

3d Count.

Mutuatus.

4th Count.
Insimul
Computassent.

Willielmus omnes tant' denar' sum' quant' idem
 Johannes proinde rationabilit' habere meruisset
 eidem Johanni cum inde postea requisit' esset
 bene & fidelit' solvere & contentare vellet. Et
 idem Johannes in facto dic' quod ipse idem
 Johannes rationabilit' habere meruit de eodem
 Willielmo al' sum' quinq; libr' similis lega-
 lis monet' Magn. Britan. scil' apud Westm.
 præd' unde idem Willielmus ad tunc & ibidem
 notic' habuit Cumq; etiam præd' Willielmus
 postea scil' eisdem die & Anno suprad' apud
 Westm. præd' indebit' fuisset eidem Johanni
 in al' quinq; libr' consimilis legalis monet'
 Magn. Britan. pro denar' per eundem Johan-
 nem pro præfat' Willielmo & ad special' in-
 stanc' & requisition' ipsius Willielmi ante tem-
 pus ill' mutuo dat' & accommodat' Et sic inde
 indebitat' existen' præd' Willielmus postea
 scil' eisdem die & Anno suprad' apud Westm.
 præd' in Cons' inde super se assumpsit & eidem
 Johanni ad tunc & ibidem fidelit' promisit quod
 ipse præd' Willielmus præd' quinq; libr' ult'
 mentionat' eidem Johanni cum inde postea re-
 quisit' esset bene & fidelit' solvere & contentare
 vellet. Cumq; etiam præd' Willielmus postea
 scil' eisdem die & Anno ult' suprad' apud
 Westm. præd' insimul computasset cum præfat'
 Johanne de divers' denar' sum' eidem Johan-
 ni per eundem Willielmum ante tunc debit' &
 ad' in arctro & insolut' existen' Et super
 compo' ill' idem Willielmus invent' fuit in
 Arrerag' erga eundem Johannem in quinq;
 libr' consimilis legalis monet' Et sic inde in
 Arrerag' invent' existen' idem Willielmus in
 cons' inde postea scil' eisdem die & Anno su-
 prad' apud Westm. præd' super se assumpsit &
 eidem Johanni ad tunc & ibidem fidelit' pro-
 misit ad solvend' eidem Johanni eandem denar'
 sum'

sum' ult' mentionat' cum inde postea requisit' esset præd' tamen Willielmus separat' promission' & assumption' suas præd' in forma præd' fact' minime curan' sed machinan' & fraudulent' intenden' eundem Johannem in hac parte callide & subdole decipere & defraudare præd' separat' denar' sum' seu aliquem inde denar' præfat' Johanni nondum solvit nec ei pro eisdem aliqualit' contentavit (licet ad hoc faciend' idem Willielmus postea scilt' eisdem die & Anno suprad' apud Westm. præd' per eundem Johannem requisit' esset) Sed ill' ei solvere seu pro eisdem aliqualit' contentare hucusq; omnino recusavit & adhuc recusat ad Dampnum ipsius Johannis decem librar' ut dicitur. Et habeas ibi hoc breve T. Roberto Eyre, Mil' apud West. 21 die Junii, Anno Regni nostri secundo.

Lowth.

Eyre.

Deliberat' 5 Julii 1728.

The same in English.

GEORGE by the Grace of God, King of Great Britain, France and Ireland, Defender of the Faith, &c. to the Sheriff of Middlesex; Greeting. We command thee, that thou take *W. B.* late of the Middle Temple, Esq; if he shall be found in thy Bailiwick, and him safely keep, so that thou have his Body before our Justices at Westminster, from the Day of Holy Trinity in three Weeks, to answer to *J. R.* Gentleman, of a Plea, why, Whereas the foresaid *W.* the fourteenth Day of March, in the Year of our Lord 1727. at Westminster,

1st Count for
Work and La-
bour.

ster, in the County of *Middlesex* afore-
 said, was indebted to the same *John* in
 5*l.* of good and lawful Money of *Great*
Britain, for Work and Labour of the
 said *John*, by him *John* for the said
William, and at the special Instance
 and Request of him *W.* before that Time
 done and performed; and being so there-
 of indebted, the same *W.* in Considera-
 tion thereof afterwards, to wit, the same
 Day and Year abovesaid, at *Westminster* a-
 foresaid, assumed upon himself, and unto
 the same *J.* then and there faithfully pro-
 mised, that he the foresaid *W.* the foresaid
 5*l.* last mentioned to the foresaid *John*,
 when he should be afterwards thereto re-
 quested, would well and faithfully pay and
 content. *And also whereas* the foresaid *W.*
 afterwards, to wit, the Day and Year a-
 bovesaid, at *Westminster* aforeaid, in Con-
 sideration that the foresaid *John*, at the
 like special Instance and Request of him
W. had done and perform'd for the same
W. other Work and Labour, assumed upon
 himself, and to the foresaid *J.* then and
 there faithfully promised, that he the same
W. all such Sums of Money, as the same *J.*
 for it had reasonably deserved to have, un-
 to the same *J.* when thereof afterwards he
 should be requested, would well and truly
 pay and content. And the same *J.* in
 fact says, that he the same *J.* hath reason-
 ably deserved to have of the same *W.* o-
 ther Sum of 5*l.* of like lawful Money of
Great Britain, to wit, at *Westminster* afore-
 said, whereof the same *W.* then and there
 had Notice. *And also whereas* the fore-
 said

2d Count for
what he de-
served.

' said *W.* afterwards the same Day and Year ^{3d Count for}
 ' abovesaid, at *Westminster* abovesaid, was in- ^{Money lent.}
 ' debted to the same *J.* in other *5 l.* of like
 ' lawful Money of *Great Britain*, for Money
 ' by the same *J.* for the foresaid *W.* and at
 ' the special Instance and Request of him
 ' *W.* before that Time mutually given (lent)
 ' and accommodated: And being so thereof
 ' indebted, the foresaid *W.* afterwards, to
 ' wit, the same Day and Year abovesaid, at
 ' *Westminster* abovesaid, in Consideration
 ' thereof, did assume upon himself, and to
 ' the same *J.* then and there faithfully pro-
 ' mised, that he the foresaid *W.* the foresaid
 ' *5 l.* last mentioned unto the same, when
 ' thereof afterwards he should be requested,
 ' would well and faithfully pay and content.
 ' And also whereas the foresaid *W.* afterward,
 ' to wit, the same Day and Year, last above-
 ' said, at *Westminster* abovesaid, had accomp-
 ' ted, together with the foresaid *J.* of divers ^{4th Count,}
 ' Sums of Money to the same *J.* by the ^{That they had}
 ' same *W.* before then (that Time) due, ^{accounted to-}
 ' and then being in Arrear and unpaid; and ^{gether.}
 ' upon that Accompt the same *W.* was found
 ' in Arrearage towards the same *J.* in *5 l.* of
 ' like lawful Money, and being so thereof
 ' found in Arrearage, the same *W.* in Con-
 ' sideration thereof afterwards, to wit, the
 ' same Day and Year abovesaid, at *Westmin-*
 ' *ster* abovesaid, assumed upon himself, and
 ' unto the same *J.* then and there faith-
 ' fully promised to pay to the same *J.*
 ' the same Sum of Money last mentioned,
 ' when thereof afterwards he should be re-
 ' quested. Yet the foresaid *W.* his several
 ' Promises and Assumptions abovesaid, made

Of a Writ of Assumpsit.

in the Form aforesaid, in no wise regard-
 ing, but contriving and fraudulently in-
 tending the same ʒ. in this Part (Particu-
 lar) craftily and subtilly to deceive and de-
 fraud, the foresaid several Sums of Money,
 or any Penny thereof unto the foresaid ʒ.
 hath not yet paid, nor him for the same any
 wise contented (altho' to do this, the same
W. afterwards, to wit, the same Day and
 Year aforesaid, at *Westminster* aforesaid,
 by the same ʒ. hath been requested). But
 that (Sum) to pay to him, or for the same
 any wise to content, he (*W.*) hitherto hath
 altogether refused, and yet doth refuse, to
 the Damage of him ʒ. ten Pounds, as it
 is said. And have thou there this Writ.
Witness Robert Eyre Knight at Westminster,
 the 21st Day of *June*, in the second Year
 of our Reign.

Lowth.

Eyre.

*Delivered the 5th of July 1728. (i. e. accord-
 ing to the late Act. See in Tit. Process.*

*Difference of
 Original Writs
 and Processes.*

By comparing together the two last *Eng-
 lish* Precedents, the Difference may be ob-
 served between an *Original Writ* and an *Ori-
 ginal Process*, as to their Form, Style, *Teste*,
Ëc. And it may be further observed, That
 as no Arrest could be on the former, being by
Writ, tho' the Damage is there laid to 100l.
 so on this later, being only a *Process* and no
Writ, no Arrest could be, altho' the Sheriff
 is thereby commanded to take the Body, be-
 cause the Cause of Action was under 10l.
 To which Sum Arrests are restrained by a
 former Statute *Temp. Car. 2.* as well as by
 the

the late Act, *To prevent frivolous and vexatious Arrests*; which see hereafter under Title *Process*.

We may also here observe from the Prolixity and (I may say) Tautology of those original Writs and first Processes, which are now in Practice, how far the Law is therein changed from its first Institution. For if we compare the Writs in the Register and *Fitzherbert*, even in Assumpsits and Actions on the Case with those *supra*, we may find, that what was formerly contained in eight or ten Lines, can now be scarcely comprehended in several Sheets of Paper, so luxuriant and exorbitant is our Law grown in meer Matters of Form, that the very End and Institution of *Writs* (which should only in *breif* shew the Cause of the Action, leaving all the particular Circumstances to be set forth and enlarged on in the subsequent Declaration) is now become grossly perverted, and by reciting therein the whole Declaration *verbatim*, are rendered not only *mischievously* prolix, but in a great Measure *ridiculously* impertinent.

Nor can any tolerable Reason be given for multiplying of *Counts*, either in the Writ or Declaration, according to the modern Practice. The only Reason I have yet met with for varying of Counts in Declaration is, that where the Plaintiff is doubtful his Proofs will not come up to the principal Charge in the Declaration, he must therefore bring the Mountain down to *Mahomet*, and by a 2d. 3d. and 4th. (nay I have known a 5th. and 6th.) Count endeavour to meet with his Witnesses Consciences.

Mischief of Prolix Writs.

See Institut. Legalis 365, 367, &c.

But as this can be no Reason for Tautology and Impertinency in *Writs*, and first *Processes*, which should always be penn'd in a *brief* and restrictive Style, so I conceive it would much more become the Honour and Dignity of the Law and its Professors, and would certainly conduce more to the Interest and Happiness of Mankind, if the Plaintiff's Case were truly stated in one *Count* (or Charge) in the Declaration. And the Jury left to give a Verdict and Damages only according to what he proved, &c. according to the Course of former Practice.

Note.

Besides, it is frequently known, That altho' there are four or five Counts in the same Writ or Process, and repeated in the Declaration, yet not one nor all of them shall contain a true State of the Plaintiff's Case; one Instance of which may be, that of the *Precedent* last recited, where the Plaintiff an Attorney, having by fraudulent and extorsive Means, obtained a Promissory Note from the Defendant for Payment of 5*l.* but not daring to bring his Action on the Note, for that it was given on the Plaintiff's promising to do his Duty in his Office of Under-Sheriff, he thereupon takes Advantage of the Defendant's Confession that he had given such a promissory Note, &c. And thereupon (by Advice of an eminent Serjeant at Law) dresses up the *Original* Process aforesaid, without mentioning any Note therein; which must be confess'd to be exactly drawn, and I believe will be found as exactly translated.

Of the Writ Audita Querela, (The Complaint heard.)

Audita Querela is in its Nature an *What it is,*
 Equitable Writ, much like a Bill of *and where it*
 Complaint; and the Instances wherein it lay, *lies.*
 as collected by *Fitzherbert, Brook* and others,
 prove that Relief might thereby be had a-
 gainst Force, Fraud and Circumvention, in
 many Cases at Common Law, without ha-
 ving Recourse to a Court of Equity. For *See Instit.*
 where-ever any Judgment, Statute, or other *Legalis 166,*
 Matter of Record was obtained or executed *167. how to*
 by Force, Covin, or other undue and ille- *proceed there-*
 gal Means, whereby an innocent Person *in.*
 might be imprisoned or dipossessed of his
 Right, this Writ lay in that Court where
 the Record was, to give him Relief, and
 avoid the Judgment, &c.

And by *F. N. B.* it lay as well upon a *F.N.B. 102.*
 Matter in Fact, as upon Matter in Writing, *H.*
 or by Record; *sed Quare.*

Therefore (says *Fitzherbert*) If a Man be *Ibid. 105. B.*
 bound in a Recognisance in *C. B.* and the
 Conuzee doth afterwards release to the Par-
 ty, and then sues Execution, contrary to
 his Release, the Conuzor may come into
C. B. and sue an *Audita Querela* thereupon,
 out of the Rolls there.

And so if one recover in *B. R.* or *C. B.* *22 H. 6. 56.*
 Debt or Damages, and afterwards, by his
 Deed, releaseth the same, and yet afterwards
 sues Execution upon the Recovery, the Par-
 ty released may have an *Audita Querela* out
 of either *B. R.* or *C. B.* or that Court where

the Record is, or he may have it out of Chancery; for the Writ in such Case seems to be either Original or Judicial, at the Party's Pleasure. *Quære F. N. B. 104. S.*

It lies for
Force.
F. N. B. 103.
C.

If a Man be bound in a Statute-Merchant, and a Defeasance is executed of the said Statute, and afterwards the Conusee doth Arrest the Conusor, and imprisons him, and takes the Defeasance from him, and then sues Execution upon the said Statute, the Conusor shall have an *Audita Querela* against him, upon the whole Matter, *i. e.* the *Force, &c.*

Duress, &c.
Ibid. L.

And so if a Man makes a Statute-Merchant or Statute-Staple, &c. by *Duress*, he shall have an *Audita Querela* to avoid the Statute so made by *Duress, &c.*

If two are severally bound in two several Statutes, and afterwards the Conuzee, by Deed, Releases both the Statutes to one of them, if he after sues Execution against them severally, they may both join in an *Audita Querela* upon that Release.

Infancy.

If an Infant binds himself in a Statute-Merchant or Staple, he may have an *Audita Querela*, during his Nonage, to avoid such Statute. And after his full Age, he may have the like Writ to avoid the Statute, upon such Matter in Fact, to wit, the *Nonage*.

Recovery.

Upon Recovery of a Debt, if the Plaintiff sues a *Scire facias*, and the Sheriff Returns *Nihil*; whereupon Execution is awarded, the Defendant, if he have a Release or Acquittance, may have an *Audita Querela*, because he could not come in to plead the Release, &c.

Where *B.* acknowledges a Statute-Staple, &c. to *A.* before the Mayor, &c. in the
Name

Of the Writ Audita Querela. 185

Name of C. and afterwards C. is arrested and taken in Execution, by Force of the Bond or Statute, now C. shall have an *Audita Querela* against A. and B. in this Form, viz.

THE King to his Justices of the Bench, See F. N. B. greeting: We have received the Complaint of C. 102, 103. containing, That A. and B. by Collusion between them before had at W. contriving our Court to delude, and the foresaid C. craftily to grieve, lately before R. Mayor of our Town of S. and R. the Clerk, deputed for taking the Recognition of Debts at S. him B. &c. there appearing (by the Name of C.) him to be C. they there, on a Corporal Oath, to this End given, they affirmed; whereby the same B. (under the Name of the same C.) unto the foresaid A. 100l. (at a certain Term now past to be paid) before the same Mayor and Clerk, according to the Form of the Statute made at Acton Burnel, did acknowledge himself to owe, and afterwards (they) falsely and maliciously procured him C. for that he paid not the 100l. to the foresaid A. at the Term aforesaid, to be taken by the foresaid Mayor, and in our Prison to be safely (closely) kept, until the same A. of the same 100l. he should fully satisfy, to the no small Damage of the same C. and manifest deceit of our Court; whereupon the same C. hath supplicated us, that we would apply to him (his Case) a convenient Remedy; We (therefore) command you, that hearing the Plaints of him C. in this Part, and calling before you the foresaid A. and B. and the foresaid Mayor and Clerk, and having severally (on both Sides) heard the Reasons (Answers) of the Parties, unto the

This Writ is Erroneous in the Original; but this is the Order of the Words.

See the Form *infra.*

same C. touching the falsehood, Malice and Deceit, you cause full and speedy Justice to be done, as of Right, and according to the Custom of our Realm, you shall see is to be done. Witness, &c.

But the Modern Form of an *Audita Querela* for vacating a Bond and Judgment, &c. is thus.

A Modern
Precedent.

GEORGE, &c. To his Justices of the Bench, Greeting. From the heavy Complaint of A. B. of, &c. We have received Information, That whereas one C. D. of, &c. such a Day, &c. (reciting the Bond and Judgment, with a Release, &c. afterwards had; and that afterwards the Bond was sued, or the Judgment executed, &c.) Whereupon he hath humbly supplicated us, of a congruous (convenient) Remedy to be provided for him in this Particular. And because we would not the same A. B. in this Particular be any wise injured, and willing what is just be done, (therein) We command you, that bearing the Complaint of him A. B. in this Particular, and calling before you the Parties aforesaid, and hearing on both Sides their Reasons (Answers) unto the same A. B. you cause full and speedy Justice to be done, as of Right, and according to Law and the Custom of our Realm is to be done. Witness my self, &c.

Process in
Audita
Quer.
See Institut.
Leg. 167.

And note; the Process on this Writ is a *Venire facias*, (a Cause to come) & *Distringas* (distrein thou) and an *Alias*, & *Pluries* (*Distringas* (otherwise and more Times distrein) and if the Sheriff return Nothing; or

or he is not found, then shall issue a *Capias* (take thou) against the Defendant.

Also note, a *Jurata* on an Issue in this Writ is thus:

The Jury between A. B. by his Attorney A Jurata Plaintiff, and C. D. Defendant, to take Know- therein. ledge, whether the Administration of all the Goods and Chattels, Rights and Credits, which were of C. F. deceased, was committed to G. H. or not, is put in Respite before the Lord the King (if in B. R.) from the Day of (i. e. a Return-Day) &c. wheresoever, &c. (or if it be at the Assises) before the Justices of the Lord the King, to take Assises in the County of D. assigned, if (except) before (such a Day) at Si for Nisi. (such a Place, &c.) by Form of the Statute, &c. shall come for Default of Jurors. And if at the Sittings in London say — Except Robert Lord Raymond Chief Justice of our Lord the King, assigned to (for) Pleas in the Court of himself the Lord the King, before the King himself to be held, before (such a Day) &c.

See for other Proceedings on this Writ *Institutio Legalis* 167, 168.

Of Writs on the Case for Scandal, &c.

The Nature,
and Definition
of the Writ.

A Writ on the Case is so called, for that it contains the Substance of the Plaintiff's Case, with its general Incidents, omitting Time, Place, and collateral Circumstances, which by the Modern Practice are also contained therein; these Writs now setting forth the whole Declaration *verbatim* (as before is shewn in Title *Assumpsit*) and are as various in their Forms, as the Circumstances of the Cases are upon which they are brought; but may in general be defin'd to be, a *Writ* setting forth *something injuriously spoken, done or omitted* by the Defendant to the *Damage* of the Plaintiff.

Three Kinds
thereof.

And as this general Description will comprehend all the several Species of Writs on the Case, so it shews they may all be reduced under three Heads (to wit)

- | | | | | | | |
|---------------|-----------------|---------------------|---------------|----------------|--------|-----------|
| 1. For Words | } <i>injury</i> | } { spoken } to the | } Plaintiff's | | | |
| 2. For Acts | | | | } <i>ously</i> | } done | } Damage. |
| 3. For Things | | | | | | |

Rules therein. For both *Injury* by the Defendant, and *Damage* to the Plaintiff must concur to support this Writ.

See Instit.
Regalis 321,
322.

'Tis also laid down as a Rule, that a *Writ* (or Action) on the Case is not to be laid *Vi Et Armis*, (with Force and Arms) but yet it must be averr'd to be *contra pacem* (against the Peace) for even the *Speaking* of Words or the *Omission* of Things may be *against the Peace*, tho' neither of them can be laid to be with Force and Arms.

But

But as to the second Part of the foresaid Division (*i. e.* Acts injuriously done) comprehending both *Malfcesances* and *Misfeasances*, (for a misdoing is in its Nature an ill doing, and *vice versa*) it has been disputed whether they may not well be laid to be done with Force and Arms, and has been generally held in the Negative, because if it were so laid, it would be rather a Writ of *Trespafs*, than on the *Case*, tho' I conceive it may well be denominated as it often is, *Trespafs on the Case*, as comprehending both Kinds; and therefore that in *Malfcesances*, especially the Writ may well alledge it to be done with Force and Arms, as the Case in 3 *Cro.* a Writ on the *Case* (for driving Cattel into his Ground, &c.) was laid *Vi & Armis*.

Vi & Armis:

1 *Cro.* 236.

Indeed Lord Cook in his ninth Report, has in affected Terms given us a curious Distinction as to Writs or Actions on the *Case*, and says, as there may be two Causes of the Action, the *causing Cause* and the *caused Cause*. So the causing, *i. e.* the remote Cause may be laid with Force and Arms, but the *caused* or immediate Cause of the Action cannot be so laid, which he explains thus.

Diversity.
9 *Co.* 52. 5.

If a Man cast Dung or other Matter into a River, whereby the Water is raised or diverted, so that it flows over my Land, or into my House, &c. to my Damage, here are two Causes of this Damage, the Throwing in of the Dung, &c. which is the remote Cause, this may be laid *with Force and Arms*; but the immediate Cause of my Damage or the *Feet* of the Action is the Flowing of the Water over my Land, &c. and this cannot be so laid. See other Examples of this Kind in

Example.
F. N. B. 92.
F. Sp. B. 56.
F.

9 *Co.*

9 Co. 51, 52. &c. And see F. N. B. 102. F. Case for driving away Cattle (*vi & Armis*) to prevent their Taking as a Distress.

Various Kinds and Denominations.

As these Writs on the Case are of various Kinds, so they have received divers Denominations, as Writs for *Slanders*, *Deceits*, *Nuisances*, *Rescues*, &c. as also on *Assumpsits*, *Indebitatus Assumpsits*, *Insimul Computassents*, *Quantum meruit*, *Quantum valet*, &c. which later are now made only different *Counts* or *Charges* in the same Writ, as is before shewn under Title *Assumpsit*; it remains then that we proceed with the Residue of the Writs above named, *viz.*

1. For tortious *Words*,
2. For tortious *Deeds*,
3. For tortious *Omissions*, as *Assumpsits*, &c.

Writs for Slander.
See *Instit. Legalis* 318.

And first of Writs for *Slander* or *Scandal*, wherein a principal Regard to that which is commonly called *Scandalum Magnatum*, which tho' it be found on the several Statutes of *Westminster* 1. c. 33. 2 R. 2. c. 5. 12 R. 2. c. 11. and commonly recites one or more of those Statutes, yet seeing it bears a great Analogy with other Writs of *Slander*, I shall here rank it under that Head.

But note; as Actions of Scandal were very rarely brought in old Time, there being not above three or four to be met with in all the Year-Books, *viz.* for the Space of 300 Years, so scarcely one Instance can be found during all that Time of an Action for Scandal of a Peer or Great Man, except in the Case of Judge . . . the Precedent whereof follows, *viz.*

An

An Original for Scandal of a Judge.

THE King, &c. to the Sheriff of G. Greet-
 ing. Whereas by a Statute of the Lord Richard Scandal.
 the King of England, the second after the Con- Magnat.
 quest, enacted and published at Gloucester, it is See Old Thes.
 amongst other things contained, that none shall Essex 88. or
 dare to tell or report any false News, Lies, or The Stat.
 any like feigned thing of any the Prelates, 12 R.2. re-
 Dukes, Earls, Barons (or) Great Men of the ord.
 Realm (of England) or of the Chancellor, Prelates.
 Treasurer, Clerk of the Privy Seal, Steward of
 our Household, Justices of the one Bench or of
 the other, or of other Great Officers of the King-
 dom, from whence Discord or any Scandal may
 arise within the said Kingdom; and that who-
 ever does this, shall incur the Pain otherwise
 ordained by the Stat. of Westminster the 1st,
 which wills, that he be taken and imprisoned
 until he find him from (by) whom the Report
 was moved, as in the same Stat. is more fully
 contained. And because J. S. of, &c. Gentle-
 man, the Statutes aforesaid in no wise weighing
 (regarding) divers false Lies and Scandals of
 T. L. one of our Justices of the Bench at Glou-
 cester, told and reported, from whence Discord
 and Scandal may arise and are risen, to the
 same T. within our said Kingdom of, &c. to
 the great Damage and Scandal of him T. as 'tis
 said. And because the foresaid T. hath made
 us secure of prosecuting his Clamor (Claim) by
 J. B. of, &c. and J. W. of, &c. We command
 thee, that thou attach the foresaid J. S. so that
 thou may'st have him before us (in such a Re-
 turn) wheresoever we shall then be in England,
 to shew why he ought not to be imprisoned until
 he

he find him from (by) whom those Tales, Lies, and Scandals were moved, according to the Form of the Ordinance (Statute) aforesaid. And further to answer to the foresaid T. as our Court shall consider (adjudge) in this Part. Witness my self, &c.

*The Entry
thereon.*

Which said Writ (being recited in the Entry thereof) was (such a Day) in this same Term before our Lord the King, delivered to R. D. Deputy, to the Sheriff of the County aforesaid, to be executed in due Form of Law, on the Peril incumbent, &c.

*A Writ re-
citing the Stat.
2 R. 2. c. 5.
See the Decla-
ration Instit.
Legal. 320.*

There is also another Form for writing and publishing a Libel against a Peer, reciting the Stat. 2 R. 2. as may appear by the following Entry and Declaration thereupon, which may be seen in *Institutio Legalis*.

*Note; the
Order of
Words are
here pur-
posely
changed, in
order to in-
troduce a
better Style
into our Law
Proceedings.*

Middlesex, to wit. It is to be remembered, that otherwhile, to wit, in the Term of St. Hilary last past, Henry Lord Earl Baron of F. one of the Peers and Great Men of this Kingdom of Great Britain, who by P. S. his Attorney prosecutes in this Part, as well for the Lord the King, as for himself, came before our Lord the King, and produced here, in the Court of the said Lord the King, then there (the King being present in Law) his Bill (quandam, might be spared) against G. D. in Custody of the Marshal, &c. of a Plea of Trespass and Contempt against the Form of the Statute of Scandals of Great Persons, lately published and provided. And John Doe and Richard Roe are the Pledges of prosecuting (*Quære*, it being in the Case of a Peer) which (*Quidam*) Bill follows in these Words, to wit, Middlesex, to wit, Henry

Henry Lord E. Baron of F. &c. (as above to) as well for the Lord the King as for himself, complains of G. H. in Custody, &c. for that, to wit, That whereas in the Parliament of the Lord Richard the second, late King of England (post conquest) held at Gloucester in the second Year of his Reign, it was among other Things published, ordained, and strictly prohibited, that none should be so bold to devise, speak or report of any Prelates, Dukes, Earls, Notes: Barons, and other Nobles and Great Men of the Kingdom of England; nor of the Chancellor, Treasurer or Clerk of the Privy Seal of England, the Steward of the Household of the Lord the King, the Justices of the one or the other Bench, nor of the other great Officers of the Kingdom aforesaid, any false News, Lies, or any other false Matters, from whence Discord or any Scandal might arise within the said Kingdom, as in the same Statute is amongst other things more fully contained. Yet the foresaid A Libel charging a Peer with Subornation, G. D. in no wise weighing (regarding) did (such a Day and Year) at Westminster in the County of Middlesex (a Conspiracy being) (thereof) before hand had with one A. B. (or rather, he having before hand had a Conspiracy thereof with one A. B.) cause or procure to be written and to be published, in the Presence of divers Subjects of the said now Lord the King, a certain false, feigned and scandalous Writing, called a Narrative, &c. of the same H. Lord E. and concerning divers Crimes, and especially Subornation of Perjury (therein or thereby) suppos'd to have been perpetrated by the said H. Lord E. then and yet being one of the Peers and Great Men of this Kingdom, and having a Voice and Place in the Parliament of the said

now Lord the King, as one of the Peers and Great Men of this Kingdom. The Tenor of which said Writing is as follows, to wit, a Narrative; &c. (too long for a Writ, and needless to be wholly recited) and might have been laid, to the Effect following, viz. setting forth only the Substance, and giving the Writing itself in Evidence. By Pretext of which said Writing so written and published, divers Rumors and Scandals towards him H. Lord E. did arise and were bad; and the same H. Lord E. fell into great Displeasure and Distrust of the said Lord the King, and of divers Peers and Great Men of this Kingdom; so that the same H. Lord E. hath lost the Favour, Grace and good Opinion which the same Lord the King, and divers Peers and Great Men of this Kingdom had before then towards him. And the same H. Lord E. fell into great Danger of incurring the Penalties provided against Suborners of Perjury by the Laws of this Kingdom; and great Scandals and Discords have arisen within this Kingdom, among divers Peers and Great Men of this Kingdom; and more and more are likely daily to arise, to the great Disturbance of the publick Tranquility of the same Kingdom, and to the Damage, &c. as it is said.

Best to omit
the Recital of
the Stat.

But I take the better Way to be, to lay it as an Offence against the Statutes in general, and not to recite any Statute in particular; which will avoid the Danger of a Misrecital, &c. as in the following Precedent.

GEORGE, &c. To the Sheriff, &c. Greeting. Whereas W. Earl C. (such a Day and Year) and long before, and continually afterwards

wards to this Time, was, and is one of the Peers and Great Men of this (our) Kingdom of Great Britain; and hath had, and still has a Voice and Place in the (our) Parliament of Great Britain, as one of the Peers of this Kingdom: Yet W. B. of, &c. Gentleman, contriving, and maliciously intending against the Form of the Statute in such a Case lately published (made) and provided, great Scandal to excite (stir up) of the foresaid Earl, whereby Discords and Strifes may arise between the same Earl, and other Peers and Great Men, and others our Subjects of this Kingdom (the Day and Year) &c. abovesaid, at B. in thy County, having Speech (or in talking) with one P. O. of and concerning the foresaid Earl, of the same Earl then and there did falsely, maliciously and scandalously, in the Presence and hearing of divers of our faithful Subjects, speak, utter, proclaim and publish these false, feigned, scandalous and opprobrious Words following, &c. But note, neither the Words spoken, nor the Epethets above, are needful in the Writ, but only, that the Defendant had spoken, uttered, reported, &c. divers Falsties, Lies and Scandals of the Plaintiff, from whence Discord and Scandal hath arisen and may arise between, &c. as in the first Precedent supra.

and also of the Words spoken.

Note;

I should now proceed to give some Precedents of Original Writs for Slander of Common Persons; but here I confess my self at a Loss, no Precedents of this Kind being found either in the Register, or Fitzherbert's *Natura Brevium*, nor in any other Book, as far as I can trace them. And no Wonder,

Slander of Common Persons.

seeing the Actions of this Kind have sprung up since the Invention of *first Proccesses*, with which the Common Law, as I conceive, was wholly unacquainted. Nor as I think, would such an Action lie even in the Case of a Peer, till the Stat. of *Westm. 1. c. 3. viz.*

Stat. Westm.

cap. 34

See 30 Ass.

pl. 19.

Dyer 155.

3 Buist 225.

1 Leon. 287.

2 Inst. 225.

For as much as there have been oftentimes found in the Country, Devisors of Tales, whereby Discord or Occasion of Discord hath many Times arisen between the King and his People, or the Great Men of the Realm, for the Damage that hath and may ensue thereof, it is commanded, that from henceforth none be so hardy to tell or publish any false News or Tales, whereby Discord, or Occasion of Discord or Slander may grow between the King and his People, or the Great Men of the Realm: And he that doth so, shall be taken and kept in Prison, until he hath brought him into the Court, who was the first Author of the Tale.

* *i. e.* such an Offence as might induce a Challenge, &c. Offences of this kind being then triable in the Court of the Earl Constable, &c. or the Spiritual Court.

The Statute of Westminster did not extend to Prelates, &c.

Whereby it appears, that the Slanders intended to be restrained and punished by this Statute, were only such as tended to stir up *Discord, &c.* either between the *King* and his *People*, or between the *Great Men* of the *Realm, i. e.* the *Temporal Peers* only. For it seems this Statute was not intended to extend to the *Prelates* and *Ecclesiasticks*, they being left to pursue their Remedy in the *Spiritual Courts* as before, till by the express Provision of the several Acts of 2 R. 2. and 12 R. 2. this Statute was extended to the *Prelates*, especially as well as to the other *Great Officers* of State therein enumerated.

And

And that this was so will further appear from the Historical Occasion of making those several Statutes, *viz.*

First, as to the *Stat. of Westminster* the first (made 3 *Ed. 1.*) we shall find the whole Reign of *H. 3.* had been one continued Scene of Discontents, Discords, Tumults and Warrs, occasioned chiefly from that King's frequently falsifying his Oath to his People, and rescinding *Magna Charta* and other good Laws by his own Arbitrary Will and Pleasure; wherein his chief Justice (*Hubert de Burgo, Earl of Kent*) and some other Great ones of abandon'd and prostituted Consciences, were commonly reported the Advisers and Promoters.

The Occasion of that Statute.

The King was violently in Love with Arbitrary Power, but somewhat cautioned by his Father's Example, was not willing to pursue it above-board, but underhand, by Gifts, Bribes, Pensions and Promises, sought to allure and corrupt those whose Office it then was to defend the Laws and the Peoples Rights, against the Incroachments of the Prerogative: Such were the *Earl Constable, Earl Marshal, &c.* who in the Intervals of Parliaments, had a Power of restraining the Excesses of Regal Power.

H. 3. His arbitrary Designs.

But the King not pursuing his Schemes with any steady Course, and at length calling in Foreigners (*Poictouins*) to assist him in working his Ends, his Designs became so publick and notorious, that the Majority of his Nobles, nay, even his honest Chief Justice *Hubert*, and other principal Fautors of his arbitrary Designs deserted him; which however did not discourage him from pursuing

His unsteady Temper.

Affairs not
settled by the
Battles of
Lewis or
Evesham.

his Designs with the Assistance of his Foreigners, till his Attempts were check'd by the Battel at *Lewis*. And the Prince, afterwards King *Edward* the first, somewhat restored the King's Affairs by the Battel at *Evesham*, and the Death of *Montfort*, &c. Yet it was evidently seen from the Behaviour of the *Londoners* and others, that except the King sent back his *Poictovins*, restored *Magna Charta*, and consented to govern by Law, he could expect no good Issue of the Game he play'd.

The Kings
Perjuries, &c.

Upon this he condescends, establishes and swears, but never trusted: For as all Historians brand him with his frequent Perjuries and Breaches of Oaths, taken in the most solemn Manner; so that even in his last Years, when he intended to act more sincerely, his just Fate was never to be believed. And hence Rumors and Reports even to the Day of his Death were common, that the King intended to call back his *Poictovins*, and to break through all the *Oaths* he had taken, and rescind all the Charters of *Liberties* that he had made.

Discords, &c.
of King Ed.
1. coming to
the Throne.

Prince *Edward* at his Father's Death was in the *Holy Land*, and it was near two Years after before he return'd: During his Absence Disputes and Discords had arisen among the temporal Peers; and there seems to have been a Faction forming, in order to exclude the Prince from the Crown, of which 'twas reported the Earls *Constable* and *Marshal* were the chief; tho' I am apt to think their Design was no other than to bind him a little more strictly at his Coronation, than his Father had been. However that were, 'tis certain,

certain, that on *Edward's* Return, several Challenges were made, and Appeals form'd, by *Peers* and *others*, wherein they charged each other not only with *Treason*, but with all manner of Crime and Infamy, which was properly cognizable by the Constable and Marshal; but they being also *participes Rei*, either as Accusers or Accused, it was necessary to institute another Judicatory or Method of Punishment, which was with admirable Prudence provided for by this Law of *Westminster 1.* which served not only as a general Amnesty or Pardon of such scandalous Reflections, either on the King or any of the Temporal Great Men, as had been formerly spoken, but provides a new Remedy for the like Scandals for the future. And whereas before the Manner of Trials in such Cases (*i. e.* where it was of Temporal Persons, and the Fact reported wanted Proof) was to be by Duel, &c. in the Court of *Military*: Now the Cognizance was hereby given to the King's Court of Justice. But this did not yet extend to *Prelates* or *Churchmen*, as I conceive.

For till the Stat. 2 R. 2. which expressly names *Prelates*, &c. I find no Proceeding on the Stat. *supra*, at the Suit of any *Prelate*, tho' 'tis possible another Reason may be given for this, *viz.* That it was against the Canons for Ecclesiasticks to sue in the King's Temporal Courts. But if those Canons were ever here of any Force, 'tis certain they were about this Time either dispensed with, or little observed; for that we have frequent Instances of Actions brought in the King's Temporal Courts by *Prelates* and other

Churchmen in the Times of H. 3. E. 1. E. 2. E. 3. R. 2. &c.

*The Occasion
of the Stat.
2 R. 2.*

*The Quarrel
between W.
Wickham
and John of
Gaunt.*

*See the first
Article of the
Charge against
Wickham.*

But the Truth of the Case as to the Motives or Occasion of making the Stat. 2 R. 2. was thus.—In the declining Years of King *E. 3. W. Wickham* Bishop of *Winchester*, in whom that King entirely confided, had found Means to introduce his Niece or Sister, (the fam'd *Alice Peirce*) to the King's Favour and Bed; and by her Means had got into the chief Management of the Councils and the Revenues of the Kingdom, so far as to exclude even the King's Sons, the *Black Prince* and *John of Gaunt*, from intermeddling in publick Affairs. This Conduct of *Wickham* raised high Resentments in the *Prince* and *Gaunt* against *Wickham* and his Party (who were the Body of the *Prelates* and *Ecclesiasticks*) and possibly might occasion their favouring of *Wickleif*, &c. who then first appear'd in Opposition to the Ecclesiastic Hierarchy. They both pursued the Matter with so much Earnestness as to obtain an Order for the Removal of *Wickham* and *Alice* from the Person of the King. But before this could be fully effected, the *Prince* died, suspected of being poisoned by a Zealot against Heresy (or one of *Alice's* Agents). However the Contest went on between *Gaunt* and *Wickham*, and *Gaunt* charges *Wickham* with embezzling above Eleven Hundred thousand Pounds of the publick Money, a prodigious Sum, above Ten Millions of our Money; and if true (as there is good Ground to believe for a great Part) might well enable him to found and endow his Colleges, out of the Plunders of the Publick.

But

But this Charge by *Gaunt* against *Wickham*, and his Favouring *Wicklief*, &c. so spirited the Rage of the Prelates and Clergy against *Gaunt*, that their utmost Malice was employ'd, and even the Pulpit itself prostituted to scandalize and defame him. *Infidel* and *Heretick* were their softer Terms; *Traytor* and *Rebel* were more common: He was generally represented by them as one that affected the Kingdom, of which to render him utterly incapable, they said he was a *suppositious Child*, a *Bastard*, &c. of which Report *Wickham* was doubtless the *Promoter*, if not the *Author*. For it was industriously reported among the *Prelates* and Clergy, that Queen *Isabel* had on her Death Bed confessed to *Wickham*, that *Gaunt* was the Son of a *Flemish* Woman, and not the Son of her or the King. But this Report was not openly spread till after the Death of King *Edward* the third.

The Rage and Scandal of the Prelates against Gaunt.

But notwithstanding the Malice of *Wickham* and the Clergy prevail'd somewhat on the *Commons*, yet *Gaunt* found so much Favour and Interest among the Temporal Nobility, as upon *Edward* the third's Death, to be constituted Protector of the young King *R. 2.* and the Kingdom.

Hereupon a new Prosecution was commenced against *Wickham* for *Forgery*, *Bribery*, *Corruption*, &c. And new Scandals were raised against *Gaunt*; but in the End, by Solicitation of the *Prelates* on one Side, and the Temporal Peers on the other, an Accommodation pass'd between them; and upon *Gaunt's* dropping the Prosecution, *Wickham* took his Oath in full Parliament, that he

But being reconciled, the Statute passed.

was

was neither the Author, nor would be the *Fautor* of those Scandals; and utterly disavow'd the Mention of his Illegitimacy by *Queen Isabel*: And urged, that the Authors of that Report had scandaliz'd him more than they had the *Duke*; and earnestly press'd that the Authors or Spreaders of those Reports might be punished, &c. as a Scandal thrown on a Right Reverend *Prelate*, as well as on a most noble *Duke*. And hereupon was the Statute 2 R. 2. enacted.

Wickham
also the Occa-
sion of 12 R.
2. c. 11.

As to the Statute 12 R. 2. I can at present say little more than that I find *Wickham* was this Year again made Chancellor; and possibly remembering the old Quarrel, was willing to sooth and mollify the Duke's Disposition towards him. And as on Occasion he was a most artful Flatterer; so knowing the utmost of the Duke's Desires was to have the Honour of his Birth guarded against such a horrid (or horrible Scandal, as the Act calls it) and knowing that high Dignity without the Duke's Favour, would but rip up old Wounds, he therefore anticipates the Duke's Wishes, and procures the Act of 12 R. 2. almost in the same Terms as the former, with a *further Punishment* (besides Imprisonment) by *the Advice of the (King's or Kingdom's) Council*.

Later Statutes seem
expired.

But since the foregoing Statutes some others have been enacted for punishing of slanderous News and Tales, as that of 2 & 3 *Phil. & M. c. 3.* and 1 *Eliz. c. 6.* and 23 *Eliz. c. 2.* but all these seem now expired.

I have but briefly hinted at some few Things in *Wickham's* Story, which, were the whole enlarged as it might, would prove that

that Prelate to have a Genius far superior to any Modern *Bishop, Chancellor, or Lord Treasurer*, who had the Art and Address, during eight or ten Years of a profound Peace, not only to screen the whole Revenues of the Kingdom thro' his own Fingers; or as the Articles say, had the sole Disposal of the King's Money, both here and beyond Sea, with all the Subsidies and Aids both great and small; but also the Price paid for the Redemption of the two Kings of *France and Scotland*, with the Money given by the Inhabitants of *Burgundy* to redeem their Country from Military Execution; as also 100000 Franks from the Duke of *Millain*, with Presents and Gifts from other Princes; so that from 26 Nov. 35 E. 3. to 43 of that Reign, the Money computed to be heap'd up by him, amounted to 1109600*l.* which vast Sum this Prelate is charged to have received, and yet tho' in Time of Peace, both the King and Kingdom by his artful Management was run in Debt; of which he acquitted himself, by rendring himself unaccountable; and at length (when Chancellor) acquitted himself by passing his own Pardon, &c.

But to return: If any Practiser thinks fit to follow the Modern Practice of turning Declarations into Writs in common Actions of Scandal, he may consult the *Institutio Legalis* from Page 321 to 356. and the Rules here laid down under Writs of *Assumpsit, ante*. But I advise to practice this with Caution; and shall now proceed to

Writs

Writs on the Case. For tortious Acts, &c.

*A Description,
&c. of these
Writs.*

THESE Writs are either for *Mal-feasance*, *i. e.* doing an ill Thing or *Misfeasance*, *i. e.* doing a Thing amiss, or otherwise than it ought; the former is indeed the doing, without any Assumpsit or Promise express'd or imply'd, of something which ought not to be done at all, and generally implies a voluntary Malice in the Doer. But the other Kind of Tortious Acts, *viz.* Misfeasances, are rather the Effect of Ignorance or Negligence, and generally arises from an Assumpsit, or Undertaking, express'd or implied to do a Thing, and the Doer does it otherwise than he had undertaken, to the Plaintiff's Damage; of which we have before given some Instances under Writs of *Assumpsit*, &c. But for a fuller Description hereof, see *Institutio Legalis* from Page 356 to 418.

Fitz. Nat.
Brev. 92. E.

'Tis of these Writs on the Case for tortious Acts, that *Fitzherbert* says, they shall not say *Vt & Armis* (with Force and Arms) and yet in the Conclusion shall say *contra pacem* (against the Peace) and gives us there the Form of a very remarkable Writ of this Kind, brought for casting the King's Writ into the Dirt, and trampling thereon, to the Plaintiff's Damage; which tho' it was done *with Force*, yet is not laid *with Force*, &c. altho' 'tis laid at the King's Suit, as well as the Plaintiff's. The Form is thus:

THE

THE King to the Sheriff, &c. If M. D. For a Contempt, &c. shall make thee secure, &c. then put J. T. by Gages and good Pledges, that he be before us wheresoever, &c. (if in B. R.) or before our Justices, &c. (if in C. B.) such a Day or Return) to answer as well us, as the said M. why, whereas the same M. had lately obtained in our said Court, a certain (our) Writ of Prohibition against the foresaid J. that he should not prosecute (follow) any Plea in Court Christian, of Chattles and Debts which are not Testamentary or Matrimonial; and the said M. had delivered our said Writ to the foresaid J. at C. the same J. receiving our said Writ, did that here into the Dirt cast, and with his Feet kicked (trampled on it) and also prosecuted (followed) the foresaid Plea in the same Court Christian, to the Contempt of us, and to the great (heavy) Damage of the said M. and against our Peace, &c. and have thou there, &c.

And there is another Writ thus.—*To answer why in the Water of Plymouth, by which a common Passage is for Ships and Boats, (passing) betwixt Humber and Gaunt, he did drive in Stakes overthwart the said Water, whereby a certain Ship (of him W.) with 30 Quarters of his the said W.'s Malt, was drowned (sunk) and 20 Quarters of the said Malt, of the Price of 100s. perished (was lost) and other things enormous to him did, &c.* For a Nuisance.

But if the Lessor ousts the Lessee's Executors of the Term leased, they shall have a special Action on the Case against the Lessor; and the Writ shall be by *Summons, &c.* and not

not by *Pone* (put by Gages and safe Pledges) as other Writs of Trespass are, viz.

In Eject-
ment, &c.

If Joan the Executrix of the Testament of E. of C. shall make thee secure, &c. then summon by good Summoners P. and M. to shew, &c. why whereas the same P. and M. had demised to the foresaid E. of C. one Mill; and six Acres of Land, with the Appurtenances in N. for a Term which is not yet past; and the same E. of C. had by the Testament aforesaid, devised the foresaid Mills and Land, to hold to the said Executrix unto the End of the Term aforesaid, to make thereof Execution of the Testament aforesaid (that yet) they the foresaid P. and M. after the Death of him E. of C. aforesaid, and during the Term aforesaid, entered into the foresaid Mill and Lands; and from the said Executrix do detain the same less justly (unjustly) and in Delay (Obstruction) of the Execution of the Testament aforesaid, as it is said. And have thou there.

Eject.

And if a Sheriff (or other Officer) shall arrest a Man on a *Capias* or other Writ, and afterwards sets him at Liberty (without Bail, &c.) he who sued the Writ shall have a special Writ on the Case against the Sheriff in this Form:

THE King to the Coroners of the County of S. Greeting. If A. shall make you secure, &c. then put, by Gages, &c. our Sheriff of Somerset, that he be before us, &c. (or before our Justices (if in C. B.) such a Day (or Return) to shew why R. B. Esq; by Virtue of a Judgment lately had and obtained (or a Recognizance lately entered

ted into by the said R. B. in such a Court, or before such a Judge, &c. for such a Sum) in the Custody of the same Sheriff at O. being, by the foresaid, the foresaid (Sum) not being satisfied, permitted the said R. B. against the Will of him A. freely to be gone (Escape) to the heavy (great) Damage of him A. and in Delay of the Execution of the Judgment (Recognizance) aforesaid, as 'tis said. And have thou there, &c.

And see there many other Cases where this or the like Writ will lie against Sheriffs and other Officers for Escapes, &c. See also *Institutio Legalis*, Page 274 to 401. 439, 441, &c.

If a Man in Account be found in Arrearage before Auditors, for which they commit him to Prison, and he afterwards escapes from thence: Now the Gaoler ought to pay the Money due upon the Account, and shall have his Writ on the Case against him who so escapes, viz. to answer to the King for the Escape, and to the Gaoler for the Damages he hath sustained, in this Form.

For an Escape to the Damage of the King and Plaintiff.

THE King to the Sheriff, &c. Greeting. F. N. B. From (by) the grievous Complaint of A. we have received (Information) that whereas B. lately gave (in) his Account to C. from the Time he was Bailiff (or Receiver) of the same C. in N. within the Liberty of K. and the same B. for arrearages of (on) that Account was after arrested, and to the foresaid A. Keeper of our Gaol of the Liberty aforesaid was delivered, to be kept in the same Gaol till he should fully satisfy the foresaid C. of the Arrearages aforesaid,

said, according to the Form of the Statute concerning such Bailiffs (or Receivers) provided, be the foresaid B. from the Custody of the foresaid A. against our Peace, hath escaped, the Arrearages aforesaid not (being) satisfied: By Occasion of which Escape the same A. hath fully satisfied the foresaid C. of those Arrearages, according to the Form of the Statute aforesaid, to the no small Damage and Grievance of him A. And because that Trespass, if so it were done, we will not leave unpunished, We command thee, that if the foresaid A. shall secure thee, then the aforesaid B. thou attach by his Body, so that him thou mayst have before us (such a Day) to answer us of the Escape aforesaid; and also the foresaid A. of the Damages which he hath sustained by Occasion of that Escape. And have thou then there this Writ, &c.

For cheating
one of his Mo-
ney at Play,
ibid. D.

There is also in Fitz. Nat. Brev. another Writ on the Case, which is founded on a Fraud or Deceit (*viz.* for cheating one of his Money at Play, with false Dice, &c.) thus:

THE King, &c. If A. shall make thee secure, &c. then put, by Gages, &c. T. of D. &c. that he be, &c. (such a Return) to shew why; whereas the same T. machinating (contriving) him A. craftily to defraud, and divers Sums of Money from him the same A. (illegally) to extort, had excited and procured the same A. to play at Dice with him T. for divers Sums of Money, at a certain Play called the Dozen, at Burton upon Trent; and the same A. there played with him T. at the Play (Sport or Game) with Dice aforesaid: He the foresaid T. certain Dice truly titled (numbered or marked) unto the
same

same A. delivered to cast : And when the Dice aforesaid to the Hands of him T. happened to come, the same T. certain other Dice false and deceitfully tited (which he knew would at every Cast touch (bring) the Number 12. (and no other) falsly and fraudulently threw, whereby the same A. lost at that Game (Play) great Sums of Money to the same T. and the same T. those Sums under Colour of Gains (or Winning) falsly and deceitfully took and carried away, to the Damage of him A. 100 Shillings, as 'tis said. And have then there the Names of the Pledges, and this Writ,

See the like Writ in the Register, fol. 240. which was sued 5 E. 4.

And note ; tho' the Defendant doth not entice the Plaintiff to play, yet if the Defendant plays with false Dice, &c. whereby he (deceitfully) gets the Plaintiff's Money, it seems the Plaintiff may well maintain this Action against him: For the Enticement is not the Cause of the Action, but the casting of the false Dice, &c. whereby he fraudulently gains the Plaintiff's Money.

Note, and see F. N. B. *ibid.*

See further of Actions on the Case for Deceits, *Institutio Legalis* 409, &c. And for Actions on the Case for Nuisances, *ibid.* 413, &c.

Of Writs on the Case for tortious Omissions.

Case for Omissions on Promises express'd.

I Have before hinted, that Actions on the Case for *tortious Omissions* do arise upon an *Assumpsit* or *Promise* either express'd or imply'd, and that an express Promise is either by Word or in Writing; whereto I shall here add, that therein a Regard must be had to a Consideration given or received, *i. e.* of Benefit to the Defendant, or Damage to the Plaintiff; for if the Assumpsit or Promise be without such Consideration, 'tis a *void Agreement*, and this Writ will not lie.

And we may further note, if the Agreement or Contract be reduced into Writing, and executed under Hand and Seal, 'tis more properly a *Covenant* than a *Promise* or *Undertaking*, and consequently that a Writ of *Covenant* lies, and not *on the Case*.

Or implied.

Of Writs on the Case for Promises both express'd and imply'd, I have before discoursed, and shall only here further observe, that as to implied Promises, the Law in many Cases has that Regard to publick Utility, as to raise an imply'd Promise, not only where no Promise is express'd, but even contrary to an express Declaration.

For as in the Cases of Surgeons, Farriers, Taylors and other Artificers, who by the publick Profession of their *Art*, are bound not only to the Exercise, but also to a due Performance of what they profess, without Damage to the Employer; so I conceive should any of these or the like Trades, expressly re-
fuse

fuse the Exercise thereof, to the Damage of any that would employ him, this Action would lie, notwithstanding such express Refusal. For every Man on tendering a fit Reward, is bound for the publick Good to the Exercise of his Profession, as well as to exercise it in a due Manner.

Thus in the Case of a Smith or Farrier, if my Horse in travelling has cast a Shoe, &c. and I bring him to a profess'd Smith to be shod, and tender him his Reward, should he refuse to do it, I conceive an Action on the Case would lie against him.

Thus a common *Inn-keeper* is bound to entertain Travellers, even tho' he declares he will not: So a profess'd *Midwife* is bound to do her Office, tho' she declares the contrary. So I may on Tender of their respective Rewards, require a profess'd School-Master to teach my Child, a common Carrier to carry my Goods, a Miller to grind my Corn, a Baker to bake, &c. And their Refusal or express Declaration to the contrary (if I receive Damage thereby) shall not excuse them from this Action. And on the like Reason it is, That if a Sheriff or other Officer refuse the doing of his Duty, as the Arresting of a Person against whom he has a Writ or Process, this Action lies against him for omitting to do his Duty; and such Refusal I conceive would but augment the Damages.

See further of Actions on the Case for tortious Omissions in the *Institutio Legalis*, Title *Non-feasance*, 358, 359, &c. From whence I shall here collect and translate several Precedents of Declarations for *tortious Omissions*, &c. and which may on Occasion be

turn'd into the Modern Form of Original Writs and first Processes, according to the Rules before laid down under Title Writs of *Assumpsit*, &c. But in this Practice I advise *Caution*.

A Precedent of a *Tortious Omission* on an *Assumpsit* or *Promise imply'd*, viz.

Precedent of a Declaration for a tortious Omission, i. e. not repairing, &c. Sea-Banks. See *Inst. t. Leg.* 559.

Lincoln ff. *C. D. of S. in the County aforesaid, Gentleman, was attached to answer to B. E. of the same County, Esq; of a Plea why, whereas the same C. ought to make, amend and repair the Banks and Sewers, and Maritime Ditches (near the Sea at such a Place) for the Lands and Tenements, to wit, one Messuage and thirty Acres of Land, which the said C. holds in the Parts of S. aforesaid, for the securing (or preserving) of them and their Appurtenances against the Flowing and Violence of the Sea adjoining. And that he and all the other Tenants of the Lands and Tenements, in the same Parts, from the Time whereof the Memory of Man is not to the contrary, have made, amended and repaired, and been used and accustomed, and ought to make, amend and repair the said Banks, Sewers and Maritime Ditches, according to the Rate and Proportion of their (several) Tenures (Tenancies) for the securing of the Parts aforesaid, against such Flowing and Violence of the Sea: (Yet) The same C. hath not for a great (long) Time, to wit, from such a Day to such a Day, hath not taken Care to make, amend and repair the (foresaid) Banks, Sewers and Maritime Ditches, for the Lands and Tenements which he holds in the same Town (Vill) whereby*

the Sea-Water, for Default of amending and repairing the said Banks, Sewers and Sea Ditches, overflowed (drowned) the Lands of him B. in S. aforesaid, to wit, 100 Acres of his Land sown with divers Grain, to wit, Wheat, Barley, Beans, Pease and Oats. And the same B. the Profit of his Land aforesaid (from such a Time to such a Time) to the Value of, &c. lost. From whence he says he is worsted and has Damage, &c.

Of a tortious Omission to perform an Express Promise, *i. e.* not making a Feoffment according to Agreement, but selling the Land to another, is thus, in B. R.

THAT whereas the same A. had such a Case in B. R. Day and Year at R. in the County aforesaid, for not performing an bargained and agreed with the foresaid C. in Express Promise. See Consideration of a certain Sum of Money, to wit, 100s. to the said A. before hand (then *Instit. Legalis* and there) paid, to sell to the said C. one Messuage, situate in R. in the foresaid County; and that the same A. had undertaken to make a Feoffment of the same Messuage to the same C. and his Heirs, within fourteen Days next after the said Day of the said Agreement; yet the foresaid A. tho' thereto often required by the said C. the Feoffment aforesaid, to the same C. according to the Form of the Undertaking (Promise) aforesaid, hath not made, but craftily contriving to defraud him C. in this Particular, the foresaid Messuage to one S. T. within the foresaid Time at R. aforesaid, hath sold, and a Feoffment thereof within the same Time to the same S. and his Heirs hath falsely and fraudu-

lently made, to the Damage of him C. 100l. and therefore he brings his Suit, &c.

The above Form too particular for a Writ.

But this Precedent, tho' proper enough for a Declaration, yet being too particular as to *Time, Place* and other *Circumstances* for a *Writ*, I rather recommend the following Form, viz.

This more proper.

Why, whereas the same A. had sold to the foresaid C. one Messuage, &c. with the Appurtenances in K. for a certain Sum of Money to the same A. before hand paid; and the same A. had ot B. promised to the same C. to make to the same C. a sufficient and secure Estate of the Messuage and Appurtenances aforesaid, within three Months next after which are now elapsed; yet the foresaid A. hath not made to the said C. a sufficient and secure Estate of the said Messuage, but hath altogether refused, and still doth refuse to do that, to the great Damage of the said C. (as it is said,) &c.

After which Manner any other *Writ* of the like Kind may be formed, from the Substance of the Declaration, noting only the Beginning and the Conclusion as before is shewn under Title *Writs of Assumpsit*.

And that the Reader may the better observe the Rules on this Head of *tortious Omissions*, I shall here insert several Forms of Declarations and Pleadings in *English*, as they are translated chiefly from the *Institutio Legalis*. And first, for a Defendant's omitting to take care of his *Fire*, whereby the Plaintiff's House was burnt.

Devon ff. J. O. lately of T. in the County Declaration
 aforesaid, Gentleman, was attached to answer for omitting
 to R. S. of a Plea, That whereas according to to take Care
 the Law and Custom of that Part of this King- of his Fire.
 dom call'd England, hitherto used and approved, See Instit.
 every Man is bound to keep his Fire by Day. Legalis 375.
 and by Night safely and securely, lest for De-
 fault of such keeping of his Fire, any Damage
 should happen in any Manner to his Neighbours:
 (Yet) the foresaid J. O. so negligently and im-
 providently kept his Fire at T. (in the County
 aforesaid) that for Default of due (Care in)
 keeping of such Fire, the Goods and Chattels of
 him R. to the Value of 50l. being in his Houses
 there, and the aforesaid Houses (themselves)
 were burnt, to the great Damage of him R.
 and against the Custom aforesaid, &c. (omitting
 the Recital) from whence he says he is worsted,
 and has Damage to the Value of 300l. and
 thereof brings his Action, &c.

The Plea whereto is to this Effect, viz. *The Plea.*
The Defendant (by such a one his Attorney)
 comes and says—That he hath kept his Fire
 safely and securely; without that, that he
 hath kept that Fire so negligently and im-
 providently, that for Default of due keeping
 of that Fire, the foresaid Messuages, &c. of
 the foresaid R. were burnt, as the foresaid
 R. by his *Writ* and *Declaration* aforesaid
 hath above supposed. And this he is ready
 to aver, &c. (and puts himself on the Coun-
 try, &c.)

And the foresaid R. says, that the foresaid *Replication*
 J. O. hath kept his Fire so negligently and *and Issue.*
 improvidently, that in Default of the due
 keeping

keeping of that Fire aforesaid, the foresaid Messuages of the foresaid R. were burnt, as he by his Writ and Declaration aforesaid hath above supposed. And prays that this be inquired by the Country, &c.

Another Precedent is against a Farrier who undertook to cure a Horse, but by his Neglect (or Omission) the Horse died, viz.

A Farrier's Neglect to cure a Horse. See *Institutio Leg.* 377, 378.

Note, for live Things you say *Price*, but for dead things *Value*.

For that, to wit—That whereas the foresaid D. now is, and for divers Tears last past hath been a Farrier, and thro' the whole Time aforesaid, hath exercised and professed the Art or Faculty of curing the Diseases of Horses. And also whereas the foresaid B. such a Day and Tear at M. &c. was possess'd of a Gelding of the Price of 10 l. as of his own (proper) Gelding; which said Gelding then and there languished of a certain Infirmity and Disease in his Foot: For the healing and curing of which said Gelding of his Infirmity and Disease aforesaid, the foresaid B. afterwards, to wit (the same Day, &c.) in the Tear aforesaid, at M. aforesaid, did put and place the foresaid Gelding with the said D. and the foresaid D. (in Consideration of so much Money in Hand paid, &c.) did then and there promise to the said B. to cure (and heal) the said Gelding of the Infirmity and Disease aforesaid; (yet) the foresaid D. contriving and fraudulently intending the foresaid B. in this Particular, craftily to deceive and defraud, afterwards, to wit (such a Day, Tear and Place) so negligently and indiscreetly (carelessly) applied his Care about the Gelding aforesaid, that the Gelding aforesaid, afterwards, to wit, the Day and Tear aforesaid at M. aforesaid, by reason of the negligent

*negligent and indiscreet Application of his Cure
aforesaid, about the Gelding aforesaid, the same
Gelding died of the Infirmity and Disease afore-
said, to the Damage of the said B. 20 l. And
thereof he brings his Suit, &c.*

Or thus more briefly for neglecting the Cure
of the Plaintiff's Leg, &c.

Why, whereas the same D. the left Leg of B. being casually hurt had, at E. for a certain Sum of Money before hand paid, undertaken well and sufficiently to cure, (yet) the same D. so negligently and fraudulently (carelessly) applied his Care about the Leg aforesaid, that the same Leg became crooked, to the Damage of him B. 10 l. &c.

Neglecting
of Cure.
Inst. Leg. 389.

*Another for a Horse lost by Negligence of a
Hostler or Inn-keeper, viz.*

B. C. was attached to answer S. T. of a Plea, why whereas the same S. (such a Day and Year at such a Place) a certain Gelding of him S. of the Price of 10 l. had delivered to the foresaid B. to be depastured and safely and securely to be kept, and to be re-delivered to the same S. when he should be thereunto required, upon Trust and Confidence of the faithful Re-delivery of the same Gelding by the foresaid B. to the same S. so to be made, the same S. was to yield and pay to the foresaid B. one Shilling of lawful Money for every Week which the same Gelding was depastured in the Pasture of the same B. yet the foresaid B. neglecting such faithful Trust of the Re-delivery of the same Gelding

For a Horse
lost by Negli-
gence.
See Instit.
Leg. 385, &c.
W. S. 83.

Note, divers
Surplusages in
this Form.

Gelding, and in no wise caring for the faithful Restitution of the same Gelding, afterwards to wit (the Day and Year) at *M.* aforesaid, by Negligence of the foresaid *B.* and for Default of good (careful) keeping of that Gelding, the foresaid Gelding by certain evil disposed Persons, who to the same *S.* are altogether unknown, was eloigned to Places to the same *S.* altogether unknown; whereby the same *S.* was not only defrauded of the Gelding aforesaid, but is also wholly deprived of all Easiments, Commodities and Profits which he *S.* by riding about divers serious (earnest) Affairs of him *S.* which diversly occurring in the Interim he might have had and received, to the Damage of him *S.*
201. &c.

*The Plea
thereto in Bar.*

And the foresaid *B.* by *J. D.* his Attorney comes and defends the Force and Injury when, &c. (i. e. *where and in what Manner the Court here shall think fit*) and saith, that the foresaid *S.* his Action aforesaid thereof ought not to have against him, because he saith, that the foresaid *S.* at the foresaid Time in the Declaration aforesaid specified, was lodged in the Inn of him *B.* and then and there requested the foresaid *B.* that the same *B.* would put the foresaid Gelding in any Close of Pasture of him *B.* to be fed (grazed) with the Grass growing in the same Field, whereupon the same *B.* did then, at the same Request of him *S.* so made, put the Gelding aforesaid in a certain Close of Pasture of him *B.* called, &c. to graze the Grass in the same, and there to be depastured: Which said

*Instic. Legal.
586.*

*Note, 'tis not
said to him
unknown.*

Gelding was in the same Close depasturing the Grass there growing, until certain Male-factors;

factors, on the Day and Year in the Declaration aforesaid above specified, took and carried away the foresaid Gelding out of the said Close ; without that, that the Gelding aforesaid, being in the Inn aforesaid, was taken and carried away out of the said Inn, in Default of him B. (or his Servants) as the foresaid S. hath above complained against him: And this he is ready to aver. Whereon he prays Judgment, if the foresaid S. ought to have his Action aforesaid thereupon against him.

And the foresaid S. says he ought not to be precluded from his Action, because he saith, That he (the *Day and Year*) aforesaid, at D. aforesaid, did deliver to the foresaid B. the *Gelding* aforesaid, to be kept and fed in the Stable within the Inn aforesaid. And that certain Malefactors, at the Time in the foresaid Declaration above specified, took and carried away that *Gelding*, so under the keeping of him B. and his Servants, as he in declaring has above alledged; *without that*, that the same S. requested him B. that the same B. would put the *Gelding* aforesaid in any Close of Pasture of him B. to be fed of the Grass growing in the same, as the foresaid B. hath above alledged; and this he is ready to aver. Whereof he prays Judgment and Damages by Occasion of the Premisses to be adjudged to him, &c. *The Replication.*

And the foresaid B. as before (at first) saith, that the foresaid S. requested him B. that the same B. would put the *Gelding* aforesaid in some Close of Pasture of him B. to feed (eat) the Grass of him B. growing in the same, as he hath above alledged; and
of *The Issue.*

of this (hereof) he puts himself upon the Country, &c. and the foresaid S. in like Manner. Therefore, &c. (i. e. *a Venire was awarded to summon a Jury to try this Issue*).

I have translated the above Precedent from *Institutio Legalis*, (and therein corrected the Errors of the Original) in order to shew the whole Course of pleading in this Action from the Original Writ, or first Process, to the Awarding of the *Venire facias*, i. e. *Cause to come* the Jury for Trial of the Issue; concerning which see hereafter more fully under the Title *Venires* under the *Division of Processes*.

And herewith I shall conclude this Title of *Writs or Actions on the Case*; and now, according to the Alphabetical Method proposed, shew the Nature and Forms

Of Writs of Certiorari (to be certified.)

THESE Writs of *Certiorari* lie in divers Cases, but were principally instituted for the Certifying and Removal of Records from inferior to superior Courts of Record. For as an *Accedas ad Curiam*, or *Resalo* before spoken of lay to remove a Plea or Cause from an inferior Court not of Record; so this Writ of *Certiorari* lies to remove the Cause or Record from inferior Courts of Record: And in some Cases it seems to lie to, remove Proceedings not of Record, as the Proceedings of Commissioners of Sewers, or of Justices of Peace in their private Sessions, &c. But I conceive a *Quære* may well be made of the Legality of such *Certioraries*. And *Fitzherbert* expressly says *Writs of Certiorari are to remove Records out of one Court into another*, which can be intended only Courts of Record.

Certioraries
to Courts of
Record.

Not of Re-
cord, *Quære*.
F. N. B.
242. B.

But it is now the Practice in *criminal Cases*, to remove by this *Writ* (or *Process*) not only Indictments, Informations, Inquisitions and the like, from all Parts of *England* into the Crown-Office in *B. R.* But also all Orders of Sessions, for keeping of Bastard Children, Relief of the Poor, &c. and Orders of Commissioners of Sewers, Orders of Court Leets, for imposing Pains and Penalties, &c. may be removed into *B. R.* by *Certiorari*, and be there affirm'd or quash'd, as the Court sees Cause.

In criminal
Cases.
See Instit.
Leg. 175,
177.

'Tis also now the Practice for any Judge of *B. R.* to grant such *Certioraries* at his Chamber,

See Infit.
Leg. 178.

Chamber, either in or out of Term, (the Ground or Reason whereof I am at a Loss to apprehend) but no *Certiorari* can be had without a Judge's Hand, or a Motion in Court; and this it seems extends to Civil Cases as well as Criminal.—But such *Certioraries* now in Practice, whether granted by a Judge or the Court, are rather *Processus* than *Writs*, as aforesaid.

In Civil Cases.
Infit. Leg.
169.

As to *Civil Cases* we may further observe, That where an Action is commenced in an inferior Court of Record, and the Defendant is there summoned or attached by his Goods or Money, such Action may be removed out of such inferior Court of Record into B. R. as well by a Writ of *Certiorari* issuing out of B. R. as by a Writ of *Habeas Corpus cum causa* (have thou the Body with the Cause.) And such *Certiorari* may be returnable before any Judge of B. R. at his Chamber, as aforesaid.

See there 117.
Procedendo.

Also if a *Certiorari* to remove a Cause, be so returned before a Judge at his Chamber, and no Proceeding is in the Cause after the Writ returned; if the Plaintiff will move for a *Procedendo* (for Leave to proceed in the inferior Court) as he well may, he must move for it before the Judge before whom the *Certiorari* was returned, and not in the Court to which the Cause is removed, because the Judge who granted it has been formerly acquainted with the Return of the Writ, and better knows the Reasons why it was granted, &c. and therefore the Court will not intermeddle to undo what the Judge has done. *Sed Quære.*

2.

And

And note ; this Writ in *Civil Cases* may be returnable either in *B. R.* or *C. B.* but in *Criminal Cases* in *B. R.* only. And it seems *Certioraries* may be directed to particular Persons, as *Sheriffs, Coroners, Mayors, Bishops,* See *Thesaurus Brev. 67 to 77.* the *Custos Brevium,* and other Officers (as well as to inferior Courts of Record) as in the following Precedents, viz.

A *Certiorari* to the *Custos Brevium* (Keeper of the Writs) in *C. B.*

THE King to his beloved Robert Darcy, See *Reg. Orig. 287.*
 Keeper of his Writs of the Common Bench,
 Greeting. *Whereas* we lately for certain Causes willing to be certified upon (concerning) the Tenor of a Record, and the Process of a Plea, F. N. B. 246. N.
 that was before our beloved and faithful W. and his Companions, Justices of our Bench, by our Writ between J. and A. of a certain Trespass to the said J. by the foresaid A. done, as 'tis said ; We had commanded the foresaid W. that he should send to us in our Chancery without Delay, under his Seal, distinctly and openly, the Tenor of the Record and Proceedings aforesaid, and of the Warrants of Attorney recorded in the Plea aforesaid, together with the Names of the same Attornies, together with our said Writ that came to him thereupon ; And being now for certain Causes willing to be certified upon (about) the Tenors of the Original and Judicial Writs, and also of other Matters touching the Premises, we command you, That the Tenors of the Writs and other Things aforesaid, being in your Custody, as 'tis said, you send to us in our Chancery under your Seal, distinctly
 and

Of Writs of Certiorari.

and openly without Delay, and this Writ. Witness my self, &c.

Another Certiorari to the Custos Brevium to certify an Original Writ.

To Cust.

Brev. to certify an Original.

Tbesaur. Brev. 70.

THE King to his beloved, &c. We being willing for certain Causes to be certified, whether a certain Original Writ between W. E. and D. his Wife, and W. Bishop of London, and J. C. Clerk of (for) that, that they the said Bishop and J. C. do hinder the foresaid E. and D. his Wife, to present a fit Person to the Church of T. in the County of S. be had of Record under your Custody or not, We command you, that you search the Original Writs and other Memorandums of the foresaid Court of the Bench of London (aforesaid) of the Term of Holy Trinity, in the fifteenth Year of our Reign, being filed under your Custody; and whatsoever you shall find of the Writ aforesaid, between the Parties aforesaid, together with the whole Return of the same Writ, you certify us wheresoever, &c. without Delay, and have there this Writ. Witness, &c.

Return.

See another infra.

To the Mayor of the Staple for certifying a Recognizance there taken.

Orig. Reg. 289.

THE King to his beloved and faithful N. B. Mayor of his Staple at Westminster, deputed to take Recognizances of Debts in the same Staple, Greeting. Whereas W. B. of T. in the County of B. (such a Day and Year of the King) before W. S. then Mayor of the Staple aforesaid

aforesaid, deputed to take Recognizances of Debts in the same Staple, hath acknowledged himself to owe to R. S. Citizen and Mercer of London 16l. according to the Form of the Statute Staple aforesaid, to be paid to the same A. within a certain Time. And because the Time of the foresaid Payment had been long elapsed, we commanded you by our Writ, that searching the Rolls of such Recognizances, made before the foresaid W. S. in the Year aforesaid, if you should find the foresaid Recognizance to have been made in the Form aforesaid, you should without Delay certify us in our Chancery upon (concerning) the Recognizance aforesaid, distinctly and openly, according to the Form of the Statute aforesaid, under the Seal appointed for acknowledging of the Statute Staple aforesaid, that we might do thereupon, what according to the Form of the Statute aforesaid was to be done; and you by Pretext of our Writ aforesaid, had certified that you had found the Recognizance aforesaid, to have been made in the Form aforesaid: And that upon the same Recognizance, it was written and intituled (noted) that on the third Day of October (in such a Year of the King) the foresaid W. then Mayor of the Staple aforesaid, had at the Request of the foresaid R. certified into the Chancery of the said King the Recognizance, according to the Manner and Form of such Certification made. And because no Certification touching the Recognizance aforesaid, is to be found in our Court of Chancery, we command you, that without Delay you certify us in our said Chancery distinctly and openly, according to the Form of the Statute aforesaid, under the Seal appointed for acknowledging of a Statute Staple, that hereupon we may further

F. N. B.
244. E.

Q

cause