The Tenth PART of the

REPORTS

OF

Sir *Edward Coke* Kt.

Lord Chief Justice of ENGLAND.

OF

The Pleas assigned to be held before the King himself, and the Privy Council of State: Of divers Resolutions and Judgments given upon solemn Arguments, and with great Deliberation and Conference of the Reverend Judges and Sages of the Law, of Cases in Law which were never resolved or adjudged before: And the Reasons and Causes of the said Resolutions and Judgments: Publish'd in the eleventh Year of the most High and most Illustrious *JAMES* King of *England*, *France* and *Ireland*, and of *Scotland* the 47. the Fountain of all PIETY and JUSTICE, and the LIFE of the LAW.

With REFERENCES to all the BOOKS of the *COMMON LAW*, as well Ancient as Modern: And the PLEADINGS in *ENGLISH*, carefully Revised and Corrected.

Deo duce, εὕρηκα.

Lex tibi quod justum est, Judicis ore, refert.

Justitia non novit Patrem, Matrem, neque Fratrem; personam non accipit, sed Deum imitatur. Jerom.

Ad officium Justiciariorum spectat, unicuique coram eis placitanti justitiam exhibere. Westm 2. cap. 39.

In the SAVOY:

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Deo, Patriæ, Tibi.

CUM a publicis meis miniſtrationibus quandoque vacarem (aſſita alacriter Induſtria mihi ex more ſolito perquam familiari in Conſortem, ſaluteque meæ dulciſſimæ patriæ cogitata, in conſolationem) precibus hiis etiam atq; etiam exorſus aſſiduis, *Adſit amœnitas Jehova Dei noſtri nobis, & opus manuum noſtrarum inſtitue in nobis, ipſum inquam opus manuum noſtrarum inſtitue*, propitio Omnipotentis ductu & auxilio, decimum hoc meum opus, a docto & benevolo Lectore contemplandum, edidi & in lucem protuli.

Veram pars hæc & fidelem continet Relationem quorundam Judiciorum & Sententiarum, in e-

AT my Times of Leiſure after my publick Services (chearfully taking Induſtry my old Acquaintance for my Conſort, and aiming at the Good of my dear Country for my Comfort) and beginning with this continual and fervent Prayer, The glorious Majeſty of the Lord our God be upon us; Oh proſper thou the Works of our Hands upon us, Oh proſper thou our handy Works, *I have, by the moſt gracious Direction and Aſſiſtance of the Almighty, brought forth and publiſhed this tenth Work to the View of the Learned and Benevolent Reader.*

Pſal. xc. v. 17.

This Part containeth a true and juſt Report of certain Judgments and Reſolutions given in his Maje-

sty's principal Courts of Justice upon great and mature Deliberation, and in Cases of as great Importance and Consequence as in any of my former Commentaries, which I have taken upon me and finished (though it hath been more than difficult to me) to avoid that the which venerable Verity doth blush at for fear, that is, That she which is the Foundation of Justice should not be hidden and unknown; Veritas abscondi erubescit, nihil enim magis metuit quam non proferri in publicum, vult se in luce collocari, & quis illam occultat, occultetve, quam omnium oculis expositam esse est æquissimum? *Neither is she pleased, when once she is found out and revealed to be called into Argument and Question again, as if she were not Verity indeed; and therefore the Rule is,* Eatenus ratiocinandum est donec veritas inveniatur, ubi inventa est Veritas ibi figendum judicium. *Nay sometimes Truth is lost by too much Altercation,* nimia altercatione veritas amittitur. *She takes small Delight with Varnish of Words or Garnish of Flowers; for sim-*

minentioribus suæ Majestatis Curiis Justitiæ administrandæ, summa atque matura deliberatione latorum, casibus tanti ponderis & momenti, quanti hii superiorum meorum Commentariorum, quicunque fuerunt. Laborem hunc ego (mihi sane difficilem plus satis) suscepi immo & perfeci, ad declinandum id quod metuendo veritas ipsa veneranda erubescit, nimirum ne illa, a qua habet Justitia firmamentum lateret minus cognita: *Veritas abscondi erubescit, nihil enim magis metuit quam non proferri in publicum; vult se in luce collocari, & quis illam occultat, occultetve, quam omnium oculis expositam esse est æquissimum?* Verum semel inventa & patefacta iteratam reduci in quæstionem & dubio subesse (quasi veritas revera non esset) prorsus indignatur; unde regula est, *Eatenus ratiocinandum donec veritas inveniatur, ubi inventa est veritas ibi figendum Judicium;* nonnunquam enim *nimia altercatione veritas amittitur:* Verborum elegantia florumve fragrantia se vestiri nequaquam curat; Simplex enim est sermo veritas,

veritas, ἁπλοῦς ὁ λόγος τῆς ἀληθείας ἔφυ, Cujus sedes cum sit inter Cor. & Caput, utrunque participat, ex capite nempe Judicium, ex corde Simplicitatem. Necesse necne sit (ad veritatem evehendam, errorique rebus tantis viam præcludendam) veras certasque horum Judiciorum & Sententiarum tum rationes tum causas (quæ in actis publicis haud exprimuntur) posteritati universæ plane fideque divulgari, Lectoris docti & discretioris censura terminandum relinquo.

plex est sermo veritas, ἁπλοῦς ὁ λόγος τῆς ἀληθείας ἔφυ, *for her Place being between the Heart and the Head doth participate of them both, of the Head for Judgment, and of the Heart for Simplicity. Now, whether it be not necessary that the true and just Reasons and Causes of these Judgments and Resolutions, which are not expressed in any Record, for the Advancement of Truth and the preventing of Error, in Matters of so great Importance and Consequence, should be plainly and faithfully published to all Posterity, I leave to the Censure of the learned and judicious Reader.*

1. Retuli primum (temporis licet serie non sit primus) casum de Xenodochio Regis Jacobi, a *Thoma Sutton* armigero fundato, merito quoniam (ut opinor) præcedat, duplicem ob causam; 1. quod in camera Scaccarii agitabatur, ubi, altissima illa Inquisitione, omnium Angliæ Judicum veredicto, pro Xenodochio *Billa vera* pronunciabatur; 2. Qd'hujus Xenodochii fundatio est, *opus sine exemplo.* Malorum imitatio exemplum plerunque superat, bonorum vero con-

The Case of Sutton's Hospital.

1. *I have reported in the first place, (though it be not first in Time) the Case of the Hospital of King* James, *founded by* Thomas Sutton, *Esq; for that in mine Opinion it doth merit to have the Precedency for two Causes; first, for that it was an Exchequer-Chamber Case, where by the Verdict of the Grand Jury of all the Judges of* England, *it was for the Hospital found* Billa vera: *2. For that the Foundation of this Hospital is* opus sine exemplo. *The Imitation of Things that be*

evil doth for the most part exceed the Example, but the Imitation of good Things doth most commonly come far short of the Precedent; But this Work of Charity hath exceeded any Foundation that ever was in the Christian World, nay the Eye of Time it self did never see the like.

Annuus valor possessionum prius datarum.

For the first Gift by Sutton *of Lordships, Manors, Lands, and Tenements to continue for ever for the Maintenance hereof, doth amount to the clear yearly Value of* 3500 *l. or near thereabouts, and within these few Years will be increased to about the yearly Value of five Thousand Pounds.* Probatio charitatis exhibitio operis. *And besides all this,* Sutton *left to descend to the* Plaintiff *(a Man of mean Quality) the Manor of* Tarbock *in the County of* Lancaster, *consisting of a fair ancient House, two Parks and large Demesnes plentifully stored with Timber of the yearly Value of* 300 *l. and* 50 *l. by the Year of the Rent of Assise, together with the Rectory of worth* 100 *l.* per Annum, *within the same County.*

In quos usus proventus statuuntur.

The large Revenues of this famous Hospital are

sectatio, nimis manca, exemplar sæpissime non attingit: Hoc vero Charitatis opus, quæcunque novit Orbis noster Christianus fundamenta, antecellit omnibus, immo dicam, hujusce instar seculorum omnium nusquam vidit oculus.

Prima enim a *Sutton* donatio Dominiorum, prædiorum, fundorum & tenementorum in perpetuam sustentationem ejusdem remansurorum, 3500. li. annui valoris plus minus attingit, & non ita multos post annos ad annualem summam 5000 li. proveniet. *Probatio Charitatis exhibitio operis.* Quin & *Sutton* præterea reliquit descensurum Actori (viro plebeio) prædium de Tarbocke in comitatu Lancast. se extendens in prospicuam pariter ac antiquam domum, bina vivaria & latifundia proceris undiquaque referta arboribus ad annuum valorem 300 li. & ultra hoc 50 li. redditus antiqui per annum, una cum Rectoria de infra comitatum eundem, quæ valet 100 l. per annum.

Ampli hujusceleberrimi Xenodochii proventus in quatuor

quatuor præcipue usus & proposita instituuntur: 1. In dignos illos innuptos Duces, Præfectos, militesve sublevandos, qui in bello usque ad necem Reip. causa ausi sunt, jamque emeriti in res angustas inciderunt & infirmi sunt. 2. Ad captivos indigentes redemendos, illos præsertim qui, misera sub servitudine Infidelium, fidem suam Religionemque orthodoxam constanter professi sunt. 3. Ad publicum Ludum literarium constituendum, doctumque Ludimagistrum & Hypodidascalum sustentandos, qui pauperum pueros bonis tum literis tum moribus erudiant, quo otium malorum omnium radix evitetur. 4. Necessaria hoc Xenodochium Theologo gravi & Docto suppeditabit, ad residentes singulos infra Xenodochium prædicato sacro Dei verbo instruendos, & ad sacrosancta Mysteria rite celebranda, tum & juvenes in veræ religionis elementis catechizandos: Qui, & alii, ut perficiantur usus, Fundator insuper ingentes pecuniarum copias, in manus Executorum suorum *Richardi Sutton* Armigeri & *Jo-*

are to be employed principally for four special Intents and Purposes: First, for the Relief of such worthy and well esteemed Captains, Commanders and Soldiers, as be unmarried, and have adventured their Lives in the Wars for the Service of the Realm, and are fallen into Poverty and Impotency. 2. For redeeming of poor Captives, especially such as are under the miserable Thraldom of Infidels, and constantly keep their Faith and the Profession of true Religion. 3. For the Erection of a Free-School, and Maintenance of a learned Schoolmaster and Usher for training up poor Children in good Literature and virtuous Education, and for avoiding of Idleness the Mother of all Vice and Wickedness. 4. Within this Hospital there shall be for ever maintained a grave and learned Divine, for the Instruction of all within this Hospital by preaching of God's holy Word, for the due Celebration of Divine Service, and the holy Sacraments, and the Catechizing of the Youth in the Principles of true Religion; for the Accomplishment and Maintenance of which and other

godly and charitable Uses, the said Founder had left also a very great and large Stock of Money to his Executors Richard Sutton *Esq; and* John Lawe *Gent. two faithful, constant, and industrious Persons.*

hannis Law generosi, deposuit.

This Work of Piety and Charity is founded in the spacious and specious House called the Charter-House, *in the Parish of St.* Sepulchre, *in the County of* Middlesex, *having fair Orchards and Gardens, and containing twenty Acres within the Precinct thereof, so as a Man may say of it, that it is* tanquam orbis in urbe; *a Place (as it appeareth by Record and History) ordained of God for pious and charitable Uses. For Sir* Walter Many *of* Henault *(who was created by King* Edw. 3. *Knight of the Garter for his Service, which with singular Commendation he performed in the* French *Wars,) when the Pestilence so raged in* London, *that the Churchyards were not sufficient to bury the dead Bodies, especially of the Poor, purchased the Place where now this famous Hospital is erected, and caused the same to be consecrated for*

Hoc pietatis & charitatis opus spatiosis illis & augustis fundatur tectis, quibus nomen est *Le Charterhouse*, in Parochia Sancti Sepulchri in Comitatu Middlesex' quibus contigue adjacent horti & pomaria amœnissima, & infra ejusdem circuitum viginti numerantur jugera, unde dici potest *tanquam Orbis in urbe*, locus sane (ut memorandis & Historia videre est) operibus pietatis & charitatis a Deo destinatus: Nam Dominus *Gualterus Many* Hanoniensis (quem, cum strenue in bello Gallico summo omnium applausu se gessisset, Rex Edw. 3. aureæ periscelidis ordine decorasset,) peste jam tum in Londino ita ubique grassante, quod cœmeteria ad sepelienda defunctorum cadavera (præcipue inopum) non satis fuerunt, emit Locum in quo celebre istud erigitur Xenodochium, & in sepulturam inopum Chri-

Christianorum (qui dum vixerunt templa fuerunt Spiritus Sancti) dicavit: Audi itaque monumentum inde publicum, *Anno Dom.* 1349. *& anno regni Regis Edw.* 3. 23. *regnante magna pestilentia, consecratum fuit hoc cœmeterium, &c. in quo & infra septa ejusdem sepulta fuerunt mortuorum corpora plus quam quinquaginta millia:* Cessante vero, ope divina, pestilentia, idem *Gualterus Many*, an. Dom. 1371. & Regis Ed. 3. quadragesimo quinto, inibi fundavit monachos Carthusianos, qui vitio Linguæ, monachi *de le Charterhouse* vulgo dicti fuerunt: Adeo ut solum hoc, quod olim *Gualterus Many*, tum Eques tum miles ad inhumandos defunctos inopes donavit, jam denuo *Thomas Sutton*, tam armiger quam miles, ad hospitandos inopes & infirmos vivos constituit & designavit: Merito igitur huc spectat quod dixit Propheta ille regalis, *Parasti, per bonitatem tuam, Pauperi, Deus.* Decisus denique fuit hic casus exultantibus multumque jubilantibus omnibus, qui vel interfuerunt vel de judicio quidquam audiverunt, & hoc quatuor

the Burial of poor Christians (which, while they lived, were the Temples of the Holy Ghost) and the Record telleth you that Anno Domini 1349. *Et Anno Regni R. E.* 3. 23. regnante magna pestilentia, consecratum fuit hoc cœmeterium, &c. in quo & infra septa ejusdem sepulta fuerunt mortuorum corpora plusquam quinquaginta millia. *But after the Plague by the Goodness of the Almighty ceased, the same Sir* Walter Many *in the Year of our Lord* 1371. *and in the* 45*th Year of King* E. 3. *founded the* Carthusian *Monks there, who by Corruption of Speech were vulgarly called the Monks of the Charter-house. So as the Soil which of ancient Time was given by Sir* Walter Many, *a Knight and a Soldier, for the Sepulchre of poor Men when they were dead, is now by* Thomas Sutton, *an Esq; and a Soldier, converted and consecrated to the Sustenance of the poor and Impotent while they live. And therefore a Man may truly apply to this Place the Saying of the Royal Prophet,* Thou Lord of thy Goodness hast prepared it for the Poor. *And*

Psalm 68.

And this Case was adjudged with the great Applause of all that heard it, or of it, and principally for four Causes: First, for the Honour of our Religion, that hath produced such a Work of Piety and Charity as never was in the Christian World for the first Foundation: 2. For the Glory of the King's Majesty, to whom ex congruo & condigno *it is dedicated and beareth his Name. 3. For the Increase of Piety and Charity,* ne homines deterrerentur a piis & bonis operibus: *And Lastly,* ut obstruatur os iniqua loquentium. *And I dare affirm it for the Honour of our Religion, that more of such good Works of Piety and Charity have been founded within this Realm, since the Beginning of the Reign of our late Queen* Elizabeth *of ever blessed Memory, during the glorious Sun-shine of the Gospel, than in many Ages before. And it hath been observed, that (by the Blessing of Almighty God) this Kingdom of* England, *for Piety, Profit and Pleasure,* viz. *for this and such other Work of Piety,* 2. *For the Crown's Inheritances of Honours, Manors, Lands,* &c. *and Certainty of year-*

de causis. 1. Religionis nostræ in honorem, quæ tale pietatis & charitatis produxit opus, quale tota respub. Christiana (si primum spectes fundamentum) nusquam produxit; 2. In regiæ Majestatis gloriam, cui *ex congruo & condigno* dedicatur, nomenque ejus habet. 3. In pietatis simul ac charitatis incrementum, *ne homines deterrerentur a piis & bonis operibus*: Postremum vero, *ut obstruatur os iniqua loquentium.* Hoc denique (ut Religionis nostræ ornamentum) asserere volo, hujusmodi plura pietatis charitatisque facta fuisse opera ab initio regiminis nuper Reginæ Eliz. æternæ piæque memoriæ, sub aprico Evangelii splendore, quam multis seculis retro elapsis. Quin & hoc regnum Angliæ (annuente Divino numine) pietate, proventibus, jucunditate, videlicet, hoc & ejusmodi pietatis operibus. 2. Coronæ hæreditate, Honorum scilicet, prædiorum, fundorum, &c. aliorumque annualium proventuum certitudine. 3. Sylvis, saltibus, vivariis, aliisque locis amœnis, amplissimæ totius orbis Christiani Monarchiæ

Monarchiæ antecelluiſſe obſervatur.

ly Profit, and laſtly for Foreſts, Chaſes, Parks and other Places of Pleaſure, hath exceeded the greateſt Monarchy in the Chriſtian World.

2. In caſu deinde *Mariæ Portington* (in univerſale principis & patriæ commodum) honorifica divulgavi funera frivolarum iſtarum novellarumque perpetuitatum, partus portentoſi ex mera inventione ementiti, & Legis olim peritis plane ignoti; portentoſum dico, quia ut apud Phyſiologos eſt, *Monſtra generantur propter corruptionem alicujus principii:* Dico nihilominus honorifica, eo quod vermes iſti in nobiles quamplurimas familias correpſerunt: Quibus quidem inſtiti exequiis, & ad oblivionis ſepulchra mortuas concomitavi, plangere autem nequirem, ubi tota Reſpubl. libera (ut loquimur) tenementa & hæreditates ſuis tandem ſe exolviſſe compedibus, & damna reipub. quamplurima tum capiti tum membris ſingulis evitata fuiſſe triumphabat.

2. *Then have I publiſhed in* Mary Portington's *Caſe, for the general Good both of Prince and Country, the honourable Funeral of fond and new-found Perpetuities, a monſtrous Brood carved out of mere Invention, and never known to the ancient Sages of the Law; I ſay monſtrous, for that the Naturaliſt ſaith,* Quod monſtra generantur propter corruptionem alicujus principii: *And yet I ſay honourable, for that theſe Vermin have crept into many honourable Families. At whoſe ſolemn Funeral I was preſent, and accompanied the Dead to the Grave of Oblivion, but mourned not, for that the Commonwealth rejoiced, that fetter'd Freeholds and Inheritances were ſet at Liberty, and many and manifold Inconveniences to the Head and all the Members of the Commonwealth thereby avoided.*

Mary Portington's Caſe.

3. Sequitur caſus de *Jennings*, quem memoratum habes in caſu *Ma-*

3. Jennings's *Caſe vouched in* Mary Portington's *Caſe, and doth concern the common*

Jenning's Caſe.

common Assurance of the Realm.

riæ Portington; & de communi stabilimento fundorum in hoc regno agit.

Lampet's Case.

4. *And next after cometh* Lampet'*s Case, where Perpetuities of Leases for many thousand Years are by Consequence overthrown.*

4. Casus de *Lampet* est proximus, ad perpetuitates dimissionum pro multis annorum millibus destruendas.

The Case of the University of Oxford.

5. *The* Case of the University of *Oxford* (*a famous Seminary of the Church and Commonwealth*) *tendeth to the Advancement of God's true Religion, and in some Degree for the better Maintenance of a learned and religious Ministry out of both the Universities of* Cambridge *and* Oxford.

5. Deinde casus *Academiæ Oxoniensis* (celeberrimi Ecclesiæ & Reipub. seminarii) in Religionis Orthodoxæ propagationem tendit, & quodam modo in meliorem eruditi & religiosi ministerii ex utrisque Academiis Cantabrigiæ & Oxoniæ sustentationem.

The Bishop of Salisbury's Case.

6. *The Bishop of* Salisbury'*s Case, against both the Diminution of the Possessions and yearly Revenues of the Archbishops and Bishops of the Realm, and the Prejudice of their Successors.*

6. Casus *Episcopi Sarisburiensis*, est contra diminutionem possessionum & annuorum reddituum Archiepiscoporum & Episcoporum hujus gentis, & successorum suorum incommoda.

Whistler's Case.

7. Whistler'*s Case containing divers material Points for the better Construction of Letters Patent of Inheritance, in divers Points commonly happening.*

7. Casus de *Whistler* diversos continet articulos materiales de exponendis literis patentibus de hæreditate, in rebus plurimis indies emergentibus.

The Case of the Churchwardens of St. Saviours.

8. *The* Case of the Churchwardens of the Parish of St. *Saviours; wherein Letters Patent of Leases are well expounded for the quieting of the Possessions of many*

8. *Custodum* sive gardianorum *Ecclesiæ parochialis sancti Salvatoris* casus literas patentes dimissionum optime explanat, quo securi sint Tenentes regii

gii de possessione sua, & consequenter multi alii de hæreditate & statu suo.

of the King's Farmers, and by Consequence of the Inheritance and Estates of many others.

9. *In Curiæ Mareschalsiæ casu*, prima institutio & jurisdictio ejusdem Curiæ manifeste patet: Quamvis enim Lex satis nota fuerit, ante hunc casum decretum, ex libris nostris & memorandis temporum omnium successive; sicuti tamen fluminum cursus, mæandros, illapsus, & elapsus notorie edocet experientia vulgaris, dum fons ipse interim abdite delitescit; ita isto de casu, Capacitatem, processus & privilegia hujusce fori, codices nostri annorum & terminorum sæpius dijudicata habent, tum & jurisdictio ejusdem apud vulgus plene intellecta fuit, quum interea vera & originalis institutio, tanquam fons ipse, latebat admodum recondita & obscura, priusquam ab antiquitate indicata fuit, quæ tam dilucide genuinum priorum actorum comitialium sensum, librorumque nostrorum rationem, de vera hujus Curiæ jurisdictione declaravit, quod & ipsi Opponentes, veneranda illuminati Antiquitate, a ra-

The Case of the Court of Marshalsea.

9. *The* Case of the Court of Marshalsea; *wherein the original Institution and Jurisdiction of that Court is clearly manifested. And albeit the Law was well known before in this Case both by our Book Cases and Records in all Succession of Ages, yet as in great Rivers, the Courses, Windings, Fallings in, and Outlets, are by Experience vulgarly known, whereas the very Fountain and Head it self lie many Times hidden and secret, so in this very Case, the Capacity, Process, and Privilege of this Court was often resolved in our Books of Years and Terms, and the Jurisdiction commonly known: And yet the true original Institution and Fountain it self lay somewhat deep and obscure, until it was brought out by Antiquity, which hath so manifested the true Sense of the ancient Acts of Parliament: And the Reason of our Books, concerning the Original and true Jurisdiction of this Court, as the very Opposites, being by venerable Antiquity inlightened, are by Reason convinced,*

convinced, and by Authority satisfied; and therefore they are worthy of Reprehension *which contemn or neglect the Study of Antiquity (which is ever accompanied with Dignity) as a withered and backlooking Curiosity:* Multa ignoramus quæ non laterent, si veterum lectio fuit nobis familiaris: *And as the Alluminor spoken of in Law, giveth Light and Lustre to the Letter or Figure to be coloured; so Antiquity doth give Light with great Grace and Ornament, both for the Understanding and Meaning of the Letter of ancient Acts of Parliament, and of our Book Cases and Authorities in Law. I wish the like were done for all his Majesty's Courts of Justice, a Matter to them that have orderly read and well observed our Books, and Authorities of Law, of greater Labour than Difficulty; and yet would the Work greatly tend to the Honour of the Law, and the preventing of many Questions, Suits, and unnecessary Charges and Delays.*

1 R. 3. cap. 9.

tione vincuntur, & authoritate se satisfactos habent: Culpandi igitur sunt, qui rerum antiquarum studium, (comitem semper habens honorem) tanquam aridam & nimis retrospicientem curiositatem, vel temnunt vel saltem negligunt: *Multa ignoramus quæ non laterent, si veterum lectio fuit nobis familiaris.* Sicut miniator (de quo in Lege fit mentio) literam vel characterem miniandum valde illustrat, sic Antiquitas summo cum decore & ornamento nos illustrat ad literam antiquorum statutorum, librorum & authoritatem in Lege, tum comprehendendam tum intelligendam. Similiter fieri de omnibus ejus Majestatis Curiis Justiciæ mihi in votis est: Quod quidem pluris laboris quam difficultatis est, si quis codices nostros & in lege authoritates ordine evolverit recteque intellexerit, & proculdubio magnum afferret Legi splendorem, quin & multas quæstiones, actiones, minus necessarias expensas, & dilationes anticiparet.

Leonard Lovies's Case.

10. Leonard Lovies's *Case is principally grounded upon the Statutes of* 32 H. 8.

10. Casus *Leonard Lovies* sibi maxime habet fundamentum statuta 32 *H.* 8.

H. 8. *cap.* 1. & 34 *H.* 8. *cap.* 5. de Teſtamentis, quæ ſanciri videantur *ad extorquenda Juriſ-prudentum ingenia*; adeo multæ perplexæ & involutæ quæſtiones ex illa ſtirpe egerminaverunt: Adjuncto tamen hoc caſu ſuperioribus, in explanationem horum ſtatutorum, a me relatis (caſui nempe de *Butler* & *Baker* in tertio meo Commentario, fol. 27. Caſui *Georgii Curſon* equitis, in ſexto meo Commentario, fol. 75. caſui *Richardi Pexall*, in octavo meo Commentario, fol. 83. caſui de *Might ibidem, fol.* 163. & caſui *Vigilii Parker ibidem, fol.* 373, *&c.*) quo modo mihi perſuadeo, ſi non omnia tamen maxima dubia & ſcrupuli ex illis enata ſtatutis, in generalem totius regni pacem dirimuntur & amoventur. Sed hoc non obſtante, viri circumſpecti & conſiderati (uti ſpero) dum adhuc integri ſunt & ſani, uxoribus, liberiſque proſpicient, & ex optimo Juriſperitorum conſilio, res ſuas ſuperſtites diſponent inſtrumento legali, quod, ſi velint, ad libitum revocabile eſſe poteſt; & negotium hoc uſque ad ultimam volun-

cap. 1. *and* 34 H. 8. c. 5. *of Wills: Which Statutes might ſeem to be made* ad extorquenda juriſprudentum ingenia, *ſo many and ſuch intricate and knotted Queſtions have grown out of thoſe Roots; and yet adding this laſt Caſe to the former Caſes reported by me, for Expoſition of thoſe Statutes, to* Butler *and* Baker's in the 3 Part of my Reports, fol. 27. Sir *George Curſon*'s Caſe in the 6 Part, fol. 75. Sir *Richard Pexall*'s Caſe in the 8 Part, 83. *Might*'s Caſe, *ibidem* 163. *Vigil Parker*'s Caſe, *ibid.* 373. &c. *I am perſuaded, that if not all, yet the principal Scruples and Doubts upon thoſe Statutes, are for the general Quiet of the whole Realm cleared and reſolved. And yet Men of adviſed and ſettled Judgments will in their perfect Health provide for their Wives and Children, and by ſound Advice of learned Counſel ſettle their Eſtates by Conveyance in their Life-time, which may, if they will, be revocable at their Pleaſure; and not to leave it to ſtand wholly upon their laſt Will, which many Times is made when they lie upon their Death-Bed (and few Men*

2 *pinched*

pinch'd with the Messengers of Death have a disposing Memory) sometimes in Haste, and commonly by slender Advice, and is subject to so many Questions upon concealed Tenures in Capite *and other Tenures by Knight's Service, (in this Eagle-eyed World,) former Conveyances, and other Matters of Fact, as in Effect they do for want of due Information and Instruction* superare jurisprudentum artem. *And it is some Blemish or Touch to a Man well esteemed for his Wisdom and Discretion all his Life, to leave a troubled Estate behind him amongst his Wife, Children or Kindred, after his Death. A competent Estate to Wife, Children, or Kindred, in Certainty and Quiet, is far better than a greater accompanied with Questions and Troubles. But hereof I have given also a light Touch in the End of* Butler *and* Baker's *Case before mentioned; and therefore having given this Admonition, I will here pass over to the next Case.*

tatem non procrastinabunt, quæ plerunque in extremis conditur (& perpaucis a mortis præcursoribus pressis memoria est dispositura) modo festinanter & sæpissime consilio imprudentum, & ita multis subditur controversiis de latentibus tenuris *in capite*, aliisve tenuris per servitium militare (in seculo hoc aquilino) prioribus concessionibus, aliisque rebus de facto, ut hujusmodi testamenta (ob consultationis & instructionis privationem) *superent* fere *jurisperitorum artem.* Labes etiam nonnulla est & infamia viro, totius suæ vitæ curriculo, de prudentia & discretione, bene existimato, res suas difficultatis plenas uxori, liberis, seu cognatis post obitum suum relinquere. Res mediocres curisque solutæ uxori, liberis vel cognatis longe sunt eligibiliores, quam magis amplæ quæstionibus & molestiis involutæ. Sed de hoc in conclusione casus de *Butler* & *Baker* paucula attexi: monitione idcirco hac subnexa, ad proximum casum properemus.

Dr. Leyfield's Case.

11. *Doctor* Leyfield's *Case; wherein the Reason of Law is opened, where-*

11. Casu Doctoris *Leyfield* sententia legis retegitur, de allegatis chartis &

& Syngraphis, in Curia monſtrandis, ibique cautum eſt de periculo probandi per teſtes coram duodecimviratu Syngrapha & ſcripta, nulla illorum habita monſtratione, eo enim fit inſtrumenta eraſa, interlinita, aliaſve adulterata, vel omiſſione verborum legalium in lege prorſus invalida, vel revocabilia, & quoad tenentes & emptores irrita (ubi ſupprimuntur, & eorum tenor illiteratorum teſtimonio confirmatur, nulla adhibita hac in re directione) admiſſa fuiſſe ut authentica; poſtea vero re iterum agitata, caſuque melius inſpecto, cum Curia demonſtrari oportuiſſe ſcripta direxerit, eorum invaliditas comparuit, rectumque valuit: Quod in Curia de Banco *Mich.* 5. Regis Jacobi inter *Small* & *Blackledge*, in Curia Cameræ Stellatæ inter *Greene* & *Eyer*, &, ex quo Judex fui, in Circuitu meo annotavi.

12. *Edwardi Seymor caſus* agit de warrantis, ſubtili ſane doctrinæ ge-

fore Charters and Deeds pleaded ought to be ſhewed forth in Court, and a Caveat given how dangerous it is in Evidence to a Jury to prove Deeds and Writings by Witneſſes without ſhewing forth; for by that Means Deeds that be raſed, interlined, or otherwiſe adulterated, or utterly inſufficient for want of legal Words, or revocable and void againſt Fermors and Purchaſers, have by concealing and proving the Effect of them by Depoſition of unlearned Men, for want of good Direction, paſſed for good and authentical; and afterwards the Matter coming in Queſtion again, and the Court directing upon Examination of the Caſe that the Deed ought to be ſhewed, upon Sight thereof the Inſufficiency appeared, and ſo the Right prevailed: Which I have known both in the Court of Common Pleas, amongſt others, Mich. 5. Regis Jac. *between* Small *and* Blackledge, *and in the Court of Star-chamber in the Caſe between* Green *and* Eyer, *and ſometime in my Circuit ſince I was called to be a Judge.*

12. Edward Seymor's *Caſe, concerning Warranties, a cunning Kind of* *Learning*

Seymor's Caſe. Co. Lit. 306. a.

Learning (I assure you) and very necessary for the Purchaser: For it armeth him not only with a Sword by Voucher to get the Victory of Recompence by Recovery in Value, but with a Shield to defend a Man's Freehold and Inheritance by way of Rebutter, which Title of the Law is in my Opinion excellently curious, and curiously excellent. And yet when you have read this Case, you will concur with me that it was more weighty than difficult.

nere, & emptori imprimis necessario; cingit enim non solum ense Vocationis, ad victoriam compensationis, recuperatione scilicet ad valorem, reportandam, sed scuto etiam ad liberum tenementum & hæreditatem propugnanda per formulam propellendi (apud nos, *per voy de Rebutter*) qui Legis Titulus (ni me fallo) egregie curiosus & curiose egregius. Lecto tamen hoc casu, plus in se habere momenti quam difficultatis, mecum consenties.

Beawfage's Case.

13. *Then cometh in* Beawfage's *Case, as well for the Safety of Sheriffs and their Officers and Ministers, as for avoiding of Extortion,* crimen expilationis, *which in holy Writ, in that Imprecation against God's Enemies, is called a cousening Sin, Let the Extortioner consume that he hath, and let the Stranger spoil his Labour: Wherein you shall find the Statute of* 23 *H.* 6. *cap.* 10. *made for avoiding of Extortion, Perjury, and Oppression, which are for the most part linked together, herein very well and justly expounded.*

Psal. 109. v. 10.

13. Proxime accedit casus de *Beawfage*, tam ut indemnes sint Vicecomites eorumque ministri, quam ad extortionem eradicandum (*crimen expilationis*, quod in sacris scripturis in imprecatione illa in inimicos Dei malum illaqueans nuncupatur, Illaqueet expilator quicquid est illi, & diripiant extranei laborem illius): Ubi etiam Statutum de 23 *H.* 6. *cap.* 10. in extortionem, perjurium & oppressionem editum (quæ plerunque inter se concatenantur) optime explicatum habes.

14. Deinde

14. Deinde sequitur casus de *Denbawd*, de concedendo *Tales de circumstantibus* ad assisas, ut melius expediantur explorationes; quo tam Vicecomites & ministri sui, quam partes, attornati & solicitatores sui monendi sunt, ne machinatione seu confœderatione aliqua, directe vel indirecte, liberos tenentes iniquos & nimis amicos circumstare, vel dolo malo Tales ascribi faciant, in subversionem veritatis & justitiæ, & actum perutile de 35 *H.* 8. *c.* 6. illudendum: Ingens siquidem hoc est crimen, & gravi mulcta, carcere, aliaque pœna exemplari plectendum.

14. *Next followeth* Denbawd's *Case for the just and due granting of* Tales de Circumstantibus *at the Assises for the better Expedition of Trials; wherein as well the Sheriffs, and their Ministers, as the Parties, their Attornies and Followers are to be warned, that by no Practise or Confederacy, directly or indirectly, they procure not partial and affected Freeholders to stand in View, or by any Shift to be packed on the* Tales, *whereby Truth and Justice may be subverted, and the necessary Act of* 35 H. 8. c. 6. *finisterly abused, for that is an high Offence, and to be punished by a grievous Fine, Imprisonment, and other exemplary Punishment.*

Denbawd's Case.

15. Casus de *Lofield* & 20. de *Clun*, reservationes reddituum super dimissionibus ad terminum annorum, &c. tractat, & quomodo exponentur; Et hos evolvant omnes necesse est, quia omnibus fere interest.

15. Lofield's *and* 20. Clun's *Case, touching Reservation of Rents upon Leases for Years,* &c. *and how the same shall be construed, necessary to be known of all Men, because in Effect it concerneth all.*

Lofield v. Clun.

16. Proximus est casus *Arthuri Legat*, contra depopulandam Ecclesiam & Rempublic. coronam, totamque hanc nationem, prætextu literarum pa-

16. *Then followeth* Arthur Legat's *Case, against the Robbing of Church and Commonwealth, of the Crown and of the Country, by Colour of pestilent Patents of*

Legat's Case.

of thievish Concealments.

tentium pestiferarum & prædabundarum de terris concelatis.

Pilfold v. Cheyney.

17, 18. *After that* Pilfold *and* Cheyney's *Case, concerning the true and legal Manner of the Assessing and enquiring of Damages,* &c. *a necessary Kind of Learning, for that many Errors, the Causes of Expence and Delay, have been therein often committed.*

17, 18. Casus de *Pilfold* & de *Cheyney* de recto legalique modo damnorum taxandorum & inquirendorum, necessario admodum genere eruditionis, eo quod errores (dispendii & dilationis causæ) in illis frequentes fuerunt.

The Mayor of Lion's Case.

19. *Next cometh the Case of the* Mayor *and* Burgesses *of* King's Lynne, *in the County of* Norfolk, *wherein is well discussed what shall be deemed in Law the true Name of the Corporation in Substance, to the End that Bonds, Covenants, Leases, Grants, or Conveyances be not, in respect of too much Niceness and Curiosity therein, against all Honesty and just Dealing, impeached and overthrown. And to say the Truth I find not in any of our Books from the Beginning of the Reign of* E. 3. *until the Reign of* E. 6. *that any Bond, Lease, Grant, or Conveyance have been overthrown by Judgment, in respect of the Misnaming of the Corporation, but after a Window was once opened, it is a Wonder to consider*

6 Co. 65. a.

19. Inde tibi occurrit casus *Majoris & Burgensium de Linne Regis* in comitatu Norfolciæ, ubi bene disceptatur quid in lege dicitur verum corporationis nomen, ne obligationes, pacta, dimissiones, concessiones, & instrumenta, cura nimis de tricis & curiositate, contra jus omne & fidem, impediantur & enerventur. Et, ut verum profitear, in nullo codicum nostrorum invenio, ab initio regni Edw. 3. usque regnum Edw. 6. obligationum, dimissionum, concessionum sive instrumentorum vel unum, male nominatæ corporationis causa, irritum judicari: fenestella vero semel aperta, qualia arrepta fuerunt lumina a corporationibus tam spiritualibus quam temporalibus, per quæ-

quæstiones & in lege actiones, ad annullanda sui ipsorum dimissiones, concessiones, & instrumenta, in nocumenta quamplurium & ruinam multorum, malæ nominationis prætextu, mirum est cogitare, immo bonos omnes dolet memorari: *Sed motos præstat componere fluctus.* Tum &, ut referatur hic casus, in causa fuerunt pax & quies tam occupantium & aliorum qui sub corporationibus aliquid sibi vendicant, quam & illarum, de pactis aliisque rebus eis habitis, *ut res magis valeat quam pereat.*

what Light hath been taken by Corporations both Spiritual and Temporal, by Questions and Suits in Law, to avoid their own Leases, Grants, and Conveyances, to the Hindrance of Multitudes, and Undoing of many, under Colour of misnaming themselves, it grieveth good Men to remember; sed motos præstat componere fluctus. *And this Case is reported for the Surety and Quiet as well of their Fermors and others claiming from them, as of themselves, for Estates, Covenants and other Things made unto them,* ut res magis valeat quam pereat.

21. Habes item casum de *Osborn*, ubi copiose decernitur, quando verba male & incongrue Latina, &c. destruunt, vitiant, vel adnihilant brevia, instrumenta, chartas, scripta, vel recorda, & quando non.

22. Casus de *Read* & *Redman* agit de Summonitione & Separatione, quo invenies ubi mors partis separatæ destruet breve, & ubi non; & ubi nonnunquam mors unius Querentium, licet non separetur, non destruet breve originale, &c.

Osborn's Case.

21. *Then have you* Osborn's *Case, wherein is at large resolved, where false or incongruous* Latin, &c. *shall abate, vitiate or make void Writs, Specialties, Charters, Deeds, and Records, and where not.*

Read v. Redman.

22. Read *and* Redman's *Case, concerning Summons and Severance, wherein you shall find, when the Death of the Party severed shall abate the Writ, and when not, and in some Cases where the Death of one of the Plaintiffs, though he be*

not

not ſevered, ſhall not abate the original Writ, &c.

R. Smith's Caſe.

23. Richard Smith's *Caſe, in what Caſe a* Quare impedit *lieth* de medietate, &c. Eccleſiæ.

23. *Richardi Smith* caſus eſt de *Quare impedit de medietate, &c. Eccleſiæ.*

Three Caſes on the Stat. of Sewers.

24, 25, 26. *Then ſhall you read certain Reſolutions upon the Statutes and Commiſſion of Sewers, a neceſſary Kind of Learning to be known, but more neceſſary (I aſſure you) to be put in due Execution: And that by colour thereof a Private be not privily intended, when the Publick is openly pretended. And in thoſe Caſes is well diſcuſſed what the Commiſſioners of Sewers may juſtly and ſafely do by their Wiſdoms and Diſcretions.*

24, 25, 26. Evolves deinde quædam Judicia in ſtatuta & commiſſiones de Seweris, genus Doctrinæ notu perutile, executioni vero debitæ ut demandaretur multo magis neceſſe, nec prætextu inde privatum ſit occulte deſignatum, dum publicum aperte prætenditur. Hiis etiam caſibus bene diſſeritur, quid commiſſionarii de Seweris fide & indemniter ex eorum prudentia & arbitrio agant.

Scroop's Caſe.

27. *And laſtly,* Scroop's *Caſe, touching a Point of Revocations, very neceſſary to be known, for that Revocations are grown ſo frequent: And the Reſolution of this one Point may prevent many Controverſies that might have grown out of them, and that moſt commonly between Brethren and others near of Blood and Alliance.*

27. Caſus denique de *Scroop* articulum de revocationibus tractat, eo magis notu dignum, quod revocationes adeo nunc ſunt frequentes: Et hujus ſolius articuli deciſio multis litibus abinde orituris, plerumque inter fratres & alios ſanguine & affinitate proximos, obvium eat.

If any do marvel, that ſeeing the Matter of every particular Caſe doth reſt in a narrow Room, and that my Manner of report-

Si mirum cuipiam videatur (cum caſus cujuſque particularis materiam anguſtæ circumſcribant metæ, & Relatio

mea

mea pro more adeo compendiosa sit, summam referens totius dicti ex una parte seorsim, & sic vicissim ex altera, initium semper sumens ab objectionibus, & in Judicio & sententia Curiæ finem faciens, quæ mihi videtur optima Relationis methodus) qua de causa casuum modo editorum nonnulli ita profuse se extendunt; in promptu causa est (a me tamen non approbata) nimirum, propterea quod quæstiones vel objectiones pro tribunali ortæ, pariter ac argumenta e codicibus sumpta, aliæque in lege authoritates abundant. Et, vero verius dicam, plures quæstiones ex rei pondere quam e difficultate casus enascuntur; nunquam enim novi magni momenti casum pace agi, plurimis non adhibitis exceptionibus in retardationem Judicii. Antiquus ille argumentandi mos ad septum Curiæ per Servientes ad legem & Jurisconsultos quos Apprenticios vocamus prorsus immutatur: 1. Ii vix unquam librum vel authoritatem nominatim produxerunt, ut videre est in 40 *E.* 3. &c. sed *Est tenus*, &c. vel

ting is summary, relating the Effect of all that was said of the one Side by it self, and so likewise of the other, beginning ever with the Objections and concluding with the Resolution and Judgment of the Court, which I hold to be the best Order of Relation) wherefore divers of these Reports are drawn into so great a Length; the Cause is apparent, though I allow not of it, that the Questions or Objections moved at the Bar, and the Arguments drawn from Books, Cases, and other Authorities in Law be so many, and to say the Truth, many Questions are raised rather out of the Weight of the Matter than the Difficulty of the Case: For I never saw any Case of great Value proceed quietly without many Exceptions in Arrest of Judgment. The ancient Order of Arguments by our Serjeants and Apprentices of Law at the Bar is altogether altered. 1. *They never cited any Book, Case or Authority in particular, as is holden in* 40 *E.* 3. &c. *but* est tenus ou agree in nr'e liures, ou est tenus adjudge in termes, *or such like, which Order yet remains in Moots at the*

 Bar

Bar in the Inner Temple *to this Day.* 2. *Then was the Citing general, but always true in the particular; and now the Citing is particular, and the Matter many Times mistaken in general.* 3. *In those Days few Cases in Law were cited, but very pithy and pertinent to the Purpose, and those ever pinch most; and now in so long Arguments with such a farrago of Authorities, it cannot be but there is much Refuse, which ever doth weaken or lessen the Weight of the Argument. This were easily holpen, if the Matter (which ever lieth in a narrow Room) were first discerned, and then that every one that argueth at the Bar would either speak to the Purpose or else be short.*

simile, qui modus in quæstionibus arguendis (quas vocamus *Moots le barre*) in interiori Templo hucusque retinetur. 2. Eo temporis annotatio fuit generalis, vera autem semper in particulari; hodie, econtra, annotatio est particularis, multoties vero abs re in generali. 3. Tunc rarissime prolati fuerunt casus si non apte & ad rem, (& hii in arcem quæstionis invadunt) nunc vero in prolixis admodum argumentis de farragine authoritatum compositis, multa male opposita necesse est, quæ semper argumentationem vel infirmant vel inficiunt. Huic facillime remedium apponeretur, si res (quæ agrum minus latum occupat) prius nota fuerat, & deinde unusquisque causam pro Tribunali tractaturus, vel congrua vel succincta eloqueretur.

But seeing my Desire is and ever hath been that the Counsel Learned, and consequently the Parties might receive Satisfaction, for which Cause all the Counsel, that have argued in the Case to be adjudged, ought to give diligent Attendance and Attention on those Days when

Quoniam vero, mihi in votis est semperque fuit, tum Jurisconsultis tum partibus satisfacere, (quamobrem Jurisconsultos singulos, qui causam discutiendam disputaverunt, sedulo attendere & interesse oportet, diebus Argumentationum Judicum, diu ante publice statutis

ſtatutis & præfixis). Hac de cauſa (cum mei ipſius ſit labor & res non ſine fructu ſuo) caſus majoris nomenti fuſius retuli, ſummam totius vel objecti vel diſcuſſi complectens: Metallicus tamen haud dubio expertus eſſe poteſt, qui venas fœcundiores invenit & ſectatur, quanquam minores & infœcundiores ignorat, circa has enim fortaſſe *materiam ſuperabit opus.* Hoc tantum a Juriſperitis univerſis cavendum adjiciam, (cum, ut germanus Legis ſenſus apprehendatur, diſceptationes ſuæ eniterentur, in meliorem Juſtitiæ adminiſtrationem) ne faciant quod ſit plane injuſtitia: Illum enim ſentio, qui textum, codicem, ſeu in Lege authoritatem a proprio ſuo ac genuino intellectu ſive torquet ſive invertit, vel ad veritatem aliquam confirmandam, peccare in Juſtitiam diſtributivam, cujus eſt ſuum cuique tribuere. Hii denique (qui ipſa argumenta *viva voce* ſimul ac vultu geſtuque vivorum, in Juſtitiæ ſede palamque in foro, pronunciata audiverunt) nequicquam credant, illo ſuo ſpoliari decore, cum,

the Judges do argue, which are ever publickly long before appointed, and prefixed on certain Days. I have for that Purpoſe (the Pains being my own, and the Matter not without ſome Fruit) in the Caſes of greateſt Conſequences made the larger Report, comprehending the Effect of all that was objected and reſolved; and yet he may be a good Miner that findeth and followeth the main Veins, though he diſcovereth not the ſmall and unvaluable Fillets, for there peradventure materiam ſuperabit opus. *This only I will add as a Caveat to all the Profeſſors of Law, that ſeeing their Arguments ſhould tend for the Finding out of the true Judgment of Law, for the better Execution of Juſtice, that therein they commit not manifeſt Injuſtice; for I am of Opinion that he that wreſteth or miſapplieth any Text, Book, or Authority of the Law againſt his proper and genuine Senſe, yea though it be to confirm a Truth, doth againſt diſtributive Juſtice, which is to give to every one his own. And let not thoſe that heard the Arguments themſelves uttered* viva voce, *with the Counte-*

Countenance and Gesture of living Men in the Seat of Justice in open Court, fear that when they shall read them privately in a dead Letter, it will want much of the former Grace: For though I confess that habet nescio quam energiam viva vox, *yet when they shall read the Effect of all that was spoken at large at several Times by several Persons, at the Bench, and at the Bar on either Part, of many and divers Matters collected and united together, and reduced* ad idem, *concerning every particular Point, it will ease them of much Labour, and conduce much to the settling of their Judgment, and that, if I be not deceived, not without a Student's Delight.*

mortuo charactere, privatim lecta fuerint, licet enim *habeat nescio quam energiam viva vox*, summam tamen omnium, utrinque a viris diversis variisque vicibus de tribunali & pro tribunali fusius dictorum, cum perlegerint, summam dico rerum multarum, immo inter se disparium, recollectarum, unitarum, & *ad idem* reductarum, de articulo quolibet particulari, faciles proculdubio sibi sui erint sudores mentesque magis firmæ; & in hiis (nisi fallor) studiosorum erit delectatio non modica.

And for that I am intreated to shew as well the Times when the Register, *the* Mirror of Justices, Glanvill, Britton, Fleta, *the* Tales *or* Novæ narrationes, Old Natura brevium, Littleton, *and other Books of the Laws now extant were published, and where the Authors themselves appear not in those Books, who were the Authors of the same; as also the Antiquity of Serjeants at Law; for their*

Quippe quum me velle narrare tam tempora editionum *Registri*, *Speculi Justiciariorum*, *Glanvillæ*, *Fletæ*, *Novarum Narrationum*, *Littletoni*, aliorumque de Lege librorum modo extantium, quique condiderunt hos quorum authores in libris ipsis non extant, quam antiquitatem Servientium ad Legem, nonnulli rogitaverunt: Ut habeant quo quiescant, Sciant imprimis *Registrum* rescripta

ſcripta ſive brevia originalia Juris municipalis comprehendens, librum de lege eſſe vetuſtiſſimum; caſus enim e codice & archivis de Anno 26 *Edw. tertii, lib. Aſſiſ. pla.* 24. evincit manifeſte, brevia originalia Aſſiſæ ut & alia brevia originalia in uſu fuiſſe ultra omnem hominum memoriam, (hoc eſt, quorum inſtitutio, vel recordatione, vel lectione, vel ex ſcriniis oſtendi non poteſt) multo ante devictam hanc Regionem: Quæ quidem hic ſolummodo percurro, eo quod eadem in proœmio tertii mei Commentarii copioſe magis adnotavi, & quoad poſſum iterationem minus gratam evitare conor. Quin & liber iſte nominatur *Regiſtrum Cancellariæ* in ſtatuto Weſt. 2. cap. 24. quia Cancellaria eſt *tanquam officina Juſtitiæ*, unde brevia originalia univerſa emanant. Cujus de authore, vel potius de authoritate, audi *Bractonum lib.* 5. *tract' de exceptionibus cap.* 17. *fol.* 413. *Breve quidem, cum ſit formatum ad ſimilitudinem regulæ Juris, quia breviter & paucis verbis intentionem proferentis exponit*

Satisfaction they ſhall underſtand, that firſt the Regiſter, *which containeth the original Writs of the Common Law, is the ancienteſt Book of the Law; for the Book-caſe and Record of* 26 E. 3. lib. Aſſ. *pl.* 24. *proveth directly that original Writs of Aſſiſe and other original Writs had been Time out of Mind of Man (that is, the Beginning whereof cannot be known either by Remembrance, Reading, or Record) long before the Conqueſt, whereof I give here but a light Touch, for that I have cited the ſame more at large in the Preface to the* 3 Part of my Commentaries, *and I avoid as much as I can unpleaſing Iterations: And this Book is called* Regiſtrum Cancellariæ, *in the Statute of* W. 2. cap. 24. *becauſe that the Chancery is* tanquam officina Juſticiæ, *all original Writs iſſuing out of that Court; Now for the Authority thereof*, Bracton, lib. 5. tract' de Exceptionibus cap. 17. fol. 413. *ſaith thus*, Breve quidem cum ſit formatum ad ſimilitudinem regulæ juris, quia breviter & paucis verbis intentionem proferentis exponit & explanat, ſicut

cut regula juris rem quæ eſt breviter enarrat, &c. Sunt quædam formata ſub certis caſibus de curſu & de communi concilio totius regni conceſſa & approbata, quæ quidem nullatenus mutari poterint abſque conſenſu & voluntate eorum. *Now joining both thoſe Authorities together, a Man may ſafely conclude, that this Book is moſt ancient and of greateſt Authority. I confeſs that, by Force of Acts of Parliament in ſucceeding Ages, divers other Writs original in Caſes newly happening are (as appeareth in the ſame) added thereunto. And of theſe ancient Writs, I will ſay (as Sir* Thomas Smith *a Secretary of State ſaid) that all the Secretaries in Chriſtendom may learn of them to expreſs much Matter in few and ſignificant Words.*

& explanat, ſicut regula Juris rem quæ eſt breviter enarrat, &c. Sunt quædam formata ſub certis caſibus de curſu & de communi concilio totius regni conceſſa & approbata, quæ quidem nullatenus mutari poterint abſque conſenſu & voluntate eorum. Binis igitur hiis authoritatibus connexis, concludere licet hunc eſſe librum tum antiquitatis tum authoritatis maximæ : Virtute autem actorum comitialium, ſeculis ſubſequentibus, varia alia brevia originalia in caſibus recentioribus emergentia (ut in eo liquet) annecti fateor. Et de hiis antiquis Brevibus dicam (quod dixit *Thomas Smith* eques auratus divæ quinetiam Elizabethæ nuper Reginæ ab Epiſtolis) Secretarios Chriſtiani orbis univerſos, rerum congeriem paucis & ſignificativis verbis exprimere, ex illis poſſe diſcere.

For the Mirror of Juſtices, ſpeculum Juſticiar', *the moſt of it was written as long before the Conqueſt,* * *by the ſame appeareth, and yet many Things were added thereunto by* Horne *a learned and diſcreet Man, (as it is ſuppoſed) in the Reign of* E. 1. †

* Plowd. 82. a.

7 R. 2. Exig. 9.

† But the Author mentions E. 2.

Speculum Juſticiariorum quod attinet, maxima ex parte literis conſignatum fuit, gente hac nondum ſubacta, ut ex illo perſpicuum eſt : Cæterum (ut ferunt) multa adjecta fuerunt per *Horne* virum eruditum ſatis & prudentem ſub regno Edw. 1.

Glanvilla

Glanvilla ſcripſit regnante Hen. 2. ut in libro ſuo conſtat: Qualem ſe geſſit, præfatio in octavum meum librum (Hiſtoriam continens mea ſententia Lectu dignam) plane edocet. Et circa id Tempus Codicillus de *Veteribus Tenuris* editus fuit.

Concerning Glanvil, *he wrote in the Reign of* H. 2. *as appeareth by this Book*; *and what he was it appeareth in my Preface to my eighth Book, a Hiſtory in my Opinion worthy the Reading. And about the ſame Time, was the Treatiſe, called the old* Tenures, *made.*

Glanvil. 62. 6 Co. Prefa. 8 Co. Prefa. and my MS.

Bractonus (ut alibi notavi) circa Hen. 3. regni finem commentatus eſt.

Bracton, *as elſewhere I have noted, wrote about the End of the Reign of* H. 3.

Britonus opus eruditum compoſuit, idemque anno 5 Edw. 1. promulgavit, per mandatum Regis Edward. 1. (*Juſtiniani* noſtri) prout in 35 Hen. 6. apparet; Cujus tenor ſe habet ſub nomine Regis, tanquam ab illo confectus, pro more *Juſtiniani* Inſtitutionum, quas ſibi arrogat *Juſtinianus*, ab aliis licet ſtructæ fuerint. Iſte *Johan. Britonus* fuit Epiſcopus Herefordenſis, ſumma & recondita in Lege Communi ſcientia, ornamento profeſſioni ſuæ ſingulari, & ſibi ſecuritate, & ſolatio optimo. Vide *Stamford' Prærogativa Regis* 6 & 21.

Britton *compoſed a learned Work, and publiſhed the ſame in* 5 E. 1. *as appeareth in* 35 H. 6. *by the Commandment of* E. 1. (*our* Juſtinian) *the Tenor whereof runneth in the King's Name, as if it had been written by him, anſwerable to* Juſtinian's *Inſtitutes, which* Juſtinian *aſſumeth to himſelf, altho' it were compoſed by others. This* J. Britton *was Biſhop of* Hereford, *and of great and profound Judgment in the Common Laws, an excellent Ornament to his Profeſſion, and a Safety and a Solace to himſelf.* Vide Stamford, Pr. R. 6 & 21.

Fleta, opus per eruditum aliquem Juriſconſultum quam optime compoſitum, cui in carcerem,

Fleta *is a Work well written by ſome learned Lawyer, who being committed to the Priſon of the*

the Fleet *had Leisure to compile it there; and therefore stiled his Book, by the Name of the Fleet,* Fleta, *and concealed his own Name, as in the Preface to his Work appeareth; The Author thereof is unknown; but it appeareth in his Book that he lived in the Reigns of King* E. 2. *and* E. 3. Vide lib. 1. cap. 20. Sect. Qui ceperunt, lib. 2. cap. 66. Sect. Item quod nullus. *But of the certain Time when it was first published (for Peradventure it had Additions afterwards) there is some Question made: But in seeking after this, I find that this Book took the Name of the Prison of* Fleet, *and that the* Fleet *Prison took the Name of the River running by it the* Fleet.

The Book entitled Novæ narrationes, *vouched and allowed in* 39 Hen. 6. 30. *by learned* Prisot *and his Companions Justices of the Court of Common Pleas, by the Name of the* Tales, *was published about the Reign of King* Edw. 3. *And* Old Natura Brevium *afterwards in the Reign of the same King, for* fol. 100. b. *the Stat. of* 5 E. 3. c. 12. *is called* le novel Statut: *But*

qui *Fleet* dicitur, ablegato, scribendi otium fuit plus satis, ideoque librum suum, secundum *Fletæ* denominationem, *Fletam* appellavit, & nomen suum suppressit, ut in operis sui proœmio constat: Author itaque ejusdem incognitus est; quem tamen sub *Edw.* 2. & *Edw.* 3. viguisse liber ejus dilucide ostendit, *Vide Lib.* 1. *cap.* 20. *Sect. Qui ceperunt, Lib.* 2. *cap.* 66 *Sect. Item quod nullus.* De tempore autem in quo primum editum fuit (quia nonnulla postea accesserunt) dubitatur: Cæterum, in hoc perscrutando, Librum istum a carcere *Fleta*, *Fletam* vero ab amniculo prætérlabente sic appellato, nomen sortitum fuisse reperio.

Codex qui inscribitur *Novæ narrationes*, in 39 *H.* 6. 30. per doctum *Prisot* & socios suos de Banco Justiciarios, sub nomine *Narrationum*, memoratus & approbatus, juxta initium regni Regis Edw. 3. in lucem prodiit: Tum & non multo post, *Vetus Natura Brevium*, Rege eodem gubernante; nam f. 100. b. statutum de 5 Edw. 3. cap. 12. novum statutum nuncu-

nuncupatur; exinde tamen multa illi annexa sunt: De libro hoc *Anthonius Fitzherbert* eques, in proœmio ad tractatum suum de *Natura Brevium*, dicit, *Et auxy pur cel intent & purpose, fuit compose, per un sage & discreet home, un liuer appell Natura Brevium.*

Liber *Fortescue de laudibus Legum Angliæ*, sub Rege Hen. 6. confectus fuit, multa lectu imprimis digna in se habens: Idem etiam pro titulo & jure Regis Hen. 6. supremi sui domini ad sceptra Angliæ tenenda librum conscripsit, quem postea ex veritatis conscientia retractavit; quorum uterque apud me sunt: Et in hoc laudem singularem meruisse videtur, quod illorum pars nulla fuit *qui suos amassent errores*, sed inventa semel veritate, facile succubuit. Iste *Johannes Fortescue* fuit eques, & principalis Angliæ Justiciarius & postmodum Dominus Cancellarius Angliæ constitutus fuit; & in hodiernum usque diem magni est ejus posteritas.

since, Additions have been made thereunto. Of this Book Sir Anthony Fitzherbert *in his Proem to his* Natura Brevium *saith as followeth.* Et auxy pur cel intent & purpose, fuit compose per un sage & discreet home un liure appel Natura Brevium.

Fortescue de laudibus legum Angliæ; *this Book was written in the Reign of King* H. 6. *in Commendation of the Laws of* England, *containing withal much excellent Matter worthy the Reading: He wrote also a Book in Defence of the Title of King* H. 6. *his sovereign Lord and Master, to the Crown of* England; *but after out of Truth and Conscience retracted the same, both which I have: Wherein he deserved singular Commendation, in that he was not amongst the Number of those* qui suos amassent errores, *but yielded to Truth when he found it. This Sir* John Fortescue *was Lord Chief Justice of* England, *and afterwards Lord Chancellor of* England, *and his Posterity remain in great and good Account to this Day.*

Stathom's

Stathom's Abridgment, *first published in the Reign of King* H. 6. *by* Stathom *a learned Lawyer of that Time: And the* Abridg. of the Book of the Assises, *published also about the same Time, but the Author thereof is unknown.*

Stathomi Compendium, a *Stathomo* Jurisconsultissimo, regnante *Hen:* 6. primo editum fuit: Et *Libri Assisarum* epitome juxta id temporis etiam in lucem prodiit, Author vero ejusdem ignotus est.

See the Preface to Co. Lit. but Note therein divers Errors.

Littleton's Tenures, *a Book of sound and exquisite Learning, comprehending much of the Marrow of the Common Law, written and published by* Thomas Littleton *a grave and learned Judge of the Court of the Common Pleas, sometime of the* Inner Temple, *wherein he had great Furtherance by Sir* John Prisot *Lord Chief Justice of the Court of Common Pleas, a famous and expert Lawyer, and other the Sages of the Law who flourished in those Days. Of this Book* Hotoman *a Civilian and Canonist in his Commentary* de verbis feudalibus, verbo feudum, *giveth his Censure; with what Charity or Discretion, judge learned Reader:* Stephanus Pasaverinus excellenti vir ingenio, &c. libellum mihi Anglicanum,

Littletoni Tenuræ, (reconditæ quidem & exquisitæ literaturæ Liber, Legis communis quasi medullas ipsas complectens) a *Thoma Littletono*, viro gravissimo pariter ac in Lege peritissimo, Judice Placitorum communium, (quondam e societate interioris Templi) compositæ fuerunt & promulgatæ; cui adjumento non parum fuit Dominus *Johannes Prisot* Curiæ ejusdem Justiciarius principalis, vir Jurisconsultissimus, aliique Legis Sagacissimi ea tempestate florentes. De hoc libro *Hotomanus*, Juris civilis & canonici peritus, commentario suo *de verbis feudalibus, verbo feudum*, censuram facit, sed qua charitate vel prudent', eruditus Lector sit Judex: *Stephanus Pasaverinus excellenti vir ingenio, &c. libellum mihi Anglicanum,* Littletonum

Littletonum dedit, quo feudorum Anglicanorum Jura exponuntur, ita incondite, absurde & inconcinne scriptum, ut facile apparet verum esse quod Polidorus Virgilius in Anglicana Historia scribit, Stultitiam in eo libro cum malitia & calumniandi studio certare. De *Hotomano* & authore suo merito dicam hoc & non amplius dicam, *Volentes esse legis Doctores, non intelligentes neque quæ loquuntur, neque de quibus affirmant*: Missos igitur faciamus in numerum illorum *qui vituperant quæ ignorant.* Scelus siquidem & periculum manifestum est, Juris civilis peritos vel Canonistas (satis notum loquor, & justis de causis) aut de jure municipali Angliæ, quod non profitentur, scriptitare, aut in ignotos dicere calumniam. Certo certius ridiculum, & audax nimis in me foret, si (quoniam partem ego parvulam Juris Civilis & Canonici, auxilio nonnullo perutili & adjumento adhibito, evolvi) de illis vel in illa statim scribere aggrederer. Illorum autem paginæ adeo manifestis refertæ sunt erroribus, ut novorum istorum machi-

Littletonum dedit; quo feudorum Anglicanorum jura exponuntur, ita incondite, absurde & inconcinne scriptum, ut facile apparet verum esse quod *Polidorus Virgilius* in Anglicana historia scribit, Stultitiam in eo libro cum malitia & calumniandi studio certare. *Of* Hotoman *and his Author I may justly say, and will say no more,* volentes esse legis doctores, non intelligentes neque quæ loquuntur neque de quibus affirmant, *and therefore let us leave them among the Number of those* qui vituperant quæ ignorant. *It is a desperate and dangerous Matter for Civilians and Canonists (I speak what I know, and not without just Cause) to write either of the Common Laws of* England *which they profess not, or against them which they know not. Sure I am, it were a ridiculous Attempt and Enterprize in me (that because I confess I have read some little Part of the Civil and Canon Laws, and that with some good Assistance and Help) by and by to write either of them, or against them. But their Pages are so full of palpable Errors and gross Mistakings,*

takings, as these new Authors are out of Charity pitied, and their Books out of our Judgment cast away unanswered. Alas, our Books of Law seem to them to be dark and obscure; but no wise Man will impute it to the Laws, but to their Ignorance, who by their sole and superficial Reading of them cannot understand the Depth of them. I will not sharpen the Nib of my Pen against them, for that I pity the Persons, and wish they had more Discretion for that I honour their Profession. And for Littleton's Tenures, *I affirm and will maintain it against all Opposites whatsoever, that it is a Work of as absolute Perfection in its Kind, and as free from Error, as any Book that I have known to be written of any human Learning. And the Posterity of this Sage of the Law (unto whom he is a great Ornament) doth flourish unto this Day: Of whom a Man of great Excellency in his Profession hath justly said that he was a famous Lawyer,* &c. *to whose Treaty of Tenures, saith he, the Students of the Common Laws are no less behold-*

Camden 574.

natorum ex charitate misereamur, & illorum libellos (dato responso) consulto rejiciamus. At si libri nostri de Lege quasi enigmatici & obscuri illis videantur; sapientes illud Legibus nostris haud vitio vertent, quin immo inscitiæ sciolorum istorum qui superficiem solam Legum vix dum penitrarunt, ideoque sensum earum reconditum intelligere nesciunt. Sed in illos calamum non acuam; miseret me hominum, & discretiores esse velint opto, professionem enim illorum in honore habeo. *Littletoni Tenuras* quod attinet, hoc affirmo & contra refragantes quoscunque ratum faciam, opus esse suo genere adeo absolutæ perfectionis, adeoque de erroribus liberum, atque aliquod aliud mihi notum humanam tractans eruditionem. Et hujusce viri, Legis peritissimi, posteritas (cui magno fuit ille ornamento) ad hunc usque diem vigescit: Quem vir, professione sua maxime egregius, non immerito appellavit *Jurisperitissimum, &c. ad cujus tractatum de Tenuris* (inquit) *Legum communium studiosi,*

studiosi, haud aliter quam Juris civilis studiosi ad Justiniani *institutiones, confluunt.*

ing than the Civilians to Justinian's *Institutes.*

Fitzherberti Compendium elaborate collectum fuit & in Anno 11 Hen. 8. a *Fitzherberto* tunc Serviente ad Legem editum: Idem aliud etiam composuit opus, cui nomen est *Natura brevium*, exquisitum sane & accurate structum, & anno 26. Hen. 8. divulgatum ab eodem tunc Domino *Antonio Fitzherberto* equite, Judice Curiæ placitorum communium. Idem non multo post, tractatum suum de *Eirenarcha* condidit: Cui Judices (ut ex rescriptis hausi) vitio dederunt, quod eo asseruit Eirenarchas ex Commissione sua ad audiendum & terminandum felonias &c. potestatem habuisse, homicidium tamen ex malitia prepensa audire & determinare non potuisse, quod (inter alia) Eirenarchas per legem posse facile affirmabant.

Fitzherbert's Abridgment *was painfully and elaborately collected, and published in the eleventh Year of King* H. 8. *by* Fitzherbert *then Serjeant at Law: And he wrote also another Book called his* Natura brevium, *an exact Work exquisitely penned, and published in the six and twentieth Year of* Hen. 8. *when he was Sir* Anthony Fitzherbert *Knight, one of the Judges of the Court of Common Pleas: About the same Time he wrote his Treatise of Justices of the Peace; wherewith the Judges (as I have seen it reported) found Fault, for that he therein affirmed that Justices of Peace having by their Commission Authority to hear and determine Felonies,* &c. *could not hear and determine* Murder, *which (amongst others) they clearly over-ruled that Justices of Peace lawfully might do.* *

* Justices of Peace are but a Novel Institution, and unknown to the Common Law. Ergo Quære.

Dialogus inter sacræ Theologiæ *Doctorem* & Legis communis *Studiosum*, anno 23 H. 8. conscriptus fuit ab authore appellato *S. Germin*, viro

Doctor and Student, *a Book written in* 23 H. 8. *Dialogue-wise between a Doctor of Divinity and a Student of the Common Law, the Author's Name was*

was St. Germin, *a discreet Man and well read, I assure you, both in the Common Law, and in the Civil and Canon Laws also.*

sine dubio prudente & juris tum Municipalis tum Civilis & Canonici satis perito.

A Book intitled a Treatise made by Divines and others learned in the Laws of this Realm, concerning the Power of the Clergy, and the Laws of the Realm, *published in the Time of King* Henry 8. *and after the six and twentieth Year of his Reign; for therein the Act of Parliament made in that Year is mentioned, which Book I have.*

Liber, qui inscribitur *Tractatus a Theologis & aliis Juris patrii peritis, de potestate Cleri, & de Legibus hujus regni*, emissus fuit sub H. 8. post annum vicesimum sextum suscepti regiminis, nam in eodem, actum Parliamentarium ejusdem anni memoratur: Qui liber penes me est.

The small Treatises concerning *the Manner of keeping Court Baron and Leet, &c.* Modus tenendi hundredum, &c. Returna brevium, Charta feodi, &c. *and* Ordinances for Fees in the Exchequer, *were all published in the End of the Reign of King* H. 8.

Minores illæ Commentationes de *Modo tenendi Curiam dominicalem & visum Franciplegii, &c. Modus tenendi Hundredum, &c. Returna brevium, Charta feodi, &c.* & *Ordinationes pro feodis in Scaccario*, in exitu regni Hen. 8. compositæ fuerunt.

The Book called the Diversity of Courts, *was compiled after the* 21 *Year of* H. 8. *for the Statute of* 21 H. 8. *for Restitution of Goods upon Indictment*, &c. *is recited, fol* 117. *a.*

Liber inscriptus *Curiarum distinctio*, ab anno vicesimo primo Regis H. 8. collectus fuit: Statutum enim de 21 H. 8. de restitutione bonorum, super indictamento, &c. *fol.* 117. *a.* recitatur.

Stamford, *This Book containeth two Parts, one of the Pleas of the Crown;*

Stamfordi liber est bimembris, unus de causis coronam attingentibus, alter,

alter, non ita grandis, de Prærogativis Regiis: Cæterum posterior prius vulgatus fuit per *Willielmum Stamford*, equitem & Justiciarium Curiæ placitorum communium, quondam e societate hospitii Graii, virum Legum municipalium consultissimum, cujus posteri hodie vigent.

the other, of a lesser Volume, of the Prerogative of the King; but the later was first published by Sir William Stamford, *Knt. sometime of* Gray's Inn, *a Man excellently learned in the Common Laws; whose Posterity prosper at this Day.*

Perkins, commentariolum quosdam legum patriarum titulos tractans, scite & literate confectum, regnante *E.* 6. per *Johannem Perkins* Juridicum, a nobis *Utterbarrister* dictum, e societate Templi interioris, emissum fuit.

Perkins, *a little Treatise of certain Titles of the Common Laws, wittily and learnedly composed, and published in the Reign of King* E. 6. *by* John Perkins *an* Utter-barrister *of the* Inner Temple.

Missa non faciam *Summarium illud statutorum, & in magnum Fitzherberti compendium Indicem, nec librum Intrationum*, percommode & laborate (hoc mihi credas) collecta & edita sub regina Maria, præsertim duo priora, in oblectationem & auxilium non mediocre Legis studiosorum, per *Willielmum Rastall* gravissimum de communi banco Judicem, & virum strenuum & summopere industrium congesta, multa tamen extunc & *statutorum Summario* & *libro Intrationum* accesserunt: Quem etiam

I cannot pretermit the Abridgment of the Statutes, and the Table to Fitzherbert's *great Abridgment, and the Book of Entries, profitably and painfully (I assure you) gathered and published in the Reign of the late Queen* Mary, *but specially the first two, tending very much to the Ease and Furtherance of the Professors of the Law, collected by* William Rastall *a Reverend Judge of the Court of Common Pleas, and of great Industry; many Things have been since added both to his Abridgment of Statutes and to the*

the Book of Entries, who originally was also the Author of the Book called the Terms of the *Law.*

habuit authorem liber de *expositione vocabulorum Juridicorum.*

The Lord Brook's *Abridgment, first published in* anno 16 Reg. Eliz. *This was gathered by Sir* Robert Brook, *Knight, Chief Justice of the Court of Common Pleas, for his private Use, and was published long after his Decease; a worthy and painful Work, and an excellent Repertory or Table for the Year-Books of the Law:* Sed satius est petere fontes quam sectari rivulos.

Domini *Brook Compendium* editum fuit in anno 16. Reginæ *Eliz.* Constructum fuit a *Roberto Brook* equite, fori placitorum communium Justiciario principali, usui suo proprio, & in lucem prius non prodiit quam author ipse obdormiverat; præclara quidem lucubratio, & codicum legis repertorium perquam utile; *sed satius est petere fontes quam sectari rivulos.*

Plowden's Commentaries, *consisting of two Parts, both of them learnedly and curiously polished, and published by himself, the one* in anno 13 Reg. Eliz. *and the other in the* 21 *Year of the same Queen, Works (as they well deserve) with all the Professors of the Law of high Account. The Author was an ancient Apprentice of the Law, of the* Middle Temple, *of great Gravity, Knowledge, and Integrity.*

Commentariorum Plow. prima & item altera pars, tam literate quam limate politæ, a seipso emissæ fuerunt, prima in anno 13 reg. *Eliz.* secunda an. 21. ejusdem reginæ, opera (ut bene merentur) apud legum professores singulos imprimis magni æstimata. Habuerunt authorem virum jurisperitum (quem Apprenticium vocamus) multa ætate provectum, e societate medii Templi, eximiæ gravitatis, scientiæ, & integritatis.

The Lord Dyer's *Book, containing the fruitful and summary Collections of that Reverend Father of the*

Domini *Dyer* liber, utiles simul ac compendiosas comprehendit observationes Reverendissimi illius

Filius legum patris *Jac. Dyer* equitis, actionum communium Curiæ capitalis non ita pridem Justiciarius, in utilitatem & meditationem suam propriam designatas; quas author ipse forma qua nunc sunt publicari nunquam cogitavit: verum quales post obitum ejus inventæ, *anno* 25 *Reginæ Elizabethæ* prælo commissæ fuerunt, quarum quidem origo manu sua propria conscripta penes me est.

Law Sir James Dyer, *Knight, late Chief Justice of the Court of Common Pleas, for his private Use and Remembrance, and never intended by him in this Form to be made publick; but were as he left them imprinted after his Decease* in anno 25 Reg. Eliz. *the very Original whereof, written with his own Hand, I have.*

Collectanea denique *Magistri Lambard de Eirenarcharum officio*, methodice digesta, juxta finem regni Elizabethæ reginæ publica devenerunt.

Lastly, Master Lambard's *Collection of the Office of Justices of the Peace, methodically written, was published towards the End of the Reign of Queen* Elizabeth.

Servientium ad legem antiquitatem quod attinet, ex libro *de Justiciariorum speculo* dilucide patet *lib.* 2. *cap. des Loiers* (ubi de legibus hujus regni & ejusdem ministris multo ante subjugationem agitur) quod Servientes ad legem antiquitus nominabantur *Narratores*, i. *Countors* seu *Counteurs*, quia brevis originalis materiam, & ipsissimum sectæ fundamentum complectitur Narratio, ex qua, quasi ex parte digniore, suam mutuati

Concerning the Antiquity of Serjeants at Law, it is evident by the Book of the Mirror of Justices, lib. 2. cap. des Loiers, *which treateth of the Laws of this Realm, and the Ministers thereof, long before the Conquest, that Serjeants at Law were of ancient Times called* Narratores, Countors, *or* Counteors, *because the Count or Declaration comprehended the Substance of the original Writ, and the very Foundation of the Suit, of which Part, as of the worthiest they*

they took their Denomination, and is all one in Effect, with that which in the Civil Law is called Libellus: *And they lost not that Name in the Reign of King* E. 1. *as it appeareth by the Statute of* W. 1. c. 29. an. 3 E. 1. *for there he is called* Serjeant Countor, Serviens Narrator: *And by the Statute* Articuli super Chartas cap. 11. anno 28 E. 1. Nest my a intender que home ne poit aver counsel des Countors & des Sages gents pour lour donant; *where, under this Word* Countors, *Serjeants at Law are included, and until this Day, when any proceeds Serjeant, he doth count in some real Action at the Bar of the Court of Common Plea; and under these Words* (Sages gents) *are included Apprentices at Law: But since the Reign of* E. 1. *they have always been called* Servientes ad Legem *for their good Service to the Commonwealth by their sound Advice in Law; and as in ancient Time, they that preserved and kept the Peace were called* Servientes pacis *or* ad pacem, *so these Men are called* Servientes Legis *or* ad legem *or* in legibus,

sunt demonstrationem quæ revera idem est quod in Jure Civili Libellus: Nec nomen istud tempore *E.* primi amiserunt, ut in Statuto de *W.* 1. *cap.* 29. *an.* 3 *E.* 1. liquet, nam ibi appellatur Serviens Narrator: Et per Statutum de *Articulis super chartas, cap.* 11. *an.* 28 *E.* 1. *Nest my a entender, que home ne poet aver counsell des Countors, & des Sages gents, pour lour donant*; ubi in hoc vocabulo (*Countors*) Servientes ad legem includuntur, & ad hunc usque diem, cum ad Servientis gradum quisquam vocetur, in actione aliqua reali ad septum Curiæ placitorum communium narrat: Et sub hiis vocabulis (*Sages gents*) includuntur Jurisperiti, quos Apprenticios dicimus. Sed a tempore Regis *Ed.* 1. hucusque, ob præclara sua in rempubl. præstita servitia per consilia plena prudentiæ & fidelitatis, Servientes ad legem dicti fuerunt; quemadmodum enim seculis retroactis, qui pacem conservabant *Servientes pacis*, vel *ad pacem*, vocabantur, haud aliter hii *Servientes legis* vel *ad legem*, vel *in legibus, &c.* nominantur. Et vetusto

illo

illo tractatu de *Speculo Justiciariorum ubi supra*, *Counteurs* Servientes in patriis Legibus periti describuntur, populo, ad actiones suas pronunciandas & defendendas usque ad sententiæ examen, pro honorario suo deserviturі; quorum officia ibid' præclare depinguntur. Hoc magnam antiquitatem Servientium ad legem demonstrat. *Inter placita de parliament' tent' apud Ashering anno* 19 *Edward* 1. in insigni illo casu *Thomæ de Weylond*, dicuntur Servientes in legibus & consuetudinibus Angliæ experti, &c. & in singulis nostris libris de annis & terminis, a primo, de illis fit mentio; ut in 1 *E*. 3. 22. *Serjeant le Roy*, *&c.* Et in 1 *E*. 3. *fol*. 16. de Apprenticio fit mentio; atque ex hoc verbo (*apprendre*) dicitur Apprenticius, quia esse debet *apprise en la Ley*, eamque ejus peritiam per prælectionem, in Hospitio illo Curiæ cujus e societate est, super statutum habitum, manifeste indicavit; & Servienti gradu proximus est. Quin & denominatio hujusmodi antiqua admodum est, & sic testatur, *Rotulo Parliamenti in crastino*

&c. *And in that ancient Treatise of the* Mirror of Justices ubi supra, Counteurs *are described to be Serjeants Skilful in the Law of the Realm, which serve the Common People to pronounce and defend their Actions in Judgment, for their Fee, whose Duty is there excellently described. This proveth the great Antiquity of the Serjeants at Law.* Inter placita de parliament' tent' apud Ashering anno 19 E. 1. *in that great Case of* Thomas de Weylond *it is said*, Servientes in legibus & consuetudinibus Angliæ experti, &c. *and in all our Books of Years and Terms from the Beginning there is Mention made of them; as in* 1 E. 3. 22. Serjeant le Roy, &c. *and in* 1 E. 3. fol. 16. *there is Mention made of an Apprentice; and he is called an Apprentice of the Law, of this Word* (apprendre) *for that he ought to be* aprise in la Ley, *and hath manifested the same by open reading upon some Statute in that Inn of Court whereof he is Fellow, and is next in Degree under a Serjeant. And this Appellation is very ancient, and so is proved*, Rotulo Parliamenti in crastino

Epiphaniæ

Epiphaniæ anno 20 *E.* 1. Rot. 5. in dorso: *The Act sayeth*, De Atturnatis & Apprenticiis, Dominus Rex injunxit Johanni de Mettingham & sociis suis, quod ipsi per eorum discretionem, provideant & ordinent certum numerum de quolibet Comitatu, &c. *And so is farther proved by a Record*, inter communia placita tenta in Hustingo London. die Lunæ in festo Sancti Clementis Papæ, anno regni E. 3. post conquestum 23. viz. die Jovis proxime ante festum sancti Gregorii Papæ, anno domini 1348. Ego Johannes Tavie armiger lego animam meam Deo, &c. Item lego omnia tenementa mea cum omnibus pertinentiis quæ habeo in parte australi in parochia sancti Andreæ, &c. Aliciæ uxori meæ ad totum terminum vitæ suæ; & quod post decessum prædictæ Aliciæ, totum illud Hospitium in quo Apprenticii legis habitare solebant, per Executores meos, si superstites fuerint, &c. vendatur, & quod de pecunia inde percepta unus Capellanus idoneus pro anima mea, &c. celebrand', dummodo pecu-

Epiphaniæ anno 20 E. 1. *Rot.* 5. *in dorso: Actus sic se habet, De Atturnatis & Apprenticiis, Dominus Rex injunxit Johanni de Mettingham & sociis suis, quod ipsi per eorum discretionem provideant & ordinent certum numerum de quolibet Comitatu, &c.* Et sic ulterius affirmatur ex archivis, *inter communia placita tenta in Hustingo London. die Lunæ in festo S. Clementis Papæ, anno regni* E. 3. *post conquestum* 23. *viz. die Jovis proxime ante festum sancti Gregorii Papæ, anno Domini* 1348. *Ego Johannes Tavie armiger lego animam meam Deo, &c. Item lego omnia tenementa mea cum omnibus pertinentiis quæ habeo in parte australi in Parochia sancti Andreæ, &c. Aliciæ uxori meæ ad totum terminum vita suæ; & quod post decessum prædictæ Aliciæ, totum illud Hospitium in quo Apprenticii legis habitare solebant, per executores meos, si superstites fuerint, &c. vendatur, & quod de pecunia inde percepta unus Capellanus idoneus pro anima mea, &c. celebrand', dummodo pecunia illa perseveraverit, inveniatur. Item lego totum illud tenementum in quo habito cum tribus*

tribus shopis post decessum ipsius Aliciæ ad fabricam Ecclesiæ Sancti Andreæ. Ex hoc monumento tria colligo; prim' de antiquitate Apprenticiorum Legis, Quod ædes Cancellariæ in vico Holborne, modo Hospitium Tavii ante annum 23 *E.* 3. (circiter annos 264. retro elapsos) antiquitus fuerat Hospitium Curiæ, in quo legis Apprenticii tempus solebant impendere: 2. De antiquitate & vero harum ædium Cancellariæ nomine, rectius dictarum Hospitium Tavii: 3. Quod super hoc testamentum, de casu in 21 *R.* 2. *Tit. Devise Fitzh.* 27. judicium ferebatur, quod remanere tenementi præfatæ Aliciæ ad terminum vitæ suæ legati, ad Rectorem Ecclesiæ de Holborne & successores suos spectabat. Tum & 39 *E.* 3. *f.* 47. *b.* in *Quod ei deforceat*, *Ingleby*, Serviens ad legem, qui Tenenti consulebat, exceptionem hanc intendebat, Breve istud (inquit) fundamentum habet Recordum, volumus igitur cogatur Petens Recordum (a quo breve hoc pendet) in certitudine deponere; & in casu *Attinctæ & Scire facias*

nia illa perseveraverit, inveniatur. Item lego totum illud tenementum in quo inhabito cum tribus shopis, post decessum ipsius Aliciæ, ad fabricam Ecclesiæ sancti Andreæ. *Out of this Record I observe three Things; first, for the Antiquity of Apprentices of the Law, that the House of Chancery in* Holborn *now called* Tavie's Inn, *had been of ancient Time, before the three and twentieth Year of* E. 3. *(which is about two Hundred sixty and four Year past) a House of Court, wherein the Apprentices of the Law were wont to inhabit.* 2. *For the Antiquity and true Name of the House of Chancery, rightly called* Tavie's Inn. 3. *That upon this Will the Case in* 21 *R.* 2, *Tit. Devise, Fitzh.* 27. *was adjudged, That the Remainder of the House devised to the said* Alice *for Life, belonged to the Parson of the Church of* Holborn *and his Successors. And in* 39 E. 3. fol. 47. b. *in a* Quod ei deforceat, Ingleby *Serjeant, of Counsel with the Tenant, took this Exception; This Writ (saith he) is founded upon a Record precedent, and therefore we pray, that the*

the Demandant may put the Record (whereupon this Writ dependeth) in certain, and in Case of Attaint *and* Scire facias *(which depend upon Records) the Tenant shall have* Oyer *of the Record:* Wilby *and* Skipwith. *This was never any Exception in this Place, but we have heard it oftentimes amongst the Apprentices in Houses of Court. And concerning Apprentices of Law thus much shall suffice.*

(quæ a Recordis pendent) Tenens auditum recordi obtinebit: *Wilby* & *Skipwith.* Hujusmodi exceptionem hoc loci nunquam novimus, cæterum inter Apprenticios in Hospitiis Curiæ frequentem audivimus. De Apprenticiis satis.

The Manner of the Creation of Serjeants is also most ancient; for it is by Writ, which is commonly found in very ancient Registers, *and continued to this Day, in this Form,* Rex, &c. Willielmo Herle, Salutem: Quia de advisamento concilii nostri ordinavimus vos ad statum & gradum servientis ad legem, in quindena sancti Michaelis proxim' futur', suscipiend', vobis mandamus firmiter injungentes, qd' vos ad statum & gradum prædictum ad diem illum in forma prædicta suscipiend' ordinetis & præparetis: Et hoc sub pœna mille librarum. Teste meipso, &c. *Wherein for the Dignity of him, it is*

Modus creandi Servientes item antiquissimus; est enim per breve, quod in registrorum vetustissimorum plerisque invenitur, & in hunc diem inolevit, sub hac forma, *Rex, &c. Willielmo Herle Salutem: Quia de advisamento concilii nostri ordinavimus vos ad statum & gradum Servientis ad legem, in quindena sancti Michaelis proxim' futur', suscipiend', vobis mandamus firmitur injungentes, quod vos ad statum & gradum prædictum ad diem illum in forma prædicta suscipiend' ordinetis & præparetis: Et hoc sub pœna mille librarum. Teste meipso, &c.* Unde in ejus honorem observandum est: 1. Quod a rege, de advisamento

advisamento concilii sui inde, evocatur. 2. Per breve Regis. 3. Breve istud in plurali numero ad eum ablegatur, vocabulo *Vobis*, dignitatis argumento singulari. 4. *Ad statum & gradum servientis ad legem* vocatur. Et in acto commitiali de 8 *Hen.* 6. *cap.* 10. de Serviente dicitur, *cum statum eundem in se suscipit*: Et in acto parliamentario de 8 *Edw.* 4. *cap.* 2. *Al creation des Serjeants del Ley, &c.* & creatio dignitatem semper intelligit. Verum interea est, quod dictum breve in Registrum excusum non inseritur, haud secus atque brevia ad promovendum aliquem in Baronem regni, vel ampliorem dignitatem, eo quod istiusmodi brevia sunt originaliter *de gratia Regis* tantummodo; & quæ ad usus publicos in Registro imprimuntur, originaliter *de Jure Regis.* De vocationis ejus celebritate, de Capitio, Pallio, Capillari, aliisque insignibus, de apparatu Epulorum lautissimo, de auris annulis erogatis, de ministris, aliisque magnificis de more Cæremoniis, ad propositam quæstionem non attinentibus, vel verbum

to be observed: 1. *That he is called by the King by Advice of his Council in that Behalf.* 2. *By the King's Writ.* 3. *The Writ is directed to him in the Plural Number,* Vobis, *a special Mark of Dignity.* 4. *That he is called* ad statum & gradum Servientis ad legem: *And in the Act of Parliament of* 8 H. 6. cap. 10. *of the Serjeant it is said,* when he taketh the same State upon him: *And in the Act of Parliament of* 8 E. 4. cap. 2. Al creation des Serjeants del Ley, &c. *and Creation is ever applied to Dignity. But it is true that the said Writ is not put into the printed* Register, *no more than Writs to call any to be a Baron of the Realm, or of higher Dignity, for that those Writs originally are only* de gratia Regis; *and such as are published in the printed* Register *are originally* de Jure Legis. *Of the Solemnity of his Call,* viz. *his Hood, Robes, Coif, and other significant Ornaments, of the great and sumptuous Feast they make, of the Rings of Gold they give, of their Attendants, and other great and honourable Ceremonies, I purpose not at this Time*

2 (*being*

(being not pertinent to the Question I have in hand) to write any Thing at all.

Their ancient Reputation is (I assure my self) the better continued, because they without the least Alteration continue the ancient Habits and Ornaments belonging to their State and Degree: For most commonly the ancient Reverence of any Profession vanisheth away with Change of the ancient Habit, albeit the newer be more costly, courtly, and curious. And in the Act of Parliament of 24 H. 8. cap. 13. *he (having both* ſtatum & gradum) *hath the Precedency of divers that ſit on the high Bench in a Court of great Eminency** *in* Weſtminſter-Hall: *But ſeeing there is no Remedy given by Law for Precedency, I (dealing only with Matters in Law) mean not to meddle with it: And albeit I have learned more of the Antiquity of this State and Degree in the School of venerable Antiquity; yet hereof thus much for this Time ſhall ſuffice:* Et (haud) valeant qui contabulatis mendaciis antiquitatem ſuperſtruunt.

* Note; a Serjant at Law had formerly precedence not only of the Maſters in Chancery, but even of the King's Attorney.

quidem dicere non ſtatuo.

Honorem eorum antiquum diuturniorem eſſe credo, eo quod veſtes & inſignia ſtatui & gradui ſuis olim ſolita, nulla ſurrepta immutatione, hodie uſurpant: Plerunque enim fit, antiquam cujuſque ordinis dignitatem evaneſcere una cum veſtimenti immutatione, ſit licet magis pretioſum, aulicum, & ſplendidum illud novitium. In acto parliam' de 24 *H.* 8. *c.* 13. (ſuſcepto tum ſtatu tum gradu) multos Aſſeſſores ſublimis Tribunalis in Curia ſummæ eminentiæ in Aula Weſtmonaſterienſe præcedit: Sed in hoc falcem immittere nolo, cum de præcedendo lex nullum conſtituit remedium, & mihi res eſt cum lege tantum. De ſtatus hujus & gradus antiquitate in veneranda rerum Antiquarum ſchola plura didici: Sed de hac re, hoc ſatis ſuperque: *Et (haud) valeant qui contabulatis mendaciis Antiquitatem ſuperſtruunt.*

Ex

Ex Servientibus hiisce tanquam e seminario Justitiæ, cooptantur Judices; nullus enim nisi Serviens Subsellii Regii, sive actionum communium Judex, vel Capitalis Baro Scaccarii, constitui potest, nec in hospitiorum Servientium ad legem unum vel alterum se conferre potest, nisi qui prius fuit Serviens ad legem; non enim Judicum vel Justiciariorum hospitium dicitur, hospitium Servientium ad legem: Novi enim Barones Scaccarii, hos qui non fuerunt de gradu *de la coife*, (ut loquimur) Judices tamen vicem egerunt, in hospitiis Curiæ, quorum fuerant socii, resedisse, & ex more Apprenticiorum legis vistitos fuisse.

Of these Serjeants, as of the Seminary of Justice, are chosen Judges; for none can be a Judge, either of the Court of King's Bench, or of the Common Pleas, or Chief Baron of the Exchequer, unless he be a Serjeant; neither can he be of either of the Serjeants Inns, unless he hath been a Serjeant at Law; for it is not called Judges or Justices Inn, but Serjeants Inn; for I have known Barons of the Exchequer (that were not of the Coif, and yet had judicial Places and Voices) remain in the Houses of Court whereof they were Fellows, and wore the Habit of Apprentices of the Law.

Tandem vobis sit animus, persuasum me habeo, casus illos evolvendi, quos adhuc tantum gustastis, & *Tempus est Veritatis & Justitiæ sancta adire penetralia:* Valedicam igitur studioso, cui, cum lectionis incremento, magis magisque in hoc studio delectationem exopto, quæ aditum ad venerabilem scientiam augendam dat facilimum, (quem, ex ali-

But I persuade my self you desire to read the Cases whereof I have given you a Taste, & tempus est Veritatis & Justitiæ sancta adire penetralia: *And therefore here will take my Leave of the good Student, to whom I wish with his increase of Reading more and more a Delight in this Study, an excellent Means to attain unto Augmentation of venerable Knowledge (which is*

is one of the Ends of my Labours) not knowing what better Thing to desire for him; and conclude with this Distich and Direction.

is, statui sudorum meorum finem) nesciens quid melius majusve ei vellem: Hoc itaque Disticho & consilio rem conficiam.

Discendi modus est dum te nescire videbis:
Disce, sed assidue, Disce, sed ut sapias.

The

The Case of SUTTON's *Hospital.*

See Lucas's Rep. 146.

Mich. 10 Jac. 1 Rot. 574.

In the King's Bench.

Midd. ss. MEmorandum, that at another Time, that is to say in *Trin. Term* last past, before the Lord the King at *Westm.* came *Simon Baxter*, Gent. by *George Cuppledick* his Attorney, and brought here into the Court of the said Lord the King, then and there his certain Bill against *Richard Sutton*, Esq; and *John Law*, Gent. in the Custody of the Marshal, *&c.* of a Plea of Trespass, and there are Pledges of Suit, to wit, *John Doe* and *Rich. Roe*, which said Bill followeth in these Words. *ss. Middlesex, ss. Simon Baxter*, Gent. complaineth of *Richard Sutton* and *John Law* in the Custody of the Marshal of the *Marshalsey*, of the Lord the King, being before the King himself, of that, that they, the 30th Day of *May* in the 10th Year of the Reign of the Lord *James*, now King of *England*, with Force and Arms, *&c.* the Close and House of him the said *Simon*, that is to say, a capital Messuage, with the Appurtenances, called the late dissolved *Charter-House* besides *Smithfield*, in the Parish of St. *Sepulchre*, in the County aforesaid, they brake and entered, and other Harms to him did, against the Peace of the said Lord the now King, to the Damage of the said *Simon* 40 *l.* and thereof he bringeth Suit. And now at this Day, that is to say, *Friday* next after 8 Days of Saint *Michael* in this Term; until which Day, the aforesaid *Richard* and *John* had License to imparl to the said Bill, and then to answer, *&c.* before the Lord the King at *Westminster*, come as well the aforesaid *Simon Baxter* by his Attorney aforesaid, as the said *Richard* and *John* by *Tho. Hayward* their Attorney; And the said *Richard* and *John*

Full. Ch. Hist. lib. 10. p. 65, 66.

Tr. spass.

come and defend the Force and Injury, when, &c. And say that they are not guilty; and of this put themselves upon the Country; and the said *Sim. Baxter* likewise: Therefore a Jury was to come thereof before the Lord the King at *Westminster*, on *Saturday* next after 8 Days of Saint *Hillary*, and who neither, &c. to recognize &c. because as well, &c. the same Day is given to the Parties aforef. there &c. from which Day the Jury aforesaid, between the Parties aforesaid, of the Plea aforesaid, by Jurors were put thereof between them in respite, until *Monday* next after the Morrow of the Purification of the blessed *Mary* then next following, [unless, &c. shall before come] for Default of Jurors, &c. At which Day before the L. the K. at *Westm.* come as well the aforef. *Simon Baxter*, as the aforef. *John Sutton* and *John Law*, by their Attornies aforesaid; and the said Jurors being likewise called, come, who to say the Truth of the Premisses, chosen, tried, and sworn, say upon their Oath, That one *Thomas Sutton*, Esq; long before the Time in which the Trespass aforesaid is before supposed to be done, was seised of and in all those Manors and Lordships of *Southminster*, *Norton*, *Little Hallingbury*, otherwise *Hallingbury Bowchers*, and *Muchstanbridge*, in the County of *Essex*, with all and singular its Rights, Members, and Appurtenances whatsoever; as also of and in all those Manors and Lordships of *Bustingthorp*, otherwise *Buslingthorp*, and *Dunnesby*, in the County of *Lincoln*, with their Rights, Members and Appurtenances whatsoever; and of and in all those Manors of *Salthorp*, otherwise *Saltrop*, otherwise *Halthrop*, *Chilton*, and *Black-grove*, in the County of *Wilts*, with their Rights, Members, and Appurtenances; and of and in all those Lands, and Pastures called *Black-grove*, containing by estimation 200 Acres of Pasture, with the Appurtenances in *Black-grove*, and *Wroughton*, in the County of *Wilts*; and of and in all those Manors of *Michenden*, otherwise *Missenden*, otherwise called the Manors of *Mussenden*, in the Parish of *Wroughton*, *Lydeyard*, and *Tregose*, in the said County of *Wilts*, with all and singular their Rights, Members, and Appurtenances; and of all that Manor of *Elcomb*, and the Park called *Elcomb* Park, with the Appurtenances in the said County of *Wilts*; and of and in all that Manor of *Wattlescote*, otherwise *Wigglescote*, otherwise *Wiggelscete*, with the Appurtenances in the said County of *Wilts*; and of and in all that Manor of *Wescot*, otherwise *Wescet*, with the Appurtenances in the said County of *Wilts*; and also of and in all those Lands and Pastures, containing by Estimation 100 Acres of Land, and 60 Acres of Pasture, with the Appurtenances in *Wigglescot*, and *Wroughton* in the said County of *Wilts*; and of and in all that Manor of *Uffcot*, with the Appurtenances in the said County of *Wilts*; and also of and in all those two Messuages, and

1000 Acres of Land, 2000 Acres of Pasture, 300 Acres of Meadow, and 300 Acres of Wood, with the Appurtenances in *Broadhinton*, in the said County of *Wilts*; and also of and in all those Manors and Lordships of *Campes*, otherwise *Campes*-Castle, otherwise called Castle-*Campes* with the Appurtenances, situate, lying, being, and extending into the Counties of *Cambridge* and *Essex* or either of them, or elsewhere in the Kingdom of *England*; and also of and in all that Manor of *Balsham* in the County of *Cambridge*, with all and singular the Rights, Members, and Appurtenances whatsoever; and also of and in all and singular those Messuages and Lands, situate, and being in the Parish of *Hackney*, and *Tottenham*, in the County of *Middlesex*, with their Rights, Members, and Appurtenances whatsoever, which Messuages were lately purchased of *W. Bower*, Knt. and the said Lands in *Tottenham* now are, or late were in the Tenure or Occupation of *William Benning* Yeoman; and of and in all and singular the Manors, Lordships, Messuages, Lands, Tenements, Reversions, Services, Feedings, Pastures, Woods, Advowsons, Patronages of Churches, and Hereditaments of the aforesaid *Thomas Sutton*, whatsoever, situate, lying and being in the said Counties of *Essex*, *Lincoln*, *Wilts*, *Cambridge*, and *Middlesex*, or any of them, with all and singular their Rights, Members, and Appurtenances whatsoever in his Demesn of Fee. And the said Jurors further say upon their Oath aforesaid, That the said *Thomas Sutton* so thereof being seised, before the said Time in which, that is to say, at the 4th Session of Parliament begun and holden by Prorogation at *Westm.* in the County of *Middlesex*, the 9th Day of *February* in the 7th Year of the Reign of our Lord *James* by the Grace of God, of *England*, *France* and *Ireland* King, Defender of the Faith, *&c.* and of *Scotland* the 43d, and there continued until the 24th Day of *July* then next following, and then prorogued until the 16th Day of *October* then next following, amongst other Things, it was enacted and established by the Authority of the same Parliament, as followeth in these Words.

An Act to confirm and enable the Erection and Establishment of an Hospital, a free Grammar-School, and sundry other godly and charitable Acts and Uses, done and intended to be done and performed by Thomas Sutton, *Esq*;

HUmbly beseecheth your Majesty, your loyal and dutiful Subject Thomas Sutton *of* Balsham *in the County of* Cambridge, *Esq; That it may please your most excellent Majesty, and the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, to enact, ordain, and establish; and be it enacted, ordained and estabished by the Authority aforesaid, That in the Town of* Hallingbury, *otherwise called* Hallingbury Bowchers *in the County of* Essex, *there may be builded and erected (at the Costs and Charges of your Suppliant) one meet, fit and convenient House, Buildings, and Rooms for the Abiding and Dwelling of such Number of poor People, Men and Children, as your Suppliant shall name, limit and appoint to be lodged, harboured, abide, and be relieved there, and for the Abiding, Dwelling, and necessary Use of one Schoolmaster and Usher to instruct the said Children in Reading, Writing, and* Latin *and* Greek *Grammar, and of one divine and godly Preacher to instruct and teach all the rest of the same House in the Knowledge of God and his Word, and of one Master to govern all these Persons of, in, or belonging unto the same House, and that the same shall and may be called and named the Hospital of King* James, *founded in* Hallingbury *in the County of* Essex, *at the humble Petition and at the only Costs and Charges of* Tho. Sutton, *Esq; and that the Right Reverend Father in God* Richard, *now Archbishop of* Canterbury, *and his Successors Archbishops there,* Thomas *Lord* Ellesmere *Lord Chancellor of* England, *and such as after him shall succeed to be Lord Chancellors or Lord Keepers of the Great Seal of* England, *for and during the Time they shall so continue or be in the same Office,* Robert *Earl of* Salisbury, *Lord High Treasurer of* England, *and such as after him shall succeed to be Lord Treasurers of* England, *for and during the Time they shall continue or be in the same Office, The Reverend Father in God* Launcelot, *Bishop of* Ely *and his Successors Bishops there,* Richard *Bishop of* Rochester *and Dean of the Cathedral Church of* Westminster *and his Successors of and in the same Deanry of* Westminster, *Sir* Thomas Foster, *Knight, one of the Justices of your Majesty's Court of Common Pleas usually holden at* Westminster, *Sir* Henry Hobart, *Knight, your Majesty's Attorney General,* John Overal,

Overal, *Doctor of Divinity, Dean of the Cathedral Church of Saint* Paul *in* London, *and his Successors Deans there,* Henry Thursby, *Esquire, one of the Masters of your Majesty's Court of Chancery,* Thomas Fortescue, Thomas Pager, Geffery Nightingal *and* Richard Sutton, *Esquires,* John Lawe *and* Thomas Browne, *Gentlemen, and such others as shall be from Time to Time for ever hereafter chosen and nominated in and to the Places and Steads of such of them as shall decease, by your Suppliant during his Life, and after his Decease, by the most Part of them which then shall be Governors of the said Hospital, to be and succeed in and to the Place and Places of him and them deceasing, shall and may be the Governors of the said Hospital, and of the Members, Goods, Lands, Revenues and Hereditaments of the same at all Times hereafter for ever, and that the same Governors and Hospital shall for ever hereafter stand and be incorporated, established, and founded in Name and in Deed a Body politick and corporate, to have Continuance for ever, by the Name of the Governors of the Hospital of King* James, *founded in* Hallingbury *in the County of* Essex, *at the humble Petition and at the only Costs and Charges of* Thomas Sutton, *Esq; and that they the said Governors may have a perpetual Succession, and that by that Name they and their Successors may for ever hereafter have, hold, and enjoy the Manors, Lorships, Messuages, Lands, Tenements and Hereditaments hereafter mentioned, without any Licence or Pardon for any Alienation of them or any of them, and without any Licence of or for Mortmain, or any other Law or Statute to the contrary notwithstanding, That is to say, your Suppliant's Manors and Lordships of* Southminster, Norton, Little Hallingbury, *alias* Hallingbury Bouchers, *and* Much Stambridge *in the County of* Essex, *with all their and every of their Rights, Members, and Appurtenances whatsoever, and also all those your Suppliant's Manors and Lordships of* Bussingthorp *and* Dunnesbye *in the County of* Lincoln *with their and either of their Rights, Members, and Appurtenances whatsoever, and also all those your Suppliant's Manors of* Salthorp, *alias* Saltrop, Chilton, *and* Blackgrove *with their and every of their Rights, Members and Appurtenances in the said County of* Wilts, *and also all those your Suppliant's Lands and Pasture-Grounds called* Blackgrove, *containing by Estimation*

two hundred Acres of Pasture, with the Appurtenances in Blackgrove *and* Wroughton *in the said County of* Wilts, *And also all that your Suppliant's Manor of* Mihenden, *otherwise called the Manor of* Mihunden *in the Parishes of* Wroughton, Lydgerd *and* Tregoce *in the said County of* Wilts, *And all that your Suppliant's Manor of* Elcombe, *and the Park called* Elcombe Park *in the said County of* Wilts, *And all that your Suppliant's Manor of* Wattlescote, *otherwise called* Wigglescote, *otherwise called* Wiglesete, *otherwise called* Wikelscete, *in the County of* Wilts, *And all that your Suppliant's Manor of* Wescote, *otherwise called* Wescete *with the Appurtenances in the said County of* Wilts, *And also all those your Suppliant's Lands and Pastures, containing by Estimation one hundred Acres of Land, and threescore Acres of Pasture in* Wiglescote *and* Wroughton *in the said County of* Wilts, *And also all that your Suppliant's Manor of* Uffcote *with the Appurtenances in the said County of* Wilts, *And all those your Suppliant's two Messuages and one thousand Acres of Land, two thousand Acres of Pasture, three hundred Acres of Meadow, and three hundred Acres of Wood with the Appurtenances in* Brodehinton *in the said County of* Wilts, *And also all those your Suppliant's Manors and Lordship's of* Campes, *otherwise called* Compes, *otherwise called* Campes Castle, *otherwise called* Castle Campes, *situate, lying, being and extending in the Counties of* Cambridge *and* Essex, *or in either of them, or elsewhere within the Realm of* England, *And also all that your Suppliant's Manor of* Balsham *in the County of* Cambridge, *with all and singular the Rights, Members and Appurtenances thereof whatsoever, And also all that your Suppliant's Messuage and Lands situate and being in the Parishes of* Hackney *and* Tottenham *in the County of* Middlesex, *or in either of them with their and either of their Rights, Members and Appurtenances whatsoever, which said Messuage was lately purchased of Sir* William Bowyer, *Knt. and the Lands in* Tottenham *now or late in the Tenure or Occupation of* William Benning *Yeoman, and also all and singular the Manors, Lordships, Messuages, Lands, Tenements, Reversions, Services, Meadows, Pastures, Woods, Advowsons, Patronages of Churches, and Hereditaments of your Suppliant whatsoever, situate, lying or being*

within

within the said Counties of Essex, Lincoln, Wilts, Cambridge, *and* Middlesex, *or any of them, with all and every their Rights, Members, and Appurtenances whatsoever: And also all your Suppliant's Letters Patent, Indentures, Deeds, Evidences, Bonds and Writings concerning the Premisses, or any of them, And all such Conditions, Warranties, Vouchers, Actions, Suits, Entries, Benefits, and Demands as shall or may be had by any Person or Persons, upon or by Reason of them or any of them, except those your Suppliant's Manors or Lordships of* Littlebury *and* Hadstocke *in the said County of* Essex *: And except all your Suppliant's Lands, Tenements and Hereditaments in* Littlebury *and* Hadstocke *aforesaid, or in either of them, And that the said Governors and there Successors by the same Name shall and may have Power, Ability, and Capacity, to demise, lease, and grant their said Possessions and Hereditaments, and every of them, And to take, acquire, and purchase, And to sue and be sued, And to do, perform, and execute all and every other lawful Act and Thing, good necessary and profitable for the said Incorporation, in as full and ample Manner and Form to all Intents, Constructions, and Purposes, as any other Incorporations or Body politick or corporate, fully and perfectly founded and incorporated, may do, And that the same Governors and their Successors for the Time being may have and use a common Seal for the Making, Granting, and Demising of such their Demises and Leases, and for the doing of all and every other Thing touching, or in any wise concerning the said incorporation, In which Seal shall be ingraven the Arms of the said* Thomas Sutton *your Suppliant: And also that it may be further enacted by the Authority aforesaid, and be it enacted by the Authority aforesaid, that your Suppliant during his Life, and the said Governors and their Successors for the Time being, or the most part of them, after his Decease shall and may have full Power and lawful Authority to break, alter and change the said Seal: And that your said Orator during his Life, and the said Governors and their Successors for the Time being, or the most Part of them, after his Decease, shall and may have full Power and Authority to nominate and appoint, and shall and may nominate and appoint, when and as often as he and they shall think good, such Person and Persons as he and they shall think meet to be*

Master, Preacher, School-master, Usher, poor Men, poor Children, and Officers of the said Hospital, And when any of them by Death, Resignation, Deprivation, or otherwise, shall become void, shall and may within one Month next after such Avoidance, by Writing under their said common Seal, nominate and appoint one or more learned, godly, and discreet and meet Men and Persons to be Master, Preacher, School-master, Usher, poor Men, poor Children, and Officers in the Places of them and every of them so Deceasing, Resigning, or otherwise becoming void, And that in Case the said Governors and their Successors for the Time being, or the most Part of them, shall not within one Month after such Avoidance make such Nomination and Appointment as aforesaid, That then and so often, and in every such Case, from and after the Decease of your said Orator, it shall and may be lawful to your Majesty, your Heirs and Successors, by your Letters Patent under the Great Seal of England, *to nominate and appoint some meet, godly and learned Men in and to the Places void, by such Default of the said Governors and their Successors for the Time being, or the most Part of them, as is aforesaid: And that it shall and may be lawful to and for the said Master, Preacher, School-master, Usher, poor People, poor Children, and Officers of the said Hospital to remain, assemble, be and cohabit together in the said House, Buildings, and Hospital: And that it may be further enacted by the Authority aforesaid, And be it enacted by the Authority aforesaid, That your said Suppliant during his Life, and that the said Governors and their Successors for the Time being, or the most Part of them, after his Decease, shall and may have full Power and Authority, under the said common Seal, to make, ordain, set down, and prescribe such Rules, Statutes, and Ordinances for the Order, Rule, and Government of the said Hospital, and of the said Master, Preacher, School-master, Usher, poor Men, poor Children, and Officers, and their Successors, and for their and every of their Stipends and Allowances, for or towards their or any of their Maintenance and Relief, as to your said Suppliant during his Life, and the said Governors and their Successors for the Time being, or the most Part of them, after his Decease, shall seem meet and convenient, And that the same Orders, Rules, Statutes, and Ordinances so by him, them, or any of them made, set down,*

down, and prescribed as aforesaid, shall be and stand in full Force and Strength in Law, the same not being repugnant nor contrary to your Majesty's Prerogative Royal, nor to the Laws or Statutes of this your Majesty's Realm of England, *nor to any Ecclesiastical Canons or Constitutions of the Church of* England *then in Force and Use: And that your Suppliant during his Life, and the said Governors and their Successors for the Time being, or the most Part of them, and such of them as your Suppliant shall thereto appoint and nominate, shall and may, after the Decease of your said Suppliant, have Power and Authority to visit the said Hospital, and to order, reform, and redress all Disorders and Abuses in and touching the Government and disposing of the same, And further to censure, suspend and deprive the said Master, Preacher, School-master, Usher, poor Men, poor Children, and Officers for the Time being, and every or any of them, as to him and them shall seem just, fit and convenient, So always that no Visitation, Act or Thing in or Touching the same, be had, made, or done, other than by your Suppliant during his Life, or the said Governors and their Successors for the Time being, or the most Part of them after his Decease, or by such of them as your Suppliant shall thereunto nominate and appoint: And also, that it may be further enacted by the Authority aforesaid, And be it enacted by the Authority aforesaid, That the said Preacher and Minister of the Word of God, which shall be placed in the said Hospital to and for the Uses and Purposes aforesaid, from Time to Time hereafter shall and may enter into, have, hold, and enjoy the Rectory and Parsonage of* Hallingbury *aforesaid, in and to his own proper Use and Behoof, for and during so long Time as he shall be Preacher and Minister there, without any other Presentation or Admission, Institution, or Induction, and that no Lease shall hereafter be made of the said Parsonage, or of any Part or Portions thereof, other than such as shall determine and end when and as soon as any such Person as shall be the Preacher or Minister of and in the said Hospital, when the same Lease shall be made, shall decease or resign, leave or be put out and removed from his said Place of Preacher or Minister of and in the said Hospital, Saving always and reserving to your Majesty, your Heirs and Successors and to all and every other Person and Persons,*

Bodies

Bodies politick and corporate, their Heirs and Successors, other than your Suppliant and his Heirs, and the Person and Persons from whom the same were purchased and their Heirs, claiming only as Heirs, all such Estate, Right, Title, Condition, Claim, Possession, Rents, Services, Commons, Demands, Actions, Remedies, Recoveries, Terms, Interests, Forfeits, Commodities, Advantages and Hereditaments whatsoever, which they or any of them shall or may have, or of Right ought to have, of, in, to, or out of the Premisses, or any of them, or any Part thereof, as if this Act had never been had or made, Other than Fine or Fines of or for any Alienation of the Premisses or any Part or Parcel thereof, And other than Respits of Homage, or Fines for Non-payment of Respits of Homage, at any Time hereafter to be demanded, And other than Title and Right of Liberty or Liberties to enter into the same, or any of them, for or by Reason of any Statute heretofore made for, concerning, or against any Alienation or Mortmain prout per eundem actum inter alia plenius apparet. And further the said Jurors say upon their Oath aforesaid, That *Thomas*, then and now Earl of *Suffolk*, Lord Chamberlain of the King's Houshold, before the aforesaid time in which, &c. was seised of and in a certain capital Messuage or Mansion-house, called or known by the Name of *Howard-house*, otherwise called the late dissolved *Charter-house*, besides *Smithfield*, situate, lying and being in the County of *Middlesex*, with all and singular Rights, Members, and Appurtenances to the same belonging and appertaining, And all that Orchard and Garden with the Appurtenances, thereunto likewise belonging and appertaining, and of and in all that parcel of Land with the Appurtenances, commonly called *Pardon Church-yard*, and of all those two Messuages or Tenements, and two Closes of Land with the Appurtenances thereunto belonging, commonly called *Welbech*, situate, lying and being in the said County of *Middlesex*, whereof the aforesaid capital Messuage with the Appurtenances, in the Declaration aforesaid mentioned is, and the aforesaid time in which it is above supposed the Trespass aforesaid to be done, as also time whereof the Memory of Men is not to be contrary, was parcel, in his Demesn as of Fee; And so thereof being seised, the said now Earl of *Suffolk*, before the time in which, &c. that is to say, the 9th Day of *May* in the 9th Year of the Reign of the now King *James* of *England*, &c. at *Westminster* in the County of *Middlesex*, by his certain Indenture, between him the said now Earl, by the Name of the Right Noble *Thomas* Earl of *Suffolk*, Lord Chamberlain of the Most Honourable Houshold of the Lord the King,

and

and *Theophilus* Lord *Howard*, Son and Heir apparent of the said Earl of *Suffolk*, and *Thomas* Earl of *Arundel* and *Surrey*, and *William* Lord *Howard* of *Nawarde* in the County of *Cumberland* of the one Part, and the aforesaid *Thomas Sutton* by the Name of *Thomas Sutton* of *Balsham*, in the County of *Cambridge*, Esq; on the other Part made, and within six Months then next following, in the Court of the said Lord the King of *Common Pleas*, at *Westm.* aforesaid, then being in due Manner of Record inrolled, according to the Form of the Statute in such Case made and provided, one Part of which, as well with the Seal of the aforesaid *Thomas* now Earl of *Suffolk*, as with the Seals of the aforesaid *Theophilus* Lord *Howard*, *Thomas* Earl of *Arundel* and *Surrey*, *Will.* Lord *Howard*, sealed, to the Jurors aforesaid in Evidence shewed, bearing Date the same Day and Year, for and in consideration of the Sum of 13000 *l.* of good and lawful Money of *England*, by the said *Thomas Sutton*, to the aforesaid *Thomas* Earl of *Suffolk*, in Hand payed, bargained and sold, all and singular the Premisses, with the Appurtenances, being called, The late dissolved *Charter-House*, besides *Smithfield*, in the said County of *Middlesex*, whereof, &c. to the said *Thomas Sutton*, to have and to hold, to him and his Heirs for ever, to the only Use and behoof of the said *Thomas*, his Heirs and Assigns for ever; the Tenor of which Indenture followeth in these Words, *This Indenture made the ninth Day of* May *in the ninth Year of the Reign of our Sovereign Lord* James *by the Grace of God King of* England, France *and* Ireland, *Defender of the Faith*, &c. *and of* Scotland *the four and fortieth, between the Right Honourable* Thomas *Earl of* Suffolk, *Lord Chamberlain of the King's Majesty's most Honourable Houshold, The Right Honourable* Theophilus *Lord* Howard *Son and Heir apparent of the said Earl of* Suffolk, *The Right Honourable* Thomas *Earl of* Arundel *and* Surrey, *And the Right Honourable* William *Lord* Howard, *of* Naward *in the County of* Cumberland *on the one Party, and* Thomas Sutton *of* Balsham *in the County of* Cambridge, *Esq; on the other Party, witnesseth, that the said Right Honourable* Thomas *Earl of* Suffolk, Theophilus *Lord* Howard, Thomas *Earl of* Arundel *and* Surrey, *and* William *Lord* Howard, *for and in Consideration of the Sum of thirteen thousand Pounds of good and lawful Money of* England, *to the said* Thomas *Earl of* Suffolk *in Hand before the Sealing and Delivery of these Presents by the said* Thomas Sutton *well and truly satisfied, contented and payed, whereof and wherewith they and every of them acknowledge themselves fully satisfied, contented,*

tented, and paid, and thereof and of every Part and Parcel thereof do clearly acquit, exonerate, and Discharge the said Thomas Sutton, *his Heirs, Executors, and Administrators, and every of them for ever by these Presents, have granted, aliened, bargained, sold, conveyed and confirmed, and by these Presents do for them and their Heirs fully, clearly, and absolutely grant, alien, bargain, sell, convey and confirm unto the said* Thomas Sutton *his Heirs and Assigns for ever, all that capital Messuage or Mansion-house, commonly called or known by the Name of* Howard-house, *otherwise called the late dissolved* Charter-house *besides* Smithfield, *scituate and being within the County of* Middlesex, *with all and singular the Rights, Members, and Appurtenances thereunto belonging and appertaining, And all that Orchard and Garden with the Appurtenances thereunto likewise belonging and appertaining, and all that Parcel of Land and Ground with the Appurtenances commonly called* Pardon Church-Yard, *And all those two Messuages or Tenements and two Closes of Land and Ground with the Appurtenances thereunto adjoining, commonly called* Welbeche, *scituate, lying, and being in the said County of* Middlesex, *And also all and singular Messuages, Houses, Edifices, Buildings, Barns, Stables, Dove-houses, Courts, Folds, Curtilages, Yards, Orchards, Gardens, Shops, Sellars, Sollers, Closes, Inclosures, Waste Grounds, Tithes, Oblations, Obventions, Fruits, Profits, Alterages, Ways, Waters, Rents, Reversions, Services, Waifs, Strays, Goods of Felons, Outlaws and Fugitives, and all other Franchises, Liberties Privileges, Jurisdictions, Profits, Emoluments, Commodities, Hereditaments, and Appurtenances whatsoever, by what Name or Names soever the same be called or known, to the said capital Messuage or Mansion-house called* Howard-House, *or the late dissolved* Charter-house *besides* Smithfield, *and other the before mentioned Premisses, and to every or any of them lying, belonging, or in any wise appertaining, or to or with the same, every, or any of them usually held, occupied, or enjoyed, or accepted, reputed, taken, known, demised, used, or letten as Part, Parcel or Member of them, or any of them, And also the Reversion and Reversions, Remainder and Remainders whatsoever of all and singular the Premisses with the Appurtenances, And all Rents and yearly Profits whatsoever reserved upon any De-*

mise,

mise, Lease, Estate, or Grant, Demises, Leases, Estates, or Grants, heretofore made or granted of the before-mentioned Premisses, or of any Part or Parcel thereof: And also all the Estate, Right, Title, Interest, Use, Possession, Reversion, Remainder, Claim, and Demand whatsoever of them the said Thomas *Earl of* Suffolk, Theophilus *Lord* Howard, Thomas *Earl of* Arundel *and* Surrey, *and* William *Lord* Howard, *and of every of them, of, in or unto the said capital Messuage or Mansion-house, commonly called* Howard-House, *or the late dissolved* Charter-house *besides* Smithfield; *And other the before-mentioned Premisses, or of, in, or unto every or any Part or Parcel thereof, And further the said Right Honourable* Thomas *Earl of* Suffolk, Theoph. *Lord* Howard, Thomas *Earl of* Arundel *and* Surrey, *and* William *Lord* Howard, *for the Considerations aforesaid, have granted, bargained, and sold, and by these Presents do grant, bargain, and sell unto the said* Thomas Sutton, *his Heirs and Assigns for ever, All and every the Deeds, Evidences, Charters, Writings, Counterpaines of Lease and Leases, Indentures, Exemplifications, Letters Patents, Transcripts of Fines and Recoveries, Terrers, Court-Rolls, Surveys, Presentments, Boundaries, Escripts, and Muniments whatsoever touching or in any wise only concerning the said capital Mess. or Mansion-house, and other the before-mentioned Premis. or any Part or Parcel thereof only: To have and to hold the said capital Messuage or Mansion-house called* Howard-house, *or the late dissolved* Charter-house *besides* Smithfield, *Houses, Buildings, Orchards, Gardens, Closes, Inclosures, Tenements, and Hereditaments, and all other the Premisses before, in, or by these Presents bargained and sold, or mentioned, intended, and meant to be barguined and sold, and every Part and Parcel thereof with the Appurtenances unto the said* Thomas Sutton, *his Heirs and Assigns for ever, To the sole, only, and proper Use and Behoof of him the said* Thomas Sutton, *his Heirs and Assigns for ever more, absolutely, without any Manner of Condition, Redemption or Revocation in any wise, And the said* Tho. *Earl of* Suffolk, *and his Heirs, the said capital Messuage or Mansion-house called* Howard-House, *or the* Charter-house, *and all and singular other the before-mentioned Premisses, with all their and every of their Appurt. and every Part and Pareel thereof, unto the said* T. Sutton, *his Heirs and Assigns for ever, in Manner and Form afores. against him the said* Tho. *E. of* Suffolk, *and his Heirs and all and every other Person and Persons lawfully claiming by, from, or under him, shall and will warrant and for evermore defend by these*

these Presents: And the said Theophilus *Lord* Howard *and his Heirs the said capital Messuage or Mansion-house, called* Howard-house, *or the* Charter-house, *And all and singular other the before-mentioned Premisses and every Part and Parcel thereof with the Appurtenances, unto the said* Tho. Sutton, *his Heirs and Assigns for ever in Manner and Form aforesaid, against him the said* Theophilus *Lord* Howard *and his Heirs, and all and every other Person and Persons lawfully claiming by, from, or under him, shall and will warrant and for evermore defend by these Presents: And the said* Thomas *Earl of* Arundel *and* Surrey *and his Heirs, the said capital Messuage or Mansion-house called* Howard-House, *or the* Charter-house, *And all and singular other the before-mentioned Premisses, and every Part or Parcel thereof with the Appurtenances, unto the said* Thomas Sutton *his Heirs and Assigns for ever, in Manner and Form aforesaid, against him the said* Thomas *Earl of* Arundel *and* Surrey *and his Heirs, And all and every other Person and Persons lawfully claiming by, from, or under him, shall and will warrant and for evermore defend by these Presents: And the said* William *Lord* Howard *and his Heirs the said capital Messuage or Mansion-House called* Howard-house, *or the* Charter-house, *and all and singular other the before-mentioned Premisses, and every Part and Parcel thereof with the Appurtenances, unto the said* Thomas Sutton *his Heirs and Assigns for ever, in Manner and Form aforesaid, against him the said* William *Lord* Howard *and his Heirs, and all and every other Person or Persons lawfully claiming by, from, or under him, shall and will warrant and for ever defend by these Presents: In Witness whereof the Parties above-named to these present Indentures interchangeably have set their Hands and Seals the Day and Year first above written* 1611, as by the same Indenture, dated as before is said, appeareth. All and singular which Premisses, by the Indenture aforesaid, in Form aforesaid Bargained, are known and vulgarly called, and at the Time of the Bargain aforesaid, were known by the Name of *The late dissolved* Charter-house *besides* Smithfield. By Colour of which Bargain, Sale, and Inrolment aforesaid, as also by Force of a certain Act in Parliament of the Lord *Henry* the 8th, late King of *England*, holden at *Westminster* aforesaid, the 4th Day of *February* in the 27th Year of his Reign, of transferring Uses into Possessi. made, and provided, the same *Tho. Sutton*, into all and singular the said bargained premisses, called

called *the late dissolved* Charter-house *besides* Smithfield, with the Appurtenances, whereof, *&c.* entred, and was thereof seised in his Demesn as of Fee; and so thereof being seized, the Lord *James*, now King of *England*, the 22d Day of *June* in the ninth Year of the Reign of the said Lord the King now of *England, &c.* abovesaid, at *Westminster* aforesaid, made his certain Letters Patents, sealed with his Great Seal of *England*, and to the Jurors aforesaid shewed in Evidence, the Tenor of which followeth in these Words.

James *by the Grace of God King of* England, Scotland, France *and* Ireland, *Defender of the Faith*, &c. *To all to whom these Presents shall come greeting. Whereas at the last Session of Parliament last Past, one Act was made and passed, intituled,* An Act to confirm and enable the Erection and Establishment of an Hospital, a free Grammar School, and sundry other godly and charitable Acts and Uses, *done and intended to be done and performed by* Thomas Sutton, *Esq; as by the same Act of Parliament more at large it doth and may appear: And whereas, sithence the said Act, the said* Thomas Sutton *hath purchased to him and his Heirs of our right trusty and well beloved Cousin and Counsellor* Thomas *Earl of* Suffolk, *Lord Chamberlain of our Houshold, a great and large Mansion-house, commonly called the late dissolved* Charter-house *besides* Smithfield, *together with divers Houses, Buildings, Courts, Yards, Gardens, Orchards, Closes, and other Hereditaments to or with the same Mansion-house used or enjoyed, or reputed as Part, Parcel, Member, or belonging thereunto within our County of* Middlesex, *which Mansion-house and other the Premisses the said* Thomas Sutton *doth conceive to be a more fit and commodious House and Place, to place, erect, and found the said Hospital and Free-School, and other godly and charitable Uses aforesaid, than in* Halingbury, *alias* Halingbury Bowchers *in the said Act mentioned, And to that End the said* Thomas Sutton *hath been an humble Suitor unto us, That we would be graciously pleased to give Licence, Power, and Authority unto him the said* Thomas Sutton, *to found, erect and establish an Hospital and Free-School, and other the godly and charitable Uses by him intended, in the said House called the late dissolved* Charter-house *besides* Smithfield (*and*) *in the said Premisses in our said County of* Middlesex, *And to incorporate the Governors of the same hereafter named, to be a Body corporate and Politick, and to have perpetual Succession for ever in Fact, Deed, and Name,*

Name, And by such Name of Incorporation, as is hereafter mentioned to have full Authority and lawful Capacity and Ability to purchase, take, hold, receive, and have to them and their Successors for ever, Manors, Lands, Tenements, Tithes, Rents, Reversions, Annuities, Pensions, Hereditaments, Goods, and Chattels whatsoever, as well of us our Heirs and Successors, as of any other Person and Persons whatsoever, for the better Maintenance of the said Hospital, Free-School, and other the godly and charitable Uses aforesaid: Know ye therefore, That we graciously affecting so good and charitable a Work, of our princely Disposition and Care for the furtherance thereof, and of our especial Grace, certain Knowledge, and mere Motion, have given, granted, and confirmed, And by these presents do give, grant and confirm, for us, our Heirs and Successors, unto the said Thomas Sutton, *his Heirs, Executors, Administrators, and Assigns, and to every of them, full Power, Licence, and lawful Authority, at all Times hereafter at his and their Will and Pleasure to place, erect, found, and establish at or in the said House called the late dissolved* Charter-house *besides* Smithfield, *and other the Premisses within our said County of* Middlesex, *one Hospital, House, or Place of Abiding for the Finding, Sustentation, and Relief of poor, aged, maimed, needy, or impotent People, As also that the said* Tho. Sutton, *during his Life, and after his Death the Governors hereafter named and their Successors, and the Survivors and Survivor of them, and his and their Successors for ever, And the Governors thereof for the Time being, and their Successors, shall have full Power, License, and lawful Authority, at his and their Wills and Pleasures respectively, from Time to Time and at all Times hereafter, to place therein such Master or Head of the said Hospital, and Numbers of poor People, Men and Children, and such other Members and Officers of the said Hospital, as to him the said* Tho. Sutton, *during his Life, and after his Death to the said Governors and their Successors, and to the Survivors and Survivor of them, and to his and their Successors, and to the Governors thereof for the Time being and their Successors shall seem convenient: And further we, of our said especial Grace certain Knowledge and meer Motion, have given, granted, and confirmed; And by these Presents we do give, grant, and confirm for Us, our Heirs and Successors, unto the said* Thomas Sutton, *his Heirs, Executors, Administrators, and Assigns, and to every of them, at his and their Wills and Pleasures, full Power, Licence, and lawful Authority,*

at all Times hereafter, to place, erect, found, and establish, at or in the said House called the late dissolved Charter-house *besides* Smithfield, *and other the Premisses in our said County of* Middlesex, *one Free-School for the Instructing, Teaching, Maintenance, and Education of poor Children or Scholars; And that the said* Thomas Sutton *during his Life, and after his Decease the Governors hereafter named, and their Successors, and the Survivors and Survivor of them and his and their Successors for ever, And the Governors of the said Hospital for the Time being and their Successors, shall have full Power, Licence, and lawful Authority, at his or their Wills and Pleasures, from Time to Time and at all Times hereafter, to place therein such Numbers of poor Children or Scholars, as to him the said* Thomas Sutton *during his Life, and after his Decease to the said Governors and their Successors, and to the Survivors and Survivor of them and his and their Successors, and to the Governors of the said Hospital for the Time being, and their Successors, shall seem convenient; And likewise one learned, able, and Sufficient Person, to be School-master of the said School, and one other learned, able, and sufficient Person to be Usher thereof, to teach and instruct the said Children in Grammar, And also one learned and godly Preacher to preach and teach the Word of God to all the said Persons, poor People, and Children, Members and Officers, at or in the said House: And further we, of our said especial Grace, certain Knowledge, and meer Motion, have ordained, constituted, assigned, limited, and appointed, And by these Presents for Us our Heirs and Successors do ordain, constitute, assign, limit, and appoint, that the said House and other the Premisses, shall from henceforth for ever hereafter be, remain and continue, and be converted, imployed, and used for an Hospital and House and Place for the Abiding, Dwelling, Sustentation and Relief of such Numbers of poor People, Men and Children, as the said* Thomas Sutton *during his Life, and after his Death the Governors hereafter named and their Successors and the Survivors and Survivor of them and his and their Successors, And all and every the Governors of the said Hospital for the Time being and their Successors shall name, assign, limit, or appoint to be lodged, harboured, abide, and to be maintained and relieved there, And for the Abiding, Dwelling, Sustentation, and Relief of such Numbers of poor Children as the said* Thomas Sutton *during his Life, and after his Death the Governors hereafter named*

and their Successors, and the Survivors and Survivor of them and his and their Successors, and the Governors of the said Hospital for the Time being and their Successors, shall from Time to Time name, assign, limit, or appoint to be lodged, harboured, abide, and to be maintained and relieved there, And for the Abiding, Dwelling, Sustentation, and Finding of one School-master, one Usher, and one Preacher as is aforesaid, and of one Head or Master of the said House and Hospital; And that it shall and may be lawful to and for the said Master, Preacher, School-master, Usher, poor People, Children, Members, and Officers of the said Hospital, or therein to be placed, for the Time being, to assemble, be, remain, abide, and cohabit together in the said Hospital, And that the said Hospital shall for ever hereafter be incorporated, named, and called, The Hospital of King James, founded in the Charter-house within the County of Middlesex, at the humble Petition and only Costs and Charges of Thomas Sutton, Esquire, *And the same Hospital and Free School by the Name of the Hospital of King* James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq; We do firmly by these Presents, for Us our Heirs and Successors erect, found, establish, and confirm to have Continuance for ever: And for the better Maintenance and Continuance of the said Hospital and Free School and the said godly and charitable Uses, Intents, and Purposes; And that the same may have and take the better Effect, And that all and every the Manors, Lands, Tenements, Rents, Reversions, Services, and Hereditaments, Goods and Chattels to be given, granted, conveyed, assigned, devised, willed, limited, or appointed for the Maintenance, Sustentation, and Relief of the Persons aforesaid in the same Hospital, may be the better governed, used, imployed, and bestowed for the Maintenance of the Persons in the said Hospital for the Time being to have Continuance for ever, We will and ordain, and do appoint, assign, limit, and name, And for Us our Heirs and Successors do grant, and ordain by these Presents, That there shall be for ever hereafter sixteen Persons which shall be called Governors of the Lands, Possessions, Revenues, and Goods of the Hospital of King* James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Tho. Sutton, *Esq; and for that Purpose we have elected, nominated, ordained, assigned, constituted, limited, and*

appointed

appointed, And by these Presents do for us our Heirs and Successors elect, nominate, ordain, assign, constitute, limit and appoint the Right Reverend Father in God George, *now Archbishop of* Canterbury, *our right trusty and well beloved Cousin and Councellor,* Thomas *Lord* Ellesmere *Lord Chancellor of* England, *our right trusty and well beloved Cousin and Councellor,* Robert *Earl of* Salisbury, *Lord High Treasurer of* England, John *the elect Bishop of* London, Launcelot, *now Bishop of* Ely, *Sir* Edward Coke, *Knt. Chief Justice of the Common Pleas, Sir* Tho. Foster, *Knt. one of our Justices of our Court of Common Pleas, Sir* Henry Hobart, *Knight and Baronet, our Attorney General,* John Overal, *now Dean of the Cathedral Church of St.* Paul *in* London, George Mountaine, *Dean of the collegiate Church of* Westminster, Henry Thursby, *Esq; one of the Masters of our Court of Chancery,* Jeffery Nightingale, *Esq;* Richard Sutton, *Esq;* John Law, *Gent.* Thomas Brown, *Gent. and the Master of the Hospital of King* James, *founded in the* Charter-house, *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq; and such Person and Persons as shall from Time to Time be Master or Masters of the said Hospital for and during such Time as they shall be Master or Masters thereof, to be the first and present Governors of the Lands, Possessions, Revenues, and Goods of the Hospital of King* James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq; and that they and the Survivors of them, and such as the Survivors and Survivor of them shall from Time to Time elect and choose, to make up the Number of Sixteen, when and as often as any of them or any of their Successors shall happen to decease, or be removed from being Governors or Governor thereof, shall be incorporated and have a perpetual Succession for ever in Deed, Fact, and Name, and shall be one Body corporate and politick, and that the said Persons and their Successors, and the Survivors and Survivor of them and his and their Successors, and such as shall be elected and chosen to succeed them as aforesaid, shall be incorporated, named, and called by the Name of the Governors of the Lands, Possessions, Revenues, and Goods of the Hospital of King* James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq; And them by the Name of the Governors of the*

Lands, Possessions, Revenues and Goods of the Hospital of King James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq;* *one Body corporate and politick by that Name to have perpetual Succession for ever to endure, We do by these Presents for us our Heirs and Successors really and fully incorporate, make, erect, ordain, name, constitute, and establish, and that by the same Name of the Governors of the Lands, Possessions, Revenues, and Goods of the Hospital of King* James, *founded in the* Charter-house *within the County of* Middlesex *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq;* *they and their Successors, and the Survivors and Survivor of them and his and their Successors, and the Persons to be elected and chosen as aforesaid, shall for ever hereafter be incorporated, named, and called, &c. and shall by the same Name have perpetual Succession for ever, and that they by the same Name be, and shall be and continue Persons able and capable in the Law from Time to Time, and shall by that Name of Incorporation have full Power, Authority, and lawful Capacity and Ability to purchase, take, hold, receive, enjoy, and have to them and their Successors for ever, as well Goods and Chattels, as Manors, Lands, Tenements, Rents, Reversions, Annuities and Hereditaments whatsoever, as well of us our Heirs and Successors, as of the said* Thomas Sutton, *his Heirs, Executors and Assigns, or any other Person or Persons whatsoever, and also that the said Governors for the Time being and their Successors, shall have full Power and lawful Authority by the aforesaid Name of Governors of the Lands, Possessions, Revenues and Goods of the Hospital of King* James *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq;* *to sue and to be sued, implead and to be impleaded, to answer and to be answered unto in all Manner of Courts and Places that now are or hereafter shall be within this our Realm or elsewhere, as well Temporal as Spiritual, in all Manner of Suits whatsoever, and of what Nature and Kind soever such Suits or Actions be or shall be, in the same and as ample Manner and Form to all Intents, Constructions, and Purposes as any other Person and Persons, Bodies politick or corporate of this our Realm of* England *being able Persons in Law, may do: And furthermore we will and grant by these Presents for us our Heirs and Successors unto the said Governors for the*

the Time being and their Successors, that they and their Successors shall have and enjoy for ever a common Seal, wherein shall be ingraven the Name and Arms of the said Thomas Sutton, *whereby the same Corporation shall or may seal any Manner of Instrument touching the same Corporation, and the Manors, Lands, Tenements, Rents, Reversions, Annuities, and Hereditaments, Goods, Chattels and other Things thereunto belonging, or in any wise touching or concerning the same: Nevertheless it is our true Intent and Meaning, That the said Governors for the Time being and their Successors, nor any of them, shall do or suffer to be done, at any Time hereafter, any Act or Thing whereby or by Means whereof any of the Manors, Lands, Tenements, Rents, Reversions, Annuities, or Hereditaments of the said Incorporation, or any Estate, Interest, Possession, or Property of or in the same, or any of them shall be conveyed, vested, or transferred in or to any other whatsoever contrary to the true Meaning hereof, other than by such Leases as are hereafter mentioned, And that in such Manner and Form as is hereafter expressed, and not otherwise; And that such Construction shall be made upon this Foundation and Incorporation, as shall be most beneficial and available for the Maintenance of the Poor, and for the Repressing and Avoiding of all Acts and Devices to be invented or put in Ure contrary to the true Meaning of these Presents: And therefore our Will and Pleasure is, and so for Us, our Heirs and Successors we do ordain, That the said Governors for the Time, or their Successors or any of them, shall not make any Lease, Grant, Conveyance, or Estate of any the said Manors, Lands, Tenements or Hereditaments which shall exceed the Number of one and twenty Years, and that either in Possession, or not above two Years before the End and Expiration or Determination of the Estate or Estates in Possession, And whereupon the accustomable yearly Rent or more by the greater Part of five Years next before the Making of any such Lease reserved, due or payable, shall not be reserved and yearly payable during the Continua. of every such Lease: And also we do ordain, grant, and appoint by these Pres. for Us our Heirs and Succes. That so often and whensoever any one or more of the said Governors for the Time being, or any other Governor or Governors that shall be chosen hereafter, shall fortune to depart*

depart this Life or to be removed from his or their Place of Governor or Governors, That then and so often the Residue of the said Governor or Governors and their Successors shall be, continue, and remain incorporate by the same Name of the Governors of the Lands, Possessions, Revenues, and Goods of the Hospital of King James, *founded in the* Charter-house *withing the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq;* *to all Intents, Constructions, and Purposes according to the true Meaning of these Presents, as if all the said Governor and Governors had continued: And that then and so often it shall be lawful for the rest of the Governors, or the greater Number of them, to elect, nominate, chuse, and appoint one or more meet Person or Persons, according to the true Intent and Meaning of these Presents, into the Room and Place or Rooms and Places of every such Governor or Governors which shall so depart this Life or be removed, which Person and Persons so nominated, elected, chosen, and agreed upon by the said Governors, or by the greater Number of them, shall be, and shall be reputed and taken from the Time of his or their Election, to be from thenceforth together with the others, Governors of the said Hospital, And after this Manner to proceed whensoever and as often as need shall require, And the same Election to be made within two Months that any of the said Governor or Governors shall so depart this Life or be removed: And that the said* Thomas Sutton *during his Life, And after his Decease the said Governors for the Time being, or the more Part of them, shall have full Power and Authority to nominate, assign and appoint, and shall and may name, assign and appoint, when and as often as he and they shall think good, such Number and Numbers of Person and Persons as he and they shall think convenient to be poor Men, Children and Scholars, Master, Preacher, School-master, Usher, Members, Officer and Officers of or for the said Hospital, as he the said* Thomas Sutton *during his Life, and after his Decease the Governors for the Time being and their Successors, or the more Part of them, shall think meet and convenient: Nevertheless if the Rents, Revenues, or Profits of all or any of the Manors Lands, Tenements, and Hereditaments, Goods, or Chattels,*

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at any Time to be granted and conveyed to the said Governors of the said Hospital and their Successors for the Maintenance of the People in the said Hospital, shall happen to encrease or to be raised or augmented to a better or greater yearly Value than formerly the same was, Or that the Rents, Revenues and Possessions of the said Hospital shall be further increased by the Determination of any former Estates in any of the said Possessions of the said Hospital, or otherwise, That all and every such Encrease shall be employed to the Maintenance of more and other poor People to be placed in the said Hospital, or to the further Augmentation of the Allowances of those Persons that for the Time being shall be in the said Hospital according to the true Intent and Meaning of these Presents, and shall not be converted or employed to any private Use : And also we do by these Presents, for Us, our Heirs and Successors, will, grant and ordain, That whensoever and as often as any of the said Places or Rooms of any of the said Master, Preacher, School-master, or Usher, poor Men, or Children, Scholars, Members, or Officers, or any of them, shall happen to become void by Death, Resignation, Deprivation, or otherwise, That then and so often it shall and may be lawful for the said Thomas Sutton *during his Life, and after his Death for the said Governors for the Time being and their Successors, or the most Part of them, within one Month after such Avoidance by Writing under the Seal of the said* Thomas Sutton *during his Life, and after his Death by the said Governors for the Time being and their Successors under their common Seal, to nominate and appoint other meet Person and Persons in the Rooms, Place, and Places of them and every of them so deceasing, resigning, or otherwise becoming void : And if in Case the said Governors and their Successors for the Time being, or the most Part of them, shall not within two Months after such Avoidance, nominate, assign, and appoint as is aforesaid, That then and so often and in every such Case, from and after the Death of the said* Thomas Sutton, *it shall be lawful for Us, our Heirs and Successors by Letters Patents under the Great Seal of* England *or Privy Seal, to nominate and appoint meet Person and Persons to all and every such Office, Rooms, Place dnd Places as shall remain void for the Time*

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aforesaid, by the Default of the said Governors and their Successors as is aforesaid : And we do further, of our especial Grace, certain Knowledge, and meer Motion, for Us, our Heirs and Successors, give and grant, That the said Master, Preacher, School-master, Usher, poor Men, Children, Scholars, Members, and Officers of the said Hospital, and every of them, shall be allowed, ordered, directed, visited, placed or displaced by the said Thomas Sutton *during his Life, and after his Death by the said Governors for the Time being, and their Successors or the more Part of them, according to such Allowances, Rules, Statutes, and Ordinances, as shall be appointed, set forth, made, devised, or established by the said* Thomas Sutton *during his Life, in Writing under his Hand and Seal, and after his Death by the Governors for the Time being and their Successors or the more Part of them under the said common Seal : And further We have given and granted, and by these Presents do give and grant to the said* Thomas Sutton *during his Life by Writing under his Hand and Seal, and to the said Governors and their Successors for the Time being, or the more Part of them after his Decease under the said common Seal, to make set down, and appoint such Rules, Statutes, and Ordinances for the Rule, Government, and well ordering the said Hospital, and of the said Master, Preacher, School-master, Usher, poor People, Children, Scholars, Members, and Officers for the Time being, and for their and every of their Wages, Stipends, and Allowances, for and towards their or any of their Maintenance and Relief, as to the said* Thomas Sutton *during his Life, and after his Decease, to the said Governors and their Successors for the Time being or the more Part of them shall seem meet and convenient : And that the same Orders, Rules, Statutes, and Ordinances so by him, them, or any of them to be made, set down, and prescribed as aforesaid, shall be and stand in full Force and Strength in Law, to all Constructions, Intents, and Purposes, the same not being repugnant to our Prerogative Royal, nor contrary to the Laws and Statutes of this our Realm of* England, *Nor to any Ecclesiastical Canons or Constitutions of the Church of* England, *which then shall be in Force : And that for the better Government of the said Hospital, the said* Thomas Sutton *during his Life, and*

and after his Decease the said Governors for the Time being or the most Part of them, or such and so many of them as the said Thomas Sutton *shall by his Writing under his Hand and Seal thereunto assign, appoint, and nominate, shall and may after the Decease of the said* Thomas Sutton, *have full Power and lawful Authority to visit, order and punish, place or displace the Master, Preacher, School-master, Usher, poor People, Scholars, Members and Officers of the said Hospital and every of them, And to order, reform, and redress all and every the Disorders, Misdemeanors, Offences, and Abuses in the Persons aforesaid and every of them, or in the said Hospital or Free-school, or in or touching the Government, Order, and disposing of the same, And to censure, suspend, deprive, and displace the said Master, Preacher, School-master, Usher, poor People, Scholars, Members, and Officers, and all, every, or any of them, as to him the said* Thomas Sutton *during his Life, and after his Death, to the said Governors for the Time being and their Successors, or the more Part of them, or to such and so many of them as the said* Thomas Sutton *by any his Writing under his Hand and Seal shall thereunto assign, nominate, and appoint, shall to him or them respectively seem fit, just and convenient. So always that no Visitation, Act or Thing in or touching the same, be had, made or done by any Person or Persons during the Life of the said* Thomas Sutton, *other than by the said* Thomas Sutton, *and after his Death by the said Governors for the Time being and their Successors or the more Part of them, or by such or so many of them as the said* Thomas Sutton *by his Writing under his Hand and Seal shall nominate and appoint thereunto: And We of our further special Grace, certain Knowledge, and meer Motion, and by our supream Power and Authority for Us our Heirs and Successors, do will, ordain, and grant, that the said Hospital, and the Master, Preacher, School-master, Usher, Members, Officers, and all other the Persons to be placed in the said Hospital, shall be for ever hereafter exempted and freed of and from all Visitation, Punishment, and Correction to be had, used, or exercised in or upon them or any of them by the Ordinary of the Diocese for the Time being, or by any other Person or Persons whatsoever, other than by the said* T. Sutton *during his*

his Life, and after his Death by the said Governors for the Time being, and their Successors: And further know ye, that we for the Considerations aforesaid, of our especial Grace, certain Knowledge, and meer Motion, have given and granted; and by these Presents for Us our Heirs and Successors do give and grant to the said Governors of the Lands, Possession, Revenues, and Goods of the Hospital of King James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq; and to their Successors for ever, our especial Licence, and free and lawful Liberty, Power, and Authority to get, purchase, receive and take to them and their Successors for ever, for the Maintenance, Sustentation, and Relief of all and every the Person and Persons to be placed in the said Hospital, of and from the said* Thomas Sutton, *his Heirs and Assigns, the said great and large Mansion-house, commonly called the* Charter-house *besides* Smithfield, *together with the Houses, Buildings, Courts, Yards, Gardens, Orchards, Closes, and other Hereditaments, lately purchased by the said* Thomas Sutton *of the said* Thomas *Earl of* Suffolk, *And all those his Manors and Lordships of* Southminster, Norton, Little Hallingbury, *alias* Hallingbury Bouchers, *and* Much Stanbridge *in the County of* Essex, *with all their and every of their Rights, Members and Appurtenances whatsoever, And also all those his Manors and Lordships of* Bustingthorpe, *alias* Busling-thorpe *and* Dunnesby *in the County of* Lincoln, *with their and every of their Rights, Members and Appurtenances whatsoever, And also all those his Manors of* Salthorp, *alias* Saltrop, *alias* Halthrop, Chilton, *and* Blackgrove *in the County of* Wilts, *with their and every of their Rights, Members and Appurtenances, and also all those his Lands and Pasture grounds called* Blackgrove, *containing by Estimation two hundred Acres of Pasture with the Appurtenances in* Blackgrove *and* Wroughton *in the said County of* Wilts, *and also all that his Manor of* Missenden, *otherwise called the Manors of* Missunden *in the Parishes of* Wroughton Lydyerd *and* Tregose *in the said County of* Wilts; *with all his Rights, Members, and Appurtenances, And all that his Manor of* Elcombe *and the Park called* Elcombe Park *with the Appurtenances in the said County of* Wilts, *And also all that his Manor of* Watlescote, *alias* Wiglescote, *alias* Wigelscete *with the Appurtenances in the said County of* Wilts, *And also all that his Manor of* Wescote, *alias* Wescete *with the*

the Appurtenances in the said County of Wilts, *And also all those his Lands and Pastures containing by Estimation one hundred Acres of Land, and threescore Acres of Pasture with the Appurtenances in* Wiglescote *and* Wroughton *in the said County of* Wilts, *And all that his Manor of* Uffcote *with the Appurtenances in the said County of* Wilts, *And also all those his two Messuages and one thousand Acres of Land, two thousand Acres of Pasture, three hundred Acres of Meadow, and three hundred Acres of Wood with the Appurtenances in* Brodehinton *in the said County of* Wilts, *And also all those the Manors and Lordships of* Campes, *alias* Campes Castle, *otherwise called* Castle Campes, *with the Appurtenances scituate, lying, being, and extending in the Counties of* Cambridge *and* Essex, *or in either of them, or elsewhere within the Realm of* England, *and also all that his Manor of* Balsham *in the County of* Cambridge, *with all and singular the Rights, Members, and Appurtenances, thereof whatsoever, and also all those his Messuages and Lands scituate, lying and being in the Parishes of* Hackney *and* Tottenham *in the County of* Middlesex, *or in either of them, with their and every of their Rights, Members, and Appurtenances whatsoever, which said Messuage was lately purchased of Sir* William Bowyer *Knight, and the said Lands in* Tottenham *now are or lately were in the Tenure or Occupation of* William Benning *Yeoman, And also all and singular the Manors, Lordships, Messuages, Lands, Tenements, Reversions, Services, Meadows, Pastures, Woods, Advowsons, Patronages of Churches and Hereditaments of the said* Thomas Sutton *whatsoever, scituate, lying, or being within the said Counties of* Essex, Lincoln, Wilts, Cambridge *and* Middlesex, *or in any of them, with all and every their Rights, Members, and Appurtenances whatsoever or any such, and so many and such Part of the said Manors, Advowsons, Lands, Tenements, and Hereditaments, or of any Part thereof, as the said* Thomas Sutton *should think meet; And also all Letters Patents, Indentures, Deeds, Evidences, Bonds, and Writings concerning the Premisses or of any of them, which shall be so given and granted by the said* Thomas Sutton *to the said Governors and their Successors, and all such Conditions, Warranties, Vouchers, Actions, Suits, Entries, Benefits, and Demands as shall be or may be had by any Person or Persons upon or by Reason of them or any of them (except all his Manors or Lordships of* Littlebury

tlebury *and* Haddestocke, *with the Appurtenances in the said County of* Essex *aforesaid) or in either of them, though the Premisses or any of them be holden of us immediately, in Chief, or by Knight's Service, or otherwise howsoever, And without any Licence or Pardon for Alienation of them or any of them, the Statute of Mortmain, or any other Act, Statute, Ordinance, or Provision to the contrary in any wise notwithstanding: And also we do give and grant like Licence, Power, and Authority to the said* Thomas Sutton, *his Heirs and Assigns, to give, grant and assure unto the said Governors and their Successors for the Uses, Intents, and Purposes aforesaid, all and every the said great and large Mansion-house commonly called the* Charter-house *besides* Smithfield, *together with the Houses, Buildings, Courts, Yards, Gardens, Orchards, Closes, and other Hereditaments lately purchased by the said* Thomas Sutton *of the said* Thomas *Earl of* Suffolk, *And all those his Manors and Lordships of* Southminster, Norton, Little Halingbury, *alias* Hallingbury Bouchers, *and* Much Stanbridge *in the said County of* Essex, *with all their and every of their Rights, Members, and Appurtenances, whatsoever, And also all those his Manors and Lordships of* Bustingthorpe, *alias* Buslingthorpe *and* Dunnesby *in the County of* Lincoln, *with their and every of their Rights, Members, and Appurtenances whatsoever, And also all those his Manors of* Salthorpe, *alias* Saltrope, *alias* Haltherope, *alias* Halstrop, Chilton *and* Blackgrove *in the County of* Wilts, *with their and every of their Rights, Members, and Appurtenances, And also all those his Lands and Pasture-Grounds called* Blackgrove, *containing by Estimation two hundred Acres of Pasture with their Appurtenances in* Blackgrove *and* Wroughton *in the said County of* Wilts, *And also all that his Manor of* Missenden, *otherwise called the Manor of* Missunden *in the Parishes of* Wroughton Lydeyard *and* Tregose, *in the said County of* Wilts, *with all the Rights, Members, and Appurtenances, And all that his Manor of* Elcomb *and the Park called* Elcomb Park *with the Appurtenances in the said County of* Wilts, *And also all that his Manor of* Watlescote, *alias* Wiglescote, *alias* Wigelscete, *with the Appurtenances in the said County of* Wilts, *And also all that his Manor of* Wescote, *alias* Wescete, *with the Appurtenances in the said County of* Wilts, *and also all those his Lands*

and Pastures, containing by Estimation one hundred Acres of Land and threescore Acres of Pasture, with the Appurtenances in Wiglescote *and* Wroughton *in the said County of* Wilts, *and all that his Manor of* Uffcote *with the Appurtenances, in the said County of* Wilts, *And also all those his two Messuages and one thousand Acres of Land, two thousand Acres of Pasture, three hundred Acres of Meadow, and three hundred Acres of Wood with the Appurtenances in* Brodehinton *in the said County of* Wilts, *And all those his Manors and Lordships of* Campes, *alias* Campes Castle, *otherwise called* Castle Campes, *with the Appurtenances scituate, lying, and being, and extending in the Counties of* Cambridge *and* Essex, *or in either of them, or elsewhere within the Realm of* England, *And also all that his Manor of* Balsham *in the County of* Cambridge, *with all and singular the Rights, Members, and Appurtenances thereof whatsoever, And all those his Messuages and Lands scituate, lying, and being in the Parishes of* Hackney *and* Tottenham *in the County of* Middlesex, *or in either of them, with their and either of their Rights, Members, and Appurtenances whatsoever, which said Messuage was lately purchased of Sir* William Bowyer, *Knight, and the said Lands in* Tottenham *now are or late were in the Tenure or Occupation of* William Benning *Yeoman; And also all and singular the Manors, Lordships, Messuages, Lands, Tenements, Reversions, Services, Meadows, Pastures, Woods, Advowsons, Patronages of Churches, and Hereditaments of the said* Thomas Sutton *whatsoever, scituate, lying, or being within the said Counties of* Essex, Lincoln, Wilts, Cambridge, *and* Middlesex, *or any of them, with all and every of their Rights, Members, and Appurtenances whatsoever, or any such, and so many and such Part of the said Manors, Advowsons, Lands, Tenements, and Hereditaments, or of any Part thereof, as the said* Thomas Sutton *shall think meet; And also all Letters Patent, Indentures, Deeds, Evidences, Bonds, and Writings concerning the Premisses or any of them, which shall be so given and granted by the said* Thomas Sutton *to the said Governors and their Successors, and all such Conditions, Warranties, Vouchers, Actions, Suits, Entries, Benefits, and Demands, as shall be or may be had by any Person or Persons upon*

or

or by Reason of them or any of them (except all his Manors or Lordships of Littlebury *and* Haddestocke *with the Appurtenances in the said County of* Essex *aforesaid) or in either of them, though the Premisses or any of them be holden of Us immediately in chief, or by Knight's Service, or otherwise howsoever, and without any Licence or Pardon for Alienation of them or any of them, the Statute of Mortmain, or any other Act, Statute, Ordinance, or Provision whatsoever to the contrary in any wise notwithstanding: And our further Will and Pleasure is, and we do by these Presents for Us, our Heirs and Successors, ordain and straitly charge and command, That whensoever and as often as any of the Churches, Parsonages, Vicarages, Chapels, or other Spiritual Livings, the Advowsons, Patronages, or Donations whereof are hereby meant, or mentioned to be licenced to be given by the said* Thomas Sutton *to the said Governors and their Successors for and towards the maintenance of the said godly and charitable Uses, shall happen to be void or become Presentative or presentable, or to be given or collated unto by Reason of the Death, Resignation, or Deprivation of any Incumbent or Incumbents of them or any of them, or by any other Means howsoever, that then and so often the said Governors for the Time being, and their Successors, or the greater Part of them for the Time being, shall present, prefer or collate thereunto such meet and sufficient Persons as they shall think fit; Nevertheless our full Meaning and Direction in this Behalf is, and so we do by these Presents for Us our Heirs and Successors, ordain and declare, that such and so many of the Scholars which shall from Time to Time be brought up and taught in the said Hospital and every of them, as shall after be fully qualified and become meet to take upon them or any of them the Charge of the said Churches, Rectories, Parsonages, Vicarages, Chapels, or other spiritual Livings aforesaid, shall as near as may be from Time to Time, be by the said Governors and their Successors, presented, preferred, and collated thereunto before any other Person or Persons whatsoever, avoiding, as much as may be, the Giving of more Benefices than one to any one Incumbent: And to the End that all Suspicion of indirect Dealing, which might hereafter be used or put in Practise by the aforesaid Governors and their Successors, or any of them, contrary to the true Intent and Meaning of these*

these Presents, may be prevented and taken away, our Will and Pleasure is, and We do by these Presents for Us, our Heirs and Successors, ordain and streightly charge and command, That the Manors, Lands, Tenements, and Hereditaments, and other Things which at any Time hereafter shall be given, granted, or conveyed for the Maintenance of the said godly and charitable Uses before in these Presents mentioned, or any Part or Parcel of them or of any of them, shall at any Time hereafter be by the said Governors, or their Successors, or any of them leased, demised, granted, or conveyed to them the said Governors, or their Successors or to any of them, or to any other Person or Persons whatsoever, for or to the Use, Benefit, or Behoof of the said Governors, or of their Successors, or of any of them, Although express Mention of the clear yearly Value and Certainty of the Premisses, or any of them, or of any other Gifts or Grants by Us or any of our Progenitors or Predecessors to the aforesaid Thomas Sutton *heretofore made, is not made, (or) any Statute, Act, Ordinance, Provision, Proclamation, or Restraint to the contrary hereof had, made, ordained, or provided, or any other Thing, Cause, or Matter whatsoever in any wise notwithstanding: In Witness whereof We have caused these our Letters to be made Patents, Witness our self at* Westminster *the two and twentieth Day of* June *in the ninth Year of our Reign of* England, France *and* Ireland, *and of* Scotland *the* 44th, as by the said Letters Patents more fully appeareth. And further the said Jurors say upon their Oath aforesaid, That the said *Thomas Sutton*, of all and singular the Premisses aforesaid with the Appurtenances, in Form aforesaid being seised, the said *Thomas Sutton* afterwards, and before the aforesaid Time in which, &c. That is to say, the 30th Day of *October* in the 9th Year of the Reign of the Lord *James* of *England* abovesaid, made a certain Writing sealed with his Seal, bearing Date the same Day and Year, and to the Jurors aforesaid shewed in Evidence, to one *John Hutton* Clerk, the Tenor of which Writing followeth in these Words. *To all to whom these Presents shall come,* Tho. Sutton *of* Balsham *in the County of* Cambridge, *Esq; sendeth greeting: Whereas it hath pleased the K.'s most excellent Majesty that now is, by his Highnesses Let. Patents bearing Date at* Westm. *the two and twentieth Day*

Day of June *in this present ninth Year of his Highness's Reign over* England, *upon the humble Suit of the said* Thomas Sutton, *to give Licence, Power and Authority to him the said* Thomas Sutton, *to place, found, and erect an Hospital and Free-School in the House called the late dissolved* Charter-house *besides* Smithfield *in the County of* Middlesex, *And like Licence, Power and Authority for him the said* Thomas Sutton, *at any Time during his Life to ordain, appoint, and place a Master of the said Hospital, and that the said Hospital, should be called by the Name of the Hospital of King* James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq*; *And where furthermore by the said Letters Patents the Master of the said Hosp. for the Time being is ordained and appointed to be one of the sixteen Governors of the Lands, Possessions, Revenues, and Goods of the said Hospital, And that the same sixteen Governors are by the said Letters Patents incorporate to purchase and take Lands to them and their Successors for ever, for the Maintenance of the said Hospital, by the Name of the Governors of the Lands, Possessions, Revenues, and Goods of the Hospital of King* James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esquire, as by the said Letters Patents (among other Things) more at large may appear: By Reason whereof, there must be a Master made before such Time as the said* Tho. Sutton *can convey the Lands intended by the said* Thomas Sutton *to be conveyed for the Maintenance of the said Hospital unto the said Governors, according to the said Letters Patents: Now the said* Thomas Sutton, *minding the Performance of the said charitable Act, hath according to the Power given him by the said Letters Patents, and by these Presents doth place, ordain, nominate, constitute and appoint his right trusty and well beloved* John Hutton *Clerk, the first and present Master of the Hospital of King* James, *founded in the* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq*; *To have and to hold the said Office, Room, and Place of Master of the said Hospital unto him the said* John Hutton, *from henceforth for and during the good Will and Pleasure of the said* Tho. Sutton: *In Witness whereof the said* Thomas

mas Sutton *hath hereunto put his Hand and Seal, dated the 30th Day of* October *in the 9th Year of the Reign of our said Sovereign Lord* James, *by the Grace of God, King of* England, France *and* Ireland, *Defender of the Faith, &c. and of* Scotland *the 45th.* And further the Jurors aforesaid say upon their Oath aforesaid, that the aforef. *Tho. Sutton* of all and singular the Premisses aforesaid, in Form aforesaid being seised, afterwards, and before the Time in which, *&c.* that is to say, the 1st Day of *November* in the 9th Year of the Reign of the said Lord the now K. of *Eng. &c.* abovef. made a certain Indenture between him the said *Thomas Sutton* of *Balsham*, in the County of *Cambridge*, Esq; of the one Part, and the Right Reverend Father in God *George*, Lord Archbishop of *Canterbury*, Primate and Metropolitan of all *England*, the Right Honourable *Thomas* Lord *Ellesmere*, Ld. Chancellor of *England*, the Right Hon. *Robert* Earl of *Salisbury*, Lord High Treasurer of *England*, the Reverend Father in God, *John* Lord Bishop of *London*, the Reverend Father in God *Launcelot*, Lord Bishop of *Ely*, *Edward Coke*, Knt. Lord Chief Justice of the Common Pleas, *Thomas Foster*, Knt. one of the Justices of the Common Pleas, *Henry Hobart*, Knt. and Bart. the King's Attorney General that now is, *John Overal*, Dean of the Cathedral Church of St. *Paul* in *London*, *George Mountain*, Dean of the Collegiate Church of *Westminster*, *Henry Thursby*, Esq; one of the Masters of the Chanc. *Jeffery Nightingale*, Esq; *Richard Sutton*, Esq; *John Law*, Gent. *Thomas Brown*, Gent. and *John Hutton*, Clerk, by the Names of the Reverend Father in God *George*, Archbishop of *Canterbury*, *Thomas* Lord *Ellesmere*, Lord Chancellor of *England*, *Robert* Earl of *Salisbury*, Lord High Treasurer of *England*, the Reverend Father in God *John*, Lord Bishop of *London*, the Reverend Father in God *Launcelot*, Lord Bishop of *Ely*, *Edward Coke*, Knt. Lord Chief Justice of the Common Pleas, *Thomas Foster*, Knt. one of the Justices of the Court of Common Pleas, *Henry Hobart*, Knt. and Bart. Attorney General of the Lord the King, *John Overal*, Dean of the Cathedral Church of St. *Paul* in *London*, *George Mountain*, Dean of the Collegiate Church of *Westminster*, *Henry Thursby*, Esq; one of the Masters of the Court of Chancery, *Jeffery Nightingale*, Esq; *Richard Sutton*, Esq; *John Law*, Gent. *Thomas Brown*, Gent. and *John Hutton*, Clerk, Master of the Hospital of King *James*, founded in the Charter-house, within the County of *Middlesex*, at the humble Petition, and at the only Costs and Charges of *Thomas Sutton*, Esq; the first and

present Governours of the Lands, Possessions, Revenues, and Goods of the Hospital of King *James*, founded in the Charter house within the County of *Middlesex*, at the humble Petition, and only Cost and Charges of *T. Sutton*, Esq; of the other Part made, and within six Months then next following, that is to say, the 4th Day of *November* in the 9th Year of the Reign of the Lord *James*, now King of *England*, abovesaid, in the Court of *Chancery* of the Lord the now King, at *Westminster* aforesaid then being, in due Manner of Record inrolled, according to the Form of the Statute in such Case made and provided; and whereof one Part, sealed with the Seal of the said *Thomas Sutton*, to the Jurors aforesaid was shewed in Evidence, bearing Date the same Day and Year, the Tenor of which Indenture followeth in these Words: *This Indenture made the first Day of* November *in the Year of our Lord God One thousand six hundred and eleven, and in the Years of the Reign of our Sovereign Lord* James, *by the Grace of God King of* England, Scotland, France *and* Ireland, *Defender of the Faith, &c. that is to say, of* England, France *and* Ireland *the 9th, and of* Scotland *the 45th, between* Thomas Sutton *of* Balsham *in the County of* Cambridge, *Esq; of the one Party, and the most Reverend Father in God* George, *Lord Archbishop of* Canterbury, *Primate and Metropolitan of all* England, *and the Right Honourable* Thomas *Lord* Ellesmere, *Lord Chancellor of* England, *the Right Honourable* Robert *Earl of* Salisbury, *Lord High Treasurer of* England, *the Right Reverend Father in God* John, *Lord Bishop of* London, *the Right Reverend Father in God* Lancelot, *Lord Bishop of* Ely, *Sir* Edward Coke, Knt. *Lord Chief Justice of the Common Pleas, Sir* Thomas Foster, *Knt. one of the Justices of the Court of Common Pleas, Sir* Henry Hobart, *Knt. and Bart. Attorney General of our Sovereign Lord the King*, John Overall, *Dean of the Cathedral Church of St.* Paul *in* London, George Mountain, *Dean of the Collegiate Church of* Westminster, Henry Thursby, *Esq; one of the Masters of the Court of Chancery*, Jeffrey Nightingale, *Esq;* Richard Sutton, *Esq;* John Law, *Gent.* Thomas Browne, *Gent. and* John Hutton, *Clerk, Master of the Hospital of King* James, *founded in the Charter-house within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq; the first and present Governor of the Lands, Possessions, Revenues and Goods of the Hospital of King* James, *founded in* Charter-House *within*

in the County of Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq*; *of the other Part, witnesseth, That whereas it hath pleased the King's most excellent Majesty that now is, by his Highness's Letters Patents bearing Date at* Westminster *the two and twentieth Day of* June *in this present ninth Year of his Highness's Reign over* England, *upon the humble Suit of the said* Thomas Sutton, *to give Licence, Power, and Authority to him the said* Thomas Sutton, *to place, erect, found, and establish, at or in the said House called the late dissolved* Charter-house *besides* Smithfield *within the County of* Middlesex, *one Hospital, House or Place of Abiding for the Finding, Sustentation, and Relief of poor, aged, maimed, needy or impotent People, as also to place, found, and establish at or in the said House one free School, for the Instructing, Maintenance and Education of poor Children or Scholars, and that the said Hospital should for ever afterwards be incorporated, named, and called the Hospital of King* James, *founded in* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq*; *and that he the said* Thomas Sutton *during his Life, and after his Death the said Governors and their Successors for ever, should have Power, Licence, and Authority to ordain, appoint, and place therein a Master, a Preacher, a School-master and Usher, and such Numbers of poor People, Scholars, and Officers as they should think meet, and in Default thereof, his Majesty, his Heirs and Successors; and where likewise our said Sovereign Lord the King's Majesty, by the said Letters Patents, hath incorporated the said Lord Archbishop, Lord Chancellor, Lord Treasurer,* John *Bishop of* London, (Lancelot) *Bish. of* Ely, *Sir* Ed. Coke, *Knt. Sir* Tho. Foster, *Knt. Sir* Henry Hobart, *Knt. and Bart.* John Overal, George Mountain, Henry Thursby, Jeffery Nightingale, Richard Sutton, John Lawe, Thomas Browne, *and the Master of the said Hospital for the Time being, by the Name of the Governors of the Lands, Possessions, Revenues, and Goods of the Hospital of King* James, *founded in* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq*; *and moreover hath thereby granted Licence, as well to the said Governors and their Successors, to have, take and purchase, as also Licence*

and Authority to the said Thomas Sutton *his Heirs and Assigns, to give, grant, and assure unto the said Governors and their Successors, for the better Continuance of the said Hospital and Free-School for ever, and for the better Maintenance of the Master, Preacher, Schoolmaster, Usher, and such Number of poor People, Scholars, and Officers of and in the said Hospital for ever, as shall be therein placed as is aforesaid, All and every the Manors, Lands, Tenements, Rents, Reversions, Advowsons and Hereditaments hereafter herein mentioned to be granted or conveyed, as in and by the said Letters Patents among other Things more at large may appear, Sithence which said Letters Patents the said* Thomas Sutton *hath by his Deed or Writing under his Hand and Seal, bearing Date the 30 Day of* October *last, ordained and appointed the said* John Hutton *to be first and present Master of the said Hospital, according to the Purport, Tenor, and true Meaning of the said Letters Patents. And the said* Thomas Sutton *being minded in his Life time to perfect the said godly and charitable Act himself, and not to leave it to be performed after his Death by others; This Indenture therefore witnesseth, that the said* Tho. Sutton, *for and in Consideration of the Continuance of the said Hospital and Free-School for ever, and for the better Maintenance of the said Master, Preacher, Schoolmaster, Usher, poor People, Scholars, and Officers for ever hereafter, with the Rents, Revenues, Issues, Commodities and Profits of the Manors, Lands, Tenements, Rents, Reversions, Advowsons, and Hereditaments hereafter in these Presents mentioned to be conveyed, and for and in Consideration of the Sum of five Pounds of lawful Money of* England, *by the said Lord Archbishop and other the Governors aforesaid paid, which said Sum of five Pounds the said* Thomas Sutton *confesseth and acknowledgeth himself to have received of the said Governors, and thereof doth acquit and discharge the said Governors for ever by these Presents, And in Consideration of the yearly Rent of twelve Pence of lawful Money of* England *hereafter in and by these Presents reserved to the said* Thomas Sutton *and his Heirs, and for divers other good and reasonable Considerations him especially moving, hath (according to the said Licence of the King's Majesty to him the said* Thomas Sutton *in that Behalf given) given,*

2 Inst 725.
Postea 34. a.
2 Rol. 787, 788.

2 *bar-*

bargained, sold, granted, confirmed, and conveyed, and by these Presents doth for him and his Heirs, bargain, sell, give, grant, confirm, and convey unto the said Governors of the Lands, Possessions, Revenues, and Goods of the Hospital of King James, *founded in* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq; and to their Successors for ever, all that the Mansion-house commonly called* Charter-house *besides* Smithfield, *in the said County of* Middlesex, *and all and singular Messuages, Houses, Courts, Yards, Gardens, Orchards, Closes, and other Hereditaments within the County of Middlesex, lately purchased by the said* Thomas Sutton *of the Right Honourable* Thomas *Earl of* Suffolk, *and all those his Manors and Lordships of* Southminster, Norton, Little Hallingbury, *alias* Hallingbury Bouchers, *and* Much Stanbridge, *in the County of* Essex, *with all their and every of their Rights, Members, and Appurtenances whatsoever, and also all those his Manors and Lordships of* Bustingthorpe, *alias* Buslingthorpe, *and* Dunnesby *in the County of* Lincoln, *with their and every of their Rights, Members and Appurtenances whatsoever. And also all those his Manors of* Salthorpe, *alias* Salthrope, *alias* Haltherope, *alias* Halstroppe, Chilton, Blackgrove, Uffcot, Misenden, *alias* Misunden, Watlescot, *alias*, Wiglescote, *alias* Wigelscete, Wescote, *alias* Wescete, *and* Elscomb *in the County of* Wilts, *with their and every of their Rights, Members and Appurtenances, and also all that his Park called* Elcombe Park *in* Elcombe *in the said County of* Wilts, *with its Rights, Members, and Appurtenances, and all those his Lands and Pasture Grounds called* Blackgrove, *containing by Estimation two hundred Acres of Pasture with their Appurtenances in* Blackgrove *and* Wroughton *in the said County of* Wilts, *and also all those Lands and Pastures containing by Estimation one hundred Acres of Land, and sixty Acres of Pasture, with the Appurtenances in* Wigglescote *and* Wroughton *in the said County of* Wilts, *and also all those his two Messuages and one thousand Acres of Land, two thousand Acres of Pasture, three hundred Acres of Meadow, and three hundred Acres of Wood, with the Appurtenances in* Brodehinton *in the said County of* Wilts, *and all those his Manors and Lordships of* Campes, *alias* Campes Castle, *otherwise called* Castle Campes, *with the*

Appurtenances, situate, lying, and extending into the Counties of Cambridge *and* Essex, *or in either of them, or elsewhere within the Realm of* England. *And also all that his Manor of* Balsham *in the County of* Cambridge *with all and singular the Rights, Members and Appurtenances thereof whatsoever; and all those his Messuages and Lands scituate, lying and being in the Parishes of* Hackney *and* Tottenham *in the County of* Middlesex, *or in either of them, with their and either of their Rights, Members, and Appurtenances thereof whatsoever, which said last mentioned Messuage was lately purchased of Sir* William Bowyer, *Knt. and the said Lands in* Tottenham *now are or late were in the Tenure or Occupation of* William Benning, *Yeoman; and also all and singular the Manors, Lordships, Messuages, Lands, Tenements, Rents, Reversions, Services, Meadows, Pastures, Woods, Advowsons, Patronages of Churches, Liberties, Privileges, Franchises, and other Hereditaments whatsoever of the said* Thomas Sutton, *scituate, lying, or being, or to be had, taken, or enjoyed within the said Counties of* Essex, Lincoln, Wilts, Cambridge *and* Middlesex, *or in any of them, with all and every their Rights, Members, and Appurtenances whatsoever, and also all Letters Patents, Indentures, Deeds, Charters, Extents, Court-Rolls, and other Writings, Miniments, and Evidences whatsoever, concerning the Premisses or any of them, or any Part or Parcel of them or any of them, Except and always foreprised out of these Presents the Manors or Lordships of* Littlebury *and* Haddestocke *with the Appurtenances in the said County of* Essex, *and all and singular Messuages, Lands, Tenements, Liberties, Privileges, Franchises, and Hereditaments, Part, Parcel, or Member, or accepted, reputed, or taken as Part, Parcel or Member of the said Manors of* Littlebury *and* Haddestocke, *or of either of them, or to the said Manor of* Littlebury *and* Haddestocke *or either of them belonging or appertaining; To have and to hold the said Mansion-house, called the* Charter-house, *besides* Smithfield, *and all and every the said Manors, Lordships, Messuages, Parks, Lands, Tenements, Rents, Reversions, Services, Advowsons, Liberties, Franchises, Privileges and Hereditaments, and all other the Premisses, with their and every of their Rights, Members and Appurtenances (except before excepted) unto the said Governors of the Lands, Possessions, Revenues, and*

and Goods of the Hospital of King James, *founded in* Charter-house *within the County of* Middlesex, *at the humble Petition and only Costs and Charges of* Thomas Sutton, *Esq;* *and their Successors for ever, upon special Trust and Confidence that all and singular the Rents, Issues, Revenues, Commodities, and Profits of all and singular the said Manors, Houses, Lands, Tenements, Hereditaments, and other the Premisses, with their Appurtenances, shall be for ever hereafter from Time to Time truly, faithfully, and wholly distributed, converted, and imployed by the said Governors and their Successors, to and for the Maintenance and Continuance of the said Hospital and Free-School, and of the said Master, Preacher, School-master, Usher, poor People, Scholars and Officers of and in the said Hospital and Free-School for the Time being, at all Times hereafter, and from Time to Time for ever, according to the true Intent, Purport, and Meaning of the said* Thomas Sutton, *and according to the Tenor and Purport of the said Letters Patent and of these Presents, and to none other Trust, Use, Confidence, Intent, Purpose, or Imployment whatsoever, yielding and paying therefore Yearly unto the said* Thomas Sutton *and his Heirs the Yearly Rent of twelve Pence at the Feast of the Nativity of St.* John *Baptist, yearly to be payed, And when and as often as the said yearly Rent of twelve Pence shall be behind and unpayed at any Feast whereon the same ought to be payed, That then and so often it shall be lawful for the said* Thomas Sutton *and his Heirs into the Premisses and into every or any Part or Parcel thereof to enter and distrain, and the Distress and Distresses there taken to take, lead, and carry away, and with him and them to detain, until he and they be satisfied of the said Rent and the Arrearages thereof, if any be: In witness whereof the Parties first above-named to these present Indentures interchangeably have set their Hands and Seals, given the Day and Year first above written.* And further the Jurors aforesaid say upon their Oath aforesaid, That the aforesaid *Thomas Sutton*, of the aforesaid Premisses with the Appurtenances, in the County of *Middlesex*, as before is said, being seised, the said *Thomas Sutton*, after the aforesaid Indenture of Bargain and Sale of the Premisses with the Appurtenances whereof, *&c.* by the aforesaid *Thomas* Earl of *Suffolk*, to the aforesaid *Thomas Sutton* made, and after the Inrollment of the aforesaid Indenture, and before the Letters Patent aforesaid, by the said Lord the King

that now is, as is aforef. made, and before the aforefaid Indenture made between the aforefaid *Thomas Sutton* of the one part, and the aforefaid *George*, Archbifhop of *Canterbury*, Primate and Metropolitan of all *England*, and others of the other part, bearing Date the firft Day of *November* in the Year of the Reign of the Lord the King that now is the 9th abovefaid, appointed one *Richard Bird*, to be Porter of the faid Meffuage, called the late diffolved *Charter-houfe* befides *Smithfield*, of the aforefaid *Thomas Sutton*, which *Richard Bird* continued Porter of the faid Meffuage, after the faid Indenture made between the aforefaid *Thomas Sutton* of the one Part, and the aforefaid *George*, Archbifhop of *Canterbury*, and others of the other Part, bearing Date the aforefaid firft Day of *November* in the Year of the Reign of the faid Lord the King that now is the 9th abovefaid, until the Death of the faid *Thomas Sutton.* And further, the Jurors fay upon their Oath aforefaid, That the faid *Thomas Sutton* afterwards, and before the Time in which &c. that is to fay, the fecond Day of *November* in the Year of our Lord 1611, made his Teftament and laft Will in Writing, amongft other Things, as followeth in thefe Words. *And my Will and Meaning is, That unlefs the faid Sir* Francis Popham *and the faid Lady* Anne *his Wife do or fhall give to mine Executor or Executors a general Acquittauce or Releafe to the Effect above-mentioned, That then as well the faid Legacy of two thoufand Marks fo willed to be given to the faid Sir* Francis Popham *and the Lady* Anne *his Wife, As alfo the other feveral Legacies given and bequeated unto every of the faid Children of the faid Sir* Francis Popham *and the Lady his Wife, fhall remain and be to the Ufe of mine Executor or Executors, to be wholly difpofed and given by them, within one whole Year after my Deceafe, partly to the Mending of the High-ways, and partly to poor Maids Marriages, and partly to the Releafing of poor Men that lie in Prifon for Debt, and partly to the poor People of my intended Hofpital, when it fhall pleafe God it fhall be eftablifhed and erected: Alfo I give for and towards the Building of my intended Hofpital, Chapel, and School-houfe the Sum of five thoufand Poands: Item, I give into the Treafury or Store-houfe of my intended Hofpital, to begin their Stock with and to defend the Rights of the Houfe, one Thoufand Pounds of lawful* English *Money: And I give to every one of my Feoffees, whom I have put in Truft about my inten-*

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tended Hospitul, to whom I have not given any Thing in this my last Will, the Sum of twenty-six Pounds thirteen Shillings and four Pence of lawful Money of England; as by the said Testament and last Will more fully appeareth. And further the Jurors say, upon their Oath aforesaid, That the aforesaid *Tho. Sutton* afterwards, and before the aforesaid time in which, &c. that is to say, the 12th Day of *December* in the Year of the Reign of the said Lord the King that now is, the 9th abovesaid, at *Hackney* in the County of *Middlesex*, died without Issue of his Body lawfully begotten; And that the aforesaid *Simon Baxter* now Plaintiff is, and at the Time of the Death of the said *Thomas Sutton*, was Cousin and next Heir of the aforesaid *Thomas Sutton*, that is to say, Son and Heir of *Dorothy*, the only Sister of the said *Thomas Sutton*. And further the Jurors aforesaid say upon their Oath aforesaid, That the aforesaid *Richard Sutton* and *John Law* afterwards, and before the Time in which, &c. claiming as two Governours of the Lands, Possessions, Revenues, and Goods of the Hospital of King *James*, founded in *Charter-house*, within the County of *Middlesex*, at the humble petition and only costs and charges, of *Thomas Sutton*, Esq; in the Names, and to the Use of them who are named Governours as aforesaid, into all and singular the Premisses with the Appurtenances, called the late dissolved *Charter-house* besides *Smithfield*, whereof, &c. entred and were thereof seised as the Law requireth, upon the Possessions of which *Richard Sutton* and *John Law*, thereof afterwards, and before the Time in which, &c. the aforesaid *Simon Baxter*, into the said Premisses with the Appurtenances, whereof, &c. entred and was thereof seised as the Law requireth; upon the possession of which *Simon Baxter* thereof, the aforesaid *Richard Sutton* and *John Law*, the aforesaid time in which, into the Premisses aforesaid with the Appurtenances, whereof, &c. claiming as two Governours of the Lands, Possessions, Revenues and Goods of the Hospital of King *James*, founded in the *Charter-house*, at the humble Petition and only Costs and Charges of *Thomas Sutton*, Esq; in the Names, and to the Use of those who are called Governours, as afore is said, re-entred, as the aforesaid *Simon Baxter* above against them complaineth. And further, the Jurors say upon their Oath aforesaid, That the aforesaid *Richard Sutton* and *John Law*, in the aforesaid Act of Parliament of the 7th Year of King *James* abovesaid, and in the aforesaid Letters Patent of the said King, and in the aforesaid Indenture of Bargain and Sale, made between the aforesaid *Thomas Sutton* of the one part, and the aforesaid

said *George*, Archbishop of *Canterbury*, and others of the other part, bearing Date the first Day of *November* in the Year of the Reign of the said L. the King that now is, the 9th abovesaid, named, and the aforesaid *Richard Sutton* and *John Law*, now Defendants, are one and the same Persons, and not others nor divers. And that the aforesaid *Thomas* Lord *Ellesmere*, *Robert* E. of *Salisbury*, the Rev. Father *Launcelot* Bishop of *Ely*, *Tho. Foster*, *Henry Hobart*, *John Overal*, *Henry Thursby*, *Jeffery Nightingale*, *Richard Sutton*, *John Law*, and *Thomas Brown*, in the aforesaid Act of Parli. of the 7th Year abovesf. named, and in the aforesf. Letters Patent of the said L. the K. and in the aforesf. Indenture of Bargain and Sale, made to *George* Archbishop of *Canterbury* and others, are one and the same persons, and not others nor divers. And that the most Rev. Father in God, *George* Archbishop of *Canterbury*, *Thomas* Lord *Ellesmere*, *Robert* Earl of *Salisbury*, *John* Bishop of *London*, *Launcelot* Bishop of *Ely*, *Edward Coke*, *Tho. Foster*, *Henry Hobart*, *John Overal*, *George Mountain*, *Henry Thursby*, *Jeffery Nightingale*, *Richard Sutton*, *John Law*, and *Thomas Brown*, in the aforesf. Letters Patent of the aforesf. Lord the King mentioned, and in the aforesf. Indenture of Bargain and Sale made between the aforesf. *Thomas Sutton* of the one part, and the aforesf. Rev. Father in God, *George* Archbishop of *Canterbury*, *Thomas* Lord *Ellesmere*, *Robert* Earl of *Salisbury*, *John* Bishop of *London*, *Launcelot* Bishop of *Ely*, *Edward Coke*, *Thomas Foster*, *Henry Hobart*, *John Overal*, *George Mountain*, *Henry Thursby*, *Jeffery Nightingale*, *Richard Sutton*, *John Law*, *Thomas Brown*, and *John Hutton* of the other part, are one and the same Persons, and not others nor divers. And that all the Manors, Lands, Tenements, and Hereditaments, in the aforesaid Act of Parliam. of the 7th Year abovesaid, and in the aforesaid Letters Patent by the aforesaid Lord the King to the aforesaid *Thomas Sutton* granted, and in the Indenture aforesaid of Bargain and Sale made between the aforesaid *Thomas Sutton* and the aforesaid *George* Archbishop of *Canterbury*, and others, (except the Lands Tenements, and Hereditaments, called the late dissolved *Charter-house* besides *Smithfield*, purchased of the aforesaid *Thomas* Earl of *Suffolk)* mentioned, are one and the same Manors, Lands, Tenements, and Hereditaments, and not others, nor divers. And that the aforesf. Lands, Tenements, and Hereditaments, called the late dissolved *Charter-house* besides *Smithfield*, in the aforesaid Indenture of Bargain and Sale made betw. the aforesf. *Tho. Sutton* and the aforesf. *Tho.* E. of *Suffolk*, and others, bearing date the 9th day of *May*

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in the Year of the Reign of the said Lord the King that now is, the 9th abovesaid, and in the aforesaid Letters Patent of the aforesaid Lord the King to the said *Thomas Sutton* made, and in the aforesaid Indenture of Bargain and Sale between the said *Thomas Sutton* and the aforesaid Archbishops of *Canterbury*, and others likewise named, whereof, &c. are one and the same Lands, Tenements, and Hereditaments, and not others nor divers. And that the aforesaid *Thomas Sutton*, in the aforesaid Act of Parliament of the 7th Year abovesaid named, and in the Writing aforesaid to *John Hutton* aforesaid made, and in all other the Conveyances, Writings, and Letters Patent aforesaid named, is one and the same Person, and not others nor divers. And that the aforesaid *George Mountain*, at the Time of the making of the aforesaid Letters Patent of the aforesaid Lord the King, who was, and now is Dean of the Church collegiate at *Westminster*; and that the aforesaid *George Mountain*, in the said Letters Pattent of the said Lord the King named, and the aforesaid *George Mountain*, in the aforesaid Indenture of Bargain and Sale, by the aforesaid *Thomas Sutton*, to the aforesaid *George*, Archbishop of *Canterbury*, and others, as afore is said made, named, is one and the same Person, and not other nor divers. And the aforesaid *John Hutton*, in the aforesaid Writing named, and in the aforesaid Indenture of Bargain and Sale of the aforesaid *Tho. Sutton* named, is one and the same Person, and not other nor divers. But whether upon the whole Matter aforesaid, by the Jury aforesaid in Form aforesaid found, the aforesaid *Richard Sutton* and *John Lawe* be guilty of the Trespass aforesaid or not, the said Jurors are utterly ignorant; and pray the advice of the Court here, &c. And if upon the whole Matter aforesaid, in Form aforesaid found, it shall seem to the Court here, that the aforesaid *Rich. Sutton* and *John Law* are guilty of the Trespass aforesaid, as the said *Simon Baxter* against them complaineth; then they assess the Damages of the said *Simon Baxter*, by Occasion of that Trespass, beyond his Costs and Charges by him about his Suit in this Part expended to one Penny, and for his Costs and Charges to 12 Pence. And if upon the whole Matter aforesaid, by the Jurors aforesf. in Form aforesf. found, it shall seem to the Court here, that the aforesaid *Rich. Sutton* and *John Law* are not guilty of the Trespass aforesf. then the said Jurors say upon their Oath aforesf. That the aforesf. *Rich. Sutton* and *John Law* are not thereof guilty, as the aforesaid *Rich. Sutton* and *John Law* above for themselves have alledged. And because the Court of the Lord the King here is not yet advised of giving their Judment of and upon the Premisses,

Day

Day thereof is given to the Parties aforesaid, before the Lord the King at *Westminster*, until *Wednesday* next after 15 Days of *Easter*, to hear their Judgment of and upon the Premisses, because the Court of the Lord the King here thereof not yet, &c. At which Day before the Lord the King at *Westm.* come the Parties aforesaid, by their Attornies aforesaid; and because the Court of the Lord the King here is not yet advised, of giving their Judgment of and upon the Premisses, day thereof is further given to the Parties aforesaid, before the Lord the King at *Westminster*, until *Friday* next after the Morrow of *Holy Trinity*, to hear their Judgment thereof, because the Court of the Lord the K. here thereof not yet, &c. Upon which (Day), the Premisses by the Court of the Lord the now King here being seen, and all and singular the Premisses fully understood, and mature Deliberation being thereupon had, for that it seemeth to the Court of the Lord the now King here, upon the whole Matter aforesaid in Form aforesaid found, that the said *Richard Sutton* and *John Lawe* are not guilty of the Trespass aforesaid, as the said *Richard Sutton* and *John Law* above for them (selves) have alledged; it granted that the aforesaid *Simon Baxter* take nothing by his Bill aforesaid, but for his false Clamour thereof be in Mercy, &c. And that the aforesaid *Richard Sutton* and *John Lawe* go thereof without day, &c. And that the aforesaid *Richard Sutton* and *John Law* recover against the aforesf. *S. Baxter* 24*l.* for their Costs and Charges by them about their Defence in this Part expended, to the said *Richard Sutton* and *John Lawe*, with their Assent by the Court of the Lord the King here, according to the Form of the Statute in such Case lately made and provided, adjudged; and that the aforesaid *Richard Sutton* and *John Law* have Execution thereof, &c.

THE

CASE

OF

Sutton's *Hospital.*

MICH. 10 Jacobi *Rot.* 574. *In the King's Bench* between *Simon Baxter*, Plaintiff, and *Richard Sutton* and *John Lawe*, Defendants, in Trespass, *De eo quod ipsi* 30 *May* 10 *Jac.* a Capital Messuage called the *Charter-house*, in the Parish of Saint *Sepulchres*, in the County of *Middlesex*, *freger' & intraver'*; upon Not guilty pleaded, the whole special Matter was found, which was adjourned out of the Court of the King's Bench by the Judges of the same Court, into the Exchequer-Chamber; and it was argued at the Bar for the Plaintiff by *John Walter* of the *Inner Temple*, *Yelverton* of *Grays Inn*, and lastly by *Bacon*, Solicitor General; and for the Defendant by *Coventry* of the *Inner Temple*, *Hutton*, Serjeant at Law, and by *Hobart*, Attorney General. And the Plaintiff's Counsel argued strongly in general. 1. That there was not any Incorporation created by the King's Letters Patent, dated 22 *Junii* 9 *Jac. Regis.* 2. Admitting the Incorporation was good; yet there was not any Foundation made by *Sutton* according to the Authority given him. 3. That the Bargain and Sale made by *Sutton*, bearing Date 1 *Nov.* 9 *Jac.* was utterly void, and by Consequence all the said Possessions descendible to the Plaintiff in particular. And in the Argument of this Case, these Points upon those Grounds were moved, 1. It was objected that by the Act of Parliament 9 *Feb.* 7 *Jac. Regis* in the Record mentioned, An Hospital was legally erected and incorporated at *Hallingbury* in the County of *Essex*, and all the said Manors given to it; and by Consequence the said Corporation made after the said Act

Jenk. Cent. 270.

2 Bulst. 146.

1. Objection.
Postea 24. b.

Act by the Letters Patent 22 *Junii* 9 *Jac. Reg.* was utterly void. Note Reader, the said Act cannot give the said House called the *Charter-house*, for *Sutton* purchased it afterwards, *viz.* 9 *May* 9 *Jac. Reg.* as by the Record appears.

2. Objection. Postea 25. b.

2. That no Hospital was founded by *Sutton*, and therefore the Incorporation failed; because *Sutton* had the King's Licence to Found, Erect and Establish an Hospital, which was an Act precedent to be performed by *Sutton* before the Incorporation, which he hath not done; and so he has not pursued his Licence; which Licence the King might have countermanded; and which was countermanded in Law by the Death of *Sutton*.

3. Objection. Postea 28. b.

3. That the King by his Charter can't name the House and Inheritance of *Sutton* to be an Hospital, for that would be to give a Name of an Hospital *in alieno solo*.

4. Objection. Postea 29 a.

4. The Place of every Corporation ought to be certain, for without a certain Place there can't be any Incorporation; but here the Licence to *Sutton* is to found an Hospital *at or in the Charter-house*; so that he may found it in all or any Part of the same House, and therefore till *Sutton* has founded it certain, there is not any Certainty of the Place, and by Consequence, no Corporation. To which was added, that a Place by a known Name is not sufficient to support the Name of an Incorporation, but it ought to be described by Metes and Bounds; and divers Precedents were cited and shewed, where the Scite of Hospitals, Priories, *&c.* were so particularly described.

5. Objection. Postea 31. a.

5. The King by his Letters Patent intended to make a present Incorporation, and so his Words expresly import, *viz. From henceforth*, *&c.* And yet no Incorporation can be till *Sutton* has named a Master, and the Letters Patent bear date 22 *Junii Anno* 9, and the Writing of Nomination 30 *Octob. Anno* 9, and so the Letters Patent are repugnant in themselves and void.

6. Objection. Postea. 32. a.

6. Until there be an actual Hospital and Poor in it, there can't be Governors of them, for Governors ought not to be idle, or as Cyphers in *Algebra*; for Governors and Government are *relativa, quæ sunt simul tempore*, and as well in his Will as in other Instruments, he has called it many Times his intended Hospital.

7. Objection. Postea 33. a.

7. To every such Corporat. a Foundation is requisite; and here is not any Foundation made by *Sutton*. For first he ought to have *per verba præscripta & in terminis terminantibus*

nantibus founded, erected and established the said House of *Charter-house* an Hospital, *&c.* And it was compared to Cases of Exchange, *Frankalmoigne*, *Dedi*, *Warrantizo*, Frankmarriage, *quæ sunt verba legalia & incompatibilia*, *&c.* And divers Precedents were shewed to the Justices of Erection of Hospitals, Schools, *&c.* wherein the said Words of *Fundo*, *erigo*, *&c.* were used. Secondly, Before such lawful Foundation made by *Sutton*, a Stranger could not have given any Land or other Thing to the said Governors. Thirdly, Without such Foundation, in Time to come it shall not be known who should be the Founder, whereupon Confusion would ensue.

4 Co. 39. b.

Postea 28. a. 30. a. 33. b.

8. The Nomination of the Master made by *Sutton* is void for two Reasons, one that he was nominated to be Master but at Will, where he ought to be nominated for Life, in as much as he is to have a Freehold in the Land. Also there ought to be at least an actual Hosp. founded by *Sutton* according to his Licence, before he could nominate a Master of it; for otherwise it should be a Mathematical or Utopical Hospital.

8. Objection. Postea 34. a.

9. The said Bargain and Sale made by *Sutton* to the said Governors was void for three Reasons. 1. That the Money which was the Consideration thereof was paid by the private Persons of the Governors, and therefore the Bargain and Sale of the Manors, *&c.* can't enure to them in their Politick Capacity. 2. The *Habendum* is to the Governors upon Trust and Confidence, and a Body Politick aggregate of many can't stand seised of a Trust or Confidence to the Use of another. 3. Because no Hospital was founded by *Sutton* according to his Licence; and for all the other Objections made against the Foundation and Incorporation, the said Bargain and Sale was void, and by Consequence all the said Manors descended to the Plaintiff as Cousin and Heir to *Sutton*.

9. Objection. Postea 34. a. 1 Cor. 24. a. 26. a.

Q.

10. That no Hospital was incorporated by the said Letters Patent, and therefore it was Objected, That the King could not incorporate them by the Name of Governors, *&c.* of the Hospital, but of an Hospital in Law, or a legal Hospital, as it was called; for the Governors can't plead, that they are seised *in jure Hospitalis sui*, because in Law there was not any Hospital.

10. Objection. Postea 34. a.

Which brief Report I have made of these Objections, because I think 'em, or the greater Part of them were not worthy to be moved at the Bar, nor remembred at the Bench: And that this Case was adjourned to the Exch. Chamb. by the Justices

Justices of the King's Bench, more for the Weight of the Value, than for the Difficulty of the Law in the Case. And the entire Record, as appears before by the Exceptions, ought to be the Case, the which was argued openly in the Exchequer Chamber by all the Judges of *England*, and Barons of the Exchequer, (except the Chief Justice of the King's Bench, who was then sick,) *viz.* Sir *Rob. Houghton*, Sir *Augustine Nicholls*, Sir *John Dodderidge*, Sir *Humfrey Winch*, Sir *Edward Bromly*, Sir *John Croke*, Sir *James Altham*, Sir *George Snigge*, Sir *Peter Warburton*, Sir *Lawrence Tansield*, Chief Baron, and Sir *Edward Coke*, Chief Justice of the Common Pleas. And it was resolved by them all in their Arguments (except by Baron *Snigge* and Justice *Croke*) that Judgment should be given against the Plaintiff, *Et quia rectum est index sui & obliqui.* A Right Line makes Discovery not only of that which is Right, but of that which is wrong and crooked; and the Confirmation of the Right and Truth is the Confutation of Error and Falshood. I will report the Effect of the Reasons and Causes affirming and confirming the Resolutions of the Judges, which are of so great Authority, Perspicuity and Gravity, that it is not necessary that the Objections should have any particular Answer, and yet for the Satisfaction of all, every one of them shall be particularly answered. And because this Case chiefly depends upon the Letters Patent, and the best Exposition of the King's Charter is upon the Consideration of the whole Charter, to expound the Charter by the Charter it self, *verba cartæ regiæ æquè portant suam expositionem*; and the King's Letters Patent in this Case are *viscera causæ, & expositio quæ ex visceribus causæ nascitur est aptissima & fortissima in lege*; all the Parts of the Letters Patent were considered, and every material Part thereof explained according to the true and genuine Sense, which is the best Method, upon the Consideration of many others, for the more clear Report of this Case.

The Judges who argued in the Case.

Post. 34. a.

Maxim.

Viscera causæ.

The first Part of the said Charter contains a short Recital of two Things, 1. of the Title of the Act of 9 *Feb. Anno* 9. viz. *An Act to confirm and enable the Erection and Establishment of an Hospital and free Grammar-School, done and intended to be done by* Thomas Sutton, *Esq*; which Title proves that no Hospital, *&c.* was founded by the Act it self; but the Scope of the Act was to enable *Sutton* to erect and establish an Hospital, *&c.* and therefore the Title saith, *intended to be done and performed by* Thomas Sutton, *Esq*; And that also appears by divers Parts of the Body of the Act, which are all *in futuro & nihil in præsenti.*

1 Part of the K' Charter. Answ. to 1. Obj. Antea 23. a.

1. Be

1. *Be it therefore enacted, That in the Town of* Halingbury, *&c. there may be builded one meet House for Abiding of poor People and Scholars, &c.* which are Words *de futuro*, and it is not certain in what Part of the Town the House shall be built, &c. 2. *And that the same shall and may be called and named the Hospital of K.* James; which are Words also *de futuro*. 3. *And that the Lord Archbishop of* Canterbury, *&c. shall and may be the Governors, &c.* 4. *And that the same Governors, &c. shall for ever hereafter stand and be incorporated*: Which Words ought to be intended to take Effect after the Erection of the Hospital, *&c.* in a certain Place, *&c.* and so the Construction is *in futuro*, which well appears by the Words *de futuro* following, *and may have perpetual Succession.* 5. *And may for ever hereafter have, hold, and enjoy, Lordships, Manors, &c. without Licence of Alienation or Licence of Mortmain.* By which it appears, that this Clause is not in Effect, but a Licence to give Manors, Lands, *&c.* held *in Capite* without other Licence of Alienation, and also without other Licence of Mortmain. But this Clause was superfluous and impertinent if the Land should pass by the Act it self, for then no Licence in those Cases was requisite. And without Question if it were admitted that there was a Corporation, yet no Lands are given to it by these Words *de futuro*. Also although the said Lands were given them, yet the King by his Letters Patent can erect and incorporate an Hospital in the *Charter-house*, which was purchased after the Act, and the Action of Trespass in the Case at Bar is for a Trespass done in the *Charter-house*. But it was resolved by all the Justices and Barons of the Exchequer (except Justice *Croke*) that the Act of 9 *Jac.* doth not incorporate the Governors, *&c.* but *in futuro*, which never did nor can take Effect; and by Consequence no Land was or could be given thereby. The 2d Branch of the Recital is of the Purchase of the *Charter-house* after the Act, which, as it is there rehearsed, is more fit and commodious than *Halingbury* to be converted into a Hospital.

The 2d Branch of the Charter.

In the second Part *Sutton* is a Suitor and Petitioner to the King for four Things, 1. *To give Licence to found, erect and establish an Hospital-house, &c. and free Grammar School, &c. at or in the Charter-house*, wherein has been observed the Incertainty of the Suit, *viz. at or in the Charter-house*, but of that hereafter. 2. *To incorporate the Governors hereafter named*, so that *Sutton* himself names the Governors which the K. incorporates. 3. *By such Name of Incorporation*

as is hereafter mentioned to have Capacity and Ability, &c. by which also it appears, that *Sutton* devises and prescribes the Name of the Incorporation; and by all these three Clauses it appears, That the Suit of *Sutton* and his express Consent was, that the Governors should be named of the said House called the *Charter-house*. 4. *Sutton* was Suitor, *that the Governors, &c. might take in Mortmain for the better Maintenance of the said Hospital, free School, Preacher, &c.*

The 3d Part of the Charter. The Division of the Charter.

The third Part of the Letters Patent contains Grants and Acts made by the King in two Manners, *sc.* by Way of Licence and by Way of Grant; of the Licences some are requisite, some abundant and not requisite; and some requisite for the Sustentation of the Poor, *&c.* and not to the Essence of the Corporation; and of the Grants, some are *in præsenti*, and some *in futuro*, and of each of them some are of Necessity, and some explanatory and not of Necessity; and those which are of Necessity, some are of Necessity to the Creation of this Body politick, and some to the Continuance and Preservation of it. And into those Branches all the said Letters Patent are divided, which shall be observed as they arise and have Place in the same Letters Patent: But before all the Licences and Grants, the King prefixes a Preamble, *sc. The King affecting so good a Work, of his Princely Disposition and Care for the Furtherance thereof, and that the same may take the better Effect, &c.* (wherein appeareth the Honour, Charity, and pious Disposition of the King) *giveth Licence to* T. Sutton, *his Heirs, Executors, Administrators and Assigns, at all Times hereafter at their Will and Pleasure to place, erect, found and establish, at or in the said House called the* Charter-house, *one Hospital House and Place of Abiding for the Finding, Sustentation, and Relief of poor aged, maimed, needy, or impotent People, &c. Also to erect, found, &c. one free School for the Instruction, Teaching and Maintenance of poor Children or Scholars, &c. And to place and maintain a learned Schoolmaster and Usher to teach and instruct the said Children in Grammar. And also one learned and godly Preacher, to preach and teach the Word of God to all the said Persons, poor People and Children, Members and Officers at or in the said House.* This in the first Place contains the End of *Sutton*'s Piety and Charity: For (*a*) *Sapiens incipit a fine, & quod primum est in intentione, ultimum est in Executione.* And that was a grand Motive to the King of his Royal Authority to give him Means, *sc.* by Creation of a capable Body politick by Way of Incorporation, to have a perpetual Succession to perfect and perpetuate so pious and charitable a Work. And

Answer to the 2d Objection.
(*a*) Co. Lit. 70. b. 127. b.
Antea 23. b.

And that the Incorporation ought to precede the Execution of this Licence, is evident by the Words and Coherence of the Letters Patent, *sc.* for this Licence is *in futuro*, *sc.* to *Tho. Sutton*, his Heirs, Executors, Administrators and Assigns, *at all Times hereafter at their Will and Pleasure*, &c. so that it is future as well in Persons, Heirs, Executors, *&c.* as in the Thing to be done. But when he comes to the Clause of Incorporation, he doth it *per verba de præsenti tempore. And the said Persons and their Successors by the Name, &c. We do by these Presents for ever hereafter really and fully incorporate, &c.* By which it follows, that the Incorporation being present, and the Execution of this Part of the Licence future, the Incorporation ought of Necessity to precede the Execution of the Licence. Then forasmuch as the principal Foundation of the Scruple was conceived upon these Words, *to found, erect, and establish*, the true Etymology and genuine Sense of them was considered; and *ex vi termini fundare, nihil aliud est quam fundamentum jacere seu ponere, &c.* to lay the Foundation of a Building; and in this Sense the Holy Ghost (which moved *Sutton* to this Work of Charity) in the Scripture takes it. And therefore in the (*a*) 1 *Regum, cap.* 6. 37. *Fundata est domus anno primo, & anno* 11 *perfecta fuit domus in omni opere suo.* And (*b*) 1 *Regum, cap.* 16. 34. *Ædificavit in diebus illis Hiel de Bethel Jerico in Abiram primitivo suo fundavit, & in Segub novissimo suo posuit portas.* By which it appears, that to found is to lay the Foundation of a Building, which is the first mechanical Part of Architecture. Then when the Foundation is laid, then comes the Erection of the House, as it is said by the Son of *Sirach* 49. 15. *Erexit nobis muros, & erexit domus nostras.* And although the Foundation be well laid, and thereupon a Building well erected, yet it ought to be well conjoined and establish'd, and therefore this Word *establish* is added to make the Building have Continuance. 3 *Reg.* 13. *Stabiliam thronum ejus*; that is, I will make his Throne to have Perdurance and Continuance. So that to found, erect, and establish, are *Opera Laboris, & Laboris Architector'*, and that appears by the Words of the Charter it self, *sc. The K. affecting so good a Work, tam bonum opus:* Moreover the subsequent Words prove it also; *to found, erect, and establish*, what? *an Hospital-house.* So that it clearly appears, that the Effect of this Licence is to make fit and to finish and furnish an Hospital-house for the Habitation of the Poor, *&c.* See after, *Mich.* 34 *&* 35 *Eliz.* the Case of the Hospital of *Bridewel* for the Exposition of these Words, *fundo, erigo, & stabilio*, which is a stronger Case than this is. And this Word *Place* in the first Place is to be intended, as hath been said, in the last Place, *scil.* To place Poor in it, to

2 Inst. 723.

(*a*) 1 Reg c. 6. ver. 37, 38.

(*b*) 1 Reg c. 16. ver 36.

Eccl. c. 49. v. 17.

Post. 31. a. b.

to erect a free School for the Instruction of Youth, and for the Maintenance of a Preacher. But how shall this holy and charitable Intention (that it should remain in Succession for ever) be brought to an End and Effect? The Charter it self shews it in Effect in this Manner: It is impossible to take in Succession for ever without a Capacity; and a Capacity to take in Succession can't be without Incorparation; and the Incorporation can't be created without the King; for this Reason the Charter saith, *And for the Maintenance and Continuance of the said Hospital*, &c. *and that the same may take the better Effect, that the said Persons*, &c. *be one Body corporate and politick, to have perpetual Succession for ever to endure; We do by these Presents for ever hereafter fully and really incorporate, &c. to have Capacity and Ability to take, &c.* Without this Capacity the End can't be effected, for (*a*) Inhabitants of a Town, or other single Persons (who have not Capacity to take in Succession but only to their singular Heirs) have Capacity to take an Incorporation; and after their Incorporation they have Capacity to take in Succession any Lands, Tenements, or Hereditaments; *unde sequitur*, that the Incorporation which gives Capacity ought to precede the Donation of any Land, *&c.* Another Licence is given to this new Incorporation to take in Mortmain. This Licence is not of Necessity, either of the Essence of the Incorporation, or of the Continuance of it; but yet it is requisite for the Establishment and Maintenance of the End, *scil.* to have the Poor sustained, and Scholars instructed, *&c.* For they can't be maintained without a Revenue, and the Revenue (as has been said) they can't take and retain without a Licence in Mortmain; and therefore those two, *sc.* Incorporation and Licence in Mortmain ought to precede the Dotation. These Words to found, erect, and establish an Hospital-house, can't be extended to the Incorporation, for that belongs only to the King, and that the King makes; not to any Dotation, for as yet (as hath been said (there is not any Capacity; *Ergo* it extends only to the Building and Finishing of the said House to be a fit Habitation for Poor, *&c.* *Sutton* thinking and rethinking that as well the Incorporation as the Licence in Mortmain were in their several Degrees requisite to bring his good and charitable Purpose to Effect, to the End that the King would grant that which was only in his Power to grant, and which he himself without the King could not do; he was a Suitor to the King to grant him Licence to do that which of himself in Respect of the Ownership of Land he might do without the King, *scil.* To build, finish, and furnish the said House for the Habitation of

(*a*) 21 E.4.56.a. Co. Lit. 3. a. Cr. El. 35,363. Lane 12. 1 Rol. 513.

Poor, as well before the Incorporation as after: But to give it Succession, &c. as hath been said he could not, and therefore this Licence was but explanatory to declare what *Sutton* as Owner of the Land might do, either with the K.'s Licence or without the K. and therefore the K. could not countermand this Licence, because it is but declaratory of that which *Sutton* might do as Owner of the Land without any (*a*) Licence; and this appears by the Book in 3 *H.* 7. *Fitz. Grant* 36. the Record whereof I have seen, between *J. Buckland* Vintner Pl. in an Action of Trespass, and *Rich. Fowcher* Chaplain Defend. *Term. Sanct. Mich.* 2 *H.* 7. *Rot.* 155. in the K.'s Bench, and in the Report at large, (*b*) 2 *H.* 7. 13. *a. b.* where the Case in Effect is, That K. *H.* 4. by his Letters Patent, *an.* 6. *regni sui*, reciting that *Rob. Ramsey* was seised in Fee of an House in the Parish of St. *Margaret* in *London*, called the Sun, &c. notwithstanding the Stat. of Mortmain, *de gratia sua speciali*, and for 20 *l.* gave Licence to *R. Ramsey*, that he might give 20 Marks Rent, issuing out of the said House, (*c*) *cuid' capellano divina celebranti ad altare beatæ Mar' in Eccles. S. Magni London singul' diebus pro salubri statu præd' Rob' & Johan' uxor' suæ*, &c. *Habend' & tenend' eid' capellano & successorib' suis capellan' Cantariæ præd' divina in Eccles. præd' ad altare præd' pro salubri statu*, &c. *juxta ordinationem præd' Rob. in hac parte faciend' celebrat' imperpet'*, &c. And afterwards the said *Rob. Ramsey* by his Deed indented tripartite, 10 *Jun.* 1407. founded, ordained and erected the said Chauntry, and ordained and named one *Jo. Meadow* to be the first Chaplain to do the said Divine Services; and further by the said Deed granted to the said *J. Meadow* the 1st Chaplain 10 Marks of yearly Rent issuing out of the said House, To have to him and his Successors, Chaplains of the said Chauntry, at 4 usual Feasts in *Lond.* to be paid, with Clause of Distress, to him and his Successors; and further appointed by the same Deed, that he himself should present to the said Chauntry during his Life; and after his Decease, that *Johanna* his Wife should present to it during her Life, and after her Decease the Parson and Churchwardens of the said Church of St. *Magnus*, and their Successors; and afterwards the said *John Medow* died, and after divers Vacations the Defend. *Rich. Fowcher* was presented to the said Chauntry, who for the said Rent arrear entered into the said House the Door being open, and took a Cup of the Plaintiff's for a Distress, &c. for which Taking the Action was brought, upon which Matters the Parties demurred in Law: And this Case was adjourn'd into the Exchequer-chamber, and there before all the Judges of *England* divers Objections were made against this License and Grant. 1. Because they were *cuidam capellano*, and named none in certain; and when the King's Grant is uncertain it is void; as if the King licenses

(*a*) 3 Inst. 202.

(*b*) Br. Patent 44.

(*c*) 1 Rol. 513

(a)Perk, sect. 65. licenses one to give 20 Marks Rent(*a*) *cuid' Abbati*, the Grant is void, because it is incertain. 2. There is not such Chaplain till *R. Ramsey* has named and ordained one, so that it appears, that the Grant would be to him who was not *in rer' natura*; as if the K. gives Licence to grant to the Major and Commonality of *Islington*, it is void where there is not any such Incorporat. altho' the Inhabitants of *Isling.* be afterwards incorporated by the Name of Major and Commonality, because there was no such Corporat. *in rer' natura* at the Time of the Grant. 3. It was objected, that the K. had not made any Incorporat. in that Case, and an Incorporat. is a Thing to be made only by the K. himself; and these Words *juxta ordination' per R'b' Ramsey fiendam*, should not enable the said *Ramsey* to make an Incorporat. for the K. can't give Licence to any to make an Incorporat. but the said Words would give him Power to make Ordinances, first touching Masses and other divine Services. 2. Of what Manner of Habit he should be. 3. To have perpetual Succession, *sc.* elective, presentative, or donative, and that is the Effect of the said Words and not to make a Corporat. and the K.'s Grant should not be taken by Implication, *sc.* by the Words to make an Incorporat. and also to give Licence to grant the said Rent, for then the K.'s Grant would enure to 2 Intents. 4. Admitting that there should be an Incorporat. by Implication, yet the Incorporat. ought to be before the Licence, and here the Licence is before the Incorporat. and therefore void. 5. The Grant ought to have been that the K. gave Licence *facere & erigere Cantar'*, &c. and there were not any such Words in the Charter, but only Licence to grant a Rent, &c. *cuid' capellano*, &c. 6. The Licence is *secundum ordination' per R. Ramsey fiendam*, and therefore the K. is deceived, because he could not have Knowledge what Ordinance it would be. 7. It was objected, that the Distress was without Warrant, and void, because the Licence did extend to grant a Rent only without Mention of any Distress. Which Objections I have here collected out of the Book reported at Length, 2 *H.* 7. 13. *a. b.* and the Report of *Fitz.* in 3 *H.* 7. *Grant* 36. and out of the Record it self.

1 Rol. 513. 2 Rol. 42. Br. Patent 44.

As to the 1st and 2d Object. it was resolved, that the Grant was good, for all the Grants of Chantries are of such Form, *sc. cuid' capellano*, and altho' there be not such Chaplain at the Time, it is not to the Purpose; for if the K. grants to the Commonalty of *Isling.* that they shall be incorporated of a Major and Bailiffs, and that they have Pow. to chuse one, it is good, altho' the Election of the Major is future. So note Reader, a Difference betwixt an Estate or Interest which none can take without present Capacity, and a Pow. Liberty or Franchise or Thing newly created, which may take Effect *in futuro*. As to the 3d it was resolved, That where the King by his Charter saith *cuidam capellano*, that was a sufficient Incorporation; and when he saith in the *Habendum sibi*

2 Rol. 157. 1 Rol. 513.

& successorib' suis, that makes a sufficient Succession. And so note Reader, this Grant of the K. enures to (a) 3 Intents, *sc.* to make an Incorporation, to make a Succession, and to grant a Rent. As to the 4th it was resolved, that where it was objected that the Licence to found the Chauntry should be 1st, and to grant after, that is not necessary; for it is not material which is before, (for the Law will construe that to precede which ought to be first) but here they are *simul & semel*. As to the 5th, That in the Licence there were not Words of *fundare, erigere, facere*, it was resolved, That notwithstand. that the Grant was good. *Nota ex hoc* Reader, that to the Essence of a Chauntry or other Body politick, 2 Things are only requisite, *sc.* an Incorporat. and a Gift, and not any Words of *fundare, erigere, & stabilire*, or Words to such Effect; for no such Words were contained in the said Grant of *H.* 4. and yet it was adjudged a good Chauntry lawfully incorporated and founded; and if such Words had been necessary and requisite in Law, the Judgment ought to have been given against the Chauntry, because they were omitted in the K.'s Grant. And thereby it appears, that in the Case at Bar, they were explanatory and of Abundance; which is a Judgm. in the Point, by the Resolution of the Justices in the Exchequer-chamber. As to the 6th Point it was resolved that these Words, *secundum ordinationem per* (b) *R. Ramsey fiendam*, import sufficient Certainty, *sc.* to enable *Ramsey* to ordain, 1. What Masses and other divine Services should be celebrated. 2. Of what Habit or Order the Chaplain should be, and 3. Whether he should be elective, presentative, or donative: By Force of which Words *Ramsey* in the Case at Bar, ordain'd it to be presentative by the Rector of the Parish of St. *Magnus* for ever. As to the 7th Objection, it appears by the Report of *Fitzherbert ubi supra*, that the Opinion of the 2 Chief Justices *Hussey* and *Brian*, and *Starkey* Chief Baron, and *Fairfax* Justice, was, That the Distress was without Warrant but *Townsend* conceived it to be good. But *inspecto recordo*, it was adjudged that the Distress was good and well warranted by the Grant; for the Chauntry-Priest distrain'd in the said House for the Rent, and his Distress was adjudged lawful, and the Plaintiff barred; and the Reasons, as I conceive, were, because the King's Charters, made for the Erection of pious and charitable Works, shall be always taken in the most favourable and beneficial Sense; and the most beneficial Rent that a Man can grant is a Rent-charge. 2. A Distress is a necessary Incident to the Rent, for without that the Grantee would be without Remedy: (c) *Verba sunt accipienda cum effectu*, and Words are to be taken with the Effect. (d) 2 *Ed.* 3. 3. Which Case I have cited more at large, because it is notable

(a) 2 Ro. 200.

Antea 24. a. Post. 30. a. 33. b.

(b) 1 Rol. 513.

(c) 4 Co. 21. a.

(d) 4 H. 7. 13. a. b

Fitzgib. 92.

notable and pertinent, and stronger (as I conceive) than the Case in Question. 2dly, Power is given to *Sutton to place a Master of the said Hospital.* 3. *At all Times hereafter to place. erect, found, and establish in the said House*, &c. *one free School for Instructing Youth*, (which well expounds the precedent Words concerning the Hospital, for these Words extend only to make fit and to finish and furnish a Grammar-scho. within the said *Charter-house*) *and a learned Preacher to teach all in the Word of God.* 4. *We do by these Presents, ordain, constitute, limit and appoint, That the said House and other the Premisses shall from henceforth for ever hereafter be, remain and continue, and be converted, employed and used for an Hospital and House, and Place for Abiding*, &c. *And shall for ever hereafter be named, incorporated, and called the Hospital of* K. James, *founded in the* Charter-house, *within the County of* Middlesex, *at the humble Petition, and at the only Costs and Charges of* T. Sutton, *Esq; And the same Hospital and free School by the Name of the Hospit. of K.* James, &c. *We do firmly by these Presents, erect, found, establish and confirm, to have Continuance for ever.* By this Clause the King *in præsenti* gives the Name of the Hospital, but as it appears before, *Sutton* had devised it, and had sued to the King to name it accordingly; and that the Name of the Incorporation it self, (*sc.* at the humble Suit, *&c.* of *T. Sutton*,) imports; so that as it is said in 38 *E.* 3. 14. *b.* and 21 *E.* 4 56. *a. b.* the (*a*) Name of Incorporation is as a proper Name or Name of Baptism: In this Case *Sutton* as Godfather gave the Name, and by the same Name the King baptized the Incorporation. By which it appears, that the Objection, that the King could not give a Name to an House which is the Inheritance of another, is not of any Value, for here *Sutton* has consented and assented to it; and all this is done at his humble Suit; and this Objection tends to the Dissolution of all ancient Deans and Chapters; for at first, as appears in the 3d Part of my Reports in the Case of the *Dean* and *Chapter* of Norwich: All the Possessions were to the Bishop, and yet by his Assent the Dean and Chapter were incorporated and named of the Cathedral Church, which did then belong to the Bishop only; and afterwards a certain Portion was assigned to the Chapter; so that the Chapter was before that they had any Possessions; and that is the Reason that of common Right the Bishop is Patron of the Prebendaries, because their Possessions were derived from the Bishop, and therefore he was Founder and Patron: And therewith agree 17 *E.* 3. 40. *a. b.* 25 *Ass. pl.* 8. 10 *Edw.* 3. 10. 50 *Ed.* 3. 26. *b.* 15 *H.* 7. 11. So that at first the Dean and Chapter were by the Assent of the Bishop

The 4 Branch of the Charter. The Answer to the 3 Object. Antea 23. b.

(*a*) 1 Rol. 512. Postea 123. 38 E. 3. 15. a.

Palm. 495. 3 Co. 75. b. Cr. E. 79.

3 Co. 76. b. Fitz. Qu. Imp 7 & Chapt. 16. Palm. 494. 3 Co. 75. b.

Bishop incorporated and named of the Church Cathedral of the Bishop. And it was said, that Questions moved in the Exchequer used to be like Spirits which may be raised with much Ease, but suppressed and vanquished with much Difficulty; but these Questions were like ruinous Buildings, more easily thrown down than raised and erected. And all the Arguments which have been made against this honourable Work of Charity, are hatched out of mere Conceit and new Invention, without any Ground of Law, and such which have any Colour were utterly mistaken. And as to the 4th Exception, That the Place of every Corporation ought to be certain; and *Sutton* sues, and the K. licences *Sutton* to found, erect, &c. an Hospital *at or in the* Charter-house, which was incertain; To that the Charter it self expresly answers, That the K. by this Clause doth ordain, &c. *That the said House and other the Premisses shall from henceforth for ever hereaf. be, remain,* &c. *and shall for ever hereafter be named and called the Hospital of K.* James, *founded in the Charter-house:* So that all the House and other the Premisses are baptized by the K. by the Name of the Hospital, &c. in which is no Shadow of Incertainty; and therefore *Sutton* as to the Licence for the mechanical Part, which (as has been said) was abundant to fit and finish all or any Part of the House for an Hospital, &c. yet all the House it self, Gardens and Orchards, &c. are named by the Name of the Hospital. And it was observed, That the K. by this Clause not only names the said House to be an Hospital, but by the Name of the Hospital erects, founds, establishes and confirms, so that the K. names it, and leaves the mechanical Part to *Sutton* to perform. And of the same Importance is the other Objection, That a known Name is not sufficient to found an Hospital, but it ought to be described by Meets and Bounds, as in divers Precedents hath been used; for it appears in *Will'm de Londres* Case, 2 *E.* 3. 36. *b. Adam* brought a *Scire facias* against *Will'm de Londres* of the Manor of *E.* the Def. pleaded that he himself is Master of the Hospital of St. *Barthol.* and so bears a Name of Dignity not named, Judgm. of the Writ: To which the Pl. replied, That that which the Def. calls an Hos. is the Manor of *East Smithfield*, and was a Manor at the Time of the Fine levied: And it was held by the Court, That by this Writ he ought to have the Manor, as that which the Manor was at the Time of the Fine levied; and whereas the Man. was made an Hospit. after the Fine, by this Suit he is to defeat your Estate and your Name, and accordingly it was ruled that the Writ was good; which proves that a Manor (which imports more Variety and Incertainty than an House known by a certain Name) may be created into an Hospit. And in 15 *Ass. pl.* 8. *John de Derbie's* Case, a Manor made *Corpus Prebend'*. The 5 Clause stands upon 2 Branches: 1. *For the better Main-*

2 Salk. 451.

Answer to the 4 Objection. Antea 23. b.

2 E. 3. 20. b. 21. a.

Br. Corporat. 42.

Br. Dean. &c 14

The 5 Clause of the Charter.

Maintenance and Continuance of the said Hospital, &c. *and that the same may take the better Effect, and that the Revenues may be the better governed and employed, there shall be sixteen Governors*, and names fifteen of them by express Names, *and such Person as from Time to Time shall be Master, to be the first and present Governors.* 2. *And the said Persons and their Successors, by the Name of the Governors of the Lands*, &c. *one Body incorporate and politick, by that Name to have perpetual Succession for ever to endure, We do by these Presents for ever hereafter really and fully incorporate*; and the Words of this Clause are *Verba operativa.* And it is to be known, that every Corporation or Incorporation, or Body politick and incorporate, which are all one, either stands upon one (*a*) sole Person, as the King, Bishop, Parson, &c. or aggregate of many, as Major and Commonalty, Dean and Chapter, &c. and these are in the Civil Law called *Universitas sive Collegium.* Now it is to be seen what Things are of the Essence of a Corporation. 1. Lawful Authority of Incorporation; and that may be by (*b*) four Means, *sc.* by the Common Law, as the King himself, &c. by Authority of Parliament; by the King's Charter (as in this Case) and by Prescription. The 2. which is of the Essence of the Incorporation, are Persons to be incorporated, and that in two Manners, *sc.* Persons natural, or Bodies incorporate and political. 3. A Name by which they are incorporated; as in this Case Governors of the Lands, &c. 4. Of a Place, for without a Place no Incorporation can be made; here the Place is the *Charter-house* in the County of *Middlesex. Vide* 3 *H.* 6. *Det.* 20. 17 *E.* 3. 59. *b.* & 45 *E.* 3. 17. 5. By Words sufficient in Law, but not restrained to any certain, legal, and prescript Form of Words. And forasmuch as good Pleading is *lapis Lydius*, the Touch-stone of the true Sense and Knowledge of the Common Law, the Form of Pleading of a Corporation by Prescription is to be observed, for in such Case he ought to prescribe in every thing which is of the Essence of the Incorporation. In the Book of *Entries*, Tit. *Quare impedit* 1. the Pleading is, *Quoddam Hospitale Sanctæ Mariæ de Bristow de uno Magistro, & Conventu a toto tempore, &c. incorporat' fuerunt per nomen Magistri & Conventus Hospitalis Sanct' Mariæ de Bristow*; and there it appears that there they purchased Lands and Tenements, and were impleaded without any Prescription for the one or the other, because when they are incorporated by Prescription by a certain Name, then to implead and to be impleaded, to grant and purchase, &c. are Incidents to a Body incorporate. *M.* 15 *H.* 7. *Rot.* 522. *in Com' Banco*, there the Prescription is *Custos & vicarii Collegii vicariorum in choro*

Verba operativa.

The Division of Corporations.

(*a*) 1 Rol. 512.

What Things are of the Essence of a Corporation.

(*b*) 1 Rol. 512.

1 Rol. 512.

1 Rol. 512.

ro Hereford sunt & a toto tempore, &c. fuerunt incorporat' per nomen Custodis & Vicar' Collegii Vicariorum in choro Hereford': And there also they purchased and were impleaded as incidents to Incorporation. (a) *Lib' Intrat' Tit' Ass. fol. 68. Magister, fratres, & sorores fraternitatis sive guildæ novem ordinum sanctorum Angelorum juxta Brainford* brought an Assise; the Tenant pleads, *quod in villa de Brainford est quædam fraternitas incorporata infra tempus memoriæ de Magistro, fratribus & sororibus novem ordinum Angelorum juxta Brainford* Bridge, *absque hoc quod habetur aliqua talis fraternitas*: Which Case is reported in (b) 22 *E.* 4. 34. *a.* where the Tenant at first pleaded, No such Corporation, and if it be, not found; and naught because two Bars, and then he pleaded the said Plea, *quod est quædam fraternitas incorporata, &c.* and yet there they were infeoffed by *Bocking* upon Condition, and capable thereof as incident to Incorporation. And therewith agrees the Bishop of *Exeter*'s Case in the Book of *Entries*, 455. (c) 2 *H.* 7. 17. *b.* the Corporation of *Godmanchester* (d) 34 *H.* 6. 27. *a. b.* in the Case of the Hospital of *Wycome*. *Vide* (e) 26 *H.* 8. 1. *b.* In 9 *E.* 4. 20. *a.* The Master of the Hospital of *Burton S. Lazarus* prescribed, *quod ipse & omnes prædecessores sui magistri Hospitalis prædict' a toto tempore, &c. nominati & cogniti fuerunt, &c. tam per nomen magistri Hospitalis Sancti Lazari de Burton, de ordine Sancti Lazari de Jerusalem in Anglia, quam per nomen Magistri de Burton Sancti Lazari de Jerusalem in Anglia*: By which it appears that this Word (g) *incorporo*, or any derivative thereof, is not in Law requisite to create an Incorporation; but other equivalent Words are sufficient, as here *nominati & cogniti*: And therewith agree (h) 44 *Ass. p.* 9. in the Prior of *Plimpton*'s Case, and (i) 4 *E.* 4. 7. *b.* in the Case of the Abbot of *Glastenbury*, and in none of these Books or Records was any Mention made of these Words, (k) *fundo, erigo, &c.* or any other like Words; for as it hath been said, they are only declaratory Words, and the Effect of them may be done by the Owner of the Land without any Grant. And it was well observed, that in old Time the Inhabitants or Burgesses of a Town or Borough were incorporated when the King granted to them to have *Gildam* (l) *Mercatoriam*: In the *Register* 219. *b.* where the Writ recites, *quod cum inter cæteras libertates civibus civitatis Winton per chartas progenitorum nostrorum quondam regum Angliæ quas per chartam nostram confirmavimus, concessum sit eisdem, quod nullus eorum qui fuerunt infra Gildam Mercatoriam placitet extra murum, &c.* where *Gilda* signifies *contubernium seu fraternitas incorporata*; and upon that the Place of their Meeting and Assemblies was called the *Guild-Hall*. And I have seen

(a) Rast. Entr. 68. a. b.

(b) Br. Brief 398. Br. Corporation 67.

(c) Br. Corporation 46.

(d) Br. Action sur le Stat. 9. Br. Pleading 11. Br. Assise 11. Br. Corporation 7. Fitz. Bar. 67.

(e) Br. Corporation 1.

(f) Br. Corporation 32. Br. Averm. 17.

(g) 1 Rol. 513.

(h) Br. Corporation 44.

(i) 4 E. 4. 8. a. Fitz. Brief 150.

(k) Antea 24. a. 28. a.

(l) 1 Rol. 513.

the Charter made by King *H.* 1. *Textoribus Lond'*, by which he grants to them that they shall have *Gildam Mercatoriam*, and a Confirmation of it made by K. *H.* 2. by which Charters they were incorporated. And where the Opinion of *Fineux* in 13 *H.* 8. 3. *b.* and of *Prisot* in 39 *H.* 6. 13. *b.* was cited at the Bar, that a Corporation aggregate of many can't be a Body only without a Head, that was utterly denied: For at first the greater Part of Corporations were Bodies without any Head by Force of these Words *Gilda Mercatoria.* And that a Corporation may be aggregate of many without a Head, *Vide* 18 *E.* 2. *Annuity* 48. 5 *E.* 3. 11. *b.* (*a*) 22 *Ass.* 67. 29 *Ass.* 17. (*b*) 2 *H.* 6. 9. (*c*) 18 *H.* 6. 16. *a. b.* 19 *H.* 6. 80. (*d*) 21 *E.* 4. 55. *b.* 56. *a. b.* (*e*) 7 *E.* 4. 14. *a. b.* 2 *Mariæ Dyer* 100. (*f*) And it appears by Record * that *Paulinus* the first Archbishop of *York*, after he had baptized the Inhabitants of *Nottinghamshire* in the River of *Trent*, founded a Collegiate Church in *Southwel* of Prebendaries consecrated to the Virgin *Mary*, which continues a Body without a Head even to this Day. *Vide* for this Word *Guild* or *Fraternity* in the Book of *Entries*, (*g*) 68. 37 *E.* 3. *c.* 5. 15 *R.* 2. *c.* 5. *the Statute of* 1 *E.* 6. *of Chantries.* In which three Things were observed, 1. how *prudens Antiquitas* did always comprehend much Matter in a narrow Room. 2. That to the Creation of an Incorporation the Law had not restrained itself to any Prescript and incompatible Words: 3. That when a Corporation is duly created, all other (*i*) Incidents are *tacite* annexed. And for direct Authority in this Point in 22 *E.* 4. *Grants* 30. it is held by *Brian*, Chief Justice, and *Choke*, That Corporation is sufficient without the Words to (*k*) implead, and to be impleaded, &c. and therefore divers Clauses subsequent in the Charters are not of Necessity, but only Declaratory, and might well have been left out; as 1. *By the same to have Authority, Ability and Capacity to purchase*, but no Clause is added that they may alien, &c. and it need not, for it is incident. 2. *To sue and be sued, implead and be impleaded.* 3. *To have a Seal*, &c. that is also declaratory, for when they are incorporated, they may make or use what Seal they will. 4. To restrain them from aliening or demising but in certain Form; that is an Ordinance testifying the King's Desire, but it is but a Precept, and doth not bind in Law. 5. That the Survivors shall be the Corporation, that is a good Clause to oust Doubts and Questions which might arise, the Number being certain. 6. If the Revenues encrease, that they shall be imploy'd to encrease the Number of Poor, &c. that is but explanatory, as appears in the (*l*) Case of *Thetford School in the* 8 *Part of my Reports*, *f.* 131. *a.* 7. To be visited by the Governors, &c. that is also explanatory; for

(*a*) Br. Corporation 43.
(*b*) Br. Corporation 3.
(*c*) Fitz. Brief 75.
(*d*) Br. Corporation 65. Br. Parliament 64. Br. Patent 72. Br. Laches 15.
(*e*) Fitz. Grant 18. Br. Corporation 54. Br. Patent 85.
(*f*) Dy. 100. pl. 70. 1 Rol. 860. 2 Rol. Rep. 155. 3 Leon. 202. 4 Leon. 235. Noy 54. Davis 43. b.
* Q.
(*g*) Rast. Ent. 68.
(*i*) 1 Rol. 513.
(*k*) 1 Rol. 513. Hob. 211.
Clauses of the Charter Declaratory, &c.
(*l*) Poph. 6, 7. Moor. 594. Cr. El. 288.

for in this Case the Poor which shall be resident in the House of the *Charter-house* shall not be incorporated, but certain Persons in whom the Possessions are vested, who shall not be resident there, but only to have the general Government and ordering of the Poor therein; so that this Case is out of the Statutes of 2 *H.* 5. *c.* 1. and 14 *El. c.* 5. for (*a*) if no Visitor had been appointed by the Charter, the Governors should visit; and the Books in 8 *E.* 3. 28. (*b*) and 8 *Ass.* 29. do not gainsay it, where it is held, that if the Hospital be Lay, the Patron shall visit, and if Spiritual, the Bishop shall visit, so that every Hospital is visitable; it is true, but in the Case at the Bar the Poor of the Hospital are not incorporated, and so no legal Hospital. 8. To make Ordinances; that is requisite for the good Order and Government of the Poor, &c. but not to the Essence of the Incorporation. 9. The Exemption from the Ordinary is but declaratory, for being a Lay Incorporation he neither can nor ought to visit. 10. The Licence to purchase in Mortmain is necessary for the Maintenance and support of the Poor, &c. for without Revenues they can't live, and without a Licence in Mortmain they can't lawfully purchase Revenues, and yet that is not of the Essence of the Corporation, for the Corporation is perfect without it, so that by what has been said, it appears what Things *in genere* are requisite to a compleat Body incorporate, and which are *verba operativa* in this Case which are necessary to be known in every Case) in the Resolution whereof it appears how necessary it is, that the Law and Experience should join with their Hands together.

(*a*) 2 Rol. 130. 231. 6 H. 8. 14. a.
(*b*) 2 Rol. 229, 230. 8 Ass. 29, 31. 8 E. 3. Ass. 150. Raym. 107. Godolp. Abr. 34.

1. As to the 5 Objection, That no Incorporation was made immediately as the Let. Patent import, nor can be till the Mast. was named, and therefore the Charter is repugnant and void. To that it was answered, That this Object. extends to the Subversion of a great Num. of Incorporations; for when a Corporation is created by Let. Patent, by the same Patent Power is given to the Body to chuse a Mayor, Aldermen, or Bailiffs, or Governors, or the like, and yet they are immediately incorporated by the same Letters Patent; and therewith expressly agree *Plow. Com.* 592. *b.* in (*c*) *Cook*'s Case, 21 *E.* 4. 59. *b.* & (*d*) 3 *H.* 7. *Grant.* 36. vouched at large before to 1st and 2d Objections. *Vide* 32 *E.* 3. *Aid* 39. (*e*) 13 *E.* 4. 8. *b.* 16 *E.* 3. *Grant* 65. And it is true, it is immediately by the Let. Patent a Corporation *in abstracto*, but not *in concreto*, till the Naming of the Master. And a Case adjudged in the King's Bench, *Mich.* (*f*) 34, & 35 *Eliz. Rot.* 172. *coram rege* was strongly urged. The Governors of the Possessions, Revenues and Goods *Hospitalis Edw. Regis Angliæ sexti* brought a Bill of Debt of twenty Pounds against *Elias Germaine*: The Defendant pleaded, That King *E.* 6. reciting

Answ. to the 5 Objection. Antea 23. b.

(*c*) 2 And. 208. Moor 233. 1 Leon. 159.
(*d*) Antea 27. a.
(*e*) Br. Corporation 58.
(*f*) Antea 26. a.

reciting the Care of the City of *Lond.* for the Relief of Poor Men and Infants, *concessit Majori, Civib' & Communitati Lond' Domum mansionalem vocat' Bridewell, &c.* and there the K. declared his Intent, that *Bridewell* should be founded, erected, *&c.* an Hospital for the said Poor, *&c. idem Rex ut intentio sua melior' capiat effectum,* and to the End the Lands which should be granted to 'em should be better govern'd, *per easd' literas patentes voluit & ordinavit qd' Hosp' præd' cum sic fundat' erect' & stablit' fuer' Hospital' E. 6. Reg' Angl. Christi Bridewell, & S. Tho. Apost' nominetur & appelletur imperpetuum, & qd' Major' communitas & cives civitat' præd' forent Gubernatores, &c. & qd' iidem Gubern' de cætero essent & forent un' corpus corporat' per' nomen Gubernat' possess' reventionum & honor' Hospital E. Reg' Angl' Christi Bridew. & S. Th' Apost', &c.* and further pleaded, *qd' nullum Hospital' quale in eisd' Lit' Pat' mentionat' post confect' præd' literarum pat' sic fundat', erect' & stabilit' fuit, &c.* Upon which the Pl. demurr'd; and upon Argum. at the Bar and Bench it was adjudg'd for the Pl. For the said Ordinance, that the said House should be an Hosp. *cum sic fundat' &c. fuer',* is intended only of the mechanical Part of an actual Hosp. *sc.* of the fitting and finishing of the Hos. House with Poor, *&c.* And this Hosp. in Intent. only is sufficient to support the Name of a Corporat. and the Words *de præsenti,* sc. *qd' iid' gubernat' de cætero essent & forent un' corpus corporat' per nomen, &c.* do in Law incorporate them presently, and shall not stay till there be an actual Hos. or till the House be fitted or furnished, which is the mechanical Part of the Hosp. *sc.* for the Habit. of the Poor; which is the first Thing to be observ'd by the said Judgmt. *V.* 32 *E.* 3. *Aid* 39. K. *E.* 3. newly founded a Priory and granted to the Monks that they might chuse a Prior, and before the Prior was chosen *W.* made a Lease to one *A.* for Life, the Remaind. to the Prior and Convent; and in a *sci' fa'* against *A.* he pleaded, that *W.* was seised in Fee, and leased to *A.* the Remainder to the Prior and Convent who were newly founded by the K. and because there was not yet a Prior, the Right was in the K. until, and prayed aid of the K. and the Aid by award was granted, and a Writ of *Procedend'* came, and then *A.* the Def. shewed, That after the Aid granted there was a Prior made and ordained in whom the Right remained, and prayed in Aid of the Prior; and he was ousted of the Aid because he had Aid before, which proves that the *(a)* Remaind. in such Case is good. The 2 Thing to be observed in the said Judgm. in the said Case of the Hosp. of *Bridew.* is, That one *(b)* Corporation may be made out of another Corporat. *sc.* the Mayor, Citizens and Commonalty of *Lond.* are created in their Politick Capacity Governors, *&c.* of the Hosp. of *Bridew.* 9 *E.* 3. 18. *b.* many Corporat. may be created one out of another, as the Dean and Chapt. of *Linc.* are a Joint Corporat. the Dean by himself is a Corporat. and every of the Prebends is a Corporat. by himself, and in a Case so manifest this shall suffice.

(a) Hob. 33. Co. Lit. 264. 4 Leon. 223. Dall. 31.
(b) 1 Rol. 512. Br. Corporation 5.

Note.

And as to the 6 Object. That till an Hosp. be founded no Incorpor. can be, for then they would be idle and mathematical Governors. It was answer'd, that there was an Hosp. *in potestate*, and an Hosp. *in exec*'; also an Hosp. *in potentia*, and an Hosp. *actu*, an Hosp. *re*, and an Hosp. *nomine*. And as to the Creation of an Incorporat. an Hosp. *potestate*, *potentia*, *seu nomine* sufficeth; as one may by Letters Pat. be Governor of an Army before there be an Army. *Vide* 17 *H.* 6. *Protection* 56. And that agrees with Philosophy and Reason. *Arist. lib.* 3. *de generatione* saith, *qd' caro gignit carnem*; and that is true *in potestate* but not *actu*; and so a fowl as soon as it is hatcht is *volatilis a volando*, *quia habet potest' volandi*, *quanqu' act' volandi non habet*: So a Child as soon as he is born is call'd *rationalis*, because he hath *potestatem*, altho' he hath not, and perhaps never will have *rationem actu*. And this is also prov'd by old Rec. and our Books also, as in the Book of Ent. *Tit. Annuit.* 32, 33. *Rex H.* 5. *quandam domum in quodam loco sive solo apud Shene* (and abuts and bounds the Soil) *quam vocari & nuncupari voluit Domum Jesu de Bethlem de Shene*, *duxit ordinand' & fundand' & domum illam quant' in ipso fuit fundavit & erexit* (which was but a nominative House, for none was then built) *& idcirco locum & sol' præd' de Shene ut primar' fundationem dedit*, *&c.* by which it appears that a void Place or Soil in which an House is intended to be built, may by the King's Charter be nam'd a House, and this nominative House shall be sufficient, as there it was, to support the Name of the Incorporat. Also it appears by *Mat. Paris* 64, *&c. Polydore Virg'*, *Chronic' Chronicor'*, *&c.* The Hosp. of S. *J.* of *Jerusal' in Anglia* was incorporated *in An'* 14 *H.* 1. and that of the Templers, by the name of *Magister milit' Templi & confratres sui in Ang' in an'* 24 *H.* 1. and yet neither the Fabrick of the Temple or the House of the Hospital was founded and built, *sed regnante H.* 2. of the one *Jord. Biset homo pius & bene nummatus*, and of the other *Heraclius* Patriarch of *Jerusal.* were Founders. *Vide Camd' Britan'* 311. which proves that a void Place to support the Name of a Corporat. may by the K.'s Charter be named an Hospital or Temple, and it is not requisite, that there be always Truth in the Name of the Corporat. either of an Hosp. or of any other Body Politick. K. *H.* 8. *an' regni sui* 2. according to the Will of K. *H.* 7. granted to divers Bps. *Tho. E.* of *Arundel*, *&c. Joh. Fineux*, and *Rob. Read*, Ch. Justices, *J. Young* Master of the Rolls, *&c.* who were Executors of *H.* 7. *quandam peciam terræ vocat' le Savoy* in the Parishes of St. *Clements* and S. *Mary le Strand* [illegible] *intentionem qd' iidem quoddam Hospital' in & super* [illegible] *d' peciam terræ vocat' Savoy erigere*, *fundare & stabilire* [illegible] *int.* 4 *H.* 8. The K. licenced 'em *quodd' Hospit' de uno magistro & 5 capellanis super prædict' peciam terr' vocat' Le Savoy fundare*, *& Hospitale cum sic fundat' fuerit*, should be incorporated by the Name *Magister & Capalla-*

Ans. to the 6 Objection. Antea 23. b.

2 Inst. 724.

Postea 123. b.

Q. Dudg. orig. 146, and 173. Sed. Mat. Paris 704, 912, 932. contr.

nerum Hospital' H. nuper Regis Angliæ 7 de Savoy; and yet in Truth it was not an Hospital in the Time of *H.* 7. but in Intention only; and yet the K. in his Charter called it the Hospital of K. *H.* 7. And it was admitted to be a good Name of Incorporation by all those who argued the Case betwixt (*a*) *Mariat & Pascal* upon the Incorporat. of the said Hosp. *Trin.* 30 *El.* in the Exch. where the Case was adjudged; or in the Exch. Chamb. where it depended by Writ of Error And therefore in (*b*) 44 *E.* 3. 16. *b. Regist.* 23. there the Corporat. was *Prior Hosp' S. Johan' Jerusal. in Anglia*: And so (*c*) 9 *E.* 4. 6. *Hospitale S. Lazari de* (*d*) *Jerusal' in Anglia*: Which sufficeth for the Name of the Corporation, altho' it be but a Fiction, *s.* that either St. *John* (which was S. *John* the Evangel.) or *Jerusalem* was situate in *England*. So *Magistri milit' Templi Jerusal' in Anglia*; and in the Register, *Prior & frat' sanctæ Mariæ de monte Carmeli in Anglia*: So I have seen a Record, That *Katharine* the first Wife of K. *H.* 8. had a Licence to found a Chauntry by the Name of the Chauntry *de monte Calvarie extra Algate Lond.* And it is great Reason that an Hosp. &c. in Expectancy or Intendment, or Nomination, should be sufficient to support the Name of an Incorporat. when the Corporat. it self is only *in abstracto*, and rests only in Intendment and Consideration of the Law; for a Corporat. aggregate of many is invisible, immortal, and rests only in Intendment and Consideration of the Law; and therefore in 39 *H.* 6. 13. *b.* 14. a Dean and Chapter can't have Predecessor nor Successor. 21 *E.* 4. 27. (72.) *a.* & 30 *E.* 3. 15. *b.* They can't commit Treason, nor be (*e*) outlawed, nor excommunicate, for they have no Souls, neither can they appear in Person, but by Attorn. 33 *H.* 8. *Br. Fealty.* (*f*) A Corporat. aggregate of many can't do Fealty, for an invisible Body can neither be in Person, nor swear. *Plo. Com.* 213. and the L. *Barkley*'s Case 245. it is not subject to Imbecillities or Death of the natural Body, and divers other Cases. A Thing which is not *in esse* but in apparent expectancy is regarded in Law; as a Bishop who is elect before he be consecrated; an (*g*) Infant in his Mother's Womb before his Birth, &c. 5 *E.* 2. *Bre.* 80. 8 *E.* 2. *Voucher* 237. 38 *E.* 3. 30. 41 *E.* 3. 5. 11 *E.* 3. *Qua. Imp.* 158. So for the Name of a Corporat. it is sufficient to name a Place in *England*, by the Name of *Jerusal. Mount Calvary*, *Mount Carmel*, *Bethelem*, &c. *a fortiori*, the name of a spacious and goodly House well and actually built by the name of an Hosp. is sufficient; for that imports Truth and Certainty. By which it appears, that in the Case at Bar there was a lawful Corporat. of the Governors, &c. created and instituted by the K.'s Charter, and by Conseq. as well any Person in *Eng.* as *Sutton*, might give and grant to 'em before any Foundat. laid, or to be laid by *Sutton* (as it was imagined he ought to have done before they were capable, &c.) but that is clearly answered and confuted before; and in Truth *hæc recitasse est confutasse.*

As

(*a*) Moor 228. 1 Leon 159. 1 Anders. 202. Hob. 125. Postea 123. b.
(*b*) Fitz. Sc. fa. 88. Br. Corporation 10.
(*c*) 9 E. 4. 19. b. Br. Corporation 32.
(*d*) 1 Rol 512.
See Treby's Argument in the Quo Warranto.
(*e*) Br Corporation 11. Br. Utlagary 72. 39 E. 3. 13 a.
(*f*) Br. Fealty 15. 7 Co. 10. b Co. Lit. 66. b. 4 Co. 11. a.
(*g*) 2 Rol. Rep 254. Co Lit. 390. a. 7 Co 9. a. Car. 87. Hob. 222, 338. 31 E. 1. Brief 873. 11 E 3. Voucher 13. 9 H. 6. 24 a. 2 Rol. 746.

As to the 7. Object. it is to be known that in Law there are two manner of Foundations, one *fundatio incipiens*, the other *fundatio perficiens*, and therefore *quatenus ad capacitatem & habilitatem*, the Incorporat. is *metaphorice* call'd the Foundat. for that is the Beginning, as a Foundat. *quasi fundamentum capacitatis*, preceding the whole, and therefore in (a) 21 *H.* 6. 4. *a.* a Writ was brought against *J. Arden*, Abb. of St. *Jo. Bapt.* of *Colch.* the Def. pleaded, that before Time of Memory Foundat. was made of the same Place *per nomen Abbat. Eccl. & Monast. de S. Jo. de Colch. &c.* where Foundat. is taken for Incorporat. 38 *E.* 3. 14. 38 *E.* 3. 28. *a.* 20 *H.* 6. 27. *a.* & (b) 18 *H.* 6. 16. *a.* in the Dean and Canons of *Windsor*'s Case, and divers other Books agree with the same; *Sed quatenus ad dotationem*, the first Gift of the Revenues is called the Foundat. and he who gives it is the Founder in Law, for *proprie fundatio est quasi fundi datio*, and the first gift is *fundamentum dotationis seu collationis, & appellatione fundi ædificium & ager continentur*; and that is prov'd by the Stat. of (c) *West.* 2. *c.* 41. *Si Abbates, Priores, Custodes Hospital' & aliarum domorum religiosarum fundatarum ab ipso rege vel a progenitoribus suis alienaver' vel de cætero tenem' domibus ipsis ab ipso vel a progenitoribus suis collata, &c.* In which was observed, that in respect of Tenements collated or given by the K. the House was said to be founded by the K. but more fully in the Clause follow. in the said Act, *Si autem domus illa a comite, barone, vel ab aliis fundata fuerit, habeat ille a quo, &c. tenement' sic alienat' collat' fuer' br'e ad recuperand', &c.* where the Collat. or Gift of the Tenements is called the Foundation. And where the Founder brings the said Writ of *contra formam collationis*, the Writ of *Præc' qd' reddat mesuag' qd' eid' domui collat' fuer. Vide* 9 *H.* 7. 26. *F. N. B.* 211. *Vet' N. B.* 142. 38 *Ass. p.* 22. He who gives the first Lands is the (d) Founder, *quia fundare* in that Sense *nihil al' est quam fundum dare*, and therewith agrees 14 *E.* 3. *Corrodie* 5. In a Writ of Prohibit. where a common Person is Found. of an Hospital the Writ as appears in the *Regist'* 41. *a.* saith, *Hospitale Sancti Egidii leprosorum de Burton per antecessor' R. filii I. ad sustentation' leprosorum & aliorum pauper' & infirmor' ibid' totum in temporal' & nihil in spiritual' fundat' existit*, and *ibid* 43. *a.* the like Writ where the K. is Founder, *cum Hospitale nostr' sanctor' innocentium juxta Lincoln' de fundatione progenitor' nostror' Regum Angliæ, &c. de terris & possessionibus pro sustentatione pauper' & infirmor' in eod' Hospital' degentium dotatum existat*: In which it was observ'd, that where the first Writ saith *fundat.* this Writ calleth it *dotat'* 39 *E.* 3. 17. *b.* The Abbot of *Lyra* brought a *sci' fac'* against the Dean of *Woborn*, where the Dean said he held of the Patronage (*i. e.* of the K.'s Foundat.) and pray'd Aid of him, and had Aid; and there came a Writ of *Procedendo*, and it was challenged because the Writ said of the Patronage

Inf. to 7. Obj. Antea 23. b.

(a) Br. Corporation 30. Br. Misnomer 31. Fitz. Brief 88.

(b) Fitz. Brief 75.

(c) 2 Inst. 457.

(d) Br. Presentment al'Esglise 39. 2 Inst. 458. 1 Rol. 514.

and not of the Collation, and it was taken all one, (*a*) 33 *E.* 3. *Aid* 103. the Dean of *Stafford*'s Case, the Deanry is said to be of the Foundation, & *paulo post* of the Collation of the K. 8 *E.* 3. 56. in *Sirach*'s Case, by the Foundation the Land is amortised. *Vide* 4 *E.* 3. *Ass.* 177. 21 *E.* 3. 60. *a.* (*b*) 24 *E.* 3. 33. *b.* 34. *a.* 44 *E.* 3. 23. (*c*) 44 *E.* 3. 11. *b.* 2 *E.* 3. 28. the E. of *Richmond*'s Case, 6 *H.* 4. 5. 7 *E.* 4. 12. And therefore it was resolv'd, That if the King had incorporated the Poor of the said Hospital, *Sutton* need not have made any Instrument comprehending any Foundation, Erection, &c. but his gift of the Land being the first Gift had made him (*d*) Founder, and the very first Donation is all the Foundation which is requisite in Law; and to the Erection of an Hospital, &c. there is not in Law any Thing requisite, but Incorporation and Donation. And in the Report I have omitted all the Arguments which were made at large on both Sides upon one common Ground, where one Act at one Instant shall enure to divers Intents distinct in Time, some holding, That the Bargain and Sale amounts not only to a Dotation, but also to a Foundation, and others *totis viribus e-contra*; for it appears to you now without Question, that the first Dotation is the Foundation. And yet in that also a Difference is necessary to be well understood, *s.* when the K. expresses the Words, designs the Place, appoints the Number, and gives them a Name by his Charter, so that it is a complete Corporation; there the Founder or Donor hath nothing to do but to make the Dotation without any Instrument comprehending these Words, (*e*) *fundo, erigo stabilio*, &c. or other the like words; for the common Person who is the Founder in such Case has nothing to do in the Work of Incorporation, but when the (*f*) King by his Charter reserves as well the Nomination of the Persons, as the Name of the Incorporation to a common Person who shall be the Founder, there he ought to name the Parties, and declare by what Name they shall be incorporated, and there many Times, although it be superfluous, he uses these Words, *fundo, erigo*, &c. or such like, and when the common Person hath done it, and declared it in Writing according to his Authority, then they are incorporated by the King's Letters Patent, and not by the common Person, for he is but an Instrument, and the King makes the Corporation in such Case in the same Manner as if all had been comprehended in the Letters Patent themselves: For it is true, that none (*g*) but the King alone can create or make a Corporation, as it is held in 49 *E.* 3. 4. *a.* 49. *Ass.* 8. but (*h*) *qui per alium facit per se ipsum facere videtur. Vide* for this Difference 38 *E.* 3. 14. *b.* 22 *E.* 4. *Grant* 30 (*i*) 2 *H.* 7. 13. *a. b.* &

(*a*) 33. E. 3. Aid de Roy, 103.
(*b*) Corody 6.
(*c*) Fitz. Aid de Roy 54. Br. Aid de Roy 15. Fitz. Br. 573.
(*d*) 1 Rol. 514. Br. Presentm. al' Esglise 39. 2 Inst. 458.
(*e*) Antea 28. a. 30. a. 1 Rol. 512.
(*f*) 1 Rol. 133.
(*g*) 1 Rol. 512. 1 Anders. 210. Br. Corporation 15. Br. Prescription 12.
(*h*) Co. Lit. 158 a. 2 Bulst. 304. 1 Bulst. 349. Godb. 387. Latch 29. Dav. 44 a.
(*i*) Fitz. Grant 36. Br. Patent 42.

& *Tit. Grant* 36. 20 *H.* 7. 7. And as to the eighth Objection against the Nomination of the Master, it was resolved that it was good; for *Sutton* had Liberty at his Will and Pleasure to nominate him, and when he is nominated, he is Master by Force of the said Letters Patent, and is now as if he had been named in and by the Letters Patent themselves at first, and the other Part of the Objection is answered before.

Answ. to 8. Objection. Antea 24. a.

And as to the Objections against the Bargain and Sale, it was first resolved without Question, That Money given by the Governors or any of 'em as private Person, is a good (*a*) Consideration to grant the Land to them in their Politick Capacity; but the Indenture imports that they paid it as Governors, and by such Name they are acquitted by the Indenture. Also there is (*b*) twelve Pence Rent reserved to *Sutton* and his Heirs, which is a good Consideration. 2. Although in the *Habendum* a Trust is declared, that without Quest. can't make the Bargain and Sale void, but the Conveyance being by Bargain and Sale, was wisely made to declare the Confidence and Trust. And as to the third, that is clearly answered and resolved before.

Answer to 9. Objection. Ant. 24. a.
(*a*) 2 Rol. 787, 788. 2 Inst. 725.
(*b*) Ant. 18. a. 1 Co. 24 a. 26. a. 2 Rol. Rep. 105. 1 Mod. Rep 263, 264.

And as to the last Objection, *sc.* That in pleading, these Governors can't plead, that they were seised *in jure Hospitalis*, because there was not any Hospital incorporate, nor in *esse*, at the Time of the Incorporation. To that it was answered and resolved, That the Pleading should be that they were seised in their Demesne as of Fee (*c*) *in jure incorporationis suæ*, and so was it pleaded in the said Case of the *Cooks* of *London* in *Plow. Com. Vide Fulmerstone*'s Case also in *Plow. Com.* 102. *Vide* (*d*) 7 *E.* 3. the Case of *Custos altaris*, he counted that he was seised, &c. *in jure altaris*. And as to the Precedents which were shewed, it was answered, That there are many Clauses inserted in Charters as well of the King as others, *ex consuetudine Clericorum*, which are not *de necessitate legis*, but some declaratory and explanatory, and some prolix and nugatory, but *lex multa proficientia, & perficientia paucis comprehendit*. And all the Judges who argued in this Case (except the two aforesaid) concluded against the Plaintiff, and those two *mutata opinione* assented also to the Judgment; so that by the Assent of all the said Judges (*e*) *nullo contradicente* Judgment was given against the Plaintiff. And the Lord *Ellesmere*, Lord Chancellor of *England*, Hearing all the Arguments at the Bar and Bench agreed also in Opinion with the Judges: And so this great Work of Charity has tasted of such Charity which ought to be in Judges, which is declared in the Statute

Answ. to 10. Objection. Antea 24. a.
(*c*) Doctrin. placit. 82.
(*d*) 7 E. 3. 51. a.
(*e*) Antea 24. b.

(d) W. 1. c. 51
2 Inst. 264
Co. Litt. 135. a.
11 Co. 76. b.

tute of (a) *West.* 1. *cap. ult. Summa charitas est facere Justitiam omnibus personis omni tempore quando necesse fuerit.* And there is a good Rule for these Governors, and all such Corporations, which is expressed in the Statute *de Templariis Anno* 17 *E.* 2. in these Words, *Ita semper quod pia & celeberrima voluntas donatorum in omnibus teneatur & expleatur & perpetuo sanctissime perseveret.* And Sir *Thomas Fleming*, Knt. after the first Day this Case was was argued fell sick, of which Sickness he afterwards died, so that he never argued this Case. This Sir *Thomas Fleming* was first a Serjeant at Law, and afterwards Solicitor General to Queen *Elizabeth*, and to the King that now is for the Space of twelve Years, and then was preferred to be Chief Baron of the Exchequer after the Death of Sir *William Periam*, and afterwards advanced to be Chief Justice of *England* after the Death of Sir *John Popham*; all which Places he discharged with great Judgment, Integrity and Discretion, and he well deserved the good Will of all that knew him, because he was of a Sociable and a placable Nature and Disposition.

The Reason of reporting this Case at large.

Which Case I have reported the more at large for three Reasons. 1. For the Confirmation of Incorporations founded for Works of Piety and Charity in Time past. 2. For the better Instruction how they which shall be founded hereafter shall be so established that no Exception may be taken to them. 3. For the resolving of certain Opinions and Questions which were moved at the Bar, and which might have disturbed the Peace of the Law. In the Argument of this Case many other Authorities were cited, *sc.* 2 *E.* 3. 47. 3 *E.* 3. 83. 5 *E.* 3. 144. 7 *E.* 3. 57. 8 *E.* 3. 5. 8 *E.* 3. 67. 8 *E.* 3. 208. 18 *E* 3. 1. 20 *E.* 3. *Nonabilitie* 9. 20 *E.* 3. *Corone* 225. 21 *E.* 3. 35. 32 *E.* 3. *Aid* 55. 40 *E.* 3. 28. 44 *Ass.* 2. 13 *R.* 2. *Breve* 643. 11 *H.* 4. 12, 19. 14 *H.* 4. 8. 3 *H.* 6. 28. 7 *H.* 6. 13. 9 *H.* 6. 13, 14, 16. 20 *H.* 6. 7. 21 *H.* 6. 2. 12 *E.* 4. 17. 15 *E.* 4. 1. 21 *E.* 4. 32, 55, 57. *Lib. Int.* 112. 6 *H.* 7. 14. 10 *H.* 7. 16. 11 *H.* 7. 9. 11 *H.* 7. 27. 13 *H.* 8. 13. 14 *H.* 8. 29. 32 *H.* 8. *Br. Corp.* 78. 1 *Mar. Dy.* 98. 7 *El. Dyer*, (b) 81. *the Case of the College of Grainstock*, 10 *El. Dyer the Case of the College of Landebrevy*, *Pl. Com. Grendon's Case* 494. *Hill.* 16 *El. rot.* 495. *Sir Fr. Fleming's Case in Communi Banco.*

(b) Dyer 81. pl. 64
Litt. Rep. 108.
4 Co. 107. b.
Sf. u 52.
1 Rol. Rep. 418.

The Names of the Governors nominated by *Sutton* and expressed in the said Charter, were the most Reverend Father in God, *George* Archbishop of *Canterbury*, *Thomas* Lord *Ellesmere*, Lord Chancellor of *England*, *Robert* Earl of *Salisbury*, *John* Bishop of *London*, *Launcelot* Bishop of *Ely*, Sir *Ed. Coke*, Knt. then Ch. Justice of the Court of Com. Pleas, and now Lord Chief Just. of *England*, Sir *Thomas*

mas Foster one of the Justices of the Court of Common Pleas, Sir *Henry Hobart* then the King's Attorney General, and now Chief Justice of the Court of Common Pleas, *John Overal* Dean of the Church of St. *Paul* in *London*, *George Mountain* Dean of *Westminster*, *Henry Thursby* one of the Masters of the Chancery, *Jeffrey Nightingale*, *Richard Sutton*, *John Law*, *Thomas Brown*, and the Master of the said Hospital for the Time Being; and after the Death of the said Sir *Thomas Foster*, one of the Justices of the Court of Common Pleas, (who was a Grave and Reverend Judge, and of great Judgment, Constancy and Integrity,) Sir *James Altham*, Knt. one of the Barons of the Exchequer, was according to the said Charter *unanimi consensu* chose in his Place. And the said Master of the Hospital, whom *Sutton* had nominated *durante beneplacito*, our Lord the King, after the Death of *Sutton*, by his Letters Patent hath nominated for the Term of his Life.

See Skinner's Rep. 484. *Lucas* 146.

MARY PORTINGTON'S *Case.*

Trin. 11 Jac. 1.

Perpetuities. 2 Brownl. 65. 138.

(a) Doctrin. placit. 379.

MARY *Portington* brought an Action of Trespass against *Robert Rogers* and *Tho. Barley*, *quare Clausum & domum fregit apud Thorp Salvyn* in the County of *York*, 20 *Junii* 7 *Jac. Regis*. And the (a) new Assignment was of a House and a Croft containing one Acre *in occupatione Tho. Barley*, &c. The Defendants pleaded in Bar, That *Herceus Sanford*, Esq; was seised of the Tenements, &c. in Fee, and held them of the King, as of the Honour of *Tickil* in Socage; and 8 *Maii* 24 *Eliz.* made his Will in Writing, and thereby devised them to *Elizabeth Sanford* his youngest Daughter, when she should accomplish her Age of eighteen Years, and to the Heirs of her Body, 20 *Julii* 24 *El.* the said *Herceus Sanford* died, the said *Elizabeth* then of the Age of five Years; and afterwards 20 *Junii* 37 *El.* she accomplished her Age of eighteen Years; and 25 *Martii*, 38 *El.* entred into the Tenements, &c. and was thereof seised in Tail, &c. and so seised took to Husband the said *Robert Rogers* 1 *Nov.* 39 *El.* and justified, &c. The Plaintiff replied, and said, That the said *Herceus* had Issue *Mary* his eldest Daughter, *Helen* his second Daughter, and the said *Elizabeth* his youngest Daughter, and confessed the devise of the said Tenements to *Elizabeth*; but farther said, That by the same Will, for want of Issue of the said *Elizabeth* the Remainder of the said Tenements was limited to the said *Mary* now Plaintiff in Tail, the Remainder to *Helen* in Tail, the Remainder to his 4th, 5th and 6th Daughters in Tail, the Remainder to his Neph. *J. Roades* and to his Heirs Males, with divers Remainders over in Tail. "Provided always, *That if my said Daughters or any*

" *of*

" *of them, or any other the Person or Persons before named,*
" *to whom any Estate of Inheritance in Possession or Remain-*
" *der, of, in, or to the said Lands, Tenements and Heredita-*
" *ments, with their Appurtenances or any of them, or any*
" *Part or Parcel of 'em or any of 'em is limited, devised or*
" *appointed by this my last Will and Testam. or the Heirs be-*
" *fore mention'd of 'em or any of 'em, shall jointly or severally,*
" *by themselves, or together with any other Person or Persons*
" *willingly, apparently and advisedly conclude and agree to,*
" *or for the Doing or Execution of any Act or Devise,*
" *whereby or wherewith the said Premisses so to 'em entail'd*
" *as is aforesaid, or any Part or Parcel thereof, or any E-*
" *state or Remainder thereof, or of any Part thereof before li-*
" *mited or appointed to any Person or Persons by this my*
" *last Will and Testament, shall or may by any Way or Means*
" *be discontinued, aliened, or put away from such Person or*
" *Persons and their Heirs, or any of 'em, contrary to my In-*
" *tent and Meaning in and by this my last Will and Testa-*
" *ment, otherwise than for the only Jointure or Dower of*
" *any the Wife or Wives of any the Person or Persons before*
" *named, for the only Life or Lives of such Wife or Wives;*
" *or shall willingly and advisedly commit or do any Act or*
" *Thing, whereby the said Manors, Lands, Tenements and*
" *Hereditaments, or any Part thereof shall not or may not*
" *descend, remain or come to such Persons, and in such sort*
" *and order, as I have before limited and declared by this*
" *my last Will and Testament, otherwise than as before is*
" *said; then I will limit, and declare and appoint hereby,*
" *that then my said Daughter or Daughters, or other the*
" *Person or Persons before named and every of 'em, so con-*
" *cluding and agreeing to or for the Doing or Execution of*
" *any such Act or Devise as is aforesaid, shall immediately*
" *from and after such concluding and agreeing, lose and for-*
" *feit, and be utterly barred and excluded of and from all and*
" *every such Estate, Remainder and Benefit as she or they, or*
" *any of 'em should, might, or ought justly to have claim, chal-*
" *lenge and demand of, in, or to so much thereof as such Con-*
" *clusion or Agreem shall extend unto or concern in such Mann,*
" *and Form, as if she or they or any of them, had never been*
" *nam'd or mentioned in this my last Will and Test. for or con-*
" *cerning the same: And that then and from thenceforth the*
" *Estate and Estates limited and given to her or them so*
" *concluding and agreeing as is aforesaid, shall from and*
" *after such Conclusion and Agreement forthwith utter-*
" *ly cease, and be determined in, for, and touching so*
" *much thereof as such Conclusion or Agreement shall con-*
" *cern and extend unto, as fully to all Intents and Pur-*
" *poses, as if she or they so concluding or agreeing, or as is*

 " *afore-*

" *aforesf. were dead without Heirs of their Bodies lawfully*
" *begotten, as is aforesaid. And then I will, and further de-*
" *clare and devise, That presently after such Conclusion and A-*
" *greement, such Person and Persons to whom the Estate and*
" *Remainder doth first and next belong and appertain unto,*
" *after such of the said Persons having then the actual Posses-*
" *sion thereof, which shall so conclude and agree as afore is said,*
" *by Force of this my last Will and Test. shall and may enter*
" *into, have and enjoy so much of the said Lands, Tenements,*
" *and Hereditaments, with their Appurtenances, as such*
" *Conclusion and Agreement shall concern and extend unto,*
" *of and for such Estates, and with such Remainders over,*
" *and with such, and in such and the same Manner, Conditi-*
" *on and Degree, and with such and the like Conditions and*
" *Limitations before knit and annexed unto the same by this*
" *my last Will and Test. in such Manner to all Intents and*
" *Purposes, as if my said Daughters, or other the said Per-*
" *sons so concluding and agreeing, were naturally dead with-*
" *out such Heirs of their Bodies lawfully begotten, as is before*
" *named, and as tho' the said Estate or Remainder were*
" *vested in him or them for want of such Heirs as is afore-*
" *said, any Act, Thing or Matter before-mentioned and de-*
" *clared in and by this my last Will and Testament to the con-*
" *trary in any wise notwithstanding*": And the said *Herceus* so seised of the Tenements aforesaid, died thereof seised, the said *Elizabeth* then being within the Age of 18 Years, who accomplished her Age of 18 Years 20 *Julii* 37 *El.* and entred into the Tenements, and was seised thereof in Tail, the Remainder over to the said *Mary*, &c. and afterwards took to Husband the said *R. Rogers*; and afterwards 13 *Apr.* 7 *Jac. Reg.* by Deed indented the said *Robert* and *Elizabeth voluntarie, evidenter, & considerate, Anglice*, willingly, apparently, and advisedly *concluserunt & agreaverunt* with *Chr. Bradshaw* and *Gerv. Rogers*, to suffer a Common Recovery of the said Tenements upon a Writ of Entry in *le Post*, &c. *ad intentionem ad evacuand' & auferend', Anglice* to make void and put away, *ab eadem Maria præd' Remanere Tenementorum prædictorum*, according to which Conclusion and Agreement, the said Writ of Entry *in le Post* was brought against the said *Robert* and *Elizabeth* of the Tenements aforesaid, they being then Tenants of the Freehold of the Premisses; and thereupon a Common Recovery was had against them, with Voucher over, and Judgment given, and Execution had against the said *Robert* and *Elizabeth*; which Recovery was to the Use of the said *Robert* and *Elizabeth*, and their Heirs; and the said Pl. said, That by Reason of the said Conclusion and Agreem. *ad permittendam prædict' Communem*

munem recuperationem in forma prædicta prædict' Robertus & Eliz. totum statum suum, &c. de & in tenementis præd' forisfecerunt & idem status suus de & in tenementis illis cum pertinen' penitus determinavit, & vacuus devenit: Wherefore the Pl. entered for the said Forfeiture as in her Rem'r, &c. upon which the Def. demurr'd in Law. And this Plea was entred *Mich.* 7 *Jac. Regis in C. B.* and had depended 14 Terms, and had been argued at the Bar more than half fourteen Times; and now this Term it was argued by the Judges, and at last it was unanimously resolved by the whole Court, That Judgment should be given against the Pl. of which I will make the shorter Report, because I have published many Cases in my Reports before to the same Effect: In this I will add some Authorities and Reasons, confirming the Rule of this Case, and affirming the Resolutions before, and refer the Reader without Repetition to the Authorities and Reasons reported by me before. On the Plaintiff's Part divers Objections or rather Declamations were made. ¶ 1. That from the Time of the Making of the Act of 13 *E.* 1. *de* (*a*) *Donis conditionalib'*, till (*b*) 12 *E.* 4. *Taltarum's* Case, there was no Opinion, That a Recovery against Tenant in Tail with Voucher over would bind the Estate-tail upon the Pretence of a feigned Recompence, but in 12 *E.* 4. it was newly invented, and never before that Time, imagined by any of the Sages of the Law, in so many Generations and Ages incurred after the said Act. ¶. 2. Altho' the Donor can't restrain the common Recovery after it is suffered and executed, (because then the Reversion or Remainder is barred, &c.) yet (as it was agreed on the other Side) he may restrain the Conclusion and Agreement to suffer it, and so prevent the Bar by the Recovery, and preserve his Remainder or Reversion. ¶ 3. Such Recoveries are by divers Acts of Parliament mark'd and branded with the Blemish of Fiction and Falsity; as in the Stat. of (*c*) 34 *H.* 8. *cap.* 20. they are styled *feigned and untrue Recoveries*; and so in the Statutes of (*d*) 11 *H.* 7. *cap.* 20. (*e*) 32 *H.* 8. *cap.* 31. (*f*) 14 *Eliz. cap.* 8. &c. they are called covenous, and had by Collusion, and therefore it stands with Law and Reason to provide for the Preservation of Rev'ns and Remainders against such feigned false and covenous Recoveries. ¶ 4. That this Opinion, that a common Recovery can't be restrained by Condit. or Limitation was new, and of late Invention, and never heard of before Sir *Anthony* (*g*) *Mildmay's* Case, *in the 6th Part of my Reports, f.* 40. *a.* For it was admitted to be restrained in the Case of the Earl of (*h*) *Arund. Dy.* 17 *El.* 342, 343. Where the said Earl in the Time of Q. *Mary* gave the Manor of *Haselber Bryan* in the County of *Dorset*, by Indenture, to *Thomas* late Earl

(*h*) Dyer 342. pl 55. Postea 40. a. 3 Co. 34 a. 6 Co. 41. a.

(*a*) Plowd. 2. b. 13. b. Manxel's Case 3. a. ib 6 Co. 40. a. Præf. ad 4 Rep. 1 b. 1. Co. 44. b. 2 Co. 46. b. 3 Co. 8. a. 6 Co. 41. a. 7 Co. 21. a. 8 Co. 35. b. 72. b. 9 Co. 105. a. 11 Co. 72 a. 12 Co. 81. 1 Rol. Rep. 48 2 Rol. Rep. 197. 1 Leon. 83, &c. Hob. 293. 2 Inst. 332. Cr. Car. 42. Co. Lit. 18. b. Rast. Tail. 1. f. 440. b. Lit. Sect. 13, 362, 441. 2 Anders. 11, 14. (*b*) Co. Lit. 361. 1 Co. 131. b. 6 Co. 40. b. Post. b & 38. a. Godb. 308. Hard. 209. (*c*) 34 & 35 H. 8. c. 20. 1 And. 46. 2 Co. 15. b. 6 Co. 55. a. Moor 195. Cro. Car. 430. Co. Lit. 335. a. Plow. 555. a. Hob. 299. 2 Rol. Rep. 417. (*d*) 1 Leon. 261. 2 Leon. 168. 3 Leon. 78. Cro. El. 2. Godb. 6. 1 Anders. 31. 1 Rol 878. (*e*) Postea 44. a. Cro. El. 562. 1 And. 38, 275. Co. Lit 362. a. 1 Co. 15. a. (*f*) Cro. El. 562. Co Ent. 655. 1 Co. 15. a. 3 Co 60. b. Moor 690. 1 And 275. Co. Lit. 356. (*g*) Co. Ent. 176. b Moor 672.

of *Northumb.* and to the Heirs Male of his Body; upon Condition, *qd' si præd' Comes aut hæred' masculi de corpore suo exeuntes, inter al', aliqd' recuperare versus eos permitterent, vel discontinuarent*: And in the Argument of *Scholastica's* Case, *Pasch.* 12 *El. Pl. Com.* 403. the said Point of Restraint of a common Recovery was never moved; and therefore it was thought to stand with the Honour and Gravity of the Court, that this Point had been so often argued at the Bar; and therefore now the Serjeants said, that it was ripe for Judgm. after such a mature Deliberation. And in this Case all the said Object. were confuted, and thereby the Point in Judgment confirmed. ¶ As to the first, 2 Questions were moved and resolved, the first, that Judgment given against (a) Ten't in Tail with Voucher and Recompence in Value, would bind the Estate-tail, notwithstanding the said Act of 13 *E.* 1. Be the Recovery upon good Title or not. 2. That the Judgm. given in such Case for the Tenant in Tail to have in Value, would bind the Estate-tail, altho' no Recompence be had. And therefore as to the first of these Questions, it appears by our Books, that the Opinion, That a Recovery against Tenant in Tail with Voucher would bar an Estate-tail, and was not restrained by the Stat. *de Donis conditional'* was not newly invented in (b) 12 *E.* 4 but oftentimes affirmed for Law by the most knowing of the Law that ever were; for Sir *William Thirning* in the Time of *H.* 4. Ch. Justice of the Com. Pleas, *anno* (c) 12 *H.* 4. 13. *b.* saith, That the most learned of the Law that ever were, (and when there was the best Law that ever was) were in the Reign of K. *E.* 3. which also were near the Making of the Stat. Let us see then how the Law was held *in diebus illis* in this Point. 15 *E.* 3. *Brief* 324. By Recovery in Value by Tenant in Tail, the Estate-tail is barred, and he shall have a Formedon of the Land so recovered in Value. And therewith agrees 42 *E.* 3. 53. for there it is held, That in some Case a Man shall have a Writ of Formedon of Land which was never given; as if Tenements in Tail be lost, and the Tenant in Tail recovers other Land in Value, the Issue shall have a Formedon of the Land recovered in Value, and yet that Land was not given. 44 *E.* 5. 21, 22. *Octavian (d) Lumbard's* Case, Ten't in Tail grants a Rent-charge to one, in Consideration that the Grantee having Right to the Land in Tail, releases to him, it shall bind the Issue in Tail. 48 *E.* 3. 11. *b.* in *Jeffery Bencher's* Case, a Recovery in Value by Tenant in Tail shall bind the Tail, and a Formedon lies of the Land recovered in Value; and therewith agree 1 *E.* 4. 5. (e) 5 *E.* 4. 2. *b.* And that also appears by the like Cases: For if Tenant (f) in Tail aliens with Warranty, and leaves Assets to descend, it is a Bar to the Issue by Reason of the Warranty and Assets descended;

(a) 2 Rol. 396.

(b) 1 Co 131. b. 6 Co. 40. b. Co. Lit. 361. b. 372. b. Godb. 308. 1 Bulstr. 159, 160. Hard. 209. 12 E. 4. 19, 20, 21.

(c) Co. Lit. 304. b.

(d) 1 Co. 94. b. 96. b. Dr. & Stud. 49. a. Co. Lit. 343. b. Plow. 436. b. 466. a. Plo. Manxel's Case 14. b. 15. a. 1 Rol. 842. Br. Charge 4. Br. Tail 6. 2 Brownl 67. 2 Bulstr. 43. Hard. 209, 384. Raym. 349. 3 Keb. 287.

(e) Postea 43. b Br. Voucher 111 Br. N. C. 70. Br. Recovery in Value 33.

(f) Co. Lit. 393. b.

but neither the Warranty without the Assets, nor the Warranty and Assets without Judgm. in a Formedon, shall bar the Estate-tail; for if the Issue (without Judgm. given) aliens *(a)* the Assets, his Issue shall recover the Land in Tail; but after Judgm. given that he shall be barred in Formedon, the Issues in Tail shall also be barred; and therewith agree *Temp. E.*1. Tit. *Garr.*89. 34*E.*1. Tit *garr'* 88. 11*E.*2. *garr'* 83. 4*E.*3.24. *Hen. Sommer's* Case, 3*E.* (3.) 4.14. 40*E.*3.9. 14*H.* 4. 39.*a.* 24*H.*8. *Br. Tail* 33. 4*Mar.* *(b)* *Dy.* 139. And in the Case of a common Recovery there is a Judgm. against the Ten't in Tail, and another Judgm. against the Vouchee to have in Value, and therefore these Resolutions and Opinions of Law produced the Judgm. in 12 *E.* 4. which was not of any new Invention, but proved and approved by the Resolution of the Sages of the Law at all Times after the said Act, until 12*E.*4. And the Judges of the Law then perceiving what *(c)* Contentions and Mischiefs had crept into the Quiet of the Law by these fettered Inheritances; upon Consideration of the said Act, and of former Expositions thereof by the Sages of the Law at all Times after the said Act, gave Judgm. That in such Case the Estate-tail should be barred. As to the 2d Question in the 1st Objection it is worthy Consideration, That the Judgment given for Tenant in Tail to have in Value, is a Bar to the Estate-tail, altho' no Recompence be rendered in Value; and that appears in 23 *Eliz.* *Dyer* 376. *(d)* Tenant in Tail suffers a common Recovery with common Voucher, and dies before Execution had against Tenant in Tail, and the Issue in Tail enters, the Recoverer may enter upon him by Reason of the Recovery in Value; and therewith agrees *Shelley's* Case, *in the first Part of my Reports*, *f.* 106. And in the Marquiss of *Winchester's* Case, *lib.* 3. *fol.* 3. *a.* If *(e)* Tenant in Tail suffers a common Recovery (altho' erroneously) and afterwards disseises the Recoveror and dies, his Issue shall not be remitted, for the Estate-tail was bound by the *(f)* Judgment to have over in Value, although in Truth no Recompence can be had. And in *Manxel's* Case, *Pl. Com. f. ult.* *(g)*. If there be Ten't in Tail, and a Stranger bring's a feigned *Præcipe quod reddat* against him, and he vouches to Warranty, and the Demandant by Default of the Vouchee, or by his Confession recovers against Tenant in Tail, and he over in Value against the Vouchee, and before Execution the Tenant in Tail dies, and the Land *(h)* descends to his Issue, yet the Demandant may enter, or sue Execution against the Issue, and the Issue shall never falsify the Recovery there, because he has, or may have Assets, for if he ought to falsify the Recovery, then he ought to retain the Land in Tail, and have Execution of the Assets also, &c. And so, as it is there reported, was

(a) Co. Lit. 393. b.

(b) Dyer 139. pl. 32. B. N. C. 66. Vet. N. B. 144. a.

(c) Co. Lit. 19 b.

(d) Dyer 376. pl. 26. 1 Co. 94. a 106. a. Co. Lit. 261. b. 2 Rol. 396. Plow. 55. b. 3 Keb. 699.

(e) Co. Lit. 349. b.

(f) 7 Co. 39. a.

(g) Plo. Manxel's Case 14. b.

(h) Lit. Sect. 690.

was it taken by the Ld. *Mountague*, and other Justices in the Star-chamber, in a Matter there in the Time of *E. 6.* So that where the Act of *W. 2.* saith *quod finis ipso jure sit nullus*, we may say, *qd' quoad communem Recuperation', &c. actus ipse ipso jure sit nullus.* ¶. As to the 2d Objection it is absurd to say, that the Recovery it self can't be prohibited by any Condition or Limitation; and yet that the Conclusion and Agreement to suffer a Recovery shall be prohibited; and such Condition to prohibit a Conclusion or Agreement favours of a new Device or Invention: For till now of late, none ever heard of any Condition or Limitat. to prohibit (*a*) *Goings about*, or any Conclusion or Agreement, but they are altogether unknown to the Law. And therefore the said Act of *W. 2.* reciting the Mischief saith, *Per factum tamen & feoffamentum eorum quibus tenementum fuit datum sub conditione exclusi fuerunt, &c.* So that the Makers of the said Act ought to be taxed with great Ignorance, and that the said Act was not necessary, if the Going about or Conclusion to alien, might have been prohibited: For then when a Man had made a Gift to one and the Heirs of his Body, he might have added a Condition, That if the Donee in Tail at the Com. Law *post prolem suscitatam* had gone about or concluded to alien, that then the Donor should re-enter, and so have peserved his Possib. of Reverter, and so against that Provision might have been made by such preventing Condition; and therefore there was no Necessity that the said Act *de Donis conditionalibus* should be made; and yet Sir *Will. Herle* (*b*) Chief Justice of the Common Pleas, in 9 *E.* 3. 22. *b.* saith, That they were wise People who made that Statute; and that Sir *William Herle* himself was at the Making of the said Stat. appears in 41 *E.* 3. *Garr'* 16. and in 5 *E.* 3. 14. *a.* the same Chief Justice saith, we saw those who made the Statute, and further saith, that K. (*c*) *E.* 1. (who by Assent of his Common Council in Parliament made the said Act) was the wisest King that ever was, and the King and the whole Parliament prohibit *factum & feoffamentum* (for this Imagination of going about or concluding, was not then, nor long Time after hatch'd.) And so in all succeeding Ages, the Alienation it self of Tenant in Tail hath been prohibited by Condition; as in 33 *Ass.* 24. *temp. R.* 2. *Richel*'s Case, *Lit. s.* 163. (*d*) *temp. H.* 4. *Thirning*, 21 *H.* 6. 33. *b.* (*e*) 10 *H.* 7. 11. *a.* 13 *H.* 7. 23. *a. b.* 21 *H.* 7. 11. *a. b.* And it was well observed in this Case, That to an Estate-tail there are three Manner of (*f*) Incidents; some by the Common Law, others by Act of Parliament, and some by Custom. By the Com. Law are such as are not restrained by the Stat. and can't be restrained by any Condit. as (*g*) Dower and Tenancy by the Courtesy after Issue,

1 Roll. 413.

(*a*) Cr. Jac. 697, 698.

(*b*) Co. Lit. 19. a.

(*c*) Co. Lit 19. a. 392. b.

(*d*) Co. Lit. 377. b. Lit Sect. 720. 6 Co. 42. b

(*e*) Br. Cond. 239.

(*f*) 6 Co. 41. a. Co. Lit. 223, 224. a. 2 Brownl. 67.

(*g*) 1 Rol. 418. 2 Brownl. 67. 6 Co. 41. a.

Issue are incident to an Estate-tail, and can't be restrained by Condit. *Vide* 22 *E*.3.17. Also the Estate of him, and of Ten't in Tail after Possibility, are dispunishable of (*a*) Waste, so a (*b*) collateral Warranty, is a Bar to an Estate-tail, and a (*c*) com. Recovery also, and none of these can be restrained by any Condition or Limitation. By Stat. Law, as to make Leases by the Stat. of (*d*) 32 *H*. 8. *c*. 28. and to levy a Fine by the Stat. of 4 *H*. 7. *c*. 24. and 32 *H*. 8. *c*. 36. to bar Issues, and none of these which are Incidents to his Estate by Act of Parliament may be restrained by Condition: For when a Man makes a Gift in Tail, he *tacite* gives these Incidents to it; and therefore to restrain them by Condition or Limitat. would be repugnant. For suppose that a Man makes a Gift in Tail, and further grants, that he may make Leases for Years or Lives according to the said Act; or to levy a Fine with Proclamation according to the Acts in such Case to bar his Issues; provided always, that he shall not make Leases, or levy a Fine; none will deny but such Proviso would be repugnant; and by Consequence in the other Case, when such Incidents are tacitly implied; for (*e*) *expressio eorum quæ tacite insunt nihil operatur*: By Custom, as to grant Lands by Copy, &c. at the Will of the Ld. according to the Custom of the Manor, &c. And the Opinion of *Litt*. as to the said Case of a common Recovery, was cited in his Chapter *of Conditions* (*f*) 84. After he had said, that Feoffee in Fee, can't be restrained from Alienation; he adds, *Item*, if Tenements be given in Tail upon Condition, that Ten't in Tail nor his Heirs shall not alien in Fee nor in Tail, nor for another's Life, but for their own Lives such Condition is good, and the Cause is (which is to be much observed) That when he makes such Alienation, he doth contrary to the Intent of the Donor; for which the Stat. of *W*. 2.*c*.1. was made, by which Estates in Tail are ordained; which is as much as to say, as if he had said contrary to the Intent of the Act of *W*. 2. or the Intent of the Donor within the Purview of the said Act; and a (*g*) com. Recovery is not contrary to the said Act, nor to the Intent of the Donor within the Purview thereof. But the Meaning of *Litt*. is, that Tenant in Tail may be restrained from Discontinuance either in Fee, or in Tail, or for another's Life, and so he himself in the next Clause following explains himself, *sc*. and when he makes such Discontinuance he doth contrary to the Intent of the Donor. ¶ And as to the third Objection and Aspersion of a Scandal upon common Recoveries (which is one of the main Pillars which supports the Estates and Inheritances of the Kingdom) it was answered, That there was never any Thing by the Wisdom of a Man so well devised, or so surely established upon Law and Reason, which the Wit and Craft of

(*a*) Brownl. 67. 1 Rol 418. 2 Rol. 826. Lit. Sect. 34. Co. Lit. 27. b. 2 Inst. 302. 6 Co. 41. a. 9 Co. 139. a. 11 Co. 80. a. Dr. & Stud. lib. 2. cap. 1. Fitz. N B. 59. b. Fitz. 1 E. 3. Wast. 125. 10 H. 6. 1. b.
(*b*) 1 Rol. 418. Co. Lit. 224. a.
(*c*) 1 Rol. 418. a. 2 Brownl. 67. 6 Co. 41. a. Hob. 170. Co. Lit. 223. b. 224. a.
(*d*) 1 Rol. 418.
(*e*) Hob. 170. 1 Mod. Rep 190. Lit. Rep. 111. Hard. 92. 1 Rol Rep 310. 2 Rol Rep. 393. Palm. 423 437. 4 Co. 73. b. 5 Co. 11. a. 8 Co. 56. b. 145 a. 11 Co 69 a. Co. Lit. 191. a. 205. a. 2 Inst. 365. 2 Sand. 351. 2 Bulstr. 131. Latch 25.
(*f*) Sect. 362. 1 Rol. 418.
(*g*) Co. Lit. 223. b.

of those who are subtle and wicked, has not abused. And therefore it appears by the Preamble of the said Act of 34 *H.* 8. That when the K. gave Lands in Tail to his loyal and faithful Servants and Subjects, intended not only to advance the Donees, but the Heirs in Blood of their Bodies, to the Intent that the Heirs of their Bodies should have in special Memory the Profit which they have by the Service of their Ancestors, and thereby they themselves the better encouraged to do the like Service to their Sovereign L. the K. It was well done by the Parliament to tax the Donees in suffering of false and feigned Recoveries to subvert the Intent of the King's Gift and Bounty by disinheriting their Issues, *quia confirmat usum qui tollit abusum:* And yet such was the Force of a common Recovery in such Case at the (*a*) Com. Law, before the said Act of 34 *H.* 8. that the Estate-tail by a common Recovery was barred, although the Rev'n was in the King, and nothing could remedy it but an Act of Parliament. And therewith agrees 33 *H.* 8. *Br. Tail* 41. *in Plo. Com.* 555. And as to the Case on the Stat. of (*b*) 11 *H.* 7. It was answered, That when the Husband for the Advancement of his Wife with a competent Jointure, and Preferment of the Heirs of their two Bodies begotten, has caused an Estate to be made to himself and his Wife in Tail, and after the Death of the Husband, the Wife to disinherit the Issues of the former Husband, suffers a Recovery, and conveys the Lands to Strangers to the Husband's Blood, such Recovery was worthy by the Parliament to be noted with the Mark to be suffered by Covin; and the Act of the Wife either when she is sole, or of her and her second Husband, is so odious, that a Recovery had upon a good Title against them by Covin is void by the said Act; and therefore it is not to be resembled to the Case at Bar; and yet there was no Remedy in such Case upon a common Recovery, till the said Act of Parliament was made. So in the said Acts of (*c*) 32 *H.* 8. and 14 *El.* when a common Recovery was had against Tenant for Life, to the Prejudice of those who had the Inheritance, it might well be called covinous, and by Collusion. And yet in the same Case, when Ten't for Life, the Remainder to *A.* in Tail, the Remainder to *B.* in Tail, *&c.* with divers Remainders over, and Tenant for Life suffers a common Recovery, in which he vouches *A.* and he the common Vouchee, it shall bind all the other Remainders; for no Covin or Conclusion can be supposed, when the next in Remainder in Tail who has the immediate Inheritance is vouched; as it was adjudged in (*d*) *Jennings*'s Case, *Trinit'* 38 *Eliz. Rot.* 2302. which Case having great Affinity with the Case at Bar, I have reported next after this Case. And as to

(*a*) Co. Lit. 372. b.

(*b*) 11 H. 7. c. 20. 1 Co. 102. a. b. Winch 43.

(*c*) 32 H. 8 c. 31. 14 El. cap. 8. Co. Lit. 362. a 1 Co. 15, 16.

(*d*) 3 Co. 60. b. Postea 43. b. Co. Lit. 362. a. Cr. El. 562, 570. Co. En. 667. a. Moor 690. 1 And. 275. Winch 43.

to the said Case of the Earl of (*a*) *Arundel*, *Anno* 17 *Eliz.* First, nothing is spoken to that by any who argued in the Case, so that it is not any Authority for them who cite it. Also in the same Case a Recovery is intended to be restrained, but not a Recovery with Voucher, &c. as in every common Recovery there is. And in divers Acts of Parliament, common Recoveries have received Allowance and Advancement. And therefore the Statute of (*b*) 7 *H.* 8. *cap.* 4. recites, That divers, as well Nobles as others, have suffered common Recoveries against them of divers of their Manors, &c. for Performance of their Wills, for Assurance of Jointures to their Wives, &c. The same Act in Approbation of common Recoveries, gives Remedies to such Recoveries in divers Cases. And St. *Germyn* in his 1st Book of the *Dr. and Student*, *cap.* 26. approves common Recoveries to bind as well in Conscience as in Law. And by the Stat. of 23 *El. cap.* 4. it is enacted, That for avoiding of the Danger to Assurances of Lands, and for Advancement of common Recoveries, That any common Recovery shall not be avoided for any Want of Form in Words, and not in the Matter of Substance. Note Reader, *Semper in (c) fictione juris subsistit æquitas, & contra negantem principia non est disputandum.* And in Truth none ought to be heard to dispute against the legal Pillars of common Assurances of Lands and Inheritances of the Subjects. And at the Parliament held in the Reign of the late Queen *Elizabeth*, in the great Case betwixt *T. Vernon* and Sir *Ed. Herbert* (which was argued by learned Counsel before the Lords in Parliament) there *Hoord* an utter Barrister, of Counsel with *Vernon* (who was barred by a common Recovery) rashly, and with great ill Will inveigh'd against common Recoveries, not knowing the Reason and Foundation of them; who was with great Gravity and some sharpness, reproved by Sir *James Dyer* then Chief Justice of the Common Pleas, who said, He was not worthy to be of the Profession of the Law, who durst speak against common Recoveries, which were the Sinews of Assurances of Inheritances, and founded upon great Reason and Authority; *Sed non omnis capit hoc verbum.* And as to (*d*) *Scholastica*'s Case, I respect much the Reporter, and attribute due Honour and Reverence to the Judges who argued in the said Case: But *amicus Plato, amicus Socrates, sed magis amica veritas*; for the Resolution in the said Case, is founded upon two Authorities in Law; one in (*e*) 29 *Ass. p.* 17. and the other in (*f*) *F. N. B.* 201. *c.* which Authorities being duly considered, do not warrant the Collection or Conclusion which is made upon them (*arguen-*

(*a*) Ant. 37. a. Dyer 342, 343. pl. 55, 56. 3 Co. 43. a. 6 Co. 41. a. Jenk. Cent. 242.

(*b*) Co. Lit. 104. b. Dr. & Stud. f. 45. a. Vaugh. 48. Dyer 31. pl. 213, 141. pl. 46. 19 H. 8. 12. a. Br. Mesne 23.

(*c*) 11 Co. 51. a. Co. Lit. 150. a. Palm. 354.

(*d*) Pl. Com. 403. a.

(*e*) Plo. 412. b. 1 Rol. 472. 473, 474. Br. Devise 16. Br. Condit. 111. Post. 40, 41. a. Dyer 127. pl. 56.

(*f*) Plowd. 413. b. 414. b. postea 41. a.

Antea 40. a.

arguendo in the said Case) but to say the Truth the contrary. For as to the said Case of 29 *Ass. p.* 17. it is there cited in this Manner; A Man seised of Lands in Fee devisable, devises them to one for the Term of his Life, and that he should be Chaplain (when the Book at large is, That the Devise was to a Clerk for Life, upon Condit. that he shall be Chaplain, and sing for his Soul) so that after his Decease, the said Tenements should remain to the Commonalty of the said Town (*sc.* of *Lang-stone)* to find a Chaplain for the same Tenements, and dies; and the Devisee being sufficient to be Chaplain, held them for six Years, and was not Chaplain, and the Heir of the Devisor ousted him, and he brought an Assise, and the Heir pleaded to the Assise, and all this Matter was found by the Assise; and the Justices stirred up the Assise as much as they could to say for the Plaintiff, and at length they said, that the Plaintiff was seised and disseised: Upon which Case so cited, the Justices, as it is there reported, so collected; for it seemed to the Court there, That the Limitation that he should be Chaplain, and sing for him, was not a Condition for the Breach of which the Heir could enter, for thereby the Remainder would be defeated, &c. In which Case are two great Misprisions; one in the Citing, the other in the Application of it. 1. That the said Devise was to the said Clerk upon express Words of Condition, that he should be Chaplain, as appears before, the other in the Application, That it should not be taken for a Condition, but for a Limitation; and to that Purpose the Case was cited. And without Question it ought to be either a Condition or Limitation: And if it was admitted to be a Limitation, then it is not possible for the Plaintiff in the Assise to recover, for then his Estate, if it were a Limitation before the Bringing of the Assise, was actually determined: For such is the Nature of a (*a*) Limitation, to determine the Estate without Entry, and then the Freehold in Law was vested in the Commonalty of *Lang-stone*, for a Stranger shall take Advantage of a Limitation, and by Consequence it was not possible that the Pl. who had lost his Estate by Force of a Limitation, should recover in the Assise. But in the Book it is taken for a Condition, for there *Briton* saith, That they in the Rem'r can't enter, for it is a Condition; and it appears, that the Heir can't enter, *unde sequitur*, that the Remainder has (*b*) destroyed the Condition: For the Book saith, That the Heir can't enter and have the Land only for the Life of the Plaintiff. By which it appears, That in such Case Words of express Condition, (which are omitted in the Citing of the Case) shall not be taken for a Limitation, but rather void by the Limitation of the Remainder over: For when it hath Words of Condition, the Manner

(*a*) Co. Lit. 214. b.

(*b*) Dy. 127. b 1 Rol. 472.

Manner of the Devise is to intend that the Heir may enter, as it is expresly said in the Book, and therefore it shall not be taken for a Limitation, to give Benefit to him in the Remainder, and it would be dangerous to make a Construction against express Words, but if the Case had been, as in the said *Scholastica*'s Case it is cited, *s.* That he devised the Land to one for Life, and that he should be Chaplain, there might be more Colour to say that it should be a Limitation by Construction, because they are neither Words of express Condition, nor legal Words of Limitation; and therefore there Peradventure the Law would construe 'em so, that they might take Effect; as in the Case betwixt *(a) Hamond* and *Wellock*, reported by me in the 3d Part of my Reports, *fol.* 20, 21. This Word (*Paying*) shall amount to a Limitation in a Will by Construction, because in Law it is not any Word, either of Condition or Limitation; and therefore in a Will it shall serve as well for the one as for the other, to supply the Intent of the Devisor. And so the Authority of the Book of (*b*) 29 *Ass.* 17. is against that which was cited in *Scholastica*'s Case. And hereby you may see (*good Reader*) how dangerous it is to ground an Opinion upon any (*c*) Abridgm. as in another Place I have observ'd: For *Fitzherbert* in abridging the Case of 29 *Ass. Tit. Assise* 281. (*d*) abridges it without any Words of express Condit. as it is cited in *Scholastica*'s Case, But *Br. Tit. Condition* 111. abridges it to be upon express Condition, *Sed* (*e*) *melius & tutius est petere fontes quam sectari rivulos.* And as to the said Case in *(f) F. N. B.* it is cited in *Scholastica*'s Case * in this Manner: A Man devises Lands in *London* to his wife upon Condition, That if she marries, that the Lands shall remain to his Son in Tail; and for want of such Issue, the Remainder to the Right Heirs of the Donor in Tail; the Wife marries, and she and her Husband occupy the Lands, he in the Remainder dies without Heir of his Body; the Right Heir of the Donor shall have a special Writ of *Ex gravi querela, &c.* So it appears, That he in Remainder shall have Advantage of the Condition, if it be broke: But that shall be by way of suing this Action, and not to enter by Force of this Condition not performed, which Writ appears in the Register. And the Justices said, That the Words of the Condition there mentioned, are not properly a Condition but Words of Limitation, so that the Sense is such. A Man devises Land to his Wife for a Term, if she shall so long continue sole, and if she marries, the Remainder in Tail, the Remainder to his Right Heir, so that the Marriage is the Limitation there which determines the Estate, and so the Remainder commences upon the Estate ended there; which Case so put by *Fitzherbert*

(*a*) Cr. El. 204. 3 Co. 20. b. 2 Leon. 114. Cro. Jac. 57, 527, 592. 2 Bulst. 273. Latch 9. Bridg. 138, 1 Mod. Rep. 86. Vaugh. 271. Cart. 93. 226. Swinb. 113, 114. 2 Rol. Rep. 219. Lane 76. Golds. 134.
(*b*) Ant. 40. a.
(*c*) 5 Co. 25. a. Pref. 4 Rep. Post. 127. b.
(*d*) Plo. 412. b.
(*e*) Ant. 118. a.
(*f*) F.N.B. 201. C. Ant. 40. a.
* Plow. 417. b.

out of the original Writ in the Register was utterly mistaken in 2 Points. 1. Because the Devise to the Wife in the Case put in *F.N.B.* was upon express Words of Condition, but *inspecto Registro, fo.* 246. the Devise was upon apt Words of Limitation, *s. Habend' sibi ad totam vitam suam si ipsa in pura viduitate sua tenuerit* (and not upon express Words of Condition, as it is there cited) *ita qd' si ipsa alicui maritaverit, vel ad aliquem virum se traxerit in fornicatione, tunc mesuagium præd' cum pertin' I. & hæredibus de corpore suo legitime procreatis remaneret, & si idem I. sine hærede, &c. obierit, tunc mesuagium præd' cum pertinen' ad rectos hæredes ipsius W. reverteret.* 2. Where *Fitzherbert* saith, That the Right Heir can't enter, it is clear that the Right Heir may well enter, because he has the Reversion by Descent, and not by way of (*a*) Remaind. And I have seen a Report in *Hill.* 3 & 4 *P. & M.* which *Dyer* Serjeant moved in *C. B. Wm. Butts* (*b*) Doct. of Physick was seised of Divers Manors, Lands and Tenements in Fee, and having Issue 3 Sons, *William, Edmund* and *Thomas*, by his Will in Writing devised Part of them to his Wife for Life, *sub conditione quod ipsa educabit pueros testatoris in eruditione & bonis moribus*; the Remainder to *Thomas* his Son in Tail, and the Reversion in Fee descended to *William* his eldest Son: The Condition was broke; the Question was, If the Heir should enter for the Condition, or *Thomas* should enter as for Breach of a (*c*) Limitation; or if the Condition be destroyed by the Limitation of the Remainder over. And it was resolved by Sir *Rob. Brook*, Ch. Justice, & *totam curiam*, That clearly it is not a Limitation, for there are express Words of Condition, and the Meaning of the Testator, That his Heir, who always is to take Advantage of a Condition, should enter, and (*d*) defeat the Estate of the Wife: But his Meaning did not agree with the Law, for he could not defeat the Estate for Life unless he defeated the Remainder, and therefore by the Limitation of the Remainder over, the (*e*) Condition was destroyed: But in such Case his Meaning never was, that he in the Remainder should enter for the Condition broke. *Nota Reader*, There are in Law apt and legal Words, as well of Limitation as Condition. Apt Words of (*f*) Limitation are *quamdiu, dummodo, dum, quousque, durante, &c.* *v.* 14. *E.* 2. *Grant* 92. a Rent granted out of the Manor of *Dale*, *quamdiu* the Grantor shall dwell there. *Vide* 7 *E.* 4. 16. *quamdiu fuer' amicabiles*, 27 *H.* 8. 29. *b.* 3 *E.* 3. 15. *a.* & 3 *Ass. p.* 9. A Man Leases Land *dummodo* the Lessee shall pay twenty Pounds, 37 *H.* 6. 27. A Lease is made to a Woman *dum sola fuerit*. 9 *E.* 4. 29. *b.* A Man made a Feoffment in Fee until, *s. quousque* the Feoffor had

(*a*) Dy. 127. a. Hob. 30.
(*b*) 2 Rol. Rep. 422.
(*c*) Dy. 117. b.
(*d*) 1 Rol. 473, 474.
(*e*) Dy. 127. a.
(*f*) Co. Lit. 214. b.

had paid him certain Money (*a*) 21 *Aff. p.* 18. *Vide* 13. (*b*) *El. Dy.* 290. *acc' Pl. Com.* 414. (*c*) 35 *Aff. p.* 14. A Lease for Years, if the Lessee shall so long live, 14 *H.* 8. 13. A Lease of Lands till he be promoted to a Benefice, &c. *Lit. Chap. Condit.* 90. (*d*) during the Coverture; all these and many others, are Words of Limitatiation, by Force of which, the Estate is determin'd without Entry or Claim: Words of (*e*) Condit. are, *sub conditione, ita qd', si contingat, proviso, &c. Vide Lit. c. Condit.* 74 & 75. 3 *H.* 6. 7. *a. b.* 27 *H.* 8. 15. *Dy.* 28 *H.* 8. 13. 4 *M. Dy.* 139. 15 *El. Dy.* 318. 32 *H.* 8. *Dy.* 47. But these Words, *ad effectum, ea intentione, ad solvendum*, or other the like, do not make a Condition in Feoffments or Grants, unless it be in the K.'s Case, or in a last Will, as it was resolv'd *Pasc.* 18 *El.* by all the Just. of the Common Pleas. And so you will the better understand your Books, in (*f*) 38 *H.* 8. 34. *a.* the Abbess of *Sion*'s Case. 31 *H.* 8. *Br. tit. Condit.* 191. 8 *E.* 2. *Aff.* 412. 5 *E.* 2. *Br. Condit.* 264. *F. N. B.* 131. 41 (*g*) *E.* 3. 17. *b.* 41 *Aff.* 3. 35 *H.* 6. 7. & 57. *per Moile.* 7 *H.* 4. 22. Sir *Sim. Beverley*'s Case. *Doct. and Stud. lib.* 1. *c.* 20. 10 *E.* 3. 44. 32 *E.* 3. *Annu.* 30. 8 *H.* 6. 23. *b. Plow. Com. in Brown.* and *Beston*'s Case 141. *a.* (*h*) 7 *E.* 6. *Dy.* 79. 3 *E.* 6. (*i*) *ib.* 65. But in Case of a Grant Executory (*Pro*) (*k*) makes a Condition; as a Grant of an Annuity *pro consilio impendendo*, (*l*) 41 *E.* 3. 6. *a. b.* 19. (*m*) 38 *H.* 6. 26. 9 *E.* 4. 20, 21. A Difference betwixt a Thing (*n*) executed and executory *Dy.* 23. *El.* 369. It was also observed, That in *Scholastica*'s Case, *Jo. Clerk* who was so supposed to be restrain'd, first levied a Fine, which Fine (for any Thing that appear'd in the Record, or in the Case reported) was a Fine at the Com. Law, and then it is a Discontinuance and Wrong, and therefore might be restrained by Condition. And *Hill.* 36 *El. Rot.* 339. in the K.'s Bench in the same Case of *Scholastica* it was resolved, for the Matter in Law by *Popham* Ch. Just. and two other Justices of the K.'s Bench against the former Opinion, but Judgment was there given upon an incurable Imperfection in the Verdict.

As to 4. Object. That this Opinion, That Tenant in Tail can't be restrained from suffering a Common Recovery, was new and of a late (*o*) Invention; it appears by the Authorities before-cited, and by *Littleton* also, that it is not new, but well proved by our ancient and later Books: And it was well said by one, *Quod novum judicium non dat jus novum, sed declarat antiquum, quia* (*p*) *judicium est juris dictum, & per judicium jus est noviter revelatum quod diu fuit velatum.* And it is true, that the Law sometimes sleeps, and a Judgm. wakens it: For, (*q*) *dormit aliquando lex,*

(*a*) Br. Assi. 230. Br. Condit. 166. (*b*) 2 Co. 57. b. 1 Rol. 388. 2 Ro. 798. Noy 122. Jenk Cent. 288. (*c*) Br. Estates 36. Br. Tail 20. Fitz. Tail 17. 5 Co. 9. b. (*d*) 5 Co. 116. a. Co. Lit. 234. b. (*e*) 2 Co. 70. b. 71. b. 72. a. 3 Co. 21. a. 5. Co. 78. b. 1 Jones 169. Godb. 418. 1 Ro. 407, 410. Cr. El. 385, 486. 2 And. 20. Co. Lit. 203. a. b. 204. a. Pop. 116, 117, 118, 119. Goldf. 130, 131. Moor 57, 404. Hob. 41, 42, 231. Lit. Sect. 328, 329, 330, 331. Br. Condit. 7, 10, 191. 3 H. 6. 6. b. Dy. 13. pl. 63, 138. pl. 12, 30. Br. N. C. 152. Hard. 10, 11. Lit. Rep. 109, 219.
(*f*) Br. Condit. 96.
(*g*) Br. Condition 20.
(*h*) Dy. 79. pl 46. 1 Rol. 408. 2 Bulst. 290.
(*i*) Dy. 65. pl. 8. 1 Rol. 408. Co. Lit. 204. a. 1 Leon. 246.
(*k*) Cr. El. 274. Co. Lit. 204 a. 2 Sand. 350. 1 Rol. 435.
(*l*) Br. Annuit. 7.
(*m*) Br. Con. 95. 38 H. 6. 26. b.
(*n*) Winch 117. Dy. 369. pl. 53. 9 Co. 50. a.
(*o*) Antea 37, 38. Co. Lit. 361. b.
(*p*) Co. Lit. 39. a. 226 a 236. a. 2 Inst. 359. 573, 3 Bulst. 39.
(*q*) Co. Lit. 279. b. 2 Inst. 161.

moritur nunquam. And this was the only Point on which Judgment was given in this Cafe againft the Plaintiff. And it was obferved, That thefe Perpetuities were born under fome unfortunate (*a*) Conftellation; for they in fo great a Number of Suits concerning them in all the Courts in *Weftminfter*, never had any Judgment given for them, but many Judgments given againft 'em, *viz. Hill.* 31 *El. in the Excheq. Chamber* in (*b*) *Chudleigh's* Cafe, *Mich.* 34 & 35 *El.* (*c*) *Hunt & Capel's Cafe in the Excheq. Chamber, Hill.* 37 *El. inter* (*d*) *Cholmley & Hunt in Communi Banco, & Hill.* 37 *El. inter* (*e*) *Germin & Arfcot in the fame Court. Hill.* 30 *El. in* (*f*) *Corbet's Cafe in Communi Banco. Mic.* 3 *Jac. in the King's Bench*, Sir *Anthony* (*g*) *Mildmay's* Cafe; and (*h*) *Sonday's Cafe in the Court of Wards* 8 *Jac. Reg.* All which Cafes I have reported, and in all which Judgment was given againft the Perpetuity, and from thefe fettered Inheritances the Freeholds of the Subject are thereby fet at Liberty according to their original Freedom.

But it was moved alfo, admitting, That fuch Conclufion to fuffer a Common Recovery might be reftrained by Condition, if the Conclufion of a Feme Covert in that Cafe by Deed indented fhould be a Forfeiture of her Eftate. And it was object. That when a Woman levies a Fine, or fuffers a Recovery with Voucher, the Law which enables her to the Principal, enables her to make a Declaration of the Ufe thereof, as it is agreed in (*i*) *Blith* and *Colgate's* Cafe: And fo if an Infant, or a Man *non fanæ memoriæ* levies a Fine, and makes Indentures to declare the Ufe thereof, the Indentures fhall not be avoided for Infancy, or *non fanæ memoriæ*, becaufe they are enabled to the Principal, and therefore fhall not be difabled for the Acceffory. And fo was it refolved in the Court of Wards by *Wray* and *Dyer* Ch. Juftices, in the Cafe of *Hugh Lewing*, who was an (*k*) Idiot, and fo found by Office, and had levied a Fine to one *Winne*, and declared the Ufe thereof by Indentures, which was pretended to be to the Ufe of the Ideot and his Heirs, becaufe the Indentures, as it was objected, were void; but *non allocatur* for the Caufe aforefaid; and therefore in this Cafe the Conclufion by the Husband and Wife by Indenture to fuffer a Common Recovery, was a Breach of the Condition. But the Chief Juftice held, That this Conclufion of a Feme Covert was of no Force, nor any Caufe of Forfeiture; and for that fome of the Maxims of the Law are to be confidered, That no Feme Covert fhall be barred by her Confeffion of her Inheritance of Freehold, but when fhe is examined by due Courfe of Law, 15 *E.* 4. 8. (*l*) 44 *E.* 3. 28. *a. Vide* 14 *E.* 4. 5. And none has Power to examine a Feme Covert without Writ. *Vide*

(*a*) Poft. 113. b.
(*b*) 1 Co. 120. a. 6 Co. 43. a. 11 Co. 80. a. Pop. 70. 1 And 309. Jenk. Cent. 276. Moor 546. 3 Keb. 177.
(*c*) 1 Co. 61. b. 2 Co. 52. b Pop. 5. 4 Leon 150. Moor 154. Jenk. Cent. 250. 1 And. 282. Goldf. 5.
(*d*) 1 Co. 86. a. 6 Co. 43. a. Cr El. 378. 1 And. 346. 2 And. 142, 149. Moor 592, 471, 633.
(*e*) 1 Co. 85. a 6 Co. 43. a. Moor 364. 4 Leon. 83. 1 And. 186. 2 And. 7. Bridg. 135. 1 Jones 59.
(*f*) 1 Co. 83. b. 6 Co. 40. a. Moor 601, 633. 2 And. 134. Winch 56 3 Keb. 177.
(*g*) 6 Co. 40. a. Co. Ent. 678. b. Moor 632.
(*h*) 9 Co. 127. b. Swinb. 112. 2 Rol. Rep. 468. Bridg. 137. Lit. Rep. 259, 286, 347.
(*i*) 1 Co. 127. a. b.
(*k*) Hob. 224. Winch 106.
(*l*) Br. Coverture & Infancy 9.

Vide 21 *E*. 3. 43. *b*. *John de Holborn*'s Case. And that is the Cause, That if the Husband and Wife acknowledge a Statute or Recognizance, it is void as to the Wife, although she survives her Husband, as it was held *Pasch*. 17 *El*. in the Countess of *Lennox*'s Case. So if the Husband and Wife (*a*) acknowledge a Deed to be inrolled, and it is inrolled, it is void as to the Wife. *Vide* 29 *H*. 8. *Br*. *Faits inrol*. 14. 7 *E*. 4. 5. *a*. 16 *H*. 7. 5. *b*. & 21 *E*. 3. 43. *b*. and the Reason is, because no such Writ is depending against the Husband and Wife, upon which the Wife by Law may be examined. But (*b*) if an Infant acknowledges a Statute or Recognizance, it is not void, but voidable by *Audita querela* during his Minority; and the Cause of the Difference is, because the Judge in Case of an Infant may by Inspection know his Age, but not whether a Woman be covert or not. And the Usage has always been upon a (*c*) Common Recovery against Husband and Wife, to examine the Wife, and to grant a *Dedimus potestatem* to take her Acknowledgment upon Examination, as in Case of a Fine; for there is a Writ upon which she may be examin'd. *Vide* 44 *E*. 3. 28. *a*. But a Common (*d*) Recovery against an Infant, although he appears by Gardian, shall not bind the Infant, for the Infant has not such a disposing Power of the Land as the Husband and Wife have, but is utterly disabled by Law to convey or transfer his Inheritance or Freehold to others during his Minority. And in these Days a Common Recovery appears to us to be a Common Conveyance and Assurance of Lands. But if a Feme Covert levies a Fine, it shall bind her and her Heirs, if the Husband doth not enter and avoid the Estate of the Conusee, because she was examined, and has Power of the Land. But the Reason that it cannot be a Forfeiture or Breach of the Condition in the Case at Bar is, because the (*e*) Conclusion by the Indenture only, and presently by the Pretence of the Plaintiff, was a Determination of the Estate of *Elizabeth*, and then the Recovery was not of any Effect, because the Estate of *Elizabeth* was determined by the Conclusion by Indenture before the Recovery; and it was not material whether there was any Recovery or not; for the pleading is, That by the Conclusion the Estate determined: So that in this Case it can't be said, as it was affirmed, That when Husband and Wife suffer a (*f*) Common Recovery, they being enabled to the Principal, shall not be disabled to the Accessory; for here this Proviso disables them to suffer a Recovery: And against the Indenture the Wife may plead (*g*) *Non est Factum*, and therefore it is no more than Husband and

(*a*) 1 Rol. 347. Fitz. Estop. 68. Reg. 140 b. Br. Faits enrol. 11, 17. Br. Coverture 47. Br. N. C. 109. Kel. 18. b. 14. E 3. Execution 73.

(*b*) Co. Lit. 380. b Moor 75. 76, 460. Kelw. 10. b. F. N B. 104 k. Cr. Jac. 59. Yelv. 88. 1 And. 25. pl. 54. 1 Rol. 305. 2 Inst 673. 2 Rol. 573.

(*c*) 1 Rol 347. 42 E 3 7. a. Br. Coverture and Infancy 9. Statham Fines 1. 2 Rol, 395. Palm. 226.

(*d*) Co. Lit. 380. b. Cr. Car. 307. contra. 1 Jones 118. 2 Rol. 395, 573. 1 Rol. 731, 751, 752. Stil. 246. 1 Mod Rep. 48, 49. 1 Leon. 211. Hob. 196. 197. 2 Saund. 94, 95. 1 Sid. 321, 322, 426. 2 Inst. 484. Cr. El. 323. Bridgm. 75. Palm. 225, 226. Jenk. Cent. 290. Noy 140. Hetl. 171, 172. Ley's Rep 82, 83.

(*e*) 1 Rol. 346. 18 H. 6. 27. a. 9 H 6. 33. b. 7 Co. 8. a b. Hob. 225 7 H. 4. 23. a. 2 Rol. 20. Br. Estop. 55. Br. Fines levy de terres 33. 1 Jones 457. 17 Ass. Coverture 77. Br. Fines levy de terres 75. 17 E. 3. 57. 78.

(*f*) 2 Rol. 395.

(*g*) 5 Co. 110. a, Doct. plac. 259

and Wife have (are) concluded without any Recovery. But this Point was not resolved, because Judgment was given upon the other.

Jennings's *Case*, (*cited in the Case before.*)

Trin. 38 Eliz. *Rot.* 2302.

In the King's Bench.

Perpetuity.

(a) 1 Ander. 275. 3 Co. 60. b. Moor 690. Antea 39. b. Cr. El 562, 570. Winch 43. Co. Entr. 667. Num. 16.

BEtween (*a*) *Wiseman* and *Crowe* the Case was such: *Thomas Wiseman* had Issue two Sons, *William* by his first Wife, and *Thomas* his younger, and a Daughter by *Dorothy* his second Wife, and being seised of Lands in Fee held in Socage, by his Will in Writing devised them to the said *Dorothy* his Wife for Life, the Remainder to *Thomas* his Son in Tail, and died, by which the Wife was seised for Life, the Remainder to *Thomas* the Son, and the Reversion of the Fee descended to the said *William*. The said Daughter married *Jennings*, and after the Stat. of 14 *El.* *c.* 8. a Common Recovery was had against the said *Dorothy* being Tenant for Life, in which *Thomas* in Remainder in Tail was vouched, and in which *Thomas* vouched over the common Vouchee without any Assent of the said *William* the Heir in Reversion, which Recovery was to the Use of the said *Thomas* and his Heirs, and afterwards *Thomas* died without Issue; *Jennings* in the Right of his Wife, being Sister of the whole Blood to *Thomas*, entred, upon whom *William* the Plaintiff entred, upon whom *Crowe* the Defendant by the Commandment of *Jennings* re-entred, upon which Re-entry this Action of Trespass was brought: And if the said Common Recovery had barred the Reversion of the said *William*, notwithstanding the said Act of (*b*) 14 *El.* was the Question. And in this Case four Points were resolved. ¶ 1. That at the Common Law a Recovery against Tenant for Life with Voucher upon a true Warranty and Recovery in Value would bind him in the Remainder, as the Books are in 19 *E.* 3. *Recovery in Value* 20. 23 *E.* 3. *ib.* 13. 44. *Ass. p.* 35. & (*c*) 5 *E.* 4. 2. *b.* and the Reason is, because the particular Estate and the Estate in Remainder are but one Estate, and one Warranty may extend to both,

(b) 1 And. 275. Moor 690. 3 Co. 60. b. Cr. El 562, 570. Winch 43. Antea 37. a. 2 Leon. 62.

(c) Raym. 322. Br. Vouch. 111. Br. Recovery in Value 33. Br. N. C. 70. Antea 37. b. 2 Leon. 65. 4 Leon. 127, 131. Rast. Recoveries 4.

both, and therefore the Recompence in Value shall enure to both the Estates. And it appears by the Preamble of the Act of (*a*) 32 *H.* 8. *c.* 31. That a Recovery suffered by the Tenant in a real Action against Tenant for Life by Covin, and not upon a true Warranty, would either bar him in the Remainder or Reversion, or at least toll them of their Entry. But now it has been resolved in (*b*) *Pelham's Case in the first Part of my Reports*, That a Common Recovery had against Tenant for Life only is a Forfeiture of his Estate, because a Common Recovery is now but a Common Conveyance or Assurance. *Vide* (*c*) 5 *Ass. pl.* 3. (*d*) 14 *E.* 3. *Resceit* 135. (*e*) 22 *Ass.* 31. (*f*) 18 *E.* 3. 28. *b.*

2. It was resolved, That no Act has been made to preserve any Reversion or Remainder expectant on an Estate-Tail; for an Estate-Tail is an Estate which by Possibility may endure for ever, and Tenant in Tail has Power to bar him in Remainder or Reversion, and therefore the Stat. of *West.* 2. (*g*) *c.* 3. (which was made at the same Parliament, that the Statute *de* (*h*) *donis conditionalibus* was made) for the Preservation of him in the Remainder or Reversion, gives Resceit to them, and provides for them in these Words, *Eodem modo si tenens in dote, per legem Angliæ, vel aliter ad terminum vitæ, vel per donum, in quo reservatur reversio, fecerit defaltam, admittantur hæredes, vel illi ad quos spectat reversio*, and altho' the Statute saith *per donum*, which by the Letter extends to Donee in Tail, yet the Judges knowing as well the Possibility of the Continuance of the Estate-Tail, as his Power to dock him in Reversion or Remainder, extended the said general Words by Construction to the Estate of the Donee in Tail after Possibility of Issue extinct, who in Truth has an Estate but for Life, which is but Part of the Gift, for an Estate of Inheritance was given and now the Donee has but an Estate for Life. And therewith agree 20 *E.* 3. *Resceit* 17. 39 *E.* 3. 8. *b.* 33 *H.* 6. 22. and the Book in 2 *E.* 2. *Resceit* 147. is ill reported, and is to be intended of Tenancy in Tail after Possibility, and not of an Estate-Tail: And therefore in 42 *E.* 3. 12. *b.* the Case is remarkable; Lands were rendred by Fine to *Robert* and *Alice* his Wife in Tail, the Remainder to *Thomas* in Tail, saving the Reversion to the Donor, *Robert* died without Issue, *Alice* his Wife was impleaded in a *Præcipe quod reddat*, who made Default after Default, for which one *Simon* the Right Heir of the Donor who had the Reversion in Fee, surmising that as well *Robert* as *Thomas* were dead without Issue, prayed to be received; the Demandant counterpleaded the Resceit, because *Thomas*, who was in the Remainder in Tail, had Issue *John*, who yet was alive: And the Demandant's Counsel made two Objections against the Resceit; first

(*a*) Cr. El. 562. 3 Co. 61. a. Co. Lit. 362. a. 1 And. 38. 2 Leon. 61, 62. 4 Leon. 126, 127, 128, 129. Rastal Recoveries 3.
(*b*) 2 Leon. 60. 67. 1 Co. 14, 15. b. 4 Leon. 123, 133. 1 And. 227. Mo. 271. Poph. 23 Co. Lit. 356. a. 362. a. Vaugh. 51 2 Brow. 170. 2 Co. 74. a. 1 Rol. Rep. 304. 3 Co. 4. b. 5 Co. 40. b.
(*c*) 3 Co. 4. b. 2 Leon. 60, 63, 66. 4 Leon. 124, 126, 128, 131. Co. Lit. 356. a. 362. a. Br. Entre congeable 49. Br. Forfeiture de terre 29. 1 Rol. 853. 1 Co. 15. b.
(*d*) 1 Co. 16. a. 3 Co. 4. b. Co. Lit. 252. a 2. Leon. 62, 66. 4 Leon. 126, 132.
(*e*) 2 Leon. 61, 63. 4 Leon. 128.
(*f*) 1 Rol. 853.
(*g*) 2 Inst. 342, 343, &c.
(*h*) 4 Leon. 129. 2 Inst. 331, 332, &c. Rast. Tail.

first, that the Estate of the Donee was not immediate to the Estate of *Alice*; *sed non allocatur*, for there it is said that it was adjudg'd, That if Land be leased for Life, the Remainder to another for Life, saving the Reversion to the Lessor, that he in Reversion had been received notwithstanding the mean Remainder: And it is true, that it was so adjudged in 11 *E.* 3. *Resceit* 118. where the Case was there was Tenant for Life, the Rever. (Rem'r) to *E.* for Life, the Rever. of the Fee to *R.* Ten't for Life was impleaded in a *Præcipe*, and living *E. R.* prayed to be received, and there *Hill* objected against the Resceit, that the Statute gives that he to whom the Reversion is immediate after the Death of Ten't for Life shall be received, and we have seen that he to whom the Reversion was, where there was a mean Estate for Life, has brought a Writ of (*a*) Waste, and was not receiv'd to that Writ; which Case of Waste was well agreed, and the Difference taken between that and the Case at Bar, was because in the Action of Waste it was to defeat the mean Esta. but here it is to save the mean Estate: And 4 *E.* 2. *Resceit* 160. agrees. The second Objection in the said Book of 42 *E.* 3. was, because there was a mean Estate in Tail (which the Book calls a Fee mediate) betwixt the Ten't for Life, and he in the Reversion in Fee, and where there is Fee mediate, he in Reversion by Force of the said Stat. shall not be received; and so the Case is there ruled, that he was not receivable; and the Difference is taken, where the Remainder is limited over for Life, there he in Reversion shall be received; and the Reason is because he who in Remainder has no higher an Estate than the Tenant himself has, but in the Case here there is a Fee mediate between him who prays now; and the Ten't who might have been received if he had come, and afterwards the Def. said, That there was no such *John in rerum natura*. But note *Reader*, if he in Reversion in Fee, and he in the Mesne Estate for Life at the same Time prayed to be received, the mesne Estate for Life in respect of the Immediateness and Proximity shall be preferred before the Reversion in Fee, for the Words of the Stat. being general, *s. admittantur hæredes vel* (*b*) *illi ad quos spectat reversio*, the Law which always respects order of Proximity prefers the small and next Estate, be it in *Remainder* or *Reversion* for Life, before the great and remote Estate in Fee; and therewith agrees 24 *E.* 3. 32. *a. b. in Pierce de Grimstead's Case*. And (*c*) the Stat. which gives the Writ of Error and Attaint to him in Reversion during the Life of Tenant for Life, *&c.* gives no such Remedy to him in Reversion expectant on an Estate-Tail. *Vide the Marquess of* Winchester's *Case in the Third Part of my Reports.*

And the Statute of (*d*) 32 *H.* 8. *c.* 31. provides only for the Preservation of the Reversion or the Remainder expectant on an Estate for Life, *&c.* and not on an Estate-Tail;

(*a*) 2 Co. 92. b. 5 Co. 76. b. Co. Lit. 54. a. F. N. B. 58. c. 59. h. Moor 18. 1 Jones 51. Cr. Jac. 688. 50 E. 3. 4. a. 2 Rol. 829. 2 Inst. 301. 11 Co. 81. b. Lit. Rep. 256.

Br. Resceit 18.

(*b*) 2 Rol. 436.

(*c*) Reg. 122. a. 9 R. 2. c. 3. Vet. N. B. 112. a. b. F. N. B. 108. a. 3 Co. 4. a. b. 61. a. 2 Bul. 15. Palm. 251, 253. Dyer 1 pl. 5. Cr. El. 289. Dyer 90. pl. 5. 4 Inst. 51.

(*d*) Cr. El. 562. 3 Co. 61. a. Co. Lit. 362. a. 1 Anders. 38. 2 Leon. 61, 62. 4 Leon. 126, 127, 128, 129. Rastal Recoveries 3.

 Tail;

Tail; and to this Effect that all Recoveries by Agreement against Tenant by the Courtesy, Tenant for Life, in Dower, Ten't in Tail after Possibility of Issue extinct, of any Lands, *&c.* whereof the Ten't shall be seised as Ten't for Life, Tenant by the Courtesy, or Ten't in Tail after Possibility of Issue extinct, shall be void against those then in Reversion, *&c.* so that by this Stat. no Provision was made for the Preservation of the Reversion or Remainder expectant on an Estate-Tail. ¶ 3. It was resolv'd, That sundry Evasions were invented out of the said Stat. of 32 *H.* 8. and therefore if after that Stat. Tenant for Life had made a Lease for Years, and the Lessee for Years had made a Feoffment in Fee, and the Feoffee had suffered a Common Recovery in which the Ten't for Life was vouched, and in which he vouched over the Common Vouchee, that this was out of the Purview of the Act of 32 *H.* 8. for two Reasons. 1. Because the Ten't for Life at the Time of the Recovery against the Feoffee was not seised for Life, but had but a Right. 2. He in Remainder or Reversion had not then, *s.* at the Time of the Recovery, the Remainder or Reversion, but only a Right for all was devested by the Feoffment of the Lessee for Years. And so was it held in *C. B. Trin.* 5 *El.* & 15 *El.* that in the like Case where (*a*) Tenant for Life in such Common Recovery came in as Vouchee, that it was out of the Stat. 32 *H.* 8. as *Bendloes* Serjeant has reported. And that was the Reason, as it also appears by the Preamble of the said Act of 14 *El.* at the Making of the same Act, viz, *Where divers Persons being seised, or that had been seised,* &c. *for Life,* &c. *have permitted and suffered themselves to be vouched by other Persons by Agreement or Covin between them,* &c. *to the great Prejudice of those to whom the Reversion or Remainder thereof hath appertained or ought to appertain.* ¶ 4. It was resolved, That the Act of (*b*) 14 *El.* doth not extend to preserve any Reversion or Remainder expectant on an Estate-Tail, where Tenant for Life is impleaded, and Ten't in Tail is vouched; and therefore all the Parts of the Act were considered. 1. The Title of the Act is, *For avoiding of Recoveries suffered by Collusion by Ten't for Life, &c.* and this Title doth not extend to the Case at Bar for two Reasons. 1. A Recovery can't be said by Collusion, where Ten't in Tail is in the Recovery Ten't in Fact, or Ten't in Law, as Vouchee, for the Law, as incident to his Estate, has made the Land and all Remainders and Reversions subject to his Pleasure, and he has Right and Power to bar them all, *& jus & fraus nunquam cohabitant*; and therefore the Title of the Act being *for avoiding of Recoveries by Collusion, &c.* can't extend to a Recovery where Tenant in Tail is Party or Privy. The second Part of the Act is the

(*a*) 1 Co. 15.a. Benl. in Kelw. 211. a.N. Benl. 132. pl. 194. 4 Leon. 128. 2 Leon. 63. 1 Jones 423 Co. Lit. 362 a. Palm. 230.

(*b*) Antea 37.a. 39. b. Cr. El. 562. 570. Co. Lit. 362.a.3. Co. 60. b. 1 And. 275. Moor 699. Winch 43. 2 Leon. 62.

the Preamble, and that doth not extend to the Case at Bar for four Reasons. 1. The Words of the Preamble are, *Whereas divers Persons being seised, or that have been seised of Lands*, &c. *as Tenants by the Courtesy, Tenants in Tail after Possibility of Issue extinct, or otherwise only for Term of Life, or Estates determinable upon Life or Lives*; so that the Intent of the Makers of the Act was to avoid Recoveries against Ten't for Life only, and not when Ten't in Tail is Party or Privy. 2. *By Agreement and Covin between them*; and (as it hath been said) Covin can't be when Tenant in Tail is Party or Privy. 3 *Against the same particular Tenant*; and in this Case the Recovery against the particular Ten't doth not bar the Reversion, but the Vouchee of Tenant in Tail and his Vouchee over. 4. *Have permitted and suffered themselves to be vouched*, &c. so that the Vouchee of Ten't for Life, and not the Tenant in Tail was intended to be prohibited.

The third and principal Part of the Act is the Body of the Act; 1. *That such Recoveries against such particular Ten'ts*, &c. and in the Case at Bar the Recovery against Ten't for Life doth dot bar the Reversion, but the Judgm. given for Ten't in Tail to have in Value, that binds the Reversion, as has been said before. 2. *Or against any other with Voucher of any such particular Tenant*; which clearly doth not extend to the Case at Bar, forasmuch as Ten't in Tail is Vouchee. 3 The Proviso, *That all and every such Recoveries* (which relates to Recoveries by Covin, *&c.* mentioned before in the Title, Preamble, and Body of the Act) which doth not extend where Tenant in Tail is vouched, and that such Recovery shall bind those who assent of Record are affirmative Words, and do not diminish the Vigour and Force of a Common Recovery in which the Ten't in Tail is vouched, and in which he vouches, who by the Law has Pow. over the Land, as has been said before; and it would be very mischievous if this Act should not be so taken, or rather if this Act should be expounded against the Writ and the Intent also thereof. For when a com. Assurance is, That Ten't in Tail of Land, with the Remainder or Reversion over, bargains and sells the Land by Deed indented and inrolled to another, against whom the Writ of Entry in the *Post* is brought, and he vouches the Tenant in Tail, and he vouches over, God forbid that the Estates of Subjects which depend on such Recoveries should be drawn in Question, and yet the Bargainee in such Case has but an Estate determinable on the Life of Tenant in Tail. Also if Tenant for Life be impleaded in a *Præcipe*, and makes Default after Default, and he in Remainder in Tail is received, who vouches over the Common Vouchee, it shall bind the Estate-Tail, and the Remainder or Reversion also. And therewith agrees

Manx. Case pl. com. 3. a.

agrees *Knyveton*'s Case, 8 *Eliz. Dyer* (*a*) 252. *Vide* (*b*) *Owen* and *Morgan*'s Case. And Judgment in the Case at Bar *per totam curiam nullo contradicente* was given for the Defendant against the Plaintiff: Upon which the Plaintiff brought a Writ of Error, and the Judges of the Common Pleas, and the Barons of the Exchequer (*c*) agreed with the Justices of the King's Bench, That the said Recovery had barred the Plaintiff's Reversion; but for insufficient Pleading the Judgment was reversed.

(*a*) Dyer 252. pl. 97. Co. Lit. 78. a. 6 Co. 77. a. 2 Rol. 395, 493. Goldf. 27. 3 Co. 6. b.

(*b*) Goldf. 26. 4 Leon. 26, 93, 222. 3 Co. 5. a. 6. b. Moor 210. 1 Anderson 162. pl. 108. Cr. Car. 321. 1 Jones 324

(*c*) 1 Anderson 276.

LAMPET's

Executory Devise.

LAMPET's *Case*.

Mich. 10 Jac. 1.

Perpetuity. 2 Brownl. 172. Cro. Jac. 460, 461. 2 Rol. Rep. 218, 315. 1 Jones 15, 17. See Lucas 421.

RIchard Lampet brought a Writ of *Ejectione firmæ* against *Margery Starkey*, and declared on a Leafe made by *Will. Lampet* and *Elizabeth* his Wife by their Indenture, 18 *Junii* 8 *Jacobi*, of an Houfe, twenty-four Acres of Land, eight Acres of Meadow, and twenty Acres of Wood, with the Appurtenances, in *Cawe Hamborne* in the County of *Gloucester* for four Years, &c. and declared of an Ejectment, &c. and averred the Life of *Elizabeth*. The Def. pleaded Not guilty, and the Jury gave a fpecial Verdict as to the faid Meffuage, and half an Acre of Land, Parcel of the Tenements aforefaid, and as to the Refidue, they found the Defendant Not guilty; and as to the faid Meffuage and half Acre they found, That *John* Lord *Lumley*, *Richard Lewkener* and *John Lampton* were feifed of the faid Houfe and half Acre of Land in Fee; and by their Indenture 14 *Maii anno* 35 *Eliz.* demifed to *John Morrice* the Younger the faid Houfe and half Acre for the Term of 5000 Years, by Force whereof he entred, and was thereof poffeffed, and 11 *Octab.* 38 *Eliz.* made his laft Will and Teftament in Writing, and thereby devifed to *John Morrice* his Father the faid Houfe and half Acre, for the Term of the natural Life of the faid *John Morrice* the Father, and after his Deceafe, the Remainder of the faid Houfe and half Acre to *Elizabeth* the Sifter of the Teftator, and to the Heirs of the Body of the faid *Elizabeth*, and made *John Morrice* his Father his fole Executor, and 20 *Oct.* *Anno* 38 *Eliz.* died of the faid Houfe and half Acre poffeffed; after whofe Death *John Morrice* the Father took upon him the Charge of the Execution of the faid Will, and into the faid Meffuage and half Acre of Land enter'd, and

and was thereof possessed *prout lex postulat*; and the said *Eliz.* took Husband *Will. Taylor*, *quodq; postea, s. 26 Julii ann' 1 Jac' id' W. Taylor & Elizabetha, ad special' instant' præd' J. Morrice Sen' per quodd' script' suum dederunt, concesserunt, remiserunt, relaxaverunt, sursum reddiderunt, assignaverunt & transposuerunt*, *Anglice*, yielded up *dict' Johan' Morrice sen' totum præd' mesuag' & præd' dimid' acr' pastur' cum pertin', unacum toto recto, tit', interesse, tempore & termino suis de & in eisd' habend' & tenend' totum dictum mesuag' & dimid' acr' pastur' cum pertin' præfat' Johan' Morice sen' pro & duran' toto statu, fine, & termino præd' Will' Taylor & Eliz' pro' & durant' residuo dict' termini* 5000 *annorum tunc venturorum*. And afterwards *J. Morrice* the Father 1 *Octb' an'* 2 *Jac'* by Indenture demised the said House and half Acre to the said *Margery Starkey* now Def. for ten Years; and afterwards the said *W. Taylor* died, and the said *Eliz.* took to Husband the said *W. Lampet*, and afterwards 15 *Nov' ann'* 7 *Jac. Jo. Morrice* the Elder died, after whose Death the said *William* and *Elizabeth* entred into the said House and half Acre; and made the Lease to the Plaint. mentioned in the Declaration, by Force whereof the Pl. entred and was thereof possessed till the Defend. ejected him. *Et si super tota materia*, the said *Margery* was guilty or not, was the Question. And this Case was oftentimes in several Terms argued at the Bar, and now this Term by the Judges; and the Effect of all their Arguments was, First, in every Matter in Law *status quæstionis, causa dubitationis*, The Cause of Doubt or Question is first to be considered; and in this Case the Cause of the Doubt is, forasmuch as the whole Term *sub modo* is in *J. Morrice* the Father, and he shall be punished for Waste, and an Action of Debt lies against him for the Rent, as it was resolved by the whole Court in this Case. *Vide Weldon's* Case in *Plo. Com.* 524. *a. b. acc.* If the said Grant or Release made to the said *John Morrice* the Father, then being possessed of the whole Term as aforesf. can bar the said *Elizabeth*, because she hath but a Possibility, and neither Interest or Right in Possession, Reversion or Remainder? and that was the great Question of the Case. But two other Questions, as appear afterwards, were moved in the Case, which without Difficulty were resolved. This Case of a Devise of a Lease for Years to one for Life, and after his Death to another during the Residue of the Term, hath produced *septem quæstiones vexatas & spinosas* 1. When a Man being possessed of Land for Years devises the Use or Profits of the Land, or the Land it self to one for Life, and afterwards to another during the Residue of the Term, if the Devise of a Chattel after the Death of the first Devisee was good, and adjudged, as appears in *Manning's Case, in the eighth Part of my Reports*, that such (*a*) executory Devise was good. And so was it held *per totam curiam* in

(*a*) Moor. 635, 748, 758. Cr. Jac. 198, 460, 461. Swinb. 134, 135. 8 Co. 95, 96. a. 2 Rol. Rep. 218, 220. 2 Brownl. 173. Cr. El. 796. B. N. C. 209.

in the Argument of this Case. The 2d Question hath been, if the executory Devise after the Death, &c. be good, when the Term it self (and not the Use or Occupation) was devised to the first for Life, &c. and afterwards to others; and adjudg'd, That in such Case also the executory Devise was good, as in the said Case of *Manning* appears; and so it was resolved in the Argum. of this Case by all the Justices. The 3d Question hath been, If the first Devisee after Assent made by the Executor, might (*a*) bar the execut. Devise, being but a Possibility, or not; and adjudged he could not; and so was it unanimously agreed in the Argum. of this Case. The 4th Question has been, If the Assent of the Execut. to the first Devisee (*b*) should enure to the other; forasmuch as he has it by execut. Devise, and not by Remainder: And adjudged it should: And so was it granted *per omnes* in the Argum. of this Case. The 5th Question hath been, When the Devise is *ut supra* to the Execut. for Life, and afterwards to another, &c. and the Execut. entreth (*c*) generally; it hath been adjudged, That he shall have it as Executor, which is his first and general Authority, and not as legatory without Claim or Demonstrat. of his Election, altho' the Testator were not indebted to any; and so was it ruled by the Court in the Argum. in this Case. The 6th Question has been, If such execut. Interest might be granted to a Stranger during the Life of the first Devisee; and adjudged it could not, as appears in (*d*) *Carter*'s Case cited in *Fulwood's Case, in the 4th Part of my Reports, f. 66.* and therewith agreed the Opinion of all the Justices in the Argum. of this Case. ¶ And now the 7th Question is, If such (*e*) Possibility may be extinguished by Grant or Release to him in Possession. And it was objected, That the said Possibility could not be released, for inasmuch as an Estate during the Life of a Man, is more than any Term for Years; and that the Land in the Case at Bar is devised to *J. Morrice* the Elder for his Life, the whole Term is in him determinable by his Death, so that the said *Eliz.* had nothing but a Possibility which can't be released; as in 27 *E.* 3. *Execution* 130, and (*f*) 25 *Ass. pl.* 7. If Conusee of a Stat. or Recogn. releases to the Terr-Tenant all his Right in the Land, yet he shall sue Execution; so if the (*g*) Son in the Life of his Father, releases to the Disseisor of his Father, and afterwards the Father dies, this Release shall not bar the Son, because the Son in the Life of the Father had but a Possibility. And therewith agrees (*h*) *Littl. c. Releases* (*i*) 11 *H.* 4. 33. *a.* & 17 *E.* 3. 87. 10 *E.* 2. *Confirm.* 24. And it is put in 13 *E.* 1. *tit. Confirm.* 24. as a Maxim, If a Man quitclaims his Right before the Right falls to him, the quit Claim is void. *Vide* 19 *H.* 6. 62. *a.* And therewith agrees *Bracton, lib.* 2. *fol.* 58. *b. Item vidend' quando quis possit confirmare; & sciendum non priusquam jus ei acciderit.* But in the Case at Bar, the Release is made by the Husb. of *Eliz.* before

Executory Devise.

(*a*) 8 Co. 96. a.

(*b*) 1 Rol. 620. 3 Bulst. 123. Bridgman 55. Cr. El. 504. Plow. 524. a.

(*c*) 1 Rol. 619. Cr. El. 223, 347, 348. Moor 350, 351. Goldf. 185. Plow. 520. a. Dy. 277. pl. 59. 1 Jones 59.

(*d*) 2 Brownl. 173. 175. 1 Bulst. 192, 193. Raym. 146. Cr. Jac. 510.

(*e*) 2 Brownl. 172, 173. Cr. Cai. 479.

(*f*) 2 Rol. 405. Br. Stat. Merchant 25. Br. Execut. 82. Br. Release 37. 2 Brownl. 174. Co. Lit. 265. a. Hob. 46.

(*g*) 2 Brownl. 174. 1 Co. 111. b.

(*h*) Co. Lit. 265. a. Lit. Sect. 446. Lib. 1. f. 111. b.

(*i*) Br. Release 10. Br. Feoffment de terres 10.

before the Right or Interest vested in the Wife; and as *Bracton* saith, *priusquam jus ei acciderit*. And it appears, that it is but a Possibility, because it can't be granted or assigned to another, as it was adjudged in (*a*) *Carter's* Case, no more than a Rectory which is appropriate *in futuro* after the Death of an Incumbent, can be demised in the Life of the Incumbent, because it is but a Possibility, as it is held in 8 *El. Dy.* 244. (*b*) And (*c*) *Hoe's Case in the 5th Part of my Reports, fol.* 70, 71. was strongly urged, where the Case was, That in an Action of Debt brought by *Hoe* in the K.'s Bench, *Phelix Marshal* was Bail for the Def. and afterwards before any Judgm. given, *Hoe* released to *Marshal* all Actions, Duties and (*d*) Demands, and afterwards Judgment was given against the Def. and on his Default a *Sci' fac'* issued against the said *Phelix*, who pleaded the said general Release, upon which the Pl. demurr'd. And it was adjudg'd, That the Release should not bar the Pl. because before Judgm. it was but a meer Possibility; and therefore as the Book saith, it could not be released. So in the Case at Bar before the Death of *J. Morrice* the Elder, *Elizab.* had but a mere Possibility; and therefore it could not be released. But it was resolved *per totam curiam*, That the said (*e*) Release had barred the said *Elizabeth* to claim any Thing in the said Lease, after the Death of the said *John Morrice* the elder. And first was observed the great Wisdom and Policy of the Sages and Founders of our Law, who have provided, that no Possibility, (*f*) Right, Title, nor Thing in Action, shall be granted or assign'd to Strangers, for that would be the Occasion of multiplying of Contentions and Suits, of great Oppression of the People, and chiefly of Terr-Tenants, and the Subversion of the due and equal Execut. of Justice. And as they can't be granted by the Act of the Party; so a Right in Action shall not be transfered by Act in Law, as to the Lord by (*g*) Escheat, neither shall the Lord (*h*) of a Villain have Things in Action, as appears in 22 *Ass. pl.* 37, &c. Also it is resolv'd in the *Marq. of* Winchester's *Case, in the third Part of my Reports, f.* 2. *b.* That by the general Words of an Act of Attainder of Treason, by which all Lands, Tenements, Rights and Hereditaments of the Person attainted are given to the King: Yet no (*i*) Right to Land in Action is given to the King, and all that was for the Quiet and Repose of the Terr-Tenants. But all Rights, Titles and Actions may by the Wisdom and Policy of the Law be released to the Terr-Tenant, for the same Reason of his Repose and Quiet, and for avoiding of Contentions and Suits, and that every one may live in his Vocation in Peace and Plenty. And therefore a Right or Title to Freehold or Inherit. (for here it is not spoken of collateral Pow-

ers)

(*a*) 2 Brownl. 173. 2 Bulst. 192. 193. Cr. Ja. 510. Raymond 146.

(*b*) Dy. 244. a. pl. 60. 6 H. 7. 13. b. 1 Co. 155. a. Co. Lit. 352. b. Br. Appropriation 5. Plow. 449. b.

(*c*) Moor 469. Goldf. 166. Cr. El. 579. Co. Lit. 265. b. Post. 51. a. Cr. Jac. 401. 451, 623, 171. 1 Sid. 141. 2 Bulst. 231. 286. Hutt. 12. Poph. 136. Winch 56.

(*d*) 8 Co. 153. b. Popham 136. 1 Brownl. 80, 115. 2 Rol. Rep. 20. Cr. Jac. 300, 486, 487. Lit. Sect. 508. 2 Rol. 406, 407. Bridg. 122, 124. 20 Ass. 5. 5 E. 4. 42. 14 H. 8, 9. 4 E. 3. 48. 34 H. 8. Releases 90. Hob. 216. Noy 26. Hut. 17. 1 Bulst. 178. Yel. 214, 215. Cr. El. 551, 552. Lit. Rep. 87. Winch. 56.

(*e*) 1 Jones 17. Cr. Car. 479.

(*f*) Co. Lit. 266. a. b. 2 Rol. Rep. 319.

(*g*) Godb. 310.

(*h*) Br. Chose in Action 8. Br. Garranty 45. Doctor and Student 139. b. Br. Voucher 132. 1 Co. 136. a. Co. Lit. 117. a. 2 Rol. 733. Br. Villenage 37.

(*i*) Hob. 342. Moor 125. 2 Rol. Rep. 319.

(a) Raym. 146. Co. Lit. 268. a. ers) be it *in præsenti* or *futuro*, may be (a) released in five Manners. 1. To the Tenant of the Freehold in Fact, or in Law, without any Privity. 2. To him in Remainder. 3. To him seised of the Reversion without any Privity; but an Estate can't be enlarg'd without Privity. 4. To him who has Right only in respect of Privity; as if the Ten't be disseised, the Lord may release his Services in respect of the Privity and Right, without any Estate. 5. In respect of Privity only, without Right; as if (b) Ten't in Tail makes a Feoffm. in Fee, the Donee after the Feoffm. has no Right; and yet in respect of the Privity only, the Donor may release to him the Rent and all Services, saving Fealty: So the Demandant may release to the Vouchee in Respect of Privity only, but no Estate can pass by Release, but to him who hath an Estate in Privity, and not in respect of the Right or Privity only. *Vide Litt.* (c) *c. Releases* 105, 106, *a. b.* 19 *H.* 6. 17, 23. 14 *H.* 8. 8. 7 *E* 4. 13. 14 *H.* 4. 38. 1 *H.* 5. *Grant* 43. 7 *E.* 4. 27. 5 *E.* 4. 1. 5 *E.* 4. 3. 43 *E.* 3. 8. 31 *E.* 3. *Gard* 116. 13 *H.* 4. *Confirm.* 20. 20 *H.* 6. 29. 8 *H.* 4. 5. 7 *E.* 4. 13. 9 *H.* 7. 25. 18 *E.* 3. 12. 5 *E.* 3. 36. 7 *E.* 3. 46. 22 *H.* 6. 12. (d) *Litt.* 114. *b.* So if the Tenant makes a Feoffment pending the Writ, the (e) Release of the Demandant to him is good in the respect of the Privity. And if Lessee for Years be ousted, and he in the Reversion disseised, and the Disseisor makes a Lease for Years, the Lessee who was ousted may release to the Lessee of the Disseisor, and yet there wants Privity; but the Disseisee can't Release to him, because he hath no Freehold. 49 *E.* 3. 31. *v.* 19 *H.* 6. And the said Release hath extinguished the future Interest of the said *Elizabeth*, for (f) divers Reasons.

(b) 2 Rol. Rep. 322, 323, 417, 429. Co. Lit. 268. a. 269. a. Godb. 313, 314. 3 Co. 29. b. 1 Jones 73.

(c) Sect. 454.

(d) Sect. 490.

(e) 8 Co. 151. b.

(f) Winch 57

The 1 Reason. 1. Because it is of a future Interest in a Chattel, which as it may be more (g) easily created than a Freehold; so it may be more easily determined. And therefore if a Man makes a Lease for Years, and that upon not Performance of a collateral Condit. that it shall be void, the Grantee of the Reversion shall take (h) Advantage thereof by the Common Law: But otherwise it is of a Lease for Life upon the like Condition, for the one may more easily be determined than the other. And if Lessee for 1000 Years be ousted by the Lessor, and he makes a Lease for two Years, the Lessee for 1000 Years may release to him. But if the Lessor disseises his Lessee for Life, and makes a Lease for 10000 Years, the Lessee for Life cant't release to him, for a Freehold is higher than to merge in a Chattel.

(g) 8 Co. 95. b.

(h) Co. Lit. 215. a.

The 2 Reason. 2. *Littl.* (i) saith, *c. Discont. f.* 144. That it is a Maxim in Law, That Land in Fee-simple, *&c.* may be charged by one way or other: So it was said, That it was a Max. in Law, that every Right or Title, or Interest, *in præsenti* or *futuro*, by the (k) joyning of all who may claim any such Right, Tit. or Interest, may be barred or extinguish'd, and therefore upon the Max. which

(i) Sect. 648. Co. Lit. 343. a. 1 Co. 147. b.

(k) Palm. 48.

which *Littleton* puts it was concluded, That if at the Com. Law the Donor and Donee in Tail had (*a*) joined in a Grant of a Rent-charge, and afterwards the Donee had died without Issue, and the Land had reverted to the Donor, he should hold it charged, and yet he had but a (*b*) Possibility at the Time of the Charge made: But all those who had Estate or Interest *in præsenti* or *futuro*, joined in the Charge: *A fortiori*, if they had joined in a Lease for Years, and the Donee had died without Issue, the Lease is good against the Donor. So upon the 2d Maxim, If in the Case at Bar *John Morrice* the Elder, and *Eliz.* had joined in a Deed of Assignment to another, without Quest. it had utterly barred the said *Eliz.* for no other had Interest either *in præsenti* or *in futuro*, but those who joined in the Grant. So when the Husband of *Eliz.* releases to him in Possession, both consented to it, one in releasing, the other in accepting of it: And in the Case when both join in the Grant, it is the Grant of him who has the Term, and the Release or Confirm. or the other. *Vide* (*c*) Mayow's *Case in the 1st Part of my Rep. f.* 146. *b.* a notable Case to this purpose. And *Pas.* 4 *E.* 6. *in Com. Banco* as the Chief Just. said, he had seen a Report, It was held by *Mountague*, *Hale*, *Molineux* and *Brown*, Just. of the Com. Pleas, That if a Man makes a Lease to another for 21 Years, if the Lessee shall so long live, and the Lessor and Lessee join in a Grant by Deed of the Term to another, and afterwards the Lessee dies within the Term, the Grantee shall enjoy the Land during the Residue of the Term absolutely. So in the Case at Bar, where the Interest of *J. Morrice* the elder was determinable by his Death, now this Release has made his Interest absolute during all the Residue of the Term. And if *cesty que use* after the Stat. (*d*) 1 *R.* 3. and before the Stat. 27 *H.* 8. had disseised the Disseisor of his Feoffees, now the Use is suspended, and depends in possibility to be revived by the Entry of the Feoffees, and yet if he makes a Feoffm. in Fee it is good and shall bind, in respect that the Law has Consideration of this Possibility of the Use.

3. *Quando diversi desiderantur actus ad aliquem statum perficiendum, plus respicit lex actum originalem*, when to the Perfect. of an Estate or Interest, divers Acts or Things are requisite, the Law has more regard to the original Act, *quia* (*e*) *cujusq; rei potissima pars est principium*, for that is the fundamental Part on which all the others are founded. In this Case at Bar 3 Things are requisite to the Perfect. of the Interest of *Eliz.* the Devise (in which is included the Death of the Devisor) and that is the fundam. Part; the Assent of the Executor, which also appears afterwards, was given in the Case; and the Death of the 1st Devisee: And therefore this Case may fitly be resembled to the Case of Dower, when a Man seised of Lands in Fee or in Fee-tail general, takes a Wife, to the Perfection of the Dower (*f*) two Things are requisite, lawful Matrimony, and the Death of her Husband: For notwithstanding her Husband is seised in Fee, and

(*a*) Co. Lit. 45. a. 2 Rol. 64.

(*b*) Palm. 48.

(*c*) Poph. 50. Cr. Car. 478. Winch 31. Lane 38. 9 Co. 140. a. 142. a. Co. Lit. 277. b. 5 Co. 15. a.

(*d*) Post. 123. a. b. 131. b. 1 R. 3. c. 1. 1 And. 86, 320, 331, 333, 334. 1 Co. 87 a. 88. a. 123 a. b. 128. b. 129. a. 131. b. 132. a. 135. a. 133. b. 147. b. 2 And 74, 87, 136.

(*e*) Co. Lit. 248. b.

(*f*) 2 Co. 93. a. Plow. 363. a. Co. Lit. 31. a. 32. a.

(a) M. 6 E. 2. Dower 145. (b) 2 Co. 93. a. Post 99. a. Cr. Jac. 333. Mo. 53. pl. 154. 5 Co. 124. a. (c) 4 H. 7. c. 24. Co. Lit. 262. a. 326. a. 372. a. 3 Co 86. b. 87. a. b. 88. a. b. 89. a. 90. a. b 77. b. 91. a. 8 Co. 100. b. 9 Co 140. b. 141. b. 105. a. b. 5 Co. 123. b. 124. a. 10 Co 96. a. 11 Co. 71. a. Pal. 255. Golds. 171. Sav 85, 88, 106. 1 Leon. 77 213. 2 And. 115. 2 Rol. Rep 402, 500, 501. 1 Rol. Rep. 153. 3 Bul. 152. 2 Leon. 53, 157. 3 Leon. 10, 227. 1 And. 170. Poph. 108, 114. 3 Inst. 216. Dyer 3. pl. 1. 72. pl. 3 182. pl. 55. 254. pl. 104. 19 H. 8. 6. b. Plo 360. b. 9 Co. 104. b. 7 Co. 32. a. Rastal Fines 8. Hob. 334. (d) Dy. 72. pl. 3. Co. Lit. 326. a. Moor 53 pl. 154 8 Co. 72. b. 1 Rol. Rep. 91, 160. 11 Co. 63. a. (e) Co. Lit. 221 b. Dy. 224. pl. 28 Palm 233 2 Co. 93 a. Golds. 148. (f) Lit. Sect. 357 Co. Lit. 221. a b. (g) Perk. Sect. 801. Co. Lit. 221. a b. 222. a. 2 Co. 59. b. 79. a. 13 H 7. 23. b. Br. Condit. 26, 217. 44 Ass. 26. 20 H 6. 34 b 5 Co. 21 a Cr El. 450. 479 2 And. 18 Moor 542, 453. Poph. 110. Hutt. 48. 1 Rol. 547, 448. 3 Co. 29 a. b. 1 Rol. Rep. 168.

the Marriage is lawful, yet she has but a Possibility of Dower till the Death of her Husband; in the same Manner as *Eliz.* has but a Possibility till the Death of the first Devisee: And therefore in 6 *E.* 2. (a) *Dow.* 145. and 19 *E.* 2. *Dower* 165. where it is held, That in a Writ of Dower brought by the Wife, a Fine levied by the Husb. and Wife is no bar; and the Reason there given is, because before the Death of the Husb. the Wife had no Right of Action; and therefore by the Rule of the Court Issue was taken, that the Wife at the Time of the Fine levied had nothing but as Wife. And the Opinion of *Plow.* in *Stowel*'s Case (b) 373. *a.* is as follows: Note *Reader*, that in my Opinion, If the Husband levies a Fine with Proclamations, and 5 Years pass after the Proclamations, the Wife shall not be bound to five Years after the Death of the Husb. but is at large, and not touched by the Purview of the Act of (c) 4 *H.* 7. For the Purview was against those who had right at the Time of the Fine levied, or had future after right upon a Cause arising before; to which future Right Wrong was done before the Fine, or by the Fine, &c. but here in case of Dower, the Title is accrued all after the Fine, *s.* by the Death of the Husb. for till the Death no Title was consummate: And the other two Points, *s.* Intermarriage and Seisin of the Husb. are not of any Moment without the 3d, so that all the 3 Points are but one Cause after the Fine. But at this Day the said Books of 6 & 19 *E.* 2. are not held for Law: For now no Quest. is made, but that if the Husb. and Wife levy a Fine, the Wife is barred of her Dower for 2 Reasons. 1. Because the Intermarriage and Seisin are the fundam. Causes of Dower, and the Death of the Husb. but as an Execut. thereof, 2. All those who have Estate or Title, or Claim, join in the Assurance, and therefore in such Case, if the Husb. and Wife have granted a Rent by Fine out of the Land, or have made a Lease for Years, rendring Rent to the Husb. and his Heirs, and afterwards the Wife recovers Dower, she shall hold it charged with the Rent and with the Term, according to the Max. which *Littleton* puts before. And the Opin. of *Plow.* aforesf. is not held for Law, as appears in 6 *E.* 6. (d) *Dy.* 72. and in *Damport*'s Case in 5 *El.* (e) 224. *Dy.* it appears, it was adjudg'd to the contrary in 4 *H.* 8. and now common Experience without Contradict. is against it. And (f) *Litt. c. Conditions*, *f.* 82. holds, That if Feoffee upon Condit. takes a Wife, the Feoffor may enter for the Condition (g) broken, and the Reason is, because the Law hath principal regard to the original and fundamental Cause; and yet it may be said, that the Title of Dower is not consummate till the Death of the Husband, and that peradventure the Wife may die before the Husband. So in the Case at Bar, the Devise and Assent of the Executor, are the original and fundamental Causes of the Interest of *Elizabeth*, and the Death of *John Morrice* the Elder is but a Mean to produce it in

Posses-

Possession, but that gives nothing, but all the Interest accrues by the Devise, and is executed by the Assent of the Executor; and therefore as well as in the Case of Dower it may be released. And Sir *Anth. Fitzherbert* in his (*a*) *N. B.* 98. holds, That if a Man levies a Fine of Land in ancient Demesne at Com. Law. to another, now the Lord in ancient Demesne shall have a Writ of *Disceit* against him who levies the Fine, and him who is Ten't, and thereby he shall annihilate the Fine, and the Conusor shall be restor'd to his Possession and Title which he had given by the Fine. And therewith agree (*b*) 21 *E.* 3. 20. *b.* & (*c*) 7 *H.* 4. 44. *a.* against an Opin. *Obiter* in (*d*) 17 *E.* 3. 31. *b.* But if the Conusor after the Fine releases to the Conusee by his Deed being in Possession, or by his Deed (*e*) confirms his Estate in the Land, then the Opinion of *Fitzherbert* is, That the Conusee shall retain and have the Land, notwithstanding the Fine is avoided, because this Release or Confirmation made to him being in Possess. makes his Estate firm and rightful against him and his Heirs, who releases or confirms: Which Opinion was affirmed for good Law by the whole Court in this Case; and yet after the Fine levied, the Conusor had no right in the Land, but only a Possibility to have the Land again after the Fine made void by Writ of *Disceit* brought by the Lord of whom the Land is held. And *Warburton* Justice cited (*f*) *Grant*'s Case, adjudged in this Court, *Hill.* 29 *El. rot.* 824. where the Case was, That *Wm. Grant* seised of Land in Fee held in Socage, by his Will in Writing devised the Land to *John Grant* Son of his Brother, when he came to the Age of 25 Years, To have and to hold to him and the Heirs of his Body, and died, having Issue *Christian* his Daughter and Heir, who married *Wm. Marsh*, who had Issue *John*, and the said *John Grant*, after the Age of 21 Years, and before his Age of 25, *an.* 37 *H.* 8. levied a Fine with Proclamat. and afterwards he attained to his Age of 25 Years, and had Issue *Margaret*, and died: If the Estate-tail *in futuro* and Contingency at the Time of the Fine levied was barred or not, was the Question; and it was resolved, That the Estate-tail was (*g*) barr'd; and yet the Conusor had but a meer Possibility to have an Estate-tail at the Time of the Fine levied: And that by Force of the Words of the Statute of (*h*) 32 *H.* 8. *c.* 36. *All Fines levied with Proclamat. &c. of any Manors, Lands, &c. before the Time of the same Fine levied in any Wise entailed to the Person or Persons so levying the same Fine, or to any of his or their Ancestors, &c.* And although the said *John Grant* was not seised by Force of the Tail at the Time of the Fine levied, yet by Reason of these Words (*before the Fine levied in any Wise entailed*) an Estate-tail *in futuro* is comprehended; and all that by Force of the said Statute, for *partes finis nihil habuerunt*. But no Judg-

(*a*) F. N. B. 98. *a.* Cr. Car. 478.
(*b*) Fitz. Disceit 44.
(*c*) Br. Disceit 38.
(*d*) Fitz. Desceit 37.
(*e*) Cr. Car. 478.
(*f*) 2 Leon. 36. 3 Leon. 211, 227. Goldf. 107. 1 Leon. 244. Cr. El. 122. 610. Hob. 333.
(*g*) 3 Co. 90. a. Cr. Car. 435. Cr. Jac. 591. 9 Co. 141. a. Cr. El. 610 Hob. 258, 333.
(*h*) 1 Leon. 244. 2 Leon. 62, 224. 3 Leon, 10. Moor 115, 146. 1 Anderf. 46. Savil 84, 88. 1 Bulstr. 33. Co. Lit. 372. a. Goldf. 11. 3 Co. 51. a. Hob. 253. 7 Co. 32. a. b. 9 Co. 140. b. 11 Co. 75. a.

Judgm. was entred. And it was resolv'd, that a future Right or Possibility which may be released, ought to have a Foundat. and an original Inception as is aforesf. so it ought to be a necessary and common Possib. which in *Cholmley's Case in the 2 Part of my Rep. f. 51. a. b.* is call'd *potentia propinqua*, and a Possib. which depends on the Death of a Man, has a necessary and common Intendm. s. necess. in respect that all the Sons of *Adam* must die, *Statutum est hominibus semel mori*; and common that the Death may happen at such a Time that the Contingency may take Effect, as in (*a*) 15 *H.* 7. 10. *b.* If Lands be given to a married Man and a married Woman, and to the Heirs of their two Bodies begotten, it is a good Estate-tail, for it is of Necessity that Death will follow, and it is a common Possib. that one will die before the other; so that Marriage may follow, but in the same Case there shall not be a (*b*) Possib. upon a Possibility. And therefore if Lands are given (*c*) to a Man and two Women, there the Law will not intend that he shall first marry the one, and afterwards she whom he shall marry shall die, and that then he shall marry the other; and therefore in such Case they are several Inheritances at the Beginning. As if Lands be given to two Men and their Wives, and to the Heirs of their Bodies begotten, in that Case the Law will not expect 2d Marriages, but they in that Case shall have Joint Estates for Life, and one Husb. and Wife shall have one Moiety in Tail in common with the other Husb. and Wife of the other Moiety, and so several Inheritances, and therewith agrees 24 *E.* 3. 29. *a.* for otherwise there would be a Possib. upon a Possibil. And if (*d*) a Man gives Land to Husb. and Wife (now it is an apparent Possibility that they may have Issue) and afterw. they are divorc'd *causa præcontractus*, so that the Possib. is dissolv'd, the Law will never expect a 2d Marriage, for by the Divorce they have but an Estate of Freehold; and therewith agrees (*e*) 4 *H.* 7. 16 & 17. A Woman may enfeoff a married Man *causa matrimonii prælocuti*, for it is of Necessity that Death will follow, and it is a common Possib. that the Wife of the Feoffee will die before the Feoffee. So in the common Case of a Lease for Life; (*f*) the Remaind. to the right Heirs of *J. S.* then alive, the Remaind. is good for the necessary and common Intendm. But the Case at Bar is stronger than any of the other Cases, for it is of Necessity that *J. Morrice* the Father will die, and it is more than a com. Intendm. that he will die within 5000 Years, for by the Civ. Law *longissimum vitæ homin' temp' est cent' an'*: And so it appears that in our Law there is *jus proprietatis, possession' & possibilitatis.*

And as to the Cases which have been urg'd by the Serjeants of the other Part. 1. As to the Release of the Conusee in (*g*) 27 *E.* 3 & 25 *Ass.* It was resolv'd, That the Books were good Law, for there the Body is the Debtor, and not the Land but in respect of the Body, and the Land is not charg'd with the Debt

(*a*) 1 Rol. Rep. 321. Fitz. Tail 31. Br. Tail 16. Br. Estate 22. Plow. 35. a. F. N. B 205. h. 1 Co. 120. a. Br. Condit. 119. Co. Lit. 20. b. 25. b

(*b*) 1 Rol. Rep 321. Co. Lit. 25. b.

(*c*) Co. Lit 25 b. 184. a.

(*d*) 1 Rol. Rep. 321. Co. Lit. 22. a. 28. a.

(*e*) 7 H. 4. 16. b 17 a Br. Tail 9. Br. Estate 11. Br. Deraignment 2. 13. 8 Co 87 a. 5 Co. 8. a.

(*f*) 2 Co. 51. b Co. Lit. 343. a. Postea 51. a.

(*g*) 27 E. 3. Execution 130. 25 Ass. pl. 7. Antea 47. b. 2 Rol. 405, 470. Co Lit. 265. b Cr. El. 552.

Debt till Execution sued; and therewith agrees *Plo. Com.* 72. in Sir *Tho. Pope*'s Case; and therefore the Release made by the Conusee of all the Right in the Land, shall not bar him of his Execut. And it was agreed, That the Release of the Son to the Disseisor of his Father in the Life of the Father is utterly void, because the Son has no Right, nor Found. or original Inception of any Right in the Life of his Father. And the Rule put in 13 *E.* 1. and in *Bracton*, is to be agreed for good Law, if it be well understood, *s.* that he who releases has Right, or a Found. or origin. Incept. of a Right. And as to *(a) Hoe*'s Case, it was also resolv'd to be good Law, for there the Thing which should be released, was utterly incertain at the Time of the Release made; for he who becomes Bail in K.'s Bench, is not bound in any certain Sum, nor doth any certainty thereof appear till Judgm. given against the Def. and therefore for the Incertainty of the Thing that should be released, the Release of all Actions, Duties and Demands can't discharge it. It was further resolv'd, That when there is incertainty in the Person, no Release can be made; and therefore if a Lease for Life be made, the *(b)* Remainder to the Right Heirs of *J. S.* and the Lessee is disseised, and the eldest Son of *J. S.* releases to the Disseisor, and afterwards *J. S.* dies, the Release is void; for it is incert. whether he would be right Heir at the Time of the Death of his Father. And in 17 *El.* this Case was mov'd at Bar in the K.'s Bench: A Man made a Lease to Husb. and Wife for 21 Years, the Remaind. to the *(c)* Surviv. of 'em for 21 Years, and the Husb. granted over this Term; and it was held by *Wray* Ch. Just. and *totam curiam*, That the Grant was void for the Incertainty of the Person, for altho' all Chattels real which belong to the Wife the Husb. may dispose of; yet in this Case neither the Husb. nor the Wife has any Thing till the Survivor. And in the *Regist. Original (d)* 239. *b.* there is a Formedon brought on a Gift in such Form, *R. dedit W. & J. uxori ejus & hæredibus de corpore alterius ipsorum W. & J. qui diutius viveret exeuntibus, & qd' post mortem W. & J. præfato T. filio & hæredi ejusd' W. qui præd' J. supervixit descendere debet, &c.* So that the Gift was to the Husb. and Wife, and to the Heirs of the Body of the Surviv. of 'em: In which Case as to the Estate-tail, there is an Incertainty in the Person; and therefore if they make a Lease for 21 Years, observing all the Circumstances required by the Stat. of 32 *H.* 8. yet that Lease shall not bind the Issue; for, for the Incertainty of the Person of the Survivor, the Estate-tail was not vested. And these Cases in my Reports *(e)* Albany's *Case*, *(f)* Digg's *Case*, *(g)* Rawlin's *Case*, *(h)* Mayowe's *Case*, *The Rector of (i)* Chedington's *Case*, *and (k)* Altham's *Case*, were affirmed for good Law in the Argument of this Case, and cited to prove the Reason of this Rule in the Case at Bar.

(a) 5 Co. 70. b. Antea 48. a. Moor 459. Cr. El. 579. Goldf. 166. Co. Lit. 265 b. Cr. Jac. 171, 401, 451, 623. 1 Sid. 141. 2 Bulst. 231, 286. Hutt. 12.

(b) Co. Lit. 343. a 2 Co. 51. b. Antea 50. b.

Yelv. 85.

(c) Co. Lit. 46. b. 1 Rol. 344. 2 Rol. 48. Poph. 5. 4 Leon. 185. Godb. 139. Cr. El. 841. Hutt. 17.

(d) Co. Lit. 26. a.

(e) 1 Co. 110. b. 4 Leon. 133, 219.

(f) 10 Co. 173. a. Moor 603.

(g) 4 Co. 52. a.

(h) 1 Co. 146. b. Poph. 50.

(i) 1 Co. 153. a. Moor 478.

(k) 8 Co. 150. b.

 4. If

The 4. Reason. 4. If the said *Eliz.* had died before the first Devisee, the Executors or Administrators of the said *Eliz.* would have had the Residue of the (*a*) said Term after the Death of the first Devisee, as appears in the said Case of (*b*) *Weldon* in *Plo. Com.* which is a great Proof that *Elizabeth* her self might have released such Interest, which by her Death might come to her Executors or Administrators. But Words make a Plea: For if I am disseised, and I release all Actions to the Disseisor, and afterwards the Disseisor dies, I notwithstanding the Release shall have a Writ of Entry in the *Per* and *Cui* against the Heir and Disseisor, for this Action was not in *esse* at the Time of the Release made, and (*c*) *actio nihil aliud est quam jus prosequendi in judic' q'd sibi debetur*, and the said Writ of Entry was not maintainable at the Time of the Release, no more than if I had died, my Heir should not be barred by the said Release to have a Writ of Entry *sur desseisin* against the Disseisor, upon a Disseisin done to me. *Vide* 22 *H.* 6. 1. If one bails Goods to another and afterwards the Bailor releases to the Bailee all Actions, the Bailee dies, in a Writ of *Detinue* brought against his Executors, they shall not take Advantage of the said Release, for that determined by the Death of the Bailee, and the Action given against the Executors, is a new Action (altho' of the same Nature) grounded on their own Detainer.

(*a*) Moor 807. Cr. Jac. 461, 510 1 Rol. 916.
(*b*) Plo. 519. a.
(*c*) 8 Co. 152. a Co. Lit. 285. a. 2 Inst. 40.

The 5. Reason. 5. The Legacy or Devise to *Elizabeth* is in *esse* and present, altho' the Interest is *in futuro*; and therefore the Legacy or Devise may be discharged, and by Consequence the Interest itself; for (*d*) *qui destruit medium destruit finem*: And therefore if one devise to one 20 *l.* when he comes to the Age of 24 Years, and dies, the Legatee after the Age of 21 Years may release this Legacy and Devise; and altho' afterwards he attains to the Age of 24 he shall be barred thereof, and yet by a Release of all Suits and Demands it is not released. As if a Man by Indenture covenants to do a future Act, and before the Covenant broken, the Covenantee releases all Actions, Quarrels and Demands, and afterwards the Covenant is broken, the said (*e*) Release is no bar in an Action of Covenant, because the Covenant was to be performed *in futuro*; but a Release of all Covenants had been a good Bar, for the Covenant was *in esse & præsenti*; and therewith agrees 35 *H.* 8. (*f*) *Dyer* 57. and (*g*) 4 *El.* in *Bendloe*'s Reports, which Case is cited at large in *Hoe*'s Case aforesaid. So in the Case at Bar the Devise is *in præsenti*, altho' the Performance thereof be *in futuro*, & *qui evertit causam evertit causatum futurum*. So *de bonis & catallis felonum & fugitivorum*, &c. the Inherit. is in *esse*, altho' the Accident be incertain, the same Law of *Nomine pœnæ*, Relief, & *similib9*. So

(*d*) Co. Lit. 161. a.
(*e*) 1 Co. 112. b. Co. Lit 292. b. Cr. Jac. 170. 8 Co 153. b. Lit. Sect. 513. Dy. 217. pl 2. 1 Anderson 8. 5 Co. 70. b. N. Bendl. 126. 2 Rol. 404. pl. 190. Moor 34. Co. Entr. 116. No. 5. Yelv 156. Hob. 216.
(*f*) 5 Co. 71. a. 1 Co. 112. b. Hutt. 17.
(*g*) 5 Co. 70. b. Hutt. 17. 1 Co. 112. b. 2 Bulst. 231.

So the Chief Justice said, That altho' no Assent had been given to the Legacy, yet forasmuch as *Elizabeth* claimed by executory Devise, she might in the Life of the first Devisee have released the Devise and Legacy. *Vide* (*a*) Middleton's *Case in the fifth Part of my Reports*, That Executors before Probate may release a Debt, because although they can't have an Action, yet the Interest of the Action is in them, which they may release.

(*a*) 5 Co. 28.a. Raym. 481. Co. Lit. 292.b.

6. It would be inconvenient that such manner of Perpetuity should be made of a Chattel, when of an Inheritance neither by Act executed by the Com. Law, nor by Limitation of an Use, nor by Devises in last Wills, any (*b*) Perpetuity can be established. And if it should be allowed, it would be the Cause of Contentions, Suits, and other Inconveniencies. And it was observed, That these Leases for so many hundred and thousands of Years, (which were made in Truth to (*c*) deceive and defeat the King or other Lords of their Wards or other lawful Duties) are many Times Unfortunate, and subject to be lost by Utlawry or other Forfeitures; and if the Owner thereof dies Intestate, the Ordinary shall grant Administration, whereby Women will lose their Dowers, Men their Tenancies by the Courtesy, and many other Inconveniences, in Subversion of the Common Law, will from thence ensue; and therefore it would be of all others most dangerous to make a Perpetuity of them.

The 6 Reason.

(*b*) Cr. Car. 230.

(*c*) Co. Lit. 46.a.

And the Chief Justice concluded his Argument, as to the principal Point, with a Judgment in this Court. *Trin.* 28 *El. Rot.* 1974 (1674.) betw. (*d*) *Hammington* Administ. of *Isab. Oram* Plaintiff, and *Rudyard* and *Mary* his Wife Adm' of *Lawrence Kidwell*, in Debt on Bond made by *Law. Kidwell* to the said *Isabel*; which Bond was made for Performance of Covenants in an Indenture betwixt *Law. Kidwell* and the said *Isabel*: And the Case was such; *Wm. Hammington* possessed of an House in *London* called *Hide's House* for 31 Years, by his Will devised the Profits thereof to the said *Isabel*, during the Time that she should continue sole and a Widow, and afterwards he devised the Term to *Reynold* his Son, and died, 1 *Mar. Isabel* by the Assent of the Executor entred, and purchased the said House in Fee, and the said *Lawrence Kidwell* bargained and sold by the said Indenture the said House to the said *Isabel* in Fee, and covenanted, That the House at the Time of the Assurance should be clearly discharged of all former Bargains, Sales, Titles, Rights, and all other Charges. The Defendant pleaded Covenants performed. The Plaintiff assigned for Breach the said Devise to *Isabel*, and afterwards to *Reynold* as aforesaid; and that after the said

(*d*) 1 Leon. 92. Owen 6. 1 And. 162. Gouldf. 59, 65. Moor 249, 759. 2 Sid. 167.

Moor 759.

ſaid Indenture, *Iſabel* had married *Oram*; whereupon *Reynold* entred, upon which the Def. demur'd. And in this Caſe four Points were reſolved. 1. That the ſaid executory Deviſe to *Reynold* was good. 2. Altho' the whole Term was in *Iſabel quouſque*, *&c.* ſo that by the Purchaſe of the Fee-ſimple, the Intereſt of *Iſabel* was extinct; yet that did not defeat the executory Intereſt of *Reynold*, but that after the Marriage of *Iſabel*, and not before, he might enter. 3. It was reſolved, That *Reynold* could not grant his Intereſt over, as long as *Iſabel* was ſole. 4. The great Difficulty of the Caſe was, foraſmuch as the ſaid *Reynold* at the Time of the ſaid Covenant had but a Poſſibility, that the ſaid Covenant did not extend to it: But it was reſolved, That the ſaid Covenant did extend to it, and to this purpoſe had Eſſence, and alſo might be forfeited; and Judgment was given for the Plaintiff which Judgm. ſtrongly proves that it might be releaſed.

The 2d Queſtion was moved, admitting the Releaſe to the firſt Deviſee to be ſufficient to extinguiſh the Claim and future Intereſt of the ſaid *Elizabeth*, if it would amend the Eſtate of *J. Morrice* the Elder, who has the entire Term in him, if he lived ſo long, or if by his Death the Leſſors might enter. And it was reſolved, That the ſaid Releaſe had conſolidated and perfected the Eſtate of the ſaid *J. Morrice*, that whereas it was determinable before by his Death, now he has the whole Term, during the Reſidue of it, in him abſolutely. But this Point is over-ruled before in the ſecond Reaſon in the Report of the Caſe; In (*a*) 4 *E.* 6. it was ſaid, That *laxare* is properly to ſet Priſoners in Fetters at Liberty; and *relaxare* is to do it quickly, and *metaphorice*, *relaxare* is to ſet at Liberty fettered Eſtates and Intereſts, and to make them free and abſolute.

(*a*) Ant. 49. a

The third Queſtion that was moved in this Caſe, Whether there appears any Aſſent or Agreement of the Executor in this Caſe to take the ſaid Houſe, *&c.* by Force of the Deviſe. For it was agreed *per omnes*, as it has been ſaid before, that firſt he ſhall take it as Executor. And it was reſolved, That when *Wm. Taylor* and *Elizabeth* his Wife *per ſcriptum ſuum, ad ſpecialem inſtantiam & requiſitionem prædict' Johan' Morrice ſenioris* (who was Executor) *relaxaverunt*, *&c.* that amounted to an Aſſent, for two Reaſons; one, becauſe he requeſted it, which implies an Aſſent; 2. He accepted it, and that likewiſe implies an Aſſent, (*b*) *Non enim refert an quis aſſenſum ſuum præbet verbis, an rebus ipſis & factis*, as 44 *E.* 3. *Fines* 37. and *Lit. Cap. Attornment*. If the Husband accepts a Grant of the Reverſion, *&c.* it amounts to an Attornment; and in (*c*) 37 *H.* 6. 17. *b.* he who has *intereſſe termini*, *ſc.* a future Intereſt, cannot

(*b*) 10 Co. 144. a. 1 Rol. 300, 303. 2 Rol. 263. 3 Keble 537.
(*c*) Poſt. 67. b. Fitz. Surrender 3. Br. Surrender 21.

cannot by expreſs Words ſurrender it; but an Acceptance of a new Leaſe will merge it. And in 7 *E.* 3. 50. *b.* the Lord demanded a Heriot, and the Heir delivered a Beaſt, in which he himſelf had Property in his own Right to the Lord, it amounted to a Gift. And afterwards in this Term Judgment was given and entred, *Quod querens nihil capiat per breve, &c.*

The Case of the Chancellor, Masters and Scholars of the University of Oxford.

Trin. 11 Jac. 1.

THE Chancellor, Masters and Scholars of the University of *Oxford*, brought a *Quare impedit* against *Richard* Bishop of *Coventry* and *Litchfield*, *Edward Basset*, Gent. and *Hugh Meare* Clerk, to present to the Church of *Draicot* in the Moor in the County of *Stafford*; and declar'd, That one *John Draicot*, Esq; was seised of the Manor of *Draicot* in the County aforesaid, to which the Advowson of the Church of *Draicot* was appendant in Fee, and by his Deed granted the next Avoidance of the said Church to one *George Eyre*, and afterwards the said *John Draicot* died: After whose Death the Manor with the Advowson descended to one *John Draicot*, Esq; Cousin and Heir of the said *John Draicot*, *sc.* Son and Heir of *Philip Draicot*, Son and Heir to *John Draicot* the Grandfather; and further declar'd, That by an Act of Parliament in the (*a*) third Year of our Lord the King that now is, it was ordained by Authority of Parliament, That the Justices of Assise and Gaol-Delivery, and Justices of Peace at their Sessions, should have Authority by Force of that Act to enquire, hear and determine of all Recusancies and Offences, as well for not receiving the Sacrament according to the true Intent of the same Law, as for not Repairing to Church, according to the true Intent of former Laws, in such Manner and Form as Justices of Assise and Gaol-Delivery might do by the former Laws, in Case of Recusancy

(*a*) Moor 836, 872. 3 Jac. c. 5. 1 Jones 20. Hob. 73, 126, 226, 227. 3 Inst. 178. Cro. Jac. 352. 1 Rol. Rep. 108. Latch 172, 177. O. Bendl. 180. Noy 88, 89. Jenk. Cent. 297 Ley 59. Post. 54. b. Cawly 200. Dalt. Just. c. 81. Godb. 216. 4 Leon. 245. Keb. Just. 566, 567, 568, 569.

Recusancy for not Repairing to Church: And also should have Power at the Assizes and general Gaol-deliveries, and at the Sessions, in which any Indictment against any Person either for not repairing to Church according to the former Laws, or for not receiving the Sacrament according to the same Law, should be taken, should make Proclamation, by which it should be commanded that the Body of every such Offender should be surrender'd to the Sheriff of the same County, &c. before the next Assizes and general Gaol-delivery, or before the next General or Quarter-Sessions respectively to be held for the County, Limit, Division or Liberty: And if such Offender should not appear, that then upon the Recording of every such Default, it should be as sufficient a Conviction in Law of the said Offence of which such Person should be indicted as is aforesaid, as if he had been convicted by Verdict. And where by another Act at the same Parliament it is enacted, That every Person that then after should be a Popish Recusant convict, during the Time that he should remain a Recusant, after the End of the Session of the said Parliament, should be dissabled to present to any Benefice with Cure or without Cure, Prebend, or Living ecclesiastical, or to confer or nominate to any Free School, Hospital or Donative whatsoever; and from the Beginning of the same Parliament should be also disabled to grant any (a) Advowson of any Benefice, Prebend, or Living Ecclesiastical, and that the Chancellor, Master and Scholars of the University of *Oxford*, as soon as any of them should be void, should have the Presentation, Nomination and Collation to every such Benefice, Prebend, or Ecclesiastical Living, School, Hospital and Donative, lying or being in the Counties of *Oxford*, *Kent*, *Middlesex*, *Sussex*, *Surrey*, *Southampton*, *Berks*, *Bucks*, *Gloucester*, *Worcester*, *Stafford*, *Warwick*, *Wiltshire*, *Somerset*, *Devon* and *Cornwall*, &c. which became void during such Time as the Patron of them should remain Recusant convict, as is aforesaid, as by the said Act amongst other Things more fully appears. And the said *John Draicot* the Son, of the Manor aforesaid, to which, &c. so being seized, at the Assizes and general Gaol-delivery for the County of *Stafford*, held at *Staff.* within the said County the 29 Day of *March* in the 8th Year of the Reign of the King that now is, was indicted as well for not receiving the Sacrament as for not repairing to Church, &c. for three Months, and then was proclaimed according to the Statutes thereof made: And that he at the next Assizes held 16 *die Augusti anno* 8 *supradicto*, made Default, and did not surrender his Body to the Sheriff; by which the said *John Draicot* became a Popish

(a) Moor 872.

Popish Recusant convict, and the said *John Draicot* of the Manor aforesaid, to which, *&c.* so being seized as aforesaid, the said Church became void by the Death of the said *John Eyre*, and yet is void, and *ea ratione* it belonged to the said Chancellor, Masters and Scholars to present, and the Defendants disturb'd them, *&c.* The Bishop pleaded, he did not disturb them, *&c.* *Edward Basset* pleaded, that the said *John Draicot* the Son, before the said Conviction of the said *John*, being seized of the said Manor to which, *&c. sc.* 20 *Junii* 8 *supradict'*, by his Deed granted to the said *Edward Basset* the (a) next Avoidance of the said Church, after which Grant the Church became void by the Death of the said *George Eyre*; wherefore he presented the said *Hugh Meare*, who on his Presentment was admitted and instituted, *&c.* the said *Hugh Meare* pleaded, that *John Draicot* the Cousin was seized of the Advowson aforesaid in Fee as in gross, and confessed the Presentment of *George Eyre*, and pleaded, that the said *John Draicot*, 1 *Maii Anno* 3 *Regis Jac.* by his Deed granted the next Avoidance of the said Church to the said *Edward Basset*, and that the Church became void by the Death of the said *George Eyre*, wherefore he presented, *&c.* the said *Hugh Meare*, *&c.* *Absq; hoc quod advocatio præd' pertin' ad præd' manerium de Draicot*, *&c.* The Plaintiff, as to the Plea of the Ordinary, prayed a Writ to the Bishop, *sed cesset Executio*, *&c.* And as to the Plea of the said *Edward*, the Plaintiff demurr'd in Law. And as to the Plea of the said *Hugh*, the Plaintiff replied, *Quod advocatio Ecclesiæ præd' pertin' ad manerium prædictum, & hoc petit quod inquiratur per patriam; & præd' Hugo similiter.* Upon the (b) Demurrer upon the Plea of the said *Edward*, four Matters in Law were moved. 1. Forasmuch as the said *John Draicot* the Son was not a Recusant convict at the Time of the Grant of the said Avoidance to the said *Edward Basset*, if the Grant be made void by the said Statute of (c) 3 *Regis Jacobi*? 2. If this Grant being made after the Indictment, if it were not covin apparent, and if such Grants should be allowed, to what Purpose would the Clause of the said Statute concerning them serve? 3. Forasmuch as the said Act gives the Benefit to present to the said Church to the Chancellor and Scholars of the University of *Oxf.* and they have brought this Action by the Name of Chancellor, Masters and Scholars of the Univ. of *Oxf.* which shall be intended their true Name of Incorporat. if they should take any Benefit of the said Act by Reason of the said Misnosmer? 4. Forasmuch as the Plaintiffs have not averr'd, that at the Time of the Avoidance of the Church, the said *John Draicot* continued and remained a Popish Recusant, if that should be intended?

As to the first, it was argued by the Counsel of the said *Edward*

(a) 1 Jones 20, 26.

(b) 2 Roll. 104. pl. 10. Co.Lit.f.125.b.

(c) Moor 836, 872. Hob. 73, 226, 227. 1 Jones 20. 3 Jac. c. 5. 3 Inst. 178. Cr. Jac. 352. 1 Rol. Rep. 108. Latch 172, 177. Noy 88, 89. O. Benl. 180. Jenk. Cent. 297. Ley 59. Antea 53. b.

Edward Baſſet, That by the Words and Intention of the ſaid Branch of the Statute, no Perſon is diſabled to grant the next Avoidance, but he who is a Popiſh Recuſant convict; and therefore the Words are, *Every Perſon or Perſons that is or ſhall be a Popiſh Recuſant convict.* 2. He ſhall be diſabled but only during the Time that he remains a Recuſant; for the Words are, *During the Time that he ſhall be or remain a Recuſant, ſhall be diſabled to grant any Avoidance*: And becauſe at the Time of this Grant he was not a Recuſant convict, but only indicted, for that Reaſon he is not ſuch a Recuſant as is deſcribed to be diſabled by the ſaid Act; and by Conſequence the ſaid Grant is good. Alſo it would be miſchievous if another Conſtruction ſhould be made; for ſuppoſe, That one ſeized of an Advowſon in Fee reſorts and repairs to Church, according to the Laws in ſuch Caſe eſtabliſhed, and for good Conſideration grants the next Avoidance, and many Years after becomes a Popiſh Recuſant, and is thereof convicted, it would be hard that this Grant ſhould be avoided, for *(a) nemo tenetur divinare*, and it is not poſſible that the Grantee ſhould have Foreknowledge of it, which is meerly a future Contingent; and it would be alſo againſt Reaſon, that a Man by his ſubſequent Offence ſhould take away a lawful Intereſt veſted by his own Grant, upon good Conſideration veſted in a Stranger. But it was reſolved *per totam Curiam*, That this Act had diſabled the ſaid *John Draicot* the Son to make this Grant, by the expreſs Words of the Act, which will the clearer appear, if the material Words of the Act as to this Caſe be ſingled by themſelves in this Manner; *Every Perſon that ſhall be a Popiſh Recuſant convict, during the Time that he ſhall be or remain a Recuſant, ſhall be diſabled from the Beginning of this preſent Seſſion of Parliament to grant any Avoidance*; and the ſaid *J. Draicot* is within all theſe Words; for, 1. Where the Words are, *Every Perſon that ſhall be a Popiſh Recuſant convict*, within which Words it appears that *John Draicot* is. 2. The Diſability is temporary, *ſc.* during the Time of Recuſancy. 3. From what Time he ſhall be diſabled, *ſc.* from the Beginning of this Seſſion of Parliament: So that as long as he remains a Recuſant Convict, he ſhall be diſabled to make a Grant of the next Avoidance from the Beginning of the Seſſion of the Parliament, *&* *(b) ſumma ratio eſt quæ pro religione facit*: And ſuch Retroſpect divers Acts of Parliament have had, and allowed by divers Judgments; and therefore it is cited in *Plow. Com. inter Stradling* and *Morgan*, *f.* 207. *a.* That where the Statute of (c) 31 *H.* 8. *cap.* 13. enacts, That the King ſhall have all the Poſſeſſions of the Abbeys

(a) Lit. Rep. 98.
(b) 11 Co. 70. b.
(c) Moor 60. pl. 169.

Mo. 128, 219, 529, 530, 531, 532. Latch 89, 90. Noy 149. Bridgm. 32. Godb. 392. O. Benl. 148, 157. Benl. in Kelw. 211. pl. 19. Benl. in Aſh. pl. 19. N. Ben. 132. pl. 195. 1 Co. 24. b. 27. a. 2 Co. 46. a. b. 49. a. 3 Co. 2. b. 7. a. b. 73. b. 5 Co. 55. b. 11 Co. 9. a. 13. a. 12 Co. 45. Co. Ent. 187. b. 374. a 445. b. 451. a. 454. a. 546. b. Raſt. Ent. 525. b. 527. a. Hob 227, 228, 248, 306. Dyer 76. pl. 8, 77. pl. 40, 80. pl. 61, 103. pl. 1, 2, 3, 4, 123. pl. 35, 206. pl. 11, 13, 231. pl. 1, 277. pl. 60, 280. pl. 11, 12, 13. 349. pl. 16. Raſt. Monaſt 11. Br. Choſe in Action 14. Br. Patent 98. Sav. 66. 1 Rol. Rep. 54. 2 Rol. Rep. 142, 171, 174. 1 Leon. 4, 333. 2 Leon. 55. 3 Leon. 164. 4 Leon. 117. Cr. Jac. 607. Cr. Car. 422, 425. 3 Bulſt. 152. Plowd. 102. a. 173. a. 193. b. 207. a. 1 Jon. 2, 185, 373. Winch Ent. 642, &c.

Abbeys that then were, and afterwards should come into his Hands by Surrender, *&c.* in the same State as they then were; it has been adjudged, as it is there said, That if any College after that Statute makes a Lease for Years, and the same College three or four Years after surrenders to the King, their former Lease made before the Surrender shall be void; for the King shall have the Possessions in the same State as then, *sc.* at the Time of the Act of 31 *H.* 8. they were, and then they were discharged and free from any such Lease: And therewith agrees *Mich.* 6 *&* 7 *Eliz. Dyer* 231. (*a*) The Abbot of *Ramsey* with the Assent of his Convent late Patrons of *Upwell* in the County of *Northampton* in *Aug.* 31 *H.* 8. which was after the Statute of 31 *H.* 8. of Monasteries, which began 28 *Aprilis* 31 *H.* 8. granted the next Avoidance of the said Church to Sir *Ed. Montague*, Knt. late Chief Justice of the Common Pleas; and afterwards in *November* following, the Abbot and Convent surrender'd to the King, *&c.* The Interest of the next Avoidance was by measne Assignments conveyed to one *Leeds*, against whom *Beaupree* the Patentee of the Fee-simple by King *E.* 6. brought a *Quare impedit* against the Bishop and Incumbent, and by Pleading to Rejoinder, the Case aforesaid appeared, and in the Rejoinder the Saving in the said Act appeared, with such Averment, that the said *Leeds non est, nec fuit, nec esse intelligi potest aliquis talis persona, quæ per, sive in actu prædicto excipitur*; and by the Opinion of all the Justices, the Grant was void against the King, and so adjudged; and the Saving can't extend to such future Interests, but extends only to Interests in *esse*: And the Record of this Plea began *Pasch.* 5 *Eliz. Rot.* 129. *in Communi Banco*; and yet in the same Case all the said Objections, which have been made in the Case at Bar, might have been made in the said Case of *Beaupree*. Also it is enacted by the Statute of (*b*) 13 *Eliz. c.* 4. That all Lands, *&c.* of every Treasurer, *&c.* or Person accountable to the Queen for any Office or Charge, *&c.* which he then had, or afterward should have, *shall be liable*, &c. *in like and in as large and beneficial Manner, to all Intents and Purposes, as if the same Treasurer had, the Day he became first Officer or Accountant, stood bound by writing Obligatory, having the Effect of a Statute-Staple to her Majesty.* And *in Anno* 35 *Eliz.* it was resolved in the Case of Sir *Christopher Hutton* late Chancellor of *England*, who became such Officer to the Queen *anno* 20 of her Reign, That if such Officer Accounts well and

(*a*) 1 Co. 47. a. Dy. 231. pl. 1. Benl. in Kelw. 211. pl. 19. Benl. in Ash. pl. 19. 2 Co. 49. a. N. Benl. 132. pl. 195. Plowd. 207. a.

(*b*) 1 Leon. 98

and truly with the Queen, and owes her nothing, and *Anno* 22 of her Reign being in such good Case purchases Lands, and in the same Year conveys or leases them to others *bone fide* upon good and true Consideration; and afterwards *Anno* 32 *Eliz.* by Reason of the said Office he becomes in Arrearages upon his Account for four or five Years, which is long Time after his Conveyance or Lease; That yet the Land so (*a*) conveyed or leased, shall be liable to these Arrearages by Reason of the Retrospect of the said Words (*as if the same Treasurer*, &c. *had the Day he became first Officer*, &c. *stood bound*, &c.) So in the Case at Bar, after that the said *John Draicot* was a Popish Recusant convict, during the Time that he remains a Recusant, he now shall be disabled to grant any next Avoidance, by the Retrospect of the Act after the Beginning of the said Session of Parliament, and the Makers of the Act intended to inflict greater Disability upon them who became Popish Recusants, after the damnable and damned Powder Treason, than before.

(*a*) Moor 127.

As to the second, it was resolved, That (*b*) Covin shall never be intended or presumed in Law, if it be not expresly averr'd, *Quia odiosa & inhonesta non sunt in lege præsumenda, & in facto quod se habet ad bonum & malum, magis de bono quam de malo præsumendum est*, and so it was adjudged in the Case of (*c*) *Meriel Littleton*, *Trin.* 10 *Jac.* in this Court, where the Case was; That *Elizabeth Tirer* Executrix of the Will of *Thomas Tirer*, brought an Action of Trespass *vi & armis* against *Meriel Littleton* and *John Daunser*, of an Ox Price 6 *l.* at *Hagley* in the County of *Worcester*, 20 *Octob.* 7 *Jac. &c.* The Defendants pleaded Not guilty; and the Jurors found a Special Verdict, That one *Thomas Tirer* was seised in Fee of 80 Acres of Land in *Hagley*, and held them of *John Littleton* Esq; *ut de Manerio suo de Hagley* in the said County by Fealty, and the Rent of 3 *s.* 1 *d. ob. sect' Cur', & reddend' optimum animal cujuslibet tenentis in feodo simplici post mortem ejusdem tenentis pro Heriotto*, of which Manor the said *Meriel Littleton* was Tenant for Life at the Time of the Death of the said *Thomas Tirer*, and the said *Tho. Tirer* being so seized 16 *die Augusti*, *Anno* 42 *Eliz.* by his Deed in Consideration of fatherly Affection to *John* his Son and Heir apparent, and in Consideration of a Marriage to be had and solemnized betwixt the said *John Tirer* and one *J[illegible]e Grove*, and for the Advancement of the said *John* did en[illegible]ff the said *John Tirer* of the said 80 Acres of Land, To have and to hold to him and his Heirs, to the Use of

(*b*) Cro. Eliz. 292, 816. Bridgm. 112. Cro. Car. 550. Jones 20. Moor 194. Cro. Jac. 451.
(*c*) 1 Brown 36. 2 Browl. 187. Bridgm. 112. 2 Jones 92.

of him and his Heirs; by Force whereof the said *John* was thereof seised in his Demsene as of Fee, and so seised the said 16 Day of *Aug. an.* 42. *ejusdem nup' Reg.* by his Deed indented, to the Intent that the said *Joyce* should not be endowed during the Life of the said *Thom.* redemis'd the said 80 Acres of Land to the said *Thom.* for 40 Years, if the said *Tho.* should so long live: And that the first Day of *Sept.* following, the Marriage betwixt the said *John* and *Joyce* was solemnized; and after the said Feoffment the said *J. Tirer*, did Suit at the Court of the said *John Littleton* Lord of the said Manor; and that after the Feoffment, *Thomas* paid the Rent for the said 80 Acres of Land; and afterwards *T. Tirer*, 30 *Junii* 7 *Jac.* died, being possessed of the said Ox, which was the best Beast which he had, and that the Defendants took the Ox *pro Heriotto post mortem præd'. T. Tirer*, as due for the said Tenements, and the Jury further found the Stat. of (*a*) 13 *Eliz.* for avoiding and abolishing of feigned, covenous and fraudulent Feoffments, Gifts, &c. as well of Lands and Tenements, as of Goods and Chattels; which Feoffments, Gifts, &c. are devised and contrived of Malice, Fraud, &c. to the Intent to delay, hinder or defraud Creditors and others of their just and lawful Actions, Suits, Debts, &c. Heriots, Mortuaries and Reliefs, &c. and therefore it is enacted by the said Act, That all Feoffments, Gifts, &c. of Lands, Tenements and Hereditaments, Goods and Chattels, &c. to be made to any Intent or Purpose before declared and expressed, shall be adjudged and taken (as against the Creditor or other Person so defrauded and grieved) to be clearly and utterly void and of none Effect, &c. And if upon the whole Matter the said *Meriel* and *J. Daunser* are guilty, then they find them guilty, and assess Damages to 5 *l.* and Costs 6 *d.* &c. And this Case was argued at the Bar; and *Trin.* 10 *Jac.* it was argued at the Bench, and it was unanimously resolved, That forasmuch as no (*b*) Fraud is found by the Jury, the Court would not adjudge the said Feoffment to be fraudulent; and although the Jury have found Circumstances and Presumptions to incite the Jury to find Fraud, yet it is but Evidence to the Jury, and not any Matter upon which the Court could adjudge Fraud; and the Office of Jurors is to adjudge upon their Evidence concerning Matter of Fact, and thereupon to give their Verdict, and not to leave Matter of Evidence to the Court to adjudge, which does not belong to them. And therefore the Chief Justice held, That if *A.* brings an Action on the Case against *B.* upon Trover (*c*) and Conversion of Plate, Jewels, &c. and the Defend. pleads Not guilty, now it is good Evid. *prima facie* to prove a Conversion, That the Plaintiff requested the Defend. to deliver them, and he refused, and therefore it shall be presumed, that he has converted them to his Use. But yet it

(*a*) 13 Eliz c. 5.
29 Eliz. cap. 5.
Co. Lit. 3. b. 76. a. 290. a. b.
Co. Ent. 162. a.
3 Co. 80. b.
5 Co. 60. a.
6 Co. 18 b.
Cr. Jac. 270, 271.
Yelv. 196, 197.
1 Brownl. 111, 112.
Cr. Eliz. 234, 645, 810.
Dy. 295. pl. 17, 351. pl. 23.
1 Leon. 47, 308.
2 Leon. 8, 223.
3 Leon. 57.
Rast. Fraud. Deeds. 1.
Rast. Ent. 207. b.
Lane 47, 103.
Moor 638.
Doct. plac. 200.
Latch 222.
(*b*) O. Bend. 68. b.
Fitzgib. 48.
1 Roll. 523.
Cr. Eliz. 292, 816.
1 Mod. Rep. 17, 38.
Cr. Car. 550.
Hardr. 397.
(*c*) Cr. El. 97. 495.
Cr. Jac. 245.
Cr. Car. 262.
Goldsb. 152.
1 Roll. 5.
Moor 460.
1 Vent. 401.
Hob. 187.
1 Sid 127.
1 Rol. Rep. 59, 60.
Hutt. 10.
2 Bulstr. 308. 310.

is but Evidence; and if it be found by special Verdict (a) in such Case, that the Plantiff requested 'em of the Defendant and he refus'd, it is not a Matter upon which the Court can judge any Conversion: For the * *Conversion* ought to alter the Action of Detinue to a *Trespass* upon the Case, which a Denial can't do in Law; for in every Action of Detinue there is alledged in the Declaration a Request and Refusal, yet it is good Evidence, as has been said, and so has always been allowed to prove a *Conversion*, That the Pl. demanded the Goods, and *the Defendant* refused to deliver 'em. 2. The Statute says, to defraud Creditors and others of their just Debts, Heriots, &c. and the Jury have not found, That the said Feoffment was made to defraud the Lord of his Heriot, and so they have not found the Case within the Stat. 3. If the Son had died in the Life of the Father, the Lord should have a Heriot after his Death. 4. It is found, That the Intent of the Feoffment and Redemise for Years made before the Marriage, was to the Intent that the said *Joyce* should not be endowed during the Father's Life, but that after his Death she should be endowed, altho' the Son had died in the Life of the Father: Which Feoffm. being found by the Jury to be made in Considerat. of Marriage, and to this particular Intent concerning the Dower of the Son's Wife, shall not be by Construction of Law extended to any other Intent. And thereupon the Ch. Just. put the Case in *Mich.* (b) 9 & 10 *El.* The K.'s Ten't *in Capite*, his Son and Heir apparent of 7 Years, is indebted to divers, and is sued for his Debts in divers Courts, and fearing the Hindrance and Impoverishment of himself, his Wife and Children by extent of his Lands, &c. for Execut. of the said Debts enfeoffs divers Persons, *sub conditione*, That when he or his Heirs shall pay to the Feoffees 30 *l.* that then they shall make such Feoffments, and to such Uses as he or his Heirs shall limit or appoint, or otherwise the Feoffm. shall be void, &c. and this Feoffm. and Intent is found by *Mandamus* returned in the Chancery, *Et qd' nulla alia causa, intentio aut collusio, viz. ad defraudand' reg', &c. de Custod' hæred' vel terrar'*: And altho' this Feoffment was found to be made by Fraud and Covin (which is always unlawful) yet forasmuch as the Fraud was to one partic. Intent, *sc.* to defraud Creditors, it shall not be extended to any other Fraud, *sc.* to defraud the K. of his Ward, altho' in Truth and by the Event, by this Feoffm. the K. was defrauded of the Wardship of the Body and Land, and so was it resolved and decreed in the Court of Wards; *a fortiori* when it is found that this Feoffm. in the Case of *Meriel Littleton* was in Consideration of Marriage, and of Advancement of his Son, and that the Son's Wife should be endowed against the one, and

(a) Hardres 48.

* See 6 Mod. 212. 11 Co. 79. 5 Co. 27, 61, 110. 2 Co. 25. 3 Salk. 365. 2 Fitzgib. 184.

(b) Cawl. 231.

Note.

and not against the other, all which are lawful Considerations, the Court shall not extend it to an unlawful Intent, nor adjudge upon the whole Matter found in that Case, That the Feoffm. was made to any other Intent than is found by the Jury.

As to the 3d Object. in the Case at Bar, It was resolved and answered 3 ways. 1. In an Act of Parliam. Misnomer of a Corporation, when the express Intention appears, shall not avoid the Act no more than in a Will, for *Parliament'*, *Testament'* & *Arbitramentum*, are to be taken according to the Minds and Intentions of those who are Parties to them. And therefore when the Descript. of a Corporat. in an Act of Parl. or in a Will is such, that the true Corporat. intended is apparent, and it is impossible to be intended of any other Corpor. altho' the right Name of the Corpor. (which is requisite to be expressed in Grants and Deeds) is not precisely follow'd, yet the Act of Parl. and Will shall take Effect. And therefore in *(a)* 21 *R*. 2. *Devise* 27. where one devised certain Tenements in *London* for Life, the Rem'r over *Ecclesiæ Sancti Andreæ de Holb.* it is adjudg'd there, That this Devise is good to the Corpor. of the Parson of the Church of St. *Andr.* in *Holborn* and his Successors; for such Descript. was sufficient in a Will to express the Parson of the Church and his Successors: *Pari ratione*, if a Devise be made to the University of *Oxford*, or to the City of *London*, or to *(b) Trin. College* in *Cambridge*, &c. such a Devise is good, and therein the true Name of the Corporation shall be implied; for by these Descriptions the Meaning of the Devisor is apparent, that the incorporate Body of every of them shall take. So here, when the Parliam. gives the Benefice to the Chancellor and Scholars of *Oxf.* and their Successors, this Descript. is sufficient to express the Meaning of the Makers of the Act, That the Corporat. of the Univ. of *Oxf.* which has a Chancellor and Scholars, shall take it, and no other Corporat. can take it. 2. The Record is well, for the Act is pleaded as if the Benefice had been given by the said Act expresly (as it is implied in Law) to the Chancellor, Masters and Scholars; and the Def. has demurred in Law thereupon, and so confessed it. 3. This Clause which gives this Benefice to the Univ. of *Oxford* is a *(c)* private Clause, whereof the Judges without pleading of it can't take Notice, and therefore now the Judges ought to take it as it is pleaded.

(a) Hob. 32. Plowd. 345. a. 523. b. Br. Corpor. 77. Perk. Sect. 509.

(b) Hob. 32.

4 Co. 12. b. (c) 2 Rol. 466. Plowd. 65. a. Hob. 227. 1 Sid. 24.

As to the 4th Object. *inspecto recordo*, It appears that the Plaintiffs have averred this Feoffm. for after that they have alledged, That the said *J. Draicot* the Son was *Papalis recusans convictus*, they have said, *ac præd' J. Draicot de manerio præd' cum pertin' ad quod, &c. in forma præd' seisit' existen' & Papalis recusans convict' in forma prædict' existens & remanens, Ecclesiæ prædict' vacavit per mortem prædict' Georgii Eyre.* But if the Plaintiffs had not averred it, the Court was of Opinion that the Declaration had not

been

been ſufficient, becauſe they had not enabled themſelves to take Benefit of the ſaid Act; and they need not aver, That he yet continues and (a) remains a Recuſant, for when once the Preſentation *hac vice* was veſted in the Univerſity, altho' afterwards the Recuſant conforms himſelf, or dies, yet the Univerſity ſhall preſent.

(a) Hob. 126, 127. 1 Jones 18. Doct. placit. 333

The Bishop of Salisbury'*s Case.*

Trin. 11 Jac. 1.

Palmer 483.
1 Jones 264.

IN a Writ of *Second Deliverance* brought by *Simon Stanton* and *Henry Knap* against *John Green*, of the taking of 127 Sheep at *Blewbury*, at a Place called *The Parsonage Slay* in the County of *Dorset*. The Defendant said, That the Place where, *&c.* contained sixty Acres; and avowed the Taking, because *John* Bishop of *Salisbury* was seised of the Manor of *Sherborne* in the County of *Dorset*, whereof the Place where, *&c.* was Parcel in his Demesn as of Fee in the Right of his Bishoprick, and so seised *ult. Septemb. Anno* 27 *El.* by his Deed shewed forth granted to *Ed. Green* and the said *J. Green*, *& eorum utrique*, *officium supervisoris omnium maneriorum suorum*, *&c. in Com. Wilts*, *Dorset*, *Berks*, *& Southampt'*, *& alibi infra regnum Angliæ*, by them and their Deputies for whom they will answer; To have and to hold to them, *&c.* for Term of their Lives. And further by the same Deed granted to them a Rent of twenty Nobles *per ann.* issuing out of the said Manor of *Sherborne*, with Diet and reasonable Expences for them and their Deputies, *equitando & alias occupando*, *arbitrio ejusdem Episcopi & success. suorum*, *aut auditorum eorum*, with Clause of Distress *si debito modo petatur*; and that the said Grant was confirmed by the Dean and Chapter 5 *Sept.* 28 *El.* in the Life of the said *Jo.* Bish. of *Salisbury*, *quodque præd' officium est antiquum officium*, *quodque dict' officium unacum prædict' Feodo* 6. 13. 4. *&c.*

L. 6. 13. 4.

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'concess' fuer' per præd' Johan' Episcop' Sarum & prædecessores suos tali personæ vel personis quibus sibi placuerit. And shewed the Death of *E. Green*, and that he demanded the Rent, and for want of Payment distrained, &c. In (*a*) Bar of which Avowry, the Pl. pleaded the Stat. of 1 *Eliz.* by which it is enacted, *That all Gifts, Grants, Feoffments, Fines, or other Conveyances or Estates, from the first Day of this present Parliam. to be had, made, done or suffered by any Archbishop or Bishop, of any Honours, Castles, Manors, Lands, Tenements or other Hereditaments, Parcel of the Possessions of his Archbishoprick or Bishoprick, or united, appertaining or belonging to any of the said Archbishopricks or Bishopricks, to any Person or Persons, &c. ut in Statuto*, and further pleaded, *qd' nec officium præd' nec annualis redditus præd' ante concessionem præd', &c. unquam concess' fuer' per eundem Episcop' vel aliquem prædecessorum suorum pro aliquo longiore tempore quam unius vitæ per quod concessio præd' per præd' Johan' nuper Episcopum Sarum vigore actus præd' vacua fuit, &c.* Upon which Bar to the Avowry, the Avowant demurred in Law: And divers Days it was argued by the Serjeants at the Bar, and now this Term it was argued by the Judges at the Bench, and divers Exceptions were taken by the Avowant's Counsel to the Bar pleaded to the Avowry.

(*a*) Palm. 433.

1. That the Avowant in his Avowry has alledged by Matter in Fact, That the said Office had been granted to such Person or Persons as the Bp. pleased, &c. and the Pl. in his Bar has pleaded in the Negative, that the said Office, &c. has not been granted but for the Life of one, &c. and therefore he ought to have concluded, *& hoc petit quod inquiratur per patriam*, but he has concluded all his Plea, *& hoc paratus est verificare, &c. & non allocatur:* For the Avowant has not alledged, That the said Office had been granted, &c. to divers Persons, but to such Person or Persons as the Bishop pleased, and *in* (*b*) *disjunctivis sufficit alterum esse verum.* ¶ 2. Another Exception was taken to the Bar to the Avowry, That it doth not appear by the Bar to the Avowry, That *John* Bishop of *Salisbury* the Grantor was dead, and it shall be intended that he is alive, because the Plea of every one shall be taken strongest against him, (*c*) *ambigua responsio contra proferentem est accipienda*; and then if he be alive, the Grant of the said Office to two was good, altho' it never had been granted to two before, and shall bind the Bp. himself for his Time; as it has been adjudg'd in 32 & 33 *El.* in this Court, betwixt (*d*) *Sale* Pl. and the Bp. of *Cov.* and *Litchf.* Defend. in a *Quare Impedit*; and *Pasch.* 39 *El.* betwixt (*e*) *Hunt* and *Singleton:* Which Cases you may see cited in

(*b*) Co. Lit. 225. a. Hawk. Max. 12.
(*c*) Co. Lit. 303. b. Hawk. Max. 27.
(*d*) 3 Co. 59. b. Cr. El. 141, 207. 1 Leon. 205. Sav. 94. Owen 99. 1 Ander. 241.
(*e*) 3 Co. 60. a. Co. Lit. 45. a. b. Cro. El. 473, 564. 3 Keb. 109. 1 Mod. Rep 205. Carter 13, 16. 1 Vent. 247. 1 Rol. Rep. 152, 154, 159, 169.

Lincoln College's Case, in the third Part of my Reports, fol. 59 & 60. Which Cases were affirmed for good Law by the Court. *Sed non allocatur Exceptio,* because it appears to the Court, that the said *John* was not now Bishop of *Salisbury*; for the Plaintiff in his Bar to the Avowry concludes, *per quod* the said Grant *per præd' Johan' nuper Episcopum Sarum vigore actus præd' fuit* void, which the Avowant by his Demurrer has confessed; and these Words *per præd' Johan'* (*a*) *nuper Episcopum Sarum* imply and import that he is not now Bishop of *Salisbury*. *Vide* the like Implications 13 *El. Dyer* 304. (*b*) & (*c*) 14 *El. Dy.* 306. *b.* so in 10 *E.* 4. 18. *b.* (*d*) If in Trespass the Defendant pleads in Bar, That *B.* leased to him the Land in which, &c. at Will by Force of which he entred, and was and yet is thereof possessed by Force of the Lease at Will, it implies that the Lessee is alive, for if he was dead the Lease was determined, and then he could not be possessed by Force thereof.

(*a*) Doct. plac. 247. Postea 62. a. 1 Rol.Rep. 50. Cro. Car. 401. (*b*) Dy. 304 pl. 52 2 Bul. 79, 263. Palmer 509. Cr. Jac. 622. Moor 376. Cr. Car. 401. (*c*) Dyer 306. pl. 66. (*d*) Doct. plac. 247. Palmer 268. (*e*) Hob. 44. Cr. Car. 500.

3. Another Exception was taken to the Avowry, *sc.* That the Alledging of it to be (*e*) *antiquum officium*, was too general and incertain, but he ought to have prescribed in it, or shewed more Certainty than now he has done: And that was held a good Exception. And this Difference was taken betwixt the Allegation of the Conveyance to the Matter, and the Matter it self; as in (*f*) 11 *H.* 4. 89. *a. b.* there one, to convey to him Title to a Leet, prescribed that he and all those whose Estate he had in the Hundred have had a Leet, &c. & *bene*, for the Prescription in the Hundred is but the Conveyance, and therewith agrees (*g*) 19 *R.* 2. *Action sur le Case* 51. but when he claims any Thing which lies in grant by Prescription originally and of it self, he can't prescribe in it by a *Que* Estate; as (*h*) *Littleton* holds *fol.* 41. 21 *H.* 7. 15. *a.* &c. So when one will plead Custom in a Town, it is sufficient to say that it was *antiqua villa*, and shew the Custom. *Vide* 22 *H.* 6. *Prescription* 47. & 6 *E.* 6. (*i*) *Dyer* 71. So of an Office, if he claims any Thing appertaining to the Office, it is sufficient to say, *Quod fuit antiquum officium*; but when he claims the Office it self, it is not sufficient to say *quod est antiquum officium*.

(*f*) 11 Co. 44. b. 1 Rol. Rep. 76. 2 Inst. 71. Fitz. Avowry 57. Br. Distress 18 Br. Que Estate 9. Co. Lit. 121. a. Cart. 31. (*g*) Carter 31. Co. Lit. 121. a. (*h*) Lit. sect. 183 Carter 31.

(*i*) Dyer 71. pl. 45

As to the Matter in Law, it was objected, That the said Grant made by the said late Bishop of *Salisbury* being confirmed by the Dean and Chapter, was not restrained by the said Act of 1 *El.* for divers Reasons. 1. That this Case was out of the Words of the Act, for it was not any Part of the Possessions of the said Bishoprick, nor appertaining thereunto. 2 They conceived, that nothing is restrained but such Hereditaments whereof on a Lease made for three Lives or 21 Years

Years, according to the Statute, a Rent may be reserved, for the Words of the Act are, *Other than for the Term of twenty-one Years or three Lives*, &c. *whereupon the old accustomed yearly Rent or more shall be reserved, &c.* and in this Case no Rent (*a*) can be reserved. 3. A Difference was taken betwixt an Office in *esse* in the Right of his Bishoprick, for that may be said Parcel of his Possessions, and such an Office, as the Bishop himself can't exercise, can't be said Parcel of his Possessions. 4. If a Grant for two Lives with the ancient Fee shall by Construction of the Statute be restrained, then by Consequence a Grant for one Life only shall be also restrained; for by what Words or Construction shall a Grant for two Lives of the said Office with the ancient Fee be restrained, and not for one Life? But it was unanimously resolved *per totam curiam*, That the said Grant of the said Office for two Lives was void against the Successor by the said Act of 1 *Eliz.*

(*a*) Co. Lit. 47. a.

And in the Argument of this Case, four Things were considered. 1. What the Common Law was before any Statute made thereof. 2. What Alteration the Statute of (*b*) 32 *H.* 8. *cap.* 28. has made. 3. What is done by the said Act of 1 *Eliz.* And lastly, If the said Grant to two of the said Office be restrained by the said Act of 1 *Eliz.* against the Successor. ¶ And as to the First, it was resolved, That at the Common Law Bishops with the Consent of the Chapter might by their Charters of Feoffments, Grants or Leases bind their Successors; and therefore such Grant to two of the said Office for their Lives had been good by the Common Law, although it was never granted to two before: Wherein was observed the Wisdom of the Sages of the Law, That no sole Corporation was ever trusted with the Disposal of the Possessions, as to bind his Successors, but in such they ought to have the Consent of others, as the Bishop of his Dean and Chapter, the Abbot the Consent of his Covent, the Parson the Consent of the Patron and Ordinary, &*sic de cæteris*. As to 2. The Statute of 32 *H.* 8. has enlarged the Power of the Bishop, for by this Act he may make a Lease for 21 Years, or 3 Lives, with divers Limitations. 1. That every old Lease be expired or surrender'd within a Year, &c. 2. That the Land ought to be usually demised to Farm by the Space of 20 Years, &c. and that the Bishop alone may do by Deed indented, following the Limitations of the Statute, whithout the Dean and Chapter.

(*b*) 3 Co. 50 b. 5 Co. 2. b. 4. a. 5. a. 6. a. 6 Co. 37. a. 7 Co. 7. b. 8 Co. 34. a. 72. a. 9 Co. 140. b. Co. Lit. 44. a. 333. a. Plowd. 112. b. Rast. Leases 2. Dyer 72. pl. 3. 162. pl. 48. 191. pl. 22. 246. pl. 69. 271. pl. 28. 357. pl. 43 363. pl. 26. Sav. 85. pl. 165. Cr. Jac. 173. Cr. El. 350, 602. Cr. Car. 22, 44, 435. 1 Rol. Rep. 159, 163, 230. 2 Rol. Rep. 169, 311, 332, 405, 410, 491, 499. Hob. 204. Latch. 45. Bridgm. 28. Moor 58, 759, 783. 1 Leon. 59, 148. 3 Leon. 132, 156. 1 Jones 60. 2 Inst. 342, 681. Godb. 102. pl. 119. 3 Keb. 381.

As to the third and fourth Point, it was resolved, That by the Act of 1 (*c*) *El.* the Bishops are generally restrained from making any Estate or Interest of any Land, Tenement or Hereditament, Parcel of their

(*c*) Co. Lit. 44. Bridgm. 29.

their Bishopricks, or of any Charge or Incumbrance out of it, or of any other Thing in their Disposal to bind the Successor, but only a Lease for twenty-one Years or three Lives, of such Lands, Tenements and Hereditaments which have been usually demised, and upon which the usual Rent shall be reserved according to the said Act of 1 *Eliz.* And if they make a Lease of any Lands usually demised, and reserve the usual Rent according to the Statute of 1 *El.* yet if all the Limitations prescribed by the Statute of 32 *H.* 8. be not pursued, as if it be not all in Possession, or that the old Lease be not expired or surrendred within a Year (which is not prohibted by the Statute of 1 *El.* as it was adjudged in *Fox's* Case) then such Lease shall not bind the Successor, unless it be confirmed by the Dean and Chapter, for the Statute of 1 *El.* doth not enable any Archbishop or Bishop only to make any Lease. And such Construction has been made, as is aforesaid, to disable the Bishop to do any Thing except to make Leases for twenty-one Years or three Lives (as is aforesaid) concerning the Bishoprick to bind his Successor; as the Grant of the next Avoidance by the Bishop of a Benefice to another, altho' it be confirmed by the Dean and Chapter, is restrained by the Statute of 1 *El.* to bind his Successor, as it has oftentimes been adjudged, because it was such an Hereditament upon which a Rent can't be reserved: For all that which is not permitted by the Exception, *sc. Other than, &c.* is restrained as to the Successor by the general Purview of the Act. But such grant shall bind the Bishop himself, notwithstanding the Statute says it shall be void to all Intents, Constructions and Purposes; for the Makers of the Act intended not only the Advancement of Religion, when the Professors of Divinity should have *duplicem honorem*, sc. *honorem reverentiæ*, and *honorem beneficentiæ*; but also the Increase of good Hospitality, and avoiding of Dilapidations and the Ruin of the Church, which the Successor, if the Acts of his Predecessor should bind him, would not be able to rebuild or repair: And therefore the Makers of the Act regarded the Succession, more than the Bp. himself. *Vide* Elmer's *Case in the fifth Part of my Reports, fo.* 4. *a, and* Jewel's *Case*, ibid. *fo.* 3. *a. the Case of Ecclesiastical Persons*, ibid. *fo.* 14. *a, b.* 15. *and* Eitrue's *Case*, and divers other Cases upon the Stat. of 13 *El. cap.* 10 concerning Deans and Chapters, *&c.* which Statute is Cousin German to this Act of 1 *El.* and these Words in the said Act of 1. *Parcel of the Possessions of his Archb. or Bishoprick, or united, belonging or appertaining to the said Archbishoprick or Bishoprick*; And it may be well and properly said, That the Gift and Disposal of this Office, and all other

Co. Lit. 45. a. Degge 111.

Bridg. 30. Moor 150. 1 And. 65. pl. 140.

Co. Lit. 44. b.

Co. Lit. 47. a.

Ant. fol. 59. a. Co. Lit. 45. a.

Moor 253.

2 Rol Rep. 169.

other the like are belonging to the Archbishoprick or Bishoprick: For altho' the Bishop himself can't exercise such (*a*) Office, yet he has an Inheritance in the Gift and Disposal thereof, as it is held in Roger *Earl of* Rutland'*s Case in the eighth Part of my Reports*, *f.* 55. *b.* And these Words (*b*) *belonging to the Archbishoprick or Bishoprick*, shall be taken for, *concerning the Archbishoprick or Bishoprick*: And therefore if a Writ of (*c*) Annuity be brought against a Bishop upon the Title of Prescription or otherwise, and Judgment be given against him upon Verdict or Confession, it is restrained by this Act, because the Bishop is charged with the Annuity in respect of his Bishoprick, and therefore the Successor shall be charged with the Arrearages incurred in the Life of the Predecessor, as it is agreed in (*d*) 21. *H.* 7. 4. *a. b.* 34 *E.* 3. *Scire facias* 153, 254 48 *E.* 3. 26. *a. b.* 22 *H.* 6. 10. 33 *H.* 6. 44. and yet the Annuity is not issuing out of the Bishoprick, as appears in (*e*) 10 *H.* 6. 10. *b.* & (*f*) 10 *E.* 4. 10. *a.* But because it concerns the Bishoprick, and tends to the (*g*) Diminution of the Revenues, and the impoverishing of Successors, it is restrained by the Statute of 1 *El.* Then to answer the Objection which has been made, Why shall a grant of the said Office to one only be good? As to that it was answered, and resolved by the Court, That if (*h*) the Office has been ancient and necessary, the Grant thereof with the ancient Fee is not any Diminution of the Revenue, nor impoverishing of the Successor, and therefore for Necessity such Grants are by Construction exempted out of the general Restraint of this Act of 1. For as *Bracton* says, *fo.* 247. *a.* (*i*) *Illud quod alias licitum non est, necessitas facit licitum,* & (*k*) *necessitas inducit privilegium quod jure privatur.* And if Bishops should not have Power to grant such Offices of Service or Necessity (*l*) for the Life of the Grantees, but that their Esta. should depend upon Incertainties, as upon the Death, Translation, &c. of the Bp. then the most able Persons would not serve them in such Offices, or at least would not discharge their Office with any (*m*) Alacrity, unless they have such Certainty of an Estate for the Term of their Lives, as their Predecessors in the same Offices had. But when the (*n*) ancient Office has been granted to one, it is not of Necessity to grant it to two, and therefore such Grant is not exempted out of the general Restraint, no more than if the Bishop grants an Office with the ancient Fee (*o*) to one, and afterwards grants it (*p*) in Reversion to another that is restrained by

(*a*) 8 Co. 55. b. Co. Lit. 3. b. Bridgm. 30. 1 H. 7. 29. b. Br. Prærog 125. Br. Grant 83. 10 H. 7. 18. b. Fitz. Grant 32. Plowd. 381. a. 379. b.
(*b*) Bridgm. 30. Ley 78.
(*c*) 5 Co. 14. b. Cr. Car. 49. Bridgm. 30. 11. Co. 69. b. 1 Rol. Rep. 152. 155, 158, 160, 164, 166, 171.
Hob. 97.
(*d*) Bridgm. 30.
(*e*) Bridgm. 30.
(*f*) Davis 5. b. Br. Scire facias 179. Br. Annuity 36. Fitz. Annu. 13.
(*g*) Ley 71, 73. Bridgm. 301. Cr. Car. 49. Co. Lit. 44. a.
(*h*) Cr. Car. 557. Bridgm. 30. Co. Lit. 44. a.
(*i*) Bridgm. 30.
(*k*) Bacon's Elements 25. 5 Co 40. b.
(*l*) Bridgm. 31.
(*m*) Bridg. 30.
(*n*) Cr. Car. 259. Bridgm. 31. 1 Jones 264.
(*o*) Cr. Car. 279, 557. Bridgm. 31. 1 Jones 264.
(*p*) Dyer 80. b. pl. 58, 259. pl. 18. 11 Co. 4. a. March Rep 41. Cr. Car. 279. 8 Co. 55. b. 2 Rol. 154. Co. Lit. 3. b. Hob. 150, 151. 4 Inst. 202.

the Statute, because it is not of Necessity; and if the Bishop may grant such Offices to *(a)* two, he may grant them without any Limitation of Lives, and by Consequence *in infinitum*; and so if he may grant to one in *(b)* Reversion, he may grant to others without any Limitation; and by the same Reason he may grant in Tail or in Fee, which will be intirely against the Intention of the said Act of 1, and of such Opinion was *Popham* Chief Justice, *Mich.* 44 & 45. *Eliz.* in *(c) Scambler*'s Case. *Vide* 23 *Eliz.* *Dyer* 370. *(d) Horne* Bishop of *Winchester* after the Statute 1 *Eliz.* granted to Doctor *Dale* for Life a Rent out of the Manor of *Waltham pro consilio, &c.* The Bishop died, Doctor *Dale*, because the Rent was void by the Death of the Grantor, brought an Action of Debt for the Arrearages incurred in his Life against his Executors: In which two Points are to be observed. 1. That the Grant was not void against the Bishop *(e)* himself; the other, That although the Rent was issuing out of the Possessions, and not Parcel, it was void by his Death. *Trin.* 30 *Eliz. Rot.* 346. in this Court, the Bishop of *Chester* after the Statute of 1. granted to *George (f) Bolton* an Annuity of five Marks *per Annum* for his Life *pro consilio impenso & impendendo*, which was confirmed by the Dean and Chapter, and afterwards the Bishop died, *Bolton* brought a Writ of Annuity against the Successor, and in his Declaration averred, That the Predecessors of the Bishop had granted reasonable Fees *(g)* (but did not aver that this Fee had been granted before) and averred, that he was *homo consiliarius & in lege peritus*, and the Opinion of the Court was against the Plaintiff, and therefore he never had Judgment. But there it was resolved, That although the said Bishoprick was *(h)* founded of late Time, *sc.* in the Time of *H.* 8. yet a Grant of Offices of Necessity to one in Possession with a reasonable Fee *(i)* (the Reasonableness of which shall be decided by the Court of Justice in which it shall depend) is good, and as has been said, exempted out of the general Restraint of the said Act. And the Court took no regard to that, that it did not appear, when *Edward Green* one of the Grantees died: For admit he died in the Life of the said Bishop, so that now against the Successor one only has the Office; yet the Grant by Force of the said Act *de primo* is void as to the Successors, *quia quæ malo*

(a) Bridg. 31.
(b) Bridgm. 31.
(c) Cr. El. 636, 637. Cr. Car. 49, 50. Co. Lit. 3. b. 1 Rol. 731. 2 Rol. 153. Bridgman 31. Ley 74, 76.
(d) Cr. Car. 49. Bridgman 31. Dy. 370. pl. 62.
(e) Co. Lit. 45. a. Cr. El. 473, 564. Antea 59. a. 60. b. 3 Keb. 109. 1 Mod. Rep. 205. Cart. 13, 16. 1 Vent. 247. 1 Rol. Rep. 152, 154, 159, 169.
(f) Cr. Car. 49. Bridgman 31. Ley 72, 73, 75. Hard. 354.
(g) Bridgm. 31.
(h) Bridgm. 31. Co. Lit. 94. a.
(i) Bridgm. 31. Co. Lit. 56. b. 59. b. Cr. Car. 48, 196. 1 Rol. 523. 2 Rol. 578. 1 Rol. Rep. 33. Cr. El. 351, 779. Moor 623. 4 Co. 27. b. 11 Co. 44. a. 13 Co. 3. 1 Brownl. 186. 187.

malo (a) inchoata sunt principio, vix est ut bono peragantur exitu, & (b) quod initio non valet, tractu temporis non convalescit; and the Statute *de primo Reginæ Eliz.* has at the Time of the Grant adjudged it void as to the Successor, which no subsequent Accident can make good, no more than if a Bishop makes a Lease for four Lives, and one dies in his Life-time, so that now there are but three Lives, and afterwards he dies, yet it shall not bind the Successor, although all other Circumstances required by the Statute of 32 *H.* 8. be observed.

(a) 4 Co. 2. b. 11 Co. 78. a. 2 Jones 73. 2 Bul. 43, 192.
(b) 4 Co. 2. b. 90. a. Cawley 214. 1 Co. 135. b. Davis 32, a.

5. It was resolved, That the Grant of any ancient Office to one with the ancient Fee by a Bishop, shall not bind his Successor, unless it be confirmed by the Dean and Chapter, for such Grants are not, as appears before, restrained by the Statute *de primo El.* and therefore remain at the Common Law, and by Consequence ought to be confirmed by the Dean and Chapter.

Also no Regard was had by the Court, That it did not appear that *John* the Bishop was dead; for *(c) nuper Episcopus* may imply a Translation, or other Removal, as well as Death, but it is all one; for be he translated, deposed, or otherwise removed, the Grant is void against the Successor.

(c) 1 Rol. Rep. 50. Ant. 59. b. Cr. Car. 401. Doct. plac. 247.

Lastly, altho' it doth not appear, that there was any Successor at the Time of the Distress for (*posito* there was no Successor then made) yet that is not material; for the Grant determined by the Death or Removal of the said *John* the Bishop. And afterwards this Term, Judgment was given for the Plaintiffs *Simon Stanton* and *Henry Knap*, and against the said *John Green* who claimed the said Office.

Note Reader, The subject of this Case is small, but the Consequence great: And where by Force of an Exception in the Statute *de primo Reginæ Eliz.* any Archbishop or Bishop might with the Consent of the Dean and Chapter convey any of their Possessions to the King, his Heirs and Successors, of any Estate whatsoever; our (*d*) Lord the King that now is, of his Piety and Devotion to Religion, and for the Honour of it, and that such Possessions which were given by his noble Progenitors Kings of *England*, should not be converted to private Uses, has at his first Parliament, and by Authority thereof, restrained them from making any Conveyance or Estate, either to himself or to any of his Heirs and Successors,

(d) 1 Jac. c. 3. Co. Lit. 44. a.

And ſo you will underſtand what Acts an Archbiſhop or Biſhop may do concerning his Poſſeſſions without the Aſſent of the Dean and Chapter; and what he may do with the Dean and Chapter; and what he may not do, although they be with the Aſſent of the Dean and Chapter.

WHISTLER's *Case*.

Hill. 10 Jac. 1.

IN a *Quare Impedit* by *John Whistler*, Gent. Plaintiff, and *John* Bishop of *Oxford*, and *Isaac Singleton* Clerk Defendants, for the Church of *Whitechurch* in the County of *Oxford*: The Case on the special Verdict was such; Q. (*a*) *Elizabeth* was seized of the Manor of *Whitechurch*, to which the Advowson of the Church of *Whitechurch* was appendant in her Demesn as of Fee as in Right of her Crown, and so seized 24 *Aprilis Anno* 9 *Eliz.* by her Letters Patent demised the said Manor with the Appurtenances to *William Smith*, except Advowsons of Churches, &c. for 21 Years; and afterwards the Queen 22 *die Maii Anno Regni sui* 27. reciting the said Demise of the said Manor to the said *Will. Smith*, with the Exception of the Advowson, made another Demise in Reversion to the said *Will. Smith* of the said Manor with the Appurtenances, except the Advowson, and afterwards Queen *Elizabeth* died; and the King that now is, in Consideration of Service, *ac ex certa scientia & mero motu*, granted to Sir *Geo. Howme*, Knight, (*b*) *totum illud manerium sive dominium de Whitechurch in Com' nostro Oxon' cum suis juribus, membris, & pertin' universis, ac omnia & singula domos, ædificia, &c. & hæreditamenta nostra quæcunque prædicto maneria sive dominio de Whitechurch, sive alicui inde parcellæ quoquo modo spectan' sive pertinen cuidam Willielmo Smith, per literas patentes dicta nuper Reg' Eliz' sub magno sigillo suo Angliæ, pro termino* 21 *annor*, (*c*) *exceptis quæ in eisdem literis patentibus excipiuntur, mentionat' fore dimiss' ac postea per alias patentes*, and mentioned the Lease in Reversion, and in which is also the like Clause, *Exceptis quæ in eisdem literis patentibus excipiuntur, mentionat' fore dimissa*,

Letters Pat.

(*a*) 2 Rol. Rep. 279.

(*b*) 2 Rol. Rep. 279.

(*c*) 2 Rol. Rep. 361.

dimissa; Ac ulterius de uberiori gratia nostra speciali, ac ex certa scientia & mero motu nostris, damus & concedimus præfato Georgio Howme Militi, hæredibus & assignatis suis imperpetuum, omnia & singula mesuagia, &c. tenementa prædicto manerio sive dominio de Whitechurch quoquo modo spectan' sive pertin', &c. Damus ulterius, & per præsentes pro nobis, hæredibus & successoribus nostris concedimus præfat' Georgio Howme Militi, hæredibus & assignatis suis imperpetuum, prædictum manerium sive dominium de Whitechurch, ac cætera omnia & singula præmissa superius per præsentes concessa cum eorum pertin' universis adeo plene & integre, & in tam amplis modo & forma, prout ea omnia & singula præmissa aut aliqua inde parcella ad manus nostras, &c. devenerunt, ac in manibus nostris jam existunt.

2 Rol. Rep. 280.

And if the Advowson appendant to the said Manor of *Whitechurch* should pass by these Letters Patent, or not, was the Question. And divers Objections were made at Bar that the Advowson should not pass. 1. Because no express Mention was made of the Advowson, and it is enacted by the Statute *de Prærogativa Regis, cap.* (a) 15. *Quando Dom' Rex dat vel concedit alicui manerium vel terram cum pertin', nisi faciat in charta sua vel scripto expressam mentionem de feodis militum, advocationibus ecclesiarum & dotibus, cum acciderint, ad prædict' manerium vel terram pertin', tunc hiis diebus Rex reservat sibi eadem feoda & advocat' cum dotibus, licet inter alias personas non fuerint observata.* And in this Case the King made no express Mention of the Advowson. The 2d Reason was, That when the King first granted the Manor of *Whitechurch*, (b) *cum pertin'*, *without* making Mention of the Advowson, it is as much in Judgment of Law, as if the Advowson had been excepted in express Words, and then when by the latter Clause the King granted *præd' manerium cum pertin', ac cætera omnia & singula præmissa superius per præsentes concessa cum eorum pertin' universis*, (c) *adeo pene & integre, &c.* this Word (*prædict'*) has Reference to the Manor mentioned before, which Manor was granted without the Advowson, and therefore this Clause being restrained by this Word (*prædict'*) and by these Words (*& cætera omnia & singula præmissa superius per præsentes concessa*) the Advowson shall not pass: And yet peradventure (as it was said) if in one and the same Clause the King had granted *totum manerium nostrum de Whitechurch in Com' nostro Oxon' adeo plene & integre, & in tam amplis modo & forma, prout idem manerium ad manus nostras devenit & modo in manibus nostris existit*, it might pass. 3. It was objected, That the original Grant is restrained by this Word (*illud*) *manerium*, and by these subsequent Words, *cuidam*

(a) Stamf. Prærog. 41. b. 1 Co. 50. a. 2 R. 3. 4. b. 41 E. 3. 5. b. Plow. 252. a. 17 E. 2. c. 15. 8 H. 7. 2. a. 43 E. 3. 22. a. 38 H. 6. 34. b.

(b) Moor 881. Hob. 170.

(c) Hob. 170. Moor 881.

Hob. 170.

cuidam Willielmo Smith per literas patentes, exceptis quæ in eisdem literis patentibus excipiuntur, mentionat' fore dimissa & concessa; in which Demise to *Smith* the Advowson was expresly excepted, and so upon the Matter by this Reference the Advowson is excepted out of this Grant. The 4. Objection was, That these Words (*exceptis quæ in eisdem literis patentibus excipiuntur*) should be an Exception out of this Grant of the King that now is, and then against the express Exception, the general Words afterwards should not pass it; for construction ought to be made upon the whole Letters Patent, that one Part may stand with the other.

To which it was answer'd and resolv'd by the Court, That when the (*a*) King's Charter in general Terms refers to a Certainty, it contains as express mention, as if the Certainty had been expressed in the same Charter, altho' the Certainty, to which the Reference is, be not of Record, but lies in Averment by Matter in *pais* or in Fact. And first it was considered, what the Law was in this Case before the Statute *de Prærogativa Regis*; and it was agreed, That before that Statute, If the King had granted a Manor to which an Advowson was appendant, without making mention of the Advowson, or without saying (*b*) *cum pertin'*, that the Advowson should pass; and so is the Book adjudged in (*c*) 43 *E*. 3. 22. *a*. That where the Earl Marshal was seized of the Manor of *A*. to which an Advowson was appendant, and gave the said Manor to K. *H*. 3. to him and his Heirs, for which Gift the King granted to him and his Heirs 50 Marks *per ann*. till he infeoffed him of so much Land, as fully and entirely as he had the Manor of *A*. of his Gift, and afterwards K. *H*. 3. gave the said Manor of *A*. to which the Advowson is appendant, without saying *cum pertin'*, to the said Earl Marshal and his Heirs for the same fifty Marks, and because the Manor was more worth by C *s* rendred C *s per ann*. &c. And altho' the Charter of K. *H*. 3. spoke nothing *de pertin'*, nor of his Fees, nor of Advowsons, yet it was adjudged that the Advowson should pass; and *Mowbray* Ch. Just. said, altho' K. *H*. 3. had given the Manor without saying (*d*) *cum pertin'*, at which Time the Advowson passed by the K.'s Gift, as by the Gift of another common Person, and all Times before the Stat. *de Præro' Regis*, which Stat. was in the Time of the Grandfather of the K. that now is: So that at all Times before the Advowson past by such Gift; wherefore Judgm. was given, That by the said Grant of K. *H*. 3. of the Manor, the Advowson should pass; and so there it is held, That before the said Stat. by the K.'s Grant of a Manor, the Tenure by Escuage shall pass, and all this is proved by the Act it self, which Act has altered the Com. Law; for the Words of it are, *Tunc hiis diebus rex reservat sibi ead' feoda & advocation' Ecclesiæ*, &c. and the Book says so it is proved by the Words (*hiis diebus*) how the Prerog. began: And

(*a*) 9 Co. 30. a. 46. b. 2 Rol. 185, 201.

(*b*) 39 E. 3. 21. b. 2 Rol. 60. Perk. sect. 116. Co. Lit. 77. a. 307. a. Cr. El. 18. Doct. and Stud. 35. a.

(*c*) Stam. Præro. 42. a. Br. Patent 6. 1 Jones 23. Fitz. Grant 46. Br. Prærog. 7.

(*d*) Co. Lit. 307. a. 77. a. Cr. El. 18.

And therewith agrees 44 *E.* 3. 20. That by Feoffment of the Manor by the Com. Law, without saying *(a) cum pertin'*, the Advowson shall pass; and altho' the Feoffment be by Word, the Advowson shall pass: And therewith agrees the Book in 39 *E.* 3. 21. *b.* that before this Statute the Advowson shall pass. *Vide* 19 *E.* 2. *Brief* 844. 8 *H.* 7. 4. *a.* *b.* 18 *E.* 3. 15. And it is to be observed, That the Act *de Prærog' Reg'* restrains but the said three Cases, *sc.* Advowsons, Knight's Service and Endowment of Women. For a Leet shall pass without express Mention, or Words equipollent, as it is held 18 *H.* 6. 12. so a Forest appendant to an Honour shall pass, as it is agreed in *(b)* 26 *Ass. p.* 60. the same Law of a Corrody appendant to the Patronage of a Priory, as appears in 26 *Ass. p.* 63. *& sic de similibus.* Also the Words of this Act are, *Quando Dominus Rex dat vel concedit*, and therefore in Case of (*c*) Restitution, Advowsons and Knight's Service, shall pass without express Mention of 'em, or Words equivalent, as in Livery to Heirs. 2. In Restitution of the Temporalities to the Successor of a Bp. and the like. 41 *E.* 3. 5. *b.* 27. *Ass.* 40. *Plo. Com.* the Lord *Berkley*'s Case, 251, 252. 20 *El. Dy.* *(d)* 306. But there *Thorp* Ch. Just. says in the same Plea, That if a Manor, to which an (*e*) Advowson is appendant, be in the King's Hands by Escheat or by Purchase, if the King at this Day (after the said Act *de Prærog' Reg'*) gives the Manor to a Man as intirely as such a one held it before it came to our Hands by way of Escheat; or as such a one held it who enfeoffed us, that the Advowson would pass without saying in the Charter *cum feodis & advocationibus*; and the Reason is, because the Law intends that in such Case the King is informed of his Right: *Quod curia concessit.* By which it is to be observed, 1. That altho' the Reference in the King's Charter be to Matter in *pais* or in Fact, that if the Truth be, that the Advowson be appendant that it shall pass, for in Judgm. of Law it is equivalent to an express Mention of the Advowson (as the Stat. speaks) in the Charter. 2. Although the King grants the Manor only without saying *cum pertin' (f)* as entirely, *&c.* yet the Advowson shall pass, and therewith agrees 6 *E.* 3. 32. *a.* *John Darcie's* Case, That if a Man has a Manor to which an Advowson is appendant, and Franchise to have Forfeitures and other Franchises within the Manor, and afterwards the Manor comes to the King by Forfeiture of War, and afterwards the King gives the Manor to hold with the Franchises, which were always regardant to the said Manor as such a one held, he shall have the Franchises; and there Sir *William Herle* said, That it shall be a new Grant, for the Franchises (which lay in Point of Charter) were come to the Crown. In which first it is be observed, That

(*a*) 2 Rol. 60.

(*b*) Br. Incidents 11. Br. Patent 35.

(*c*) Fitz. Livery 7. Co. Lit. 77. a. Br. Livery 45. Plowd. 252. a. F.N.B. 33. N.O. Br. Patent 75.

(*d*) Dy. 360. pl. 5. Co. Lit. 77. a.

(*e*) Hob. 323. Moor 872.

(*f*) Hob. 323. 9 Co. 25. b. Dy. 44. pl. 32.

if a Man has a Manor, in which Manor the Owners thereof have Franchises which lie in Point of Charter, as Forfeitures for Treason, and other Royal Franchises; and afterwards the Manor with the Franchises comes to the King's Hands, and the King grants the Manor with the Forfeitures of Treason and other Franchises which were regardant or appertaining to the said Manor as such a one held; That all the Franchises should pass, and these Words *which were regardant or appertaining to the said Manor* shall be taken in this Sense, which were lawfully enjoyed within the said Manor, as entirely as such a one had them; and yet according to the strict Propriety of the Words, such Franchises could not be appertaining to the Manor. But such Construction as will make the true Intention of the King expressed in his Charter take Effect, is for the King's Honour, and stands with the Rules of Law: And therefore this Word (*appertaining*) shall in such Case in the King's Grant be taken out of the proper Signification. 2. It is to be observed, that in the same Case such Franchises which lie in Point of Charter shall pass as by a new Grant, *a fortiori* Franchises appendant or appertaining to a Manor, as Advowsons, Fairs, Markets, Warrens, &c. (which always continue in *esse*, and are never extinct in the Crown) shall pass. It is said in *Plo. Com.* in *Fogassa*'s Case. 12. *b.* If the King at this Day grants over certain Lands which have come to his Hands before, and further grants to the Grantee *tales libertates, privilegia, Jurisdictiones, &c.* that he had, who was last seised of the Lands, where the King knows not the Certainty of the Liberties and Privileges, yet the Grant is good enough, and the Patentee may enquire what Liberties and Privileges the other had before; and forasmuch as this Incertainty may be reduced to a Certainty by Enquiry or Circumstance, the Grant is good. *Vide the Case de Strata Marcella in the 9th Part of my Reports, f. 34. b.* 18 *Eliz. Dyer* (b) 350, 351. hereafter cited.

9 Co. 27. a.

8 Co. 77. a.

9 Co. 26. a.

(a) 9 Co. 24. b. 9 H. 6. 27. a b. Fitz. Grants 7, 40. Br. Patent 4, 60. 5 E. 4. 8. b. 23 H. 6. 43. a. Br. Estate 44. Plow. 381. b. Br. Contract 13.

As to the 2d Objection, It was answered and resolved, That it is true, That if the said Clause of (c) *adeo plene & integre* had been omitted, &c. that then the Advowson had not passed by the first Clause, but by the Addition of the later Clause, all the Parts of the Letters Patent taking Effect at one and the same Time, the Advowson should pass as appendant: And this Word (*prædict*) doth not restrain the Passing of the Advowson, but describes what Manor it is, and then the Addition of these Words (*adeo plene & integre & in tam amplis modo & forma*) express the King's Intention to pass it as intirely as the Manor came to his Hands, or otherwise the said Words *adeo plene, &c.* would not take their right and genuine Effect: And it was never seen in any Letters Patent, that the

(b) Winch 11. Lit. Rep. 62. 2 Rol. 185. 1 Jones 23. Postea 56. b.

(c) Hob. 170.

said Words, *adeo plene & integre, &c.* came in the first Clause of the Grant, but is a new Clause by it self; and then in the last Clause, this Word (*prædict'*) is always added, and so in Truth was the Case in 18 *Eliz. Dyer* 350, 351. For it appears by the Letters Patent of Queen *Elizabeth* mentioned in the said Cas., That the Rectory of *Westbodwin*, to which the Advowson of the Vicarage was appendant, came to the King by the Attainder of *E.* for Felony, and was concealed, Queen *Elizabeth* granted *totam illam Rectoriam de W. in Com' Wilts. cum suis juribus, membris & pertin' universis, nec non omnia & singula mesuagia, &c. & hæreditamenta parcell' spectan' sive pertinen' dictæ Rectoriæ: Et ulterius, &c. Concessimus præd' Rectoriam cum pertin' cæteraque præmissa cum pertinen' adeo plene & integre & in tam amplis modo & forma, quantitate & qualitate prout, &c.* the Felon had it, and as it came to her Hands: And it was adjudged that the Advowson should pass without express or special Mention; also the Words were *ex certa scientia & mero motu*, and so the Queen was not deceived: Which being a Judgment in the Point consonant to the Resolutions in ancient Time, and agreeing with common Experience and Opinions of learned Men, this was not worthy any Question. And thereupon it was concluded, That if the King has the Manor of *D.* in the County of *Northumberland*, and some of the Rents and Services extend into *Cumberland*, and the King grants the Manor of *D.* in the County of *Northumberland, & omnia & singula mesuagia, &c. redditus, servitia, & hæreditamenta in dicto Comitatu Northumberland, seu alibi parcell' prædicti manerii, &c.* That the Rents and Services in the County of *Cumberland* shall pass; for (*prædict'*) is but a Description of the Manor, and these Words (*aut alibi*) ought to have some Effect. And therefore in as much as in such Case all Parts of the Charter take Effect at one Time, these Words (*aut alibi*) shall be in Judgment of Law annexed to the first Clause, and shall be of such Effect as if the King had granted the Manor of *D.* and all Rents and Services, Parcel of the said Manor in the County of *N. aut alibi*, and that stands with the Rule of good Construction, *sc.* to make all the Words of the Letters Patent, according to the true Intention of the King expressed in them, take Effect. As to the third Objection, Although the first Clause of the Grant refers to the Demise in which the Advowson is excepted, yet by the middle Clause all Tenements, *&c.* appertaining to the Manor are granted; and the last Clause grants the Manor with

2 Rol. 185. 1 Jones 23. Winch 11. Lit. Rep. 62. Ant. 65. a.

with the Appurtenances, *&c. adeo plene & integre*, so that the Answer to the second Objection, satisfies this also. As to the fourth Objection, it was resolved without any Difficulty, that the Exception should be extended only to Leases recited, and not to be any Exception out of the Letters Patent of the Fee-simple. And accordingly Judgment was given that the Advowson should pass.

[Note; *A Writ of Error was brought on this Judgment, and the Suit was afterwards determined by Compromise.*]

Skinner 60.

The Case of the Church-wardens of St. Saviour *in* Southwark.

Trin. 11 Jac. I.

IN an Information of Intrusion preferred in the Court of Exchequer by the King's Attorney General, which is entred *Hill. 5 Jac. Regis Rot.* 121. against *Thomas Harvy, John Marshal, Abraham Grene*, and others, for intruding into the Rectory of the Parish-Church of S. *Saviour* in the County of *Surry*, 9 *Octob. Anno* 3. *Regni Regis Jac. &c.* Upon Not guilty pleaded, the Jury gave a special Verdict to this Effect: That Queen *Elizabeth* was seised of the said Rectory in her Demesne as of Fee in Right of her Crown, and by her Letters Patent bearing Date 22 *Febr. Anno Regni sui* 27. demised to the Church-wardens of the Parish of S. *Saviour* in *Southwark* (who by such Name were incorporated by Act of Parliament in *Anno* 32 *H.* 8. and so found) the said Rectory from the Feast of St. *Michael* then last past for twenty-one Years, by Force whereof they entred, and were thereof possessed; and afterwards the said Queen by her other Letters Patent bearing Date the 28 *Novemb. Anno Regni sui* 33. reciting the said Lease, *per prædictas literas patentes port' dat'* 22 *Febr. Anno dictæ nuper Reg'* 27. *confect': Quas quidem literas patentes, & totum statum, titulum, interesse, terminum annorum adhuc futur' de & in præmissis, dilecti subdit' nostri Thomas Norton, &c. gardiani dictæ Ecclesiæ parochialis modo habentes, & ad præsens possidentes nobis sursum reddiderunt & restituerunt cancelland', quam quidem sursum redditionem acceptamus per præsentes; sciatis*

sciatis igitur quod nos ad humilem petitionem gardianorum & parochianorum dictæ Ecclesiæ sanct' Salvatoris de Southwark, tam in consideratione sursum redditionis præd' quam in consideratione quod præd' nuper gardiani Eccl' parochial' præd' post datum dictarum nostrarum literarum patentium superius mentionat', unam sufficientem domum aptam & convenientem pro Schola Grammaticali ibid' tenend' infra paroch' sancti Salvatoris præd' pro eruditione puerorum ejusd' paroch' sumptibus eorum & expensis erexerunt & ædificaverunt, necnon pro fine 20 *l. legalis monetæ Angl' ad recept' Scaccarii nost' ad usum nostr' per præfatos modo gardianos solut'*, demised the said Rectory to the said *Tho. Norton, &c.* now Wardens of the said Church, from the Feast of the Anunciation of our Lady then last past for the Term of 50 Years; and further found, that the said Wardens at the Time of the making of the said Lease for 50 Years, surrendred and yielded up the said Letters Patent of 27 *El.* to be cancelled, and then paid to the Officers of the Court of Chancery the Fees due for cancelling them, and making a *Vacat* of the Enrollment of them; and that they then were possessed of the Residue of the said Term of 21 Years, but no *Vacat* was made of the said Enrolment of the said Letters Patent; and that the Defendants and others being Wardens, had entred into the said Rectory by Force of this later Lease *præd' tempore quo*; and if the Entry of the said Defendants as Wardens was lawful or not, was the Question. And this Case was often argued at the Bar in sundry several Terms, and now this Term it was argued by Sir *Ed. Bromley*, Sir *James Altham*, and Sir *Geo. Snigge*, Barons of the Excheq. and Sir *Lau. Tanfield* Chief Baron: And in this Case 3 Points were resolved. First, That an actual Surrender was not necessary in this Case, because these Words, *modo habentes & ad præsens possidentes, &c.* prove, That at the Time of the Making of the said Letters Patent, the said Church-wardens had the said Term for Years in them; and therefore it expresly appears, that the King's Intention was not that they should make any (*a*) Surrender before the Patent, but that by Acceptance of the Letters Patent, they having the Term then in them, their Estate for Years should be surrendred, And where the Words are *sursum reddiderunt, & restituerunt, &c.* in the Preterperfect Tense, it is to be observed, That the Words are, *modo habentes & ad præsens possidentes sursum reddiderunt & restituerunt, &c.* which is true in Construction of Law: For in Judgment of Law the Surrender (*b*) precedes the new Lease; and in many Cases the Preterfect Tense is put for the Present Tense, as *Dedimus &* Con-

(*a*) Hob 204. 2 Rol Rep. 406. 1 Jones 26.

(*b*) 1 Jon. 26.

Concessimus, pro Damus & Concedimus, &c. To which Surrender in Law the King expresly agrees by these Words, *quam quidem sursum redditionem acceptamus*; and the King is not deceived thereby, nor prejudiced in Estate, Interest, Value or Remedy, and although the Lessees were a Corporation aggregate of many, and could not make an express Surrender (*a*) without Deed in Writing under their Seal; yet they might by Act in Law Surrender their Term without Writing, for (*b*) *fortior & potentior est dispositio legis quam hominis*, as in 37 *H. 6.* 16. If a Man has *interesse termini pro termino annorum* to begin at *Michaelmas*, he can't expresly Surrender this Interest; but if he takes a new Lease for Years, this Acceptance is a (*c*) Surrender in Law of the first Lease. So if a Prior with the Consent of his Covent makes a Lease for Years rendring Rent; if the Prior by Deed expresly releases the Rent and dies, the Successor shall recover the Arrearages: But if the Prior had ousted the Lessee and died, this Discharge in Law should discharge the Rent which incurred during the Ouster against the Successor, as it appears in 34 *H. 6.* 21.

And this Construction and no other stands with the Words and Intention of the said Letters Patent. But if (*d*) two Constructions may be made of the King's Grant, then the Rule is, when it may receive two Constructions, and by Force of one Construct. the Grant may according to the Rule of Law be adjudg'd good, and by another it shall by law be adjudged void: Then for the K.'s Honour, and for the Benefit of the Subject, such Construction shall be made, that the K.'s Charter shall take Effect, for 'twas not the K.'s Intent to make a void Grant; and therewith agrees Sir (*e*) *J. Molins*'s *Case in the 6th Part of my Reports.* ¶ 2. It was resolved, That the (*f*) Delivery made by the Wardens of the said Letters Patent in Chancery to be cancelled, &c. (which was Part of the Consideration) by their Hands without Writing, was sufficient, and as much as they ought to do; and it belongs to the Lord Chancellor or his Officers to have cancelled them, and every one ought to do what belongs to him to do. ¶ 3. It was resolved, (*g*) That it was not necessary to find the Payment of the said Twenty Pounds, which was one of the (*h*) Considerations of the Lease; for that is but a Sum of Money in the Personalty, and affirmed by the King to be paid and satisfied in Time before the Patent, and so a personal Consideration executed; and therewith expresly agrees 37 *H. 8. Br. Patents* 4.

Note, Reader, I have seen divers other Letters Patent made

(*a*) 11 Co. 79. a. Br. Tresp. 288. Br. Corp 47, 50, 51, 52, 96. 4 H. 7. 6. b. 16 H. 7. 2. b. 7 H. 7. 16. b. 26 H. 8. 8. b. B. Baily 1. 12 H. 7. 26. b.

(*b*) Co. Lit. 338. a. 6 Co. 64. a. 69. b. 8 Co. 152. a. 2 Rol. Rep. 315. Hutt. 18. 2 Sid. 59.

(*c*) Co. Lit 218. b. 338. a. 2 Rol. 496. 5 Co. 11. b. 54. b. Cr. El. 264. 522, 605, 873, 874. Ant. 52. b. 53. a. Poph. 8. 9. 2 Leon. 188. 3 Leon 247. 4 Leon. 30. Dall. 74. Moor 196, 358, 636, 637. 2 And. 52. 192. Dy. 46. pl. 9. 112. pl. 49, 140 pl. 43, 177. pl. 35, 200. pl 62, 280. pl. 13, 849. pl. 15. Perk. sect. 617. 14 H 8. 15. a. Br. Lease 14. 2 Rol. Rep. 171, 406. Lane 7. Lit. Rep. 273, 282. 6 Co 69. b. 37 H. 8. 18. a Plo. 107. b. 194. b Br. Surrender 14, 35. 2 Co. 17 b. 7 Co. 38. a. Ray 148. O. Benl. 57. Kel. 70. b. 21 H. 7. 5. a b. Br. Estopel 210. 1 Sid. 138.

(*d*) 11 Co. 11. a. 8 Co. 56. a. 167. a. 77. a. Kel. 175. a. 198. a. 3 Leon. 243. 2 Sid 141. 2 Rol. 200. Plo. 32. a. 126. a. 143. b. Hard 500. Fitz Grant 29. Br. Exemp. 9. 1 Co 49. a. 2 R. 3. 4. a. b.

(*e*) 2 Rol. 200. 6 Co. 6. a. 3. Bul. 6. 2 Inst. 497.

(*f*) 2 Rol. 199. (*g*) 2 Rol. 206. (*h*) Hob. 222. Plow. 455. a. 5 Co. 94. a.

made upon like Consideration, and having such Words, *modo habens & possidens*, and no actual Surrender was ever made in any of them. *Vide (a) Berwick's Case in the fifth Part of my Reports, f.* 93, 94. *Vide the Case of* Alton wood *in the first Part of my Reports*, betwixt which and the Case at Bar the Difference appears.

(a) 5 Co. 93. b. 1 Co. 43. b. Moor 393. 2 Rol. Rep. 173. Davis 40. Hob. 204. 3 Keb. 414. Style 189. Hard. 499. Lane 31.

The Case of the Marshalsea.

Mich. 10 Jacobi 1.

Jurisdiction.
1 Brownl. 199.
2 Brownl. 124
2 Inst. 462, 548.
4 Inst. 130.
1 Bulstr. 207.
Carthew 190
Skinner 445, 470, &c
Rep. Q. A. 105.

RIchard Hall brought an Action of Trespass of Assault, Battery, Wounding and False Imprisonment against *William Stanley*, *William Richardson*, and *Roger Cante*, That they 1 *Jan. anno* 7 *Jac. Regis*, did assault, beat, wound and imprison, and in Prison detain for the Space of three Months, *&c.* The Defendants as to all the Trespass, but the Assault and Imprisonment, and detaining of him in Prison, pleaded Not guilty, and as to the said Assault and Imprisonment, *&c.* the said *William Stanley* and *William Richardson* said, *Quod Curia Dom. Regis, vocat. Curia Marischalciæ Hospitii Dom. Regis, est antiqua Curia ipsius Dom. Regis & progenitorum suorum Regum Angliæ, & quod eadem Curia tenetur, & a tempore cujus contrar. memoria hominum non existit tenebatur, & teneri consuevit infra virgam, &c. coram seneschallo Curiæ Marischalciæ & Marischallo hospitii Dom. Regis pro tempore existen'*, and that the same Court from Time whereof, *&c.* had Jurisdiction to hold Pleas of Trespass, and Trespass on the Case, *infra Hospitium præd' & infra Virgam ejusdem Hospitii fact'*, and by all the said Time within the said Court there were *tam quidam Mariscall' Marischalciæ hospitii præd' quam quidam Officiarii (de le Baston)* of the Staff, *infra virgam hospitii dicti Dom. Regis, qui quidem Marischall', Marischalciæ hospitii præd' & Officiarii* of the Staff *pro tempore existen. sunt & per totum idem tempus fuerunt Officiarii & Ministri Cur. præd. & quod omnia brevia & præcepta ejusdem Cur. dirigenda sunt, & per totum tempus præd. direct. & dirigi usitat. fuerunt eidem Marischallo Marischalciæ, quod ipse idem Marischall' Marischalciæ per se, & præd. Officiarii* of the Staff, *& per ejus mandat. ore tenus fact'*,

fact', habent & a toto tempore supradict. habuer. & habere consuever' executionem & retorn. omnium & omnimodorum brevium, precept' & warrant. quorumcunq; a Curia præd. emanan. Marischallo Marischalciæ præd. direct' ; & iidem Williel', Williel', & Rogerus ulterius dicunt quod in Curia præd. habetur, & toto tempore supradicto habebatur talis consuetudo, viz. quod si aliqua persona existen. Def. in aliquo placito transgr. in eadem Curia penden. & in custodia Marischalli Mar. hospitii existen. fuit tradit. in ball', and prescrib'd to let the Defendant to Bail ; and that the said *Will. Richardson* before the Trespass, and yet is Marshal of the *Marshalsea* of the Housh. and the said *W. Standley* Offi. of the Staff, and that the said *Roger Cante* before the Trespass, *sc.* 21 *Jan.* 5 *Jac. Reg.* in the said Court of *Marshalsea* of the Houshold, before *Tho. Warre*, Esq; then Steward of the said Court, and *Tho. Vavasor*, Knt. then Marshal of the said Houshold at *Southwark* within the County of *Surry*, within the Verge, *&c.* exhibited a Bill against one *Thomas Ownstead* then in the Custody of the Marshal of the *Marshalsea* of the said Houshold, of a Plea of Trespass upon the Case, and declared, That the said *Tho.* was indebted to the said *Roger* in 80 *l.* for divers Sums of Money by the said *Tho.* to the said *Roger* due, and so being indebted the said *Tho.* 1 *Jan.* 5. *Jac. Reg.* at *Islington* within the Verge, promised to pay the said *Roger* the said 80 *l.* upon Request, which he had not done, *&c.* Whereupon the said *Tho.* was let to Bail, and the said *Rich. Hall* and one *Rich. Petty* became his Bail: To which Declaration the said *Thomas Ownstead* pleaded *Non assumpsit*, *&c.* which Issue was tried for the Pl', and Dam. and Costs assessed, whereupon the Pl' in the same Court had Judgment, and the Pl. upon that Judgm. sued forth a Precept in the Nature of a *Cap.* against the said *T. Ownstead* directed to the Marshal of the *Marshalsea* of the Housh', who returned *Non est inventus*; whereupon the then Pl. sued forth a Precept in the Nature of a *Cap'*, to take the Body of the said *T. Ownstead*, or of *Rich. Hall* and *Rich. Petty*, according to the Custom of the said Court, *ad satisficiend'*, *&c.* directed to the Marshal of the *Marshalsea* of the said Housh', by Force whereof the said Marshal of the *Marshalsea ore tenus* commanded the said *Will. Stanley* to execute the said Writ, by Virtue whereof he arrested *infra virgam*, *&c.* the Body of the said *Rich. Hall*, and delivered him to the said *William Richardson*, Marshal, *&c.* in Execution, *&c.* who detained him in the Prison of the *Marshalsea* at *Southwark infra virgam* in Execution, *&c.* The Plaintiff replied and said, *quod nec præd. Rogerus Cante in placito præd. querens nec prædict.* Thomas Ownstead *in placito prædicto Def. tempore exhibitionis billæ prædict', fuit servus seu servi dicti Domini Regis seu*

seu de hospitio suo præd. existen', &c. Upon which the Defendants did demur in Law. And this Case was often argued at the Bar, and two Points were moved. 1. Whether an Action upon the Case upon *Assumpsit* for Payment of a Debt being made within the Verge, be within the Jurisdiction of the Court of *Marshalsea*. 2. Admitting that it be not, Then if the Defendants having the Warrant of the said Court, shall be punished for a False Imprisonment, or not. And much was said by them who were of Counsel with the Court of *Marshalsea*; for the Antiquity, Honour and Jurisdiction of the Court of *Marshalsea*: For the Antiquity, that it is as ancient as any of the King's Courts, as appears in 4 *H. 6.* 8. *b.* and *Diversity of Courts*, Tit. *Marshalsea*; for the Honour, that *Fleta*, *lib.* 2. *cap.* 2. next after the High Court of Parliament, adds, *Habet & Curiam suam coram Seneschallo suo in Aula sua*, &c. and *Britton*, *cap.* 1. (which is in the Book, spoken in the Person of the K.) begins with the Court of *Marshalsea* before any other, in these Words, And that the Marshal of Our Houshold hold our Place within the Verge, &c. And We Will, That the Earl of *Norfolk* by himself or by another Knight, be attendant to Us and Our Steward, to do Our Commands, and the Attachments and Executions of Our Judgments and of Our Steward, through the Verge of Our Houshold; wherein 'twas also observed for the Honour of the Court, That the Judges hold the King's Place, and that a Man of such Dignity as the Earl of *Norfolk*, is attendant to the said Court; and they further said, That this Court was of so high Jurisdiction, that before the Statute of 5 *E.* 3. *cap.* 2. and 10 *E.* 3. *cap.* 2. no Writ of Error lay of any Judgment there given, but in Parliament: And by the same Statutes their Errors shall be examined and redressed in the King's Bench. And, as it appears by *Fleta*, This Court of antient Time, for the greater Honour thereof, was held *in Aula Regis*, within the Hall of the King's honourable Houshold.

6 Co. 20. b.

1 Bulstr. 208, 209, 210, 211, 212.
6 Co. 2. b. 21. a.
3 Keb. 335.
Cr. El. 502.
2 Inst. 547, 548.
F. N. B. 241. b.

The 1 Point.

And as to the Jurisdiction, they said, That before the Statute of *Articuli super Chartas*, *cap.* 3. the Court of *Marshalsea* had Jurisdiction within the Verge of Pleas of the Crown or criminal Causes, and of all common Pleas, real, personal and mixt, and that before the said Statute, the Steward and Marshal of the King's Houshold used to hold all the Pleas aforesaid within the Verge, altho' none of the Parties were of the King's Houshold, and now the said Act has restrained them to three Actions only, *sc.* Contracts, Covenants and Trespasses, and that in three distinct Manners, *sc.* In Contracts and Covenants, when both are of the Houshold. 2. In Trespass, when either Party is

6 Co. 20. b. 21. a.
F. N. B. 241. b.

is of the Houſhold. 3. Of other Treſpaſſes done within the Verge, when neither of the Parties is of the Houſhold, and that ſtands with the Words of the ſaid Act, *ſc. but only of Treſpaſs of the Houſhold, and of other Treſpaſſes done within the Verge, and the Contracts and Covenants which any of the King's Houſhold has made to another of the ſame Houſhold*; ſo that by expreſs Words they have Power not only of Treſpaſs of the Houſhold, but alſo of other Treſpaſſes within the Verge, and that the later Words, which any of the Houſhold, *&c.* have made to another of the ſame Houſhold, ſhall have Relation only to Contracts and Covenants, and not to the Clauſe concerning Treſpaſſes, for then theſe Words (And of other Treſpaſſes done within the Verge) are void; for it ſpeaks firſt of Treſpaſs of the Houſhold, and then if the later Clauſe ſhall have Relation to the Clauſe of Treſpaſs, the ſame Clauſe (And of other Treſpaſſes done within the Verge) will be void, *& gloſſa viperina eſt quæ corrodit viſcera textus.* And they ſtrongly relied upon an Act of Parliament made within two Years after the ſaid Act of 28 *E.* 1. *ſc. anno* (*a*) 30 *E.* 1. not printed, but remaining in the Treaſury, which is a good Expoſition of the ſaid former Act; by which it is enacted; That where before the Steward and Marſhal, the Court being many Times near the City of *London*, ſome Enqueſts are taken of Treſpaſſes, and other Things done within the ſaid City, betwixt ſome of the ſame City only, and betwixt them and Foreigners jointly, or betwixt Foreigners; and the Conuſance of which Treſpaſſes and other Things belongs to the Steward and Marſhal by Reaſon of the Verge, that all ſuch Enqueſts ſhall be taken within the City of *London*, and not elſewhere; upon which it was inferred, That of all Treſpaſſes done within the Verge betwixt what Perſons ſoever, the Conuſance belongs to the Steward and Marſhal of the Houſhold, which is an Expoſition by the High Court of Parliament, *&* (*b*) *contemporanea expoſitio eſt fortiſſima in lege*: So that as well before the Statute of 28 *E.* 1. as by the Words of the ſame Statute, and by the Act of 30 *E.* 1. the Steward and Marſhal of the Houſhold have Juriſdiction to determine all Pleas of Treſpaſs betwixt any Perſons whatſoever. And they cited alſo the Statutes of 5 *E.* 3. *cap.* 2. and 10 *E.* 3. *cap.* 3. by which it appears, That the Court has Juriſdiction not only of Treſpaſſes of the Houſhold, but alſo of other Treſpaſſes. And they held that this Word [Treſpaſs] ſhall be extended beneficially for the Juriſdiction of the ſaid Court, becauſe their antient Juriſdiction was ſo much reſtrained by the ſaid Act, and therefore they conceived, That all Actions, the Entry whereof is *in placito tranſgreſ. &c.* ſhall be within this Word [Treſpaſs.] And therefore

(*a*) 6 Co. 21. a.

(*b*) Cart. 20, 135. 2 Inſt. 11. 4 Inſt. 138.

fore Pleas of *Ejectione firmæ*, *Trespass quare clausum fregit*, of Goods taken away, Assault, Battery, Wounding, Trespass upon the Case, upon Trover and *Assumpsit*, and other Trespasses upon the Case, shall be taken within this Word [Trespass] and the Jurisdiction thereof belongs to the Steward and Marshal of the Houshold. Tho' none of the Parties are of the King's Houshold: And they concluded, That infinite Precedents might be shewed at all Times after the Making of the said Act of 28 *E.* 1. That they have held Pleas of Trespass, as well Trespass upon the Case, as other Trespasses within the Verge, altho' neither of the Parties was of the King's Houshold, *(a)* & *optimus legum interpres consuetudo.*

(*a*) 2 Co. 81. a. 2 Inst 18.

The 2 Point. Carter 19.

And as to the other Point, admitting the Court had not Jurisdiction of the Cause, yet the Proceeding in it (being a Court of Record) is not void, but voidable by Writ of Error. Also the Marshal of the *Marshalsea* of the Houshold, and the Officer of the Staff, are Officers and Ministers of the Court, and it would be against Reason to punish them for executing the Precept and Warrant of the Court, when if they had refused, the Court would have punished them for their Disobedience, and therefore the Rule is, *Quicunq; jussu judicis aliquid fecerit, non videtur dolo malo fecisse, quia parere necesse est*, and in 26 *E.* 3. 70. *b.* there it is taken for a Maxim, That the Thing which an Officer doth by Warrant or Command of a Court, can't be said against the Peace: And *Doct.* & *Stud.* 150. the King's Officers are bound to execute the King's Writs at their Peril: And they cited and strongly urged the Book in 7 *E.* 3. 23. *b.* and 24. *a.* where *Alice* brought an Action of Trespass against one *William*, of False Imprisonment: The Defendant said, That before the Imprisonment it was commanded in the *Marshalsea*, That if any Woman followed the Houshold of our Lord the King, she should be taken and imprisoned, and this *Alice* followed the Houshold of the King; wherefore *John Claydon* then Marshal commanded this *William*, who is Gaoler, to take her; wherefore he took her by his Commandment, and for such Cause, and we do not conceive that she can assign any Wrong in our Person, and there the Rule of the Book is, That *William* the Defendant did no Wrong, tho' he receiv'd her, whether the Cause were allowable or not; for he ought to be obedient to his Sovereign; but the Gaoler ought always to receive whosoever is sent to him by his Sovereign, be the Cause of the Taking allowable or not; and there issue was taken, whether the Defendant had the Plaintiff of the Delivery of the Marshal. So in the Case at Bar, the Officers of the Court are not to dispute their Authority, but ought to be obedient, and execute the Warrants and Commands of the Judges of the Court: And upon this Ground are the

Antea 76.

Books in 8 *E.* 3. 38. 17 *E.* 3. 66. 19 *E.* 3. *Quare non admisit* 7. *Plo. Com. Morgan's* Case 12, 13. 7 *H.* 4. 27. 11 *H.* 4. 35. 9 *H.* 6. 20. 2 *R.* 3. 10. 21 *H.* 7. 22. 14 *H.* 8. 16. *Vide temp. E.* 1. *Assise* 402. 32 *E.* 1. *ibid.* 378. 17 *E.* 2. *Ass.* 373. 19 *E.* 3. *Scire facias* 12. 31 *Ass.* 19. 10 *E.* 3. 47. 14 *H.* 4. 24. 21 *E.* 4. 66. 21 *H.* 6. 36. 21 *H.* 6. *Trespass* 50.

But upon solemn Argument at the Bench it was unanimously resolved, That Judgment should be given against the Defendants.

The Resolution to 1 Point.

And as to the first Point, it was divided into five Parts. 1. What Jurisdiction the Court of *Marshalsea* had at the Common Law before the Act of *Articuli super Chartas, anno* 28 *E.* 1. and therein the Extent of their Jurisdiction was considered; *sc.* 1. In what Actions the Court had Jurisdiction. 2. To what Place their Jurisdiction was circumscribed, and to what Persons their Jurisdiction extended.

2. The Reasons why the Common Law gave them, as Judges of the Court of *Marshalsea*, such particular and limited Jurisdiction.

3. Consideration was had of the Act of *Articuli super Chartas*, and therein three Points were discussed. 1. Why this Act was called *Articuli super Chartas.* 2. What Manner of Act it was, whether introductory of a new Law, or declaratory of the old. 3. The several Parts of the Act were considered.

4. The Authorities of Law in all Successions of Ages since the said Act.

5. The Nature of this Action upon the Case *sur Assumpsit.*

As to the first, it is to be known, That the Steward and Marshal of the King's Houshold had, before the said Act, two distinct Authorities; one, they had such general Authority in Effect as Justices in *Eyre* had, for they were the Vicegerents in Part of the Chief Justice of *England* within the Verge: Also the Steward and Marshal had another Authority, *sc.* to hold the Court of *Marshalsea*, the Title of which was, *Plac. Coronæ Aulæ Hospitii Dom' Regis coram Seneschallo & Marischallo.* By Force of their first Authority, they might hold all Manner of Pleas of the Crown, and of Common Pleas as well real and mixt, as personal, and that appears by divers antient Precepts of Summons which they used to direct to Sheriffs, &c. to cause to come before them all Pleas, &c. the Form of which was such; *Robertus filius Johannis miles, Seneschallus hospitii domini Regis Vic. S. salutem: Mandamus quod ven' fac' coram nobis tali die ubicunq; dom' Rex tunc fuerit in balliva tua omnes Assisas novæ*

6 Co. 21. a. Postea 73. a. 2 Inst. 549.

disseisinæ

disseisinæ, mortis antecessoris, ultimæ præsentat', magnas Assisas, & omnes juratas, inquisitiones & attinctas & omnia placit' de dote Unde mulieres nihil habent & quæ summ' sunt coram Justic' Regis ad primas Assisas cum in partes illas venerint, immo & omnes Assisas illas & placita illa, juratas, inquisitiones & attinctas illas quæ coram Justic' Regis ad Assisas capiendas in balliva vestra assignatis fuerint attaminatæ & non finitæ. Et partibus diem illum præfigatis qd' tunc sint ibi Assisas illas, & placita illa, juratas & inquisitiones & attinctas illas in eodem statu quo remanserunt coram præfat Justic' prosecut' si voluerint. Venire etiam fac' coram nob' dictis die & loco, omnes prisones & manucaptos de balliva vestra, & omnia attachiamenta quæ pertinent ad gaolam deliberandam. Fac' etiam proclamari & sciri per totam ballivam vestram quod omnes liberi & quatuor homines & præpositus de villatis quar' interfuerit quod tunc sint ad deliberationem prædictam. Et habeat' ibi Recognitores, nomina pleg', summ' & hoc breve.

Q. arrainatæ?

Q.

And that they had such general Authority, appears in *Fleta*, who wrote before the said Act of 28 *E.* 1. *lib.* 2. *cap.* 2. *Habet & Rex Curiam suam coram Seneschallo suo in Aula sua, qui jam tenet locum Capitalis Justiciarii Regis; de quo fit mentio in communi brevi de Hom' repl', qui proprias causas Regis terminari consuevit, & falsum judicium ad veritatem revocare & conquerentibus absque brevi justitiam exhibere; cujus vices gerit in parte idem Seneschallus hospitii Regis, cujus interest de omnibus actionibus contra pacem infra metas hospitii, &c. recenter illatis etiam sine brevi, &c. auditis queremoniis injuriarum in Aula regis audire & terminare, assumpt' sibi camerar', hostiar', vel Marischallo Aulæ, militibus, vel aliquibus eorum, si omnes interesse non possunt. Et cap.* 3. *Habet Seneschallus ex virtute officii sui prædictam potestatem procedendi ad utlagationes & bella injungendi, & omnia & singula faciend' quæ ad Justiciarios itinerantes, prout superius dictum est, pertinent faciend', hoc tantum excepto quod de libero tenemento intromittere non debet sine brevi.* And there it appears, That the Steward, &c. held this Court *in Aulâ Regis*; and what Authority Justices in *Eyre* had to hold Pleas of the Crown, and all common Pleas, real, mixt and personal, you may see in the *Mirror of Justices*, *cap.* 2. *sect.* 3. where it is said, The Kings do Right to all by their Justices Commissaries errants assigned to all Pleas. *Vide* the Statute of *Westm.* 2. *cap.* 11. *Bracton*, *lib.* 3. *cap.* 7. *fol.* 105, &c. and 115. *b. Britton cap.* 1. 6 *E.* 2. *Assise Bro.* 496. 4 *E.* 3. 41, 42. 6 *E.* 3. 55. 27 *Ass. plac.* 1. 15 *H.* 7. 5. *b.* And it is to be observed, That he, who is Prisoner to the King's Bench, is *in custodia Mareschalli Mareschalciæ Domini*

mini Regis; and he who is Prisoner to the *Marshalsea* of the Houshold, is *in custodia Maresc' Mareschalciæ hospitii dom' Regis.* And thereby also it appears, That the Steward, *&c.* *vices gerebat capitalis Justiciarii.* And therewith agrees *Britt. c.*1. who wrote in 5 *E.* 1. which was before the Stat. of *Articuli sup' Chartas*; and that the Marshal of our Houshold, hold our Place within the Verge of our Housh. and that his Office extends itself to hear and determine the Presentments and Articles of our Crown when we shall see it good. And note, That these Articles were those which Justices in Eyre charged the Jury to enquire of, as it appears in *Bracton, Lib.* 3. *Tract.* 2. *cap.* 1. *fol.* 116. And therewith agrees the *Mirror of Justices*, which Book was also wrote before the said Act of 28 *E.* 1. To the Offices of (those) the Chief Justices belong false *Judgm. and Errors, &c.* and so it belongs to their Office to hear and determine all Plaints made of personal Wrongs within twelve Miles round about the King, and the Gaol-delivery of Prisoners deliverable, and to determine as much as is to be determined by Justices Intinerants. And *Bracton* also, who likewise wrote before the said Act, *Lib.* 3. *de actionibus, cap.* 7. *fol.* 105. *Habet Rex plures Curias in quibus diversæ actiones terminantur, & illarum cur' habet unam propriam sicut Aulam Regiam, & Justiciar' Capitales qui proprias causas Regis terminant, & aliornm omnium, per querelam, vel per privilegium, vel per libertatem.*

As to the other Authority, the (*a*) Steward and Marshal are Judges of the *Marshalsea* of the King's Houshold, and this Court at the Common Law had a particular and limited Jurisdiction: 1. In respect of the Causes; for they as Judges of this Court had Jurisdiction only of Pleas of the Crown, and of (*b*) three particular common Pleas, *sc.* Pleas of *Debt, Covenant* and *Trespass vi & armis*, as of Battery, Goods taken away, but not of Trespass *Quare clausum fregit, Ejectione firmæ, Action on the Case, Detinue*, nor any other personal Action, nor of any real or mixt Action: 2. In respect of the Persons; for in (*c*) *Debt* and *Covenant* both the Parties ought to be of the King's Houshold, but in Trespass it was sufficient if one of the Parties was of the King's Houshold; and this also appears by *Fleta, lib.* 2. *cap.* 3. *Si autem de aliquo familiari Regis* (*i.* any of the King's Houshold) *fiat queremonia, primo summoneatur,* 2. *attachietur.* 3. *capiatur &c.* whereby it appears, That the Trespass ought to be *vi & armis*, and not upon the Case, otherwise a (*d*) *Capias* lay not at the Common Law; and also that it was sufficient if one of the Parties was of the King's Houshold. But forasmuch as the Steward and Marshal had at the Common Law these Authorities, the one general, and the other particular, and both Courts

(*a*) 6 Co. 12. a. F. N. B. 241. b. 19 E. 4. 8. b. 20 E. 4. 16. b. Cr. Jac. 314. 1 Bulstr. 210.

(*b*) 2 Inst. 548. Postea 74. b.

(*c*) 6 Co. 20. b.

(*d*) 3 Co. 12. a.

were then held *in Aula Regis*; and that they had the general Authority but at Will, and had a fixed Estate for their Lives in the other, they drew to their Court of the *Marshalsea*, by Colour of the said general Authority many Causes which did not by Law belong to the Jurisdiction of the said Court. 3. In respect of the Place to which their Jurisdiction was circumscribed; and that appears by *Fleta*, *lib.* 2. *cap.* 2. *Infra metas hospitii continentes* (a) 12. *leucas in circuitu*, and the *Mirror of Justices*, *ubi supra*. And this was the Law before the Statute of (b) 13 *R.* 2. *cap.* 3. but that limits the 12 Miles to be computed from the King's Lodgings. And the Steward and Marshal, being so restrained, invented divers Means and Devices to enlarge their Jurisdiction, and to encroach upon the Common Law; and therefore if in the Bond or Covenant, &c. Mention was made of Distress of the Steward or Marshal of the King's Houshold, or one of them, they would hold Plea thereof, altho' the Bond or Covenant was made out of the Verge: And also they used to take Conusance of Debts and other Things, where the Parties were not of the King's Houshold, and that appears by *Fleta*, *lib.* 2. *cap.* 3. *Tunc demum de obligationibus & contractibus, in quibus debitores ad districtionem Seneschalli & Mareschalli domini Regis sponte se obligaverunt.* Et paulo post, *Et Nota; quod in obligatione omni in qua sit mentio de districtione Seneschalli & Mareschalli hospitii Regis vel eorum alterius tantum, audit' sunt partes, & loquela terminata sine brevi ubicunque, se contraxerint infra virgatam vel extra coram sen' nisi loquela liber' tangat ten' ejus vel pertinent', Nec obstabit petenti exceptio de contractu facto extra virgatam, ut inter placita Petri de Chamnet anno regis regni Ed.* 18. *inter Henr' de Wotton petentem, & Ranulfum Foleschanks obligat' præfat' H. in necessariis pro victu & vestitu & hujusmodi ad valenc.* 20 *li. per an' suo perpetuo inveniend' pro quad' terra in D. & quadam balliva in S. & unde idem R. obligavit se in Lond' districtioni Sen' & Mar' Regis anno* 15, *Rege tunc existente in Vascon'. Cui exceptione de non infra virgatam non allocata, petiit judicium si de libero ten' vel ejus pertinen' debuit sine brevi Regis respondere, cum idem H. petiit certum redditum ad terminum vitæ suæ: Et quia voluit sic obligari, nec volenti & scienti fit injuria* *; *considerat' fuit per plures Justic' qui aderant, ex quo necessaria illa proveniebant tanquam de Camera & non de loco certo de quo potuit visus fieri, quod exceptio prædicta locum non haberet, & quod aliud diceret & responderet, vel pro indefenso & convicto haberetur.* Another Invention *ad ampliandum jurisdictionem suam* was, That altho' none of the Parties was of the King's Houshold, yet they would name them in the Declaration and Plea of the K.'s Houshold, and so

(a) 4 Co. 47. a. Postea 74. a. F. N. B. 241. b.
(b) 1 Bulstr. 209.

Nota.

* Note, The Proceedings here were by Consent, as being more expeditious, &c. than in other Courts; and in this Case had even the Judges Approbation.

so as they conceived, to estop the Party to contradict it. But to conclude this Point, it appears to you, good Reader, that to know what the Law was before the Act of 28 *E.* 1. how necessary the Authorities of the said ancient Books of the (*a*) *Mirror of Justices*, of *Bracton*, *Briton* and *Fleta* are to discuss this Point; and altho' perhaps one may know the Law upon the ancient Statutes, yet he will never know the true Reason of the Interpretation of 'em, unless he knows what the Law was before the Making of them; and therefore it is true, *Quod multa ignoramus quæ nobis non laterent si veterum lectio fuit nobis familiaris.*

(*a*) 8 Co. 35. a. Plow. 357. a.

As to the 2d Point, the ancient Stile of the Court of the *Marshalsea* was, (*b*) *Placita Coronæ Aulæ hospitii Dom' Reg' tenta coram,&c.* by which Words *Aulæ hospitii*, it is prov'd, that at least one of the Parties ought to be of the K.'s Houshold: For how can the Words be *Aulæ hospitii Dom' Reg'*, when none of the Parties is of the K.'s Housh.? And it was observ'd, that those who are of the K.'s Houshould are call'd *Aulici*, and that is the Reason that it is not necessary in Suits there before the Steward and Marshal, (*c*) to alledge that the Pl. or Def. was of the K.'s Houshold, for the Stile of the said Court, as appears afterwards by many Authorities, implies it. The 2d Reason is, because the Proceedings in the same Court is by Bill in respect of the Privilege of the Parties, and not by original; and the Court of K.'s Bench can't hold any Com. Plea by Bill without Privilege of the Court. The 3d Reason, That the Service and Attendance of the K.'s Servants were so requisite and necessary to the K. that the Pleas in the said Court should be rather discontinued by his removal out of the Verge, than he should lose the Attendance of his Servants: And if they might hold Pleas betw. meer Foreigners, what Reason could there be that the Pleas should be discontin. by the K.'s Removal? And why should the Judges of the K.'s Houshold decide Causes, when none of the Parties is of the K.'s Houshold? (*d*) *Jurisdictio est potestas de publico introducta cum necessitate jurisdicendi.* And that agrees well when the Parties are of the Housh. for the Necessity of the K.'s Service, but not when none of the Parties is of the same Housh. In *Mich.* 42 & 43 *El.* in the K.'s Bench, (*e*) *Hall* brought a Writ of Error against *Jones* of a Judgm. given in the Court of Pipowders of the Market in the City of *Gloucester*, for *Jones* Register to the Bish. of *Glouc.* because *Hall* had publish. slanderous Words of him, sc. *That Mr.* Jones *and his Clerks have by Colour of his Office extorted and gotten* 300 l. per annum, *by unlawful Means for many Years together, above their ordinary Fees, for proving of Testaments, and granting of Administrations*, and the Judgment was reversed for two Errors. 1. Because the said Words did not concern any Matter (*f*) touching the Market, and therefore the Court had no Jurisdiction of them; but

(*b*) 6 Co. 21. a. Antea 71. a. Doct. pl. 87. 2 Inst. 549.

(*c*) Doct. pl. 87. 247.

(*d*) 1 Bulst. 210.

(*e*) Moor 623, 624. 4 Inst. 272. Cro. El. 773. 1 Rol. 544. 2 Bulst. 21.

(*f*) 4 Inst. 272. Moor 624. Cro. El. 773. 1 Rol. 544. 2 Bulst. 21, 24. Cro. Jac 313. Moor 830, 831. Cro. Car. 45.

but if one slanders any one who trades in the Market, in any Thing which (a) concerns his Trade, there an Action lies well. 2. It appears in the Daclarat. that the Words were spoken (b) before the Market, and not in it: For as the Court had no (c) Jurisdict. but for Things concerning the Market, so it had no Jurisdict. for Matters concerning the Market, unless they were done in the Market. *Vide* 2 & 3 *P. & M.* (d) *Dy.* 132. *Vide Bract.* 334. (e) 13 *E.* 4. 8. *b.* 7 *H.* 6. 19. 13 *H.* 7. 19. *b. the Stat. of* 27 *H.* 6. *c.* 5. 17 *E.* 4. *c.* 2. & 1 *R.* 3. 6. *Pari ratione* it would be against Reason that Pleas should be held *coram Senesc' & maresc' hospit' Dom' Reg'* of a Thing which doth not concern any of the Houshold. The 4th Reason, *ex congruo*, it would not be seemly that any Carman or other mechanical Person should sue another in the same Court, and draw them *in Aulam Regis*, where the Court was originally held, for they have not *vestimenta aulica*; and therefore it is recorded by S. *Luke* the Ev. *c.* 7. *v.* 25. *Dixit ad turbam, quid exiistis videre hominem mollib' vestimentis indutum? Ecce qui in veste preciosa sunt & in deliciis agunt, in domib' regum sunt.* And the Com. Law regards Conveniency, and doth not allow *aliquid indecorum*, nor that which is done *contra bonos Mores*. 5. At the same Parliament, *scil. an'* (f) 28 *E.* 1. *c.* 5. it was enacted, that the Chancel. and Just. of his Bench should follow him, so that he might have at all Times near him some that be learned in the Law, which be able duly to order all such Matters as shall come to the Court at all Times when need shall require, and it appears by divers Records subsequent, That the Chancellor and the Judges after that Act had their Purveyors, &c. and that accordingly Purveyance was made for them, as appears in *Rot. Pat.* 10 *E.* 2. *parte* 2. *Memb.* 20. & 2 *E.* 3. *parte* 1. *Memb.* 33, &c. till 4 *E.* 3. at which Time the Court of K.'s B. became resident, and all the Pleas there being *coram Rege*: And by the Act of 4 *E.* 3. *c.* 3. it was prohibited, that no Purveyance should be taken great or small, but only that the Purveyors of the King, Queen and their Children, take not Corn, &c. But by the said Act of 28 *E.* 1. *c.* 5. the general Authority of the Steward vanish'd, inasmuch as having regard to the same, they were but the Vicegerents of the Ch. Just. when he himself was present, (g) *in præsentia majoris cessat potestas minoris*; and yet under Colour of their former general Authority, they encroached much upon the Com. Law. And it was observ'd, that the Court of *Marshals.* of the K.'s House never held any Pleas of the Crown after the Making that Act, because the Justices of the King's Bench were to follow the King, and therefore they have used to hear and determine Pleas of the Crown within the Verge by Force of a Commission of *Oyer* and *Terminer*, in Vacation-Time, for in (h) Term Time when the King's Bench sits in the same County, all Commissions cease. *Vide Katherine Wrote's Case in the fourth Part of my Reports, fol.* 47. *a.*

(a) 2 Inst. 272. 2 Bulst. 21.
(b) Moor 624. 4 Inst. 272. 2 Bulst. 21.
(c) Cro. El. 773.
(d) Dy. 132. pl. 80. Jenk. Cent. 211. 2 Bulst. 21, 23. Moor 830. 1 Rol. 544. Finch Ley 122 a. 4 Inst. 272. Kelw. 99. a.
(e) Fitz. Co. 3. Br. Error 171.
(f) Rastal Chancery 1. 2 Inst. 551.
2 Inst. 544
(g) 9 Co. 118 b. 2 Inst. 26, 16[illegible].
(h) 9 Co. 118. b. 121. a.

6. The Reason why this Court was limited to these 3 Actions, was, because one of the Houshold who lives on his Salary or Pension, has often occasion to borrow Money, and make Covenants with others of the same Housh. for Apparel and other Necessaries; and for Trespass *vi & arm'* as Battery, carrying away of Goods, &c. they have Jurisdict. for the Preservation of the Peace, as aforesaid. 7. The Reason why the Bounds of the *Marshalsea* are call'd the Verge, and that its Jurisdiction is confin d within the Verge is, because the Marshal *portat virgam (quæ signat pacem) coram Rege per spatium* (a) 12 *leucarum, &c. & de virga prædict' dicitur virgata*, and beyond that the Steward and Marshal never had Jurisdiction, and that appears in *Fleta, lib. 2. c. 4.*

As to the 3d Point, *sc.* The Considerat. touching the Act of (b) *Articuli super Chartas, c.3.* It was resolved, That *Articuli super Chartas*, is as much as to say, (c) *Explanationes super Chartas*; and the Charters here mention'd, are the Great Charter, and the Charter of the Forest, and so it appears by the Preamble, because the Points of the Great Charter of Liberties, and of the Forest, &c. and in *Pierce de Saltmarsh*'s Case, the Book saith, That *Herle* Ch. Just. in *6 E.3.33. b.* order'd the Explanations upon the Charters, *sc.* the 11th Chapter of *Champerty* to be read. By which it appears, that *Articuli* in this Case signifies *Explanationes*; and some say, *qd' dicuntur Articuli quia arctant ad obedientiam*: But then it will be ask'd in what Part of *Magna Charta* can one find any Thing concerning the Court of *Marshalsea*? To that it was answer'd, that the (d) 29 Chap. of *Mag' Char'* extends to it, for there it is enacted, *Qd' nullus liber homo capiatur, vel imprisonetur, aut disseisietur de liber' ten'to suo, vel de libertatibus, vel liber' consuetudinib' suis, aut utlagat' aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus nisi per legale (e) judic' parium suorum aut per legem terræ*; by which Act every Arrest or Imprisonm. and every Oppress. *contra legem terræ* is prohibited. Then, if any against the Law usurp any Jurisdict. and by Colour thereof arrest or imprison a Man, or in any manner by Colour of an usurped Authority oppress any Man (which is a manner of Destruction) against Law, he may be punished by that Statute: And because the Steward and Marshal of the Court of *Marshalsea* had encroach'd to 'em Jurisdiction in divers Causes which did not belong to them, and by Colour thereof awarded Precepts sometimes to arrest the Body of the Defendant, and sometimes by Colour of Execution to sell, &c. the Goods and Chattels of the Defendant against Law, which is an Oppression by Colour of Justice, and a manner of Destruction, for that Reason this third Chapter was enacted for Explanation of the said Great Charter, as to the Jurisdiction of the said Court of *Marshalsea*. So that this Act of *Articuli super Chartas*, is not introductory of

(a) 4 Co. 47. a. Antea 72. b. F. N. B. 241. b.

(b) 2 Inst. 547. 3 Inst. 134. 1 Bulst. 201, 209, 210, 211, 212. 2 Leon. 160. 4 Co. 46 a. 6 Co. 12. a. 20. b. Antea 71. a. 5 E. 4. 129. a. Br. Action sur le Stat. 38, 49. 10 H. 6. 13. a. Reg. 185. a. 191. b. F. N. B. 241. b. Rast. Ent. 433. a.

(c) 2 Inst. 538.

(d) 5 Co. 64. a. 11 Co. 99. a. 2 Bulst. 328. 1 And. 158. 1 Rol. Rep. 225. 4 Leon. 61. 2 Inst 45, 46.

(e) 2 Inst. 48.

a new Law, but an Explanation of the Great Charter, which was declarative of the ancient Com. Law. of *Eng*. But it appears also by this 3d Chapter, the Parts whereof are now to be consider'd. This Chapter concerning the Court of *Marshals.* is divided into two general Parts. *ss.* Into the Preamble, and the Body of the Act: In the Preamble 3 Things are propounded to be remedied by the Body of the Act; 1. Of the Estates of the Stewards and Marshals, *id est*, concerning the Jurisdict. by Force of their Offices in which they have Estates, *sc.* for their Lives within the Court of *Marshalsea*. 2. Of the Pleas which they ought to hold, by which it appears that this Chapter was declarative, for the Intent of this Chapter was to reduce the Court of *Marshalsea* to its true and lawful Institution, which this Word (*ought*) imports, and therefore this Act demonstrates what Pleas they ought to hold, which well agrees with the Title *Articuli super Chartas*, and with the Book of *(a) 6 E.* 3. the Explanations of the Charter, *i. e.* of the Com. Law. The 3. is, how they ought to hold the Pleas. The Body of the Act pursues the Parts of the Preamble; and first the whole Purview thereof extends only to the Court of *Marshalsea* of the K.'s House. As to the Pleas which they ought to hold, the Body of the Act has made a Declarat. of 3 Points: 1. Of the Causes. 2. Of the Persons. 3. Of the Place. For the Causes, the Purview of the Act is in the Negative, in part absolutely, and in part with an Exclusion. It is ordained from henceforth, That they hold not Plea of Freehold, and that is absolute; nor of Debt, nor of Covenant of the People, but that is with Exclusion, first to the Causes, (*b*) but only of Trespass of the Houshold and of other Trespass done within the Verge, and of Contracts and Covenants: So that these Words (*but only, &c.*) reduce, as to the Causes, the Jurisdict. of the Court to its original Institution, *sc.* to Actions of *Trespass, Debt and Covenant*, and all other Pleas are excluded. As to the Persons, If this Act had not made any Particular Declaration, as appears before, they ought to have had the Privilege of the House, *sc.* in Trespass, where both, or at least one be of the House; and in Case of Debt and Covenant, where both are of the House, and of that also this Chapt. has made an express Declarat. And the Exposit. in (*c*) *Michelborn's Case in the 6th Part of my Rep.* was affirm'd for Law: And *Vide* there an Act passed both Houses of Parl. *an'* 1 *R.* 2. *& vide inter petitiones Parliam' an'* 1 *E.* 3. *Lond'* 10. that there the Stew. and Marshal, after the said Act, did encroach to 'em to hold other Pleas than of *Trespass, Debt* and *Coven.* as to the Place, the Statute has restrained it to the Verge only; and because by Colour of certain Inventions of the Steward and Marshal *ad ampliandam Jurisdictionem suam* as to Pleas, Persons and Precinct, this Chapter has enacted, That from henceforth

(a) 6 Ed. 3. 33. b

(b) 6 Co. 20. a.

(c) Cro. El. 502. 6 Co. 20, 21. a. 2 Inst. 130. 1 Bulst. 208, 210, 213.

 the

the Steward hold not Plea of Debt or other Thing, but of the People of the Houshold, so that the voluntary (*a*) Conusance of Debts before the Stew. and Marshal by Foreigners, did not give the said Court Jurisdiction, but as an unjust Encroachment upon the Com. Law was ousted by this Act. It is also further enacted, That they shall hold no Plea by Bond made at the Distress of the Stew. or of the Marshal; by Colour of which, as appears before, they encroached to themselves Jurisdict. not only when the Parties had no Privilege, but also of Causes which did not belong to their Jurisdict. and those also done out of the Verge, as appears by that which *Fleta* has before reported, and who has well expressed the true Cause and Sense of the two last Branches, which of themselves were full of Obscurity. As to the third Part of the Preamble, *sc. How, &c.* the Body of the Act has three Branches: 1. That they shall implead no Plea of Trespass, except the Party was attached by them. 2. And they shall plead speedily from Day to Day, so that they may be pleaded and determined before that the King depart out of the Bounds of the same Verges where the Trespass was done. 3. And if so it chance, that they can't be determined within the Bounds of the same Verge, the Pleas shall (*b*) cease before the Steward, and the Matters be determined at the Com. Law. And it was observed, That altho' the (*c*) Steward and Marshal are both Judges, yet in this last Clause, as many in *Fleta*, the Steward is only named, because he was the Lawyer, and therefore had the Direction of the Court. And the Conclusion of the Body of the Act, as to these three Points, is, and if the Steward or the Marshal do any Thing against this Ordinance, it shall be held as void. And this Act was of so great Profit and Consequence, that by the Act of Parliament *anno* 18 *E.* 3. *cap.* 7. it is enacted and commanded to be put in Execution.

(*a*) F.N.B. 242. a.

(*b*) F.N.B. 241. b.

(*c*) Ant. 72. a. 6 Co. 12. a. F. N B 241. b. 19 E 4 8. b. 20 E. 4. 16 b. Cro. Jac. 3 4. 1 Bulstr. 210.

And as to Authorities in Law, they are copious, and of four several Natures. 1. The Year-Books. 2. Books written of the Laws of *England*. 3. Judgments in Parliament: And all these are *Thesauri aperti*. 4. Judicial Records and Precedents: And these are *Thesauri absconditi*. And for direct Authority in the Point in the Year-Books, *vide* (*d*) 6 *R.* 2. *Action sur lestatute pl. ult.* 3 *H.* 6. *Estoppel* 18. *Action sur lestatute* 13. 7 *H.* 8. 30. 10 *H.* 6. 13. *a.* 14 *H.* 6. 6. *b.* 5 *E.* 4. 129. *a.* 19 *E.* 4. 8. *b.* 20 *E.* 4. 16. *b.* 22 *E.* 4. 11. 22 *E.* 4. 16. 22 *E.* 4. 31. *b.* *Vide* 48 *E.* 3. 17. *b.* & *Register Original* 111. the Plaintiff shall never aver,* &c. that the one or other Party is of the Houshold *causa qua supra.* *Register Original* 185. *a. inter brevia de Statuto, Rex Seneschallo & Mareschallo hospitii sui salutem* (and recites the said Chapter of the Statute) & *etiam* ex

(*d*) Br. Action sur le Stat. 49. Post 77. a.

* Vide prox. pag.

ex gravi querela A. de B. accepimus, quod vos ad sectam R. ipsos ad respondendum coram vobis præfat' R. de quadam transgressione, &c. infra virgam nostram apud B. quanquam neuter eorum de eodem hospitio existat, &c. vobis mandamus quod si ita est, tunc placito illo coram vobis ulterius tenend' supersedeat' omnino ipsum B. contra formam ordinationis præd' non molestant' in aliquo, seu gravant'. Which Writ being form'd upon the said Stat. and presently after the Making of it, is a manifest Proof, that the Court of *Marshalsea* can't hold Plea in Trespass within the Verge, if none of the Parties are of the K.'s House. And it is to be observed, that where any Stat. prohibits any Thing, a Man may have a *Supersedeas* in the Nature of a *Prohibition* to any Judge who shall hold Plea against any Stat. and this appears in many Cases in the *Register inter brevia de Statuto.* It is likewise to be observed, That when any Stat. prohibits any Thing, &c. if any one impleads another, altho' it be in Course of a legal Proceeding, yet the Party grieved shall have an Action upon the Stat. against the Party who sues against the Stat. (*a*) altho' the Words of the Stat. do not give any Action to the Party, but that is a Consequent, and a Thing implied in every Thing prohibited by any Statute: And this appears by the said Book of (*b*) 7 *H.* 6. 30. *b.* 31. *a.* where the Party grieved had an (*c*) Action upon this very Stat. and 4 *E.* 4. 37. *a. b.* an Action upon the Stat. of (*d*) 2 *H.* 5. *c.* 7. for not delivering of the Libel. The *Tales sive novæ Narrationes*, *f.* 102. a Book cited and approved in 39 *H.* 6. *The Diversity of Courts* 102. *F. N. B.* 241. *b.* a Man shall have an Averment in an Action brought against him in the Court of the Steward and Marshal, That he was not of the K.'s Houshold at the Time of the Trespass or Contract made; or that the Plaintiff was not of the K.'s Houshold. *Vide* (*e*) *Stanford*, *lib.* 2. *c.* 5. And this Point is resolved by Parliament in (*f*) 15 *H.* 6. *cap.* 1. where it is recited, That the Steward and Marshal of the K.'s House and their Deputies, have held Pleas of Debt, Detinue and other personal Pleas betwixt People which were not of the same House, making Mention in their Records, that the Plaintiffs and Defendants were of the same House, and not allowing to the Parties Defendants their Challenges and Exception by them alledged, that themselves or the Plaintiff are not of the same House, against the Laws and Statutes in those Cases made and provided, That they shall not be estopped by such Record, &c. but the said Defendants shall have their Averment to say, That they or the Plaintiffs were not of the same Houshold, at the Time of such Plea or Suit commenced, the said Record or other Matter therein contained notwithstanding. By which Act the said Invention to increase their Jurisdicti-

(*a*) F. N. B. 160. b. 163. a. 165. b. 166. d. 241. c 242. a. Dalt. Sh. 121. a. 2 Bulstr. 209. Cro. Jac. 134, 361. 2 Inst. 55.

(*b*) 6 Co. 20. b. Br. Action sur le Stat. 13. Fitz. Bar. 17.

(*c*) Fitz. Action sur le Stat. 35. Br. Jurisdict. 97.

(*d*) 2 H. 5. cap. 3. 12 Co. 61, 13 Co. 42. 3 Bulstr. 5. 120. Reg. 58. a. Cr. Jac. 37, 388. Moor 756.

(*e*) Stanford Cor. lib. 2. c 5.

(*f*) 1 Bulstr. 209, 123. Rast. Marshalsea 7.

on was taken away, which was but a Declaration of the Com. Law, as appears by the said Book in 3 *H. 6. Estoppel* 18. & 10 *H. 6.* 13. *Vide* the said Acts of 30 *E.* 1. 1 *E.* 3. 1 *R.* 2. 5 *E.* 3. 10 *E.* 3. & 33 *H.* 8. *cap.* 12. And it was observ'd that every Act made concerning the *Marshalsea*, either restrains or explains their Jurisdiction, and no Act adds any Thing to it. As to judicial Records, it appears in *Pasch.* 38 *E.* 3. in the Treasury *coram Rege*, That Judgment given in the *Marshalsea* in an Action of Detinue, was reversed in the King's Bench, because they had no Power to hold Plea in such Action; and therefore in the said Statute of (*a*) 15 *H. 6.* in the Preamble, the Action of Detinue is ill recited.

In the *Book of Entries* 278 & 128. *Conusans* 7. & 32 *H.* 6. (*b*) *Purchase*'s Case cited in *Michelborn*'s Case, which see there to be adjudged in the Point.

As to the Nature of the Action, It was resolv'd, That as well the Com. Law, as the said Act of 28 *E.* 1. extended only to Trespass *simpliciter*, and not to Trespass *secundum quid*, *sc.* upon the Case; for these are not Actions of Trespass without Addition, no more than they can hold Plea in an Action of Trespass upon Trover, or Bailm. and Conversion, or the like, but only of Trespass *simpliciter*, *ss. vi & arm'* and also of such Trespass in which any Freehold can't come in Debate, as is aforesaid; and according to this Resolution it was adjudged in the K.'s Bench, *Hill.* 5 *Jac. Reg. Rot.* 876. in (*c*) *Jeremy Gray*'s Case. That Judgm. given in the Court of *Marshalsea* in an Action upon the Case upon Trover and Conversion was reversed, because the Statute did not extend to Trespass upon the Case; and therewith also agrees (*d*) the said Case of *Michelborn*. But altho' this Action of Assumpsit upon (*e*) general Consideration, *quod indebitatus existit*, be against the Law, as appears in *Slade*'s Case *in the fourth Part of my Reports*; yet if they had Jurisdiction of the Cause, their Proceeding therein was not void, but voidable by Writ of Error. But that shall be spoke to more at large in the second Point, which now follows.

2dly, It was resolved, That the Action well lies against the Defendants: And a Difference was taken when a Court has (*f*) Jurisdiction of the Cause, and proceeds *inverso ordine*, or erroneously, there the Party who sues, or the Officer or Minister of the Court who executes the Precept or Process of the Court, no Action lies against them. (*g*) But when the Court has not Jurisdiction of the Cause, there the whole proceeding is *coram non Judice*, and Actions will lie against 'em without any regard of the Precept or Process, and therefore the said Rule cited by the other Side, *sc.* (*h*) *Qui jussu judicis aliquod fecerit* (but when he has no Jurisdiction, *non*

(*a*) 15 H. 6. cap. 1
(*b*) 6 Co. 10. Cro. El. 502. 1 Bulst. 208 209.
(*c*) 1 Bulst. 207, 208. Godb. 284.
(*d*) 6 Co. 20. b. Cro. El. 502. 4 Inst. 130. 1 Bulst. 208, 210, 213.
(*e*) Postea 77. a Cro. Car. 6. 31. Hob. 5, 13. Yelverton 176. Cro. Jac. 207, 213, 214, 245, 397, 548, 642. Cro. El. 242. 1 Leon. 155, 156 Godb. 401. Hard. 132, 133. D ct. pl. 20. Palm. 171. 1 Bulst. 67. 3 Bulst. 207. Jenk Cent. 293. 1 Rol. Rep. 24, 379, 396. Moor 854. The Resolution as to the 2. Point.
(*f*) Plow. 13. a. 9 Co. 68. a. Raymond 129. 1 Mod. Rep. 173. Hard. 481. Cart. 19. 2 Bulst. 64. Cro. Car. 395. March 8.
(*g*) Hard. 478, 481. Godb. 387. Cart. 19. Cro. Jac. 314. 2 Bulst. 61. Lutw. 1560. 1561. Salk. 201, 202.
(*h*) Ant. 70. b.

non est judex) non videtur dolo malo fecisse, quia parere necesse est, was well allow'd, but it is not of Necessity to obey him who is not Judge of the Cause, no more than it is a meer Strang. For the Rule is, *Judicium a non suo judice datum nullius est momenti.* And that fully appears in our Books: And theref. in the Case betwixt *Bowser* and *Collins* in 22 *E*. 4. 33. *b*. there *Piggot* says, if the Court has not Power and Authority, then their proceeding is *coram non judice*: As if the Court of Com. Pleas holds Plea in an Appeal of Death, Robbery, or any other Appeal, and the Def. is attainted, it is *coram non judice, quod omnes concesserunt.* But if the Court of Com. Pleas in a Plea of Debt awards a (*a*) *Capias* against a Duke, Earl, *&c.* which by the Law doth not lie against 'em, and that appears in the Writ it self; and if the Sheriff arrests 'em by Force of the *Capias*, altho' the Writ be against Law, notwithstanding, inasmuch as the Court has Jurisdiction of the Cause, the Sheriff is excused: And therewith agrees 38 *H*. 8. *Dy*. 60. *b*. The same Law, If a Justice of Peace makes a Warrant to arrest one for (*b*) Felony who is not indicted although the (*c*) Justice errs in making the Warrant, yet he who makes the Arrest by Force of that Warrant, shall not be punished by Writ of false Imprisonment, because he is Judge of the Cause; and therewith (*d*) agrees 14 *H*. 8. 16. *a*. But if one be indicted before Justices of Peace and confesses the Felony, and has a Coroner, and becomes an Approver, and makes an Appeal, such Appeal before the K. was adjudged void, as appears in (*e*) 9 *H*. 4. 1. *b*. & (*f*) 2 *H*. 4. 19. *a*. *Vide* 44 *E*. 3. 44. *a*. *b*. and the Reason of that Case (as some suppose) is, beca. the Commission of Peace extends only *ad inquirendum*, (*sc.* to inquire before themselves) *audiendum & terminandum*; and so the Appeal of the Approver is out of (*g*) their Commission, because the Approver doth not make his Appeal before the Justices, but before the Coroner, and the Coroner Records it to the Court. But the Reason which is given in (*h*) 9 *H*. 4. 1. *b*. is, that the Justices of the Peace have no Power to assign him a Coroner, no more than they can enquire of Treason, as it is there also held, because it is not within their Commission. So where the (*i*) Sheriff, who is prescribed by the L. to hold his Turn within the Month after *Michaelmas*, *&c.* holds his Turn after the Month, and takes an Indictment of Robbery at the same Turn, and the Indictment is by *Certiorari* removed into the King's Bench, by the Advice of all the Justices the Party so indicted was discharged, because the Indictment was utterly void, and *coram non judice*, forasmuch as at that Time the Sheriff had not Authority to hold the Court. And it was said by the Justices, That if a Man has a Leet which has been held at a certain Day, if he holds it at another Day, that such Court so held is void, and without Warrant; and otherwise it is of a Court-

(*a*) 6 Co. 52. b. 54. a. 9 Co. 68. a. 2 Rol. Rep. 434, 493. Moor 767.

(*b*) Dy. 69. pl. 29.

(*c*) Cro. Car. 395, 602.

(*d*) Br. Faux Imprisonm. 8. Br. Peace 6.

(*e*) 3 Inst. 130. Fitz. Corone 77. Br. Appeal 28. Br. Corone 25.

(*f*) Fitz. Justice of Peace 5. Br. Peace 1. Br. Appeal 18.

(*g*) 3 Inst. 130. Ha. pl. Cor. 194.

(*h*) Supra.

(*i*) 31 E. 3. c. 15. Stam. Cor. 84. a. b. 6 H. 7. 2. a. Br. Indictment 27, 99. Br. Leet 17, 21. 38 H. 6. 7. a. Fitz. Tourn de Viscount 2, 6. Fitz. Inditement 14. Fitz. Leets Hundred 2.

Court-Baron. But if the Court of Common Pleas holds Plea in Debt, Trespass, *&c.* without an Original, it is not void, for they are Judges of those Pleas, and it can't be said that the Proceeding is *coram non judice*: And therewith agrees (*a*) 19 *E.* 4. 8. *b.* and therewith in the Point agrees the said Book in (*b*) 6 *R.* 2. That Judgment in the *Marshalsea*, when (*c*) none of the Parties is of the K.'s Houshold, may be avoided by Plea (*d*) without any Writ of Error, which proves that it is void. *Vide* 20 *E.* 4. 16. *b.* 22 *E.* 4. 13. 31. *&* 10 *H.* 6. 13. *a.* It is agreed in the Point also, That in Trespass before the Steward and Marshal, if none of the Parties be of the K.'s Houshold, there it is *coram non judice*, because they exceed their Power. The same Law, if they hold Plea out of the Verge, as it is held in *Plo. Com. Plat's* Case 37. *b.* and that agrees with the Rule, *Extra territorium jus dicendi non paretur impune. Vide* 22 *Ass.* 64. *Plo. Com.* 394. *b.* 37 *Ass. p.* 17, 39 *E.* 3. 33, 34. 39 *Ass. p.* 6. 7 *H.* 4. 27. 11 *H.* 4. 36. 36 *H.* 6. 32. 22 *E.* 4. 32. 1 *R.* 3. 1. 2 *R.* 3. 2. 5 *H.* 7. 17. *b.* 9 *H.* 7. 12. 21 *E.* 3. *Barre* 271. 3 *Mar.* (*e*) *Dy.* 135. And with this Difference all the Books were well reconciled. And as to the said Case of (*f*) 7 *E.* 3. 23. *b.* 24. *a.* by the Com. Law it belongs to the Office of the Marshal to protect the Court from Whores, as appears in *Fleta, lib.* 2. *c.* 5. (*g*) *Mareschalli interest virgatam a meretricibus omnibus protegere & deliberare, & habet Mareschal. ex consuetudine pro qualibet meretrice communi infra metas hospitii inventa* 4*d. primo die, quæ si iterum in balliva sua inveniat', capiatur, & cor' Seneschal' inhibeant' ei hospitia regis reg', & liberor' suor', ne iterum ingrediatur, & nomina ear' imbrevient', quæ si iterum inventæ fuerint hospit' secutrices, tunc aut remaneant inprisona in vinculis, aut sponte præd' hospit' abjurent, quæ si autem tertio inventæ fuerint, considerabitur quod amputetur eis tressoria & tondeantur, quæ quidem si quarto invenient', tunc amputentur eis superlabia, ne de cætero concupiscant ad libidinem.* This being the Law, it appears, that the Report of the said Book of 7 *E.* 3. is so obscure and imperfect, that much of the Substance of the Matter ought to be supplied by Intendment.

And the Chief Justice in the Conclusion of his Argument observed, That all the Cases in which before there was Diversity of Opinions betwixt this Court and the Court of K.'s Bench, are now unanimously resolved. 1. That the (*h*) general Declaration is an Action upon the Case *Qd' cum indebitat' fuit* in such a Sum, *sup' se assumpsit*, without shewing the Cause of the Debt, is insufficient. 2. That a (*i*) particular Declarat. in such Case shewing the Cause of the Debt, altho' it appears that the Pl. may have an Action of Debt, well lies, as it was resolved in *Slade's* Case. 3. That (*k*) for an *Assump'* of the Testator, *&c.* to pay a Debt or Duty, an Act upon the Case lies against the Executors, *&c.* as it was adjudged in

(*a*) 6 Co. 20. b.
(*b*) Br. Action sur le Stat. 49. Antea 75. a.
(*c*) F.N.B. 241.
(*d*) Contr. plac. 277.
(*e*) Dyer 135. pl. 14. 11 Co. 64. b. 2 Rol. Rep. 100.
(*f*) Antea 70. b.
(*g*) 3 Inst. 205.
(*h*) 2 Brownl. 138. 1 Roll. Rep. 24. 379, 396. 1 Bulstr. 67. 3 Bulstr. 207. Moor 667, 854. Antea 76. a. Cro. Car. 6, 31. Hob 5, 18. Cro. Jac. 207, 213, 214, 245, 297, 548, 642. Cro. Eliz. 242. 1 Leon. 155, 156. Godb. 41. Hard. 132, 133. Doct. pl. 20. Palm. 171. Jenk. Cent. 293. Yelv. 176.
(*i*) Cro. Car. 415, 527, 540. 1 Mod. Re. 163. 4 Co. 93. a. Yelv. 20. Cro. El. 756. Moor 433, 667. Dyer 21. pl. 125.
(*k*) 3 Co. 87. a. 93. b. Swinburn 327. 1 Leon. 165. Cro. El. 121, 454, 459. 1 Rol. Rep 924. Yelv. 20, 56. 195, 197. 2 Brownl. 136, 137. Cro. Jac. 273, 293, 294, 404, 237. 3 Bul. 235, 236. Godb. 154. Moor 691. Jenk. Cent. 29.

in *Pinchon's Case in the ninth Part of my Reports*, 4. This Case of the Juriſdiction of the *Marſhalſea* is now adjudged by both Courts, *ſc.* in the Caſe of the ſaid *Jeremy Gray* in the King's Bench, and in the Caſe at Bar in this Court; againſt which Judgments there is no Opinion in any of our Books, but as appears before, many concurring *in terminis* with them in all the Points now reſolved. So that our Succeſſors, as I believe, may take up the Saying of the Prince of Poets.

Haud unquam neq; concio nos neq; curia dictis
Audivit pugnare, animo ſed ſemper eodem
Et ſentire eadem, atq; eadem decernere vellet.

[*Quære, If the Court of the* Marſhalſea *(as to Civil Suits) was not the Original of the Court of B. R. for all Proceſſes here ſuppoſe a Treſpaſs*, &c. (i.e. *within the Verge) and therefore all Defendants here are ſaid to be* in Cuſtodia Mar' Mariſchalciæ, *&c.* i. e. *In Cuſtody of the Marſhal of the* Marſhalſea. *Note many Caſes before cited ſeem to warrant the Affirmative.*]

LEON-

LEONARD LOVIES's *Case*.

Pasch. 11 Jac. 1.

IN an *Ejectione firmæ* brought by *Robert Prowt* against *Roger Worthen*, on a Demise made to the Plaintiff by *Leonard Lovies*, Gent. 13 *Martii anno* 7 *Regis nunc*, of 8 Acres of Land in *Clawton* in the County of *Devon* for five Years, from the last Day of *June* then last past. The Defendant pleaded Not guilty, and thereupon the Jury gave a Special Verdict to this Effect; *Leonard Lovies*, Esq; was seized of the Manors of *Affaland* and *Heanton* in the Counties of *Devon* and *Cornwall*, and of the Manors of *Rillaton*, *Pengelly*, *Willesworthy* and *Trivesquite* in the County of *Cornwall*, in his Demesne as of Fee, and had Issue *Thomas* his eldest Son, *William Lovies*, *Humphrey Lovies* and *Richard Lovies*, (which *William* afterwards had Issue *Leonard* the Lessor of the Plaintiff, and the said *Leonard* the Grandfather, 27 *Septemb'* *anno* 12 *Regina Eliz.* by his Deed enfeoffed *Robert Prideux*, Esq; *Humphrey Specot*, Esq; and others, and their Heirs, to the Uses and Intents in certain Indentures tripartite of the same Date expressed and declared: That is to say, Of the Manors of *Rillaton*, *Pengelly* and *Willesworthy*, and of the Manor of *Affaland* to the Use of *Leonard Lovies* the Grandfather for his Life without Impeachm. of Waste; and afterwards to the Use of such Fermors or Ten'ts to whom he should demise any Part of the Premiss. for or during Life or Lives, and for any Term of Years, as in any such Demise or Demises should be limited and appointed, *&c.* and afterwards to the Use of the Performance

Testaments.
2 Brownl. 103.
Cro. Jac. 601.
2 Bulstr. 131.
Moor 772.
Fitzgib. 243.
Post. 87. b. &c.
Ibid.

formance of the Last Will and Testam. of the said *Leon.* the Grandfather, and to the Use of such Person and Persons severally to whom the said *Leon.* the Grandfather by his Last Will should devise any Estate or Estates of and in the said Manors last mentioned, or of any Part of them, according to true Intent and Meaning of his said Last Will; and after the Performance of his Last Will, to the Use of the said *William Lovies*, and the Heirs Males of his Body issuing; and for Default of such Issue, to the Use of *Humphrey Lovies* and the Heirs Males of his Body lawfully begotten; and afterwards to the Use of *Richard Lovies* and the Heirs Males of his Body lawfully issuing; and for Default of such Issue, to the Use of *Leonard* the Grandfather, and the Heirs Males of his Body upon the Body of *Ibot* his Wife begotten, and afterwards to the Use of the Heirs Females of the Body of the said *Leonard* the Grandfather; and for Default of such Issue, to the Use of the said *Leonard* the Grandfather, and his Heirs for ever: And of the Manor of *Heanton*, to the Use of the said *Leonard* the Grandfather for his Life, without Impeachment of Waste, and to the like Uses as aforesaid; saving that the said *Humphrey* is preferred as to this Manor before *William*, and then to *William*, with such Remainders over as is aforesaid: And of the said Manor of *Trivesquite* to the like Uses as aforesaid; saving that *Richard Lovies* is preferred to this Manor in Remainder to him and his Heirs Males of his Body before *William* and *Humphrey*, and afterwards to the same Uses as aforesaid. In which Indentures there was a Power of Revocation, *sc.* That if the said *Leonard* the Grandfather should be minded or disposed to alter, change, or make void the said Feoffment, *vel aliquem usum eorundem maneriorum, seu aliquem statum vel status qui accrescerent* (*Anglice*) should grow, or should be executed by Reason of any Use or Uses in any of the said Manors, *&c.* Or if the said *Leon.* the Grandfather should be minded or disposed to have again the said Manors, or any Part of them; or to give or dispose of the said Manors or any Part of them, in any other Manner than they before are limited; or to have again the said Manors, or any Part of them, to him and his Heirs, as in his former Estate; and thereupon *Leonard* the Grandfather, by his Writing sealed with his Seal and signed with his own Hand, should notify and signify his Will and Pleasure to the said *Roger* and *Humphrey*, *&c.* That then after such Notice and Signification in such Writing as aforesaid, such and so many of the said Manors whereof he should make such Notice or Signification in such Writing, should be intirely

intirely revoked and utterly void, and ſhould be to the Uſe of the ſaid *Leonard* and his Heirs; and that the ſaid Feoffees then ſhould be ſeized, *&c.* to the Uſe of the ſaid *Leonard* the Grandfather and his Heirs for ever, Leaſes in Form aforeſaid to be made, always excepted and reſerved. And afterwards, *ſc. 26 Aprilis anno* 14 *Eliz. Reginæ*, *Leonard Lovies* the Grandfather purchaſed to him and his Heirs of *George Digley*, Eſq; the ſaid 8 Acres, in which, *&c.* and afterwards, 16 *Martii anno* 18 *Eliz.* by his Writing ſealed with his Seal, and ſubſcribed with his own Hand, reciting his ſaid Power of Revocation ſignified by the ſaid Writing to the ſaid *Roger*, *Humphrey*, *&c.* did revoke and make void the ſaid Feoffment concerning only the ſaid Manors of *Rillaton*, *Pengelly* and *Willeſworthy*, and the ſaid Manor of *Affaland* (the Barton there only excepted.) And further declared and ſignified to them, That ſo much and no more of the ſaid Feoffment and Indentures which contained the ſaid Premiſſes (except before excepted) ſhould be utterly fruſtrate and void. And the ſaid *Leonard* the Grandfather ſo being ſeiſed of all the aforeſaid Premiſſes as the Law requires, 20 *Martii anno* 18 *Eliz. Reginæ*, made his Laſt Will in Writing, and deviſed the ſaid Acres in which, *&c. inter alia* to *Thomas Lovies* his eldeſt Son, by theſe Words following. *I deviſe to* Thomas Lovies *my eldeſt Son all my Manors*, &c. *within the County of* Cornwall, *wherein, or in the which I the ſaid* Rich. Lovies *have or had any Eſtate of Inheritance, the Lands by me ſold only excepted; and alſo all my Manors, Lands, Tenements, Rents, Reverſions, Services and Hereditaments with the Appurtenances, within the County of* Devon, *wherein or in which I have or had, (beſides the Lands by me ſold,) any Manor of Eſtate of Inheritance: Except, and always reſerved out of this preſent Gift, Grant, Will and Bequeſt, my Manor of* Triveſquite *within the ſaid County of* Cornwall, *and all the Meſſuages, Lands and Tenements in* Triveſquite *aforeſaid, within the Pariſh of St.* Mabin *in the ſaid County of* Cornwall, *and alſo the Patronage of the Rectory and Parſonage of St.* Mabin *aforeſaid in the ſaid County of* Cornwall; *and alſo except, and always reſerved out of this preſent, Gift, Grant and Bequeſt, as well the Barton only of my Manor of* Affaland *in the ſaid County of* Devon, *as all my Manor of* Heanton, *alias* Heighaunton, *with the Patronage of the Rectory and Parſonage of* Heanton, *alias* Heighaunton *aforeſaid, in the ſaid County of* Devon, *and my Tenement called* Tenakar *in the Pariſh of* Clawton *in the County of* Devon *aforeſ. To have, hold, occupy and enjoy the Premiſſes*

Premisses with the Appurtenances, except before excepted, to my said Son Thomas, *and the Heirs Males of his Body lawfully begotten, from and after my Death for and during the Term of* 500 *Years then next ensuing, fully to be compleat and ended. Upon this Condition, That my said Son allow all such Estates, Grants and Conveyances thereof already made, or at any Time to be made by me the said* Leon. Lovies, *of and in the said Manors, Messuages, Lands, Tenements, and other the Premisses, to him by this my Last Will given, granted and bequeathed, according to the true Meaning, Purport and Effect of the said Lease and Leases so made or to be made. Provided always, That if my said Son* Thomas, *or any the Issue Males of his Body lawfully begotten, alien, give or grant the same or any Part thereof to them by these Presents, given, granted and appointed, otherwise than to lease, demise or grant the same or any Part thereof, to any Person or Persons for Term of any Number of Years, as may and shall be determined upon the Deaths of any three Persons, or upon the Death of any less Number of Persons to be named within the said several Leases, Demises and Grants, and whereupon the old and most accustomed Rents and Services shall be yearly reserved, to have Continuance during the same several Leases: That then all the Premisses for Default of such Issue Males of the Body of the said* Thomas *lawfully begotten, or to be begotten, or so much thereof as shall be aliened, given, and granted otherwise than as aforesaid, by the said* Thomas, *or by the said Issue Males, immediately upon every or any such Alienation, Gift or Grant so made or to be made of the Premisses, or of any Part thereof, contrary to the true Meaning of these Presents, shall remain and come to my Son* William Lovies, *and to the Heirs Males of his Body lawfully begotten; and for Default of such Issue, or if the said* William *or any of his Issue Males of his Body lawfully begotten, make any Manner of Alienation, Gift or Grant, otherwise than my said Son* Thomas *, *or otherwise than they may lawfully do by Virtue of the Statute made in the* 32*d Year of the Reign of King* H. 8. *in that Case provided, or any of his said Issue Males may lawfully do by these Presents; Then all the said Premisses, for Default of such Issue, or so much thereof so alienated, given or granted by my said Son* William, *or by any of the Issue Males of his Body lawfully begotten, otherwise than as aforesaid, shall remain and come to my Son* Humphrey Lovies, *and to the Heirs Males of his Body lawfully begotten,* &c.

* Q.

And

And afterwards the said *Leonard Lovies* the Grandfather died seized of the said eight Acres of Land, in which, &c. and of other the Premisses seized *prout lex postulat*, and that the said eight Acres are held in Socage; and that the said Tenements devised by the said Will at the Time of the Death of the said *Leonard* the Grandfather, were of the yearly Value of 24 *l.* 14 *s.* 10 *d. per annum*, & *non ultra*; and that the Tenements whereof the said Feoffment was made, and not revoked at the Time of the Death of the said *Leonard* the Grandfather, were of the yearly Value of 55 *l.* 6 *s.* 8 *d.* And that the said Manor of *Trivesquite* only is held by Knight's Service *in Capite*, and that the said *Leonard* the Grandfather had not any other Lands, and that *Thomas Lovies* after the Death of the said *Leonard* the Grandfather entred into the said eight Acres, in which, &c. and died without Heir Male of his Body, having Issue *Julian* his Daughter, who took to Husband *Robert Doily*, Esq; who entred into the said eight Acres, in which, &c. And that the said *William Lovies* died, having Issue the said *Leonard Lovies* in the Writ and Declaration mentioned, who entred into the said eight Acres, in which, &c. upon the Possession of the said *Robert* and *Julian*, and demised to the Plaintiff the said eight Acres, in which, &c. as in the Declaration is alledged, who entred; upon whom the Defendant by the Commandment of the said *Robert Doily* and *Julian* his Wife, did enter and eject him. And if the Entry of the said *Leonard Lovies* the Lessor was lawful or not, was the Question, &c.

After that this Case (being of great Difficulty and Consequence) had been often argued at the Bar; for it began *Trin.* 8 *Jac. Regis*, *Rot.* 4251. This Term it was argued by the Justices, and it was concluded, That Judgment should be given against the Plaintiff, because the Entry of the said *Leonard Lovies* the Lessor was not lawful. And in this Case divers Points were moved and resolved by the Court; some upon the Statutes of (*a*) 32 & 34 *H.* 8. of Wills; and some at the Common Law. Upon the said Statutes, 1. If a Man be seised of three Acres of an equal yearly Value, one of them being held of the King by Knight's Service *in Capite*, and having Issue two Sons, gives the Acre so held, and one of the other Acres to his younger Son in Tail; by which he has so executed his Power, that he can't devise by his Will any Part of the third Acre; and afterwards he purchases other three Acres of equal annual Value held in Socage: Now he having the Reversion in Fee expectant on the Gift in Tail (made to his younger Son) and the three Acres newly purchased held in Socage, can devise but two Parts of the said Land newly purchased, in respect of the said Reversion: But against that two Objections

(*a*) 32 H. 8. c. 1. 34 H. 8. cap. 5. Rastal. Wills 2. 1 Rol. Rep. 65. 166, 418. 2 Rol. Rep. 335, 383, 404, 422. 1 Anders. 3, 4. 34, 47, 146, 147. Dyer 72. pl. 2. 85. pl. 88, 127. pl. 52, 143. pl. 53, 54, 150. pl. 86, 255. pl 7. 286. pl. 46, 308. pl. 74, 313. pl. 93, 329. pl. 16, 354. pl. 34. Benl. in Kelw. 209. 1 Brownl. 44. Cr. El. 100, 524, 525. 1 Leon. 113. 2 Leon. 305. 3 Leon. 79. 4 Leon. 35. Swinb. 28, 29, 30, 31. Benl. in Ash. 81. N. Benl. 61. pl. 106. 3 Co. 31. b. 33. b. Wentw. 10. Jenk. Cent. 215, 233. Plow. 68. b. 564. a. Br. N. C. 486. 3 Keb. 554. Co. Lit. 76. a. b. 78. a. 111. b. 99. a. Hob. 10. 122. 2 Brownl. 246. 1 Rol. 556. Raym. 112. Style 391. Godb. 394. 2 Keb. 66, 162. Moor 38. pl. 124. 177. pl. 313, 314, 254. pl. 401, 341, 342. pl. 463, 726. 727, 734, 837. Poph. 89, 90. Owen 155, 156. 1 Bulstr. 62. 3 Bulst. 184. 2 Co. 25. b. 4 Co. 4. a. 6 Co. 16. b. 76. a. b. 77. a. 8 Co. 84. a. b. 85. a. 163. b. 164. a. 165. b. 9 Co. 126. a. b. 133. b. 10 Co. 83. a. Cr. Jac. 157, 625. 1 Co. 25. b. Cr. Car. 34.

Objections were made. 1. That the Reversion depends upon the Estate which was given in Tail, according to the Power and Authority given him by the Acts of 32 & 34 *H.* 8. to the younger Son, upon which Wardship or *primer Seisin* is saved and given by the said Acts to the King; That the said Reversion depending upon the said Estate-tail shall not hinder the Devise of the other Lands held in Socage purchased afterwards, because the King is once satisfied for it; as if a Man makes a Feoffment of Lands, whereof Part is held by Knight's Service *in Capite*, to the Use of his elder Son and the Heirs Males of his Body, and afterwards to the Use of his younger Son in Tail or in Fee, and dies; if the King be once satisfied of the Wardsh. or *Primer (a) Seisin* after the Death of the Father, and afterwards the elder Son dies without Issue, he shall not have another *Primer Seisin* after the Death of the Elder, as it has been often resolved, for the said Statutes were satisfied with the first; so in the Case at Bar; the said Statutes once wrought upon the Gift in Tail of the Acre *in Capite*, and therefore the Reversion of the same Acre shall not restrain the Devise of the Lands held in Socage newly purchased. 2. The said Reversion is (*b*) fruitless, and not of any yearly Value, as long as the Estate-tail continues, and therefore is not within the said Acts, for they do not extend to such Hereditaments which are not of any yearly Value, as it is resolved in *Butler* and *Baker's Case*, *in the 3d Part of my Rep. fol.* 25. But it was resolved, That the said Rev'n (*c*) expectant upon the Estate-tail did restrain the Devise of the whole Socage Land newly purchased by the express Letter of the Act 34 *H.* 8. 5. *And further be it declared and enacted, That all and singular Person and Persons having a sole Estate*, &c. *in Fee-simple*, &c. *of or in any Manors, Lands, Tenements*, &c. *in Possession, Reversion or Remainder*, &c. *holden of the King by Knight's Service* in Capite: So that without Question the Devisor has an Estate in Reversion of the Lands so held, and by Consequence he can devise but two Parts of the Lands newly purchased. And as to the Case which has been put, that the younger Brother in Remainder, after the King has been once (*d*) satisfied by the elder Brother, shall not sue Livery; it was agreed for good Law, because in such Case the Words and Meaning of the Stat. is satisfied, and the younger Son claims by Purchase, and not as Heir to the elder Son, and therefore after his Death he can't be in Ward, or pay *Primer Seisin*. And therewith agrees 14 *Eliz. Dyer* 340. (*e*) and *Matt. Mene*'s Case *in the 9 Part of my Rep. f.* 133. a. b. And *Coke* Chief Justice said, That it was resolved in the K.'s Bench, *Hill.* 35 *Eliz. Reginæ in Clement Howard's Case*, That

(*a*) 2 Co. 93. b. Co. Lit 78. a. 8 Co. 165. a. Dy. 308. pl 74. a.

(*b*) Co Lit. 111. b.

(*c*) 11 Co. 23, 24. Cr. El. 350.

(*d*) Co. Lit. 78. a Dy. 308. pl. 74.

(*e*) Dyer 308. pl. 74.

That if a (*a*) Man seised of Lands in Fee, Part of which is held of the King by Knight's Service *in Capite*, conveys two Parts of them to any of his Sons, or to the Use of his Wife for Life, or in Tail, in such Case he may by his Will devise the Reversion of the two Parts, altho' the Statute be in the Disjunctive, by Act executed, or by his Will, yet the Intent of the Act was, that he should have Power to dispose two Parts (*b*) entirely as to all Estates, and to leave only the 3d Part to descend, and that appears by the Words of the Stat. of (*c*) 34 *H*. 8. *sc. to give, dispose, will or assign by his Will, or act executed, by himself solely*, &c. *or by all these ways or any of them*; which is as much as to say, either by Will, or by Act executed, &c. or by 'em both, and as to the said Words of the Statute *in Possession, Reversion or Remainder*. It was resolved, Where the said *Leonard Lovies* had a Remainder in Tail expectant upon the Estates in Tail limited to his Sons, that (*d*) such Remainder was not within the said Act, and therefore if *A*. be seised of Lands held in Socage, and *B*. seised of Lands in Fee held by Knight's Service *in Capite*, makes a Lease for Life, or a Gift in Tail to *C*. the Remainder to *A*. in Tail, or in Fee; *A*. by his Will devises all his Land held in Socage, and dies, living the Lessee for Life, or during the Gift in Tail, the Devise is good for all the Lands held in Socage, for such Remainder is not within the Intendment of the Statute, but only such Remainder which may draw Wardship and Marriage by the Common Law. As if a Man makes a Lease for Life or for Years, and afterwards grants the (*e*) Reversion for Life or in Tail, the Remainder in Fee, and afterwards the Grantee for Life dies, or the Donee in Tail dies without Issue, such Remainder which is now in Point of (*f*) Reversion, is within the Statute, for it will by the Common Law draw in such Case Wardship and Marriage, &c. And that it ought to be a Remainder of such Nature, appears by the Words of the said Act it self next following, *Or if any Rents or Services incident to any Reversion or Remainder*; for no Rent or Service can be incident to any Remainder but of such Nature.

As to the 2d Object. it was resolved, That there was a Difference betwixt (*g*) Hereditaments which of their Nature are not of any annual Value, as *bona & catalla Felon' & Fugitivor'* Waif, Stray, & *similia*. *Vide* for that in *Butler* and *Baker*'s Case, *f*. 32. *b*. and the notable Opinion of *Prisot*, Ch. Just. in this Court, in 32 *H*. 6. 22. *a*. upon the Stat. of (*h*) 1 *H*. 4. *c*. 6. and Things which of their Nature are of an annual Value, but in respect of a Gift or Lease, *absque aliquo inde reddendo*, they are not of any present Value,

(*a*) Co. Lit. 111. b.
(*b*) Co. Lit. 111. b.
(*c*) 34 H. 8. c. 5.
(*d*) Moor 837.
(*e*) Co. Lit. 111. b.
(*f*) Raym. 41. Co. Lit. 111. b.
(*g*) Co. Lit. 111. b. Postea 82. a.
(*h*) Rast. Pat. 4. Co. Lit. 133. a.

as in the Case at Bar, altho' the Reversion *in præsenti* is not of any annual Value, yet the Land it self is of an annual Value, and therefore such Reversion is devisable, as it was resolved by *Popham* and *Anderson* Chief Justices in the Court of Wards, *Trin.* 34 *El. in* Bedingfield's *Case*; where the Case was, That *Edm. Bedingfield* of *Oxborough* in the County of *Norfolk* Esq; was seised of 6 Manors in the Counties of *Norfolk* and *Suffolk*, *s.* of one in his Demesn as of Fee, and of the others in Tail, with the Reversion expectant to him and his Heirs, and had Issue *Thomas Bedingfield*; divers of which Manors were held of the Q. by Knight's Service *in Capite*, and every one of 'em of equal annual Value; the said *Edmund* by his last Will in Writing devised all the said Manors to divers Persons and their Heirs, upon Trust and Confidence for Payment of his Debts, and Advancement of his Children, and died; and the Estate in Tail, which descended to his Issue, was more than the third Part of the Whole: Now the Question was, If the said Devise should be void for a third Part of the Manor in Possession, and a 3d Part of the Reversions in Fee; or if it should be good for the whole Manor in Possession, and for the entire Reversions, or if it should be good for the whole Manor in Possess. and 2 Parts of the Reversions; and those Doubts arose upon two Branches of the said Statute of 34 *H.* 8. the first is in these Words, *All and singular Person and Persons having a sole Estate in Fee-simple in Possession, Reversion or Remainder, holden of the King by Knight's Service in Chief, shall have full Power*, &c. *to dispose two Parts:* By which Clause it seems the Devise should be void for the third Part of the Manor in Possession, for the Devisor had a sole Estate of the Reversion in Fee held by Knight's Service *in Capite.* The second Clause is, *And that the King shall have*, &c. *for his third Part*, &c. *such Manors as shall descend as well in Tail as Fee-simple; and that the Will of every such Devisor of and for the two Parts of the said Manors residue, shall stand good, albeit the Will be made of all his Fee-simple Lands.* By which Branch it seems clearly, That if the Devisor had not any Reversion in Fee but only the said Estate-Tail, that the Devise should be good for all the Manor in Possession, but the having the Reversion upon the Consideration of the said former Clause, made the Quest.: And it was *quæstio tortuosa & difficultatis plena.* In which Case it was first resolved by the two Chief Justices, That a Reversion in Fee expectant on an Estate-Tail seck and fruitless, was within the said Act, for the Cause and Reason aforesaid.

11 Co. 24. a.

2. It was resolved, That the said Devise should be good for two Parts of the Reversions, and for the whole Manor in Posses-

Co. Lit. 111. b.

Possession, and that by the Meaning of the Makers of the Act upon both Branches, to the End the Debts of the Devisor should be paid, and his last Will performed, which was one of the principal Motives of making the said Act; and *sic determinata fuit spinosa illa quæstio. Vide* (*a*) 14 *Eliz. Dyer* 308. The Lord *Paget* being the Queen's Tenant by Knight's Service *in Capite*, levied a Fine to the Use of himself for Life, and afterwards to the Use of his elder Son in Tail, and afterwards to the Use of his younger Son in Tail, and afterwards to the Use of the right Heirs of the said Lord *Paget*, and died; the elder Son of full Age sued Livery, and paid the Value of the third Part of the Land in Possession, and the Moiety of the Reversion in Fee, according to the usual Rate: Which proves, That the Acts of (*b*) 32 & 34 *H.* 8. being in the Affirmative, and which give the King Benefit in respect of the Possession, take not away such Benefit which the Common Law gave the King for the Reversion of the same Land.

(*a*) Dyer 308. pl. 74. Co. Lit. 78. a. 2 Co. 94. a.

(*b*) 32 H. 8. cap. 1. 34 H. 8. cap. 5.

It was also resolved, That altho' (*c*) Hereditaments which of their Nature are not of any annual Value can't be devised, yet if they be held *in Capite*, they shall restrain the Devise of Manors, Lands, &c. and shall make them void for a 3d Part, for the Hereditament held by Knight's Service *in Capite*, need not be deviseable. And the Chief Justice in his Argument for the more Perspicuity, divided the said intricate and prolix Acts into several Branches: The first Branch out of the said Act of 34 *H.* 8. which has been mentioned before, *All and singular Person and Persons having a sole Estate in Fee-simple*, &c. *of and in any Manors*, The 2d, *Holden of the King by Knight's Service in Chief.* The 3d is out of the Act of 32 *H.* 8. *Saving*, &c. *to the King the Custody, Wardship, or* Primer Seisin, *the clear yearly Value of the third Part of the same Manors, Lands*, &c. The fourth Clause is out of the Statute of 34 *H.* 8. *May give, dispose, will or assign two Parts of the same Manors*, &c. The fifth Clause is out of the Act of 34 *H.* 8. *That the King shall take for his full third Part*, &c. *such Manors, Lands*, &c. *as shall descend as well of Inheritance in Fee-Tail as Fee-simple.* And out of these several Branches 6 Times were observ'd; for (*d*) *Judicis officium est, ut res, ita tempora rerum Quærere, quæsito tempo' tutus eris*, and *omnia tempus habent & habet sua tempora tempus.* The first Time is *tempus habendi, every Person having*, &c. The second Time is *tempus tenendi, holden of the K.* &c. The 3d Time is *tempus disponendi, may give, dispose*, &c. and it is to be known that by such Dispo-

(*c*) Co. Lit. 111. b. 3 Co. 32. b. Antea 81. a.

(*d*) 10 Co. 127. b. Co. Lit. 171. a 3 Bulst. 170.

fition there is a Vefting either in the Subject or the King; in the Subject, either by Act executed by the Com. Law. in the Life of the King's Tenant, or by laft Will, which vefts only by Force of thefe Acts; in the King, only by the Death of his Tenant, for then Wardfhip or *Primer Seifin* vefts in him. The fourth Time is *tempus appretiandi feu æftimandi, the clear yearly Value*, &c. The fifth Time is *tempus providendi, plenam tertiam partem*, to defcend in Fee or in Tail, *a full third Part*, &c. *to defcend or come by defcent, as well of Eftates of Inheritance in Fee-Tail as in Fee-fimple.* The fixth Time is by Conftruction on all the Parts, *s. tempus continuandi, feu tempus continuum.*

And it was held, That the faid three former Times ought to concur, *fc.* the Time of *having*, the Time of *holding*, and the Time of *difpofing* ought to concur together; and therefore if a Man be feifed of an Acre of Land in Fee held of the King by Knight's Service *in Capite*, and of other two Acres in Fee held in Socage, and the Tenant enfeoffs his younger Son of the Acre held in Chief, and of one of the other Acres, To have to him and his Heirs; and afterwards he purchafes Lands held in Socage, that in this Cafe he may devife all the Lands newly purchafed held in Socage, and that for three Reafons. 1. Becaufe he had no Lands held by Knight Service *in Capite* at the Time of the Devife, for the faid Acts have made a Marriage or Conjunction of the Lands which the King's Tenant had in Socage, with the Lands which he held of the King by Knight's Service *in Capite*; for the Words of both the Acts are, *Every Perfon*, &c. *having Manors, Lands*, &c. *may give, difpofe*, &c. *two Parts of the fame Manors, Lands*, &c. And the Saving in the faid Act of 32 *H.* 8. is *Saving a full third Part*, &c. *of the fame Manors, Lands*, &c. fo that when the Tenant has conveyed the Lands held *in Capite* to his younger Son, now when he makes his Will of the Lands newly purchafed, he has no Lands held of the King *in Capite* at the Time of the Devife, and the Statutes reftrain only the Lands in Socage, which he had at the Time of the *Having* of the Lands held *in Capite*. 2. The faid Acts give him *full Power and Authority to give, difpofe, will or affign two Parts for the Advancement of his Wife, Preferment of his Children, or Payment of his Debts:* So that when the Stat. has given him Power to convey two Parts (whereof the Land held by Knight Service *in Capite* is Part) the Intention of the Makers of the Acts never was to prefume him, who has according to the

11 Co. 24. a.
Co. Lit. 11. b.

the Acts conveyed the Land, to have the same Land for any Intent or Purpose; and as it is resolved in *Might's Case in the 8th Part of my Reports, Trin. 7 Jac. fol.* 194. Land which is conveyed to one of the said three Ends can't be said (*a*) covinous, because it is warranted by the Act. 3. The great Benefit which the King has by these Statutes was observed, for the King's Tenant *in Capite* before these Statutes might have so conveyed the Land to any of the said three Uses, that the K. should never have (*b*) Wardship nor *Primer Seisin*, as appears in Sir *Geo. Curson's Case in the sixth Part of my Reports, f.* 75. *b.* And therefore it would not be reasonable to interpret the Statute in Prejudice of the Subject against the express Letter, *s.* by Saving a 3d Part of the same Lands which the King's Tenant then had, to extend it beyond the Words to Lands held in Socage, which he purchased after he had conveyed over the Land *in Capite.* But the greater Question was, That if *Leon. Lovies* the Grandfather had conveyed (as was admitted) the Land held by Knight's Service *in Capite* to *Wm. Lovies* his 2d Son in Fee, &c. with Power of Revocation; so that he had Power over the Land, and might dispose of it, if that should restrain the Power of *Leon. Lovies* to Devise all the Land in Socage newly purchased. But the Chief Justice held it all one for the Reasons and Causes aforesaid; and *eo potius*, because the Statutes gave him Power to give, dispose, &c. two Parts, &c. at his Will and Pleasure; so insomuch as his Will and Pleasure appears to convey the Land to *William*, as is aforesaid, with Power of Revocation, he thereby pursues the Power which the Statutes give him, *quod Nichols* Just. *concessit.* And as these Statutes have been put in Ure according to the express Purview, altho' Damage has accrued to the Subject, as in *Vincent*'s Case briefly vouched by the Lord *Dyer*, 22 *El.* 367. Is was resolved, That (*c*) if the King's Tenant by Knight's Service *in Capite* conveys the Lands to the Use of his Wife and her Heirs, or to the Use of his youngest Son and his Heirs, and dies, his eldest Son within Age, that altho' the Eldest Son be disinherited, yet *afflictio addetur afflicto*, he shall be in Ward to the King, altho' he has nothing by Descent, by the express Purview of the Statute: So no Interpretation shall be made for the Benefit of the King against the express Purview; and therewith agrees *Wray* Ch. Just. in *Butler* and *Baker*'s Case 31. *b.* And therefore if a Woman the K.'s Tenant *in Capite* has Issue a (*d*) Bastard Daught. and conveys the Lands to her (*e*) Bast. Daught. and dies, the K. shall not have Wardship; for if it be within the Statute of 32 *H.* 8. it ought to be a Child in Law and Truth, and not in Reputation

(*a*) 1 Co. 163. b. 164. a
Co. Lit 78. a.
2 Inst. 110.

(*b*) Co. Lit. 78.
6 Co. 76. a
8 Co. 164 b.
2 Inst. 110, 111, 112.

(*c*) Co. Lit. 78. b.
Cr. Jac. 157.
Dy. 367. pl. 42.
Br. N C. 394.

(*d*) Co. Lit. 78. a.
6 Co. 77. a.

(*e*) Co Lit. 3. b. 123. a.
Jenk Cent 239.
Cr El. 358, 509.
Poph. 188.
Goldb 191.
Moor 43.
Noy 35.
2 Rol. 4 . 44.
1 Ander. 79.

(a) Dy. 345. pl. 4. Co. Lit. 78. 6 Co. 77. a.
(b) Dy. 296. pl. 23.
(c) 2 Rol. Rep. 127. Hob. 308. Goldsb. 93. Godb. 315. Cr. Jac. 608. 1 Jones 2, 3. 4 Leonard 159, 160. 11 Co. 13. a.
(d) Dy. 368. pl. 47. 4 Co. 106. b. 108. a. 4 Leon. 156 &c. Jenk. Cen. 245. 1 Rol. Rep. 417. Hugh's Abr. 1717. 11 Co. 13. a.
(e) Palm. 214. Co. Lit. 78. a.

Reputation, as it is resolved in *Thornton's* Case *M.* 17 & 18 *El. Dy.* (a) 345. *Vide* 12 *El.* (b) *Dy.* 296. and yet a Chantry in (c) Reputation was adjudged within the Act of 1 *E.* 6. *c.* 14. 22 *El. Dy.* (d) 368. *in the Dean of* Paul's *Case.* And the Chief Justice said, That it was resolved in the Court of Wards, *Trin.* 25 *El.* That Where Sir *Nicholas* (e) *Strange* Knight was the King's Tenant of the Manor of *Hunstanton*, and of divers Manors, Lands and Tenements held in *Capite* in the County of *Norfolk*, and *Hamond Strange* his eldest Son and Heir apparent purchased the said Manors, Lands and Tenements of him *bona fide* for Money, and the said Sir *Nicholas* died, the said *Hamond* of full Age, and this Matter was found by Office; and it was resolved by *Wray* and *Anderson* Chief Justices, That he should not pay *Primer Seisin*, for the Words of the said Statutes are *give* (which implies to be done *ex mera liberalitate & voluntate: Vide Bracton, lib.* 2. *c.* 5. *f.* 11.) and altho' the Words are, *dispose and assign*, yet the Conclusion is for the Preferment of his Children, &c. and Purchase can't be called Preferment, for every Preferment ought to be also *ex mera liberalitate & spontanea voluntate*; and accordingly it was resolved (as then it was said) in *Porrige's Case in an.* 12 *El.* And *Randal's* Case in 4 & 5 *P. & M. Dyer* 158. was cited by every one of the Justices in the Argument of this Case. (f) A Man seised in Fee of Land of Socage Tenure assures it to the Use of his Wife for her Jointure *in ann.* 32 *H.* 8. and afterwards *in ann.* 2 *E.* 6. he purchases Lands held by Knights Service *in Capite*, and of two Parts thereof makes his Will and dies, his Heir within Age, and if the Queen should have any of the Socage Land to make a full third Part of the Whole, was the Question: And resolved she should not, for the Words of the Act of 34 *H.* 8. of Explanation are, *and having no Lands holden by Knights Service*, which proves, that the Time of *having*, *holding in Capite* by Knights Service, and of *disposing*, ought to concur. And a (g) Difference was taken and agreed between a Disposition by act executed in the Life of the Devisor, and by his last Will in Writing: And therefore if a Man seised of Lands held in Socage of the yearly Value of twenty Pounds *per annum*, and has no Lands held *in Capite* by Knights Service, and makes his Will in Writing, and thereby devises the Socage Land to another in Fee, and afterwards he purchases Lands held by Knights Service *in Capite*, of the yearly Value of twenty Shillings, and dies, this Devise shall not be good for all the Socage Lands, for nothing is disposed or transferred over by the Will, till the Death of the Devisor, and there was an Union of the Land held *in Capite*, and of the Land of Socage Tenure, so that the Time of

(f) Dyer 158. pl. 33. 3 Co. 30. b. 6 Co. 76. a. 2 Brownl. 105.

(g) Co. Lit. 78. a.

having

having, holding and disposing concur'd; and therewith agrees the Opinion in *Butler* and *Baker*'s Case. So, and for the same Reason it is there held, That if a (*a*) Man be seised of Lands held by Knights Service *in Capite*, and of Lands held in Socage, and by his Will in Writing devises all the said Lands, and afterwards aliens the Lands held *in Capite*, that this Devise is good for all the Land in Socage; and many other Cases to the like Effect put in *Butler* and *Baker*'s Case which you may see there. And where the Stat. of 34 *H.* 8. saith, *two Parts as well of the said Manors, Lands, Tenements, Rents and Hereditaments, as of all and singular his other Rents and Hereditaments*; these last Words, *as of all and singular his other Rents* ought to have Reference to the Beginning of the Sentence, *sc. having a sole Estate*, &c. *of or in any Manors, Lands*, &c. *holden in Capite*. For if he has no Land *in Capite*, he is not restrained to devise but two Parts, for then he may devise the Whole: But these Words were necessary to be added; for the Beginning of this Branch extends only to enable the Tenant to devise, &c. two Parts of the Lands held *in Capite* only; and therefore it was necessary to add, *As also of all and singular his other Rents and Hereditaments* not holden *in Capite* by Knights Service? But all the Words together prove (as has been said) that the Time of *having, holding* and *disposing* ought to concur. As to the 4th Time, *sc.* From what Time the Value of the Lands whereof the King shall have the third Part shall be taken, it was resolved, that the Value of the Lands shall be taken as they are at the Time of the (*b*) Death of the K.'s Tenant, for then by the Saving in Case of act executed, the Title of Wardship and *Primer Seisin* vests in the King; and in Case of Will it also takes Effect for two Parts by the Death of the Tenant, and the third Part descends to the Heir, of whom the King shall have the Wardship or *Primer Seisin*; so that *tempus appreciandi* ought to concur with the Time of the Death; but the Time of vesting in the Subject by act executed, and the Time of Value, do not concur. And the Resolution of *Virgil* (*c*) *Parker*'s Case in the eighth Part of my *Reports*, the last Case, was cited and agreed to be good Law: Where the Case was, That *Virg. Parker* was seised of the Manor of *Fushil* in Fee, held of the King by Knights Service, as of his Dutchy of *Lancaster*, *anno* 27 *El.* made a Feoffment of half of the Manor to the Use of himself for Life, and afterwards to the Use of *Mary*, whom he intended to marry, for Life, with divers Remainders over; he married *Mary Cony*, and afterwards devised the other half to divers, for Payment of his Debts and Legacies, and died: And it was resolved,

(*a*) 5 Co. 35. a. Co. Lit. 111. b.

(*b*) Co. Lit. 111. b.

(*c*) 8 Co. 173. b. Co. Lit. 76. b.

That forasmuch as the Advancement of his Wife is as well within the Statute, as Payment of his Debts, and the Stat. (as to Value) principally takes its Effect by the Death of the King's Tenant; for this Cause, altho' the Estate of the Wife has the Precedency, it was resolved, That the 3d Part of the King should be taken (*a*) equally out of both Halfs, and not out of the Half so devised only, and accordingly, as it appears there, it had been resolved divers Times before. As to 5. Time, *sc.* To Provide a 3d Part to descend, it is to be known, That if a Man seised of certain Lands, Part of which is held *in Capite* by Knights Service of the yearly Value of 60 *l. per ann.* all which Lands he conveys to one of the said three Uses, and afterwards purchases Land of the yearly Value of 20 *l.* or more, in Tail or Fee, and leaves it to descend for the 3d Part due to the King, it is good enough, for this Time to provide a 3d Part, need not concur with the Time of *having*, *holding or disposing* by Act executed; but it is sufficient if this Time concurs with the Time of the Value, *sc.* the Time of the Death of the K.'s Tenant; and this appears by the express Words of the Act of 34 *H.* 8. *s.* *That the K. shall take for his full 3d Part such Manors*, *Lands*, &c. *as shall descend in Fee-Tail or Fee-simple*, without any Words of Reference or Restraint, or any Union made of these Lands which descend with the Land held *in Capite* by Knights Service, as the other Clauses aforesaid are, As to 6. Time, *sc.* *tempus continuum*, to some Purpose Time ought to continue *usque ad mortem*, and in some Case *post mortem*; *usque ad mortem*; the Estate conveyed to any of the said three Purposes, ought to continue 'till the Death of the King's Tenant, as it is resolved in (*b*) *Bingham*'s Case; in the second Part of my *Reports*, *f.* 91. *a. b.* *Post mortem*, 1. The Tenure by Knights Service *in Capite* ought to continue *post mortem*, for if the Tenure be but during the Life of the Tenant, so that it doth not continue after his (*c*) Death, it will not restrain the Devise of the other Lands, as it is held in *Butler* and *Baker*'s Case. 2. The Estate of the Land held ought to continue after the Death of the Tenant; and therefore if Tenant in Tail be to him and the Heirs Males of his Body, the Remainder in Fee to another, of Land held by Knights Service *in Capite*, and he is seised of other Lands in Socage in Fee, and by his Will in Writing he devises all his Socage Lands, and dies without Issue Male, in this Case the Devise is good for all the Socage Land, for the Estate of the Land held determined by his Death, so that there was no Cause of Wardship at the Common Law. The same Law, if the Estate of the Land held be defeated by Condi-

(*a*) 8 Co. 173. b. 9 Co. 113. b.

(*b*) Moor 607. Jenk. Cent. 267.

(*c*) 3 Co. 34. b.

Condition after the Death of the Tenant. *Vide* 13 *Eliz.* (*a*) *Dyer fo.* 3. The Privity of the Heir of the Ten't ought to continue after his Death; and therefore if the King's Tenant *in Capite* conveys all his Land to any of the said three Uses, and is afterwards attainted of Treason, and afterwards he dies his Heir within Age, in this Case the King shall not have the Wardship, because he dies without Heir in Respect of the Corruption of Blood, and in which Case no Wardship can accrue by the Common Law, (*b*) as it was resolved in Sir *Everard* (*c*) *Digby*'s *Case*, *Mich.* 7 *Jac. in the eighth Part of my Reports*, *fol.* 165. *b.*

(*a*) Dyer 298. pl. 30. 1 Co. 133. b. 1 Keb. 800. 2 Keb. 145. Co. Lit. 76. b. 248. a. 2 Rol 39. 2 Rol. Rep. 469.

(*b*) Co. Lit. 78. a.

(*c*) Baker's Chron. 433. Wilson's Hist. 29.

Questions at the Common Law.

2. If the Uses limited by the said tripartite Indentures to *William Lovies* in Tail, with the Remainder over, are in Contingency or not? Or if the Uses be immediately executed by the Statute of * 27 *H.* 8. of Uses in *William Lovies* with the Remainders over? And the Chief Justice held, That the Uses were in (*d*) Contingency, and not executed till the Death of *Leonard Lovies* the Grandfather, for when he has by the said Indentures limited to himself an Estate for Life, and upon the Matter Power to make Leases for Life, Lives or Years, without any Restraint of Lives or Years, then when the Limitation is farther to the Use of the Performance of his Last Will and Testament, and to the Use of such Person and Persons severally to whom he by his Last Will shall devise *any Estate or Estates*, by these Words, without Question he may devise the said Land to any Person in Tail or in Fee, (for he had Power before to make Leases for Lives or Years, without any Limitation) and by Consequence the Use limited to *William Lovies* in Tail, with all the Remainders over, are in Contingency. For where it is (*e*) doubtful and incertain whether the Use or Estate limited *in futuro* will ever vest in Estate or Inrerest or not, there the Use or Estate is said to be in Contingency, because upon a future Contingent it may either vest or never vest, as the Contingent shall happen; and therefore there is a Difference betwixt such a Contingency as aforesaid, and a Limitation of Estates by Words of Contingency, which extend upon the Limitation of former Estates, and which vest in Estate or Interest immediately to take Effect in Possession *in futuro*, as in 5 *E.* 3. 27. (*f*) *William* leases to *John* for the Life of *John*, tendring to *William* 40*s*. Rent during the Life of *William*, and after the Death of *William* to *John* and his Heirs, this Remainder to *John* can't vest immediately, because peradventure it will never vest in Estate or Interest, and the Contingent in this Case is the Time of the Death of *William*; for if *William* dies, *John* living, the Remainder is good; but if *William* survives *John* and

* 27 H. 8. c. 10.

(*d*) 1 Rol. Rep. 436. Lit. Rep. 219.

(*e*) 2 Rol. 419. 3 Co. 20. a. Raym. 144.

(*f*) 2 Bulstr. 130 Lit. Rep. 316, 321. Herl. 67.

(a) Plowd. 33. a.

(b) Cart. 203. 2 Bulstr. 130. Lit. Rep. 258, 289.

(c) Cr. Jac. 259, 510. 1 Saund. 184. 2 Rol. Rep. 284, 411. 3 Keb. 85. Palm. 390. Moor 191.

(d) 2 Rol. Rep. 411. Palm. 390.

(e) 3 Co. 21. a. Cr. Jac. 461, 510. Palm. 141.

(f) 6 Co. 18. a. Co. Lit. 111. b. 271. b. Lit. Rep. 288, 321. Moor 493, 567. Cr. Car. 39.

(g) Jenk. Cent. 260. Cr. El. 877. Cr. Jac. 31. Moor 476, 567. Co. Lit. 111. b. 3 Keb. 538.

and dies after him, the Remainder is void. *Vide* (a) *Plo. Com.* in *Colthirst*'s Case. *Pasch.* 36. *Eliz. Rot.* 348. *inter* (b) *Acton* and *Hore* in the King's Bench, the Case was; That a Fine was levied to the Uses of *A.* and the Heirs Males of his Body, till he or the Heirs Males of his Body has done such a Thing, and after such Thing done to the Use of another in Tail, and dies without Issue without any Thing done: It was adjudged, That the Remainder was in Contingency, and never fell. If a Man has made several Leases of two several Acres of Land for two several and distinct Terms, as well in the Commencement as in the End, and afterwards makes a Lease of both Acres, to begin after the Determinations of the said several Terms for forty Years, it shall not expect to begin after the last Lease, but (c) shall vest immediately in Interest, *reddendo singula singulis*, as it is adjudged in Justice *Windham's Case in the fifth Part of my Reports, f.* 7. *b.* (& *vide* (d) 6 *E.* 3. 53. a good Case. *Vide* (e) *Boraston's Case inter Hinde* and *Ambry in the third Part of my Reports.*) For it vests immediately in Interest, to begin in Possession after the Determination of a former Term for Years. But in the Case at Bar, nothing can vest by the Devise to *William Lovies*, nor the Remainders over till the Death of the Devisor, because he has Power by his Will to devise to any Person any Estate, be it in Fee-simple if he will: *Ergo* it can't vest immediately in *William Lovies*, and by Consequence in none of the Remainders; upon which it follows, that in the mean Time the Use of the Fee vests (f) again in *Leonard* the Grandfather, (as it was adjudged in Sir *Ed. Clere*'s Case) and then he was seised of Lands held *in Capite* at the Time of the Purchase of the said eight Acres in which, &c. And for this Cause, he having disposed two Parts by Act executed according to the Statute, he can't devise the said eight Acres. For it appears by the Record, that he has conveyed by the Feoffment, Lands and Tenements of the yearly Value of 55 *l.* 6 *s.* 8 *d.* and the Land mentioned to be devised is but of the Value of 24 *l.* 14 *s.* 10 *d. per Annum*, and the Feoffment can't extend to the said eight Acres, for they were purchased after; but being a Last Will shall be a Direction to declare Uses upon the Feoffment; and when the Land shall pass by the Will it self, and when by the Feoffment, *vide* the said Case of Sir (g) *Ed. Clere*. But against this it was objected, That the Fee, which *Leonard* the Grandfather had by Operation of Law, vanished by his Death, in as much as he made no Disposition of the Land in Fee-simple by his Will, which was granted as had been resolved before. But it was answered and resolved, That the said Reversion

in

in Fee expectant upon the Estate-tail, did not vanish, as fully appears. Another Objection was made, That forasmuch as the Words of the Statutes of 32 & 34 *H.* 8. are, *Lawfully execute in his Life*, &c. in this Case, forasmuch as the said Uses were in Contingency, no Execution of any Estate was, but after the Death of *Leonard* the Grandfather, and so out of the Statute. To which it was answered, That after the Death of the said *Leonard* the Grandf. the said Estates were derived, and took their Essence and Effect by Force of the said (*a*) Feoffment made, and so upon the Matter executed in his Life. Also it was held by the Chief Justice, That the Remainder to *William Lovies* by the Will is contingent, forasmuch as no Alienation is found to be made by *Thomas*; for in Effect it is a Devise to *Thomas* and his Heirs Males; provided, that if he aliens it, that then for Want of Issue Male of his Body, it shall remain to *William*, &c. So that there are two main Impediments to the Remainder, *sc.* that there was no Alienation, and if there had been an Alienation, then also it would be repugnant, that after the Alienation the Land should remain to *William*, and so *quacunque via data* the Remainder as this Case is doth not vest in *William*. And the several Pennings of the Devise to *Thomas* with Contingency to remain over to *William*, and of the Devise to *William* and the Remainder over were observed, which prove several Intents in the Testator, as appears in (*b*) *Edriche's Case, in the fifth Part of my Reports, fo.* 118. *a. b. upon* the Statute of (*c*) 32 *H.* 8. of Rents. But this Point was not resolved by the Court. Another Point at the Common Law was also moved in the Case, *sc.* Whether the said Revocation mentioned in the Record was sufficient or not: Touching which, there are three Things to be considered, 1. His Power reserved to him by the Proviso of Revocation, 2. In the Revocation if he has pursued his Power; First, the Words of the Power divide themselves into five Branches. 1. That if the said *Leonard Lovies* shall be disposed *to alter, change, or to make void præd' feoffamentum*, &c. 2. *Vel aliquem usum seu usus, &c. superius limitat'.* 3. *Vel aliquem statum vel status qui accrescerent seu execut' forent ratione alicujus usus, &c.* 4. *Aut si præd' Leonard Lovies Avus disponeret rehabere omnia & singula præd' Maneria, &c. vel aliquam partem eorundem.* 5. *Vel eadem Maneria vel aliquam partem eorundem disponere vel donare in aliquo alio modo, vel eadem aut aliquam partem eorundem rehabere eidem Leonard' & Hæred' suis, ut in pristino statu suo, &c. & superinde significar' voluntat' & beneplacit' suum inde* to the Feoffees or any of them, &c. *qd' tunc immediate, &c.* the Manors, &c. should be to the Use of *Leonard* the Grandfather and his Heirs, *ut in pristino statu suo.*

(*a*) 6 Co. 18. a. Co. Lit. 111. b. 271. b. 2 Brownl. 52. 1 Bulstr. 200. Cr. El. 878. Cr. Car. 39. Hob. 160. Moor 262, 567.

(*b*) 2 Rol. Rep. 246, 278. Lit. Rep. 93.

(*c*) 32 H. 8. c. 37. Vaugh. 48. Dy. 375. pl. 20. Rast. Rents 2. Co. Lit. 162. a. b. 351. b. 4 Co. 48 b. 50 a. 51. a. 8 Co. 64 b. 65. a. 7 Co. 38. b. Cr. El. 805. Cr. Car. 471. Goldsb. 30. 1 Anders. 47. Co. Entr. 119. pl. 2. 1 Leon. 302. 2 Leon. 155. 3 Leon. 59.

Then

Then the Revocation stands upon two Parts: 1. He signifies to the Feoffees that so much of the Feoffment and Indentures, which concerns certain Manors, shall be void, which was objected can't be, because the Indenture was made 26 *Sept. anno* 12 *Eliz. Reginæ*, and the Feoffment was made 28 *Sept.* following. and therefore the Indenture precedent can't avoid the Feoffment which passed by Livery subsequent. Also he declares, *That so much of the Feoffment and Indentures, and no more, as concern only Parcel of the Premisses*, shall be void; and admitting that the Feoffment and Indentures may be avoided, and made void in all, yet they can't be avoided in Part, *s.* the Deed of Indenture *quoad* one Manor to be made void and to lose its Force, and *quoad* another to stand as a Deed, and of such Effect, as it was objected, is the second Branch, *s. I will that so much and no more of the said Feoffment and Indentures, and every Clause and Article therein contained, to be utterly frustrate and void,* &c. 3. The Nature of the Things to be revoked was considered, That all the Declarations and Limitations of the Uses in the Indenture at the Time of the Deed of Revocation, were only in Contingency, and nothing in Estate in Possession, Reversion, or Remainder or in Interest, but only in Possibility, which can't be revoked, or changed, or altered; for a Revocation, Alteration or Change, presupposes a former Essence, as the Rule of the Logician is, *(a) Omnis privatio præsupponit habitum*: And altho' future Powers and Authorities annexed to Estates, as a Power to make Leases, *&c.* given to him who has an Estate for Life may with the Estates be revoked; yet it was objected, That when all is in Contingency or Possibility it can't be revoked; and the Use, which by Operation of Law was vested in *Leonard Lovies* the Grandfather, can't be revoked, for the Proviso of the Indentures extends only to Uses declared by the same Indentures, and not to an Use created by the Law. But it was answered and unanimously resolved by the Court, That the Revocation was good: For Uses and Powers in Contingency and Possibility, may by mutual Assent of the Parties be (*b*) revoked and determined, for as they may be raised by Indenture, so by Proviso or Limitation annexed to them in the same Indenture, they may be extinguished and destroyed, either before or after their Essence. And it was resolved, that these Words, *The said Indentures, and every Clause and Article therein contained,* extend to all the Uses and Limitation in Contingency and Possibility. And this Resolution concurs with common Experience, *s.* That Estates limited to 1, 2, 3, *&c.* Sons, before any is born, are usually by the like Provisoes, and without Question daily revoked. And without Question the Inden-

(*a*) Co. Lit. 341. b.

(*b*) 2 Rol. 792.

Indentures, as to the Direction and Declaration of Uses, may lose their Force in Part, and stand in Part; and if the Operation as to Part be taken away by the (a) Proviso, then the Feoffment for that Part is to the Use of the Feoffor and his Heirs; and by Consequence in the Case at Bar, where *Leonard Lovies* had an Use vested in him by Operation of Law upon the Feoffment, till other Declaration was made by his Will, now by the Revocation he has an absolute Estate in Fee-simple, *ut in pristino statu suo* without any Limitation.

(a) Co. Lit. 237. a. 2 Rol. 792.

Also the Chief Justice held, That the said Devise to *Thomas* was but for Years, because it is so devised in express Words, and against the express Words, no Inference or Interpretation shall be admitted in this Case, for the Words are, *Item, I give, grant, will and bequeath, to my Son* Thomas *all my Manors*, &c. *To have and to hold to my said Son* Thomas, *and to the Heirs Males of his Body lawfully begotten, from and after my Death, for and during the Term of* (b) 500 *Years then next ensuing fully to be compleat and ended*, &c. and the Remainders to *Will. Lovies* and others, to every of them and to their several Heirs Males of their Bodies, without any Restraint to any Number of Years; and *note*, the Liberty given to *Thomas* is in these Words, *Otherwise than to lease*, &c. *the same for Years determinable upon the Death of any three Persons or less Number of Persons*: But in the Liberty given to *William* and the others, the Words, *Otherwise than they may lawfully do by the Statute of* 32 H. 8. Which Act he doth not mention in the Devise to *Thomas*: So insomuch as *Thomas* has an Estate but for 500 Years, so long as he has Issue of his Body, he gives him Power only to demise for Years, but to *William* who has an Estate in Tail, he leaves him Power to lease the Lands for three Lives or 21 Years, according to the Statute of 32 *H.* 8. which gives such Power to Tenant in Tail, and therewith agreed *Winch* Justice. But these Words, *During the Term of* 500 *Years*, will make a Limitation of a Term of Years to determine for Want of Issue Male. And that it is but (c) a Term for Years in Grants, the Books are express in the Point, (d) 11 *Ass.* 21. 33 *Ass. p.* 17. 39 *E.* 3. 37. 19 *E.* 3. *Accompt* 56. 9 *H.* 6. 58. 22 *H.* 6. 33. 34 *H.* 6. 27. *Litt.* 168. 10 *Eliz. Dyer* 276. *Vide* 21 *H.* 8. (e) *Br. Estates*, the like. But as to that Point which had been controverted betwixt this Court and the Court of King's Bench, in a former Action brought upon this Devise, no Resolution as to that Point was now given by the Court. *Note*, Reader, if a (f) Term be devised to one and the Heirs Males of his Body, his Heirs shall not have it, but his Executors, for a Term

(b) Moor 773, 810. Cr. Jac. 62, 63. 1 Rol. 741, 831, 847. 2 Brownl. 104. Cart. 166. Godolp. Leg. 351.

(c) Cr. Jac. 62.
(d) Br. Estate 32. Br. Assise 172.
(e) Br Estate 50.
(f) 1 Rol. 611, 741, 831, 915, 916. 1 Rol. Rep. 356. 2 Rol. Rep. 129, 424. Cr. Car. 210. Orph. Leg. 348, 351. Swinb. 135. 1 Sid. 37, 451. 1 Jones 15, 16. Godb. 42. Dyer 7. pl 8. 8 Co. 95. a. Went. 333, 334. 1 Bulstr. 191, 192. 4 Leon. 246. Cr. Jac. 510. Palm. 334. Moor 758, 807, 810. 831. B. N. C. 209. & 334.

(a) 1 Rol. 837.
2 Rol. Rep. 129.

Cr. Eliz. 143.

a Term which is but a Chattel can't (a) be entailed, and such Devisee may well alien the Term to whom he pleases. And so it was adjudged *Trin.* 18 *Eliz.* in the King's Bench in *Peacock*'s Case, and *anno* (21) 31 *Eliz.* resolved by *Anderson* and *Walmesley*, being referred to them out of the Chancery, between *Higgins* and *Mills*.

[*See Reports Q. A.* 106. *and* 121 *to* 130. Brounker *vers.* Cooke, *That Lands purchased after a Will made, will not pass by the Devise. See also the Case of* Archer *vers.* Bokenham, *ibid.* 148 *to* 163. *ad idem.*]

Doctor

Doctor LEYFIELD'*s* *Case*.

Monstrans de Faits.

Hill. 8 Jac. 1. *in* B. R.

JOhn (a) *Leyfield* Doctor of Divinity brought an Action of Trespass in the King's Bench, *Hill.* 8. *Jac. Regis Rot.* 1282. against *Henry Hillary*, for Corn and Hay taken and carried away at *Old Cleve* in the County of *Somerset*. The Defendant pleaded in Bar, That Queen *Elizabeth* was seised of the Rectory of *Old Cleve* in the same County in her Demesne as of Fee, as in Right of the Crown of *England*; and by her Letters Patent 20 *Junii* 35 of her Reign (without saying (b) here shewed forth) demised the said Rectory to *Conand Prowse* for his Life, who 16 *Jan. anno* 3 *Jac. Regis* demised the said Rectory to *George Pincomb* for eight Years, if the said *Conand tam diu viveret*; and that the Defendant as Servant to the said *George* took the Corn and Hay as Tithes severed from the nine Parts, and averred the Life of the said *Conand*: Upon which the Plaintiff demurr'd in Law, and shewed the Cause of his Demurrer, because the Defendant's Plea amounted to the (c) General Issue. And it was adjudged in the King's Bench, That the Bar was insufficient, because the Defendant in his Plea (d) did not shew to the Court the Letters Patent of Queen *Elizabeth*, made to *Conand Prowse*, which the Court took to be Matter of (e) Substance, and which the Defendant ought to have shewed forth, altho' he, in whose Right he justified, had but Part of the Estate. Whereupon a Writ of Error was brought in the Exchequer-Chamber, and there two Errors were moved; one, which was assigned by the Plaintiff for the Cause of Demurrer. *s.* That the said Plea amounted to the General Issue, because the Defendant gave the Plaintiff no

(a) 1 Bulstr. 154. Cr. Jac. 317.

(b) 1 Bulstr. 154. Cr. Jac. 317. 2 Rol. Rep. 172, 191. 1 Rol. Rep. 221. 5 Co. 74. a. Lane 32.

(c) Winch 20. Jenkins Cent. 133.

(d) Cr. Eliz. 146, 217. 1 Leon. 178. 1 Bulstr. 155. Cr. Jac. 317. Lit. Rep. 306.

(e) Co. Lit. 72. a.

no Colour, in which Case no Judgment ought to have been given against the Defend. but the Court ought to have ruled him to answer over; the Second, That for Want of shewing the said Let. Pat. the Court ought not to have given Judgm. against the Defend. for two Reasons. 1. Because by Law the Letters Patent need not be shewed forth. 2. If they ought to have been shewed, yet that is but Matter of Form, and not of Substance; and therefore by the Stat. of (*a*) 27 *Eliz. Reg. c.* 5. forasmuch as he has not shewed it for any Cause of his Demur. he shall not take Advantage of it. As to the first, it was objected, That the said Plea in Bar amounts to the (*b*) General Issue, because the Defend. has not given any Colour to the Plain. nor any Possession upon which he may ground his Action, and thereupon they cited (*c*) (11) 21 *E.* 4. 65. *a.* In Trespass for certain Cart-loads of Oats taken and carried away at *Bodmin*, against the Prior of *Bodm'*; the Def. said, That the Corn was growing in a certain Place in *B.* in the Parish of *Bodm'*, whereof he was Parson imparsonee, and (being oblig'd by the Rule of the Court to shew how he came to the same Parsonage) said, That he had the Impropriation by Title of Prescription; and that the Corn was severed from the nine Parts, and that he took them as his own Goods (and gave Colour) that he delivered them to one *T.* who delivered them to the Pl. to keep, and the Def. took them. And in (*d*) 21 *H.* 6. 30. *a. Robert*, Parson of the Church of *Clifford*, brought an Action of Trespass against divers, and declared of his Goods taken and carried away, *s.* Wheat, Barley, three Coverlets, and three Blankets. As to the Wheat and Barley, the Defendant said, That before the Trespass one *A.* was Parson of the said Church, and the Parish. had sowed their Lands with Wheat and Barley the first Day of *May*, and afterwards the same Day the said *A.* made the Defend. his Executors, and died; and gave Colour to the Plaintiff, That he was instituted and inducted Parson of the said Church, and afterwards the Parishioners severed the Corn from the nine Parts, and the Plaintiff as Parson took the Corn, and the Defendants as Executors took it out of his Possession. And 19 (*e*) *H.* 6. 20. *a. b.* In Trespass against *B.* Prior of *L.* for Breaking of his Close, and taking and carrying away his Grass being in Cocks: The Defendant as to the Close pleaded his Freehold; as to the *Cocks*, he said, That he himself is Parson imparsonee, and that the Place where is so much Land of such a Town within the same Parish, (and he was compell'd by the Court to give a Name to the Place) and that the Cocks were there *growing**, and severed from the nine Parts; and you claiming to be Parson of the same Church by the King's Presentment by his Letters Patent, whereas you was not instituted nor inducted, took the same

(*a*) 1 Leon. 44, 80, 193, 311. Cr. Eliz. 232. Hob. 133, 198, 232, 301. Hutt. 15. Moor 885. 1 Rol. Rep 112. Goldsb. 37, 47, 48, 49. Savil 78, 87. Palm 368. 1 Anders. 150, 151, 160, 168. 7 Co. 9. b. Postea 92. a. 94. b. Jenk. Cent. 133. Co. Lit. 72. a. 304. b.

(*b*) Cr. Car. 157. Cr. El. 146. Cr. Jac. 165, 319. 1 Sid. 106.

(*c*) 11 Co. 10. a. Br. Travers per sans ceo 67. Postea 90. b. Br. Colour 59 Doct. placit. 78

(*d*) Br. Colour 20. Br. Emblement 90. Postea 91. a.

(*e*) Br. Jurisdiction 41. Fitz. Jurisdict 7. Br. Colour 14. Postea 91. a.

* Q. Standing.

ſame Cocks, and we took them again, and there *Forteſcue* and *Newton* conceived that the Colour was not good. And in 2 *H.* 4. 5. *a.* The (*a*) Vicar of *Saltaſh* brought an Action of Treſpaſs for carrying away his Goods in *S.* The Def. alledged, that the Dean of *Windſor* was Parſon of *S.* and that he as Servant took the Goods as his Maſter's Goods, and the Pl. would have taken them from him, and he would not ſuffer him; and ruled by the Court no Plea, becauſe the Def. did not acknowledge any Poſſeſſion in the Pl. nor Property in him at any Time of the ſaid Goods. (*b*) 34 *H.* 6. 10. *b.* The Abbot of St. *Mary* of *York* brought an Action of Treſpaſs againſt *John* Parſon of the Church of *D.* for taking of 30 *l.* at *D.* in the County of *York.* The Defend. ſaid, That there is a Chapel of our Lady in the City of *York* in the Defendant's Pariſh, in which Chapel there is an Image of our Lady, to which the People uſed to offer Gold and Silver; and that the ſaid 30 *l.* were offered there, and that he took them away, as he lawfully might, and gave Colour to the Pl. ſ. That he delivered the Money to *B.* to keep for the Defendant's Uſe, who delivered the Money to the Pl. and the Defend. took it out of his Poſſeſſion, &c. And in 39 *H.* 6. 1. *b.* & 2 *a.* In (*c*) Treſpaſs, the Pl. declared of 2 Horſes wrongfully taken; the Def. ſaid, That the Lord *Latimer* is Lord of the Barony of *Godford*, which is an ancient Barony, and has been Time out of Mind, &c. Within which he and all his Anceſtors, and all thoſe whoſe Eſtate he has in the Barony, have had Waif and Stray *a Tempore cujus*, &c. And further ſaid, That the ſaid Horſes were ſtolen and brought within the Barony, where, &c. and there the Horſes waived, wherefore the Defend. as Servant to the ſaid Lord, and by his Commandment ſeiſed, &c. and the Pl. took them, and the Def. took them again; and Exception was taken to this Plea, becauſe the Def. gave not the Pl. any Colour: For altho' they were Waifs out of his Franchiſe, and the Defend. ſeiſed them, the Pl. has no Colour to take them; wherefore the Def. ſaid, That the Pl. ſuppoſing that the Property was in him before the Stealing took them; but *per totam Curiam* the Plea is nought, without ſaying in Fact that the Property was in him; wherefore he pleaded accordingly. And many other Caſes were put to this Purpoſe, which I purpoſely omit. *Vide* (*d*) 22 *E.* 4. 23. *b.* Againſt which it was argued by the Counſel on the other Side, That in this Caſe it is not neceſſary to give Colour, for 2 Reaſons. 1. Becauſe the Def. juſtifies as Servant. 2. Becauſe the Beginning of the Bar is with the Queen's Letters Patent. As to the firſt, (*e*) 18 *E.* 4. 3. *a.* was cited, where in an Action of Treſpaſs for breaking his Cloſe, and 30 Loads of Wheat taken and carried away,

(*a*) Poſt. 91. a. Fitz. Colour 41. Br. Treſp. 79.

(*b*) Poſt. 91. a. 34 H. 6. 10 b. Fitz. Replication 10. Br. Property 7. Br. Colour 5.

(*c*) Poſt. 91. a. Br. Colour 37. Doct. pl. 79.

(*d*) Br. Colour 62. Br. Property 35. 55 Juriſdiction 79.

(*e*) Poſt. 89. b. Br. Colour 54. Br. Traverſe 254. Doct. pla. 76. Cr. El. 76.

away, the Defendant pleaded, That one Sir *C. M.* was seised of a Carve of Land, whereof the Place, &c. in his Demesn as of Fee, and sowed the same Land with Wheat, and that the Def. as his Servant, and by his Commandment entred into the same Land and cut the Wheat, and carried it away, as he lawfully might. And it was moved, That the Bar was insufficient because the Def. gave no Colour: And it was held by all the Justices, that he should not in this Case give Colour to the Plaintiff, because in all Cases where a Man justifies as (*a*) Servant to another, and by his Commandment, he shall not give the Pl. any Colour. As to 2. Colour always ought to be given by him who is (*b*) first in the Conveyance, or else all before is waived; and therewith agree (*c*) 10 *H.* 7. 14. *b.* 15 *E.* 4. 32. *a.* (*d*) 18 *E.* 4. 10. *a.* & (*e*) 22 *E.* 4. 25. *a.* And in this Case Q. *El.* is the first in Conveyance by her Letters Patent, and the Def. can't suppose that the Pl. claims by former Letters Patent, for then that would give the Pl. a good Title; as in 12 *H.* 6. *Colour* 54. In Trespass for breaking his Close, the Defend. said, That one *H.* enfeoffed him, and the Pl. claiming (*f*) by Colour of a Lease made to him for Term of Years before the Feoffment, where nothing passed, entred, &c. And there *Fitzherbert* conceives that the Plea is not good; for if such Lease was, it passes presently, and when he pleads that the Plaintiff claiming by Colour of a Lease for Years, where nothing passes, it is repugnant in it self: For when he says by Colour of a Lease, this Word *Lease* implies a Lease in Law; for otherwise it is no Lease. As in Assise, it is (*g*) no Plea to say, that one *H.* enfeoffed him, and the Plaintiff claiming by Colour of a Feoffment where nothing passed entred, for the Law intends it is no Feoffm. without Livery; and therefore it is the (*h*) Use to plead, That the Plaintiff claiming by Colour of a Deed of Feoffment where nothing passed, &c. for by the Deed without Livery nothing in Truth passed. So if the Def. should say in the Case at Bar, That the Pl. claiming in by Colour of a former Grant of the said Queen by her Letters Patent, &c. that implies a lawful Grant, &c. But both these Reasons were disallowed by the Justices. For as to the first, It is true, when the Defendant in Trespass, &c. pleads, that the (*i*) Freehold is in *J. S.* and that he by his Commandment entred; or that *J. S.* is seised in his Demesn as of Fee, which is all one (as the Book is in (*k*) 18 *E.* 4.) and that the Defendant as his Servant, and by his Commandment entred, there he need not give any Colour, because notwithstanding the Fee or Freehold be to one, yet the Pl. may have a Lease for Years, &c. and therewith

(*a*) Doct. pla. 76. Cr. El. 76. Cr. Jac. 229.
(*b*) Post. 91. b.
(*c*) Br. Colour 84. Postea 91. b.
(*d*) Br. Colour 55. Br. Title 52. Br. Trav. 354.
(*e*) Br. Colour 63.
(*f*) Doct. pla. 73, 326.
(*g*) Doct. pla. 323. Rast. Ent. 59. b. 273. a. Doct. & Stud. 159. a.
(*h*) Doct. pla. 73, 293.
(*i*) Cr. Jac. 229. Cr. El. 76. Doct. pla. 76.
(*k*) 18 E. 4. 3. Ant. 89. a. Br. Colour 54. Br. Trav. 254. Cr. El. 76. Doct. pla. 76.

with agrees 22 *H.* 6. 50. *a.* But when ſpecial Title is made, as in 2 *R.* 3. 8. *Joh. Atwood* brought Treſpaſs of breaking of his Cloſe againſt one *John Dingle* and *Wm. Dingle*; the Defendants ſaid, That one *Tho. Atwood* was ſeiſed thereof, and enfeoffed *J. B.* and *R. S.* who enfeoffed Sir *John Norbury*, Knt. and the ſaid *J. Dingle* in his own Right, and the ſaid *W.* as Servant to him, &c. and gave Colour to the Pl. by the ſaid *T. Atwood*: And 1 *H.* 7. 19. *a. b. Rob. Rednesh* brought a Writ of *Forcible Entry* upon the Statute of 8 *H.* 6. againſt *J. B. qui placitavit quod Johan' Hoke & Hen' Atwood fuer' ſeiſiti, &c. & feoffaverunt Fines & Sackvile in feodo,* and the Def. *ut ſerviens, &c. & dedit colorem prout oportet,* and traverſed the Force; for when the Def. makes ſpecial Title to him in whoſe Right he juſtifies as Servant, there it ſhall not be intended that the Pl. has any Intereſt in the Land, and ſo is the Difference. As to 2d Reaſon, The Def. ought to give Colour by former Letters Patent, *s. colore quarundam literarum patentium fact' præd'* the Pl. *de tenementis præd' ante, &c. pro termino, &c. ubi nihil tranſivit,* and he ſhall not ſay that the Pl. claiming *colore conceſſionis ſive dimiſſionis, &c.* but *colore literarum patentium, &c.* and that the Colour ſhall be given in ſuch Caſe, appears in 7 *H.* 7. 14. *a.* where in the ſame Caſe, Colour was given.

Doct. pla. 76. Cr. El. 76 Br. Colour 26.

Br. Forcible Entrie 24. 8 H. 6. c. 9.

Doct. pla. 77.

But it was reſolved, That in Caſe at Bar Colour ought not to be given to the Pl. And the Reaſon that Colour ſhall be given in a Writ of *Entry ſur diſſeiſin, Writ of Entry in Nature of Aſſiſe, Aſſiſe, Treſpaſs, &c.* is, That the Law, (which prefers and favours Certainty as the Mother of quiet and repoſe) to the Intent that either the Court ſhall adjudge thereupon, if the Pl. demurs, or that a certain Iſſue may be taken upon one certain Point, requires that the Def. when he pleads ſuch ſpecial Plea, that notwithſtanding that the Plaint. may have Right, the Def. ſhall give Colour to the Pl. to the End that this Plea ſhall not amount to the general Iſſue, and ſo to leave all the Matter at large to the Jury, which will be full of Multiplicity and Perplexity of Matter. And altho' Colour is but a Fiction, yet *lex fingit ubi ſubſiſtit æquitas: Vide Doctor and Student, c.* 53. *f.* 160. But when the ſpecial Matter of the Plea, notwithſtanding that the Pl. had Right before, utterly bars him of his Right, in ſuch Caſe the Def. need not give any Colour, becauſe he bars the Plaintiff of his Right, if he had any; in which Caſe it would be in vain to give the Plaintiff Colour, where it appears upon the Matter of the Plea that he had no Right. For therefore in a real Action, as *Aſſiſe,* Writ of *Entry in Nature of Aſſiſe, &c.* if a collateral Warranty be pleaded, and the Defendant relies upon it, or if an Eſtoppel be

Doct. pla. 77. Cr. Car. 169. Dy. 336. pl. 35.

Doct. pla. 77.

be pleaded, or a Fine levied with Proclamations, &c. there it is not necessary to give any Colour, because the Pl. is (*a*) barred altho' he had Right; and therewith agrees 35 *H. 6. Trespass* 160. So, and for the same Reason, If the Defend. conveys to himself a Title by Act of Parliament, as it is held in 3 *E.* 4. 2. *a. b.* when one justifies his Entry by a Cause which binds the Pl. or his Blood for ever, he shall not give any Colour: And therewith agrees (*b*) 22 *E.* 4. 4. *a. b. Vide* (*c*) 5 *H.* 7. 10. *a.* 3 *E.* 3. *tit. Ass.* But if a Man pleads a Descent in Bar, yet the Def. ought to give Colour, for that binds the Possession, and not the Right, as it is agreed in 19 *H. 6.* 41. and (*d*) 2 (22) *H. 6.* 50. *a.* If in Trespass for Goods taken away the Def. justifies, because he has Waif within his Manor; and shews, that one stole the said Goods *de quodam ignoto*, and waived 'em within his Manor, wherefore the Def. seised 'em, it is good without any Colour, and therewith agrees (*e*) 12 *E.* 4. 5. *b.* But it was there held by all the Justices, That if the Def. had said, that *A.* was possessed of the Goods as of his proper Goods, and that one *B.* had stolen the Goods *ut supra*, that he ought to give Colour to the Pl. for then he proves that no Property was in the Pl. so he had no Colour of Action; but there in the same Case he shews that they were stolen *extra possessionem cujusdam ignoti*; so it is not denied but that the Property was to the Pl. and he is not bound to shew expresly in whom the Property was. The same Law of a (*f*) Sale in Market overt, if he had said, That such a one sold them, he need not give Colour; but if he says, That such a one was possessed of the Goods as of his proper Goods, and sold 'em him in Market overt, he ought to give Colour: And all this appears in the said Book of (*g*) 12 *E.* 4. 5. *b.* But I conceive, that the said Case is not well reported, for the Reason there given makes against the Opinion of the Justices; for their Reason is, That the Plea shall not be good without Colour, when the Property is alledged in a certain Person, because it is proved, that no Property was to the Pl. and so he had no Colour of Action: *Ergo* it is a good Reason that no Colour shall be given, because it is an absolute Bar of the Property, and of all the Plaintiffs right, as appears before. And so is the Book in 32 *H. 6.* 1. *a. b.* in the same Case when the Property is alledg'd in a Person certain; and therewith agrees (*h*) 21 *E.* 4. 18. *b.* and (*i*) 21 *E.* 4. 65. *a.* And where in (*k*) 9 *E.* 4. 22. *a.* the Defendant when he justifies for Wreck gives Colour; it is held in 21 *E.* 4. 18. *b.* and 21 *E.* 4. 65. *a.* that in such Case no Colour shall be given and the Reason of all the other Books agrees with it. So when the Matter of the Plea bars the Right of the Plaintiff, no Colour shall be given.

Also

(*a*) Post. 97. b.

(*b*) Fitz. Trespass 141. Br. Colour 61. Doct. pla. 76. b.

(*c*) Br. Colour 41, 75.

(*d*) 22 H 6 50. a. Antea 90. a.

(*e*) Fitz. Colour 28. Br. Estray 6. Br. Forfeiture de Biens 62. Br. Trav. 241. Doct. pl 77.

(*f*) Doct. pl. 77. Rast. En. 675. b.

(*g*) 12 E 4 5. b supra.

(*h*) Br. Colour 57.

(*i*) Ant. 88. b. 11 Co. 10. a. Br. Trav. 67. Br. Colour 59. Doct pla. 78.

(*k*) Fitz. Colour 27. Br. Colour 31.

Also when the Defend. entitles himself (a) by the Pl. himself, no Colour shall be given, 13 *H.* 7. 6. (b) 6 *H.* 7. 14. *b.* Also when a Man pleads to the Writ, or to the Action of the Writ, no Colour shall be given, (c) 21 *E.* 4. 4. And for the Case of Tithes, which is the Case at Bar, he who justifies for'em shall not give Colour, for to whomsoever the Property is, and whosoever severs them from the nine Parts, they belong to the Parson. And therewith agrees 12 *E.* 4. 12. (d) 21 *E.* 4. 18. *b.* & 65. *a.* (e) And as to the said Cases which have been put on the contrary Part. 1. In the Case of (f) 21 *E.* 4. 65. *a.* where Colour was given in the Case of Tithes, *Brian* Ch. Just. there held, that it was not necessary to be given, for such Plea was good without Colour; and as to the Case of (g) 21 *H.* 6. 30. *a.* there Colour was given, but by no Rule of the Court, and the Opin. in (h) 19 *H.* 6. is not to the Contrary, inasmuch as he took upon him to give Colour, if any was necessary, but such Colour which he gave was not good. The Case of (i) 2 *H.* 4. is not of Tithes, but of other Goods, and therefore is not to be resembled to this Case. In the Case of (k) 34 *H.* 6. 10. *b.* no Colour need be given, but there *Moil* towards the End of the Case, saith, If any Man takes my Goods or Money, and offers 'em to an Image, in that Case I am barred against him as of Goods (l) sold and tolled in a Fair or Market, in which Case no Colour shall be given. And as to the Case of (m) 39 *H.* 6. 1. *b.* & 2. *a.* the Case of (n) Waif, when the Def. alledges that the Property was to the Pl. &c. It was resolved that no Colour shall be given: And it appears before by (o) 12 *E.* 4. 5. *b.* and the other Books, that no Colour shall be given in Case where the Defendant alledges that the Goods stolen and waved were *bona cujusdam hominis ignoti*; and in the End of the Case of (p) 39 *H.* 6. 2. *a.* the Reporter saith, *Quære*, If it is necessary in this Case to give Colour to the Pl. because by this Plea the Property of the Horses is not denied to be to the Pl. before the Stealing, and then it seems the Plea is good without Colour; and there the Reporter further saith, *Vide* such Matter in a Replevin, *an.* 5 *Ed.* 3. where he gave no Colour where he avowed for Wreck of the Sea, and the Case which he means is in *Hill.* (q) 5 *E.* 3. 3. *a.* *Wm. de Newport* of *London* brought a Replevin against Sir *Henry de Nevil*, Knt. and declared of the Taking of the Goods to the Value, &c. *s.* ten Lasts of Herrings in the Town of *Walring*. The Defendant pleaded, That the Lasts of Herrings were cast by Tempest of the Sea out of any Ward upon his Land in *Walring*, where the Plaintiff had declared; and that the Defendant had Franchise of Wreck through the whole Town, as appendant to his Manor of *Walring*, and so his own Goods; Judgment if he should be answered to this Writ? And in this Case two Points were resolved.

(a) Doct. pl. 78.
(b) Br. Trespass 180. Br. Colour 77.
(c) Br. Colour 16. Doct. pl. 76. Plowd. 281 a. Perk. Sect. 67.
(d) Br. Colour 57.
(e) 10 Co 88. b. 11 Co. 10. a. Br. Colour 59. Doct. pla. 78.
(f) 21 E. 4 65. a. supra.
(g) Ant. 88. b. Br. Tresp. 48. Br. Colour 20. Br. Emblements 9.
(h) 19 H. 6. 20. a. b. Antea 88. b. Fitz. Colour 7. Br. Colour 14.
(i) Antea 89. a. 2 H. 4. 5. a. Fitz Colour 41. Br. Tresp. 70.
(k) Ant. 89. a. Fitz Replic. 19. Br. Property 7. Br. Colour 5.
(l) Cr. El. 485.
(m) Ant. 89. a Br. Colour 37. Doct. pla 79.
(n) Cro. El. 174
(o) Antea 90. b. Fitz Colour 28. Br. Estray 6. Br. Forfeiture de Biens 62. Doct. pla. 77.
(p) Supra.
(q) Fitz. Replevin 41.

(a) Co. Lit. 303. b.

(b) Co. El. 485

(c) Co. Lit. 303. b.

(d) Doct. pl. 72.

(e) Fitz. Colour 8. Br. Colour 15. Br. General Iſſue 14. Doct. pla. 75.

(f) Cro. Jac. 122, 319.

(g) Doct. and Stud 159. a. Doct. pla. 72.

(h) Doct. pl. 73.

(i) Doct. pl. 73. Antea 89. b.

1. That againſt this (*a*) ſpecial Matter the Plaintiff was not received to a ſimple Averment, without anſwering to the Cauſe. 2. Notwithſtanding the Def. did not acknowledge that (*b*) the Property was at any Time in the Pl. yet the Plea was good; for when Goods are found in the Sea, then they are out of the Cuſtody and Poſſeſſion of every one, then the Lord upon whoſe Lands they are caſt, need not acknowledge whoſe Goods they were; and the Pl. by the Rule of the Court was driven to anſwer: Wherefore he ſaid, that the Def. took the Goods out of the Poſſeſſion of the Merchants and Mariners, and the Def. was compelled by the Court to take Iſſue thereon: In which Caſe it is to be obſerved, That if the Def. had generally claimed Property, he ſhould not only ſay that the Property was in him, but further, and not in the Pl. or otherwiſe he doth not anſwer the (*c*) Declaration: But in the Caſe at Bar, becauſe the Matter of the Plea bars the Pl. of his right, he need not deny the Pl.'s Property. *Nota*, Reader, every Colour ought to have four Qualities. 1. (*d*) It ought to be a Doubt to the Lay People, (*e*) 19 *H.* 6. 21. *a.* 11 *H.* 4. 3. *a.* 19 *E.* 4. 3. *b.* 23 *H.* 6. 54. 10. 20 *H.* 6. 8. 36 *H.* 6. *Treſp.* 162. 36 *H.* 6. 7. *b.* 20 *H.* 6. 27. As where the Def. ſays, that the Pl. claiming by Colour (*f*) of a Deed of Feoffm. &c. that is good, for it is a Doubt to Lay People, if Land ſhall paſs by Deed only without Livery, or not. (*g*) 2. That Colour as a Colour ought to have Continuance, altho' it wants Effect; as if the Def. gives Colour by Colour of a Deed of demiſe to the Pl. for the Life of *J. S.* who was dead before the Treſpaſs, that is not any Colour, for it doth not continue, but the Def. may well deny the Effect of it, that he claims by Colour of a Deed of Demiſe to him for his Life where nothing paſſed; and ſo there is a Difference betwixt the Continuance of the Colour, and the Effect of it. 2 *E.* 4. 19. *b.* 19 *H.* 6. 21. *a.* 9 *H.* 4. 3. *a.* 8 *H.* 6. 9. *a.* 14. *a.* 38 *H.* 6. 67. 9 *E.* 4. 17. *b.* *Vide* 19 *E.* 4. 3. *b.* 7 *H.* 7. 13. *b.* & 14. *a.* (*h*) 3. It ought to be ſuch a Colour, that, if it was of Effect, would maintain the Nature of the Action; as in an Aſſiſe, to give him Colour of a Freehold, and not as Gardian in Knights Service. 2. *Aſſ. p.* 6. 28 *Aſſ. p.* 28. 43 *E.* 3. *Aſſ.* 53. 22 *H.* 6. 6. *a. b.* nor to his Anceſtor where the Action is of his own Poſſeſſion. 4. (*i*) Colour ought to be given by the firſt Conveyance as has been ſaid, otherwiſe all the Conveyance before is waived, 10 *H.* 7. 14. *b.* 15 *E.* 4. 32. *a.* 18 *E.* 4. 10. *a.* 22 *E.* 4. 25. *a.* *L.* 5 *E.* 4. 134. *a.* 21 *H.* 6. 32. *b.*

As to the other Error which was aſſigned, the ſaid two Points were argued. 1. If the Letters Patent ought to be ſhewed by the Defendant, who juſtifies as Servant to him who has but Parcel of the Eſtate of him to whom the Letters Patent were granted. 2. Admitting that he ought to ſhew them, if the

Omiſſion

Omission of this Clause (*Cur' hic prolat'*) be Matter of Substance or Matter of Form; for if it be but Matter of Form, then forasmuch as the Plaintiff has not shewed it particularly and expresly for this Cause of Demurrer, he shall not take Advantage of it by the said Stat. of (*a*) 27 *El. cap.* 5. And as to the first, (*b*) *Austin*'s Case in 1 & 2 *P. & M. Dy.* 115. was cited, where in an Information of Intrusion in the Manor of *Eastfarleigh* in *Kent*, the Def. pleaded the Letters Patent of K. *H.* 8. to Sir *Thomas Wyat* in Tail, and that Sir *Thomas* leased to him for 36 Years, without shewing forth to the Court the Letters Patent; and the Ld. *Dyer* in reporting the Case, saith, *Nota hoc*; and this stands, as it was said, upon great Reason, for the Lessee having but Parcel of the Estate, the Letters Patent do not belong to him, but to his Lessor, and therewith agrees 29 *Ass. p.* 2. (*c*) *J. Eatbread*'s Case, and the Reason there given, is, Because the Patent doth not remain with him who has but Parcel of the Estate. And in 28 *H.* 8. *Dy.* 29. *b.* in (*d*) Trespass the Def. said, That the Place where was ten Acres of Land, whereof the K. was seised in Fee in the Right of his Crown; and by his Letters Patent granted the Land to the Lady *Carew* for Term of Life, who leased to the Def. for Years, and averr'd the Life of the first Lessee, and so justified, and it was moved if the Plea was good without shewing the first Letters Patent; and it was (*e*) held by *Brown*, *Willowby* and *Baldwin*, That he shall not be compelled to shew 'em, because the Letters Patent do not belong to him, no more than a (*f*) Sub-Collector, (*g*) Under-Sheriff, or Incumbent, because they have not any Means to make their Grantors or Masters to shew 'em: And by them there is a Difference, when the Patentee grants over his whole Interest, there the Patent belongs to him, and therefore he shall shew it forth, but when he grants but Parcel, it is otherwise: And with the Case of (*h*) the Incumbent agree 31 *E.* 3. *Monstrans des faits* 177. & (*i*) 31 *H.* 6. 14. and the Case of the Sub-Collector and Under-Sheriff, 22 *H.* 6. 42. *a.* & 3. 1 *H.* 6. 14. *b.* 12 *E.* 3. (*k*) *Monstrans de faits* 65. A Sub-Taxer shall justifie the Taking of Goods without shewing the Commission; but if (*l*) a Man will justify the Imprisonment of the Body of a Man by Warrant, he ought to shew the Warrant.

But it was resolved, That the Lessee for Years in the Case at Bar ought (*m*) to shew the Letters Patent made to the Lessee for Life: For it is a Maxim in the Law, That if he who is Party or Privy in Estate, or Interest, or he who justifies in the Right of him who is Party or Privy pleads a Deed, altho' he who is Privy claims but Parcel of the original Estate, yet he ought to shew the original Deed to the Court; and the Reason that Deeds being so

(*a*) Co. Lit. 3 4. b. Antea 88. b.
(*b*) Post. f. 94. a. Dy. 115. pl. 55, 66. 7 Co. 8. b. Plowd. 560 b. Co. Lit. 46. a. Moor 362. Hob. 324. 2 Rol. Rep. 491. Bridg. 27.
(*c*) Post. 94. a. 29 Ass. pl. 21. Br. Aid de Roy 80. Br. Monst. de faits 163.
(*d*) 1 Bulst. 154. 6 Co. 38. b. Palm 87. Postea 94. a.
(*e*) Post. 94. a.
(*f*) 22 H. 6 42. a. Fitz. Monstrans de faits 86. Plow. 148. b. Br. Monst. de faits 58.
(*g*) Cro. El. 67. Cro. Jac. 372. 1 Rol Rep. 221, 327.
(*h*) Plowden 148. b.
(*i*) Fitz. Monst. de faits 92.
(*k*) Palm. 87.
(*l*) Cro. Jac. 372. 1 Rol. Rep. 227, 327.
(*m*) Co. Lit. 225. a b 226 a. 227. b. 317. b. Cro. Car. 209. 441, 442. Post. 93. b. 94. b. Cro. Jac. 70, 103, 109, 292, 317, 360. 1 Bulst. 154, 155. Plowd. 80. a. 85. a. 148. b. 222. a. Dy. 29. pl. 199. 200. a. 5 Co. 75. a. Palm 87. 1 Rol. Rep. 332 2 Rol. Rep. 172, 191. 1 Mod. Rep 266. Doct pla. 215. 15 E. 4. 16. b.

so pleaded shall be shewed to the Court, is, that to every Deed two Things are (a) requisite and necessary; the one, that it be sufficient in Law, and that is called the legal Part, because the Judgm. of that belongs to the Judges of the Law; the other concerns Matter of Fact, sc. if it be sealed and delivered as a Deed, and the Trial thereof belongs to the Country. And therefore every Deed ought to approve it self, and to be proved by others: Approve it self upon its shewing forth to the Court in two Manners. 1. As to the Composit. of the Words to be sufficient in Law, and the Court shall judge that. 2. That it be not razed or interlined in material Points or Places, and upon that also in ancient Time the Judges did judge upon their view, the (b) Deed to be void, as appears in 7 *E*. 3. 57. 25 *E*. 3. 41. 41 *E*. 3. 10, &c. but of late Times the Judges have left that to be tried by the Jury, *s*. if the razing or interlining was before the Delivery. 3. That it may appear to the Court and to the Party, if it was upon Condit. Limit. or with Power of Revocat. &c. to the Intent that if there be a Condit. Limit. or Power of a Revocat. in the Deed, if the Deed be Poll, or if there wants a Counterp. of the Indent. the other Party may take Advant. of the Condit. Limitat. or Power of Revocat. and therewith (c) *Litt. c. Conditions, f.* 90 & 91. (d) 40 *Ass.* 34. agree. And these are the Reasons of the Law, that Deeds pleaded in Court, shall be shewed forth to the Court. And therefore it appears, that it is dangerous to suffer any who by the Law in pleading ought to shew the Deed it self to the Court, upon the general Issue to prove in Evidence to a Jury by Witnesses that there was such a Deed, which they have heard and read; or to prove it by a Copy: For the Viciousness, Rasures or Interlineations, or other Imperfections in these Cases, will not appear to the Court; or peradvent. the Deed may be upon Condit. Limitat. or with Power of Revocat. and by this way Truth and Justice, and the true Reason of the Com. Law would be subverted. But yet in great and notorious Extremities, as by Casualty (e) of Fire, that all his Evidences were burnt in his House, there if that should appear to the Judges, they may, in favour of him who has so great loss by Fire, suffer him upon the general Issue to prove the Deed in Evid. to the Jury by Witnesses, that Affliction be not added to Affliction; and if the Jury find it, (f) altho' it be not shew'd forth in Evid. it shall be good enough, as appears in 28 (g) *Ass. p.* 3. but in (h) 12 *Ass. p.* 16. the Judges would not suffer a Deed to be given in Evid. which was not shewed forth to the Jury. *Vide* 26. *Ass. p.* 2. the like. But the (i) Copy of a Record may be shewed and given in Evid. to the Jury for Records are of so high a Nature, and such Credit in Law, that they can't be proved by other Means than by 'emselves and no Rasure or Interlineations shall be intended in them. And therefore a Copy of a Record being testified to be true, is permitted

(a) 6 Co. 38. a. 9 Co. 25. a. Hob. 107. Co. Lit. 35. b. 121. b. 225. a. b.

(b) Cro. Car. 399. Co. Lit. 35. b. 121. b. 225. a. b.

(c) Lit. sect. 183. f. 41. a. Sect. 365, 366. Co Lit. 225. a. b.

(d) Br. Monstr. de faits 142.

(e) Post. 93. a.

(f) Co. Lit. 227. b.

(g) Br. Verd. 39.

(h) Br. Grant 65. Br. Nosm. 36.

(i) Doct. pla. 201, 306.

mitted to be given in Evidence; but the (*a*) sure Way is, to exemplify it under the Great Seal, or at the least under the Seal of the Court. And in the said Case of Casualty by (*b*) Fire, there ought to be great Care and Discretion in the Judges, for notwithstanding any such Casualty by Fire, he in Pleading ought to shew forth the Deed to the Court, otherwise his Plea will be insufficient, and Judgm. shall be given against him; for the Law will rather suffer a (*c*) Mischief in a private Case, than an (*d*) Inconvenience, which by the Breaking of the Rule of Law, should be brought upon the Publick. Also the Deed ought not only, as hath been said, to approve it self, but it ought to be proved by others, *sc.* by Witnesses, that it was sealed and delivered; for otherwise altho' the Fabrick and Composition of the Deed be legal, yet without the other it is of no Effect: And all this which has been said of Deeds, as to the legal Part, may be also affirmed of the King's Letters Patent. And the said Maxim aforesaid is proved by many Authorities in Law; and therefore in 3 *H.* 6. 20. *b.* 21, 22. in (*e*) *William Pole*'s Assise, the Case was such: Sir *John Clynton*, Knt. by his Deed indented enfeoffed *William Daventure* and his Heirs, yielding to the said Sir *John* and his Heirs the yearly Rent of five Marks, with Clause of Distress; which Rent after the Death of Sir *John*, descended to Sir *William Elington*, Knt. as to his Cousin and Heir, which Sir *William* by his Deed shewed forth, granted to the said *William Pole* now Plain. (who was a Lawyer) *pro consilio impenso & impendendo*, 26 *s.* 8 *d.* Parcel of the said Rent, to have and receive to him for his Life, and that he was thereof seised and disseised; and there *Westbury* and others take a Difference, when the first Grantee grants over as great an Estate as he had, and where he grants a less Estate; for when he grants as great an Estate as he had, by the express Grant the whole Estate in the Rent remains in the Person of the second Grantee, in which Case the first Deed of Right belongs to the second Grantee; and therefore in an Assise brought by him of this Rent, he ought to shew forth the first Deed: But where he grants a less Estate than he had, *sc.* where he that has a Fee-simple grants for Life, or makes a Gift in Tail, the second Grantee shall not be compell'd to shew the first Deed made to his Grantor, because the Fee remains in the Lessor or Donor to whom the Deed belongs, and to no other, and therefore he shall not be compell'd to shew the first Deed: But the Opin. of the whole Court was against the Pl', and the Reason was, because he is privy in the Estate of the Rent, and claims by the first Grant. *Vide Lit. lib.* 3. *c. Releas. fol.* 106. *Note*; (*f*) Every Release made to him who has a Rev'n or Rem'r in Fact, shall serve and aid him who hath the Freehold, as well as him to whom the

(*a*) Doct. placit. 306.

(*b*) Antea 92.

(*c*) 42 E. 3. 3. b. Dyer 51. pl. 15. Co. Lit. 97. b. 152. b. Lit. Sect. 231. 13 H. 4. 3. a. 12 R. 2 Fitz. Voucher 81.

(*d*) 40 Ass. pl. 27. f. 247.

(*e*) Fitz. Monstrans de fait. 76. Br. Monstrans de faits 5.

(*f*) Lit. Sect. 452. Co. Lit. 267. b Lit. f. 107. a.

Releaſe is made, if the Tenant for Life has the Releaſe in his Hand to plead; and the Reaſon of it is, becauſe there is Privity in Eſtate betwixt him in Reverſion, or Remainder, and the Tenant for Life; and yet the Deed doth not belong *(a)* to him, but to him in Reverſion or Remainder. In the ſame Manner *Littleton* ſaith, *(b)* Where a Releaſe is made to Tenant for Life, or to Tenant in Tail, it ſhall enure to them in the Reverſion or Remainder, as well as to the Ten't of the Freehold, and they ſhall have as great Advantage of it, if they can ſhew it; but in Reſpect of the Privity of Eſtate, if they can't ſhew it, they ſhall not take Advantage of it: And therewith agrees 35 *H. 6.* *(c) Monſtrans des faits* 118. where *Priſot* Chief Juſtice of the Common Pleas holds, That in many Caſes a Man ſhall not plead a Releaſe or Deed which doth not belong to him, nor can have an Action to recover, without ſhewing of it; as if the Diſſeiſor makes a Leaſe for Life, who is impleaded in a *Præcipe*, and makes Default after Default, and the Diſſeiſor is received, he ſhall not plead a Releaſe made by the Diſſeiſee to the Tenant for Life, without ſhewing it. So the *(d)* Lord by Eſcheat ſhall not plead a Releaſe made to the Diſſeiſor by the Diſſeiſee without ſhewing it; neither ſhall he in Rem'r be receiv'd without ſhewing the Deed, and yet it doth not belong to him, nor has he Remedy to get it. And it was ſaid, That theſe Caſes were ſtronger than the Caſe at Bar; for when the ſaid *Conand* made a Leaſe to the ſaid *George* for Years, the Leſſee might bind the ſaid *Conand* by Covenant, or otherwiſe, to ſhew the Letters Patent to the Court, when need ſhould be; but ſo can't the Tenant for Life, or he in Remainder or Reverſion, for there no contract is made betwixt him who pleads the Deed, and him to whom the Deed is made. It is further ſaid in 35 *H. 6.* that it was agreed, *(e)* That Guardian in Chivalry ſhall plead a Releaſe made to his Tenant, without ſhewing it, and that is adjudged as it is there ſaid; and *(f)* Tenant in Dower ſhall plead a Releaſe made to her Husband without ſhewing it. And in 14 *H.* 8. 4. *b.* it is agreed by all, That he who is *(g)* Privy in Eſtate, as Feoffee, Leſſee for Years, *&c.* and he who juſtifies as *(h)* Servant to him who is privy, ought to ſhew the Deed in Court which they plead, *&c.* And *(i)* in Debt againſt the Heir he ſhall not plead a Releaſe made to the Executor without ſhewing it, for there is Privity betwixt them, and therewith agrees 13 *E.* 2. *Monſtrans des faits* 42. And there is another Maxim in Law, That where a Man is a Stranger to a Deed, and doth neither *(k)* claim the Thing compriſed in the Grant, nor any Thing out of it, nor doth any Thing in the Right of the Grantee as Bailiff or Servant, there he ſhall plead the Patent

(a) 2 Ro. 3.
(b) Co. Lit. 267. a. b. 275. a. Lit. Sect. 453, 470. Lit. f. 107. a. b.
(c) Co. Lit. 225. b.
(d) Co. Lit. 226. a.
(e) Co. Lit. 225. b. Poſtea 94. b.
(f) Co. Lit. 225. b. Cro. Car. 209. 442. Poſtea 94. b.
(g) Br. Monſtrans de faits 61, 161. Co. Lit. 226. a.
(h) Cr. Jac. 292, 317, 360. Co. Lit. 226. a. Plowd. 148. b.
(i) Co. Lit. 232. a.
(k) 20 H. 7. 6. b. Palm. 87. 6 Co. 38. a. b. Yelv. 201. Br. Monſtrans de faits 172.

Patent or Deed without ſhewing it. If the (*a*) Tenant pleads a Grant of the Lord with Attornment, he ſhall not ſhew it; and *ſic de ſimilibus*; but when he who claims the Things, or any Right or Intereſt out of them, or juſtifies in Right of the Grantee, there he ought to ſhew the firſt Grant, as the ſecond Grantee of the Rent-charge ſhall ſhew the firſt Grant, and ſo ſhall his Bailiff; and the Grantee of the Rent-charge ſhall not plead the Releaſe of the Diſſeiſee to the Diſſeiſor without ſhewing it; for altho' he doth not claim the Land of which the Releaſe is made, yet he who has a Rent out of Land has a Right in the Land, which by Releaſe of all his Right will be extinguiſh'd, and therefore he ought to ſhew the Deed in ſuch Caſe; and therewith agrees (*b*) 20 *H*. 7. 6. *b*. and 14 *H*.8. 5. The Diſſeiſee ſhall not plead a Releaſe to the Diſſeiſor, neither the Right in the Land, nor of Rent iſſuing out of the Land, without ſhewing it; for where one claims the Thing to which a Releaſe is made, or a Right or Intereſt out of it, the Law makes a Privity in Reſpect of his Eſtate or Right in the Land, to ſuch Intent that he ſhall not have Avail of the Deed without ſhewing it. Which Caſes are ſtronger than the Caſe at Bar; for in the Caſe at Bar, he claims Eſtate and Intereſt in the Land it ſelf which is demiſed by the Letters Patent, and therefore he ought to ſhew them. And as to the Caſes which have been urged to the contrary, and firſt to (*c*) *Auſtin*'s Caſe, there is not any Authority in the Book, that it was either allowed or diſallowed by the Court; and the ſaid Caſe of (*d*) *Eatbread* in 29 *Aſſ*. *p*. 2. There the Prior alien made a Leaſe for Life, which he made as Prior out of the Inheritance of the Houſe, and not by Force of the Letters Patent, by which but a Chattel paſſed. And in the Caſe of (*e*) 28 *H*. 8. there *Fitzherbert*, *Mountague*, and *Knightley* held, That the Letters Patent ought to be ſhewed in ſuch Caſe; *& ſic gens contra gentem*.

And as to the ſecond Point it was objected, That it was but Matter of Form, and the (*f*) Subſtance is the Grant of Queen *Eliz*. by her Letters Patent, which is confeſſed by the Plaintiff by his Demurrer. And the Book in (*g*) 6 *E*. 4. 2. *a*. *b*. was objected, where *Choke* holds, that if one be bound upon Condition to perform the Covenants in certain Indentures; and he pleads Performance without ſhewing them in Court, and the Plaintiff replies, and ſhews a Breach, he makes the Bar good; for he ſays, That of ſuch Things which are not material, the Replication will make the Bar good; by which it was inferred, that the ſhewing of the Indentures was a Thing of Form, and not of Matter. And a Judgment was cited *Mich*.

(*a*) Doct. placit. 49. a.

(*b*) Br. Monſtrans de faits 172.

(*c*) Dyer 115. pl. 65, 66. 7 Co. 8. b. Plowd. 560. b. Co. Lit. 46. a. Moor 362. Hob. 324. 2 Rol. Rep. 491. Bridg. 27. Antea. 92. a.

(*d*) Antea 92. a. 29 Aſſ. pl. 21. Br. Monſtrans de faits 163.

(*e*) 28 H. 8. Dyer 29. pl. 199, 200. 1 Bulſtr. 154. 6 Co. 38. b. Palm. 87.

(*f*) Doct. pl. 69. a.

(*g*) 8 Co. 120 b. 7 Co. 25. a.

29 & 30 *Eliz.* in this Court in *the Mayor and Commonalty of (a) Launceston*'s Case in Trespass in *Cornwall*, the Letters Patent of Queen *Elizab.* were pleaded, *sc.* that Queen *Elizabeth* by her Letters Patent *concessit*, &c. without saying *(Cur' prolat')* upon which the other Party demurred generally, and the Plea adjudged good. But it was resolved, that it was Matter (*b*) of Substance, as appears by the Causes for which Deeds shall be shewed forth. And as to the said Case of the Mayor and Commonalty of *Launceston*, it is true, that such Judgment was given upon Argument of other Points: But in a Writ (*c*) of Error *Mich.* 30 & 31 *Eliz.* upon the Statute of 27 *Eliz.* Error was assigned, That the Letters Patent were not shewed forth; and it was resolved, That for this Cause the Plea was insufficient in Substance; and therefore it was resolved by all the Justices of the Common Pleas, and the Barons of the Exchequer, that the Judgment should be reversed. And of such Opinion in the Case at Bar, were all the Judges of the Common Pleas and Barons of the Exchequer, and so the Judgment given by the Judges of the King's Bench in the Case at Bar was affirmed. Observe well Reader, this Case adjudged by all the Judges of *England*, and Barons of the Exchequer. *Nota* Reader, as to the said three Cases put in 35 *H.* 6. *sc.* of the (*d*) Guardian, (*e*) Tenant in Dower, and Tenant by the Curtesy, they are good Law: For as to the said two Cases of Guardian and Tenant in Dower, there is a Difference where a particular Estate or Interest is gained by the Law, and where by the Act of the Party: In the Case at Bar, the Interest is gained by the Act of the Party, who might provide for himself; but when the Law creates the Estate, and the Deed doth not belong to him, nor ever was in his Power, then he shall not shew it, as in the said Case of Guardian in Chivalry; and therewith agrees 20 *E.* 3. *Darrein Presentment* 13. 33 *E.* 3. *Gard.* 162. And therefore the Guardian, in Chivalry in a Writ of Dower brought against him, shall not plead (*f*) Detainment of Charters, because they do not belong to him, but to the Heir, as it is held in 10 *E.* 3. 49, &c. The same Law of Tenant in Dower, as it is held in 5 *E.* 3. *Hors de son Fee* 2. 3 *H.* 6. 21. *a.* 7 *H.* 6. 1. *a.* 7 *H.* 5. 5. *a.* *Vide* 11 *H.* 4. 83. *a.* 14 *H.* 8. And so of (*g*) Tenant by Statute-Merchant, Staple, *Elegit*, &c. for they come to the Possession by Execution of Law, and against the Will of the Ter-Tenant who has the Deed; for, *Judicium redditur in invitum*: And therewith agrees (20) 24 *H.* 7. 6. *a.* *b.* But (*h*) the Tenant by the Curtesy ought to shew the Release made to his Wife; for altho' his Estate be created by

(*a*) Cr. El. 75, 117.
(*b*) Cro. El. 153, 217. 1 Leon. 300. Cro. Jac. 32. 16, 17 Car. 2. cap. 8. 22, 23 Car. 2. cap. 4. Hob. 233.
(*c*) Cro. El. 117.
(*d*) Antea 93. b. Co. Lit. 225. b.
(*e*) Antea 93. b. Co. Lit. 225. b. Cro. Car. 209, 442. Cro. Jac. 117.
(*f*) 9 Co. 19. a. Co. Lit. 39. a. Dy. 230. pl. 52. Doct. pl. 151. Perk. sect. 361. 10 E. 3. 49. Fitz. Dower 112. Vet. N. B. 9. b.
(*g*) Co. Lit. 225. b. 5 Co. 75. a. Cro. Car. 209, 442. Cro. Jac. 37.
(*h*) Co. Lit. 226. a.

by Law, yet the Deed belongs to him, and he had it in his Power, becauſe the Deed was made to his Wife, and he may detain it during his Life. *Vide* 14 *H.* 8. 4, 5. *Note* Reader when a Plea amounts to the (*a*) General Iſſue, and the Plaintiff demurs upon it, if the Defendant will not plead the General Iſſue, but join in Demurrer, the Court ſhall adjudge againſt him at the Common Law upon the general Demurrer, and after the ſaid Act of (*b*) 27 *Eliz.* upon ſuch Special Cauſe ſhewed as was in the Caſe at Bar. And by theſe Reaſons and Differences you will the better underſtand your Books; and the Books, which *prima facie* to ſome ſeem to diſagree, are well reconciled.

(*a*) Doct. pla. 116. Antea 88. b. Cro. Car. 157. Cro. El. 146, 147, 433, 485. 1 Leon 178. 1 Sid. 106. Doct. & Stud. 158. b. Co Lit. 303. b. Hob. 127, 133, 218. Winch 19. Cro. Jac. 165. 319. Noy 106.

(*b*) 27 El. c. 5. Antea 88. b.

Edward

EDWARD SEYMOR's *Case.*

Mich. 10 Jac. 1. *In B. R.*

Warranty.
1 Bulstr. 162.
Jenk. Cent. 51.
Cro. Car. 58.
Hard. 414.
Carthew 101.
Rep. Q. A. 20, 103.

BEtween *William Heywood*, Gent. Plaintiff in *Ejectione firmæ* in the King's Bench, and *Samuel Smith* Defendant, upon a Demise made by *Edward Seymor*, Esquire, 9 *Martii anno* 4 *Jac.* of a House within the Parish of St. *Anne infra præcinctum Black-fryars, in Warda de Farringdon infra London*, for three Years, &c. and that the Defendant had ejected him, &c. The Defendant pleaded Not guilty; and upon this Issue a Special Verdict was given to this Effect: Sir *Thomas Cheyny*, Knight, was seised of the said Messuage in Fee, and 6 *Decembr. anno* 1 *Eliz.* by his Will in Writing devised the said Messuage to *Henry Cheyny* his Son, (afterwards Lord *Cheny*) and to the Heirs of his Body; the Remainder to *John Cheny*, and to the Heirs Males of his Body; the Remainder to the next Heirs Males of the said *Thomas Cheyny*, and to the Heirs Male of their Bodies; the Remainder to the next Heirs of the said Sir *Thomas* for ever; and afterwards the said Sir *Thomas Cheyny* died seised: After whose Death the said *Henry* his Son entred into the said Messuage, and was thereof seised in Tail, with the Remanders over in Tail, the Reversion in Fee to him and his Heirs, and 18 *Decemb. anno* 22 *Eliz.* by an Indenture enrolled in the Chancery within six Months, for a certain Sum of Money bargained and sold the said Messuage to *William Higham*, Gent. and his Heirs, by Force whereof he entered and was thereof seised accordingly, and afterwards the said *Henry Cheyny*, *sc. Octob. Mich.* 22 *Eliz.* levied a Fine with Proclamations of the said Messuage to the said *William Higham* and his Heirs, with general

general Warranty to him and his Heirs against all Men. *William Higham* 19 *Decemb. anno* 23 *Eliz.* of the said Messuage enfeoffed *Edw. Stanhope*, Esq; in Fee, who 30 *Jan. anno* 26 *Eliz.* enfeoffed *Henry* Lord *Seymor* in Fee, who *ult. Octob. anno* 26 *Eliz.* of the said Messuage enfeoffed *Edward* Lord *Seymor* in Fee; and that the said *John Cheyney* in Remainder had Issue *Tho. Cheyny*, and died; and afterwards the said *Henry* then Lord *Cheyny* died *anno* 29 *Eliz.* without Issue; and that the said *Tho. Cheyny* was Cousin and Heir to the said *Henry* Lord *Cheyny*, and the said *Tho. Cheyny* 16 *Novemb. anno* 31 *Eliz.* entred into the said Messuage, claiming the said Messuage by Force of the said Remainder in the said Will; and that the said *Edward* Lord *Seymor* died, having Issue the said *Edward* the Lessor of the Plaintiff his Son and Heir, who entred into the said Messuage, and made the Lease to the Plaintiff, as in the Declaration is alledged, and that the Defendant as Servant of the said *Tho. Cheyny*, and by his Commandment, ejected him, *&c. Et si super totam materiam* the said Defendant *legitime intravit necne*, *Juratores præd' ignorant*, *& petunt inde advisamentum Curiæ*, *&c.* And this Case was argued at the Bar and at the Bench in the King's Bench, and therein divers Points were resolved *per totam Curiam*. ¶. 1. That by the Deed indented of Bargain and Sale inrolled, the Bargainee had an Estate (*a*) descendible to his Heirs, determinable upon the Death of the Tenant in Tail, and also he had the Reversion in Fee expectant upon the Estate in Remainder in Tail, and that the Wife of such Bargainee should be (*b*) endowed. And therewith agrees (*c*) 24 *E.* 3. 28. *b.* in *Caley*'s Case; but such Dower shall be determinable by the Death of the Tenant in Tail; ¶ 2. It was resolved, That the Fine levied to the Bargainee did not make a Discontinuance of the Rem'r to *John Cheyny*, because it did not touch or displace his Remainder, and no Estate of Freehold passed by the Fine, but the Fine with Proclamations corroborated the Estate of the Bargainee; and by the Statutes of (*e*) 4 *H.* 7. *c.* 24. and 32 *H.* 8. *c.* 36. made his Estate more perdurable; for where it was (having regard to the Estate-tail) determinable upon the Death of the Ten't in Tail, now it is not determinable till Ten't in Tail dies without Issue, but if the (*f*) Fine had been levied before Bargain and Sale enrolled, it had been a Discontinuance; as it was resolved in *Hynde*'s Case *in the* 4 *Part of my Reports*, *fo.*70.*b.* but in the (*g*) Case at Bar the Fine operated upon the Estate precedent, which passed by the Bargain and Sale, and is guided by the precedent Estate, and no Conclusion; for he may confess and avoid, as in (*h*) 6 *R.* 2. *Estoppel* 111. ¶. 3. It was objected, That where by the Feoffment of the Bargainee the Rem'r of *J. Cheyney* was (*i*) displaced and put

(*a*) 1 Saund. 261. Cro. Car. 429. 3 Keb. 499. Cro. El. 805. Moor 625. Carr. 210. 1 Bulstr. 165. 2 Bulstr. 34. Jenk. Cent. 51. Antea 45.
(*b*) Plow. 557. b. Post. 98. a. 1. Bulst. 165. Cro. Car. 429. 1 Co. 25. b. 2 Co. 52. a. 59. b. 70 a. 77. a. 79. a. 3 Co. 27. b. 84. a. b. 4 Co. 22. a. 30. b. 64. b. 66. a. b. 112. a. b. 6 Co. 34. a. 41. a. 79. a. 7 Co. 37. b. 8 Co. 27. a. 34. b. 9 Co. 16. b. 135. b. 10 Co. 52. a. 13 Co. 19. 3 Keb. 499. Cr. El. 805. Cart. 210. Co. Lit. 150. a. Lit. Rep. 122. 5 E. 3. Vouch. 249. 10 E. 3. 26. Br. Avowry 159.
(*c*) 1 Saund. 261. Fitz. Dower 98. Carr. 210.
(*d*) 1 Bulstr. 162, 164, 164. Co. Lit. 332. b. Cro. Car. 126, 321. Moor 28, 220. pl. 359. 9 Co. 106. a. Post. 97 a.
(*e*) Co. Lit. 262. a. 372. a. b. 326. a. 2 Inst. 519. 3 Inst. 216. 1 Leon. 77, 213. 2 Leon. 53, 157. 3 Leon. 10, 221, 227. 1 And. 170. Poph. 108, 114. 3 Co. 77. b. 78. b. 79. a. 86. b. 87. a. b. 88. a. b. 89. a. 90. a. b. 91. a. 4 Co. 125. b. 7 Co. 32. b. 9 Co. 104. b. 105. a. b. Cro. El. 561. Sav. 85. 88 Palm. 255. Goldf. 171, 172. Plowd. 360. b. 371. b. 3 Bulstr. 152. Dy. 72. pl. 3. 133. pl. 2. 186. pl. 68. 215. pl. 32. 224. pl. 28, 254. pl. 104, 256. pl. 9, 270. pl. 21.
(*f*) Cro. Car. 218, 321. 1 And 27. 113, 285, 286. 2 And. 161. O. Benl. 13, 14. Hob. 222. Owen 69, 70. Poph. 49. Cro. El. 917. 2 Inst. 671, 672. Godb. 218. 1 Leon. 6. 3 Leon. 1, 2. Jenk. Cent. 5, 51. 1 Bulst. 163. 2 Bulstr. 34. Moor 337, 338, 680, 681. 1 Co. 120. b.
(*g*) 4 Co. 91. a. Hynde's Case.
(*h*) 1 Bulstr. 164. Cr. El. 917. 6 R. 2. Estoppel 211. 2 Co. 74. b. 78. a.
(*i*) Cro. Car. 156. 9 Co. 106. a Jenk. Cent. 51.

to a (*a*) Right, so as the Warranty in the Fine descended upon *John Cheyney*, who has but a Right, and therefore shall bar him: It was unanimously resolved *per totam Curiam*, That this (*b*) Warranty should not bar the Remainder for divers Reasons. 1. Because every Warranty ought to be knit and annexed to an Estate, for every Warranty (*c*) has its Essence by Dependency upon an Estate; and in this Case at the Time of the Fine levied the Warranty was annexed to the Fee-simple determinable upon the Death of the Tenant in Tail without Issue, and to the Reversion in Fee, but did not extend to the Estate of *John Cheyney* in the Remainder, for that was not then displaced or devested, but continued in him, for *John Cheyney* at the Time of the Fine levied, and after, was seised of his Remainder. Then if the Warranty at the Time of the Creation of it be annexed to an Estate, the Conusee by his Feoffment or other Act can't extend it farther than it was at the Time of its Creation; and therefore when the Estate-tail, to which the Warranty is annexed, is determined by the Death of the Tenant in Tail without Issue, the Warranty, which had its Essence by Dependancy, is also (*d*) determined, for then there is no Estate which will support it: And therefore it was agreed, That if a Man makes a Gift in Tail, and warrants the Land to him and his Heirs, and afterwards Tenant in Tail makes a Feoffment in Fee, and dies without Issue, the Feoffee shall not (*e*) rebut the Donor in a Formedon in the Reverter, because the Estate, to which the Warranty is annexed, is determined: But it is held in 7 *E*. 3. 34 & 35. That if a Man makes a Gift in Tail, and warrants the Land to him, his Heirs and Assigns, and afterwards Ten't in Tail makes a Feoffment in Fee and dies, he shall rebut the Donor by Force of the said Warranty in a Formedon in the Reverter: And this Book is cited by *Wilby* in (*f*) 46 *E*. 3. 4. *b*. which Book is good Law, if it be intended of a Gift in Tail made before the Statute *de donis conditionalibus*, for then the Warranty was annexed to an Estate in Fee-simple, and the Donor had but a Possibility of Reverter, which might be barred by a collateral Warranty. *Vide* (*g*) 45 *Ass. pl.* 6. and *Plow. Com.* in the Lord *Barkley's Case* 234. *a*. But when a Man makes a Gift in Tail with Warranty after the Statute, this Warranty, in what Manner soever it be made, can't extend to bar the Reversion in Fee; for the Estate to which the Warranty extends, is determined by the Death of Tenant in Tail without Issue; and as hath been said, a Feoffment or other Act done by the Donee subsequent, shall not extend the Warranty further than the Estate-tail, to which the Warranty at the Time of the Creation of it was annexed. 2. It is a Maxim in Law, That no (*h*) Warranty shall extend to bar any Estate of

(*a*) 9 Co. 106. a.

(*b*) Jenk. Cent. 51.

(*c*) 1 Bulstr. 163, 166. & infra.

(*d*) Cart. 240.

(*e*) Co. Lit. 385. a. 1 Bulst. 166. 3 Co. 63. a. Vaugh. 389.

(*f*) Co. Lit. 385. a. 1 Bulstr. 166. 3 Co. 63. a. Vaugh. 388. Br. Formed. 57. Plowd. 436. b. Fitz. Garrantie 18. Statham Garrantie 4.

(*g*) Co. Lit. 19. b. 370. b. Plowd. 234. a. 553. b. Fitz. Garr. 68. Br. Assets per Descent 31. Br. Tail 34. Br. Prerog. 52. Br. Serch pur le Roy 5. Br. Garran. 52.

(*h*) 9 Co. 106. a. Co. Lit. 327. b.

(*a*) Free-

(*a*) Freehold or Inheritance which is in *esse* in Possession, Reversion or Remainder (and not displaced and put to a Right) before or at the Time of the Warranty made, altho' afterwards, and at the Time of the Descent of the Warranty, the Estate of Freehold or Inheritance be displaced and devested. And therefore if there be Father and Son, and the (*b*) Son has a Rent-Service, Rent-charge, or Rent-Seck, or Common of Pasture issuing out of certain Land, and the Father releases to the Tenant of the Land with Warranty and dies, it shall not bar the Son, for of the Rent or Common the Son was (*c*) actually seised at the Time of the Warranty made, and he who is in Possession need not put in his claim, either to avoid a Fine or collateral Warranty; and in the same Case, altho' the Son after the Warranty made was (*d*) disseised of the Rent or Common, and afterwards the Father dies, that shall not bar him, because the Warranty at the Time of the Creation of it, did not extend to any Estate of Freehold or Inheritance in *esse* at the Time of its Creation; but if the Son be disseised of the Rent or Common, and affirms himself to be disseised by (*e*) bringing of an Assise, and afterwards the Father releases with Warranty and dies, there the collateral Warranty shall bar the Son of his Rent or Common, because he had but a bare Right at the Time of the Warranty made. *Vide* (*f*) 31 *Ass.* *p.* 13. (38). 22 *Ass. p.* 36. 41 *Ass. p.* 6. 33 *E.* 3. *Garranty* 74. So if (*g*) my collateral Ancestor releases to my Tenant for Life and dies, it shall not bind me, because the Reversion continues in my Person; but if my Tenant for (*h*) Life be disseised, and my Ancestor releases to the Disseisor with Warranty, and dies, it shall bind me, because as well the Estate of the Tenant for Life, as my Reversion, was devested out of me at the Time of the Warranty made, and with this (*i*) (43) 45 *E.* 3. 3. 21. *b.* & 21 *H.* 7. 11. *a.* agree.

4. It was clearly resolved, That a Warranty can't (*k*) enlarge an Estate. 22 *H.* 6. 15. *b.* 19 *H.* 6. 73. *b.* 20 *H.* 6. 73. 2 *H.* 4. 13. *a.* 43 *E.* 3. 17. *b.* 43 *Ass. p.* 42. *Vide* 12 *Ass. p.* 17. 12 *E.* 4. *Tail* 3. 21 *E.* 4. 16. *b.* 44 *E.* 3. 10. *b.* 44 *Ass.* *Bassingborn*'s Assise.

5. It was resolved, That the Feoffment of the Conusee was no Discontinuance (*l*) of the Remainder of *Jo. Cheyney*, so that his Entry shall be tolled, for none can discontinue the Remainder or Reversion, but he only to whom the Land was entailed: And therefore if Tenant in Tail grants *totum statum suum* to one, and he makes a Feoffment in Fee, it shall not Toll the Entry of him in the Remainder or Reversion.

(*a*) Co. Lit. 327. b. 388. b. 9 Co. 106. a. 1 Andes. 37, 38.

(*b*) Co. Lit. 388. b.

(*c*) Co. Lit. 388. b.

(*d*) Co. Lit. 388. b.

(*e*) 1 Co. 140. a.

(*f*) 31 Ass. 13. Br. Charge 29. Br. Estate 34. Br. Garrant. 50. Br. Extinguishment 30.

(*g*) Co. Lit. 381. b.

(*h*) 1 Co. 67. a. 2 Rol 740.

(*i*) Statham Garranty 3.

(*k*) Co. Lit. 333. b. 385. b. 12 Ass. 16. 44 Ass. 35. f. 295. b. Perk. Sect. 165, 166. 1 Bulst. 164, 166. Statham Garranty 4. 1 Co. 85. a. Fitz. Feoffm. 8. Br. Estate 18, 73. Fitz. Annuity 16. Br. Garranty 10.

(*l*) 1 Bulstr. 163, 164, 165. Moor 28. 220. pl. 359 Cro. Car. 156, 321. Co. Lit. 332. b. Antea 96. a.

(a) 1 Bulstr. 165, 167. Co. Lit. 227. a. 283. a. 2 Rol. 690. (b) 34 E. 3. Fitz. Droit 29. (c) 2 Rol. 650 Ant. 90. a. b. (d) Doct. pl. 85. 2 Salk. 685.

6. It was resolved, That if the (a) collateral Warranty should bind, that it might be well given in Evidence, and found by the Jury, altho' some Opinions *obiter* be to the contrary in 22 *Ass. p.* 37. & 7 *H.* 5. 6. *a. Vide* 34 *E.* 3. *tit.* (b) *Droit* 29. For altho' a collateral Warranty (c) gives not a Right, yet in Law it bars and binds a Right, and therefore may be given in Evidence; and *eo potius*, because now in (d) *Ejectione firmæ*, and other personal Actions, it can't be pleaded by way of bar. 15 *E.*4. *Entre* 42. 20 *H.*7.4. *a.* 1 *H.* 7. 12. *a.* 21 *H.* 7. 32. *a.* 3 *E.* 4. 4. *b.* 8 *E.* 4. 19. 21 *E.*4. 82. *b.* 22 *E.* 4. 4. *a. b.* 3 *H.* 6. 27. 36. *b.* 20 *H.* 6. 44. *a. b.* 35 *H.* 6. *Trespass* 160. 27 *H.* 8. 22. *b.* And that a collateral Warranty may be given in (e) Evidence, and found by the Jury upon Not guilty pleaded in *Ejectione firmæ*, appears in the first Part of my Reports in (f) *Chudleigh*'s Case. And according to these Resolutions in *Trin.* 9 *Jac. Regis*, Judgment was given for the Defendant. Whereupon the Plaintiff brought a Writ of Error upon the new Stat. in the Excheq. Chamber; where it was resolved in this very Term by all the Justices of the Com. Pleas, and Barons of the Exchequer, That the Judgm. given by the Judges of the K.'s Bench should be affirmed; and that the Warranty did not bind the Remainder of *John Cheyny*, for the Reasons and Causes before recited without any great Difficulty. *Nota* Reader, every (g) Estate descendible to the Heir, is either an Estate of Inheritance, or an Estate of Freehold; an Estate of Inheritance is either Fee-simple or Fee-Tail; an Estate of Fee-simple is either an Estate of Inheritance absolute and indeterminable, as where Lands are given to a Man and his Heirs, he has such a pure and absolute Estate which can never determine; or a Fee-simple determinable, and that is in two Manners, *sc.* either expresly derived out of an absolute and pure Estate in Fee-simple, or implicite, and derived out of an Estate-Tail; out of an absolute Estate in Fee also in two Manners. First, by Condition, as upon Mortgage, and that is called a Fee-simple conditional. Secondly, by Limitation, as if *A.* enfeoffs *B.* of the Manor of *D.* to have and to hold to him and his Heirs, so long as *C.* has Heirs of his Body, and that is called a Fee-simple limited and qualified; and in both these Cases, the whole Estate in the Land is in the Feoffee; and therefore no (h) Remainder or Reversion can be expectant upon either of them; implicite and derived out of an Estate-Tail, as in the Case at Bar; when Tenant in Tail bargains and sells the said Messuage by Deed indented and enrolled to *William Higham* and his Heirs, and afterwards levies

1 Salk. 245. (e) 1 Bulst. 167 Doct. pl. 185. (f) 1 Co. 120. b.

(g) Co. Lit. 1. b.

(h) Co. Lit. 18. a. Palm. 138. Hutt. 60. 2 Leon. 114. 2 Rol. Rep. 216, 220. Vaughan 269. 2 Rol. 791. Plow. 235. a. 239. b. 248, 249. a.

levies a Fine to him and his Heirs with Proclamations, he has an Estate in Fee-simple, as long as the Tenant in Tail has Heirs of his Body, derived out of the Estate-Tail; and this is a more inferior and subordinate Estate in Fee-simple than the other two aforesaid, for upon this a Remainder or Rever. may be expectant; and yet in (*a*) all these Cases, he who has any such Estate of Inheritance may plead that he is seised of the Land in his Demesn as of Fee without shewing the Beginning of his Estate, as well when he has a Fee-simple derived out of an Estate-Tail, as a Fee-simple conditional or limited. An Estate of Freehold descendible, in like manner is either expressed or implied; expressed, as if a Man demises Land to one and his Heirs (*b*) during the Life of *J. S.* or Tenant for Life grants his Estate to (*c*) one and his Heirs; in these Cases the Lessee or Grantee has an Estate of Freehold descendible, but no Estate of Inheritance, for he shall be punished (*d*) for Waste and he in Reversion or Remainder shall enter for Forfeiture, and his Heir shall not have his (*e*) Age; for he in a Manner is but a special *occupant*; nor shall he be in respect thereof charged as Heir in an Action of Debt; implicite, as where in the Case at Bar Tenant in Tail bargains and sells the Land to *Wm. Higham* and his Heirs, he has an Estate descendible and determinable upon the Death of the Tenant in Tail, and yet he has a better Estate than the other has, for he shall not be punished for Waste; or if he makes a Feoffment none shall enter for the Forfeiture, and his Wife shall be (*g*) endowed determinable upon the Death of Tenant in Tail; and yet (*h*) you Pleaders look well to it, that in such Case you do not begin your Plea, That the Bargainee in such Case *fuit seisitus in dominico suo ut de feodo*, but (*i*) the sure Way is to plead the special Matter, and to aver the Life of the Tenant in Tail.

And so you will the better understand your Books, *s. Litt.* 3. *b. cap. Tail, & cap. Garranty,* 7 *E.* 4. 12. 9 *E.* 4. 26. *a.* 15 *Ed.* 4. 8. 2 *H.* 4. 13. 21 *H.* 7. 4. 18 *E.* 3. 12. 13 *H.* 7. 10. 18 *H.* 8. 3. *b.* 11 *H.* 4. 42. 7 *H.* 4. 46. 8 *H.* 4. 15. 17 *E.* 3. 48. 19 *E.* 3. *Account* 56. 33 *Ass. Pla.* 17. 27 *Ass. Pla.* 31. 22 *H.* 6. 33. 39 *E.* 3. 25. 22 *E.* 5. 19. 27 *H.* 8. 29.

(*a*) Doct. pla. 287. Cart. 211.

(*b*) 1 Co. 146. b. Br. Estates 50. Hob 323. Plowd 556. b. 1 Bulst. 135. B. N. C. 14. 3 Keb. 487. Dyer 253. pl. 99, 100. Co. Lit. 239. a. 110. b. Fit. Account 56. Cr. Jac. 282. 2 Rol 66. Moor 726.

(*c*) Co. Lit. 41. b.

(*d*) Co. Lit. 41. b. 44. b. 54. a. 2 Rol 826. 6 Co. 37. b. 2 Inst. 301. Plowd. 151, 555. b.

(*e*) Dyer 321. pl. 2. Co Lit. 239. a. 1 Anders. 21.

(*f*) 1 Bulst. 165.

(*g*) Ant. 96. a. 3 Co. 84. b. Cart 210.

(*h*) Cart. 209.

(*i*) Doctrin. pla. 287.

21 *H.* 8. *titulo Estates* 28. 50. 8 *El. Dy.* 253. 24 *Ed.* 3. 28. *b.* 9 *Ed.* 4. 19. *Plowden's Commentaries in Walsingham's Case*, 555.

And I conceive that in the Case at Bar, the Remainder of *John Cheyny* by the Feoffment of the Conusee to *Edward Stanhope* and his Heirs was not displaced, nor put to a Right; for the Conusee had a Fee-Simple determinable upon the Death of *Henry* Lord *Cheyney* without Issue of his Body, and when he made the Feoffment his determinable Fee-simple in Possession, and his absolute Fee-simple expectant upon the Estate-Tail of *John Cheyny* in the Remainder should pass, and should not devest the Remainder of *John Cheyny*: For the Feoffment which in it self is not tortious, can't be tortious to another. But where Tenant for Life, or Tenant in Tail makes a Feoffment, the Feoffment in it self is tortious; for Tenant for Life or in Tail can't give in Fee, and therefore the Feoffment it self is tortious: And in Case of an Estate-tail is tortious as to his Issues: But when he who has a Fee-simple, although it be determinable, makes a Feoffment in Fee: He who has the Fee-simple, gives a Fee-simple, and thereby he doth no wrong to his Heirs, and by Consequence no wrong to him in the Remainder. Also the Estate-Tail by the said Fine is utterly barred, and a new Estate in Fee-simple created.

(a) Co. Lit. 389. a. 33 E. 3. Garranty 74.

Nota also, Reader, there are some Titles to which a (a) Warranty doth not extend, as the Title in Case of Discharge, Condit. upon Mortgage, &c. Mortmain, Consent to Ravisher, and the like, because for these no Action lies, in which there can be Voucher or Rebutter, neither can a Descent toll the Entry in such Cases; and they continue in such Plight aud Possession as they were by their original Creation; and they by no Act can be displaced or devested out of their original Essence. *Vide* 34 *E.* 3. *Garranty* 72.

Co. Lit. 389. a.

A collateral Warranty shall not bar a Title of Dower, for that continues the Essence according to the original Creation: And yet for that an Action is given; and therefore there is a Difference between a collateral Warranty, and a Fine levied, and five Years passed;

for

for upon a Fine and five Years passed all the said Titles are bound; and the Title of (a) Dower also, if an Action be not brought within the Time prescribed by the Stat. *Vide Plow. Com.* 373. *a*.

(a) Cro. Jac. 333. Ant. 49. b. Co. Lit. 326. a. 6 E. 2.

Dower 145. 19 E. 2. Dower 165. Cr. Car. 201. 9 Co. 140. b. 8 Co. 72. b. Dyer 72. pl. 3. 224. pl. 28. 2 Co. 93. a. 10 Co. 49. b. 1 Rol. Rep. 160. 3 Inst. 216. Moor 53. 72 Rol. Rep. 69, 409. Goldsb. 184. 3 Leon. 50, 221. Palm. 235.

BEAWFAGE's *Case*.

Mich. 10 Jac. I.

Sheriff's, &c.

(a) Hardr. 121. 3 Co. 59. b. Cro. Car. 361. Hob. 13 Cro El. 66, 76, 178, 190, 199. 200, 271, 800. Dy. 25. pl. 157. 118. pl. 1. 119. pl. 1, 2, 3, 4. 32. pl. 32, 33, 364. pl. 29. Styl. 234. 2 Bulstr. 13. 213. 37 H. 6. 1. a. Fitz. Obliga. 4 Br. Obliga. 37. Plowd. 62. b. 63. a. 65. a. Rast. Sheriffs 25. 1 Leon. 132. 2 Leon. 78, 107, 118. 3 Leon. 228. 1 Rol. Rep. 40, 169. 2 Rol. Rep. 201. Savil 81. Latch 23, 54, 55, 143. O. Bendl. 110. 1 Jones 65. Hutt. 70. 3 Inst. 194. 1 Rol. 537. Moor 247. Owen 90. Godb. 136. Goldsb. 54, 66. Cro. Car. 287, 309, 448. 1 Keb. 391. Noy 33, 76, 172, 173. 3 Keb. 191. 1 Anders. 267. 2 Ander. 122. 1 Sand. 161, 162. Poph. 165. Hetl. 25, 175. F. N. B. 251. b.

IN this Term it was moved at the Bar in the Case of one *Beawsage*, if the Sheriff who has *Fieri facias* may take a Bond of the Defendant to pay the Money into Court at the Return of the Writ; and the Doubt which was conceived upon it, was upon the general Words of the Act of (a) 23 *H. 6. cap.* 10. And if any of the said Sheriffs, or other Officers, or Ministers aforesaid, take any Obligation in other Form, by Colour of their Offices, that it be void: And such Bond to pay the Money into Court, &c. is in other Form than the Statute prescribes. ¶ But upon Consideration of all the Parts of the said Act, it was resolved, That such Bond was not made void by the said Act, and therefore *cohærentia provisionum Actus præd' est observanda*. First (as to this Matter) it is enacted, That Sheriffs, &c. shall let out of Prison all Persons arrested by them, or in their Ward by Force of any Writ, Bill or Warrant, in any Action personal, or for Cause of Indictment of Trespass, upon reasonable Surety of sufficient Persons having sufficient within the Counties where such Persons are so let to Bail, to keep their Days, &c. (except Persons in Execution by *Capias utlagat'*, *cap. Excom'*, Surety of Peace, and Persons committed by the special Command of any Justice, and Vagabonds.) The second Clause is, That no Sheriffs, &c. shall take, or cause to be taken or made any Obligation for any Cause aforesaid, or by Colour of their

their Office, but (*a*) only to themselves, of any Person nor by any Person which shall be in their Ward by the Course of the Law, but by the Name of their Office, and upon Condition written, that the Prisoners appear at the Day contained in the said Writs, Bills or Warrants, and in such Places as the said Writs, Bills or Warrants require. (Then comes the said Clause :) And if any of the said Sheriffs, &c. take any Obligation in other Form by Colour of their Offices, that it shall be void. So that the first Branch contains the Clause of the Precept and Commandment to Sheriffs, that they shall let Prisoners to Bail, who were arrested in personal Actions, &c. which the Sheriff could not do before this Act, as appears by (*b*) 22 *H.* 6. 46. *a. b.* 19 *H.* 6. 43. *a.* 21 *E.* 4. 77. *b.* *F. N. B.* (25) 251. *a. b.* The 2d Branch contains the Form of the Bond by which he shall be let to Bail: The 3d, the Penalty, if the Sheriff do not observe the Form prescribed by the Stat. so that upon the Coherence and Dependency of the Branches, the later Words, altho' they are general, shall extend only to the precedent Branch, *sc.* of Bonds taken of those who are in their Ward. And according to this Resolution it hath been adjudged in this Court *Tri.* 34 *E. Rot.* 1656. In Debt by *Dawson* Sheriff of *B.* against *Burman* upon a Bond, the Def. pleaded the Statute of 23 *H.* 6. and shew'd that one *K.* recovered Debt and Damages against him, and sued out a Writ of *Fieri fac'* against him directed to the Sheriff of *B.* and that he made the Bond to the Pl. for the Execution, and that the Bond was void by the said Act; upon which the Pl. demurr'd. And it was resolved, first, That the said (*c*) Bond was not within the said Stat. because the Stat. extends only to such Bonds, which any in his Ward makes to him. 2dly, That the Bond was not void by the Com. Law; whereupon the Pl. had Judgm. And the like Judgm. was given in this Court, *Mich.* 28 & 29 *Eliz. Rot.* 1502. *inter Burwey* and *Ket* upon Bond taken by the Sheriff *pro solutione pecuniæ debitæ Dominæ Reginæ*, upon an Extent out of the Exchequer. *Nota*, Reader, where it is said in the last Clause of the Act, That if any of the said Sheriffs, or other Officers or Ministers aforesaid, take any Obligat. in other Form by Colour of their Offices, that it shall be void. It is to be known that there are two manner of Forms, *sc. Forma verbalis, & forma legalis*; *Forma verbalis* stands upon the Letters and Syllables of the Act; *Forma legalis* is *forma essentialis*, and stands upon the Substance of the Thing to be done, and upon the Sense of the Stat. *quia Notitia ramorum hujus Statuti non in sermonum foliis sed in rationis radice posita est.* And (*d*) according to this Distinction hath this Branch of this Act been expounded; and therefore in 37 *H.* 6. 1. *a. b.* If the (*e*) Sheriff takes a single Bond of one in his Ward, who was bailable, it is void, for this Bond wants the

(*a*) Plowd. 68. b

(*b*) F. N. B. 251. b. B. Mainpr. 37. Plowd. 67. a.

(*c*) Anders. 267.

(*d*) Cr. Jac. 286.

(*e*) Plowd. 64. a. 67. b. Br. Det. 116. Dy. 119. pl. 84. Br. Obligat. 3. Fitz. Obligat. 4. 7 E. 4. 5. b.

the essential Form prescrib'd by the Stat. for the Condit. prescribed there is wanting, which is Part of the Substance; so there (a) *Moile* said, if the Sheriff had let one to Bail, which is excepted in the Stat. and is not baliable, and had taken a single Bond, that it should be void, *qd' alii Justiciarii concesserunt*; for by the Except. it appears that it was not the Intent of the Statute that they should be let to Bail, and so the Bond is taken in other Form than the Stat. intended. And I conceive that as well in the same Case of 37 *H. 6.* as in the principal Case of *Dive* and *Maningham* *Plow. Com.* 67. The Bond which hath Condit. to (b) save the Sheriff, &c. harmless (when the Sheriff against Law lets one to Bail who is not bailable) is against Law, and void by the Com. Law: And herewith agrees *Wm. Wiseham*'s Case, 15 *El. Dy.* (c) 324. And in (d) 7 *E.* 4. one was in Custody of the Sheriff by Force of a *Capias* directed to him upon an Indict. of Trespass and the Party made a Bond to another (by the Nominat. of the Sheriff) upon such Condit. as the Stat. prescribes for the Surety of the Sheriff; and there it is held that the Bond is void, because the Act prescribes the Bond to be made to the Sheriff himself, and that is Part of the essential Form. So if the Sheriff adds to the Condit. that he shall be (e) kept without Damage against the K. and Pl. &c. That shall make the whole Condit. void for the Reason aforesaid. So if the Sheriff or Gaoler takes a Bond of a Prisoner, with Condit. to be a true Prisoner, or to pay for his (g) Meat and Drink: So if the Sheriff adds another Thing to the Matter prescribed by the Stat. as to pay so much Money for an Horse, &c. this Addit. makes the whole Bond void, for it is taken in other Form (touching the Substance of the Matter) than is prescribed by the Stat. And with all this agrees *Plow. Com.* in *Dive* and *Manningham*'s Case, 67, 68, 69. But in *Pasch.* 27 *El.* In the K.'s Bench, in an Action of Debt brought by Sir *Will. Drury*, late Sheriff of the County of *Suffolk*, upon a Bond of 20 *l.* against *A. B.* who demanded *Oyer* of the Bond, by which it appears that the Def. was only bound in it, and of the Condit. which was that one *More* whom the said Sheriff had arrested by the Force of a *Latitat* out of the K.'s Bench should appear in Person at the Day contained in the Writ, &c. and pleaded the Stat. of 23 *H.* 6. And that the said Bond was taken in other Form, than the said Act prescribed, &c. upon which the Pl. demurred in Law; and it was objected that there were three Variances from the Form prescribed by the Stat. *sc.* one in the Bond, and two in the Condit. In the Bond, because Pl. took but one (h) Surety, and the Stat. prescribes reasonable Surety of sufficient Persons (in the plural Number) having sufficient within the Counties where such Persons are so let to Bail, in which Case there ought to be two Sureties at least, and

(a) Plow. 64. a. 37 H. 6. 2. b. Fitz. Obligation 4.

(b) Yelv. 197. 2 Bulst. 213. Hob. 14. Godb. 250, 251. Plowd. 64. b. 67. b. 68. b.

(c) Dyer 324. pl. 32, 33. 2 Keb. 423.

(d) Plow. 68. a 66. b. 7 E. 4. 5. b. Fitz. Det. 80. Br. Non est factum 14. 3 Co 59. b. 5 Co. 119. b. Dyer 120. pl. 8

(e) Plow. 68. b.

(f) 1 Sid. 383. Latch, 143.

(g) Plow. 68. a. b.

See Lucas 327.

(h) Cro. Eliz. 672, 808, 852. Noy 40. Cr. Jac. 286. Cr. Car. 446. 1 Mod. 228. 2 Mod. 181.

and here is but one Surety, and the (*a*) plural Number can't be satisfied with the singular; and so against the Words of the Act, for the more and the more able the Sureties are, they will the rather cause him who is bailed to appear, and thereby Justice will proceed with more Expedition, and so against the Intention of the Stat'. And with all this agrees the Opinion of *Montague* Ch. Just. of the Com. Pleas in (*b*) *Dive* and *Manningham*'s Case. Also in the Condition, first, the Words are, That the Prisoner shall appear in (*c*) Person, where the Words of the Statute are, *shall appear* generally (without these Words *in Person*.) 2. That he shall appear at the Day, &c. *ad respondendum*; whereas these Words, *ad respondend'*, are more than the Stat. prescribes, and so likewise for two Reasons the Condition varies from the Form prescribed by the Stat', and by Consequence the Bond void, as in the said Cases of (*d*) 37 *H.* 6. 7 *E.* 4. and *Dive* and *Manningham*'s Case. But it was resolv'd by Sir *Christ. Wray*, Sir *Tho. Gawdy*, and the whole Court of K.'s Bench, That the said Bond was not made void by the said Act. For as to the first, the Words, *upon reasonable Surety of sufficient Persons*, are added for the Surety of the Sheriff; and therefore if he will take but (*e*) one Surety, it is at his Peril, for he shall be amerced if the Defendant doth not appear, and therefore the Stat. doth not make the Bond void in such Case; for the said Branch which prescribes the Form, requires that the Bond shall be made to the Sher. himself, &c. by Name of his Office, and that the Prisoners appear, in which Clause no mention is made of the Sureties; so that the Intent of the Act was, That forasmuch as it was at the Sher.'s Peril, to leave it to his (*f*) Discret. to take one or more for his Indempnity, and peradventure it will be better for him sometimes to take one who is sufficient, than two others; and altho' the Surety or Sureties have not sufficient within the same County, as the Stat. mentions, yet the Bond was good enough, for those Words of the Act, as to this Point, are more for Counsel or Direction of the Sheriff, than for Precept or Constraint to him, and that for the Safety of the Sheriff: For if the Defend. can't find two sufficient Sureties, having sufficient within the same County, the Sheriff is not bound to let him to bail. And this Resolution agrees with the old Rule, *sc.* (*g*) *Quilibet potest renunciare juri pro se introduct'*. As to the said two Additions to the Condition of the said Bond, more than is in the Stat. It was resolved, it is true, there is a verbal Difference from the Form prescribed by the Statute, but none in Subst. and Effect; for he who is so bailed ought to appear in Person, for so much is implied in this Word of the Act (*appear*,) and therefore at the Com. Law when any Ten't or Def. was commanded to (*h*) appear in any Court, he ought before the Stat. thereof made, in all Cases to have appeared

(*a*) Post. 102. b, 103. a. Plowd. 69. a.

(*b*) Plowd. 69. a.

(*c*) Cr. Eliz. 672, 776, 810. Noy 33, 54, 172, 173. Owen 50. Goldsb. 54, 66. Sav 81. 2 Leon. 78.

(*d*) 37 H. 6. 1. a. b. 7 E. 4. 5. b. Antea 100. a. b.

(*e*) Cr. El. 624, 672, 808, 852. Cr. Jac. 286. Cr. Car. 446. Plowd. 69. a. Noy 40. Antea 100. b.

(*f*) Cro. El. 624, 808.

(*g*) Co. Lit. 99. a. 166. a. 2 Inst. 183, 501. 3 Keb. 146. Cart. 19, 21, 119, 121. Lit. Rep. 41. Stamf. Cor. 46. b.

(*h*) 8 Co. 58. b. Co. Lit. 128. a. 2 Inst. 249. F. N. B 25. C. Cawley 164. 2 Lev. 123, 180.

(a) F.N.B.25.C. appeared in proper Person; and therewith agrees (a) *F.N.B.* 25. and the Books before cited, so for the same Reason the other Addition is not material, for he who ought to appear, ought to appear *ad respondend'*, & (b) *parum differunt quæ re concordant. Et est ipsor' legislator' tanquam viva vox, rebus & non verbis legem imponimus. Vide* 21 *Eliz. Dyer* (c) 364. there the Condition was in the Conjunctive, *appear and answer*, in the Copulative, and yet the Bond good. *Tr.* 27 *Eliz.* in the K.'s Bench *inter Danby* and *Hethcote*, in a Writ of Error upon a Judgment given in the Marshalsey, it was resolved, That if a Sher. or Gaoler for the Ease and Enlargement of any who is in his Ward, takes a Promise to save him harmless, that altho' the Stat. speaks only of an Obligation with Condition, yet it is in equal Mischief. (d) And *Wray* Ch. Just. said, That the Stat. would serve for little or no Purpose, if Promises should not be taken within the Statute. And the said later Clause is general, *sc.* and if the Sheriff takes any Obligation in other Form, that it shall be void, within the Equity of which Words (any Obligat.) an (e) *Assumpsit* is taken; for as it is said in the antient Verses.

(b) 5 Co. 4. b. 2 Bulstr. 53.
(c) Dyer 364. pl. 29. Cr. Jac. 286.
(d) Cr. Eliz. 66.
(e) 2 Rol. Rep. 201 Noy 76. O. Bendl. 100. Het. 175. 2 Bulstr. 213. Yelv. 197. Godb. 250, 251. Cr. El. 178, 190, 200, 230, 271 1 Leon. 132. Owen 97, 98. 3 Leon. 227, 228. 1 Rol. 16.

Verba ligant homines, taurorum cornua funes,
Cornu bos capitur, voce ligatur homo.

Quando verba statuti sunt specialia, ratio autem generalis, generaliter statutum est intelligend'. And it appears by the Preamble, that the Stat. was made to avoid Perjury, (f) Extortion and Oppression, three most horrible and odious Sins, and therefore for the Suppressing of them, and for the Advancement of Truth and Justice, the Words of the Act shall have a benign and favourable Interpretat. *in hiis enim quæ sunt favorabilia animæ, quamvis sunt damnosa rebus, fiat aliquando extentio statuti.* And the Extortion and Oppression which is done to Prisoners is the most odious, because it is *sævire in dolentes, & addere afflictionem afflictis.* And it is true, that before this Statute, the Sheriffs, Gaolers, *&c.* sometimes for Ease or Enlargement, and sometimes by Oppression and *Dures*, would extort from the Prisoners by Colour of their Offices divers Sums of Money and other Profits, and so by such Pillage and Extort. they were enriched, and the Prisoners impoverished, and the Proceedings of Justice delayed. And it is well said in *Dive* and *Manningham*'s Case 68. *a.* That (g) Extortion is no other than Robbery, but is more odious than Robbery; for Robbery is apparent, and hath always the Appearance of Vice, but Extortion carries a Visage of Truth, and is more difficult to be tried or discerned; and is likewise oftentimes (h) accompanied with the damnable and damned Sin of Perjury, in Breach of the Oath which the Officer takes when he is admitted to his Office, and therefore it is the more odious.

(f) 3 Inst. 149.
(g) Co. Lit. 368 b.
(h) 3 Inst. 149.

(a) Ex-

(a) *Extortio est crimen, quando quis colore officii extorquet quod non est debitum, vel quod est supra debitum, vel ante tempus quod est debitum*; and it is called *crimen expilationis*, and *crimen concussionis*.

Also it was said, That the said *Assumpsit* did not bind the Prisoner at the Common Law, because the Consideration was against Law. *Vide* 19 *Eliz. Dyer*, (b) *Onley*'s Case.

(a) Hutt. 53. Co. Lit. 368. b. (b) Winch 51. Cr. Car. 361. Palm. 190. Dyer 355. Moor 166. Hob. 806. 1 Leon. 19, 179. 2 Bulstr. 230.

ALFRID

ALFRID DENBAWD's *Case*.

Mich. 10 Jac. 1. *In B. R.*

Tales, &c. Cr. Jac. 316. Jenk. Cent. 288.

*A*Lfrid *Denbawd*, alias *Burnard*, brought a Writ of Error in the Exchequer-Chamber against *Peter Woodley*, *Hill.* 9. *Jac. Reg. Rot.* 1151. in the King's Bench. And the Case was, That *Peter Woodley* brought Trespass against the said *Alfrid* and one *Thomas D. Quare clausum fregit*, at *Aishbarton* in the County of *Devon*. The Defendant pleaded Not guilty, and at the Assizes in the Country *Alfrid* was found guilty, and the Plaintiff had Judgment against the said *Alfrid*. Whereupon the said *Alfrid* brought a Writ of Error, and the Error which was assigned, was, Because one of the Jurors, of the principal Panel appeared only at the Assises, upon which at the Prayer of the Plaintiff a Panel of *Tales de Circumstantibus* was returned by the Sheriff in this Form: The Title was *Nomina decem talium*, *&c.* and under it he returned eleven Jurors. And it was argued, That this Judgment was erroneous for two Reasons. 1. Because but one of the principal Panel appeared only, and two at least ought to appear. 2. That inasmuch as he entitled the Panel of the *Tales*, *Nomina decem talium*, he could not return eleven. As to the first, the Award of the said *Tales* ought to be warranted by the Statute of 35 *H.* 8. *cap.* 6. for at the Common Law the Justices of *Nisi prius* could not grant any *Tales*; and it was objected, That the Award of the *Tales* in the Case at Bar, was not warranted by the said Act; for the Words of the Act are, *And that the Justices shall and may proceed to the Trial of every such Issue, with those Persons that were before impanelled and returned, and with those newly added*, &c. So that these Words *those Persons*, being in the plural Number, can't be satisfied with

F.N.B. 189. H.

with one (*a*) singular Person; as upon the Stat. of (*b*) *West.* 2. *c.*11. *Cum dom.* &c. *dederit eis Auditores compoti*, &c. if one accounts before (*c*) one Auditor, in Debt for the Arrearages upon such Account, he shall wage his Law, as it is held in 20 *H.* 6. 41. *b.* and the Reason there given is, because the Stat. speaks of Account before Auditors. *Vide* (*d*) 5 *H.* 4. *c.* 8. 11 *H.* 4. 56. *b.* 8 *H.* 6. 15. *b.* 20 *H.* 6. 17. *a.* 14 *H.* 6. 24. *b.* 20 *H.* 6. 41. (45.) *b.* 22 *H.* 6. 35. *a.* *vid.* 49 *E.* 3. 2. *b.* & 43 *E.* 3. 11. (31.) *b.* *Nota* Reader, there is not any Act of Parl. which by express Words takes away the Wager of Law in an Action of Debt upon Arrearages of Acc't, but at the Com. Law the Def. shall have his Law in an Action of Debt brought upon Arrearages of Account, whether the Acc't be before one Auditor, or many, as appears in 38 *H.* 6. 6. *a.* but the Reason why the Def. shall not wage his Law when the Acc't is made before Auditors, is upon the Stat. of *West.* 2. *c.* 11. for now this Stat. has made the Auditors Judges of Record, because they have Power thereby to commit the Def. to Prison, which none can do unless they be Judges of (*e*) Record; and with this Reason, *sc.* that they are Judges of Record agree (*f*) 2 *H.* 6. 41. & 10 *H.* 6. 24. *b.* 25. *a.* and for this Reason he was ousted of the Law by all the Just's in such Cases: But if the Account be before one Auditor only, it is out of the Stat. for he can't commit the Def. to Prison, and therefore remains at Com. Law. So the Lord who is found in Surplusage, the Stat. is made against the Accountant only, and the Lord can't be committed to Prison, and therefore he also remains at the Com. Law, as it is adjudged in 14 *H.* 6. 24. *b.* *Vide* 10 *H.* 6. 25. *a.* 38 *H.* 6. 6. *a.* 20 *H.* 6. 41. *b.* And it appears by the Judgment of the whole Parl. in (*g*) 5 *H.* 4. *c.* 8. That in an Action of Debt upon Arrearages of Account before (*h*) Auditors, that the Def. shall not wage his Law, but there Remedy is given by Examination, to discern if the Matter lie in Acc't, and if not, then to allow the Def. his Law; and therefore the Books in (*i*) 43 *E.* 3. and 49 *E.* 3. are ill reported. And moreover the Counsel with the Pl. in the Writ of Error, cited the Case of 22 *H.* 6. 47. *b.* where the Custom of foreign Attachment being alledged against Persons in the plural Number, shall not be satisfied with one; and the Case of Redisseisin, where the Stat. of *Merton*, *cap.* 3. saith, (*k*) *Assumptis tecum Custodibus placitor' Coronæ Dom' Regis*; this Plural Number shall not be satisfied with one, if there are more than one: And with that agrees 27 *Ass.* *p.* 7. 50 *E.* 3. 17. *a.* *b.* 39 *H.* 6. 42. *a.* So in Grants made by Corporations, the plural Number shall not be satisfied with one, as appears in the Case of the Cooks of *London* in *Plow.* *Com.* So in Writs, if the Writ be that the Defendant *falso fabricavit* (*l*) *diversa falsa facta*, he can't declare upon one only. 35 *H.* 6. 37. *b.* *Vide* 7 *E.* 4. 31. *a.* 20 *H.* 6. 45, &c. But it was resolved, That in Case when but (*m*) one of the princi-

(*a*) Dyer 245. pl. 64. Antea 101. a. Plowd. 393. b.
(*b*) 2 Inst. 379, 380.
(*c*) 2 Inst. 380. Co. Lit. 295. a. 20 H. 6. 16. b. 17. a. Fitz. Ley 10. 2 Rol. 606. 4 H. 6. 25. b.
(*d*) 5 H. 4. c. 8.
(*e*) 2 Inst. 380. 8 Co 120. a.
(*f*) 20 H. 6 41. b.
(*g*) Dyer 145. pl. 63.
(*h*) Co. Lit. 295. a. 2 Inst. 380. 2 Rol. 106.
(*i*) 43 E. 3. 1. b. 49 E. 3. 2. b. Dy. 145. pl. 63.
(*k*) Plow. 393. a. 23 Ass. pl 7. Fitz. Rediss. 2. Br. Rediss. 3. Rastal Rediss.
(*l*) Fitz. Forger de faux faits 14. Br. Amendm. 15. Br. Count 22. Br. Faits 5. Plow. 84. b.
(*m*) Cr. Jac. 316. 2 Rol. Rep. 210, 211. Jenk. Cent. 340.

pal Panel appears, the Statute gives Authority to Justices of *Nisi prius* to award *Tales de Circumstantibus*: For it is enacted by the said Statute, *For the more speedy Trial of Issues to be tried by twelve Men hereafter to be had, that in every Writ of* Habeas Corpora *or* Distringas *with a* Nisi prius, *where a full Jury shall not appear before the Justices of Assise or* Nisi prius, *or else after an Appearance of a full Jury, by Challenge of either of the Parties the Jury is like to remain untaken for Default of Jurors; that then the same Justices, upon Request made by the Party, Plaintiff or Demandant, shall have Authority by Force of this Act to command the Sheriff, or other Minister or Ministers to whom the Making of the said Return shall appertain, to name and appoint, as often as need shall require, so many of such able Persons of the said County then present,* &c. *as shall make up a full Jury.* By which Words without Question, altho' one only appears, the Court may award *Tales de* 11. Then comes the Clause which has been mentioned before, which doth not restrain the Generality of the first Words. And the Cases put before, which give Authority in the Nature of a Commission, as in the Case of Auditors of the Account, (a) Redisseisin, *&c.* are not to be resembled to this Case upon the said Act of 35 *H.* 8. which is made for more speedy Trials, which always, and all other Statutes of like Nature, shall be taken benign and favourably in Furtherance and Advancement of Expedition in Justice; and it is as great Mischief and Delay of Justice when one only, as when two or more appear, and therefore if the Body of the Act had been in the plural Number, yet it should be construed to extend to the Case, when one only of the principal Panel appears: And therewith agrees the Opinion of the Court of Common Pleas in *Mich.* 7 *&* 8 *Eliz.* (b) *Dy.* 245. in the same Point, *sc.* that the Justices of Assise and *Nisi prius* have Power to award *Tales* when one Juror only appears; for there it is said, So was the Intention of the Makers of the Statute, and there *Brown* held, if two of the principal Panel appear, and at the Prayer of the Plaintiff 12 *de Circumstantibus* are returned, and then the two principal are drawn forth by Challenge; now the Trial shall be all by the Twelve *de Circumstantibus*: But the Lord *Dyer* makes a *Quære* of that: But at the Com. Law, the Jurors of *Tales* passed in Trial without any Juror of the principal Panel; and this Act has been always expounded favourably: And therefore in *Mich.* (c) 16 *&* 17 *Eliz.* No Hundredor appeared, and all the Hundredors were returned upon the *Tales*: And 23 *Eliz.* *Dyer* 367. they have Power to grant a *Tales de Circumstantibus*, directed *Coronatoribus* for Favour or Affection of the Sheriff

(a) F. N. B. 189. H.

(b) Dyer 245. pl. 64.

(c) Dyer 338. pl. 42.

(d) Dyer 367. pl. 24.

by the said general Words of the said Act of 35 *H.* 8. *Mich.* 35 & 36 *Eliz. Julius* (*a*) *Cæsar* Master of the Court of Requests, brought an Action in the King's Bench for slanderous Words against *Philip Corsini*. The Def. pleaded Not guilty, and said, that he was an Alien born, &c. and prayed Trial *per medietat' linguæ*; and it was granted; and at the *Nisi prius* in *Lond.* but six *Englishm.* and five Aliens appeared, and the Pl. prayed a *Tales de Circumstantib' per medietat' linguæ*; and it was granted, so that there wanted one Alien; and the Record was, *Ideo alius alienigena de Circumstantib' per vic' Lond' ad requisition' infranominati Julii Cæsaris per mandatum Justic' de novo apposit', cujus nomen panell' præd' affilatur secund' form' statuti in hujusm' casu nup' editi & provisi; Qui quidem jurator sic de novo appositus, viz. Christianus Dethick alienigena, exact' similit' venit, ac in jurat' ill' simul cum aliis juratorib' præd' prius impanellatis & juratis juratus fuit*; and the Jury found for the Pl. and assessed the Dam. to 100 *l.* And it was moved in Arrest of Judgm. That no *Tales* is to be granted *de Circumstantib'*, when the Trial is *per medietat' linguæ* by the Just's of *Nisi prius*, by the said Act of 35 *H.* 8. for three Reasons. 1. The *Tales* ought to ensue the Nature of the principal Panel, and that always is *ad requisition' defendentis*, and in this Case the Pl. prays the *Tales*. 2. That the Words of the said Act are in the plural Number, *The Jury is like to remain untaken for Default of Jurors*: And here it was but for the Default of one Juror. 3. The Act gives no Authority in this Case to the Justices to grant a *Tales*, for in the former Part of the Act it spoke of the (*c*) Freehold of the Jurors, and of Issues to be returned upon the Jurors; and an Alien has no Freehold, neither shall Issues be returned upon him. Also the Statute saith, If there be any Default of Jurors, others of the same County shall be returned, &c. and an (*d*) Alien is not properly said of any County: & *hiis non obstantibus*, because the Stat. was made for the speedy Execut. of Justice, it shall be expounded favourably to effect the Intent and Purpose of the Makers of the Act, and Judgment was given for the Plaintiff.

(*a*) Poph. 35. Cr. Eliz. 305, 841.

(*b*) Dyer 144. pl. 59, 60, &c. Dalt. 22. pl. 5. 3 Inst. 27. Jenk Cent. 216. Cr. El. 818, 841. Stamf. Cor. 139. a. b.

(*c*) Poph. 35, 36. Dy. 144. pl. 59. Cr. El. 841.

(*d*) Co. Lit. 156. b. Poph. 36. 7 Co. 18. b. Calvin's Case.

As to the 2d Objection which has been made, it was resolved, That the Title was the Misprision of the Sheriff; and it can't be taken that the Justices granted *Tales* only of (*e*) ten, but of as many as in all would make a Jury: And that appears, because eleven were returned, and eleven sworn with him of the principal Panel; and therefore it was resolved, That this Misprision of the Sheriff should be amended, and *Decem* put out of the Title; and then the Title would be good and formal, *Nomina talium*, &c. or it may be *Nomina Juratorum de novo apposit' secundum formam statuti.*

(*e*) Cr. Jac. 305.

Note

Note Reader, at the Common Law in the Granting of a *Tales*, five Things are to be considered. 1. The Time of the Granting, &c. of it. 2. The Number of the *Tales*. 3. The Order of them. 4. The Manner of Trial, *sc.* either by them with others, or by them only. The Quality of them is to be considered.

As to the first, four Things are to be considered. 1. That the Time of the Granting of them is upon (*a*) Default of so many of those of the principal Panel, that there can't be a full Jury. 2. That at the Time of the Granting of them, the principal Array stands, for *Tales* are Words similitudinary, and have Reference to the Resemblance which at that Time ought to be in *esse*; and therefore if the Array be quashed, or all the Polls challenged and tried out, no *Tales* shall be awarded, for at that Time *non sunt quales*, but in such Case a new *Ven' fac'* shall be awarded; but if at the Time of the Granting of the *Tales* the principal Panel stands, and afterwards is (*b*) quashed, as is aforesaid, yet the *Tales* shall stand, for it is sufficient if there were *quales* at the Time of the Granting them; and that appears in 34 *H. 6. Enquest* 30. 3. It is to be observed, That he who is meerly Defend. can't pray a *Tales*, till the (*c*) Plaint. has made Default. 4. In some Case a *Tales* shall be granted after a full Jury appears and is sworn; as if a Jury be charged, and afterwards before the Verdict given in Court one of them dies, a *Tales* shall be awarded, and no new *Ven' fac'*; and therewith agrees (*d*) 12 *H.* 4. 10. *a.* So if any of the Jurors impanel'd die before they appear, and that appears by the Return of the Sher. the Panel shall not abate, but if need be, a *Tales* shall be awarded. *Vide* (*e*) 20 *E.* 4. 11. *b.* And the Time of the Challenge and *Trial* of the *Tales* is after the principal Panel is tried; and if the principal Panel is affirmed, (*f*) the same Triers shall try the *Tales*; but if it is quashed, then the two Triers of the principal Panel shall not try them. (*g*) 9 *E.* 4. 46. *b.* 14 *H.* 7. 1. *b.* & 33 *H.* 6. 25. *vide* 19 *H.* 6. 48. *a. b.*

As to the 2d, *sc.* the Number, 2 Things are to be observ'd. 1. In all Cases the *Tales* ought to be (*h*) under the Number of the Principal in the *Venire fac'* (unless it be in Case of an Appeal) as in (*i*) *Attaint* under 24, and in other Actions where the *Venire fac'* is of 12, under 12, and the Reason why more may be granted in an Appeal on the Part of the Plaintiff is, because the Plaintiff may challenge peremptorily; and if Default be in the Plaintiff, then the Defendant may pray a *Tales*; and the Reason is *in favorem vitæ*, and that he may dispatch and free himself of Trouble and the Question of his Life, for fear that his Witnesses should die, &c. and therewith agree 14 *H.* 7. 7. *a.* 37 *H.* 6. 12. *a.* 18 *E.* 4. 6. *b.* 16 *E.* 4. 6. *b.* and therefore the

(*a*) 2 Rol. Rep. 182, 183. Co. Lit. 158. a.
(*b*) Dy. 78. pl 41.
(*c*) Cr. Car. 484.
(*d*) Stamf. Cor. 155. b.
(*e*) Stamf. Cor. 155. b.
(*f*) Co. Lit. 158. a.
(*g*) Co. Lit. 158. a.
(*h*) Stamf. Cor. 155. a.
(*i*) 2 Rol. 672.

the Book in 48 *E.* 3. 1. seems to be misprinted. *Vide* 49 *E.* 3. 1. *b.* & 48 *E.* 3. 28. The 2. that the Number ought always to be certain, as 10, or 8, or 6, or 4, &c. *Vide Octo tales Br.* 11. But now upon the said Act of 35 *H.* 8. a *Tales de Circumstantibus* may be granted as well of an (a) incertain, as of a certain Number; and that by Force of the Words of the said Act, *sc. so many*, &c. *as shall make-up a full Jury.*

(a) Cr. Jac 316.

As to the third, *sc.* the Order, it is to be known, that always in every new *Tales* the Number shall be diminished, as if the first be 10, the second shall be 8, and so always less; and therewith agrees 14 *H.* 7. 1. *b. Tit. Tales Br.* 15. *Vide* 47 *Ass. p.* 10. But if a *Tales* is awarded, and it is afterwards quashed by Challenge, he may have a new one of the same Number as before; and therewith agrees 20 *H.* 6. 40. *a.*

As to the fourth, *sc.* To the Manner of Trial, *sc.* by them with others, it is common every Day, and by them only, when after the Granting of 10 *Tales* and *octo Tales* the principal Panel is quashed, there the Trial may be only of the *Tales*, or if the *Tales* do not amount to a Jury, a *Tales* to supply the former *Tales* may be granted; and therewith agrees (b) 36 *H.* 6. Tit. *Enquest*, 30.

(b) Stamf. Coron. 155. b.

As to the fifth, *sc.* to the Quality of the *Tales*, they ought to be of the (c) same Quality as the Principals are; and therefore if the first be *per medietatem linguæ*, of *English* and Aliens, the *Tales* ought to be so, so if the Principal be out of a Liberty, and all those Things which are required by the Law in the Principals, are required in the *Tales*, *Vide* (3) 4 *E.* 4. 11. 7 *H.* 6. 40. *a.* 30 *Ass. p.* 42. And afterwards by the Advice of all the Justices of the Common Pleas, and Barons of the Exchequer, the Judgment was affirmed; and so the principal Case at Bar has been adjudged by all the Justices of *England*, and all the Barons of the Exchequer.

(c) Cr. El. 305.

Nota Reader in *Assise*, if so many of the Recognitors make default, that there are not 12, the Justices of (d) Assise can't award a *Tales de Circumstantibus*, for altho' Justices of Assise are named in the said Act of 35 *H.* as well as Justices of *Nisi Prius*, yet forasmuch as the said Act doth not give Power to Justices of Assise or *Nisi Prius*, but where the Trial shall be by twelve Men in every Writ of *Habeas Corpora*, or *Distringas* with *Nisi Prius*; and that can't be in *Assise*: For *Assisæ capiantur in proprio Com'*, and never can be taken by *Nisi Prius in proprio Com'*, and no Exposition can be made against ex-

(d) Cr. Car. 341.

8 Co. 57. a.

(a) 2 Bulst. 179. 11 Co 34. a. Hawk. Max. 424.

press Words; for that would be (a) *Viperina expositio quæ corroderet ventrem textus:* And of such Opinion was *Catlyn* Chief Justice in his Time, and *Gerard* Attorney General, and after them *Wray* and *Anderson* Chief Justices, Justices of Assise in *Norfolk* Circuit.

[*See now the late Statutes for Return of Jurors, whereby such Tales-Men are abolished*, &c.]

HUM-

HUMFREY LOFIELD's *Case*.

Rent received on a Lease for Years.

Mich. 10 Jac. 1.

1 Browol. 61. Hob. 276.

THomas Young, and *Dorothy* his Wife, brought an Action of Debt against *Thomas Milton* and *Anne* his Wife Executrix of *Humphrey Lofield*, upon a Bond of one hundred Pounds, made 20 *Decemb. Anno 6 Jac. Regis* by the said *Hum. Lofield* to the said *Dorothy dum sola fuit*. The Defendants demanded *Oyer* of the Bond and Condition, which was, *That if the within bounden* Humfrey Lofield, *his Executors, Administrators and Assigns, and of every of them, shall well and truly observe, perform and keep all and singular the Covenants, Payments, Reservations, Grants, Articles and Agreements contained in a Pair of Indentures bearing Date the Day of the Date of the Obligation made between the said* Humfrey *and* Dorothy, *dum sola fuit, which on his and their Part, &c.* And pleaded, That by the said Indenture, which they shewed forth, the said *Dorothy*, in Consideration of the Rent after by the same Indenture reserved, demised to the said *Humfrey Lofield* a Wine-Cellar in *Gravesend*, To have and to hold to the said *Humfrey Lofield*, his Executors and Assigns, after the Feast of the Nativity of Christ then next following, *pro termino unius anni integri extunc prox' sequentis, & si in fine dicti unius anni ambæ partes placerent, agrearent, & contentatæ forent, quod eadem præsens dimissio foret renovata, sive continuata pro aliquo longiori tempore, tunc habend' & tenend' dimissa præmissa dict' Humfrido Lofield, executoribus & assignatis suis, ab & post dictum festum*

 Nativi-

Nativitatis Dom' tunc prox' sequen' datum Indentur' usque plenarium finem & terminum trium annorum extunc prox' sequent' reddendo inde annuatim durante dicto termino dictæ Dorotheæ, executoribus & assignatis suis, 40 l. *ad quatuor usual' dies festos, sive terminos, &c. sc.* the Annunciation, *&c.* with Clause of distress if the Rent was arrear by the Space of ten Days after any of the Feasts, *&c.* and pleaded, That he occupied the said Cellar for the Space of the said first Year, and at the End of the said Year performed all the Covenants, Payments, Reservations, *&c.* in the said Indentures, *&c.* The Plaintiff replied, and for Breach shewed, That the said *Humfrey Lofield* did not pay 10 *l.* due in the said first Year at the Feast of the Birth of Christ for one Quarter. Upon which the Def. demur'd in Law. And this Plea began *in Communi Banco Trin.* 10 *Jac. Reg. Rot.* 3434. And it was argued by the Serjeants of Counsel with the Defendants, That the said Lessee should not pay any Rent for the first Year, and that for three Reasons: 1. Because the Reservation, as it is made, depends upon a Contingency, *sc.* if at the End of the first Year both Parties should agree that the Lease should be renewed and continued for any longer Time, then to have and to hold the said Cellar to the said *Humfrey* from the Feast of the Birth of Christ next ensuing the Date of the Indenture for three Years, *Reddendo inde annuatim durante dicto termino dictæ Dorotheæ, &c.* 40 *l.* So that the *Reddendo* depends upon the said contingent, which never took Effect, for the Lease was not continued beyond the first Year. 2. The Reservation of the Rent is *durante termino præd'*, which being spoken in the singular Number shall relate only to the Term of three Years last mentioned, and not to the Term of one Year, which was certain and compleat before the Contingent. 3. That every (*a*) Reservation and Exception shall be taken *stricte* against the Lessor, and beneficially for the Lessee, because every Reservation charges and incumbers the Land demised; and the Words of Reservation are the Words of the Lessor, and the Reservation is his Act, and therefore shall not be extended beyond the Words; and so it is held in *Hill* and *Grange's* Case in *Plow. Com.* 171. *a.* and to this Purpose the common Cases in 12 *E.* 3. *Tit. Ass.* 86. 17 *E.* 3. 52. & 17 *Ass. p.* 10. 10 *E.* 4. 18. *b.* 27 *H.* 8. 19. *a.* and divers others were cited. And it was further said, That if (*b*) two Tenants in common join in a Grant of an Ox, or a Pair of gilt Spurs, or an Hawk, the Grantee shall have two Oxen, *&c.* but if they make a (*c*) Gift in Tail, or a Lease for Life, or Years, rendring an Ox, *&c.* to them and their Heirs, they during their Lives, nor their several Heirs after their Deaths, shall have but one Ox, *&c.* And so if a Man makes a Gift in

(*a*) 2 Sand. 166. 368. Plow. 171. a.

(*b*) 5 Co. 7. b. Co. Lit. 196. b. 167. a. 267. b. Plow. 171. a. 140. b. 161. b. Perk. Sect. 106.

(*c*) Co. Lit. 197. a. Perk. Sect. 107.

in Tail of two Acres, (*a*) one at the Common Law, and the other in Borough English, rendring an Ox to him and his Heirs, and the Donee having two Sons dies, the elder Son inherits one Acre, and the Younger the other; in this Case the Donor or his Heirs shall have but one Ox, because the Reservation shall be taken strictly against him and his Heirs. But it was resolved, That the said (*b*) Reservation should extend to the first Year; for the proper Place of a Reservation is to come after the Limitation of all the Estates: And therefore if a Man by Deed indented demiseth Lands to *A. habendum* to him for Life, the Remainder to *B.* and to the Heirs of his Body, and for want of Issue of his Body, to remain to *D.* in Tail, or for Life, *Reddendo inde* to the Lessor and his Heirs an annual Rent, this Reservation shall extend to all the Estates before. *Vide* (*c*) 34 *E.* 3. *Avowry* 258. And altho' the future Term is incertain, yet it is certain that the Lessee shall have the Cellar for one Year, and the Reservation shall (*d*) extend to it, for *durante termino præd'*, altho' it is in the singular Number, yet it is a collective Word, and shall have Relation to every Term demised by the Indenture: And it is to be observed, That if the Lessee had held the Cellar beyond the said first Year, that the Reservation had extended without Question to the first Year; and the Consideration of making the Lease, was only in Consideration of the Rent reserved in the said Indentures; and in ancient Time Rent reserved upon Leases, &c. was called *vivus redditus*, because the Lessor (*e*) lived by it; and *vide Plow. Com. Hill* and *Grange*'s Case 171. such Construction shall be made in Case of Reservation of Rent, that the Lessor shall not lose his Rent at any Day, &c. And in *Hill.* (*f*) 23 *El. Rot.* 1410. *in Com. Banco*, *Dionise Passmer* brought a Replevin against *George Prowse* for taking of his Cattle at *Halberton*, in a Place called *Terleigh Down* in the County of *Devon*; the Case, as appears by the Record, was such: A Lease was made of an House and Land for Years, if the Lessee should so long live; and afterwards the Lessor by his Deed indented granted the Messuage and Land to another, To have and to hold the Reversion to the Grantee for Life, *cum per mortem, sursum redditionem, vel forisfacturam* of the Lessee, *aut aliter acciderit*, *Reddendo inde annuatim* to the Grantor and his Heirs, *cum reversio præd' acciderit*, 9 s. 4 d. *per annum*; the Lessee died, the Grantor of the Reversion distrained for the Arrearages of Rent, as well before the Death of the Lessee as after; and in that Case four Points were resolved clearly by the whole Court. 1. That by the Demise of the Messuage and Land for Life, the (*g*) Reversion thereof

(*a*) Post. 107. b.

(*b*) 1 Brownl. 61. Hob. 276.

(*c*) 34 E. 3. Avowry 258.

(*d*) 1 Brownl. 61. Hob. 276.

(*e*) Co. Lit. 143. a.

(*f*) Dy. 376. pl. 27. 1 Vent. 91. 2 Brownl. 300. 2 Sand. 166.

(*g*) Cro. Car. 400. Co. Lit. 324. b. 5 Co. 124. b. 4 Co. 36. a. Dy. 125. pl. 45. 233. pl. 10, 11. Plowd. 155. a. 159. a. 30 E. 1 Grant 86. 7 E. 4. 20. Fitz. Feoffm. 22. Fitz. Grant 97. 6 Co. 56. a. 66. b. 2 Rol. 190. B. N. C. 267. 35 H. 8. Br. Grant 50. Lit. Rep. 18.

1 Salk. 233. 2 Salk. 541. (a) Plowd. 103 b 152. a. Lit. Rep. 18. 5 Co 124. b. Cr. Car. 400. Godb. 451. Kelw. 18. b. (b) Moor 55, 56. Co. Lit. 183. a. 2 Co. 24. a.

past; but by grant of the (*a*) Rev'n Land in Possession shall not pass. 2. By the Grant of the Messuage and Land, (*b*) *Habendum reversionem*, &c. for Life after the Death of the Lessee, &c. that the *Habendum* is good; for in Judgm. of Law, nothing but the Reversion is granted by the Premisses; and as in *Throckmorton*'s Case, *Plo. Com.* 147. when a Reversion is granted, *Habendum* the Land, the *Habendum* is adjudged good: So when the Land is granted *Habendum* the Reversion; after the Death of the Lessee, &c. it is in Construction as much as to say, to take Effect in Possession after the Death, &c. Also the *Habendum* had been good, altho' no mention had been made either of the Land, or of the Reversion in the *Habendum*; for the principal Office of the (*c*) *Habendum* is to limit the Estate of the Land contained in the Premisses. 3. It was resolved, That by the said Reservation, the Rent should not commence before the Reversion fell into (*d*) Possession; and these Words, *cum reversio præd' acciderit*, shall be expounded according to the Intent of the Parties, which was not that the Grantee for Life should pay the Rent reserved, before he might take the Profits to raise the Rent out of them. 4. That the Distress was well taken for the Arrearages after the Death of the Lessee, and not for the Arrearages incurred before. Note, by the Lord *Dyer* in 23 *El.* (*e*) 376, 377. which proves that a Reservation shall be expounded according to the reasonable Intention of the Parties, to be collected by the Words of their Deed; and it is apparent, that the Intention of the Parties in the Case at Bar, was, That the Lessee should pay Rent for the Time which by Force of the said Lease he occupied the said Cellar: But forasmuch as the Bond was forfeited, the Court moved the Pl. to take his Arrearages, Costs and Damages, with which he was contented; and so no Judgment was given.

(c) 2 Rol. 65. Co. Lit. 6. a. 2 Co. 55. a. 9 Co. 47. b.

(d) Dyer 377. pl 27. 2 Brownl. 300. 2 Sand. 166. Cr. El. 323. 1 Vent. 91. 17 E. 2. Executors 112.

(e) Dyer 376, 377. pl 27 2 Brownl. 300. 1 Vent. 91. 2 Saund. 166.

(f) Ant. 107. a

Nota Reader, as to the said Case put at the Bar, of a Gift in Tail of one (*f*) Acre at Common Law, and of one Acre in Borough English rendring an Ox, and afterwards the Donee dies, having Issue two Sons, so that the one Acre descends to the one, and the other to the other, that but one Ox shall be paid. For the better Understanding of the Law, and of the Reason thereof in that Case and other the Like, it is to be known, That there is a Difference in Law, when by Operation of the Law without the Act of the Party there shall be a Multiplication of one entire Service, and when not. And therefore there is a Difference betwixt very Lord and very Tenant, and between the Donor and Donee, or the Lessor and Lessee: For in the Case of very Lord and very Tenant, as well the Annual as the Casual entire (*g*) Services in many Cases shall be multi-

(g) 8 Co. 105. b. 6 Co 1. b.

multiplied, as appears in *Bruerton's Case, in the sixth Part of my Reports, and in the eighth Part of my Reports, f.* 102. *in* John Talbot's *Case.* But in the Case of the Donor and Donee, or Lessor and Lessee, the entire Rent reserved shall not, by any Division either of the Reversion or of the Possession by Act in Law, be multiplied: And therefore if in the said Case of one Acre at Common Law, and the other in Borough English, the Donee dies having Issue two Sons, this several Descent which is an Act in Law shall not charge each of them with the entire Service, no more than if the Donor in the same Case dies having Issue two Sons, so that the Reversion descends severally by Act in Law; yet the Donee nor their Heirs shall be charged but with one entire Service. So if a Man is seised of two Acres, one of the Part of his Father, and the other of the Part of his (*d*) Mother, and makes a Lease of both for Life, reserving yearly a Lamb to the Lessor and his Heirs, and the Lessor dies without Issue of his Body, the several Heirs shall not have two Lambs, but one Lamb only. So if a Man gives Land to two Men, and to the Heirs of their two Bodies begotten, yielding an (*b*) Hawk, and they die, their several Issues shall pay but one Hawk: And the Reason of these and other like Cases, that the entire Services in these Cases shall not encrease, is, because the Reservation of the Donor or Lessor is his Title only, and when he himself reserves but one, the Law, which is always grounded upon Right and Equity will never encrease it, or give him more than he himself has reserved. And the Reason of this Difference appears in *Woodland*'s Case *Plo. Com.* 94. For Encroachment by the Donor upon the Donee, or by the Lessor upon the Lessee, shall not bind them in an Avowry, as it shall betwixt Lord and Tenant; and the Reason is, because when the Donor and Lessor, or the Heir of any of them avows, he ought to shew the original Reservation, by which it will appear, how much the Donor or Lessor has reserved. And with this agrees the Judgment in Sir *Wm. Foster's Case in the eighth Part of my Reports, f.* 65. *a.* That the Donor or Lessor need not in an Avowry alledge Seisin; neither shall an Encroachment upon them bind them, because the Reservation is their Title. But if there be Lord and Tenant, and the Tenant makes a Gift in Tail, or a Lease for Life, the Remainder in Fee, there Encroachment by the Lord upon the Donee or Lessee shall bind them, for the Lord need not shew the Commencement of the Seigniory, but it shall not bind the Issue in Tail; and therewith agree 20 *E.* 3. *Avowry* 131. 5 *E.* 4. 2. *a.* and *F. N. B.* 11. *a.* The same Law is, when the Law creates the Tenure;

6 Co. 1. b. 2. a.
8 Co. 105.
Co. Lit. 149. a. b.

(*a*) 1 Co. 100. b.
Co. Lit. 12. b.
Br. descent 11.
14 H. 8. 8. b.
Plow. 132. b.
8 Co. 54. a.

(*b*) Co. Lit. 197. b.

Cr. Car. 81.
8 Co. 65. a.
1 Brownl. 170.

Plow. 95. a.
9 Co. 34. a.
4 Co. 11. b.
F. N. N. 11. d.

as if Lord and Tenant be by Fealty, and the yearly Rent of a Lamb, and the Tenant makes a Gift in Tail to two Men, and to the Heirs of their Bodies without any Reservation, now the Donees ſhall hold of the Donor by the like Services as he holds (*a*) over, *Lit.* 4. *b.* 33 *H.* 6. 7. *a.* &c. yet if the Donees having Iſſue die, their ſeveral Iſſues ſhall pay but one Lamb, for the Donor or his Heirs in Avowry ought to ſhew the Tenure betwixt the Lord and the Tenant, and the Gift in Tail, ſo that it will appear to the Court, that but one Lamb at the Time of the Gift was due; and the Law, to the Prejudice of the Heirs of the Donees, will not encreaſe it. But there is a Difference betwixt thoſe which are entire Services; for ſome Services by the meer Operation of the Law ſhall be encreaſed; and therefore if a Man ſeiſed of two Acres, one at the Common Law, and the other of the Cuſtom of Borough Engliſh, makes a Gift in Tail of both; and the Donee having Iſſue two Sons dies, both the Sons ſhall do Fealty: The ſame Law of Homage, if it be reſerved by the Party, or created by the Law. So if the Donor dies having Iſſue two Sons, both the Sons ſhall have Homage and Fealty. And ſo there is a Difference betwixt entire (*b*) Services of Profit and of no Truſt, and Services of Truſt and no Profit. The ſame Law is, if there be Lord and Tenant by Knight Service, and the Tenant gives the Tenancy to two Men, and to their Heirs of their Bodies, and they die having Iſſue, their Iſſue ſhall hold ſeverally by Knight's Service, for that is for the Defence of the Lord and of the Realm: And ſo another Difference betwixt an entire Service for the private Profit of the Lord, and an entire Service for the publick Defence of the Realm. *Vide* all theſe cited in *John Talbot*'s Caſe*; and by theſe and other Differences there put, all the Books directly proving them, are well without any Contrariety or Difficulty agreed.

(*a*) Co. Lit. 23. a. 143. a.

(*b*) 8 Co. 105. b. 106. a. b. 6 Co. 1, 2. Co. Lit. 149. a. b.

* 8 Co. 105, &c.

ARTHUR

ARTHUR LEGAT's *Caſe, in Subverſion of peſtilent Patents of thieviſh Concealers.*

Mich. 10 Jac. 1. *which began Paſch.* 1 Jac. 1. *Rot.* 1639. *in C. B.*

Norf. ſſ. EDward *Cockle*, late of *Wimondham* in the County aforeſaid, Husbandman, was attached to anſwer to *Arthur Legat*, Gent. of a Plea, wherefore with Force and Arms, ſix Acres of Paſture, and ſix Acres of Wood with the Appurtenances in *Wimondham*, which *John Smith*, Gentleman, to the aforeſaid *Arthur* demiſed, for a Term which is not yet paſt, he entred, and him from his Farm aforeſaid did eject, and other Harms did to him, to the great Damage of the ſaid *Arthur*, and againſt the Peace of the Lord the now King, &c. and whereupon, the ſaid *Arthur* by *Robert Love* his Attorny complaineth, that whereas, the aforeſ. *John* the 19th

19th Day of *October* in the 8th Year of the Reign of the Lord the now King, at *Wimondham* had demised to the said *Arthur* the Tenements aforesaid, with the Appurtenances, to have and to hold to the said *Arthur*, his Executors and Administrators, from the Feast of St. *Michael the Archangel* then last past, for and during the Term of three Years from thence next following to be compleat and ended; by Virtue of which demise the said *Arthur* into the Tenements aforesaid with the Appurtenances entred, and was thereof possessed, until the aforesaid *Edward* afterwards, that is to say, the 10th Day of *April* in the 9th Year of the Reign of the said Lord the now King of *England*, &c. with Force and Arms, &c. into the Tenements aforesaid with the Appurtenances, which the aforesaid *John* to the said *Arthur* in Form aforesaid demised, for the aforesaid Term which is not yet past, entred, and him from his Farm aforesaid did eject, and other Harms, &c. and against the Peace, &c. whereupon he saith, that he is the worse, and hath Damage to the Value of 20 *l.* and thereof he bringeth Suit, &c. And the said *Edward*, by *Tho. Blofield* his Attorney, cometh and defendeth the Force and injury when, &c. and saith, he is not Guilty of the Trespass and Ejectment aforesaid, as the said *Arthur* above against him complaineth, and of this puts himself upon the Country; and the aforesaid *Arthur* likewise. Therefore it is commanded to the Sheriff, that he cause to come here, from the Day of *Holy Trinity*, in three Weeks, 12. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. at which Day the Jurors between the Parties aforesaid, of the Plea aforesaid were put between them in respite here until this Day, that is to say, in 8 Days of St. *Michael* then next following, unless the Justices of the Lord the King to Assises in the County aforesaid to be taken assigned by the Form of the Statute, &c. on *Monday* the 15th Day of *July* next, at the Castle of *Norwich* in the County aforesaid should first come; And now at this Day cometh as well the aforesaid *Arthur* as the aforesaid *Edward*, by their Attornies aforesaid; and the aforesaid Justices to Assises, before whom, &c. send here their Record in these Words; *viz.* Afterwards the Day and Place within contained, before *Ed. Coke*, Knt. Chief Just. of the Lord the King of the Bench, and *John Croke*, Knt. one of Justices of the said Lord the King to Pleas, before the King himself to be holden assigned, Justices of the said Lord the King to Assises, in the County of *Norfolk* aforesaid to be holden assigned by Form of the Stat. &c. came as well the within named *Arthur*, as the within written *Ed. Cockle*, by their Attornies within written; And the Jurors of the Jury, whereof within is made mention, being

ing called, likewise came, whereof 12, that is to say, *Robert Seaman, Adam Bale, Bartholomew Harrison, Thomas Reynolds, William Bidwell, Henry Howlet, Thomas Crooke, Richard Russell, Thomas Tilney, John Freeman, John Jewel* and *Edmund Johnson*, in the Jury aforesaid are sworn; after which, one of the Jurors aforesaid, that is to say *Robert Seaman*, with the Assent of both Parties aforesaid, and by the Command of the Justices aforesaid, from the Panel aforesaid, was utterly withdrawn, &c. Therefore with the Assent of the Parties aforesaid, the Jury aforesaid was further put in respite here, until in 8 Days of St. *Hillary*. Therefore that the said Sheriff have their Bodies, &c. (*and so appointed a Decem Tales*): At which Day here cometh as well the aforesaid *Arthur*, as the aforesaid *Edward*, by their Attornies aforesaid; and the Sheriff now sendeth, that as to the distreining of *Bartholomew Stone* and the other Jurors, that the Writ of the Lord the King to him directed, was so late delivered him, that for the shortness of the Time he could not execute it, but as to the putting of the *Decem Tales*, whereof in the said Writ was made mention, the said Sheriff now sendeth, that Execution thereof doth appear in a Schedule to the said Writ annexed, in which said Schedule is contained the Panel of the Names of Ten Jurors, whereof none, &c. Therefore the Jury aforesaid again is put in respite here, until from *Easter-day*, in 15 Days, unless the Justices of the Lord the King to the Assizes in the County aforesaid to be taken assigned, by the Form of the Statute, &c. on *Wednesday* in the first Week of *Lent*, at *Thetford* in the County aforesaid, first shall come, for Default of Jurors, &c. Therefore that the Sheriff distrein the Jurors aforesaid by all their Lands, &c. And that the Issues, &c. So that they be here, unless, &c. to make the Jury aforesaid, &c. *Norff. ss.* Afterwards at the Day and Place within contained, before *Edward Coke*, Knt. Chief Justice of the Lord the King of the Bench, and *John Crooke*, Knt. one of the Justices of the said Lord the King, for Pleas before the said Lord the King to be holden, &c. to Assizes in the County aforesaid to be taken assigned by the Form of the Statute, &c. cometh as well the within named *Arthur Legat*, as the within written *Edward Cockle*, by their Attornies within contained; and the Jurors of the Jury aforesaid, whereof

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within is made mention, being called likewise come; who to say the Truth of the (Matters) within contained, being chosen, tried and sworn, say upon their Oath, That the late King and Queen, *Philip* and *Mary*, the 9th Day of *July* in the 4th and 6th Year of the Reigns of the same King and Queen, *Philip* and *Mary*, were seized of and in the Manor of *Wimondham* in the County aforesaid, in their Demesn as of Fee, in the Right of their Crown of *England*, whereof the Land's and Tenements in the Declaration within written, then were parcel; and the aforesaid late King and Queen, *Philip* and *Mary*, so as before is said, of and in the Manor aforesaid, whereof, *&c.* being seized, the said King and Queen, the said 9th Day of *July* in the 4th and 6th Year of the Reigns of the said late K. and Q. *Philip* and *Mary* made their Letters Patents under their great Seal of *England* to one *George Howard*, Knt. of the aforesaid Lands and Tenements, in the Declaration within written, named amongst other, by the Names of 2 Pieces of Lands, called *Nettlehamsted* and *Wikemans*, containing by Estimation 15 Acres, lying and being in *Wimondham* aforesaid in the County aforesaid, then or late in the Tenure or Occupation of *John Coleman*, and late to the Monastery of *Wimondham* sometime belonging and appertaining, and Parcel of the Possessions thereof then being; the Tenor of which Letters Patent followeth in these Words: The King and Queen, to all to whom, *&c.* greeting: Know ye, that we, in Consideration of the good, true, and faithful Service of our beloved and faithful Servant, *George Howard*, Knt. before this Time to us done, and for diverse other Causes and Considerations us especially moving, of special Grace, and of our certain Knowledge and meer motion, have given and granted, and by these Presents do give and grant, for us, and the Heirs and Successors of us the aforesaid Queen, to the aforesaid *George Howard*, all those two Acres of our Lands, lying and being in *Ashwynen* in our County of *Norfolk*, *&c.* We also give and grant, by these Presents, to the aforesaid *George Howard*, Knt. two Pieces of our Lands, called *Nettlehamsted* and *Wikemans*, containing by Estimation 15 Acres, lying and being in *Wimondham* aforesaid in the County aforesaid, now or late in the Tenure or Occupation of *John Coleman*, and late to the Monastery

nastery of *Wimondham*, sometimes belonging and appertaining, and being Parcel of the Possessions thereof, &c. We also give for the Consideration aforesaid, by these Presents, for us, the Heirs and Successors of us the aforesaid Queen, do grant to the aforesaid *George Howard*, Knt. all and all Manner of Woods and Underwoods, and our Trees whatsoever, of, in, and upon the Premisses growing and being, and all the Land, Ground, or Soil of the same our Woods, Underwoods, and Trees, and the Reversion and Reversions whatsoever, of all and singular the Premisses above expressed and specified, and to every parcel thereof, as also the yearly Rents and Profits whatsoever, reserved upon whatsoever Demises and Grants of the Premisses, or any Parcel thereof, any wise made, as fully and wholly, and in as ample Manner and Form, as any Abbots, or Priors of the said late Abby or Priory, or any of them, or any Guardians, or any Chaplains, Chaunters, or Incumbents, or any Chaplain, Chaunter, Chauntress, or Incumbent, of Chauntry, Guilds, Lamps, Obits, and Lights aforesaid, or any other, or others, the Premisses, or any parcel thereof, having, possessing, ever had, held, or enjoyed, or ought to have, hold, use, or enjoy, as fully, freely, and wholly, and in as ample Manner and Form, as all and singular the Premisses, to our Hands, or to the Hands of the most dear Father of us the said Queen, *Henry* the 8th, late King of *England*, or unto the Hands of our most dear Brother of us the said Queen, *Edward* the 6th, late King of *England*, by Reason or Colour of the several Dissolutions of the said late Monastery, Priory, Chauntry, Guild, Lamps, Obits and Lights aforesaid, or by reason of any Act of Parliament, or any Acts of Parliament, or any other lawful Means, Right or Title, ought to come, and in our Hands now of Right, by Reason of the Dissolutions of the said late Monastery, Priory, Chauntry, Guild, Lamps, Obits and Lights, are or ought to be; all which singular Premisses with the Appurtenances, from us, and from the Father and Brother of us the said Queen, were concealed and detained, and the Rents and Revenews thereof, nor of any Parcel thereof, to us before this Time

Time were answered; and all which and singular Premisses, with the Appurtenances, now in the whole do amount to the clear yearly Value of 22 Pounds, 8 Shillings, and 6 Pence, and not above; that is to say, &c. the aforesaid Lands, Tenements, Meadows, Pastures, and other the Premisses in *Possewicke*, *Keringham*, *Massingham*, *Great Berlingham*, *Gist*, *Girston*, *Holme*, *Hunstonston*, *Alderford*, *Duckleborough*, *Boyton*, in the Parish of St. *George* in the City of the County of *Norwich*, *Buckenham*, *New Wimondham*, *Plamstead*, *Tylenham*, *Southelingham*, *Dinham*, and *Estlyham* aforesaid, in the said County of *Norfolk*, to the clear yearly Value of 56 shillings, and 4 Pence; Provided always that if it shall happen the aforesaid Lands and Tenements above expressed, and specified, or any Parcel thereof, at the Time of the making of these our Letters Patent, to be of greater yearly Value old Rent, than in those present Letters Patent is particularly specified, that then it shall be lawful for us, the said King and Queen, and the Heirs and Successors of us the aforesaid Queen, from Time to Time, during the Term of 10 Years, after the Date of these Letters Patent, into all the aforesaid Lands, Tenements, and other the Premisses, and every Parcel thereof so being of greater yearly Value, to enter, and the same to seize and have in our Hands, and our Possession, to keep, until we the said King and Queen, the Heirs and Successors of us the aforesaid Queen, of so many Sums of good and lawful Money of *England*, to how much the said greater and yearly Value of the Premisses or any Parcel thereof according to the Rate of Purchase of 21 Years do amount unto, we be thereof satisfied and paid; to have, and to hold, and enjoy the aforesaid Messuages, Houses, Buildings, Lands, Tenements, Meadows, Feedings, Pastures, Woods, Underwoods, Rents, Reversions, Services, and other Hereditaments whatsoever with the Appurtenances; and all and singular the Premisses with all their Appurtenances to the aforesaid *George Howard*, Knt. his Heirs and Assigns, to the proper Use and Behoof of him the said *George* and his Heirs and Assigns for ever, to hold the aforesaid Messuages, Lands, Tenements, and all and singular other the Premisses with their Appurtenances, of us and of the Heirs and Successors of us the aforesaid Queen, as of

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our Manor of *East Greenwich* in our County of *Kent*, by Fealty only in free Socage, and not in *Capite*, for all Rents, Services, and Demands whatsoever, for the same to us, the Heirs and Successors of us the aforesaid Queen, for the same to be any way rendred, paid, or to be done; and further, of our further special Grace, We have given, and granted, and by these Presents for us, the Heirs and Successors of us the aforesaid Queen, We give and grant to the aforesaid *George Howard*, Knt. from henceforth, all and singular the Rents, Reversions, and Profits, of all and singular the Premisses, from the Feast of the *Annunciation* of the Blessed *Mary* the Virgin last past, hitherto coming or arising, to have the same of our Gift, without any Account, or any other Thing to us, the Heirs and Successors of us the aforesaid Queen, in any Manner to be rendred, paid, or done: We will also, and by these Presents, grant to the aforesaid *George Howard*, that he have, and shall have these our Letters Patent in due Manner made and sealed, without any Fine or Fee, great or small, to us in our Hanaper, or elsewhere to our Use for the same, any Ways to be rendred, paid, or done, because express mention, &c. In Witness, &c. *T. R.* and *R.* at *Westminster* the 9th Day of *July* in the 4th and 6th Years of *Philip* and *Mary*, &c. And further, the Jurors aforesaid say upon their Oath, That at the aforesaid Time of the making of the said Letters Patent, so as before is said, to the aforesaid *George Howard*, the Manor aforesaid from the aforesaid late King and Queen was not concealed nor detained, but the Rents and Reversions thereof to the said Lord the K. and Lady the Q. then were answered; and that the said Manor was in Charge and Account of Record, and the Rents and Reversions thereof to the said late King and Queen, *Philip* and *Mary*, were answered: But whether the Lands and Tenements in the Declaration above mentioned, by the said Letters Patent, to the aforesaid *George Howard*, Knt. passed or not, the Jurors aforesaid are ignorant, and thereof pray the Advice and Consideration of the Court in the Premisses; and if upon the whole Matter aforesaid, by the Jurors aforesaid, in Form aforesaid found, it shall seem to the said Justices and the Court, that the aforesaid Lands and Tenements in the Declaration aforesaid mentioned by the aforesaid Letters Patent of the Lord *Philip* and *Mary*, late King and Queen of *England*, to the aforesaid *George Howard* did pass, then the Jurors aforesaid say that the aforesaid *Edward Cockle* is not guilty

guilty of the Trespass and Ejectment, as he before in pleading hath alledged: And if upon the whole Matter, by the Jurors aforesaid in Form aforesaid found, it shall seem to the Justices and Court, that the Lands and Tenements in the Declaration within written, by the aforesaid Letters Patents of the Lord *Philip* and *Mary*, King and Queen of *England*, to the said *George Howard* passed not, then, *&c.*

ARTHUR

ARTHUR LEGAT's *Case, in Subversion of pestilent Patents of thievish Concealers.*

Mich. 10 Jac. 1. *which began* Pasch. 10 Jac. 1. *Rot.* 1639. *in C. B.*

ARthur *Legat*, Gent. brought an *Ejectione firmæ* against *Edward Cockle*, on a Demise made of six Acres of Wood in *Wimondham* in the County of *Norfolk* by *John Smith* 19 *Octob. Anno* 8 *Jac.* for three Years, and that the Defendant ejected him, &c. The Defendant pleaded Not guilty, and a special Verdict was found to this Effect. The King and Queen *Philip* and *Mary*, were seised of the Manor of *Wimondham* in the County of *Norfolk* in Fee, in the Right of their Crown of *England*) whereof the said six Acres of Wood in which, &c. were Parcel) and 9 *Julii Anno* 4 & 5 of the said King and Queen by their Letters Patent under the Great Seal of *England*, in Consideration of Service done by Sir *George Howard*, Knt. *ex certa scientia, mero motu, & gratia speciali*, gave and granted to the said Sir *George Howard* (*inter alia*) *omnes illas duas pecias terræ nostras vocat' Nettlehamsted & Wikemans, continen' per æstimation'* 15 *Acras, jac' & existen' in Wimondham in Com' Norf. modo vel nuper in tenura sive occupatione Jo. Colman, ac nuper Monast' de Wimondham quond' spect' & pertinen' &c. quæ quidem*

omnia

omnia & singula præmissa cum pertinentiis a nobis ac a patre & fratre nostris præfatæ Reginæ concelata & detent' fuer', ac redditus & reventiones inde nec alicujus inde parcellæ antehac responsa fuer', Habend' præd' Georgio Howard milit', hæred' & assignatis suis, &c. And that the said six Acres of Wood whereof, *&c.* were Parcel of the said Land called *Nettlehamsted* and *Wikemans*; and that the said Manor of *Wimondham* whereof, *&c.* at the Time of the Making of the said Letters Patent *non concelat' nec detent' fuit, sed fuit in onere & compoto*, and the Rents and Profits thereof (saving of the said Lands called *Nettlehamsted* and *Wikemans*) were answered to the King before and at the Time of the said Let. Patent: And if the said Lands called *Nettlehamsted* and *Wikemans*, being Parcel of the said Manor, pass'd or not, was the Question: And if the said Lands did not pass by the said Let. Patent, then they found for the Pl. *&c.* and if, *&c.* And in this Case three Questions were moved. 1. If the said two Parcels of the Manor called *N.* and *W.* should, as this Case is, be said in Law to be concealed or detained from the K. when the Manor it self whereof, *&c.* is in Charge to the K. and Q. altho' in Truth the said two Parcels called *N.* and *W.* were occupied by an Intruder, who answered nothing for them. The second Question was, forasmuch as the said Grant was of the said two Parcels by the special Names of *N.* and *W.* in *Wimondham* in the County of *Norfolk*, and has these Certainties, *sc. modo vel nuper in tenura sive occupatione Johannis Colman, ac nuper Monasterio de Wimondam quondam spectant', &c.* all which were true, if the said two Parcels should pass, notwithstanding they should not be said in Law to be concealed or detained. 3. If the said Grant by Let. Patent *ex certa scientia, mero motu, & gratia speciali*, should make the Grant good, notwithstanding the Falsity of the said Clause, *Quæ quidem, &c.*

And as to the First, it was resolved, that where the K. and Q. were answered of the ancient Rent of the Manor, altho' the Fermors, or Officers and Ministers of the K. suffer any to intrude into any Parcel of the Manor, yet that shall not be said in Law to be concealed or detained; for the Manor is in Charge, and by Consequence in Law every Part of it, *& turpis est pars quæ non convenit cum suo toto.*

As to the second, it was objected, that there was multiplicity of Certainty in the Clause of the Grant it self. 1. In the Thing granted, *sc.* by certain Names. 2. By certain Content, *sc.* fifteen Acres. 3. In a certain Town. 4. In a certain County. 5. In the Occupation of a certain Person. 6. In Title, *Nup. Monast. de Wimondham spectan'*; and all these are true: And therefore altho' in truth the said Lands called *N.*

and

and *W.* were not concealed, yet they should pass, for (*a*) *utile per utile non vitiatur*: And for that they cited the Book in (*b*) 29 *E.* 3. 9. where K. *E.* 3. granted to *Will.* E. of *Salisbury* the Son *omnes advocationes Ecclesiarum quæ pertinent ad prioratum de Montague, &c. & quas nuper concessimus Will' tunc comiti Sarum patri præd' Willielm.* And in truth, the Advowson of the Church of *W.* then in Question, was not granted to the Father, and yet there the Grant is held good: And if it was in the Case of a common Person, the false *quæ quidem, &c.* would not avoid the Grant. But it was answered and resolved *per tot' curiam*, that the Grant was void for four Reasons. 1. Because the Clause of (*c*) *quæ quidem, &c.* was in Judgm. of Law the Suggestion of the Patentee. 2. That it was a Clause of Restraint, to restrain the Grant to the Thing only concealed from the K. and Q. &c. and not in Charge. 3. To the End the final Intention of the K. and Q. by these Let. Patent, was to reward the Service of the Patentee, and not to diminish any Part of their Revenue. 4. Forasmuch as the Words are in the Conjunctive *concelata & detenta fuer', &c.* in which Case if the Land may be said to be detained from the K. or not. As to the first, *sc.* That the said Clause *quæ quidem, &c.* should be taken in Law as the Suggestion of the Party, in 10 *E.* 3. *Grant* 58. (*d*) The K. by his Let. Patent gave Licence to appropriate the Advowson of *D.* to the Prior of *C.* *quæ quidem advocatio non tenetur de nobis, &c.* and in Truth the Advowson was held mediately of the K. and the Licence was held void, for the Book saith that the Suggestion was false. And in (21.) 31 *E.* 4. 48. *a.* If (*e*) the K. grants the Manor of *D.* &c. *quod quidem manerium ad manus nostras devenit ratione escheat', &c.* and in truth the Manor did not come to the K. by escheat, the Grant is void; and the Reason that *Hussey* Ch. Just. there gives is, because the Falsity comes on the Surmise of the Party. And therewith agree 8 *H.* 7. 3. *b.* (*f*) 37 *H.* 8. *Br. Patents*, (*g*) and 9 *H.* 6. 28. *a. b.* And in 16 *E.* 4. 7. *a.* it is held, That the Patentee shall not take Advantage of any other Title, than that which is expressed in the Let. Patent. And in the Act of Confirmation of Let. Patent, *an.* 18 *El. c.* 2. there is a Proviso: *Provided always, that this Act, &c. shall not extend to any Let. Patent, which at any Time since the Beginning of her Majesty's Reign have been, or hereafter shall be granted by the Q.'s Highness to any Person or Persons, of any Manors, Lands, &c. by Force of any Information, Suit or Suggestion made or to be made to her Highness, that the same Manors, Lands, &c. were concealed Lands.* And always after this Act, and after the like Act of Confirmation of Let. Patent, *an.* 43 *El. c.* 19. the said Clauses of *quæ quidem, &c.* and ordinary Proviso's concerning Concealments, were construed and taken in Law for Informations,

(*a*) 3 Co. 10. a. Co. Lit. 3. a. 227. a. 2 Sid. 63, 70. 2 Rol. Rep. 422. Cart. 154, 155. 2 Sand. 169. Hob. 171.

(*b*) 29 E. 3. 8. a. b. Postea 113. b.

(*c*) 6 Co. 55. b. Godb. 423.

(*d*) 2 Rol. Rep. 275, 278, 360. Plowd. 335. a. Lane 109, 110. Godb. 423.

(*e*) 1 Co. 52. a. Lane 12. 2 Rol Rep. 360. Dy. 87. pl. 100.

(*f*) 37 H. 8. Br. Patent 100.

(*g*) 2 Rol. Rep. 274 278. Moor 318. 1 Mod. Rep. 196.

Hard. 231, 232. 2 Rol. Rep. 275. 6 Co. 55. b. Godb. 423.

Suggestions and Suits of the Patentee to the Q. for concealed Lands. As to the Second, the said Clause of *Quæ quidem, &c.* contains Words of Restraint inserted for the K.'s Benefit, for it implies a Suggestion to the K. (as has been said) and an Answer made to it by the K. *sc.* The Suggestion of the Patentee to the King is, That he has found Lands which are concealed from him, of which he has not any Rent, Profit, or other Benefit answered; and therefore may it please the K. in Reward of his Service, *&c.* to grant those Lands to him, which he by his Industry has found to belong to the King. To which the King answers, I am content to grant you the said Lands, so as according to your Suggestion they are concealed from us, and whereof we have not any Rent or Profit answered: Upon which the said Clause of *Quæ quidem, &c.* was added in the Patent, to restrain the K.'s Grant to Lands only which were concealed from him, and to no other, whereof the K. was answered any Rent or Profit. *Quod restringendi causa additur in casu domini regis, si falsum sit vitiat cartam.* And therefore a notable Cause was cited, which was adjudged *Mich.* 22 *&* 23 *Eliz. Reginæ* in the King's Bench; but it was entered *Pasch.* 21 *El. Rot.* 33. where the Case was, that *Francis Vowe* brought an *Ejectione firmæ* against *Richard Smith*, on a Demise made by *Leonard Vowe* 3 *Oct. an.* 20 *El. Reg.* of a Messuage, *&c.* in *Hallangton* in the County of *Leicester*; the Def. pleaded Not guilty; and at *Nisi prius* before Sir *James Dyer* then Ch. Justice of *C. B. &c.* a special Verdict was found to this Effect. *William Dexter* was seised of the Manor of *Hallangton* in the said County of *Leicester* in Fee, whereof the said Messuage, *&c.* was Parcel, and in the Time of *R.* 2. did thereof enfeoff *Henry* Earl of *Derby* and his Heirs; and afterwards the said Earl took upon him the Crown and Government of this Realm, by the Name of *Henry* the Fourth. And afterwards 2 *Aprilis ann' regni sui* 7. *ad humilem petitionem & supplicationem quorundam Johannis Miton & Margaretæ uxoris ejus consanguineæ & hæredis dicti Willielmi Dexter, videlicet, filiæ Willielmi, filii prædicti Willielmi Dexter, de gratia sua speciali per literas suas patentes sigillo Ducatus sui Lancastriæ confect', gerentes dat' eisd' die & ann', dedit & concessit præfat' Joh. Miton & Margar' uxoris suæ maner' præd' unde, &c. Habend' eis & hæred' de corpore ejusd' Margaret' legitime procreat', &c.* the said *J. Miton* and *Margaret* his Wife had Issue, and died; and afterwards one *Tho. Vowe*, Cozen and Heir of the Body, *an.* 1 *Reg. Mar.* of the said Tenements in which, *&c.* enfeoffed the said *Rich. Smith* now Def. and of the Residue of the Manor enfeoffed the said *Leonard Vowe* the Pl.'s Lessor: And the Jury found further

Vow's Case in Mich. 22 & 23 El. in B. R. Moor 417. 2 Anders. 19. Raym. 177.

in

in these Words, *Idemque Leonardus Vowe frater prædicti Tho. Vowe postea, sc. primo die Julii anno regni dictæ dominæ reginæ nunc 17 in vita dicti Tho. Vowe senioris fratris sui, dans eidem dominæ reginæ intelligi & informari seipsum fore proprium exitum & hæredem de corpore præfat' Margaretæ Myton legitime procreat', eidem dominæ reginæ humillime supplicavit, ut eadem domina regina nunc per literas suas patentes sub magno sigillo suo Angliæ sigilland' renovare & confirmare velit eidem Leonardo & hæred' suis de corpore suo legitime procreat' prædict' cartam factam per præfatum quondam H. 4. gerent' datum, &c. Per quod domina regina nunc humili petitioni dict' Leonardi annuens, & informationi suæ fidem adhibens, primo die Julii anno 17 Volentes dictam intentionem prædicti regis H. 4. effectum capere & non evacuari, de gratia sua speciali & ex certa scientia & mero motu, certis causis & considerationibus ipsam dominam reginam specialiter moventibus, per literas suas patentes geren' dat' eisdem die & anno dedit & concessit prædicto Leonardo Vowe existen' (ut datum fuit eidem dominæ reginæ intelligi) proxim' hæredi & exitui de corpore prædictæ Margaretæ Myton legitime procreat', manerium prædictum unde, &c. Habendum & tenendum prædicto Leonardo & hæredibus de corpore suo legitime procreat', ubi revera prædictus Leonardus non fuit proximus hæres de corpore prædictæ Margaretæ Myton, sed prædictus Thomas Vowe fuit in plena vita & frater senior ejusdem Leonardi.* And afterwards *Thomas Vowe* died without Issue; after whose Death the said *Leonard* then was in truth the next Heir of the Body of the said *Margaret Myton*. The Queen reciting the said Misprision, and all the said special Matter under her Privy Seal, bearing Date 9 *Julii anno regni sui* 20. (to be a Warrant to the Great Seal) granted to the said *Leonard Vowe* the said Manor, whereof, &c. in Tail; but before he had obtained it under the Great Seal, the said Queen 2 *Sept. anno regni sui* 20 *supradicto*, by her Letters Patent under the Great Seal granted to the said *John Farnham*, Esq; one of her Pensioners, the said Messuage, &c. *In quo, &c. inter alia per nomen totius illius messuagii voc' Vowes, alias Mytons, alias Dexters, in Hallanston in comitat' Leic', quæ quidem omnia & singula præmissa & quælibet inde parcella a nobis aut a patre, fratre vel sorore nostris hucusq; vel usq;* 8 *diem Oct. an. regni n'ri* 17 *concelata, substracta, vel injuste detent' fuer', &c.* To have and to hold to the said *J. Farnham* and his Heirs for ever. *Proviso semper, quod si præmissa non sunt aut non fuer' a nobis aut a dictis patre, fratre, vel sorore nostris concelata, substracta, vel injuste detent', & sic remanser'*

 usque

usque tempus captionis primæ inquisitionis vel informationis, &c. quod tunc hæ literæ patentes quoad, &c. vacuæ erunt. And the first Certificate was *Octabis Trinit' anno regni dict' dom' reginæ El.* 20. And afterwards, *sc.* The first Day of *Octob.* then next following, The said *Leonard Vowe* obtained Letters Patent under the Great Seal, according to the said Privy Seal, and the first Day of *Octob.* in the twentieth Year aforesaid, the said *John Farneham* by Deed indented and inrolled, bargained and sold to the said *Richard Smith* now Defend. the said Messuage, *&c. in quo, &c.* To have and to hold to him and his Heirs, by Force of which he entered, *&c.* upon whom the said *Leonard Vowe* entered, and made the Lease *prout, &c.* And if upon the whole Matter aforesaid, the said Let. Patent made to the said *John Farnham*, were sufficient in Law to pass the said Messuage, *&c.* then they found for the Defend.; and if not, then for the Pl. and assessed Damages and Costs. And in that Case upon Argument made at Bar and Bench, four Points were resolved. 1. That the said Let. Patent *de an.* 17 *reg. El* were void in Law, because they were in the Nature of a Restitution, and the Suggestion of the said *Leonard Vowe* recited in the said Let. Patent, that he was next Heir of the Body of the said *Margaret Myton*, was false; and altho' it was but Matter in Fact, yet because it was the principal Motive of the said Grant in the Nature of a Restitution, and the Intention of the Q. expressed in the Let. Patent, was that the Intention of the Grant of the said K. *H.* 4. should take Effect, which the Q. reciting the Let. Patent of K. *H.* 4. and the Imperfection of them declares her Intention in these Words; *volentes dictam intentionem præd' regis Henrici* 4. *effectum capere & non evacuari*, which could not be if the right Heir of the Body of the said *Margaret Myton* be not restored; for this Cause the said Grant of Q. *El. de an.* 17. was void. 2. It was resolved, That the said Clause of *Quæ quidem, &c.* was in Judgment of Law the Suggestion of the Patentee, and added to restrain the said Grant in such Manner, that if the said Clause of *quæ quidem* be false, altho' the said Messuage be granted by certain Name, yet the Grant is void. 3. It was resolved, That when the K.'s Officers by Force of any Matter of Record, may have so certain Notice of the Lands or Tenements comprised therein, that they may put them in Charge to the King, altho' the Record it self be not of any Effect or Validity in Law; yet in Judgment of Law, such Lands or Tenements shall never be said to be concealed, for the Negligence or Laches of the King's Officers or Ministers shall not turn to the K.'s Prejudice in such

5 Co. 94 a. Hob. 230.

Hob. 228.

ſuch Caſe: And therefore any Grant or demiſe of the K. of any Land in certainty under the Exchequer-Seal, where it ought to be under the Great Seal, or under the Great Seal where it ought to be under the Dutchy Seal, or under the Seal of the Dutchy, or of the Court of Augmentations, where it ought to be under the Great Seal: Yet ſuch Land can't againſt ſuch Record be ſaid to be concealed; and therefore, altho' the ſaid Grant of K. *H.* 4. under the Dutchy Seal, where it ought to have been under the Great Seal, altho' nothing paſſed by it: Yet by Reaſon thereof the ſaid Manor of *Hallington* can never after be ſaid to be concealed. So if K. *E.* 3. had by his Let. Patent under the Great Seal demiſed the Manor of *D.* for Life, or for Years, which Leaſe was void by Reaſon of the Miſnomer of the Leſſee, or any other ſuch like Imperfection, yet the ſaid Manor never after can be ſaid to be concealed, and if any Parcel of the Poſſeſſions of the Crown be in Charge in the Dutchy, or of the Dutchy in the Exchequer, theſe ſhall never be ſaid to be concealed. And it was ſaid that this Word Conceal was a Word of new Invention, in Times paſt not uſed or known to the Sages of the Law, but in one Writ which (*a*) *Stamford Prerog.* 80. *b.* ſpeaks of, which Writ is there called, *a Writ de terris concelatis*, and lies after a general Livery ſued; but ſuch Writ is now alſo concealed, for it is not found in the *Regiſter*, *Original* or *Judicial*. 4. That no Land or Tenement whereof the K. is ſeiſed, *&c.* altho' it be concealed from the K. can be ſaid in Law to be ſubſtracted or detained from the King; for the K. can't be diſſeiſed or deforced of any Land, *&c.* But if the K.'s Tenant is (*b*) diſſeiſed, and dies without Heir, then the Right eſcheats to the K. and there in truth the Land is detained from the K.; but ſuch Right ſhall not paſs by the K.'s general Grant of the Land. *Hill.* 38 *El.* it was reſolved by *Poph.* and *Anderſ.* Ch. Juſtices in the Caſe of one (*c*) *Shane* ſent out of *Ireland*, That the Clauſe of *quæ quidem*, *&c.* in the like Let. Patent of Concealment of Lands in *Ireland*, amounted to a Suggeſtion, and being falſe, made the Grant of divers Rectories by certain Name void, as here in the fourth Point will appear. As to the third Reaſon, to the End that the final Intention of the K. by theſe Let. Patent was to reward the Service of the Patentee, and not to diminiſh any Part of the Revenue of his Crown, but only to paſs that which was concealed from him: And the Opinion of *Juin* in 9 *H.* 6. 28. *b.* was cited, (*d*) If a Man ſues to the King by Petition, to have a Manor, and ſaith in his Petition, that the Manor is worth but 10 *l.* and hath a Patent of the ſame Manor, and afterwards it is found upon Record, that the Manor was worth 40 *l.* *per annum*, the

(*a*) Stamf. Prærog. 80. b.

(*b*) 3 Co. 4. b. 1 Leon. 271. Stamf. Cor. 187. b.

(*c*) Hill. 38 El. Shane's Caſe. Moor 417.

(*d*) 2 Rol. 188

the Patent shall be repealed, for the K. intended to diminish his Revenue but 10 *l. per ann.* and upon the Suggestion of the Patentee he was (*a*) deceived in the Value, and thereby he decreased his Revenue 40 *l. per ann. Vide* 16 *E.* 3. *Grant* 54. As to the fourth Reason, the said Clause of *Quæ quidem* has a double Conjunctive, *sc. concelata & injuste detenta*; and as it appears by the fourth Point of (*b*) *Vowe's* Case, Land, *&c.* can't be detained from the King; and so it was resolved in (*c*) the said Case of *Shane*, *Hill.* 38 *reg. El.* where the Case was; Q. *El.* by her Let. Patent under the Great Seal of *Ireland*, *ex certa scientia, mero motu, & gratia speciali*, granted to *Edm. Barret the Rectory of Sroze in the County of Longford in Ireland*, (*inter alia*) Parcel of the Possessions of the late Priory of *Laughsendy*, *Quæ omnia & singula præmissa a nobis & progenitoribus nostris diu antehac concelata, substracta, & injuste detenta fuerunt & adhunc sunt*, To have and to hold to the said *Edm. Barret* and his Heirs. And it was resolved, that that Grant was void, because the said Clause of *quæ quidem* was in Judgment of Law the Suggestion of the Patentee, and the said Rectory could not be unjustly detained from the Queen; and the Words are in the Conjunctive, *ss. concelata, substracta, & injuste detenta*, and so *Francis Shane* who occupied the said Rectory did prevail against the said Patentee: And the second Conjunctive is, *Et redditus & reventiones inde, nec alicujus inde parcell' antehac respons' fuer'*; so that both the (*d*) Conjunctives ought to be true, or otherwise the Grant is void.

(*a*) 1 Co. 46. a. 51. a. 52. b. 2 Co. 33. b. 5 Co. 94. a. 6 Co. 29. b. 55. b. 7 Co. 12. b. 8 Co. 56. 11 Co. 4. b. 90. a. Lane 110. Moor 45, 164. 9 H. 6. 28. b. Hob. 223, 229. Cro. Car. 198. Co. Ent. 384. a. 41 Ass. 19. Br. Patent 38. 1 Mod. Rep 196. Kelw. 8. b. 12. b. Yelv. 48. 2 Rol. 188. Dyer 336. pl. 47. 352 pl 26. Plowd. 332. a.

(*b*) Antea 110. b. Moor 417. 2 And. 19. Raym. 177.

(*c*) Antea 112.

(*d*) Co. Lit. 225. a.

As to the third Point in the principal Case it was resolved, where the said Grant made to Sir *George* (*e*) *Howard* was *ex certa scientia, mero motu, & gratia speciali*: *Ex certa scientia* (*f*) imports that the King had knowledge of the Thing he granted, and therefore such Grant is called assertive and not suggestive, as it is said in 2 *E.* 3. 7. *in John de Bretaine's Case*, but that is to be intended of the Truth, which is the proper Object of Knowledge, and not of Falsity, which is *non ens*, and of that the King can't have knowledge, but in such Case the K. notwithstanding those Words, is utterly deceived in his Grant; and therefore they shall not give the Patentee any Advantage.

(*e*) 3 Inst. 389.

(*f*) Plowd. 330. b. 1 Co 51. b. 53. b. 3 Leon. 249.

Ex mero motu properly imports the Honour and Bounty of the King, who rewards the Patentee for the Merit of his Service of his own mere Motion, without any Suit of the Party: And it was said that those Words were added after the Statute of (*g*) 4 *H.* 4. *cap.* 4. by which Act the King declares, that he will abstain from granting any

(*g*) Rast. Pat. 6

Part

Part of his Revenues, Lands or Wardships, unless to those who have deserved, and those who sue for any such Thing shall be punished, and shall not have the Thing for which the Suit was made: After which Act, to the End it might not appear that any Suit was made, these Words were added, *sc. ex mero motu*: And the said Act is intituled in the Roll *Brangwyn*, which in the *British* Tongue signifies *White Crow*: And he was called a Crow because he was oftentimes craving and acquiring: And White because he had *aulica & candida vestimenta. Ex gratia sua speciali*, in respect of the Grace and Favour, which the King had conceived for the Patentee. And it was resolved that there was a Difference between Clauses of (*a*) *quæ quidem, &c.* For some are added only to make a more plain Demonstration of the Certainty of the Thing granted, and some which concern the King's Title, or the Value of the Land granted, or to make a Restraint of the King's Grant as has been said before: And Additions only to make more Certainty shall not avoid the King's (*b*) Grant of a Thing certain; as (*c*) 10 *H.* 4. 2. *b.* in Sir *John Lestrange*'s Case, it is held, That if the King by Office found has a Manor in Ward, and grants the said Manor by a certain Name in such a County, *quod quidem manerium nuper seisitum fuit in manus nostras, &c.* and in Truth this Manor never was seised, it shall not avoid the Grant, for it is not (*d*) material whether the King had seised it or not; and it was added but to make more Certainty to that which was certain enough before; and therefore it shall not avoid the Grant altho' it be false. Otherwise it is of a general Grant, as in the principal Case there it was.

Brangwyn.

(*a*) Cr. Jac. 34. 35. 6 Co. 55. b. Lane 13. Plowd. 191. b. Cr. Car. 548. Yelv. 48.

(*b*) Savil. 48. Moor 45. Cr. Car. 548. Dy. 87. pl. 101.

(*c*) 3 Keb. 413, 414. Godb. 423. 1 Mod. Rep 197. 2 Co. 35. a.

(*d*) Cr. Jac. 34.

So in *Mich.* 22 & 23 *Eliz.* A Case between the Earl of *Rutland* and *Thomas* (*e*) *Markham* was by the Command of Queen *Elizabeth* referred to *Bromley* Chancellor of *England*, *Gerard* Attorney, and *Popham* Solicitor; and the Case was such: The Queen granted to *Thomas Markham Officium custodis parcorum sive boscorum de Billo & Berkland in foresta de Sherewood in com' Nott' quod quidem officium Henric' nuper Comes Rutland' nuper habuit*, to have and to hold the said Office to the said *Tho. Markham* for Term of his Life; and in Truth the said *Henry* E. of *Rutland* never had the said Office; and yet it was resolv'd by 'em that the Grant was good, because *quod demonstrandi causa* (*f*) *additur rei satis demonstratæ frustra fit.* So if the King demises a Manor by special name, (*g*) *quod quidem manerium nuper fuit in tenura sive occupatione Johan' Stile*: And in Truth he never had it, yet the Grant is good, for

(*e*) Mich. 22 & 23 Eliz. Tho. Markham's Case. 1 Mod. Rep. 197.

(*f*) Dyer 87. pl. 101.

(*g*) 2 Co. 33. a. 3 Co. 10 a. Hob. 171. Plowd. 191. b. Dy. 87. pl. 101. Cr. Jac. 34. Moor 45. Yelv. 48. Cr. Car. 548.

for in these Cases the King is not deceived in his Title, nor in the Value which he intends to *(a)* grant, nor in the Restraint which he for his Profit intends to make. It was likewise resolved, That there was a (*b*) Difference betwixt the King's Case, and the Case of a Subject, for a Subject who may mind his own private Affairs, shall not avoid his grant in these or the like Cases, being made upon a false Insinuation or Suggestion; but the King who takes Care of the Commonwealth, shall avoid his grant in these Cases *jure regio*, as it is said in *(c)* 21 *E*. 3. 47. *a*. *b*. in the Earl of *Kent's* Case, and it is an high and great Prerogative which the K. has, that when he makes any grant upon such false Suggestions as aforesaid, they are void in Law; so when upon false Insinuations or Pretences, he makes any grant as of any Monopoly, *&c.* which in Truth is to the Prejudice of the King and the Commonwealth, the King *jure regio* shall avoid such Grants, and such Letters Patent by Judgment of Law shall be cancelled. And it was said that Perpetuities, Monopolies, and Patents of Concealments were born under an unfortunate (*d*) Constellation; for as soon as they have been brought in Question, Judgment has always been given against them, and none at any Time given for them; and all of them have two inseparable Qualities, *sc.* to be troublesome and fruitless.

(*a*) Co. Jac. 34.
(*b*) 11 Co. 87. a.
(*c*) 11 Co. 87. a 74. b. 1 Co. 44. a. Hob. 155. Cr. Car. 548.
(*d*) Ant. 42. b.

As to the said Case in (*e*) 29 *E*. 3. 8. the Case there is, That the King being Founder of the Priory of *Mountague* (which was a Priory alien) by reason of the War of *France* seised the said Priory, and by his Charter granted to *Will. Mountague* Earl of *Salisbury*, the Father, the Advowson of the said Priory to him and his Heirs, and also the keeping of the said Priory during the War, with all the Appurtenances, and all the Profits thereunto belonging, as entirely as it was in his Hands. And after the said Earl died, *Will.* his Son and Heir then within Age; to whom the King by another Charter granted *omnes advocationes Ecclesiarum quæ pertinent ad prioratum de Mountague, tenendum usque ad legitimam ætatem præfati Willielmi, & quas nuper concessimus præfato Comiti Sarum Patri*; where it is taken, That the Advowsons appertaining to the said Priory did not pass to the Father by the said general Words. And there *Green* Chief Justice said, Surely he conceived, That altho' the K. had never granted the Advowsons to the E. the Father, That by the second Charter they should pass to *Wm.* the Son by those Words; for in as much as he grants, *&c.* to hold till his full Age, altho' that which he says after (the which he granted to his Father) be false, *(f)* the Grant is good,

(*e*) Ant. 110. a.
(*f*) Palm. 85.

good; but *Norton* contrary; so that *Green's* reason was, because the said Words of Restriction came after the *Habendum*, *sc.* after a full and absolute Grant; also if the said Opinion of *Green* should be Law, the said Case is out of the Reason and Rule of the Case at Bar, as appears before. And *Mic.* 10 *Jac. Reg.* Judgm. was given for the Plaintiff; whereupon the Def. brought a Writ of Error, and the Error assign'd was in the Point adjudged, which Point was argued again at the Bar, and at the Bench, and in *Mich.* 11. *Regis Jacobi* the Judgment was affirmed *per totam Curiam*, for the Causes and Reasons reported before. *Nota* Reader, That *Hill.* 36 *Reginæ El.* an Information was exhibited in the King's Bench against *Hugh* (*a*) *Vaughan* for intruding into the Scite of the late Priory of *Friers Preachers* in *Langley Regis*, in the County of *Hereford*, and upon Not guilty pleaded the Jury gave a special Verdict to this Effect. *Richard* Prior of the said late Priory *ann.* 38 *H.* 8. with the Consent of the Convent by their Deed enrolled did surrender and grant to *H.* 8. his Heirs and Successors all their Possessions, &c. by Force whereof, and of the Act of 31 *H.* 8. The King was seised of the said Scite, and 7 *Feb. ann.* 31 *H.* 8. demised it by the Name of the Scite of the said late Priory to the Suffragan of *Dover* for his Life *absque aliquo inde reddendo*, and afterwards the said Suffragan died; and the Scite by mean Descents descended to Q. *Elizabeth*. And afterwards 27 *Junii ann.* 8 *Eliz.* a Commission was directed under the Exchequer Seal to *Will. Cook*, Esq; and others giving them Authority to survey the said Scite (*inter alia*) and to certify to the Exchequer in what Reparation it was, and what Lead, Stone and Iron was requisite to repair it; which Commissioners 3 *die Septemb.* following by Force of the said Commission, did certify in Writing under their Seals (*inter alia*) That there was an old Church appertaining to the said late Priory, which was in great Ruin and Decay, and was covered with Lead, which Lead was worth, 33 *l.* 6 *s.* 8 *d.* And the Timber and Stones were little worth, &c. After which Certificate the Lead, Timber and Stones were sold by the Treasurer and Under-Treasurer of the Exchequer *ann.* 9 *El.* to one *Webster* for 33 *l.* 6 *s.* 8 *d.* who in the Court of Exchequer acknowledged the Debt. And afterwards the said Queen *El.* 9 *Aprilis anno regni sui* 16. by her Letters Patent, *ex certa scientia*, *mero motu*, & *gratia nostra speciali*, granted the said Scite of the said late Priory *inter alia* to *Edward Grimston* the Father, and *Edward* his Son and their Heirs, under this *Proviso*, *semper quod si prædicta præmissa aut aliqua inde parcella, aut redditus aut proficua eorundem non sunt nec fuerunt ante* 10 *diem Aprilis anno regni nostri* 14. *a nobis nec a patre, fratre, nec sorore nostris concelat' subtracta*,

(a) Hill. 36. El. Hu. Vaughan's Case in B. R. Cr. El. 507, 508. Moor 537, 538.

tracta, vel injuste detenta, & sic concelat' subtract' vel injuste detent' remanserunt usque præd' 10 diem Apr' anno 14 supradicto, quo die præd' Edwardus & Edwardus, &c. suis propriis sumptibus & expensis ad revelationem inde fieri procuraverant, qd' tunc hæ Literæ patentes quoad hujusmodi parcell' sic non concelatam, subtractam, vel injuste detentam vacuæ erunt. And further found that the Queen never took any Profit of the said Scite, but of the said Church as aforesaid. And if, *&c.* And it was objected that the said Scite should pass by the Letters Patent, because altho' it should be admitted that the Scite it self could not be said to be concealed in that Case, and altho' the said Scite could not be said substracted or unjustly detained from the Queen. Yet forasmuch as the Rents and Profits thereof were substracted and unjustly detained from the Queen, and the Words are in the Disjunctive, *aut redditus aut proficua eorundem, &c.* therefore the said Letters Patent were sufficient to pass the said Scite. Also it was objected, That the said Commission under the Exchequer Seal, is not any such authentical Record in Judgment of Law, to prove that the said Scite was not concealed. But it was resolved *per totam Curiam*, That upon the said special Matter found, the said Scite should not pass by the said Letters Patent. And in that Case six Points were resolved. 1. That when there is any Record by which the Certainty of the King's Land (which is not in Charge) so particularly appears, That the King's Officers may put it in Charge (without any Respect to the Time of the said Record, so that it be after the King's Title accrued) such Land can never be said to be concealed. As if a Man seised of the Manor of *D.* in Fee by Deed enrolled granted the said Manor to King *H.* 8. his Heirs and Successors, and the King or any of his Successors after the said Grant had never taken any Rent or Profit thereof, yet this Manor shall never be said to be concealed. So in the Case at Bar, when the King demised the said Scite of the late Priory to the Suffragan of *Dover* for his Life, altho' nothing be reserved, this Scite shall never after be said to be concealed: *Et sic de similibus.* 2. It was resolved, That in the King's Case, altho' one wrongfully takes the Rents or Profits of his Lands, yet the said Rents or Profits can't be said to be withheld or unjustly detained, for the King may charge him who takes the Rents or Profits of his Lands as his Bailiff to render (*a*) account; for in the K.s Case the Law in such Case makes a Privity; and therewith agrees 33 *H.* 6. 2 & 3. And when the Land itself it is not concealed, the said Words, *aut redditus aut proficua eorundem, &c. concelata*

(*a*) 11 Co. 90. a. 92. b. 93. a. Cro. El. 221, 508. Br. Account 8, 65. Br. Bayly 25. Moor 476. Jenk. Cent. 226. c. 89. Plow. 321. a. 440. 3 Co. 12. b. Godb. 292, 293, 297, 299. 2 Rol. Rep. 296, 297, 300, 302, 303, 304. Hardr. 25, 26. 7 Co. 21. b. 29 b. 8 Co. 171. a. 12 Co. 3. 2 Inst. 19. Lane 48, 138. 1 Venter. 132. 2 Rol. 161, 156. Dy. 160. pl. 41. 224. pl. 32, 33. 249. pl. 83. 295. pl. 10.

celata, ſubtracta, vel injuſte detenta, &c. will not paſs it, for the King's Intention was to paſs nothing but that which was concealed from him; for otherwiſe by Pretence of the Patentee, if the King's Leſſee has detained his Rent reſerved upon his Leaſe, it ſhould paſs by the ſaid Words, which was abſolutely denied by all the Juſtices, for no ſuch conſtrained Conſtruction ſhall be made in the King's Grant, to paſs his Inheritance againſt the King's Intention, and the Suggeſtion of the Patentee himſelf. 3. It was reſolved, as before in *Shane*'s Caſe, that in the ſame Caſe Land can't be ſaid to be ſubſtracted or unjuſtly detained. 4. That the ſaid Words *ante decimum diem Aprilis anno* 14 *El.* ſhould in Conſtruction of Law be taken for the whole Time after the later Title of the Queen, until that Day, and not for a Month, or a Year, or two Years, *&c.* upon which great Uncertainty would follow; but all Times after the King's Title until that Day ſhould be taken, notwithſtanding the Diſjunctive Words ſubſequent, *a nobis, aut a ſorore, fratre, vel patre noſtris.* 5. That the ſaid Commiſſion under the Exchequer Seal, and the Return thereof was ſufficient to inſtruct the King's Officers to put the Scite in Charge, and it ſerves for a ſufficient Record to that Purpoſe; but an Office found by Force of a Commiſſion under the Exchequer Seal, is not ſufficient to entitle the King, in Caſe of Attainder of Felony, Mortmain, *Ceſſavit*, or the like. So Note (*a*) the Difference betwixt an Office of Inſtruction, * and an Office of intitling. Laſtly, It was reſolved, That foraſmuch as the Queen was anſwered ſome Part of the Profits of the ſaid Scite, no Part thereof can be ſaid to be concealed.

(a) 5 Co. 52. b. 56. b. Moor 199, &c. 325. Co. Lit. 2. a. 117. a. B. N. C. 443. 4 Co. 58. a. Cro. El. 855. Cr. Car. 173. 1 Jones 78, 79, 217.

[*See the Hiſtorical View of the Exchequer, by* Guilbert, *Chap.* 7. *and* 4 Co. 54, 55, &c.]

ROBERT

ROBERT PILFOLD's *Case.*

Mich. 10 Jac. 1. *in B. R.*

Damages and Costs.
(a) Cr. Jac. 297. Jenk. Cent. 288. Cases in Law, &c. 275 Skin. 363, 367, 555. Carth. 20, 21, 230. Lucas 275.

ROBERT (a) *Pilfold* brought an Action of Trespass in the King's Bench, *Trin.* 7 *Jac. Reg. Rot.* 795. against *Robert Dawks quare clausum & domum fregit*, at St. *Olaves* in *Southwark*, in the County of *Surrey*, with a *Continuando* for a long Time, to the Damages of the Plaintiff 40 *l.* The Defendant pleaded Not guilty, *&c.* which Issue was tried by *Nisi prius* for the Plaintiff, and Damages assessed *occasione transgressionis prædictæ ad* 49 *l.* and for Costs of Suit 20 *s.* upon which Verdict the Plaintiff at the Day in Bank, being the Day of the Return of the *Distringas* (b) remitted 9 *l.* Parcel of the said 49 *l.* assessed for Damages, and prayed Judgment of 40 *l.* (to which Damage he had declared) with Increase of Costs, and had 9 *l. de incremento* added by the Court, which in all did amount to 50 *l.* and had his Judgment accordingly. And thereupon *Dawks* the Defendant brought a Writ of *Error* in the Exchequer-Chamber; and in this Case it was assigned for *Error*, that the Damages and Costs together amounted to more than the Damages alledged in the Declaration: And it was strongly argued that it was *Error*, for *misa & custagia* are included in this Word Damages; and therefore where the Statute of (c) 8 *H. 6.* gives treble Damages in a Wit of Entry, in an Action upon the Statute, or in Assise, there the Costs also shall be treble; and yet the Statute gives treble Damages only, but treble Costs are included in this word Damages. And therewith agree 14 *H. 6.* 13.

(b) 11 Co. 56. a. 2 Bulst. 279. 1 Rol. Rep. 88. Jenk. Cent. 286. Hob. 178. F. N. B. 107. b. 1 Rol. 784.

(c) 8 H. 6. cap. 9. Cro. El. 582. Cro. Car. 560. Co. Lit. 257. b.

13. *a*. 19 *H*. 6. 32. *a*. 22 *H*. 6. 57. *a*. 12 *E*. 4. 1. *a*. *F. N. B.* 248. *c*. And in 4 & 5 *P*. & *M*. *Dy*. 159. *b*. *Domingo* (*a*) *Bilota* brought an Action on the Case against one *Pointel*, because he sued him before the Admiral for a Thing done upon the Land, in which Case the Stat. of 2 *H*. 4. *c*. 1. gives the Pl. double Damages, without speaking of any Costs, and yet there he recovered as well double Costs as double Damages. And in 18 *E*. 4. 23. *a*. The (*b*) Jurors may assess the Damages and Costs entirely if they will, for Damages include the Whole, (*c*) 42 *E*. 3. 7. *b*. that the Pl. shall not recover more Damages than he himself has declared for; and therewith agree (*d*) 2 *H*. 6. 7. 9 *El*. *Dy*. (*e*) 258. *b*. And in (*f*) 13 *H*. 7. 16, 17. in Trespass the Pl. declared to his Damages of 20 Marks, and the Jury gave 22 Marks for Costs and Damages: *Brian*, this is good for 20 Marks, but they shall not give Costs beyond the Sum of the Damages in the Declaration, & *alii concord'*, and that was said, was a Case in the Point, wherefore it was concluded, that the Judgment for that Reason was erroneous. But it was at last resolved by all the Judges of the Com. Pleas, and Barons of the Exchequer, that the Judgment should be affirmed. And the Reasons and Causes thereof I have thought necessary to report at large. And therefore, First, at the (*h*) Com. Law before the Statute of *Gloucester* (which was made *ann*. 6 *E*. 1. *c*. 1.) A Man should not recover Damages in any real Action, as in (*i*) *Dower* before the Statute of *Merton*, *c*. 1. nor in *Aiel*, *Mordanceſtor*, &c. before the said Stat. of *Gloucester*; but in Actions mixt, as in *Assise*, (*k*) *Entry in the Nature of Assise*, &c. or in personal Action, as *Trespass quare clausum fregit*, of Goods taken away, &c. 2. And that in all Cases where a Man (*l*) should recover Damages he should recover Costs, which is meant of all Cases, where he should recover Damages; either before the said Act of 6 *E*. 1. or by the said Act. 3. In all (*m*) Cases where a Man either before, or by the same Statute should not recover Damages, if after the said Act another Stat. in a new Case gives Damages, either single, or double, or treble, &c. there the Pl. shall not recover Costs, for this Act is an Act of Creation, which creates and gives a Recompence to the Pl. where in the same Case no Recompence was given before. 4. But it is otherwise of an Act of (*n*) Addition, *sc*. which adds greater Recompence and Satisfaction than was given before such Act; for where Damages and Costs were given by the Common Law, but the Act increases the Damages, there the Plaintiff shall recover his Damages increased by the Statute, and also (*o*) Costs: And therefore in a *Quare impedit* (*p*) Damages are given to the Plaintiff by the Statute of *West*. 2. made in 13 *E*. 1. *cap*. 5. but no Costs shall be there recovered, because it is an Act of Creation, which newly gave Recompence to

(*a*) 1 Rol. 517. Dy. 159. pl. 37. 38. 4 Inst. 141. Moor 892.
(*b*) 1 Rol. 517.
(*c*) 1 Bulst. 49. Cr. Jac. 70.
(*d*) 1 Bulstr. 38. 2 H. 6. 7. a. 1 Rol. 578. Yelv. 70. Cr. El. 544. Cr. Jac. 70.
(*e*) Dy. 258. pl. 16. 1 Bulst. 49.
(*f*) Post. 117. b. 1 Bulstr. 49. 1 Rol. 578. Cr. El. 544. Cr. Jac. 70, 297. Yelv. 70. 2 Inst. 288. Cr. El. 568.
(*g*) 1 Rol. 578. Cr. Jac. 69, 70. Yelv. 70.
(*h*) 2 Inst. 286. 1 Jones 434. Co. Lit. 285. a. b.
(*i*) 2 Inst. 289. Co. Lit. 285. a. b. Br. Cost 29.
(*k*) Dy. 370. pl. 61.
(*l*) 2 Inst. 289.
(*m*) 2 Inst. 289. 362. March 29, 61. Cro. Car. 360. 1 Jones 434.
(*n*) 2 Inst. 289. March 29, 61.
(*o*) Cro. El. 582. 1 Vent. 133.
(*p*) 1 Jones 434. 2 Inst. 289, 362. Co. Lit. 17. b. 344. b. 5 Co. 59. a. 3 Inst. 156. 6 Co. 51. a. Kelw. 26. a.

to the Pl. where none was recoverable before: And therewith agree 27 *H.6.* 10.*b.* 2 *H.4.* 17.*b.* 9*H.6.* 66.*b.* But in an Action on the Stat. of (*a*) 2 *H.4.* against him who sues in the Admiralty for a Thing done upon the Land, that is an Act of Addition, for Damages and (*b*) Costs were in such Case recoverable at the Com. Law. *Vide* for that 8 *E.4.* 13.*b.* & 14.*a.* and the Stat. increases the Damages to double, and yet he shall recover Costs also; for the Stat. in increasing the Damages, doth not take away the Costs. So afterw. at the same Parl. at *Gloucester, anno* 6 *E.* 1. *c.* 5. An Action of (*c*) Waste is given, where there was but a Prohibit. against Ten't in Dower, &c. at the Com. Law, and no Damag. should be recover'd in it, but for Waste done after the Prohibit. deliver'd, and against Tent' for Life, or Years, no Prohibit. lay, and therefore the Stat. 6 *E.* 1. *c.* 5. which gives treble Damages for Waste done before the Writ brought, and the Place wasted, is a Law of Creation, and which gives Remedy where none was before, and therefore there no Costs shall be recovered: And therew. agree 2 *H.4.* 17.*b.* 9*H.6.66.b.* & 19*H.6.*32.*a.* and therefore the Books in 5 *H.* 5.13. *a.* & 5 *E.* 4.7. *a.* are ill reported. But in *Ravishment of Ward*, which is a Law of Addit. *sc.* which adds the Recov. of the Ward it self, or the Value of it: Yet Damag. and Costs shall be also recover'd, because an Action lay at the Com. Law for Ravishm. of Ward, in which the Pl. should recover his Damages and Costs: And therewith agrees 27 *H.6.* 10. *b.* So in an Action for forcible Entry into Lands upon the Stat. of 8 *H.* 6. or in an Assise for a Disseisin done with Force, there the Pl. shall recover treble (*d*) Damages, and his Costs also, because at the Com. Law the Pl. should recover Damages and Costs in both the Cases, for that Stat. is but an Act of Addit. and therewith agree 14 *H.6.*13.*a.* 19*H.6.*32.*a.* 22*H.6.* 57.*a.* 12 *E.* 4. 1. *a.* *F.N.B.* 248. *c.* But in a *Decies tantum*, which is a Law of Creation, there the Pl. shall recover the Penalty given by the Stat. and no more, for that is a Law of Creation, 2 *H.4.* 17.*b.* So upon the Stat. of 5 *E.6.* of (*e*) Ingrossers, the Pl. shall not recover Costs, but only the Penalty given by the Stat. because the Party had no remedy at the Com. Law. 35 *H.* 8. *Damages* 200. *Brook.*

Fifthly, It is to be known, that this Word (*f*) *Damna* is taken in the Law in two several Significations, the one properly and generally, the other *relative & stricte*; properly, as in the Cases which have been put upon the Statutes of (*g*) 2 *H.* 4. & 8 *H.* 6. where Costs are included within that Word: For *damnum* in its proper and general Signification *dicitur a demendo, cum diminutione res deterior fit*, and in this Sense Costs of Suit are Damages to the Pl. for by them *res sua diminuitur.* But when the Plaintiff shews for Wrong done to him to the Damage of such a Sum, that is to be taken *relative* for the Wrong which is past before the Writ brought, and are assessed *occasione transgr' prædictæ*,

(*a*) 2 H 4. c. 11. 1 Rol. 517.

(*b*) 2 Inst 288. Salk. 205.

(*c*) 1 Jones 438. Kelw. 26. a, Cro. Car. 560 19 H. 6. 32. a. 2 Inst. 289.

(*d*) 8 H. 6. c. 9. 1 Jones 434. Lit. Sect. 431. 2 Inst. 289. F. N. B. 248. c. Co. Lit. 257. a. b. 12 E. 4. 1. a. 14 H. 6. 13. a. 19 H. 6. 32. a.

(*e*) 5 & 6 E. 6. c. 14. March 25.

(*f*) Cr. Jac. 69, 420.

(*g*) 2 H. 4. c. 11. 8 H. 6. c. 9.

Cr. El. 568.

dictæ, and can't extend to Costs of Suit, which are future, and of another Nature, *sc.* to legal Expences, and whereof no Certainty could then be known. So these are two distinct Things, *sc. damna pro injuria illata*, and *expensæ litis*; and therefore in the said Acts of Parliament of (*a*) 2 *H.* 4. and 8 *H.* 6. they are taken in their proper and general Signification, and in favour of the Pl. who always when he recovers is favoured in Law. But in the Case at Bar, it is taken in its relative Signification, regarding the Wrong which is past; and so they are expresly assessed by the Jury, and that also in the Plaintiff's Favour: And the Difference was well observed betwixt personal Actions, and real Actions in which Damages are to be recovered: For in personal Actions, they shall declare to Damages, because they shall recover Damages only for the Wrong done before the Writ brought, and shall recover no Damages for any done pending the Writ; but in (*b*) real Actions the Demandant shall never count to Damages, because he is to recover Damages pending the Writ: And therefore it is held in (*c*) 33 *H.* 6. 47. *a.* In a Writ of *Entry sur disseisin, or in Nature of an Assise*, where the Party shall recover Damages, and a Writ is awarded to enquire of the Damages, that the Plaintiff shall recover Damages from the Time of the Disseisin to the Time of the Awarding of the Writ of Enquiry of Damages, and not after, notwithstanding that the Writ of Enquiry was not serv'd after seven Years past, and Issue be joined triable by Verdict, he shall recover Damages, but from the Time of the Disseisin to the Time of the Verdict: But in a *Præcipe quod reddat*, of a Rent of the Possession of the Demandant himself, he shall recover the Arrearages behind, as well at all Times pending the Writ as before, *usque diem Judicii redditi*, because it is his Inheritance: And therewith agree 7 *E.* 4. 5. *a. vide* 13 *Ass. p.* 2. 17 *Ass. p.* 10. 29 *Ass. p.* 59, 31, 33. 36 *Ass. p.* 2. 40 *E.* 3. 24. 7 *H.* 4. 16. *a.* 16 *H.* 7. 5. *a.* 6. *a.*

And as in (*d*) real Actions the Demandant shall not count to Damages, because it is incertain to what the Damages will amount, because he shall recover those pending the Writ; so in the Case of Costs they shall be recovered for the Expences pending the Writ, which being uncertain can't be comprehended in the Count, because the Count extends to Damages past, and not to Expences of Suit. And Costs are not always included in this Word Damages, for if Trespass is brought against two Def. and the one is found guilty by himself, and the other guilty by himself, and (*e*) Damages are severally assessed, yet the Costs shall be jointly taxed: And therewith agree 36 *H.* 6. 13. *a.* and 12 *E.* 4. 1. *a.* And the Books in (*f*) 42 *E.* 3. and 2 *H.* 7. were agreed to be good Law, *sc.* that the Pl. shall never recover more (*g*) Damages, than

(*a*) 2 H. 4. c. 1. 8 H. 6. c. 9.

(*b*) 2 Inst. 286.

(*c*) Jenk. Cent. 6. Br. Damages 14. Fitz. Damages 34.

(*d*) 2 Inst. 285.

(*e*) 11 Co. 5. b. 7. a. Jenk. Cent. 269. Hob. 66. 1 Brownl. 233. 1 Bulstr. 157. Cr. Jac. 118, 349, 384, 385. Cr. Car. 54, 243. 1 Rol. Rep. 30, 31. Cr. El. 860.

(*f*) Plowd. 91. a. b. 42 E. 3. 7. b. 2 H. 6. 7. b.

(*g*) Cr. Jac. 69, 297. Yelv. 45, 70. Cr. El. 544, 568, 866. 1 Bulstr. 49. 1 Rol. 578.

(a) Cr. Jac. 69, 297. Yelv. 45, 70. 1 Bulst. 49. Cr. El. 544, 568, 866 1 Rol. 578. (b) Bulst. 49.

than he has (*a*) declared for, *sc.* Damages for the Wrong done; but *Expensæ litis* may be added thereto; and therefore (*b*) 34 *E.* 3. *Damages* 7. was denied to be Law, *sc.* That in *Waste* the Pl. declared to the Damages of 10 *l.* and the Jury found Damages to 20 *l.* and they were trebled; and the Reason there given is, because the Stat. of *Glouc.* enacts, that the Defendant make Agreement of the treble of what the *Waste* is taxed at; but the Stat. is to be intended of Damages lawfully taxed: And so it was held by the Lord *Dyer Trin.* 10 *El.* in an Action of Waste brought by the Lord *Abergaveny*, that the Jury could not value the Waste more than the Pl. has alledged in his Declaration: And therewith agrees *Hill.* 3 *E.* 4. *Rot.* 137. And yet in some Cases the (*c*) Pl. shall recover more Damages than he himself has declared for, as in 8 *H.* 6. 5. *a.* in (*c*) Detinue, the Pl. shall recover more Damages than he himself has declared for. And as to the Case of (*d*) 13 *H.* 7. 16 & 17. which Case has been cited out of *Brook's Abridgment*, the Book at large was confessed to be good Law; for the Case, as it is there reported, is such; In an Action of Trespass brought by *Dorrel*, he declared to the Damages of 20 Marks, the Def. pleaded Not guilty: And they taxed the Damages and Costs of his Suit jointly to 22 Marks, which is the principal Case Word by Word, which is clear that the Verdict can't stand; for it doth not appear how much is for (*e*) Damages, and how much for Costs; and then it may be they have given greater Damages than the Pl. has declared for, so the Verdict is incertain; and therefore *Brian* saith well, That in such Case the Pl. can have Judgment but of 20 Marks: Then all that follows is but the Collection of the Reporter: So that according to his Opinion, and of others the Jury can't give Costs beyond the Sum of the Damages on which the Pl. has declared, which Collection is not warranted by the Opinion of *Brian*: For in as much as the Damages and Costs were jointly assessed, the Plaintiff could not have Judgment but of 20 Marks for the Incertainty, altho' Costs might be given beyond the Damages in the Declaration. And therefore (*f*) Abridgments are of good and necessary Use to serve as Tables to find the Cases in the Books at large, or Records, and not to ground any Opinion upon Abridgments: For Example; the Case in (*g*) 45 *E.* 3. 19, 20. where the Case was, That Lands were given to *J. de C.* with one *Joan* the Sister of the Donor, *Habendum eis & hæredibus suis imperpetuum*; and *Fitz.* in abridging the Case, Title *Tail* 14. saith, That the Gift was adjudged Fee-simple, and not Frank-marriage; and *Statham*, in abridging the Case Title *Tail*, saith, it was adjudged an Estate in Frank-marriage,

(c) 1 Rol. 578.

(d) 1 Rol. 578

(e) 1 Rol. 578. Cr. El. 568.

(f) Antea 41. a. 5 Co. 25. a. Præf. 4. Rep.

(g) 9 Co. 14. a. Perk. Sect. 168.

marriage, and *Brook* Title *Frank-marriage* 1. saith, *Quære, quia non adjudicatur; ideo satius est petere fontes quam sectari rivulos. Nota* Reader, the principal Case was adjudged by the Court of King's Bench, and afterwards that Judgment was affirmed by all the Justices of the Common Pleas and Barons of the Exchequer, and the Record was sent back into the King's Bench according to the Statute.

2 Show. 56, 57.

See Skinner 595, 596.

CHEYNEY's *Case*.

Mich. 10 Jac. I.

THis Term Serjeant *Nichols* moved this Case: *Cheyney* brought a Writ *de valore maritagii*, and Issue was taken upon the Tenure; and before the Justices of *Nisi prius* in the County of *York* it was found for the Plaintiff, and the Jury did assess 40 *s.* Damages, and 10 *s.* Costs, and did not * enquire of the Value of the Marriage, as they ought to have done; and he moved, that the Plaintiff might have a Writ to enquire of the Value to supply the Defect of the Verdict; and he cited two Precedents, one *Pasch.* 3 *Jac. Rot.* 745. in *Ravishm. of Ward* brought by the Lord *Barkly* against *Hill*; the Defendant pleaded Not guilty, the Jury found him Guilty, and that the Heir was within Age, and married, *&c. & assident damna & mis.* and found not the Value of the Marriage, and a Writ issued to enquire of the Value of the Marriage: And the like Writ awarded *Trin.* 38 *Eliz. Rot.* 1703. And in 4 *Mar. Dyer (a)* 135. in a *Quare Impedit* brought by *Poyner*, the Issue was found for the Plaintiff, but by his Negligence the Jury was not charged to enquire of the four Points, *sc. De plenitudine, ex cujus Præsentatione, si tempus semestre transierit*, and the Value of the Church *per annum*; there the Plaintiff may have a Writ to enquire of these Points. *Vide* 8 *El. Dyer (b)* 241. 9 *El. Dy.* 260. And the Case was oftentimes debated, and at last it was resolved, that the Verd. was insufficient: For the Ch. Just. said,

*Carthew 362.

(a) 2 Rol. 722. Dyer 135. pl. 12. 2 Keb. 409.

(b) Dyer 241. pl. 48. Hob. 152, 154. 2 Rol. 387. 11 Co. 56. a. 2 Rol. 722.

said, That in a Writ *de valore Maritagii*, three (*a*) Things are to be recovered, *s.* The Value of the Marriage, Damages, and Costs, *quod fuit concessum per tot' Cur'.* 2. It was resolved, That altho' the Issue be in this Case *de valore Maritagii* upon the Tenure, yet, as upon a Consequent or Dependent upon the Issue, the Jury are, as Parcel of their Charge, if they find for the Plaintiff, to enquire of the Value of the Marriage, of Damages, and Costs; and if the Jury assess excessive Value, or excessive Damages, Attaint lies thereof. And therefore in Assise, if the Issue be joined upon a Release, and a mediate Ouster confessed, there if the Issue be found for the Plaintiff, yet as Parcel of their Charge, the Recognitors of the Assise shall enquire of the Seisin and Disseisin, for that is the Point of the Writ, and thereupon Attaint lies: And therewith agree 11 *H.* 4. 27. 34 *H.* 6. 32. *b.* 16 *Ass. p.* 1. 16 *E.* 3. *Attaint* 41. *Vide* 32 *E.* 3. *Cessavit* 25. 33 *H.* 6. 25. And in (*b*) Trespass against two, one comes and pleads Not guilty, and is found guilty, in this Case this first Enquest shall assess Damages for the whole Trespass by (*c*) both Defendants; and afterwards the other comes and pleads Not guilty, and is found guilty, the Finding of the Damages by the first Enquest to which he was not Party, shall bind him; and therefore if they are outragious or excessive, the Defendant in the last Enquest shall have an *Attaint:* And therewith agree 44 *E.* 3. (4) 7. and *F. N. B.* 107. *E.* So in Trespass *Quare clausum fregit*, if Issue is joined upon a Feoffment, and the Jury give outragious Damages an (*d*) *Attaint* lies, for the Enquiry of the Damages is subsequent upon the Issue, and Parcel of their Charge. So in the Case at Bar, if the Jury had found outragious Value or Damages, an *Attaint* lay thereon. 3. It was resolved, That the Omission in the Verdict should not be (*e*) supplied by a Writ of *Enquiry of Damages*, for that would prevent the Pl. of his Remedy by *Attaint*, which would be mischievous, for then such Omission might be on Purpose to deprive the Pl. of his *Attaint*. But the Rule is, That when the Court (*f*) *ex officio* ought to enquire of any Thing upon which no *Attaint* lies, there the Omission of it may be supplied by a Writ of *Enquiry of Damages*, (as in the said Case of *Quare Imp'*, to enquire of the said four Points, for of them no *Attaint* lies, as it is held in (*g*) 11 *H.* 4. 80. because as to them the Enquest is but of Office) but in all Cases when any Point is omitted whereof *Attaint* lies, there it shall not be supplied by a Writ of *Enquiry of Damages*, upon which no *Attaint* lies: And therefore the Precedents which have been cited, and all others which are against these Rules, passed

(*a*) 9 Co. 72. a.

2 Rol. 722.

(*b*) 11 Co. 7. a.

(*c*) 11 Co. 5. b.

(*d*) 11 Co. 6. a. Cr. Car. 54. 2 Sid. 93. Br. Attaint 17. 1 Rol. Rep. 30. Cr. Jac. 348, 349.

(*e*) Cr. Car. 143. 2 Rol. 722.

(*f*) 19 H. 6. 8 a. 39 H. 6. 1. a. 1 Rol. 280. 2 Rol. 722. 1 Rol. Rep. 30. Br. Attaint 44.

(*g*) 1 Rol. 280.

sub silentio, without the Advice of the Court, and against the Rule of Law: And therefore in *Detinue*, if the Jury find Damages and Costs, and no Value, as they ought, it shall not be supplied by a Writ of *Enquiry of Damages* for the Reason aforesaid: And therefore by the Rule of the Court a new *Venire facias* was awarded.

2 Rol. 722.

2 Rol. 722.

The

The Case of the Mayor and Burgesses of Linne Regis, *concerning Misnosmer of Corporations.*

Trin. 10 Jac. 1. Rot. 2413.

Norf. ss. JOHN *Payn*, late of *Catton* in the County aforesaid Gent. Executor of the Testament of *John Payn*, late called *John Payn* of *Linne Regis* in the County of *Norfolk* Esq; was summoned to Answer to the Mayor and Burgesses of *Linne Regis* in the County of *Norfolk*, of a Plea, that he render to them 3000 *l.* which he unjustly detaineth from them, *&c.* And whereupon the said Mayor and Burgesses, by *Henry Bastard* their Attorney say, That whereas the aforesaid *John Payn* the Testator in his Life, the 27th Day of *Jan.* in the 6th Year of the Reign of the Lord the now King, *&c.* at *Gaywood* (in the County aforesaid) by his Writing Obligatory, had granted himself to be bounden to the said Mayor and Burgesses in the aforesaid 3000 *l.* to be paid to the said Mayor and Burgesses when thereof he was required; yet the said *John Payn* the Testator in his Life-time, and the aforesaid *John Payn* the Executor, after the Death of him the Testator *John Payn*, altho' often required, the aforesaid 3000 *l.* to the said Mayor and Burgesses rendred not, but the same denied to them to render, and the aforesaid *John Payn* the Executor doth yet deny the same to render to them, and unjustly detaineth the same; whereupon they say, that they

Brownlow.

are the worse, and have Damage to the Value of 100 *l.* and thereof bring Suit, &c. and bring here into Court the Writing aforesaid, which the Debt aforesaid, in Form aforesaid, testifieth, whose Date is the same Day and Year aforesaid, &c. And the aforesaid *John Payn* Executor, by *Tho. Blofield* his Attorney, comes and defends the Force and Injury when, &c. and saith, that he of the Debt aforesaid, by Virtue of the Writing aforesaid, ought not to be charged, because he saith, that it is not the Deed of the said *John Payn* the Testator, and upon this puts himself upon the Country; and the aforesaid Mayor and Burgesses likewise; therefore it is commanded to the Sheriff, that he cause to come here, from the Day of *Holy Trinity* in three Weeks, twelve, &c. by whom, &c. who neither, &c. to recognize, &c. because as well, &c. At which Day the Jurors between the Parties aforesaid, of the Plea aforesaid, were put between them in respite here until this Day, that is to say, in eight Days of St. *Michael* then next following, unless the Justices of the Lord the King to Assises in the County aforesaid to be taken assigned, by the Form of the Statute, &c. upon *Monday* the 27th Day of *July* next following, at the Castle at *Norwich* in the County aforesaid first shall come; and now at this Day come as well the aforesaid Mayor and Burgesses, as the aforesaid *John Payn* the Executor, by their Attornies aforesaid; and the aforesaid Justices to Assises, before whom, &c. send here their Record in these Words. Afterwards the Day and Place within contained, before *Edward Coke* Kt. Chief Justice of the Lord the King of the Bench, and *John Croke* Kt. one of the Justices of the said Lord the King to Pleas, before the King himself to be holden, assigned Justices of the said Lord the King to Assises, in the County aforesaid to be taken, assigned by the Form of the Statute, &c. come as well the within named Mayor and Burgesses, as the within written *John Payn* the Executor, by their Attornies within written; and the Jurors of the Jury, wherefore within is made mention, being likewise called come, who to say the Truth of the within contained being chosen, tried and sworn, say upon their Oath, That long before the making of the writing Obligatory within written, the Lord *Henry*, late K. of *Engl.* the 8th, the 7th Day of *July* in the 29th Year of his Reign, by his Letters Patent, sealed under his Great Seal of *England*, bearing Date at *Westminster* the same Day and Year, and to the Jurors aforesaid in Evidence shewed, reciting by the said Letters Patent, That whereas the said late King by his Letters Patent, whose Date was the 27th Day of *June* in the 16th Year of his Reign, of his special Grace, and of his certain Knowledge and meer Motion late had granted, and by the said his Letters Patent confirmed, for him his Heirs and Successors, to the Mayor and Bugesses and Inhabitants of his

Borough

Borough of *Linne Bishop* in his County of *Norfolk*, that they for ever should be one Body Corporate, and one Comminalty, perpetually in Thing and Name, and that they should have perpetual Succession, and the Name of the Mayor and Burgesses of the Borough of aforesaid. *Bishops Linne* in the County of *Norfolk*, should have and bear, and by the same Name, should be Persons able and capable in Law to have and purchase Lands, Tenements, Goods and Chattels, and other Possessions whatsoever, and to plead and to be impleaded, answer and answered, defend and defended, and might and could defend, and be defended, before any Justices or Judges whatsoever, whether Spiritual Judges or Temporal, in whatsoever Courts, and in all and singular Actions, Causes, Matters, Plaints and Demands of whatsoever Kind they should be or Nature, in the same Manner as the other the Liege People of the said late King, Persons able and capable in Law to plead, and be impleaded to answer, and to be answered, defend, or might defend, or be defended; and that the said Mayor and Burgesses, and their Successors, should have, or might have, one common Seal for their Businesses, and others to be done within the Borough aforesaid. happening or arising, with divers other Liberties, Franchises, Grants, Articles and Immunities in the said his Letters Patent contained and specified, as in the said his Letters Patent more fully and manifestly appeared: And whereas afterwards by a certain Statute late in a Parliam. of the said late K. at *Lond.* holden the third Day of *Novemb.* in the 21st Year of his Reign, and from thence adjourned to *Westm.* and there holden, and from that Time continued by divers Prorogations until the 4th Day of *Feb.* in the 27th Year of his Reign, and then and there holden, amongst other Things, it was enacted, That the said late K. *Hen.* the 8th, his Heirs and Successors, Kings of *Engl.* should have, hold and enjoy, to him for ever, the Lordships or Manors of *Bishops Linne* and *Gaywood*, amongst other, with all and singular their Appurtenances, as also all Liberties, Franchises, Goods and Chattels, Waifs and Strays, Views of Frank-pledge, Courts, Profits of Courts, and all and singular other Temporal Possessions and Hereditaments, with the Appurtenances in *Bishops Linne* and *Gaywood* aforesaid. which late before then belonged to the late Bishop of *Norwich*, and which the said Bishop then lately had in Right of his said late Bishoprick, as in the said Act of Parliament more fully appeared; the said late K. *Hen.* the 8th, for that by the said Act the same Manors and Possessions to him and his Heirs Kings of *Engl.* were enacted, and were willed and ordained, and by the same his Letters Patent declared for him and his Heirs, That the said Town of *Bishops Linne*, from thenceforth for ever, should be named and commonly called and known by the Name of *Kings Linne*, and not by any other Name; and that the same from the Name of *Bishops Linne* from hencef. should be destroyed and deprived. And further

the ſaid late K. *Hen.* the 8th, out of his ſpecial grace and meer motion, and for the love which he bore to the aforeſ. his beloved and faithful ſubjects, the mayor and burgeſſes of his borough of *Linne* aforeſ. in his county of *Norfolk* aforeſ. and which to the ſaid borough and the inhabit. of the ſame he had and bore; and deſiring moreover peace, quiet and tranquillity in the ſaid borough, continually to be had, and from time to time to be increaſed, from whence all proſperity, utilities, and their accommodations undoubtedly take beginning; had condeſcended, and by the ſame his letters patent had granted for him, his heirs and ſucceſſors, to the aforeſaid mayor and burgeſſes and inhabitants of his borough aforeſ. that they for ever after, the name of mayor and burgeſſes of his borough of *Linne Regis*, commonly called *Kings Linne*, in his county of *Norfolk*, ſhould have, bear and enjoy, and by the ſame name ſhould be called and named, and not by any other name; and that by the ſame name they ſhould be perſons able and capable in law to have and purchaſe lands and tenements, goods and chattels, and other poſſeſſions whatſoever, and to plead and be impleaded, anſwer and to be anſwered, defend and might be defended, before whatſoever juſtices or judges temporal or ſpiritual in what court ſoever, and in all and ſingular actions, cauſes, matters, plaints and demands, of what kind ſoever they ſhould be, or nature, in the ſame manner as the other liege people of the ſaid late King were able and capable in law to plead and be impleaded, anſwer and be anſwered, defend or might be defended, as by the ſaid letters patent, to the jurors aforeſ. in evidence ſhewed, amongſt other things, more fully appeareth. And farther the jurors ſay upon their oath aforeſ. that after the making of the ſaid letters patent aforeſ. that is to ſay, the aforeſ. 27th Day of *Jan.* in the 6th year of the reign of the Lord the now King of *Engl.* &c. within written, the aforeſ. *John Payn* the teſtator in his life, the writing obligatory, in the declaration above ſpecified, made, ſealed, and as his deed delivered to the aforeſ. mayor and burgeſſes of the borough of the Lord the King of *Linne Regis*, commonly called *Kings Linne*, in his county of *Norf.* in the aforeſ. letters patent named, by the name of the mayor and burgeſſes of *Kings Linne* in the county of *Norf.* but whether upon the whole matter aforeſ. by them the ſaid jurors in form aforeſ. found, the writing obligatory aforeſ. in the declaration within written ſpecified, be the deed of the ſaid *J. Payn*, or not, the ſame jurors are altogether ignorant, and pray thereof the advice of the juſtices and court here, *&c.* And if upon the whole matter aforeſ. by them the ſaid jurors in form aforeſ. found, it ſhall ſeem to the juſtices here, that the writing aforeſ. in the declaration within written ſpecified, be the deed of the aforeſ. *John Payn* the teſtator, then the ſaid jurors ſay upon their oath aforeſ. that the writing aforeſ. is the deed of the ſaid *John Payn* the teſtator, and then they aſſeſs the damages of the ſaid mayor and burgeſſes,

by Occasion of detaining of the Debt within written, above their Costs and Charges, by them in their Suit in this Behalf expended, to 12 *d.* and for their Costs and Charges to 12 *d.* And if upon the whole Matter aforesaid, by them the Jurors in Form aforesaid found, it shall seem to the Justices here, That the Writing aforesaid, be not the Deed of the aforesaid *John Paine* the Testator, Then the said Jurors say, upon their Oath aforesaid, That the Writting aforesaid is not the Deed of the aforesaid *John Paine* the Testator, as the aforesaid *John Paine* the Executor above in pleading hath alledged; and because the Justices here will advise themselves of and upon the Premisses, before that they give their Judgment thereof, day is given to the Parties aforesaid, until, *&c.* To hear their Judgment thereof, because the said Justices here thereof not yet, *&c.*

The

The Case of the Mayor and Burgesses of Linne Regis, *concerning Misnosmer of Corporations.*

Mich. 10 Jac. 1. *which is entered* Trin. 10 Jac. 1. *Rot.* 2413. *In C. B.*

THE Mayor and Burgesses of *Linne Regis* in the County of *Norfolk* brought an Action of Debt against *John Pain*, Gent. Executor of *John Pain*, Esq; on a Bond made by the Testator to the Plaintiffs, 27 *Jan. anno* 6 *Jac. Reg.* in 3000 *l.* The Defendant pleaded not the Testator's Deed, *&c.* and the Jury gave a special Verdict: *viz.* King *H.* 8. 7 *Junii anno regni sui* 29. by his Letters Patent under the Great Seal, reciting, That the said King by his Letters Patent 27 *Junii anno regni sui* 16. had granted to the Mayor and Burgesses and Inhabitants *burgi sui de Linne Episcopi in comitatu suo Norfolc' quod ipsi imperpetuum essent unum corpus corporatum, & una communitas perpetua in re & nomine & quod habeant successionem perpetuam, ac nomen Majoris & Burgensium burgi prædicti Linne Episcopi in comitatu Norfolc' haberent & gererent, & per idem nomen essent personæ habiles & capaces in lege, &c.* And by the same Letters Patent, reciting that

that whereas by Act of Parliament, 4 *Feb. ann.* 27 *H.* 8. it was enacted, That the said King, his Heirs and Successors Kings of *England*, should have the Manors of *Linne Episcopi*, and *Gaiwood*, *inter alia*, the said K. by the said Let. Patent declared, *Quod eadem villa de Linne Episcopi de cætero vocaretur & nominaretur Linne Regis, vulgariter nuncupat'* King's Linne, *& non per aliud nomen:* And granted to the said Mayor, Burgesses and Inhabitants *burgi sui præd' quod ipsi imperpetuum nomen Majoris & Burgensium burgi sui de Linne Regis' vulgariter nuncupat'* King's Linne *in comitatu suo Norf. haberent & gererent, & per idem nomen vocarentur & nominarentur & non per aliud nomen, & qd. per idem nomen essent personæ habiles, &c.* And the Jury further found, That 27 *Jan. an. Reg. Regis Jacobi* 6. *præd' Joh'es Pain Testator in vita sua prædictum script' obligatorium fecit, sigillavit, & ut fact' suum deliberavit præfat' Majori & Burgensibus burgi domini regis de Lynne Regis, vulgariter nuncupat'* K.'s Linne *in Com' suo Norf. per nomen Majoris & Burgensium de Linne Regis in com' Norf. sed utrum super tota materia, &c. præd' scriptum obligatorium in narratione specificat' sit factum præd' Johannis Pain Testatoris necne, iidem Juratores ignorant & inde petunt advisamentum Justiciariorum & Cur', &c.* And this Case was oftentimes argued at the Bar. And it was objected on the Defendant's Part, That the said Bond (*a*) varied from the true and right Name of the Corporation, and by Consequence was not the Testator's Deed; and the material Variances were, because they were incorporated by the Name of *Majoris & Burgensium burgi domini Regis de Linne Regis, &c.* and the Bond was made to them *per nomen Majoris & Burgensium de Linne Regis*, omitting after this Word *Burgensium*, these two Words, (*b*) *Burgi Regis*, which are Parcel of the Name of the Incorporation. And it was observed by them, first, that the Name of the Corporation is like to the proper (*c*) Name, or the Name of Baptism. 2. After the King has given them their Name, then it is added, *Et quod per idem nomen vocarentur, &c.* 3. Negative Words are added to the said affirmative Words, *Et non per aliud nomen:* But the Bond varies from the proper Name of the Incorporation, and is not made *per idem nomen*, but *per aliud nomen*, directly against the Letter and Intention of the King's Charter. And it was strongly urged, That the (*d*) Place of the Incorporation is of the Essence of an Incorporation; for without a Place, no Corporation can be founded,

(*a*) 11 Co. 20. a.

(*b*) 1 Brownl. 57. ante 28. b.

(*c*) 10 Co. 28. b. 1 Rol. 512. 38 E. 3. 15. a. 21 E. 4. 56. a. b. 1 And. 196.

(*d*) 10 Co. 29. b. 1 Rol. 512. Plowd. 150. a.

founded, and the Place is the principal Part by which the Incorporation can be known and distinguished from others: and therefore may be fitly resembled to a Man's Face which is the principal Part by which he is known and discerned: And for that a Case was cited *Mich.* 29 & 30 *El.* in the Exch. *in Ejectione firmæ*, in which (*a*) *Mariet* was Pl. and *Paschal* and others Defendants, of a Demise made by *Tho'* *Fanshawe*, Esq; the Queen's Remembrancer of her Court of Exchequer, of certain Lands in *Denge* in the County of *Essex*, &c. and upon Not guilty pleaded, the Jury gave a special Verdict to this Effect, The Master and Chaplains of the *Savoy* were incorporated *per nomen Magistri & Capellanorum Hospitalis Henrici nuper Regis Angl' septimi de Savoy* by Force of certain Let. Patent made *anno* 4 *H.* 8. And the Master and Chaplains of the said Hospital being seised in Fee of the Manor of *Denge* in the County of *Essex*, whereof the Lands in which were Parcel, *anno* 26 *E.* 6. by Deed indented demised the said Manor to *John Paschall* for 99 Years, *per nomen Magistri Hospitalis Henrici Regis Angl' septimi, vocat'* the *Savoy*, & *Capellanorrm ejusd' Hospitalis*; and if this Lease was made according to their true Name of Incorporation, was the Question: And it was adjudged in the Exchequer that the Lease was void, because they had mistaken their Name of Incorporation in the most material Part of it, *sc.* in the Place, for the true Name is, *Hospitalis*, &c. *de* (*b*) *Savoy*, and in the Demise, it is *Hospitalis*, &c. *vocat'* the *Savoy*; and the material Variance, in Respect that *de* signifies the Place it self, and *vocat'* signifies a Name, which may be applied to another Place; as *Prior & confratres Hospitalis Sancti Johannis de* (*c*) *Jerusalem in Anglia*, and many other Cases, as of Mount *Carmel*, *Bethlehem*, and others, which in Truth are in the Land of *Canaan*, and yet are applied to certain Places in *England*: All which you may see cited before in the *Case of the Hospital of the Charter-house*; and therefore I have omitted them here. And it was said, that upon the said Judgment, a Writ of Error was brought in the Exchequer-Chamber, where the Case was often argued again at the Bar, and yet the said Judgment was never (*d*) reversed. So in the Case at Bar, forasmuch as this Word *Burgi* is omitted, which is the Place of the Incorporation, it is such a material Variance, that the Bond is void: And altho' it is said, *de Linne Regis*; yet that well proves that it is a Town; but it doth not thereby appear that it is a Borough, for every Borough is a Town, but every Town is not a Borough. And therefore *Litt. lib.* 2. *cap.* 10. *of Burgage* saith, It it is to be known, (*f*) That the

(*a*) Mich. 29. & 30 El. in the Exchequer, the Case of the Hospital of the Savoy. 1 And. 202. Hob. 125. 1 Leon. 159. Moor 228, 865. Antea 32. b.

(*b*) Moor 865. Hob. 125.

(*c*) Antea 32.a.b.

(*d*) Hob. 125.

(*e*) Co Lit. 109. a. 110.

(*f*) Co. Lit. 109. a. b. Lit. Sect. 164.

the ancient Towns called Boroughs are the most ancient (*a*) Towns that are in *England*: For those Towns which are now Cities or Counties, in ancient Times were Boroughs, and called Boroughs, and from such ancient Towns called Boroughs came the Burgesses to Parliament, when the K. had summoned his Parliament. Also for the greater Part such Boroughs have divers Customs and Usages which other Towns have not, &c. By which there appears a manifest Difference in Judgment of Law betwixt a Borough and a Town; and the Opinion of *Cavendish* Chief Justice in 40 *Ass. p.* 27. was cited, where he holds that all the ancient Boroughs are of Record in the Exchequer. And with *Littleton* agree 41 (43) *E.* 3.32. *a.* 21 *E.*4.53. *b.* & 54. *a.* 21 *H.* 5. 15. *b.* by *Frowick*, &c. Another Variance was observed, That this Word (*Regis*) was omitted, for the true Name of the Corporat. is *burgi sui de Linne*, i. *Burgi Regis de Linne*; and in the Bond not only *Burgi* is omitted, but *Regis* also; which (as it was urged) was also a material Variance, for *Regis* ought to be twice added, *sc. Burgi Regis de Linne Regis*; and for that the Case of (*b*) *Eaton* College, *Trin.* 3 & 4 *P.* & *M. Dyer* 150. was cited, where it appears that K. *H.* 6. incorporated the said College *per nomen præpositi & Collegii regalis Collegii beatæ Mariæ de Eaton juxta Windsore*, and in the Time of *E.* 6. Sir *Thomas Smith*, Knt. being Provost there, a Lease was made *per nomen præpositi & sociorum Collegii regalis de Eaton juxta Windsore*, omitting *Collegium* in the first Place, and yet in the second Place *Collegii Regalis* was added, & *per Opinionem omnium Justic'* it was a void Lease; & *sic adjudicat' fuit Mich.* 10 & 11 *El. Reginæ*: So in the Case at Bar, the Omission of this Word *Regis* in the first Place, altho' it is observed in the second, makes a material Variance. Many other Cases were put upon the general Ground of Misnomer of Corporations, which I have on purpose omitted, because these Cases which are here mentioned, were the most material, and all the other shall be generally cited with Reference to the Books at large in the End of this Case. But the Court held the said Bond good, and that the Plaintiffs ought to have Judgment to recover. In which Case two Points were (*c*) resolved. ¶ 1. As to these Words, *per idem nomen, & non per aliud*: That this Word *Idem* has two Significations, *sc. idem syllabis seu verbis*, and *Idem re & sensu*, and the Name of a Corporation in Grants or Conveyances need not be *idem syllabis seu verbis*, but it is sufficient if it be *idem re & sensu*: And according to these Significations divers Cases have been resolved and adjudged, *Mich.*

(*a*) Lit. Sect. 164. Co. Lit. 109. a. b.

(*b*) Moor 13. 1 Anderf. 23. Dy 150. pl. 84. 1 Leon. 159. Jenk. Cent. 214. c. 54.

(*c*) 1 Browni. 58.

(a) Mich. 10 El. Case of Dean and Chapter of Carlisle, Moor 233. 1 And. 203, 206, 208. 1 Leon. 159. Dy. 278. pl. 1. 2 Bulstr. 303. Jenk. Cent. 235.

(b) Mic. 29 & 30 El. in B. R. the Case of Dean and Canons of Windsor. Palm. 494. 1 Leon. 162. Moor 230. n. 227. 1 Rol. Rep. 229. Hob. 124.

(c) Moor 230. Hob. 124.

(d) 1 Leon. 160. 5 Co. 4. b. 2 Bulstr. 53, 86.

10 & 11 *El. Dy.* 278. The Dean and Chapter of (*a*) *Carlisle* were incorporated *an.* 33 *H.* 8. by the Name of *Decanus & Capitul' Eccl' Cathedralis Sanctæ & individuæ Trinitatis Carliensis*, and they made a Lease by this Name *Decanus Ecclesiæ Cathedralis Sanctæ Trinit' in Carlile, & tot' Capitulum de Ecclesia præd'*, which Lease is not made *per idem nomen quod est idem syllabis seu verbis:* For first this Word *Individuæ* is omitted. 2. *In Carlile*, where the true Name is *Carliensis, sc.* of *Carlile*. 3. This Word *Totum* is added. 4. The Order of the Words is not kept, for the true Name of the Corporation is *Decanus & Capitul' Eccl' Cathedral' Sanct' & individuæ Trinit' Carliensis*, and the Lease is, *Decanus Eccl' Cathedral' &c. & tot' capit' de Eccl' præd.*: But *hiis non obstant'*, It was resolved by *Dyer, Weston, Welsh, Southcot, Carus* and *Harpur*, that the Lease was good notwithstanding these Variances; and the Reason is there given, because these Variances are not in the Substance of the Name. In *Mich.* 29 & 30 *Reg' Eliz.* between *Hall* and *Wingat* in *Ejectione firmæ* in the King's Bench, the Case was, That the Dean and Canons (*b*) of *Windsor* were incorporated by Act of Parliament in 22 *E.* 4. by this Name: *The Dean and Canons of the King's free Chapel of St. George the Martyr within his Castle of Windsor*, and in the Time of the Reign of King *Philip* and Queen *Mary*, they made a Lease of certain Lands by this Name, *The Dean and Canons of the King and Queen's free Chapel of St. George within the Castle of Windsor:* And in that Case three Variances were observed; 1. Where the Name of the Corporation was by the Act of 22 *E.* 4. *The Dean and Canons of the K.'s free Chapel:* The Lease was made by Name of *Dean and Canons of the K. and Q.'s free Chapel, &c.* 2. Where the Incorporation was, of *St. George the Martyr*, the Lease was, *of St. George*, omitting *the Martyr*. The 3d was *within his Castle*, sc. *within the King's Castle of Windsor.* And it was adjudged that in that Case one of them was a Variance in Substance, *sc.* (*c*) *of the King and Queen's free Chapel*, for the true Name of the Corporation by the said Act of 22 *E.* 4. was *of the King's free Chapel:* And altho' at the Time of the Making of the said Lease, in Truth the Chapel was *the King and Queen's free Chapel*, yet the Corporation ought to be such as was given by the Founder, and that shall not be altered by the Alteration of the Name of the Founder, or of the Owner of the Castle; as if a College is incorporated in the Time of *E.* 6. by the Name of Master and Fellows of King's College, if they make a Lease in the Reign of Q. *El.* they can't make Lease by the Name of Master and Fellows of Q. College: But for the other two Variances the Court resolved, that they were Variances in Syllables and Words, and not in Substance, & (*d*) *parum differunt quæ re* con-

concordant, for St. *George* includes the Martyr, as the Trinity implies and includes this adjective *individuæ*; and within (*a*) *his Castle of Windsor*, and within *the Castle of Windsor*, is all one in Substance and Effect. In which Case the Chief Justice was of Counsel with *Wingat*; and in another also in which *Wingat* was Plaintiff, and Judgment was given for him in both. *Hill.* 30 *Eliz.* in the King's Bench betwixt *Hen.* (*b*) *Fisher* Pl. in *Ejectione firmæ*, and *Wm. Bois* Def. of certain Lands in *Ellam* in *Kent*; the Case was; By Act of Parliament *anno* 1 *Mariæ*, a College in *Oxford* was incorporated *per nomen Gardiani & Scholarium domus sive Collegii Scholarium de Merton in Universitate Oxoniæ*, and they made a Lease of the said Lands *per nomen custodis domus sive collegii de Merton in Oxonia & scholar' ejusdem domus*: And in that Case four Variances were observed. 1. For this Word, *Guardianus*, *Custos*. 2. Where the true Name of the College was *domus sive collegium scholarium de Merton*; the Lease was *per nomen domus sive collegii de Merton*, omitting (*c*) *Scholarium*. 3. For *in Universitate Oxoniæ*, the Lease was *in Oxonia*. 4. *Scholares* were misplaced; for they came in the End, whereas in the Act they are named immediately after the Guardian: And it was adjudged, that for the second Variance, it was a Variance in Substance; for the said Act had baptized the College by the (*d*) Name of the *College of Scholars of Merton*; and they made the Lease by the Name of the College of *Merton* himself, who in Truth was the Founder: But for *Guardianus*, he is *Custos*, and for the University of (*e*) *Oxford* and *Oxford*, they are all one in Effect and Substance, and therefore no material Variances; and for the Misplacing of the said Words, that is not material *dummodo proprius sensus remanet*. And the Chief Justice was of Counsel with the said College against the said Lease. So in the Case at Bar, the said Variances are only *in syllabis & verbis*, and not *in* (*f*) *sensu & re ipsa*; and therefore are not material: For *per idem nomen*, shall be intended *idem sensu & re*, and not *per aliud*, i. *aliud sensu & re*. And it is to be known, that in the Case at Bar, these Words *Burgenses de Linne Regis*, (*g*) imply that *Linne Regis* is *Burgus*, for *Burgus* and *Burgenses sunt conjugata*, and as *Littl.* saith *ubi supra*, from Boroughs came the Burgesses, &c. and *Linne Regis* imply also, that it is *Burgus suus*, i. *Regis*: and these Words *vulgariter nuncupat' King's Linne* are included in these Words *Linne Regis*; so that the Name in the Bond by Matter apparent therein imports a sufficient, certain Demonstration of the true Name of the

(*a*) Moor 71, 72.

(*b*) Hill 30 El. The Case of Merton Coll. in Oxford in B. R. 1 Leon. 162. 11 Co. 20. a. b. Hob. 125. Lane 15, 34. Moor 266. 1 Andersf. 196.

(*c*) 11 Co. 20. a. 1 Bulstr. 91. Hob. 125.

(*d*) Cr. El. 106.

(*e*) Cr. El. 338, 339. Moor 361. 1 Andersf. 196.

(*f*) Cr. El. 106.

(*g*) Hob. 125. 1 Rol. Rep. 113.

(a) 1 Ander f. 203, 204, 208, 220. Cr. Cl. 338. L. 5 E. 4. 20. b. 1 Leon. 163. Br. Varian. 75.

Incorporation. 5 *E.* 4. 20. *b.* The Abbot of (a) *York* was incorporated by this Name *Abbas Monasterii beatæ Mariæ Eborum*, and a Bond was made to the Abbot by this Name, *Abbati Monasterii beatæ Mariæ extra muros civitatis Eborum*; and altho' the Abby was *extra muros civitatis Ebor'*; yet because in Truth it was within *York*, the Bond was good, and therefore the Abbot there brought his Action of Debt by his true Name, and in his Declaration he said that the Bond was made to the Plaintiff *per nomen, &c.* which implies an Averment that the Abby was within *York*; and the Writ was awarded a good Writ by the Opinion of the whole Court; and yet there was more Variance *in syllabis & verbis*, than in the Case at Bar; but because in Truth and Substance, as appears by the Averment *dehors*, all was one in Effect, the Bond made to them was good, and yet the Name in the Bond doth not import of it self the true Name of the Corporation without Averment *dehors*: And therefore in Pleading, or in a special Verdict, in many Cases, if by express Averment, or by the finding of the Jury, it shall be made apparent to the Court, that the true Name of the Incorporation, and the Name in the Lease, Grant, *&c.* are all one in Effect, it will much inforce the Matter, altho' in Words there is some seeming Difference: And therefore it was well found in the special Verdict in the Case at Bar, That the said *John Payne* the Testator, *prædictum scriptum obligatorium fecit, sigillavit, & ut factum suum deliberavit præfatis Majori & Burgensibus burgi Domini Regis de Linne Regis vulgariter nuncupat' King's Linne in comitatu suo Norf.* (which is the Name of the Corporation without any manner of Variance) *per nomen Majoris & Burgensium de Linne Regis in comitatu Norf.* (b) which imports all Averments requisite by the Law in this Case. And it is well observed in Sir *Moile Finch's Case in the 6th Part of my Reports, f.* 65. *a.* that till this Generation of late Years it was never read in any of our Books, That any Body politick or corporate endeavoured or attempted by any Suit to avoid any of their Leases, Grants, Conveyances, or other of their own Deeds, nor any other Grants, *&c.* made to them for the Misnomer of their true Name of Incorporation. But after a Window was opened to give them light to avoid their own Grants for the Misnomer of themselves, what Suits and Troubles (to avoid Grants, *&c.* as well made to them as by them) have followed thereupon every one knows: But there it was said, That for every curious or nice Misnomer, God forbid, that their Leases or Grants, *&c.* should be defeated; for there

(b) Hob. 125.

See Rep. Q. A. 67.

will

will be a found *(a)* Difference betwixt Writs and Grants; and in all Cases it is true, *quod (b) apices Juris non sunt Jura*: For if a Writ abates, one might of common Right have a new Writ, but he can't of common Right have a new Bond, or a new Lease, Grant, *&c.* And I well approve of the Book in 25 *E.* 3. 48. *b.* Where the Case was, That a *(c) Præc' quod red'* was brought against the Prior of *Worcester*, and demanded a Manor, and the Writ was *Præcipe Priori Wigorniæ, &c.* The Tenant said, that in *Worcester* there were two Priories, *s.* the Priory of Fryers Preachers, and the Priory of our Lady; and the Writ was abated: So I conceive it would be reasonable *a multo fortiori* to drive him who would avoid a Writing, Demise, Grant, *&c.* made by a Corporation, or to it, by reason of any verbal or literal Misnomer, to shew that there are two Corporations in the same City, Borough or Town, *&c. s.* one by the true Name, and another by such Name as is contained in the Deed, *&c.* and so leave the Deed, *&c.* good by or to one of them. But when in Truth there is but one and the same Corporation, Leases, Grants, *&c.* made by them, or to them, ought not to be avoided by such nice and verbal Variances, when in Substance the true Name of the Corporation, either by Matter expressed or necessarily implied in the Words themselves, appears to the Court. And as to the said Case of the Hospital of the *Savoy*, It is true that Judgment was given in the Exchequer by Baron *Clarke* and Baron *Gent*, against the Opinion of Sir *Roger Manwood* Chief Baron *totis viribus*; and after the Writ of *Error* brought, and the Case argued at the Bar, the said *Thomas (d) Fanshaw* compounded with *Paschal* for his Lease, and I was of Counsel with the said *Tho. Fanshaw*: And I conceive that there is little Difference betwixt the Mayor and Commonalty of the City of *London*, and the Mayor and Commonalty of the City called *London*, unless it can be shewed that there are two distinct Corporations which have these two distinct Names. Also, there is a Difference betwixt ancient Corporations, and Corporations made of late Times; for ancient Corporations made by Usage have divers and several Names; and Leases, Grants, *&c.* by any of them will be good enough. And these, and divers other Differences you will find in your Books following. *Vide the Case of the Dean and Chapter of* Norwich, *in the third Part of my Reports* 73, *&c. Plow. Com. inter* Croft and *Howel, fol.* 537. 2 *Ma. Dy.* 97 & 98. 14 *H.* 8. 29. 26 *H.* 8. 1. 11 *H.* 7. 27. 12 *H.* 7. 14. 23 *H.* 7. 14.

(a) Pop. 133. a. 5 Co. 121. a. 6 Co. 65. a. b. 9 Co. 48. a. 11 Co 21. b.

(b) Co. Lit. 283 b. 304. b. 6 Co. 65. a. Nov 30.

(c) Fitz. Brief 243.

(d) Moor 235, 28. Antea 32. b. 122. b. Hob. 125. 1 Leon 159. 1 Anders. 202.

14 *H.* 7. 1. 16 *H.* 7. 1. 2 *R.* 3. 7. 1 *E.* 4. 7. 4 *E.* 4. 8. 8 *E.* 4. 18. 9 *E.* 4. 19. 11 *E.* 4. 2. 15 *E.* 4. 1. 20 *E.* 4. 12. 21 *E.* 4. 10. 21 *E.* 4. 55, 56. 3 *H.* 6. 28. 7 *H.* 6. 13. 19 *H.* 6. 64. 20 or 26 *H.* 6. 27. 21 *H.* 6. 4. 26 *H.* 6. *Brief* 101. (161.) 35 *H.* 6. 5. 36 *H.* 6. *Brief* 485. 12 *H.* 4. 19. 29 (49) *Ass.* 9. 44 *E.* 3. 16. 35. 38 *E.* 3. 15, 28, 33. 22 *E.* 3. 9. 8 *E.* 3. 5. *b.* & 436. 8 *Ass.* 24. *Register* 178.

WIL-

WILLIAM CLUN's *Case.* 2 Salk. 578.

Mich. 11 Jac. 1. *which is entred* Termino Sanctæ Trin. an. 10 Jac. 1. Rot. 664. in B. R.

Cr. Jac. 300. 4 Leon. 247, 248.

WIlliam Clun Executor of *Anne Breather* was Plaintiff against *Henry Archer* Defendant, and demanded 9 *l.* Debt, and declared that the said *Anne Breather* 26 *Nov. ann.* 3 *Jacobi Regis* by Indenture of the same Date demised to the said *Henry* one Messuage, two Mills, one Garden, and divers Lands in *Cooperſale* in *Eſſex* from the Feast of St. *Michael* the *Archangel* then last past for fifty Years, if the said *Anne* should so long live, *Reddendo & ſolvendo pro omnibus prædict' præmiſſis præſat' Annæ Breather executor' & aſſignatis ſuis annuatim & quolibet anno durante continuatione dimiſſionis prædict' ad domum manſionalem Johannis Archer in Witham præd' plenariam ſummam trigint' & ſex librarum bonæ & legalis monetæ Angl' ad quatuor feſta ſive terminos in anno uſualia, viz. feſta nativitatis Dom' Jeſu Chriſt', Annunciationis beatæ Mariæ virginis, nativitat' ſancti Joh' Bapt' & ſancti Mich' Archangeli, vel infra treſdecem ſeptimanas proxim' poſt quemlibet præd' dierum feſtival' per æquas & æquales portion'*; by Force of which the said *Henry Archer* entred into the said Tenements, and had and held them *uſque ad & poſt feſt' Annunciationis beatæ Mariæ virginis, anno regni regis nunc* 9. *ſc. uſque* 2. *diem Aprilis anno* 9 *ſupradicto, quo quidem* 2 *die Aprilis prædict' Anna apud Cooperſale prædict' obiit*, and for 9 *l.* for the Quarter due at the Feast of the Annunciation *Anno* 9 *ſupradicto*, he

brought this Action, upon which Declaration the Defendant demur'd in Law; and this Case was often argued at Bar, and now this Term it was argued by the Justices *Houghton*, *Dodderidge*, *Croke*, and the Chief Justice: And it was resolved, that the Action of Debt was not (*a*) maintainable: And because *duo sunt instrumenta ad omnes res confirmandas & impugnand', ratio & authoritas*: First I will report the Reasons of this Resolution, and then divers Authorities in the Point. And three Reasons of this Resolution were shewn. 1. Because the (*b*) disjunctive is added for the Benefit of the Lessee; and it is more for his Benefit to have the last Day, in which Case there are two Days of Payment, one voluntary, and that at the Election and Liberty of the Lessee to pay it at the Days of the said Feasts; the other Day of Payment is at the End of the thirteen Weeks after, and that is the (*c*) extreme and legal Time, and therefore forasmuch as the said *Anne Breather* died before the extreme and legal Time, the Lessee is (*d*) discharged of the Rent by the Act of God for the same Quarter. *Vide Hill* and *Grange*'s Case, *Plo. Com.* 172, 173. the most extreme Time is the legal Time. And it is to be known, that in case of Payment of Rent issuing out of Land, there are four Times of Payment, the first Time of Payment voluntary and not satisfactory, and yet good to some special Purpose. The 2. voluntary, and in case satisfactory, and in case not. The 3. legal and satisfactory absolutely, and not coercive. The 4. legal, satisfactory and coercive.

(*a*) 4 Leon. 247. Cr. Jac. 310.

(*b*) Cr. Jac. 310. 5 Co. 22. a. 1 Rol. 450. Cr. El. 380 Cr. Jac. 500.

(*c*) Cr. Jac. 423, 500. 5 Co. 114. b. Co. Lit. 202. a

(*d*) Cr. El. 380. Cr. Jac. 228 Postea 128. a.

As to the First, if the Lessee, Donee or Tenant pay his Rent before the Day, it is voluntary, (*e*) and not satisfactory, for the Cause rendred in the third Reason: But if it be paid in the Name of Seisin of the Rent, altho' it shall not (*f*) enure by way of Satisfaction, yet it shall give a sufficient Seisin to this purpose to have his Assise, or other Remedy; for the Law takes delight in giving Remedy; and therewith agrees *Lit. cap. Attornment* 127. *b. Vide* (25) 45 *E.* 3. 44. *b.* 49 *E.* 3. 15. 15 *E.* 3. *Execution* 63. 37 *H.* 6. 33. 39 *H.* 6. 36. 5 *E.* 4. 2. As to 2. if the Rent is payable at the Feast of *Easter*, if the Tenant pays the Rent in the Morning, and the Lessor dies at two Hours before Noon of the same Day: This Payment was voluntary, and yet it is a good Satisfaction against the Heir; but not against the (*g*) King, 44 *E.* 3. 3. *b.* As to 3. legal Time is a convenient Time before (*h*) the last Instant of the Day, which is the most extreme Time, and is satisfactory and not coercive; for till the End of the Day no Remedy is given by the Law, 21 *H.* 6. 40. *a.* As to 4. that is when the Rent is due and in arrear, and therefore it is well said by the Poet, (*i*) *Judicis officium est ut res, ita tempora rerum Quærere, quæsito tempore tutus eris.*

(*e*) Cr. El. 15. 1 Rol. Rep. 390.

(*f*) 4 Co. 10. a Co. Lit. 315. a.

(*g*) Brownl. 106 Hard. 24. Yelv. 167, 168

(*h*) Co. Lit. 202. a. Cr. Jac. 423, 500. 5 Co. 114. b

(*i*) 10 Co. 82. a. Co. Lit. 171. a. 3 Bulstr. 170.

The

The second Reason was, when the Lessee doth not make (*a*) Payment at the first Day according to his Election, then the Rent is absolutely due at the second Day, and the second Day is as well Parcel of the Reservation as the first Day, and therefore after the Non-payment at the first, it is now upon the Matter as much in Law, as if it had been reserved (*b*) at the second Day only, for then the whole Election is past, as in 17 *El.* 344. If (*c*) a Man by Deed grants a Rent-charge to one and his Heirs, and doth not say, for him and his Heirs, and dies, now the Time of Election to make it an Annuity is past: And therefore if the Grantee brings a Writ of Annuity against the Heir, it shall not discharge the Land, because when no Election remains, it is as much in Law, as if there never had been any Election: And therefore upon the Books in 43 *E.* 3. *Bar.* 194. 44 *E.* 3. 32. 15 *E.* 3. *Execut.* 63. 5 *E.* 2. 2. This Case was put, if one 1 *Octob.* makes a Lease for Years, or for Life, or a Gift in Tail, yielding by the Year a Pair of Gilt Spurs at the Feast of *Easter*, or twenty Shillings at the Feast of St. *Michael* the Archangel: In this Case if the Lessee doth not pay the Spurs at the Feast of *Easter*, nothing is due till the Feast of St. *Mich.*

(a) Rol. Rep. 390.

(b) 4 Leon. 19. 1 And. 9, 10.

(c) Dy 344. pl. 2. Poph. 87. Co. Lit. 144. b. 1 Rol. 226. Hob. 58. Plowd. 457 a. Br. Estate 65. Br Annuity 13. Fitz. Annu. 16. 2 H. 4. 13. a.

The third Reason was, because the Rent reserved is to be raised out of the Profits of the Land, and is not due until the Profits are taken by the Lessee: For these Words (*d*) *Reddendo inde*, or *Reservando inde*, is as much as to say, That the Lessee shall pay so much of the Issues and Profits at such Days to the Lessor, for (*e*) *reddere inde nihil aliud est quam acceptum restituere, seu reddere est quasi retro dare*, and *Redditus dicitur a reddendo, quia retro it, &c.* to the Lessor, Donor, *&c. sicut provent' a proveniendo*; and *obventus ab obveniendo.* And that is the Reason that the Rent so reserved is not due or payable before the Day of Payment incurred, because it is to be render'd and restor'd out of the Issues and Profits, and that is the Reason, That if the Land is (*f*) evicted, or if the Lease determines before the legal Time of Payment, no Rent shall be paid, for there shall never be an Apportionment in respect of Part of the Time, as there shall be upon an Eviction of Part of the Land: And therefore if Ten't for Life makes a Lease for Years rendring Rent at the Feast of *Easter*, and the Lessee occupies for three Quarters of the Year, and in the last Quarter before the Feast of *Easter*, the Ten't for Life (*g*) dies, here shall be no Apportionm. of the Rent for three Quarters of the Year, because no Rent was due till the Feast of *Easter*, and no Apportionment shall be in respect of Time; but in the same Case, if Part of the Land had been (*h*) evicted before the Feast of *Easter*, and the Feast of *Easter* incurred in the Life of the Lessor, there shall be an Apportionment of the Rent, but not in respect of the Time which well continued, but in respect that Parcel of the Land leased is evicted.

(d) Co. Lit. 141. b.

(e) Palm. 481.

(f) Co Lit. 292. b. Cr. Jac. 310, 311. 3 Co. 22. a. Dyer 56. pl. 15. Plowd. 134. b.

(g) Cr Jac. 228. Cr. El. 380.

(h) Co. Lit. 148. b.

And this Difference appears in our Books 27 *E.* 3. 84. *b.* In (*a*) Debt against Executors, declaring, That their Testator granted him a Pension of 20 *l.* to remain with him in the King's Wars at the Time that he should be reasonably warned, to take at four Terms of the Year equally; and shewing further, That he went with him to *Calais* by the warning of their Testator, and was there armed; and demanded Judgment, and prayed his Debt. To which the Defendant said, that for the first Quarter he was paid 5 *l.* and shewed forth an Acquittance, and before the second Quarter ended, the Testator died, and demanded Judgment of the Action; and *Mowbray* of Counsel with the Plaintiff moved, since you do not deny the Pension to be granted as one entire by the Year, upon a Condition which we have perform'd, *sc.* that we have remained with him, We pray the Debt: But *Wilby* Ch. Just. by the Rule of the Court, awarded that the Pl. should take nothing by his Writ, because there should be no Apportionment in respect of Part of the Time, altho' it happen'd by the Act of God. *Vide* 10 *E.* 4. 18. 20 *H.* 6. 6. 9 *E.* 4. 1. 30 *H.* 8. *Br. Apportionm.* 7. If I am bound to you by Bond of 20 *l.* to be paid at four usual Feasts of the Year by equal Portions, the Obligee shall not have an (*b*) Action of Debt before all the Terms incurred; the same Law of a Contract: But if a Rent is reserved on a Lease for Years at four usual Feasts of the Year, the Lessor shall have an Action of Debt after the first Day, and shall not stay till the Whole is due, because it is accounted in Law as a Reservation of Parcel of the Issues and Profits of the Land, which is no Debt before the Day, as in the said Case of a Bond or Contract: And that is the true Difference betwixt the Case of the Bond, and a Rent reserved on a Lease for Years in *Lit.* 117. *b.* *Vide F.N.B.* 267. and Note a Difference betwixt a Recognizance of a Debt payable at several Days, for that is not like a Bond, but a Rent reserved on a Lease for Years. *Vide* 3 *Mar.* (*c*) *Dyer* 103. another Difference betwixt a Covenant or Promise, and a Contract or Bond. *Vide* 5 *Mar.* *Action sur le Case*, *Br.* 108. 10 *E.* 2. *Execut.* 157. and 16 *E.* 2. *ibid.* 138. *Vide* 9 *E.* 3. 7. For Authorities in the Point, I have seen a Report of a Case, *Mich.* 34 *H.* 8. in the Time of *Baldwin* Chief Justice of the Common Pleas, that it was the Opinion of all the Justices, that if a Man seised of Land in Fee 1 *die Octob.* makes a Lease of the same Land for ten Years, from the Feast of St. *Michael* then last past, yielding to him and his Heirs the yearly Rent of 20 *l.* at the Feast of St. *Michael* the Archangel, or within one Month after; That in this Case if the Lessor dies between the Feast of St. *Michael* and the End of the Month, that the (*d*) Heir shall have the Rent as incident to the Reversion, and not the Executors as Rent behind, because it was not due till the End of the Month.

(*a*) Fitz. det. 143.

(*b*) 2 Leon. 107, 108, 131. F. N. B. 130. h. 267. b. Benl. in Ash. pl. 10. Old Benl. 3. pl. 8. Yelv. 67. Owen 42. Cr. El. 118, 776, 807. New Benl. 57 pl. 93. 3 Leon. 4. 4 Leon. 13. Moor 13. Benl in Kelw. 208, 209. 3 Co 22. a. Co. Lit. 47. b. 292. b. 1 Rol. 29, 30, 601. 1 Rol. Rep. 221. 4 Co. 94. b. Cr. Car. 241. Cr. Jac. 505 2 Sand. 237. 8 Co. 153. a. 2 Rol. Rep 47. 5 Co 81. b. 2 Inst. 395.

(*c*) Dy. 113. pl. 55. Cr. Car. 241. 4 Co 94. b. 2 Rol. Rep. 47 Cr Jac. 505. 8 Co. 153. a.

Mich. 34 H. 8. Case resolved by the Justices in the Time of the Lord Baldwin.

(*d*) Cr. Jac. 228, 311, 310. Cr. El. 565, 575. Orph Leg. 159 4 Leon. 247. Yelv. 167. 1 Brownl. 106. 3 Keb. 195.

The ſame Law if the Leſſor betwixt the ſaid two Days had granted the Reverſion over, and the Tenant attorn'd, the (*a*) Grantee ſhould have the Rent as incident to the Reverſion. And *Mich.* 2 & 3 *P.* & *M. Prideaux* Serjeant mov'd *Mountague* Ch. Juſt. and the other Juſtices of the Common Pleas, that if a Man makes a Leaſe for Years, yielding a yearly Rent at the Feaſt of *Eaſter*, or one Month after, with Condition of Re-entry, and the Leſſee (*b*) tendreth the Rent at the laſt Inſtant of the Feaſt of *Eaſter*, if the Leſſor may enter upon demand made at the laſt Inſtant of the Month: And it ſeemed not, becauſe the Leſſee had Liberty to pay it then: And the Difference was taken betwixt the ſaid disjunctive Reſervation, and when the Reſervation is at a certain Feaſt; and a Condition is added, That if it be behind by the Space of a Month after the Feaſt, that then the Leſſor ſhall re-enter, there the Leſſee, for the Salvation of his Leaſe cannot tender it at the laſt Inſtant of the Feaſt-day, becauſe he has not ſuch Liberty and Election as in the other Caſe. And it was ſaid by the new Serjeants, That in the Time of the L. *Baldwin* it was reſolv'd by all the Juſtices, That in the ſaid Caſe of the disjunctive Reſervation, if the Leſſor dies betwixt the two Days, the Heir ſhall have the Rent, and not the Executors: Which Caſe the Ch. Juſt. ſhewed in Court reported by an ancient and learned Bencher of the *Inner Temple*, *Trin.* 31 *El.* in the King's Bench, *Rot.* 666. between (*c*) *Smith* Pl. and *Buſtard* Def. where the Caſe was in Effect, That *Smith* leaſed certain Land for Years, yielding yearly a Rent of 35 *l.* at the Feaſts of St. *Michael*, and the Annunciation of our Lady, or within 12 Days after each of the ſaid Feaſts, payable at the Font-ſtone in the Temple-Church, upon Condit. that if the ſaid Rent of 35 *l.* or any Part of it be behind and not paid *per præd' ſpatium* 12 *dier' prox' poſt aliqd' præd' Feſtorum ſeu dierum ſolutionis inde prout ſupradict' eſt*, that then the ſaid Leaſe ſhould be void; and it was adjudged, that the Leſſee in Safeguard of his Leaſe ſhould have 12 Days (*d*) after the firſt 12 Days to pay the ſaid Rent, for when the Rent is not paid at the firſt Day, it is as much as if it had been reſerved upon the 12th Day after: And where it is ſaid, *per præd' ſpatium* 12 *dierum poſt, &c.* by good Conſtruction all the Words ought to take Effect, *ſc. poſt aliquod præd' feſtor' ſeu dierum ſolutionis inde*; and *dies ſolutionis* is the 12th Day after the Feaſt, and therefore the Leſſee ſhall have 12 Days after the 12th Day, which is *dies ſolutionis poſt feſtum, &c.* and that for the Leſſee's greater Advantage, for whoſe Benefit further Time was given; and theſe Words, *prædict' ſpatium* 12 *dierum*, ſtand Right in good Senſe, *ſc. per prædict' ſpatium* 12 *dierum poſt prædict'* 12 *dies*, for that is *prædict' ſpatium*, altho' they have not the ſame

(*a*) Cr. Jac. 228. Mic. 2 & 3 P. & M. Caſe reſolv'd in the Time of the Ld. Mountague.

(*b*) Cr. El. 14, 48, 73. Moor 122, 223. Plowd. 70. b. Co Lit. 211. a. 2 Leon. 130, 131. Godb. 38, 39.

(*c*) Trin 31 El. Rot. 666. Caſe adjudged inter Smith and Buſtard, in the Time of Wray Ch. Juſt. of England. 1 Leon. 141, 142. 1 Rol. 459.

(*d*) Dy. 17. pl. 88, 97. pl. 104, 142. pl. 50. Plowd. 172. b.

Beginning as the other have; and so the *Quære* in 3 & 4 *P. & M.* 142. well resolved and adjudged. *Trin.* 30 *Eliz. in Communi Banco inter* (*a*) *Pilkington* and *Dalton.* The Case was, A Parson of a Rectory made a Lease for Years rendring Rent at the Feast of St. *Michael*, or within one Month after; the Lessor died ten Days after the Feast of St. *Michael*, and the Pl. was barred by Judgm. of the Court, because the Lessor (*b*) died before the Rent was due. *Pasch.* 40 *El.* in the King's Bench, the Case was, The Lady *Elizabeth Pawlet*, late the Wife of *Chedwick* Lord *Pawlet*, seised of the Manor of *Wade* in the County of *Southampton* for her Life, by Deed indented leased the said Manor to *Will. Pawlet* for ninety-nine Years, if the said Dame *Eliz.* should so long live, yielding the yearly Rent of 100 *l.* at the Feasts of St. *Michael* the Archangel, and the Annunciation of our Lady, or within 40 Days after each of the said Feasts; *Will. Pawlet* made *Dulcibel* his Wife Executrix, and died; *Dulcibel* took to Husband *John Moor* Esq; the Lady *Eliz. Pawlet* made *Ed. Walgrave* her Executor, and died the 13th Day after the Feast of St. *Michael*; her Executor brought an Action of Debt for the half Year ended at the Feast of St. *Michael*, before the Death of the Lady *Elizabeth*, and *tota Curia contra Querentem*: But by Entreaty of some of the Justices, *John Moor* gave the Plaintiff 10 *l.* And in the Case at Bar Judgment was given, *Quod Querens nihil capiat per billam.*

Dy. 142. pl. 50. (*a*) Trin. 39 El. Case adjudged inter Pilkington & Dalton in the Lord Anders. Time. Swinb. 323. Cr. El. 575. 3 Keb. 47. (*b*) Cr. El. 380. Pasch. 40 Eliz. in B. R. Case resolved inter Walgrave and Moor, in the Time of Popham Chief Justice of England. Cr. Jac. 227, 228, 233, 311. 1 Bulstr. 1, 2. 1 Brownl. 105. 2 Brownl. 220. Yelv. 167, 168.

JAMES

JAMES OSBORN's *Case*.

Mich. 11 Jac. 1. *in* B. R.

MIch. 9 Jacobi Regis in C. Banco Rot. 1427. *James Osborn Generosus* brought an Action on the Case against *Fran' Middleton*, and declared, That whereas the Plaintiff 14 *Febr. anno* 4 *Regis Jacobi* had bought *diversa bona & catalla, viz. unum fulcrum lecti*, (*a*) *Anglice* a Field Bedstead with a Testern and Curtain of Say, *unum Canopium vocat'* a Canopy for a Bed of Dornix, *unum operimentum vocat' a Rug*, &c. *ad valentiam* 11 *l. pro undecim libris eidem Francisco super* 28 *die Jun' tunc prox' sequen' solvend'*, and declared upon *Assumpsit*, *&c.* (upon certain Considerations mentioned in the Declaration) *ad deliberand' bona prædict'*, *&c.* which the Defendant had not done, *&c.* the Defendant pleaded *non assumpsit*; and the Jury found for the Plaintiff, and assessed Damages and Costs, upon which the Plaintiff had Judgment; and the Defendant brought a Writ of Error, and assigned for Error, That Damages were entirely given for divers Things, and for some of them no Damages ought to be given: For where it is said *unum fulcrum lecti* (*b*) *Anglice* a Field Bedstead, for that Damages might well be given; but for the Addition subsequent, *sc. With a Testern and Curtains of Say*, no Damages ought to have been given: For *fulcrum lecti* doth not include more than the Bedstead it self, for *fulcrum dicitur a fulciendo, quo lectus sustinetur*, and when (*c*) Damages are entirely given, and for Part no Damage ought to have been given, there *Juratores male se gesserunt in assidendo damna*, and therefore no Judg-

Jenk. Cent. 270. c. 87. Hard 41.

(*a*) Hob. 172. Lit. Rep. 161. 2 Rol. Rep. 61. 255.

(*b*) Cr. Jac. 665.

(*c*) Hutt. 125. Cr. Jac. 665. Hetl. 53. Hob. 189. Lit. Rep. 61.

Judgment ought to have been given in such Case, and therewith agree * 9 *H*. 7. 3. *a*. *b*. in Rescous, and 28 *H*. 6. 10. *b*. and the Case in 22 *El*. *Dy*. 370. was cited, where the Case was, That (*a*) *Clifford* brought a Writ of *Ejectione custod'. terræ & hæredis, &c.* and declared accordingly, and the Issue was taken upon the Traverse of the Tenure, which was tried by *Nisi prius pro Querente*, and Damages assessed generally, and it was said in arrest of Judgm. that an Action did not lie *pro custodia hæredis, sed pro custodia terræ tantum*, and therefore in the Case *supra*, Damages being entirely assessed for the Ejectment of the Land and Heir, the Pl. relinquished his Damages as to him, and prayed Judgm. of the Ejectm. of the Land only. All these Cases were agreed by the Court: And further in Proof thereof, two Judgments were cited, the first in *Mic*. 14 and 15 *El*. in the King's Bench, in Tresp. by (*b*) *Poley* against *Osborn* for breaking his Close, and beating his Servant (and did not say *per quod servitium, &c. amisit*) the Def. pleaded Not guilty, and the Jury found him guilty generally, and assessed Damages also generally, and it was moved in Arrest of Judgm. because Damages were entirely given, where by the Law no Damages ought to have been given the Pl. for the Battery of his Servant, unless it had been alledg'd that by reason thereof he had lost his Service: For otherwise the Servant should have the Action, and not the Master: To which it was answered by the Plaintiff's Counsel, That it should be intended that the Court (which ought to direct the Jury in Points of Law) had given Direction to the Jury for how much according to Law they should assess Damages, and therefore it should be intended in the Case at Bar, that the Jury had given Damages only for the Breaking of the Close, and not for the Beating of the Servant; for as much as for that (as the said Case was) no Damages ought to have been assessed: And they compared it to the Common Case, if a Man brings an Action on the Case against another for (*c*) scandalous Words (*exempli gratia*) for these, *Thou art an arrant Knave, a Cosener, and a Traitor*, the Def. pleads Not guilty, and the Jury find for the Pl. and assess Damages generally; it is well done, for it shall be intended, that the Court directed the Jury to give Damages only for the actionable Words, *sc. Thou art a Traitor*, and not for the other Words for which no Action lies. But it was resolved by the Court, That in the said Case of *Poley Juratores in assidendo damna male se gesserunt*, for when Damages are (*d*) entirely assessed, it shall be intended for all that for which the Plaintiff complains, and therefore it would be good Policy in such Cases to direct the Jury to give Damages for the Thing (*e*) only for which Da-

* Moor 142.

(*a*) Dy. 369, 370. pl. 56. 11 Co. 45. b. 56. a 2 Bulst. 28. 5 Co. 108. a. 1 Rol. 784. Postea 132. a. Cr. Jac. 104. Hard. 166. Styl. 399.

(*b*) 5 Co. 108. a. 2 Bulst. 102. 2 Rol. Rep. 52. Hard. 166.

(*c*) 1 Rol. 767. Hutt. 52. Cr. Jac. 630. Cr. El. 329. 1 Sid. 38.

(*d*) Cr. El. 329, 685. Cr. Jac. 127.

(*e*) Cr. El. 282.

Damages ought by Law to be given; as if in the same Case the Jury had given Damages (*a*) particularly for the Breaking of the Close, that had been good. And as to the Case of slanderous (*b*) Words, the Court agreed the same to be good Law for two Reasons. 1. That it is an Action on the Case, and therefore he might well (*c*) declare his Case as it really was. 2. All together is but one Scandal, and altho' no Action lies for the said Words, *Thou art an arrant Knave, a Cosener*, by themselves; yet being spoken at one and the same Time, and coupled with the other Words actionable, they aggravate them: But if at one Time the Defendant calls the Plaintiff *Traitor*, and at another Time he calls him *arrant Knave and Cosener*, and the Plaintiff brings an Action on the Case, and alledges the said several Words spoken at several Times, as several Causes of Action; there if upon Not guilty pleaded, the Jury assess Damages entirely, Judgment shall be arrested for the Whole; for he grounds his Action upon two several Scandals, whereas one is not actionable. Another Case was adjudged in the King's Bench, *Mic.* 30 and 31 *El. Regin'*; but it was entred *Mich.* 28 and 29 *El. Rot.* 476. the Case was such, (*d*) *Moor* brought an Action on the Case against *Bedel*, and declared, That whereas *Pasch.* 22 *El. Bedel* had recovered by Default in an Action of Waste, and 45 *l.* Damages, after which Judgment, *sc. ultimo Novembr. anno* 24 *El.* they submitted themselves to the Award of *Palmer* and *Povy* of all Matters then in Variance betwixt them, in Consideration that the Plaintiff had assumed to perform the Award on his Part; the Defendant made reciprocal Promise to perform it on his Part, and that he would not sue Execution on the said Judgment in the Action of Waste, and afterwards 10 *Decemb' anno* 24 the said Arbitrators made an Award in Writing to this Effect; they awarded that *Moor* should pay to *Bedel* 10 *l.* at certain Days, and 15 *l.* at other certain Days, and for the Payment of the 15 *l.* one *Will. Salter* should be ready to seal and deliver fifteen Bonds, *&c.* and further they awarded, That whereas certain Copyhold Land of the Manor of *Langley* in the County of *Bucks*, of which the said *Bedel* had made a (*e*) Lease for Years by Indenture contrary to the Custom, *&c.* that the said *Will. Salter* should do his Endeavour *pro posse suo*, that no Advantage should be taken of the Forfeiture; and *in consideratione inde* that *Bedel* should discharge *Moor* of 20 *l.* Parcel of the said 45 *l.* recovered in the said Action of Waste, and that upon the Readiness of *William Salter* to seal and deliver the said fifteen Bonds, *Bedel* by his Deed should release to *Moor* all Actions then depending, and all Demands to the fifteenth Day of *June anno vicesimo quarto supradict'*. And shewed that

(*a*) Cro. Jac. 127.
(*b*) Cro. Jac. 127, 343, 424, 630. Cro. El. 296, 329, 685. 1 Rol. 576, 767. 1 Bulstr. 37. 1 Anders. 120. Moor 142, 143, 780. Hob. 6. Cro. Car. 327, 328. Hut. 52. 1 Sid. 38.
(*c*) Cro. El. 882. Rep. Q. A. 96.
(*d*) 1 Rol. 242, 243, 244, 245, 247. Goldf. 91. 5 Co. 108. a. 1 Leon. 170. 1 Rol. Rep. 270, 437. 2 Rol. Rep. 2. 192. Jenk. Cent. 264. Winch 33. 2 Bulstr. 258. Hard. 399. Palm. 107. Bridgm. 58, 59.
(*e*) Co. Lit. 59 a.

that the 10 *l.* was paid according to the Award, and *ultimo Octob.* 24 *El. Will. Salter* offered to be bound in the said 15 Bonds, and did his Endeavour *pro posse suo, qd' nullum advantagium caperetur de forisfactura*, &c. and assigned two Breaches of the Award, the one that the Def. had not made the said Release upon Request made, the other, that he had sued Execution on the said Judgm. by *Fi. Fi.* and had levied 4 *l.* Parcel. The Defend. pleaded *Non assumpsit*, and this Issue was found for the Pl. and 50 *l.* Damages given: And in this Case two Points were resolved, which were only moved in the King's Bench; the one that altho' the Parties had been bound by Bond to perform the Award (as in this Case by mutual Promisses) yet as to all that which was to be done by *W. Salter*, being a (*a*) Stranger to the Submission the Award was void; for they are not bound to perform any Award, but that which is within the Submission; and so was it adjudged *Pasch.* 24 *Reginæ El. Rot.* 2417. between *Ecclesfield* and (*b*) *Maliard* in the King's Bench; and therewith agrees 17 *E.* 4. 5. *b.* by all the Justices. *Vide* (*c*) 22 *H.* 6. the Opinion to the contrary; but the Case is good Law, but ill reported; for in an Action of Debt on a Bond, the Def. pleaded that the Bond was indorsed on such Condition, that if the Def. stood to the Arbitrement and Award of *A.* and *B.* of all Quarrels and Debates betwixt the Pl. and him, &c. that then the Bond should lose its Force; and said that they awarded, that the Def. should pay to one *Kendal* 20 *s.* which he had paid him, Judgm. &c. *Ashton* of Counsel with the Pl. took Exception to the Plea, because it appeared that this Arbitrement was void, so the Bond remained in Force: But that without Question is a *Non sequitur*: For if no Arbitrement, or a void Arbitrement is made, which is all one in Law, the Bond is not forfeited, nor shall the Obligee take any Benefit thereof; and therefore all that follows there is (as I conceive) mistaken by the Reporter, as an Opinion not pertinent to the Case in Question. *Vide* 28 *H.* 6. 13. 8 *E.* 4. 22. 19 *E.* 4. 1. 21 *E.* 4. 75.

(*a*) 5 Co. 78. a. 1 Rol. 243, 247. 259. 1 Rol. Rep. 270. Kewl. 43. a. 3 Leon. 62. 2 Sand. 293, 337. Hutt. 9. Cr. El. 432. Moor 3, 359. Cro. Car. 226. Hard. 46. Yelv. 98.

(*b*) Cro. El. 4. Godb. 12. 1 Rol. 245.

(*c*) 22 H. 6. 46. b. Hard. 41. Fitz. Det. 49. Br. Arbitrement 24. Br. Condit. 59.

2. Altho' many Things are awarded to be done in Satisfaction of another (as that Case was) and some are (*d*) within the Submission, and some out, and so void; and altho' all were intended by the Arbitrators to be a Plenary and intire Recompence, for the Things which the other should do in Consideration thereof, notwithstanding if any Thing to be given or done to the Party, although it be of small Value, be within the Submission, the Award is good, although it appears by the Intent of the Arbitrators, that that which is within the Submission, without

(*d*) Cro. Jac. 448.

the others was not a plenary Satisfaction for the Thing to be done by the other Party; whereupon Judgment was given for the Plaintiff; and thereupon the said Executors of *Bedel* brought a Writ of *Error* upon the new Statute; and the said Exceptions moved in arrest of Judgment in the K.'s Bench were moved again; and the Justices of the Common Pleas and Barons of the Exchequer agreed as to them with the Judges of the King's Bench: And then another *Error* appearing in the Record was assigned, which was not mov'd in the King's Bench, and that was, That there were two Breaches assigned by the Plaintiff, one of the Refusal to make the said Release, and the other the Suing of Execution; and as to the Release, the Award was void, and by Consequence Damages being entirely given, the Judgment given for those Damages was erroneous, and it appeared that the said Release was out of the (*a*) Submission; for the Submission was of all Things in Variance, *Ult. Nov.* 24 *El.* and the Award was, that *Bedel* should release to *Moor* all Demands to 15 Day of *June anno* 24 *El.* and the Request to make the said Release was *anno* 26 *El.* and so one of the Breaches was out of the Submission. Against which it was objected, that it is true, when two Points are put in Issue, and for one no Action lies, and Damages are entirely assessed, it is erroneous, because both are directly within the Charge of the Jury, as in the said Case, of breaking of the Close and Battery of his Servant; but in the said Case between *Moor* and *Bedel*, the Defendant in the Action on the Case, pleads *Non assumpsit modo & forma*, which is only their Charge, and it shall be intended that the Court directed the Jury as to Damages for that Breach only which is within the Award and the *Assumpsit*: And that Case depended long in Advisement; and after the Case had been often argued before them, and upon Conference amongst themselves, it was resolved by them all, That it should be intended (if it be not specially found) that (*b*) Damages were given for both the Breaches, and therewith agrees (*c*) *Clifford*'s Case aforesaid in 22 *El. Dyer*, where the Issue was joined on the Tenure, and Damages generally assessed extended as well to the Custody of the Body as of the Land; and for as much as in the said Case betwixt *Moor* and (*d*) *Bedel*, one of the Breaches was out of the Submission, as it was resolved by all the Justices and Barons, the Judgment given in the King's Bench was for that Reason reverst.

But in the Case at Bar it was unanimously agreed that the (*e*) Judgment was well given by the Judges of the Common Pleas, and that it ought to be affirmed. And in this Case these Differences were agreed. 1. Between the Cases in which two Things are directly

2 put

(*a*) Hob. 191. Cr. Jac. 115. 353, 578, 639, 640, 664. Cr. El 858, 861. 2 Cro. 217. 1 Sid. 154. Moor 885. Hutt. 9. 1 Brownl. 48. 1 Rol. 258, 245.

(*b*) 5 Co. 108. a. Cr. Jac. 215, 343. Cr. Car. 327. Hob. 189.

(*c*) 5 Co. 108 a. 10 Co. 130. b. 11 Co. 45. b. 56. a. Dy. 369, 370. pl. 56. 2 Bulst. 28. 1 Rol. 784. Cr. Jac. 104. Hard. 166. Styl. 399.

(*d*) 1 Rol. 242, 243, 244, 245, 247, 258. 5 Co. 108. a. 2 Rol. Rep. 192. Jenk. Cent. 264. Goldsb. 91. Hardr. 399. Winch 33. 1 Leon. 170. Palm. 107. 3 Bulstr. 258. 1 Rol. Rep. 270, 437. Bridgm. 58, 59.

(*e*) Jenk. Cent. 270. ca. 87. Hard. 41. Cro. Jac. 665.

put in Issue, or obliquely enquired of by the Jury; and the Case at Bar, where there is but one Thing only, for *Fulcr' lecti* is only the Thing for which Damages are given, and for the Testern and Curtains no Damages were assessed, for they are not alledged *positive*, but *expositive*, sc. *unum (a) fulcrum lecti (b) Anglice*; and the Exposition extends to more than *fulcrum lecti* signifies, and therefore all the Residue is a meer Nugation, and void, as a Thing not at all alledged; and by the Statute of (c) 36 *E*. 3. *c*. 15. It is enacted, That all Pleas which shall be pleaded, &c. be pleaded, shewed, defended, answered and debated in the English Tongue: (And that they shall be entred and enrolled in *Latin*) and that the Laws and Customs of the said Realm, Terms and Process be holden and kept as they are, and have been before these Days. And it was resolved, That this Statute as to the first was introductive of a new Law, but as to the two other Branches, they are declarative of the Old, for of old Time, and before the Conquest, the original Writs and all the Process and Proceedings upon them were entered in *Latin*, and infinite Records before this Time yet extant are entered in *Latin*: And yet for the better Illustration of the Truth, a Deed, *English*, *French* or *Dutch*, &c. may be entred either in a Plea, or special Verdict, (d) 41 *E*. 3. 16. Tit. *Brief & Abatement de ceo*, *Br*. 49. (the Book at large being ill printed) in a *Præcipe quod reddat*, the Writ was, *Præcipe quod reddat filio & heire*, where it should be *hæredi* in *Latin*, and for this Cause the Writ was abated; for as *Shard* Chief Justice saith in 29 *E*. 3. 31. *a*. *Latin* is a formal Language to put in Writs, &c. and *English* are the Words of the common People; and yet when *English* or *French* is Parcel of a Name, there it shall be suffered in a Writ, and therefore if the Name of a Manor be *A. beside K.* he may demand it in a *Præcipe* by that Name in *English*, for peradventure notwithstanding the Name, the said Manor lies in *K.* and therefore in a *Præcipe* if he should say in *Latin A. juxta K.* then without Question if any Part of the Manor should extend into *K.* the Writ would abate, and therewith agree (e) 44 *E*. 3. 12. *b*. & 29 *E*. 3. 31. *a*. So if a Man's Surname be *Fitz-John*, he may be so named in a Writ; for if he should be named in a Writ, *Præcipe Willielmo filio Johannis*, it would be a good Plea to say that his Father had another Christian Name, as *Richard*, &c. and so abate the Writ, and so it is held in 29 *E*. 3. 30. *b*. 31. *a* (f) 40 *E*. 4. 22. *a*. 44 *E*. 3. 12. *b*. & 13. *a*. 11 *Ass*. *p*. 29. 11 *E*. 3. *Estoppel* 228. (g) 10 *E*. 4. 12. *a*. So I have read that one *Henry* had to his Surname *In the Hall*, and he brought a Writ by that Name, which consisted of three *English* Words, & *bene*, for his Name is not

Henricus

(a) Cr. Jac. 665.
(b) Hardres 4.
(c) Co. Lit. 304. b. Cro. El. 85. Dy. 239. pl 32. 2 Bulstr. 214. 8 Co. 161. a. See the Preface to Bohun's English Lawyer, as to the Words in the Parenthesis
(d) 41 E. 3. 21. a.
(e) Fitz. Br 574. Br. Brief 67. Statham, Brief 31.
(f) Co. Lit. 3. 2. Fitz. Brief 524.
(g) Fitz. Br. 180. Br. Estop. 165.

Henricus in aula. Vide 29 *E*. 3. 2. *a*. So that *brevia tam originalia quam judicialia patiuntur Anglica nomina*.

2. It was resolved, That Words, which pass under the Name of *Latin* are of four Sorts. 1. Good *Latin* allowed by Grammarians. 2. Words significant, and known to the Sages of the Law, but not allowed by Grammarians, nor having any Countenance of *Latin*. 3. In what Cases *Mala Grammatica*, false *Latin*, or no *Latin*, and yet having Countenance of *Latin*, shall abate or destroy, and where not. 4. Words insensible, and of no Signification, and which have not any Countenance of *Latin*, are utterly rejected. Of the first Sorts are good and proper (*a*) *Latin*, and that without Question is within the Stat. of 35 *E*. 3. Of the 2d Sort are *mesuagium*, *toftum*, *gardinum*, *bruera*, *jampna*, *maremium*, *&c*. These and divers other of the same Nature are allowable, not only in pleading, but in original Writs also; for these Words are known to the Law, and to the Judges thereof, and such also are within the said Act of 36 *E*. 3. And so in other Sciences it is frequent, as the Professors of the Civil Law use, *reprisalia*, *feuda*, *shopa*, *solaria*, and many other, the like; and many Times they use to explain them by *Anglice*, &c. as *Sollaria*, *Anglice* Warehouses; and the Physicians use this barbarous Word *Brothium*, for Broth, and such like. Of the 3d Sort are false or incongruous *Latin*, which shall abate an original Writ, but shall not make any judicial Writ, Count, Pleading or Judgment vicious (for false *Latin* shall be in such Cases amended,) *a multo fortiori* shall not avoid a Grant, or any Deed, *&c*. And therefore neither false *Latin* nor false *English* shall make void a (*b*) Grant or other Deed, when the Meaning of the Parties appears, *Mich*. 3. *&* 4 *Eliz*. in the Common Pleas, *Rot*. 1350. The Obligation was in *Octaginta libris*, with Condition for Payment of 40 *l*. and altho' this Word *octaginta* is *minus Latinum*, yet it was adjudged a good Obligation of *octoginta libris*. *Nota octingent'* is 800. So *Mic*. 44 and 45 *Eliz*. *Rot*. 1031. in the Common Pleas, the Obligation was in *septungenta libris*, with Condition for the Payment of three hundred and fifty Pounds; and it was adjudged, That that *septungenta* should be taken for *septingent'*, *i*. seven Hundred Pounds. So in 9 *H*. 6. 7. *a*. an Obligation of *wiginti libris* taken for *viginti libris*, and 9 *H*. 7. 16. *b*. and 2 *H*. 4. 8. *a*. *acc*. *Mich*. 11 *Jacobi Regis* in the Common Pleas, a Bill was made in (*c*) *English*, *sc*. in *sewtene Pounds* which was false *English*, and yet adjudged a good Bill of seventeen Pounds, for the Intent of the Parties appeared. Also when there is no *Latin* Word for divers Things, as for a Stirrop, but a feigned Word *Stapedia*; and so for Velvet there

(*a*) 1 Sid. 98. 183. 5 Co. 121. a. 8 Co. 159. b. Stil. 328, 358. 2 Vent. 173. 2 Saund. 31. 1 Bulstr. 126. Hob. 191. Cr. Jac. 307. Cr. Car. 33, 386.

Fitzgib 5. 1 Salk. 328.

(*b*) Co. Lit. 304. b. 8 Co. 161. a. Ant. 126. a. 6 Co. 65. b. Cr. Car. 146, 147, 417. Cr. Jac. 203, 261, 603. Noy 119. 3 Keb. 255. Yelv. 95, 96. Hob. 18, 19, 20, 116. Cr. El. 896. 1 Brownl. 61. Style 320. Moor 645, 864. Br. Obliga. 4. 71. 2 Rol. 146, 147. Lutw. 423. Salk. 462. Comb. 477, 60.

(*c*) Cr. Jac. 607.

is no *Latin* Word for it: And therefore in that Case it may be said in pleading two or three *virgatas velveti*. And in all such Cases where it is no *Latin*, and yet is significant, and has the Countenance of *Latin*, it is wisely done, to make an Illustration of such Words, to add (*a*) *Anglice*, as in the said Case before, *Anglice of Velvet*; *& sic de similibus*, as in the Case at Bar, *operimentum*, *Anglice* a Rug, there being no *Latin* Word for a Rug. And these are also within the said Act of 36 *E.* 3. Of the fourth sort are insensible Words, *&c.* as in the Case of Replevin *Pasch.* 35 *El.* between *Thomas Gawyn* and Sir *Edmond Ludlow*, the Declaration was of divers Goods and Chattels, and amongst them was *vitrium*; and upon Issue joined the Jury assessed Damages entirely for all. And it was resolved, that if *vitrium* be a Word insensible, and of no Signification, then Damages could not be given for it, but for the Residue only: But the Court did strongly incline, that it was but false *Latin*; for *vitrum* is *Latin* for Glass, and *vitrium* has Countenance of *Latin*, and doth sufficiently ascertain the Court that he intended it for Glass: And so *quacunque via data*, *Gawyn* had Judgment to recover. And afterwards by all the Justices in the Case at Bar the Judgment was affirmed.

(*a*) 1 Jones 144, 454. Cr. Car. 554. Cr. Jac. 129.

Note Reader; *Multa renascentur quæ nunc cecidere, cadentque*
Quæ nunc sunt in honore vocabula, &c.

READ

READ *and* REDMAN's *Case.*

Skinner 39.

Pasch. 10 Jac. 1. *in C. B.*

IN Debt brought by two Executors, one was summoned and severed, and afterwards he who was severed died, and the Defendant pleaded it in Abatement of the Writ. And it was resolved, The Writ should not abate against the Book briefly reported in 38 *E.* 3. 11. where the Reporter saith the contrary. *Ter. Trin.* 16 *Reg.* &c. and 20 *E.* 3. *Accom'* 78. the Executors of the Earl of *Salisbury* brought an Account, and one was summoned, severed and afterwards died, and the Writ by Award was abated. But for the better Understanding of the true Reason of the Law in this Case and the Like, these Differences are to be observed. The first is betwixt Writs (*a*) real original, and Writs real judicial. For if two (*b*) Coparceners bring a real Action, and one is summoned and severed, and afterwards dies having Issue or no Issue, the Writ shall abate. So if two Joint-tenants bring an Assise or other original real Action, and one is summoned and severed, and he who is summoned and severed dies, the Writ shall abate, although the Thing in demand shall survive; for a Man in a real Action shall never recover upon a Writ either false in Words, or (*c*) unapt for his Case; because he may have another Writ true and apt also, neither shall a Man recover a Moiety, where he may have an original Writ to recover the Whole; and sometimes by the Act of God subsequent the Words of the Writ well brought become false or unapt for his Case, and in such

Summons and Severance. 13 Co. 32. Co. Lit. 139. a.

(*a*) Hutt. 37. Hob. 287.
(*b*) Cr. Car. 574, 583, 589. 1 Jones 452.
(*c*) 11 Co. 5. b. 45. a. 1 Rol. Rep. 34, 77, 36 H. 6. 28. a. Hob. 164, 178, 199. Yelv. 71, 148. Palm. 524. Cro. Jac. 70, 104. Cro. Car. 575. Cro. El. 325. 1 Brownl. 68. 1 Sand. 285.

Cases the Writ shall abate; and therewith agree 5 *E.* 3. 3. in a Writ of *Aiel*, *John de Hatton*'s Case, 38 *E.* 3. 35. *b.* 37 *H.* 6. 11. *b.* 19 *R.* 2. *Brief* 925. *Vide* 38 *E.* 3. 43. But if two Coparceners bring a *Sci. fa.* which is a judicial Writ upon a Fine levied, &c. and one Coparcener is summoned and severed, and dies without Issue, the judicial Writ shall not abate: The same Law in Case of two Joint-tenants; but if the Coparcener who dies has Issue, then the Writ shall abate, as it is adjudged in 42 *E.* 3. 2. & 8. *Vide* 32 *E.* 3. *Brief* 292. 12 *E.* 3. *ibid.* 258. The 2d Difference is in real Writs original, where he who is summoned and severed dies, which is the Act of God by which the Writ is abated, and taking of Husband, or Entry into the Land by him who is summoned and severed, which shall not abate the Writ, for these are the Acts of him who is summoned and severed, and the Writ by such Acts (where there is not any Summons and Severance) becomes only abateable; and therewith agrees 39 *E.* 3. 16. The 3d Difference is between real Actions concerning Freehold or Inheritance as is aforesaid, without having Regard to Survivor, and Actions meerly personal, or personal and in some Manner mixt with the Realty, in which Chattels or entire Things are demanded: There if one Pl. be summoned and severed, his Death (where the entire Thing survives to the other) shall not abate the Writ. As in a Writ of Ward of the Body 37 *H.* 6. 11. 38 *E.* 3. 35, 36, &c. *Vide* 50 *E.* 3. 7. 30 *E.* 3. 14. 38 *E.* 3. 36. 1 *H.* 5. 12. 9 *H.* 6. 30, 56. 7 *E.* 3. 364. 17 *E.* 3. 11 Tit. *Brief* 665. 38 *E.* 3. 43. *V.* 17 *E.* 3. 11. *F. N. B.* 35. 3 *H.* 5. 4. *Qua. Imp.* 71. 10 *El. Dy.* 272. And in such Case of (*a*) *Quare Impedit* in some Case the Death of one of the Plaintiffs shall not abate the Writ without any Severance, *sc.* where otherwise the Pl. who survives will be without Remedy, &c. as upon a Plenarty and six Months past, or that Lapse will incur, which Reason peradventure will reconcile all the Books aforesaid, which *prima facie* seem to disagree; and that is the Reason given in some of the said Books, as in 38 *E.* 3. 36. 9 *H.* 6. 30, &c. That otherwise the Wrong done to the Pl. will be unpunished, or otherwise the Lapse will incur, &c. and peradventure such Wrong will turn to the Disinheritance of the Survivor for ever; as if two purchase an Advowson in Fee, and a Stranger usurps, and they bring a *Quare Impedit*, and the (*b*) six Months pass, and afterwards one of them dies, if in this Case the Writ should abate by the Act of God, the Survivor would be disinherited of the Advowson for ever: But when after the Death of one of the Plaintiffs, the Survivor may have a new Writ without any Prejudice to him, there you will find in some of the said Books, that the Writ has been abated: But without Question if one of the Plaintiffs in a *Quare Impedit* be (*c*) severed and dies, the

(*a*) 7 Co. 26. b. Moor 9. Co. Lit. 198. a. Dallison 7. F. N. B. 35. L.

(*b*) 2 Rol. 323.

(*c*) Kelw. 47. b.

the Writ shall not abate. In a Writ of (*a*) *Detinue* of Charters brought by three Coparceners. *Vide* 19 *E*. 3. *Severance* 14. 20 *H*. 6. 45. 2 *E*. 3. *Severance* 19. In a Writ of Debt by Executors, which is the Case now in Question, 5 *E*. 2. *Brief* 802. 16 *E*. 2. *Executors* 111. 3 *H*. 7. 1. For there the Debt demanded is entire and survives; but in these Cases, if one Plaintiff dies without Severance, the Writ shall abate. *Vide* 2 *R*. 3. 1. *Vide* 37 *H*. 6. 16. In 48 *E*. 3. 32. Two bring a Writ of Warranty of Charters, &c. and the one dies, the Writ shall abate, for that is an Original; but in a *Quid Juris clamat* by two, and one of them dies, the Writ shall not abate, for that is a judicial Writ, 48 *E*. 3. 32. And regularly in all judicial Writs in personal Actions, the Death of one of the Plaintiffs shall not abate the Writ, 41 *E*. 3. *Execution* 38. 11 *R*. 2. *Brief* 638. *Vide* 25 *E*. 3. 38. *b*. & 18 *H*. 6. 2. *Vide* 20 *E*. 3. *Severance* 17. that Summons and Severance lies not in *Quid juris clamat*, but the (*b*) Nonsuit of one is the Nonsuit of both, for the Tenant shall not be put to attorn to one only. Another Difference is between Writs in which something is to be recovered, and Writs in which nothing is to be recovered, but are to discharge the Plaintiff only of a Burden: And therefore in a Writ of Error the Death of one of the Plaintiffs shall abate the Writ, 3 *H*. 7. 1. 2 *R*. 3. 1. *a*. 19 *Ass*. *p*. 7. & 44 *E*. 3. *Brief* 584. But in (*c*) *Audita querela*, which is also an Original, the Death of one of the Plaintiffs, or of one of the Defendants shall not abate the Writ, 2 *R*. 3. 1. 11 *R*. 2. *Brief* 638. because he is to recover nothing, but only to discharge himself of a Burden and Charge. And for this Reason the Nonsuit of one is not the Nonsuit (*d*) of the other in an *Audita querela*; but there shall be Summons and Severance, 15 *E*. 3. *Severance* 23. *Nota* Reader, Summons and Severance is always before Appearance, and (*e*) Nonsuit after Appearance, where the Severance is without Process, &c. 38 *E*. 3. 9. 26 *Ass*. *p*. 35.

(*a*) Co. Lit. 286. b.

(*b*) Co. Lit. 139. a.

Comb. 263, 441.

(*c*) Co. Lit. 139. a. Yelv. 209. Cr. Jac. 19.

(*d*) Co. Lit 139. 6 Co. 25. b. Cr. El. 448. 139. a.

(*e*) Co. Lit. 139. b.

RICHARD SMITH's *Case.*

Trin. 10 Jac. 1. *in C. B. which Plea began* Hill. 7 Jac. 1. Rot. 1231.

Quare Impedit de medietate Ecclesiæ.

RIchard Smith, Administrator of *Gregory Backhouse*, was Plaintiff in a *Quare Impedit* against *Thomas* Bishop of *Peterborough*, *Thomas Abbot* and *Hugh Lloyd* Clerk; and the Writ and Count was, *de placito quod permittat ipsum Rich' præsentare ideoneam personam ad medietatem Eccl' de Woodford in Com' Northampton, quæ vacat & ad suam spectat donationem*, and in this Case after many Arguments at Bar, and now this Term at the Bench, divers Points were resolved. 1. That none should have a *Quare Impedit præsentare ad medietatem Eccl'* but when there are two several Patrons, and two several Incumbents of the Church within one and the same Town, so that one Patron has a distinct and separate Advowson of one half of the Church, and his Incumbent has a distinct and separate half Part by it self of the Tithes and other Ecclesiastical Profits in the same Town; and so has the other Patron and his Incumbent *mutatis mutandis*; and in that Case the Advowson and the Church are severed in Right and in Possession: But when there is but one Incumbent, altho' the Advowson be divided and severed into several Hands, yet there shall never be *Quare Impedit præsentare ad medietatem seu tertiam partem Ecclesiæ, &c.* and the Reason of this Difference is manifest, for every *Quare Impedit* is in the Possession, and respects the Church which belongs to the Incumbent: And therefore in the Writ of *Quare Impedit, id est, quod permittat ipsum præsentare ad Ecclesiam de W.* and thereby it appears that the State and Quality of the Church directs the *Quare Impedit*; and therefore when the Church is not severed, but there is but one Incumbent, one Church, one Cure, it is not possible that in respect of the Severalty

Co. Lit. 17, 18. a.

ralty

ralty of the Advowson, that any *Qua. Imp.* should be brought *ad medictatem, &c. Eccl'*; for there is not any Moiety in the Church, but that is entire; but he who presents has a Moiety, *&c.* in the Advowson: And therefore when at the Beginning of the Foundation of the Church, one and the same Church of one and the same Town was divided and severed in two Parts, and the Advowson of the one Part allotted to one, and of the other Part to the other; and that there should be two (*a*) several Incumbents, one *de una medietate Eccl'*, and the other *de alia medietate Eccl'*, and one Part of the Town should go to one, and the other to the other; there when one Patron presents to the Moiety of the Church, and is disturbed, he may well have a *Qua. Imp. qd' permittat ipsum præsentare ad* (*b*) *medietatem Eccl'*, for in Truth the Incumbent shall have but the Moiety of the Church, and not the whole Church, nor the whole Profits of the Church, nor the whole Cure of Souls. But the Writ of Right of *Advowson* is brought to recover the Advowson, and the Writ is *Præcipe qd' reddat advccationem Eccl'*, and therefore the Estate and Quality of the Advowson, and not of the Church, shall direct that Writ; for the Incumbent of the Church shall not be removed by that Writ, for *Advocatio* belongs to the Patron, and *Ecclesia* to the Incumbent; and therefore it was utterly denied, That if a Consolidation is made of three Advowsons, so that all make but one Incumbent and one Church, in that Case altho' the Advowsons are several to present by turns, yet the *Qua. Imp.* shall be in such Case *præsentare ad Eccl'*, for now upon the Matter it is but one Church and one Incumbent, (*c*) *Vide F. N. B.* 39. *f. g.* 5 *H.* 7. 8. *a.* And it was objected, that admitting that in such Case as has been put, *sc.* where there are two separate Incumbents, that the *Qua. Imp.* should be maintainable *de medietate Eccl'*, yet such special Case ought to be set forth in the Count, or else it should not be intended, and no such special Matter is alledged in the Count in the Case at Bar. To which it was answered and resolved, That the Count in the Case at Bar was sufficient to ascertain the Court, That there were two (*d*) Patrons, and two Incumbents: For the Count was, That one *Wm. Thorley fuit seisitus de manerio de Thorleys in com' præd', ad qd' advocatio medietatis Eccl' præd', &c. pertinuit & adhuc pertinet, in dominico suo ut de feodo, &c.* And always one is said to be seised *de advocatione medietatis*, when there are two several Patrons; and so *Prisot* held in (*e*) 33 *H.* 6. 11. *b.* in Sir *Ed. Odingsel*'s Case: And therefore in the Case at Bar, when the Pl. declares, That *Wm. Thorley* was seised *de advocatione medietatis*, it implies two several Patrons and two Incumbents, for there the Advowson and the Church are severed in Right and in Possession. (*f*) 14 *H.* 6. 15. *b. per Newton acc'. F. N. B.* 31. *b.* In 31 *E.* 1. (*g*) *Droit* 68, 69. it appears, That a Man shall have a Writ of Right *de medietate advocationis*, where the Advowson is parted betwixt two Coparceners,

(*a*) 1 Jones 446.

(*b*) F. N. B. 33 a.

(*c*) 1 Jones 446.

(*d*) Doct. pla. 87, 248.

(*e*) Co. Lit. 17. b. Postea 136. b. Dy. 299. pl. 32. Moor 167. pl. 1199.

(*f*) Co. Lit. 17. b.

(*g*) Co Lit 18. a. Cr. Eliz. 688.

and one is disturbed by a Stranger: But a Writ of Right *de advocatione medietatis Ecclesiæ* lies where two several Patrons present two several Parsons to one Church, as there are in some Churches two Parsons, against the Opinion of *Finchden* in 45 *E.* 3. *Fines* 41. *Vide* 45 *E.* 3. 12. *b.* 17 *E.* 3. 38. *b. Poining*'s Case. *Vide* 17 *E.* 2. *Dower* 163. a Writ of Dower *de tertia parte advocationis. Vide* (*a*) *F. N. B.* 33. (*b*) when a Parson sues in the Spiritual Court for Tithes amounting to the fourth Part of the Value of the Church, against the Parson of another Parish, that Parson who is so sued may have a Prohibition called *Indicavit*, to the Ecclesiastical Judge and to the Party, and then the Patron of the Parson so prohibited may have a Writ of Right *de advocatione decimarum* 3 *partis Ecclesiæ de S. vel* 4 *partis*; but that Writ is given by the Stat. of *W.* 2. *C.* 5. *verf. finem. Vid.* 38 *E.* 3. 13. 31 *H.* 6. 14. and the Stat. of *Articuli Cleri*, *C.* 2. and *Conjunctim Feoffati*, *F. N. B.* 30 *E. D.* & *Stud. C.* 25. *f.* 108. *vid.* 4 *E.* 3. 27, 29. 7 *E.* 3. 42, 8 *E.* 3. 49. 9 *E.* 3. 42. 2 *H.* 7. 12. 12 *E.* 4. 13. *vid. Register* 29. *b. Præcipe quod reddat advocationem medietatis Ecclesiæ de S. vel* 3. *partis* and *F. N. B.* 30. 31 *E.* 1. *Droit* 68, 69. 22 *Aff. p.* 33. where there are three Parsons of one Church, and one in a *Quare Imp.* declared *præsentare ad medietatem*, where it should be *ad tertiam partem*, and the Writ abated, which proves that in such special Case a *Quare Imp.* lies *præsentare ad medietatem*, or 3 *partem*; 7 *E.* 3. 327. 8 *E.* 3. 421. 33 *E.* 3. *Qu. Imp.* 169. 14 *H.* 6. 15. 5 *H.* 7. 8. and therewith agrees the Book of Entries 477. Tit. *Quare Imp. divisione portion'*, *Mich.* 22 *H.* 6. *Rot.* 469. a Writ of *Quare Imp.* was *præsentare ad* 2 *partes Ecclesiæ. Vide* 6 *E.* 6. 78. (*c*) *Dyer* the Lord *Windsor*'s Case. And it was objected, There was not any Writ in the Register of any *Quare Imp. præsentare ad medietatem seu tertiam partem Ecclesiæ*, but only *ad Ecclesiam*. To which it was answer'd, and resolv'd, That when the Register gives a Writ for the Whole, it is a sufficient Warrant, to bring it for any Part, if the Case will warrant it, and the later Part of the Opinion of *Prisot* in (*d*) 33 *H.* 6. 11. *b.* was denied, *sc.* that when there are two Patrons and two Incumbents of one and the same Church, so that the Church it self is divided into Moieties, that there a *Quare Imp.* will not lie to present to a Moiety, for Reason and many Authorities in Law are against it, as appears before: But in such Case, I conceive, that in such Case the Patron *de advocat' mediet'* may have a *Qu' Imp' præsent' ad Eccl'*, for upon the Matter as to him it is one Church. And so the Pl. may have, as I conceive, a Writ in the one Form or in the other; and therewith agrees (*e*) *Windsor's Case in the* 5 *Part of my Rep. f.* 102. where the Count was *de advocat'* 3 *partis*, and yet the Writ was *ad Eccles'*, and not *ad* 3 *partem*. And so you will the better understand the Reason of your Books, and thereby attain to the true Sense and Judgm. of the Law. And afterwards Judgm. was given, That the Writ was good, and the Def. ruled to answer over, and so he did. *Vide Trin.* 14 *Eliz.*

(a) F.N.B. 33. a.
(b) F.N.B. 30. e.

(c) Dy. 78. pl. 34.
5 Co. 102. b.
4 Co. 75. a. b.

(d) Dyer 299. pl. 32.
Co. Lit. 17. b.
Moor 877. pl. 1199.
Antea 136. a.

(e) 5 Co. 102. a. b.
2 Rol. 347.
Co. Ent. 489. pl. 6.
Moor 558, 559.
Cr. El. 686, 687
2 Rol. Rep. 131.
Lit. Rep. 430.

Rot. 1060. *Pasch.* 37 *Eliz. Rot.* 1226. Sir *Thomas (a) Stanhope*'s Case. *Pasch.* 41 *Eliz. Rot.* 836. The Case of the Church of *(b) Darsfield*, where such a Writ of *Quare Impedit* as this is in the principal Case, *sc. quod permittat præsentare idoneam personam ad medietatem Ecclesiæ de Darsfield* was, upon Demurrer and solemn Argument, adjudged maintainable.

(a) 5 Co. 102. b.

(b) 4 Co. 75.

CASES

CASES

UPON THE

Statute and Commissions of *Sewers.*

The Case of Chester *Mill upon the River of* Dee.

Pasch. 7 Jac. 1.

15 Co. 35.
1 Mod. Rep. 45.
4 Inst. 275.

A Causey or Mill-stank of Stone in the River of *Dee* and City of *Chester* before the Reign of King *E.* 1. was made and erected, for the necessary Maintenance of certain Mills, some of the King's, others of the Subject, which stood at the End of the said Causey; and now of late a certain Decree was made by certain Commissioners of Sewers, for a Breach to be made by ten Rods in Length in the said Causey, which Causey (as it was admitted by both Sides) was erected before the Reign of King *E.* 1. and so hath continued until this Day, without any Exaltation or Inhansement. And if by any Decree of the Commissioners, by Force of any Statute, any Breach might be made in this Causey, was the Question, which was referred by Letters of the Lords of the Privy Coun-

cil

cil to the two Ch. Just. and the Ch. Baron; and upon hearing of Counsel learned divers Days, and good Consideration had in the Time of the last Vacation of all the Stat. concerning Sewers, and upon Conference had amonst themselves, It was resolved as follows. 1. Where it is provided by the Stat. of *Mag. Char'*, (*a*) *Quod omnes Kidelli deponantur de cætero penitus per Thamesiam & Medeweyam, & per tot' Angl' nisi per costeram Maris*, It was resolved, That this Stat. extends only to Kidel, *i.* open Wears for taking of Fish; but the first Stat. which extends to the putting down or abating of any Mills, Mill-stanks and Causeys, was the Stat. of (*b*) 25 *E.* 3. *c.* 4. which Act appoints such only to be put down or abated, which were levied or erected in the Reign of K. *E.* 1. or after; but by the Stat. made (*c*) 1 *an. H.* 4. *c.* 12. upon Complaint in Parl. of great Damages which had happen'd by the outragious inhansing of Mills, Mill-stanks, and other Impediments made and erected before the Reign of K. *E.* 1. the said antient Mills and Mill-stanks were appointed by Act then made to be surveyed, and such as were found much inhansed to be corrected and amended; Saving always reasonable Substance of such Mills, Mill-stanks, Wears, *&c.* so in old Time made and levied; none of which Acts extends to the Case in Quest. for this Causey, *&c.* was erected before the Reign of K. *E.* 1. and was never exalted or inhansed after the Erection thereof: And the Stat. of (*d*) 12 *E.* 4. *c.* 7. confirms all the said Acts and by them the generality of the said Act of *Mag. Char.* is restrained, as by the said Acts appears. And by the Stat. of (*e*) 25 *H.* 8. *c.* 5. none of the said Acts (as to the Point in Quest.) is repealed: For first, the same Act appoints the Manner, Form, Tenor and Effect of the Commission of Sewers, by which Power and Authority is given to the Commissioners to survey Walls, *&c.* Sewers, Causeys, *&c.* Mills, *&c.* and them to correct, repair, amend, *put down or reform, as Cause shall require, according to their Wisdoms and Discretions; and therein as well to ordain and do, after the Form, Tenor and Effect of all and singular the Stat's. and Ordinances made before the first of* Mar. an. 23 H. 8. *as also to enquire by the Oaths of honest and lawful Men,* &c. *thro' whose Default the said Hurts and Damages have happened*, &c. By which it appears, That the (*f*) Discretion of the Commission. was limited *sc.* to proceed according to the Stat. and Ordinan's before made; and then all the subsequent Clauses, *And also to reform, repair and amend the said Walls*, &c. by Force of this Word (*said*) have relation to the precedent Purview of the Act: *And further, to reform, amend, prostrate and overthrow all such Mills*, &c. *and other Inpediments and Anoyances (aforesaid) as shall be found by Inquisition, or by your Survey and Discretion to be excessive and hurtful:* Which Word *aforesaid* refers this Clause also to the precedent Purview, *sc.* such Impediments and Annoyances as are against the Stat. and Ordinances before made,

(*a*) 13 Co. 35. Magna Charta, cap. 23. 2 Inst. 38. Callis Lect. 258.

(*b*) 13 Co. 35.

(*c*) 13 Co. 36.

(*d*) 13 Co. 36.

(*e*) 13 Co. 36. Cr. Jac. 336. 2 Bulstr. 197. Postea 139. a. 140. a. Callis Lect. f. 1. 5 Co. 99. b.

(*f*) Co. Lit. 227. b. 5 Co. 100. a. Postea 140. a. 4 Inst. 41. Hard. 146. Cr. Jac. 336. 2 Bulst. 197, 198. Hob. 158. Callis Lect. 112.

Also it is further enacted by the said Act, *That all and every Statute, Act and Ordinance heretofore made concerning the Premisses, or any of them, not being contrary to this present Act, nor heretofore repealed, shall from henceforth stand and be good and effectual for ever.* But the said Acts of *(a)* 25 *E.* 3. and 1 *H.* 4. are not contrary to any Clause of this Act, nor were repealed before. And always such *(b)* Construction ought to be made, that one Part of the Act may agree with the other, and all to stand together. And if they had intended to have repealed the said former Acts, they would not have repealed them by such general and *(c)* doubtful Words, concerning Causeys, Mill-stanks and Mills, when they concern the Inheritances of many Subjects. And according to this Resolution we *(d)* certified the Lords of the Council, That the said Statutes of 25 *E.* 3. and 1 *H.* 4. remained yet in Force; and that the Authority given by the Commission of Sewers, did not extend to Mills, Mill-stanks, Causeys, &c. erected *(e)* before the Reign of King *E.* 1. unless they had been raised and exalted beyond their former Altitude, and thereby made more prejudicial: In which Case they are not to be *(f)* thrown down or over-turned, but to be reformed by the Abatement of the Excess and Inhansement only.

(a) 13 Co. 36. Antea 138. a.

(b) 11 Co. 63. a.

(c) 2 Rol. Rep. 410.

(d) 13 Co. 36.

(e) 1 Sid. 145.

(f) 13 Co. 36.

KEIGHLEY'S

KEIGHLEY's *Case.*

Mich. 7. Jac. I. *in C. B.*

THIS Term, upon Evidence to a Jury of *Essex* in the Case of one *Keighley*, It was resolved *per totam Cur' de Communi Banco*, That if one who is bound by Prescription to repair a Wall *contra (a) fluxum Maris*, and he keeps the Wall in good Repair, and of such Height, and as sufficient as it was accustomed; and by the sudden and unusual Increase of Water, salt or fresh, the Walls are broken, or the Water over-flows the Walls; That in this Case the Commissioners of Sewers ought to tax all such Persons who hold any Lands or Tenements, or Common of Pasture, or Profit of Fishing, or have or may have any Loss, Damage or Disadvantage by any Manner of Means in the same Places, according to the Quantity of their Lands, &c. for no Fault in this Case was in him who ought to repair it. And the Statute of (*b*) 23 *H.* 8. *cap.* 5. first authorises the Commissioners *to enquire by the Oaths of the honest and lawful Men*, &c. *thro' whose Default the said Hurts or Damages have happened*, &c. *and who hath or holdeth any Lands or Tenements*, &c. *or hath or may have any Hurt, Loss, or Disadvantage*, &c. *and all those Persons, and every of them to tax*, &c. which ought thus to be intended, That when one by Prescription or other

(*a*) Dal 63. pl. 26. Dal. in Kelw. 206. pl. 10. Dal. in Ash. pl. 10. Mo. 62. pl. 173. 68. pl. 187. 78. pl. 200. 2 Bulstr. 200. Co. Lit. 53. b.

(*b*) Antea 138. a. 13 Co. 36. 2 Bulstr. 197. Cr. Jac. 336. Callis Lect. f. :-

otherwise ought to repair any Wall, Sewer, &c. that he ought to do it; but if he is not able to do it, and for inevitable Neceſſity it ought to be repaired, in Prevention of a great and publick Hurt; or if no Default is in him by reaſon of the extraordinary Rage and Violence of the Water, That the Commiſſioners of Sewers in ſuch Caſes have Power by the ſaid Act to charge all who have any Loſs, &c. according to the Quantity of their Land, &c. But when one is bound by Preſcription or otherwiſe to repair a Wall, &c. if any Fault is in him, and the Danger is not inevitable, but that he himſelf may well repair it, The Commiſſioners may by the true Intent of the Act charge him only to repair it; and if thro' his Fault the Danger becomes inevitable, or that he himſelf is not able to repair it, by which as it hath been ſaid, all are charged, &c. Every one of them may have an Action on the Caſe againſt him who is ſo bound to repair the Wall, &c. and ſhall recover their Damages according to their Loſs. In (*a*) 18 *E.* 3. 23. an Action on the Caſe was brought againſt *B.* and the Pl. declared that the ſaid *B.* was ſeiſed of certain Lands in *K.* by Reaſon whereof he and his Anceſtors, and all the Ter-Tenants *a tempore cujus*, &c. have made and repaired, when Need ſhould be, ſo many Perches of the Wall of the Sea in *K.* &c. and for want of Reparation, &c. the Water entred and drowned the Pl's Land, the Defend. traverſed the Preſcription upon which they were at Iſſue, and it was found for the Pl. and that there was a Defect in the Wall for not repairing of it; for which the Pl. recovered his Damages, and a Writ was awarded to the Sheriff to diſtrain *B.* to repair the Wall there where there was Need, and a Fault. *Nota* Reader, this Judgment in an Action on the Caſe, and the Reaſon thereof is *pro bono publico*, for, (*b*) *Salus populi eſt ſuprema Lex*; and therefore it is Part of the Judgment in this Action on the Caſe, That the Def. ſhall be diſtrained to repair the Wall. And in the Caſe at Bar, the Law is grounded upon great Reaſon: For altho' by the Law one be bound to keep and repair it, yet (*c*) *impotentia excuſat legem*, and that which comes by the Act of God, and is ſo inevitable, that by no Providence or Induſtry of him that is bound, it can be prevented, ſhall not charge him: And therefore if Tenant for Life or Years does not (*d*) repair a Sea Wall, ſo that by his Fault the Land is drowned, and becomes unprofitable, it is Waſte; but if the Land is drowned by the extraordinary Rage and Violence of the Sea without his Fault, it is no Waſte; no more than if an Houſe is burnt by Lightning, or overthrown by the Rage of the Wind or Tempeſt, without Fault in the Leſſee, it is no Waſte. And many times great Tides are occaſioned by ſtrong Winds: And there-

(*a*) Style 192.

(*b*) Noy 30.

(*c*) 1 Co. 98 a. 4 Co. 11. a. 5 Co. 22. a. 6 Co. 21. b. 68. a. Co. Lit. 29. a. Hard. 387.

(*d*) Co. Lit. 53 b. F. N. B. f. 59. N

with, as to Waste, agrees the Opinion of the Court of Com. Pleas, *in an. 6 Reg. El.* in (*a*) Just. *Dallison*'s Reports.

And the Court had Consideration of another Clause in the said Act of (*b*) 23 *H.* 8. *c.* 5. *And to make and ordain Statutes, Ordinances,* &c. *after the Laws and Customs of* Romney-Marsh *in the County of* Kent, *or otherwise, after your own Wisdoms and Discretions.* ¶. And it was resolved clearly, That the several Commissioners of Sewers throughout *England* are not bound to follow the Laws and Customs of (*c*) *Romney-Marsh*: But in Case where some particular Place within their Commission, has such Laws and Customs as *Romney-Marsh* has, there they may follow them; for (*d*) *consuetudo loci est observanda.* Lastly, it was resolved, That these Words in the said Act, *sc. According to your Wisdoms and* (*e*) *Discretions,* are to be intended and interpreted *according to Law and Justice,* for every Judge or Commissioner ought to have *duos Sales, viz. Salem Sapientiæ, ne sit insipidus, & Salem Conscientiæ, ne sit Diabolus.* Also Discretion, as it is well described, is *Scire per legem quid sit justum*: And therefore the Commissioners of Sewers ought to pursue as well their Commission, as the Oath expressed in the said Act of 23 *H.* 8. which they take to execute their Commission, in the same Manner as it is there prescribed. And therewith agrees the Description of Discretion in *Rook's Case, in the fifth Part of my Reports, f.* 100. *a.* And it was well observed, That every Statute, Ordinance and Provision which is made by Force of the Commission of Sewers, ought to consist upon four Causes. 1. The material Cause, and that is the Substance. 2. The formal Cause, and that is the Manner, with convenient Circumstance. 3. The efficient Cause, and that is their Authority according to their Commission. 4. The final Cause, and that is *pro bono publico, & nunquam pro privato.* And whereas the Opinion of *Walmesley* Justice in *Rook*'s Case aforesaid was, that if the Owner of the Land was by Prescription bound to repair the River Bank, that yet upon such Commission awarded, the Commissioners ought not to charge him only with the Whole; upon Conference with *Walmesley*, and *Flemming* Chief Justice, *Yelverton*, *Williams*, and other Justices, it was agreed by *Walmesley* himself, and all the others, That the said Resolution upon the Difference aforesaid, was good in Law: And *Walmesley* explained his Opinion in *Rook*'s Case, That the Commission ought not to charge him who is bound by Prescription only; that he meant *where there is no Default in him* (for that agrees with the Words of the said Act of 23 *H.* 8.) and no inevitable Necessity for

(*a*) Dall. 64. pl. 26. Dall. in Kelw. 206. pl. 10. Dall. in Ash. pl. 10. Mo. 62. pl. 173. 68. pl. 117. 73. pl. 200. Co. Lit. 53. b.
(*b*) Ant. 138. a. 139. a. 13 Co. 36. 2 Bulst. 197. Cr. Jac. 336. Callis Lect. f. 1. 5 Co. 99. b.
(*c*) 4 Inst. 276, 277. Callis Lect. 202.
(*d*) 4 Co. 28. b. 6 Co. 67. a. 7 Co. 5. a.
(*e*) 2 Bulstr. 197, 198. Hob. 158. Callis Lect. 112. Co. Lit. 227. b. 5 Co. 100. a. 4 Inst. 41. Antea f. 138. a. Hard. 146. Cr. Jac. 336.

5 Co. 100 a. Callis Lect. 144.

for Insufficiency or otherwise; but if he himself can do it, there he himself shall be only charged by Force of the said Commission: And he said, That his Reason given in *Rook*'s Case implied as much, *&c.* for otherwise it may be that all the Country will be drowned; which Reason imports his Meaning, That all who had Lands in Danger should not be charged, but in Case of Insufficiency of him who is bound, or for other inevitable Necessity.

The Case of the Isle of Ely.

Mich. 7 Jac. 1.

A Case was referred by the Lords of the Council to *Coke* Chief Justice of the Common Pleas, *Daniel* and *Foster* Justices of Common Pleas, concerning a Decree made by the Commissioners of Sewers, for making a new River within the Isle of *Ely*; and in Effect the Case was such. The Commissioners of Sewers had decreed, That a *(a)* new River should be cut out of the old River of *Owse*, and through the main Land within the same Isle, for seven Miles, to another Part of the same River: And for the doing thereof, they had severally taxed as well *Fen*, *Drayton*, *Samsey*, *Over-Wivelingham*, *Rampton*, *Cottenham*, and nine other Towns within the County of *Cambridge*, out of the said Isle, as the Inhabitants of the said Isle, and the Tax was general, *sc.* so much of one Town, and so much of another, and *sic de singulis.* And in this Case two Questions were moved: 1. If the Commissioners of Sewers might by Force of their Commission make such new River, or not. 2. If such general Taxation upon the Town was lawful, or not. As to the first, we must consider what might have been done by the Common Law, before any Statute made thereof. And it is to be known, that by the Common Law, before the Statute of *6 H. 6. c. 5.* the King ought of Right to save and defend his Realm, as well against the Sea, as against the Enemies, that it should not be drowned or wasted, and also to provide, that his Subjects have their Passage through the Realm by Bridges and High-ways in Safety: And therefore if the Sea-walls be broken,

(a) Stile 121.

F. N. B. 113.

or the Sewers or Gutters are not scoured, that the fresh Waters can't have their direct Course, the King ought to grant a Commission to enquire, and to hear and determine these Defaults: Which Commission appears in the Register, amongst the Commissions of *Oyer* and *Terminer*; in which it is said, *Nos eo quod ratione dignitatis nostræ Regiæ ad providend' salvationi Reg' nostri circumquaq; sumus stricti, &c.* and with that agrees the Stat. of *6 H. 6. c.* 5. and the Stat. of 23 *H.* 8. *c.* 5. and as to that *vide* a notable Precedent *Pasch.* 44 *E.* 3. *Midd.* 2. *cor' Rege, præcept' est Vicecem' quod distringat* A. B. *& alios quod ipsi defectus walliarum erga terras suas reparant, & si ipsi sufficientes non fuerunt, quod distrin' omnes tenentes terrar', &c. qui defension', commod', salvamen, vel damnum ratione reparat' seu non reparation' walliæ præd' habent seu aliquo modo habere poterint, ita qd' quilibet tenentium præd' juxta quantitatem tenuræ suæ ibid' contributionem præfat'* A.B. *& aliis ad wallias illas faciend' & reparandas faciant indilate*: Which Record was before any Act of Parliament that limited any Form of Commission. The 2 Thing observable in the said Commission at the Com. Law, is this Clause, *Ad hujusmodi wallias, fossata, gutturas, sueras, pontes, calceta, & gurgites in locis necessariis reparand' & quotiescunq; & ubi necesse fuerit de novo facienda*: By which it appears, That by the Commission in the Register at the Com. Law, that the antient Walls, Gutters and Sewers might be repaired or new made; but no new Walls, Gutters or Sewers, by Force of the said Commission might be made. Then we must consider in what Cases the Stat. have made Provision in these Cases: And it is to be known, That the Stat. of 6 *H.* 6. *c.* 5. enlarges the Commission which was at the Com. Law; for where these Words (*de novo facienda*) refer only to old Walls, Gutters, Sewers, *&c.* the said Act hath these Words, *& eadem & alia quotiescunq; & ubi necesse fuerit de novo facienda*; which Words (*& alia*) being added to the former Commission, give the Commissioners Power to make new Walls, Gutters, Sewers, *&c.* but this Act continued but 10 Years; and by 18 *H.* 6. *c.* 10. the like Commission was established for 10 Years; and by 23 *H.* 6. *c.* 9. for 15 Years; and by 12 *E.* 4. *c.* 6. for 15 Years; and by 4 *H.* 7. for 25 Years; and by 6 *H.* 8. *c.* 10. for ten Years, and until the next Parliament and afterwards the Statute of 23 *H.* 8. *c.* 5. was made, which recites none of the former Acts as the others do, but enacts, That there shall be for the future a Commission of Sewers *according to the Manner, Tenor, Form and Effect hereafter ensuing*, and rehearses the Form of the Commission *de verbo in verbum*:

verbum: Which Commission omits the said Words (*& alia*) and follows the Commission in that Point which was at the Common Law; the Words of the Act of 23 *H.* 8. being, *And also to reform, repair and amend the said Walls, Ditches, Banks, Gutters, Sewers,* &c. *and the same (omitting these Words, and other) as often, and where need shall be, to make new*; and the former Clause concerning Execution of the former Stat. and Ordinances, is restrained with these Words *touching the Premisses*, which refer only to repair the old Walls or Sewers, or to make them new; and also a subsequent Clause, *That all and every Statute*, &c. *heretofore made concerning the Premisses*, (which restraineth that Clause *ut supra*) *not being contrary to this present Act, nor heretofore repealed, shall stand and be good and effectual for ever.* So that it was resolved by the said Justices, That by Force of the said Commission founded upon the Act of 23 *H.* 8. the Commissioners could not make the said new River out of the main Land for four Reasons. 1. That this Act prescribes the Manner and Form of the Commission in express Words, which extends only to the Reparation and new making of old Walls, Gutters, *&c.* 2. That these Words, *& alia*, which were included in the Stat. of 6 *H.* 6. and all the said Acts are left out of this Commission. 3. All the former Acts were for a Time, but this Act which establishes this Commission, is made perpetual by the Statute of 3 *E.* 6. *c.* 8. and therefore it would be hard to enlarge it beyond the Words, and to give Power to Commissioners to try new Inventions at the Charge of the Country, which perhaps will never take good Effect, but *via trita est tutissima.* 4. It appears by the Register in the Writ of *Ad quod damnum*, *fo.* 252. and *F.N.B.* 225. *E.* That if an old Ditch or Trench coming from the Sea to a Town, by which Boats or Vessels use to pass to the said Town; now if it is stopped by the Outrage of the Sea, and a Man would sue to the King to have Leave to make a new Trench, and to stop the old Trench, he ought first to sue *Ad quod damnum*, to know what Damage it will be to the King or others: By which, and by the Writ in the Register *de antiqua trenchea obstruenda & nova facienda seu habenda*, it appears that no such new Trench or River which runs to the Sea, can be made without the Writ of *Ad quod damnum*, and thereupon to obtain the King's License to make it. For if any Commissi. might do it *ex officio*, great Inconvenience thereupon for private Lucre might ensue as well as for publick Damage as stopping of Havens, (which are the Gates of the Kingdom) and

Moor 825. Style 152.

and other common Rivers, as particular Nusance and Prejudice to private Men, by drowning of their Lands and Inheritance, and therefore such new Rivers can't be made without the King's License, grounded upon a Writ of *Ad quod damnum. Vide* the Writ of *Ad quod damnum* in such Case, *quia optimum.* But it was resolved, That as new inventions, as of an artificial Mill to cast out the Water, or of a great River out of the main Land, and other the like, are not warranted by the said Commission upon the said Act of 23 *H.* 8. *quia nihil semel inventum est & perfectum*; so when an old Sewer is newly to be made or cleansed, some small Alteration in respect of the natural Change of the Current, or otherwise for the publick Good of such Place (and so in the like Cases) may be made. So when an old Wall by the extream Rage of the Water is broken down, to preserve the Lands within the same Level from Inundation; another Wall, in Case of inevitable Necessity for the publick Good of that Part, may be made to defend the People and their Lands within the same Level; for this Manner of Defence by Walling, is no new Invention, but the old Way and Mean well approved of by Experience, and upon the Matter it is but a new making of the old Wall in a Place by inevitable Necessity more fit than the other. But if by the timely Reparation of the old Wall, the extream Danger may be avoided, no other ought to be made; for *si assuetis mederi possis nova non sunt tentanda:* But when new Inventions are proposed, as is aforesaid, if they are apparently profitable, no Owner of the Land there will deny to make Contribution for his Advantage; and then it ought to be made by their voluntary Consent and Charge, and not by Constraint by Force of the said Commission of Sewers upon the said Act of 23 *H.* 8. but sometime when the publick good is pretended, a private Benefit is intended; and if any such new Invention is in truth (*quod raro aut nunquam fit*) good for the Commonwealth, and yet no Consent can be obtained for the making of it, then there is no Remedy but to complain in Parliament, and there to provide Relief, as Sir *John Popham* late Chief Justice of *England* did, who exhibited a Bill in Parliament *anno* 3 *Jac.* for making a new River in the said Isle, which he himself at his great Charge begun, knowing that without an Act of Parliament, none could be compelled by Force of the Commission of Sewers, to contribute to such new Attempt. But the Bill was utterly rejected.

Co. Lit. 230. a. 377. b.

It was also resolved, that none could be taxed towards the Reparat. &c. but those who had Prejudice, Damage, or Disadvantage by the said Nusances or Defaults, and who might have Benefit

Cro. Arg. 24, &c.

Benefit and Profit by the Reformation or removing of them. Also the (*a*) Tax, Assessment and Charge ought to have these Qualities. 1. It ought to be according to the Quantity of their Lands, Tenements and Rents, and by the Number of Acres and Perches. 2. According to the Rate of every Person's Portion, Tenure or Profit, or of the Quantity of the Common of Pasture, or of Fishing, or other Commodity. And therefore it was clearly resolved by them, That the said Tax (*b*) generally of a several Sum in gross upon a Town is not warranted by their Commission, but it ought to have been particular, according to the express Words, upon every Owner or Possessor of Lands, Tenements, Rents, &c. observing the Qualities aforesaid. And it is to be observed, that there are three Manner of Statutes which concern Sewers: The first consists *in defendendo & reparando wallias, seweras, &c.* The 2. *in destruendo & amovendo nocumenta, &c.* The 3. which concerns both the Points, *tam in destruendo quam in defendendo.* Of the first Sort are *Magna Charta, c.* 15, & 16. 6 *H.* 6. *c.* 5. 18 *H.* 6. *c.* 10. 23 *H.* 6. *c.* 9. 12 *E.* 4. *c.* 6. 4 *H.* 7. *c.* 1. 6 *H.* 8. *c.* 10. Of the second Sort are *Magna Charta, c.* 23. 25 *E.* 3. *c.* 4. 45 *E.* 3. *c.* 4. 1 *H.* 4. *c.* 12. 9 *H.* 6. *c.* 9. (*c*) 12 *E.* 4. *c.* 7. The third Sort of Statutes, which concern both the former Sorts, are 23 *H.* 8. *c.* 5. 25 *H.* 8. *c.* 10. 3 *E.* 6. *c.* 8. and 13 *Eliz. c.* 9.

(*a*) Callis Sect. 122.

(*b*) Moor 825. Cro. Jac. 336. 2 Bulst. 198.

(*c*) Antea 138.

SCROPE'S

Revocation.

SCROPE's Case.

Mich. 10 Jac. 1.

In the Court of Wards.

Fitzgib. 218.
2 Rol. 262, 263.
3 Keb. 537, 551, 572.
Lit. Rep. 111.
Winch. 83.

THE Case between *Thomas Bridges* and *Anne* his Wife Plaintiffs, and *Elizabeth Scrope* and others Defendants, was such: *Nicholas Scrope* seised in Fee of the Manors of *Harleston* and *Mount*, and having Issue the said *Anne* one of the Plaintiffs by *Winefrid* his Wife, by Indenture dated 26 *Junii* 23 *Eliz.* for the Preferment of *Winefrid* his Wife and *Anne* their Daughter, covenanted with diverse to stand seised of the said Manors to the Use of the said *Nicholas*, *Winefrid*, and *Anne* for their Lives, and afterwards to the said *Anne*, and the Heirs of her Body, with other Remainders over; with a Proviso, That if the said *Nicholas* during his Life, and after the Debts paid, mentioned in a Schedule annexed to the Indenture, should be disposed either to determine, disannul, change, alter, enlarge, diminish or make void *the Uses or Estates, or any of them of the Premisses, or any Part thereof; That then it shall be lawful to and for the said* Nicholas, *at all Times at his Pleasure, by his Writing indented under his Hand and Seal, subscribed in the Presence of three Witnesses, to determine, disannul,* &c. *And also by the same Writing at his Will and Pleasure, or any other Writing whatsoever, signed and subscribed as above, to limit, declare, and appoint the Uses of the same to the Persons abovesaid, or to any other Persons*, &c. *Winefrid* died, the said *Nicholas* married *Eliz. Morrice*; and by Indent. *ult. Nov.* 33 *El.* subscribed in the Presence of three Witnesses, in Consideration of a Jointure to be made to the said *El.* covenanted with *Wykes* and *Warnford*;

to ſtand ſeiſed of the ſaid Manor of *Harleſton* to the Uſe of the ſaid *Nicholas* and *Eliz.* for their Lives, and afterwards to the Uſe of the right Heirs of the ſaid *Nicholas*, &c. and other Conveyances of the Fee-ſimple were afterwards made. And it was reſolved by the two Chief Juſtices, and the Ch. Baron, That although in this Caſe there s not any (*a*) expreſs Signification of his Purpoſe or Determination to determine, diſannul, *&c.* Yet foraſmuch as by the ſaid Indenture of 33 *Eliz.* he covenanted to ſtand ſeiſed to the Uſe of himſelf, and the ſaid *Eliz.* then his Wife, and afterwards to his right Heirs, it inured to two Intents. 1. To declare his Purpoſe and Determination to determine, diſannul, *&c.* and thereby *ipſo facto* the former Uſes ceaſed. And 2. the Covenant in the ſame Indenture inured to raiſe a new Uſe to the ſaid *Nicholas* and *Elizabeth* his Wife, and to the Heirs of the ſaid *Nicholas:* And ſo it was reſolved in a Caſe in the King's Bench, between (*b*) *Frampton* and *Frampton*, *Trin.* 2. *Jac. Regis*, *quia* (*c*) *non refert an quis intentionem ſuam declaret verbis*, *an rebus ipſis*, *vel factis*; and when he limited new and other Uſes, he thereby ſignified his Purpoſe to determine and alter the Uſes before. But it was reſolved, That all incident Circumſtances preſcribed by the Proviſo, as to Subſcription, Witneſſes, and other (*d*) Circumſtances, ought to be obſerved in the ſecond Indenture.

(*a*) Raym. 301. Hob. 313. Cro. Car. 472. 2 Rol. 262, 263. 1 Jones 393. 6 Co. 33. b. Co. Lit. 237. a. 1 Sid. 343. Winch 83.

(*b*) 2 Rol. 263.

(*c*) 3 Keb. 537. 1 Rol. 300, 303. 2 Rol. 263. 10 Co. 52. b.

(*d*) Hob. 312. Bridgm. 21. Lit. Rep. 25.

[*Yet Powers of Revocation are to be largely taken.* Comberb. 11, 12.]

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