly. As to the Opinions of foreign Writers they hold "that "where the Assurance is general, the Insurer is liable to all Loss "happening in the *usual* Course of the Voyage."

And to this Purpose, he cited *Loccenius*, *de Jure Maritimo L.* 2. *c.* 5. *sect.* 10. *de Averstone Periculi*. Whose Distinctions turn upon the Master's pursuing the *usual* Course of the Voyage. *Marcarius*, *de Jure Mercator. L.* 2. *c.* 15. N°. 148. *Roccus*, *de Assecurationibus*, N°. 138. The Insurer is liable for all Losses *durante Itinere*.

So that the Principles of Justice and Equity, the Strictness of Law, and the Opinions of Foreign Writers, All concur in Favour of the Plaintiff.

Sir *Richard Lloyd*, for the Defendants (the Insurers,) agreed to Mr. *Williams*'s General Principles; And that the Insurers were liable for all Losses during the *Course of the Voyage*. But He denied Mr. *Williams*' Conclusions; and insisted that this Policy was certainly confined to Losses *at Sea*: Whereas *this* Loss was a Loss *on* SHORE. This is a Policy upon the Body of a *Ship*; And therefore is manifestly confined to Losses *at Sea* only. Besides, these Goods are averred by the very Declaration itself, "to have been carried * *on Shore*." And it's being an Insurance "*out* and *Home*," does *not interfere* with this Position. As to the Supposition "that the *Ship* had been "burnt, and the *Sails*, *&c.* saved;" It is no Argument at all: For if they had NOT *been lost*, the Insurers could *not* certainly have been *liable* to pay for them. As to the *Prudence* of the Captain—It might be prudent with Regard to the *Owners*: But this Care of *them* is not to affect the *Insurers*. He is indeed to act his best, for Both: but *diverso Intuitu*; and not to serve the One, at the *Risque* of the Other. As to the *Words* of the Policy—He denied it to be *within* them; referring Himself to the Words themselves.

* Some of the Breaches are assigned.

The *Cases cited* do not affect the present Case: And *foreign* Writers have said no more than *English* Ones. For no Doubt, the Insurance must be understood to be in the *usual Course of Trade*, and *durante Itinere*. But the Question is, "WHAT IS the *Iter* insured."

This

This is a *Common* Policy of Inſurance, in the old and ordinary Form: And it muſt be underſtood, as theſe Policies were underſtood, before the *Eaſt India Company* had a Being. And the *Intent* of it muſt be collected from the Inſtrument *itſelf*.

Now this is an Inſurance of the Ship with it's Tackle and Furniture, *&c. from Port to Port.* And Policies muſt be conſtrued upon the *Words* of them, or from *neceſſary Conſequences.* If any Thing *beyond* the natural Import of the Words was intended, it ought to have been *ſpecified:* If not ſpecified, it cannot be ſuppoſed.

The *Court alone* are to judge of the *Extent* of the Contract. And theſe Contracts have been conſtrued *ſtrictly.* A *Deviation* from the particular Voyage inſured, ſhall diſcharge the Inſurer; unleſs a *Neceſſity* intervenes; which does, and ought to alter the Caſe. But even that muſt be *within the Compaſs of the Voyage deſcribed:* For if it happens AFTER *a Deviation*, the Inſurer is diſcharged, even though the Ship ſhould have returned into the right Road again, before the Accident happened. Now this preſent Accident did *not* happen WITHIN *the Voyage inſured:* For it happened AT LAND.

But Mr. *Williams* ſays "this happened in the *Courſe of Trade.*" My Anſwer is, "That We have nothing to do with the Courſe of "*Trade.*" We have nothing to do with any Thing but the Courſe of NAVIGATION; which is quite a different Thing. Theſe Sails, Tackle, *&c.* were inſured IN *the Ship:* And if the Captain takes them *out* of the Ship and puts them *any where* ELSE, the Inſurers are *not* anſwerable. And it's being for the *Benefit* of the Ship, *&c.* makes no Difference. It did not ariſe from Neceſſity: Much leſs from a Neceſſity ariſing in the Voyage. This Act of mere Prudence or Convenience cannot affect the *Inſurers.* And their *knowing* this to be the Courſe of the Voyage, will not prove that they meant to inſure any Thing at *Land.* They *cannot*, by their Charter, do it; for that reſtrains them from inſuring at Land: and therefore they certainly *never intended* it. As to the Caſe of *Tierney* v. *Etherington* P. 17 *G.* 2. It was *not* a *Common* Policy. It was thereby agreed "that they might unload, *&c. and reſhip* into an *Engliſh* "Ship." But no *Engliſh* Ship being there, they unloaded upon a *Store*-Ship. And this was a Peril *at* SEA; for the Ship was loſt at *Sea:* So that it ſtrictly and properly was WITHIN *the Voyage.* And as to it's being the Mode of Re-ſhipping, in Caſe no other Ship was there; here is no ſuch Agreement in the preſent Caſe, as was there inſerted in the Policy: So that it was within the very *Terms* of the Policy, in that Caſe. He cited the Caſe of *Fitzgerald* v. *Pole*, in *P.* 23 *G.* 2. in *B. R.* and afterwards in *Dom' Proc.* in *May* 1752. which was an Inſurance of a Privateer for four

Months: And there the *whole Cruize* was by this Court underſtood to be inſured; And the Inſurers were holden here, to be bound, though the Ship itſelf was ſafe; and accordingly they gave Judgment for the Plaintiff. But the Houſe of Lords held them diſcharged; as the *Ship* was ſafe; and affirmed the Judgment of the Exchequer Chamber, who had reverſed that of *B. R.* And there is no Inconvenience in my Doctrine: Becauſe whatever is by the Parties particularly *meant* to be inſured, *beyond* the general Meaning of the Words, may be *ſpecially* inſerted in the Policy; And then all will be clear; and nothing left to uncertain Conſtruction.

Mr. *Williams* in Reply—

This Fire happened *during the Courſe of the Voyage.* And this Inſurance is *not merely* upon the Ship; but upon the Rigging, Sails *Tackle and Furniture* likewiſe; which in their Nature are capable of being carried on Shore, and *uſually* are ſo, upon theſe Occaſions, as is expreſly ſtated.

And this is a Loſs happening in *Port.* It is the proper, and the only Port, where the *Engliſh* can clean and refit their Ships. And being *upon a Sand-Bank* in the River, is a Loſs at *Sea*, not at Land. If the Goods cannot be removed from on Board One Ship to another, the Reaſon of that muſt be, that the Inſurer has had only that *particular Ship* in Contemplation, on *which* he inſured; and perhaps the Care and Caution of the *Maſter* of it too, *as well* as the *Goodneſs* of the Ship.

This Taking out and depoſiting the Rigging, Sails and Furniture was a *neceſſary Act*; and is done by all the Nations in *Europe*, except the *Dutch*; who are ſtated to conſider it as a Diſadvantage that they are not permitted to do it. And it is ſtated to be for the Benefit of the Ship, and of the Inſurers, and all concerned. And this being the uſual Courſe of the Voyage, it was unneceſſary to particularize or ſpecify this in the Policy: It muſt neceſſarily have been in the Contemplation of the Inſurers.

And as to the Company's being *obliged by their Charter*, not to inſure on Land—The Merchants inſuring with them are *not obliged to know* this; Nor do the Company in fact *practiſe* it. Beſides, if they *do it*, *notwithſtanding* their Charter, they are not the leſs bound to anſwer what they have undertaken. And indeed the Charter only means to preclude them from inſuring *Houſes and Buildings* at Land, (which is quite another thing;) *not Ships* at Land.

As to the Caſe of *Fitzgerald* v. *Pole*, There was *no* Loſs of the *Thing inſured:* Whereas here is a Loſs of the *very Thing* inſured.

Lord Mansfield ſaid It was very neceſſary that the Determinations upon Policies of Inſurance ſhould be fixed and certain: And therefore they would conſider this Matter, and look into the Caſes; and then (within the Term) give their Opinion,

Cur. advisare vult.

Lord Mansfield now delivered the Opinion of the Court.

He ſtated the Caſe minutely, and then the Queſtion, which was "Whether *this* was a Loſs for which the Inſurers are *reſponſible*, "within the *Intent and Meaning* of the above-mentioned Policy of "Inſurance."

By the expreſs Words of the Policy, the Defendants have inſured the *Tackle*, *Apparel*, and other *Furniture of the Ship Onſlow* from *Fire*, during the *whole* Time of her Voyage, *until* her Return in ſafety to *London*, *without any Reſtriction*.

Her Tackle, Apparel, and Furniture were inevitably burnt in *China*, *during the Voyage*, before her Return to *London*.

The Event then which has happened, is a Loſs within the *General* Words of the Policy: And it is incumbent upon the *Defendants*, to ſhew, from the Manner in which this Misfortune happened, or from other Circumſtances, "that it ought to be conſtrued a Peril "which they did *not undertake* to bear."

From the Nature, Object and Utility of this kind of Contract, Conſequences have been drawn; and a Syſtem of Conſtruction eſtabliſhed, upon the ancient and inaccurate Form of Words in which the Inſtrument is conceived.

The Mercantile Law, in this Reſpect, is the ſame all over the World. For, from the *ſame* Premiſſes, the found Concluſions of Reaſon and Juſtice muſt univerſally be the *ſame*.

Hence, among many other, the following Rules have been ſettled.

If the *Chance* is *varied* or the *Voyage altered* by the *Fault* of the Owner or Maſter of the Ship, the Inſurer ceaſes to be liable: Becauſe he is underſtood to engage that the Thing ſhall be done, ſafe from fortuitous Dangers; *provided* due Means are uſed by the Trader to attain that End.

But

But the Maſter is *not in Fault*, if what he did was done in the *uſual Courſe*, or *neceſſarily ex juſtâ Cauſa*.

The Inſurer, in eſtimating the Price at which He is willing to indemnify the Trader againſt all Riſques, muſt have under his Conſideration the *Nature* of the Voyage to be performed, and the *uſual Courſe and Manner* of doing it. *Every* thing done in the *uſual Courſe* muſt have been *foreſeen* and in *Contemplation*, at the Time he engaged. He took the Riſque, upon a Suppoſition that what was uſual or neceſſary, *would* be done.

It is abſurd to ſuppoſe, when the *End* is inſured, that the uſual *Means of attaining it* are meant to be *excluded*.

Therefore, when Goods are inſured "*till landed*;" without *expreſs* Words, the Inſurance extends to the *Boat*, the *uſual Method* of Landing Goods out of a Ship, upon the Shore.

If it is *uſual* to ſtay ſo long at a Port, or to go out of the Way, the Inſurer is conſidered as *underſtanding that Uſage*. *Bond* v. *Gonſales*, 2 *Salk.* 445. was ſo ruled by Ld. Ch. J. *Holt*.

If Goods are inſured on Board *one* Ship, to a Port; and from thence, on board *another* Ship, the firſt that can be got; The Inſurance *extends* through *all the intermediate Steps* of removing from one Ship to the other, *as uſual*. * For the *Means* muſt be taken to be inſured, as well as the *End*.

* *Ut ſupra.*

All this has been determined in the Caſe of *Tierney* v. *Etherington* at *Guildhall*, 5th *March* 1743. That was an Inſurance on Goods in a *Dutch* Ship, from *Malaga* to *Gibraltar*, and at and from thence to *England* and *Holland*, both or either; on Goods as here under agreed; beginning the Adventure from the Loading, and to continue till the Ship and Goods be arrived at *England* or *Holland*, and there ſafely landed.

The Agreement was "That upon the Arrival of the Ship at "*Gibraltar*, the Goods might be *unloaded*, and *reſhipped* in one or "more *Britiſh Ship or Ships*, for *England* and *Holland*; and to re-"turn One *per Cent.* if diſcharged in *England*."

It appeared on Evidence, that when the Ship came to *Gibraltar*, the Goods were unloaded, and put into a *Store-Ship*, (which it was proved was always *conſidered as a Warehouſe*;) and that there was then *no Britiſh* Ship there. Two Days after the Goods were put into this *Store-Ship*, they were loſt in a Storm.

For

For the Defendant, It was inſiſted that the Inſurance was only upon the *Dutch* and *Britiſh* Ships; and that it did *not extend* to the *Store-Ship*; which is conſidered *as a Warehouſe at Land, and ſo not a Peril at Sea.*

For the Plaintiff, It was inſiſted, That this was a Loſs *in the Voyage:* For the Policy is, for all Loſſes *at Gibraltar*, as well as to and from. If there had been a *Britiſh* Ship there, and the Goods had been put into a *Lighter*, in Order to go to the *Britiſh* Ship, and loſt in the way; That would have been a Loſs within the Policy. We have Liberty to unload and reſhip; and therefore have a Liberty to uſe all the *Means* in Order to do that.

Lee, Ch. J. ſaid—It is certain, that in Conſtruction of Policies, the *ſtrictum Jus*, or *Apex Juris* is not to be laid hold on: But they are to be conſtrued largely, for the Benefit of Trade, and *for the Inſured.* Now It ſeems to be a ſtrict Conſtruction, to *confine* this Inſurance only to the unloading and reſhipping, and the Accidents attending that Act. The Conſtruction ſhould be *according to the Courſe of Trade in this Place.* And this appears to be the *uſual Method* of unloading and reſhipping in that Place: *Viz.* "That "when there is no *Britiſh* Ship there, then the Goods are kept in "Store-Ships."

He added, that where there is an Inſurance on Goods on Board ſuch a Ship; *that* Inſurance extends to the carrying the Goods to Shore, in a *Boat.* So if an Inſurance be of Goods to ſuch a *City*; and the Goods are brought in Safety to ſuch a *Port*, though diſtant from the City; That is a Compliance with the Policy, if that be the *uſual* Place to which the Ships come.

Therefore as here is a Liberty given of unloading and reſhipping, It muſt be taken to be an Inſuring the Goods under *ſuch Methods* as are *proper* for the unloading and reſhipping. Here is no Neglect on the Part of the Merchant, (the Inſured:) for the Goods were brought into Port the 19th and were loſt the 22d of *November.*

This Manner of unloading and reſhipping is to be conſidered as the *neceſſary Means* of attaining that which was intended by the Policy; and ſeems to be the ſame as if it had happened in the Act of reſhipping from one Ship to the other. And *as this is the known Courſe of Trade, it ſeems extraordinary if it was not intended.*

This is *not* to be conſidered as a *Suſpenſion* of the Policy, during the unloading and reſhipping from One Ship to another. For, as the Policy would extend to a Loſs happening in the unloading and

reſhipping from One Ship to Another, ſo any *Means* to attain that *End* come within the Meaning of the Policy.

And accordingly, a Verdict was given for the Plaintiff.

In the *Eaſter* Term following, a new Trial was moved for: But it was refuſed, by Lord Ch. J. *Lee*, Mr. Juſt. *Chapple*, and Mr. Juſt. *Deniſon*; Mr. Juſt. *Wright* indeed being of a different Opinion; namely, "that it was a Removal at the Peril of the *Inſured*."

So in the preſent Caſe, the ſame Reaſoning will hold. And, in general, What is *uſually* done by ſuch a Ship, with ſuch a Cargo, in ſuch a Voyage, is underſtood to be *referred* to by *every* Policy; and to make a *Part of it*, as much as if it was *expreſſed*.

The *Uſage*, being *foreſeen*, is *more* ſtrongly allowed to be done, than what is left to the Maſter's Diſcretion upon *unforeſeen* Events: Yet if the Maſter, *ex juſtâ Cauſa*, goes out of the Way, (as, to refit, or to avoid Enemies, Pirates &c.) the Inſurance *continues*.

Upon theſe Principles, It is difficult to frame a Queſtion which can ariſe out of this Caſe, as ſtated.

The only Objection is, "That they were burnt in a Bank-Saul "and *not* IN *the Ship*; upon *Land*, and *not at Sea* or upon *Water*; "and, being appurtenant the *Ship*, Loſſes and Dangers *aſhore* could "not be included."

The Anſwer is obvious. (1ſt.) The *Words* make no ſuch Diſtinction. (2dly.) The *Intent* makes no ſuch Diſtinction.

Many Accidents might happen *at Land*, even to the *Ship*.

Suppoſe a Hurricane to drive it a Mile on Shore. Or an Earthquake may have a like Effect. Suppoſe the Ship to be burnt in a dry Dock. Or ſuppoſe Accidents to happen to the Tackle upon Land, taken from the Ship, while accidentally and occaſionally refitting; as on Account of a Hole in it's Bottom, or other Miſchance.

Theſe are poſſible Caſes. But what might ariſe from an *accidental* Occaſion of refitting the Ship, is not near ſo ſtrong as a *certain neceſſary* Conſequence of the *ordinary* Voyage, which the Parties could not but have in their direct and immediate Contemplation.

Here, the Defendants *knew* that this Ship *muſt* be heeled cleaned and refitted, in the River of *Canton*. They *knew* that the Tackle &c. *would* then be put in the Bank-Saul. They *knew* it was for the *Safety* of the Ship, and *prudent*, that they *ſhould* be put there.

Had

Had it been an *accidental Neceſſity* of refitting, the Maſter might have excuſed taking them out of the Ship, *ex juſtâ Cauſa*. But Deſcribing the Voyage is an *expreſs Reference* to the uſual Manner of making it, as much as if every Circumſtance was mentioned.

Was the Chance varied by the *Fault* of the Maſter? It is impoſſible to impute any *Fault* in him.

Is this like a *Deviation*? No: 'Tis *ex juſtâ Cauſa*; Which always excuſes.

And yet Sir *Richard Lloyd*, being preſſed in his Argument, was obliged to inſiſt "that it reſembled a Deviation: Which deter-"mines the Inſurance, and diſcharges the Inſurer."

Anſwer. This Suppoſes the Parties to inſure from *London* and back again, knowing that the Policy would be determined in the River *Canton*: Which would be abſurd. Beſides, it ought to make a difference in the Præmium: Yet the Under-Writers have All kept the Præmium upon other *China* Voyages.

One Objection was formed by comparing this Caſe to that of changing the Ship or Bottom, on board of which, Goods are inſured: Which the Inſured have no Right to do.

Anſwer. *There*, the identical Ship is eſſential: For *that* is the Thing inſured. But that Caſe is not like the preſent.

Another Objection was, "That Policies ought to be conſtrued "*ſtrictly*, and *not* to be extended to *Caſes omitted*:" (Which latter Poſition is true; and muſt be agreed.)

Anſwer—But that is not the preſent Caſe: For this is not a *Caſus omiſſus*; but clearly within the View and *bona fide* Intent of the Policy.

The Caſe of *Fitzgerald* v. *Pole* is no way applicable to the preſent. The Queſtion there was, "Whether it was a partial, or "a total Loſs, within the Meaning of the Policy." In that Caſe, there was Nothing fixed by Uſage, or by known and eſtabliſhed Conſtruction, (as there is in this Caſe:) So that no Inference can be drawn from that Caſe, concluding to this.

Here, the Defendants *knew* that the Tackle and Furniture would be put in this Bank-Saul, as the *uſual*, *certain* Conſequence of the Voyage at Sea; which *always* made it *neceſſary* to heel clean and

refit the Ship in the River of *Canton*. Had the Inſurers been aſked, they muſt, for their *own* Sakes, have inſiſted they ſhould be put there, as the beſt and ſafeſt Method. They would have had Reaſon to complain, if, from their *not* being put there, a Misfortune had happened: In *that Caſe*, the Maſter *would* have been to blame, and by his Fault *would* have varied the uſual Chance.

They have taken a Price for ſtanding in the Plaintiff's Place, as to *any* Loſſes He might ſuſtain in performing the *ſeveral* Parts of the Voyage; of which, *this* was *known* and *intended* to be *One*.

* Mr. Juſt. *Wilmot* was not preſent; being ingaged in Chancery, as One of the Lords Commiſſioners.

Therefore We (All of Us who * heard the Argument) are very clearly of Opinion, That in every Light and every View of this Caſe, in Reaſon and Juſtice, and within the Words, Intent and Meaning of the Policy, and within the View and Contemplation of the Parties to the Contract, the Inſurers ARE LIABLE to anſwer for this Loſs. Wherefore

Per Cur'. Let the POSTEA be delivered to the PLAINTIFF.

Anderſon *verſ.* George.

UPON a Rule for the Plaintiff to ſhew Cauſe "Why a *Verdict* obtained by Him for 16 *l.* ſhould not be ſet aſide, and "a new Trial ordered, UPON *Payment of Coſts*;"

The Caſe appeared to be, That the Plaintiff had ſold Goods to the Defendant: Who paid for them by a Promiſſory Note of One *Hopley*; which the Defendant indorſed. The Plaintiff demanded the Money of *Hopley*: But indulged Him with further Day of Payment, ſeveral times; till *Hopley* broke.

The only Diſpute between the Parties was, "*Which* of them "ought to bear the Loſs of this Note." For the Plaintiff was paid, if the Loſs ought to fall upon Him, through his Neglect or Indulgence in giving further Credit to *Hopley*.

There were *two Counts* in the Declaration: One, for *Goods ſold*; the Other, againſt the Defendant as Indorſor of the Promiſſory *Note*.

When the Cauſe came on to be tried, though Both Parties came to try the *real Merits* of the Queſtion between them, *viz.* "*Which* "ſhould bear the Loſs of the *Note*, occaſioned by *Hopley's* Failure;" And the Plaintiff's Agents had the *Note in Court*; Yet, finding upon their own Evidence, "that the Plaintiff had given repeatedly "further

" further Credit to *Hopley*," they reſorted to a TRICK, and reſted their Caſe upon proving the Sale and Delivery of the *Goods*, which never was diſputed. The Defendant could not produce the Note: It was in the Plaintiff's Cuſtody. Relying upon it's being the only Ground of the Plaintiff's Caſe, the Defendant had not given Him NOTICE " *to produce it.*" The Count, ſtating it, could not be given in Evidence: And the Defendant had not intitled Himſelf to prove the Contents, for want of Notice to produce it. LORD MANSFIELD told them, at the Trial, It was an improper Artifice; That no Verdict could ſtand, which was ſo obtained. But the the Plaintiff *refuſed to produce* the Note; and had a Verdict, of Courſe.

It was now contended, for the Plaintiff, that the Verdict was *regular*, and the Plaintiff in *no Fault*: For, without Notice, He was *not obliged to produce* the Note. Therefore the Verdict ought not to be ſet aſide.

The COURT thought the Plaintiff had taken an *unfair* Advantage, *contrary to Juſtice and good Conſcience*. That the Rules of Practice muſt be *general:* But He who abuſed them in a particular Caſe, ſhould not ſhelter a *Trick*, by *Regularity*. The Plaintiff did not want Notice to produce a Note he *had in Court*, and which he had laid in the Declaration as his *Ground of Action*. Beſides, He took a Verdict for the Price of the Goods; *though* he had *received Satiſfaction*, the Evidence of which was in his own Cuſtody and *ſuppreſſed*.

They not only ſet aſide the Verdict; but ſet it aſide WITHOUT *Payment of Coſts:* And declared, " the next Time that a Party " ſhould obtain a Verdict in like Manner, by an *unfair unconſciona-* " *ble* Advantage, without trying the real Queſtion, they would ſet " aſide the Verdict, and make *Him pay the Coſts.*"

A new Trial being ordered; This Cauſe was tried at *Guildhall*, the Sittings after this Term: And the *Defendant* had a Verdict upon the *Merits*, to the Satisfaction of every Body; the Caſe being clear, beyond a Doubt.

23d *May* 1757.

Rex *verſ.* Inhabitants of Bentley.

TWO Juſtices removed *John Pickering* and his Wife and Son, from *Baxterly* to *Bentley:* And their Order was confirmed by the Seſſions. It was moved, in this Court, to quaſh both theſe Orders.

The Caſe ſtated was, That this *John Pickering* was hired and ſerved for a Year in *Bentley*; And before the [then] laſt General Quarter-Seſſions, he was removed, by proper Order, from *Baxterly to Stourbridge*, as the Place of his laſt legal Settlement: Which Order of Removal *was* QUASHED, upon an Appeal, by the ſaid [then] laſt General Quarter-Seſſions. And *ſince* the ſaid laſt Seſſions, the Pauper being removed from *Baxterly* aforeſaid *to Bentley*, *Bentley* appealed, and *offered to prove a Settlement in* Stourbridge, by a Hiring and Service for a Year in *Stourbridge*, BEFORE *the ſaid laſt Seſſions*, but SUBSEQUENT *to the ſaid Hiring and Service in* BENTLEY: But the Court of Seſſions REFUSED *to go into it*; being of *Opinion* " That the *Determination* of the Court at the ſaid laſt " Seſſions was FINAL *and* CONCLUSIVE; ſo that no Evidence could " be given by the Hamlet of *Bentley*, of a Settlement in *Stourbridge* " *gained* PRIOR *to* the ſaid laſt Seſſions."

It was objected to theſe Orders, as a Reaſon why they ought to be quaſhed, " that this Opinion of the Seſſions was altogether ER- " RONEOUS:" It being a *ſettled* DISTINCTION, " that though an " Order of CONFIRMATION is indeed *concluſive* and binds *all the* " *World*; Yet an Order of REVERSAL *or* DISCHARGE is *only con-* " *cluſive on the contending* Parties, and is *final* ONLY *between the* " TWO *Pariſhes* CONCERNED, but does NOT *bind a* THIRD Pariſh."

In proof of which Diſtinction, the following Caſes in Point were cited, *viz.*

2 *Salk.* 527. Inter Inhab' of *Mynton* and *Stony-Stratford.*
1 *Strange* 232. Between the Pariſhes of *Little Bitham* and *Somerby.*
Carthew 516. Between *Bedingham* and *Kingſton Bowſey* Pariſhes.
Mich. 8 *G.* 2. 1734. *B. R.* Rex *v.* Inhab' of *Cirenceſter*, *Mary Coates*'s Caſe: [It ought to have been ſo cited: Not as the Caſe of Inhabitants of *Coln St. Aldwyn's.*]

And THE COURT unanimouſly agreed to this Diſtinction: (And indeed Mr. *Norton*, who ſhewed Cauſe againſt quaſhing the Orders, did

did not diſpute it; but only endeavoured to ſhew that the preſent Caſe was not within the general Rule.)

They ſaid it had been long ago fully ſettled and eſtabliſhed; and with very good Senſe and Reaſon, and upon right and juſt Principles. For where the Order of Removal is *confirmed* upon Appeal, and the Pauper thereby fixed upon the Pariſh appealing, ſuch Pariſh ſo charged was *Party to the Litigation*, and has been fully *heard*, and the Law has run it's Courſe as to them; And therefore the Determination is, and 'tis reaſonable that it ſhould be, concluſive *upon* THEM as to *all the World*, And *all the World* may *take Advantage* of it: But where the Order of Removal is *vacated and diſcharged*, the *two contending* Pariſhes are indeed *eſtopped and concluded* by the Determination; but No THIRD Pariſh is eſtopped or concluded thereby; For the Point has never been determined AS *to* THEM, who were *no Parties* to the former Litigation, or have *ever been* HEARD *at all.*

Now in the preſent Caſe (as Ld. *Mansfield* obſerved) there is only a *negative* Opinion, in a Litigation between *Baxterly* and *Stourbridge*, "That the Pauper was NOT *ſettled at* STOURBRIDGE." But, notwithſtanding this, tho' *Baxterly* might not be able to ſhew that the Settlement was really at *Stourbridge*, Yet *Bentley* may be able to give ſtronger Evidence than *Baxterly* could, and may be able clearly to prove it.

So, in the Caſe of *Coln St. Aldwyn's*, that was *negatively* determined "NOT *to be the Settlement of Mary Coates*, in a Litigation be-"tween *Minety* and *Coln St. Aldwyn's*": (From the former of which Places the two Juſtices had removed Her, to the latter; And their Order was *diſcharged* on Appeal.) But when two other Juſtices made a ſubſequent Order to remove Her *from Cirenceſter* (a THIRD Pariſh) to this *ſame* Pariſh of *Coln St. Aldwyn's*, *without* her having gained any ſubſequent Settlement there, ſince the former Order; And the Seſſions, upon Appeal from this ſecond Order, were of Opinion that it was illegal, and diſcharged it; and the Point thereupon came before this Court; Lord *Hardwicke* ſaid He took the Diſtinction now laid down, to have been clearly ſettled, and He held it to be a reaſonable One: And he added the Reaſon for it, namely, "becauſe a *third* Pariſh might be *able to give better and* "*ſtronger Evidence*, than the former Pariſh could produce, to "charge the Pariſh to which the Pauper had been antecedently re-"moved by the diſcharged Order; And if the third Pariſh, that "is to ſay, *any* OTHER Pariſh, into which the Pauper ſhould come, "had ſuch ſtronger Evidence, they ought to be at Liberty to Uſe "it, Since all the former Tranſaction was *res inter alios acta.*"

So

So here, *Bentley* may be able to give ſtronger Evidence to fix the Settlement at *Stourbridge*, than *Baxterly* could: And what then paſſed, was *res inter alios acta*.

Therefore this Caſe of *Coln St. Aldwyn's*, and the Reaſon of it, are deciſive in the preſent Caſe.

* *Per Cur.* unanimouſly and clearly
BOTH ORDERS quaſhed.

* Mr. Juſtice *Wilmot* was now preſent.

The End of *Eaſter* Term 1757. 30 *Geo.* 2.

Trinity

Trinity Term

30 & 31 Geo. 2. B. R. 1757.

Rex *verſ.* Inhabitants of Great Torrington. *Monday* 13th *June* 1757.

TWO Juſtices removed *Mary Bray*, Singlewoman, from *Bideford* to *Great Torrington:* And the Seſſions confirm their Order.

It appeared, upon the Special Caſe ſtated, That *Hugh Bray*, and his Wife, and *E.* & *M.* their Daughters, came into *Bideford* by virtue of a *Certificate from Lancraſs directed to Bideford*, and inhabited there ſome Years; And that *M.* the Pauper, was then *bound an Apprentice*, by the Officers of the Pariſh of *Lancraſs*, by the Allowance of two Juſtices of the Peace, to *Thomas May*, for an Eſtate in *Lancraſs*; and lived in *Great Torrington* aforeſaid *an Apprentice*, for *ſeveral Years*, UNDER *the ſaid Indenture*. That after the ſaid Apprenticeſhip expired, the ſaid *Mary hired* Herſelf a *Servant for a Year*, with *Solomon Lyon*, *in Bideford*; and *lived* with Him *there*, for ſuch Year, and for eleven Months after.

The Seſſions, being of Opinion that the ſaid *Mary*, *coming* AT FIRST in the ſaid Pariſh of *Bideford* UNDER *the ſaid* CERTIFICATE as aforeſaid, *did* NOT *gain* a Settlement there, BY *the ſubſequent Service* as a Covenant-Servant as aforeſaid in that Pariſh, confirm the ſaid Order.

Mr. *Gould* moved to quaſh both theſe Orders: And urged that the Pauper, *by* having ſerved an Apprenticeſhip in a *third* Pariſh, became *emancipated from her Father*'s Family, and *ſui juris*, and quite *clear of the Certificate*; and therefore was *as much* at Liberty to gain a new Settlement in *Bideford*, *as any uncertificated* Perſon whatſoever could be.

Mr. *Huſſey* was to have ſhewn Cauſe why the Orders ſhould not be quaſhed: But he very candidly acknowledged that He had looked into the Caſes, and was ſatisfied that theſe Orders could not be ſupported.

LORD MANSFIELD—Certainly, they can not.

RULE to quaſh them, made abſolute.

V. the next Caſe, *Rex* verſ. *Inhabitants of Keynſham:* which is the ſame Point, and determined on the like Conceſſion of the Adverſe Counſel.

Tueſday 14th June 1757.

Rex *verſ.* Inhabitants of Keynſham.

See the laſt Caſe—S. P.

MR. *Gould* having moved to quaſh an Order of two Juſtices removing *William Harris*, his Wife, and their three Children, from *Hanham* in *Glouceſterſhire* to *Keynſham*, and alſo the Order of Seſſions confirming it; and Mr. *Norton* now coming to ſhew Cauſe why they ſhould not be quaſhed; this appeared to be the very * ſame Point with the laſt Caſe, of the King againſt the Inhabitants of *Great Torrington.* And

* *V. poſt* 27th *January* 1758. Pa. S. P.

Mr. *Norton* now acknowledged (as Mr. *Huſſey* did Yeſterday) that He could not ſupport the Orders.

Whereupon BOTH Orders were QUASHED.

Wedneſday 15th June 1757.

Weller *verſ.* Goyton and Walker.

ACTION againſt *Two*, upon a JOINT-Promiſe; *Judgment againſt Walker*, by Default; Iſſue joined by *Goyton*; and the Plaintiff neglected to bring it on to Trial: And the Common Rule was obtained, for Judgment *as in Caſe of a* NON-SUIT.

This was a Queſtion on 14 *G.* 2. *c.* 17. §. 1. concerning the Court's giving Judgment as in Caſes of Non-Suit: And it aroſe upon a Doubt of the Maſter's, "Whether He could tax Coſts as in Caſe "of a *Non-Suit*; as there was a Judgment by Default, *for the* "*Plaintiff*, againſt the *Other* Defendant."

Mr. *Lawſon*

Mr. *Lawſon* moved for the Direction of the Court to the Maſter, that he ſhould tax the Defendant *Goyton* his Coſts, *purſuant to the Rule*.

Lord Mansfield (though no Counſel appeared on Behalf of the Plaintiff) had a Doubt, "Whether there could *be Judgment* "as *in Caſe of a Non-Suit*, in a Caſe where the Plaintiff was not "*liable* to a Non-Suit." This Act of 14 *G.* 2. *c.* 17. enacts "that "all Judgments given by Virtue of it, ſhall be of the like Force "and Effect, as *Judgments upon Non-Suit*; and of no other;" (§ 2:) And provides "that the Defendant or Defendants ſhall, upon ſuch "Judgment, be awarded his her or their Coſts, in any Action or "Suit *where He She or They* would upon Non-Suit *be intitled* "*to the ſame*; and in No other Action or Suit whatſoever;" (§ 3.) So that the Point ſeems to be "Whether the Plaintiff *could*, in this "Caſe, have been nonſuited at the Trial." For if he could not, then the Caſe of a Non-Suit *does* not *here* exist: And conſequently the Court cannot give Judgment and Coſts, as *in Caſe* of a Non-Suit, when the Caſe of a Non-Suit does not at all exiſt. Now here was a *Judgment* obtained *by* the Plaintiff *againſt One* of the Defendants, *already:* How then can the Plaintiff be out of Court *as to* Him? But *if he is nonſuited* in this Action, He will be out of Court, as againſt *both* Defendants.

Mr. Juſt. Denison ſeemed to think alſo that the Plaintiff would *not* have been liable to a *Non-Suit* at the Trial. And to that Purpoſe, He recollected and mentioned the Caſe of *Gree* v. *Roll* and *Newell*; which is wrong in 2 *Salkeld* Title *Nonſuit*, *pl.* 5. pa. 456. *

* See S. C. alſo, at large, in Caſes in *B. R. temp. W.* 3. Pa. 651.

Nothing was taken by the Motion.

Hall et Ux' *verſ.* Woodcock.

Friday 17th *June* 1757.

Trin. 1756. 29, 30 *G.* 2. *Rot'lo* 921.

(Lord Commiſſioner Wilmot *abſent, in Chancery.)*

Error to *reverſe a Common Recovery*. The Error aſſigned was—"that the Vouchee, before the rendering of the Judg-"ment, died without Iſſue." Upon the *Scire faciaſes* previouſly iſſued againſt the Demandant in the Writ of Entry and againſt the Terretenants, *&c*; who were returned to have been ſummoned, *&c*. and

and thereupon, Errors aſſigned, *Lucas*, the Demandant, comes in and pleads "That there is no Error:" And one of the Terre-Tenants ſuffered Judgment by Default. But *Woodcock* who was alſo one of the *Terre-Tenants*, prays *Oyer* of the *Scire facias*; and pleads "NON-TENURE, and that *Henry Balguy* and his Wife *are the* "*Terre-tenants*;" And *prays* JUDGMENT ON THE SCIRE FACIAS. To this Plea there is a Demurrer by the Plaintiff in Error, and Joinder in Demurrer, by *Woodcock* the Terre-Tenant.

Serjeant *Poole* for the Demurrer, *viz.* for the Plaintiffs in the *Scire facias*, and in Error.

The *Scire facias* which iſſued againſt the *Terre-tenants* is not *ex Neceſſitate*, nor *ex Debito Juſtitiæ*; but only diſcretionary in the Court, and only to ſee if the Terre-tenant has a *Releaſe of Errors:* But the Terre-tenant can not plead "Non-tenure," and "that "*another Perſon* was Tenant of the Freehold, at the Time of the "iſſuing of the *Scire facias*." That *Other* may as well plead (in like Manner) to another *Scire facias* to be iſſued againſt *him*, "that "a THIRD Perſon is Tenant of the Freehold;" and ſo on. And the Terre-tenant's *Title* will not be affected by *this* Judgment and Recovery: For an *Ejectment* muſt be brought. The Terre-tenant cannot plead in *Abatement* of the Writ of Error; but *only* in *Bar* of it. 1 *Lev.* 72, 130, 146. *Winn* v. *Lloyd* is ſo. 1 *Siderf.* 213. S. C. 1 *Keb.* 54, 351, *&c.* S. C. Sir *T. Raym.* 15, 55. S. C. *Dyer* 321. *a.* is alſo a ſtrong Intimation "that the Terre-tenant can only plead in *Bar* "of the Writ of Error." The Caſe of *Winn* v. *Lloyd* is in Point. And the preſent Caſe muſt be taken to be a Plea put in merely for *Delay*, (as that was.)

Mr. *Luke Robinſon contra* for the Defendant *Woodcock*, whoſe Plea was demurred to. It appears *upon the whole Record*, that the Plaintiffs in Error have *no Title:* And if ſo, there is an End of the Matter.

As to *this Plea of the Terre-tenant*, "of Non-tenure; and that "*Balguy* and his Wife are the Terre-tenants"—The Fact is *admitted* by the Demurrer: And the Plaintiffs in Error ought to have taken out a *new Scire facias* againſt *Balguy* and his Wife. The *Scire facias* againſt the Terre-tenant, is of *neceſſity*, and NOT *diſcretionary*. For the Tenant to the *Præcipe* is merely *nominal:* But 'tis the Terre-tenant who is the *true* Tenant of the *Freehold*. And the Terre-tenant *may plead* MANY *other* Pleas *beſides a Releaſe:* He may plead "that the Plaintiff has conveyed the Land to another;" or he may plead *Non-tenure*. That "a *Scire facias* againſt the "Terre-tenant *is ſtrictly neceſſary*;" is proved by 3 *Mod.* 119. **Kingſton* v. *Herbert*. 3 *Mod.* 274. *Anon.* ſays, "that there † ſhould be

* This Caſe was adjourned; and therefore is no Authority.

† The Court there held it *not* to be neceſſary, in Point of *Law*: But that it was neceſſary, *by the Courſe* of the Court, and *reaſonable* that it ſhould be ſo.

" a *Scire facias*, *both* againſt the *Heir* AND againſt the Terre-te-
" nants." (Now here is *none* againſt the *Heir*, at all.) *Dyer* 321. *a. b.* proves expreſly, " that there *ought* to be a *Scire facias* " to the Terre-tenants before the Court proceeds to an Examination " of the Errors." 5 *Mod.* 209. *Stokes* v. *Oliver*. A Writ of Error was brought to reverſe a Common Recovery: And there *was* a *Scire facias* againſt the Terre-tenants. 6 *Mod.* 134. *Adams* v. *Terre-tenants of Savage*, was a *Scire facias* by the Adminiſtrator, to warn in *All* the Terre-tenants of *Savage*, (*not naming* them:) And *fo.* 199. was a Plea in *Abatement*; " That *J. S.* was a Terre-
" tenant of *Savage*; and was not ſummoned." *

* This Caſe ſtands alſo adjourned.

But *ſuppoſing* the Plea to be bad, yet there is neither *Heir* nor Terre-tenant *before* the Court. And He ſaid He had *other* Objections too. But

LORD MANSFIELD ſaid He had better reſerve them, till he ſhould ſee whether this Plea to the *Scire facias* would hold. And He aſked Mr. *Robinſon* Whether He had any *Authority* to prove " that the Terre-tenant could plead ANY " *Thing elſe* BUT *a* RELEASE."
(Which Mr. *Robinſon* could not produce.)

Serj. *Poole* in reply—The preſent Queſtion is upon *this* Plea of the Terre-tenant. I deny that a *Scire facias* againſt Terre-tenants is *ex Debito Juſtitiæ*. However, We *have iſſued* a *Scire facias* againſt One of the Terre-tenants; who has ſuffered Judgment by Default. *Dyer* 321. *a.* cites the Caſe of *Leyghe* v. *Colyn & al'*, 7 *H.* 8. Error to reverſe a Judgment in Aſſize. * The Caſes in 5 *Mod.* 209. and 6 *Mod.* 134. are not applicable to the preſent Caſe: That in 6 *Mod.* 134. was in Order to bring all the Co-Terre-tenants in, to make Contribution.

* *V. Dyer* 65, 132, 375: All S. P. but not S. C.

If they have a *Releaſe* to plead, let them ſhew it: If not, 'tis plainly a Plea only for *Delay*.

LORD MANSFIELD—By the * *eſtabliſhed Method* of Proceeding, there muſt be a *Scire facias* againſt the *Terre-tenants*: Otherwiſe, indeed, it is an *Irregularity* but *no more*.

* *V. Carthew* 111, 112. *accord*.

The *Terre-tenant* has *nothing to do with the Matter*. All that he can do, is only what ANY *Amicus Curiæ* may do; *viz.* produce a *Releaſe of Errors*: But he has Nothing to do, *in Intereſt*. Therefore there ought to be a *Reſpond. ouſter*, in this Caſe.

As to the *other* Objections, 'tis not proper to meddle with them *yet*.

Mr. Juſt. DENISON concurred. This is *not* like a *Scire facias* on the * *Death* of a Party: 'Tis only a *Scire facias* againſt the Terre-tenant, who is *no Party to the Record*, and has *Nothing* to do with the Matter, in *Point of Intereſt*.

* [Which was the Caſe in 6 *Mod.* 134 & 199.]

In *Carthew* 111, 112. The Earl of *Pembroke*'s Caſe, Theſe *Scire faciaſes* againſt the Terre-tenants are ſaid by Lord Ch. Juſtice *Holt*, to be diſcretionary, and "*not* to be *ſtricti Juris*; but yet to have "been the conſtant and uſual *Courſe of the Court*; and therefore "not to be departed from." And the Terre-tenant *can only plead* a *Releaſe of Errors*; to defend his own Poſſeſſion, or for the Sake of Purchaſers: But he CANNOT *plead in Abatement to the Writ*, when he is *no Party to the Suit*.

In the Caſe of *Winn* v. *Lloyd*, the three Terre-tenants pleaded * three different Pleas; which were rejected as * frivolous. And ſo is this; and ought to be rejected. And it is premature to enter into the Errors objected to in the Record: For Mr. *Robinſon* is only Counſel *for Woodcock*, One of the *Terre-tenants*.

* *V. Raym.* 55, 56. S. C.

Mr. Juſt. FOSTER was clearly of the ſame Opinion. Here, the Defendant *Woodcock* comes in, and ſays "He has *No Intereſt* in the "Land." Therefore he certainly cannot be heard, in Objection to the *Judgment*, and to ſhew *that* to be *erroneous: This* was no Part of the Intention of the Notice given him by the *Scire facias*. His Plea is inſufficient: Therefore He ought to anſwer over.

Per Cur. RESPOND. OUSTER.

Far, (Spinſter,) *verſ.* Denn.

ERROR to reverſe a Judgment in Ejectment.

Mr. Serj. *Martin* for the Plaintiff in Error.

This was an Ejectment, wherein *Denn* was Plaintiff, and *Elizabeth Far* and *Rebeccah Savil Far* were Defendants: And Iſſue had been joined between the Plaintiff and *both* theſe Defendants. And Day was given to the Parties *&c.* At which Day comes as well the Plaintiff as the ſaid *Elizabeth Far:* But the *other* Defendant *Rebeccah Savil Far*, doth *not* come. And the Sheriff doth not return his Writ.

Then the *Death of* REBECCAH SAVIL *Far* is SUGGESTED *upon the Roll*, in the uſual way. And a new *Venire* is awarded to try the Iſſue againſt the ſurviving Defendant *Eliz. Far:* And it is ſur-

ther awarded, " That all further Proceedings againſt *Rebeccah Savil* " *Far* ſhall ceaſe." Then it ſets forth the Record of the *Poſtea* at the Aſſizes; and the Recovery againſt *Elizabeth Far*. And the Judgment is " That the Plaintiff recover his Term againſt the ſaid *Eli-* " *zabeth Far*."

Errors aſſigned — " That there is no Record of *Niſi prius*;" [which Serjeant *Martin* ſaid, was only done, in Order to give them Opportunity of objecting to the Variances;] And " That Judgment " is given for the Plaintiff below, whereas it ought to have been " given for the Defendant." Then a *Certiorari* iſſued, to certify the Record of *Niſi prius*: Which was certified accordingly. And " *In Nullo eſt erratum*" was pleaded, by the Defendant in Error.

This Writ of Error was brought, He ſaid, by the Approbation of the Court of *C. B.* on Conſent to waive a Motion there in Arreſt of Judgment. He cited *Biſhop*'s Caſe, in 5 *Co.* 37. *b.* to ſhew that he was at Liberty to make Exceptions *not aſſigned* for Error. Alſo 1 *Salk.* 268. S. P. *Carlton* v. *Mortagh.*

And then He proceeded to make his Objections; *viz.*

1ſt. The *Niſi prius Roll* is erroneous, in itſelf.

2dly. The *Niſi prius* Record *varies* materially from the *Plea Roll.*

3dly. This may be taken Advantage of, AFTER *Verdict.*

4thly. The *Omiſſion* of " *Quod querens Nil capiat per Breve*," as to *Rebeccah Savil Far*, makes the Judgment erroneous.

5thly. The *Judgment* ought not to have been for more than a MOIETY of the Lands demanded.

And Firſt—The Death of *Rebeccah Savil Far*, One of the Defendants, ought to have been ſuggeſted *upon* the *Niſi prius* Record. It is NOT *ſufficient* that this be mentioned in the *Jurata*-part of it. *Barnes's Notes, Tr.* 7 & 8 *G.* 2. *C. B. Fo.* 8. *Waldo* v. *Harriſon:* Where the *Jurata* in the Record of *Niſi prius* was amended. Which was done upon the Foundation that the *Jurata*-part of the Record is *not* an Award of the *Court*; but *only to annex* the Proceedings. Indeed *Rebeccah Savil Far* is, in *that* Part, ſaid to be dead: But 'tis only in a *Parentheſis*, and by way of *Recital.* However, that is *not the* PLACE for a *Suggeſtion* of the *Death of Parties.* And it ought to be a *full and poſitive* Aſſertion: For there are to be Proceedings upon it.

If

If any Special Matter had been ſuggeſted, about awarding the *Venire* out of the Common Courſe, a Copy muſt have been given. 1 *Strange* 235. *Brocas* v. *City of London.*

This *Recital* did *not authorize the Judge* to try the Cauſe between *One* of the Parties only. There ought to be a *New Venire* awarded; Or it ought to have been awarded againſt *both* Defendants. For here is NO *proper Suggeſtion* of the Death of One of the Defendants.

The *Jurata* is *wrong*. 2 *Hawkins P. C.* 290.

The Death muſt be *ſuggeſted*. 8, 9 *W.* 3. *c.* 11. § 7. But a *Recital* is *no* Suggeſtion. And this is *not* a Diſcontinuance; but a Mis-*Trial*, (which is not helped by the Stat. of Jeofails.)

Secondly—This *Niſi prius* Record *varies* materially from the Plea-Roll: For it is *not* between the *ſame Parties*. And *ſmall* Variances are fatal. 1 *Ld. Raym.* 329. *Doberteen* v. *Chancellor. Palmer* 378. *Young* v. *Engleſield. Cro. Eliz.* 340. *Long* v. *Michell. Viner's Abridgment* 553. *Pl.* 8. of Title *Error.*

☞ Mr. Juſt. FOSTER—Brother, VINER *is* NOT *an Authority*. Cite the Caſes that *Viner quotes: That* You may do.

Serj. *Martin* proceeded—

Thirdly—This may be taken Advantage of, AFTER *Verdict*.

Fourthly—The Judgment is *imperfect*, without theſe Words "*Quod querens nil capiat &c.*"

LORD MANSFIELD—Would You have it, "That he ſhall take "Nothing by the Judgment, againſt a *dead* Perſon?" However, it *is* in the Entry of the Judgment, "That further Pro-"ceedings ſhall ſtay againſt this dead Perſon."

Fifthly—The Judgment ought *only* to have been for a *Moiety* of the Premiſſes. My Argument ariſes on 11 *G.* 2. *c.* [19. I ſuppoſe.] And here *might* have been two *ſeparate* Records. *Both* are made Defendants by the Rule. It is ſaid in 1 *Ventr.* 355. If every One do not appear, the Plaintiff cannot proceed againſt the Reſt. And though Ejectments be the Creatures of the Court, Yet the Records muſt preſerve as *regular a Form* as other Records muſt: And ſo it is, even upon Common Recoveries.

LORD

Lord Mansfield—If it be wrong, to award the Recovery of the Term againſt the Tenant in Poſſeſſion, how would You have *had* it awarded? For it might have been very inconvenient to award it in *Moieties*.

Serj. *Martin*—Perhaps, the *proper* Method may be, to apply to the Court where the Judgment is, " that the *Execution* ſhould be " taken out, of ſuch Part only as was the Poſſeſſion of the *living* " Defendant."

Serj. *Hewitt contra*—

Firſt,—The *Niſi prius* Record is perfectly right. Even before the Statute of 8, 9 *W.* 3. *c.* 11. the Death of the Party might be ſuggeſted upon the Roll. And here it is done, upon the very next Appearance Day after the Death.

My Brother *Martin* ſays, " It is only done by way of *Recital* upon " the *Niſi prius* Roll." But it is not neceſſary to enter it upon the *Niſi prius* Roll *at all*; *unleſs* to direct the Judge, *between whom* He is to try the Iſſues, and that He has *Juriſdiction* to try it.

Secondly, Here is *no* material Variance: Whereas his Caſes are Caſes of *material* Variances. Indeed here is no Variance *at all*.

Thirdly—Here is nothing to take Advantage of.

Fourthly—The Judgment is perfect enough.

Fifthly—The *Judgment* muſt be, " to recover the *Term*." Indeed the Plaintiff muſt take Care to take out *Execution* for no more than He has a Right to, by the Recovery. And Many of his Objections (even if they had any thing in them,) are *cured* by the Statute.

Serj. *Martin*, in Reply, to the ſame Effect, as before.

Lord Mansfield thought there was no Difficulty in the Objections. They are reducible indeed to *three*. For the 3 firſt are no more than, Whether the *Judge* had Juriſdiction to try the Cauſe, between the Plaintiff, and the living Defendant only.

Now the Suggeſtion, and the Award, and All the Proceedings ſhew *One* of the Defendants to be dead; And there is an Award for the Proceedings to *ſtay* as to *this* Defendant; and to go on againſt the *other* only: And the Jury is awarded as againſt the

living One, the Other BEING dead. Both were alive, when the Iſſue was joined: And it is *properly* awarded upon the Iſſue Roll; and acknowledged. And the *Niſi prius* Roll is only for the *Direction of the Judge*, to try it: And it is not traverſable on *this* Roll. And the two laſt Points are as plain.

The *Judgment* is right enough: And the *Execution* muſt be taken out according to the Right and Juſtice of what is *really* recovered.

Mr. Juſt. DENISON held it not neceſſary to enter and tranſcribe the *very* WORDS of the Suggeſtion, from the Plea-Roll, upon the *Niſi prius* Roll; and all the Continuances: But *only enough* to ſhew and notify *to the Judge*, what Iſſues he was to try, and between whom. And it is as properly put in here, in the *Jurata*, as any where elſe: And it could *not* be *traverſed* on the *Niſi prius* Roll. And here is *no Variance*; but only an *Omiſſion* of what was *unneceſſary* to be put in. And there was no Need of the "*Quærens nil capiat* "*per Breve:*" there is *ſufficient without* it.

And as to the 5th Exception—They *might* be *Joint-tenants*; and then 'tis ſtrictly right. But if not, the Plaintiff recovers *his Term:* And he muſt take Care not to take out *Execution* for more than he had Right to recover.

Mr. Juſt. FOSTER was very clear in concurring.

Per Cur. unanimouſly
JUDGMENT affirmed.

Saturday 18th June 1757.

Ball, qui tam *verſ.* Cobus.

MR. *Whitaker* ſhewed Cauſe againſt quaſhing an Information *qui tam*, for exerciſing the Trade of a Baker at *the Pariſh* of *Speldhurſt* in *Kent*, not having ſerved an Apprenticeſhip; contrary to 5 *Eliz. c.* 4.

The 1ſt Objection taken to this Information, by Mr. *Clayton*, on the Original Motion was "That *Speldhurſt* does not appear to be "a City, Market-*Town* or Corporation: It may be a VILLAGE." For ſupporting which, He had cited 2 *Keble* 583. *Rex* v. *French*; (1ſt. Exception.) which Caſe is alſo reported in 8 *Mod.* 26. S. C. *Rex* v. *Turnith*; and 1 *Ventr.* 51. S. C. But though theſe are all Reports of the ſame Caſe (which was cited by Mr. *Clayton*, only out of *Keble*,) Yet Mr. *Whitaker* alledged that they are inconſiſtent with each other.

Mr. *Clayton*,

Mr. *Clayton, contra*—The Act was intended *merely* for the Benefit of *Corporations:* And it has * always been taken, "that it does "*not* extend to any *Village*, or any Place *less* than a City, Market-"Town, or Corporation." And it would be extremely *inconvenient* to the Inhabitants of all distant retired Villages, if it did.

* *Raincsford* thought otherwise, in t *Mod.* 26.

LORD MANSFIELD—The Question is *not* now upon the *Evidence*; but upon the LAYING the Offence. Have You any Authority, that it may not be *laid* at a *Parish?*

Mr. *Clayton*—None but that in *Keble*; (*viz.* 2 *Keb.* 583.)

LORD MANSFIELD—There is nothing in the Act, that restrains it to be LAID in a City, Market-Town, or Corporation: And this *Laying* it in a *Parish* will *not affect the* EVIDENCE.

Mr. Just. DENISON expressed Himself in Terms exactly to the same Effect.

Mr. Just. FOSTER—*Many* Trades are carried on in *Villages:* Most of the *Cloth*-Trade in *Yorkshire*, is carried on in the *Villages.*

Mr. *Clayton* offered another Objection; *viz.* That it was not averred "that he did not *then* exercise the Trade," (namely, at the Time of making the Act.) But

2d. Objection.

THE COURT (without any Hesitation) over-ruled this Objection. So that, (Both Objections being over-ruled,) the Rule "to "shew Cause why the Information should not be quashed, was "DISCHARGED."

Tarrant *verf.* Haxby.

MR. *Norton* and Mr. *Winn* moved for a *Prohibition* to the Consistory Court of *York*, to stay their Proceedings against *Tarrant* the present Parish-Clerk of St. *Osith* in *York*; which Proceedings were there instituted at the Instance of *Haxby* the *deprived* PARISH-CLERK, for the *Restoration* of the said *Haxby.*

The *Office* of Parish-Clerk is of a TEMPORAL Nature: And the *Fees* are of TEMPORAL Cognizance. There are two Cases in Sir *J. Strange*'s Reports to this Purpose; *V.* 2 *Strange* 942. *Peak* v. *Bourne*; and 2 *Strange* 1108. *Pitts* v. *Evans C. B.* And there is an express Case in 2 *Brownl.* 38. *Gaudye*'s Case with Dr. *Newman*,

Dr. *Newman*, *C. B.*, *P.* 8 *Jac.* 1. That the Office of Pariſh-Clerk is *Lay:* And the Spiritual Court have no Juriſdiction concerning his Deprivation.

This *Haxby* they ſaid, was deprived by the Parſon and the whole Pariſh, for Drunkenneſs during Divine Service, and other Miſdemeanors: Whereupon, the Parſon appointed *Tarrant* in his Room. Againſt whom, *Haxby* libelled, in the Conſiſtory Court of *York*; Where there was a Monition; and they were proceeding to reſtore *Haxby*. And all this was ſuggeſted. Upon which, a Rule was granted to ſhew Cauſe. And now Mr. *Nares* was to have ſhewn Cauſe: But, being ſatisfied that it was too ſtrong againſt Him, He would not trouble the Court. Whereupon

The RULE for the PROHIBITION was made ABSOLUTE.

Monday 20th *June* 1757.

Rex *verſ.* Inhabitants of Uffculme.

TWO Juſtices removed *John Hine* and *Thomazin* his Wife, and *James* and *John* their Children, from the Pariſh of *Uffculme*, to that of St. *Sidwell* in *Exeter*: And their Order was quaſhed by the Seſſions, upon an Appeal from it.

The Caſe ſtated on the Seſſions Order, was this—*John Hine*, the Pauper, PURCHASED *a Tenement* in St. *Sidwell*'s: For which, he gave 8*l.* in Money, and a Note for 4*l.* more; *amounting*, IN ALL, *to* 12*l.* He lived there, upon the ſaid Tenement, with his Family; and was then RATED *to the* LAND-*Tax* for the Year 1746. in the following Manner, to wit, "Occupier, late Widow *Hooper*'s, NOW "JOHN HINE's *Tenement* 12*l.*" and for 1747. in the following Manner, to wit, "Occupier, late Widow *Hooper*'s Tenement, NOW "JOHN HINE's *Tenement* 12*l.*" And was *alſo rated* to the *Poor*-Rate for the Year 1746. as follows, to wit, "Occupier of late "*James Hooper*'s Tenement $\frac{3}{4}$ per Week:" And for the Year 1747. in the following Manner, "Occupier of the late *James Hooper*'s, "NOW HINE's $\frac{1}{4}$ per Week." And that the ſaid *John Hine* did, after ſuch rating, live in the ſaid Pariſh of St. *Sidwell* for about one Year; and did, during his Reſidence there, PAY the ſaid Rates, *both* to the *Land*-tax and the *Poor*, according to the Rates aforeſaid; and then ſold the ſaid Tenement and went, with his Family, into the ſaid Pariſh of *Uffculme:* From whence, he was removed into the ſaid Pariſh of St. *Sidwell.*

The Seſſions, being of Opinion that the ſaid *John Hine* did *not* gain a Settlement in St. *Sidwell's by being rated and paying* as afore-

ſaid, the CONSIDERATION *of the ſaid Purchaſe being* UNDER 30*l.* do THEREFORE vacate the ſaid Order.

Mr. *Gould* now moved to quaſh this Order of Seſſions: And He cited

2 *Salk.* 478. *Inter* the Inhabitants of St. *Mary le More* and *Heavy-Tree* in *Devonſhire:* Where it was adjudged that one *Facy*, who, being ſettled at *Heavy-Tree*, went afterwards into the Pariſh of St. *Mary le More*, and took a Houſe there, of one Pound *per Annum*, wherein he lived a Year and a half, and *paid* the *Rates and Taxes* due *for the ſaid* HOUSE, became thereby ſettled at St. *Mary le More*; though his *Perſon* was *not* rated.

[See alſo *Rex* v. *Inhabitants of Chidingfold*, *ante*, *pa.* 247. and the Caſes there cited.]

Serjeant *Davy* and Mr. *Aſton* ſhewed Cauſe againſt quaſhing this Order of Seſſions.

They argued that the Queſtion turned upon two different Acts of Parliament, *viz.* 3 & 4 *W. & M. c.* 11. and 9 *G.* 1. *c.* 7. The former whereof, they inſiſted, was *virtually repealed* by the latter.

3 & 4 *W. & M. c.* 11. §. 6. provides and enacts "that being "*charged with and paying* his Share towards the *public Taxes or* "*Levies* of the Pariſh, ſhall be deemed to *gain a legal Settlement* "in ſuch Pariſh, WITHOUT *Notice.*"

9 *G.* 1. *c.* 7. §. 5. enacts "that *no* Perſon ſhall gain a Settlement "in any Pariſh or Place, for or by Virtue of any Purchaſe of any "Eſtate or Intereſt whereof the *Conſideration* doth *not amount to* 30*l.* "*bonâ fide* paid; for any *longer or further Time* than ſuch Perſon "ſhall *inhabit* in ſuch Eſtate."

They urged that this latter Statute *controlled* and *virtually repealed* the former.

They aſſerted that the Pariſh-Officers were *obliged* by 43 *Eliz. c.* 2. *to rate* this Man, as Occupier; And that by 17 *G.* 2. *c.* 38. §. 4. either the Man *Himſelf* may appeal, if left out of the Rate; or *other* Perſons may appeal from it, as an unequal Rate.

And it is againſt Reaſon, to argue that their Rating Him ſhould be a *Recognition* of Him as a Pariſhioner; when they could *neither remove* Him, *nor help taxing* Him.

Lord Mansfield and Mr. Juſtice Foster aſked whether there had been any Determinations upon *Certificate-Perſons* charged with and paying Pariſh-Rates, in the ſmall Interim between the two Certificate-Acts of 8, 9 *W.* 3. *c.* 30. and 9, 10 *W.* 3. *c.* 11. The latter of which, only recites, in general, "that ſome Doubts "had ariſen upon the Conſtruction of the former, *By* what *Acts* "ſuch Certificate Perſon might procure a legal Settlement in the "Pariſh to which he came." For if there were any ſuch intermediate Determinations, they would ſerve to guide the preſent.

In order to look into which, it ſtood over, with a
Cur. adviſare vult.

And now Lord Mansfield delivered the Reſolution of the Court.

It will be neceſſary to conſider how the Law ſtood before the 9 *G.* 1. *c.* 7. Becauſe the Seſſions ſeem to have confounded different Acts of Parliament, and different Qualifications.

Now before that Act, no Man was removeable from his *own*; be the Value of the Purchaſe of it, *never ſo ſmall and inconſiderable*. And there were then *other* Ways alſo, of gaining Settlements: As, under 3, 4 *W. & M. c.* 11. §. 6. either by ſerving a *Public annual Office* in the Pariſh, for a whole Year; or by being *charged with and paying a Share* towards the Public Taxes or Levies and Burdens of the Pariſh.

But this Act of 9 *G.* 1. was levelled *only* againſt *fraudulent Purchaſes*, of *ſmall Value*, made in order to gain Settlements: And it declares that Purchaſes of leſs than 30*l.* Value, *bonâ fide* paid, ſhall not gain a Settlement for any longer Time than the *Inhabitancy* thereupon ſhall continue; *After* which, the Purchaſer ſhall be liable to be removed to his former legal Settlement prior to ſuch Purchaſe and Inhabitancy upon it. And the eſtabliſhed Conſtruction of this Act has been purſuant to the Intention of the Legiſlature, *to prevent* fraudulent Purchaſes: And therefore *Deviſes*, or other *ſuch* Methods of coming to Eſtates, have *not* been conſidered as *Purchaſes within* this Act; becauſe *they* are not *fraudulent*.

Whereas the preſent Settlement is claimed by being rated *and having* paid *towards the Public Taxes* of the Pariſh: Which is quite a *different Method* of gaining a Settlement.

The Man Himſelf is here *perſonally* rated: The Tax is laid upon a Tenement "late *Hooper*'s, *now John Hine*'s." But if He had been only

only rated *as Occupier*, without adding his Name, yet ſurely that would imply Notice of the Man's being an Inhabitant.

But it is objected "that the Pariſh were OBLIGED "*to rate Him.*"

Now I *deny* that they were *obliged* to rate Him, *if* He was a Man of no Abilities: And he could not oblige them, (even by 17 *G.* 2. *c.* 38.) to rate Him, if he was *not* FIT *to be rated.*

There is great Analogy between *this* Caſe, and Caſes upon the Certificate-Act. And though there are no Caſes upon that Act to be found, between the Making of it and of it's explanatory Act, Yet that explanatory Act (9, 10 *W.* 3. *c.* 11.) does, of itſelf, ſufficiently determine that a Certificate-Perſon WOULD *have gained a Settlement* by being rated and having paid towards the public Taxes of the Pariſh, notwithſtanding the former Certificate-Act, of 8 & 9 *W.* 3. *c.* 30. *That* Act therefore goes a great Way towards the Conſtruction of *this* Act.

And WE are ALL clear that *this* Act only means to put a Negative upon a Perſon's gaining a Settlement by making a *ſmall Purchaſe*, with a *fraudulent Intention* to gain a Settlement thereby, in the Pariſh where ſuch Purchaſe is made; And that it does NOT *affect any* OTHER *Method* of gaining a Settlement.

And indeed it is but reaſonable that Perſons who have been rated and have paid towards the public Taxes and Levies of a Pariſh, ſhould receive Aſſiſtance *from that* Pariſh, when they become neceſſitous themſelves.

Order of SESSIONS QUASHED:
Order of the two JUSTICES AFFIRMED.

Rex *verſ.* Inhabitants of Milwich.

Monday 20th *June* 1757.

TWO Juſtices removed *Thomas Thacker* and his Wife and Children, from *Creyton* to *Milwich:* And the Seſſions confirm their Order, upon this Caſe ſtated—

Thacker was hired by Mr. *Blurton* of *Milwich*, *for* ELEVEN *Months*, for 4 *l.* 10 *s.* And it was agreed between them, "that "*Thacker* ſhould GIVE *Mr. Blurton a* MONTH'S *Service* IN, *beyond* "*the eleven* Months." *Thacker ſerved* Mr. *Blurton* the eleven Months, *in Milwich*; and *alſo all the given-in Month*, *except* the laſt 3 Days: *And as to thoſe* 3 *Days*, *Thacker could not ſay* Whether

He ſerved them, or went away without ſerving them; But he *received the whole* 4 *l.* 10 *s.* Wages.

The Seſſions confirm the Order; being of Opinion this was a *Hiring for a Year*, and a *Service for a Year*.

Mr. *Norton* moved to quaſh theſe Orders, upon 2 Objections. 1ſt. This is not a good HIRING FOR A YEAR, within 3, 4 *W. & M. c.* 11. being *only* for *eleven* Months.

1 *Strange* 83. *Rex* v. *Inhabitants of Haughton.*
2 *Salk.* 535. *Inter Inhab. of Dunſfold* and *Ridgwick.*
1 *Strange* 143. *Between the Pariſhes of Coombe* and *Weſt Woodhay.*

2dly. 'Tis *not* a good SERVICE *for a Year:* Becauſe *three* Days are wanting, *at the* END *of it.*

2 *Strange* 1022. *Between the Pariſhes of Seaford* and *Caſtlechurch.*

But The COURT *viz.* Lord *Mansfield*, Mr. Juſt. *Deniſon*, and Mr. Juſtice *Foſter*, were extremely clear,

1ſt. That this Agreement (taken all together) is a manifeſt Contract " *to ſerve* FOR A YEAR;" notwithſtanding the Form of Expreſſion: (which, by the way, they conſidered as an Attempt to prevent the Man's gaining a Settlement, by a very paltry Evaſion.) The real Queſtion is no more than " Whether 11 Months and One " Month make 12 Months." There are *no particular technical* Words neceſſary, to make a Hiring for a Year. The *Subſtance* of this Agreement is " to ſerve 12 Months, for 4 *l.* 10 *s.*" And what ſignifies the Variation of *Expreſſion?* Every Contract to ſerve, is a Contract to ſerve * *for a Year*; unleſs there be ſomething to explain it otherwiſe. Now certainly here is Nothing to explain it otherwiſe. And Mr. Juſtice *Foſter* obſerved that this was an *entire ſingle* Contract; And not like to the Caſes of different Contracts, at different Times: And He added, that no Action would have lain for the Wages, till the *End* of the *whole* 12 Months.

* *V. Co. Litt.* 42. *b.*

2dly. That as to the Servant's *going away* 3 DAYS *before the End of the Year*—The State of the Fact *don't ſupport* the Objection: For it don't appear that He *did* go away before the End of the Year. It is only ſtated " that He *could not ſay* Whether He ſerved theſe " 3 Days, *or* went away without ſerving them." But it is poſitively ſtated " that He *received the whole* 4 *l.* 10 *s. Wages:*" Which, at leaſt, ſeems to imply the *Maſter's Conſent* or Permiſſion. Whereas in the Caſe of the *King* againſt *the Inhabitants of Iſlip*, *P.* 7 *G.* 1. in 1 *Strange* 423. it was holden that the Servant's going away 3 *Days before* the End of his Year, *directly in Oppoſition to his Maſter's Will and expreſs Prohibition*, upon a reaſonable Occaſion, and upon

a reaſonable Requeſt (unreaſonably refuſed,) *did* NOT vitiate the Settlement.

Per Cur. unanimouſly
BOTH ORDERS AFFIRMED.

Harris *verſ.* Huntbach.

Tueſday 21ſt. June 1757.

THIS was a Cauſe in the Civil Paper; and came before the Court, upon a Caſe reſerved for the Opinion of the Court, in an Action upon a *general Indebitatus Aſſumpſit*, in which the Plaintiff declared upon two Counts; The 1ſt of which was for Money *lent and advanced* by the Plaintiff, at the Defendant's Requeſt; The 2d was for Money *laid out and expended* by the Plaintiff, at the *Defendant's Requeſt:* And the Queſtion upon the Caſe ſtated, was "Whether the *Evidence ſupported the Declaration.*"

The Caſe ſtated—1ſt. That a Note of the Defendant's was produced in Evidence by the Plaintiff, in the following Words: "3d *December* 1751. Then received of Mr. *Harris* the Sum of "19 *l.* on the Behalf of my Grandſon: Which I promiſe to be "*accountable for*, on Demand. Witneſs my Hand *S. Huntbach.*" This Evidence was produced in Support of the firſt Count.

On the 2d Count—The Evidence was, that One *Davidſon* coming to the Plaintiff, by the Defendant's Order, for Money to pay Workmen, the Plaintiff refuſed to pay the Money, unleſs the Defendant would ſign a Receipt. Whereupon the Defendant wrote the following Note, *viz.* "Mr. *Harris*, At the earneſt Requeſt of "the Gardiner, the Workmen wanting Money greatly, for the "Work at the Woodhouſes, This is to certify that it is *My Requeſt* "that You pay to Mr. *Davidſon*, on the Account of Maſter *Hil-* "*lier*, for the Workmens Uſe the Sum of 15 *l.* As Witneſs my "Hand *S. Huntbach.*" And a Receipt was given by the ſaid *Davidſon*, the Gardiner, to the Plaintiff, on the Plaintiff's paying him this 15 *l.* Verdict for the Plaintiff—Caſe ſaved upon this Queſtion, *viz.* "Whether the *Evidence* was *ſufficient* to ſupport the "Verdict."

Mr. *Aſton* for the Plaintiff—The firſt Count is for Money lent and advanced by the Plaintiff, at the Defendant's Requeſt. And here is a Note under the Defendant's Hand produced, acknowledging the Receipt of it, and promiſing to be *accountable* for it: Which is tantamount to a Promiſe to PAY it. And it's being added, "*on the Behalf of my Grandſon,*" makes no Difference: For

there is *No Remedy* againſt the *Infant*. Therefore it is an *Original*, not a *Collateral* Undertaking. In 2 *Ld. Raym.* 1085. *Buckmyr* v. *Darnall*, It is agreed " That where no Action will lie againſt the " Party himſelf, Undertaken for, it is an *Original* Promiſe." In the Caſe of *Reid* v. *Naſh*, *M.* 24 *G.* 2. *B. R.* and *Tr.* 1751, 24 & 25 *G.* 2. It was ſettled accordingly. And here is *no Remedy againſt the Infant*, upon this Note.

2d. 2d Queſtion. Whether the other Evidence above ſtated was ſufficient to maintain the 2d Count.

Now the Plaintiff could not have maintained an Action againſt the Infant, for *this* Money, no more than for the former. The Plaintiff refuſed to advance it, till the Defendant wrote thus, " It is " *my Requeſt* that You ſhall pay, on the Account of Maſter *Hillier*, " to Mr. *Davidſon*, to the Workmens Uſe, 15 *l.*" And this is an *Original* Undertaking " that the Defendant will pay the Money :" And it was advanced on the Account and Credit of the Defendant.

Mr. *Nares contra* for the Defendant—

1ſt. The Queſtion is, how far a general *Indebitatus Aſſumpſit* will lie, upon theſe Facts, and the Evidence brought to ſupport them. This is a general *Indebitatus Aſſumpſit :* And *Indebitatus Aſſumpſit* does not lie, but when an Action of *Debt* will lie. 1 *Salkeld* 23. *Hard's* Caſe is expreſly ſo. 2 *Ld. Raym.* 1034, 1035. *Smith* v. *Ayrey :* " *Indebitatus Aſſumpſit* does not lie for Money won at Play." 1 *Strange* 680. *Welch* v. *Craig :* " It does not lie on a Promiſſory Note." No more will it, upon a *Collateral* Undertaking. And therefore the preſent is *not a proper Count*, if the Evidence would ſupport it. This cannot be conſidered as Money *lent*. It cannot be more than Evidence of a *Collateral* Promiſe. And why will not an Action lie *againſt the Infant?* I think it *will*. And then it is exactly within the Caſes of *Buckmyr* v. *Darnall*, in 2 *Ld. Raym.* 1085; and *Reid* v. *Naſh*, Where *Naſh* promiſed to pay 50 *l.* if the Plaintiff would withdraw his Record; (Which was indeed an Original Promiſe.)

2d. Secondly, on the 2d Count—The Note only imports a *Certificate* " that the Money is *proper* to be paid." No general *Indebitatus Aſſumpſit* will lie upon this. Here is no Evidence of Money lent.

Mr. *Aſton*, in Reply—

1ſt. A Note of Hand acknowledging the Receipt, and promiſing to be accountable, is certainly Evidence of Money *lent*. And it

is every Day's Experience, that Notes of Hand are *given in Evidence* upon *General Indebitatus Aſſumpſits*. And as to inſerting "on Be- "half of my Grandſon" it makes no Sort of Difference. 2 *Strange* 955. *Thomas* v. *Biſhop*—The Addition of "Caſhier to the York "Buildings Company," was holden to make no Difference. And there is no Privity between Mr. *Harris* and the Infant: Nor will any Action lie againſt Him.

This is *not* a Promiſe *in Aid*, or a *Collateral* Undertaking; but a *ſole*, *abſolute*, *Original* Promiſe. Therefore He prayed that the *Poſtea* might be delivered to the Plaintiff.

Lord Mansfield—

The Queſtion is Whether there be *Evidence* of a Debt contracted by the Defendant, payable to the Plaintiff.

The Declaration conſiſts of two Counts, for two different Debts. And there cannot be clearer Evidence, than the firſt Note is, of the former Debt. And as to the 2d—Here is a Manſion-Houſe belonging to an Infant: Which Manſion-Houſe has a Garden belonging to it. It might *not* be *neceſſary* (in regard to the Infant's Situation and Circumſtances) to ſupport this Garden, (which might be a *Pleaſure* Garden:) And No Action will lie againſt the Infant *but* for *Neceſſaries*. It don't appear at all, that there could be any Remedy againſt the Infant.

You can bring an *Indebitatus Aſſumpſit for the Debt*; and *give the Note in Evidence:* And ſurely, it ſupports the Declaration.

This is ſaid to be a *Collateral* Undertaking. But the Argument about Original or Collateral Undertakings, depends merely upon the Want of ſufficiently defining the *Terms* "Original" and "*Collateral*:" Otherwiſe, there can be no Doubt about them. *This* is clearly an *Original* Undertaking. And the Jury have *found* theſe Notes to be *ſufficient Evidence* of the Debt: And it is indeed a Matter of *Fact*, rather than of *Law*.

Mr. Juſt. Denison concurred.—

Surely, This Note is *Evidence* of Money lent. And between the Plaintiff and Defendant, this is certainly an *Original* Undertaking: And the Money was paid at the *Defendant's Requeſt*. And there is no Privity between the Plaintiff and the *Infant*. The Caſe of *Reid* v. *Naſh* is, in ſome Meaſure, like this. * Here is Nothing like a Collateral Requeſt or Promiſe: 'Tis an *Original* Undertaking.

* [And that Caſe was determined upon mature Conſideration.]

Mr.

Mr. Juſt. FOSTER likewiſe concurred.—

The *Infant* was *not liable*, and therefore it *could not* be a *collateral* Undertaking. It was an *Original* Undertaking of the Defendant to pay the Money.

Per Cur. Let the POSTEA be delivered to the PLAINTIFF.

Hammond *verſ.* Brewer.

THIS was a Caſe for the Opinion of the Court, from the *Suſſex* Aſſizes, before Mr. Baron *Smythe*.

The Caſe ſtates that an Act of Parliament was made in 26 *G.* 2. (*c.* 54.) for repairing and widening the Road from *Flimwell Vent* in the Pariſh of *Ticehurſt* in the County of *Suſſex*, to the Town and Port of *Haſting* in the ſaid County: And it ſtates many other Matters not worth noting; as the ſingle Queſtion was "Whether "the TOWN *of Battel* was meant to be *included* or *excluded*.

The Queſtion aroſe upon that Part of this Turnpike-Act which gave Directions for repairing the Road *to* and *from* the Town of *Battel*; which Town was ſtated to be lately *paved* before the Act of Parliament, by the Inhabitants; and that it was *kept in Repair by them*, and *is now ſo*.

Note. In many other Parts of the Act, the Roads are deſcribed as leading from to *and* THROUGH ſuch and ſuch Towns: But when it mentions the Town of *Battel* it only ſays "TO and FROM it," but *omits* the Word "THROUGH." And the only Queſtion was "Whether the Act intended to INCLUDE or "EXCLUDE the Town of *Battel* itſelf."

Mr. *Knowler* was for the Plaintiff (of whom the Toll had been taken:) And Mr. *Harvey*, for the Commiſſioners, (the Defendant having acted by their Authority;) who had ſet up a Turnpike in the *very Heart* of the Town.

The COURT were clear that the Act of Parliament intended to EXCLUDE the Town of *Battel*; And that it was right and reaſonable that it ſhould be excluded.

And LORD MANSFIELD obſerved that it was neither uſual nor convenient to erect Toll-Gates in the *Middle* of great Towns;

(Which theſe Commiſſioners had done:) Which might *obſtruct* the neceſſary Intercourſe amongſt the Inhabitants; or even hinder an Inhabitant from ſending his *Horſes to Water*, without paying the Toll. Therefore They Ordered the

POSTEA to be delivered to the PLAINTIFF.

Rex *verſ.* Manning.

Wedneſday 22d June 1757.

MR. *Aſton* ſhewed Cauſe againſt quaſhing an Order of Seſſions made upon a Road-Act made in 29 *G.* 2. *c.* 57. (for enlarging the Terms and Powers granted by former Acts:) Whereby the Surveyor of the Highways beyond *Sheppard Shord* and the *Devizes &c.* is authorized and impowered to *dig Gravel &c.* or other Materials *&c.* in upon or out of and from all and every the Lands Fields or Grounds in the *Occupation* of *John Manning* in the Pariſh of *All Cannings* in the County of *Wilts.*

The Subſtance of the Order was as follows—It begins with reciting the Act of 29 *G.* 2. *c.* 57. impowering the Surveyor or Surveyors of the Highways or Roads therein ſpecified, or any other Perſon or Perſons appointed by him or them, (having firſt an Order from the Quarter-Seſſions; *Six Days Notice, in Writing*, of the Application for ſuch Order, being firſt given *by the Surveyor* or Surveyors, *to the* OWNER OR OWNERS, *Occupier or Occupiers* of the Lands and Grounds then intended or purpoſed to be cut digged or gathered for Materials for repairing and amending the Highways or Roads, or left at his or their Places of Abode;) to cut dig gather take and carry away any Furze Heath Gravel Sand or other *Materials proper and ſufficient* for repairing of the ſaid Highways or Roads, (*if* ſuch Materials cannot be had or found in or upon any Waſte or Common Grounds in any Pariſh Town or Place adjoining to or lying near the ſame Highways or Roads,) in upon or out of and from ANY *Lands, Fields or Grounds or either of them* (Not being a Yard Garden Orchard Park Paddock Wood Coppice Nurſery or incloſed Ground planted with any Walk or Walks of Trees or Avenue to any Houſe;) Paying ſuch Rates for ſuch Materials, or for the Damage done to the OWNERS AND *Occupiers* of the Ground where any and from whence the ſame ſhall be cut digged gathered taken and carried away, or over which the ſame ſhall be carried, *as the* SURVEYOR *or* SURVEYORS, *or* OTHER *Perſon* or Perſons by them appointed or to be appointed by Virtue of the ſaid former Acts or the ſaid recited Act, for that Purpoſe, ſhall *think reaſonable.*

Then the ſaid Order of Seſſions recites That Application had been made to that Court, *by* THE *Surveyor* of the ſaid Highways or Roads, for an Order to cut dig gather take and carry away Furze Heath Stones Gravel Sand or other Materials proper and ſufficient for repairing of the ſaid Highways or Roads, in upon or out of and from ALL *and* EVERY the Lands Fields *and* Grounds *now in the Occupation of John Manning* of the Pariſh of *All Cannings* in the ſaid County of *Wilts* Yeoman, (not being a Yard Garden Orchard Park Paddock Wood Coppice Nurſery or incloſed Ground planted with any Walk or Walks of Trees or Avenue to any Houſe.)

Then the Order goes on thus—

And the ſaid Surveyor having made and given *full Proof* to this Court " that *ſix Days Notice in Writing*, of his intended Applica-" tion to this Court for ſuch Order, hath been given by Him " TO *the ſaid* JOHN MANNING, *or left* at *his* Place of Abode;" *And the ſaid* JOHN MANNING, in Conſequence thereof having *offered to this Court by* HIS *Counſel*, Reaſons againſt ſuch Order being made; and endeavoured to ſupport the ſame by Proofs, *(Which Reaſons and Proofs this Court* ADJUDGE *to be very inſufficient;)* And the ſaid Surveyor alſo having made and given *full Proof* to this Court, " that PROPER *and* SUFFICIENT *Materials* for repairing of " the ſaid Highways or Roads *cannot be had or found* in or upon " any Waſte or Common Grounds in any Pariſh Town or Place " adjoining to or laying near the ſame Highways or Roads,"

THIS COURT doth therefore, in purſuance and by Virtue of the ſaid recited Act of Parliament unanimouſly Order that the ſaid Surveyor of the ſaid Highways or Roads, *or* ANY other Perſon or Perſons by Him appointed and employed, may, And He and They is and are (by virtue of the ſaid Act of Parliament and by virtue hereof) authorized and impowered to cut dig gather take and carry away any Furze Heath Stones Gravel Sand or other Materials *proper* and ſufficient for repairing of the ſaid Highways or Roads, in upon or out of and from ALL *and* EVERY the Lands Fields or Grounds *in the Occupation of the ſaid John Manning, in the ſaid Pariſh of All Cannings*, (not being a Yard Garden Orchard Park Paddock Wood Coppice Nurſery or incloſed Ground planted with any Walk or Walks of Trees or Avenue to any Houſe,) *Paying* SUCH Rates for ſuch Materials, OR for the Damage done to the *Owners* OR *the ſaid Occupier* of the ſaid Lands where any and from whence the ſame ſhall be cut digged gathered taken and carried away, AS *the ſaid* ACT OF PARLIAMENT herein before in Part recited DOTH DIRECT AND PRESCRIBE.

Mr. *Norton*'s Objections to this Order upon making the Original Motion, were only *two:*

1ſt. That there ought to have been *Notice to the* OWNER, as well as to the Occupier of the Land wherein the Gravel was to be dug: Although He owned that the ſtrict *Words* of the Act had not the *Copulative* but only the *Disjunctive*; *viz.* upon Notice, *&c.* " to the Owner *or* Owners, Occupier *or* Occupiers of the Land, " *&c.*" Yet, He ſaid, that Juſtice required that the OWNER *ſhould have Notice, as well* as the Occupier; when *his Property* is to be ſo *materially affected:* And He argued this to be the *Intention* of the Act, And 'tis frequent, in ſuch Caſes, to underſtand *negative* Conjunctions, AS *Copulative.*

2dly. The *Satisfaction* is directed by the Act, to be made *both* to Owner AND Occupier: Whereas they have here awarded NONE at all to the *Owner* of the Land, who is the Perſon principally inſured. Upon this Motion a Rule was made to ſhew Cauſe. After which, 9 additional Objections were given in, in Writing. And now, Mr. *Aſton* ſhewed Cauſe why the Order of Seſſions ſhould not be quaſhed.

1ſt. Objection. (given in in Writing) is that the *Name* of the Surveyor who applied for the Order is not mentioned.

Anſwer—That is *Not Neceſſary.*

2d. Objection. That the Seſſions have *not* ADJUDGED " That " ſix Days *Notice* in Writing was *given to any* Perſon, of the in- " tended Application:" The Words are only, " The Surveyor " *having* made and given full Proof to this Court," that ſuch Notice was given.

Anſwer—That it *does appear:* But if not, yet it is *not neceſſary.*

3d. Objection. That the Fact of ſuch Notice being given, is *not ſufficiently ſet forth*; it being only ſaid " That ſuch Notice was given " to *Manning*, OR *left at his Place of Abode.*"

Anſwer—That that *is* ſufficient.

4th. Objection: (which was Mr. *Norton*'s firſt.) It is not ſet forth that ſix Days Notice in Writing of this intended Application was given to the OWNER of the Lands.

Anſwer. Notice to the OCCUPIER is enough. So, on a Diſtreſs—Notice may be given *either* to the Tenant *or* to the Owner of

of the Goods. 4 *Mod.* 390. *Walter* v. *Rumball* is ſo holden by the Court. [*pa.* 395.] And here the Owner may perhaps *not* be intitled: For the Act ſays, "That the Damages, IF *any*, *&c.*" Beſides, the Owner may be at a vaſt Diſtance from the Land. And here the *Tenant appeared*, and made what Defence he thought proper.

5th. Objection. That the Seſſions have *not expreſsly* ADJUDGED "That proper and ſufficient Materials for repairing the Highways "were NOT *to be found in any* Waſte or Common Ground *in any* "*Place near* the ſaid Highway:" For it is only ſaid, "The Sur-"veyor *having* made and given full Proof to the Court, that, *&c.*"

Anſwer—The Order is agreeable to the Act of Parliament: And it ſpecifies "that *full Proof* was made and given to the Court, of this Fact.

6th. Objection. That it is not ſet forth "That NO *proper Ma-*"*terials* AT ALL, for repairing the Highways, are to be found in "any ſuch Waſte or Common Ground:" But only (in looſe and general Words) "That PROPER and SUFFICIENT Materials for "ſuch Purpoſe are not to be found there." Notwithſtanding which, It is ordered, "that the Surveyor ſhall cut and carry away "ALL *Sorts* of Materials neceſſary for the Repair of the *whole* "Road."

Anſwer—That it is exactly agreeable to the Act.

7th. Objection. *Non conſtat* that *any Materials* proper for ſuch Purpoſe ARE TO BE FOUND *in any Part* of theſe Grounds.

Anſwer—That muſt depend upon *Trial.* The Lands are to be "cut digged, and gathered *for* Materials."

8th. Objection. 'Tis not ſet forth *how far* theſe Grounds *lie from the Highway*; nor *to what Diſtance* all *waſte* Grounds have been found barren of proper Materials; nor that theſe Grounds are *nearer* than any *Waſte* where ſuch Materials *may* be found.

Anſwer—The Order is worded *agreeable to the Act:* And theſe Particularities *need not be inſerted* in it.

9th. Objection. That the *Powers* here committed to the Surveyor are *uncertain* in every Branch thereof. For *only* that PARTICULAR *Piece* of Land which affords the Materials, is made liable by the Act. But here ALL the Grounds in the Occupation of *Manning*, (being, as he alledged, a Farm of 540*l. per Annum*) are to be dug, at the Diſcretion of the Surveyor. And they are alſo laid under a per-

petual Incumbrance, or at leaſt one that is abſolutely uncertain; for that *no time* is prefixed at which ſuch Grounds ſhall be emancipate.

Anſwer—This alſo is ſufficient; being agreeable to the Act.

10th. Objection: (Which was Mr. *Norton*'s Second) That *Satisfaction* for ſuch Materials is by this Order, awarded to the Owner OR Occupier; but *not* to BOTH: Nor is it certainly defined to *which* of them. Whereas the Act of Parliament is, expreſs, "Paying to "the Owners AND Occupiers.

Anſwer—'Tis ſufficient: The Act is disjunctive, in directing the Notice; and muſt here be taken *disjunctively* and *reſpectively*.

11th. Objection. That the RATE *of ſuch Satisfaction* is eſtimated in the Order only as for the *Value of the Materials* which ſhall be cut or carried out of theſe Grounds; OR for the *Damage done thereby*; but *not* as for BOTH; as it ought, in Juſtice, to be: nor is it certainly defined, for WHICH of the two, the Compenſation is to be made.

Anſwer—'Tis in the *Words* of the Act.

Mr. *Norton* and Mr. *Thurlow* in Reply, ſupported theſe ſeveral Objections; And urged that theſe ſummary Authorities given to Juſtices, to the Detriment of the Liberty or Property of the Subject, ought to be STRICTLY *purſued:* And they cited many Caſes, of what they apprehended to be ſimilar Inſtances, or at leaſt proceeding upon the ſame Principles. Whereas in the preſent Caſe, the Juſtices have not (as they alledged) given themſelves *Juriſdiction*, by any ADJUDICATION of the neceſſary Facts: but have *only recited the* EVIDENCE of them.

LORD MANSFIELD—ſaid this Order was very ill penned; and the Juſtices ought undoubtedly to purſue their Authority: But however, He did not agree to *all* the Objections; and particularly to the * 2d. and † 5th. which are founded upon a ſuppoſed Neceſſity that there muſt be *expreſs Adjudications*; where the Recitals and Allegations are ſufficient, and where Concluſions are actually drawn.

*† The 2d. and 5th. of thoſe given in Writing.

As to the 4th Objection—He did not think that the Act could mean that it ſhould *always* be neceſſary to give *Notice to the* OWNER: Which might be impoſſible.

But as to the 6th and 7th Objections—It IS *neceſſary to ſhew* that there were NO proper Materials to be found in or upon the Waſtes or Common Grounds *near* the Highway. Which is *not done* here.

And they are not warranted to dig in the private Soil for ALL *the Species* of Materials; *becauſe* SOME *of theſe Species* are not to be found in or upon the ſaid Waſtes or Common Grounds. They ought to SPECIFY what *can* NOT be found in or upon the *Waſtes* or Common Grounds; and what *may* be found *in the private* Soil. And they can *not* dig, to TRY for it, in the *private* Soil: They ſhould previouſly *know* that it is to be found there; or *at leaſt*, have a reaſonable Proſpect of finding it there.

9th. And they cannot make this *general* Order "to *dig over* ALL *the Eſtate*;" and leave this to the *Diſcretion of the Surveyor:* They ought to *fix* upon the *particular* Part; to determine this *themſelves*, and not leave it to their Surveyor THIS Objection is FATAL.

10th. So alſo is that of the *Satisfaction:* For the SATISFACTION *ought to be awarded* to the Owner, or to the Occupier, or to Both; ACCORDING *to the* DAMAGES ſuſtained by the One, *or* by the Other; *or* by Both.

Perhaps ſome *other* Objections might hold: But however, here is *enough*, that I have *already* mentioned.

Mr. Juſt. DENISON—It is a very imperfect Order, and liable to many Objections.

As to the 2d, 3d, 5th, 6th, and 7th, Objections—An *expreſs* and *direct* ADJUDICATION may *not* be neceſſary: But many of theſe Foundations of their Authority ought, *ſome how or other*, to APPEAR *upon the Face* of the Order. Particularly, it ought to appear that *Notice* was given of the Intention to dig in ſome *particular Place*: For perhaps very good Cauſe may be eaſy to be ſhewn againſt it. But

9th. It can never be right to dig over ALL *the Eſtate*;

6th. Nor to dig in the private Soil for *ſuch* Materials as *may be found* in the Waſte.

As to the 4th—NOTICE is *not* univerſally neceſſary to be given to the *Owner:* This may in ſome Caſes be *impracticable*.

But as to the 10th. SATISFACTION ought to be be made *to the Owner*, (if he be damaged,) undoubtedly.

Mr. Juſt. FOSTER concurred.

The Perſon that drew this Order, has kept to the WORDS, but *not to the* SPIRIT of the Act.

And

And as to the 9th Objection in particular, undoubtedly, The Juſtices have exceeded their Power in ordering the *Surveyor to dig* over the WHOLE *Eſtate: This* can never be reaſonable, nor within their Juriſdiction.

Per Cur. unanimouſly
RULE for quaſhing the ORDER
MADE ABSOLUTE.

Cogan *verſ.* Ebden and Another.

Thurſday 23d June 1757.

ON a Motion (made the 18th inſtant,) To *ſet aſide a Verdict*, as being given in by the *Foreman*, CONTRARY to the Opinion and Intention of EIGHT *of the Jury*.—It appeared that the Defendant juſtified under a Right of a Way, over the Plaintiff's Ground, to *two* Cloſes of the Defendants, *viz. Broadmoor*, and *Three-Acres:* Upon which, *two different Iſſues* were joined; *viz.* One, upon the Right of a Way to *Broadmoor*; the Other, upon the Right of a Way to the *Three-Acres*. And the Foreman gave in the Verdict, as a *general* Verdict for the Defendant, upon *both* Iſſues. But *Eight* of the Jury made *Affidavit* "That it was the "MEANING AND INTENTION of the WHOLE *Jury* to find the "former Iſſue for the Defendant; and the LATTER *for the* PLAINTIFF: And that this Miſtake was diſcovered by them, *an Hour* "*afterwards*; but not till the *Judge was gone* to his Lodgings." And upon the Judge's Report it appeared that, though there was indeed Evidence on *both* Sides, yet the *Weight* of the Evidence was (as it appeared to Him) on the Side of the Plaintiff, as to this latter Iſſue.

N. B. The Foreman had declined making any Affidavit; becauſe, he ſaid, he ſhould make himſelf appear a Fool, to the Court of King's Bench.

This Matter was much litigated by the Counſel on both Sides. And the Counſel for the Plaintiff mentioned the Caſe of *Baker* v. *Miles*, in *C. B.* in *M.* 4 *G.* 2. *B. R.* S. P. where Eleven of the Jurymen ſwore "That the Foreman had miſtaken their Verdict;" And it was thereupon ſet aſide.

The COURT were All clear that this was a *Miſtake*, ariſing from the Jury's being unacquainted with Buſineſs of this Nature; and from the Aſſociate's Omiſſion in not aſking the Jury particularly "how they found *each reſpective* Iſſue," and in not making the Jury fully *underſtand* their own Finding; And that it was agreeable to Right

Right and Juſtice, that the *Miſtake ſhould be* RECTIFIED. And they had no Doubt about the *Fact* of this Miſtake; from the Affidavit of the Eight Jurymen, *confirmed* (as they held it in Effect to be) by the Foreman's declining to make any Affidavit at all: Eſpecially, as the Judge's Notes ſhewed the Weight of the *Evidence* to have been for the Plaintiff, as to this latter Iſſue.

And LORD MANSFIELD and Mr. Juſt. DENISON thought that as it was a *mere Slip*, there might be *ſome* Method of RECTIFYING *the Verdict* according to the Truth of the Caſe; from the Judge's Notes, if they were ſufficiently particular; WITHOUT *ſending* the Iſſue to be tried over again, at a great Expence.

And the Caſe of *Newcombe* v. *Green*, in 2 *Strange* 1197. was mentioned; where the *Poſtea was* amended by the Judge's Notes. And Lord *Mansfield* ſaid that at leaſt they could ſet aſide the Verdict *without* Coſts. But Difficulties occurring how the Coſts would be, in ſuch Caſe; as *One* Iſſue was ſtill found for, and was in Truth clearly for the Defendant. Therefore CUR. ADVIS'.

And now Lord MANSFIELD, ſeeing Mr. *Morton* in Court, who was concerned for the Plaintiff, and had (on his Behalf) moved to SET ASIDE the Verdict, took Occaſion to mention this Caſe; and ſaid They had thought of it and He had talked with his Brother * *Wilmot* too, about it: But, however, He was not now going to give any Opinion; but only to *propoſe* what ſeemed to Him the moſt *proper Method* of coming at it.

* [Whoſe ordinary Engagements were now in the other Court.]

The Caſe of *Newcombe* v. *Green*, itſelf, is not applicable to this Caſe: But there is another Caſe, of *Mayo* v. *Archer*, in 1 *Strange* 514, 515. Where the Queſtion was "Whether a Farmer who "bought and ſold Potatoes could be a Bankrupt:" And the Special Verdict did not ſet forth the *Quantities* he had bought and ſold; though they were *proved at the Trial.* The Court did not there award a *Venire facias de novo*; but *amended* the Special Verdict, in that reſpect. Which Caſe is more applicable to the preſent Caſe, than that which was cited: For here they Ordered the Special Verdict to be amended: though the Plaintiff's Motion was only "that a *Venire facias de novo* might be awarded."

But another Caſe has been mentioned to me, which is applicable to the *Principle* of this Caſe; though not like the particular Fact. It is that of *Dayrell* v. *Bridge*, *Tr.* 22 *G.* 2. *B. R.* Treſpaſs for cutting down an Oak-Tree—The Defendant pleaded ſeveral Pleas; One of which was, "Not Guilty." At the Trial, a *General* Verdict was taken down, and ſo entered. And the Court *rectified the Verdict*, by expunging the Finding on all but the "Not Guilty;"

It appearing that Nothing was in Queſtion (at the Trial) but "whether the Place where the Tree ſtood, was parcel of the Manor, "or not." In the Caſe of *Newcomb* v. *Green*, Several Caſes * were cited on the ſame Subject: Though the Caſe *itſelf* is not the preſent Caſe.

* None are mentioned by *Strange Pa.* 1197. But *Cro. Car.* 338. *Eliot* v. *Skypp*, 1 *Salk.* 53. *Bold*'s Caſe, and a Caſe of *Fry* v. *Horder*, in Lord *Raymond*'s Time, were cited.

If the Court ſets the Matter right, they ſhould proceed according to the *whole* Truth of the Caſe. The Judge who tried the Cauſe agrees to the Fact diſcloſed in the Affidavit of the *Eight* Jury-Men: Whereas Your *firſt* Affidavit on which the Rule was made, was an Affidavit of only *Four* of them.

Therefore what I would propoſe is that You ſhould make your Motion, and have a Rule to ſhew Cauſe, Why, upon Reading the Affidavits of theſe *Eight* Jury-Men, the Verdict ſhould not be AMENDED *and* SET RIGHT, *according to the Truth of the Finding.*

Note—Such a Motion was afterwards made; and a Rule to "ſhew Cauſe" granted. But it never came before the Court any more: It plainly appearing that the Court, upon Deliberation among themſelves, had come to an Opinion "that in "this Shape the Verdict *might* be ſet right."

Rex *verſ.* Goddard Williams.

Tueſday 28th *June* 1757.

MR. *Nares* ſhewed Cauſe (on *Wedneſday*, 9*th Feb.* laſt,) againſt quaſhing a *Certiorari* to remove, from the Quarter-Seſſions of the City of *London*, an Information upon 1 *Ja.* 1. *c.* 22. intitled "The Duty of Tanners, Curriers, Shoemakers and of others "Cutting of Leather."

Note. The Information runs, throughout, "that the Informers "give the LORD MAYOR of *London* to underſtand *&c.*" But the *Certiorari* is directed to the SESSIONS of the City of *London*.

Three Objections, he ſaid, had been (upon the original Motion) taken to this *Certiorari*:

Obj. 1ſt. The *Certiorari* does *not lie*, at all.

2d.' 'Tis *not well directed*. [*V. infra*, & 1 *Jac.* 1. *c.* 22. § 50.]

3d. It does *not lie*, BEFORE *Conviction*. 1 *Salk.* 145. Dr. *Sands*'s Caſe. 1 *Siderf.* 296.

Anſwers—

As to the 1ſt Objection—1 *Ld. Raym.* 469. Dr. *Groenvelt*'s Caſe proves that a *Certiorari* will lie: For this Court, by *Common Law*, may iſſue it. 1 *Salk.* 148. *Croſs* v. *Smith.* A *Certiorari* lies to *All Inferior* Juriſdictions. 1 *Ventr.* 68. *Smith*'s Caſe is to the like Effect. *Style* 351 & 356. in Point. 8 *Mod.* 331. * *Arthur* v. *Commiſſioners of Sewers in Yorkſhire.* 1 *Hawk. P. C.* 218. § 79, 80. is very ſtrong in Favour of *Certioraries*, where the Inferior Juriſdiction exceeds it's Authority.

[*A miſerably bad Book, intitled "Modern Caſes in Law and Equity."

2dly. It is *directed* to the Juſtices at Seſſions, *generally.* And it is right: For this is an *Act of Seſſions.* 2 *Hawk. P. C.* 290. § 43. proves this Method to be right.

3dly. As to 1 *Salk.* 145. *pl.* 5. Dr. *Sands*'s Caſe, *P.* 10 *W.* 3. The Reaſon given for the Opinion is anſwered by the very next Caſe (*pl.* 6.) in the ſame Book. The Caſe in 1 *Siderf.* 296. [There are two Caſes there, in the ſame Page, *pl.* 19. & *pl.* 20. *Tr.* 18 *C.* 2. which both ſeem applicable to this Subject.] ſtands upon its own bottom. And perhaps the Method mentioned in 1 *Salk.* 145. *pl.* 6. was not then found out. However, notwithſtanding what is there ſaid, Yet it will lie to every *Quarter-Seſſions:* And this was at the Quarter-Seſſions.

Mr. *Norton contra*, for the Rule (to quaſh the *Certiorari*) agreed to put it upon 1 *J.* 1. *c.* 22. § 50. which Clauſe gives Juriſdiction to the Lord Mayor of *London* for the Time being, within the City, AND *within Three Miles compaſs of it.*

And this Information is here given to the LORD MAYOR, *preſent* (it is true) *in Court* of the aforeſaid Court of Seſſions: And the Informers pray the Judgment *of the* LORD MAYOR, though it is indeed added "*ſo preſent in the ſaid Court.*" Therefore this is NOT a Proceeding AT *Seſſions*; but a Proceeding *before the Lord Mayor*, purſuant to the Act.

Note—The Caption is AS *at a Court of Seſſions:* But the Information is given TO the *Lord Mayor*; And they conclude with *praying Judgment* OF *the* LORD MAYOR, *ſo preſent in that Court* (of Seſſions.)

LORD MANSFIELD—The *Certiorari* has manifeſtly iſſued, as *ſuppoſing* it to be a *Proceeding* BEFORE *the* JUSTICES *at the Seſſions:* And *they return* it *as ſuch.*

N. B.

N. B. The Return is by " *Stephen Theodore Janſſen* Eſq; *Mayor* " of the City of *London*, and ALSO *one of the Juſtices* within " written."

The COURT thought the PREVIOUS Queſtion to that of the Regularity or Direction of the *Certiorari*, depended upon the Propriety and Validity of the *Information*; *viz.* " Whether the *Mayor* " ALONE had the Juriſdiction, under this Act;" *or* " the *Mayor* " IN SESSIONS."

Mr. *Norton*—The Juriſdiction is in the *Mayor* ALONE: For He has it even for the Space of 3 *Miles out of the City*; where the Seſſions have NO *Juriſdiction at all.* It is true that He has here *executed* this Juriſdiction IN Seſſions.

Lord MANSFIELD and Mr. Juſt. DENISON were ſatisfied that the *Propriety* of the DIRECTION *of the Certiorari*, depends upon the *Propriety* of the *Conviction:* And they ſeemed to think that the *proper Method* of bringing this Queſtion before the Court, would be for Mr. *Nares* to move " to QUASH *the Information.*"

Mr. *Nares* deſired to take a Day or two's Time, to conſider of this, and to be better prepared for it. Whereupon it was, at preſent, ADJOURNED.

And on *Monday* 23d *May* The preſent Rule was *enlarged:* And alſo Mr. *Nares* (by Approbation of the Court, and of the adverſe Party,) took a Rule, agreeable to the above Hint, " to SHEW " CAUSE why the INFORMATION ſhould not be *quaſhed.*"

And now Mr. *Norton* and Mr. *Williams* being ready to ſhew Cauſe, *pro Rege*;—

Mr. *Gould* and Mr. *Nares*, for the Defendant, propoſed their Objections, to the *Information*, thus; *viz.*

1ſt. That the Juriſdiction is not in the LORD MAYOR; but in the *Seſſions.*

2dly. The Remedy is NOT *by way of* INFORMATION; but ought to be by *Indictment.*

Firſt—They ſaid that the Queſtion turned upon 1 *Jac.* 1. *c.* 22. § 29, 32, 33, 46, 50. They inſiſted " That the Lord Mayor had no " Authority, by this Act, to appoint Triers, where the Leather is

" made and manufactured *into Wares*;" And conſequently that as this Leather appeared to have been manufactured into Wares, *viz.* into Saddles, the Lord Mayor had *no Juriſdiction* to proceed in this ſummary Way: But that

Secondly—The Proceeding ought to have been *by Way of Indictment*; and not by way of Information, which is no Common-Law Proceeding. They added

Thirdly—
That it is uncertain before WHOM the Information is taken.

Now *If* it muſt be underſtood as taken before the Lord Mayor, *He* has *no Juriſdiction*, for the Reaſons above: But *If* it be underſtood as taken before the Seſſions, it ought (as has been ſaid) to have been by *Indictment*. Whereas it is a Rule that Informations ought to be at leaſt as certain as Indictments. So is 2 *Hawk. P. C. pa.* 261. *c.* 26. § 4.

Mr. *Norton*, Mr. *Williams* and Mr. *Lucas*, for the Proſecution—anſwered, That this is an Information brought by the Warden of the Sadlers Company, under this Act of Parliament, of 1 *J.* 1. *c.* 22. And

Anſwer to the 3d Objection. It is not at all uncertain; But is an Information exhibited to the *Mayor* ONLY; and prays the *Judgment* of the *Mayor only*.

Anſwer to the 1ſt Objection. And the Act gives him Juriſdiction, *as well* where the Leather is manufactured, as where not. And this is a Proceeding like the Informations in the Exchequer, *in Rem*, for a Condemnation.

Anſwer to the 2d Objection. It is *not* before the *Seſſions*. So that this Objection of it's not being by way of Indictment is out of the Caſe.

Moreover, They urged that the Court would NOT *quaſh* ſuch an Information, upon *Motion:* Eſpecially, where a PRIVATE PERSON is *intitled to the Penalty*; and none of it belongs to the Crown.

Lord MANSFIELD—As to the Court's NOT *quaſhing on* MOTION, but putting the Party to *demur*—That Reaſoning does not hold, *where the Objection* is to the JURISDICTION of the Court that has undertaken to proceed.

Now here the Queſtion is upon the *Juriſdiction*.

This

This is agreed by Mr. *Williams* and Mr. *Norton*, to be a Proceeding before the Lord Mayor PERSONALLY, though IN *Seſſions*. But the 50th Section (which gives Him the Juriſdiction,) does *not* give it to Him PERSONALLY; but in *the Terms* of the common Commiſſion of *Oyer and Terminer:* And the *ſame* Power is given to *Him*, as to the *other* Mayors, Bailiffs, Head-Officers of Boroughs, Stewards of Leets *&c.* Now this muſt be exerciſed *according to the Courſe* of the *Common* Law; i. e. *by* INDICTMENT.

But it is objected " That the *Seſſions* cannot have Juriſdiction " *beyond the Limits of the City:*" Whereas this is given to the Mayor in any Place within 3 *Miles* of it.

The Anſwer to this is, " That this Juriſdiction of the *Seſſions* is " *therefore*, by this Act, *extended* to 3 Miles beyond the City."

The Parallel does not hold, with regard to Informations *in rem*, in the Exchequer; (to which it has been compared.) For that Proceeding in the Exchequer depends upon the *Courſe* of the Court of Exchequer: And it is neceſſary there. For it is not there known, *Who* will claim; nor does it affect the *Party:* And the Perſon who owns the Goods may not perhaps be in Court, or may be unknown, or may not have other Opportunity to come in and claim. This is an ancient Courſe there; as ancient as the *Court* of Exchequer itſelf, and by *Common* Law.

But here is no Sort of Incongruity, in the preſent Caſe, in the *Goods being forfeited by* the *Party's* being *convicted* of the Offence, upon an *Indictment*. And here is no Colour for the Notion of a *ſummary Juriſdiction* in the Mayor, under the Authority of this Act of Parliament. Therefore the Information ought to be quaſhed, for *want of Juriſdiction* in the Mayor, to receive and proceed upon it.

Mr. Juſt. DENISON concurred. And he agreed with LORD MANSFIELD that there was *no Need* to put them to *demur*, in a Caſe where there is *Defect of Juriſdiction:* And cited a Caſe of *Rex* v. *Weſley*, on his own Motion, in Perjury; where the Seſſions had no Juriſdiction; And therefore the Court quaſhed the Indictment.

And as to the *Juriſdiction*—He concurred with Lord *Mansfield*; and (at large) gave the ſame Reaſons, drawn from the 50th Section of this Act: which He ſaid, manifeſtly conſidered the Mayor, merely as the *Head* of his Corporation; and did *not* intend to give

Him a *ſummary* Juriſdiction, PERSONALLY. Conſequently, they muſt proceed in the *ordinary* Way; that is, *by Indictment.*

And this very Act of Parliament *gives the Seſſions* the *extended Juriſdiction* as far as within 3 Miles Compaſs of the City: For if it *gives the* END, it muſt be conſtrued to give the *Means* too.

And it is *not like* the Proceedings *in rem*, in the Exchequer. For the Juſtices here may give the Forfeiture, undoubtedly, *upon an Indictment*, (after Conviction.)

This *Information* therefore ought to be *quaſhed:* as it appears that the Lord Mayor, PERSONALLY, had *no ſuch Juriſdiction.*

Mr. Juſt. FOSTER concurred. He held that the 50th Section did *not* give the Juriſdiction to the Mayor PERSONALLY, and in a *ſummary* Way; but as the HEAD *of a Court:* And He ſaid That the whole Clauſe (taken together) plainly ſhews this. Therefore the Proceeding ought to be in the ordinary Courſe, *viz.* by *Indictment.* And if they have *proceeded* WITHOUT *Juriſdiction*, they ought to be ſtopped; and the Information may be *quaſhed upon Motion:* For as there is *no Juriſdiction*, the REASON *does not hold*, for putting the Defendant *to* DEMUR; but We may in *ſuch* Caſe, very properly quaſh, *on Motion.* Conſequently, this Information, being of this Kind, ought to be quaſhed.

Per Cur. unanimouſly—RULE for quaſhing the Information made abſolute: And the former RULE (prayed for quaſhing the *Certiorari*) DISCHARGED.

Wedneſday 29th June 1757.

Bright, Executor of Hannah Criſp, Widow, *verſ.* Eynon.

(Mr. Juſtice Wilmot *was abſent; Sitting in Chancery, as One of the Lords Commiſſioners of the Great Seal.)*

THE Plaintiff's Counſel moved for a NEW TRIAL, upon Payment of Coſts; and obtained a Rule "to ſhew Cauſe why "this *Verdict* ſhould not be SET ASIDE, upon Payment of Coſts."

LORD MANSFIELD ſaid that He did not chooſe, in any Cauſe tried before Him, to conclude the Matter by a ſhort Report, "that "He was ſatisfied, or diſſatisfied, with the Verdict." He would ſtate the Caſe particularly to the Court; and reſerve declaring his

Opinion of the Verdict, (which he had not yet intimated, either at the Trial or ſince,) till He had heard the Counſel on both Sides.

This was an Action upon the Caſe, brought by the Plaintiff, as Executor of *Hannah Criſp* Widow deceaſed, againſt the Defendant, upon a Promiſſory Note in the following Words (all of the Defendant's own Writing,) which was proved and read: "I acknowledge "to have borrowed of Mrs. *Hannah Criſp*, this 29th Day of *Sep-* "*tember* 1753, the Sum of 60*l.* For which I promiſe to pay 5*l.* *per Cent. per Annum*, and to be accountable for the whole, ſix "Months after Notice given for that Purpoſe. *John Eynon. Sep-* "*tember* 29th 1753."

The Defendant ſet up a *Diſcharge* by a Writing in the following Words: "I promiſe unto *John Eynon*, that, *in Conſideration* of "his paying unto Me, Intereſt for Sixty Pounds He has of mine, "during my Life, after the rate of 5*l. per Cent. per Annum*, that "then the ſaid Sixty Pounds, at my Deceaſe, ſhall be *His*, and his "Note for the ſame ſhall be *void* and of *none Effect*. Witneſs "my Hand, this 10th of *October* 1753. *Hannah Criſp.*" The *Body* was all *his* own Hand; but he called two Witneſſes who ſaid they believed the *Name* ſubſcribed to be the Hand of the Teſtatrix: But their Knowledge of her Hand was very ſlight, One of them having only ſeen her ſign a Receipt.

He alledged that She gave this Diſcharge, in Conſideration of a Marriage between him and *Rebecca Bright* his now Wife, (Siſter to the Plaintiff.)

He produced a Will, in his own Cuſtody, bearing Date the 11th of *Auguſt* 1753. by which the Teſtatrix had made the ſaid *Rebecca Bright* her Executrix and Reſiduary Legatee.

This Marriage was not till *May* 1754: The Teſtatrix died in *April* 1756.

It came out, upon his own Evidence, that the Teſtatrix was not worth 200*l.* and that She paid 5*s.* a week, or at the Rate of 13*l.* a Year, for her Board. He could make no Proof of the Conſideration alledged: The fartheſt that any of his Witneſſes went was to ſay "that the Teſtatrix ſeemed to approve the Match."

The Plaintiff, in Reply, inſiſted "that the Signature was *forged.*" *Joſiah Bright* ſwore, that the Defendant's Wife did not know the Defendant had borrowed any Money from the Teſtatrix, till after She was married. After ſhe was acquainted with it, She preſſed him to pay the Money, out of a Legacy of 150*l.* from one *Sarah Hart*

Hart which he received: For the Teſtatrix might call it in. The Defendant bid her not be uneaſy: " for I muſt have ſix Months " Notice."

Several Witneſſes proved, that *Hannah Criſp*, about *Michaelmas* 1754, talked of calling in the Money upon this Note, and lending it to other Perſons.

That in 1755 and 1756, She ordered Letters to be wrote to the Defendant, for the Money. When She gave theſe Orders, She produced the Defendant's Note, and ſaid " the Intereſt was not enough " to maintain her."

It was proved that the Defendant entered a *Caveat* at *Doctors Commons* in *April* 1756: and when he found She had made a Will in Favour of the Plaintiff, and conſequently revoked that which was in Favour of his Wife, He was very warm, and mentioned a Note from him to her; and declared he would not withdraw his *Caveat*, unleſs It was given up.

The Plaintiff examined no Witneſs, to ſay the Signature was not her Hand. By Way of Rejoinder, they called Witneſſes to the Defendant's Character: who gave him a good one.

The Defendant inſtructed his Counſel to ſay, that he alway underſtood the Gift to be revocable by *Hannah Criſp* during her Life; but if She did not revoke or call in the Money during her Life, then the Debt was to be diſcharged.

The principal Queſtion made at the Trial was, " Whether this " latter Note was forged, or not." And as to that, the two Witneſſes who believed it to be her Hand, were not oppoſed by any Witneſſes to the contrary: The Reaſon given, was, that they had no Opportunity of getting it inſpected.

His Lordſhip ſaid He left two Queſtions to the Jury: (1ſt.) " Whether the Name of the Teſtatrix was *forged*;" (2d.) If they took it upon the Evidence laid before them to be her Hand, then " Whether it was not obtained by *Fraud*, and without her *knowing* " the Contents and Effect of the Writing She ſigned."

The Jury found for the Defendant.

Lord *Mansfield* intimated nothing, then, as to his *own* Opinion of the Caſe; and profeſſedly avoided doing it now, till He ſhould have heard the Counſel.

They

They were accordingly heard. And They who ſhewed Cauſe againſt the Rule, went very much at large into the *Propriety* and *Riſe* of granting *New Trials*. They urged that a Verdict ought to be *concluſive*, where Evidence of any Sort was given on *both* Sides. That the *Forgery* here was the *only* Queſtion: And if the Plaintiff objected *Fraud* and *Impoſition*, He muſt go to a Court of *Equity* for Relief.

Lord Mansfield—Trials by Jury, in Civil Cauſes, could not ſubſiſt now, without a Power, *ſomewhere*, to grant new Trials.

If an erroneous Judgment be given in Point of *Law*, there are *many* Ways to review and ſet it right.

Where a Court judges of Fact upon *Depoſitions in Writing*, their Sentence or Decree may, *many* Ways, be reviewed and ſet right.

But a general Verdict can *only* be ſet right by a *new Trial:* which is no more than having the Cauſe more deliberately conſidered by *another Jury*; when there is a reaſonable Doubt, or perhaps a Certainty, that *Juſtice has not been done*.

The Writ of *Attaint* is now a mere Sound, in *every* Caſe: In *many*, it does not pretend to be a Remedy.

There are numberleſs *Cauſes* of falſe Verdicts, *without* Corruption or bad Intention of the Jurors. They may have heard too much of the Matter, before the Trial; and imbibed Prejudices, without knowing it. The Cauſe may be intricate: The Examination may be ſo long as to diſtract and confound their Attention.

Moſt general Verdicts include *legal Conſequences*, as well as Propoſitions of Fact: In drawing theſe Conſequences, the Jury may miſtake, and infer directly contrary to Law.

The Parties may be *ſurprized*, by a Caſe falſely made at the Trial, which they had no Reaſon to expect, and therefore could not come prepared to anſwer.

If *unjuſt* Verdicts, obtained under theſe and a thouſand like Circumſtances, were to be concluſive for ever, the Determination of Civil Property in this Method of Trial, would be very precarious and unſatisfactory. It is abſolutely *neceſſary to Juſtice*, that there ſhould, upon many Occaſions, be Opportunities of *reconſidering* the Cauſe by a new Trial. And it is done in a Way very favourable to the Parties for whom the wrong Verdict is given: It is, *upon*

Payment of *Coſts*. Whereas in *other* Caſes where a wrong Judgment is reverſed, Coſts are paid as if the right Judgment had been given in the firſt Inſtance.

It is NOT *true* "that no new Trials were granted *before* 1655:" as has been ſaid from *Style* 466.

In *Slade*'s Caſe, *M.* 24 *C.* 1. (which was in 1648,) in *B. R.* reported in *Style* 138. The Court was moved for Judgment, formerly ſtayed upon a Certificate, made by Baron *Atkins*, "That the "Verdict paſſed againſt his Opinion." *Bacon* Juſtice ſaid, "Judg-"ments HAVE BEEN arreſted in the *Common Pleas*, *upon ſuch* "*Certificates*." *Hales*, of Counſel with the Defendant, prayed that the Judgment in that Caſe of *Slade* might be arreſted, and that there might be a *New Trial*; For that it HAD BEEN DONE THERETOFORE, in like Caſes. Indeed that Caſe, as there reported, repreſents *Roll* Juſtice to hold "that it ought not to be ſtayed, "*though it have been done* in the *Common Pleas:* for that it was too "arbitrary for them to do it." And He adds "You may have "your Attaint againſt the Jury; And there is no other Remedy in "Law for You: But it were good to adviſe the Party to ſuffer a "new Trial, for better Satisfaction."

In the Caſe of *Wood* v. *Gunſton*, *Michaelmas* 1655, *Banc. Sup. Style* 466. (which was an Action upon the Caſe, for ſpeaking ſcandalous Words of the Plaintiff, and a Verdict for the Plaintiff, with 1500*l.* Damages,) the Defendant moved for a new Trial. And *Glyn* Chief Juſtice ſaid "It was in the *Diſcretion of the Court*, "in *ſome* Caſes, to grant a new Trial: But this muſt be a *judicial* "and *not an arbitrary* Diſcretion. And it is FREQUENT IN OUR "BOOKS, for the Court to take Notice of the Miſcarriages of Ju-"ries and *to grant new Trials* upon them. And it is for the *Peo-"ple's Benefit*, that it ſhould be ſo: For a *Jury* may ſometimes, by "indirect Dealings, be moved to ſide with one Party, and not to "be indifferent betwixt them; but it can not be ſo intended of the "Court." And in that Caſe, *a new Trial was ordered*, upon the Defendant's paying full Coſts; the Judgment ſtanding as a Security to pay what might be recovered upon the next Verdict.

The Reaſon why this Matter can not be traced *further back*, is, "that the Old Report-Books do not give any Accounts of Deter-"minations made by the Court upon *Motions*."

Indeed, for a good while after this Time, the Granting of new Trials was holden to a degree of *Strictneſs*, ſo intolerable, that it drove the Parties into a *Court of Equity*, to have, in effect, a new Trial at Law, of a *mere legal* Queſtion; becauſe the Verdict, in Juſtice,

Juſtice, under all the Circumſtances, *ought not to conclude:* And many Bills have been retained upon this Ground; and the Queſtion tried over again at Law, under the Direction of a Court of Equity. And therefore of *late* Years, the Courts of Law have gone more *liberally* into the granting of New Trials, according to the Circumſtances of the reſpective Caſes. And the Rule laid down by Lord *Parker*, in the Caſe of the *Queen* againſt *the Corporation of Helſton*, *H.* 12 *Ann. B. R.* (*Lucas* 202.) ſeems to be the *beſt General Rule* that can be laid down upon this Subject; *viz.* "Doing *Juſtice* to "the Party," or in other Words "Attaining the *Juſtice* of the "Caſe."

The Reasons for granting a New Trial muſt be collected from the *whole* Evidence, and from the *Nature* of the Caſe conſidered under *all it's Circumſtances*.

This Power may be exerciſed at much leſs Expence of Time and Money, therefore *more beneficially for the Subject*, by the Court of *Common Law* where the Cauſe has been tried.

Of late Years, New Trials have been granted not only after Trials at *Niſi prius*, but alſo after Trials *at Bar*. And it is at leaſt *equally reaſonable* to do it after Trials at Bar, as after Trials at *Niſi prius*, (if the Juſtice of the Caſe demands it;) or, indeed, rather *more* ſo, as the latter muſt be done upon what could have actually and perſonally appeared to a *ſingle* Judge only, whereas the former is grounded upon what muſt have manifeſtly and fully appeared to the *whole* Court.

I come now to the preſent Verdict; and ſhould be ſorry that the Queſtion depended upon *my* being ſatisfied, or diſſatisfied: and therefore I have ſtated the whole.

If the Matter in Diſpute was of *great Value*, I will not ſay that all the ſuſpicious Circumſtances *might not* be a Ground for a new Trial; to give the Plaintiff an Opportunity of getting the Inſtrument *inſpected* by Perſons acquainted with her *Hand:* though I think upon the Evidence *laid before the Jury*, the Verdict, in *that* reſpect, was *right*.

What I go upon is the apparent manifeſt Fraud *and* Impoſition in *obtaining* the Diſcharge from the Teſtatrix, if She *really* ſigned it.

Fraud or Covin may, in Judgment of the Law, *avoid* every kind of Act: Many Inſtances are put in *Fermor*'s Caſe. 2 Co. 77. also Booth's Case. 3 Co. 77. "What

" *What* Circumſtances and Facts *amount* to ſuch Fraud or Covin," is always a Queſtion of *Law*. Courts of Equity, and Courts of Law, have a *concurrent* Juriſdiction, to ſuppreſs and relieve againſt FRAUD. But the Interpoſition of the former is often neceſſary for the *better inveſtigating* Truth, and to give *more complete* Redreſs.

The Writing, upon the *Face* of it, ſpeaks IMPOSITION. It purports being for *Conſideration*. She releaſes the Principal, *in Conſideration of 5 l. per Cent.* during her Life: Which is only legal Intereſt, and the preciſe Rate he was obliged to pay by his Note. The Defendant has ſet up *another* Conſideration, *not* expreſſed: which is not only *not proved* by him, but *diſproved* by the Evidence on both Sides.

He now contends, and his Counſel have argued, " that it was " intended to be revocable by her during her Life; and therefore " was only in the Nature of a Legacy." That Power " to revoke," is *omitted*, The Writing, all of his *own hand*, and kept in his *own Cuſtody*: And if it was in the Nature of a Legacy, It is *revoked* by the ſubſequent Will.

The Teſtatrix *never imagined* She had ſtripped herſelf of this Money: In her *Circumſtances*, It would have been Madneſs. The Defendant, *during her Life*, did not dare to ſay, even to his own Wife, " that the Teſtatrix *had given* him this Money."

He did not dare to claim it, *immediately*, after her Death: but would have *compounded*, by withdrawing his Caveat, to have got his Note delivered up. *No Anſwer* was attempted, by Proof, to the *apparent Impoſition*. Upon his own Caſe ſtated by himſelf, and the Evidence on both Sides, the Tranſaction to get her Hand to this Writing muſt have been *fraudulent*: And if it be ſo the Law ſays " He ſhall *not avail* himſelf of it."

The *Attention* of the Jury was artfully drawn to the heinous Charge of Forgery, *only*. And I left the Queſtion of FRAUD to them, without any *expreſs* Direction " that the Circumſtances ſpoke " Fraud apparent." The *ſame* Jury might, upon Reconſideration, find a *different* Verdict. I dare ſay they *meant* to do right.

But the Merits of the Caſe appearing to Me in this Light, I am clearly of Opinion that there *ought* to be a NEW TRIAL.

Theſe are my Setiments: My Brothers will judge Whether I am right, or not.

Mr. Juſtice DENISON concurred in them.

He added, That it would be difficult perhaps to fix an *abſolutely General Rule* about granting new Trials; without making ſo many Exceptions to it, as might rather tend to darken the Matter, than to explain it: But the Granting a new Trial, or Refuſing it, muſt depend upon the LEGAL DISCRETION of the Court; guided by the *Nature and Circumſtances* of the particular Caſe, and directed with a View to the *Attainment of Juſtice*.

In the preſent Caſe, He ſaid, It appeared to Him, "That the "Teſtatrix, Mrs. *Criſp*, had been *impoſed upon*:" And He held "That FRAUD was ſufficient to *invalidate* this her Defeazance (the "ſubſequent Note of Diſcharge ſigned by Her,) even in a *Court* "*of* COMMON *Law*." For Proof of which, He cited *Throughgood*'s Caſe, 2 *Co.* 9. Where it was holden "That the Deed of an unlet-"tered Layman, into the Execution whereof he is *deceived*, by it's "being wrong read to him, or falſely explained to him, (though "by a Stranger to the Party to whom the Deed is made,) ſhall *not* "*bind* the unlettered Perſon who made it."

Mr. Juſt. FOSTER agreed to the Propriety of what had been ſaid; as to ſuch Caſes in which the Juries give Verdicts *againſt* Evidence; and even as to Caſes where there may be a Contrariety of Evidence, but where the Evidence, upon the Whole, in Point of Probability, greatly *preponderates againſt* the Verdict; (Which depending on a Variety of Circumſtances, is matter of Legal Diſcretion, and cannot be brought under any General Rule:) But in all Caſes where the Evidence is *nearly in Æquilibrio*, He declared that He ſhould always think himſelf bound to have Regard to the *Finding of the Jury*; For "ad quæſtionem * *Facti* reſpondent *Juratores*." In *ſuch* a Caſe, it is *not* the Province of the *Judge*, to determine: It ought to be left to the *Jury*.

* See *Trials per pais*, fa. 447. (the laſt Paragraph of the Book,) extremely ſtrong, on this Subject, in favour of Juries.

FRAUD will *invalidate*, in a Court of *Law*, as well as in a Court of *Equity*. We All remember the Caſe of *Wyndham* v. *Chetwynd*, *P.* 1755. 28 *G.* 2. in this Court: Where the Court directed the Jury to find "*Non deviſavit*," though there was a *Deviſe in Fact*; but it was *obtained by Fraud*, and therefore conſidered as *no Deviſe* at all.

And He agreed with Lord *Mansfield* and Mr. Juſtice *Deniſon*, That in the preſent Caſe, the Defeazance or Diſcharge (the ſubſequent Note) was obtained from Mrs. *Criſp by Fraud*; And that it *appeared*, upon the whole of the Evidence "that it was *ſo obtained*:" And that the Jury have drawn a WRONG CONCLUSION from Facts *admitted on both Sides*.

Therefore He thought The Verdict ought to be *ſet aſide*.

Per Cur. * unanimouſly
The RULE for *ſetting aſide* the Verdict was made *abſolute*.

* Note. Mr. Juſtice *Wilmot* was abſent (in Chancery.)

Mr. *Gould*, of Counſel for the Plaintiff, moved that it might be *without Coſts:* But was anſwered by Mr. Juſtice *Deniſon* and Mr. Juſtice *Foſter* (Lord *Mansfield* being now gone,) That this was directly contrary to the Terms upon which He himſelf had moved it. And accordingly They only Ordered the Verdict to be ſet aſide

Upon Payment of Coſts by the Plaintiff.

Memorandum—The Cauſe never came on, to be tried again. Probably, the Defendant acquieſced in the Opinion of the Court, and paid the Money.

A Black Merchant of Bombay *verſ.* Dorrell.

MR. *Dorrel*, who came from *Bombay*, and had a Diſpute with a Black Merchant there, of a Civil Nature (concerning Property,) had upon his Leaving *Bombay*, entered into a Bond conditioned for his *Appearance in this Court* at his Arrival in *England*, TO ANSWER *to any Demands* that might be made againſt him by or on Behalf of the ſaid *Black Merchant* in that Country; and alſo to abide by the Determination of the Mayor's Court there, or elſe to appeal therefrom to the King in Council.

Serj. *Hewitt* moved, on Behalf of Mr. *Dorrell*, that He *might appear in this Court, in ſuch* METHOD *as the Court ſhould judge proper*, in Order to *prevent the Forfeiture* of his Bond.

The COURT after requiring Notice to be given to the *Eaſt-India* Company (who did not oppoſe it,) admitted his Appearance; and directed that He ſhould enter in a Recognizance (with Sureties) in the Penalty of the Bond, to anſwer the Demands expreſſed in the Condition of the ſaid Bond: Which He was to do before One of the Judges of this Court; as his Sureties were not now preſent.

Note—This Rule was taken on the *Civil* Side (of the Court.)

Rex

Rex *verſ.* Middlehurſt.

MR. *Norton* ſhewed Cauſe againſt quaſhing an Order of two Juſtices, and an Order of Seſſions confirming it, made in Purſuance of the Act of 11 *G.* 2. *c.* 19. § 3. (for the more effectual ſecuring the Payment of Rents, and preventing Frauds by Tenants,) againſt one *Thomas Middlehurſt*, for willfully and knowingly aiding or aſſiſting *John Cheſterton* the Tenant of Sir *Thomas Fleetwood*, in fraudently removing and conveying away 5 Cows, *&c.* OR in concealing the ſame.

Mr. *Gould*, who had moved to quaſh this Order, founded his Motion upon two Objections: *viz.*

1ſt Objection. The whole Adjudication refers to the Complaint of One *Thomas Weſton*; Wherein there is *no Charge upon Cheſterton*, the *Tenant*, at all; nor upon the Defendant *Middlehurſt*, for aiding and aſſiſting *Him:* Neither is it ſtated "That *Cheſterton*, the Tenant, DID *remove* the Goods."

2d Objection. The Act creates two Offences, *viz.* aſſiſting in *removing*, and aſſiſting in *concealing* the Goods. Now it is not ſpecifically charged upon the Defendant *Middlehurſt*, that he willfully and knowingly did *either One* of theſe two things: It is only alledged that he willfully and knowingly did One OR the Other. In 1 *Salk.* 371. *Rex* v. *Stocker*, An Indictment for forging *or* cauſing to be forged, was holden ill; becauſe the Charge was in the *disjunctive*. 2 *Hawk. P. C.* 225. § 60. An Indictment charging a Man *disjunctively*, is VOID: For the Offences are diſtinct; And it appears not, of *which* of them the Defendant is accuſed. So here, it does not appear, WHICH of the *two* Offences the Juſtices have convicted him of.

And 2 *Ld. Raym.* 1265. *Queen* v. *Baines* proves that the Court will make no Intendment againſt the Defendant.

Upon which Objections, he obtained a RULE to SHEW CAUSE "why the Order ſhould not be quaſhed."

And now Mr. *Norton* ſhewed the following Cauſe againſt quaſhing it.

1ſt. As to the 1ſt Objection—" That it is not deſcribed ſufficiently, " *What* the *Offence* is." He anſwered That this is an *Order:* And the Court will *not intend* it to be ill. To prove which, He cited *Rex* v. *Biſſex*, *Tr.* 29 *G.* 2. *B. R.*

2dly. As to the 2d—The Charge being in the *Diſjunctive*, " That " he wilfully and knowingly aided and aſſiſted the Tenant in re- " moving the Goods, OR in concealing the ſame." He ſaid, The Crime and the Puniſhment are the *ſame* upon *both:* And the Defendant *was heard.*

Mr. *Gould* for the Defendant, replied

1ſt, It is not at all ſtated " That the *Tenant* DID *remove* the " Goods."

2dly, The Aiding and Aſſiſting *in removing*, is a *different* Offence from aiding and aſſiſting *in concealing:* And here it is only charged in the ALTERNATIVE.

LORD MANSFIELD—Upon INDICTMENTS, it has been ſo determined, " That an *Alternative* Charge is *not* good;" As " forged " *or* cauſed to be forged:" Though *One only* need be *proved*, if laid *conjunctively*, (as " forged *and* cauſed to be forged.") But I don't ſee the Reaſon of it: The Subſtance is exactly the ſame; the Defendant muſt come prepared againſt both; And it makes no Difference to him in any reſpect.

But this is an ORDER: And being *good in Subſtance*, needs not be literally *ſo ſtrict.*

Mr. Juſt. DENISON thought alſo that the Caſes upon *Indictments* are very nice. But this is *not* an Indictment, but an ORDER: And therefore being good in *Subſtance*, needs not be ſo ſtrict in *Form*, as an Indictment muſt be. And either Aiding or Aſſiſting *in removing*, OR aiding or aſſiſting *in concealing*, is equally an Offence: And theſe are the very Words of the Act. 'Tis *only Form*; and does not at all vary the Defence or Puniſhment. I am not therefore inclined to the ſame Strictneſs as was obſerved in the Caſe of *The King* v. *Stocker*, in 1 *Salk.* 371.

* Mr. Juſt. *Foſter* was out of Court, and Ld. Commiſſioner *Wilmot* in Chancery.

Per * *Cur.* RULE DISCHARGED:
And conſequently BOTH ORDERS AFFIRMED.

The End of *Trinity* Term 1757. 30 & 31 *Geo.* 2.

Michaelmas Term

31 Geo. 2. B. R. 1757.

Maſters *verſ.* Manby.

Monday 7th November 1757.

MR. *Norton* moved that the Defendant might be diſcharged upon Common-Bail, as being a *menial Servant to a Public Miniſter*, (*viz.* Meſſenger to Baron *Haſlang*,) on 7 *Ann. c.* 12.

But the Defendant was not able to make out a Caſe ſufficient to induce the Court even to grant Him a Rule to ſhew Cauſe. He not only had been formerly a Trader, and a Bankrupt; (upon which indeed no Streſs was laid, as it appeared that he had not traded at all, ſince he had obtained his Certificate under the Commiſſion;) But was confeſſedly a *Land-Waiter* at the Cuſtom-Houſe here in *London*, and *officiated there* as ſuch: though He ſwore to the Hiring, and alſo to the having *ſometimes* executed this Service to the Baron, as *his Meſſenger*.

Yet, upon the whole, LORD MANSFIELD was clear that this Man could never be eſteemed a *bonâ fide* Domeſtic of a foreign Miniſter: And the other Judges concurring, the Motion wa DENIED.

Bennett, qui tam, *&c.* *verſ.* Smith.

Monday 14th November 1757.

THE COURT refuſed *to ſet aſide* a *Non Proſ. regularly* obtained by the Defendant, againſt the Plaintiff who was only a COMMON *Informer*, (who ſued for a Penalty of 10000*l.* upon the Statute of Uſury;) though the Defendant offered to pay the Coſts of ſetting it aſide.

For, though LORD MANSFIELD ſeemed to think that the Caſe might perhaps have born a different Conſideration, in caſe the

Plaintiff had been the *Party* REALLY INJURED, and had ſued in Order to come at *Juſtice and Reparation*, for ſuch real Injury; Yet not only his Lordſhip Himſelf, but

* Mr. Juſt. *Foſter* was not in Court.

The whole COURT (now * preſent) were clear and unanimous that where a MERE *Common Informer*, who ſued for PUNISHMENT *only*, had been guilty of a Slip or Miſtake which put him *out of Court* and intitled the Defendant to enter a *Non Proſ.* againſt him, they would not exerciſe their *diſcretionary Power*, in ſetting aſide this *Non Proſ.* thus regularly obtained, and reſtoring the *mere Common Informer* to an Opportunity of proceeding for the Sake of *Puniſhment* only.

And they diſtinguiſhed the preſent Caſe from Caſes of AMENDMENT: Which indeed the Court would not ſcruple to make, even in Caſes of *Qui tam* Actions, where there was any thing *to amend by*; and which they had frequently done, in ſome Inſtances that were mentioned or at leaſt hinted at; as, in particular, the giving Leave to *change the Country*, in a *Qui tam* Action, on Mr. *Norton*'s Motion, not many Terms ago.

Tueſday 15th *November* 1757.

Rex. *verſ.* Robert Chappel.

A Motion was made by Mr. *Burland*, and ſupported by Mr. *Norton*, for an Information for *ſending a Challenge*, by Letter, to Mr. *Hamilton* of *Wells:* But they only produced *Copies*, NOT *the* ORIGINALS of the Letters wherein the Challenge was contained.

THE COURT made a Rule to ſhew Cauſe, upon reading the COPIES *only* of the Letters; (ſuch Copies being ſufficiently verified.)

Wedneſday 16th *November* 1757.

Rex *verſ.* Williams.

THIS was a Cauſe in the Crown-Paper, upon a Writ of Error directed to the Juſtices of the Great Seſſion in the County of *Denbigh*, upon a Judgment given there for the King againſt the Defendant after a Verdict, upon an Information brought againſt Him in that Court by the Protonotary and Clerk of the Crown there, *at the Relation* of *John Moſtyn*, Eſq; *according to the Form of the* STATUTE in that Caſe made and provided.

The Information ſets forth the Incorporation of the Town of *Denbigh*, by Letters Patent dated 14th *May* 15 *C.* 2. Which gave them Power to have and hold *within the Burrough a Court of Record* on every *Friday* in every ſecond Week throughout the Year,

to

to be held *before the Bailiffs* of the ſaid Burrough for the Time being, or One of them.

Then it alledges the Acceptance of theſe Letters Patent by the Corporation.

It further ſhews that by virtue of theſe Letters Patent, the ſaid Court of Record, from the Time of making the ſaid Letters Patent, to the Time of exhibiting the Information, ought to have been held within the ſaid Burrough on every *Friday* in every ſecond Week through the Year, *before the Bailiffs* of the ſaid Burrough for the Time being, or One of them.

Then it charges that *Friday* the 13th Day of *December* 25 *G.* 2. was a Day on which the ſaid Court of Record ought to have been ſo held within the ſaid Burrough, by virtue of the ſaid Letters Patent. That the Defendant (well knowing the Premiſſes aforeſaid) *on the ſaid 13th Day* of *December* 25 *G.* 2. at the Burrough of *Denbigh* aforeſaid in the County of *Denbigh* aforeſaid, *in the Abſence* of *John Hoſier* Gentleman and *David Williams* Gentleman, who then and long before and afterwards were *the Bailiffs* of the ſaid Burrough, and of each of them, did wrongfully and unjuſtly PRESUME TO HOLD *and* DID *hold* THAT *Court of Record within the ſaid Burrough*, WITHOUT *any* legal Warrant Right or Authority whatſoever; and did then and there *preſide* therein; He the ſaid *Thomas Williams* (the Defendant) then NOT *being one of the Bailiffs* of the ſaid Burrough.

PLEA—That He *did* NOT *hold* the ſaid Court of Record in the ſaid Information ſuppoſed to have been held by the ſaid *Thomas* (the Defendant) *nor did preſide therein*, in Manner and Form as by the Information is charged againſt him. (Upon which, Iſſue is joined.)

And the Defendant farther ſaith that at the Time mentioned in the Information, HE HAD NOT, NOR HATH *any Warrant* Right Power or Authority; but *wholly* DISCLAIMS to have any Warrant Right Power or Authority whatſoever to hold the ſaid Court of Record, or to preſide therein: And this He is ready to verify. Wherefore he prays Judgment, and that He of the Premiſſes aforeſaid may be diſcharged and diſmiſſed by the Court, and ſo forth.

Upon the Iſſue joined, the Jurors find that the Defendant, on 13th *December* 25 *G.* 2. at the ſaid Burrough of *Denbigh*, in the Abſence of *John Hoſier* Gentleman, and *David Williams* Gent. who then and long before and afterwards were the Bailiffs of the ſaid Burrough, and of each of them, *did* wrongfully and unjuſtly preſume to hold, and *did hold* the ſaid Court of Record in the ſaid In-

formation mentioned, within the ſaid Burrough, *without* any legal Warrant or Right or Authority whatſoever; and *did* then and there *preſide* therein; (He the ſaid *Thomas Williams* then not being One of the Bailiffs of the ſaid Burrough;) as in the ſaid Information is alledged.

The Judgment of the Court is "that the Defendant do *not in* "*any Manner intermeddle with or concern Himſelf* in and about hold-"ing of the ſaid Court of Record within the ſaid Burrough, in the "ſaid Information ſpecified; but that He be abſolutely *forejudged* "*and excluded from holding* the ſaid Court for the future; And that, "in order to ſatisfy our Sovereign Lord the King, for and on Ac-"count of the Uſurpation aforeſaid, He be *taken*, and ſo forth; "AND that the ſaid *John Moſtyn, the Relator* above-mentioned in "this Behalf, *do recover* againſt the ſaid *Thomas Williams* the Sum "of 141*l.* 12*s.* 11*d. for his* COSTS by him laid out and expended "in carrying on his Suit in this Behalf, ACCORDING *to the Form of* "*the* STATUTE *in ſuch Caſe made and provided.*"

The Aſſignment of Errors is—

1ſt. General—*viz.* That Judgment is given for the King againſt the Defendant: Whereas by the Law of this Kingdom, it ought to have been given for the Defendant.

2dly. Special—*viz.* And alſo in this, that it appears by the ſaid Record, that Judgment in the Plea aforeſaid was given "that the ſaid "*John Moſtyn*, in the ſaid Plea named *the Relator therein, recover* "*againſt the ſaid Thomas Williams* 141*l.* 12*s.* 11*d. for his* COSTS "laid out in that Suit:" Whereas by the Law of this Realm, No *Judgment ought to have been given, in the Plea aforeſaid, for* THOSE *or for any other* COSTS in that Suit. And therefore in *that* reſpect alſo, there is manifeſt Error.

To this Aſſignment of Errors there is a Joinder in Error in the Name of the King's Coroner and Attorney in this Court.

Mr. *Madocks*, for the Plaintiff in Error.—

Objected that this was NOT *a Caſe within* 9 *Ann. c.* 20: And that therefore there could not, nor ought to be any Judgment for COSTS.

That Act takes in only two Caſes; 1ſt. Where an Office is *uſurped*; and 2dly. Where He has had a Title, but unlawfully *holds* and exerciſes the Office: But the whole is *confined to* OFFICES *in Corporations*; And the Words "ſaid Offices and Franchiſes" are tied up

up to OFFICES *in Corporations*, or to the Franchiſe of being a *Freeman*. [See Sections 4 & 5.]

Whereas this Information is only for *holding a Court* in the Burrough, in the Abſence of the two Bailiffs; He not being One of the Bailiffs of the Burrough. So that this is *no direct Charge* of uſurping the OFFICE *of Bailiff*. And an *indirect* Charge is not ſufficient: 2 *Hawk. P. C.* 261. "Whatſoever Certainty is requi- "ſite in an Indictment the ſame, at leaſt, is neceſſary alſo in an "Information." 1 *Salk.* 375. *Rex* v. *Knight*; and 1 *Ld. Raym.* 527. *Rex* v. *Knight and Burton*, S. C; prove expreſly "That *ar-* "*gumentative* Informations are naught."

This is only a Charge of doing *a ſingle* Act; which Act belonged indeed to the Office of Bailiff: But it is no Charge of his *claiming the* OFFICE *of Bailiff*; Nor could the Right to the OFFICE *of Bailiff* be tried *upon* THIS *Information*. And this, He ſaid, was a new Caſe: For the Common Way is to charge the Defendant *directly* with uſurping an Office; whereas this only charges him with Facts that may indeed be *Evidence* of ſuch Uſurpation of the Office of Bailiff; but does not charge Him with a direct Uſurpation.

Secondly. It cannot properly be called an Information *in Nature of a Quo Warranto* at *Common* Law: For it does not charge Him with exerciſing the Office at the TIME *of exhibiting the Information*.

"*Non uſurpavit*," generally and alone, is not a ſufficient Plea to an Information in Nature of *Q. W.* at Common Law. *Godbolt* 91. Sir *Jervis Clifton*'s Caſe; and 3 *Leon.* 184. Sir *Gervaſe Clifton*'s Caſe, S. C. *

[* This Caſe was not determined: *V. Godbolt* 93.]

This Information only charges Him with holding the Court upon a particular Day. On the whole, therefore, this Information is not good at *Common Law*, neither; no more than it is upon the Act of Parliament.

Mr. *Hall contra, pro Rege.*

This STATUTE-*Judgment*, "for the *Coſts*," is good: And ſo alſo is the *Common-Law* Judgment, "of *Ouſter* of the Franchiſe."

1ſt. The Act of 9 *Ann. c.* 20. ought to be *liberally* conſtrued.

This Information is an Information for uſurping the *Office of one of the Bailiffs* of the Burrough or *Denbigh*. The Facts charged upon the Defendant *amount* to an Uſurpation of the *Office*: though the Word "*uſurp*" is not indeed made Uſe of. And it is not neceſſary to

uſe this or any other *technical* Term. Therefore this Uſurpation of the *Office of Bailiff*, is here ſufficiently alledged.

But, at leaſt, it is a Charge of an Uſurpation of or intruding into a *Burrough-Franchiſe:* Which is a Caſe within the Act. The Preamble and Body of the Act prove this.

This is for holding and preſiding at a Court *in* a Corporation: Which certainly is a *Corporation-Franchiſe*. And the Defendant, by his manner of Pleading, has conſidered this as an Information on the Act, for a Burrough-Franchiſe: For He firſt pleads to the particular Charge, and then diſclaims.

But, at leaſt, this Caſe ſhall be taken to be within the *Equity* of the Statute: Which was made for the Benefit of the Commonwealth. Which Point He endeavoured to prove, from ſeveral Inſtances of *extenſive Conſtructions* of Statutes; And particularly of Statutes giving Coſts. For the latter, He cited *Cro. Eliz.* 257. *pl.* 36. * *Haſelip* v. *Chaplen*. And He ſaid that the Court often Ordered Coſts, even where the Statutes had not given them.

[* *Adjournatur.*]

As to the Caſe of *Rex* v. *Knight*, The Facts there charged were not ſufficient to ſupport the Concluſion: It was an imperfect defective Information. But here, it is poſitively alledged "That he "held this Court without any legal Warrant Right or Authority "whatſoever."

And this may be made good by Intendment. *Raym.* 34, 35. *The King* v. *Read*. *Siderf.* 91. *Rex* v. *Cover*. *Cro. Jac.* 473.

Secondly—As to the not charging the Defendant with exerciſing the Office *at the Time* of the Information; *One ſingle Act* is ſufficient.

Upon the Whole, this Caſe is either within the *Words*, or at leaſt within the *Intent* of the Act.

Mr. *Madocks* in Reply—There is no *expreſs*, but only a *circumſtantial* Charge, of exerciſing the *Office* of Bailiff.

The *Equity* of every Statute ſtands upon the Foundation of the Statute itſelf. Now this Act is certainly confined to *Offices* in Corporations, affecting the Rights of Election of Members to Parliament: And was not intended to take in Rights of holding *Courts* or *Fairs* in Corporations though the Words of the *Title* are indeed general, "the Rights of Offices and Franchiſes in Corporations and "Burroughs." But the *Body* of the Act confines the Word

" Franchiſes" to the Rights of being free: And the Body of the Act is the Part to be regarded.

And here is no Charge of intruding into the *whole* Office: Which is an *entire* Thing. The Uſurpation of *Part* cannot be an Uſurpation of the *Whole* of an Office.

Secondly—The Information ought to be good in it's ſelf and upon it's own Strength, independent of the Plea. This is an Information only for doing this *ſingle* Act, *ſix Years ago*.

Lord Mansfield—

1ſt. The Act is meant to extend to *all Officers* of *Corporations*, as ſuch; and as far as relates to all the corporate Rights of the Burgeſſes and Freemen, it is very legally, clearly, and correctly drawn: But it is not within the Reaſon or Meaning of the Act, that it ſhould extend generally to all Offices or Franchiſes exerciſed without *Authority from the Crown*, within a Corporation. It was meant to be *confined* to ſuch Franchiſes as were claimed in Inſtances affecting thoſe Rights between Party and Party.

The *Title* cannot control the *Body* of the Act.

And the *Equity* of an Act can be carried no further than to what was within the *View and Intention* of the Legiſlature, and the *Miſchief* meant to be prevented. Whereas here is *no ſuch* Equity, to bring the preſent Caſe within the Act.

Here is no Charge of uſurping or exerciſing or claiming the *Office* of *Bailiff*. I do not ſay that any particular *technical* Words are neceſſary. But here are none that are at all tantamount: It is not even ſaid that he held the Court, " *as* Bailiff." There is no Argument neither, or Inference, " that He did ſo:" Rather indeed, the contrary; for it ſeems implied in the very Charge, that if they had been there, he could *not* have held it.

No Fruit is obtained of this Trial, but as of an Uſurpation *upon the Crown* and for an *Offence* or Miſdemeanour: Here is nothing relating to the Intereſt of any private *Perſons*. And the Manner of Pleading proves nothing: For he was obliged to plead ſo, in *either* Caſe.

Therefore, as a *Statute*-Judgment it is wrong.

2dly. But as to the Common-*Law* Part of the Judgment—Mr. *Madocks*'s Objection will not hold. For He may certainly be puniſhed

ed for *One ſingle* Offence; though he goes no further. So that *this Part* of the Judgment is right.

Mr. Juſt. DENISON concurred That the *Statute*-part of the Judgment as to the *Coſts*, is wrong: But the *Common*-Law Part, *viz.* the Judgment of "*Excluſion* from the future Exerciſe of the "Franchiſe," is right.

As to the former—The Charge is not within the Act of Parliament of 9 *Ann. c.* 20.

The Information ſets out the Charter; which gives Power to the Bailiffs to hold this Court in the Corporation: And it calls upon the Defendant to know by what Authority he held it in the Abſence of the Bailiffs: But ſurely, this has no Relation in the Earth to the *Office of* BAILIFF; nor will it be ſaid that he could, upon *this* Information, have been OUSTED *of the Office of* BAILIFF. It was not, in the preſent Information, neceſſary to ſet out as Part of the Charge upon the Defendant "That the Court ought properly and regularly "to have been holden *before the Bailiffs:*" It had been enough, to have aſked the Defendant "By what Authority *He claimed* to hold "*this Court of Record*;" (without mentioning the Preſence or Abſence of the Bailiffs, at all.)

There are Numbers of Offices which a Man may uſurp, and be liable to an Information for uſurping; which are NOT *Franchiſes in Corporations*. But *Theſe* "Franchiſes" mentioned in the Act, mean *corporate* Rights or *Rights* to *Freedom* in Corporations. The Words of the Act are plain, that this is *not* a Caſe upon which the Informer can recover *Coſts*.

The Proceeding indeed may be, at *Common*-Law, for *Puniſhment*. Therefore this *latter* Part is right. But the Judgment *as to* COSTS ought to be reverſed.

And the *Mention of a* RELATOR is no more than *Surpluſage*, and may be rejected; and therefore *will not hurt* the Common-Law Judgment.

Mr. Juſt. FOSTER was clear too—

1ſt. That this Caſe was not within the Act: Which never intended to give Coſts in Caſes of *this Kind*. The Word "Franchiſes" in the Act, means only Freedoms and Rights to be Members of the Corporation.

This Act was drawn with great Care and Attention: (Judge *Powell* was the Perſon who drew it.) And there is no Reaſon to extend this Act beyond it's Intention.

2dly. The Judgment at *Common-Law* may be very right.

Mr. Juſt. WILMOT declared Himſelf extremely clear in both Points.

Per Cur. unanimouſly—
The *Common-Law* Judgment, *viz.* as to the OUSTER, was affirmed: But the Judgment for COSTS (which was founded upon the *Statute*,) was REVERSED.

Bond *verſ.* Iſaac.

Monday 21ſt November 1757.

THE *Exoneretur* which had been ordered to be entered (*V. ante* 339, 340.) was *not actually* entered on the Bail-piece, (by the Omiſſion of the proper Officer who ought to have entered it:) But the PLAINTIFF Himſelf was *appriſed of the* Surrender; though his Attorney ſwore that *He* (the Attorney) had no Notice of it.

The Plaintiff's Attorney, not being appriſed of the Surrender of the Principal, ſued out *Scire faciaſes* againſt the Bail; who paid the Money: But they were ſued out into *London* (where the Original Cauſe of Action was;) and *not into* MIDDLESEX, where the Surrender was made, and where the Bail-piece remained.

The Bail had applied, upon both theſe Irregularities, (*viz.* 1ſt. the PLAINTIFF's *being appriſed* of the Surrender and Order of the Court; and 2dly the *Scire faciaſes* not being ſued out into *Middleſex*;) that the *Scire faciaſes* might be ſet aſide for Irregularity, with Coſts; and the Money reſtored.

Mr. *Norton* was Counſel for the Bail, and had moved as above.

Sr. *Richard Lloyd*, for the Plaintiff, now ſhewed Cauſe.

The COURT was clear, on *both* Points, that the *Scire faciaſes* were *irregularly* ſued out; and granted Mr. *Norton*'s Motion, by making the Rule abſolute, as prayed: Excepting only, that they omitted the *Coſts*; merely becauſe it would have been to no Purpoſe to have ordered them, as the Plaintiff himſelf (who was appriſed of the Surrender) was gone abroad; and the Attorney, (not being appriſed of it) had not acted with any ill Deſign or Intention to oppreſs.

Tuesday 2d *November* 1757.

Sheepshanks et Uxor *verf.* Lucas.

P. 29 *G.* 2. *Rot'lo* 622.

ERROR from *C. B.* to *reverse a Common Recovery*. The Wife of *Sheepshanks* claiming to be intitled (in Common with others) to a Remainder in Fee (under the Will of one *Broadbent*) after the Death of One *Thomas Peirson*, Tenant in Tail, who was vouched in this Recovery; her Husband and She bring this Writ of Error: And the Error assigned is "The *Death of the* VOUCHEE, before "Judgment;" concluding with an *Averment*.

"*In nullo est erratum*"—is pleaded: (Which *confesses* the Error assigned, to be *true in Fact*.)

Serjeant *Poole* for the Plaintiff in Error—

Without Doubt, a Person intitled to a Remainder after an Estate-Tail, *may have a Writ of Error* to reverse a Common Recovery suffered by the Tenant in Tail. 3 *Co.* 3. *b.* The Marquis of *Winchester*'s Case, is express to this Purpose; and gives the Reason of it, at large. *Pigott, Of Common Recoveries* 169. "If the Vouchee die "before Judgment, it is Error." 1 *Ro. Abr.* 742. Title *Error*; Letter A. *pl.* 3. 1 *Ro. Abr.* 747. Title *Error*, Letter K. *pl.* 1. 1 *Ro. Rep.* 301. *Holland et al.* v. *Lee. Bridgman's Rep.* 71. S. C. *Holland et al.* v. *Jackson, et al. Palmer* 224. *Darcy* v. *Jackson*, S. C. *Dyer* 90. *a.* 40, 188.

We claim under a Devise by the Will of One *Broadbent*, in Remainder after an Estate-Tail given to *Peirson*. *Wynne* v. *Wynne*, *H.* 17 *G.* 2. *B. R.* is in Point to this Case—It was a Writ of Error by a Remainder-Man in Tail: And the very same Error was assigned, as is here. *There*, indeed, the *Fact* (of the Vouchee's dying before Judgment) was *denied*: And it was, upon Trial of the Issue, found "that She was alive at the beginning of the Term; "but *died before the Return* of the Summons *ad warrantizandum*." And the Relation of Law, (which was in that Case insisted upon,) was not permitted to prevail. And the Entry of her Appearance *at* the said Return (which was there entered on the Record) was holden *not* to be contrary to the Allegation of her Death *before* such Return: *Because* such her Appearance was only entered *as* BY ATTORNEY; whose Authority ceased by her Death. So that the Error there assigned was *not* an Assignment contrary to the Record.

Mr. *Luke Robinſon contra*, for the Defendant in Error. Common Recoveries are *now* conſidered as Common Aſſurances; and are therefore to be favoured and ſupported. Even *another* Warrant of Attorney ſhall be preſumed: Though *One* already appears upon the Record. *

* *V. Pigott* 168.

1ſt Objection. *No One* can *maintain a Writ of Error* upon a Judgment, but One who is either *Party* or *Privy*. But this Plaintiff in Error is neither *Party* or *Privy* to, nor *injured by the Judgment* here complained of. It does not appear that *Broadbent*, under whoſe Will She claims the Reverſion, was ever *ſeiſed* IN FEE of the Eſtate: And therefore it does not appear how he had a *Right* TO DEVISE the Eſtate, in the Manner he has done. They *ought* to have *ſhewn* in their Writ of Error, "That he was ſeiſed *in* "FEE:" Which the Defendant *might have traverſed*, if it had been ſo alledged.

2d Objection. No *Scire facias* or *Warning* has been given to *the* HEIR: Who may be an *Infant*, or may have many Things to plead. *Bernard Lucas*, the Recoveror, is the only Defendant; Who is *only* NOMINAL, but has *no real* Intereſt.

3d Objection. It appears upon this Record, that *Bernard Lucas* has Judgment to recover againſt THOMAS COWPER: But *Thomas Peirſon* is no Party at all to the Writ. Therefore *Thomas Peirſon* (who only came in as Vouchee) had nothing to do with a Judgment againſt ANOTHER *Man*. Conſequently *Peirſon*'s Death before Judgment is *no* ERROR: It can be only an *Irregularity*. And NO JUDGMENT is given at all, againſt *Thomas Peirſon*: The Recovery is againſt *Thomas Cowper*; who is indeed to have Recovery over, in Value, againſt *Thomas Peirſon &c.* But this Recovery over in Value, againſt *Peirſon*, is *not* the Judgment *upon which* this Writ of Error is brought. *This* Writ of Error does *not tally with the Judgment* of which it complains.

4th Objection. This Error is *not well* ASSIGNED: For it is an Error *in* FACT; and therefore ought to conclude *to the* COUNTRY; which this *does not*. *Yelverton* 58. *Rex* v. *Goſper and Shire*. "When a Man aſſigns Error in Fact, he ought to put himſelf *en* "*paiis*." And the Plea of "*in nullo eſt erratum*" *confeſſes nothing* but what is WEIL *pleaded*. And that Caſe is Word for Word the *ſame* with this, as to the Concluſion of the Aſſignment of Errors: And there WAS a "*Hoc paratus eſt verificare*," as well as here is.

Serj.

Serj. *Poole*, in Reply—

1ſt. It is enough, if We ſuggeſt Matter *ſufficient to ſhew* that We are *privy to* and *affected by* the erroneous Judgment. It is ſufficient for Us, to ſhew the Deviſe of the Remainder to Us; without any Neceſſity of ſhewing that the Deviſor was *ſeiſed in Fee*. And the Precedents are ſo.—*Wynn* v. *Wynn* was ſo. Sir *John Dinely Goodyere*'s Caſe was ſo. *Darcy* v. *Jackſon*, *Palmer* 224. is ſo determined, "That *the Title needs not* to be *ſet out*, as in a Pro-"ceeding *to recover Lands*." And all the Entries are ſo.

2dly. The *Scire facias* is brought againſt the *proper Perſon*: Which is the *Recoveror*.

3dly. *Peirſon* appears by his Warrant and vouches: And there is Judgment over, in Value, *againſt him*.

4thly. There never was, nor properly can be ſuch a *Concluſion to the* COUNTRY. Here is a *new* Matter of Fact introduced: Which the other Party *perhaps will not controvert*. We cannot conclude to the Country, TILL the other Party *denies it*.

As to the Caſe in *Yelverton*—*If* it be as cited, yet, it can never be ſupported. The Aſſignment of an *Error in Fact* ALWAYS concludes with an *Averment*.

LORD MANSFIELD was clear for the Plaintiff in Error, on *all* the Points.

1ſt. The Writ of Error *needs not* to ſet forth a *complete* Title: It is only required of the Plaintiff in Error, to ſhew the *Connexion and Privity* between the Perſon againſt whom the Recovery is had, and the Perſon who brings the Writ of Error. This is *not* like a Proceeding to try the *Right* of the Land, or to recover the *Land itſelf*. The Precedents are ſo: And None are produced to the contrary.

2d Objection. No Authority or Reaſon is produced, for a *Scire facias* to the *Heir*.

3d Objection has no Weight in it: And the Caſe of *Wynn* v. *Wynn* is in Point againſt it.

4th Objection. The Concluſion with an Averment, is right; and gives an Opportunity to try the Fact by the Country, if the Defendant in Error chooſes it: Which is all that is requiſite.

So

So much as to the *Form*. And

As to the *Merits*—It is extremely clear that a Remainder-Man *ought* to have this Chance to the Benefit of the Entail; *viz.* To ſee that all the proper and requiſite Forms ſhould be gone through, before He is barred of it.

It is plain that Judgment ought not to be given againſt any Man, *after* he is *dead*. And there could have been no Judgment againſt the Tenant to the Præcipe in a Common Recovery, without a Judgment likewiſe over, in Value, againſt the Vouchee: They are *all* entered at one and the ſame Time, and are Part of the *ſame Proceeding*.

Mr. Juſt. DENISON concurred—

1ſt. This GENERAL *Allegation* is ſufficient, ſurely, *in the* WRIT: He needs not ſhew a *complete Title*. Nay, even in a *Formedon*, I do not know that the Title needs to be completely and fully ſet out in the WRIT. And *Wynn* v. *Wynn* is an Authority, on this Head.

2dly. A *Scire facias* to the *Heir* was not neceſſary; nor any *Warning to* HIM: The *Recoveror* has the *legal* Right; and muſt be *taken* by the Court, to have the real Intereſt.

3dly. The *Death of the Vouchee*, before Judgment, is Error in a Common Recovery; and *may be aſſigned* for ſuch. *Wynn* v. *Wynn* was in Point, to this.

4thly. The Caſe in *Yelv.* 58. is ſo far true, (and can mean no more than) that it ought to be put in a Method of being tried by a *Jury*. And here the Plaintiff in Error has done ſo: He ſays "He is READY *to verify it.*". So that the Defendant in Error *might* have put it in Iſſue, if he had pleaſed. But he has choſen to plead "*in nullo eſt erratum*": Which *confeſſes the Fact*, and puts the Matter of Law upon the Judgment of the Court.

As to the *Merits*—The Remainder-Man has a Right, both in Law and Juſtice, to reverſe the Recovery, if it be erroneouſly ſuffered.

Mr. Juſt. FOSTER and Mr. Juſt. WILMOT declared their clear Concurrence in Opinion with LORD MANSFIELD and Mr. Juſt. DENISON.

Per Cur. clearly and unanimouſly
JUDGMENT REVERSED.

Friday 25th *November* 1757.

Windham Esq. *verſ.* Chetwynd Esq:

Paſch. 28 *G.* 2. *Rot'lo* 53.

Sum. Dict. Ideo Will.

A Special Verdict upon a Will of Land, dated the 14th of *May* 1750; and a Codicil of the ſame Date, made by *Walter Chetwynd* late of *Grendon*, Esq.

The Special Verdict—At which Day, before our Lord the King at *Weſtminſter* come as well the ſaid *William Wyndham Malachi Lindon Catherine Lindon Thomas Stevens* alias *Walter Paris* alias *Walter Chetwynd Suſannah Blacknell Henry Perrott George Huddleſton* and *James Crofts* by their Attorney, as the ſaid *William Henry Chetwynd* by his Attorney. And the Jurors *&c.* being ſummoned *&c.* do come *&c.* and being elected *&c.* do find, As to the firſt Iſſue joined between the ſaid Parties, that the ſaid *Walter Chetwynd* was, at the Time of making the ſaid Writings importing to be his laſt Will and Codicil, of ſound Mind. As to the third Iſſue, they find that the Teſtator did not, by the ſaid Writing importing to be his laſt Will, Deviſe to the aforeſaid *William Windham* and his Heirs any Lands or Tenements in the County of *Warwick*, In Truſt or for the Benefit of the ſaid *Thomas Stevens* alias *Walter Paris* alias *Walter Chetwynd*. And as to the fourth Iſſue, the Jury find that the Teſtator did not, by the ſaid Writing importing to be his laſt Will, Deviſe to the ſaid *Catherine*, now *Catherine Lindon* the Wife of the ſaid *Malachi Lindon*, an Annuity of 200*l.* by the Year, for the Term of her natural Life. And as to the ſecond Iſſue, the Jury find that the Teſtator was in his Life Time ſeiſed in Fee of certain Lands Tenements *&c.* in the ſeveral Counties of *Warwick* and *Staffford*, of the yearly Value of 3100*l.* and being ſo thereof ſeiſed, he the ſaid *Walter Chetwynd*, in his Life Time, ſigned ſealed and publiſhed a certain Paper Writing bearing Date the 14th Day of *May* 1750. purporting to be his laſt Will and Teſtament, and likewiſe another Paper Writing purporting to be a Codicil indorſed on the ſaid firſt-mentioned Paper Writing, and of the ſame Date; (which Will and Codicil it ſets out *in hæc verba*;) And in the former, there is a *Charge* upon the Reſidue of his *Real* and perſonal Eſtates, for the Payment of all his juſt *Debts*, Legacies, and Incumbrances: And that the ſaid Paper Writings were ſo ſigned *&c.* by the ſaid *Walter Chetwynd* in the Preſence of *Staffford Squire*, *Robert Baxter*, and *Joſiah Higden*; who likewiſe atteſted the ſame at his Requeſt, in his Preſence, and in the Preſence of each other. And they further find that the ſaid *Staffford Squire* and *Robert Baxter*, being Attornies at Law, were in or about the Year 1747, employed by the

the ſaid *Walter Chetwynd* to ſolicit a private Act of Parliament "for "Sale of the Eſtates late of *Henry Fleetwood* Eſq; deceaſed, in the "County of *Lancaſter*, for raiſing Money to diſcharge Incumbrances "affecting the ſame *&c.*" And that the ſaid *Stafford Squire* and *Robert Baxter* charged the ſaid *Walter Chetwynd Debtor in their Books*, for the Fees and Expences of paſſing the ſaid Act: And which Charge *continued ſo, until and after the Death* of the ſaid *Walter Chetwynd*. And that at the ſaid Time of the ſaid ſigning ſealing and publiſhing of the ſaid ſeveral Paper Writings, and alſo at the Time of the Death of the ſaid *Walter Chetwynd*, there was *due and owing to the ſaid* S. S. *and R. B.* for the ſaid Buſineſs done, the Sum of 318*l.* and that ſome Time after the Death of the ſaid *Walter Chetwynd*, the ſaid *S. S.* and *R. B. delivered a Bill* for paſſing the ſaid Act *to the Truſtees* nominated and appointed in and by the ſaid Act of Parliament for the Purpoſes therein mentioned: and afterwards, and before the Examination of the ſaid *S. S.* and *R. B.* in this Cauſe, the ſaid *S. S.* and *B. R.* received *from the ſaid Truſtees*, at ſeveral different Times, ſeveral Sums, amounting in the whole to 302*l.* 4*s.* 8*d.* ½ and that the ſaid *Truſtees were willing to have paid the Remainder*, if it had not been for a Miſcalculation. And the Jury further find that in the ſaid private Act of Parliament there is contained a certain *Clauſe for Payment of the Expences* attending the ſaid Bill: (which Clauſe they find *in hæc verba.*) They further find that at the Time of the ſigning ſealing publiſhing and atteſting the ſaid Paper Writings, there was a *current Account* open and ſubſiſting between the ſaid *S. S.* and *R. B.* and the ſaid *Walter Chetwynd* for *other* Buſineſs excluſive of the Expences of paſſing the ſaid private Act: on the Balance of which Account, if ſtated at that Time, the ſaid *S. S.* and *R. B.* were indebted to the ſaid *Walter Chetwynd* in the Sum of 138*l.* 14*s.* 10*d.* They further find that at the ſaid Time of the atteſting of the ſaid Writings, and alſo at the Time of the Death of the ſaid *Walter Chetwynd*, there was due and owing from him to the ſaid *Joſiah Higden*, his *Apothecary*, the Sum of 18*l.* 5*s.* 5*d.* on ſimple Contract: Eleven Pounds whereof were ſo due on 25th *December* 1749. and *before the laſt Sickneſs* of the ſaid *Walter Chetwynd*. They alſo find that the ſaid *Walter Chetwynd* died on the 17th of *May* 1750, without Iſſue, and ſeiſed *&c:* and that the ſaid *William Henry Chetwynd* is the only Brother and Heir at Law of the ſaid *Walter Chetwynd*. They further find that his real Eſtate at the Time of ſigning *&c*, and alſo at the Time of his Death, was ſubject to certain Mortgages made thereof, by the ſaid *Walter Chetwynd* to the Amount of 19000*l.* And of 5000*l.* more, made by the ſaid *Walter Chetwynd*'s late Father. And that the ſaid *Walter Chetwynd* owed at the Time of his Death, by Bonds, the Sum of 1600*l.* and by ſimple Contract 2874: and that his perſonal Eſtate then amounted to 13972*l.* and was ſufficient to pay all the ſimple Contract

Contract Debts and Bond Debts of the ſaid *Walter Chetwynd*. And that the ſeveral real Eſtates ſo in Mortgage were of Value more than ſufficient to ſatisfy the ſeveral Incumbrances affecting the ſame. The Jury further find that on the 2d of *Auguſt* 1750, the ſaid *William Henry Chetwynd* filed his Bill in Chancery againſt the ſaid *William Windham &c*, for the obtaining a Decree and Recovery of the ſaid Lands *&c*; and thereby conteſted the Validity and due Execution of the ſaid Paper Writings. That Anſwers were put in, and Amendments made to the Bill; and other Anſwers put in: and the ſaid *William Henry Chetwynd* proſecuted the ſaid Suit in Chancery with all due Diligence. The Jury further find that the ſaid *William Windham*, as Executor of the ſaid *Walter Chetwynd, paid to the ſaid Joſiah Higden* the ſaid Sum of 18*l*. 5*s*. 5*d*. *after the Death* of the ſaid *Walter Chetwynd* and *before the Examination* of the ſaid *Joſiah Higden* in this Cauſe: And that the ſaid *J. H.* had not, *at the Time of his Examination* in this Cauſe, any Demand upon the ſaid *Walter Chetwynd*. But whether upon the whole Matters aforeſaid by the Jurors in Form aforeſaid found, the ſaid Paper Writings or either of them were or was DULY EXECUTED by the ſaid *Walter Chetwynd*, ſo as to paſs Lands or Tenements, or not, the ſaid Jurors are wholly ignorant: And therefore pray the Advice, *&c. &c.*

This Caſe was argued twice; 1ſt. on *Friday* the ſixth of *May* laſt, by Sir *Richard Lloyd* for the Plaintiff, and Mr. *Clayton* for the Defendant; and again, on *Friday* the 18th Inſtant by Mr. Serjeant *Prime* for the Plaintiff, and Mr. *Norton* for the Defendant.

The principal Objection inſiſted upon by the Counſel for the Defendant, was "That the ſubſcribing Witneſſes to the Will were not, "at the *Time* of their ATTESTATION, *credible* Witneſſes:" And conſequently, this was not a good Will of Lands, within the Statute of 29 *C*. 2. *c*. 3. for Prevention of Frauds and Perjuries; as not being atteſted by three *credible* Witneſſes.

In proof of which, they urged many Arguments, and reaſoned from ſeveral Caſes: And, amongſt others, they cited two Caſes as in Point; *viz*. *Hilliard* v. *Jennings*, reported in 1 Ld. *Raym*. 505, *Comyns* 92, *Carthew* 514, and Caſes in *B. R. temp. W*. 3. *page* 277; And *Holdfaſt ex dim' Anſley et Ux'* v. *Dowſing*, in 2 *Strange* 1253.

But it would be unneceſſary to prefix either the Arguments of the Counſel, or the Authorities upon which they relied; As Lord *Mansfield* entered into the Caſe ſo very minutely, in delivering the Opinion of the Court upon it.

After the Court had taken ſome Time to conſider of it, they all agreed that the Will was *duly* atteſted by three *credible* Witneſſes. And now

LORD

Lord Mansfield delivered the Opinion of the Court, to the following Effect.

The Doubt made by this Special Verdict ſprung, after the Cauſe of *Anſly* v. *Dowſing*, out of the *General* Queſtion then much agitated, " Whether a Benefit given to a ſubſcribing Witneſs by the " Will, either under a general or particular Deſcription, ſhould " annul his Atteſtation, As *at the Time of his* SUBSCRIBING; and " make the Will wholly and abſolutely void, for Want of Form, " as much as if he had never atteſted at all; *though at or after the* " *Teſtator's* Death, He might be *diſintereſted*, and *competent* to be " examined in Support of the Will."

This *general* Point is the Baſis of the Objection to theſe ſubſcribing Witneſſes. Unleſs the Defendant can ſupport it, He has no Ground to ſtand upon: But though He ſhould ſucceed in the *general* Propoſition, the Application to *this* Caſe may fail, from the *particular Circumſtances*, and the *Kind* of Benefit objected.

The Queſtion does *not* depend upon the Conſtruction of any Words of the Statute. The Statute is ſilent as to the *Capacity* of the Witneſſes: It declares no Incapacity; It requires no Qualification.

The Epithet " *Credible*" has a clear preciſe Meaning. It is not a Term of Art appropriated only to legal Notions; but has a Signification univerſally received. It is never uſed as Synonimous to *Competent*. When applied to Teſtimony, it preſuppoſes the Evidence *given*.

After the Competence of a Witneſs is allowed, the Conſideration of his Credibility ariſes: And *not before*. Perſons undoubtedly credible *cannot* be Witneſſes, *under particular Circumſtances*: Perſons manifeſtly incredible *may* be, and *often are* Witneſſes.

In Acts of Parliament which direct Convictions upon the Oaths of Witneſſes, the Epithet " *Credible*" is added; but by no Means intended to ſignify " Competent:" *That* is implied in the Term " Witneſs." But it is intended, (from abundant Caution,) to declare, That though competent Witneſſes ſwear poſitively, their *Credibility is to be weighed*: And if the Magiſtrate thinks the Evidence *not credible*, He ought not to convict.

In *this* Senſe, it was very unneceſſary to add the Epithet, here, to ſubſcribing Witneſſes. And yet, to make the eſſential Solemnity of the Will depend upon the *Credibility* of the ſubſcribing Witneſſes, is ſo abſurd; that their Credibility has always been held to make *no Part* of the neceſſary Form.

If they all ſwear that the Teſtator did not execute; If they had, at the Time, the worſt Characters, and had committed the moſt infamous Actions; yet their Atteſtation anſwers the neceſſary Form: Becauſe the Teſtator meant to comply with the Law, and might not know them to be bad Men.

The 3d Rule or Caution in making Wills, given at the End of
* 3 Co. 36. b. *Butler* and *Baker*'s Caſe, * is—" At the Time of the Publication " of the Will, Call *credible* Witneſſes to ſubſcribe their Names to " it." Lord *Coke* certainly meant " Perſons of Credit and Cha- " racter."

From hence, and from the Uſage in Penal Acts directing Convictions, I am perſuaded that the Epithet was inſerted here, as a Word of Courſe, and miſapplied. Had the Operation or Effect of the Word, in this particular Caſe, been attended to, it never could have been inſerted; becauſe, in the *natural* and *obvious* Senſe, the Meaning muſt be rejected, from the Conſequences it would have: And in *any other*, it has no Meaning at all; For, Suppoſe it to ſignify *competent*, Competence is *implied* in the Term " Witneſſes."

This *whole* Clauſe, which introduces a poſitive Solemnity, to be obſerved, not by the Learned only, but by the Unlearned; at a Time when they are ſuppoſed to be without legal Advice; in a Matter which greatly intereſts every Proprietor of Land; where the Direction ſhould be plain to the *meaneſt* Capacity; is ſo looſe, that there is not a ſingle Branch of the Solemnity defined or deſcribed with ſufficient Certainty to convey the ſame Idea to the *greateſt* Capacities.

There have been Litigations, and contradictory Opinions, upon *almoſt every Part* of the Form; as " What is *Signing* by the Teſta- " tor? Whether the Witneſſes are to atteſt *uno* Contextu, *uno* " *eodemq;* Tempore? Whether they are to *ſee* the Teſtator ſign? " Whether they ought to know that He ſigns it *as his Will?* Whe- " ther he ought to publiſh it *as* his Will?" A very little Preciſion, and a very few Words, might have prevented all theſe Queſtions.

In a Clauſe not the moſt accurate, I can eaſily believe that the uſual Epithet " *Credible*" ſlipped in, as of Courſe, without Attention to the *Impropriety* of uſing it on this Occaſion.

It has been ſaid " that this Act of 29 *C.* 2. *c.* 3. was drawn by " Ld. Ch. J. *Hale*;" But this is ſcarce probable, ſince it was not paſſed till after his Death: And it was brought in, in the Common Way; and not upon any Reference to the Judges.

But what Senſe ſoever is put upon this Word "*Credible*," the Statute leaves the Queſtion juſt as it was: For it does not declare who *are*, or are *not* credible; or, (if it is ſuppoſed to mean *competent*,) who are competent, or who are *incompetent*.

Their Competence could not be referred to any Law then eſtabliſhed: becauſe there was, there could be, none applicable throughout to this New Caſe. The Neceſſity of ſubſcribing Witneſſes to any Inſtrument, never had exiſted before, in *this* Country. There never could have ariſen, in the Law of *England*, a Queſtion, "concerning the Competence of a Witneſs, at the Time of his knowing the *Fact*, he came to teſtify;" but only "whether he was "competent at the Time of his *Examination*."

The Time of *Examination* could *not* poſſibly be the Criterion upon which the Validity of the Will was to depend. The Witneſſes might *not live* to be examined: Their Incompetence to be examined, might ariſe *long after* their Atteſtation.

"What Objection therefore to the ſubſcribing Witneſſes, ſhould "be ſufficient to avoid a Will, as *informal*," was left to be judged of as Caſes ſhould ariſe; by general Principles, by Analogy to the Law of Witneſſes in other Inſtances, and by Arguments drawn from the Nature and Fitneſs of the Thing, with regard to Juſtice, Convenience, and the Intent of the Statute.

When ſolemn Determinations, acquieſced under, had ſettled preciſe Caſes, and become a Rule of Property; they ought, for the Sake of Certainty, to be obſerved, as if they had originally made a Part of the Text of the Statute.

I will therefore conſider the *General Queſtion*, in two Views:

1ſt. Suppoſing there had been *no Judicial Determinations* relative to the Capacity of ſubſcribing Witneſſes ſince the Statute;

2dly. Upon the *Foot of the Judicial Determinations* that have been ſince the Statute. And

3dly. In the laſt Place, I will conſider the *particular Caſe* now in Judgment, under all it's own Circumſtances.

Firſt—Conſidering the Matter *at large*; Let me obſerve that the Power of Deviſing ought to be favoured.

It is a natural Conſequence of Property, and the Right a Man has over his *own*. It was a Right by the Law of the Land, before the

the Conqueſt, and down to about the Time of *Henry* the 2d—It ceaſed, conſequentially only, by the Introduction of Feodal Tenures; becauſe, originally, every Species of Alienation was contrary to that Syſtem.

Aſſoon as the Power of Alienation *inter Vivos* was indulged, Teſtaments followed, indirectly, as Declarations of Uſes.

The Statute of *Uſes* accidentally *checked* this Form of Deviſing. Therefore the Statute of *Wills* was made.

The 29 *Car.* 2. *c.* 3. (which gives Riſe to the preſent Queſtion,) did *not* mean to *reſtrain* Teſtamentary Diſpoſitions of Land: The Reaſons to encourage that Power were *increaſed*.

The Policy of Tenures, from whence aroſe the Impediment to Wills, was aboliſhed; but had left many Conſequences remaining, which made Teſtamentary Diſpoſitions of *Land*, more reaſonable than they were among the *Greeks* and *Romans*, or here before the Conqueſt.

The Eldeſt Son only is Heir, *ab Inteſtato*. Among Collaterals, not all the next of Kin, but One often is Heir; to the Excluſion of many in the ſame, and many in a nearer Degree. Simple contract Creditors had no Right to be paid their Debts. Money inveſted in Land could not be traced. Much Land was in Truſt: Where the Widow had no Right to Dower.

In *perſonal* Eſtates, the Succeſſion *ab Inteſtato* is ſubject to all Debts, and governed by natural Family Equity.

In *real* Eſtates, the Succeſſion is governed by political Conſequences of a Poſitive Syſtem: Which make the Teſtamentary Power often neceſſary, to enable a Man to do Juſtice to his Family, and his Creditors.

The Legiſlature meant only to guard againſt Fraud, by a Solemn Atteſtation; which they thought would ſoon be univerſally known, and might very eaſily be complied with. In Theory, this Atteſtation might ſeem a ſtrong Guard; It may be ſome Guard in Practice; But I am perſuaded many more fair Wills have been overturned for Want of the Form, than fraudulent have been prevented by introducing it.

I have had a good deal of Experience at the Delegates; and hardly recollect a Caſe of a forged or fraudulent Will, where it has not been ſolemnly atteſted. I have heard eminent Civilians who are dead, and ſome now living, make the ſame Obſervation.

Suppoſe the ſubſcribing Witneſſes honeſt; how little need they know? They do not know the Contents; they need not be together; they need not ſee the Teſtator ſign; (if he acknowledges his Hand, it is ſufficient;) They need not know it to be a Will; (If He delivers it as a Deed, it is ſufficient.)

For theſe and many more Reaſons, it is clear That Judges ſhould lean *againſt* Objections to the Formality. They have always done ſo, in every Conſtruction upon the *Words* of the Statute: *à fortiori* ought they to do ſo, in raiſing a conſequential Syſtem, *not* preſcribed in Words. And ſtill more ought they to do ſo, if that Syſtem would ſpread a Snare, in which many honeſt Wills muſt unavoidably be intangled; and be no Preſervative againſt Fraud.

At the Time this Act was made, the Law rejected no Witneſs to prove a Will; Unleſs, at the *Time of his Examination*, his Teſtimony tended to ſupport his own Title, and enable himſelf to hold or recover an Intereſt under it.

In the Eccleſiaſtical Court, the Probate is concluſive to every Body as to every Part. If a Legatee come to prove it, He intitled himſelf to his Legacy. But if the Legacy was contingent, and at the Teſtator's Death could not take Effect; if He had the ſame or a greater Intereſt, though the Will ſhould be ſet aſide; He was a Witneſs: A Releaſe, Payment, or Tender, made him a Witneſs.

In the Courts of Common Law, where the Witneſs had a Charge upon Land deviſed to another, He was juſt in the Caſe of a perſonal Legatee. If he had as great an Intereſt the other Way; if his Intereſt at the Teſtator's Death could never take Effect; if there was a Releaſe, (of which ſeveral Authorities were cited;) and I will add, as by neceſſaary Conſequence, if there was Payment or Tender; He was a Witneſs.

Nice Objections, of a remote Intereſt, which could not be paid or releaſed, though they held in other Caſes, were not allowed to diſqualify a Witneſs in the Caſe of a Will: As * Pariſhioners might prove a Deviſe to the Uſe of the Poor of the Pariſh for ever.

[* *T.* 2 *Sid.* 109. *M.* 1658. *Townſend* v. *Row.*

Before the Statute, No Man could, in a Court of Juſtice, intitle himſelf by his own Examination, to a Deviſe. So, after the Statute, No Man ſhould intitle himſelf, in a Court of Juſtice, to a Deviſe, by Virtue of his own Subſcription, which at the Time of Subſcribing, He could not have proved by his Examination.

The Diſability of a Witneſs from *Intereſt*, is very different from a *poſitive* Incapacity. If a Deed muſt be acknowledged before a Judge or Notary Public; Every other Perſon is under a *poſitive* Incapacity to authenticate it: But Objections of *Intereſt*, are Deductions from natural Reaſon, and proceed upon a Preſumption of too great a Bias in the Mind of the Witneſs, and the public Utility of rejecting partial Teſtimony.

Preſumptions ſtand no longer than till the contrary is proved.

The Preſumption of Bias may be taken off, by ſhewing the Witneſs has as great, or a greater Intereſt the other Way; Or that he has given it up.

The Preſumption of public Utility, may be anſwered, by ſhewing that it would be very inconvenient, under the particular Circumſtances, not to receive ſuch Teſtimony.

Therefore from Neceſſity, the Courſe of Buſineſs, and other Reaſons of Expedience, Numberleſs *Exceptions* are allowed to the *general* Rule.

The Preſumption of Bias ariſes as at the Time of *ſubſcribing*. But it may be anſwered.—If Part is deviſed to a ſubſcribing Witneſs, The Preſumption is anſwered, by ſhewing he was Heir at Law; or that the Deviſe is void; or that he has renounced it.

Where is the Reaſon to ſay that a Witneſs who does not know the Contents of a Will during the Teſtator's Life, and at his Death takes no Benefit, was biaſſed at the Time he ſubſcribed, or can be biaſſed at the Time of his Examination?

During the Life of a Teſtator, Deviſes are mere Poſſibilities: No Intereſt can veſt till his Death. The Preſumption of Bias from the *Poſſibility*, is anſwered by the Fact when it *becomes* an Intereſt. His Swearing when he is totally *diſintereſted*, is concluſive, that the Poſſibility is *not* to be preſumed the corrupt Cauſe of his ſubſcribing.

For the Sake of third Perſons, It is wiſe and juſt, to allow the Objections thus to be purged: Otherwiſe, many Settlements by Will muſt be overturned, to the Ruin of Families.

It is natural and uſual to give Legacies to Servants, and Tokens to Friends.—Perſons under theſe Deſcriptions are moſt likely to be Witneſſes. Ought ſuch Trifles to overturn *unavoidably* the moſt deliberate Diſpoſitions of the greateſt Eſtates? Which may be at-

tended often with this Family Diſtreſs, That a Man may have given his Money to One Part of his Family, and his Land to Another: In which Caſe, the Will would be good as to the Money; and void, as to the Land.

If the Legiſlature had *ſaid ſo*, That would have been a *poſitive* Rule: But it is contended for, by *Conſtruction*, and to *guard againſt Fraud*.

It is not a Guard, even in Theory, in the Caſe of *Legatees:* Becauſe, they may, in another Shape, atteſt the Deviſe which charges the Land with their Legacies.

It is ſettled, "That where the Land is once charged, (and it always is an auxiliary Fund,) with the Payment of Legacies, by a ſolemn Deviſe, The Legacies may be given, altered, or revoked by a ſubſequent Will *unatteſted*." The fraudulent Legatee might atteſt the Charge, and get his Legacy in a Codicil unatteſted.

Let a Will be ever ſo fair, a Slip in Form is fatal: Which is a certain Miſchief. But, if a Will be fraudulent; though it is allowed to be formal, It may be ſet aſide upon Evidence and Circumſtances.

Neither Reaſon, nor Policy requires the Objection to be carried farther than I have laid it down; agreeable to the Law before the Statute, and the univerſal Maxim, "Teſtis in *propriâ* Cauſâ non "eſt adhibendus."

But *if* Judicial Determinations, acquieſced under, and become a Rule of Property, ſince the Statute, have *extended the Incapacity* further, They muſt be adhered to. Which brings me

Secondly, To conſider the *Judicial Determinations* ſince the Statute.

All the Determinations *agree exactly* with theſe Principles.

In many Inſtances, the Preſumption of *Bias from a Legacy*, at the Time of ſubſcribing, has been allowed to be *taken off* by a *Releaſe*. Authorities in print have been cited, to ſhew "this was "conſidered as a ſettled Point:" And I verily believe it was ſo, from the Authority of the oldeſt and moſt eminent Practiſers in *Weſtminſter-Hall*; and therefore I give Credit to the Dictum of *Powys* in *Viner*, * "That it had been ſolemnly agreed by the "Judges, That where a Perſon had a Legacy given, and did *relcaſe* "*it*, He was a *good* Witneſs to prove the Will."

* See *Viner's Abridgment*, Title *Evidence*, *page* 14. N° 53.

I know that before the Caſe of *Anſly* v. *Dowſing*, a Will of a very great Eſtate was liable to the Objection; and the Heir at Law would have conteſted it: But as it was certain the Witneſſes would be paid, or releaſe, No Opinion that he took, encouraged Him to think it worth his while.

Mr. *Fazakerley* and Sir *Thomas Bootle* have told me, they took it to be ſettled: And indeed the Number of Wills where the Objection lay and never was taken, demonſtrated it.

There is not a ſingle Determination which carries the Incapacity farther than the Rule I have laid down; *viz.* "That a Perſon "ſhall not, in a Court of Juſtice, intitle himſelf to a Deviſe, by "Virtue of his own Subſcription, which at the Time of ſubſcri-"bing He could not have proved by his Examination."

That is the Caſe of *Hilliard* v. *Jennings*. That is the Reſolution and Judgment of the Court in the Caſe of *Anſly* v. *Dowſing*. There, the Defendant was Deviſee; ſubject to an Annuity of 20 *l.* a Year to *Eliz.* the Wife of *John Hailes*, for her Life, for her ſeparate Uſe: And there did not appear to be any perſonal Eſtate. Her Intereſt was a Charge, in the Nature of a Legacy, to be paid by the Defendant, out of the Eſtate deviſed to him: And being for her ſeparate Uſe, it was a Truſt; and the Defendant was her Truſtee. Upon the Validity of the Deviſe to the Defendant, Her Annuity *depended*. If he ſucceeded, *her* Title followed of Courſe; for He muſt take the Land, *as* the Teſtator gave it, ſubject to the Charge and Truſt: And upon the Deviſe to the Defendant being found good at Law, a Court of Equity muſt, of Courſe, have decreed the Truſt. So that *She* was the *Ceſtuy que Truſt* of the *Party to the Cauſe*; and *either* way, the Judgment would immediately *affect her Intereſt*.

In matter of Evidence, *Huſband and Wife* are conſidered as *One*; and *cannot be Witneſſes*, the *one* for the *other*. The Huſband cannot be Witneſs *for his Wife*, in a Queſtion touching her *ſeparate* Eſtate.

There was *no Releaſe*. There could be *no Payment*, or *Tender*, without the Interpoſition of a Court of Juſtice; becauſe the Value depended upon incertain Eſtimation: But no Attempt had been there made towards paying, or tendering the Value of the Annuity.

This brought it preciſely to the Caſe of *Hilliard* v. *Jennings*: The Witneſs, in a Court of Juſtice, was to ſupport a Deviſe to himſelf, by Virtue of his *own* Subſcription; (for the Caſe is the

ſame, as if the *Wife* had been the *Witneſs*, or the *Husband* the *Deviſee* of the Annuity.)

It is true that Ld. Ch. J. *Lee*, in * delivering his Opinion, argued as if the Objection of Benefit from the Will to the Witneſs, at the Time of ſubſcribing, could *not* be anſwered or taken off by any ſubſequent Fact: Which He grounded upon the Authority of the *Roman* Law from the Digeſt, and Code; where it is ſaid "*Condi-* "*tionem* Teſtium *tunc* inſpicere debemus, *cùm ſignarent*, non mor- "tis Tempore." But the Senſe of this Paſſage was not enough conſidered.

* That Opinion was delivered by Ld. Ch. J. *Lee*, on *Tueſday* 22d *April* 1746. *P.* 19 *G.* 2.

vid. Hurds Dialogues Vol. 2. 178 to 229.

"*Conditio Teſtium*" here means the *poſitive Capacity* of the Witneſſes; their Rank, or Quality, as Freemen, Citizens, Adult.

There *never* was a Time, in the *Roman* Law, when *Intereſt under the Will* was any Objection to ſubſcribing Witneſſes.

To explain this a little farther—

The Eſſence of the *Roman* Teſtament was the Appointment of an Heir, to repreſent the Teſtator.

Before the 12 Tables, the Teſtamentary Heir might be made *Two* Ways; *in Procinctû*, as *Plutarch* deſcribes at the Seige of *Corioli*; or in the Form of a Legiſlative Act, in *Comitiis calatis*.

The 12 Tables gave an abſolute Power to every Man, to make the Law of his own Succeſſion; But preſcribed *no Form*.

As a Teſtament was an Alienation of the Teſtator's Property and Family after his Death, The Form of Mancipation *per Æs et Libram*, uſed in *other* Transfers of Property or Family, was followed in *this*: The Heir was ſuppoſed to *buy*, and the Teſtator to *ſell* his Succeſſion and Family, for and as repreſenting their Families. The Ceremony was tranſacted with all the Symbols of a *Sale*; in the Preſence of the Officer who held the Balance, and of *Five* Freemen, Citizens of *Rome*, 14 Years of Age at leaſt, ſolemnly required to bear Witneſs.

Theſe Ceremonies and Symbols were invented *before* Inſtruments in *Writing*: And this imaginary Sale, *per Æs et Libram*, was uſed in Alienations, Adoptions, and almoſt every Species of Change of Dominion, or Property ſtrictly ſo called, ("*Proprium eſt quod Quis* "*Librâ mercatur et Ære*,") and in many other Contracts.

Subſequent Laws and Uſages, eſpecially *after* Teſtaments came to be in *Writing*, took away the Ceremony of the *Symbolical* Sale, added *two* Witneſſes more, and preſcribed *Forms of Atteſtation*;

But left the *Condition of the Witneſſes*, the ſame: They muſt be Freemen, *Roman* Citizens, Adult, & *Teſtabiles*. Yet by an equitable Conſtruction, *General Reputation* was ſufficient: As where the Witneſs, whom *Every Body conſidered* as a Freeman, really was a Slave.

This was the *Conditio Teſtium*, and muſt *exiſt at the Time of ſubſcribing:* As much as where there is a Cuſtom to ſurrender into the Hands of 2 Copyholders out of Court, they muſt be Copyholders *at the Time*.

Though in *other* Caſes, the Objection of *Intereſt*, to a Witneſs, was allowed; it did not incapacitate Witneſſes to a WILL.

While the Teſtament *per Æs et Libram* continued, neither the Teſtator, or Heir, or any of the Families of either, could be Witneſſes; becauſe they were ſuppoſed the *Parties* to the Contract.

When the Symbolical Sale ceaſed, and Teſtaments were *in Writing* and *ſecret*, The *Heir himſelf* was a ſufficient ſubſcribing Witneſs. Afterwards, though the Will was *open*, and He *knew* the Contents, *He* was a ſufficient ſubſcribing Witneſs: As appears from
* § 48. *Cicero* for *Milo*, ſpeaking of *Cyrus* *—"*Unà fui; Teſtamentum ſimùl* "obſignavi cum Clodio; *Teſtamentum autem* palam *fecerat, &* il-"lum Hæredem & Me *ſcripſerat.*"

Juſtinian Inſt. Lib. 2. Tit. 10. § 10. recites the *Heir having been allowed* to be a Witneſs; but forbids it, (not upon the Foot of his being intereſted, but) "*ad imitationem priſtini familiæ Emptoris*; "*quia hoc totum Negotium, Teſtamenti ordinandi gratia, creditur* "*hodie inter Teſtatorem & Hæredem agi.*" But in the next Section (§ 11.) He expreſly allows the *Ceſtuy que Truſt*, and *Legatees*, to be ſubſcribing Witneſſes; "*Quia non Juris Succeſſores ſunt.*" And yet the Heir *might be* merely a Truſtee for the whole Inheritance to be delivered to the *Ceſtuy que Truſt*; and the Legatee *might* exhauſt the whole Eſtate.

This abundantly ſhews that the Paſſage from the Code and Digeſt did *not* relate to Witneſſes being INTERESTED.

And the Code and Digeſt are conſiſtent with the Inſtitute, on this Head.

The Code, Digeſt, and Inſtitutes are all one connected Work.

The Code was firſt publiſhed in the third Year of *Juſtinian:* The Digeſt was compiled before the Inſtitutes; but publiſhed a Month after, in the ſeventh Year of *Juſtinian.*

The

The Propoſition " that *any kind of Intereſt*, at the *Time of ſub-* " *ſcribing*, could *not* afterwards be taken off;" and the Application of this Paſſage in Support of it, was much agitated in *Weſtminſter-Hall* and the whole Kingdom.

A Gentleman at the Bar, purſuing the Propoſition through all it's Conſequences, hit upon this Point—" That a *Charge upon Land* for " Payment of *Debts*, would defeat the Will, if a ſubſcribing Wit- " neſs," was a *Creditor* at the *Time of Subſcribing*." Aſſoon as it occurred to him, He mentioned it to Me. There had been *many* ſuch Deviſes: But the Queſtion, " Whether the Witneſs was a Cre- " ditor, *never had been aſked* at Law; nor by Interrogatories in Chancery, framed to eſtabliſh or impeach a Will.

If the General Rule was right, the Deduction ſeemed very plauſible.

He put this Point in Iſſue, in Chancery; and examined to it, in Behalf of the Heir, in ſeveral Caſes. Lord *Hereford*'s Will was one of the firſt: *This* was another.

A Caſe ſoon happened which brought the General Propoſition flung out by Ld. Ch. J. *Lee*, under *Judicial* Examination. On the 10th of *February* 1746, The Earl of *Aileſbury* died; having made a Will, 15th *May* 1746, of his whole Eſtate real and perſonal, charged with Debts and *Legacies:* The three ſubſcribing Witneſſes, as being in his Service at his Death, had *Legacies*; One, 30 *l.* a Year for Life; the other two, pecuniary Legacies. All three *releaſed*, the 12th of *February* 1746.

He had made a former Will, on the 20th of *December* 1744, atteſted by 3 diſintereſted Perſons; under which, the 3 ſubſcribing Witneſſes to the laſt Will would have had the *ſame* Legacies.

A Bill was brought in Chancery, to have the latter Will eſtabliſhed, notwithſtanding this Doubt; and ſtating the whole Matter. Notwithſtanding the Will of 1744, which the Teſtator had revoked, (as He thought, effectually,) and might probably have cancelled; It was a Benefit to the Witneſs, *at the Time of Subſcribing*, to have a Legacy under the *laſt* Will.

The Cauſe came on to be heard, the 5th of *November* 1748. And I was of Counſel, in it.

I had taken the Liberty to aſk Mr. Juſtice *Deniſon*, " Whether " the Judgment of the Court, in the Caſe of *Anſty* v. *Dowſing*

" went upon the *General* Propoſition." He told me it did *not*; but upon the *particular Circumſtances*. As to himſelf, He was *not* of Opinion, " that an Objection of Benefit, at the Time of Subſcri-" bing, *might not be taken off*, by being diſintereſted, at, or after " the Death."

I mentioned this to the Lord Chancellor, who had got from Ld. Ch. J. *Lee*, a Copy of the Opinion He delivered: And He was clear, " *they were good Witneſſes*." At the *Death* of the Teſtator, it was indifferent to them, *which* Will prevailed: Beſides, they had *releaſed*: He declared the laſt Will, of the 15th of *May* 1746, to be *well proved*, *eſtabliſhed it*, and *decreed the Truſts*.

There is another Matter touched in that Opinion delivered by Ld. Ch. Juſt. *Lee*, which interferes with the Rule I have laid down, in it's *full* Extent: *viz.* " That a ſubſcribing Witneſs who is a *ſeveral* " *Deviſee*, which Deviſe *as to him* muſt be void, ſhall not by his " Subſcription authenticate the *Reſt* of the Will." But, for this, no Authority is cited. In the Caſe of *Hilliard* v. *Jennings*, the whole Land was deviſed to *William Hilliard*. And I am ſatisfied that Ld. Ch. J. *Holt* took the Diſtinction, " That the Will might " be only void, *quoad the* DEVISE *to the Witneſs*:" Becauſe *Carthew*, [*pa.* 514.] who was Counſel in the Caſe, and has reported it the moſt correctly, *hints* an Expreſſion of that kind, *viz.* " That it was void " *quoad* the Deviſe of the Lands to the Plaintiff;" And Ld. *Ray-*
* 1 *Peere Wms.* 557, 558. *mond*, in the Caſe of * *Baugh* v. *Holloway*, ſays *expreſly*, " That " Ld. Ch. J. *Holt* ſo determined.

The Validity of the Will, as to the *Perſonal* Eſtate, was not before the Court, and never could come before the Court, becauſe *that* Queſtion belonged to another Juriſdiction. The Caſe in Judgment was of a Deviſe to the Witneſs *only*. Ld. Ch. J. *Holt* might, very properly, throw out ſomething to guard againſt Inferences from their preſent Determination, to the Caſe of a Deviſe to a *third* Perſon.

I have looked into the Regiſter-Book, for that Caſe of *Baugh* and *Holloway*; and find the State of it to be this—*Richard Baugh* died, leaving *Elizabeth* his Wife, and two Sons, named *John* and *George*; having firſt made his Will, dated 11th *June* 1707, whereby he deviſed certain Premiſſes to his youngeſt Son *George* his Heirs and Aſſigns, charged with the Payment of 200 *l*, which was due on Bond to *Lancelot Baugh*, the Teſtator's younger Brother. And the ſaid Teſtator alſo deviſed certain other Lands to the ſaid *George*, with a Proviſo, that on the ſaid *George*'s attaining 21 and having 1000 *l*. paid him, then all the ſaid Premiſſes ſhould return to his eldeſt Son *John*. And in Caſe both his ſaid Sons ſhould die under

21 and unmarried, then the ſaid Teſtator deviſed the ſaid firſt mentioned Premiſſes to his Wife *Elizabeth* her Heirs and Aſſigns, charged with the Payment of the ſaid 200 *l*, to the ſaid *Lancelot Baugh*, and alſo with the Payment of 150 *l*, to the ſaid *Lancelot Baugh*'s Children; and deviſed the ſaid laſt mentioned Premiſſes to his Brother *Edward Baugh* his Heirs and Aſſigns. Both the Teſtators ſaid Sons died without Iſſue, under Age: And *Elizabeth Baugh* poſſeſſed and enjoyed the ſaid Premiſſes under the ſaid Will, and afterwards died, 20th *October* 1714; having firſt made her Will, and deviſed the ſaid firſt mentioned Premiſſes to *Catharine Rawlins*, charged with the Payment of her Debts, and alſo ſubject to the ſaid Charge made by her Huſband's Will. *Catharine Rawlins* entered, and enjoyed the ſaid Premiſſes, and died; having made her Will dated 26th *May* 1716, and deviſed the ſaid Premiſſes to *Anne Oxenden* and *Elizabeth Holloway* as Tenants in Common, charged with the Payment of the Debts and Legacies appointed to be paid thereout by the ſaid *Richard Baugh*, and alſo of the Debts, *&c.* of the ſaid *Elizabeth* unſatisfied by the ſaid *Catharine Rawlins*. The ſaid *Anne Oxenden* and *Eliz. Holloway* claimed the ſaid Premiſſes, as only Children of *John Holloway* by *Anne* his Wife, and as Coheirs at Law of the ſaid *Eliz. Baugh* and *Cath. Rawlins*. *Lancelot Baugh* filed his Bill, and claimed as Uncle and Heir at Law of *John Baugh* the ſurviving Son of his Brother *Richard Baugh*; thereby impeaching his ſaid Brother's Will.

The Order is ſtated right in 1 *Peere Wms.* 558: And on ſearching the Regiſter's Book, it could not be found to have come on again. Therefore it is reaſonable to think the Heir muſt have been adviſed to drop it.

Deviſes of Lands differ extremely from *Wills*. They are no Appointment of an Heir; They create no Repreſentation; The Deviſee does not ſtand in the Place of the Deviſor, as to ſimple-contract Debts; and till the * Statute of King *William*, the Deviſee was not liable to Specialty Debts, (becauſe he was conſidered as an Alienee, and not as the Heir.) They are Conveyances or Diſpoſitions *Mortis Cauſâ*: And that is the Reaſon why a Man cannot deviſe Land which he ſhall afterwards acquire.

* 3, 4 *W. & M. c.* 14.

One Deviſe may be void, (as in the Caſe of this very Will;) and the Deviſe of another Eſtate, good. There is no Probate of the whole Inſtrument: Every ſeveral Deviſee muſt make out his Title, in a diſtinct Cauſe, and *de novo*, againſt every new Party.

Upon legal Principles, there is great Weight in the Diſtinction ſaid to have been made by Ld. Ch. J. *Holt*: And the Authors referred to by *Swinburne* are ſtrong, upon the Reaſon and Fitneſs of the Thing.

The Danger of Fraud, from the Imagination "that four Witneſſes might * divide the Eſtate among them," ſeems very chimerical. That very *Contrivance* would overturn the Will. If it would not; they might as well execute their Scheme, by four Deviſes, in four Paragraphs, ſeverally atteſted.

* By contriving to atteſt, each for the three others, as to the Lands deviſed to thoſe others; though none of them could be a good Witneſs as to the Deviſe to Himſelf.

Thirdly—In the third and laſt Place, I propoſed to conſider the preſent Caſe under it's *own* Circumſtances.

Theſe Witneſſes are in the Nature of *Legatees*; not ſeveral *Deviſees*.

The Preſumption of "Intereſt at the Time of *Subſcription*" is *taken off*, at the *Death*, by the principal Funds being more than ſufficient: It is taken off, *before the Trial*, by the Debts being *paid*.

But the Benefit at the Time of ſubſcribing was *Nothing*. It does not appear the principal Funds *then* were deficient. The Legacy is a *bare Poſſibility*, upon a Contingency; which Contingency *never happened*.

But I will go farther, I think a *Charge* "*to pay Debts*" ought *not* to incapacitate ſubſcribing Witneſſes; *although* they wanted and claimed the Benefit of it. Every Honeſt Man ſhould make that Charge in his Will: He who omits it, is ſaid to ſin in his Grave.

Fraud can not be preſumed, from inſerting a Clauſe which it would be iniquitous *not* to put in.

No Man would reſort to wicked and fraudulent Practices, to get his Debt charged upon Land by the *Will* of his Debtor: If he ſuſpected the Debtor's Circumſtances, He would not ſtay till his Death or Truſt to a *revocable* Security.

The Preſumption of Fraud in this Caſe would be againſt Juſtice and Truth; and the public Inconvenience ſo great, that hardly a Will could ſtand.

This Charge ought to be in every Will.

The Perſons attendant upon a dying Teſtator, and therefore moſt common Witneſſes, are generally in *ſome* Degree *Creditors*; ſuch as Servants, Parſon, Attorney, Apothecary, *&c:* And the diſallowing ſuch Perſons to be Witneſſes can not anſwer any Ends of public Utility.

Upon the Whole We are all of Opinion that this Will is *duly* atteſted by three Witneſſes.

JUDGMENT for the PLAINTIFF.

Rex *verſ.* Strong.

MR. *Clayton* had moved (on the 19th Inſtant) That the Defendant might be at Liberty (without paying any Coſts) *to pay into Court* 40*s.* being the *Penalty* for his *exerciſing the Trade* of a Grocer, for the Space of one Month, contrary to 5 *Eliz. c.* 4; whereof he had been convicted upon an Indictment found at the laſt *Cumberland* Aſſizes; (which Proceedings the Defendant had removed hither by *Certiorari*;) And that thereupon the *Recognizance* might be *diſcharged:* And He founded his Motion upon the Authority of *Rex* v. *French*, *Paſch.* 24 *G.* 2. *B. R. Rex* v. *Fiſher*, *Tr.* 24 *G.* 2. *B. R.* (Both, on the Motion of Mr. *Ford*;) in which Caſes, this was done; becauſe by 5, 6 *W. & M. c.* 11. §. 3. No Coſts are payable, *but* upon Indictments brought by the *Party grieved*, or upon Proſecutions by Juſtices, *&c*, or other civil Officers proſecuting *as ſuch*. And ſo it was alſo, in a former Caſe, of *Rex* v. *Mary Incledon*, *M.* 20 *G.* 2. *B. R.* A Rule was made to ſhew Cauſe. And now, Mr. *Norton* not objecting to this Motion, (being ſatisfied with the Caſes cited—)

The ſaid RULE was made ABSOLUTE.

Jenkin *verſ.* Whitehouſe and Another.

MR. *Madocks* moved for a *Prohibition* to the Conſiſtory Court of the Biſhop of *Coventry* and *Litchfield*, to ſtay Proceedings in a Cauſe there, relating to the WILL *of a* MARRIED WOMAN, who was a Midwife by Profeſſion, and had, by her Marriage-Settlement, a Power given Her *to make a Will* for the Diſpoſition of her perſonal Gains in that Profeſſion. He ſaid this was *not a* WILL, properly ſpeaking: A *Feme-Covert* can *not* make a *Will*; And cited 1 *Mod.* 211. Anonymous, as in Point. Alſo in a Caſe of *Rex* v. Dr. *Betteſworth*, upon the Application of *Miles Barnes* Eſq; againſt *Diana Robſon*, Daughter of *Diana Elwick*, formerly *Diana Robſon* and late Wife of Governor *Elwick*, on 27th *November* 1751. *M.* 25 *G.* 2. *B. R.* this Court agreed "that the Spiritual Court "could *not* treat it as a Will, by granting *Probate* of it;" though it is true, in that Caſe, the Court did not even make a Rule "to "ſhew

" ſhew Cauſe why a Prohibition ſhould not go;" Becauſe they thought the Spiritual Court had taken the right Method, *viz. annexing* the Paper or Inſtrument purporting to be Mrs. *Elwick*'s Will, to an Adminiſtration granted to her ſaid Daughter Mrs. *Diana Robſon*, upon the Renunciation of the Executors. And ſo, 1 *Salk.* 313. *Shardelow* v. *Naylor*; and *Farreſley* 147. S. C. ſhews " that " this is not a Will, nor proveable by the Ordinary."

And the Caſe of *Burnet* v. *Holgrave* in *Equity Caſes Abr. pa.* 296. ſhews that this is not in it's own Nature *teſtamentary*.

And He ſaid that the *Adminiſtration* granted to the Huſband, had been brought *into the Spiritual Court, pendente lite* there: Which He prayed might be RE-DELIVERED to him; and that this laſt Clauſe might be added to the Rule.

LORD MANSFIELD—That is going too far: We will not add *that*.

* 5th *July* 1744. In a Cauſe of *Roſs* v. *Ewer*, in Chancery, * there was a Power to a Feme Covert; " to appoint *by Will*." Lord Chancellor held clearly, " though ſuch Will operates as an Appointment, it *muſt be* " *proved* in the Spiritual Court:" And he would not proceed, *till* the Will was ſo *proved*. It was not material for him to conſider of the *preciſe Form* in which it was to be *proved*; whether by a *ſtrict Probate*, or by granting Adminiſtration with the Appointment in nature of a Will *annexed:* And therefore *that* Point was not entered into. But the *Fact*, " that the Paper *was* her Will, in Caſe " ſhe had a Power to make one," muſt be *eſtabliſhed by the Eccleſiaſtical* Court: For ſuch an Appointment is in the *Nature* of Will, and attended with all the *Conſequences* of a Will.

As to the Determination in the Caſe of *Burnet* v. *Holgrave*, " that " Money appointed, under the Execution of a Power, by ſuch a " Will, ſhould not lapſe;" It was very fully conſidered, and contradicted in the Cauſe of the Duke of *Marlborough* againſt the Earl of *Carliſle*, Earl *Godolphin*, and Others, in † Chancery.

† 26th *Nov.* 1750.

The Caſes cited or referred to by Mr. *Madocks*, ſhew that *Adminiſtration may be granted*, with the Appointment *annexed:* Which proves it to be *teſtamentary*. For nothing can be *annexed* to an Adminiſtration, but a *teſtamentary* Diſpoſition? Which is proved and eſtabliſhed by the Eccleſiaſtical Court in *that* Form.

But if the Queſtion be, " Whether the Wife *had a Power* to " make an Appointment in the Nature of a Will, and thereby to " deprive the Huſband of any Benefit which by Law would de- " volve upon him in Conſequence of her Death," *That* is a Queſtion

ſtion proper to be conſidered here: And if She had *no* ſuch Power, this Court will grant a Prohibition. And *ſo far*, the Caſe in 1 *Mod.* 211. cited by Mr. *Madocks*, goes expreſsly.

It ſeems right, therefore, to grant a Rule "to ſhew Cauſe why "there ſhould not be a Prohibition:" And then the Caſe will be better underſtood, under all it's Circumſtances.

The COURT granted a Rule to ſhew Cauſe:
But It never came on again.

Rex *verſ.* Stephens.

Saturday 26th *November* 1757.

MR. *Coxe* moved for an Information in Nature of a *Quo warranto* againſt the Defendant *John Stephens* Eſq; to ſhew by what Authority He acted as one of the Aldermen of the Corporation of St. *Ives* in *Cornwall.*

The Fact upon which the Information was prayed, was the Defect of the Defendant's Title: Which ſtood as follows—

John Noall was elected Alderman in *June* 1728. WITHOUT *being then a Burgeſs or Aſſiſtant*; (which was a neceſſary *previous* Qualification:) And the ſaid *John Noall* was, the next Year, elected Mayor. And all the ſucceeding Mayors and Aldermen were elected UNDER *Noall and his Succeſſors* in the Mayoralty, (Each, *under* his reſpective Predeceſſor;) and likewiſe *by* Aldermen claiming under *Noall*'s ſaid *defective* Election; till in *September* 1741. the DEFENDANT *was elected Alderman*, BY ſuch DEFECTIVE *Electors* as aforeſaid; and in *November* 1742, He was, by the like and no better Authority, elected *Mayor*. And it was ſworn that by the Conſtitution of the ſaid Burrough, there CAN *be no* DUE *Election*, of a Mayor or Alderman, without a *legal* Mayor preſiding at ſuch Election.

Note.—*Noall* died, a Year ago, in *quiet Poſſeſſion* of his Office of *Alderman.*

The COURT were clear and unanimous in REFUSING *to grant* this Information; by reaſon of the STALENESS of the Defect of Title, aſſigned as the Foundation for it; which was of no leſs than 29 Years ſtanding. For they thought it would be of very ill Conſequence to Corporations, if the Court ſhould, AFTER *ſo many* Years Acquieſcence, QUIETA *movere*, and call Corporators to account for acting under ſuch Elections, depending upon the prior

Rights of Others, whoſe Rights had *never* been before objected to: Which muſt occaſion infinite Confuſion in Corporations.

And They ſaid that though there was indeed no Statute nor even fixed Rule of Limitation, as to the Length of Time which ſhould ſuffice to quiet the Poſſeſſors of theſe Offices, yet the Court, in their Diſcretion, ought to refuſe granting theſe Motions, after a great Length of Time.

And Lord Mansfield obſerved that there was no direct and expreſs Limitation of Time, when a *Bond* ſhould be ſuppoſed to have been ſatisfied: The General Time indeed was commonly taken to be about 20 Years; but He had known Lord *Raymond* leave it to a Jury upon 18 Years.

Mr. Juſt. Foster mentioned a Caſe of *Malmeſbury*, not ſo ſtrong as this Caſe: Where an Information was denied. *

* In a Caſe of *Rex* v. *Mayor of Bridgewater*, *M.* 6 *G.* 1. *B. R.* An Information was refuſed, after 35 Years Acquieſcence under the New Charter.

And Mr. Juſt. Denison mentioned a like Caſe in † *Leominſter*: In which He himſelf was Counſel. †

† But the *Leominſter* Caſe (which was *Rex* v. *Spencer*, 1ſt *June* 1741. *Tr.* 14, 15 *G.* 2. *B. R.* was not determined upon *this* Point; (far from it, indeed:) but was refuſed for the Inſufficiency of the *Affidavit*, and not properly proving the *By-Law* on which the Motion was grounded.

Per Cur. unanimouſly
The Motion was denied.

Rex *verſ.* Inhabitants of Lower Swell.

Mr. *Aſton* ſhewed Cauſe againſt quaſhing an Order of Seſſions, which diſcharged an Order of two Juſtices made for removing One *Hannah Duns* from *Lower Swell* to *Turk-Dean*.

The Short of the Caſe was That a *Cottage* at *Lower Swell* had been ſeveral Years ago, and before ‖ 9 *G.* 1. *c.* 7. *purchaſed* for a Term of 2000 Years, by one *Ambroſe Duns* for 15 *l.* 10 *s.* Which *Ambroſe Duns* afterwards died *inteſtate*. *John Duns*, his Son, entered, and lived 17 Years in this Cottage; and then died *inteſtate* alſo. Then, after his Death, his Widow, *Hannah Duns*, the preſent Pauper, lived in it above 40 Days, without *taking out any Adminiſtration:* After which, She was removed. And then afterwards, (after ſuch Removal,) She *took out Adminiſtration*.

‖ See Section 5th of that Act.

Mr. *Aſton* obſerved that the Order of Seſſions runs thus—(" *Which John Duns,* before He *came to live* in this Cottage, LIVED " at *Turk-Dean.*") And this is *only in a Parentheſis:* So that it is *not expreſly ſtated* " That He *was* SETTLED at *Turk-Dean.*" Whereas in the Caſe of *Widworthy* v. *Farringdon, Tr.* 10, 11 *G.* 2. *B. R.* It was expreſly ſtated " that the Man was SETTLED at *Far-*" *ringdon.*" And conſequently *that* Perſon's DERIVATIVE Settlement under his Father, was *gone*; And therefore HE ought to have taken out Adminiſtration. But the ſame Concluſion will not hold in the preſent Caſe: For here *John Duns* does *not* at all appear to have had *any* OTHER Settlement, than the *derivative* Settlement under his Father *Ambroſe*; upon which, He Himſelf, the Son, had lived 17 Years, before his Death; And if he had lived there only 3 Years more, it had been a good Title even under an *Ejectment.*

Mr. *Vernon contra*—He inſiſted on the Caſes of *South Sidenham* v. *Lamerton, Tr.* 3 *G.* 1. *B. R.* and *Widworthy* v. *Farringdon,* to prove " That the *taking out Adminiſtration* was neceſſary." For the two Juſtices have adjudged the Settlement of *John*'s Widow and Children to be in *Turk-Dean:* And *Turk-Dean* muſt be taken to be ſo, upon the whole of this Caſe. The Seſſions *give a* BAD *Reaſon for diſcharging* this original Order. Therefore the Order of Seſſions is ill; And the Original Order muſt ſtand.

LORD MANSFIELD—No: They do not give it AS *a* REASON; but *ſtate* it AS *a* FACT. And upon the Facts ſtated, it does *not* appear that *John* was *ſettled* at *Turk-Dean:* On the contrary, it appears that *Ambroſe*'s Son *John Duns* and all his Family, lived with *Ambroſe, at Lower Swell,* and *gained a* DERIVATIVE *Settlement* THERE under him.

The Three other Judges were unanimouſly and clearly of the ſame Opinion.

Per Cur. unanimouſly—
ORDER of SESSIONS (diſcharging the Order of two Juſtices) AFFIRMED: And the Original ORDER, QUASHED.

V. Poſt. Rex v. *Inhabitants of Cold Aſhton, H.* 31 *G.* 2.
S. P. as to taking out Adminiſtration

Cockerill,

Monday 28th *November* 1757.

Cockerill, Aſſignee, *verſ.* Owſton.

THE Queſtion was Whether a *Bankrupt's Certificate*, obtained after Judgment in an Action *upon a Bail-Bond*, againſt the BANKRUPT HIMSELF, (For the Bail were *not at all* concerned in this Motion,) ſhould *diſcharge the Bankrupt* FROM THIS *Judgment upon the* BAIL-BOND, as well as from the *Original* Debt: (Which the Plaintiff's Counſel agreed that it *did* diſcharge Him from.)

Note—The Defendant had paid the Money into the Sheriff's Hands, upon being taken up by a *Ca. Sa.* in Order to procure his Liberty. So that the Motion was "That the Money "might be reſtored to the Defendant, with Coſts." And the Court had granted a Rule to ſhew Cauſe, upon Mr. *Luke Robinſon*'s Motion: Againſt which Rule, Mr. *Clayton* now ſhewed Cauſe.

The COURT held that the Certificate *obtained ſubſequent* to the bringing of this Action upon the Bail-Bond, (though ſuch Certificate was founded upon an Act of Bankruptcy *prior* to the bringing this Action upon the Bail-Bond,) did NOT *diſcharge the Bail-Bond*; although it diſcharged the *Original* Debt: For that this was a *new* and *diſtinct Cauſe of Action.*

Indeed ſuch Certificate ſhall diſcharge Proceedings depending *againſt Bail* in an Action upon the old Debt, *who are* NOT *already* FIXED: So it has been lately determined. *V. ante, pa.* 244. *Woolley* v. *Cobbe & al.* (Which is the Caſe they hinted at.)

RULE DISCHARGED: And Ordered that the Sheriff pay the Money to the PLAINTIFF.

The End of *Michaelmas* Term 1757. 31 *Geo.* 2.

Hilary

Hilary Term

31 Geo. 2. B. R. 1758.

Roſe *verſ.* Green.

Thurſday 26th *January* 1758.

THIS Caſe came before the Court upon a Reſervation by Lord *Mansfield* at *Niſi prius* at *Guildhall*, for the Opinion of the Court "Whether the Defendant became a Bankrupt, on the 31ſt of *March*, or on the 6th of *May*:" Which particular Day was to be indorſed upon the *Poſtea*, agreeably to ſuch Opinion.

This Mr. *Green* having been *arreſted for Debt in* KENT, on the 31ſt of *March*, was afterwards, on the 6th of *May* following, brought up by an *Habeas Corpus*, in order to be turned over; And, on the Road to the Judge's Chamber, was permitted (at the Deſire of Himſelf and his Father,) to call at his Attorney's Houſe (Mr. *Penfold*'s) upon *Garlick Hill* in the City of *London*, which was OUT *of the* COUNTY *of Kent*; and was carried thence, (by a *Habeas Corpus*,) directly to a Judge's Chamber, to be bailed; and accordingly was bailed, but INSTANTLY *there ſurrendered* by his Bail, in diſcharge of themſelves, who had juſt before bailed Him; and thereupon *committed*, EO INSTANTE, *to the King's Bench Priſon*, where he lay above two Months, *viz.* from the ſaid 6th of *May* till the 15th of *July* next following.

Sir *Richard Lloyd*, Mr. *Caldecott*, and Mr. *Bainham* argued that this was an Act of Bankruptcy *from the Time* of the *firſt* Arreſt, taking it either of theſe two Ways; *viz.* either 1ſt. As *a* LYING IN PRISON *two Months* after having been arreſted for Debt; (under 21 *J.* 1. *c.* 19. § 2.) Or 2dly. As *an* ESCAPE out of Priſon, (under the ſame Clauſe) this Arreſt being for above the Sum of 100 *l.*

1ſt. If a Trader ſurrenders himſelf in *diſcharge* of his Bail, and *then* lies two Months, it is a Bankruptcy from the *firſt* Arreſt. *Smith* v. *Stracy*, 2 *Ann.* 1 *Salk.* 110. at *Niſi prius* at *Guildhall*—Ld. Ch. J. *Holt* ſo inclined, and gave his Reaſon for it: Which Caſe was ſubſequent to the Caſe of *Came* v. *Coleman* in 1 *Salk.* 109. (where indeed the Court held otherwiſe.) *Tribe* v. *Webber*, *P.* 17 *G.* 2. *C. B.* was a Diſtance of more than *Nine Months between* the Putting in Bail, and the Surrender.

2dly. His being *in London* was an ESCAPE: And the Debt being *above* 100 *l.* this *Eſcape* is an Act of Bankruptcy *from the firſt Arreſt.*

Mr. *Norton* and Mr. *Burrell*, *contra.*—The Queſtion upon the Caſe ſtated at the Trial, and reſerved for the Opinion of the Court, is, "Whether He ſhall be a Bankrupt, *from* the 31*ſt of March*, "when he was *firſt arreſted*; or from the 6*th of May*, when he "was *ſurrendered* and committed to the Marſhal; (in whoſe Cuſto-"dy he lay from the 6th of *May* till the 15th of *July*.")

As to the 2d Point—This was NOT a WILFUL Eſcape in the Priſoner: But he was *carried* out of the County by the Sheriff. And ſurely *this Act of a third Perſon* ſhall not make a Man a Bankrupt. Nor indeed can a *permiſſive* Eſcape ſuffered by the Sheriff, or any *Act of the Sheriff*, make a Man a Bankrupt; who is, in many reſpects, conſidered as a *Criminal.*

As to the 1ſt Point—When a Perſon is *once admitted to Bail*, his Lying in Priſon *ſubſequent* thereto, *viz.* the *firſt Day of his* DOING ſo *after being Surrendered*, ſhall be the Time to which his Bankruptcy *ſhall relate:* And *not* the Time of the firſt *Arreſt*, upon which He put in Bail.

The Caſe of *Duncomb* v. *Walter* in 1 *Ventr.* 370. is ill reported there. So, in 3 *Lev.* 57. it is ill reported. It is alſo reported in Sir *Tho. Raymond* 479. and in *Skinner*, twice; *viz. fo.* 22 & 87, 88. In which laſt, it appears to be ſolemnly ſettled, "that the "Relation to make a Man a Bankrupt ought to be upon an *actual* "lying in Priſon, and *not* upon putting in *Bail* only." *

* *N. B.* None of theſe Reports of this Caſe are well drawn up, except Sir *Tho. Raymond*'s: And that is only an Argument, with an *Adjournatur.*

Came v. *Coleman*, 1 *Salk.* 109. is S. P. *viz.* "that the Bankruptcy "ſhall only be from the Time of *ſuch* firſt Arreſt, *upon which* He "lies in Priſon: *Not* where he puts in ſufficient *Bail.*" And in 17 *G.* 2. *Tribe* v. *Webber*, *C. B. per tot. Cur.* the ſame Point was reſolved unanimouſly. The Caſe of *Smith* v. *Stracy* in 1 *Salk.* 110, 111. is only an Opinion of Ld. Ch. J. *Holt* at *Niſi prius.*

And it is admitted that the preſent Defendant was *at large*, at a Time intervening between the Arreſt and the Surrender. But even allowing him to have *remained* in Cuſtody of the Sheriff of *Kent*, Yet the two Months can only run from his firſt LYING in Priſon. There muſt be *ſome* Time (more or leſs) between his being bailed, and his being committed to the Marſhal. Therefore he was only a Bankrupt *from* the 6th of *May*.

Sir *Richard Lloyd* was beginning to Reply: But the Court thought it unneceſſary.

LORD MANSFIELD obſerved, that where poſitive Laws fixed and deſcribed what ſhould be looked upon as Acts of Bankruptcy, they ought to be conſtrued according to their *Intention*, and ſo as to *anſwer the Ends* of public Benefit, which the Legiſlature had in view.

Point. In thus conſtruing this Act of Parliament, He held this Caſe not to be SUCH *an Eſcape* as that the Man ſhould be thereby rendered a Bankrupt and a *Criminal*. For the Act clearly intended SUCH *an Eſcape* made by a Priſoner, as ſhews that he means to RUN AWAY, *and thereby defeat his Creditors*. But this is *not* SUCH an Eſcape: And certainly, a Man ſhall not be made a *Criminal*, where he had not the leaſt Criminal Intention to diſobey any Law whatſoever. There is *no Eſcape at all*, in the *Senſe* of this Act of Parliament: He *remained* SUBSTANTIALLY *in Cuſtody*, notwithſtanding his being *thus carried* into another County.

Point. Where *Bail* is *really* put in, the Bankruptcy *only relates* to the Time of the SURRENDER. The *moſt ſubſtantial* Trader is liable to be *arreſted*; And the MERE *being* ARRESTED, is *no* Preſumption of Inſolvency: The Preſumption from his LYING *in Priſon* two Months, WITHOUT *being able to get* Bail, is a *very ſtrong* One. But THIS *Sort* of Bailing is a *mere* FORM, to turn the Defendant over from One Cuſtody to another: The Bail *never juſtify*.

And upon Caſes of ſuperſeding Actions by reaſon of the Plaintiff's not proceeding upon them within two Terms, being *merely turned over* from one Cuſtody *to another*, is always conſidered as a *Continuance* of the *ſame* Impriſonment. And ſo I think it is, in the preſent Caſe, upon the *preſent Circumſtances*; Notwithſtanding what I have declared as my Opinion, upon the *general* Principle, and upon a *fair* and *ſubſtantial* Bailing. Therefore in the *preſent* Caſe, I think, the Bankruptcy *has* a Relation to the *firſt Arreſt*.

Point. Mr. Juſt. DENISON concurred, clearly, in both Points. Can it ever be called an *Eſcape* within the *Meaning* of this Act; when the Man

Man *by Permiſſion* of the Sheriff *paſſes through* another County, in being carried to a Judge or to the Court? Can this be eſteemed a *criminal Act* of the Man himſelf? Moſt certainly not.

1ſt Point. Nor can this *formal Bail* put in *without Juſtification*, and ONLY in ORDER *to be ſurrendered*, (which is a *mere Matter of Form*,) be conſidered as being OUT *of Cuſtody*, within the *Intent and Meaning* of this Act. No: It is a *Continuation of the ſame* Impriſonment; and has Relation to the *firſt* Arreſt and Impriſonment.

Mr. Juſt. FOSTER was clear on both Points; and expreſſed Himſelf to the ſame Effect, as Lord MANSFIELD and Mr. Juſtice DENISON had done.

Mr. Juſt. WILMOT alſo moſt clearly concurred. And He laid it down, "That theſe *Bankruptcy-Acts* were to be *conſtrued ac-* "*cording to their real Intention.*"

1ſt Point. The *general Principle* of the Caſes cited is right: But the *Reaſon* of them is ſtrongly *againſt* the preſent One, as it ſtands circumſtanced. Here is *not a ſingle Moment*, in which the Man is *out of Cuſtody:* It is a mere Form of *changing his Priſon.*

* The Words of it are, "or procure his Enlargement by putting in *common* or *hired* Bail." *V.* § 2.

And the very * Act itſelf *diſtinguiſhes* between *Common* Bail (or no Bail at all,) and *ſufficient* Bail. Now *this* Bail, in the preſent Caſe is, in Effect, NO *Bail* at all.

2d Point. The Acts which render a Bankrupt a *Criminal*, muſt mean an Eſcape AGAINST *the Conſent* of the Sheriff; a *running away*, and *breaking* his Priſon: Certainly *not ſuch* as this was, UNDER *the Conſent* of the Sheriff.

Cur. ORDERED the *Poſtea* to be indorſed, "That *Green* "became a Bankrupt on *the* 31*ſt of March.*"

Friday 27th *January* 1758.

Waring *verſ.* Griffiths, et al'.

THIS was a Caſe reſerved upon a Trial at *Niſi prius.*

The Plaintiff's Action was founded upon a preſcriptive Right of Burial of any Perſon dying in his Houſe at *Oſweſtree*, in the Chancel of the Church of *Oſweſtree*: In the Exerciſe of which, the Defendants had diſturbed him. And they themſelves acknowledged that they had diſturbed him in it.

The Caſe ſtated was, in ſhort, this: That the Plaintiff was ſeiſed of a Meſſuage &c. in *Oſweſtree* &c. and had ſuch a preſcriptive Right of Burial belonging to it; And that the Defendants *did diſturb* him in burying &c. and *were Wrong-Doers:* But (it was alſo ſtated) that 2 *s.* WAS DUE *to the Pariſh* of *Oſweſtree*, for *every Perſon* buried in the Chancel of that Church.

Mr. *Aſton*, on Behalf of the Plaintiff, argued that here were two Croſs-Preſcriptions; and that the *two* Preſcriptions were *diſtinct* and *collateral*; One, for the Plaintiff to bury &c. the other for the Pariſh to receive a Payment of 2 *s.* &c. for it: And therefore it was NOT *neceſſary to alledge* the latter, in the Declaration, it being only a *collateral* Recompence. And he cited *Cro. Eliz.* 546 & 563. *Lovelace* v. *Reynolds*, A Preſcription for Common; And found that he had Common, *paying* for it &c. So that that was *part* of the Preſcription; A *Condition precedent:* It was *paying for it*, every Year, a Penny to the Plaintiff. But it was holden to be otherwiſe, where there are *Two* Preſcriptions; One, for the Commoner; the other, for the Lord: as in the Caſe in *Cro. Eliz.* 405. *Gray* v. *Fletcher*, Where the Preſcription was found; And "that he and "all thoſe &c. *had* USED to pay for it, every Year a Hen and five "Eggs." 5 *Co.* 78. S. C. *Gray*'s Caſe—And there, the Terre-tenant was adjudged to have a Remedy for the Recompence. And therefore this was holden to be *only Collateral*, and as *two* Preſcriptions; and therefore need not be alledged, the Preſcription being perfect without it. So here, it need not be alledged: But they may have their *Collateral Remedy*; as, in the *Eccleſiaſtical* Court, they may have. In proof whereof, he cited 1 *Ventr.* 274. *Anonymous*. Where it is ſaid "That the Remedy for a Duty of this kind "is in the Eccleſiaſtical Court."

And this Fee is not to be paid *till after* the Burial: And therefore the Non-payment of it cannot defend the Wrong-Doer, who is a *Stranger*. So, in an Action againſt a *Stranger*, for diſturbing his Seat, or Sepulture in a Church, it is *not* neceſſary to ſhew any *Title in the Plaintiff*. 3 *Lev.* 73. *Aſhly* v. *Freckleton:* Though, in ſuch an Action againſt the *Ordinary* himſelf, it *is* neceſſary to ſhew ſome Cauſe; as building, repairing, &c.

Kenrick v. *Taylor*, *Paſch.* 25 *G.* 2. *B. R.* It was ſolemnly determined "That in the Caſe of a Stranger and Wrong-Doer, it was "*not* neceſſary to alledge more than his own Right and a Diſtur-"bance."

He mentioned the two following Caſes, *viz.* 2 *Lutw.* 1517. *Bennington* v. *Taylor*; and 3 *Lev.* 90. *Chaſin* v. *Betſworth*, Which,

(as he ſaid) are like this Caſe. They were Diſturbances, by Strangers, in erecting Stalls in a Market-Place: And no Title is ſhewn. So, in Caſe of a free Fiſhery.

And the Finding is quite immaterial. For this collateral Claim
* 4th Point. is no Part of the Plaintiff's preſcriptive Right. *Palmer* 82. * the Caſe of the Corporation of *Maidenhead*, in a Claim of a Market *&c.* *Mayor of Northampton* v. *Ward. Mich.* 19 *G.* 2. *B. R.*

Mr. *Hall contra* for the Defendant argued that it was PART *of the Preſcription*; and that it *ought to have been alledged*, even *againſt a* WRONG-*Doer*, "that this 2*s.* was payable to the Pariſh, for "every Perſon ſo buried." This is a Preſcription upon a *Condition precedent*. It is an *entire* Preſcription: The Payment of the 2*s.* is *Parcel* of the Preſcription; and it ought to have been ſo laid and alledged. Preſcriptions are againſt Common Right; and ought to be proved, as laid: And the Plaintiff muſt prove it as laid; even *againſt a Wrong*-Doer. And if the Evidence fall ſhort of the Preſcription pleaded; it will be againſt the Perſon who pleaded it. In proof of which Poſition, He cited theſe Caſes—*Carthew* 241. *Rex* v. *the Inhabitants of Hermitage et al.* The Preſcription was not proved as laid, becauſe there was an Exception. *Palm.* 362. *Countee de Devon* v. *Eyre*. Which was a Preſciption *pro Ovibus generally*; (inſtead of *Ovibus* ſuis:) The Proof failed. *Hobart* 209. *Michell* v. *Mortimer*. The Preſcription failed; becauſe it was laid too large. *Cro. Eliz.* 415. *Boraſton* v. *Hay*; A Cuſtom pleaded generally; but found with an Exception: It is againſt the Pleader. *Carthew*, 117. *Murgatroid* v. *Law*. The Caſe of *Potwater* mentioned by *Popham* in *Gray*'s Caſe 5 *Co.* 78. *b.* and *Cro. Eliz.* 405. laid *generally*; found "*paying* 6*d.* by the Year" was ill laid. *Lovelace* v. *Reynolds Cro. Eliz.* 546, 563. allows *Gray*'s Caſe, and the Caſe of *Potwater*. 2 *Ro. Abr.* 720. *Title Trial, pl.* 30. in Prohibition—The Plaintiff declared upon a Preſcription about Lambs; And the Jury found farther, *&c:* It was holden that the Plaintiff *ought to have rehearſed the* WHOLE of it; and that for not doing ſo, he had failed in his Preſcription.

Now here, the Payment of 2*s. is* PART *of the Preſcription* and muſt be *as ancient* as the Right; which is "to bury in the Chan-
* Note. He does *not* here ſtate the preſent Preſcription *truly*, according to the Caſe ſtated. *V. ante* 441.
"cel, any Perſon dying in his Houſe; * *paying* 2*s.* for each Per-
"ſon." Which is a Condition PRECEDENT, and therefore ought to have been alledged. *Forreſter*, 166. Sir *John Robinſon* v. *Comyns*, "There are no technical Words to diſtingiſh Conditions pre-
"cedent, and Conditions ſubſequent." *Acherley* v. *Vernon—per* Ld. Ch. J. *Willes*. [See this Caſe in *Lucas* 518. *Watſon* 709.]

The Church-Wardens had no Remedy, but by Interruption. And being ſtated as *a Fee for* Burial, it ought to be paid *before* Burial.

The Court will not direct a Perſon to be turned over on *Ha. Cor. till* the Gaoler's Fees be paid. 2 *Hawk. P. C.* 151. §. 31. is ſo. So, in Caſes of the Fee of *Gloves*, on pleading Pardons. 1 *Siderfin* 452. *Rex* v. *Webſter*, "The Pardon is *not* to be *allowed*, till the Fees be paid, *viz.* the Gloves to the Court and Officers." Sir *T. Jones*, 56. *B. G.* preſented Gloves to all the Judges, according to Cuſtom. *Kely.* 25. Gloves are a *Fee due*, *on* pleading a Pardon.

—*We* are *not* the Church-Wardens, I agree; but *Wrong-Doers*. (And then he diſcloſed their Provocation: Which He ſaid was in Defence of the Bones of one Mr. *Griffiths*, a former Poſſeſſor of this Meſſuage; which Mr. *Waring* was turning out, in Order to make room for a *Servant* of his own.) But the Plaintiff had *no Right to the* SOIL: And therefore he ought to have *ſet out* his Title. And here, he ought to have *proved* his Caſe, AS *he has laid it*. 3 *Mod.* 48. 52. *Hebblethwaite* v. *Palmes*; *per* Ch. Juſtice, (at the End of the Caſe,) "The Plaintiff ought to *prove* "his Preſcription: Or elſe, he muſt be Nonſuit." And the *ſame* Preſcription ought to be given in *Evidence*, as is *laid*.

Gray's Caſe is *beſt* reported by Lord *Coke*, in 5 *Co.* 78. *b.* 79. *a.* And that Caſe turns upon the Remedy, which the Terre-tenant has for the Recompence. And according to the Caſe of *Potwater* there mentioned, (paying 6*d.* yearly,) here could have been NO *Remedy* for the 2*s.* Fee, *but* by a *ſubſequent* Diſturbance upon a *future* Burial.

Mr. *Aſton*'s Caſes are not applicable to the preſent Caſe; becauſe in them there was a *collateral* Remedy: But here We have none. Therefore the Plaintiff ought to be in the preſent Caſe nonſuited; and We are intitled to the *Poſtea*.

Mr. *Aſton* was going to reply: But

The COURT prevented him; being extremely clear for the Plaintiff: And LORD MANSFIELD ſaid—that the DISTINCTION is between the Caſe of the OWNER *of the Soil*, and the Caſe of a STRANGER, diſturbing the Perſon who has a Right of this Sort.

Where a Perſon claims a Servitude upon another's Property, he *muſt lay* and prove *the* WHOLE, againſt the OWNER of ſuch Property. There is a great Difference too between granting a Servitude,

tude, *abſolutely*; and granting it, *ſub modo:* The latter is a Condition precedent. And there are many Reaſons why in Caſe of a Condition precedent, where the Grantee brings his Action againſt the *Owner*, the *whole* ought to be *ſet out:* (which Reaſons He ſpecified.)

But in an Action againſt a *Stranger* and *Wrong-Doer*, it is *not* neceſſary to *ſet out* the *whole*. Here, (which is agreed to be in the Caſe of a WRONG-DOER,) the Plaintiff has *ſtated enough*, and has *proved* it. He claims a Right to bury in the Chancel; and is diſturbed by a Stranger and a *Wrong-doer*. What is the Defence? "That IF *he had* buried the Corpſe in the Chancel, (which the "Defendants hindered him from doing,) the *Church-Wardens* "WOULD HAVE *had* a Right to 2*s*. for a Burial-Fee." But he was *diſturbed*, by the Defendants, FROM *burying the Corpſe there:* And *then* the Church-Wardens had *no* Right to the 2*s*. For their Right aroſe upon the Corpſe *being buried there*.

For this Purpoſe, the Payment of the 2*s*. is *no material* and *eſſential* Part of the Preſcription; but *collateral* to it. It is *not* an entire Preſcription, as in the Caſe of *Lovelace* v. *Reynolds*; whereof the Payment of the Penny was *Parcel*.

Mr. Juſt. DENISON concurred entirely. And He diſtinguiſhed this Caſe (as Ld. *Mansfield* had alſo done) from that of *Lovelace* and *Reynolds:* which was "*paying* FOR *it*, every Year a Penny."

But whatever may be the Right that the *Church-Wardens* might in the preſent Caſe have, the Plaintiff had *no* Need to *ſet out* this Right, in an Action againſt a *Wrong-Doer*, a *Stranger*. I do not know that in *this* Caſe, he needed even to have ſet out any Preſcription, in this Action againſt a Stranger and Wrong-Doer. And this Matter ſeems ſettled in the Caſe of *Kendrick* v. *Taylor*.

Mr. Juſt. FOSTER concurred for the ſame general Reaſons. And He thought the Payment of the 2*s*. to be rather a *Cuſtomary* Payment, than a Preſcription: being "for EVERY Perſon buried in the Iſle, or Chancel." To which Ld. *Mansfield* agreed.

Mr. Juſt. WILMOT was alſo clear in the general Poſition laid down by the reſt, as before. And he obſerved alſo, "that the "Duty could *never ariſe till* AFTER *the Sepulture*." And therefore He thought that if the Action had *even* been brought *againſt* the Church-Wardens, it had yet been within the Diſtinction of *Gray*'s Caſe, and to be come at by a *collateral* Remedy; and *not Parcel* of the Preſcription, or a Qualification of it. But againſt a *Wrong-*

Wrong-Doer, POSSESSION *alone* is certainly ſufficient. Therefore He was clear, upon both Points.

Per Cur. unanimouſly
Let the POSTEA be delivered to the PLAINTIFF.

Rex *verſ.* Loxdale and FOUR Others.

MR. *Morton* had ſometime ago, (*viz.* on *Monday* 17th *November* 1755.) moved to quaſh an Order of two Juſtices appointing FIVE *Overſeers* for the Pariſh of St. *Chad* in *Shrewſbury*.

His Objection was that the Juſtices have no Power to *exceed* the Number of FOUR. Which Objection was founded upon the Words of 43 *Eliz. c.* 2. §. 1. "That the Church-Wardens of every Pariſh; "and FOUR, *three*, or *two* ſubſtantial Houſeholders there, as ſhall "be thought meet, having reſpect to the Proportion and Great-"neſs of the ſame Pariſh and Pariſhes, to be nominated yearly in "*Eaſter* Week or within one Month after *Eaſter*, under the Hand "and Seal of two or more Juſtices of the Peace in the ſame Coun-"ty, (whereof one to be of the *Quorum*) dwelling in or near the "ſame Pariſh or Diviſion where the ſame Pariſh doth lie, ſhall be "called Overſeers of the Poor of the ſame Pariſh: And they, *or* "*the greater Part of them, &c.*" And He mentioned a former Caſe of *Rex* v. *Harman*, upon the very ſame Point, which depended in this Court from *P.* 12 *G.* 2. to *M.* 15 *G.* 2. and at laſt was never determined; and alſo *Rex* v. *Beſland*, *Hil.* 19 *G.* 2. *B. R.* which was the *Reverſe* of an EXCESS of their Juriſdiction, where the Order, (being to appoint ONE Overſeer,) was confirmed.

A Rule was thereupon made, "to ſhew Cauſe." And after the Point had been ſeveral Times argued in Ld. Ch. J. *Ryder*'s Time, it came on to be argued once more, on the 27th of *January* 1757. before Lord *Mansfield*, He having never heard the former Arguments. When the ſame Things which had been ſo often ſaid, were again repeated.

On the Side of the Extenſion of the Number of Overſeers, *Uſage* was alledged, and greatly relied upon.

Note—The Court, miſled by Aſſertions "that there had been "a Uſage to appoint more Overſeers than four;" for fear of Inconvenience, had avoided determining the Queſtion in the Caſe of the *King* v. *Harman*, after it had depended ſix Years, in hopes that the Legiſlature would make ſome Proviſion for what was paſt, as well as for the Future. And upon the

ſame Apprehenſion, the Court had hitherto poſtponed the Determination of this.

Lord Mansfield ſaid He had ſeen full Notes of the former Arguments of the preſent Caſe; and alſo of the Caſe of *Rex* v. *Harman*. He obſerved particularly what was ſaid as to the Uſage in large Pariſhes. And He therefore had directed Inquiry to be made in many large Pariſhes, as to the Fact "Whether there had been "ſuch Uſage, or not." And he ordered the Return which had been made to Him upon ſuch Inquiry, by the Agents on both Sides, to be read. From which, it appeared that in St. *James's Clerkenwell*, 4. In St. *Bridgett's*, 3. In St. *Dunſtan's*, 2. In St. *Clement's Danes*, 4. In St. *Paul's Covent-Garden*, 2. In St. *George's Hanover Square*, 4. In St. *James's Weſtminſter*, 4. In St. *Margaret's Weſtminſter*, 2. In St. *Andrew's Holbourn*, 8: (but that Pariſh contains 3 ſeparate Diviſions.) In St. *Giles's in the Fields*, 8; (though *now* only 4 are appointed by the Juſtices, and act as Aſſiſtants, unleſs 8 voluntarily ſerve: but there were never leſs than 8 *before* the Caſe of *Rex* v. *Harman*.) In St. *Martin's in the Fields*, 5. (ſince the Act of Parliament lately made, which impowers them to appoint 9, if in the Diſcretion of the Juſtices it ſhould be thought proper.) In *Shrewſbury*, (which contains 5 Pariſhes;) In St. *Alſemonds*, 3. In *Holy-Croſs* and St. *Giles's*, 4. In St. *Mary's*, 4. St. *Julian's*, 4. St. *Chad's*, 5, for *one* Year only; And never exceeding 4. *but once*, *viz.* this *preſent* Year.

After reading the Report, Lord *Mansfield* proceeded, The Usage is, as it were, out of the Caſe; or rather, it ſuppoſes "that they can "*not* legally exceed 4."

Therefore, conſequently, but *little* Inconvenience can ariſe from determining the Conſtruction of the Statute, *according* to it's natural Import.

As to *legal* Conſtructions—The Caſe of *Rex* v. *Harman* was never determined, * *as* to the * Order for the Appointment *of Overſeers*.

In the Caſe of *Rex* v. *Beſland*, where *only One* Overſeer was appointed, *no* Opinion was given *judicially*, upon the Point of Law; nor was the Appointment † quaſhed. So that the preſent Caſe is a new Original Caſe: And it muſt be determined upon the 43 *Eliz. c.* 2; which is the Foundation of the Syſtem of Law concerning the Poor.

* There was *another* Order, adjudging *Harman* "to "have neg- "lected the "Execution "of his Of- "fice;" which *was* quaſhed in *Mich.* 13 *G.* 2.

† It was confirmed, as *not neceſſarily* appearing to be a bad Order: For it *might* be, "that others were appointed by "*other* Orders."

There

There is a known Diſtinction between Circumſtances which are of the *Eſſence* of a Thing required to be done by an Act of Parliament, and Clauſes *merely directory*. The *preciſe Time*, in many Caſes, is NOT of the *Eſſence*.

In the Caſe of *Rex* v. *Sparrow*, 2 *Strange* 1123. the Juſtices had been guilty of a *Neglect*, in not appointing Overſeers within *due Time:* And this Court iſſued a *Mandamus* to compel them to do it afterwards, for the *Sake of the Poor*. The Poor could not have had *a* SPECIFIC *Remedy*, in that Caſe; *unleſs* the Juſtices might do it *after* the preciſe Time, in Obedience to the *Mandamus*.

So, as to the Juſtices "*in or near* the Pariſh or Diviſion" It is *only Directory*.

Juſtices of Peace have *no other* Power to appoint Overſeers but under the Special Authority given them by Act of Parliament. Therefore this Special Authority muſt be ſtrictly purſued, and can *not* be *exceeded* by them. The Queſtion here is upon the Meaning and Intention of the Legiſlature, in this Power given the Juſtices to appoint Overſeers.

Where there are different Statutes *in pari materia*, though made at different Times, or even expired, and not referring to each other, they ſhall be taken and *conſtrued together*, as one Syſtem, and as explanatory of each other. So, in the Laws concerning Church Leaſes; and thoſe concerning Bankrupts. And ſo alſo I conſider All the Statutes providing for the Poor, as *one Syſtem* relative to that Subject. Now 39 *Eliz. c.* 3. is the firſt of theſe, and when firſt mentioned by my Brother *Foſter*, ſtruck Me ſtrongly, with regard to the Determination of the preſent Queſtion. That Act ſays, "That the "Church-Wardens and FOUR ſubſtantial Houſeholders, *&c.*" (*without any Latitude* whatſoever, for a greater Number.) And *more* than four could *not* have been appointed under it: For the Number the *Legiſlature* had named, could *not* be altered.

That Act of Parliament of the 39 *Eliz.* was *continued* by the very Act of 43 *Eliz. c.* 2. §. 18. till the following *Eaſter*, when that of 43 *Eliz. c.* 2, was to take Place: So that the Legiſlature had it before them, and even under *particular* Conſideration. And that Act of 39 *Eliz.* is expreſsly fixed to *four*. Pariſhes were not then, ſo populous as they are now. And this Act of 43 *Eliz. c.* 2. gives Power to *leſſen* the Number to Three or Two according to the Size of the Pariſh: But they had no Notion of *extending* it to a *greater* Number. And there is *ſome* Weight in the Circumſtance of the Numbers *deſcending* from 4 downwards, and *not aſcending* upwards.

As

As to the Argument which was drawn from 13, 14 *C.* 2. *c.* 12. §. 21. I think that Statute *ought* to be taken into the Conſideration, in conſtruing this of 43 *Eliz. c.* 2: But I do *not* ſee that this will help the Caſe. For it is begging the Queſtion, to ſuppoſe "that "the Juſtices MAY appoint *more* than 4 Overſeers of the Poor, in "Townſhips and Villages in thoſe large Pariſhes." It is expreſsly directed by that Statute of 13, 14 *C.* 2. *c.* 12. §. 21. that ſuch Choice and Appointment ſhall be, (And the Conſtruction of it muſt be guided according to it's *own* Reference,) "ACCORDING to the "Rules and Directions mentioned in the Statute of 43 *Eliz.*" And neither any judicial Determination, nor Uſage, ſupport this Conceit "that they *can* appoint *more* than 4 in theſe Townſhips and Vil-"lages in the large Pariſhes."

That Act of 13, 14 *C.* 2. was indeed rightly and reaſonably extended to *Wales*. But no Argument can be drawn from *that* Latitude of Conſtruction: As both the Words of it, (which *name Wales*,) and alſo the general Intention of it, (*viz.* the *Care of the Poor*,) well juſtified *ſuch* an Extenſion.

Then the Act of Parliament in 1740. relating to St. *Martin*'s and the Overſeers of that Pariſh, and which extends their Number, ſhews the Conſtruction put *by the Legiſlature* themſelves upon the 43 *Eliz.* on this Head; and excepts this very large Pariſh of St. *Martin* out of it. And yet even this very Act *reſtrains* the Number to *Nine:* Which ſhews that the Juſtices had no Power under the 43 *Eliz.* to appoint *what Number* THEY PLEASED. For it would be a ſtrange Thing, to *limit* the Number, in a *very large* Pariſh; and leave it *at large*, in *ſmaller* Ones.

There are two other Acts of Parliament, which have not been mentioned; and both of them paſſed after the Caſe of *Rex* v. *Harman*, and after the Caſe of St. *Clement's Danes*; *viz.* 17 *G.* 2. *c.* 3. and 17 *G.* 2. *c.* 38. both relating to Overſeers: And yet no Extenſion of Number, nor any Variation therein.

The PRECISE NUMBER is *not* an *immaterial* Thing; either to the Officers of the Pariſh, or to the Perſons for whom they are Truſtees. Upon themſelves, 'tis a Burden: Which, by this Practice, would come round the ſooner. And in reſpect to the Pariſh for whom they are Truſtees, a great Number may not do Buſineſs better than a ſmaller; and it would be attended with more Expence.

Alſo with regard to the *Church-Wardens* who are joined in Authority with them—THEY are *only* 2. or (by Cuſtom) 4. Church-Wardens in each Pariſh. Therefore a greater Number of *Overſeers*

being appointed, neceſſarily alters the Balance of the *Majority* amongſt them, and makes an eſſential Difference in the Porportion between one and the other. And there is no Number to *ſtop* at, if the Juſtices *exceed* four: They may go on, without *any* Boundary, unleſs the ſpecified Number of Four be the Limit.

Therefore I think this Appointment of *more* than 4. is NOT *warranted* by the 43 *Eliz.* upon the *true* Conſtruction of that Statute.

Mr. Juſt. DENISON concurred in Opinion, "that this Appointment ought to be quaſhed:" And He did not think that this Court *ever had had* any Doubt about the *legal* Determination of this Queſtion.

He then ſtated and expatiated upon the Caſe of *Rex* v. *Harman*; and ſaid the Reaſon why the Court did not quaſh that Appointment was *merely* for the *Sake* of the *Poor*; and not from any Doubt of the *Law*.

Beſland's Caſe was quite a different Caſe from that of appointing a *greater* Number than four. The Point of the Validity of an Order appointing more than Four, is a *new* Caſe; but *not* a *difficult* One, at all.

This Act of 43 *Eliz.* is, as one may call it, the *Magna Charta* of the Poor. And it can never be called *directory* as to the *Number of the Overſeers* appointed by it.

By 1 *Inſt.* 13. *b.* it appears that there was *only two Eſcheators*, in *England*, in ancient Time: Though more were made indeed by Act of Parliament, [14 *E.* 3. *c.* 8.] So there can be but *One Chief Juſtice*, or *Chief* Protonotary. *Jenkins*, 142. *Caſe* 93. So, in the Conſtitution of the Court of *Wards*; where 32 *H.* 8. *c.* 46. enacts "that "there ſhall be *two* Auditors of the Court of *Wards*," the King can not make *Four*. So is 11 *Co.* 4. *a. Auditor Curle*'s Caſe.

Certainly, the Legiſlature had the Number which ſtood fixed by 39 *Eliz.* in their *View* and under their *Conſideration*, when they made the 43 *Eliz.* And Can it be imagined that the Juſtices have a Juriſdiction to appoint *more?* Clearly, they have *not*.

In the Caſe of *Rex* v. *Sparrow*, (mentioned in 2 *Strange* 1123.) The Court took great Care in their Determination. And 13, 14 *C.* 2. was there conſidered by Ld. Ch. Juſt. *Lee*, as tied up to the Rules and Directions of 43 *Eliz.* And that *Mandamus* was iſſued for the *Sake* of the *Poor:* And the Court equitably and rightly held "That when the Juſtices had elapſed the Time for appointing

" Overſeers, the Court might oblige them to do it afterwards, *as* to " the *Time*; THAT being diſcretionary."

But No-Body every thought it diſcretionary *as* to the NUMBER. And there is no Reaſon in the Earth, for Us to break the Boundary, which is fixed. Therefore He was clear, to quaſh the preſent Order for the Appointment of *five*.

Mr. Juſt. FOSTER declared the very ſame Thing; and that He never had any Doubt in Point of *Law:* His only Doubt was in Point of *Diſcretion*; as He *then* ſuppoſed the *Uſage* to be otherwiſe than as it *now* appeared to be.

When the Statute of 43 *Eliz.* was made, there were very few large Pariſhes in Towns and Cities: Therefore at *that Time*, the Parliament thought Four Overſeers ſufficient. Under 39 *Eliz.* I take it, the Juſtices *could not have gone* BELOW *Four*. For, It being a *Special Power* given by Statute, muſt be *ſtrictly purſued*. And therefore, in the 43 *Eliz.* the Legiſlature, though they took the Act of the 39th for their Plan, and followed it in almoſt every Inſtance; Yet, ſeeing the Inconvenience in ſmall Pariſhes, departed from it with regard to the NUMBER of Overſeers: Which they *reduced*, at the Diſcretion of the Juſtices; but did *not increaſe*, in any Event; Probably becauſe they thought *Four* Overſeers, *with* the Church-wardens, ſufficient for the largeſt Pariſh (as they certainly are,) though too many for the ſmall Ones.

If it be *now* become inconvenient, the Application muſt be to *Parliament*. However, He declared that He did not think that Buſineſs *is* beſt done by a Multitude of Hands: And in Fact, where the Number that are to do it is large, they always delegate the actual Tranſaction of it to a *Few*.

It is NOT *true*, (what ſome People imagine) " That the *Common* " Law of *England* made NO *Proviſion* for the *Poor:*" The Mirror ſhews the *contrary*. How, indeed, it was *done*, does not appear.

As to the Caſe of *Rex* v. *Sparrow*,—43 *Eliz.* fixes a *Time* to appoint Overſeers, with a Penalty: But did not mean that the *Poor ſhould loſe* the Equity and Benefit of the Act, if the Juſtices did not appoint *within* that Time.

No Pariſh ever applied for a *Mandamus* commanding the Juſtices to appoint *more* than Four. The general Senſe of Mankind was againſt it. This is an *Authority founded* upon a *poſitive* Law; and *therefore muſt* be purſued.

Mr. Juſt. WILMOT declared (as his Brethren Mr. Juſt. DENISON and Mr. Juſt. FOSTER had done) that He never had had the leaſt Doubt, but upon the Apprehenſion of an *Uſage* of the large Pariſhes, for many Years back, *to appoint* MORE than Four: But this Apprehenſion is now vaniſhed: And therefore the *Uſage* (as it *now* comes out) confirms the *true* Conſtruction of the Act.

The Inſtances of greater Numbers appear to be *only Three:* And One of them (*St. Andrew's Holbourn,*) is conſidered as 3 Vills, under 13, 14 *C.* 2. And *St. Martin*'s (another of them) is under a new Act of Parliament made on Purpoſe. I think this Order *cannot* be ſupported.

There *were* Proviſions for the Poor, as my Brother FOSTER has obſerved, at *Common* Law: Though it does not fully appear *what* they were. The firſt *regular* Proviſion however, is by 39 *Eliz.* By this Statute, and by 43 *Eliz.* the Legiſlature add *Four* OVERSEERS to the *former parochial Adminiſtration.* And no One can doubt that the *Number* is *eſſential*; and *cannot*, by the Rule of Law be *exceeded.* For Powers given by a poſitive Law, or even by Deed, to CERTAIN *Numbers* of Perſons can never be exceeded, in the Article of Number. On the other hand, If it had reſted ſingly upon 39 *Eliz.* the Number 4 could not have been *leſſened.* But then indeed the 43 *Eliz.* relaxes this preciſe Number of *Four*, as to *ſmall* Pariſhes; but ſtill *continues it*, as to all *greater.* And where the Makers of the Act *intend* an *indefinite* Number, they EXPRESLY *ſay ſo.* For the 19th Section relating to the Iſland of *Foulneſs* converts the whole Diſtrict into one Pariſh, for this Purpoſe; and *directs* an *indefinite* Number of Overſeers for *that* Place. Which Clauſe *alone* would ſatisfy me, as to the *Senſe* of the *Legiſlature.* And they might as eaſily have ſaid "*So many* as ſhould ſeem neceſ- "ſary," as preciſely fix it to *Four*; if they had meant it ſo.

And it is (as has been obſerved) an Office which is burdenſome upon the Perſons appointed: And Buſineſs is *not* better done by great Numbers of Men, than by a few. And the *Pariſh* have as great Security from Four, as from more. Upon the whole, He intirely concurred, "That the Order could not be ſupported."

Mr. *Norton* moved that the Order might not be immediately quaſhed; becauſe the Overſeers had laid out 500 *l.* or 600 *l.* *under* it: And therefore He propoſed that the Other Side ſhould conſent to have one of the Overſeers *left out* of the Order.

The

The COURT thought it might be reaſonable; And for this Reaſon ONLY, did not directly and immediately *pronounce* the Rule "To quaſh the Order."

But now, at a Day ſo long ſubſequent, on Mr. *Morton*'s Motion for the Judgment of the Court; and Mr. *Norton*, not urging any further againſt it, (and acknowledging that He had ſpoken to his Client,)

LORD MANSFIELD ſaid there muſt be an End of it, ſome Time or other: Therefore let the RULE be made abſolute, to

QUASH the APPOINTMENT.
ORDER QUASHED

Tueſday 31ſt *January* 1758.

Miller *verſ.* Race.

IT was an Action of TROVER againſt the Defendant, upon a BANK-NOTE, for the Payment of Twenty-one Pounds Ten Shillings to One *William Finney* or *Bearer*, on Demand.

The Cauſe came on to be tried before Lord *Mansfield*, at the Sittings in *Trinity* Term laſt at *Guildhall*, *London*: And upon the Trial it appeared That *William Finney*, being poſſeſſed of this Bank-Note, on the 11th of *December* 1756, ſent it by the General Poſt, under Cover, directed to One *Bernard Odenharty* at *Chipping Norton* in *Oxfordſhire*; That on the ſame Night, the *Mail was robbed*, and the Bank-Note in Queſtion (amongſt other Notes) taken and carried away by the Robber; That this Bank-Note, on the 12th of the ſame *December*, came into the Hands and Poſſeſſion of the Plaintiff, for a *full and valuable Conſideration*, and *in the* USUAL *Courſe and Way of his Buſineſs*, and *without any Notice or Knowledge* of this Bank-Note being taken out of the Mail.

It was admitted and agreed, that in the common and known Courſe of Trade, Bank-Notes are paid by and received of the Holder or Poſſeſſor of them, *as Caſh*; And that in the uſual way of negotiating Bank-Notes, they paſs from one Perſon to another as Caſh, by *Delivery only*, and *without* any further Inquiry or Evidence of *Title*, than what ariſes from the *Poſſeſſion*. It appeared that Mr. *Finney*, having Notice of this Robbery, on the 13th of *December*, applied to the Bank of *England*, "*to ſtop the Payment* of this Note:" Which was Ordered accordingly, upon Mr. *Finney*'s entering into proper Security "to indemnify the Bank."

Some little Time after this, the Plaintiff applied to the Bank for the Payment of this Note; and, for *that* Purpoſe, delivered the Note to the Defendant, who is a Clerk in the Bank: But the Defendant refuſed either to pay the Note, or to *redeliver* it to the Plaintiff. Upon which, this Action was brought againſt the Defendant.

The Jury found a Verdict for the Plaintiff, and the Sum of 21 *l.* 10 *s.* Damages; ſubject nevertheleſs to the Opinion of this Court upon this Queſtion—" Whether, under the Circumſtances of " this Caſe, the Plaintiff had a *ſufficient Property* in this Bank-" Note, to intitle him to recover in the *preſent Action?*"

Mr. *Williams* was beginning on Behalf of the Plaintiff.—

But Lord MANSFIELD ſaid " That as the Objection came from the Side of the Defendant, it was rather more proper for the Defendant's Counſel to ſtate and urge their Objection.

Sir *Richard Lloyd*, for the Defendant.

The preſent Action is brought, *not* for the *Money* due upon the Note; but for the NOTE *itſelf*, the *Paper*, the *Evidence* of the Debt. So that the *Right to the* MONEY is *not* the preſent Queſtion: The Note is only an *Evidence* of the Money's being due *to him* AS BEARER.

The Note muſt either come to the Plaintiff *by Aſſignment*; or muſt be conſidered as if the Bank gave a *freſh, ſeparate, and diſtinct Note to each* Bearer. Now the Plaintiff can have no Right by the *Aſſignment of a* ROBBER. And the Bank cannot be conſidered as giving a *new* Note to each Bearer: Though each Bearer may be conſidered as having obtained from the Bank a *new* PROMISE.

I do not ſay Whether the Bank *can*, or *cannot ſtop Payment: That* is *another* Queſtion. But the *Note* is only an *Inſtrument* of Recovery.

Now this Note, or theſe Goods (as I may call it,) was the *Property* of Mr. *Finney*, who paid in the Money: *He* is the real Owner. It is like a Medal, which might intitle a Man to Payment of Money, or to any other Advantage. And it is by Mr. *Finney*'s Authority and Requeſt, that Mr. *Race* detained it.

It may be objected, " that this Note is to be conſidered *as Caſh*, " in the *uſual Courſe of Trade*." But ſtill, the Courſe of Trade is

not at all affected by the *preſent* Queſtion, about the Right to the *Note*. A *different Species of Action* muſt be brought for the *Note*, from what muſt be brought againſt the Bank for the *Money*. And this Man has elected to bring Trover *for the* NOTE itſelf, *as Owner of the* NOTE; and not to bring his Action againſt the Bank, for the *Money*. In which Action of *Trover*, Property can not be proved in the Plaintiff: For a *Special* Proprietor can have no Right againſt the TRUE *Owner*.

The Caſes that may affect the preſent, are 1 *Salk.* 126. *M.* 10 *W.* 3. *Anonymus, coram Holt*, Ch. J. at *Niſi prius* at *Guildhall*. There Ld. Ch. J. *Holt* held "that the right Owner of a Bank-Bill, "who loſt it, might have Trover againſt a Stranger who found it: "But not againſt the Perſon to whom the Finder transferred it for "a valuable Conſideration, by reaſon of the *Courſe of Trade* which "*creates a Property* in the Aſſignee or Bearer." 1 Ld. *Raym.* 738. * S. C. In which Caſe, the Note was *paid away*, in the Courſe of Trade: But *this* remains in the Man's Hands, and is not † come into the Courſe of Trade. *H.* 12 *W.* 3. *B. R.* 1 *Salk.* 283, 284. *Ford* v. *Hopkins per Holt* Ch. J. at *Niſi prius* at *Guildhall*. "If "Bank-Notes, Exchequer-Notes, or Million-Lottery Tickets, or "the like, are ſtolen or loſt, the Owner has ſuch an Intereſt or "Property in them, as to bring an Action, *into* WHATSOEVER "*Hands* they are come. Money or Caſh is not to be diſtinguiſhed: "But theſe Notes or Bills are diſtinguiſhable, and *can* NOT *be* "*reckoned as* CASH; And they have diſtinct Marks and Numbers "on them." Therefore the true Owner may ſeize theſe Notes wherever he finds them, if not paſſed away, in the Courſe of Trade.

* *N. B.* In this Caſe, the Transferree went to the Bank; and got a *new* Bill, in his own Name. However, the Caſe turned upon his having the Note for a valuable Conſideration.

† The Fact ſeems to be quite otherwiſe.

1 *Strange* 505. *H.* 8 *G.* 1. In *Middleſex*, *coram Pratt* Ch. J. *Armory* v. *Delamirie*—A Chimney-Sweeper's Boy found a Jewel. It was ruled "that the *Finder* has ſuch a Property as will enable "him to keep it *againſt* ALL *but* the *rightful* Owner; and, con- "ſequently, may maintain Trover."

This Note is juſt like *any other* Piece of Property, UNTIL *paſſed away in the Courſe of Trade*. And *here* the Defendant *acted as* AGENT to the TRUE *Owner*.

Mr. *Williams contra* for the Plaintiff.

The HOLDER of this Bank-Note, upon a *valuable* Conſideration, has a Right to it, even *againſt* the *true* Owner.

1ſt. The Circulation of theſe Notes veſts a *Property* in the *Holder*, who comes to the Poſſeſſion of it, upon a *valuable Conſideration*.

2dly. This

2dly. This is of vaſt *Conſequence to Trade and Commerce:* And they would be greatly incommoded, if if were otherwiſe.

3dly. This falls *within the Reaſon* of a Sale in *Market-Overt*; and ought to be determined upon the *ſame Principle.*

Firſt—He put ſeveral Caſes, where the Uſage, Courſe, and Convenience of Trade, *made* the Law: And, ſometimes, even *againſt an Act of Parliament.* 3 *Keb.* 444. *Stanley* v. *Ayles. Per Hale* Ch. J. at *Guildhall.* 2 *Strange* 1000. *Lumley* v. *Palmer*: Where a Parol-Acceptance of a Bill of Exchange was holden ſufficient againſt the Acceptor. 1 *Salk.* 23.

Secondly.—This Paper Credit has been always, and with great Reaſon, favoured and encouraged. 2 *Strange* 946. *Jenys* v. *Fawler et al.*

The *Uſage* of theſe Notes is, " that they *paſs* by *Delivery only*; " and are *conſidered as current Caſh*; and the POSSESSION always *car-* " *ries* with it the Property." 1 *Salk.* 126. *pl.* 5. is in Point.

A particular Miſchief is rather to be permitted, than a general Inconvenience incurred. And Mr. *Finney* who was robbed of this Note, was guilty of *ſome* Laches in not preventing it.

Upon Sir *Richard Lloyd*'s Argument, a Holder of a Note might ſuffer the Loſs of it, for want of Title againſt a true Owner; even if there was a Chaſm in the Transfer of it through one only out of 500 Hands.

Thirdly—This is to be conſidered upon the *ſame Foot* as a *Sale in Market Overt.*

2 *Inſt.* 713. " A Sale in *Market Overt binds* thoſe that had Right."

But it is objected by Sir *Richard*, " that there is a ſubſtantial " *Difference* between a Right to the *Note*, and a Right to the *Mo-* " *ney.*" But I ſay the Right to the Money will *attract* to it a Right to the Paper. Our Right is not by *Aſſignment*; but by *Law*, by the Uſage and Cuſtom of Trade. I do not contend that the *Robber*, or even the *Finder* of a Note, has a *Right to the Note:* But AFTER *Circulation*, the Holder upon a valuable Conſideration *has* a Right.

We *have a Property* in this Note: And have recovered the Value againſt the WITH-HOLDER of it. It is not material, *what* Action We could have brought againſt the *Bank.*

Then He anſwered Sir *Richard Lloyd*'s Caſes; And agreed that the true Owner might purſue his Property, where it came into the Hands of another, WITHOUT *a valuable Conſideration*, or NOT IN *the Courſe of Trade:* Which is all that Ld. Ch. J. *Holt* ſaid in 1 *Salk.* 284.

As to 1 *Strange* 505. He agreed that the Finder has the Property againſt all *but* the rightful Owner; NOT *againſt* HIM.

Sir *Richard Lloyd* in Reply—

I agree that the Holder of the Note has a *Special* Property: But it does not follow that he can maintain *Trover* for it, *againſt the true Owner.*

This is not only *without*, but AGAINST *the Conſent* of the Owner.

Suppoſing this Note to be a Sort of *mercantile* Caſh; yet it has an Ear-Mark, by which it may be diſtinguiſhed: Therefore Trover will lie for it. And ſo is the Caſe of *Ford* v. *Hopkins.*

And You may recover a Thing ſtolen from a Merchant, as well as a Thing ſtolen from another Man. And this Note is a mere Piece of Paper: It may be as well ſtopped, as any other Sort of Mercantile Caſh, (as, for Inſtance, a *Policy* which has been ſtolen.) And this has NOT *been paſſed away* in Trade: but remains in the Hands of the true Owner. And therefore it does not ſignify in *what Manner* they are *paſſed away*, when they *are* paſſed away: For this was NOT *paſſed* away. Here, the true Owner, or his *Servant* (which is the ſame Thing,) detains it. And, ſurely, *Robbery* does *not deveſt the Property.*

This is not like Goods ſold in *Market Overt:* Nor does it paſs in the Way of a Market Overt; nor is within the Reaſon of a Market Overt. Suppoſe it was a *Watch* ſtolen: The Owner may ſeize it, (though he finds it in a Market Overt,) *before* it is ſold there. But there is no Market Overt FOR *Bank Notes.*

I deny the Holder's (merely *as* Holder) having a Right to the Note, *againſt the* TRUE *Owner:* And I deny that the *Poſſeſſion* gives a Right to the Note.

Upon this Argument on *Friday* laſt, Ld. *Mansfield* then ſaid that Sir *Richard Lloyd* had argued it ſo ingeniouſly, that (though he had no Doubt about the Matter,) it might be proper to look into the Caſes he had cited, in Order to give a properer Anſwer to them:

them: And therefore the Court deferred giving their Opinion, to this Day. But at the ſame Time, Ld. *Mansfield* ſaid He would not wiſh to have it underſtood in the City, that the Court had any *Doubt* about the Point.

LORD MANSFIELD now delivered the Reſolution of the Court.

After ſtating the Caſe at large, He declared that at the Trial, He had no Sort of Doubt, but that this Action was *well* brought, and *would lie* againſt the Defendant in the preſent Caſe; upon the *general Courſe of Buſineſs*, and from the *Conſequences* to Trade and Commerce: which would be much incommoded by a contrary Determination.

It has been very ingeniouſly argued by Sir *Richard Lloyd*, for the Defendant. But the whole Fallacy of the Argument turns upon comparing Bank-Notes to what they do *not reſemble*, and what they *ought not* to be compared to, *viz.* to Goods, or to Securities, or Documents for Debts.

Now they are *not* Goods, not Securities, nor Documents for Debts, nor are ſo eſteemed: But are treated as *Money*, as *Caſh*, in the ordinary Courſe and Tranſaction of Buſineſs, by the general Conſent of Mankind; which gives them the Credit and Currency of *Money*, to ALL Intents and Purpoſes. They are as much *Money*, as Guineas themſelves are; or any other current Coin, that is uſed in common Payments, *as* Money or Caſh.

They paſs *by a Will*, which bequeaths all the Teſtator's Money or Caſh; and are *never* conſidered as *Securities* for Money, but as *Money itſelf*. Upon Ld. *Aileſbury*'s * Will, 900*l.* in Bank-Notes was conſidered as *Caſh*. On *Payment* of them, whenever a Receipt is required, the Receipts are always given *as* for *Money*; NOT as for *Securities* or *Notes*.

* *Popham et al.* v. *Bathurſt et al.* in Chancery, 5th *November* 1748.

So, on Bankruptcies, they can not be followed as identical and diſtinguiſhable from Money: But are always conſidered as *Money* or *Caſh*.

'Tis pity that Reporters ſometimes catch at quaint Expreſſions that may happen to be dropped at the Bar or Bench; and miſtake their Meaning. It has been quaintly ſaid, "that the *Reaſon why* "Money can not be followed is, BECAUSE it has *no Ear-Mark*:" But this is NOT *true*. The *true* Reaſon is, upon Account of the *Currency* of it: It can not be recovered after it has paſſed *in Currency*. So, in Caſe of *Money ſtolen*, the true Owner can not recover it, *after* it has been paid away fairly and honeſtly upon a valuable

and *bonâ fide* Consideration: But *before* Money has passed in Currency, an Action may be brought for the *Money itself*. There was a Case in 1 *G.* 1. at the Sittings, *Thomas* v. *Whip*, before Ld. *Macclesfield:* Which was an Action upon *Assumpsit*, by an Administrator against the Defendant, for Money had and received to his Use. The Defendant was Nurse to the Intestate during his Sickness; and, being alone, conveyed away the *Money*. And Ld. *Macclesfield* held that the Action lay. Now this must be esteemed a *Finding*, at least.

Apply this to the Case of a *Bank-Note*. An Action may lie against the *Finder*, 'tis true; (and it is not at all denied:) But NOT *after* it has been PAID AWAY IN CURRENCY. And this Point has been determined, even in the Infancy of Bank Notes: For
* *V. ante* 454. 1 *Salk.* 126. *M.* 10 *W.* 3. at *Nisi-prius*, is in * Point. And Ld. Ch. J. *Holt* there says that it is "by *reason of the Course of Trade*; "which creates a Property in the Assignee or Bearer." (And "the "Bearer" is a *more proper* Expression than *Assignee*.)

Here, an Inn-keeper took it, *bonâ fide*, in his Business, from a Person who made the Appearance of a Gentleman. Here is no Pretence or Suspicion of COLLUSION *with the Robber:* For this Matter was strictly inquired and examined into at the Trial; And is so stated in the Case, "that he took it for a *full and valuable Consi-* "*deration*, in the *usual Course of Business*." Indeed if there had been any *Collusion*, or any Circumstances of *unfair Dealing*; the Case had been much otherwise. If it had been a Note for 1000*l.* it might have been suspicious: But this was a *small* Note, for 21*l.* 10*s.* only; and *Money given in Exchange* for it.

† *Ex relatione* of another Person.

Another Case cited was a loose Note † in 1 Ld. *Raym.* 738. ruled by Ld. Ch. J. *Holt* at *Guildhall*, in 1698; which proves nothing for the Defendant's Side of the Question: But it is exactly agreeable to what is laid down by my Ld. Ch. J. *Holt*, in the Case I have just mentioned. The Action did not lie against the Assignee of the Bank-Bill; BECAUSE he had it for *valuable* Consideration.

In that Case, he had it from the Person who found it: But the Action did not lie against him, *because* he took it in the *Course of Currency*; And *therefore* it could not be followed in his Hands. It *never* shall be followed into the Hands of a Person who *bonâ fide* took it in the *Course of Currency*, and in the *Way of his Business*.

* *V. ante* 454. The Case of *Ford* v. *Hopkins*, was also * cited: Which was in *Hil.* 12 *W.* 3. *coram Holt* Ch. J. at *Nisi prius*, at *Guildhall*; and was an Action of Trover for Million-Lottery Tickets. But this must be a very *incorrect* Report of that Case: It is *impossible* that it can be a true

a true Repreſentation of what Ld. Ch. J. *Holt* ſaid. It repreſents Him as ſpeaking of *Bank-Notes*, Exchequer-Notes, and *Million-Lottery Tickets*, as LIKE *to each other*. Now no two Things can be more UNLIKE to each other, than a *Lottery-Ticket*, and a Bank-Note. Lottery-Tickets are *identical* and *ſpecific*: *Specific Actions* lie for them. They may prove extremely unequal in Value: One may be a Prize; another, a Blank. *Land* is not more ſpecific, than *Lottery-Tickets* are. It is there ſaid, " That the Delivery of " the Plaintiff's Tickets to the Defendant, as that Caſe was, was " *no Change of Property*." And moſt clearly it was NO *Change of the Property*: So far, the Caſe is right. But it is here urged as a Proof " that the true Owner may follow a *ſtolen Bank-Note*, into " what Hands ſoever it ſhall come."

Now the whole of that Caſe turns upon the throwing in *Bank-Notes*, as being LIKE to *Lottery-Tickets*.

But Lord Ch. J. *Holt* could never ſay " That an Action would " lie againſt the Perſon who, *for a valuable Conſideration*, had re- " ceived a *Bank-Note* which had been ſtolen or loſt, and *bonâ fide* " *paid to him*;" even though the Action was brought *by the true Owner*: Becauſe he had before determined *otherwiſe*, but two Years before; and becauſe Bank-Notes are not like Lottery-Tickets, but *Money*.

The Perſon who took down this Caſe, certainly miſunderſtood Lord Ch. J. *Holt*, or miſtook his Reaſons. For this Reaſoning would prove, (if it was true, as the Reporter repreſents it) that if a Man paid to a Goldſmith 500 *l.* in Bank-Notes, the Goldſmith could never pay them away.

A Bank-Note is conſtantly and univerſally, both at Home and Abroad, treated *as Money*, as *Caſh*; and paid and received, as *Caſh*: And it is neceſſary, for the Purpoſes of Commerce, that their *Currency* ſhould be *eſtabliſhed* and *ſecured*.

There was a Caſe in the Court of Chancery, * on ſome of Mr. *Child*'s Notes, payable to the Perſon to whom they were given, or Bearer. The Notes had been loſt or deſtroyed many Years. Mr. *Child* was ready to pay them to the Widow and Adminiſtratrix of the Perſon to whom they were made payable; upon her giving Bond, with two reſponſible Sureties, (as is the Cuſtom in ſuch Caſes,) to indemnify Him againſt the Bearer, if the Notes ſhould ever be demanded. The Adminiſtratrix brought a Bill; which was diſmiſſed, becauſe ſhe either could not or would not give the Security required. No Diſpute ought to be made with the Bearer of a *Caſh-Note*; in regard to *Commerce*, and for the Sake of the *Credit of theſe Notes*:

* *Walmeſley* againſt *Child*, 11th *December* 1749.

Though it may be both reaſonable and cuſtomary, to *ſtay* the Payment, *till* Inquiry can be made, Whether the Bearer of the Note came by it *fairly*, or not.

Lord MANSFIELD declared that the Court were All of the ſame Opinion, for the Plaintiff; And that Mr. Juſt. WILMOT concurred.

RULE—That the *Poſtea* be delivered to the PLAINTIFF.

Wedneſday 1ſt *February* 1758.

Rex *verſ.* Dr. Shebbeare.

THE Doctor was brought up to be bailed: But had not Bail ready.

Note—He was now brought up by Virtue of a *Habeas Corpus* ISSUED by the Ld. Ch. Juſtice in the *Vacation*, returnable *immediatè*, before Himſelf *at his Chambers*.

Upon Dr. *Shebbeare*'s mentioning that He had been informed " that, as the Term was begun, it was neceſſary to take out a *new* " Writ of *Habeas Corpus*, to bring Him into Court;" And the Officers on the Crown-Side having ſaid that *their* Notion of the *Practice* was, " That, the *Term being begun*, the *old* Writ was *ex*- " *pired*, and it was neceſſary to take out a *new* One;

Lord MANSFIELD declared the Court to be unanimouſly of Opinion That ſuch Notion was *ill founded*; That a Perſon *might* be brought into Court upon a *Habeas Corpus* iſſued in the *Vacation*; and that to require a new Writ, would be attended with Delay and Expence, without the leaſt Reaſon or Utility.

Lord MANSFIELD—If you have not Bail, We cannot commit you to the ſame Cuſtody you come hither in, (which was that of Mr. *Carrington*, One of the King's Meſſengers;) but muſt commit you to our Marſhal: And you will not then be obliged to ſue out your *Habeas Corpus* again; but may be brought up from the Priſon of this Court, by a *Rule* of Court, whenever you ſhall be prepared to give Bail.

Accordingly, the Doctor, being charged with two Warrants under the Hand and Seal of the Secretary of State, * which appeared upon the Return to the *Hapeas Corpus*, was

* See the Charge, *poſt pa.*

COMMITTED to the Cuſtody of the *Marſhal* of this COURT.

Rex *verſ.* Inhabitants of Flecknow.

Saturday 4th *February* 1758.

H. 30 *G.* 2. N° 6.

THIS was a Cauſe in the Crown-Paper, upon a ſpecial Caſe from the Aſſizes in *Warwickſhire*; upon an Indictment againſt the Inhabitants of the Hamlet of *Flecknow*, for *not repairing a Highway*, which the Indictment lays, "that THEY ought to "repair."

The Inhabitants pleaded "That *One George Watſon ought* to re- "pair it, by reaſon of his Tenure; SO LONG *as* the ſame ſhould "*remain incloſed, &c.*" And traverſe that the Defendants, the Inhabitants, ought to repair it.

The Replication ſets out an Act of Parliament of 15 *G.* 2. *c.* (a private Act) "for incloſing and dividing the Common Fields "called *Flecknow*, in the County of *Warwick*, into juſt Allotments "and Proportions;" And alſo the ſeveral Proceedings under it; and then traverſes "that the ſaid *George Watſon* by reaſon of his "incloſing the ſaid Highway, ought to repair and amend it, as "often as there ſhould be Occaſion, whilſt it ſhould remain ſo in- "cloſed by him," *modo & forma prout* is alledged by the Plea: *Et hoc paratus eſt verificare.*

The Rejoinder admits the Act, and the Proceedings under it, and *George Watſon*'s Acceptance *&c.* under them; and alledges that *George Watſon* by reaſon of his incloſing, ought to repair *&c.* And of this, they put themſelves upon their Country.—Iſſue is taken thereon; And a Verdict *pro Rege*, ſubject to the Opinion of this Court.

The Caſe ſtated, by Conſent of Counſel was (in Subſtance) thus —The *Inhabitants* of the Hamlet of *Flecknow*, BEFORE *the making the Incloſure* by Virtue of the Act of Parliament in the Record mentioned, *were bound to repair* the Highway in Queſtion.

The *Road* in the Pleadings mentioned, was, *before* the Making the ſaid Act of Parliament, an ANCIENT OPEN *Road*, lying *un-incloſed*, without Hedge Ditch or Fence; and continued to lie ſo un-incloſed *at the Time* of making the ſaid Act of Parliament, and *until* the Incloſure thereof as hereafter mentioned.

The Commiſſioners appointed by the ſaid Act of Parliament did, *in Purſuance of the ſaid Act*, by their Award in Writing, *duly award*, *aſcertain*

aſcertain, *ſet out*, *direct*, and *appoint* " That there ſhould be at " all Times, for ever, after the new Incloſure by the ſaid Act " directed to be made, *A Public Way or Road*, leading from the " Hamlet of *Flecknow* aforeſaid, to *Southam* in the ſaid County of " *Warwick*, and alſo from *Southam* aforeſaid to *Flecknow* aforeſaid " (being the Road in Queſtion,) for Perſons to paſs, either on Foot " Horſeback, or with Cattle and Carriages, into over and through " the ALLOTMENT *of the ſaid George Watſon*; And that the ſame " ſhould be and remain at all Times for ever thereafter, *full forty* " *Feet broad*, as the ſame was then admeaſured and ſet out." And the Caſe ſtates that within One Year after making the ſaid Award, (that is to ſay, in *January* 1745.) the ſaid *George Watſon incloſed his Allotment*, purſuant to the ſaid Act of Parliament: And the Highway in queſtion *lay open and uninclosed* on each Side thereof as aforeſaid over the Lands Part of the Allotment of the ſaid *George Watſon*, for the Space of THREE *Years* next after the Incloſure of his ſaid Allotment ſo by him made as aforeſaid.

The ſaid *George Watſon*, *at the End of* the ſaid THREE *Years*, INCLOSED *with Hedges Ditches and Fences* the ſaid Highway, on both Sides thereof, leaving the ſame full forty Feet broad between the Ditches: And the ſaid Road or Highway *remained ſo incloſed by* the ſaid *George Watſon*, during the whole Time mentioned in the Indictment.

The ſaid *George Watſon* made *no* Incloſure of the ſaid Highway in Queſtion, *other* than as aforeſaid.

A Verdict by Conſent was found by the Jury; Whereby the Defendants were found guilty: But ſuch Verdict was to be ſubject to the Opinion of this Court, upon the whole Caſe, as it appears on the Pleadings and on what appeared to be and was the Caſe as is before mentioned. And the

QUESTION ſubmitted is Whether the *Inhabitants* of the ſaid Hamlet of *Flecknow* CONTINUED *bound* to repair the Highway in the ſaid Indictment mentioned, NOTWITHSTANDING *the ſaid* INCLOSURE *by the ſaid George Watſon in manner before ſtated:* Or Whether, *by reaſon of* SUCH INCLOSURE, they were DISCHARGED therefrom, DURING *the Time* in the Indictment ſpecified.

Serj. *Hewitt pro Rege*, argued That the Inhabitants *remained* STILL *bound.*

It is admitted that this Hamlet of *Flecknow was bound* to repair *before the Act* of Parliament. And it does *not appear* that *George Watſon* is bound by having incloſed, under this Act of Parliament:

For this is *no Incroachment, no Injury to* the *Public, no Act* done *without Conſent.*

And the Caſes turn upon WANT *of lawful Authority.* 1 *Ro. Abr.* 390. Letter A. *pl.* 1. Sir *Edward Duncombe*'s Caſe: Outlets are Parcel of the Highway, in an open Field. *Ibid.* Letter B. *pl.* 1. " The Subject may go out of the beaten Track, when the Way " is founderous, in an open Field." *Sheppard's Epitome of the Law* 1116. " If a Man incloſe the Highway, and put it within his own " Ground, the Pariſh is not to repair it; but He muſt repair it himſelf:" 2 *Saund.* 160. *Rex* v. Sir *Nicholas Stoughton:* An Encroacher upon the Highway, is obliged to repair, ſo long as the Encroachment continues. *Style* 364. " Whoever incloſes *&c.* " takes upon him to repair."

But *this* Incloſure and Allotment is *under an Act of Parliament*; to which *Every Body conſents.* And this Act directs public and private Highways to be laid out: And it provides " That *No-Body* " ſhall go upon *any other* Highway." Therefore, the old Right to the old Way is at an End, is annihilated: And ſo is the Way itſelf, being exchanged for the new One. And this, of Courſe, *warrants* the Incloſure.

But the Act lays no Charge upon the Owner: Therefore *George Watſon* cannot be ſaid to have incloſed any part of the *Highway:* For this Land is allotted to him, as his *private Property*; And He is warranted in making this Incloſure.

This is juſt like the Caſe of a Writ of *Ad quod damnum.* It *is* indeed a *Parliamentary Ad quod damnum.* It may be even worth the Inheritance of the Land, to repair the adjoining Highway. So that this is *not within the* PRINCIPLES which oblige Perſons incloſing, to repair. And if *George Watſon* be *not* obliged to repair this Highway, the Inhabitants of *Flecknow are* obliged.

Mr. *Caldecott contra* for the Defendants. This is an Indictment againſt the Inhabitants for not repairing: And it only charges " that they are bound."

The Plea ſets out by Way of Inducement " That one *George* " *Watſon, by reaſon of his Incloſure,* ought to repair:" And then tenders a Traverſe " *that the Inhabitants* OUGHT NOT *to repair.*"

The Replication (inſtead of taking Iſſue upon this Traverſe,) ſets out the Act of Parliament, and then ſets out all the Proceedings under it, and the Allotment to *George Watſon,* and his Acceptance thereof, and his Incloſing his Allotment, firſt, and the Road afterwards; and then takes quite another Traverſe, *viz.* " That He " the

" the ſaid *George Watſon*, is not, by his incloſing the Road, bound " to repair it."

Cur'—We cannot meddle with the *Pleadings*, now: We are upon the *Special Caſe*. If You have any Objection to the *Pleadings*, You muſt move in Arreſt of Judgment.

Mr. *Caldecott* then proceeded on the *Caſe*. This was a Road, which was always an open and un-incloſed Road, and went over *George Watſon's* own Lands.

1ſt. This is no Incloſure, WITHIN *this Act*.

2d. If it was, Yet the Act does *not take away the legal Conſequence* of Incloſure.

Firſt—This was an old open un-incloſed Road, over this *George Watſon's own* Lands. And the Act does not give any Authority to incloſe it; nor could intend any ſuch Thing. And it is much better for the Public, that it ſhould be open and un-incloſed, than that it ſhould be incloſed. If He will incloſe it, He ought to repair it.

It is here ſtated that he did incloſe his *Allotment* within two Years (the Time limited for ſo doing:) But that he did not incloſe this *Road*, *till* THREE *Years* after the Commiſſioner's Award. Therefore it is *not* an Incloſure *under* this Act: Conſequently, he *is liable* to repair.

I agree that if a Man incloſes on both Sides of a Road, he ſhall repair the Whole: And if *&c.* And if *&c.* [See *Hawkins*, as below.] There is a great deal on this Subject in 1 *Hawk. P. C.* 202. *Lib.* 1. *c.* 76. § 6, 7. And I agree that a Man is bound to repair, *no longer* than WHILST *he continues his Incloſure:* So that if he opens his Incloſure, he will be diſcharged.

As to an *Ad quod damnum*—It makes the old Road to become private Property: And there ought to be a Grant from the Crown.

But this Act of Parliament has *not directed an Incloſure* of the Road in Queſtion: *Neither* does the *Award of the Commiſſioners* direct it. Therefore *George Watſon is* in this Caſe obliged to repair; And the Inhabitants are not obliged.

Lord MANSFIELD ſtopped Mr. Serjeant *Hewitt* from replying: For this Caſe was too plain, He ſaid, to need a Reply.

An Owner of Land over which there is an open Road, may *incloſe* it, by his *own* Authority; or *alter* it, under a *proper* Authority, and by a legal Courſe. 1ſt. He may *incloſe* it, by his OWN *Authority:* But then it muſt be upon *two Conditions*—One, " that " he *is obliged to repair* it, TILL he throws up the Incloſure;" the Other " that he leave ſufficient Space and Room for the Road." 2dly. The Other Act, *viz. Altering* or *changing* the Road *by a legal Courſe*, is by a Writ of *Ad quod Damnum:* where the Application is to be made by the Owner of the Lands; and a Licence given by the King, upon a Finding by a Jury. But in this *latter* Caſe, the Owner of the Land, is *not* obliged to repair the new Road; *unleſs* the Jury impoſe ſuch a Condition upon him: For if they do not, the Repair of the Road ſtands juſt *as it did before*; even though it was at firſt open, and ſhould be directed by the Jury to be incloſed.

And this Caſe is *like* a Writ of *Ad quod damnum*; and not only ſo, but even *more* than a Writ of *Ad quod damnum*. For here, the Act veſts a Power in the Commiſſioners, to ſet out *new* Roads, by their Award. Therefore there is an *End* of the old Road, *as* an old Road. And the Commiſſioners here made their Award: In which they deſcribe the future Road, and direct it to be 40 Feet broad, as it was then admeaſured.

And theſe Common Fields were not deſigned to continue open Fields, as they were before; but the Intent of the Act of Parliament was that they might be incloſed. And the Act ſays nothing about the Expence of repairing the Road. Therefore the Repair clearly *ſtands as it did before*; and was *certainly meant ſo to do.*

And every Man had a Right to incloſe, whoſe Lands adjoin the Road. But if the Perſon to whom the Allotment was made near the Highway, was to be obliged to repair, it might have made a vaſt *Difference in the Value* of the Lands reſpectively allotted to each Perſon: For one Perſon's Allotment might perhaps run along very far, by the *Side* of the Highway; and another Perſon's Allotment *not lie at all near it*. And yet there is no Proviſion for any ſuch Caſe.

Therefore this *George Watſon* is not, upon the Facts here ſtated to Us, obliged to repair, *by Reaſon* of his having *incloſed an open Road:* Nor indeed *is it an open Road,* under the Circumſtances of this Caſe.

The Pariſh were bound to repair, before the Act: And this Road happens too to be the ſame identical Road, that was the Road be-

fore the Act. And the Act of Parliament *never designed* to alter the Charge and Obligation of repairing the Roads over these Fields which were intended to be inclosed by virtue of it: Nor is this Inclosure thus made under this Act, *such* an Inclosure as comes within the Meaning of the Law, which obliges the Person inclosing a Road *voluntarily* and of his own Head, to repair the Road which he has so *voluntarily* inclosed.

Mr. Just. DENISON concurred: And He thought this Case was very *properly* compared to the Case of an *Ad quod damnum*; and that it might be very properly called a *Parliamentary Ad quod damnum.*

And He was very clear that the *Hamlet were bound* to repair, *just as they were before:* And that *this* Inclosure was *not* such an Inclosure as the Cases cited intend.

Mr. Just. FOSTER likewise concurred. And He thought the Act *intended to give* the Person to whom an Allotment adjoining to the Road, should be made, *Power to inclose:* Or otherwise he might be a very great Sufferer by such Allotment. And He was extremely clear that the *Hamlet remained bound* to repair the Road, just as much as they were bound to repair before the Act.

Mr. Just. WILMOT concurred too, clearly. And the rather, for that if it was not so, the Allotment might prove what the Civil Law terms a *dammosa Hæreditas:* And the Allotments to the different Persons might be of extreme different Values, according as they lay near to, or far from the Road.

Upon all the Circumstances of the Case, He was clear that the *Hamlet remained liable*, in the same Manner as they were before the Act.

Per Cur. unanimously

RULE for the *Postea* to be delivered to the *Prosecutor.*

Turner *verf.* Turner.

THE COURT (Mr. Just. FOSTER being gone) were unanimous, that a Person VOLUNTARILY *inlisting* HIMSELF, was NOT *privileged from Arrests*, within the *Act* of last Sessions (30 *G.* 2. *c.* 8.) " for the speedy and effectual Recruiting of his " Majesty's Land-Forces and Marines:" For that the Act was only meant to privilege SUCH Persons from Arrests, as were, under that Act, * COMPELLED *against* their Wills, to serve as Soldiers.

* *V.* Section 20th, *pa.* 217, 218.

Sir Edward Worſeley & al. Aſſignees of Richard Slader, a Bankrupt, *verſ.* Demattos and Slader. *Tueſday 7th February 1758.*

THE preſent Queſtion came before this Court, after a Trial at Law before Lord *Mansfield*, upon a feigned Iſſue out of the Court of Chancery, to try, Whether one *Richard Slader*, a Trader, was a Bankrupt; And (2dly.) *If* he was a Bankrupt, then *Upon* WHAT PARTICULAR *Day* he became ſo: And *that* particular Day on which he ſhould be found to have become a Bankrupt, was to be *indorſed* upon the *Poſtea*.

It was ſoon agreed, as to the firſt Point, "That he certainly *did* "*become* a Bankrupt," by an undoubted clear Act of Bankruptcy committed on the thirteenth of *November* 1756.

But, upon the ſecond Point, as to the *Time when* he FIRST became a Bankrupt, It was inſiſted, on Behalf of the Plaintiff, That he became a Bankrupt *anterior* to that 13th of *November*, *viz. upon* the 23d of *October*, namely, by the very *executing* the Deed in queſtion, which bore the latter Date. For they alledged this Deed to be *fraudulent*; and the Executing it, to be *ipſo facto an Act of Bankruptcy*, within the Statute of 1 *Jac.* 1. *c.* 15. * which Statute expreſly makes any fraudulent Grant or Conveyance of the Trader's Lands or Goods, whereby his Creditors may be defeated or delayed of their juſt Debts, a *ſpecific Act of Bankruptcy*.

* *V.* § 2. of that Act.

If the Deed *was* fraudulent, within the true Intent and Meaning of the Statute, He certainly committed an Act of Bankruptcy on the 23d of *October*: If it was *not*, He did not commit any Act of Bankruptcy till the 13th of *November*.

The Jury found Him a Bankrupt.

And, by Conſent, the following Order was made at *Niſi prius*; *viz.* That either Party be at Liberty to move the Court. And if the Court ſhall, upon ſuch Motion, be of Opinion "That the "Deed of 23d of *October* 1756, is, under All the Circumſtances, "*fraudulent*, and the Execution of it by *Richard Slader*, *an Act of Bankruptcy*."—Then the *Poſtea* ſhall be marked on the Back thereof, "That the ſaid *R. S.* became a Bankrupt on the ſaid 23d of "*October* 1756:" But if the ſaid Court ſhall be of Opinion "That the Execution of the ſaid Deed, under all the Circum-"ſtances, by the ſaid *R. S.* be *not* an Act of Bankruptcy," Then the ſaid *Poſtea* ſhall be marked on the Back, "That the ſaid "*R. S.* became a Bankrupt on the 13th Day of *November*."

The

The Form of the *Rule*, under which it came before the Court was thus—" It is ordered that the Plaintiffs ſhew Cauſe why the " Poſtea in this Cauſe ſhould not be indorſed, that *Richard Slader* " became a Bankrupt on the *thirteenth* Day of *November* 1756."

Lord Mansfield firſt repeated the whole Evidence very particularly and minutely: Which, after the Counſel had done, was reſolved, by the Opinion of the whole Court, into the following Caſe; *viz.*

James Davis, an Agent of *Iſaac de Mattos*, *knowing Slader* to be indebted, and that he could not carry on his Trade, unleſs ſome body in *London*, in the Nature of a Banker, would pay his Draughts, negotiated (in the Month of *July* 1756,) an Agreement between the ſaid *Iſaac de Mattos* and *Richard Slater*, " that *de Mattos* ſhould " pay *Slader*'s Draughts, upon having Security."

The Nature of the Security, and the Terms of the Agreement, appear only by the Deed of the 23d of *October*; prepared, and procured to be executed, by *James Davis* and *James Whitehead*, Both of them Agents of *Iſaac de Mattos*.

The Deed in Queſtion bears Date the 23d of *October* 1756; and recites *Slader*'s Title to the Mill and Premiſſes; and alſo his being concerned in and carrying on divers Branches of Merchandize and other Buſineſs; and his having frequent Occaſion to draw and remit Sums of Money from and to *London*; and his having requeſted *Iſaac de Mattos* to be his Agent or Banker there; And that in order to indemnify him for ſo doing, *Slader* had agreed to transfer and aſſign All his Eſtate and Intereſt in the Premiſſes aforementioned in the ſaid Indentures, *and alſo* All *his Stock* uſed and employed in the Trades of Brewing and Making Malt, and in the Buſineſs of a Corn-Factor and Miller, to the ſaid *Iſaac de Mattos* his Executors Adminiſtrators and Aſſigns, for that Purpoſe: And then the Deed imports that for the Purpoſes aforeſaid, and in part of Performance of the ſaid Agreement, and in Conſideration of 5*s*. He the ſaid *Slader* Grants Aſſigns, *&c.* his ſaid Meſſuage, Corn Water-Mill, and divers other Things (ſubject to a Mortgage then ſubſiſting, on part thereof.) And further, in full Performance of the ſaid Agreement, and for the Conſiderations aforeſaid, He grants *&c.* All *his Stock*, *Utenſils*, *and other Things*, uſed in his Trades of Brewing and Malting, and of a Corn-factor and Miller; conſiſting of Coppers, Tuns, Backs, Coolers, Pumps, Ciſterns, Skreens, and *other* Implements; And Also All his *changeable Stock*, conſiſting of Debts, Horſes, Carts, Caſks, Hops, Beer, Ale, Wheat, Barley, Malt, Coals, Wood, and All other *Goods and Commodities* belonging

longing employed or made uſe of, *in the ſaid ſeveral Trades* or any of them; And all his Eſtate, Right, Title, Intereſt, Property, Claim, and Demand whatſoever thereto, and to every or any Part thereof; to the ſaid *Iſaac de Mattos*, his Executors *&c. Defeazanced* however, on his the ſaid *Slader*'s paying and making good to the ſaid *Iſaac de Mattos* All the Sums of Money which he ſhould advance and pay on any Note Draught Bill or other Writing of the ſaid *Slader*; and on his indemnifying *de Mattos* againſt the ſame, and all Matters any ways touching or concerning the ſaid Agency.

This Deed further contains the common Covenants: And there is a Receipt indorſed for the 5*s.* Conſideration-Money.

In it is alſo a Covenant that in Caſe of Breach of or Failure in the Conditions *&c.* or any Part thereof, *then* and *from thenceforth*, it ſhould be lawful for the ſaid *Iſaac de Mattos* his Executors *&c.* to ENTER, POSSESS *and* ENJOY the ſaid Land and Premiſſes *&c*; And ALSO *to take to his and* their own Uſe and Uſes, abſolutely, All and ſingular the Premiſſes *laſt* before-mentioned, *viz. the* STOCK, *&c.*

Upon the 8th of *October*, *Richard Slader* drew a Bill upon *Iſaac de Mattos*, by Authority from him, for 200*l.* But, to give it Credit, it was made payable to the ſaid *James Davis*, and indorſed by him.

Upon the 23d of *October*, *Richard Slader* drew another Bill upon *Iſaac de Mattos*, by Authority from him: But, to give it Credit, It was made payable to the ſaid *James Whitehead*, and indorſed by him.

Iſaac de Mattos himſelf *perſonally knew* that the Affairs of *Richard Slader* were in Confuſion; and *hired Samuel Sills*, whom He *ſent* down in the Month of *October*, to be *Book-keeper* to this *Richard Slader*. *Sills* accordingly went; and had examined all *Slader*'s Accounts and Affairs, by the 20th of *October*.

The Deed, (which had been a conſiderable Time preparing,) was executed on the 23d of *October*; and is *witneſſed* by the ſaid *James Whitehead*, *James Davis* and *Samuel Sills*.

The Bankrupt *continued in Poſſeſſion* of every Thing conveyed by the ſaid Deed. And *James Davis* took Occaſion to tell the Creditors of *Richard Slader*, "that the ſaid *Slader* would *do very well*;" "that he had recommended him to two good Men;" and "that "*Slader* had given a Mortgage of the *Mill*, and *other Leaſe-hold* "Premiſſes:" But *James Davis concealed* and did *not* mention *Slader*'s having aſſigned his GENERAL Effects.

Upon the 11th of *November*, *Slader told Davis and Sills*, both together, " that he *could not ſtand*;" and conſulted them what to do: The Reſult of which Conſultation was,—That *Sills*, by Order of *Slader*, the ſame Day, gave *Poſſeſſion to Davis*, as Agent of *de Mattos*, who immediately ſet out for *London*. The next Day, (the 12th of *November*,) *Slader* ordered *Sills* to deny him: On the 13th *Sills* did deny him accordingly; and told the Reaſon, " that " it was *to commit* an Act of Bankruptcy."

Slader had nothing of Value, *but* what was comprized in the Deed of the 23d of *October*: And he traded as a Brewer, Maltſter, Corn-factor, and Miller; but carried on *no other* Trade.

After the 13th of *November*, *Iſaac de Mattos* paid the ſaid two Draughts indorſed by *Davis* and *Whitehead*.

After Ld. *Mansfield* had reported the Evidence, the Counſel for the Plaintiffs proceeded to ſhew Cauſe: And they urged the Deed to be *merely colourable*, and ſo *fraudulent* as to conſtitute, in itſelf, an Act of Bankruptcy; being to the *Intent to defeat and delay* his Creditors, or *whereby they* MIGHT *be* DEFEATED *or* DELAYED.

They cited 3 *Co.* 80. *Twine*'s Caſe, and the Rules and Reſolutions contained in it, and urged that the preſent Caſe was fully within it.

They alſo cited 13 *Eliz. c.* 7. and 1 *Jac. c.* 15. §. 2: which goes further than 13 *Eliz.* Likewiſe 2 *Inſt.* 110. on the Statute of *Marlebridge*. 6 *Rep.* 76. *Curſon*'s Caſe S. P. *Moore* 193. Ld. *Paget*'s Caſe, upon the Statute of Fugitives beyond Seas made *Anno* 13 *Eliz.* (In which, they obſerved that 13 *Eliz. c.* 3. is in *Raſtal*, and not elſewhere.) *Style* 288. *Tucker* v. *Coſh.* 2 *Peere Wms.* 427. *Small* v. *Oudley et al.* Where a Goldſmith aſſigned $\frac{1}{3}$ of his Stock in the *Wine* Trade; And it was holden good: But *contra*, if it had been of ALL his Goods, *&c.*

Alſo *Lucas's Rep.* 489. Dr. *Goodfellow*'s Caſe; and *Ryal* v. *Rowls* in *Canc.* 27th *January* 1749.

And they obſerved that here was no *Poſſeſſion* altered; no *Eſtimate or Account* taken of the Stock *&c*; nor any *Conſideration* paid.

The Counſel for the Defendants inſiſted, that even IF *it was granted* that this Deed was fraudulent, AS *againſt* Creditors or Purchaſers, yet it would NOT be an ACT OF BANKRUPTCY: For the * Act has a Proviſo to except Deeds made *bonâ fide* and upon *good* Conſideration.

* *V.* 13 *Eliz. c.* 7. §. *ult.*

This

This Deed was made *bonâ fide*, and *upon good Conſideration*. It was made by Mr. *Slader*, a Trader in the Country, to ſecure Mr. *De Mattos*, who agreed to become his Banker or Agent in *London*; and to permit *Slader* from the Country, to draw upon him in Town: And the *only* INTENT *of it* was to indemnify *De Mattos* againſt *Slader*'s OVER-*drawing*. *Unwin* v. *Oliver*, *in Canc. Tr.* 12 *G.* 2. was a like Caſe, determined by the Lord Chancellor. And this Tranſaction tended to enable the Country Trader the better to carry on his Trade; and was far from being intended to deceive his Creditors.

It muſt be agreed, that this Deed of Aſſignment *includes Goods and Utenſils*, as well as the Houſe and Mill &c; And that there was NO *previous Appraiſement*. But *that* was quite unneceſſary: Becauſe it could not be *then* known *how much* Money was to be ſecured.

As to the Owner's *continuing in Poſſeſſion*.—The Caſe of *Meggot* v. *Mills*, 1 *Ld. Raym.* 286. *B. R.* 1697. was ſo; and yet not fraudulent. *Precedents in Chancery* 285. *Bucknall et al'* v. *Roiſton* was the like. And in the Nature of the Thing, Poſſeſſion could not be delivered in the preſent Caſe; becauſe the Debt to be ſecured was future and uncertain. So that *this Continuing in Poſſeſſion* was *no mala Fides, no Badge or Evidence of Fraud:* Becauſe it did not give the Owner *a falſe and fallacious Credit*. Neither was it *ſecret*; but notorious: And it was NOT *with Intent to defeat and delay* his Creditors; but to their Benefit, and calculated to ſupport *Slader*'s Credit, and to enable him to pay his Creditors.

The GENERALITY of a Deed is *not always* and *neceſſarily* an *Evidence of Fraud*: For unleſs there be a *Truſt*, either expreſſed or implied, there is no Fraud: And here is no Truſt, either expreſſed or implied: Nor could *De Mattos* recover more than was fairly owing to him.

The Caſe of *Ryal* v. *Rowls* was rightly determined, "that a Se-"curity may be loſt, by ſuffering a Continuance in Poſſeſſion." But it does not follow that our Continuance in Poſſeſſion *conſtituted an Act of* BANKRUPTCY. Here was neither Impoſition nor Colluſion: It is only a Mortgage of his Perſonal Property, and for a fair Conſideration.

To prove it NOT to be an *Act of Bankruptcy*, they cited ſeveral Caſes. In the Caſe of *De Gols* v. *Ward*, in 1739. the *quo animo* was indeed clear and plain. The next Caſe where a Deed was conſidered as an Act of Bankruptcy, was *Aſhley*'s Caſe: But that was alſo

alſo quite clear. So again, in *Mackrell*'s Caſe, lately: Where it was indeed given up. But there is *nothing* INTENTIONALLY *ill*, in the preſent Caſe.

If this mere Giving Security to indemnify his Banker was an Act of Bankruptcy, It could NEVER *afterwards* BE PURGED: Which would be a great Inconvenience to Trade; becauſe it is a common Caſe. And this Man gave it to his *former* Banker, as well as to *De Mattos*.

It is no Act of Bankruptcy, unleſs the Deed be FRAUDULENT, as well as intended to give *unjuſt Preference to One Creditor* before Another. And there is no Pretence, in the preſent Caſe, that any bad Uſe has been made of this Deed.

The 5th Clauſe in 1 *Jac.* 1. *c.* 15. would be nugatory, if the ſecond was to be underſtood to make the Executing ſuch a Deed as this, an *ipſo facto* Act of Bankruptcy. It was only a *contingent* and *collateral* Security, depending upon *future* Events and Circumſtances: And therefore there could not, in the Nature of the Thing, be either *Delivery of immediate Poſſeſſion*, or *any particular Conſideration-Money* expreſſed. And *De Matto*'s being *liable* to be damnified was, of itſelf alone, a *good Conſideration*.

The Caſe of *Unwin* v. *Oliver*, *P.* 12 *G.* 2. *in Canc.* was this: *Unwin*, being appointed Receiver by that Court, and thereupon obliged to give Security, aſſigns his Debts, as a Security (amongſt other Things) to the Perſons who were bound for him in a Recognizance upon that Occaſion: And afterwards he became Bankrupt. *This Aſſignment* of his Debts was holden good.

Bankruptcy is conſidered by the Acts of Parliament, as a CRIME. The Deſcription of an Act of Bankruptcy, or of Perſon's becoming Bankrupt, muſt be therefore taken *ſtrictly*: And the Acts that conſtitute Bankruptcy muſt be done *with Intent* to defraud or delay Creditors.

Put the Caſe of an Officer in the Revenue appointing *a Trader* his *Deputy*; And, for his Indemnity, *taking* from ſuch Deputy, *ſuch a Deed as this* is: Would the *Executing* it make the Trader a Bankrupt?

The Act of 21 *Jac.* 1. *c.* 19. § 10, 11. takes Care of any Inconvenience to the Creditors, ariſing from the Trader's continuing in Poſſeſſion. But ſuch Aſſignments have *never* been conſidered as conſtituting an *Act of Bankruptcy*. *Small* v. *Oudley*, 2 *Peere Wms.* 427. *Jacob* v. *Shepherd*, there cited. *Ryal* v. *Rowls*, *in Canc.*

27 *January* 1749: Which was an Aſſignment by *Harveſt* the Bankrupt, of *all* his Goods Utenſils *&c.* and was made liable to *future* Monies to be advanced.

The Counſel for the Plaintiffs in Reply, urged the Inconvenience that muſt ariſe to Trade, from ſuch *General* Aſſignments of *All* a Trader's Effects in Trade, *un*-valued and *un*-appraiſed; in Order to ſecure *eventual Debts*, *not* exiſting at the Time of executing the Deed: And inſiſted that 1 *Jac.* 1. *c.* 15. § 2. *expreſly makes* ſuch Conveyances *Acts of Bankruptcy*.

Here is *no Conſideration* of any Money paid, or any Debt really contracted. Nor was any Money *afterwards advanced* upon this Deed. And for what was *then owing* to Mr. *De Mattos*, he had at *that* Time a *Warrant of Attorney*, to confeſs and enter up a *Judgment:* Though it was afterwards deſtroyed, when he actually took Poſſeſſion under the Deed now in Queſtion.

And indeed, IF *there* HAD *been a real* Debt ſubſiſting, Yet *this* had been an *undue Preference*, within the Act. But as it was *not* ſo, nor any thing done in Conſequence of this Deed, it is merely *fraudulent*.

None of the Caſes, on either Side, are in Point.

In *Unwin*'s Caſe, there was a Conſideration: For an *Indemnity* is a *good Conſideration*. And the Caſe goes no further than to prove "that it is ſo."

But of moveable Chattles, *Poſſeſſion* ought to be inſtantly and *actually* given: And of immoveable or remote Chattels, Poſſeſſion of every *Title* to it, and every Thing that can in the nature of the Thing, be done *towards it*.

Whereas here was *no Attempt* to take Poſſeſſion; *till* the Man was determinately going to become Bankrupt, by a plain indiſputable Act, on the 11th of *November*.

Therefore this *General* Proviſion for *one* particular Creditor, *implied a ſecret Truſt* or conciliating Favour: Which is a Badge of *Fraud and Colluſion*. And no Argument can be drawn from Mortgages of *Land*, (where it is the *uſual* Method for the Mortgagor to remain in Poſſeſſion) to the keeping Poſſeſſion of *Goods* aſſigned over. And if this had been an honeſt Tranſaction, there would have been an *Appraiſement* and a *Schedule*; and it would not have been left *thus at large*.

As to it's not being to be afterwards *purged*;—That does not alter the Case at all: For no Act of Bankruptcy can be purged, but by obtaining a Certificate.

As to 21 *Jac.* 1. *c.* 19. § 11. Continuing in Possession was always looked upon as an *Evidence* of Fraud: That Law is only *declarative* of what was the Law before.

The Cases cited of *Ward*, *Ashley*, and *Macrell*, prove Nothing against Us, at all.

Lord Mansfield said The Court would consider it, both upon the particular Circumstances, and upon the general Principles: And it would be proper to consider the Subject, with regard to *Traders in general*, under 13 *Eliz. c.* 7. as well as to Traders *becoming Bankrupts*. And They would give Notice when they were ready to declare their Opinion.

Lord Mansfield now delivered the Opinion of the Court.

The Question is, Whether, upon *all the above Circumstances*, *Slader* became a Bankrupt on the 23d of *October*, or on the 13th of *November*.—And the *Postea* is to be indorsed, as to the *Time* of *Slader*'s becoming Bankrupt, according to the Opinion of the Court.

All the Acts concerning Bankrupts are to be taken together, as making *One System* of Law: They are All to be construed *favourably for Creditors*, and to *suppress Fraud*.

* *Vide ante* 397. *accord.*

"Whether a Transaction be fair, or fraudulent," is often a Question of * *Law*: It is the *Judgment of Law*, upon Facts and Intents.

The *Indemnity*, which is the Consideration of the Deed in Question, I allow to be a good, valuable, and true Consideration: And I allow this Deed to be a valid Transaction, As between the *Parties*.

But valid Transactions, as between the *Parties*, may be fraudulent by Reason of Covin, Collusion, or Confederacy to injure a *third* Person: For Instance—*A.* buys an Estate from *B.* and forgets to register his Purchase Deeds: If *C.* with express or implied Notice of this, buys the Estate for a full Price, and gets his Deeds registered; This is fraudulent, because he assists *B.* to injure *A.* Or, If a Man knowing that a Creditor has obtained a Judgment against his Debtor, buys the Debtor's Goods, for a full Price, to enable

him to defeat the Creditor's Execution: It is fraudulent. Again, If a Man, knowing "that an Executor is waſting and turning the "Teſtator's Eſtate into Money, the more eaſily to run away with "it," buys from the Executor, with that View, though for a full Price; It is fraudulent.

Marriage-Brocage Bonds, ſecret Agreements, different from the open Treaty of Marriage, and many other Caſes that might be put, though for a true and valuable Conſideration, as between the *Parties*, are fraudulent, by Reaſon of Deceit or Injury conſequentially brought upon *third* Perſons.

* *Twyne*'s Caſe, even in a Criminal Proſecution was of this Sort: The Conſideration of the Sale was more than ſufficient, and undoubtedly true. * 3 Co. 80. *b.* 81. *a.*

Whether *this* Deed be of that Sort, will depend upon the whole Purpoſe of it.

As to All, except the Leaſehold, It could not have the Effect of a Conveyance, if *De Mattos* permitted *Slader* to *continue in Poſſeſſion*.

By the expreſs Tenor of the Deed, *Slader* was to have the abſolute Order and Diſpoſition as before. In Fact, he was permitted to continue in Poſſeſſion, and *act as Owner*. They who dealt with him, truſted to his viſible Trade and Stock. They truſted to the Bankrupt-Law, that he could neither have ſold or mortgaged; and, in Caſe of a Misfortune, that his Effects muſt be equally diſtributed. They were impoſed upon by *falſe Appearances*.

To deceive the more, under a fictitious Shew of Credit, the Bills drawn upon *De Mattos* were made payable to and indorſed by his *own Agents*. *Davis*, One of his Agents, expreſly told the Creditors, "That *Slader* would do very well; That Two good Men, "upon Security of the Leaſehold, would pay his Draughts:" But *concealed* that he had mortgaged any Thing elſe.

A falſe ſhew, by Colluſion, to deceive third Perſons, is generally connected with a *ſecret Confidence*. So here, the Truſt put in *Slader* manifeſtly was, That when he could ſtand no longer, he ſhould give Notice to *De Mattos* or his Agents, deliver Poſſeſſion, and then commit a poſitive Act of Bankruptcy.

From the Nature of the Fund, Poſſeſſion never could be meant to be taken, but as the immediate Fore-runner of a Commiſſion of Bankruptcy. He could not ſtand a Moment, after his whole Trade,

Trade, fixed and fluctuating Stock, and Credits were taken from him.

To watch *Slader*, *De Mattos* put *Sills* about him, as his Book-keeper; Agreeable to the Confidence put in him, when *Slader* ſaw he could ſtand no longer, He acquainted *Sills* and *Davis* the Agent of *De Mattos*, with it; and *by their Advice*, firſt gave an Order to deliver Poſſeſſion, and then to be denied. This ſhews, to a Demonſtration, that they were All aware that *Poſſeſſion was neceſſary*, and intended from the firſt; by a formal Delivery of Poſſeſſion, when he was determined to break, to evade the * Clauſe in 21 *Jac.* 1. *c.* 19. For the Meaſure was inſtantly taken, without any *new* Advice.

* § 11.

I will conſider this Tranſaction more particularly, in two great Views:

1. In Reſpect of the *End*;

2dly. In Reſpect of the *Means*.

As to the firſt—The *End* propoſed by the ſecret Truſt was, that in Caſe *Slader* ſhould become Bankrupt, his whole Eſtate ſhould firſt be veſted in *De Mattos*, for Payment of what was juſtly due to him. The *Preference* aimed at was *fraudulent* and *unlawful*.

Suppoſe, *after* the Conſultation on the 11th of *November*, this Deed had been prepared and executed, accompanied with ſuch formal Delivery of Poſſeſſion: We are of Opinion, that it would have been *fraudulent*, and an *Act* of Bankruptcy.

Such *Preference* is a Fraud upon the whole Bankrupt Law, and would defeat the two main Objects it has in View; to wit, the *Management* of the Bankrupt's Eſtate; and an *equal Diſtribution* among his Creditors.

The Law gives the *Management*, to Perſons choſen by the *Creditors*, under the Direction of Commiſſioners, and the Controul of the Great Seal.

But, if a Bankrupt may convey all to a favourite and friendly Creditor, juſt before he orders himſelf to be denied; The whole Power of ſelling his Effects, calling in his Debts, and ſettling his Accounts, muſt be in *ſuch* Single and particular Creditor: *He* muſt have a Right even to the Cuſtody of the Books and Papers.

An

An *equal Diſtribution* among Creditors, who equally gave a general perſonal Credit to the Bankrupt, anxiouſly provided for, ever ſince the Act of 21 *Ja.* 1. *c.* 19.

It was thought miſchievous, to ſuffer Priorities to be gained by *ſecret Liens*; as * by Judgment, Statute, Recognizance, Bond, Specialties, Attachments by Cuſtom in *London* or elſewhere, Aſſignment of Debt to the † King's Debtor. Unleſs they took out Execution, theſe All equally gave a perſonal Credit to the Bankrupt, and truſted *him* to manage his Effects. * § 9. † § 10.

Conveyances of perſonal Chattels by way of Security, where *Poſſeſſion* was left * *with the Bankrupt*, fell within the ſame Reaſon. * § 11.

LAND is held, *without* Perception of the Profits, by the TITLE. But there is *no* Hold of GOODS, which the Mortgagor is allowed to poſſeſs and diſpoſe of. Therefore, by a † Clauſe in the ſame Act, any Priority by ſuch *ſecret* Lien is alſo taken away; and, as ſuch Mortgage equally gives a general Credit, He is levelled with the *other* Creditors. † § 10.

But, if a Bankrupt may, juſt before he orders himſelf to be denied, convey *All*, to pay the Debts of *Favourites*; the worſt and the moſt dangerous Priority would prevail, depending merely upon the unjuſt or corrupt *Partiality* of the Bankrupt.

A * Caſe lately happened, where a Conveyance calculated to *poſtpone* one Creditor to the reſt, was held an Act of Bankruptcy. It came on before Ld. *Hardwicke*, the late Ld. Chancellor, at *Lincoln's-Inn Hall*, † One *Gayner*, a Trader, had made an Aſſignment on the 7th of *June* 1755, of all his Effects, Goods, Stock in Trade, and Book-Debts, (Except Houſehold Goods, Watches, Plate, Bills of Exchange, Inland Bills, Promiſſory Notes, and Caſh then by him,) to Truſtees, in Truſt to pay themſelves and all the reſt of his Creditors, *except Foord the Petitioner*. But the Truſtees declined to act under *this* Aſſignment; He executed *another*, on the 9th of *June* 1755: Wherein the Truſtees were to pay themſelves, and all the Creditors mentioned in a *Schedule*; (in which Schedule, the Petitioner was *not* included:) And in this ſecond Aſſignment, a large Parcel of *Ginger*, as well as the Things above-mentioned, were excepted. * *Gayner*, Bankrupt. *Ex parte Foord* and others. † 31ſt *July* 1755.

The Petitioner inſiſted that he *alone* could chooſe Aſſignees; ſince the *other* Creditors claimed under the *Aſſignment*.

Ld. *Hardwicke* was clear, "that the *executing* the Deed of the "9th of *June* was an *Act* of Bankruptcy." And all that heard

his Determination, were of the ſame Opinion: And every Body concerned acquieſced in it. Whereupon the Creditors mentioned in the Schedule, conſented to wave all Benefit or Advantage under that Aſſignment; and all proved their Debts, in order to receive an equal Dividend with the Petitioner: And the Creditors proceeded to a Choice of new Aſſignees.

The Framers of this Deed executed by *Gayner*, took for granted, "that if it had been a Conveyance of *all* his Effects, it muſt be "bad;" and therefore they *colourably excepted Parts*. But the Contrivance did not prevail, even ſo far as to bear an Argument; or to be thought, by any Body, worthy of a Trial.

There is a great Difference between the Conveyance of *All*, and of a *Part*. A Conveyance of a *Part* may be public, fair and honeſt: As a Trader may *ſell*; ſo he may *openly transfer* many Kinds of Property, by way of *Security*. But a Conveyance of ALL, muſt either be fraudulently kept ſecret; or produce an immediate abſolute Bankruptcy.

It has been argued, "that *after a Reſolution* taken by a Trader, "to commit an Act of Bankruptcy, the Trader ſo reſolving to be-"come Bankrupt, might lawfully prefer a juſt Creditor by convey-"ing *Part* of his Effects, to ſatisfy that Creditor's Debt."

It is not neceſſary to determine that Queſtion, in *this* Cauſe; for here the Conveyance is of ALL: And therefore I will only ſay, that no ſuch Propoſition is yet *eſtabliſhed*; much leſs, in the *Extent* whereto it has been urged.

* *V. Lucas* 489.
† Cited in 2 *Peere Williams*, 430, 431.
‡ 2 *Peere Williams*, 427.

The Caſes mentioned, were * *Cock* v. *Goodfellow*; † *Jacob* v. *Sheppherd*; ‡ *Small* v. *Oudley*; and *Unwin* v. *Oliver*.

In the Caſe of *Cock* v. *Goodfellow*, the Fact did not give Riſe to any Queſtion. An immediate Proſpect of a certain Bankruptcy was *not the Motive* to what Mrs. *Cock* did. She was *ſolvent* at the Time; and, that very Day, lent 40,000*l*. Beſides, her Children, to whom She was Guardian and Truſtee, were not upon the Foot of *Common* Creditors: The Court of Chancery would have decreed Her to place their Fortunes out upon Government or real Securities.

As to the Caſe of *Jacob* v. *Shepperd*, I have looked into the Regiſter's Book, upon this Occaſion: And I have a Note of it, as ſtated by Ld. *Hardwicke* in the Cauſe of *Bourne* v. *Dodſon*. And it was this—

Mr. *Thomas Leigh*, (the Bankrupt,) who was a *Turkey*-Merchant, by Deed dated the 8th of *June* 1709, ſold and conveyed *particular*

Goods in the Hands of his Factors, to Mr. *William Snelling*; upon Truſt to apply the Money ariſing thereby, in Satisfaction, in the firſt Place, of a Debt of 1500*l.* due to *Snelling* himſelf; and then of a Debt of 1551*l.* and Intereſt, due to *Geo. Morley*; and out of the Reſidue, to pay *ſuch* of the Bankrupt's Creditors, as He, with *Morley*'s Conſent, *ſhould direct:* And if there ſhould be any Surplus after the ſaid *Snelling*'s and *Morley*'s Debts were paid, and ſuch Sums for which they were Bail or Security for the ſaid Bankrupt, the ſame was to be paid to the ſaid Bankrupt his Executors, Adminiſtrators and Aſſigns.

Afterwards, by Deed dated 16th *December* 1709, and by Deed dated 20th *January* 1709, other Debts were appointed to be paid, *agreeable to the Power* reſerved by the former Deed.

On the 11th of *February* 1709, *Thomas Leigh* failed, and committed an acknowledged Act of Bankruptcy: And a Commiſſion was taken out, and his Eſtate and Effects aſſigned.

The Truſts of the Deed of the 8th of *June* 1709, were *immediately*, and *openly* carried into Execution: So that no Queſtion ever did or could ariſe upon the * Clauſe of 21 *Ja.* 1. *c.* 19. But the Aſ- * § 11.
ſignees brought a Bill againſt all the Parties claiming under the Deed of the 8th of *June* 1709, and the ſubſequent Deeds; "to "have them ſet aſide; and to have an Account of the Money "which they had received;" upon two Grounds; 1ſt. That the Deeds were obtained by Fraud and Impoſition on *Leigh* the *Bankrupt*; 2dly. That they were an Impoſition upon the *other Creditors*.

The Cauſe came on to be heard at the *Rolls*, upon the 16th of *June* 1725. Sir *Jo. Jekyll* took time to conſider of it; and ordered all the Pleadings and Proofs to be left with Him: and upon the 17th of *December*, Sir *Joſeph* gave Judgment. He thought theſe Deeds could not be looked upon, or ſet aſide, upon the former Ground, *viz.* as a Fraud upon the *Bankrupt:* But He declared the ſaid Deeds to be FRAUDULENT, and an Impoſition upon the *Creditors* of the Bankrupt; And decreed them to be *ſet aſide*, with Coſts.

In making this Decree, He went upon right Principles; but did not attend to it's being a *Bankrupcy*, if it was *really* fraudulent; And that a Court of Equity could not decree it to be fraudulent, unleſs it was fraudulent *at Law*; in which Caſe, it would conſtitute an *Act* of Bankruptcy, of itſelf.

On the 6th of *Auguſt* 1726, Ld. *King*, upon an Appeal, directed an Iſſue at Law, to try, "Whether by the Execution of the Deed of

" of the 8th of *June* 1709, *Thomas Leigh* became a Bankrupt; or at " any other, and what Time." The Jury found he became Bankrupt on 11th *February* 1709.

Upon the Equity reſerved, Ld. *King eſtabliſhed* the Deeds; held the Plaintiffs to be only intitled to the Surplus, *after* the Truſts in the Deeds were performed; and decreed the proper Accounts againſt the Defendants, of the Money they had received, in Order to find out that Surplus.

Many very obvious Obſervations occur upon this Caſe.

Sir *Joſeph Jekyll* was ſo ſtruck with the Objections of Fraud from Preference, that He ſet aſide the Deeds, with Coſts.

Ld. *King* reverſed his Decree; becauſe no Deed made by a Trader can be fraudulent in *Chancery*, which is not fraudulent in a Court of *Law*, and an *Act* of Bankruptcy. Therefore He directed an *Iſſue*.

There might be many Reaſons, *why* it was *not found fraudulent*, upon the Trial. The Deed was executed the 8th of *June*, of *ſpecific* Goods; and was *immediately carried into Execution*. The Act of Bankruptcy was not till the 11th of *February* following: And I ſee no Suggeſtion that *in June*, *Leigh thought* of committing an Act of Bankruptcy. Beſides, one Ground upon which the Aſſignee brought his Bill, was " Fraud and Impoſition upon the *Bankrupt* " *himſelf*, in obtaining the Deeds:" Therefore, moſt probably, he was frightened into giving this Security, by Threats of *legal* Diligence againſt him.

The Caſe of *Small* v. *Oudley* was determined very ſoon after; *viz.* upon the 4th of *December* 1727. The beſt Report of it, is in 2d. *P. Wms.* 427: But it is no where fully ſtated. I have a Copy of the Decree from the Regiſter's Book; as follows—

On the 21ſt of *September* 1720, *Small*, (to accommodate *Daniel* and *Joſeph Nercott*, Brothers, Goldſmiths and Partners, upon a preſſing Occaſion,) transferred to them 500*l.* S. S. Stock; upon their engaging " to transfer to him the like Sum in the S. S. Stock " in a Week or ten Days at fartheſt," and giving a Note for that Purpoſe.

They ſold the S. S. Stock for 1800*l.*

On the 29th of *September* 1720, they made the Aſſignment of *their Share in a Wine-Partnerſhip* with *Oudley*, carried on ſolely in

his Name, (in which, they had Two Thirds, and *Oudley* One Third;) as a *Security for transferring* 500*l.* S. S. Stock; and reciting the Truth of the Caſe.

They, at the *ſame Time*, aſſigned two *Leaſe-hold* Eſtates to *Small*, for the ſame Purpoſe.

Their Intereſt in the Wine Trade was *but* 300*l.* And *Oudley* had a Right to carry on the Trade till *Chriſtmas* 1723. The Bill (which was againſt *Oudley*, and againſt the Aſſignee under a Commiſſion iſſued againſt the *Nercotts*,) was not brought by *Small*, till after that Time: But an Iſſue had been directed in another Cauſe, to try "Whether the ſaid *Nercotts* were Bankrupts at the Time "they executed an Aſſignment to *Small*, of a Leaſe of certain Houſes, "on the *ſaid* 29th of *September* 1720."

The above Facts are admitted by the Anſwers; *no Fraud* is ſuggeſted; and they do not mention any Deſire to have the *Time* of the Bankruptcy tried over again.

Sir *Joſeph Jekyll*, in 2 *Peere Wms.* * gives ſtrong Reaſons *againſt* the Decree He thought Himſelf *bound* to make, becauſe Ld. *King* had juſt eſtabliſhed, "That a Deed by a Bankrupt could not be "ſet aſide, as fraudulent in Chancery." * pa. 429. to 431.

This Caſe too was *very particular*. The Fraud was upon *Small*; and not upon the Creditors: His Stock was to be replaced, in a Week, or ten Days *at fartheſt*, by the original Agreement. 1800*l.* of *Small's Money*, went to the Creditors: And this Security amounted *but* to about 300*l.* So that the whole Tranſaction was *beneficial* to the Bankrupt's Creditors. The S. S. Stock was got from *Small*, with a View to *ſave* the *Nercotts* from breaking. The Security was given, at the *very time* they were *obliged to replace* the 500*l.* S. S. Stock: and there was no Pretence that *Small* afterwards permitted them to *continue* one Moment in *Poſſeſſion*.

The Caſe of *Unwin* v. *Oliver*, * *T.* 12 *G.* 2. is not entered in the Regiſter's Book: But I have ſeen a fuller Note of it, than was cited at the Bar.

* *Stephen* and *Morley Unwin*, againſt *Oliver et al*, Aſſignees of *Martin Unwin*, a Bankrupt: *Eaſter* Term 1739.

It was an Aſſignment of ſeveral Debts mentioned in a Schedule; to indemnify his Sureties in a Recognizance. *Martin Unwin* had been appointed Receiver of a Lunatic's Eſtate: And the Plaintiffs became his Securities, by Recognizance, "that He ſhould account "for what He ſhould receive under the Orders of the Court." Two Years after, *Martin Unwin*, by Deed reciting "that 604*l.* was "due from Him to the Lunatic's Eſtate," aſſigned to the Plaintiffs,

ſeveral Debts mentioned in a Schedule annexed to the Aſſignment; To diſcharge the 604 *l.* and to indemnify them againſt this Security which they had entered into for Him. A Month after this Aſſignment, *Martin Unwin* became a Bankrupt.

The Act of Bankruptcy was admitted to be a *Month* after the Aſſignment. *No* Queſtion was made upon the Clauſe in the 21 *Ja.* 1. *c.* 19. And there was *no* Suggeſtion, "that the immediate Proſpect of a certain Bankruptcy was the Cauſe of the Aſſignment."

Lord HARDWICKE held that it could not be ſet aſide as fraudulent, *in Chancery*; unleſs it was fraudulent in a *Court of Law*, and an Act of Bankruptcy. And He held "that *Indemnity* was a "*good* Conſideration:" Of which, there can be no Doubt.

But 2dly. (to conſider this Tranſaction, in reſpect of the *Means*) Suppoſe a Bankrupt could, after a Reſolution to commit an Act of Bankruptcy, prefer one of his Creditors, by an Aſſignment of *All*; (which We think He cannot;) Yet in *this* Caſe, the MEANS to attain ſuch Preference were *fraudulent*. A *falſe Credit* is induſtriouſly given the Bankrupt, upon a *ſecret Truſt* "to deliver Poſſeſſion *ſo as* "*to avoid* the Clauſe in the 21 *Ja.* 1. *c.* 19."

* 3 *Co.* 81. *a.* The ſecond Argument of Fraud in *Twyne*'s Caſe, * is—"The "Donor *continued in Poſſeſſion*, and uſed them *as his own*; and by "*Means thereof*, traded with others, and deceived and defrauded "them."

BUT, three Caſes have been cited to ſhew, "That upon a *Mortgage* of Goods by a Trader, the Leaving Poſſeſſion does *not* infer Fraud; though it may, upon an *abſolute Sale*. Theſe are the Caſes of *Meggott* v. *Mills et al'*, 1 *Ld. Raym.* 286; *Bucknal et al'* v. *Roiſton*, in *Precedents in Chancery* 285; and *Ryal* v. *Rowls*, in Chancery, 27th *January* 1749.

The firſt is a direct Authority to the *contrary*. For Ld. Ch. J. *Holt* ſays, "If theſe Goods of *Wilſon*'s had been aſſigned to any "*other* Creditor, the Keeping of the Poſſeſſion of them had made "the Bill of Sale fraudulent, as to the other Creditors." But He very juſtly diſtinguiſhed that Caſe; and ſeems to have conſidered the Landlord (who lent his Tenant Money to buy the Goods, to furniſh his Houſe,) as the original Owner of the Goods.

Bucknal et al' v. *Roiſton* was *not* a Caſe of *Bankruptcy*, but upon the Courſe of *Adminiſtration of Aſſets*, (where ſecret Liens give

Priority;) and is *expreſly* * *diſtinguiſhed*, by my Lord Chancellor, from the Caſe of a *Bankrupt*. Beſides, the Poſſeſſion was there a Truſt under an Authority to negotiate and ſell; and could not be meant to give any *falſe Credit*.

* *V. Precedents in Chancery, pa.* 287. Where Lord Chancellor admits, "that in Caſe of a Bankrupt, ſuch Keeping Poſſeſſion *would* make the Sale void, againſt his Creditors."

In the Caſe of *Ryal* v. *Rowls*, the Act of Bankruptcy upon which the Commiſſion proceeded, was *long after* the Mortgages; the Aſſignees *did not wiſh* to carry it farther back; and therefore *never objected* "that the Bankrupt's keeping Poſſeſſion made the Mortgages fraudulent:" But if they had, in *that* Caſe the Preſumption of Fraud would have been *diſproved*. The ſame Fund was mortgaged ſix Times over: They All truſted to their Conveyances, (like Mortgages of Land,) as a *Title*, without Poſſeſſion; though a Bankruptcy ſhould happen. They *miſtook* the Law; but did not *evade* it.

Whereas here, the Parties manifeſtly were *aware* "that Poſſeſſion was *neceſſary*:" The ſolemn Determination in the Caſe of *Ryal* v. *Rowls* had made that Point *notorious*. Poſſeſſion was here left, upon a *ſecret Truſt* "to deliver it *ſo as to avoid* the Clauſe in "21 *Ja.* 1. *c.* 19." Which, *in Fact*, was accordingly *done*.

Two General Objections, from Inconvenience, have been urged: Which deſerve an Anſwer. Objections—

1ſt. That it will *hurt Credit*, if Traders may not raiſe Money by mortgaging their Goods without quitting Poſſeſſion. 1ſt Objection.

The Policy of the Bankrupt Law introduced by 21 *Ja.* 1. *c.* 19. and followed ever ſince, is to *level* All Creditors, who have not actually recovered Satisfaction, or got hold of a Pledge which the Bankrupt could not defeat. Anſwer,

A Trader is truſted upon his Character, and *viſible* Commerce: That *Credit* enables him to acquire Wealth. If by *ſecret Liens*, a few might ſwallow up All; It wou'd greatly *damp that Credit*.

If he mortgages and *parts with the Poſſeſſion* of Goods, the World has *Notice*: But, to give Priority from mortgaging Goods, of which the Trader is allowed to act and appear *as the Owner*, would be enabling him to *impoſe* upon Mankind; and draw them in by *falſe Appearances*.

No Injuſtice is done to ſuch Mortgagee; becauſe he really truſts only to the *general* Credit of the Trader: The Conveyance is not againſt *him*, but againſt his *other* Creditors.

Mortgages

Mortgages of *Land* are checked by the *Title:* But where Poſſeſſion is not delivered, *Goods* may be mortgaged a hundred Times over, and open a plentiful Source of *Deceit*.

2d Objection. The other General Objection from Inconvenience was, "That "a fraudulent Deed is an Act of Bankruptcy, upon the Face of it; "and *can never be purged*."

I am ſorry the Phraſe has crept into Uſe: Becauſe it *confounds* the Idea which ought to be annexed to it.

Every equivocal Fact may be *explained by Circumſtances*. If a Trader orders himſelf to be *denied*, Circumſtances may ſhew, that he did not do it *to avoid Payment*; but on Account of Sickneſs, or particular Buſineſs. So if he *leaves his Houſe*, Circumſtances may ſhew it was not, *to abſcond*.

Of all the equivocal Facts which can amount to Acts of Bankruptcy, *Deeds* are the moſt open to be explained by a Variety of Circumſtances. Hardly any Deed is fraudulent upon the mere *Face* of it. It is a *good* Sale, if the Conſideration be true; *fraudulent*, if falſe; *Good*, if Poſſeſſion immediately follows; *bad*, if it do not: Nay, the *not Taking Poſſeſſion*, being *only Evidence* of Fraud, may be *explained*.

The *Uſe* to which a Deed is applied, ſhews *quo animo* it was made. Leaving Poſſeſſion till after the Act of Bankruptcy, in the Caſe of *Ryal* v. *Rowls*, ſhewed there was *no* Fraud; and that they truſted to the Conveyance.

In *this* Caſe, the Conſultation and Delivery of Poſſeſſion upon the 11th of *November*, *proves the ſecret Truſt*, in Confidence of which, the falſe Credit was given the Bankrupt before: It ſhews that Evading the Clauſe in 21 *Ja.* 1. *c.* 19. was in the *View* and *Contemplation* of the Parties. There was *no other Reaſon* for delivering Poſſeſſion on the 11th of *November:* Becauſe no Default had happened, which gave *De Mattos* more Pretence to enter *then*, than *before*.

Under all the Circumſtances, We are of Opinion That this Conveyance of the Bankrupt's *whole* Subſtance to *De Mattos*, *though* by way of Security, and for valuable Conſideration, is *fraudulent* and an *Act of Bankruptcy*.

The Determination *here*, is upon the Aſſignment *of* All.

Per Cur. The *Poſtea* muſt be indorſed, "That *Richard* "*Slader* became Bankrupt on *the* 23*d* of October."

Rex *verſ.* Wakefield et al'.

Wedneſday 8th *February* 1758.

MR. *Harriſon* had obtained a Rule, in *Michaelmas* Term 1755. to ſhew Cauſe Why an Order of two Juſtices, made upon *ſeveral Quakers*, (for Payment of Tithes under the Value of Ten Pounds to the Curate of a Chapel) and confirmed at the Seſſions, upon an Appeal from it, ſhould not be quaſhed; together with the Order of Seſſions confirming it. See 7, 8 *W.* 3. *c.* 34. and 1 *G.* 1. *St.* 2. *c.* 6. § 2.

Mr. *Norton*, in *Michaelmas* Term laſt (*viz.* on 26th *November* 1757.) ſhewed Cauſe. He gave up the Order of Seſſions, as not maintainable: But defended the *Original* Order.

To this Original Order, Mr. *Harriſon* had taken 4 Exceptions: Which were now ſupported by Him and Mr. *Clayton*. Theſe Exceptions were as follow.

1. It is a *joint* Order made on DIFFERENT *Perſons*, for *diſtinct* Non-Payments of *different Tithes:* Whereas there ought to have been a *diſtinct* Order on EACH. In 1 *Strange* 471. *Between the Pariſhes of Chewton* and *Compton-Martin*, the Removal of two different Families of Paupers by One Order, was holden bad; Though the Pariſhes were the ſame.

2d. The TITLE *is in Queſtion:* Therefore the Juſtices have *no Juriſdiction*. The Exception in the Act of 1 *Geo.* 1. *Stat.* 2. *c.* 6. § 2. is "*Unleſs* the *Titles* of ſuch Dues Tithes or Payments ſhall be "in Queſtion." And theſe Words "Unleſs *&c.*" extend to this *whole* Clauſe; and are not confined to the granting a *Certiorari* only. And this Fact, of the Title being in queſtion appeared, as Mr. *Harriſon* alledged, upon the Granting the *Certiorari*, in the preſent Caſe.

3d. *Non conſtat* that the two Juſtices who made this Original Order, are "*neither* PATRONS *nor* INTERESTED in the Tithes." But 1 *G.* 1. *c.* 6. § 2. requires that they ſhall be neither One nor the Other. Now they ought *expreſly to* AVER and *ſhew* (negatively) "that they "*are not:*" Or elſe they have no Juriſdiction, by the very Words of the Act; The Juriſdiction being given to "Any two or more "Juſtices *&c.* OTHER *than* ſuch as *&c.*"

4th. It does *not sufficiently ascertain and state* WHAT is due and payable by the Defendants, or at least, * FOR *what*, the respective Sums are due. † One Sum is "1 *s.* 6 *d.* being *due to the Curate*;" not saying FOR *what*. Another is, "being the *Value* of their ancient customary Payments". Another is—"4 *s. being antient* "*customary* Payments."

* *V.* 7, 8 *W.* 3. *c.* 34. § 4. *N B.* The Act does not require the *latter*.

† This Objection is not supported by the Act.

This Order was made on the Act of 1 *G.* 1. *Stat.* 2. *c.* 6. § 2. which extends the 7, 8 *W.* 3. *c.* 34. § 4. to ALL *Payments* to Ministers or Curates officiating in Churches or Chapels. (*V.* that Statute of 7, 8 *W.* 3. *c.* 34. § 4: which extends *only* to *Tithes* and *Church-Rates*.)

Mr. *Norton contra* answered these Objections. The Substance of his Defence against them was fully sufficient, if true: For He denied the 1st. to be *material*; And denied the three last, to be well founded.

The Matter was adjourned to *Monday* 28th *November*.

Then, this Motion being mentioned again,—
The COURT inquired "Whether the Return of the *Certiorari* "was filed."

And Lord MANSFIELD said He had called for, and read the Affidavits made for obtaining the *Certiorari*, and upon the shewing Cause.

Mr. Just. DENISON mentioned a Case of *Rex* v. *Furnes*, *B. R. H.* 6 *Geo.* 1. upon a *Certiorari* to remove an Order made upon the Act of 7, 8 *W.* 3. *c.* 6. for Payment of small Tithes: Where Ld. Ch. J. PRATT thought that where the RIGHT *was in question*, such Cases were *never intended to be* the Subject of that Act of Parliament. He said, this was only spoken from a Note, which He had seen: But it should seem to be right * and true; and the rather, from a Case of *Rex* v. *Furnefs* being mentioned in 1 *Strange* 264. where an Order for Non-Payment of small Tithes made on 7, 8 *W.* 3. *c.* 6. was quashed.

* It is right and true: At least, I have a MS. Note of the same Case to the same Effect, or stronger; (For mine says "*Per Cur.* The Design of the Statute was only to give a speedy Remedy for small Tithes where the Right is agreed.")

Adjourned to the present Term.

Lord MANSFIELD now delivered the Opinion of the Court.

He begun with stating the two Acts of 7, 8 *W.* 3. *c.* 34. (§ 4.) and 1 *G.* 1. *Stat.* 2. *c.* 6. (§ 2.) The former relates only to great and small *Tithes* and *Church*-Rates; and is temporary. The latter makes it perpetual and extends it to "*any* Tithes or Rates, or *any*

" Cuſtomary or other *Rights Dues* or *Payments* belonging to any " Church *or Chapel*, which, of Right, by Law and Cuſtom ought " to be paid, for the Stipend or Maintenanance of any Miniſter or " Curate officiating in any Church or Chapel." And Both Acts direct " that the Proceedings ſhall not be removed into any other " Court, *unleſs the Title* ſhall be in Queſtion."

It is upon the *laſt* Act, that the preſent Order was made.

A *Certiorari* has iſſued, to remove the Order into this Court; And it came on, upon Exceptions to the Order. Both Sides made very material Objections.—One Side, to the Order; for that the Juſtices had no Juriſdiction, *becauſe* the Title *was* in Queſtion: The Other, to the *Certiorari*; for that no *Certiorari* could iſſue, by the expreſs Proviſion of the Act, to remove the Proceedings from before the Juſtices into any other Court, becauſe the Title was not in queſtion.

The Act was made in *Favour* to, and for the *Eaſe* and *Benefit* of QUAKERS; and to ſave them from troubleſome and expenſive Proſecutions: But it *never meant*, that a *mere Scruple* of theirs, or an OBSTINATE *With-holding* of the Tithes ſhould be any Hinderance to the Matter's being determined by the Juſtices of Peace. *This* would have fruſtrated the very Intention of the Act: Which meant to give this Juriſdiction to the Juſtices in *that very Caſe*; where the *real Right and Title* to them ſhould not be in Diſpute between the Parties.

Then His Lordſhip directed the Affidavits on which the *Certiorari* was granted to be read.

It was therein ſworn on the part of the Defendants, " That the " Defendants CONTROVERTED *the Title* to the Tithes, before the " Juſtices;" and alſo, " That the Title to the Tithes *was then*, " and *at the Time* of making the ſaid Affidavit, REALLY *in Queſtion*."

The Juſtices had Notice to ſhew Cauſe againſt the *Certiorari*.

On ſhewing ſuch Cauſe, Five old Inhabitants of the Chapelry ſwear by their Affidavit " That ſuch cuſtomary Stipends or Pay- " ments *have always been paid* to the Curate by the Land-Holders, " *without* any Sort of Scruple or Objection *except* LATELY *by the Quakers:*" And *no Other* Perſons diſpute it. And theſe 5 Perſons alſo ſwear " That they believe them *to be due*; And that the *former* " *Owners* of *theſe very Lands* (which had been purchaſed about 4 " Years ago, by theſe Quakers,) DID PAY *for them*, as other Perſons " did,

" did, in the ſaid Chapelry;" And theſe Quakers purchaſed the Lands *as ſubject* to ſuch Payments.

——Theſe are the Affidavits *upon which* the *Certiorari* was granted.

Now if this GENERAL *Allegation* " of the Quakers *Controverting* " *the Title*," and the *conſequential Aſſertion* " that the Title *was* " *in* QUESTION," (without any further Particulars, or ſhewing at all *upon what* FOOT they controverted the Payment) ſhould be eſteemed a ſufficient Ground for removing the Orders, It would put a *total End* to theſe Acts of Parliament, and *evade* the very Deſign and Intention of making them.

For the Quakers might pretend that they are obliged in Conſcience to refuſe or controvert the Payment of theſe Demands; and conſequently, to queſtion and deny the Right to receive them. Now that is the *very thing* the Acts mean to provide a ſummary Remedy for. The Intention was, that in *ſuch* Caſe, the Juſtices ſhould make an Order to *compel* them to pay.

Their Affidavits are general, " That they controverted the Ti- " tle; and that it was really in queſtion."

Whereas by the Affidavits made by the 5 old Inhabitants, it is very plain that the *former Owners* of theſe very Lands have *always paid*; and that theſe Quakers, who are the ſubject of this Order, have *no Pretence* to diſpute it, upon any other Foot than their own *general Scruple* to pay any Demands of this Nature: Which theſe Acts are, for their *own Eaſe and Advantage*, calculated to *compel* them to do, in a Method the moſt *gentle* and *convenient for themſelves* (who ſcruple to pay *without* Compulſion.)

We are All of Opinion, as to the Merits of the Caſe, that the Title is *not ſo* controverted, or *ſo* in Queſtion, as that the Juſtices can be precluded from Juriſdiction, or their Order be regularly and properly removed into any other Court.

And We are All of Opinion That the Rule for the *Certiorari* having been made abſolute, and the Return thereto having been filed, ought not now to ſtand in the Way and prevent our Coming at the Real Juſtice and Merits of the Caſe. For if the *Certiorari* iſſued *improvidè*, We can Order it to be *ſuperſeded*; and the *Return to be taken off the File*.

There have been * ſeveral Inſtances of this—(*a*) One was where an Order of two Juſtices was appealed from; and before the Time when the Appeal ſhould in Courſe have come on at the Seſſions, a *Certiorari* was brought to remove the Order: And, becauſe the *Certiorari* was brought before the Time of hearing the Appeal was come, the *Certiorari* was quaſhed, and the Return taken off the File.

* I ſuppoſe He meant the Caſes of (*a*) *Rex* v. *Eliz. Nicholls*, *Poſt.* 18 G. 2. *B. R.* And (*b*) *Rex* v. *Gowers*, *Poſt.* 28 G. 2. *B. R.*

The (*b*) Other was a *Certiorari* to remove an Indictment from the *Old Bailey*: And it appearing to this Court, that *They* could not give Judgment, but that the *Seſſions* of *Oyer* and *Terminer* at the *Old Bailey* ought to do it; the like Method was taken, And it was ſent back to the Court below, for *them* to pronounce the Judgment.

Therefore, upon this Caſe, We are All of Opinion That the Writ of *Certiorari* be ſuperſeded (*quia improvidè emanavit*;) the Return taken off the File; And the Order remanded.

His Lordſhip added this Hint, to be obſerved in future Caſes of this Sort; *viz.* That upon All Orders of this Kind, the great and material Point muſt be "Whether the TITLE TO *the* "*Tithes was* REALLY *in queſtion*, or not;" and ought to be "determined, before the *Certiorari* iſſues.

Note—

Upon a ſubſequent Motion, on Behalf of the Quakers, to diſcharge their Recognizance, for that the Order was not affirmed; there was a great Litigation "Whether the Qua-"kers ſhould pay any *Coſts*, or not; And if any, then to "what Point of Time." The Diſcuſſion of which Queſtion, and it's Determination, *vide poſt. pa.*

Godin et al' *verſ.* London Aſſurance Company.

Thurſday 9th *February* 1758.

THIS was a Point reſerved at *Niſi Prius*, before Lord *Mansfield*, at *Guildhall*.

The Queſtion, ſtrongly litigated there, was "Whether the "Plaintiff ought to recover his WHOLE Loſs, or only HALF;" It being objected "that there was a DOUBLE Inſurance."

A Verdict was found for the *Whole*, ſubject to the Opinion of the Court: And if the Court ſhould think, upon his Lordſhip's Report, "that the Plaintiff, by Law, ought to recover for *Half* his "Loſs *only*," then the Verdict to be entered up as for *Half*.

It was argued, Yeſterday, by ſeveral Counſel on each Side: And, this Day,

Lord MANSFIELD delivered the Opinion of the Court.

He begun with ſtating the Facts, as they appeared to Him at the Trial: Which were Theſe—

Mr. *Meybohm*, of *St. Peterſburgh*, had Dealings with Mr. *Amyand* and Company, of *London*; Who often ſent Ships from *London*, to Mr. *Meybohm* at *St. Peterſburgh*.

Meybohm, as appeared by the Evidence, was *indebted*, on the *Balance* of their Accounts, to *Amyand* and Company.

Amyand and Company ſent a Ship, called the *Galloway*, *Stephen Baker* Maſter, to Mr. *Meybohm* at *St. Peterſburgh*, to fetch certain Goods.

Meybohm ſent the Goods; and promiſed to ſend the Bill of Lading by the next Poſt, but never did.

Afterwards, *viz.* in *Auguſt* 1756, *Amyand* and Company got a Policy of Inſurance from private Inſurers, for 1100 *l.* on the *Ship*, *Tackle*, *and Goods*, at and *from London to St. Peterſburgh*, and at and from thence *back again* to *London*; which Policy was ſigned by ſeveral private Underwriters, quite different Perſons from the preſent Defendants: And of this Sum of 1100 *l.* thus underwritten, 500 *l.* was declared to be on $\frac{1}{16}$ Parts of the *Ship*; And the remaining 600 *l.* to be on *Goods*.

Between 26th *Auguſt* and 28th *September* 1756, (Both included,) Mr. *Amyand* inſured 800 *l.* more, with other private Inſurers: And this latter Inſurance was upon *Goods only*; and was *only* at and *from St. Peterſburgh to London*.

On 28th, 29th and 30th of *October* 1756, Mr. *Amyand* inſured 900 *l.* more, with other private Inſurers: Which *laſt* Inſurance was on *Goods only*, at and *from the* SOUND to *London*.

So that the whole Sum thus inſured by *Amyand* and Company, was 2800 *l.* Of which 2800 *l.* the Sum of 2300 *l.* was on *Goods*; the remaining 500 *l.* was on the *Ship*.

Several *Letters* being given in Evidence, It appeared that *Meybohm* wrote from *Peterſburgh*, on 7th *September* 1756, (the Date of his firſt Letter on this Subject,) to *Amyand* and Company; and mentioned what Goods He ſhould ſend to them, referring to the In-

voice for the Particulars; and directed *them* to get *Insurance thereon*, and to place the Goods and the Insurance to a particular Account which he named in his Letter; in which, He also specified some Iron, which was for Mr. *Amyand*'s own Account.

This Letter Mr. *Amyand* afterwards received, (probably, about the 27th of *October*:) And *in Consequence* of it, made the Insurance accordingly, upon the 28th, 29th and 30th of the same *October*, as before mentioned.

Meybohm, having shipped the Goods, *indorsed the Bills of Lading* to One Mr. *John Tamesz* in *Moscow*, (the Plaintiff, in Effect, in the present Action:) Who, on the 7th *October* 1756, wrote to his Correspondent Mr. *Uhthoff*, here in *London*, "*to insure* these Goods." In this Letter, He desires Mr. *Uhthoff* to *insure the whole*, "that "He (*Tamesz*) might be *safe in all Events*; For He suspected that "these Goods were intended to be consigned by *Meybohm* to some "body else, and perhaps *might be insured by some other Persons*:" And He says, They were transferred to Him, in Consideration of his being in Advance to *Meybohm* more than their Amount. This Letter from Mr. *Tamesz*, with these Directions "to insure," was received by Mr. *Uhthoff*, on the 15th of *November* 1756.

Mr. *Uhthoff* accordingly applied to the Defendants, the *London* Assurance Company; and *disclosed* to them, at the same Time, All these Particulars: And they, upon the 16th of *November* 1756, AFTER *being thus* APPRISED "*that there might be* ANOTHER *In-* "*surance*," made the Insurance now in question, for 2316*l.* on the *Goods*, at and *from the* SOUND to *London*. The Goods were *lost*, in the Voyage.

Mr. *Uhthoff*'s Insurance was made by the Plaintiff's *Godin Guion* and Company, who are Insurance Brokers: And they declare That this Insurance (which is expressed to be made by them, "as well "in their own Names, as for and in the Name and Names of all "and every *Other* Person or Persons to whom the same doth may "or shall *appertain*, in Part or in all,") was made by Order of *Henry Uhthoff* Esq. This Declaration is indorsed upon the Policy; and is dated 18th *November* 1756.

There is no Doubt, as to the Value of the Goods, or as to the Loss of them. And it is admitted by the Defendants, "That the "Plaintiff ought to recover *Half* the Loss, from *Them*:" But they say, they ought to pay *only Half*, *not* the *Whole* of the Loss. So that the only Question is

"Whether the Plaintiff is entitled, upon the Circumstances of "this Case, and upon the Facts I have been stating, to recover the "WHOLE

" WHOLE Loſs *from the preſent Defendants*; Or *only* the HALF " of his Loſs from *Them*, and the Remainder from the Under-Wri- " ters of Mr. *Amyand*'s Policy."

The Verdict is found for the Plaintiff, for the *Whole:* But it is agreed to be ſubject to the Opinion of this Court, upon the Queſtion I have juſt mentioned.

Firſt—To conſider it, *as between* the *Inſurer* and *Inſured.*

As between *them*, and upon the Foot of Commutative Juſtice merely, there is no Colour why the Inſurers ſhould not pay the Inſured the *Whole:* For they have received a *Premium* for the *whole* Riſque.

Before the Introduction of *Wagering* Policies, It was, upon Principles of Convenience, very wiſely eſtabliſhed, " That a Man " ſhould *not* recover *more* than He had loſt." Inſurance was conſidered as an *Indemnity only*, in Caſe of a Loſs: And therefore the Satisfaction *ought not to exceed* the Loſs. This Rule was calculated to prevent Fraud; Leſt the Temptation of Gain ſhould occaſion unfair and wilful Loſſes.

If the Inſured is to receive *but One* Satisfaction, Natural Juſtice ſays that the ſeveral Inſurers ſhall All of them *contribute pro rata*, to ſatisfy that Loſs againſt which they have *All* inſured.

No particular Caſes are to be found, upon this Head: Or, at leaſt, None have been cited by the Counſel on either Side.

Where a Man makes a *double* Inſurance of the *ſame* Thing, in ſuch a Manner that He can clearly recover, againſt ſeveral Inſurers in diſtinct Policies, a *double* Satisfaction, The Law certainly ſays, " That He *ought not* to recover doubly for the *ſame Loſs*, but be " content with *One ſingle Satisfaction* for it." And if the ſame Man really and for his own proper Account, inſures the ſame Goods doubly, though both Inſurances be not made in his own Name, but One or Both of them in the *Name* of *another Perſon*, Yet that is juſt the ſame Thing: For the *ſame Perſon* is to have the *Benefit of both* Policies. And if the *Whole* ſhould be recovered from *One*, He ought to ſtand in the Place of the Inſured, to receive *Contribution* from the Other, who was equally liable to pay the Whole.

The Act of 19 *G.* 2. *c.* 37. (made to regulate Inſurances, and for Prevention of wagering Policies,) expreſsly *prohibits* the *Reaſſuring*, (after having already inſured the ſame Thing;) *Unleſs* the former Aſſurer ſhall be inſolvent, or become a Bankrupt, or die: * *V.* § 4. And it provides * that even in *thoſe* Caſes, it ſhall be *expreſſed* in the

Policy "*to be a Re-Aſſurance.*" So that, here, if Mr. *Tameſz* had Himſelf made a ſecond Aſſurance upon the ſame Goods, and was to have had the *Benefit of both* Aſſurances Himſelf, it had been within this Act.

But *if Tameſz* was *not* to have the Benefit of both Policies *in all Events*, then it can never be conſidered as a *double* Policy.

It has been ſaid "That the *Indorſement* of the Bills of Lading "*transferred* MEYBOHM's *Intereſt* in all Policies by which the "Cargo aſſigned was inſured; And therefore *Tameſz* has a *Right* "to Mr. *Amyand's Policy*;" and "that *Tameſz*, being the Aſſignee "of *Meybohm*, is the *Ceſtuy qui Truſt* of it, and may recover the "Money inſured;" And even "that He may bring *Trover*, or "*Detinue*, for the very Policy itſelf:" And it is urged from hence, "That He either will or *may* have a *double* Satisfaction for the "*ſame* Loſs." Objection.

But, allowing "that by the Indorſement of the Bills of Lading "and aſſigning the Cargo to *Tameſz*, He ſtands in the *Place of* "MEYBOHM in reſpect of *his* Inſurances;" Yet *Mr. Amyand* has an Intereſt of his *own*, and had actually inſured the Ship and Goods, and the Sum of 1900*l.* (upon both together,) *prior* to any Directions or Intimation received from Mr. *Meybohm*, "to inſure for "HIM." *Various People* may inſure VARIOUS INTERESTS, on the ſame Bottom: (As one Perſon, for Goods; another, for Bottomree, *&c.*) And here, Mr. *Amyand* had an Intereſt of *his own*, diſtinct from the Intereſt of *Meybohm:* He had a *Lien upon theſe very Goods*, as a Factor to whom a Balance was due. And He had the *ſole* Intereſt in the *Ship:* Which was a Part of the Things inſured by Him. It is far from appearing, "that even his *laſt* In-"ſurance (in *October*) was made on the Account of *Meybohm*, or "as Agent for *Him.*" So far from it, Mr. *Amyand* inſiſts upon it for his *own Benefit*, (as He expreſsly declared at the Trial,) and abſolutely *refuſes to give it up* or to ſuffer his *Name* to be uſed by the Plaintiff; though He was a Witneſs for the Defendants, and was produced by them, and inclined to ſerve them. So that the *Foundation* of this Argument, urged by the Defendant's Counſel, *fails* them; And there is, in Reality, *Nothing to ſupport it.* Anſwer.

But even ſuppoſing "that Mr. *Amyand* had made his Inſurance, "not upon his own Account, but *as Agent or Factor* for Mr. *Mey-*"*bohm*, and upon the *Account of Meybohm*;" Yet, *even then*, *Tameſz* can *never* come againſt *Amyand*'s Underwriters, or come at *Amyand*'s Policy, to his own Uſe. For Mr. *Amyand*, the Factor for *Meybohm*, has *Poſſeſſion* of the Policy, and appears to have been a *Creditor* of *Meybohm*'s upon the Balance of Accounts between them

at the Time when He made the Inſurance: And I take it to be now a ſettled Point, "that a FACTOR, *to whom a Balance is due*, "has a LIEN *upon all Goods of his Principal, ſo long* as they re- "main in his *Poſſeſſion.*" *Kruzer et al.* v. *Wilcox et al.* was a Caſe in Chancery upon this Head. It came on firſt, * before Sir *John Strange* then Maſter of the Rolls: Who decreed an Account; and directed Allowances to be made for what the Factor had expended on Account of the Ship or Cargo; and reſerved All further Directions, till after the Maſter's Report. It came on again, afterwards, for further Directions, after the Maſter's Report, before the Lord Chancellor; who was attended by four eminent Merchants, who were interrogated by Him publickly. After which, He took Time to conſider of it; And on 1ſt *February* 1755, decreed "that the "Factor has a *Lien* on Goods conſigned to Him; not only for in- "cident Charges, but as an Item of mutual Account for the *general* "*Balance* due to Him, *ſo long* as he retains the *Poſſeſſion:* But if "he *parts with the Poſſeſſion* of the Goods, He *parts with his Lien*; "becauſe it can not then be retained as an Item for the general Ac- "count." And there was another Caſe, in the ſame Court, of *Gardiner* v. *Coleman*, a few † Months after; in which, the former Caſe, determined as I have mentioned, was conſidered as a Point ſettled: And this latter Caſe, of *Gardiner* v. *Coleman*, was decreed agreeably to it. So that Mr. *Amyand*, *even* conſidered as *Factor or Agent* to *Meybohm*, and as making the Inſurance upon *Meybohm*'s Account, is yet intitled to *retain* the Policy; *Meybohm* being *indebted to Him* upon the *Balance* of the Account between them: And He has a *Lien* upon the Policy, *whilſt* it continues in *his Poſſeſſion.* Therefore, even in *this* View of the Caſe, Mr. *Tameſz* muſt firſt have paid to Mr. *Amyand* the Balance of his (*Amyand*'s) Account, before he could have gotten that Policy out of Mr. *Amyand*'s Hands: And conſequently, Mr. *Tameſz* was very far from being intitled to the Benefit of it, as a *Ceſtuy qui truſt*, abſolutely and entirely.

* 12th *March* 1754.

† 2d *June* 1755.

But *if* the Queſtion "Whether *Tameſz* could take Benefit of Mr. "*Amyand*'s Policy," were *doubtful*; Yet, here, *Tameſz* inſured the Goods with the Defendants, *expreſsly under the Declaration* of his Suſpicion "that there might have been a former Conſignation, and "ſome *former Inſurance* made upon the Goods by ſome *other* Per- "ſon;" But He deſired to inſure the *Whole*, for his *own* Security: And to this, the Defendants *agreed*; and took the *whole Premium.* Mr. *Amyand* inſiſted upon his Right to the *whole* Benefit of his *own* Policy, when He was examined as a Witneſs; and is now litigating it in Chancery. It would neither be juſt nor reaſonable, that *Tameſz* ſhould only recover *Half* of his Loſs from the Defendants, and be turned round, for the *other Half*, to the uncertain Event of a long and expenſive Litigation. I do not believe there ever will or can be any Recovery by *Tameſz* or thoſe who ſhall ſtand in his Place,

againſt *Amyand*'s Underwriters. However, *if* thoſe Underwriters are liable to contribute at all, the Contribution ought to be amongſt the *ſeveral Inſurers* themſelves: But *Tameſz*, the *Inſured*, has a Right to recover his WHOLE Loſs *from the Defendants*, upon the Policy now in Queſtion, by which *They* are bound to pay the *Whole*. For though here be *two* Inſurances, yet it is *not* a DOUBLE Inſurance: To call it ſo, is only confounding Terms. IF *Tameſz* could recover againſt *both* Sets of Inſurers, Yet He certainly could not recover againſt the Underwriters of *Amyand*'s Policy, *without* ſome *Expence*; nor *without* alſo firſt paying and reimburſing to Mr. *Amyand* the *Premium* He paid, and alſo his *Charges*. This is by no Means within the *Idea* of a DOUBLE Inſurance. Two Perſons may inſure two *different Intereſts*; Each, to the whole Value: As the Maſter, for Wages; the Owner, for Freight *&c.* But a DOUBLE Inſurance is where the *ſame* Man is to receive *two Sums inſtead of One*, or the ſame Sum *twice over*, for the *ſame Loſs*, by reaſon of his having made two Inſurances upon the ſame Goods or the ſame Ship. Mr. *Tameſz* is intitled to receive the whole from the Defendants, upon *their* Policy; whatever ſhall become of Mr. *Amyand*'s Policy: And *They* will have a Right, in caſe He *can* claim any Thing under Mr. *Amyand*'s Policy, to *ſtand in his Place*, for a *Contribution* to be paid by the other Underwriters *to* THEM. But ſtill *They* are certainly obliged to pay the *Whole* to HIM.

Therefore, upon theſe Grounds and Principles, in *every Light* in which the Caſe can be put, We are All of Us clearly of Opinion, " That the Verdict is right, as it now ſtands, for the WHOLE; " And that the

" POSTEA be delivered to the PLAINTIFF."
RULE accord.

Rex *verſ.* Inhabitants of Biſhop's *Hatfield*.

MR. *Wade* ſhewed Cauſe againſt quaſhing an Order of two Juſtices made for the Removal of *James Arnold*, *Anne* his Wife, and *E. M.* and *Anne* their Daughters *&c.* from *Saundridge*, to Biſhop's *Hatfield*; and an Order of Seſſions confirming it: Both which Orders Mr. *Yates* had moved to quaſh, as being founded upon a miſtaken Judgment.

The State of the Caſe was this—*James Arnold* was hired to one *Parſons*, a Pariſhioner of *Saundridge* at 5*l.* for one Year, to wit, from *Michaelmas* 1752. to *Michaelmas* 1753. *with Liberty to let himſelf for the* HARVEST-MONTH, *to any* OTHER *Perſon*. That the ſaid

ſaid *James Arnold* ſerved the ſaid *Parſons* until the ſaid Harveſt-Month; And, a little before the ſaid Harveſt, *without* the Knowledge of the ſaid *Parſons*, *hired* himſelf *for* the ſaid HARVEST-MONTH, to one *Thrale* of the SAME *Pariſh:* But *went*, *with* the Knowledge of the ſaid *Parſons*; and *worked with the ſaid Thrale for the ſaid Harveſt-Month*; and received Wages for the ſaid Harveſt-Month. That *in* the ſaid Harveſt-Month, the ſaid *Arnold brewed for the ſaid Parſons:* And *after* the ſaid Harveſt-Month, *Arnold* ſerved the ſaid *Parſons* for the *Remainder* of the Year. And the ſaid *Arnold* LODGED *in the ſaid* PARSONS's *Houſe*, in the ſaid Pariſh of *Saundridge*, during the *whole* Year: And at the End of the ſame, the ſaid *Arnold* received the ſaid 5*l.* for his Year's Wages.

Whereupon the Seſſions adjudge that the ſaid *James Arnold*, under the ſaid Hiring and Service with the ſaid *Parſons*, in the ſaid Pariſh of *Saundridge*, did *not* gain any Settlement in the ſaid Pariſh of *Saundridge:* And therefore they confirm the Order of the two Juſtices, and diſallow the Appeal.

Mr. *Wade* argued That this was *not* a *complete Hiring* for a Year, AND *Service* for a Year. To prove this, He cited 1 *Strange* 143. *Rex* v. *Inhabitants of Weſt-Woodhay*—[Between the Pariſhes of *Coombe* and *Weſt-Woodhay*:] Where a Hiring "from the *Thurſday after* "*Michaelmas*, till the next *Michaelmas*," was holden inſufficient. 1 *Strange* 83. *Rex* v. *Inhabitants of Haughton*—Several Hirings, each for eleven Months, were holden inſufficient: And the Court ſaid "It would be dangerous to depart from the *Words* of the Sta-"tute." 2 *Strange* 1022. Between the Pariſhes of *Seaford* and *Caſtlechurch*—"Going away 12 *Days* before the *End* of the Year, pre-"vents the Gaining a Settlement."

He agreed, that where there is a *regular Hiring* for a Year, the Court will not be over rigid as to the *Service*. 2 *Strange* 1232,—Between the Pariſhes of St. *Peter* in *Sandwich* and *Goolaſton* [*Goodneſtone*] in *Kent* was ſo: There, the Servant went to the Herring-Fiſhery, with his Maſter's Leave. 1 *Strange* 423. *Rex* v. *Inhabitants of Iſlip* were ſmall Abſences; and after a complete and *perfect Hiring* for a whole Year. Now this is only a *Hiring* for 11 *Months*; and a *Service for* 11 *Months*.

Mr. *Yates contra*—The *Maſter* was bound; though the Servant was at Liberty. The Servant was *not removeable*. He *ſerved* his Maſter, in *ſome* Reſpects, *even* DURING *this Month*.

LORD MANSFIELD—It is, in Effect, *only* a *Hiring* for *Eleven* Months: And the *Harveſt*-Month is the *principal* Month of the Year.

It

It is safeſt, to *keep to the Statute*. If We allow *this*, We ſhall not know where to ſtop.

Mr. Juſt. DENISON concurred. And He obſerved that though the Conſtruction had been, in many Reſpects, favourable *as to the* SERVICE, yet they had been ſtricter as to the *Hiring*: And if this was allowed to be a *good* HIRING, it would tend to enervate the Act, and ſet the Conſtruction quite looſe.

Mr. Juſt. FOSTER agreed, in both, with Mr. Juſt. DENISON: And he mentioned ſome Inſtances of the former; and particularly the Caſe of *Weſt-wood-hay*, abovementioned. But *this* is only a HIRING *for* 11 Months.

Mr. Juſt. WILMOT concurred—It does not turn upon the Obligation the *Maſter* was under; but upon the Obligation the *Servant* was under: And the Servant was *not* obliged to ſerve the whole Year. It is very clear that this is NOT a HIRING *within* the Act.

Per Cur. unanimouſly,
RULE DISCHARGED, and BOTH ORDERS AFFIRMED.

Roſſell qui tam &c. *verſ.* Kitchen.

Saturday 11th *Feb.* 1758.

ON *Thurſday* 26th *January* laſt, Mr. *Whitaker* moved in Arreſt of Judgment, after a Verdict for the Plaintiff in a *qui tam* Action upon the Statute of 1 *J.* 1. *c.* 22. ("the Duty of Tanners, Curriers, Shoemakers, *and of* OTHERS *cutting of Leather.*") A Rule was then made "to bring in the *Poſtea*." And the *Poſtea* being now brought in, Mr. *Whitaker* and Mr. *Nares* objected—

1ſt. That the Defendant is *not an Object* of this Act.

It is not alledged in the Declaration "that the *Defendant was a* "*Tanner*, Currier, Shoemaker *or other Perſon occupied in* the cutting of Leather:" Which the *Preamble* ſhews that *he ought* to be. *Cro. Car.* 587. *Lodge* v. *Hollowell*, is an Action brought upon another Clauſe of this Act: And there *it is* alledged "that the Defendant was a Currier &c." * *Brown's Entries*, , on the Act againſt buying and ſelling live Cattle—The Defendant is there alledged to be a Butcher.†

* The Words there are— "that the "Defendant, "*bring* a Currier &c."

† But *N. B.* Here, the Words of § 38. are, "that *every Perſon*."

They relied upon the *Preamble* of the Act, rather than the enacting Part; and argued that *Both* muſt be taken together.

2d. Objection—This Action is brought upon a Supposition, and under an Allegation, "that a *Third* Part of the *Penalty belongs to the Dean and Chapter of Westminster, as Lords of the Liberty where the* OFFENCE *was committed.*" Whereas by the Act of Parliament this third Part of the Penalty must belong to the City of *London*, when the Offence is committed WITHIN THREE MILES *of the City:* Although the *Place where* the Offence was committed, be NOT, in any *other* Respects, *situated within* the said City or its Liberties.

For the 50th Section of this Act gives to the *Mayor of London*, a JURISDICTION *extending to* ALL *Places* * *within* 3 *Miles* of that City: And at the same time, EXCLUDES All others in general, and all the other Jurisdictions thereby established in particular, *from having* ANY *Jurisdiction at all, within* three Miles of the said City. So that if the City of *London* have not Jurisdiction *in* ALL *Places within three Miles* of the City, they have *none* AT ALL given them under this Act of Parliament.

* *V. ante* pa. 389, 390: *Rex* v. *Goddard Williams.*

Now *Drury Lane*, appears and was proved to be the *Place* WHERE the present *Offence was committed:* Which is clearly within three Miles of the City of *London*; and therefore is within the *Jurisdiction* given to the City by this Clause, although it is indeed *actually* situated within the *Liberty* of the Church of *Westminster*. And consequently, the Penalty belongs to the *City of London*; and *not* to the Church of *Westminster*.

[*Vide* § 46. which gives the Penalty; *viz.* $\frac{1}{3}$ to the King; $\frac{1}{3}$ to the Prosecutor; and $\frac{1}{3}$ to the City, Borough, Town, or Lord or Lords of Liberties *where* the Offence shall be committed or done.] They cited 1 *Lutw.* 138. under this second Objection.

3d. Objection. It follows, "that the *Venue* is wrong;" it being *laid in Middlesex.*

Mr. *Norton contra* for the Plaintiff, was going to answer the Objections: But was prevented by

LORD MANSFIELD.

1st. The Act is *not confined* to particular Sorts of Leather, nor to particular Persons: It *extends to* ALL *red* Leather; and to EVERY Person. The *Preamble* indeed is *general*, and does *not* mean or intend to specify and enumerate every *particular* Case. But what the Legislature had in View, in the making this Act, was "to *secure* "*the* STAPLE of Leather, by this Search &c."

And

And all the *other* Clauſes of this Act are general; and are NOT *confin'd* to "Perſons occupied in the Trade or Buſineſs of *cutting* "*Leather*" *This* would not have remedied the Evil; or anſwered the *End* of the Act: For the Evil is juſt the ſame, if any *other* Perſons commit this Offence.

2dly. The EXTENSION *of the* JURISDICTION of the City of *London*, undoubtedly, can NOT ALTER *the* LOCALITY of the Place *where* the Offence is committed. All that the Act does, is enlarging the *Juriſdiction* of the City of *London*. Beſides, the Act gives *particular* Penalties for particular Offences: And this Penalty, in the 46th Section, is given "$\frac{1}{3}$ to the King; $\frac{1}{3}$ to him or them that "ſhall firſt ſue *&c*; And $\frac{1}{3}$ to the City, Borough, Town, or Lord or "Lords of Liberties, WHERE the Offence ſhall be *committed or done*."

He concluded with ſaying that it was an exceſſively plain Caſe.

In which Opinion

The Three JUDGES concurring, a RULE was made,
"That the *Poſtea* be delivered to the PLAINTIFF."

Rex *verſ.* Inhabitants of *Auſtrey*.

Monday 13th *Feb.* 1758.

TWO Juſtices removed *Francis Orton*, *Lucy* his Wife, and *John* their Son, from *Auſtrey* to *Grindon*, (both in *Warwickſhire:*) Which Order was quaſhed by an Order of Seſſions, upon an Appeal.

The Special Caſe ſtated was this—The Pauper *Francis Orton* being at that Time a Poor Child *about* TEN *Years of Age*, was *in April* 1744, legally bound Apprentice, BY *the Churchwardens and Overſeers* of the Poor of the Pariſh of *Grindon*, to *Samuel Lythall* OF *the ſaid Pariſh of* GRINDON, UNTIL *he ſhould attain his Age of* 24 *Years*, *purſuant to the Statute of the* 43*d of Elizabeth:* Which Indenture was duely approved of by two Juſtices of the Peace, purſuant to the Directions of the ſaid Statute.

The ſaid Pauper ſerved and inhabited with his ſaid Maſter, in *Grindon*, under the ſaid Indenture, TILL *Michaelmas* 1754; at which Time, the ſaid *Lythall*, *the Maſter*, *in Conſideration of* 40*s. then paid him by the Pauper*, *agreed to* DISCHARGE *the ſaid Pauper from his ſaid Apprenticeſhip:* Which *Receipt and Diſcharge* was *indorſed and written* BY *the Maſter*, on the Back of the ſaid Indenture; which He *then* DELIVERED *up to his ſaid Apprentice*. And the

ſaid Pauper *then left* his ſaid Maſter, *and hired himſelf for a Year, and ſerved for a Year*, at the Pariſh of *Higham*. Afterwards, *viz.* at *Michaelmas* 1755, He *hired himſelf for a Year* to *Lilly*, in the Pariſh of *Auſtrey* aforeſaid, *and ſerved the ſaid Year* IN *the ſaid Pariſh*; and *received* his Year's Wages.

The Pauper is NOW [12th *July* 1757.] upwards of 23 Years of Age: But *hath* NOT *attained the Age of* 24 *Years*.

Upon this Caſe, the *Seſſions* QUASH the Order of two Juſtices. And Mr. *Wheeler* had, (on 27th *January* laſt,) moved to quaſh this Order of Seſſions.

Mr. *Caldecott* and Mr. *Gueſt* now ſhewed Cauſe againſt quaſhing this Order of Seſſions.

1ſt. The Apprentice became *ſui Juris*, by *this Diſcharge*.

No Intereſt at all remains in the Pariſh Officers: Their Power is only a *limited* Power. And a Pariſh-Child thus bound agreeable to 43 *Eliz.* is upon the ſame Foot as if he had *bound himſelf:* And *when of full Age*, is at Liberty to *conſent* to his own Diſcharge, and thereby to put an End to the Apprenticeſhip.

2dly. But if not, yet the Service being *by his Maſter's Leave and Conſent*, it gains Him a Settlement in the Place where it was *performed:* Which was firſt, in *Higham*; and afterwards, in *Auſtrey*.

Firſt—The Maſter *alone* has Power to diſcharge the Apprentice. 1 *Strange* 48. *Rex* v. *Barnes* is an Authority to prove that the Maſter may ASSIGN the Apprentice, though bound out by the Juſtices; (the Apprentice *conſenting* to it.) And the ſame Reaſon holds for *diſcharging* him, as for *aſſigning*.

Secondly—It is, at leaſt, a *Leave and Conſent* of the Maſter to the Apprentice's *Serving in this Pariſh:* And *therefore the* LAST 40 *Days Service* makes the Settlement. This was the very Caſe, between the Pariſhes of *St. George Hanover Square* and *St. James*, in 2 *Strange* 1001; Where *Alice Wheeler*, a Pariſh Girl, being bound out, her Maſter let her out for Hire to a Perſon in *Marybone*, where She reſided above 40 Days: And the Court held her to be ſettled in *Marybone*.

Mr. *Wheeler*, Mr. *Vernon*, and Mr. *Norton contra* argued for quaſhing the Order of Seſſions; and in Support and for Affirmance of the Order of two Juſtices.

The

The Conſtruction attempted by the other Side, they ſaid, would invalidate the Act of 43 *Eliz. c.* 2. Which gives Power to bind ſuch poor Lads, *till* 24 Years of Age. [See *Sect.* 5th.]

They alledged that the Pariſh-Officers, and even the Public *are intereſted* in this. And ſuch an Apprentice *cannot be diſcharged* without the *Conſent* of the Pariſh-Officers, who bound Him out. In 1 *Salk.* 381. *Domina Regina* v. *Gould*, The Court allowed an Indictment, for Diſobedience, "in not receiving and providing for "ſuch an Apprentice." And they alſo cited 20 *G.* 2. *B. R. Rex* v. *Trevelyan:* [But that Point was not there determined.] The Intereſt of the Churchwardens and Overſeers is a *remaining* Intereſt.

2dly. Here is no *expreſs* Conſent by the Maſter to this Service. And therefore the laſt 40 Days Service ſhall *not* gain a Settlement; for want of ſuch Conſent. 2 *Ld. Raym.* 1352. and 2 *Strange* 582. S. C. the Caſe of the Pariſh of *Buckingham:* Which is in Point.

Lord MANSFIELD aſked Whether the Apprentice was OF *Age*, or UNDER *Age*, at the *Time* of his *conſenting* to the Diſcharge: For the whole depends upon THAT.

Mr. *Norton*—He was UNDER *Age*, at the Time of his conſenting to the Diſcharge: As is evident, by comparing the Dates ſtated; (which ſhew that He muſt have been *about half a Year under.*)

Lord MANSFIELD—*Then* there is Nothing in it. If he was UNDER *Age*, his *Conſent* is quite out of the Caſe; and is exactly upon the ſame Foot, as if he had given NO *Conſent at all:* For the Conſent of an *Infant*-Apprentice can ſignify nothing, nor be of any Validity.

2d Point—Then if his *Conſent is of no Validity*, and *as Nothing at all*, his ſubſequent *Services*, under the *Hirings* ſtated in the Order, can never be conſidered AS *performed by the Maſter's* * LEAVE AND CONSENT; and * *ſo*, as being a Service of his Maſter UNDER *the Indenture:* Becauſe this is no *expreſs and explicit* Leave and Conſent given by the Maſter to the † *particular* Service; but was intended to be quite general, and is even *founded* in a MISTAKEN *Apprehenſion* "That the Apprentice COULD *conſent* "to his being diſcharged;" which he, being an Infant, was not capable of doing.

* *V.* 2 *Ld. Raym.* 1352. and 1 *Strange* 582. S. C. the Caſe of *Buckington* Pariſh.

† Which *was* the Caſe, in *Rex* v. *Inhabitants of Fremington, ante* 274. (N° 3.)

* Mr. Juſt. *Foſter* was abſent.

And The * two other Judges being of the ſame Opinion,

Per Cur. ORDER of SESSIONS QUASHED: Original ORDER AFFIRMED.

Rex *verſ.* Inhabitants of Cold Aſhton.

TWO Juſtices made an Order to remove *Mary Harriſon*, Widow, and her 4 Children, (*Charles*, *George*, *William*, and *Thomas Harriſon*,) from *Cold Aſhton* to *Woodcheſter*: And the Seſſions, upon an Appeal from this Order, diſcharged it.

The Special Caſe ſtates—That in *July* 1725, *Daniel Harriſon* and *Mary* his Wife, and *William Harriſon* their Son, went from *Woodcheſter* to *Cold Aſhton* with a *Certificate from Woodcheſter*, directed to *Cold Aſhton*, acknowledging "That they the ſaid *D. H.* "and *Mary* his Wife, and *William H.* their Son, and ſuch other "Children as they the ſaid *Daniel H.* and *M.* his Wife ſhould have "afterwards born in *Cold Aſhton*, were Inhabitants legally ſettled *in* "*Woodcheſter*."

That the ſaid *Daniel Harriſon* and *Mary* his Wife and *William H.* their Son, lived in the ſaid Pariſh of *Cold Aſhton* under the ſaid Certificate, from the ſaid Month of *July* 1725, till about *Chriſtmas* 1728: At which Time, *William Fido, the Father of the ſaid Mary* the Wife of the ſaid *Daniel Harriſon*, DIED INTESTATE, *leaving the ſaid* MARY HIS DAUGHTER AND FIVE OTHER *Children*; And was at the Time of his Death poſſeſſed of and intitled unto a TENEMENT *and* 2 ½ *Acres of Land*, of the Yearly Value of 6 *l.* 17 *s.* ſituate in *Cold Aſhton*, for the *Remainder of a* TERM *of* 99 *Years determinable* on the Death of himſelf and of the *ſaid* MARY *his Daughter*, the Wife of the ſaid *Daniel Harriſon*.

That upon the Death of the ſaid *William Fido*, the ſaid *Daniel Harriſon* and *Mary* his Wife, and the ſaid *William Harriſon* their Son, (He being then about 5 Years old) ENTERED *upon and* TOOK POSSESSION *of the ſaid Tenement and Land*; And the ſaid *Daniel Harriſon* and *Mary* his Wife *have* LIVED IN *and* OCCUPIED *the ſame, ever ſince, until this Time.*

That there being a CUSTOM in the Hundred of *Pucklechurch* in which the ſaid Pariſh of *Cold Aſhton* lies, "for the *Occupiers* of "*ſmall Tenements* within the ſaid Hundred to ſerve *the* OFFICE *of* "TYTHINGMAN *for* HALF *a Year* ONLY *at a Time*;" the ſaid

Daniel Harriſon, about 25 *Years ago*, *ſerved the* OFFICE *of* TYTHINGMAN for the ſaid Pariſh of *Cold Aſhton for* HALF *a Year* ONLY; and about *five Years ago*, *ſerved the ſame Office*, for the *ſame Pariſh*, *for* ANOTHER HALF *Year* ONLY.

But that NO *Adminiſtration* of the Goods or perſonal Effects of the ſaid *William Fido* was ever granted to, or taken out *by the ſaid Daniel Harriſon* and *Mary* his Wife, or either of them, *or any other* Perſon.

That the ſaid *William Harriſon* lived with the ſaid *Daniel H.* and *Mary* his Wife, in the ſaid Tenement till ABOUT 8 OR 9 *Years ago:* When he married the abovenamed *Mary* (his now Widow;) by whom he had the Iſſue abovenamed, *Charles*, *George*, *William*, and *Thomas H.* their ſaid Children.

That *after the Marriage of the ſaid William Harriſon*, the Father of the Pauper Children, with the ſaid *Mary* his Wife, *they* lived in the ſaid Pariſh of *Cold Aſhton*, *ſeparate and apart from* the ſaid *Daniel H.* and *Mary* his Wife, *until the Death of the ſaid William*; which happened about 1 ½ Year ago.

And the ſaid *Mary the* WIDOW *of the ſaid William H.* the Father, and her ſaid 4 Children, having *after the Death of the ſaid William H.* the Father, *become actually chargeable* to the ſaid Pariſh of *Cold Aſhton*, they the ſaid *Mary* the *Widow*, and her ſaid 4 Children were, by the ſaid Order of two Juſtices, removed from *Cold Aſhton* to *Woodcheſter*; They the ſaid *William Harriſon* the Father, or his ſaid Widow or Children, NOT *having gained any* Settlement, AFTER *the giving of the ſaid Certificate*, except as aforeſaid.

Mr. *Huſſey* and Mr. *Norton* had (on 27th *January* laſt) moved to quaſh this Order of Reverſal, and to affirm the Original one.

Mr. *Selwin*, Mr. J. *Morton* and Mr. *Nares*, now ſhewed Cauſe againſt quaſhing the Order of Seſſions, which diſcharged the Order of two Juſtices; and againſt affirming that of the two Juſtices.

They inſiſted that *Daniel Harriſon* gained a Settlement in *Cold* 1ſt.
Aſhton, by *both* the Methods directed by the Statute of 9, 10 *W.* 3. *c.* 11; *viz.* By reſiding upon a Tenement of his *own*; and alſo by executing this *public Office for one whole Year*; (for the two Halves amount, they ſaid, to a whole Year;) And which is an *Annual* Office *in its Nature*. In *H.* 9 *G.* 1. *B. R.* 1 *Strange* 544. Between the Pariſhes of *Burleſcome* and *Sampford Peverell*; the Office of Tythingman was adjudged to be "an *annual Office within the Pa-* "*riſh*," within the Words and Meaning of the Act. And the electing

electing him *twice* into the Office, ſhews their Approbation of him the ſtronger, as a *fit* and *proper* Perſon to execute ſuch an Office.

Lord Mansfield—By *this* Cuſtom, as here ſtated, it is *not* an annual Office, but an Office for *half* a Year only.

Whereupon, the Counſel for *Woodcheſter* proceeded as to the *other* Method directed by the Statute; And argued that, as to the *beneficial Intereſt* ariſing upon the Death of *William Fido*, *though* no *Adminiſtration* was taken out, yet an equitable *Right* veſted in *Daniel H.* by the Statute of Diſtribution; And *that* is ſufficient, *without* Adminiſtration. The Truſt of a ſmall Part of a Cottage is enough to gain a Settlement. 1 *Strange* 97. Between *Murſley* and *Grandborough* Pariſhes. And in *H.* 1708. *Grice* v. *Grice*, in Chancery, It was determined by Ld. *Cowper*, "That the *equitable* Right * veſted by "the Statute of Diſtribution." They accordingly entered upon it, and have enjoyed it ever ſince: Which will appear, on Computation, to be 29 Years and an Half. And 29 ½ *Years Poſſeſſion* upon it, is ſufficient to gain a Settlement. And no Adminiſtration was in the preſent Caſe, granted to any one *elſe*; Nor any Objection made to their Right. Therefore He had both the *equitable Right*, and the undiſputed *Poſſeſſion for ſo many Years*; And there was *no other* Perſon who had any legal Claim upon it. Which, ſurely, is enough: For it is both the equitable and alſo the legal Intereſt united.

* *V.* 3 *Peere Williams* 50. under Note D.

There are indeed two Caſes, that may be urged againſt us; *viz. Farringdon* v. *Widworthy*, *Tr.* 1737. 10 & 11 *G.* 2. where a Poſſeſſion for five or ſix Years only, without taking Adminiſtration, was holden *not* to gain a Settlement: And *South Sydenham* v. *Lamerton T.* 3 *G.* 1. in 1 *Strange* 57. which was a Reſidence for only two Years upon a Tenement that was the Mother in Law's; and no Adminiſtration taken out. But it appears by *Strange's Reports* that it went off upon another Point. And in *Lucas* 389. It appears expreſsly that the Court gave *no* Opinion upon the Queſtion about the Right to an Adminiſtration being ſuch an equitable Intereſt as would amount to a Settlement, *without actually taking out Letters* of Adminiſtration.

But ſuppoſe *Daniel* and *Mary Harriſon* to have at firſt *entered* without a Title, yet after 20 Years Poſſeſſion, their Poſſeſſion *became lawful.* Now here appears to be ſuch a Poſſeſſion, of *twenty* Years: And they moreover remained *Nine* Years after that, without Interruption. Now, the Caſe in 1 *Strange* 608, Between the Pariſhes of *Aſhbrittle* and *Wyley*, and 8 *Mod.* 287. S. C. is a full Proof "that long Poſſeſſion (as thirty Years) will gain a *Title*, "*againſt all the World, but* the Lord; and even againſt Him, unleſs

" upon Ejectment. And in Ejectment, 20 Years Poſſeſſion will " either make or defend a Title."

The Pauper's Settlement is *derivative* under the Certificate; And therefore if gained in *Cold Aſhton*, muſt be AS *by* a *Certificate*-Perſon. There is no Doubt, but this would have gained a Settlement, if the *Title* had been COMPLETED *by Adminiſtration:* And the WANT *of Adminiſtration* will not, in *this* Caſe, prevent it.

Indeed, in the Caſe of *Farringdon* v. *Widworthy* where the Poſſeſſion was *only five or ſix Years*, it was determined " that no Set- " tlement could be gained, in *ſuch* a Caſe, without taking out Ad- " miniſtration." However, perhaps, if it was *Res integra*, it would not now be ſo determined.

But certainly, that Principle if *admitted*, ought *not* to be EXTENDED. And the Authority of that Caſe ought not to interpoſe *here:* (1ſt.) Becauſe there the Poſſeſſion was only *five* or *ſix* Years, after the Death of the Pauper's Father. Here there was a Poſſeſſion of 29 ½ Years. (2dly.) There the *Term was gone*, was *expired*, *before* the Removal of the Pauper; And the Adminiſtration was not taken out *till after the Expiration* of the Term, and after the making of the Order. *Here*, the Term and Intereſt, both *exiſt:* And the *Poſſeſſion ſubſiſted* at the Time of making the preſent Order of Removal.

The *Right* is ſo *veſted in the next of Kin*, that if ſuch *next of Kin is once in Poſſeſſion*; ſuch Poſſeſſion ſhall *not be deveſted*, *without another Adminiſtration* taken out by ſome other Perſon. Nor could even a *rightful* Adminiſtrator evict, AFTER *a quiet Poſſeſſion of* 29 *Years*. And now, ſhall an *Order of two Juſtices* effect what an *Action* of Ejectment would not be able to effect? Surely, not.

2d. Point—Suppoſing a Settlement in *Daniel* the *Father* and *Mary* his Wife—*Qu.* Whether that ſhall *communicate* a Settlement to *William* the *Son* and his Family. 2d.

Now this *derivative* Settlement may be conſidered as *without* relation to the Certificate Laws. Here, *William* the Son *continued with his Father*, *above* 20 *Years* after his Father and Mother came into Poſſeſſion of this Tenement. Therefore THIS was his *derivative* Settlement *at the* TIME *when he ſeparated* from his Father's Family, and became emancipated: *For his Father and Mother had* THEN a *complete* Title, *even* upon an Ejectment, from *their Length of Poſſeſſion.*

If the Son had married and thereby become emancipated, even in the Midſt of the Father's inchoate Title, and *before* it became

completed by full 20 Years Poſſeſſion: Yet it ſhould have *Relation* to the Beginning of it, if it had afterwards become actually completed to full 20 Years by Elapſion of Time. But here, the *Son did not* become emancipated, *till* the Father's Title was *become* completed by a full 20 Years Poſſeſſion.

The un-emancipated Son's derivative Settlement *ſhifts* and *varies* WITH *the Father's, toties quoties*, ſo often as the Father's Settlement changes.

Mr. *Norton* and Mr. *Huſſey*, *contra*, for quaſhing the Order of Seſſions.

1ſt. They *denied* that the Law *veſted* ANY *Intereſt* in *Daniel Harriſon*'s Wife *Mary*; whoſe Father, *William Fido*, had *Five* OTHER Children, *beſides* herſelf; as it is expreſsly ſtated: And they *denied* that ANY *Length of Poſſeſſion* will give a *Right*, though it may bar the particular Remedy of an Ejectment. Nor is the Length of Poſſeſſion any Sort of Argument, in the preſent Caſe: becauſe the Poſſeſſors were never ſubject to Removal. No Certificate Perſon can be removed, TILL *he actually becomes* chargeable. Now here, *Daniel Harriſon* NEVER *became actually chargeable* to the Pariſh of *Cold Aſhton*. Therefore they could NOT *remove* him, *wherever* he reſided. And conſequently, his *Length of Poſſeſſion* ought NOT *to affect them*.

As to the *Right veſting in the* NEXT *of Kin*, by the Statute,—IF We were to *admit* their Principle, it would *not help* them: For *Mary* the Wife of *Daniel*, was NOT *the next of Kin*; She having five other Perſons in *equal Degree* with Herſelf. And therefore She was NEVER *irremoveable*; For She NEVER had a *Right*, either equitable or legal: Nor, conſequently, any Perſons claiming under Her.

And as to the *Length* of Poſſeſſion, it ſhall not enure *to do wrong* to the certificated Pariſh, who (as has been obſerved) had no Power to remove the Pauper, let his Reſidence be where it would, TILL *actually become* chargeable: Which this Man never was.

Neither have they at all proved "that an EQUITABLE *Intereſt* "*will* gain a Settlement." But, however, here the certificated Perſon had *neither* an equitable *nor* a legal Intereſt; as five other Perſons were *equally* concerned, and the Certificate-Man had *no Adminiſtration*.

As to the Caſe of *Farringdon* and *Widworthy*—*Five* Years would have gained a Settlement as well as Fifty; if the reſt of the Facts had been ſufficient to ſupport it.

As to the TIME of the *Son's taking* the derivative Settlement *from the Father*, they agreed that it muſt be conſidered as reſpecting the Time *when he left* his Father's Family, and the Place of his Father's Settlement at *that* Time. And they ſaid that they ſhould have argued, (if the Father's executing the Office of Tythingman had in the Judgment and Opinion of the Court, been thought material,) "that, as he had only executed it for one *half* Year *at the* "*Time of the Son's parting from him*, it could *not* have gained a "Settlement to the Father himſelf, *at* THAT *Time*." But that Point is now out of the Queſtion; as the Court do not eſteem it an annual Office.

But admitting and agreeing that the Son's derivative Settlement from his Father can only relate to the *then* Settlement of the Father, which the Father was intitled to, *at the Time*; Yet here, the Father's Settlement was NOT *then* become even helped by the Poſſeſſion, in the Manner that they endeavour to repreſent it. For it is *not expreſsly* ſtated "that he had then been 20 Years in Poſſeſ-"ſion of the Tenement:" And the Court will not preſume the Words "ABOUT *Eight* OR *nine* Years," to mean NINE *Years* ABSOLUTELY. And if not, the Father's Poſſeſſion does *not* appear to have been a Poſſeſſion of 20 Years complete, *at the Time when* the Son parted from him. So that the Foundation of their Argument from *that* Topic, fails them in Point of Fact.

LORD MANSFIELD—This Caſe ſeems to depend upon two Queſtions.

1ſt. Whether *Daniel Harriſon* the Father of *William* gained a Settlement, *Himſelf*, in *Cold Aſhton*; to which Place He is agreed to have come originally, *as a Certificate-Man.*

2d. Whether *William* the Son of this *D. H.* gained a DERIVATIVE Settlement there, from his Father.

Firſt Queſtion—*Daniel* had been 29 $\frac{1}{2}$ Years in Poſſeſſion at the Date of the Order. The Queſtion is Whether he is within 9, 10 *W.* 3. *c.* 11. which mentions *only two* Methods, whereby certificated Perſons can gain Settlements in Pariſhes, to which they come with Certificates; *viz.* taking a Leaſe of a Tenement of 10*l. per Annum*, or executing an annual Office.

But an ESTATE *of a Man's* OWN, FROM *which he* CANNOT *be removed*, has been, *by Conſtruction*, (and a very *reaſonable* one too,) holden to be WITHIN this Act: For it would be a very hard thing, to remove a Man *from his* OWN *Eſtate*. And the Rule holds as well

well in the Case of a *Certificate-Person*, as in any *other* Case, " That " no Man ought to be removed from his *own* Property and Estate." The Principle of this Determination is, because a Property of a Man's *own*, is a *stronger* Case than HIRING *another* Person's, of 10 *l. per Annum* Value.

The Question then is " Whether, here, *Daniel Harrison* acquired *such* a Right, *as rendered him* IR-*removable*. (For it does not turn, at all, upon his *becoming actually chargeable*, or not: The true Question is, " Whether he became *ir-removable* or not.)

Now here he had acquired a POSITIVE *Right*, by 20 Years Possession: Which is much more than a mere *negative* Right or a *Bar*. This was such a positive Right as would have sufficed to *support an Action*: He might have BROUGHT *an Ejectment upon* a 20 Years Possession. Therefore it is distinguishable from the Case of a *Bar*, (a mere negative Right,) or a Limitation: For it does not merely bar the Remedy; but it *gives* a Right, upon which He may recover in an Ejectment.

And here is a *Presumption* " That they had AGREED *with* the " other Children of *William Fido*, for their Shares." 'Tis like the Presumption of a Bond's being satisfied; when no Interest has been paid for twenty Years.

As to *Mary Harrison*'s Right to this Settlement, as being *next of Kin* to *William Fido*, who died possessed of this Term—The *General* Question " Whether it be sufficient for the next of Kin, to " be in *Possession* merely, WITHOUT *taking out Administration*," is very different from the particular Question in this Case: And We have nothing to do with it, in the *present* Case: For there is great Difference between a SOLE next of Kin; and where SEVERAL Persons in equal Degree have All of them an EQUAL Right; (Which is the present Case.)

On the *General* Question, I should have desired to look into the Cases; and to have well considered them. But that is not now necessary; because I ground my present Opinion on the Case here stated to Us, upon what is PARTICULAR in this Case.

Second Question.—As to the derivative Settlement of the Son, (the Husband and Father of the present Paupers) from his Father *Daniel Harrison*.

The Term *Emancipation* has been much made Use of. But " *Emancipation*," in the Case of Settlements of poor Persons is a vague Term; and not properly applicable to the Subject.

2 The

The Children of all Parents muſt have the Settlement of the Father, TILL they acquire another for themſelves. Here, the Son is *not* ſtated to have *acquired* One of his *Own:* Therefore he had ſuch as he derived from his Father. And his Father had gained One in *Cold Aſhton*. And there is no ground, here, to ſay that the Son muſt *neceſſarily* be taken to have left his Family, BEFORE the Time that the Father acquired a full and complete Settlement in *Cold Aſhton*, for *Himſelf*.

Therefore I think the Seſſions Order, which fixes the Paupers upon *Cold Aſhton*, ought to be confirmed.

Mr. Juſt. DENISON kept to the ſame Points, and agreed in the ſame Opinion.

1ſt Point—The Father, *Daniel Harriſon*, was in Poſſeſſion of an *Eſtate of his* OWN, for *above* 20 *Years:* And He was NOT *removable* from it, on Account of his *Property* in it, which rendered Him *irremovable*. It is not material HOW *he came into Poſſeſſion:* For 20 Years Poſſeſſion will, *alone*, give him a Settlement. Twenty Years Poſſeſſion is ſufficient either to defend, or even to make a Title in Ejectment. The Caſe of *Aſhbrittle* v. *Wiley*, 1 *Strange* 609. is ſo, expreſly.

And it does *not* turn upon his not being removable *till actually* chargeable: It turns upon his being *ir*-removable *from his* OWN. And a *Certificated* Perſon may gain a Settlement *by* TITLE, as well as an *uncertificated* Perſon may.

Second Point—As to the *derivative* Settlement of *William Harriſon*, the Son of *Daniel*, There can be no Doubt but that if *Daniel* gained a Settlement by ſuch Title, his Son will do ſo too: For the Children derive their Settlement from the Father. And We muſt not be ſcanning Days and Hours, upon this Order, to endeavour to make out that *perhaps* the 20 Years Poſſeſſion of the Father was not become *abſolutely completed*, at the Time when his Son left him. It appears probable that it was: And it does not at all appear that it was not.

Therefore I am of the ſame Opinion with my Ld. Ch. Juſtice, "That the Order of Seſſions ought to be affirmed."

Mr. Juſt. WILMOT concurred: And expreſſed himſelf to the following Effect.

1ſt. I do not think it material to ſay any Thing about the *Taking out* or *not taking* out Adminiſtration. If that Point upon the

General Queſtion is ſettled, I ſhall not be at all inclined to overturn or contradict it; *eſpecially* in the Caſe of the *Poor's Settlements*, which it is always beſt to aſcertain and reduce to *Preciſion:* And it is proper *ſtare deciſis*, in Caſes of this Nature.

It is objected that *Daniel Harriſon* had no *legal* Poſſeſſion. But this Poſſeſſion is either by Right, or by Wrong: And it was a Poſſeſſion of 20 Years. If it was by *Right*, the Objection is at an End. And a 20 Years Enjoyment and Continuance, *even* upon a Poſſeſſion by *Wrong*, gives a *legal* Title upon an Ejectment, *even againſt* the *rightful* Owner. And after ſuch a Length of Poſſeſſion, One would be inclined to *preſume* as much as is poſſible. Now here it is poſſible that *Daniel Harriſon* and his Wife *might* have ſome Grant or Aſſignment from *William Fido* in his Life-time; or ſome other *regular* and *rightful* Title to the Poſſeſſion which they took of this Tenement: So that their Poſſeſſion *might* poſſibly have been a *rightful One.*

2d Point—The Word "*Emancipation*" is improperly applied to Caſes of this Kind, and has been uſed in a vague Senſe upon theſe Occaſions. It is a Term taken from another Law; and in that Law has a determinate Meaning: But here it has been miſapplied.

It has been argued "That if the Son left his Father's Family "*before* the Father had been in Poſſeſſion for *full* 20 Years, He "could not derive a Settlement from his Father gained by a 20 "Years Poſſeſſion." But We are not to ſtand upon a Nicety of Computation, in Order to endeavour to make out, that under the general Expreſſion of the Son's "living with his Father and Mother, "in the Tenement till *about* 8 or 9 Years ago," he might poſſibly have left his Father's Family *before* the Father had been *quite* 20 Years in Poſſeſſion.—We have no Reaſon to *preſume this:* And here may, on the contrary, be a Preſumption or Poſſibility at leaſt, of the Father's coming *legally* into the Poſſeſſion; *viz.* by Aſſignment from *William Fido*, before his Death, or by ſome other legal Method.

Per Cur. unanimouſly, (Mr. Juſtice FOSTER only being abſent,)
ORDER of SESSIONS AFFIRMED: ORIGINAL ORDER QUASHED.

Rex *verſ.* Martha Gray.

THE Defendant ſtood indicted for a Nuſance, in ſtopping up a Foot-Way leading through *Richmond-Park.*

The preſent Queſtion was only, Whether the Trial (for which Notice had been regularly given by the Proſecutors, " to try it at " the next *Surrey*-Aſſizes,") ſhould be put off, or not.

The Cauſe alledged for putting it off, by the Counſel for the Defendant, (who profeſſed themſelves to be Counſel, in this particular Caſe, for the Crown,) was That there had been a LIBEL *publiſhed* relative to the Queſtion in Iſſue, *with Intention to influence* the Publick and the *Jury* who ſhould try the Cauſe.

The Fact was, That when the Cauſe came on to be tried at the *laſt* Summer Aſſizes, before Lord *Mansfield*, this Libel (juſt then publiſhed and diſtributed,) was produced in Court, and complained of in Court, as calculated to inſtruct the Witneſſes and influence the Jury.

Two of the *Principal Proſecutors*, then in Court, were by Affidavit charged with having *procured* the ſaid Libel to be written publiſhed and diſtributed. It purported, in the Title-Page, to be printed for and publiſhed by *Shepheard*, the Brother of a Principal Proſecutor: And an Affidavit was read, proving Him the Publiſher, And that the Copy produced was bought from Him in his Shop, and that He ſaid, " Great Numbers had been ſent to the *Surrey*-" Aſſizes."

The next Day *One* of the ſaid Proſecutors *only* made an Affidavit to deny the Charge; but in *ſuch a Manner* that it rather fixed it, as much as the Silence of the Other did.

The Counſel for the Proſecution, as it did not appear to *what* Witneſſes or Jurors the Pamphlet had been conveyed, And apprehending that ſuch Practices were not only a Contempt of the Court and high Miſdemeanor, but might invalidate any Verdict obtained before a proper Inquiry could be made into the Matter, deſired that the Trial might be poſtponed.

Which was conſented to, by the Counſel for the Defendant: And an Order was accordingly made, upon the Motion of one Side, conſented to by the Other.

Informations were afterwards moved for, and granted, againſt Some of the Perſons concerned in Printing and Publiſhing the ſaid Pamphlet; and were ready for Trial at the Sittings after this Term, in *Middleſex* and *London*.

Mr.

Mr. Attorney-General and the other Counſel for the Crown, moved, a few Days ago, to put off the intended Trial of the *Indictment againſt* the Defendant GRAY, TILL AFTER *the Trial* of *this* Information which had been filed *againſt the Publiſhers of this Libel*; or at leaſt to the next following Aſſizes to theſe now approaching *Lent*-Aſſizes; To the End that the Publiſhers of this Libel might be tried in the *Interim*, and receive Judgment, (if convicted:) Which, they ſaid, would *take off* the improper Influence which the Publication of it had occaſioned.

Which Motion being ſtrongly oppoſed by the Counſel for the Proſecution; The Court took Time, till this Day, to adviſe.

And now Lord MANSFIELD delivered his own and Mr. Juſt. DENISON's and Mr. Juſt. WILMOT's Opinions, (for He ſaid He did not know Mr. Juſt. FOSTER's, who had juſt ſent Him a Letter to inform Him "That He could not be here to Day;") which Opinion was, in ſhort, (though He gave it very much at large,) That the Trial of theſe Informations for publiſhing the Libel, was NOT *ſo connected with* the Merits of the Queſtion to be tried upon the Indictment, (which was a mere Queſtion of *Civil Right*, though in the Form of a Criminal Proſecution,) as that the Trial of the Civil *Right* ought to be ſtayed till the Determination of the Information againſt theſe Publiſhers of the Libel.

At the Aſſizes, The Counſel for the Proſecution deſired the Trial might be put off: Which was conſented to, on the Part of the Defendant. If they had not, I ſhould have adjourned it Myſelf. But there is not the ſame Reaſon now. For at *that* Time, it appeared that One, if not Two of the principal Proſecutors attending the Aſſizes, had been induſtrious in diſperſing and ſending it about, to the Witneſſes and Jury, for very unjuſtifiable Purpoſes. But now
* *Shepheard.* * One of theſe principal Proſecutors chiefly concerned in it, is
† *Lewis.* dead, and was ſo even before the Motion for the Information; the † Other is NOT *now under the Charge* of being concerned, (whatever *Suſpicion* may remain upon him:) And the *only* Perſons fixed upon by the Affidavits, now actually under the Charge, are *mere Pamphlet-Sellers and Publiſhers*, of whom they were bought. And He could not, He ſaid, upon the beſt Conſideration that he could give it, at all diſcover or conceive how the Conviction or Acquittal of *them* of the mere FACT *of Publication of this Libel*, could ANY WAY *affect* the Merits of the Queſtion concerning the *Civil* Right; or how the Trial of the Point upon the Civil Right could be at all altered, by being brought on before, or after the Event of the Criminal Trial for publiſhing the Libel.

Indeed,

Indeed, *if that had been* the Caſe, As ſuppoſe there had been an Information againſt the Principal Proſecutors of this Indictment, for the Nuſance, for inſtructing and ſuborning Witneſſes, or for undue Endeavours to influence Jurors, *That* might be a Reaſon for poſtponing the Cauſe till theſe Charges relative to the Conduct of the Parties were tried. But *that* is not this Caſe: And whether the Defendants to the Informations were or were not guilty of publiſhing this Libel, can no way affect the Merits of the Cauſe, nor can any how be given in Evidence.

Therefore the RULE muſt be DISCHARGED.

Rex *verſ.* Inhabitants of Mayfield.

MR. *Aſton* and Mr. *Burrell* ſhewed Cauſe againſt quaſhing an Order of Seſſions.

Two Juſtices had removed *Robert Furner* and *Mary* HIS WIFE, from *Mayfield* to *Horſtedcaines*, (both, in *Suſſex*:) And the Seſſions, upon an Appeal, diſcharged their Order.

Which Order of Seſſions Mr. *Ruſſell* and Mr. *Norton* had moved to quaſh.

The Order of Seſſions ſtates no Caſe at all. It is expreſſed only thus—" Upon the Appeal of *&c.* from an Order *&c.* for removing " of *Robert Furner* and *Mary* HIS WIFE, from *&c.* to *&c*; And " upon hearing of Counſel on both Sides; It is ordered by this " Court, That the ſaid Order or Warrant of the ſaid two Juſtices " of the Peace be diſcharged, AS TO *the* SAID MARY: And, by " this Court, it is diſcharged accordingly."

The Counſel who moved to quaſh this Order of Seſſions Objected " That this *amounts to a* DIVORCE of the Huſband and Wife."

Note—The Fact was That it appeared to the Seſſions, that She had a *former Huſband:* Who did not appear to them to be dead. (And Lord *Mansfield*, upon the Original Motion, ſuſpected " that the Seſſions might think Her *not to be* his Wife.)

The Counſel who ſhewed Cauſe againſt quaſhing the Order of Seſſions obſerved, That *even if She was* really his Wife, yet She *might* have hired herſelf to a Service, when Sole; And if ſo, her Marriage would not diſſolve the Contract. However they propoſed that it

ſhould go back to be *more fully ſtated:* Which the other Side were ready to conſent to. But

* Lord *Manſfield* was now abſent; and alſo Mr. Juſtice *Foſter*.

* Mr. Juſt. DENISON did not think it neceſſary: For the Seſſions had *not called* her his Wife; nor can We take it for granted, "that "She was ſo." And We muſt *intend* them to have done *right*. They *only recite* the Order of *two Juſtices*, which indeed calls her, "*his ſaid Wife*": But when the Court of Seſſions come to uſe their *own* Words, they call her "*the* SAID MARY." So that upon the Face of their Order, they plainly took Her NOT *to be* his Wife. And I do not know that the Juſtices are *obliged* to ſtate the Caſe *ſpecially*.

Mr. Juſt. WILMOT concurred; and declared that it was extremely plain to Him, that the Juſtices at Seſſions did *not* take her to be his Wife: For though they *recite the Original* Order which removes Her *as the Man's Wife*, they drop the Word "*Wife*," and only call her "*the ſaid Mary*," in their *own* Order (of Seſſions,) And, as they had Juriſdiction, We ought to *intend* that they did *right*.

RULE DISCHARGED: And the
ORDER of SESSIONS AFFIRMED.

Fairley *verſ.* McConnell.

MR. *Aſton* ſhewed Cauſe "why a *Procedendo* ſhould not go, to the *Burrough-Court* of *Portſmouth*:" who inſiſted on a Right to proceed there, AFTER *a Habeas Corpus cum Cauſa*.

He, on the contrary, inſiſted That by the Proviſo in § 6. of the 21 *Jac.* 1. *c.* 23. ("to prevent Suits commenced in inferior Courts, "from being removed into ſuperior, unleſs *&c*,") There ought to have been an *Utter-Barriſter* of 3 Years ſtanding, PRESENT at the Trial of the Cauſe: Whereas no ſuch Perſon was preſent at this Trial. For *want of which*, the Trial, He ſaid, was void; And the *Habeas Corpus* to remove the Cauſe, was well brought. In Proof of this He cited *Cro. Car.* 79. *Clapham*'s Caſe—(2d Reſolution) in Point—"That it is eſſential that an Utter-Barriſter of 3 Years "Standing, be preſent, either as Judge, or Deputy-Judge." 3 *Mod.* 85. *Anonymus*. A like Reſolution proving the Neceſſity of an Utter-Barriſter's being preſent; Or elſe, that this Act, by Virtue of this Proviſo, does *not extend* to the Caſe.

Mr. *Yates contra* for the *Procedendo*. This Qualification, of being Utter-Barriſter of 3 Years ſtanding *&c*, ONLY *extends* to the

Cafe of the Judge or Steward *Himſelf*; NOT to his *Aſſiſtant*. And Mr. *Serj. Stanniford* who *is* ſuch a Barriſter as is deſcribed in the Proviſo, is the *Judge* of the Court. So that the *Proviſo does not extend* to the preſent Caſe.

Mr. *Aſton* in Reply—But *He* was NOT *preſent:* The Cauſe was tried by Mr. *White*, an *Attorney*; who is his Deputy, and is not a Barriſter at all. And the Defendant relied upon the *Habeas Corpus*, to remove the Cauſe out of this inferior Court; and therefore did not attempt to try the Merits, or make any Defence, *there*.

N. B. The PROVISO is, " That this Act (of 21 *J.* 1. *c.* 23.) " ſhall *extend* ONLY *to* SUCH Courts of Record in Cities, Li- " berties, Towns Corporate, and elſewhere, and for ſo long " Time only, as there is or ſhall be an Utter-Barriſter of 3 " Years Standing at the Bar, of one of the Four Inns of Court, " that is or ſhall be *Steward*, *Under-Steward* or *Deputy-Stew-* " *ard*, *Town-Clerk*, or *Judge* or *Recorder* of the ſame inferior " Court; or that is, or ſhall be from Time to Time *Aſſiſtant* " to ſuch Judge or Judges of ſuch inferior Courts *as ſhall not* " *be* Utter-Barriſters of ſuch Standing, as is aforeſaid; AND " THERE PRESENT; In which, ſuch Actions, Bill, Plaints, " Suits or Cauſes, is or ſhall be brought, commenced, or de- " pending; and *not of Counſel* in any Action, Suit or Cauſe " then depending in the ſame inferior Court."

Lord MANSFIELD—The Judge, though He be ſuch a Barriſter, can be of no Uſe to the Court, unleſs *He* HIMSELF *be* THERE. The Meaning of the Act is, That ſuch an Utter-Barriſter ought in all Events, *to be* PRESENT *at the Trial*.

Mr. Juſt. DENISON and Mr. Juſt. WILMOT—Certainly: *That* was the Meaning of the Act beyond Doubt. And *for* WANT *of this*, the Trial now in queſtion is void.

The RULE (to ſhew Cauſe " Why there ſhould not iſſue a " Writ of *Procedendo*, to be directed to the Mayor Aldermen " and Burgeſſes of the Burrough of *Portſmouth*;" And " Why " the Defendant ſhould not pay to the Plaintiff the Coſts of " this Application;") was

DISCHARGED.

Rex

Rex *verſ.* Elizabeth Sarmon.

THE Court made no Sort of Difficulty to *quaſh an Indictment*, (though attempted, by two or three Counſel, to be ſupported) "For that the Defendant *for the Space of* FOUR *Hours and* "MORE TOGETHER, on *every* of the ſeveral Days ſpecified, (which "were the firſt Day of *January* 29 *G.* 2. and *divers other* Days "and Times between that Day and the Day of taking the Inquiſi- "tion,) *with Force and Arms &c.* at *London*, at the Pariſh of *St.* "*Martin within Ludgate*, in the Ward of *Farringdon Without*, in "*London* aforeſaid, unlawfully injuriouſly and wilfully did SET "PLACE *and* KEEP *a certain* Perſon, (whoſe Name was yet un- "known to the Jurors,) *in and upon the common and ancient Foot-* "*Way* on the North-Side of the *Public Street* there ſituate, called "*Ludgate-hill*; TO DELIVER *out certain* PRINTED BILLS OF HER "OCCUPATION, to Perſons paſſing that Way; *which ſaid Perſon* "ſo ſet placed and kept there, by her the ſaid *Elizabeth*, did, on "the ſaid Days and Times, REMAIN IN AND UPON *the ſaid Com-* "*mon Foot-Way* DURING *the ſeveral Spaces of Time aforeſaid*, DE- "LIVERING AND DISTRIBUTING *printed Bills*, as aforeſaid; "Whereby *the ſame Foot-Way*, at thoſe ſeveral Days and Times, "*was greatly* IMPEDED *and* OBSTUCTED; So THAT *the Liege* "*Subjects* of our ſaid Lord the King, *there paſſing and reſiding*, "*could* NOT SO FREELY *go paſs and repaſs in by or through the* "SAME WAY, *as they ought and were uſed to do:* To the great "Damage and *common* NUSANCE *of* all the ſaid Subjects, and "againſt the Peace of our ſaid Lord the King his Crown and "Dignity."

The COURT held this to be a Matter NOT *indictable*; and *quaſhed* the INDICTMENT.

The End of *Hilary* Term 1758. 31 *Geo.* 2.

Eaſter

Eaſter Term

31 Geo. 2. B. R. 1758.

Rex *verſ.* Richardſon.

Wedneſday 12th April 1758.

THIS was a *General* Demurrer, by the King's Coroner and Attorney, to the Defendant's Plea to an Information in Nature of a *Quo warranto* exhibited againſt *Thomas Richardſon*, to ſhew by what Authority he claimed to be one of the Portmen of the Town or Burrough of *Ipſwich*.

The Plea (in Subſtance) is, that *Ipſwich* is an ancient Burrough by Preſcription, prior to the Charter: That at the Time of granting it, there were, and long before had been 12 Burgeſſes called Portmen. Then it ſets forth the Letters Patent of Incorporation, dated 11 *Feb.* 17 *Car.* 2. which, after reciting that this Town or Burrough had been, for many Ages, a Corporation *&c*; firſt confirms the ſaid Incorporation and all their Liberties Free Cuſtoms Franchiſes *&c*. Then the ſaid Letters Patent name conſtitute and confirm the ſeveral Officers, and (amongſt the reſt) twelve Portmen. Then they go on to grant and confirm, "that All *Elections* of the *Portmen* "and of every of them, by the Death OR REMOVAL of any of "them or otherwiſe in whatſoever Manner happening, ſhould from "thenceforth for ever be made and ought to be made *by the* OTHERS "*or* RESIDUE of the Portmen for the Time being, *or the greater* "*Part of* THEM."

Then the Plea ſets forth the Acceptance of the Letters Patent by the Corporation, and their conforming thereto, to the Time of the Plea.

The Plea goes on, and alledges a Cuſtom then and ſtill ſubſiſting, "that the Bailiffs Burgeſſes and Commonalty for the Time "being, OR *ſo many of them as would be preſent*, have met and aſ"ſembled and of Right ought to meet and aſſemble together in the

" *Moot-hall* yearly and every Year, at divers Times in the Year, " *viz. Once, on the 8th of September* in every Year, for the Elec- " tion of Bailiffs, and for the consulting about and transacting of " other lawful and necessary Affairs concerning the Burrough and " the good Rule and Government thereof; and *again at Michaelmas* " in every Year, for the transacting of divers lawful and necessary " Businesses &c; And *also at such* OTHER *Time and Times* in the " Year as to the Bailiffs of the said Town or Burrough for the " Time being hath seemed meet and necessary, *upon* DUE *Notice* " being previously given thereof, for the better ordering Regula- " tion and Government of the said Town or Burrough: At which " said Assembly, from Time to Time had and held as aforesaid, " the Bailiffs of the said Town or Burrough for the Time being, " during all the Time aforesaid, have of Right presided, and have " used and been accustomed and ought to preside; and *which said* " *Assembly*, during all the Time last aforesaid, hath been and hath " been called the GREAT *Court* of the said Town or Burrough."

Then the Plea further sets forth another then and still subsisting Custom and Method of *Electing* swearing and admitting the *Portmen, whenever* any Vacancy or Vacancies hath or have happened by the Death Resignation *Discharge* or *Removal* of any Portman or Portmen of the same Town, or in any wise whatsoever; *viz.* " that " *the* RESIDUE of the Portmen, or the *greater Part of* THEM, " have *within a* REASONABLE AND CONVENIENT *Time* after the " happening of such Vacancy or Vacancies, *assembled* in the Coun- " cil-Chamber, for the *Election of another Portman* or other Port- " men; And, in the said Room there, have elected and named, " and of Right ought to elect and name, out of the then Burgesses " of the said Town or Burrough then resident and inhabiting " within it, such other Person or Persons as the *said then* RESIDUE " of the Portmen aforesaid, *or the greatest Part of* THEM, have " thought fit and proper to be a Portman or Portmen of the said " Town, to fill up such Vacancy or Vacancies: And such Person " or Persons *so* elected and named to be a Portman or Portmen of " the said Town or Borough, and being resident and inhabiting in " the same Town, hath and have, for all the Time aforesaid, been " sworn and admitted, and during all that Time ought of Right " to be sworn and admitted into the same Office or Offices; And " every Person *so* elected sworn and admitted &c, and being resi- " dent and inhabiting &c, during all the Time aforesaid, hath of " Right enjoyed had used and exercised, and during all that Time " ought of Right to have Use and Exercise, and still of Right " ought to enjoy use have and exercise the said Office of a Port- " man of the said Town or Burrough, and all the Liberties Privi- " leges Rights and Franchises to that Office belonging and apper- " taining, from the Time of his Admission thereto, until the Death " Resignation *Discharge* or *Removal* of such Portman."

The Plea further ſhews, That every Portman of the ſaid Town or Burrough, during the Time of his being in that Office, ought, according to the Cuſtom of the ſaid Town or Burrough, to be reſident and inhabiting within the ſame Town or Burrough or the Liberties thereof; and according to the Cuſtom of the ſaid Town or Burrough and BY THE DUTY *of his Office of Portman, ought to* ATTEND *and be* PRESENT *at every* GREAT *Court* of the ſaid Town or Burrough held or to be held in the *Moot-hall* aforeſaid within the ſaid Town or Burrough, *To* ADVISE *and* ASSIST *the Bailiffs* of the ſaid Town or Burrough for the Time being, in the good Rule and Government of the ſame Town or Burrough.

It then alledges that on the 8th of *September* 1755, and for ſix Months and more next preceding that Day, He the ſaid *Thomas Richardſon* and one *John Gravenor* were Bailiffs of the ſaid Town or Burrough.

That on the ſame Day and Year, and for the Space of one whole Year then laſt paſt, and upwards, Sir *Richard Lloyd* Knight, *John Sparrowe*, *Samuel Kent*, *Humphrey Rant*, *Ellis Brand*, *Michael Thirkle* the Younger, *Goodchild Clarke*, *William Hammond*, *George Foſter Tuffnell*, and *James Wilder* were the then Portmen of the ſaid Town or Burrough.

That within the ſaid Space of that Year during which the ſaid Sir *Richard Lloyd &c.* were Portmen as aforeſaid, *divers Great Courts* of the ſame Town or Burrough, were holden *&c*; that is to ſay, *One Great Court* of the ſaid Town or Burrough, was duly holden at the ſaid *Moot-Hall* of the ſaid Town, in and for the ſaid Burrough, on the 13th of *January* 1755; *One other Great Court* of the ſaid Town or Burrough was duly holden at the ſaid *Moot-Hall &c.* on the 15th of *April* 1755; *One other*, on the 9th of *June* 1755; And *One other*, on the 19th of *June* 1755: Before the Holding of which ſaid ſeveral Courts reſpectively, DUE NOTICE *had been* GIVEN *of the holding thereof reſpectively.*

That on the ſaid 8th of *September* 1755, they the ſaid *Thomas Richardſon* and *John Gravenor*, being then Bailiffs, and the abovenamed *James Wilder*, then one of the Portmen of the ſaid Town or Burrough as aforeſaid, and a great Number of the then Burgeſſes and Commonalty of the ſaid Town or Burrough, in due Manner, according to the Cuſtom of the ſaid Burrough, met and aſſembled together in the *Moot-Hall* aforeſaid within the ſaid Town or Burrough; and then and there held a *Great Court* of the ſame Town or Burrough, (*due Notice of the holding thereof* having there been previouſly given,) *for the Election of Bailiffs* of the ſaid Town or Burrough,

rough, and for the Tranſaction of divers other lawful and neceſſary Matters and Buſineſſes concerning the good Rule and Government of the ſame Town or Burrough.

That the ſaid Sir *Richard Lloyd*, *John Sparrowe*, *Samuel Kent*, *Humphry Rant*, *Ellis Brand*, *Michael Thirkle*, *Goodchild Clarke*, *William Hammond*, and *George Foſter Tuffnell*, did *not*, *nor did* ANY *of them* ATTEND *or* APPEAR *at the ſame Great Court* of the ſaid Town or Burrough, *but* WILFULLY ABSENTED *themſelves therefrom*; And that They and Every and Each of them WILFULLY *had abſented themſelves from the ſaid other Great Courts* of the ſaid Town or Burrough which had been ſo duly holden in the ſame Town or Burrough within the ſaid Space of One Year then laſt paſt as aforeſaid, and from *every* of thoſe Great Courts; And had *voluntarily neglected*, and Every and Each of them *had voluntarily* NEGLECTED *to attend* at the ſaid Great Courts ſo holden as aforeſaid, *or at any of them:* And *thereby*, Each of them the ſaid Sir *Richard Lloyd &c.* and *G. F. Tuffnell neglected and omitted the Duty and Execution of his ſaid Office* of One of the Portmen of the ſaid Town or Burrough, and *thereby* DEPRIVED *the then Bailiffs Burgeſſes* and Commonalty of the ſaid Town or Burrough, *aſſembled at the ſaid ſeveral Great Courts*, of that *Counſel Aid Aſſiſtance* and *Advice* which *by the* DUTY *of his Office of Portman* of the ſaid Town or Burrough, and *according to the* OBLIGATION *of the* OATH *of Office by him taken* in that Behalf, He *ought* to have given; *To the great Hindrance and Delay of the* PUBLIC *Buſineſs of the ſaid Burrough*, To the *great Damage Diſappointment and Prejudice* of the Bailiffs Burgeſſes and Commonalty of the ſaid Burrough, and to the great Hindrance and in open Subverſion of the good Rule Government and Conſtitution of the ſaid Burrough.

That *thereupon*, *at the ſame Great Court* of the ſaid Town or Burrough holden on the ſaid 8th Day of *September* 1755, for the Purpoſes aforeſaid, (the ſaid Great Court having Notice of the Premiſſes,) It was in due Manner Ordered, by the ſaid then Bailiffs Burgeſſes and Commonalty of the ſaid Town or Burrough then met and aſſembled at that Great Court as aforeſaid, " That the ſaid Sir " *Richard Lloyd*, *John Sparrowe*, *Samuel Kent*, *Humphry Rant*, " *Ellis Brand*, *Michael Thirkle*, *Goodchild Clarke*, *William Hammond*, " and *George Foſter Tuffnell*, and each of them reſpectively, ſhould " ſeverally and reſpectively HAVE NOTICE *of the Neglect of Duty* " *charged upon each of them*, and *be ſummoned to appear* at the then " next Great Court of the ſaid Town or Burrough, that is to ſay, " in the Moot-Hall aforeſaid, on *Monday* the 29th Day of the ſame " *September*; ſeverally and reſpectively to *ſhew Cauſe*, (if they or " any of them could,) Why Each of them reſpectively *ſhould not* " *be* DISCHARGED *from his ſaid* OFFICE *of* PORTMAN, FOR *his* " *reſpective* NEGLECTS *aforeſaid*."

That

That afterwards, and before the Holding of the ſaid then next great Court of the ſame Town or Burrough, to wit on the 20th Day of the ſame *September* 1755, Each of them the ſaid Sir *Richard Lloyd*, *J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* HAD NOTICE *of the ſaid Order* ſo made by the ſame Great Court, and of the *Charge alledged* againſt *Each* of them reſpectively, of his aforeſaid Neglects; and were then and there *ſeverally and reſpectively* SUMMONED, and *every and each* of them was then and there *in due Manner ſummoned* to attend and appear at the ſaid then next Great Court of the ſaid Town or Burrough to be holden in the Moot-Hall aforeſaid in the ſaid Town or Burrough on *Monday* the 29th Day of the ſame *September*, by the Bailiffs Burgeſſes and Commonalty of the ſaid Town or Burrough, and to ſhew Cauſe (if any of them could) why Each of them the ſaid Portman reſpectively ſhould not be diſcharged from his ſaid Office of Portman, for his reſpective Neglects aforeſaid.

That afterwards, that is to ſay, on the ſame *Monday* the 29th Day of *September* in the ſaid Year of our Lord 1755, They the ſaid *Thomas Richardſon* and *John Grovenor*, being then and there Bailiffs of the ſaid Town or Burrough, and the ſaid *James Wilder* being then *One* of the Portmen of the ſaid Town or Burrough, And a great Number of the then Burgeſſes and Commonalty of the ſame Town or Burrough (due Notice having there been previouſly given in that Behalf,) did, in due Manner according to the Cuſtom of the ſaid Burrough, meet and aſſemble in the Moot-Hall aforeſaid within the ſaid Town or Burrough, And then and there *held a Great Court* of the ſame Town or Burrough in and for the ſaid Town or Burrough; And the ſaid Sir *Richard Lloyd*, *J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* although they were then and there ſolemnly and ſeverally called for that Purpoſe, *did* NOT *nor did any of them* APPEAR *or* ATTEND *at that Court*, *or* SHEW ANY CAUSE Why they and each of them ſhould not be diſcharged from the ſaid Office of Portman of the ſaid Town or Burrough: But they and each of them did then and there *wholly make* DEFAULT *therein.*

That at the *ſame* Great Court *&c.* ſo holden as aforeſaid on the ſaid *Monday* the 29th of *September* 1755, a FURTHER *Day was given* by the ſame Great Court, to the ſaid Sir *Richard Lloyd &c*, reſpectively, *until the then next* Great Court of the ſaid Town or Burrough to be holden in and for the ſaid Town or Burrough at the Moot-Hall of the ſaid Town or Burrough on *Tueſday* the 14th Day of *October* then next enſuing, To ſhew Cauſe as aforeſaid: And it was then and there in due Manner Ordered by the ſame Great Court, " That the ſaid Sir *Richard Lloyd &c*, and every of them " *ſhould have Notice* and be ſeverally and reſpectively *ſummoned to* " *appear* at the ſaid then next Great Court *&c*, to be holden *&c*,

" on the ſaid *Tueſday* the 14th Day of *October* then next enſuing;
" ſeverally and reſpectively to ſhew Cauſe, (if any of them could,)
" why they and Each of them reſpectively ſhould not, *for the*
" *Cauſe aforeſaid* alledged againſt Each of them reſpectively, be diſ-
" charged from his Office of Portman of the ſaid Town or Bur-
" rough, *for his Neglects* aforeſaid."

That afterwards, and before the Holding of the ſaid then next Great Court of the ſame Town or Burrough, to wit, on the 10th Day of the ſame *October* in the ſaid Year of our Lord 1755, They the ſaid Sir *Richard Lloyd &c*, and each of them reſpectively, *had due Notice* of that Order, and of the Charge alledged againſt each of them reſpectively, of his aforeſaid Neglects; and were then and there ſeverally and reſpectively *ſummoned*, and every and each of them was then and there *in due Manner ſummoned to appear and attend* at the ſaid then next Great Court of the ſaid Town or Burrough to be holden in and for the ſaid Town or Burrough, on *Tueſday* the 14th Day of *October* then next enſuing, To ſhew Cauſe, (if they any of them could,) why they and each of them reſpectively ſhould not, *for the Cauſe aforeſaid* alledged againſt each of them reſpectively, be diſcharged from his Office of a Portman of the ſaid Town or Burrough, *for his Neglects aforeſaid.*

That on the ſaid *Tueſday* the 14th of *October* aforeſaid, in the ſaid Year of our Lord 1755, *Lark Tarver* and *Thomas Bowell* were Bailiffs of the ſaid Town or Burrough; And that the aforeſaid Sir *Richard Lloyd &c*, *And James Wilder*, were the then *only* Portmen of the ſaid Town or Burrough.

That on the ſaid *Tueſday* the 14th Day of *October* aforeſaid, They the ſaid *Lark Tarver* and *Thomas Bowell*, then being Bailiffs of the ſaid Town or Burrough, and *the ſaid James* WILDER *then* ONE of *the Portmen* of the ſame Town or Burrough, and a great Number of the then Burgeſſes and Commonalty of the ſaid Town or Burrough (*due Notice* in that Behalf having there been previouſly given,) did, in due Manner according to the Cuſtom of the ſaid Burrough, meet and aſſemble in the Moot-Hall aforeſaid in the ſaid Town or Burrough, and then and there held a Great Court of the ſame Town or Burrough, for the Tranſaction of divers lawful Affairs concerning the Good Rule and Goverment of the ſaid Town or Burrough.

That at the ſame Great Court, *&c.* ſo holden as aforeſaid on *Tueſday* the 14th of *October* 1755, The aforeſaid Sir *Richard Lloyd &c*, were ſeverally and ſolemnly called, and every and each of them was ſeverally and ſolemnly called to appear and ſhew Cauſe at that Court, (if any of them could,) why each of them reſpectively ſhould

ſhould not, for his Neglect of Duty aforeſaid charged and alledged againſt each of them reſpectively, be diſcharged and removed from his ſaid Office of Portman of the ſaid Town or Burrough. That they the ſaid Sir *Richard Lloyd &c*, being ſo reſpectively and ſolemny called as laſt aforeſaid, DID NOT *nor did any of them* THEN ATTEND *or appear or ſhew any Cauſe* whatſoever, at that Court, why they or any of them ſhould not be diſcharged and removed from his ſaid Office of Portman of the ſaid Town or Burrough: But they Every and Each of them did then and there *wholly make Default* therein; and *neither* they nor any of them, nor any Perſon on the Behalf of them or any of them, did then require any future Day or Time to be allowed to them or any of them, to ſhew Cauſe as aforeſaid. WHEREUPON, the ſaid *Lark Tarver* and *Thomas Bowell*, then being Bailiffs of the ſaid Town or Burrough, And the Reſt of the ſaid Burgeſſes and Commonalty of the ſaid Town or Burrough, then ſo met and aſſembled, and holding the ſaid Great Court of the ſaid Town or Burrough as aforeſaid on the ſaid 14th Day of *October* in the Year laſt mentioned, having taken the Premiſſes into their Conſideration, and having fully and deliberately weighed the ſame; The ſaid COURT did then and there ORDER "That Each of them the ſaid "Sir *Richard Lloyd, J. S. S. K. H. R. E. B. M. T. G. C. W. H.* "and *G. F. T. ſhould be* DISMISSED DISCHARGED *and* REMOVED "from his *Office of a Portman* of the ſaid Town or Burrough: And "Each of them reſpectively *was* then and there, by the ſaid Court, "FOR *his ſaid Neglect of Duty*, DULY *diſcharged and removed* from "his Place and Office of Portman of the ſaid Town or Burrough; "and Each of them hath ever ſince remained and been, and yet is "diſcharged and removed therefrom."

That the aforeſaid Sir *R. L. J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* being ſo reſpectively diſcharged and removed from their ſaid reſpective Offices as aforeſaid, He the ſaid *James Wilder*, afterwards on the ſame Day and Year, and from the Time of their ſaid reſpective Diſcharges and Removal UNTIL AND AT *the Time of the Election of* OTHER *Portmen* of the ſaid Town or Burrough herein after mentioned, remained and was a Portman of ſaid Town or Burrough; and then, and during all that Time, was *the* ONLY *Portman* of the ſame Town or Burrough.

That afterwards, on the ſaid *Tueſday* the 14th Day of *October* aforeſaid in the Year laſt mentioned, the ſaid *James Wilder, being* THEN *the* ONLY *Portman* of the ſaid Town or Burrough, *retired* and went into the Room called the Council-Chamber, in the Moot-Hall aforeſaid in the ſaid Town or Burrough, *in Order to elect Other* Burgeſſes of the ſame Town or Burrough, reſident and inhabiting within the ſaid Town or Burrough, to be *Portmen* of the ſaid Town or Burrough *in the Places* of Portmen of the ſaid Town or Burrough VACANT *as aforeſaid*; And *did* then, in the ſaid Room there

there, *in due Manner* ELECT HIM *the ſaid* THOMAS RICHARDSON (being then and there a Burgeſs of the ſame Town or Burrough, inhabiting and reſident within the ſame Town or Burrough, and a fit and proper Perſon to be a Portman thereof,) to be *One of the Portmen* of the ſaid Town or Burrough, *in the Place of* One of the Portmen of the ſaid Town or Burrough THEN VACANT *as aforeſaid.*

That he the ſaid *Thomas Richardſon*, being *ſo elected* to be a *Portman* of the ſaid Town or Burrough, afterwards and before he was admitted to or took upon him the Execution of that Office, that is to ſay, at the ſame Great Court of the ſaid Town or Burrough, in the Moot-Hall aforeſaid, on the ſame *Tueſday* the 14th Day of *October* in the Year laſt aforeſaid, at the ſame Great Court of the ſaid Town or Burrough, in the Town-Hall aforeſaid, did then and there, BEFORE *the* ſaid *Lark Tarver* and *Thomas Bowell* then BAILIFFS of the ſaid Town or Burrough, in *due Manner* and *according to the Uſage and Cuſtom* of the ſaid Burrough, *take his Corporal Oath for the faithful and due Execution of the ſaid Office* of a Portman of the ſaid Town or Burrough in all Things concerning the ſame, *and* ALL OTHER *Oaths then required by Law in that Behalf:* And thereupon, He the ſaid *Thomas Richardſon* was then and there, at the ſame Great Court, in due Manner admitted into the ſaid Office of a Portman of the ſaid Town or Burrough. And thereupon, and by Virtue thereof, He the ſaid *Thomas Richardſon*, afterwards, that is to ſay, on the ſaid 14th Day of *October* 1755, and continually from thence until and at the Time of exhibiting the Information, was and ſtill is a *Portman* of the ſaid Town or Burrough.

And by that Warrant *&c. &c.*

The King's Coroner and Attorney demurs *generally:* And the Defendant joins in Demurrer.

This Caſe was three Times argued.

The *General* Queſtion was, "Whether the Defendant has ſhewn a *ſufficient Title* to the Office:" Which general Queſtion was divided into two *ſubordinate* Ones; *viz.*

1ſt. Whether the Nine Portmen had been *well and duly* REMOVED; And (admitting that they were ſo,)

2dly. Whether the *Defendant was well* CHOSEN.

1ſt Objection to the Removal.

Firſt—The Counſel for the Crown urged, That the Perſons amoving had *no* POWER *to amove.* For a Corporation have no ſuch

2 Power

Power inherently or *incidentally*: And none is, in the preſent Caſe, either given to this Corporation by Charter, or claimed by Preſcription.

They cited *Magna Charta, c.* 29. " *Nullus liber homo diſſeiſietur* " *de libero tenemento ſuo, niſi per legale judicium parium ſuorum,* " *vel per legem terræ.*" *James Bagg*'s Caſe, 11 *Co.* 93 to 99. 1 *Ro. Rep.* 224, 225. S. C. and S. P. The Crown may, by Writ, diſcharge ſome Officers, after Conviction. See Sir *Robert Sawyer*'s Argument on the *Quo Warranto* againſt *London, fo.* 22. *State Trials Vol.* 4. *fo.* 810. S. C. Where Sir *Robert* mentions the Caſe of a Coroner: *F. N. B. New Edit.* 381. *Old Edit.* 163. *Writ de Coronatore eligendo vel exonerando. Regiſter* 177, 178. *Writ de Coronatore eligendo; & de Viridario eligendo. F. N. B. New Edit.* 383. *Old Edit.* 164. *Writ de electione Viridariorum Foreſtæ. Dyer* 333. *Paſch.* 16 *Eliz. pl.* 28. which was a Reſtoration by Writ of a Citizen of *London*, who had been diſfranchized.

Theſe Authorities they cited, to illuſtrate and deduce the Poſition " That, in Conſequence of a *Conviction*, Writs ſhall iſſue out of " the *King*'s Courts, where the Conviction is;" and to ſhew " that " the Power is originally in the *Crown.*"

In *Yates*'s Caſe, *Style* 477, 480. it is ſaid " There muſt be a " Cuſtom or a Statute to warrant a Diſfranchiſement." 1 *Ld. Raym.* 391. *Rex* v. *Mayor of Coventry*, *M.* 10 *W.* 3. (2d Point,) The Court held that the Corporation ought to ſhew a Power, either by Cuſtom or under their Letters Patent. 2 *Ld. Raym.* 1564, 1565, 1566. *M.* 3 *G.* 2. *Rex* v. *Mayor &c.* of *Doncaſter*, recognizes the Authority of *Bagg*'s Caſe, and *Yates*' Caſe, " That " a Freeman ſhall not be removed, but by Charter or Preſcription:" That Return was quaſhed; and a peremptory *Mandamus* iſſued. And *M.* 29 *G.* 2. *B. R. Rex* v. *Ponſonby* was agreeable to this.

The only *Dictum* to the contrary of this Doctrine, is in 2 *Strange* 819, 820. Lord *Bruce*'s Caſe: where it is ſaid " that the *Modern* " Opinion has been, that a Power of Amotion is *incident* to the Cor- " poration." But this Report ought to carry but little Weight: For *other* Accounts of that Caſe *differ* from it; And NO ſuch *modern Opinion* as is there hinted at, does any where appear.

Second Objection (under the firſt Point.)

2d Objection to the Removal.

Here was NO *ſufficient* CAUSE of Removal of theſe 9 Portmen.

Their NON-ATTENDANCE was *no Breach* of their Duty, ſo as to occaſion a *Forfeiture.* 1 *Hawk. P. C.* 168. ſays that the Notion of Forfeiture by bare Non-Uſer is not well warranted by the Authority cited in Maintenance of it.

This Duty, "of attending to advise and assist the Bailiffs at the "Great Courts," is NOT *constant and continual*; but OCCASIONAL *only*, and when they receive *Notice* to do so: They are not obliged to attend the *ordinary* and *common* Business of these Great Courts. And it is not here alledged, "that any Counsel, Aid, Assistance, or "Advice was *wanting*." Indeed, the Plea concludes that this was "to the Damage and Prejudice of the Corporation, and their Hin-"derance *&c.*"

But there is *no special Damage* laid: And the stating a *General* Damage to the Corporation is not enough; without shewing a *particular* Prejudice to them. 1 *Inst.* 233. *b.* is expresly so.*

* As to *private* Offices: Not as to *public*, which concern the Administration of Justice or the Common-Wealth.

A Burgess's Non-Attendance at Sessions, is no Cause sufficient for a Removal of him. *Regina* v. *Mayor and Burgesses of Pomfret*, *M.* 11 *Anne*, in *Lucas's Report* 107. is expresly so resolved.

But even admitting they had this Power of Removal; Yet, it ought to be for *such* an Offence as was *against their Oath of Office:* and consequently, *this Oath of Office* ought to be *set forth. Style* 477, 478. 2 Ld. *Raym.* 1233. in Serjeant *Whitaker*'s Case—*Regina* v. *Ballivos*, *Burgenses &c. de Gippo:* There the Oath *is set forth.* Here, it is not.

3d. Objection to the Removal.

Third Objection (under the first Point)—"This is not a Removal *by the* WHOLE *Body*, at a *Corporate Assembly*; but by a particular *Court*. In *Carthew* 172. Sir *Peter Rich* v. *Pilkington*, the Court of Mayor and Aldermen was holden *not* to be a Corporate Assembly; but a *Court*. So here, this *Great Court* was only a *mixt* Assembly; and *not* the Mayor Burgesses and Commonalty.

4th. Objection to the Removal.

Fourth Objection (under the first Point.) the Removal is NOT *under their Common Seal.* 1 *Salk.* 192. The Mayor of *Thetford*'s Case, is in Point, "That a Corporation can not do an Act in *Pais*, "without their Common Seal." 13 *H.* 8. 12. *Plowd.* 91. *b.* 92. *a.* 2 *Saund.* 305.* 3 *Lev. Manby* v. *Long et al.*† 1 *Ventr.* 47. *Horn* v. *Ivy.* 1 *Mod.* 18. S. C.‡ In 1 *Ventr.* 355. *Haddock*'s Case, The Words are, "If the Power to remove be at their Will and Plea-"sure, this Will *must* be expressed *under their Common Seal:* But in "a *Return to a Mandamus*, *Debito modo amotus* may suffice." There is a Note, at the Bottom of the *Colchester* Case in 1 *Peere Wms.* 596, "That the Method of disfranchising a Corporator, (in order "to examine Him as a Witness,) is by an Information in the Na-"ture of a *Quo warranto* against the Member; who confesses the "Information: On which, there is a *Judgment* to disfranchise Him." The present Case is NOT *like* to a *Return* to a *Mandamus*; where the mere Return of his being "*debito modo amotus*" is sufficient:

* (On the 1st Exception to the Plea)
† (2d. Exception to the Avowry)
‡ All these last Cases do not authoritatively prove the Position; *not* being the *Point resolved.*

Here

Here, it ought to be *ſo pleaded*; this being a *Plea* to an Information: which Plea ought to be taken againſt the Pleader.

Fifth Objection (under the firſt Point) was to the Want of PERSONAL *Notice* being given to the 9. removed Portmen, "to attend "the five Great Courts firſt mentioned in the Plea;" (for the Non-Attending whereof, they were afterwards removed.) 5th. Objection to the Removal.

This Objection was firſt ſtarted by Lord *Mansfield*; who obſerved that for the Meetings aſſembled for doing Corporate Acts, A *Summons* (of *ſome Sort or other*) is neceſſary; And that *here*, the Offence itſelf turns upon Abſences from ſeveral Courts, *not* holden (except one of them) *upon* STATED *Days*, during the Period of about a Year; Yet *no* PERSONAL *Notice* to theſe Portmen is alledged by the Plea; but only, in general, "that DUE *Notice* was given of "the holding thereof reſpectively:" So that it does *not appear* that they had *any Reaſon to think of any* PARTICULAR *or* SPECIAL *Buſineſs*. And *if ſo*, the particular Notice afterwards given them, "to ſhew Cauſe why they ſhould not be disfranchiſed," will not affect them: For *that* is quite a ſubſequent diſtinct Tranſaction.

Therefore He offered to hear a further Argument on this ſingle Head if the Parties deſired it. Which they did: And this Objection was argued by itſelf.

The Counſel for the Crown *alſo* objected to the Notice given to theſe Portmen, of the Courts at which they were to have attended *to ſhew Cauſe* why they ſhould not be disfranchiſed.

1ſt. They argued that it was *not* their Duty to have attended *at* ALL *Great Courts*, upon GENERAL *Notice* of them, WITHOUT PARTICULAR *and* PERSONAL *Summons*. For without ſuch *perſonal* Notice, they could not be guilty of ſuch a Laches as would be a Ground for a Forfeiture of their Office.

2dly. They inſiſted alſo that PARTICULAR *and* PERSONAL *Notice* ought to have been given them, of the *Charge*, and of the *Intention to disfranchiſe*. 1 *Salk.* 214. *Nurſe* v. *Frampton*. 8 *Rep.* 93. *Fraunces*'s Caſe, (3d. Reſolution.) And although it is alledged, "that EACH of them *reſpectively* HAD *Notice*;" * yet this was *not enough*: But a *particular* and *ſpecific* Summons ought to be ſet forth. And they cited *Style* 446, 452. The Protector and the Town of *Colcheſter*, *Bernardiſton* the Recorder's Caſe. 4 *Mod.* 37. *Glide*'s Caſe. Caſes *temp. W.* 3. *fo.* 29. S. C. *Bagg*'s Caſe 11 *Rep.* 99. *a.* And it is likewiſe ſo in *Actions*. *Fletcher* v. *Ingram*, laſt cited Book, *fo.* 87, 88. (v. Caſes *temp. W.* 3.) was a Replevin: And "*Notitiam habuit*" was holden too general. 1 Ld. *Raym.* 225, 226.

* *V. ante* 521. (which ſeems to be as particular and perſonal as Words can expreſs.)

Rex

Rex v. *Chalke* upon a *Mandamus* to reſtore an Alderman, *per Holt*, " A Summons is neceſſary, that the Perſon charged may be *pre-* " *pared* to make his Defence." And this ought to be *perſonal*. And it muſt be given by the proper Perſon. 6 *Rep.* 29. *a.b. Green's* Caſe: * Where no Lapſe incurred for want of it's being given in Certainty and explicit Particularity, and by the proper Perſon too.

The 1ſt Point.

Now the Words in the *preſent Allegation* " that each of them *had* " Notice," may be *true*; *though* they had no *proper*, *regular*, and *perſonal* Notice.

Second Point (*viz.* Second ſubordinate Queſtion.)

The Defendant has NOT *been* DULY ELECTED, and *ſworn*.

1ſt. Objection to Defendant's Election.

1ſt. For the Election ought to be by the *Reſidue*; And " *Reſidue*" is a *plural* Term, and imports " *the others:*" Whereas here was only ONE SINGLE Portman left, And He *alone* elected the Defendant into this Office.

The Cuſtom requires " the *Portmen* to *aſſemble:*" Which Expreſſion neceſſarily imports ſome *Number* of them, at leaſt more than *One*; For One alone can never be ſaid to *aſſemble*. And all Charters ought to be taken according to the Cuſtom ſubſiſting at the Time of granting them. 2 *Inſt.* 282. And here, they have been reduced to One, not by the Act of Providence, but by the voluntary Act of the Corporation themſeves.

2d. Objection to Defendant's Election.

2dly. The Cuſtom alſo requires a *reaſonable and convenient Time*, " between the Happening of the Vacancy, and the Election of a " new Portman." Whereas this Election Admiſſion and Swearing of the Defendant to be One of the Portmen in the Place of One of thoſe removed, were all *immediate*.

3d. Objection to Defendant's Election.

3dly. Beſides, He ought to have been elected into the *Place* of ſome *particular* Portman; not in *general*, " into the Place of *One* " of them then vacant."

4th. Objection to Defendant's Election and Swearing.

4thly. The Plea does not ſufficiently particularize the Oath of Office, (vide *Style* 478;) nor alledge that the Perſons who *adminiſtered* the Oaths to the Defendant, (*viz.* the Bailiffs,) " *had ſuch* " POWER *to adminiſter them.* It is only averred " That He took " them before them in due Manner and according to the Cuſtom." 1 *Strange* 539. *Rex* v. *Decan. et Capitul. Dublin. Per Eyre* Juſtice, " In the Caſe of Corporations, where the *Charter doth not impower* " any Body to give the Oath, they are forced to get a *Dedimus* out " of Chancery." *M.* 8 *G.* 2. *B. R. Rex* v. *Gibbon*, a Freeman of

New Romney; on a Motion for a new Trial; per Ld. *Hardwicke* " The Defendant, when He comes to make a Title againſt the " Crown, upon an Information in nature of a *Quo warranto*, muſt " make a *complete* Title to the Office; and muſt ſhew a RIGHT of " Swearing:" And his Lordſhip expreſly added, " Shewing that " he was ſworn in due Manner and Form, *alone* is *not* ſufficient." Now here, he has *not* ſhewn " That the *Bailiffs* had a *Right* to " adminiſter the Oath."

The Counſel for the DEFENDANT Firſt obſerved that a PLEA is to be taken to a *common* Intent: 'Tis *not* like a *Mandamus to reſtore*; which muſt be taken *more ſtrictly*. *Ex parte Def.*

It appears, they ſaid, upon this Plea, that there was *in Fact* a *Removal* of former Portmen; a *Vacancy* occaſioned thereby; and an *Election* of the Defendant into the Office, upon *that* Vacancy. The POWER *to remove*, is to be tried in *another* Method; at leaſt, more properly than by *this* Method: However, the Defendant is content to have the Merits determined in *this* or *any* Method.

Having premiſed thus much in general—

1ſt. They urged that this Power of Removal is *implied* and *inherent* and INCIDENTAL *to the Conſtitution* of a Corporation. Anſwer to 1ſt Objection to the Removal.

The *Law* gives *whatever is neceſſary* to the Enjoyment of a Grant. Upon this Principle, is founded the *Power of making By-Laws* by Corporations: Much more, muſt they have Power inherent in them to exerciſe *Acts* ESSENTIAL *to their Exiſtence and Preſervation.*

The Power of *Amotion* is One of theſe; and is NOT *limited* to Caſes where the Party has been *previouſly* CONVICTED. Their Power of Amotion is the *ſame*, *after* Conviction, as *before*; neither greater, nor leſs: The *Conviction working no* CHANGE, either upon the Charter or Preſcription.

Conviction is not a true Criterion of Guilt. For atrocious Crimes are not purged, with reſpect to the Corporation, by a *Pardon before Conviction*; (which the Crown may grant, if they pleaſe:) Or the Offender may run away; and *thereby avoid being convicted* at all.

Such Amotion can not be contrary to *Magna Charta*. For a Man *may* certainly be removed from his *Freehold*; *if* he can be ſo by the *Law of the Land*. So that there is no Argument to be drawn from *Magna Charta*, as to this Queſtion.

If a Corporation have no inherent Power to disfranchiſe, How can they do it even *upon Requeſt* of the Corporator himſelf? Yet that was *Tidderley*'s * Caſe. * *V.* 1 *Sider.*

But *this* is NOT *a Disfranchiſement* of a *Freeman*; but only a Diſplacing an *Officer* from an OFFICE, leaving him STILL *a Freeman*. And ſurely, *this mere* DISPLACING *from an Office* can *never demand a previous Conviction*.

Suppoſe an Officer becomes, by the Viſitation of Providence, *inſane*, *blind*, or otherwiſe *incapable to execute his Office*; may not He be removed from ſuch Office? Ours is not an arbitrary Removal *ad libitum*; but a Removal for *good Cauſe*.

The Caſe of the Corporation of *Doncaſter*, in 2 Ld. *Raym.* 1564. (on a *Mandamus* to reſtore *Scott* to be a Capital Burgeſs,) makes the *Diſtinction* between * turning out from an *Office*, and *disfranchiſing*.

* At pa. 1566. indeed the Court obſerve "that the "Charge did "not affect "him AS *a* "*Capital* "*Burgeſs*; but "*only as* "Chamber-"lain."

Lord *Bruce*'s Caſe in 2 *Strange* 819. is an Authority for us: For it ſays expreſsly, "that the *Modern Opinion* has been that a Power "of Amotion is incident to a Corporation; though *Bagg*'s Caſe "ſeems contrary." So in the Caſe of *Rex* v. *Plimpton temp.* Ld. *Hardwicke*.† And from the nature of the Thing, it *muſt be inherent* in the Corporation.

† *Qu.* What Caſe, or when: § *V. poſt* 533. or 534.

Beſides, here *is* an IMPLIED Power to remove, *by the Cuſtom*. For it is "to go to Election &c. whenever any Vacancy happens by "*Removal &c.* of any Portman or Portmen:" Which implies that the Corporation muſt have a *Power to amove*.

In the Caſe of Mr. *Fetherſton-haugh*, *Rex* v. *Mayor* of *Newcaſtle upon Tyne*, *Mich.* 1747. 21 *G.* 2. *B. R.* the Court would not grant a peremptory *Mandamus* to reſtore Him; though the *Common Council* who removed him, had no Power in *them* to remove, but that Power muſt have been in *the Body at large*, if it exiſted at all. However, here, the Removal is by the Body at large.

In the Caſe of *Rex* v. *Tidderley*, 1 *Sidorf.* 14. It appears that the Ld. Ch. Baron *Hale* thought that Corporations *had* this Power, "to "remove for good Cauſe;" AS Corporations, and *incidentally*.

It has been ſaid, "that, after Conviction, the Corporation may have a *Writ from the Crown* to remove the Offender." But this is a *dangerous Doctrine*, "that Corporators may be removed *by Writ from the Crown*."

As to the Caſes cited—Some of them relate to Coroners, Verderors &c. which are not applicable to Corporators.

Bagg's Caſe was upon a *Mandamus* to reſtore: And there was NO *ſufficient Cauſe* of Removing him from his *Franchiſe*. All the reſt

reſt of the Caſe is *extrajudicial:* And the latter Part of it does not appear in Ld. *Rolls*'s Report of it. So that, probably, it was *only* the *Reporter*'s own Opinion; and *not* ſaid by the *Court.*

And if a Corporation has inherent Power to remove, the Citation from *Magna Charta* does not oppugn it: Becauſe, in ſuch Caſe, it is "*per legem terræ.*"

Style 478. was the Caſe of a *Freeman disfranchiſed*; *not* an *Officer only removed* from his particular *Office.*

As to 1 *Ld. Raym.* 391. *Rex* v. *Mayor of Coventry*, It was a *Mandamus to reſtore:* And the *Cauſe* returned was holden * inſufficient. * Yet ſtill it ſeems to be an Authority:

For the Court held "that they ought to have *ſhewn* either *Cuſtom* or *Grant* to remove."

As to 2 *Ld. Raym.* 1564. the Diſtinction abovementioned is expreſly taken: And the Cauſe returned was holden † inſufficient. † Yet it is an Authority in Point, in expreſs Terms, "that a Freeman ſhall *not* be removed by a Corporation, *unleſs* by virtue of a Char-"ter or Preſcription."

As to the 2d Objection (under the firſt Point,) concerning the CAUSE of Amotion of the 9 Portmen— Anſwer to 2d Objection to the Removal.

It appears to be a Cauſe fully ſufficient: For they had *neglected the Duty* of their Office, even *after Notice.* 1 *Inſt.* 233. *a.* proves this to be a Forfeiture of Office: For Lord *Coke* there expreſly ſays "that *Non Uſer* of Public Offices is, of it ‖ ſelf a Cauſe of Forfei-"ture." And in the *Nature of the Thing*, it was ſo in the preſent Caſe. The Corporation have a RIGHT *to their Attendance:* And the *Right* and the *Obligation* ought to be *reciprocal.* ‖ *V. ante, pa.* 526. *in Margine.*

And how is it poſſible to aſſign a *ſpecial* Damage, where ſeveral Officers are *equally* obliged and *equally* negligent? However it *is* charged to be "*to the Damage and Prejudice* of the Corporation."

It is a tacit Condition, that *Neglect of Duty* is a *ſufficient Cauſe* of Disfranchiſement. *Bagg*'s Caſe 98. *a.* In 2 *Ld. Raym.* 1275. *Regina* v. *Truebody*, Who left the Burrough and lived out of it ſeveral Years, and *neglected Attendance* at the public Aſſemblies *&c.* This was holden a good Cauſe of Disfranchiſement. In 4 *Mod.* 33. *Glide*'s Caſe, The whole Court agreed in this Opinion, "that "an Alderman's deſerting his Office was a good Cauſe of Disfran-"chiſement." And *Holt* ſaid "So was abſenting himſelf from "the Council, in the very Nature of the Thing." In *Carthew* 227. *Vaughan* v. *Lewis* Ld. Ch. J. *Holt* was of Opinion, "That "the not inhabiting *infra* the Burrough *&c.* was a good Cauſe to "remove a Member.

In

In the Caſe of *Rex* v. *Ponſonby*, it did not appear "That there "*was* any *Non*-Attendance:" It only appeared "That they lived "out of the Burrough."

And this wilful Abſence and Neglect of the 9 removed Portmen could not but be contrary to their Oath of Office too; though their *Oath of Office* is only mentioned *conſequentially*, in ſetting forth their Offence in the Plea.

Anſwer to 3d Objection to the Removal.

As to the 3d Objection under the firſt Point—It is objected, "that this was *not a Corporate* Meeting." But it clearly was ſo: The Meeting conſiſted of *all the integral Parts* of the Corporation; And the Portmen muſt be Freemen. It was not neceſſary to *ſpecify the Names* of the Corporators who were preſent. Theſe Portmen were removed at a Corporate Aſſembly, met to do Corporate Acts; And upon a *Contumacious Refuſal to attend and ſhew Cauſe* why they ſhould not be amoved.

Anſwer to 4th Objection to the Removal.

4thly, It is Objected, "that it was *not under the Common Seal.*

As to which, 1ſt. That was *not neceſſary:* And 2dly, It is done *upon Record*; which is of *as high* a Nature.

And Members are, in every Day's Experience, amoved without any *Judgment.*

Anſwer to 5th Objection to the Removal.

As to the Want of *Perſonal* Notice, *viz.* "Whether the Abſence "of theſe Portmen, whoſe *Preſence was* NOT *particularly neceſſary*, "and who had *no particular* Notice of any *ſpecial* Buſineſs, or any "*Reaſon to ſuſpect* any particular and ſpecial Buſineſs to be done "at theſe Courts, made a Forfeiture, or was a ſufficient Ground of "Amotion."—

They cited 9 *Co.* 50. *a.* in the Earl of *Salop*'s Caſe. Non-Uſer or Non-Attendance is a Forfeiture of ſuch Offices as ought to be attended without Demand or Requeſt.

2 *Ld. Raym.* 1237. Serj. *Whitaker*'s Caſe. It was holden "that "Non-Attendance was a Cauſe of Forfeiture: And he was bound "to attend, *at his Peril*, being a *public* Office concerning the Ad-"miniſtration of Juſtice."

It is their Duty, as much as if they had actually covenanted to do it. And it appears by *Palmer* 332. *Biſhop of Rocheſter* v. *Young* "That a Covenantor ſhall *take* Notice; and there is *no Need of* "perſonal Notice." And this Notice is EQUIVALENT *to perſonal Notice.*

For

For it is reaſonable to *preſume* that they were *reſident* in the Corporation. *Carthew* 227, 229. *Vaughan* v. *Lewis*, (the laſt Point) Ld. Ch. J. *Holt* held "That the not inhabiting within the Bur- "rough, ought to have been returned as Special Matter." 5 *Mod.* 438, 442. *Vanacker*'s Caſe *—*Per Holt*, Ch. J. "Every Member "of a Corporation, though abſent, is *ſuppoſed* in Law to be there." "2 *Ro.* 136. Title *Notice*—Commoners are obliged to TAKE Notice of Ordinances made by the Homage under a Cuſtom. *Cro. Car.* 497. S. C. *James* v. *Tutney*. There, it was, by the Cuſtom, the Duty of all the Commoners, to appear at the Court. So here, it is ſtated to be the Duty of theſe Portmen, to be reſident. And *Non-Reſidence* ALONE is a Cauſe of Forfeiture. * 4th Objection.

And the Frequency of Corruption of the original Inſtitution is a good Reaſon for reforming.

Their contumacious Diſobedience to the Summons to ſhew Cauſe why they ſhould not be diſfranchiſed, ſhews their former Neglects to be wilful. They abſented themſelves 5 ſucceſſive Courts; though *only One other* Portman was left.

An Officer *refuſing to come when demanded*, forfeits his Office. *Bro. Forfeiture de terre, pl.* 61, 115.

And "*due Notice*" is alledged: Which is *confeſſed* by the Demurrer.

Second Point—The Defendant was *duly and legally* ELECTED, and ſworn.

Indeed, *if* he was not, the *Corporation is gone*: And therefore the Court will *endeavour to ſave it*, rather than let it be deſtroyed. And ſo they did, in the late Caſe of the Corporation of *Carmarthen*. *P.* 1755. 29 *G.* 2. *B. R.*

1ſt. The Word "*Reſidue*" only imports *what is left*; and does *not* neceſſarily imply Plurality. *Wilder was* "*the* RESIDUE." Conſequently, he could continue the Corporation. Anſwer to 1ſt Objection to Defendant's Election.

The Court will conſtrue theſe Words favourably, *Regina* v. *J. S. Burgeſs of the Deviſes*, 7 *Ann.* in *Hilary* Term, was ſuch a Conſtruction. And ſo here, Death or Amotion might reduce the Number to Two or even to One: In either of which Caſes, there might be a Want of Majority amongſt them. So that the Court will make ſuch a Conſtruction as to ſupport the Charter.

Anſwer to 2d Objection to Defendant's Election.

2dly. As to the *Time*.—The ſooner it was done, the better: And eſpecially as there was only One Portman left. If he had died, the Corporation had been diſſolved. They had a Right to fill up the Vacancy *immediately*.

Anſwer to 3d Objection to Defendant's Election.

3dly. The Election into *One* of the Vacancies is enough: It was not neceſſary to ſpecify *which*.

Anſwer to 4th Objection to Defendant's Election.

4thly. As to the *Swearing in* of *Richardſon*—It is alledged "that "he was ſworn in before *L. T.* and *T. B.* then Bailiffs of the Bur- "rough, *in* DUE *Manner*, and ACCORDING *to the Uſage and Cuſtom* "of the ſaid Burrough;" And "that he had taken All the requi- "ſite Oaths:" And they might have traverſed this, and taken Iſſue upon it. But they have demurred generally: And this is good on *General* Demurrer. However, theſe Slips may be amended, on Motion.

Reply.

1ſt Objection to Removal.

The Counſel for the Crown replied That Powers do *not always* ariſe to Corporations, upon *every* Caſe of Neceſſity.

A Pardon will have the ſame Effect in this Caſe, as in all Others.

Where the Corporation is *not* poſſeſſed of the Power, the Amotion is NOT *per legem terræ*.

An ACCEPTANCE *of a Corporator's Surrender* does *not operate* AS *a Diſfranchizement*.

As to the IMPLIED *Power* given by the Charter—Such a Power is NOT ALLEDGED: And the Court will *not preſume* ſuch a Power againſt the Crown.

As to the Caſe of the Corporation of *Newcaſtle*—Nothing was done in it: Mr. *Fetherſton* had for very many Years *deſerted* the Corporation; and *therefore* the Court ſuſpended granting the peremptory *Mandamus*.

As to Lord *Bruce*'s Caſe in 2 *Strange* 819. It is only a looſe and miſtaken Report of it.

As to the Caſe of *Rex* v. *Plimpton*—It is not ſtated, nor can the Counſel on the other Side give any Account of it.

We do not contend "That *the Crown* can diſfranchiſe a Cor- "porator by Writ:" But We ſay that the Crown may give Notice of the Determinations of the Law; which it's Miniſters are to execute.

Lord

Lord *Coke* reports what We have cited out of *Bagg*'s Caſe, As *the Determination of the Court*; not as his own extrajudicial Opinion.

As to the *Doncaſter* Caſe—We have cited it from Lord *Raymond:* We do not know what the Man was. [*v.* 2. Ld. *Raym.* 1564.]

As to the *Cauſe* of Removal, We do not ſay "That a Portman "was *not obliged* to attend the great Court;" But "That it was "not neceſſary to the *Exiſtence* of that Court;" Nor is it *ſhewn* to be contrary to the Obligation of their Oath of Office. *Non-Attendance* might indeed be a *Miſdemeanour*, but is NOT *a Cauſe of* FORFEITURE; eſpecially, without SPECIAL *Damage* ſhewn. And it is *ſuch* a Miſdemeanour, that an Indictment or Information will lie againſt a Corporator for it: So that there MIGHT *have been* a *previous Conviction*, in the preſent Caſe. 2d Objection to the Removal.

And though this is an *Information*, not a Mandamus; yet this Man has here ſet out his own *Title*; which appears upon his own Plea to be a *bad* One: And therefore the *Court muſt give Judgment* AGAINST *him.* And this ſeems a very *adequate* Remedy. If a perſon be improperly elected, He is to be *removed* by a Judgment of *Ouſter*. *Afterwards*, indeed, Thoſe who have Right may be *admitted*, upon a Mandamus.

It does not appear that this Court was a CORPORATE *Aſſembly* of the *Mayor Bailiffs and Burgeſſes*. And, as to a CONTUMACIOUS *Refuſal* to attend—There is no Pretence to ſuppoſe it: They are only ſaid "Not to have attended upon *due Notice* given of the "Great Courts." There was *no* PARTICULAR *Summons* to attend them; *nor any* PARTICULAR *Call*, for their Advice and Aſſiſtance. 3d Objection to the Removal.

A Corporation can do no *important* Act without their *Seal*. And this Great Court was NO *Court of Record*. 4th Objection to the Removal

As to the want of *Perſonal* Notice—This is not like the Caſe of a Bond: which obliges the Obligor to *take* Notice. *Palm.* 532. is ſimilar to the Caſe of a Bond: There, *Young* covenanted to find Proviſions for the Steward *&c.* 5th Objection to the Removal.

Vanacker's Caſe too is quite of another Tendency and Conſideration: There, the Notice was proper Notice to the whole Body; and was taken to include every Member.

The "DUE *Notice* given" is * *not alledged* to be given *Perſonally* TO *them:* And therefore is not confeſſed by the Demurrer.

* *V. ante pa.* 519. "Due "Notice had "been *given*, As "of the hol'd- "ing, *&c.*"

As to Lord *Shrewſbury*'s Caſe—The Clerk of the Market is certainly an Office that muſt of neceſſity be conſtantly attended: And the other Offices there ſpecified and hinted at, are ſuch as are of Neceſſity, for the Adminiſtration of Juſtice; and where the Public muſt ſuffer by the Officers not attending.

Non-Inhabitancy is NO *part of the Charge* againſt theſe Port-men: 'Tis *Non-Attendance* at 5 ſucceſſive Courts. But there was NO *Reaſon* for them to think of any SPECIAL *Occaſion* for their Attendance; *nor* any *particular Notice* to any ſuch Purport.

2d *Point*—The Court will not ſupport an Uſurpation againſt Law.

1ſt Objection to Defendant's Election. The Words are "Reſidue *of* THEM;" "Major part *of* THEM:" And they are *to* "ASSEMBLE, *&c.*" All which Expreſſions import a *Number* of perſons; at leaſt, more than One Individual.

The Caſe of the Burgeſs of the *Devizes* was conſidered as the Act of the *nineteen:* And that Corporation was a fluctuating Body; and any Majority of their Number *for the time being*, might do the corporate Acts.

Two may elect, in the preſent Caſe; provided they agree: And Two are certainly the Major part of two. And theſe Words are *not* merely *directory*. No *Power* of Election is given to ONE only.

And this can't be *preſumed*. They ought to have *alledged* and *ſhewn* ſuch a Power.

4th Objection to Defendant's Election. The *Bailiffs* had no Power *to adminiſter* the Oaths. So that the Defendant did NOT take them duly and effectually.

It was impoſſible for us to *traverſe* what they never alledged.

Reſolution of the *Court*. LORD MANSFIELD now delivered the Reſolution of the Court.

The *General* Queſtion upon the Plea is, "Whether the Defen- "dant has ſet out a *good Title* to the Office of a Portman of the "Town or Burrough of *Ipſwich*.

The Title he ſets out is, That upon a Vacancy made by Removal, He was duly elected, ſworn, and admitted into the ſaid Office, to fill up ſuch Vacancy.

His Right therefore muſt depend upon two general Points;

1ſt. Whether the *Vacancy* was *duly made*;

2dly. If

2dly. If it was, Whether the Defendant was *duly elected admitted* and *ſworn*.

Upon the firſt Point, the principal and material Objections are Two;

1ſt. That the Corporation of *Ipſwich* has *no Power to amove:*

2dly. Suppoſe they have Power, the *Cauſe* of Amotion is not ſufficient.

Upon the ſecond Point; one Objection is chiefly relied upon; *viz.* That, after the Amotion, *James Wilder* being the ONLY *remaining Portman*, the Election under which the Defendant claims, was SINGLY *by him:* But *One* can not elect.

Then his Lordſhip ſtated the Record; which ſee before *pa. &c.*

Upon the firſt Point,

1ſt Objection—That they had *no Power* to amove.

1ſt Objection As to the *Power* of Removal.

This Objection depends upon the Authority of the ſecond Reſolution in *Bagg*'s Caſe, 11 *Co.* 99: Where it was reſolved, " That " no Freeman of any Corporation can be diſfranchiſed by the Corporation; *Unleſs* they have Authority to do it either by the *expreſs Words of the Charter*, or by *Preſcription:* But if they have " *not* Authority either by *Charter* or *Preſcription*, then he ought " to be *convicted* by Courſe of Law, before he can be removed. " And this appears by *Magna Charta, c.* 29: Nullus liber homo " capiatur, vel impriſonetur, aut *diſſeiſietur de libero tenemento ſuo*, " vel libertatibus, vel liberis conſuetudinibus ſuis *&c*; *niſi* per *legale* " *judicium parium ſuorum*, vel per *legem terræ*. And if the Corporation *have* Power by *Charter* or *Preſcription* to remove him for a " reaſonable Cauſe, that *will* be *per legem terræ:* but if they have *no* " ſuch Power, he ought to be *convicted per judicium parium ſuorum* " &c. As if a Citizen or Freeman, be *attainted* of Forgery, or " Perjury, or Conſpiracy, at the King's Suit *&c*; or of any other " Crime whereby he is become infamous; *upon ſuch Attainder*, " they may remove him: So if he be *convicted* of any ſuch Of- " fence which is againſt the *Duty* and *Truſt* of his Freedom, and to " the *public Prejudice* of the City or Burrough whereof he is free, " and againſt his *Oath*; (as if he burnt or defaced the Charters or " Evidences of the City or Burrough, or eraſed or corrupted them, " and is thereof *convicted and attainted*;) Theſe and the like are

" good Cauſes to remove him. And *although they have* lawful Au-
" thority either by *Charter* or *Preſcription*, to remove any one from
" the Freedom, and that they *have juſt Cauſe* to remove him; yet
" if it appears by the Return, that they have proceeded againſt him,
" *without hearing* him anſwer to what was objected, or that he was
" not *reaſonably warned*, ſuch Removal is void and ſhall not bind
" the Party; *quia quicunque aliquid ſtatuerit parte inaudita alterâ*
" *æquum licèt ſtatuerit, haud æquus fuerit*; and ſuch Removal is
" againſt Juſtice and Right."

Previous Conviction was not a Circumſtance at all neceſſary to the Judgment in that Cauſe: For there was *no ſufficient Cauſe* of Amoval at all. There too, the actual Removal was by the *ſelect Body*, (the Mayor and 9 of the Maſters;) which can not be, except by Charter, By-Law, or Preſcription.

There are three Sorts of Offences for which an Officer or Corporator may be diſcharged:

1ſt. Such as have *no immediate Relation to his Office*; but are in themſelves of ſo *infamous* a Nature, as to render the Offender unfit to execute any public Franchiſe.

2d. Such as are *only* againſt his *Oath*, and the *Duty of his Office* as a Corporator; and amount to Breaches of the tacit Condition annexed to his Franchiſe or Office.

3d. The third Sort of Offence for which an Officer or Corporator may be diſplaced, is of a *mixed Nature*; as being an Offence *not only againſt the Duty* of his Office, but *alſo* a Matter *indictable at Common Law*.

The Diſtinction here taken, by my Lord *Coke*'s Report of this ſecond Reſolution, ſeems to go to the Power of Trial, and *not* the Power of *Amotion*: And he ſeems to lay down, " that where the
" Corporation *has* Power by Charter or Preſcription, they may *try*,
" as well as remove; But where they have *no* ſuch Power, there
" muſt be a *previous Conviction* upon an *Indictment*." So that *after* an Indictment and Conviction at Common Law, *this* Authority admits, " That the Power of Amotion *is incident to* every
" Corporation."

But it is now eſtabliſhed, " that *though* a Corporation *has expreſs*
" *Power* of Amotion, Yet, for the *firſt* Sort of Offences, there *muſt*
" be a *previous Indictment and Conviction*." And there is no Authority ſince *Bagg*'s Caſe, which ſays that the Power of Trial as well as Amotion, for the *ſecond* Sort of Offences, is not incident to *every* Corporation.

In

In Lord *Bruce*'s Caſe—2 *Strange* 819, The Court ſays, " The " Modern Opinion has been, that a Power of Amotion *is incident* " to the Corporation."

We All think this Modern Opinion is *right*. It is *neceſſary* to the good Order and Government of Corporate Bodies, that there ſhould be *ſuch a Power*, as much as the Power to make *By-Laws*. Lord *Coke* ſays, * " There is a tacit Condition annexed to the " Franchiſe, which if he breaks, he may be disfranchiſed." * 11 *Co.* 98. *a.*

But where the Offence is *merely againſt his Duty as a Corporator*, He can only be *tried* for it *by the Corporation*. Unleſs the Power is *incident*, Franchiſes or Offices might be forfeited for Offences; and yet there would be *no Means* to carry the Law into Execution.

Suppoſe a *By-Law* made " to *give Power of Amotion for juſt* " *Cauſe*," ſuch *By-Law* would be *good*. If ſo, a Corporation, by *Virtue of an incident Power*, may *raiſe* to themſelves Authority to remove for juſt Cauſe, *though not expreſly given* by Charter or Preſcription.

The Law of Corporations was not ſo well underſtood, and ſettled, at the time of *Bagg*'s Caſe, as it has been *ſince*. And " Whether a Power of Amotion was incident to the Corporation," could be *no part* of the Queſtion in Judgment in that Caſe, or neceſſary to the Determination of it. The Power of Amotion was there exerciſed by the *ſelect Body*; and the *Cauſe was inſufficient*; the Offence not being any of the three Kinds for which a Corporator could be disfranchiſed. And the *Diſtinction* * there taken, as to the *Mode of Trial*, is certainly *not Law*. For *though* the Corporation *has* a Power of Amotion by *Charter* or *Preſcription*, Yet, as to the *firſt* Kind of Miſbehaviours, which have *no* immediate Relation to the Duty of an Office, but *only* make the Party infamous and unfit to execute *any* public Franchiſe; THESE ought to be eſtabliſhed by a *previous Conviction* by a Jury, according to the Law of the Land; (as in Caſes of general Perjury, Forgery, or Libelling, *&c.*) * 11 *Co.* 99. *a.*

We therefore think the Court was well warranted in Lord *Bruce*'s Caſe, to *controvert* the Authority of the Propoſition, *collected* from what is ſaid in *Bagg*'s Caſe, " That there can be *no* Power of " Amotion, *unleſs* given by Charter or Preſcription:" And We think that from the Reaſon of the Thing, from the Nature of Corporations, and for the Sake of Order and Government, This Power IS INCIDENT, as much as the Power of making By-Laws.

The ſecond Objection upon this Point was, That the CAUSE is not ſufficient. 2d Objection as to the *Cauſe* of Removal.

The

The Plea ſets forth two *ſtated* Days in the Year, *viz.* the 8th Day of *September* and *Michaelmas* Day for holding Great Courts at the *Moot-Hall*; and " that the Bailiffs may call a Great Court at " any " *other* Time." Great Courts were called on the 13th of *January*, the 15th of *April*, the 9th of *June*, and the 19th of *June* 1755. *Before the Holding of the ſaid ſeveral Courts reſpectively*, DUE *Notice had been given of the Holding thereof reſpectively.* The Plea ſtates likewiſe another Great Court on the 8th of *September* 1755; *due Notice* of the Holding thereof having there been previouſly given. And the Portmen removed did not attend theſe Courts; but *wilfully abſented* themſelves.

It is *not* ſtated " that the removed Portmen had PERSONAL " Notice;" And the Fact certainly is " that they had *not*:" For, where perſonal Notice *was* given to anſwer the Charge, the Plea alledges it preciſely, and in a different Manner; Beſides, if Truth would have warranted them, they might have * amended.

* The Defendant's Counſel had once propoſed to move to amend; but gave it up, on finding their Facts inſufficient to ſupport it.

The Notice then of Holding theſe Great Courts muſt have been by ſome cuſtomary Signal, (as Sounding a Horn, or Tolling a Bell;) which the removed Portmen, in Fact, might know nothing of.

It is *not* alledged that the Portmen's Preſence was *neceſſary* to the Holding the Great Court: On the contrary, the Preſcription is alledged to be, " that the Bailiffs, Burgeſſes and Commonalty, or *ſo many* of " them as WOULD *be preſent*, have met, or aſſembled in " the *Moot-Hall*."

It is *not* alledged particularly, that any *particular* Buſineſs was obſtructed or defeated by the Portmen's Abſence. The Plea alledges, " that they *wilfully* abſented:" But that is a *Conſequence of Law*. In pleading, they muſt alledge *Facts*, from which the *Court* may judge " Whether the Abſence was wilful:" Upon which Facts, *Iſſues* may be taken, and tried by a Jury.

It is clear from the Plea, that the Portmen had *full Notice* of the CHARGE againſt them, and full Opportunity to have been heard: And therefore I lay all the Objections upon *that* Head, out of the Caſe. But, if the CHARGE was *inſufficient*, they had no Occaſion to defend themſelves.

This brings the whole to the Queſtion, " Whether an Abſence " from *four occaſional* Great Courts, and *One upon a ſtated Day*, ſo " circumſtanced, is a *ſufficient* CAUSE of *Amotion*."

There is *no Authority* which ſays it is. Though the *Uſual Signal* is given for holding a Great Court, a Member may *not know* of it: Though he ſhould know of it, he may be innocently abſent, where he *thinks* his Preſence not at all neceſſary, and where he does *not imagine* that any Buſineſs of Conſequence is to be propoſed.

In the Caſe of *Rex* v. *Mayor and Aldermen of Carliſle*, * The Court argued in this Manner, That where an Alderman receives a Summons to appear at the *Common Council*, he might conſider that his Preſence was of no Conſequence, and ſo ſtay away; And becauſe He might innocently ſtay away from the Common Council, It was holden, that he ſhould have had a *particular* Summons to meet the *Mayor and Aldermen:* And for want of *ſuch* Summons, an Amotion by the Mayor and Aldermen, *at that Common Council*, was holden to be void.

* *Trin.* 1720. 6 G. 1. *B. R.* [*V.* 1 *Strange* 385, 386.]

There is not an Officer or Freeman in the Kingdom, (who is a Member of an Aſſembly,) that might not be removed or diſfranchiſed, if this Doctrine was given Way to. At Times, *Every* Alderman, *Every* Common Council Man, not neceſſary to the Conſtitution of the Aſſembly, *knowingly omits attending*.

It is not neceſſary, and would be highly improper at preſent, to ſay *what kind* of Abſence, or under *what Circumſtances*, Non-Attendance may be a Cauſe of Forfeiture. It is ſufficient that the Abſence, with all the Circumſtances alledged by *this* Plea, is *not* a Cauſe.

And We are All of Opinion that it is *not*.

The ſecond General Point is, "Whether the Defendant was "*duly elected*, by the *One* remaining Portman." But that is now become unneceſſary. If it had been material, We are inclined to *ſupport* the Election.

2d. Point; (*viz.* The Validity of the Defendant's Election.)

However, It is not *now* neceſſary to enter into *that* Point; becauſe We are, upon the *former* Point very clear "that the Cauſe of Amotion alledged and relied upon in the Plea, is NOT *a ſufficient Cauſe* of Amotion.

JUDGMENT for the KING.

Rex *verſ.* Mary Mead.

A *Habeas Corpus* having iſſued in the laſt Vacation, at the Inſtance of *John Wilkes*, Eſq; to bring up the Body of *Mary Wilkes*, Wife of the ſaid *John Wilkes*, and Daughter of the ſaid *Mary Mead*, before Mr. Juſt. *Deniſon*; Mrs. *Mead* now brought Her *into Court*.

The Subſtance of the Return was, That her Huſband, (having uſed her very ill,) *in Conſideration* of a great Sum which She gave him out of her ſeparate Eſtate, *conſented* to her living alone, executed *Articles of Separation*, and *covenanted* (under a large Penalty) never to diſturb Her or any Perſon with whom She ſhould live. That ſhe lived with Her Mother, at her *own* earneſt Deſire; and that this Writ of *Habeas Corpus* was taken out with a View of ſeiſing Her by Force, or ſome other *bad Purpoſe*.

The Court held this to be a formal *Renunciation* by the Huſband, of his Marital Right to ſeize Her or force Her back to live with Him.

And they ſaid that *any Attempt* of the Huſband to ſeize Her by Force and Violence, would be a *Breach of the Peace*. They alſo declared that any Attempt made by the Huſband, to moleſt Her *in her preſent Return from Weſtminſter-Hall*, would be a *Contempt* of the Court. And they told the Lady, She was at full Liberty to go where, and to Whom, She pleaſed.

V. Rex v. *Clarkſon et al.* 2 *Strange* 444, 445: Where the Court only took Care that the young Lady ſhould be under no illegal Reſtraint; and ordered a Tip-Staff to ſee Her ſafe Home, to her Guardian's, as had been formerly done in Lady *Harriot Berkley*'s Caſe.

Rex v. *Captain Liſter, Huſband of Lady Rawlinſon.* 1 *Strange* 478.

Lady *Vane*'s Caſe *M. & H.* 17 *G.* 2. *B. R.*

Rex v. *Johnſon*, 1 *Strange* 579. *H.* 19 *G.* 1. 2 Ld. *Raym.* 1334. S. C. A Child was *delivered* to it's proper *Guardian*, by the Court.

Rex v. *Smith*, 2 *Strange* 982: Where indeed the Boy was *only ſet at Liberty*; And *Johnſon*'s Caſe was ſaid to be carried *too far*.

Rex v. *Griffith. H.* 8 *W.* 3. *B. R.* And

Lady *Catherine Anneſley*'s Caſe.

Rex *verſ.* Wright, Clerk.

MR. *De Grey* ſhewed Cauſe againſt quaſhing the Indictment.

Mr. Serjeant *Hewitt* had moved to quaſh this Indictment charging the Defendant, That He, being a *Spiritual* Perſon, did TAKE *to Farm* ſeveral Lands *&c*; againſt the Statute of the 21 *H.* 8. *c.* 13. §. 1. For that *no Indictment* will lie, where a Statute *creates a new* Offence, and gives a *particular* Remedy. On *Monday* 13th *February* 1758 (upon Mr. *De Grey*'s then coming to ſhew Cauſe) the Serjeant propoſed *Three* Objections: *viz.*

1ſt. An *Indictment* will *not lie:* It ought to be a proceeding *by Action*, or by *Information*; (which are the two particular Methods of proceeding, ſpecified and preſcribed by this Statute.)

2d. *No Offence* is here charged. For OCCUPATION is the Offence for which the Act gives the Forfeiture: And here, *no Occupation* is *charged*; 'Tis only "That He did TAKE *to Farm.*"

3d. It can *not* be proſecuted at the SESSIONS: For the Words of the Act are "in any of the KING's *Courts.*"

Firſt—An *Indictment* will *not* lie: Becauſe the Statute *creates* the Offence, and has preſcribed a *particular Method* of proceeding; and has *no* General Words. It enacts "that no Spiritual Perſon ſhall "take to Ferm *&c*; *Upon Pain* to forfeit 10*l.* for every Month "that He *&c:* The One Half of which Forfeiture to be to the "King; the other Half, to every ſuch Perſon that will ſue for the "ſame *by* Original Writ, Bill, or Plaint of Debt, or by any Infor-"mation in any of the KING's *Courts.*" 2 *Hawkins, P. C. c.* 25. §. 4. *p.* 211. is in Point "That where a Statute makes a *new* Of-"fence, and appoints a *particular* Manner of proceeding, an In-"dictment will *not* lie." *Cro. Jac.* 643, 644. *Caſtle*'s Caſe (1ſt Exception) is alſo moſt expreſs in Point. 4 *Mod.* 144. *Rex & Regina* v. *Marriott.* S.P. *Rex* v. *Gluff*, *Caſes temp. Will. 3tij. B. R.* 104. S.P. *

* But this was only quaſhed *Niſi*, (or a Rule to ſhew Cauſe,) on a Motion heard *ex parte*, only.

LORD MANSFIELD—Let us hear an Anſwer to this Objection firſt: For it ſeems a ſtrong One; this being NO OFFENCE *at* COMMON-*Law.*

Mr. *De Grey*, *contra*, proceeded to ſhew Cauſe on Behalf of the Proſecutor.

As

1st. As to the 1st Objection—

2 *Hale's Hist. P. C. fo.* 171. is expres, that if the Act does also contain a *prohibitory* Clause, the Offender may be indicted upon the prohibitory Clause, notwithstanding the Penalty.

Castle's Case *Cro. Jac.* 643. *M.* 20 *J.* 1. is incorrectly reported: as appears by 2 *Ro. Rep.* 247. S. C. Which says "That the Indict-"ment was quashed for *some* of the Exceptions." Therefore *Castle*'s Case is not an Authority in the present One: As it is only a partial Report, upon Memory; and has Mistakes in it, (as 40*l.* instead of 20*l.* for one Instance.) 1 *Mod.* 34. *Crofton*'s Case on 17 *C.* 2. *c.* 2. "To restrain Non-Conformist Ministers from inhabiting in Corpo-"rations," is most full and clear in Point to the contrary. 1 *Ventr.* 63. S. C. this very Objection was disallowed. 3 *Keb.* 75. *Rex* v. *Baker*. *Raym.* 219. S. C.*

* The two last are loose Notes; and adjourned.

2d. As to the 2d Objection. The *Occupation* is only to ascertain the Quantum of the Penalty; *viz.* 10*l.* for every Month that he shall occupy: But the TAKING *to Farm*, is the Offence prohibited.

3d. As to the 3d Objection. The Indictment may be brought at the Sessions, and prosecuted there.

In answer to the Case cited in Support of the 1st Objection, of *Rex et Regina* v. *Marriott* according to 4 *Mod.* 144. Ld. Ch. J. *Holt* held *against* the other two Judges, *Dolben & Eyre*; and thought an Indictment the proper and reasonable Method. *Carthew* 263. S. C. *Rex* v. *Marriott*, refers to 4 *Mod.* 144. and observes that it was *against the Opinion* of Ld. Ch. J. *Holt*. 1 *Shower* 398 is S. C. *Dominus Rex* v. *Marriott*; And the Reporter, (who Himself took the Objection,) says "That the Rule was pronounced by Ld. Ch. J. *Holt*, *consentientibus aliis*, thus—"*Let it stay.*"+

+ But *Eyre* added "It "cannot be maintained, I doubt." Note also, that *Shower*'s Report of what passed in this Case, is of *Tr.* 4 *W. & M.* (as likewise indeed is 4 *Mod.* 144:) But *Carthew*'s is of *Hil.* 4 *W. & M.* which is two Terms *later*.

LORD MANSFIELD—I always took it that where *new-created* Offences are only prohibited by the *general prohibitory* Clause of an Act of Parliament, an Indictment will lie: But where there is a prohibitory *particular Clause* specifying only *particular Remedies*, there *such particular Remedy* must be *pursued*. For otherwise the Defendant would be liable to a double Prosecution; One upon the general Prohibition, and the other upon the particular specific Remedy.

Therefore,

Therefore, if there be any Doubt or Difficulty about this Matter, it will be better to enlarge the Rule, till next Term.

Mr. Juſt. DENISON laid down the Diſtinction thus; *viz.* That where an Offence is *not ſo at Common Law*, but *made an Offence* by Act of Parliament; yet an Indictment *will* lie, where there is a *ſubſtantive* prohibitory Clauſe in ſuch Act of Parliament; (though there be afterwards a particular Proviſion, and a particular Remedy given:) But it is * otherwiſe, where the Act is *not Prohibitory*; but *only* inflicts the Forfeiture, and ſpecifies the Remedy. * *V.* 2 *H. H. P. C.* 171.

Mr. Juſt. WILMOT alſo took it ſo; and that this Point had been ſettled, later than any of the Caſes cited. [In *Hil.* 2 *G.* 2. *B. R. Rex* v. *Penſacks*, and alſo in *Rex* v. *Malard*, the ſame Term, It was ſettled "that an Indictment will *not* lie, where an Act of Parliament "*makes a new* Offence, and *preſcribes a particular Method* of Proceeding."]

He ſaid He had always underſtood it to be a ſettled Diſtinction, between a ſubſtantive independent Clauſe, and a Prohibition *ſub modo*.

And, it would be hard to puniſh a Man *twice* for the ſame *new* Offence.

Mr. Juſt. DENISON—*This Act* does not ſeem to me, to give *the King* ALONE, a Power to proſecute *at all*, for this new Offence. However I ſhall give no Opinion now, as the Rule is enlarged.

On this Day, Serjeant *Hewitt* informed the Court that Mr. *De Grey gave up* this Matter.

LORD MANSFIELD—I do not at all wonder at it: I thought he would do ſo. I have looked into it: And there is Nothing in it. That Caſe of *Croſton* has been *denied* many Times. Beſides, Mr. *Clayton* has informed me of a Caſe that was determined upon the 3d Objection, "of it's being *at Seſſions*."

RULE "To quaſh the Indictment," MADE ABSOLUTE.

Rex *verſ.* Inhabitants of Bank-Newton.

Thurſday 13th *April* 1758.

MR. *Aſton* ſhewed Cauſe againſt quaſhing the two following Orders.

Two Juſtices removed *George Ayrton*, *Ellen* his Wife, *Anne*, *Elizabeth*, *Iſabel*, *Jane*, and *George* their Children from the Pariſh of *Marton* in the Weſt-Riding of *Yorkſhire*, to *Bank-Newton:* And the Seſſions, upon an Appeal, confirm their Order.

The State of the Caſe was this—*George Ayrton*, the Pauper, *and* HIS WIFE, being legally at *Bank-Newton*, on the 16th of *February* 1738, *John Wilcock*, a Son of *Henry Wilcock* of *Marton*, by Order of his Father, on the *ſaid 16th of February* 1738, *agreed*, on the Behalf of his ſaid Father, with the ſaid *George Ayrton* the Pauper, *who was* THEN *a* MARRIED *Man*, to ſerve the ſaid *Henry Wilcock* his Father, for a Year, from the 24th of the ſame Month of *February* (when his Father's then Servant was to go away,) at 5 Guineas Wages; *in caſe* the ſaid *Henry Wilcock* ſhould approve the ſaid Terms.

That *afterwards*, the WIFE of the ſaid *George Ayrton* DIED, on the 18th of the ſame Month of *February* WITHOUT *Iſſue*. And *on the* 24th of the ſame Month of *February*, the ſaid *George Ayrton*, THEN *having* NEITHER WIFE *nor Child*, went to the ſaid *Henry Wilcock* the Father, who then lived in *Marton* aforeſaid. And the ſaid *H. W.* then aſked him the ſaid *G. A.* " *Upon* WHAT *Terms and* " *Conditions*, he the ſaid *G. A.* and his Son *John Wilcock* had agreed:" And the ſaid *G. A.* then told the ſaid *H. W.* " That the Terms " agreed upon between him the ſaid *G. A.* and the ſaid *J. W.* were, " that He the ſaid *G. A.* ſhould ſerve the ſaid *H. W.* for a Year, " from the 24th Day of the ſame Month of *February*, for 5*l.* 5*s.* 0*d.* " Wages, *in caſe* He the ſaid *H. W.* ſhould *approve* the ſaid Terms." And thereupon the ſaid *H. W.* ſaid " That *de* DID *agree* to the ſame " Terms." And accordingly, the Pauper *G. A.* did, on the ſaid 24th of *February* 1738. THEN *having neither* WIFE *nor* CHILD, enter into the Service of the ſaid *H. W.* and *did ſerve* the ſaid *H. W.* in *Marton* aforeſaid *for One whole Year* from the ſaid 24th Day of *February* 1738; and received 5*l.* 5*s.* 0*d.* of the ſaid *H. W.* for a Year's Wages.

The Seſſions were of Opinion " The Pauper ſerved the ſaid " Year, *under* the ſaid CONTRACT *made with* the ſaid JOHN *Wil-* " *cock*, as aforeſaid; And that at the *Time* of the SAID *Contract* " *and Hiring*, He was NOT *an* UNMARRIED *Perſon* WITHOUT *a* " *Wife*; and that *therefore* He *did* NOT, by *ſuch* Hiring and Ser- " vice, gain a Settlement in *Marton:*" And therefore they confirm the ſaid Order of Removal.

Mr. *Norton* having moved to quaſh both the original Order and the Order of Seſſions—

Mr.

Mr. *Aſton* now ſhewed cauſe why theſe Orders ſhould not be quaſhed.

By 3, 4 *W. & M. c.* 11. §. 7. He muſt be *unmarried* at *the Time* of the *Hiring*. The Words are, " That if any *unmarried* Perſon, " not having Child or Children, ſhall be *lawfully hired* into any " Pariſh or Town for 1 Year, ſuch Service ſhall be adjudged " and deemed a good Settlement therein; though no ſuch Notice " in Writing be delivered and publiſhed, as is therein before re- " quired." Here, the Hiring, He ſaid, was on the 16th and the Wife did not die till the 18th. So that he was NOT *an unmarried Perſon, when* he was hired.

The Agreement might perhaps be made with a married Perſon on purpoſe, *by way of Caution*, to prevent a Charge upon the Pariſh. And in 10 *Mod.* 393. *Ranton* v. *Horton* Pariſh—*per Pratt* Ch. J. The Intent of ſuch a Caution is lawful. [See *Lucas* 393.]

To prove that the *Time of the Contract*, muſt be referred to the *Inception* of it—He cited *Bro.* Contract, *pl.* 15. The *Retainer* is the *proper Inchoation* of the Service. So is *Bro. Labourers, pl.* 9 & 11.

Mr. *Norton*, *contra*—for quaſhing the Orders—

The Intent of the Reſtriction of this Law to unmarried Perſons without Children, was to prevent the conſequential Damage that might accrue to Pariſhes from hiring Servants incumbered with Wives or with unſettled Children. But this Man is within both the *Words* and *Meaning* of the Qualifications admitted by the Act. He could bring no conſequential Charge upon the Pariſh.

If a Perſon hired unmarried, ſhall marry * during the Service, Yet He ſhall gain a Settlement, both to himſelf and his Wife. So if a Female Servant happening to be then with Child, be hired; She and her Child ſhall both gain a Settlement, if She ſerves out her Year.

* *V.* 2 *Salk.* 529. and Seſſions Caſes, Edition 1750. Vol. 1 *Elſley Lovat* v. *Clent.*

It is enough, that *when he begun* his Service, there was no danger of a conſequential Charge to the Pariſh. And this is all that the Court have their Eye upon.

And *though* this ſhould, *as between the Parties*, be a Contract between *them*, from the 16th, Yet that will not affect the *Pariſh*. But, however, the Contract was *not complete*, but a meer Nullity, TILL *the Aſſent* of the Principal, (the Father:) For he had it in

his Power to *diſapprove*. It was *not binding*, till his Aſſent was given: For the Agent only acted under a limited Authority. And *when* the Principal did aſſent, the Servant was *unmarried*.

As to *Bro. Contract*, 15. It certainly was binding upon both the Parties, *when J. N.* ſet the Price: But had not been ſo, *if J. N.* had *refuſed* to ſet a Price. So *Bro. Labourers*, *pl.* 9 *& pl.* 11. But ſtill this affects only the contracting Parties; and *not the Pariſh*.

LORD MANSFIELD ſtopt Mr. *Norton* from proceeding; It being clear that the HIRING *was on the 24th*. For the Father *might have diſſented* from the conditional Agreement made by his Son on the 16th. But the Man was *unmarried* on the 24th when the Father made the COMPLETE *Agreement* with him.

And the Three other JUDGES declaring themſelves moſt clearly to be of the ſame Opinion—

BOTH ORDERS were QUASHED.

Saturday 15th *April* 1758.

Rex *verſ.* Peach et al'.

CAUSE was now ſhewn againſt an Information which had been moved for, at the *Application* of ſome Perſons who now appeared to be a Parcel of infamous Cheats and Gamblers, againſt ſeveral others of the SAME *Profeſſion and Character*; for a *Conſpiracy to cheat* them out of about 900*l.* at a Foot Race, by a moſt ſhameful Tranſaction of Fraud, Colluſion, and Bribery, to induce the Racers to run Booty.

But it appearing moſt clearly to the Court, and it being too plain to be diſputed by the Counſel for the Proſecutors themſelves, That the Parties *complaining* and thoſe *complained* of, were (*all of them* alike) a Parcel of infamous Cheats;—

The COURT unanimouſly refuſed to give the Complainants the EXTRAORDINARY *Aſſiſtance* of this Court, to enable them to attack their Bretheren in Iniquity, (who had probably, as the Court not without Reaſon ſuſpected, quarrelled with them about the Diviſion of their ill-gotten Spoils:) But they referred the Complainants to the *ordinary Remedy* of Action or Indictment; eſpecially as the Facts alledged ſeemed to be within the Acts of Parliament made to prevent exceſſive Gaming. And, accordingly,

The RULE to ſhew Cauſe "Why there ſhould not be an In-"formation againſt them," was DISCHARGED.

Carleton ex dimiſſ. Griffin *verſ.* Griffin.

Tueſday 18th *April* 1758.

THIS was a Special Caſe in Ejectment, brought upon the Demiſe of *John Griffin*, the Teſtator's Heir at Law. A Verdict had been given for the Plaintiff, ſubject to the Opinion of this Court, on the following Caſe. *John Griffin* (the Teſtator) being ſeiſed *&c*, and being *&c*, on the 2d of *May* 1752. wrote upon a *Sheet of Paper* with his own Hand as follows; *viz.* "Know all "Men, by theſe Preſents, that I *John Griffin &c* make the after-"mentioned, my laſt Will and Teſtament: And when it pleaſe "God to call me, I pray God direct my Relict. I make my pre-"ſent Wife, my whole and ſole Executrix of what it hath pleaſed "God to bleſs me with. I order my Son *John Griffin*, my Son by "my firſt Wife, 600 *l.* I have 600 *l.* in the three *per Cent.* An-"nuities: Which I order, not to be ſold; but I order my Wife to "leave the Intereſt thereof to help to bring up my Daughter *La-*"*viner*. I likewiſe have two *Freehold* Houſes in *&c:* [Which "are the Premiſſes in queſtion:] Which are to be for the ſame "Uſe, to help to bring up my Daughter *Laviner*, and *her Heirs* "*for ever*. My Daughter to take Poſſeſſion of the Annuities at "her *Age of* 25. And if it pleaſe God my Daughter die before "her Mother, and unmarried and without a lawful Heir, then the "ſaid two Houſes to go to my Son *John* and his Heirs for ever."

It concludes—"I pray God to bleſs and direct my Wife and "Daughter and Son. And I die in Peace with all Mankind: And "I hope the Lord Jeſus Chriſt will receive my Soul. And this "is my laſt Will; and not any other. 2d Day of *May* 1752."

And he *ſubſcribed* it, at the ſame Time when he wrote it: But there was *no Seal*, *nor Witneſs* to it.

And it was further ſtated, that on the 5th of *January* 1754. He wrote on the *ſame Sheet of Paper*, the following Words, *viz.* "Memorandum—*Blackman-Street*, 5th *January* 1754: Whereas I "have laid out *&c*, on a Lighter called *&c*, and the Barge called "the *Lemon &c*; All theſe, and alſo all *&c.* at my Death, All "ſhall be at my preſent Wife *Mary*'s Diſpoſal. And this not to "diſannul any of the former Part made by me, the 2d of *May* "1752: Except that my Wife ſhall not be liable to pay to my "Son *John &c.* Witneſs my Hand, *J. Griffin*, Sen."

N. B. The Will was written on the firſt and ſecond Sides of a Sheet of Paper: And the Codicil was begun either upon the

End of the Second or the Beginning of the Third, and written upon the 3*d* Side. (Which Circumſtance Lord *Mansfield* thought material, though not deciſive.)

And all this Codicil (or whatever it may be called,) related *only* to the PERSONAL Eſtate; and *not at all*, to the REAL.

The Teſtator ſubſcribed this in the Preſence of Three Witneſſes. And then he took the ſaid *Sheet of Paper* in his Hand, and declared IT to be his laſt Will and Teſtament, in the Preſence of the ſaid 3 Witneſſes; and then delivered it to them, and deſired they would atteſt and ſubſcribe it in his Preſence, and in the Preſence of each other: Which they accordingly did.

Upon this Special Caſe, Two Queſtions are reſerved for the Opinion of this Court: *viz.*

1ſt. Whether the Republication of the ſaid firſt Will (made in 1752;) upon the 5th of *January* 1754, be a *Publication* or *Republication* of his firſt Will, *within the Statute of Frauds.*

2d Queſtion. Whether any Eſtate paſſed by the firſt Will, either to the *Daughter*, or to the *Mother*.

Mr. *Barnard* argued on Behalf of the Plaintiff, *John Griffin*, Heir at Law to the Teſtator.

This was no good Will, to paſs Lands, beyond all Doubt, *till* the 5th of *January* 1754. And what happened then was *neither a Publication* nor a *Republication* ſufficient to make it a good Will within the Statute of Frauds. Here are *two diſtinct Inſtruments*, at *two different Times:* The firſt, UNATTESTED, relating to the *Real* Eſtate; The ſecond, *ſigned*, *publiſhed*, and *atteſted* according to the Statute of Frauds, relating to the *Perſonal*. But the firſt was *originally bad*; and could *not* be made good, by the ſubſequent Tranſaction. In Support of which Aſſertion, He mentioned the Caſe upon Serjeant *Maynard*'s Will, cited in *Comyns* 384. in the Caſe of *Acherley* v. *Vernon et al'*.

He likewiſe cited *Penphraſe* v. *Ld. Lanſdown et al'*. *H.* 11 *Ann. Rot'lo* 620. (on the Earl of *Bath*'s Will,) which is alſo cited in the Caſe of *Acherley* v. *Vernon*, in *Comyns* 384; Where the firſt Will was only executed, not atteſted; And on making a Codicil to it, the Teſtator took the Codicil in one Hand, and the Will in the other, And ſaid "This is my Will *&c*; And I publiſh this "Codicil as Part thereof;" and ſigned the Codicil in the Preſence of the Witneſſes who ſubſcribed it in his Preſence: It was holden

to be no Republication of the Will. And this Caſe alſo proves that there can be no Republication *by Implication*, as it was there expreſly determined: But the Will ought to be re-executed; or otherwiſe a Deviſe of Lands ſhall not be good.

Second Queſtion. No Eſtate paſſes by this Will, *either* to the *Mother* or to the *Daughter:* But it deſcends to the Plaintiff *John Griffin*, as Heir at Law to the Teſtator.

And the Statute of Uſes does not operate; becauſe there is no Tranſmutation of Eſtate: Without which, no Uſe can ariſe. Now here the Eſtate never paſſed out of the Heir at Law.

He made 3 Sub-diviſions, under this ſecond Queſtion.

1ſt Subdiviſion. No Eſtate paſſes to the *Mother*. The Words of the Will muſt ſquare with the Intent of the Teſtator. And here the Words do not extend to the Real Eſtate; becauſe they are accompanied with the Word "*Executor*." *Precedents in Chancery* 471. *Piggot* v. *Penrice*. "I make my Niece *Gore*, *Executrix* of all "my Goods, *Lands*, and Chattels." Her Lands of Inheritance did *not* paſs: *Though* She had no Term, or Intereſt for Years, in any Lands whatſoever.

2d Subdiviſion (of the 2d Queſtion.) Nor does any Eſtate paſs by this Will to the *Daughter*. The Heir at Law ſhall not be diſinherited by a ſtrained Conſtruction.

3d Subdiviſion (of the 2d Queſtion.) The Statute of Uſes cannot operate for want of a Tranſmutation of Eſtate: For here, it never paſſed out of the Heir at Law; and therefore no Uſe could ariſe. For no Uſe can ariſe without a Tranſmutation of Poſſeſſion. To prove which Poſition he cited 1 *Inſt.* 271. *b.* 6 *Rep.* 7. *b.* 18. *a.* Sir *Edward Cleve*'s. 1 *Rep.* 176. *a. b.* 1 *Leon.*—*Moore* 569. So that no Uſe could here ariſe. And no Eſtate or Intereſt paſſed either to the Mother or Daughter under this Will.

Therefore He prayed Judgment for the Plaintiff.

Mr. *Burrell contra* for the Defendant.

1ſt Queſtion. Whether the Publication of the ſecond Inſtrument in the Manner as ſtated, is a Publication or *Republication* of the *former*, within the Statute.

2d Queſtion. Whether ANY *Eſtate paſſes, either* to the *Mother*, or *Daughter*.

Firſt.

Firſt. The firſt Will indeed has not the Requiſites appointed and required by the Statute of Frauds (29 *C.* 2. *c.* 3.) as eſſential to a Will of Lands. But that Statute has been always *liberally conſtrued*, in Favour of Wills. 3 *Peere Wms. fo.* 252, 254. *Stonehouſe et Ux'* v. *Sir John Evelyn*, (the laſt Point,) is a Proof of this: Where it was holden "That the Teſtatrix's *owning* her Hand, was "ſufficient; though the Witneſs did not actually ſee her ſign." This was a liberal Conſtruction, as to the *Perſon Signing*. So has been the Conſtruction alſo as to the *Witneſſes* Atteſting. 2 *Chancery Caſes* 109. *Anonymus:* A Will atteſted by 3 Witneſſes, who were *not preſent together*, but ſubſcribed *at ſeveral Times*, was decreed to be good. 2 *Salk.* 688. *Shires* v. *Glaſcock:* The Atteſtation was adjudged good, becauſe the Teſtator *might* have ſeen the Witneſſes ſubſcribe, through a broken Window. So, 3 *Lev.* 1. *Lemayne* v. *Stanley:* As to the *Teſtator's Signing* his Name.

The Will was dated the 2d of *May* 1752, and was ſubſcribed by the Teſtator; but was not then indeed, either witneſſed or ſealed. But it may be conſidered as intended to be afterwards executed.

Then in *January* 1754, He added a Codicil, on the *ſame* Sheet of Paper; took the ſaid Sheet of Paper in his Hand; declared IT to be his Will; and deſired the Witneſſes to atteſt *it*. This muſt be either a *Publication*, or a Republication. The very Caſe reported in *Comyns* 381. of *Acherley* v. *Vernon*, *M.* 10 *G.* 1. in Chancery, was a Determination "That what Mr. *Vernon* there did was "a *Republication*; And that the Will and Codicil made *but One* "*Will*:" And this Determination was affirmed in the Houſe of Lords.

2d Queſtion. Whether ANY *Eſtate paſſed* to either the *Mother* or the *Daughter* by this Will: (For if ANY Eſtate paſſed to *either*, the Plaintiff in Ejectment cannot recover.) 2 *Siderf.* 75. *Marret* v. *Sly*, is a Proof of great Allowances and Indulgence to the Teſtator's Manner of Expreſſion. [See the 3d Point of that Caſe; where the Words were very falſe *Engliſh*.]

In the preſent Caſe, they took, a *Chattel*-Intereſt to the *Wife*; and an Eſtate in *Fee* to the *Daughter:* Or, at leaſt, they took *ſuch* an Eſtate as is ſufficient to preclude the Plaintiff; (whatever their Eſtate may, in Nicety of Law, be.)

As to the Words of the Will—The firſt Clauſe relates only to the Wife, *as Executrix*. "I order *John Griffin* 600 *l.* I have "600 *l.* in *&c.* I leave the *Intereſt &c*, to help to bring up my "Daughter

" Daughter &c. I have 2 *Houſes &c:* Which are to be to the " *ſame Uſes, viz.* to help to bring up my Daughter &c."—He meant a *Chattel*-Intereſt to the *Mother*, for the *Benefit* of the Daughter, *till* She came to 25 Years of Age; and TO *the Daughter, from* her Age of 25.

The Remainder is deviſed to the Heir at Law, *after* the Death of the Daughter, unmarried and without lawful Heir, in the Life-time of her Mother. Therefore he ſhall *not* have it BEFORE that Event. *Carter* 26, 27. 3 *Rep.* 19. 6 *Rep.* 95. *Cro. Jac.* 75. *Equity Caſes abridged* 179. Title *Deviſes, pl.* 6. 2 *Peere Wms.* 194. *Newland* v. *Shephard*, (a ſtrong Caſe;) Where a Deviſe of the Produce and Intereſt, in Truſt for the Grand-Children, *till* 21, was decreed to paſs the abſolute Right and Property of both Real and Perſonal Eſtate, to the Grand-Children *after* that Age: For the Heir at Law was to have no Concern in it. So here, *John* the Son of the Teſtator, was to have no Concern in this Eſtate, *till* the Death of the Daughter.

Boreaſton's Caſe, 3 *Rep.* 19. was holden to be a *veſted* Remainder. So here, it is a *veſted* Remainder in the *Daughter*. Therefore the Plaintiff can have no Demand. Wherefore he prayed that the *Poſtea* might be delivered to the Defendant.

Mr. *Barnard* in Reply—

1ſt. The Teſtator taking up the Paper in his Hand, ſaid, " This " is my laſt Will and Teſtament," or " IT is my laſt Will and " Teſtament." Which Act and Manner of Expreſſion can only mean the *Inſtrument* that he had *then* ſigned in their Preſence.

The preſent Codicil has NO *Words of Confirmation:* Nor does it at all relate to *Land*; but *only* to *perſonal* Eſtate.

2d Point. Neither the Mother or Daughter took *any* Eſtate. The Words are, " I likewiſe have two Freehold Houſes, which are " to be &c, to help to bring up my Daughter *Laviner*, and her " Heirs for ever &c. And if my Daughter dies unmarried and " without lawful Heir, in the Life-time of her Mother, then to go " to my Son *John* and his Heirs for ever." As to the Mother, the Words are, " I make my Wife *Mary Griffin* Sole *Executrix* of all " that it hath pleaſed God to bleſs me with." And there is no Other Diſpoſition, to the Mother.

An Eſtate ſhall never be taken by Implication, but from Neceſſity. And here is no Neceſſity.

Lord MANSFIELD. The Caſe is accurately ſtated: For it is *not* ſtated to be either *a Will*, or a *Codicil*; but a SHEET OF PAPER written *&c.*

Firſt. This is a Will of an illiterate Man, drawn by himſelf.

At firſt, in 1752, the Teſtator did not know that any Witneſſes were neceſſary. In 1754 he had found that they were neceſſary. Then he makes a ſubſequent Diſpoſition: Which is a *Memorandum* to be *added* to it. But he does not *call* this a *Codicil*; Nor does the Caſe *ſtate* it to be *ſo*. He plainly conſiders the whole as *one intire* Diſpoſition: And he expreſly declares in the latter, "That he does "not thereby mean to diſannul any Part of his *former* Deviſe or "Diſpoſitions."

There is not a Tittle in the latter, that relates to the *Real* Eſtate. Therefore the only Intent of having the 3 *Witneſſes*, was and muſt be to *authenticate the* FORMER.

The *Signing* the former, does *no Harm:* It makes it more ſolemn; but does *not hurt* it.

Then the Publication of it is AS *of a Will*—He takes up the Sheet of Paper, and holding up the *ſaid Sheet* of Paper, ſays "*It* "is my Will." And certainly, He did not mean a *Part* of it, *only*; but the *Whole* of it. And he deſires them to atteſt it. All this muſt relate to the Whole that was written on this Paper.

The Second Point is as plain *upon the bare reading*, as any Argument can make it.

There can be no Doubt of the Deviſe to the *Daughter*; whatever may be the Doubt of the Intereſt bequeathed to the *Mother*, till the Daughter comes of Age, for her Maintenance. But it is ſufficient to bar the Plaintiff, that an Intereſt is given to *One* of them.

Therefore it is clear for the Defendant on both Points.

Mr. Juſt. DENISON concurred.—A Man may make his Will at different Times: And the Witneſſes may atteſt at different Times. Here an illiterate Man makes and ſigns his Will; In which there is a Deviſe of Lands. To be ſure, if He had died before Atteſtation, the Deviſe of the Land had not been valid. But afterwards, he adds more to it, on the *ſame* Sheet of Paper, and declares "That "he does not thereby mean to diſannul any Part of his former

" Deviſe and Diſpoſition;" and ſigns it; and then takes the Sheet of Paper in his Hand, and declares it to be his laſt Will and Teſtament, in the Preſence of 3 Witneſſes; and deſires the Witneſſes to atteſt it: Which they do in his Preſence, &c.

This muſt be conſidered as One ENTIRE *Will*, made at different Times; and atteſted agreeable to the Statute of Frauds.

As to the Second POINT—It is not at all material, *What* SORT of Intereſt the Wife and Daughter, or either of them take under this Will: It is ſufficient, that they take *ſome* Sort of Intereſt ſufficient to preclude the Plaintiff's Demand. And *this* they certainly do.

Mr. Juſt. WILMOT concurred with Lord *Mansfield* and Mr. Juſt. *Deniſon*. *He* alſo conſidered this as an *entire* Inſtrument, and as a *Continuation* of the former Act.

The Teſtator himſelf calls it a " *Memorandum*," (*not* a Codicil;) and declares " that he did not mean thereby to diſannul any Part of " his *former* Deviſe or Diſpoſitions." He only takes up the Conſideration of ſomething further that had occurred to him, ſince his writing the former: And it is not material, whether he does this, at two *Days*, or at two YEARS Diſtance from writing the former Part. A Man is not obliged to make his *whole* Will, *all at the ſame* Time.

And the Teſtator's having originally *ſigned* the former Part, is out of the Caſe, and makes no Difference: For it was not at all neceſſary or material to it, as a Will of *perſonal* Eſtate; and the Signing *alone*, unattended with the other Requiſites, was not ſufficient to render it effectual as a Will of *Land:* Therefore it was *totally immaterial*. And in *January* 1754, having written the Memorandum with his own Hand, on the *ſame* Sheet of Paper, He takes the ſaid Sheet of Paper in his Hand, and declares " *It* is his laſt Will and Teſta- " ment;" and deſires them to *atteſt it as ſuch*, in his Preſence and in the Preſence of each other:—Which they do. So that there can be no Sort of Doubt that this was a good *Publication* of this *as his Will*, within the Statute of Frauds.

As to the Second POINT—It is not at all material, *what Species* of Intereſt the Teſtator's Wife and Daughter or either of them may have in theſe Houſes; provided that they or either of them have *ſuch* an Intereſt as is ſufficient to intitle them to the Poſſeſſion of the Eſtate: For *if* they have *ſuch an Intereſt* in them or in either of them, the Plaintiff cannot recover in Ejectment againſt them.

Now I ſhould think that there is a CHATTEL-*Intereſt* in the *Mother*. But be that as it may, here is a Deviſe " to the Daugh- " ter

" ter *and her Heirs*," expreſly ; (however inaccurately this illiterate Teſtator has worded what accompanies it:) and therefore She ſeems to have a *Fee* ; (though liable to be controlled by certain Events that may happen.) But thus much at leaſt, is clear ; *viz.* that his *Son* (*John Griffin*, the Plaintiff's Leſſor,) was not to take, TILL the Teſtator's Daughter ſhould be *dead without Iſſue*.

So that it is extremely clear and plain, that *either* the Mother *or* the Daughter have *ſuch* an Intereſt as intitles them to the *Poſſeſſion* of the Eſtate.

* Mr. Juſtice *Foſter* happened to be abſent.

Per * *Cur.* unanimouſly,
Let the POSTEA be delivered to the DEFENDANT.

Thurſday 20th *April* 1758.

Rex *verſ.* Young and Pitts, Eſquires.

A Motion was (on 10th *May* 1757) made for an Information againſt theſe two Juſtices of the Peace, for *arbitrarily*, *obſtinately*, and *unreaſonably* REFUSING TO GRANT A LICENCE to One *Henry Day*, *to keep an Inn* at *Everſley* ; where it was alledged and ſworn to be fit and proper and even neceſſary that there ſhould be an *additional* One, (there being *One* there already ;) and for which Occupation of keeping an Inn, this Man was (as theſe two Juſtices themſelves had allowed on a former Occaſion) a *proper* Perſon, they having before licenſed Him to do ſo *at another Place*.

Upon this Original Motion being made at the Bar—

LORD MANSFIELD and Mr. Juſt. DENISON held, that notwithſtanding this was a Matter left in a great Meaſure to the *Diſcretion* of the Juſtices, Yet if it appeared to the Court, from ſufficient Circumſtances laid before them, that their Conduct was influenced by *partial*, *oppreſſive*, *corrupt*, or *arbitrary* Views, inſtead of exerciſing a fair and candid Diſcretion, The Court might call upon them to *ſhew the* REASONS whereby they *guided their Diſcretion :* And therefore they were for granting the Rule to ſhew Cauſe, *as prayed*. But

Mr. Juſt. FOSTER (who happened to know the Place, and ſaid there was *another* Houſe of good Entertainment there already,) thought it ſufficient to make a Rule upon the two Juſtices " To " ſhew Cauſe why they ſhould not GRANT *this Licence*." And

LORD MANSFIELD and Mr. Juſt. DENISON concurred with Him, to expreſs the Rule in that Manner, though the Subſtance was the

ſame: becauſe, if they did not ſhew ſufficient Cauſe, the Conſequence muſt be granting an Information.

Per Cur. unanimouſly—(Mr. Juſt. *Wilmot* being abſent in Chancery.)

RULE upon theſe two Juſtices to ſhew Cauſe "*why they did* NOT GRANT *this Licence* to this *Henry Day.*"

On *Monday* 27th of *June* 1757. upon ſhewing Cauſe—The Juſtices, by their Affidavits, made *no Perſonal* Objections to *Day*; but thought the *Certificate inſufficient*, becauſe not ſigned by the Parſon, Vicar or Curate.

The COURT was of Opinion "that the Certificate, being ſign-"ed by 3 or 4 reputable and ſubſtantial Houſe-keepers, *&c*, *was* "ſufficient." But though the Juſtices had miſtaken the Act, The Court cleared them from any wrong Motive.

But it being ſuggeſted "that the preſent Parſon and Churchwar-"dens were ready to ſign a Certificate in his Favour," The Court enlarged the Rule to the firſt Day of next Term; with a View that He might be licenſed at *Michaelmas*, *if* there ſhould be *no other* Objection than what aroſe from the Certificate's not being ſigned by the Parſon and Churchwardens; and the Matter (which ſeemed to have raiſed great Heats, and was ſtrongly ſupported by Sir *John Aſtley*, on the Part of *Day*,) be accommodated

The RULE was accordingly enlarged in theſe Terms, *viz.* "That "the firſt Day of the next Term be farther given them, to ſhew "Cauſe *why they have not granted*, &c."

N. B. By 26 *G.* 2. *c.* 31. §. 1. It is enacted, That upon granting Licences by Juſtices of Peace, to any Perſon, to keep an Alehouſe, Inn, *&c.* Every ſuch Perſon *ſhall enter into a* RECOGNIZANCE in 10*l.* with two ſufficient Sureties, Each in 5*l*; or One ſufficient Surety in 10*l*; under the uſual Condition, "*for maintain-*"*ing of* GOOD ORDER AND RULE within the ſame."

By §. 2. It is enacted, That *no Licence* to keep the ſame ſhall be granted *to any Perſon* NOT LICENSED *the Year preceding*; UNLESS ſuch Perſon produce, at the General Meeting of the Juſtices in *September*, a CERTIFICATE under the Hands of the *Parſon, Vicar or Curate and the Major Part of the Churchwardens and Overſeers*, OR ELSE *of* 3 *or* 4 *reputable and ſubſtantial Houſekeepers and Inhabitants* of the Pariſh or Place where ſuch Ale-houſe is to be; ſetting forth "That ſuch Perſon is of good Fame, and of ſober Life

" and Converſation." And it ſhall be *mentioned in ſuch Licence*, " That *ſuch Certificate was produced :*" Otherwiſe ſuch Licence ſhall be null and void.

By §. 3. No Licence ſhall intitle any Perſon to keep an Alehouſe *in any* OTHER *Place*, than that *in which it was* FIRST *kept*, by Virtue of ſuch Licence: And ſuch Licence, *with regard to* ALL OTHER *Places*, ſhall be null and void.

On *Friday* 18th of *November* 1757. Mr. *Norton* again moved (and moved it as a *new original* Motion) for *an* INFORMATION againſt theſe two Juſtices of Peace; who, he ſaid, had at their laſt general *September* Meeting for granting Licences, ſtill PERSISTED *in refuſing to grant this Licence*, notwithſtanding what had already paſſed in this Court upon the ſame Subject and Occaſion. Of this Fact He had Affidavits: and he alſo produced *freſh* and *circumſtantial Affidavits*, as to the Merits; *viz.* the Neceſſity of ſuch a Licence, and the Conduct of the Juſtices in their Oppoſition to it.

Lord MANSFIELD—What paſſed before was, " That the Court " did *not* think any thing CRIMINALLY *imputable* to theſe " Juſtices." The Court then gave no Opinion as to *obliging* them to grant the Licence: But, on the contrary, expreſly adjourned the Conſideration of the Reaſons of their Refuſal.

This former Rule was only kept on Foot, *in order to obtain the* MATERIAL END *of it:* But as to the Behaviour of the Juſtices, with regard to the criminal Complaint againſt them, the Court diſcharged them from any Imputation of *Crime* or *arbitrary Intention to oppreſs* the Man.

The COURT therefore now made the *like Rule*, upon theſe FRESH *Affidavits*, as they had made upon the former, and Ordered that both Rules ſhould come on *together*.

Sir *Richard Lloyd* (on *Saturday* 11th of *February* 1758.) accordingly ſhewed Cauſe upon both Rules.

He obſerved that it was a Sort of Rule never before granted; and which He had known refuſed 25 Years ago. He ſaid he never knew a Rule made upon Juſtices, to ſhew Cauſe " WHY *they did not grant a Licence*," or *to enforce* them to do ſo; Unleſs there was ſome Charge of Corruption, Partiality, Bias, or other Imputation upon the Juſtices.

Lord MANSFIELD anſwered That the Affidavits upon which the *Original* Motion was made *did import ſuch a Charge*;—And the Mo-

tion was *originally* made *upon that Foot:* And that the Rule was put into it's preſent Form, *out of* TENDERNESS *to theſe Gentlemen*, and *Regard* to the Fairneſs of their Character.

And they did indeed, upon the former Cauſe ſhewn, appear to be *free* from Blame, as to any *Criminal* Imputation.

But yet *if* they have *no reaſonable Objection* to the Man, they OUGHT *to licenſe* him: And *if* they *have any Reaſon*, they OUGHT *to* GIVE *it*. For *though* they have, it is true, a *Diſcretion* in theſe Caſes, yet it muſt NOT *be permitted* to them to exerciſe an ARBITRARY *and* UNCONTROLED *Power* over the *Rights* of other People, and in Caſes where their *Livelihoods* are ſo eſſentially concerned.

Sir *Richard Lloyd* argued and inſiſted that the Legiſlature has made them the SOLE *Judges*, as being ſuch who, from their Reſidence on the Spot, muſt *beſt know* the Perſons and their Characters, and alſo the Circumſtances of Time and Place. And the Legiſlature has even excluded Juſtices of Peace of *other* Diviſions. And the Juſtices *thus intruſted* have a Right to *judge* FOR THEMSELVES: No Man can judge for another. And *this Power* is truſted to them, by the *Conſtitution*, by the *Legiſlature*.

It may be very *dangerous* to them, to be obliged to *give their Reaſons publicly:* Though they may have *very ſufficient* Ones to ſatisfy their *own* Minds and to direct their *own* Judgment.

And if they are thus intruſted, Why are they liable to be called to an Account by *any other* Juriſdiction; *unleſs* they act faultily and wilfully wrong? Indeed, if they do *wilfully* wrong, let them be puniſhed: But where they act quite conſcientiouſly, they are *not accountable to any Body*.

Now theſe Gentlemen ſay, and they SWEAR too, " that they " *really* judge *this Houſe* to be an IMPROPER HOUSE; and *this Per-* " *ſon* to be an IMPROPER PERSON; And that this is their *real and* " *ſincere Opinion*."

This Queſtion *affects* ALL *the Juſtices in England:* (I mean, *ſetting aſide the* IMPUTATION of *wilful* Miſbehaviour.)

Lord MANSFIELD—Moſt certainly. *No body doubts* of the Thing; *ſetting aſide every Degree of Imputation:* It will not bear an Argument.

Sir *Richard* repeated the *Juſtices Reaſons* for their Refuſal; and concluded with INSISTING on their RIGHT to *judge for* THEMSELVES.

Mr.

Mr. *Young*, being in Court, spoke (very handsomly) in Exculpation of himself from any ill Intention; and declared very solemnly, "that He had acted according to his *real Sentiments*, "and the *best of his Judgment*."

Lord MANSFIELD—It is a Matter of too much Consequence, and too much Length too (as I am obliged to go away,) to be determined now immediately: And it may as well stand over till next term, as so little Time of this Term is left.

ADJOURNED.

On *Thursday* 13th of *April* 1758. This Case being mentioned again—Lord MANSFIELD proposed *altering the Rule*, by making it "To shew Cause why there should not be an INFORMATION "against them:" For so He said, it was *originally moved*, and this was the *true* and *proper* Foot to argue it upon; (And Mr. *Norton* declared that he proposed to argue it *upon that* Foot;)—Though in *Tenderness* to the Justices, and lest the Country should run away with a Notion of their being under a *Criminal* Charge, it had been put into the Form that it at present stands in. (*V. ante p.* 557.) And Mr. *Nares*, Counsel for the two Justices, not opposing or objecting to this Alteration— The Rule was *altered accordingly*.

And now this Affair coming on again, (for the last Time;)

Lord MANSFIELD again declared that the Argument ought to be taken up upon the Foot of *Criminality* in the Justices: For it was so *originally moved*; it was the *proper Nature* of the Question; it was so understood by every Body; and so *meant by the Court*. For, (as He again explicitly declared,) there was no Pretence, upon any *other* Foot, to make a Rule upon the Justices, who have a *Discretionary* Jurisdiction given them by the Law. But though * DISCRETION does mean (and can mean nothing else but) *Exercising the best of their Judgment* upon the Occasion that calls for it; Yet if this Discretion be *wilfully abused*, it is *criminal*, and ought to be under the Control of this Court.

* *V. post. p.* a farther Definition of *Discretion.*

Mr. *Nares* and Mr. *Thurlow*, for the Defendants thereupon argued strongly and very largely, that the Justices had been so far from acting *criminally*, that they had acted *rightly*, *properly* and *honestly*: And they hinted that the Court had *already* exculpated them from any *Criminality* of Behaviour.

And the Legislature have left this Jurisdiction *so absolutely* to the Justices of the *particular Division*, that *no Appeal* will lie from their Determination; as appears by 1 *Salk.* 45: which is expressly so, and is cited in 2 *Strange* 881, as a Proof of this Position.

Neither

Neither will any *Mandamus* lie to the Juſtices, to oblige them to grant the Licence; even though they ſhould appear to have refuſed it upon Reaſons which may be looked upon as very ſuſpicious at leaſt, if not very improper. 2 *Strange* 881. (*Rex* v. *Juſtices of Worceſter*) *Giles*'s Caſe.

Nor will the Court grant an *Information*, for refuſing to grant a Licence. *Rex* v. *Juſtices of Nottingham*, where, *they ſaid*, an Information was *denied*.

But *Per Cur*. That Caſe was an *Abuſe*, a *groſs Abuſe*, of their Diſcretion: And the Information was therefore *granted*. And ſo it was in the Caſe of *Bridgewater*, upon the ſame Foot, of *Abuſe* of the Diſcretion intruſted to them.

The Counſel for the two Juſtices next obſerved that *Day*'s having for many Years had a Licence to keep a public Houſe *in another* Pariſh, was quite an *immaterial* Circumſtance: For, by 26 *G*. 2. *c*. 31. § 3. ſuch Licence was *abſolutely null and void*, with regard to all OTHER Places. [*V. ante* 558.]

The Affidavits on both Sides being then All diſtinctly read, It appeared (upon the whole Matter) that theſe two Juſtices had acted in this Affair, with Fairneſs, Impartiality, Candor, and Juſtice; that they *really and ſincerely thought* both the *Man* and the *Houſe* IMPROPER *to be licenſed*; and that they had *very good and ſufficient Reaſons* for ſo thinking and determining.

Whereupon, their Counſel concluded with praying that the Rules made upon them might be diſcharged with *full Coſts*.

Contra for the Proſecutors.

The main Tendency of the Arguments of the Counſel *in Support* of theſe Rules, was, to ſhew that the Refuſal to grant this Licence to *Day*, aroſe from PARTIALITY to Mr. *Barker* the Lord of the Manor, who was the Proprietor (the Landlord) of the *other* publick Houſe already eſtabliſhed in the Pariſh.

Lord MANSFIELD once more declared "That this Court had NO "*Power* or Claim, to *review the Reaſons* of Juſtices of Peace, upon "which they form their Judgments in granting Licences; by way of "APPEAL *from their* JUDGMENTS, or OVER-RULING *the* DISCRE-"TION *intruſted to them*."

But if it CLEARLY *appears* that the Juſtices have been *partially*, *maliciouſly*, or *corruptly* influenced in the EXERCISE of this Diſcre-

tion, and have (conſequently) ABUSED *the Truſt* repoſed in them, they are liable to Proſecution by *Indictment* or *Information*; or even, poſſibly, by *Action*, if the Malice be very groſs and injurious.

If their JUDGMENT *is wrong*, yet their HEART *and* INTENTION *pure*, God forbid that they ſhould be puniſhed! And He declared that He ſhould always lean towards *favouring* them; unleſs Partiality, Corruption, or Malice ſhall *clearly* appear.

The preſent Queſtion therefore only is, " Whether theſe Gen-" tlemen have been guilty of any *Partiality* or *Malice*, (for Corrup-" tion is not pretended,) in the Refuſal of this Licence."

Then He went minutely and accurately through All the Particulars both of the Charge and of the Defence. And He thought that upon the firſt and original Motion, the Juſtices appeared to have been *miſtaken* in the *Grounds* of their Refuſal; in that they fixed it upon the want of the Miniſter's and Church-Wardens Signing; which *they judged* to be *requiſite* by the 26 *G.* 2. *c.* 51. (when it was *not*.) However, in this, they were *not criminal*; though they were *miſtaken*. And at *that* Time, they had *no* Perſonal Objection to *Day*. And therefore it was (from all that *then* appeared) reaſonable to expect that, upon enlarging the Rule, they *would* at their next Meeting *grant* the Licence; which they had before refuſed, *upon a Miſtake*, of which they were ſubſequently informed.

But SINCE *this*, and antecedent to ſuch next Meeting, there are come out *ſeveral ſtrong* PERSONAL *Objections to* DAY *himſelf*: (Which theſe Juſtices were the PROPER *Judges* of:) Namely, His keeping and having long kept a Houſe for publickly retailing Ale Wine and Spirituous Liquors without being licenſed thereto; His having been twice convicted of ſelling Spirituous Liquors, without a Licence; His ſuffering a Day-Labourer to drink a whole Day in his Houſe, in Harveſt-time, and afterwards vindicating it; His having been charged with a Fraud, upon Oath; Beſides an Allegation in One of the Affidavits, " That two notorious Highway-" men and Robbers appeared at leaſt to have uſed his Houſe as a " Public Houſe, if they enjoyed no other and more particular kind " of Harbour and Protection in it."

And in reſpect to the *Houſe*, the Juſtices now ſwear that they are clearly of *Opinion* " That *One* Houſe is ſufficient." And they likewiſe clear themſelves, by the moſt ſolemn Aſſertions in their Affidavits, of all *Criminal* Imputation.

Therefore He concluded with declaring it as his Opinion, that there was NO *ſufficient Foundation* for a CRIMINAL Charge againſt theſe Juſtices.

Mr. Juſt. DENISON concurred.

HE alſo expreſly *allowed the Diſcretionary* Power of the Juſtices in granting Licences; *without Appeal* from their Judgments, or having their *juſt* and *honeſt* Reaſons *reviewed* by *any* Body. But yet an *improper and unjuſt Exerciſe* of their Diſcretion, He ſaid, *ought* to be under Controul.

But it muſt be a CLEAR *and* APPARENT *Partiality*, or *wilful Miſbehaviour*, to induce the Court to grant an Information: *Not* a mere Error in *Judgment*. And here is certainly NO *clear and apparent* Partiality, or *wilful* Miſbehaviour, in theſe Juſtices.

Therefore the Rules ought to be diſcharged.

Mr. Juſt. FOSTER concurred in the *general Principles* before laid down: And He thought that there was no Evidence of Partiality, Malice or Corruption, in the preſent Caſe.

He declared *againſt increaſing* the Number of public Houſes; and gave ſeveral ſtrong Reaſons againſt it: And therefore He thought the Juſtices far from being to blame, in having come to a Reſolution "*not* to increaſe them." And He was ſatisfied that the Juſtices had Reaſon ſufficient to refuſe this *particular* Licence; both with regard to the *Houſe*, and alſo with regard to the *Man* refuſed.

Mr. Juſt. WILMOT concurred.

He was very explicit, that the SOLE *Diſcretion* of granting Licences, is in the JUSTICES *of the Diviſion*: And He moreover gave very good Reaſons why it ſhould be ſo.

And this Point (he obſerved,) is admitted at the Bar.

Then the *Sole Diſcretion being in them*, the RULE is invariable, "That this Court will *never* interpoſe to puniſh a Juſtice of Peace "for a mere *Error in* JUDGMENT."

Therefore, even ſuppoſing them to have been *miſtaken* from Beginning to End, yet there is no Ground from any of the Affidavits, to infer any *Partiality*, *Malice*, or *Corruption:* There is not the leaſt

leaſt *Fact*, whereupon ſufficiently *to* FOUND any ſuch Apprehenſion and Belief even in the Complainants; And the Juſtices themſelves do moſt *ſolemnly* DENY it in *their* Affidavits.

Per Cur. Both RULES DISCHARGED, with *Coſts*.

Lord MANSFIELD—There are *two* diſtinct Reaſons why We ſhould *give* COSTS: One, with regard to the Perſon *complaining*; The Other, with regard to the Perſons *complained of*. For it appears, upon the Affidavits, that *Day* (the Perſon complaining) has *perſevered* in keeping this Houſe WITHOUT *a Licence:* And it *now* appears that the Juſtices who are complained of, have acted both *honeſtly* and *legally* in *refuſing* to grant it, in a Place where there was *already* a Sufficiency.

V. poſt, pa. ——*Rex* v. *Athay* Eſq; *M.* 1758. 32 *G.* 2. *B. R.* a like Point.

Saturday 22d *April* 1758.

Rex *verſ.* Inhabitants of Macclesfield.

MR. *Yates* ſhewed Cauſe againſt quaſhing an Order of Seſſions.

Two Juſtices removed *Joſeph Bower*, an Infant of Eleven Years of Age, from *Macclesfield* to *Sutton:* But the Seſſions, upon an Appeal from this Order, diſcharged it.

The Special Caſe ſtated was this—The ſaid Pauper *Joſeph Bower* was a Baſtard-Child, *born in Sutton*, and maintained by the Overſeers of *Sutton*.

When he was about the Age of 8 Years, he was, *without* the Knowledge or Conſent of the *Overſeers* of *Sutton*, HIRED to One *John Swain of Macclesfield*, to work in his Silk-Mill there, for the Term of 3 *Years*; at 6 *d.* a Week for the firſt Year, 9 *d.* a Week for the ſecond Year, and 13 *d.* a Week for the third Year: And that the ſaid Contract was made (as well *with* the Conſent and Direction of the *Mother* of the ſaid Pauper, as with his own free Will,) *by a Perſon* whom the Mother employed for that Purpoſe; She not being able to ſtir about herſelf, or to do any Thing towards maintaining the ſaid Pauper. That the Maſter, *John Swain*, was NOT *to find* the ſaid Pauper either Diet *or Lodging:* And the ſaid Service was to be *only* ELEVEN *Hours* in the *Six Working-Days*; And *all the Reſt* of the Time, as well as on *Sundays*, the ſaid Pauper was AT HIS OWN *Liberty* and *his* OWN MASTER.

The Pauper *continued* 3 *Years* in the ſaid Service; But within that Time, *frequently* ABSENTED *himſelf from his Work*; ſometimes, for *a whole Day or longer*; and at other Times, for *ſeveral Hours* in the Day; For all which Defaults, *Deductions* were made out of his Wages, in Proportion to the Time loſt: But there was never any new or other Agreement made, ſave as aforeſaid.

That during the ſaid *whole* 3 *Years*, the ſaid Pauper LODGED with his *Mother* in *Macclesfield*; Who *received his Wages:* And the *ſame* NOT *being ſufficient to maintain* him, and the Mother being unable to work, the OVERSEERS OF SUTTON CONTRIBUTED 6 *d. a Week, during the whole Time*, TOWARDS *his Maintenance.*

That about, or ſoon after the Expiration of the ſaid 3 Years, the Mother died: And the ſaid Pauper (being ill) required Relief from the Overſeers of the Poor of *Macclesfield*; Who, thereupon, applied for the Order to remove him from their Townſhip of *Macclesfield* to that of *Sutton.*

The Seſſions declare their Opinion, " That this Settlement is in " the ſaid Borough and Townſhip of *Macclesfield:*" And therefore they *repeal and make void* the ſaid Original Order; and give 15*s.* 6*d.* Coſts, to the Overſeers of *Sutton.*

Mr. *Norton*, who was for quaſhing this Order of Seſſions, argued that the Settlement was in *Sutton*, and NOT *in Macclesfield:* For that the Facts ſtated could *not* be conſtrued to amount to a *Hiring for a Year and Serving for a Year*, within the Meaning or Intention of the Act of Parliament.

Mr. *Yates*, *contra*, argued that it *was.* See the Statutes of 3, 4 *W. & M. c.* 11. § 7; And 8, 9 *W.* 3. *c.* 30. § 4: Which give a Settlement by being hired and ſerving for a Year.

He cited the Caſe of *Rex* v. *White-Chapel*, *P.* 11 *G.* 1. 1725; and *Rex* v. *Inhabitants of King's Norton and Camden*, *B. R. P. & Tr.* 1740; and *Rex* v. *Inhabitants of Wrinton alias Wrington*, *M.* 22 *G.* 2. *B. R.*

THE COURT held clearly with Mr. *Norton.*

Lord MANSFIELD premiſed that there was *no Foundation*, on this State of the Caſe, to imagine that it could be a Settlement upon the Ground of an *Apprenticeſhip:* The *only* Queſtion is " Whether " theſe Facts ſtated, amount to a Settlement in *Macclesfield*, AS " *a Hiring for a Year and Service for a Year.*"

The Pauper was an *Infant of* ONLY *Eight Years* of Age, at the Time of the hiring: Therefore *he was* NOT *bound* by the Agreement. Indeed he *might* have affirmed it; (For the Contract of an Infant is *not abſolutely* void, but only *voidable*, at his * *own* Election:) But the Maſter could NOT *oblige* him to ſtand to it.

[* This Doctrine was ſettled and eſtabliſhed in the Caſe of *Holt v. Ward*, *B. R. Mich.* 1732. 6 *G.* 2.]

Then as to the *Contract itſelf*—It was only "To ſerve 11 *Hours* "in the Day, of the Six Working-Days: but *during* ALL *the Reſt* "of thoſe Days, and the WHOLE *Sunday*, the Servant was to be "at his OWN LIBERTY and his OWN MASTER." It is in the Nature of a Contract *from Week to Week*; And it cannot, in this Caſe, be conſtrued to gain a Settlement, unleſs it had been *intended* that it ſhould: Whereas it is plain that the Pariſh of *Sutton* have not underſtood it in that Light, as a Contract to *change* the Child's Settlement; becauſe they have *contributed towards* it's Maintenance during the *whole* 31 Years.

Upon the whole, therefore, this Pauper's Settlement is clearly in *Sutton*.

Mr. Juſt. FOSTER concurred. He ſaid He could not diſtinguiſh this Caſe from that of *Chew-Stoke*. †

[† *M.* 1748. 22 *G.* 2. Cited before, by Mr. *Yates*, by the Name of *Rex* v. *Inhabitants of Wrixton alias Wrington.*]

A Service ſufficient to gain a Settlement, muſt be ſuch a State, *during the* WHOLE *Time*. Whereas this was NOT *a Servitude during* ALL *the Time:* For he was to be at his *own Liberty* and his *own Maſter* during the greater Part of *every Day*, and *every* WHOLE *Sunday*. Conſequently, this Perſon was NOT *at all in a State of Servitude*, *at* THOSE excepted Times. And therefore this is not *ſuch* a Service as is intended by the Act.

Mr. Juſt. WILMOT alſo concurred. The Servant's *Lodging* in his Mother's Houſe, would have made no Difference, He ſaid; Provided the Hiring and Service had been in all *other* Reſpects good.

But here, the Infant was NOT *bound*. For an Infant has Power, *either* to avoid, or to confirm his Contract: And ſo it was determined in the Caſe of *Holt* v. *Ward*, *Trin.* 1732. *B. R.*

Then, As to the *Contract* itſelf—This is *not ſuch* a Hiring and Service as will gain a Settlement within the Act of 3, 4 *W. & M. c.* 11. § 7. For that Act intends only ſuch ſervices, where the Servant is *under the Command and Control* of the Maſter, *during the* WHOLE *Year:* Which this Servant was *not* to be; but ſeems only to have been hired for the *particular* Purpoſe of working in theſe Silk-Mills, at *certain Hours*. He was *not* in a *continued* and *abiding*

State of *Servitude*, during the *whole* Year: And therefore He did *not* gain a Settlement in the Burrough and Townſhip of *Macclesfield*. Conſequently, the Seſſions have determined wrong.

Per Cur. unanimouſly, * ORDER of SESSIONS QUASHED: ORIGINAL ORDER AFFIRMED.

* Mr. Juſtice *Deniſon* was abſent.

Rex *verſ.* Epiſcopum Dunelmenſem.

Monday 24th *April* 1758.

MR *Willes*, on Behalf of Dr. *Sterne*, Prebendary of the ſecond Stall in the Cathedral Church of *Durham*, moved for a MANDAMUS to the Biſhop, commanding Him to exerciſe his VISITATORIAL *Power* over the *Temporalties* of that Church, in the Inſtance hereinafter mentioned: (In which Dr. *Sterne* had applied to the Biſhop to exerciſe it; Who refuſed to do ſo, unleſs under the Authority of this Court.)

And He alledged that ſuch Viſitatorial Power is given to the Biſhop, by the 40th of their Statutes.

And there is no other Method of trying this Queſtion, but before the Biſhop as Viſitor.

Mr. *Norton*, for the Biſhop, ſaid that the Biſhop was not ſatisfied that He HAD *ſuch a Power*: And therefore He propoſed that the Dean and Chapter ſhould be called in, to litigate it.

N. B. The Merits of the Queſtion were "Whether the *Succeſ-*
"*ſor*-Prebendary (Dr. *Sterne*) had a Right to 2 ½ Years Profits
"accruing during the *Vacancy of the Stall*, from the Death of
"Dr. *Benſon*, Biſhop of *Glouceſter*, (the laſt preceding Pre-
"bendary:) Which intermediate Profits the *Other* Preben-
"daries had received, and *divided* amongſt them."

LORD MANSFIELD thought that an *Action at Law* was the *proper Method*; and inſtanced the Caſe of Dr. *Young* v. *Dr. Lynch*, *P.* 26 *G.* 2. 1753. *B. R*; and mentioned likewiſe Canon *Seager*'s Caſe (who was a Canon of the Church of *Saliſbury*) in Chancery.

"Whether the *Biſhop* can have a *Juriſdiction* to determine *this*
"*Point*; Or Whether *Matters of Property* in Cathedrals can be
"determined otherwiſe than according to the Courſe of the *Law*
"*of the Land*," is a great Queſtion. And certainly, the Dean and Chapter muſt have an Opportunity to ſhew Cauſe againſt a *Mandamus* being iſſued to the Biſhop, to exerciſe ſuch a Juriſdiction.

But

But in this particular Caſe, the Queſtion muſt be litigated, not only with Members of the Body; but with *Executors and Adminiſtrators* of deceaſed Prebendaries: Over *Whom*, the Biſhop (*ſuppoſing* Him Viſitor, and as Viſitor to have Conuzance of ſuch a Caſe,) can have no Power. Which *alone* is deciſive againſt his Juriſdiction in *this* Queſtion.

Mr. *Willes*, perceiving the Court ſo ſtrongly againſt him, agreed to take nothing by his Motion.

Rex *verſ.* Peters et al':

O R

Cavil *verſ.* Burnaford et al'.

MR. *Huſſey* ſhewed Cauſe againſt the iſſuing of a *Mandamus*.

A Motion had been made by Mr. *Whitaker* (on 13th *February* 1758) for a *Mandamus* to be directed to the Defendant *John Peters*, the County-Clerk, (who was the Steward of the Court,) and alſo to the free Suitors of the *County-Court* of the County of *Cornwall*, commanding them to *proceed to final Judgment* in a certain Cauſe by Plaint in Replevin, commenced in the ſaid County-Court, between *John Cavil* Plaintiff, and *John Burnaford*, *Anthony Pomery*, and *Nicholas Pelyne*, Defendants; in which Cauſe the ſaid *John Cavil* obtained an *Interlocutory Judgment* in the ſaid County-Court.

The *Caſe*, in ſhort was,—That *Burnaford* diſtrained *Cavil*, for Rent; *Cavil* brought a Replevin, in the County-Court of *Cornwal*; An INTERLOCUTORY JUDGMENT *was regularly entered*; And a Writ of Inquiry of Damages executed thereupon; and 2*d.* aſſeſſed for Damages, and 5*s* for Coſts, and ſo much more Coſts as the Court ſhould allow. This *Inquiſition* was ſet aſide for *Irregularity*, (*viz. Want of Notice* of executing the Writ of Inquiry.)

The Defendant's Advocate there then moved "To *ſet aſide* "the ſaid (regular) INTERLOCUTORY JUDGMENT *itſelf*; UPON "*the Defendant's paying the Coſts of entering it*, (to be taxed by "*the* Steward,) *and on avowing iſſuably*: And afterwards, on a ſubſequent Motion "to make ſuch Rule abſolute," it being urged by the other Side, "that that Court had no Power to ſet aſide a *regular* Judgment," the Judge took time to adviſe. At a future Court, after Inquiry from ancient Practiſers in the ſaid Court, and being informed that it had been the *conſtant Cuſtom and Uſage of it*

" TO SET ASIDE *interlocutory Judgments, any time before executing* " *Writs of Inquiry therein*, ON *the Defendant's paying the Coſts of enter-* " *ing the ſame Judgments, and pleading iſſuably to ſuch Actions in-* " *ſtanter*;" and after having fully conſidered the Affair in all it's Circumſtances; and apprehending it to be agreeable to the Practice of *this* Court; He declared his Opinion " That it *ought to be ſet aſide*, and " the Defendant's Avowry received, they having paid the Coſts, " at the Time of filing it *de benè eſſe*," (which had been done in the Interim: And accordingly, He made a Rule, thus—" *Cavil* v. " *Burnaford et al'*. It is *Ordered, &c*, That the interlocutory " Judgment entered in this Cauſe *be* SET ASIDE, on Payment of " Coſts taxed; And that the Avowry filed in this Cauſe *de benè eſſe*, " laſt Court-Day, be now, on Conſideration of the Court, made " abſolute: And therefore Rule for the Plaintiff in Replevin to " Plead in Bar to the Avowry."

And the Judge of this inferior Court ſwears " That He acted " with the utmoſt Impartiality in the Affair, and according to the " beſt of his Judgment and Underſtanding; And, He apprehends " and believes, according to the CONSTANT USAGE AND PRAC- " TICE *eſtabliſhed and obſerved in the ſaid Court*."

Mr. *Whitaker*'s Motion was grounded upon the *Inferior Judge*'s having *exceeded his Authority*. And He had cited 2 *Strange* 823. *Fox* v. *Glaſs*, *H.* 1728. 2 *G.* 2. as the *firſt* Time that even *this Court* had ſet aſide REGULAR Judgments; and 1 *Strange* 392. *Bayly* v. *Boorne*, *M.* 7. *G.* 2 where they doubted of an *Inferior* Judge's having ſuch a Power.

On *Friday* laſt, (21ſt *April* 1758,) Mr. *Huſſey* ſhewed Cauſe Why this *Mandamus* ſhould not iſſue. And He made the two following Queſtions.

1ſt. Whether the Judge or Steward of an *inferior Court* has a Right to SET ASIDE *interlocutory Judgments* REGULARLY obtained:

2d. Whether in *this particular Caſe*, the Steward of *this* inferior Court had a Right to do as he had done, and as is the Practice of *that* inferior Court.

As to the 1ſt Queſtion—He agreed they *cannot* grant *new Trials*. 1 *Salk.* 201. *Regina* v. *Hill et al'*, and 2 *Salk.* 650. the Caſe of *Briſtol* (which is S. C.) *Brooke* v. *Ewers et al'*, 1 *Strange* 113. S. P. A *Mandamus* iſſued to a Judge of an inferior Court, " to give Judg- " ment:" *though* he had granted a new Trial. Therefore He would not contend that an inferior Court has a Right to ſet aſide a *regular* Judgment, UNLESS it be to let in the *Merits*.

But they *may* do it *in order to* TRY THE MERITS. 2 *Salk* 650. In the Caſe of the Mayor and Aldermen of *Briſtol*, It was holden, " That an *inferior* Court could not grant a *new Trial*." However, it was long ſince done by *this* Court: And they would alſo *formerly* ſet aſide *regular Judgments*, on putting the Plaintiff in as good Condition as before. And it does not appear how the Court came to leave it off; as Sir *John Strange* ſays (in the Caſe of *Fox* v. *Glaſs*) that they had done.

And it ſeems right in itſelf, and agreeable to natural Juſtice, to permit inferior Courts to ſet aſide regular *interlocutory* Judgments, in Order *to let in a Trial of the* MERIT. Indeed it is reaſonable, *not* to permit them to ſet aſide the *Verdicts of* JURIES: Which is an exceedingly different Caſe from a Judgment by Default.

As to the 2d Queſtion—In the *preſent* Caſe, the Steward acted rightly and reaſonably, upon the Circumſtances attending it.

Mr. *Whitaker*, *contra*, for the *Mandamus*.

The *Letting in the Trial of the* MERITS, makes *no Difference*. I ſay that an Inferior Court can *not* ſet aſide a *regular* Judgment after they have *once exerciſed their Authority*. In 1 *Strange* 392. *Baily* v. *Boorne*, *M.* 7 *G.* 2. *B. R.* The Court thought it a Queſtion that deſerved Conſideration, " Whether the Judge of an Inferior Court " *could* do it." And there is no more Reaſon Why they ſhould have *this* Power, than that of ſetting aſide *Verdicts*. They have no ſuch *Diſcretion*. " *Diſcretion*" *is another Word for* " *Arbitrary* " *Will*."

Lord MANSFIELD denied this Interpretation of the Term *Diſcretion*; and referred to what was ſaid (a few Days ago) in the Caſe of *Rex* v. *Young* and *Pits* (*V. ante p.* 560. and 561, 562.) And he ſaid that DISCRETIO is, as Lord *Coke* ſays, " diſcernere *per Legem* quid ſit juſtum."

To which Obſervation, Mr. Juſt. WILMOT deſired to add another, from 5 *Co.* 100. *a. Rooke*'s Caſe: " DISCRETION is a Sci- " ence and Underſtanding of diſtinguiſhing and diſcerning between Falſehood and Truth, *&c &c*; and NOT to do ac- " cording to *arbitrary Will* and *private Affection*."

Mr. WHITAKER—But theſe Inferior Judges have *no Sort* of diſcretionary Power of *any Kind*.

Lord MANSFIELD—That Caſe of *Baily* v. *Boorne*, in 1 *Strange* 392. only ſays " That it was a Queſtion that deſerved *Conſideration*."

But

But there is *no Precedent or Authority* to the contrary of their having ſuch a Power.

And it ſeems a Power *neceſſary to the Exerciſe of Judicature*; And is very different from the Caſe of ſetting aſide VERDICTS.—*This* Power to ſet aſide *interlocutory* Judgments, ſeems *incident to Juſtice.*

However, both Lord *Mansfield* and the other * two Judges, thought it might not be amiſs to look into it. And— * Mr. Juſt. *Foſter* was abſent.

Mr. Juſt. DENISON intimated as if there was ſomething of this Sort before the Court, in † *P.* 28 *G.* 2. *B. R.* [† It was in *Hil.* 1754. 27. and *P.* 1755. 28 *G.* 2. *Eaſtwell* v. *Livermore*: *V. poſt.* 572.]

CUR' adviſare vult.

And now Lord *Mansfield* delivered the Opinion of the Court; having firſt deſired Mr. *Huſſey* to ſtate the Caſe, for the Sake of the Students: (For He took this Opportunity of obſerving and declaring "that Nothing *miſleads* ſo much as reporting the Determination of "Courts of Juſtice, without having a ſufficient and *correct State of* "*the Caſe*;" which, He ſaid, was only an *ignis fatuus*, leading People into an *Error* and *Miſtake*.)

Here, the *Queſtion*, upon the *true* State of the Caſe, (which *V. ante*, *p.* 568.) appears to be "Whether an INFERIOR *Court* has "POWER *to* SET ASIDE *a* REGULAR INTERLOCUTORY *Judg-*"*ment*, *in* ORDER *to let in the Trial of the* MERITS."

And We are All of Us of Opinion, "That they HAVE ſuch a "Power." There is NO *Authority* nor *even Dictum*, to the *contrary*: Nor is there any *Reaſon* why they ſhould not have ſuch a Power; which is *incident* to the Doing of *Juſtice.*

Indeed there *are* Authorities which ſay, "That an Inferior Court "can *not grant a* NEW TRIAL, or *ſet aſide the* VERDICT *of a* JURY, "but for Irregularity."

But there may be many Reaſons Why they may be permitted to ſet aſide an *interlocutory* Judgment, *in order* to let in the *Merits*; which Reaſons will not hold ſo far as to make it allowable for them to ſet aſide the *Verdict of a Jury*: (One of which Reaſons may be, "that *no Attaint* lies upon a Verdict given in an *inferior* Court.") And indeed the Setting aſide a *Verdict of a* JURY, is too great a Power to be intruſted to an *inferior* Juriſdiction. Yet

We are, All of Us, clearly of Opinion "That they *may* ſet aſide "*regular* INTERLOCUTORY Judgments, *in order* to let in the *Me-*"*rits*;"

The writ of attaint is now a mere ſound in every Caſe. V. p. 393.

If ſo, can it be a reaſon for a diſtinction of power between a ſuperior and an inferior juriſdiction.

" *rits*;" both upon the *Reaſon* of the Thing, and for the *Convenience* attending it.

That Caſe in 1 *Strange* 392. of *Baily* v. *Boorne* (*V. ante p.* 570.) proves nothing at all againſt this. And in 1 *Strange* 499. *Jewell* v. *Hill*, *H.* 8 *G.* 1. An inferior Judge ſet aſide *even a Verdict*, for *Irregularity*, (or rather for *Surprize*:) Which this Court allowed he might do.

Mr. Juſt. DENISON added, that in the Caſe of *Eaſtwell* v. *Livermore*, (*V. ante p.* 571. *in Margine*) It ſeemed to be underſtood and agreed at the Bar, " That an inferior Court could not ſet aſide a " Verdict, * AT ALL:" But He finds that He has written a Note at the Bottom of that Caſe, importing that *He Himſelf* thought that it ought not to be taken for granted, *ſo generally* as this is laid down, " That they cannot do it * *at all*;" For that He thought " that an inferior Court *may* ſet aſide *even* a *Verdict*, *for* IRREGULARITY; though they are not to be truſted with a Power of Setting aſide *Verdicts*, *upon the* MERITS.

* It is true that there was no Diſtinction *expreſſed*, in the Diſcuſſion of that Caſe. But *no Irregularity* was there *pretended*; nor *any other Reaſon* attempted to be given for ſetting aſide that Verdict, *but* becauſe it was a *hard* One, and ſuch as *ought* to be ſet aſide.

And *this*, He ſaid, was certainly the RIGHT *Diſtinction*; *viz.* That they *may* ſet aſide even Verdicts, *for Irregularity*; but *not* upon the Merits.

Wherefore *Per Cur.* unanimouſly,

Let the RULE made " That *John Peters* the County-Clerk, " and the Free Suitors of the County-Court, ſhould ſhew " Cauſe Why a *Mandamus* ſhould not iſſue, directed to them, " commanding them to proceed to final Judgment in a cer- " tain Cauſe by Plaint in Replevin commenced in the ſaid " County-Court, between *John Cavil*, Plaintiff, and *John* " *Burnaford*, *Anthony Pomery*, and *Nicholas Pelyne*, Defen- " dants, in which ſaid Cauſe the ſaid *John Cavil* obtained an " interlocutory Judgment in the ſaid County-Court, on the " 12th Day of *October* laſt;"—*be* DISCHARGED.

1 RULE DISCHARGED.

Rex

Rex *verſ.* Collingwood Foſter, Edward Gallon, George Selby, and Thomas Mills.

FOUR Rules having been made abſolute, (laſt *Tueſday*,) for four Informations in Nature of *Quo Warranto*, againſt theſe 4 Defendants, reſpectively, " to ſhew by what Authority they claimed " to be Chamberlains of *Alnwick* in the County of *Northumber-* " *land*"—

Sir *Richard Lloyd*, on Behalf of the Defendants, moved (on *Saturday* laſt,) That there ſhould be ONLY *One* Information againſt All the four Defendants, inſtead of FOUR *diſtinct and ſeparate* Informations.

Which The COURT thought very *reaſonable*, upon the 4th Section of 9 *Ann. c.* 20. which runs thus—" And if it ſhall appear " to the ſaid reſpective Courts, That the *ſeveral Rights* of *divers* " Perſons, to the ſaid Offices or Franchiſes, *may properly* be deter- " mined on ONE Information, It ſhall and may be lawful for the " ſaid reſpective Courts to give *Leave* to exhibit ONE ſuch Infor- " mation againſt SEVERAL Perſons, in order to try their *reſpective* " Rights to ſuch Offices or Franchiſes."

Mr. *Norton contra*, for the Proſecution, urged that though the Court *might* indeed *give Leave* for this joining ſeveral Perſons Rights in One Information, yet they *would not do ſo*, if the Proſecutor judged that it might be *inconvenient* to him.

Sir *Richard* replied that the Court *would* direct it, unleſs it was *ſhewn* to be attended with Inconvenience.

It ended in Mr. *Norton*'s taking Time to conſult his Client.

Which having done, He (this Day) ſaid his Client had no Objection to it; provided no Exception ſhould be afterwards taken to ſuch Union of the ſeveral Cauſes.

CUR. The Defendants cannot object to it, when the Court judge it to be proper.

Tueſday 25th *April* 1758.

Challoner *verſ.* Walker.

AN Action of Debt on a Bond, Conditioned as follows; after firſt reciting That Whereas *G. Needham* being ſeiſed in Fee &c died inteſtate &c, leaving a Son *James &c* and *Anne Needham his Widow*, then living; And whereas *James &c* were about to ſell the Eſtate; And alſo reciting the ſaid *Anne*'s being married to a ſecond Huſband *David Kinneir*; And reciting a *Doubt* having ariſen concerning *her Right to Dower*; And whereas it was agreed that 30 *l.* Part of the Purchaſe-Money of the Eſtate, ſhould be left in the Defendant's Hands, in order to indemnify &c from the ſaid Claim &c, And all Coſts Charges &c: Then the Condition is, that if the Defendant and one *Coulſon* or their Heirs Executors and Adminiſtrators ſhould indemnify the Plaintiff from all and all Manner of Claim of Dower that might be made BY *the ſaid Anne Needham*, as Widow of the ſaid *G. Needham*, out of the ſaid Premiſſes; and of and from all Coſts Charges Damages Demands &c, that may ariſe or happen by or from ſuch Claim &c; then &c.

Plea, That he has indemnified the Plaintiff.

Replication—That *David Kinneir* married the Widow; and exhibited a Bill in Chancery for Arrears of Dower—He anſwered the Bill; and expended 8 *l.* 10 *s.* for Coſts in the ſaid Suit.

To this Replication, the Defendant demurs ſpecially; and ſhews ſeveral Cauſes of Demurrer; *viz.*

1ſt. The Replication is *not a direct Anſwer* to the Plea.
2d. *No Iſſue can be taken* upon this Replication.

3d. *No Breach* of Condition is *ſufficiently alledged* in this Replication.

Mr. *Altham* for the Defendant, made two Points:

1ſt Point. The Condition only extends to a Claim of Dower to be made by *Anne Needham in her* LIFE-*time*.

2d. The Plaintiff has *brought his Action too ſoon*: He ought to have ſtayed *till* the Suit in Chancery had *been determined*.

Firſt Point—Conditions ſhall be conſtrued *favourably* for *Obligors*. 1 *Saund.* 66. *Butler* v. *Wigge*—It is ſo declared by the Court.

Cro. Eliz. 396. *Greningham v. Ewer*—There the ſame Rule was laid down. 2 *Saund.* 411. *Ld. Arlington* v. *Merricke.*

And a Condition ſhall *not be extended* further than the *Words* of it. 1 *Ro. Abr.* 489. 1 *Ro. Abr.* 426. *pl.* 6. 1 *Strange* 227. *Stibbs* v. *Clough.* 1 *Lutw.* 536. *Wilſon* v. *Conſtable.*

Second Point—His Expence will be *repaid him*, if the Bill ſhould be diſmiſſed with Coſts. It is not like the Payment of a Debt admitted to be due: *This* Condition is only to indemnify againſt a *Claim.*

Mr. *Aſhurſt* for the Plaintiff.

1ſt Point. 1ſt. This Breach is within the *Words* and *Letter* of the Condition.

2d. It is clearly within the *Meaning of it.*

Firſt—*Aſhurſt* and *Walker* purchaſed the Eſtate. The Widow had *claimed* Dower. The Indemnification is againſt any *Claim* of Dower that ſhould be made by her. And the Suit is brought upon that *Claim.*

Secondly—But it is clearly within the *Intent* of the Condition. And Mr. *Altham*'s Caſes will not hold now: Becauſe Courts of Equity will now relieve againſt the Penalty. And Courts of Law therefore are leſs ſtrict than formerly. *M.* 29 *G.* 2. *B. R. Drummond et Ux' Adminiſtratrix of Aſh Eſq*; v. *Duke of Bolton.*

In the preſent Caſe, there was a Treaty for the Sale of the Eſtate: And a Bond (inſtead of incumbering the Deed with a Covenant) to indemnify againſt all *Claim* of Dower, and all *Expences Coſts* and *Damages* ariſing *from any ſuch Claim.* Mr. *Altham*'s Caſes of 1 *Ro. Abr.* 426, *&c.* are not applicable to the preſent Caſe.

2d Point—The Plaintiff is certainly *already* damnified: And he is *not* obliged to *wait* for Reimburſement, *till* a Chancery-Suit ſhall be determined. Nor can he have *Intereſt* for his Money, if he was to wait till then. 1 *Ventr.* 35, 36 & 78. *King* v. *Atkins.*

Mr. *Altham* in Reply—

1ſt Point. The Condition is "To ſave him harmleſs from the "Dower or Thirds that are or ſhall be claimed BY *Anne Needham*, "and from all Coſts Charges Damages *&c* ariſing *&c therefrom*:" That is, from *her* Claim.

2d Point—

2d Point—In 1 *Ventr.* 35, 36, 78. The Shilling was an abſolute Damnification: For there no Coſts were recoverable, upon the *Scire facias* iſſued againſt *King*, to which He was obliged to appear.

Lord MANSFIELD—This is the plaineſt Caſe that can come before a Court. He ſtated the Pleadings. And He treated the Objections, and the Caſes cited in Support of them, (and thus applied to them,) as quite frivolous and nugatory; And, without the leaſt Doubt or Difficulty, over-ruled them. For the Caſe is moſt clearly *within* the Words and Meaning of the Condition: And the Obligee has been *already* damnified, and therefore has a Right to be *immediately* reimburſed.

Mr. Juſt. DENISON concurred in both. And He added that here was 30 *l.* left in the Purchaſer's Hands to indemnify the Plaintiff. And the Indemnification is againſt the *Claim*, and all Conſequences of it. The Obligee has nothing to do with the *Claimant's Right:* It is enough, that he is damnified by the *Claim.* And he is not to ſtay *till* the Determination of the Suit: He has an *immediate* Right to be reimburſed.

Mr. Juſt. FOSTER and Mr. Juſt. WILMOT were clearly of the ſame Opinion: And Both of them explicitly declared themſelves to the above Effect.

JUDGMENT for the PLAINTIFF.

Rex *verſ.* Inhabitants of the Tything of Milland.

ON ſhewing Cauſe againſt quaſhing two Orders, *viz.* An Original Order of two Juſtices, made for *taxing rating and aſſeſſing* the Inhabitants of the TYTHING of *Milland*, in AID of the Pariſh of *St. Peter's Cheſehill* in the *ſame County*; and the Order of Seſſions confirming it;

The Queſtion was, Whether it was ſufficiently ſtated "That Both "theſe Places (*viz. Milland* and *St. Peter's*) lie WITHIN *the* SAME HUNDRED:" Which is a Circumſtance eſſentially neceſſary to be aſcertained, in order to give the Two Juſtices any *Juriſdiction* in the Caſe.

For, by 43 *Eliz. c.* 2. § 3. Power is given to Two Juſtices, in Caſes where they perceive a Pariſh not to be able to maintain it's own Poor, "to tax any other Pariſh *within* the HUNDRED where "the Pariſh is." [Which is all the Authority given to Two Juſtices.]

tices.] . Then the Act goes on, further, " And if the ſaid Hundred " is not able, then the SESSIONS ſhall aſſeſs any other Pariſh within " the County."

Now it is here only ſtated " That the Tything of *Milland* and " the Pariſh of *St. Peter's Cheeſehill* Both lie in the *ſame* LIBERTY " *of the Soke*, where the ſaid Pariſh lies."

It was therefore Objected That *non conſtat* that they are within the ſame HUNDRED: For " *Liberty*" and " *Soke*" are Words of vague, indeterminate Meaning, not equivalent to the known legal Term " Hundred," nor co-extenſive with it; And perhaps the Liberty may extend into *ſeveral* Hundreds. However, it is plain that the *Two* Juſtices have *not ſhewn* that they have Juriſdiction: And the Court can't *intend* that they have any.

In Support of the Objection, were cited the following Caſes; *viz. Foley's Laws relating to the Poor* 31. (or 42 in 3d Edition,) *St. Benedict Pariſh* v. *St. Stephen's and St. Mary Magdalen's in Norwich. Reports temp. Qu. Ann.* 269. S. C. *Viner*, Title *Poor*, *pa.* 416. S. C. with *Foley* 31.

The COURT thought it beſt, to ſend it back to the Seſſions, in order to have the Matter better explained and more particularly ſtated.

But they did not think themſelves bound down by the *particular Word* " HUNDRED," which is the Term uſed in the Act, ſo as to be confined to this ſingle *Species of Diviſion* of Counties. For if ſuch Diviſion be called by any *other* Term or Name ſynonimous or *equivalent* to that of " *Hundred*", it muſt be equally within the Intention of the Act, and the Court may adjudge according to ſuch *Intention*.

And now, the Caſe having been newly and particularly ſtated,

Mr. *Gould*, who was for the Orders, prayed the Opinion of the Court.

And Mr. *Norton*, who was againſt them, candidly owning That as the Facts are *now* ſtated, He could not contend but that it does appear *(ſubſtantially)* to be a Hundred, though the Diviſion was called by another Name;

The COURT diſcharged the Rule, and affirmed the Orders.

BOTH ORDERS AFFIRMED.

Wedneſday 26th April 1758.

Johnſon *verſ.* Houlditch.

IN an Action upon the Caſe for the Uſe and Occupation of a Houſe, the Defendant had, in *Hilary* Term laſt, obtained the Common Rule, for Liberty " To pay 2*l.* 5*s.* into Court, and to " have it ſtruck out of the Declaration, ON *Payment of Coſts.*" The Plaintiff's Attorney applied to get theſe Coſts taxed, and take the Money out of Court. Upon and after which Application,

Mr. *Whitaker*, for the Defendant, had moved (in the Beginning of this Term) to diſcharge this Rule ſo far as related to the *Coſts*; and alſo that the PLAINTIFF ſhould pay the Coſts of the Suit itſelf, aud alſo the *Coſts* of that Application: For that the Plaintiff had the very ſame Offer of the very ſame Sum, before the Judge.

The Caſe he went upon, (and from whence he argued the Plaintiff's Conduct to be oppreſſive) was as follows—A Quarter's Rent (amounting to 2*l.* 5*s.*) and Nothing more, was due from the Defendant to the Plaintiff. The Defendant was *always ready to have paid it:* But the Plaintiff kept out of the Way in order to *prevent* a Tender; and yet brought his Action as above ſtated, by Bill returnable laſt Term. The Defendant ſummoned the Plaintiff before a Judge, to ſhew Cauſe " Why, upon Payment of the DEBT *and* " *Coſts*, Proceedings ſhould not be ſtayed." The Plaintiff's Attorney pretended that the Plaintiff had *other* Demands, and therefore refuſed to take the 2*l.* 5*s.* and Coſts. And ſo the Judge was precluded by this Allegation, from interfering; and could make no Order. This *obliged* the Defendant to apply to the Court, for the Common Rule, " To pay the 2*l.* 5*s.* into Court, with the Coſts then incurred:" (*After which*, if the Plaintiff proceeds, it is at his Peril.)

But as this Common Rule is always made upon the Terms of the *Defendant's paying* COSTS *to the Plaintiff*; Mr. *Whitaker*'s Motion made as abovementioned, was " To ſet aſide *ſo much* of the " ſaid Rule as put upon the Defendant thoſe Terms of PAYING " *Coſts* to the Plaintiff:" And he had even added to this Motion, " That, on the contrary, the *Plaintiff* ſhould pay the Coſts of the " Suit itſelf, and alſo of that Application, TO *the* DEFENDANT;" It being moſt manifeſt that the Plaintiff was determined to *oppreſs* the Defendant, as it now appeared that only this 2*l.* 5*s.* was really due to him.

Mr. *Norton*, on Behalf of the Plaintiff, now ſhewed Cauſe againſt Mr. *Whitaker*'s Rule. And

He inſiſted, that *however oppreſſive* this Action might appear, Yet the Plaintiff had, *by Law*, A RIGHT *to bring it*: And conſequently, he was INTITLED *to his Coſts of Suit*, to be taxed and paid to him, upon the Defendant's obtaining this Rule, under the * Statute, which gives Liberty to pay " the Rent due into the Court :" For thoſe are the *Terms* PRESCRIBED *by* that Act.

* I take theſe Rules to be diſcretionary, and founded upon the Courſe and Practice of the Court; *not* upon any particular *Statute*.

But

The COURT, upon full Conſideration of the Matter, looked upon theſe Proceedings thus carried on by the Plaintiff, to be *oppreſſive*: And therefore they did DISCHARGE *ſo much* of the abovementioned Rule as directed the *Payment of Coſts* by the Defendant to the Plaintiff.

The Rule now made was this; *viz.*

" It is ORDERED that the ſaid Rule [made in this Cauſe on *Wed-*
" *neſday* next after three Weeks from *Eaſter*-Day in this ſame
" Term] be DISCHARGED: And alſo that *ſo much* of the Rule
" made in this Cauſe in the laſt *Hilary* Term, for the Pay-
" ment of 2 *l.* 5 *s.* into Court, *as relates to the Payment of*
" COSTS *to be taxed* by Mr. *Clarke*, be DISCHARGED.

Hutchins *verſ.* Chambers et al'.

Friday 20th *April* 1758.

THIS was a Special Caſe from *Surrey* Aſſizes, before Ld. Ch. J. *Willes*.

It was an Action of *Treſpaſs* againſt the *Juſtices of Peace*, the *Pariſh Officers*, the *Conſtables*, and their *Aſſiſtants*; for executing a *Warrant of* DISTRESS made by theſe two Juſtices, *upon a Poor-Rate* amounting to 13 *l.* 2 *s.* And a Verdict was found for the Plaintiff, againſt ALL the Defendants, ſubject to the Opinion of the Court, upon the whole Matter.

The Diſtreſs at firſt taken, was 5 Geldings, ſtated to be *Beaſts of the Plow and Cart*; with their Halters. Which firſt Diſtreſs not being ſufficient, they diſtrained a *ſecond Time*, under the SAME *Warrant*; and took 3 *other Geldings*, which were and are ſtated to have been *alſo Beaſts of the Plow and Cart*, of the Value of 36 *l.* 17 *s.* with their Halters. It is expreſly ſtated, " That upon the *former* Diſtreſs, *there* WERE OTHER *Goods &c*, more than ſufficient to anſwer the Value of the Demand, beſides theſe Beaſts of the Plow and Cart.

This

This Caſe was firſt argued on *Tueſday* the 31ſt of *January* 1758, by Mr. *Knowler* for the Plaintiff, and Mr. *Gould* for the Defendants; And again, on *Friday* the 14th of *April* 1758, by Mr. *Stowe* for the Plaintiff, and Mr. *Williams* for the Defendants.

There were 5 Queſtions ſtated for the Opinion of the Court, *viz.*

1ſt. Whether the *Rate and Aſſeſſment* was a *good and ſufficient Rate and Aſſeſſment*, in Point of Law: And if not, then Whether the Plaintiff *can avail Himſelf* of any Objection to it.

2d Queſtion. Whether the *Warrant ought to have fixed and* LIMITED *the* TIME * WITHIN WHICH *the Geldings* and Goods diſtrained were to be *ſold:* And whether *for want thereof*, the *Warrant is* VOID, and the *Defendants*, or *any*, and *which* of them, are *Treſpaſſers.*

* *V.* 27 G. 2. *c.* 20. and 17 G. 2. *c.* 38.

3d Queſtion. Whether the SECOND *Diſtreſs* is at all *juſtifiable.*

4th Queſtion. Whether the Geldings, being *Beaſts of the* PLOW, and uſed by the Plaintiff, BOTH *for the Plow* AND *Cart*, were LIABLE to be taken and *diſtrained* FOR *the ſaid* RATE *and* ASSESSMENT.

5th Queſtion. Whether, upon the whole State of the Caſe, the Plaintiff's *Action is maintainable againſt the Defendants*, or *any*, and *which* of them.

And a 6th Queſtion, " Whether the 2d Diſtreſs was not *exceſſive*," aroſe upon the Argument.

After the firſt Argument, (in which, the Diſtreſs was treated as a *Common-Law* Diſtreſs; and Mr. *Knowler* expreſly denied it to be an Execution, becauſe it was repleviable; and inſiſted that the Statute *de diſtrictione Scaccarij* is general, is declaratory of the Common Law, and extends to *all* Diſtreſſes for any Cauſe whatſoever;)

LORD MANSFIELD, finding that the Parties propoſed ſpeaking to it again, took Notice That All about the *Rates* is clearly out of the preſent Caſe: For *if* THEY *are bad* the Parties who thought themſelves aggrieved, *ſhould have* APPEALED.

So All about the *Warrants* may be laid out of the Caſe. For the warrant is not void, ſo as to make it a Treſpaſs *ab initio.*

Therefore the future Argument may be confined to the other Objections.

ULTERIUS CONCILIUM.

Mr. *Stowe*, who argued for the Plaintiff, on *Friday* the 14th of *April* 1758. paſſed over 1ſt and 2d Queſtions, upon what the Court had intimated after the former Argument; and proceeded directly to the 3d Queſtion.

3d. Queſtion. It is ſtated that here was ſufficient Diſtreſs, the firſt Time: And therefore the *Second* was NOT *juſtifiable*. *Co Lit*. 272. *b*. *Cro. Eliz*. 13. *Moore* 7. 2 *Lutw*. 1532. *Wallis* v. *Savill*. *Fitz. H. N. B*. Title *Recaption*. 8 *Co*. 50. *Jehu Webb*'s Caſe. And this is a Duty of a *leſs* Nature than Rent: And yet even in *that* Caſe, a double Diſtreſs is unlawful. 3d Queſtion.

A ſecond Reaſon why the SECOND *Diſtreſs* was not good nor juſtifiable, is, becauſe the Warrant is NOT *an* AUTHORITY to take it: For, the Warrant *having been* ONCE *executed*, had PERFORMED *it's Office*; and conſequently was no more than a Piece of waſte Paper, at the *Time of Taking* the ſecond Diſtreſs.

4th Queſtion. Beaſts of the *Plough* (though uſed both for Plough *and Cart*) cannot be diſtrained for a *Rate*, when there are other Goods ſufficient. 51 *H*. 3. *Stat*. 4. de diſtrictione Scaccarij. "None ſhall be diſtrained by his *Beaſts that gaigne his Land*, nor "by his *Sheep &c*." 2 *Inſt*. 133. is large and expreſs, "That this "was ſo by the Common and Civil Law; and that this Statute "*extends to* ALL *Sorts of Diſtreſſes* whatſoever; alſo to all Manner "of *Executions*, as well at the Suit of the King, as of the Subject." *Dyer* 312. 4th Queſtion.

The Words "*levy the Debt*" can not be applicable *merely* to Lord and Tenant; but are *general*, and extend to *all* Diſtreſſes whatſoever. 1 *Inſt*. 289. *b*. 2 *Inſt*. 133.

6th Queſtion. "Whether the ſecond Diſtreſs is not EXCES- "SIVE." 6th Queſtion.

He argued that this Diſtreſs was EXCESSIVE; being a Diſtreſs taken of 3 Geldings, of *triple* the Value: For the Value was 36*l*. 17*s*. 0*d*. and the Sum diſtrained for, only ⅓ (or very little more) of that Sum, *viz*. 13*l*. 2*s*. which is exceſſive upon the Face of it. And He cited 1 *Roll. Abr*. 674: Where Inſtances are given of Diſtreſſes exceſſive upon the Face of them. 1 *Inſt*. 107.

And this Diſtreſs is NOT *an entire Diſtreſs*: but a Diſtreſs of 3 *diſtinct* Things. And an exceſſive Diſtreſs of *ſeveral diſtinct* Things

is not maintainable: And an Action of *Trespass will lie* for it. *H.* 28 *G.* 2. *Moir* v. *Munday et al'* which was a Distress of a Great Quantity of Pedlar's Goods (of the Value of 100*l.*) which might have been severed; for only 6*s.* 8*d.* Therefore both the first and the second Distress are illegal.

Wherefore He prayed Judgment for the Plaintiff.

Mr. *Williams*—*contra*, for the Defendants.

He confined Himself to these 3 Questions, *viz.* First. Whether, under the Statute of 43 *Eliz. Averia Carucæ* can be distrained for the *Poors Rate*, where there is other sufficient Distress. 2dly. Whether under the Warrant for levying the Sum assessed, a *Second* Distress can be made, where the First is deficient, and a sufficient Distress might have been taken in the first Instance. 3dly. If a Second Distress *can* be made; Whether the Second Distress is not *excessive*, and whether, on *that* Account, *this* Action can be maintained.

And he observed, That the *two Justices* are *not concerned* in these present Questions, now remaining before the Court. He observed likewise, That the First Distress's being a Trespass or not, depended entirely upon the First of his three Questions; and the second Distress's being a Trespass or not, depended entirely upon the two last of them: and all the three Questions depended principally upon the Statute of 43 *Eliz.*

4th Original Question; (Mr. *Williams's* 1st.)

He begun with his own first Question, (which was the 4th Original Question:) And He First considered the Nature of the *Duty* created by the 43d of *Elizabeth*, and then the Nature of the *Remedy* thereby given for the Recovery of that Duty.

The *Duty* is *not* a Tax upon the *Land*, nor payable out of it; but a Charge upon the *Person:* And it is a Tax throughout the Kingdom, and for *public Benefit.* This is *not* to be considered upon the Foot of a COMMON LAW *Distress:* The Nature, Design, and End of this public Duty required the most effectual and speedy Remedy that could be devised.

The Reason why Beasts of the Plough could not be distrained at *Common Law*, will not hold in the present Case.

This is similar to an *Execution*, and essentially different from a Distress at Common Law.

At *Common Law* the Distress *could not be sold:* It was only taken *nomine pœnæ*; not as a *Satisfaction*, (which this is,) for the Duty.

The REASONS of the Privilege *do not now hold*. Agriculture *then* wanted and required Encouragement, and muſt have been impeded by a Common-Law Diſtreſs. *Now*, it does not. *Then*, the Thing diſtrained could not be ſold; and remained uſeleſs: *Now*, it may be ſold. The Debt, there, was of a *private* Nature: This here, is of a *public* Nature.

This Diſtreſs is *not* taken as a Pledge, or as a *Mean to compel*; but for a *Satisfaction* for the Duty itſelf, a perſonal Duty, and of a public Nature.

1 *Lord Raym.* 386. *Vinkenſterne* v. *Ebden*. *Sir T. Raym.* 232. *Prideaux* v. *Warne*. 2 *Lev.* 96. S. C. *Cro. Eliz.* 710. *Smith* v. *Shepheard*, proves that the Rule is not applicable to Diſtreſſes for *ſuch* Duties. They are Preſcriptions for Toll-through: And the firſt and laſt are Inſtances of *Sheep &c*, taken for *Tolls*.

As to the Statute de Diſtrictione Scaccarij—Comparing that Statute with the Statute of Articuli ſuper Chartas, 28 *Ed.* 1. *c.* 12. (which refers to the Stat. de Diſtrictione Scaccarij,) and attending to the Words of it, It can never be taken to *extend* to ſuch Caſes as the preſent; to Parliamentary Remedies; at that Time unknown. It is confined to ſuch Diſtreſſes as could be *ſold*; to Caſes of the Grantees of the Crown, or where the *Prerogative of the Crown* was concerned. * The Miſchief, at that Time, was the unbounded Power of the Prerogative in Diſtreſſes, and the great Abuſe and Oppreſſion exerciſed by the King's Bailiffs and by Lords of Liberties.

* *Vide* 51 *H.* 3. *Stat.* 4. *A. D.* 1266.

The King, by his Prerogative at the Common Law, might take the Land, as well as the Goods and Chattels, in Execution; (Sir *Wm. Harbert*'s Caſe. 3 *Co.* 12:) Conſequently, the Beaſts of the Plough.

And though *Sheep* are expreſly mentioned in that Act, yet *Sheep may* be diſtrained for Toll. Which proves "that this Act does "*not* extend to *all* Diſtreſſes." *Cro. Eliz.* 710. is ſo: *Smith* v. *Shepheard*—Where Sheep were taken for a Toll of 2*d.* for every 20 *Sheep*; And no Sort of Objection, "that Sheep were not diſtrain-"able."

Beſides the Act of 43 *Eliz. c.* 2. is an *implied Repeal* of the Stat. de diſtrictione Scaccarij.

Another Anſwer to this Act is—That if they would have availed themſelves of it, a *Special* Action ought to have been brought *upon* this particular Statute. *Regiſter* 97. *b.* & *F. N. B.* 89. & *F. N. B.* 90. are particular Forms of Writs upon it.

So

So, upon the Stat. of *Marlbridge*, *c.* 4. (which prohibits unreaſonable Diſtreſſes,) *Treſpaſs* will not lie for an unreaſonable Diſtreſs: But the Remedy muſt be by a *Special* Action founded on the Statute. In 2 *Strange* 851. *Lynne* v. *Moody*, It was adjudged " that *Treſpaſs* will *not* lie for taking an exceſſive Diſtreſs: But " the Remedy ought to be by *Special* Action founded on the Sta- " tute of *Marlbridge*." And on the ſame Statute, " that Diſtreſſes " taken in one County, ſhall not be driven into another," there are Writs formed. *Regiſter* 97. *F. N. B.* 82. But *Treſpaſs* will not lie: It muſt be a *Special* Action. 3 *Lev.* 48. *Woodcroft* v. *Thompſon*—The three Judges held, (againſt *North*,) " that he that " would take Advantage of the Statute of *Marlbridge*, *c.* 4, and " 1, 2 *P. & M. c.* 12. ought to do it by way of Action, *&c.*"

Their Argument would prove too much. For *Sheep* were privileged by the Common Law; and by the Stat. de Diſtrictione Scaccarij, expreſly " No Man ſhall be diſtrained by *&c—nor by his Sheep.*" But *Sheep* are *now* allowed to be diſtrainable for a *Poor's Rate*. So are the *other* Things mentioned by Lord *Coke* (from the Mirrour) in his 2d *Inſt.* 133. * as not diſtrainable at Common Law, if there were other Goods ſufficient. All theſe are ſurely diſtrainable for this Rate. 1 *Ld. Raym.* 386. . *Raym.* 232. & 2 *Lev.* 96. S. C. *Cro. Eliz.* 710.

* *V.* Comment on c. 15. *ſub finem*, which mentions Beaſts and living Things; and alſo mort Goods, as Armour, Apparel, Veſſel, Jewels *&c.* and even Saddle Horſes.

Therefore the 43 of *Eliz.* is *not confined* to COMMON LAW Diſtreſſes.

But theſe Beaſts are ſtated to be " Beaſts of the Plough AND " *Cart*." Therefore they *are* diſtrainable: For Beaſts of the *Cart* are not privileged. 1 *Sid.* 422. 440. *Welch.* v. *Bell.* 2 *Keb.* 595. S. C. *Bract. Lib.* 4. 217. *b.* ſpeaks of *Oxen*, as Beaſts of the Plough.

However, *This* is an EXECUTION: And therefore none of the Arguments relative to the Diſtreſſes can be applied to *this* Caſe.

When Goods are ſeiſed in *Execution* on a *fieri facias*, the Debt is diſcharged. So is 2 *Ld. Raym.* 1072. *Clerk* v. *Withers.*

This is a Diſtreſs for a *Satisfaction* of the Demand; *not* for a Pain, or Penalty, or Pledge. Conſequently, it is an *Execution.* This is the *Eſſential Difference* between an Execution and a Diſtreſs at Common Law.

In the Caſe of *Rex* v. *Speed*—*Caſes temp. W.* 3. 328. A *Levari facias* out of *B. R.* after Affirmance of a Conviction for Deer-Steal-

ing, was holden regular: And it was conſidered as an *Execution*; For *per Holt*, " When a Statute ſays *Money ſhall be levied by Diſtreſs*, this is an *Execution*." Therefore, it being an *Execution*, Beaſts of the Plough might have been taken.

And ſo they may here, *This* being an EXECUTION.

What has been urged on the other Side, from 2 *Inſt.* 133. " That " the Statute de Diſtrictione Scaccarij extends to *all* Diſtreſſes what- " ſoever, and likewiſe to Executions," is one of the very few Miſtakes of that excellent Writer. And this Opinion of Lord *Coke* is not only contrary to common Experience; but alſo to the Opinion of Ld. Ch. J. *Holt*, in *Comberb.* 356. *Hardiſley* v. *Barney*— where *Holt* ſaid, " that upon a *Fieri facias* the ſheriff may take *any* " *Thing* but wearing Clothes; Nay, if the Party has two Gowns, " He may take One of them."

And *Sheep* are notoriouſly diſtrainable now: and yet they are expreſly and by Name, within the Stat. de Diſtrictione Scaccarij.

The Stat. of *Weſtm.* 2. *c.* 18. which gives the Elegit, expreſly excepts Beaſts of the Plough. At that Time the Legiſlature thought ſuch Exception neceſſary. And *Dyer* 7. *b. pl.* 10. ſays That a Man ſhall not have Execution of the Profits of a Filazer's Office; becauſe he cannot grant and aſſign it. So that the Rule ſeems, from that Caſe, to be, " that whatever may be aſſigned by the Party, " may be taken in Execution, *et è contra*."

The Doctrine on which theſe Gentlemen build their Arguments, is now *obſolete*, and unknown to the Generality of Mankind: And it would be very inconvenient to re-eſtabliſh it. And this Diſtreſs is for the Benefit of the Debtor, as theſe Things are moſt ſaleable; and of no Prejudice to any Body. And no Caſe is cited on the Part of the Plaintiff.

In 3 *Salk.* 136. it is ſaid to have been adjudged " that the Rule " of Common Law, to exempt *&c.* extends to Caſes where a Di- " ſtreſs is given in the Nature of an Execution, by any particular " Statute, as for Poor Rates *&c.*" But perhaps this is no Authority to be relied on.

As to the next Queſtion. I agree to 2 *Lutw.* 1532. " That " a ſecond Diſtreſs can not be taken for the Remainder of the ſame " Rent, where the firſt Diſtreſs was only for *Parcel* of the whole " Rent due." But in this preſent Caſe, if the Officer is *deceived in the Value* of the firſt Diſtreſs, he *may* take a Second: So, if the firſt *dies in the Pound*, (*Dyer* 280. *b. pl.* 14.) or is by Accident *become* 3d Original Queſtion; (Mr. *Williams*'s 2d)

ineffectual; Or if the Officer did *not know* that there were ſuch other Goods; (which laſt might be the preſent Caſe.) Theſe can not be looked upon as two diſtinct Diſtreſſes for one entire Demand.

But if this be conſidered AS *an* EXECUTION; Then there can be no doubt about it. For the Sheriff may, in *ſuch* Caſe, re-enter before the Return of his Writ, to complete his Execution. And this laſt Reaſon equally anſwers the Objection to the *Warrant*: For that is *not completed* and *finiſhed*, TILL the *Whole* Demand is levied.

6th Original Queſtion; (Mr. *Williams*'s 3d.)

6th Queſtion. As to the *Exceſſiveneſs* of the 2d Diſtreſs—

He did not much contend that it was not ſo. But He inſiſted that an Action of *Treſpaſs will not* lie for taking an exceſſive Diſtreſs. For Proof of which, He relied on the Caſe of *Lynne* v. *Moody*, 2 *Strange* 851. and the Caſe in 3 *Lev.* 48. *Woodcroft* v. *Thompſon*.

The Declaration contains two Counts; One for each Treſpaſs: And the Damages are given jointly for Both. Therefore it is incumbent, upon the Plaintiff, to ſhew that *both* theſe Diſtreſſes are illegal.

Reply. Mr. *Stowe* in Reply—

4th Queſtion. The Caſes of *Tolls* are not applicable to the preſent Caſe.

Agriculture deſerves Encouragement *now*, as well as formerly.

I ſuppoſe the King's Diſtreſs might be ſold at *Common Law*. Therefore the Act *de Diſtrictione Scaccarij* does extend to *Executions*. And the 43 of *Eliz.* has not repealed it.

Theſe Beaſts are privileged, if there be ſufficient beſides: And here was ſufficient beſides. Beaſts of Cart are within the ſame Reaſon, as Beaſts of Plough: They *gaignont ſon Terre*, as the Statute of 51 *H.* 3. ſays.

3d Queſtion. The Arguments of *Obſoleteneſs* and *Ignorance* will not hold: For the *former* is not true; and the *latter* will not excuſe. 'Tis no part of the Caſe, "That they did *not at firſt know* the Value." And it is begging the Queſtion to ſay "That he may take a ſecond Diſ-"treſs, when the firſt was not ſufficient." That is the very thing that wants to be proved.

6th Queſtion. As to the Caſe of *Lynne* v. *Moody*—The Entry there was at firſt *lawful*; and there was Nothing *ſubſequent* to make that lawful En-

try a Treſpaſs. But here, the ſecond Entry to take the ſecond Diſtreſs, was *tortious:* And therefore they are liable to an Action. So that that Determination does not affect the preſent Caſe.

CUR' ADVIS'.

This Cauſe now ſtanding in the Paper, for the Reſolution of the Court,

Lord MANSFIELD delivered their Opinion.

The Rule of *Niſi prius* is ſo conceived as to ſubmit the Caſe to the Opinion of the Court, be that whatever it may; and ſo as to obviate all Objections to the Form of the Pleadings and Finding of the Verdict.

In ſtating the Caſe, He obſerved that there *were other* Things which might have been taken upon the *firſt* Diſtreſs, beſides thoſe which were actually diſtrained: But *not* upon the *Second*, (from any Thing that appears.)

Upon the firſt Argument, the two firſt Objections were laid out of the Queſtion: Eſpecially ſince the 17 G. 2. *c.* 38. So that the *Juſtices* were out of the Caſe. For a Defect in the Rate (*unappealed from*) could not avoid the Warrant; Nor is the Warrant *void*, ſo as to make it a Treſpaſs *ab initio*: And the *Juſtices* could not be Treſpaſſers, by what the Officers afterwards did.

So that it was reduced to 3 Queſtions: *viz.*

1ſt. Whether (upon the firſt Diſtreſs) AVERIA CARUCÆ could be taken and diſtrained for a *Poors Rate and Aſſeſſment*; when there were *other Things* that might have been diſtrained, and which were *more than ſufficient* to anſwer the Value of the Demand.

The 2d Queſtion turned upon two Objections to the ſecond Diſtreſs: *Viz.* 1ſt. Whether the *ſecond Diſtreſs*, under the *ſame* Warrant was at all juſtifiable, when there was enough that might have been taken upon the *firſt*; and 2dly. Whether this ſecond Diſtreſs, being *exceſſive*, *that* Circumſtance alone was not a ſufficient Ground to maintain THIS *Action of* TRESPASS, independent of any other Conſideration.

On the ſecond Argument, Mr. *Williams* not only argued very well as Counſel for his Client; but he explained the whole Learning of *Diſtreſſes at Common Law*; which were a *Nomine Pœnæ*, not a Satisfaction: And as I adopt the Reaſoning of his Argument throughout,

throughout, to avoid Repetition now, I will in a great Meaſure refer to it for the Grounds of the Opinion which the Court is of.

The 1ſt Queſtion is "Whether *Averia Carucæ* may be taken "for a *Diſtreſs upon the Poors Rate*, where there are *other* diſtrain-"able Goods ſufficient."

As to this—The *ſolid Diſtinction* is, "That the Seiſing under the 43 of *Eliz.* and ſuch like Acts of Parliament, is *but* PARTLY analogous to the *Common Law* DISTRESS, (as being repleviſable *&c*;) but is *much more* analogous to the Common Law EXECUTION; (like a *Fieri facias*, where the Surplus, after Sale, ſhall be returned.)

In the Old Common Law Diſtreſſes, which were in nature of a *Nomine Pœnæ* to compel Payment, It would have been abſurd to have ſuffered the Implements by which a Man gained his Livelihood to be holden as a Pledge: Becauſe that would have been taking from the Man, the only Means he had, of being able to pay the Debt. But this Reaſon don't hold, where the Things diſtrained may immediately he ſold by way of Satisfaction: Which, though called a Diſtreſs, yet really is, in this Reſpect, an *Execution*.

The Adjudication ſaid to have been made in *M.* 8 *W.* 3. *C. B.* in 3 *Salk.* 136. was very properly cited by Mr. *Williams*, as no ſufficient Authority, and not (of itſelf) to be relied upon: But I take it that the ſame Reaſon was gone upon, in the Caſe in 1 *Ld. Raym.* 386. *Vinkenſterne* v. *Ebden*, *M.* 10 *W.* 3. *B. R.* Where Ld. Ch. J. *Holt* ſays, "It is true, a Horſe cannot be diſtrained in a Smith's Shop *&c*: *But* there is *no ſuch* Reſtriction, where the Diſtreſs is for a PERSONAL *Duty*." And He obſerved that the Duty, in that Caſe, aroſe out of the Goods laden to be exported: So that by their being laden, the Duty commenced, and the Ship became chargeable; and, *à fortiori*, any Part of her. I take the Meaning of what He there ſays of *perſonal* Duties, to be applicable to the Caſe of *Parliamentary Duties* alluded to in 3 *Salkeld*, and conſequently to be agreeable to 3 *Salk.* 136. which ſays, It was adjudged "That "this Common Law Exemption of Utenſils, Tools, Inſtruments "of Huſbandry *&c* from Diſtreſs, holds only in Diſtreſſes for *Rent*-"Arrear, *Amerciaments &c*; but doth NOT *extend* to Caſes where "a Diſtreſs is given in the *nature of an Execution*, by any particular "*Statute*; (as for Poor Rates *&c*.")

Therefore it is more analogous to an *Execution*, than to a Diſtreſs at Common Law: And *there*, (in Caſes of Execution,) *Averia Carucæ may* be diſtrained; although there be other ſufficient Diſtreſs.

1

And

And on *this* Ground, We are All of Opinion, that there is no Objection to the *firſt* Diſtreſs, from the *Averia Carucæ* being taken: For that they *are diſtrainable* under the 43 *Eliz.* and *ſuch like Acts of Parliament.*

Thus far, You ſee, relates only to the *firſt* Diſtreſs.

As to the SECOND Diſtreſs—

The 1ſt Queſtion relating to *that*, is " Whether this *ſecond* " Diſtreſs can be AT ALL juſtified: As it was a SECOND Diſtreſs " taken under the *ſame* Warrant; when enough *might* have been " taken *at firſt*, if the Diſtrainer had then thought proper.

Now a Man who has an ENTIRE Duty, ſhall *not* SPLIT the *entire* Sum; and diſtrain for *Part of it* at one Time, and for *other Part* of it at another Time; and ſo *toties quoties*, for ſeveral Times: For *that* is great Oppreſſion. And that is the Caſe of *Wallis* v. *Savill et al'* in 2 *Lutw.* 1532: Where the ſecond Diſtreſs was holden unjuſtifiable; becauſe Both Diſtreſſes were taken for *One and the ſame* Rent; And it was the Leſſor's Folly, that He had not taken a ſufficient Diſtreſs at firſt.

But if a Man ſeiſes *for the* WHOLE Sum that is due to him, and *only* miſtakes the *Value* of the Goods ſeiſed, (which may be of very uncertain, or even imaginary Value, as Pictures, Jewels, Race-Horſes *&c*;) there is no Reaſon why he ſhould not afterwards *complete* his Execution by making a further Seiſure. And how can the Officer who ſeiſes, judge of the real or perhaps imaginary Value of the Horſes or Goods ſeiſed? The Value of them may be quite unknown to him, or may even depend upon Whim and Fancy.

It is to the *Advantage* of the Defendant that this ſhould be ſo: It is better for him that the Officer ſhould be at Liberty to ſeiſe a ſecond Time, in caſe he makes an inſufficient Seiſure the firſt Time. Or elſe, it might induce him to a Neceſſity of taking Effects of a very great Value, at firſt: For if he is to be precluded from thus making up the Deficiency, He will certainly take care not to take too little at firſt.

Now Pictures, Horſes, Jewels, Books, and ſome other ſuch Effects, may be of ſo uncertain and even imaginary or fancied Value, that it may be exceedingly uncertain how much Money they may fetch, when they come to be ſold: So that the Perſon ſeiſing may not be at all able to judge how much they may produce, upon Sale.

And if he does not take the Value of the whole at firſt, (out of Tenderneſs and Moderation perhaps,) there is no Reaſon why he ſhould not complete it by a ſecond Seiſure; Provided it be for the SAME *Sum due.*

Therefore this *firſt* Objection to the Second Diſtreſs, fails.

3d Queſtion. The *ſecond* Objection to this ſecond Diſtreſs, is the third remaining Queſtion; *viz.* It's being *exceſſive*, and as ſuch being a ſufficient Ground for an Action of Treſpaſs.

Now as to this third Queſtion, " Whether the taking an exceſſive " Diſtreſs, is a ſufficient Ground to maintain an Action of Treſ- " paſs;" ſeveral Authorities have been cited, * to ſhew " that an " Action of *Treſpaſs* will NOT *lie* for taking an † exceſſive Diſtreſs;" but " that it ought to be a *particular* Action grounded upon the " Statute:" And particularly, One Caſe, which is in 2 *Strange* 851. *Lynne* v. *Moody*, *M.* 3 *G.* 2. *B. R.* where it had been ſo adjudged in *C. B.* But the Judgment of *C. B.* was there reverſed; And it was ſaid " That the Remedy ought to be by *Special* Action " *founded on the Statute* of *Marlbridge*."

* *Vide ante pa.* 585.
† *Vide ante pa.* 581. where this Objection was urged by the Counſel for the Plaintiff.

So that it has been ſufficiently eſtabliſhed " That a *General* " Action of *Treſpaſs* can *not* be maintained for taking an exceſſive " Diſtreſs."

One Caſe indeed was cited to the *contrary:* Which was the Caſe of *Moir* v. *Munday*, *H.* 28 *G.* 2. *B. R.* And that was an Action of *Treſpaſs*; where 6 Ounces of *Gold*, and 100 Ounces of *Silver* were taken for 6 *s.* 8 *d.* which was holden to be an exceſſive Diſtreſs; And Judgment was given for the Plaintiff.

But that *appeared* upon the *Face* of it, and upon the *Pleadings*, to be exceſſive: And ſo the Court expreſly declared. And it was a Diſtreſs of *Gold* and *Silver*; which are of a *certain known* Value; and even the *Meaſure of the Value* of other Things. But it was there holden, " that in *all* OTHER Caſes of Goods or other Things " of *arbitrary* and uncertain Value, it MUST be an Action *upon* " the *Statute*." And this (as I am told) was the Diſtinction there taken: And that is therefore an *Exception* (and was there conſidered as being ſo) from the general Rule; and ſerves to *confirm* the Rule itſelf.

We are therefore All of Us of Opinion That there is *no* Cauſe of Action maintainable by the Plaintiff in the preſent Caſe, nor has he any

any Right to recover againſt ANY of the Defendants; and that the Defendants be at Liberty to enter a Non-ſuit.

The RULE taken was,
" That the *Poſtea* be delivered to, and Judgment
" entered for the DEFENDANTS."

Rex *verſ.* Inhabitants of Caverſwall.

Monday 1ſt *May* 1758.

MR. *Morton* ſhewed Cauſe againſt quaſhing the following Orders.

Two Juſtices removed *Samuel Braſſington*, *Mary* his Wife, and their five Children, (naming them, and ſpecifying their Ages) from *Trentham* to *Caverſwall:* And their Order was confirmed by the Seſſions.

The Special Caſe ſtated was this—*Samuel Breſſington*, the Pauper, was hired for a Year, and ſerved a Year in *Caverſwall.* And afterwards was *hired for a Year*, to *Edward Braſſington* of *Trentham*, at five Pounds Wages; and SERVED *him* TILL *within* THREE WEEKS *of the* END *of the Year:* When, on ſome Diſputes ariſing betwixt him and his Maſter, He was, *with his own Conſent*, DISCHARGED from his Service; and *received* All his *Wages* EXCEPT what was *deducted* FOR *the* 3 *Weeks.*

Aſſoon as he left this his Service, He went to *London*; and was *abſent about a Fortnight.*

Upon his Return, at MRS. *Braſſington*'s Requeſt, (his Maſter being then from Home,) *he* WENT AGAIN *into their Service*; and *within a Week* after the Expiration of the firſt Year, his ſaid Maſter *hired him* AGAIN *for* ANOTHER *Year*; And He ſerved Him, *in Trentham*, for *about* SIX *Months of that* SECOND *Year*, and then left him.

The SESSIONS, being of Opinion " That, as the Pauper had " ABSOLUTELY QUITTED his Service, before the firſt Year was " expired, the ſubſequent Service, under the ſecond Hiring, *though* " *with the ſame Maſter*, could NOT *be taken in Aid*, ſo as to make " up a Year's Service, and give a Settlement, within the Meaning " and Intention of the Statute of 8, & 9 *W.* 3." confirmed the Order of Removal *from Trentham* to *Caverſwall.*

This COURT was moved by Mr. *Gilbert* (on 10th *February* laſt) for a Rule to ſhew Cauſe " Why theſe Orders ſhould not be " quaſhed:".

" quaſhed:" Becauſe here was, as he ſaid, an undoubted *regular* HIRING for a Year: And the *whole* of the SERVICE, *taken together*, was for *more* than a Year. And he cited 2 *Strange* 878. *Inter Par.* of *Hanmer* v. *Elleſmere:* Where it was adjudged " that the Service " needs not be in the ſame identical Year." 2 *Raym.* 1511. *Rex* v. *Inhabitants* of *Aynhoe*. S. P. accord. *Rex* v. *Inhabitants* of *Fifehead Magdalen*, *M.* 1737. 11 *G.* 2. *B. R:* Where the Servant *left* his Maſter's Service, (leaving a Shirt at his Maſter's Houſe;) then went to his Father's Houſe (in the ſame Pariſh) before any Diſcourſe about a new Contract: But in about one Hour met his Maſter, and made a new Agreement for a Year. This was adjudged to be a *Continuance* of the former Service.

Mr. *Morton* and Mr. *Aſhurſt*, The Counſel for the Orders, upon ſhewing Cauſe now, inſiſted that the Seſſions had determined *right:* For that the former Service, under the firſt Hiring, was at a TOTAL END. They ſtated the Acts of 3, 4 *W. & M. c.* 11. & 8, 9 *W.* 3. *c.* 30. The Caſe indeed of *Rex* v. *Inhabitants* of *Aynhoe*, 2 *Ld. Raym.* 1511; And the Caſe of * *Brightwell* and *Weſt-banning*, upon which that Reſolution was grounded, (though otherwiſe not in itſelf agreeable to Lord *Raymond*'s own Opinion,) they allowed, are Authorities not to be ſhaken *now*; " that a Hiring for a Year, and a Service " for a Year, *though* not under the *ſame* Hiring nor within the " *ſame* Year, ſhall be conſtrued to gain a Settlement." But then that muſt be an uninterrupted Continuance in the ſame Service. And accordingly that was the Caſe of a *continued uninterrupted* Service: But here, the *Contract* was *abſolutely determined* and *diſſolved. Tr.* 1745. 18 & 19 *G.* 2. *B. R. Rex* v. *Goodneſtone*, † is rather an Authority that this preſent Settlement is bad: For there the Court conſidered the Man, as being *all the Time* IN *the Service* of his Maſter; (though he was, with his Maſter's Leave, gone to Sea upon the Herring-Fiſhery.)

* *Hil.* 1 G. 1. *B. R.* See *Lucas* 287. S. C.

† *V.* 2 *Strange* 1232. S. C. (though miſintitled.)

They alſo inſiſted that this could not poſſibly be eſteemed *a* CONTINUANCE *in the* SAME *Service*, under the Act of Parliament: Which the Caſe of *Fifehead*, *Tr.* 9 *G.* 2. *B. R.* might very well be conſtrued to be.

Mr. *Norton* and Mr. *Gilbert*, The Counſel on the other Side—, for quaſhing the Orders, cited the ſame Caſe of *Goodneſton*, (*V. ſupra,*) as a liberal Conſtruction in *Favour* of Settlements: Where the Servant had Leave to go and did go to the Herring Fiſhery, 3 Weeks before the End of his Year; yet the Settlement was holden good.

The Gaining Settlements has been always favoured: And Natural Birth-right and Juſtice demand that the Right of the Subject ſhould not be narrowed. And in thoſe Caſes where *ſubſequent* Hirings and

Services have been *taken in Aid*, yet there has been a *total End* of the *firſt* Contract, as well as there can be ſaid to be in the preſent Caſe. However, it is *not neceſſary* that the Contract ſhould continue uninterrupted during the WHOLE Time.

The Court have allowed them to be acquired under *different Contracts*, under *different Services*, in *different Pariſhes*. And a *temporary Interruption* or even Diſſolution of the Contract will not vary the Caſe: For in many of the adjudged Caſes, the *firſt Contract was even totally diſſolved*, as much as it can be pretended to be in the preſent Caſe.

This Man was of CREDIT *enough*, to be hired for a Year: And that is the *proper Teſt*, of his being a Perſon likely or not likely to be chargeable. Nay, he is even of Credit enough to be hired for a *Second* Year, after his firſt was expired: Which makes it ſtill ſtronger.

And this SERVICE alſo is in itſelf ſufficient to gain him a Settlement. The Wife received him again *&c.* And the Wife's Act is the Act of the Huſband; and beſides, is ratified by him. And it appears that the Servant * *returned* to his Service, within the *firſt* Year.

* Note. The Words of the Order are, "*Went* AGAIN *into* their Service."

To the Caſes cited in Support of the Orders—

It was replied—that in the Fiſhery-Caſe, *Rex* v. *Inhabitants of Goodneſtone*—the Man *hired a Deputy* to ſerve for him: And *that* was adjudged to be a *Continuance* in his Maſter's Service. Whereas here, his Service was *abſolutely at an End*. And the Words of the Act are "That he ſhall CONTINUE *and* ABIDE in the SAME "*Service* during the Space of one whole Year." [*V.* 8, 9 *W.* 3. *c.* 30. §. 4.] Reply.

LORD MANSFIELD ſaid the Determinations upon theſe Poor Laws ought to be according to plain common Senſe, and with the leaſt Subtlety poſſible.

A *Hiring for a Year* was neceſſary by the * former Act: A SERVICE *for a Year* was added, by the † latter.

* 3, 4 *W. M. c.* 11. § 7.
† 8, 9 *W.* 3. *c.* 30. § 4.

And where the Maſter gives *Leave*, it is a *Continuance* in the *ſame* Service: As in that Caſe of the Herring-Fiſhery, where a Man with his Maſter's Conſent, hired one to ſerve for him. (*V.* 2 *Strange* 1232.) So where there has been both a Hiring for a Year, and a Service for a Year, (though the original Hiring was for leſs than a Year,) and the Service *continues*; it has not been required

that the Hiring for the whole Year ſhould be ſtrictly reckoned from the firſt Moment of the Service: But it ſhall be conſidered as ſufficient, that there were *both a Hiring for a Year* and a *Service for a Year*.

In the Caſe of *Fifehead*, the Service was, in my Apprehenſion, (and ſo Ld. Ch. Juſt. *Lee* and the reſt of the Court alſo took it,) a *continued* Service.

But here was a CHASM *of a Fortnight or* 3 *Weeks*. And the firſt Contract was ABSOLUTELY *diſſolved*; and *ſo* CONTINUED *for a Fortnight or* 3 *Weeks*. Therefore this laſt Service can NOT *be connected* with the former Part of the Year. For if a *Chaſm of a Fortnight or* 3 *Weeks* be not a *Diſcontinuance* of the Service, it will be hard to ſay what *is*.

Therefore I hold that here was no Settlement gained in *Trentham*.

Mr. Juſt. DENISON—The true Reaſon of the liberal Conſtructions of Services for a Year has been *becauſe* the ſame Service CONTINUED: Whereas this Caſe is the very REVERSE; it being EXPRESSLY *ſtated* " That he was DISCHARGED." So that We *cannot help taking it* to be TOTALLY *diſſolved*.

Indeed in the Caſe of *Aynhoe*, and in that of *Brightwell* and *Weſthanning*, the Court (though indeed they were upon a Conſtruction ſomewhat ſtrained too) determined them upon the Foot of the Service *continuing*: Whereas *this Service was* TOTALLY *at an End*.

Therefore He concurred.

Mr. Juſt. FOSTER—The Caſe of *Fifehead* confirms the Principle that the Court now go upon. There they did not conſider ſo *ſmall an Interruption* as *One Hour* or thereabouts, as an entire Diſſolution of the Contract. But here it is a TOTAL *Diſſolution*, and the two Services *can* NOT *be connected*.

Therefore he concurred; and upon the ſame *Principle*, " That " it ought to be a *continued uninterrupted* Service."

Mr. Juſt. WILMOT concurred.

The Caſes of Hiring for *leſs than a whole* Year, and Service (under *ſuch* Hiring) for *Part* of a Year; and then a ſecond Hiring for a *whole* Year, and Service for Part of it, is indeed within the WORDS

of the Act; where the WHOLE *Service together* amounts to *One whole* Year. But here is *both* a *Diſſolution of the Contract*, and *alſo* an *End of the Service*; Both, within the Firſt Year. Whereas in the Caſes cited, the *Service* CONTINUED. The Caſe of *Fifehead* was only, as Lord Ch. Juſt. *Lee* expreſſed it, a *Heſitation* of the Boy, for an *Hour*. Therefore it is plain that *if* Lord Ch. Juſt. *Lee had* conſidered it AS a *Diſſolution* of the Contract and an *End* of the Service, He would have held the Settlement to be bad.

And it is much the beſt Way to determine theſe Caſes upon the Poor Laws, according to plain and common Senſe. For if once We go upon *Niceties* of Conſtruction, We ſhall not know where to ſtop: For One Nicety is made a Foundation for another; and that Other for a Third; And ſo on, without End.

Therefore He concurred entirely with the Reſt of the Court; and upon the ſame * Principle, "That it ought to be an *uninter-* "*rupted* CONTINUANCE of the *ſame* Service;" or elſe, that the ſecond Service could never be connected with the former.

* This Principle was alſo fully ſettled and eſtabliſhed, in *Rex* v. *Inhabitants* of *Croſcombe*, *M.* 1745. 19 *G.* 2. *B. R.*

Per Cur. unanimouſly,
BOTH ORDERS AFFIRMED.

Baldwin et Ux' *verſ.* Blackmore Eſquire.

Tueſday 2d *May* 1758.

THIS was a Caſe reſerved at the Aſſizes for the County of *Lancaſter* in an Action for an Aſſault upon, and *falſe Impriſonment* of the Plaintiff's *Wife*.

CASE—That the Plaintiffs *William Baldwin* and *Suſannah* his Wife, being *Paupers*, legally ſettled in the Townſhip of *Banknewton* in *Yorkſhire*, and having been regularly and properly *removed by an Order* of two Juſtices of the County of *Lancaſter* from *Marſden* in *Lancaſhire*, to the ſaid Townſhip of *Banknewton* in the ſaid County of *York*, as the Place of their laſt legal Settlement: Which Order was not appealed from. That afterwards, they (*Both* of them) RETURNED of their *own accord and without* bringing any Certificate with them from *Banknewton* (to which they belonged,) to *Marſden* aforeſaid, from whence they had been ſo removed by the ſaid Order of two Juſtices. Of which, Complaint being made in Writing, and upon Oath, to the Defendant, who was a Juſtice of Peace of the ſaid County of *Lancaſter* wherein the ſaid Pariſh of *Marſden* lay, by the Overſeer of the ſaid Pariſh (from which the Paupers had been lawfully removed, and to which they unlawfully returned,) He iſſued his Warrant to bring the two Paupers (the Man

Man and his Wife) before him: Who being accordingly brought before him, and the Facts being fully proved, upon Oath, made by *Thomas Murgatroyd*, one of the Churchwardens of *Marsden* aforesaid, He committed BOTH of them, the Man AND *his* WIFE, to the *House of Correction*, "there to remain UNTIL they should be "DISCHARGED BY DUE COURSE OF LAW." The Warrant was directed to the Constable of *Marsden*, to convey; and to the Master of the House of Correction in *Preston*, to receive: And was in these Words, "Whereas *Thomas Murgatroyd*, One of the Churchwar- "dens of the Township of *Marsden* in the said County, hath made "Oath before Me, One of his Majesty's Justices of the Peace in "and for the said County, That *William Baldwin* and *Susan his* "*Wife*, poor Persons having been lately removed by an Order un- "der the Hands and Seals of *Roger Hesketh* and *Rigby Molineux* "Esquires, Two of his Majesty's Justices of the Peace and *Quorum* "in and for the said County, from the said Township of *Marsden* "unto *Banknewton* in the West Riding of the County of *York*, as "to their last lawful Settlement, are now returned back, to inhabit "in the said Township of *Marsden*, *contrary to* THE *Statute* in this "Behalf made; These are therefore, in his Majesty's Name, to "command you forthwith to convey THEM the said *William Bald-* "*win* and *Susan his Wife*, to the *House of Correction* aforesaid, "and deliver THEM to the Master thereof; hereby requiring Him "to receive THEM into his Custody, and THEM safely to keep "UNTIL they shall thence be discharged by *due Course of Law*. "Hereof fail not, at your Peril—Given *&c.* this 8th Day of *Fe-* "*bruary &c.*

That under this Warrant of Commitment, the Plaintiff and his Wife were kept in Prison in Custody of the Keeper of the House of Correction at *Preston*, from 12th *February* to 17th *March* following.

Notice was proved to be given to the Defendant of bringing the Action, one Month before it was brought.

Upon the Trial of this Cause, There was a Verdict for the Plaintiff, and 1 *s.* Damages, subject to the Opinion of the Court upon the two following Questions; *viz.*

1st. Whether there ought not to have been a *previous Conviction* of *Vagrancy*.

2dly. Whether the WIFE could be convicted of *Vagrancy*, or be liable to be sent to the House of *Correction* for returning without a Certificate; as She only accompanied and resided with her *own Husband*.

N. B. By 13, 14 *C.* 2. *c.* 12. § 3. It is provided that any Perſon or Perſons *may go* TO WORK in any Pariſh or Place, *carrying* with them a *Certificate* of their being Inhabitants of their proper Pariſh: And, in ſuch Caſe, if they ſhall not return when their Work is finiſhed; or ſhall fall ſick or impotent, whilſt they are in the ſaid Work; it ſhall not be accounted a Settlement; but two Juſtices of the Peace may convey *the ſaid* Perſon or Perſons to the Place of his or their Habitation as aforeſaid. And if *ſuch* Perſon or Perſons ſhall refuſe to go, or ſhall not remain in ſuch Pariſh, but *ſhall* RETURN, *of* HIS *own Accord*, to the Pariſh from whence He was removed; it ſhall and may be lawful for any Juſtice of the Peace of the City County or Town-Corporate where the ſaid Offence ſhall be committed, to *ſend* SUCH *Perſon or Perſons* offending, to the *Houſe of Correction*, there to be *puniſhed as a* VAGABOND; or, to a *public Workhouſe* (in the Act after-mentioned,) there to be employed in Work or Labour.

By 17 *G.* 2. *c.* 5. § 1. It is enacted, that Whereas the Number of Rogues Vagabonds Beggars and other idle and diſorderly Perſons daily increaſes *&c*; All Perſons who threaten to run away *and* LEAVE *their* Wives *or Children* to the Pariſh; and ALL *Perſons who ſhall* UNLAWFULLY *return* to ſuch Pariſh or Place from whence they have been legally removed by Order of two Juſtices of the Peace, WITHOUT *bringing a Certificate* from the Pariſh or Place whereunto they belong; And alſo all Perſons who *&c &c ſhall be deemed* IDLE AND DISORDERLY *Perſons:* And *it ſhall and may be lawful* for any *Juſtice of Peace* TO COMMIT *ſuch Offenders (being thereof* CONVICTED before Him, by his own View, or by their own Confeſſion, or by the Oath of One or more Credible Witneſs or Witneſſes,) to the *Houſe of Correction*; there to be kept to hard Labour, for any Time NOT *exceeding one Month.*

As to the two Points, It was inſiſted on Behalf of the Plaintiff—

1ſt. That there ought to have been a *previous* CONVICTION of Vagrancy, before the Juſtice could commit to the Houſe of Correction at all.

2dly. That *Suſannah* the Wife, following and *reſiding* WITH *her* OWN HUSBAND to and at *Marſden*, could not be convicted of VAGRANCY, for returning there without a Certificate.

This Cauſe was firſt argued on *Tueſday* the 21ſt of *June* 1757, by Mr. *Yates* for the Plaintiff, and Mr. *Clayton* for the Defendant.

And again on *Friday* the 11th of *November* following, by Serjeant *Poole* for the Plaintiff, and Mr. *Norton* for the Defendant.

For the Plaintiff. For the Plaintiff it was argued to the following Effect.

1ſt Point—On 17 *G.* 2. a *previous Conviction* is expreſly made neceſſary; The Words of it are, "being thereof *convicted &c.*" And 3 Methods of Conviction are ſpecified; *viz.* View, Confeſſion, and Proof by One or more Witneſſes.

Now here was Nothing but the mere Complaint and Information of the Pariſh-Officer; without any *Adjudication* by the Juſtice, "that it was true."

Therefore the Juſtice proceeded without any Authority.

On 13, 14 *C.* 2. No previous Conviction is indeed neceſſary, by any expreſs Words of the Act of Parliament. But ſuch an arbitrary and extraordinary Power ought to be very narrowly watched. However, this cannot be a Proceeding under this Statute of 13, 14 *C.* 2. For the Foundation of this Warrant is the Information of the Churchwarden on Oath; which plainly goes upon an Offence created ſince that Statute of *C.* 2. *viz.* "Returning *without bring-*" *ing a Certificate* from the Pariſh to which they belonged."

2d Point—This Return of the Woman cannot be conſidered as an *unlawful* Return. A Feme Covert is *obliged* to follow her Huſband. If She commits Theft, in Company with her Huſband, it ſhall be taken to be done by the Coercion of her Huſband. 1 *Hawk. P. C. fo.* 2, 3. *Sect.* 9, 10, 13. *Bro. Coron.* 108. *Kelynge* 31, 37. *Hale's H. P. C. Vol.* 1. *pa.* 516. and *pa.* 47. 3 *Inſt.* 108.

Indeed there are Caſes where the Wife is the PRINCIPAL *Actreſs*, (as keeping Bawdy-houſes,) where She is puniſhable with her Huſband. But here, SHE is guilty of *no* Offence at all.

As to it's being a hard Action—Our's is a very hard Caſe.

For the Defendant. *Contrà* for the Defendant (the Juſtice of Peace, who had committed the Woman,) it was argued to this Effect;

1ſt Point—If this Proceeding ſhould be taken to be on 17 *G.* 2. And even ſuppoſing a Conviction to be previouſly neceſſary, Yet it is not neceſſary that ſuch a Conviction ſhould be *expreſly* STATED upon this Caſe: But the Juſtice may, *at any Time*, draw up a Conviction in Form, upon the Facts here ſtated; which Conviction he was not obliged to draw up *in Form*, till called upon.

1 But

But this Proceeding is upon 13, 14 *C.* 2. *c.* 12. § 3. And the Caſe is within the Words of that Act, *viz.* "Returning of her own "Accord, to the Pariſh from whence ſhe was removed."

And theſe two Acts (of 13, 14 *C.* 2. and 17 *G.* 2.) are conſiſtent: And the latter does *not repeal or vacate* the former; It operates as a *Saving*, under that Act. And upon this former Act, no Conviction is neceſſary.

2d Point. A Wife may be guilty and liable in committing a Crime *with* her Huſband, from Treſpaſs * up to Murther and Treaſon. In Dr. *Huſſey*'s Caſe, in *Hob.* and in Lord *Coke*, A General Rule is laid down, as to married Women, "That where "they offend voluntarily and knowingly, they are liable to Puniſh- "ment."

* *V. Hob.* 96. and 9 *Co.* 73. Dr. *Huſſey*'s Caſe: Where whatever may be to the Purpoſe in the preſent Caſe, (if any Part of it is at all ſo,) will be found.

This is a new Law; and the Wife was intended to be included in it: And if Wives are within the Miſchief of a Statute, they ſhall be included in it. The matrimonial Vow muſt be underſtood as reſtrained to *lawful* Acts: The Wife ought not to obey her Huſband in unlawful Acts.

In Treſpaſs *vi et armis*, the Wife might be ſeiſed for the Fine. And the Coercion of the Huſband *only excuſes* Her from ſuffering for the Crime: It does not make the Act *lawful*. She ought not to commit Theft; although the ſuppoſed Coercion of the Huſband excuſes Her from Puniſhment.

This Act expreſly includes *All* Perſons whatſoever. The Words are general; and ſo alſo was the Intention.

And the Huſband's Act (of returning) is *unlawful:* And therefore She ought not to follow him, and thereby commit an unlawful Act Herſelf. Nor is She obliged to follow him *for Maintenance:* For the Pariſh to which they were removed, is obliged to maintain Her, in the ſame Manner as if her Huſband had run away.

If it were otherwiſe, here would be an innocent Pariſh, who muſt be at a continual Expence of removing the Wife back, *toties quoties*, without being reimburſed for their Charges: And if She was *obliged* to return with her Huſband once, She would *always* be obliged equally ſo to do, whenever He ſhould return Himſelf.

All their Reaſoning would hold juſt as ſtrongly in obliging the Wife *to aſſiſt* her Huſband and *obey him* in *keeping a Bawdy-houſe*,

as

as in *any other* ILLEGAL Act. Yet for keeping a Bawdy-house, she is certainly punishable with her Husband. *

* 1 *Salk.* 384. *Regina* v. *Williams, M.* 10 *Ann. B. R.* and *Rex* v. *Hayward*, a later Case.

This is not a Commitment in *Execution*, and by Way of *Judgment* for an Offence: It is a Commitment on 13, 14 *C.* 2. and not on 17 *G.* 2. nor for any definite Time. They might have been *bailed* on this Commitment: For it is only, "*till* discharged by due "Course of Law." And though the Words of the Act of 13, 14 *C.* 2. are "*There to be punished as a Vagabond*;" yet this is only in Order to be amenable to Justice upon a *future* Indictment. And so the sending them "to a *public* † *Workhouse*, there to be "employed in Work and Labour," is no Punishment to a poor Person, who is *used* to Work and Labour.

† But the Commitment is "to the House of *Correction*."

It would be highly UNreasonable that the Husband (who could not bring an Action in his *own* Name and on his *own* Account) should be permitted to bring it on Account of his *Wife*, and in *her* Name, against a Magistrate who has acted for the public Good; and HIMSELF *receive the Benefit* of what has been originally occasioned by and taken it's Rise from his OWN UNlawful *Act*.

Reply. The Counsel for the Plaintiff replied to the following Effect.

As to the Conviction being still in the *Power of the Justice* to draw up in Form—It does not appear that there *ever will* or *can* be such a Conviction: But it is plain that there IS *none*.

It does not any how explicitly *appear*, *upon* WHAT *Act*, this Commitment is founded. But however, it *must* be on 17 *G.* 2. because the Information is for an Offence expressly within that Statute; and the Warrant of Commitment is founded upon the Information. Therefore there ought to have been a *previous Conviction*.

The Certificate could not be in the *Wife*'s Power to produce: Her Husband must have it, if there was any.

We do not deny that the Wife was so far *within the Intent* of this Act of Parliament, that She was *capable* of being a Vagrant: She might have gone about begging; She might have returned to this Parish without her Husband. But We say that here is no Act of Vagrancy stated; and for the particular Fact that *is* stated, her being *sub Potestate Viri*, was an *Excuse* to Her: She is within all the Excuses mentioned in Dr. *Hussey*'s Case, for Person's guilty against the *Letter* of a Law.

The Hardship of the Parish to which these Persons returned cannot destroy the General Law of the Land.

A married Woman's Keeping a *Bawdy-houſe* jointly with her Huſband, varies from the general Principle: Becauſe there She is the PRINCIPAL *Actor*, and *Chief Manager* and *Conductor*.

The preſent Commitment is, " *till* diſcharged *by due Courſe of* " *Law*." But ſtill it may be a Commitment on 17 *G.* 2: As it does NOT EXCEED a Month; though it does *not indeed fix* it TO a Month.

It is a quite new Doctrine, " that Impriſonment in a Houſe of " Correction is no Puniſhment:" Certainly, It is a Puniſhment, and no ſmall One.

As to the Huſband's becoming intitled to the Damages, when recovered; that ariſes from the *Law* itſelf: But it is properly the *Wife*'s Action, and will *ſurvive to* HER; though She (being Coverte,) cannot by Law bring it in her *own Name*. This therefore is the *Act of the Law*; and ought not to be objected to the *Huſband*, much leſs, to the *Wife*, whoſe Action this properly is.

Lord MANSFIELD deſired to be informed how the USAGE was: (though it would not indeed, as he obſerved, alter the *Law*.)

The Counſel had not made this Inquiry. But Both the Counſel, and alſo Mr. Juſt. FOSTER and Mr. Juſt. WILMOT ſaid, That the Act of 13, 14 *C.* 2. had been ALWAYS *conſidered* as GENERAL, and NOT *as tied up* by the particular Words of Reference to that *particular* Caſe of *going to work*, *only*. And

Lord MANSFIELD ſaid that perhaps that might have been practiſed for the Sake of General Good.

He ſtrongly intimated that it would be a right Thing to *compromiſe* this Cauſe: And if it ſhould not be ſo, He deſired to know the *Practice and Uſage*, about ſending the *Wife* to the Houſe of Correction, with the Huſband.

As to 13, 14 *C.* 2. He ſaid He was now ſatisfied by his Brother *Foſter*, " That it had always been *taken* as a GENERAL Law;" notwithſtanding the Words of Reference; (which had ſtruck Him on the Reading.)

Mr. Juſt. FOSTER deſired to know alſo how the Practice had been as to *Children*.

Mr. *Clayton* (who was Counſel for the Defendant in the former Argument) ſaid He had known the *Children* alſo committed.

CUR' ADVIS', (i. e. *eventually*, if not compromiſed.)

On *Tueſday*, 25th *April* 1758, This Caſe being mentioned at the Bar, as ſtanding for the Opinion of the Court,

Mr. *Norton* (for the Defendant) then ſaid He had ſeveral Certificates of it's being the PRACTICE, for Juſtices to commit the WIFE, as well as the Huſband, for returning to the Pariſh from whence they had been removed; *although* She ſo returned, WITH *her Huſband*.

Lord MANSFIELD now (on *Tueſday* 2d *May* 1758,) delivered the Reſolution of the Court.

He firſt ſtated the whole Caſe very fully. And He prefaced, That it was manifeſt that the Juſtice had *not* acted *intentionally* wrong: And it is plain that the Jury were of that Opinion, as appears by their giving *only* 1 *s.* Damages: The Court would gladly therefore have leaned towards excuſing this Gentleman from ſuffering for what he had honeſtly and without any bad Intention done; if they could have found him juſtifiable by any legal Excuſe.

But there is One FATAL *Objection* to his Proceeding, which We cannot get over; and which puts all the *other Points*, out of the Caſe: And that is, that the WARRANT of Commitment IS ILLEGAL.

The *Legality of the Warrant* depends upon *Two* Acts of Parliament, or at leaſt upon *One* of them: For there are Two Acts of Parliament upon *One* of which two, this Warrant muſt be founded; though it does not appear, upon *which* of the Two, the Juſtice proceeded.

* *Vide ante pa.* 597. † 8, 9 *W.* 3. *c.* 30. firſt introduced them.

Theſe two * Acts are 13, 14 *C.* 2. *c.* 12. (a Law made *before* Certificates under the † late Acts exiſted;) And 17 *G.* 2. *c.* 5. (which relates to Perſons returning, *&c.* without bringing ſuch a Certificate.)

Now this Warrant is *not* within this *former* Act, of 13, 14 *C.* 2: Nor is the Caſe itſelf within it. Theſe Perſons did not go to any Pariſh, *carrying with them* a Certificate of their being Inhabitants of their proper Pariſh: Nor is the Commitment made "to the "Houſe of Correction *there to be puniſhed as a Vagabond*;" Nor "to a *public Work-houſe*, *there to be employed in Work and Labour*;" as that Statute directs. So that the Warrant is not at all agreeable to the *Directions* of THAT Act, which ſpecifies the *particular Man-*

ner of ſending the Offender to the Houſe of Correction, or to a public Work-houſe: For it is, only, " to remain TILL *diſcharged* " *by due Courſe of Law.*"

Neither can this Warrant be good upon the *latter* Act, of 17 *G.* 2. *c.* 5. Becauſe though this is indeed a Commitment to the Houſe of Correction, (which the latter Act directs,) Yet it is " *to* RE- " MAIN there TILL *diſcharged by due Courſe of Law.*" Whereas, by *this Act*, the Power given the Juſtice is " To commit ſuch Of- " fenders to the Houſe of Correction, there to be kept to hard " Labour for any Time NOT *exceeding* ONE *Month.*" But this *Warrant* is quite *general*: It is *an* IN*definite* Commitment; NOT for a *preciſe limited Time*, as this Act expreſly directs and requires.

Therefore the Warrant of Commitment is totally illegal: And conſequently, the Plaintiff is intitled to the Damages that he has recovered.

And You'll obſerve, that We *go* ONLY *upon the* WARRANT: Which for the Reaſons I have mentioned, We hold to be totally *illegal.*

RULE That the *Poſtea* be delivered to the PLAINTIFF.

Thomas *verſ.* Powell.

Friday 5th *May* 1758.

A Feigned Iſſue had been agreed upon, between the Parties and by Approbation of the Court, in order to try a Corporation-Right.

This feigned Iſſue had been now tried: And it was found for the Proſecutor in the Original Motion for the Information in the Nature of a *Quo Warranto.*

The Queſtion now was, (upon a Motion for the Direction of the Court, to the Maſter,) Whether the Proſecutor ſhould have ALL *his Coſts previous to the feigned Iſſue*; or *any*, and *what Part of* them: Or whether he ſhould *only* have his Coſts FROM the *feigned Iſſue.*

Mr. *Aſton* and Mr. *Nares*, who were Counſel for the Plaintiff, inſiſted to have *All* the Coſts: *Viz.* Coſts of the *Original Application*; alſo Coſts of *ſettling the Iſſue*, (which had been diſputed and ſquabbled about;) as well as the Coſts of the Trial of the Iſſue, in the common Courſe. They cited *Rex* v. *Griffiths*, *M.* 1755, 29 *G.* 2.

B. R.

B. R. Rex v. *Juſtices of Walſall, alias Stubbs et al'* v. *Nichols et al'*, *Tr.* 1755, 28 *G.* 2. *B. R. Herbert* v. *Williams*, *P.* 25 *G.* 2. *B. R. Baſkerville* v. *Redding*, there cited. And 1 *Strange* 33. *Dominus Rex* v. *Powell et al'*. (Which laſt was only to ſhew that an Information in the Nature of a *Quo Warranto*, is to be conſidered as a Civil Suit, with regard to Coſts.)

And they ſaid that this being of the Nature of a *Civil* Suit, in the Original Application to the Court, was different therefore from Caſes where the Original Application was of a *Criminal* Nature, where *no Coſts were payable* by the Defendant.

Mr. *Morton*, on Behalf of the Defendant, denied that *any more* Coſts ought to be here taxed, than *merely* thoſe *of the feigned Iſſue*; and even thoſe, *only* from the Time of the Iſſue *joined*.

For he inſiſted that the Original Rule "to ſhew Cauſe why the "Information ſhould not be granted," was *actually* DISCHARGED, even *before* this feigned Iſſue was agreed upon as a proper Method of Trial of the Right: So that there was no Pretence for the Coſts of *that* Application being now included. And the Diſputes about the Perſon to be made Defendant in the feigned Iſſue, were, and could not but be, *prior* to its being *joined*.

Mr. Juſt. DENISON and Mr. Juſt. WILMOT were clear that the Coſts to be taxed upon ſuch a feigned Iſſue, were ONLY the Coſts *of the feigned Iſſue itſelf*, and NOT any Coſts *antecedent* to the *Conſent* to "try the Right in a feigned Iſſue." And this was ſettled (as Mr. Juſt. *Wilmot* ſaid) in the Caſe of *Walſal*. *

* It was ſo: on 12th *June* 1755, *Tr.* 28 *G.* 2.

And they *Both* ſaid, That it would be endleſs to enter into the Coſts *previous* to the feigned Iſſue: For they would always be ſure to have Diſputes, "Which Party was right, And which wrong, at "firſt and upon the Original Motion."

Lord MANSFIELD concurred in their Opinion: Which He explained to mean, (and to which They aſſented,) "*from the Time* "when the feigned Iſſue was FIRST *Ordered and agreed to.*"

Note—In the preſent Caſe, The Coſts of the Diſputes about *ſettling* the feigned Iſſue, AFTER *it* was agreed upon and Ordered, were conſidered as *Part of* the Coſts which were to be taxed to the Plaintiff; (who had *prevailed* in the Queſtions diſputed, both before the Maſter, and before the Court.)

Dearden, Aſſignee &c. *verſ.* Holden.

THE Queſtion was, " Whether a Plea of the Statute of 23 *H.* " 6. *c.* 10. (againſt Sheriffs taking Bonds *Colore Officii &c.*) " And that this Bond was taken for Eaſe and Favour *&c*; be or be " not an ISSUABLE *Plea*, within a Judge's Order giving the De- " fendant Time to plead, upon the *uſual Terms* of pleading an *iſ-* " *ſuable Plea &c.*"

In the preſent Caſe, the Plaintiff had *ſigned Judgment*, upon the Defendant's having *thus* pleaded, under the *uſual* Order from a Judge, " for Time to plead, on the common and uſual Terms:" For the Plaintiff conſidered this Plea, as a *Nullity*; and now inſiſted that it was ſo; and therefore that he had a Right to ſign Judgment, without giving any Rule to plead.

But The MASTER reported this Judgment to be irregular: And to this, The COURT alſo aſſented—For

Per Cur' This *is* an *iſſuable* Plea: For if the Plaintiff had taken Iſſue " That the Sheriff *did* NOT let the Defendant go, for Eaſe and " Favour," It would have brought all Matters ſuggeſted in the Plea, to Iſſue.

The Judge's Order does *not confine* the Defendant to plead the GENERAL *Iſſue*. The preſent Plea is within his Order: And the Plaintiff *might* here have taken Iſſue (as above,) " That the Sheriff did " *not* let the Defendant go, for Eaſe and Favour:" Which would have let in all the Matters in Iſſue.

RULE " for ſetting aſide the Judgment, with Coſts," MADE ABSOLUTE.

But it being ſuggeſted by the Plaintiff's Counſel, " That the " Plea was, in Truth and Reality, only a *Sham* Plea, put in mere- " ly to gain Time;"—

Mr. *Norton*, on Behalf of the Plaintiff, moved that the Defendant might *plead as he would ſtand by*.

To which, it being conſented, on Behalf of the Defendant, *This* alſo was made Part of the RULE.

The End of *Eaſter* Term 1758. 31 *Geo.* 2.

Trinity Term

31 Geo. 2. B. R. 1758.

Friday 26th *May* 1758.

Rex *verſ.* James Clarke, Eſquire.

A *Habeas Corpus* had been iſſued during the laſt Vacation, by Lord *Mansfield*, bearing Teſte the 8th Inſtant, being the laſt Day of the preceding Term, directed to *James Clarke* Eſquire, commanding him to have *before his Lordſhip* AT HIS CHAMBERS in *Serjeants Inn*, immediately, the Body of *Lydia Henrietta Clarke*, his Daughter, then detained in his Cuſtody, together with the Day and Cauſe of her Taking and Detainer; then and there to undergo and receive what his Majeſty's ſaid Chief Juſtice ſhould then and there conſider of, concerning her in this Behalf.

The Writ was now returned *here in Court:* and the ſaid *Lydia Henrietta Clarke* produced.

Mr. *Clarke* the young Lady's Father, *returned* That She was *his* DAUGHTER; and that on the 22d of *March* laſt, She, without any Leave or Notice to Him or to his Wife (her Mother,) ſecretly went away from his Houſe in *Great Ormond Street*, and took with her a Box or Bundle containing ſeveral Sorts of Wearing-Apparel and about 27*l.* in Money.

That, in about 12 or 14 Days time, He, being credibly informed " That his ſaid Daughter had been INVEIGLED *away* from " him *by the Inſtigation* of one *James Mervin*, a Perſon of NO *vi-* " *ſible Occupation or Subſtance*, nor keeping any Houſe; *with* DE- " SIGN *to* MARRY *her to One Joſeph Iſgrave*, who is under Age, " and who about two Years ago *ſerved* the ſaid *James Clarke as a* " FOOT-BOY, and *is yet in no better Condition*; and that they " were all gone together into the Iſle of *Thanet*, where they were " *to get a* LICENCE *for ſuch Marriage*;" He being under great Concern for the Welfare of his ſaid Daughter, and in Order to *prevent* *the*

the ſaid Marriage, (She being *intitled to a conſiderable Fortune*, after her ſaid Mother's Death, and being likewiſe *his* ONLY *Child*,) took a Journey to find them out, and (if in his Power) *to prevent the ſaid intended Marriage*; and gave Directions to his Nephew Mr. *Peter Starkie Floyer*, to go in queſt of them, and if he found them, to endeavour to prevent the Marriage and to bring his ſaid Daughter to Him.

That his ſaid Nephew found them out at a Place called *Broad Stairs*, in the Iſle of *Thanet*: Where the ſaid *James Mervin* repreſented himſelf as, and *paſſed for*, the Uncle of his ſaid Daughter.

That the ſaid *Lydia Henrietta Clarke* came Home with his ſaid Nephew to his (the ſaid *James Clarke's*) Houſe in *Great Ormond Street:* Where ſhe arrived the 7th of *April* laſt: and the ſaid *James Mervin* came with her as far as *Canterbury:* But the ſaid *Joſeph Iſgrave* run away; and the ſaid *James Mervin* pretends He is gone to *Holland.*

That on her being thus brought Home to him, He did, in the *tendereſt Manner*, repreſent to Her the Ruin She was inevitably falling into, if She purſued a Deſign to marry a Perſon ſo much inferior to herſelf; and who, having no viſible Way of Livelihood, muſt reduce her to the utmoſt Neceſſity and Want, as well as Diſgrace and Shame. Whereupon She aſſuring her ſaid Father "That "She was *not* married," He, through his Duty as a Parent, and from the Affection he bore towards her, did receive her into his Houſe; and the *mildeſt and beſt Endeavours* have been uſed, *to diſſuade Her from ſuch Marriage*; *ſuch Endeavours extending no further* than what he humbly conceives to be conſiſtent with that parental Care which *may* be uſed *by a Father* towards his Child: And NO SEVERITY *whatſoever* hath been uſed to Her.

That She hath, ever ſince the ſaid 7th Day of *April* laſt, (when She came Home to his Houſe as aforeſaid) hitherto, OF HER OWN ACCORD, continued to live and reſide with Him (her Father) and ſtill doth live and reſide with him, at his ſaid Houſe, *of* HER OWN ACCORD *and under* NO *Reſtraint whatſoever.*

And there is no Other Cauſe of detaining the ſaid *L. H. C. &c.*

Note—This *Habeas Corpus* was iſſued upon an Affidavit made by the above named *James Mervin*; who made out a very *plauſible* Caſe, fully ſufficient, (if true) to obtain the Writ; but which was now alledged by Mr. *Norton*, (of Counſel with Mr. *Clarke*,) to be abſolutely and utterly FALSE *in Fact.*

In it the young Lady was ſworn to be of *full Age*, (*viz.* about 22;) which was true: But it *alſo* alledged "that She had "been *hardly uſed*, and *confined*, by her Father," and *other Circumſtances*, which were falſe.

Note alſo—That although this *Habeas Corpus* directed Her to be brought before *Lord Mansfield* AT HIS CHAMBERS; and although She *was actually brought* before *Him* whilſt He was ſitting at *Guildhall*, on *Wedneſday* laſt; Yet, the Father deſiring to have an Opportunity to take the Advice of Counſel, in ſettling the Return; And the Young Lady declaring publicly, "She had no objection to continue with her Fa- "ther, who had always uſed her with great Tenderneſs, "and much better than ſhe deſerved;" His Lordſhip judged it proper to *adjourn* it, and direct Her to be brought *into Court* the firſt Day of Term; the rather too, that She might have a Chance of being better adviſed: For if ſhe had been then taken from her Father, it was plain She would have purſued her improvident Deſign; and *Mervin* appeared at *Guildhall*, ready to have carried her off. She was *now brought into* COURT by *Virtue of the* SAME *Writ*, which was returnable *before* HIS *Lordſhip*, *at his* Chambers *immediatè*.

Lord MANSFIELD now only aſked Her, "Whether She deſired "to continue with her Father, or to go elſewhere."

She anſwered—"To *continue* with her Father."

Upon which, The Court told Her, She was at Liberty to go. Which She accordingly did.

Then Mr. *Norton* moved that *Mervin's Affidavit* might be FILED, (together with the Return of the Writ;) as Mr. *Clarke* was determined to proſecute him for *Perjury*.

The COURT ordered it to be ſo; and recommended the Proſecution very ſtrongly to Mr. *Clarke*.

3

Wilford

Wilford *verſ.* Berkeley.

Saturday 27th *May* 1758.

MR. *Morton*, on Behalf of the Defendant, moved for a *new Trial*, for EXCESSIVENESS *of Damages*. It was an Action for CRIMINAL CONVERSATION with the Plaintiff's Wife: And the Jury (a Special One) had given 500 *l.* Damages. The Defendant was a Clerk in the Exchequer, during Pleaſure, at a Salary of 50 *l.* a Year, only: Which was his *whole Subſiſtence*.

The Court were, All * Three, clear and unanimous, That although there was no Doubt of the Power of the Court to exerciſe a proper Diſcretion in ſetting aſide Verdicts for Exceſſiveneſs of Damages, *in Caſes where* the Quantum of the Damage really ſuffered by the Plaintiff could be *apparent*, or were of ſuch a Nature that the Court could *properly judge of the Degree* of the Injury, and could *ſee manifeſtly* that the Jury had been outrageous in giving ſuch Damages as greatly exceeded the Injury; Yet the Caſe was very different, where it depended *upon Circumſtances which were* PROPERLY and SOLELY *under the Cognizance* of the *Jury*, and were FIT to be ſubmitted to *their* Deciſion and Eſtimate. And they held the Caſe of Criminal Converſation with another Man's Wife to be of this *latter* kind. For the Injury ſuffered by the Huſband, and the Eſtimate of the Damages to be aſſeſſed muſt, in their Nature, depend entirely upon CIRCUMSTANCES, which it was ſtrictly and properly the Province of the Jury to judge of: And in the preſent Caſe, the Court could not ſay that 500 *l.* was too much; or that 50 *l.* would have been too little.

* Mr. Juſtice *Foſter* was abſent.

Note—The Caſe of *Chem* v. *Brigg*, *M.* 6 *G.* 1. *B. R.* before Ld. Ch. J. *Pratt*, was exactly ſimilar to this; and the very ſame Sum of 500 *l.* was given: And the like Motion was rejected then, upon the ſame Principles as the Court have now rejected the preſent One.

MOTION DENIED.

Rex *verſ.* Little.

Saturday 3d *June* 1758.

In the Crown-Paper.

THIS was a *Conviction*, returned to a *Certiorari* directed to *William Bailye* Eſq; a Juſtice of Peace for the City and County of *Litchfield*, for offering to ſell Goods *&c.* as a *Hawker and Pedlar*,

Pedlar, without *Licence*, contrary to the Statute in that Caſe made and provided.

It was dated 24*th October* 31 *G.* 2. And ſet forth that One *Thomas Preſton* Gentleman came before the ſaid Juſtice (*William Bailye* Eſq;) and gave him Information, that One *Thomas Little* (in the Writ named) after the 24th of *June* 1698, that is to ſay upon the ſaid 24th Day of *October* 1757, in the Pariſh of St. *Mary* in the ſaid City and County of the ſaid City of *Litchfield*, was *found Offering to Sale Silk Handkerchiefs*, AND *trading* AS *an Hawker Pedlar or Petty Chapman*; AND *that the ſaid Thomas Little* DID *then and there* OFFER *to ſell a Parcel of Silk Handkerchiefs*; And that he the ſaid *Thomas Little did* NOT, although required ſo to do, PRODUCE *any Licence*, as the Law in that Caſe made and provided directs, to qualify him for his *ſaid Trading:* And the ſaid *Thomas Preſton* then and there prayed that he the ſaid *Thomas Little* might be thereof convicted, according to the Form of the Statute in ſuch Caſe made and provided. Whereupon the ſaid *Thomas Little* being brought before Me, and being then and there preſent, and having heard the ſaid Information read, and being charged therewith, He the ſaid *Thomas Little* is then and there aſked by me the ſaid *William Bailye*, " if he hath any thing to ſay, or can ſay any thing, Why he the " ſaid *Thomas Little* ſhould not be convicted of the SAID *Offence* " *ſo charged upon him in Form aforeſaid*, according to the Form of " the Statute in ſuch Caſe made and provided." Whereupon he the ſaid *Thomas Little* doth now here freely and voluntarily CONFESS, before Me the ſaid *William Bailye* the Juſtice aforeſaid, " That he " the ſaid *Thomas Little* DID *offer to ſell Silk Handkerchiefs to the* " *ſaid Thomas Preſton*, in SUCH MANNER *as is mentioned in the* " *aforeſaid Information*;" and " *that he hath* NO *Licence* for ſelling " thereof." And the ſaid *Thomas Little* is now here required by me the ſaid *William Bailye* the Juſtice aforeſaid, *to* PRODUCE *a Licence* granted to him to impower or qualify him *to travel or trade*, purſuant to the Statute in that Behalf made and provided. And he the ſaid *Thomas Little* doth NOT *produce* before Me any *ſuch Licence*, or *any Licence* granted to him in *that* Behalf. And the ſaid *Thomas Little* doth not pretend or alledge that he is the real Worker or Maker of the ſaid Goods, or the Child, Apprentice, Agent or Servant of or to any ſuch Worker or Maker: *Nor doth alledge any other Matter* in his Defence.

Whereupon, and upon due and full Conſideration by me had, of and upon the ſaid Matters and Premiſſes, I do adjudge that the ſaid *Tho. Little* IS *an Hawker*, within the true Intent and Meaning of the Statute in ſuch Caſe made and provided: And it manifeſtly appeareth to me the ſaid Juſtice " That the ſaid *Tho. Little is* GUILTY " *of the* OFFENCE *in the ſaid Information above laid to his Charge*,

" *in Manner and Form* as by the ſaid Information is above alledged."

Therefore it is conſidered and adjudged by me the ſaid Juſtice, That the ſaid *Tho. Little* be, and he is convicted by me OF THE SAID PREMISSES *in the ſaid Information ſpecified*, above laid to his Charge, according to the Form of the Statute in that Caſe made and provided; And that the ſaid *Tho. Little* forfeit the Sum of 12 *l. for his ſaid Offence*; to be levied and paid according to the Form of the Statute in that Caſe made and provided. In Witneſs, *&c.*

William Bailye (L. S.)

V. 8, 9 *W.* 3. *c.* 25. § 1, 2, 3. and 9, 10 *W.* 3. *c.* 27. § 1, 2, 3. and 12 *W.* 3. *c.* 11. *V.* alſo 3, 4 *Ann. c.* 4. § 1, 4. for continuing theſe Duties: Which refers to the Deſcription in the former Acts.

Mr. *Yates*, on Behalf of the Defendant, took two Exceptions.

1ſt. That the Defendant is not brought within the Deſcription of the Acts, as *going from Town to Town &c* and *travelling &c:* But he is only *generally* deſcribed to be a Perſon that *traded* AS *a Hawker and Pedlar*, and offered to ſell *a* Parcel of Silk Handkerchiefs to the Informer.

2d Exception. That there is *no Evidence* at all of his Guilt: For it is a Conviction upon a Confeſſion; And the Confeſſion *extends no further* than barely to the ſimple Fact of offering to Sale Silk Handkerchiefs to the ſaid *T. Preſton* in *ſuch Manner* as is charged upon him. But that Charge is an *inſufficient* One.

Firſt—He cited 1 *Strange* 497, 498. *Rex* v. *Sparling*, A Conviction for profane Curſing and Swearing was held bad, for not ſpecifying the Oaths and Curſes: For the *Court*, NOT *the Witneſs*, were to judge of their being profane. So here, the *Court*, not the Witneſs, are to be the Judges Whether he was a Hawker, Pedlar or Petty Chapman, within the Deſcription of the Acts of Parliament. So, in the Caſe of *Colehorne* v. *Stockdale* there cited and reported in 1 *Strange* 493; Civil Action of Debt on Bond; And Plea " that " Part of the Money was won by Gaming, contrary to the Sta- " tute;"—It was adjudged that the *Game played at*, ought to be mentioned in the Plea: For it is *Matter of Law*, and *not* barely Evidence. So, in Convictions for killing Game, not being qualified, The Want of the due Qualifications muſt be *negatively* ſpecified. And He cited the Caſe of *Rex* v. *Chapman*, 30th *April* 1755; A Conviction on 43 *Eliz. c.* 7. for robbing an Orchard; " the ſaid " Robbing *not being* Felony, by the Laws of this Realm:" This

was

was holden not to be a ſufficient Charge for the Court to judge upon. *Rex* v. *Burnaby*, 2 *Ld. Raym.* 900, 901. was a Conviction on the ſame Act of Parliament of 43 *Eliz. c.* 7. for cutting down Trees without mentioning the Number: And it was holden inſufficient; and laid down as a Rule, that Convictions ought to be *certain* and are always taken *ſtrictly*.

Second Exception. All the Evidence to ſupport this Conviction is the Confeſſion of the Party: And that is only "That he did offer "to ſell Silk Handkerchiefs to the ſaid *Thomas Preſton in the Man-*"*ner charged* upon him in the Information." But it does not appear by the preceding Charge "That he was a Hawker Pedlar or "Petty Chapman," SUCH *as is deſcribed* by the Acts of Parliament: And if not, he cannot be liable to this Penalty.

Mr. *Luke Robinſon* for the Conviction.

This Queſtion depends, and the Conviction is founded upon the following Acts of Parliament; 8, 9 *W.* 3. *c.* 25. 9, 10 *W.* 3. *c.* 27. (which is in the very ſame Words, and is now in Force,) and 3, 4 *Ann. c.* 4. § 4. *pa.* 116.

And 1ſt. The Defendant is ſufficiently brought *within the Deſcription* of theſe Acts. The Selling Silk Handkerchiefs is only *One Overt Act* of his Trading, which is ſpecified by the Conviction. And the *Juſtice* of Peace is to judge Whether the Perſon is or is not a Hawker or Pedlar or Petty Chapman. And He has adjudged him to be a Hawker *within* the true Intent and Meaning of the Act of Parliament.

2dly. The Defendant has confeſſed the Charge, *as laid*; and that he had no Licence *&c.* If he had any Defence, he ought to have made it, before the Juſtice.

And theſe Convictions upon the *Revenue*-Laws ought *not* to be taken *ſo ſtrictly* as others. For which, he cited what is laid down in 1 *Ld. Raym.* 581. *Rex* v. *Chandler*. *Per Holt* Ch. J. "That the "Juſtices are not confined to legal Forms, in theſe Caſes: It is "enough to purſue the *Intent* of the Act."

And the Court will *preſume* the Conviction to be right, unleſs the contrary appears upon the Face of it. And ſo is 1 *Strange* 608. *Rex* v. *Theed:* Where the Court *preſumed* that the Officer came *by Day*, and not by Night; becauſe no ſuch Thing as Coming in the Night was apparent upon the Face of the Conviction.

And He alledged that Mr. *Yates*'s Caſes are not *ad idem.* In Game-Convictions it is not neceſſary to ſet out negatively, " That " he had *not* ſuch and ſuch Qualities." Nor is it neceſſary to ſet out the particular Oaths and Curſes, in Convictions for profane Curſing and Swearing. Nor in *Chapman*'s Caſe, was it neceſſary to ſet out that it was not Felony by Law.

Mr. *Yates* in Reply,

1ſt. Urged the Neceſſity and Reaſonableneſs of ſpecifying the Act of Trading *&c* in the Conviction. But this Man was *not*, in Fact, *within the Definition of going from Town to Town, and travelling:* For he reſided at a *fixed Place.*

In Game-Convictions, it *is* neceſſary to *ſpecify negatively* and *particularly*, " That the Defendant was NOT ſo and ſo qualified."

Mr. Juſt. DENISON—That has been ſo ſettled.

Mr. *Yates* proceeded in his Reply.

2dly. The Confeſſion is only " That he did offer to ſell Hand- " kerchiefs *&c:*" *Not* " That he TRADED *as a Hawker Pedlar* or " or Petty Chapman."

Lord MANSFIELD. The Act of 3, 4 *Ann.* refers to the Deſcriptions in thoſe of *W.* 3.

A SINGLE *Act* of ſelling a Parcel of Silk Handkerchiefs *to a particular Perſon*, is not a Proof that he was SUCH a Hawker Pedlar or Petty Chapman, as ought to take out a Licence, by Virtue of theſe Acts of Parliament.

Now it is certainly of the ESSENCE *of the Crime* " of NOT PRO- " DUCING a Licence," That he muſt be SUCH a Perſon as OUGHT *to take out* a Licence.

And the *Confeſſion* is only of the *Fact*, " That he ſold the " Handkerchiefs to *Thomas Preſton:*" Not " That he TRADED as " a Hawker *&c.*"

Convictions ought to be taken *ſtrictly:* And it is reaſonable that they ſhould be ſo; *becauſe* they muſt be taken to be true, againſt the Defendant; and therefore ought to be conſtrued with *Strictneſs.* I do not ſay that it is neceſſary to *define exactly, What* a Hawker Pedlar or Petty Chapman *is.* But it is neceſſary to alledge and ſhew that he ſold the Goods, or traded, AS *One.*

Mr. Juſt. DENISON concurred, for the ſame Reaſons; and thought the *Material* Averment to be here *wanting*; it not being averred "That he was *ſuch* a Hawker Pedlar or Petty Chapman as "ought to take out a Licence."

And He mentioned a Caſe of *Rex* v. *Gardiner*, *Tr.* 1738, 11, 12 *G.* 2. *B. R.* Where the Juſtice convicted a Man of keeping a Gun, BEING an Inſtrument to deſtroy Game. And ſo it certainly was: But, in Fact, the Man had never uſed it *as* ſuch; but only to keep Pigeons off from his Grounds. And the Conviction was quaſhed.

Mr. Juſt. WILMOT concurred clearly, for the ſame Reaſons. For certainly a Man may ſell Goods *as* a Hawker Pedlar or Petty Chapman, without being *ſuch* a Perſon as is *obliged* to take out *a Licence*. And *if* he is not obliged to *take out* a Licence, moſt undoubtedly he ought not to be convicted in a Penalty for *not* PRODUCING One.

Now here, it appears to Me that the Juſtice has convicted the Man of an Offence, of which He has not proved him to be guilty.

* Mr. Juſtice *Foſter* was not preſent.

Per Cur. * unanimouſly,
CONVICTION QUASHED.

Tueſday 6th *June* 1758.

Doe on the Demiſe of Hitchings and Another *verſ.* —— Lewis Eſq;

THIS was a Special Caſe from the Aſſizes, upon an Ejectment brought by a Tenant againſt his Landlord, who had formerly obtained a Judgment by Default, in a former Ejectment brought by Him againſt this ſame Tenant.

The Special Caſe ſtated for the Opinion of the Court was as follows.

Thomas Lewis, being ſeiſed in Fee, demiſed to *John Hitchings* (in Conſideration of a Fine *&c.* of 49 *l.* 13 *s.* 6 *d.*) To hold for 99 Years, if Three Perſons ſhould ſo long live; at 11 *l.* 5 *s.* payable at *Michaelmas* yearly; ſubject to a Proviſo that if the Rent ſhould be in Arrear *&c.* for the Space of one Month, being lawfully demanded; and no ſufficient Diſtreſs upon the Premiſſes *&c &c*; That then it ſhould be lawful to the ſaid *Thomas Lewis* his Heirs and Aſſigns, to re-enter *&c.*

That *John Hitchings*, the Leſſee, entered and was poſſeſſed &c; And then died; having firſt made his laſt Will and Teſtament &c; Whereby he deviſed the ſaid Term to his Son *Edward Hitchings* (the Leſſor of the Plaintiff;) and made his Wife Executrix. The Teſtator's Wife, his Executrix, duly proved the ſaid Will and duly aſſented to the Legacy: And the ſaid Deviſee *Edward Hitchings*, the Leſſor of the Plaintiff, entered into the Premiſſes, and became poſſeſſed of the ſaid Term, being then and ſtill unexpired; and continued in Poſſeſſion, till the 15th of *April* 1737.

Thomas Lewis, the original Leſſor, by his Will, &c, deviſed to ſeveral Truſtees, &c, in Truſt for *Morgan Lewis*, an Infant &c. The ſaid *Thomas Lewis* died ſeiſed &c: And the ſaid Deviſees in Truſt became ſeiſed &c. And there being 3 Years *Rent due and in Arrear* from the ſaid *Edward Hitchings* for and upon the Premiſſes, a Declaration in Ejectment was *ſerved upon the ſaid Edward Hitchings*, UNDER *and* BY VIRTUE *of* the Statute of 4 *G.* 2. *c.* 28. for the ſaid Premiſſes, on the Demiſe of the Truſtees and Deviſees aforeſaid; And Judgment was obtained thereupon, *by Default*, againſt the CASUAL *Ejector*; and a Writ of Poſſeſſion iſſued thereupon; And Poſſeſſion was delivered according to the ſaid Writ, to the ſaid Truſtees, on the ſaid 15th of *April* 1737: Which ſaid Truſtees have been in Poſſeſſion of the Premiſſes *ever ſince*. And the ſaid *Edward Hitchings* (the now Leſſor of the Plaintiff) has not ſince paid nor tendered the Rent in Arrear or any Part thereof, nor the Coſts; nor filed any Bill for Relief in Equity.

On the Trial of this *ſecond* Ejectment now brought by *Edward Hitchings* againſt the ſaid *Lewis*, *no Affidavit was* PRODUCED, " That half a Year's Rent was due before the *firſt* Declaration " in Ejectment was ſerved upon the ſaid *Edward Hitchings*; " and that no ſufficient Diſtreſs was to be found on the demi- " ſed Premiſſes, countervailing the Arrears then due; And that " the Leſſors in that *firſt* Ejectment had Power to re-enter."

On this Trial of the ſaid ſecond Ejectment, *viz.* the Ejectment brought by the ſaid *Edward Hitchings*, A Verdict was found for the Plaintiff; but ſubject to the Opinion of this Court, " Whether or " no the Plaintiff therein ought to recover."

" Whether *Edward Hitchings* the Leſſor of the Plaintiff in " the preſent Ejectment ought to recover, or not;" depended upon the following

Queſtion:

Queſtion: *Viz.* " Whether it was neceſſary for the Defendant " Mr. *Lewis* to PRODUCE an *Affidavit* That, Half a Year's Rent " *&c. ut ſupra*; And that the Leſſors in that former Ejectment had " Power to re-enter."

Mr. *Nares* made two Queſtions: *viz.*

1ſt. How far this Caſe is within the 2d Section of 4 *G.* 2. *c.* 28. " for the more effectual preventing Frauds committed by Tenants, " and for the more eaſy Recovery of Rents *&c.*"

2d. Queſtion. If it is within it, then how far the Plaintiff has proved his Title under that Statute, upon the particular Circumſtances of this Caſe.

The Firſt Point may be rendered the more clear, by conſidering how it ſtood before the Statute; and how ſince.

1ſt. *Before* that Statute, the Plaintiff in Ejectment muſt have proved " that there was Rent in Arrear;" and " that there was " no ſufficient Diſtreſs to be found upon the Premiſſes;" and, thirdly, " that he had made a lawful Demand of the Rent in " Arrear."

This Condition here annexed to the Leaſe in the preſent Caſe, is in Derogation of the Party's own Grant, and tends to defeat the Eſtate: And therefore Mr. *Lewis* would have been kept ſtrictly to prove all theſe previous Facts. And if it had been a Judgment againſt the *Caſual* Ejector; the Judgment would have been no Bar againſt the *real* Tenant, in an Action of the *meſne Profits*. Indeed if the Judgment had been obtained againſt the *Real* Tenant, or againſt the *Owner* of the Eſtate, the Perſon who obtained ſuch a Judgment needed not prove any Thing over again, in an Action for the meſne Profits. And ſo the Lord Ch. J. at *Niſi prius* at *Guildhall*, in 2 *Strange* 960. *Jefferies* v. *Dyſon*, * expreſſly lays down this Diſtinction. And here the *real* Tenant did not enter into the Rule: But it is *res inter* ALIOS *acta*.

* See this Caſe ſtated at large, by Mr. Juſtice *Dodſon, poſt.*

This Judgment in Ejectment had therefore (before the Statute) no Relation to the *real* Tenant: And conſequently, Mr. *Lewis* muſt have *ſhewn his Title* to re enter.

Then, to conſider the Caſe as *ſubſequent* to the Statute, here is *not* an Acquieſcence of 20 Years. And what ſeeming Acquieſcence there was, aroſe from the Poverty of the Party.

2dly. The next Point in Queſtion is, " Whether according to " the State and Circumſtances of this Caſe, it can be conſidered " as a Caſe *within* the Statute; and that the Plaintiff has proved a " Title *under* the Statute."

The Court will *not preſume* any Thing, in Support of a Judgment obtained by Confeſſion or Default, or in any other Way than upon a *Trial of the Merits*. *Skinner* 586. *Sanders*'s Caſe is a Proof of this: Where *Holt* Ch. J. makes the like Diſtinction.

An Inconvenience would ariſe from too great a Latitude in conſtruing this Statute. As in Caſe of *Fraud and Connivance*, in recovering the Judgment againſt the Caſual Ejector: It would be very hard, if in *ſuch* Caſe, the real Tenant could not bring an Ejectment.

Mr. *Nares* was now departing from the Facts ſtated in the Caſe; in which he ſaid it was omitted to be inſerted " That " there *was* ſufficient Diſtreſs."

Lord Mansfield—We muſt judge upon the Caſe as *ſtated*: If it is miſ-ſtated, You muſt apply to amend it. However, I do not ſee that this would be very material.

He obſerved that it was alſo ſtated, only, " That no Affidavit " was PRODUCED:" Not " That there *was* no Affidavit *at* " *all*." Alſo that Preſumptions are not dependant upon certain fixed Rules; but muſt be guided by Circumſtances: And ſuch Circumſtances are proper for the Conſideration of a Jury.

Here was an Acquieſcence of 20 Years within a few Months. And it is ſtated to be a Caſe " *within* the Act of Parlia- " ment:" Which is a material Part of the Caſe. The Ejectment is ſtated to have been ſerved " *under and by Vir-* " *tue of* this Act."

Mr. *Morton* was beginning to ſpeak on Behalf of the Defendant: But

Lord Mansfield told him that the Caſe was ſo clear on his Side of the Queſtion, that it was not neceſſary for him to give himſelf any Trouble.

Then His Lordſhip repeated the Caſe exactly as it was ſtated: (Which ſee, *ante pa.* 614, 615.)

The *General* Queſtion " Whether the Plaintiff in this laſt Ejectment ought to recover," depends upon this particular Queſtion, *viz.* " Whether the firſt Ejectment was *regularly* brought and " proceeded upon, by the Truſtees under *John Hitchings's* Will, " purſuant to the Directions ſpecified in the Act of 4 *G.* 2. *c.* 28. " § 2." This laſt Ejectment is brought near 20 Years after the former.

Now, beſides the GENERAL *Preſumption* " That the Proceedings were regular and *omnia ſolemniter acta, unleſs* ſomething " had appeared to the contrary;" and the Rule " That *ſtabitur* " *præſumptioni*, donec *probetur in contrarium*;" Here is, in this Caſe, a DECISIVE *Fact* ſtated: Which Fact is " That the Proceeding under the firſt Ejectment *was* UNDER *and* BY VIRTUE " *of this Act* of Parliament."

Indeed *Edward Hitchings was in Poſſeſſion*, as appears by the Caſe ſtated *till* the 15th of *April* 1737. the Time when Poſſeſſion was delivered (by Virtue of the Writ of Poſſeſſion) to the Truſtees. So that, being the Tenant in Poſſeſſion, he MUST *have been ſerved* with the Declaration in Ejectment; Whether it was a Common Law Proceeding, or a Proceeding upon this Act of 24 *G.* 2.

But the Caſe itſelf ſtates it to have been a Proceeding UNDER *this Act:* And if it was ſo, the Judgment MUST *have been founded* upon ſuch an Affidavit as that Act expreſly directs and requires, *viz.* An Affidavit " That half a Year's Rent was due, before the " Declaration in Ejectment was ſerved; and that no ſufficient Diſtreſs was to be found upon the demiſed Premiſſes, countervailing the Arrears then due; And that the Leſſors in that Ejectment had Power to re-enter."

And the Caſe does not ſtate, affirmatively, " That the Judgment " was IRregular;" or, expreſly and explicitly, " That there was " *No* Affidavit at all;" or indeed any Thing whatſoever, *to* TAKE OFF *a Preſumption* which is *immenſely ſtrong* the other Way. For *Edward Hitchings acquieſced under* this Judgment, Execution, and Poſſeſſion, for *almoſt Twenty Years*, and *never tendered* the Rent and Arrears together with Coſts (purſuant to the Act;) nor filed any Bill for Relief in Equity, within ſix Months after the Execution executed, nor indeed at any ſubſequent Time. So that he is barred by the Statute, and fore-cloſed from all Relief or Remedy in Law or Equity, (other than by Writ of Error,) and the Landlord is by Virtue of the Act of Parliament to hold the Premiſſes diſcharged from the Leaſe; upon Suppoſition that his former Proceedings were regular.

The Affidavit may be *loſt*, after this Length of Time; Or the Landlord may be unable to *come at* it; although there were, in Fact, a proper One made, to ſupport his Judgment and Execution: And it would be too hard, to put the labouring Oar upon the Landlord, of PROVING *the Regularity* of all the Circumſtances upon which his Judgment and Execution were founded.

As to what has been ſuggeſted (*v. ante* 617,) " That there may " be *Fraud, Connivance*, or *Colluſion* with the Under-tenant, in " the Manner of recovering Judgment againſt the Caſual Ejector;" It is merely imaginary, in the *preſent* Caſe. Beſides, *Fraud will infect every Thing:* And upon the Principles of *Fermor*'s Caſe 3 *Co.* 77. it would not ſtand.

There can be no Suſpicion of any ſuch Thing here. For this *Edward Hitchings*, the preſent Leſſor of the Plaintiff, the Perſon who has thus long acquieſced under this Judgment and Execution, and never attempted to be relieved from it either at Law or in Equity, is Himſelf the VERY MAN *upon whom* the Declaration in the firſt Ejectment was ſerved.

The true End and profeſſed *Intention of this Act* of Parliament was to *take off* from the Landlord the Inconvenience of his continuing always liable to an Uncertainty of Poſſeſſion, (from it's remaining in the Power of the Tenant to offer him a Compenſation at *any* Time, in order to found an Application for relief in Equity;) and to *limit and confine* the Tenant to Six Calendar Months after Execution executed, for his doing this; or elſe, that the Landlord ſhould from thenceforth hold the demiſed Premiſſes diſcharged from the Leaſe.

His Lordſhip was therefore clearly of Opinion " that in this " Caſe, the Plaintiff ought *not* to recover."

Mr. Juſt. DENISON concurred in Opinion " That the Plaintiff " had *no* Title to recover."

The former Ejectment brought by the Landlord againſt *Edward Hitchings* the Tenant, who is now become Leſſor of the Plaintiff in the preſent Ejectment, is ſtated to have been ſerved upon *Hitchings* " *under and by Virtue of* this Act of 4 *G.* 2. *c.* 28." Now this Act (*v.* § 2.) expreſly recites " That great Inconveniences frequently " happen to Landlords, in Caſes of Re-Entry for Non-Payment of " Rent, from the many Niceties attending Re-Entries at *Common* " Law; and that Expences and Delay often happened from In- " junctions out of Equity, after Judgment in Ejectment:" And the Act

Act is professedly made in order to prevent these Inconveniences. It prescribes a Method of Proceeding, in *two* Cases or Manners of recovering upon the Proceeding in Ejectment which it directs; *viz.* One, in Case of Judgment against the *Casual* Ejector; the Other in Case of it's Coming to a *Trial*. In the *former* Case, of Judgment against the *Casual* Ejector, (and so also upon Non-suit on not confessing Lease Entry and Ouster,) it directs "That it shall be *made* "*to appear* to the Court where the Suit is depending, *by* AFFIDA-"VIT, That half a Year's Rent was due before the Declaration "was served; and that no sufficient Distress was to be made upon "the Premisses, countervailing the Arrears then due; And that the "Lessor or Lessors in Ejectment had Power to re-enter:" In the *latter* Case, (of it's Coming to a Trial,) the same Thing must be *proved upon the Trial*.

The present Question is upon a Judgment of the *former* Kind, *viz.* against the *Casual* Ejector, by Default; and upon an Ejectment brought UNDER *and* BY VIRTUE *of this Act*. And We must *take and presume it to be a right, regular, and good* One; as nothing appears to the Contrary.

And this Case is not at all like the cited Case of *Jefferies* v. *Dyson*, 2 *Strange* 960. Where "in an Action *for mesne Profits*, "the Plaintiff offered a Recovery in Ejectment against the Casual "Ejector; upon which no Writ of Possession had issued: And "when the Defendant would have gone into the *Title*, the Plain-"tiff insisted that he was *estopped* from doing so, by the Judgment "against the *Casual* Ejector." But the Ch. Justice held "That "though it would have been an Estoppel, if the then Defendant "had been made a Defendant in the Ejectment and the Verdict "*against* HIM; yet that *that* Judgment to which he was NO *Party* "could be no Estoppel to *Him*:" And therefore the Ch. Just. admitted the Defendant to controvert the Title. And that Distinction is right, *there*: But it is not like the present Case.

I am of Opinion the Plaintiff here has no Title.

Mr. Just. FOSTER was of the same Opinion.

The Judgment is certainly good, *till* set aside. The present Objection, "of the not producing such an Affidavit," is grounded upon the Act of 4 *G.* 2. *c.* 28. And that Act *does require* such an Affidavit: And *for that very Reason*, We must *presume* "That "there *was* such a One *made*; and that the Judgment was founded "*upon it*." But the *Plaintiff* in that Ejectment has it not: It remains in Mr. *Cowper*'s Office.

Clearly, the Plaintiff has no Title.

Mr. Juſt. WILMOT alſo concurred.

He ſaid it would be unreaſonable that the now Plaintiff ſhould recover from the Landlord, after almoſt 20 Years Acquieſcence; and after the Landlord may have improved the Eſtate.

He alſo agreed to the Caſe of *Jefferies* v. *Dyſon:* But denied it to hold in *this* Caſe.

This Act was made to compel Leſſees to bring their Ejectment, or their Bill in Equity, WITHIN *a* LIMITED *Time.* And this is ſtated to be a Proceeding "*under and by Virtue of* that Act." Therefore there *muſt have been* ſuch an Affidavit, though the preſent Defendant did not produce it.

Per Cur. unanimouſly,
JUDGMENT for the DEFENDANT.

Rex *verſ.* Inhabitants of Painſwick.

Wedneſday 7th *June* 1758.

MR. *Morton* ſhewed Cauſe againſt quaſhing the two following Orders.

Two Juſtices removed *Iſaac Moorman*, *Heſter* his Wife, and *W. T. H. A.* and *J.* their Children, from *Cirenceſter* to *Painſwick*, Both in the County of *Glouceſter:* And the Seſſions confirmed their Order.

The Special Caſe, ſtated upon the Order of Seſſions, was That on the 13th of *September* 1737, the Pauper *Iſaac Moorman* was bound Apprentice, by Indenture, to One *Henry Phips* of *Painſwick*, Taylor, for Seven Years; and lived with him, as his Apprentice, under the ſaid Indenture, in the ſaid Pariſh of *Painſwick*, for three Years and upwards: And then, the ſaid *Phips* failing, the ſaid *Iſaac Moorman* left him, and never returned to him again. That in the Year 1753, the ſaid *Iſaac Moorman* took a *Houſe* lying in the ſaid Pariſh of *Cirenceſter*, of One *Thomas Clifford*, for a Year, at the Yearly Rent of 32 Shillings and 6 *d*; and *agreed to pay the Land-Tax and Poors Taxes, and all other Taxes*, for the ſaid Houſe, for the ſaid Year.

That the Poors Rates of the ſaid Pariſh of *Cirenceſter* being produced in Court at the ſaid Trial of the ſaid Appeal, It appeared,

from them, to the Court, That the *Poors Taxes for the ſaid Houſe*, during the Year the ſaid *Iſaac Moorman* rented the ſame, were rated or charged in the Manner following; *viz.* " *Thomas Clifford*, " OR *Tenant*."

That the ſaid *Iſaac Moorman* occupied the ſaid Houſe, during the ſaid Year for which he took the ſame, and more; AND PAID the ſaid Year's Rent AND *the Land-Tax and Poors Rates and all other parochial Taxes* for the ſaid Houſe, during the whole Time he ſo as aforeſaid occupied the ſame Houſe; and had *ſeveral Receipts* given to him, *in his own Name, by the Overſeers* of the Poor of the ſaid Pariſh of *Cirenceſter*, *for ſeveral Payments* by him to them made *to the Poors Rates* of the ſame Pariſh; One, only, of which Receipts was produced and read in Court at the ſaid Trial: But that the ſaid *Iſaac Moorman* did *not know* whether his *Name* was or was not inſerted in the ſaid Rates.

And that the ſaid *Thomas Clifford*, during the whole Time of the ſaid *Iſaac Moorman*'s ſo occupying the ſaid Houſe as aforeſaid, *lived five Miles diſtant* from the ſaid Pariſh of *Cirenceſter*.

V. Stat. 3, 4 *W. & M. c.* 11. § 6. *V. Rex* v. *Inhabitants of Sarratt*, *M.* 9 *G.* 2. *B. R.* Where it was adjudged " that the Per- " ſon muſt be *charged*, as well as pay." *V. ante Rex* v. *Inhabitants of Ufculme*, *P. & Tr.* 1757. Where Lord MANSFIELD ſeems to ſay " That the NAMING the Pauper *to be the Tenant* is not " neceſſary: For that it may, WITHOUT *that*, be *ſufficient Notice* " of his being an Inhabitant."

N. B. Mr. *Vernon*, who moved to quaſh theſe Orders, alledged " That this Man was *ſufficiently* CHARGED, to notify to the " Pariſh of *Cirenceſter* that he was an Inhabitant there; and " conſequently gained a Settlement *in Cirenceſter* by the Pay- " ment of the Rates ſo charged."

Now, Mr. *Morton* ſhewed Cauſe: Which was, that this Pauper's Settlement was in *Painſwick*; And that he had not gained a new One in *Cirenceſter*, becauſe he was *not* RATED there. 2 *Strange* 1023. *Rex* v. *Inhabitants of Bovindon*, proves that the *Party* muſt be *rated*: For that the *Rating* is the Act of the Pariſh, and is what gives the Settlement. Now it is only the *Houſe*, here, of *Thomas Clifford*: But this Man (*Iſaac Moorman*) *Himſelf* is not rated: He is neither expreſly *named*, nor even *perſonally* hinted at.

Mr. *Aſton contra*, for quaſhing the Orders.

Here, the *Man* IS rated: For it is ſaid that " the Poors Taxes " for the ſaid Houſe during the Year that the ſaid *Iſaac Moorman*

" rented the ſame Houſe, were thus rated or charged; *viz. Tho-*
" *mas Clifford*, or *Tenant*;" *i. e. Clifford*'s Tenant; which is a *perſonal* Rate.

But, however, Rating the *Houſe* is enough. 2 *Salk.* 478. Between the Inhabitants of St. *Mary le More*, and *Heavy-tree*—is in Point " That a Rate for a *Houſe* is ſufficient, WITHOUT a Rate on his " *Perſon.*"

(Lord MANSFIELD was gone to the Dutchy Court.)

The Three Judges were clear about this Matter, That the Pauper was SUFFICIENTLY *rated* to gain him a Settlement in *Cirenceſter*.

Mr. Juſt. DENISON thought that the Court ought not to be *overnice* and critical in requiring a ſcrupulous Strictneſs as to the Form and Terms of rating Perſons: And he even hinted that Rating the *Houſe* only might, for aught that he ſaw to the contrary, be ſufficient. For the Pariſh could not but *know who was the Occupier*. Therefore He held this to be ſufficient to gain him a Settlement, having *paid* the Rates accordingly.

Mr. Juſt. FOSTER alſo held that this was a ſufficient Notice to the Pariſh; *though* the Tenant was not particularly and expreſly *named* by his own proper Name.

Mr. Juſt. WILMOT held this to be EQUIVALENT *to the actual* Naming him; and it is NOT *neceſſary* that he ſhould be *expreſly* named: Which He ſaid, had been lately ſo determined; though He did not recollect the Name of the particular Caſe.

BOTH ORDERS QUASHED.

Cottingham *verſ.* King.

Friday 9th *June* 1758.

Paſch. 31 *G.* 2. *Rot'lo* 179.

THIS was a Writ of Error brought upon a Judgment of the Court of King's-Bench in *Ireland*; who had affirmed a Judgment in Ejectment given for the Plaintiff by the Court of Common Pleas there, after a General Verdict for the Plaintiff.

In this Ejectment, the Parcels are deſcribed to be (amongſt Others therein mentioned and included) 5000 Meſſuages, 5000 Cottages, 10,000 Acres of Land, *&c*; in all thoſe the Lordſhips, Manors, and late-diſſolved Abbey or Monaſtery of *Boyle* and *Inſemacranaw*; and

and QUARTER of Land of *Tallagh*, with the TOWN and TENEMENT of *Boyle*, and *Fairs* and *Markets* thereunto belonging, in the COUNTY *of Roſcommon*; And all thoſe the Lands and Hereditaments called *Grangemoore*, (with many other Parcels, deſcribed by the Name of QUARTERS, ſome containing ſo many, others ſo many Acres;) and *part of Sumternat*, *&c.* a large *Deer-Park &c*; and the Parſonage of *Longford &c*; in the COUNTY *of Roſcommon*; and a ſmall Park or Field, in the *Poſſeſſion of &c.*

On this Ejectment, there had been (as is above mentioned) a General Verdict for the Leſſor of the Plaintiff; and Judgment for him, in *C. B.* in *Ireland*. And afterwards, A Writ of Error was brought upon it, in *B. R.* in *Ireland*: And General Errors were aſſigned. The Court of *B. R.* in *Ireland* affirmed the Judgment of the Court of *C. B.* there. And upon this Judgment of Affirmance, the preſent Writ of Error was brought.

Many Exceptions had been taken in *Ireland*, on the Part of the Plaintiff in Error, upon the Writ of Error brought in the King's Bench there. But

Mr. *Aſhurſt*, who argued for the Plaintiff in Error here, ſaid he would *now* only take Exception to the UNCERTAINTY *of the Deſcription* of the Premiſſes ſpecified in the Declaration: Whereas in Ejectment there ought to be a *ſufficient Certainty*; that the Sheriff may know how to deliver Poſſeſſion. 1 *Brownlow* 142. *Challener* v. *Thomas*: "An *Ejectment* will not lie, De *Aquæ Curſu*." 1 *Ld. Raym.* 277. *Shalmer* v. *Pulteney*, ſeems to concede that an Ejectment will not lie "de *quodam Ædificio*;" for the Uncertainty of the Term *Ædificium*. In *Style*'s 30, It was doubted whether an Ejectment lies "de uno *Crofto*." *Dyer* 84. *b.* in Aſſize "de *quadam portione* "Decimarum *&c*," It was objected that the Plaint was uncertain.

This is an entire Judgment, and *entire Damages:* And it is particularly liable to Exception, in the following Inſtances; *viz.*

1ſt Exception. 1ſt. *No Vill* at all is mentioned throughout the whole Declaration: The Lands *&c* are only deſcribed to lie (generally) "in the "*County* of *Roſcommon:*" This Defect runs through the whole Declaration.—*Cro. Eliz.* 822, *Gray* v. *Chapman*, is in Point; and by the whole Court: "The Declaration in Ejectment was holden ill, "for not alledging in what Vill the Tenements were." *Heb.* 89. *Rich* v. *Shere*, is moſt expreſly in Point: And the Judgment was, for this very Cauſe, reverſed *in Cam' Scacc'*. 2 *Barnes*, 150. *Goodright on the Demiſe of Griffin* v. *Fawſon:* The Judgment was arreſted for the ſame Uncertainty, "in which of two Pariſhes the Meſſuage ſtood."

2d.

2d. The Words are—" With the *Town* and *Tenement* of *Boyle* 2d Exception.
" and *Fairs* and *Markets* thereunto belonging." Now Ejectment will not lie for a *Town*; nor for a *Tenement*, generally. 1 *Sid.* 295. *Birbury* v. *Yeomans:* Ejectment " *de 7 Meſſuagiis ſive Tenementis,*" was holden ill, after a general Verdict. *Cro. Eliz.* 186. *Wood* v. *Payne* was the ſame Determination, in an Ejectment " *de uno Meſ-*
" *ſuagio ſive Tenemento.*" 1 *Lord Raym.* 191. *Copleſton* v. *Piper*: The two *Powells* Juſtices ſaid, and *Treby* Ch. J. agreed, That Ejectment " *de uno Tenemento*" is ill, for the Uncertainty. 2 *Strange* 834. *Goodtitle* v. *Walton*—: After Verdict for the Plaintiff in Ejectment, Judgment was arreſted; And it was holden That an Ejectment " *de uno tenemento*" will not lie. 1 *Barnes* 117. *Makepeace* v. *Hopwood*: Judgment in Ejectment was arreſted for the Uncertainty of the Words " One Meſſuage *or Tenement.*"

3d. " *A Quarter*" is another Term uſed in the Declaration: 3d Exception.
Which Term is totally *uncertain*; and even appears to conſiſt of different Numbers of Acres ſome, more; ſome, leſs. *Yelv.* 117. St. *John* v. *Commyn*—: Ejectment " *de Caſtro villa et terris de Kil-*
" *brough in Com' &c,*" was holden inſufficient for want of expreſſing the Number and Certainty of Acres. And that Caſe is like the preſent; Which is " the Lands called *&c:*" but they are deſcribed by the Name of " One *Quarter &c;*" Which Term does not convey an Idea of any determinate Number of Acres.

4th. It is of " *Part* of *S. M. & D:*" Which is abſolutely un- 4th Exception.
certain and vague.

5th. And of " *a large Deer-Park in the County of Roſcommon:*" 5th Exception.
Which is vaſtly too uncertain and indeterminate.

6th. " Of a *ſmall Park or Field*, in the Poſſeſſion of *&c*; *not* 6th Exception.
ſpecifying WHERE. 11 *Co.* 55. *Edward Savel*'s Caſe: Ejectment of " a Cloſe called *Dove-cote Cloſe*, containing 3 Acres." The Judgment was arreſted, for not ſpecifying what Nature and Quality the three Acres were of. 1 *Shower* 338. *Knight* v. *Symmes:* Ejectment of " 5 Cloſes of Paſture and Meadow, called *Faldowne*, " containing ten Acres:" But did not diſtinguiſh how many of One, and how many of the Other. Judgment was arreſted, after a Verdict for the Plaintiff; for want of ſufficient Certainty. 1 *Salk.* 254. S. C: And *Holt* Ch. J. is there ſaid to have affirmed *Savel*'s Caſe for Law.

7th. The *Quantity* and *Quality* of the Lands is not ſufficiently 7th Exception.
ſhewn.

Therefore, for theſe Exceptions, He prayed to reverſe the Judgment of the Court of King's Bench in *Ireland*.

Mr. *Williams*, who argued for Sir *Edward King*, the Defendant in Error, ſaid That the Merits of the Title to this Eſtate (an Eſtate of 8000 *l. per Ann.*) came in Queſtion in C. B. in *Ireland*; Where Lord *Kingſborough*'s pretended Will was found to be a Forgery: And the Court of King's Bench there affirmed the Judgment of C. B. there. And being *after a Verdict* upon the *Merits*, the Court here will *preſume* what they can in *Favour* of the Judgment.

And as to the Exceptions——

1ſt. " 5000 Meſſuages, 5000 Cottages *&c &c*, in the *Lordſhips* " *and Manors* of *&c* late belonging to the diſſolved Abbey or Mo- " naſtery of *&c* in the County of *R.*" is ſufficient without naming any Vill. For a *Manor* is as notorious in it's Boundaries, as a Pariſh: So alſo is a Lordſhip.

The " Pariſh of *A. or B.*" has been holden ſufficient. For Proof of which, he cited a Caſe (which does not perhaps quite prove it;) *viz.* 3 *Lev.* 334. *Goodwin* v. *Blackman:* Which was an Ejectment of Lands in *K. & G.* whereas the whole lay in *K.*

And *after a Verdict*, this *Manor* ſhall be *intended* to be a Vill. " *Pariſh*" ſhall be intended to be a Vill, *primâ facie*. 2 *Salkeld* 501. *Rudd* v. *Moreton*—: It is ſaid to have been ſo adjudged in the Caſe of *Wilſon* v. *Laws*, in *M.* 6 *W.* 3.

And if a Place be named *generally*, that Place ſhall be taken to be and *intended a Vill*—This was adjudged, (as is alſo ſaid in 2 *Salk.* 501.) in the Caſe of *Vinckerſton* v. *Ebden*, *M.* 10 *W.* 3. B. R.

2dly. As to Ejectment not lying for a *Town*, or for a *Tenement*.

After a Verdict, the Court will *intend* the Lands to be *Parcel of the Townſhip:* And they ſhall paſs with it. And to ſupport this Poſition, he cited *Cro. Car.* 168. *Gennings* v. *Lake*; Where the Court conceived that the Land might be ſaid to be *appendant* to the Houſe. 3 *Keble* 44. *Smith* v. *Martyn*; Where a Garden was allowed to be demiſable, as *Parcel* of a Meſſuage. *Doe, ex dim' Saville* v. *Borlace et al'* determined in the Houſe of Lords (on a Judgment in the Exchequer) 11 *March* 1735: (Which he cited from the Reſpondent's Caſe, upon the 4th Exception,) " That the " Advowſon and Common ſhould be *intended* to have been *ap-* " *pendant*

" *pendant* to the Manor." So here, the Lands may paſs as *appendant* or *belonging to* the Townſhip; though not alledged to be *Part* of it. So, " *Communia Paſturæ*," generally, ſhall, after Verdict, be *intended* to be *ſuch* Common, for which an Ejectment will lie, as Common *appendant* or *appurtenant*. 1 *Strange* 54. *Newman* v. *Holdmyfaſt* is expreſly ſo determined. And an Ejectment will lie for a *Town*; and alſo for a *Tenement*, where it is reduced to a Certainty.

Moſt of Mr. *Aſhurſt*'s Caſes are in the *disjunctive*; " Meſſuages " *or* Tenements." However, here the Word " *Vocato*" renders it certain enough. 1 *Lev.* 65. Lady *Dacre*'s Caſe: *Twyden* ſaid that though an Ejectment will not lie of a Croft; Yet it will lie of " a Croft *called Black Acre*." 1 *Siderf.* 295. *Burbury* v. *Yeomans*: He repeats the ſame Aſſertion. And in both Places, He gives the Reaſon; *viz.* " That this renders it *certain*." And here, it is " the Town and Tenement *of Boyle*:" Which Appellation of it by it's Name, aſcertains it ſufficiently. And this is agreeable to what is ſaid in 3 *Mod.* 238. *Hexham* v. *Coniers*; " That the *adding* VOCAT. " the *Black Swan*, to the Words *Meſſuagium ſive Tenementum*, " makes it certain that the Tenement intended is a *Houſe*."

And the old Rule about the Sheriff's being neceſſarily to be informed ſo exactly *upon the* RECORD, " What he is to deliver Poſ- " ſeſſion of," is now out of Uſe, and is not to be regarded. For the Plaintiff in Ejectment is to take Poſſeſſion, *at his Peril*, according to his *own Shewing*. *Savile* 28. *Caſe* 67. *Queen* v. *Ayleworth*: *Manwood*, Chief Baron, expreſly declares this; and ſays " It was the Opinion of the Chief Juſtices in the Star-Chamber." 1 *Strange* 695. *Sullivane* v. *Segrave*—An Ejectment " de *parte* " Domûs," was holden ſufficient, upon the ſame Principle. 2 *Ld. Raym.* 1470. *Bindover* v. *Sindercomb*: An Ejectment of " *Part* of " a Mote, *Parcella Areæ*, *Parcella Pomarij &c*," was holden good, upon Error, after Verdict. 2 *Ld. Raym.* 789. *Camell* v. *Clavering*: An Ejectment was brought in the Exchequer, " de *minutis* Deci- " mis:" And, after Verdict and Motion in Arreſt of Judgment, Judgment was given for the Plaintiff, by all the Barons. 1 *Salk.* 255. *Whittingham* v. *Andrews*: Ejectment " de *mineris* Carbonum," (generally,) without ſhewing the Number of Mines, was holden good, in *Durham*, where the Courſe was ſo, and of which the Court took Notice. And ſo the Court will take Notice of the Kingdom where *this* Ejectment was brought: And *Eight* of the Judges there have determined this to be a ſufficient Deſcription, in *that* Country; And this Court will *give Credit to them*. 2 *Keb.* 745. * *Jane* v. *Polyxphen*: The Court conceived an Ejectment brought in *Ireland*, of " 20 *Villis et Terris*," to be good. *Cro. Car.* 511. *Mulcarry et al'* v. *Eyres et al'*: An Ejectment in *Ireland*, " of 100

* This Caſe was adjourned.

" Acres of *Bogge*, in *Villis et Territoriis* de *D. S. & V.*" was holden good. 1 *Strange* 71. *Ld. Kildare* v. *Fiſher:* An Ejectment of " 100 Acres of *Mountain*," was held good in *Ireland.* And this laſt mentioned Caſe was a ſolemn and unanimous Judgment, after conſulting the Lord Chancellor and Judges of *Ireland.*

* It is reported to be *per Curiam*; and with a *Nota bene*, too.

3dly. As to the Term " *Quarter*"—The Caſe cited from * *Yelv.* 117. is not the Determination of the Court: Nor was that the Point before them. And " *a Quarter*" is a known Deſcription in *Ireland:* Every Child knows them. That Country was divided into Quarters, when Ld. *Strafford* was Ld. Lieutenant there.

As to the 4th, 5th and 6th Objections. His Anſwer was, That they *All* belong to the Townſhip: And beſides, they may be the *Names* of the Cloſes.

7thly. And as to the laſt Objection—He inſiſted that the Quantity and Quality of the Lands are ſufficiently ſet forth: And then anſwered the Caſes cited on the other Side. As to *Savel*'s Caſe—That Caſe was doubted in Ld. *Raymond*'s Time; and has been ſince diſallowed, or at leaſt called in queſtion. *V.* 2 *Ld. Raym.* 1472. *Bindover* v. *Sindercombe. Comberb.* 198, 199. *Knight* and *Symms: Per Eyres* Juſt.—The latter Opinions are againſt *Savel*'s Caſe. Though the Chief Juſtice indeed there ſays " That an Ejectment " ought to be as certain as a *Præcipe quod reddat.*"

Mr. *Aſhurſt* in Reply—I know Nothing of the *Merits* of this Caſe: I am only to argue upon the *Record.*

2d Exception. Theſe Premiſſes cannot poſſibly be intended to lie within the *Townſhip* of *Boyle:* They are only deſcribed generally, to be within the *County* of *Roſcommon.* I ſay that an Ejectment will *not* lie of the *Town* and *Tenement itſelf:* Therefore, conſequently, neither will it, of theſe Premiſſes *as belonging* thereto.

Poſſeſſion muſt be delivered at the *Peril* of the *Sheriff, as well* as of the Plaintiff. " *De parte Domûs*" is much leſs uncertain, than an undefined Part *of a great Eſtate.* I agree that if the Deſcription be *known* in *Ireland* it is enough. But I ſay that *this* Deſcription is *every where* uncertain.

3d Exception. In *Yelv.* 117. The Point for which it is cited, is taken † alſo into Conſideration, as well as the Principal Objection.

† Not directly and principally, indeed; but poſitively and explicitly.

Lord MANSFIELD—This is *after a Trial and Verdict* in *C. B.* in *Ireland:* And the Objection is, the *Uncertainty* of the Claim or Deſcription of the Premiſſes in the Declaration.

In a *Præcipe* in a real Action, which is a *formed* Writ, Preciſion is requiſite: Becauſe it was neceſſary to follow the Form preſcribed by the Regiſter.

Whilſt Ejectments were compared to real Actions, and Arguments were drawn from Analogy with them, they muſt be, of Courſe, *fettered*: And this was ſo, till after the Reign of King *James* the Firſt. But of *later* Times, an Ejectment has been conſidered with more Latitude; as a Fictitious Action to try Titles with more Eaſe and Diſpatch, and leſs Expence.

Even in a *Præcipe*, I do not know whether the Sheriff could always be quite certain, *Which* were the particular Acres &c, of which he was to deliver Poſſeſſion. But in this *fictitious* Action, the Plaintiff is to *ſhew* the Sheriff; and is to take Poſſeſſion *at his Peril*, of *only* what he has Title to: If he takes more than he has recovered and ſhewn Title to, the Court will, in a ſummary Way, ſet it right. So that ſuch a very exact Deſcription is not equally neceſſary in *this* Action, as in a *Præcipe*.

However, there are in this Caſe, (as it is particularly circumſtanced,) two Things, which carry it much farther than the general Caſe of Ejectments, and are deciſive: For it is *after Verdict*; and it is *from Ireland*. The Title has been *tried* by a *Jury* of *Ireland*, where the Lands lie; Evidence has been given to them, upon which they have found for the Plaintiff; and *Two Courts there* have given Judgment for the Plaintiff, without Difficulty.

The Denominations of Land may be certain and known *there*; though unknown *here*: For Words and Names are arbitrary. Ejectments have been brought *there*, of *Mountain*, of *Bogg*; nay of Mountain *in* a Bogg: And a Certificate has been given by Judges of *Ireland*, that the Term "*Mountain*" does not neceſſarily include Situation but deſcribes *Quality*; that Fines, Recoveries, Writs of Dower, and Settlements of it, are frequent there; and Ejectments *uſually* brought of it.

And *there*, it is frequent to deſcribe the Lands of great Eſtates, even in their Settlements, by "*Towns*:" I know this, of my own Knowledge.

Ireland was planted and ſettled by Degrees, both formerly and lately; And *Towns* came, by Degrees, to be known and certain Deſcriptions: And ſo, "*Quarters*" might be, after *Cromwell*'s Settlements there, and the Diviſion of it into Quarters. "*Town*" and "*Tenement*", are here uſed as ſynonimous Terms.

However, the Jury of *that* Country underſtood it; and the Two Courts of *that* Country underſtood it, and have made no Difficulty about it: And therefore I am ſure I will not, *after* this, ſay "that "it is not to be underſtood."

Mr. Juſt. DENISON was of the ſame Opinion "That the Judg- "ment ought to be affirmed:" And He held the Deſcriptions to be ſufficient.

In a *Præcipe quod reddat*, it was neceſſary to deſcribe the Lands formally, once: But it is *not* ſo, in an *Ejectment*.

I take this preſent Ejectment to contain, firſt, a general Deſcription, which takes in the Whole: And afterwards, the Eſtate demanded in it, is deſcribed particularly and in Parcels, "*what* it conſiſts "of." This was ſettled in the Caſe that has been mentioned, *Doe ex dimiſſ. Savill* v. *Borlace*, *Tr.* 9 *G.* 2. *in Cam' Scacc'*;" (which I argued.) It was after a Verdict; and was an Ejectment for Tithes of various kinds: And two Things were there holden; 1ſt. That being after Verdict, it was to be *intended* as brought of *ſuch* Tithes *only*, for which an Ejectment would lie; and 2dly. that there was no Objection to a *bis petitum* in an Ejectment. And ſo here, I take it that this Manner of deſcribing the Premiſſes is a *bis petitum*, a ſecond Deſcription of the ſame Thing.

And as to the Caſes that have been urged in Support of the Objections, There has been a greater Latitude of *late* Years, than *formerly:* Whatever Strictneſs was uſed at firſt, it is certain that Ejectments are *now* conſidered upon a more *liberal* Foot. "*Town*" appears, by what has been ſaid, to be a common and known Deſcription in *Ireland*. "*Mountain*" alſo appears to be a known Deſcription *there:* And Fines, Recoveries, Writs of Dower, Ejectments, and Settlements uſe it as ſuch. In the Caſe of *Ld. Kildare* v. *Fiſher*, the Caſe of *Holbourn* v. *Babbington in Dom' Proc'*, is ſaid to have been reverſed upon another Point: And They gave Credit, in that Caſe of *Ld. Kildare* v. *Fiſher*, to the Certificate of the *Iriſh* Chancellor and Judges.

And "*Quarter*" may be a Term as well known in *Ireland* as "Mountain" is: And in this Caſe, I ſhall *intend* it to be ſo.

Mr. Juſt. FOSTER concurred, for the ſame Reaſons.

So alſo did Mr. Juſt. WILMOT. And He added that He never could underſtand that Manner of Reaſoning, ſo often urged upon Arguments of this Sort, *viz.* "That the Deſcription muſt neceſſa- "rily be *ſo certain* that the Sheriff may be able exactly to know,

" without any Information from the Plaintiff, of *what* to give Poſ-
" ſeſſion :" Which is not true ; for ſuch Preciſion is *not neceſſary* in an Ejectment.

After Verdict, this Deſcription muſt be *intended* to be ſufficient.

Per Cur. unanimouſly,
JUDGMENT AFFIRMED.

Rex *verſ.* Earl Ferrers.

Saturday 10th *June* 1758.

ON *Wedneſday* 26th *January* 1757. Mr. *Norton* moved, *either* for an Attachment againſt the Earl, for not returning a *Habeas Corpus* already iſſued, and returnable *immediatè*, commanding him to bring up the Body of his Counteſs (Siſter to Sir *William Meredith* ;) *or* for a new *Habeas Corpus*, ACCOMPANIED *with an Attachment*.

He ſaid that the latter had been done in the Caſe of *Rex* v. *Dr. Wright*, *M.* 5 *G.* 2. *B. R* ; And that the Reaſon of iſſuing the Attachment at the ſame Time with the *Habeas Corpus*, was for Prevention of a Delay which might, in certain Caſes, render the Remedy ineffectual. *

* This Caſe was *not at all*, as cited. See it in 2 *Strange* 915.

Lord MANSFIELD aſked Mr. *Norton*, Whether He knew any Inſtance of an *Attachment* ACCOMPANYING a Writ. He ſaid He underſtood an Attachment going, for *not having* obeyed a Writ : But did not know any Inſtance of an Attachment going out *together with* the Writ.

Mr. *Norton* ſtated *Wright*'s Caſe, from a Note taken by a Gentleman who has now left the Bar ; † Where *Lee*, then a Puiſne Judge held it *might* be done : Though, in that Caſe, *Wright* did afterwards return the Writ in Court.

† The Note here relied upon was erroneous.

Note—In the preſent Caſe, Mr. Juſtice *Foſter* had granted a *Habeas Corpus :* Which was ſerved on the Earl, by Sir *William Meredith*. But Sir *William* at length agreed not to proſecute it ; on *Condition* that his Lordſhip ſhould carry Lady *Ferrers* to *Bath* ; which the Earl promiſed, but had not performed.

Mr. *Norton* ſaid He would take Nothing by his Motion. And

Mr. *Clayton* moved for a *new* Writ, returnable in Court *immediatè*. Which was GRANTED.

Lord

Lord *Ferrers* neglecting likewiſe to obey this *ſecond* Writ of *Habeas Corpus*, the Counſel for Sir *William Meredith* (on Behalf of his Siſter) intended, on *Tueſday* the 8th of *February* 1757. to have moved for an Attachment againſt Lord *Ferrers*, for this his Diſobedience: But ſome Doubts and Difficulties having been ſtarted by Members of both Houſes, concerning the *Privilege of* PEERAGE; and "whether the Court of King's Bench could iſſue an ATTACHMENT *againſt a Peer* during the Sitting of Parliament, and execute "it upon him, ONLY *for a* * CONTEMPT *to their Court*," Sir *William Meredith* judged it prudent to petition the Houſe of Lords, for their *Leave* to proceed againſt the Earl; and accordingly, did Yeſterday, (by the Hands of the Earl of *Weſtmoreland*,) deliver ſuch a Petition, ſtating the Facts. Lord *Delaware* oppoſed it; and ſaid, It was too ſummary and haſty a Method of determining upon their Privileges; and propoſed referring the Matter to a Committee, and ſummoning Lord *Ferrers* to anſwer it in his Place: And to obviate the Objections which might be made to this Method on Account of the Delay, He offered ſome Schemes for the intermediate Safety of the Counteſs. But Lord *Mansfield* anſwered Him, and ſpoke in Support of the Juriſdiction of his Court, and the Unreaſonableneſs Injuſtice and Inconvenience of allowing ſuch a Privilege in *Criminal* Caſes and *Breaches of the Peace*. The Duke of *Argyle* then ſpoke to the like Effect, and expreſſed a Surpriſe that there ſhould be any Doubt about it; the Reaſon of the Thing being ſo clear and plain. Laſtly, the Earl of *Hardwick* ſpoke ſtrongly and particularly in Support of the ſame Doctrine, and adduced many Inſtances and Precedents in Proof of his Poſitions; and concluded with propoſing, that to put an End to all Doubt about it for the future, the Lords ſhould come to a Reſolution; And accordingly they did come to the following Reſolution or Declaration, and Ordered it to be entered on their Journal; *viz.* "7 *Februarij* 1757. It is Ordered and Declared, That no Peer or Lord of Parliament hath "Privilege againſt being compelled by Proceſs of the Courts of "*Weſtminſter-Hall*, to pay Obedience to a Writ of *Habeas Corpus* "directed to him."

(And it was afterwards, *viz.* "*Die Mercurij* 8 *Junij* 1757. "Ordered and Declared by the Lords Spiritual and Temporal in "Parliament aſſembled, That no Peer or Lord of Parliament hath "Privilege of *Peerage* or of *Parliament*, againſt being compelled by "Proceſs of the Courts in *Weſtminſter-Hall*, to pay Obedience to "a Writ of *Habeas Corpus* directed to him." And it was then and thereby further Ordered, "That this Order and Declaration be "entered upon the Roll of the *Standing Orders* of this Houſe.")

* See *Bacon's* New Abridgment of the Law, Vol. 3. fo 5. Title *Habeas Corpus*, Lord *Leigh's* Caſe, in point; and fo. 6. expreſs, "That an Attachment may be granted, if the Peer refuſes Obedience to the Writ: For, *being* a *Contempt* a *Peer* has NO *Privilege*."

On the 8th of *February* 1757, Mr. *Norton* renewed his Motion for an *Attachment* againſt the Earl: And he produced Affidavits of his Lordſhip's Diſobedience to the Writ, and continuing his ill Uſage of his Lady.

All the Affidavits (quite from the Beginning of this Affair) were read.

Lord MANSFIELD—This is a *Habeas Corpus* at *Common Law*; which is a Prerogative Writ, for the Liberty of the Subject. The Court *may* inforce *ſpeedy* Obedience to it: And the *Circumſtances* of *this* Caſe (where Delay may be very dangerous), require it. It is reaſonable that the Lady ſhould have Opportunity of laying her Caſe before the Court; and ſwearing the Peace, if She thinks proper, in Order to obtain the Protection of the Court. The *End* of this Courſe that We now take, in iſſuing an Attachment to inforce Obedience to the Writ, is to have this Lady produced for this Purpoſe.

And therefore We think, *under the* * EXTRAORDINARY *Circumſtances* of this Caſe, *an Attachment* ſhould iſſue; *to inforce Obedience* to this Writ of *Habeas Corpus*, which ſo much affects the Preſervation and Security of this Lady.

* One of theſe was detaining Sir *William Meredith* (who himſelf ſerved the firſt Writ upon the Earl,) and drawing a Piſtol upon him, and chellenging him.

But at the ſame Time, His Lordſhip intimated to them, NOT *to* EXECUTE *it* AT ALL, if it was poſſible to *obtain the End* of their Application by any *gentler* or *other Means*; the End and Intention of granting it, being only to have the Lady immediately brought up.

Mr. Juſt. DENISON (the only other Judge in Court) only ſaid "that an Attachment *ought to go*."

ORDERED That a Writ of Attachment iſſue againſt The Right Honourable *Laurence* Earl FERRERS.

In Conſequence whereof, The Earl having been ſerved with the Writ, (or at leaſt having had it notified to him) by the Under-Sheriff of *Leiceſterſhire*, accompanied by a Brother of the Counteſs;—On the *Saturday* following He appeared in *Weſtminſter-Hall*; and about one o'Clock, ſent a Meſſage into Court, to Lord *Mansfield*, "deſiring to ſpeak with him."

Lord MANSFIELD bid the Meſſenger tell his Lordſhip, "That "when an Affair was depending before the Court, He could not "ſpeak with any Body about it, *but* IN *Court*."

Soon after, the Earl came upon the Bench, and ſpoke to Lord *Mansfield*. It was not eaſy to underſtand what he ſaid, as he ſpoke pretty low: But I imagine he propoſed putting ſome certain Queſtions to his Lady; For Lord *Mansfield*'s Anſwer was, " That " when She came into Court, All *proper* Queſtions would be " aſked her."

Some Time afterwards, on the ſame Day—

Lady *Ferrers* came into Court, and had Articles of the Peace ready to exhibit againſt the Earl.

Note—Nothing more was ſaid concerning the *Habeas Corpus* or the *Return of it*; The real End of it being ſufficiently anſwered, by her being left at Liberty to come to this Court, in order to obtain it's Protection.

Sir *Richard Lloyd* and Mr. *Gould*, for the Earl, deſired Leave to aſk Lady *Ferrers* one or two Queſtions, previous to her ſwearing to the Articles which She had prayed Leave to exhibit.

But Lord *Mansfield* told her Ladyſhip, That She was *not obliged* to anſwer any Queſtion previous to her ſwearing the Peace.

And He told Sir *Richard* that the preſent Buſineſs was only to obtain Security of the Peace.

Juſt at this Time, The Earl came into the Body of the Court, (upon the Floor, not upon the Bench;) and deſired to aſk Lady *Ferrers* " Whether an Affidavit which ſhe had lately made, in " the Country, before a Commiſſioner authorized by this Court " to take Affidavits, was made by Her *voluntarily*, or *involun-* " *tarily*."

Note—This was an Affidavit (in which She had joined, during her being in his Power in the Country, after the iſſuing of the *Habeas Corpus*;) Wherein ſhe was made to ſwear " That She " was content to remain with her Huſband, that She had no " Complaint againſt him, and that the Application made by " her Relations for the *Habeas Corpus* was without her Deſire " and againſt her Will." Which Affidavit *her Friends* ſaid was ſo far from being voluntary, that it was *extorted* from her *under Dureſs*; and was the mere Effect of Fear Force and Compulſion, or at leaſt of very *undue Influence*.

LORD

Lord MANSFIELD perſevered in permitting her Ladyſhip, without anſwering any Queſtions, to proceed in exhibiting her Articles; And then aſked the Earl, " if He had Security ready."

The Earl firſt, and Sir *Richard*, afterwards, preſſed that Lady *Ferrers* might anſwer their Queſtions: And Sir *Richard* dropped an Intimation that the Earl's Regard or Diſregard for her would depend upon her Anſwers.

But Lord *Mansfield* ſaid He had before told Her, that She *need not* anſwer them: And now he would *not ſuffer* Her, He ſaid, to anſwer them.

Lord *Ferrers* went in and out of Court once or twice: But did not, at *this* Time, give the Security of the Peace; Nor did Mr. *Norton* preſs that He ſhould give it immediately.

On *Wedneſday* the 27th of *April* following, The Earl appeared; and gave Security: Himſelf in 5000*l.* And each Manucaptor in 2500*l.*

Monday, 13th *February* 1758 The Earl having broken this Recognizance in the Month of *Auguſt* 1757, by drawing a Piſtol upon Lady *Ferrers*, at the Earl of *Weſtmoreland*'s at *Mereworth Caſtle* in *Kent*; He was taken up ſome Time after, again, upon a freſh Warrant from Lord *Mansfield*: And having given Bail on the ſame 13th Day of *February* 1758. before my Ld. Ch. Juſtice, (whilſt his Lordſhip was gone out to Dinner,) He preſently afterwards came into Court, to appear. And upon the Return of the Ld. Ch. Juſtice—

The Counteſs alſo came into Court; and *ſwore* FRESH *Articles* of the Peace againſt the ſaid Earl, grounded upon the above-mentioned Fact. After which, He (being ſtill preſent) was called upon to give Bail to theſe recent Articles of the Peace.

He had previouſly given Notice of Two Perſons to be his Bail before the Lord Chief Juſtice: With One of which the Proſecutors were not ſatisfied.

After ſeveral Propoſals; and after ſeveral Hints which came from Lord *Mansfield*, as well as from Mr. *Norton*, " That it was neceſ-
" ſary for the Earl to give Bail *at preſent*, and not to pray *Time* to
" do ſo, as the giving it *now* was the only Method he could take,
" if he expected to remain at Liberty;" It ended in a Compro-
" miſe to take both theſe Perſons as Bail now, and to give a few
" Days time for the juſtifying the doubtful One, (a Peruke-Maker,)
" or for finding a better.

Accordingly, He himſelf became bound in 5000 *l.* Mrs. *Shirley* (his Mother,) in 2500 *l.* and Mr. *John Bennifold*, Peruke-maker, in 2500 *l.*

The Earl's Counſel *now* moved to diſcharge the Recognizance: To which the Lady's Counſel afterwards conſented.

Tueſday 13th *June* 1758.

Rex *verſ.* Thomas Dawes.

ON *Thurſday* laſt, the 8th of *June*, Mr. *Morton* and Mr. *Burrell*, on behalf of the Commiſſioners, ſhew'd Cauſe againſt making abſolute a Rule of laſt Term, made upon the Commiſſioners in and for the County of *Suſſex*, for putting in Execution the late Act "for the ſpeedy and effectual Recruiting His Majeſty's Land-"Forces and Marines," for them to ſhew Cauſe Why *Thomas Dawes* ſhould not be diſcharged out of the Regiment of Foot commanded by Colonel *Thomas Brudenell*.

They produced a Number of Affidavits; and reſted entirely upon the Facts contained in them: Which fully proved (as they alledged) that He was a proper Object of the Act of Parliament; and that the Commiſſioners had done Right; and that He ought not therefore to be diſcharged from the Condition of a Soldier.

Mr. *Harvey* and Mr. *Norton*, on Behalf of the Defendant *Dawes*, (the impreſſed Man,) on the contrary, argued for making the Rule abſolute, for diſcharging him.

They urged That this was a high and unconſtitutional Authority lodged in theſe Commiſſioners, and without requiring from them any Oath of Duty: And they endeavoured to ſhew, from their Affidavits, that the Man was not a proper Object of the Commiſſioners Juriſdiction. They argued therefore that He ought to be diſcharged; Eſpecially, as the Crown did not at all interpoſe.

Note—The Regiment was gone abroad: But the Man himſelf had firſt *deſerted* from it.

The Court did not come to any Determination, then; but took Time, in Order to conſider the Affidavits on both Sides.

Now, Lord MANSFIELD delivered the Opinion of the Court; in which, He ſaid, they were all agreed: And All of them, He ſaid, had ſeparately read over the Affidavits.

Then He went minutely through the Affidavits on both Sides; and made the proper Remarks upon their different Repreſentations of the Caſe.

The Reſult was, That they clearly thought him *to be* a proper Object; and that the Commiſſioners had done Right.

Whereupon, they DISCHARGED THE RULE.

Rex *verſ.* Andrew Keſſell.

THIS Point was exactly ſimilar to the laſt; being the Caſe of a preſſed Man, who applied to be diſcharged out of Captain *Temple*'s Company in Colonel *Duroure*'s Regiment, upon the Foot of Injuſtice done to Him by the Commiſſioners, to whom He was obliged by Force to ſubmit: And the Queſtion turned, in like Manner, upon the Man's being a *proper Object* of the *Commiſſioners Juriſdiction*, or not; which depended upon the particular Circumſtances of the Caſe, ſworn to, on both Sides.

It was argued on the 10th of *June*, by Mr. *Norton* and Mr. *Biſhop* for *Keſſell*, and by Mr. *Huſſey* for the Commiſſioners, upon the *Fact* only.

No Objection was made, on Behalf of his Majeſty, or of Colonel *Duroure*.

The Court had taken Time, (as in the former Caſe,) to look into the Affidavits. And now

Lord MANSFIELD declared the Opinion of Himſelf and his Brethren, "That upon the Circumſtances appearing in *this* Caſe, The "Man was *not* a proper Object of the Commiſſioners Juriſdiction; "and that He was, by an undue Exerciſe of the Power truſted to "them, compelled to ſerve as a Soldier."

And therefore They ordered That he ſhould be forthwith diſcharged. (But they would not give *Coſts*; though aſked for, by the Man's Counſel.)

Note—In both theſe Caſes (of *Dawes* and *Keſſell*,) Neither of them could have brought a *Habeas Corpus:* Neither of them was in Cuſtody. *Dawes* had deſerted, and abſconded: *Keſſell* was made a Corporal. Both prayed to be diſcharged from the Condition of Soldiers, upon the Ground of the Commiſſioners having miſbehaved in the Exerciſe of a Parliamentary Authority; (for which Miſbehaviour, they might be liable to an Information.) In neither Caſe, did the Counſel object to the Propriety of this Method: And the Benefit to the Subject is manifeſt.

Rex *verſ.* Davis.

V. Rex v. *Roger Johnſon*, 2 *Strange* 824. S. P.

THE Defendant having been apprehended upon an Outlawry for High-Treaſon in diminiſhing the Coin of this Kingdom (*viz.* filing Guineas,) was brought up by *Habeas Corpus* from the Place where He was taken; and afterwards committed to *Newgate:* From whence he was brought up by Rule, on *Tueſday* 6th *June* 1758.

Mr. *Norton*, for the Crown, immediately prayed that he might be aſked "what he had to ſay why Judgment ſhould not paſs upon "him."

And the Outlawry was then ordered to be read; And was accordingly begun to be read. But

The COURT not having had any previous Notice of this, nor having even ſeen the Outlawry, Adjourned it to the *Saturday* then next following (the 10th;) and Ordered that Copies of the Outlawry ſhould be ſent to them, in the mean Time.

The Defendant intimated "that he was out of the Realm at the "Time of the Outlawry pronounced:" And he alſo intimated his Deſire to have the Aſſiſtance of Counſel.

But *per* Lord MANSFIELD—The Court can *not aſſign* him Counſel, *till* he has pleaded: And *then* he may have Counſel, upon that *collateral* Matter. However, the Court do not reſtrain Counſel from adviſing him in *private.*

N. B. The Sheriff of *Middleſex* was ready with a Jury, *in Caſe* he had now pleaded "That he was NOT *the ſame Perſon.*"

On the ſaid *Saturday* (10th *June*) the Defendant being brought to the Bar, was called upon to hold up his Hand, and then arraigned (by Mr. *Athorpe* Secondary of the Crown-Office,) upon an Outlawry upon an Indictment in *London*, for High Treaſon in diminiſhing the Coin of this Kingdom; and aſked what he had to ſay for himſelf "Why this Court ſhould not proceed to give Judgment and "award Execution againſt him according to Law."

Note—The Sheriff of *Middleſex* was again ready with a Jury, (as before) in caſe He had denied his being the identical Perſon.

Mr. *Whitaker*, who was Counſel for the Priſoner prayed that the Outlawry might be read. Which being done—

Mr. *Whitaker* ſaid that If the Outlawry is bad, the Defendant, or even any *Amicus Curiæ*, may aſſign Errors upon it; And the Court will either give him Time to apply for a Writ of Error, or give him Leave to plead to the Indictment.

Now this *Outlawry is bad*, (He ſaid) upon the Face of it.

1ſt Exception—The ſecond *Capias* ought to have had 3 *or* 4 Months between the Teſte and Return: Whereas this has *only* 15 *Days*. 8 *H.* 6. *c.* 10. is expreſs "that it ſhall be returnable "3 Months after, where the Counties are holden from Month to "Month; and 4 Months after, where the Counties are holden "from 6 Weeks to 6 Weeks." 10 *H.* 6. *c.* 6. confirms the former Act; and extends it to Indictments removed by *Certiorari*. And for Want of this, the Outlawry is *void*.

2d Exception. Here is a *Diſcontinuance* of Proceſs for a whole Year: There being a Chaſm of a whole Year, in which it does not appear that any Writs were *iſſued out*; (though the Sheriff's Returns to ſuch Writs are indeed ſet out.)

3d Exception (To the *Exigent*.) This Exigent is in *London*: And the Outlawry is returned to be pronounced by *Mr. King*, the *Coroner*. Whereas the *Lord Mayor* of *London* is *perpetual Coroner* in *London*: And the *Recorder* is to *pronounce* it. *Cro. Jac.* 531. *Garrard* v. *Regem* proves that the Mayor for the Time being is perpetual Coroner. 2 *Ro. Abr.* Title *Utlagarie*, *Fo.* 805, 806. prove both Poſitions: *Pa.* 806. "That the Mayor is Coroner;" and *pa.* 805. *per quel*, *Pl.* 1. "That the Judgment is given by the Recorder; and "*not* by the Coroners."

4th Ex-

4th Exception. He is not ſaid to be outlawed, "*ſecundum Legem* "*et Conſuetudinem Regni:*" Which the Writ requires. And *Dalton* gives the Return in that Manner.

5th Exception. The *Name of Office* of the Sheriffs is not ſet to the Return of the ſecond Exigent: 'Tis only "the Return of *W.* "*A.* and *A. C. Eſquires.*" 2 *Hale's Hiſt. P. C.* 204. is expreſs "that it muſt be ſo:" "The Sheriff's Name *and Office* alſo muſt "be ſubſcribed to the Return of the Exigent; e. g. *A. B. Arm'* "*Vicecomes.*"

N. B. The Record appeared to be right. But Mr. *Whitaker* ſaid it was not ſo in the Return upon the Writ itſelf.

6th Exception was to the *Writ of Proclamation:* Which he alledged to be faulty, both in it's *Teſte* and in it's *Return.* This Writ is founded upon the Statute of 31 *Eliz. c.* 3. Which gives it in Perſonal Actions, and directs the particular Manner &c; And to be of the SAME Teſte and Return with the Exigent. 4, 5 *W. M. c.* 22. § 4. extends this Writ of Proclamation to *Criminal* Caſes, as well as Civil; and directs it to be delivered to the Sheriff 3 Months before the Return.

Now this Writ of Proclamation is *teſted* and *returned* upon the SAME DAY. And the Return of the Sheriff is only "That he cau- "ſed him to be proclaimed according to the Form of *the* Statute." But *Non conſtat What* Statute he means: There is none mentioned in the Writ.

The Return ought to be particular; and to *ſpecify* the reſpective Proclamations, and to ſhew that they were a Month before the *quinto exactus* by Virtue of the Exigent. And ſo *Dalton* ſays.

7th Exception. The Man was *abroad, out of the Kingdom,* at the time when the Outlawry was pronounced againſt Him.

This, indeed, is an Error in *Fact*; and muſt be verified.

8th Exception. The Huſtings (where it was pronounced) are *not* ſaid to be "holden *in and for* the City of *London.*"

Mr. *Norton contra, pro Rege,* ſaid He would be under the Direction of the Court, whether to defend it now, or take Time.

The COURT ſeemed to think that Mr. *Attorney General* ſhould have been preſent.

2 But

But Mr. *Norton* ſaid that Mr. *Attorney* had deſired to be excuſed.

Lord MANSFIELD—*Some* of the Exceptions ſeem to have Weight: And ſome of the Errors alledged are Errors in Fact; And it is a Matter of Diſcretion in the *Attorney General*, " Whether he will " think proper to confeſs *them*, or not."

Mr. Juſt. FOSTER—Some of the Exceptions go to ſhew the Outlawry to be a *Nullity*, and to avoid it *without* a Writ of Error.

Which Lord MANSFIELD agreed to.

Mr. Juſt. DENISON—The Cuſtom of the City of *London* is a Matter of Fact.

Lord MANSFIELD—Mr. *Attorney General* will conſider Whether to confeſs the Errors in Fact, and let the Party in, to plead to the Indictment; or take the longer Courſe of a Writ of Error: This is a Matter of Prudence.

Mr. *Whitaker* prayed that the Priſoner might be ſent to the Priſon of *this* Court; and not to *Newgate*.

Per Cur'. *Newgate* is as much the *Priſon of this Court*, as the King's Bench Priſon is: EVERY *Priſon in the Kingdom* is the *Priſon of this Court*.

Priſoner remanded; and Ordered to be brought up again on *Tueſday*, the 13th.

And Now, the Defendant being brought up accordingly, Mr. *Attorney General* allowed that One or Two of the Exceptions were fatal; As for Inſtance the 1ſt and the 6th.

But though the Act of 31 *Eliz. c.* 3. declares the Outlawry to be *void*, if had otherwiſe than that Act directs; Yet he ſaid, He was afraid this Making it void could not be done by the Court upon *Motion*; but it muſt be avoided by *Writ of Error*, in the *legal* Way. For ſo is *Plowd. Com.* 137. *b.* and *Hob.* 166. and 2 *Hawk. P. C.* 306. *c.* 27. § 127.

Lord MANSFIELD—What do You ſay to the Errors in *Fact*?

Mr. *Attorney General*—If there are any that I *can* confeſs, I would do it: Becauſe I am ſatisfied it *muſt be reverſed* upon a Writ of Error. As to the 7th. If I was to confeſs it, it would not ſignify: Becauſe his Time is elapſed; The Year is expired.

Cur'. There is no getting at it, without a Writ of Error.

Lord MANSFIELD—If the Attorney General has an Authority from the Crown, he may confeſs an Error in *Fact*, which is not true: But the *Court* will not permit the Confeſſing an Error in *Law*, which is not true.

Mr. Juſt. FOSTER mentioned a Caſe of one Mr. *Stafford*, who was called "Eſquire;" And he ſaid he was only a Yeoman, and not an Eſquire: And the Attorney General came in and confeſſed it. *

* *V. Lucas's Reports* 188.

Per Cur'. The preſent Defendant was remanded in *Order to* † *purchaſe his Writ of Error.*

† "*Purchaſing*" his Writ of Error is a technical Term; which does *not* here convey any *pecuniary* Idea, as if he was to pay a *Price* for it.

N. B. Per Cur' and Counſel—There are a great many *other Errors* upon this Record.

Wedneſday 14th *June* 1758.

Cheſterton *verſus* Middlehurſt.

A *Bail-Bond* was given in a Court of a *County Palatine* (*Cheſter*,) in an Action brought there: Which Bail-Bond being aſſigned by the Sheriff, an Action was brought upon it in *this* Court.

The Defendant filed Special Bail, below; and then moved to ſtay Proceedings here. And

The COURT All held this bringing the Action here, to be an *unfair Practice*; unleſs there had been ſome *Special Circumſtances* to warrant it, (as the Defendant's Living out of the Juriſdiction, or the like:) Which was not even pretended, in the preſent Caſe. Therefore the Court held that the Plaintiff ought to have proceeded in the Court below; and accordingly *ſet aſide* his Proceedings in *this* Court.

Rex *verſ.* Florence Henſey M. D.

ON *Monday* 8th of *May* 1758, The Defendant was brought into Court by the Keeper of *Newgate*, upon a *Habeas Corpus* directed to him, commanding Him "to bring up his Body." He appeared (upon the Reading of the Return) to have been committed

mitted by Warrant under the Hand and Seal of the Earl of *Holdernesse* One of his Majesty's Principal Secretaries of State, for *High-Treason* in ADHERING TO and aiding and corresponding with the King's Enemies; and to be detained in his Custody, by Virtue of a second Warrant of the like Kind.

Mr. *Attorney General* prayed that the Return might be filed.

Cur. Let it be filed.

Mr. *Attorney General* then informed the Court and the Defendant, "That there was an Indictment of High-Treason found "against the Defendant:" (Which Indictment was so found by the Grand Jury, by itself singly, and brought into Court, singly, by them on *Tuesday* last.) With which Indictment, the Defendant being now charged, And being called upon by the Secondary of the Crown-Office to hold up his Hand, The Court Ordered the Indictment to be read to him.

But The COURT, (*before* it was read to him,) asked him, "Whether he desired Counsel to be assigned to him;" And if he did desire to have Counsel, then "*Whom*, by Name, "He desired to have assigned to him."

He named, And accordingly

The COURT assigned to him, Mr. *John* * *Morton*, and the Honourable Mr. *Thomas Howard*; and Mr. *John Peirce* for his Attorney.

N. B. Mr. *M.* is not One of His Majesty's Counsel; (though He has a Patent of *Precedency*.)

The Indictment was then READ *verbatim* to him, by the *expres* Direction of the Court: (Although He *had a* COPY of it five Days ago; agreeable to 7 *W.* 3. *c.* 3, "for regulating of Trials in Cases "of Treason and Misprision of Treason.") Upon which Indictment being thus read to him by Mr. *Barlow*, He was immediately asked (by Mr. *Athorpe*, Secondary of the Crown-Office,) "Whether he was guilty or not guilty of the High-Treason therein "charged upon him. To which he pleaded

NOT GUILTY.

The Defendant, after he had pleaded "Not guilty," intimated to the Court "That he had received hard and severe Usage, during "his Confinement."

Mr. *Attorney General* absolutely disavowed his having received any severe Treatment at all; and assured him that he would be treated with all possible Humanity, so far as was consistent with his being safely secured from Escaping.

Then

Then a Day was fixed for his Trial; *viz. Monday* 12th *June* 1758.

Which being ſettled, without any ſort of Objection on any Part, the Defendant was REMANDED (to *Newgate.*)

On which *Monday* 12th *June* 1758, at the Trial, The Defendant's Counſel took Exception to the Reading of two Papers—(N°. 1, 2.) being the rough Draughts of Letters written by himſelf, and found in a Bureau where he kept his Linen and Papers; and which were only *introductory* Evidence; not any Part of the *Overt-Acts*, which were to ſupport the Species of the Treaſon charged upon him. It was objected to them, that they were not ſufficiently proved to be *found in his Cuſtody*; nor ſufficiently proved to be his *Hand-Writing*: For *mere Compariſon of Hands* is not ſufficient to ſupport their being read againſt the Defendant.

The Counſel for the Crown anſwered, That, the Papers being *found in his Cuſtody*, and his Hand having been *ſufficiently proved by Perſons who had ſeen him write*, it was ſufficient to intitle the Crown *to read* them; though the Jury are to judge of them. And they mentioned *Layer*'s Caſe; and Lord *Preſton's* Caſe; and *Francia*'s Caſe; and *Sidney*'s Caſe; and *Buchanan*'s Caſe, in the North, in 1746; and *Croſby*'s Caſe, *Skinner* 578, 579. and 1 *Ld. Raym.* 39. S. C. *Rex* v. *Croſby alias Philips:* Where Compariſon of Hands was allowed to be good Evidence, if the Papers are found in the Cuſtody of the Perſon himſelf. Sir *John Wedderburn*'s Caſe. Sir *Cholmeley Dering*'s Caſe—for Murder: *(i. e. Rex* v. *Thornhill.)*

The COURT unanimouſly over-ruled the Objection. Theſe Papers *were found in his Cuſtody*; and they have been ſufficiently proved, by Perſons who have *ſeen him write*, to intitle the Crown to *read* them.

Then the Evidence for the Crown being opened, and given; (which conſiſted chiefly of Letters to and from the Priſoner;) and being alledged to be a Proof of Overt-Acts of *two* different Sorts of Treaſon, *viz. Of compaſſing and imagining* the Death of the King, and alſo of *adhering* to the King's Enemies;

Mr. Solicitor General declined Summing up the Evidence; choo-ing to reſerve himſelf for the Reply.

Which the COURT held to be within Rule, if He ſo thought proper.

So the Counſel for the Crown reſted it here.

Then the Counſel for the Priſoner (Mr. *Morton* and Mr. *Howard*) began upon his Defence. They declined giving any *Evidence* on the Part of their Client: But they inſiſted upon theſe two Topics, in his Defence; *viz.*

1ſt. That *no* One Fact was proved upon him in *Middleſex*; where the Indictment is laid.

2dly. That the Evidence, if it had been brought Home to the Defendant ſo as to affect him, yet would by no means have *amounted to a Proof* of any Overt-Acts of *either* of the two before named Species of Treaſon.

For they were only Letters of *Correſpondence*. And if a Correſpondence of this Nature, either within or out of the Realm, had been Treaſon in *general* and in *all* the King's Subjects, within 25 *Edw.* 3. it would never have been *particularly enacted to be Capital* in a SOLDIER, by the Mutiny Acts of 3, 4 *Ann. c.* 16. §. 35. Fo. 266. and 30 *G.* 2. *c.* 6. §. 1.

N. B. The former makes it Treaſon, to do it either "upon "Land, *out* of *England*, or at Sea:" The latter makes it Capital, or ſuch other Puniſhment as a Court Martial ſhall inflict, to do it "upon Land *within* OR *out* of *Great Britain*, "or upon the Sea."

Mr. YORKE, His Majeſty's Solicitor General, then proceeded to reply: In doing which, He made only ſome General Obſervations upon the Evidence that had been given on the Part of the Crown, but did not ſum it up particularly, (as the *Priſoner* had given *no Evidence* at all;) but confined himſelf to what the Defendant's Counſel had urged in his Favour, in Point of *Law and Reaſon*.

He anſwered thus, to the Objections which they had inſiſted upon.

1ſt. That the 5th Letter given in Evidence bears Date "from "*Twickenham*, which *is in Middleſex*." Which, alone, is a full Anſwer to the Objection.

2dly. That the Correſpondence proved *was*, in Point of Law, an *Evidence of an Overt-Act*, of EACH of the before mentioned Species of Treaſon:

First—Of *Compaſſing and imagining* the Death of the King. To prove which, he cited 1 *H. H. P. C.* 167. Cardinal *Pool*'s Caſe. 3 *Inſt.* 14. S. C. And ſo Ld. Ch. J. *Holt* alſo held, in *Gregg*'s Caſe; (which He cited from a Manuſcript Report of Judge *Tracy*'s:) And Baron *Smyth* and Mr. Juſt. *Dormer* ſeemed to agree to it. And in Ld. *Preſton*'s Caſe, alſo, Ld. Ch. J. *Holt* ſo held.

Secondly—It is alſo an Overt-Act of *adhering* to the King's Enemies. In *Gregg*'s Caſe—, It was agreed by all the Judges, "That ſuch Letters, *though intercepted* before they arrived, "were ſo."

Lord MANSFIELD—We have ſeen three Reports of *Gregg*'s Caſe; *viz.* One, by Ld. Ch. Baron *Dodd*; another by Mr. Juſt. *Price*; and this by Mr. Juſt. *Tracy*: And they all three agree "That ſuch Letters, *though intercepted*, were Overt-Acts "of *each* Species of Treaſon before mentioned; And that *All* "the Judges *agreed* in this."

Mr. Solicitor General—And as to the Statutes of Queen *Ann* and the preſent King, The Statute of 7 *Ann. c.* 4. and the late Mutiny Act of 30 *G.* 2. *c.* 6. go *further* than the Act of 25 *Ed.* 3. does.

Lord MANSFIELD ſummed up the Evidence.

As to the LAW—*Levying War* is an *Overt-Act* of *Compaſſing* the Death of the King: An *Overt-Act* of the *Intention* of levying War, or of bringing War upon the Kingdom, is ſettled to be an *Overt-Act of Compaſſing* the King's Death. *Soliciting a foreign Prince, even in Amity* with this Crown, to *invade* the Realm, *is* ſuch an *Overt*-Act: And ſo was Cardinal *Pool*'s Caſe. And *One* of theſe Letters is ſuch a Solicitation of a foreign Prince to invade the Realm.

Letters of Advice and Correſpondence, and Intelligence to the Enemy, to enable them to annoy us or defend themſelves, written and ſent, in order *to be delivered* to the Enemy, are, *though intercepted*, Overt-Act of *both* theſe Species of Treaſon that have been mentioned. And this was determined by all the Judges of *England*, in *Gregg*'s Caſe: Where the Indictment (which I have ſeen) is much like the preſent Indictment. The only Doubt, there, aroſe from the Letters of Intelligence being *intercepted* and *never delivered*: But They held "that *that* Circumſtance did *not* alter the "Caſe."

As to the FACT, in the preſent Caſe—The Jury are to conſider whether they were written by the Priſoner at the Bar, *in Order to be delivered to the Enemy*, and *with Intent* to convey to the Enemy ſuch Intelligence as might ſerve and aſſiſt them in carrying on War againſt this Crown, or in avoiding the Deſtinations of our Enterprizes and Armaments againſt them.

Then His Lordſhip went through the Evidence particularly: And having finiſhed his Summing it up, He propoſed to the Counſel, and they agreed to it on both Sides, "That the Jury ſhould take the Letters out with them."

As to the *Locality* of the Facts—He ſaid, It is certain that *ſome One* Overt-Act muſt be proved IN *the County* where the Indictment is laid: Indeed if *any One* be ſo proved in *that* County, it will let in the Proof of others in *other* Counties.

Now here, *One* of the Letters is *dated at Twickenham*, which is in *Middleſex*.

The Jury went out, a little after eight, taking the Letters *&c* with them; And ſoon ſent to deſire Leave to have Candles; which the Officer who brought in their Meſſage, ſaid he was ſworn "not to let them have;" unleſs it ſhould be ſo *Ordered*.

Lord MANSFIELD aſked the Counſel, if either Side objected to it.

And the Counſel on both Sides agreeing to it—

Leave was given accordingly: And they had them.

In half an Hour, the Jury returned, and brought in their Verdict, "GUILTY."

Lord MANSFIELD obſerved, as to the two Acts of Parliament of 7 *Ann. c.* 4. and 30 *G.* 2. *c.* 6.—That they carried the Matter *further* than the Law extended to before: And, beſides that, they were Both of them *declaratory*, as well as enacting; which was calculated on purpoſe to avoid the very Objection that has been now taken: (*V. ante*, 645.)

The Defendant was remanded to *Newgate* and a Rule made "to bring him up again on *Wedneſday*."

And

And the Priſoner being accordingly brought to the Bar, on this Day about 4 o'Clock in the Afternoon, by the Keeper of *Newgate*,—

Mr. Attorney General prayed the Judgment of the Court upon him.

Mr. *Athorpe*, Secondary of the Crown Office, called upon Him to hold up his Hand, and reminded him, " That he had been indicted " of High Treaſon, and thereto had pleaded *Not guilty*; and for his " Trial had put himſelf upon God and the Country, which Country " had found him Guilty;" and then aſked him " If he had any " Thing to ſay for himſelf, why the Court ſhould not proceed to " give Judgment againſt him according to Law."

The Priſoner thereupon took out a written Paper; and rather read, than ſpoke it. It conſiſted partly of an *Apology*, and partly of a Sort of *Defence* againſt the Charge; together with ſome Objections to the *Proof* of it upon him.

The Subſtance of it was—That the Correſpondence with which He had been charged, as treaſonable and giving Intelligence to an *Enemy* of his Liege Sovereign, was nothing more than writing Letters to his *own Brother*, who was ſo far from being an Enemy, that he was in the Service of the King's *good Brother and faithful Ally*, as His Majeſty Himſelf had ſtiled the King of *Spain*, in His Speech to his Parliament; and that theſe Letters contained *only Coffee-houſe News and idle Speculations*; but gave no ſuch Intelligence as could be *uſeful* or even unknown to an Enemy; nor did betray any of the *Secrets* of this Government to their Enemies.

That he had no Malignity in his Heart againſt the King or His Government; nor had ever been guilty of any improper Behaviour; But always conducted himſelf with Decency and Duty towards his King and Country: For the Truth of which, he appealed to his Character and Converſation.

And as to the *Papers* which were ſeized by the Meſſenger, at the Houſe where he lodged—They might juſt as well be the *Woman*'s of the Houſe, as *his:* For *Both* of them had *Acceſs* to the Bureau, in which the Meſſenger found them.

That the Statute of 7 *W.* 3. *c.* 3. § 2 & 4. directs that there ſhall be *two* Witneſſes to each Overt-Act of the ſame Treaſon. Whereas his *Hand-writing had been proved only by One* Witneſs, who could pretend to *know* any Thing of his Hand-writing: For that the other

three knew little or nothing of his Hand, and could *ſcarcely* be ſaid even to have ever ſeen him write.

[Note. The Act directs "That *either* both the Witneſſes muſt "be to the ſame Overt-Act, OR One of them to One, and "the Other of them to another Overt-Act of the ſame "Treaſon."]

And there was no Witneſs at all, he ſaid, to prove any Act of Treaſon committed by him *in the County* of *Middleſex*, where the Indictment lays the Offence to have been done.

He alledged that this Caſe of his was the *firſt Inſtance*, ſince the Statute of *Edw.* 3. where *Giving Intelligence* has been holden to be *High-Treaſon*. And he ſaid that as he had not had four Days between his Trial and his Sentence, (as was uſual,) his Counſel had not had ſufficient Time to prepare themſelves in Arreſt of Judgment.

Therefore upon the whole, he prayed that the Court would either be ſo kind to him as to *reſpite* his Sentence; or, if that might not be obtained, that they would be graciouſly pleaſed to recommend him to *His Majeſty's Mercy*.

He was then aſked "if he had any *Point of Law*, to move in *Arreſt* of Judgment."
To which His Anſwer was, "That he had not."

Lord MANSFIELD then obſerved that the Priſoner had been convicted upon a very full Trial, and upon very cogent Proof; and that he appeared upon the Evidence to have committed *many* Overt-Acts of Treaſon.

He took Notice that the Priſoner had even *ſolicited* this Employment, *from Inclination*; as well as under-taken for *Hire*, to act as a Spy againſt his own native Country, and to reveal the Secrets of the King and Government to the open Enemies of Both; and to give them Information and Intelligence of the Enterpriſes and Deſigns of this Kingdom againſt them; and all this, with Intent and in Order to aid and aſſiſt them in defending themſelves againſt his King and Country.

He obſerved that the Enemy had manifeſtly ſhewn "that *they* "*themſelves looked upon* this Correſpondence to *be* an Aid and Aſ"ſiſtance to them;" by their giving him a Stipend, and paying him a ſtipulated Monthly Price, as the Purchaſe and Reward of it, under a Penalty of his forfeiting 20 *s.* for every Omiſſion of a Weekly Letter from him.

He alſo obſerved, that the Priſoner appeared to have procured his Information of the State of our Navy and Army and Finances, and the other Matters contained in his Papers and Memorandums ſeized in his Bureau, with that very VIEW *and Intention* of communicating them to the Enemy: And by his Letter of the 22d of *July* laſt, he had even *adviſed and invited the Enemy* TO INVADE *his Native Country*; and to *bring War and Deſtruction into the Heart of it*. The Guilt of this Offence ariſes from the *Nature* of the Correſpondence, which is calculated to betray the *Secrets* of his King and Country to the Enemy, *as a* SPY; a Treaſon of a very dangerous kind, and which gives an Enemy much more Aid and Aſſiſtance, than a Perſon publicly and profeſſedly declaring himſelf an *open* Enemy to his own Country could give them.

He laid it down as a Point which was never doubted, " That " this Offence, of SENDING INTELLIGENCE to the Enemy, of the " Deſtinations and Deſigns of this Kingdom and Government, *in* " *Order to* aſſiſt them in their Operations againſt Us or in their " Defence of themſelves, is High-Treaſon; *even* ALTHOUGH ſuch " a Correſpondence ſhould be *intercepted*, without ever coming to " the Enemy's Hands. And ſo was the Reſolution of All the " Judges in *Gregg*'s Caſe."

And as to the Witneſſes to the Priſoner's *Hand-Writing*—There are *Four* of them that have *ſeen* him write, and ſwear to his Hand, of their *own Knowledge:* And theſe four Witneſſes are *not contradicted* by any Evidence on his Part; but, on the contrary, are *confirmed* by a Variety of Circumſtances.

As to the Point of *Locality*—He ſaid that IF there had been *no* Evidence at all, of that particular Letter which bears Date at *Twickenham* (which is *in Middleſex*,) Yet nevertheleſs the *Preſumption* was ſtrong and ſtood uncontradicted too, " That they were *written* " *in Middleſex*, where the Priſoner reſided, and where his Papers " were ſeized."

As to *Mercy*—He told the Priſoner that *that* was in the KING's Breaſt; but was no Part of *their* Province: And therefore his Application on *that* Head, muſt be *elſewhere*.

The *Lord* CHIEF *Juſtice* (it being a Caſe of *High-Treaſon*) pronounced the Sentence.

Mr. *Attorney General* then moved that the Court would appoint a *Day* for the *Execution*.

Lord MANSFIELD deſired him to name a Day.

Mr. *Peirce*, the Defendant's Solicitor, ſaid he hoped it would not be an early Day.

Mr. *Attorney General* ſaid, He was willing to give as long a Day as might be proper.

Mr. Juſt. FOSTER mentioned, that Dr. *Cameron* had 3 Weeks.

(*N. B.* Mr. *Charles Radcliffe* had only a Fortnight.)

Mr. *Peirce* deſired that this might be a *Month*.

The COURT and Mr. *Attorney General* very readily agreed to a *Month*. Accordingly, it was Ordered to be upon *Wedneſday* the 12th of *July*.

The Priſoner was remanded to *Newgate*; and bowed reſpectfully to the Court, and courteouſly to the Bar and Audience, on retiring.

Note.
On the *laſt* Day of a Term

An *Attachment* may be moved for, in the two Caſes following, *viz.*
For Non-payment of *Coſts*; and
Againſt a Sheriff, for *not returning* a Writ.

This was alledged by Mr. *Clayton*, and conceded by the Court, to be the Practice.

Note alſo
The Rule is, That Counſel may move, on the laſt Day of Term,
To *quaſh* an INDICTMENT; but
Not to quaſh an *Order*.

The Court was not up, till within about a Quarter of an Hour before Midnight.

The End of *Trinity* Term 1758. 31 *Geo.* 2.

A Short REFERENCE (for immediate Uſe) to the PRINCIPAL MATTERS contained in *this* Volume; The *full* Table (or *Abridgment*) being reſerved for a more proper Place.

Account ſtated. See *Debt*, *Extinguiſhment*, *Pleading*.

IS *no Extinguiſhment* of the Original Debt. *Page* 9.

Action.

Of Trover. See Title *Trover*.
Of Treſpaſs. See *Treſpaſs*.
Of Ejectment. See *Ejectment*.
Of Debt upon an *Award* itſelf differs much from an Action of Debt upon the Arbitration-*Bond*. 280 to 282.
On the *Caſe*, upon 12 *G.* 1. *c.* 29. § 1, 2. 332. See *Declaration on Bail-Bond*.
On *Indebitatus Aſſumpſit*. 375. See *Declaration*.
On a *Note*. 375. See *Declaration*.
On a *Bail-Bond* given in a County *Palatine*—*Where* it muſt be brought. 642.
By Huſband and Wife (*Pariſh-Poor*) againſt a Juſtice, who committed the *Wife*, for returning without a Certificate. 596 to 603. See *Pariſh-Poor*.

Ad quod damnum.

Is the only legal Authority for *altering* a Road. 465.
Incloſing a Road. *ibid.*
Repairing the *new* Road. *ibid.* See *High-way*.

Alienation of *Land*.

Could not be made, according to the Ancient *Feudal* Law, without the *Lord's concurrence*: And the *Form of Conveyance* was by *Feoffment*, publickly, notoriouſly and ſolemnly made. 107.
The Statute of *Quia Emptores terrarum* (18 *E.* 1.) took away *Sub-Infeudations*; and gave *free Liberty* of Alienation, to the Tenants

of *Subjects*, and to Thoſe who held of the King as of an *Honour* or *Manor*: And *other* Statutes extended the Power to the King's Tenants *in Capite*. *Page* 108.

Ambaſſadour's *Domeſtic Servants*

Muſt be *bonâ fide* ſo, in order to claim Privilege under 7 *Ann. c.* 12. A Land-waiter at the Cuſtom-Houſe was denied it. 401.

Amendment

Shall *not* be made, *after* the Court can't help ſeeing that the Matter is upon Record: For the whole muſt be *ſuppoſed* to be ſtill *in Paper*. 322.

Amotion. See *Diſfranchiſement*.

Apprentice. See *Trade*.

Apprenticeſhip

Where neceſſary to be *ſerved*, previouſly to exerciſing a Trade. See *Indictment*, and *Statutes* (5 *Eliz. c.* 4. § 31.)

Arbitration.

Awards are *now* conſidered with *leſs Strictneſs* than *formerly*. 277, 278.

Yet they muſt be *certain*, and *final*. *ibid.*

In an Action of Debt *upon* the *Award* itſelf, the Plaintiff needs not ſhew forth ſo much as he muſt have done, if he had brought it *upon* the Arbitration-*Bond*. 280, 281, 282.

Aſſiſe of Novel Diſſeiſin.

When and *whence* introduced; And *how* and *why* extended. 107 to 110.

Againſt Whom, this Remedy lay. 110.

Aſſurance. See *Inſurance*, *Policy*.

Attachment

Granted againſt the Plaintiff's Attorney, for putting to the Proceſs the *Name* of an Attorney of this Court, without Authority. 20.

What *Sort* of Attachment may be moved for, on the *laſt* Day of a Term, 651. See *Practice*.

Attaint.

The Writ of Attaint is *now* a mere Sound: And, in many Cases, *no Remedy*. *Page* 393. See *New Trial, Practice.*

Attorney.

The *Name* of an Attorney *put to Process*, without his Authority. 20. See *Attachment.*

Taking a *Turn-key* for his *Article-Clerk*—Disallowed; And the Articles cancelled. 291.

Award. See *Arbitration.*

Bail.

A *Bankrupt*'s Bail (which Bankrupt obtains his *Certificate* pending the Action,) *discharged*, if obtained *before* they are fixed: *Liable*, if not till *after*. 244, 245.

Affidavit of the Debt, or of the Sum sworn-to being marked. See *Statutes* (12 *G.* 1. *c.* 29. § 1, 2.) and *Declaration on Bail-Bond.*

How a *Soldier*'s Bail may *surrender* Him, in their own Discharge. See *Soldier*, *Habeas Corpus.*

Bail shall have *time to surrender* their Principal, after a Writ of Error brought by Him: But upon different *Terms*, according to different *Circumstances*. 340.

Where the *Scire facias* is irregular, for want of an *Exoneretur* being actually entered. 409.

Bank-Notes.

The *Nature* and *Currency* of them, fully discussed: And why a Person who has *fairly* and *bonâ fide* received even a *stolen* One regularly passed in Currency, shall recover against the Cashier who *stopped* it. 452 to 460.

Bankrupt.

The *Property* of a Bankrupt's Goods is, *after* Assignment, in the Assignee, *from* the time of the Act of Bankruptcy, by *Relation.* 31, 32.

And the Assignee may maintain *Trover* against the Sheriff who *took* them in Execution after the Act of Bankruptcy and *before* the Assignment, and Sells them *after* the Assignment. 31, 32, 33.

The

The *Bail* of a Bankrupt who obtains his Certificate pending the Action, ſhall be diſcharged, if *not* before *fixed*: But if *already fixed*, they remain liable. *Page* 244, 245.

But the *Bankrupt Himſelf*, though diſcharged of the *Original* Debt, is *yet liable* to the Judgment obtained againſt Him in an Action upon the *Bail-Bond*. 436.

Statutes concerning Bankrupts—How to be *conſtrued*, in general: 439, 474. And in particular, with regard to *lying* in Priſon, and *eſcaping* out of it. 439, 440.

Where a Conveyance by a Trader, of his *Whole* Subſtance to a particular Creditor, but *continuing in Poſſeſſion* and acting as *viſible Owner*, ſhall be eſteemed *fraudulent* and an *Act* of Bankruptcy. 467 to 485.

Baron and Feme.

Are conſidered as *One*, in Matters of *Evidence*. 424.

The *Will* of a *Feme Covert* made under an Agreement with her Huſband, muſt be *proved*; And Adminiſtration of it, (though not ſtrict Probate,) granted 432. But her *Power* to make it, is a Queſtion to be diſcuſſed in a *Common-Law* Court. 432, 433.

Separated by *Articles*, in Conſideration of Money received by the Huſband, with Covenants from Him: He can't *ſeize* Her, or *force* Her to live with Him. 542.

Biſhops.

With the *Confirmation* of their Dean and Chapter, might, at *Common* Law, exerciſe every Act of abſolute Ownerſhip. 221.

They may *now* grant *Ancient Offices*, with the *ancient Fees*, in the ſame manner as they have been *uſually* granted before 1 *Eliz. c.* 19. *ibid.* to 226.

Bonds.

Limitation of them; (*i. e.* their being ſuppoſed to be ſatisfied.) 434. See *Limitation*.

By-Law.

In *Reſtraint* of Trade, is *not* good, without ſetting forth a *particular Cuſtom*, to ſupport it. 16, 17.

Such a particular Cuſtom can't be *preſumed*. *ibid.*

A By-Law to *confine* Such as have a Right to the general Freedom of the City of *London*, to take it up in ſome One particular *Company*, is a *Reſtraint* of Trade. *ibid.*

Of a Company, "To elect upon their Livery, *Such* and ſo many of "their Members, as ſhould *ſeem* moſt meet and convenient to "them; On pain to *forfeit* 25 *l.* on Refuſal to accept, or to pay "the Admiſſion-Fee;" is a *good* By-Law. *Page* 239, 240.

By-Laws ought to have a *reaſonable* Conſtruction. *ibid.*

A By-Law returned to have been made by the *Body at large*, *may* be good, where the Power is given to a *ſelect* Number. 131.

A By-Law to *prevent* being made free, *until* called at three ſeveral Meetings of the Mayor &c, and approved of by them or the Majority of them, was holden to be a *reaſonable Regulation* of Trade. 131.

A By-Law made *to give Power of Amotion*, for juſt Cauſe, would be *good*; though the Corporation who made it, had *no* Power of Amotion given them expreſly by Charter or by Preſcription. 539.

Caſes doubted or denied.

4 *Leon.* 9. *pl.* 39. 6.

1 *Ventr.* 46. *Dyer* v. *Eaſt*—denied. 244. See *Statutes* (5, 6 *E.* 6. *c.* 4.) and *Prohibition.*

2 *Ld. Raym.* 767. *Regina* v. *Taylor*—denied. 252. See *Indictment.*

1 *Ld. Raym.* 724. *Cole* v. *Davies et al':* The 1ſt Poſition, ("that "no Action will lie againſt the Sheriff—") denied. 36.

Dyer 253. *b. pl.* 102.
Cro. Eliz. 217. *Green* v. *Edwards.*
1 *Co.* 153. *b.* Rector of *Chedington*'s Caſe.
Sheppard's Touchſtone 274.
} See *Term of Years*, and *Deeds.*

3 *Lev.* 334, 335. *Goodwin* v. *Blackman.* 330.

Yelverton 58. *King* v. *Goſper and Shire.* See *Common Recovery.*

11 *Co.* 99. *a. Bagg*'s Caſe, 2d Reſolution, denied. 538, 539. See *Diſfranchiſement.*

Certiorari.

On 5, 6 *W. & M. c.* 11. § 3. *No Coſts* are payable; *unleſs* the Indictment be brought by the *Party grieved*, or by Juſtices, Mayors &c, or other *Civil Officers* proſecuting *as* being Such. 431.

May be *ſuperſeded, quia improvidè emanavit*; The Return taken *off from the File*; and the Orders *remanded.* 488, 489. See *Quakers.*

Chancellor.

The Earl of *Hardwicke* ſwore-in the new Lord Chief Juſtice, on the 8th of *November* 1756. 1. And He Himſelf *reſigned the Seal* on the 19th. 20. Which was thereupon delivered to three *Commiſſioners. ibid.*

Chancery.

Decreeing Deeds fraudulent. *Page* 480, 481. See *Fraud, Bankrupt.*

Common

Is only a Right of *eating the Graſs:* But the *Lord* remains Owner of the *Soil.* 267.
What the *Lord may do:* And what He *may not* do. 265 to 268.
What the *Commoners may do*: And what They *may not* do. *ibid.*
In a *Juſtification* under a Right of Common, Two Eſſentials are, "that the Cattle be the Defendant's *own*;" and "that they "be *levant and couchant.*" 320. See *Pleading.*

Common Recovery.

On a Writ of Error, to *reverſe* it, There muſt be a *Scire facias* againſt the *Terre-tenants.* 361.
What the Terre-Tenant *muſt*, and what He may not *plead.* 361, 362.
A *Remainder-Man's Right* to reverſe One erroneouſly ſuffered. 413.
His *Method of doing it.* 412, 413.
The *Riſe*, *Nature*, and *Hiſtory* of Common Recoveries, *very largely diſcuſſed.* 115.
They ought not to be ſupported, where the Parties have *no Power* to ſuffer them. 116 to 119.
A *Secret Feoffment* under a *naked* Poſſeſſion, is not ſufficient. 117, 118.
Nor an Eſtate by *Wrong*, *Fraud*, or *Practice. ibid.*

Confeſſion.

Of a Charge, "*in Manner and Form as charged,*" confeſſes no more "than ſuch Matter *So* charged; but *no farther.* 613.

Conies.

Placed upon *Commonable* Land, by the Lord, is conſiſtent with the Lord's Grant: And the Commoner can't *kill*, *chaſe*, or *deſtroy* them; much leſs *dig* the Burrows. 265 to 268.
But if the Lord *ſurcharges*, or *incloſes*, the Commoner has a proper Remedy. *ibid.* See *Common.*

Construction.

Of *Statutes*—Several *Rules* laid down concerning it. *Page* 447 to 452.
Of *Deeds*, ſhould be liberal. 285.

Conviction.

On the *Game*-Acts, muſt *particularly* and *negatively* ſpecify "that "the Perſon convicted had *not any* of the Qualifications required "by 22, 23 *C.* 2. *c.* 25." 153 to 156.
On the *Hawkers and Pedlars* Acts, are to be taken *ſtrictly*: And a *ſingle Act* of Selling is not a Proof of a Man's being within them. 613, 614.

Copyhold.

Copyholds are very ſeldom granted *for Years*: But if they be ſo granted, the *Executor* of the Termor is obliged to be *admitted*; And the Lord is intitled to a Fine, upon ſuch Admittance. 206 to 218.

Coroner. See *Deodand*, *Inquiſition*.

If the Coroner *neglects* to find an Inquiſition, *Other* Juriſdictions may do it. 19.
But their *Inquiſitions* are *traverſable*. 18.
So alſo are the Coroner's. 19. (*Qu.* if thoſe of "*Felo de ſe*" are here included. 18, 19.)

Corporation: Corporator.

How to be *taxed*. 156 to 158. See *Tax*.
A Company's *Right to have a Livery* muſt be founded on Charter or Cuſtom: And it can't be preſumed, but muſt be *ſhewn*. 237.
Freedom of a Corporation may be *reſtrained* by By-Law. 132. See *By-Law*.
Election by *One ſingle* Portman only, being the ONLY *remaining* One, is good; though the Power of Election was given to the "Reſidue or the *greater Number* of them. 541.
Disfranchiſement. 517 to 541. See *Disfranchiſement*.

Costs.

On Diſcharging a Recognizance. See *Recognizance*.
On a *feigned Iſſue*. 603, 604. See *Feigned Iſſue*.
On *Informations*. See *Information*.

Covenant.

In a Building *and* Repairing Leaſe—Where it ſhall extend to *new* Erections only. *Page* 290, 291.

Court.

Rules and *Practice* of it. See *Practice*; and *infra*.

The great End of the *General Rules* of the Court, is the Attainment of *real Juſtice*, with *Eaſe*, *Certainty*, and *Diſpatch*. 301.

Spiritual. See *Prohibition*.

Inferior. See *Inferior Courts*.

Of *Equity*—can't decree a *Deed made by a Trader* to be fraudulent *in Equity*, Which is not fraudulent at *Law* and an *Act of Bankruptcy*.

Damages.

EXCESSIVE. See *Verdict*.

Debt.

Extinguiſhment of it. See *Extinguiſhment*, *Pleading*.

Declaration.

De bene eſſe—How and when to be *delivered*; and the *Effect* of it. 55, 56.

In *Debt* on a By-Law of a Company, for not taking the *Livery*—muſt *ſhew* that the Company has a *Right* to a Livery. 237. See *Demurrer*.

On a *Promiſſory Note*—See *Promiſſory Note*, and *infra*.

On a *Bail-Bond*—needs not ſet forth "that there was an *Affidavit* "of the Debt," or "that the Sum ſworn-to was *marked* on the "Back of the Writ." 332.

Upon a *general Indebitatus Aſſumpſit*, A *Note* may be given in *Evidence*. And what Sort of a Note will *ſupport* the Declaration. And where the *Undertaking for an Infant* is *original*; and where *collateral*. 375, 376.

Upon a *Preſcriptive Right*—What muſt be *ſhewn* therein: And what needs not to be ſhewn. 443, 444, 445.

Deeds.

The *Conſtruction* of them, eſpecially ſuch as execute mutual Agreements for valuable Conſiderations, ought to be *liberal*, and agreeable to the obvious and apparent *Intention* of the Parties. *Page* 285, 286.

Priority of Execution is a Fact: But if not found, the Court may make a *Preſumption*, in ſupport of the clear Intention of the Parties. 106, 107.

Demurrer.

The Want of *Shewing a Right* in a Company "to have a Livery," (in a Declaration in Debt upon a By-Law, for not taking the Livery,) may be taken Advantage of, upon a *general* Demurrer. 237.

When it may be *withdrawn:* And when not. 322.

Deodand. See *Coroner*, *Inquiſition*.

Deviſe.

"*For* LIFE *and* NO LONGER," may create an Eſtate in TAIL, by *neceſſary Implication*, to *effectuate* the *manifeſt* general *Intent* of the Teſtator. 50, 51, 52.

Wherever the *whole Property* is deviſed, with a *particular Intereſt* given *out of it*, the Operation is by way of *Exception* out of the abſolute Property. 233, 234.

Where an *abſolute Property* is given; and a *particular Intereſt* given in the *mean Time*; This ſhall *not* operate as a *Condition precedent*, but as a *Deſcription of the Time* when the Remainder-Man ſhall take *in Poſſeſſion*. *ibid.*

In *conſtruing* Wills, The *Intention* of the Teſtator ought to prevail, *if* agreeable to Law. 233. So 272, 273. So 554, 555, 556.

And *adjudged Caſes* may properly be argued from, if they eſtabliſh general Rules of Conſtruction. 233.

The Word *Legacy* may be extended to Deviſes of *Land*. 272, 273.

A *Pecuniary* Legacy can't be limited *after* a dying *without Iſſue*. *ibid.*

Credibility of Witneſſes atteſting a Deviſe of Lands, very fully *diſcuſſed* and *ſettled*. 417 to 431.

The Act of 29 *C.* 2. *c.* 3. probably *not* drawn by *Hale*. 418.

The *Power of Deviſing* ought to be *favoured:* And the Act of 29 *C.* 2. *c.* 3. did *not* mean to reſtrain it. 420.

It's *Riſe* and *Progreſs*. *ibid.*

It is more reaſonable *now*, than *formerly*: And *why*. *Page* 420.
Objections to the *Formalities* of Deviſes ought not to receive too much Countenance. 421.
Diſablities of Witneſſes from *Intereſt*, diſcuſſed and ſettled. 422 to 429.
The *Roman* Law on this Head, diſcuſſed and explained. 425, 426.
Legacies charged on Land may be *altered or revoked* by a ſubſequent *un*atteſted Will. 423.
Deviſes of *Land* differ from *Wills*: And how. 429.
A Deviſee under a *void* Deviſe, being a *ſubſcribing Witneſs*, may authenticate the *Reſt* of the Will: At leaſt, There is great weight in *Holt*'s Diſtinction, "That ſuch Will is *only* void *quoad* the "Deviſe to ſuch Witneſs." 428, 429.
A *Charge* upon *Land*, "to *pay Debts*," ought *not* to incapacitate ſubſcribing Witneſſes who are *Creditors*. 430.
Every honeſt Man ought to make ſuch a Charge in his Will. *ibid.*
The moſt *uſual* Witneſſes are, generally, Creditors (in ſome Degree) of the Teſtator: And the *Diſallowing* ſuch Witneſſes can anſwer no End of Public Utility. 430.

Diſfranchiſement. See *Amotion.*

What Sorts of Offences render Corporators liable to it: And where a previous *Conviction at Common Law* is neceſſary; and where, not—fully diſcuſſed and ſettled. 538, 539.
Power of Amotion is *incident* to Corporations, as much as the Power of making By-Laws: And it is not true "that they can have "None, unleſs by Charter or Preſcription." 539.
Cauſes of Amotion, particularly *Abſence* from Corporation-Courts, diſcuſſed: And (therein) the Species of *Notice* neceſſary to be given. 540, 541.

Diſſeiſin.

The *Idea* of it, according to the *Old Law* before the Aſſiſe of *Novel Diſſeiſin*. 107 to 114.
What conſtituted ſuch a Diſſeiſin as *made* the Diſſeiſor *Tenant to the Demandant's Præcipe*; though the right Owner's Entry was *not* taken away. 107, 109, 110.
Difference between Diſſeiſins where the true Owner thinks fit to *admit* Himſelf to be diſſeiſed; and *actual* Diſſeiſins, *in ſpite* of the true Owner. 107 to 114.
Diſſeiſin ever *implies a Wrong*: But *Diſpoſſeſſion* or *Ejectment* may be by *Right* or by Wrong. 111.
Diſſeiſin *at Election* differs from *actual* Diſſeiſin. 111, 112.
The *Conſequences* of *actual* Diſſeiſins (conſidered *as* ſuch) continue Law. 112.

Where an *Ejectment* is brought, there can be *no* Diſſeiſin. *Page* 111.
Taking Poſſeſſion *under* a *Judgment* in Ejectment, is *not* a Diſſeiſin of the Freehold. 113. Nor can the true Owner *elect* to make it ſo. 114.

Diſtreſs.

Averia Carucæ—where diſtrainable. 587, 588, 589.
The *Diſtinction* between *Common-Law* Diſtreſſes (to compel Payment, *not ſaleable*, but only detained *nomine Pœnæ*,) and Diſtreſſes *in Execution* (for Satisfaction, which are *to be ſold outright*.) 588.
The Statute of 51 *H.* 3. *de Diſtrictione Scaccarii* doth *not* extend to the *latter*. 586, 588.
Nor the *Common-Law Exemption* of Utenſils, Tools, Implements *&c. ibid.*
A Diſtreſs for an *entire Duty*, ſhall *not* be *ſplit*; and taken for One *Part* at *one time*, and for the other Part at *another* time. 589.
Otherwiſe, if the Seizure be *at firſt* for the *Whole*, and only the *Value* miſtaken: There, the Execution may be *completed* by a *ſecond* Seizure. 589, 590.
Exceſſive—The *Remedy* muſt be by a *Special* Action, founded on the Statute of *Marlbridge*: A *general* Action of Treſpaſs can't be maintained for taking an exceſſive Diſtreſs. 590.

Ejectment

FOR Land which is Part of the *King's High-way*, may be brought by the *Owner of the Soil*. 143 to 147.
The Owner of the Soil muſt recover, and the Sheriff muſt deliver Poſſeſſion, *ſubject to the Eaſement*. *ibid.*
Ejectment will lie, by the Deſcription and Name of *Land*; although it has a Wall, Porch and Part of a Houſe *built upon it* (by Incroachment.) 144, 145, 146.
More *Latitude* is allowed in Ejectments, than in *real* Actions. 144.
Where the Plaintiff demands *more* than He has a Title to, He ſhall recover *according* to his Title. 329, 330.
One of *two* Defendants in Ejectment *died*, after Iſſue joined, *but before Trial*—
1ſt. *How* his Death muſt be *ſuggeſted*. 366.
2dly. *How* the *Judgment* and *Execution* muſt be. 364, 366.
Brought by a *Landlord* againſt his Tenant, on 4 *G.* 2. *c.* 28. § 2. who had *Judgment* againſt the Caſual Ejector *by Default*, and *Poſſeſſion* thereupon delivered; Near 20 Years after which, the *Tenant* brings an Ejectment againſt the *ſame* Landlord, for the *ſame*

ſame Premiſſes: The Landlord is *not* obliged to *produce the Affidavit*. *Page* 615 to 622. See *Statutes*.

Leſs Preciſion requiſite, than in a *Præcipe* in a *real* Action. 629 to 631.

And *leſs Strictneſs* than was *formerly* required in *Ejectments* themſelves. 630.

Iriſh Deſcriptions (not known in *England*) holden *good*, after Verdict and Judgment and Affirmance there. 624 to 626, and 631.

Where an Ejectment is brought, there can be no Diſſeiſin. 111.

A *Judgment* in Ejectment is a Recovery of the *Poſſeſſion*, without Prejudice to the *Right*: And He who enters under it, can only be *poſſeſſed according* to *Right*, *prout Lex poſtulat*. 114.

And He who recovers a *naked Poſſeſſion* only, *without Right*, can *convey no other* to his Feoffee. 114.

An Ejectment is a *Poſſeſſory Remedy*; and only competent, where the Leſſor of the Plaintiff may enter. 119.

Therefore it is always neceſſary for the Plaintiff to *ſhew* "that his "Leſſor had a *Right* to enter," by *proving a Poſſeſſion within* 20 *Years*, or *accounting for the Want of it*. *ibid.*

Twenty Years adverſe Poſſeſſion is a *poſitive Title* to the Defendant: It takes away the Plaintiff's *Right of Poſſeſſion*. *ibid.*

Every Plaintiff in Ejectment muſt *ſhew a Right of Poſſeſſion*, as well as of *Property*: And therefore a Defendant in Ejectment *needs not plead the Statute of Limitations*. *ibid.*

Upon a *ſpecial Verdict* in Ejectment, It ought to *appear* "that the "Leſſor of the Plaintiff *might enter* at the *time* of his bringing the Ejectment. *ibid.*

A *Leaſe under a Power*, made *unfairly* and in *Prejudice of thoſe in Remainder*, found in the *Cuſtody of the Maker* of it, at his Death, amongſt his *own* Muniments, ought (at the Trial) to be *preſumed to have been ſurrendered*. 126.

Error.

The *Allowance* of a Writ of Error is the *Superſedeas*: The *Notice* of it's being allowed, relates only to the *Contempt* in proceeding ſubſequently to ſuch Notice. 340.

To reverſe a *Common Recovery*. See *Common Recovery*.

To reverſe an *Outlawry*. See *Outlawry*.

On a Judgment in *Ejectment*, from *B. R.* who had determined *for* the Plaintiff, upon the *Right*; but *againſt* Him, upon the *Remedy*, (Holding him to be *barred* by the Statute of Limitations:) The Lords determined the latter Point, *firſt*; and affirmed the Judgment *without entering* into the *other* Point at all. 126, 127.

Escape.

Such as ſhall make a Trader a *Bankrupt*, *Page* 439, 440. See *Bankrupt*.

Evidence. See *Proof*.

A *Commiſſion* under the *Exchequer-Seal*, (though a Commiſſion of *Inſtruction* only, *not* of *Intitling*,) is *admiſſible* in Evidence, but *not concluſive*. 147.

Where a *Note* may be given in Evidence: And what *Sort of a Note* will ſupport the Declaration. 375, 376. See *Declaration*.

Extinguiſhment.

Of an Original *Debt*. See *Pleading*.

Factor.

A Factor or Agent, to whom a *Balance is due*, has a Lien upon all Goods of his Principal conſigned to Him; not only for incident Charges, but as an Item of mutual Account for the *general Balance* due to Him; ſo long as He retains the *Poſſeſſion* of ſuch Goods: But *if he parts with the Poſſeſſion* of them, He parts with his *Lien*. 494.

Feigned Iſſue.

The *Coſts* were directed to be taxed *from the time* of it's being *firſt conſented* to by the Parties and ordered by the Court: incluſive of the Diſputes about *ſettling* it; but excluſive of every thing prior to it's being conſented to. 603, 604.

Feme Covert. See *Baron and Feme*.

Separated from her Huſband. 542. See *Baron and Feme*.

Will of a Feme Covert. 432. See *Baron and Feme, Deviſe*.

Feoffment.

In general—The *Operation* of it. 92. (*per Knowler, arguendo.*)

The Nature and Operation of it, with a View *only* to make a *Tenant* to the *Præcipe*. 115 to 119.

A Feoffee to the Intent *to be Tenant to the Præcipe*, is a *mere Inſtrument* for *One* Purpoſe of *Form only*: His Wife ſhall *not* be *endowed*; Nor his Statutes or Judgments *affect* the Land; Nor his Term (if he has One) *merge*. 117.

A Man ſhall not, *by his own injurious* Feoffment, acquire an *Advantage to Himſelf*. *Page* 118.

Fines, to Lords.

On *Copyholds* granted for Terms of Years. 206 to 219. See *Copyholds*.

Fraud

May, in Judgment of Law, *avoid* every kind of Act. 395.
And it *invalidates*, as much in a Court of *Law*, as in a Court of Equity. 391 to 396.
Courts of *Equity* and Courts of *Law* have a *concurrent* Juriſdiction to ſuppreſs and relieve againſt Fraud. 396.
" *What* Circumſtances and Facts *amount* to Fraud or Covin," is a tion of *Law*. 396.
So is, often, the Queſtion " Whether a Tranſaction be fair or frau- " dulent." 474.
A Court of Equity can't decree a *Deed made by a Trader*, to be fraudulent; which is not fraudulent *at Law* and an *Act of Bankruptcy*. 480, 482. See *Bankrupt*.

Freedom

Of a *Corporation*. See *Corporation, By-Law*.

Freehold: Freeholder. See *Seiſin, Diſſeiſin*.

The *Idea* of a Freehold, and of a Freeholder, according to the *ancient Feudal* Law. 107 to 114.
The Idea which *Modern* Times annex to thoſe Terms, is taken merely from the *Duration* of the Eſtate. 108.

Game. See *Conviction*.

Grants

OF Offices, by and under *Biſhops*. 221 to 226. See *Biſhops*.

Great Seal.

Reſigned by the Earl of *Hardwicke*. 20.
Delivered to Lords Commiſſioners, *Willes, Smythe*, and *Wilmot*. 20.

(*Reſigned* by them, and delivered to Sir *Robert Henley*, as Lord Keeper; on 30th *June* 1757, the Day after the End of *Trinity* Term 30 & 31 *G.* 2.)

Habeas Corpus.

AN *impreſſed Man* in Cuſtody at the *Savoy*, brought up by his *Bail*, in order to be ſurrendred by them in *their* Diſcharge, was firſt committed to the *Marſhal*, with Orders to deliver Him *inſtanter* to the Keeper of the *Savoy:* And an *Exoneretur* was entered. *Page* 339, 340. See *Soldier.*

Iſſued in Vacation, and returnable *immediaté* before a Judge at his *Chambers*, does *not expire* by the Coming in of the Term: But the Defendant may be brought into *Court* at *Weſtminſter* upon the *old* Writ. 480, 542, 606.

And if committed to the Marſhal, He may afterwards, by *Rule*, without a *new Habeas Corpus*, be brought up, to be bailed. 460.

For a *Wife*. See *Baron* and *Feme.*

For a *Young Lady*, who had been decoyed away from her *Father.* 606.

No *Peer* or *Lord* of Parliament hath Privilege againſt being compelled to pay Obedience to a Writ of *Habeas Corpus* directed to Him. 632. See *Privilege.*

For *impreſſed* Men—Two different Rules were diſcharged upon the *Merits*; but *without Coſts.* 637 and 638.

Hawkers, Pedlars, and Petty-Chapmen.

A *ſingle Act* of Selling does not make a Man *ſuch* a Trader as obliges Him to take out a *Licence.* 613, 614. See *Conviction.*

High-Way.

The *Owner of the Soil* may recover it, in *Ejectment*; ſubject to the Eaſement: And He has a Right to *the Freehold* and *all Profits* above and under Ground, except only the Right of Paſſage. 143 to 147. See *Ejectment.*

Nuſances near it. 337, 338. See *Indictment.*

Repair of Roads or High-ways *incloſed* by the Owner of the Lands adjoining. 465, 466.

Change or *Alteration* thereof muſt be by a Writ of *Ad quod damnum.* 465.

Repair of a Road *altered under* an *Ad quod damnum. ibid.*

Indictment

ON 5 *Eliz. c.* 4. may be *found* at the Seſſions of a *City* or *Burrough*; but *not* out of the *County*. 251, 252.

For a *Nuiſance*, in erecting Buildings at the *Pariſh* of *T.* *near* the King's Common Highway there, and *near* Dwelling-houſes; and there making acid Spirit of Sulphur, whereby the Air was impregnated with *noiſome and offenſive* Stinks &c.: To the *Common* Nuſance of All Perſons inhabiting &c. and paſſing &c. 333 to 339.

On 1 *Jac. c.* 22. (about cutting Leather) § 50. An Indictment *lies*; but *not* an Information before the Lord Mayor *perſonally*: For the Juriſdiction is given to Him *in Seſſions*. 389, 390.

For a *Nuſance*, in *placing a Perſon* (for ſeveral Days) in the *Foot-way of the Public Street* in *London*, *to deliver out printed Bills*—quaſhed, as *not* indictable. 516.

Lies not upon an Act of Parliament which creates a *new* Offence and preſcribes a *particular Remedy*. 545.

For *exerciſing a Trade*, contrary to 5 *Eliz. c.* 4. See *Trade*, *Soldier*, *Statutes*, *Information qui tam &c.*

Inferior Court.

Proviſo of 21 *Jac.* 1. *c.* 23. § 6. "that it ſhall extend *only* to "*ſuch* as have *Utter-Barriſters* of 3 Years Standing"—explained, "that ſuch Utter-Barriſter muſt be *preſent* at the Trial." 515. See *Proceedendo*, *Statutes*.

They may *ſet aſide regular interlocutory Judgments*, in order to let in a *Trial of the Merits*: But they can *not* ſet aſide *Verdicts*, except for *Irregularity*. 571, 572.

Information.

For a *Challenge* (to fight with Piſtols) was denied: Becauſe the Perſon applying was the *firſt Sender* of it; and ought therefore to be left to his *ordinary Remedy*. 316.

For a *Challenge*—A Rule "to ſhew Cauſe" was made, upon producing verified *Copies* of the Letters containing the Challenge. 402.

This *extraordinary* Remedy ſhall not be allowed to *Cheats*, againſt *Other* Cheats. 548.

Againſt *Juſtices of Peace*, for *refuſing to grant a Licence* under 26 *G.* 2. *c.* 31. was *denied*; becauſe the Juſtices of the Diviſion have the *Sole Diſcretion*, without Appeal; and they acted with *Purity* of Intention. 561 to 565.

But if they exercise this absolute Discretion with *Partiality*, *Malice* or *Corruption*, an Information shall be *granted*. *Page* 561 to 565.

Information in Nature of Quo Warranto.

For *holding* a Court of Record, within a Charter-Burrough, and *presiding* therein, in the *Absence of the Bailiffs*. 407, 408, 409.
1st. Is no Charge of usurping the *Office* of Bailiff. *ibid.*
2d. How far the 9 *Ann. c.* 20. § 4, 5. extends. *ibid.* particularly, as to *Costs*. *ibid.*
3d. The *Statute*-Judgment (" that the Relator recover his *Costs*") was reversed. *ibid.*
4th. The *Common*-Law Judgment (of *Ouster*) was affirmed. *ibid.*
Shall *not* be granted, *after a great Length* of *quiet Possession* of the Persons under whom the Defendant claims. 433, 434.
Four may be consolidated into *One*, on 9 *Ann. c.* 20. § 4. where several Rights may be properly determined on One. 573.

Information, qui tam, &c.

For *exercising a Trade*, contrary to 5 *Eliz. c.* 4. Not having served an *Apprenticeship*, may be *laid* at a *Parish*; and needs not aver " that the Defendant did not *then* exercise the Trade." 366, 367.
On 1 *J.* 1. *c.* 22. (about *cutting of Leather*) does not lie before the *Lord Mayor*, *alone*. 389, 390.
A *Common* Informer is *not* intitled to the same discretionary *Indulgence*, as the Party *really injured* is. 402. See *Practice*.

Inquisition. See *Coroner*.

On an *untimely Death*, may be taken by Justices of *Gaol-Delivery*, *Oyer and Terminer*, or of the *Peace*; if *omitted by the Coroner*. 18, 19.
But it must be done *publickly* and *openly*. *ibid.* Otherwise, it shall be *quashed*. *ibid.*
Of *Instruction*: Of *Intitling*. 147. See *Evidence*.

Insurance. See *Policy*.

Double—The *Idea* of a double Insurance. 494, 495.
A Person insured more than once, shall receive *but One Satisfaction*. 492.
But *various Persons* may insure *various Interests* on the *same* thing: And Each, to the *whole* Value. 493, 494, 495.

If *different Perſons* inſure the *Whole* with *different Inſurers*—How the Inſurers ſhall *contribute* amongſt themſelves. *Page* 495.
The Act of 19 *G.* 2. *c.* 37. againſt *Re-aſſuring*, diſcuſſed and explained. 492, 493.

Intention of the Parties

Ought to prevail, both in *Deeds* and *Deviſes*, unleſs contrary to Law. 233, 272, 273, 285, 286. See *Conſtruction*, *Deeds*, *Deviſe*.

Iſſue

Immaterial. See *Repleader*.

Judges.

At what *reſpective Times* the preſent four were ſworn-in. 1, 2.

Judgment

May be entered *nunc pro tunc*, at the Diſcretion of the Court. 148 and 226.
As in Caſe of a Nonſuit. See *Nonſuit*.
In *Ejectment*, where *One Defendant dies* between Iſſue and Trial. See *Ejectment*.
Interlocutory Judgments may be *ſet aſide* by *Inferior* Courts, though *regular*; in order to *let in a Trial of the Merits.* 571, 572. Much more, if irregular. *ibid.*

Juriſdiction.

The *Want* of it, is a Reaſon for quaſhing an Information *upon Motion.* 388 to 391.

Jurors: Jury.

Special Jurors *fined*, for Non-Attendance: But taken off, the next Day; a full Jury then appearing. 274.
The Jury are the proper Judges of Caſes depending *entirely on Circumſtances.* 609. See *Verdict*.
So, where the Evidence is nearly *in Æquilibrio.* 393, 394, 397. See *Verdict*, *Practice*.
But a Verdict *againſt Evidence*, or againſt *greatly preponderating* Evidence, *may be ſet aſide. ibid.*
The *Setting aſide their Verdicts*, and granting *new Trials*, diſcuſſed and vindicated. 393 to 398.

Juſtices

Justices of Peace.

Justices *at Sessions* have a Right of Judging with the *same Latitude* of Discretion, upon an *Appeal* from an Appointment of Overseers, as the *two* Justices had. *Page* 246, 247.

And they *need not* give any *Reasons:* but shall be *presumed* to have acted on proper Grounds. *ibid.* The Court will *intend* every Thing in favour of their Orders. 247.

So, if they give an *imperfect* or *inconclusive* Reason, yet the Court will *presume* their Orders to be *right*, if they possibly can. *ibid.*

But if they give their *whole* Reasons; And they are *manifestly bad, repugnant*, or conclusive *against* their Order; the Court will then be obliged to adjudge the Order *bad. ibid.*

Qu.—Whether the *Office of Overseer* is incompatible with that of an *Acting Justice:* (For the Court did enter into this general Question.) *ibid.*

Refusing to grant Licences to keep Inns, or to sell Ale—See this Subject fully discussed, *Pa.* 556 to 564. See *Licences, Information.*

Warrants of Distress upon *Poor-Rates*—

1st. No *Action* of Trespass will lie against the Justices, though the Rate and Assessment be bad; *if never appealed-from.* 581, 587.

2d. Nor *upon the Warrant*; It *not* being void, so as to make it a Trespass *ab initio. ibid.*

3d. And the Justices *can't* be *Trespassers*, by what the *Officers* afterwards do. 587.

Commitment of WIFE, as well as Husband, being *Parish-Poor*, RETURNING *to the Parish* from whence they had been legally removed, without bringing a Certificate. 595 to 604. See *Parish-Poor.*

Land. See *Seisin, Disseisin.*

HOW alienated, in the Times of the ancient *Feudal* Law. 107. See *Alienation.*

Landlord. See *Rent, Tenant, Statutes.*

Leases

Made *under Powers.* 120. See *Powers.*

A Lease is a Contract between Landlord and Tenant, by which *Both* are bound in *mutual* Stipulations: And it can be no Lease, unless

unleſs ſome Perſon *agrees to hire* the Thing demiſed, and *to pay the Rent*. *Page* 122.

For, a *Sale* and a Leaſe are the *ſame Species* of Contract. *ibid.*

Leather,

Cutting it. See *Statutes* 1 *J.* 1. *c.* 22. § 50. (under *Pa.* 307, 308. and again under *Pa.* 309.)

Legacy

Is a *veſted* Intereſt, when the *Time* is annexed to the *Payment only*; and *not to the Legacy* itſelf: Otherwiſe, where the *Time* is *Part of the Condition* of it's *becoming* payable. 227.

The Term "*Legacy*" may be applied to *Land* as well as Money, 271 to 273. See *Deviſe*.

Licence

To *keep an Inn*—The *Juſtices of the Diviſion* have the ſole Diſcretion. 556 to 565. See *Statutes* (26 *G.* 2. *c.* 31.) and *Information* (againſt Juſtices, for refuſing One.)

To *ſell Ale*. *V. ſupra*, and *Information*.

Limitation

Of *Quo Warranto Informations*. See *Informations in Nature of Quo Warranto*.

Of *Bonds*—About 20 *Years* is commonly taken to be the *general* Time: But it has been left to a Jury, upon 18 Years (by Lord *Raymond*). 434.

London

Cuſtoms—

1ſt. If put in *Iſſue*, are *triable* by the Mayor and Aldermen, by the Mouth of their Recorder. 249. But there muſt be a proper *Surmiſe*, in order to this Method of Trial. *ibid.*

2dly. The Recorder *certified ore tenus* at the Bar: (Which has not been *actually done* at the Bar of *this* Court, within 200 Years paſt.) 248, 249, 250.

3dly. The Cuſtom certified by Him, was "That if One Perſon "has a Houſe which has ANCIENT *Lights fronting oppoſite* to "or *over* an adjoining Houſe or ancient Foundation of a *Houſe*, "the Owner of the latter HOUSE or ancient Foundation of a "HOUSE, may exalt his Houſe, or *rebuild* upon ſuch *ancient*

" *Foundation* any *new House*, to ANY *Hight* that he ſhall pleaſe, " *againſt and oppoſite* to the ſaid ancient Lights of the Former, " and *thereby obſcure* them :" But this Cuſtom is *confined* to *Meſſuages* or HOUSES ; and does *not extend* to OTHER *Erections or Buildings*. *Page* 248, 249, 250.

Mayor IN SESSIONS—His Juriſdiction under 1 *Jac.* 1. *c.* 22. § 50. about cutting Leather, See *Statutes*.

Lords,

Their *Privileges*, 632. See *Privilege*.

Mandamus

TO *compel a Meeting* under a By-Law. See *By-Law*.

To *approve* a Perſon *arbitrarily* and *without Cauſe* diſapproved of. See *By-Law*.

To a *Viſitor* " to exerciſe his Viſitatorial Power *over the Temporal-* " *ties* of a Cathedral Church, concerning the *intermediate Pro-* " *fits* during the *Vacancy of a Stall*"—*Denied*; as being a Matter proper for an Action at Law. 567.

Maxims.

" Boni Judicis eſt, ampliare JUSTITIAM"—is the true Text: Not " *Juriſdictionem*." 304.

Money.

Payment of it *into Court*. 578. See *Practice*.

Mortgage.

By Bankrupts. 477, 478. See *Bankrupt*.

Mutual Debts. See *Set-off*, *Statutes*.

New Trial. See *Practice*, *Repleader*, *Verdict*.

FOR *Exceſſiveneſs of Damages*. See *Verdict*.

Is no more than having the Cauſe more deliberately conſidered by another *Jury*; when there is a *reaſonable Doubt*, or perhaps a *Certainty*, " That *Juſtice* has *not* been done." 393.

It is *neceſſary to Juſtice*, that unjuſt Verdicts ſhould be re-conſidered. *Page* 393.
And it is always on Payment of *Coſts*, to the Party in Poſſeſſion of the Verdict. 394.
The Courts of *Law* grant New Trials of late Years, *more liberally* than they did formerly: And *Why* they do ſo. 395.
The *Grounds* on which they ought to be granted. 393 to 398.

Non-ſuit.

Action againſt *Two*; Judgment AGAINST *One*, by Default; Rule for Judgment FOR the Other, as in Caſe of a Non-ſuit, purſuant to 14 G. 2. *c.* 17. § 1. Yet this Defendant cannot have his Coſts taxed as in Caſe of a Non-ſuit; becauſe the *Caſe of a Non-ſuit does* NOT *here exiſt*: For if the Plaintiff be non-ſuited, He muſt be out of Court as againſt *Both* Defendants; whereas He has *obtained Judgment* againſt *One* of them. 359.

Notice

Of an *Inquiſition at the Aſſizes*, upon an *untimely Death*, where the Coroner has omitted to take One—is neceſſary. 19.
Of being *elected on the Livery* of a Company—given, "to attend at "the next Court of Aſſiſtants, to take upon him the Livery." 239, 240.
1ſt. The Notice ſhall be *intended* to be regular: *Per Deniſon.* 240.
2dly. A Livery-Man of the Company *ought to know* when the *next* Court is: *Per* Lord *Mansfield.* 239.
To *Corporators*—Of Courts, which their general Duty obliges them to attend—Where it muſt be *Perſonal.* 540, 541. See *Diſfranchiſements.*

Nuſance.

Writ to the Sheriff "*to abate it.*" See *Practice.*
Calling a thing a Nuſance (in a Plea) will *not make* it ſo: This can *not alter* the Law. 267.
The Perſon injured by a Nuſance may not *abate* the *Whole* of it, where it ariſes only from Exceſs; but only *ſo much* of it, as by it's *Exceſs* above what is allowable, conſtitutes the Nuſance. 267, 268.
In occaſioning *noxious* and *offenſive* Stenches, in a *Pariſh*, NEAR the King's Highway, and NEAR ſeveral Dwelling-Houſes. 336, 337, 338. See *Indictment* for a Nuſance.

Offices.

GRANTS of them, by Biſhops. *Page* 221 to 226. See *Biſhops.*

Orders

Of Juſtices are intitled to all *favourable Preſumptions.* 246, 247, 248. See this at large under Title "Juſtices of Peace."

Of Seſſions upon a *Turnpike-Act*, for *digging Materials* in PRIVATE *Soil.* See *Turn-pikes.*

An Order *needs not be ſo ſtrictly in Form*, as an *Indictment* muſt: An *Alternative* Charge is *not good* in an *Indictment*; but *may be good*, in an Order. 400. This was an Order on 11 *G.* 2. *c.* 19. § 3. for preventing Frauds by Tenants: The Orders were affirmed; though it was objected, as follows, *viz.*

1ſt. That it is only an *alternative* Charge "That the Defendant "aided and aſſiſted in removing OR concealing the Tenant's "Goods." *ibid.*

2d. It is not charged "That the *Tenant* Himſelf *did* remove "them;" nor "That the Defendant aided and aſſiſted HIM." *ibid.*

To appoint *Overſeers*—appointing MORE *than* FOUR, is bad. 452.

For *aſſeſſing One Pariſh*, in AID of another; purſuant to 43 *Eliz. c.* 2. § 3.

1ſt. If within the *ſame Hundred*, Two Juſtices have Juriſdiction. 576, 577.

2d. If the *Hundred is not able*, Then the SESSIONS are to aſſeſs any other Pariſh within the *County. ibid.*

3d. The *two* Juſtices muſt *ſhew* that both Pariſhes are within the ſame Hundred or *Diviſion ſynonymous or equivalent to Hundred.* 577.

* Orders of Removal.

* I have abridged the Caſes under this Head, very fully; for the Accommodation of Gentlemen who give their Aſſiſtance at the Quarter Seſſions.

The general Rule how to *title* all Caſes of this Sort. 52, 53.

The Juſtices have *no Power* to remove a married Woman from her *Huſband's* OWN *Property*, upon her being *only* LIKELY to become chargeable. 53.

The Tenant's being *rated* AND *paying the* LAND-*tax* amounts to ſuch a Notice as gains him a *Settlement* under 3, 4 *W. & M. c.* 11. § 6: Although he be *repaid* it again, by the Landlord, (or a Tide-Waiter, by the Collector:) And this, though it be *two Quarters only.* 247, 248.

An *Apprentice* (by Pariſh-Indenture) *voluntarily permitted* by her Maſter to go and work elſewhere for her OWN *Benefit*, and accordingly

cordingly ſerving another Maſter in another Pariſh above 40 *Days*; then returning to her Indenture-Maſter, and ſtaying with him only 8 Days, at the End of which, her Apprenticeſhip *expired*, is ſettled in that other Maſter's Pariſh, where She *ſerved* 40 *Days:* For ſuch Service was UNDER *the Indenture*, which was *never diſcharged*. *Page* 307, 308.

The WIFE *and* four Children of *Richard Crockford* jun. were removed from *Elvetham* to *Alton:* Which Order was confirmed by the Seſſions; and *both* Orders were *affirmed* by this Court. This *Richard Crockford's Father and Mother* came by CERTIFICATE from *Alton* to *Elvetham*; where this Son was BORN, SUBSEQUENT *to the Certificate*. He became a *hired Servant* to Sir *Harry Calthorpe*, at *Elvetham (the Place of Sir Harry's Reſidence,)* and ſerved him, in all, ten Years. But the LAST 40 DAYS *of the ſecond Year's* Service was *at Scarborough:* Where, without ever quitting his Service, He *applied* to his Maſter, at the End of the ſecond Year, to *make a new Agreement* for another Year. His Maſter ſaid "It *would be time enough*, when they returned "Home to *Elvetham*." Whereupon the Servant *continued on*, for about ſix Weeks, till they returned. Then he was AGAIN *hired* by his ſaid Maſter, for a *third* Year, at advanced Wages; and *ſerved it out*, in *Elvetham*; and continued 7 Years more in the ſame Service, in *Elvetham*. After which, he married this Wife, and had theſe Children. 308.

1. The *Wife and Children* were *properly removed* to the Settlement of the *Huſband* and *Father* of them: And if *He* ſhould *in future* come to *Elvetham*, he may be removed by another Order. 308 to 314.

2. *Alton*, which gave the Certificate, was that proper *Settlement*. 310 to 314. For

1ſt. Though a Servant *may* gain a Settlement in a Place where his *Maſter has none*, or where the *Maſter never reſides himſelf*; *ibid.*

2dly. Yet this Servant gained *no Settlement at Scarborough* (where his Maſter only went as a Caſual *Sojourner*, not as an Inhabitant.) *ibid.*

3dly. Beſides, here was *not* any *Finiſhing or End* of the original Contract, by what paſſed at *Scarborough:* On the contrary, it was adjourned and *continued*; And the *Re-hiring* for the third Year was *tranſacted at Elvetham*. So that the Whole was a CONTINUATION of the *Original Service* firſt BEGUN *under the Certificate* from *Alton*. *ibid.*

An Order of CONFIRMATION (upon Appeal to the Seſſions) is *concluſive*, and *binds all the World:* But an Order of DISCHARGE or REVERSAL is only final *between the two then contending Pariſhes*; And no *Third* Pariſh is bound thereby. And *this Diſtinction* is fully ſettled, and quite juſt and reaſonable: For the two contending

ding Pariſhes have been fully heard; The third Pariſh, not at all. *Page* 354 to 356.

The CHILD *of a Certificate Perſon*, having regularly gained a Settlement in a *third* Pariſh, may, AFTER *that*, gain One in the certificated Pariſh. 357 and 358.

A *bonâ fide* Purchaſer of a *ſmall* Purchaſe *under* 30*l.* Value, if *rated and paying* towards the public Taxes of the Pariſh, does, by ſuch being rated and paying, gain a Settlement that ſhall *continue beyond* the Time of his Inhabitancy. 370. For

1ſt. The 9 *G.* 1. *c.* 7. § 5. was only levelled againſt *fraudulent* Purchaſers. *ibid.*

2d. The 3, 4 *W. & M. c.* 11. § 6. is *not affected* by 9 *G.* 1. *ibid.*

3d. The Pariſh is *not obliged* even by 17 *G.* 2. *c.* 38. to rate a Perſon *unfit* to be rated. 371.

A Hiring for Eleven Months " and to *give a Month's Service in*, " beyond the Eleven Months"—is a Hiring *for a Year*. 372.

A Queſtion was made concerning the Neceſſity of a Pauper's taking out *Adminiſtration*, in Order to gain a Settlement: But this Queſtion was not now determined; becauſe it was holden to be ſtated as a Fact, " That the Pauper had a derivative Settlement" (*excluſive* of the Claim under Adminiſtration.) 435.

A Hiring for One *Year*, to wit, from *Michaelmas* 1752 to *M.* 1753, *with Liberty* " to *let himſelf for the Harveſt-Month*, to *any other* " Perſon," is *no* Hiring *for a Year*. 496, 497.

The *Conſtruction* has been *favourable* as to the *Service*; but *more ſtrict* as to the *Hiring*. *ibid.*

An Apprentice (by *Pariſh-Indenture*, till 24) was, by a moſt explicit and formal AGREEMENT *between his Maſter and himſelf*, DISCHARGED from his Apprenticeſhip, And the Indentures delivered up; the Apprentice being *then* UNDER 21. He then left his Maſter; and was regularly hired for a Year, *and ſerved for a Year* in *A.* He gains no Settlement in *A.* 500, 501.

1ſt. The *Infant*'s Conſent is of no Validity: (For, being *under* Age, He *could not conſent* to his being diſcharged.) 501.

2d. The *ſubſequent Service* of the Apprentice, under the Hiring for a Year, gained *no Settlement*; *as being* by the Maſter's Leave and Conſent, and ſo a Service UNDER *the Indenture*. 501.

3d. For this is no EXPRESS *and* EXPLICIT *Leave* given by the Maſter *to a* PARTICULAR *Service*; but intended to be *general*, and even founded on a Miſtake. *ibid.* See *ante*, under *Pa.* 307, 308.

Daniel Harriſon, *Mary* his Wife, and *William* their Son (an *Infant*) went *by* CERTIFICATE to reſide at *Cold-Abſton*. *Her Father*, being poſſeſſed of a *Term* in a *Tenement in Cold-Abſton*, died *inteſtate*, leaving Her and *Five other* Children. *Daniel* and She and *William* (then under 5 Years of Age) *entered and took Poſſeſſion*;

and *Daniel* and *Mary* have *occupied ever ſince*, (being 29 ½ Years:) But NO *Adminiſtration* was ever granted either to *them*, or to *any other* Perſons. *William* lived with his Father and Mother *in* the ſaid Tenement, till ABOUT 8 or 9 Years ago: When he married, and lived ſeparate, but gained no other Settlement. *Daniel* (the Father) ſerved the *Office of Tithingman* for the ſaid Pariſh, for *half* a Year, about 25 Years ago; and the ſame Office again, for *another Office* Year, about 5 Years ago: The Cuſtom there being "to ſerve it for *Half a Year* only, at a Time." All of them were ſettled at *Cold Aſhton*. 510.

1ſt. The 9, 10 *W.* 3. *c.* 11. mentions the "Taking a *Leaſe of* "*a Tenant of* 10*l. per Annum* Value," or "*Executing ſome* "*annual Office in the Pariſh*," as the ONLY Methods by which a *Certificated* Perſon can gain a Settlement. 507.

2d. But by a *reaſonable Conſtruction*, an ESTATE of a Man's *own*, from which He *cannot be removed*, is *within* this Act. *ibid.*

3d. The Office ſtated in this Cuſtom is *not* an ANNUAL Office; but an Office for *Half* a Year only. 504.

4th. *Daniel*, the Father of *William*, here acquired *ſuch a Right* as rendered him *irremovable*. 508, 509, 510.

1ſt. It was a 20 *Year's Poſſeſſion*: Which will maintain or defend even an *Ejectment*. *ibid.*

2dly. *After ſo long* a Poſſeſſion, a *regular Title to it* ſhall be *preſumed*. *ibid.*

3dly. As to the *general* Queſtion "Whether the *mere Poſ-* "*ſeſſion* of a Term, by the *ſole* Next of Kin, WITHOUT "*Adminiſtration*, be ſufficient to render irremoveable;" it is out of the preſent *particular* Caſe.

5th. *William*, the SON of *Daniel*, here gained a *derivative* Settlement in *C. A.* from his Father. *ibid.*

1ſt. The *Children* of all Parents muſt have the Settlement of the Father, TILL *they acquire* Another for themſelves. *ibid.*

2dly. A *critical* and *ſevere* Scanning of Words and Expreſſions ſhall *not* be admitted, to prevent this. *ibid.*

An Order of *Seſſions* made on Appeal is *not obliged* to ſtate the Caſe *ſpecially*: And, where their Expreſſion is not abſolutely clear and explicit, They ſhall be *intended* to have done *right*. 514.

An *Unmarried* Perſon, *not having Child or Children*, may be *hired* for a Servant, and gain a Settlement by the Service: (by 3, 4 *W.* & *M. c.* 11. § 7.) 546, 547, 548.

1ſt. Such Perſon muſt be unmarried, *when hired*. *ibid.*

2d. One was hired *conditionally*, being *then married*; His *Wife died*; then the Hiring was *completed* by the Principal, who ſtood at *Liberty to have diſſented*. This Man was holden unmarried, when hired. *ibid.*

An *Infant*, of 8 Years of Age, was hired, to work in Silk-Mills for 3 *Years*: But the Maſter was *not* to find *Diet*, or *Lodging*; And the SERVICE was to be *only Eleven Hours* in the ſix Working-Days; and *all the Reſt* of the Time, as well as on *Sundays*, the Child was to be at it's *own Liberty* and it's own Maſter. This gains no Settlement. *Page* 565, 566,

1ſt. Here is no Sort of Foundation for One, upon the Foot of an Apprenticeſhip. *ibid.*

2d. As a *Hiring and Service*—It gains None. *ibid.* For

1ſt. The *Infant is not bound:* Though an Infant has an *Election* to affirm his Contract, if he pleaſes. 566.

2dly. The *Contract* itſelf is *not a Hiring for a Year*, within 3, 4 *W. & M. c.* 11. § 7. *ibid.*

Theſe Determinations (upon the Poor-Laws) ought to be according to *plain common Senſe*, without *Subtlety or Nicety*. 593, 595.

A *Hiring* for a Year, was neceſſary by 3, 4 *W. & M. c.* 11. § 7: A *Service* for a Year was added by 8, 9 *W.* 3. *c.* 30. § 4. 593. And, by the Latter, a CONTINUING *and* ABIDING in the *ſame* Service, during the Space of one WHOLE Year, is made eſſential. *ibid.*

1ſt. The *Maſter's Leave* makes it a *Continuance* in the ſame Service. 593.

2d. If there be a *continued* Service for a whole Year, it is enough; though the Hiring and the Service be *not* Both under the *ſame Contract:* Provided there be *both* a Hiring for a Year *and* a Service for a Year. 592 to 596.

3d. A *ſmall Interruption* of the Service ſhall not hurt. *ibid.*

4th. But a *total Diſſolution*, or an *abſolute Diſcharge*, or what *entirely breaks the Connection*, is fatal to the Settlement: For it muſt be an *uninterrupted* (*i. e.* an *undiſſolved*) *Continuance* of the ſame Service. 593, 594, 595.

Rating the *Houſe* to the Poor's Tax, *without* expreſly *naming the Tenant*, is ſufficient to gain a Settlement: The Land-tax, Poor's Rates, and all other parochial Taxes were *paid by the Tenant*; and the Receipts given to him, by the Overſeers, in *his own Name*; and He had *agreed to pay them*. This Rate was "on *T.* "*C.*" (who was the Landlord) "OR Tenant." 623. *V. Supra*, (under *Pages* 247 and 368.)

Overſeer.

A *Juſtice of Peace*, who was alſo a *Half-pay Lieutenant of Marines*, appointed Overſeer of the Pariſh where He reſides and acts. 246, 247. See *Juſtice of Peace*.

No greater Number than FOUR can be appointed. 445 to 453.

Outlawry.

Error (Writ of) to reverſe an Outlawry. (The preſent One was in *London*, for *High Treaſon* in diminiſhing the Coin.) *Page* 638 to 643.

1ſt. After Plea, the Defendant may have *Counſel*, upon the *Collateral* Matter. 638.

2d. If, upon being arraigned, the Defendant pleads *Non-Identity*, it is to be *tried inſtanter*. 638, 639.

3d. If Error *in Fact* be alledged, the Attorney General may *confeſs* it, tho' not true: But He can *not* do ſo, if the Error aſſigned be an Error *in Law*. 642.

4th. Eight Errors were objected; (Which were not now determined.)

1ſt. That the ſecond *Capias* ought to have had either 3 or 4 *Months* between it's Teſte and Return. 639.

2d. That there was a *Diſcontinuance* of Proceſs. 639.

3d. That the Outlawry was ſaid to be *pronounced* by Mr. *King*, the Coroner: Whereas the *Lord Mayor* is *perpetual Coroner*; and the *Recorder* is to *pronounce* the Outlawry. 639.

4th. That He is *not* ſaid to be outlawed *ſecundum legem et conſuetudinem regni*. 640.

5th. That the *Name of Office* (*Vicecomites*) is not ſet to the Return of the ſecond Exigent. 640.

6th. That the Writ of *Proclamation* is *teſted* and *returned* upon the ſame Day. And the Return does *not ſpecify* the particular Proclamations. 640.

7th. That the Defendant was *out of the Kingdom* when the Outlawry was pronounced. 640.

8th. That the *Huſtings* are *not* ſaid to be holden " *in and for* " the City of *London*." 640.

Pariſh-Clerk.

THE *Office* and the *Fees* are (Both of them) of *temporal* Cognizance. 367, 368. See *Prohibition*.

Parish-Poor. See *Orders:*

RETURNING to the Parish *from whence removed*, without bringing a Certificate, is punishable by two Statutes, *viz.* 13, 14 *C.* 2. *c.* 12. § 3. and 17 *G.* 2. *c.* 5. § 1. by Commitment to the House of Correction &c. *Page* 596, 597.

1st Qu. Whether a *previous Conviction* be necessary, upon the *former* Act: (The *Latter* expresly requires it.) 598 to 604.

2d. Qu. Whether a WIFE returning *with* her Husband, to the Parish from which Both were legally removed, and bringing no Certificate, is *liable* to Commitment, as well as the Husband. *ibid.*

3d. Though 13, 14 *C.* 2. *c.* 12. § 3. is, in expres Words, *tied up* to Persons going TO WORK in another Parish, yet it has always been considered as *general*, and as *not* being tied up to that particular Case of going *to work*, only. 601.

4th. But a general Commitment to the House of Correction, "UNTIL *discharged by due Course of Law*," (indefinitely, and without Limitation of Time) is *not* good within *either* Act: For the Former requires *Punishment as a Vagabond*; and the Latter requires the being kept to *hard Labour*, but *limits* the Confinement "*not to exceed One Month.*" 602, 603.

5th. An *Action* lies by *Husband and Wife*, against the Justice, for this illegal Commitment; although it arose from the Husband's illegal Act. *ibid.*

Parliament,

Lords of it—Their Privileges. See *Privilege.*

Payment of *Money into Court.* See *Practice.*

Peace. See *Security of the Peace, Attachment, Articles.*

Peers.

Their *Privileges.* See *Privilege.*

Plea.

Immaterial. See *Repleader.*

Liberty to *amend* it. See *Repleader.*

Issuable (within the Terms of the usual Judge's Order, giving Time to plead, upon certain Terms, whereof One is "to plead an *issuable*

" *fuable* Plea—") A Plea (to an Action upon a Bail-Bond) of " 23 *H.* 6. *c.* 10. and that the Bond was taken for Eaſe and " Favour *&c*;" *is an iſſuable* Plea, within ſuch Order. *Page* 605.

So is a Plea of *Tender*. 59. See *Pleading*.

But *not* a Plea in *Abatement*. *ibid.*

Pleading.

An *Account ſtated* is *no Extinguiſhment* of the original Debt: And therefore it is *no Plea in Bar* to a Demand of a Debt of the *ſame Degree*. Neither can a *Note* of Hand be pleaded in Bar to an Action upon Simple Contract: Though a *Bond* may; becauſe it extinguiſhes the Debt. 9. But One Bond cannot be pleaded to Another. *ibid.*

A Plea of *Tender*, is an *iſſuable* Plea, within a Judge's Order giving Time to plead, upon the uſual Terms " of *pleading iſſuably* " *&c.*" 59.

A Plea *in Abatement* is not ſo; (becauſe it tends to delay the Plaintiff.) *ibid.*

A Plea *calling* a Thing a *Nuſance*, cannot alter it's Nature and *make* it ſo. 267.

Repleader. See *Repleader*.

Iſſue muſt be taken upon a ſingle POINT: But it is not neceſſary that that ſingle Point ſhould conſiſt of a *ſingle* FACT *only*. (As if the Defendant juſtifies under a Right of *Common*, It is a good Replication and not multifarious, to traverſe " That " the Cattle were the Defendant's *own*, AND that they were " *levant and couchant*, AND that they were *commonable* Cattle.") 320.

Where the *whole* Plea is denied, the Replication muſt conclude to the *Country*: Where only a *particular Fact is denied*, it muſt conclude with an Averment. *ibid.*

Where a *corrupt Agreement* is pleaded, the Replication may *either* reply " That the Bond was given upon another Account," and traverſe the corrupt Agreement with an *abſque hoc*; OR may deny the corrupt Agreement *directly*, and conclude to the *Country*. 320, 321.

Condition to *indemnify* againſt all Claim of Dower BY *a Widow*, and againſt all *Coſts Charges &c* ariſing *therefrom*. Breach aſſigned in a Bill in Chancery brought BY *the Widow's* SECOND HUSBAND, for *Arrears* of Dower: In which Suit, the Plaintiff in the preſent Action *had expended* 8*l.* 10*s.* *for Coſts*. Judgment for the Plaintiff, on Demurrer. 575, 576.

1ſt. This is within the *Words* and *Meaning* of the Condition. 576.

2d. The Obligee, being already damnified, has an *immediate* Right, to be *reimburſed*, *without waiting* the Determination of the Suit in Chancery. 576.

Policy of *Insurance.*

On an *East India-Ship*, it's Body, Tackle, Apparel &c, and other *Furniture*; against Perils of the Sea &c, and *Fire* (expressly;) to any Ports and Places beyond the *Cape of Good Hope*, and back to *London*. At *Canton*, the Ship stayed *to clean and refit:* In Order to which, All the *Sails and Furniture* were TAKEN OUT *of the Ship*, and put into a *Warehouse* built for that Purpose ON A SAND-BANK in the River there: *Where* they were accidentally *burnt*. This was found to be the *well-known and established* USAGE; and to be *prudent*; and to be for the general *Benefit* of the *Insurers* and All concerned. *Page* 347 to 353.

1st. This is a Loss *within the Words and Meaning* of the Policy. 347 to 353.

2d. If the Loss happens by the *Variation of the Chance, or Alteration of the Voyage*, or other *Fault* of the *Owner* OR *Master* of the Ship, the Insurer ceases to be liable. *ibid.*

3d. Otherwise, if the Thing be done in the *usual Course of the Voyage*, or *ex justâ Causa*. *ibid.*

4th. So, if a Ship, warranted to depart *with Convoy*, goes out of the Way *in Order* to have the Opportunity of Convoy, This is *no Deviation*. *ibid.*

5th. The *essential Means* and necessary intermediate Steps must be taken to be insured, as well as the End. *ibid.*

6th. What *must necessarily be understood*, makes a *Part of the Policy*, as much as what is expressed. *ibid.*

7th. This is a Loss within the *Voyage*, though it happened (strictly speaking) upon *Land*. *ibid.*

8th. But the Insured have no Right to *change the Bottom*; though to a better or stronger Ship. 351.

9th. A *Deviation* (without Necessity) *determines* the Policy, and *discharges* the Insurer. 351.

DOUBLE *Insurance*—What *is*, and what is *not* so; and it's *Effects*. 490 to 495. See *Insurance*.

Poor-Tax. See *Orders*, *Statutes*, (43 *Eliz. c.* 2. § 1.) *Rates*.

Powers.

The Limitation and Modifying of Estates by Virtue of Powers, *came from Equity*, into the Common-Law, with the *Statute of Uses*. 120.

The *Intent* of the Parties who gave the Power, ought to *govern every Construction* of them. 120.

They

They ſhall *not be exceeded*; nor their *Conditions evaded*; but ſhall be STRICTLY *purſued*, in *Form* and *Subſtance:* And all Acts done under a Special Authority, *not agreeable to it*, nor *warranted by it*, are VOID. *Page* 120.

"*To make Leaſes*," is of all kinds of Powers, the moſt frequent. *ibid.*

1ſt. The Plan of this Power "to make *Leaſes*" is for the *mutual Advantage* of Poſſeſſor and Succeſſor. 121.

2d. The *Succeſſor* therefore muſt *not be prejudiced* in point of *Remedy* or any other Circumſtance of *full and ample Enjoyment*. *ibid.*

3d. The two uſual Methods of Leaſing are, either "at the *beſt* "*Rent*," or "upon *Fines:*" And the Conditions in Favour of the Succeſſor muſt be *purſued* not only literally, but *ſubſtantially*. 121, 122.

4th. If the *ancient Rent* is to be reſerved, It muſt be reſerved with ALL the *beneficial Circumſtances*. *ibid.* and *ſpecifically* too, (not generally only;) that the Remainder-Man may be under *no Difficulty in avowing:* For otherwiſe, it will be a *void Leaſe*, as againſt *Him*; though good againſt the Owner of the Inheritance. *ibid.*

5th. It can be *no* Leaſe, unleſs both Landlord and Tenant are bound in *mutual* Stipulations. 122.

6th. Where the *Leſſee* never executed any *Counter-part*; never *entered*; never *covenanted to pay the Rent*; never *conſented*; never *accepted* the Leaſe, nor appears to have been in *Poſſeſſion* of it or perhaps ever *known of it*; and conſequently, was *never bound* by it; Such a Leaſe is no Execution of the Power. *ibid.* Eſpecially, as there was *no Clauſe of Re-Entry* in it. 125.

7th. For every *fraudulent*, *unfair*, *prejudicial* Execution of ſuch a Power, *in reſpect of thoſe in Remainder*, is VOID at Law. 125.

8th. But it is *no Objection* to a Leaſe made under a Power, "That it is *in* TRUST *for him who executes the Power:*" Provided the *legal Tenant be bound*, during the Term, in all requiſite Covenants and Conditions. 124.

9th. The Leaſe intended by every Power of Leaſing, is the *uſual Huſbandry* Leaſe, reſerving a *Rack-Rent*. 124.

10th. A Leaſe, by Virtue of a Power, *takes Effect out of the Settlement* that gives the Power. 123.

Practice. See *Proceſs*, *Proceedings*, *Declaration*, *Pleading*, *Repleader*.

All *enlarged Rules* to ſhew Cauſe, made in a preceding Term, muſt be brought on before the laſt Week of the Term next following; unleſs particular Leave be given to poſtpone. 9.

Verdict againſt Evidence is, in general, a good and conſtant Reaſon for granting a *new Trial*. *Page* 12. But

Such a Verdict being found *for the Defendant*, and the Action appearing to be *frivolous*, *trifling*, and vexatious, the Court *refuſed* to grant the *Plaintiff a new Trial*; notwithſtanding it's being a *Verdict againſt Evidence*. *ibid.*

All *Cauſes ſtanding for Argument* in the ſpecial Paper, to come on in the ſame *Order* in which they are there entered; and *ſo to continue to ſtand*, till they ſhall be argued: And none to be put off, without a previous Special Application to the Court. 52.

A *New Trial* ſhall not be granted, merely to *gratify litigious Paſſions*, upon every Point of *Summum Jus*, or in *hard Actions*, or after *unconſcionable Defences: Though* the Verdict be *againſt* Evidence and the ſtrict Rule of Law. 54. *V. ſupra*, *Pa.* 12. *infra Pa.*

All Motions really and fairly ready at the Bar, made REMANETS; and to be heard (though they take up 2, 3, or more Days,) before the Dignitaries and Seniors at the Bar ſhall be again called upon to move. 57, 58.

This Regulation of Motions at the Bar was made *by Lord Mansfield*, at his firſt Coming upon the Bench; but was otherwiſe, *till* his Lordſhip's Time, and eſpecially in Ld. Ch. J. *Holt*'s Time; when the junior Barriſters uſed to attend many Days together, *without Opportunity* of making their Motions. *ibid.*

Judgment entered *nunc pro tunc*. See *Judgment*.

A *Motion* for a *new Trial*, and a *Motion in Arreſt of Judgment*, may *not* be made *both together*: The former *muſt precede*. 334.

Bail—The different Terms upon which they ſhall have *Time to ſurrender* their Principal, *after a Writ of Error* brought by him. 340. See *Bail*.

A *Verdict* obtained *by Stratagem* or *unequitable Methods*, ſhall be ſet aſide WITHOUT Coſts on either Side, at leaſt; if not with *Coſts to be paid by* the Party who *ſo* obtained it. 353. *V. ſupra*, under *Pa.* 12 and 54.

Scire facias againſt *Terre-Tenants*—See *Common Recovery*.

The Rule "about NOT *quaſhing on* MOTION, but putting to demur," does not hold; where the Court which is proceeding, *wants Juriſdiction* in the Caſe. 388 to 391.

An *Eaſt-India*-Merchant being *bound at Bombay* in a Bond conditioned "*to appear* in this Court, to anſwer the *Demands of a Black* "*Merchant there*," was permitted to *appear here* and enter into a Recognizance with Sureties, in the Penalty of that Bond, and with the *like Condition*; after Notice to the *Eaſt-India*-Company. 398.

The Court will *not* ſet aſide (even on an Offer to pay the Coſts of it) a *regular Non prof.* obtained by the Defendant againſt a COMMON Informer: Whatever they might have done, if the Plaintiff had been the Party *really injured*, ſuing for Juſtice and Reparation. 401, 402.

Scire facias againſt Bail, AFTER *Surrender* of the Principal. See *Bail.*

Of bringing *into Court*, in *Term*-time, upon a *Habeas Corpus* iſſued in *Vacation* and returnable *immediatè*. 460. See *Habeas Corpus*, (under *Pa.* 460, 542, 606.)

Rule to *pay Money into Court*, and have it ſtruck out of the Declaration; upon Payment of COSTS; (in an Action upon the Caſe, for the Uſe and Occupation of a Houſe;) was diſcharged as to the *Coſts*; (*i. e.* permitted to be done WITHOUT *paying Coſts*;) the Plaintiff's Action appearing to be brought and kept on Foot, *very* OPPRESSIVELY. 578, 579.

On the *laſt Day of a Term*, an *Attachment* cannot be moved for; Except 1ſt. for Non-Payment of *Coſts*; Or 2dly Againſt a Sheriff, for not returning a Writ. 651. Alſo it may be moved "to quaſh an *Indictment*" (on the laſt Day of a Term:) But *not* "to quaſh an *Order*." *ibid.*

Prebend: Prebendary.

Profits during Vacancy—Upon a Queſtion about the *Right to them*, an *Action* at Law, or a *Bill* in Equity, is the proper Method: *Not a Mandamus to the Viſitor.* 567. See *Mandamus.*

Preſcription. See *Declaration.*

For a *Right of* BURIAL in a Chancel, claimed as belonging to his Meſſuage: It was ſtated "That he had ſuch a Right; and that "2*s. was due to the Pariſh, for* EVERY Perſon buried in the "Chancel of that Church." 443, 444.

1ſt. This Payment is *not* a Condition *precedent*, or Parcel of the Preſcription. *ibid.*

2d. But either a *Cuſtomary Payment*, or, at leaſt, a *Collateral* Preſcription. *ibid.*

Privilege

Of *Attornies*—See *Attorney.*

Of LORDS *of Parliament*—does *not extend* to prevent the Court of King's Bench from enforcing *Obedience to a Habeas Corpus* "to "bring up a *miſ-uſed Wife*," by ATTACHMENT. But the Circumſtances of the Caſe muſt be ſuch as *neceſſarily require* ſuch a Method: And it muſt be *cautiouſly executed.* 631 to 636. (Where ſee all the Particulars of Earl *Ferrers*'s Caſe, previous and ſubſequent to his Counteſs's Swearing the Peace againſt him.) *V. infra*, next Article.

No *Peer* or *Lord of Parliament* hath Privilege of *Peerage* or of *Parliament*, againſt being compelled by Proceſs of the *Courts in Weſtminſter-*

minſter-Hall, to pay Obedience to a Writ of *Habeas Corpus*, directed to him. *Page* 632.

Procedendo

Denied to a *Burrough-Court*, who had tried a Cauſe WITOUT *the* PRESENCE *of an Utter-Barriſter* of 3 Years Standing: (For, by 21 *J.* 1. *c.* 23. § 6. Such an Utter-Barriſter ought, in all Events, to be PRESENT *at the Trial.*) 515.

Proceedings

Set aſide, for want of *Attorney's Name* to the Proceſs; It being ſet thereto, *without* his Authority. 20.

Proceſs.

Attorney's Name. See *Proceedings.*

Prohibition

To a *Viſitor.* See *Viſitor.*

Declaring in Prohibition—198, 199.

1ſt. The *Defendant* in Prohibition has, perhaps, a Right to *demand* it, where the Opinion of the Court is againſt him. 198, 199.

2d. But the *Party applying* for a Prohibition has *no* Right to inſiſt upon declaring, when the Court are clear that his Application is groundleſs. 198 to 205.

To the Spiritual Court, to ſtay Proceedings on 5, 6 *E.* 6. *c.* 4. § 2: Which Act contains 3 diſtinct Clauſes levelled againſt 3 diſtinct *Offences in Churches and Church-Yards*; *viz.* 1ſt. Quarrelling, Chiding, or Brawling by *Words* only; 2dly. *Smiting*, or laying *violent Hands*; 3dly. Striking with a *Weapon*, or *drawing One* with Intent to ſtrike. (For which 2d Offence, the Offender is, *ipſo facto*, to be deemed *excommunicate.*)

1ſt. The Eccleſiaſtical Court may proceed upon the *two firſt* Clauſes; and are *not* to be prohibited. 243, 244. But

2dly. Upon the *third* Clauſe, there muſt be a *previous Conviction.* and a Tranſmiſſion of the Sentence, and a Declaration. *ibid.*

3dly. But if they proceed for *Damages*, on either Clauſe, they ſhall be prohibited. 244.

4thly. The Proceedings of the two Courts are *diverſo intuitu:* This, to puniſh; that, to amend. 243, 244.

To the *Spiritual* Court—AFTER *Sentence*—

1. Shall

1. Shall *not* go, unleſs Defect of Juriſdiction appears upon the *Face* of the Libel. *Page* 315.
2. Nor even where they have *tried a Cuſtom or Preſcription*; Provided they have adjudged againſt it. *ibid.*
3. *Otherwiſe*; where they have tried a Cuſtom or Preſcription, and adjudged *for* it; (becauſe they will eſtabliſh it upon *leſs* Evidence than the Common Law requires.) 315.

To the *Spiritual* Court, to ſtay Proceedings for reſtoring a Pariſh-Clerk, ſhall be granted: (For the *Office* and *Fees* are of *Temporal* Cognizance.) 367, 368.

To the *Spiritual* Court, to ſtay their Proceedings in a Cauſe relating to the *Will* of a *Feme Covert*, who had Power (by her Marriage-Settlement) *to make a Will:* Qu. Whether ſuch Will muſt not be *proved* in the Spiritual Court. 432. See *Baron and Feme.*

Promiſſory Note. See *Bill of Exchange.*

If made payable *certainly and at all Events*, it is a good Note, within 3, 4 *Ann. c.* 9. § 1. Otherwiſe, if it be *contingent*, and *uncertain* whether it ſhall *ever be paid* at all, or not. 227, 228. See next below.

A promiſſory Note given TO *an Infant*, payable *when He ſhall come of Age*, and *ſpecifying the particular Day*, (*viz.* 12th *June* 1750,) is of the *former* kind: *ibid.* For

1ſt. This is *certainly* and *in all Events* payable. *ibid.*

2dly. The *Diſtance of Time* makes no Difference. *ibid.*

3dly. Nor the *Adding* "that 'tis the Day of the Infant's Coming "of Age." *ibid.*

4thly. It is *Debitum in præſenti*; though *ſolvendum in futuro.* 228.

In the Name of *Two*, but *ſigned by* ONE *only*; promiſing to pay on the Death of *G. H.* "PROVIDED He leaves Either of Us ſufficient "to pay the ſaid Sum; OR *if* We ſhall be otherwiſe able to pay "it." 325, 326.

1ſt. This is *not a negotiable Note* within 3, 4 *Ann. c.* 9. § 1; being *only eventual*, not abſolute. *ibid. V. ſupra.*

2dly. If it had, the Declaration might have been againſt that One, *ſingly*, who ſigned it. 325.

3dly. But this Declaration was upon an *abſolute* Note: Which was not ſupported by producing this Conditional Note in Evidence; but was a *Variance.* 325, 326.

Quakers

REFUSING to pay *Tithes*, *Rates*, or other *Rights Dues* or *Payments* to Churches or Chapels, for the Stipend or Maintenance of the Miniſter or Curate, are *compellable* thereto, (if *not exceeding* 10*l.*) by an Order of any *Two Juſtices* of the County or Place, *Other than Patrons* or Perſons any Way *intereſted* (who may alſo order *Coſts*, not exceeding 10*s.*) Which Order may be *appealed* from, to the General Quarter *Seſſions*; but ſhall *not* be removed into *any other* Court, *unleſs* the TITLE of ſuch Tithes Dues or Payments ſhall be in Queſtion. *Page* 485 to 489.

1. The Act of 7, 8 *W.* 3. *c.* 34. § 4. extends only to great or ſmall *Tithes* and *Church*-Rates; and is temporary: But the ſubſequent Act of 1 *G.* 1. *Stat.* 2. *c.* 6. § 2. makes the former perpetual, and *extends* it to *any* Tithes or Rates, or *any* cuſtomary or other *Rights Dues* or *Payments* belonging to any Church or *Chapel*, which of Right by Law and Cuſtom ought to be paid for the Stipend or Maintenance of any Miniſter or Curate officiating in any Church or Chapel. 486.
2. Both Acts direct that the Proceedings ſhall *not be removed* into ANY *other Court*, (except the Appeal to Seſſions,) *unleſs* the TITLE ſhall be in Queſtion. 487.
3. They mean that the Title be *really* in Queſtion, and upon ſome *real Foundation* of Controverſy: But the *mere general Scruple* of the Quakers to pay any Demands of this Nature, and their conſequential Aſſertion "That the Right is in Queſtion," (without ſhewing *upon what Foot*,) is *not* a ſufficient Ground for removing ſuch Orders. 488, 489.
4. Theſe two Acts were made in *Favour* to, and for the *Eaſe and Benefit* of Quakers: And it would *fruſtrate their End and Intention*, if they might be thus *evaded*, either by their Obſtinacy or mere general Scruples. *ibid.*
5. A *Certiorari* having iſſued, grounded upon a *poſitive*, but *general* Affidavit on the Part of the Quakers, "That they *con-*" *troverted the Title* to theſe Tithes before the Juſtices; and "that the Title to them *was* REALLY *in queſtion:*" The Writ was *ſuperſeded* (upon it's appearing that this general Allegation and conſequential Aſſertion had no better Foundation than their Scruples or Obſtinacy as above,) *quia improvidè emanavit*; the *Return taken off the File*; and the *Order remanded.* 488, 489.
6. But theſe Acts *never meant* to give the *Juſtices* Juriſdiction to determine upon the *Right* and *Title*, where they are *really* in Diſpute and Queſtion between the Parties. 487, 489.

Recognizance

TO remove an Indictment from the Court of *Oyer and Terminer* at *Hicks's Hall*, is a Recognizance at *Common Law*, and not within the *Stat.* of 5, 6 *W. & M. c.* 11. § 2. *Pa.* 10.

Such a Common-Law Recognizance, not within the Statute, shall be discharged, upon the Terms of it's being complied with; *without* Payment of any *Costs*. 10.

To remove an Indictment from the Quarter-Sessions, upon 5, 6 *W. & M. c.* 11. § 2. shall *not* be discharged before *Payment of Costs* to the Prosecutor (after Conviction,) if the Prosecutor be PROVED *by Affidavit* to have been a *Civil Officer &c*; ALTHOUGH his Name be NOT INDORSED as such, upon the Indictment: For the 3d Section does *not* require such an Indorsment, as *necessary* to the Court's giving him *Costs*; (though the 2d Section does indeed direct it to be done.) 54, 55.

But NO *Costs* at all are payable on that Act; *unless* the Indictment was brought by the *Party grieved*, or by a Justice, Mayor *&c* or other *Civil Officer* prosecuting as such. 431.

Recovery. See *Common Recovery*.

Rent.

Act of 4 *G.* 2. *c.* 28. " for the more effectual preventing Frauds committed by Tenants, and for the more easy Recovery of Rents and Renewal of Leases. 616. See *Statutes, Ejectment*.

Repleader

Shall be *granted*, where the Issue joined is *immaterial* and *void*, and does *not* at all *determine the Right:* Unless the Case itself appear to be *so bad*, that no *Manner of Pleading* could have helped it. 301, 302.

So, where the Issue joined is so very *inconclusive*, that the *Court* cannot tell how to *give Judgment* upon it. *ibid.*

But where it clearly appears that the Defendant *can have no Title or Defence*, whatever Shape or Form the Pleadings may be put into, *there* Judgment shall be given and entered against him, *without* awarding a Repleader. 299 to 306.

If a Repleader be awarded, it must be WITHOUT *Costs*. 304.

In an Information in Nature of *Quo Warranto*, against a Mayor, He claims under an Election and Swearing pursuant to a *Mandamus* under 11 *G.* 1. *c.* 4. and shews an Election accordingly, and that he was sworn pursuant to the said Statute: But when he comes

to *ſpecify* the Manner of his being *ſworn in*, He (by Miſtake, in following an old Precedent) ſhews a *Swearing purſuant to the Charter*, but *not Agreeable to the Directions of the Mandamus-Act*. The Replication takes Iſſue on *this* Swearing-in: Which was found for the King; the Defendant *not being permitted to give Evidence* of his being ſworn in *purſuant to the Act*; (which, however, was, the Fact.) The Court held it right, that he was *not* permitted to give *ſuch Evidence*. But as *this* and *Eleven* other Iſſues were found for the King, *without Evidence*, they conſidered the Defendant's whole Title, as *One entire Title* (though ſplit into Parts by the Replication;) and were unanimous in *ſetting aſide the Verdict*, UPON *Payment* of *Coſts* by the Defendant, and in giving him Liberty to *amend his Plea*; as the beſt Method of Coming at the *true Juſtice of the Caſe*. *Page* 301 to 307.

Return

To a *Certiorari*—may be taken *off the File*, on the Writ's being *ſuperſeded quia improvidè emanavit*. 487, 488, 489. See *Certiorari*.

Of "*Nulla Bona*" upon Executions againſt *Bankrupts*. 31 to 38. See *Bankrupt*.

Roads. See *Highways*.

Rules and Practice of the *Court*. See *Practice*.

The great *End* of the general Rules of the Court is "to *do Juſtice*:" And therefore the Court ought to ſee that it be *really* attained. 301.

Security of the Peace. See *Articles of the Peace*.

Seiſin. See *Diſſeiſin*.

THE *Idea* of Seiſin, according to the *Old Law*, in the Times of *Feudal Tenures*. 107.

It was the *Completion* of that *Inveſtiture*, by which the Tenant was admitted into the Tenure; and *without* which, no Freehold could be conſtituted or paſs. 107.

Livery of Seiſin—

1ſt. Is *immaterial*, under a Leaſe by Virtue of a *Power*: Becauſe the Leaſe *takes Effect out of the Settlement*, which gives the Power. 123.

2d. *Mere*

2d. *Mere Taking Livery*, without Entry or Occupation, is *not* ſufficient to *charge with the Rent* reſerved. *Page* 123.

Settlement

Of *Poor*. See *Orders of Removal.*

Of *Poor*. The Determinations upon theſe Laws ought to be according to *plain common Senſe*; without *Subtlety* or *Nicety*. 593, 595.

Sheriff. See *Return*, *Bankrupt.*

Soldier. See *Habeas Corpus.*

No Perſon liſted according to 29 *G.* 2. *c.* 4. § 14, ſhall be *taken* OUT *of* His Majeſty's Service by any Proceſs other than for ſome *Criminal* Matter. 339, 340.

But He may be *Surrendered* by his *Bail*, in their own Diſcharge. *ibid.*

1ſt. An *impreſſed Man*, in Cuſtody at the *Savoy*, may be brought up by his Bail, by *Habeas Corpus:* And when ſurrendered, is to be firſt committed to the *Marſhal*, and *inſtanter delivered* to his *Military Keeper* who brought him up. *ibid.*

2dly. A Soldier *at Large*, (not in Cuſtody at all,) is to be firſt committed to the *Marſhal*, but *inſtantly ſet at large: Per* Lord *Mansfield. ibid.*

A *Volunteer* under 30 *G.* 2. *c.* 8. is *not* privileged from Arreſts: But Perſons *compelled againſt their Wills*, are privileged by § 20. of that Act. 466.

Statutes. See *Conſtruction.*

5 *Eliz. c.* 4. See *Trade* and *Trader:* See *Indictment* alſo; and *Information.*

5, 6 *W. & M. c.* 11. § 2. See *Coſts*, *Recognizance.*

5, 6 *W. & M. c.* 11. § 3. The Proſecutor's being a Civil Officer *&c* may be *proved by Affidavit:* It is not eſſentially neceſſary that it be *indorſed*. 54, 55. See *Recognizance.*

18 *Eliz. c.* 3. See *Orders of Baſtardy.*

6 *G.* 2. *c.* 31, § 1. See *Orders of Baſtardy.*

22, 23 *C.* 2. *c.* 25. See *Conviction.*

5 *Ann. c.* 14. See *Conviction.*

3, 4 *Ann. c.* 9. § 1. See *Promiſſory Note.*

5, 6 *E.* 6. *c.* 4. See *Prohibition.*

9 *G.* 2. *c.* 30. § 1. to prevent the *Liſting* his Majeſty's Subjects to ſerve as Soldiers, without his Majeſty's Licence. See *Felony.*

31 *Eliz. c.* 5. § 7. 251, 252. See *Indictment.*

9, 10 *W.*

9, 10 *W.* *c.* 15. See *Arbitration.*
11 *G.* 1. *c.* 4. See *Mandamus, Pleading.*
12 *G.* 1. *c.* 12. § 1, 2. See *Declaration* on *Bail*-Bond.
29 *G.* 2. *c.* 4. § 14. See *Soldier, Bail, Habeas Corpus.*
14 *G.* 2. *c.* 17. § 1. concerning Judgment as in Caſe of a Non-ſuit. See *Non-Suit, Judgment.*
8, 9 *W.* 3. *c.* 11. § 7. concerning Suggeſtion of Death of the Party, upon the Record. See *Suggeſtion.*
5 *Eliz.* *c.* 4. concerning exerciſing a Trade in a *Village.* See *Information, Trade.*
3, 4 *W.* & *M.* *c.* 11. § 6. concerning Notice. See *Orders of Removal,* (under *Pa.* 247, 370, 371.)
9 *G.* 1. *c.* 7. § 5. } See *ibid.*
17 *G.* 2. *c.* 38. }
26 *G.* 2. *c.* 54. (a *Suſſex* Turnpike Act.) See *Turnpikes.*
29 *G.* 2. *c.* 57. impowering to *dig Materials* in *private Soil.* See *Turnpikes.*
1 *Jac.* 1. *c.* 22. § 50. (about Cutting of Leather) gives the Juriſdiction to the Lord *Mayor of London* IN SESSIONS, within the City and *within* 3 *Miles Compaſs of it.*
1ſt. This is *no* ſummary *Juriſdiction* given to the *Mayor,* PERSONALLY. 389, 390.
2dly. But *only as Head* of his Court of Seſſions. *ibid.*
3dly. An *Information* therefore will not lie. *ibid.* But ſhall be quaſhed on Motion. *ibid.*
4thly. But the Juriſdiction muſt be exerciſed according to the Courſe of the *Common* Law; *i. e.* by *Indictment. ibid.*
7 *Ann.* *c.* 12. See *Ambaſſadour.*
9 *Ann.* *c.* 20. § 4, 5. See *Information in Nature of Quo Warranto, Mandamus.* And
☞ *N. B.* This Act is *legally, clearly,* and *correctly* drawn: *Per* Lord *Mansfield.* 407. Judge *Powell* was the Perſon who *drew* it: *Per Foſter* Juſtice. 409.
5, 6 *W.* & *M.* *c.* 11. § 3. *No Coſts* are payable; unleſs the Proſecutor be the *Party grieved,* or a *Civil Officer &c.* 431. See *Recognizance, Certiorari.*
21 *J.* 1. *c.* 19. § 2. See *Bankrupt.* (under *Pa.* 439, 440)
43 *Eliz.* *c.* 2. § 1. See *Overſeers.*
30 *G.* 2. *c.* 8. § 5 & 20. See *Soldier.*
15 *G.* 2. *c.* A private Act for *dividing and incloſing the Common Fields* of *Flecknow* in *Warwickſhire.* See *Highway.*
1 *Jac.* 1. *c.* 22. "The Duty of Tanners, Curriers, Shoemakers, and OTHERS Cutting of *Leather.*
1ſt. This Act was intended *to ſecure the* STAPLE *of Leather*; and is NOT *confined* to Perſons *occupied in the Trade* of Cutting it. 498, 499.

2dly. The ½ of the Penalty under § 50. belongs to the Lord of the Liberty of the Place *where* the Offence was committed; *notwithſtanding* the Extenſion of the Mayor of *London*'s Juriſdiction to 3 Miles Compaſs round it. *Page* 498, 499. (*V. Supra* under *Pa.* 389, 390.)

21 *Jac.* 1. *c.* 23. § 6. providing that this Act ("to prevent *Removal of Suits from* INFERIOR *Courts of Record*,) ſhall *only extend* to *ſuch* inferior Courts where an *Utter-Barriſter* is Judge or Deputy, *and there* PRESENT. See *Procedendo.*

21 *H.* 8. *c.* 13. § 1. prohibiting *Spiritual* Perſons from *taking Lands to Farm*, creates a *new* Offence, and *preſcribes a particular Remedy:* Therefore *no Indictment* lies upon it. 545.

3, 4 *W. & M. c.* 11. § 7. allowing *unmarried* Perſons, *not having Child or Children*, to be hired and gain Settlements. See *Orders of Removal* (under *Pa.* 547, 548.)

29 *Car.* 2. *c.* 3. Of Frauds. See *Deviſe.*

26 *G.* 2. *c*, 31. for regulating the Manner of *licenſing Alehouſes.* 556 to 565. See *Licence*, *Information* (againſt Juſtices for refuſing.)

3, 4 *W. & M. c.* 11. § 7. concerning Settlements under a *Hiring* FOR A YEAR. 565 to 567. See *Orders of Removal.*

9 *Ann. c.* 20. § 4. Several Informatious in Nature of *Quo Warranto conſolidated* into One againſt all the Defendants. 573. See *Information.*

43 *Eliz. c.* 2. § 3. about aſſeſſing One Pariſh in AID of Another. 576, 577. See *Orders.*

8, 9 *W.* 3. *c.* 25. § 1, 2, 3.
9, 10 *W.* 3. *c.* 27. § 1, 2, 3.
12 *W.* 3. *c.* 11.
3, 4 *Ann. c.* 4. § 1, 4.
} See *Hawkers*, *Pedlars* and *Petty Chapmen:* and See *Conviction.*

4 *G.* 2. *c.* 28. § 2. (See *Rent*, *Ejectment.*) It preſcribes two Manners of recovering in an Ejectment brought by the Landlord; *viz.* by *Default*; and on *Trial*; In both which, it muſt be made to appear "That *Half a Year's Rent was due*; that there was *no* "*ſufficient Diſtreſs*; and that the Leſſor had *Power to re-enter.*" In the former Caſe of Judgment againſt the *Caſual Ejector* (and ſo alſo upon Non-Suit on not confeſſing Leaſe Entry and Ouſter,) This muſt be made to appear by *Affidavit:* In the latter Caſe, the ſame Thing muſt be *proved* upon the Trial. 620.

1ſt. This is a very different Caſe from that of the *Defendant in an Action for the* MESNE PROFITS, not being eſtopped from going into the Title, by a Judgment againſt the *Caſual* Ejector, (to which Judgment, *He* was *no Party.*) 620.

2dly. The End and Intent of this Act was to *limit and confine the Tenant* to *Six Calendar Months*, after Execution executed, for offering Compenſation or applying for Relief in Equity. 619 to 621.

4, 5 *Ann. c.* 16. § 8. } See *View.*
3 *G.* 2. *c.* 25. § 14. }
18 *E.* 1. " Quia Emptores Terrarum"—it's Effect. *Page* 108. See *Alienation.*
13 *E.* 1. " De Donis conditionalibus"—when and how *evaded.* 115.
14 *G.* 2. *c.* 20. is a *retrospective* and *declaratory* Law; and seems to have restored the *Original Tenant to the Præcipe.* It proceeds upon the Parties to a Recovery having *Power to suffer it.* 116. See *Common Recovery, Tenant in Tail.*
21 *Jac.* 1. *c.* 16. " Of Limitations." 119. See *Ejectment.*
1 *Eliz. c.* 19. § *ult.* (concerning Grants by Bishops.) 221 to 226. See *Bishops, Grants, Offices.*
1 *Jac.* 1. *c.* 15. § 2. 467. See *Bankrupt.*
7, 8 *W.* 3. *c.* 34. § 4. } 485, 486. See *Quakers, Tithes.*
1 *G.* 1. *Stat.* 2. *c.* 6. § 2. }
19 *G.* 2. *c.* 37. 492. See *Insurance* (*double.*)
51 *H.* 3. *de Districtione Scaccarii* does *not extend* to Distresses in *Nature of Executions* for *Poor's Rates* and such like. 586, 588. See *Distress.*
13, 14 *C.* 2. *c.* 12. § 3. 17 *G.* 2. *c.* 5. § 1. relating to Poor Persons *legally removed,* and afterwards RETURNING *to the Parish from whence removed,* without bringing a Certificate. 596 to 603. See *Parish-Poor.*

Suggestion

Of the *Death* of One of the Parties. 366. See *Ejectment* (against Two; One dies *&c.*)

Sunday

Included in Days of Notice. 56. See *Declaration* (*de bene esse.*)

Supersedeas

To an *Action.* See *Practice, Prisoners.*

Tax.

Corporation of the *Royal-Exchange Assurance* Company in *London,* are *liable* to be assessed in their *Corporate* Capacity, AS *a Corporation.* 156 to 158.
First—The 30000 *l.* or rather 1500000 *l.* (*viz.* the Sum of Money exempted by 6 *Geo.* 1. *c.* 18. § 2, 5, 10.) is *confined* to

to the *Original* Fund and Company eſtabliſhed by that Act; and does *not extend* to the *preſent* Corporation, *ſince* founded upon a *Charter* of the Crown, which neither did *nor could* give any ſuch *Exemption*. *Page* 156.

Secondly—They ought to be rated AS *a Corporation*; *not* as *Individuals* (in their reſpective Wards.) 157.

Term (of *Years*.)

Long Terms for Years are *modern* Contrivances, unknown to our Anceſtors, and *different* from their Notions concerning Terms for Years. 217.

Copyholds, for Term of Years. See *Copyhold*.

Leaſe for *Years*, *if* Leſſee ſo long live; Remainder to Another, for and during the *Reſidue* of the *ſame* TERM. This (notwithſtanding former Caſes which ſay "That the Reſidue of the *Term* is *void*, "becauſe the Term is at an End by the Death of the Leſſee,") ſhall be conſtrued That the Remainder-Man ſhall enjoy during all the Reſidue of the YEARS *to come*; where the manifeſt *Intention* of the Parties appears to be ſo. 285, 286. See *Deeds* (under *Pa.* 285, 286.) and ſee *Caſes denied*.

The Word "Term" may ſignify the *Time*, as well as the *Intereſt*. 285, 286.

The *Old* Caſes held "That there could be *no Remainder* of a "Term, after an Eſtate for Life, by *Deed*, or *Will*. But, when *long and beneficial* Terms came in Uſe, ſuch Limitations were firſt allowed to be created by *Will*, (under the Name of *Executory Deviſes*:) And afterwards, Remainders were allowed by *Deed*, for the Reſidue of the *Years*, but *not* of the *Term*. But *now* Limitations of Terms are of *general Uſe*; their Bounds ſettled; and the *Rules* concerning them *certain and eſtabliſhed*. 285, 286.

Term.

Motions allowable or not allowable, on the *laſt Day* of it. See *Practice*.

Tithes

Payable by *Quakers*. 485. See *Quakers*.

Trade and Trader. See *Bankrupt*.

A Perſon *not* qualified to exerciſe a Trade *himſelf*, by having ſerved an *Apprenticeſhip*, entering into *Partnerſhip* with a *qualified* Partner, and only Sharing the Profits and ſtanding the Riſques of the Partnerſhip, WITHOUT *ever exerciſing or interfering* in the Trade

himſelf *perſonally*, is not within the prohibitory and *penal* Act of 5 *Eliz. c.* 4. ſo as to be liable to the Penalties of it. *Page* 5 to 10.
Reſtraint of it. See *By-Law.*
Regulation of it. See *By-Law.*
In a *Village.* See *Information.*

Treaſon.

Dr. *Henſey*'s Trial, for High Treaſon in *adhering to*, and *aiding and correſponding with* the King's Enemies: The ſummary Hiſtory of it. 643 to 652.
1ſt. The Grand Jury brought in this Bill, *by itſelf.* 643.
2. The Indictment was *read to him*, upon his Arraignment: Though He had had a *Copy* of it five Days before. *ibid.*
3. Papers *found in the Cuſtody* of the *Perſon Himſelf* may be *read* againſt him, if proved by the Evidence of thoſe who have *ſeen him write*, or know his Hand. 644.
4. Where the *Defendant gives no Evidence*, the Counſel for the Crown may decline to *ſum up their own.* 645.
5. Letters of Intelligence written and ſent, *in order to be delivered to the Enemy*, are, though INTERCEPTED, Overt-Acts of both the following Species of Treaſon, *viz. Compaſſing and Imagining the King's Death*, and *adhering to his Enemies.* 646, 647, 650.
6. *Levying War* is an Overt Act of *compaſſing* the King's Death. 646.
7. *Overt Acts of the Intention of Levying War* are Overt Acts of ſuch *Compaſſing. ibid.*
8. Soliciting a *Foreign Prince*, even *in* AMITY with this Crown, *to invade* the Realm, is ſuch an *Overt Act. ibid.*
9. *Some One Overt Act* muſt be proved *in the County* where the Indictment is laid. 647.
10. A *Letter dated* from a *Place which lies* in that County, is ſufficient for ſuch Proof. *ibid.*
11. A *Month*'s Time was allowed, between Sentence and the Day appointed for Execution. 651.

Trial

New. See *New Trial.*
Put off, upon Account of a *Libel* publiſhed with *Intention to influence* the Jury: But ſhall *not be again put off* till after Trial of an Information againſt the mere *Pamphlet-Sellers.* 512.

Trial at *Bar*

Concerning a Right to a *Track-Path* on each Side of the River *Tees* (alternately) for *towing*, without paying any Acknowledgment—The Right found. *Page* 292.

Concerning *Fines* payable to the Lord of the *Barony of Gilleſland*, and their *Liberty of Exchanging*—Found for the Tenants. 333.

Trover

Is a *Fiction*, in it's *Form:* But, in it's *Subſtance*, a *Remedy*. 31.

It is a Remedy to recover the *Value* of perſonal Chattels, wrongfully converted by Another to his own Uſe. 31. The Form ſuppoſes that the Defendant may have come *lawfully* by the Goods. 31. And it lies in *ſuch* Caſes. *ibid. Where taken wrongfully* and by Treſpaſs, the Plaintiff, if he brings this Action, *waves* the *Treſpaſs*, and *admits* the *Poſſeſſion* to be lawful. *ibid.*

It may be brought for an *unlawful Converting*; though the *Original Poſſeſſion* was *lawfully obtained:* But *no Damages* can be recovered in *this* Action, for the *mere Taking*. 31.

It is an Action of *Tort:* But the *whole Wrong* conſiſts in the wrongful *Converſion*. *ibid.*

Two Things only are neceſſary to be *proved*, to intitle the Plaintiff to recover in it; *viz. Poſſeſſion*, in the Plaintiff; and a *wrongful Converſion*, by the Defendant. *ibid.*

It is maintainable by the Aſſignees againſt a Sheriff, who *ſells* the Goods of a Bankrupt, (before taken by him in Execution,) AFTER *Aſſignment:* For *after Aſſignment*, they become the *Property of the Aſſignees, from the Time* of the Bankruptcy, by *Relation*. 31, 32.

Trover therefore lies againſt the Sheriff, for this *unlawful Converſion:* Though this Relation ſhall *not* make him a *Treſpaſſer* or *Wrong-Doer*, where the *Original Taking* of the Goods, was *prior* to the Aſſignment, and *lawful*. 35 to 38.

In Trover, the Plaintiff *waves the Treſpaſs*; and relies upon the *unlawful Poſſeſſion*, only. 31.

Turnpikes.

It is neither uſual nor convenient, to erect them in the *Middle* of Great Towns. 376, 377.

The Town (itſelf) of *Battel* is EXCLUDED out of 26 *G.* 2. *c.* 54. *ibid.*

Act impowers to *dig Materials* in PRIVATE *Soil:* (29 *G.* 2. *c.* 57.) The Seſſions make an *Order* upon it: Which was quaſhed. 383.

1ſt. EXPRESS *Adjudication* is *not* neceſſary, where the Recitals and Allegations are *ſtrong*, and *Concluſions* are actually drawn. *Page* 382.

2d. Yet the *Foundations* of their Authority ought to appear *upon the Face* of the Order, ſome how or other. 382.

3d. *Notice* to the OWNER of the Soil is not always neceſſary. 382.

4th. But *Satisfaction* is, wherever *He* is injured. *ibid.*

5th. The Order muſt SPECIFY what Materials can *not* be found in or upon the *Waſt*, and what *may* be found in the private Soil. 382.

6th. And alſo *fix* the *particular Part* of the Private Property. *ibid.*

7th. For they cannot order a Digging over the *whole* Eſtate, in general. 382, 383.

8th. Nor can they dig the private Property, to TRY *for Materials*, without *knowing* or at leaſt a *reaſonable Proſpect*, that they ſhall find them there. *ibid.*

Verdict

AGAINST Evidence. See *Practice, New Trial.*

Without Evidence. See *Repleader, New Trial.*

Obtained by Stratagem or *unequitable* Methods. 352, 353. See *Practice.*

Wrong delivered by the Foreman—may be amended. (*Adjournatur*) 384, 385.

May NOT *be ſet aſide* by an INFERIOR *Court*; except for *Irregularity or* Surprize: But *not* upon the Merits. 571, 572.

Shall *not* be *ſet aſide* for *Exceſſiveneſs of Damages*, in Caſes turning upon CIRCUMSTANCES, which are ſtrictly and properly WITHIN *the* PROVINCE *of the Jury:* (As, for *Criminal Converſation* with the Plaintiff's Wife.) 609.

Where the *Evidence* which ſupports it, is *clear and full*, ſhall *not* be ſet aſide. 394 to 398.

But where the Verdict is *againſt* Evidence, or againſt the Weight of it *greatly preponderating*, it ſhall. *ibid.*

Fraud will *invalidate*, in a Court of *Law*, as well as in a Court of Equity: And where it has interfered, the *Common-Law Court* have a *concurrent Juriſdiction* with a *Court of Equity*, to ſet aſide the Verdict. *ibid.*

Set aſide—The *Antiquity* of this Practice; The *Rule* of it; The *Reaſonableneſs* of it. *ibid.*

General Verdicts can *only* be ſet right by a New Trial. 393. See *New Trial.*

Moſt

Moſt General Verdicts *include legal Conſequences*, as well as Propoſitions of Fact. *Page* 393.

Veſting

Of *Legacies*. See *Legacy*.
Of *Remainders*. See *Deviſe*.
Of *deviſed Intereſts*. See *Deviſe*.

View.

By 4, 5 *Ann. c.* 16. § 8. in any *Action* brought in any of the Courts of Record at *Weſtminſter*, where it ſhall *appear to the Court* that it will be *proper and neceſſary* that the Jurors ſhould have a View, They may Order *ſpecial* Writs of *Diſtringas* or *Habeas Corpora* to iſſue, commanding the Sheriff to have Six OF THE FIRST TWELVE of the Jurors therein named, or ſome greater Number of them at the Place in queſtion *&c:* And the Sheriff ſhall, by a *ſpecial Return*, certify "That a View has been had."

And by 3 *G.* 2. *c.* 25. (the Balloting-Act) § 14. it is provided "That where a View ſhall be allowed, Six *of the Jurors named in the Pannel*, or more, ſhall have the View, and ſhall be the *firſt ſworn*, (or Such of them as appear,) before any Drawing."

But as the having a View was *not*, by either of theſe Statutes, made a Matter *of Courſe*, though ſuch a Practice had prevailed, and had been abuſed to the Purpoſes of Delay, The Court thought it their Duty to take Care that their Ordering a View ſhould not *obſtruct Juſtice*, and prevent the Cauſe from being *tried:* And they reſolved not to Order One any more, without a full Examination into the Propriety and Neceſſity of it; unleſs the Party praying it would come into ſuch Terms as might prevent an *unfair Uſe* being made of it. For they were All clearly of Opinion that the Act of Parliament meant that a View ſhould not be granted, unleſs the Court was ſatisfied that it was *proper and neceſſary:* And they thought it better that a Cauſe ſhould be tried upon a View had by *any* Six, or by *fewer* than Six, or even *without any View*, than be delayed for a great Length of Time. 252.

Accordingly, They added a Clauſe to the uſual Rules for Views, purporting that the Party praying a View CONSENTED "That in "Caſe *no* View ſhould be had; or if a View ſhould be had by "*any* of the Jurors whomſoever, (though not being Six of the "firſt Twelve;) yet the Trial ſhould proceed, and no Objection "be made on Account *thereof*, or for Want of a *proper Re*-"*turn*." 256.

Since which, Motions for Views are become Motions of Courſe, with ſuch additional Conſent annexed to them. *Page* 256.

See the *Form* of the *uſual* Rule, and alſo of the modern *Addition*, both in Cauſes to be tried by *Special* Juries, and thoſe to be tried by *Common* Juries, reſpectively recited *verbatim*. 257, 258.

Viſitor.

The general Power of Viſitation, properly exerciſed, is *uſeful and convenient to Colleges*. *Per* Ld. *Mansfield*. 200.

The Juriſdiction of the Viſitor is *ſummary* and *without Appeal* from it. 200.

The Founder of a College may appoint a Viſitor, either *generally*, or *ſpecially*. 200.

He may preſcribe *particular Modes and Manners*, as to Part. *ibid.*

He may appoint a *Special* Viſitor, for a *particular Purpoſe*, and *no farther*. *ibid.*

His *general* Viſitor has incidental Power, *as* ſuch: But yet he may *reſtrain* him as to *particular Inſtances*. *ibid.*

No technical Form of Words is neceſſary for appointing either a *general* or a *ſpecial* Viſitor. *ibid.* and 202, 205.

But it muſt be collected from the *whole Purview* of the Statutes conſidered together, WHAT *Power* the Founder *meant* to give the Viſitor. *ibid.*

The Founder may make a *general* Viſitor; and yet appoint *inferior particular* Powers in Others, in the firſt Inſtance. *ibid.*

Of St. *John's College Cambridge*—

1ſt. The *Biſhop of Ely* is Viſitor, as to the *Election of Fellows*, *Per* Ld. *Mansfield*. 201, 202.

And indeed *general* Viſitor, *except as to altering the Statutes*. 201 to 205.

2dly. And of Dr. *Keton's* ANNEXED *Fellowſhips*, as well as of the Reſt. *ibid.*

Ingrafted or *annexed* Fellowſhips in Colleges, (though ingrafted by *Indenture*,) are to be conſidered as *Part of the* OLD *Foundation*, 204, 205.

And a Clauſe of *Diſtreſs*, given to a *third* Perſon makes no Difference: For that is no adequate Remedy TO *the Fellow*, (and was given *diverſo intuitu*,) nor ought to take away the SPECIFIC *Remedy*, from the Perſon injured. *ibid.*

Mandamus to a Viſitor, "to exerciſe his Power *over the Temporalties*, in a Diſpute about the intermediate *Profits of a prebendal Stall*, during it's Vacancy"—Denied. 567, 568. See *Mandamus*.

For a Visitor has *no such Jurisdiction:* It must be determined according to the Course of the *Law of the Land*; As it is a Litigation not only with the Members of the Body; but with *Executors and Administrators* of deceased Prebendaries; Over *whom*, the Visitor can have no Power. *Page* 567, 568.

Will

OF a *Married Woman.* See *Prohibition, Baron and Feme.*

F I N I S.