Mich. 8 Jacobi.

In Communi Banco.

Baten's *Caſe.*

HEnry Baten, and *Elizabeth* his Wife brought a *quod permittat* againſt *George Sampſon*, to proſtrate a Houſe in the Pariſh of St. *Clements Danes* without *Temple Bar*, *London*, which the ſaid *George* wrongfully, and without Judgment had built *ad nocumentum liberi tenementi nuper* Johannis Pleader, & *modo præd'* Henrici & Eliz. *in jure ipſius* Eliz. &c. And declared that the ſaid *John Pleader* was ſeiſed of a Meſſuage in the *Strand* in the ſaid Pariſh in Fee, and ſo ſeiſed the ſaid *George*, *ult' Octob. anno* 41 *Eliz.* wrongfully, and without Judgment (*a*) erected upon his Freehold a Houſe, ſo near the ſaid Meſſuage *nuper præd'* Johannis Pleader & *modo ipſorum* Henrici & Eliz. *ſic quod Orientalis pars ejuſdem domus ipſius* Georgii (*b*) *ſuperpendet*, *Anglice*, *doth jut over* the ſaid Meſſuage late of the ſaid *John Pleader*, and now of the ſaid *Henry* and *Elizabeth in latitudine* 17 Inches, and *in longitudine* 17 Feet, *ad nocumentum liberi tenementi ipſorum* Henrici & Eliz. *in eadem*, &c. to their Damage of 100 *l.* upon which the Defendant demurred in Law. And in this Caſe 3 Points were reſolved. 1. That it was not neceſſary to (*c*) ſhew how the Plaintiffs had the Eſtate of *John Pleader* in the ſaid Houſe to which the Nuſance is done, for ſo have always been the Forms of Actions upon the Caſe, and the Declarations upon them in ſuch Caſes: And ſo was it adjudged and affirmed in a Writ of *Error*, as appears by the Record (which agrees with this Caſe) in *Penruddock's Caſe in the fifth Part of my Reports f.* 100. *b.* 2. It was objected, That there was Variance between the Writ and the Declaration in this Caſe, becauſe the Writ was (*d*) *levavit*, &c. *ad nocumentum liberi tenementi nuper* Johannis Pleader, & *modo præd'*

(*a*) 3 Inſt. 201, 202. Godb. 233.
(*b*) 1 Brownl. 4.
(*c*) 1 Brownl. 4. Doctrin. pl. 87. 1 Rol. Rep. 394.
(*d*) Godb. 233. 2 Inſt. 406.

præd' Hen. & Eliz. and the Declaration was *levavit, &c. domum, &c. tam prope Messuag' præd'* Hen. & Eliz. *sic qd' Orientalis pars, &c. superpendet, Anglice, doth jut over, præd' messuag' nup' præd'* Johan. Pleader, & *modo ipsorum* Hen. & Eliz. *&c. ad nocumentum liberi tenementi ipsorum* Hen. & Eliz. *in eadem*, so that the Writ is, *ad nocumentum liberi tenementi nup'* Joh. Pleader, & *modo* of the Pl.'s, and the Declaration is, *ad nocument' liberi tenementi ipsorum* Hen. & Eliz. and so Variance; & *non allocatur*, for the Pl's shew in their Declaration *(a)* that the Erection was in the Time of *J. Pleader*, *&c.* which agrees with the Writ, because the Erection was *ad nocumentum Joh. Pleader*, and the Conclusion *ad nocumentum* of the Pls. is necessary; for otherwise they can't maintain an Action, nor demand Damages. 3. It was objected, That the Pls. have declared generally, *ad nocumentum*, and have not assigned any Nusance in certain, *sc.* That the *(b)* Rain fell from the said House newly built, upon the Pl.'s House, or that the Windows are stopped, by which he loses the Light, *&c.* as in *(c)* 4 *Ass.* 3 & 4 *E.* 3. 36. *a. b. (d) Richard de Dalby's Case*, the Pl. in the *quod permittat* shewed the Manner of the Nusance, *s.* when the Smoke entred into the said Houses, so that no Man could live there. So in 18 *E.* 3. 22. *b. (e)* A Man brought a Writ of Nusance of a House levied to his Freehold, and declared that where he had a House, and under his House had a Place which contained so much in length, and so much in breadth, by which the Water used to descend from his House and pass, there the Def. had built a House above the Spout, so that the Water and Drops of Rain could not fall as they ought, but fell upon the Walls of his House, whereby the Timber of his House perished. So in 32 *Ass.* 2. In *Assise of Nusance quare divertit (f) cursum aquæ*, *&c.* and assigned that he made a Trench cross a River which came to the Pl.'s Mill, so that it was misturned, insomuch that where the Mill used to grind 3 Quarters, *&c.* it could now grind but a Bushel, and also that the said Water did drown 15 Acres of the Pl.'s Meadow, adjoining to the same Mill; so as where he used to have 40 Loads of Hay in them, he could now have but 7, *&c. Vide* 30 *E.* 3. 3. *a.* & 26. *a. b.* 17 *E.* 3. * 39. 2 *(g)* *H.* 4. 13. *a. b.* and so it was in the said Case of *Penruddock*. But it was resolved, that the Plaintiffs need not in this Case assign any *(h)* special Nusance; for here it appears to the Court, that it is to the Plaintiffs Nusance; For this Case differs from all the said Cases; for in this Case the Defendant has built a new House, which overhangs Part of the Plaintiff's House (which was not in any of the other Cases) so that of *(i)* Necessity the Rain which falls from the new House must fall upon the Pl.'s House. Also

(a) Doctrin. pl. 96, 384.

(b) 2 Roll. 140, 141.

(c) Doctrin. placit. 86. Br. Nusance 16. Br. Travers, &c. 167.

(d) 4 E. 3. 36. a. b.

(e) 2 Rol. 140. Fitz. Nusance 1.

(f) Fitz. Assise 309.

* 17 E. 3 9. b. 2 Rol. 142.

(g) Fitz. quod permittat 2. Br. quod permittat 3. Br. Brief 523.

(h) Doctrin. placit. 86.

(i) 2 Roll. 140, 141.

(a) *Cujus*

(a) 2 Rol. 141. Co. Lit. 4. a. Cr. El. 118. (a) *Cujus eſt ſolum, ejus eſt uſque ad Cœlum.* And therewith agrees 13 *H.* 8. 1. And by the Overbuilding upon Part of the
(b) 2 Rol. 141. Houſe of the Pl.'s, he has deprived them of the Air;
(c) Co. Lit. 303. b. alſo he has (*b*) prevented them from building their
(d) Doct. pl. 86. Houſe higher; and that which appears (*c*) to the Court
(e) Doct. pl. 86. need not be averred; for (*d*) *Lex non requirit verificare quod apparet Cur'*, *Plow. Com.* 87. *b. in Patridge's Caſe.* 13 *H.* 4. 17. if (*e*) an Infant brings an Aſſize of Mort-
8 Co. 126. b. (f) 8 Co. 126. b. danceſter, he need not aver, that it is within the Time of
46 E. 3. 16. b. Doct. pl. 86. Limitation, for it appears by the Pl.'s Infancy, 46 *E.* 3. in
Fitz. Brief 602. Treſpaſs for taking (*f*) of Money, the Value need not be
Br. Faux Latin 8. Form 13. ſhewed, becauſe it appears. *Vide* 33 *H.* 6. 54. 26 *H.* 6. *Gard.*
(g) Doct. pl. 86. Hard. 81. 58. 35 *H.* 6. 30. *a. Bracton* 254. and this is according to the old Verſe, *Quod (g) conſtat clare non debet verificare.* And in *Penruddock's Caſe*, the Pl. did not aſſign any ſpecial Nuſance before the Writ brought; but that *ſuperpendet* 3 *pedes curtilagii, &c. per qd' aquæ pluviales de eadem domo deſcendentes, ſolum ejuſd' meſuagii conterunt, ac magnopere indies magis magiſq; conſumunt & devaſtant, & ea ratione curtilagium præd' quolibet pluviali tempore humectatum & inundatum exiſtit:* So that all the Words in the ſaid Declaration being in the preſent Tenſe, and ſo after the Writ brought, and no Aſſignment of any ſuch particular Nuſance before the Writ brought, it appears thereby that the Court, as of a Thing apparent, took Notice thereof without Averment,
(g) Doct. pl. 86. For *Nunc pluit, & toto nunc Jupiter æthera fulget*, and that every one knows: And the Book in 3 *E.* 3. *Aſſiſe* 362. (*h*) was cited where in Aſſiſe of Nuſance *de foſſo levato ad nocum' liberi ten' ſui*; and made his Plaint that there where the Water of *S.* held Courſe directly from *S.* to the Water of *Idele*, the Def. had made a Ditch croſs the Water ſo that the Water was ſtopt and roſe, ſo that his Land lying near the ſaid Ditch is drowned *ad dampnum, &c.* and Exception was taken to it, becauſe he doth not ſay how much Land is
(i) 32 Aſſ. 2. Antea 54. a. drowned, ſo that the Plea is uncertain (and Note he doth not ſhew as in (*i*) 32 *Aſſ.* before the particular Nuſance upon the drowning, *ſc.* that where he uſed to have ſo many Loads of Hay, that now he has but ſo many;) alſo it might have been ſaid, that by ſome Manner of drowning, the Meadow would be the better, but there *ad damnum* implies the Con-
(k) 3 E. 3. Aſſiſe 362. Supra. h. trary, but it was anſwered in the Caſe of (*k*) 3 *E.* 3. that the Aſſiſe ſhall ſay in certain, becauſe ſometimes more may be drowned, and ſometimes leſs, wherefore the ſaid Plaint was adjudged good. So in the Caſe at Bar, the Jury ſhall enquire of the Certainty and Quantity of the Damage which happen-
(l) 1 Jones 222. ed to the Pl. by the ſaid Nuſance. *Nota* Reader, there are 2 (*l*) Ways to redreſs a Nuſance, one by Action, and in that he ſhall recover Damages, and have Judgment that the Nuſance ſhall be remov'd, caſt down, or abated, as the Caſe requires; or the

the Party grieved may (*a*) enter and abate the Nuſance himſelf, as appears by 17 *E.* 3. 44. 9 *E.* 4. 35. and in *Penruddock's Caſe*, but then he ſhall not have an Action, nor recover Damages, for in an *Aſſiſe of Nuſance*, or *Quod permittat proſternere*, &c. it is a good Plea, that the Plaintiff himſelf either before the Writ brought, or pending the Writ, has abated the Nuſance: For in an *Aſſiſe* or *Quod permittat*, he ſhall have Judgment of 2 Things, *ſc.* to have the Nuſance abated, and to recover Damages, and he has diſabled himſelf by his own Act to have Judgment for one of them, *ſ.* to have a Nuſance abated, and therefore the Action doth not lie; and therewith agree 50 *E.* 3. 11. *a. b.* The Abbey of *Buckfaſt's Caſe*, and 2 *H.* 4. 1. 46 *E.* 3. 24. *a.* 29 *Aſſ.* 2. *Vide* the Stat. of *W.* 2. *c.* 24. *In* (*b*) *Caſibus in quibus conceditur breve de Cancell' de facto alicujus, de cætero non recedant querentes a Curia Regis ſine remedio, pro eo quod Tenſtum transfertur de uno in alium. Et in Regiſtro de Cancellaria non eſt invcntum aliquod breve in iſto caſu ſpeciali, ſicuti de muro, domo, mercato, conceditur breve ſuper eum qui levavit ad nocumentum, & ſi* (*c*) *transferatur domus, murus, & hiis ſimilia in aliam perſonam, breve non denegetur, ſed de cætero cum in uno caſu conceditur breve in conſimili caſu ſimili remedio indigente ſicut prius fiat breve.* And the Reaſon, that at the Common Law Aſſiſe of Nuſance lay not againſt him who levy'd the Nuſance, and him to whom the Tenement was transferred, was becauſe there was not found any Writ of Aſſiſe of Nuſance in the *Regiſter*, but which ſuppoſed, that the Tenants in the Aſſiſe *levaverunt*; and that can't be ſaid when the Tenement is transferred to another; for he did not levy the Nuſance, but only the other; and now this Stat. gives a Writ of Aſſiſe in ſuch Caſe: *ſc. Queſtus eſt nobis A. quod B.* (who levied the Nuſance) & *C.* (to whom the Tenement is transferred) *levaverunt*, and this Stat. extends only to Aſſiſe of Nuſance againſt him who made the Nuſance and his Alienee, 30 *E* 3. 26. *a. b.* 46 *E.* 3. 23. *b.* 24. *a.* 50 *E.* 3. 11. *a. b.* and afterwards the Plaintiffs in the *Quod permittat* had Judgment.

(*a*) 1 Rol. Rep. 394. 3 Bulſt. 197. Cr. El. 296. 1 Jones 222. 2 Rol. 144, 145, 565. 5 Co. 101. b. Cr. Jac. 555. Cr. Car. 185. 9 E. 4. 35. b.

(*b*) 2 Inſt. 405. &c.

(*c*) 5 Co. 101. a.

2 Inſt. 405.

THE

Poulterers Caſe.

(a) Moor 813, 814.

(b) Cr. Car. 15, 16. 3 Inſt. 143. 2 Rol. Rep. 258. 2 Bulſt. 271. 1 Jones 93. Latch. 79, 80. Hut. 49. O. Bendl. 124. Palm. 315. 1 Rol. 110, 111, 112. Herd. 196. 2 Inſt. 561, 562.

(c) 1 Jones 94.

MICH. 8 *Jac. Regis*, The Caſe between (*a*) *Stone* Plaintiff, and *Ralph Waters*, *Henry Bate*, *J. Woodbridge*, and many other Poulterers of *London* Defendants, for a Combination, (*b*) Confederacy, and Agreement betwixt them falſly and maliciouſly to charge the Plaintiff (who had married the Widow of a Poulterer in *Gracechurch-ſtreet*) with the Robbery of the ſaid *Ralph Waters*; ſuppoſed to be committed in the County of *Eſſex*, and to procure him to be indicted, arraigned, adjudged, and hanged, and in Execution of this falſe Conſpiracy, they procured divers Warrants of Juſtices of Peace, by Force whereof *Stone* was apprehended, examined, and bound to appear at the Aſſizes in *Eſſex*; at which Aſſizes the Defendants did appear, and preferred a Bill of Indictment of Robbery againſt the ſaid Plaintiff; And the Juſtices of Aſſize hearing the Evidence to the Grand Jury openly in Court, they perceived great Malice in the Defendants in the Proſecution of the Cauſe, and upon the whole Matter it appeared, That the Pl. the whole Day that *Waters* was robbed, was in *Lond.* ſo that it was impoſſible that he committed the Robbery, and thereupon the Grand Inqueſt found (*c*) *Ignoramus*. And it was moved and ſtrongly urged by the Defs. Counſel, That admitting this Combination, Confederacy and Agreement between them to indict the Pl. to be falſe, and malicious, that yet no Action lies for it in this Court, or elſewhere, for divers Reaſons. 1. Becauſe no Writ of *Conſpiracy* for the Party grieved, or Indictment or other Suit for the K. lies, but where the Party grieved is indicted, and *legitimo modo acquietatus*,

acquietatus, as the Books are, (*a*) *F. N. B.* 114. *b.* 6 *E.* 3. 41. *a.* 24 *E.* 3. 34. *b.* 43 *E.* 3. *Conspiracy* 11. 27 *Ass. p.* 59. 19 *H.* 6. 28. 21 *H.* 6. 26. 9 *E.* 4. 12. *&c.* 2. Every one who knows himself guilty, may to cover their Offences, and to terrify or discourage those who would prosecute the Cause against them, surmise a Confederacy, Combination, or Agreement betwixt them, and by such Means notorious Offenders will escape unpunished, or at the least, Justice will be in danger of being perverted, and great Offences smothered, and therefore they said, that there was no Precedent or Warrant in Law to maintain such a Bill as this is. But upon good Consideration, it was resolved that the Bill was maintainable; and in this Case divers Points were resolved.

(*a*) F. N. B. 114. d.

1. That at the Com. Law, (which not only favours the Life, but also the Liberty of a Man, and Freedom from Imprisonment,) when a Man was imprisoned *pro morte hominis, &c.* where *prima facie* by the Law he was not bailable, and *ne detineatur diu in prisona, sc.* till the Coming of the Justices in Eire, as appears by the Stat. *W.* 1. *cap.* 11. the Prisoner in such Case might have a Writ *de* (*b*) *Odio & atia*, directed to the Sheriff, *quod* (*c*) *assumptis tecum custodibus placitorum coronæ in pleno comitatu per Sacrament' proborum & legalium hominum, &c. inquiras utrum A. captus & detentus in prisona, &c. pro morte W. unde rettatus* (*i. accusatus*) *est, rettatus sit odio & otia, an eo quod inde culpabilis sit, & si odio & atia, tunc quo odio & atia, &c. nisi indictatus vel appellatus fuerit coram Justic' nostris ultimo itinerantibus in partibus illis, & pro hoc captus & imprisonatus, &c.* by which it appears, that if the Prisoner be indicted or appealed, and by Force thereof imprisoned, the said Writ being but a Surmise lay not against the said Matter of Record.

(*b*) 2 Inst. 42, 43. 5 H. 7. 5. a. Stamf. Pl. Cor. 77. b.

(*c*) 2 Inst. 42. Vide Regist. f. 133. b.

2. It is to be observed, That if upon the said Writ *de odio & atia*, the Jury found him Not guilty, yet the Sheriff, with the Coroners, or any of them, could not bail him; but then should issue forth a Writ *de ponendo in ballivum* to the Sheriff, which Writ recites the Inquisition, by which the Prisoner is found Not guilty, or that he did it *se defendendo, & non per feloniam, ex malitia præcogitata, vel per infortunium, tibi præcipimus, quod si præd' A. invenerit tibi* 12 *probos & legales homines de comit' tuo, &c. qui eum manucapiant habere coram Justiciaris nostris ad primam Assisam, &c. ad standum, &c. tunc ipsum A. &c. præd'* 12 *interim tradas in ballivum.* By which it appears, that in such Case the Sheriff without a Writ could not bail him, nor bail by Writ under the Number of 12 Persons who wou'd bail him.

Vide

Vide Magna Charta, cap. 26. *W.* 1. *c.* 11. *Glouc', c.* 9. *W.* 2. *c.* 29. But now this Writ *de odio & atia* is taken away by the Stat. of 28 *E.* 3. *c.* 9. *Vide Regiſtr' ubi ſupra Stamf. Pl. Cor.* 77. *g. Vide Bracton lib.* 3. 121. *b.*

2 Inſt. 43.

3. It is to be obſerved, That there was Means by the Com. Law before Indictment to protect the Innocent againſt falſe Accuſation, and to deliver him out of Priſon: And as *Odium* in the ſaid Writ ſignifies *Hatred*, ſo *Acia* or *Atia* ſignifies *Malice*, becauſe *malitia eſt acida, i. eager, Sharp* and *Cruel.*

Moor 814. Cr. Jac. 8.

And it is true, That a Writ of *Conſpiracy* lies not, unleſs the Party is indicted, and *legitimo modo acquietatus*, for ſo are the Words of the Writ; but that a falſe Conſpiracy betwixt divers Perſons ſhall be puniſhed, altho' nothing be put in Execution, is full and manifeſt in our Books; and therefore in 27 *Aſſ. p.* 44. in the Articles of the Charge of Enquiry by the Enqueſt in the King's Bench, there is a *Nota*, That two were indicted of Confederacy, each of them to maintain the other, whether their Matter be true, or falſe, and notwithſtanding that nothing was ſuppoſed to be put in Execution, the Parties were forced to anſwer to it, becauſe the Thing is forbidden by the Law, which are the very Words of the Book; which proves that ſuch falſe Confederacy is forbidden by the Law, altho' it was not put in ure or executed. So there in the next Article in the ſame Book, Inquiry ſhall be of Conſpirators and Confederates, who agree amongſt themſelves, *&c.* falſly, to indict, or acquit, *&c.* the Manner of Agreement and betwixt whom, which proves alſo, That Confederacy to indict or acquit, altho' nothing is executed, is puniſhable by Law: And there is another Article concerning Conſpiracy betwixt Merchants, and in theſe Caſes the Conſpiracy or Confederacy is puniſhable, altho' the Conſpiracy or Confederacy be not executed; and it is held in 19 *R.* 2. *Brief* 926. A Man ſhall have a Writ of *Conſpiracy*, altho' they do nothing but conſpire together, and he ſhall recover Damages, and they may be alſo indicted thereof. Alſo the uſual Commiſſion of *Oyer* and *Terminer* gives Power to the Commiſſioners to enquire, *&c. de omnibus coadunationibus confœderationibus, & falſis alliganciis*; and *Coadunatio* is a Uniting of themſelves together, *Confœderatio* is a Combination amongſt them, and *falſa alligantia* is a falſe Binding each to the other, by Bond or Promiſe, to execute ſome unlawful Act: In theſe Caſes before the unlawful Act executed the Law puniſhes the Coadunation, Confederacy or falſe Alliance,

1 Jones 94.

Moor 814.

to

to the End to prevent the unlawful Act, *quia (a) quando aliquid prohibetur, prohibetur & id per quod pervenitur ad illud: Et affectus punitur licet non sequatur effectus*; and in these Cases the Common Law is a Law of Mercy, for it prevents the Malignant from doing Mischief, and the Innocent from suffering it. *Hill.* 37 *H.* 8. in the Star-chamber a Priest was stigmatized with *F. (b)* and *A.* in his Forehead, and set upon the Pillory in *Cheapside*, with a written Paper, *for false Accusation. M.* 3 & 4 *Ph. & Ma.* one also for the like Case *fuit Stigmaticus* with *F. & A.* in the Cheek, with such Superscription as is aforesaid. *Vide Proverb'* 1. *Si te lactaverint peccatores & dixerint, Veni nobiscum ut insidiemur sanguini, absondamus tendiculas contra insontem frustra, &c. omnem pretiosam substantiam reperiemus & implebimus domus nostras spoliis, &c. Fili mi ne ambules coram eis, &c. pedes enim eorum ad malum currunt & festinant ut effundant sanguinem.* And afterwards upon the Hearing of the Case, and upon pregnant Proofs, the Defendants were sentenced for the said false Confederacy by Fine and Imprisonment. *Nota* Reader, These Confederacies, punishable by Law, before they are executed, ought to have four Incidents: 1. It ought to be declared by some manner of Prosecution, as in this Case it was, either by making of Bonds, or Promises one to the other: 2. It ought to be malicious, as for unjust Revenge, *&c.* 3. It ought to be false against an Innocent: 4. It ought to be out of Court voluntarily.

(a) 2 Inst. 48. Hardr. 146.

(b) Moor 814.

Mich. 8 Jacobi *Regis.*

William Aldred's *Caſe.*

2 Rol. 141. *William Aldred* brought an Action on the Caſe againſt *Thomas Beaton*, which began *Trin.* 7. *Jacobi Rot.* 2802. *in Banco*, that whereas the Plaintiff, 29 *Septemb' anno* 6 *Jac.* was ſeiſed of an Houſe, and a Parcel of Land in Length 31 Feet, and in Breadth 2 Feet and an half, next to the Hall and Parlour of the Plaintiff of his Houſe aforeſaid in *Harleſton* in the County of *Norfolk* in Fee; and whereas the Def. was poſſeſſed of a ſmall Orchard on the Eaſt Part of the ſaid Parcel of Land, *præd' Thomas malitioſe machinans & intendens ipſum Willielmum de eaſiamento & proficuo meſſuag' & parcell' terræ ſuorum præd' impedire & deprivare*, the ſaid 29th Day of *Septemb' anno* 6 *Jacobi quoddam magnum lignile in dicto horto ipſius Thomæ conſtruxit & erexit, ac illud adeo exaltavit, &c. quod per lignile illud, &c. tam omnia feneſtr' & luminaria ipſius Willielmi aulæ & Camerarum ſuarum, quam oſtium ipſius Willielmi aulæ ſuæ prædict' penitus obſtupat' fuer', &c. & præd' Thomas ulterius machinans & malitioſe intendens ipſum Willielmum multipliciter pragravare, & ipſum de toto commodo, eaſiamento & proficuo totius meſſuagii ſui præd' penitus deprivare, præd' 29 die Sept. an.* 6 *ſupræd' quodd'* (a) Hutt. 136 2 Rol. 141 *ædificium pro ſuibus (a) & porcis ſuis in horto ſuo præd' tam prope aulam & conclave ipſius Willielmi prædict' erexit, ac ſues & porcos ſuos in ædificio in horto illo poſuit, & ill' ibidem per magnum tempus cuſtodivit, ita quod per fe-*

gidos & insalubres odores sordidorum prædict' suum & porcorum præd' Thomæ in aulam & conclave præd' ac alias partes præd' Messuagii ipsius Willielmi penetran' & influent' idem Willielmus & famuli sui, ac aliæ personæ in messuagio suo præd' conversantes & existen' absque periculo infectionis in aula & conclavi præd' ac aliis locis messuagii præd' continuare seu remanere non potuerunt: Prætextu cujus idem Willielmus totum commodum, usum, ecstamentum, & profi-cuum maximæ partis messuagii sui præd' per totum tempus præd' totaliter perdidit & amisit ad damnum ipsius Willielmi 40*l. &c.* And the Defendant pleaded Not guilty, and at the Assises in *Norfolk* he was found guilty of both the said Nusances, and Damages assessed. And now it was moved in arrest of Judgment, That the Building of the House for Hogs was necessary for the Sustenance of Man; and one ought not to have so delicate a Nose, that he can't bear the smell of Hogs; for *Lex non favet delicatorum votis:* But it was resolved, That the Action for it is (as this Case is) well maintainable; for in an House 4 Things are desired, *habitatio hominis, delectatio inhabitantis, necessitas luminis, & salubritas aeris*, and for Nusance done to 3 of them an Action lies, *sc.* 1. to the Habitation of a Man, for that is the principal End of a House. 2. For Hindrance of the Light; for the ancient Form of an Action on the Case was significant, *sc. quod Messuagium horrida tenebritate obscuratum fuit*, therewith agree 7 *E.* 3. 50. *b.* 22 *H.* 6. 14. (*a*) by *Markham*, 11 *H.* 4. 47. and as to this there was a Case adjudged in the King's Bench, *Trin.* 29 *El. Tho.* (*b*) *Bland* brought an Action on the Case against *Thomas Mosley*, and declared how that *James Bland* was seised in Fee of an ancient House in *Netherousegate* in the Parish of S. *Michael* in the County of the City of *York*; and that the said *James*, and all those whose Estate he had in the said House, from Time whereof, *&c.* have had and have used to have for them and their Tenants, for Life, Years, and at Will in the West side of the said House seven Windows or Lights against a Piece of Land containing half a Rood, in the Parish aforesaid, adjoining to the said House, which Piece of Land from Time whereof, was without any building, until the 28 Day of *Septemb. anno* 28 *El.* and shewed the Length and Bread of the said Windows for all the Time aforesaid, by force of which Windows the said *James*, and all those whose Estates he had in the said House from Time whereof, *&c.* have used to have for them and their Tenants aforesaid divers wholesome and necessary Easements and Commodities, by reason of the open Air and Light, *&c.* And that the said *James* 20 *Sep. an.* 28 *El.* demised to the Pl. the said House for 3 (*c*) Years; and that the Def. maliciously intending

(*a*) 22 H. 6. 15 a. 2 Rol. 140.

(*b*) Hut. 136. 1 Rol. 107, 558. Yelv. 216. 1 Bulstr. 115, 116. Godb. 183

(*c*) F. N. B. 184 E.

Mich. 8 Jacobi *Regis.*

William Aldred's *Case.*

2 Rol. 141.

William Aldred brought an Action on the Case against *Thomas Benton*, which began *Trin.* 7. *Jacobi Rot.* 2802. *in Banco*, that whereas the Plaintiff, 29 *Septemb' anno* 6 *Jac.* was seised of an House, and a Parcel of Land in Length 31 Feet, and in Breadth 2 Feet and an half, next to the Hall and Parlour of the Plaintiff of his House aforesaid in *Harleston* in the County of *Norfolk* in Fee; and whereas the Def. was possessed of a small Orchard on the East Part of the said Parcel of Land, *præd' Thomas malitiose machinans & intendens ipsum Willielmum de easiamento & proficuo messuag' & parcell' terræ suorum præd' impedire & deprivare*, the said 29th Day of *Septemb' anno* 6 *Jacobi quoddam magnum lignile in dicto horto ipsius Thomæ construxit & erexit, ac illud adeo exaltavit*, &c. *quod per lignile illud*, &c. *tam omnes fenestr' & luminaria ipsius Willielmi aulæ & Camerarum suarum, quam ostium ipsius Willielmi aulæ suæ prædict' penitus obstupat' fuer'*, &c. & *præd' Thomas ulterius machinans & malitiose intendens ipsum Willielmum multipliciter prægravare, & ipsum de toto commodo, easiamento & proficuo totius messuagii sui præd' penitus deprivare, præd' 29 die Sept. an.* 6 *suprad' quodd' ædificium pro suibus* (a) *& porcis suis in horto suo præd' tam prope aulam & conclave ipsius Willielmi prædict' erexit, ac sues & porcos suos in ædificio in horto illo posuit, & ill' ibidem per magnum tempus custodivit, ita quod per fe-*

(a) Hutt. 136 2 Rol. 141

tidos & insalubres odores sordidorum prædict' suum & porcorum præd' Thomæ in aulam & conclave præd' ac alias partes præd' Messuagii ipsius Willielmi penetran' & influent' idem Willielmus & famuli sui, ac aliæ personæ in messuagio suo præd' conversantes & existen' absque periculo infectionis in aula & conclavi præd' ac aliis locis messuagii præd' continuare seu remanere non potuerunt: Prætextu cujus idem Willielmus totum commodum, usum, ecsiamentum, & proficuum maximæ partis messuagii sui præd' per totum tempus præd' totaliter perdidit & amisit ad damnum ipsius Willielmi 40*l.* &c. And the Defendant pleaded Not guilty, and at the Assises in *Norfolk* he was found guilty of both the said Nusances, and Damages assessed. And now it was moved in arrest of Judgment, That the Building of the House for Hogs was necessary for the Sustenance of Man; and one ought not to have so delicate a Nose, that he can't bear the smell of Hogs; for *Lex non favet delicatorum votis:* But it was resolved, That the Action for it is (as this Case is) well maintainable; for in an House 4 Things are desired, *habitatio hominis, delectatio inhabitantis, necessitas lumini, & salubritas aeris*, and for Nusance done to 3 of them an Action lies, *sc.* 1. to the Habitation of a Man, for that is the principal End of a House. 2. For Hindrance of the Light, for the ancient Form of an Action on the Case was significant, *sc. quod Messuagium horrida tenebritate obscuratum fuit*, therewith agree 7 *E.* 3. 50. *b.* 22 *H.* 6. 14. (*a*) by *Markham*, 11 *H.* 4. 47. and as to this there was a Case adjudged in the King's Bench, *Trin.* 29 *El. Tho.* (*b*) *Bland* brought an Action on the Case against *Thomas Mosley*, and declared how that *James Bland* was seised in Fee of an ancient House in *Netherousegate* in the Parish of S. *Michael* in the County of the City of *York*; and that the said *James*, and all those whose Estate he had in the said House, from Time whereof, &c. have had and have used to have for them and their Tenants, for Life, Years, and at Will in the West side of the said House seven Windows or Lights against a Piece of Land containing half a Rood, in the Parish aforesaid, adjoining to the said House, which Piece of Land from Time whereof, was without any building, until the 28 Day of *Septemb. anno* 28 *El.* and shewed the Length and Bread of the said Windows for all the Time aforesaid, by force of which Windows the said *James*, and all those whose Estates he had in the said House from Time whereof, &c. have used to have for them and their Tenants aforesaid divers wholesome and necessary Easements and Commodities, by reason of the open Air and Light, &c. And that the said *James* 20 *Sept. an.* 28 *El.* demised to the Pl. the said House for 3 (*c*) Years; and that the Def. maliciously intending

(*a*) 22 H. 6. 15 a 2 Rol. 140.

(*b*) Hut. 136. 1 Rol. 107, 558. Yelv 216. 1 Bulst. 115, 116. Godb. 183

(*c*) F N. B. 183. E.

tending to deprive him of the ſaid Eaſements, & *obſcurare Meſſuagium præd' horrida tenebritate*, &c. 20 *Nov. ann.* 29 *Eliz.* had erected a new (*a*) Building on the ſaid Piece of Land, ſo near, &c. that the ſaid 7 Windows were ſtopped, whereby the Pl. loſt the ſaid Eaſements, &c. *Et maxima pars Meſſuagii prædict' horrida tenebritate obſcurata fuit*, &c. In the Bar of which Action the Defendant pleaded, *quod infra prædict' civitatem Ebor' talis habetur, & a toto tempore cujus contrarii memoria non exiſtit, habebatur conſuetudo, videl't, quod ſi quis habuerit feneſtras & viſum per eaſdem verſus terram vicini ſui, vicinus ille viſum illarum feneſtrarum obſtruere ſuper terram illam ſolebat & poſſet, ſicut melius viderit ſibi expedire.* By Force of which Cuſtom he juſtified the Stopping of the ſaid Windows; and upon that the Pl. demurred in Law; and it was adjudged by Sir *Chr. Wray* Ch. Juſtice, and the whole Court of K.'s Bench, That the Bar was inſufficient in Law (*b*) to bar the Pl. of his Action, for two Reaſons: 1. When a Man has a lawful Eaſement or Profit, by Preſcription from Time whereof, &c. another Cuſtom which is alſo from Time whereof, &c. can't take it away, for the one Cuſtom is as ancient as the other: As if one has a Way over the Land of *A.* to his Freehold by Preſcription from Time whereof, &c. *A.* can't alledge a Preſcription or Cuſtom to ſtop the ſaid Way. 2. It may be that before Time of Memory, the Owner of the ſaid Piece of Land has granted to the Owner of the ſaid Houſe to have the ſaid Windows, without any ſtopping of them, and ſo the Preſcription may have a lawful Beginning: And *Wray* Ch. Juſtice then ſaid, That for ſtopping as well of the wholeſome Air (*c*) as of Light an Action lies, and Damages ſhall be recovered for them, for both are neceſſary, for it is ſaid, & *reficitur aura æthérea*; and the ſaid Words *horrida tenebritate*, &c. are ſignificant, and imply the Benefit of the Light. But he ſaid, That for (*d*) proſpect, which is a Matter only of Delight, and not of Neceſſity, no Action lies for ſtopping thereof, and yet it is a great Commendation of an Houſe if it has a long and large Proſpect, *unde dicitur, Laudatur pulchre domus longos qui proſpicit agros.* But the Law don't give an Action for ſuch Things of Delight. And *Solomon* ſays, *Eccleſiaſt.* 11. 7. *Dulce lumen eſt & delectabile oculis videre ſolem. Et olim (ut Plutarchus in Conv.* 7. *Sap. refert.) Rex Æthiopum interrogatus quid optimum? reſpondebat lucem; quis enim natura Duce tenebras non exhorreſcit?* and if the Stopping of the wholeſome Air, &c. gives Cauſe of Action, *a fortiori* an Action lies in the Caſe at Bar, for infecting and corrupting the Air. And the Building of

(*a*) 3 Inſt. 201, 202.

(*b*) Yelv. 216. Godb. 123.

(*c*) 2 Rol. 141

(*d*) 2 Rol. 141

a (*a*) Lime-kiln is good and profitable, but if it be built ſo near an Houſe, that when it burns the Smoke thereof ſo enters into the Houſe, ſo that none can dwell there, an Action lies for it. So if a Man has a Watercourſe running in a Ditch from the River to his Houſe, for his neceſſary Uſe; if a * Glover ſets up a (*b*) Lime-pit for Calve-skins, and Sheep-skins, ſo near the ſaid Watercourſe, that the Corruption of the Lime-pit has corrupted it, for which cauſe his Tenants leave the ſaid Houſe, an Action on the Caſe lies for it, as it is adjudged in 13 (*c*) *H.* 7. 26. *b.* and this ſtands with the Rule of Law and Reaſon, *ſc. Prohibetur ne quis faciat in ſuo quod nocere poſſit alieno: Et ſic* (*d*) *utere tuo ut alienum non lædas. Vide* in the Book of *Entries* Tit. *Nuſance* 406. *b.* he who has a ſeveral Piſcary in a Water ſhall have an Action on the Caſe againſt him who erects a (*e*) Dyhouſe, *ac fimos, fœditates, & alia ſordida extra domum præd' decurrentia in piſcariam præd' decurrere fecit, per quod idem proficuum piſcariæ ſuæ præd' totaliter amiſit, &c.* And there is another Precedent againſt a *Dyer, &c. quod idem* Henricus *in manſione ſua præd' ob metum infectionis per horridum fœtorem fumi, fœditatis, & aliorum ſordidorum, &c. per magnum tempus morari non audebat.* So in the Caſe at Bar, foraſmuch as the Declaration is, That the Defendant maliciouſly intending to deprive the Plaintiff of the Uſe and Profit of his Houſe, erected a (*f*) Swine Sty, *tam prope aulam & conclave ipſius* Will'i, *ac ſues & porcos ſuos in ædificio illo poſuit, & ill' ibid' per magnum tempus cuſtodivit, ita quod fœtidi & inſalubres odores ſordidorum præd' ſuum & porcorum præd'* Thomæ *in aulam, &c. penetran' & influen' idem* Will'us *ac famuli ſui, &c. in meſuag' prædict' converſantes exiſten' abſq; periculo infectionis in aula, &c. continuare ſeu remanere non potuerunt, prætextu cujus idem* Will' *totum commodum, &c. maximæ partis præd' meſſuag' per totum tempus præd' totaliter perdidit.* To which Declaration the Defendant pleaded Not guilty, and was found guilty of the Matter in the Declaration: It was adjudged that the Plaintiff ſhould recover.

(*a*) 2 Rol. 141.

* Palm. 533.

(*b*) 2 Rol. 141. Action ſur le Caſe 123.

(*c*) Ant. 51. a. Palm 536.

(*d*) Palm. 536.

(*e*) 2 Rol. 141. Palm. 536.

(*f*) 2 Rol 141. Hut. 136. Palm. 536.

Mich. 8 Jacobi.

In Camera Stellata.

John Lamb's *Case.*

Moor 813.

John Lamb Proctor of the Eccleſiaſtical Court exhibited a Bill in the Star-Chamber againſt *William Marche*, *Rob. Harriſon*, and many others of the Town of *Northampton*, and againſt *Shucburgh* and others, for publiſhing two Libels. It was reſolved, That every one who ſhall be convicted in the ſaid Caſe, either ought to be a Contriver of the Libel, or a procurer of the Contriving of it, or a malicious Publiſher of it, knowing it to be a Libel; for if one reads a Libel, that is no Publication of it; or if he hears it read, it is no Publication of it, for before he reads or hears it, he can't know it to be a Libel, or if he hears or reads it, and laughs at it, it is no Publication of it; but if after he has read or heard it, he repeats it, or any Part of it in the Hearing of others, or after that he knows it to be a Libel, he reads it to others, that is an unlawful Publication of it; or if he writes a Copy of it, and does not publiſh it to others, it is no Publication of the Libel; for every one who ſhall be convicted ought to beContriver, Procurer or Publiſher of it, knowing it to be a Libel. But it is great Evidence that he publiſhed it, when he, knowing it to be a Libel, writes a Copy of it; unleſs afterwards he can prove that he deliver'd it to a Magiſtrate to examine it; for then the Act ſubſequent explains his Intention precedent. *Vide* Reader, *Bract. lib.* 3. *tract. de*

Moor 813.
3 Inſt. 174.
5 Co. 125. b.

Moor 813.

5 Co. 125. b.

Corona

Corona cap. 36. *fo.* 155. *Fiat autem injuria, cum quis pugno percussus fuerit, verberatus, vulneratus seu fustibus cæsus; verum etiam cum ei convitium dictum fuerit; vel de eo factum carmen famosum.*

Trin. 10 Jacobi *Regis.*

Robert Bradſhaw's *Caſe.*

Cr. Jac. 304. Hob. 114. Doct. pl. 61.

John Salmond brought an Action of Covenant againſt *Robert Bradſhaw* in the King's Bench, which began *Hill.* 8 *Jac. Regis rot.* 520. and declared that *Bradſhaw* by his Indenture 3 *Aug. anno* 7 *Jac. Regis*, demiſed to the ſaid *John Salmond* divers Lands and Tenements in *Stanford*, in the County of *Leiceſter* for ſix Years, if *Robert Reyns*, Son and Heir apparent of *Nicholas Reyns* ſhould ſo long live; and covenanted by the ſame Indenture with *Salmond*, That the ſaid *Bradſhaw* then had full Power and lawful Authority to demiſe the Premiſſes according to the Form and Effect of the ſaid Indenture. *Salmond* for Breach of the ſaid Covenant in Fact ſaid, That *Bradſhaw* at the Time of the Making of the ſaid Indenture, had not full Power and lawful Authority to demiſe the Premiſſes, according to the Form and Effect of the ſaid Indenture, *& ſic præd* Rob'us *conventionem ſuam prædict' cum eodem* Johan' *in hac parte non tenuit, ſed illam penitus infregit & illam*, &c. to the Damages of *Salmond* 200 *l. Bradſhaw* pleaded, That after the Making of the ſaid Indenture, there was a Concord betwixt him and *Salmond*, That *Bradſhaw* ſhould pay to *Salmond* in full Satisfaction and Diſcharge of the ſaid Covenant, and of all other Covenants in the ſaid Indenture 12 *l.* which Sum *Bradſhaw* paid, and *Salmond* accepted accordingly: *Salmond* denied the Concord upon which they were at Iſſue, and found for the Plaintiff, and Damages aſſeſſed 133 *l.* 7 *s.* 8 *d.* and Coſts, &c. whereupon *Salmond* had Judgm. for Damages and Coſts *in toto* to 145 *l.* 7 *s.* 8 *d.* upon which Judgment *Bradſhaw* brought a Writ of Error *in Camera Scaccarii*, and aſſigned two Errors for the Inſufficiency of the Declaration; one that the Plaintiff *Salmond* had not averred, that *Robert Reyns* was alive at

2 Rol. Rep. 110, 111.

the

the Time of the Beginning of the ſaid Leaſe, nor at the Time of the Action brought; & *non allocatur*; for the Covenant refers to the Time of the Leaſe made, and then be *Reyns* alive or dead the Action lies; for if he be dead before the Leaſe, then the Leaſe is abſolute, and if he died after the Leaſe, and before the Action brought, yet the Action lies, and Conſideration ſhall be had thereof in Damages. The other Error which was aſſigned was, That *Salmond* in his Declaration had not ſhewed what Perſon had Right, Title, Eſtate or Intereſt in the Lands and Tenements demiſed at the Time of the Making of the ſaid Indenture, by which it might appear to the Court, that *Bradſhaw* had not full Power and lawful Authority to demiſe the Premiſſes, and ſo enable himſelf to an Action, and to charge the Defendant to anſwer him Damages for the Breach of the ſaid Covenant. But upon Conference and Debate amongſt the Juſtices, it was reſolved, That the Aſſignment of the Breach of Covenant was good, for he has followed the Words of the Covenant *negative*, and it lies more properly in the Knowledge of the Leſſor what Eſtate he himſelf has in the Land which he demiſes, than the Leſſee who is a Stranger to it; and therefore the Defendant ought to ſhew what Eſtate he had in the Land at the Time of the Demiſe made, by which it might appear to the Court, that he had full Power and lawful Authority to demiſe it. *Nota* this Point adjudged by both Courts.

Cr Jac. 304, 370. Doctrin pl. 61. Co. Lit. 303. b. 1 Mod. Rep. 292. Cr. Jac 312. Yelv. 228.

Spe-

Special Verdict at a Seſſions of Goal-delivery for Newgate Decemb. 5. *Anno* 8 Jacobi *Regis.*

Mackalley's *Caſe in killing a Serjeant of* London.

Cro. Jac. 279.

AD ſeſſion' gaolæ deliberationis de Newgate, tent' pro civitate London, apud **Juſtice Hall in the Old Baily**, in paroch' ſanct' Sepulchri extra Newgate in ſuburbiis dictæ civitatis, die Mercur' quinto die Decembris annis regni domini Jacobi Dei gratia Angliæ, Franciæ, & Hiberniæ Regis, fidei defenſor', octavo, & Scotiæ 44. coram *Willielm' Craven* milit', Major' civitat' præd', *Thoma Fleming* milit', capital' Juſtic' dicti domini Regis ad plac' coram ipſo Rege tenend' aſſign', *Georgio Snigg* milit' uno Baron' Scaccarii dicti domini Regis, *Johanne Croke* milit', uno Juſtic' dicti domini Regis ad plac' coram ipſo Rege tenend' aſſign' *Thoma Foſter* milit', uno Juſtic' dicti domini Regis de Banco, *Edwardo Bromly* milit', altero Baron' dicti domini Regis Scaccarii ſui præd', *Joanne Sotherton*, altero Baronum Scaccarii ſui præd', *Henrico Mountague* milit' Recordatore dictæ civit' ſuæ London, ac aliis ſociis ſuis, Juſtic' dicti domini Regis, per literas patent' ipſius domini Regis, eis & al' & aliquib' quatuor vel pluribus eorum inde confect', ad inquirend' per ſacr'um proborum & legalium hominum de civit' Lond. tam infra libertat' quam extra, per quos rei veritas melius ſciri poterit, de quibuſcunq; proditionibus, miſpriſionibus, proditionum, inſurrectionibus, rebellionibus, ac de quibuſcunq; murdris, feloniis, homicidiis, interfectionibus, burglariis, & al' malefactis, offenſis, & injuriis quibuſcunq; infra civitat' prædict' commiſſ. in literis patent' præd' ſpecificat', ac ad eadem proditiones & alia præmiſſ. ſecundum legem & conſuetudin'

regni

regni domini Regis Angliæ, audiend' & terminand, necnon Juſtic' ipſius domini Regis ad gaolam præd' de priſon' in ea exiſten' deliberand' aſſign' per ſacramentum Radulphi Edmundi, Leonardi Harwood, Joh. Froſt, Edw. Davies, Joh. Lyſſant, Franciſci Barton, Edw. Parnell, Tho. Hyet, Hen. Kent, Edw. Motley, Humfrid' Lee, Rich. Weſtcot, Williel. Fairbrother, Edw. Fawcet, & Tho. Smith, proborum & legalium hominum civitat' præd' extitit præſentat', qd' ubi die Sabbat' 17 die Novembris, anno regni domini noſtri Jacobi Dei gratia Angliæ, Franciæ, & Hiberniæ Regis, fidei defenſoris, &c. 8. & Scotiæ 44. in cur' dicti domini Regis coram Rich. Pyot Aldermano, adtunc & adhuc uno Vicecom' civitat' London præd' in computator' ſuo ſcituat' in Parochia S. Michaelis in Woodſtreet London præd' ſecundum conſuetudinem civitat' præd' tunc tent', quidam Rob. Radford levaſſ. quandam querel' de plac' debiti, ſuper demand' quingent' libr', verſus quendam Joh. Murray de London armigerum, cujus quidem querel' tenor ſequitur in hæc verba, ſcil', Joh. Murray armiger ſummon' verſus Rob. Radford Salter in plac' debiti ſuper demand' quingent' libr': Ac ſuperinde præd' Rob. Radford tunc & ibidem petiit proceſſum verſus dictum Joh. Murray ſecundum conſuetudinem civitat' præd' ſerviend': Super quo ad petitionem ejuſdem Rob. Radford taliter in eadem cur' proceſſum fuit qd' præd' Rich. Pyot, tunc & adhuc unus Vicecomit' civitat' præd' cuidam Rich. Fells, adtunc uno ſervient' ad clav' dict' Vicecom', ac miniſtro cur' præd', ore tenus, ſecundum conſuetudinem civitat' prædict' præcepit, quod ipſe idem ſervien' ad clav' præd' Joh. Murray per corpus ſuum caperet & arreſtaret ſi invent' foret infra libertat' civitat' prædict', ita quod haberet corpus præf. Johan. Murray ad proxim' cur' dicti domini Regis apud Guildhald' civitat' præd ſcituat' in Parochia S. Laurentii in veteri Judaiſmo in Ward' de Cheape London præd' die Mercur' 21. die dicti menſis Novembris, annis 8 & 44. præd' tenend', ad reſpond' præf. Rob. Radford in plac' querel' ſuæ præd': Virtute cujus præcepti idem Rich. Fells eundem Joh. Murray poſtea, ſcil', decimo octavo die dicti menſis Novembris, annis regni dicti domini Regis nunc octavo & quadrageſ. quarto ſupradict' inter horas quintam & ſextam poſt merid' ejuſd' diei, apud Lond. præd', videl't, in Paroch' S. Martini Bowyer Rowe, in Ward' de Farringd' infra London præd', in communi alta Regia via ibid' per corpus ſuum

ſuum cepit & arreſtavit, ac ſub cuſtodia ſua tunc & ibidem habuit; ipſoq; Joh. Murray ſic ſub cuſtod' dicti Rich. Fells virtute præcepti præd' tunc & ibidem ut præfertur exiſten', ita tunc & ibidem acciderit, quod idem Joh. Murray nuper de London armiger, al' dict' Joh. Murry nuper de London armiger, quidam Joh. Mackall nuper de London Yeoman, alias dictus Joh. Mackalley nuper de London Yeoman, quidam Joh. Engles nuper de London Yeoman, al' dict' Joh. Engliſh nuper de London Yeoman, & quidam Archibald' Miller nup' de Lond. Yeoman timorem Dei præ oculis ſuis non habentes, ſed inſtigatione diabolica moti & ſeduct' vi & armis, videlicet, gladiis, &c. ea intentione ad ipſum Johan. Murray ab arreſtatione præd' tunc & ibidem reſcuſſand' in & ſuper præd' Rich. Fells tunc & ibidem inſult' & affraiam fecer'; in qua quidem affraia præd' Joh. Mackall alias dictus Joh. Mackalley, cum quodam gladio, Anglice vocat' a Rapier, de ferro & chalibe extract', valoris duodecim denar', quam ipſe idem Joh. Mackall, alias dictus Joh. Mackalley, in manu ſua dextra tunc & ibidem habuit & tenuit, eundem Rich. Fells, in & ſuper ſiniſtram patrem corporis ſubter ſiniſtram ſcapul', Anglice the left Shoulder Blade, ejuſdem Richardi, felonice, voluntarie, & ex malitia ſua præcogitat', tunc & ibidem percuſſit & inforavit, Anglice thruſt in dans eidem Rich. Fells adtunc & ibidem cum gladio præd' vocat' a Rapier, in & ſuper ſiniſtram partem corporis, ſubter ſiniſtram ſcapul' præd', Anglice the left Shoulder Blade aforeſaid, unam plagam & vulnus mortale longitud' dimid' unius pollic', latitudin' dimid' unius pollic' & profunditat' ſex pollic' de qua quidem plaga & vulnere mortal' præd' prædictus Rich. Fell adtunc & ibidem, ſcil', in Parochia & Ward' ultime præd', inſtanter obiit. Et ulterius jur' præd' præſentant quod præd' Joh. Murray nuper de London armiger, alias dictus Joh. Murry nuper de London armig', prædict' Joh. Engles nuper de London Yeoman, alias dictus Johan. Engliſh nuper de London Yeoman, & præd' Archibald' Miller nuper de London Yeoman, dicto decimo octavo die Novembris annis octavo & quadrageſimo quarto ſupradictis, inter horas prædictas, in Parochia, Ward' & loco ultim' præd' felonice, voluntarie, & ex malitia ſua præcogitat' fuer' præſentes, pugnantes, procurantes, præcipient', abettant', confortant', & auxiliant' præd' Johannem Mackall nuper de Lond. Yeoman, alias dictum Joh. Mackalley nuper de Lond. Yeoman, ad præd' Richardum Fells modo & forma præd' interficiend'

ficiend' & murdrand'. Et ſic jurator' præd' dicunt quod prædictis Joh. Mackall nuper de London Yeoman, alias dict' Joh. Mackalley nuper de London Yeoman, Joh. Murray nuper de London armiger, alias dictus Joh. Murry nuper de London armig', Joh. Engles nuper de London Yeoman, alias dictus Joh. Engliſh nuper de London Yeoman, & Archibald' Miller nuper de London Yeoman, præd' Rich. Fells apud London præd', ſcilicet, in Parochia & Ward' ultime prædict' felonice, voluntarie, & ex malitia ſua præcogitat', modo & forma præd' interfecer' & murdraver', contra pacem dicti Domini Regis nunc coron' & dignitat' ſuas, &c. Et ſuper hoc ad iſtam eandem ſeſſion', coram præf. Juſtic', præd' Joh. Murray, al' Murry, Joh. Mackall, alias Mackalley, Joh. Engles, alias Engliſh, & Archibald' Miller in cuſtod' Rich. Pyot ac Franciſci Jones Vicecom' civitat' præd' in gaola de Newgate præd' exiſten', ad barram ibidem duct' in propr' perſon' ſuis vener', & ſeparatim allocuti qualiter ſe vellent de felon' & murdro præd' acquietari, quilibet eorum pro ſeipſo ſeparatim dixit, quod ipſe non fuit inde culpabil, & inde de bono & malo ſeparatim ſe poſuer' ſuper patriam, & Rich. Langley armig', qui pro Domino Rege in hac parte ſequitur, ſimiliter, &c. ideo immediate ven' inde jurata: Et jurator' jurat' illius per præd' Vicecom' civitat' præd' ad hoc impannellat' exact', ſcil', Willi'us Morgan, Tho. Dalbit, Tho. Evans, Tho. Aſtin, Salomon Green, Will. Chewne, Will. Ellill, Metcalf Allington, Joh. Drake, Will. Taylor, Owinus Davies, & Tho. Damport vener', qui ad veritat' de & ſuper præmiſſ. dicend' electi, triati, & jurat' dicunt ſuper ſacram' ſuum quod civitas London eſt, &, a toto tempore cujus contrarii memor' hominum non exiſtit, fuit antiqua civitas, quodq; infra civitat' præd', a toto tempore præd' fuit cur' de record' tent' in computator', ſcituat' in Parochia S. Michaelis in Woodſtreet præd', coram uno Vicecom' civitat' præd' pro tempore exiſten'; quodq; infra civitat' præd' talis habetur & a toto tempor' ſupradict' habebat' conſuetud', quod in præd' cur' omnes & ſingul' perſonæ, a toto tempore ſupradict' uſæ fuer' levare querel' de placit' debiti, attingent' ad quamcunque ſummam, verſus aliquam perſon' quamcunque, & cauſare eaſdem querel' intrari in libro Janitor' computator' prædict'; ac quod a toto tempore prædict', fuit & eſt Janitor computator' prædict', qui quidem Janitor computator' prædict' pro tempore exiſten', a toto tempore prædict' fuit & eſt officiar' dicti unius Vicecom' civitat' prædict', ad intrand' querel'

in forma præd' levat' in libro Janitor' computator' præd' versus quamcunq; personam, ad sectam cujuscunq; personæ, in pl' debiti attingen ad quamcunq; summam, in quodam brevi & summario modo; ac qd' querel' præd' in libro Janitor' præd' intrat', a toto tempore præd', consueverunt transferri & intrari de recordo in rotul' cur' præd' in debita legis forma, infra tempus rationabile & conveniens, post intrationem earund' in libro janitor' præd'; ac quod infra civitatem præd' talis habetur & per totum tempus præd' habebatur consuetud', quod aliqua persona existen' servien' ad clav' dicti Vicecom', ac minister cur' præd', ad requisitionem partis hujusmodi querel' sic levant, ex offic' usa fuerit, post intrac' hujusmodi querel' in libro Janitor' præd', tam ante intrac' hujusmodi querel' in rotulo cur' præd', quam post hujusmodi intrac' in rotulo cur' præd capere & arrestare per corpus suum aliquam hujusmodi person' versus quam talis querel' levata fuit, ad respondend' hujusmod' personæ quer' in pl' præd', absq; aliquo al' præcepto ore tenus, vel aliter, tali servien' ad clav' ac ministro cur' præd' in ea parte direct', sive dirigend'. Ac jur' præd' ulterius dicunt super sacramentum suum præd', quod præd' die Sabbati decim' septim' die Novembris anno Domini millesimo sexcentesimo decimo, præd' Rob. Radford civis Lond. requisivit præf. Rich. Fells, tunc un' servien' ad clav' dicti Rich. Pyot adtunc unius Vicecom' civitat' præd', quod ipse idem Rich. Fells causaret levari querel' de debito quingent' libr' in computator' præd', ad sectam præd' Rob. Radford versus præd' Joh. Murray armig', & superinde arrestaret præfatum Johan. Murray ad respondend' præf. Rob. Radford in querel' præd', dictusq; Richardus Fells superinde ivit ad dict' computator' in parochia S. Michael' in Woodstreet præd', & ibidem dicto 17 die Novembris, an' octavo & 44. præd', levari causavit querel' de debito quingent' libr' versus præf. Joh. Murray ad sectam præd' Rob. Radford; quæ quidem querel adtunc intrat' fuit in libro Janitor' computator præd', Anglice in the Porter's Book of the Counter aforesaid, prout in talibus casubus usuale existit, ac secund' consuetud' præd', in hæc verba, ff. J. Murray Esq; vers. Rob. Radford Salter debt CCCCC. l. pl' Fleetstreet per Fells servien: Quæ quid' querel' postea intrat' fuit de record' in rot' cur' comput' præd', in hiis verbus, ff. Sabbati 17 die Novembris ann' regni Jacobi Regis Angl', Franc', & Hibern', 8. Scotiæque 44. Johan. Murray armig' S. versus Rob. Radford Salter in placito debiti super demand' 500. l'. pleg' de prosequend'

ſequend' Johan. Fleat & Rich. Streat per Fells ſervien', &c. Sed jurator' præd' ſuper ſacram' ſuum dicunt, quod intrac' præd' in rotulo cur' præd' fact' fuit die Lunæ decimo nono die Novemb. annis octavo & quadrageſimo quarto præd', & non antea, quodque dictus Rich. Fells die Solis dicto decimo octavo die Novembris, cum tribus al' offic' in ejus cœt', Anglice **in his Company**, manebat circa portum vocat' Ludgate infra libertat' civitat' London præd', ad arreſtand' virtute querel' præd' præd' Johan. Murray cum præterieret, & poſtea quando idem Joh. Murray, inter horas quintam & ſextam poſt merid' ejuſdem decimi octavi diei Novembris, ambulabat & tranſibat per & trans Ludgate præd', in communi alta via Regia, cum ſex al' perſon' in ejus cœtu (dictis al' perſon' armat' exiſten') dictus Rich. Fells adtunc exiſten' un' ſervien' ad clav' dicti Rich. Pyot adtunc un' Vicecom' civit' præd' juratus & cognitus, ac miniſter cur' præd', prope Ludgate in dicta communi alta via Regia, in præd' parochia S. Martini Bowyer Rowe, in præd' Ward' de Farringdon infra London præd', ven' ad dictum Joh. Murray, & ipſum Joh. adtunc & ibidem infra brachia ipſius Rich. virtute præmiſſorum cepit & tenuit, & eidem Joh. Murray, prout in Anglican' verbis ſequit', inſtanter dixit, I, ſeipſum Rich. Fells innuendo, **Arreſt you**, dictum Joh. Murray innuendo, **in the King's Name, at the Suit of Maſter Radford**, dictum Rob. Radford in querel' præd' nominat' innuend'; ſed iidem jurator' dicunt, quod præd' Rich. Fells tempore arreſtationis præd' non oſtendebat eidem Joh. Murray aliquod warrant' aut clavam ſuam, Anglice **his Mace**, ſed dic', quod præd' Rich. Fells adtunc geſſit & habuit ad dorſum ipſius Rich. Fells clav' ſua', Anglice **his Mace**; ac quod null' offic' præd' qui vener' in cœt' dicti Rich. Fells aliqua tela, Anglice **Weapons**, adtunc habuer': Et præd' Joh. Murray circumſpiciens circa ſe ac luctans, Anglice **ſtriving**, cum dict' Ric' Fells, adtunc & ibidem dixit hiis perſon' qui in cœt' ipſius Joh. Murray ven', prout in Anglican' verbis ſequit', viz. **Draw, draw, Rogues**, ſuper quo præd' Johan. Mackall al' Mackalley, & Johan. Engles al' Engliſh, adtunc & ibidem exiſten' in cœt', Anglice **the Company**, dict' Johan. Murray, glad' ſuos, Anglice **their Rapiers**, traxer', dictiſq; Ric' Fells & Joh. Murray ſuper terr' proſtrat' exiſten', & eodem Ric' Fells ſuprajacent', Angl' **lying uppermoſt**, dictus Joh. Mackall al' Mackalley, cum glad' ſuo extract', Angl' **his Rapier Drawn**, ad dict' Ric' Fells adtunc & ibidem cucurrit, ad præd' Joh. Murray ab arreſtatione præd' recuſſand', & cum glad' ſuo prædict' R. Fells percuſſit & inforavit, dans eid' R. Fells in & ſup' fini-

ſiniſtram partem corporis, ſubter ſiniſtram ſcapul', Anglice the left Shoulder Blade, ipſius Ric' Fells plagam & vulnus mortale in indictamento præd' mentionat', de quo vulnere idem Ric' Fells adtunc & ibidem, ſcil', in parochia, & Ward' uitim' præd' inſtanter obiit. Et ulterius jurator' præd' dicunt quod tempore interfectionis præd' Ric' Fells modo & forma præd', iidem Johan' Murray, & Johan' Engles, alias Engliſh, fuer' præſent' & auxiliant' eidem Joh' Mackall, alias Mackalley, ad ipſum Ric' Fells modo & forma præd' interficiend'; ſed utrum ſuper tota mater' præd' per jurator' præd' in form' præd compert', interfectio præd' dicti Ric' Fells in forma præd perpetrat' & fact' ſit murdrum necne, jurator' præd' ignorant, & inde petunt adviſament' juſtic' & cur' hic; & ſi ſuper tota mater' præd' videbitur juſtic' & cur' hic, quod præd' interfectio dicti Ric' Fells ſit murdrum, tunc jurator' præd' dicunt ſuper ſacram' ſuum præd', quod præd' Johan' Murray, Johan' Mackalley, & Johan' Engles, ſunt culpabiles, & quilibet eorum eſt culpabil' de murdro præd' Ric' Fells, modo & forma prout per indictament' præd' verſus eos ſupponitur. Et quod ipſi tempore murdri præd' in forma præd' commiſſ. nul' habuer' bon' ſeu cattal' terr' aut tenementa, ad notic' jur' præd'; & ſi ſuper tota mater' præd' in form' præd' compt' videbit' juſtic' & cur' hic, quod præd' interfectio præd' Ric' Fells in forma præd' perpetrat' non ſit murdrum, tunc jur' præd' dicunt ſuper ſacram' ſuum præd', quod præd' Johan' Murray, Johan' Mackall, & Johan' Engles, non ſunt culpabil', nec eorum aliquis eſt culpabil' de murdro præd' Ric' Fells, prout ipſi allegaver' nec ea occaſion' unquam ſe retraxer', aut eorum aliquis ſe retrax'; & ſi ſuper tota mater' prædict' per jurator' prædict' in forma prædict' compert' videbitur juſtic' & cur' hic, quod interfectio prædict' dicti Ric' Fells, in forma præd' fact', ſit felon' & homicid', tunc jurator præd' dicunt ſuper ſacramentum ſuum præd' quod præd' J. Murray, Johan' Mackall, & Johan' Engles, ſunt culpabiles, & quilibet eorum eſt culpabilis, de felon' & homicid' præd', & quod ipſi null' habent bona nec catall' terr' aut tenementa. Et ulterius jurator' præd' dicunt ſuper ſacramentum ſuum præd' quod præd' Archibald' Miller in dicto indictamento nominat' de felon' & murdro prædict' non eſt culpabil', nec ea occaſione unquam ſe retraxit: Ideo conſideratum eſt per curiam, quod prædict' Archibald' Miller eat inde quietus ſine die, &c. Et quia curia hic de judicio ſuo de & ſuper præmiſſis concernentibus prædictum Johannem Murray,

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Johannem Mackall, & Johannem Engles, reddendo, nondum adviſat', ideo dies inde dat' eſt præfat' Johan' Murray, Johanni Mackall, & Johanni Engles uſque proxim' Seſſion' gaolæ deliberationis prædict' pro civitat' prædict' tenend', ſub cuſtod' præfat' Vicec' interim commiſſ. ſalvo cuſtodiend', de judicio ſuo inde audiendo, &c. Et quia Juſtic' prædict' inde nondum, &c.

Paſch. 9 Jacobi *Regis.*

Mackalley's *Caſe, in Killing of a Serjeant of* London.

1 Jones 198. Jenk.Cent.291. Br. Jac. 279. 3 Bulſtr. 206. Poph. 208.

BY the King's Command all the Judges of *England* were ordered to meet together to reſolve what the Law was, upon the ſaid Record; and accordingly all the Judges of *England*, and Barons of the Exchequer met together the Beginning of *Hillary-Term* now laſt paſt, and heard Counſel learned upon this ſpecial Verdict, as well of the Priſoners, as of the King; that is to ſay, Serjeant *Harris* the younger, *Anthony Diot* and *Randall Crewe* of Counſel with the Priſoners; and *Yelverton*, *Walters* and *Coventry* for the King. And the Matter was very well argued by Counſel on both Sides at two ſeveral Days in the ſame Term; and diverſe Exceptions were taken to the Indictment, and to the Verdict alſo. Firſt, againſt the Indictment five Exceptions were moved. 1. Becauſe it appears, That the Arreſt was tortious, and by Conſeq. the Killing of the Serjeant could not be Murder, but Manſlaughter, and they argued that the Arreſt alledged in the Indictment was tortious, becauſe it was made in the Night, that is to ſay, 18 *diem Nov. inter horas quintam & ſextam poſt meridiem*, which appears to the Court to be in the Night, and the Night is a Time of reſt and repoſe, and not to arreſt any by his Body, for thereof would enſue (as *in hoc caſu accidit*) Bloodſhed; for the Officer and Miniſter of Juſtice can't have ſuch Aſſiſtance, nor can the Peace be ſo well kept in the Night, that is to ſay, *in tenebris*, as in the Day, *in aperta luce*: And the Priſoner can't know the Officer or Miniſter of Juſtice in the Night; nor can the Priſoner ſo ſoon find Sureties for his Appearance

Cr. Car. 280. Jenk.Cent.291.

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in the Night, and thereby avoid his Impriſonment, as he may in the Day: And they cited 11 *H.* 7. 5. *a.* that the Lord ſhall not diſtrain for his Rent or Services in the (*a*) Night. But it was anſwer'd by the Counſel with the K. and in the End reſolved by all the Judges and Barons of the Exchequ. that the Arreſt (*b*) in the (*c*) Night is lawful, as well at the Sute of a Subject as at the K.'s Sute; for the Officer or Miniſter of Juſtice ought to arreſt him when he can find him; for otherwiſe perhaps he will never arreſt him, (*quia* (*d*) *qui male agit odit lucem*; and if the Officer does not arreſt him when he finds him, and may arreſt him, the Pl. ſhall have an Action upon his Caſe, and recover all his Loſs in Damages; and it is like the Caſe of diſtreſs for Damage (*e*) Feaſant, for which one may diſtrain in the Night; for otherwiſe perhaps he will never diſtrain them, for they may be taken or eſcape out, and then they can't be diſtrained, but in Caſe of Rent Service it is otherwiſe; for the Law intends that the Ten't will be all the Day attendant upon the Land to pay his Rent, but he is not compellable to attend in the Night. *Vide* 11 *H.* 7. 5. *a.* 10 *E.* 3. 21. *b.* (*f*) 12 *E* 3. *Diſtreſs* 17. and no Inconvenience will enſue upon it; for altho' he can't ſee the Officer, yet when he hears him ſay, I arreſt you in the K.'s Name, &c. he ought to obey him, and if the Officer has not a lawful Warrant, he ſhall have his Action of falſe (*g*) Impriſonment. And as to the finding of Sureties, the Law is, That he ought to remain in Priſon till he finds Sureties, be it in the Day, or in the Night. But great Inconvience will enſue on the other Side, if thoſe who are indebted to others ſhall go at their Pleaſure in the Night without danger of arreſt, for then they will become Nightwalkers, and turn the Day into Night in deſpight of their Creditors, and as the Officer or Miniſter of Juſtice may by Force of a Warrant directed to him, arreſt any at the K.'s Sute either for Felony or other Crime in the Night, ſo may he do at a Subject's Sute; for the K. has no more Prerogative as to Time to make an arreſt, than a Subject; for the Arreſt is to no other Intent than to bring the Party to Juſtice: And it appears by the Opinion of the Court in the K.'s Bench in *Semaigne's Caſe in the* 5 *Part of my Reports*, That the Sheriffs may arreſt in the (*h*) Night, as well at the Sute of a Subject, as at the King's Sute. And in *Heydon's Caſe in the* 4 *Part of my Reports* it is reſolved, That if one kills a (*i*) Watchman in Execution of his Office, it is Murder, and yet that is done in the Night; and if an Affray be made in the Night, and the Conſtable, or any other who comes to (*k*) Aid him to keep the Peace be killed, it is Murder; for when the Conſtable commands them in the King's Name to keep

(*a*) 1 Rol. 672. Fitz. Avowry 137. Br. diſtr. 101. Doct. & Stud. 75. a. Co. Lit. 142. a. 7 Co. 7. a. Milborn's Caſe. (*b*) Cr Jac. 280. Jenk. Cent. 291. Hale's Pl. Cor. 45. (*c*) Owen 63. (*d*) 8 Co. 37. b. (*e*) Co. Lit. 142. a. Doct. & Stud. 75. a 7 Co. 7. a. Milborn's Caſe. 1 Rol. 672. Fitz Avowry 137. Br. diſtr. 101. (*f*) 7 Co. 7. a. Milborn's Caſe.

(*g*) Poſt. 69. b.

(*h*) 5 Co. 92. b. (*i*) Hale's Pl. Cor. 45. Cr. Jac. 280. 4 Co. 40. Yong's Caſe. Poſt. 60. b. 3 Inſt. 52. (*k*) Jenk. Cent. 291. Cr. Jac. 280. Hale's Pl. Cor. 345. 1 Hawk. 57.

the Peace, altho' they can't discern or know him to be a Constable, yet at their Peril they ought to obey him.

It was also resolved, That altho' in Truth between 5 and 6 of the Clock in *Novemb.* is Part of the Night, yet the (a) Court is not bound *ex Officio* to take Conusance of it, no more than in the Case of (b) Burglary, without these Words, *in nocte ejusdem diei*, or *Noctanter*.

(a) 1 Rol. 525.

(b) 1 Rol. 524

2. It was objected, That *Sunday* is not *dies juridicus*, and therefore no arrest can be made thereon, but it is the Sabbath, and therefore thereon every one ought to abstain from secular Affairs for the better Worship and Service of God in Spirit and Truth. As to that it was answered and resolved, That no judicial Act ought to be done on that Day, but ministerial Acts may be lawfully executed on the (c) *Sunday*; for otherwise peradventure they can never be executed; and God permits Things of Necessity to be done that Day; and Christ says in the Gospel, *Bonum est benefacere in Sabbatho*.

(c) Cr. Jac. 280, 281. Jenk. Cent. 291. 5 Co. 85 b. 1 Jones 156, 157. Cawley 78. 8 Co. 127 a. Dy. 268 pl. 17. Hale's Pl. Cr. 45.

3. Another Exception was taken, because it is said in the Beginning of the Indictment, *in Curia dicti Dom' Reg' in computatorio suo, scituat' in parochia Sancti* Michaelis, in *Woodstreet London*, and doth not shew in what Ward the said Parish was, & *non allocatur*, for as it is held in 7 *H.* 6. 36. *b.* every (d) Ward in *London* is as an Hundred in a County, and every Parish in *London* is as a Town in an Hundred, and it is not necessary to declare in what Hundred a Town is, no more in what Ward a Parish is; but the same is commonly added, because there are divers Parishes in *London* of one and the same Name, and the Ward is added to make a Distinction of one Parish from another; wherefore it was resolved, That in the Case at Bar the Indictment was sufficient, notwithstanding the Omission (e) of the Ward, for it doth not appear to us that there is any other Parish of that Name, and this Parish is particularly described, *viz. in Parochia Sancti Michael' in Woodstreet London*: And therewith agrees the Rule of the Book in 7 *H.* 6. 36. *b.* for Bill was awarded good *in Parochia Sancti Laurentii in Judaismo*, omitting the Ward.

(d) Cr. El. 732.

(e) Jenk. Cent. 291.

The 4 Exception was, because it doth not appear in what Parish the Sheriff commanded *Fells* the Serjeant to arrest the Defendant; and that was disallowed by all the Justices; for the Words of the Indictment are, *taliter in eadem Curia processum fuit*, &c. and *eadem Curia* fully demonstrate that the Warrant was made at the same Court mentioned before; and that was expressly alledged to be held *in Parochia Sancti Michaelis* &c.

5. It was excepted againſt the Indictment, *viz.* That the Precept was to arreſt the Defendant, *ſi inventus foret infra libertates Civitatis præd'* and the Indictment is *quod in Parochia S. Martini Bowyer Rowe in warda de Farringdon infra Londinum præd'* the Serjeant arreſted him, and ſo he has not purſued the Precept, for the Precept is, *infra libertates London*, and notwithſtanding that, the Indictment was reſolved to be good, for the ſaid Pariſh and Ward in *London* ſhall be intended to be within the Liberties of *London*, for theſe Words (*a*) Liberties of *London* are more ſpacious than *London*, and include in them the City of *London* it ſelf. (*a*) Jenk. Cent. 291.

And 9 Exceptions were taken to the Verdict. 1. That there is a material Variance betwixt the Indictment and the Verdict, for the Indictment ſuppoſes that *Piot* Sheriff of *London* upon a Plaint entred, made a Precept to the ſaid *Fells* Serjeant at Mace to arreſt the ſaid *Murray* the Defendant; and by the Verdict it appears that there was not any ſuch Precept made, but that by the Cuſtom of *London*, after the Plaint entred, any Serjeant (*b*) *ex officio* at the Requeſt of the Plaintiff may arreſt the Defendant *abſque alio præcepto ore tenus, vel aliter*, ſo that the Indictment being ſpecial, to make this Offence Murder by Conſtruction of Law upon the ſpecial Matter without any Malice prepenſe, ought to be purſued, and proved in Evidence, which is not done in this Caſe, for the Jury have not found the ſaid ſpecial Matter, but the contrary; and becauſe the Jurors have not found the ſpecial Matter contained in the Indictment, but other Matter, Judgment can't be given againſt the Priſoners upon this Indictment. To which it was anſwered, and in the End reſolved, That there was ſufficient Matter in the Verdict purſuant to the Matter contained in the Indictment, upon which the Court ought to give Judgment of Death againſt the Priſoners, notwithſtanding the ſaid Variance, and that for 2 Reaſons. The Exceptions againſt the Verdict. (*b*) 1 Rol. 555.

1. Becauſe the Warrant which the Serjeant had to arreſt the Def. was but (*c*) Circumſtance, which is not neceſſary to be preciſely purſued in Evidence to be found by the Jury; but it is ſufficient if the Subſtance of the Matter be found without any ſuch preciſe regard to Circumſtance: And therefore, if a Man is indicted, that he with a Dagger gave another a mortal Wound, upon which he died, and in (*d*) Evidence it is proved that he gave the Wound with a Sword, Rapier, Staff, or Bill, in that Caſe the Defendant ought to be found guilty, for the Subſtance of the Matter is, That the Party indicted has given him a mortal Wound, whereof he died, and (*c*) Poſt. 112. a. 119. a. 3 Inſt. 50. (*d*) 2 Inſt. 319 3 Inſt. 135. Hale's Pl. Cor 265.

the Circumstance of the Manner of the Weapon is not material in case of Indictment; and yet such Circumstance ought not to be omitted, but some Weapon ought to be mentioned in the Indictment. So if *A. B.* and *C.* are indicted for killing (a) Post. 112. *J. S.* (*a*) and that *A.* struck him, and that the others were present, procuring, abetting, &c. and upon the Evidence it appears that *B.* struck, and that *A.* and *C.* were present, &c. in this Case the Indictment is not pursued in the Circumstance; and yet it is sufficient to maintain the Indictment, for the Evidence agrees with the Effect of the Indictment, and so the Variance from the Circumstance of the Indictment is not material; for it shall be adjudged in Law the Wound (*b*) 4 Co. 42. b. 11 Co. 5. b. 2 Inst. 138. 34 H. 8 Br. Coron. 172. 1 Rol. Rep. 31. of (*b*) every one of them, and is as strongly the Act of the others, as if they all three had held the Weapon, &c. and had altogether struck the Deceased, and therewith agrees *Plow. Com.* 98. *a.* So if one is indicted of the Murder of another upon Malice prepense, and he is found guilty of Manslaughter, he shall have Judgment upon this Verdict, for the Killing is the Substance, and the Malice prepense the Manner of it; and when the Matter is found, Judgment shall be given thereupon, altho' the Manner is not precisely pursued; and therewith agrees, *Plow. Com.* 101. *b.* where it is said, *when the Substance of the Fact, and the Manner of the Fact, are put in Issue together, if the Jury find the Substance and not the Manner, Judgment shall be given for the Substance.* And I moved all the Judges and Barons, if in this Case of (*c*) Jenk. Cent. 291. 3 Inst. 52. Hale's Pl. Cor. 45. Cr. Jac. 280. Postea 68. a. Cr. Car. 183, 332, 338. (*d*) Cr. Jac. 280. 12 Co. 87. (*e*) Jenk. Cent. 291. Hale's Pl. Cor. 46. 3 Inst. 52. Cr. Car. 183. (*f*) Jenk. Cent. 291. 3 Inst. 52. Hale's Pl. Cor. 45. Killing of a Minister of (*c*) Justice in the Execution of his Office, the Indictment might have been (*d*) general, *sc.* that the Prisoners *felonice, voluntarie, & ex malitia sua præcogitata, &c. percusser'* without alledging any special Matter and I conceived that it might well be, for the Evidence would well maintain the Indictment, for as much as in this Case the Law implies Malice prepense. As if a (*e*) Thief, who offers to rob a true Man, kills him in resisting the Thief, it is Murder of Malice prepense: Or if one kills another without (*f*) Provocation, and without any Malice prepense, which can be proved, the Law adjudges it Murder, and implies Malice; for by the Law of God every one ought to be in Love and Charity with all Men, and therefore when he kills one without Provocation, the Law implies Malice: And in both these Cases they may be indicted generally that they killed of Malice prepense, for Malice implied by Law, given in Evidence is sufficient to maintain the general Indictment. So in the Case at Bar, in this Case of the Serjeant, the Indictment might have been (*g*) general, That he feloniously and of his Malice prepense killed the said *Fell*; and the special Matter might well have been given in Evi-

(g) Cr. Jac. 280. 12 Co. 87

dence;

dence; *quod fuit conceſſum* by all the other Judges and Barons of the Exchequer. The 2 Reaſon was, becauſe it is expreſly alledged in the Indictment, That the ſaid *John Mackalley, &c. eundem Rich'um Fells, &c. felonice, voluntarie, & ex malitia ſua præcogitata, &c. percuſſit & inforavit, &c.* ſo that beſide the ſpecial Matter which implies Malice, it is expreſly contained in the Indictm. that he felonioufly and *ex malitia præcogitata* killed the ſaid *Fells*, and then altho' the ſpecial Matter given in Evidence had varied in Subſtance from the ſpecial Matter contained in the Indictm. yet for as much as it was reſolved that the Indictm. in this Caſe might be general, for this Cauſe the Evidence, altho' it doth not agree with the ſpecial Matter, yet it proves, that the Priſoners killed the ſaid *Fells* of their Malice prepenſe: And ſo well maintains the Indictment. And that in the End was the Opinion of *all the Juſtices and Barons of the Exchequer.*

2. Exception was taken to the Verdict, That the Cuſtom found by the Jury, That after a Plaint entred, the Defend. might be arreſted by his Body, was againſt Law, becauſe the Def. ought to be firſt ſummoned before the precept in Nature of a *Capias* can iſſue, for his Body ſhall not be arreſted if he has ſufficient, *&c. & non allocatur*; for it appears by the Book in * 21 *E.* 4. 66. *b.* and by common Experience always daily uſed, that after a *(a)* Plaint entred, by the Cuſtom of *London*, (which is eſtabliſhed and confirmed by Parliam.) the Def. may be arreſted. And in this Caſe three Points were reſolved *by all the Juſtices and Barons of the Exchequer*, 1. That altho' the Proceſs be apparently *(b)* erroneous, that yet if the Miniſter of Juſtice in the Execution thereof be killed, it is Murder, for the Miniſter is not bound to diſpute the Authority of the Court, which awards the Proceſs, but his Office is to execute the Proceſs: And therefore, if a *(c) Capias* in an Action of Debt be awarded againſt a Baron, or other Peer of the Realm, which is erroneous (becauſe their *(d)* Body by Law is privileged in ſuch Caſe) yet if the Officer be killed in Execution thereof, it is Murder. So if a *Capias* be awarded where a Diſtreſs ought to iſſue, and in Execution thereof the Officer is killed, it is Murder, for as the Sheriff, *&c.* when he is charged with an Eſcape ſhall not take Advantage of any Error in the Proceeding, ſo the Defendant when he kills the Sheriff, *&c.* ſhall not take Advantage of Error in the Proceſs. 2. It was reſolved, That if any Magiſtrate or Miniſter of Juſtice, in Execution of his Office, or in keeping of the Peace according to the Duty of his Office be killed, it is Murder, for their Contempt and Diſobedience to the King, and to the Law, for it is *contra poteſtatem Regis & legis*, and therefore, if a Sheriff, Juſtice of Peace, chief Conſtable, Petit

* Poſtea 68. b.
(a) 1 Rol. 555. Cro. Jac. 473. 8 Co. 126. a. Jen7. Cent. 291.
(b) Cr. Jac. 280. C. Car. 371. Jenk. Cent. 291.
(c) 6 Co. 54. a. 10 Co. 76. b. Latch. 223. 2 Rol. Rep 493. 494. Hal. Pl. Cro. 46. Jenk. Cent. 291. Cr. Jac. 280. Cr. Jac 3. Moor 767. 2 Bulſtr. 65.
(d) 6 Co. 52. b. 9 Co. 49. a. 60. a. Cr. Agum. 106. Stile 222. 2 Leon. 174. Hob. 61.
(e) 8 Co. 142 a. Poſtea 119. a. Cr. Jac. 3. Moor 275, 276. 2 Bulſtr. 64, 65. Godb. 403. Savil 63. Cr. El. 164, 165. 2 Leon 85. Jenk Cent. 291. Hal. 1 Co. 45. 3 Inſt. 52. Cr. Jac. 280. Cr. Car. 183, 374, 538. 1 Jones 346. Aur. 67. b.

Constable, Watchman, or any other Minister of the King, or any who comes in their Aid be killed in doing of their Office, it is Murder for the Cause aforesaid: For when the Officer or K.'s Minister by Process of Law (be it erroneous or not) arrests one in the K.'s Name, or requires the Breakers of the Peace to keep the Peace in the K.'s Name, and they notwithstanding disobey the Arrest or Command in the K.'s Name, and kill the Officer, or the King's Minister, reason requires that this killing and slaying shall be an Offence in the highest Degree of any Offence of this Nature; and that is voluntary, felonious, and Murder of Malice prepense. And a Watchman by the Law may arrest a Nightwalker, 4 *H.* 7. 2. *a.* and if a (*a*) Watchman arrests such a one, and he kills him, it is Murder. *Vide Heydon's Case in the* 4 *Part of my Reports f.* 40 *&* 41. *a.* And it is true, That the Life of a Man is much favoured in Law, but the Life of the Law it self (which protects all in Peace and Safety) ought to be more favoured, and the Execution of the Process of Law and of the Offices of Conservators of the Peace, is the Soul and Life of the Law, and the Means by which Justice is administred, and the Peace of the Realm kept. *Vide* 2 *R.* 3. 21. *b.* If the (*b*) Principal be erroneously attainted, the Accessory shall be put to answer, and shall not take Benefit for the Saving of his Life of the erroneous Proceeding against the Principal. 3. It was resolved, That the Officer or Minister of the Law in the Execution of his Office, if he be resisted or assaulted, is not bound to (*c*) fly to the Wall, *&c.* (as other Subjects are) for *Legis minister non tenetur in executione officii fugere, seu retrocedere.*

(*a*) Ant [illegible] a. 4 Co. [illegible] a. Young's Case. 3 Inst. [illegible] Cro. [illegible] Hale Pl. Cor. [illegible]

(*b*) Post. 119. a. b.

(*c*) Jenk. Cent. 29[illegible]. Hal. Pl. Cor. 41. 3 Inst. 56.

2. It was objected, That the Def. ought not to have been arrested before the Plaint was entred of Record in the Court before the Sheriff, for this is in Truth the Court of Record where the Declaration and Pleading shall be. To that it was answered and resolved *by all*, That after the (*d*) Plaint entred in the Porter's Book, and before the Entry thereof in the Court before the Sheriff, the Def. may be arrested by the Custom of *London*; and therewith agrees the Book in (*f*) 21 *E.* 4. 66. *b.* in the Point. *Vide* 9 *E.* 4. 48. *b.*

(*d*) Jenk. Cent. 291. 1 Rol. [illegible]5. Cro. Jac. [illegible].

(*e*) 8 Co. 12[illegible] a.

(*f*) A[illegible] a.

4. It was objected, That the said Arrest found by the Verdict was not lawful, for the Serjeant in this Case ought to have, when he arrested him, (*g*) shewed at whose Suit, out of what Court, for what Cause he made the Arrest, and in what Court it is returnable, to the Intent, that if it be for any Execution, he might pay the Money, and free his Body, and if it be upon mean Process either to agree with the Party to put in Bail according to the Law, and to know when he shall appear, as it is resolved in the Countess of *Rutland's*

(*g*) Hal. Pl. Cor. [illegible] Cro. Jac. 485, [illegible] 2 Rol. [illegible] 6 Co. [illegible]. Jenk. Cent. 291.

Case, in the 6 *Part of my Reports f.* 55. But in the Case at Bar the Serjeant said nothing, but *I arrest you in the King's Name, at the Suit of Mr. Radford*, and so the arrest not lawful, and by Consequence the Offence is not Murder. As to that it was answered and resolved, That it is true that it is held in the Countess of *Rutland's Case*, That the Sheriff, &c. or Serjeant ought upon the Arrest to shew at whose Suit, &c. But that is to be intended when the Party arrested submits himself to the Arrest, and not when the Party (as in this Case *Murray* did) makes Resistance and interrupts him, and before he could speak all his Words, he was by them mortally wounded and murdered, in which Case, the Prisoners shall not take Advantage of their own Wrong. It was also resolved, That if one knows that the Sheriff, &c. has Process to arrest him, and the Sheriff, &c. coming to arrest him, the Def. to prevent the Sheriff's arresting him, kills him with a Gun, or any other Engine, or Weapon, before any Arrest made, it is Murder: *a fortiori*, in the Case at Bar, when he knew by the said Words, that the Serjeant came to arrest him.

6 Co. 54. a. Cr. Jac. 485, 486.

5. Exception was taken, because it was not found by the Verdict, That the said *Mackalley felonice percussit*, &c. but *percussit* only, & *quod iidem Johan' Murray*, & *Johan' English fuerunt præsentes, auxiliantes*, &c. and doth not say *felonice*; & *non allocatur*, for the Office of the Jury is to shew the Truth of the Fact, and to leave the Judgment of the Law to the Court; but they have well concluded, And if *super tota materia præd' videbitur Justic' & Cur' hic quod præd' interfectio' dict' Rich' Fells sit murdrum, tunc Jurat' præd' dic' super Sacramentum suum quod præd' Johan' Murray, Johan' Mackalley, & Johan' English sunt culpabiles, & quilibet eorum est culpabilis de murdro præd' Ric' Fells, modo & forma prout per Indictamentum præd' supponit'*, &c. And because the Judges and the Court have resolved upon the special Matter, that it is Murder, the Jury have found him guilty of the Murder contained in the Indictment.

Jenk. Cent. 291.

6. It was objected, That the Serjeant at the Time, nor before the Arrest, shewed the Prisoner his Mace; for thereby he is known to be the Minister of the Law, and from thence he has his Name, *sc. serviens ad clavam*; *Et non allocatur* for two Causes. 1. Because the Jury have found, That he was *serviens ad clavam dicti Vicecomitis*, & *juratus*, & *cognitus*, & *minister Cur'*; And a Bailiff sworn and known need not (altho' the Party demands it) shew his

Jenk. Cent. 291. Hale's Pl. Cor. 46.

his Warrant, nor any other ſpecial Bailiff is not bound to ſhew his Warrant without demand of it, 8 *E.* 4. 14. *a.* 14 *H.* 7. 9. *b.* 21 *H.* 7. 23. *a.* and where the Books ſpeak of a known Bailiff, it is not requiſite that he be known to the Party who is to be arreſted, but if he be commonly known it is ſufficient; 2. If Notice was requiſite, he gave ſufficient Notice when he ſaid, *I* (*a*) *arreſt you in the King's Name*, &c. and the Party at his Peril ought to obey him; and if he has no lawful Warrant, he may have his Action of (*b*) falſe Impriſonment. So that in this Caſe without Queſtion the Serjeant need not ſhew his Mace; and if they ſhould be obliged to ſhew their Mace, it would be a Warning for the Party to be arreſted to flie.

(*a*) Jenk. Cent. 291.

(*b*) Antea 66. a.

7. Another Exception was taken to the Verdict, becauſe the Cuſtom which gave the Serjeant Warrant to arreſt, was not purſued; for the Cuſtom is *Quod aliqua perſona exiſtens Serviens ad clavam ad requiſitionem partis hujuſmodi querelam ſic levantis, &c. uſa fuit arreſtare*, which ought to be taken that the Plaint ought to be entred before the Requeſt; but afterwards it is found that the Requeſt was before the Plaint, and ſo the Cuſtom not purſued; *& non allocatur.* For by the Cuſtom it is not proved, but that the Requeſt may be as well before as after the Plaint entred, and ſo is the common Uſage and Experience.

8. It was objected, That the Verdict was repugnant in it ſelf, for firſt they find, that the Plaint was entred *de Recordo in Rot' Cur' computator' in his verbis, Die Sabbathi* 17 *die Novemb.* and afterwards they find, *quod intratio præd' in Rot' Cur' præd' facta fuit die Lunæ* 19 *die Nov. &c.* And the (*c*) Jury can't find any thing againſt the Record it ſelf. *Vide* 11 *H.* 6. 42. *a.* 9 *H.* 6. 37. 28 *Aſſ.* 34. 47 *E.* 3. 19. 11 *H.* 4. 26. 9 *H.* 7. 3. 13 *H.* 7. 14. 33 *E.* 3. *Judgment* 255. *Dyer* 32 *Eliz.* 147. *&c.* And all this was affirmed for good Law. But that makes the Caſe ſtronger againſt the Priſoners, for now the Judges ought to judge upon a Plaint entred of Record in *Cur' Computator'*, the *Saturday* the 17 of *Novemb.* which was before the Arreſt.

(*c*) 2 Co. 4. b. 5 Co. 32. b. Dyer 32. pl. 7. 2 Rol. 691.

Jenk. Cent. 291. 2 Rol. 555.

9. Exception was taken to the Verdict, that the Entry of the Plaint was without Form, and ſo ſhort and obſcure, *quod opus eſt interprete; & non allocatur.* For it was found that it was according to the Cuſtom of *London*; and is but a Remembrance to draw the Declaration at length afterwards in the Court of Pleas, which notwithſtanding is by Cuſtom ſufficient to have the Def. arreſted. And afterwards at the Seſſions of *Newgate* held the 5 Day of *May* after this Term, the 2 Chief Juſt. openly declared the Reſolution of all the

the Juſtices and Barons of the Exchequer, to the great Satisfaction and Contentment of all there preſent. And accordingly Judgment of Death was given againſt the ſaid three Priſoners by the Recorder of *London*, in the Preſence of the ſaid two Chief Juſtices. And the ſaid *Mackalley* was executed with other Priſoners at *Tyburn*.

Trin.

Trin. 9 Jacobi.

In Camera Stellat'.

Richard Peacock's *Caſe.*

NOTA, This Term in the Star-chamber in the Caſe between Sir *George Reynel* Plaintiff, and *Richard Peacock* and others Defendants, where *J. H.* and another were Commiſſioners to examine *Peacock* upon Interrogatories drawn by the Plaintiff, and *Peacock* being examined, would have declared the whole Truth, which *J. H.* being a Commiſſioner choſen by the Plaintiff, would not ſuffer him to do, but held him ſtrictly to the Interrogatories, ſo that the Truth could not appear. And that was held by the *Lord Chancellor, the two Chief Juſtices, Chief Baron, and the whole Court of Star-chamber*, a great Miſdemeanor, for it is a murthering of the Truth and Right, as the Statute of *Exeter* ſpeaks, *& per quod Juſtitia & veritas ſuffocantur* as it is ſaid *in capite itineris*. And Commiſſioners to examine ought to be *(a)* indifferent, and by all Means to expreſs the Truth, and they are not *(b)* ſtrictly tied to the Words of the Interrogatories, but to every Thing alſo which neceſſarily ariſeth thereupon for the Manifeſtation of the whole Truth concerning the Matter in Queſtion. Alſo the ſaid *J. H.* when he was in Examination went out of the Place to the Plaintiff, who was in another Room near to him, and had ſecret Conference with him. And it was held *per totam Curiam*, That a Commiſſioner ought not before Publication of the Witneſſes *(c)* to diſcover to any of the Parties the Matter which any Witneſs has depoſed, nor after he beginneth to examin upon the Interrogatories, to confer with the Party to take new Inſtructions to examine further than he knew before, and if he ſhall ſo do, theſe are great Miſdemeanors, puniſhable by

(a) 4 Inſt. 278.
(b) 4 Inſt 278.
(c) 4 Inſt. 278.

by (*a*) Fine and Impriſonment. For if theſe ſhall be permitted, Perjury would in theſe Days abound; and for as much as in the Star-chamber and Exchequer-chamber the Courts proceed upon Examination of Witneſſes, if the Truth ſhould be by ſuch Means ſuppreſſed, and Falſity certified in the Examinations, ſo the Innocent would be oftentimes puniſhed, or the Guilty eſcape Puniſhment, and Juſtice and Right would be utterly ſubverted; for as it is commonly ſaid, The Suppreſſion of Truth, is the Oppreſſion of the Innocent. And the Lord Chancellor ſaid, That he heard in the Common Pleas, in the Time of Sir *James Dyer*, then Chief Juſtice of the Common Pleas, That it was reſolved by the Court, that it was not a principal (*b*) Challenge to ſay, That one returned of a Jury was choſen (*b*) Commiſſioner by the other Party for Examination of Witneſſes in the Court of Chancery; for every Commiſſioner is made and conſtituted by the (*c*) King, who is the Head of Juſtice, by his Commiſſion under the Great Seal, and therefore he being Commiſſioner upon Record, is preſumed in Law to be indifferent: But otherwiſe it is of an (*d*) Arbitrator, for he is created only by the Submiſſion of the Parties themſelves in the Country; and therefore it is a principal Challenge to ſay, That ſuch a one returned of the Jury was an Arbitrator for the other Party; and therewith agree 7 *H.* 7. 10. *b.* 9 *E.* 4. 46. 15 *E* 4. 24. 3 *H.* 6. 24. *b.* And the Court had ſo great Diſlike of the Proceedings of the ſaid *J. H.* that the Attorney General was ordered to prefer an Information againſt him for the ſaid Miſdemeanors, and in the mean Time he was put out of the Commiſſion of Peace.

(*a*) Cr. Jac. 65.

(*b*) Co. Lit. 157 b. 2 Rol. 656.

(*c*) Cr. Jac. 65. Yelv. 62.

(*d*) Co. Lit. 156. a. 157. b. 2 Rol 655. 656. Br. Challenge 7, 88, 156. 3 H. 6. 24 b. 9 E. 4 47. a. Fitz. Challenge 16, 57.

Trin.

Trin. 9 Jac. *Regis.*

Doctor Huſſey's *Caſe.*

Co. Ent. 568. nu. 7. 2 Brownl. 59, 91. 3 Bulſt. 275. Cr. Car. 594. Hob. 93. 1 Rol. Rep. 445. Cr. Jac. 413.

IN a Raviſhment of Ward brought by *Francis Moor* Eſq; according to the Stat. of *W.* 2. *cap.* 35. againſt *James Huſſey* Eſq; and *Katharine* his Wife, *Robert Wakeman* Clark, *John Woodford*, and *Cutbert Clifford* of the Raviſhment of *James Horniold*, Son and Heir of *Ralph Horniold* Eſq; being within Age, The Defendants pleaded Not guilty, which Iſſue was tried at the Bar, *Mich.* 8 *Jac.* And the Plea began *Trinit.* 7 *Jac. Rot.* 759. and was tried *in abſentia Walmſley propter ægritudinem* and of *Coke* Chief Juſtice, then being in the Star-chamber. And the Jury found that the ſaid *Katharina, Robertus & Johannes Woodford fuer' culpabiles de raptu & abductione præd' Johannis Horniold, prout præd' Franciſcus ſuperius verſ. eos queritur, & aſſident damna, &c.* 10 *l. & cuſtag'* 10 *s. Et ulterius Juratores præd' dicunt ſuper ſacramentum ſuum, quod præd' Johannes Horniold maritatus exiſtit, quodq; idem Johannes tempore Maritagii illius fuit ætatis ſexdecim annorum & amplius, & infra ætatem viginti & unius annorum quodq; Maritagium præd' Johannis Horniold valet juxta verum valorem ejuſdem* 800 *l.* and that the ſaid *James* (the Husband of the ſaid *Katharine*) and *Cutbert* were Not guilty. And in Arreſt of Judgment divers Points were moved and argued by the Serjeants at Bar in the Terms of St. *Mich. Hill.* and *Paſch.* And the principal Point which was argued by the Serjeants was, if a Feme Covert was within the Statute of *W.* 2. *cap.* 35. or not. And now this Term it was argued by the Juſtices; And it was argued by

by *Foster* and *Warburton*, that Judgment ought to be given as well against the Feme (*a*) Covert, as against the others who were found guilty, and their principal Reason was, because at the (*b*) Com. Law a Feme Covert was punishable for Ravishment of a Ward and shall be fined and imprison'd for it, and Damages shall be recovered against her, and levied upon her Husband, and after his Death upon the Wife her self; and the Stat. of *W.* 2. *c.* (*c*) 35. adds but a greater Penalty to the Value of the Marriage, Damages and Costs, and Imprisonment for 2 Years, and if the Defs. are not sufficient, *abjurent regnum vel habeant perpetuam prisonam*: So that it never was the Meaning of the Makers of the Act to exclude a Feme Covert out of the Purview thereof, who was punishable by Action of Tresp. at the (*d*) Com. Law, for which Offence also her Body at the Com. Law shall be imprisoned: And therefore they strongly held, that a Feme Covert was within the Stat. of * *Merton c.* 6. and within the Stat. of *W.* 1. *c.* 20. *de malefact.* *e*) *in parcis*. For a Feme Covert for these Offences was punishable by the Com. Law, and these Stat. add greater Punishment, and in another Manner than it was at the Com. Law. And they said, That a Feme Covert was within the Words of the Act; and it would be a great Mischief if any Construction should exempt her out of the Penalty of this Stat. (in such odious Cases as Ravishm. of Wards are.) And an Action upon the Stat. of forcible Entry upon the Stat. of (*f*) 8 *H.* 6. lies against a Feme Covert, as the Book is in 36 *H.* 6. 22, 23. So Waste lies against the Husband and Wife as it is held in 3 *E.* 3. 76. So if a Feme Covert commits, (*g*) Rediseisin, she shall be punished in a *Rediseisin*, 9 *H.* 4, 5. *b. F.N.B.* 188. So *Cessavit* lies against Husband and Wife, 4 *E.* 2. *Cui in vita* 22. And many other Cases were put upon this Ground, wherefore they concluded that Judgm. should be given against all for the Value, Damages, and Costs, and that the Defs. *Capiantur*. And it was argued by the Chief Just. and *Walmesly* to the contray, that the Pls. shall have (*h*) Judgment upon this Record against none of the Defs. And their Argument was divided into 4 Parts. 1. What Alteration the Stat. of *W.* 2. *cap.* 35. has made. 2. If a Feme Covert be within the said Stat. 3. If the Verdict be sufficient or not against any of the Defs. 4. If Damages besides the Value are to be recovered in an Action of *Ravishment* grounded upon this Stat. As to the first, it was resolved by all, that at the Com. Law for Ravishm. of Ward, the Guardian might have had an Action of *Tresp.* in which the Pl. should recover Damages, and the Defs. should pay a Fine to the K. and should be imprisoned, until, &c. and that such Action lay against a (*i*) Feme Covert, as well as against a Feme Sole; And therefore where some Books say, that no Writ of *Ravishm. of Ward* lay at the Com. Law, it is true, if it be meant of such *Ravishment of Ward*, which is in *Regist.* and in *F.N.B.* for it is grounded and

(*a*) Cr. Jac. 413. 2 Brownl. 60, 91, 93.
(*b*) 1 Rol. Rep. 445. 2 Bulst. 322. 3 Bulstr. 87. Hob. 93, 101.
(*c*) 2 Inst. 437, 438.
(*d*) Hob. 93.
* 2 Inst. 90, 91.
(*e*) Hob. 95. 2 Inst. 198, 199.
(*f*) Hob. 95. 8 H. 6. c. 9.
(*g*) Hob. 96. Co. Lit. 154. b. Moor 373. Fitz. Rediseisin 1. Br. Rediseisins 1.
(*h*) Hob. 101.
(*i*) Hob. 93.

and formed by the Stat. of *W.* 2. *c.* 35. but that in such Case the Guardian might have an Action of (*a*) *Trespass* is manifest in our Books, 29 *Ass. p.* 35. 29 *E.* 3. 24. *a. b.* 3 *E.* 3. 3. 8 *E.* 3. 52. *a. b.* 22 *R.* 2. *Damages* 130. 12 *H.* 7. *Kelw.* 20. *b.* 21. *a. F. N. B.* 90. *H.* 140. Then came the Stat. of *Merton c.* 6. by which it is enacted, (and greater Punishm. than the Com. Law inflicted) *de hæredibus, &c. contra pacem vi abductis vel detentis seu maritatis, ita provis' est qd' quicunq; laicus inde convict' fuerit qd' puerum aliquem sic detinuerit, abduxerit seu maritaverit, reddat perdenti valorem Maritagii, & pro delicto corpus ejus capiatur ut imprisonetur, &c. Et hoc de hærede infra quatuor annos existente.* And by the Stat. of *W.* 2. *c.* 35. it is provided, *de pueris masculis seu femellis, quorum maritagium ad aliquem pertineat, raptis & abductis, si ille qui rapuit non habens Jus in maritagio, licet post modum restituat puerum non maritatum, vel de maritagio satisfecerit, puniatur tamen pro transgressione per prisonam duorum annorum, & si non restituerit, vel Hæredem post annos nubiles maritaverit, & de maritagio satisfacere non potuerit, abjuret regnum vel habeat perpetuam prisonam.* And this Stat. of *W.* 2. *c.* 35. has made 7 (*b*) Alterations. 1. The said Stat. of *Merton* did not extend to Heirs Females, for before the Age of (*c*) 14 Years the Male could not assent to Marriage, but the Heir Female at 12 3 and therefore it was taken that the Stat. of *Merton* did not (*d*) extend to an Heir Female: And therewith agrees the Book in 35 *H.* 6. 55. *a. b.* and the Act of *W.* 2. by expres Words extends to both; for the Words are, *de pueris masculis seu femellis.* 2. The Stat. of *Mert.* doth not extend to any of the Clergy; for the Words are, *quicunq; laicus inde convictus fuerit, &c.* but the Stat. of *W.* 2. extends to all, (*e*) for the Words are, *si ille qui rapuerit jus non habens, without any Restraint.* 3. The Stat. of *Mert.* doth not extend as appears before, but when the Heir was ravish'd within 14 Years, within which Time the Heir Male can't consent to Marriage: But now the Stat. of *W.* 2. extends to a Ravishment *post annos nubiles.* 4. The Words of the Stat. of *Mert.* are, *vi abductis vel detentis*, the Words of the Stat. of *W.* 2. are *raptis seu detentis.* 5. The Action given by the Stat. of *Mert.* is the ancient Writ of *Right of Ward*, as it is held in 18 *E.* 3. 52. *a. b.* But the Stat. of *W.* 2. *dat actionem formatam in verbis* (*f*) *conceptis*, a new Action, the Form of which was not at the Com. Law, the Form of which appears specially by the Act. 6. In Process, for in a Writ of *Right* upon the Stat. of *Merton*, he shall have but the ancient Process at the Com. Law: But the Stat. of *W.* 2. gives a more speedy Process, and that the Death of the Pl. or Def. (*g*) shall not abate the Writ. 7. The Stat. of *W.* 2. gives greater Punish-

(*a*) Co. Lit. 137. a. Br. Trespass 252. 3 E. 3. 2. b. 2 Inst. 50. Hob. 94.

(*b*) 2 Inst. 90.

(*c*) 2 Inst. 90. Co. Lit. 78. b.

(*d*) 2 Inst. 439. Hob. 94, 95.

(*e*) 2 Inst. 439.

*Post. 73. b 74. b.

(*f*) Co. Lit. 136. b.

(*g*) 2 Brownl. 91, 94.

Punishment than the Statute of *Merton* doth, as appeareth by the Purview of both Acts. And these are the most material Alterations that the Statute of *W.* 2. has made.

As to the 2 Point; If a Feme-Covert be within the Purview of the Statute of *W.* 2. (*a*) The Parts thereof were considered, which as to this purpose stand upon four Parts. 1. *Si restituat puerum non maritatum, puniatur tamen pro transgressione per prisonam duorum annorum.* 2. If he marries the Infant, & *de maritagio satisfecerit, puniatur tamen, per prisonam ut supra.* 3. *Si non restituerit, & satisfacere non potuerit, abjuret regnum, vel habeat prisonam imperpetuum.* 4. *Si Hæredem post annos nubiles maritaverit & de maritagio satisfacere non potuerit abjuret regnum, &c. ut supra.* And this Case is within the last Clause, *sc.* That the (*b*) Feme-Covert has married the Infant, and is not able to (*c*) satisfy, for a Feme-Covert has nothing during the Coverture wherewith she can satisfy, but is disabled by the Law to satisfy; and forasmuch as the Law has disabled a Feme-Covert to satisfy, the Law will not for this Disability inflict so great a Punishment as perpetual Banishment, or perpetual Imprisonment, *id est, perdere sive patriam, sive libertatem: Et* (*d*) *lex non cogit ad impossibilia, sed* (*e*) *impotentia excusat legem.* 22 *E.* 3. *Coron.* 279. If an Appeal be brought against a (*f*) Feme-Covert, or a Monk, and they are acquitted, the Feme-Covert or Monk shall never have a Writ to enquire of the Abettors; for by general Words the Law will never enable any for his Benefit, whom he Law has disabled, *a fortiori* the general Law will never punish any so severely for not doing of that which the Law it self has disabled him to do. So upon the Statute of *Marlebridge*, *Non liceat hujusmodi feoffatos expellere*, If the Lord's (*g*) Villain be infeoffed, the Lord shall expell him, for the general Law will not do wrong, *sc.* to enable the Villain against the Lord. And divers other Cases were put to the same Effect; as the Case of Ecclesiastical Persons, in the 4 *Part of my Reports*, *f.* 15. and others. And (*h*) 7 *E.* 3. 11. *a. b.* was cited by the Ch. Justice, *sc.* That *W.* brought a Writ of *Ravishment of Ward* against the Master of the Hospital of *Burton S. Lazer*, and *Robert de Lee*, & *Richard de la Fosse*, Confreres of the same Hospital, and there *Trew* Serjeant for the Defendants said, Sir, This Writ is given by Statute, and of certain Form, and it ought to be when the Parties against whom the Writ is brought are such, who by the Law may have Right to have the Ward; but when the Writ it self supposes any named in the Writ to be such, That they can't have Right in the Ward, &c. wherefore this Writ can't be

(*a*) Westm. 2. cap. 35. 2 Brownl. 60, 91, 93. Ci. Jac. 413. 1 Rol. Rep. 445. 2 Bulstr. 322. Hob. 93. 101. 3 Bulstr. 87. 2 Inst. 437, 438, 439.

(*b*) Hob. 93, 101. Ci. Jac. 413.

(*c*) Ci. Jac. 449.

(*d*) Hob. 96. Co. Lit. 92. a. 221. b. Hardr. 387.

(*e*) Hardr. 387. 1 Co. 98. a. 4 Co. 11. a. 5 Co. 22. a. 6 Co. 21. b. 68. a. 10 Co. 139. b. Co. Lit 29. a.

(*f*) Hob. 98. 2 Inst. 385

(*g*) 11 Co. 77 b. 52 H 3. c. 6. 2 Inst. 111.

(*h*) Hob. 97

maintained. To which Sir *William Herle* Chief Juſtice anſwered, If the Freres in Aid of the Guardian took the Infant in ſaving the Right of the Hoſpital, the Freres have *quodam modo* Right, becauſe they are of the Hoſpital; wherefore anſwer, out of which Caſe two Things were obſerved: 1. That every Man ſhall be intended ſufficient to ſatisfy the Pl. if the Pl. does not pray that the Jury may enquire of his ſufficiency; and therewith agree (*a*) 8 *E.* 3. 52. *a. b.* 22 *R.* 2. (*b*) *Damages* 130. But when it appears by the Writ it ſelf, that any Def. is not able (having Diſability by Law) to ſatisfy, there the Difference appears, becauſe in the one Caſe it is apparent to the Court, and in the other not; and therefore this Caſe is ſpecial, and differs from the Reaſon of all the Caſes which have been put: For Example, from the Caſe *de Malefactoribus in parcis*; for there the Purview is general; but the ſaid Act is not ſo preciſely penned as the Stat. of *W.* 2. is: For in Effect this Act has provided, that none ſhall be puniſhed by this Act, but who by Poſſibility may ſatisfy at the Time of the Judgment, (for the Words are, *& de maritagio ſatisfacere non potuerit*, and not to puniſh him by the Law for the Diſability which the Law it ſelf has made. And in (*c*) 8 *E.* 3. 52. *a. b.* 22 *R.* 2. *Damages* 130, *&c.* The Pl. prayed that the Jury might enquire of the Defendant's ſufficiency, which would be to no purpoſe in this Caſe; becauſe it appears to the Court, That a Feme-covert at the Time of the Judgm. is diſabled by the Law: And therefore ſuch Rule is to be given in this Caſe as Sir *Wm. Herle* gave in the like Caſe in 7 *E.* 3. 41. in a Writ of (*d*) *Meſne* brought againſt the Husband and Wife, they made default at the grand *Diſtreſs*, upon which the Pl. ſued Proclamation, and now at this Day the Proclamation was teſtified, and the Husband and Wife were demanded, and appeared not; for which the Pl. prayed they might be forejudged: *Herle*; There is no Reaſon that the Wife ſhould be forejudged of her Seigniory for the Default of her Huſband, and eſpecially by your Sute which you have brought, which is given by Statute, where you might have your Suit at the Common Law: And ſo in this Caſe the Plaintiff might have his Remedy at the Common Law, either by Action of *Treſpaſs* againſt all who raviſhed, or a Writ *de valore Maritagii* againſt the Heir himſelf, and not upon this Statute, for the Goods or Lands of the Husband who is innocent, are not to be liable by this Act, for the Act has expreſly provided, That for the Inſufficiency of the Defendant he ſhall be exiled, *&c.* And therefore the Statute doth not charge the Husband in this Caſe, for the Statute is penal and perſonal to the Defen-

(*a*) Hob. 98, 99 Ant. 72. b 74. b.
(*b*) 2 Brownl. 92, 93. Hob. 94, 98.
(*c*) Hob. 98, 99, Ant. 72. b 74. b.
(*d*) Co. Lit. 100. a.

efendant himself. And so for the Ravishment made by a
onk, his Soveraign shall not answer by Force of this Act.
s to the Objection which was made, That he may have
dgment at the Common Law, *sc.* of Damages and Impri-
nment, and then the Husband shall be charged with the
amages; that was utterly denied for two Reasons; the one
at this Action is grounded upon the Statute of *W.* 2. *c.* 35.
d such Writ in this Case is brought, and is there formed;
d therefore he ought to have Judgment according to his
iginal, which is the Foundation of his Sute; and not to
ound his Writ upon the Statute, and to have Judgment at
e Common Law, *nec e converso*, (*a*) 30 *E.* 3. 11. *b.* The
ing brought a *Prohibition* against the Prior of *Woburne*,
hat where the King had recovered in a *Quare Impedit*,
e Defendant sent his Frere to *Rome* with an Appeal, and
d there to avoid the Judgment, according to the Stat. of
æmunire, and upon Not guilty pleaded, all this was
nd against the Def. and there for the King Judgment
s prayed upon the Stat. newly made, *sc.* 27 *E.* 3. *c.* 1. in
e of *Præmunire*, and it was adjudged he should not have
because the (*b*) Judgment ought to be conformable to
e Original; and this Sute was not brought according to
e Stat. but by a Writ of *Prohibition* at the Com. Law.
d in 47 *E.* 3. 10. *b.* in a (*c*) general Action of *Trespass*
ainst Malefactors in Parks, the Defendants were found
ilty, and the Pl. prayed Judgment of double Damages,
ree Years Imprisonment, and to find Sureties never more
offend; and if they did not find Sureties, that they might
ure the Realm. And altho' the Stat. gave no formed A-
on, yet forasmuch as the Action was brought generally at
e Com. Law, he could not have Judgment upon the Stat.
d therewith agree 10 *H.* 6. 2. *a.* and many other Books.

As to the 3 Point, It was held by the Chief Justice, and
imesley, that the (*d*) Verdict was insufficient; for this A-
on being founded upon the said Stat. and the Stat. extends
y when the Ravisher marries the Infant, for the Words
(*heredem post annos nubiles maritaverit*) so that inas-
ch as the Stat. is so penal, it shall not be extended but
y when the Ravisher marries him. And if after the Ra-
hment, the Infant of his own Head *post annos nubiles*
rries himself, without the Procurement or Assent of the
visher, or if a Stranger afterwards marries him, in
se Cases the first Ravisher (*e*) shall not be pu-
hed by this Statute. And in this Case the Jury
ve found generally *quod prædict'* Johannes Horniold
ritatus existit, quodque idem Johannes *tempore ma-
agii illius fuit ætatis sexdecim annorum & ampli-
& infra ætatem viginti & unius annorum*, which

(*a*) 11 Co. 34 b.

(*b*) Doctrin. pl. 333.

(*c*) Bl. Trespass 38. Br. Action sur le Statute 10. Fitz. Action sur le Stat. 13.

(*d*) 3 Co. 9. a. Cro. Jac. 413. Hob. 93. 2 Bl. Com. 52, 92.

(*e*) Hob 99

Verdict is not only uncertain who procured him to be married, *ſc.* the Raviſher or any Stranger, or the Plaintiff himſelf, or if the Ward of his own Head married himſelf, but is alſo uncertain in the Time when he was married, *ſc.* before the Raviſhment or after, and therefore in the Book of Entries 368. *p.* 11 & 12. 369. *p.* 17. A. *rapuit, & idem A. matrimonium, &c. contra voluntatem* of the Plaintiff. *Vide* 29 *H.* 6. *Gard* 118. 8 *E.* 3. 52. *a. b.* 33 *E.* 3. *Judgment* 251. *&c. acc.* And therefore it is well ſaid in 30 *E.* 3. 29. *b.* a Verdict ought to be ſuch, that the Judges ought clearly to go to Judgment, and therefore Verdicts ambiguous and doubtful are inſufficient and void, as in 40 *E.* 3. 15. *a.* in Debt (*a*) againſt Executors they plead fully adminiſtred and ſo nothing in their Hands: The Jury find that they have Aſſets in their Hands, and do not ſay to what Value; and for this Uncertainty the Verdict was held inſufficient and void.

(*a*) Co. Lit. 227. a. Br. Enqueſt 4

As to 4 Point, altho' 16 *E.* 3. *Damages* 80. and ſome other Books are againſt it, That no (*b*) Damages ſhall be recovered; yet foraſmuch as it is held in 17 *E.* 3. 57. *b.* 2 *E.* 3. 44. 24 *E.* 3. 46. 22 *R.* 2. *Damages* 130. 8 *E.* 3. 52. 27 *H.* 6. *Gard* 118. *Paſch.* 27 *H.* 6. *Rot.* 123. *in the Book of Entries. f.* 368. and diverſe other Books with which common Experience agrees, It was reſolved accordingly. And the Chief Juſtice vouched an ancient Reading upon the Statute of *W.* 2. *c.* 35. That where the Statute ſays (*c*) *abjurer regnum vel habeat perpetuam priſonam* in the Diſjunctive, That the Election ſhall be in the Court to give Judgment upon which of the ſaid two Points the Judges will: And great reaſon, for it may be, the Diſpoſition and Quality of the Defendant being conſidered, it would be dangerous to the State to baniſh him into foreign Countries.

(*b*) Cr. Jac 413.

(*c*) 2 Inſt. 439.

Trin

Trin. 11 Jacobi *Regis.*

Combes's *Case.*

IN *Replevin* by *William Atlee*, againſt *Daniel Banks* and *Thomas Osborn* of taking of his Cattle at *Harmonſworth*, in a Place called *Walnut-tree Cloſe*, in the County of *Middleſex*, *&c.* Which Plea began *Trin.* 8 *Jac. Reg. Rot.* 330. Upon the Pleading, and Iſſue joined, and ſpecial Verdict given, the Caſe was ſuch. *Thomas Combes* Copyholder in Fee of ten Acres of Paſture in *H.* of the Manor of *Harmonſworth* in the County of *Middleſex*, by his Deed 22 *Novemb.* 5 *E.* 6. conſtituted and ordained *William Combes* and *Stephen Erlie* two Copyhold Tenants of the ſame Manor his lawful Attornies, to ſurrender *vice & nomine ſuo* to the Lord of the ſaid Manor, the ſaid ten Acres of Paſture to the Uſe of *John Nicholas* and his Heirs, and afterwards in a Court held of the ſaid Manor 8 *Julii anno* 6 *E.* 6. the ſaid Attornies *tunc tenentes Dom' per copiam Rot' Cur' in eadem Cur' oſtenderunt ſcriptum præd' gerens dat' prædict' 2 Nov' anno* 5. *ſupradicto, & iidem Willielmus & Stephanus authoritate eis per præd' literam Attornatus dat' in plena cur' ſurſum reddiderunt in manus Dom' præd' decem acras paſturæ ad opus & uſum præd' Johannis Nicholas heredum & aſſignatorum ſuorum*, who was at the ſame Court admitted accordingly: And that within the ſaid Manor there was not any Cuſtom to ſurrender Copyhold Lands, *&c.* by Letter of Attorney, either in Court or out of Court. And if the ſaid Surrender by Letter of Attorney of the ſaid Lands held by Copy, *&c.* was good or not, was the Doubt which the Jury referred to the Con- Co. Ent. 575 a.

sideration of the Court. And this Case was argued at the Bar, in *Michaelmas*, *Hillary*, and *Easter-Terms*, and in this Term, and in this it was also argued by the Justices at the Bench; and in this Case two Points were moved, 1. If a Surrender could be made by Force of the Letter of Attorney. 2. If the Attornies had pursued their Authority.

As to the first it was unanimously agreed by all the Judges in their several Arguments, that the Surrender in the Case at Bar made by Letter of (*a*) Attorney, was good; and their Reason was, because every (*b*) Copyholder having a customary Estate of Inheritance, may *de communi jure*, without any particular Custom, surrender his Lands held by Copy in full Court, and therefore in pleading the Copyholder need not (*c*) alledge a Custom within the Manor to surrender in Court; for that which is the Usage *per totam Angliam*, is the (*d*) Common Law, as it is held in 34 *H.* 8. *Br. Custom* 59 & 34 *H.* 8. *Dy.* 54. *quod habetur* (*e*) *consuetudo inter Mercatores per totam Angliam, &c.* is no good manner of alledging a Custom, for that is the Com. Law; and in the *Book of Entries*, Tit. *Presp. Divisione Copyhold* 1. *f.* 568. no Custom is alledged to enable a Copyholder to surrender in full Court, no more than that a Copyholder may make a (*f*) Lease for one Year; because that he may do by the general Custom of the Realm, which is the Common Law. *Vide Bracton lib.* 2. *c.* 8. Then if a Copyholder may surrender his Estate in Court by the general Custom of the Realm, which is the Common Law, from thence it follows that he may do it by Attorney, as a Thing incident by the Common Law: And that will more clearly appear if the Reason of such Things which a Man can't do by Attorney be well considered. And therefore if a Man has a bare Authority coupled with a Trust, as (*g*) Executors have to sell Land, they can't sell by Attorney; but if a Man has Authority, as absolute Owner of the Land, there he may do it by Attorney, as *Cestui que use* might after the Statute of (*i*) 1 *R.* 3. and before the Statute of (*k*) 27 *H.* 8. for *Cestui que use* had an absolute Authority to dispose of the Land at his Will, without any Confidence reposed in him, as appears in 11 *Eliz. Dyer* 285. and there a Judgment is cited in 25 *H.* 8. accordingly, against the Opinion of some Judges in 9 *H.* 7. (*l*) 24. But in the Case at Bar, the Copyholder has a customary Estate of Inheritance, and not an Authority or Power only. Also there is a (*m*) Difference betwixt a general absolute Power and Authority as Owner of the Land, as aforesaid, and a particular Power and Authority (by him who has but a particular Interest)

(*a*) 2 Rol. Rep. 323. 393, 394. Herl 24. God. 389. 1 Rol. 500. 1 Leon 36.
(*b*) Co. Lit. 59 a. 1 Rol. 500.
(*c*) 2 Bulst. 252. Doct. pl. 104.
(*d*) Co. Lit. 110 b. 2 Bulstr 186, 252. 253.
(*e*) 2 Bulst. 186. B. N. C 255. Br. Cust. 59. Dy 60. pl. 19.
(*f*) Doct. pl. 104, 105. 1 Rol 846. 2 Bulstr 252. 4 Co. 26. a. Cr. El. 103, 222. 225 1 Leon. 328. Pop. 188. Owen 18. Hutt 101. Lit. Rep. 253. 1 Jones 249. Cr. Car. 233. Moor 272.
(*g*) 2 Rol Rep. 329, 393. 1 Rol. 330.
(*h*) 1 Anders. 28 29 1 Rol. 322. O B nl. 15. pl. 65. Godb 314 389. 2 Rol. 330 Dy 283 pl 30. Benl in Kelw. 207. a. Benl. in Ash pl. 2. N. Benl. 12. pl 10 1 Leon. 265. 2 Rol. Rep. 322 324
(*i*) 1 R. 3. c. 1.
(*k*) 27 H. 8. c. 10. Br. Feoffm. 43.
(*l*) 9 H. 7. 26 a. Godb. 312. Br. Feoffment a. use 27 2 Rol. Rep 294.
(*m*) Co. Lit. 52. b.

to make Leaſes for Life or Years. And therefore if (a) *A.* be Tenant for Life, the Remainder in Tail, &c. and *A.* has Power to make Leaſes for 21 Years rendring the ancient Rent, &c. he can't make a Leaſe by Letter of Attorney by Force of his Power, becauſe he has put a particular Power which is perſonal to him: And ſo was it reſolved in the Caſe of the Lady *Greſham* at the Aſſiſes in *Suffolk* in *Quadrageſim'* 24 *El.* by *Wray* and *Anderſon* Chief Juſtices, Juſtices of Aſſiſe there. Alſo there are ſome Things perſonal, and ſo inſeparably annexed to the Perſon of a Man, that he can't do them by another, as doing of (b) Homage and Fealty: So it is held in 33 *E.* 3. *Treſpaſs* 253. the Lord may beat his Villain for Cauſe or without Cauſe, and the Villain ſhall not have any Remedy? but if the Lord commands another to beat his Villain without Cauſe, he ſhall have an Action of Battery againſt him who beats him in ſuch Caſe. So if the Lord diſtrains the Cattle of his Tenant, altho' nothing be behind, the Tenant for the Reſpect and Duty which belong to the Lord, ſhall not have (c) *Treſpaſs vi & armis* againſt him; but if the Lord (d) commands his Bailiff or Servant in ſuch Caſe to diſtrain where nothing is behind, the Tenant ſhall have an Action of *Treſpaſs vi & armis* againſt the Bailiff or Servant. 2 *H.* 4. 4. *a.* 11 *H.* 4. 78. *b.* 1 *H.* 6. 6. *a.* 9 *H.* 7. 14. *a.*

Littleton in his Chapter of *Burgage* holds, That where in a Borough he who is ſeiſed of Lands in Fee may deviſe by Cuſtom, there the Owner of ſuch Land may deviſe that his (e) Executors ſhall ſell, which they ſhall do as Attornies to him. 3 *E.* 3. *Coron.* 310. by the Cuſtom of a Manor a Freehold will paſs from one to another by Surrender in Court, againſt the (f) Will of the Lord, and where the Cuſtom is ſuch, the Tenant may do it by Attorney. *Vide* 14 *H.* 4. 1. *a.* by *Hankford*, & *vide* 19 *Aſſ. p.* 9.

And it was ſaid, (g) as he to whoſe Uſe a Surrender is made may be admitted by Attorney, ſo a Copyholder may ſurrender by Attorney in full Court: And the Caſe of him to whoſe Uſe ſeems the ſtronger Caſe, becauſe he who is to be admitted is to do Fealty, (h) which none can do Fealty but he who ſhall be admitted, and therefore in ſuch Caſe the Ld. may refuſe to admit him by Attorney; but (i) if he admits him by Attorney, it is good enough.

But *Hill.* 28 *Eliz.* in (k) *Chapman's* Caſe it was held in the King's Bench, That where the Cuſtom of a Manor is, That the Copyholder out of Court may ſurrender into the Hands of the Lord of the Manor by the Hands of two cuſtomary Tenants, who in Effect are but Inſtruments or (l) Attornies of the Copyholder to take his Surrender, that in ſuch Caſe the Copyholder by his Attorney

(a) 2 Rol. Rep. 393. 1 Rol. 330. Palm. 436.

(b) 2 Rol. Rep. 393. Co. Lit. 66. b. 68. a.

(c) 10 E. 4. 7. a. Fitz. Office del Court 7. Brook Office del Court 29. 11 H. 4. 78. b. 4 Co. 11. b. 2 Inſt. 105. Co. Lit. 127. a. Stat. de Marleb. c. 3. Plow. 66. b. 84. b. 85. a.

(d) 2 Inſt. 105. Br. Treſpaſs 98.

(e) Lit. ſect 169. Co. Lit. 112. b.

(f) Co. Lit. 59. b. 1 Rol. 562.

(g) 1 Rol. 505.

(h) Co. Lit. 68. a.

(i) 1 Rol. 505.

(k) 1 Rol. 500, 501.

(l) Sty. 423.

can't surrender into the Hands of the Lord by the Hands of two Copyhold Ten'ts; for in as much as the Surrender in such Case ought to be warranted by the Custom, the Surrend. without special Custom to warrant it by Attorney will not be good. Also that was upon the Matter by Attorney to make a Surrend. by others who are but Attornies, for that is not warranted by the (*a*) particular Custom of the Manor to make a Surrender out of Court. But in the Case at Bar the Com. Law, and no particular Custom warrants the Surrend. and therefore it may well be made according to the Rule and Reason of the Com. Law by Attorney. But it was resolv'd, That the Attorney ought to (*b*) pursue the Manner and Form of the Surrender in all Points according to the Custom, as the Copyholder himself ought to have done; as if the Surrend. by the Custom ought to be by the Rod, or by any other Thing, or in any other Manner, the Attorney ought to pursue it. And the *Ch. Just.* said, that the Style of a Copyholder imports 3 Things: 1 *Nomen*, his Name, 2 *Originem*, his Commencement: 3 *Titul'* his Assurance: His Name is Ten't by Copy of Court-Roll, for his (*c*) Name is not Ten't by Court-Roll, but by Copy of Court-Roll, who is the sole Ten't in Law that holds by Copy of any Record, Charter, Deed, or any other Thing, 2. His Commencement, *ad voluntatem domini*; for at the Beginning he was but Ten't at the Will of the Lord; 3. His Title or Assurance, *secundum consuetudinem Manerii*, for the Custom of the Manor has (*d*) fixed his Estate, and assured the Land to him so long as he doth his Services and Duties, and performs the Customs of the Manor. And therefore (*e*) *Danby* saith in 7 *E.* 4. 19. *a.* That by the Custom he is as well inheritable to have the Land, as Ten't to hold his Freehold by the Com. Law. And it was resolved that the Case was stronger, because the Let. of Attorney was made to those who were Ten'ts by Copy, *&c.* of the said Manor. But it was agreed, that where an (*f*) Infant at the Age of 15 Years may make a Feoffm. that he can't do it by (*g*) Attorney, because a Custom which enables a Person disabled by the Law, ought to be pursued, and an Infant can do nothing to pass any Thing out of him by Attorney: *Vide* 11 *H.* 4. 33. *a.* and it would be hard, if Men in (*h*) Prison, or Sick, or beyond the Sea, could not make Surrenders of their Lands held by Copy for Paym. of their Debts, or Preferment and Advancement of their Wives and Children, *&c.* *Nota* Reader, this is the first Case that I have known which was adjudged in this Point.

2. It was resolv'd, that when any has Authority, as Attorney, to do any Act, he ought to do it in his (*i*) Name who gives the Authority; for he appoints the Attorney to be in his Place, and to represent his Person; and therefore the Attorney can't do it in his own Name, nor as his proper Act, but in the Name, and as the Act of him who gives the Authority. And

(*a*) Co. Lit. 59 a. 1 Rol. 500.

(*b*) 1 Rol. 501.

Lit. sect. 75. Co Lit. 60. a.

(*c*) Hetl. 7.

(*d*) Lit. sect. 77. Co. Lit 61. a. 4 Co. 22. a.

(*e*) Doct. and Stud. 21. a. 1 Rol. 567. 5 H. 7. 31. a. 41. a. 11 H. 4. 33. a. Fitz. Cust. 9. 11. Br. Custom 15.

(*f*) 8 Co. 25. a.

(*g*) 1 Leon. 36.

(*h*) 1 Rol. 330, 501. 1 Sid. 289. Moor 70, 71.

(*i*)

And where it was objected, That in the Case at Bar That the Attornies have made the Surrender in their own Names; for the Entry is *Quod iidem Willielmus, & Stephanus, &c. sursum reddiderunt, &c.* It was answered and resolved *per totam curiam*, that they have well pursued their Authority; for first they shewed their Letter of Attorney, and then they (*a*) *authoritate eis per præd' Literam Attornat' dat' sursum reddiderunt, &c.* which is as much as to say, as if they had said, We as Attornies of *Thomas Combes* surrender, *&c.* and both these Ways are sufficient; as he who has a Letter of Attorney to deliver Seisin saith, I as Attorney to *J. S.* deliver you Seisin; Or I by Force of a Letter of Attorney deliver you Seisin; and all that is well done, and a good Pursuance of his Authority: but if Attornies have Power by Writing to make Leases by Indenture for Years, *&c.* they can't make Indentures in their own Names, but in the Name of him who gives them Warrant. But if a Man by his Will in Writing devises that his Executors shall sell his Land, and dies, there the Executors in their own (*b*) Name may sell the Land for Necessity, because he who gives them Authority by his Will (which takes Effect after his Death) is dead; yet in such Case the Vendee is in by the Devisor.

(*a*) 1 Rol. 501.

(*b*) 1 Rol. 330. Dy 251. pl. 89.

Mich.