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THE

LAW

OF

USES and TRUSTS.

Of Uſes.

AN USE is where the legal Eſtate of Lands is in a certain Perſon, and a Truſt is alſo repoſed in him, and all Perſons claiming in Privity under him, concerning thoſe Lands that ſome other Perſon ſhall take the Profits, and be ſo ſeized or poſſeſſed of that legal Eſtate, to make and execute Eſtates according to the Direction of the Perſon or Perſons for whoſe Benefit the Truſt was created.

By the Rules of Common Law, he for whoſe Uſe ſuch Perſon was ſo ſeized, had neither *jus in Re*, nor *ad Rem*; for if he came upon the Land, he was a Treſpaſſer; and the Reaſon was, becauſe where Lands were given to one, to the Uſe of another, according to the Conſtruction of the Common Law, which is meerly upon the Words of a Contract, the Limitation of the Uſe was adjudged repugnant and void, becauſe by that Law he can't be otherwiſe than a plenary Proprietor; and conſequently he muſt have it to whom the Property was firſt limited by expreſs Words; and by another Rule of Law no Poſſeſſion could paſs from one to another without ſolemn Livery; and tho' the Conſideration was never ſo valuable, if that Ceremony was omitted, nothing was transferred.

But the Chancery, that examines the Conſcience, with Regard to Men's Actions, conſiders with what Deſign Agreements are made; and 'tis contrary to natural Equity, that when any Man has taken Lands to keep for another, he ſhould deceive him, and take the Profits himſelf; or that a Purchaſer, when he has paid his Money, ſhould not have a ſufficient Conveyance in Law executed, and a ſpecifick Performance

formance of the Thing contracted for, and take the Profits according to the Agreement.

The Original of Uſes was from a Title under the Civil Law, which allows of an uſufructuary Poſſeſſion, diſtinct from the Subſtance of the Thing it ſelf; and 'twas brought over to us from thence by the Clergy, who were Maſters of the Civil Law, for when they were prohibited from taking any Thing in Mortmain, and after ſeveral Evaſions by purchaſing Lands of their own, Tenants ſuffering Recoveries, and purchaſing Lands round the Church and making them Church-yards, by Bull from the *Pope*, at laſt this Way was invented of conveying Lands to others to their own Uſe; and this being properly Matter of Equity, it met with a very favourable Conſtruction from the Judge of the Chancery Court, who was in thoſe Days commonly a Clergyman; and the Clergy thought this a Statute contrary to natural Juſtice, and ſo could eaſily tolerate any Act in evading it. Thus this Way of Settlement begun; but it more generally prevailed among all Ranks and Conditions of Men, by Reaſon of the civil Commotions between the Houſes of *Lancaſter* and *York*, to ſecrete the

Poſſeſſions, and to preſerve them to their Iſſue notwithſtanding Attainders: And hence began the Limitation of Uſes with Power of Revocation. And here is to be conſidered,

1ſt, What is the Nature of Uſes at Common Law.

2dly, What Alterations are made by 27 H. 8.

Firſt, At Common Law.

And here are to be conſidered eight Things.

1. *Who may be ſeized to an Uſe.*
2. *What are the Properties of an Eſtate in an Uſe.*
3. *Who may raiſe an Uſe.*
4. *To whom it may be raiſed.*
5. *Where, and what Conſiderations are neceſſary for the raiſing an Uſe.*
6. *In what Manner Uſes are declared.*
7. *The ſeveral Sorts of Uſes.*
8. *The Inconveniences of Uſes.*

1. Who may be ſeized to an Uſe.

To that two Things are neceſſary.

1. *That the Perſon be capable of Confidence and Truſt.*
2. *That he take it up under the Truſt limited and appointed.*

1. *That the Perſon be capable of Confidence and Truſt.*

1. Bodies Politick are not capable of an Uſe or Truſt, becauſe they are Bodies framed at the Will of the King, and are no further capable than he wills them; and 'tis his Will that they ſhould purchaſe for the common Benefit, and for the Ends of their Creation, and not that they ſhould take any Thing in Truſt for others; alſo being incorporate, the Chancery had no Proceſs on the Perſons to compel them to diſcharge their Truſt. 1 Co. 122. Pop. 72. Plow. 538. Bro. *Feoff. to Uſes*, 338. S. 10.

2. Aliens, and Perſons attainted, are not capable of an Uſe, for they can take for no Man's Benefit but the King's. 1 Co. 122. Pop. 72. 1 Ro. Rep. 382.

3. The King cannot be ſeized to an Uſe, becauſe there is no means to com- Pop. 72. Har. 468. Ro. Rep. 332. Bro. *Feoffment to Uſes*, 338. C. S. 17.

compel him to perform; for the Chancery has only a delegated Power from the King over the Conſciences of his Subjects; and the King, who is the univerſal Judge of Property, ought to be perfectly indifferent, and not to take upon him the particular Defence of any Man's Eſtate, as a Truſtee.

1 And. 313. 2. *That he take it up under the Truſt limited*; which may be done two Ways.

1. *By expreſs Words.*
2. *By Implication.*

1. By expreſs Words; as if by the Words of the Deed a Man takes it to his own Uſe, or to the Uſe of another, there can be no Averment that he takes it as a Truſtee in any other Manner; for there is ſuch a Sanction given to all ſolemn Acts of contracting, that they cannot be conſtrued directly contrary to their own Expreſſions; but that muſt be where the Deed is executed upon a valuable Conſideration; otherwiſe 'tis looked upon as a fraudulent Conveyance againſt the Truſts, and has not the Sanction of a lawful Deed, which the Oaths of Men ought not to defeat.

2. *By*

2. *By Implication*; which is two-fold.

1. When one takes a Feoffment, having Notice of the ſeveral Uſes and Truſts, there the Party is ſuppoſed to take it under thoſe Uſes and Truſts; for the Law will ſuppoſe a Man's Actions rather juſt than otherwiſe.

2. Where a Man takes it upon a valuable Conſideration, there he is ſuppoſed to take it to his own Uſe, for otherwiſe he would not have given an Equivalent. 2 And. 82. Bro. *Feoff. to Uſes* 340. *a.* 5 C. 6. Dy. 340 *b.* 1 And. 313.

If a Feoffee to Uſes makes a Feoffment in Fee by Deed, upon an equitable Conſideration to *J. S.* and his Heirs, to the Uſe of his Heirs expreſly, *J. S.* ſhall be ſeized to his own Uſe, tho' he had Notice of the former Truſt; for where the Deed expreſſes the Uſe, an implied one cannot be averred.

A Feoffee to the Uſe of *A.* makes a Leaſe to *B.* reſerving a Rent, tho' *B.* has Notice of the Uſe, he ſhall be ſeized to his own; for Words of Demiſe equally paſs an Uſe as if there were expreſs Words to transfer it. 30 H. 8. Bro. *Feoff. to Uſes* 339, 47. 1 And. 314.

If a Feoffee to an Uſe makes a Feoffment in Fee upon a valuable Conſideration, with Notice, the ſecond Feoffee ſhall be ſeized to the former Uſes, for the Conſideration imports a Seiſin to his 1 Co. 122. Pop. 73.

own Uſe, the Notice, a Seiſin to the former Uſes, and where the Act is capable of a double Interpretation, that muſt be taken which conſiſts moſt with Equity.

1 Co. 122. If a Feoffment be made with Conſideration, and without Notice, the Feoffee ſhall be ſeized to his own Uſe, for here the Act is capable of no other Conſtruction.

1 Co. 122. If *A.* is enfeoffed to the Uſe of *B.* and *A.* enfeoffs *C.* without Conſideration or Notice, 'tis ſtill to the Uſe of *B.* for tho' when a Man aliens without Conſideration, 'tis to the Uſe of the Feoffor, yet in this Caſe it cannot be to the Uſe of *A.* becauſe he himſelf held it to the Uſe of *B.*

Weg *and* Villers. 2 Ro. Ab. 796. *A.* in Conſideration of natural Affection, covenants to ſtand ſeized to the Uſe of himſelf for Life, the Remainder to his Daughter for Life, with contingent Remainders over, *A.* reciting the Uſes, grants the Reverſion to *F.* and his Heirs expreſly, but without Conſideration, *F.* ſhall take it ſubject to the Uſes, *cauſa qua ſupra.*

Hob. 348. *Earl of* Ormond's *Caſe.* *J. S.* ſeized to the Uſe of *A.* in Tail, the Remainder to *B.* in Tail, Remainder to the right Heirs of *A.* *J. S.* and *A.* join in a Feoffment to three, two of which have Notice of the former Uſes, and therein they limit new Uſes, the

new

new Uſes ſhall ſtand; for *A.* has a Power to diſcontinue his own Eſtate in Tail, and the Remainder alſo; which is done by this Feoffment; and they cannot be re-continued by the Entry of *J. S.* who cannot enter contrary to his own Act. Hob. 349, 350.

But *B.* will have a Remedy againſt all the Confederates in the Breach of this Truſt, *viz. J. S.* the Feoffees that had Notice, and out of the Eſtate of *A.*

If a Feoffee to an Uſe binds himſelf in a Statute, *&c.* and the Conuſee takes out Execution, he ſhall have it to his own Uſe; for the Chancery will not relieve againſt the Act of Law, where the Property is veſted upon valuable Conſideration, and with no fraudulent Deſign. Bro. *Feoff. to Uſes*, 338. *a.*

A Feoffee of a Manor to the Uſe of *J. S.* releaſes to the Tenants, they ſhall not have it to the Uſe of *J. S.* for the Seigniory is drowned in the Tenancy which they had to their own Uſe, and there can be no Truſt without an Eſtate in Being. Bro. ib.

But by the modern Courſe of Chancery, if the legal Eſtate be merged, and the Owners of the Land have Notice of the Truſt, the Land is inveſted with it, and they ſhall be enforced by a Decree in Chancery to ſet it up again, for the Land was at firſt bound, and Jackſon *and* Jackſon's *Caſe*, Nat. Arg. 14.

atten-

attendant to anſwer the Truſt; and where the Owners of the Land knew of this Truſt, 'tis Iniquity in them to deſtroy it.

1 Rep. 122. a. 129. b. 139. A Diſſeizor, Abator, or Intruder, cannot be ſeized to an Uſe, for they take it under no Truſt, but defeat the Eſtate to which the Truſt was ſubjoined, and the Chancery has no Power to try the Right of Inheritance between them, for the Right of that Title is triable only at Common Law; but if he, who has the Uſe, exhibits a Bill againſt the Feoffee to an Uſe, the Chancery will order him to try the Title with the Diſſeizor at Common Law.

1 Rep. 122. If a Feoffment be made to one for Life, Remainder in Fee to the Uſe of *J. S.* and the Tenant for Life aliens in Fee, with Notice, the Alienee ſhall not ſtand ſeized to the firſt Uſes; for the Tenant for Life has no Power ſo to alien, and now the Feoffee is in of an Eſtate by Wrong, quite different from that to which the Truſts were annexed.

1 Rep. 122. *a.* 129. *b.* Bro. *Feoff.* 338. *a.* S. 1 R 122. *A Lord by Eſcheat* ſhall not be ſeized to an Uſe, becauſe he is in by a Title paramount, and ſeized of an Eſtate antecedent to that to which the Uſe is annexed. Lord of a Villain, a *Lord* that enters for *Mortmain*, or recovers by *Ceſſavit*, or a *Tenant by the Curteſie*

Curteſie cannot be ſeized to an Uſe, for they claim by the general Laws and Statutes of the Kingdom, which the Chancery has no Power to alter, and do not take as Subſtitutes under thoſe private Contracts, to which Truſts are annexed, and ſo cannot be puniſhed as corrupt Breakers of that Truſt which they never undertook.

But a Tenant in Dower may be ſeized to an Uſe, for a Tenant in Dower claims by the Marriage Agreement, and a ſufficient Proviſion is made for her by Law, which is a third Part of his Eſtate; and ſince a private Contract is the Original of her Title, ſhe continues the Eſtate of her Husband as he purchaſed it, and under the ſame Truſt and Agreements. Hard. 469. Co. Lit. 239. 1 Rep. 122. *contr.* Bro. *F. to Uſes*, 338. S. 10.

An Occupant may be ſeized to an Uſe, for an Occupant continues the Eſtate of Tenant for Life, as his Subſtitute, and ſo muſt take it as he had it. Hard. 468. Bro. *Feoff. to Uſes*, 338. *a.* S. 10.

Tenant in Tail cannot be ſeized to an Uſe, for the Land is by the Act of Parliament appropriated to Tenant in Tail and his Heirs; ſo that the Chancery, which is bound by the Act of Parliament, cannot turn it to any other Purpoſe. C. L. 196. Cro. Jac. 400. 2 Ro. Ab. 780, 1. Ro. Rep. 313. Bro. *F. to Uſes* 338. *a.* S. 10.

Where

1 Co. 128. *b.* Where there is a Tenant for Life, the Remainder in Fee to the Uſe of another, and he in the Remainder enters and diſſeizes the Tenant for Life, he takes the Eſtate as a Diſſeiſor, and is not capable of taking any Eſtate after the Truſt ended, for he cannot be remitted contrary to his own Act.

1 Ro. Ab. 780. If a Man poſſeſſed of a *Term* in Truſt, commits *Treaſon*, whereby the Term is forfeited to the *King*, the *King* is not ſubject to that Truſt, for he is in the *Poſt*, and the Law diſpoſing the Property of all Criminals to the Uſe of the King, he cannot take it under the Truſt limited.

Pop. 72, 78. Where there is a *Tenant for Life*, the *Remainder* to *A.* to the Uſe of *B.* and the Tenant *for Life* makes a Feoffment in Fee, and *A.* releaſes to the *Feoffee*, the *Uſe* is gone for ever, *cauſa qua ſupra.*

Hard. 469. If Mention be made of Perſons in the Poſt, it ſeems, by the Opinion of the Lord *Hale*, they ſhall be liable to the Truſt.

Bro. *F. to Uſes*, 338. *a.* S. 10. If a Man grants a *Seigniory* to *A.* to the Uſe of *B.* and the Tenancy Eſcheats, *A.* ſhall hold the Tenancy to the ſame Uſe; for a Seigniory ſuppoſes an old Property after the preſent Fee is determined, and ſince *A.* has taken

it up to the Uſe of *B.* when the Tenancy comes in, he ſhall have it to thoſe Uſes to which the Property was at firſt granted.

Where Feoffee to *A.*'s Uſe vouches and recovers Land in Value, he ſhall be ſeized to his firſt Uſe, for the Recompence muſt enſue the Loſs, and *Ceſtuy que Uſe* loſt his *Uſe* by the Recovery.

Where *A.* Feoffee to the Uſe of *B.* grants a Rent to *C.* having Notice of the Uſe, the Rent ſhall be to the Uſe of *B.* for *A.* has the Freehold in him, and now at the Common Law may raiſe a Freehold out of it, but he has the Fee in Truſt, and ſo in Conſcience cannot raiſe a Freehold but under the ſame Truſt; and ſince in that Caſe he gave Notice of the Truſt, he has created the Rent under the Truſt according to his Power; and ſo if *A.* makes a Feoffment to *D.* without Notice, and *B.* releaſes to *D.* after the Stat. of *R.* 3. and before the Stat. of *H.* 8. this did extinguiſh the Rent; for by that Stat. the Releaſe of *Ceſtuy que Uſe* is an Act ſufficient to convey the Freehold of the Rent, and ſo 'tis merged in the Land. Bro. *F. to Uſes*, 337. *b.* S. 10. 14 H. 8. 4.

But if Feoffee to a Uſe grants to *J. S.* a Way or Common for his Beaſts, this Bro. *F. to Uſes*, 338. S. 10.

this, *ex natura rei*, cannot be but to the Uſe of the Grantee.

Bro. *F. to Uſes*, 339. S. 27. The Feoffee to an Uſe may grant the Office of a Steward, Bailiff, Receiver, *&c.* for he is the Inſtrument to convey the Profits to *Ceſtuy que Uſe*, and now it may be in his Power to appoint all Means in order thereunto; but

ibid. this it ſeems muſt be by the Conſent of *Ceſtuy que Uſe*; for this Appointment is wholly to convey the Profits to him.

Bro. *F. to Uſes*, 339. S. 27. But during the Minority of the Heir of *Ceſtuy que Uſe*, all Feoffees may grant ſuch Offices without his Aſſent, for the Law ſuppoſes a tacit Conſent when 'tis for the Benefit of the Infant.

Ibid. But they cannot ſettle Fees to ſuch Officer during Life, without the Aſſent of the Infant when he comes to his full Age, for that may be to his Prejudice.

Trin. 9. Car. Eaſt-Greenſtead's *Caſe*, Herne's *Char. Uſes* 60,61,62, 63. A Feoffee to a Charitable Uſe makes a Feoffment upon valuable Conſideration, and without Notice, the Purchaſer ſhall not be ſeized to a charitable Uſe, nor any Perſons claiming under him, tho' they have Notice; for he is expreſly excepted by the Statute, and the Lands once diſcharged are never after chargeable.

But

But if the Feoffee to a charitable Uſe makes a Feoffment to *A.* for a valuable Conſideration, and without Notice, and *A.* enfeoffs *B.* for a valuable Conſideration, without Notice, *B.* ſhall be ſeized to the charitable Uſe; for the Words of the Statute are, that the Commiſſioners ſhall come and order the Lands and Tenements to be employed according to the Party's Intent, ſo that the Statute appropriates the Lands to the charitable Uſes in the Hands of *A.* and *B.* his Subſtitute takes it under the Charge, and in ſetting forth the Title how he has obtain'd them, he muſt ſhew the original Purchaſe which was under the Charge.

Hill. 11. Car. Sutton *and* Colefield's *Caſe.* Herne 135, 136, 253, 254, 256.

If a Man gives Land to *A.* and a Rent out of it to charitable Uſes, *B.* purchaſes the Land, with a good Conſideration, and without Notice, he ſhall hold it charged; for firſt the Rent is not extinct by the Purchaſe, becauſe appropriated by the Statute to the charitable Uſe, and ſo cannot be merged according to the Rules of Common Law while the Charity continues.

Peacock *and* Shewer, 14 Car. Mic. Herne 100. Town *of* Woodford *and* Pockm. Hill. 14. Car. Herne 74. *New Ed.* 174.

2. 'Tis not within the Exception of the Statute, for that extends only to the Purchaſers of the legal Eſtate to which the Charity is annexed, and *B.* has purchaſed the legal Eſtate of the Land

Land and not of the Rent, for theſe are as diſtinct Rights in *A.* as if they had been in different Perſons.

2. 'Tis to be conſidered what are the ſeveral Properties of an Eſtate in an Uſe.

1. If an Inheritance be purchaſed, 'tis deſcendible to Heirs at Law, and here 'tis to be conſidered,

1 *What are the Deſcents of an Uſe in Poſſeſſion.*
2. *What is the Deſcent of an Uſe in Reverſion.*

1. Of the Deſcent of an Uſe in Poſſeſſion. If an Uſe be limited to a Man and his Heirs, the Court of Chancery will direct it to go to ſuch Perſons as the Common Law has appointed to repreſent him; for the Chancery cannot alter the common Import of Words, or ſet up Rules of Property oppoſite to the Rules of Law; for there is no legiſlative Power in the Chancery; and to abrogate and ſet aſide Laws, is equal to the Power of making Laws.

1 Co. 121.

1 Co. 121. C. L. 14. 4 Rep. 22. There is *poſſeſſio fratris* of an Uſe, for the Rules of Inheritance govern in Chan-

Chancery; now none can make himſelf Heir, but he that repreſents the Perſon that was laſt in Poſſeſſion; for he that laſt poſſeſſed it had the entire Dominion and Property, which none elſe can have but by ſtanding in his Place; and no Man can ſtand in his Place but one of the whole Blood.

If Lands deſcend on the Part of the Mother, and the Party makes a Feoffment in Fee, without Conſideration, or reſerving this Uſe to him and his Heirs, the Uſe ſhall deſcend to the Heirs of the Part of the Mother; for the Land would have gone to the Heirs of the Part of the Mother, and a Uſe is but an Eſtate in Equity, Part of the Eſtate in the Land; for the Rule of Law that tends to the Eſtabliſhment of Families and Encouragement of Induſtry, is, that thoſe that take Benefit as Repreſentatives ſhould convey it all along in the Blood of the firſt Purchaſer, from whom the Benefit was derived, and the Uſe and Poſſeſſion was derived from the Mother, and the Uſe was never parted with, but the Poſſeſſion only; ſo the Uſe muſt be all along conveyed to the Heirs on that Side. Co. L. 13. 2 Ro. Ab. 780. Dy. 179. Co. L. 22. 13 Co. 56. licet Hob. 31. Dy. 134. *contr.* Bro. *F. to Uſes*, 338. *a.* S. 10.

If a Man for a valuable Conſideration purchaſes Lands, or the Uſe of them, to himſelf, yet they ſhall deſcend Bro. *F. to Uſes*, 337. *b.* 4. 1 Co. 100. *b.*

ſcend to his Heirs; for there wants not the Word *Heirs* to create an Inheritance in an Uſe; for 'tis Equity that a Perſon, who gave a Conſideration for the Fee, ſhould have it; and that is not ſetting up any other Rules of Property oppoſite to the Rules of Law, but mitigating and diſpenſing with the Rules of Law, in particular Caſes, where they ſhould happen to ſhelter Diſhoneſty and Oppreſſion: But now ſince the Statute, no Inheritance can be raiſed without the Word *Heirs*, becauſe now the Uſes are transferred into Poſſeſſion, and muſt be governed by the Rules of Poſſeſſions at Common Law, as to the Words that create new Eſtates.

Cro. Eliz. 478.

The *Poſſeſſio fratris* of an Uſe follows the Analogy of Deſcents at Law; and ſo if a Man ſeized in Fee of an Uſe, had Iſſue a Son and Daughter by one *Venter*, and a Son by another *Venter*, and deviſes it for Years, and dies, and the Son dies during the Term, the Daughter ſhall have it, and not the Son; otherwiſe it had been if he had deviſed it for Life.

1 Rep. 101. 5 Ed. 4. 7. Dy. 179. 2 Ro. Ab. 780. C. L.

As the Court of Chancery cannot alter the Deſcent of the Land, ſo it cannot alter the Law and Cuſtom of a Place;

23. 13 Co. 56. Hob. 31. Dy. 134 *contra.*

Place; for all immemorial Uſages are Part of the Laws of the Land: And ſo if a Man makes a Feoffment in Fee of Lands in Gavel-Kind, or Burrough Engliſh, without a Conſideration, to the Uſe of the Feoffor and his Heirs, this ſhall go to all the Sons, or to the youngeſt, according to the Cuſtom. Br. 339. S. 32.

If there is a Cuſtom, that Lands ſhall go to the eldeſt Daughter only, and the Party makes a Feoffment in Fee to the Uſe of him and his Heirs, the Uſe ſhall go to the eldeſt Daughter. 2 Ro. Ab. 780. 10 Car. Jones *and* Ronsby.

2. *Of Deſcents of a Reverſion which are governed by theſe Rules.*

Firſt, Where a Man has an Eſtate in himſelf, and limits an Eſtate to his Right Heirs, he is ſeized of the whole Eſtate.

In the ſame Manner, where a Man has a Uſe in himſelf, and limits a Uſe to his own Right Heirs, the ſame Uſe is in him ſtill. The Reaſon is, becauſe Anceſtor and Heir are Correlative; and ſo whoever repreſents me as to my Eſtate veſted in him after my Death, I repreſent him during my Life as to that Eſtate; and conſequently giving an Eſtate, already in me, to my Heir, is not departing with it; for 'tis a Diſ- 1 Vent. 380.

poſition in other Words to my ſelf, and ſo all Things remain *in ſtatu quo.*

But where I limit a Uſe, already in me, to my own Repreſentatives, and add a Qualification to thoſe Repreſentatives; tho' this be not Departing with the Eſtate, becauſe theſe are not Words to convey it out of my ſelf, yet there is an Alteration of the Eſtate in my ſelf, and the Uſe ſhall alter and deſcend to my Heirs that came under that particular Diſtinction and Qualification; becauſe the Uſe has always been changed and modified according to the Intent of the Parties that have the Intereſt; and ſuch a particular Eſtate ſhall be ſuppoſed in them, as may beſt anſwer the Intent, *ut res valeat.*

1 Vent. 278, 9. 1 Co. 47, 137. *a.* Co. L. 22. *b.* Hob. 27. 1 Mod. 96. 1 Ro. Ab. 827, 841. 627. Dy. 156, 237, 362.

If a Man ſeized of Lands in Fee, makes a Gift in Tail, or a Leaſe for Life, Remainder to his own Right Heirs, they take by Deſcent, as in the old Reverſion.

If *A.* ſeized of Lands in Fee, grants them by Fine, during his own Life, the Remainder to his own Right Heirs, the Reverſion is in him, and he may grant it.

A Fine *ſur Conuzance de Droit que il et ſa Feme ad de ſon done* to the Husband, with a Remainder to the Conuſor, for Life, Remainder to the Right

Dy. 237.

Right Heirs of the Husband, they are in the old Reverſion, and the Wife ſurviving ſhall have it for Life.

If a Man makes a Feoffment without a valuable Conſideration, to the Uſe of himſelf, for fifty Years, the Remainder to *B.* in Tail, the Remainder to his own Right Heirs; the Feoffor is in the old Reverſion, and he may deviſe it; for a Feoffment without Conſideration does not diſpoſe of the Uſe thereof; the old Uſe is in him ſtill. *E. of* Bedford's *Caſe*, Pop. 3. 1 Co. 130. Moo. 718, 719.

But it hath been held that if the Feoffment were made upon a valuable Conſideration, in as much as that is a Diſpoſition of the Uſe, there is an Eſtate in the Feoffees to retain it till the Death of the Feoffors; and this is an Eſtate of Freehold, and affords a *Tenant to the Precipe*, and an Eſtate to ſupport the contingent Remainder. Co. Lit. 22. *b.* 23. *a.* Moor 720, 721.

If a Man covenants to ſtand ſeized to the Uſe of his Heirs, begotten on a ſecond Wife, that is an Eſtate in Tail, veſted in the Anceſtor. Pybus *and* Mitford, 1 Mod. 98, 121, 122, 129.

2. Where a Man limits an Eſtate of Freehold to me for Life, with a Remainder to my Heirs, tho' after never ſo many particular Eſtates, the Remainder is veſted in me for three Reaſons. Bro. *F. tit. Uſes*, 338. S. 16. 1 Ven. *from* 372 *to* 382.

Firſt, Becauſe otherwiſe you conſtrue the Grantmoſt in Favour of the Grantor, and let him in to the Reverſion during the Contingency, to puniſh Waſte and enter for the Forfeiture.

Secondly, Becauſe the whole Advantage muſt be intended to me when I am firſt named to take the ſame Sort of Eſtate in the Conveyance, and the Benefit is not deſigned to any other particular Conveyance, but to all other Perſons that bear the Character of my Repreſentatives; ſo that the Limitation is for my Sake, and only intends to enlarge my Eſtate after the particular Eſtates are worn off, yet cannot be conſtrued in the ſame Manner as where an Eſtate is limited to *A.* the Remainder to the Right Heirs of *B.* becauſe there is nothing in the laſt Caſe to lead the Mind to ſuch an Interpretation; for here is no Benefit originally deſigned to *B.* but to his Heir primarily; and ſo the Heir takes as a Purchaſer.

But if the ſame Sort of Eſtate be not limited to the Anceſtor as to the Heir, the Heir muſt take by Purchaſe; for it is plain the Donor deſigned him an original Benefit, quite different from what he deſigned the Anceſtor.

Thirdly, Becauſe when the particular Eſtates are worn off, they are as if they had

had never been; and ſo the Heir ſhould claim by Deſcent, as in his better Title, and as of the Dying ſeized of his Anceſtors.

Another Reaſon of this Law is, becauſe it muſt be a contingent Remainder, or a Remainder veſted; but it could not be a contingent Remainder, becauſe of Neceſſity it muſt be in the Anceſtor, and the Perſon that repreſents him, and ſo conſtrued a Remainder veſted.

If *J. S.* makes a Feoffment to the Uſe of *A.* for Life, the Remainder to *B.* in Tail, the Remainder to the Right Heirs of *A.* the Remainder is veſted in *A.* and his Heirs claim by Deſcent. Co. Lit. 22. *b.* Co. 91. *b.* Fenwick *and* Nutford. Mo. 284, 5, 720.

But if *J. S.* makes a Feoffment to the Uſe of *A.* for a Term of Years, the Remainder to *B.* in Tail, the Remainder to the Right Heirs of *A.* the Remainder is not veſted in *A.* but his Right Heirs take by Purchaſe. Cro. Car. 24. *a.* Co. Lit. 22. *b.* Moore 720. 1 Co. 104.

If an Eſtate be limited to *A.* for Life, Remainder to the Heirs Males of the Body of *A.* and to the Heirs Males of ſuch Heir Male, there is a Truſt executed in *A.* becauſe this is within the Rule; for here an Eſtate is limited to *A.* for Life, with a Remainder to his Heirs; and ſo the Word *Heirs* is not a Name of Purchaſe but Limitation. 1 And. 76. 1 Co. 104.

1 Co. 66, 67. 11 H. 6. 13. Co. Lit. 22. b.

But if an Eſtate be deviſed, or *per Hale*, be conveyed to *A.* for Life, the Remainder to his next Heir Male, and to the Heirs Males of the Body of ſuch Heir Male; there is an Eſtate only for Life in *A.* and a contingent Remainder in his Heir, as a Purchaſer, which veſts *eo inſtanti* that the particular Eſtate determines; for tho' there be an Eſtate for Life in *A.* yet the Remainder is limited to his Heir only, in the ſingular Number; and Heir in the ſingular Number only, is a Word of Purchaſe, and not of Limitation.

Co. Lit. 8. b.

If an Eſtate be limited to a Man and his Heir, he has only an Eſtate for Life; for it cannot go in perpetual Succeſſion, becauſe no more Repreſentatives than one only is expreſſed. The Heir cannot take by Way of Remainder, becauſe it is limited by a Conjunction Copulative; and as Jointenant he cannot be, becauſe *nemo eſt Hæres viventis.*

Co. Lit 8. b.

But if a Man deviſes an Eſtate to a Man and his Heir, a Fee-ſimple paſſes, and Heir there is taken as *nomen collectivum*, to anſwer the Intent of the Party, which appears to be, that he intended to paſs a Fee, as if it had been limited to the Deviſee and his Heirs for ever.

But

But if an Eſtate be deviſed to *A.* during the Life of *B.* in Truſt for *B.* and after the Deceaſe of *B.* to the Heirs Males of the Body of him the ſaid *B.* now living; that is a Remainder veſted in the Heirs of *B.* for Heir now living, in that Deviſe, muſt be taken as a Periphraſis of the Heir apparent, who is called Heir in Law, as may be obſerved by the Words *quare filium & Hæredem rapuit.* 2 Vent. 311, 318.

2. A Feme is not dowable of an *Uſe*, for the Privilege of Dower was only to Freeholders Wives; now an Uſe being no Freehold, is not within that Law, and the Chancery allows the Feoffees to be ſeized to no Body's Uſe, but thoſe that are particularly named in the Truſt. 1 Co. 123. *b.* 4. Dy. 11. *b.* 1 Ch. Rep. 152.

And that being the Caſe, it became a Practiſe; ſo the Father and Friends of the Woman, procured the Husband to take an Eſtate from the Feoffees, or others ſeized to his own Uſe, for Life; and then to the Uſe of his Wife, for Life, before or after the Marriage; which was the Original of Jointures. 4 Co. 1. *b.*

Nor can the Husband be Tenant by the Curteſie of an Uſe, *cauſa qua ſupra.* 4 Co. 123. *b.*

3. An Uſe is alienable, *1ſt*, at Common Law, *2dly*, by the *Stat. of R.* 3.

a Dower

a Dower was annexed to it to alien the Lands.

Allen 16. Plow. 349. *b.* 1. At Common Law, *Ceſtuy que Uſe* might alien the Uſe, becauſe every one may diſpoſe of the Rights that were in him; or he may prefer a Bill in Chancery to make the Tertenant execute the Uſe in himſelf.

But at Common Law, if *Ceſtuy que Uſe* had entered and made a Feoffment in Fee of the Lands, this had not been good to paſs the Eſtate to the Feoffee; becauſe *Ceſtuy que Uſe* had not the Freehold in him, and ſo could not paſs it to another; but by his Entry he was a Diſſeiſor: Yet in this Caſe, if the Feoffees of *Ceſtuy que Uſe* had re-entered upon the Purchaſer, the Feoffees would not have had the Lands to their own Uſe by the original Truſt; and they would not have ſtood ſeized to the Uſe of *Ceſtuy que Uſe*, becauſe he had transferred the Uſe to another.

Plow. 352. *b.*

If *Ceſtuy que Uſe* makes a Leaſe for Years, rendering Rent, the Reſervation is void, unleſs it be by Deed; for the Rendering Rent to a Man is an Acknowledgment of the holding Lands from him; but here the Lands are not held of *Ceſtuy que Uſe*, but of the Feoffees who have the Reverſion. But if the Reſervation be by Deed, the Feoffees

fees are eſtopped by their own Act to deny the Tenure of *Ceſtuy que Uſe*. Bro. F. tit Uſes, 338. S. 23, 339. 26.

If *Ceſtuy que Uſe* may make a *Letter of Attorney* to give *Livery*, *Quære*; or if the Act confines it to the Act of *Ceſtuy que Uſe*. Bro. F. tit Uſes, 339. S. 28.

2. By the Statute of 1 *R.* 3. *c.* 1. a Power was annexed to a Uſe, that *Ceſtuy que Uſe* ſhould alien the Lands.

The Reaſon of that Statute was, becauſe *Ceſtuy que Uſe* in Poſſeſſion often aliened the Lands, and then the Feoffees entered, which cauſed a great deal of Vexation and Chancery Suits; and ſo the Statute gave to *Ceſtuy que Uſe* an immediate Power of Alienation, without the Concurrence of the Feoffees.

Firſt, *Who are within the Statute.*

Secondly, *What Authority is given by it.*

1. By the Statute *Ceſtuy que Uſe* has no Power of Alienation, when he has a naked Right to a *Uſe*, and not a *Uſe* in *Eſſe*; unleſs it be in order to confirm an Eſtate in Being; becauſe the Intent of the Statute was only to give *Ceſtuy que Uſe* a greater Power, and to transfer his Eſtate, and not any other Remedy to regain and reveſt it; and unleſs he has the *Uſe*, he cannot paſs Plow. 351. *b.* 1.

the

the *Uſe*, much leſs the Poſſeſſion to another: And ſo if *A.* ſeized of Lands to the *Uſe* of *B.* enfeoffs *J. S.* and dies without Iſſue, *C.* has no other Way of regaining the *Uſe* but by the Entry of the Feoffee; and he has no Power to alien by this Statute till the *Uſe* be reveſted.

Plow. 351. *b.* 1. But if the *Feoffee* to a *Uſe* in Fee be diſſeiſed, and *Ceſtuy que Uſe* releaſes to the Diſſeiſor, this extinguiſhes the *Uſe*, and by the Statute bars the Entry of the Feoffee.

Bro. F. *to Uſes*, 331. *b.* S. 8. 27 H. 8. 29. Where Feoffees to an *Uſe* are Diſſeiſees, and after the Diſſeiſor enfeoffs *Ceſtuy que Uſe*, who enfeoffs a Stranger; this is good, and ſhall bind the Feoffees; for the Feoffment is good to paſs the Poſſeſſion, and Right of the *Uſe*, which he had in him; and the Feoffees cannot enter to revive an *Uſe*, which the Party himſelf by his own Act has extinguiſhed.

2. The Statute is to be underſtood of *Ceſtuy que Uſe*, that has an *Uſe* in *Eſſe*, in Oppoſition to him that has only a Reverſion or Remainder of an *Uſe*.

Plow. 350. 1 Co. 122. *b.* If a Feoffment be made to the *Uſe* of *A.* for Life, Remainder to *B.* in Fee, *A.* may alien in Fee, becauſe the Feoffees claim the whole Eſtate for the *Uſe* of *A.* during his Life, and he has

has the whole Advantage of it; and the Statute that gives the preſent Poſſeſſor of the *Uſe* a Power of Alienation, has provided an immediate Remedy for the Remainder Man.

But if the Tenant for Life of an *Uſe* aliens in Fee, and dies, the Feoffees may enter on the Alienee; for by the Words of the Statute, the Alienation is good againſt *Ceſtuy que Uſe* and his Heirs, and Perſons claiming only to his *Uſe*: So when Feoffees claim to the *Uſe* of the Remainder Man, the Feoffment of Tenant for Life, according to the Authority given by the Statute, is no longer valid to bar the Feoffees of the Entry; for their Right is by the Common Law. Plow. 348. Delamer *and* Barrard's *Caſe, the Point reſolved.*

But if there be a Feoffment in Fee to the Uſe of *A.* for Life, the Remainder to *B.* in Fee; *B.* has no Power of Alienation by the Statute, during the Continuance of the Eſtate for Life, becauſe the Poſſeſſion is, as is ſaid, to the *Uſe* of *A.* only, during his Life, and ſo the Remainder Man has nothing to do with the Poſſeſſion; and if the Remainder Man would enter on the Feoffees and make a Feoffment, either the *Uſe* of Tenant for Life would be deſtroyed, or the Feoffees muſt re-enter and create a particular Eſtate to themſelves, Plow. 250. *b.* Bro. *Feoff. to Uſes,* 339. *b.* 44. 1 Co. 128. *b.*

ſelves, without being ſubject to *Dower*; for by the Common Law, every particular Eſtate is derived out of the Fee Simple by the Agreement of the Parties in Intereſt; but here are no Parties to ſuch Agreement, and the Statute has not altered the Law in this Caſe.

Plow. Ibid. But if there be a Tenant for Life, Remainder in Fee, he in Remainder may make a Leaſe for Years, or grant a Rent-Charge to begin after the Death of Tenant for Life; for he cannot enter and take the Poſſeſſion out of the Feoffee; but 'tis an Executory Contract on which the Statute operates after the Death of Tenant for Life.

Tenant for Life to the Uſe of *A.* and the Reverſion is granted with Attornment to another, to the Uſe of *B.* for Life; the Reverſion in Fee is granted to a third, to the Uſe of *C.* *B.* and *C.* may grant their Eſtates preſently, becauſe there is a Diviſion of Eſtates, and each has a Tertenant of his own; ſo that the transferring one Eſtate does not diſpoſſeſs another Tertenant, or make any particular Eſtate than what is created by the Parties.

1 Co. 128. A Feoffment to the *Uſe* of *A. T.* Remainder to the *Uſe* of *B.* in Tail, Remainder to *A.* in Fee, *A.* makes a Feoffment

ment to the *Uſe* of himſelf, for Life, the Remainder to his eldeſt Son in Tail, and then the Statute of *H.* 8. is made, and the Father dies; the firſt Feoffees may re-enter, and revive the former *Uſe*; for *A.* could only make a Feoffment in Fee determinable upon his own Life; but as this Contract muſt be taken ſtrongeſt againſt them, 'tis a Diſpoſition and Alteration of the *Remainder* in Fee, according to the *Uſes* limited.

2. *What Authority is given by the Statute.*

If a Lord or Grantee of a Rent, be alſo *Ceſtuy que Uſe* of the Land, and makes a Feoffment in Fee according to this Statute, the Rent is extinct; but if the Tertenant gives a Letter of Attorney to the Lord or Grantee of a Rent-Charge, and he makes a Feoffment accordingly, this does not extinguiſh the Rent; for in the firſt Caſe he paſſes alſo his own Intereſt and Eſtate in the Land; but in the laſt Caſe he himſelf paſſes nothing, for he is but ſubſtitute to another, and the Eſtate paſſes only from the Tertenant. Co. Lit. 52. a.

If

Co. Lit. 202. Bro. F. al Uſes, 338. S. 23. If *Ceſtuy que Uſe* makes a Feoffment in Fee upon Condition, and after enters for the *Condition broken*, he ſhall be ſeized of the Eſtate in the Land; for the whole Eſtate is diveſted out of the Feoffees by the Feoffment, and they cannot enter for the *Condition broken*, becauſe no Parties to it.

This Statute does not give *Ceſtuy que Uſe* any Power to deviſe the Land; for there are no Words that alter the Law in that Point.

D. 143. Bro. F. al Uſes, 337. S. 219. 37 H. 8. 13. If *Ceſtuy que Uſe* in Tail, aliens the Land by Leaſe and Releaſe, or Feoffment; this only binds the Feoffees during his Life, becauſe he has no longer Power of Alienation; *vid.* the Stat. If this *Ceſtuy que Uſe* aliens by *Fine*, this is good, and bars the Entry of the Feoffees after his Death; for that would diſpoſſeſs the Eſtate in Tail by the Stat. of 4 *H.* 7. and if he aliens by *Recovery*, it does not bind the *Iſſue*, Ibid. S. 7. becauſe he is not *Tenant to the Precipe*; ſo that would be no Bar at Common Law, and this is not helped by any Statute: For tho' a Recovery here be expreſly mentioned, and ſo binds the Party himſelf, yet the Right of the Eſtate in Tail is ſevered.

1 Ch. Caſ. 49, 213. 2 Ch. Caſ. 63. 64. If Tenant in Tail of a Truſt levy a Fine, or ſuffer a Recovery, this is an equi-

equitable Bar of the Eſtate, tho' the Truſtee does not join in the Recovery to make a legal Tenant to the *Præcipe*; for as the Fine and Recovery paſs the Entail in a legal Eſtate at Common Law, ſo it paſſes the Entail of a Truſt in the Court of Equity.

But if Tenant in Tail of a Truſt makes a Mortgage, or acknowledges a Judgment or Statute, and then levies a Fine and ſettles a Jointure, the Jointreſs ſhall hold it ſubject to the Mortgage or Judgment, in the ſame Manner as if the Mortgagor or Conuſor had been Tenant in Tail of the legal Eſtate, and after the Mortgage or Judgment had levied a Fine and made a Jointure; becauſe the ſubſequent Declaration of the Uſe of the Fine is meerly the Act of Tenant in Tail, and he cannot by any Act of his own make a ſubſequent Conveyance take Place of a precedent; and the rather becauſe the Feme claims under that Fee which Tenant in Tail got by the Recovery or Fine; and that Fee was ſubject to all the Charges he had laid upon it. 1 Ch. Caſ. 119, 120.

If a Man recovers by an erroneous Judgment, and makes a Feoffment to his own Uſe, and upon a Writ of Error the Judgment is reverſed, the Party Bro. *F. al Uſes*, 337. S. 3. 26 H. 8. 2.

ſhall enter without a *Scire facias* againſt the Feoffees; for this is within the Letter of the Statute.

Bro. F. *al Uſes*, 337. S. 6. 27H.8.13. If *Ceſtuy que Uſe* makes a Leaſe for Years, reſerving a Rent, he ſhall have an Action of *Debt* upon the Contract; but he ſhall not *avow*, becauſe the legal Eſtate of the Reverſion is ſtill in the Feoffees, ſince he has put the Eſtate out of them but for a Term; but the equitable Eſtate is in him, and he may diſpoſe of it, and the Rent paſſes; but the Feoffees ſhall puniſh for *Waſte* done by the Tenant, and enter for a *Forfeiture*, &c.

Bro. F. *al Uſes*, 338. *b.* S. 23, 339. B. F. *al Uſes* 338. S. 18. Co. Lit. 47. If *Ceſtuy que Uſe* makes a Leaſe for Years, reſerving a Rent, this ſhall go to his Heirs; for ſince the Statute has given him Power to make Eſtates at Law, they are governed by the Rules of Common Law.

B. F. *al Uſ.* 338. S. 18. If *Ceſtuy que Uſe* makes a Leaſe for Years, reſerving a Rent, with a Clauſe of *Re-entry* for Nonpayment of the Rent, and the Rent is behind, *Ceſtuy que Uſe* may enter; for he only can take Advantage of his own Condition. And ſince the Statute allows the Act of Re-entry by allowing him Power to make Leaſes, he ſhall for ever keep the Poſſeſſion againſt the Feoffees. *Quære tamen.*

4. A Uſe is deviſable.

For the Reaſon why Lands were not originally deviſeable, was, becauſe the Ceremony of *Livery* was required to the Tranſmutation of the Poſſeſſion, which is not Neceſſary to the Diſpoſal of an *Uſe*; for *Livery* is to give Notice againſt whom the *Præcipe* is to be brought, and the *Præcipe* is only of an Eſtate of Freehold. *Treatiſe of Tenures* 77. 1 Co. 123. *b.* B. *F. al Uſ.* 3. 37 H. 8. 8. Doct. *and* Stud. 30. 22. H. 8.

If a Man makes a Feoffment in Fee to the *Uſe* of his laſt Will, the Feoffor has it to the Uſe of himſelf and his Heirs; for until a Man has actually diſpoſed of the *Uſe*, the *Uſe* is in him only: It is ſo in this Caſe; and if he deviſes, the Parties muſt claim their Intereſt by the Deviſe. 6 Co. 18. Co. Lit. 111. *b.* 272. *b.* Bulſ. 200. Paſ. Jac. 10. Semain's *Caſe.*

But if a Man makes a Feoffment in Fee to the *Uſe* of ſuch Perſon and Perſons, and of ſuch Eſtate and Eſtates as he ſhall appoint by his laſt Will; there by the Words of the Conveyance he has a *qualified Fee*, determinable upon the Limitation of other Eſtates; and the Feoffment mentions the future Eſtates that ſhall riſe on his Denomination, which plainly conveys an *Executory Fee* to the Perſons nominated; and 'tis only the Office of the *Will* to 6 Co. 18. C.L. 111. *b.* 272. *b.*

nominate; for the Intereſt is transferred and diſpoſed of by the *Feoffment*. But in the former Caſe there is in the *Feoffment* no Words of Diſpoſition, *&c.* and there the Parties muſt claim by the *Deviſe*.

4 Co. 23. 1 Leon. 174. If a *Copyholder* ſurrenders to the Uſe of his laſt Will, the Land is ſtill in the *Copyholder*, and he may diſpoſe of it by an Act in his Life-Time; if he does not, by any Will, it ſhall go to his Heirs; if he makes a Will, it paſſes by the *Surrender*, and not by the *Will*; for the Property of the Copyhold is not altered by a private Act of the Tenant, but by an open and ſolemn Act in the Lord's Court; but at Common Law the Uſe of the Land may paſs by a *Deviſe*, as is ſaid; and the Freehold it ſelf ſince the *Statute*.

Cro. El. 441, 2.

6 Co. 18. Hob. 349. If a Man ſuffers a *Recovery* to the *Uſe* of his *Laſt Will*, he may diſpoſe of the Eſtate by a *Conveyance de novo* during his Life; but he cannot, during his Life, limit new *Uſes* on the *old Recovery*, ſo as to be thereby bound from any Alteration; for the whole Intereſt of the Recovery was declared to be to the *Uſe* of his *Will*, which is changeable in its Nature.

B. F. *al Uſ.* 337. *f.* 79. H. 8. 12. A Man makes a Feoffment in Fee to the *Uſe* of his Laſt Will, and in the

the Deed he expreſſes the *Uſe* of the Will to be to himſelf for Life, and then to his Son in Tail, and afterwards makes a Leaſe for Years, and dies; this ſhall bind the Son; for it being expreſly declared to the *Uſe* of his Will, it ſuppoſes a Power in him to change it.

Ceſtuy que Uſe deviſes, that his Feoffees may alien the Land to *J. S.* the Feoffees may enfeoff *B.* and *B.* may alien to *J. S.* B. F. 338. S. 12.

Ceſtuy que Uſe deviſes, that his Feoffees ſhould alien the Land for Payment of his Debts, the Creditors may compel him in the Court of Chancery to do it. Ibid.

If *Ceſtuy que Uſe* deviſes, that his *Feoffees* ſhould alien the Land, this is in the *Heir* till Alienation. Ibid.

5. *'Tis not* extendable *or* Aſſets,

Becauſe there is no Proceſs at Law but upon Eſtates at Law; and *Uſes* are meerly Creatures of Equity, on which the Common Law can award no Execution; and they are not *Aſſets*, becauſe they go in the Courſe of *Inheritance*, and not to *Executors*. Rep. 1. 121. *b.* B. F. *al Uſ.* 339. S. 25. 1 Ch. Rep. 14, 128.

But if a *Term* be limited to attend a *Fee*, this ſhall be *Aſſets* for the Payment of juſt Debts; for the Court of Chancery will not carry it out of its Hard. 489.

due Courſe, where there is any Prejudice or Inconvenience.

But by the Stat of *R.* 3. 'tis held *extendable* upon a *Statute Staple* or *Merchant*; for this is in the Nature of a *Grant*, or *Leaſe for Years*; and Grants of Leaſes are made good againſt *Ceſtuy que Uſe* and the *Feoffees*, by the Statute.

B.F. al Uſ. 339. S. 25. 1 Co. 131. b.

But ſince the Statute of *Frauds and Perjuries*, they ſeem to be *Aſſets* in the *Heir* for the Payment of juſt *Debts*, the *Heir* being obliged to pay all juſt Debts out of a real Eſtate that deſcends from the Anceſtor.

1 Chan. Rep. 128.

6. *'Tis not forfeitable.*

1. Not for *Felony*; for in Caſe of *Felony* the Lands are caſt on the Lord of whom they are holden, for Want of *Heirs*; but a *Uſe* is holden of no Body.

Hard. 466, 7. 488 to 489. B.F. al Uſ. 339. S. 334.

2. Not for *Treaſon*; for all Tenures are forfeited by the Breach of Fidelity and Duty owed to the Lord; for under that Condition the Tenants take their Eſtates, and conſequently all Breaches of Allegiance forfeit the Eſtate to the *King*, ſince it originally came from him, conſequently the Eſtate which is holden may be forfeited; but

Hard. 492, 495.

but a *Uſe* is holden of no Body: But this is alter'd by the Statute.

If a Term be limited in Truſt, and *Ceſtuy que Truſt* commits *Treaſon* or *Felony*, the Term is forfeited; for the perſonal Property goes with the Perſons; when the Poſſeſſion is forfeited, the Party is incapable of perſonal Property, and conſequently the Right is in the Publick, and the King has the *Uſe* of the Term in this Caſe. 26 H. 8. c. 10. 33 H. 8. c. 20. *Sir* John Drake's *Caſe*, Allen 16. Holland's *Caſe*, ib. Stile's Re. 44. Hard. 466, 495.

But if a *Term* be limited to attend the *Inheritance* in Truſt, it is not forfeited for *Felony*, becauſe it does not veſt in his Perſon and go to his Executors, but belongs to the *Inheritance*, like the Charters which are not forfeited. Hard. 467.

3. Who may declare or raiſe the Uſes.

1. Since the Chancery, as hath been ſaid before, does not ſet up Rules of Property contrary to Rules of Law, thoſe that have not a diſpoſing Power by the Law, cannot raiſe a *Uſe*; and conſequently a Husband and Wife cannot declare *Uſes* upon a Feoffment, ſo as to bind the Wife.

But Baron and Feme may levy a *Fine* which will bind the Wife; for Mo. 197. 2 Co. 57. a. 2 Ro. A. 798.

here the Law allows her a diſpoſing Power, becauſe ſhe is privately examin'd, conſequently the Chancery muſt allow them to declare what is the Deſign of that Fine; and therefore ſuch Declaration by them both ſhall bind the Wife.

2 Co 57. a. Ro. Abr. 798. If the Husband only declares the *Uſes*, this ſhall bind the Wife; for ſince ſhe joins in the Fine, ſhe muſt be preſumed to concur in the Deſign of that Fine, unleſs the contrary appears by ſome manifeſt Sign of her Diſſent.

2 Co. 57. Moor 196. Beckwith's *Caſe*. But if the Husband declares the *Uſes* of the Fine one Way by Deed, and the Wife another by Deed, this binds the Husband during the Coverture, but not the Wife afterwards; for the Huſband cannot declare the *Uſes* without Concurrence of the Wife, becauſe he has no Eſtate; and ſhe cannot be preſumed to concur where the contrary appears by her Deed; and ſhe cannot declare the *Uſes* alone, becauſe during Marriage ſhe is not *ſui juris*; and without the Husband ſhe has no diſpoſing Power: And if there be no *Uſe* declar'd upon this Fine, it is to the *Uſe* of the Wife; for where there is no other Intent of a Fine declared, it is ſuppoſed to be deſign'd as a farther Security

Quære *whether the Declaration be not meerly void.*

2 Co. 57. a. b. 58. b.

to

to the preſent Poſſeſſor; and the *Uſe* is ſtill in the Wife, ſince in this Caſe ſhe has not departed with it.

If *Husband* and *Wife* ſell the Lands for Money, and levy a Fine, the *Uſes* may be averred without any Deed from the Wife, to prove her Aſſent. 2 Co. 57. Moor ib. 2 R. Ab. 798.

If *Baron* and *Feme* levy a Fine, and there be an Indenture in the Name of the Husband and Wife, declaring the *Uſes*, which is brought to the Wife to ſeal, and ſhe refuſes, the *Uſes* do not bind the Wife; for ſhe cannot be preſumed to concur after ſuch a Refuſal. 2 Ro. Ab. 798. L.T. Pl. 3.

If *Baron* and *Feme*, *within* Age, levy a Fine, this ſhall bind her; for tho' an *Infant* ought not to levy a Fine, yet when done it is valid, becauſe there is no Averment againſt Records; and if the Law allowed it to be valid, it is reaſonable the Parties ſhould have Power to declare the Intent of it. 2 Ro. Ab. 798. 2 Co. 58. *a.* Q. *whether the Fine be not reverſable for the Nonage of the Wife during her Nonage; reſolved it is in* Cro. El. 129, 130. 2 Co. 57. *b.*

Baron and *Feme* levy a Fine of the Land of the Wife, and both ſeal an Indenture; and in Conſideration of Money, limit the *Uſe* to the Conuſee, and there is a Clauſe of *Re-entry* upon Payment of the Principal and 10 *per Cent.* which is more than the lawful Intereſt, whereby it becomes an Uſurious Contract, becauſe the Parties en-

joyed the Profits of the Land; beſides, if the Husband afterwards, and before the Fine be engroſſed, rectifies it, and explains their Intention by another Deed, wherein the Conuſee covenants, that the *Baron* and *Feme* ſhould take the Profits in the mean Time, altho' the Wife does not agree to the ſecond Deed, it ſhall bind her; for the firſt Deed declares the Intent of the Fine, and paſſes the *Uſes*, and the laſt Deed only declares the Intent of the firſt to rectify the Matter of the Uſury.

1 Co. 58. a. A Man of *non ſane Memory* may declare the *Uſe* of a Fine levied, *cauſa qua ſupra.*

1 Co. 58 a. 2. Every Man may declare and diſpoſe of the *Uſe* according to the Eſtate and Intereſt he has in the Land; and therefore if two Jointenants levy a *Fine*, and declare the *Uſes* ſeverally, each Man diſpoſes of his own Moiety; but if they declare no *Uſes*, they are ſeiſed as before.

Ibid. If Tenant for Life, and he in Remainder in Fee join in a *Fine*, without declaring any *Uſes*, they are ſeiſed as they were before.

Ibid. *A.* ſeiſed of certain Lands, and *B.* a Stranger join in a *Fine*, it ſhall be to the *Uſe* of *A.* for ſince there is no

Conſideration to part with the Land, the Uſe is ſtill in him.

So if *A.* ſeized in Fee of certain Lands, and *B.* a Stranger joins in a Common Recovery, without declaring any *Uſes*, the *Uſe* ſhall ariſe to him that had the Intereſt in the Land, and not to the Stranger. 2 R. Ab. 789.

4. To whom a Uſe may be raiſed.

1. Not to Aliens.

An *Alien* could not compel the Feoffees to execute a Uſe; for 'tis contrary to the Policy of the Law that an *Alien* ſhould plead, or be impleaded, touching Lands, in any Court of the Kingdom. Al. 16. B. *F. al Uſ.* 139. *a.* S. 29. Style 21.

The King ſhall have the *Uſe* of an *Alien* upon his Purchaſe; for the Advantage a Man receives from his Duty can extend no farther than the Obligation of that Duty reaches, but the Allegiance of an *Alien* is temporary, therefore ſo is his Property; and ſince he is incapable of Perpetualneſs of Subjection, he cannot be protected in any Eſtate that is of perpetual Continuance; and the Inconvenience is the ſame if this be a *Freehold* at Law, or a *Truſt*. All. 16. Sty. 40. Hard. 195.

But

Sty. 40. But in this Caſe the King ſhall not ſeize the Land of an *Alien*, unleſs it be executed in him by a Decree in Chancery; for there was no Right in the *Ceſtuy que Uſe* to ſeize the Lands without a Decree, and the King has only the Rights of the *Ceſtuy que Uſe*. Q.

B.F. *al Uſ.* 338. *a.* S. 29. *Secondly*, Tho' the King cannot have Feoffees to his *Uſe*, becauſe he cannot take but by Matter of Record; yet he may take it when the Uſe is found of Record, where an Office is found of the whole Matter.

B.F. *al Uſ.* 339. *a.* S. 29. *Thirdly*, A *Monk* cannot have a *Uſe*, becauſe he has vowed perpetual Poverty, and therefore cannot have Property; but he may be an Executor, becauſe poſſeſſed to another's *Uſe*.

8 H. 7. 8. B.F. *al Uſ.* 339. *a.* S. 29. Mich. 10. Car. Elſham *v.* Warren. 6 Jac. Haſtings *and* Warwick. Hern. 132, 142. 33 H. 8. *c.* 10. 1 Co. 23, 24, 25. *Fourthly*, The Limitation of a *Uſe* to the Poor of the Pariſh of *Dale*, is good, tho' no Corporation; for tho' they are capable of no Property at Common Law, in the Thing truſted, becauſe the Rules of pleading require Perſons claiming to bring themſelves under the Gift; and no indefinite Multitude, without publick Allowance, can take by a general Name, yet they are capable of a Truſt; for here the Complainants do not derive to themſelves any Right or Title to the Eſtate, but

ſhew

ſhew that it has been abuſed and miſemployed by the Owners, contrary to Conſcience.

Fifthly, Where and what Conſideration is neceſſary to the Raiſing of an Uſe.

It being, (as is ſaid) the Uſe of the Country to deliver Lands to be ſafely kept, the meer Alteration of the Poſſeſſion does not in Equity give a Right, but it ſhall be to the *Uſe* of the Donor, unleſs in two Caſes.

1. *Where the Uſe is expreſſed.*
2. *Where there is a valuable Conſideration.*

1. Where the *Uſe* is expreſſed on the Tranſmutation of the Poſſeſſion; for ſince there is no Property without a Power of Diſpoſal, the Chancery, without oppoſing the Rules of Law, cannot ſet aſide a Diſpoſition, or preſume that it is delivered in Truſt for a Man's ſelf, againſt his own expreſs Words; and therefore here no Conſideration is neceſſary to the raiſing ſuch an *Uſe*.

If a Man levies a *Fine* to the *Uſe* of *A.* a Stranger, this is good without any Conſideration. 2 Ro. Ab. 788, 791.

So

2 Ro. 79. Trampton v. Sonard. So if a Man levies a Fine, and in Conſideration of Blood, and the Marriage of his Baſtard-Daughter, covenants that the *Conuſee* ſhall be ſeized to the *Uſe* of the Daughter; this is good.

2 Co. 76. a. Ibid. In a Fine *ſur Grant & Render* the Conſideration is expreſſed to be *pro finali concordia*; and when a Conſideration is expreſſed, no Conſideration can be averred but what ſtands with the expreſs Conſideration.

1 Co. 176. b. The ſame Law is on a Recovery or Feoffment.

2 Ro. Ab. 781. 1 Co. 176. b. Poſt 136. If a Man raiſes *Uſes* upon a *Fine*, *Feoffment*, or *Recovery*, he may reſerve to himſelf a Power of making Leaſes; but he cannot do it on a Covenant to ſtand ſeized, or on a Bargain and Sale; for upon a Fine, Feoffment, or Recovery, a Uſe may be raiſed without a Conſideration, and therefore will ariſe to thoſe Leſſees without Conſideration; and the former Eſtates which were raiſed without Conſideration, may be defeated without it; but in a Bargain and Sale, and Covenant to ſtand ſeized, no *Uſes* will riſe without Conſideration, therefore not to the Leſſees; for where the Perſons are altogether uncertain, and the Terms unknown, there can be no Conſideration; and for which Reaſon the former Eſtates, raiſed upon good

good Conſideration, cannot by ſuch Leſſees be defeated.

The two Conſiderations upon which a Deed is allowed to be valuable, are *Marriage* and *Money*; for *Marriages* being not only for the Hopes of Poſterity, but being likewiſe induced by the Contracts and Settlements that are made at the Marriage, ſuch Contracts are allowed to be valid, ſince the Marriage had not been but on the Foot of thoſe Contracts, and therefore no voluntary Deed, tho' prior, *&c.*

Secondly, *Where the Party can prove a Conſideration.*

Conſiderations are two-fold, 1. *Blood*, 2. *Money*.

Firſt, Blood; if a Man parts with any Lands in Advancement of his Iſſue, and to provide for the Contingencies and neceſſary Settlements of his Family, 'tis fit the Chancery ſhould make them ſuch good Conveyances tho' they want the Ceremonies of Law; for 'tis the Deſign and Intent of the Court of Equity to mitigate the Severities of Law, ſo as they may beſt comply with the Peace of Families; for their Eſtabliſhment is Part of the Nature and End of Government. 2 Ro. Ab. 782, 783.

Roll. ib. Therefore if a Man, in Conſideration of natural Love and Affection, covenants to ſtand ſeized to the *Uſe* of his Son or Brother, this is a good Uſe.

Vid. poſtea. But if a Man covenants to ſtand ſeized to the *Uſe* of *J. S.* in Conſideration that he is an intimate Friend, or School-Fellow, or that he was bound in a Recognizance, this is not good to raiſe a *Uſe*; for the Obligation that a Man has to his own Family, is ſuppoſed by all Governments ſuperior to all Obligations of meer Gratitude; and therefore the Chancery will not preſume 'tis the Party's Intent to diſpoſe of

2 Ro. Ab. 783. Lands out of the Family where any Ceremony is abſent that is neceſſary in Law to the making ſuch a Contract.

2 Ro. Ab. 785. A Covenant to ſtand ſeized to the *Uſe* of a Baſtard, in Conſideration of natural Love, is not good; for ſince that Copulation is unlawful, the Iſſue ought not to have from the Government the Privilege of a lawful Son.

2 Ro. Ab. 788. Tho' Blood be a good Conſideration to raiſe a *Uſe*, yet muſt the Intent of the Party be declared by Deed, and the Chancery muſt follow that Intent; for it would be miſchievous that any Words of Kindneſs that expreſs a future Deſign of Parting with an Eſtate

ſtate, ſhould be conſtrued as a preſent Settlement.

If a Man covenants to ſtand ſeized to the *Uſe* of ſuch Perſons as *J. S.* ſhall name, this is void, tho' *J. S.* names one of the Covenantor's Sons. But if a Man covenants to ſtand ſeized to the *Uſe* of ſuch of his Sons or Couſins as *J. S.* ſhall name, this is good; if he makes the Nomination for a general Covenant, that extends farther than a Man's own Kindred, it is void, and falls not within an equitable Conſideration; and being in its Creation void, it can never be made good.

Secondly, Money, if an Equivalent be given, tho' the Contract be not executed with all the Formalities of Law, yet in Equity the *Uſe* of the Lands ought to be in the Purchaſer.

If a Man, in Conſideration of Blood, makes a Charter of Feoffment, with a Letter of Attorney to deliver Seiſin, and no Seiſin be delivered, no *Uſe* ſhall ariſe; for the Court of Equity muſt follow the Intent of the Parties; and they have expreſſed their Intent not to part with the Eſtate until the Ceremony is performed. Co. Lit. 49. *a.* 2 Ro. Ab. 787.

But if a Man, in Conſideration of Money expreſſed in the Deed, ſells his Co. Lit. 49. *a.* 2 Ro. Ab. 787.

8 Co. 94. Vid. 2 Ro. Ab. 787. March 50.

Land, and gives a Letter of Attorney to deliver Seiſin, this paſſes the *Uſe* before Livery; becauſe the Equity to paſs the *Uſe* ariſes from the Payment of the Money; and therefore now, ſince the Statute of 37 *H.* 8. he may chuſe to have it one Way or the other, according as he firſt wills, either to enroll the Deed, or take Livery, (*vid.* Bargain and Sale) but if the Conſideration be not expreſſed in the Deed, it muſt paſs at Common Law.

But if Tenant for Life and the Remainder Man in Fee, make a Charter of Feoffment, and a Letter of Attorney to make Livery, and Livery is made accordingly, this is good; and the Remainder ſhall paſs by the Delivery of the Deed; for when a compleat Conveyance appears at Common Law, the Court of Chancery does not intermeddle therewith.

Selling *ex vi termini* ſuppoſes my Transferring a Right of ſomething for Money, the common Medium of Commerce. But if there be no ſuch Conſideration, it may be an Exchange, a Covenant to ſtand ſeized, a Grant, *&c.* but it can be no Sale.

If a Man bargains and ſells Lands for divers good Conſiderations and Cauſes, it is void, unleſs Money be averred. 1 Co. 176. a. Moor 578, 502.

If there be a Conſideration of Money expreſſed in the Deed, no Averment or Evidence can be admitted againſt it; for the Affirmative is proved by the Deed, and 'tis impoſſible in Law or Equity the Negative ſhould ever be proved. Moor 578.

If the Deed ſays for a competent Sum of Money, 'tis ſufficient, without averring the Sum; for 'tis a Sale if there be any Money. Moor 578. New Chan. Rep.

A Man in Conſideration of 70 *l.* bargains and ſells to his Daughter and *J. S.* in Tail, who intermarry, it may be averred, as well in Conſideration of Marriage, as alſo of Seventy Pounds; for a Man may aver any Conſideration conſiſtent with that in the Deed. 1 Co. 176. 2 Co. 76. a.

If a Man in Conſideration that *J. S.* was bound in a Recognizance, and other Bonds for him, and for divers good Cauſes and Conſiderations, bargains and ſells his Land to him and his Heirs *, that is not good; but it had been good by Way of Covenant to ſtand ſeized, had there been apt Words. Cro. El. 394. * Ante 29. contr.

Cro. El. 394. If I bargain and ſell my Land to my Son, no Uſe ariſes, unleſs there be a Conſideration of Money, *cauſa qua ſupra.*

Dy. 337. *a.* If a Man, in Conſideration of ſo much Money, to be paid at a Day to come, bargains and ſells, the *Uſe* paſſes preſently, and after the Day the Party has an Action for the Money; for 'tis a Sale, be the Money paid preſently or hereafter.

Dy. 169 *a.* An Averment cannot be allowed by the Heir, that the Conſideration is falſe againſt the Deed and Conveyance of his Anceſtor, *cauſa qua ſupra.*

Co. Rep. 199. Lambert *and* Bainton. If a Man conveys Lands to *A.* for the Payment of his Debts, and *A.* pays Debts to the Value of the Land, he is a Purchaſer.

Sixthly,

Sixthly, *in what Manner Uſes may be raiſed.*

1. *How they may be raiſed with or without Deed.*
2. *By what Words they may be raiſed.*
3. *How they may be raiſed by Implication of Law.*

1. *How they may be raiſed with Deed or without it.*

If a Lord releaſes to a Copyholder in Fee, to the Uſe of another, this is a good *Uſe*; for ſince the Seiſin and Uſe of the Eſtate is in the Lord, he may transfer the Seiſin of the legal Eſtate by paſſing the *Uſe* to another, or not, as he pleaſes. *Quære*, if the Law is not the ſame of *Releaſes* that enure by Way of Enlargement, and *tranſmitting of an Eſtate*; but otherwiſe of Releaſes that enure by Way of *tranſmitting a Right* and *Extinguiſhment*; for in theſe Caſes the Releaſor has not the *Uſe* and Poſſeſſion of any Eſtate; for that is in the Diſſeiſor. 2 Ro.Ab. 788. 2 Ro.Ab. 788. Co. Lit. 193. b.

If a Husband covenants with his Wife to ſtand ſeized to her *Uſe*, this is void; for Husband and Wife in all Matters of 2 Ro.Ab. 788. Co. Lit. 112.

Property, by the Rules of Law, are as one Perſon; and no Man can covenant with himſelf.

5Co.26 *a.* If a Man makes ſeveral Declarations of the Uſes of a *Fine*, or *Recovery* ſubſequent, the laſt Declaration ſhall ſtand; for each Declaration is to manifeſt the Intent of the Fine; now all Acts follow the laſt Determination of the Mind, and conſequently the *Fine* follows the laſt Declaration of their Intent.

5Co.26.*a.* If a Man declares *Uſes* by *Deed*, and after declares other *Uſes* by *Parol*, and the Fine or other Conveyance be purſued according to the Deed, the firſt *Uſes* ſhall ſtand; for a Deed cannot be contradicted but by ſomething of equal Validity.

5Co. 26.*b.* 2 Co. 76. *a. b.* 2 Ro.Ab. 799. If the Declaration of the *Uſes* and the Fine differ in Perſons, in Quantity, or Quality of the Land, or any other Circumſtances, and there be no other Declaration, this ſhall ſtand; for the Law preſumes that this Deed declares the Intent of the Fine, tho' they differ in Circumſtances; becauſe it ought to ſupport Men's Contracts, and take them ſtrongeſt againſt the Grantors; but there is no Room for a Preſumption, or Gueſſing at their Mind, where a contrary Intention is expreſſed.

If

If a Man declares *Uſes* by Deed, and afterwards declares other *Uſes* by *Parol*, and theſe two Declarations differ in thoſe leſſer Circumſtances of Quantity, Time, or Perſon, and the *Fine* is conformable to the laſt Declaration, that ſhall ſtand; for this is not an Averment contrary to the Deed: For then they muſt be ſo apparently different that both cannot be conſiſtent. But where the Averment declares the *Uſe* of a different Fine, 'tis not contrary to the former Deed: But the *Fine* mentioned in the Deed, and the Fine levied, being in their Circumſtances really different, they cannot be preſumed to be the ſame by the Law, becauſe the Intent of the *Fine* levied is expreſſed to be different from the Intent of the *Fine* mentioned in the Deed. 5 Co. 26. b. 2 Co. 75. b.

Now tho' the Expreſſion of a Man's Mind cannot be contradicted, but by Expreſſions of equal Solemnity, yet where his Mind is only preſumed, it may be contradicted by any Expreſſion.

If the Indentures preceding, and thoſe ſubſequent to the *Fine* differ, the Fine cannot be directed, Part by the one, and Part by the other; but, (as it is ſaid) it muſt be by the latter; for the latter Contract of the ſame Nature always deſtroys the former. 5 Co. 26. a. b.

9Co.10.a. 2 Ro.Ab. 782. If a Man levies a *Fine* or ſuffers a *Recovery*, he may afterwards declare the Uſes, for the Uſes are in him in that Caſe; and therefore 'tis Equity he ſhould diſpoſe of it when, and as he pleaſes to bar himſelf and his Heirs.

9 Co. 10. b. v. 29 Car. 2. c. If a Man levies a *Fine*, and then declares the Uſes by Parol, and afterwards by an Indenture declares other *Uſes*, yet the firſt ſhall ſtand; for the firſt is a Diſpoſition and Transferrence of his Uſe; and therefore there can be no other Diſpoſition, for nothing is in him to diſpoſe of; and this is alſo executed now by the Statute, and cannot be diveſted.

9Co.11.a. If a Man levies a *Fine*, and afterwards grants a *Rent-Charge*, and then declares the *Uſes*, *Ceſtuy que Uſe* ſhall hold it charged, unleſs he can prove a compleat Agreement before the Grant of the *Rent-Charge*; for otherwiſe he muſt take it as a Subſtitute of the other, and as he could grant it.

A Uſe cannot be raiſed without a Deed or Feoffment.

2 Ro.Ab. 788. If a Man levies a *Fine* of a *Rent*, he cannot limit the Uſe of it to a Stranger, without a Deed; for the *Uſe* and Poſſeſſion of that which has its Nature

Nature and Being by a ſolemn Agreement by Deed, cannot paſs without ſuch Agreement; for otherwiſe there would be a greater Evidence that the *Uſe* continued with the Party, than that it was diſpoſed of.

On a *Fine*, *ſur Conuſance de Droit tantum*, Uſes may be raiſed without a Deed; for *affectio tua imponit nomen operi tuo*; and therefore where-ever there is an Act that alters the Poſſeſſion, the Party's own Words may declare the Intent of the Act; and this being according to the Policy of the Common Law, has not been altered by any Statute.

On a Fine *ſur Grant & Render*, a different *Uſe* cannot be averred by Words only; for in this *Fine* there is a *Uſe* implied, becauſe there is a Conſideration, (*viz*) *pro finali concordia*, *&c.* and where-ever a *Uſe* is either expreſſed or implied, there can be no verbal Averment to the contrary; for there is a greater Sign that the Minds of the Parties are altered from the verbal Agreement, than that they continue the ſame, when they leave no ſolemn Teſtimony that there was ſuch a one.

2 Co. 75, 76, 77. 2 And. 80, 81, 82. Dy. 311. pl. 6, 7.

But by Deed a *Uſe* may be raiſed upon a Fine *ſur Grant & Render*; for otherwiſe the Deed muſt be wholly ſet aſide that the Parties have never cancelled, for that is capable of no other Meaning; but the *Fine* has a plain and direct Senſe, different from the Implication of paſſing a *Uſe*, (*viz*) to paſs the legal Eſtate; and here it paſſes that only, becauſe when two Contracts are made, there muſt be ſuch a Conſtruction of them, if poſſible, that both may have Effect; eſpecially here, where by the Words of the Deed it appears, a Relation was deſigned to each other.

But if the *Fine* differs from the Deed in Quantity or Quality, or of the Land, or of the Perſons, or in any other Circumſtances, a verbal Averment may be allowed to reconcile them; and the *Uſes* may well paſs by the Deed *cauſa qua ſupra*.

A Man ſeized of a Manor in Fee, to which there is an *Advowſon appendant*, bargains and ſells them in Fee, rendering Rent to the Bargainor in Fee, provided the Bargainee regrant the Advowſon for Life, *&c.* The Bargainor covenants to levy a *Fine* of the Manor, *&c.* to the Bargainee, and the Bargainee mutually covenants to render back

back the Rent, by the ſame *Fine*, to the Bargainor, the Bargainor and Bargainee join in a Fine to *J. S.* who grants and renders the Manor, *&c.* to the Bargainee in Fee, and the Rent to the Bargainor in Tail, the Remainder in Fee to *J. N.* tho' the Bargainor and Bargainee join in the Fine to *J. S.* whereby the abſolute Eſtate ſeems to be lodged in him, and the Condition diſpenſed with, and he renders over the Eſtate to the Bargainee, as abſolute as he had it; yet is not the Bargainee ſeized of an abſolute Eſtate by the Grant and Render; for the *Uſe* of this Grant and Render will riſe, on the Deed declaring the Intent of the Fine, *Cauſa qua ſupra*; and according to that the Bargainee has but a Conditional Eſtate: And tho' the Deed and Fine differ in Perſons, it being levied to *J. S.* and in the Manner of limiting the Rent, yet the *Uſe* as in the Deed, may be averred to be the Intent of the Fine.

2 Co. *from* 70 *to* 82. 2 And. *from* 69 *to* 89. Cromwell's *Caſe*.

At Common Law any *Uſe* might be raiſed by Words only. 2 Inſt. 675.

For Averment of Conſiderations, *ſee* Conſideration, 11 *Co.* Dy. 229.

Secondly,

Secondly, *By what Words* Uſes *may be raiſed.*

Vid. *By what Words Uſes may be raiſed ſince the Stat.* Fo. 16.

A Man, in Conſideration of *B.*'s Marriage with his Son *A.* covenants, that after his Death, the Lands ſhall remain to the ſaid *A.* and *B.* and the Heirs of *A.* tho' the Marriage takes Effect, yet the *Uſes* do not riſe by this Covenant; for here the Seiſin of the Father is not appropriated to the ſeveral Uſes, but only a Remainder limited after the Father's Death, which cannot be without a particular Eſtate; nor that without a particular Contract, and no Man can contract with himſelf.

2 Ro. Ab. 789. The ſame Law is if a Man grants the ſaid Lands to his Son *B.* after his own Deceaſe, to have and to hold to *B.* and the Heirs of his Body begotten; the Remainder to *C.* in Tail.

2 Ro. Ab. 787. If a Man ſeized in Fee ſuffers a Common Recovery, in Truſt and Confidence that the Recoveror would execute it to him in Tail, Remainder in Fee to his Son; tho' no Conſideration be expreſſed, or any Covenant to compel him to execute it, the Court of Chancery would have formerly forced him

him to it, and conſequently the Statute will now execute it in him.

If a Man ſeized of Lands in *Tail*, levies a *Fine*, or ſuffers a *Recovery*, and declares no *Uſes*, the *Uſe* reſults to the Tenant in Tail, and he becomes ſeized in Fee by Virtue of the Recovery, becauſe the Recoveror is Tenant in Fee Simple, and then no *Uſes* are declared of that Recovery; and where no Conſideration appears from the Recoveror, the Recovery can be to no other Purpoſe than to dock the Entail. 9 Co. fo. 8 *to* 11. 2 Ro. Ab. 7, 8, 9. Jenk. cent 212.

If the *Uſes* of a Fine or Recovery be declared by a precedent Indenture, all Parties are eſtopped from averring any other *Uſes* of ſuch Fine or Recovery, becauſe that was the original Intention of ſuch Fine or Recovery; but if the *Uſe* be declared by an Indenture ſubſequent, no Parties are eſtopped from declaring other *Uſes*, but ſuch as are Parties to the Deed; becauſe it does not appear to be the original Intention of ſuch a Fine; and therefore a Declaration of other *Uſes* may be averred, and no Body is eſtopped from ſuch an Averment, but thoſe that are Parties to the ſubſequent Deed. *9 Co.* 10. *b.* 11 *a. Caſ. in Parl.* 144, 145. 4 *Mod.* 163. 5 *Co.* 26. *a. Cro. Jac.* 29.

But

But if the *Fine* varies from the precedent Deed, then any Perſon, as well the Parties to ſuch Deed as Strangers, may aver any other *Uſes*; becauſe the Deed not referring to the ſame Time is ſubſtantive, and the *Uſes* may be averred as if there were no Deed at all.

But by 29 *Car.* 2. of Frauds and Perjuries, the reſulting *Uſe* upon any Fine or Recovery could not be altered without Deed; and then it became a Doubt whether the reſulting *Uſes* were not executed, and thereby any ſubſequent Deed excluded: And therefore for that Purpoſe the Stat of 4 *Ann. c.* 16. declares again, that a ſubſequent Deed may limit the *Uſes* of ſuch Fine and Recovery.

2 Ro. Ab. 786, 787. If a Man gives, grants and confirms his Lands to *H.* and his Heirs, with a Clauſe of *Warranty*, and the Deed be indented and enrolled, this ſhall raiſe an *Uſe*; becauſe it does not appear to be the Intent of the Parties to paſs it by Way of Feoffment, notwithſtanding the Warranty; inaſmuch as a *Ceſtuy que Uſe* can rebutt by Force of the *Warranty*, tho' he cannot vouch. Fo. 22.

B. *Fal Uſ.* Fo. 33. S. 4. Vid. Fo. 3. *a.* If a valuable Conſideration was given, the Fee paſſed without the Word *Heirs*; for it was Conſcience to convey

vey the Fee, (as 'tis ſaid) but the Law is altered.

A *Uſe* may be entailed; for the Chancery is bound up to the Mind of the Donor by the Intent of the Act of Parliament; and this *Uſe* may be barred by the *Fine* or *Recovery* of the Tenant in *Tail*, notwithſtanding the Party has not the legal Eſtate, if there be a Conſideration for ſuch a Conveyance; for ſuch a Perſon is out of the Reach of the Statute: But where there is no Conſideration there is leſs Equity in the Caſe, and therefore leſs Reaſon for the Chancery to interpoſe. Co. Lit. 20. a. Id. 49. Id. 68.

If a Man ſeized of Lands in Fee makes a Leaſe for Life, and then covenants on valuable Conſideration, to ſtand ſeized to the Uſe of Tenant in Tail, and then Tenant for Life ſuffers a Common Recovery voluntarily, this is no Forfeiture; for tho' he has only an Eſtate for Life by Law, and conſequently it would, by the Rules of Common Law, be a Forfeiture, yet ſince he in Reverſion held it under further Truſts for Tenant for Life, he is out of the Rule; for there is no Equity that a Man ſhould forfeit that to another, which the other is bound to preſerve and keep for him, and cannot lay

lay hold of at any Time for his own Advantage.

Thirdly, *How an* Uſe *may be raiſed by Implication of Law.*

2 Ro.Ab. 789. Dy. 146. If a Man ſeized of Lands alone, or with a Stranger, levies a *Fine* and limits no *Uſe*, it ſhall be (as has been ſaid) to his own *Uſe* by Implication of Law; and the ſame Law is of a Recovery or Feoffment.

If a Man ſeized of Lands in *Tail*, levies a *Fine* or ſuffers a *Recovery*, and declares no *Uſes*, the *Uſe* reſults to the Tenant in Tail, and he becomes ſeized in Fee by Virtue of the Recovery, becauſe the Recoveror is Tenant in Fee; and when no *Uſes* are declared of that Recovery, and no Conſideration ariſes from the Recoveror, no Intent for levying that Fine, *&c.* it ſhall be conſtrued only to dock the Entail.

If the *Uſe* of a Fine or Recovery be declared by a precedent Indenture, all Parties are eſtopped from averring any other *Uſes* of ſuch Fine or Recovery; but if the *Uſes* be declared by an Indenture ſubſequent, no Parties are eſtopped from averring other *Uſes* but ſuch as are Parties, *&c.* *Vid.* all this *ante.*

If

If a Man makes a Leaſe for Life or for Years, this ſhall be to the *Uſe* of the Leſſee, or if a Leſſee for Life or Years grants over his Term, it is to the *Uſe* of the Grantee; for (as is ſaid) the *Uſe* of the Country to declare Lands to be ſafely kept, has made the meer Delivery of Poſſeſſion no Evidence of Right, without a valuable Conſideration. But theſe leſſer Eſtates were not uſed to be delivered to be kept for the future Support and Proviſion of the Family, and therefore the meer Act of delivering Poſſeſſion paſſed a Right, without Conſideration; ſince there is no Preſumption from the *Uſe* of the Country that theſe Eſtates were transferred under ſecret Truſts; eſpecially ſince Rents were uſually reſerved, and they ſubject to Waſte and other Forfeitures. 1 Ro. Ab. 789.

If Leſſee for Life or Years grants over his Eſtate, and limits the *Uſe* but of Parcel of the Eſtate to the Grantee, the Remainder of the Eſtate ſhall be to the *Uſe* of the Grantee by Implication of Law, *cauſa qua ſupra.* 2 Ro. Ab. 782.

Seventhly, The ſeveral Sorts of Uſes.

1. *Abſolute or Contingent, of which hereafter.*

2. *Sole or conjoint Uſes, and conjoint Uſes may be divided into Eſtates of Jointenancy and Tenancy in common.*

Jointenancy comes under a two-fold Diviſion.

1. *Joint Truſts.*
2. *Joint Eſtates in Uſe of Truſt.*

Firſt, *Joint Truſts are again two-fold, with or without an Intereſt.*

With an Intereſt; as if one deviſes his Land to his Executors, to be ſold, or his Land to be ſold by his Executors; which is all one, and equally transfers the Eſtate; for to deviſe Lands ſignifies to give, grant or diſpoſe of it by Will. Without an Intereſt; as if one deviſes that his Executors ſhall ſell the Land; for this does not only transfer it; for to grant that another ſhall diſpoſe of it by an Act of his, is not, till the Act be accompliſhed, any Diſpoſition.

Co. Lit. 236, 181. *b*

Co. Lit. 181. *b*. And in the former Caſe the Intereſt ſurvives, and the Truſt with it.

Dy. 186. *a*. Cro. Car. 231, 245. If an Eſtate be granted to *A.* and *B.* for their Lives, to the *Uſe* of *C.* for Life, if *A.* and *B.* die, the Eſtate of *C.* is determined.

But

But if an Eſtate be granted to the Husband and Wife, *habend'* to the Huſband and Wife, to the *Uſe* of them and the Heirs of their Bodies, this is an Eſtate in Tail, veſted in the Husband and Wife; but this is not a Grant of an *Uſe* divided from the Eſtate, but a Grant of the Eſtate and the *Uſe* to the ſame Perſon; ſo that either the Word, *viz. to the* Uſe *muſt be ſet aſide*, or that whole Sentence, *viz.* to the *Uſe* of them and the Heirs of their Bodies, becauſe the Parties have appointed no Poſſeſſion out of which the *Uſe* of an Eſtate Tail may ariſe. Dy. 186. a. Cro. Car. 231. 244, 5.

If there be a Joint Truſt, and one refuſes, *&c.* to act according to the Truſt, the other can act only as to his Intereſt. As if a Man deviſes Lands to Executors, to be ſold, and one of thoſe Jointenants refuſes, *&c.* the other could only ſell his Moiety at Common Law; but now in this he may ſell the whole, *per* 21 *H.* 8. *c.* 4. tho' the other refuſes or dies. Co. Lit. 113. a. Bro. *Feof. al Uſes* 338. a. S. 10.

Secondly, *Joint Truſts without an Intereſt.*

At Common Law theſe Joint Truſts are taken as Authorities, and don't ſurvive, for the Common Law judges of a Co. Lit. 112. b.

Man's Deſigns from his Words only; and therefore if a Man deviſes that *J. S.* and *J. N.* ſhall ſell his Land, and one of them dies; ſince he has authorized and put both of them into his Place, one only can't repreſent him.

But if a Man deviſes his Land to *A.* for Life, and that, after the Death of *A.* his Executors, or that his Sons-in-Law ſhall ſell it, and makes four Executors, or has five Sons-in-Law, and one of them dies, the Survivors may ſell it; for the Authority remains with the Plural Number of them, by the plain Words of the Deviſe; for he has made thoſe Perſons that come under the Denomination, as to that Act, his lawful Repreſentatives; and ſince that Land was to be ſold after his Death, 'tis highly probable that as one of the four might die during his Life, he could not abſolutely intend the Sale ſhould be by them all.

Co. Lit. 112, 123. 1 And. 149.

But if in this Caſe all die but one, he has not an Authority to ſell at Common Law, *cauſa qua ſupra.*

1 And. 149. Lock *and* Loghing. Co. Lit. 112, 123.

But the Court of Chancery, that conſiders the Nature of the Truſt, will impower him to do it, and compel the Heir to join with him, as if it be for the Payment of Debts or Legacies, or to be divided among Nephews or Relations; for 'tis equitable that ſuch an honeſt and

rea-

reaſonable Deſign ſhould be ſupported, tho' it can't Effect by the Rules in conſtruing thoſe Words that neceſſarily govern at Common Law.

The Executors in the Caſe may ſell without Deed, for they are but Repreſentatives of the Teſtator, and the Vendee is in by the Will. Co. Lit. 113. a.

If it be deviſed that Executors ſhould ſell, and one refuſed, at Common Law, the other could not ſell any Part of it, *cauſa qua ſupra*; but now he may ſell the whole, becauſe it is within the Equity of the Stat. of *H.* 8.

The Executors may ſell any Part of it as they find Purchaſers; for if they have Authority over the whole they have it over every Part; for a Man can't make void his own Act by doing leſs than his Authority, when he does an Act that he is authorized to do. Co. Lit. 113. 4.

If one Executor refuſes to ſell or adminiſter, the other can't ſell the Land to him; for ſince they are authorized to ſell, they muſt of Neceſſity be excluded from buying, ſo that no Power was by the Will given to ſell to any of them, but to all other Perſons excluſive of them. Co. Lit. 113. a. 1 And. 47.

Secondly, *Joint Eſtates in a* Uſe *or* Truſt.

1 Ro.Ab. 91. 13 Co.55, 66. Hutt.112. 1Ro.Abr. 791. Sam's Caſe.

If a Man enfeoffs or levies a Fine to *A.* in Fee, to the *Uſe* of himſelf, and *B.* and their Heirs, they are at Common Law Jointenants of the *Uſe*; the Eſtate in a *Uſe* veſts according to the Intent of the Parties, which was to place the entire *Uſe* in them, and the Poſſeſſion only in *A.* and ſince the Statute executes the Poſſeſſion in the ſame Manner as the *Uſe* was, they were not Tenants in Common, as one in by the Common Law, and the other by the Statute, but Jointenants by the Words of the Statute.

If a Man makes a Leaſe for Life, Remainder in Fee to the Right Heirs of *J. S.* and *J. N.* alive, the Heirs are Tenants in Common, for when *J. S.* dies, his Heirs have either a ſole Property of the Fee, or he has it with others; he can't have it with others, becauſe there is none in Being to take it with him; and if he had a ſole Property of the Fee, it can't alter without ſome Act of his own; but he can't have a ſole Property in the whole Remainder, for that were expreſsly contrary to the Conveyance; he muſt therefore have a ſole Property

perty of the Fee in a Moiety; which is a Tenancy in Common.

But in Caſe of a *Uſe* Perſons may be Jointenants that don't take at the ſame Time; as if a Man enfeoffs ſuch a one to the *Uſe* of himſelf for Life, and of ſuch a Wife as he ſhall afterwards take, they are Jointenants; for here the Huſband has no Property in the Land, neither *Jus in re*, nor *ad rem*, but the Feoffee has the whole Property at firſt to the Husband only, and upon the Contingency of Marriage to them both entirely; and this is the only Rule of Equity to ſupport the Truſt in the ſame Manner the Parties have limited it, and now it is executed by the Statute in the ſame Form as it was governed in Equity. Co. Lit. 188. *a.* 13 Co. 56. Dy. 340. 1 Co. 101. *a.*

If a *Diſſeiſin* be made to the *Uſe* of two, and one agrees at one Time, and another at another Time, yet they are Jointenants; for every ſubſequent Conſent is equal to a Command precedent; and if both had commanded the *Diſſeizin*, the firſt Act had been the Act of both; and therefore from that Act done, they are now eſteemed as Joint *Diſſeiſors*. Co. Lit. 188. *a.* 1 Co. 56. Co. Lit. 180. *b.* 2 Leon. 223.

If a Man infeoffs *A.* to the *Uſe* of *A.* and *B.* they are Jointenants, tho' *B.* gave no Conſideration, becauſe the *Uſe* is diſpoſed of expreſly to him. 2 Ro. Ab 791.

Cha. Rep. 28. Scroope *verſus* Scroope.

If Father and Son join in the Purchaſe of Lands, on a valuable Conſideration, and the Father afterwards deviſes thoſe Lands, the Court of Chancery will not ſuppoſe the Concurrence of the Son was only in Truſt for the Father; but that he was made Jointenant for his own Advantage; and this was the antient Way of Purchaſe to avoid Wardſhips.

Eighthly, The Inconveniencies of Uſes.

Tho' theſe *Uſes* had a very equitable Beginning; yet like all new Models and general Schemes of ordering Property, it introduced a great many unforeſeen Inconveniencies, and ſubverted in many Inſtances the Inſtitution and Policy of the Common Law.

Firſt, Eſtates paſſed by Way of *Uſe*, from one to another, by bare Words only, without any ſolemn Ceremony or permanent Record of the Tranſaction; whereby a third Perſon that had Right knew not againſt whom to bring his Action.

Stat. 27, H. 8. c. 10. 1 Co. 123, 4. 1 And. 323. Poph. 73.

Secondly, *Uſes* paſſing by Will, the Heirs were diſinherited by the inadvertent Words of dying Perſons.

Thirdly,

Thirdly, Lords loſt their Wardſhips, Reliefs, Marriages and Eſcheats; the Truſtees letting *Ceſtuy que Uſe* continue the Poſſeſſion; whereby the real Tenants that held the Lands could not be diſcovered. Ibid.

Fourthly, The King loſt the Eſtates of Aliens and Criminals; for they made their Friends Truſtees, who kept Poſſeſſion, and ſecretly gave them the Profits ſo as the *Uſe* was undiſcovered. Ibid.

Fifthly, Purchaſers were unſecure; for the Alienation of *Ceſtuy que Uſe* in Poſſeſſion was at Common Law a *Diſſeiſin*, and 1 *R.* 3. *c.* 1. gave him Power to alien what he had; yet the Feoffees may ſtill enter to reveſt a Remainder or contingent Uſe, which were never publiſhed by any Record or Livery, whereby the Purchaſer could know of them. Ibid.

Sixthly, The *Uſe* was not ſubject to the Payment of Debts, *cauſa qua ſupra*, fol. 7. Ibid.

Eighthly, Many loſt their Rights by Perjury, in Averment of ſecret *Uſes*. Ibid.

Ninthly, *Uſes* might be allowed in Mortmain. Ibid.

See *The Alteration of Property by the Stat.* 27 H. 8. cap. 10.

The Deſign of this Law was utterly to aboliſh and deſtroy that pernicious Way Vaugh. 50. 1 Co. 124.

Way of Conveyance; and the Means they took to do it was to make the Poſſeſſion fall in with the *Uſe* in the ſame Manner as the *Uſe* was limited; and where they were all Freeholds, it was thought they would be then ſubject to the Rules of Common Law; but the Method has not anſwered the Legiſlature's Intent; for it has introduced ſeveral Sorts of Conveyances quite oppoſite to the Rules of Common Law: For now wherever a *Uſe* is raiſed, the Statute gives *Ceſtuy que Uſe* the Poſſeſſion; ſo that 'tis only neceſſary to form a *Uſe*, and the Poſſeſſion paſſes, without any *Livery* or *Record* at all, and the Reverſions, without the Attornment of particular Tenants; and how the other Purpoſes of the Statute be evaded will after appear.

Co. Lit. 309.

Here is to be conſidered;

Firſt, *The ſeveral Sorts of* Uſes *executed by the former Clauſe of the Statute, and their ſeveral Incidents.*

Secondly, *The Execution of Jointures by the latter Clauſes of the Statute.*

Thirdly, *The Caſes out of the Statute.*

Firſt, Of the ſeveral Kinds of *Uſes*; and they are two-fold; *viz.*

1. Uſes *in* Eſſe.
2. Uſes *in* Poſſibility.

Firſt,

Firſt, Uſes *in* Eſſe; *and they are raiſed by Tranſmutation of Poſſeſſion, or without it.*

Firſt, Of *Uſes* raiſed by Tranſmutation of Poſſeſſion; as upon a *Fine*, *Feoffment*, or *Recovery*.

1. *In what Manner they are raiſed.* V. Poſtea.
2. *In what Manner they are executed ſince the Statute.* V. Poſtea.
3. *In what Manner they are pleadable.*

Firſt, In what Manner they are raiſed ſince the Statute, *&c.*

1. *By what Rules of Law* Uſes *are governed.*

A Feoffment is made to the *Uſe* of *J. S.* and his Heirs Males lawfully begotten, with Remainder over; this does not paſs an Eſtate *Tail*, but a *Fee Simple*, ſince the Statute; for ſince the Statute has brought the *Uſes* into Poſſeſſion, they ought to be governed by the Rules of Eſtates in Poſſeſſion, as to the Words that are eſſential to the creating ſuch *Uſes*. Now, if there be no Words eſſential to the

Cro. El. 479. Dy. 169. 1 Co. 87. Co. Lit. 10

the Creating of an Eſtate; there is no ſuch Eſtate at Common Law, and the Statute has not abrogated the Common Law ſo far as to allow an Eſtate in Being, without Words neceſſary to create it; and here no body is limited from whence the Heirs of the *Tail* may proceed. Alſo no Fee Simple can be created in *Uſes*, without the Word *Heirs*, ſince the Statute, for the ſame Reaſon.

2 Ro. Ab. 791. Sed Q. per me, *Whether in order to make this Remainder contingent, the Limitation ought not to be to the Uſe of A. for Years, Remainder to B. in Tail, Remainder to the right Heirs of C. for the Caſe, as reported in Rolls, and taken here, does not appear to be a contingent Remainder*, &c.

If a Man makes a Feoffment to the *Uſe* of himſelf for Years, the Remainder to *B.* in Tail, Remainder to his own Right Heirs, and after *B.* dies without Iſſue, living the Feoffor, the Remainder to the Right Heirs, is void, becauſe it being contingent, there is no Eſtate of Freehold to ſupport it; for here is no *Tenant to the Precipe*; and the not having a perpetual Tenant to the *Precipe* was an Inconvenience the Statute expreſly deſigned to redreſs, and conſequently to this Rule the Statute has ſubmitted all Uſes.

If a Man makes a Feoffment in Fee to the *Uſe* of *A.* for Life, the Remainder to his firſt Son in Tail, the Remainder to *B.* in Fee; if *A.* dies, his Wife being *privement Enſient*, and a Son is afterwards born, he ſhall take nothing; for if the Remainder does not veſt the Determination

termination of the particular Eſtate, it ſhall never veſt; for, as is ſaid before, the Statute does not change the Nature and Being of Eſtates that were ſettled at Common Law, and a Remainder *ex vi Termini* ſuppoſes a particular Eſtate, of which it doth remain.

If a Man makes a Feoffment in Fee to the *Uſe* of *A.* his Son for Life, and afterwards to the *Uſe* of every Perſon that ſhall be his Heirs, for Life only, 'tis not good to the Heir; for it is againſt the Rules of Common Law, that a perpetual Freehold for Life only ſhould deſcend, becauſe it creates a Perpetuity; but it ſeems in this Caſe, [a] as if the Chancery (ſince there is ſuppoſed a good Conſideration) would have executed a Fee in *A.* according to the Intent of the Parties. 1 Co. 138.

2. *What Rules of Law are ſet aſide by the Statute.*

If a Man makes a Feoffment in Fee, to the *Uſe* of *A.* in Fee; but upon Payment of 100 *l.* or any other Contingency to the *Uſe* of *B.* in Fee, if the Contingency happens, the Fee ſhall be executed in *B.* for though, according to the Rules of Common Law, a Fee can't be limited on a Fee, becauſe a *Fee Simple* is the largeſt Eſtate that can

can be limited; and therefore will not bear a Remainder over, by Way of Limitation; and this can't be conſtrued a conditional Eſtate; becauſe, to avoid Maintenance, the Common Law allows no Stranger to take Advantage of a Condition: But the Neceſſities of Commerce and Family Settlements induced the Chancery to paſs by this Rule, and the Statute has executed the Poſſeſſion in the ſame Manner and Form as the Party had the *Uſe*. Now ſince he had but a conditional Fee in the *Uſe* before the Statute, he can't have an abſolute and unconditional Eſtate, ſince the Statute; for that is to ſet up an Eſtate directly contrary to the expreſs Words of the Statute.

Secondly, *In what Manner* Uſes *are executed by the Statute.* Ante.

If there be a Tenant in Tail, the Remainder in Fee, and Tenant in Tail makes a Feoffment in Fee, and dies, the Iſſue ſhall not be remitted.

Daviſon's *Caſe.* 2 Leon. 222. 1 In *b.* 348

Where a Feme is Tenant to Life, Remainder to the Heirs of the Husband, and the Husband makes a Feoffment in Fee, to the *Uſe* of himſelf and his Wife, for their Lives, the Remainder to their own Right Heirs, the Husband dies, the Wife is not remitted. The

The Reaſon is, becauſe no Man can be remitted contrary to his own Act, and a *Statute* is interpreted to be the Act of every one, and therefore the Feme Covert and Heir, that are in by the *Statute*, can't be remitted.

If a Man ſuffers a Recovery *on the Morrow of all Souls*, and an *Indenture* is dated the Firſt of *November*, wherein he expreſſed, that all Recoveries hereafter to be ſuffered between the Parties, ſhall be to the *Uſes* contained in this *Indenture*, the *Uſes* limited in this *Indenture* ſhall not be executed on the *Recovery* ſuffered before; for tho' the Term be as of one Day, and Judgment as of the laſt Day of the Term, the Recoveries being taken as common Aſſurances and *Uſes*, according to the Parties Intent, the Word *hereafter* excludes the *Uſes* from being executed on the Recovery. Ro. Ab. 799. Whatſon and Wentworth.

If a Man poſſeſſed of a Term aſſigns it over, or grants it to a *Uſe*, this is not executed by the Statute, becauſe the Words of the Statute are, whoſoever is ſeized to a *Uſe*, the *Uſe* ſhall be executed, *&c.* But there is Seiſin only of an Eſtate of Freehold, and the Inconveniencies, that this Statute deſigns to redreſs, lay in Freeholds only. Pop. 76.

But

2 Inſt. 671. 2 Co. 35, 36. But a Man may limit the *Uſes* of a *Freehold* for Years, and the *Uſe* ſhall be executed by the Statute.

To the Execution of a *Uſe* four Things are neceſſary.

1. *There ought to be a* Perſon Seized.
2. *Ceſtuy que Uſe* in Rerum Natura.
3. *A* Uſe *in* Eſſe *in Poſſeſſion, Reverſion or Remainder.*
1 Co. 126. 4. *That the Eſtate of the Feoffees may veſt in* Ceſtuy que Uſe, *and here only the firſt and fourth Thing is to be conſidered; for the ſecond and third Conſideration fall under contingent* Uſes.

Firſt, There ought to be a Perſon ſeized, for the Words of the Statute are, if any Perſon ſtand or be ſeized, and if the Feoffees be diſſeiſed, and then the Statute were made, the Feoffees have only a Right of Poſſeſſion, and that be executed; for the Words of the Statute are, that the Eſtate, Right and 1 Co. 126. *b.* Poſſeſſion ſhall be in *Ceſtuy que Uſe*, yet this muſt be referred to the preceding Words, and that is in Caſe where the Feoffees ſtand ſeized.

Thirdly,

Thirdly, *In what Manner they are pleadable.*

If a Man makes a Feoffment in Fee to *A.* to the *Uſe* of *B.* *B.* may plead this Feoffment, and ſhew that *J. S.* diſſeized him, without laying any *actual Entry*, for the Statute executes the Poſſeſſion in him; he may alſo plead it without ſhewing any *Agreement* thereto, becauſe the Freehold is in him, unleſs he diſagree, and then it muſt be ſhewn on the other Side, for thereby the Freehold is immediately out of him. Owen 86. Green *and* Wiſeman. Owen 87.

But in Treſpaſs he muſt ſhew an actual Entry; for this Action is grounded on the Diſturbance of his Poſſeſſion, or the Violation of his Right by taking the actual Profits, which no Man could hinder him from, or diſturb him in, till he ſhews he was in Poſſeſſion.

In *Pleading* the Party ſhew'd that *A.* was ſeiſed to the *Uſe* of *B.* and lay a *Diſſeizin*, without ſhewing how he came to be ſeized, and it was held good; *Ceſtuy que Uſe* can't juſtify the taking of Beaſts *Damage-feaſant* before the Statute, becauſe he had no Eſtate at Common Law; but he may ſince the Statute. Bro. *Feof. to Uſes.* 337. C. 8. 10. Bro. *Feof. al Uſes.* 338. 1. 13.

Bro. F. *al Uſes*, 338. C. S. 15. *a.*

If a Man pleads that he bought the Land for 20 *l.* without ſhewing the Money paid, or a Day alledged for the Payment of it, this is good; for Buying implies Payment of the Money; and if there was none paid, the Plaintiff may reply, he did not buy, *&c.*

Secondly, *Of* Uſes *that paſs without Tranſmutation of Poſſeſſion, and they are* two-fold *according to the* two-fold *Conſideration before-mentioned.*

Firſt, *Raiſed by Way of* Bargain *and* Sale, *on the Conſideration of Money.*
Secondly, *By Way of* Covenant *to ſtand ſeized, on the* Conſideration *of* Blood.

Firſt, By *Bargain* and *Sale.* Bargain and Sale is a Contract in Conſideration of Money, paſſing an Eſtate in Lands by Deed indented and inrolled, if a Freehold of Inheritance; if otherwiſe, by Word only; and here it is to be conſidered,

1. *The ſeveral Parts of the* Definition.
2. *The Effect of this* Conveyance.
3. *The Expoſition of it.*
4. *The Pleading of* Bargains *and* Sales.

Firſt,

Firſt, The ſeveral Parts of this Definition, and they are five.

1. *Who may* Bargain *and* Sell.
2. *To* Whom, *and both theſe are implyed in its being a Contract.*
3. *The* Conſideration, *of which is already ſpoken.*
4. *What may be* Bargained *and* Sold.
5. *In what Manner a* Bargain *and* Sale *may be made.*

Firſt, *Who may* Bargain *and* Sell.

The King and all other Perſons that can't be ſeized to a *Uſe*, can't *Bargain* and *Sell*; for when a Man had ſold his Land for Money, without giving *Livery*, the *Uſe* paſſed in Equity, as it is ſaid; and this is executed and becomes a *Bargain* and *Sale* by the Statute, and antecedent to any ſuch Execution; here muſt be a *Uſe* well raiſed, which can't be without a Perſon capable of being *Seized* to a *Uſe*. 44 Eliz. B.C.Roll 518. Atkins *and* Lung.

If *Tenant* in *Tail* bargains, and ſells his Land in Fee, this paſſes an Eſtate determinable upon the Life of Tenant in Tail; for at Common Law, the *Uſe* could not be granted of any greater Eſtate than the Party had in him. Now Te- 10 Co. 96. 98. 1 Sand. 260, 261.

nant in *Tail* had an Inheritance in him, but he could diſpoſe of it only during his own Life; and therefore when he ſells the *Uſe* in Fee, *Ceſtuy que Uſe* has a Kind of Inheritance, yet determining within the Compaſs of a Life; and the *Statute* executes it in the ſame Manner as he has the *Uſe*, and conſequently he will have ſome Properties of a *Tenant* in *Fee*, and ſome of a *Tenant* for Life only; but if *Tenant* for Life bargains and ſells in *Fee*, this paſſes only an Eſtate for Life, for he could not paſs the *Uſe* of an Eſtate for Life to the Bargainee, and the *Statute* executes the Poſſeſſion as the Party has the *Uſe*.

1 C. 14, 15. Co. Lit. 151. *b.*

Secondly, *To whom a* Bargain *and* Sale *may be made.*

7 Co. 40. 11 Co. 24. Cro. El. 394. 1 Vern. 137.

A Man may *Bargain* and *Sell* to his Son, but yet the Conſideration of *Money* ought to be expreſſed, and it ought to have all the other Circumſtances of a *Bargain* and *Sale*; but this ſhall operate as a *Covenant* to ſtand *Seized*, if there be none but the Conſideration of natural Love and Affection expreſſed.

10 Co. 24, 34. 1 Ro. Abr. 788.

A Man may *Bargain* and *Sell* to a *Corporation*; for they may take a *Uſe* tho' the Money be given by the Governors

nors in the natural Capacity, and a *Bargain* and *Sale* in Truſt to them is good, tho' the Truſt be void when limited to other Perſons, *cauſa qua ſupra.*

Thirdly, *Of the Conſideration, of which ſufficient hath been ſaid before.*

Fourthly, *What may be bargained and ſold.*

Any Freehold or Inheritance in Poſſeſſion, Reverſion, or Remainder upon an Eſtate for Years or for Life, or in *Tail* may be bargained and ſold, and it ſhall be enrolled. A Rent in *Eſſe* may be bargained and ſold, becauſe this is a Freehold within the Statute. 2 Co. 54. Dy. 309. 2 Inſt. 671. Co. 69.

A Man poſſeſſed of a Term can't bargain and ſell it ſo as to be executed by the Statute, *cauſa qua ſupra. Antea.* Pop. 76.

But a Man ſeized of a Freehold may bargain and ſell it for Years, *cauſa qua ſupra, ibid.* And this ſhall be executed by the Statute of *Uſes*, but it need not be enrolled by the Statute of Enrollment. 2 Inſt. 671. Co. 35, 36. 8 Rep. 93, 6, 94, 2 Ro. Rep 204.

Before the Statute, a Rent newly created might be bargained and ſold; becauſe when the Money as an Equivalent was given, and Ceremonies or Words of Law were wanting, the Chan- Roll 85.

cery ſupplied them; therefore this was good to paſs the Eſtate without any Words of Granting.

1 Co. 126. 1 And. 327. But ſince the Statute, a *Rent* newly created, can't be bargained and ſold, becauſe there ought to be a Freehold in ſome other Perſon to be executed in *Ceſtuy que Uſe*; but there can be no Seizin of this *Rent* in the Bargainor, becauſe no Man can be ſeized of a *Rent* in his own Land; and conſequently there can be no Eſtate to be executed in the Bargainee.

Kell. 84. 20 H. 78. 2 Co. 36. If a Man ſells 20 *l.* Worth of his Land, Parcel of a Manor, this is void, for that 'tis neither certain in it ſelf nor reducible to a Certainty; for no Man is made a Judge of the Value; otherwiſe it ſeems, if he had granted the 20 Acres Parcel of this Manor, for an Acre is a Thing certain, and the Situation may be reduced to a Certainty by his Election.

Kell. 84. Co. Lit. 265. If a Son bargains and ſells the Inheritance of his Father, this is void; becauſe he hath no Right to transfer, and the ſame Law is of a *Releaſe*.

But if the Son makes a Feoffment of the Inheritance of his Father, this paſſes an Eſtate during the Son's Life; for

Co. Lit. 265. a. it is a *Diſſeizin* to the Father; and the Son after the Father's Death, can't avoid

void it; for no Man can alledge an Injury in any voluntary Act of his own.

But if the Son *releaſes*, with *Warranty*, he and his Heirs are for ever hereafter barred of the *Rebutter*. Ibid.

If there be two *Jointenants*, and one of them bargains and ſells all his Eſtate, and before Inrollment the other dies, the *Bargainee* hath only a Moiety, and the Bargainor is in of a Moiety ſurviving.

If *Husband*, ſeized of Lands, in Right of his Wife, or Tenant in Tail bargains and ſells Trees in the Lands, and dies before Severance, the *Bargainee* hath nothing; for they are not Chattles; and as ſuch, not diſpoſable till Severance. 2 Bulſ. 5. Mich. 10. Jac. *in* Billingly *in* Horſey's *Caſe*. Moor 41.

Fifthly, *In what Manner it may be* Bargained *and* Sold; *and here is*, 1ſt, *To be conſidered, by what Words it may be* Bargained *and* Sold. 2dly, *Of the* Inrollment. 2 Inſt. 675.

Firſt, *By what Words it may be* Bargained *and* Sold. 2 Inſt. 675.

At Common Law, Lands might be bargained and ſold by Words only, for it was the Conſideration that in Equity raiſed the Uſe; but ſince the Statute of Dy. 229. Chilben's *Caſe*. Poph. 48, 49, 50. 2 Inſt. 672. *and* Co. 94.

the 32 of *H.* 8. *cap.* 16. Lands can't paſs without an *Indenture.*

Dy. 169. 'Tis not neceſſary to a *Uſe* that the Words *Bargain* and *Sell* are there, but any Words equivalent are ſufficient to make a Covenant to ſtand ſeized; for valuable Conſideration will raiſe a *Uſe*; ſo will the Word *Give*, *Grant*, and *Confirm.*

Cro. Jac. 210. Moor 34. 1 Cro. El. 166. The Words *Bargain* and *Sell* will not paſs a Reverſion until Attornment, unleſs it be enrolled; but the Word *Alien* will; nor will the Words *Give* and *Grant*, without a valuable Conſideration or Attornement, paſs a Rent, tho' the Deed be inrolled.

'Tis already ſhewn that if a Man makes a *Charter* of *Feoffment* upon valuable Conſideration, with a *Letter of Attorney* to deliver *Seizin*, the Party may chuſe either to receive *Livery*, or to have the Deed inrolled, and ſo take it by *Bargain* and *Sale.*

2 Co. 35. Nayward's *Caſe.* A Man demiſes, *Bargains* and *Sells* a Manor, Part in Demeſne, and Part in Tenants Hands, for 17 Years, the Party may chuſe either to take it by Way of *Leaſe* at *Common Law*; and then the Tenants muſt attorn; or by Way of *Bargain* and *Sale* without Attornment; and this agrees with the Policy of the Common Law, to take every Man's Grant, ſo to paſs an Intereſt, as ſhall be moſt

moſt advantageous for the Grantee: And ſince in this Caſe the Words allow a double Way of taking it, the Grantee ſhall be at Liberty to judge which is moſt beneficial: So at Common Law, if *A.* makes a *Leaſe* for Years to *B.* and afterwards makes a *Charter* of *Feoffment* to *B.* who is in Poſſeſſion, by the Words *Dedi & Conceſſi* with a Letter of Attorney, to deliver Seizin, before Livery he may make Uſe of the Deed as a Confirmation, and afterwards as a Feoffment; and a Grant to Tenant at Will, may enure as a Confirmation, ſince no *Livery* is neceſſary to one in Poſſeſſion.

2 Leonard Caſe 29 El. B. R.

Co. Lit. 49.

Dy. 269.

Where Tenant for Years makes a *Charter* of *Feoffment* upon a valuable Conſideration, by the Words *Dedi & Conceſſi*, with a Letter of Attorney, to deliver Seizin, which is done accordingly; this is a Forfeiture, for this ſhall not be taken as a *Bargain* and *Sale*, whereby the Term only is paſſed, which the Leſſee might lawfully paſs; but here Livery of Seizin is authorized by him, which ever paſſes a Freehold, and is a Diſſeizin to the Reverſioner, and conſequently a Forfeiture of his Term.

Dy. 262.

A. by *Indenture*, in Conſideration of natural Affection, grants to *B.* a *Rent* in *Eſſe*, *habend'* to *B.* for Life, the Remainder to *C.* in *Tail*, the Remainder to the Right

Right Heirs of *A.* after *A.*'s Death, and there is an Attornment, and it is found *C.* was Couſin to *A.* and adjudged that this ſhould riſe by Way of *Uſe* without *Attornment*; for there can be no Eſtate at Common Law by *Attornment* after the Death of the Grantor; for to every Contract a Grantor and Grantee is neceſſary; and if any of theſe are wanting when the Contract begins to take Effect, 'tis wholly void and inſignificant.

Jackſon's *Caſe.* Paſch. 1657. Co. Lit. 49.

Secondly, Of the Enrollment, it has been already ſhewn, that the Statute of the 27 *H.* 8. *cap.* 10. by executing all *Uſes* raiſed, introduced a ſecret Way of Conveyance, contrary to the Policy of the Common Law; and to remedy this, the Enrollment of the Deeds of *Bargain* and *Sale* was invented; which by *cap.* 16. was to be within ſix Months after the Date. And here three Things are to be conſidered.

1. *The* Relation *between the* Enrollment *and the* Deed.
2. *What* Eſtates *are to be enrolled.*
3. *When they are to be enrolled.*

Firſt, The *Relation* between the *Enrollment* and the *Deed.*

At *Common Law*, the *Uſe* paſſed from the Delivery or Date of the Deed; by the

the *Stat.* of the 27 of *H.*8. *c.* 10. the *Poſſeſſion* paſſed, as the Party had the *Uſe*, which then was from the Delivery of the Deed; but 'twas thought convenient to add further Circumſtances to theſe Contracts; and therefore *cap.* 16. provided, *That the Poſſeſſion ſhould not ſtand or alter from one to another; or any Uſe be made, by Reaſon of any Bargain and Sale, unleſs it be by Deed indented and enrolled within ſix Months.* So that the Bargain and Sale is void and ineffectual to any Purpoſes; unleſs it hath the Qualifications required by the Statute: But if it hath theſe Qualifications, it hath the ſame Effect it had before at *Common Law*; (to wit,) to raiſe the *Uſes* from the Delivery; for the Words of the *Statute* are only to add ſome Things, and not to aboliſh or ſet aſide the Force it had formerly; and if the *Uſe* paſſes from the Date of the Deed, the Poſſeſſion muſt paſs in the ſame Manner by the 27 *H.* 8. *c.* 10. for this Statute of Enrollment doth not deſtroy the Operation of the Statute of *Uſes*, if the Conveyance be made effectual by all Circumſtances required by this Statute; and then the Statute of *Uſes* muſt have its Effect, according to its own Words, and paſs the Poſſeſſion immediately.

Dy. 218. Hob. 136. 2 Inſt. 674. 4 Co. 71. fol. 57.

From

From hence it follows, that the *Bargainee* hath not the Freehold till Enrollment; for till then, there is no Contract effectual to alter the Property.

2 Bulſt. 5 M. 10. Jac. *in* Billingby *and* Horſey's *Caſe*, Mackrels *Caſe*, 10 El. 2 Co. 56. *a.*

If a Man bargains and ſells his *Manor*, to which there is an *Advowſon appendant*, the Bargainee can make no Title to preſent before *Enrollment*.

A *Releaſe* to the Bargainor before *Enrollment*, is good; and it enures to the Bargainee, becauſe the Releaſor can't claim the Right that he hath paſſed out of himſelf by his own *Releaſe*.

Bro. Tit. *Fuits Enfi.* 322. *a.* S. 9. 6 E. 6. Cro. Jac. 53. Co. Lit. 186. 1 Bulſt. 3, 1.

If there be two *Jointenants*, and one of them makes a Bargain and Sale of his own Eſtate in Fee, and then the other dies, the other Moiety ſhall ſurvive to the Bargainor; for ſince the Freehold is in the *Bargainor*, the *Jointure* continues.

1 Rep. Hind's *Caſe*. Moor 681, 337. 2 And. 3, 162, 203. 4 Leon. 4. Poph 49. Hob. 222.

If a Man bargains and ſells his Land, and then ſuffers a *Recovery*, levies a *Fine*, or makes a *Feoffment* to the Bargainee, and then the Deed is *Enrolled*; the Land paſſes by the *Recovery*, *Fine* or *Feoffment*; for ſince the Freehold and *Uſe* is in the *Bargainor* till Enrollment, it muſt paſs by the Recovery, *&c.* And when it has paſſed by the Recovery, the *Uſe* can't riſe, nor the Poſſeſſion be executed from the Date of the Deed.

But

But if the Land had been in any *City*, *Burrough* or *Town Corporate*, that have the Privilege of *Enrollment*, it had been otherwiſe; for they are excepted out of the Statute of Enrollment; and ſo the Poſſeſſion is executed from the Date of the Deed. Yelv. 123. 4 Dy. 229. 2 Inſt. 675.

If a Man *Bargains* and *Sells* Land to *A.* and then grants a *Rent-Charge* to *B.* and then levies a *Fine* to the *King*, and then 'tis to be enrolled, he ſhall hold the Land diſcharged; for the Land paſſes by the Grant; for Grants to the King muſt be by Matter of Record, and not Deeds recorded, as are the Sales of common Perſons; and there can be no Averment or Proof againſt a Record; and by the Record, it appears, if any Intereſt were transferred, it paſſed from the Date which was before the *Fine*: Alſo when ſuch Deed is acknowledged in Court, 'tis good without *Enrollment*; for 'tis not the Enrollment, but the Acknowledgment of it, in a Court of Juſtice which gives it the Sanction of a *Record.*

From hence it likewiſe follows, that after Inrollment, *the Freehold is in the* Bargainee *from the Date of the Deed.*

If the *Bargainor* or *Bargainee* dies before *Enrollment*, it may be enrolled; 2 Inſt. 674. Hob. 136. 1 And. for 229, vide Godbolt, *Caſe* 337.

for here are Parties to give and take the Intereſt when it begins to veſt; for it veſts from the Date of the Deed; otherwiſe it is in Caſe of Attornment.

If a Man *Bargains* and *Sells* his Lands, the *Bargainee* may be *Tenant* to the *Precipe* before Enrollment.

He may, by the better Opinion, receive a *Releaſe* before *Enrollment*.

1 And. 161. The *Bargainee* may maintain an *Aſſize* before *Enrollment*.

If there be two *Jointenants*, and one of them *Bargains* and *Sells* to another *Statum ſuum* in Fee, and dies before *Enrollment*, and after 'tis enrolled, his Moiety paſſes to the *Bargainee*, and ſhall not ſurvive.

Hale *and* Davie Laches 151. 1 Sid. 310. Owen 15. Godbolt, *Caſe* 209. If a Man *Bargains* and *Sells* a Reverſion, and the Rent is incurred; and afterwards the Deed is enrolled, the *Bargainee* ſhall have the Rent unpaid; but if the Rent be once paid to the *Bargainor*, that will be a good Payment by the Tenant of the Land; and the Bargainor is not accountable; becauſe the Contract had not any Effect to paſs the Eſtate from the *Bargainor* before Enrollment; and the Relation of the Law can't make void an Act that was lawful; for it can't be ſet aſide, but by an expreſs and poſitive Law.

If a Man makes a *Leaſe* for Life, with a Clauſe of *Re-entry*, reſerving a Rent; and then *Bargains* and *Sells* the *Reverſion*, and the Bargainee demands the Rent, and the Leſſee refuſes, and then the Deed is enrolled, the Bargainee can't *Enter* for the *Forfeiture*; for till *Enrollment*, he is not Grantee of the Reverſion within the Statute, capable of the Duty; and conſequently at the Day, could make no legal Demand; which was precedently neceſſary to his *Entry*. Owen 69. 3 H. 8. c. 34.

If Tenant for Life be impleaded after a *Bargain* and *Sale* of the Reverſion, and then the Deed is enrolled, the Bargainee ſhall be received; though no Man ſhall be received by the Stat. *Weſtm.* 2. that purchaſes the Reverſion, *pendente lite*. Owen 70.

If a Man *ſeized* in *Fee*, is bound in a *Recognizance*, and then *Bargains* and *Sells* all his Lands, and then the *Recognizance* is forfeited; and then a *ſcir. fac.* is iſſued againſt the Lands in the Hands of the *Bargainor*, and then the Deed is enrolled; this *Scir. fac.* is not maintainable. Owen 70, 1, 2. And. 161. 2 Inſt. 674.

If a Man *Bargains* and *Sells* his Land to *A.* and before Enrollment *Bargains* and *Sells* it by Deed to *B.* and the laſt Deed is firſt enrolled, the laſt Deed

Deed is of no Effect; for after *Enrollment* within the Time Deeds have their Effect according to Common Law; and conſequently the firſt Deed hath the whole Effect, and the other paſſes nothing; the ſame Law is of a *Fine* levied to *B.*

Moor 42.

Cro. Jac. 52, 3. 2 Inſt. 675. Hob. 13, 6. Noy 10, *b.*

If Land be *Bargained* and *Sold* to *A.* and before *Enrollment A.* the *Bargainee Bagains* and *Sells* it to *B.* and *A.*'s Deed is firſt enrolled, the Sale is good to *B.* But *Quære* if *B.*'s Deed be firſt enrolled; becauſe when the Contract firſt becomes effectual to paſs an Intereſt, *A.* had no Intereſt transferred to him by any effectual Contract, which he could paſs over to *B.* and if a Contract hath all the Circumſtances required by the Law to make it of Force, and yet paſſes no Intereſt, it can never paſs an Intereſt after, according to the Rule, *quod ab Initio non valet ex tractu temporis non convaleſcit.*

2 And. 161.

If Lands are *Bargained* and *Sold*, and a Stranger enters, and then the Deed is enrolled, and the *Bargainee* dies, his *Wife* ſhall be *Endowed.*

But if Lands are *Bargained* and *Sold*, and the *Bargainee* dies before Enrollment, his *Wife* ſhall not be endowed; for the *Right* of *Dower* is according to the Rules of *Common Law*, conſummate by

by the Death of the *Husband*; and at the Death of the *Husband*, the *Bargain* and *Sale* had no Effect to veſt the Lands in him; and tho' the Freehold, after Enrollment has a Retroſpect to the Date of the Deed; yet there can't thereby ariſe to the *Wife* a new Title of *Dower*, contrary to the Rule of Common Law, without an expreſs Proviſion by the Statute.

But if a Man *Bargains* and *Sells* Lands by *Indenture*, and then takes a *Wife*, and dies, and after the Deed is enrolled, the *Wife* ſhall not be endowed. Cro. Car. 569.

If there be a Cuſtom in Copyhold Lands, that the *Wife* of the Tenant ſhall be endowed of the Lands of which he died poſſeſſed, and the *Tenant* becomes a Bankrupt, and the Commiſſioners of Bankrupts *Bargain* and *Sell* the Lands, and the *Tenant* dies, the *Bargainee* is admitted; his *Wife* ſhall not be endowed; for after Enrollment or Admittance, the *Bargainee* is in from the Date of the Deed; and conſequently is in paramount to the Wife's *Title* of *Dower*, and all other Incumbrances whatſoever made in the mean Time. Cro. Car. 568, 569. Parker and Bleeke

2. *What Eſtates ought to be enrolled.*

2 Inſt. 271. An Eſtate of *Freehold* or *Inheritance* muſt be enrolled; but not Terms for Years; for they are not within the Words of the Statute.

7 Co. 40. Bedel's *Caſe.* If a Man Bargains and Sells Lands to his Son, in *Conſideration* of *Money*, the Deed muſt be *Enrolled*.

Mich 16. 49 B. R's. Wats *and* Dick's *Caſe.* Stile 188. Co. ſup. Lit. 49. But if the Father in Conſideration of Natural *Love* and *Affection*, and alſo in Conſideration of *Money*, grants Lands to his Son, this need not be enrolled; for Covenants to ſtand ſeized are not within the Words of the Statute; and where the Conſideration of Blood is expreſſed, it may enure as a Covenant to ſtand ſeized; but 'tis only a Sale when the Conſideration of *Money* is alone expreſſed; for that excludes all other tacit *Conſiderations*: And Cities, Burroughs, *&c.* that have the Privilege of Enrollments, are not within the Act; for tho' the Intent of the Makers of that Statute might be not to have excepted them from Enrollments in the Courts of *Weſtminſter*; yet the Statute is ſo worded, that they are diſcharged from any Enrollment at all. The Words are, "Provided always, that "this Act, nor any Thing therein contained

"tained extend not to any *Manor*,
"*Lands*, &c.

3. *When it may be enrolled.*

It muſt be enrolled *within ſix Months* from the Date which ſhall be accounted according to the Computation of twenty-eight Days *per* Month; for a Month in its proper and original Signification is the Space Time meaſured by the compleat Courſe of the Moon; and the Year is meaſured by the Compliment of the Sun's Courſe. 2 Inſt. 674. 6 Co. 62. Gaſſendus 56.

From the *Date*, and from the *Day* of the *Date* in this Caſe, is taken all one, as it is in all other Caſes of Computation; and therefore the Enrollment may be on the *Day* of the *Date*, or on the laſt Day of the ſixth Month after the *Day* of the *Date*; for tho' when an Intereſt paſſes from the Day of the Date, the Day itſelf is excluded; yet when a Time is ſtinted, in which an Act ought to be done, it is in Order to haſten the doing of that Act; and therefore the doing it on the Day from whence the Period is firſt reckoned, within the Time appointed, and the laſt Day of the ſixth Month, is within the Words of the Time given. Co. ſup. Lit. fo. 6. a. Daliſon 4. Hob. 140. Moor 40, 42. 2 Inſt. 674. 2 Ro. 520. Hob. 139. Dy. 286. 6 Co. 1, 6.

Hob. 140. 2Inſt. 674. Moor 42. If the *Deed* has no *Date*, the ſix Months are to be reckoned from the *Delivery*, but not otherwiſe.

Secondly, *The Effect of a* Bargain *and* Sale.

It works no Diſcontinuance.

Sand. 260. 2Inſt. 644. Moor 42. A Tenant in Tail, bargains and ſells his Lands in Fee, only an Eſtate of Freehold paſſes; becauſe it is determinable within the Compaſs of a Life, and therefore he can't deviſe it; for the Statute of 32 *H.* 1. 35 *H.* 8. 3. give only a Power to deviſe a Fee Simple, which is the expreſs Expoſition of the Word *Inheritance*.

1 Co. 98. *b.* 1 Sand. 261. But yet the *Bargainee* hath ſeveral Properties of a *Tenant* in *Fee*, he is *Diſpuniſhable* of *Waſte*, doth not forfeit by *Alienation*; and the Reaſon is, becauſe, as he gave a Conſideration for the *Uſe* of the Fee, 'tis fit he ſhould have all the Properties of the Fee that were not prejudicial to the Right of Ibid. Sand the *Iſſue* in *Tail*, and were not within the Power of the Father to diſpoſe of. *Q. If the Wife be dowable.*

1 Sand. 261. 10 Co. 96. Bro. *Feoff. to Uſes* 337. But if Tenant in Tail Bargains and Sells Lands in Fee, and afterwards *Levies* a *Fine*, the *Bargainee* is then *b.* S. 7, 21. H. 8. 21. ſeized

ſeiſed of a *Fee-ſimple* determinable on the Eſtate Tail, inaſmuch as the *Iſſue* in *Tail* is barred by the *Fine*, for that bars all Parties and Privies, tho' not the Remainder Man; and when the Right of the Tenant is extinguiſhed the *Iſſue* hath no Claim againſt the Tenant of his Anceſtor; but if the *Bargainee* had levied a *Fine*, the Iſſue, by the *Statute of Fines* has five Years from the Deſcent; for the Anceſtor could not claim in his Life-time. Cro. Eliz. 896.

If the *Bargainee* in this Caſe deviſes the Lands, and dies, and afterwards the *Bargainor* levies a *Fine*, the *Heir* of the *Bargainee* ſhall have it, and not the Deviſee, for the Deviſe is Conſummate at the Time of the Death of the Deviſor, and if then it be void, it cannot after be made good. 1 Sand. 261.

If Tenant in Tail *Bargains* and Sells his Land in Fee, and then levies a *Fine* in Fee to a Stranger, the *Bargainee* hath a *Fee-ſimple* determinable upon the Eſtate Tail; for Tenant in Tail hath to all Purpoſes departed with his whole Eſtate, tho' the Right of the *Iſſue* is ſav'd, and conſequently he can paſs nothing to the *Conuſee* of the *Fine*. 1 Sand. 261.

A *Bargain* and *Sale* works no Forfeiture:

But if a Man levies a *Fine* of an *Advowſon*, or any Thing lying in

Grant; tho' this diveſts not the *Reverſion*, yet it works a *Forfeiture*.

For a *Forfeiture* Is a Puniſhment, for doing ſomething contrary to the Nature and Being of the Eſtate he hath, and contrary to the Truſt and Fidelity due to the Perſon from whom it was derived, or his Subſtitutes; therefore if the Tenant for Life, by *Feoffment* or *Granting* it by *Record*, or any other Act, took upon him the Right to the Fee, it was a *Forfeiture*; but otherwiſe, it was, if he ſold the *Uſe* in *Fee*; for *Uſes* are only the Creatures of Equity, and not taken Notice of at *Common Law*; and the Chancery in Favour of a Purchaſer for a valuable Conſideration, ſince there is no Prejudice to the Reverſioner, will allow this, as a Man grants the *Uſe* of an Eſtate for Life, and the Statute executes the Poſſeſſion, as the Party has the *Uſe*, which is only during the Life of the *Bargainor*, and works no *Forfeiture*.

Bro. *Feoff. al Uſes* 38. *b.* 922.

A *Bargainee* cannot *Vouch* by Force of a *Warranty*, annex'd to the Eſtate of the Lands; for he that is in by the Statute, is in the *Poſt*; for he is not in the Poſſeſſion by the meer Contract of the Party, but by the general Law of the Land; and therefore by the Writs of Entry, cannot be ſaid to be in the *per*, that is by

4 Co. 125. *a.* Co. Lit. 259. *a.*

by ſuch a one; and he that is in the *Poſt* can't vouch; for a *Warranty* is a *Covenant*, annexed to the Freehold, whereby the Party agrees to take it up when controverted, and to defend it; it can therefore only extend to thoſe that claim the Freehold from him, and not to thoſe that come to it any other Way, but he may *Rebut*; for tho' he hath not covenanted to defend the Lands to him, yet he can't claim them, becauſe when any Man covenants to defend the Lands, be it to whom it will, it appears thereby the *Warrantor* can have no Right to claim them, unleſs a new Title appears after the *Warranty*. 2 Ro. Ab. 787.

The *Uſe* and *Poſſeſſion* paſſes to the ſame Intent; and therefore a Man may *Bargain* and *Sell*, reſerving a Rent; for tho' no *Rent* be reſerved out of an *Uſe*, for a *Rent* had its Nature and Being at *Common Law*, and accordingly reſervable; yet now the *Uſe* and *Poſſeſſion* carry a Relation to the ſame Moment that the *Rent* is well reſerved, and there is an Eſtate out of which it may iſſue. Co. 54. 2 Inſt. 673.

If a Man ſells a *Reverſion* upon a Leaſe for Life or Years, the *Bargainee* ſhan't take Advantage upon a Demand of the *Rent*, without Notice of the *Bargain* and *Sale*; for it was never the Intent of the Statute of Enrollment, *In* Mallor's *Caſe*, 5 Co. 114. *b.* Cro. Jac. 146.

that the Farmer ſhould be forced every ſix Months to ſearch for the *Enrollments* in Defence of his own Tenure.

Co. Lit. 273. *a.* At *Common Law*, no Man could releaſe to *Tenant* for *Years*, unleſs in Poſſeſſion; for all Poſſeſſions were transferred by Livery ſolemnly, and there can be no Livery where the Party is in Poſſeſſion before; therefore there the Intereſt muſt paſs by Way of *Releaſe*; but where he is not in Poſſeſſion, he is within the Rule, and therefore muſt take by *Livery*.

Co. Lit. 273. *a.* Vaugh. 44,5,6,7, 8, 9, 51. If a Man makes a Leaſe for *Life* or *Years*, and after grants the Reverſion for *Life* or *Years*, and the *Tenant* attorns, the *Leſſor* may releaſe to the *Grantee*; for there is no Need of a new Grant and new Attornment, where the Party is already in Attornment of the Reverſion.

Cro. Jac. 604. Lutwych & Milton. If a Man *Bargains* and *Sells* Lands for Years, he may releaſe to the *Bargainee*, without Entry; or if he bargains and ſells the Reverſion for a Year, he may releaſe to the *Bargainee*, without *Attornment*, becauſe the Poſſeſſion is veſted in the *Leſſee* by the Statute; and conſequently is capable of a *Releaſe*, *cauſa qua ſupra*.

2 Ro. Ab. 787. Paſ. 5 Car. B. R. Grotton *Leſſee of Sir* John Dorrel. If a Man, deſigning to convey Lands to *B.* demiſes, grants, bargains and ſells them

them to *A.* for Years, and afterwards *Releaſes* them to *A.* for the Uſe of *B.* this *Releaſe* is good before there is any Agreement of *A.* to take the *Releaſe* by Way of *Bargain* and *Sale*; and if *A.* afterwards chuſes to take this as a *Releaſe* at Common Law, whereby a Poſſeſſion would be neceſſary to the Operation of a *Releaſe*; yet ſhall not this deſtroy the Eſtate of *B.* becauſe *A.* being expreſſed to be made uſe of but as an Inſtrument to convey it to *B.* ſuch an Expoſition muſt be made, as will make him capable of doing it; and not ſuch as would make the Conveyance of no Signification.

Thirdly, *The Expoſition of* a Bargain *and* Sale. 2 H. 7. 9. a.

Every *Bargain* and *Sale* ſhall be expounded equally and indifferently between both Parties, becauſe they had their Original in *Equity*; but otherwiſe it is of *Gifts* and *Grants* at *Common Law*, which are taken ſtrongeſt againſt the *Grantors*.

If before the Statute, a Man had *Bargained* and *Sold* to *A.* and afterwards had executed an Eſtate by *Livery* to *B.* the firſt Vendee had been without Remedy, *cauſa qua ſupra.* Kell. 85.

A *Bar-*

Cro. Jac. 659, 660. A *Bargain* and *Sale* of Land to *J. S.* in Fee, with a Proviſo, that if the *Bargainor* pay ſo much at ſuch a Time, the *Bargain* and *Sale* ſhall be void; and the *Bargainee* covenants not to inter-meddle with the Profits; but for the Default of Payment, the *Bargainor* is Tenant at Will to the *Bargainee*; and if he makes a Leaſe for Years, he is no *Diſſeizor* to the Bargainee, becauſe no wrongful Intention; and when the Leaſe expires, he is *Tenant* at *Will*.

Dowſly v. Blackman, Bridgman 121.

Fourthly, *The Manner of Pleading* Bargains *and* Sales.

Co. Lit. 251. *b.* Co. Lit. 225. *b.* 5 Co. 53. *a.* A *Bargain* and *Sale* is a Deed *Enrolled*, and as ſuch muſt be pleaded; the Deed it ſelf, whereby the *Uſe* it ſelf originally paſſes, is a Matter in *Pais*, and muſt be ſhewn to the Court, and not the Tenor of the Deed which is on the Roll of Record; for the Enrollment is the Tranſaction of the King, or his Courts of Juſtice; and therefore they have the Eſteem of undoubted Fruits; and conſequently *Grants* to the King, or Inſtruments to any Subjects made in open Court, are *Records*, and uncontroulable; but the *Deeds* of Subjects privately made, not in open Court, when the Party claims from the Date

Date or Execution of theſe Contracts, have not the Sanction of *Records*, tho' the Deeds be after publickly *Acknowledged* and *Enrolled*; for the private Contract may be falſely and fraudulently dated, or ill executed; and therefore, 'tis neceſſary they themſelves ſhould be ſhewn, ſince the Party from their Commencement derives his Title.

But the Tenor of an *Enrollment* is a Record which can't be produced; becauſe, tho' 'tis certainly an authentick Copy, yet it may be the true Copy of a falſe Deed. Ibid.

But the Act of *Enrollment* is a Tranſaction of the Court, and therefore can't be denied; but as all other *Records* may, by Pleading *Nul tiel Record*, and the only Trial is, by ſhewing it; but the Time of *Enrollment*, when it doth not appear on the Rolls it ſelf, as antiently it did not, was to be tried by a *Jury*; but when the Time doth appear on the Roll it ſelf, as it hath done ſince the Office of *Enrollments*, it ſhall be tried by nothing but it ſelf. 4 Co. 71. 2 Ro. Rep 119, 120.

Hence it follows, that if an *Infant Bargains* and *Sells* his Lands by Deed, indented and enrolled, yet he may plead *Nonage*; for notwithſtanding the Statute, the *Bargainee* claims by the Deed as at *Common Law*, which 2 Inſt. 678.

which was, and therefore is ſtill defeaſable by *Nonage*.

2 Inſt. 673. Bro. *Faits Enroll.* 328. S. 5, 11, 14. But if an *Infant* contracts in open Court; as if he acknowledges a *Statute*, *&c.* he can't plead *Nonage* againſt it; for if the Court have allowed him to have a contracting Power, there can be no Averment to the contrary.

2 Inſt. 673. Bro. ibid. 17. If an *Infant* makes an Obligation, and afterwards acknowledges and enrolls it in open Court, he can't plead *Nonage*; for the *Recognition* of any Perſonal Contract, amounts to the making of one, for the Deſign of all Perſonal Contracts is but to acknowledge an Obligation, which, when done in Court, is not to be controverted; but in real Contracts, the Deſign of the Statute is, that the Inſtrument it ſelf, with apt and ſignificant Words ſhould paſs the Intereſt, and not the *Recognizance*, which is only a ſolemn Act appointed for further Notoriety; and therefore the Party muſt claim from the Words that transferred the Eſtate, which are only in the Deed.

2 Inſt. 676. But if an Infant acknowledges the *Statute* or *Obligation* in Court, he may avoid it by an *Audita Querela*, for he is inſpected in Court, and the former Act may be annulled by an Act of equal Authority.

By

By the *Common Law*, a Deed acknowledged by the *Husband* and *Wife*, binds only the *Husband*; for the *Wife* can't be examined by any Court, without a Writ, and there is no Writ allowed in this Caſe, for the better Security of *Wives*, who are, by our Law, entirely ſubjected to the Will of the *Husband*; ſo that the Court is not impower'd to take ſuch an *Obligation*, but it is an Act extrajudicial.

But the *Cuſtom of London*, that allows them to trade ſeparately, binds them alſo by ſuch *Obligation*. 1 Inſt. 673. Bro. Ib. S. 17.

If a Man acknowledges and enrolls a Deed, he can't afterwards plead *Dureſs*. Bro. ibid. 15. Moor 42.

If a Man makes a *Leaſe* for *Years* the 10th of *May*, and afterwards *Bargains* and *Sells* his Land, and antedates the Deed, the Acknowledgment and Enrollment the 10th of *April*, the Leſſee is without Remedy; becauſe there is an Averment againſt the Record. Owen 138. *Sir* Thomas Howard's *Caſe*.

The Party that claims by any *Bargain* and *Sale* muſt ſhew in what Court the Deed is enrolled; becauſe he muſt ſhew all Things in certain that make out his Title, and otherwiſe his Adverſaries would be put to an infinite Search before he could traverſe with Security. Yelv. 213. 1 Co. 7. *a*.

Secondly,

Secondly, *Of Covenants to ſtand ſeized upon Conſideration of Blood; of which ſee before.*

Billingham *and* Morley, Mich. 9. *W.* The Original of it was in this Manner before 27 *H.* 8. When any Man covenanted to ſtand ſeized to the *Uſe* of another, the Remedy was *two-fold.*

Firſt, By *Action* at *Common Law* upon the Covenant, and thereby *Damages* only were recovered.

Bro. *Feoffm. to Uſes*, 338. 8. 16. *Secondly*, In *Chancery*; and here the Remedy aroſe thus; when any Man covenants to do a Thing, the Party is firſt bound in Conſcience to perform the Thing it ſelf; and if that can't be, then to render *Damages* for not doing of it; therefore the Chancery that examines the Conſcience of Men's Actions requires a *ſpecifick Performance* of the Thing it ſelf, where it can be had: But the *Common Law* could not carry this *Covenant* ſo far without offering Violence to its own Rules; for the *Common Law* requires *Livery*, and to allow an Action; for a *ſpecifick Performance* makes the Agreement binding without it; but by the 27 *H.* 8 theſe *Uſes* are executed, and therefore no Action lies; for there can be no Complaint for not transferring the Thing, when the Statute transfers it to the Party himſelf.

Plow. Com. 308.

Cove-

Covenants to ſtand *Seized* in Conſideration of Marriage, need not be indented or enrolled, for they are not within the Statute of the 16th; for Marriage makes it publick, and it was not thought fit to publiſh it any otherwiſe. Plow. Com. 307.

And here 'tis to be conſidered,

1. *Who muſt* Covenant *to ſtand* Seized, *and to whom.*

Secondly, What Conſideration *is neceſſary to a Covenant to ſtand ſeized.*

Thirdly, *By what Words a Man may* Covenant *to ſtand* Seized.

Fourthly, *The Effect of a Covenant to ſtand ſeized.*

Firſt, *Who may* Covenant *to ſtand* Seized, *and to whom.*

Tenant in Tail *Covenants* to ſtand *Seized* to the *Uſe* of himſelf for Life, Remainder to his eldeſt Son in Tail; ſince he had only the Power of diſpoſing of an Eſtate for *Life*, by the Statute *de Donis*, which he hath not paſſed out of himſelf, it is ſtill in him as it was before; and the Remainder is void in its Creation, and therefore there can be no Execution of it, for the Execution muſt be immediate by the Statute of *Uſes*; and therefore a *Fine* afterwards levied can't help it. Cro. El. 895. Beddingfield's *Caſe.* 279 Blythman *and* Blythman. 2 Co. 52.

But

But it ſeems in this Caſe, that before the Statute, the Chancery would oblige to a *Specifick Performance* by *Fine* againſt the Party himſelf, but not againſt his *Iſſue*; *Quære.*

Secondly, *What* Conſideration *is neceſſary to a* Covenant *to ſtand* Seized, *and how far it extends.*

Tho' a Man can't *Bargain* and *Sell* but upon *Conſideration* of *Money*, yet he may *Covenant* to ſtand *Seized* upon other *Conſiderations* beſides that of *Blood.*

Cro. El. 394. If a Man, in *Conſideration* that *J. S.* was bound in a Recognizance for him, *Covenants* to ſtand *Seized* to his *Uſe*, this is good; for the Chancery will oblige a Specifick Recompence upon any Agreement, where a Conſideration was performed on one Side; and where the Chancery would raiſe an *Uſe* the Statute executes it.

1 Leon. 165. Pagett's *Caſe.* If a Man, ſeized of certain Lands, in Conſideration that *J. S.* will pay his Debts, and certain Sums of Money that he ſhall appoint, out of the Profits of the Land, *Covenants* to ſtand *Seized* to the *Uſe* of *J. S.* for twenty-four Years, this ſhall not raiſe a *Uſe*; for ſince the Debts are to be paid out of the Profits of

of the Land; this is no Conſideration to part with them, or veſt an Intereſt in *J. S.* for the *Conſideration* ariſes from his own Property, and not from any Equivalent; but otherwiſe it had been, if the Debts were to be paid out of the proper Lands of *J. S. cauſa qua ſupra.*

If a Man *Covenants* to ſtand *Seized* to the *Uſe* of three Perſons, for the performing ſeveral Truſts to himſelf, his Wife and Children, and one of theſe is his Brother, to him alone there is a *Conſideration*; and therefore he alone is ſeized of the Intereſt under the *Truſt* aforeſaid. Cro. Car. 529. Smith *and* Riſley.

There is a Difference between a *Covenant* to ſtand *Seized* and a *Feoffment*; for if a Man *Covenants* to ſtand *Seized* to the *Uſe* of *A.* a Stranger for Years, *&c.* the Remainder to *B.* his Son in Tail, this is void as to *A.* for Want of a *Conſideration*, and the *Uſe* veſts immediately in *B.* and a void *Uſe* is as if no *Uſe* be limited; and if no *Uſe* be limited, *B.* muſt take immediately, and not by Way of Remainder, or elſe he can't take at all; for a Remainder *ex vi Termini* ſuppoſes a particular Eſtate, and *B.* muſt not be excluded, becauſe *Uſes* being *Creatures* of *Equity*, the Parties Intent muſt be made good as far as poſſible, where there is a juſt and good 1 Leon. 195. 10. 201. licet Plowdens Com. 307. cont.

Ground for any Part of the Conveyance.

1 Leon. 197. per Manwood. But if a Man makes a Feoffment in Fee to the *Uſe* of *A.* and a Stranger, or Baſtard for Life, the Remainder to his Son in Tail, this is good to *A.* for upon a *Feoffment* there needs no *Conſideration* to raiſe the *Uſe*, as is ſaid.

5 Co. 8. *b.* If a Man, ſeized of three Acres, makes a Leaſe of one to *A.* for Life, and of another to *B.* for Life, and of another to *C.* in Tail, and then reciting the ſeveral Eſtates, *Covenants* after all the Eſtates finiſhed, to ſtand ſeized to the Uſe of his *Brother* in Fee; if *A.* dies, the *Brother* ſhall have the *Reverſion* of that Acre immediately, and not expect till the other Eſtates are determined; for it muſt be conſtrued *ſecundum ſubjectam materiam*; and the *Covenantor* hath three diſtinct *Reverſions* in him.

Thirdly, *By what Words a Man may covenant to ſtand ſeized.*

Vent. 138 139, 140. Mod. Rep *from* 175 *to* 179, 2 Ro. Ab. 787. If a Man, in Conſideration of *Natural Love*, and for *Augmentation* of his *Daughter*'s *Portion*, Gives, Grants, Bargains and Sells, Aliens, Enfeoffs and Confirms certain Lands to *J. S.* his Daughter, with a ſpecial Warranty, and the Deed is enrolled, this enures by Way of

of *Covenant* to ſtand *Seized*, in Reſpect of the *Conſideration*.

But if the *Conſideration* be not expreſſed in the Deed, it ſeems no *Uſe* ariſes. Co. ſup. Lit. 49, 8 Co. Fox's *Caſe*, March 50. Moor 122. Pl. 267. Cro. Eliz. 279.

If a Man, in *Conſideration* of *Marriage* of his Son's Daughter, covenants that his Land ſhall Deſcend, Come and Remain to him, or her, this is only a *Covenant Executory*, upon which an Action lies, and the Force of the *Covenant* is not to alter the Deſcent; but 'tis no *Covenant* to ſtand *Seized*, whereby he may be intitled in Chancery to a Specifick Performance.

If a Man ſeized of a *Reverſion Expectant* upon an Eſtate for Life, Gives, Grants, and Confirms the ſame to his Son in Fee, in *Conſideration* of *Natural Love* and *Affection*, expreſſed in the Deed to the *Uſe* of himſelf for Life, the *Remainder* to his Son in *Tail*, the *Remainder* to a Daughter, without *Attornment* or Enrollment, this Conveyance is void, and can't enure by Way of *Covenant* to ſtand *Seized*; for if it enures by Way of *Covenant* to ſtand *Seized*, the legal Eſtate out of which the *Uſes* riſe remain in the *Covenantor*: But the Intent of the Conveyance is to raiſe the *Uſes* by Way of *Tranſmutation of Poſſeſſion*, and to transfer the Freehold, out 2 Vent. 318. Samon *and* Jones Sid. 25. Hore *v.* Dix.

of which the *Uſes* are to riſe to the Son; but this Conveyance will not paſs that Freehold for Want of *Attornment*, and ſo the *Uſes* can never ariſe by this Deed.

Fourthly, *The Effect of a* Covenant *to ſtand* Seized.

2 Ro. Ab. 790. N. 5. If a Man *Covenants* to ſtand *Seized* of the Manor of *D.* to the *Uſe* of *J. S.* this is void, though he afterwards purchaſes the Manor in Fee.

Noy F. 19. Cro. El. 491. If a Man *Covenants* to ſtand *Seized* of the Land that he ſhall hereafter purchaſe to the *Uſe* of his Son, and after purchaſes Land to the *Uſe* of himſelf and his Heirs, the Fee is in the Father.

For if a Man binds any Lands, you muſt ſuppoſe him to have a Power to oblige them; for no Man can do that which he hath no Power to do; but he that hath no Intereſt, hath no Power to oblige them; and therefore ſuch a *Covenant* in *Equity*, before the Statute, could not oblige him to a *Specifick Performance*, for that were in Equity, to bind the Land, which is abſurd; and ſince the *Covenant* is void in Equity, there can be no Execution by the Statute; for the Rules of Law are equally ſtrict in avoiding this Repugnancy;

Ibid. per omnes.

for

for in Law, every Diſpoſal ſuppoſes a precedent Property; and by Conſequence, every *Covenant* to ſtand *Seized* preſuppoſes a precedent *Seizin*.

By the ſame Rule tis ſaid, that if the *Mortgagor*, in Conſideration of ſo much *Money* paid by *J. S.* *Covenants*, that after Redemption, he will ſtand ſeized to the *Uſe* of *J. S.* and his Heirs, this is a void *Covenant*; but if a *Feoffment* be made to *A.* to *enfeoff B.* to the *Uſe* of *C.* and *A.* enfeoffs *B.* without the Limitation of any *Uſe*; yet it ſhall be to the *Uſe* of *C.* Cro. El. 402. Noy 19.

So if a Man covenants to purchaſe Land by *Michaelmas next*, and before *Eaſter* following, to levy a *Fine* to ſuch *Uſes*, and accordingly purchaſes Land, and levies a *Fine*, it ſhall be averred to be to the *Uſes* limited in the *Covenant*. Cro. El. 402. Noy 19.

For a Man may declare the Intent of a future Act, which he had no Power to do at the Time of the Declaration; for to declare the Intent of a future Act, doth not ſuppoſe an immediate Power of doing it; but the doing any Act it ſelf, which the Law allows to be good and effectual, preſuppoſes the Power of doing.

Another Reaſon why the *Uſe* declared upon the Covenant in the firſt Caſe of Land after purchaſed is bad, is this; Cro. El. 401. Noy 19.

becauſe the *Uſe* muſt be limited by the *Donor* or *Feoffor*; for he muſt limit the *Uſe*, that at the Time of Limitation had the Diſpoſal: Now in this Caſe the Donor limits the Fee to the Purchaſer, which controuls the Intent of the *Covenant*.

Secondly, *Of* Uſes *in* Poſſibility.

Firſt, *Of* Executory Fees.
Secondly, Contingent Remainders.

Firſt, Of *Executory Fees*. How *Executory Fees* begun, and how the Rule of Law, that no *Fee* can be limited upon a Fee, is evaded, is already ſhewn; and when an Executory Fee is well raiſed, that it can't be deſtroyed but upon Alienation, upon good Conſideration, *&c.* is ſhewn; and how Executory Fees may be limited, is here to be conſidered, and they are to be governed by three Rules.

1. That all Limitations that tend to the Proviſion of the Family, and to ſecure againſt Contingencies that are within the Parties own immediate Proſpect, are to be favoured.

2. All Limitations that Perpetuate or tend to *Perpetuity*, are in themſelves void

void and repugnant to the Policy of the Law.

And therefore it is to be ſeen what is a Perpetuity.

A *Perpetuity* is the Settlement of an Intereſt deſcendable from Heir to Heir, ſo that it ſhall not be in the Power of him in whom it is veſted to diſpoſe of it, or turn it out of the *Channel*. *Caſe of Perpet.* 23. 4 Not. 1. Arg. 6. Pop. 79, 80. 1 Co. 138, 9. 1 And. 139, 140. 2 Ro. Rep 221.

The *Inconveniencies* of which are, that the Eſtate is made uncapable of anſwering the Ends for which *Perpetuity* is maintained and eſtabliſhed; for it puts it out of the Power of the Owner to provide for the Neceſſities of his Family, or the Extremity and various Changes of his own Affairs out of the Eſtate; beſides it would be of univerſal Damage to the Common Wealth; for it would ſhut up all Converſe, by making the Way of Communication between Land and Money utterly impracticable; to know therefore how far a Limitation may be allowed, without the Danger of being conſtrued a *Perpetuity*, 'tis to be conſidered, what Limitations are conſiſtent with theſe Rules of *Reaſon* and *Policy*.

Firſt, the Law in all Caſes, allows the *Limitations* of Eſtates for Life, to Perſons in Being; for there can be no Danger in ſuch a Common Limitation,

nor any Deſign to *Perpetuate*; and therefore here the Party is reſtrained from *Alienation* farther than for his own Life.

Secondly, The Law allows of no Eſtate of Inheritance that goes in lineal Succeſſion; but what is under the Power of that Perſon to whoſe Repreſentatives the Eſtate muſt deſcend, and to eſtabliſh a Right of Succeſſion, and yet to reſtrain the Power of Alienation is to *Perpetuate*; and therefore to limit an Eſtate of Succeſſion, determinable upon remote Contingency, tends to a *Perpetuity*, ſince none can purchaſe with Security, while ſuch a Cloud hangs over the Eſtate.

Which Rules are equally obſervable in Freeholds and Chattels.

First, *In Freeholds.*

Cro. Jac. 590. Roll. 2. Rep. 196, 216, 3. Leon. 64. Dy. 44. Dy. 7.

If an Eſtate be deviſed to *J. S.* in Fee, and if he dies without Iſſue in the Life of *J. N.* then to *J. N.* in Fee, this is good; for an Eſtate determinable upon the Compaſs of a Life, is equally agreeable to the Policy of the Common Law, and can't but be as good as the Limitation during a Life; for why may not a Fee be contracted to an Eſtate for Life, as an Eſtate for Life be prolonged to a Fee upon a Contingency.

Per Holt Trin 1697 Dy. 44. Dy. 7. Vaugh. 272.

But if an Eſtate be limited to *J. S.* in Fee while *J. N.* hath Iſſue, Remainder

der to *J. D.* this is void to *J. D.* for this comes within the Danger of a Perpetuity, and doth not determine within the Common Compaſs of an Eſtate for Life.

Secondly, *Chattels.*

A Grant of a Leaſe for Years to *J. S.* for Life, Remainder to *J. N.* is not good to *J. N.* for as Leaſes for Years being under the Power of the Freeholder, they are recovered as Chattels, and go to the Executors; and a Chattel can't be limited for Life with a Remainder over; becauſe this would create great Inſecurity in Common Traffick. Co. 8 R. 95.

But in Caſe of *Deviſes*, the Courts of Common Law are governed by the Rules of Equity to ſupport the Intent of the Teſtator; and therefore ſince the Time of *H.* 8. when long Leaſes could firſt be made with Security, a Deviſe of a Term for Years to one for Life, with the Remainder over, has been allowed, and the Chancery has forced the Tenant for Life, to give Security to the Remainder Man; but becauſe this was found to multiply Suits and Vexation, it was thought more convenient, that the Tenant for Life ſhould alien according to the Intereſt he had in him, which was only during his own Life.

But

8 Co. 87. Leon. 421 Lova's *Caſe.* 1 Ro. Ab. 611. Levenſthorp *and* Aſhley, *Not.* 1. *Arg.* 4. Reeve's *Caſe.*

But the *Deviſe* of a Term for Years in Tail, with Remainder over, is void to the Remainder-Man; for that, according to the former Rules, would introduce a Perpetuity.

The Limitation of a Term for Years in Tail, is an abſolute Diſpoſition of the Term, and it ſhall go to the Executors.

Mod. Rep 115. Burges *and* Burges, *Not.* 1. *Arg.* 4. *Sir* Will. Buckhurſt's *Caſe.*

If a Term for Years be limited to a Man and his Iſſue, and if the Man dies without Iſſue, the Remainder over, this is void, becauſe the Contingency is not to happen till after a Succeſſion.

If a Term be limited to *A.* for Life, Remainder to his *1ſt*, *2d*, and *3d* Son in Tail ſucceſſively, the Remainder to a Daughter, or to *B.* (*a Perſon in Eſſe*) if the Party hath no Sons; but afterward a Daughter, neither the Daughter or *B.* ſhall take this Remainder; for this is an Affectation of a Perpetuity, and is not a Limitation meerly upon an Eſtate for Life; but it amounts to a Limitation upon the Failure of the Perſon in the lineal Order to Succeed into the ſame Eſtate.

Not. 1. *Arg.* 11, 12. 2 *Arg.* 29. Hale ſup. Dy. 44, vide Child *and* Bayly's *Caſe*, Cro. Car. 459

But if it be limited to *A.* and if he dies without Iſſue, to *B.* the Remainder is good; for here it is not a Limitation to the Iſſue, but upon a Contingency, which if it doth not happen, it makes the whole Term veſt in the Party

Party; and if the Contingency doth fall, the Remainder-Man has it upon the Determination of an Eſtate for Life. 2 *Not.* 1. *Arg.* 16, 17.

If a Term be deviſed to *A.* for 18 Years, the Remainder to *B.* for Life, the Remainder to the firſt Iſſue of *B.* this is good.

If a Term is limited to *H.* and the Heirs of his Body, and if *T.* dies without Iſſue in the Life of *H.* Remainder to *C.* and his Heirs, this is good; for *H.*'s Term is not taken from him by any Contingency, which muſt of Neceſſity happen, during the Life of him in whom the Eſtate is veſted. *Duke of Norfolk's Caſe*, Trin 34 Car. 2.

Where a long Leaſe is limited to *A.* for 60 Years, if he lives ſo long, Remainder to *B.* his Wife for 60 Years, if ſhe live ſo long, Remainder to *C.* his Son, and his Executors, if he outlive *A.* and *B.* but if he dies in their Life-Time, leaving Iſſue, then to the Iſſue; and if he died without Iſſue, living *A.* or *B.* the Remainder to *D.* In this Caſe, if *C.* dies without Iſſue in the Life of *A.* or *B.* *D.* ſhall have the Remainder; for the Remainder of the whole Term is veſted in *C.* which is not diveſted out of him, and veſted in *D.* upon Failure of lineal Succeſſion to *C.* but not till the Death of *C.* without Iſſue, during the Life of *A* or. *B.* Trin. 21. Car. 2. Wood *and* Saunders. Pol. 35.

As

Not. 1. *Arg.* 4. As the legal Eſtate of a Term may be deviſed, ſo the Truſt of a Term may be limited.

Chan. Rep. 8. Goring *and* Bickerſtaff. A *Limitation* of a Term for Years to twenty diſtinct Perſons in *Eſſe* is good; but the *Limitation* of a Term to *A.* for Life, the Remainder to the Right Heirs of *B.* a Perſon in *Eſſe*, is a void Remainder; and after the Death of *A.* it ſhall revert to the Donor; becauſe this might tend to the Eſtabliſhing an Eſtate of Inheritance in a Chattel, and putting it out of the Courſe the Law had ſettled for it, whereby it ought to go to the Perſonal Repreſentative.

If a *Term* be limited to *A.* for Life, the Remainder is in the Donor; if a

Chan. Rep. 8. *Term* be limited to *A.* for Life, the Remainder to the Right Heirs of the Donor, this is a void Limitation, becauſe the *Reverſion* is in him.

If the *Truſt* of a Term be limited to *A.* for Life, the *Remainder* to *B. B.* may diſpoſe of the *Remainder*; but if a *Term* be deviſed to *A.* for Life, the *Remainder* to *B. B.* can't diſpoſe of this *Remainder*; for by the Rules of Common

Ch. Rep. 89. Co. 4. R. 66, 6, 10. R. 47. Law, a Poſſibility can't be granted over, for a Man that only may have Right, has at preſent no Right in him; and while the Rules of Law ſay he has no Right, it is contradictory

and

and repugnant, to allow him to act as a Perſon having Right by transferring an Intereſt to another. *B.* in this Caſe has only a Poſſibility to have a Right, becauſe the Eſtate of *A.* being of uncertain Duration may outlaſt the Term for Years; but in Chancery, where the Truſt is examined, they allow a Man to provide for his preſent Occaſions out of what he may poſſibly have; and a Purchaſer of it ſhall not loſe the probable Advantage, ſince he hath given for it a valuable Conſideration.

As to *Executory Fees*, there is another Difference, where they riſe by Way of *Uſe*, and where by Way of *Deviſe*.

Firſt, If it riſes by Way of *Uſe*, there muſt be a Seizin in Somebody to be executed in the Grantee of the contingent *Uſe*, whenſoever the Contingency happens; for if there be not a Perſon that can be ſeized of a *Uſe*, there can be no *Uſe*; and conſequently there can be no Execution of it; therefore if a Man covenants to ſtand Seized to the *Uſe* of himſelf in Fee, till ſuch a Marriage takes Effect, and then to the *Uſe* of himſelf for Life, the Remainder to his Wife, his Son, *&c.* and before the Marriage he makes a Feoffment in Fee, Gift in Tail, or Leaſe

Cro. El. 765. Wood *and* Reynolds 2 Ro. Ab. 796. Cro. Jac. 169. Moor 731 *and* 742.

Leaſe for Life, upon good Conſideration, without Notice of the *Uſes*, the Eſtates limited after the Marriage ſhall never ariſe; becauſe here is Nobody ſeized to ſuch *Uſes*, and the ſame Law is of Feoffments to ſuch contingent *Uſes*.

Cro. El. 854. Wood *and* Reynolds Cro. Jac. 169. But if in this Caſe he had made a Leaſe for Years, he would not have deſtroyed the future *Uſe*, but only have bound it; becauſe there is a Seizin, out of which the *Uſe* riſes; and at Common Law, if the Feoffees had made a Leaſe upon good Conſideration, as in this Caſe, it would have bound the Lands, and conſequently *Ceſtuy que Uſe* muſt have the Profits of the Land thus leaſed; and in this Caſe, ſince the Statute, the Covenantor has the ſame Power of obliging the Fee; and therefore thoſe to whom the contingent Eſtates are limited muſt take it under the Charge. *Quære.*

Feoffment to the *Uſe* of *A.* in Fee, and if *B.* pays ſo much, *&c.* then to *B.* in Fee; *A.* deviſes his Land, and dies, it

1 Moor 733. deſtroys the Contingent Eſtate; otherwiſe it is, if he had deviſed Portions out of the Land, for that could not alter the Freehold.

Cro. Jac. 592, 3. A *Recovery* doth not bar an *Executory Fee*; for the Recoveror with Notice, and without Conſideration, is ſeized to the former *Uſes*. *Second-*

Secondly, By Way of *Deviſe*; if a Man deviſes Lands to *A.* in Fee, and upon ſuch Contingency to *B.* in Fee, *A.* makes a Feoffment in Fee; this doth not deſtroy the *Contingency*; for by a Deviſe, the Freehold it ſelf is transferred, and there needs no Perſon to be ſeized to execute an Eſtate in the Deviſee, as muſt be where a Feoffment is made to *Executory Uſes*. 2 Ro. Ab. 793.

But if a Man deviſes it to *A.* for Life, with a Contingent Remainder; if *A.* makes a Feoffment in Fee, this deſtroys the *Contingent Remainder*; becauſe there is no particular Eſtate to ſupport it. 2 Ro. Ab. 793.

Secondly, Contingent Remainders; *and here it is to be conſidered*, 1ſt, *In what Manner they are to be executed.*

As if a Feoffment be made to *J. S.* in Fee, to the *Uſe* of *A.* for Life, Remainder to his *1ſt*, *2d* and *3d* Son, the Remainder to *B.* in Fee, there are three plain Preliminaries to this Enquiry.

Firſt, There ought to be a Perſon ſeized to the *Uſe* at the Time when 1 Co. 126. a.

the *Uſe* is executed; and this, as is ſaid before, is Plain by the Words of the Statute; *viz. If any Perſon ſtand or be ſeized.*

Pop. 74. *Secondly*, The Eſtate for Life is immediately executed in *A.* the Remainder in Fee to *B.* by the Statute; becauſe the *Uſe* is immediately in them, and they have the Poſſeſſion in the ſame Manner they have the *Uſe.*

1 Co. 126. a. Pop. 72. 1 Co. 136. a. *Thirdly*, No Poſſeſſion can be immediately executed in the Sons, becauſe they are not in Being; and therefore capable of no Property, neither in *Uſe* nor *Poſſeſſion.*

The Non-performance of all theſe Rules, cauſed two falſe Opinions in this Matter in the Debate of *Chudley's* Caſe.

Firſt, Some thought, according to this ſecond Rule, that the whole Poſ-
Pop. 73. 1 Co. 132, 133, 134. ſeſſion muſt be executed in *A.* and *B.* and therefore that the contingent *Uſe*, when it falls, was executed out of the firſt Livery; and the Eſtate formerly in Feoffees; and this by the Words of the Statute; the Eſtate that was in the Feoffees ſhall be in *Ceſtuy que Uſe*; and hence they inferred, that ſince the

Eſtate was executed by the Power of the Statute, it muſt be preſerved till ſuch Execution by the ſame Power; and therefore they ſaid, the Contingent Remainders were in *Abeyance*, and not extinguiſhable by the Alienation of Tenant for Life.

But this is a Miſtake, Firſt, becauſe this is contrary to the firſt Preliminary; for that ſuppoſes an Eſtate in *J. S.* at the Time of the Execution. 1 Co. 136. a. 1 And. 332

Secondly, Becauſe it is contrary to the Nature of an *Abeyance* by the Rules of Law; for if there be Tenant for Life, Remainder to the Right Heirs of *J. S.* living, if Tenant for Life dies, or aliens, during the Life of *J. S.* the Remainder is deſtroyed. Co. 1, 133.

Thirdly, Becauſe it would create a Perpetuity.

Some add another Conſequence of this Doctrine, that a *Uſe* would riſe out of a *Uſe*. 1 Co. 133. 9. Pop. 79. So. 1 And. 341. P. 81. 1 Co. 136. Cro. El. 139.

Others held a different Opinion; and they thought there was an immediate *Remainder* veſted in *J. S.* to ſerve the *Contingent Uſe* when it falls, and that this Eſtate was determinable 1 Co. 129. a.

minable upon the Riſing and Execution of the Eſtate in the Sons, *&c.*

But this could not be, Firſt, becauſe this is contrary to the ſecond Preliminary; for thereby an Eſtate is immediately
1 Co. 129. *a.* veſted in *A.* and *B.* but by this Opinion, the Eſtate in *B.* is only *Executory*; for it ariſes to him upon the ſame Contingency that the Eſtate of *J. S.* riſes, for he could not have a Fee before; for then there would be a double Fee.

Secondly, Becauſe *J. S.* would have a *Remainder* without any Grantor, and
1 Co. 128. the Law leaves it to Parties to limit their own Eſtates; and where Nobody has limited an Eſtate, there can be no legal Limitation.

Thirdly, If a Remainder be veſted in *J. S.* he muſt *puniſh Waſte*, and enter for a *Forfeiture*; but the Party deſigned him no ſuch Benefit, but made him only an Inſtrument to convey it to others.

The true Opinion is, that the legal Eſtate is executed in *A.* and *B.* but the contingent Remainders are not utterly loſt, becauſe the *Poſſeſſion* by the Statute muſt be executed in the ſame Manner as the *Uſe* is limited; therefore there re-

remains a Poſſibility of *Poſſeſſion* to the Feoffees, to this Purpoſe only, that when the Contingency happens, then the Poſſeſſion may be transferred to the Remainder-Man; and if this is an Eſtate not known before, and ſo has no Determination at Common Law, yet it is ſuch a one as muſt be raiſed by the Intent of the Statute, and all its Ends could not be anſwered without it; and therefore to ſuppoſe, as in the other Opinions, no Eſtate in the Feoffees, or to reduce it to the Standard and Rules of Common Law is equally falſe and impracticable.

Secondly, *How they may be defeated.*

1ſt. *Where there is no Power of Revocation given.* 2dly, *When there is expreſs Power of Revocation.*

Firſt, Where there is no Power of Revocation expreſſed; ſince Executory Fees, as is ſaid, and Contingent Remainders tend to Perpetuities, they are conſtrued according to the ſtricteſt Rules of Law, and as far as poſſible, put under the Power of the Eſtate that ſupports them.

And hence came the Diverſity between deſtroying and contingent Remainders, and an Executory Fee.

A Remainder is the Reſidue of a particular Eſtate diſpoſed of by the ſame Conveyance; therefore *ex vi Termini* it ſuppoſes,

First, *A particular Eſtate in Being.*
Secondly, *That individual Eſtate that was made by the ſame Conveyance as the Remainder.*
Pop. *from* 70 *to* 83. Thirdly, *It ſuppoſes an Exiſtence of this Eſtate when the other goes out of Being.*
Fourthly, *It ſuppoſes the Eſtate ſhould remain in the ſame Manner as it was diſpoſed.*

1 Co. *from* 120 *to* 140. 1 And. *from* 309 *to* 344. Chadley's *Caſe.* 1 Leon. 352, 3. Therefore if a Man makes an Eſtate to the *Uſe* of *A.* for Life, Remainder to his 1*ſt*, 2*d*, and 3*d* Son in Tail, Remainder to *B.* in Fee, and *A.* makes a Feoffment in Fee, and then a Son is born, the Contingent Remainder is deſtroyed; for by the Feoffment, the particular Eſtate is extinguiſhed, and afterwards, by the firſt Rule, there would ariſe no Remainder of it.

4 Leon. 237. If Lands be given to one in Tail, if *J. S.* comes to *Weſtminſter*, and the Remainder to him in Fee, Tenant in Tail dies, the

the Eſtate deſcends on Copartners; they make Partition, tho' *J. S.* does come to *Weſtminſter*, *&c.* he ſhall take nothing; for the individual Eſtate is altered, and the Freehold altered by the Partition contrary to the ſecond Rule.

If Lands be given to *A.* and *B.* for the Life of *C.* the Remainder to the Right Heirs of the Survivor; if *A.* releaſes to *B.* the Heirs ſhall take nothing, *cauſa qua ſupra.* 4 Leon. 237.

A. ſeized in Fee deviſes his Land to his eldeſt Son *Thomas* for Life, and if he dies without Iſſue living at the Time of his Death, to *Leonard* another Son, and his Heirs; but if *Thomas* has Iſſue living at the Time of his Death, then that the Fee ſhould remain to the Right Heirs of *Thomas* for ever. *Thomas* enters after the Death of the Deviſor, and ſuffers a *Common Recovery*; it was reſolved that the Fee that deſcends to *Thomas* immediately after the Death of the Deviſor, did not merge the Eſtate for Life, contrary to the expreſs Words of the Deviſe; for the Remainder to *Leonard* muſt be conſtrued to be a *Contingent Remainder*, becauſe it is limited to take Place upon the Determination of the Eſtate for Life; for and can't be conſtrued as an *Executory Fee*; becauſe Ray. 28. 1 Sid. 47. 1 Kell. 29. 119. 1 Salk. 224, 225.

there is no Fee limited to *Thomas*, but upon a Contingency; and therefore if the Law ſhould conſtrue the old Inheritance that deſcends to *Thomas*, in the mean Time to be a Merger of the Eſtate for Life, it would immediately have deſtroyed the *Contingent Remainders*; for the Eſtate to *Leonard* would not ariſe as an *Executory Fee* out of the Inheritance, ſince that was not deviſed, but deſcended; and therefore they conſtrued the Eſtate for Life to have a Continuance in *Thomas*, and that the Reverſion did not execute in him; for if they had not conſtrued it to be a diſtinct Eſtate for Life in *Thomas*, there would have been no Foot for a *Contingent Remainder* to *Leonard*; and they could not conſtrue it as an *Executory Fee*, in *Leonard*, when there was no *Precedent Fee* limited to *Thomas*; and ſince it was a *Contingent Remainder* in *Thomas*, the Recovery deſtroyed the particular Eſtate; and by Conſequence deſtroyed the *Contingent Remainder*, before ſuch Contingency happened. 1 *Leo. fol.* 11. *Plunket* and *Holmes*.

2 Saund. *from* 380 *to* 387. Sampſon Shelton's *Caſe.*

A Man deviſes Lands to his Wife for Life, and if ſhe has a Son, named *Sampſon*, the Remainder to him and his Heirs, the Deviſor dies, the Wife takes

takes another Husband; the Heir at Law, to whom the Reverſion deſcended, bargains and ſells in Fee to the Husband and Wife; a Son called *Sampſon* is born, he ſhall not take the Remainder; for when the particular Eſtate determines by Merger, the Remainder can't veſt, and though the Wife had after diſagreed to the Purchaſe, this would only have revived her own Eſtate, but would never be good to limit on it a new Remainder. 1 Sand. 387.

But if it had been by the ſame Conveyance, it had been otherwiſe; as if a Feoffment in Fee had been made to *J. S.* to the Uſe of a Husband and Wife, Remainder to the Eldeſt Son in Tail, Remainder to the Husband's Wife in Tail, *&c.* here is a Tail executed in the Husband and Wife immediately; but this doth not drown the Contingent Remainder; but when a Son is born, the Eſtate opens and lets it in, after the Eſtate for Life in the Husband and Wife is determined. 1 Co. 80. Levin. Bold's *Caſe.* Co. Lit. 28. 2 Sand. 387.

For in Equity, the Truſts aroſe in this Manner, becauſe this appeared to be the Parties Intention by their own Limitation, and the Statute executes the *Poſſeſſion*, as the *Uſe* is limited.

Tenant for Life with a Contingent Remainder, Tenant for Life is diſſeized,
Pop. 83. the Contingency happens, the Remainder veſts; for ſince Tenant for Life is put out by Wrong, he has a Right Entry, and in Judgment of Law his Eſtate continues.

Tenant for Life, with a *Contingent Remainder*, Tenant for Life is diſſeized, a Collateral Warranty bars the *Contingency*; tho' it afterwards happens, during the particular Eſtate; becauſe no Man can claim that which he is obliged, as Heir, to defend to another.

2 Ro. Ab. 796, 7. 2 Sid. 64, 129, 157. If a Feoffment is made to *J. S.* to the *Uſe* of *A.* for Life, Remainder to *B.* his Wife for Life, Remainder to *C.* for Life, Remainder to the firſt Son of *C.* in Tail, *A.* makes a Feoffment in Fee, this doth not deſtroy the *Contingent Remainder* to the Son of *C.* for Life, who had a *Right* of *Entry* for the *Forfeiture*; and a particular Eſtate in Right, on which the *Contingent Remainder* will depend.

If in this Caſe, the Wife had entered after the Husband's Death; this could not only have revived her Eſtate, but the Eſtate of *C.* and the Contingent Remainder thereon, which had never

never been put out of Being; otherwiſe 'tis, as is ſaid, in *Sampſon Shelton's Caſe*, if the *Contingent Remainder* had depended upon the Eſtate of *B.*

If in this Caſe, the Son had been born during the Life of *C.* and neither *B.* nor *C.* had entered, the Son could not, but the Feoffees might; for the Poſſeſſion of the Feoffees muſt be executed by the Statute in the Son, before he can have a Remainder by the Rules of Common Law; till therefore by the Entry, they have revived the Eſtate, the Son has nothing; if *J. S.* in this Caſe, releaſes to the Feoffee of *A.* or to the Diſſeiſor, the *Contingent Remainder* could never veſt; for *J. S.* could never enter contrary to his own *Releaſe.*

A. makes a Feoffment to the *Uſe* of his Wife for Life, Remainder to *B.* his Son for Life, Remainder to him in Tail, that ſhall be the eldeſt Iſſue of *B.* at his Death; *A.* dies, the Wife makes a Leaſe for Years to *B.* who makes a Feoffment and levies a Fine to *J. S.* this does not veſt the *Contingent Remainder*; but if *B.* dies having Iſſue in the Life of the Wife, the Iſſue ſhall take it; for the Feoffment of *B.* drowns his own Eſtate for Life, and is a Forfeiture 2 Ro. Ab. 794. Cro. El. 630.

feiture to the Wife, and her Entry preſerves the *Contingent Uſe*, which now immediately depends upon her Eſtate, as if *B.*'s Eſtate were worn out by Efluxion of Time; and if it be the Reſidue of any of the ſame Eſtates that were created by the ſame Conveyance, it anſwers the Notion of a *Remainder*.

Noy 122. Cro. Jac. 168, 9. 2 Ro. Ab. 793. Bould v. Wilſon. A Man covenants to ſtand ſeized to the *Uſe* of his Son for Life, Remainder to ſuch a Wife as he ſhall afterwards marry, the Covenantor makes a Leaſe for Years; this will not prevent the Riſing of the *Contingent Remainder*, nor bind it; for the *Covenantor* has no Power to demiſe any thing but the *Reverſion*; and conſequently the Freehold remains unaltered to ſupport the *Contingent Remainder*; but if the Covenantor, in this Caſe had reſerved for himſelf a Power of making Leaſes, this Leaſe would have been good; and a *Revocation* of the former *Uſes*.

Moor 742 3, 4. Lea v. Burton. Tenant for Life, Remainder to his Wife for Life, and if ſhe be diſturbed during her Life, the Remainder to the Wife in Fee, the Husband makes a Leaſe to begin after the Wife's Death, tho' ſhe be diſturbed, ſhe ſhall not have the *Reverſion*; for the *Leaſe* has alter-

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ed it; ſo there is the ſame Eſtate to be executed in the Wife as was in Being at the Diſpoſition of the particular Eſtate.

If *A.* gives Lands to *B.* for Life, Remainder to the firſt Son of *B.* Remainder to the right Heirs of *B.* and *B.* makes a Leaſe for Years; and then a Son is born, this ſhall not deſtroy his Eſtate; for there is the Rent of the ſame Eſtate as was limited; for the Freehold it ſelf receives no Variation by the making of a Leaſe for Years, and if the Remainder to the Son ariſes, it can't be bound by the Leaſe for Years; for Tenant for Life had only Power to deviſe it during his own Life; *Quære tamen.* 2 Ro. Ab. 794. Noy Rep. 122.

If *A.* ſeized of a *Copyhold* in Fee, ſurrenders it to the *Uſe* of his laſt Will, and after deviſes it to *B.* for Life, with a *Contingent Remainder*; and after *B.* is admitted Tenant, and after he ſurrenders it to the Lord of the Manor to the Uſe of his Will, the *Contingency* happens, *B.* dies, his Surrender did not deſtroy the *Contingent Remainder*; for in Copyholds a *Surrender* doth not put the Eſtate out of the Tenant, as it doth in the Caſe of *Frank-Tenements*; and therefore there is a particular Eſtate 2 Ro. Ab. 794. Dawley *and* Lowdall.

ſtate to ſupport the *Contingent Remainder.*

Hughes Rep. 27, 28. *Caſe* 40. Hard. 4, 6. Tenant for Life, with a *Contingent Remainder*, Tenant for Life *Bargains* and *Sells* the Lands in Fee; this doth not deſtroy the Remainder, for this paſſes but an Eſtate for Life, as is ſaid before; and ſo the Eſtate of the Bargainee will ſupport the *Remainder.*

Secondly, *Where there is a Power of* Revocation.

Co. Lit. 237. A *Feoffment* or *Fine*, *&c.* with Powwer of *Revocation* is void at Common Law as to all Power of *Revocation*; for the Words of Enfeoffing or Granting, *&c.* transfer the whole Right, Property and Power of Diſpoſal to the Feoffee, *&c.* and therefore for the Party to limit to himſelf a Power of *Revocation*, and Diſpoſal is repugnant to the Force of the precedent Words, and would introduce a double Power ſeated in diſtinct Perſons over the ſame thing, which the Common Law diſallows; but this Rule of Law was ſet aſide by the ſame Conſtruction that hath brought in *Executory Fees*; for when before the Statute *Uſes* were limited with Power to revoke, as the Occaſion, Circumſtan-

ces

ces and Mind of the Party altered it, it was thought reaſonable that the Party ſhould have Liberty to *Revoke* according to their own apparent Intent, by which *Uſes* are ever governed; and ſince the *Poſſeſſion* is executed by the Statute, as the Party had the *Uſe*, the Eſtate continues *Revocable*.

A Power of Revocation *is two-fold*; 1ſt. *a Power relating to the Land.* Hard. 43. p. Hale.

2. *A Power ſimply* Collateral *to the Land.*

Firſt, A Power relating to the Land is where a Power is limited to one that had, hath, or ſhall have an Eſtate or Intereſt in the Land.

This is again *two-fold.*

1. Appendant *or* Annexed *to the Eſtate in the Land.* Hard. 415.

2. *In* Groſs.

Firſt, *Appendant* or annexed to the Eſtate in the Land, is when a Man hath an Eſtate in the Land; and a Power of *Revocation*, and the Execution of the Power

Power falls within the Compaſs of the Eſtate in the Lands; as if Tenant for Life with Power to make Leaſes or *Revoke*, Grants a *Rent-Charge*, and then makes a Leaſe according to his Power, the Leſſee ſhall hold it charged during the Life of the Tenant for Life; for he hath Power to charge his own Intereſt, which, by his own Act can't be avoided.

And if in this Caſe, he covenants to ſtand ſeized to the *Uſe* of a Stranger, he can't, by any After-Act, *Revoke* the *Uſes*; for ſince, as is ſaid, the Execution of this Power falls within the Compaſs of the Eſtate; ſo that, unleſs it be executed during the Continuance of the Eſtate, it can never be executed; therefore whatever Act paſſes away the Eſtate hinders the Execution of this Power of demiſing; for a Man can't demiſe that Eſtate which he hath paſſed away to another.

Secondly, *In Groſs*, is where a Man hath an Eſtate and Power of Revocation, and the Execution of the Power falls out of the Compaſs of the Eſtate; as if there be Tenant for Life, Remainder in Tail, with a Power lodged in Tenant for Life to make a Leaſe for
Hard. 416 31 Years, to commence after his Death,

to

to raiſe Portions to his Daughters; this is a Power *in Groſs*; and if Tenant for Life *Bargains* and *Sells* the Lands in Fee, this doth not deſtroy the Power; for ſince the Execution of the Power doth not fall within the Compaſs of his own Eſtate, the ſelling of his own Eſtate only doth not hinder the making *Uſe* of the Power.

But if he had levied a *Fine*, or made a *Feoffment* in *Fee*, this Power had been deſtroyed, for here he abſolutely paſſes the entire Eſtate, and diveſts all the Remainders, and thus, by paſſing the whole Eſtate to another, he hath deſtroyed all the Power of *Revocation*, and limiting new *Uſes* to his own Benefit; for this Power can't be executed but out of the Remainders; and he hath prevented the Execution of it by having already diſpoſed of the whole Eſtate to another. Hard. 416

He may *Releaſe* ſuch a Power of *Revocation* to the Remainder-Man; for he that is to have an Intereſt by any Poſſibility may releaſe the ſame to the preſent Poſſeſſor, as well as if he had a future Right, for 'tis according to the Policy of the Law, for the Quiet and Peace of the Poſſeſſors. Hard. 416 Lumpet's *Caſe*. 10 Co. 48.

Secondly, Where the Power of *Revocation* is ſimply *Collateral*. Hard. 415

And that is, where a Man hath no preſent Intereſt in the Land, and by the *Revocation* of the Eſtate is to have nothing.

In this Caſe, a *Fine* or *Feoffment* of the Land is no Extinguiſhing of the Parties Power; for tho' every Man is eſtopped to claim any Intereſt contrary to his own Act, whereby he paſſes an Eſtate to another; yet if a Man makes a *Feoffment*, or levies a *Fine*, and then *Revokes*; whereby a Stranger claims an Intereſt; the Stranger, who is the only Perſon that can claim, is not *Eſtopped* to claim it; for no Man is *Eſtopped* from demanding his own Right by the Act of another; and if there be no *Eſtoppell* in this Caſe, the Stranger hath a Right by the Contract.

And here of the Manner of Revocation.

Co. Lit. 287. 1 Co. 173, 174. *Firſt*, If a Man is Tenant for Life, having a Power of *Revocation*, upon *Revoking* he is ſeized of his former Eſtate, without Entry or Claim; for he is in Poſſeſſion already; and therefore there can be no Entry, and the Claim where the Party is already in Poſſeſſion is a void Solemnity; for it doth dot make any Change of Property notorious.

Secondly, If there be Tenant for Life, with a Power to *Revoke* the Remainders, and limit new ones, he may do both by the ſame Conveyance. Co. Lit. 237.

For ſince upon *Revocation* the former *Uſes* are void *ipſo facto*, without any Solemnity; there is nothing to hinder why the ſame Conveyance ſhould not create new ones, and the Law to ſupport the Contract will ſuppoſe the Deſtruction of the antient *Uſes* to precede the Creation of the new *Uſes*. Ibid. Co. Lit.

Thirdly, He may *Revoke* Part at one Time and Part at another; for this is not entire, like a Condition, for a Condition is entire, becauſe the Eſtate muſt be defeated in the ſame Manner that it is made; for otherwiſe the Solemnity of the *Entry* will not be equivalent to the Solemnity of *Livery*; but a *Revocation* is in the Nature of a *Limitation*, and there is no Solemnity neceſſary to the Defeating the Eſtate; and therefore it may be done by Parts; conſequently if a *Fine* be levied of Part, that is a *Revocation* only of that Part. Ibid. Co. Lit. Ibid. Rep. Co. Lit. 215.

Fourthly, The Power of *Revocation* follows the Eſtate.

A Covenant to ſtand ſeized to the *Uſe* of *B.* and his Heirs, with Power of *Revocation* upon Payment of Mo- Lee 55, 61 Allen's Caſe.

ney by *B.* and his Aſſigns; *B.* dies, he may tender to the Heir who is in Law the *Aſſignee* to this Purpoſe.

Fifthly, a Power of *Revocation* is in ſome Caſes a Forfeiture.

If there be Tenant for Life, with Power of *Revocation* over the Eſtates in Remainder; and the *Revocation* depends upon Circumſtances inſeparably annexed to the Perſon of Tenant for Life, this cannot be forfeited; but if it depends upon Circumſtances, it may be performed by another, the King ſhall take Advantage of it, and *Revoke* the *Uſes*; as if the *Revocation* is to be by Writing under the Parties own Hands and Seals, this cannot be forfeited to the King; but if the *Revocation* is to be upon Tender of a Ring by himſelf, or any other for him during his Life, this Power is forfeitable.

1 Co. 12. *b.* 1 Vent. 128 *to* 132.

Sixthly, If a Man makes a *Feoffment* with Power of *Revocation*, when he hath executed that Power, he cannot limit new *Uſes* upon the ſame *Feoffment*; but otherwiſe it is, if he had a Power to *Revoke* and limit new ones on the ſame *Feoffment*, with a ſecond *Power* of *Revocation*, *&c.* and ſo *in infinitum*.

1 Vent. 198. 2 R. 2 Ab. 262.

Second-

Secondly, *The Execution of Jointures by the laſt Clauſe of the Statute.* 4 Rep. 1. b.

The Original of Jointures was in this Manner; moſt Lands were ſettled in *Uſe*, whereof Women were not *Dowable*; and therefore the Wife upon Marriage uſed to procure the Husband to take the Eſtate of the *Feoffees*, and ſettle it to the *Uſe* of him and her ſelf for Life or in Tail, with what Remainder over he pleaſed; for there was no Confidence at all in thoſe Times in the *Dower* at *Common Law*.

Upon the Execution of *Uſes*, there were ſeveral Maxims at *Common Law*, which would have given the Wife a double Proviſion, as that no Right could be barred before it accrued, and no collateral Thing could be received in Satisfaction of a frank Tenant, in which it muſt have been adjudged, that the Wife muſt have *Dower*, notwithſtanding her Jointure; and therefore the Statute provides, that the Intent of the Parties in this Change of Property, which is made, ſhould be obſerved, as that the Wife ſhould not claim both her *Dower* and Settlement, contrary to Juſtice.

To make a good *Jointure* within the Statute, ſix Things are regarded.

Firſt, The Eſtate muſt of Neceſſity take Effect immediately after the Death of the Husband.

If the Husband be Tenant for Life, the Remainder to the Wife for Life, this is a good *Jointure*, tho' not within the expreſs Examples of the Statute, for 'tis within the Equity and Deſign of it.

4 Rep. Aſhton's *Caſe.* If the Remainder be limited to the Wife, upon Condition, her Acceptance of ſuch a *Conditional Jointure* makes it good; for this Eſtate ſupports the Wife well enough, and 'tis in her Power to continue it during her Life; therefore an Eſtate *durante viduitate* is a good *Jointure.*

4 Rep. 3. If an Eſtate had been made to the Husband for Life, the Remainder to *J. S.* for the Life of the Husband, to ſupport *Contingent Remainders*, *Remainder* to the Wife; this is a good *Jointure.*

Hutton 15. 4 Rep. 3. If an Eſtate be made to the Husband for Life, the Remainder to the Wife for a *Jointure*; this is no good *Jointure*; for 'tis not within the Words or Intent of the Statute; for the Statute deſigned nothing as a Satisfaction for *Dower*, but that which came in the

ſame Place, and is of the ſame *Uſe* to the Wife; and tho' *J. S.* dies during the Life of the Husband; yet this is not good; for every Intereſt not equivalent to *Dower*, being not within the Statute is a void Limitation to deprive the Wife of her *Dower*, and a void *Limitation* is as if there were none at all.

If an Eſtate be made to the *Uſe* of *A.* for Life, the Remainder to the Wife for Life, this is not good, tho' *A.* dies living the Husband. 4 Co. 2. Hob. 151

If an Eſtate be made to the Husband for Life, the Remainder to *J. S.* for Years, the Remainder to the Wife for her *Jointure*, this is not good. Hutton 51. Winch. 33.

If a Man makes a *Feoffment* to the *Uſe* of himſelf for Life, Remainder to the Son and his Wife, and the Heirs of the Body of the Son, this is no good *Jointure*, tho' the Wife hath an immediate *Franktenement*; for to be within the Caſes of the Statute, whereby *Dower* is barred, the Wife muſt have a ſole Property after the Death of her Husband. Ibid.

A *Jointreſs* of Lands mortgaged, and it was decreed in Chancery, that the Wife ſhould pay the Mortgage, and to hold the Land, not only during her Life, but till ſhe and her Executors be re-paid with Intereſt. Bertue *and* Stile Chan. Rep. 87

A Feoffment in Fee to the *Uſe* of the Feoffee for Life, the Remainder to
1 Sid. 3. 4. Per Bridgman, Ch. Juſtice. the *Uſe* of his ſecond Son for Life, Remainder to the *Uſe* of ſuch Wife as the Son ſhall take, Remainder to the Heirs of the Son, the Father dies, the Son marries and dies, the Wife is not by this Settlement barred of her *Dower*; for this at the Time of the Creation, was no certain Proviſion for the Wife's Life; for the Son might have married and died in the Life of the Father.

2 Bulſ. 188. 2 H. 4. Co. Lit. 132. It may be immediately either after the Natural or Civil Death; and therefore if the Husband be baniſhed, the Wife ſhall have *Dower*.

Secondly, it muſt be for Term of her own Life, or a greater Eſtate, otherwiſe it doth not anſwer the Deſign of the
Co. Lit. 36. *Dower*; therefore if an Eſtate be made to the Wife in Tail or in Fee, this is a good *Jointure*.

If an Eſtate be made for the Life or Lives of many others, this is no good *Jointure*.

Ibid. A Leaſe of 100 Years, if the Wife live ſo long, or abſolutely is no good *Jointure*.

For the Statute provides, that when the Wife hath an Eſtate for Life by Settlement, ſhe ſhall be barred of her *Dower*

Dower at *Common Law*; if ſhe hath any greater Eſtate, ſhe hath an Eſtate for her own Life included in it; but if ſhe hath any leſs Eſtate 'tis out of the Statute.

Thirdly, it muſt be made to her ſelf, and not to others in Truſt for her, tho' by her Aſſent, and expreſſed to be in Satisfaction of her *Dower*; for the Statute only bars the *Dower*, when by it the Poſſeſſion (which was formerly a *Uſe*) is executed in her. Co. Lit 36.

Fourthly, It muſt be in Satisfaction of her whole *Dower*, and not of Part only; for if it be in Satisfaction of Part, 'tis uncertain, for what Part; 'tis in Satisfaction of her *Dower*: But if it be expreſſed of what Part, *Quære* if good. Co. Lit 36. *b.* 4 Rep. *a.*

If an Eſtate be made to the Wife in Satisfaction of Part of her *Dower* before Marriage, and after Marriage other Lands are conveyed, wherein it is ſaid to be in full Satisfaction of all her *Dower*, if ſhe waives the Lands conveyed to her after Marriage, ſhe ſhall have *Dower* for all the Lands of her Husband, notwithſtanding the Settlement is in Satisfaction of Part.

Fifthly, It muſt be expreſſed to be in Satisfaction of *Dower*. Co. L 36. *b.* 4 Rep *a.*

An Averment is ſufficient; for ſince before the Statute, all Lands were ſet-

tled by Way of *Uſe*, it was not neceſſary it ſhould be expreſſed in the Conveyance, that it was in Satisfaction of *Dower*, ſince the Wife was not *Dowable* of *Uſes*; and if the Heir could not take Benefit in ſuch Caſe by Averment, the Deſign of the Statute, as to many Caſes, would have been avoided.

Ibid. A *Deviſe* of an Eſtate for Life cannot be averred to be in Satisfaction of a *Dower*, unleſs it be expreſſed ſo in the Will, for there can be no Averment contrary to the Will, and conſequently there can be no Averment contrary to the Conſideration implied in every *Deviſe*, which is the Kindneſs of the Teſtator; and ſo it cannot be averred, that the quitting of *Dower* was the Conſideration of this *Deviſe*, becauſe 'tis not ſo expreſſed.

Owen 33.

If an Aſſurance be made to a Woman for her *Jointure*, and this is not expreſſed in the Deed but averred, ſuch Averment is not traverſable; for 'tis not material by the expreſs Words of the Statute; and therefore 'tis not a neceſſary Point to entitle themſelves to it by the Benefit of this Diſcharge.

Co. Lit. 36. b. *Sixthly*, A *Jointure* may be made either before or after *Marriage*.

4 Rep. 3. a. Co. Lit. 36. b. If it be made before *Marriage*, ſhe is Sole, and as ſuch under no Man's Power; if after *Marriage*, ſhe takes a *Jointure*

ture in Satisfaction of a *Dower*, ſhe may wave it after *Coverture*; but if ſhe enters and agrees thereto, ſhe is concluded; for tho' a Woman is not bound by any Act, when ſhe is not at her own Diſpoſal; yet if ſhe agrees to it when ſhe is at Liberty, 'tis her own Act, and ſhe cannot avoid it.

If a *Jointure* be made to the Wife before *Coverture*, and the Husband and Wife alien by *Fine*, the Wife ſhall not afterwards be endowed of any Lands of her Husband's; for ſince ſhe quitted her *Dower* when ſhe was at her own Diſpoſal, ſhe can claim nothing but the *Jointure*; and that ſhe has paſſed away by the *Fine* levied; but if the *Jointure* was made during the Coverture, and then ſhe relinquiſhed it by *Fine*, yet ſhe ſhall have her *Dower* of the other Lands; for the Acceptance of a *Jointure*, during the Coverture, is no Bar of her *Dower*, and ſhe paſſing it by *Fine*, cannot be conſtrued as an Acceptance of Property in them, ſince that Act is capable of another Conſtruction; (*viz.*) to bar her of her *Dower* in thoſe Lands. 1 Bulſ. 163. Co. Lit. 36. *b.*

The Wife may waive her *Jointure* by *Parol in pais*, for the *Uſe* may be limited by Parol at Common Law; and therefore may be deveſted by *Parol*; and the 24 *H.* 8. by its expreſs Words, 3 Co. 26. *b.* Pop. 88.

Words, has no Power to execute the Freehold in her when ſhe refuſes.

Co. Lit. 29. b. If an Eſtate be made to the Wife for her *Jointure* during the Coverture, the Remainder to *J. S.* in Fee, and the Wife *waves* this *Jointure*, *J. S.* ſhall have the Remainder; for here was a particular Eſtate at the Time of creating the Remainder; ſo that it had the Circumſtances of a Remainder, being the Reſidue of a particular Eſtate then in Being; and ſince the particular Eſtate was defeaſable by an Act that could not hurt the Remainder, the Remainder upon ſuch Deſtruction of the particular Eſtate comes in Being.

A Man covenants to ſtand ſeized to the *Uſe* of himſelf in Tail, the Remainder to his Wife for Life, the Remainder to *B.* in Tail, and then he makes a *Feoffment* in *Fee* to the *Uſe* of himſelf and his Wife for their Lives as a *Jointure*, the Remainder to *C.* and

Co. Lit. 348. a. dies without Iſſue, the Wife is *Remitted*; for where a Later, and Defeaſable, and a Former, and Indefeaſable Title concur in the ſame Perſon, there muſt be a *Remitter*.

But in this Caſe the Wife hath two Titles both waivable by her, the firſt indefeaſable by any third Perſon; the later defeaſable by a third Perſon; for

for upon her Claiming by the ſecond Title, ſhe waives the firſt, and conſequently the Remainder in *B.* commences, and he ſhall have his Action; and therefore ſhe muſt be in her former Title to ſave the Contention and Trouble of the Action.

But if an Eſtate be made to the Husband in Tail, the Remainder to the Wife for Life, the Remainder to the Right Heirs of the Husband; the Husband afterwards makes a *Feoffment* in *Fee* to the *Uſe* of the Husband and Wife for their Lives, the Remainder to the Right Heirs of the Husband; the Husband dies without Iſſue, the Wife may claim, by which ſhe pleaſes, and is not *Remitted nolens volens*; becauſe here are not two Titles, the one indefeaſable, and the other defeaſable by a third Perſon, but both equally firm; for the Right Heir of the Huſband, upon the Waiver of the firſt Eſtate, by the Wife, can claim nothing in the Land, contrary to the *Feoffment* of his *Anceſtor*; and therefore that Eſtate which the Wife claims is indefeaſable, and no Stranger is prejudiced by being put to his Action. Co. Lit. 357. Dy. 351. b.

But if ſhe makes no Election, ſhe ſhall be ſuppoſed to be in of her elder Eſtate, becauſe every one is preſumed to chuſe what is moſt for his Benefit. 2 Ro. Ab. 422. 41 Ed. 3. 19.

If

Cro. Jac. 490. If the Wife has an old Right before the Coverture, and afterwards takes a *Jointure* of the ſame Lands ſhe ſhall be *Remitted.*

Hob. 72. An Eſtate ſettled to the Husband for Life, Remainder to the Wife for a *Jointure*, except ſuch of the Lands as the Husband ſhould deviſe, this Exception is repugnant to the Grant; becauſe the Settlement might be avoided by the Husband deviſing the whole.

Of Pleading Jointures.

Hob. 72. In a Writ of *Dower* the Tenant pleads a *Jointure* in Bar of *Dower*, and concludes that the Wife claimed after the *Coverture*, by Force of the *Jointure*, the Wife makes a Title to the ſame Lands by another Conveyance, and concludes her Replication without traverſing the Claim alledged in the Bar; but the Tenant cannot rejoin, that the Wife claimed by Force of the *Jointure*; Cro. Jac. 490. without traverſing her Claim by the Title alledged in the Replication; and the Reaſon of the Difference is this, the Claim by Force of the *Jointure* alledged in the Bar is out of Time, and idly pleaded; and therefore requires no *Traverſe*; for by the general Words of the Statute a *Jointure* is a good Plea in Bar of

of *Dower*; but there is an Exception in theſe Words, provided if the Lands be aſſured, during the *Coverture*, ſhe may have Liberty to refuſe them; ſo that the Wife, to avoid the Bar of the Statute, muſt plead that ſhe is within the Exception of the Statute; for ſhe muſt ſhew what is for her own Purpoſe and Advantage; but when ſhe ſets up a Claim by another Conveyance in the Replication, the *Tenant* cannot plead a Claim by the *Jointure* without traverſing her Claim by the other Conveyance, becauſe the Matter muſt be brought to Trial when any Difference in Fact is ſtated; and he that denies the Fact of any thing properly and fitly pleaded muſt draw to the Iſſue by offering a *Traverſe*. Hob. 72. Cro. Jac. 490.

Of the Wife's Alienation of her Jointure.

By the 11 *H.* 7. 20. If a Woman hath an Eſtate in *Jointure* or in *Dower*, and aliens by *Recovery*, or otherwiſe, he that hath an Intereſt, and to whom the Land ought to belong, may enter as if the Woman were dead, without *Diſcontinuance* or *Recovery*.

A *Uſe* at Common Law, ſettled by the Husband on the Wife for her *Jointure*,

ture, is within the Intent of the Statute; for 'tis an Hereditament within the Words of the Statute; and tho' the Statute ſpeaks that it muſt be by Diſcent or Purchaſe of the Husband; yet it muſt be an *Uſe* newly raiſed to be within the Law; becauſe 'tis Part of the old Eſtate which the Husband had by Diſcent or Purchaſe.

Since the Execution of *Uſes*, an *Uſe* ſettled in Marriage on the Wife by the Husband, is within the Statute; for it comes within the expreſs Words (given to the Husband and Wife, by any ſeized to the *Uſe* of the Husband) for every one is Party to an Act of Parliament; and therefore the Feoffees transfer their Intereſt in the Manner that it is ſettled.

A Woman ſeized of Lands in Fee Simple takes a Husband, and has Iſſue a Son, and ſhe and her Husband levy a *Fine* of her Lands with a *Grant*, and *Render* back to them both in ſpecial Tail, the Remainder to her Right Heirs, if the Husband dies, and the Wife after *levies* a *Fine* of theſe Lands, this is no *Diſcontinuance* within the Statute; ſo if a Woman conveys Lands to the Anceſtors of her intended Huſband, who re-conveys it to the Husband and Wife in Tail, the Wife, after the Co-

Coverture may alien; and yet be out of the Danger of the Statute; for the Statute intended to redreſs the Miſchief of the Wife's Alienation of the Huſband's Lands, and theſe were originally her own.

If Lands be ſettled to the *Uſe* of the Husband and Wife in Tail ſpecial for her *Jointure*, the Husband dies, the Wife *Aliens* in *Fee*, the Iſſue may enter in the Life of the Wife; for by the 1 *Rich.* 3. *c.* 1. the Acts of *Ceſtuy que Uſe* ſhall bind the Feoffees, and according to his Title and Intereſt in the Lands; ſo that the Feoffee of a *Uſe* in *Tail* might have entered after the Diſcontinuance of *Ceſtuy que Uſe* in Tail, without being put to their *Formedon*; and therefore if the Statute of *H.* 7. did not give an Entry in the Life of *Ceſtuy que Uſe* in Tail, it would be to no Purpoſe.

Husband and Wife, Tenant in Tail Special, Remainder to the Heirs of the Husband; the Husband dies, the Iſſue *levies* a *Fine*, and by it grants all his Intereſt to *J. S.* the Wife makes a Leaſe, for three Lives, not warranted by the 32 *H.* 8. *J. S.* may enter immediately, and ouſt the Leſſee; for *J. S.* is the Perſon that has an Intereſt, and to whom the Lands ought to belong; for the *Fine* concludes the Iſſue of the Tail; Brown's *Caſe*. Co. 3. Rep. 5.

by

by the 32 *H.* 8. 36. a *Fine* levied of any Lands intailed to any of the Anceſtors of the Conuſor is a Bar to all Intents and Purpoſes, and the Remainder is granted by the Common Law; ſo that *J. S.* hath the next immediate Intereſt, and conſequently may enter for this Alienation in the Life of the Wife.

If the Wife be Tenant for Life of the Husband's Lands, the Reverſion to the Iſſue in Tail, and Tenant in Tail ſuffers a *Recovery* by Diſſeizin of the Wife, and then the Wife releaſes to the Recoveror with Warranty, the Wife dies, the Iſſue in Tail dies leaving Iſſue, his Iſſue ſhall not avoid the *Collateral Warranty* of the Wife; for if the immediate Heir inheritable, either before, or at the Time of the Alienation, conſents upon Record, he is not within the Benefit of this Statute by the laſt Proviſo; but if after the Alienation of the Wife, the Iſſue in Tail had releaſed upon Record, this had been no Bar of the Tail; for when the Iſſue has any Right as Tenant in Tail, he cannot by his Act bar his Iſſue, *Weſtminſt.* 2 *C.* 1. and ſince the Statute *de Donis* is not repealed by expreſs Words, a Conſent to part with any Right accrued to Tenant in Tail, is within the Verge of the Statute.

There

There is a Difference between this Statute and the 6 of *R.* the 2. for there the next of Kin to the Perſon raviſhed ſhall enter, and by the Words of the Statute, ſhall hold it *Jure Hæreditatis*; and therefore if a Daughter entered and held it *Jure Hæreditario*, the Son born afterwards ſhall not diveſt it; but here the Statute ſays, *That the Perſon that has Intereſt ſhall enter and hold it*; and therefore if a Daughter enters, a Son born afterwards ſhall diveſt it.

Thirdly, *Of the Caſes out of the Statute, and they are two-fold.*

1. *Where Uſes are limited upon Uſes.*
2. *Where the Uſes of Terms are limited.*

Firſt, Where *Uſes* are limited upon *Uſes*; if a Man bargains and ſells his Lands to *A.* to the Uſe of *B.* the Statute cannot execute the *Uſe* in *B.* for by the Bargain and Sale, which implies a Conſideration, there is a *Uſe* in *A.* and before the *Statute* it was impoſſible that two diſtinct Perſons ſhould have the *Uſe* of the ſame Land.

And by the Statute, the firſt *Uſe* cannot be executed in *A.* ſince there could not be two plenary Poſſeſſors, and the ſe-

cond *Uſe* being contrary to the Diſpoſition to *A.* muſt be null and void; but the *Chancery* that looks upon the Intereſt of the Parties in Conveyances, conſtrues *A.* only as an Inſtrument to take the legal Eſtate, and that in Conſcience he is bound to anſwer the Truſt to *B.* which he hath taken; *Quære tamen*, if the Conſideration moves from *A.*

Vaugh. 5. Chan. Ca. 114, 115.

Pop. 81. If a Man doth *Enfeoff* another to the Uſe of *J. S.* and his Heirs, and upon this Conſideration, that if *J. N.* ſhall pay ſo much Money, then the ſaid *J. S.* and his Heirs ſhall be ſeized to the *Uſe* of *J. N.* and his Heirs, *J. N.* pays the Money, the *Uſe* is not executed in him by the Statute, *cauſa qua ſupra*; but the Court of *Chancery* will undoubtedly ſupport ſuch Truſt.

4 Rep. 4. A *Deviſe* ſuppoſes a *Conſideration*, and therefore it cannot be averred to any other *Uſe* than to the *Uſe* of the Deviſee, for that were an Averment contrary to the Deſign of the Will appearing in the Words.

2 Vent. 312. But if an *Uſe* be expreſſed, it ſhall be to the *Uſe* of *Ceſtuy que Uſe*, and will execute; for the Will has only an implied *Uſe*, where no other is limited, and *Expreſſum facit Ceſſare Tacitum.*

2 Vent. 312. Burcher v. Durdant. But if Lands be deviſed to *A.* during the Life of *B.* in Truſt for *B.* the Remainder

mainder to the Heirs of *B.* now living; this is a *Chancery Truſt* in *B.* and not executed by the Statute; for this was the Deſign of limiting an Eſtate to *A.* that a *Tail* might not be executed in *B.* whereby he might have a Power to dock it.

Secondly, *Where the* Uſes *of Terms are limited out of the Statute*; ſee before; *and theſe Limitations are two-fold.*

Firſt, *Of Such as wait on an Inheritance.*
Secondly, *Terms in Groſs.*

Firſt, Such as wait on the Inheritance: The Original of this was in the Time of *Queen Elizabeth*, when Mortgaging by Way of raiſing Terms was invented; and then if a Marriage Settlement was made, or a Purchaſe upon valuable Conſideration, and the Mortgage was diſcharged by the Purchaſe-Money, or the Marriage-Portion, it was thought fit to take an Aſſignment of the *Term* in Truſt to the ſame Perſons to whom the Inheritance was limited, to protect it againſt latter Mortgages. *The Caſe of Biſhop Pemberton's Argument*, 10.

And hence it is that the Inheritance was limited in Tail, with Remainder over, *Caſe of Perpetuities*, 3, 4, 6, 11.

over, the Truſt of the Term might be limited in the ſame Manner; and therefore if the *Tail* was docked by *Fine* and *Recovery*, the Truſt of the Tail and Remainders ceaſed, and attended the Inheritance in Fee, for the Truſts could not protect or attend theſe Eſtates that were not in Being, and the Truſtee, who is but an Inſtrument to protect others cannot have it to his own *Uſe*.

The Intailing a Term is not within the Statute *de Donis Condit.* for that
Ibid. 3. 11. Statute extends only to Eſtates of Inheritance, and not to Chattels, which the the Rules of Common Law have carried into another Channel.

And therefore in this Caſe the *Truſtee* and Tenant in Tail may diſpoſe of it
Ibid. 3. 11. without a *Fine* or *Recovery*; and this upon valuable Conſideration, will bind the Iſſue; becauſe, ſince the Chancery are not bound by the Statute, they are at Liberty to direct the Rules of Equity, and 'tis not Equity to ſet up the Truſt to the *Iſſue* when the *Anceſtor* has received for it a *Valuable Conſideration*.
Ibid 3. 11. And it will be *Aſſets* to pay Inteſtates Debts, for all Chattels of Inteſtates are *Aſſets* at *Common Law*; and 'tis not Equity to direct it otherwiſe.

But if the Inheritance of an *Uſe* be intailed, the Alienation of Tenant

in Tail, will not diveſt it out of the Iſſue, for 'tis within the Intent of the Statute *de Donis*, which ſays that if an Eſtate be thus limited, the *Donee* ſhall not alien to prejudice his Iſſue; and the *Chancery* in interpreting Mens Contracts, is bound by the Intent of an *Act* of *Parliament*. Co. Lit. 20.

If a *Term* be given to *A.* in *Truſt* for *B.* in Tail, with Remainder over, attendant on an Inheritance, and *A.* ſurrenders to *B.* this ſhall not deſtroy the Remainder; for tho' the Surrender deſtroys the Eſtate at *Law*, yet the Truſt remains in *Equity*, if the Party had Notice. *Duke of* Norfolk's *Caſe*. *Not.* 1. *Arg.* 3. 2 *Arg.* 26.

But in Caſe, if *A.* or *B.* had aliened upon valuable Conſideration, without Notice, this would have deſtroyed the Equity of the Iſſue and the Remainder Man. *Caſe of Perpet.* 11.

Secondly, *Terms in* Groſs. *Of* Executory Truſts, *or* Terms *in* Groſs, *is already ſpoken in the Law of* Executory Truſts.

If a Leaſe be limited in *Truſt*, and the *Truſtee* renew the Leaſe, it ſhall be to the Benefit of *Ceſtuy que Truſt*; for if the Truſtee takes on him the Truſt, he takes upon him to act for the Bene- Chan. Rep. 191.

fit of the Party to whom the Advantage of the Term was originally deſigned.

The Father made a Truſt for his Will, and deviſed 500 *l.* to each of the Daughters, payable at their full Age or Marriage; or if any or all of them died before, then to others; the *Truſtee* out of this cannot allow Maintenance to the Daughters, tho' they have no other Maintenance, becauſe the whole is deviſed to others; and therefore, if the *Truſtee* deducts any Part of it, they do not follow the Intent of the Will.

1 Co. 120. &c. Where *A.* ſince the Statute of the 27 of *H.* 8. enfeoffed *B.* in Fee to the *Uſe* of himſelf and his Heirs, during the Life of *C.* then to the *Uſe* of the firſt Iſſue Male of *C.* in Tail, ſo on to the tenth Iſſue; then to the *Uſe* of *D.* in Tail, then to the *Uſe* of *F.* in Tail, Remainder to the *Uſe* of the Right Heirs of *A. B.* enfeoffed *C.* before the 1 Co. 137. *b.* Birth of any Iſſue, without any Conſideration; and having Notice of the *Uſes*, afterwards, on a Trial between the Feoffee of *C.* and his Iſſue, this Matter came in Queſtion; and the Point of the 1 Co. 135. *a.* Caſe was, whether or no theſe contingent *Uſes* are deſtroyed by the Feoffment to *C.* and it was reſolved that they are. In handling this Caſe, I ſhall firſt

firſt endeavour to ſhew that *C.* the Feoffee of *B.* did not ſtand ſeized to the former *Uſes* notwithſtanding the Feoffment was made without Conſideration, and he had Notice of the Uſes; for this Feoffment diveſts all the Eſtate out of others, and by it *B.* gained a new Eſtate in Fee by Wrong, which he paſſed over to *C.* ſo that *C.* is not ſeized of the old Eſtate, ſubject to ſuch and ſuch *Uſes*, but he has a new Eſtate that is ſubject to no *Uſes*, becauſe not expreſſed or limited; and the Law, by Conſtruction, will not make his Eſtate ſubject to *Uſes* annexed to an old Eſtate, now gone and only remaining in Right; for were the Land chargeable with the *Uſes* into whoſeſoever Hands it came, this would be a *Perpetuity*; for by limiting a great many contingent *Uſes*, and charging the Lands with them *ratione poſſeſſionis*, into whoſe Hands ſoever it came; and it being in the Power of Nobody to bar and defeat theſe contingent *Uſes* (as it cannot be) (were the Lands charged into whoſe Hands ſoever it came) with them, all theſe Inconveniencies, the neceſſary Conſequences of a Perpetuity, muſt need follow. Therefore a *Uſe* was not a Thing at *Common Law* annexed to the Poſſeſſion of the Land, but the Privity of

Eſtate; therefore the *Chancery* did not charge all the Perſons that had the Lands, but only thoſe Perſons that came into the Lands by Privity of *Eſtate*, and with the Truſt and Confidence at firſt repoſed in the *Tertenants*; and that for the Reaſon aforeſaid, leſt they might encourage *Perpetuities*; and they conſtrued in a Court of *Equity*, the Limitations of *Uſes*, as thoſe of Eſtates in Poſſeſſion were at the Courts of *Common Law*; for the Chancery would not ſet up a Rule of Property diſtinct from that at *Common Law*, eſpecially in Caſes ſo inconvenient; for if the contingent future *Uſes* might not be deſtroyed as well as contingent *Remainders*; then by the Limitation of them, an Eſtate of Inheritance would be ſo fettered, that Nobody would meddle with the Purchaſe of it; and what Reaſon can there be aſſigned, why a contingent *Uſe* cannot be deſtroyed as well as a *Uſe* in *Eſſe*, which was daily deſtroyed, and that by the Conſtruction of the greateſt Equity; for if the Feoffee to an *Uſe*, had for good Conſideration enfeoffed another who had no Notice, the *Uſe* was deſtroyed, tho' the Feoffee came in by Privity of Eſtate; and this for the ſame Reaſon, for if the Lands were charged with the Uſe into who' Hands

Bro. 338. 4. Pl. 10.

Hands ſoever they came, the Inconveniencies of a *Perpetuity* would immediately follow; for who would meddle with Lands, that they could with no Poſſibility know whether it was charged with a *Uſe*, or not; for that it might be limited in ſo ſecret and private a Manner, that it were impoſſible to come to the Knowledge of it. Therefore ſuch Feoffee ſtood ſeized to his own *Uſe*; and the only Remedy for the former *Ceſtuy que Uſe*, was to complain in Chancery of the Feoffee's Breach of Truſt. So if *Diſſeizor* had entered upon the *Feoffee*, he had not ſtood ſeized to the *Uſe*, *&c.* but the Feoffee muſt have entered, and then have revived the *Uſe*, which as it ſeems to me, he might be compelled to do in *Chancery*; and if he had ſtood ſeized to the *Uſe*, he would have been puniſhed by Law, as a Wrong-Doer, for taking the Eſtate, and thoſe Profits to himſelf he had no Right to; and yet would have been anſwerable to the *Ceſtuy que Uſe* for the Profits, as was the *Feoffee*; beſides he came not in Privity of Eſtate, and ſo was not liable to any Contract or Agreement made by other Perſons concerning thoſe Lands he claimed not by or from any of them; neither was any Confidence repoſed in him. An *Alienee*, nor

If the Heir enter upon a Truſtee to defeat the Truſt, his Eſtate is notwithſtanding ſubject to the Truſt. D. Norf. Ca. 14.

1 Co. 122.

nor Perſon *Attaint*, were not capable of having any Lands to the *Uſe* of other Perſons; for they were not capable of having any Lands themſelves, for the Benefit of any but the King; the Perſon *Attaint* is only capable to have a Purchaſe of Lands for the *King's Uſe* and Benefit, and that excludes all others; neither can an Alien have Lands, and then he cannot be ſeized to an *Uſe*. A *Corporation* cannot, by the *Common Law*, be ſeized to a *Uſe*; for in their Conſtitution, they are a Body of Men collected by Force of the King's *Letters Patent*, to ſuch Intents and Purpoſes; all which are only for the Benefit and Advantage of the *Corporation*: And therefore they cannot have Lands as a *Corporation* (which implies to the own *Uſe* and Behalf) to the *Uſe* of another; for they we not at firſt created to that End, and they having no Power as a *Corporation*, any other than they receive by Force of the *Letters Patents*; and by that they being conſtituted only to ſuch and ſuch Ends they want Power as a *Corporation*, to take Lands to the *Uſe* of other People, for that is an End Nobody could think of, in the Erection of a *Corporation*; neither ſhall the King ſtand ſeized to a *Uſe*, for all the Lands he is ſeized of, he

It ſeems an Occupant is ſubject to an Uſe. Hard. 468.

he is ſeized *in Jure Coronæ*, for the Maintenance and Support of his Crown and Dignity, and the well Government of the Common Wealth, which is a *Uſe* the Law deſigned him *primitus*, and conſequently 'tis excluſive of all other *Uſes*: Neither can it be imagined that the King ſhould in Point of Honour ſtand ſeized of Lands only to the Benefit and Advantage of another, and ſo be a Sort of Bailiff to him. 2 Ro. 780.

Tenant by the *Courteſy*, or *Tenant* in *Dower* cannot be ſeized to *Uſes*, becauſe they come to theſe Eſtates by the Diſpoſition of Law, for the Advancement and Encouragement of Matrimony; and thoſe Eſtates are given them for their own Maintenance, and are conſequently excluſive of all other *Uſes*, for the Advantage of other People. Hard. 469

Quære if at this Day an Eſtate be given to a Man and his Heirs, to the *Uſe* of him and his Heirs, in Truſt for another and his Heirs, whether the Woman ſhall be endowed without any Truſt; for if ſhe be not, then here will be an Eſtate of Inheritance in *Fee Simple*, ſo ſettled that no Woman can have *Dower* of it; for a Woman is not dowable of a *Truſt*; *ideo Quære*. Lord by Eſcheat cannot be ſeized to an *Uſe*; for he comes in and claims above the *Uſe* Quære.

Uſe, by a Condition in Law ſecretly annexed to his Eſtate in its Commencement; *viz.* That, if the *Feoffee* died without Heir, he ſhould re-enter; and ſo he claiming in by Force of a *Title* Paramont to the *Uſe*, ſhall never be ſubject to any Charges that take their Riſe and Date from an inferior Time and Title.

Beſides he has the Land in Satisfaction for his Services that are now gone; but what Satisfaction will it be if he is ſtill to hold the Land charged with the *Uſe*.

A Man poſſeſſed of a *Term* in *Truſt* for another, is attainted of Treaſon; the *King* is not ſubject to this *Truſt*. 2 *Roll.* 780.

Otherwiſe *of Tenant in Dower*; becauſe ſhe comes in in the *per*, by the Aſſignment of the Heir, and not in the *poſt*, as *Tenant by the Courteſy*. 1 *Inſt.* 239, or *Bro. Feoff. Uſes* 338. *a.* makes a Difference between *Dower* at *Common Law*, and *ad oſtium Eccleſiæ*, and *ex Aſſenſu patris*; for they are by expreſs Aſſignment.

Where *A.* Feoffee to the *Uſe* of *B.* grants a Rent to *C.* who has Notice of the *Uſe*, he ſhall hold the Rent to the *Uſe* of *B.* and if *A.* enfeoff *D.* without Notice, and *B.* after Stat. *R.* 3. releaſes

leaſes to *D.* by this the Rent of *C.* is extinct. *Bro.* 337. *Co.* 10. 14 *H.* 8. 4.

If Feoffee to *Uſe* grants to *J. S.* or Common, this *ex Natura Rei* could not be to the *Uſe* of *Ceſtuy que Uſe*. *Bro.* 338. 10. *See* Contingent Remainders. 3. *b.*

Where a Feoffee to *Uſe* makes a Leaſe for Life or for Years, or a Gift in Tail, either with a Rent reſerved, or without, tho' the Leſſee or Donee have Notice of the former Uſes; yet he ſhall not ſtand ſeized to thoſe Uſes but to his own. *Bro.* 339. 47. 340. *a.* 1 *And.* 314. If a *Seigniory* be held to the *Uſe* of *A.* and the Tenancy eſcheats, that ſhall be to the *Uſe* of *A.* ſo if Feoffee to an Uſe vouches and recovers in Value, he ſhall be ſeized to the firſt *Uſe*. *Bro.* 238. *pl.* 10.

Where a Feoffee to *Uſe* enfeoffs another upon Conſideration of Blood, that Feoffee ſhall be ſeized to the former *Uſes*; but 'tis otherwiſe, if the firſt Feoffment were in Conſideration of Blood. 2 *Roll. Ab.* 779. 3 *Co.* 81. 2 *Ro.* 781. 2 *Leon.* 15. *Dy.* 340. *b.*

Where *J. S.* is a *Feoffee* to the Uſe of *A.* in Tail, Remainder to *B.* in Tail, Remainder to the Right Heirs of *A.* and the *Feoffee* and *A.* join in a *Feoffment* to three, (two whereof have Notice

tice, the other not) to new *Uſes*, they ſhall be ſeized to the new *Uſes*; for *A.* had a Power over his own Eſtate for Life and in Fee; but the two Feoffees ought to make Recompence to *A.* for the Loſs that every body elſe ſuſtained. *Hob.* 349.

If a Feoffee to an Uſe doth enfeoff one upon a valuable Conſideration, who has Notice of the former *Uſes* to expreſs *Uſes*, he ſhall ſtand ſeized to thoſe expreſs *Uſes*, and not to the former *Uſes*. *Hob.* 349. 2 *And. Bro. Feoff. al Uſes*, 340. *Dy.* 341. *b.* 1 *And.* 313. But *Quære* if a Reverſion be ſubject to future *Uſes*, and is granted to a Man and his Heirs without Conſideration, to the *Uſe* of the *Grantee* and his Heirs; yet whether 'tis ſubject to the former *Uſes*. 2 *Roll.* 79. *Dy.* 340. *b.* 2 *Roll.* 796. 2 *Sid.* 124. 157. 64. *A.* agrees with *B.* to make him a *Leaſe* of *Black-Acre* for Years, then makes a *Feoffment* to *C.* upon a valuable Conſideration, who has Notice of the *Uſe*, he ſhall be compelled to make it. 2 *Roll.* 781. *Pl. Com.* 351. 1 *Co.* 122. *B.*

Feoffee to an *Uſe* cannot appoint a *Bailiff* without the Conſent of *Ceſtuy que Uſe*; nor allow him Fees unleſs the *Ceſtuy que Uſe* be an Infant. *Bro.* 338 to 339. 27.

Thus have we ſhewn how *Uſes* in *Eſſe* were deſtroyed at *Common Law*, and by Conſequence how thoſe that are *Future*, and which 'tis uncertain whether ever they will come in *Eſſe*, may be deſtroyed; for the ſame Arguments that hold for the Deſtruction of preſent *Uſes*, hold good for the Deſtruction of future Contingent *Uſes*: For if he that comes in of another Eſtate, than that which the *Feoffee* to the *Uſe* had, ſhall not be ſeized to the *Uſes* in *Eſſe*; by the ſame Reaſon, neither ſhall he be to future and contingent *Uſes*. 1 Co. 121. b.

The ſame Law is of Corporations, Aliens, *&c.* If then a *Uſe* be not a Thing annexed to the Land, it will be asked of me, What it is? To which I anſwer, that a *Uſe* is an equitable Right to have the Profit of Lands, the legal Eſtate whereof is in the *Feoffee*, according to the Truſt and Confidence repoſed in him, which equitable Right alſo extends it ſelf to thoſe that come to the Lands in Privity of Eſtate to the Feoffee, and under the ſame Truſt and Confidence that he did; ſo that, to every Uſe two Things are incident; a Confidence in the Perſon, and a Privity of Eſtate; and when any of theſe failed, the *Uſe* was either ſuſpended or deſtroyed. *Conuſee of a Stat. not ſubject to Uſes.* Bro. 338. a. 10.

A *Uſe* is defined by my *Lord Coke* to be a Truſt and Confidence, which is not iſſuing out of the Land, but as a Thing collateral, annexed in Privity to the *Eſtate*, and the Perſon touching the *Land*.

1 Co. 131. *b.* Bro. 339. 25. Hard. 495 1 Co. 131. *b.* The acknowledging a Statute by *Ceſtuy que Uſe*, was the ſame Thing as making a Leaſe within 1 *R.* 3. and therefore the *Feoffee's* Land was extendable upon it.

Uſes were to ſome Intents reputed in Law as *Chattels*, and therefore were deviſable; for the Court of *Chancery*, in the directing and judging concerning *Uſes*, always made ſuch Conſtructions as were moſt reconcilable to the Intent and Will of the Parties, where no Inconvenience would follow; therefore it appearing to be the Intent and Deſign of the Parties, that the *Uſe* ſhould be to the *Deviſee*, they adjudged it in him; yet there was a *Poſſeſſio fratris* of a *Uſe*, and it was intailed within the Statute *de Donis*, *&c.* for Reaſon would that the Siſter of the whole Blood ſhould have the *Uſe* before the Brother of the half, for the ſame Reaſons as hold good in Freeholds, and the *Chancery* in Equity ſupported the Will of the *Donor*; ſo if the *Uſe* ſhould come to his Iſſue, for that the Intent

Intent of the Parties is there a great Direction for the Guidance of the Judgment; *Uſes* were neither *Aſſets* to the Heir or Executor, their original Inſtitution being for ſuch Intents and Purpoſes, that no Execution, *&c.* might be had of them. But *Quære* why in Equity, they ſhould not have been liable to Execution, *&c.*

It may be asked, What this Privity of Eſtate is, that is requiſite to the ſtanding ſeized to an *Uſe?* And it is when a Perſon comes into the ſame Eſtate the Feoffee to Uſe had in and by Contract with him, for a *Diſſeiſor* comes into the ſame Eſtate, but not by Contract and Agreement; and therefore he is in the *poſt*; *i. e.* claims not *by* or *from* the *Feoffee:* And why a Privity of Eſtate is requiſite to the ſtanding ſeized to a *Uſe*, has been already accounted for in a great many particular Caſes: But in general, 'tis becauſe he that comes not in Privity of Eſtate claims not the Eſtate by and from the *Feoffee*, who ſtood ſeized to the *Uſe*, and conſequently claims not the Eſtate as it was ſubject to the *Uſes*; but one above that clear and free; and he that claims an Eſtate by no Contract or Agreement with the *Feoffee*, but either by Title above his, or by the Diſpoſition and Gift of Law,

cannot ſtand ſeized; for this would in a Manner defeat his Title, and fruſtrate the Benefit of the Eſtate the Law gave him, and why ſhould a Man ſtand ſeized to an *Uſe* when he claims not the Eſtate by Agreement with him that did ſtand ſeized, or has not the Eſtate that was charged to the *Uſe*; for Confidence in the Perſon is as well requiſite as Privity of Eſtate; for ſo firſt began *Uſes*, by enfeoffing ſome Friend to the *Uſe*, in
Dy. 340. *b.* whom the Feoffor repoſed a Confidence and Truſt; and if the Feoffee performed not the Truſt, the only Remedy for the *Ceſtuy que Uſe* was to puniſh him for his Breach of that Truſt. But where there is no *Truſt*, there can be no Breach of *Truſt*, and conſequently no Puniſhment for it; of Neceſſity therefore, whereſoever the *Truſt* and Confidence fail, the *Uſe* is gone, becauſe the Remedy is gone; and before we have ſhewn ſeveral Reaſons why the *Uſes* muſt ceaſe, the Lands not being charged with them *ratione poſſeſſionis*, for the Danger of a *Perpetuity*; but only the Perſon being charged, is reſpondent of the Privity of Eſtate, and Confidence repoſed in him. Confidence in the Perſon is either expreſs or implied, and if that fails, the *Uſe* is gone; as if a Feoffee to an *Uſe*, for good Conſideration,

doth enfeoff one who has not Notice of the *Uſe*, the *Uſe* is gone, for here is no Truſt in him; he not knowing that there were any *Uſes*, no Truſt could be repoſed in him to let the *Ceſtuy que Uſe* take the Profits; but if he had Notice, a Truſt might well be ſaid to be repoſed in him, becauſe he took the Land, knowingly, with the *Uſes*: If the Feoffment had been without Conſideration, tho' he had no Notice of the *Uſe*; yet he ſtood ſeized to the *Uſe*, for the Law implied Notice of the *Uſe*, and ſo there is a Truſt; and this introduces no Manner of Inconvenience in charging him with a *Uſe*; becauſe he loſes nothing, having given no Conſideration; for he would be ſeized to the *Uſe* of the Feoffor, if no *Uſe* were limited, and then the *Feoffor* muſt be anſwerable for the Value of this *Uſe* to the *Ceſtuy que Uſe*, which would be a vain Security. It ſeems, tho' this *Feoffment* were to *Uſes* expreſsly, yet the *Feoffee* ſhould ſtand ſeized to the old *Uſes*, becauſe he came to the Lands, without any valuable Conſideration, and perhaps the firſt *Feoffee* to *Uſe* was not reſponſible for his Breach of Truſt; but the other Caſe of a *Feoffment*, with Conſideration, without Notice of the *Uſes*, is widely different from this; for were he is charg-

ed with all the *Uſes*, all the Inconveniencies of a Perpetuity inſtantly follow. For the Limitation of Uſes may be ſo ſecret, that it is impoſſible to know of them, and then who would purchaſe Lands; ſo that of Neceſſity, Land would be ſo ſettled, that it would not be in the Power of the *Tertenant* to diſpoſe of it, but it muſt neceſſarily remain in the Family which is a Perpetuity. There is a Diverſity taken in *Plowden* between the Feoffment of the Feoffees and of *Ceſtuy que Uſe*; for if the *Ceſtuy que Uſe* for Life or in Tail made a Feoffment in Fee, either with or without Conſideration, all the old Uſes were diſcontinued, and the ancient Eſtate which the Feoffees had, is gone, and they have a new Eſtate ſubject to theſe new Uſes created by the Feoffment; for when *Ceſtuy que Uſe* made a Feoffment in Fee, which by the 1 *Rich.* the 3d. he might lawfully do, he paſſed a Uſe in Fee Simple to the Feoffee; which being a new Uſe to the Feoffee, all the old Uſes were diſcontinued, and conſequently the Eſtate of the Feoffees muſt be altered; for were it the ancient Eſtate, it were ſtill ſubject by the former and elder Limitation of Uſes to the old Uſes; therefore have the Feoffees, by Conſtruction, a new Eſtate to the new Uſes;

Plow. Com. 350.

but if the Feoffees themſelves had made a Feoffment without Conſideration, the Feoffees had ſtood ſeized to the old Uſes, for here was no Uſe nor new Eſtate; but as it ſeems they both agree upon the whole, for if one have an Eſtate for Life to the Uſe of another, and he makes a Feoffment in Fee, (and this is really the Caſe of *Ceſtuy que Uſe*) the Feoffee ſhall not ſtand ſeized to an Uſe, for he has a new Eſtate, and not the old one ſubject to Uſes. *Quære* whether, by the Feoffment of *Ceſtuy que Uſe*, only a Uſe paſſed, or whether the legal Eſtate paſſed; for it ſeems by *Plowden*, that only a Uſe paſſed; but by Conſequence the legal Eſtate paſſed, which, as it ſeems, is Law; the Lands were liable in the Hands of the Feoffees to an Uſe to Execution for the Debt of *Ceſtuy que Uſe*; and for Relief and Heriot after the Death of *Ceſtuy que Uſe*, after the 19 *H.* 7. *c.* 15.

1 Co. 132. *a.* 128. *b.* *Truſts made Aſſets, by* 29 Car. 2 Cap. 3.

Having thus ſhewed, that by the *Common Law*, ſuch a contingent Uſe as in the Caſe firſt put, had been deſtroyed by the Feoffment, we come now to ſhew the 27 *H.* 8. did not intend the Preſervation of them; for the very End and Deſign of that Act upon Conſideration of the many Miſchiefs and Inconveniencies that had been introduced by

1 Co. 124. Uſes, was utterly to extinguiſh and ſuppreſs them; if therefore it ſhould be conſtrued ſo far in the Favour of Uſes as to ſupport and preſerve contingent Uſes in theſe Caſes, where before at Common Law they were utterly deſtroyed, the Act would be expounded againſt the End of its Sanction, and all thoſe Inconveniencies it was made to ſuppreſs, would be ſtill in Being; for who could be ſure of a Purchaſe of Lands, when by the Limitation of a future Uſe in a ſecret Manner, which by no Act could be deſtroyed or defeated, he ſhould looſe his Land; when that came in Play, the Makers of the 27 *H.* 8. *c.* 10. thought
1 Co. 125. that after that Act, no Land could paſs by Way of Uſe, but by Common Law, which was the Way they deſigned to retrieve and bring in an Uſe again; and therefore they provided by a *Salvo* for the Right of all others, that they had before the making of that Act; yet they provided no *Salvo* for any body's Right after the Statute; but ſeem to give all Lands that are ſeized in Truſt to the *Ceſtuy que Truſt*, without any Manner of Proviſion for the Rights of other People; therefore if *A.* do diſſeize *B.* ſince the Statute, and makes a Feoffment to *C.* in Fee, to the Uſe of *D.* in Fee, the Right of *B.* is not ſaved by

by the expreſs Letter of the Act, for that gives the Land to *D.* without any Manner of *Salvo* for the Right of *B.* but by equitable Conſtruction the Judges have ſaved the Right of *B.* ſince that Way of Conveying is in Uſe, which the Makers of 27 *H.* 8. thought would be no more in Practice; and therefore made no Proviſion for the Right of thoſe after the Act; but this the Makers of the Act took for granted; for the Way of conveying by Uſe is not any Ways prohibited by the Act, but only the Poſſeſſion executed to the Uſe. Therefore this Manner of Conveying not being prohibited, and being much practiſed, the *Salvo* for others Right is abſolutely neceſſary for every Man's Safety; but becauſe the Makers of the Act thought the Way of Conveying by Uſe, would ſtill be uſed by Way of *Bargain* and *Sale*, that that alſo might be notorious, and on the ſame Level with *Common Law* Aſſurances, they afterwards, at the ſame Parliament Enacted, That they ſhould be enrolled; and this ſhews, that the Intent of the Law-Makers was not to ſhew any Manner of Favour to Uſes in *Eſſe* or *Contingency*; and as the Preſervation of contingent Uſes is clearly out of the Intent of the Statute, ſo it is out of the Remedy of the Body of the

Act *provided* againſt the Miſchiefs that were before the Act; for the only Intent and Deſign of the Act is to execute the Poſſeſſion in thoſe that have the Uſe; ſo that to the Execution of every Uſe within the Intent and Meaning of the Act, it is neceſſary that ſome body ſhould be ſeized to the Uſe of ſome other Perſon; ſo that if there be no Perſon ſeized to the Uſe, there can be no Execution of the Uſe, by the Force of the Statute, and there muſt be a Uſe in *Eſſe*, and not a Right of an Uſe only, for the Words of the Act are, *That every Perſon that has, or hereafter ſhall have any Uſe*, &c. So that the Uſe muſt be in *Eſſe*, in Poſſeſſion, Reverſion or Remainder, and the *Ceſtuy que Uſe* muſt be in *Eſſe*; for the Words of the Act are, *Stand ſeized to the Uſe of any Perſon or Perſons*; for how can the Act execute the Uſes to the Poſſeſſion, if there be no Perſon to take the Uſe in Being; and the Eſtate of the Feoffee, muſt veſt in *Ceſtuy que Uſe*; for the Act ſays, "That the Eſtate of ſuch Perſon ſeiz-"ed to an Uſe ſhall be adjudged in "*Ceſtuy que Uſe*": And when any of theſe fail, there can be no Execution by Force of the Statute; and this Conſtruction is abſolutely neceſſary, that the Words of the 27 *H.* 8. may have their full

full Scope and Meaning; ſo the Makers of the Act did wiſely in making no Proviſion for Uſes *in futuro*; for if they had, all theſe Inconveniencies at *Common Law* had ſtill remained, and Perpetuities had been preſerved by the Limitation of contingent *Remainders*, not to be deſtroyed; Eſtates would have been ſo fettered, that no body could have diſpoſed of them; ſo that the Statute having made no Proviſion for theſe *Remainders*, they are left to the Conſtruction of the *Common Law*; and then the contingent Remainder in the Caſe firſt put had been deſtroyed for the Reaſons before, when we treated concerning theſe Remainders at *Common Law*: If there be no Seizin, in the Feoffees, when the Uſe comes in *Eſſe*, it cannot be executed, *&c.* and if the Feoffees be barred of their Entry and Right to come at *Seizin*, the *Poſſeſſion* can never be executed to the Uſe; were the Lands charged with contingent Uſes, into whoſe Hands ſoever it came by Force of this Statute; then a *Corporation* Diſſeiſor of the King, *&c.* ſhould ſtand ſeized to the Uſe, as before has been ſhewn they cannot; and the Nature of the Uſe would now be quite altered; for before it was a Truſt and Confidence in the Perſon, now it would be a Sort of Attendant

1 Co. 78. *b.*

2 Leon. 259.

on

on the Land, or annexed thereto; and then it were a new Hereditament; by Conſtruction of this Statute, the Heir of the Part of the Father, ſhould have the Uſe, tho' the Lands moved from the Mother's Side; and this would be contrary to diverſe ſettled Reſolutions. If
2 Inſ. *a.* 1 Co. 127. *a.* there be a Tenant for Life, the Remainder in Fee, and the Remainder-Man covenants, that if the Tenant for Life ſhall die in four Years, he will ſtand ſeized to the Uſe of *J. S.* in Fee, and the Tenant for Life makes a Feoffment in Fee, the Feoffee likewiſe covenanting to ſtand ſeized to the Uſe of *J. N.* if the Tenant for Life dies in four Years, the Statute cannot preſerve and execute both theſe future Uſes at once; therefore one of them muſt be toll'd, and then the Statute has not the Effect to preſerve future Uſes. Before the Statute if the Feoffee had bargained and ſold, and made over no legal Eſtate to the Bargainee, no Uſe had paſſed; for the Privity of Eſtate and Confidence remain; and therefore the old Uſe continues.

Object. But then it may be objected, if future contingent Uſes are not preſerved and all executed by the 27 *H.* 8. how can the Poſſeſſion be ever executed to them, ſince the whole Eſtate is out of the

Reſp. Feoffees. To this I anſwer, that only that

that Eſtate is executed to the Uſe, by the 27 *H.* 8. that has the Requiſites before-mentioned to the Execution of a Poſſeſſion to an Uſe; and it is impoſſible a future Uſe ſhould have the Poſſeſſion executed to it by the Statute, when 'tis uncertain whether it will ever come in *Eſſe* or no: But the Feoffee has a Poſſibility to ſtand ſeized to the Uſe, and when the Uſe itſelf comes in *Eſſe*, then the Poſſibility is come to a Certainty; *viz.* an Eſtate to the Uſe of *Ceſtuy que Uſe*, and ſo is executed by the Statute; but if the Eſtate of the Land be altered by a *Diſſeiſin* or Feoffment, ſo that the Poſſibility of the Feoffees is ſuſpended, there he muſt enter to revive; the future Uſe is abſolutely deſtroyed, and no Eſtate remains in the Feoffee, for the Benefit of a future Uſe; for then, if a Feoffment were made to the Uſe of a Man for Life, and then to the Uſe of his firſt Son, not yet born, in *Tail*, the *Remainder* to *B.* in *Fee*, he would be a Tenant for Life, the Remainder to the Feoffee and his Heirs, as long as the Sons ſhould have Heirs of their Body, the *Remainder* to *B.* in *Fee*, and ſo there would be a *Fee* upon a *Fee*, and the Feoffee might puniſh the Tenant for Life for Waſte, or perhaps enter for a Forfeiture, when perhaps the con-

1 Co. 129. Dy. 14 *a.*

Fine and Nonclaim take away their Entry. 1 Leon. 258, 259.

contingent Remainder would never come in *Eſſe*: So that of Neceſſity he muſt have nothing but a Poſſibility, which when it comes in *Eſſe*, is ſuch an Eſtate in him as may ſerve to anſwer the future Uſe, and be executed to it accordingly, by Force of the Statute; for as he had a whole Fee to ſuch Uſes, ſo the Statute parcels out of his Eſtate, according to the Uſes; and as there had been no Execution of the Poſſeſſion, he muſt have ſtood ſeized to the future Uſe, when it came in *Eſſe*: So now the Statute gives that Eſtate in Poſſeſſion to the Uſe, when it comes in *Eſſe*, as it does to Uſes in *Eſſe* preſently. But if when the future Uſe comes in *Eſſe*, there is an Eſtate adjudged in the Feoffee, it may be asked what Eſtate there is in him, or what Eſtate did he gain when he enters to revive a future Uſe; for his old and antient Eſtate he cannot get when that is executed by Force of the Statute in others. It ſeems that in both Caſes, he has but ſuch an Eſtate as may ſerve to be executed by Force of the 27 *H.* 8. in the *Ceſtuy que Uſe*; for he cannot diveſt the Eſtate lawfully veſted before by the Force of that Act of Parliament. So that if the future Uſe be for the Life of *Ceſtuy que Uſe*, when this comes in *Eſſe*, it ſeems the Feoffee has a legal

2 Ro. Ab. 789.
1 Co. 129. 137.

a legal Eſtate to him and his Heirs, during the Life of *Ceſty que Uſe*, which is that Inſtant executed in the *Ceſtuy que Uſe*, by Force of the Statute; the ſame Law is, if he had entered to revive the Uſe; ſo if the *Ceſtuy que Uſe* had an Eſtate Tail in the Uſe, the Feoffee ſhall, when this Uſe comes in Being, have an Eſtate to him and his Heirs as long as the *Ceſtuy que Uſe* has Heirs of his Body. Then it may be asked, How he can have ſuch an Eſtate which is a Fee, and yet many Eſtates Tail, and a Remainder in Fee expectant upon it? But it may be anſwered, if he hath it only of Neceſſity, that the *Ceſtuy que Uſe* may have an Eſtate Tail in him, which is *eo inſtanti* executed in him, the Thing being momentaneous; and ſo there can be no Manner of Objection made of the Inconveniencies following upon the Limitation of a Fee upon a Fee; there muſt be an Eſtate in the Feoffees to ſerve the future Uſe; for the Statute ſays, That the Eſtate that was in ſuch Perſon, *&c.* ſhould be adjudged and deemed in him that has the Uſe, *&c.* ſo that of Neceſſity, ſome Eſtate muſt be adjudged in the Feoffee, that it may be executed by Force of the Statute; and tho' the Feoffee hath a particular Eſtate in the Land by his Entry without any

1 Co. 129. *a.* Plow. Com. 352. 1 Co. 137. *a.*

any *Donor*, this is not any Abſurdity, it being done by Force of the Statute, tho' regularly at Common Law, no ſuch Eſtate can be created. No Limitation of a Uſe is good, but where the like Limitation of an *Eſtate* in Poſſeſſion were good at Common Law; for the Deſign of 27 *H.* 8. was to revive the ancient Common Law, and this Conſtruction muſt be allowed of Neceſſity; for now the ſame Reaſon that had forbidden,
1 Co. 130. ſuch a particular Limitation of Eſtate in Poſſeſſion at Common Law, forbids the like Limitation of a Uſe; becauſe the Poſſeſſion is by the Act executed to
2 Co. 138. the Uſe; therefore muſt the ſame Inconveniencies neceſſarily enſue; ſo that if a Man makes a Feoffment to the Uſe of one for Years, Remainder to the Uſe of the Right Heirs of *J. S.* who is living, this Uſe limited to the Heirs of *J. S.* is *void*, for the ſame Reaſon as if an Eſtate had been made to one for Years, Remainder to the Right Heirs of *J. S.* becauſe that the Freehold is now here, ſo that there cannot be a Tenant to the *Præcipe*, (yet this were good of a Uſe at Common Law) and ſo if any one hath a Cauſe of Action, he may be delayed of his Right, and the like Inconvenience there is in a Uſe ſo limited; for

for no Eſtate is left in the Feoffee, as before has been ſaid, but only a Poſſibility. So in all other Caſes, the Execution of the Poſſeſſion to a Uſe, is conſtrued according to the Rules of *Common Law*, becauſe the ſame Reaſons hold there. So if a *Feoffment* be made to the *Uſe* of *A.* for Life, and then to the *Uſe* of her who ſhould be the Wife of *B.* *A.* dies, *B.* takes a Wife, ſhe ſhall take nothing becauſe a contingent Remainder ought to veſt at *Common Law*; either during the particular Eſtate, or *eo Inſtanti* that the particular Eſtate determines. Yet perhaps in both theſe Caſes at *Common Law*, the Chancery might have ſupported the *Uſe* in Remainder, becauſe there was no Inconveniency in it then, as there would be now. 'Tis objected, that if a Privity of Eſtate is requiſite, then no future *Uſe* can be executed by the Force of the Statute; for when the Statute has executed the preſent *Uſe* in *Eſſe*, they are in the *Poſt*, that have the Uſe ſo executed; and ſo are not Privies in Eſtate to the *Feoffee*, from which the future *Uſes* may ariſe. To this I anſwer, that the Statute requires that theſe Eſtates that were limited by 1 Co. 135. a.

Way

1 Co. 130. b. Way of *Uſe* in the ſame Conveyance with a future *Uſe*, and were executed by the Statute, ſhould ſtill remain and continue till the future *Uſe* comes in *Eſſe*; and this Privity of Eſtate is, where two Perſons have an Intereſt created by the ſame Conveyance in one Eſtate, by one Conveyance; becauſe then they come to one Eſtate by a Contract or Agreement, to which both are Parties and Privies, (*i. e.*) conuſant; and why the Eſtate ſhould continue till the future *Uſes* would ariſe, we have already accounted for, to prevent the Danger of a *Perpetuity*; and for many other Reaſons; which ſee before. All Statutes, that have been made in ſuppreſſing the Inconveniencies ariſing from *Uſes*, have always been extended by Equity beyond the Letter of them. It was the Opinion of ſome Judges, in *Chudley*'s Caſe, that the future *Uſes*, limited upon a Conveyance were in *Abeyance*; and alſo the Eſtate being executed to them by Virtue of the Statute, it was one entire Eſtate in *Abeyance*. But the other Judges for very good Reaſons were of a contrary Perſwaſion; for the Statute, as before has

1 Co. 138. a. 135. a. 136. b.

has been ſaid, extends only (by the very expreſs Words of it) to execute the Poſſeſſion to the *Uſe* where the *Uſe* is in *Eſſe*, and not to a Poſſibility of a *Uſe*, and what Ground can there be for an equitable Conſtruction to carry an Eſtate in certain to the Poſſibility of an *Uſe*, when the Words of the Statute warrant no ſuch Expoſitions; ſo that a future *Uſe*, notwithſtanding the Statute, remains as it was at *Common Law*, 'till it comes in *Eſſe*, and then the Statute executes the Poſſeſſion to it. 1 Lev. 259.

It was alſo held in *Chudley*'s Caſe, that future *Uſes* muſt not ariſe out of the Eſtate of *Ceſtuy que Uſe*, but out of the Eſtate of the *Feoffee*; therefore[a] if *A.* doth infeoff *B.* to the *Uſe* of *C.* and his Heirs, and if *D.* ſhould pay *C.* 100. then *C.* ſhould ſtand ſeiſed to the *Uſe* of *D.* and his Heirs, this *Uſe* to *D.* is void, not being raiſed out of the Eſtate of the *Feoffee*; the Reaſon of which Reſolution ſeems to have been, that he that ſtands ſeiſed to an *Uſe* muſt come in in Privity of that Eſtate to which the *Uſe* is annex'd; but here the *Ceſtuy que Uſe* comes in by the Statute, and ſo in the *Poſt*; but now it ſeems to me that the Limitation to *D.* would be ſupported as a *Chancery Truſt*, ſince they have 1 Co. 137. [a].

found out a Way to creep out of the Statute, if a Feoffment be made in Fee to the *Uſe* of the *Feoffee* and his Heirs in Truſt for *J. S.* and his Heirs; *Quære*, Whether this Eſtate be not executed in *J. S.* by the Statute; for as it ſeems, the *Feoffee* is in by the *Common Law*; and ſo the Statute not ſatisfied; ſo that it ſeems the Way of *Bargain* and *Sale* is good to raiſe a Truſt; yet it was adjudged that if a Man bargain'd and ſold his Lands in Fee to one, to the *Uſe* of one for Life, with other Limitations of *Uſes* to Others, that they were void, becauſe a *Uſe* could not be limited of a *Uſe*, which is the only Reaſon of the Caſe next before.

Dyer 155. Poph. 81. Poſt 127. *a.*

Feoffee to an *Uſe* of a Manor releaſes to the Tenants, they cannot have the Services to the *Uſe* of *Ceſtuy que Uſe*, becauſe they are drowned; and there can be no Truſt without an Eſtate in Being. *Bro.* 138. *a.* But it ſeems in ſuch Caſes, they would be compelled by the Court of Chancery, to anſwer the Rents to the *Ceſtuy que Uſe*. Duke of *Norfolk*'s Caſe, 14. 2 *Co.* 78. *b.*

Sir *Edward Cooke* being obliged by Order of the Council-Table, to make a Settlement of his Eſtate in this Manner,

ner, (that is to ſay) to covenant to ſtand ſeized to the *Uſe* of himſelf, for Life, then to the *Uſe* of *Elizabeth Hatton*, his Wife, for Life, then to the *Uſe* of his Daughter *Elizabeth*, for Life, for a Moiety of thoſe Lands, and then to the *Uſe* of her Sons in *Tail*, 'till the Tenth Son, and then for the other Moiety to the *Uſe* of his other Daughter *Frances*, for Life; then to the *Uſe* of her firſt Son in Tail, and ſo on 'till the Tenth Son, with Croſs Remainders to each of the Daughters, if the other died without Iſſue, then to the *Uſe* of the Right Heirs of Sir *Edward Cooke*; yet that he might have it nevertheleſs in his Power to defeat or preſerve the contingent Remainders to his Daughters Sons, for which End he covenanted to ſtand ſeized, and ſo no more was out of him than what was veſted in the *Ceſtuy que Uſe*, and did not make a Feoffment to *Uſes*, and put the whole Eſtate out of him, and put it in the Power of the *Feoffees* to preſerve or deſtroy them, as it was in *Chudley*'s Caſe; but here he makes a Leaſe to one for Years, and then grants his Reverſion to another in Fee, without conſidering, that ſo he coming in in Privity of Eſtate, under the Confidence Sir *Edward* had, might ſtand

ſeized to the future *Uſes*, that the Eſtate of Sir *Edward* was ſubject to, and then he makes a Feoffment in Fee to others; ſo that had he ſeen Reaſon to ſuppreſs theſe future Uſes, he would have deſtroyed the Deed of Grant of the Reverſion, and trump'd up the Deed of Feoffment; but had he ſeen any Reaſon to preſerve the Remainders, he would have ſuppreſſed the Feoffment, and ſhewed only the Grant of the Reverſion; but none of theſe Things being done, it became a *Queſtion* between the *Feoffees* and the Son of one of the Daughters, (the other dying without Iſſue) and 'twas reſolved in Favour of the contingent *Uſe*, and ſo againſt the Feoffees; a particular Tenant having entered after the *Feoffment* made by Sir *Edward*, but 'twas agreed that if Sir *Edward* had made a Feoffment before he made a Grant of the Reverſion, the future *Uſes* had been deſtroyed; for then the Feoffees had come in of another Eſtate, not of that ſubject to the *Uſes*, as was before ſhewed in *Chudley's Caſe*, the future *Uſes* were to have ariſen out of the Eſtate that Sir *Edward* had in him, as in the Caſe of the Feoffees it doth out of their Eſtate; and if he had paſſed away the whole Fee then, as in the Caſe

2 Rell. 795, 7. 1 Vent. 188, 9.

Caſe of the *Feoffees*, a Poſſibility only remained in him, then when Sir *Edward Cook* grants away, by legal Conveyance, his Eſtate to another, without Conſideration, the *Grantee* of this Eſtate being in the Privity of Eſtate, Sir *Edward* had, and under the ſame Truſt and Confidence, implied by Law that the future *Uſes* may well riſe out of his Eſtate. The next Thing then to be conſidered is, what is to be operated to the Deſtruction of thoſe future *Uſes*, by the Feoffment that Sir *Edward* made, and that can have no Operation to their Deſtruction; for though he thereby diſcontinued all the Eſtates, and the *Feoffee* ſtood ſubject to the new *Uſes*, yet when the particular Tenant entered, then all the Eſtates again were recontinu'd, and conſequently the Eſtate of the *Grantee* of Sir *Edward*, was again ſubject to the future *Uſe*; but this Leaſe made by Sir *Edward* would have bound the future *Uſes*, though not the Remainder Men, becauſe the future *Uſes* were to ariſe out of the Eſtate of Sir *Edward*; and ſo far as that was defeated, ſo far was the contingent *Uſes*; and had that been wholly deſtroyed, the future *Uſes* had been ſo too.—If a Man Bargains and Sells Lands to one for Life, then

to his firſt Son in Tail, who is not yet born, it ſeems this is a good *contingent Remainder*, riſing out of the Eſtate of the *Bargainor*; but 'tis ſaid by Judge *Nudigate*; that by Bargain and Sale only, no *contingent Uſe* can be ſupported, it ſeems he means by the Eſtate of the *Bargainee*; but *Quære*, Whether it may not, *ut ante*, but it ſeems a Feoffment or Fine is the ſureſt Way, and ſo to put it out of the Power of the Owner of the Land to deſtroy the future *Uſes*. *Quære*, Whether the Conſideration given by the Party in *Uſes* will create a *Uſe* to one not in *Eſſe*.

A. poſſeſſed of a Leaſe for Term of Years, grants it over to *B.* and *C.* and their Aſſigns, to the Uſe of *A.* and his Wife, and the longer Liver of them; *A.* grants away to another ſuch Intereſt as he then had in the ſaid Lands, *&c.* and it was adjudg'd that *A.*'s Grant was void; for he had nothing but a *Truſt*, which he could not aſſign over; for a *Truſt* cannot be aſſigned over, becauſe it lies in Privity; and though *A.* may repoſe a *Truſt* and *Confidence* in the *Leſſee*, yet his *Aſſignee*, that is no Party to the Agreement, cannot do it, becauſe not privy (*i. e.*) not conuſant of, nor Party to that Agreement; where-

Dyer 369. 2 Inſt. 671. 4 Inſt. 85.

by

by by the Contract between the Parties, a *Truſt* was repoſed in the Tenant of the Land; for though he might be willing to ſtand intruſted for the Benefit of his Friend, it does not therefore follow that he would for every Body's Advantage. But it ſeems to me, in this Caſe, that if *A.* had aſſigned over the Land itſelf, it would be good by 1 *R.* 3. but the Words he uſed were not ſufficient to paſs the Land itſelf, for he had no Intereſt therein; for 27 *H.* 8. executes no Poſſeſſion to a *Uſe*, but where ſome Body is ſeized to the *Uſe* of another for Years, Life, Poph. 76 *&c.* ſo that the Tenant muſt have a Freehold in the Land, elſe the Statute executes no Poſſeſſion to the *Uſe*; but if a *Fine* be levied to the *Uſe* of one for Years, then it is executed, for the Conuſee of the *Fine* is ſeized. A Man Bargains and Sells his Land for Years, that is executed by the Statute, if the Bargainor had a Freehold for only a *Uſe* paſſed at Common Law, and ſo had ſtood ſeized to an Uſe; and whatever Intereſt the *Ceſtuy que Uſe* has in the *Uſe*, 'tis executed by the Statute, if any Body be ſeized to that *Uſe*. *A.* Feoffee to the *Uſe* of *B.* and his Heirs before the Statute, Bargains and Sells the Land to *C.* and his Heirs,

1 Inſt. 271. b. 272. a. no *Uſe* had paſſed to *C.* for there cannot be two *Uſes* of one and the ſame Land, and the *Uſe* of *B.* continued, for the Privity of Eſtate and Truſt and Confidence remained, and therefore did the *Uſe* of *B.* prior to *C.*'s Title; for *Uſes* cannot be deſtroyed nor altered without a Tranſmutation of the Poſſeſſion, by which the Privity of Eſtate, or the Truſt and Confidence is altered and gone. The ſame Law is of Covenants to ſtand ſeized.

7 Co. 72. b. Dyer 362. Vaughan 52. *A.* covenants to ſuffer a *Recovery* of ſuch Land to the *Uſe* of *B.* and his Heirs, rendering to *A.* an annual Rent of 42 *l.* it was held that upon the Recovery *A.* ſhall have the Rent executed in him, by 27 *H.* 8. *c.* 10. and may diſtrain for the Rent; for though there be no Clauſe of Diſtreſs nor Covenant; for the *Recoveror* was ſeized to the Intent another ſhould have the Rent; and though the Appointment of the Rent was after the Limitation of the *Uſes*; as if the Deſign was that the Rent ſhould iſſue out of the Eſtates executed by the Statute; yet that is not material, for the Intent being that a Rent ſhould Iſſue there, ſuch Conſtruction ſhall be made *ut Res magis valeat quam pereat.*

But

But if *A.* diſſeizes *B.* to the *Uſe* of *C.* and his Heirs, and then *Bargains* and *Sells* the Lands to *D.* a *Uſe* will paſs to him; for though *A.* committed the Diſſeiſin to the *Uſe* of *B.* and his Heirs, yet has *B.* no ſuch *Uſe* as can be executed by the Statute, *viz.* an equitable Right to take the Profits; for a *Diſſeizor* cannot ſtand ſeized to an *Uſe*, there being no Privity of Eſtate, nor Confidence, and ſo no Ground to *ſubpœna* him to Chancery; and they cannot there take Notice of his Title; for they are not to determine the Right of Inheritance; but the *Diſſeiſin* being done to the *Uſe* of *C.* it ſeems he may enter upon *B.* and have the Lands, tho' he have no ſuch *Uſe* as is to be executed by the Statute. 'Tis regularly true, that if the *Ceſtuy que Uſe* enters upon the Feoffee, he was a Treſpaſſor; yet in ſome Caſes, by Intendment of Law, he might enter and occupy the Lands at the Will of the *Feoffee*; therefore if a Man before the Statute made a *Feoffment* in *Fee*, to the Intents to perform his Laſt Will, yet might the *Feoffor* enter and occupy the Land at the Will of the *Feoffee*; and ſo as it ſeems, in the Caſe of a *Feoffment* to future *Uſes*, the *Feoffor* might enter and occupy at Will. If

the

the *Feoffment* were made without Conſideration, as the Caſe is to be intended; for the Law gave the *Feoffor* and his Heirs a *Uſe* till the future *Uſe* came *in Eſſe*; and a *Uſe* is nothing but a Right to take the Profits to that End; therefore it gave him Leave to enter and occupy the Lands at the Will of the *Feoffee*; and ſo as it ſeems from *Lit. Sect.* 464. may his Heir do after him, and in giving him the *Uſe* in the mean Time, till the future *Uſe* comes in *Eſſe*, it gives him Leave to take the Profits. But then 'twill be objected, If the Law gives not a Man Leave in Caſe where there is a *Uſe* expreſly limited to him, but makes him a Treſpaſſer, how can it give him Leave to enter, *&c.* where there is no ſuch expreſs Limitation to him? To which I anſwer, that where the Law by Intendment gave him an *Entry* to occupy at Will, 'tis but to give him Leave to take what the Law gives him; but when a *Uſe* is expreſly given to a Man there to give him Leave to enter, is to make a Conſtruction quite contrary to the Meaning of the Parties expreſſed in their Deeds, by which it appears, that the *Feoffee* was to have the Poſſeſſion and Occupation of the Land, and to anſwer over the Profits to the *Ceſtuy*

Hard. 401.

1 Sid. 438.

Ceſtuy que Uſe; ſo that the Difference is this; in the one Caſe there is but a reaſonable Conſtruction made to let a Man have that preſently which he would have at the long run, that is to ſay, the Profits of the Land, when there is nothing repugnant to ſuch Conſtruction; in the other Caſe to expound the Entry of the *Feoffor* to be lawful, is to make a Conſtruction quite contrary to the plain Intent and Meaning of the Parties fully expreſſed, which would be to introduce all Manner of Uncertainty in the Expoſition of Deeds. Where the Will of the Parties ought to be ſupported, if no Inconvenience follow from it, it appears by *Lit. Sect.* 464. what Uſes were at Common Law; for there he ſays that *Ceſtuy que Uſe* ſhould be a Juror, if the Land were worth 40 *s. per Ann.* therefore when the Statute ordained that a Juryman ſhould have 40 *s. per Ann.* the Judges conſtrued it according to the Common Law, that *Ceſtuy que Uſe* ſhould be the Perſon, and not the *Feoffee*.

1 Co. 122. a. 1 Inſt. 272.

Who

Who may have a Uſe.

All. 316. Bro. 339. *a.* Stiles 40. Hard. 495. Bro. 338. *p.* 17. 339. 29. 1 Co. 23, 24. 1 Hern. 132.

If an *Uſe* be limited to an *Alien*, he cannot have it, but it is forfeited to the King, who cannot ſeize the Lands, but may have a *Subpœna* to get the Profits or the Eſtate executed to him.

The King cannot have a *Uſe*, becauſe he cannot take but by Matter of *Record*; but if the *Uſe* be found by Office, upon Record, then he may take.

If a *Uſe* be limited to the Poor of the Pariſh, 'tis good, though they are no Corporation.

Vid. poſt *where this Diſtinction is rejected.*

When a Man makes a Feoffment in Fee, to the Intent to perform his Laſt Will, and afterwards deviſes the Lands to another, and dies, the *Deviſee* is in by the Will; but if a Man makes a *Feoffment* in *Fee* to the *Uſe* of ſuch Perſons, and of ſuch Eſtate as he ſhall appoint by his Laſt Will, and then limits the *Uſe*, by Will to another, the Deviſee is in by the Execution of *Uſes* upon the *Feoffment*, by the Statute; and the Reaſon of the Diverſity ſeems to be this, in the firſt Caſe, he having limited no *Uſes*, and having a *Uſe* to him and his Heirs, the *Feoffment* in both Caſes being made without Conſideration, the Statute executes the Eſtate

2 Inſt. 471. *b.* 1 Inſt. 111. *b.* 112. *a.* 6 Co. 18. *a.*

ſtate fully in him again, and leaves nothing in the *Feoffee*; but in the latter Caſe, there being *Uſes* expreſly named, tho' the *Feoffor* had his Eſtate again, yet there is a Poſſibility left in the *Feoffee*, which becomes an Eſtate when the Contingency happens: But then it will be objected that the firſt *Feoffment* being made upon *Truſt* and *Confidence* to perform his Laſt Will, this was a *Uſe* in Contingency; and ſo there is the ſame Reaſon for this Caſe as for the other; but it may be anſwered, That this is no *Uſe*; or if it were one at *Common Law*, yet that 'tis now deſtroyed by the *Feoffee*, who can never perform the Truſt repoſed in him, becauſe the Eſtate is preſently by the Act out of him, at *Common Law*, it might be a *Uſe*, for he had an Eſtate in him, ſo that he could perform the Will of the *Deviſor*; but in the other Caſe the Will is but a Direction of the Perſons and the Eſtates they ſhall have according to this Power reſerved upon the *Feoffment*, and there upon the original *Feoffment* there was nothing for the Feoffees to do.——Tenant in Tail cannot ſtand ſeiz'd to an Uſe; for the Intent of the Statute *De donis* was, that he ſhould have the Lands and the Profits of them, and he cannot execute

1 Inſt. 19. *b.* 2 Roll. 780. Cro. Jac. 400. 1 Rol. Rep. 333. 2 Co. 78. *a.* Moor 107. Conr. 2 And. 87. Vide 2 Roll. 781.

execute the Eſtate to the *Uſe*, and therefore cannot anſwer the End of the Creation of *Uſes*, (*viz.*) that the Tertenant ſhould make Eſtates according to the Directions of *Ceſtuy que Uſe*; and it appears by the Intent and Scope of the Act, that the Makers did never intend that the *Tenant* in *Tail* ſhould ſtand ſeized to an *Uſe*, for they have reſtrained him to alien to prejudice his Iſſue; but if he were to ſtand ſeized to an *Uſe*, as it was a Part of the Truſt repoſed in him to make Eſtates according to the Direction of *Ceſtuy que Uſe*; ſo it would be a Prejudice to the Iſſue; and the Statute would never have ſo carefully preſerved the Land to the Iſſue, if he might have it only to another's *Uſe*.——If a Baſtard hath gotten a Name by Reputation, to be ſuch a One's Son, yet 'tis not a Conſideration ſufficient to raiſe a *Uſe* to him; for ſtill in Law, he is look'd upon as *nullius filius*; therefore the Law can never ſupport that as a good *Uſe* to him, as the Son of ſuch one, in reſpect of the natural Affection that a Father bears to his Sons, when by another Maxim the Law ſuppoſes, and ſays, he is *nullius filius*; and ſo no Body can have any natural Affection for him.

2 Inſt. 113. *a.* *poſt* 139. *b.* Dyer 374. *b.*

A Man

A Man levies a Fine, and covenants by Indenture, in Conſideration of natural Love and Affection, Blood and Marriage of his Baſtard Daughter, that the Conuſee ſhall ſtand ſeized to the Uſe of the Baſtard Daughter, tho' this be not a ſufficient Conſideration to raiſe a Uſe upon a Covenant, yet 'tis expreſſive of the Intent of the Party; and therefore ſhall ſerve as a ſufficient Declaration of a Uſe upon the Fine, where there needs no Conſideration. Uſes, (as has been ſaid) may be raiſed either upon the Tranſmutation of Poſſeſſion, as upon a Fine, Feoffment or Recovery, *&c.* or where there is no Tranſmutation of Poſſeſſion, as upon a Covenant or Grant upon good Conſideration, as upon a Bargain and Sale, where there muſt be *quid pro quo*, ſomething given for ſomething; but if in a Covenant there be but a *good Conſideration, though nothing be given, it is ſufficient*; and here it will be requiſite to ſee what is a good Conſideration to raiſe a Uſe upon a Covenant. And firſt, in the Caſe of *Sherrington* and *Pleadale* ver. *Strotton*, it came to be a Queſtion, Whether a Covenant in Conſideration that the Lands ſhould remain to the Heirs Male of the Body of the Covenantor, and in Conſide- 2 Co. 75. b. 76. a. ante.

Conſideration of Brotherly Love and Affection; and that the Lands ſhould remain in the Blood of the Covenantor, were ſufficient to raiſe a Uſe; for 'twas objected that 'twas not, becauſe no Advantage came to the Covenantor by that Conſideration; for 'twas unneceſſary, and 'twas no more than was before, and would be afterwards; but the Court did adjudge that the Uſes did well riſe upon thoſe Conſiderations, and in the Reſolution they ſeem to have regard to each of theſe Conſiderations, as if any of them ſingly were ſufficient to raiſe a Uſe, as indeed they ſeem to be; for as for the firſt, in Conſideration, that the Lands ſhould remain to the Heirs Male of his Body, he covenants to ſtand ſeized to the Uſe of himſelf for Life, then to others for Life, and then to the Heirs Male of his own Body; this it ſeems is a ſufficient Conſideration to give him an Eſtate Tail, tho' he does not part with his Eſtate; and ſo in other Caſes it would remain in him, as before; as if a Man makes a Feoffment in Fee to the Uſe of *J. S.* in Tail, the Remainder to his own right Heirs, he has his old Reverſion in him; but here the Conſideration of preſerving the Lands to the Heirs Male of his Body, by the

Moor 505.

Creation of an Eſtate Tail; and ſo having the Force of the Statute *De donis* to preſerve the Inheritance; for the Iſſue being a good Conſideration to raiſe a Uſe, that Eſtate, which the Owner of the Land had, is changed and qualified into an Eſtate Tail. Accordingly my Lord *Coke* ſays, that if a Man makes a Feoffment in Fee to the Uſe of one for Life, the Remainder to the Uſe of the Heirs Male of his own Body, this is an Eſtate Tail in him; yet here the Uſes were not out of him; ſo that a Man may modify a Fee that continues in him; but he cannot take a Fee as *de novo*, when he has the old one in him. In the Caſe of *Pybus* and *Mitford*, it was held, that if a Man covenanted to ſtand ſeized to the Uſe of his Heirs Male, begotten on the Body of his ſecond Wife, he had thereby an Eſtate Tail.

1 Inſt. 22. b. 7 Co. 13. b. 1 Vent. 372. Moor 495, 505. 13 Co. 55. 2 Mod. Rep. 109.

A Father makes a Feoffment in Fee to his Son, with a *Letter of Attorney* to make *Livery*, but no *Livery* is made, no *Uſe* ſhall ariſe to the Son; for it appears to be the plain Intent of the Parties, that the Land ſhall paſs by the *Common Law* by the *Feoffment*; and that the *Feoffee* ſhould be in the *Per*, and it would be unreaſonable to make ſuch Conſtruction as to raiſe a

Later Authorities ſeem to incline that this ſhall amount to a Covenant to ſtand ſeized.

Uſe, and ſo make the Son come in by the Statute; and in the *Poſt*, contrary to the expreſs Agreement of the Parties mentioned in the Deed. It ſeems the Diverſity taken before, came in by a Conſtruction made in Favour of Lords, upon the 32 & 34 *H.* 8. to hinder the Diſpoſition of one third Part. When the Feoffment was made to the *Uſe* of the *Feoffor*'s Laſt Will, this was expounded to be no more than reſerving a Power to diſpoſe of the Land by Will, which, as Owner, he might do before, and not that he deſign'd himſelf to raiſe a particular Authority to limit an *Uſe* to this or that Perſon, upon the *Feoffment*; ſo the *Feoffment* being made without Conſideration, was to the *Uſe* of him and his Heirs; and therefore when he diſpoſes of the Land, tho' he did it as having a Power by the *Feoffment*, yet the Will took Effect, as he was Owner of the Land; but this Diſtinction ſeems to me to have no Manner of Reaſon or Ground for it, in any fair Conſtruction. When a Man makes a *Feoffment* in *Fee* to the *Uſe* of ſuch Perſons, and of ſuch Eſtate as he ſhall appoint by his Laſt Will, the *Feoffor* is in the mean time ſeized of a *qualified Fee*, and has a double Power over the Land, either as Owner of it

6 Co. 18. a.

1 Inſt. 111, 112. Hob. 312. 6 Co. 18. a. 1 And. 245.

to diſpoſe of it by Will, without taking any Notice of his Power reſerved upon the *Feoffment*, or by limiting *Uſes* and *Eſtates*, according to that particular Power. If therefore he deviſes his Lands by the Will, generally, it takes Effect as if he were Owner of the Land; for having Liberty to chuſe whether he will make any Uſe of the Power reſerved to him upon the Feoffment, and yet having Power, as Owner of the Land to diſpoſe of it, when he deviſes it generally without any Relation to his Power, it ſeems his plain Intent was to waive the Execution of the particular Power he had upon the *Feoffment*, and to make *Uſe* of the general Power he had as Owner of the Land; and now ſince the Lands are of Socage Tenure, deviſable by Will, in every ſuch *Deviſe* by Will, the *Deviſee* would be in by the Will, tho' ſometimes, in Caſe of Knight-Service, Lands were otherwiſe; as if after ſuch *Feoffment*, or by ſuch *Feoffment* of three Acres, he had diſpoſed of it to *A.* and afterwards by Will generally had deviſed the third, the *Deviſee* had been in by the *Feoffment*, and not by the *Will*, becauſe as Owner of the Land he was reſtrained from making any Deviſe at all; and therefore that Cro. El. 878.

the Will might be of ſome Effect, (which was moſt certainly the *Deviſor*'s Intent) it was expounded, and that moſt reaſonably to be a purſuing of his Authority according to the Power reſerved to him upon the *Feoffment*; but if he had made no Diſpoſition of the Lands, but only as general Owner of them had *deviſed* them, there, becauſe the Will was of Effect to paſs two Acres, the *Deviſe* was void for the third.

A. ſuffers a Recovery to the Uſe of his Laſt Will, if he declares Uſes by Deed in the mean Time; yet they are revocable, being founded on a Recovery ſuffered to Uſes that were alterable at the Will of *A.* therefore in ſuch a Caſe he may either declare new Uſes, or if he makes a Leaſe for Years, that ſhall bind the Perſons nominated by the Declaration of the Uſes to the Will. *Hob.* 349. *Bro.* 337. *b.* 19 *H.* 8. 12. *Dyer* 166, 324.

1 Co. 175. *ante.* In an Action on the Caſe for ſlandering his Title, the Defendant pleads that one Sir *Henry Sharington* was ſeized of the Lands whereof, *&c.* and had Iſſue three Daughters, and covenanted with others, in Conſideration of a Jointure to be made to his Wife, the Advancement of his Iſſue Male, if he

he ſhould have any, the Preferment of his Daughters, and the Continuance of the Land in his Blood; and for divers other good Conſiderations, to ſtand ſeized of the Lands *E. G.* of ſix hundred Arcres, to the *Uſes*, *Intents* and *Purpoſes*, and under the *Proviſo* enſuing, (*viz.*) to the *Uſe* of himſelf for Life, and after of Three hundred Acres in certain, to the *Uſe* of his Wife for Life, for a Jointure, and of the other 300 Acres after his Death; and of the other Three hundred limited for his Wife's Jointure, after both their Deaths, to the *Uſe* of the Heirs Male of his Body engendered; and for Default of ſuch Iſſue, then of the Three hundred Acres not limited for his Wife's Jointure to the *Uſe* of his three Daughters ſeverally, and the Heirs of their Bodies; and for Default of ſuch Iſſue to the *Uſe* of the right Heirs of Sir *Henry*; and then there was the like Limitation of the other Three hundred Acres; and if any of the ſaid three Daughters die without Iſſue, then her Portion to the Survivors by Moieties, Remainder to the Right Heirs of Sir *Henry*, and then comes this Proviſo: *Provided always, and it is covenanted and agreed between all the ſaid Parties, that it ſhall*

be lawful for the ſaid Sir Henry, *by his Will, in Writing, to limit any Part of the ſaid Lands to any Perſon or Perſons, for Term of Life, Lives or Years, for Payment of his Debts, performing of his Legacies, Preferment of his Children, or any other reaſonable Conſideration, as to himſelf ſhall be thought good; and all Perſons thereof ſeized to ſtand ſeized to the Uſe of ſuch Perſons, and for ſuch Intereſts as ſhall be ſo limited after by his Will.* Afterwards *Urſula*, the eldeſt Daughter died without Iſſue: Afterwards the ſaid Sir *Henry*, by his Will in Writing, for the Advancement of his Daughter *Oliffe*, and her Huſband, and the Heirs of the Body of the ſaid *Oliffe*, limited a great Part limited to *Grace*, to the ſaid *Oliffe*, for 1000 Years, without reſerving any Rent; and afterwards the ſaid Sir *Henry* died without Iſſue Male, and ſo the Defendant juſtifies his ſaying, that *Oliffe* and her Husband had Right to the Lands; and upon this *Plea* the Plaintiff *Demurs*, and this Limitation for 1000 Years was *adjudged* to be void, and conſequently the Defendant had ſlandered the *Plaintiff's Title*; and ſo Judgment was given for the Plaintiff; and that by the Opinion of all the

the Juſtices in *England*; and that upon theſe Grounds and Reaſons. Tho' upon a Feoffment, *Uſes* may be limited without Conſideration, yet they cannot by *Covenant* or *Bargain* and *Sale*; and the Reaſon ſeems to be this, when a Man made a *Feoffment* in *Fee*, without Conſideration, and without expreſſing any *Uſes*, whereby the *Feoffee* came into the Land for nothing, it was thought very reaſonable and equitable that the *Feoffee* coming to a conſiderable Eſtate, without giving any thing in exchange for it, ſhould ſtand ſeized to the *Uſe* of the *Feoffor*; for that ſeemed to be the Intent of the Parties, it not being to be imagined that any Man would give away an Eſtate without any Manner of Reaſon or Conſideration for it; but when upon the Feoffment *Uſes* were expreſſed, then theſe expreſs *Uſes* were ſupported, tho' the *Feoffment*, *Fine*, *&c.* were without Conſideration, becauſe that ſeemed to be the plain Intent and deliberate Deſign of the Parties, that the Eſtate ſhould be ſettled according to thoſe Limitations; and there would be no Equity in overthrowing ſuch a Deſign; but in a *Covenant* or *Bargain* and *Sale*, no *Uſe* can be raiſed without a good Conſideration; tho' there be 1 Co. 176.

Uſes expreſſed; for in a *Feoffment* it is Equity that gives a *Uſe*, tho' there be none expreſſed; and the ſame Equity will not ſupport any *Uſe* by *Covenant* or *Sale*, tho' expreſſed, if there be no Reaſon for it, as there is not in a *Bargain* and *Sale*, without Conſideration. But it may be asked, ſince *Uſes* on a *Feoffment*, if expreſſed, may be ſupported without any Conſideration, why may not *Uſes* upon a Covenant, *&c.* if expreſſed, tho' without any Conſideration, be ſupported too? To which it may be anſwered that if a *Feoffment* be made in Fee, without Conſideration, the *Feoffee* hath a legal Eſtate and Right to take the Profits of that, and that the *Feoffor* ſhould take the Profits, is only an Equitable Conſtruction in his Favour, which if he will paſs away by limiting it to others, or in this or that Manner, he may; but when a Man, that has a legal Eſtate and an equitable Right too to take the Profits, will covenant to ſtand ſeized to an Uſe; he that will take the Benefit of the *Uſe* of the Land, muſt ſhew ſome good reaſonable Cauſe to take the Profits in Equity, ſince he hath none in Law; which no Man could do but he that comes to the *Uſe* for a good Conſidera-

ſideration. When a *Feoffment* is made to an *Uſe*, a Truſt is repoſed in the *Feoffee*, which may be very well done, without any Conſideration; nay, it better anſwers the End of a *Truſt*, if it be done without any Conſideration; and when a *Truſt* is repoſed in any Body, he muſt perform it, or he is Guilty of a Breach of *Truſt*; but when he *covenants* to ſtand ſeized to a *Uſe*, the *Ceſtuy que Uſe* ought to ſhew ſome good Reaſon to intitle himſelf to the Profits of Lands in Equity. And a *Bargain* and *Sale*, *ex vi Termini*, implies a Conſideration; and that there ſhould be *Quid pro quo*. And as an *Uſe* cannot be raiſed upon a Covenant in a *Bargain* and *Sale* without Conſideration; ſo if a Man for good and valuable Conſiderations Bargains and Sells Lands, or covenants to ſtand ſeized to an *Uſe*, no *Uſe* is thereby raiſed; for the Words are too general to ſhew the Nature of the Conſideration; and it appears not by them, whether any Conſideration was given or not; and what is a good one to raiſe a *Uſe* ought to appear to the Court to be ſo; for they are to judge whether the Conſiderations given were ſufficient, or not, to raiſe a *Uſe*; but yet, becauſe, if in Truth, a Conſideration was paid, *&c.* it is reaſon-

Holt, *in the Caſe of* Jones *v.* More.

reaſonable the Party ſhould have the Benefit of it, tho' *primâ facie*, becauſe there is none mentioned in the Deed, therefore there ſeems to be none; yet the Party may aver, that there was a Conſideration paid, and ſet it out, which if it is an *Uſe* ſhall be raiſed to him; and this Averment is always *traverſeable*; and tho' there be a Conſideration which is always a good one, mention'd in the Deed, as ſuppoſe Money; yet may the Party aver another, beſides that, if it ſtands with the Deed, as all Conſiderations muſt that are averred to be of any Force or Effect; as if there be a Conſideration of Blood averr'd, the Party muſt be of the Blood of the *Covenantor*. If *A. covenants* with *B.* for good Conſiderations to ſtand ſeized to his *Uſe*, no *Uſe* is raiſed to *B.* but if in Truth *B.* be of his Blood, and in Truth the *Covenant* was made for Advancement of his Blood, he may *aver* it, and ſo have the *Uſe*. When the Conſideration is a Covenant to ſtand ſeized to *Uſe*, or in a Bargain and Sale, is good, and the Perſon certain, there that Perſon may take an *Averment* that the Conſideration was paid, and according to the Truth of the Caſe; but where the Perſon is uncertain, and the Conſideration general, there no *Averment* can be

Dyer 146.
7 Co. 40.
11 Co. 24.
1 Co. 176.
See Tit. Revocation of Uſes, 34.
1 Co. 176.

be taken by any Perſon. In the firſt Caſe the Averment by the particular Perſon is but Reducing the general Conſideration to ſome Certainty, and making out that in particular, in Favour of the Perſon who was before included in the general Words; which is very reaſonable, in Caſe a good Conſideration were *bona fide* paid by him; but in the latter Caſe the Intent of the *Covenantor* was void *ab initio*; for it appearing that he deſigned no Body in particular, for the Benefit of the *Uſe* he would raiſe, no Perſon in certain could aver any particular Conſideration why he ſhould have the *Uſe*; becauſe it plainly appears by the Deed, he did not deſign him for the *Uſe* any more than any other Perſon; and the Law will not give a *Uſe* to any Body contrary to the Intent of the Party mentioned in the Settlement; therefore if *A.* for divers good Conſiderations, covenants to ſtand ſeized to the *Uſe* of him that *B.* ſhall name, and nominates one, no *Uſe* is raiſed to him; for there is no particular Conſideration expreſſed, and the Nominee of *B.* cannot aver any, becauſe it appears that *A.* knew not who the Nominee would be, and therefore could have no Reſpect for any particular Perſon to make him raiſe

raiſe a *Uſe*. If *B.* had paid Money, *Quære* whether he might not have averred it, and ſo made good the *Uſe* to the *Nominee*; but if *A.* in Conſideration of the Advancement of his Blood, had covenanted with *B.* to ſtand ſeized to the *Uſe* of ſuch a one of his Kindred as *B.* ſhould appoint, and then *B.* had nominated one, the *Nominee* had a good *Uſe*; for *A.* had a Deſign, for very good Reaſons, to advance ſome of his Family, and he only left it to *B.*'s Judgment who ſhould be the Perſon. When *Uſes* are raiſed to Sons in Conſideration of Natural Love and Affection, and afterwards there is a Proviſo that the *Covenantor*, for divers good Conſiderations, might make Leaſes for any Number of Years or Lives, to any Perſon he would, he cannot by Force of this *Proviſo*, make any Leaſe to any of his Sons, or any other Perſon; for the Conſideration is too general to raiſe a *Uſe*; and no particular Averment can be made by any Perſon in certain, and the Conſideration that is requiſite in a *Covenant* or *Bargain* and *Sale* to raiſe a *Uſe*, will be ſo in a *Proviſo* to raiſe *Uſes* in that Covenant or Bargain; for the *Proviſo* is but an under Sort of Agreement, and what is requiſite in the *Covenant*, which

is

is the fundamental Agreement; for the Settlement of the *Uſes* will be requiſite in the *Proviſo* of that Agreement; for it is an Agreement of the ſame Sort or Nature with the other; and the *Uſes* raiſed by it are only raiſed by Covenant and Agreement, and not upon *Feoffment*, where *Uſes* may be raiſed without any Conſideration originally; and by the ſame Reaſon as it ſeems by Proviſo. In the Caſe of *Mildmay*, the *Uſe* intended to be raiſed was deſigned to come under that Clauſe in the Agreement, for divers other good Conſiderations; and therefore for the Reaſons aforeſaid, it was void; but if the Leaſe to *Oliffe* had been for any other Conſideration mentioned in the *Proviſo*, it ſeems it would have been good upon theſe Words, *other Conſiderations mentioned in the* Proviſo. It was reſolved that the Conſiderations, upon which a new *Uſe* muſt have been raiſed according to the Power of the Proſo, muſt not have been any of thoſe Conſiderations mentioned before in the Deed; for the Word *other* implies ſo much; and therefore for that Reaſon alſo, the *Uſe* raiſed by the Power of the Proviſo was void, being done for the Advancement of his Daughter, which was mentioned before, and was the

1 Co. 176.

the Conſideration for raiſing the *Uſe* in the *Indenture*. If the Proviſo had been that upon the Conſideration of Blood he might have made Leaſes to any of his Kindred, it ſeems the Intent had been good; for the Leaſe might riſe upon the Conſideration, which was as good in that Caſe as in any Caſe of Blood; and the Perſons to whom it was to be made were to be thoſe expreſſed in the Conſideration; but if it had been that for Conſideration of Blood he might have made Leaſes, it had been void, though the Leaſe *in facto* were made to one of his Blood; for the Power was too general at firſt, and ſo void. 2 *Roll* 260. *Cro. Jac.* 180. like Caſe *Moor* 373. *Hob.* 312. 1 *Co.* 177. *Moor* 171.

Where there is a Recovery to the Intent to make ſuch Eſtates; he is ſeized to his own Uſe in the mean Time. Moor 103.

If a *Feoffment* be made, or a *Fine* be levied, or Recovery be ſuffer'd, without Conſideration, and no *Uſes* are expreſſed, it is to the *Uſe* of the *Feoffor* and his Heirs. But if any *Uſes* be expreſſed, it ſhall be to thoſe *Uſes*, tho' no Conſideration be had; and herein is the Difference between raiſing *Uſes* by *Fine*, *Feoffment*, or other Conveyance operating by *Tranſmutation* of *Poſſeſſion* and *Uſes* raiſed by *Covenant*; for upon the firſt, if no *Uſes* were expreſſed, it is Equity that aſſigns the Feoffor

Moor 509. of *Things lying in Grant.*

to

to have the *Uſe*; for by the Law, the *Feoffor* has parted with all his Intereſt; but where he expreſſes *Uſes*, there can be no Equity in giving him the *Uſe* againſt his own Will; and there can be no Preſumption that the Conveyance was to the *Uſe* of the *Feoffor* againſt his own Declaration; but in Caſe of a *Covenant*, it is Equity that muſt give a *Uſe*; for the Perſon can have no Right by Law; therefore in ſuch Caſe there can be no *Uſe* without a Conſideration; for there is no Equity there ſhould.

A Feoffment on Conſideration, to the Uſe of Feoffees for Life, they ſhall have it but for Life. Dyer 169. Lit. Rep. 288. *argued at Court.* Plowd. Com. 306.

Husband and Wife levy a *Fine* of the Wife's Land to the *Uſe* of the Heirs of the Husband, begotten on his Wife, Remainder to the Heirs of the Husband, this is a void Limitation; for the Huſband had no *Uſe in præſenti*, and ſo the other *Uſes* cannot be ſupported. Show. Parl. Ca. 104. 2 Salk. 675. 4 Mod. 153.

A *Truſt* is limited thus, If ſuch a Marriage takes Effect, after *M.*'s Age of 16, being the Daughter of *H.* and ſhe ſhall have Iſſue Male of the Body of *S.* then to both for Life, he marries her at 12 Years of Age, ſhe lives 'till near 17, and dies without Iſſue, he ſhall have no Truſt for Life; becauſe ſhe having no Iſſue Male, there was a Failure of the precedent Qualification to enable him, it ſeems ſhe living 'till after Six-

Parl. Ca. 84.

teen

teen fulfills the firſt Words well enough, *&c.* if the Marriage ſhould take Effect after her Age of 16, after the Death of *S.* and *M.* the Daughter of *H.* without Iſſue. The Truſt was limited over to others; but decreed that 'till the Daughter of *S.*'s Death, he in Remainder could not take, but that the Heir ſhould have the Truſt till that happen'd; for ſo much of a Truſt as is not diſpos'd of, muſt be to the Heir. A Woman ſhall not have the Thirds of a *Truſt* of a *Term* to wait upon an Inheritance againſt the Purchaſer, by her Title of *Dower*, but againſt an Heir perhaps ſhe may.

Ibid. 87.

Ibid. 73

If *Ceſtuy que Uſe* enters upon the *Feoffee*, he is Tenant at Will. See how *Uſes* are executed by the Statute, 1 *Leon.* 298. all Pernancy of Profits is gone by the 27 *H.* 8. ſo as now no Body can be Tenant to the *Præcipe*, in Reſpect of that.

1 Vent. 58. Dyer 32. 4. Parl. Ca. 104.

Tenant in Tail, Remainder in Fee, he in Remainder, in Conſideration that the Land ſhould continue in his Blood, and for divers other good Conſiderations, *covenants* to ſtand ſeiſed to the *Uſe* of himſelf in Tail Male, then to the *Uſe* of his Brother in Tail Male, then to the *Uſe* of the King in Fee, no *Uſe* is hereby raiſed to the King, unleſs ſome valuable Conſideration be averr'd

2 Co. 15. Moor 325.

to

to be given by the King; and if this *Uſe* in the King ſhould preſerve the Eſtate from being barred, yet that could be no Reaſon to give the King an equitable Right to take the Profits; for that is no Advantage to him. If the *Uſe* had been limited to the King, in Conſideration that he was the Head of the Commonwealth, and had the Care and Government of his Subjects, yet had no *Uſe* been raiſed to him, for that is no particular Conſideration to entitle him to the Profits of thoſe Lands; neither has he any more Reaſon to have them now than before; for *Ex officio* he takes Care of the Commonwealth, and to that End he has a ſufficient Revenue. 2 Co. 15. *b.*

Where the Lord *Paget* ſeiz'd of Lands in Fee, *covenants* with *T. F.* and others, in Conſideration of the Charges of his Funeral Expences, Payment of Debts and Legacies, out of the Profits of his Land, and for the Advancement of his Son, Brother, and others of his Blood, that he and his Heirs would *ſtand ſeized* of the ſaid Manors to the *Uſe* of the ſaid *J. F.* for the Life of the Lord *Paget*, and after his Death to the *Uſe* of *C. D.* for the Term of Twenty-four Years, and then to the *Uſe* 1 Co. 154. *a.* 1 Leon. 165. Moor 195.

of *W. P.* his Son in *Tail*, with divers Remainders over; it was adjudged in this Caſe, that my Lord *Paget* had an Eſtate for his own Life; and the Reaſon given is, becauſe all the Remainders were to commence after his Death; and ſo the Eſtate remained in him, during his own Life; but it ſeems that this muſt be underſtood, that all thoſe Eſtates that were good, and upon a valuable Conſideration, were to commence after his Death; for all Eſtates were limited to the *Covenantees*, during the Life of my Lord *Paget*; but it doth not appear to be on a valuable Conſideration; it was alſo reſolved that *C. P.* took not the Eſtate for Twenty-four Years, becauſe there was no Conſideration to raiſe it to him; for they had nothing to do to pay his Debts and Legacies, neither were they thereto chargeable; but if they had been his Executors, it had been good; for that had been their proper Work and Employment: It was alſo reſolved that *W. P.* ſhould take before the Twenty-four Years expired, becauſe the Words were after the End or Expiration of the ſaid Term of Twenty-four Years, which ſignifies the legal Intereſt, and not the Time; and the ſaid Term being void, the Remainder Man's Intereſt com-

Moor 194. *Quære.*

commenced preſently; for it was the Deſign of the Party, that he ſhould take after that Intereſt determined; and if there be no Intereſt, he ought to take it preſently, or elſe the Deed would be conſtrued moſt in the *Grantor*'s Favour; but if the Words had been, *and after the Twenty-four Years expired, then to the* Uſe *of* W. P. *in Tail*, there, tho' the Term had been void, yet no *Uſe* had been raiſed to him, 'till after the Years expired; for by expreſs Limitations, the *Uſe* was then to commence. In this Caſe, there was this Diverſity taken by *Manwood* Chief Baron. If a Man *covenants* to ſtand *ſeized* to the *Uſe* of one for Life, then to the *Uſe* of another in Fee, and the Tenant for Life refuſes, the Remainder Man's Intereſt ſhall not commence preſently; for it muſt be Equity that gives any Body a Right to take the Profits, during that Eſtate for Life, and the Remainder Man's Intereſt is not to commence 'till after his Death; ſo that in the mean Time no Body being able to claim any Intereſt upon any good Conſideration, the *Uſe* muſt remain in the *Covenantor*; but if a *Feoffment* in *Fee* be made to the *Uſe* of one for Life, then to the Uſe of another in *Fee*, and the particular Tenant refuſes, the Re-

mainder Man's Intereſt ſhall commence preſently; for the *Feoffor* had diſpoſed of the whole Land; and it is Equity that gives him a *Uſe* when the *Feoffment* is made without Conſideration; but againſt his expreſs Limitation, there can be no Equity in giving him a *Uſe*; and the *Feoffee* paying no Conſideration, there is no Reaſon that he ſhould have any; and there being a *Uſe* limited to commence after the Eſtate for Life, which now is not, it is Reaſon, that it ſhould commence. *Quære* of this Diverſity, and whether, If the *Feoffment* was made in *Fee*, upon *Conſideration*, the *Feoffee* ſhould not have had the *Uſe* during the particular Eſtate. My Lord *Hale* ſaid that a Truſt being a Thing created by the Contract of the Party, is wholly directed by the Party; conſequently thoſe that come in the *Poſt*, are not liable to a Truſt, becauſe they are not within the Direction of the Party, unleſs they are named, and then he ſeems to think they are bound, as thus: If an Eſtate is given to a Man and his Heirs, in Truſt, thoſe that do not come under that Limitation are not charged with a *Uſe* by the Party.

Hard. 469. *Quære whether an Aſſignee can be bound by Words; one in the* Poſt *can be bound.*

5 Co. 8. *b.* Moor 493, 515, 516, &c.

A Man makes a Feoffment in Fee to the Uſe of ſuch Perſon or Perſons,

1 Co. 85, 86.

and

and of ſuch Eſtate and Eſtates, as he has or ſhall appoint by his Laſt Will and Teſtament, which was made before, and publiſhed again after the Feoffment. *Quære* whether the Eſtates be preſently executed according to the Limitation of thoſe Deeds, or he be ſeiz'd of a qualified Fee. The Stat. 27 *H.* 8. ſo executes the Poſſeſſion to the Uſe, in the ſame Manner, Plight and Quality as the Uſe, *&c.* but that muſt be underſtood where the Eſtate to the Uſe is large enough; for if Lands be given to *A.* and *B.* during their Lives, to the Uſe of *C.* if *A.* and *B.* dies, *C.*'s Eſtate is determined; for the Seiſin to Uſe, that *A.* and *B.* had, was only for their Lives, and the Execution of it in *C.* cannot make the Eſtate larger. Dyer 188. *a.* Cro. Car. 330, 345. Hob. 84. Ch. Rep. 28.

Where Perſons ſhall be Jointenants for the Limitation of a Uſe to them, ſee *Inſt.* 188. *a.*

If the Father and Son purchaſe Lands jointly, the Law will not ſuppoſe that the Son purchaſed only in Truſt for the Father, and conſequently ſhall ſurvive to the Son. The Stat. 27 *H.* 8. executes the Poſſeſſion preſently, as to the Eſtate; ſo if a Man Bargains and Sells for Years, the Leſſee is in Poſſeſſion preſently, and the Leſſor has a Reverſion,

ſo as there are two divided Intereſts before any Entry by the Leſſee, yet the Leſſee cannot have Treſpaſs before actual Entry; but by a Common Law Leaſe the Eſtate is not divided before the Entry of the Leſſee; ſo ſays *Cooke*, upon a Bargain and Sale the Freehold paſſes preſently; but the actual Freehold is not in him till an Entry; for it is impoſſible an Act of Parliament ſhould give any more than a Civil Seiſin; it cannot give a natural one; but a Releaſe may be made to one that has nothing but a Freehold in Law; ſo it ſeems upon a Bargain and Sale for Years, the Party being in Poſſeſſion of the Eſtate of the Lands for that Time, a Releaſe to him will be good to increaſe his Eſtate; but in Caſe of a Common Law Leaſe, it ſeems a Releaſe will not be good before the Entry of the Leſſee; for the Eſtates are not deviſed till then, and ſo there can be no Privity of Eſtate, and the Leſſor can have no Demand upon the Leſſee, which a Releaſe ſuppoſes; but in Caſe of a Bargain and Sale there is a Privity, and the Demand of the Rent ſhall incur before actual Entry.

1 Inſt. 266. b.

A. ſeized in Fee of three Acres of Land, makes a Leaſe to *A.* of one

Acre for Life, to *B.* of another Acre for Life, and a Gift in Tail to *C.* of the other Acre, and *covenants* after all the Eſtates ended to *ſtand ſeized* to the *Uſe* of his Brother in Fee, *B.* dies, his Brother ſhall have that Acre in Fee preſently, and ſhall not ſtay 'till the other Eſtates are ended; for if he ſhould, perhaps that would never be; but if the laſt had been a Leaſe for Life, it had been all one, as it ſeems; for this *Covenant* ſhould be expounded, *Reddendo Singula Singulis.* Where the Lord releaſes to a Copyholder in Fee, *to have and to hold to him and his Heirs*, to the *Uſe* of another, that is a good *Uſe*; for the *Releaſe* enures by Way of Enlargement of his Eſtate, and by this *Releaſe* the Copyhold Eſtate is extinct and gone, as it ſeems, to the Execution of a *Uſe* into Poſſeſſion; by the Stat. it is requiſite that there muſt be a compleat Poſſeſſion; for the *Feoffee* muſt make an actual Entry; for the Intent of the Stat. was not to help out a Poſſeſſion already good; ſo it ſeems, if a *Reverſion* be granted to one to the *Uſe* of another, that this is not executed before *Attornment*, for the Reverſion paſſes not 'till then; but if a Man hath a *Reverſion* granted to him by *Fine*, and before *Attornment*,

2 Roll A br. 788

5 Co. 112. b. 113.

2 Inſt. 310; 2 Vent. 318.

he Bargains and Sells it to another, the *Reverſion* is executed by the Stat. in the *Bargainee*; for as in the firſt Caſe the *Grantee* had no Reverſion for want of *Attornment*; and it conſequently could not be executed; ſo in the laſt Caſe, the *Conuſee* had a *Reverſion* before *Attornment*, which he paſſed the Uſe of to another, and then the Stat. executes the Poſſeſſion to the *Uſe*, but in the ſame Plight as the *Uſe* was, and conſequently ſtill 'till *Attornment*, there wants a Privity of Diſtraining, *&c.* *A.* makes a Leaſe for Years to *B.* and then grants the *Reverſion* by *Fine* or *Bargain* and *Sale* to *D.* to the *Uſe* of *C.* this is executed by the Stat. in *C.* without *Attornment*; becauſe a Reverſion was granted and preſently executed by the Stat. *eodem inſtanti*; ſo that there could be no Time for the Tenant to *Attorn* to the *Grantee*; and if an *Attornment* was neceſſary, no Grant could be made by *Fine* to the *Uſe*, *&c.* becauſe no *Attornment* could poſſibly be had; but if the Grant were by Deed, then no *Reverſion* could paſs before the *Attornment*; and ſo not be executed by the Statute. Tenant for Life makes a Feoffment to *J. S.* he in Remainder releaſes to him, the *Uſes* are for ever gone; for the

Cro. El. 832.

1 Inſt. 309. *b.*

Pop. 78, 74.

the Feoffee comes in of another Eſtate than what was ſubject to Uſes; and the Releaſe only removes the Right of the Remainder Man, but leaves the *Feoffee* in, of the ſame Eſtate he had before.

A. covenants with *B.* that if *B.* enfeoffs him of three Acres of Land in *D.* that then he the ſaid *A.* and his Heirs, and all others *ſeized* of ſuch Lands, ſhall *ſtand* thereof *ſeized* to the *Uſe* of *B.* and his Heirs. *A.* enfeoffs another of the Land in *D.* now the *Uſe* ſhall riſe to *B.* and his Heirs; for the *Feoffment* did not deſtroy the Contingency; for the *Uſe* was not to riſe 'till after *B.*'s *Feoffment*, which it well may. There is this more in *Cook*'s Settlement before-mention'd; had he made a Feoffment before he had granted the Reverſion, the *contingent Uſes* had been deſtroyed; for the *Feoffee* had not come in in Privity of Eſtate, which was ſubject to *Uſes*; but of a new Eſtate this muſt be intended of a *Feoffment* made before the Contingency happens; for elſe the Eſtate had veſted, and then it could not be deſtroyed; but the Grant of the Reverſion being made firſt, and without any Conſideration, the Grantee of the *Reverſion* ſtood ſeized to *Uſes*; and then when the *Feoff-*

Feoffment was made, and the Eſtate diſcontinued; yet when the Tenant for Life in Remainder entered, he thereby recontinued all the Eſtates, and conſequently the Reverſion in the old Plight; ſo that when the Contingency happened, the *Uſe* was executed out of the Eſtate of thoſe in Reverſion; and herein lay the Difference between conveying by *Feoffment*, and a *Covenant* to ſtand ſeized; for if he had made a *Feoffment* to thoſe Uſes, then the contingent *Uſe* muſt have ariſen out of their Eſtate; and that Act which the Tenant for Life could do, would amount to no more than to diſſettle the Eſtates, and then when the particular Tenant had recontinu'd the Eſtates, the *Feoffees* had ſtood ſeized to the contingent *Uſe*, which would have been executed when it happened; but the Conveyance being by *Covenant*, and ſo the *Uſe* to ariſe out of the Eſtate of the *Covenantor*, any Conveyance that hindered the Purchaſer from ſtanding ſeized to a *Uſe*, as where the Perſon comes not in Privity of Eſtate, deſtroyed the Remainders. *J. S.* ſeized of Copyhold Land held of Sir *T. B.* by Indenture, dated 22 *Dec.* between him on the one Part, and the ſaid *J. S.* and *G. S.* his Son, on the other Part, did Bargain

13 Co. 55.

and

and Sell, Enfeoff and Confirm unto the ſaid *J. S.* the ſaid Lands, *to have and to hold to the ſaid* J. S. *and* G. S. *their Heirs and Aſſigns, to the only Uſe and Behoof of the ſaid* J. S. *and* G. S. *their Heirs and Aſſigns for ever*, and Livery of Seiſin was made according to the true Intent of the Indenture. In this Caſe, theſe Points were remarkable. Firſt, That *G. S.* being not named, but in the *Habendum*, could not take by the *Habendum*; for the Livery did not help him, being made according to the Intent of the *Indenture*, which *Indenture* was void to him, and now could have no Intendment in Law to give him any legal Eſtate, and conſequently the *Livery* would not give him any thing, being only purſuant to the *Indenture*; but tho' the legal Eſtate limited to him were void, yet the *Uſe* limited to him was good; for that is conſtrued according to the Intent of the Parties, and may as well come after the *Habendum* as before. And then it was further reſolved that they were Jointenants, becauſe the *Uſe* was jointly limited to both; and the Statute executes the Poſſeſſion according to the *Uſe*, and *J. S.* was not in here by the *Feoffment*, as he ſhould have been, had the *Uſe* been limited to him alone, becauſe it appears to be the Intent of the

the *Feoffor*, that they ſhould have one Joint *Uſe*; and ſo the Limitation of the *Uſe* to him removes the Eſtate he had before ſettled in him; as if one makes a *Feoffment* in Fee to the *Uſe* of the *Feoffee*, and the Heirs of his Body, this diveſts the *Common Law Eſtate*, according to the Intent of the Parties expreſſed by the Limitation of the *Uſes*; and tho' this muſt be own'd to be out of the Words of the 27 *H.* 8. yet it is within the Meaning of the Act, and ſhall be executed by it. The Words of the Act are *when any Perſon*, &c. *ſtand or be ſeized to the Uſe of any other Perſon*, &c. *and here the Perſon is ſeized* to the *Uſe* of himſelf; and ſo of the like Caſes, a *Uſe* ſhall not be ſuſpended or extinct by a joint or ſole Seiſin of the Land; as if *A.* had at *Common Law* been enfeoffed to the *Uſe* of himſelf and *B.* the *Uſe* had been a Joint *Uſe* to him and to *B.* tho' *A.* were ſole ſeized of the Land, for no Part of the *Uſe* had been ſuſpended and extinct; and therefore it ſeems the *Uſe* ſhall ſurvive in ſuch Caſe. The like Law muſt be of a *Truſt* now. So if *A.* and *B.* be enfeoffed to the *Uſe* of *A.* and his Heirs, and *A.* dies, the whole *Uſe* ſhall deſcend to his Heir, but *B.* ſhall remain the

the ſole Tenant of the Land, for this ſeemed the Intent of the Parties by the Limitation of the *Uſe*.

A. with ſeven others was ſeized to the *Uſe* of himſelf and his Heirs; the *Uſe* was held ſuſpended for an Eighth Part. *A. covenants* with *B.* that when *A.* ſhall be enfeoffed by *B.* of three Acres of Land, that then *A.* and his Heirs will ſtand ſeized of the Land in *S.* to the *Uſe* of *B.* and his Heirs, and afterwards *A.* enfeoffs a Stranger of his Lands in *S.* and *B.* enfeoffs *A.* of the three Acres; it is ſaid to be reſolved in this Caſe, that the *Uſe* will ariſe to *B.* of the Lands in *S.* tho' the Stranger had not Notice of the *Uſe*; but it ſeems this muſt be underſtood that the Feoffment was made without Conſideration; and *Quære* then, for if it were made with Conſideration, then there is no more Reaſon the Land ſhould be charged with the *Uſe*, into whoſe Hands ſoever it came, by Reaſon of the *Covenant*, than there is by Reaſon of an *Uſe* actually raiſed; for a *Covenant*, cannot extend beyond the thing itſelf.——*Uſes* were governed at Common Law by the ſame Rules as the legal Eſtate itſelf was; ſo if it were entailed, it was deſcendable in like Manner as a legal Eſtate intailed; ſo

1 Leon. 257.

Ibid. 260.

1 Co. 88. *a.* 121. *b.* 4 Co. 22. *a.* 2 Roll Abr. 780.

2 Inſt. 23. *a.* 13 Co. 56. Dyer 179. *b.* Bro. 338. *a.*

ſo there was *poſſeſſio fratris* of a *Uſe*; and if the Lands were *Gavelkind* Lands the *Uſe* deſcended to all the Sons alike; ſo if by Cuſtom the Land was deſcendable only to the eldeſt Daughter, the *Uſe* would deſcend ſo too.

So if a Man ſeized of Lands of the Part of the Mother, makes a Feoffment in Fee without Conſideration, the *Uſe* ſhall be to him and the Heirs of the Part of the Mother; and in this all agree; but if he reſerves a *Uſe* to him and his Heirs, then *Hobart* ſays, the *Uſe* ſhall go to the Heirs of the Part of the Father; but the better Opinion ſeems to the contrary.—An Eſtate raiſed by *Uſe* may be waived *in pais*, as upon a *Feoffment* to the Uſe of *Ceſtuy que Uſe* it may be waived *in pais* at the *Common Law*. Before 27 *H.* 8. if a Man had Bargained and Sold Land for valuable Conſideration, a *Uſe* in Fee had paſſed without the Word *Heirs*; for Equity having the ſole Management and Diſpoſal of theſe Affairs, they had not regard to the ſtrict Rules of Law, but to the Intent of the Parties; but now the Stat. transferring *Uſes* into Poſſeſſion, whereby they become *Common Law* Eſtates; as there is the ſame Reaſon for requiring Words

Moor 254. 1 Co. 87, 100. *b.* Dyer 169. Bro. 837. 4. 1 And. 35. *held ſo even ſince the Stat.* 1 Inſt. 9. *b.* Moor 519. Dyer 169. *cont.* Cro. El. 478. 6 Co. 34. *a.* 54. *a. Uſe would ceaſe without Claim, at Common Law, but not ſo now.* 6 Co. 34. *a.* 1 Co. 123. *b.* 4 Co. 16.

Words of Limitation in ſuch Caſes, as where Lands paſs by *Common Law* Conveyance, ſo in Fact it is, and conſequently the Intent of the Parties muſt be legally expreſſed, or elſe no Eſtate will paſs.

A *Woman* was not *Dowable* of an Eſtate in an Uſe; neither could a Man be Tenant by the Curteſy of a *Uſe*; and ſo moſt Eſtates being in *Uſe*, it was uſual for the Friends of the Woman, either before or after Marriage to get ſome legal Eſtate ſettled upon her for her Jointure, which was the firſt Occaſion and Original of Jointures. By the *Common Law* a *Uſe* was alienable by *Ceſtuy que Uſe*, or he might have a Bill in Chancery to compel; the *Ceſtuy que Uſe* could not enter upon the Lands and make a *Feoffment* of them; but if he did he was *Diſſeiſor*; but if the *Feoffees* had re-entered upon the Feoffee of *Ceſtuy que Uſe*, they ſhould ſtand ſeized to his *Uſe*, it ſeems by the Stat. of *R.* 3. no Body can make a *Feoffment* of the Land in Poſſeſſion, but he that has the preſent *Uſe* in Poſſeſſion; ſo if there be *Feoffees* to the *Uſe* of *A.* for Life, then to the *Uſe* of *B.* in Fee; tho' by the Stat. *A.* may make a *Feoffment* in Fee of the Land, becauſe during his Life the whole Eſtate

Plow. 350, 351, 352. 1 Co. 128. *b.* Bro. 339. *b.* Dyer 330.

ſtate is to his *Uſe*, and after the Death of *A.* the *Feoffees* may enter and revive the *Uſe* to *B.* yet *B.* cannot, during the Life of *A.* make a *Feoffment* of the Lands, becauſe the whole Eſtate is to the *Uſe* of *A.* and *B.* has no Right to a Poſſeſſion, and the *Feoffees* cannot enter to gain a particular Eſtate; for that would be without any *Donor*. But if there be Tenant for Life to the *Uſe* of *A.* and then the Reverſion is granted for Life to the *Uſe* of *B.* and then the Reverſion in Fee to the *Uſe* of *C.* here being ſeveral Eſtates, *B.* may grant the *Reverſion* that is to his *Uſe*, and ſo may *C.* for none of the Inconveniencies follow from hence that there do in other Caſes where the Eſtate is but one; but if there be one Eſtate to the *Uſe* of *A.* for Life and to the *Uſe* of *B.* in Fee, tho' *B.* can make a *Feoffment*, and thereby paſs the Poſſeſſion, yet it ſeems he may make a Leaſe or Grant of a Rent to commence after the Death of *A.* He that has a *Uſe in Eſſe*, has Power by 1 *R.* 3. to make a *Feoffment*, but not he that has a *Uſe* in Right only, but ſuch Perſon may do an Act that extinguiſhes his Right, as by releaſing, *&c.* The Intent of the Stat. was to give Remedy to transfer an Eſtate, not reveſt it; ſo that if one

be ſeized of Lands in Fee, to the *Uſe* of *A.* in Tail, Remainder to *B.* in Fee, *A.* by Force of the Statute makes a Feoffment in Fee, and dies without Iſſue, *B.* has no Power to gain this *Uſe*; but by the Entry of the *Feoffees*, and 'till then he has no Power by 1 *R.* 3. to do any thing with the Land; but if the *Feoffee* to an *Uſe* be diſſeized, and *Ceſtuy que Uſe* releaſes to the Diſſeizor, this extinguiſhes the *Uſe*, and by the Statute bars the Entry of the *Diſſeiſee*. Where Feoffees to an Uſe are diſſeiſed, and afterwards the *Diſſeiſor* enfeoffs *Ceſtuy que Uſe*, who enfeoffs a Stranger, by this the *Uſe* and Poſſeſſion both paſs, and the *Feoffees* cannot enter to revive the *Uſe*, it ſeems, tho' a *Uſe* were deviſable at *Common Law*, yet no Power is given by 1 *R.* 3. for the *Ceſtuy que Uſe* to deviſe the Land; for the Intent of the Statute was not to make Land deviſable, but only to give Power to the *Ceſtuy que Uſe* to alien, during his Life, by an Act executed. If the *Lord* of a *Seigniory*, or the *Grantee* of a *Rent-Charge*, be alſo *Ceſtuy que Uſe* of the Land; and by Virtue of 1 *R.* 3. makes a *Feoffment* in *Fee*, by this the Seigniory and Rent are both deſtroy'd; but if they both had made the *Feoffment* as Attornies, the Rent remained.

Bro. 337. *b.* 8. 27 H. 8. 29. Dyer 143. *a.* 1 Inſt. 52. *a.*

1 Inſt. 202. *a.* If *Ceſtuy que Uſe* made a Feoffment in Fee upon Condition, and entered for the Condition broken, he ſhall be ſeized of the legal Eſtate of the Land.

Bro. 337. 2. If *Ceſtuy que Uſe* in Tail makes a Feoffment in Fee, this only is during the

19 H. 8. 13. Life of *Ceſtuy que Uſe*; for he had no longer Power over it; but if he aliens by *Fine*, that it ſeems is good to bind the Iſſue, if the Alienation were ſince

Bro. 337. 1. the Stat. of *H.* 7. but it ſeems a *Recovery* had againſt him, does not bind the Iſſue, becauſe he is not Tenant to the Precipe, and there can be no Recovery in Value by him, to recompence the Iſſue.

If a Man recovers by erroneous Judgment, and makes a *Feoffment* to his

Bro. 338, 13, 339, 26. own Uſe, and upon Error, the Judgment is reverſed, the Party may enter

Bro. 339. *b.* 28. without a *Scire facias* againſt the

Bro. 338, 15. *Feoffees*; for it is plainly within the Letter of the Statute; if *Ceſtuy que Uſe* makes a Leaſe for Years by Deed indented, reſerving Rent, he may have an Action of Debt upon the Contract, for the *Leſſee* is eſtopped; but he cannot avow Taking the Diſtreſs, becauſe he has not the Reverſion. If the Reſervation of the Rent be not by Deed indented, it is not good, becauſe he has not the *Reverſion*.

Quære, Whether *Ceſtuy que Uſe* may make a *Feoffment* by Letter of Attorney. If *Ceſtuy que Uſe* makes a Leaſe, the Reverſioner ſhall puniſh the Waſte done, and enter for the Forfeiture; if he recovers the Rent it ſhall go to his Heirs: If a *Condition* be added to the Non-payment of Rent, he muſt enter; but *Quære* whether he ſhall retain it againſt the *Feoffees*. *Ceſtuy que Uſe* could not diſtrain the Beaſts Damage-feaſant, before the Statute but ſince he may: A Truſt may be entailed, as it ſeems, and then the Fine of *Ceſtuy que Uſe* will bar it; and there ſeems the ſame Reaſon for a *Common Recovery*. Ch. Rep. 49, 68.

A *Truſt* in *Fee* is not forfeitable for Felony; for no Statute made *Uſes* forfeitable in ſuch Caſe; but it ſeems by my Lord *Hale*, that it is by Force of 26 *H.* 8. 20. the laſt of which mentioned *Uſes*, which Statute being made after 27 *H.* 8. muſt mean Truſts, as now *Uſes* are made liable to be executed by the Stat. of *H.* 7. yet 29 *Car.* 23. was made to make Truſts liable to pay Debts; for according to *Hale*, before that Statute they were not Aſſets to pay Debts. A Truſt in an Alien is forfeited to the King, in the Caſe of the King's Debtor, Truſts were liable *per Curſum Scaccarii*. If *Ceſtuy que Uſe* willed Hard. 495.

that his Feoffees ſhould make an Eſtate Tail to *J. S.* and died, the *Uſe* was changed before the Execution of the Eſtate.

Dyer 96. a.

Who may declare Uſes.

Moor 197. 2 Co. 57. 1 And. 164.

If *Husband* and *Wife* be ſeized of Lands in Right of the *Wife*, and they make a Feoffment, and declare the Uſes, that ſhall not bind the *Feme*; for the Feoffment does not bind her. It is but an Act *in pais*, and ſhe being *ſub poteſtate viri*, it may be made contrary to her Will; but if they levy a Fine of the Wife's Land, and declare the Uſes, that ſhall bind the *Feme*; for the Wife may levy a Fine, becauſe ſhe is privately examined before a Judge; and if ſhe may levy a Fine with her Husband, ſhe may declare the Uſes; for that is but purſuant to the End and Intent of the Fine; and if the *Husband* alone declares the Uſes of ſuch a Fine, that is good, and it ſhall bind the *Feme*, if her Diſaſſent does not appear; for the Will of the *Feme* being in the Diſpoſal of her *Huſband*, he being reputed as the Head, and they two being conſidered in Law but as one Perſon, the Declaration made by him is conſidered as the Declaration

Owen 6. *If the Fine be of the Husband's Land, to which the Feme has Title of Dower, her Diſaſſent to the Huſband's Declaration of Uſes, will, as it ſeems, hinder the Operation of the Declaration.*

of both, when nothing appears to the contrary, and conſequently, though the Eſtate of the Land moves from the *Wife*, yet if ſhe alone declares the Uſes of a Fine levied of her own Land, ſuch Declaration is null and void; for it is made by one that has by Law no diſpoſing Power, even of her own Eſtate, but has her Will ſubjected to the *Husband*'s Will, and ſo is not *ſui Juris*; but yet on the other hand, if the *Husband* make one Declaration of Uſes, and the *Wife* another, both Declarations are void; the *Wife*'s is ſo upon the Reaſon before mentioned; and the *Husband*'s is ſo becauſe the Eſtate being the *Wife*'s, and ſo not in the Diſpoſal of the *Husband*, without the Concurrence of the *Wife*; after the Fine levied, he might make what Declarations he pleaſed of the Uſes; he might diſpoſe of the Eſtate as he pleaſed, in Spite of his Wife; and ſo all the Care the Law takes for the ſecret Examination of *Feme Coverts*, in the levying a Fine, would be vain and fruitleſs, and the Declaration of the Uſes is but purſuant to the Deſign of levying the Fine; and ſo ſhe ought to conſent to that as well as the other; and ſo though an *Infant* can do no Act to oblige himſelf, yet if he levies a Fine, he is enabled

by Law to declare the Uſes; and if he reverſeth not the Fine, during his *Nonage*, the Declaration of Uſes will ſtand
5 Leo. 159. good for ever; for tho' that be a Matter *in pais*, and all ſuch Acts an Infant may avoid at any Time after his full Age, if he do not conſent; yet being made in Purſuance of the levying a Fine, which Fine muſt ſtand good for ever, ſo will the Declaration of Uſes too.

12 Co. 123. 2 And. 145. So if one *Non compos* levies a Fine, it is unavoidable; but yet he may, by Deed, declare the *Uſes* of that Fine; which Declaration of Uſes will alſo ſtand good for ever.

If the *Husband* and *Wife* agree in the Declaration of Uſes of Part of the Lands, and diſagree for the Reſidue, the Declaration of Uſes for that Part they agree in ſhall ſtand good, and be void for the reſt; for as to that Part in which they both agree, all the Requiſites are found neceſſary to make a Declaration, and the Defect of the other Part can have no Influence on that which is good; but if they agree in the Limitation of Uſes for Part of the Eſtate in the Land, and diſagree in the other Eſtates, there all is void; for elſe there will be another Moulding of the Eſtates than the Feme deſigns, and her

her Conſent is requiſite to every Eſtate that ſhall be created by the Limitation of Uſes; and it is to be ordered by her Direction. Thus if the *Husband* declares the Uſes to himſelf and *Wife* for Life, the Remainder to the Heirs of the *Wife*, and the *Wife* declares the Uſes to herſelf for Life, and then to her own Right Heirs, both Declarations are void, and it ſhall not ſtand good for the Remainder in Fee, and be void for the reſt; for the Eſtate moving from the *Wife*, whatever Uſes do take Effect muſt be by her Direction and Conſent, and in the ſame Manner as ſhe pleaſes; tho' the *Husband* has Power over the Eſtate of the *Wife*, during Coverture, yet if ſhe declares the Uſe one Way, and he another, his Declaration is abſolutely void, and it ſhall not ſtand good, during the Coverture. The Reaſon of the Difference ſeems, that in other Caſes the *Huſband* having Power over the Wife's Eſtate, he may grant an Intereſt as from himſelf, during the Coverture, for ſo long as he has Power over her Eſtate; but when they levy a *Fine* in Fee, the Eſtate paſſes ſolely and entirely as one Eſtate in *Fee-ſimple* from the *Wife*; and the Uſes that are declared thereupon muſt be all with the

Conſent of the *Wife* for the whole Eſtate, becauſe the whole Eſtate and Intereſt paſſes from the *Wife*; but if a Jointenant levies a Fine, and one declares the *Uſe* one Way, and another another Way, here both the Declarations ſhall ſtand, *viz.* the Declaration of each ſhall ſtand for his Moiety in Reſpect of their ſeveral Intereſts. If *Baron* and *Feme* levy a *Fine*, and an Indenture in both their Names, is brought to the Wife to ſeal, declaring the Uſes of the *Fine*, and the Wife refuſes to ſeal, this Declaration ſhall not bind her, becauſe, tho' a Declaration of the Husband be ſufficient, yet here her Refuſing to ſeal was a ſufficient Declaration of her Diſaſſent. When *Baron* and *Feme* ſell the Land to one, and after levy a *Fine* to him, this ſhall bind the Feme; yet here is no Declaration of Uſes; but it is preſumed to be to the *Uſe* of the Conuſee, and his Heirs, and conſequently is binding. If a *Fine*, levied by Baron and Feme, be reverſed by Reaſon of the Nonage of the *Wife*, the whole Eſtate ſhall be reveſted preſently in the *Feme*; and there ſhall not be any Diſpoſition during the Coverture.

2 Roll Abr. 798. 2 Co. 57. *a.* 2 R. 798.

Dyer 290. *a.*

Note, *The Wife join'd in the Recovery*, &c.

Baron and *Feme* ſeized of Lands, and *Baron* covenants by Indenture, in Conſideration of 20*l.* to ſuffer a Recovery

covery of Lands to the Uſe of the Recoverors, till they have made a good and indefeaſable Leaſe for forty Years, and then to the Uſe of the *Husband* and *Wife*, and the Heirs of the Huſband; it was held that this Declaration ſhould bind the Wife, the Husband alone making it.

Where *Baron* and *Feme* levy a Fine of the Wife's Land, and both by Indenture, in Conſideration of a Sum of Money, limit the Uſe to the Conuſee, with a Condition and Clauſe of Reentry, upon Payment of ſuch Sum which was allowing 10 *per Cent.* which, with the taking the Profits together, made it an Uſurious Contract; but before the Fine engroſſed, there was another Deed, wherein it was covenanted that the Conuſor ſhould take the Profits till Default of Payment; at the Day appointed, the *Feme* diſagrees to the Deed; yet it was held ſhe was bound; for the firſt Deed was Declaratory to the Uſes to which ſhe agreed, and the laſt Deed was but Explanatory of the firſt; the laſt Contract was about the Money which the *Feme* had nothing to do with, but was the *Huſband's*. 2 Roll Abr. 798.

If *A.* be Tenant for Life, Remainder to *B.* in Fee, and they levy a Fine, *Ibid.* 2 Leo. 58.

this

this ſhall be to the Uſe of *A.* for Life, and then to the Uſe of *B.* in Fee; ſo if the Owner of the Land, and a Stranger levy a Fine, it ſhall be to the Uſe of the Owner only.

If an *Infant* Bargains and Sells Lands, and then levies a Fine to the Bargainee, though the Bargain and Sale be made, yet it ſhall amount to and ſtand as a Declaration of Uſes upon the Fine; ſo if by Cuſtom an *Infant* of the Age of Fifteen may make a Feoffment, and he accordingly makes one to the Uſe of his Laſt Will, tho' he cannot by Law make a Will, yet he may declare the *Uſes* upon the *Feoffment*.

Moor 512.

1 And. 164. *Husband* makes a Feoffment of the *Wife*'s Land to *A.* and he and his Wife levy a Fine to *A.* this ſhall be to the *Uſe* of *A.*

What Conſiderations are ſufficient to raiſe a Uſe.

7 Co. 4. 2 Roll 785. Plow. 307. Brotherly Love and Affection is a good Conſideration to raiſe a *Uſe*, according to the Caſe of *Bedel*; and the Continuance of the Land in the Name, *&c.* is a good one; ſo that all the Conſiderations in this Caſe are good to raiſe a *Uſe*, tho' taken ſingly and apart. If a Man covenants, in Conſideration of Natural

Natural Love and Affection to his Brother, to ſtand ſeized to the *Uſe* of him and his *Wife*; it ſeems that is good to raiſe a *Uſe* to his Wife, they being both but one Perſon; ſo that the Love and Favour he bears to his Brother may be very well ſaid to extend to his Brother's Wife; and accordingly in the Caſe of *Bould* and *Wynſton*, it is adjudged that where the Father covenants, in Conſideration of Natural Love and Affection to his eldeſt Son, to ſtand ſeized to the *Uſe* of him for Life, and then to the Uſe of ſuch a Feme as he ſhould marry for Life, that was a good Conſideration to raiſe a *Uſe* to the Wife, as well as if a Man covenants, in Conſideration of the Marriage of his Son with ſuch a *Feme*, to ſtand ſeized to the *Uſe* of the Son, and the Son's Wife; this is a good Conſideration to raiſe a *Uſe* to them both; tho' a Conſideration be abſolutely requiſite to the raiſing a *Uſe* upon a Covenant, yet no Conſideration needs be mentioned in the Deed; but if the Perſon be ſuch an one as has an obvious Conſideration of his Side, a *Uſe* ſhall preſently riſe to him; as if a Man covenants to ſtand ſeized to the *Uſe* of his *Wife* or *Brother*, or any of his Kindred, this is ſufficient to raiſe a *Uſe* to them, without any Mention

Cro. Jac. 165. 2 Roll 78, 4. Plow. 307.

7 Co. 40. 2 Roll 783.

11 Co. 24. T. Jones, 105. Cro. Car. 230. Moor 495, 564.

Mention of a particular expreſs Conſideration; for the Love and Affection between them is obvious; which being a Conſideration in it ſelf ſufficient to raiſe a *Uſe*, it ſhall be preſumed that it was to the Intent the *Uſe* was limited; nay, if there be a Conſideration to ſome certain Perſon, and afterwards a *Uſe* is limited to another Perſon, that does not come under the Conſideration expreſſed; yet if he be a Perſon on whoſe Side there is a manifeſt Preſumption of another Conſideration, he ſhall have the *Uſe* limited to him by that Conſideration, tho' he could not take by Virtue of the firſt. Thus if a Man covenants, in Conſideration of Natural Love and Affection that he bears to his eldeſt Son, to ſtand ſeized to the *Uſe* of him, and then to the *Uſe* of any other of his Kindred, as Brother, Couſin, *&c.* this ſhall give a *Uſe* to them, tho' they do not come within the Conſideration that is expreſſed to the eldeſt Son; for there is an obvious and apparent Conſideration to raiſe a Uſe to them; and it ſeems by the ſame Reaſon, if any other Conſideration were had for raiſing the firſt *Uſe*, it were the ſame thing; but if a Conſideration be expreſſed for the raiſing a *Uſe* to a Perſon, that would take by the implied Conſideration, without

If a Uſe be limited to a Woman before Marriage, without Conſideration, it will not raiſe an Uſe, unleſs it be parti ularly averred for ſome Conſideration; for before Marriage there is no Preſumption on her Side.

Dyer 146. Moor 505.

out

out any expreſs one, yet if that expreſs one fails, no *Uſe* ſhall be raiſed by Force of the implied one, for *expreſſum facit ceſſare tacitum.* Thus if a *Father*, in Conſideration of 100*l.* covenants to ſtand ſeized to the *Uſe* of his Son, this muſt be enrolled, or elſe no *Uſe* paſſes; yet if no Money was paid, a *Uſe* would riſe to the Son by the implied Conſideration, without any Enrolment. So if a Man, in Conſideration of the Natural Love and Affection he bears to his Children, covenants to ſtand ſeized to the *Uſe* of himſelf for Life, then to the *Uſe* of his Wife for Life, *&c.* this will raiſe a *Uſe* to the Wife; for tho' ſhe does not come within the Conſideration, yet there is a manifeſt Conſideration of her Side; and conſequently ſhall a *Uſe* very well ariſe to her. Co. 24. Plow. 303.

The Conſideration of ancient Acquaintance, or being Chamber-Fellows together, or entire Friends, will not raiſe a *Uſe.* 2 Roll 783.

If *A.* in Conſideration of *B.*'s being bound in a Recognizance for him, Bargains and Sells the Land to him, no *Uſe* will ariſe to him, becauſe it is not a Bargain and Sale; there is not *quid pro quo*; but yet it is agreed that ſuch a Conſideration is ſufficient to raiſe a *Uſe* upon a Covenant; but the Words were not apt Cro. El. 394. 2 Roll 783.

apt to make a Covenant to ſtand ſeiz'd, and ſo the Deed had not any Operation.

Quære, *Whether Loan of Money be a good Conſideration to raiſe a Uſe, or make a Bargain and Sale.* 2 Roll 782, 790.

If a Man, in Conſideration of Love and Affection to his Wife and Children, and to the Intent to ſettle his Lands in his Name and Blood, covenants with his Brother and Strangers, to ſtand ſeiz'd to the *Uſe* of himſelf for Life, then to the Uſe of his Wife for Life, and then to the Uſe of the Covenantees, and their Heirs; it was held that no *Uſe* aroſe to Strangers, becauſe they could not come within the Conſideration; yet it did ariſe to the Brother, both from the Conſideration expreſſed of ſettling the Land in the Name and Blood of, *&c.* and alſo becauſe he was his Brother, yet there was a Truſt limited after the *Uſe* to him.

Cro. Car. 529. 2 Roll 783, 791.

2 Roll 784. 2 Inſt. 672. Plow. 307.

If a Man in Conſideration of Money given by *A.* covenants to ſtand ſeiz'd to the Uſe of *A.* and *B.* and *C.* or to *A.* for Life, Remainder to *B.* for Life, Remainder to *C.* in Fee, this is good, and ſhall raiſe *Uſes* to them all; for tho' the Money be given but by one, yet it is a Conſideration for all the Eſtates, and ſhall be preſumed to be given for all; but Natural Love, *&c.* is a perſonal Conſideration, applicable to no Stranger; and ſo no *Uſe* can ariſe by

by Force of the Conſideration to any Body but to thoſe that come under it. There is a Caſe in *Roll's* that goes ſo far as to ſay, that if a Conſideration of Money be given by *A.* and conſequently the Owner of the Land covenants by Deed with *B.* and *C.* to ſtand ſeiz'd to their *Uſe, viz.* to the *Uſe* of *B.* and *C.* that by this a good *Uſe* is raiſed to them, and the Money is look'd upon as paid for them. If a Man, in Conſideration of the Marriage of his Son with ſuch a Woman, covenants to ſtand ſeized to an Uſe, the Remainder to *C.* this is void to *C.* becauſe he is a Stranger; but yet it is ſaid by Counſel, in *Plowd.* that if the Eſtate to *C.* be limited firſt, and afterwards there is an Eſtate limited to the Son and his Wife, that in ſuch Caſe the Uſe to *C.* is good, becauſe the Uſe limited afterwards is good, and that is not to commence 'till after the Eſtate of *C.* ended; and ſo the Uſe to *C.* ſhall be held good to ſupport the Uſes to the others that follow; but *Quære* well of that, for if the Limitation be void, it ſeems the other Uſes may as well be ſupported without it; and *Roll* that has took almoſt every Thing that is remarkable out of that Caſe, yet has left this out.

Yelv. 51. *not good to Son.*

Plow. 307. Moor 505. *Conſideration to J. S. will make the Covenantor have a particular Eſtate; but Quære Whether it be by Conveyance, or to ſupport any other Uſe.* 2 Roll 784.

If

2 Roll 785, 794. If a Man, in Conſideration of Natural Love, &c. to *J. S.* taken and reputed as his Son, covenants to ſtand ſeiz'd to his Uſe, by this no Uſe is raiſed to a Baſtard Son.

If a Man for divers good Cauſes and Conſiderations, covenants, &c. no *Uſe* ariſes, the Conſideration is too general, and the Certainty ought to appear, for the Court to judge whether the Conſideration be ſufficient or not.

But if a Man Bargains and Sells Lands for a certain Sum of Money, that is ſufficient to raiſe a *Uſe*, without mentioning any Sum of Money in certain; *Ibid.* 785. for whatever the Sum be, it is ſufficient to raiſe a *Uſe*; and ſo there needs no Averment of any Sum in certain, for the Court to determine.

A Man covenants, in Conſideration of Money, to ſtand ſeized of the Lands to the *Uſe* of *A.* and his Heirs, and being ſeized of other Lands, covenants that if he ſhould afterwards ſell them, *A.* ſhould have the Refuſal; and if he went about to ſell them to any Body, without making him the Offer, that from thenceforth he would be ſeized to the *Uſe* of him and his Heirs, he afterwards goes about to make a Sale 2 Roll 785. of them, without offering him the Lands; it was held that the *Uſe* aroſe to him; for

for the Money paid for the other Lands was alſo a Conſideration for the Covenant. It ſeems at Common Law, the Party had two Remedies to come to the Effect of his Covenant, either to ſue in Chancery, and have a ſpecifick Performance of the Covenant, or elſe to have an Action.

If a Man covenants now to ſtand ſeized to a *Uſe*, and there is no Conſideration, ſo that there can be no *Uſe* raiſed by Law. *Quære* whether or no the Party may have an Action of Covenant, and recover Damages. Where the Party ſhall convey by Way of *Uſe*, and not by Common Law Conveyance. Plow. 308. *it ſeems not.* Dyer 96. *a.*

A Man covenants, that in Conſideration *A.* had conveyed divers Lands to him, after the Death of *A.* to levy a Fine of his Lands to the *Uſe* of himſelf for Life, and then to *A.* in Tail, the Fine is not levied, no *Uſe* ſhall riſe by Force of that Covenant; for the Intent was not that it ſhould riſe preſently. Dyer 96. *a.*

To what Uſes a Conveyance ſhall be ſaid to be had.

A Fine is levied to ſeveral Conuſees, with a Render to one for thirty Years, and ſeveral void Remainders, the Moor 478.

Fine ſhall be to the *Uſe* of the Conuſees; for otherwiſe the Render cannot be good; for if it be to the *Uſe* of the Conuſor, the whole Eſtate will be in him, as before, and the Render naught; but if the Render had been void in all, then the *Uſe* ſhould be according to the Intent of the Render. *Quære*, Why it may not as well be to that *Uſe*, where but Part of the Render is void.

Conſideration.

2 Roll Abr. 790. If a Man covenants, in Conſideration of Natural Affection to his Son, to ſtand ſeized to his *Uſe*, tho' there be no other Conſideration mentioned, nor no general Words, as for divers other good Cauſes and Conſiderations, it may be averred that it was in Conſideration of Payment of Debts of the Father by the Grand-father; and alſo of Lands ſettled by the Grand-father upon the Father; for theſe Conſiderations are not contrary to the Deed, but may well concur.

If a Man covenants in Conſideration of a Marriage to be had between him and *B.* to ſtand ſeized to the *Uſe* of himſelf and *B.* for Life, no *Uſe* riſes till the Marriage; and if they ſhould marry

marry, and be divorced *Cauſa præcontract*, it ſeems the *Uſe* to *B.* would ceaſe.

A Man covenants, in Conſideration of the Marriage of his Nephew, and of two hundred Marks paid by the Father of the Woman he is to marry, to ſtand ſeized, *&c.* the Marriage takes no Effect; it was held by the Judges that a *Uſe* would not riſe upon the Money. Moor 102.

A Man covenants that two Perſons ſhall quietly enjoy his Land; no *Uſe* ariſes. 1 Sid. 16.

Limitation of Uſes upon Conveyances.

Tho' the Appointment and Limitation of *Uſes*, by an Indenture in Writing, precedent to a Fine or Recovery, do not bind the Eſtate of the Land, yet being made in ſo ſolemn a Manner, it is not to be controuled, but by Matter of as high a Nature; and ſo if the *Uſes* of a *Fine* or *Recovery* to be had, be declared by a Deed precedent, no Averment by Parol will alter the Declaration in Writing, according to the Maxim, *unumquodque diſſolvitur eo ligamine quo ligatum eſt*, becauſe an Agreement by Deed, for the Direction of *Uſes* is not obligatory as to the Eſtate 5 Co. 26. 2 Roll 291. Holt, Jones, v. Morley.

of the Land, but only a bare Contract between the Parties, and conſequently by Deed it may be diſannulled; as all Contracts, by Conſent of the Parties, may loſe their obligatory Power; ſo if the Party declares other *Uſes* by Deed, before the levying the Fine, the laſt Declaration ſhall ſtand, as the laſt Declaration of the Mind of the Party. If there be any Variance between the Agreements Declaratory of the Uſes of the Fine, and the Fine itſelf, as in the Number of Acres, Time, Perſons, or the like, there a Declaration of Uſes by
2 Co. 75. b. Parol, ſhall ſtand good, tho' poſterior to a former Declaration by Deed; for when there is a Variance between the Agreement and the Fine levied, then it cannot be preſumed to be the Fine intended by the Agreement, becauſe different from it, and then it ſhall be guided by the parol Declaration, which may well direct the Uſes of it, becauſe being different from the Deed of Agreement, there is no need to guide the Uſes of the Fine; but if there be no parol Declaration of Uſes, the Fine ſhould be guided by the Declaration
Ibid. 76. a. of Uſes contained in the Deed, notwithſtanding ſome Variance there may be between the Deed and the Fine; for when no other Fine is levied, or no other

other Declaration of Uſes made, there the Fine ſhall be that preſumed to be mentioned in the Agreement. Where there are two ſeveral Declarations of Uſes, by Deed precedent to the Fine, there the laſt ſhall ſtand *in toto*, for it is wholly a Revocation of the former; and ſo the Fine ſhall not be to the *Uſes* of both Deeds compounded and thrown into one another.

It came to be a *Quære* in *Dowman's* Caſe, Whether a ſubſequent Declaration of the *Uſes* of the Recovery were good to raiſe *Uſes* upon the precedent Recovery; for the Intent of the *Uſes*, as was agreed, muſt either be precedent or preſent with the Recovery; but it was adjudged to be good; for when there is no other Declaration of *Uſes*, then the ſubſequent one is ſuppoſed to be the Intent of the Party at the Time of the Recovery ſuffered; for ſo the Parties themſelves have declared it to be; but where the Declaration of *Uſes* by Indenture precedent and ſubſequent differ, that againſt precedent Declarations no parol Averment is to be admitted; but againſt a ſubſequent Declaration by Deed, there may be a parol Averment; for if before, or at the Time of the Recovery ſuffered, there was ſuch a particular Declaration of

9 Co. 9.

Not by the Conuſor and his Heirs, but where a Deed precedent and Fine differ, the Conuſor may aver. Holt *in* Jones *v.* Morley.

Uſes by Parol, then the Eſtate was preſently executed to thoſe *Uſes*; and then any Manner of Declaration by Deed comes too late; if in the mean Time between the Recovery and the Deed ſubſequent Declaratory of the *Uſes*, there be any Leaſe, *&c.* made of the Lands, then the ſubſequent Declaration is not ſufficient of itſelf to ſhew that the Intent of the Parties was that the Recovery ſhould be ſuffer'd to thoſe very *Uſes* declared by the Deed ſubſequent, and thereby to avoid all mean Eſtates and Charges; but there muſt be ſome other very good Proof that ſuch was the Intent at the Time of the Recovery had. Where a Recovery is ſuffered without Conſideration, it is to the *Uſe* of the Recoveree, who conſequently may declare the *Uſes* of it by Deed ſubſequent, when it is ſuffered with Conſideration; and ſo the Eſtates ſhall be executed. *Quære*, Whether the Recoveree can declare the *Uſes* by any ſubſequent Deed; tho' he ſeems to ſtand in the ſame Place with the Recoveror, where it is without Conſideration. If any Clauſe, Privilege or Conſideration be added to a *Uſe* declared by Parol, yet the Declaration of the *Uſe* ſhall ſtand good, though the Clauſe, *&c.* be void. An Indenture for Years, after the

the Recovery was held ſufficient to declare the *Uſes* of that Recovery. Dyer 136. 2 Roll 782.

Pleading of Uſes.

The Form of pleading *Uſes* is to ſay that a Recovery was had to ſuch and ſuch *Uſes*; and in an Aſſize, by the Lord *Cromwell* againſt *Andrews*, of Lands and Tenements in *Alexton*, Indentures were giving in Evidence; whereupon the Jury find a ſpecial Verdict, *viz.* that *J. B.* was ſeized of the Manor of *A.* in Fee, and of the Advowſon of the Church of *A.* thereto belonging; and by Deed Bargained and Sold the Manor, with the Appurtenances, to *A.* *A. to have and to hold* to him and his Heirs, to the *Uſe* of him and his Heirs, in the ſame Manner and Form as is aforeſaid in the Indentures mentioned; and by the ſame Indenture, *J. B.* covenanted to ſuffer *W. R.* or *R. A.* to recover the ſaid Manor, with the Appurtenances, by a Common Recovery to the *Uſes* following, to the *Uſe* of *A. A.* and his Heirs, rendering forty-two Pounds to *B.* and his Heirs, at two Feaſts, with a Clauſe of Diſtreſs, and *Nomine pœnæ*; and it was further covenanted that *Blunt*, before *Eaſter* next, ſhould levy a Fine of the ſaid Manor to *A.* 9 Co. 11. 2 Co. 69. Mo. 105, 471. 2 And. 89.

A. and his Heirs; and by the ſame Fine *A. A.* ſhould render forty-two Pounds *per Ann.* to the ſaid *J. B.* and his Heirs. *Provided always* that the ſaid *A. A.* ſhall by his Deed ſufficient in the Law, give the Advowſon and Parſonage of the ſaid Church to the ſaid *J. B.* during his Life; and if it happens not to be vacant in his Life, then one Turn to his Executors; and it was further agreed, that all Manner of Eſtates, Aſſurances and Conveyances hereafter to be made, ſhould be to the *Uſes* and Intents comprized in the Indenture, and to no other Intent or *Uſe*, and accordingly a Recovery was had againſt *J. B.* and then *J. B.* and *A. A.* levied a Fine to *R. R.* and his Heirs, who granted and rendered the Rent of forty-two Pounds to *J. B.* and the Heirs of his Body, the Remainder to my Lord *Mountjoy*, in Fee, and the Land he rendered to *J. B.* and his Heirs, and the Jury find that this Fine was levied to the *Uſe* in the Indenture mentioned, *A. A.* died before he made any Grant of the Advowſon, according to the Proviſo. *J. B.* having never requeſted it, the Church became vacant in the Life of *J. B.* *E. A.* enters upon the Manor as Heir to *A. A.* and *J. B.* enters for the

Condition

Condition broken, and Bargains and Sells the Manner to the Lord *Cromwell*, on whom *A. A.* enters; Lord *Cromwell* dies, and his Heirs enter, upon whom *E. A.* and the reſt, by his Command, re-enter, and whether it was a Diſſeiſin, was referred to the Court; and *firſt*, it was reſolved, that though the firſt Deed of Bargain and Sale paſſed no Eſtate, not being enrolled, but ſerved only as a Declaration of *Uſes*, yet the Word *Proviſo* made a *Condition*; and ſo all the *Uſes* afterwards raiſed and executed by the Recovery were Conditional; for as there may be a Deed precedent to raiſe the *Uſes* of the Recovery; ſo there may be a Conſideration added to thoſe *Uſes* which will make the Eſtate Conditional, when it is afterwards executed; and the Condition need not be made at the ſame Time the Eſtate is made; for making a *Conditional Uſe* makes afterwards a *Conditional Eſtate*, the Statute 27 *H.* 8. 10. executing the Poſſeſſion in the ſame Manner and Plight that the *Uſes* are in. *Secondly*, It was reſolved, that upon the Recovery the Rent in Fee was executed accordingly in *J. B.* by Force of 27 *H.* 8. *Thirdly*, It was reſolved, that the Eſtate being executed Conditionally upon the Recovery, the Fine after-

afterwards by *J. B.* who had the Condition, and by *A. A.* who had the Eſtate, to *D.* did not extinguiſh the Condition; for tho', generally ſpeaking a Fine will extinguiſh all Manner of Right and Title that a Man hath to Lands; yet if there be an antecedent Agreement to qualify and reſtrain its Operation, it ſhall have its Effect according to the Agreement; as here it was covenanted that all Manner of Aſſurances afterwards to be had, ſhould be to the *Uſes* in that Indenture mentioned, which controlled the general *Uſe* of the Fine, and preſerved the Condition, according to the Intent of the Parties; for when Men agree and levy a Fine, generally, there all the Conuſee's Right ſhall be extinguiſhed; and when they both agree in reſtraining and abridging the *Uſe* of the Fine, there is no Reaſon to extend the Operation of that Fine beyond the Intent of the Party. A Lord may releaſe his Right, reſerving a Rent, and one may enter into Warranty, with a *Salvo* to his Rent; and the like Caſe, as to the Point of Extinguiſhment, was reſerved in the Caſe of *Putnam* and *Duncomb*, where it ſeems alſo to be agreed, that if ſuch Indenture between two, if the Fine be afterwards levied to one accordingly, he

Dyer 357.

he is concluded from ſaying the *Fine* was to any other *Uſe*; or if he refuſe to take the Fine to thoſe *Uſes*, then the Fine is only to the *Uſe* of the Conuſor, and his Heirs; and there is a Caſe where a Fine was levied by a *Husband* and *Wife* to one who grants and renders a Rent to them two, and then they agree that a Recovery ſhall be ſuffered, wherein the *Husband* and *Wife* ſhall be vouched to thoſe *Uſes*, that the *Baron* and *Feme* ſhould have the Rent and the Conuſee the Land, and in the Recovery they are vouched, and enter generally into the Warranty; yet it was held the Rent was ſaved by Virtue of the Agreement; ſo that the Rent may be ſaved either by a Collateral Agreement or a Special Entry; whereas it was inſiſted in *Cromwell's* Caſe, that in ſuch Caſe the *Salvo* ought to appear upon the Record and Fine itſelf, and not by Matter *Dehors*. But it was otherwiſe reſolved; and accordingly it was held in the Caſe of *Cromwell*, when it came in Queſtion before, a precedent Feoffment will guide a ſubſequent Fine; as if there be a Feoffment to two, and their Heirs, to the *Uſe* of them and their Heirs, and a Fine is levied to them and the Heirs of one; this will not prejudice their Eſtate;

Feoffment is made, reſerving 3 l. Rent, the Feoffee levies a Fine for further Aſſurance, rendering 3 l. Rent, the old Rent remains, and he may avow upon the Deed. Moor 384, 295.

Dyer 311. *b.* 2 Co. 74.

Eſtate; for they ſhall both have the Fee ſtill, for in the Fine there is a Neceſſity that the Fee ſhould be limited to one. A Fine *Sur Grant and Render*, cannot be averred by Parol to be to any other *Uſes* than what are mentioned in the Fine; ſo that if an Eſtate in Fee be granted and rendered back to one in Tail, he ſhall have it to his own *Uſe*; and ſo if the Conuſee keep the Fee, he ſhall have it to his own *Uſe*; but by Deed the *Uſe* of a Fine *ſur Grant and Render* may be directed; and if there be a Deed to lead the *Uſes* of ſuch a Fine, tho' there be
1 Co. 75. ſome Variance between the Deed and the Fine; yet it ſhall be ſaid to be to the *Uſes* of the Deed, if there be no other *Uſes*, and that that was the Intent.

2 Co. 76. b. If *A.* has ten Acres and *B.* has ten Acres, and *A.* levies a Fine to *B.* of Twenty, who renders Twenty, it is good; but for Ten, unleſs there be a Special Agreement; for he cannot render more then he receives: It was objected, that ſince there can be no Declaration of *Uſes* upon a Fine *ſur Grant to Render*, but by Deed, and this Limitation by Deed was not good to bind *Perkins*, who had the Eſtate of the Land, but was a Stranger to the Deed, and conſequently no Deed by them

them would be of any Effect to bind him; and there being no *Uſe* but what was implied upon the *Fine*, there was no Conditional Eſtate; but it was an-anſwered that *P.* was but an Inſtrument to convey the Land in the ſame Manner as *J. B.* and *A. A.* had agreed, and ſo had nothing to do to limit the *Uſes*; for if he would not make the Render as they would have him, he had not been employed; and if after the Fine levied he had refuſed to render, yet the former Agreement would declare the *Uſe* of his Eſtate, tho' a Stranger, according to the Intent and Purport. So if *A.* Bargains and Sells Lands to *B.* and covenants to levy a Fine to him, and that *C.* ſhall bring a Writ of Entry, *&c.* and ſo a Common Revovery ſhall be had, which ſhall be to the *Uſe* of *B.* and his Heirs, in this Caſe, tho' *C.* be but a Stranger, yet being but an Inſtrument, the Declaration of *Uſes* by the other two ſhall be good; the Render of *C.* cannot extinguiſh the Condition; for his Seiſin is but inſtantaneous, and only to the Purpoſe to render back the Eſtate.

There was an Eſtate in Fee in the Rent, upon the Recovery; but that Rent, and the new one created upon the

the Fine, but that was nothing to the *Uſe* of the Land, and could not alter that neither one Way nor other; for tho' there be a new Rent in Being, yet there is no new *Uſe* in *A.* and ſo his Eſtate remains Conditional upon a Fine that enures by Way of Releaſe or Extinguiſhment.

2 Co. 78. *b.* 1 Inſt. 193. *b.* 13 Co. 55. No *Uſe* can be limited unleſs there be ſome other Conveyance, as it ſeems, which paſſes the Eſtate; for there it ſeems they are taken as one Conveyance; neither can the Surrender of a particular Eſtate be to a *Uſe.*

If the Diſſeiſee limits the *Uſe* to one, and the Diſſeiſor to another, and the Conuſee to a third, the *Uſe* of the Diſſeiſee ſhall ſtand; ſo if the Recoveror limit the *Uſe* to one, the Vouchee to another, and the Owner to a third, the Declaration of the Owner ſhall ſtand; tho' a Condition concurring with that in the Deed may be averred by Parol, yet no *Uſe* can be averred by *Parol*, when there are *Uſes* contained in the Deed expreſly. A Man cannot covenant with his Wife to ſtand ſeized to her *Uſe*; it ſeems at Common Law a *Uſe* might have been raiſed by Word, upon a Conveyance that paſſed the Poſſeſſion by ſome ſolemn Act, as a Feoffment; but where there was no ſuch Act,

2 Co. 76. *a.* 1 Inſt. 112. *a.* 2 Roll 788.

there it ſeems a Deed Declaratory of the *Uſes* was neceſſary; for as a Feoffment which paſſed the Eſtate, might be made at *Common Law*, by *Parol*; ſo by the ſame Reaſon might the *Uſes* of the Eſtate be declared by *Parol*; but where a Deed was requiſite to the paſſing of the Eſtate itſelf, it ſeems it was requiſite for the Declaration of the *Uſes*, as upon a Grant of a Rent, or the like. So it ſeems, a Man could not covenant to ſtand ſeized to a *Uſe*, without a Deed, there being no ſolemn Act; but yet a Bargain and Sale by Parol has raiſed a *Uſe* without, and it has been held to do ſo ſince the Statute. In Cities exempted out of the Statute, it has been held, that if a Fine be levied of a Rent, no *Uſe* can be limited of it without Deed; but now by 29 *Car.* 2. *c.* 3. all Declarations of Truſt, other than ſuch as ariſe by Implication of Law, are to be in Writing, and ſigned by the Party, who is by Law enabled to declare ſuch *Truſt*, or elſe it muſt be by his Laſt Will in Writing.

Pop. 49. Moor 688, 444. 2 Inſt. 675. Holt, Jones, *v.* Morley, Dyer 229. *a.* 1 Sid. 26. *a Man may deviſe to Uſe.*

A Man ſuffers a Common Recovery *Oct. Mich.* and the 14th of *November* next, by Indenture, he declares that the *Uſes* of all Recoveries hereafter to be ſuffered, ſhall be ſo and ſo, and ſo this Indenture does not declare the

Uſes

2 Roll 799. Dyer 136. a.

Uſes of the Recovery precedent, tho' the Term be reckoned but as one Day in Law; but yet it ſeems, if there be an Averment, that it was the Intent of the Party in that Indenture, to guide the *Uſes* of the precedent Recovery, it will be good; but *Quære* ſince the Statute 29 *Car.* 2. whether that will do; for as the Statute of Wills requires that a Will ſhould be in Writing, and if that be not ſufficient that is writ, no Averment will help out the Defect; ſo the Statute 29 *Car.* 2. requiring a Declaration of *Uſes* to be in Writing, it ſeems by the ſame Reaſon, no Parol Averment can help it.

A Man covenants to levy a Fine to four, to ſuch *Uſes*, and after two die, and it is levied to the Survivors, the *Uſes* ſhall be directed by the firſt Indenture.

Cro. Jac. 510, 512.

A Man grants a Rent of 20*l. per Ann.* and covenants to levy a Fine to theſe *Uſes*, *viz.* that if it ſhall happen the ſaid yearly Rent to be in Arrear, and not a ſufficient Diſtreſs found, or any Reſcous or Replevin be made, then that the Grantee ſhall enter, *&c.* in this Caſe the Rent was in Arrear, and then the Fine levied, and then a Diſtreſs taken, and a Replevin ſued. Two Judges held that the *Uſe* being

raiſed by the Fine, it could not extend to thoſe Averments that were before the Fine; but the other two held it ſhould, the whole being reckoned but as one Conveyance.

A. covenants to levy a *Fine* of one hundred Acres, within the Year, and after the Year, a *Fine* is levied but of eighty; it ſhall be guided by the Covenant before.

Husband and *Wife* ſeized of Lands to them, and to the Heirs of the *Huſband*, Bargain and Sell the Land to one *P.* upon Condition that if they or any of them, their Heirs, Executors, Adminiſtrators and Aſſigns of the Huſband, ſhould at ſuch a Day pay 500 *l.* to the ſaid *P.* that then it ſhould be lawful for the *Husband* and *Wife*, and the Heirs of the *Husband* to enter, and ſo hold it as in their former Eſtate, and that after the Payment, this Indenture, and all Fines and other Aſſurances ſhould be to the *Uſe* of the *Husband*, and his Heirs, this being Contradictory to what went before, is void, or elſe ſhall ſerve only to direct the *Uſes* of the Fee-ſimple, after the Death of the *Wife*. When *Uſes* are declared by a Deed precedent, no Writing will controul that, tho' under Hand and Seal, unleſs it be a Deed; as was the Caſe Moor 680.

of *Jones* and *Morley*, where a Deed declared the *Uſes* of a *Fine*, to be levied next *Hill.* Term, to one and his Heirs, before the Fine levied, *Husband* and *Wife*, by Writing under Hand and Seal, declare it ſhall be to the *Uſe* of her and her Heirs; it was held that if the Fine had been purſuant, this would not have controlled the former Deed; but becauſe the Agreement was in *Hill.* Term, to levy it next *Hill.* Term, and the *Fine* was levied the ſame Term, there was a Variance; and ſo the former Deed was controlled. If Lands be granted to *A. Habendum* to *A.* and *B.* and their Heirs, to the *Uſe* of them and their Heirs, tho' *B.* can take no Eſtate, becauſe named after the *Habendum*, yet the Limitation of the *Uſe* is good, and by that they ſhall both be Jointenants. If a Man covenants to ſtand ſeized of all the Lands he has, or which he ſhall afterwards purchaſe to the *Uſe* of *A.* this will only bind the Lands he then had; for if he afterwards purchaſe other Lands, no *Uſe* ſhall ariſe upon it; for a Covenant to ſtand ſeized, is a Covenant that affects an Alteration of the Land itſelf, which no Man has Power over but the Owner; and it is not now in the Nature of a Contract

13 Co. 55.

2 Roll 790 Moor 342.

Contract to do any thing but that which reaches the Lands themſelves.

So if one *Jointenant* covenants to ſtand ſeized of the Moiety of his Companion, after his Companion's Death, to ſuch *Uſes*, no *Uſe* will thereby ariſe, tho' he does ſurvive his Companion; for he could not then Charge the Moiety. But if a Man covenants to purchaſe Lands before *Michaelmas*, and to levy a *Fine* of them to *B.* which ſhall be to the *Uſe* of *A.* and his Heirs, and this is done accordingly, it is good; for this Agreement was not deſigned to raiſe the *Uſes* of its own Force, but only that it ſhould be an Agreement precedent to direct the *Uſes* of the Fine to be levied.

If a Man levies a Fine of his Lands, and covenants, in Conſideration of Natural Love, and the Marriage of his Baſtard Daughter, that the Conuſee ſhall ſtand ſeized to her *Uſe*, this is a ſufficient Declaration of the *Uſe* to her, tho' it be not ſufficient upon the Covenant to raiſe a *Uſe*. See about *Contingent Uſes* before, and Title *Contingent Remainders*. 2 Roll 790, 791.

A Man may have an Aſſize upon a Feoffment to his own *Uſe*, without an actual Entry, and without Laying an Agreement; for the Statute executes it Owen 86. Bro. 337. *b.* 10.

in him; but an Action of Treſpaſs he cannot have, before an actual Entry. A Man may plead that ſuch a one was ſeized to his *Uſe*, without ſhewing the Commencement of the *Uſe*. A Man brings a Writ of *Waſte*, the Writ ſets forth a Feoffment to ſuch Perſons, to ſeveral *Uſes*, but does not ſay the Feoffment was to them and their Heirs; and if it were not a Feoffment in Fee, the *Uſe* could not riſe; but it was held
Hob. 84. well enough, becauſe all the Forms of the Writs had been ſo; and yet the Plaintiff might have had a general Writ, and declared Specially.

A. ſeized of twenty-five Acres at *W.* covenants to levy a Fine of them all, and that twenty-four of them ſhall be to the *Uſe* of *C.* in Tail; and for the other it ſhall be to the *Uſe* of him in Fee, afterwards a Fine is levied of twenty-four; *Quære* whether the *Uſes* of them twenty-four, are not directed by the precedent Conveyance.

2 Roll 791. A Man makes a Feoffment in Fee, and afterwards declares by Indenture, that this Feoffment was to the *Uſe* of himſelf, and after Marriage with *A.* to her for Life, and then to the *Uſe* of his own Right Heirs, this is a good Limitation of *Uſes*; and after Marriage *A.* ſhall have a *Uſe*, and in the mean Time he

is ſeized to the *Uſe* of himſelf and his Heirs.

A Man covenants, in Conſideration of Marriage to be had between him and *B.* to convey certain Lands to their *Uſes* for Life, and afterwards he levies a Fine to thoſe *Uſes*, there is an Eſtate veſted in them, tho' the Marriage ſhould take no Effect; for it was a Declaration of *Uſes* upon the Fine, which is good, tho' there be no Conſideration; but if there had been nothing but a Covenant to ſtand ſeized to *Uſes*, no *Uſes* had then riſen without a Marriage.

And if a Man covenants, in Conſideration of the Marriage of his Son with *B.* to ſtand ſeized to the *Uſe* of his Son and *B.* and they are married *infra annos nubiles*, and afterwards they diſagree, the *Uſe* to *B.* ſhall ceaſe; and it ſeems there is the ſame Reaſon the *Uſe* to his Son ſhould ceaſe, ſince the Conſideration ceaſed, the Marriage being the only thing the *Uſe* was founded upon. 2 Roll 792.

A Man covenants to ſtand ſeized to the *Uſe* of *B.* and his Heirs, if ſuch an Act be not done, *B.* dies, the Act is not done, a *Uſe* ſhall ariſe to the Heir of *B.* who ſhall be in by Diſcent.

2 Roll 794. A Man covenants, in Conſideration of Natural Love, *&c.* to ſtand ſeized to the *Uſe* of himſelf for Life, then to his Son for Life, then to *D.* his Baſtard for Life, with ſeveral Limitations over, and covenants to make a Feoffment for further Aſſurance to the ſame *Uſes*; and accordingly a Feoffment is made, yet *D.* ſhall take nothing, becauſe the Feoffment was made but for further Aſſurances, according to the Covenant, by which he could take nothing, if it were only ſaid to the ſame *Uſes*, and not for further Aſſurance. *Quære*, Whether *D.* would not take.

2 Roll 795. Mo. 385.

Cro. Jac. 180. A Man covenants to convey his Land to ſuch and ſuch *Uſes* before *Eaſter* next, and covenants to ſtand ſeized of ſo much as ſhall not then be conveyed to the *Uſe* of the ſame Perſons, none is conveyed before *Eaſter*, the *Uſes* of the whole ſhall riſe.

Ven. 168, 371. Tenant for Life, with Power of Revocation, levies a *Fine*, and by Deed, ten Days after, declares the *Uſes* of that Fine, which Deed had all the Circumſtances required in the Deed of Revocation, and whether the Power of Revocation was extinct by the *Fine*, or that the Deed of the Declaration of *Uſes* was to be reckoned together, with the Fine, as one Conveyance; and ſo his

his Power executed was the *Quære*; and it was held that the Power was extinct by the *Fine*, and the Deed afterwards came too late, for the *Fine* paſſed it away, and the Deed afterwards ſhall not deveſt any thing lawfully veſted by that Fine; yet if the Intent at the Time of the Fine levied was to make ſuch a Declaration by Deed, *Quære* whether the Fine will extinguiſh it, but a bare Declaration afterwards, without full Proof of the Intent, at the Time of the Fine levied, will not control the natural Operation of that Fine. A Man has Power to revoke by Deed ſealed and ſigned in the Preſence of two Witneſſes, and covenants by Deed, having thoſe Circumſtances to levy a Fine to other *Uſes*, which he does, and it was reſolved to be but as one Conveyance, and it ſhould amount to a Revocation. The Deed of itſelf amounting to a Revocation, becauſe it looked as ſomething to be done, and the Fine of itſelf could not, becauſe it had not thoſe Circumſtances.

1 Ven. 291, 195. *Deed, Fine and Recovery are but one Conveyance, tho' they have divers Effects.* 2 Ven. 31. Mod. Rep. 250 Cro. Car 472. *Cromwe* Caſe. 2 Co.

A Feoffment is made to *Huſband* and *Wife*, for their Lives, Remainder *ſeniori puero*, Remainder to *K.* in Fee, *Huſband* and *Wife* levy a Fine, and by Indenture declare the *Uſes* to

2 Ven 290.

Moor 104. *Husband* and *Wife* for Life, and then to the eldeſt Child, then to *K.* in Fee; it was reſolved the *Fine* did not deſtroy the Eſtate in Remainder, but it was in Abeyance; and that the Indenture leading the *Uſes* of the *Fine* put it out of all Diſpute that the Remainder ſhould go to the eldeſt Child, whether Male or Female; and yet it does not appear, there was any Deſign beforehand, or Agreement to levy this Fine; it was held likewiſe that the Daughter may aver that *ſeniori puero* was intended the eldeſt Child, Male or Female. 1 *Vent.* 195. Where two Deeds or Acts done at ſeveral Times, ſhall be look'd upon in Law but as one and the ſame, ſee *Cro. Jac.* 643. Tenant in Tail levies a Fine, without Conſideration, or expreſſing any *Uſe*, he ſhall be ſeized in *Tail*, as before; for it is by Coveyance of Law that he hath any Eſtate, and whatſoever Eſtate he takes by Law, muſt be rightful, and according to the Rules of Law; and to give him an abſolute Eſtate in Fee, would be to the Prejudice of him in Reverſion. *Quare* if it be not the ſame of a Recovery.

Moor 616. Cro. Car. 433. Vaugh 43.

Palm. 359.

What

What may be granted to an Uſe.

All Lands and Inheritances real may be granted to an *Uſe*, but no Inheritance perſonal can be granted to an *Uſe* as Annuities, and the like; for their having the Inheritance conſiſts in taking the Rents; ſo he cannot have the Freehold upon the Truſt and Confidence to permit another to take the Profits; ſo Things which are mere Rights cannot be conveyed by Way of *Uſe*, as Commons, *&c.* Ways in Groſs; for a Man cannot walk over Another's Ground to the *Uſe* of a third Perſon. The Lords decreed that the Office of High Chamberlain could not be granted by Way of *Uſe*; nothing that paſſes by Way of Extinguiſhment can be granted to an *Uſe*. Jones 127. Palm. 349.

A Man ſeized of the Manor of *S.* in *O.* and of divers other Lands in *O.* ſuffered a Recovery of all, and limits the *Uſe* of all his Lands and Tenements in *O.* to his Wife for Life, and of the Manor of *S.* to his younger Son in Tail; it was held the Wife had nothing of the Manor of *S.*

A Deviſe may be made to a *Uſe*; but *Quære* if the Limitation of the *Uſe* be void, whether the Deviſee ſhall be ſeized to the *Uſe* of the Deviſor and his Heirs; tho' if an Eſtate paſſes by

Palm. 359. by Way of Extinguiſhment, no *Uſe* can be limited upon it; yet if Tenant for Life ſurrenders his Eſtate to him in Remainder, to the Intent to ſuffer a Recovery, which is accordingly done, if no other *Uſe* be limited, it ſhall be to the *Uſe* of him for Life; if they both join in a Feoffment to the *Uſe* of *J. S.* and his Heirs, who ſuffers a Recovery, and doth vouch, this it ſeems ſhall be to the former *Uſes*, becauſe the *Uſe* was to *J. S.* and his Heirs; yet that was only to keep the Eſtate in him, to the Intent that he might be a Tenant to the ſaid *Præcipe*.

Cro. Car. 268. Hard. 402. If a Man covenants to levy a Fine to *Uſes*, the Fine muſt be drawn according to the Covenant, or elſe he is not obliged to levy the Fine. *A.* enfeoffs *B.* and covenants to make further Aſſurances, *B.* leaſes to *A.* who then levies a Fine to *B.* this bears and conveys the Eſtate for Years, without a precedent Agreement, otherwiſe it goes in Corroboration of it.

Hob. 273, 274, 275. A Man conveys Lands to one, and covenants to do Acts for farther Aſſurance, and then levies a Fine to him, this will be to the *Uſe* of the Bargainee; for the Covenant is a Declaration of the *Uſe* to him, but that Covenant is to be conſidered by the Eſtates that paſs

paſs by the firſt Conveyance; and it is to be looked upon as a Declaration of no more; as if a Man paſſes the third Part of his Lands to *J. S.* and covenants to make further Aſſurances of his Eſtate to him, and levies a Fine of all to him, this Covenant ſhall declare the *Uſe* of the Fine to the Vendee, for the third Part; but the other ſhall have the *Uſe* of the two other Parts. A Recovery is ſuffered to the Intent the Recoverors ſhould make ſuch Eſtates, the *Uſes* are not in the mean Time to the *Recoveree*; for that would prevent the Execution of the Eſtates. 2 Leo. 17. 2 Cro. 789.

A Man ſuffers a Recovery to the *Uſe* of himſelf for Life, Remainder *ſeniori puero* in Tail, in contingent Remainder to himſelf in Tail, he levies a Fine and declares the *Uſes* by another Indenture to him for Life, Remainder to his eldeſt Child in Tail, Remainder to himſelf in Tail; it was reſolved the Fine did not deſtroy the Remainder *ſeniori puero*; for it goes in Corroboration of the Eſtate, and that the laſt Indenture declared the Intent of the firſt to mean by *ſeniori puero*, either Boy or Girl, according as they ſhould be born firſt. 2 Leo. 217.

A Fine is levied to four, to the Intent they ſhould make an Eſtate of the ſaid

ſaid Land to ſuch a Perſon as the Conuſor ſhould name, and that they ſhould not be ſeized to any other *Uſe* but to that Specially; it was held that before the Nomination they were ſeiz'd to their own *Uſe*; and if the Conuſor died before Nomination, to the *Uſe* of his Heir; and one Judge held the Conuſor might name which of the Conuſees he pleaſed, but the other two held not; but he ought to be ſuch a one as would take the Eſtate; and one Jointenant cannot give from his Companion. *Quære*, If a Man grants two Acres in *D.* and covenants to levy a Fine for further Aſſurance, and levies a Fine of all in *D.* and he has four Acres there for the Surpluſage, whether the *Uſe* ſhall be to the Conuſor.

1 Roll Rep. 103.

Of

Of Bargains and Sales.

NO Perſon that cannot be ſeized to a *Uſe* can paſs Lands by Way of *Bargain* and *Sale*, for it only paſſes an *Uſe* at Common Law; and tho' the Poſſeſſion and *Uſes* paſs both together, *tanquam uno flatu*, yet there muſt be a Seiſin to a *Uſe* in every *Bargain* and *Sale*, elſe there could be no Execution by Force of the Statute; yet every Body that comes in by a *Bargain* and *Sale*, comes in by the Statute; therefore the King, nor any Corporation, cannot *Bargain* and *Sell*; and there ſeems the ſame Reaſon for an Alien; but if there be a proper Conſideration, it ſeems a *Bargain* and *Sale* may be made to any Body; but then the Conſideration muſt be Money, for nothing elſe will make it a *Bargain* and *Sale*; and it may amount to a Covenant to ſtand ſeized, or an Exchange, but not a *Bargain* and *Sale*, without the Conſideration of Money. Money given by the Governors of an Hoſpital is a good Conſideration to raiſe a *Uſe* to them in their publick Capacity; and tho' a Body Politick cannot be ſeized to a *Uſe*, yet upon a *Bargain* and *Sale* to them, a Truſt

44 El. C. B. rot. 518.

Moor 681

Atkins & Long.

Lands let for a Year, reſerving a Pepper-Corn, if demanded, is a good Bargain and Sale. Mo. 262. 10 Co. 24, 34. 2 Roll 788.

Truſt may be limited that they ſhall diſpoſe of the Rents and Profits of the ſame amongſt the Poor of the ſaid Corporation. It ſeems any thing that a Man has a Freehold or Inheritance in, may be *Bargained* and *Sold* by Force of the Statute; for ſo are the Words of the Statute; but a Man poſſeſſed of a Term for Years, cannot *Bargain* and *Sell* it by Force of the Statute 27 *H.* 8. *c.* 10. to have it executed, becauſe it is not within the Statute. At Common Law upon a *Bargain* and *Sale*, a *Uſe* would riſe, tho' the *Bargain* and *Sale* were by Parol; but now, as to Eſtates of Freehold and Inheritance, they are reſtrained by the 27 *H.* 8. *c.* 16. for now they muſt be made by Deed indented and enrolled; but a *Bargain* and *Sale* for Years was out of the Statute; and therefore might, as it ſeems, be made by Parol; and Houſes and Lands in Cities, where the Mayor, *&c.* had Power to enrol Evidences, being excepted, it has been ſince reſolved that a *Bargain* and *Sale* is good by Parol there, for the Statute was Defective; for it executed ſuch Lands, *&c.* out of the Statute of Enrolments, but does not enact that the Sale of ſuch Eſtates ſhould be enrolled in thoſe Cities. It ſeems by the Statute for

2 Inſt. 671.

2 Inſt. 675. Dyer 229.

execu-

executing *Uſes* into Poſſeſſion, a Rent new created may be bargained, *&c.* but now it cannot be, becauſe there muſt be a Seiſin to an *Uſe*, or elſe there can be no Execution by the Statute, before the Intent of the Party was regarded and ſupported by Chancery; and this ſeems to be, my Lord *Hale's* wary putting of the Caſe of *Jackſon*, which ſee. The Words *Bargain* and *Sell* are not neceſſary to make it a *Bargain* and *Sale* within the Statute; but any Words at Common Law, that upon a valuable Conſideration would have raiſed a *Uſe*, will be ſufficient to create a *Bargain* and *Sale*, within the Statute; but there it ſeems that the valuable Conſideration muſt be Money; ſo that if a Man for Money *covenants to ſtand ſeized, or aliens, or demiſes, grants and to Farm lets*, theſe Words, if the Deed be indented and enrolled, amount to make it a *Bargain* and *Sale*; and if the Money be paid but by one, it is ſufficient, and ſhall make the Eſtate to paſs to all, if no Conſideration be expreſſed; yet if it be averred that there was one paid, it is ſufficient; but if a Conſideration be expreſſed in the Deed, and be acknowledged to be received, tho' in Truth none was paid, yet the Party and his Heirs

Kelw. 84. 1 Co. 126. *a.* Pop. 49, 50.

1 Inſt. 672. 8 Co. 94. 3 Lev. 16. Cro. El. 166.

2 Inſt. 672. Dyer 169. Moor 141.

Heirs, are eſtopped, from ſaying there was none paid. The Intent of 27 *H.* 8. *c.* 10. was to deſtroy theſe Inconveniencies that had crept into the Law by *Uſes*, and reſtore the former Laws for paſſing of Lands by Matter that is notorious into Practice and Uſe again; and therefore, leſt ſtill they ſhould convey by Way of *Uſe*, and the Inconveniences remain, was that Statute of 27 *H.* 8. *c.* 16. made, which requires the Deed to be enrolled, and ſo made notorious in whom the Eſtate ſhould be; ſo that by Force of the Statute, no Eſtate can paſs by Force of a *Bargain* and *Sale*; but where the Deed is enrolled, ſo that 'till that Circumſtance be had, the Deed is ineffectual. Before this *Statute* the *Uſe* and *Poſſeſſion* paſſed preſently, both together *tanquam uno flatu*, upon the Delivery of the Deed; but this Statute requiring another Circumſtance, 'till that be had, the Deed is of no Effect; and when it is had, this Statute is ſatisfied; and the *Uſe* and *Poſſeſſion* are ſaid to paſs both together by Relation, from the Delivery of the Deed, by Virtue of the former Law; this laſt not aboliſhing it, but only adding another Circumſtance to it, and then leaves the former Law to Operation; ſo that when the Deed is

Quære *whether the Loan of Money will make a Bargain and Sale.* 2 Roll 782, 790. 2 Inſt. 674. Hob. 136. Cro. Car. 218. Dyer 218. *b.* T. Jones 196. Hob. 189. Cro. Car. 400.

afterwards enrolled, it hath Relation, for the Advantage of the *Bargainee*, to protect him from all Incumbrances made in the mean Time by the *Bargainor*, and for him to take Advantage of the Acts done for the corroborating his Eſtate, and the making good any Diſpoſition that he will make in the Interim of the Land. But as for Houſes and Lands that are in Cities and Boroughs, where they have the Power of enrolling Evidences, by being excepted out of the Statute, they paſs preſently upon the Delivery of the Deed.

Moor 752. 2 Cro. 52, 3. Yelv. 123.

If a Man *Bargains* and *Sells* Lands by Deed indented; but before Enrolment he levies a Fine of the Lands, to the Party himſelf, he ſhall be in by the Fine, tho' the Deed be afterwards enrolled; for 'till the Enrolment, the *Bargainor* has the Eſtate, all thoſe Circumſtances not being had which are requiſite to make it a good *Bargain* and *Sale*; and before Enrolment the Eſtate paſſes by the Fine; the ſame Law of all Conveyances paſſing the Poſſeſſion. If in the mean Time the *Bargainee* dies before Enrolment, his Heirs ſhall take and be in by Diſcent; for the Enrolment, as between *Bargainor* and *Bargainee*, makes the Eſtate paſs *ab initio*, by Force of

2 And. 3. 161, 203. 4 Co. 71. 10 Co. 96. Moor 80. 337. *otherwiſe if they lie in a City.* Yelv. 113. Dyer 229.

Hob. 136. Cro. Jac. 408, 53. the 27 *H.* 8. *c.* 10. which paſſes the *Uſes* and *Poſſeſſion* both together inſtantly.

Hard. 410. Where Tenant for Life, with Power to make Leaſes to commence after his Death, *Bargains* and *Sells* the Land in Fee, the Power does not paſs. A *Bargain* and *Sale* will not paſs a contingent *Uſe* in the *Bargainor*, but a Feoffment will. If one Jointenant *Bargains* and *Sells* all the Lands, and before Enrolment the other dies, his Part ſhall ſurvive; for the Freehold not being out of him, the Jointure remains; but yet when afterwards the Deed is enrolled, only a Moiety ſhall paſs; for the Enrolment by Relation cannot make the Grant of any better Effect than it would have been if it had took Effect immediately; but tho' that Enrolment be made, he that Bargains and Sells the whole ſhall have the other's Part by Survivorſhip, tho' the Deed be afterwards enrolled, and ſhall relate to the Delivery; becauſe tho' the Relation will work for the Benefit and Advantage of the *Bargainee*, yet it ſhall not prejudice the *Bargainor*; yet in ſuch Caſe, if the *Bargainor* dies, his Part ſhall not ſurvive; for the Relation the Deed afterwards by Enrolment has,

Ibid. 416.

1 Inſt. 136. *a.* Cro. Jac. 53. Bro. 328. *a.* 9.

ſupports the Intereſt of the *Bargainee*, as paſſing *ab initio*.

If the *Bargainee*, before Enrolment, *Bargains* and *Sells* to another, and then both Deeds are enrolled, according to *Cooke*, it is good, which ſeems reaſonable that the Relation ſhould as well confirm his own Acts againſt himſelf, as protect him from the Acts of the *Bargainor*; but as the Caſe is reported by *Cro.* the Judges were divided; and it ſeems by him in another Place, as if it were adjudged not to be good; and ſo it is reported by *Hob.* A Man *Bargains* and *Sells* the Seventh, and acknowledges the Statute the Eighth, and afterwards the Deed is enrolled, and upon an Iſſue whether the *Bargainor* was ſeized the Eighth, it was held that he was not in Reſpect of the Relation; but in another Caſe afterwards the Judges were divided, and ſeemed to be againſt it, tho' *Coke* be expreſs, and ſays that as to paſſing Eſtates, the Enrolment makes the Deed relate even as to Strangers as well as Parties. 2 Inſt. 675. Cro. Jac. 53, 408. Cro. Car. 218. Hob. 36. Cro. Car. 217. Owen 150. Noy 106. 2 Inſt. 674. Ow. 69. 2 And. 161. Cro. Car. 217.

A Man ſeized of a Copyhold in Fee, by the Cuſtom of which Manor, the Wife of every Copyholder that died ſeized of any Eſtate, ſhall be endowed, becomes a Bankrupt, the Commiſſioners *Bargain* and *Sell* the Land; the Ow. 70.

Cro. Car. 569. Bankrupt dies, the Deed is enrolled. It was held that the Wife ſhould not be endowed; for now by Relation he did not die Tenant; and this confirms what my Lord *Cooke* ſays, that the Eſtate ſhall paſs by Relation, even as to Strangers. So if one does Bargain and Sell Land, and takes a Wife, and dies, and then the Deed is enrolled, the *Wife* of the *Bargainor* ſhall not have *Dower*; for by the Relation the Eſtate paſſed before ſhe was his Wife; and by the ſame Reaſon, if the Eſtate ſhall be ſaid to paſs as to Strangers, *ab initio*, for their Diſadvantage, it ſhall paſs for their Advantage. And therefore if a *Bargain* and *Sale* be made to a Man, and he dies, and then the Deed is enrolled, it ſeems his Wife ought to be endowed.

Cro. Car. 317. Owen 150. *cont.* Dyer 218. *b.* Bro. 128. *a.* 9. If a Man *Bargains* and *Sells* Lands by Deed indented to one, and then *Bargains* and Sells them to another, and the firſt Deed is enrolled within the ſix Months, the laſt *Bargain* and *Sale* is void; and ſo it is if a Man do after the ſaid *Bargain* and *Sale* levy a Fine of the Lands to another, and then the Deed is enrolled, the Fine is of no Manner of *Uſe*, and ſo it is, if the laſt *Bargain* and *Sale* be firſt enrolled. But if the firſt *Bargain* and *Sale* be

never enrolled; ſo as it never takes Effect, then it ſeems the Second, *&c.* ſhall ſtand good, like the Caſe of two Surrenders of Copyhold Lands, a Releaſe to the *Bargainee*, before Enrolment, is good, and a *Recovery* ſuffered againſt him is good; for he is *Tenant* to the *Præcipe*, by the Enrolment afterwards, which farther proves what my Lord *Cooke* ſays, that even as to Strangers, the Relation works; as to paſſing the Eſtate it is not material when the Deed is acknowledged, provided it be enrolled within the ſix Months. Feb. 13 El. C. B. rot. 1307. 2 Inſt. 675. Ow. 70.

It ſeems the *Bargainee*, before Enrolment, may grant a Rent out of the Lands, this Relation is not properly a Fiction in the Law; but here are ſeveral divided Acts that have a Real *Eſſe*, which when they happen, are reckon'd at Law but as one Act; whereas a Fiction in Law, is what the Law ſuppoſes to be in *eſſe*; and it is really not ſo; if Tenant for Life be impleaded, the *Bargainee* of the Reverſion ſhall be received after Enrolment; but yet if one purchaſes a Reverſion, hanging the Writ, he ſhall not be received. If a Man *Bargains* and *Sells* Land, and then a Stranger enters, and the Deed is enrolled, the *Bargainee* may, as it Cro. Car. 217. Hob. 222. 2 And. 161. Ow. 70

ſeems, maintain an Aſſize; for now by Relation, it is a Diſſeiſin to him.

Hob. 222. 4 Co. 71. If a Man *Bargains* and *Sells* Lands, and then grants a Rent-charge, and then levies a Fine of the Land to the *Bargainee*, it ſeems the *Bargainee* ſhall hold it charged, becauſe he comes in by the Fine.

Lat. 157. 1 Sid. 310. Cro. Car. 217. A Man makes a Leaſe for Years, rendering Rent, and then *Bargains* and *Sells* the Reverſion, and then a Rent-Day incurs, it ſeems the Rent does belong to the *Bargainee*; and ſo if a *Bargain* and *Sale* be *made* of an Advowſon, and before Enrolment the Church becomes vacant, it ſeems it belongs to the *Bargainee* to preſent; for the Enrolment hath Relation to make the Deed paſs, as to

2 Bro. b. 8. cont. Strangers, *ab initio*, as appears from the Caſes; *a multo fortiori* it has between the Parties themſelves; but yet it was

Ow. 150. held by the Juſtices, in Sir *Henry Dimcock*'s Caſe, that Payment to the *Bargainor*, by the Leſſee, was good, and the *Bargainee* has no Remedy; which Caſe ſeems to agree that the Right belongs to the *Bargainee*, but allows Payment to the *Bargainor*, becauſe

Godbolt 250. Caſe. the *Bargainee*, before Enrolment, has not the Reverſion compleatly in him; and therefore if the *Bargainee* demands the Rent, and there is a Clauſe of Re-

entry,

entry, and then the Deed is enrolled, the *Bargainee* cannot enter, becauſe not compleat Grantee before Enrolment; if the *Bargainor* continues Poſſeſſion after Enrolment, he is a Diſſeiſor. If a Releaſe be made to the *Bargainor*, it ſeems it is good, and ſhall enure to the *Bargainee*. Ow. 69. Noy 106.

When the Enrolment muſt be, and of what.

The Enrolment muſt be within ſix Lunar Months after the Date, excluding the Day of the Date; and if the Deed bears Date one Day, and be delivered the next, or ſome long Time after, yet the Enrolment muſt be within ſix Months after the Date. If the Enrolment be on the Day it bears Date, it ſeems it is well enough; for tho' when an Intereſt is given to commence from the Day of the Date, that Day is excluded; for the Grantee ought not to take before the Intereſt was deſigned him; for that would be to the Prejudice of the *Grantor*; yet where a Time is given for a Thing to be done, if it be done before the Time, or before that Space it was allow'd to commence from, it is within the Reaſon of the Allowance of any Time, and ſo ſeems to 2 Inſt. 674. 1 Leon. 184. Hob. 140.

2 Roll 250. Moor 40. Dyer 218. b.

be good; and yet it would be good if it were done the laſt Day of that Time, as the laſt Day of the ſix Months, excluding the Day of the Date, becauſe it is within the Time expreſly allow'd.

2 Inſt. 671. 7 Co. 40.

All Eſtates of Freehold and Inheritance that paſs by Way of *Bargain* and *Sale*, muſt be enrolled; but Eſtates for Years need not; but if a *Uſe* be deſigned to be raiſed to one upon valuable Conſideration of Money, the Deed muſt be enrolled, tho' that Perſon was ſuch a one that a *Uſe* would have roſe to him, without the Conſideration of Money; but if there be both a Covenant to ſtand ſeized, and a Grant for Money, if the Deed be not enrolled, it will riſe upon the Covenant. Lands, *&c.* in Cities and Boroughs that have the Privilege of Enrolment, are not within the Act of *Bargains* and *Sales*, and need not be enrolled at all; for the Intent ſeems to be that they ſhould be enrolled in the Cities and Boroughs, yet theſe are only Words to except them out of the Statute, but none to enforce the Enrolment in any other Place. If the Courts of *Weſtminſter* are adjourned to another Place, yet the Enrolment muſt be where the Courts are, for it is confined to the Courts, and not to *Weſtminſter* itſelf. If a Man has

Mich. 1649. *B. R.* Watts *v.* Dicks. 1 Leo. 56. 11 Co. 24, 25.

Dyer 229. 2 Inſt. 675, 676.

has Power to revoke *Uſes*, and he *Bargains* and *Sells* the Lands in Fee, it ſeems this need not be enrolled. 1 Vent. 291.

The Effect of a Bargain and Sale.

A *Bargain* and *Sale* works no *Diſcontinuance*; for at Common Law nothing but a *Uſe* paſſed; in which Caſe it was Equity that no more ſhould paſs than what lawfully might, and the Statute executes the Poſſeſſion in the ſame Manner as the *Uſe*; therefore if Tenant in Tail *Bargains* and *Sells* in Fee, nothing but an Eſtate deſcendable, during the Life of Tenant in *T.* paſſes; for by the Common Law there is no Diſcontinuance without ſolemn Act or Livery. If Tenant for Life *Bargains* and *Sells* his Land to one and his Heirs, the Bargainee has but an Eſtate for the Life of the Bargainor, and he is liable to forfeit or to be puniſhed for Waſte, and the like; but when Tenant in Tail bargains in Fee, the Bargainee has an Eſtate *to him* and his* 9 Co. 106. *b.* 10 Co. 96. *a.* 1 Saund. 260. 1 Inſt. 327, 232. Bro. Feoff. 332. *b.* 22.

* *The Bargainee of a Tenant in Tail, has a baſe Fee not determined, nor determinable 'till the Entry of the Iſſue.* Salk. 619. 1 Sand. 260. Took *and* Glaſcock *was there denied; as alſo* Lit. ſect. 612. *if literally taken.*

Heirs,

10 Co. 98. *Heirs*, during the Life of Tenant in Tail; but he is diſpuniſhable of Waſte, and his *Wife* ſhall be endowed; and the Reaſon of the Difference is becauſe 1 Sand. 260. that the Perſon that ſhould take Advantage of theſe Things, has paſſed away all his Right; a *Bargainee* cannot vouch by Force of a *Warranty* annex'd to his Eſtate, becauſe he comes 1 Co. 125. a. in the *Poſt*; but he may rebut upon a *Bargain* and *Sale* of Lands, a Rent 2 Roll 787. may be reſerved, becauſe the *Poſſeſſion* 2 Inſt. 673. and *Uſe* paſſes both together, *tanquam eodem inſtanti*. The *Bargainee* of a Re- 2 Co. 54. Cro. Jac. 146. verſion cannot take Advantage of the Non-payment of Rent, upon a De- 8 Co. 92. mand, without giving Notice of the *Bargain* and *Sale*; but it ſeems he may have an Action of Waſte and Debt for Rent, without any Notice. When a Man is in Poſſeſſion, there the Inheritance may be conveyed to him by Way of Releaſe; and if a Man 1 Inſt. 273. a. makes a Leaſe for Years, or for Life, and then grants the Reverſion to *C.* for Years, and the Tenant attorns, he may releaſe to the *Grantee* of the Reverſion, to enlarge his Eſtate. So if a Cro. Jac. 604 Man *Bargains* and *Sells* to one for Years, he may releaſe to the *Bargainee* before Entry; for he has Poſſeſſion by Force of the Statute; ſo if he *Bargains*

gains and *Sells* the Reverſion for a Year, he may releaſe to the *Bargainee*, for he has the Poſſeſſion in him by Force of the Statute, without any Attornment; and this is the modern Way of Conveying Lands.

A. deſigning to convey Lands to *B. Grants*, *Demiſes*, *Bargains* and *Sells* them to *C.* and before any Entry, releaſes them to *C.* and his Heirs, to the *Uſe* of *B.* and his Heirs, the Lands ſhall paſs by Way of *Bargain* and *Sale*, *ut res magis valeat*, *&c.* And if *C.* afterwards chuſes to take by Way of Demiſe at Common Law; yet that ſhall not deveſt the Eſtate of *B. C.* being but an Inſtrument to convey: Every *Bargain* and *Sale* ſhall be expounded indifferently between the Parties, and not like a Grant at Common Law, moſt againſt the *Grantor*; becauſe it was Equity that always made the Conſtruction of *Bargains* and *Sales*. A Freehold in Law paſſes before Entry. 2 Roll 707. 2 H. 7. *b.* *a.* 1 Roll 829. *Title* Leaſes 13.

Pleading of Bargains and Sales.

A *Bargain* and *Sale* by Deed indented and enrolled, is but a Deed recorded, and therefore in pleading, the *Profert* muſt be made of the Deed itſelf, and not of the Tenor of it enrolled; 2 Inſt. 235. *b.* 251. *b.* 2 Inſt. 673.

ſo

ſo that if an Infant *Bargains* and *Sells* Lands by Deed indented and enrolled, yet notwithſtanding that he may plead his *Nonage*; for it takes Effect as a Deed, notwithſtanding the Enrolment; but if an *Infant* binds himſelf in a Bond, and afterwards enrolls it, he cannot plead *Nonage* to it; for it is now a *Record*, and it is turned into a Thing of a higher Nature, the Effect of both being the ſame; but when a Deed is had of Lands, in ſuch Caſe Lands paſs by the Deed, and therefore cannot afterwards paſs by Acknowledgment and Enrolment.

2 Inſt. 673. Bro. 328. 17. A Deed by the Common Law ought to be enrolled for the *Husband* only, and not for the *Wife*; but if ſhe do acknowledge it, it ſhall not bind her. If a Man acknowledges and enrolls a Deed, *Quære* whether he may afterwards plead *Dureſs*; for the acknowledging it afterwards is voluntary.

2 Inſt. 673. Cro. El. 88. Bro. 328. 8. *b.* Moor 46. *cont.* Yelv. 213. If a Man pleads a Deed enrolled, he muſt ſhew in what Court it was enrolled; and becauſe it was not done, it was held ill, even after a Verdict, becauſe by the Statute the Enrolment is to be in ſome certain Court; and therefore he ought to ſhew it was according to the Statute; and the ſaying it was *ſecundum formam Stat.* is

Cro. Jac. 291.

not

not ſufficient; the *Enrolment* is Matter of *Record*, and ſhall be tried by the *Record*; but the Time of the Enrolment is Matter *in pais*, and ſhall be tried by the Country; but this, as it ſeems, muſt be underſtood where the Time of the Enrolment was not entered upon the *Record*; for where it is, there it is proved of Record; for ſince 16 *Eliz.* the Practiſe has been to enter the Time of the Enrolment; and therefore it was reſolved that where a Man made a Leaſe for Years on the 10th of *May*, and *Bargained* and *Sold* by Deed, dated 10th of *April*, and enrolled alſo as of that Time, that in ſuch Caſe no Averment could be taken, but that the Deed was of that Time.

1 Co. 7. a. 4 *Ibid.* 71. 2 Roll Rep. 119. Ow. 138. 1 Leon. 182. Moor 504.

If a Man pleads a *Bargain* and *Sale*, *Quære* whether he need aver Payment of the Money.

Of fraudulent Conveyances.

BY the *Common Law*, if a Man had a Right and Title to a Thing, or a juſt Debt owing to him, he might avoid any fraudulent Conveyance made to deceive him of that Right or Debt; as if a Man had a Right to Goods, and he that had them ſold them by Covin in Market Overt, to alter the Property of it; or if any paſſes away Goods to deceive a Creditor, theſe Acts might have been ſet aſide; but if the Gift were precedent to the Right or Debt, there was no Way, in ſuch Caſe to ſet aſide the Conveyance; but the 13 *El.* and 27 *El.* have remedied this Inconvenience; by Virtue of which Laws all Conveyances made to deceive Creditors or Purchaſers are void, as againſt them; and if Conveyances are made for good Conſideration; yet if they are made with a Deſign to deceive Creditors, they are void by thoſe Statutes; and if made *bona fide*, if without Conſideration, they are alſo void, as againſt them; but it ſeems this muſt be underſtood with ſeveral Reſtrictions. Thus, a Man made a *fraudulent Deed* of all his Goods to one of his Creditors; and it was held within the Statute,

3 Co. 83. Mo. 638.

Dyer 294, 160.

tute, and void againſt another Creditor. Thus if one be indebted to ſeveral, and then makes a Gift of all his Goods to his Son, in Conſideration of Natural Affection, tho' this Gift be made *bona fide*, yet it ſhall be void againſt Creditors; but if it ſhall be made before the Debts contracted and *bona fide*, it ſeems it would not be ſet aſide; for the Intent of the Act was not to ſet aſide all voluntary Settlements; but if a Gift be made upon any *Truſt*, either expreſſed or implied, between *Donor* and *Donee*, tho' made *bona fide*, yet it ſhall be within the Statute; for all Statutes made for the ſuppreſſing of *Fraud* are liberally expounded; and therefore the Word *Forfeiture*, tho' mentioned among Penalties, and the like, ſhall be expounded to extend to all *Forfeitures* to the King and Subject. 50 *E.* 3. relieves Creditors, when their Debtors fly to Privileged Places, having given their Tenements and Chattels to their Friends in Truſt, and ſo does 2 *R.* 2. *Stat.* 2. *c.* 3. and by 3 *H.* 7. all Deeds of Gift of Goods in Truſt, for the Perſons that made the Gift ſhall be of no Force. By the 27 *Eliz. it is enacted*, That if a Man ſettles Lands to *Uſes*, with a Power of Revocation, and afterwards ſells the Lands for valuable Conſide-

Cro. Car. 550. 2 Roll Rep. 306. 1 Sid. 349. 1 Vent. 194. Mod. Rep. 119.

Conſideration, that the former *Uſes* ſhall be revoked to him; but the Act only mentions *Purchaſers*; and therefore as to Creditors, if it were not made with an Intent to deceive them, it ſeems it ſhall not be avoided by them; for they are not mentioned in the Clauſe; and if a Man, having a future Power of Revocation, *Bargains* and *Sells* the Land before his Power commences, yet it is within the Act; ſo if the Power of *Revocation* be reſerved, with the Conſent of *A.* and he conveys his Land, not having revoked, the Conveyance ſhall be good. So if one having a Power of Revocation, extinguiſhes by Feoffment, and then ſells, the *Sale* ſhall be good; for the Feoffment comes within the Law of all *fraudulent Conveyances*.

Moor 605.

If a Man makes a *fraudulent Leaſe*, and then another *bona fide*, without Rent or Fine, the ſecond Leſſee ſhall not avoid the firſt Leaſe; for no Purchaſer ſhall avoid a former *fraudulent Conveyance*; but a Purchaſer for valuable Conſideration, which excludes all Conſideration of *Blood*, and the like; and he that will, by Virtue of theſe Acts, avoid a former *fraudulent Conveyance*, muſt be ſuch a Purchaſer, and muſt alſo come in without any

1 And. 233. Moor 602.

Fraud

Fraud or *Guile*; if a Gift be made to deceive one Creditor, it is void againſt all Creditors that are within the Statute; it is not neceſſary that he that contracted the Debt ſhould make the *fraudulent Conveyance*; for if a Man binds himſelf and his Heirs in a Bond, and Lands deſcend to his *Heir*, who makes a *fraudulent Conveyance* of thoſe Lands, the Creditor ſhall avoid it. Moor 615. 5 Co. 60. Gooche's Caſe.

If a *fraudulent Conveyance* be made to deceive *Purchaſers*, and one having Notice thereof purchaſes the Land, he ſhall avoid the former *fraudulent Conveyance*, notwithſtanding his Notice; for it is by the Statute made abſolutely void. The *Father* makes a Leaſe to the *Son*, who makes a *fraudulent Aſſignment* of that Leaſe, the *Father* dies the *Son* ſells the Inheritance, the *Vendee* ſhall avoid the Term; and if the *Son* had only ſold the Term, the *Vendee* ſhould have avoided that *fraudulent Aſſignment*. A Man makes a Jointure to his Wife, with an Intent to deceive Purchaſers, they ſhall avoid it. A Feoffment was made to deceive Creditors; and tho' by Event, the King was cheated of his Ward, yet being only to that Intent and Purpoſe, it was not to be extended further. So a Redemiſe to 5 Co. 60. *b.* 6 Co. 72. 10 Co. 57. 10 Co. 57. *a.* Dyer 351. *b.*

A. to the Intent the Wife of the Tenant ſhould not be *endowed*, during the Life of *A.* it is not to be extended to any other Intent or Purpoſe.

If Lands are given to the King, with an Intent to deceive *Purchaſers*, the Purchaſer ſhall avoid ſuch Gift; ſo if a Reverſion be granted to the King, on Purpoſe to hinder Docking the Reverſion, and the Tenant ſuffers a Recovery, and ſells, and dies without Iſſue, the *Purchaſer* ſhall hold againſt the King.

2 Co. 54. 11 Co. 74.

Pleadings relating to fraudulent Conveyances.

5 Co. 60. A *fraudulent Conveyance* may be given in Evidence upon the general Iſſue, and need not be pleaded. Covin muſt be pleaded expreſly by Averment, and cannot be preſumed; and therefore in a *Special Verdict*, if the Jury find ſuch Circumſtances in the Caſe, as might very well have induced them to find *Fraud*, yet if they do not expreſly find it, it ſhall never be preſumed.

10 Co. 57. Yelv. 196. Cro. Jac. 270. Cro. El. 810. *cont.* 2 And. 178.

The *fraudulent Gift* is good againſt every Body but Creditors, *&c.* it ſtands between the Parties themſelves; for it ſeems by the Caſe of *Hawes* and *Loader*, that the Executors cannot main-

tain the Poſſeſſion of the Goods againſt the *Donee*, even to ſatisfy Creditors; but *quoad* the Creditors, they are all liable in his Hands. One held of divers Lords by *Heriot Cuſtom*, and to the Intent to deceive one, made a Gift of all his *Beaſts Heriotable*, the Lord aggrieved brought his Action for the Value of all the Beaſts; and held by two Judges that it was well, and another *cont.* and by one that they ought to have joined. Dyer 351. *b.* 2 Leon. 8, 9.

A Man having a Leaſe for Years, forges another for Ninety, and ſells the forged Leaſe, and all Right and Title to the ſame, and his Intereſt in the Land; and altho' by the general Words, his true Intereſt in the Land paſſed, yet *it was reſolved* he was not a *Purchaſer* for a valuable Conſideration, within the Statute; for the Purchaſe and Contract was for the *forged Term*; tho' in a Gift of Goods, if one continues the Poſſeſſion, it is a great Sign of *Fraud*; yet in *Mortgages* it is none at all. If a Man ſettles Lands in Truſt upon himſelf for Life, and then to his Child, not fraudulent, and then for valuable Conſideration ſells the Land to another; *Quære* whether the former Conveyance ſhall be avoided during his Life; and if a Man enfeoffs others with Power of *Re-* Co. Lit. 3. *b.* 1 Rep. 3. 2 Roll Rep. 304.

vocation, and then covenants to ſtand ſeiſed to another's *Uſe*, who ſells the Land, the firſt *Feoffment* is not hereby avoided, the Covenant to ſtand *ſeized*, being only upon Conſideration of *Blood*, which is not a Conſideration that will avoid a precedent Eſtate. A *Woman* Covert purchaſes Land with the Money ſhe had in another's Name in *Truſt* for her, the Truſtee *jacens in extremis*, at her Requeſt makes a Leaſe for two hundred Years in *Truſt* for her, upon Conſideration, that if he ſhould ſurvive the Firſt of *June*, and pay Twelvepence, the Leaſe ſhould be void; he does ſurvive, but does not pay, and then for 100*l.* makes a Leaſe to another, without any Direction from the *Feme*; and whether the ſecond *Leſſee* ſhould avoid the firſt *Leaſe*, or no, was the Queſtion, but *not reſolved*.

Moor 751.

A Man binds himſelf in a Bond to pay Money, and then in a Statute to make ſuch a Conveyance, *&c.* a *fraudulent Conveyance* is made contrary to the Defeaſance of the Statute, tho' the Conveyance be void againſt the firſt Debtor, yet it is a Breach of the Conſideration of the Statute, and he ſhall be ſatisfied before the Debt upon Bond.

Cro. Jac. 131, 132.

If

If one makes a *Leaſe* for Years, with a *Proviſo* to be void upon Payment of 10*s.* this Leaſe will be void againſt *Purchaſers*; but if it be a *Mortgage* for a conſiderable Sum of Money, tho' it be in the Power of the *Mortgagor*, yet it is not void.

So if one promiſes a *Woman*, before Marriage to make her a Jointure of 1000 *l.* a Year, and after Marriage makes a *Leaſe* to commence after his Death, for 100 *l.* a Year, with a *Proviſo* that on making the Settlement the Leaſe ſhould be void; yet it was held a good Leaſe againſt the *Purchaſers*. And a *voluntary Settlement* was held void againſt *Purchaſers*, though there appeared no Circumſtances of Fraud in it. Cro. Jac. 455.

A Leaſe in Truſt for his Daughter and Heir to take the Profits to raiſe her a Portion, if ſhe married with the Conſent of the Father, then in Truſt for her after Marriage, it was held to be well enough, and not void; for the Marriage made it a good Conſideration, and the Man might have Reſpect to that in marrying her. 1 Sid. 133.

So, tho' a Deed be *fraudulent* in its Creation, yet by Matter *ex poſt facto*, it may be good; as if one makes a 1 Sid. 134. Dyer 9. Raym. 25.

 1 Co. 122.

Feoffment for a valuable Conſideration, and then the firſt Feoffee enters, and he makes a Feoffment for valuable Conſideration, yet the Feoffee of the firſt Feoffee, ſhall retain the Land. The Cro. 455. Concealing of a Conveyance will not make it *fraudulent*; when upon revealing it it appears to be good.

Hard. 398. 1 Leo. 150, 151, 237, 8. If a Settlement be made in Conſideration of the Marriage, the Conſideration will ſo far extend to all the Eſtates raiſed, tho' not within the Statute, as to cauſe that they ſhall neither be conſtrued *fraudulent* or *voluntary*. If Lands are ſettled in Conſideration of Marriage, and a Portion, with a Power to charge them with 2000*l.* which is done by *Leaſe* and *Releaſe*, the former Conveyance ſhall never be preſumed to be *fraudulent*, and void by the laſt, tho' the Power be not ſtrictly purſued as it ought to be.

2 Roll Abr. 34. A Man makes a *fraudulent Conveyance* to prevent the Eſcheat, and then commits *Felony*, the Land ſhall go to the Lord; ſo if one commits *Treaſon* nine Days after the Conveyance upon his *Son*, the Conveyance ſhall be preſumed *Fraudulent*; otherwiſe, if T. Jones 91. it were made in Purſuance of an Agreement made before. A *Man* and his *Wife* ſeized in Fee of Lands, in Right of

of the Woman, in Conſideration of the Marriage of their Son, and 500 *l.* paid for a Portion, *levy* a *Fine* to the *Uſe* of the Father and his Wife for their Lives, then to their Son, and his Heirs; *Proviſo* that it ſhould be lawful for the Father to revoke, with Conſent of four Perſons, the Relations of the *Son*'s Wife; the Father dies; the Mother, without Conſent, ſells the Lands for valuable Conſideration to other Perſons, it was held that the Vendee ſhould not avoid the Settlement, the Power of Revocation being very much out of the Power of them to effect; the Conſent of ſuch being neceſſary over whom the Father and Mother could not be preſumed to have any Power. Otherwiſe, if the Conſent were lodg'd with thoſe Perſons, that may be ſuppoſed to be at the Diſpoſal of the Perſons to whom the Power is reſerved. — *Fines* levied by *Fraud* ſhall not bind; ſee here ſeveral Caſes of Covin. — A *Sale* in *Market overt* will not bind the Property of Goods. — Tenant for Life, with Remainder to another in Tail, with Power of Revocation, becomes indebted to the King, the whole Eſtate is ſubject to the Debt, though there be no Revocation, nor Averment of Fraud

3 Co. 77. 2 And. 115. Hob. 339.

made.—He that makes a *fraudulent* Gift within the Statute, muſt be the ſame Perſon that afterwards makes a Sale of the Lands.—A verbal Agreement before Marriage, will be of Effect to prevent its being ſaid to be *fraudulent*.

Moor 158.
1 Vent. 194.
Cro. Jac. 454.

ADDITI-

ADDITIONAL

CASES

Inſerted by the

EDITOR, which have been adjudg'd ſubſequent, in Time, to theſe in the foregoing Treatiſe; and a few others omitted by the AUTHOR.

SIR *John Trevor*, late Maſter of the *Rolls*, being ſeized of the Eſtate in Queſtion, which was the ancient Eſtate of the Family, and of the Value of 239 *l. per Ann.* or thereabouts, on his Marriage with *Jane Puleſton*, Widow, enters into Articles on the Twenty-third of *October*, 1669. with the ſaid *Jane*, and with *William Salisbury* and Sir *Richard Lloyd*, as her Truſtees, whereby, in Conſideration of the intended Marriage, and of the Love

Sir J. T. *articles with his intended Wife and Truſtees,*

in Conſideration of an intended Marriage, to convey to the Truſtees, to the Uſes following.

Love and Affection he had and bore to the ſaid *Jane*, and the Heirs Male of their two Bodies, he doth for himſelf, his Heirs, Executors and Aſſigns, covenant, promiſe and grant, with the ſaid Truſtees, their Heirs and Aſſigns, that he would, at his own Coſts and Charges, before the End of two Years next after the Date thereof, at the Requeſt of the ſaid Truſtees, their Heirs and Aſſigns, ſettle, convey and aſſure to the ſaid Truſtees, and their Heirs, as they or their Heirs, or their Counſel ſhould direct and appoint the Lands in Queſtion, to the ſeveral Limitations and Uſes in theſe Preſents mentioned and expreſſed; and alſo in the ſaid Settlement and Conveyance, as ſhould be agreed on by the ſaid Sir *John Trevor*, *William Salisbury* and Sir *Richard Lloyd*, and to no other Uſe or Uſes whatſoever, *viz.* to the Uſe of Sir *John Trevor* for Life, without Impeachment of Waſte, and after his Deceaſe, to the Uſe of the ſaid *Jane Puleſton*, for her Life, and after her Deceaſe to the Uſe of the Heirs Males of the Body of the ſaid Sir *John Trevor*, upon the Body of the ſaid *Jane Puleſton* to be begotten, and the Heirs Males of ſuch Heirs Males iſſuing; and for Default of ſuch Iſſue, to the Uſe of the Right Heirs of

To the Uſe of Sir J. T. for Life, then to the Uſe of his intended Wife for Life, Remainder to the Uſe of the Heirs Males of the Body of Sir J. T. on the Bo-

Sir

Sir *John Trevor* for ever, with a Covenant from Sir *John Trevor*, with the Truſtees, and their Heirs, that the ſaid Premiſſes ſhould remain to the ſaid *Jane Puleſton*, during her Natural Life, after the Death of the ſaid Sir *John Trevor*, free from all Incumbrances, and a Covenant in the Words following: And the ſaid Sir *John Trevor* doth further, for him and his Heirs, grant and agree to and with the ſaid *Will. Salisbury* and Sir *Richard Lloyd*, their Heirs and Aſſigns, that in Caſe the Uſes and Limitations in theſe Preſents are not hereafter well and truly raiſed, according to the true Intent and Meaning of theſe Preſents, that then the ſaid Sir *John Trevor*, and his Heirs, ſhall ſtand and be ſeiſed of all and ſingular the ſaid Premiſſes, until ſuch Time that a further Aſſurance of the ſaid Premiſſes be made, to ſuch Uſe and Uſes, Intents and Purpoſes, as herein before-mentioned, expreſſed and declared; and ſoon after the Marriage took Effect, and Sir *John* had Iſſue by the ſaid *Jane*, the Plaintiff, his eldeſt Son, the Defendants, three younger Sons, and two Daughters; theſe Articles were laid by for ſeveral Years, and nothing further done upon them; but in 1692. Sir *John Trevor* levies a Fine of theſe Lands; and the

dy of the ſaid J. P. *and for Default of ſuch Iſſue, to the Right Heirs of the Covenantor; and Sir* J. T. *further Covenants with the Truſtees, that in Caſe the Uſes before are not truly raiſed, that the ſaid* J. T. *ſhall ſtand ſeiſed until a further Aſſurance be made to the ſame Uſes. The Truſtees died without ever having requeſted a Settlement. Sir* J. T. *levies a Fine, and in order to to diſinherit his Son, declared other Uſes.*

two

two Truſtees being dead, without having ever requeſted a Settlement, the Plaintiff, ſome Time after this Fine, marries againſt his Father's Conſent, and by ſeveral other Acts of Weakneſs and Diſobedience, became ſo obnoxious to his Father, that 29 *Septemb.* 1699. Sir *John Trevor* makes a Deed, wherein he recites theſe Articles, that he had thereby agreed to ſettle and convey theſe Lands to the Uſe of himſelf for Life, Remainder to the ſaid *Dame Jane* his Wife, for Life, Remainder to the Heirs Males of his Body, on the Body of the ſaid Dame *Jane* to be begotten; and reciting that his Son *Edward* (the Plaintiff) was very weak and diſordered in his Underſtanding, and that all Methods to improve him had been ineffectual; and alſo reciting, that he had married with a ſtrange Woman, and thereby brought Diſgrace on his Family, to the Ruin thereof; and that he was of a furious Spirit towards his Brothers and Siſters; therefore, and for ſeveral other Cauſes and Conſiderations, Sir *John* declares that it was the Intent and Meaning of the ſaid Parties, at the Time of levying the ſaid Fine, that the ſame ſhould be and enure to the Uſe of himſelf for Life, without Impeachment of Waſte, then to the

Uſe

Uſe of the ſaid Dame *Jane* for Life, Remainder to the Defendant, *John Trevor*, his ſecond Son, and the Heirs Males of his Body, with like Remainders to *Arthur* and *Tudor Trevor*, his two youngeſt Sons, with Remainder to his own Right Heirs; and a *Proviſo*, that if any of his three younger Sons ſhould marry without his Conſent, that then he ſhould have Power to demiſe or leaſe the ſaid Premiſſes for the Term of 500 Years, reſerving Rent, or no Rent, as he thought fit, to any Perſon or Perſons he ſhould think fit; and on the 16th of *October* next following, he makes the like Settlement of other Lands, of the Value of 630*l. per Ann.* and upwards, and the Twentieth of *May*, 1717. dies inteſtate, leaving a Perſonal Eſtate to the Value of about 40000*l.* and alſo a Real Eſtate in *Ireland*, of the yearly Value of 750*l.* or thereabouts, being let out on Leaſes for Lives, and worth to be ſold, about 24000*l.* and alſo ſome new purchaſed Lands in *England*, of the Value of 300*l. per Ann.* or thereabouts, and by his Death the new purchaſed Lands, and the Eſtate in *Ireland*, deſcended to the Plaintiff, his eldeſt Son, who alſo became entitled to his Share of the Perſonal Eſtate, which amounted to upwards

wards of 9000*l.* After his Death *John Trevor* entered on the Lands ſettled on him, as aforeſaid, for which he being provided for beyond his Share of the Perſonal Eſtate, could have no Part thereof, by Reaſon of the Statute of Diſtributions; and this conſiderably augmented the Shares of *Edward* the eldeſt Son, and the other Brothers and Siſters; notwithſtanding which, the Plaintiff, the eldeſt Son, brought his Bill to have the Truſt performed, and a ſpecifick Execution of theſe Articles, and that the Lands compriſed in the Articles may be conveyed to him, and the Heirs Males of his Body, according to the Purport of the ſaid Articles, and to have a Diſcovery of the Deeds and Writings, and an Account of the Rents and Profits from the Time of his Father's Death. It appeared that theſe Articles had been thrown by for ſeveral Years as uſeleſs, and were, after Sir *John Trevor*'s Death, found at the Bottom of an old Trunk; but the Plaintiff having gotten the ſame into his Cuſtody, brought this Bill for a ſpecifick Performance thereof.

The Plaintiff, the eldeſt Son, brought his Bill to have a ſpecifick Execution of theſe Articles.

For the Defendants it was inſiſted, that though by the firſt Part of the Articles they ſeemed to be only executory, yet by the laſt Part, by the Covenant

venant to ſtand ſeiſed, that they were actually and immediately executed; that he thereby covenanted to ſtand ſeiſed to the before-mentioned Uſes, till a Settlement was made thereof accordingly; that no ſuch Settlement having ever been made, the Uſes continued to be executed by Virtue of that Covenant; that by theſe Uſes he was plainly Tenant in Tail, then by the Fine had bound his Iſſue, and made himſelf Maſter of this Eſtate, which he might ſettle and diſpoſe of as he thought fit; that he was Tenant in Tail, appeared from this, that if a Settlement had been made purſuant to the very Words of the Articles, he had an Eſtate-tail in himſelf; that wherever the Anceſtor takes an Eſtate for Life, and afterwards in the ſame Deed, a Limitation is made to the Heirs Males or Heirs Females of his Body to be begotten; that in ſuch Caſe the Heirs Males, or his Heirs Females take by Deſcent, and not by Purchaſe; that this is a known and ſtanding Rule of Law which has never yet been ſhaken; that the Limitation after to the Heirs Males of ſuch Heirs Males was Tautology, and of no Uſe; that it was ſaying no more than what the Law would have ſaid without thoſe Words; and therefore,

For the Defendant, That no Settlement having been made, the Uſes continued to be executed by Virtue of the laſt Covenant; and that by theſe Uſes he was plainly Tenant in Tail, and by the Fine had bound the Iſſue, and made himſelf Maſter of the Eſtate, which he might ſettle as he thought fit.

if

if there were two ſuch Limitations one after another, they would not impeach or controul the firſt Limitation; and this appears clearly by *Shelley*'s Caſe, 1 *Co.* and in a Caſe of * *Legat* and *Sewell* in this Court, where the Judges of *C. B.* by Certificate under their Hands, gave their Opinions accordingly, that the Settlement being actually executed, the Law was open, and the Plaintiff had no Occaſion to come into this Court for a ſpecifick Execution of what was already executed; that this was plain from the Covenant, that the Wife ſhould enjoy during her Life, free from Incumbrances; and this Covenant does not go to the whole Eſtate agreed to be ſettled, but only to the Eſtate for Life of the Wife; that if the Iſſue were intended to take as Purchaſers, this Covenant would have been extended to the whole Eſtate, as the Iſſue under this Marriage Contract were Purchaſers of it, as well as the Wife; but the Heirs Males of the Body of Sir *John Trevor*, coming in only by Virtue of the Intail, it would have been vain and idle to have carried that Covenant beyond the Eſtate for Life of the Wife, becauſe it would only be a Covenant for himſelf, that the Clauſe without Impeachment of Waſte did not neceſſarily argue an

* Vide *this Caſe*, infra *Letter* (F.) *Caſe* 7. *reported* cont'.

Eſtate for Life in Sir *John Trevor*; that it was for the Sake of the intervening Jointure to his Wife, which would have obſtructed that Power without expreſs Words; and he might have been enjoined for Waſte in this Court, for the Preſervation of her Jointure, if he had not reſerved to himſelf an expreſs Liberty of committing Waſte; that this Court was not bound in all Caſes to carry Articles executory (admitting this were ſo) into Execution; that if the Nature and Circumſtance of the Caſe were ſuch as to make it unequitable and unconſcionable, this Court would never decree a ſpecifick Execution of Articles; that in this Caſe it was unreaſonable to ask Aſſiſtance of this Court, when ſo much greater Compenſation was to come to the Plaintiff; that by the Deſcent of ſo a Real Eſtate, and the Acceſſion of ſo great a Share of the Perſonal Eſtate, the Plaintiff was abundantly recompenſed for the Value of the Eſtate in Queſtion; that it was in Sir *John Trevor*'s Power to have prevented them of either, and his not doing it was equivalent to an expreſs Deviſe thereof to him, and therefore ought to be looked on as a Satiſfaction; that in the Caſe of *Blandy Wigmore*, in this Court, where the Huſ-

band, before Marriage, gave a Bond to leave his Wife worth 500*l.* if ſhe ſurvived him; and he afterwards died inteſtate; and her diſtributive Share came to above 500*l.* this was adjudged a Satisfaction of the Bond; that Sir *John Trevor* plainly took it, he had a Power over this Eſtate; that his Judgment was ſo well known, that he never would have attempted it, if he had not thought it clear; that the Diſobedience and Behaviour of his Son, the Plaintiff, were ſuch, as put him under a Neceſſity of conſidering the Nature and Extent of his Power over this Eſtate; and ſince he, who was ſo good a Judge in Caſes of this Nature, had diſpoſed of the Eſtate, this Court would preſume he had Power ſo to do, and that the Motives of his Proceeding herein were juſt and warrantable.

But decreed for the Plaintiff.

But notwithſtanding theſe Reaſons, it was agreed for the Plaintiff; my Lord *Chancellor* ſaid, this ought to be conſidered now as if this Bill had been brought within two Years after the Making of the Articles; that if a Bill had been then brought, there could have been no Doubt but that a Settlement muſt have been decreed purſuant to the Intention of the Articles; that upon Articles the Caſe was ſtronger than on

a Will; that Articles were only Minutes or Heads of the Agreement of the Parties, and ought to be ſo modelled when they come to be carried into Execution, as to make them effectual; that the Intention of the Parties was only to give Sir *John Trevor* an Eſtate for Life; that if it were otherwiſe, it would have been vain and ineffectual; and it would have been in his Power, as ſoon as the Articles were made, to have deſtroyed them; that then the Conſideration of Love and Affection which he had to *Jane*, and the Heirs Males of their two Bodies, would have run thus; that he did, in Conſideration thereof, ſettle an Eſtate on himſelf, which he might give away from his Heirs Males whenever he thought fit; that this was much ſtronger, by Reaſon of the Limitation, and to the Heirs Males of ſuch Heirs Males iſſuing; that the Conſtruction contended for by the Defendant, would make theſe Words perfectly uſeleſs and idle; that he did indeed admit it to be ſo reported in *Shelley*'s Caſe, 1 *Co.* but he ſaid, 1*ſt*, That was not material to the Principal Point in Queſtion there. 2*dly*, That in *Anderſon*'s *Report* of that Caſe, nothing like it was taken Notice of, and he ſaid, that few or none of the Points

For the Intent of the Articles was that Sir J. T. ſhould have but an Eſtate for Life.

reported by Lord *Cook*, were the Reſolutions of the Court. 3*dly*, That the Reaſon of the Caſe was, for that if it had veſted in the eldeſt Son by Purchaſe, and that Heirs Males of the Body ſhould have been a Deſcription of a Perſon; that then, if he had died without Iſſue, there had been (as was then held) an Eſtate-tail, and none of the younger Sons could have ſucceeded it; but this has been held otherwiſe ſince that Time, and a Judgment in Point, in *Carter*'s *Reports*, (as he remembered) that the Eſtate-tail ſhould go to all the Sons ſucceſſively, notwithſtanding its veſting in the eldeſt Son by Purchaſe; that he did not know how the Caſe of *Legat* and *Sewell* was; but if it were as cited, he thought it not Law; that the Intention of the Articles was plain, to make the Iſſue of that Marriage Purchaſers; that they were wholly relative to a ſubſequent Settlement to be made, that the Agreement to ſettle to the *Uſes* therein, and alſo in the ſaid Settlement to be agreed upon, could only be intended to ſuch other *Uſes* as were neceſſary to make the Settlement effectual; and that it could never be intended other *Uſes* inconſiſtent with, and repugnant to thoſe Articles; that if that had been their Intent,

And a plain Intent of the Articles to make the Iſſue of that Marriage Purchaſer.

That the other Uſes within were appointed to be raiſed by the Articles move, not to be repugnant or contrary to the Articles.

Intent, it had been in Effect but Agreement with the Truſtees to ſettle thoſe Lands as he thought fit; that the other *Uſes* to be agreed upon, muſt not be ſuch as would overthrow the preſent *Uſes*, but ſuch as would eſtabliſh and ſupport them; that this could only be by a Limitation to Truſtees to ſupport the contingent Remainders; that this Limitation to the Heirs Male of his Body was in Effect but a Limitation to his firſt and other Sons; and if the Articles had been ſo penned, would not this Court have decreed a Limitation to Truſtees to preſerve them? or if by Fine, or otherwiſe, they had been deſtroyed before they took Place, would not this Court have ſet them up again? that the Limitation to the Heirs Males of his Body, upon theſe Articles, was but a contingent Remainder, and yet ſuch as within the Intent of the Parties ought to be preſerved; that the Covenant to ſtand ſeiſed was until ſuch Time as the *Uſes* therein were well and truly raiſed, according to the true Intent and Meaning of the Articles; that if a Settlement had been made Defective in any Particular, that would not have been final or concluſive; that a ſecond Settlement muſt have been made till the *Uſes* therein

And if the contingent Uſes there mentioned, had been deſtroyed by a Fine, the Court of Chancery would have ſet them up again.

were well and truly raiſed, according to the true Intent and Meaning of the Articles; that if a Settlement had been made Defective in any Particular, that would not have been final or concluſive; that a ſecond Settlement muſt have been made till the *Uſes* therein were well and truly raiſed; that this Covenant for ever ſubſiſted till ſuch Settlement were made; that he did not believe it was Sir *John Trevor*'s Opinion, that he was abſolute Maſter of this Eſtate, and might diſpoſe of it as he thought fit; that if that had been his Opinion, he would have thought it ſufficient to have levied a Fine thereof, without tranſmitting down his Son to Poſterity with ſuch a Blemiſh; that the Reaſon of that could only be to diſcourage his Son from attempting to break in to the Settlements he had made of this Eſtate; that if it were otherwiſe, he thought it no Imputation on Sir *John Trevor*'s Judgment; that the Provocations he might be under from his Son's Diſobedience and Miſbehaviour, might ſo far biaſs his Judgment, as to incline him to think he had Power over this Eſtate, that he would not look on theſe Settlements in 1699. as made by Sir *John Trevor*, Maſter of the *Rolls*, but as made

made by a Father, provoked by the undutiful Behaviour of an eldeſt Son; that he hoped never to ſee the Time when this Court ſhould ſo far have Power as to judge what Behaviour of a Son ſhould amount to a Forfeiture of his Eſtate; and therefore thought, if the Settlement had been made, no Miſbehaviour of the Son could amount to a Forfeiture of it; that as to the Eſtate deſcended on the eldeſt Son, this came to him by Accident, it was not given to him by his Father in Satisfaction of the Articles; and there may happen a Caſe where no Eſtate at all may deſcend to an eldeſt Son; and if a Father, upon ſuch Articles ſhould have Power to defeat an eldeſt Son, and leave him no other Proviſion, it would be of dangerous Conſequence to eſtabliſh a Precedent of ſuch a Power; that tho' the eldeſt Son in this Caſe happened to be well provided for, ſo were the younger Sons too; and as they were ſufficiently provided for, there was the leſs Reaſon to take away this from the Eldeſt; that this Eſtate being ſpecifically agreed to be ſettled, it was a Truſt for the eldeſt Son, which he came here to have an Execution of, and not to have a Recompence or Satisfaction for it; that this Truſt paſſed with the Lands into

And therefore a Conveyance was decreed to be executed to the Plaintiff, and the Heirs Males of his Body; and an Account of the Profits from the Father's Death, and the Deeds and Writings to be delivered up.

whoſe Hands ſoever they came, and could not be defeated by any Act of the Father, or the Truſtees; and therefore decreed a Conveyance to the Plaintiff, and the Heirs Males of his Body, and an Account of the Profits from the Father's Death, and the Deeds and Writings to be delivered up. *Trin.* 1719. between *Trevor* and *Trevor*.. This Decree was affirm'd in the Houſe of Lords.

Hill. 11 Geo. *in Chancery.*

Modern Caſes in Law and Equity, 2d Part, 128.

THE *Father* of the *Plaintiff*, and the *Defendant*, in Conſideration of his Marriage with their Mother, and of a Portion in Money, did in the Year 1673. article to ſettle his Eſtate to the Uſe of *himſelf for Life*, then to *his intended Wife* for Life, then upon *Truſtees*, to preſerve *contingent Remainders*, then to the *firſt Son* of that Marriage, and to all and every the Sons, *&c.* in *Tail Male*, with ſeveral *Remainders* over, with Power to make a Jointure to any Wife of 1000*l. per Ann.* and a *Proviſo* that it ſhould be lawful for him, by and with the Conſent of the Truſtees, to ſell the Eſtate, and with the

the Money ariſing by ſuch Sale, to purchaſe other Lands, and to ſettle the ſame to the like *Uſes*, as in the ſaid Deed, dated *Anno* 1673.

Afterwards the Father ſold the Lands, and with the Money purchaſed other Lands, now in Queſtion; and in the Year 1692. he ſettled the new purchaſed Lands, by and with the Conſent of the Truſtees, in the firſt Settlement, to the *Uſe* of himſelf for Life, Remainder to the Defendant for Life, (*who by the firſt Settlement had an Eſtate-tail*, Remainder to Truſtees, to preſerve contingent Remainders, then to his firſt and every other Son in Tail Male, with ſeveral Remainders over, with a Power to make a Jointure to any Woman he ſhould marry, of the *yearly Value of* 600*l.* and ſoon after the Father died.

Then the Defendant, who was his eldeſt Son, in Conſideration of his Marriage, and of a Marriage-Portion by Deed, dated 1698. conveyed the new purchaſed Lands to Truſtees to the *Uſe* of himſelf for Life, then to his intended Wife for Life, then to Truſtees to preſerve contingent Remainders, then to his firſt and every other Son in Tail Male, with ſeveral *Remainders over*.

The

The Defendant, *Thomas Reeves*, having only a Daughter, and no Iſſue Male by his ſaid Marriage, would now ſell theſe Lands, alledging that the Remainders limited to the Iſſue Male, were *voluntary*, not being within the Conſideration of the Settlement made by him in the Year 1698.

Therefore this Bill was exhibited by the next in Remainder to obſtruct the Sale, and to oblige the Truſtees to enter to preſerve the contingent Remainders, and that the Deeds and Evidences may be brought into Court to know how the Title ſtands, he ſuggeſting that by the *Marriage Articles* of their Father, dated *Anno* 1673. he covenanted to ſettle his Eſtate, as aforeſaid, but with a Proviſo to ſell the ſame, by and with the Conſent of the Truſtees, and to purchaſe other Lands, and to ſettle them upon the ſame *Uſes*, as in the firſt Settlement, *&c.*

And it was argu'd for the Defendant, that the Settlement in 1673. made upon the Marriage of the Father, both of the Plaintiff and Defendant, though mentioned to be by *Articles* only, was and is a good Settlement, by Way of *Covenant* to ſtand ſeiſed; and that the Defendant is by the expreſs Words of that Settlement, made *Tenant in Tail* of the Lands ſold, and the Proviſo being

ing to ſettle the new purchaſed Lands to the ſame *Uſes*, as in the firſt Settlement, it was not in the Power of his Father to make him *Tenant for Life*, by any other Settlement whatſoever; ſo that he muſt ſtill remain *Tenant in Tail of the new purchaſed Lands*, and that Settlement made by his Father in the Year 1692. when he purchaſed thoſe Lands as far as it croſſes the Limitations in the firſt Settlement is entirely void, being *voluntary*; ſo that the Settlement made by the Defendant in the Year 1698. upon his Marriage, is good, and ſuch of the Lands which are not contained in that Settlement, the Defendant may ſell, and the Plaintiff hath no Right to conteſt the Sale, even of thoſe Lands, he being no Ways within the Conſideration of that Settlement.

On the other Side it was inſiſted for the Plaintiff, that this Settlement made by the Father, in the Year 1692. of *the new purchaſed Lands*, appears on the very Face of it, to be made in Conſideration of the Settlement made by him in the Year 1673. which tho' mentioned to be by Articles; yet ſtrictly ſpeaking, thoſe Articles amounted to a *Covenant to ſtand ſeiſed*, and the Settlement made in 1692. being in

Execu-

Execution of that Covenant, and acquieſced under ever ſince it was made, muſt be now taken as a full and entire Execution of that Covenant; and tho' the Father could not be compelled by a Court of Equity to make the Defendant *Tenant for Life*, who by the firſt Settlement was *Tenant in Tail*, yet the Father having of his own Accord, and with the Conſent of the Truſtees, made this Settlement, and no Objection made to it, during his Life, the Defendant ſhall not be admitted to ſay it is not good, it not correſponding with the Proviſo in the firſt Settlement.

This is not the like Caſe of *Wakely* againſt *Wakely*, where the Father on his Intermarriage, *&c.* articled to convey his Eſtate to the *Uſe* of himſelf and his Wife, for Life, *Remainder to the Heirs of their two Bodies*; and afterwards he had Iſſue a Son, who coming of Age, the Father, by his Laſt Will, which he mentioned to be in Execution of the Articles, deviſed the Eſtate to his Son *for Life*, Remainder to his firſt and every other Son, *&c.* in Tail Male, with ſeveral Remainders over, and afterwards the Son brought his Bill in this Court, to be relieved againſt this Deviſe, it not correſponding with

with the Articles; and the Court declared that tho', by the *Equity of the Articles*, the Son ſhould be *Tenant in Tail*; and if he had ſued in this Court, to compel the Father to an Execution of the ſaid Articles, the Court would have decreed an Eſtate-tail to him; yet if the Father, by the Conſent and Approbation of the Truſtees, had made ſuch a Settlement, this Court would never ſet it aſide.

But in that Caſe the Father had done it by his Laſt Will, without the Conſent of the Truſtees, and without the Conſent of the Son, who was then of Age, and by that Means the Son, having no Power to make a Jointure, or any Charge on the Lands, to make Proviſion for the younger Children, that Deviſe was ſet aſide.

But in the Principal Caſe, the Settlement in 1692. was made by *the Conſent of the Truſtees* in the firſt Settlement, which is therefore good, and a full Execution of the Covenant in that Settlement.

And ſo is *Mathews*'s *Caſe*, who by his Father's Marriage Articles, was made *Tenant in Tail*; but ſome Time afterwards the Father made a Settlement, by which *Mathews* was made *Tenant for Life*, with a Power to ſettle

tle a Jointure of 600 *l.* a Year, on any Woman he ſhould marry; and being about to marry, it was the Opinion of ſeveral eminent Lawyers, he could make no greater Jointure; for tho' he was *Tenant in Tail, by the Articles*; and if it reſted there, he might have made what Jointure he thought fit, yet *being Tenant for Life*, by a ſubſequent Settlement varying from the Articles, he could not make the Jointure beyond 600 *l. per Annum*, and thereupon he applied to the Parliament, and obtained an Act to make up the Jointure 1000 *l. per Annum*, but that his Eſtate in Poſſeſſion, and all the Remainders over, ſhould continue as before.

Next, the Counſel for the Plaintiff cited the Caſe of *Burton* againſt *Haſtings*, in this Court, which was thus, (*viz.*) By the Marriage Articles the Wife's Eſtate was to be ſettled on the Husband and Wife, and on the Heirs of their *two Bodies* to be begotten, and afterwards it was ſettled to the *Uſe* of the Husband and Wife, during their Lives, Remainder to the firſt and every other Son of the Husband in Tail Male, Remainder to *the Heirs of the Body of the Wife*; they had no Son, and but one Daughter, the Husband died, and the Widow married again, and

and then the Husband and Wife joined in a Fine, and ſettled the Eſtate to other *Uſes*; thereupon the Daughter exhibited her Bill, and prayed Relief on the Articles; becauſe by the Equity thereof, the Husband and Wife ought to be but *Tenants for Life*, and the ſubſequent Settlement could not enlarge the Eſtate of the Wife to an *Eſtate-tail* general, (*viz.*) *to her and the Heirs of her Body*; but ſhe had no Relief; the *Lord Chancellor Cowper* declaring he could not relieve againſt the Settlement, tho' if it reſted on the Articles, without any Settlement made, he would have decreed that the Articles ſhould be carried into Execution.

It was further inſiſted for the Plaintiff, that he was proper in this Application, and had Reaſon to pray the Aid of this Court; and for that Purpoſe a Caſe was cited between Sir *Richard Mead* and the Lord *Kerry*, which was thus, (*viz.*) The late Lord *Kerry*, in Conſideration of a Marriage and a Marriage Portion, ſettled his Eſtate to the *Uſe* of himſelf for Life, then to Truſtees to preſerve contingent Remainders, then to his firſt and every other Son, in Tail Male, *&c.* and before he had any Iſſue, he borrowed Money of the Plaintiff; and for ſecuring the Repayment thereof, with

with Intereſt, he levied a *Fine*, *&c.* and upon a ſpecial Verdict found in the Cauſe, the Queſtion was if the Charge was good againſt the preſent Lord; for that on his Father's levying the Fine, the Truſtees did not enter to preſerve the contingent Remainders; ſo that it is very proper that the Plaintiff in the Principal Caſe ſhould come into this Court to compel the Truſtees to enter, in order to preſerve the contingent Remainders, eſpecially ſince the Plaintiff is a Purchaſer under the Settlement made 1692. for that his Father, who made that Settlement, had thereby abridg'd his Power of Charging the Eſtate with 1000 *l. per Annum*, which by the Settlement made *Anno* 1673. he had Power to do.

Curia. Every *Remainder Man* hath a Right to come into this Court, and pray the Aid thereof, to compel Perſons to bring in the Deeds and Evidences relating to the Eſtate; but this is a Bill of the firſt Impreſſion, as to the Prayer; for the *Truſtees to enter to preſerve contingent Remainders*; for their Title is meerly at Law, neither doth it appear in Cauſe that the Truſtees refuſed to enter.

Now, if this Caſe is conſidered upon the Deed made *Anno* 1673. the De-

fendant is *Tenant in Tail* of the Lands thereby ſettled; but the Deed made 1692. of the *new purchaſed Lands*, was intended to be a Family *Settlement*, and a full Execution of the Covenant in the Deed, made 1673. by which Deed the Defendant being made *Tenant for Life*, he ſhall not be at Liberty to incumber any Part of the Lands thereby ſettled by his Father; therefore the Decree was for the Plaintiff.

And in pronouncing this Decree, the *Lord Chancellor* ſaid, that where a Settlement is made by the Father, or other lineal Anceſtor, in Conſideration of the Marriage of his Son, in ſuch Caſe all the Remainders limited to his Children and their Poſterity, are within the Conſideration of that *Settlement*; but when it is made by a Brother, or any other collateral Anceſtor, on his Marriage, after the *Limitations* to his own Iſſue, all the Remainders limited to his Collateral Kindred are voluntary, and not within the Conſideration of the *Marriage Settlement*.

Vane againſt his Father, Lord Barnard.

Trin. 7 Annæ, in *Chancery*; *Chancellor* Cowper.

THE Lord *Barnard*, for the Advancement of the Plaintiff, a younger Son, in Marriage, Sir—— *Jolliff*'s Daughter enters into Articles with Sir——*Jolliff*, to this Effect:

Jolliff covenants and agrees, *inter alia*, to ſettle Lands free from Incumbrances, according to the uſual Limitations in Marriage-Settlements; and in Conſideration thereof, the Lord *B.* covenants and agrees to ſettle Lands, by the Name of the Value of 2000*l. per Annum*, (but with a Life or two upon them) upon Truſtees, to like Uſes; but with theſe Words, *That in ſuch Settlement there ſhall be Covenants that he is ſeiſed in Fee, has good Right to convey, and that the Truſtees ſhall enjoy, free from Incumbrances.* It happen'd that theſe Lands were charged by Lord *B.*'s own Marriage-Settlement, with 6500*l.* to be paid to ſuch Daughter or Daughters, as ſhould be living at my Lord's Death, and not provided for.

The Bill was to have a ſpecifick Performance of the Articles, by my Lord's paying off, or otherwiſe giving collateral Security againſt this contingent Portion of 6500*l.* he having then one Daughter about Sixteen Years old. It was urged for the Plaintiff, that it was uſual for this Court to decree a ſpecifick Performance of Articles and Covenants, and not to depend only upon the uncertain Reparation of Damages which the perſonal Eſtate may perhaps not be able to ſatisfy; and this was not controverted where it was poſſible to be done. But the Lord Chancellor held, that here was not any Covenant that the Lands were free from Incumbrances, but only a Covenant that he would, in the Settlement (which was after to be executed) covenant for that Purpoſe; ſo that the Parties ſeem'd to be ſatisfied with a bare Covenant only; and the Marriage-Articles were only a Covenant to covenant; ſo that inſerting that Covenant in the future Settlements, was a ſpecifick Performance of thoſe Articles; and was all that my Lord agreed to do, or that the Plaintiff, by his Bill, deſir'd to have.

My Lord Chancellor ſaid, Notice or no Notice of this Incumbrance was

very material in this Caſe; for a Covenant is in this Manner: If any Incumbrance is diſcover'd between the Executing the Articles and Sealing the Deed of Settlement, whereof the Party had no Notice, that Incumbrance ſhall be diſcharg'd, even before Sealing the Deed of Settlement, both upon Account of the Fraud, in concealing ſuch Incumbrance; and becauſe it would be needleſs to enter into a Covenant, which before entering into it is already known to be broke. But againſt all other Incumbrances diſcovered afterwards, there is the Parties Covenant only. Now where you have Notice of an Incumbrance, before executing the Articles, it is a ſtronger Caſe than the laſt; for you covenant with your Eyes open, to accept the Parties Covenant againſt an Incumbrance you were aware of; and when you have choſen your Method of Security your ſelf, this Court will give you no other, nor make the Party do a farther Act than by the Articles he has agreed to do; and the rather in this Caſe, for that the Portion it not a certain Incumbrance, but a contingent one; and therefore it is reaſonable to ſuppoſe, that my Lord *Barnard* would not be compell'd to charge his remaining Eſtate, at all Hazards,

to ſecure againſt an Incumbrance that was but contingent, to the Prejudice of his eldeſt Son, eſpecially when he had provided for the younger Son ſo plentifully. And decreed that my Lord *B.* ſhould execute a Deed of Settlement, with Covenants exactly purſuant to the Articles only. But becauſe the Eſtate was ſubject to a preſent Charge, *viz.* to the Payment of a yearly Sum for the Daughter's Maintenance, from her Birth; that the Lord *B.* ſhould pay and diſcharge all Arrears of that and the growing Annuity, as it ſhall ariſe, taking Acquittances from his Daughter, and leaving them with the Plaintiff for his Security.

It was ſtrongly urged by Mr. *Vernon*, That ſuppoſing theſe Articles were but a Covenant to covenant, yet as ſoon as the Articles were perform'd, by ſealing the Deed of Settlement, then they might come the next Day and exhibit their Bill to enforce an Execution, ſpecifically of the Covenant in ſuch Deed of Settlement; and why may not the Court decree that to be done now, as well as that which after the Performance of this Decree, they will immediately decree upon a new Bill.

Lord Chancellor ſaid, in this Caſe, they could not; for the Incumbrance

was not neceſſary, but contingent; and if you brought an Action at Law upon ſuch a Covenant, you ſhould not recover Two-pence Damages, 'till a Breach, which poſſibly may never happen. Beſides the Covenant in the Deed of Settlement, is not to be that the Eſtate is free from Incumbrances, but that the Truſtees ſhall enjoy free from Incumbrances; which ſo long as they do, the Covenant is not broke; and it ſeems the Portion being contingent, and not certain, was the Reaſon of this Part of the Decree, becauſe it is plain, by the latter Part of the Decree, where the Incumbrance was certain (*viz.* the Payment of a certain Sum) the Lord *B.* was decreed immediately to diſcharge it; tho' by the Articles he did but Covenant to Covenant, as is aforeſaid; and there is no other Difference between thoſe two Matters, in controverting the Point of Notice in this Caſe. It appear'd that Sir *Edward Northey* was employ'd as Counſel by the Plaintiff; and *Jolliff* had Notice, as he owned, but afterwards, he not being able to diſpatch it faſt enough, the Matter was taken out of his Hands, and one Sir —— was employ'd, who drew the Writing, and finiſh'd the Matter, and no Proof was made, that he had any Notice of this

Incum-

Incumbrance; whereupon the Queſtion was, Whether Notice to a Counſel, or Agent, that is once employ'd, and goes not through with the Buſineſs, ſhall be Notice to the Party himſelf? for it was allow'd on all Hands, that if he goes through Notice to Counſel, Attorney, Scrivener, or any other Agent, it is ſufficient Notice to the Party himſelf.

The Chancellor was in Doubt, but another Proof of Notice being accidentally diſcover'd, this Matter was not determin'd; for it appears that in theſe Articles, Notice was taken of my Lady *B.*'s Jointure in theſe very Lands, which neceſſarily leads to the Deed, whereby that Jointure is made; and in that Deed there was this Portion charged upon the Lands, and whatever is contained in a Deed to which any other neceſſarily leads you, you are preſumed to know, which was allow'd, without a Word more.

Note the Difference between a preſent Covenant, that Lands are free from Incumbrance, and that a Man ſhall execute a Deed, with a Covenant that the Lands are free,

And between a Covenant that Lands are free, and that the Truſtees ſhall enjoy the Lands free.

If a Man deviſes 1500*l.* to *A.* and *B.* for ſuch Uſes as the Teſtator had declar'd to them, and by them not to be diſcloſed, and he diſcloſes the Truſt to *A.* who by Letter diſcloſes it to *B.* this ſhall be a Truſt, and the Letter is a good Declaration thereof, tho' either or both the Truſtees be dead. *Trin.* 1689. between *Crooke* and *Brooking.* 2 *Vern.* 106.

But if a Man deviſes Forty Pounds to be paid to his Couſin *J. S.* and by him to be diſpoſed of in ſuch Manner as the Teſtator ſhould by a private Note acquaint him with, and dies without having made any ſuch Appointment, this ſhall be a good Requeſt to *J. S.* and ſhall not go to the Executors, from whom it was intended to have been given away. 1 *Chan. Caſes* 198.

If an Impropriator deviſes to one that ſerved the Cure, and to all that ſhould ſerve the Cure after him, all the Tithes and other Profits, *&c.* tho' the Curate is incapable of Taking by this Deviſe, in ſuch Manner, for want of being Incorporate, and having Succeſſion, yet the Heir of the Deviſee ſhall be ſeiſed in Truſt for the Curate for the Time being. 2 *Vent.* 349. decreed by *Finch* Lord Chancellor.

A. lent

A. lent *B.* 100*l.* and in the Note which was given, Mention was made that it ſhould be diſpoſed of as *A.* ſhould direct, on a Bill exhibited for it; the Court declared it was a *Depoſitum*, or Truſt, and decreed Payment of it, tho' it was barred by the Statute of Limitations. 2 *Ven.* 345.

If *A.* in Conſideration of Eighty Pounds, conveys an Eſtate abſolutely to *B.* and afterwards *A.* brings a Bill to redeem, and *B.* by Anſwer, inſiſts that the Conveyance was abſolute; but confeſſes that after the Eighty Pounds paid, with Intereſt, it was to be in Truſt for the Wife and Children of *A.* and *A.* replies to the Anſwer, though there be no other Proof of the Truſt, yet it will be decreed for the Wife and Children. *Paſch.* 1693. between *Hampton* and *Spencer.* 2 *Vern.* 288, 289.

So if *J. S.* makes his Will, and his Wife Executrix, and the Son afterwards prevails on his Mother, by telling her, *&c.* to get *J. S.* to make a new Will, and name him Executor therein, he promiſing to be a Truſtee for the Mother, which is done accordingly; and in that Will there is but a ſmall Legacy given the Wife, this will be decreed a Truſt for the Wife, on the Point of Fraud, notwithſtanding the Statute of *Frauds*

and

and *Perjuries*. *Hill.* 1684. between *Thyn* and *Thyn*. 1 *Vern.* 296.

If a Man purchaſes Lands in another's Name, and pays the Money, it will be a Truſt for him that paid the Money, tho' there be no Deed made, declaring the Truſt thereof; for the Statute of *Frauds* and *Perjuries* extends not to Truſts raiſed by Operation of Law. 2 *Vent.* 361. 1 *Vern.* 366. *S. P.* admitted; but there ſaid that the Proof muſt be very clear that he paid the Purchaſe-Money.

If there are three Leſſees of a Church, and one of them ſurrenders the old Leaſe, and takes a new Leaſe in his own Name, it ſhall be a Truſt for all. *Mich.* 1684. between *Palmer* and *Young*. 1 *Vern.* 276. *per Curiam.*

A. and *B.* agreed together to take a Leaſe of a Colliery for leſs than three Years, for which they contracted at a certain Rent; but by the Agreement, the Leaſe was taken in *A.*'s Name only, tho' at the Time of the executing thereof, the Leſſor inſiſted that *B.* ſhould be a Joint Leſſee with *A.* and ſhould receive a Moiety of the Profits, and be anſwerable for a Moiety of the Rent, and refuſed to let it on any other Terms, and accordingly demanded and received a Moiety of the Rent from

B. on

B. on a Bill brought by *B. A.* pleaded the Statute of *Frauds* and *Perjuries*, and that there was no Declaration of a Truſt in Writing, *B.* inſiſted that it was good, being a Leaſe for leſs than three Years; or if his Title was not good on that Account, yet it was good, as a reſulting Truſt; as to the firſt, the Court held, that tho' a Leaſe for three Years may be good by Parol, yet when ſuch a Leaſe is made in Writing, the Truſt of that Leaſe cannot be declar'd by Parol; and as to the ſecond, ordered the Plea to ſtand for an Anſwer; the Judge who ſate in my Lord Chancellor's Abſence, being in Doubt about it, tho' he inclin'd to over-rule the Plea. *Mich.* 1682. between *Riddle* and *Emerſon.* 1 *Vern.* 108.

A.'s Father had executed a Grant of the next Avoidance of a Church, to *B.* the Defendant's Father, who was a Clergyman, and a Perſon much intruſted and employed by him, and the Grantee knew nothing of the making of this Grant; and being examin'd in a Cauſe, had depoſed that he did not purchaſe it; and it was held that this was a reſulting Truſt to the Grantor, there being no other Truſt declared. *Hill.* 1697. between the Duke of *Norfolk* and *Brown.*

But

But if the Mortgagee aſſigns over his Mortgage to *J. S.* and declares a Truſt thereof by Parol, for *A.* and *B.* only, it ſhall prevent a reſulting Truſt to the Aſſignor; for the Statute of *Frauds*, which ſaves reſulting Truſts, extends only to ſuch as were reſulting Truſts before the Statute, and a bare Declaration by Parol, before the Act would prevent any reſulting Truſt. *Trin.* 1693. between Lady *Bellaſſis* and *Compton.* 2 *Vern.* 294. but no Decree.

If a Father purchaſe Lands in the Name of his eldeſt Son, this ſhall be an Advancement for the Son, and not a Truſt for the Father, though the Father has been in Poſſeſſion of it, and has receiv'd the Rents and Profits thereof. *Hill.* 28 *Car.* 2. between Lord *Gray* and Lady *Gray*, 1 *Chan. Caſes* 296. 1 *Chan. Caſes* 27. *S. P.* 2 *Chan. Caſes* 231. *S. P.* and there ſaid to be the conſtant Rule.

So where the Lord of a Weſt-Country Manor, his Tenants refuſing to renew, made a Leaſe to his Daughter, for Ninety-nine Years, and afterwards ſold the Eſtate to *J. S.* who had Notice of the Leaſe, and took a collateral Security that the Daughter ſhould releaſe within Four Years after ſhe attained her Age of Twenty-one Years; and

and though it was inſiſted that this was a Truſt for the Father; and that it was the uſual Method that Lords of Weſt-Country Manors took, when the Tenant in Poſſeſſion refuſed to renew; yet my Lord Chancellor held it no Truſt for the Father, but an Advancement for his Child; and that the Purchaſer having purchas'd with Notice of it, and taking a Collateral Security, he muſt make the beſt of his Security. *Trin.* 1687. between *Jennings* and *Selleck.* 1 *Vern.* 467. decreed.

So if a Father purchaſes a Copyhold Tenement, in the Name of his eldeſt Son, an Infant of about Eleven Years old, and lays out 400*l.* in Improvements, pays the Purchaſe-Money, and all the Fines, and enjoys it, during his Life, but having ſurrendered it to the Uſe of his Will, deviſes it to his Wife for Life, and after to his younger Children, who were otherwiſe unprovided for, and the eldeſt Son recovers in Ejectment, the Wife and Children cannot be relieved againſt it; for the Purchaſe ſhall be conſider'd as an Advancement for the Son, and not a Truſt for the Father, tho' he enjoyed it during his Life; for the Son was but an Infant at the Time of the Purchaſe. *Paſch.* 1687. *Mumma* and *Mumma.* 2 *Vern.*

2 *Vern.* 19. 2 *Vern.* 28. *S. P.* decreed.

A Man bought Copyhold Lands of the Nature of Borough *Engliſh*, in the Name of his eldeſt Son, but there was no Declaration of Truſt in Writing; but the Plaintiff would have had it a Truſt; for the Father, who as well as the Eldeſt, were both dead; it was agreed the Father paid the Purchaſe-Money, and many Witneſſes were examin'd on both Sides. And Acts of Ownerſhip, as Receipts of Rents, Repairs, *&c.* prov'd in both Father and Son; ſo that the Proofs, as to the Matter, ſeem'd to be pretty equal; but there being no Declaration in Writing that it was a Truſt for the Father, the Court decreed it an Advancement for the Son, which was affirm'd in the Houſe of Lords. *Trin.* 1701. between *Shales* and *Shales*.

So if a Father purchaſes in his eldeſt Son's Name, and the Son is put into Poſſeſſion, who afterwards falls ſick, and in his Sickneſs the Father gets him to ſeal a Deed, declaring his Name was made uſe of only in Truſt for him, and the Son recovers and continues in Poſſeſſion, and marries, after his Deceaſe his Wife ſhall be endow'd, notwithſtanding this Declaration of Truſt; and

and though the Father had got a Conveyance of the legal Eſtate from the younger Sons; for this is a Secret and fraudulent Deed of Truſt, to deceive Creditors and Purchaſers. *Paſch.* 1702. between *Bateman* and *Bateman.* 2 *Vern.* 436.

If the Grandfather takes Bonds, in the Name of his Grandchildren, the Father being dead, this ſhall be an Advancement for the Grand Children, and not a Truſt for the Grandfather; for the Father being dead, the Children are under the immediate Care of the Grandfather. *Paſch.* 32 *Car.* 2. between *Ebrand* and *Dancer.* 2 *Chan. Caſes* 26.

If Lands are deviſed to Truſtees and their Heirs, in Truſt for a Feme Covert, and that the Truſtees ſhall from Time to Time pay and diſpoſe of the Rents and Profits to the ſaid Feme Covert, or to ſuch Perſons as ſhe, whether Sole or Covert ſhall appoint; and that her Husband ſhall have no Benefit thereof; and as to the Inheritance in Truſt to ſuch Perſons as ſhe by Will, or other Writing, under her Hand ſhould appoint; and for Want of ſuch Appointment to her and her Heirs, this ſhall be a Truſt, and not an Uſe executed by the Statute. *Mich.* 1686. between

tween *Nevil* and *Saunders*. 1 *Vern.* 415.

But where a Man deviſed the Rents and Profits of certain Lands to *T. B.* the Wife of *W. B.* during her Natural Life, to be paid by his Executors, into her own Hands, without the Intermedling of her Husband; and after her Deceaſe he deviſed them to others; and it was held by *Rokeby* and *Eyre*, Juſtices, that the Lands themſelves belong'd to the Wife, againſt *Holt* Chief Juſtice, who held ſtrongly that the Executors were only Truſtees for the Wife. Between *South* and *Allen*. 1 *Salk.* 228.

A Short

A Short and Accurate

TREATISE

OF

Dower.

ACTIONS relating to Eſtates for Life, concern either Eſtates in *Dower*, or other Eſtates for Life.

Firſt, relating to Eſtates in *Dower*; and they are either Droitural or Poſſeſſory.

1. Droitural, as the Writ of Right of *Dower*, concerning the Quarentine.
2. Poſſeſſory, as

1. The Writ of *Dower, unde nihil habet.*
2. The Writ of *Admeaſurement of Dower.*
3. The Writ *De dote aſſignanda.*

Secondly, Actions relating to Eſtates for Life, as a Writ of *Quod ei deforciat.*

Firſt, Of the Writ of Right of Dower.

What Dower is.

The *Dower* is the Proviſion which the Law makes for the *Wife*, after the Deceaſe of the *Husband*; and in (*a*) *Socage Tenure*, it was originally Half during the Widowhood, becauſe whatſoever was got during the Coverture, was ſuppoſed to be by the joint Induſtry of them both; but Half only during the Widowhood, becauſe it was not to be carried away from that Family into

(*a*) *Socage Tenure* is the Condition upon which Tenants held their Lands, to plow the Land of their Lords, with their own Ploughs, and do other inferiour Services of Husbandry, at their own Charge. This ſlaviſh Tenure hath, by the Agreement of Lords and Tenants, been turned into the Payment of a yearly Sum, which is called *Free Socage*, in Contradiſtinction to the other Tenure, which was called *Villanum Socagium.* Bract. lib. 2. c. 35. Co. Lit. 117.

another:

another: So in (*a*) *Knight-Service* it was a Third; one Third being allow'd for the Performance of the Service, and the other two Thirds were to be divided between the Wife and the Heir; and here the Wife was to hold during her Life; for they conſider'd it here, not as an Acquiſition that was to go back into the former Husband's Family, if ſhe married another; but as a Tenure that was to continue, according to the Form of the Infeudation, which was during Life; and therefore look'd on the Marriage Contract for an Infeudation after the Death of the Husband; not only in every Manner which he ſhould have during the Time of the Coverture; but ſince the Marriage was only a Contract for ſuch (*b*) *Infeudation*, it

(*a*) *Knight-Service*, or *Servitium militare*, was a Tenure, whereby ſeveral Lands in this Kingdom were held to the King, which drew after it Homage and Service in War, Eſcuage, Ward, Marriage and Relief; but it is now taken away by the Statute of 12 *Car. c.* 24.

(*b*) This Word *Infeudation*, is a Term borrowed from the Civil Law, which ſignifies (according to the Civilians) the Granting Lands, Honours or Fees, either to a Man, during the Will of his Lord or Sovereign, or for the Feudary's own Life, or to him and his Heirs for ever, upon this Condition, that he and his Heirs acknowledge the Donor, and his Heirs to be their Lord and Sovereign, and bear Faith to him and his Heirs, for the ſaid Tenure, and do ſuch Services as was covenanted between them, and proper to a Feud.

was not actually made until the Heir had aſſigned which was the Completion of the Infeudation. Hence it was that the Aſſignment was by the Heir, where all other Infeudations were made *coram paribus Curiæ*; therefore the Heir made the Aſſignment, as Lord of the Manor, who was to create the Tenure; but if there was any Diſpute, touching the Quantity, it was determinable by the (*a*) *Pares*. If they did not like the Determination, the Wife might remove it to the County-Court, and ſo to the King's Court; and the Heir immediately to the King's Court; to avoid Delay to the Wife, it was ſet out by Way of *Metes* and *Bounds*, becauſe it was a Tenancy of the Heir, and therefore like all other Lands in Tenure, was to be ſeparated from the Demeſnes of the Manor; the Infeudation defeated the Deſcent; becauſe by the Marriage Contract, the Tenure was to take Place on the Death of the Husband; ſo only two Thirds can be ſuppoſed to deſcend in

(*a*) This word *Pares* ſignifies Men of the like Condition in Life, and under the ſame Law, who were called to the King's Court, the County-Court, or Court-Baron, to Judge of Matters in Diſpute, between their Fellow Countrymen, that were under the ſame Juriſdiction. *Spelman's Gloſſ.* 448.

Demeſne

Demeſne to the Heir; ſince in the other Third a Tenure is created in the Wife to hold of the Heir immediately from the Death of the Anceſtor; and the Reaſon why the Law created this as a Tenure was, that the Heir might be obliged to do the Service for it, during the Time of its Continuance, as he was obliged to do for all Lands which he had given out in Tenure, as well as thoſe he held in Demeſne; and had there been no Tenure it had been cut off from the *Manor*, during the Life of the Wife, when the Heir was a Tenant and no Lord of the Manor; the Aſſignment of *Dower* was in the Nature of Subinfeudation; and this Tenure continues after the Statute of (*a*) *Quia Emptores terrarum*, ſince the Heir does not part with the Fee.

That it is a Writ Patent.

The Writ *of Right of Dower* is Patent, and ſhall be directed unto the Heir, to ſue in the Court of the Heir,

(*a*) The Statute of *Quia Emptores Terrarum*, is a Statute made in the 18th of *E.* 1. whereby none might grant Lands or Tenements in Fee ſimple, to hold of himſelf, and is ſo called, becauſe the Statute begins with theſe Words, *Quia Emptores Terrarum & Tenementorum de feodis magnatum & aliorum Dominorum in prejudicium eorundem, &c. Terras & Tenementa ſua vendiderunt tenendum in feodum ſibi*; ſo that theſe Words, and what followed, ſhew the Cauſe of making that Statute. 2 *Inſt.* 500. 1 *Inſt.* 98. *b.*

as it appeareth by *Britton*; and where the Writ is directed to the Heir of the Husband, and the ſame Heir is ſeiſed of the Land whereof the Wife demanded *Dower*; then if he will not aſſign *Dower* unto the *Feme*, the *Feme*, who is Demandant, may remove the ſame by a (*a*) *Tolt*, into the County-Court; and alſo may remove the ſame out of the County-Court into the Common Pleas, by a (*b*) *Pone*, without ſhewing any Cauſe in the Writ, as the Demandant ſhall do in a Writ of Right Patent; but the *Tenant* in a Writ of Right Patent, ſhall not remove the Plea out of the County-Court into the Common Pleas, without ſhewing Cauſe in the *Pone*; and the *Tenant* in a Writ of *Right Patent*, or in a Writ of *Dower*, may remove the Plea into the Com-

That the Wife may remove the Plaint.

That the Tenant cannot, without ſhewing Cauſe.

(*a*) A *Tolt* is a Writ whereby a Cauſe depending in a Court-Baron, is remov'd into the County-Court, and is ſo called, becauſe thereby *Lis tollitur e Curia Baronis & ad Curiam vicecomitis defertur.*

(*b*) This Writ is called a *Pone*, only from the Mandatory Part of the Writ, which is, if the Party makes the Sheriff ſecure that he will proſecute his Claim againſt the Defendant, the Sheriff is commanded to compel the Defendant to give Security to anſwer the the Plaintiff's Complaint by the Words *tunc pone per vadios & ſalvos plegios* (the Defendant): And it is for the Demandant in *Dower* to remove the Cauſe into the Court of Common Pleas. See *New Nat. Brev.* 15.

mon

mon Pleas, by a (a) *Recordare* out of the Court of the Lord, upon Cauſe ſhewed in the Writ; and what Cauſes are ſufficient, and good to remove the Lord's Plea out of the Court, or out of the Country, and what not, does appear in the Regiſter; and therefore ſee the Caſes there; but the Demandant could not remove the Plea out of the Court of the Heir, by a *Pone*, becauſe he ought firſt to remove it by a *Tolt* into the County-Court, and from the County-Court he may remove it into the Common Pleas, by a *Pone*, without ſhewing the Cauſe in the Writ, as before is ſaid.

Where it may be Recordare.

Not to be done by a Pone, but by a Tolt.

Since the *Dowreſs* holds of the Heir, as the Heir holds over of the Lord; the Writ of *Right of Dower* is directed to the Heir, who, upon that Writ, may aſſign *Dower*, without any further Conteſt; and if the *Heir* be Lord of the Manor of which the Wife is to be endowed, then the Aſſignment is to be by

To whom the Writ is to be directed.

(a) *Recordare* is a Writ directed to the Sheriff to remove a Cauſe depending in an inferior Court, to the King's Bench or Common Pleas; and is ſo called by theſe Words of the Writ, *The Judge of the inferior Court, is commanded to make a Record of the Proceedings in the County-Court, and tranſmit the Cauſe into the King's ſuperior Court of Record.* New Nat. Brev. S. A. 16. E.

the Heir, with the Approbation of the *Pares Curiæ*; but if the Heir be only Tenant, and not Lord of a Manor, then the Aſſignment cannot be in the *Court-Baron* of which the Tenant holds, becauſe the Writ is not directed to that Lord, to give him Authority to proceed; for the Writ of Right was only where the great Controverſy happen'd between the immediate Feudaries of the Manor; and the *Dowreſs* is Tenant to the Heir, and not to the Lord; therefore the Writ cannot come into the *Court-Baron*, unleſs where ſhe is to be endowed of the Manor itſelf, or where the Lord is *Guardian* in *Chilvalry* to the Infant, then the Writ ſhall be directed to the Lord to endow her; and this is an Act done by the Lord, as Guardian to the Infant, and as annexed unto the Eſtate, which falls into the Lord's Hands, during the Minority of the Infant; but in that Caſe, if the Infant had an Eſtate in Socage-Tenure, whereof the Wife might endow herſelf, that was an Endowment (*a*) *De la pluis Beale.*

If

(*a*) *Dower de la pluis Beale*, is that Kind of *Dower*, which is neither of the other Kinds of *Dower*, *viz.* *Dower* at the Common Law, *Dower* by the Cuſtom, Dower

If the Heir, or Lord of the Manor, would not endow the Feme, ſhe may have a *Tolt* into the Sheriff's Court, without any Cauſe ſhewn, becauſe it was in her own Delay, and where the Heir had no Court, unleſs ſhe acquieſced in the Endowment made by him, her only Remedy was to remove it by *Tolt* immediately; and where the Lord was *Guardian* in *Chivalry*, and refuſed to endow, becauſe ſhe might have *Dower de la pluis Beale* into whatever Court the Cauſe was removed, he might plead ſuch Title to *Dower* in the Wife, in Bar of his Aſſignment, becauſe the Lord was not obliged to divide his own Feud, the Wife having otherwiſe a ſufficient *Dower* to ſuſtain her.

Where ſhe might have a Tolt. *Writ of Right*, 11, 12.

And in a Writ of *Right Patent*, the Plea may be removed at the *Tenant's*

Where the Plea to be removed by a Recordare.

Dower *ad oſtium Eccleſiæ*, or *Ex aſſenſu patris*, but is therefore contradiſtinguiſhed from them by this Appellation, *De la pluis Beale*, ſo called, becauſe where there are Lands held by *Knight-Service*, and ſome by *Socage Tenure*, of which the Husband died ſeiſed, the Guardian in Chivalry may pray that the Wife may be endowed *De la pluis Beale*, *i. e.* of the moſt Fair of the Lands held by the *Socage-Tenure*, according to the Value of the Third Part, which ſhe claims of thoſe Lands held by *Knight-Service*; and the Reaſon is, becauſe this *Knight-Service* is for Defence of the Realm, and therefore it is *pro bono publico*, that ſuch Service do remain intire, and ought to be favoured. *Co. Lit.* 39. *b.*

Suit,

Suit, by a *Recordare* out of the Lord's Court into the Common Pleas, before the Juſtices there; and by the ſame Reaſon, it ſeemeth, it may be removed at the Suit of the Tenant, in a Writ *of Right of Dower*, out of the Heir's Court into the Common Pleas, before the Juſtices there, by a *Recordare*, for good Cauſe; *ſed Quære.*

12 Aſſ. Pl. 20. *Where the Writ to be directed to the Feoffee.*

And if the *Husband* do enfeoff a Stranger of all his Lands, and dies, and his *Heirs* have nothing by Deſcent; now if the *Feme* be to ſue forth a Writ of *Right of Dower*, it ſeemeth that ſhe ſhall ſue her Writ of *Right of Dower*, directed to the *Feoffee*; for after the Endowment, the *Feoffee* ſhall be her Lord, and ſhe ſhall hold the *Dower* of him, by *Fealty*; but before the Statute of *Quia Emptores*, *&c.* if the *Husband* enfeoff a Stranger of Parcel of his Lands, to hold of him; then if the *Feme* be to ſue a Writ of *Right of Dower* againſt the Feoffee, the Writ ſhall be ſued in the Heir's Court, and directed to the Heir, for the Seigniory that remaineth in him.

Where to the Heir.

And ſo if the *Husband*, at this Day, giveth Parcel of his Manor in Tail, to hold of him, and dieth, the *Feme* ſhall ſue her Writ of *Right of Dower*, in the Court of the Heir of her Husband, and

and againſt the *Donee* in Tail, and the Writ ſhall be directed to the Heir. *The like.*

But if the *Husband* makes a Gift in Tail, of all the Lands that he hath, and dies, and the *Feme* is to ſue a Writ of *Right of Dower* of that Land, then her Husband's Heir cannot have any Court, becauſe he hath but a *Seigniory in groſs*; and therefore it ſtands with Reaſon, that ſhe ſhould have her Writ of *Dower* againſt the *Donee* in Tail, directed to the Sheriff, returnable in the Common Pleas; and ſhe ſhall have this Clauſe in the Writ, *Quia* B. *capitalis Dominus feodi illius nobis inde remiſit Curiam ſuam.* *Where the Writ to be againſt the Donee, directed to the Sheriff.*

Dower is the Conſequence of the Marriage Contract, which was underſtood, that the Wife ſhould have the Third Part of the Eſtate, the *Husband* was ſeiſed of, during the Coverture, to ſuſtain herſelf and younger Children, during her Life, becauſe ſhe was ſuppoſed to be equally concerned in the Acquiſition. In *Knight-Service*, ſhe had a Third, becauſe one Third was allowed for the extraordinary Burthen of the *Tenant*, and one Third for ſuſtaining the Heir; ſo ſhe always equally divided with him; but the Heir was always to ſet it out; and ſhe was not to carve for herſelf, becauſe the Wife held *That Dower is the Conſequence of the Marriage;* *For what Purpoſes allowed.*

held of the Husband's Repreſentative, as inferior to the Husband, and conſequently as ſubject in Tenure to the *Heir*, who repreſented him; but if the *Heir* did not ſet out according to Equality in his Court, ſhe might apply to the *County-Court*, and to the *King's Court*, and where the *Heir* had no Court, ſhe may enter a *Dominus remiſit Curiam ſuam*; and hereby the Writ of *Right of Dower* was returnable into the *King's Court*; but if the *Heir* had a Feudal Court, ſhe might have had it there ſet out; and then it was either aſſigned, and ſet out by the Heir himſelf, or by his *Pares*; for this was an Act that he himſelf might do, as well as his *Pares* in that Court; becauſe it was preſumed that he would rather be more Beneficent to his Mother, than act according to the ſtrict Diviſion required by Law; and this Power continued to the Heir, as long as the Tenure continued; ſo that he had a Power over the Lands, as a Feudal Lord, before the Statute *Quia Emptores, &c.*

To whom to apply for her Dower.

How it ſtood before the Statute Quia Emptores Terrarum.

And if the *Husband* aliened the Lands to hold of himſelf, ſince the Feoffee continued Feudatory to the Huſband, the *Heir* was to aſſign Dower in his Court; but ſince the Statute, the Feoffee

Feoffee holds of the ſuperior Lord; therefore the *Heir* remits his Court; and the Writ of *Right of Dower* is to be brought in the King's Court by the *Dominus remiſit Curiam ſuam*; but the Tenant in Tail or for Life, *&c.* did after the Statute hold of the Lord; and therefore the Heir's Aſſignment of *Dower* continues. *Where the Writ is to be brought.*

And ſo if the *Husband* makes a Leaſe of all his Lands unto a Stranger for Life, and dieth, and the *Feme* is to bring a Writ of *Dower* againſt the Leſſee, for Life, then it ſeems reaſonable, that the *Feme* have her Writ of *Right of Dower* againſt the Leſſee for Life in the Common Pleas; becauſe that he in the Reverſion hath not any Court. *Where the Tenant in Dower to have the Writ againſt the Leſſee for Life.*

And altho' that this Clauſe, *Quia B. capitalis D'nus, &c.* be put into the Writ, the Lord has not any Court to hold, becauſe it is a Seigniory in Groſs, and not any Demeſne Land to hold a Court, *&c.* and then altho' the Lord did never remit his Court, and that there is not any Matter apparent remaining in the Chancery, to prove the Lord's Will, or Aſſignment, to remit his Court; yet the Writ returned into the Common Pleas, before the Juſtices there, is good; and they ſhall proceed *Where the Writ may be returnable in the Common Pleas, tho' the Clauſe* Quia Capitalis Dominus *be not in the Writ.*

proceed thereupon; if the Lord hath not any Court to hold Pleas of this Matter.

And the Lord to have no Action for ſuing the Writ there.

And it ſeems, that the *Lord* ſhall not have his Action againſt the *Demandant*, for ſuing the Writ in the Common Pleas, if he hath got no Court to hold Plea thereupon, and to do Right unto the Party.

Where he may have a Prohibition.

But if the *Lord* hath a Court to hold Plea, then he may have a Prohibition to the Juſtices of the Common Pleas, that they do not proceed upon the Plea, otherwiſe not. *Quære de hoc.*

Where a Dominus remiſit Curiam ſuam, *is implied.*

When the *Husband*, being Lord, aliens Lands to hold of the ſupream Lord, of Conſequence they are no more Attendant to his Court; and therefore there is implied a *Dominus remiſit Curiam ſuam*; ſo that no Action lies for the *Heir*, for bringing the Writ into the King's Court, ſince the Anceſtor remitted his Court, by ſuch Alienation; and no Action lies by the *Meſne Lord*; becauſe the Title of the *Wife* begins before the Tenure aroſe to him; for the *Wife*'s Title ariſes from the Seiſin of the *Husband*, which was preceding the Alienation, whereby the Alienee is attendant upon the next Lord, and by Conſequence, the Court

is remitted to the Crown by Alienation.

And this Writ of *Right of Dower*, lieth where a *Feme* is endowed of Parcel of her *Dower*, and ſhe would demand the Reſidue againſt the ſame Tenant, and in the ſame Town; then ſhe ought to ſue this Writ of *Dower*; for the Words of the other, *viz. unde nihil habet*, will not ſerve, becauſe that ſhe hath received Part of her *Dower*; and therefore, of Neceſſity, it behoves her to ſue this Writ of *Right of Dower*, to recover the Reſidue; and the Writ ſhall be directed to the Heir, or to his Guardian, if he be in Ward, as a Writ of *Right Patent* ſhall be, *&c.*

Where a Wife is endowed of Part of her Dower, ſhe muſt have her Writ of Right of Dower.

The Reaſon of this is, becauſe the Poſſeſſory Writ, as the Writ *Unde nil habet* is, muſt demand the whole *Dower* of the whole Eſtate of the Husband; and that Poſſeſſory Writ ſhe can have but once; therefore if ſhe omits out of the Writ of *Unde nil habet* any of the Lands which the Husband was ſeiſed of, during the Coverture, ſhe is put to her Writ of *Right of Dower quoad* the Lands.

And the Reaſon thereof.

Where a Feme loſeth by Default, ſhe may have her Writ of Right of Dower.

And if a *Feme* loſes her Land which ſhe holds in *Dower* by Default in a *Præcipe quod reddat*; yet, according to the Opinion of ſome Men, ſhe ſhall have

have a Writ of *Right of Dower*; but it ſeems by the Equity of the Statute of *Weſt.* 2. *c.* 4. That if a *Feme* loſe, by Default, the Land whereof ſhe hath had *Dower*, that by that Statute ſhe may have a *Quod ei Deforciat*, to recover that Land; and before the Statute, ſhe had no Remedy to recover the Land, but only in an Action of *Diſceit*, if ſhe were not ſummoned.

Tenant for Life, barred in a Poſſeſſory Action, could not have a Droitural *Writ at Common Law.*

At *Common Law*, if *Tenant for Life* was barred in the Peſſeſſory Action, he never could have the Action *Droitural*; but if he was barred of his Seiſin, as he was in the Poſſeſſory Action, he was barred of his Right for ever; and the Reaſon is, becauſe no Body could have a final Judgment to Perpetuity, to put the Lands in Peace, by the *very Tenant*, or *Tenant in Fee-ſimple* of thoſe Lands, and that bound the Right for ever againſt all Perſons, even againſt all Strangers that did not Claim within the Year and Day; but *Tenant for Life* of Lands, claims the *Seiſin* only, therefore whatever barred the Seiſin, was a Bar to their Right, ſince they had not a meer Right, diſtinct from the Seiſin; and therefore, if even the *Tenant* in *Dower* was barred by Default, in a Writ of Dower, *Unde nihil habet*, ſhe was perfectly barred thereby, be-

cauſe the Bar to her Seiſin was a Bar to her Right; but if the Lands were omitted in the Writ of *Dower unde nihil habet*, the Judgment in the Writ could be no Bar *quoad* the *Dower* in thoſe Lands, becauſe the Judgment was not concerning the ſame; but as to the Lands mentioned in the Writ, Judgment by Default was a Bar, 'till helped by the Statute of *Weſt.* 2. *c.* 4. which gives the *Quod ei Deforciat.*

Feme loſing her Dower by Aſſize, her Remedy is Attaint.

And if the *Feme* hath *Dower*, and loſe the ſame by *Aſſize*, or Action tried, it ſeems ſhe hath no Remedy but by *Attaint*; for it ſeems ſhe ſhall have no Remedy to recover by a Writ of *Right of Dower*, becauſe ſhe had the Land once aſſigned to her in *Dower*; and ſhe was in Poſſeſſion of the ſame; ſo that the Title was executed, and ſo ſhe ought to ſue an Action of her own Poſſeſſion, if ſhe be afterwards deforced.

The Reaſon.

For the Statute extends only to Eſtates for Life, or in *Dower*, where the Tenants loſe by Default, and not where they are barred by Judgment, upon the Merits of their Cauſe.

The Proceſs after Removal.

And after the Plea removed into the Common Pleas, the Proceſs is then a *Grand Cape*, and a *Petit Cape*; and in the Heir's Court, the Manner is to make a

Proceſs in the Nature of a *Summons*, and of a *Grand* and *Petit Cape*; and the Writ to the Heir is thus,

The Form of the Writ.

REX A. *ſalutem. Præcip. tibi quod ſine dilatione plenum rectum teneas* B. *quæ fuit uxor* C. *de tertiâ parte decem acr. terræ cum pertinent. in* W. *quam clamat tenere de te in dote per liberum ſervitium tertiæ partis uniûs denarii per Annum, pro omni ſervitio quod ei deforciat, &c.*

Dower of a Moiety.

And alſo a *Feme* may have a Writ of *Right of Dower* of the Moiety, according to the Uſage of *Gavelkind*, where ſhe hath received Part, and is *deforced* of Part.

Where directed to the Heir.

And alſo it appeareth in the *Regiſter*, that the *Feme* ſhall have a Writ of *Right of Dower* directed unto the Heir himſelf, where he himſelf deforceth her of the Profits of an Office, and the Writ is thus,

The Form of the Writ of Dower, to the Heir for the third Part.

REX A. *ſalutem. Præcip. tibi quod plenum rectum teneas* B. *de tertia parte exituum provenientium de Cuſtodia Gaolæ Abbatiæ Weſtm. & de tertia parte trium Rodarum terræ uniûs Rodæ prati, & redditûs tot per Annum & lagenarum cerviſiæ vel tot ferculorum per Diem vel per ſeptimanam vel per Annum cum pertinentiis in villa Weſtm. quas clamat pertinere ad liberum tenementum ſuum*

ſuum quod de te tenet in dote & tenere clamat de te in liberum ſervitium inveniendum tibi tertiam partem Cuſtod. pro Cuſtodia Gaolæ prædict. & portæ ejuſd. Abbatiæ pro omni ſervitio quod ipſa deforciat, &c. Vide 15 Ed. 3. Dower 81.

Dower demanded of the Profits coming from a *Fair de N.* 11 *El.* 3. *Dow.* 85. *C. Lit.* 32. Dower is demandable of the Moiety of *Stallage*, coming from the Fair of *D.* and good, without ſaying the Moiety of the Profits of *Stallage*, for *Stallage* is a Profit. *Ra. Ent.* 234. *De tertia parte exit. & profic. de quodam mercato quolibet anno in feſto.* S. Mich. 12 Ed. 3. *Dower* may be well demanded of the Third Part of the Profits of a Bailiff's Office, Parker, &c. without demanding the Third Part of the Office, becauſe entire; *dubitatur* in the Office of *F.* v. 45 *Ed.* 3. *Dower* 50. where the *Feme* is endow'd of the Third Part of the Profits of a *Mill*, and had the Freehold of the Third Part of the *Mill* in her. 21 *Ed.* 3. 51. *Dower*, of the Third Part of the Office of the *Marſhalſea*.

The Profits of a Fair.

Of Stallage.

Of an Office.

Of a Mill. Vide Sat. Title Dower, Pl. 3 H. 5.

And by the Writ it appeareth, that the *Feme* ſhall have a Writ of *Dower* of what is appendant, or appurtenant

Dower of what is appendant and appurtenant.

to the Land which ſhe holdeth in *Dower*, if ſhe be deforced thereof.

Of a Writ De Quarentina Habenda.

The Writ De Quarentina Habenda, when it lies.

The Writ of *Quarentina Habenda*, lieth where a Man dieth ſeiſed of a Meſſuage and Lands, and immediately after the Death of the *Husband*, the *Heir*, or he who ought to have the Lands after his Death, will put the Wife out of the Meſſuage, *&c.* then the Wife will have this Writ; for by the Statute of *Magna Charta*, *cap.* 7. the *Wife* ſhall remain in the Capital Meſſuage after the Death of the Husband, forty Days, if it be not a *Caſtle*, and that Writ is *Vicountiel*, and ſhall be directed to the Sheriff, and he ſhall hold Plea thereof.

That it is a Writ Vicountiel.

By what Statute given.

This Writ was given by the Statute of *Magna Charta*, *c.* 7. and therefore the Statute is recited in the Writ; and it was for the Time which the *Wife* was to continue in the *Husband*'s Houſe, and until ſhe had got an Aſſignment of her Dower; and that the unnatural Heirs ſhould not turn her out immediately; therefore the Writ is *Vicountiel*, that the Sheriff might reſtore her; in Caſe ſhe was put out before the forty Days were ended.

And

And the Writ is in this Form,

REX vicecomiti ſalutem, or, *ballivis ſuis ſalut. Ex querela* B. *quæ fuit uxor* D. *accæpimus quod cum in Magna Charta de libertatibus Angliæ continetur, quod viduæ maneant in capitali Meſſuagio maritorum ſuorum per dies* 40. *niſi Meſſuag. illud caſtr. ſit, infra quod tempus dotes ſuæ aſſignentur eiſdem, & quod interim habeant rationabilia eſtoveria de bonis eorundem*, J. *de* C. *ipſam* B. *ſtatim poſt mortem prædict. viri ſui, de capitali Meſſuag. quod fuit ejusdem* D. *in* H. *licet nec caſtrum ſit, nec dos ei aſſignata fuerit, violenter ejecit, & ipſa eſtoveria ſua de bonis ejuſd.* D. *percipere non permittit, ad ipſius* B. *dammum non modicum & gravamen, & contra tenorem chartæ prædictæ, & quia præfat.* B. *injuriari nolumus in hac parte vobis præcipimus, quod vocatis coram vobis partibus prædict. & auditis hinc & inde earum rationibus eidem* B. *plenam & celerem juſtitiam inde fieri faciatis juxta tenorem chartæ prædictæ, ne pro defectu juſtitiæ querela ad nos venerit, Teſte, &c.* The Form of the Writ.

And upon that Writ, the Sheriff ſhall award Proceſs againſt the Party, to

How the Sheriff to demean himſelf thereon.

come and anſwer the ſame, and ſhall not ſtay until the County-Court be holden; for this Writ is a Commiſſion to him, and upon the ſame he ſhall immediately make Proceſs to anſwer, *&c.* within two or three Days, according to his Direction; and thereupon to proceed as Juſtices ſhould do in a Commiſſion of *Oyer and Terminer*, *&c.*

Dower unde nihil Habet.

A Writ of Dower unde nihil Habet, where it lies.

A Writ of Dower *unde nihil habet*, lieth in Caſe where a Woman taketh a *Husband* who is ſole ſeiſed of Lands or Tenements, to him and his Heirs, in Fee-ſimple, or to him and the Heirs of his Body; or if the *Husband*, during his Marriage, be ſolely ſeiſed in Fee-ſimple, or Fee-tail of ſuch Eſtate, that the Iſſue begot between him and his Wife, may inherit the ſame; then if the *Husband* doth alien the ſame, or dieth ſeiſed thereof, or be diſſeiſed and dieth, his Wife ſhall have a Writ of Dower *unde nihil habet*, againſt him who is Tenant of the Freehold of the Land, or againſt him who is Guardian by *Knight-Service* of the Land.

And

And the Form of the Writ is thus,

REX vic. ſal'em. Mandamus vobis quod juſte & ſine dilatione redd. B. *quæ fuit uxor* C. *rationabilem dotem ſuam, quæ ei contingit de tenemento quod fuit prædict.* C. *quondam viri ſui in* N. *unde nil habet, ut dicit, & unde queritur quod* A. *ei deforciat, & niſi, &c.* The Form of the Writ in Latin.

Note; Altho' the Writ be conditional, *niſi fecerit, tunc ſummoneas*, yet the *Demandant* is not bound to accept the Tender *in pais*; for then ſhe ſhould loſe her Damages for the Time paſt; nor is the Tenant bound to tender it there; and yet he may plead in the Common Pleas, *touts temps priſt.* 11 H. 4. 62. 11 H. 4, 40, 41. *Demandant not bound to accept the Tender of Dower.*

It is plain the *Wife* cannot have Damages but from the Time of her Demand, becauſe the Tenant of the Land cannot ſet out the *Dower*, 'till the *Feme* be there to accept it; and therefore when the Writ of *Dower* comes to him, he is not bound to ſet out the *Dower*; becauſe the *Dowreſs* is not with the Sheriff to accept it: Indeed, if ſhe comes with the Sheriff, it will make a Demand *in pais*, from thence *From what Time the Demandant to have Damages.*

When to plead that he was always ready.

to recover her Damages in the ſame Manner as if ſhe had made her Requeſt before the Writ brought; but if ſhe has not made ſuch Demand *in pais*, the Defendant may plead *touts temps priſt*, ſince, as it is ſaid, he is intitled to the Profits, 'till Default; but he cannot plead *touts temps priſt*, againſt her after an Eſſoin caſt; becauſe by that, his Delay appears on Record.

And againſt the Guardian the Writ is thus,

The Form of the Writ againſt the Guardian.

Præcipe A. *cuſtod. terræ* J. *quod reddat, &c.* B. *quæ fuit uxor* D. *&c.* 9 H. 5. 4. *Note* 13 Ed. 3. Brev. 242. if he be Guardian of the Land and Body, he ought to be named ſo in the Writ; otherwiſe it ſhall abate. 18 *Ed.* 2. *Brev.* 832.

That he is to be named Guardian.

Becauſe if the *Dowreſs* do not name him *Guardian* of both in the Writ, ſhe does not intitle herſelf to the Action againſt him; for he is not to ſet out *Dower* for her, but as *Guardian* of the Infant.

Ought to ſhew the Heir was Heir to him laſt ſeiſed.

And note; She ought to make him Heir by the Writ to him that was laſt ſeiſed. 11 *Ed.* 3. *Brev.* 471. becauſe if the Writ be brought againſt the *Heir* of

of the Aſſignee of the *Husband*, unleſs ſhe ſhews that the Tenant is Heir to the Perſon that was laſt ſeiſed, ſhe does not intitle herſelf to an Aſſignment from him.

Otherwiſe where ſhe is endowed *ad oſtium Eccleſiæ*, it is thus,

Præcipe A. *quod redd.* B. *quæ fuit uxor* C. *cent. acr. terræ, cum pertin. in* N. *de quibus prædict.* C. *quondam vir ipſius* B. *eam dotavit ad oſtium Eccleſiæ, quando eam deſponſavit, unde nil habet, &c.* Præcipe of Dower ad oſtium Eccleſiæ.

And if ſhe be endowed *De aſſenſu patris*, then thus,

Præcipe A. *quod reddat* B. *quæ fuit uxor* C. *cent. acr. terræ, &c. de quibus prædict. & filius & hæres ipſius* A. *quondam viri ipſius* B. *de aſſenſu & voluntate ipſius* A. *patris ſui, eam dotavit ad oſt. Eccleſiæ, unde, &c.* Ex aſſenſu patris.

And the Writ of Dower *unde nihil habet*, may be ſued in the County before the Sheriff, by a *Juſticies*, and a *Wife* ſhall be endowed of an Advowſon, Villains, Commons, *&c.* and of other Profits and Liberties of which her Husband had any Eſtate of Inheritance, Dower unde nihil habet, *may be ſued before the Sheriff by a* Juſticies.

tance, which Eſtate the Iſſue, betwixt them, by Poſſibility, may inherit, *&c.*

And the *Wife* may ſue a Writ of Lands or Tenements in *London*; and the Writ ſhall be directed to the Mayor and Sheriffs of *London*, and it ſhall be ſuch:

Præcipe to the Sheriffs of *London.*

REX majori & vic. Lond. *ſal. Præcip. vobis quod Juſticiatis* A. *quod juſte & ſine dilatione & ſecund. conſuet' civ. noſtræ* Lond. *redd.* B. *quæ fuit uxor* C. *rationabilem dotem ſuam quæ ei contigit &c. in* Lond. *& Juſticiatis* D. *quod juſte, &c. & ſecundum, &c. reddat eidem* B. *rationabilem &c. in eadem civitate unde nihil habet, &c. ut dicit, &c. & unde queritur quod prædict.* A. *& D. ei deforciant, ne amplius, &c. Teſte, &c.*

Dower in London, *againſt ſeveral Tenants.*

And by that it appears, that a Woman ſhall have a Writ of *Dower* in *London* againſt ſeveral Tenants by a ſeveral *Juſticies* in the Writ, as well as ſhe ſhall have the Writ of *Dower* againſt ſeveral Tenants by ſeveral *Præcipe's*, and all in one Writ, and the Proceſs is *Summons*, *Grand* and *Petit Cape*, in the Common Pleas.

A. Brought

A. brought *Dower* againſt *B. de libero tenemento in* C. & D. B. appeared; and before Plaint made, ſhe brought another Writ in the ſame Vill; this Writ ſhall abate, though no Plaint was made before; for by *Shard*, one ſhall not have two Writs of Dower *unde nihil habet*, againſt the ſame Tenant, in the ſame Vill, if it be not upon Special Matter; as if the Tenant purchaſe other Lands, after the firſt Writ, whereof ſhe is dowable. 11 *E.* 3. *Brev.* 476. Otherwiſe it is of an Aſſize. 39 *H.* 6. 12.

One cannot have two Writs of Dower unde nihil habet, at one and the ſame Time, but the latter ſhall abate.

The Writ of *Dower* being returnable before *Juſticiariis reſident.* the firſt Writ is depending at the Time of the ſecond Writ purchaſed; and therefore it may be pleaded in Bar thereof, if they both relate to the ſame Lands; but in the Caſe of the *Aſſize*, if the firſt never be returnable before the *Juſt. itinerant.* the Commiſſion is at an End; and a ſecond Writ may be brought at the next *Aſſizes*, ſince the firſt cannot be ſaid to be pending.

Where there may be a ſecond Writ.

Of Admeaſurement of Dower.

The Writ of *Admeaſurement of Dower* lieth where the Heir, when he is within Age, endoweth the Wife of more than

Where a Writ of Admeaſurement of Dower lieth.

Who may have it.

than ſhe ought to have *Dower* of, or if the *Guardian* endoweth the Wife of more than of a Third Part of the Land of which ſhe ought to have *Dower*, then the *Heir* at full Age may ſue this Writ againſt the *Wife*; and thereby ſhe ſhall be admeaſured, and the Surpluſage ſhe had in *Dower*, ſhall be reſtored to the *Heir*; but in ſuch Caſe, there ſhall not be aſſigned a-new any Lands to hold in *Dower*, but to take from her ſo much of the Lands as ſurpaſſeth the Third Part whereof ſhe ought to be endowed; and he need not ſet forth of whoſe Aſſignment ſhe holds. 17 *Ed.* 3. 66. a View is not grantable on this Writ 17 *Ed.* 3 67. *cont. adjudg'd*, 78 *E.* 3. 20. and it ſeems that the Heir within Age, ſhall have an *Admeaſurement of Dower* of his own Aſſignment. 7 *E.* 3. *Admeaſurement* B. but if the Heir, at full Age, aſſigns *Dower*, he ſhall not have this Writ againſt his own Aſſignment. 6 *H.* 3. *Admeaſurement* 18.

The Heir within Age.

Where the Heir at full Age ſhall not.

Where the Guardian to the Heir ſhall have the Writ.

And if the *Heir* within Age, before the *Guardian* enters into the Land, do aſſign to the Wife more Land in *Dower* than ſhe ought to have, then the *Guardian* ſhall have the Writ of *Admeaſurement* againſt the *Wife*, by the Statute of *Weſt.* 2. *c.* 7. and if the *Guardian* brings the Writ, and does purſue it againſt the Wife, yet the *Heir* at his

full Age, by the ſame Statute, ſhall have the Writ of *Admeaſurement of Dower* againſt the Wife.

And the Writ is *Vicountiel*, and ſhall be ſued in the County before the Sheriff, and is thus:

REX vicecomiti ſalutem. Queſtus eſt nobis A. *filius & hæres* B. *quod* C. *quæ fuit uxor prædict.* B. *plus habet in dotem de libero tenemento quod fuit prædict.* B. *quondam viri ſui, in* N. *quam h'ere debet, & ad ipſam pertinet habend. ideo tibi præcip. quod juſte, &c. admenſurari facias dotem illam, ita quod prædict.* C. *non habeat plus in dotem de hæred. prædict.* A. *quam habere debet & ad ipſam pertinet habendum ſecundum rationabilem dotem ſuam, & prædictus* A. *habet de dote illa id quod h'ere debet & ad ipſam pertinet habendum ne amplius, &c. Teſte, &c.* The Form thereof.

The Writ of *Admeaſurement* lieth upon the Aſſignment of *Dower* by the *Heir*, within Age, or his *Guardian*; becauſe any Act of ſuch *Heir* cannot intitle her to more than is due by the Law; and by Conſequence a Writ of *Admeaſurement* muſt lie, and there was no View in this Writ; becauſe it proceeded on a Suppoſition, that it had been viewed, and found to be more than a Third Part; and therefore to have allowed *Where it lieth upon an Aſſignment of Dower, by the Heir or Guardian.*

allowed a View afterwards, in order to ſee ſuch an Error, was to ſuppoſe that the Writ had originally no Foundation; and it was *Vicountiel*, becauſe it was preſumed the firſt Aſſignment was in the Court of the Heir; and if there was any Miſtake there, it was to be rectified in the Court of the Sheriff. *Vide* 13 *E.*3. *Admeaſurement* 17. Yet *Bracton* ſays, if ſhe hath Lands in *Dower* in divers Countries, there it ought to be *coram Juſticiariis*; and note, there the Tenant ſhall have ſeveral Writs.

Where it is Vicountiel.

Where it is coram Juſticiariis.

All the Land to be named.

So note *firſt*, In every Writ of *Admeaſurement*, all the Land which he hath in the ſame County, ſhall be nam'd and admeaſur'd.

Where there are to be ſeveral Writs.

Secondly, If he hath Lands in ſeveral Counties, there ſhall be ſeveral Writs and ſeveral Extents of the whole Land, whereof the Party died ſeiſed; and it ſeems he may have one *Count* and one *Admeaſurement*. *Quære* how it ſhall be made. 13 *Ed.* 4. *Admeaſurement* 17. yet note 7 *R.* 2. *ibid.* 4. the Defendant was put to anſwer, notwithſtanding this Exception.

The Reaſon why the Writ is to be coram Juſticiariis.

The Reaſon why the Writs muſt be *coram Juſticiariis*, where the Lands are in ſeveral Counties, is, becauſe the Sheriffs of two Counties cannot ſet out a perfect *Dower*; for they cannot meet

out of their Cities, in order to do it; and the *Dower* might have been Right in the whole, though it was out of Proportion in one of the Counties; therefore there is no correcting *Dower* ſet forth in two Counties, nor conſidering it whether juſt or not, but only by conſidering it *coram Juſticiariis*; but the Tenants muſt have ſeveral Writs, becauſe an Inqueſt muſt be taken before the *Juſtices* in ſeveral Counties; but tho' there be ſeveral Writs, yet the Count muſt be upon them all, becauſe the Queſtion before the Court, is touching the Aſſignment of the *Dower*, which is one entire Thing; and therefore the Judgment muſt be of the Aſſignment upon all the Writs, tho' the *Inqueſt* muſt be ſeveral upon each of them. It ſeems the *Inqueſts* muſt be taken in every County, where the Defendant is dowable, of how much more or leſs than a Third is aſſigned in every County; and upon comparing all the Inqueſts returned, the *Juſtices* are to give Judgment, that the Heir ſhould recover thoſe Acres that were over aſſigned, and by the Conſequence of that Judgment, the Defendant will hold the reſt as a reaſonable Dower.

How the Concluſion of the Count muſt be.

And, it ſeems, that in the *Count* the Concluſion is, *Et inde producit ſectam*, &

& petit admenſurationem &c. as in the Count of Admeaſurement of Paſture; and if the Dowreſs can plead nothing in Bar of the Admeaſurement, her Manner of pleading is, *Venit & Defendit vim & injur' quando, &c. & concedit admenſurationem præd. fieri, &c. ideo præceptum eſt vic.* (of the ſeveral Counties) *quod aſſumptis ſecum* 12 *lib. & legal. hominibus, &c. per quos, &c. qui nec, &c. in propria perſona ſua accedant ad prædictam terram admenſurandam, & quod per eorum ſacr'um admenſurari faciant terram illam, ita quod prædict. Defend. nil h'eat in illa plus in dotem, quam ad ipſam pertinet habendum, ſecundum dotabilem dotem ſuam, & admenſurationem quam, &c. Scire facias hic tali die ſub ſigillo, &c. ſigillis, &c.*

How the Dowreſs is to plead.

The award of the Writ.

When the Writ is returned, it is entered up in this Manner,

PER quod prædictus vic. adtunc & ibidem admenſurari fecerit terr. illam, tam per diſcretionem ſuam, quam per ſacr'um 12 *prob. & legalium hominum ad hoc jurat. qui dicunt ſuper ſacramentum ſuum, quod in villa de H. x. acræ terræ ſunt aſſignatæ præd' Defend. plus quam illa habere debet, & plus quam ad ipſam pertinet habendum ſecundum rationabilem dotem ſuam,* and then the Judgment is, *Quod* (the Heir) *recuperet x. acras terræ prædictas.* And

How the Entry is to be, when the Writ is returned.

And where the Lands are in ſeveral Counties, there are ſeveral Inqueſts, and one entire Judgment; for the Number of the *overplus* Acres are contained in all the Inqueſts. *Raſtall's Entries, Admeaſurement de Paſt. fol.* 23. *Several Inqueſts.*

And for the Guardian, the Writ is thus,

Queſtus eſt nobis A. *Cuſtos terræ & hæred.* C. *quod* B. *quæ fuit uxor prædict.* C. *plus habet in dotem ipſius, &c. ita quod non habeat plus in dotem, &c. & quod prædict. Cuſtos habeat, &c. ne amplius, &c. Teſte, &c.* Writ for the Guardian.

And when the Plea is in the County, the Plaintiff may remove it without any Cauſe ſet forth in the Writ; and the Defendant may likewiſe remove it without any Cauſe in the Writ, as in Replevin. *When the Plaintiff to remove the Plea, without ſetting forth a Reaſon.*

And if the Writ be removed into the Common Pleas, by a *Pone*, and Proceſs be awarded againſt the Defendants, according to the Statute, which is *Summons*, *Attachment* and *Diſtreſs*, *&c.* then the Sheriff cannot make the Admeaſurement, but to extend all the Lands, particularly, and to return the ſame into the Common Pleas; and *The Proceſs, and by whom the Admeaſurement to be made.*

thereupon the *Admeaſurement* ſhall be made by the Juſtices.

And if the Guardian aſſign for Dower to the Wife, more than ſhe ought to have, and afterwards grants over his Eſtate, his Aſſignee ſhall not have a Writ of *Admeaſurement*. Note theſe Points following are well reſolved.

Where the Grantee to have the Writ. *Firſt*, If the *Guardian* aſſign *Dower*, and grants over the Ward, the *Grantee* ſhall not have *Admeaſurement*.

Where the Heir, and not the Guardian to have it. *Secondly*, If the *Anceſtor* aſſigns *Dower*, and dies, the *Guardian* of his Heir ſhall never have *Admeaſurement*, but his *Heir* ſhall have it; but this ſeems to be in Caſe where the Anceſtor was within Age at the Time of the Aſſignment.

Where the Guardian ſhall have it. *Thirdly*, Where the *King* ſeiſes a *Ward*, to which he hath no Right, the *Guardian* ſues an *Ouſter le main*, and has it, *ſalva dote*, it ſeems, in this Caſe, the Guardian ſhall have *Admeaſurement*; otherwiſe it is of the Aſſignee or Grantee of the King. 7 *R.* 2. *Admeaſurement* 4. *Note* there alſo, if the *Diſſeiſor* endow the Wife of more than a Third Part, the *Heir* ſhall have an *Aſſiſe*.

Where the Heir ſhall have an Aſſiſe. *The Reaſon why the Grantee may have it, and not the Heir, at his full Age.* The Reaſon is, becauſe the *Grantee* comes in under the *Guardian*, and therefore is bound by his Acts; but if the *Heir* be

be of full Age, and aſſigns *Dower*, and dies, his *Heir* ſhall have no Writ of *Admeaſurement*, tho' he aſſigned too much, becauſe he is bound by the Act of his Anceſtor; but if the *Heir* be within Age, and aſſigns Dower, and dies, his *Heir* being of full Age, he ſhall have a Writ of Admeaſurement, becauſe his Anceſtor was not bound by his Act, during the Minority; but if the *Heir* be within Age, when he aſſigns Dower, and dies, leaving an *Heir* within Age, ſuch *Heir* ſhall have an Admeaſurement when he comes of full Age, when he may be thereby bound; and the *Guardian* ſhall not have thereby a new Admeaſurement during the Minority, becauſe he muſt take the Eſtate in the Condition the Anceſtor left it, tho' ſuch Aſſignment of the Anceſtor was to the Prejudice of the Guardian.

Otherwiſe if the Heir be within the Age.

And if the *Diſſeiſor* endows the *Wife* of more than a Third Part, the *Heir* ſhall have an Aſſiſe, becauſe he had no Right to aſſign *Dower*, and therefore the Wife does not come in under a Perſon who had Power to make an Aſſignment, *quoad* that Part which is more than her Dower; ſo that in that, ſhe is looked upon as a Diſſeiſor; and by Conſequence the *Heir* may have an *Aſſiſe*.

Whether the Heir ſhall have an Aſſiſe.

Where the Guardian ſhall have a Writ of Admeaſurement of Dower, but not his Aſſignee.

And ſo if the *Heir*, within Age, aſſigns to the Wife more in *Dower* than ſhe ought to have, *&c.* the *Guardian* in Right may have a Writ of *Admeaſurement*; but if he Grants over his Eſtate, his *Aſſignee*, who is Guardian in Fact, ſhall not have the Writ, becauſe it was a Thing in Action given to him, and the *Heir* ſhall have a Writ of Admeaſurement of *Dower* for Dower aſſigned in the Time of his Anceſtor; *hoc videtur*, if the Anceſtor was within Age at the Time, *&c.*

Where the Heir ſhall have the Writ; and the Tenant no Remedy by Aſſiſe, but by Scire facias.

And if a *Woman* be endowed in Chancery by the *King*, the Heir ſhall have a Writ of *Admeaſurement* againſt her, if ſhe has more aſſigned unto her for Dower than ſhe ought to have. If upon Recovery of the Third Part in Dower, the Sheriff aſſigns a Moiety, the Tenant hath no Remedy againſt the Sheriff by *Aſſiſe*, but he may have a *Scire facias* to aſſign Dower *de novo*. 23 *R.* 2. *Execution*, 165. Vide 21 *H.* 7. 29.

Dower not to be avoided by Entry.

Dower aſſigned by the Infant, more than was neceſſary, ſhall not be avoided by Entry. Vide 10 *Ed.* 3. 21. *Dower* ſhall not be admeaſured by a Writ of *Dower*. 19 *Ed.* 3. *Quare Impedit*, 154.

The

The Reaſon is, when the Feme recovers *Dower*, and the Sheriff aſſigns it by Award of the Court, and by the Inqueſt of twelve Men, the Sheriff is no Wrong-doer, tho' he aſſigns more than her Share, ſo that the *Heir* can have no *Aſſiſe* againſt him, but he muſt apply himſelf to the Court for a new Inqueſt; and therefore muſt call in the *Tenant* in *Dower*, by *Scire facias*. And when the Heir aſſigns, during his Minority, more than is neceſſary, he cannot, at his full Age, avoid it by Entry, becauſe Part is well aſſigned, ſince ſhe was intitled to ſome Dower, and conſequently he cannot avoid, but *quoad* the Overplus, and ſuch Overplus cannot be diſtinguiſhed till it be admeaſured.

Where the Sheriff conſtrued no Wrong-doer, and the Heir can have no Aſſiſe.

The Tenant to be called in by a Scire facias.

Secondly, This Aſſignment was ſuppoſed to be done with the Approbation of the *Pares* of the Heir's Court, and ſo could not be avoided without an Inqueſt; but if the *Wife* brings a Writ of *Dower*, and the *Dower* be ſet out under the Direction of the Court, the *Heir* ſhall not have *Admeaſurement* when he comes of full Age, becauſe it is ſuppoſed the Court will take Care of the Intereſt of the Infant; therefore its Act cannot be impeached, tho' the *Wife* had thereby more than

An Aſſignment of Dower, ſuppoſed to be done per Pares, *not to be avoided but by Inqueſt.*

Whether the Heir may have a Scire facias, *notwithſtanding an Inqueſt.*

ſhe ought; but *Quære* whether the Heir may not have a *Scire facias*, if the Sheriff has ſet out more than he ought; and if the Guardian do aſſign *Dower* more than ſhe ought to have, the Heir, during his Nonage, ſhall not have a Writ of Admeaſurement; but if he himſelf does, *&c.* then it ſeems reaſonable that he himſelf, during his Nonage, may have the Writ of Admeaſurement of Dower. *Quære tamen.*

Improvement of the Tenant in Dower, not to be taken from her by Admeaſurement.

But if the *Wife*, after the Aſſignment of *Dower*, do improve the Land, and make it better than it was at the Time of the Aſſignment, an Admeaſurement does not lie of that Improvement. 14 *H.* 3. *Admeaſurement* 10. 13 *E.* 1. *ibid.* 17. but if the Improvement be by Caſualty, as a Mine of Coals, or of Lead, which are in the Land, *&c.* which have been occupied in the Huſband's Time, the Doubt is the more; but ſhe ſhall not dig new Mines, for that would be Waſte.

A Difference taken, as to ſeveral Sorts of Improvements. 5 Co. fol. 12.

The *Diſtinction*, touching the Mine, ſeems to be this, That where a Mine is not open, ſhe cannot work it at all, becauſe it will be Waſte; if it be open, and in Work, it ſeems to be only a caſual Profit; and a caſual Profit ſhall not avoid an Aſſignment, or be ſo admeaſured as to vacate it, ſince it is

not

not certain to continue during the Life of the *Dowreſs*; and therefore not to be computed into the Value of that Part which ſhe poſſeſſes, unleſs the Value was coextenſive with the Eſtate which ſhe is to have in it.

Where the Wife endowed, tho' the Husband had no Poſſeſſion.

And if the *Anceſtor* dieth ſeiſed, and the *Husband* die before he entereth into the Land, yet the *Wife* ſhall be endowed, tho' her Husband had but a Poſſeſſion in Law.

Aliter of a Tenant by the Curteſy.

But a Man ſhall not be *Tenant* by the *Curteſy* of Land, if the *Wife* had not a Poſſeſſion in Deed, if it be not in Special Caſes, as of an *Advowſon*, of *Rent*, where ſhe dies before the Day of Payment.

And in that Caſe, if the King's *Tenant* die ſeiſed, and the Ter-tenant dies before he enters, then the Wife ſhall be endowed.

Where the Wife not to be endowed where the Heir intrudes upon the King's Poſſeſſion.

But if the *Heir* enters and intrudes upon the King's Poſſeſſion, and afterwards dies before he ſueth his *Livery*, the *Wife* ſhall not be endowed by the Statute of *Prærog. Reg. c.* 12. which is, that if the Heir intrude upon the King's Poſſeſſion, that *nullum accreſcit ei lib. tenementum*. Where a *Woman* takes a Leaſe for Years of Land, ſhe ſhall not be endowed of the ſame Land, during the Term; accordingly

Where the Wife to be endowed, tho' the Husband be attainted, if the Heir be reſtored.

where the Wife takes the Commitment of the Wardſhip from the Grant of the King, without any Execution of *Dower*, ſhe ſhall be barred of *Dower*, during the Nonage of the Heir. *6 H.* 4. 7. But if the *Baron* be attainted, and dies, and the *Wife* takes a Leaſe for Years of the Land, from the Grant of the King, the *Heir* of the Husband being alſo in Ward of the King for other Tenements that were intailed; and afterwards by Act of Parliament, or Repeal of Judgment, the *Heir* is reſtor'd, now ſhe ſhall have her *Dower*; for that the Leaſe was made before the Title of *Dower* commenced. So if *A.* makes a Leaſe to a *Feme* for Years, and afterwards they intermarry, *A.* dies within the Term, his *Wife* ſhall be endowed. *6 H.* 4. 7. 8. Sir *John Cornwallis*'s Caſe. *Dyer* 76. Tenant at Will ſhall be in *Dower* of the ſame Lands.

The Reaſon thereof.

The Reaſon of this Caſe is, becauſe when the *Wife* takes a Term, or has a Term in the Land, by her own Act, ſhe agrees to hold it under the Reſervation of the Rent; therefore ſhe cannot afterwards recover a Freehold in that Eſtate, which would make a Merger of the Term, *quoad* that third Part; and by Conſequence take away the Security which the Heir had for his Rent,

ſince

ſince he could not afterwards diſtrain in that third Part for his Rent, and therefore ſuch Term will be a Bar to the Wife's recovering *Dower* in that Land, ſince ſhe has covenanted with the *Heir* to hold of him in another Manner; but though the Wife were Tenant at Will, ſhe may bring *Dower*, becauſe the bringing the Writ is a Determination of the Will. And where the Eſtate, which the Husband hath during the Marriage, is ended, there the Wife ſhall loſe her *Dower*.

Where the Wife's Acceptance of a Term ſhall bar her Dower.

Aliter *of the Acceptance of a Tenancy at Will.*

As if Tenant in Tail do diſcontinue in Fee, and afterwards taketh a Wife, and diſſeiſeth the Diſcontinuee, or the Diſcontinuee doth enfeoff him, and afterwards the Tenant in Tail dieth ſeiſed, his Heir is remitted, and the Wife ſhall loſe her *Dower*, becauſe the *Heir* is ſeiſed of another Eſtate of Inheritance than the *Husband* had during the Coverture. *Vide infra.*

Where the Wife ſhall loſe her Dower by a Diſcontinuance. 1 Inſt. 31. Dyer 41.

And ſo if a Man have a Title of Action to recover any Land, and afterwards he entereth and diſſeiſeth the Tenant of the Land, and dieth ſeiſed, and his *Heir* entereth, his *Heir* is remitted unto the Title which his Anceſtor had, and the Husband's Wife ſhall loſe her Dower, for the Eſtate which the Husband had is determined; for

Where the Wife ſhall loſe her Dower, the Husband being a Diſſeiſor.

for that was an Eſtate in Fee by Wrong, and the *Heir* hath the Eſtate in Fee, which his Anceſtor had by Right. According to this Diverſity. Vide 19 *Ed.* 3. 27.

Where the Wife of the Donor ſhall not be endowed of a Rent, it being Extinct.

If a Man makes a Gift in Tail, reſerving a Rent to him and his Heirs, and afterwards the *Donor* hath a Wife, and dieth, and the *Tenant* in *Tail* dieth without Iſſue, the Wife of the *Donor* ſhall not be endow'd of the Rent, becauſe the Rent is extinct; for it was reſerved upon the Eſtate-tail, which is ended; but altho' that the Tenant in Tail dieth without Iſſue, yet his Wife ſhall be endowed, becauſe the Land continueth, and is not determined, as the Rent is.

Where the Wife ſhall have Dower of a Rent, but ceſſet executio during the Nonage of the Heir.

N. B. If a Rent be granted to *J. S.* and his Heirs, upon Condition that if the Grantee or his Heirs be within Age, the Rent ſhall ceaſe during their Nonage, the *Wife* ſhall recover *Dower* of the *Rent* againſt the Ter-tenant; but *ceſſet executio* during the Nonage. 12 *E.* 3. *Condition*, *Perkins fol.* 65. *Pl.* 277.

Where the Wife of the Father ſhall not have Dower of the Grandmother's third Part.

If the Grandfather dies ſeiſed, and after the Father dies ſeiſed, and the Son hath the Land, and then the Wife of the Grandfather is endowed of the third Part of the Land, and dieth, yet the Wife of the Father ſhall not have Dower of the third Part. *Quia dos de dote peti non debet.*

The

The *Dowreſs* holds of the *Heir*; but by the Inſtitution of the Law, ſhe is in of the Eſtate of her Husband; ſo that after the Heir's Aſſignment, ſhe holds by an Infeudation from the immediate Death of the Husband: Hence it is that *Dower* defeats *Deſcent*, becauſe the Lands cannot be ſaid to deſcend as Demeſne, which are in Tenure, and the Aſſignment of *Dower* being in Nature of *Infeudation*, and taking Place immediately from the Death of the Husband, there are only two Thirds which deſcended as Demeſne: Hence the Maxim aroſe that there could not be *Dos ex dote*; for if there were Grandfather, Father and Son, *&c. ut ſupra*, the Mother was not intitled to be endowed of a third Part of that Third, becauſe it was in Tenure of the Grandmother, during the Life of the Father, and he was never ſeiſed of it.

Where Dower defeats Deſcent.

Where Dos cannot be ex dote.

But if the *Grandmother* had died, during the Life of the *Father*, the *Mother* ſhould be endowed; becauſe the Tenure of the Dowreſs's Grandmother was determined, and ſo was Demeſne in the Life of the Father.

Where the Mother ſhall be endowed.

So if the *Grandfather* had enfeoffed the Father, and died, and the *Grandmother* had recover'd *Dower* of the Father,

The like of that Part which the Grandmother held in Dower.

Father, and then the Father died, the *Mother* ſhould be endowed, not only of the Eſtate in Poſſeſſion, but of one Third in Reverſion, of that Part (*viz.*) which the Grandmother held in *Dower*, becauſe the actual Seiſin of the Father, by the Feoffment, was before the Tenure of the Grandmother took Place upon the Eſtate, tho' the Title to ſuch Tenure was precedent; therefore the Title of the *Grandmother* does not avoid the Seiſin of the *Father*, which he attain'd by the precedent Livery, but only burthens it with an Eſtate for Life; ſo that the *Seiſin* of the *Father*, in this Caſe, being not defeated by the Tenure of the Grandmother, as it was in the former Caſe, ſuch *Seiſin* muſt therefore be eſteem'd to have Continuance during the Coverture; and from this Notion it is clear, that if Tenant in Tail diſcontinues, and after takes a Wife, and diſſeiſes the *Diſcontinuee*, and dies, his Wife ſhall not be endow'd, becauſe her Tenure muſt ariſe out of the Eſtate gained by Diſſeiſin, and by Conſequence, ſuch Tenure is defeated by the Remitter; for ſhe cannot hold of the *Heir*, as by *Infeudation* of that Eſtate, which he has not in him.

Where the Wife of the Diſſeiſor of the Diſcontinuee ſhall not be endowed.

If the *Husband* be *Tenant* in *Common*, with two others in Fee, of certain

tain Lands, and dies, his Wife ſhall be endowed of the third Part of the Land, by *Metes* and *Bounds* to hold in Common, *&c.* it is to be holden by *Metes* and *Bounds*, *quoad* the Heir, and ſhe muſt ſtock the Land in Proportion to a Third of a Moiety; and *quoad* the other Moiety, ſhe muſt ſtill hold in Common with the other Tenants. *How the Wife of a Tenant in Common to be endowed.*

10 *Dower* muſt always be in Severalty by *Metes* and *Bounds*, *quoad* the Heir; becauſe it is a Tenure of the Heir, and therefore muſt be divided from his Demeſnes. *Dower by Metes and Bounds.*

And if a *Wife* be endow'd of a Mill, or of an Office, ſhe ſhall have the third Part of the Profits thereof aſſigned to her, and ſhe ſhall have a Freehold in the third Part of the Mill, *&c.* *M.* 45. *E.* 3. 111 A Woman at the Age of Nine Years, or more, at the Death of her Husband, ſhall have *Dower* of his Land; but if ſhe be of leſs Age, *&c.* then ſhe ſhall have no *Dower*. *How to be endowed of a Mill, or an Office.*

10 If a *Woman* be endow'd, and after loſeth it by an Action tried, if ſhe prays in Aid of him in the Reverſion, ſhe ſhall be endow'd of that which remaineth. Vide 4 *E.* 3. 25, 36. 10 *E.* 3. 7. yet there ſeems this Diverſity, if a Wife be endow'd by a *Diſſeiſor*, ſhe ſhall have the Warranty; but if the Rever- *Tenant in Dower, praying Aid of him in Reverſion, how to be endowed.*

Reverſion of thoſe Lands be only granted over by the Heir, ſhe hath loſt the Warranty againſt the *Grantee*. 17 *E.* 3. 7. 21 *E.* 3. 48. 10 *E.* 3. *Quid juris*, 41.

Dower of Lands held in Exchange.

If the *Husband* exchangeth Lands, *&c.* and afterwards dieth, if the *Wife* have *Dower* of the third Part of the Land taken in exchange, ſhe ſhall not have *Dower* of the other Lands, *&c.* which were given in Exchange.

Where a Stranger may plead ſhe holds Lands in Socage.

If a Woman be *Guardian* in *Socage*, and ſhe brings a Writ of *Dower* againſt a Stranger, he may plead that ſhe holdeth Lands in *Socage*, of which ſhe may endow herſelf *de la pluis Beale*, and then upon that the Wife may endow herſelf of thoſe Lands, unto the Value of the third Part, which ſhe ought to have of the other Lands which the Guardian holdeth, *&c.*

Whether ſhe may endow herſelf of Lands de la pluis Beale.

And whether ſhe may endow herſelf *de la pluis Beale*, unto the Value of the third Part, which ſhe ought to have of all her Husband's Lands or no, *Quære*. For ſome hold that Dower *de la pluis Beale* ſhall endure but during the Minority of the Heir which is in Ward.

Where the Son cannot endow ex aſſenſu patris.

The *Son* would have endow'd his *Wife* of a Reverſion of Land, which one held for Life, *ex aſſenſu patris*,

and held not good, *M.* 4. *E.* 3. becauſe it was not in Poſſeſſion, whereof a Right of *Dower* may be claimed.

And the Writ of Dower *ex aſſenſu patris* lies as well againſt the Guardian as againſt the Tenant of the Freehold. *Where that Writ lies.*

If the *Tenant* fore-judge the *Meſne*, yet the Meſne's Wife ſhall be endow'd. If a Man recovers in Value againſt the Husband, by a *Warranty anceſtrel*, yet the Wife ſhall be endow'd, becauſe the ſame is by Force of the Warranty made, and not by Reaſon of a paramount Title to the Land. *Where the Wife of the Meſne Tenant to be endowed.*

Where the *Husband*'s Lands are evicted by a Title Paramount, the *Wife* cannot be endow'd, becauſe the *Wife* cannot be intitled to an Infeudation, where the Husband is not intitled to the Land itſelf; but if Land be recover'd by Way of Recompence in Value, either by *Homage anceſtrel*, or otherwiſe, ſuch Recompence binds the Land only from the Judgment of ſuch Land being precedently bound. By the Wife's Title to her Dower, ſhe ſhall have her Dower out of the Lands recover'd in Value; and if the Wife be evicted in any Part of thoſe Lands aſſigned unto her for her Dower, ſhe is intitled to recover in Value againſt the Aſſignor *Where the Wife cannot be endowed of Lands evicted by a Title Paramount.* *Where ſhe ſhall have Dower out of Lands recovered in Value.*

Aſſignor of Dower, be he Diſſeiſor or Heir; becauſe it was not an Infeudation of that Third to which ſhe was intitled; but ſhe ſhall not recover againſt the *Heir's Grantee* of the Reſidue of the Lands, becauſe he did not make the Infeudation, and the Tenure is not in him, but the Reverſion ſtill continues in the *Heir*; and albeit, the *Heir* had granted the Reverſion of the third Part, yet ſhe could not recover againſt the *Grantee*, becauſe the *Heir* could not grant over the Reverſion, without her Attornment; and ſhe is not oblig'd to attorn, unleſs ſuch *Grantee* of the Reverſion will enter into a Warranty to defend her Eſtate; and it ſeems that the Recompence which the Wife has, is only againſt the Perſon who made the Aſſignment of Dower, and doth not touch any Eſtate not ſubject to ſuch Infeudation. The younger Son ſhall not aſſign *Dower* to his Wife, *ex aſſenſu patris* of the Father's Land, becauſe no Heir apparent.

Not againſt the Heir's Grantee.

What Dower ad oſtium Eccleſiæ, and ex aſſenſu Patris.

The Endowment *ad oſtium Eccleſiæ*, or, *ex aſſenſu Patris*, are particular Infeudations in the Life of the Huſband, though to take Place after his Deceaſe, and therefore the *Wife* may enter without any Aſſignment of the *Heir*, or any further Specification of

the Father, than what was contain'd in his original Deed; becauſe the Tenure was erected in the Life of the Husband; and none can endow in this Manner, but the Heir apparent; becauſe no Body elſe can be certainly intitled to the Demeſne, and therefore they cannot make ſuch Sort of Infeudation out of them, nor could the Heir do it, without the Aſſent of the Father; becauſe the Demeſnes are in him, nor could the younger Son even in *Borough Engliſh* do it, becauſe there may be a younger; and theſe Sort of Dowers were ſo conſtituted as to take Place at all Events, either in the Life of the Father, by his Aſſent, or after his Death by the Infeudation of the Huſband. Co. Lit. 35. b. *For what Purpoſe conſtituted.*

If the *Husband* enters into Religion, the *Wife* ſhall not have *Dower*, during his Life; for the entering into Religion is only a Separation, and no Diſſolution of the Marriage; and if he were *deraigned*, he may enter upon his Eſtate again; and it ſeems the Eccleſiaſtical Law will give the *Wife* Alimony, during his Life; but ſhe cannot have a ſeparate Intereſt, by Way of *Dower*, during the Marriage. *A Wife not to have Dower upon the Civil Death of the Husband, and why.*

The Wife ſhall have the Third Part of an Advowſon for her Dower: If

May loſe her Dower by Adultery.

the Wife do elope from her Husband, and remain with the Adulterer, ſhe ſhall loſe her Dower.

But not if ſhe is upon the Land.

But if ſhe remain in Adultery, upon the Husband's Lands or Tenements, ſhe ſhall have *Dower*, becauſe the ſame is not an *Elopement*.

How the Old Law ſtood when Villenage was in Uſe.

By the old *Feudal Law*, the *Vaſſal*, if he committed Adultery with his Lord's Wife, it was a Forfeit of his *Feud*, and conſequently if the Wife of a Tenant committed Adultery, ſhe forfeited the Infeudation of her *Dower*; but the ſubſequent Laws put it upon Elopement; becauſe by that the Adultery became flagrant, and they would not allow ſecret Adulteries to be pretended after the Death of the Husband, by which the Heir blemiſh'd the Reputation of his Anceſtor.

How ſhe might loſe her Dower before the Law was altered.

If the *Husband* be attainted of *Felony* by *Outlawry*, or otherwiſe, ſhe ſhall loſe her *Dower*. *Vide* the Common Law alter'd in this Caſe. 1 *E.* 6. *c.* 12.

1 E. 6. c. 12, 9, 17. Co. Lit. 9, 55. 44.

When the *Husband*'s Eſtate eſcheated to the Lord for Felony, or to the King for Treaſon, there was an End of the Wife's Dower, becauſe the King or Lord came in by Title Paramount, and the Eſtate of the Husband was at an End, out of which the Infeudation was

to be; ſo if the Husband had enfeoffed any Perſon, and had committed *Treaſon* or *Felony*, ſhe could not have claimed her *Dower* from the *Feoffee*, becauſe the *Feoffee* after the Death of the Husband, held of the ſuperior Lord; and the Eſtate of the Husband, which he had during the Coverture, is forfeited; but if the Husband had not committed the Treaſon or Felony, then ſhe might have claim'd her *Dower* of the *Feoffee*, tho' ſince the Statute of *Quia Emptores*, the Feoffee holds of the ſuperior Lord, becauſe the Marriage is conſidered as a Charge upon the Eſtate to any Perſon that comes in the *Per*; as under the Conveyance of the Husband, and therefore the Wife's Dower was conſider'd as an Infeudation charged on the Eſtate of the *Feoffor*; but if the Husband had committed a Forfeiture after Feoffment, it would have work'd as an Eſcheat of the Meſnalty, and conſequently the Feoffee would have held of the Lord Paramount; and the Wife could not therefore have had Dower; but where there was no Forfeiture, the Meſnalty had a Continuance, and then the Wife's Dower was to charge the *Feoffee*, as a prior Infeudation ariſing out of the Marriage Contract.

When ſhe could not claim Dower of the Feoffee.

How the Law is ſince the Statute Quia Emptores Terrarum.

The like. But after the Statute of *Quia Emptores*, *&c.* this Diſtinction, which aroſe out of the Meſne Tenure, became obſolete; and therefore they thought, ſince the Husband could not by his Alienation, defeat the Wife's Dower, ſo neither ought he by his Act of Forfeiture; therefore, agreeable to this, the Statute of 1 *E.* 6. *c.* 12. was made to preſerve the Wife's Dower where the Husband had forfeited.

Wife of a Jointenant. If one *Jointenant* makes a Forfeiture of his Part, his Wife ſhall not be endow'd, becauſe the Husband was never ſole ſeiſed.

The like. In that Caſe of *Jointenancy*, during the Joint Seiſin, the Wife's Contract of Dower can never attach upon the Eſtate; becauſe the other Jointenant comes in by the Feudal Contract, ſuperior to the Marriage Contract, ſo to the Wife's Infeudation; for though the Marrirge Contract had been prior to the Jointenancy, yet it will not attach upon it, becauſe the Eſtate in Jointenancy is ſo created, that it ſhould ſurvive, *Et cujus eſt dare ejusdem diſponere*; therefore, though the Marriage were precedent, yet it cannot take Place upon this Infeudation; but as ſoon as the ſole Seiſin commences, the Wife of the *Feoffee* ſhall be endow'd, and the Wife

of

of the former Companion of the Alienor, who is now become *Tenant* in *Common* with the Feoffee.

Endowment *ex aſſenſu matris* is good, but *ex aſſenſu fratris*, is holden not good. *Dower ex aſſenſu matris and fratris.*

And Dowment *ex aſſenſu patris*, after Marriage, is good. Dowment *ex aſſenſu matris* is good, becauſe the Son is Heir apparent of her Lands; but *ex aſſenſu fratris* is not ſo, becauſe one Brother cannot be ſaid to be Heir apparent to another, ſeeing the Brother may marry, and have Children, and the Dowment *ex aſſenſu, &c.* is good, at any Time during Marriage; becauſe it is only aſcertaining the Quantity of Infeudation, nor is there any Objection that this ſhould over-reach a Purchaſer; becauſe when ever an Heir Apparent is married, it is ſufficient Notice to enquire into the Settlement of the Land of the Father. If a Man marry a Woman in a Chamber, Dowment *ad oſtium Cameræ*, is not good. *Patris & matris. Why not ex aſſenſu fratris. Ad oſtium Eccleſiæ,*

Dowment *ad oſtium Eccleſiæ* of the Moiety of the Land, is good. *What a good Marriage to have Dower.*

And a Woman married in a Chamber, ſhall not have Dower by the Common Law. *H.* 16 *H.* 3. *Quære* of Marriages made in Chapels not conſecrated, *&c.* for many are by Licence

from the Biſhops married in Chapels, *&c.* and it ſeemeth reaſonable they in ſuch Caſes, ſhould have *Dower*.

How formerly. Formerly they held, if they were not married at the conſecrated Church, that the Wife ſhould not be endow'd; becauſe the Contract not being ſolemnly made, was no ſufficient Foundation for an Infeudation; but afterwards, when the Solemnization of Marriages in conſecrated Chapels were allow'd, by Licence from the Biſhops; and when it came to be held that Marriages were good, tho' done in Private, and in unconſecrated Places, ſince they held that the Sacrament depended on the Prieſt, and not on the Place, they then determined (ſince that the Heir's Title to the Demeſnes depended on the ſame Title as the Wife's Claim to Dower) that Dower was demandable upon ſuch private Marriages.

How in later Times.

When a Moiety. And in ſome Places the Wife ſhall have the Moiety in *Dower*, as in *Gavelkind*.

When the whole. And in ſome Cities ſhe ſhall have all by the Cuſtom, which is call'd *Free-Bench*.

The Original of Free-Bench. The *Free-Bench* ſeems to have its Riſe from the ſame Cuſtom as *Borough-Engliſh* in *Villeine Tenure*, the Lords having the Cuſtom to poſſeſs their Tenants

nants *Wives*, they contracted that the younger Son ſhould inherit; but the Wife obtained the Privilege over the whole Eſtate, and eaſily compounded for Crimes of that Kind.

Dower ad oſtium Eccleſiæ, *how much to be aſſigned.*

And *Glanville* ſayeth, that *ad oſtium Eccleſiæ* a Man cannot aſſign more than the third Part in Dower; and if he do, the Wife ſhall be admeaſured, *&c.* but leſs may be aſſigned by Law; yet at this Day, it ſeemeth that the Aſſignment *ad oſtium Eccleſiæ*, of more than the Third Part, is good; and ſhe ſhall not be admeaſured for it.

The Reaſon of the ancient Uſe in that Caſe.

The Reaſon why in *Glanville*'s Time, Endowment *ad oſtium Eccleſiæ* of more than a Third Part was not good, ſeems to be, becauſe it hurted the Fruit of the Lord's Feudal Service, during the Minority, but ſince it ſubſiſts on a Contract made on a Condition of Marriage, it ought to prevail, though it exceeds a Third; and this is the Reaſon of the latter Reſolution.

Wife not to be diſtrained for Debts due to the King.

And the *Wife* ſhall not be diſtrain'd in the Lands which ſhe holdeth in *Dower* for the Debts of the Husband in his Life due to the King, nor in the Lands of Inheritance of the Wife, nor in the Lands, which ſhe hath by Purchaſe, made by the Husband, to him and his Wife, and to their Heirs; and if ſhe be

diſtrain'd by the Sheriff, ſhe may ſue forth this Writ,

The Form of that Writ. Reg. Brev. 142. b.

REX vic', &c. ſalutem. Cum ſecundum leges & conſuetud' Regni noſtri Angliæ, Mulieres in terris & tenementis quæ tenent in dotem de dono virorum ſuorum, vel quæ de hæreditate ſua ſint vel quæ ſibi perquiſiverant, pro debitis virorum ſuorum Reddend. diſtringi non debeant, Ac Tu B. *quæ fuit uxor* A. *diſtringis in terris & tenementis ſuis quæ tenet in dotem de Dono prædict.* A. *& etiam, &c. quæ fuerunt de hæredit. ipſius* B. *ſicut ex querelâ ſuâ accipimus, Tibi præcipimus quod ipſam* B. *in terris & tenementis ſuis quæ tenentur in dotem vel ſint de hæreditate ſua propriâ vel ex perquiſito ipſius* B. *pro debito ipſius* A. *quondam viri ſui Reddend. ne diſtringi fecer' contra legem & conſuetudinem prædict. & diſtrictionem ſi quam, &c. ei redeliberar' facias, Teſte, &c.*

Another Form.

There is another Form of the Writ in the Regiſter for Tenant in *Dower*, which is directed to the Sheriff, commanding him that he do not diſtrain the Wife in thoſe Lands which ſhe holdeth in *Dower*, or of her own Inheritance for her Husband's Debt; but that Writ

Writ hath theſe Words in the End of it, *Dum tamen hæredes & Executores teſtamenti ipſius* A. *ad debita illa nobis Reddenda, ſufficient' non Diſtring'*; and by theſe Words in the Writ, it ſeemeth, that if the Heir or Executor, have not ſufficient of Lands or Goods to pay the Debt, that the Wife ſhall be charged, and the Debt diſtrain'd for her Purchaſe in the Joint Lands made by her Husband and her, but not in her Lands of Inheritance, nor in the Lands, wherein ſhe had Title of *Dower*, before the Husband became indebted to the King; and that the firſt Writ is according to Law in theſe Caſes. *With this Addition.* Reg. Brev 143.

But if the *Husband* be indebted to the *King* before ſhe hath Title of *Dower*, it ſeemeth to be otherwiſe. Vide 4 *Aſſiſe* 36, 53. *Aſſiſe*. 5 *Dyer* 224. Sir *William St. Lewis*'s Caſe accordingly. *Husband Debtor to the King.*

And there is another Writ in the Regiſter for the Wife, directed to the Sheriff, that he do not diſtrain her in Lands and Tenements which her Huſband and ſhe purchaſed jointly; before the Husband was indebted to the King, if they purchaſe the Lands jointly to them in Fee, the Lands, after the Death of the Husband, in the Hands of the Wife, and her Heirs, ſhall be *A Writ not to diſtrain in the Lands purchaſed jointly by Baron and Feme.*

be discharged of the Debt; and if she be distrained, that he deliver them again to the Wife.

Where the Wife holds discharged of the King's Debt.

And by the same Reason, tho' the *Husband* be before indebted to the *King*, that if he and she purchase the Land jointly in Fee to them, after the Death of the Husband, the Wife, and her Heirs, be discharged of the Debt.

Where Tenant in Dower not to be distrained for the King's Debt.

And there is another Writ in the Register, for Tenant in *Dower*, directed to the Sheriff, that he do not distrain the Wife for the Husband's Debts, because that the Heir, who ought to pay the same out of the Lands, is within Age, and in Ward to the King; or because that other Tenants, who should be charged with the Payment thereof, are omitted.

The like.

And so, it seemeth, the Land of the Tenant in *Dower* shall be discharged, if there were other Lands of the Husband's to pay the Debts; and those Writs appear in the *Register*, *fol.* 143.

Another Writ in the Register, not to distrain for the King's Debt.

And another Writ directed to the *Sheriff*, that he do not distrain the Wife who holdeth Lands in *Dower*, for the Debts of the Husband, which he owed to the King, before the Contract of Marriage between him and the Wife purchased jointly in Fee, for the Husband's Debts, which he became Debtor for

for before the Purchaſe; and ſhe may have ſuch Writ out of Chancery, directed unto the Treaſurer, and Barons of the Exchequer, commanding them that they enquire thereof; and if they find the ſame, that they ſurceaſe and diſcharge the Wife, with this Proviſo of the Writ, *Proviſo, quod debita illa de Execut. & Hæred. prædict.* A. *ac tenentibus terrarum quæ fuerunt ſuæ & quæ inde de Jure debent onerari ad opes noſtras levand' ut Juſtum eſt. Teſte, &c.*

The true Diſtinction of theſe Caſes is, that if the Debt to the *King* be ſubſequent to the *Marriage*, then the Wife's Dower, being a Contract for Infeudation, at the very Time of the Marriage, and which binds the Lands, the Aſſignment of *Dower* over-reaches the Charges, by Debt of the King; for if the *Husband* could not alien, during the Coverture, ſo as to defeat the Wife's Infeudation, he could not make any other Charges that would impeach it; and therefore the Wife there may have a general Prohibition, ſince the King's Debt does not affect the Lands; but if the King's Debt was before the Marriage, then the Contract for Infeudation, was ſubject to the Burthen of the King's Debt; and there-

The Diſtinction of theſe Caſes.

fore

fore there ſhe can only have a *Special Prohibition*, with an *Ita quod*, that there are Lands in the Hands of the Heir, or Chattels in the Hands of the Executor, to anſwer the King's Debts; for if there be not, then the King may levy the whole Debt upon the Dowreſs, and ſhe muſt come upon the *Feoffees* of the Husband, who are equally liable to Contribution; for the Huſband, by ſubſequent Alienation, cannot put ſuch a Diſadvantage upon the Crown, that has given him Credit, as to force the Crown to bring in every *Alienee*, in order to be paid by them; but the King has a Right to ſeiſe the Lands in whoſeſoever Hands he finds them, if ſuch Perſon comes in ſubſequent to ſuch Charges.

Where a Writ De dote Aſſignanda *lieth.*

The Writ *De dote aſſignanda* lieth, where it is found by Office that the King's Tenant was ſeiſed of Tenements in Fee, or Fee-tail, the Day he died, *&c.* and held of the King in *Capite*, then the Wife may, and ought to come into the Chancery, and there make Oath, that ſhe will not marry without the King's Licence; and thereupon the King may aſſign her *Dower* in the Chancery of thoſe Manors and Lands.

Marriage of Dowreſs.

There was to be no Marriage of the Dowreſs, during the Nonage of the Heir,

Heir, that was in Ward of the King, without the King's Licence, becauſe, by the general Conſtitution of the Feudal Law, every Feudatory of the Crown was to marry with Licence, that there might be no Diſparagement to the Family, whilſt they were under the Care of the Crown; and the Dower being aſſigned by the Crown, was in the Nature of a Royal Infeudation, therefore under the ſame Neceſſity to take out a Licence, and thereupon ſhe ſhall have a Writ unto the Eſcheator, where the Lands are, which ſhall be thus,

Dower aſſigned by the Crown.

REX eſcheator' ſuo in Com. B. *ſalutem. Sciatis quod de Terris & Tenementis quæ fuerunt* N. *defuncti, qui de nobis tenuit in Capite, & quæ occaſione mortis ejuſdem* N. *capt. eſt in manum noſtram aſſign.* J. *quæ fuit uxor prædict.* N. *tertiam partem maner. de* T. *&* C. *in Com.* T. *cum pertinentiis, necnon tertiam partem purpart. quæ fuit ipſius* N. *cum libertate honoris* Winton *& viſus* Franci *plegii in dicto Com.* T. *habend. in dotem ipſam de maneriis & purparte prædict. ſecundum legem & conſuetudinem Regni noſtri Angliæ contingentem, necnon de aſſenſu* E. *principis* Walliæ *filii noſtri chariſſ.*

The Writ to the Eſcheator. Reg. Brev. 297.

chariſſ. Cuſtod. maner. de R. *in Com.* Bucks *quæ ad x. libras extend. per Ann. ſicut per extentas inde* de mandato *noſtr. fact. in Cancellariam noſtram retorn. eſt compert. aſſignavim. præfat.* J. *dict. maner. de* N. *cum pertinentiis pro dote ſua dictor. maner. de* K. N. *habend. infra prædict. & ideo tibi præcipimus quod eidem* J. *dict. maner. de* N. *cum pertinentiis liberes habend. in dotem ſuam ſicut prædict. eſt. Teſte, &c.*

Vide Ret. finium 1 *E.* 1. *Mem.* 21. A Command to the Eſcheator, to ſeiſe all the Lands, *De quibus* A. *ſi, &c. & etiam quod* Margeria *quæ fuit uxor prædict.* A. 20 *libras de terr. & tenement. præd. aſſignari faciat donec rationabilem dotem ipſam conting. ſecundum legem & conſuetudinem tibi fecerit aſſignari. Vide Accord.* Cloſe Roll, 2 E. 1. Mem. 15.

When ſhe may have a Writ to the Eſcheator.

And when the Wife hath made her Oath in the Chancery, ſhe may have a Writ *de Dote aſſignanda*, directed to the Eſcheator, to aſſign her Dower; and the Writ ſhall recite, that ſhe hath made her Oath in the Chancery, *&c.* but the Uſe is to make the Aſſignment of Dower in the Chancery, and to award a Writ unto the Eſcheator,

or, to deliver the Lands aſſigned unto her; and altho' the King doth commit the Cuſtody of the Land unto another, yet the King may aſſign Dower to the Wife in Chancery; and ſhe ſhall have a Writ to the Eſcheator, to deliver unto her that Dower, as appeareth by the *Regiſt.* 298. *a.* Vide *Keilw.* 133. it ſeems that the Committee cannot aſſign Dower. *Quære tamen*, if it ſhall not be good till the Heir ſues Livery; and the Writ ſhall be ſuch,

Another Writ to the Eſcheator.

REX Eſcheator', &c. ſal. Cum inter cæter. terr. & tenement. J. *quæ fuit uxor* N. *defuncti, qui de nobis tenuit in capite per nos de terr. & tenement. quæ fuerunt prædict.* N. *in dotem aſſignat. aſſignavimus eidem* J. *partem maner. de* G. *cum pertinentiis in Com.* B. *necnon tertiam partem propartis, quæ fuit ipſius* N. *cum libert. honoris* W. *& viſum Franci plegii in eodem Com. habend. in dotem infra prædict. tibi præcip. quod eidem* J. *cujus ſacram. quod non maritabit ſine licentia noſtra recipimus dictas tertias partes in Baliva tua, in præſentia Cuſtod. eorund. maner. & tertiæ partis, per vos inde præmuniend. ſi intrare voluerit, vel attorn. ſu. in hac parte aſſignari, & liberari, fac. habend. in dotem, ſicut prædictum eſt, &*

eſt. & cum aſſignationem, &c. Teſte, &c.

And if the Wife, after the Death of the Husband, doth come into the Chancery, and prayeth her *Dower*, there the King may grant a Writ unto the Eſcheator, commanding him to take Security of the Wife, that ſhe do not marry without, *&c.* and to aſſign *Dower* unto her; and the Writ is,

Reg. Brev. 297. *a.*

REX Eſcheat. ſal. Præcipimus tibi, quod capt. ſacram. M. *quæ fuit uxor* W. *defuncti, qui de nobis tenuit in capite, quod ſe non maritabit ſine licentia noſtra eidem* M. *rationabilem dotem de omnibus terr. & tenement. quæ prædict.* W. *quondam vir ſuus tenuit in Dominico ſuo ut de feodo in Baliva tua, die quo obiit, & quæ per mortem prædict.* W. *capt. fuerunt in man. noſtrum & in manu noſtra ſic exiſtent. ſecundum legem & conſuetud. Regni noſtri Angliæ contingent. per extent. inde fact. vel aliam ſi neceſſ. fuerit iterato faciend. in præſentia* B. *per te inde præmuniend. ſi intereſſe voluerit aſſignari facias & cum aſſignationem illam ſic feceris, eam ſub ſigillo tuo diſtincte & apperte mittas, ut eam in Rotulis Cancellariæ*

noſtræ prout moris eſt Irrotul. faciamus, Teſte, &c.

And if a Man dieth ſeiſed of Lands, which are holden by Knight-Service of any Manor, or otherwiſe, of any Abby, Biſhoprick or Priory, or ſuch as are in the King's Hands, by Reaſon of the Vacancy of the Abbot or Biſhoprick, *&c.* then, if the Wife will have *Dower*, ſhe ought to ſue in the Chancery, to have ſuch Writ directed unto the Eſcheator, to aſſign her *Dower*; but there the Wife ſhall not take Oath that ſhe will not marry without the King's Conſent, as appeareth by the Writ; for the *Prærogative* does not obtain in that Caſe, for the King aſſigns *Dower*, as Guardian of the Temporalties, and not as ſuperior Lord; and the Writ is, *When the Wife to ſue in the Chancery.*

REX, &c. Præcipimus tibi, quod A. *quæ fuit uxor* B. *defuncti, qui de Abbatia de Burgo S. Petri nuper vacante & in manus noſtras exiſt. tenuit per ſervitium militare rationabilem dotem ſuam de omnibus terr. & tenement. &c. quæ prædict.* B. *vir ſuus tenuit de Abbatia prædict. in Baliva tua die quo obiit, & poſt mortem ipſius* B. *in man. noſtras exiſt. &c. ut ſupra.* Writ to the Eſcheator, when the Lands are held of Spiritual Lords.

And the like Writ may be ſued by the Wife, for Lands which her Huſband held by Knight-Service of the Manor of him who is in Ward of the King, by Reaſon of his Nonage; but there ſhe ſhall not make Oath that ſhe will not marry, &c. no more than in the precedent Caſe; *cauſa qua*, &c.

And the King may aſſign Lands in *Dower*, in the Chancery, rendering Rent yearly, &c. to the King, becauſe the Lands do exceed the Value of the Third Part of all the Tenements, whereof ſhe ought to have *Dower*; and then upon that Aſſignment made in the Chancery, ſhe ſhall have ſuch Writ to the Eſcheator.

Writ to the Eſcheator, where there is a Rent reſerved.

REX Eſcheat. ſal. Sciatis, quod de terris & tenementis, quæ fuerunt E. *de* B. *defuncti, qui de nobis tenuit in capite, & quæ occaſione mortis ejusdem* E. *capta ſunt in manus noſtras, aſſignavimus* M. *quæ fuit uxor prædict.* E. *manerio ſubſcripta, viz. de* B. C. &c. *cum pertinentiis in Com.* T. *quæ ad* 100 *libras extend. per Ann. habend. in dotem, ipſam de terr. & tenement. prædict. ſecundum legem & conſuetud. Regni noſtri Angliæ, contingent. Reddend. inde nobis per Annum, ad Scaccarium noſtrum tantum, quod excedit dotem ſuprà-*

prædictam. Ideo tibi præcipimus, quod eidem M. *dict. maner. cum pertinentiis liberes: habend in dotem ſuam, in forma prædicta, Teſte, &c.*

And if the Wife be impotent, ſo as ſhe cannot come into the Chancery, to make Oath, and to demand her *Dower* to be aſſign'd by the King, if ſhe will demand *Dower*, ſhe may have a Special Writ, directed to certain Perſons to take her Oath, and receive an Attorney for her, to ſue for her *Dower* in the Chancery, *&c.* the Writ appeareth in the *Regiſter*, *f.* 298. *Where Dedimus to go take the Dowreſs's Oath.*

And if the King makes Livery unto the Heir, at his full Age, ſaving unto the Wife her *Dower*, to be aſſign'd by the King, then if the Wife will demand *Dower*, ſhe ought to ſue for the ſame in Chancery; and if ſhe do demand her *Dower* there, then ſhall iſſue a Special Writ unto the Eſcheator, that he may warn the Heir to be in Chancery at a certain Day, *&c.* and there the Wife ſhall have the ſame Day to receive her *Dower*, *&c.* and the Writ which ſhall iſſue againſt the Heir is, *Livery to the Heir, with a* Salvo *of Dower.*

REX Eſcheat. ſal. Cum Ed. *nuper Rex Angliæ, Pater noſter* 11 *die* Jan. *prox. præter. ceperit homagium* J. *de* B. *filii & hæredis* J. *de* B. *defuncti, de omnibus* The Writ to the Eſcheator, in that Caſe.

Reg. Brev. 298. a.

omnibus terr. & tenement. quæ idem J. pater ſuus tenuit de dict. patre noſtro die quo obiit, &c. & terras, & tenementa illa reddiderit, ea quæ ſibi mand. liberari, ſalvo jure cujuſlibet, & ſalva M. quæ fuit uxor prædict. J. rationabili dote ſua ipſam de terr. & tenement. prædict. ſecundum legem & conſuetudinem Regni noſtri Angliæ contingent. & ei prout moris eſt aſſignand. ſicut per inſpectionem Rotulorum Cancel. nobis conſtat, ac præfat. M. nobis ſupplicaverit ut ei dotem ſuam de terr. & tenement. prædict. contingent. ſecundum legem, &c. aſſignari faciamus, per quod diem dedimus præfat. M. quod ſit in Cancellaria noſtra in craſt. animarum, &c. ubicunque, &c. ad recipiendam dotem ſuam prædictam, tibi ideo præcipimus, quod Scire facias præfat. J. quod ad diem prædict. interſit aſſignandæ dotis prædict. ſi ſibi viderit expedire, & habeas ibi nomina, &c. & hoc breve, &c. Teſte, &c.

But if the King maketh Livery unto the Heir, by his Writ, directed unto the Eſcheator, by which Writ he commandeth his Eſcheator to deliver Seiſin unto him, of all his Lands, &c. *Salvo jure cujuſlibet*, and he putteth not in the Writ theſe Words, *Salva* M. *quæ fuit*

fuit uxor, &c. rationabili dote ipſius de terr. & tenement. ipſis contigen. per nos aſſignand', then, in that Caſe, the Wife ought to ſue her Writ of *Dower* againſt the Heir, if ſhe will demand *Dower* of thoſe Lands, becauſe the King made Livery generally of thoſe Lands by his Writ, without any Reſervation of *Dower* to be aſſign'd by him, *&c.* When the Words *Salva dote* are not in the Writ.

And if the King makes a Reſervation of *Dower*, to be aſſigned by him, by his Writ of Livery, which is directed to the Eſcheator, if the Wife never demanded *Dower*, or if ſhe have *Dower* aſſign'd to her by the King in Chancery; yet after the Aſſignment made by the King, the Reverſion thereof is in the Heir, and he ſhall not ſue Livery of that Reverſion, after the Death of the Tenant in *Dower*, becauſe the Writ of Livery doth not reſerve any Thing to the King, but Aſſignment of *Dower* to the Wife; but the Writ doth command the Eſcheator to deliver Seiſin of all the Lands, and that the Eſcheator doth, and by that the Livery of all the Land paſſeth from the King; and therefore it followeth, that when the Wife is aſſign'd her *Dower* by the King in Chancery, yet the Reverſion doth remain in the Heir, *Where the Heir ſhall ſue Livery of a Reverſion, after the Death of Tenant in Dower.*

Heir, &c. for which he ſhall not ſue a new Livery of that Reverſion, after the Death of the Tenant in Dower, &c. *tamen Quære* of that Caſe.

That the King is to perfect the Infeudation of Dower, and where.

When the King's Feudatory dies, during the Minority of the Heir, the King is to perfect the Infeudation of *Dower*, and therefore to make the Aſſignment; and tho' the King does not make the Aſſignment, during the Minority, yet he may reſerve to himſelf the Power of Aſſignment after the Heir's full Age, and that is a Prerogative for the Benefit of the Dowreſs, ſince it may be better, and more compendiouſly done by a Petition in Chancery, and ſetting it out by the Eſcheator, than by a Suit at Law, which is ſubject to great Delay; and therefore the King may, if he pleaſes, on the Livery to the Heir, make an Exception of his Prerogative, touching the Aſſignment of *Dower*, and then the King ſhall aſſign *Dower* at the full Age of the Heir; but then ſuch Aſſignment, being an Infeudation of the Dowreſs, in delivering the Dower out of the King's Hands; by Conſequence, the Heir need not ſue Livery of the Reverſion; but if the Dowreſs does not Petition, then the King often granted the Livery to the Heir, without any Exception, touching his

his Prerogative of aſſigning Dower, and then the Dowreſs was put to her Suit at Common Law, againſt the Heir, if he did not aſſign, becauſe Livery giving the whole Demeſnes out of the King's Hands, into that of his Tenants, without any Reſerve, the King parts with his Power of making any Infeudations of that Eſtate; and that muſt be conſtrued to be the Intent of the Livery, where it is without any Reſervation, but the *Onus* of the Dowreſs follows it, into the Hands of the Heir, where ſhe muſt obtain it, as by Law ſhe may.

Where the King ſhall ſend a Writ to the Eſcheator, to make a new Extent.

And if the Wife be aſſign'd *Dower* in the Chancery, and afterwards it is ſurmiſed by the Heir, or by Another for the King, that the Land aſſign'd to the Wife, is not extended to the very Value, but that the Land aſſigned unto her, is much more in Value than it is extended at, and that the Lands which remain in the King's Hands are extended to the very Value, *&c.* then the King ſhall ſend a Writ to the Eſcheator, to make a new Extent; and upon that Writ return'd, if it be found that the Land aſſign'd to the Wife, is of greater Value, *&c.* then upon return thereof, a *Scire facias* ſhall be awarded againſt the Wife, to ſhew

Cauſe wherefore ſhe ſhall not be a-new endow'd, *&c.* and if ſhe be warn'd, and make Default, it ſeemeth ſhe ſhall be a-new endow'd for the Default; or if ſhe appear, and cannot ſay any Thing contrary to that new Extent, ſhe ſhall be endow'd a-new, ſo as Part of the Land aſſign'd to her, ſhall be taken from her at the King's Pleaſure; or the King may make a new Aſſignment of all that ſhe had in Dower, if he pleaſeth, and a new Writ ſhall be to the Sheriff, to deliver her Seiſin thereof, ſo newly aſſign'd to her.

Where the Dowreſs ſhall have a Scire facias *to re-ſeize the Lands.*

Quære the Uſe of this Point.

So if the *Dower* of the Feme be evicted upon elder Title, upon the Record brought into Chancery, by which ſhe was evicted, ſhe ſhall have a *Scire facias* to re-ſeize the Lands, and to be endow'd *de novo* of the Reſidue, tho' after Livery made to the Heir, 43 *Aſſ.* 32. it ſeems alſo, that if Dower be aſſign'd to the Wife, within Age, in Chancery, and after Livery is made to the Heir, ſhe may have a Writ of Dower of the Reſidue. 18 *E.* 3. 29.

Where the King ſhall ſend a Writ to the Eſcheator to re-ſeize the Lands.

And if the Wife maketh Oath that ſhe will not marry herſelf without the King's Licence, and is endow'd upon the ſame, *&c.* and afterwards ſhe marrieth without Licence, *&c.* then the King ſhall

ſhall ſend a Writ to the Eſcheator, that he re-ſeize all the Lands which ſhe holdeth in *Dower*, as appeareth by the *Regiſter*, and not all the other Lands which ſhe or her Husband had in their own Right; and the Writ is,

The Form of the Writ.

REX Eſcheat', &c. Cum A. *quæ fuit uxor* J. *de* B. *defuncti, qui de nobis tenuit in capite, quæ nuper ſacramentum præſtitit corporale quod ſe non meritaverit Licentia noſtra ſuper hoc prius non obtentâ, ut accipimus tamen ſe ſine tali Licentia nuper maritâſſe, nos contemptum hujuſmodi nolentes tranſire impunitum, tibi præcipimus, quod ſi ita eſt, tunc terras, & tenementa omnia quæ prædicta* A. *tenet in dotem de Hæredit. ipſius* J. *in Baliva tua, ſine dilatione capias in manus noſtras, ita quod de exitibus inde proventibus nobis reſpondeas, ad Scaccarium noſtrum quouſque nobis de forisfactura ad nos inde proveniente ſatisfact. fuerit, vel aliud inde duxerim. demand. Teſte, &c.*

Of a Writ De Quod ei Deforciat.

Where it lieth.

THE Writ of *Quod ei deforciat*, lieth where Tenant in Tail, or Tenant in Dower, or by the Curteſy, or for Term of Life, loſe their Lands by Default, in a *Præcipe quod Reddat*, brought againſt them, they have not any other Remedy, if they were ſummon'd according to Law, *&c.* but this Writ, which is given by the Stat. of *Weſtm.* 2. *c.* 4. and the Writ is mention'd in the Statute.

From whence it ariſe.

The Writ of *Quod ei deforciat* ſeems to have ariſen from the Inconveniency which Wives ſuffer'd, by a Trick, to diſappoint them of *Dower*; for the Husband was wont to be impleaded by his Alienees, and loſe by Default; and Judgment being given for the Alienee to recover, on ſuch Default of the Husband, his Seiſin, he came in by Title Paramount, and therefore defeated the Seiſin of the Husband, and conſequently the Title of the Wife to Dower, and it was generally held that no Judgment by Default, could be defeated, but by the very Tenant; and therefore ſuch was Miſchievous, not only to Tenant in Dower, but to Tenant for Life, and Tenant in Tail, that happen'd

pen'd to loſe by Default; for they could not have a Writ of Right, becauſe they were not Tenants in Fee, ſo this Statute gave them a *Quod ei deforciat*, by which that Recovery could not bar the Demandant's Right, but the Defendant was oblig'd to ſue an elder Title; but the Iſſue in Tail could not have this Writ, becauſe he had his Formedon in the Diſcender, by the Statute *De donis*; yet the Writ or Count do not ſuppoſe any Recovery. 18 *H.* 6. 25. is upon loſing by Default in a *Ceſſavit*, *Reg. Brev.* 171. and the ſame is ſuch,

REX vic', *&c. Præcipe* A. *quod* The Form. *reddat* B. *quæ fuit uxor* C. *unum meſſuagium cum pertinent. in* N. *quod clamat eſſe rationabilem dotem ſuam*, *& quod idem* A. *ei injuſte deforciat*, *ut dicit*, *&c.*

And if the Tenant in Frank-marriage bring ſuch Writ, it is,

Quod juſte, *&c. reddat*, *&c. quod clamat eſſe jus & maritagium ſuum*, *& quod idem* J. *ei injuſte deforciat.*

And if Tenant in Tail. *Præcipe*, *&c. quod clamat tenere ſibi*, *& hæred.*

de

de corpore ſuo exeuntibus, & quod prædict. A. *ei injuſte deforciat, &c.*

It is good, without ſhewing whoſe Gift it is in his Count. 29 *E.* 3. 47. 30 *E.* 3. 31. for the Writ is brought only after a Recovery by Default of his own Seiſin; and therefore who made the Gift, is not material, but Matter of Evidence only; and conſequently need not be ſet out in the Count.

And for Tenant for Life, the Writ is,

Quod clamat tenere ad terminum vitæ ſuæ, (and if Tenant by the Curteſy) *Quod clamat tenere per legem Angliæ.*

That the Tenant by the Curteſy is entitled to the Writ.

And the *Regiſter* is, That this Writ for Tenant by the Curteſy, is by Equity of the Statute, and in this Manner, tho' not nam'd by the 24th Chapter of this Statute; but if the Tenant in Tail, or ſuch other Tenant, who hath a particular Eſtate, loſe by Default, where he is not ſummon'd, *&c.* then he may have a Writ of *Diſceit*, or a *Quod ei deforciat*, as he pleaſeth.

Loſing by Default.

If a Man loſe by Default in an Action of Waſte ſued forth againſt him, he ſhall not have a *Quod ei deforciat*, for the Verdict which found the Waſte.

Accord.

Accord. as to Waſte, 3 *H.* 6. 29. by *Rolf. Brooke*, Quod ei deforciat, 7. *Dubitatur.*

And if a Man loſe any Land by Default, in a Writ of Right, in a Court-Baron, he may remove that Record into the Common Pleas, and have a *Quod ei, &c.* upon that Record. *Item*, If he do not remove it; but then, it ſeems, that the *Quod ei, &c.* ſhall be ſued in the Common Pleas, or in the Court-Baron, were he loſeth the Land, as he pleaſeth; *tamen Quære.* *Loſing Land in a Writ of Right.*

Note; Upon a Recovery, by Default, in a Court-Baron, *Quod ei, &c.* lies in the Court of the King; and therefore it is no Iſſue to ſay, *Nul tiel Record*; but he ought to ſay no ſuch Record or Recovery, by which it appears that the Tenements were loſt by Default. 2 *E.* 4. 11. 10 *H.* 7. 9. 6 *H.* 4. 3. *What no Iſſue.*

In the *Quod ei, &c.* it was enough for the Plaintiff to ſhew that he was Tenant for Life, by the Curteſy, or in Dower, *&c.* and he was not oblig'd to ſet forth the Recovery in his Writ or Count, but that came on the Defendant's Side; and he might plead that there was no ſuch Record or Recovery in Abatement of the Writ; for if there was no Recovery by Default, then the Plaintiff *What enough to ſhew in the Writ.*

Plaintiff has miſconceiv'd his Writ; for he might recover by Aſſize or Writ of Dower; and it would be impertinent to clog the Plaintiff's Writ or Count, with a Recovery by Default, becauſe that is Part of the Defendant's Title; and therefore comes properly on his Side to ſhew; and if there be ſuch Recovery, the Defendant muſt ſet it forth in Bar; and alſo his Title, as if it be by a Gift in Tail; and he had recover'd by Default, in a Formedon, he muſt ſet forth and ſay, that he is *Paratus manutenere jus & titulum per donum prædict.* and the Defendant, by Way of Replication, may traverſe the Gift, or traverſe the Seiſin of the Dower. *Raſt. Entries* 537. but the Plaintiff can never traverſe the Recovery, becauſe that is the Foundation of his own Writ; but if the Defendant traverſes it in Abatement of the Plaintiff's Writ, if the Record be in a Court-Baron, then it may be remov'd by a *Recordari* into the Common Pleas; but if the Recovery, by Default, be in a Court of Record, it muſt be remov'd by *Certiorari* and *Mittimus*.

That it lies againſt a Stranger, to the Recovery.

And the *Quod, &c.* lies againſt a Stranger to the Recovery; as if a Man recovers by Default, and maketh a Feoffment after, the *Quod, &c.* ſhall be brought

againſt the Feoffee. 44 *E.* 3. 43. *accord. Dubitatur.* 11 *E.* 3. 30. *Quod ei, &c.*

And if a Woman loſe by Default, and taketh Husband, he ſhall have the *Quod, &c.* but if Tenant in Tail loſeth by Default, *&c.* his Heirs ſhall not have a Writ of *Quod, &c.* but a *Formedon*, for that is his Writ of Right. *Where not this Writ, but a Formedon.*

Where a Woman hath Dower aſſign'd to her in Chancery, for the Nonage of the Heir, who is in Ward of the King; and afterwards the Heir, at full Age ſueth a *Scire facias* in the Chancery, to avoid that Endowment, and recovereth on that *Scire facias*, in Default of his Wife; now the Wife ſhall have a *Quod, &c.* in the Common Pleas, upon that Recovery. *Where the Wife ſhall have the Writ.*

And ſo if a Man recovers in the King's Bench, any Land by Default, upon a *Scire facias* ſued out of a Record, which is there, the Tenant, who loſt by Default, ſhall have his *Quod ei, &c.* and ſhall ſue the ſame in the Common Pleas. *The like.*

If two Coparceners, Tenants in Tail, loſe their Land by Default, they ſhall join in a *Quod ei, &c.* and yet the Default of one is not the Default of the other. *M.* 46. *E.* 3. *Coparceners.*

And

Tenant for Life, or in Tail, making Default. And in a *Præcipe quod reddat*, if the Tenant for Life, or in Tail, appears, and after departs in Deſpight of the Court, he ſhall loſe his Land, and yet he ſhall have a *Quod ei*, *&c.* for that Recovery was by Default, becauſe he did not appear when he was demanded.

Departure in Deſpight of the Court. And if Tenant in Tail, or Tenant for Life, after the Miſe joined in a Writ of Right, depart in deſpight of the Court, he loſeth his Land, and there he ſhall not have a *Quod ei deforciat*, becauſe Judgment final ſhall be given againſt him in that Caſe.

The Reaſon of the foregoing Diſtinction. The Reaſon of the Diſtinction in the foregoing Caſes, ſeems to be, becauſe in a *Præcipe quod reddat*, in Entry, the Plaintiff only recovers Seiſin; and thereupon, in this Caſe, the *Quod* lies, which was intended in this particular Caſe, inſtead of the Writ of *Right* for theſe Tenants; but where the *Miſe* is joined upon the mere Right, and the Tenant departed in Deſpight, *&c.* Judgment Final was given againſt him; and there could be no new *Writ of Right*; therefore in theſe Caſes, no new Writ of *Quod ei deforciat* was given in Lieu thereof.

Baron and Feme. If the Husband and Wife be ſeiſed of Lands, in Right of the Wife, for the Life of the Wife, and they loſe the

Land in *Præcipe*, by Default, yet they ſhall have a *Quod ei, &c.*

And if Tenant for Life, loſe his Land in a *Ceſſavit* brought againſt him, by Default, yet he ſhall have a *Quod ei, &c.* by the Statute of *Weſtm.* 2 *H.* 5. *c.* 3. and *M.* 6 *E.* 3. becauſe the Lord, in this Caſe, as well as in all other Caſes, by Default, makes Title by the Ceſſer, in Maintenance of the Default. *Tenant for Life, loſing by Default, in a Ceſſavit.*

And if the Tenant, by a Receipt upon the Default of Tenant for Life appeareth, and is receiv'd, and pleadeth, and afterwards loſeth by Action tried, yet the Tenant for Life ſhall have a *Quod ei, &c.* for the Judgment is given againſt him by his Default. 33 *E.* 3. *Quod ei, &c.* 117. 3 *H.* 4. 15. 33 *E.* 3. *Avowry* 255. *Tenant by a Receipt.*

And if the Tenant vouch, and the Vouchee will not appear, for which the Tenant loſeth by Default of the Vouchee, it is to ſee whether the Tenant ſhall have a *Quod ei, &c.* for he loſeth the Land by Default, tho' not his own; for the Statute is, *Et cum temporibus retroactis, cum aliquis amiſiſſet terram ſuam per defaltam, ne habeat aliud recuperari quam per Breve de recto*; and there it doth not ſay, *Per defaltam ſuam*, but generally; but after in the *Whether the Tenant ſhall have the Writ.*

Statute, it ſays, *Proviſum ſit quod de cætero non ſit eorum defalta eis ita prejudicialis, &c.* and by that, it ſeemeth that the Tenant ought to make Default; and it ſeemeth, that the Default of the Vouchee, is the Default of the Tenant, and ſo Default in both. *Quære hoc.*

The like. But if the Tenant vouch, and the Vouchee appeareth, and entereth into the Warranty, and afterward loſeth by Default; now if the Tenant loſe by the Default of the Vouchee, he ſhall not have a *Quod ei, &c.* becauſe he ſhall not have Judgment over in Value againſt the Vouchee, by Default of the Vouchee, for that is not the Default of the Tenant; *ergo Quære.*

If the Vouchee do not appear, it is the Default of the Tenant, in not bringing in his Vouchee at the Day, in order to defend his Title; therefore the Demandant recovers by Default; and by Conſequence the Writ lies for the Tenant that loſes upon ſuch Default, who becomes Demandant in a *Quod ei deforciat*, to make the former Demandant ſhew his Title, on which he could maintain his former Writ. Indeed if the Vouchee came in, and after made Default, no Writ of *Quod ei deforciat* lies; but ſuch a Recovery may

may be pleaded as a Bar to the *Quod ei, &c.* becauſe the Demandant in the former Action had Judgment to recover in Value; and therefore having the Recompence by the former Judgment, he could never maintain this Writ, to recover the Thing itſelf; but in the former Caſe, Vouchee not appearing at all, there could be no Judgment for Recompence in Value; and if the particular Tenant had not this Writ, he would be without Remedy; and this is the Reaſon, why in a Common Recovery, Tenant in Tail cannot implead the Recoveror in a *Quod ei deforciat.*

And if Husband and Wife loſe, by Default, the Land of the Wife, which ſhe holdeth for Life, if the Husband dieth, ſhe ſhall not have a *Quod ei deforciat*, but a *Cui in vita*; for it is a Demiſe made by the Husband. The Statute *Weſtm.* 2. *c.* 3. expreſly gives a *Cui in vita*, in this Caſe, therefore not within the Statute that gives a *Quod ei deforciat*; and when he bringeth the *Quod ei deforciat*, he counteth that he was ſeiſed of the Land in Demeſne, as of Freehold, or in his Demeſne in Tail, without ſhewing of whoſe Leaſe or Gift he was ſeiſed; and he *Baron and Feme.*

ought to alledge Eſplees, in himſelf, *&c.*

Is genenal. We have already mention'd why he need not ſhew of whoſe Leaſe or Gift he holds in the Count or Writ; but only in general ſay, that he himſelf was ſeiſed, *ut ſupra*, becauſe to alledge it generally, was ſufficient to entitle himſelf to the Writ, becauſe he lays the Eſplees, which ſhews the Seiſin; and if he ſhews the Seiſin, he need not ſay of whoſe Gift, becauſe the Ouſter is of that Seiſin, which he has laid to be actually in him, and then the Defendant ought to deny the Right of the Demandant, *&c.* and ſhew how that at another Time, he recover'd the Land againſt the Demandant, by a *Formedon*, or other Action; and ſhall ſay at the End of his Plea, *Quod ipſe paratus eſt ad manutenendum jus, & titulum ſuum prædict. per donum prædict', &c. inde petit judicium, &c.* and then the Demandant in the *Quod ei deforciat*, ſhall traverſe that Title, or ſhew Matter to bar that Title, *&c.* but he ſhall not make a Defence, and then plead in Bar, as he ſhall do in the *Formedon*, &c.

Obſervations on the Writ.

The Meaning of this is, that in the *Formedon*, after the Defendant has enter'd into the Defence, that is, *Venit & defend. jus ſuum quando, &c. & dicit quod*

quod præd' the Plaintiff *Actionem ſuam verſus eum habere non debet quia dicit &c.* and ſo ſhews Matter to defend himſelf from the Plaintiff's Action.

But in the *Quod ei deforciat*, the Defendant, by Way of Bar, is to ſet up his former Recovery, by Default, and protect that Recovery by Title, and ſo to aver the Defence of that Title, whereby he recover'd; therefore it would be very improper for him to ſay *Actionem ſuam verſus eum habere non debet*, becauſe the Tenant has expreſly given the Action, where there was a Recovery by Default; and to begin his Defence in that Manner, would be an Averment againſt the Statute.

A TABLE

To the ſeveral

MATTERS contained in the two foregoing Treatiſes, divided under the following HEADS.

Alien.

OF the Truſts of an Alien *Page* 243

Aſſets.

1. That a Uſe was not Aſſets, and why 37
2. That a Term limitted to attend a Fee, ſhall be Aſſets 37
3. That ſince the Statute of Frauds, they ſeem to be Aſſets 38

Aſſiſe.

Aſſiſe.

That a Man may have an Aſſiſe upon a Feoffment, to his own Uſe, without an actual Entry *Page* 275

Attornment.

1. What ſhall ariſe by Way of Uſe, without Attornment 90
2. That there can be no Eſtate at Common Law, by Attornment, after the Death of the Grantor 90
3. That the Words *Bargain and Sale*, will not paſs a Reverſion 'till Attornment, nor the Words *Give and Grant*, without a Conſideration. 88
4. A Reverſion granted to an Uſe, the Uſe is not executed 'till Attornment, otherwiſe if granted by a Fine 231, 232

Authority.

1. Where the Authority by a Deviſe, to ſell Lands ſurvives, and where not 68
2. How the Court of Chancery will interpoſe, that an Authority to ſell, may be executed 68
3. That Perſons authoriſed to ſell, are of Neceſſity excluded from buying. 69

Averment.

1. What Conſideration not to be averred. *Vide* Conſideration, where a Bargain and Sale is void, unleſs Money be averred *Page* 51.
2. No Averment or Evidence is to be admitted againſt a Conſideration expreſſed in the Deed *ibid.*
3. That no Averment can be allowed by the Heir, that the Conſideration is falſe againſt the Deed and Conveyance of his Anceſtor. 52
4. Where Money is to be averred the Conſideration 51
5. That a Deviſe cannot be averred to any other Uſe but to the Uſe of the Deviſee 162
6. Otherwiſe, if a Uſe be expreſſed, it is executed *ibid.*
7. A different Uſe cannot be averred upon a Fine *Sur* Grant and Render 57
8. Where Parties are eſtopped from averring other Uſes upon a Fine, and where a Declaration of other Uſes may be averred 61, 64
9. That there may be a parol Averment againſt a ſubſequent Declaration of Uſes 261, 262
10. Where the Conſideration may be averred 258
11. Where no Averment by Parol, ſhall alter the Declaration in Writing 259, 260

Vide Conſideration 11

A TABLE.

Bargain and Sale.

1. What a Bargain and Sale is, and the several Parts of its Definition *Page* 82, 297, 295, 299
2. The Effect of a Bargain and Sale 82
3. The Expoſition thereof *ibid.* 105
4. Who may Bargain and Sell 83
5. That the King cannot Bargain and Sell to a Uſe *ibid.*
6. To whom a Bargain and Sale may be made 84
7. That a Man may Bargain and Sell to his Son *ibid.*
8. That a Man may Bargain and Sell to a Corporation *ibid.*
9. What may be Bargained and Sold 85
10. That a Man ſeiſed of a Freehold for Life, may Bargain and Sell it for Years *ibid.*
11. How a Rent might be ſold before the Statute, and how ſince *ibid.* 86
12. That a Sale of 20*l.* 10*s.* worth of Land, and Part of a Manor, is void, and why; and what other Bargains and Sales are void *ibid.* 87
13. In what Manner Eſtates may be Bargained and Sold, and of the Enrolment *ibid.*
14. By what Words Lands may be Bargained and Sold *ibid.*
15. Of the Effect of a Bargain and Sale, and that it will work a Diſcontinuance 100

16. That

16. That a Bargain and Sale works no Forfeiture *Page* 101, 102
17. That a Man may Bargain and Sell, reſerving a Rent, and why 103
18. That before 27 *H.* 8. a Uſe in Fee, by a Bargain and Sale, had paſſed upon a Conſideration, without the Word *Heirs* 238
19. But now ſince the Statute, there is the ſame Reaſon to require Words of Limitation, in ſuch Caſes, as in Common Law Conveyances 239
20. Selling *Ex vi Termini* ſuppoſes a Man's transferring a Right to ſomething, for Money 50
21. Of Pleadings relating to Bargains and Sales 299, 300, 301
22. What a ſufficient Conſideration upon a Bargain and Sale, tho' no Money certain is mentioned 256
23. What neceſſary to Bargains and Sales to have them executed by Force of the Statute 285
24. Where a Bargain and Sale paſſed no Eſtate, it not being enrolled, but it ſerved only as a Declaration of Uſes 264, 265
25. Of the Enrolment, Conſideration, and other Requiſites, neceſſary to a Bargain and Sale 286, 287, 288, 289, 290
Vide Conſideration 9, 13
Vide Covenants to ſtand ſeiſed 4
Vide Enrolment

Bargainor and Bargainee.

1. That a Bargainee in Fee of Tenant in Tail, hath ſeveral Properties of a Tenant in Fee, and the Reaſon thereof *Page* 100
2. Where a Bargainee in Fee is ſeiſed of a Fee-ſimple, determinable on the Eſtate-tail *ibid.* 101
3. That a Bargainee cannot vouch by Force of a Warranty annexed to the Eſtate of the Land, and why 102
4. If a Man ſells a Reverſion upon a Leaſe for Life or Years, the Bargainee ſhall not take Advantage upon a Demand of the Rent, without Notice given of the Bargain and Sale, and why 103
5. Where the Bargainor may be termed a Tenant at Will, to the Bargainee, and a Leaſe for Years made by him, makes him no Diſſeiſor 106
6. Where the Bargainee by a Fine *Sur* Grant and Render, ſhall not be ſeiſed of an abſolute, but of a conditional Eſtate only 59
7. Where the Bargainee ſhall be received, tho' the Deed be enrolled after the Tenant for Life is impleaded.
8. That the Bargainee in Fee of Tenant for Life, has but an Eſtate for the Life of the Bargainor 297

Baron and Feme.

1. Where an Eſtate-tail is executed in the Wife immediately *Page* 135
2. That by the Common Law a Deed acknowledged by the Husband and Wife, binds only the Husband, and how the Cuſtom of *London* varies the Common Law 109
3. Where the Husband and Wife, levying a Fine, are in of the old Reverſion 20, 21
4. That the Wife may wave her Jointure by Matter *in pais* 153
5. What is an Eſtate-tail veſted in the Huſband for Life 67
6. Where an Uſurious Contract is made upon one Deed to declare Uſes, and there is a ſubſequent Deed to rectify the Uſury, the Wife ſhall be bound by the firſt Deed 42
7. What is not a good Uſe to the Wife made by the Husband of the Wife's Alienation of her Jointure 54
8. That after an Alienation, the Party intereſted may enter, as if the Woman was dead 157
9. Where the Alienation by the Wife, works a Forfeiture, and he in Remainder may enter immediately 160
10. Where the Alienation by the Wife, in Fee, gives an Entry to the Heir, in the Life of the Wife 159
11. That the Husband cannot be Tenant, by Curteſy, of an Uſe 25

12. Of Declarations of Uſes by Husband and Wife *Page* 244, 246, 247, 248, 249

Baſtard.

1. Where a Uſe ſhall not ariſe to a Baſtard, upon a Covenant to ſtand ſeiſed 278
2. That no Uſe will ariſe to a Baſtard. 256

Ceſtui que Vie.

The Eſtate of *Ceſtui que Vie*, for the Life of *A.* is determined by the Death of *A.* 66

Ceſtui que Uſe.

1. Where a Leaſe by *Ceſtui que Uſe* is void, and where good, and why 26
2. That at Common Law, the Entry of *Ceſtui que Uſe* made him a Diſſeiſor, and why 26
3. That at Common Law *Ceſtui que Uſe* might alien the Uſe, and why *ibid.*
4. What Authority is given to *Ceſtui que Uſe*, by 1 R. 3. *c.* 1. 27
5. That the Statute of 1 R. 3. gives no Authority to *Ceſtui que Uſe* to deviſe the Land 32
6. That by the Statute *Ceſtui que Uſe* has no Power of Alienation, when he has a naked Right, and a Uſe in *Eſſe*, unleſs it be in order to confirm an Eſtate in Being, and why 27
7. Who are within the Statute of 1 R. 3. *c.* 1. by which a Power of Alienation was annexed to the Eſtate of *Ceſtui que Uſe*, and the Reaſon of that Statute 27

8. Where the Feoffees to an Uſe, ſhall be bound, the *Ceſtui que Uſe* enfeoffing the Diſſeiſor, and why *Page* 28
9. Where *Ceſtui que Uſe* may alien in Fee, and why *ibid.*
10. Where *Ceſtui que Uſe*, being a Feoffor upon Condition, entering for a Condition ſhall be ſeiſed of the whole Eſtate 32
11. Where *Ceſtui que Uſe*, in Tail, aliens by Leaſe and Releaſe, it only binds the Feoffees otherwiſe by Fine, but binds not the Iſſue by a Recovery *ibid.*
12. If *Ceſtui que Uſe* aliens by Fine, it bars the Entry of the Feoffees after his Death *ibid.*
13. The Conſequence of a Deviſe by *Ceſtui que Uſe* 37
14. How Feoffees of *Ceſtui que Uſe* may alien according to the Deviſe of *Ceſtui que Uſe* *ibid.*
15. Where *Ceſtui que Uſe* ſhall have an Action of Debt, but cannot avow, and why 34, 242
16. Where *Ceſtui que Uſe* ſhall enter for a Condition broken 34
17. A Rent reſerved by *Ceſtui que Uſe* ſhall go to his Heirs *ibid.*
18. Where *Ceſtui que Uſe*, under a Fine, ſhall hold the Lands charged with a Uſe 56
19. Where a Grantee of a Rent from the Feoffee to an Uſe, ſhall hold it to the Uſe of *Ceſtui que Uſe* 172
20. Where the Tenants of a Manor ſhall

anſwer the Rents to the *Ceſtui que Uſe*, tho' the Services are drowned *Page* 194.
21. Whatever Intereſt the *Caſtui que Uſe* has in the Uſe, it is executed by the Statute 199
22. That *Ceſtui que Uſe* could not enter upon the Lands 239
23. That tho' it is generally true that if *Ceſtui que Uſe* entered upon the Feoffee, he was a Treſpaſſor, yet in ſome Caſes, by Intendment of Law, he might enter and occupy the Lands at the Will of the Feoffee, and in what Inſtance 201, 202
24. What gives *Ceſtui que Uſe* the legal Eſtate 239
25. Where *Ceſtui que Uſe* of a Remainder in Fee, after ſeveral Eſtates of different Natures, ſhall have his Remainder, when the Eſtates happen to determine, and ſhall not ſtay 'till they are all determined, tho' the Words are after all the Eſtates ended 231
26. The Conſtruction of the Judges upon the Statute appointing a Juryman to have 40 *s. per Annum*, that *Ceſtui que Uſe* was within that Statute 203

Condition.

What was held not to extinguiſh a Condition 266
Vide Ceſtui que Uſe 9, 15

Conditional Uſes.

Of Conditional Uſes. 265

Conſide-

Conſideration.

1. That Conſiderations of raiſing an Uſe upon a Covenant, are two-fold, Blood or Money *Page* 47, 48
2. That the two Conſiderations which are allowed to be valuable in a Deed, are Marriage and Money 47
3. Brotherly or Paternal Love, are good Conſiderations: So of Marriage, but not Friendſhip or Acquaintance 48, 251
4. Nor is Natural Love a good Conſideration 48
5. What Conſideration is neceſſary to the raiſing an Uſe 45
6. Upon a Fine 47
7. What Conſideration is neceſſary to a Covenant to ſtand ſeiſed, and how far it extends 112, 207, 252, 253, 254, 255, 256, 257
8. What are, and what not good Conſiderations in Covenants to ſtand ſeiſed 48
9. That no Uſes will ariſe without a Conſideration upon a Bargain and Sale, or Covenant to ſtand ſeiſed 46
10. Where a Uſe may be raiſed without a Conſideration *ibid.*
11. No Conſideration to be averred, but what ſtands with the Conſideration expreſſed *ibid.*
12. Tho' Blood be good Conſideration to raiſe an Uſe, yet muſt the Intent of the Party be declared by a Deed, and the Court of Equity muſt follow that Intent 48

13. What Conſideration is neceſſary to a Bargain and Sale, and what to a Covenant to ſtand ſeiſed *Page* 112
14. Where there needs no Conſideration to raiſe an Uſe 114
15. Where no Uſe ariſes, unleſs there be a good Conſideration of Money 52
16. Where the Uſe ſhall ceaſe becauſe the Conſideration ceaſed 277
Vide *Prior and future Uſes*
Vide *Covenants to ſtand ſeiſed*
Vide *Averment*, 1
Vide *Bargains and Sales*, 22
Vide *Covenants to ſtand ſeiſed*

Confirmation.

1. Where the Leſſee for Years may make Uſe of a Deed, as a Confirmation, and afterwards as a Feoffment 89
2. Where a Grant to a Tenant at Will may enure as a Confirmation 89

Conuzee in a Fine. Vide *Fine*, 18, 28

Conuzee of a Statute. Vide *Fraudulent Conveyances*, 6

Contingent Remainders. Vide *Remainders*

Coparceners. Vide *Quod ei Deforciat*, 12

Vide *Contingent Remainder*, 8

Copyholder.

How a Copyholder, ſurrendering to the Uſe of his Laſt Will, may diſpoſe of his Eſtate *Page* 36
Vide *Releaſe*, 1
Vide *Contingent Remainder*, 8

Corporations. *Vide* Seiſin to Uſes, 7

Covenant.

1. Whether a Man may have an Action of Covenant, to recover Damages, tho' no Uſe could ariſe 257
2. The Difference between a Covenant that Lands are free from all Incumbrances, and that a Man ſhall execute a Deed, with a Covenant that the Lands are free 343
3. The Difference between a Covenant that the Lands are free, *&c.* and that the Truſtees ſhall enjoy the Lands free, *&c.* 343

Covenants to ſtand ſeiſed.

1. Of Covenants to ſtand ſeiſed, in Conſideration of Blood, and their Original 110
2. Who may covenant to ſtand ſeiſed, and to whom 111
3. By what Words a Man may covenant to ſtand ſeiſed 114
4. That a Bargain and Sale in Conſideration of Love, and for increaſing his Daughters Portions,

Portions, ſhall enure by Way of Covenants to ſtand ſeiſed *Page* 114, 115
5. What ſhall be conſtrued a Covenant Executory, and not a Covenant to ſtand ſeiſed 115
6. Where a Conveyance, without Attornment or Enrolment is void, and cannot enure by Way of Covenant to ſtand ſeiſed 115
7. The Effect of a Covenant to ſtand ſeiſed, and where ſuch Covenant is void 116
8. Where a Covenant being void in Law, is void in Equity *ibid.*
9. That every Covenant to ſtand ſeiſed, preſuppoſes a precedent Seiſin 116, 117
10. That if a Mortgagor covenants after Redemption to ſtand ſeiſed to the Uſe of *J. S.* it is a void Covenant; and how in Caſe of a Feoffment 117
11. Where a Covenant by the Father, to ſtand ſeiſed to the Uſe of his Son, ſhall ſtill make the Fee in the Father 116
12. A Covenant to ſtand ſeiſed to the Uſe of the Nominee of *J. S.* is void, but to ſuch of the Covenantor's Couſin as *J. S.* ſhall name, is good 49
13. The Difference between a Covenant to ſtand ſeiſed and a Feoffment to a Uſe 113
14. Where the Covenantor to ſtand ſeiſed, ſhall be conſtrued to have an Eſtate for his own Life, becauſe all the Remainders were to commence after his Death 26
15. Whether a Covenant, being Contratradictory to what went before in the

ſame Deed, ſhall be void, or how far it ſhall extend *Page* 272

Damages.

Vide *Dower*, 49

Debt.

Where *Ceſtui que Uſe* ſhall have an Action of Debt 34

Declarations of Uſes.

1. Who may declare Uſes 39, 40, 41, 42, 43, 244
2. That one *Non compos mentis* may declare Uſes 42, 246
3. That an Infant may declare Uſes 245, 246, 251
4. See more of Declarations of Uſes, by Infants 251
5. Declaration of Uſes by Jointenants, ſeverally 42
6. A Baron and Feme cannot declare Uſes upon a Feoffment, ſo as to bind the Wife 39
7. What became a Doubt upon the Statute of Frauds, concerning a reſulting Uſe, and that by the Statute of 4 *Anne*, *c.* 16. a Man may declare the Uſes of a Fine and Recovery, by a ſubſequent Deed 62
8. What is ſufficient to declare an Uſe which would not have been ſufficient to a Covenant to raiſe an Uſe 275
9. Where

9. Where a Deed Declaratory of an Uſe was neceſſary at Common Law *Page* 270, 142
10. Where a Letter is a good Declaration of a Truſt 347
11. What ſhall not controul Uſes declared by a Deed 273
Vide *Fine*, 6, 7, 8, 14, 15
Vide *Leaſe*, 4

Dedimus.

To take the Dowreſs's Oath. *Vide* Dower, 171

Deeds.

1. Whether the laſt Deed, or the firſt, ſhall be moſt effectual 96
2. Where a Perſon not named, but in the *Habendum* of a Deed, ſhall not take by the *Habendum* 235

Deviſe, Deviſor, and Deviſee.

1. If a Limitation of a Uſe in a Deviſe, be void, whether the Deviſee ſhall be ſeiſed to the Uſe of the Deviſor, and his Heirs 281
Vide *Averment*, 5
2. Where the Deviſee claims by the Statute of Uſes 204
3. That a Uſe is deviſable 35
4. The Conſequences of a Deviſe to an Uſe 35, 36
Vide *Fine*, 4
Vide *Jointures*, 9

Diſcent.

1. If the Bargainee dies before Enrolment, his Heirs ſhall take by Diſcent *Page* 289
2. Of Diſcents of an Uſe in Reverſion · 19
3. What are the Diſcents of an Uſe in Poſſeſſion, and what in Reverſion 16
Vide *Dower*, 112
Vide *Heirs*, 5
Vide *Perpetuities*, 1, 3

Diſcontinuance.

Vide *Bargains and Sales*, 15
What no Diſcontinuance within the Statute of 11 *H.* 7. *c.* 20.
Vide *Dower*, 106, 116

Diſſeiſin, Diſſeiſor, and Diſſeiſee.

1. Every ſubſequent Conſent is equal to a Command precedent to make a Joint Diſſeiſin; and tho' the Act of Diſſeiſin be done by one, yet a ſubſequent Act of the other makes them, in Law, eſteemed Joint Diſſeiſors 71
2. Where the Uſe and Poſſeſſion both paſs by the Feoffment of the Diſſeiſor 241
3. Where a Releaſe to the Diſſeiſee extinguiſhes the Uſe 241
4. Where the Uſe of the Diſſeiſee ſhall ſtand good 270
Vide *Ceſtui que Uſe*, 2, 7
Vide *Dower*, 108, 116

Vide *Feoffment, Feoffor, and Feoffee*, 3.
Vide *Pleadings*, 5

Diſtreſs.

Vide *Ceſtui que Uſe*, 26
Vide *Dower* 152, 153, 154, 155, 156, 157, 158, 159

Donor and Donee.

Vide *Dower*, 12
Vide *Limitations*, 2

Dower.

1. What Dower is 354
2. That the Writ is a Writ Patent 357
3. That the Wife may remove the Plaint 358
4. That the Tenant cannot, without ſhewing Cauſe *ibid.*
5. Where it may be removed by a *Recordare* 359
6. Not to be done by a *Pone*, but by a *Tolt* *ibid.*
7. To whom the Writ is to be directed *ibid.*
8. Where ſhe might have a *Tolt* on a *Writ of Right* 361
9. Where the Plea is to be removed by a *Recordare* *ibid.*
10. Where the Writ is to be directed to the Feoffee 362
11. Where to the Heir 362, 363

12. Where the Writ is to be againſt the Donee, directed to the Sheriff *Page* 362, 363
13. That Dower is the Conſequence of the Marriage *ibid.*
14. For what Purpoſes allowed *ibid.*
15. To whom to apply for her Dower 364
16. How it ſtood before the Statute *Quia Emptores Terrarum* *ibid.*
17. Where the Writ is to be brought 365
18. Where the Tenant in *Dower* is to have the Writ againſt the Leſſee for Life *ibid.*
19. Where the Writ may be returnable in the Common Pleas, tho' the Clauſe *Quia Capitalis Dominus, &c.* be not in the Writ 365
20. And the Lord to have no Action for ſuing the Writ there 366
21. Where he may a Prohibition *ibid.*
22. Where a *Dominus remiſit Curiam ſuam*, is implied *ibid.*
23. Where a Wife is endowed of Part of her Dower, ſhe muſt have her Writ of *Right of Dower* 367
24. And the Reaſon thereof *ibid.*
25. Where a Feme loſeth by Default, ſhe may have her Writ of *Right of Dower* *ibid.*
26. Tenant for Life barred in a Poſſeſſory Action, could not have a *Droiturel Writ* at Common Law 368
27. And the Reaſon thereof 369
28. Feme loſing her Dower by Aſſiſe, her Remedy is by Attaint 369
29. The Reaſon thereof *ibid.*

30. The

30. The Proceſs after Removal *Page* 369
31. The Form of the Writ 370
32. Dower of a Moiety *ibid.*
33. Where to be directed to the Heir *ibid.*
34. The Form of the Writ of Dower, to the Heir, for the Third Part *ibid.*
35. Of the Profits of a Fair 371
36. Of Stallage *ibid.*
37. Of an Office *ibid.*
38. Of a Mill *ibid.*
39. That ſhe ſhall have Dower of what is Appendant and Appurtenant *ibid.*
40. Of the Writ *De Quarentina Habenda*, when it lies 372
41. That it is a Writ *Viſcountiel* *ibid.*
42. By what Statute given *ibid.*
43. The Form of the Writ 373
44. How the Sheriff to demean himſelf thereon 374
45. A Writ of Dower, *Unde nihil habet*, 374
46. Where it lies *ibid.*
47. The Form of the Writ in *Latin* 375
48. The Demandant not bound to accept the Tender of Dower *ibid.*
49. From what Time the Demandant to have Damages *ibid.*
50. When the Defendant to plead that he was always ready, *&c.* 376
51. The Form of the Writ againſt the Guardian *ibid.*
52. That he is to be named Guardian *ibid.*
53. That the Defendant ought to ſhew that the Heir was Heir to him laſt ſeiſed *ibid.*
54. A Precipe of Dower *Ad oſtium Eccleſiæ* 377

55. *Ex aſſenſu patris* Page 377
56. Dower *Unde nihil habet* may be ſued before the Sheriff, by a *Juſticies* 377
57. *Præcipe* to the Sheriffs of *London* 378
58. Dower in *London*, againſt ſeveral Tenants *ibid.*
59. One cannot have two Writs of Dower *Unde nihil habet*, at one and the ſame Time, but the latter ſhall abate 376
60. Where there may be a ſecond Writ *ibid.*
61. Where a Writ of Admeaſurement of Dower lieth *ibid.*
62. Who may have it 380
63. The Heir within Age *ibid.*
64. Where the Heir at full Age ſhall not *ibid.*
65. Where the Guardian to the Heir ſhall have the Writ *ibid.*
66. The Form thereof 381
67. Where it lieth upon an Aſſignment of Dower, by the Heir, or the Guardian *ibid.*
68. Where it is *Vicountiel* 382
69. Where it is *Coram Juſticiariis, &c.* *ibid.*
70. All the Lands to be named *ibid.*
71. Where there are to be ſeveral Writs *ibid.*
72. The Reaſon why the Writ is to be *Coram Juſticiariis* *ibid.*
73. How the Concluſion of the Count muſt be 383
74. How the Dowreſs is to plead 384
75. The Award of the Writ *ibid.*
76. How the Entry is to be when the Writ is returned *ibid.*

77. Where

77. Where there are ſeveral Inqueſts *Pa.* 385
78. A Writ for the Guardian *ibid.*
79. When the Plaintiff to remove the Plea, without ſetting forth a Reaſon *ibid.*
80. The Proceſs *ibid.*
81. And by whom the Admeaſurement to be made *ibid.*
82. Where the Grantee of the Ward is to have the Writ 386
83. Where the Heir, and not the Guardian is to have it *ibid.*
84. Where the Guardian ſhall have it *ibid.*
85. Where the Heir ſhall have an Aſſiſe *ibid.*
86. The Reaſon why the Grantee may have this Writ 386
87. And not the Heir at his full Age *ibid.*
88. Otherwiſe if the Heir be within Age 387
89. Whether the Heir ſhall have an Aſſiſe *ibid.*
90. Where the Guardian ſhall have a Writ of Admeaſurement of Dower, but not his Aſſignee 388
91. Where the Heir ſhall have the Writ *ibid.*
92. And the Tenant no Remedy by Aſſiſe, but by *Scire facias* *ibid.*
93. Dower not to be avoided by Entry *ibid.*
94. Where the Sheriff is conſtrued no Wrong-doer 389
95. And where the Heir can have no Aſſiſe *ibid.*
96. The Tenant to be called in by a *Scire facias* *ibid.*

97. An

97. An Aſſignment of Dower, ſuppoſed to be done *Per Pares*, not to be avoided but by Inqueſt *Page* 389
98. Whether the Heir may have a *Scire facias*, notwithſtanding an Inqueſt 390
99. Improvements of the Tenant in Dower, not to be taken from her by Admeaſurement *ibid.*
100. A Difference taken as to the ſeveral Sorts of Improvements *ibid.*
101. Where the Wife was endowed, tho' the Husband had no Poſſeſſion 391
102. The like of a Tenant by the Curteſy *ibid.*
103. Where the Wife not to be endowed when the Heir intrudes upon the King's Poſſeſſion *ibid.*
104. Where the Wife to be endowed, tho' the Husband be attainted, if the Heir be reſtored 392
105. The Reaſon thereof *ibid.*
106. Where the Wife's Acceptance of a Term, ſhall bar her Dower 393
107. *Aliter* of the Acceptance of a Tenancy at Will *ibid.*
108. Where the Wife ſhall loſe her Dower by a Diſcontinuance *ibid.*
109. Where the Wife ſhall loſe her Dower, the Husband being a Diſſeiſor *ibid.*
110. Where the Wife of the Donor ſhall not be endowed of Rent, it being extinct 394
111. Where the Wife ſhall have Dower of a Rent, but *Ceſſat Executio*, during the Nonage of the Heir *ibid.*

112. Where the Wife of the Father ſhall not have Dower of the Grandmother's Third Part *Page* 394
113. Where Dower defeats Diſcent 395
114. Where *Dos* cannot be *Ex dote* *ibid.*
115. Where the Mother ſhall be endowed *ibid.*
116. The like of that Part which the Grandmother held in Dower 396
117. Where the Wife of the Diſſeiſor of the Diſcontinuee ſhall not be endowed *ibid.*
118. How the Wife of a Tenant in Common to be endowed 397
119. Dower by Metes and Bounds *ibid.*
120. How to be endowed of a Mill or an Office *ibid.*
121. Tenant in Dower praying Aid of him in Reverſion, how to be endowed *ibid.*
122. Dower of Lands held in exchange 398
123. Where a Stranger may plead that ſhe holds Lands in Socage *ibid.*
124. Whether ſhe may endow herſelf of Lands, *De la pluis Beale* *ibid.*
125. Where the Son cannot endow *Ex aſſenſu patris* *ibid.*
126. Where that Writ lies 399
127. Where the Wife of the *Meſne* Tenant to be endowed *ibid.*
128. Where the Wife cannot be endowed of Lands evicted by a Title *Paramount* *ibid.*
129. Where ſhe ſhall have Dower out of Lands recovered in Value *ibid.*
130. Where not againſt the Heir's Grantee 400
131. What

131. What Dower *Ad oſtium Eccleſiæ*, and *Ex aſſenſu patris* are *Page* 400
132. For what Purpoſe conſtituted 401
133. A Wife not to have Dower upon the civil Death of the Husband, and why *ibid.* 402
134. That ſhe may loſe her Dower by Adultery 402
135. But not if ſhe is upon the Lands *ibid.*
136. How the old Law ſtood when Villenage was in Uſe *ibid.*
137. How ſhe might loſe her Dower before the Law was altered *ibid.*
138. When ſhe could not claim Dower of the Feoffee 403
139. How the Law is ſince the Statute of *Quia Emptores Terrarum* 403, 404
140. Wife of a Jointenant, where not to be endowed 404, 405
141. Dower *Ex aſſenſu matris & fratris* *ibid.*
142. *Patris & matris* *ibid.*
143. Why not *Ex aſſenſu fratris* *ibid.*
144. *Ad oſtium Eccleſiæ* *ibid.*
145. What a good Marriage to be entitled to Dower *ibid.*
146. How formerly *ibid.*
147. How in later Times *ibid.*
148. When Dower is to be of a Moiety 406
149. When of the whole *ibid.*
150. The Original of Free-Bench *ibid.*
151. Dower *Ad oſtium Eccleſiæ*, how much to be aſſigned 407
152. The Reaſon of the ancient Uſe in that Caſe *ibid.*

153. Wife not to be diſtrained for Debts due to the King *Page* 407
154. The Form of her Writ to be relieved 408
155. Another Form 409
156. With the Addition of the Clauſe, *Dum tamen hæredes, &c.* 409
157. How it is to be where her Husband is Debtor to the King *ibid.*
158. A Writ not to diſtrain in the Lands purchaſed Jointly by Baron and Feme *ibid.*
159. Where the Wife holds the Lands diſcharged of the King's Debt 410
160. Where Tenant in Dower is not to be diſtrained for the King's Debt 411
161. Another Writ in the *Regiſter*, not to diſtrain for the King's Debt 410
162. The Diſtinction of the Caſes 411
163. Where a Writ *De dote Aſſignanda* lieth 412
164. When there was to be a Marriage of the Dowreſs *ibid.*
165. Dower aſſigned by the Crown 413
166. The Writ to the Eſcheator *ibid.*
167. When ſhe may have a Writ to the Eſcheator 414
168. Another Writ to the Eſcheator 415
169. When the Wife is to ſue in the Chancery 417
170. A Writ to the Eſcheator, when the Lands are held of Spiritual Lords *ibid.*
171. A Writ to the Eſcheator, where there is a Rent reſerved 418
172. Where a *Dedimus* to go to take the Dowreſs's Oath 419

173. Li-

173. Livery to the Heir, with a *Salvo* of Dower *Page* 419
174. The Writ to the Eſcheator, in that Caſe *ibid.*
175. When the Words *Salva dote* are not to be in the Writ 421
176. Where the Heir ſhall ſue Livery of a Reverſion, after the Death of Tenant in Dower *ibid.*
177. That the King is to perfect the Infeudation of Dower, and where 422
178. Where the King ſhall ſend a Writ to the Eſcheator, to make a new Extent 423
179. Where the Dowreſs ſhall have a *Scire facias* to re-ſeiſe the Lands 424
180. When the King ſhall ſend a Writ to the Eſcheator to re-ſeiſe the Lands *ibid.*
181. The Form of the Writ. 425
Vide *Jointures*, 4, 5, 6, 7, 9, 10, 11, 16, 17

Dowtureł Writs.

Vide *Dower*, 26

Dureſs.

Vide *Pleadings*, 7

Election.

1. Where the Party may chuſe to take an Eſtate by Way of Leaſe, at Common Law, or by Bargain and Sale, with Attornment 88, 89
2. Where the Party may chuſe to accept Livery, or to have the Deed enrolled 88

Enrolment.

1. What an Enrolment is *Page* 106
2. When introduced, and for what Reason 90
3. What the Tenor of the Enrolment is, and of the Act of Enrolment 107
4. When the Enrolment muſt be, and what paſſeth before, and what by the Enrolment 295, 296
5. What Power before or after Enrolment 292, 293, 294
6. That the Statute of Enrolment does not deſtroy the Operation of the Statute of Uſes 91
7. What Contracts that are not enrolled, are conſtrued to be 106, 107
8. The Relation between the Enrolment and the Deed 90
9. That after the Enrolment, the Freehold is in the Bargainee, from the Date of the Deed 93
10. That the Bargainee hath not the Fee till Enrolment, and why 92
11. Where the Bargainee ſhall have the Rent in Arrear, before Enrolment 94
12. That the Bargainee may enter for a Forfeiture, before Enrolment 95
13. That the Bargainee may be Tenant to the Precipe, may receive a Releaſe, or maintain an Aſſiſe before Enrolment 94
14. Where the laſt Deed of Bargain and Sale, firſt enrolled, ſhall not take away the Effect of the firſt 96

15. That an Eſtate of Freehold or Inheritance, muſt be enrolled, and not a Term for Years, and why, and where the Deed muſt be enrolled *Page* 98
16. That the Bargainee can make no Title to preſent to an Advowſon, before Enrolment 92
17. How a Releaſe to the Bargainor enures before Enrolment 92
18. When it may be enrolled 99
19. If the Bargainor or Bargainee die before Enrolment, yet it may be enrolled 94
20. From the Date, and from the Day of the Date, is all one, and therefore an Enrolment may be on the laſt Day of the 6th Month, after the Day of the Date 99
21. How the Enrolment muſt be, where the Deed has no Date 100
22. Where there is a Bargain and Sale, and a Recovery, or a Feoffment, and the Deed enrolled, the Land paſſes by the Recovery 92
23. That a Party who claims by a Bargain and Sale, muſt ſhew in what Court the Deed is enrolled, and why 109
24. That Covenants to ſtand ſeiſed, in Conſideration of Marriage, need not be enrolled 111
25. That the Bargainee dying before the Enrolment, his Heirs ſhall take by Diſcent 289
26. Where the Party ſhall be in by the Fine, tho' the Deed be enrolled afterwards 289

Vide

Vide Bargains and Sales, 13, 24, 25
Vide Leaſe, &c. 1
Vide Pleadings, 7

Entail.

Vide Fine, 2
Vide Truſts, 12

Entry.

1. That a Leſſee cannot have an Action of Treſpaſs before an actual Entry *Page* 230
2. By a Bargain and Sale, the Freehold in Law paſſes preſently, but not an actual Freehold 'till an Entry *ibid.*
3. That a Releaſe may be made to one that has but a Freehold in Law 230
4. Where a Feoffee of a Recoveror, by an erroneous Judgment ſhall be entered upon without a *Scire facias* 34
Vide Dower 93
Vide Jointures, 9
Vide Baron and Feme, 9
Vide Pleadings, 2

Equity.

1. That ſince the Statute has brought the *Uſes* into Poſſeſſion, they ought to be governed by the Rules of Eſtates in Poſſeſſion; and therefore there muſt be apt Words 75
2. Where an Act is capable of a double Interpretation, that Conſtruction muſt be made as conſiſts moſt with Equity 8
3. Where Equity will not relieve againſt the Act of Law 9
4. That a Court of Equity conſtrued the Limitation of *Uſes* as thoſe of Eſtates in

Poſſeſſion were at the Courts of Common Law *Page* 168

5. A Court of Equity cannot alter the common Import of Words, ſo as to ſet up Rules of Property oppoſite to the Rules of Law 16

6. But a Court of Equity may mitigate or diſpence with the Rules of Law in particular Caſes, where they ſhould happen to ſhelter Diſhoneſty or Oppreſſion 18

7. What Conſtruction the Court of Chancery makes in directing and judging concerning *Uſes* 176

8. As a Court of Equity cannot alter the Diſcents of Land, ſo it cannot alter the Law and Cuſtom of a particular Place; for all immemorial Uſages are Part of the Laws of the Land 19

9. That Equity having the ſole Management and Diſpoſal of *Uſes*, regarded not the ſtrict Rules of the Common Law, before the Statute of *Uſes*, but now otherwiſe 238

10. What the Court of Equity will do for the Benefit of Commerce, and to ſupport Family Settlements. *Vide* Fee upon a Fee

Eſtates and Eſtates-tail.

1. Where an Eſtate limitted to a Man and his Heir, is an Eſtate for Life, and the Reaſon thereof 24

2. In whom, the Eſtates are before Alienation 37

3. What is an Eſtate-tail veſted in the Anceſtor. *Page* 21
Vide Baron and Feme, 1

Eſcheat.

A Writ for the Demandant in Dower, to the Eſcheator. *Vide* Dower, 165, 166, 167, 168, 169, 177, 179
Vide Fraudulent Conveyances, 13

Eſtoppel.

Vide Averment, 8

Evidence.

Vide Fraudulent Conveyances, 16
Vide Right, 3

Exchange.

Vide Dower, 122

Executors. Vide Statutes.

1. How the Statute of 37 *H.* 3. hath altered the Common Law, as to the Power of Executors to ſell 60
2. Of a Deviſe of Lands to Executors, to be ſold 66, 67, 68, 69

Executory Fees.

1. Of Executory Fees, how they began, and what the Rules of Law are, relating thereto *Page* 118
Vide Contingent Remainders 10, 14
2. That Executory Fees are conſtrued according to the ſtrict Rules of Law, and under the Power of the Eſtate that ſupports them
3. The Difference as to Executory Fees, where they ariſe by Way of Uſe, and where by Way of Deviſe; if it ariſeth by Way of Uſe, there muſt be a Seiſin in ſomebody, to be executed in the Grantee of the contingent Uſe, whenſoever it happens 125, 126
4. But by a Deviſe, the Freehold itſelf is transferred, and there needs no Perſon to be ſeiſed to execute the *Uſe* in the Deviſee 127

Extinguiſhment.

1. That he who hath a Uſe in Right only, may do an Act, and what to extinguiſh it
2. Where a Rent granted to charitable Uſes ſhall not be extinct 15
3. When the Seigniory and Rent are extinguiſhed 241
Vide Condition
Vide Rent

Father and Son.

1. What ſhall be deemed an Advancement for the Son, and not a Truſt for the Father *Page* 348
2. What was held an Advancement for Children, and not a Truſt for the Father 348, 349, 350
Vide Covenants to ſtand ſeiſed 11
Vide Jointenants 6

Fee upon a Fee.

Tho' a Fee cannot be limited upon a Fee, by the ſtrict Rules of the Common Law, yet the Court of Chancery paſs by this Rule, for the Neceſſity of Commerce, and to ſupport Family Settlements 76

Feoffment, Feoffor and Feoffee.

1. Where a Feoffee is ſuppoſed to take an Eſtate to *Uſes*, and when to his own *Uſe* 7
2. When the Feoffee ſhall be ſeiſed to the *Uſe* of another, and when to his own Uſe 8
3. Where a Court of Equity will order the Feoffee to try the Title with the Diſſeiſor at Common Law 10
4. That a Feoffee to an *Uſe* may grant a Way or Common 13
5. Where the Feoffee to an *Uſe* may grant the Office of a Steward, Bailiff or Receiver 14

6. And may, during the Minority of the Heir, without his Aſſent, but cannot ſettle Fees, during Life *Page* 14, 174
7. Where a Feoffor is conſtrued in of the old Reverſion, and may deviſe it, and where not 21
8. Where the Feoffor to the *Uſe* of his Laſt Will, has a qualified Fee, and why 35
9. What ſhall bind the Son of the Feoffor, to the *Uſe* of his Laſt Will 36, 37
10. Where the firſt Feoffees may enter, and revive a former *Uſe* 31
11. Where the Feoffees to an *Uſe*, may enter upon the Alienee of Tenant for Life, and why 29
12. Where the Feoffor may enter and revive an *Uſe*, for the Benefit of another, who cannot make a Feoffment 240
13. Where the *Uſe* ſhall be to the Feoffor and his Heirs, of the Part of the Mother 238
Vide *Ceſtui que Uſe* 7, 9, 10, 13, 22
Vide Covenants to and ſeiſed, 13
Vide Dower, 10, 138
Vide Entry, 4
Vide Heirs, 3
Vide Enrolment, 21
Vide Prior and future *Uſes*
Vide Leaſe, &c. 2
Vide Pleadings, 4
Vide Releaſe, 4
Vide Remainder, 6
Vide Revocation
Vide Contingent Remainders, 7, 13, 17, 19

A TABLE.

Fine.

1. Of *Uſes* upon a Fine and Recovery *Page* 282, 283
2. That a Fine and Recovery paſs the Entail at Common Law; ſo does it paſs the Entail of a Truſt, in a Court of Equity 33
3. That the Iſſue in Tail, are barred by a Fine, tho' not he in Remainder 101
4. Where the Heir of the Bargainee ſhall have the Eſtate under a Fine, and not the Deviſee, upon a Deviſe, before the Fine *ibid.*
5. That Baron and Feme levying a Fine, it ſhall bind the Wife, and why 39
6. The Husband declaring the *Uſes*, ſhall bind the Wife, and why, and where not 40, 41
7. Where a Declaration of *Uſes* by the Husband, on a Fine levied, ſhall bind the Wife, during her Coverture, but not after, and why 40
8. Where no *Uſes* are declared upon a Fine, it ſhall be to the *Uſe* of the Wife, and why *ibid.*
9. Where *Uſes* of a Fine levied by Huſband and Wife may be averred without the Wife's Deed; and where her refuſing to aſſent to the *Uſes*, ſhall not bind the Wife 41
10. Where the Wife levying a Fine within Age, it ſhall bind her, and why *ibid.*

11. That the *Uſe* of a Fine cannot be limitted to a Stranger without a Deed, and where it may *Page* 56, 57, 215

12. Where a verbal Averment may be allowed to reconcile a Difference between a Fine and a Deed to lead the *Uſes* 58

13. That a Covenant to levy a Fine to the *Uſe* of a Man's Baſtard Daughter, is good 207

14. That the laſt Declaration of the *Uſe* of a Fine, ſhall not ſtand, but the firſt 54, 55, 56

15. Of Declaration of *Uſes* on a Fine or Recovery 53, 54, 55, 260, 262, 267, 268

16. Where two Perſons, having different Eſtates in the Land, declare no *Uſes* upon a Fine, how they ſhall be ſeiſed, and how, where one of the Parties has no Eſtate 43

17. Where it was reſolved that a Fine did not deſtroy a Remainder limited *ſeniori puero* 283

18. A Conſtruction upon a Fine levied to the Conuzees, to make an Eſtate to ſuch a Perſon as the Conuzor ſhould appoint 284

19. That a ſubſequent Declaration of *Uſes*, upon a Recovery, is good 261, 271, 272

20. What ſhall be a good Declaration of *Uſes* upon a Fine, tho' no Marriage be had, which would not have been good upon a Covenant to ſtand ſeiſed 277

21. Of a Declaration of *Uſes*, upon a Fine levied to Survivors *Page* 272
22. That a Fine *Sur Grant and Render* cannot be averred by Parol, to be to any other *Uſes* than thoſe contained in the Fine 268
23. Where a Fine by Husband and Wife, did not deſtroy the Eſtate in Remainder, but that it was in Abeyance 280
24. Where no *Uſe* ſhall ariſe by Force of a Covenant, without the Fine levied 257
25. Whether *Uſes* of a Fine levied of Part, ſhall be good 276
26. Where a Fine ſhall be guided by a Covenant made before 273
27. Whether a Fine ſhall extend to Averments before the Fine levied 272, 273
28. Where the Render of the Conuzee cannot extinguiſh the Condition, becauſe his Seiſin was Inſtantaneous 269, 270
29. How a *Uſe* ſhall ariſe to Tenant for Life, upon a Recovery 282
30. Where a *Uſe* limitted by a Recovery for Part, ſhall enure to the Wife for that Part only 281

Vide *Attornment*, 3
Vide *Baron and Feme*, 3
Vide *Ceſtui que Uſe*, 11, 12, 18
Vide *Conſideration*, 6
Vide *Forfeiture*, 2
Vide *Jointenants*, 2
Vide *Enrolment*, 25

Forfeiture.

1. What a Forfeiture is *Page* 102
2. Where a Fine levied of a Thing lying in Grant, is a Forfeiture 101, 102
3. That a *Uſe* is not forfeitable for Felony or Treaſon, and why 38
4. That a Term limited in Truſt, is forfeitable for Treaſon, by *Ceſtui que Truſt* 39
5. Where a Feoffment by Tenant for Years is a Forfeiture *ibid.*
6. Where a Recovery by Tenant for Life, is no Forfeiture, becauſe he in Reverſion held the Eſtate under Truſts for Tenant for Life 63
7. Who ſhall enter for a Forfeiture 243
Vide *Bargains and Sales*, 16
Vide *Baron and Feme*, 9
Vide *Enrolment*, 12
Vide *Revocation*, 14

Fraudulent Conveyances.

1. What accounted a fraudulent Conveyance 6
2. Of fraudulent Conveyances 302
3. Who ſhall avoid fraudulent Conveyances 304, 305
4. Where Purchaſors ſhall avoid a Gift to the King 306
5. Who ſhall not be eſteemed a Purchaſor for a valuable Conſideration 307

6. What

6. What fraudulent Conveyance may be avoided *Page* 304, 305, 308
7. Where a Cognizee of a Statute, accepting a fraudulent Conveyance, ſhall ſtill be paid his Debt, before a Bond-Creditor 308
8. That a fraudulent Gift is good againſt every Body but Creditors, and will ſtand good between the Parties themſelves 306
9. What is a good Leaſe made to the *Uſe* of the Wife, ſhall be good againſt Purchaſors 309
10. What will be a void Leaſe againſt Purchaſors *ibid.*
11. Where Conveyances upon a Marriage ſhall not be conſtrued Fraudulent 310
12. That tho' a Deed be fraudulent in its Creation, yet by Matter *ex poſt facto*, it may be made good 309, 310
13. Of a fraudulent Conveyance, to prevent an Eſcheat 310
14. Where the Vendee ſhall not avoid a Settlement, the Power of Revocation being out of the Vendors 311
15. Pleadings relating to fraudulent Conveyances 306
16. That a fraudulent Conveyance may be given in Evidence upon the General Iſſue, and need not be pleaded 306

Free-Bench.

Vide *Dower*, 150

Freehold.

Vide *Enrolment*, 9
Vide *Limitation*, 3
Vide *Perpetuities*, 2, 7
Vide *Contingent Remainders*, 4, 8

Grant, Grantor and Grantee.

Where the Grant of the Intereſt the Grantor had in the Lands which he had before granted was void, and the Reaſon thereof *Page* 198
Vide *Ceſtui que Uſe*
Vide *Dower*, 82
Vide *Purchaſors*, 3
Vide *Releaſe*, 7

Guardian.

Vide *Dower*, 51, 52, 64, 66, 67, 83, 90

Habendum.

Vide *Deeds*, 2

Heirs.

1. Where the Word *Heirs* is not a Name of Purchaſe, but of Limitation 23
2. And where it is not a Word of Limitation, but of Purchaſe 24
3. Where a Remainder veſts in the Feoffee to an *Uſe*, ſo that his Heirs claim by

Diſcent; and where not, ſo that his Heirs take by Way of Purchaſe *Pa.* 23, 24.
4. What is conſtrued a Remainder veſted in the Heir, and for what Reaſon 25
5. Where Heirs take by Diſcent, as in the old Reverſion 20
6. Where the *Uſe* ſhall deſcend to the Heirs of the Part of the Mother, and where to Heirs on the Part of the Father, and where to the Heirs on the Part of the Purchaſor 17, 18, 19, 238
7. Where the Eſtate of *Ceſtui que Uſe* ſhall be in the Heirs, till Alienation by the Feoffees, purſuant to the Will 37
8. Where a *Uſe* ſhall ariſe to the Heir, upon a Covenant to ſtand ſeiſed, and he ſhall take by Diſcent 277
9. Where the Heir of the Deviſee ſhall be ſeiſed in Truſt, for the Cure of a Church, for the Time being 344
10. That a Man limiting an Eſtate to his own Right Heirs, makes him ſeiſed of the whole Eſtate; and the like of an Uſe 19

Vide *Averment*, 3
Vide *Bargains and Sales*, 18, 19
Vide *Baron and Feme*, 10
Vide *Ceſtui que Uſe*, 17
Vide *Dower*, 11, 33, 53, 63, 64, 66, 82, 87, 88, 90, 94, 97, 102, 103, 129, 172, 175.

Implication.

1. Where the Deed expreſſes a *Uſe*, an implied one cannot be averred 7

2. Of *Uſes* raiſed by Implication *Page* 7, 8, 9
3. How a *Uſe* may be raiſed by Implication of Law 64, 65
Vide *Truſts*

Infant.

Vide *Declaration of Uſes*, 3
Vide *Infant*, 3

Inqueſt.

Vide *Dower*, 16, 97, 9

Intent of the Parties.

Vide *Conſideration*, 12

Jointenants.

1. Whether Perſons to whom a *Uſe* is raiſed by a Fine, or by a Leaſe at Common Law, are Jointenants or Tenants in Common 70
2. Whether a Fine levied to the *Uſe* of the Conuzor and *B.* and their Heirs makes them Jointenants or Tenants in Common *ibid.*
3. Where the *Uſe* being jointly limited to two, made them Jointenants 20, 235
4. A Leaſe for Life, Remainder in Fee to the Right Heirs of *J.* and *K. N.* alive, the Heirs are Tenants in Common, and why 70

5. But

5. But in Caſe of a *Uſe* there may be Jointenants; tho' they do not take at the ſame Time *Page* 71
6. Where the Father and Son purchaſing Lands Jointly, the Eſtate ſhall ſurvive to the Son 72, 229
7. Where the Moiety of a Jointenant ſhall paſs to the Bargainee, and not ſurvive 194
8. Of Bargains and Sales by Jointenants 290
9. Where no *Uſe* ſhall ariſe from a Jointenant to the Survivor 275
10. On a Sale by one Jointenant of his Moiety, the other ſhall ſurvive 92
Vide *Declarations of Uſes*, 5
Vide *Dower*, 139

Joint Truſts.

1. Of Joint Truſts with an Intereſt 66
2. Of Joint Truſts without an Intereſt 69
3. If there be a Joint Truſt, and one refuſes to act according to the Truſt, the other cannot act only as to his Intereſt 67
4. Of Joint Eſtates in a *Uſe* or *Truſt* 70
5. At the Common Law Joint Truſts were taken for bare Authorities, and did not ſurvive 77

Jointures and Jointreſs.

1. What was the Original of Jointures 25, 147, 239, 289

2. What Requiſite to make a good Jointure within the Statute *Page* 147
3. *Firſt*, That the Eſtate muſt of Neceſſity take Effect immediately after the Death of the Husband 148
4. *Secondly*, That it muſt be for the Term of her own Life, or of a greater Eſtate, or elſe it doth not anſwer the Deſign of *Dower*, for which it is to be a Recompence 150
5. *Thirdly*, It muſt be made to herſelf, and not to others in Truſt for her, tho' by her Aſſent, and expreſſed to be in Satisfaction of her *Dower* 151
6. *Fourthly*, It muſt be in Satisfaction of her whole *Dower*, and not of Part only; for if it be in Satisfaction of Part only, it is uncertain *ibid.*
7. *Fifthly*, It muſt be expreſſed to be in Satisfaction of her *Dower* *ibid.*
8. That a Jointure may be made either before or after Marriage 152
9. That an Agreement to her Jointure made after Marriage, by her Entry into the Lands, concludes her from claiming her *Dower* 153
10. That a Deviſe of an Eſtate for Life, cannot be averred to be in Satisfaction of *Dower*, unleſs it be expreſſed ſo in the Will, and why 152
11. Where an Averment was ſufficient to ſhew that the Jointure was made in Satisfaction of her Dower *ibid.*
12. That an Averment of a Jointure, being in Satisfaction of Dower, is not traverſeable *ibid.*
13. Where

13. Where an Acceptance of a Conditional Jointure is good *Page* 148
14. Where a Remainder to the Wife, after a Remainder to ſupport contingent Remainders, is a good Jointure *ibid.*
15. Where an Eſtate limited to the Wife, by Way of Remainder, is not a good Jointure *ibid.* 149
16. That a Leaſe for the Life of another, or a long Term, is no good Jointure to bar a Woman of her Dower 150
17. What was no good Jointure to bar the Wife of her Dower upon a Settlement made by her Husband's Father, becauſe it was uncertain whether the Eſtate would commence *ibid.*
18. Where a Jointreſs ſhall hold Lands ſubject to a Mortgage or Judgment by Tenant in Tail of a Truſt, making a Mortgage or ſuffering a Judgment, and why 33
Vide *Baron and Feme*, 4, 7

Iſſue in Tail.

Vide *Quod ei Deforciat*, 7
Vide *Marriage*
Vide *Contingent Remainders*, 23

Juſticies.

A TABLE.

Law.

The Law will ſuppoſe a Man's Actions rather Juſt than otherwiſe 7

Leſſor and Leſſee.

1. Where the Leſſee is without Remedy, by the Leſſor's ſelling the Lands and dating the Deed and Enrolment before the Leaſe 109
2. A Power of making Leaſes may be reſerved upon a Feoffment, Fine or Recovery to Uſes 46
3. Where one of three Leſſees ſurrenders up the old, and takes a new Leaſe to himſelf, it ſhall be in Truſt for all 346
4. Tho' a Leaſe for three Years be good by Parol, yet when ſuch a Leaſe is in Writing, the Truſt of that Leaſe cannot be declared by Parol 347
5. What was held a reſulting Truſt to the Grantor 347
6. What ſhall prevent a reſulting Truſt to the Aſſignor of a Mortgage 348
7. Where Notice of an Incumbrance was neceſſary, and where not 309, 310
8. Where a Notice to Counſel or Attorney, &c. is good 343
Vide *Ceſtui que Uſe*, 1
Vide *Confirmation*, 1
Vide *Dower*, 18
Vide *Election*, 1
Vide *Entry*, 1

Vide *Fraudulent Conveyances*, 8
Vide *Prior and future Uſes*
Vide *Remainders*, 20, 21, 29
Vide *Jointures*, 4

Limitation.

1. That by a Man's limiting a Uſe to his own Right Heirs, the Uſe is ſtill in himſelf, and why *Page* 19
2. But a Man's limiting a Uſe to his Repreſentatives, with a particular Qualification, ſo alters the Eſtate, that the Uſe ſhall alter and deſcend in ſuch Manner as it is directed, and why 20
3. Where a Freehold is limited to a Man for Life, and the Remainder to his Right Heirs, tho' after never ſo many particular Eſtates, the Remainder is veſted in him for three Reaſons; and what thoſe Reaſons are 21
4. That a Limitation of a Term for Years, to twenty diſtinct Perſons *in Eſſe*, is good, but otherwiſe of a Remainder, and why 124
5. What is conſtrued a void Limitation, becauſe the Reverſion is ſtill in the Donor 124
Vide *Heirs*, 1
Vide *Marriage*
Vide *Perpetuities*, 5, 6

Livery.

To the Heir, with a *Salva dote*
Vide *Dower*, 173
Vide *Election*, 2

London.

Vide *Baron and Feme*, 2

Lord of a Manor.

Vide *Releaſe*, 1

Lord by Eſcheat.

Vide *Seiſin to Uſes*, 9

Marriage and Marriage Settlement.

1. Where a Settlement is made by the Father, or other lineal Anceſtor, in Conſideration of the Marriage of his Son, in ſuch Caſe all the Remainders limited to his Children and their Poſterity, are within the Conſideration of that Settlement; but when it is made by a Brother, or any other Collateral Anceſtor, on his Marriage, after the Limitations to his own Iſſue, all the Remainders limited to Collateral Kindred are voluntary, and not within the Conſideration of the Marriage Settlement *Page* 397

2. Where

2. Where the Feoffor ſhall be ſeiſed to himſelf and his Heirs, till a Marriage takes Effect *Page* 276
3. Where no *Uſe* will ariſe 'till a Marriage 258
4. Where no *Uſe* will ariſe upon a Portion paid in Conſideration of a Marriage, unleſs the Marriage takes Effect 259
5. Where, by Articles of Marriage, it was intended that the Husband ſhould only have an Eſtate for Life, and that he ſhould make a Conveyance to the Uſe of the Heirs Male of his Body, and the Iſſue of ſuch Heirs Male, it was not in the Power of the Husband to deſtroy it by a Settlement to any other Uſes 313 *to* 328

Vide *Conſideration*, 2
Vide *Dower*, 13, 144, 163
Vide *Fraudulent Conveyances*, 11
Vide *Enrolment*, 24
Vide *Jointures*, 8, 9

Merger.

1. When a Seigniory is drowned in the Tenancy 9
2. If the legal Eſtate be merged, and the Owners of the Land have Notice of a Truſt, the Land is inveſted with it, and they ſhall be forced by a Decree in Chancery, to ſet it up again 9

Naked Right.

Vide *Ceſtui que Uſe*, 5

Nonage.

Vide *Pleadings*, 8

Non compos.

Vide *Declarations to Uſes*, 2

Notice.

Vide *Leaſe*, 7, 8

Occupant.

Vide *Seiſin to Uſes*, 16

Parol Averment.

Vide *Averment*, 9, 11

Parol Leaſe.

Vide *Leaſe*

Of Perpetuities.

1. What a Perpetuity is, and the Inconveniencies thereof *Page* 119, 120, 168, 169

2. That

2. That it is againſt the Rules of Law, that a Freehold for Life ſhould deſcend, becauſe it creates a Perpetuity; yet where the Eſtate for Life ſhall be conſtrued a Fee, if there be a Conſideration to ſupport the Intention of the Parties *Page* 77

3. That the Law allows of no Eſtate of Inheritance that goes in Lineal Succeſſion, but what is in the Power of the Perſon to whoſe Repreſentatives the Eſtate muſt deſcend 120

4. How Cautious the Court of Chancery is of giving Encouragement to Perpetuities 168

5. All Limitations that perpetuate, or tend to a Perpetuity, are in themſelves void and repugnant to the Policy of the Law 118, 119

6. All Limitations that tend to the Proviſion of the Family, and to ſecure againſt Contingencies, that are within the Parties immediate Proſpect, are to be favoured 118

7. What Rules, relating to Perpetuities, are obſervable in Law and Equity, relating to Freeholds and Chattels 120, 121

Of Pleadings relating to Uſes.

1. In what Manner *Uſes* are pleadable 81, 263

2. That a *Uſe* may be pleaded without ſhewing an actual Entry 81

3. But in Treſpaſs, he muſt ſhew an actual Entry, and the Reaſon thereof *Page* 81
4. How to plead a Feoffment to an *Uſe*, where *J. S.* diſſeiſed the Feoffee *ibid.*
5. In pleading, the Party ſhewed that *A.* was ſeiſed to the *Uſe* of *B.* and laid a Diſſeiſin, without ſhewing how he became ſeiſed, and held good *ibid.*
6. Where the Party pleads that he bought the Land, without ſhewing the Money paid, and held good 82
7. That if a Man acknowledges and enrolls a Deed, he cannot afterwards plead Dureſs 109
8. Where an Infant upon a Bargain and Sale, may plead Nonage, and where not 107, 108
9. What to be traverſed, and what not in Pleadings relating to Dower 156, 157
10. Of pleading in Dower
Vide *Dower*, 74
Vide *Fraudulent Conveyances*, 15

Pone.

Vide *Dower*, 6

Prerogative.

1. That Grants to the King muſt be by Matter of Record 93
2. Where the King ſhall hold the Lands diſcharged from a Rent-charge *ibid.*
3. That the King is not ſubject to the Truſt; that the Perſon attainted was otherwiſe; of a Tenant in Dower 172
Vide *Fraudulent Conveyances*, 4

Prior and future Uſes.

1. Where a Feoffee ſhall be ſeiſed to former *Uſes* 173
2. If a Reverſion be ſubject to future Uſes, and is granted to a Man and his Heirs, without Conſideration, to the Uſe of the Grantee and his Heirs, whether it is ſubject to the former Uſes 174
3. Where a Leſſee or Donee, having Notice of former Uſes, ſhall not be ſeiſed to thoſe Uſes, but to their own Uſes 173
4. And where to new Uſes 174
5. A future Uſe, notwithſtanding the Statute, remains as it was at Common Law, till it comes *in Eſſe*, and then the Statute executes the Poſſeſſion to it, and a future Uſe muſt not ariſe out of the Eſtate of *Ceſtui que Uſe*, but out of the Eſtate of the Feoffee
6. Where the old *Uſes* and where the new *Uſes* ſhall ſtand, 193, 194, 195, 196, 197, 198, 199

Prohibition.

Vide *Dower*, 21

Purchaſer.

1. If an Equivalent be given, tho' the Contract be not executed with all the Formalities of the Law, yet in Equity, the

the *Uſe* of the Lands ought to be in the Purchaſer *Page* 49
2. Where the Purchaſer of Lands, charged with a Rent to a Charitable *Uſe*, ſhall hold it ſo charged 15
3. Where the Payment of the Debts of the Grantor makes the Grantee a Purchaſer 52

Vide *Fraudulent Conveyances*, 4, 5, 9

Qualified Fee.

Vide *Feoffment*, 8

Quarentina habenda.

Vide *Dower*, 40

Quia Emptores Terrarum.

Vide *Dower*, 16, 139

Of a Writ of Quod ei Deforciat.

1. Where it lieth 426
2. From whence it aroſe *ibid.*
3. The Form of the Writ 427
4. That Tenant by the Curteſy is entitled to the Writ 428
5. Tenants loſing by Default *ibid.*
6. Of loſing Lands in a Writ of Right 429
7. What no Iſſue *ibid.*

8. What enough to ſhew in the Writ *Page* 429
9. That it lies againſt a Stranger to the Recovery 430
10. Where the Party is not to have this Writ, but a *Formedon* 421
11. Where the Wife ſhall have the Writ *ibid.*
12. Where Coparceners ſhall join *ibid.*
13. Tenant for Life or in Tail, making Default 432
14. Departure in Deſpight of the Court *ibid.*
15. Baron and Feme *ibid.* 433
16. Tenant for Life, loſing by Default in a *Ceſſavit* *ibid.*
17. Tenant by a Receipt *ibid.*
18. Whether the Tenant ſhall have the Writ *ibid.*
19. The like *ibid.*
20. Where the Writ is general *ibid.*
21. Obſervations on the Writ *ibid.*

Records.

That Grants to the King, or Inſtruments to any Subject made in open Court, are Records, and as ſuch are uncontroulable 106

Vide *Prerogative*, 1

Recordare.

Vide *Dower*, 5, 9

A TABLE.

Recovery.

1. What is a ſufficient Freehold to make a Tenant to the *Præcipe*, for a Recovery *Page* 21
2. A Perſon ſuffering a Recovery to the *Uſe* of his Laſt Will, how he may diſpoſe of the Eſtate 36
3. Where the Word *hereafter*, in a Deed to lead the *Uſes* in a Recovery, excludes the *Uſes* from being executed on the Recovery 79

Releaſe.

1. The Lord releaſing to a Copyholder to the *Uſe* of another, is a good *Uſe* 53, 231
2. Whether it be ſo when a Releaſe enures by Way of Enlargement of an Eſtate 53
3. Otherwiſe, if it enures by Way of tranſmitting an Eſtate, or by Extinguiſhment *ibid.*
4. Where the *Uſe* is gone by a Releaſe from the Tenant for Life, to the Feoffee 12
5. A Releaſe to a Bargainee for Years, in Poſſeſſion, will be good to enlarge his Eſtate 230
6. At Common Law, no Man could releaſe to a Tenant for Years, unleſs in Poſſeſſion, and why 104
7. Where the Leſſor for Life or Years may releaſe to the Grantee of the Reverſion *ibid.*
8. Where a Bargainee for Years, with a Releaſe to him, for the *Uſe* of *B.* may

take that Releaſe at Common Law, yet it ſhall not deſtroy the Eſtate of *B.* *Page* 105

Remainder and Reverſion.

1. Where the Remainder-Man has no Power to alien in Fee, by the Statute of 1 *R.* 3. and why 29
2. Where he in Remainder may make a a Leaſe for Years, or grant a Rent-charge, to commence after the Death of Tenant for Life, and why 30
3. Where Reverſioners to an Uſe of different Eſtates, may grant their Eſtates *ibid.*
4. Where a Remainder is veſted in the Grantee for Life 21
5. Where he in Remainder in Tail, after a *Uſe* to *C. D.* for the Term of Twenty-four Years, ſhall take when the legal Intereſt of the Term ceaſes, and before the Expiration of the Time of the Term 226
6. Where there is this Difference, that the Remainder-Man's Intereſt ſhall not commence preſently upon the Tenant for Life's refuſing to accept the Eſtate upon a Covenant to ſtand ſeiſed; otherwiſe in the Caſe of a Feoffment of *Uſes*, and the Reaſon thereof 227

Contingent Remainders.

1. Of Contingent Remainders, and in what Manner they are executed 127

2. Three Preliminaries neceſſary to an Enquiry into Contingent Remainders, and what they are *Page* 127
3. The ſeveral Opinions of great Men about the ſame 128, 129
4. When Contingent Remainders are limited, there muſt be a Freehold to ſupport them 76
5. And if the Remainder does not veſt, during the Determination of the particular Eſtate, it ſhall never veſt 77
6. Where the Contingent Remainder is deſtroyed, there not being a particular Eſtate ſufficient to ſupport it 127
7. Where a Contingent Remainder is deſtroyed by the Feoffment of Tenant for Life 132
8. Where the Contingent Remainder is deſtroyed by the Eſtate of the Tenants deſcending to Coparceners, whereby the Freehold is altered *ibid.* 133
9. Where the Remainder to the Right Heirs of *A.* and *B.* is gone by a Releaſe from the Donor to *A.* *ibid.*
10. The Difference between deſtroying Contingent Remainders, and executory Fees 132
11. That a Bargain and Sale in Fee, by Tenant for Life, does not deſtroy the Contingent Remainder 135
12. Where the Surrender of a Copyhold Tenant for Life, ſhall not deſtroy the Contingent Remainder 139
13. Where a Feoffment to *D.* of Lands of which the Feoffor had covenanted to

ſtand ſeiſed upon a Contingency, did not deſtroy the Contingency *Page* 233
14. And tho' the Feoffee had Notice 137
15. What was conſtrued a contingent Remainder, and not an Executory Fee, becauſe it was limited to take Place upon the Determination of the Eſtate for Life 133
16. Where a contingent Remainder will veſt, tho' the Tenant for Life be diſſeiſed 136
17. A Collateral Warranty bars the Contingency, tho' it afterwards happens, during the particular Eſtate 36
18. Where a Feoffment of *Ceſtui que Uſe* for Life, does not deſtroy the Contingent Remainder 136
19. Where the Re-continuance of the Eſtate of *Ceſtui que Uſe* ſhall not revive his own Eſtate, but the Eſtate of the Remainder dependant upon it 236
20. Where, 'till the Feoffees to an Uſe, have entered to revive the Eſtate, the Remainder upon a Contingency is gone 137
21. Where *B.* forfeits his Remainder for Life by a Feoffment, and levies a Fine, this ſhall not veſt a contingent Remainder; and yet the Entry of a precedent Tenant for Life ſhall preſerve the contingent Uſe 138
22. Where a Leaſe for Years will not prevent the contingent Remainder from ſpringing up when it happens *ibid.*
23. Where a Conditional Remainder is limited to him in Remainder for Life, up-

on a Diſturbance of his Eſtate, ſhall not veſt, becauſe the Diſturbance is by a Leaſe to commence after his Death *Page* 138, 139

24. Of the Remainder of Terms, and how far they ſavour of a Perpetuity 122, 123

25. Where a Remainder of a Term is good, when it muſt happen within the Compaſs of a Life, and how it will be on a Death, with Failure of Iſſue *ibid.*

26. The Difference between a Remainder of a Chattel, limited by a Deed, and by a Deviſe 121, 122

27. Where the particular Eſtate determines by Merger, the Remainder cannot veſt 135

28. Where the Wife a Deviſee for Life, (Remainder upon a Contingency,) together with a ſecond Husband, purchaſes the Reverſion, tho' this would revive the Wife's Eſtate, yet it is not ſufficient to ſupport the contingent Remainder *ibid.*

29. Otherwiſe, if it had been by the ſame Conveyance *ibid.*

30. For when it is by the ſame Conveyance, the Eſtate opens and ſhuts to let in the contingent Remainder, after the Eſtate for Life is determined *ibid.*

31. Where a Leaſe for Years, made by the Tenant for Life, ſhall not deſtroy the Remainder's Eſtate 139

32. Where the Covenantor, having granted three Eſtates, ſhall be conſtrued to have three different Reverſions in him 114

33. Where

33. Where the Remainder, limited by Tenant in Tail is void, and that a Fine afterwards levied, cannot help it *Page* 111
34. For what Reaſon an Eſtate limited by a Man to himſelf, for Life, with a Remainder to his Heirs, veſts the Remainder in himſelf 21
35. Where the Remainder ſhall paſs by the Delivery of the Deed 50
36. The Wife's waving her Jointure ſettled on her, during her Coverture, Remainder to *J. S. J. S.* ſhall have the Remainder, on her waving her Jointure 154

Vide *Baron and Feme*, 9
Vide *Fine*, 3, 17, 29
Vide *Heirs*, 3, 4
Vide *Jointenants*, 4
Vide *Jointures*, 14, 15
Vide *Marriage*, 1
Vide *Remitter*, 3
Vide *Limitation*, 3

Remitter.

1. Where a later and defeazable Title, and a former and indefeazable Title concur in the ſame Perſon, ſuch Perſon is remitted to his former Eſtate 154
2. Where the Wife ſhall be remitted after a Feoffment made by the Husband, to the Uſe of himſelf and Wife, the Remainder to *C.* 154

3. And that by her Remitter ſhe recontinues an Eſtate for him in Remainder, limited by the Deed of Jointure *Page* 155
4. But when there are two Titles, and the one indefeazable, but the other not defeazable by a third Perſon, but both equally firm, there the Wife ſhall not be remitted *Nolens volens* 155
5. Where a Wife has two Titles, both equally firm, ſhe ſhall be ſuppoſed to be in of her elder Title, becauſe every one is preſumed to chooſe what is moſt for their Benefit 155
6. Where the Iſſue in Tail ſhall not be remitted 78
7. Where the Wife ſhall not be remitted *ibid.*
8. That no Man can be remitted againſt his own Act to the contrary 79

Removal of Plea of Dower.

Vide *Dower*, 79

Rent.

1. Where the Rent is extinct by the Lord or Grantees being alſo *Ceſtui que Uſe*, and what will not extinguiſh the Rent by an Act of the Ter-tenant only 31
2. What will extinguiſh a Rent 13, 31
3. Who ſhall not take Advantage upon Demand of a Rent, without Notice 103

Vide *Bargains and Sales*, 11
Vide *Dower*, 110, 111
Vide *Extinguiſhment*, 2, 3
Vide *Enrolment*, 10
Vide *Purchaſers*, 2

Rent-Charge.

Vide *Prerogative*, 2

Reſulting Truſts.

Vide *Leaſe*, 5, 6

Revocation of Uſes.

1. The different Powers of Revocations *Page* 141
2. Where a Power of Revocation may be reſerved, and where not 140
3. Of a Power of Revocation appendant, annex'd to the Eſtate of the Land 141, 142
4. Of a Power of Revocation in Groſs, what it is, and what does not deſtroy ſuch Power *ibid.*
5. Where a Fine or Feoffment in Fee, deſtroys all the Powers of Revocation, and where not 143, 144
6. That a Tenant for Life may releaſe a Power of Revocation to him in Remainder 143
7. Where the Power of Revocation is ſimply Collateral 144
8. Of the Manner of Revocation *ibid.*
9. That a Tenant for Life, having a Power of Revocation, upon his revoking, is ſeiſed of his former Uſe *ibid.*
10. Where a Power of Revocation is appendant and annex'd to the Eſtate, un-

leſs it be executed during the Continuance of the Eſtate, it can never be executed *Page* 142

11. Whether a Power of Revocation was extinct by the Fine, or that the Deed of Revocation of Uſes was to be reckoned together as one Conveyance 278, 279

Vide *Fraudulent Conveyances*, 13

12. If there be Tenant for Life, with a Power to revoke the Remainders, and limit new ones, he may do both by the ſame Conveyance 145

13. If a Man makes a Feoffment, with Power of Revocation, when he hath executed that Power, he cannot limit new ones upon the ſame Feoffment 146

14. He may revoke Part at one Time and Part at another, Revocation of Uſes not being like to a Condition, which is in its Nature entire 145

15. What is a good Tender of Payment of Money, to ſave the Power of Revocation 146

16. A Power of Revocation is in ſome Caſes a Forfeiture, and where it is ſo, and where not *ibid.*

Right.

1. That a Perſon who only may have a Right, has at preſent in Law no Right in him; and therefore it is a Contradiction to allow him to act as a Perſon having a Right, by transferring an Intereſt to another; and ſee an Example according to this Rule 125

2. He that has a *Uſe in Eſſe*, has Power by 1 *R.* 3. to make a Feoffment, but not he that has a *Uſe* in Right only; but ſuch a Perſon may do an Act to extinguiſh his Right *Page* 240
3. The meer Act of delivering Poſſeſſion, paſſes a Right in leſſer Eſtates, but in greater Eſtates Poſſeſſion is no Evidence of a Right 65

Scire facias.

1. Where a *Scire facias* is not maintainable to have Execution of Lands in the Hands of the Bargainee 95
2. Where the Party may enter without a *Scire facias* 242
Vide *Dower*, 92, 98, 179

Seigniory.

Vide *Merger*

Seiſin.

1. No *Uſe* is to ariſe till there be Seiſin where a Charter of a Feoffment is made, with a Letter of Attorney to deliver Seiſin 49
2. Otherwiſe, if a Man, for a Conſideration, ſells Lands, with a Letter of Attorney to deliver Seiſin 50

A TABLE.

Seiſin to Uſes.

1. Who may be ſeiſed to an *Uſe*, and what is neceſſary thereto *Page* 5
2. *Firſt*, That the Perſon be capable of a Confidence and Truſt *ibid.*
3. *Secondly*, That he take it up under the Truſt limited 6
4. That Bodies Politick are not capable, and why 5
5. That the King is not, and why 5, 6
6. That Aliens and Perſons attainted, are not capable of an *Uſe*, and why 170, 171
7. That Corporations are not, and why *ibid.*
8. That Tenant by the Curteſy, or in Dower are not, and why *ibid.*
9. That a Lord by Eſcheat cannot, and why 171, 172
10. Where the Grantee of a Seigniory ſhall hold the Tenancy to a *Uſe* 12
11. Where a Feoffee, being a Recoveree, ſhall be ſeiſed to an *Uſe* 13, 61
12. That the Purchaſer of a Charitable *Uſe* ſhall not be ſeiſed to ſuch *Uſe* 14
13. Yet where a Feoffee of a Purchaſer ſhall 15
14. He that comes in of another Eſtate than that which the Feoffee to the *Uſe* had, ſhall not be ſeiſed to *Uſes in Eſſe*, nor to future and contingent *Uſes* 175
15. That a Tenant in Tail cannot be ſeiſed to an *Uſe*, and why 11

16. That

16. That an Occupant may, and why *Page* 11
17. That a Diſſeiſor, Abator or Intruder, cannot be ſeiſed to an *Uſe* 10
18. Where the Alienee of Tenant for Life ſhall not be ſeiſed to an *Uſe*, and why 10
19. Where a Feoffee, being a Recoveror in Value, ſhall be ſeiſed to his firſt *Uſe* 13

Vide *Covenants to ſtand ſeiſed*

Sheriff.

Vide *Dower*, 94

Statutes.

1. The ſeveral Sorts of *Uſes* executed by the former Clauſe of the Statute, and their ſeveral Incidents 74
2. The Execution of Jointures, by the latter Clauſes of the Statute *ibid.*
3. The Caſes of the Statute *ibid.*
4. The Difference between the Statutes of 6 *R.* 2. and 11 *H.* 7. 161
5. The Reaſon af the Statute of 1 *R.* 3. *c.* 1. 27
6. Who are within that Statute 27, 28, 29, 30, 31
7. What Authority is given by that Statute 31, 32
8. The Alteration of Property, as to *Uſes*, by 27 *H.* 8. *c.* 10.

Surrender.

Vide *Leaſe*, 3
Vide *Contingent Remainder*, 12

Survivorſhip.

Where the Intereſt ſhall ſurvive, and the Truſt with it *Page* 66
Vide *Authority*, 1
Vide *Jointenants*, 6, 7, 9, 10

Tenants in Common.

Vide *Dower*, 118
Vide *Jointenants*, 2, 4

Tenant in Fee.

Vide *Bargainor and Bargainee*, 1

Tenant in Tail.

1. The Conſequence of a *Sale of Lands in Fee by Tenants* in Tail 83
2. That Tenant in Tail has ſome Properties of a Tenant in Fee, and others only of Tenant for Life 84
3. Where an Eſtate-tail is veſted in the Anceſtor 21
4. Where Tenant in Tail, levying a Fine, ſhall ſtill be ſeiſed in Tail as before 280
Vide *Bargainor and Bargainee*, 1

Tenant for Life.

Where the Uſe ſhall be to Tenant for Life Page 249, 250
Vide *Bargainor and Bargainee*, 7, 8
Vide *Quod ei Deforciat*, 13, 16
Vide *Forfeiture*, 6
Vide *Releaſe*, 4
Vide *Revocation*, 6, 9
Vide *Contingent Remainders*, 11, 15

Tenant by the Curteſy.

That a Man cannot be Tenant by the Curteſy of an Uſe, and why 239
Vide *Baron and Feme*, 11
Vide *Dower*, 102
Vide *Quod ei Deforciat*, 4

Tenant by Receipt.

Vide *Quod ei Deforciat*, 17

Tenant to the Precipe.

Vide *Recovery*, 1
Vide *Enrolment*, 13

Tenant at Will.

Vide *Bargainor and Bargainee*, 5

Tenant in Dower.

Vide *Prerogative*, 3
Vide *Dower*

Tenant for Years.

Vide *Releaſe*, 5

Terms of Years.

1. The Original of Terms that attend the Inheritance, and when created, and for what Purpoſe 163
2. That Entailing of a Term is not within the Statute *De Donis* 164

3. That the Tenant in Tail may diſpoſe of a Term without a Fine and Recovery *Page* 164
4. That a Term will be Aſſets to pay Inteſtates Debts *ibid.*
5. Of Terms in Groſs 165
6. Where a Term limited to attend a Fee ſhall be Aſſets, and why 37
7. Where a Term limited in Truſt is forfeitable for Treaſon, and why 39
8. Where a Term limited in Truſt to attend the Inheritence, is not forfeitable, and why *ibid.*
Vide *Limitations*, 4

Title Paramount.

That a Perſon claiming by Force of a Title Paramount to the *Uſe*, ſhall never be ſubject to any Charges that take their Riſe and Date from an inferior Time and Title 172
Vide *Dower*, 128

Tolt.

Vide *Dower*, 6

Traverſe.

Vide *Jointures*, 12
Vide *Pleadings*, 9

Treaſon.

Vide *Forfeiture*, 3, 4

Treſpaſs.

Vide *Pleadings*, 3

A TABLE.

Tryal.

What to be tryed by *Nul tiel* Record, and what by a Jury *Page* 107

Truſts.

1. That the Manner of Taking a Truſt may be by expreſs Words or by Implication only 6
2. And how by expreſs Words *ibid.*
3. And how by Implication 8, 9, 10, 11, 12, 13, 14, 15
4. That Equity will ſet up a Truſt where the legal Eſtate is merged 29
5. That there can be no Truſt without an Eſtate in Being 19
6. What ſhall be deemed a Truſt for the Wife, and not an *Uſe* executed by the Statute 351
7. Where the Lands ſhall be adjudged to belong to the Wife, and not to the Executors in Truſt for the Wife 352
8. What Money lent to be diſpoſed of as *A.* ſhould direct, was held a *Depoſitum* or Truſt 345
9. Where the Over-plus of an Eſtate, after the Mortgage-Money paid off, was adjudg'd to be a Truſt for the Wife and Children 345
10. Where the Son promiſing to be a Truſtee for his Mother, prevails upon her Husband to make a Will at the Son's Requeſt, and to name the Son Executor, made him a Truſtee for his Mother 345

11. What was decreed a Truſt for him that paid the Purchaſe-Money, tho' the Lands were purchaſed in another's Name *Page* 346
12. That a Truſt may be entailed 243
13. What Truſts are liable to Debts, and by what Statutes *ibid.*
14. That a Truſt of a Fee is not forfeitable *ibid.*
Vide *Alien*
Vide *Father and Son*
Vide *Fine*
Vide *Leaſe*, 3
Vide *Prerogative*, 3

Uncore Prist.

Vide *Dower*, 50

Voluntary Settlement.

Vide *Fraudulent Conveyances*
Vide *Marriage*

Usurious Contract.

Vide *Baron and Feme*, 6

Of Uses.

1. What is a *Uſe* 1
2. The Conſtruction of the Common Law and of Equity, as to an *Uſe* 2
3. The Original of *Uſes*, and the Reaſon of their prevailing with Mankind 3
4. What is the Nature of *Uſes* at Common Law 4
5. The

5. The ſeveral Sorts of *Uſes* Abſolute or Conditional, Sole or Conjoint *Page* 66
6. That two Things are neceſſary to an *Uſe*; *firſt*, That the Perſon be capable of Confidence and Truſt; *ſecondly*, That he take it up under the Truſt appointed, 5
7. The Inconveniency of *Uſes*, for which the Statutes of 1 *Ric.* 3. and 27 *H.* 8. was made 72, 73, 74
8. The Alteration made by the laſt Statute 4
9. What was the Nature of *Uſes* at Common Law 4
10. That a *Uſe* was not a Thing at Common Law, annex'd to the Poſſeſſion of the Land, but to the Privity of Eſtate 167
11. That *Uſes* are only Creatures of Equity, and not taken Notice of at Common Law 102
12. That they have been always changed and modified according to the Intent of the Parties intereſted 20
13. That the Court of Equity will direct an *Uſe* to ſuch Perſons as the Common Law appoints Repreſentatives 16
14. By what Rules of Law *Uſes* are governed 75
15. How a *Uſe* paſſed at the Common Law 90, 91
16. What was provided by 27 *H.* 8. *c.* 10. and what by *c.* 16. 91
17. Who may be ſeiſed to an *Uſe* 4
18. That Bodies Politick, Aliens, and Perſons attainted, nor the King cannot 5

19. That a Lord by Eſcheat, or entering for Mortmain, or Recovering by *Ceſſavit*, and a Tenant in Tail cannot be ſeiſed to an *Uſe* *Page* 10, 11
20. That the King poſſeſſed of a Term forfeited for Treaſon, cannot 12
21. That he in Remainder being a Diſſeiſor, cannot *ibid.*
22. That a Tenant in Dower, or an Occupant may 11
23. Where a Grantee of a Rent ſhall be ſeiſed to an *Uſe* 13
24. That a Diſſeiſor cannot ſtand ſeiſed to an *Uſe*, and the Reaſon 201
25. That he who ſtands ſeiſed to an *Uſe*, muſt come in in Privity of that Eſtate to which the *Uſe* is annex'd 193
26. Where the Alienee ſhall not be ſeiſed to former *Uſes* 10
27. Who may declare or raiſe *Uſes* 39
28. By what Words *Uſes* may be raiſed 60
29. In Caſes of Marriage *ibid.*
30. To whom a *Uſe* may or may not be raiſed 43, 44
31. To an Alien, but the King ſhall have the *Uſe* gained by Purchaſe, and why *ibid.*
32. How the King may have an Eſtate of his Feoffees, to *Uſe* 44
33. That a Monk could not have an *Uſe*, and why *ibid.*
34. That a Baſtard, by Reputation, the Son of ſuch a one, cannot have a *Uſe* 206
35. An *Uſe* to the Poor of the Pariſh of *Dale* is good, tho' no Corporation 44, 204
36. That

36. That the King cannot have an *Uſe* Pa. 204
37. Where no *Uſe* will ariſe to Strangers 254
38. In what Manner *Uſes* may be raiſed 53
39. That a *Uſe* cannot be raiſed without a Deed or Feoffment 56
40. What are the ſeveral Properties of an Eſtate in an *Uſe* 16
41. That there may be *Poſſeſſio fratris* of an *Uſe*, and why 16, 17, 18, 238, 239
42. That an *Uſe* was not originally alienable or deviſeable, and why 35
43. How a *Uſe* is alienable 25
44. That a *Uſe* cannot be limited upon an *Uſe* 194
45. That a *Uſe* is not Extendible or Aſſets, and why 37
46. Where a Term limited to attend a Fee ſhall be Aſſets *ibid.*
47. Where and what Conſideration is neceſſary to the raiſing an *Uſe* 45, 46
48. That there cannot be two *Uſes* of one and the ſame Land 200
49. In what Manner *Uſes* are executed by the Statute 76
50. What neceſſary to the Execution of an *Uſe*; *firſt*, a Perſon ſeiſed; *ſecondly*, in *Rerum Natura*; *thirdly*, that the Eſtate of the Feoffees may veſt in *Ceſtui que Uſe* 80
51. Where a Feoffment in Fee is made to the *Uſe* of ſuch Perſons as the Feoffor ſhall appoint by his Laſt Will, which was made before, and publiſhed after the Feoffment, whether the Eſtates are executed 229

52. If a Feoffment be made in Fee to the *Uſe* of the Feoffee and his Heirs, in Truſt for *J. S.* and his Heirs, whether this Eſtate be executed in *J. S.* by the Statute *Page* 194

53. Where the Tenant muſt have a Freehold in the Land, otherwiſe the Statute executes no Poſſeſſion to the *Uſe*; yet if a Fine be levied to the *Uſe* of one for Years, it is executed 199

54. Where the Recoveror ſhall have a Rent executed in him, by the 27th of *H.* 8. *c.* 10. and may diſtrain for the Rent 200

55. Whether a Covenant, in Conſideration that the Lands ſhould remain to the Heirs Male of the Body of the Covenantor, and in Conſideration of Brotherly Love and Affection, and that the Lands ſhould remain in the Blood of the Covenantor, was ſufficient to raiſe an *Uſe* 208

56. That a Term aſſigned over is not executed by the Statute 79

57. Yet a Man may limit the *Uſes* of a Freehold for ſix Years, and it will be executed 80

58. Where there are two *Uſes* limited, when the new *Uſes* ſhall ſtand 8, 9

59. A *Uſe* ſhall not be ſuſpended or be extinct by a Joint or Sole Seiſin of the Lands 236

60. That *Uſes* cannot be deſtroyed or altered without a Tranſmutation of the Poſſeſſion, by which the Privity of Eſtate,

ſtate, or the Truſt and Confidence is altered and gone *Page* 200
61. Of *Uſes* raiſed by Tranſmutation of the Poſſeſſion, as upon a Fine, Feoffment or Recovery 75
62. That a Releaſe from *Ceſtui que Uſe* to the *Diſſeiſor*, extinguiſhes the *Uſe* 28
63. Where he in Remainder releaſing to Tenant for Life, deſtroys the *Uſes* 232
64. Of *Uſes* that paſs without a Tranſmutation of Poſſeſſion 82
65. Of *Uſes* raiſed by Way of Bargain and Sale, on the Conſideration of Money *ibid.*
66. Of *Uſes* raiſed by Way of Covenant to ſtand ſeiſed, on the Conſideration of Blood *ibid.*
67. Of Limitations of *Uſes* upon Conveyances 259
68. Of *Uſes* in Poſſibility 118
69. Why a *Uſe* declared upon a Conveyance of Lands after Purchaſed, is bad 117
70. Where the Court of Chancery would, before the Statute, have forced the Party to execute an *Uſe* which is now executed by the Statute 60
71. As to the Execution of *Uſes* by the laſt Clauſe of the Statute 147
72. Where a Man has a new Eſtate that is ſubject to no *Uſes*, the Law by Conſtruction will not make his new Eſtate ſubject to *Uſes* annex'd to an old Eſtate 167
73. What Rules of Law are ſet aſide by the Statute of *Uſes* 77

74. If *Uſes* were executed, they were deſcendible as Eſtates-tail *Page* 237
75. Whether Contingent *Uſes* are deſtroyed by a Feoffment of the Feoffee to *Uſes* 166
76. What ſhall not raiſe a *Uſe* 112
77. How a Man may declare the Intent of a future Act, and why 117
78. By what Words *Uſes* may be raiſed 60, 61, 62
79. That a *Uſe* may be entailed, and why 63
80. To what *Uſes* a Conveyance ſhall be ſaid to be made 257, 258
81. What may be granted to an *Uſe* 281, 282, 283

Warranty.

That a Warranty is a Covenant annex'd to the Freehold, and its Conſequences 103

Vide *Bargainor and Bargainee*, 3

Waſte.

1. That a Man may have an Action of Waſte, tho' he does not alledge the Feoffment to be made to the Feoffees, and their Heirs 276
2. Who ſhall puniſh Waſte 243

Writ of Right.

Vide *Dower*, 8, 23, 25

Writ Viſcountiel.

Vide *Dower*, 41, 68

FINIS.

ERRATA.

PAGE 9. in the Margin for *Nat*, read *Not*, *p.* 26. Line 1. for *Dower* r. *Power*, *p.* 32. *l.* 30. for *ſevered* r. *ſaved*, *p.* 37. *l.* 15. for *him* r. *them*. *p.* 67. *l.* 22. for *Jointenants* r. *Joint Truſtees*, *p.* 69. *l.* 2. r. *can't take Effect*, *p.* 111. for *muſt* r. *may*, *p.* 120. *l.* 2. for *be prolonged* r. *belong*, *p.* 151. *l.* 26. for *for* r. *of*, *p.* 166. *l.* 4. for *Truſt* r. *Truſtee*, *p.* 170. *l.* 19. for *the* r. *their*, *l.* 20. for *behalf* r. *behoof*, *l.* 21. for *we* r. *were*, *p.* 173. *l.* 3. r. *a Way or Common*, *p.* 179. *ult. l.* for *were* r. *where*, *p.* 218. *l.* 35. for *is* r *in*, *p.* 230. *l.* 23. for *deviſed* r. *divided*.