The Eleventh PART of the

REPORTS

OF

Sir *Edward Coke*, Kt.

Chief Juſtice of ENGLAND (of Pleas aſſign'd to be holden before the King himſelf) and *one* of the Privy *Council of State*.

OF

Divers Reſolutions and Judgments given on ſolemn Arguments, and with great Deliberation and Conference of the moſt 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 Thirteenth Year of the Moſt High and Moſt Illuſtrious *JAMES* King of *England*, *France* and *Ireland*, and of *Scotland* the 49th, 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 Antient as Modern: And the PLEADINGS in *ENGLISH*, carefully Reviſed and Corrected.

Simplicitas Juſtorum diriget eos; & ſupplantatio perverſorum vaſtabit eos. PROV. cap. 11. ver. 3.

Non roborabiter homo ex impietate; radix autem Juſtorum non commovebitur. PROV. cap. 12. ver. 3.

Compendaria res improbitas, virtus longa.
Compendia, ſunt diſpendia.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer*, Eſq;) for R. Gosling, W. Mears, W. Innys and R. Manby, T. Woodward, F. Clay, J. Ward, J. and P. Knapton, T. Motton, T. Longman, D. Browne, T. Osborne, H. Lintot, and T. Waller. M.DCC.XXXVIII.

Deo, Patriæ, Tibi.

MUltos ſcribendi Libros, dicit *Solomon*, nullus eſt finis; quod intelligitur de hiis, qui nec metam ſibi, nec finem proponunt aliquem: Loco igitur Præfationis (Docte Lector) ſubſtantiam Caſuum in hoc undecimo opere meo emiſſorum, paucis edocere decrevi; quo facile eorundem finem & intentionem colligere poſſis.

In primo loco, caſum Baronis *la Ware*, decretum in Parliamento *Anno* 39 *Eliz.* tento retuli; ubi conſtat de inhabilitatibus perſonalibus & temporariis, quæ

OF *writing many Books, ſaith* Solomon, *there is no End; which is underſtood of ſuch as are written to no End: I mean therefore, Learned Reader, by Way of Preface, to propoſe unto you in a few Words, the Subſtance of the Caſes in this Eleventh Work, whereby you will eaſily collect the End and Scope of the ſame.*

1. *In the firſt Place, I report the Caſe of the Lord* laWare, *reſolved in Parliament holden in the* 39*th Year of the Reign of Queen* Elizabeth; *wherein appeareth what*

Diſabilities are perſonal and temporary, and bar-reth not the Heir to claim Honour and Dignity from that Anceſtor ſo diſabled, or from any other Anceſtor paramount him; and alſo what Diſabilities are in Law abſolute and perpetual.

2. *In the ſecond Place, followeth Auditor* Curle's *Caſe, reſolved in the 7th Year of the moſt happy Reign of King* James: *In this Caſe is reſolved, that judicial Offices cannot be granted in Reverſion, but that generally ſuch Grants by the Common Law of* England, *are utterly void, and therefore, though this Caſe be calculated for the Meridian of the Court of Wards, yet by Computation, it may ſerve for all the Judicial Courts of* England: *A neceſſary Caſe, I aſſure you, to be publiſhed, and the Law to be put in Uſe in theſe Days: In which Caſe are alſo handled ſome other particular Points concerning the Office of the ſaid Auditorſhip in the Court of Wards.*

hæredem a vindicando titulos & dignitates ab anteceſſore ſic inhabilitato, ſeu ab aliquo alio ſuperiore anteceſſore, non impediunt; & de Inhabilitatibus in lege abſolutis & perpetuis.

2. Sequitur in ſecundo loco caſus Auditoris *Curle*, Anno ſeptimo fæliciſſimi regni Regis noſtri *Jacobi* adjudicatus: In hoc caſu Judicialia Officia in reverſione concedi non poſſe, immo omnes hujuſmodi conceſſiones generaliter per communem legem Angliæ penitus eſſe irritas determinatur, ideoq; licet caſus iſte ad Meridianum Curiæ Pupillorum calculetur, per computationem tamen, omnibus Angliæ Curiis Judicialibus inſerviat: Caſus proculdubio in lucem proferri neceſſarius, & Lex hiſce temporibus debitæ executioni demandanda: ubi etiam multa tractantur particulariter de Officio dicti Auditoris

Auditoris Curiæ Pupillorum.

3. Caſus deinde accedit *Johannis Heydon*, equitis, Termino Trinitatis anno decimo *Jacobi* Regis determinatus; in quo perſpicue oſtenditur, ubi damna ſeparaliter taxabuntur per Juratores, & ubi primus duodecemviratus inter quærentem & unum defendentium, taxabit damna, pro omnibus defendentibus, & ubi non: Unde libri inter ſe pugnantes optime reconciliantur; qui dum minus recte intelligebant', multa arreſtata fuerunt Judicia, & multa quæ lata fuerunt, per Breve de Errore ſubverſa fuerunt, ad immenſum diſpendium, moram, & vexationem partis gravatæ.

4. Poſt hunc ſe apperit caſus de *Priddle* & *Napper* de Termino Michaelis anno decimo *Jacobi* Regis: in quo edocetur quæ unitas juxta Statutum de anno triceſimo primo *Hen.* Octavi, ad exonerandam terram

3. *Then cometh in Sir* John Heydon's *Caſe, adjudged in Trinity Term* 10 Regis Jacobi; *wherein is perſpicuouſly expreſſed, where Damages ſhall be ſeverally aſſeſſed by the Jurors; and where the firſt Jury between the Plaintiff, and one of the Defendants ſhall aſſeſs Damages for all the Defendants, and where not; whereby all the Books are well reconciled; for want of right Underſtanding whereof, many Judgments have been arreſted, many that have been given, have been overthrown by Writ of Error, to the great Charge, Delay, and Vexation of the Party grieved.*

4. *After this appeareth the Caſe of* Priddle *and* Napper, *in* Mich. 10 Jacobi Regis; *and therein is ſet down what Unity is ſufficient within the Statute of* 31 H. 8. *to diſcharge the Land of Tithes, with divers other*

Points concerning the ſame.

5. *Next after, Doctor* Graunt's *Caſe preſenteth itſelf, adjudg'd* Mich. 11 Jacobi Regis, *whereby you may ſee where Parſons and Vicars may have certain Tithes for Houſes in Cities, Boroughs,* &c.

6. *Then you ſhall read the Caſe of Sir* Henry Nevill, *adjudged* Mich. 11 Jacobi Regis: *And underſtand that a cuſtomary Manor may be holden by Copy, and that ſuch a Lord may hold Courts and grant Copies.*

7. *Now caſt your Eye upon Doctor* Ayraye's *Caſe, adjudged* Mich. 11 Regis Jacobi; *wherein you ſhall perceive what be material Miſnamings of Corporations, either to avoid their own Grants by miſtaking their own Name, or Grants made to*

de Decimis ſatis eſt, cum diverſis aliis de eadem re Articulis.

5. Proxime ſe repreſentat caſus Doctoris *Grant*, Termino Michaelis anno undecimo Regis *Jacobi* decretus; unde videre eſt, in quo caſu Rectores & Vicarii habere poſſunt quaſdam decimas pro domibus in Civitatibus, Burgis, &c.

6. Caſum deinde evolves *Henrici Nevil*, Equitis, Termino Michaelis anno undecimo *Jacobi* Regis adjudicatum, unde manerium Cuſtumarium per tranſcriptum Apographum ſive (ut loquimur) per copiam teneri poſſe, tum & hujuſmodi Dominum Curias tenere, & tranſcripta concedere poſſe intelliges.

7. In Doctoris *Ayraye* caſum, de Termino Michaelis anno undecimo Regis *Jacobi*, jam oculos intendas: In quo, quæ ſunt materiales male nominationes Corporationum, tam ad proprias ſuas conceſſiones, quam ad conceſſiones in

eas collatas ob errorem proprii nominis enervandas. Caſus ſane, qui non ſolum Collegiorum & aliarum Corporationum, ſed etiam Firmariorum aliorumq; ſub iis rem ſibi vendicantium commodum ſpectat & tranquilitatem.

8. Dehinc oculis veſtrum ſubjicitur *Henrici Harpur* caſus, Termino Trinitatis anno duodecimo *Jacobi* Regis, judicatus: in quo viri edocentur, Quomodo, hii qui tenent de Rege per ſervicium militare in capite, duas partes terrarum ſuarum &c. pro debitis ſuis ſolvendis, uxore eferenda, & filiis natu minoribus promovendis vel aliter ſecundum lege poſſunt diſponere, nullam omnino poſt obitum ſuum inter hæredem & Legatarios inquietationem ſeu queſtionem relicturi: Ignorantia cujus, ſi non deſtructionis, magni tamen familiar' multarum damni in cauſa hucuſque fuit.

9. Perinde *Henrici Pigot* caſum retuli, ad Le-

them; a Caſe that concerns the Good and Quiet, not only of Colleges and other Corporations, but of their Farmers, Leſſees, and others that claim under them.

8. *Then is offered to your View* Henry Harpur's *Caſe, reſolved,* Trin' 12 Jacobi Regis; *wherein Men are directed how the King's Tenant that holdeth by Knights Service* in capite, *may diſpoſe two Parts of his Lands,* &c. *for the Payment of his Debts, Advancement of his Wife, Preferment of his younger Children, or otherwiſe according to Law, and leave no Trouble or Queſtion, after his Death, between his Heir and the Deviſees; the Want of* Knowledge *whereof hath tended, if not to the undoing, yet to the great Hinderance of many Families.*

9. *Next to this, have I reported* Henry Pigot's *Caſe,*

Caſe, adjudged Trin. 12 Jacobi Regis, *to inſtruct the Reader what Alteration of any Deed after the Enſealing and Delivery, and by whom, avoideth the Deed.*

10. *By this Time I preſume you have expected, and deſired to ſee the Caſe of* Alexander Poulter, *that moſt wickedly and feloniouſly burnt the good Town of* Newmarket, *who upon Conſideration of many intricate and ill-penned Statutes, in the End was clearly (as you ſhall perceive) ouſted of his Clergy: Wherein many notable and obſervable Points concerning Clergy, which in ſome Sort concern the Life of Man, are reſolved,* Mich. 12 Jacobi Regis.

11. *And leſt there ſhould be Error in bringing of a Writ of Error,* Metcalfe's *Caſe,* Mich. 12 Jac. *hath gotten the next Place: Wherein is plainly diſcuſſed, upon what Judgment or Award a Writ of Error doth lie, and upon what* ctorem inſtruendum, qualis immutatio alicujus ſcripti poſt ſigillationem & deliberationem, & per quem vacuum reddit ſcriptum.

10. Te demum expectaturum & optaturum opinor, caſum *Alexandri Poulter,* qui ſceleratiſſime & felonice oppid' illud lautum *Newmarket* incendebat; qui poſt conſiderationem variorum Statutorum perplexorum & male compoſitorum tandem (ut obſerves) a beneficio clericatus penitus fuit excluſus: Quo etiam multa imprimis notanda de Clericatu, ad vitam hominis quodammodo ſpectant' determinantur. *Mich.* 12 *Jac. Regis.*

11. Ac ne erratum eſſet in ferendo Breve de Errore, caſus *Metcalfe* de Termino Michaelis anno duodecimo *Jacobi* Regis proximam ſibi ſedem ſortitus eſt; ubi plene diſcuſſum eſt, ſuper quo judicio ſive arbitrio Breve de Errore emanare

manare poteſt, & e contra.

12. Quin &, ut declinetur error in arrogandis mulctis pro contemptib' in Letis & aliis curiis de recordo, in caſu *Ricardi Godfrey* armigeri, dilucide decernitur, ubi oportet mulctam eſſe ſeparalem & ubi conjunctam, & quomodo mulcta illegitime impoſita evitetur, & quando Dominus pro certo Leti diſtringere poteſt. *Mich.* 12 *Jac.*

13. Caſus *Ricardi Liford* locum ſequentem merito ſibi obtinuit; quia in eo adjudicatur, quid intereſſe Firmarius habet in arboribus ſtructuræ idoneis quando non ſunt exceptæ; & quid intereſſe in eodem caſu & Locatori, & quid & quale intereſſe Firmarius habet in arboribus exceptis, & utrum in eodem caſu per generalem conceſſionem reverſionis transferuntur illi cui conceſſio facta fuit, cum multa eruditione de hac re neceſſaria. *Mich.* 12 *Jacobi.*

Judgment or Award it lieth not.

12. *And to avoid Error in impoſing of Fines upon Contempts in Leets, and other Courts of Record, in the Caſe of* Richard Godfrey, *Eſq; is clearly reſolved, when the Fine ought to be ſeveral, and when joint, and when and how a Fine unlawfully impoſed, may be avoided, and when the Lord may diſtrein for Court Leets.* Mich. 12 Jac.

13. *The next Room* Richard Liford's *Caſe hath juſtly gotten, for therein is reſolved, what Intereſt the Leſſee hath in Timber Trees, when they are not excepted, and what Intereſt in that Caſe the Leſſor hath: What and what Manner of Intereſt the Leſſor hath in Trees excepted, and whether, in that Caſe by a general Grant of the Reverſion, they paſs to the Grantee, and much neceſſary Learning concerning that Matter.* Mich. 12 Jac.

14. *Then*

14. *Then have you the Caſe of the Taylors of* Ipſwich, *a neceſſary Caſe for poor Tradeſmen, that many Times are by Ordinances made by incorporations (whereby the publick Good is pretended, and private Reſpects intended) barred or hindred of the Freedom of their Trade.* Mich. 12 Jac.

14. Deinceps operatorum pannorum Gipuvicenſium habes caſum, valde neceſſarium pauperibus Mechanicis, qui multoties colore ordinationum conſtitutarum per incorporationes (in quibus bonum publicum prætenditur, privatum vero intenditur) a libero uſu artium ſuarum excludentur vel ſaltem impediuntur, *Mich. 12 Jac.*

15. Edward Saul's *Caſe taketh up a very little Standing, and ſhortly ſheweth that an* Ejectione firmæ, *(that now is grown ſo common) lieth not for a Place known, but of certain Acres of Land, Meadow or Paſture,* &c. Mich. 12 Jac.

15. *Edwardi Saul* caſus limites non ita latos occupat, ſed breviter oſtendit, quod breve de *Ejectione firmæ* (quod in uſum frequentiorem jam accrevit) de loco certo nomine tantum denotato uſurpari non poteſt, ſed de jugeribus fundi, prati, paſturæ, *&c. Mich. 12 Jac.*

16. *And* Bentham's *Caſe in as few Words as the other, ſheweth how in ſome Caſes the Omiſſion of Matter material in a Verdict may be ſalved.* Mich. 12 Jac.

16. Porro *Benthami* caſus adeo paucis declarat verbis, quomodo omiſſio rei materialis in veredicto nonnunquam ſuppleri poteſt. *Mich. 12 Jac.*

17. *I could not keep back* Dr. Foſter's *Caſe, wherein, upon mature*

17. Nec caſum Doctoris *Foſter*, retinere potui, in quo, maturam poſt

poſt conſiderationem habitam de omnibus ſtatutis in Sacrifuges editis, via aperta recluditur pro eorum merita & feſtina juxta leges convictione. Et hic ſane caſus enarrat gloriam Dei & Religionis noſtræ honor'. *Mich.* 12 *Jacobi.*

18. Inſuper caſus Magdalenſis Colleg' in Cantabridgia, proximum ex merito ſibi locum vendicat, qui tendit ad ſuſtentationem veræ Dei Religionis, elevationem artium liberalium & Scientiarum, ſupportationem ſtatus Eccleſiaſtici, præſervationem & Proſperitatem ambarum illarum ſororum celeberrimarum Academiarum Cantabrigiæ & Oxoniæ, acſingulorum hujus regni Collegiorum, necnon ad Xenodochiorum & Proviſionum pro pauperibus firmamentum: Et adjudicatus fuit Termin'Paſchæ 13 *Jac.*

19. In temporis ſerie accedit caſus *Ludovici Bowles*, in quo, vera operatio ac ſenſus clauſulæ in Dimiſſionibus, abſque

Conſideration had of all the Statutes of Recuſants, a clear Way is opened, for their juſt and ſpeedy Conviction according to the Laws; a Caſe that concerneth the Glory of God, and the Honour of our Religion. Mich. 12 Jac.

18. *And juſtly doth the Caſe of* Magdalen *College in* Cambridge *challenge the next Place: Which tendeth to the Maintenance of God's true Religion, the Advancement of liberal Arts and Sciences, the Support of the Eccleſiaſtical State, the Preſervation and Proſperity of thoſe two famous Siſters, the Univerſities of* Cambridge *and* Oxford, *and of all the Colleges within the Realm, and the Eſtabliſhment of Hoſpitals, and Proviſions for the Poor: Adjudged* Paſchæ 13 Jac.

19. *And in Courſe of Time doth* L. Bowles's *Caſe come, wherein, is clearly reſolved the true Operation and Senſe of the*

the Clauſe in Leaſes, Without Impeachment of Waſte; *and what Intereſt the Leſſee hath in the Timber of an Houſe proſtrated by Tempeſt: Adjudged* Paſchæ, 13 Jac.

20. *And though it cometh not in Sequence of Time, yet the Caſe of Monopolies cannot come out of Time, wherein divers Things concerning Monopolies, are clearly reſolved, and worthy to be publiſhed.* Trin. 44 Eliz.

21. *And I could not keep back the Earl of* Devonſhire's *Caſe reſolved* Hill. 4 Jac. *whereby the Prerogative of the King appeareth; That his Right of Reſtitution dieth not by the Death of the Party that doth him Wrong; the End whereof is, that the King's Toll may come to the right Mill.*

22. *And laſtly, the Caſe of* James Bagge, *adjudged* Trin. 13 Jac. *wherein is reſolved, where a Writ of Reſtitution for a Freeman of an Incorporation being disfranchiſed, doth*

impetitione vaſti & quid intereſſe Firmarius habet in Maeremio domus a tempeſtate plene decernitur proſtratæ. *Paſch.* 13 *Jac.*

20. Et quanquam ordine temporis non ſequitur caſus Monopoliorum, intempeſtive tamen adeſſe non poteſt; ubi plurima de Monopolis liquide determinantur, quæ in medium proferri digna ſunt. *Trinitat.* 44 *Eliz.*

21. Nec Comitis Devon' caſum adjudicatum *Hill.* 4 *Jacobi*, ubi prærogativa Regis in hoc apparet manifeſte, Quod jus ejus reſtitutionis non moretur, per mortem perſonæ qui injuriam ſibi inferebat, celare nequeo; cujus quidem finis eſt, quod vectigalia Regia ad proprium molendinum dirigantur.

22. Caſus denique *Jacobi Bagge*, determinatus Trinitatis 13 *Jac.* edocet in quo caſu Breve *Reſtitutionis* pro municipe alicujus incorporationis exurbitatio acquiri poteſt,

poteſt, & incidenter qui habent poteſtatem exurbitare, & quæ ſunt cauſæ ſufficientes exurbitationis.

Hoc undecimum opus (erudite Lector) in hac tempeſtate multorum aliorum arduorum & inſtantium negotiorum emiſi; Ideoque (ut in votis mihi fuit) perpolire non potui.

Si mihi in hac re fore Judex liceret, caſuum hujuſce libri materiam nulli ſuperiorum ſecundam eſſe affirmarem. Denique ut ſit Deo gloria, Regis Majeſtati honor, bono publico incrementum, Docto ſtabiliment' & Studenti inſtructio, ſcopus eſt, quem mihi in hac editione propoſui.

lie: And incidently, who have Power to disfranchiſe, and what be ſufficient Cauſes of Disfranchiſement.

This Eleventh Work (learned Reader) I have publiſhed in the Tempeſt of many other important and preſſing Buſineſs; and therefore could not poliſh them as I deſired.

If I might judge, I ſhould ſay, that the Matter of theſe are not inferior to any of the other. The End of this Edition is, that God may be glorified, his Majeſty honour'd, the common Good encreaſed, the Learned confirmed, and the Student inſtructed.

The Lord *De La Warre's* Caſe.

See Lucas's R. 116, 122, 283, &c. and 407. 91, 356.

Anno 39 Eliz.

AT the Parliament held in *anno 39 Reginæ Eliz.* the Caſe was ſuch: *Thomas la Warre*, Kt. Lord *la Warre*, Son and Heir of *William*, Son and Heir of *George*, Brother and Heir of *Thomas*, Son and Heir of *Thomas* Lord *la Ware*, exhibited his Petition to the Queen to this Effect, That whereas the ſaid *Thomas* his Great Grand-father was called to Parliament by Writ of Summons, *An.* (*a*) 3 *H.* 8. and afterwards the ſaid *Thomas* the Great Grand-father died; after whoſe Death *Thomas* his Son was called to divers Parliaments by Writ of Summons, and afterwards by Act of Parliament, *Anno* 3 *E.* 6. for diverſ Cauſes mentioned in the ſaid Act, it was enacted, That the ſaid *William*, during his Life, ſhould be diſabled to claim or enjoy any Dignity or Lordſhip in any Right, Eſtate, *&c.* by Deſcent, Remainder, or otherwiſe, and afterwards the ſaid *Thomas*, Son of *Thomas*, died; after whoſe Death, the ſaid *William* being ſo diſabled, was not called to any Parliament by Writ of Summons, till Queen *Elizabeth* called him to Parliament by Writ of Summons, and he ſat as Puiſne Lord of the Parliament, and afterwards died: And now the ſaid *Thomas* his Son being called to this Parliament by Writ of Summons, ſued to the Queen, that he might have the Place in Parliament of his ſaid Great Grand-father, *viz.* between the Lord *Berkeley* and the Lord *Willoughby* of *Ereſby*: And the ſaid Petition was endorſed in theſe Words, *Her Majeſty hath*

D'ewes Journal 526, 527, 528, 529. Cambden's Eliz. 541, 542. Dugdale's Baron. Tom. 2. fo. 141, 142. Hughs Abr. 1337.

(*a*) Dugdale's Summ. ad Parliament. 488.

Raymond 354. 2 Rol. Rep. 418.

Dugdale's Summ. ad Parliament. 536.

come

D'ewes Journal 526.

commanded me to ſignify to your Lordſhips, That upon the humble Suit of the Lord la Warre, *ſhe is pleaſed that the Matter ſhall be conſidered and determined in the Houſe, Rob. Cecil:* Which Petition being read in the Upper Houſe of Parliament, the Conſideration thereof was committed to the Lord *Burghley*, Lord Treaſurer, and divers other Committees; who at his Chamber in *Whitehall*, heard the Counſel Learned on both Parties, in the Preſence of the two Chief Juſtices, and divers other Juſtices; and two Objections were made againſt the Claim of the ſaid Lord *la Warre.* 1. Foraſmuch as his Father was diſabled by Act of Parliament to claim the Dignity, the Petitioner could not convey by him who was diſabled, as Heir to his Great Grand-father, and by Conſequence he could not have the Place of his Great Grand-father, but his Father's Place.

But it was reſolved by the Juſtices, That there was a Difference betwixt a Diſability perſonal and temporary, and a Diſability abſolute and perpetual: As where one is attainted of Treaſon or Felony, that is an abſolute and perpetual Diſability by Corruption of Blood, for any of his Poſterity to claim any Inheritance in Fee-ſimple, either as Heir to him, or to any Anceſtor above him; but when one is but diſabled by Parliament (without any Attainder) to claim the Dignity for his Life, it is a perſonal Diſability for his Life only, and his Heir after his Death may claim as Heir to him, or to any Anceſtors above him. The ſecond Objection was, That the ſaid *William* had accepted of a new Creation of the Queen, which Dignity newly gained, did deſcend to the Petitioner, which he could not wave, and therefore the Petitioner could not have other Place than his Father had.

1 Ventris 416. Co. Lit. f. 25. b.

2 Roll. Rep. 418.

Camden's Eliz. 542.

To which it was anſwered and reſolved, That the Acceptance of a new Creation by the ſaid *William*, could not hurt the Petitioner, becauſe the ſaid *William* was at that Time diſabled, and in Truth, was not a Baron, but only an Eſquire; ſo that when the old and new Dignity deſcend together, the old ſhall be preferred. Which Reſolution was well approved by all the Lords Committees, which was accordingly reported to the Lords of the Parliament, and allowed by them all: Whereupon it was ordered by the Lords, That the Queen ſhould be acquainted with it by the Lord Keeper of the Great Seal, which was done accordingly, and the Queen likewiſe confirmed it: All which was ordered and entered accordingly: Whereupon, at the ſame Parliament the Lord *De La Warre* in his Parliament Robes, was by the Lord *Zouch* (ſupplying the

the Place of the Lord *Willoughby*, then within Age) and the Lord *Berkeley* alſo in their Robes, brought into the Houſe, and placed in his ſaid Place, *viz.* next after the Lord *Berkeley*; Garter King of Arms attending upon them, and doing his Office: And I was of Counſel with the Lord *De la Warre.*

Dugdale's Summ. ad Parliament. 538.

Fitzgib. 91.

Auditor CURLE's *Caſe.*

Hill. 7 Jac. I.

4 Inſt. 188. Co. Lit. 77. a. b. 12 Car. 2. cap. 24.

IT is enacted by the Statute of 32 *H.* 8. *cap.* 46. *That there ſhall be two Perſons to be named by the King's Highneſs, which ſhall be called the Auditors of the Lands of his Grace's Wards, and ſhall be called the Fourth Officer of the ſame Court:* Which Office is in Part Miniſterial, as to the auditing of Accompts, and in Part Judicial; for he is ſworn by Force of the ſaid Act, *That you ſhall not take nor receive of Poor nor Rich, any Gift or Reward in any Matter or Cauſe depending or to be diſcuſſed in the ſame Court, &c.* ever ſince which Statute the Auditors of the ſaid Court had an Office judicial, *ſc.* a Voice in every Cauſe depending in the ſame Court: And in the ſame Statute there is a Proviſo, *That* John Peryn *which by the King's Letters Patents hath been heretofore, and now is Auditor of his Grace's Wards Lands, ſhall continue and be one of the two Auditors mentioned in this Act, during the Term of his natural Life.* King *H.* 8. *An.* 32. of his Reign, by his Letters Patents under the Great Seal, nominated and conſtituted *John Peryent unum Auditorum curiæ ſuæ Wardorum & liberationum, habendum* to him for the Term of his Life, with a Fee of forty Marks *per Annum. John Peryent, An.* 36 *H.* 8. ſurrender'd his Eſtate and Patent to the King; and *H.* 8. by his Letters Patents under the Great Seal, *in complementum tam prioris quam poſterioris actus* (*viz.* of 32 & 33 *Hen.* 8.) granted to *J. Peryent* and *W. Tooke officium unius Auditorum curiæ ſuæ Ward', habendum dictis J. Peryent & W. Tooke conjunctim & diviſim pro termino vitarum ſuarum & eorum alterius diutius vivent', cum feodo* 40 *Marcarum.*

4 Inſt. 202.

32 H. 8. cap. 46. 33 H. 8. cap. 22. 12 Car. 2. cap. 24. Hughs's Abr. 1388, 1389.

Marcarum. Peryent died *An.* 6 *E.* 6. and *William Tooke* exerciſed and enjoyed the Office alone until 30 *Eliz.* and then died. Queen *Elizabeth*, *An.* 31. of her Reign, by her Letters Patents *in complementum*, &c. *ut ſupra*, granted to *Walter Tooke* and *William Curle officium unius Auditorum curiæ ſuæ Wardorum*, &c. *habend' dict'* Waltero *&* Willielmo *&* *alteri eorum conjunctim & diviſim pro termino vitarum ſuarum & eorum alterius diutius viventis.* Our Lord the King that now is, *Anno* 4, during the Lives of *Walter Tooke* and *William Curle*, by his Letters Patents (in which is recited the Grant made of the ſaid Office by Queen *Elizabeth* to *Walter Tooke* and *William Curle*) *& in complementum, &c. ut ſupra*, granted to *J. Churchil* and *J. Tooke*, *Officium unius Auditorum curiæ ſuæ prædictæ, habend' eiſdem* J. Churchil *&* J. Tooke *immediate poſt mortem prædict'* Walteri Tooke *&* Wil. Curle, *vel eorum alterius diutius viventis, vel a tempore quo officium illud per forisfacturam, ſurſum redditionem, ſive quemcunque alium modum primo & proxime vacaverit, aut ad manus noſtras devenire contigerit.* And afterwards *John Churchil* died, and the King reciting both the Letters Patents, the one made to *Walter Tooke* and *William Curle*, and the other to *John Churchil* and *John Tooke in complementum*, &c. *ut ſupra, & ea intentione ut ſint duæ perſonæ poſt mortem aliquorum prædict'* Walteri, Willielmi *&* Johannis *qui ſint vocat' Auditores terrarum Wardorum ſuorum, ſecundum vim & intentionem Actus prædict'*, granted to *Richard Percival Officium unius Auditorum curiæ ſuæ prædict'*, &c. *habendum poſt mortem prædict'* Walteri Tooke, Willielmi Curle, *&* Johannis Tooke, *vel aliquorum duorum eorum qui citius mori contigerint, vel a tempore quo*, &c. *ut ſupra:* And afterwards *Walter Tooke* died, and *William Curle*, and *John Tooke*, and *Richard Percival*, are alive. In this Caſe divers Queſtions were made and argued by Learned Council, on both Parts, at divers Days, as well in *Michaelmas* Term now laſt paſt, as this Term: And upon good Conſideration and Conference between the two Chief Juſtices, and the Chief Baron, theſe Points were unanimouſly reſolv'd.

1. That the Letters Patents made to *John Peryent* and *William Tooke de officio unius Auditorum curiæ ſuæ Wardorum, fuer' bonæ*, For altho' the Statute Enacts, That there ſhall be two Perſons which ſhall be called *the Auditors of the Lands*, &c. ſo that there ſhall be two Perſons and called two Auditors, yet it is but *unum officium*, and they both are but *unus Officiarius*, and ſo the Statute itſelf ſpeaks, theſe two Perſons called *Auditors*, *ſhall be called the Fourth Officer of the ſame Court:* So that the Grant *de* 2 Roll. 152, 153.

Officio unius Auditoris, or *unius Auditorum*, is good enough; for (*a*) *mala grammatica non vitiat conceſſionem*, and if the Grant had been in *Engliſh*, viz. *The Office of one Auditor, or one of the Auditors of the Lands, &c.* it had been good: And ſo is the Book adjudged, by the Advice of all the Juſtices in the like Caſe, in (*b*) *9 Ed.* 4. *fol.* 2. *a. b.* where King *E.* 4. by his Letters Patents, *Anno* 4. of his Reign, granted to *William Swyrenden* and *John Bagot*, *Officium unius Clericorum de Corona in Cancellaria dicti Domini Regis*, for Term of their Lives, *&c.* And in Aſſiſe brought in the King's Bench, *Catesby* took Exception to that Grant, becauſe it appears that *Officium unius Clericorum* is granted to two, and it is impoſſible that two can have the Office of one, no more than if the (*c*) Chief Juſtice of this Place, is granted to two, it is void; for the Matter itſelf proves, That two can't have it in Common, for none can be Chief Juſtice but one. But *ſi Officium Clerici de Corona* be granted to two, it is good enough; and many other Exceptions were taken by him: And the Book ſaith, That the Juſtices ſaid, that they had talked of all theſe Points with the Juſtices of the *Common Pleas*, and it ſeemed to them, that theſe Matters were to no Purpoſe to arreſt the Judgment, and we are of the ſame Opinion; wherefore it was awarded, That the ſaid *Swyrenden* and *Bagot* ſhould recover the Office, and their Damages taxed by the Aſſiſe, *&c.* By which Reſolution of all the Juſtices, it appears, That when there is an Office of Clerk of the Crown in *Chancery*, that it is all one to grant *Officium unius Clericorum de Corona*, *&c.* and to grant *Officium Clerici de Corona*, *&c.* to two, becauſe there is but one Office: So in this Caſe at the Bar there is but one Office, and two Perſons to ſupply it, and therefore the Grant is good; and in this Caſe, this Word *unius* is not numerative, but to note the Unity, Particularity, and Identity of the Office.

(*a*) 9 Co. 48. a. Co. Lit. 146. b. 6 Co. 39. b. 10 Co. 133. a.

(*b*) 6 E. 4. 8. b. 9 E. 4. 11. a. 7 E. 4. 29. b. Dyer 149. pl. 81. 2 Jones 137.

(*c*) 2 Rol. 152. 18 E. 4. 7. b. Br. Grant 170. Br. Patent 69. 9 E. 4. 11. a.

2 Roll. 152.

2. It was reſolved, That altho' theſe two Perſons called Auditors, are but one Officer, yet the Words in the Grant, *viz. Conjunctim & diviſim, & alterius eorum diutius viventis*, are material; for if an Office be granted to two, *Pro termino vitarum ſuarum*, (without more) by the Death of the one of them, the Grant will be void: For being an Office of Truſt there ſhall be no Survivor of it. And in this Caſe no Survivor can be: For inaſmuch as it is enacted by the Act of Parliament, by which this new Court was erected, That there ſhall be two Perſons, *&c.* who have (as is aforeſaid) a Judicial Voice, the K. can't conſtitute one only, for the Subject by the Act has Intereſt in it, *Et ſecurius expediuntur*

Dyer 150. pl. 1. 2 Rol. 86. 5 Co. 9. a. b.

Hob. 214. Jenk. Cent. fol. 292.

expediuntur negotia commiſſa pluribus: But the King may conſtitute one at one Time by one Patent, and another at another Time by another Patent; and altho' he may ſo do, yet he who is firſt conſtituted has not any Judicial Voice till the other is conſtituted; for it is enacted by the Statute, That two Perſons, *&c.* ſhall be one Officer; and therefore it was reſolved, That theſe Words *Conjunctim & diviſim, & alterius eorum diutius viventis*, ſhall ſerve to this Purpoſe, That the Survivor ſhall be one of the Perſons, to whom another ſhall be added. 4 Co. 46. a. 2 Rol. 86.

3. It was reſolved, That this Nomination by the King ought to be under the Great Seal of *England*, and not by Word, nor by the Privy Seal, nor Signet, *&c.* Fitzgib. 291.

4. It was reſolved, That the Grant made by the King to *John Churchil* and *John Tooke* in Reverſion, after the Death of *Walter Tooke* and *William Curle*, was void for three Reaſons. 1. Becauſe he is, as it has been ſaid, a Judicial Officer; for theſe Auditors are one of the Judges of the Court: And as none can give any Judgment of Things which will happen *in futuro*, ſo none can be a Judge *in futuro*; and the Rule is, That *Officia Judiciale non concedantur antequam vacent:* And great Inconvenience would thence enſue: For he who at the Time of the Grant in Reverſion, may be able and ſufficient to ſupply the Office of Judicature, and to adminiſter Juſtice to the King's People, before that the Office falls, may become unable and inſufficient to perform it. And it was reſolved, That neither the Office of Maſter of the Wards, nor of the Surveyor, nor of the Attorney of the ſame Court, can be granted in Reverſion, becauſe they are Judicial Offices. 2. Altho' the Office is in Part Judicial, and in Part Miniſterial, and Offices Miniſterial may be granted in Reverſion; yet foraſmuch as two Perſons ſhall have both theſe as one Office and one Officer, it is by the Act of Parliament ſo entire, that it can't be divided; for the King can't make two Auditors of the Miniſterial Office, and two as to the Judicial, for then there wou'd be four Perſons, and the Act reſtrains it to two; neither can the King make one Perſon to have the Judicial Voice, and the other the Miniſterial Office; for then there wou'd be two Officers, and two Offices, and the Act makes but one Officer; and then the one wou'd have a diſtinct Office and Voice, whereas the Act conjoins them in two Perſons. 3. Theſe Words in the ſaid Grant in Reverſion, *Vel a tempore quo*, &c. *officium illud per foriſfactur', ſurſum redditionem, ſeu quemcunque alium modum*, &c. *vacari contigerit*, cannot (if the Miniſterial Office might be only granted in Reverſion) take Effect by the Death of March. Rep. 41. Cro. Car. 279. Dyer 80. pl. 58. 8 Co. 55. b. Dyer 259. pl. 18. 2 Rol. 154. 2 Jones 126. Co. Lit. fol. 3. b. * Hob. 150, 151. 4 Inſt. 202. 2 Rol. 154. 2 Rol. 154. 2 Jones 126. Cro. Car. 279. Cro. Eliz. 336. Dyer 80. pl. 58. 10 Co. 61. b. Hardr. 12.

Walter Tooke, to make another to exerciſe the Office with the Survivor, becauſe granted to two; and then if *Walter Tooke* had died during their two Lives, there would be three Officers, where the Act reſtrains it to two only; and altho' one dies, that doth not make the Grant, (*a*) which is void, at the Time of the making of it, good. Alſo the Words are, *Cuando Officium illud*, &c. *vacare contigerit*; and that in this Caſe ſhall be intended the whole Office; and that is not void till after the Death of both the Patentees in Poſſeſſion.

(*a*) 10 Co. 62. a. 4 Co. 2. b. 90. a.

5. When *Walter Tooke* died, then *William Curle* remain'd one of the Perſons, *&c.* and the King might add another to him; and until another is added, his Voice is ſuſpended, as in the Caſe of (*b*) 14 *H.* 4. 35. *a.* If a Writ iſſue to the Sheriffs of *London*, and one of them dies, the other can't execute the Writ, becauſe his Power is ſuſpended until he has a Companion choſen to him.

(*b*) Br. Retorn. de Brief 42. Br. Office & Officer 11. Fitz. Retorn de Vicount 56. Hob. 70.

6. It was reſolved, That the Grant made to *Richard Percival*, is void: Firſt, becauſe it is a Judicial Office, and (as is aforeſaid) can't be granted in Reverſion: Secondly, Admitting it might be granted in Reverſion, it recites the Grant made to *John Tooke* and *John Churchil*, as a good Grant, whereas it was void; and the Grant of *Percival* is to begin after that, and ſo the King is deceived in his Grant.

Co. Lit. f. 3. b. 2 Roll. 188. 5 Co. 94. a.

Yelverton 48.

[See *Skin.* 104. where two Perſons make but one Officer.]

Sir

Sir JOHN HEYDON's *Caſe.*

Trin. 10 Jac. 1.

SIR *John Heydon*, Knight, brought an Action of Treſpaſs of Battery, and wounding (which in Truth was in a cruel and barbarous Manner) at *Fakenham* in *Norfolk*, againſt *Froxmere Cocket*, *Thomas Cocket*, and *Jeffrey Cobbe*; *Froxmere Cocket* appear'd, againſt whom the Plaintiff declared with *Simul cum*, &c. And *Froxmere Cocket* pleaded Not Guilty, and thereupon *Venire facias* iſſued, *&c.* And afterwards *T. Cocket* appeared, againſt whom the Plaintiff alſo declared with *Simul cum*, &c. who pleaded alſo Not Guilty, upon which, another *Venire facias* iſſued; and both theſe Iſſues came to Trial at the Aſſizes at *Thetford* in *Norfolk*, *Anno* 8 *Jac. Regis*, before the Chief Juſtice of the *Common Pleas*, and in Truth the Iſſue againſt *Froxmere* was firſt tried, and the Jury aſſeſſed Two hundred Pound Damages; and at the ſame Aſſizes the Iſſue againſt *Thomas Cocket* was tried, and *de bene eſſe* Damages were aſſeſſed to Fifty Pounds; and the Cauſe which moved the Jury to extenuate the Damages againſt the others, was, That altho' they were Parties, and of one Quarrel, yet *Froxmere Cocket* was the moſt malicious and cruel, and his Hand gave the ſaid barbarous and grievous Wounds: *Jeffrey Cobbe* appeared, and confeſſed the Action, and a Writ of Enquiry of Damages awarded upon the Roll, but none iſſued. And a great Queſtion was moved and depended for divers Terms, how, and againſt whom, and for what Damages, Judgment ſhould be entred. And at the laſt, upon Conſideration

1 Brownl. 233. 1 Rol. Rep. 30. Cr. Jac. 348. Jenk. Cent. 269. Hughs Abr. 557. 1405, 2001.

Q. Fitzgib. 98.

deration had of the Precedents, and of our Books, it was reſolved *per totam Curiam*, as follows.

The 1ſt Point reſolved.

1. When in Treſpaſs againſt divers Defendants, they plead Not Guilty, or ſeveral Pleas, and the Jury find for the Plaintiff in all, (*a*) the Jurors can't aſſeſs ſeveral Damages againſt the Defendants, becauſe all is one Treſpaſs, and made joint by the Plaintiff, by his Writ and Declaration; and altho' one of them is more malicious, and *de facto* doth more and greater Wrong than the others, yet all coming to do an unlawful Act, and of one Party, the Act of one is the Act of all of the ſame Party being preſent. And (*b*) therefore in ſuch Caſe, if the Hand of one only gives a mortal Wound, whereupon Death enſues, it is Murder in all who are preſent, and of the ſame Party, altho' the others did not intend to give a Wound ſo mortal, as appears in *Mackellie*'s Caſe, 9 Part of my *Reports*, *fol.* 67. *b.* But (*c*) in Treſpaſs againſt two, If the Jury find one Guilty at one Time, and the other at another Time, there ſeveral Damages may be taxed, (*d*) but if the Plaintiff himſelf confeſſes, that they committed the Treſpaſs ſeverally, there the Writ ſhall abate; and ſo there is a Difference between finding by Verdict, and Confeſſion of the Party. *Vide* 36 *H.* 6. 27. *b.* in *Maintenance*, 2 *H.* 7. 16. *b.* (*e*) Alſo there is a Difference betwixt an expreſs Confeſſion, and not Gainſaying, 8 *H.* 6. 13. *a.* 10 *E.* 4. 8. *b.* 11 *H.* 7. 6. *a.* by *Mordant*, 8 *H.* 5. 5. 8 *E.* 3. 8. *b.* 17 *E.* 3. 43. *a.* 21 *E.* 3. 13. *a.* 18 *E.* 3. 49.

(*a*) Jenk. Cent. 269. 10 Co. 117. a. Poſtea fol. 7. a. Hob. 66. 1 Br. 233. 1 Bulſtr. 257. Cro. Jac. 118. 349. 384, 385. Cro. Car. 54. 243. 1 Rol. Rep. 30, 31. Cro. El. 860.

(*b*) 4 Co. 42. b. 3 Inſt. 138. Plowd. 98. a. 34 H. 8. Br. Coron. 171. 1 Rol. Rep. 31.

(*c*) 1 Brownl. 233. 10 Co. 117. a. Cro. Car. 55. Jenk. Cent. 269. 1 Rol. Rep. 30.

(*d*) Cr. El. 30. Hob. 164. 199. Styl. 15. 1 Leon. 41. 3 Leon. 77. Poſt. 45. a. Hob. 279. 3 Co. 1. b. 36 H. 6. 28. a.

(*e*) Br. Confeſſion 41.

The 2d Point reſolved.

2. It was reſolved, That (*f*) in Treſpaſs againſt two, where one comes and appears, *&c.* againſt whom the Plaintiff declares *Simul cum*, &c. who pleads and is found guilty by the Enqueſt to Damages, and afterwards the other comes and pleads, and is found guilty; the Defendant who pleaded laſt ſhall be charged with the Damages taxed by the former Enqueſt; for the Treſpaſs which the Plaintiff has made joint by his Writ and Declaration, and done at one Time, can't be ſevered by the Jury, if the Jury find the Treſpaſs to be done by all at one and the ſame Time, as the Plaintiff has ſuppoſed. Againſt which it was objected, That it might be miſchievous to the Defendant who laſt pleads; for exceſſive Damages, by Conſent between the Plaintiff and the firſt Defendant, may be found, with which the ſecond Defendant ſhall be charged; and he ſhall have no Remedy to relieve himſelf by Attaint, inaſmuch as he is a meer Stranger to the Iſſue, upon the Trial whereof the Damages were aſſeſſed. But it was reſolved, (*g*) That in ſuch Caſe he ſhould have Attaint; for altho' he is a Stranger to the Iſſue, yet becauſe by the Law he is privy in Charge, he ſhall have Attaint; and

(*f*) 3 Leon. 122. 39 H. 6. 1. a. Cro. Jac. 349. F. N. B. 107. E. 1 Brownl. 233. 10 Co. 119. a. 26 H. 6. Enqueſt 16. 1 Rol. Rep. 34.

(*g*) 10 Co. 119. a. Cro. Jac. 349. F. N. B. 107. E. 39 H. 6. 1. a. 46 E. 3. 21. b. 48 E. 3. 14. b. 35 H. 6. 21. b. Br. attaint. 44. 1 Rol. Rep. 31. Hob. 66.

and therewith agree 44 *E.* 3. 7. *b.* adjudged in the Point; and *F. N. B.* 107. *E.* accord. and in 44 *E.* 3. 6. *b.* in Treſpaſs of Battery there is a Maxim taken, That in every Caſe where the Enqueſt is taken by the Iſſue of the Parties, by the ſame Enqueſt ſhall the Damages be taxed for all. *Vide Paſchæ, 9 Hen.* 6. *Rot.* 345. *in Communi Banco, Exoneratio Juratorum de damnis aſſidendis in tranſgreſſione ſuper verediɛto ſuo, eo quod prius aſſeſſa fuerunt per aliam Jurat' verſus alios in le ſimul cum:* But in *Mich.* 39 *Hen.* 6. 1. *a.* in an Action of Treſpaſs againſt many (who had pleaded in Bar the laſt Term) and one of them made Default, which was recorded, there it is reſolved by the whole Court, That for ſaving of a Diſcontinuance, a Writ of Enquiry of Damages ſhou'd be awarded; but none ſhou'd iſſue, becauſe he ſhou'd be contributory to the Damages taxed by the Enqueſt on the Iſſue of the Parties, if they ſhou'd find for the Plaintiff; and if they ſhou'd find againſt the Plaintiff, then the Writ of Enquiry of Damages ſhou'd iſſue forth. And the Reaſon that no Writ ſhou'd iſſue forth at firſt to enquire of the Damages, until, *&c.* is, becauſe if a Writ ſhou'd iſſue, and Damages be found, it is but an Enqueſt of Office, and not on the Iſſue of the Parties; and yet the Enquiry (if it ſhou'd be lawful) ought to ſerve for all the Damages; for the Enquiry of them ſhall not be twice, and the others who have pleaded to the Enqueſt, if the Iſſue be found againſt them, wou'd be chargeable with thoſe Damages which are found by Enqueſt of Office; and if they are exceſſive, they ſhou'd have no Remedy, and yet no Default in them; for they can't have *Attaint*, becauſe it is but an Enqueſt of Office: But in Caſe when in Treſpaſs againſt two, they plead Not Guilty ſeverally, and ſeveral *Venire facias* are awarded; the Enqueſt which firſt paſſed, ſhall aſſeſs Damages for all, and the ſecond Enqueſt ſhall not aſſeſs Damages; but he ſhall be contributory to the Damages aſſeſſed by the firſt, notwithſtanding he is not Party to it; and yet if the Damages are exceſſive, he ſhall have *Attaint*, and ſo no Damage or Miſchief will accrue to him in ſuch Caſe. *Vide* 21 *E.* 3. 57. *a.* And there in the ſaid Book of 39 *Hen.* 6. 1. *a. Winſlade* the Prothonotary ſaith, It had been a common Courſe here, that ſo ſoon (*tantoſt*) as one had made Default, to award a Writ of Enquiry of Damages, againſt him: To which *Priſcot*, C. J. anſwer'd, it is not a good Uſe: And according to the Saying in *Winſlade* in 19 *Hen.* 6. 8. *a. b.* a Writ of Enquiry of Damages was awarded in ſuch Caſe, but againſt Law *, as before appears. And further, in Arreſt of it was moved and alledg'd, That there was a ſt (*f*) *J. Cobbe*, and the Diſcontinuance

Cro. Car. 54.
10 Co. 119. a.
2 Siderf. 93.
Br. Attaint 17.
1 Rol. Rep. 30.
1 Rol. Rep. 39.
10 Co. 119. a.
19 H. 6. 8. a.
2 Rol. 722.
1 Rol. 280.
39 H. 6. 1. a.
1 Rol. Rep. 30.
Br. Attaint 44.
Cro. Jac. 349.
10 Co. 119. a.
Hob. 66.
F. N. B. 107. E.
39 H. 6. 1. a.
46 E. 3. 21. b.
48 E. 3. 14. b.
35 H. 6. 21. b.
1 Rol. Rep. 30.
31. Br. Default 38.
* Q.
1 Rol. Rep. 31.

is

* 32 H. 8. cap. 30.

is not aided by the Statute of * 32 *Hen.* 8. nor any other Statute; for the Judgment is given upon Confeſſion, and not upon Verdict. Alſo *Jeffery Cobbe* is not Party to the Iſſue or the Enqueſt which aſſeſſed the Damages. *(a) Vide Mich.* 1 *&* 2 *Ph. & Mar.* Iſſue joined betwixt the Demandant and the Vouchee, is out of the Statute of 32 *Hen.* 8. *c.* 30. and yet he was Party to the Iſſue. But it was reſolved, That the ſaid Act extends to the Caſe at Bar, becauſe *Jeffery Cobbe* was Party to the Original, and one of the Defendants in the Action; for the Words of the Statute of 32 *Hen.* 8. are, *If any Iſſue be tried by Oath of twelve or more indifferent Men for the Plaintiff or Demandant, or for the Party of the Tenant or Defendant*, &c. So that the Vouchee is out of theſe Words; but *Jeffery Cobbe* in this Caſe is one of the Defendants, and ſo within the Words of the Act, and a Verdict in this Caſe is given, *(b)* to which he is ſo privy, that he may have *Attaint*. *(c)* Alſo it was affirmed by all the Prothonotaries, and ſo reſolved, That after the Writ of Enquiry of Damages awarded, there is no Continuance taken after in the Common Pleas, betwixt the Plaintiff and the Defendant, againſt whom the Writ of Enquiry, *&c.* is awarded; but it was ſaid the Courſe is otherwiſe in the *King's Bench*: And ſo it was adjudged between *(d) Tooly* Plaintiff, and *Prieſton* Defendant, *Mich.* 29 and 30 *Eliz.* in the Common Pleas, and afterwards affirmed in a Writ of Error in the Court of King's Bench: But there are divers Precedents in this Court, that in ſuch Caſes Continuances have been taken, which is a ſure Way, *Et (e) abundans cautela non nocet.* And afterwards in the Caſe at Bar, Judgment was given for Sir *John Heydon* the Plaintiff, for the Two hundred Pounds aſſeſſed, *&c.* againſt all the Defendants: *(f)* Upon which Judgment a Writ of Error was brought, and all the ſaid Points were moved and debated again at the Bar, and at the Bench in the King's Bench, and upon good Conſideration the Judgment before given, was unanimouſly affirmed by the whole Court. Note Reader, in *Mich.* 28 *&* 29 *Eliz.* in the King's Bench, *(g) Richard Gomerſal* brought an Action of Accompt againſt *J. Gomerſal* of divers Receipts and Parcels; to all which, except one, the Defendant pleaded to Iſſues, (and to one Parcel pleaded nothing) and the Iſſues were found for the Plaintiff. And it was moved in Arreſt of Judgment, That the Plea was diſcontinued, becauſe he did not anſwer to Parcel, as it is agreed in 7 *E.* 4. 24. *b.* and 7 *H.* 6. 5. *a. &c.* And it was objected, That that Diſcontinuance was not remedied by the Statute of 32 *H.* 8. becauſe no Anſwer is given to one Parcel, and of Parcel the Plaintiff could not have Judgment according to his Declaration; for of the Parcel to which no Anſwer was made, no Judgment could be given.

(a) 1 Anderſ. 26, 27. 5 Co. 36. b. 8 Co. 162. b. O. Bendl. 12. N. Bendl. 37. Bendl. in Kelw. 207. b. Bendl. in Aſh. pl. 5. Hob. 281.

(b) 10 Co. 119. a. Cro. Jac. 349. Hob. 66. 39 H. 6. 1. a. 46 E. 3. 21. b. 48 E. 3. 14. b. 35 H. 6. 21. b. F. N. B. f. 107. E.

(c) Jenk. Cent. 269. 1 Roll. Rep. 31. 408. Cro. El. 75. 144. 3 Bulſt. 208, 209. 1 Sid. 16. 1 Rol. 485. Yelv. 97. Noy 120. 17 E. 3. 58. b. pl. 50. Dyer 196. pl. 39.

(d) 1 Leon. 297. Cro. El. 74, 75. 1 Rol. Rep. 31.

(e) Raymond. 273.

(f) Cro. Jac. 348. 1 Rol. Rep. 30.

(g) 2 Leon. 194, 118. March 21. Godb. 55.

3. But

3. But it was reſolved, and ſo affirmed in the King's Bench, That the Statute of 32 *H.* 8. *c.* 30. did extend to it; for it is thereby Enacted, That after Verdict found, Judgment ſhall be given, *any Diſcontinuance, &c. notwithſtanding:* And accordingly Judgment was given of ſo much as was found by the Verdict, *Vide Herlakinden's Caſe in the Fourth Part of my Reports, fol.* 62. *a.* The 3d Point reſolved. Hardr. 331. Hob. 187. 1 Roll. Rep. 31. Cro. Jac. 353. Lucas 410. Poſt. 34.

4. In the Caſe at Bar; foraſmuch as in Judgment of Law, the ſeveral Juries gave a Verdict all at one and the ſame Time, the Plaintiff may have Election to have Judgment *De melioribus Damnis* by any of the Enqueſts, and it ſhall bind all; but *fiat niſi unica executio. Vide Mich.* 10 *&* 11 *Eliz. Rot.* 758. *Hill.* 17 *Eliz. Rot.* 1042. *lib. intrat.* 589. *ſect.* 12. But in the Caſe at Bar, in Truth the greater Damages were firſt aſſeſſed. *Vide* 19 *H.* 6. 8. *a.* by *Hody.* The 4th Point reſolved. Jenk. Cent. 269. Dyer 131. b. 1 Roll. Rep. 395. Cro. Jac. 118, 349. Cro. Car. 54, 55. 193, 243. Hob. 66. Yelv. 68.

5. It was reſolved, That where in Treſpaſs, the Defendants plead ſeveral Pleas all triable by one and the ſame Jury, and both the Iſſues are found for the Plaintiff, the Jury can't ſever the Damages; and if they do, the whole Verdict is vicious, as appears, *Hill.* 43 *Eliz. Rot.* 1694. *in Communi Banco inter Auſten* Plaintiff, and *Williard* and two others Defendants in Battery; one pleaded Not Guilty, and the others pleaded of his own Aſſault; all triable by one Inqueſt, and both the Iſſues found for the Plaintiff, and ſeveral Damages given againſt them, *& male per totam Curiam.* The 5th Point reſolved. Jenk. Cent. 269. 1 Brownl. 233. 10 Co. 119. a. 1 Bulſtr. 157. Cro. El. 860. Cro. Jac. 118. 349, 384, 385. Cro. Car. 54, 243. 1 Roll. Rep. 30. Antea fol. 5. b. Hob. 66.

And in this Caſe a Record was cited, by which it appears, That *Edward Miles* brought Treſpaſs (which began in the King's Bench, 7 *Jac. Regis, Rot.* 413.) againſt *Richard Prat, Thomas Richardſon* and *Nicholas Babbs*, for breaking and entring his Cloſe and Houſe at *Nedeham Market*; and for taking and carrying away a Cupboard of the Value of Forty Shillings, with divers Deeds, Evidences, and Muniments in the ſaid Cupboard contained; a Copper of the Value of Forty Shillings; a Lead of the Value of Ten Pounds, and Forty Yards of Wainſcot, of the Value of 5 *l.* to the Damages of the ſaid *Edward* of Two hundred Pounds, *Nicholas Babbs* pleaded Not Guilty generally, *Tho. Richardſon* to all the Treſpaſs, (except the breaking and entring the Cloſe and Houſe) pleaded Not Guilty: *Richard Prat* to all the Treſpaſs (except the breaking and entring the Cloſe and Houſe, and taking and carrying away the ſaid Cupboard and Lead) pleaded Not Guilty. As to the breaking the Cloſe and Houſe, *Richardſon* ſaid, and as to the breaking the Cloſe and Houſe, and taking and carrying away Cro. Jac. 303. 1 Bulſtr. 50. Hughs Abr. 1465.

the ſaid Cupboard and Lead, *Prat* ſaid *actio non*, and pleaded in Bar a Statute-Staple of One hundred and fifty Pound, acknowledged by *Miles* to *Thomas Prat*, and that the ſaid Houſe and Cloſe, and the ſaid Copper and Lead *inter alia* were extended by Force of the ſaid Statute, and by *Liberate* delivered to the ſaid *Thomas Prat*, who died poſſeſſed and inteſtate; and the Adminiſtration of the Goods and Chattels of the ſaid *Thomas Prat* was committed to the ſaid *Richard Prat*; wherefore, the ſaid *Richard Prat* in his own Right, and *Richardſon* as his Servrnt entred into the ſaid Cloſe and Houſe, and took the ſaid Copper and Lead, as the Goods and Chattels of the ſaid *Richard Prat*, by Reaſon of the ſaid Adminiſtration: *Miles* replied, That there was no ſuch Record of the ſaid Extent and *Liberate* remaining in the *Chancery*. *Prat* and *Richardſon* rejoined, That there was ſuch a Record of the Extent and *Liberate* remaining in *Chancery*. All theſe Pleas were entred in *Mich. Anno 7 Jac. Regis*, and Day was then given to have the Record *apud Weſtm' die Mercurii proxime poſt Craſtin' Purification' beatæ Mariæ ſub ſuo periculo*; and alſo a *Venire fac.* was then awarded for Trial of the ſaid Iſſues retornable *ad præfat' Diem.* At which Day *Prat* and *Richardſon* failed of the Record, whereupon it was awarded that *Miles* ſhould recover Damages, and upon that it was then awarded *Venire facias tam ad triand' exitus prædict' quam ad inquirend' de damnis*, retornable *Die Mercurii proxime poſt quinden' Paſchæ*, and then it is entred in ſuch Manner, *Poſtea continuat' inde Proceſſu inter partes præd' de prædict' placito per Jurat' poſit' inde inter eas in reſpect' coram domino Rege apud Weſtm. uſque diem Martis prox. poſt Octab' ſancti Mich. tunc prox. ſequen', Niſi Juſtic' domini Regis ad aſſiſas in Com' prædicto capiend' aſſign' prius die Martis 24 die Julii apud Bury St. Edmundi in Com' prædicto per formam Statuti*, &c. *Venerint pro defect' Jurat', &c.* At which Aſſiſes all the Iſſues were tried for *Miles*, and ſeveral Damages aſſeſſed as well for the Treſpaſs put in Iſſue triable *per patriam*, as for the Treſpaſs tried by the Record; the which Verdict afterwards at the Day in Bank *per totam Curiam* was quaſhed, becauſe the Jury had aſſeſſed the ſaid Damages ſeverally. *Et quia Juratores prædict' male ſe geſſerunt in verdicto ſuo reddendo*, a *Venire facias de novo* was awarded; and upon the ſecond Trial had, all the Iſſues were found for the Plaintiff, and entire Damages aſſeſſed for the whole Treſpaſs and Coſts of Suit, in the whole amounting to One hundred and fifteen Pound, twelve Pence: And it was moved in Arreſt of Judgm. that there was not any Continuance *a termino Paſchæ, anno 8 Jac. Regis, uſque term' Trinit'* then following; *Nec ab eodem termino uſque diem Mart' proxime poſt Octabas Sancti Michaelis tunc proxime ſequentis.*

1 Brownl. 233. 1 Bulſtr. 50.

Cro. Jac. 304.

And

And altho' there was a full Diſcontinuance in that Caſe, and altho' the Iſſue of *Nul tiel Record*, is not within the Statute of 32 *H.* 8. which ſpeaks of the Verdict of twelve or more indifferent Men: Yet for the Reaſons before rehearſed, Judgment was given for the Plaintiff, and afterwards a Writ of Error was brought upon that Judgment, and the only Error aſſigned, was the ſaid Diſcontinuance; but for other Errors not aſſigned, (as it was openly ſpoken in the Argument in the Caſe at Bar) the Judgment given in the ſaid Caſe of *Miles*, was reverſed. Cro. Jac. 304.

[*En quo Diſcordia Legis Perducet Miſeros!*]

PRIDDLE

PRIDDLE *and* NAPPER's *Case.*

Mich. 10 Jac. I.

2 Brownl. 25. Hardres 69. 3 Jones 189.

IN an Attachment upon a Prohibition in the Common Pleas by *John Priddle, qui tam, &c.* againſt *Thomas Napper,* Gent. Proprietor of the Rectory of *Tintenhul* in the County of *Somerſet:* The Plaintiff declares, That whereas one *Robert Shirburne* alias *Whitlocke,* late Prior of the Priory of St. *Peter* and *Paul* the Apoſtles, of *Mountacute* in the County of *Somerſet, ordinis Cluniacenſis,* was ſeiſed of 22 Acres of Land, called *Perin's-hill* alias *Guilbert's-hill* in *Tintenhul* in the ſaid County, and of the Rectory of *Tintenhul, Eidem Prioratui pertin' & ſpectan', ac parcel' eiſdem Priorat' exiſten'* in his Demeſn as of Fee in the Right of the Priory, and that the ſaid Prior and all his Predeceſſors, Priors of the ſaid Priory before the Diſſolution of the ſaid Priory, and at the Time of the ſaid Diſſolution of the ſaid Priory, were Rectors of *Tintenhul* aforeſaid, and had, and held the Rectory aforeſaid *Simul & ſemel* with the ſaid 22 Acres of Land, *In manibus ſuis propriis in Jure Prioratus ſui prædicti, ratione cujus idem nuper Prior & omnes prædict' alii Priores ejuſdem nuper Prioratus per totum tempus prædictum ante prædictum tempus diſſolutionis Prioratus illius, uſque ad tempus diſſolutionis,* &c. *Habuerunt & tenuerunt, ac idem nuper Prior tempore diſſolutionis,* &c. *Habuit & tenuit prædictas viginti & duas acras terræ exonerat', acquietat', & immunes de omnibus & omnim' decimis, &c.* and that 20 *Martii, an.* 30. the ſaid Prior and Convent by their Deed enrolled in *Chancery,* gave

gave, granted, and ſurrender'd the ſaid Priory, the ſaid Rectory, Land, and all the Poſſeſſions thereof, to King *Hen.* 8. his Heirs and Succeſſors; and that by Force thereof, and of the Statute of 31 *Hen.* 8. of Diſſolutions, King *Hen.* 8. was ſeiſed of the ſaid Rectory, and of the ſaid Land in his Demeſn as of Fee, as in the Right of his Crown; and ſhewed the Clauſe of the Statute of 31 *H.* 8. of Diſcharge of Payment of Tithes; by Force whereof, King *H.* 8. was ſeiſed of the ſaid 22 Acres of Land, *&c.* diſcharged of Payment of Tithes, and conveyed the Inheritance of the ſaid 22 Acres to Sir *Thomas Freke*, and others; who, *Anno* 38 *Eliz.* demiſed the ſame to the ſaid *John Priddle* for 99 Years, if three of his Sons, or any of them, ſhould ſo long live; and averr'd their Lives; and that the Defendant *Proprietarius Rectoriæ prædict'*, *&c.* before the Biſhop of *Bath* and *Wells* ſued the Plaintiff for Tithes of Corn growing in the 22 Acres of Land, *&c.* *Et præd' Thomas Napper pro Conſultatione habenda*, alledged a Grant by Letters Patents of Queen *Elizabeth*, *Anno Regni ſui ſecundo*, of the ſaid Rectory to *Rive* and *Evelyn*, and to their Heirs; and by mean Conveyance, conveyed the ſaid Rectory to the ſaid *Thomas Napper* in Fee, and that he libelled for the ſaid Tithes, as he lawfully might; *Abſque hoc quod prædictus Prior & omnes prædeceſſores ſui Priores præd' nuper Prioratus a tempore cujus contr' memoria hominum non extitit ante tempus diſſolutionis, &c. necnon uſque ad tempus diſſolutionis, &c. Habuerunt & tenuerunt prædict' viginti & duas acras terræ exonerat', acquietat' & immunes de omnibus & omnimodis decimis quibuſcunque ſuper prædictas viginti & duas acras terræ quoviſmodo provenient', &c. prout, &c. & hoc, &c. unde petit Judicium, & breve dicti domini Regis de conſultatione ſibi in hac parte concedi, &c.* Upon which Iſſue was joined, and the Jury, before the Juſtices of *Niſi Prius*, gave a Special Verdict; That the Prior and his Predeceſſors, *a tempore cujus, &c.* until the Time of the Diſſolution, were ſeiſed of the ſaid 22 Acres of Land in their Demeſn, as of Fee, as in the Right of the ſaid Priory; and that one *Thomas*, late Prior of the ſaid Priory, was ſeiſed of the Advowſon of the ſaid Church of *Tintenhul* in Fee, in the Right of his Priory: And he being ſo ſeiſed *Hen.* 8. the 8th Day of *May*, in the 20th Year of his Reign, by his Letters Patents (the Exemplification of the Enrolment of which, under the Great Seal, they ſet forth) *De gratia ſua ſpeciali ac certa ſcientia & mero motu ſuis licentiam dedit præfat' Tho' tunc Priori nuper Prioratus, & ejuſd' loci Conventui & Succeſſoribus ſuis, quod ipſi & Succeſſores ſui dictam Eccleſiam Parochialem de Tinten' præd', impropriare, conſolidare, incorporare;*

31 H. 8. cap. 13.

Hardres 76.

Hugh's Abr. 1009.

incorporare, annectere, & unire, & eam ſic appropriat', conſolidat' incorporat', & unitam, in proprios ſuos uſus tenere poſſint; with Proviſo to endow a Vicarage, and that a competent annual Sum ſhould be diſtributed to the Poor, with uſual *non obſtante:* And that *John*, Biſhop of *Bath* and *Wells*, Ordinary of the ſaid Place, 4th *Sept.* 1529, by Indentures triparite, *viz.* One Part ſealed with the Seal of the ſaid Biſhop, the other Part ſealed with the Seal of the Prior and Convent of *Bath*, (which confirmed the ſaid Indenture) and the third Part ſealed with the Seal of the Dean and Chapter of *Wells* (which alſo confirmed the ſaid Indenture) *Eccleſiam parochialem de Tintenhul dictæ noſtræ Diœceſis & ſui Patronatus (ut aſſerunt) dictis Priori & Conventui & Succeſſoribus ſuis & domui ſive Prioratui ſuo prædict' cum conſenſu pariter & aſſenſu metuendiſſimi in Chriſto Principis & Domini Henrici Octavi Dei gratia, &c. Authoritate noſtra ordinaria annectimus, appropriamus & unimus per præſentes, ita quod cedente vel decedente Rectore ejuſdem Eccleſiæ Parochialis qui nunc eſt, ſeu aliter ipſa Eccleſia quoviſmodo vacari contigerit, liceat ipſis Priori Conventui ſuiſque Succeſſoribus per ſe vel per alium ſeu alios ipſorum nomine poſſeſſionem dictæ Eccleſiæ Parochalis authoritate propria intrare, &c. & in proprios uſus convertere & imperpetuum retinere:* With Endowment of a Vicarage, and Proviſion for an annual Sum to the Poor; And afterwards the then Parſon of the ſaid Rectory died, after whoſe Death the ſaid *Thomas*, Prior of the ſaid Priory, into the ſaid Rectory enter'd, and was as well of the ſaid Rectory, as of the ſaid 22 Acres of Land ſeiſed in his Demeſn, as of Fee in Right of the ſaid Priory: And afterwards the ſaid Prior *Thomas* died, and Prior *Robert* ſucceeded him: And that the ſaid Prior *Thomas*, and Prior *Robert*, ever after the ſaid Approbation, held the ſaid Rectory, with the ſaid 22 Acres of Land, in their own Hands, *ſimul & ſemel*, in the Right of his Priory, and found the Surrender of the ſaid Priory; and that the ſaid King *H.* 8. 24 *die Julii*, *Anno* 36 *Hen.* 8. by Indenture under the Seal of the Court of Augmentation, demiſed the ſaid Rectory to *William Petre*, Doctor of Law, for 21 Years, who aſſigned it over to *Edward Napper*, and that no Tithes were paid until the ſecond Year of Queen *Mary*, and then the ſaid *Edward Napper* had a Sentence in the Court of Audience againſt one *Thomas Guil*, then Farmer of the ſaid 22 Acres; and that after the ſaid Sentence, until the 8th Year of Queen *Elizabeth*, Tithes were paid of the ſaid 22 Acres, and conveyed the ſaid Rectory from King *Hen.* 8. by mean Deſcents to Queen *Elizabeth*, and by the ſaid Letters Patents, and by divers mean Conveyances to *Napper:*

Hugh's Abr. 1009.

Et

Et utrum ſuper tota materia, &c. Præd' Robertus nuper Prior & omnes prædeceſſores ſui Priores ejuſdem a tempore cujus contrar', &c. ante tempus diſſolutionis, &c. necnon uſque ad tempus diſſolutionis, &c. habuerunt & tenuerunt prædict' 22 acras terr' exonerat', acquietat', & immunes de omnibus & omnimodis decimis quibuſcunque, &c. Juratores penitus ignorant, & petunt adviſamentum Curiæ in præmiſſis, & ſi, &c. And this Caſe was oftentimes argued at the Bar by the Serjeants, and now this Term it was argued at the Bench. And in this Caſe theſe Points were reſolved.

1. That the Information upon which the Prohibition was granted, was ſufficient in Matter: For altho' every Pariſh Church is ſuppoſed to be Preſentative, and the Incumbent ought to come in by Admiſſion, Inſtitution, and Induction; yet the Plaintiff in this Caſe may preſcribe, That the Prior and his Predeceſſors, *a tempore cujus, &c.* have been Rectors of the ſaid Church; for that amounts that it was impropriate, *&c.* and the Beginning of a Thing done before Time of Memory, can't be known, *viz.* Whether it came by Union or Impropriation, and therewith agrees (*a*) 21 *Ed.* 4. 65. *a.* Where in Treſpaſs for certain Cart-loads of Oats taken at *Bodman* againſt the Prior of *Bodman*, the Defendant ſaid, That the Corn was growing in a certain Place in *B.* in the Pariſh of *B.* of which Pariſh he is *perſona imperſonata*, *i.* Incumbent; and he was driven to ſhew how he came to the ſame Parſonage, wherefore he alledged Title by the Preſcription, and how the Corn was ſevered from the nine Parts, and that he took it, and that was allowed for a good Title to the Rectory: Wherefore, as to this Point, the Information was reſolved to be good; but the Addition of the Impropriation, *&c.* had made it without Queſtion. It was alſo held, That the Concluſion of the Preſcription of the Unity, *viz. Ratione cujus*, the Prior held the ſaid Land diſcharged of Tithes, was not formal; for in Truth, by the (*b*) Unity (as it ſhall appear after) the Land was not diſcharged of Tithes, but of Payment of Tithes; and ſo are the Words of the Statute of 31 *Hen.* 8. (as alſo ſhall be after ſhewed:) But yet it ſeems, that foraſmuch as the Preſcription it ſelf is well alledged in Subſtance, ſo as the Foundation of the Prohibition is good, that the Miſpriſion of the Concluſion, and Conſequence thereupon, ſhall not be a Cauſe to grant a Conſultation.

2. That the Defendant's Plea, *Pro conſultatione habenda*, (for he is in a Manner an Actor) was inſufficient, becauſe he has traverſed a Thing not traverſable, for the Preſcription of the Unity ought to have been traverſed; and not the Concluſion, *viz.* (*c*) *Ratione cujus*, and that for divers Reaſons; one as in Logick, The Concluſion of a Syllogiſm can't be denied, but the *Major* or *Minor* Propoſition;

(*a*) 10 Co. 88. b. Br. Travers per ſans ceo 267.

(*b*) 2 Co. 47. b. Poſtea 14. b. Hob. 298. 44. 309. 32 H. 8. Br. Diſmes 17. B. N. C. 178. Daliſon 50. Mo. 219. 532, 533, 534. 2 Bullſt. 184. Noy 35. 132. 1 Leon. 248, 332, 334, 335. Cro. Jac. 452, 453, 608. 1 Jones 3. 4 Leon. 47. Savil 62. Dav. 6. a. Dyer 43. pl. 21.

(*c*) Hard. 70. Hob. 298. 2 Co. 48. a. 1 Leon. 333. Cro. Eliz. 29. 584, 585. Moor 530, 534. Doctrin. placit. 351.

No Travers can be after a Confeſſing, *&c. Fitzgib.* 33.

poſition; ſo it holds in Law, which is the Perfection of Reaſon: (*a*) And therefore in a *Præcipe*, if one pleads, That the Manor of *Dale* is ancient Demeſn, and the Land in demand is Parcel of the Manor, and ſo ancient Demeſn; the Demandant can't ſay, That the Land in demand is not ancient Demeſn, for that is the *Concluſion* * upon the two precedent Propoſitions. The firſt, That the Manor is ancient Demeſn; the ſecond, That the Land in Demand is Parcel of the Manor, for *Sequitor concluſio ſuper præmiſſis*, and therefore it can't be denied; and therewith agree (*b*) 41 *E.* 3. 22. *a.* 48 *E.* 3. 11. *a. b.* and many other Books: So in the Caſe at Bar, the *Major*, (*c*) where there is a perpetual Unity of a Rectory and Land therein, until the Diſſolution, there the Land is diſcharged of Tithes; but here has been a perpetual Unity of the Rectory of *T.* and the 22 Acres, *Ergo*, the 22 Acres are diſcharged of Tithes, this Concluſion can't be deny'd: 2. It is not only a Concluſion, but a Concluſion of Law, and Matter in Law ſhall not be put in Iſſue to be tried by the Country, for the Rule is, (*d*) *Quod quiſque norit in hoc ſe exerceat*, and therefore (*e*) *Sicut ad quæſtionem facti non reſpondent Judices, ita ad quæſtionem Juris non reſpondent Juratores*: (*f*) And if the Jury take upon them to know the Law, and find the Special Matter, and miſtake the Law, the Judges of the Law ſhall give Judgment on the Special Matter according to Law, without having regard to the Concluſion of the Jury, who ought not to take upon them the Judgment of the Law, and therewith agree *Pl. Com. Amy Townſend*'s Caſe, *fol.* 112. *b.* 114. *b.* *Vide* 5 *H.* 7. *Carew*'s Caſe, 12, 13, 14, 15. 9 *H.* 6. 38. *a.* 13 *H.* 7. 22, &c. and the Lord *Barkley*'s Caſe, *Plow. Com.* 230. *b.* One pleads a Gift to King *Hen.* 7. and to the Heirs Males of his Body, *virtute cujus* he was ſeiſed in Fee; the other confeſſed the Gift, *virtute cujus* he was ſeiſed in Tail, and no Traverſe to the *virtute cujus*, for the Concluſion is the Concluſion of the Law. 3. The (*g*) Iſſue is not well joined, 1. Becauſe the Matter of the Diſcharge is, by Reaſon of the Unity, which is by Force of the Statute of 31 *Hen.* 8. and not by the Common Law, and the Iſſue is joined upon a Diſcharge by the Common Law, *viz.* Preſcription in the Prior and his Predeceſſors to hold the ſaid 22 Acres of Land diſcharged of Tithes, which is a Diſcharge by the Common Law: 2. (*h*) Every Iſſue ought to conſiſt upon an Affirmative and a Negative, and here is not any Affirmative, for that which comes after the *ratione cujus* is not *Affirmative*, or *Poſitive* alledg'd, but as a Conſequence upon the precedent Matter, *Vide* 8 *Hen.* 6. 6. *a.* 36 *H.* 6. 15. *a. b.* 9 *Ed.* 4. 36. 6 *Hen.* 7. 5. *b.* and therewith agrees the Reſolution of the Judges in the Biſhop of *Canterbury*'s Caſe, in the Second Part of my *Reports*, *fol.* 48. ſo that here

(*a*) Doctrin. Placit. 351, 352, 370.

* Fitzgib. 33, 88.

(*b*) Br. Ancient Demeine 6. Fitz. Ancient Demeſne 9.

(*c*) Hob. 298.

(*d*) 12 Co. 66. 13 Co. 12. Co. Lit. 125. a. 8 Co. 130. a.

(*e*) 4 Co. 42. a. b. 2 Bulſt. 204, 251, 305, 314. 1 Sid. 127. 9 Co. 13. a. 25. a. 8 Co. 155. a. Co. Lit. 125. a. 155. b. 226. a. Plowd. 114. b. 1 Roll. Rep. 132.

(*f*) Moor 105, 269. 4 Co. 42. b. Cro. El. 45, 481, 482. Hob. 53. Plowd. 112. b. 114. b. Cro Car. 75, 76, 212. Cro. Eliz. 481. 12 Co. 15. Hutt. 121. Dyer 361. pl. 15. Hard. 347. 2 Roll. 701, 702.

(*g*) Doctrin. plac 1. 192. 2 Co. 47. a. b.

(*h*) Co. Lit. 110. a. Cro. Car. 80, 94. Dyer 274. pl. 21, 22. Doctrin. pl. 187, 188, 190, 192. Br. Iſſues joines, 86.

here is not any Iſſue joined, of any Matter alledged in Fact in the Information.

4. Upon the Verdict divers Points were moved at the Bar, 1. If the ſaid Impropriation (as it was found) was good, or not. 2. If it was not good by the Common Law, if the Statute of 35 *Eliz. Reginæ, cap.* 3. has ſupplied the Imperfection of it, or not. 3. When the Jury find Matter ſufficient to bar the Parſon of the Tithes, which was not Parcel of their Charge, nor within the Iſſue, if without Regard to that Matter a Conſultation ſhall be granted. 4. If by the ſaid Impropriation and Unity, ſo ſhort a Time before the Diſſolution, which could not be above nine or ten Years, it ſhould be ſuch a Diſcharge of Tithes as is intended within the Statute of 31 *Hen.* 8. Poſtea 13. a.

As to the firſt it was objected, That the ſaid Impropriation was void for two Reaſons: 1. Becauſe the King has made a Licence of Impropriation of the Church of *T. per verba de præſenti tempore*, where it appears, that at the Time of the Licence made, there was an Incumbent then of the ſame Church; ſo that no Appropriation could be made *in præſenti*, but in *futuro*, by ſpecial Words, to take Effect after the Death of the preſent Incumbent, for as no Appropriation can be made of a Church which is full of an Incumbent, but in a ſpecial Manner to take Effect after the Death of the Incumbent, ſo the King's Licence (without which the Appropriation can't be made) ought to be Special alſo, or otherwiſe the King is deceived in his Grant, and by Conſequence the Appropriation is void; and that no Appropriation can be made without the King's Licence, *vide* Sir *William Ethingham*'s Caſe, in 17 *Ed.* 3. 39. *a.* and *Plow. Com.* in *Grendon*'s Caſe, *fol.* 495. *b.* And that in ſuch Caſe the Appropriation ought to be made in ſuch ſpecial Manner, appears in *Grendon*'s Caſe; and in 8 *Eliz. Dyer* 244. *pl.* 60. The ſecond Reaſon was, That the Appropriation in the Caſe at Bar, was made to take Effect in Poſſeſſion, and not in ſuch ſpecial Manner after the Death of the Incumbent, as it appears before it ought by the Law. 1 Roll. 239. Plowd. 499. b. Godolph. Abr. 222. Plowd. 449. b. Plowd. 499. b. 10 Co. 48. a. 1 Co. 155. a. Co. Lit. 352. b. 6 H. 7. 13. b. Br. Appropri. 5.

But it was reſolved, That that Appropriation was ſufficient in Law, for it is true, that the Licence is general, and therefore it ſhall be taken in ſuch Senſe, that it may take Effect, and that is, to be appropriated after the Death of the Incumbent: And when the Letters Patents may be taken to two Intents good, in many Caſes they ſhall be taken to ſuch Intent as is moſt beneficial for the King; but if the Letters Patents may be taken to one Intent good, and to another Intent void; then for the King's Honour, and 1 Roll. 239. 8 Co. 56. a. 167. a. 10 Co. 67. b. Kelw. 175. a. 198. a. 3 Leon. 243. 2 Sider. 141. 2 Roll. 200.

for the Benefit of the Subject, they ſhall be taken in ſuch Manner, that the King's Grant ſhall take Effect; for it was not the King's Intention to make a void Grant, and therewith agree (*a*) 21 *Ed.* 4. 44. *b.* and *Roger Earl of Rutland's Caſe, in the Eighth Part of my Reports, fol.* 56. *a.* which is proper to be peruſed; and in the *Lord Stafford's Caſe, in the ſame Part, fol.* 77. *a.* and the *Caſe of Sir J. Molins, in the* 6*th Part of my Reports,* 6. *a.* and the *Lord Chandos's Caſe, in the ſame Part, fol.* 55. *b.* and the *Earl of Cumberland's Caſe, in the* 8*th Part of my Reports, fol.* 167. *a.* And ſo it was reſolved in the principal Caſe, That the Licence ſhall be taken to this Intent, to make the Appropriation to take Effect after the Death of the preſent Incumbent; and *eo potius*, becauſe the Letters Patents were *Ex certa ſcientia & mero motu*, and therewith agrees a Record in the Book of *Entries, Tit. Quare Impedit, diviſion' Appropriation*, Where the Licence of Appropriation was general, and the Appropriation after the Death of the Incumbent in theſe Words, *Volens & concedens ut cedente vel decedente ipſius Eccleſiæ nunc Rectore, quod prædictus Abbas & Conventus ejuſdem Eccleſiæ corporalem poſſeſſionem apprehenderent, ac fructus, proventus & obventiones perciperent & libere haberent.* And *vide in eodem libro, Tit. Droit* 1. As to the ſecond Reaſon, that is miſtaken, for it appears by the Inſtrument of Approbation found within the Record, That it was by expreſs Words to take Effect after the Death of the then Incumbent, *Ita quod cedente vel decedente Rectore dicte Eccleſiæ qui nunc eſt, &c.* Another Reaſon was added, That inaſmuch as always the King's Licence of Approbation is made to the Body Spiritual, to which the Church ſhall be appropriated, and not to the Biſhop, *&c.* and therefore it ſhall be preſumed, that they would obtain it in ſuch Form that it ſhould avail them. Alſo the Licence of Appropriation is always general, and ſo are all the Precedents; for altho' the Rector be alive at the Time of the making of the Licence, he may die or reſign, *&c.* before the Appropriation.

(*a*) 1 Co. 45. a. 8 Co. 56. a. 167. a. Plowd. 32. a. 126. a. 143. b. Hardr. 500. Fitz. Grant 29. Br. Exempt. 9. 2 R. 3. 4. a. b.

1 Roll. 239.

As to the ſecond Point, admitting the ſaid Appropriation had been void, it was objected, that the ſaid Act of 35 *Eliz.* has made it good, for thereby it is enacted and declared, *That all Manors, Lands, Tenements and Hereditaments, which at any Time heretofore were the Poſſeſſions of any Abby, Monaſtery, Priory, &c. which after the ſaid fourth Day of* February, *in the* 27*th Year of* Hen. 8. *were granted or conveyed, or mentioned to be granted or conveyed, in, or by any Letters Patents whatſoever, made by the ſaid late King* Hen. 8. *to any Perſon, &c. were and ſhall be reputed, taken and adjudged to have been lawfully, and perfectly in the actual and*

35 Eliz. cap. 3.

and real Poſſeſſion of the ſaid late King, and of his Heirs and Succeſſors, at ſuch Time as the ſame were granted by the ſaid late King. And where it was anſwered by the Plaintiff's Counſel, That the ſaid Act of 35 *Eliz.* extended only to Letters Patents made by King *Hen.* 8. and the Letters Patents in the Caſe at Bar, were made by Queen *Elizabeth*, and ſo out of the ſaid Act of 35 *Eliz.* it was reſolved, That in Truth the ſaid Act of 35 *Eliz.* did not extend to this Caſe, but not for the Cauſe alledged by the Plaintiff's Counſel; for altho' it is true, that Queen *Elizabeth* granted the Inheritance of the ſaid Rectory, yet it appears by the ſpecial Verdict, That King *H.* 8. by his Letters Patents indented, had demiſed the ſaid Rectory to *William Petre*, Doctor of Law, for 21 Years; and the Act of 35 *Eliz.* enacts, *That all Manors, Lands, Tenements and Hereditaments, mentioned to be granted or conveyed in or by any Letters Patents whatſoever, made by King* H. 8. *to any Perſon or Perſons, Bodies Politick or Corporate, ſhall be reputed, taken and adjudged to have been lawfully and perfectly in the actual and real Poſſeſſion of the ſaid late King, and his Heirs and Succeſſors*; in which Purview four Things were obſerved; 1. The favourable Penning thereof, *ſc.* mentioned to be granted, altho' in Effect nothing paſſed by the Grant. 2. The Generality of the Words, firſt, concerning the Quality of the Letters Patents, *ſcil. In or by any Letters Patents whatſoever*, be they under the Great Seal, the Exchequer Seal, the Court of Augmentation Seal, the Dutchy Seal, *&c.* Secondly, Concerning the Eſtate or Intereſt which is mentioned to paſs by the Letters Patents, which is left at large, and not reſtrained to any in certain, and therefore if the Letters Patents purport a Grant for Life, or for Years, the Statute hath as great Operation, as to the Purview of the Act, as if the Letters Patents had purported a Grant of an Eſtate Tail, or a Fee. 3. The Generality of the Purview, for it extends not only to make the Grant good, but to veſt the Manors, Lands, Tenements and Hereditaments of the late Abbots, *&c.* in the actual and real Poſſeſſion of King *Hen.* 8. 4. And not only in King *Hen.* 8. but to him, his Heirs and Succeſſors, ſo that the Lands ſhall be as well veſted in the King, his Heirs and Succeſſors, when the King grants the Land for Life or Years, as where he grants it in Fee-Tail or Fee-ſimple, and ſo the Purview extends to three other Caſes. 1. Where any ſuch Lands, Tenements or Hereditaments, *came to the Hands or Poſſeſſion of the ſaid late King* Hen. 8. 2. *Or which were put in charge to, or for his Highneſs in his Court of Exchequer, or any other Courts of his Majeſty's Revenue.* 3. *Or by any Auditor, or*

35. Eliz. cap. 3.

2 Roll. 182.

other Officer of the ſaid late King; and in every of theſe Caſes the Purview hath ſo great Operation, as in Caſes of Letters Patents, as to veſt ſuch Lands, Tenements or Hereditaments, in the King, his Heirs and Succeſſors: But yet it was reſolved, That the ſaid Act of 35 *Eliz. cap.* 3. did not extend to this Caſe; for the Purview has a Qualification or Reſtraint which has not been mentioned before at the Bar; and that is, That in the ſaid four Caſes, ſuch Lands, Tenements and Hereditaments, *ſhall be reputed, taken, and adjudged, in the actual and real Poſſeſſion of the ſaid late King, his Heirs and Succeſſors, at ſuch Time as the ſame did ſo come to his Majeſty's Hands or Poſſeſſion, or were ſo put in charge or granted, or conveyed by the ſaid late King* Hen. 8. *as aforeſaid*; (then comes the Qualification or Reſtraint) *notwithſtanding*, 1. *Any Defect, Want, or Inſufficiency of or in any Surrender, Grant, or Conveyance of the ſaid Manors, Lands, Tenements or Hereditaments, or any Part thereof, to the ſaid late King* Hen. 8. 2. *Or any other Matter or Cauſe whatſoever, by which his Highneſs was or might have been entitled to the ſame:* So that the Scope and Purpoſe of the Act was, to veſt in King *Hen.* 8. all the Lands, Tenements, and Hereditaments, which the Abbots, *&c.* had, notwithſtanding the Defects aforeſaid: But if the ſaid Appropriation was void, and was not given the King by the Statute of Monaſteries, then the Prior of *Montacute*, in the Caſe at Bar, had nothing in the ſaid Rectory, but the Advowſon only, and *jus præſentandi*: But yet the ſaid Act of 35 *Eliz.* is of great Uſe and Effect, for inaſmuch as the Statute of 31 *H.* 8. gave not the King any Monaſteries, Priories, *&c.* but only which had been ſurrendred, granted to the King, *&c.* or were diſſolved; or which ſhould be ſurrendred, granted, *&c.* or diſſolved, this Act, in the ſaid four Caſes, has ſupplied the Defect or Want of a Surrender, Grant, or Conveyance; alſo of an inſufficient Surrender, Grant, or Conveyance, ſo that be there any Conveyance to the King, or not; and if any be, altho' it be inſufficient, the ſaid Lands, Tenements and Hereditaments, are actually veſted in the King, his Heirs and Succeſſors. 2. If the Abbot, Prior, *&c.* had been diſſeiſed, or in any other Caſe, where an Office, *Scire facias*, Seiſure, *&c.* was requiſite to veſt the Poſſeſſion in the King; there the latter Words, *viz. Or any other Matter or Cauſe whatſoever, by which his Highneſs was or might have been entitled to the ſame*, ſupply all ſuch Means by which the King might have been lawfully entituled, and put in actual Poſſeſſion. *Vide* 33 *H.* 8. *Brook, Tit. Choſe in Action* 14. The Queſtion there made, where an Abbot, *&c.* was diſſeiſed, well explained and reſolved. But altho' there be a Defect in the

35 Eliz. cap. 3.
31 H. 8. cap. 13.

Appro-

Appropriation, yet (if the Rectory be in (*a*) Reputation Appropriate, and so has been used) it is given the King by the Statute of 27 *H.* 8. *c.* 38. or 31 *H.* 8. *c.* 13. and therefore in 19 *Eliz.* (*b*) in the Dean of *Paul*'s Case, it was adjudged in the King's Bench, That a Chantry, or College in Reputation, and not in Law, was given to King *Ed.* 6. by the Statute of 1 *E.* 6. within the Words, *All and all manner of Chanteries, Colleges*, &c. 27 *Junii*, *Anno* (*c*) 29 *Eliz. in Cancellaria*, upon an Aid prior of the King, by the Course of the Common Law, the Case was between the Lord St. *John*, Plaintiff, and the Dean and Chapter of *Glouceſter*, Defendant, for the Parſonage Impropriate of *Penmark* in the County of *Glamorgan*, becauſe the Patron (who, before the Appropriation, had granted the Advowſon to the Body Eccleſiaſtical, to which the Appropriation was made) in *Anno* 18 *R.* 2. was but Tenant in Tail, and yet it always continued as a Church Appropriate, it was reſolved by Sir *Thomas Bromley*, Lord Chancellor of *England*, *Gilbert Gerrard*, Maſter of the Rolls, *Shute* and *Windham*, Juſtices, (whom the Lord Chancellor in that Caſe aſſociated unto him) that this Rectory in Reputation was given to the King by the Statute of Monaſteries. (*d*) Another Caſe was, *Tr. Eliz. in Camera Scacc' inter T. Grimes* and *H. Smith* for the Parſonage of *Bulbenham* in the County of *Leiceſter*, which, *Anno* 22 *Ed.* 4. was appropriated to the Abby of *Sulby*, and no Vicar endowed there, *&c.* according to the Purview of the Acts of 4 *H.* 4. 12. 15 *R.* 2. 6. But there had continued a Vicar in Reputation, and the Rectory continued alſo as appropriated; and it was reſolved, That that Rectory was given to the King by the Statute of Monaſteries. (*e*) *Hill.* 4 *Jac. Reg. in Cancellar' inter Bedel* and *Bear*, for the Church of *Kumbalton*, which was appropriated in *Anno* 40 *Ed.* 3. and the Defect was, That *Humphrey de Bohun*, Earl of *Hereford* (who granted the Advowſon of the ſaid Church to the Body Eccleſiaſtical, to which the Appropriation was made) was but Tenant in Tail; and reſolved clearly, That it was given to King *Hen.* 8. by the Statute of Monaſteries. *Nota* Reader, in the Statute of Monaſteries there is a (*f*) ſaving of Rights, *&c.* but the Founders, Donors, *&c.* are excepted out of the Saving; ſo they are bound by the Body of the Act.

(*a*) Hob. 308. Goldſb. 93. Godbolt 315. 2 Roll. Rep. 127. Cro. Jac. 608. 1 Jones 2, 3. 4 Leon. 159, 160.
(*b*) Dyer 368. pl. 47. Jenk. Cent. 245. 1 Roll. Rep. 417. 10 Co. 83. b. Hugh's Abr. 1717. 1 E. 6. cap. 14. 4 Co. 106. b. 108. a. 109. a. 110. b.
(*c*) Hugh's Abr. 1717. Hardr. 51.
(*d*) Hardr. 51. Hugh's Abr. 1717, 1718.
(*e*) 12 Co. 4. Palm. Rep. 222.
(*f*) Cro. Jac. 608. 1 Jones 2, 3.

As to the third Point upon the Verdict, it was reſolved, That foraſmuch as the (*g*) ſpecial Matter found by the Jury, was not Parcel of their Charge, nor pertinent to the Iſſue, (admitting that the ſpecial Matter had been ſufficient to have barred the Plaintiff of the Tithes) it ſhould not be regarded; for the Party griev'd thereby can't have (*h*) Attaint, nor the Witneſſes puniſh'd for Perjury * by the Statute of (*i*) 5 *Eliz.* becauſe the Saying of the Jury, nor the Teſtimony of the Witneſſes was not material to the Iſſue; ſo that inaſmuch as the Iſſue is joined upon Preſcription in the Prior and his Predeceſſors, to hold the ſaid

(*g*) Hob. 53. 12 Co. 15. 9 Co. 14. a. 2 Roll. 701, 702. Hardr. 347. Dyer 362. pl. 15. Hutt. 121. Cr. El. 481. Cro. Car. 75, 76, 212. Plowd. 112. b. 114. b. 1 Sid. 96.
(*h*) 1 Rol. 284. 3 Inſt. 167.
* See Carth. 422.
(*i*) 5 El. cap. 9.

22 Acres

22 Acres discharged of Tithes, *a tempore cujus*, they can't give in Evidence an Unity of the Rectory and Land for ten Years only; that if any Colour should be, that the same should be a Discharge, it is not a Discharge by Prescription *a tempore cujus, &c.* by the Common Law, but by the Statute of 31 *H.* 8. So that for the Insufficiency and Impertinency of the Points and Parts of this Prolix Record, the other Justices did not speak to the fourth Point of the Verdict: But the Chief Justice (for the better Direction of this and such other Cases) did declare that the Point had been resolved before, and the Causes and Reasons of the Resolution thereof.

Note. It was a long Time in all the Courts at *Westminster*, a great Question upon the said Branch of the Statute of 31 *H.* 8. and the Cause of the Doubt thereof stood upon two Considerations: 1. Upon Consideration of the Nature and Quality of Tithes before the said Act. 2. Upon the Words and Purview of the said Branch of 31 *H.* 8. And as to the first, *Quota pars*, i. *Decima pars*, which we call Tithes, (*a*) is an Ecclesiastical Inheritance collateral to the Estate of the Land, and of their proper Nature, due only to an Ecclesiastical Person by the Ecclesiastical Law, and therefore no Unity of Possession can either extinguish or suspend them; but they, notwithstanding any Unity, remain *in esse*, so that they may be demised or granted to any Spiritual Man, notwithstanding any such Suspension. Tithes are more collateral to Land than a Warren, which the Owner of the Land has in it; for by Feoffment of the Land, without excepting the Warren, the Warren is extinct, as it is held in (*b*) 35 *H.* 6. 56. *a.* But (*c*) if a Prior who has a Parsonage Impropriate, enfeoffs another of Part of the Glebe, yet he shall have Tithes against his own Feoffment, as it is held in 42 *E.* 3. 13. *a.* and they are not like a Leet; and yet if the Lord of a Leet purchases Land within it, his Leet is not suspended, nor (if he makes a Feoffment of the said Land) is his Leet in it extinct, as it is held in 7 *Ed.* 2. *Tit. Avowry* 211. and 8 *Ed.* 2. *ibid* 212. But he has an Inheritance by the Common Law in the Leet, which is descendable, and which he may grant over to whom he pleases: But such Inheritance a Lay-man can't have in Tithes by the Common Law, neither shall they pass by such Words as Temporal Inheritances shall pass, and therefore *Mich.* 31 *&* 32 *El.* in a Prohibition betwixt *John* (*d*) *Parkins* and *Thomas Hinde*, Parson of *Babington* in the County of *Somerset*, the Case was, That the said Parson by Deed indented, leased his Glebe, *Cum proficuis & commoditatib' eidem spectantib'* for 95 Years, rendring Rent *pro omnibus exactionib' & demandis quibuscunque dictæ Rectoriæ pro clauso prædicto spectantibus*; and the Question was, If the Lessee should have the said Close discharged of Tithes during the Term: And it was resolv'd *per totam*

(*a*) 1 Jones 3. Godolph. Abr. 354. Cro. Jac. 452. Degges Parson's Counsellor 214.

(*b*) 7 Co. 23. b. Dyer 30. pl. 209. But's Case. Dav. 5. b.

(*c*) Cro. Jac. 362. 2 Bulst. 183, 184. 1 Roll. 655. Cro. Jac. 452. 2 Co. 49. a. 1 Co. 111. a. Moor 50. Dyer 43. pl. 21. Br. Dismes 17. Moor 47, 532. Dav. 6. a. Noy 35, 132. Hughs Abr. 94. Dall. 50.

(*d*) Noy. 35. Cro. El. 161, 479. Degges Parson's Counsellor 226. Hetly 31. Owen 39. 2 Roll. 57. Godb. 398. 2 Bulstr. 184.

totam Curiam, That the Tithes ſhould not paſs by ſuch general Words; and as they are Tithes not ſerved, they are meer Eccleſiaſtical; for the Subſtraction of which, no Remedy lies by the Common Law. If a Parſon purchaſes Land within his Rectory, and leaſes this Rectory, the Leſſee ſhall have Tithes of the Land purchaſed; and therewith agrees 30 *H.* 8. *Dyer* 43. *pl.* 21. *Vide* 32 *Hen.* 8. *Brook*, *Tit. Diſmes* 17. Then, inaſmuch as if Tithes be conſidered of themſelves, before the Severance of them, they are mere Eccleſiaſtical, and ſo collateral to the Eſtate of the Land, that no Unity can extinguiſh or ſuſpend them; but notwithſtanding any Unity, they remain *in eſſe*; now the Words of the Act are to be conſidered, which are, *That as well the King, his Heirs and Succeſſors, as all and every ſuch Perſon and Perſons, their Heirs and Aſſigns, which have, or hereafter ſhall have any Monaſteries, Parſonages appropriate, or other Hereditaments, &c. ſhall have, hold, retain, keep and enjoy, as well the ſaid Parſonages appropriated, &c. Meſes, Lands, Tenements, and other Hereditaments, &c diſcharged and acquitted of Payment of Tithes, as feely, and in as large and ample Manner as the ſaid late Abbots, Priors, &c. had held, occupied, poſſeſſed, uſed, retained or enjoyed the ſame, at the Days of their Diſſolution*: And upon theſe Words, foraſmuch as the Unity doth not diſcharge nor ſuſpend the Tithes, but that they were *in eſſe* at the Time of the Diſſolution: And foraſmuch alſo as theſe Words (diſcharge and acquit) imply actual Immunity and Freedom; and that the King and his Patentees ſhall not have them diſcharged and acquitted abſolutely, but *ſub modo*, that is to ſay, *In as large and ample Manner*, &c. *as the ſaid late Abbots*, &c. And the late Abbots held not the ſaid Lands in Caſe of Unity diſcharged, but charged with the Payment of them; for theſe Reaſons, in ſhort, it was doubted, Whether the ſaid Act ſhould extend to the Caſe of a perpetual Unity; and it was alſo urged, That if the ſaid Act of 31 *Hen.* 8. in Caſe of perpetual Unity ſhould, in reſpect thereof, diſcharge the Land of Tithes, it would do a Wrong; and as it is ſaid in *Plowd. Com.* in the Earl of *Leiceſter*'s Caſe, 398. *b.* The Parliament is a Court of the greateſt Honour and Juſtice, of which none ought to imagne a diſhonourable Thing, and the *Doctor and Student*, *fol.* 165. *cap.* 55. It can't be thought, that a Statute that is made by Authority of the whole Realm, as well of the King, and of the Lords Spiritual and Temporal, as of all the Commons, will do a Thing againſt the Truth, *&c.* And *Forteſcue*, *cap.* 18. *Prudentia etiam & ſapientia neceſſario ſtatuta hujus regni referta putandum eſt, dum non unius aut centum ſolum conſultorum virorum, ſed pluſquam trecentorum electorum hominum, quali numero olim Senatus Romanorum regebatur, ipſa ſunt edita.*

Moor 47, 50. Noy 35, 132. 2 Bulſtr. 183, 184.

Moor 219, 532. Davis 6. a. Dall. 50. B. N. C. 178.

Note.

Co. Lit. 110. a.

Iut

But at length, upon great Conſideration, it was reſolved and adjudged, That a (*a*) perpetual Unity, *a tempore cujus, &c.* till the Diſſolution, ſhould be *prima facie* a Diſcharge of the Land of Payment of Tithes, by Force of the ſaid Branch of 31 *H.* 8. *cap.* 13. for divers Reaſons. 1. The (*b*) Statute doth not ſay diſcharged of Tithes, but diſcharged of Payment of Tithes, and divers other Reaſons, the chief of which was, for the (*c*) infinite Impoſſibility, and impoſſible Infiniteneſs, ſo that ſuch Immunities and Diſcharges which Religious Houſes had before Time of Memory, cannot be known. And it was expreſly reſolved, That the general Allegation of Unity at the Time of the Diſſolution, *&c.* without an Averment that it was perpetual, was not ſufficient: And altho' it had been a perpetual Unity, (*d*) yet if the Farmers of the Lands of the Rectory had paid Tithes before the Diſſolution, then the Intendment and Preſumption of Law, upon the perpetual Unity, failed: And all this you may ſee in the *Archbiſhop of* Canterbury's *Caſe, in the ſecond Part of my* Reports, and divers Judgments and Reſolutions there cited, *fol.* 48, and 49. So that ſuch Unity, which is within the ſaid Branch of the Act of 31 *Hen.* 8. ought to have (*e*) four Qualities. 1. *Talis unitas* ought to be *juſta*, rightful and not by wrong. 2. It ought to be *æqualis, ſc.* Fee in the one and the other; for if the Abbots, Priors, *&c.* have held by Leaſe, *a tempore cujus, &c.* that is not an Unity within the Statute. 3. It ought to be *perpetua tempore cujus, &c.* 4. It ought to be *libera*, free of Payment of any Tithes: But if their Farmers at Will, for Years, *&c.* have paid Tithes to them (as hath been ſaid) the Unity perpetual will not ſerve. But it was aſked, What if the Appropriation was made in the Times of *E.* 4. *H.* 6. *H.* 4. *R.* 2. *E.* 3. *&c.* and yet in Law within Time of Memory, and Unity had continued from the Time of the Appropriation until the Diſſolution, and Tithes were never paid, neither by the Abbots, *&c.* or their Farmers: Should not the Statute extend to thoſe Cauſes? And it was anſwered, No, upon the Point of Unity; for if he will take the Aid of the Act of 32 *H.* 8. the Unity, as hath been ſaid, ought to be perpetual. But in ſuch Caſe he may alledge the ſaid Branch of the Act of 31 *H.* 8. concerning the diſcharge of Payment of Tithes, *&c.* (*f*) and that the Abbots, *&c. a tempore cujus, &c.* until the Diſſolution, have held the Land diſcharged of Tithes (as he may well preſcribe by the Common Law) and give ſuch Evidence that he may approve it: And ſo if in Truth, the Land be diſcharged, he has ſufficient Remedy to relieve himſelf. *Vide the Biſhop of* Wincheſter's *Caſe, in the ſecond Part of my* Reports, *fol.* 44. *b.* 45. *a.* But if the Abby, or Priory, *&c.* was founded within

(*a*) Moor 50. Hob. 311.

(*b*) Hob. 297.

(*c*) 2 Co. 48. a. Hob. 298.

(*d*) Cro. Jac. 559. 2 Co. 48. a.

(*e*) Cro. Jac. 453. Hob. 311. Degg's Parſon's Counſellor 334. Godolph. Abr. 454.

(*f*) 2 Co. 44. b. 45. a. Cro. Car. 423. Hob. 300, 311.

within Time of Memory, then he can't preſcribe *omnino*, and foraſmuch as in the principal Caſe, the Appropriation was made in 20 *H.* 8. ſo that it appeared to the Court, that before that, the 22 Acres were charged with Tithes; for of Common Right all Lands ought to pay Tithes; for that Reaſon the Chief Juſtice concluded, That the ſaid 22 Acres were as this Caſe is, chargeable with Tithes; but if the Parties are not ſatisfied with it, they may begin again: For inaſmuch as the Information, as it is reſolved, is good, and the Plea, *Pro conſultatione habenda*, altogether inſufficient, and the Verdict impertinent to the Iſſue, they would not grant a Conſultation; and thereunto the whole Court agreed. Hob. 300. 2 Co. 48. a. Yelv. 31.

[See *Fitzgib.* 38. in Dr. *Bentley*'s Caſe.]

Dr. GRAUNT's

Dr. GRAUNT'S *Caſe.*

Mich. 11 Jacobi 1.

Which is Entred in *C. B. Paſchæ* 11 *Jac. Regis. Rot.* 2559.

THE Caſe was, That *Gabriel Graunt*, Doctor in Divinity, Parſon of the Pariſh of St. *Leonard* in *Foſter-Lane*, *Infra præcinctum Sancti Martini le Grand*, libell'd in the Spiritual Court before Dr. *Maſter*, *Official* of the Dean and Chapter of *Weſtminſter*, againſt *Edward Taylor*, Farmer, of a great and ancient Houſe, called the *Dean's Houſe*, within the Precinct of St. *Martins le Grand*, late Parcel of the Poſſeſſions of the Abbot of *Weſtminſter*, and alledged, That every Pariſhioner, or Inhabitant having, or occupying a Manſion-Houſe, Shops, Ware-Houſes, Cellars or Stables, within the ſaidPariſh of St. *Leonard*, within St. *Martins le Grand*, yearly, every Quarter of the Year, at the Feaſts of *Eaſter*, the Nativity of St. *John* the Baptiſt, St. *Michael* the Arch-Angel, and the Birth of Chriſt, *a tempore cujus*, *&c.* or at leaſt from the Foundation, Donation, and Erection of the ſaid Rectory of St. *Leonard*, by equal Portions, to the Parſons of the ſaid Rectory for the Time being, *Nomine & loco decimar' ſuar', juxta ratam cujuſlibet viginti ſolidat' redditus per an. ex qualibet hujuſmodi*

hujuſmodi domo, ſhopa, ſollar', cellar', ſive ſtabulo ſic tent' ſive occupat' in prædicta parochia, duos ſolidos legalis monetæ Angliæ, &c. and that the ſaid *Edward Taylor* and his Family, did dwell in the ſaid Houſe three Years, and had, and poſſeſſed it for the ſame Time, *Sub annuali redditu ſexdecim librarum ſeu ſaltem* 12 *librarum, &c.* and ſo demanded two Shillings in the Pound, *&c.* The ſaid *Edward Taylor* exhibited an Information and Suggeſtion to the Court, That the late Abbot of *Weſtminſter*, and all his Predeceſſors, 'till the Diſſolution of the ſaid Monaſtery, which was *Anno* 30 *Hen.* 8. had held the ſaid Houſe diſcharged of Tithes, and alledged the Statute of 31 *Hen.* 8. concerning the Diſcharge of Payment of Tithes, and conveyed to himſelf a Leaſe for Years, and thereupon had a Prohibition; to which the ſaid Doctor *Graunt* appeared, and *Taylor* declared againſt him to the Effect aforeſaid, and Doctor *Graunt* traverſed the ſaid Preſcription of Diſcharge of Tithes; whereupon Iſſue was joined, and tried before me in *London* for Doctor *Graunt*: And now it was moved by *Taylor*'s Counſel, That upon the ſaid Libel, no Conſultation ought to be granted; for *de communi jure*, no Tithes ought to be paid for Houſes of Habitation, nor for any Rent reſerved upon any Leaſe made of them; for Tithes ought to be paid of Things which grow and renew from Year to Year, by the Act of God. *Vide Regiſter* 54 *b. F. N. B.* 53. *E. Br. Tit. Diſmes* 16. and not for dwelling in Houſes, or of Rents iſſuing out of Lands, reſerved and created only and meerly by the Act of the Party: And therefore in the City of *London*, the Parſons have two Shillings and eight Pence in the Pound, *&c.* in Name of Tithes; but that is by Decree made *Anno* 1535, which is enacted and confirmed by Authority of Parliament, *Anno* 37 *Hen.* 8. *cap.* 12. But St. *Martin's le Grand* is not included within the ſaid Decree, and Act, for it is within *London*, and not of it; and therefore remains at the Common Law. And in 30 *Ed.* 3. *fol* 1. *a. &* 38 *Ed.* 3. *fol.* 13. *a.* by *Finchden* it is ſaid, That the Profits of the Churches in *London*, are the Oblations and Obventions.

31 H. 8. *c.* 13.

Degg's Parſons Counſellor 264. 1 Roll. 636. Hob. 11. Cro. Car. 596. Moor 912. Godolph. Abr. 349. Cro. El. 276. 2 Inſt. 651. 2 Rol. 284.

Hob. 11. Moor 912. Cro. Car. 596. Cro. Eliz. 276. Hugh's Abr. 676.

But it was reſolved *per totam Curiam*, 1. That a Conſultation ſhould be granted, for it may have a lawful Beginning; for it *may be*, that for all the Tithes of the Land, upon which the Houſes are built, this *Modus Decimandi* has been *a tempore cujus, &c.* paid, and altho' it is after built, that ſhall not take away the Right of the Parſon in ſuch Caſe. And becauſe it might have a lawful Beginning, and that it has been uſed *a tempore cujus, &c.* it was therefore reſolved, that a Conſultation ſhould be granted.

Hob. 11. Rol. 642. Degg's Parſon's Counſellor 264.

Hob. 11.

It was likewiſe reſolved, 2. That for theſe Monies he might ſue in the Eccleſiaſtical Court, becauſe they are in the Nature

2 Rol. 283, 284. Latch. 210.

Hob. 247.
1 Rol. Rep. 419.
3 Bulſt. 241, 242.

of Tithes, *viz. Modus decimandi*; and every ancient City and Borough has for the moſt Part ſuch Cuſtom, *De modo decimandi* for their Houſes, for the Maintenance of their Parſon. And as to the Opinions in 30 *Ed.* 3. *&* 38 *Ed.* 3. it was ſaid, That *Obventio dicitur ab obveniendo*, and includes Oblations, Rents, or other Revenues, which may well agree with the Reſolution before; and afterwards a Conſultation was granted.

40 E. 3. 1. 2.
38 E. 3. 13. a.

[*Note*, The *may be*, &c. in the firſt Reſolution, *ante*, ſeems a weak Reaſon to ſupport that Reſolution.]

Sir

Sir HENRY NEVIL'S *Caſe.*

Mich. 10 Jacobi I.

PAſchæ, 9 Jac. Regis, Rot. 925. In a ſecond Deliverance between *Alexander Goodcrome* Plaintiff, and *H. Moor* Defendant, in the Common Pleas, upon the long and intricate Record, the Caſe was briefly ſuch. Sir *Henry Nevil* Knight, was ſeiſed of the Manor of *Wargrave*, which extended itſelf into *Warfield* and divers other Towns, in his Demeſn as of Fee; whereof one Houſe, one Yard of Land, and eighteen Acres of Land were Parcel: And *Alexander Goodcrome* alledged a Cuſtom in this Manor, *viz. quod infra præd' Manerium de* Wargrave *eſt & tempore cujus contrar' memoria Hom' non exiſt', fuit un' Manerium cuſtumar' ſc. manerium de* Warfield, *quod quidem manerium de* Warfield *per totum idem Temp' conſiſtebat de Terris dominicalib' & ſervitiis cuſtumariis, viz. de præd' meſſuagio & virgata terræ & de* 18 *acr' terræ, ac omnibus reddit'ib' & aliis pertinen' cuſtumar' in* Warfield, *eidem Manerio cuſtumar' pertinen' : quodque præd' tempore quo, &c. necnon a toto tempore cuj' contrar', &c. diverſæ parcellæ præd' meſſuagii & virgat' terræ præd' & de præd'* 18 *acris terræ, fuer' terræ cuſtumar' ejuſdem manerii de* Warfield, *& dimiſſ. & dimiſſibil' per copiam Rot' Cur' ejuſdem manerii de* Warfield *per Dom' ejuſdem manerii vel per ſeneſchallum Domini ejuſdem manerii pro tempore exiſten', diverſis perſonis ea capere volenti ſeu volentibus in feodo ſimplici, ad termin' vitæ, vel Annorum, ad Voluntat' Dom' ſecundum Conſuetudin' ejuſdem manerii, &c. quod quidem manerium de* Warfield *eſt, & a toto temp' ſupradicto fuit parcel' manerii de* Wargrave *tent' de*

Cro. Jac. 327. 2 Bulſtr. 135.

eodem manerio de Wargrave *per copiam Rot' Curiæ ejuſdem manerii de* Wargrave, *ac dimiſſ. & dimiſſibil' per copiam Rot' Cur' ejuſdem manerii, per Dom' ejuſdem manerii vel per ſeneſchallum ſuum ejuſdem manerii pro tempore exiſten' cuicunq; perſonæ ſive perſonis ill' capere volenti vel volentib' in feodo ſimplici, ad termin' vitæ vel annorum, ad voluntatem Domini ſecundum conſuetudinem ejuſdem manerii de* Wargrave, *per nomen unius meſſuagii & unius virgatæ terræ &* 18 *acr' terræ & omnium reddituum & aliorum pertin' in* Warfield: And Sir *Henry Nevil* at the Court of his Manor of *Wargrave*, *Anno* 28 *Eliz.* granted to *Robert Albany* the Manor of *Warfield*, *per nomen Unius Meſſuagii, unius virgatæ terræ &* 18 *Acr' terræ & omnium reddituum & aliorum pertin' in Warfield*, To have and to hold to the ſaid *Robert Albany* and his Heirs, at the Will of the Lord of the ſaid Manor of *Wargrave*, according to the Cuſtom of the ſame Manor: *Et idem Alexander ulterius dicit, quod infra præd' manerium de* Wargrave *talis habetur, & a toto tempore cuj' contrar' memoria Hom' non exiſtit habebatur conſuetudo, quod quilibet Domin' cuſtumar' dicti manerii de* Warfield *per ſeneſchallum ſuum uſus fuit tenere Cur' infra dictum manerium de* Warfield *pro & concernen' cuſtumarios tenentes ſuos præd' manerii de* Warfield *præd' diverſar' parcell' terræ per copiam Rot' Cur' ejuſdem manerii dimiſſibil' ſecundum Conſuetudinem ejuſdem manerii de* Warfield, *ut præfertur, quodque præd' 2 acr' terræ cum pertinen' in quibus &c.* are *& a tempore cuj', &c.* were Parcel of the ſaid cuſtomary Manor of *Warfield, & dimiſſ. & dimiſſibil', &c.* And the ſaid *Goodcrome* claim'd by Grant by Copy of the ſaid two Acres made by the Steward of the Lord of the ſaid cuſtomary Manor of *Warfield:* And Iſſue was taken, whether *infra præd' Manerium de* Wargrave *eſt & a toto tempore, &c. fuit un' manerium cuſtumar', viz. manerium de* Warfield, *dimiſſ. & dimiſſibil' per copiam Rot' Cur' præd' manerii de* Wagrave *prout, &c.* And the Viſne was *De vicineto manerii de Wargrave*, and the Trial was at the Bar, and the Iſſue was found for *Goodcrome* the Plaintiff, *viz.* That there was ſuch a Cuſtomary Manor; and it was moved in Arreſt of Judgment, That there could not be ſuch a Cuſtomary Manor by Law; for of a Copyhold (which is but a Tenure at Will) there cannot be Lord, Meſne and Tenant; but of a Freehold at the Common Law only.

Yelv. 190. Co. Lit. 58. b. Co. Jac. 260. 327. Cro. Car. 43.

But it was clearly reſolved *per totam Curiam*, That a Cuſtomary Manor may be held by Copy, and ſuch Cuſtomary Lord

Lord may hold Courts, and grant Copies, and ſuch Cuſtomary Manor ſhall paſs by Surrender and Admittance, and Fines ſhall be paid upon Admittance as well upon Alienation as Deſcent. And there may be Lord Cuſtomary Meſn, and Cuſtomary Tenant, as well in Caſe where the Meſnalty is a Tenancy at Will according to the Cuſtom of the Manor, as where there is a Tenancy at Will at the Common Law, of a Manor. And if ſuch Cuſtomary Manor is forfeited, the Lord ſhall have the Cuſtoms and Services appertaining to it: As if Tenant at Will of a Manor grants Copies, and reſerves Rents and Services, theſe Rents and Services are annexed to the Manor, and ſhall attend upon the Owner of the Manor after the Will determined, altho' the Lord of the Manor doth not claim by or under, but above him and without any Privity in Eſtate: So in Caſe of him who is Tenant for Life or Years of a Manor, the Rents and Services reſerved by them, ſhall go to them in the Reverſion: And ſo note a Difference betwixt Reſervations at the Common Law, and by the Cuſtom of the Manor. And afterwards a Writ of Error was brought, and the ſame Matter aſſigned for Error, which was clearly overruled by the whole Court of King's Bench; and Exception was alſo taken to the Viſne, that it ſhould be (*a*) alſo of *Warfield*, *ſed non allocatur*, for the Iſſue riſes upon the Cuſtom within the Manor of *Wargrave*, and it appears that the Tenements in *Warfield* are Parcel of the Manor of *Wargrave*; and thereupon the Judgment was affirmed: And it was ſaid that the Manor of *Aileſham* in the County of *Norfolk*, is held by Copy, and others in ſeveral other Places.

1 Bulſtr. 56, 57.

1 Co. 96. a.

(*a*) 2 Rol. 613, 619, 620. 2 Bulſt. 135. Cr. Jac. 327. Cro. Car. 312. 1 Jones 320. 16, 17 Car. 2. c. 8.

Dr. AYRAY's *Case.*

Hill. 11 Jacobi 1. *in B. R.*

Lane 15, 33.

John Alcock, Gentleman, brought an Action of Treſpaſs againſt *Henry Ayray* Doctor of Divinity, *William Witham*, *William Parſons*, and *Thomas Prieſt*, (which Plea began in the King's Bench, *Trin. 9 Jac. Regis Rot.* 413.) and declared of a Treſpaſs 1 *Maii*, *Anno* 8 *Regis Jacobi* in an Houſe of the Plaintiff's, call'd the Parſonage Houſe, and the Plaintiff's Cloſes, *viz.* One called the Parſonage Cloſe, and another containing ten Acres of Glebe Land at *Charleton ſuper Otemore*, in the County of *Oxford*. The Defendants pleaded *Not guilty*, and a Special Verdict was given to this Effect, That the Places in which, *&c.* were Parcel of the Glebe of the Rectory of *Charlton ſuper Otemore*; whereof the ſaid *Henry Ayray* at the Time of the Treſpaſs, *&c.* was, and yet is Parſon, and that King *E.* 3. 18 *Jan.* in the Fourteenth Year of his Reign, by his Letters Patents under the Great Seal, *Ad honorem Dei, & augmentation' cultus Divini, de gratia ſua ſpeciali conceſſit & licentiam dedit Roberto de Eglesfield Clerico ipſius nuper Regis, quod ipſe in quodam Meſſuagio ſuo cum pertin' in Oxon' in Parochia Sancti Petri in Oriente, quandam Aulam Collegialem de Scholaribus, Capellanis, & aliis, perpetuis Temporibus duratur' ſub Nomine Aulæ Scholar' Reginæ de Oxon', quæ per unum Præpoſitum de dictis Scholar' juxta ordinationem præfati Roberti inde faciend' gubernabitur, conſtruere & de novo fundare, ac meſſuagium illud cum pertin' præfatis Præpoſitio & Scholaribus dare poſſit & aſſignare. Habendum & tenendum ſibi & Succeſſoribus*

Fu'l. Ch. Hiſt. 113.
1 Bulſtr. 91.

ſoribus ſuis Præpoſitis & Scholaribus Aulæ illius pro eorum inhabitatione imperpetuum. Et eiſdem Præpoſito & Scholaribus, quod ipſi meſuagium prædictum a præfato Roberto recipere poſſint & tenere ſibi & ſucceſſoribus ſuis prædictis, ſicut prædictum eſt, tenore præſentium licentiam ſimiliter dedimus ſpecialem. Et memoratam Aulam cum Præpoſito & cæteris ſociis per electionem in futurum habitantibus & morantibus in eadem, quos ad verum Collegium erigimus & exiſtere extunc præponimus, & ut Collegium licitum & approbatum agnoſcimus, authoritate noſtra plena qua poſſumus, acceptamus, ratificamus, & confirmamus: Statut' de terris & tenementis ad manum mortuam non ponendis edit', aut quocunque alio ſtatuto vel ordinatione in contrarium fact' non obſtante. Nolentes quod prædictus Robertus vel hæredes ſui, ſeu præfatus Præpoſitus & Scholares aut Succeſſores ſui ratione præmiſſorum, &c. occaſionentur, moleſtentur in aliquo, ſeu graventur, &c. They further found, That King *James* that now is, 11 *Oct. Anno* 8. of his Reign, had exemplified under the Great Seal the ſaid Charter in the Records of the *Chancery*, enrolled in the *Tower* of *London*, and in the Exemplication, the Clauſe of *ſub nomine*, was, *ſub nomine Aulæ Reginæ de Oxon'*, whereas in Truth the Charter was, *ſub nomine Aulæ Scholarium Reginæ*; ſo that this Word (*Scholarium*) was in that Clauſe omitted. And they further found, That the ſaid *Robert de Egleſfield, Poſtea virtute licentiæ prædictæ fundavit Collegium prædict' in Oxon' prædict', & condidit diverſas leges & ſtatuta pro regimine Collegii prædicti & ſcholarium in eo allocat' & allocand' prout' patet ex Rotulo patentium de Anno* 1 *Regis Rich.* 2. *Juratoribus prædictis in evidenc' oſtens'*, the Tenor of which is entred in the ſpecial Verdict *in hæc verba:* By which it appears, that the ſaid *Robert de Egleſfield* by his Charter nominated the ſaid College, *Aula Reginæ æternaliter nominand', & Scholares* alſo he nominated in it in divers Places *Socii*; and by the ſame Deed conſtituted divers Ordinances and Statutes, for the better Government of the ſaid College. And the Jury further found, That King *H.* 8. was ſeiſed of the Advowſon of the Church of *Charleton ſuper Otemore prædict'* in Fee in the Right of his Crown, and 4 *Julii Anno* 35 *Regni ſui*, by his Charter under the Great Seal, granted the ſaid Advowſon to *Richard Andrews* and *Nicholas Temple*, and their Heirs, who by their Deed 8 *Julii*, 35, granted the ſaid Advowſon to *William Devendiſhe*, and *Francis Shawe*, and their Heirs. And that 8

Julii, 1509. *quidam Hugh Hodgeſon tunc Præpoſitus Aulæ præd' & Scholares ejuſdem Aulæ, per nomina Hugonis præpoſiti Collegii Reginæ in Univerſitate Oxoniæ & Sociorum & Scholarium ejuſdem Collegii*, by their Deed under their Common Seal, preſented one *Allen Scott* to the ſaid Church, then void, who was admitted, inſtituted and inducted; and that the ſaid *Allen Scot*, 20 *Maii*, *Anno* 10 *Dominæ Elizabethæ, nuper Reginæ Angliæ* (the ſaid *Allen* then being Parſon of the ſaid Church, and Provoſt of the ſaid Hall) by his Deed demiſed the ſaid Rectory of *Charlton ſuper Otemore* to *William Shillingford* for the Term of eighty-one Years, and afterwards, *viz.* the 30th Day of the ſame Month of *May*, *Præpoſitus Aulæ ſive Collegii præd' & Scholares ejuſdem Aulæ, per nomina Præpoſit' Sociorum & Scholarium Aulæ vel Collegii Reginæ in Univerſitat' Oxon' Rectoriæ Eccleſiæ de Charleton ſuper Otemore Patroni, per Scriptum ſuum ſigillo ſuo communi Sigillat'*, confirmed the ſaid Demiſe; and that *Hugh* Biſhop of *Oxford*, Ordinary of the ſaid Place, confirmed it alſo in the ſaid tenth Year, in the Life of the ſaid *Allen Scot*; and that *Allen Scot* died: After whoſe Death, the ſaid *Henry Ayray* to the ſaid Church then void was lawfully preſented, admitted, inſtituted, and inducted; and that the ſaid *John Alcock* had the Eſtate and Intereſt of the ſaid *William Shillingford*, who entred into the ſaid Rectory, and was thereof poſſeſſed. And that the ſaid *Henry Ayray* then being Parſon, and the other Defendants, by his Commandment entred into the Tenements, in which, *&c.* upon the Poſſeſſion of the ſaid *John Alcock*, *&c.* and the Doubt which the Jury referred to the Court, was, Whether the ſaid Demiſe of the ſaid Rectory was well confirmed or not, *&c.* And it was objected, That as well the ſaid Confirmation, as the ſaid Preſentation, were utterly void, by Reaſon of the Miſpriſion of the true Name of the Corporation: And therefore the firſt Queſtion which was made, was, What was the true Name of the Corporation; and they conceived, That the true Name of the Corporation was *Præpoſitus & Scholares Aulæ Scholarium Reginæ de Oxon'*; and this Name they collected out of the Words of the Charter itſelf, That the King licenſed the ſaid *Robert Egleſfield* to Found *Quandam Aulam Collegialem de Scholaribus, &c. ſub nomine Aulæ Scholarium Reginæ de Oxon', quæ per unum Præpoſit' de dictis Scholar', &c. gubernab.* Then this being the true Name, betwixt the true Name of the Corporation and the ſaid Confirmation, five Differences were obſerved, *ſc.* three

Co. Lit. 300. b.

1 Roll. Rep. 415. Moor 865.

ſc. three in Addition, one in Alteration, and one in Omiſſion. In Addition, firſt of the Word (*Sociorum*) for the Confirmation is, *Præpoſitus, Socii & Scholares*, where it ſhould be *Præpoſitus & Scholares*. Secondly, of theſe Words, (*vel Collegii.*) Thirdly, of this Word (*Univerſitate.*) In Alteration, *ſc.* (*de*) for (*in*) for the true Name of the Corporation was *de Oxon'*, and the Confirmation was *in Univerſitate Oxon'*. In Omiſſion of this Word (*Scholarium*) in a material Place, where it ſhould be *Aulæ Scholarium Reginæ*, it is *Aulæ Reginæ*. And in the Preſentation, divers Variances were obſerved; one Alteration, *ſc. Collegii* for *Aulæ*; and the other Miſpriſions in Addition, Alteration and Omiſſion. And all theſe were argued at the Bar by *Coventry* and *George Croke*, on the Plaintiff's Part, and by *Thomas Crew* and *Yelverton* Solicitor for the Defendant; and all the ſaid Variances, but one, were unanimouſly reſolved by all the Juſtices to be without Queſtion, and not worthy of any Argument; and were not of any Force to impeach the ſaid Confirmation or the ſaid Preſentation: And the only Point which had any Scruple, was the ſaid Variance of the Omiſſion of (*Scholarium*) after this Word (*Aulæ.*) And that depends only upon the Conſideration of the true Name of the Corporation; and what Diverſity was betwixt this Caſe, and the Caſe of *Fiſher* and *Boys*, reported by me in the tenth Part of my *Reports*, in the Caſe of the Mayor and Burgeſſes of *Lynne*, which you may ſee there; which Caſe was affirmed by all the Juſtices to be good Law.

2 Roll. 42. Cr. El. 167, 338.

Hob. 125. a. 10 Co. 125. Mo. 266. 1 Anderſ. 196. Lane. 15, 34.

And yet it was reſolved, That in the Caſe at Bar, as well the Confirmation as the Preſentation, was good enough, notwithſtanding the Omiſſion of the Iteration of this Word (*Scholarium.*) For it was reſolved, That upon Conſideration of the ſaid Charter of King *E.* 3. and of the Inſtrument of the ſaid *Robert de Egleſfield*, the true Name of the Corporation was *Præpoſitus & Scholares Aulæ Reginæ de Oxon'*; for it appears by the Charter itſelf, that the Name of the Corporation required only once *Scholares*, and not any double Iteration of it (which, as it was ſaid, was *Oculus quæſtionis*) and that for divers Reaſons: 1. That in the Clauſe of *ſub nomine*, this Word was but once mentioned: 2. Altho' in the *ſub nomine* it is ſaid *Aulæ Scholarium Reginæ*, yet in Conſtruction, as in many Caſes is uſed, it ought to precede theſe Words *Aulæ Reginæ*; and that for three Reaſons: 1. Otherwiſe it would be a ſole Corporation conſiſting upon a Provoſt only; for then the Corporation would be *per Nomen Præpoſiti Aulæ Scholarium Reginæ*,

Hob. 124. Moor 865.

and not a Corporation aggregate of many, as every one has agreed it was: 2. Immediately after these Words, *Sub nomine Aulæ Scholarium Reginæ*, these Words are added, *Quæ per unum Præpositum de dictis Scholaribus, &c. gubernabitur:* So that it clearly appears, that this Word (*Scholares*) should be but once mention'd in the Corporation: 3. Such Construction is directly approv'd by three Interpreters *Omni exceptione majores, &c.* King *E.* 3. in his Charter, the said Founder *Robert Eglesfield* in his Instrument of Foundation, and the Incorporation itself: 1. By the Charter in the next subsequent Words, it is said, *Ac Mesuagium illud cum pertin' præfat' Præpositus & Scholaribus dare possit, &c.* Where these Words, *Præpositus & Scholares* are joined together; also there the *Habendum* is, *Habendum & tenendum sibi & successoribus suis, Præpositis & Scholaribus Aulæ illius:* In which Words the King not only conjoins the said Words together, but also the King gives Precedence to this Word *Scholaribus*, before *Aulæ illius*, and no mention of them after, also *Nolentes quod præfat' Præpositus & Scholares aut successores sui, &c.* 2. In the Instrument of the said *Robert de Eglesfield*, the Founder ordains, That the said College shall be always called *Aulæ Reginæ*, (and not *Aula Scholarium Reginæ*) and he saith, *Aula Reginæ æternaliter nominanda:* 3. The Corporation itself, from the said Time of Incorporation, never accepted any Grant, or made any Grant with double Iteration of this Word (*Scholares*) but with a single mention of it only, as appears by many, and almost infinite Precedents; Also it was never called in Vulgar Appellation, *Queen's Scholars College*; neither doth any one know it by such Name, but every one knows it by the Name of *Queen's College*. And by this Determination of the true Name, it appears, That there is not any Affinity betwixt the said Case of (*a*) *Fisher* and *Boys*, and the Case at the Bar; for there is a double Iteration of this Word (*Scholares*) in two material Places, and in the Case at Bar but one single mention of it only.

(*a*) 10 Co. 125. a. Moor 266. Lane 15, 34. 1 Anderf. 196.

And as to the other Variances, it was resolved, That none of them were material; for first, *Nomen est quasi rei notamen*, and *Nomina sunt notæ rerum*, and were invented to make a Distinction between Person and Person, *&c.* and in the Case at Bar, the College was called by such Name that it might be well distinguished from every other College in the same University: 2dly, Altho' it is said in 21 *E.* 4. 55. and other Books, that the Name of an Incorporation is like the Name

Name of Baptiſm: Yet if the Perſon be ſo (*a*) deſcribed, that he may be certainly known from other Perſons, the Omiſſion, or in ſome Caſe the Miſpriſion of the Name of Baptiſm ſhall not avoid the Grant; as a Gift (*b*) *Omnibus filiis J. S.* or *primogenito filio J. S.* or (*c*) *uxori de J. S.* or *filiæ de J. S.* when there is but one, *&c.* 37 *H.* 6. (10.) 30. *b.* 11 *E.* 4. 2. *a*, 18 *E.* 3. 30 *E.* 3. 18. *b.* 12 *Aſſ.* 16. and in (*d*) 27 *E.* 3. 85. *a. b.* The Name of Baptiſm of the Abbot of *W.* was *Richerus*, and he by the Name of *Richardus*, *Abbot de W.* made a Grant; and altho' his Name of Baptiſm was miſtaken, yet becauſe the other Words, *ſc. Abbas de W.* did certainly deſcribe the Perſon; for this Cauſe the Grant, notwithſtanding the Miſpriſion of the Name of Baptiſm, was good. So if a Grant be made to *J. S. & Margaretæ uxori ſuæ*, where the Wife's Name is *Margeriæ*, or to *J. S. & Mariottæ uxori ſuæ*, where the Wife's Name is *Marion*, yet the Grant is good; altho' the Name of Baptiſm be miſtaken, becauſe *uxori ſuæ* is a certain Deſcription of the Perſon, 1 *H.* 5. 8. *a.* 46 *E.* 3. 22. *a. b.* 1 *Aſſ.* 11. 12 *Aſſ.* 16. 9 *H.* 7. 9. 3 *H.* 6. 25. *b.* 12 *R.* 2. *Feoffments & Faits* 58. 22 *E.* 3. *Brief* 936. 9 *E.* 3. 14. 46 *E.* 3. 22. *a. b.* 14 *H.* 7. 21. So (King) is a Name of Incorporation; yet a Grant made to the King, by the Name of (Sovereign Lord *James*) omitting this Word King, is good enough: For, *Nihil facit error nominis cum de corpore conſtat*; and *hæc fuit vetus & conſtans Opinio* in the Caſe of Corporations. And therefore in 26 *E.* 3. 66. 67. *a.* *Iſabel*, Queen of *England*, brought a Writ of Covenant againſt *William*, Prior of *Coventry*; for that *Hugh*, Prior of *Coventry*, his Predeceſſor, and his Covent, did ſubmit themſelves to the Award of the ſaid Queen and her Council, for the Heritage which was of *R. N.* in *Coventry*, *Et partibus adjacentibus*; and of the Queen's Tenements in *Coventry*, and of thoſe which were in Aid of her, and alſo of the Tenements of the Prior of *Coventry*, and which were in Aid of him; and the Deed of Covenant was, *Hugh* Prior of our Lady of *Coventry*. *Mutford* who was of Council with the Defendant, you have in your Writ and Count omitted (Our Lady) Judgment of the Variance betwixt the Corporation and the Specialty: To which *Green* of the Plaintiff's Council ſaid, That the Prior, and alſo the Church of *Coventry*, is founded by the Name of *St. Michael*, and ſo I cannot have a Writ according to the Specialty; for you may abate the Writ, notwithſtanding the Deed ſhall be good; and *Mutford* by the Rule of the Court was put to Anſwer; wherefore he pleaded other Matter. So that in thoſe Days the Miſpriſion in a Deed of the Saint, to whom the Corporation was dedicated, was not ſufficient to avoid their Deed; becauſe

(*a*) Co. Lit. 32. Hob. 32, 36. 2 Roll. 43.

(*b*) Br. noſme 9. 2 H. 4. 25. a. b. Br. done & remainder 17. Co. Lit. 3. a. Br. Graunt 54.

(*c*) Br. Graunt 65. 1 Aſſ. 111. Br. Graunt 63.

(*d*) Fitz. Grant. 67. Co. Lit. 3. a. Cr. El. 111.

Fitz. Feoffment & Faits 37. 2 Rol. 43. Br. Graunt 63, 65. Br. noſme 36. Co. Lit. 3. a. Br. Graunt 22. Br. Fait 82. 1 H. 7. 29. a. 6 Co. 65. b.

(a) 6 Co. 65. b. 10 Co. 126. a. 133. a. 5 Co. 12. a.

becauſe *Hugh*, Prior of *Coventry*, was a certain Deſcription of the Corporation. But it might (*a*) abate the Writ, becauſe he might purchaſe another Writ. *Vide F. N. B.* in the Writ *de Corodio habendo*, the Name of the Saint omitted: And where there was a Prior of our Lady of *Southwark*, and a Prior of the *Trinity* of *London*; and the ſaid Prior of Our Lady of *Southwark* of old Time by the Name of the *Canons* of *Southwark*, granted by their Deed to the other Prior, by the Name of *Canons* of *London*, an Annuity, *&c.* and it was adjudged good in 17 *E.* 3. 32. *a.* For although the preciſe Name of the Corporation was not purſued, and the Saint to whom the Houſe was dedicated, omitted; yet becauſe in Truth the Prior of each of the Houſes was one of the Canons thereof; for that Cauſe (foraſmuch as *ſatis conſtabat de perſonis*) prudent and grave Antiquity did adjudge ſuch Grant good: It likewiſe appears in our Books, that the Name of the Corporation of *Templers*, was, *Magiſter Militiæ Templi de Jeruſalem in Anglia & confratres ſui*, 3 *E.* 3. 11. 5 *E.* 3. 36. 31 *E.* 1. *Tryal* 99. And the Name of the Corporation of the Priory of *St. John's* of *Jeruſalem*, *Prior Hoſpitalis Sancti Johannis de Jeruſalem in Anglia & confratres ſui*, as appears in 44 *E.* 3. Then the Statute *de Templariis* is worthy of Conſideration, made *Anno* 17 *E.* 2. in the Preamble of which, mention is made, *De adnullat' ordin' Militiæ Templi & de fratribus ejuſdem ordinis*; and in the Body of the Act, *Ordo Militiæ Templi de fratribus ejuſdem ordinis*, and it is enacted by the ſame Act, *Quod omnia terræ tenementa, &c. quæ fuerunt dictorum Templariorum, aſſignentur & liberentur ordini fratrum Hoſpitalis Sancti Johannis Jeruſalem, Habend' & tenend' eiſdem Priori & fratribus & ſucceſſoribus ſuis, de Domino Rege & aliis Dominis feodorum prædict', per illæ eadem ſervitia per quæ fratres ordinis Militiæ Templi ea tenuerunt:* In which Act, altho' the Makers of the Act do not follow the preciſe Words of the Corporation, either of the Templers or Hoſpitalers; yet becauſe they were ſo certainly deſcribed, *Quod conſtat de perſonis*, the Words of the ſaid Act were ſufficient to transfer the Poſſeſſions, *Magiſtri Militiæ Templi Jeruſalem in Anglia & confratrum ſuorum, Priori Hoſpitalis Sancti Johannis Jeruſalem in Anglia & confratribus ſuis*, and ſo has it been always allowed in our Books, 1 *Edw.* 3. 9. 3 *E.* 3. 11. 5 *E.* 3. 36. 35 *H.* 6. 46. *Vide* 2 (4) *E.* 4. 24. *b.* *John* Abbot of *D.* made a Bond by the Name of *J. C. Clericus de D.* and held good; and yet the Abbot is a dead Perſon, as to all Reſpects, but to ſuch Acts which he

Br. Abbey & Prior 31. Fitz. Obligation 60.

he doth as Abbot: And a Man may have a Writ of Right of Advowſon, *De Advocatione Eccleſiæ de D*; and then if there be two Churches in one Town, the Tenant ſhall have the View; but if there be two Churches in one Town dedicated to two ſeveral Saints; for Example to St. *Mary* and St. *Peter*, then if a Writ be brought *De Advocatione Eccleſiæ Sanctæ Mariæ de D.* the Tenant ſhall not have the View; ſo by that it appears, That in a Writ of Right of Advowſon, wherein the Advowſon of the Church ſhall be recovered, the Demandant may in his Writ, add or omit the Name of the Saint at his Pleaſure. 48 *E.* 3. 31. *a.* 21 *E.* 3. 57. 36 *H.* 6. 16. *a.* *Regiſtr.* 33. *a.* & *F. N. B.* 49. *o.* *Si Præbendarius Præbendæ de N. in Eccleſia Sancti Petri Eborum*, without ſaying *in Eccleſia Cathedrali*, which is in Truth its right Name; ſo *ibid in Eccleſia Sancti Pauli London'*, and *in Eccleſia beatæ Mariæ Lincoln'*, *&c.* in 18 *E.* 3. *fol.* 10. *b.* & 11. *a.* the Caſe was, That in the Town of *Toft-Newton* there were two Churches, one of St. *Michael*, the other of St. *Peter* and St. *Paul*, and the Truth was, That *Toft-Newton* was one Town, and in that was a Church known by the Name of the Church of *Toft-Newton*; and in *Newton*, which was an Hamlet of *Toft-Newton*, was another Church known by the Name of *Newton tantum*, and there a *Quare impedit* was brought *ad Eccleſiam de Toft-Newton*, without more, *& bene*, although the Saint was omitted; becauſe there was a ſufficient Difference by which the Church, whereof the Writ is brought, may be known, and therefore *Wilby* Chief Juſtice, who gave the Rule, ſaid, the Church is certain enough; wherefore Anſwer, and there Iſſue was taken not of the Name of the Town, but of the Surname of the Church, *ſc.* That there were two Churches in *Toft-Newton*, *abſque hoc* that either of the Churches bears the Name of the Church of *Newton*: and in 17 *E.* 3. 48. *a. b.* one was named *Burgenſis de novo Caſtro ſuper Tinam*, and Exception was taken, That *Burgeſs* ought to be of a Town certain, and not of a Caſtle, *Sed non allocatur*; for the antient Judges of the Law did reject ſuch Niceties concerning Appellations or Names. And as to the Addition of this Word (*Sociorum*) in the Preſentation, that doth not impeach the Preſentation, for notwithſtanding this Addition, the College is certainly enough deſcribed, that it may be diſtinguiſhed from every other; and for any Thing that appears in the Caſe, *Socii & Scholares* may be *Synonima*, and in the ſaid Charter, the King names *Scholares* by the Name of *Socii*, *Vide* 20 *E.* 4. 20. according to this Reſolution.

Hughs Abr. 2046.

Fitz. View. 22. 62. Br. View 70. 33 E. 3. View 183. 19 E. 3. View 105.

And for the Addition of *Univerſitate*, it was clearly overruled, as before it was in the ſaid Caſe between *Fiſher* and *Boys*, and for the Reaſons and Cauſes there reported.

Lane 15, 34. 1 Anderſ. 196. 10 Co. 125. a. Moor 266.

So

So for the Addition of theſe Words (*vel Collegii*) after this Word (*Aulæ*) and for putting this Word (*Collegii*) in Lieu of (*Aulæ*) none of theſe have any Colour of material Variance, but are *eadem re & ſenſu.* And King *E.* 3. in his Charter called the ſaid Hall a College, as in Truth it is. And I have made a briefer Report of this Caſe, becauſe I have publiſhed the Caſe of the Major, *&c.* of *Lynne*, in the laſt Part of my *Commentaries*, which ſtands in Effect upon the ſame Argument, and divers Judgments cited there tend to the ſame End.

Cro. El. 167. 2 Roll. 42. Hob. 124.

HENRY

HENRY HARPUR's *Caſe.*

Trin. 12 Jac. 1. *in B. R.*

IN an *Ejectione firmæ* between *John Wirral* Plaintiff, and *Henry Harpur*, Eſquire, and *Barbara* his Wife, Defendants, which began *Trin.* 11 *Jac. Regis, Rot.* 553. in the King's Bench. The Plaintiff declared, That whereas *Thomas Seylard*, Eſquire, and *Elizabeth* his Wife, 24 *Maii, Anno Regni Domini Jacobi nunc* 11. *apud Bredon in Com' Leiceſtr'* by their Indenture, *&c.* ſhewed forth, demiſed to the ſaid *John*, an Houſe, thirty Acres of Land, ten Acres of Meadow, and twelve Acres of Paſture, with their Appurtenances in *Workington in Parochia de Bredon in Com' præd'*, *ac etiam unam capellam cum pertin' in Workington in Parochia de Bredon prædict'*, *necnon omnes & omnimodas decimas quaſcunque annuatim provenient' in Workington & Willeſdon prædict' in Parochia de Bredon prædict' in Com' prædict' per nomina totius illius Meſuagii, cum omnibus domibus, &c. clauſis, terris, pratis, paſtur', communiis, & hæreditamentis ill' pertinen' in campis ſeu hamlet' de Workington in Parochia de Bredon in Com' prædict'*, *ac etiam per nomina unius Capellæ in Workington præd'*, *ac etiam per nomina omnium & omnimodarum decimarum quarumcunque annuatim creſcen' in hamlet' de Workington & Willeſdon in prædict' Parochia de Bredon, cum pertin'*, *habend' & tenend' tenementa & decimas prædict' cum pertin'*, from the Feaſt of the Annunciation of our Lady, then laſt paſt, for ſeven Years; by Force whereof *Idem Johannes Wirral in tenementa & decimas prædicta*, 24 *die Maii, Anno* 11. *ſupradicto, intravit, & fuit inde poſſeſſ. quouſque præd' Hen. & Barbara poſtea, ſc. eodem* 24 *die Maii, An.* 11. *ſupradicto*

Moor 837. Raymond 248. 1 Roll. Rep. 65.

apud Bredon prædict', vi & armis in tenementa & decimas præd' cum pertinen' ſuper poſſeſſionem ipſius Johannis inde intraverunt, and did eject him, *&c.* to his Damages of forty Pound, *&c.* And upon *Not guilty* pleaded, the Jury gave a Special Verdict to this Effect. *Henry Beaumont* Knight, was ſeiſed in Fee of the Manor of *Gracedieu* in the County of *Leiceſter*, and held it of the King by Knights-ſervice *in Capite*, and was alſo ſeiſed in Fee of the Manor of *Normanton* in the County of *Derby*, and held that of the King by Knights-ſervice *in Capite*, and the firſt Day of *October*, *Anno Regni Regis Jacobi nunc Angl'* 2. by Indenture, bearing Date the ſame Day and Year, in Conſideration of a Marriage to be ſolemnized between him and *Barbara Faunt*; and for the Advancement and Preferment in living of ſuch Iſſue which he and the ſaid *Barbara* ſhould have, did Covenant and Grant with *Andrew Noel* and *Henry Haſtings*, Knights, and their Heirs, That the ſaid *Henry Beaumont* and his Heirs, would ſtand ſeiſed of the ſaid Manors, to the Uſes following, *viz.* Of the ſaid Manor of *Gracedieu* to the Uſe of the ſaid *Henry Beaumont*, and the Heirs Males of the Body of the ſaid *Henry*, upon the Body of the ſaid *Barbara* to be begotten; and afterwards to the Uſe of *John Beaumont*, his ſecond Brother and the Heirs Males of his Body; and afterwards to the Uſe of *Francis Beaumont* his younger Brother, and the Heirs Males of his Body; and afterwards to the Uſe of the right Heirs of the ſaid Sir *Henry*. And of the Manor of *Normanton* to the Uſe of the ſaid *Henry* and *Barbara* for the Jointure of the ſaid *Barbara*, and to the Heirs of the Body of the ſaid *Henry*; and afterwards to the Uſe of the ſaid *John Beaumont*, and to the Heirs Males of his Body, and afterwards to the Uſe of the ſaid *Francis Beaumont*, and to the Heirs Males of his Body, and afterwards to the Uſe of the right Heirs of the ſaid Sir *Henry*: And afterwards the ſaid *Henry* married the ſaid *Barbara*. And the Jury further found, That one *Edward Sharpe* was ſeiſed in Fee of the Tenements and Tithes ſpecified in the Declaration, in which, *&c.* and held them of our Lord the King, as of his Manor of *Eaſt-Greenwich* in Free-Socage by Fealty only; and 7 *Martii*, *Anno* 3. *Domini Regis nunc*, by his Indenture, bearing Date the ſame Day and Year, and enrolled according to the Statute, in Conſideration of 1220 *l.* bargained and ſold to the ſaid Sir *Henry Beaumont* and his Heirs, the ſaid Tenements and Tithes, in which, *&c.* by Force whereof he enter'd, and was ſeiſed thereof in his Demeſn as of Fee. And afterwards the ſaid Sir *Henry*, 7 *Julii*, *Anno* 3. made his laſt Will in Writing, and thereby deviſed that his Executors ſhould ſell the ſaid Tenements and Tithes, in which, *&c.* and made his Siſter *Eliz. John Towne*, and

Edward Sharp, his Executors. And the ſaid Sir *Henry* ſo being ſeiſed of the ſaid Manors, Tenements, and Tithes, as is aforeſaid, 7 *Julii*, *Anno* 3. *ſupradicto*, died thereof ſeiſed, having Iſſue on the Body of the ſaid *Barbara*, one *Barbara* his Daughter and Heir. And that the ſaid Manor of *Gracedieu* at the Time of the making of the ſaid Indenture, and at the Time of the Death of the ſaid Sir *Henry*, was of the yearly Value of 30 *l.* and that the Manor of *Normanton* was then of the yearly Value of eighteen Pound; and that the Tenements and Tithes, in which, *&c.* were then of the yearly Value of three Pounds: And that the ſaid Executors for Money, ſold the Tenements and Tithes, in which, *&c.* to *Thomas Wroth*, Eſquire, and *William Towſe* Eſquire, and their Heirs, who conveyed them to the ſaid *Elizabeth*, one of the ſaid Executors, and her Heirs, who married the ſaid *Thomas Seylyard*, who made the Leaſe ſpecified in the Declaration to the Plaintiff, *Prout*, *&c.* by Force whereof the ſaid *John Wirral* entred into the ſaid Tenements and Tithes, in which, *&c.* and was poſſeſſed thereof, till the Defendants *Vi & armis in Tenementa & decimas* did enter and eject the Plaintiff, and ſo ejected and put out of his Poſſeſſion *extratenuer' & adhuc extratenent'*: And if upon the whole Matter the Defendants were guilty, or not, the Jury prayed the Advice of the Court, *&c.* And after this Caſe had been argued in ſeveral Terms at the Bar, and this Term by the Juſtices at the Bench, It received the ſame Reſolution which was in *Lovie*'s Caſe, which I have publiſhed in the tenth Part of my *Reports*, *fol.* 80 & 81. and therefore I will now make a more Summary Report of this Caſe.

In this Caſe it was firſt unanimouſly reſolved, That if the King's Tenant by Knights-ſervice *in Capite*, conveys his Land held *in Capite*, To one of his Sons in Fee, or to the Uſe of his Wife in Fee, *&c.* and afterwards purchaſes Land held in Socage, That in this Caſe he may by his Will in Writing, deviſe all the Land in Socage for the Reaſons and Cauſes in the ſaid *Lovie*'s Caſe. 10 Co. 82. b. Co. Lit. 111. b.

Secondly, That the Reverſion of the Fee which the ſaid Sir *Henry* had expectant upon the Eſtates in Tail, ſhall hinder the Deviſe of the other Land for a third Part of the other Land held in Socage; and although upon the Creation of the Eſtate of the Manor of *Normanton*, to him and his Wife, and the Heirs of his Body; the King is to have a third Part in Ward during the Life of the Wife, by the Statute, for the ſame Eſtate, upon which the Reverſion depends, and altho' the Reverſion is Seck without Rent, or any Profit. 10 Co. 80. b. Co. Lit. 111. b. Moor 837. 10 Co. 80. b.

Thirdly,

10 Co. 84. a. Co. Lit. 314. b.

Thirdly, That altho' the Reverſion of the Fee continued in him, yet he might deviſe two Parts of the Land newly purchaſed; and if he had granted over the Reverſion in Fee, he might have deviſed all the Land held in Socage purchaſed after.

Fourthly, That altho' he had executed his Power for more than two Parts, to the Uſe of his Wife; yet for the Land in Socage which he purchaſed after (if the Reverſion had not continued in him) he might have deviſed the whole, notwithſtanding the Execution of his Power before, and foraſmuch as the Reverſion of the Fee continued, in the Caſe at Bar, the Deviſe was good for two Parts; and the ſame Reaſons were given for all theſe Reſolutions in this Caſe at Bar, which are reported in *Lovie*'s Caſe.

Fifthly, It was objected, That nothing paſſed to *John* and *Francis*, Brothers of the ſaid Sir *Henry*, for two Reaſons: 1. Becauſe they were not within the Conſiderations expreſſed, *viz.* For the Advancement of the ſaid *Barbara*, and of the Iſſues which he ſhall beget on the Body of the ſaid *Barbara*; ſo that the Brothers are out of the Conſideration; for (*a*) *expreſſum facit ceſſare tacitum*; and therefore (*b*) if I covenant by Deed indented, that in Conſideration of 100 *l.* paid me by my Son, I will ſtand ſeiſed to the Uſe of him and his Heirs; if the Deed be not enrolled according to the Statute, nothing paſſes, becauſe the expreſs valuable Conſideration takes away the tacite and implied Conſideration of Blood; and no other Conſideration can be averred, than is contained in the Deed, becauſe the Subſtance of the Agreement is by Aſſent of the Parties referred to the Deed. 2. It is not found *in facto*, that the ſaid *John* and *Francis* were his Brothers, and ſo by the Covenant nothing veſts in them in Remainder; and then when Sir *Henry* died without Iſſue Male, the Manor of *Gracedieu* deſcended to *Barbara* in Fee-ſimple; ſo that a full third Part, and more deſcended to her; wherefore the Deviſe ſhall be good for all the ſaid Land and Tithes, in which, *&c.* held in Socage; and ſo Judgment ſhall be given for the Plaintiff for the whole. It was reſolved, That the Uſes were well raiſed to the Brothers in Remainder, and a Judgment was cited in this Court in Debt between *Elizabeth* (*c*) *Bedel* Plaintiff, and *Michael Bedel* Defendant, which began *Hill.* 1 *Jac. Rot.* 375. and is in the 7th Part of my *Reports*, *fol.* 39. where on the Record the Caſe was ſuch: *Robert Bedel* ſeiſed in Fee of a Houſe, *&c.* in *Iver* and *Langley*, in the County of *Buckingham*, had Iſſue by *Eliz.* his Wife, three Sons, whereof *James* was the ſecond, and the ſaid *Michael* the Defendant the third; by Deed indented tripartite between the ſaid *Robert* and his Wife of the 1ſt Part, the ſaid *James* his Son of the 2d Part, and the ſaid *Mich.* his Son on the 3d Part, in Conſideration of natural

(*a*) Co. Lit. 183. b. Godb. 449. Latch. 265. Raymond 46. 5 Co. 97. a. Carter 146. 7 Co. 39. b.

(*b*) Carter 138, 146. Cr. Eliz. 394. 1 Ventris 138. Palm. 214, 215. 8 Co. 94. a.

(*c*) Jenk. Cent. 289. Cro. Jac 168. 2 Roll. 782, 785. Raymond 50, 248. 8 Co. 94. a. Raymond 46. Cr. Jac. 624, 625. 2 Inſt. 172. 1 Roll. Rep. 68. 1 Jones 419. 2 Jones 101. 2 Ventris 318. March 50, 51.

natural Affection, and paternal Love which he had to the ſaid *James* and *Michael*, and for their better Preferment and Advancement, the ſaid *Rob.* covenanted with the ſaid *J.* and *Michael*, That he and his Heirs would ſtand ſeiſed of the ſaid Houſe, *&c.* to the Uſe of himſelf for Life, and afterwards to the Uſe of the ſaid *Elizabeth* his Wife for her Life; and afterwards one Moiety to the Uſe of the ſaid *J.* in Tail, and of the other Moiety to the Uſe of the ſaid *Mich.* in Tail; and afterwards *Robert* died; and all this Matter was found by ſpecial Verdict; and the ſole Queſtion of that Caſe was, If any Uſe was raiſed to *Elizabeth* his Wife? And the two Objections were moved againſt the Wife, which have been made againſt the Brothers in the Caſe at Bar.

And it was reſolved, as to the firſt, That the Conſideration that ſhe was his Wife, was apparent in the Deed, and no other Conſideration was expreſſed to raiſe an Uſe to her, but that ſhe was his Wife, and therefore if the Caſe which has been put, ſhould be admitted, where (*a*) the Father covenants by Deed indented with his Son, in Conſideration of 100 *l.* that he will ſtand ſeiſed to the Uſe of him and his Heirs; that in that Caſe the Deed ought to be enrolled according to the Statute, or nothing ſhall paſs: Yet it is not to be likened to the Caſe at Bar, becauſe there is a valuable Conſideration expreſſed in the Deed to be given by the Son; but ſo it is not in the Caſe at Bar, and a (*b*) Conſideration which ſtands with the Deed, may be averr'd, notwithſtanding it is not contained in the Deed, as it is adjudged in 3 *&* 4 *Ph. & Ma. Dyer* 146. (*c*) *Viller's* Caſe, and ſo reſolved in the firſt Part of my *Reports*, *fol.* 176. *a.* in *Mildmay's* Caſe. *Br. N. C.* 182.

As to the ſecond, it was reſolved, That (*d*) it was not neceſſary to aver that ſhe was his Wife, for that is apparent in the Deed, *Et* (*e*) *manifeſta probatione non indigent. Vide* (*f*) 13 *H.* 4. 17. *a.* in Aſſiſe of *Mortdaunceſter.* 46 *Ed.* 3. 33 *H.* 6. 13. 3 *H.* 6. 32. *Plow. Com.* in *Talbois's* Caſe, *&c.* That Things apparent need not be averr'd, and if in Truth ſhe was not his Wife, (*g*) that ſhall come in of the other Part; and for theſe Reaſons it was adjudged, That the Uſe was well raiſed to the ſaid Wife: On which Judgment, a Writ of Error was brought, and in the *Exchequer* Chamber, *Mich.* 5 *Jac. Regis*, after divers Arguments heard at the Bar, the Judgment was affirmed for the Reaſons and Cauſes aforeſaid, *una voce* by all the Juſtices of the *Common Pleas*, and Barons of the *Exchequer*.

Sixthly, It was reſolved, That for the Manor of *Gracedieu*, the Eſtate-tail vaniſhed by the Death of Sir *H.* without Iſſue-male; and therefore ſuch Eſtate-tail which ſo vaniſhed by his Death, is not any Cauſe to reſtrain the Deviſe for any Part, as oftentimes it has been reſolved; but the Reverſion in Fee in this Caſe, is the Cauſe to reſtrain the Deviſe for the 3d Part:

(*a*) 7 Co. 39. b. 1 Ventris 138. Cro. El. 394. Antea 24. b. Carter 138, 146. Palm. 214. 215. 8 Co. 94. a. Raym. 46. Jenk. Cent. 289. Winch. 59. 60.

(*b*) 7 Co. 39. a. 2 Inſt. 672. 4 Co. 3. a. 9 Co. 26. a. b. Owen 33. Hob. 124. 2 Rol. 790. 5 Co. 26. b. 2 Co. 76. a. Palm. 214, 506. 2 Anderſ. 46, 47.

(*c*) 2 Anderſ. 47. N. Benl. 39. 2 Rol. 781.

(*d*) Hob. 124. 1 Anderſ. 79. Moor 504.

(*e*) 7 Co. 39. a. b.

(*f*) Br. Aſſiſe 60. Br. Mortdaunceſter 8.

(*g*) Hob. 124, 228.

So that it was resolved upon the whole Matter, That the Pl. should have Judgment for two Parts against the Defendants. But the Chief Justice well observing the Declaration, and the Visne, in the Conclusion of his Argument, moved these Exceptions: 1. That the *Ejectionæ firmæ* is brought *De* (a) *omnibus & omnimodis decimis in Workington, &c.* without saying, *garbarum fœni, lanæ agnellorum*, or any Certainty of the Nature or Quality of the Tithes, whereof a certain Judgment may be given, or Execution by *Habere facias possessionem* had, and that appears in the Assise brought *De quadam portione Decimarum, &c.* in 7 *E.* 6. *Dyer* 84. for altho' the Measure or certain Number of them shall not be expressed, for the Fruitfulness or Barrenness may encrease or diminish them; yet the several Kinds ought to be expressed. Also it may be, That all the Tithing consists *in modo decimandi*, by Payment of a yearly Sum in Satisfaction of Tithes, whereof no *Ejectione firmæ* lies. And the Statute of 32 *H.* 8. c. 7. which gives the Action for Tithes, gives it *as they should or might do for Lands*, &c. but in Action for Lands, the Plaintiff ought to shew the Quality or Nature of them, as Land, Meadow, Pasture, Wood, *&c. Paschæ* 5 *Jac. Regis*, The Countess of *Oxford* brought a Writ of Dower to be endowed of Predial (b) Tithes, and counted of the Certainty of the Kinds, as of Garbs, *&c.* within such a Town; and in the same Case it was held, That the most equal Assignment is of the third Sheaf; for if the Garbs of the third Part of the Arable Land be assigned, it is in the Election of the Terre-Tenant, whether he will sow it or not. So *Mich.* 3 *&* 4 *Eliz.* reported by *Benlows* Serjeant of Law, in Dower of a (c) Mill in *Wadesmil* in the County of *Hertford*, the Assignment was of the third Part *Molendini, viz. De integro Molendino per quemlibet tertium mensem*, &c.

2. It is not formal to bring an *Ejectione firmæ de una* (d) *capella*, but it ought to be by the Name of an House.

3. The *Venire facias* was *de vicineto Parochiæ de Bredon*, which was ill awarded: For first, the Lease and the Ejectment also are alledged to be made at *Bredon*, which shall be intended to be a (e) Town, and the House and Lands are alledged to be in *Workington* (which also shall be taken for a Town) in the Parish of *Bredon*; so that now it appears to the Court, That there is Town called *Bredon*, a Parish called *Bredon*, and *Workington* a Town in the Parish of *Bredon*, and the Tithes are alledged to be in *Workington* and *Willesdon* (which also shall be intended a Town) *in Parochia de Bredon*: So that the Visne ought not to be out of the Parish of *Bredon*, but out of *Bredon*, *Workington*, and *Willesdon*, for the Visne shall be always awarded out of the Place, which contains the most Certainty,

(a) 1 Rol. Rep. 68. Moor 837. Hardr. 59. Palm. 101. 2 Rol. Rep. 166. Doctrin. placit. 85 Styl. 77, 101, 238. Cro. Car. 301. 1 Jones 321, 322. 11 Co. 55. a. 2 Inst. 641. Dyer 116. pl. 17. 16 H. 7. 7. a.

(b) Styles 77. 1 Rol. Rep. 68. Co. Lit. 32. a.

(c) N. Ben. 120. Co. Lit. 32. a.

(d) Doctrin. placit. 291. Styles 101.

(e) Moor 837. 1 Rol. Rep. 68. Co. Lit. 125. b. Noy 17. Cr. Car. 151. 6 H. 7. 3. b. 11 H. 7. 23. a. 6 Co. 14. b. Cro. Jac. 120. 263, 274, 676. Cr. Eliz. 117, 837.

and altho' *Workington* and *Willeſdon* are called Hamlets in the *pernomen*, yet the Court ought to adjudge upon that which is alledged by the Plaintiff in his Declaration. And the Chief Juſtice ſhewed the Reaſon that moved him to take theſe Exceptions, which was, That if they ſhould give Judgment, it might be reverſed by a Writ of Error for theſe Cauſes, which might be a Blemiſh in Time to come to their Reſolution concerning the Matter in Law: Wherefore, by Conſent of the whole Court, for the Cauſe aforeſaid, no Judgment was entred. But it was ſaid at the Bar, That the Court of Wards, where a Bill depended for this Matter (and by Order of which Court, the Matter in Law was to be adjudged by the Common Law) would take Order for the Poſſeſſion accordingly.

Moor 837. 1 Roll. Rep. 68.

HENRY PIGOT's *Case.*

Trin. 12 Jac. 1.

2 Bulſtr. 246. Moor 835. 1 Roll. Rep. 39.

BEnedict Winchcombe, Eſq; brought an Action of Debt against *Henry Pigot*, which was entered *Trin.* 11 *Jac. Regis*, *Rot.* 566. *in Banco Regis*, on a Bond made to the Plaintiff in 60 *l.* 2 *Martii*, *Anno* 8 *Jac. Regis.* The Defendant without demanding Oyer of the Bond or Condition, pleaded *Non eſt factum.* And the Jury gave a Special Verdict to this Effect, That the Bond was made to the Plaintiff in the ſame Manner as he had declared, and found the Bond in theſe Words, *Noverint univerſi per præſentes nos Georgium Watkins Generoſ. Henricum Pigot de Civitate Oxon' Draper, & Johannem Pyme de eadem Civitate, Cordwayner, teneri & firmiter obligari Benedicto Winchcombe armig' in* 60 *libris*, &c. And in Truth the Plaintiff was Sheriff of the County of *Oxford*, and the Condition of the Bond was, That the ſaid *George Watkins* ſhould appear in the King's Bench *Menſe Paſchæ* to anſwer to *George Cottle* in a Plea of Treſpaſs; and that the ſaid Bond was delivered by the ſaid *Henry Pigot* as his Deed to the Uſe of the Plaintiff; and that after the Delivery of the ſaid Deed *hæc verba ſequentia, videlicit (vicecom' Comitatus Oxon') inſert' & interlineat' fuerunt in eodem Scripto poſt prædicta verba (Benedicto Winchcombe Armig') & ante prædicta verba (in ſexaginta libris) ſuperius in Obligatione prædicta mentionat', ſine notitia, Anglice* the Privity, ſeu

1 Roll. Rep. 39. 2 Bulſtr. 246. Moor 835.

ſeu mandat' prædict Benedicti, & utrum ſuper tota materia, &c. videbitur Juſtic' & Cur' hic qd' Scriptum præd' ſit factum præd' Henrici necne iidem Jur' penitus ignorant, & petunt adviſamentum Cur' hic, &c.

And in this Caſe theſe Points were reſolv'd: 1. (*a*) When a lawful Deed is raſed, whereby it becomes void, the Obligor may plead, *Non eſt Factum*, and give the Matter in Evidence, becauſe at the Time of the Plea pleaded, it is not his Deed.

(*a*) 5 Co. 119. b. Sav. 71. contra. Dall. 33. pl. 21. 105. pl. 50. Doct. placit. 269. Cro. El. 120. Owen 8. 2 Bulſtr. 247. Dyer 112. pl. 50. Cro. El. 627, 800.

Secondly, It was reſolved, That (*b*) when any Deed is altered in a Point material, by the Plaintiff himſelf, or by any Stranger, without the Privity of the Obligee, be it by Interlineation, Addition, Raſing, or by drawing of a Pen thro' a Line, or thro' the midſt of any material Word, that the Deed thereby becomes void: (*c*) As if a Bond is to be made to the Sheriff for Appearance, *&c.* and in the Bond the Sheriff's Name is omitted, and after the Delivery thereof, his Name is interlin'd, either by the Obligee or a Stranger, without his Privity, the Deed is void: So if one make a Bond of 10 *l.* and after the Sealing of it another 10 *l.* is added, which makes it 20 *l.* the Deed is void: So if a Bond is raſed, by which the firſt Word can't be ſeen, or if it is drawn with a Pen and Ink thro' the Word, altho' the firſt Word is legible, yet the Deed is void, and ſhall never make an Iſſue, whether it was in any of theſe Caſes altered by the Obligee himſelf, or by a Stranger without his Privity. (*d*) So if the Obligee himſelf alters the Deed by any of the ſaid Ways, altho' it is in Words not material, yet the Deed is void: But (*e*) if a Stranger, without his Privity, alters the Deed by any of the ſaid Ways in any Point not material, it ſhall not avoid the Deed. *Vide* (*f*) *Dyer*, 9 *Eliz. fol.* 261. *b.* And therefore in the principal Caſe, the Addition made by a Stranger, without the Privity of the Plaintiff, being in a Point (*g*) not material for any Thing that appears to the Court; for this Cauſe, Judgment was given for the Plaintiff; and ſo you will the better underſtand the Book in 14 *H.* 8. *fol.* 25. *b.* And in this Caſe it was moved at the Bar, when a Deed ſhall be good in Part, and void in Part: As to that, I conceive, there is a Difference when a Deed is void *ab initio*, and when it becomes void by Misfeaſance *ex poſt facto*. Alſo there is a Difference when the Deed, which is void in Part *ab initio*, doth conſiſt upon the Entierty, and when upon divers ſeveral Clauſes; and in theſe alſo there is a Difference, when the ſeveral Clauſes are abſolute and diſtinct, and when they are ſeveral, and yet the one has Dependency upon the other.

(*b*) 2 Roll. 29. 1 Roll. Rep. 40. 2 Bulſtr. 247. Cro. El. 626, 627. Dyer 27. b. pl. 175. 44 E. 3. 42. b. 1 Ventris 185. Cr. Car. 399. Moor 10, 28, 35, 36, 230, 301, 547, 619, 835.

(*c*) 2 Roll. 29. b.

(*d*) 2 Roll 29. Cent. Cent. 234.

(*e*) 2 Roll. 29. Godb. 166. Moor 230, 835. 1 Roll. Rep. 39, 40. 2 Bulſtr. 247. Bridg. 102, 103. 1 Leon. 199.

(*f*) 1 Roll. Rep. 40. 2 Bulſtr. 247. Cr. El. 627. Cr. Car. 399. Jenk. Cent. 234.

(*g*) 1 Roll. Rep. 40, 41. Br. non eſt factum, 11.

Br. non eſt factum, 11.

As to the firſt, it is unanimouſly agreed in 14 *H.* 8. 25, 26, *&c.* That if ſome of the Covenants of an Indenture, or of the Conditions endorſed upon a Bond, are againſt Law, and ſome good and lawful; that in this Caſe, the Covenants or Conditions which are againſt Law are void *ab initio*, and the others

2 Rol. 28.

ſtand good. So if three diſtinct Bonds are wrote upon one Piece of Parchment, and one of them only is read to the Obligor,

2 Co. 3. b. & 9. b.

and he being a Man not letter'd, ſeals and delivers this Deed, it is good for that which was read, and *ab initio* void for the others: And this Caſe is agreed by *Brudnel* and *Pollard*, in

Br. non eſt factum, 8.

14 *H.* 8. 26. *a.* In 9 *H.* 5. *fol.* 15. *a.* One brought a Writ of Debt of 20 *l.* againſt another, and declared upon a Bond of the ſame Sum; the Defendant pleaded, That he was a Lay-

2 Co. 9. a. b.

man, and could not read, and that he acknowledged to be bound to the Plaintiff by the ſame Deed in 20 *s.* which he has paid, and ſhewed an Acquittance thereof; and as to the Remnant of the Sum in the ſaid Bond, it was not his Deed; and it was held a good Plea: Which Caſe being of one entire Sum proves without Queſtion, That if there are two abſolute and diſtinct Clauſes in a Deed, and the one is read to the Party not lettered, and the other not, that the Deed is good for the Clauſe which was read, and *ab initio* void for the Reſidue: And altho' the Deed conſiſting upon an entire Sum was void for the whole, as it is agreed in 14 *H.* 8. *&*

30 E. 3. 31. b. 32. a. 2 Roll. 28.

30 *E.* 3. 31. *b.* yet it was wiſely done by the Defendant's Counſel, in 9 *H.* 5. 15. *a.* to plead the Truth of his Client's Caſe, and not to leave the Matter upon any Queſtion in Law, when the Truth of the Matter would take away all Queſtions.

2 Roll. 28. 30 E. 3. 31. b. 32. a.

In 30 *E.* 3. *caſu ultimo*, in Aſſiſe before *Stouffe* and others in the Country, the Defendant pleaded a Feoffment from the Plaintiff to him by Deed of the Land in Bar, to have and to hold to him and his Heirs, comprehending a Letter of Attorney to deliver Seiſin, *&c.* And in Truth, the Plaintiff was a Layman not lettered, and that the Deed with the Warrant of Attorney was read to him, according to the Form of an Eſtate-Tail, and that upon the ſame Intent, he ſealed and delivered the Deed, with the Letter of Attorney in it, to deliver Seiſin: In that Caſe, altho' the Clauſe of the Feoffment in Fee, and the Warrant of Attorney, are two ſeveral Clauſes, yet foraſmuch as the Warrant of Attorney depended upon the Feoffment, and had Relation to an Eſtate in Fee, altho' that was well and truly read, the whole was adjudged to be void. And there *Thorpe* Juſtice ſaid, That every Deed ought to have Writing, Sealing and Delivery, and when any Thing ſhall paſs from them who had not Underſtanding but by hearing only, it ought to be read alſo: And it is

true,

true, that he who is not lettered, is reputed in Law as he who can't ſee, but hear only, and all his Underſtanding is by his hearing. And ſo a Man who is letter'd and can't ſee, is, as to this Purpoſe, taken in Law as a Man not lettered: And therefore if a Man is lettered, and is blind, if the Deed is read to him in other Manner, he ſhall avoid the Deed, becauſe all his Underſtanding in ſuch Caſe is by his hearing, as it was reſolved in the Caſe of *John Shuter*, of the County of *Wilts*, in the Star-Chamber, *Mich. 9 Jac. Regis*, who was a Man of 115 Years at the Time of his Death. In 47 *E.* 3. 3. *a.* *John Pinſchon* brought an Action of Debt againſt *Thomas Gerves* and others, Executors of *John Northgate*, upon a Bond made by the Teſtator of 100 *l.* the Defendants pleaded a Releaſe from the Plaintiff of all Manner of Actions; and alſo the Plaintiff, by that Deed, had received 20 *l.* of the Teſtator, *&c.* and the Deed was read, which expreſſed, that he had received 20 *l.* *in ſolutione de* 100 *l.* *& etiam remiſ. omnimodas actiones, &c.* To which the Plaintiff ſaid, That the Teſtator was indebted to him in 20 *l.* for other Contracts; and it was agreed betwixt them, that the Plaintiff ſhould releaſe that 20 *l.* and becauſe the Plaintiff was a Layman, and knew not what was written in the Deed, and what not, by Agreement between them, the Deed was delivered to the ſaid *Thomas Gerves*, now one of the Executors to keep, upon ſuch Condition, That if the Deed mentioned only the 20 *l.* in which he was bound to him by Reaſon of the Contracts, that then the Deed ſhould be delivered to *John Northgate*; and if not, that it ſhould be delivered to the Plaintiff: And there *Finchden* Chief Juſtice ſaid, If what you ſay is true, you may ſafely deny the Deed; for as to Parcel which was made according to the Agreement, the Deed is good; and as to the other Parcel, that a Thing is written, of which you know nothing: So that as to Parcel you may acknowledge a Deed of Parcel, and as to Parcel which was not read to him, deny the Deed. And the ſame is in a Manner affirmed by *Perſay*, but he ſaid, it wou'd be abſur'd to Lay-people to plead *Non eſt Factum* as to Parcel: But afterwards it ſeemed, That the ſaid Bailment to *Thomas Gerves*, was not any Delivery of the Deed, unleſs the Conditions were performed: Wherefore the Defendants ſhewed, That the Conditions were performed, and that the Deed, by the Plaintiff's Aſſent, was delivered to the Teſtator; upon which Iſſue was taken, *viz.* That the Deed was not delivered to him, in his Life-time, with the Plaintiff's Aſſent, which Caſe is cited in 14 *H.* 8. 26. *a.* to be adjudged, but is there ill reported by the Reporter.

Hob. 226.

2 Roll. 28. 18 E. 4. 28. a. 12 Co. 89. 15 E. 4. 18. b. 14 H. 8. 26. a. 9 H. 6. 59. a. b. Br. Eſtoppel 6. 9 H. 6. 5. b. Fitz. Eſtoppel 23. 2 Roll. 28. 44 E. 3. 23. a. 44 Aſſ. 30. 14 H. 8. 26. a. 1 H. 7. 15. b. Plowd. 66. b. Br. Non eſt Factum 10. 2 Co. 9. b.

(a) 2 Roll. 30. But (a) if a Deed contains divers diſtinct and abſolute Covenants, if any of the Covenants are altered by Addition, * See 6 Mod. 233. Interlineation or *Raſure, this Misfeazance *Ex poſt facto*, avoids the whole Deed, as it is held in 14 *H.* 8. 25, 26. For although they are ſeveral Covenants, yet it is but one (b) 2 Roll. 30. Br. Obligation 43. Fitz. Bar. 46. Deed. (b) 3 *H.* 7. *fol.* 5. *a.* If two are bound in a Bond, and afterwards the Seal of one of them is broken off, this Misfeaſance *Ex poſt facto*, avoids the whole Deed againſt both. (c) 1 Roll. Rep. 40. Doctrin. placit. 259, 262. 2 Bulſtr. 248. Mar. 152. 2 Show. 28. 2 Lev. 220. *Vide* the Caſe of (c) *Matthewſon*, *Mich.* 39 & 40 *Eliz.* *In the Fifth Part of my* Reports, *fol.* 23. *a.*

[*Note*, the Difference where the Bond is *jointly*, and where *ſeverally*.]

ALEX-

ALEXANDER POWLTER'S *Caſe.*

Trin. 12 Jac. 1.

ONE *Alexander Powlter*, of *New-Market* in the County of *Cambridge*, of extreme Malice and Ill-will, *Felleo animo* did burn an Houſe in the ſaid Town, upon which the greateſt Part of the ſaid Town was burnt and conſumed: For which Offence, at the Aſſiſes of *Cambridge* in Autumn laſt paſt, he was indicted and convicted by Verdict, and prayed his Clergy; and if he ſhould have his Clergy, or not, was the Queſtion? Upon which the Juſtices of Aſſiſe before whom he was arraign'd, wou'd take Advice, and now this Term, all the Judges of *England* met together for the Reſolution of this Point; and upon the Conſideration of divers intricate, ill-compiled and compoſed Statutes, they were in Doubt whether he ſhould have his Clergy, or not: But it was agreed by them all, that it was (*a*) Felony by the Common Law, as appears by *Britton*, *fol.* 16. *&* *Bracton*, *fol.* 146. *b.* *&* 11 *H.* 7. *fol.* 1. *b.* and it was accounted in Law an heinous and exorbitant Felony; for by the Statute of (*b*) *Weſtminſter* 1. *cap.* 15. it is declared, That ſuch as are taken for Houſe-burning Felonioufly done, or for counterfeiting the King's Seal, *&c.* or for Treaſon touching the King himſelf, ſhall in no ways be repleviſable. By which it appears, firſt, That it was Felony at the Common Law; and ſecondly, That it was ſo heinous, that he was not bailable no more than for High-Treaſon.

(*a*) Hales's Pl. Cor. 85. 3 H. 7. 10. a. 2 Inſt. 188. Cro. Car. 376, 377. Br. Coron. 225. 1 Jones 351. Stamf. Pl. Cr. 36. a. 3 Inſt. 66. 4 Co. 20. a.

(*b*) 2 Inſt. 185, 186, 187, &c. Stamf. Pl. Cr. 36. a. 3 Inſt. 66.

But

But yet it was resolved, That for the great Favour and Respect which the Law doth attribute to Men of Holy Church, for this Felony at Common Law, the Offender (who (*a*) was not so disabled, that he could not be enabled by any Dispensation which might be made to be a Member of Holy Church, as if he was (*b*) blind, *&c.* or in Respect of Sex, *sc.* a Woman, as appears in 22 *E.* 3. *Corone* 461.) should have the Privilege of his Clergy by the Common Law; for the Common Law doth not deny *beneficium clericatus*, the Benefit of his Clergy, but in certain Cases: As if a Man be convicted of any Heresy, he shall not have his Clergy for any Felony, *&c.* the same Law of a (*c*) *Saracen*, *Jew*, or other *Infidel*, (*d*) *Gravius est enim divinam quam temporalem lædere Majestatem*; the same Law (*e*) in Case of High-Treason against the King; and of Petit-Treason also, before the Statute of 25 *E.* 3. 4. *Vide* (*f*) 19 *H.* 6. 47. *b.* for High Treason accordingly. But a Man excommunicated by Holy Church for any Ecclesiastical Cause, or outlawed by the Common Law for any Felony, for which he might have his Clergy, shall have his Clergy. Also in Case of Sacrilege a Man shall be ousted of his Clergy, as appears in (*g*) 20 *E.* 2. *Tit. Corone* 193. (*h*) 12 *Ass. pl.* 39. 12 *E.* 3. *Tit. Corone* 120. 22 *E.* 3. *ibid.* 357. (*i*) 26 *Ass.* 19. (*k*) 27 *Ass.* 42. at the Common Law, (*l*) *Insidiatores viarum, & depopulatores agrorum*, had not their Clergy, as appear by the Statute of 4 *H.* 4. 2. And before the Statute of (*m*) *Articuli Cleri, cap.* 15. he who (*n*) confessed the Felony, could not have the Benefit of the Clergy, because he could not make his Purgation, and altho' the Statute speaks only in Case of Abjuration, and of an Approver, yet the Judges *in favorem Ecclesiæ* did extend it to all other Confessions, upon the Arraignment of the Offender, 10 *E.* 3. *Corone* 147. 12 *E.* 3. *Corone* 117. (*o*) 27 *H.* 6. 7. *b.* (*p*) 34 *H.* 6. 49. *b.* (*q*) 7 *E.* 4. 29. *a.* (*r*) 8 *E.* 4. 26. (*s*) 9 *E.* 4. 28. *a.* (*t*) 13 *E.* 4. 3. *b.* 22 *E.* 4. *Corone* 44. (*u*) 15 *H.* 7. 9. *a.* And Clergy, not only at the Suit of the King upon Indictment, but upon Approvement, and at the Suit of the Party in Appeal, (*w*) 40 *E.* 3. 42. *a.* (*x*) 40 *Ass.* 17. (*y*) 11 *H.* 4. 93. *a.* And generally in all Cases, when the Life, or any Member of the Offender, as cutting off his Hand, *&c.* is not in Jeopardy, the Offender shall have his Clergy, as in Case of Petit Larceny, *Stanford* 124. *a.* So that it was resolved, That at the Common Law, for this Felony for burning of Houses, the Offender shall have the Privilege of his Clergy. (*Quære de hoc?*)

(*a*) Stamf. Pl. Cr. 123. b.

(*b*) Hales's Pl. Cr. 229. 3 Inst. 114. Stamf. Pl. Cr. 123. b.

(*c*) Hales's Pl. Cr. 229.
(*d*) Wingat Max. fol. 8.
(*e*) Hales's Pl. Cr. 230.
(*f*) Stamf. Pl. Cr. 3. a. 44. a. 124. a. Br. Clergy 6.

(*g*) Stamf. Pl. Cr. 123. b. 26 Ass. 27. Br. Clergy 12. Cont.
(*h*) Br. Clergy 10.
(*i*) Br. Cler. 11. Br. Corone 99.
(*k*) Br. Clergy 13.
(*l*) Stamf. Pl. Cr. 124. a. 3 Inst. 5, 204.
(*m*) 2 Inst. 633, 634, 635, &c.
(*n*) Postea 30. a.

(*o*) Fitz. Coron. 36. Br. Coron. 4.
(*p*) Fitz. Coron. 20. Br. Clergy 19.
(*q*) Br. Clergy 17. Br. Ordinary 16. Fitz. Fine 24.
(*r*) That Year has but 25. folia.
(*s*) Fitz. Coron. 32. Br. Coron. 55. Fitz. Chart. 23. Br. Chart. de Pardon 23.
(*t*) Fitz. Coron. 38. Br. Coron. 157.
(*u*) Br. Coron. 53. Br. Ordinary 11. Br. Charter de Pardon, 21.
(*w*) Fitz. Coron. 91. Br. Clergy 23.

(*z*) Then it is to be consider'd, Whether this Privilege be taken away by any Statute: And therefore it must be known, That by the Statute of 23 *Hen.* 8. 1. it is enacted, *That no Person or Persons, which shall be found guilty of any Manner of Petit Treason, or for Wilful Murder of Malice prepensed,*

(*x*) Br. Clergy 14. Br. Certificate de Evesque 18. (*y*) Fitz. Coron. 143. Br. Coron. 31. Br. Clergy 5.
(*z*) Hales's Pl. Cr. 232. Stamf. Pl. Cr. 124. b.

penſed, or for robbing of any Churches, Chapels, or other Holy Places; or for robbing of any Perſon or Perſons in their Dwelling-Houſe, or Dwelling-Place, &c. or for robbing of any Perſon or Perſons in or near the Highway; wilful burning of any Dwelling-Houſes, or Barns wherein any Corn is, or the Procurers or Abettors of the ſame, be admitted to the Benefit of his or their Clergy (ſuch as be within Holy Orders, that is to ſay, of the Orders of Sub-Deacon, or above, only excepted.) So that this Statute ouſts the Principal Offenders aforeſaid, of the Privilege of Clergy, and their Acceſſories before. And it is to be obſerv'd, That the Statute doth not ſay, *That no Perſon or Perſons that ſhall, upon his or their Arraignment, plead not guilty, and ſhall be found guilty*; for then that muſt of Neceſſity be taken for found guilty by Verdict: But the Words are, *That no Perſon ſhall be found guilty of Petit Treaſon*, &c. and that may extend as well to confeſſion of Record (for the Court finds him guilty upon his own Confeſſion before them) as to a finding by Verdict of Twelve Men, when the Offender denies the Fact, and pleads not guilty; and the Caſe of Confeſſion is the ſtronger Caſe; for altho' he is found guilty by Verdict, yet he may be innocent, and therefore he might have his Clergy at Common Law, and make his Purgation; but if he has confeſſed the Offence upon Record, he ſhall not have his Clergy by the Common Law, becauſe he can't make Purgation when the Court finds his Confeſſion on Record; for in Intendment of Law he can't (againſt his expreſs and voluntary Confeſſion in Court) be innocent: *Confeſſus in judicio pro judicato habetur, & quodammodo ſuo ſententia damnatur.* And therewith agrees a Proviſo in the ſaid Act of 23 *H.* 8. which has made him who confeſſes the Felony, in Equipage with him who is adjudged for Felony, the Words of which are, *Provided, That this Act extend not to give any Benefit to any ſuch Perſons, which after their Confeſſion, or Judgment given againſt them, of or for Felony*, &c. *Vide* 25 *E.* 3. 42. *b.* & *Stamf.* 122. *c.* Attainder by Confeſſion is the ſtrongeſt Attainder that can be, for the vehement Preſumption that the Law has of the Truth, for it would be abſurd to ſay, that he has not done ſuch a Felony, when the Party himſelf has confeſſed it, to the Deſtruction (*a*) of him and all his Offspring. And where the Statute of 8 *H.* 6. 9. enacts, That if the Party grieved recovers by Aſſiſe, or by Action of Treſpaſs, and it is found by Verdict, or in other Manner, in due Form of Law, That the Defendant entred with Force, *&c.* that the Plaintiff ſhall recover treble Damages; in ſuch Caſe, if the Defendant confeſſes the Action, or makes Default, or *Nihil dicit*, or pleads an inſufficient Plea, and upon Demurrer Judgment is given againſt him, in all theſe Caſes it is a finding within the Statute; for there is one finding by the Jury, and another by the Judges; and when the

All this ſeems only declaratory of the Common Law.

Antea 29. b.

Stamf. Pl. Cr. 122. b.

(a) Yet ſuch a Caſe happen'd, 8 E. 2. Fitz. Corone 425.

Poſtea 60. a. b.

the Defendant confeſſes it, *&c.* the Judges find ſufficient Matter before them to give Judgment: *Vide* for this, Serjeant *Bendlow's Reports*, that it was ſo taken in 6 *H.* 8. and in 4 *&* 5 *Phil. & Mary*, in a Writ of Error; and ſo I heard the Lord *Dyer* vouch a Judgment accordingly, in divers of the ſaid Caſes, upon the Statute of 8 *H.* 6. *c.* 9. And therefore the Opinion of *Stamford*, *fol.* 125. That in Caſe of Confeſſion, the Offenders in theſe great and heinous Offences, ſhall have their Clergy, is not taken for Law; and the conſtant and continual Experience of the Judges in their Circuits has been to the contrary. Alſo this Act of 23 *H.* 8. *c.* 1. extends as well to Appeals and Approvements, as to Indictments: But yet in this Statute there were found divers great Defects; for the ſaid Offenders, and their Acceſſories before, might by an eaſy Means and Equivocation have had their Clergy, notwithſtanding this Statute: For if the Offender had upon his Arraignment ſtood Mute, or would not directly Anſwer (which is all one) or would have challenged Peremptorily above the Number of Twenty, he ſhould have the Benefit of the Clergy, notwithſtanding the Purview of this Statute; for in theſe Caſes they are not found guilty of the Felony, as the Statute ſpeaks, but ſhall have Judgment *Fort* and *Dure* for their Contumacy, becauſe they will not anſwer according to Law, nor put themſelves upon their Country: Alſo if the Offender had not appeared, but had been outlawed for any of theſe Offences, yet notwithſtanding this Statute, he ſhould have his Clergy; for he was not found guilty of the Felony, but outlawed for his Default. Alſo altho' the Offender had committed Burglary, yet if it was without Robbery, he ſhould have his Clergy notwithſtanding this Statute; and ſo ſhould the Acceſſories as well before as after: And ſo as to ouſt the Acceſſories before of their Clergy in all the ſaid Offences, the Words are (*be found guilty*) ſo that the ſame Defects are alſo in this Clauſe as in the former.

Benl. in Kelw. 207. 1 Anderſ. 25. pl. 57. 2 Anderſ. 150. pl. 82. Dyer 214. pl. 45. N. Bendl. 11. pl. 6. Benl. in Aſh. pl. 1. Poſtea 60. a.

Q.

Stamf. Pl. Cr. 124. b.

It was afterwards ordain'd by the Statute of 25 *H.* 8. *cap.* 3. which recites the Act of 23 *H.* 8 and further enacted, *That if in thoſe Caſes the Perſon arraigned ſtand Mute, or will not directly Anſwer, or challenge above the Number of Twenty, ſhall loſe the Benefit of his Clergy in like Manner and Form as if he had directly pleaded, &c. and thereupon had been found guilty according to the Laws of the Land.* By which Words, the Intention of the Makers of the Act appears, That he who is found guilty of any of the ſaid Offices (which extends as well to Confeſſion as to Verdict) ſhall loſe his Clergy, and therefore altho' the Act of 23 *H.* 8. *cap.* 1. is not revived, yet there are ſufficient Words in the Act of 25 *H.* 8. *c.* 3. to ouſt him who is found guilty, of his Clergy: And this alſo appears was the Intention of the Makers of the Act of 5 *&* 6 *E.* 6. for if the Act of 25 *H.* 8. had not extended to him who is found guilty by Verdict or Confeſſion, they would not have revived it to ouſt

the

the Offender of the Privilege of his Clergy only in Caſe when he ſtood Mute, or would not Anſwer, or challenge above the Number of Twenty; and not where he is found guilty by Verdict, or Confeſſion. Alſo the Words of the Act of 5 & 6 *E.* 6. are, *That the ſaid Act of* 25 H. 8. *ſhall remain and be in full Strength and Virtue, in ſuch Manner and Form as it did before the making of the Act of* 1 E. 6. and before the ſame Act, without Queſtion, he who was found guilty by Verdict, or Confeſſion, was ouſted of his Clergy. But this Act of 25 *H.* 8. had not, by any Words, in any Caſe taken away Clergy from the Acceſſory before, which was a great Defect, for if he was found guilty, according to 23 *H.* 8. as well the Acceſſory before, as the Principal before, was ouſted of his Clergy; but if he ſtood Mute, or anſwered not directly, or challenged above Twenty, in which Caſes the Principal was ouſted of his Clergy by 25 *H.* 8. yet in the ſame Caſes the Acceſſory before was not ouſted of his Clergy: And this Act of 25 *H.* 8. doth not extend to Appeals or Approvements, but only to Indictments; for the Words are, *If any Perſon be indicted*, &c. It was enacted by the ſame Statute, That if any be indicted for Felony for ſtealing any Goods in any County, and thereupon arraigned, be found guilty, or upon Malice ſtand Mute, or challenge peremptorily above the Number of Twenty, or will not directly anſwer to the Law; they ſhall loſe the Benefit of their Clergy, in the ſame Manner and Form as they ſhould, if they had been indicted, arraigned, and found guilty in the ſame County where the Robbery or Burglary was done or committed. *If it ſhall appear to the Juſtices, before whom any ſuch Felons or Robbers be arraigned, by Evidence given before them, or by Examination, that the ſame Felonies, whereupon they be ſo arraigned, had been ſuch Robberies or Burglaries*, &c. *Wherefore by the ſaid Statute they had loſt the Benefit of their Clergy, if they had been found guilty thereof in the ſame Shire.* And there is alſo Defect in this Branch; for it doth not extend to the Caſe, when the Offenders for any of the ſaid Offences are outlawed, *&c.* alſo it doth not extend to Acceſſories before in ſuch Caſes: And it is to be known, That when the Offender confeſſes the Indictment, or ſtands Mute, or challenges above the Number of Twenty, altho' no Evidence can be given againſt him, yet the Words of the Stat. are (*or by Examination*) which Words have Relation when the Offender doth confeſs the Offence, or ſtand Mute, or challenges above the Number of 20. Then was the Stat. of 1 *E.* 6. 12. by which it is enacted, *That no Perſon that ſhall be in due Form of Law, attainted or convicted of Murder of Malice prepenſed, Poyſoning of Malice prepenſed, breaking*

3 Inſt. 114.

3 Inſt. 114, 115.

3 Inſt. 114.

Dalt. Inſt. 523. Hales's Pl. Cr. 229. Stamf. Pl. Cr. 125. a.

ing of any Houſe by Day or Night, any Perſon being then in the ſame Houſe and put in Fear or Dread; or for robbing of any Perſon in or near the Highway; or for felonious ſtealing of Horſes, Geldings or Mares; or for felonious taking of any Goods out of any Church, &c. or being thereof indicted or appealed, and thereupon found guilty by Verdict of Twelve Men, or ſhall confeſs the ſame upon his or their Arraignment, or will not anſwer directly, or ſtand Mute, ſhall not be admitted to have the Benefit of Clergy, or Sanctuary (a). And that in all other Caſes of Felony, other than ſuch as are beforementioned; all Perſons that ſhall be arraigned and found Guilty, or ſhall confeſs the ſame, or ſtand Mute in Form aforeſaid, or will not directly Anſwer, ſhall have the Privilege of Clergy, or Sanctuary, as they might have had before the firſt Year of King Henry 8. And this Act of 1 *E.* 6. has made divers great Alterations: For 1. By this (*b*) general Clauſe, Clergy was reſtored to him who offended in burning of Houſes, and to his Acceſſories before. 2. (*c*) All Acceſſories before, in Caſe of Petit Treaſon, Murder, Burglary, or other Offences mentioned in the Act of 23 *H.* 8. were reſtored to their Clergy by the ſaid general Clauſe; and therefore they err who hold, That the Acceſſory to a Burglary, ſhould be ouſted of his Clergy, for at that Time, as well every Acceſſory in Burglary, as well before as after, ſhould have his Clergy; and that appears by the Judgment of the whole Parliament of 2 *&* 3 *Phil. & Mar.* by which it is enacted, That the Benefit of Clery ſhould be taken from *Benedict Smith*, &c. for the Murder of *Rufford*, if the ſaid *Benedict* ſhould be found Guilty, as Acceſſory to the Murder, *&c. Nota*, the ſaid Murder was ſo barbarous and ſo heinous, that Clergy was taken from him, and others, being but Acceſſories before, after the Offence committed. *Vide* 3 *&* 4 *Phil. & Mar. Dyer* 133. *pl.* 4. where mention is made that he was ouſted of his Clergy by the ſame Act of 2 *&* 3 *Phil. & Ma.* which proves, That if the ſame Act had not been made, he might have his Clergy. 3. By this general Clauſe, Clergy was reſtored to heinous Offenders in Piracy upon the Seas, which was taken away by the Statute of 28 *Hen.* 8. *cap.* 15. and in divers other Caſes. 4. The Words concerning Attainder of breaking of Houſes only, would be repugnant and very abſurd, unleſs they are ſupplied by a reaſonable Intendment, and good Conſtruction; For as *Stamford* 126. *a.* well obſerves, If any break any Houſe by Night, without Intent to commit Felony, it is not Burglary nor Felony (and therefore theſe Words, with felonious Intent, are wanting) alſo if he breaks an Houſe in the Day, although he has a felonious Intent,

(a) Fitz. 2 Inſt. 89. a. Stamf. Pl. Cr. 125. a.

(b) Stamf. Pl. Cr. 125. a.

(c) Stamf. Pl. Cr. 125. b.

Hales's Pl. Cr. 233. 4.

2 & 3 P. & M. c. 17. 4 & 5 P. & M. c. 4.

Dyer 133. pl. 4. Benl. 3.

Poſtea 36. b. Stamf. Pl. Cr. 126. a.

if

if he carries away nothing it is not Felony; and therefore in that Caſe theſe Words, *and ſteal Goods Feloniouſly*, are * wanting, and yet *Stamford* holds, That theſe general and incertain Words ought to be ſupplied with an (*a*) Intendment, *viz.* Where he is attainted and convicted of breaking the Houſe in the Night (*b*) *Burglariter*, or of breaking the Houſe in the Day, and ſtealing the Goods there within; but as to the Caſe of Burglary, this Act has made an Alteration more ſtrict than 23 *H.* 8. had, for this Act takes away Clergy in Caſe of Burglary, without any ſtealing of Goods. 5. This Act of 1 *E.* 6. adds a Thing not material, and omits a Thing much material, which was compriſed in the Acts of 23 *&* 25 *H.* 8. for it takes away Clergy from him who (*c*) poyſons another of Malice prepenſe, which without Queſtion is wilful Murder; and for that the Offender was ouſted of his Clergy by the Acts of 23 *&* 25 *H.* 8. and it omits the heinous Offence of burning Houſes, and yet takes away Clergy from him who commits Burglary, altho' he impairs the Houſe little or nothing, and *implicite* allows Clergy to him who burns the whole Houſe; and not only one Houſe, but the greater Part of a Town, as it was in the Caſe now in Queſtion. 6. There is a great Defect in this Act in the Clauſe of ouſting Offenders of their Clergy; for it doth not extend where the Offender challenges above the Number (*d*) of Twenty, which was included in the Act of 25 *H.* 8. But that is remedied by the reviving of the Act of 25 *H.* 8. by the Statute of 5 *&* 6 *E.* 6. as ſhall herein after appear. 7. There is a great Repugnancy in the ſaid general Clauſe; for notwithſtanding that, If any Offender who is to be reſtored to the Benefit of his Clergy, whereof he was ouſted by any former Statute, challenges above the Number of Twenty, or if he is outlawed for the ſame Felony, he ſhall not be reſtored to his Clergy; for this Clauſe doth not extend but where the Offender is found guilty by Verdict or Confeſſion, or ſtands Mute, or will not directly Anſwer. 8. He who commits (*e*) Robbery or Burglary in one County, and carries the Goods ſtol'n into another County, *&c.* who was ouſted of his Clergy by 25 *H.* 8. was reſtored to his Clergy by theſe general Words. 9. This Act extends to all Perſons, *viz.* as well to thoſe who are within Holy Orders, who were excepted out of 23 *H.* 8. as to other Lay People. 10. This Act of 1 *E.* 6. in other Points has ſupplied ſome of the Defects which were in the former Statutes, concerning the Offences mentioned in the ſame Act; for 1. The other Statutes did not extend, as appears before, where the Offender was outlawed for any of the Offences mentioned in them;

* The Original is deſired.

(*a*) Stamf. Pl. Cr. 125. b. 126. a.

(*b*) 4 Co. 39. b. Doctrin. placit. 84. Cr. El. 920. 5 Co. 121. a. 3 Inſt. 63. Stamf. Pl. Cr. 126. a.

(*c*) Stamf. Pl. Cr. 126. a.

Negatur, For 'twas ouſted of Clergy by the Common Law.

(*d*) Stamf. Pl. Cr. 126. a.

(*e*) Stamf. pl. Cr. 126. a.

them; but this Act extends to Men Outlawed, Attainted by Battel, Abjured, Attainted by Parliament; for the Words are, *If any hereafter ſhall in due Form of Law be attainted*, which Words extend to every Manner of Attainder. 2. This Act extends by expreſs Words to the Caſe of Confeſſion; for the next Words of this Act are, *or Convict*, and that is by Verdict or Confeſſion: So the Clauſe for ouſting of Clergy, is better penned as to theſe Points, than the general Clauſe for Reſtitution of Clergy, as appears before. And it is to be obſerv'd, That this Act of 1 *E.* 6. extends as well to Appeals and Approvements, as to Indictments. And afterwards the Statute of 5 & 6 *E.* 6. *cap.* 10. was made, the Title of which was, *That ſuch as rob in one Shire, and fly into another ſhall not have the Benefit of Clergy*. This Act firſt recites the ſaid Act of 25 *H.* 8. which recites the other Act of 23 *H.* 8. and in which, Mention is made of burning of Houſes, and further, the Addition which the Act of 25 *H.* 8. makes, and alſo the Branch concerning the ſtealing of Goods in one County, and carrying the Theft into another County: And the ſaid Act of 5 & 6 *E.* 6. recites alſo the Purview of the ſaid Act of 1 *E.* 6. *de Verbo in Verbum*, (in which the Omiſſion of burning of Houſes appears) and alſo the ſaid general and beneficial Branch for Clergy of the Act of 1 *E.* 6. and then after the Recital of theſe three Statutes, the Words of the Act of 5 & 6 *E.* 6. are, *By Reaſon whereof divers and many Perſons, ſince the ſaid firſt Year, have committed ſuch Robberies and Burglaries, and after have been taken with the Manner in another County, and there indicted, arraigned, and found guilty, have had and enjoyed their Clergy; which they could not have had, if the ſaid Statute of* 25 *H.* 8. *had ſtood in Force: For Redreſs whereof, be it enacted, That the ſaid Act made in the ſaid Five and twentieth Year, touching putting of ſuch Offenders from their Clergy; and every Article, Clauſe, and Sentence contained in the ſame, touching Clergy, ſhall from henceforth, touching ſuch Offences from henceforth to be committed and done, ſtand, remain, and be in full Strength and Virtue, in ſuch Manner and Form, as it did before the making of the ſaid Act of* 1 E. 6. *any Clauſe, Article, or Sentence compriſed in the ſaid Act, made in the ſaid firſt Year, to the contrary notwithſtanding*. And the whole Scruple of this Caſe doth conſiſt upon theſe Words of the Body of the Act of 5 & 6 *E.* 6. and of a *Quære* which *Stanford* makes, *lib.* 2. *cap.* 43. *fol.* 128. *a*. That the Act of 25 *H.* 8. is not revived in all, but only in that Part which concerns the ſtealing

Poſtea 60. a. F. N. B. 73. Stamf. Pl. Cr. 125. b. 126. a.

Stamf. Pl. Cr. 126. a.

of Goods in one County, and the carrying of them afterwards into another, by Reaſon of theſe Words *(ſuch Offenders*, &c. *and ſuch Offences*, &c.) which have Relation only to that Offender, which is expreſſed before in the ſame Act: Hereunto others added two other Objections, 1. That the Title or Style of this Act is particular, *viz. That ſuch as rob in one County, and fly into another, ſhall not have Benefit of Clergy*; whereby the Intent of the Makers of the Act appears to what Thing the ſaid Act ſhall extend, and this the Caſe of *Stradling* and *Morgan*, *Plowd. Com.* 203. *b.* proves, where the particular Stile of the Act of 7 *Ed.* 6. concerning the Revenues of the King, limits and qualifies the general Words of the Body of the Act, *viz.* *(Any Receiver)* to extend only to the King's Receivers, according to the Title of the Act. Another Objection was made by ſome, That admitting the ſaid Act of 5 *&* 6 *Ed.* 6. has revived the whole Act of 25 *Hen.* 8. yet foraſmuch as the Act of 23 *Hen.* 8. was not revived, the ſaid *Alexander Powlter* in the Caſe now in Queſtion, ſhall have his Clergy; for as it has been ſaid, the Act of 23 *Hen.* 8. extends only when the Offender is found guilty (which is our Caſe) and the Act of 25 *Hen.* 8. recites the ſaid Act of 23 *Hen.* 8. and makes Addition when the Offender ſtands mute, or will not anſwer, or challenges above the Number of Twenty, ſo that the Act of 25 *Hen.* 8. extends not to the Caſe where the Offender is found guilty by Verdict or Confeſſion, becauſe the Act of 23 *Hen.* 8. has provided for that, and in as much as the general Words of the ſaid Act of 1 *Ed.* 6. have taken away the Force (but in one ſpecial Caſe as aforeſaid) of both the Statutes of 23 *H.* 8. and 25 *H.* 8. and the Act of 5 *&* 6 *Ed.* 6. has revived only the Act of 25 *Hen.* 8. for this Reaſon in the Caſe now in Queſtion, the Benefit of Clergy is not taken away. Againſt which it was argued by other Juſtices: Firſt, that the Statute of 5 *&* 6 *Ed.* 6. has revived the whole Act of 25 *H.* 8. concerning Clergy. 2dly, That the Act of 25 *Hen.* 8. has taken away the Benefit of Clergy from him who is found guilty of burning Houſes by Verdict or Confeſſion. 3dly, They cited a Judgment in Parliament to prove it. 4thly, they confirmed it by a conſtant Opinion and Proceeding of the Juſtices of Aſſiſes in their Circuits.

Fitz. Inſt. 87. a. b.

Stamf. Pl. Cr. 128. a.

As to the firſt, it was ſaid, That this Relative *(ſuch)* refers rather to the precedent Matter, than to the particular Form of Words, and to the End that the Remedy intended by the Makers of the Act, ſhould be of as great Extent as the Malady and Miſchief was, *(ſuch)* ſhall be taken *(ſuch in Miſchief, and ſuch in Inconvenience)* and to *ſuch* as in Form of Words

Stamf. Pl. Cr. 128. a. Palm. 221, 222. 2 Inſt. 357, 481.

is mentioned before. And therefore the Statute of (a) *W.* 2. *cap.* 5. is, *Cum quis jus præſentandi non habens præſentaverit ad aliquam Eccleſiam, &c. per quod hæredes infra ætatem exiſtentes per fraudem & negligentiam cuſtodum, &c. Statutum eſt quod hujuſmodi præſentationes, &c. non ſint hujuſmodi rectis hæredibus, &c. ita præjudiciales*; and the Caſe in (b) 44 *Ed.* 3. 21. *a. b.* That an Infant had an Advowſon by Deſcent, and avoided an Uſurpation, without Averment, that he was in Ward; becauſe this Word (c) (*hujuſmodi*) *i. e. ſuch*, ſhall be taken *ſuch in Miſchief, viz.* to provide for all the Miſchief; and having an Advowſon by Deſcent (which was the Subſtance) it matters not, whether he was in Ward, or not. So the Statute of (d) *W.* 2. *cap.* 12. the Preamble ſaith, *Per appellatores nihil habentes, &c.* and the Body of the Act is, *Statutum eſt quod cum aliquis ſic appellatus, &c.* yet, without Queſtion, If the Appellor is ſufficient, notwithſtanding this Word (*Sic*) the Statute extends to it. And where the Statute of (e) 21 *Hen.* 8. 15. ſpeaks in the Preamble of Leaſes made for great Fines *for the Incomes*, &c. and the Purview is, *That all ſuch Termors ſhall or may falſify*, it has been always taken, That the Statute extends to Leaſes made, either for a ſmall Fine, or for no Fine: So the Preamble of the Statute of (f) 32 *Hen.* 8. *cap.* 33. ſpeaks of Diſſeiſins with Strength (Force) and the Body is, *That the dying ſeiſed of any ſuch Diſſeiſor*, &c. it extends to a Diſſeiſin without Force; for, that is *ſuch in Miſchief*; and ſo it is held in 3 & 4 *Phil. & Mary*, *Dyer* 219. *pl.* 7. and ſo in many other Caſes. And as to the Style or Title of the Act, that is no Parcel * of the Act, and ancient Statutes were without any Title, and many Acts are of greater Extent than the Titles are, as the Statute of *Uſes*, *Anno* 27 *H.* 8. *cap.* 10. the Title is, *An Act expreſſing an Order for Uſes and Wills*, and yet the Body of the Act extends to Jointures and Dowers of Women. And ſo in this Caſe they argued, That the Body of the Act of 5 & 6 *Ed.* 6. was more ſpacious than the Title, but not more ſpacious than the Preamble; for the Preamble extends to two Miſchiefs, one *implicite* by Recital, and the other *explicite* by expreſs Words; *Implicite* by the Recital of 23 & 25 *Hen.* 8. which extend to burning of Houſes, and by Recital of 1 *Ed.* 6. in which was the Omiſſion of burning of Houſes (which was thought to be by the Negligence of the Writer; for it is a more heinous Offence, than many others which are there mentioned) *Explicite* of Robbery, *&c.* in one County, and carrying into another County; then when the Words are, *For Redreſs whereof be it enacted*, &c. It refers not only to the latter, which was the Offence of Commiſſion, but alſo to the Omiſſion of the Offence of burning of Houſes in the Statute of 1 *Ed.* 6.

(a) 2 Inſt. 353, 354, 355, 356, 357, &c. 481.

(b) 3 Inſt. 357. Statham Quare Impedit 14.

(c) 2 Inſt. 481.

(d) 2 Inſt. 383, 384, 385, 386. Stamf. Pl. Cr. 168, 169, &c.

(e) 2 Inſt. 321, 322, 323. 6 Co. 57. a. F. N. B. 220. I. 198. E. 9 Co. 135. 2. Co. Lit. f. 46. 2.

(f) 13 Co. 5, 6. Co. Lit. 238. a. 256. a. Plowd. 47. a. Hob. 242, 243. 1 Keble 609.

* 2 Salk. 609.

and then this Word *(ſuch)* ſhall have Reference to burning of Houſes, as well in the Statute of 23 *Hen.* 8. as in the ſaid Act of 25 *Hen.* 8. both which are before recited in the ſame Act of 5 *&* 6 *Ed.* 6. Another Reaſon was added, That the Purview of the Act of 5 *&* 6 *Ed.* 6. has a double Sentence, *ſc. That the ſaid Act of* 25 *H.* 8. *touching the putting of ſuch Offenders from their Clergy*, if that ſhould be admitted to extend only to Robbery in one County, and carrying into another; yet there is another Sentence in the ſame Act, *and every Article, Clauſe and Sentence, contained in the ſame, touching Clergy, ſhall from henceforth touching ſuch Offences, remain, and be in full Strength and Virtue.* And it was argued, That this latter Clauſe ſhould extend to the whole Act of 25 *Hen.* 8. for divers Reaſons: 1. Becauſe the firſt Sentence had been ſufficient for the Robbery in one County, and carrying into another, and then this latter Sentence, which has more general Words, *ſc. And every Article, Clauſe, and Sentence, &c.* would be vain and ſuperfluous, *Et* (*a*) *viperini eſt expoſitio quæ corrodit viſcera textus.* 2. There was but one Clauſe or Sentence, concerning Robbery in one County, and carrying into another, and this Branch of 5 *&* 6 *Ed.* 6. ſaith, *All and every Article, Clauſe and Sentence, concerning Clergy*, ſo that it would be hard that theſe general Words ſhould be reſtrained to one particular Clauſe and Sentence; but the good Expoſitor makes every Sentence have its Opperation to ſuppreſs all the Miſchiefs before the ſaid Act, and chiefly thoſe which are ſpecified in the Act itſelf (as it is in the Caſe in Queſtion) and altho' the latter Words of the Sentence are, *Shall from henceforth concerning ſuch Offences, remain in Force*, in good Conſtruction theſe Word *(ſuch Offences)* ought to have Reference to ſuch Offences as are contained in any Article, Clauſe, or Sentence of the Act of 23 *Hen.* 8. *touching Clergy*. And by this Conſtruction, ſuch heinous Offence will not paſs in Effect with Impunity, and Malefactors will not be encouraged to burn, not only Houſes, but Towns and Cities, and paſs with a little burning in the Hand, and all the Statutes will, by this Conſtruction, ſtand together, and be well reconciled, and agree with the conſtant and continual Experience of the Judges. And (*b*) it is frequent in our Books, That Penal Statutes have been taken by Intendment, to the End they ſhould not be illuſory, but ſhould take Effect according to the expreſs Intention of the Makers of the Act: And for that it was enacted by the Statute of (*c*) 27 *E.* 3. *cap.* 1. That he who draws any to the Court of *Rome*, in a Plea which might be determined in the King's Court, or of Things, whereof Judgment is given in the King's

The Courts uſually ſtretcht Acts in favour of Clergy. See Lucas 410. Ante 7a

(*a*) 2 Bulſtr. 179. Hawks Max. 424.

(*b*) Plowd. Com. 10. a. 46. b. 46 E. 3. 17. a. Vide ſupra.

(*c*) 3 Inſt. 119, 120, 121, 122, &c. 12 Co. 17.

Court, or who ſues in any other Court, to defeat or impeach the Judgments given in the King's Courts, ſhould have Day (*a*) containing the Space of two Months, *&c.* and if they come not at the ſame Day in proper Perſon, they ſhould be put out of Protection, *&c.* A Queſtion was moved in (*b*) 30 *Ed.* 3. 11. *b.* (which was within three Years after the making of this Act.) If the Offender does not make Default, but appears, and pleads, and is condemned, if he ſhould have the high and penal Judgment of *Præmunire* given by the ſaid Act. But afterwards in (*c*) 39 *E.* 3. 7. *a. b.* Judgment was given againſt the Biſhop of *Chicheſter*, who appeared, That he ſhould be put out of Protection, *&c.* and yet the Letter of the Statute is, and if they do not come at the ſame Day, *&c.* they ſhall be put out of Protection, *a fortiori*, when he appears and ſays nothing, ſuch Judgment ſhall be given, for in equal Miſchief, *a multo fortiori* when the Defendant in ſuch Caſe appears, and pleads, and is found guilty, he ſhall have Judgment on the ſaid Statute, as it is adjudged in *Fereby's Caſe*, in 44 *Ed.* 3. 36. *a. & b.* and yet it is out of the Words of the Act, which ſpeaks only of Default; and infinite Judgments on the Statute of 27 *E.* 3. have been given accordingly, and therefore (*d*) *Qui hæret in litera hæret in Cortice*; which Caſe, 'twas ſaid, had greater Defect of Words than the Caſe now in Queſtion: By the Statute of (*e*) 8 *H.* 6. *cap.* 12. it is ordained, that if any Record, or any Parcel thereof, *&c.* is voluntarily carried away, withdrawn, *&c.* by Reaſon whereof any Judgment is reverſed, that ſuch Stealer, Carrier-away, Withdrawer, and Avoider, *&c.* are adjudged for Felons. And in (*f*) 2 *R.* 3. 10. *a.* an Action of Debt was brought againſt *J. B.* whereas in Truth his Name was *W. B.* Proceſs continued till he was Outlawed, and the Original was raſed, and the third *Capias*, and made *W. B.* and the Rolls raſed and made accordingly, this Act was reſolved to be Felony by all the Juſtices; and yet by that the Outlawry was made good, *&c.* So by the Statute of 25 *Ed.* 3. the killing of his Maſter is adjudged Treaſon, and this extends by Conſtruction to (*g*) the Miſtreſs, as it is held in 19 *H.* 6. 47. *a.* and in many other Caſes, Penal Statutes have been taken by Intendment to remedy the Miſchief, in Advancement of Juſtice, and in Suppreſſion of Crimes and heinous Offences.

As to the ſecond, The Statute of 25 *Hen.* 8. has taken away Clergy from him, who is found guilty of burning of an Houſe; for the ſaid Act of 25 *Hen.* 8. takes away Clergy from him, who in ſuch Caſe, upon his Arraignment, ſtands mute, or will not plead, or challenges above the Number of twenty, *in like Manner and Form*,

(*a*) 3 Inſt. 125.

(*b*) 9 Co. 74. a.

(*c*) 3 Inſt. 125.

(*d*) 5 Co. 4. b. Co. Lit. 54. b. 283. b. 3 Bulſtr. 65. Wing. Max. 19. Hawks Max. 425.

(*e*) 3 Inſt. 70, 71, 72, 73. Dalt. Juſt. 386. Keb. Juſt. 245, 246. Stamf. Pl. Cr. 36. b. Fitz. Juſt. 41. b.

(*f*) Br. Coron. 173. Br. Treaſon 31. Stamf. Pl. Cr. 36. b.

(*g*) Hales Pl. Cr. 23. Plow. 86. b. Stamf. Pl. Cr. 40. b. 3 Inſt. 20. 12 Aſſ. 30. Fitz. Juſt. 14. b. Dalt. Juſt. 336. Br. Coron. 74. Br. Treaſon 8, 12. Fitz. Cor. 7. 270.

as if he were found guilty after the Laws of the Land, which are affirmative Words, and take away the Clergy from him, who is found Guilty according to the Laws of the Land.

As to the third Point, The Makers of the Statute of (*a*) 4 & 5 *Phil. & Mar. c.* 4. knowing that by the ſaid Statute of 25 *H.* 8. which was revived by the Statute of 5 & 6 *E.* 6. Clergy was taken from the principal Offender in the ſaid Caſe of burning of an Houſe, and not from any Acceſſory, have provided that the Acceſſories before, in ſuch Caſe, ſhall be ouſted of their Clergy; which was taken by divers of the Juſtices to be a good Interpretation by the whole Parliament, of all the ſaid Acts concerning this Matter, for if the Principal ſhould have his Clergy, it would be abſurd, and never ſeen in the whole Law, that the Clergy ſhould be taken from the Acceſſory only, and leave the principal Offender at large to have his Clergy. Secondly, It would be in vain by the ſaid Act of (*b*) 4 & 5 *Phil. & Mar.* to take away Clergy from the Acceſſory before, and leave the Principal to have his Clergy; for if the (*c*) Principal has his Clergy before Judgment, the Acceſſory ſhall not be arraigned, as it is held in the 4*th Part of my Reports fol.* 43. *b.* 44. *a. Nota bene* Reader, The ſaid Act of 4 & 5 *Phil. & Mar.* takes away Clergy from him who is Acceſſory before the Offence of burning of an Houſe, *&c.* extends where the Acceſſory is outlawed, or otherwiſe attainted or convicted, or ſtands mute, or denies to anſwer directly, or challenges above the Number of twenty, which is well and perfect as to that; but this Act doth not extend to every Burglary, or breaking of Houſes, *&c.* but only when Robbery is committed.

(*a*) Jenk. Cent. 221. Dalt. Juſt. 524. Hales Pl. Cr. 232, 233. Fitz. Juſt. 86. b.

(*b*) Savil 46.

(*c*) Cr. El. 541. 3 H. 7. 1. b. Br. Corone 131. Br. Clergy 15. Fitz. Corone 58. 9 H. 7. 19. b. Plow. 99. b. 2 R. 3. 21. b. Stamf. Pl. Cr. 47. a. b. Moor 461. 13 E. 4. 3. b. Br. Corone 157. 2 Inſt. 183, 184. 3 Inſt. 114, 139. 9 Co. 117. a. Cr. Car. 566.

As to the fourth Point, upon Conference had with divers Clerks of Aſſiſe, and other ancient Clerks, and upon the Sight of divers and many Records, it appears, That the Principals and Acceſſories before have been (*d*) ouſted of their Clergy, in the Caſe of burning of Houſes: For their Manner of Entry, when Clergy doth not lie, is to ſay *Cul. ſuſ. per coll.* But when Clergy lies, then the Entry is, *Petit librum, &c.* And all the Precedents but one (and that was before Sir *John Puckering*, and his Companion, Juſtices of Aſſiſe in the County of *Eſſex*) were, *Cul. ſuſ. per Collum*, without the Words, *Petit librum.* Upon all which Matter, and upon View of the ſaid Precedents, it was reſolved, That the ſaid Offender in the Caſe now in Queſtion, ſhould be ouſted of his Clergy; and accordingly at the laſt Aſſiſes in the County of *Cambridge* (altho' the Offender could read well) Judgment was given upon him, and Execution done accordingly, and Order given, that he ſhould be hanged in Chains near the Place where he offended, *& ita fuit.*

7 H. 7. 12. b. Fitz. Cr. 53. Br. Corone 137. Br. Clergy 16. Hales Pl. Cr. 221, 222. Bl. Dalt. Juſt. 401. Fitz. Juſt. 32. b. 33. a. vet. N. B. 117. b. 18 E. 4. 9. b. Br. Coron. 164. 9 Co. 119. b. 1 Rol. 777. Hales Pl. Cr. 233.

(*d*) 3 Inſt. 66. Cr. Car. 377, 378. 1 Jones 351. Fitz. Juſt. 88. b. Stamf. Pl. Cr. 126. a.

Nota Reader, As to Burglary and Robbery in Houſes, *&c.* foraſmuch as Doubts and Queſtions may ariſe upon what has been ſaid, I have thought it neceſſary (by Way of Appendix) to make a ſhort Explanation of it, and of ſome other Things, to the Intent, That of the one Side, great Offences ſhould not paſs unpuniſhed, nor of the other Side, the Subject be deprived of the Privilege which the Law gives him.

Jenk. Cent. 222. Hob. 291. By the Statute of 18 *Eliz. cap.* 7. it is enacted, *That if any Perſon ſhall commit any felonious Burglary, and ſhall be found guilty by Verdict, or ſhall be outlawed, or upon his Arraignment ſhall confeſs the ſame; in every ſuch Caſe he ſhall be ouſted of his Clergy:* By this Act it is commonly held, and ſo publiſhed in ſome printed Books, That none ſhall have Clergy who commits any felonious Burglary. And that is true, if it is well underſtood, and the Secret thereof is worthy your Apprehenſion and Knowledge, for this Statute of 18 *Eliz.* extends only to three Caſes, *viz.* where the Offender is outlawed, or is found Guilty by Verdict, or confeſſes it: And therefore if any one is indicted of Burglary generally at the Common Law, (without ſomething Special, and without any Allegation, according to certain Statutes in ſuch Caſe provided) if the Offender is outlawed, or if upon Not-Guilty pleaded, he is found Guilty by Verdict; or if he confeſs the ſame, he ſhall be ouſted of the Privilege of Clergy by this Statute; but if he is arraigned upon ſuch general Indictment, and ſtands mute, or will not anſwer, or challenges above the Number of twenty; in ſuch Caſes, upon ſuch Indictment, he ſhall have his Clergy.

Quere. And therefore it would be wiſely done, for the Indictment to ſay according to the Statutes of 23 *H.* 8. 1. *&* 1 *E.* 6. 12. that ſome Perſon was in the Houſe and put in Fear, *&c.* for in ſuch Caſe the ſame Act ouſts him of his Clergy; or, according to the Statute of 5 *Edw.* 6. 9. the Owner, his Wife, or Children, being ſleeping or waking; for if any ſuch Special Matter is contained in the Indictment, then if the Offender ſtands mute, or will not directly anſwer, or challenges above the Number of twenty, he ſhall be ouſted of his Clergy. But alſo the ſaid Acts of 1 *&* 5 *E.* 6. are neceſſary to be explained, *viz.* The Act of 1 *Ed.* 6. 12. ought to be expounded, as it has been before; and although this Act extends to a ſingle Burglary without Robbery, yet it requires, that ſome Perſon be then in the Houſe that is put in Fear; for if the Party was there, and not put in Fear; as if he be ſleeping, or awake, or in another Part of the Houſe, and not put in Fear, then, notwithſtanding ſuch Burglary, he ſhall have his Clergy,

Hales Pl. Cr. 233.

Clergy, notwithſtanding the Statute of 23 *H.* 8. joins Robbery with Burglary in ſuch Caſe, and the Statute of 1 *Ed.* 6. 12. which extends to ſingle Burglary; but both agree, That the Perſon ought to be put in Fear. And the ſaid Act alſo of 5 *Ed.* 6. 9. is worthy of Expoſition; for firſt, it joins Robbery with Burglary, ſo that if the Offender breaks the Houſe in the Night, with a felonious Intent, without taking any Thing, although the Perſon be put in Fear, yet he ſhall have his Clergy. Secondly, This Act extends only when the Offender is found guilty of the Felony, and not when the Offender is outlawed, or ſtands mute, or will not anſwer, or challenges above the Number of twenty; and therefore the ſureſt Way is, in the Indictment, to follow the Statute of 1 *Ed.* 6. 12. For that as to Burglary is the moſt ſure and compleat Law, as to ground an Indictment of Burglary.

But what has been ſaid extends to the principal Offenders in Burglary, and it is requiſite that ſomething ſhould be ſaid in what Caſes the Acceſſories, in this Offence, ſhall have their Clergy, and in what not. The Statute which takes away the Privilege of Clergy, in this and divers other Caſes, is the ſaid Statute of 4 & 5 *Phil. & Mar.* for the Act of 23 *H.* 8. which denies Clergy to the Acceſſory before, is (as has been ſaid) taken away as to that, by the ſaid general Clauſe of 1 *Ed.* 6. and the Act of 18 *Eliz.* extends but to the Principal: And therefore the Words of the ſaid Act of 4 & 5 *Phil. & Mar.* are to be conſidered, and they as to this Purpoſe are, *All and every Perſon and Perſons, that ſhall maliciouſly command, hire, or counſel any Perſon or Perſons, to do any Robbery, in any Dwelling-Houſe, or Houſes,* ſhall loſe the Benefit of his Clergy; and of ſuch Effect was the Statute of 23 *H.* 8. 1. and the Statute of 25 *H.* 8. extends only to the Principal; by which it appears, That if the Commandment is to do any Felony and Robbery of Goods, that ſuch Acceſſory before, ſhall have his Clergy, *Vide Stamford, lib.* 1. *cap.* 24. by what other Felonies Burglary may be committed. Savil 46.

But let us leave Burglary which ought to be done in the Night, and let us ſee in what Caſes a Man ſhall be ouſted of his Clergy, when he breaks any Dwelling-Houſe in the Day. 1. Upon the Statutes of 23 *H.* 8. 25 *H.* 8. 1 *Ed.* 6. *cap.* 12. & 5 & 6 *E.* 6. 9. it is clear, That there ought to be an actual Felony done, beſides the breaking of the Houſe in the Day, for the breaking of the Houſe only in Popham 84. Stamf. Pl. Cr. 128. a.

Antea 11. b. Stamf. Pl. Cr. 126. a.

the Day, altho' it was with a felonious Intent, without taking away ſomething, is not Felony; and therefore no Clergy is neceſſary in the Caſe. 2. Upon the ſaid Statutes of 23 & 25 *Hen.* 8. there ought to be the Owner, his Wife, or ſome of his Children, or Servants then there, and put in Fear; and by 1 *Ed.* 6. 12. ſome Perſon ought to be in the Houſe and put in Fear, by 5 & 6 *Ed.* 6. *cap.* 9. If the Owner, Wife, or ſome of his Children or Servants be in any Part of the Houſe, ſleeping or waking, and all the other Points concerning the Attainder, Conviction, ſtanding Mute, *&c.* in Caſe of Burglary, extend alſo to Robbery in a Dwelling-Houſe in the Day-time: And he who robs any Perſon in (*a*) any Booth or Tent, in any Fair or Market, the Owner, his Wife, Children, or Servants then there being ſleeping or awake, ſhall be ouſted of his Clergy by the Statute of 1 *Ed.* 6. *cap.* 12. & 56 *Ed.* 6. *cap.* 9. But two Things in the Caſe of Robbery in a Dwelling-Houſe in the Day, are to be obſerved. None of theſe Statutes ouſts the Party of his Clergy in Caſe of Robbery in a Dwelling-Houſe in the Day, but in two Caſes. 1. If any Perſon be put in Fear upon the Statute of 1 *Ed.* 6. *cap.* 12. and other Statutes before. 2. (*b*) If the Owner, his Wife, his Children, or Servants, be then in another Part of the ſame Houſe, altho' they be not put in Fear, the Offender ſhall be ouſted of his Clergy by the Statute of 5 & 6 *Ed.* 6. *cap.* 9. but if a Stranger be there by the Owner's Leave, the Offender ſhall have his Clergy, for it is out of the Words; and of ſuch Opinion is *Stamf.* 129. *b.* who vouches the Opinion of all the Juſtices accordingly: But a Doubt was conceived upon theſe Statutes, If any in the Day-time had broken an Out-houſe, as a Barn, Stable, *&c.* if that ſhould be ſaid, as to ouſt the Offender of his Clergy, a Dwelling-Houſe, and afterwards the Statute of 39 *Eliz.* *cap.* 15. was made, by the which it is enacted, That he who robbeth to the Value of five Shillings in any Dwelling-Houſe or Out-houſe in the Day-time, altho' no Perſon was there within it, ſhall be ouſted of his Clergy. And it is to be known, That none of the ſaid Statutes extends to any Acceſſory before the Robbery in an Houſe in the Day-time, but only (as it has been often ſaid) the Statute of 23 *Hen.* 8. and the Statute of 4 & 5 *Phil.* & *Mar.* and the Statute of 23 *H.* 8. as to this Point, is taken away by the Stat. of 1 *Ed.* 6. *cap.* 12. Then let us ſee in what Caſes the Acceſſory before ſhall have his Clergy, and in what not. And therefore the ſaid Act of

(*a*) Stamf. Pl. Cr. 128, 129. a. 3 Inſt. 64. Fitz. Juſt. 89. a. Dalt. Juſt. 524.

(*b*) Godbolt 315. Stamf. Pl. Cr. 129. a. Fitz. Juſt. 89. a.

§ Co. 40. a.

4 & 5

4 & 5 *P. & M.* is to be again review'd and conſider'd as to this Point. For in Caſe where the Clergy is taken away from the Principal, in Caſe of robbing in any Dwelling-Houſe in the Day, before the ſaid Act of (*a*) 4 & 5 *Phil. & Mar.* in ſuch Caſe the Clergy is taken from the Acceſſory before, by the Stat. of 4 & 5 *Phil. & Mar.* But 1. This Act doth not extend to Acceſſories before, in Caſe of robbing in a Booth or Tent, be it in the Day or in the Night; for theſe are not eſteemed in Law for a Dwelling-Houſe, as the Statute of 4 & 5 *P. & M.* ſpeaks, and as well appears in the Recital of 5 & 6 *Ed. 6. cap. 9.* Alſo the Statute of 4 & 5 *P. & M.* doth not extend to the Offence within the Act of 39 *Eliz.* which was made long Time after the Act of 4 & 5 *Ph. & M.* and the Act itſelf of (*b*) 39 *Eliz.* takes away Clergy from the principal Offender only. And you may take this for a general Rule, That (*c*) every Act which takes away Clergy from the Principal, and ſpeaks nothing of the Acceſſory; that the Acceſſories, as well before as after, ſhall have their Clergy, as it was held by all the Juſtices, 1 *Mar. fol. 99. a.* (*d*) *Dyer.* Another general Rule is, (*e*) In all Caſes where a Man is ouſted by any Statute for any Offence from the Benefit of his Clergy, the ſame Offence ought to be contained in the Indictment or Appeal, in ſuch Manner and Form, and with the ſame (*f*) Circumſtances as is contained in the Statute, or otherwiſe the Offender ſhall have his Clergy, becauſe the Statute which ouſts him of his Clergy, not being purſued, the Offender is left to the Common Law: For Example, upon the ſaid Act of 4 & 5 *Phil. & Mar.* the Words are, *All and every Perſon and Perſons that ſhall maliciouſly command, hire, or counſel any Perſon to commit or do any Petit Treaſon, wilful Murder, or to do any Robbery in any Dwelling-Houſe*, &c. *or wilfully to burn a Dwelling-Houſe*, &c. And thereupon the Caſe in *Anno* 2 *Reginæ Eliz. Dyer* (*h*) 183. was, That a Man is indicted of Robbery of another in his Manſion-houſe, he being in the ſaid Houſe, and put in Fear; and another is indicted, becauſe he feloniouſly, before the ſaid Robbery, procured and counſelled the Principal to commit that Robbery; in which Indictment of the Acceſſory this Word (*i*) (Maliciouſly) was omitted: And by the Opinion of all the Juſtices of Aſſiſe in their Aſſembly, except the Chief Juſtice, and *A. Brown*, for want of this Word (maliciouſly) in the Indictment, the Party had his Clergy, becauſe the Words of the Statute of 4 & 5 *Phil. & Mar.* were not purſued. Alſo in 18 *Eliz.* a Servant of the Lady

(*a*) Sav. 46. 4 & 5 P. & M. cap. 4. Dalt. Juſt. 524.

(*b*) 39 El. c. 15. 3 Inſt. 65. Cro. Car. 474. Jenk. Cent. 221. cap. 72.

(*c*) Hales Pl. Cr. 231.

(*d*) Dy. 99. pl. 59. Stamf. Pl. Cr. 125. a.

(*e*) Stamf. Pl. Cr. 130. a. Fitz. Juſt. 89. b.

(*f*) Dyer 363. pl. 25. 11 Co. 38. a. 1 And. 49. c. 123. Doct. pl. 332, 333. Dyer 312. pl. 86. Cro. Eliz. 749. 2 Keb. 289.

(*g*) Hales Pl. Cr. 232. Savil 46. Dyer 186. pl. 3. Fitz. Juſt. 86. b. Dalt. Juſt. 524.

(*h*) Jenk. Cent. 221. cap. 72. Dyer 183. pl. 59.

(*i*) Hales Pl. Cr. 231.

Lady *Laxton* of *London*, was indicted for feloniously procuring the Robbery of his Miſtreſs by one *Crompton*: But in the Indictment there wanted *Conſuluit*, *Conduxit*, *vel præcepit*, and alſo Maliciouſly; and therefore Clergy was allowed him after Judgment *per Opinionem Juſticiariorum*.

Dyer 186. pl. 3.

MET-

METCALFE's *Caſe.*

Q. Carth. 46. 87.

Mich. 12 Jacobi I.

WOOD, and others, brought a Writ of (*a*) Accompt in the Common Pleas againſt *Metcalfe*, and upon Iſſue found againſt him, Judgment was given *Quod computet*, & (*b*) *ideo in miſericordia quia non prius computavit.* Upon which Judgment *Metcalfe* brought a Writ of Error; and now two Queſtions were moved. 1. If after this Judgment, the Writ of Error lies or not? The 2d, If the Writ of Error does not lie, if the Record be removed or not? And it was argued on the Plaintiff's Side, that the Writ of Error well lies: For after this Verdict and Judgment, if the Plaintiff dies, or if the Plaintiff be a Woman, and after this Judgment takes Huſband, the Writ ſhall not abate; and ſo it is adjudg'd in (*c*) 27 *Ed.* 3. 87. *a.* and therewith agrees (*d*) 14 *H.* 4. 1. *a.* where in a Writ of Accompt againſt one as Bailiff, and *ne unque ſon bailie, &c.* pleaded; and after Trial againſt the Defendant, Judgment was given *quod Def. computet*, and afterwards the Plaintiff dies, his Executors had a *Scire facias* againſt the Defendant, which was ſerved, and he appeared not; for which a *Capias ad computand'* iſſued againſt him, retornable at a certain Day; and the Plaintiffs prayed an *Exigent* againſt him, and had it. *Vide* (*e*) 21 *Ed.* 3. 32. *a.* and in 21 *Ed.* 3. 7. *a. b.* in *Robert de Holywel's* Caſe, it is adjudged, That after ſuch Judgment, the Plaintiff can't be (*f*) Nonſuit; but notwithſtanding his Default, he may have a *Capias ad computand'* within the Year, and a *Scire facias* after the Year; and therewith agrees (*h*) 3 *H.* 4. 7. *a. b.* And there it is ſaid, That by the Judgment, that the Defendant ſhall Accompt, that the (*i*) Original is determined, (*k*) 21 *H.* 6. 26. *a. b.* in *J. Ferrer's* Caſe; but

(*a*) Godbolt 258. 1 Rol. Rep. 84. Cr. Jac. 356, 357. 1 Roll. 750. 3 Keb. 384. Hugh's Abr. 165, 1130, 1623.
(*b*) 2 Roll. 2[illegible]8.
(*c*) 27 E. 3. 86. b. 87. a. Fitz. Accompt. 88.
(*d*) 14 H. 4. 1. a. Fitz. Exec. 59. Br. Accompt 33.
Br. Excom. 39.
Br. Exigent 21. 1 Roll. Rep. 84.
Br. Proceſs 41.
Br. Scire fac' 81. Cr. Jac. 356. contra.
(*e*) 1 Rol. Rep. 84.
(*f*) Fitz. Accompt 65.
(*g*) 1 H. 7. 2. b. contra 3 H. 4. 7. b. Fitz. Accompt 15. contra Br. Accompt 63. Br. Nonſuit 41. Co. Lit. 139. b. cont. Cro. Eliz. 19. 2 Roll. 151. Cro. Jac. 356.

cont. Styl. Practi. Regiſt. 359. contra. 1 Rol. Rep. 84, 85. contra. (*h*) Br. Accompt 27. Br. Nonſuit 53. (*i*) Poſtea 40. contra. (*k*) Fitz. Accompt 16. Br. Accompt 45. Br. Nonſuit 25.

but there it is ſaid, That altho' in ſuch Caſe the Plaintiff can't be (*a*) Nonſuit, yet the Default of the Plaintiff in ſuch Caſe ſhall bar him for ever; and ſo is a Judgment there cited in (*b*) 19 *Ed.* 3. by *Wilby*, *Vide* 18 *Ed.* 2. *Accompt* 123. (*c*) 21 *Ed.* 3. 7. *a. b.* (*d*) 1 *Hen.* 7. 2. *b.* (*e*) 3 *H.* 4. 7. *a. b.* (*f*) 41 *Ed.* 3. 3. *a.* It is held, That if two be adjudged to Accompt, and the one dies, the other ſhall Accompt alone, and the Writ ſhall not abate, *Vide* 31 *Ed.* 3. *Accompt*, *Satham.* *Vide* 34 *Ed.* 1. *Brief* 854. 1 *Ed.* 5. *fol.* 1. *a.* In a Writ of Accompt, the Defendant was awarded to Accompt, and a *Capias ad computandum* awarded; and the Defendant came in by *Cepi corpus*, and the Auditors were aſſigned to him, *&c.* wherefore the Party entered in Accompt, and pleaded a Payment by the Command of the Plaintiff, the Plaintiff traverſed the Command, and upon that they were at Iſſue; and after Iſſue joined, the Defendant was let to Mainpriſe by Recogniſance; and afterwards the Iſſue was diſcontinued by the Demiſe of King *Ed.* 4. before Verdict given. And in that Caſe two Points were reſolved. 1. That the Mainpernors were diſcharged by the Demiſe of the King. 2. That after ſuch Judgment given, that the Defendant *computet*, always the *Entry* is, *Ideo conſideratum eſt quod prædict' M. computet, & idem M. in miſericordia, quia prius non computavit*, which proves that it is a Judgment, and by Conſequence a Writ of Error lies upon it.

(*a*) Co.Lit.139.b. contra. Cro. Jac. 356. 2 Roll. 131. Styl. Pract. Regiſt. 359. contra. Cr. El. 19. 1 Roll. Rep. 84, 85. contra.

(*b*) 21 H. 6. 26. b.

(*c*) Fitz. Accompt 65.

(*d*) Fitz. Accompt 15. Cr. El. 636. Br. Accompt 63. Poſtea 40. b. Br. Nonſuit 41.

(*e*) Fitz. Accompt 27. Br. Nonſuit 53.

(*f*) Fitz. Accompt 23. Br. Accompt 10. Fitz. Reſpond. 29.

1 Roll. Rep. 84.

But it was reſolv'd by the whole Court, That the (*g*) Writ of Error upon this Judgment *Quod computet, &c.* before the final Judgment given, lay not, and that appears by the Words of the Writ of Error, *ſcil. Quia in recordo & proceſſu ac etiam in redditione judicii loquelæ quæ fuit in curia noſtra coram vobis, &c. per breve noſtrum inter W. & M. qd' id' M. rederet præfat' W. rationabilem computum ſuum de quo fuit Receptor denariorum, &c. Error intervenit manifeſtus ad grave damnum ipſius M. &c. Nos errorem ſi quis fuerit modo debito corrigi, & partibus prædictis plenam & celerem Juſticiam fieri volentes in hac parte, vobis mandamus; qd' ſi judicium inde reddit' ſit, tunc recordum & proceſſum loquelæ præd' cum omnibus ea tangentibus, &c. nobis, &c. mittatis & hoc breve, &c.* And all the Queſtion of this Caſe was, What Judgment was intended in the Writ of Error? *ſcil.* That *quod defendent computet*, or the latter Judgment? And it was reſolved, That (*h*) no Writ of Error lies till the laſt Judgment be given; and that for divers Reaſons. 1. When a Thing (whereof there are divers Degrees and Qualities) is indefinitely mentioned in a Writ, Count, or other Record, the principal Thing, and the moſt worthy, ſhall be intended; as 6 *Eliz. Dyer* 236. *a.* A Penalty inflicted by Act of Parliament to be recover'd in any of the Courts of Record of the Qu. ſhall be intended of the principal Courts

(*g*) Co. Lit. 288. b. Palm. 2, 4. Cro. El. 636. 1 Roll. 750. Godb. 258. Cr. Jac. 324, 356. 1 Roll. Rep. 85. 2 Bulſtr. 119, 120. Hughs Abr. 16. 1 Leon. 193, 194. cap. 178.

(*h*) Co.Lit.288.b.

(*i*) Dy. 236. pl. 24. 6 Co. 19. b. 20. a. Moor 421. Cro. Car. 112, 146. 1 Jones 193. Hetly 101. Hutt. 99. Cro. Jac. 53. 85, 179. Styl. Rep. 430. 6 Co. 19. b. Cro. El. 737. 1 Ventris 8. Palm. 386. Cawly 82. Moor 600 Styl. 383. Jenk. Cent. 288. Plowd. 208. a. b. 1 Roll. Rep. 51. 4 Inſt. 65, 104, 165. 12 Co. 98. 2 Roll. Rep. 331. Lit. Rep. 170.

Courts at *Weſtminſter*, (*a*) 20 *Hen.* 6. 23. *a.* in an Accompt, ſuppoſing the Defendant to be his Receiver from the Feaſt of St. *Michael*, ſhall be intended the principal Feaſt of St. *Michael* the Archangel, and not St. *Michael de Monte Tumbæ*. So (*b*) 13 *H.* 4. 4. *b.* 21 *H.* 6. 8. 37 *H.* 6. 29. *b.* If the Father and Son are of one Name, *viz. J. S.* if *J. S.* is named generally in a Writ, Count, or other Record, it ſhall be intended of the Father, for he is the more worthy. So 10 *Ed.* 4. 11. *a. b.* 7 *R.* 2. *Tit. Bar.* 241. A (*c*) Man is bound to prove a Thing, he ought to prove it by the moſt principal Proof in Law, and that is by Jury: So (*d*) if Fee is mentioned, it ſhall be intended Fee-ſimple; and if Eſcuage, it ſhall be intended the principal Eſcuage, and that is Eſcuage incertain, *Lit. fol.* 21. *a.* And ſee a notable Caſe to this Purpoſe, in 5 *Ed.* 2. *Reſceit* 165. Where the Caſe was, That in Admeaſurement of Paſture againſt a Man and his Wife, Judgment was given that Admeaſurement ſhould be made; and afterwards it was made in the Country, and retorned to the Common Pleas, 15 *Hill.* at which Day the Huſband made Default, and the Wife came into Court before the Judgment given in the Principal, and prayed to be received, and was received, notwithſtanding *quod dictum fuit a parte*, That ſhe was come too late after the Admeaſurement awarded, which is a Judgment, *ad quod dictum fuit per Herle*, that it was not a Judgment upon the Principal. And where the Statute of *W.* 2. *cap.* 3. is, *Si uxor ante judicium venerit, &c. Statutum debet intelligi de principali Judicio:* So in 22 *E.* 3. *Tit. Reſceit* 139. Aſſiſe of Mortdanceſter againſt the Huſband and Wife, the Aſſiſe was awarded by Default, and the Aſſiſe remained all the while *pro defectu juratorum*; and now the Wife prayed to be received, and it was objected, That Judgment was given, that the Aſſiſe ſhould be taken; and afterwards the Wife, who came before the final Judgment, was received; and therewith agrees 17 *Ed.* 2. *ibid.* 173. & 22 *Aſſ. pl.* 22. after the Aſſiſe awarded, the Wife was received, 24 *Ed.* 3. 29. *b.* and divers other Books agree.

(*a*) 5 Co. 20. a. Fitz. Count 31. Br. Count 13. Br. Expoſition 20. Br. Jour. 5.
(*b*) 5 Co. 20. a. Fitz. Brief 118, 137, 586. Br. Addition 12, 16, 18, 43. Br. Noſm. 30. 33 H. 6. 53. b. 54. a. 44 E. 3. 34. b.
Br. Brief 471. 7 H. 7. 11. b.
(*c*) 4 Co. 74. b. 3 Bulſtr. 55. 6 Co. 20. a. 2 Brownl. 57. Cr. Jac. 188, 232, 381. 1 Rol. Rep. 222. Hob. 93, 217. 1 Sid. 313. Moor 113. Num. 253, 181. Nu. 322, 845. Nu. 1140, 888. Nu. 1250. Perk. Sect. 791. 2 Roll. 595. 1 Roll. Rep. 261. 3 Inſt. 98. Br. Condit. 151. Hugh's Abr. 1541.
(*d*) 5 Co. 20. a. 9 Co. 27. a. Cro. Eliz. 57.
(*e*) 6 Co. 19. b. 20. a. Lit. Sect. 99. Co. Lit. 73. a. 2 Inſt. 342, 343.

Reſceit 173. Reſceit 25.

2. The ſaid Words, *Si judicium inde redditum ſit, &c.* are intended not only *de principali judicio*, as appears before, but alſo *de integro judicio, ſc.* When all the Matter within the Original is determined, as in 34 *H.* 6. (18.) 41. *a.* in *Humphrey Bohun*'s Caſe, in a *Quare Imped'* brought againſt two; one pleads to Iſſue, and the other confeſſed the Action; upon which Confeſſion Judgment is given; and he againſt whom Judgment was given, ſued a Writ of Error to remove the Record into the King's Bench: *Priſot & tota Curia*, that can't be, for the Writ of Error rehearſes all thoſe who are Parties to the Original Writ; and then the Writ ſaith, *Et ſi judicium inde redditum ſit, tunc recordum illud habeatis*; wherefore it proves

Palm. 4. Bridg. 57, 58. 2 Roll. Rep. 125. 34 H. 6. 11. a. b. 38, 39, 40. Fitz. Error 35. Palm. 4. 33 H. 6. 23. b. 34 H. 6. 41. a.

34 H. 6. 41. a. that can't be before the whole Matter is determined: To which *Littleton* ſaid, If a Writ of Treſpaſs is brought againſt two, and one appears and pleads, ſo that he is attainted of the Treſpaſs, and Judgment given againſt him, notwithſtanding the Matter is not determined againſt the other, yet he againſt whom the Judgment was given, ſhall have a Writ of Error, and the Plea ſhall be removed. *Priſot*, No truly, and the contrary to what you ſay was here lately adjudged, in the Caſe of the Lord *Cromwel*, againſt *Cawary* and others,

Fitz. Judgm. 37. Br. Demurrer 23. 32 *H.* 6. 5. *a. b. & 6. b.* In Treſpaſs by the Lord of *S.* againſt one for taking his Cattle; as to Parcel, the Defendant pleaded Not-guilty; and as to the other, he pleaded another Plea, upon which the Plaintiff demurr'd, and afterwards the Iſſue was found for the Plaintiff, upon which he had Judgment: Yet he ſhall not have a Writ of Error, 'till the whole Matter is determined. And the Reaſon of the ſaid Caſe is, that if the Record ſhould be removed 'till the whole Matter is determined, there would be a Failure of Right: For the Judges of the King's Bench can't proceed upon the Matter which is not determined, and upon which no Judgment is given; and the whole Record ought to be either in the Common Pleas or in the King's Bench, alſo the Original is entire, and can't be there and here likewiſe. 39 *H.* 6. *Tit. Error* 11. A Man caſt in a Writ of Error of a Judgment given (where the Judgment was given of the Principal, and of the Damages and not of the Coſts; for which Cauſe it was rejected, becauſe the Writ is conditional, *Si Judicium inde redditum ſit*, 12 *Eliz. Dyer* 291. *b.* In a Formedon brought by *Fitz-Williams*, againſt *Copley*, the Demandant has Judgment for Part, *&c.* and afterwards the Tenant brought a general Writ of Error before the Diſcuſſion of the Reſidue, and earneſtly prayed, that the Record might be removed *in Banco Regis*, *ſed Curia noluit hoc concedere* before the whole Matter demanded was determined; for otherwiſe they ſhould proceed in a Plea without a Warrant; and alſo the Writ of Error ſaith, *Si judicium inde redditum ſit*, and this Word *inde* goes to the whole Demand. So in the Caſe at Bar, the Record ſhall not be removed 'till the whole Matter of the Accompt is determined, *& judicium detur de integro*, and that can't be till the Judgment is given of the Arrearages and Damages, *&c. Ne curia Domini Regis deficeret in juſtitia exhibenda*, The Record ſhall not be removed 'till the whole Matrer is determined.

Poſtea 41. a.

Dyer 291. b. pl. 67. Co. Lit. 288. b. 34 H. 6. 41. a. Palm. 4, 6. 39 H. 6. Error 40. 33 H. 6. 23. b. 2 Rol. Rep. 125. 32 H. 6. 5. a.

1 Roll. Rep. 86. 5 Co. 111. a.

Co. Lit. 74. a.

3. The Writ of Error is to be intended not only *De principali & integro*, but alſo *De judicio graviter damnoſo*: And

as

as to that, it is to be known, That the Original Writ of Accompt, notwithſtanding the ſaid Award, doth remain undetermined, and upon that the Judgment in the End ſhall be given; for the Original is, that the Defendant *Computet, &c.* and then the Defendant enters in Accompt before Auditors, *&c.* before whom he pleads to Iſſue, which is found by Verdict, or in other Manner, that he is in Arrearages of a certain Sum; and then the Plaintiff, by Force of the ſaid Original Writ of Accompt, ſhall have final or definitive Judgment, *Ideo conſideratum eſt quod præd' W. recuperet verſus præfat' M.* ſo much as is found *in arreragiis, & damna occaſione interplacitationis, &c.* and that is the Judgment by which the Defendant is charged with the Account, which is the Effect of his Suit; and the other Award is but Acceſſory to it: For by the Award *quod computet*, no Sum is recovered, nor doth it make an End of the Original, but is only a Means to bring it to the End: But the Judgment, by which he ſhall recover not only the Arrearages of the Account, but Damages alſo, as is aforeſaid, is the End and Determination of the Original: And therefore the Writ of Error may well ſay *ad grave damnum* of him who was Defendant in the Accompt; for by the Judgment he has Loſs, but not by the Award; and therefore the Judgment intended in the Writ of Error is *Judicium graviter damnoſum* to the Defendant. Antea 38. a. contra.

The fourth Reaſon was, That the Award *quod computet*, is but as an Award; as an Award that the Aſſiſe ſhall be taken, an Award in Waſte, a Writ of Enquiry of Waſte, in Treſpaſs, *&c.* a Writ of Enquiry of Damages *in partitione facienda*, an Award *quod partitio fiat*, in a Writ of Admeaſurement, an Award *quod Admenſuratio fiat*, an Award that one ſhall be ouſted of Aid, and the like, which are but Awards of the Court, and are but interlocutory and not definitive; whereupon no Writ of Error lies 'till the laſt Judgment is given: And therewith agrees 7 *R.* 2. *Tit. Error* 68. by *Belknap*, *Skipwith*, and the whole Court; That if a Man prays in Aid, and is ouſted by Award, he ſhall not have a Writ of Error of that Award, before the principal Plea is determined. *Vide* 17 *Ed.* 3. 5. in Darrein Preſentment: *Et a Sententia interlocutoria non appellatur jure Civili.* Cro. Jac. 358. 1 Rol. Rep. 85. Palm. 2. Cro. Jac. 324. 2 Bulſtr. 104, 119, 120. 1 Rol. 750. Cro. El. 235. 1 Leon. 193. cap. 178. (a) Co. Lit. 135. a. (b) 1 Rol. Rep. 84, 85.

5. 'Till the latter Judgment, the Parties have Day by the (a) Roll, which proves that the Plea remains undetermined. And *Hill.* 39 *Eliz. Rot.* 327. (b) *Anne* Counteſs of *Warwick* brought a Writ of Partition againſt *Henry* Lord *Berkley*, where Judgment 2 Bulſtr. 104. 1 Rol. 750. Hugh's Abr. 1446. Noy 71. Cr. El. 635, 645. 2 Rol. Rep. 125, 126. Moor 643.

Judgment was given upon a Special Verdict, *Quod partitio fieret*, and before the laſt Judgment, *viz.* (after Partition made) (*a*) *Quod partitio firma & ſtabilis imperpetuum teneatur*; the Lord *Berkley* brought a Writ of Error, and it was (*b*) reſolved, That the Writ of Error lay not till the principal Judgment given, which determines the Plea: As in a Writ of Dower, when Judgment is given that ſhe ſhall recover her Dower, there the Original is determined; and the Sheriff ſhall make Execution of the third Part by Meets and Bounds, which Proceſs need not be retorned.

(*a*) Cro. El. 65.

(*b*) 1 Roll. Rep. 85. There was no Reſolution. Co. Lit. 168. a. 169. a. Cro. El. 636. Cro. Jac. 324. 2 Bulſtr. 119.

And for direct Authority in the Point *in terminis terminantibus*, in (*c*) 21 *E.* 3. *fol.* 9. *a. Thorp* came to the Bar, and ſaid, How that *A.* brought a Writ of Accompt againſt *B.* who was awarded to Accompt, and a *Capias ad computandum* iſſued againſt him: And now the ſaid *B.* has brought a Writ of Error to diſturb the Accompt; and prayed, that the Record might not be ſent 'till he had accompted: *Stonſe*, it ſhall not; for the Plea is not ended until he hath accompted; *& ea de cauſa* the Court granted him, that the Record ſhould not be removed: *Et* 21 *E.* 3. *Tit. Accompt*, *Statham. Vide* 6 *E.* 4. 2 *&* 3.

(*c*) 1 Rol. Rep. 84. 1 Roll. 750. Palm. 2. 2 Bulſtr. 104. 1 Leon. 194.

And it is held in (*d*) 1 *H.* 7. 2. *b.* in theſe Words, If the Defendant is adjudged to Accompt, and they are at Iſſue before Auditors, and the Enqueſt is ready to paſs, and the Plaintiff makes Default; now ſhall the Plaintiff be Nonſuit, and ſhall not be received after: And if the Plaintiff is preſent, and will not ſue further, he ſhall be barred in the principal Action; for they ſaid, That tho' the Party is adjudged to Accompt, yet the Action is not clearly determined until the Accompt is determined; for the Accompt depends upon the Original, and all is but one; and ſo the Nonſuit or Diſcontinuance now upon the Proceſs upon the Accompt, is a Diſcontinuance of the whole Action; and it is not like other Actions, where the Plaintiff has once Judgment to recover; then the Action is clearly determined to all Intents: And when he ſues a *Scire facias* to have Execution, he may be Nonſuit in it; but that makes nothing to the Original Judgment.

(*d*) Fitz. Accompt 15. Antea 38. b. Br. Accompt 63. Br. Nonſuit 41. Cro. El. 19. 636. Co. Lit. 139. b. 2 Roll. 131. 1 Roll. Rep. 84, 85. Cro. Jac. 356. 3 H. 1. 7. b. Scyl. Pract. Regiſt. 359.

And yet upon Conſideration of theſe, and all the other Books, it may well be, that to divers Intents and Purpoſes (as in the ſaid Books appear) the ſaid Award *quod computet* is a Judgment, but not ſuch a Judgment (for the Cauſes and Reaſons before) as is intended within the Words of the Writ of Error, *Si judicium inde redditum ſit*; and for the moſt Part, every particular Caſe which has been ruled in the ſaid Books, may well ſtand upon a ſeveral and particular Reaſon.

Know

Know Reader that where it is ſaid in this Caſe, That a Writ of Error lies not upon an Award, till the principal Judgment is given; and where it is alſo ſaid, That no Writ of Error lies till the whole Matter in the Original is determined: Both theſe Rules are regularly true; but yet each of them has Exceptions; for as to the firſt, in *Trin.* 18 *H.* 7. in the King's Bench, *Rot.* 3. the Caſe was, That one *Eaton* was indicted of the Death of *John M.* before Juſtices of Peace in the County of *Lincoln*; upon which a *Capias* was awarded, and upon that an Exigent; after which, *Eaton* died before any Attainder, upon which Award of the Exigent, his Adminiſtrators brought a Writ of Error; and it was adjudged, That the Writ of Error did lie; and the Reaſon was, becauſe by the Award of the Exigent, his Goods and Chattels were forfeited; and of ſuch Awards which tend *ad tale grave damnum* of the Party, a Writ of Error lies, altho' the principal Judgment was never given; and in this Caſe, *Exceptio probat regulam, & ſic de ſimilibus.* As to the 2d, you will find in 36 *H.* 6. *Tit. Fieri facias* 3. it is held, That in Debt againſt divers, by ſeveral *Præcipes*, if there be Error in the Judgment againſt one, he ſhall have a Writ of Error. For in thoſe Originals in which there are ſeveral Declarations, and Error is againſt one, he ſhall have a Writ of Error, and the Record of his Declaration and the Pleading, *&c.* ſhall be ſevered from the Original, and removed into the King's Bench; and yet the Original remains here, (as well becauſe the Court of Common Pleas is in Poſſeſſion of it, as becauſe otherwiſe the Common Pleas could not proceed to determine the Reſidue without the Original) and in ſuch Caſe, as I conceive, If there is Error in the Original upon a *Certiorari* the Chief Juſtice ſhall certify but the Tenor of it: But where the Original is one, and one Declaration, he cannot have a Writ of Error till the whole is determined: For the Record cannot be in the King's Bench and here too.

Co. Lit. 288. b.

Cro. Jac. 357. Palm. 2. 1 Rol. Rep. 85. Hughs Abr. 960. 5 Co. 111. a. 2 Sid. 93. 1 Rol. 912. Cro. El. 225, 273. Owen 147. 1 Leon. 325. Godb. 377, 380.

Godb. 304. Hardres 392.

Antea. 39. b.

It is likewiſe to be obſerved, That in the principal Caſe of 36 *H.* 6. *ubi ſupra*, That the Writ of *Entre ſur Diſſeiſin* was brought of Land, and of Rent; as to the Land, they were at Iſſue, and it was found for the Demandant; and the Rent depended yet in Plea; wherefore for the Land he ſhall have Judgment, *&c.* and there *Priſot* ſaid, Bring us a ſpecial Writ of Error, if you will, and we will adviſe (when we ſee the Writ) if it ſhall be allowed, or not: And in the ſame Caſe the Opinion of the Court was, That the Party in the principal Caſe ſhould not have Judgment of his Coſts of Suit, 'till the

Original (*i. e.* all the Matter in the Original) was determined; for he cannot know what Damage he ſhall ſuſtain before the Suit is determined, *Vide* (*a*) *Dyer* 12 *El.* 291. *b.* *Vide* 36 *H.* 6. 13. *a. b.*

(*a*) Palm. 4, 6. Dyer 291. b. pl. 67. 34 H. 6. 41. a. 39 H. 6. Error 40. 33 H. 6. 23. b. 2 Rol. Rep. 125. 32 H. 6. 5. a.

As to the ſecond Point it was unanimouſly reſolved, That the Record is not removed, becauſe 'till ſuch Judgment given as intended in the Writ, the Chief Juſtice of the Common Pleas has no Authority to ſend it; for the Words are, *Si judicium inde redditum ſit, tunc recordum & proceſſum, &c. mittatis, &c.* and therefore the Record doth yet remain in the Common Pleas, upon which they may proceed, notwithſtanding the Roll is mark'd, *Mittitur, &c.*

Richard

Richard Godfrey's *Caſe.*

Mich. 12 Jac. 1.

Robert Bullen Plaintiff, in Replevin againſt *Richard Godfrey* Eſquire, *Owen Godfrey* and *Jo. Haynes*, which began *Mich.* 11 *Jac. Regis Rot.* ... and declared, That they took his Cattle, *ſcil.* Two Cows, *&c.* at *Bathele* in a Place called the Common, *&c.* The ſaid *Richard* avow'd, and the ſaid *Owen* and *John* as Bailiffs to *Richard* made Conuſance of taking the ſaid Cattle, becauſe the ſaid *Richard Godfrey* was, and yet is ſeiſed of the Manor of *Bathele* in the County of *Norfolk*, (whereof the Place where was Parcel) *&c.* in Fee, and that the ſaid *R.* and all thoſe whoſe Eſtate he has in the ſaid Manor *a tempore cujus, &c.* have had a Leet once *per annum, ſcil.* Within a Month after *Michaelmas*, before his Steward to be held, as to the ſaid Manor appertaining; and that ſuch Steward for the Time being, Time whereof, *&c.* hath uſed to ſwear twelve or more of the Inhabitants and Reſiants within the Leet aforeſaid to be chief Pledges of the Leet, to enquire of all the Articles concerning the Leet, and to preſent them; and that within the ſaid Manor, Time whereof, *&c.* there has been ſuch Cuſtom, that the ſaid chief Pledges of the ſaid Leet for the Time being ſo ſworn, have uſed *a tempore cujus, &c.* at every Leet to preſent (*inter alia*) that they themſelves the ſaid chief Pledges ſhould pay to the Lord of the Manor for the Time being, *Pro capital' argent' ſive pro certo Letæ* ten Shillings, and have paid it at the ſame Leet, and that at the Leet held at the ſaid Manor, within a Month after the Feaſt of St. *Mich. an.* 10 *Jac. Reg'* before *T. King* then Steward of the ſaid

See Carthew. 235. 1 Rol. Rep. 326. 73.

6 Co. 77. b. Yelv. 186. 1 Brownl. 19. 1 Rol. Rep. 72. 73.

ſaid *Rich. Godfrey* of the ſaid Leet, the ſaid Steward ſwore the ſaid *Robert Bullen*, *John Shaxton*, *Robert Daniel* and others to the Number of twelve chief Pledges of the Leet, and to enquire of the Articles of the Leet; and they being ſo ſworn, at the ſaid Leet, *Contemptuoſe recuſaverunt præſentare quod ipſi iidem capitales plegii ſolverunt præfato Richardo Godfrey, tunc domino Manerii prædicti ad illam eandem Letam pro capitali argento ſive certo Letæ xs. Necnon adtunc & ibidem contemptuoſe recuſaverunt ſolvere Richardo ad eandem Letam*, the ſaid chief Silver or Certainty of Leet *ob quod prædict' Thomas King Seneſchallus, &c. ad illam eandem Letam finem ſex Librarum ſuper eoſdem capitales plegios adtunc & ibidem impoſuit*, And becauſe the ſaid ten Shillings for chief Silver, or Certainty of Leet, and the ſaid Fine of 6*l.* to the ſaid *Richard Godfrey* were behind and not paid, the ſaid *Richard Godfrey* avow'd, and the ſaid *Owen* and *John*, as Bailiffs of the ſaid *Richard*, acknowledged the taking of the ſaid Cattle in the Place, where, *&c. pro præd' ſeperalibus ſummis decem Solidorum & ſex Librarum, &c.* Upon which Avowry the Plaintiff demurr'd in Law. And in this Caſe four Points were moved and argued at the Bar. 1. Whether the ſaid Fine being jointly impoſed was lawful? 2. If it was not duly impoſed, whether it was void, or voidable? 3. Whether the Avowant might diſtrain for the ſaid chief Silver, or Certainty of Leet? 4. When the Defendant avows the taking for two diſtinct Cauſes, and it appears of his own ſhewing, that one of them is not any Cauſe in Law, and that for the other he has a juſt Cauſe, whether he ſhall have a Retorn?

Co. Lit. 126. b. 127. a. 1 Rol. Rep. 35, 73. Hughs Abr. 167.

And this Caſe was argued ſeveral Times at the Bar, and this Term at the Bench. And as to the firſt Queſtion, it was unanimouſly reſolved, That the Fine impoſed upon the Jurors jointly, was not lawfully impoſed, but it ought to have been aſſeſſed upon them ſeverally, and eſpecially in this Caſe, becauſe what produced the Fine was ſeveral, for the Refuſal of every of them was ſeveral and perſonal, and the Refuſal of the one is not the Refuſal of the other; and therefore it was reſolved, That if ſome refuſe, and the others are ready to preſent, *&c.* Thoſe who refuſe, ſhall be only fined. And therefore the Caſe which *Priſot* puts in 35 *H. 6. Tit. Examination* 17. That if one of the Enqueſt eſcapes after they are ſworn, ſo that they cannot give their Verdict, although the others were not aſſenting to it, that yet they ſhall be all fined, was utterly denied to be Law; for *Nemo debet puniri pro alieno Delicto*, to which he is not party, privy, conſenting nor aſſenting, for then it might be ſaid *Rutilius fecit*,

1 Rol. Rep. 73.

Æmilius plectitur; and it was ſaid, That the ſaid Caſe was either ill reported, or ill printed. *Vide Pl. Com.* 519. *b. Weldon's* Caſe. One Juror who (*a*) miſdemeaned himſelf, was only impriſoned and fined. *Vide* 36 *H.* 6. 28. And with this Reſolution agrees (*b*) 10 *E.* 3. *fol.* 9. 10. where *William Freeman* brought a Replevin againſt the Abbot of *Ramſey* and others, of taking of his Cattle; the Abbot avowed the taking, by Reaſon that he is Lord of the Hundred of *F.* within which Hundred he had ſeveral Leets to hold once *per ann.* in the Town of *M.* within the ſame Hundred, *&c.* and that the ſaid *William Freeman* is Reſiant, *&c.* and that at ſuch a Leet held within the Hundred, twelve were ſworn to preſent Things preſentable which belonged to the Oath, and this *William* was one of them, and after they had received the Articles, they were commanded to anſwer to the Articles, and to preſent, *&c.* and they refuſing, that this *William* and the others were amerced, and the Amercement of *William* was aſſered to half a Mark, and for the half Mark he avowed. To which *Aſhton* of Council with the Plaintiff took Exception againſt the Avowry, becauſe the Avowant ſuppoſed they were amerced in common; and afterwards he ſaid, That the Amercement of *W.* was aſſered, and ſo was the Aſſerance ſeveral, and the Amercement in common, Judgment of the Avowry? To which it was anſwered and reſolved, That ſo ſhall the Law be, for (*c*) becauſe all refuſed, all ſhall be amerced; but when the Sum ſhall be impoſed or aſſered, it ſhall be upon every one ſeverally *Secundum* (*d*) *quantitatem delicti ſalvo contenemento ſuo*; and afterwards the Plaintiff was commanded to ſay further. And in 4 *Reg. El. Dyer* 211. (*e*) the Jurors of a Leet refuſing to preſent the Articles of the Leet according to their Oath, the Steward may aſſeſs a Fine upon each of them.

It was further reſolved, That in a ſtronger Caſe than the Caſe at Bar, where the Foundation is joint, yet the Fine ſhall be ſeveral: As in Aſſiſe againſt two, the Diſſeiſin is found with Force, altho' the Diſſeiſin is joint, yet the Fine ſhall be ſeveral, and therewith agrees 10 *E.* 3. 10. *a.* So in 30 *E.* 3. 1, 2. 30 (*f*) *Aſſ. pl.* 49. two were jointly convicted in the King's Bench, in a Bill of Treſpaſs of Reſcous done in *Middleſex*, to the Damages of 40 *l.* who join'd in Attaint, and there it is held, That though the Fine and Impriſonment is ſeveral, yet foraſmuch as the Plaintiff has joined them in one Action, they may well join in an Attaint againſt him. And ſo (*g*) *F. N. B.* 75. *g.* in a Court-Baron, if two are amerced for one Treſpaſs outragiouſly, they ſhall not join in a Writ *De moderata Miſericordia*, for they ſhould be ſeverally amerced, altho' the Treſpaſs is committed jointly. (*h*) So in a Plaint ſued by two, if they are Nonſuit, the Amerciament ſhall be ſeveral. And it muſt be known when

(*a*) Plow. 519. b. 212. a. 520. a. 1 Rol. Rep. 73. Palm. 380. Owen 38. Co. Lit. 227. b. 2 Rol. 713. 1 Anderſ. 183. c. 119. 1 Leon. 132, 133. c. 181. Dyer 37. pl. 45. 55. pl. 10. 218. pl. 4. 78. pl. 41. Cro. Jac. 21. Goldsb. 93. Dr. & Stud. lib. 2. c. 52. Br. Juror 2, 12, 13, 41, 51. 14 H. 7. 29, 30, 31. Br. Verdict 198. 108. 14 H. 7. 1. b. 20 H. 7. 3. a. 15 H. 7. 1. b. Br. Repleader 47. 35 H. 6. Br. Examin. 17. 39 Aſſ. 19. Br. decies tantum 15. Br. Impriſon. 92.

(*b*) 8 Co. 39. a. 40. b. 1 Rol. Rep. 73.

(*c*) Cr. Car. 55, 178.

(*d*) Ma. Chart. c. 14. 2 Inſt. 27. F. N. B. 75. e. 8 Co. 38. b. Seld. Table-talk. Fines 61.

(*e*) 1 Rol. Rep. 33, 74, 506. 8 Co. 38. b. Dyer 211. pl. 31. Br. Leet. 36.

(*f*) Fitz. Joinder in Action 7. 1 Rol. 74, 75. Br. Joinder in Action 80. Hughs Abr. 1108. Ci. Car. 55, 178.

(*g*) Hughs Abr. 1108. 1 Rol. Rep. 74.

(*h*) F. N. B. 75. g 1 Rol. Rep. 74

Judgment is given in the King's Bench or in the Common Pleas, *&c.* againſt two *& ideo in Miſericordia*, yet when it is aſſered by the Coroners in the County, the Amercement ſhall be ſet upon them ſeverally. *Vide* (*a*) 1 *H.* 6. 7. *b.* and *Greſly's Caſe in the eighth Part of my Reports* 39. But if a Jury appear at the Bar, and the Plaintiff is Nonſuit, the Judges may amerce the Plaintiff; and the Jury who are of the ſame Country may aſſeſs it, as it is held (*b*) in 18 *E.* 3. 13. *a.* And (*c*) there is a Difference as to this Purpoſe, betwixt a Fine and an Amercement: For the Fine is aſſeſs'd by the Court, and therefore need not be aſſered; but an Amercement ought to be aſſered by the Country, and therewith agree (*d*) 7 *H.* 6. 12. *b.* (*e*) 10 *H.* 6. 7. *a. Vide Greſly's* Caſe, and *Plowd. Com. Weldon's* Caſe, 519. And when there are divers Defendants, and they are by Law to pay a Fine, then the Judgment is, *ideo capiantur*, and that is for the Fine: For the Impriſonment is but till the Fine is paid, and therewith agree 17 *E.* 3. 73. *a.* 9 *E.* 3. 6. *Vide* 34 *H.* 6. 24. *a.* and that is the Reaſon, that when the Entry is *ideo capiatur*, that he ſhall not be amerced, becauſe he is to pay a Fine. And although the Entry is *ideo capiantur*, yet it ſhall be taken *reddendo ſingula ſingulis*; for the Damages of the Party they ſhall be taken by a joint *Capias ad ſatisfaciendum*, but for the Fine due to the King, they ſhall be taken ſeverally by *Capias pro Fine*, as it appears before, that they ſhall be ſeverally impriſoned, and ſeverally fined, for it is not reaſonable that the one ſhould be impriſon'd, 'till the other has paid his Fine. And in all Caſes, when the Means to attain to the Fine is ſeveral, the Fine itſelf ought to be ſeveral; and in ſome Caſes the Fine or Amercement ſhall be impoſed upon divers jointly, ſometimes upon a Country, ſometimes upon an Hundred, and alſo upon a Town, *&c.* As for the Eſcape of a Murderer, *&c. Vide* (*f*) 22 *E.* 3. *Corone* 238. 2 *E.* 3. *Ibid.* 147. 3 *E.* 3. *Ibid.* 302, 316, *&c.* and 10 *E.* 3. 10. *a.* and that is for the Incertainty of the Perſons, and for the Infiniteneſs of the Number.

(*g*) And it was obſerved, That of Courts, ſome may fine and not impriſon, as the Court-Leet; ſome can neither fine nor impriſon, but amerce, as the Court of the County, Hundred, Court-Baron, *&c.* For no Court can fine or impriſon which is not a Court of Record, as *F. N. B.* 73. *b.* If a Man is convicted before the Sheriff in a Writ of (*h*) Recaption, the Defendant ſhall be but amerced; but if he is convicted in a Writ of Recaption before the Juſtices, *ſ.* in a Court of Record, the Defendant ſhall be fined and impriſon'd; but then he ſhall not be amerc'd, and therewith agree 9 *H.* 5. 1. *b.* Some may impriſon and not fine, as

(*a*) 1 H. 6. 7. 8 Co. 40. a.

(*b*) 8 Co. 39. b.
(*c*) Co. Lit. 126. b. Br. Amerciam. 25, 65. Kelw. 65. a. Palm. 7. 8 Co. 39. a. Cr. Car. 275. Cart. 28. 2 Inſt. 196. 10 H. 6. 7. b. Cr. El. 241, 1 Rol. Rep. 74.
(*d*) 8 Co. 38. b. 2 Rol. Rep. 3. 7 H. 6. 12. b. Br. Det. 85. Br. Leet 14, 36. 1 Rol. 218, 219.
(*e*) Br. Ley. Gager 99. Br. Amercia. 50.

(*f*) 1 Rol. Rep. 34, 35, 75.

(*g*) 1 Rol. Rep. 35, 74. 8 Co. 38. b. Hughs Abr. 1071.

(*h*) 8 Co. 60. b. 41. a. F. N. B. 73. d. 130. a.

as the Conſtables at the Petit Seſſions, for any Affray made in Diſturbance of the Court, may impriſon but not fine. Some Courts can neither impriſon, fine, nor amerce, as Eccleſiaſtical Courts held before the Ordinary, Archdeacon, *&c.* or their Commiſſaries, and ſuch as proceed according to the Canon or Civil Law. *Vide Brook, Tit. Error* 177. And ſome Courts may fine, impriſon, and amerce, as the Caſe requires, as the Courts of Record at *Weſtminſter*, and elſewhere.

It was alſo reſolved, That the (*a*) Reaſonableneſs of the Fine ſhall be judged by the Juſtices; and if it appears to them to be exceſſive, it is againſt Law, and ſhall not bind; for *exceſſus in re qualibet jure reprobatur communi*, as exceſſive Diſtreſs is prohibited by the (*b*) Common Law, 41 *E.* 3. (*c*) 26. *a.* (For the Act of (*d*) *Articuli ſuper Chartas, cap.* 12. *Non capietur gravis diſtrictio*, extends to the King only.) (*e*) *Vide* 27 *Aſſ.* 51. (*f*) 28 *Aſſ.* 50. (*g*) 11 *H.* 4. 2. *a. b.* (*h*) 8 *H.* 4. 16. And it appears by the Stat. of *W.* (*i*) 1. *cap.* 35. That exceſſive or outragious Aid is againſt Law, and therewith agree *Glanvil, lib.* 9. *fol.* 70. *F. N. B.* 82. 75. and *Magna Charta, cap.* (*k*) 14. Exceſſive Amercement is againſt Law. (*l*) *Nullus liber homo amercietur. &c. Niſi ſecundum quantitatem delicti*; 10 *E.* 4. 10. *a. acc.* The ſame Law (*m*) of exceſſive Diſtreſs, in Reſpect of the Multiplicity, is againſt Law. (*n*) 27 *Aſſ.* 50, 51. *F. N. B.* 178. *a. b.* (*o*) 9 *H.* 7. 3. *a. b.* An Aſſiſe lies of outragious Diſtreſs. 14 *Hen.* 4. 9. *a.* An exceſſive Fine at the Will of the Lord, ſhall be ſaid Oppreſſion of the People. And if (*p*) Tenant in Dower has Villeins or Tenants at Will, who are rich, and ſhe by exceſſive Diſtreſs and Fines makes them poor and Beggars; it is by the Law adjudged to be againſt Law, and to be waſte, as appears in 16 *H.* 3. *Tit. Waſte* 135. 16 *H.* 7. *& F. N. B.* 60. *b. & Regiſtr' Judic'* 25. (*q*) Waſte lies *in exulando Henricum & Harmanum, &c. Nativos, quorum quilibet tenuit unum Meſuagium & unam virgatam terræ in villa de T. per graves & intolerabiles diſtrictiones:* By which it appears, That ſuch intolerable Oppreſſion of poor Villeins, and Tenants at Will, is *ad exhæredationem* of him in Reverſion, and againſt the Common Law of the Land. And in *the fourth Part of my Reports, fo.* 27. *b.* (*r*) If Fines of Copyholders of a Manor are incertain, the Lord cannot demand, or exact exceſſive and unreaſonable Fines; and the Copyholder may deny to pay it, and the Reaſonableneſs of the Fine ſhall be determined by the Juſtices, *&c. Quam rationabilis debet eſſe finis non definitur, ſed omnibus circumſtantiis inſpectis pendet ex Juſticiariorum diſcretione.* And ſo it was adjudged *in Com' Banco* between

(*a*) Hughs Abr. 167. Cr. Car. 196. Co. Lit. 59. b. 4 Co. 27. b. Cr. El. 351, 779. Moor 623. 1 Rol. Rep. 33. 1 Rol. 523. 2 Rol. 578. 13 Co. 3. 1 Brownl. 186.
(*b*) 13 Co. 2. 2 Inſt. 232. Hughs Abr. 167. Co. Lit. 60. a. 1 Rol. 674.
(*c*) Br. Amerciament 8. Br. Avow. 19. Fitz. Avow. 65. 13 Co. 2.
(*d*) 2 Inſt. 565. 13 Co. 2.
(*e*) Br. Diſtreſs. 33. Br. Avow. 85. 13 Co. 2.
(*f*) Br. Diſtreſs 35. Br. Aſſiſe 291. 13 Co. 2.
(*g*) Br. Avow. 42. Br. Fees & Extortion 3. Br. Diſtreſs 94. Fitz. Avow. 52. 13 Co. 2.
(*h*) Br. Diſtreſs 15. 13 Co. 2.
(*i*) 2 Inſt. 229.
(*k*) 2 Inſt. 27.
(*l*) 8 Co. 38. b. 3 Co. 3.
(*m*) 4 Co. 11. b. F. N. B. 178. I. 8 Co. 50. 2. 2 Inſt. 414.
(*n*) Br. Condition 109. Br. Entre conge 114. Br. Relation 16. Fitz. Aſſiſe 256. 13 Co. 3.
(*o*) Br. Reliefs 16, 28.
(*p*) Co. Lit. 53. b.

13 Co. 3. (*q*) 13 Co. 3. (*r*) 1 Rol. Rep. 55. Co. Lit. 59. b. 60. a. Cr. Car. 196. 13 Co. 3. Trebies Argument in Quo Warranto, 34. 1 Brownl. 186. Moor 623. Cr. Eliz. 351, 779. 2 Rol. 578. Hob. 135. 1 Rol. 523.

(a) 13 Co. 1. 1 Rol. Rep. 75.

(a) *Stallon* Plaintiff and *Brady* Servant of *Thomas Willows* Lord of the Manor of *Fenditton* in the County of *Cambridge*, *Paſchæ*, 9 *Jac. Rot.* 1845.

As to the ſecond Point, it was reſolved, That when a

(b) 1 Rol. Rep. 75. Hughs Abr. 167.

(b) Fine is impoſed againſt Law, as joint, where it ſhould be ſeveral, as in the Caſe at Bar; or if it is unreaſonable, it may be avoided by Plea, and Judgment of the Court in which the Suit depends, for other Remedy is not given to him.

(c) Hughs Abr. 167. 1 Jones 133. 1 Rol. Rep. 33, 35, 75, 76. Raym. 204. Latch. 95, 120. 1 Vent. 105. 3 Bulſtr. 323. Hughs Abr. 1910.

As to the third Point, it (c) was reſolved, That the Avowant could not diſtrain for this Certainty of Leet, becauſe it was againſt Common Right, and for the private Advantage of the Lord of the Leet, which the Lord could not have without Preſcription; and therefore as he ought to preſcribe in the Principal, ſo he ought to preſcribe in the Diſtreſs. In 6 *E.* 3. 10. *a.* the Caſe was, That *William* brought a Replevin againſt *John*, of taking of his Cattle wrongfully, the Defendant avowed, that the ſaid *John* was chief Deciner of the Hundred (which is intended of the Leet) of *F.* And ſaid, That the Lord of the Hundred had every Year two Marks, to receive the Moiety at the Hundred held next after the Feaſt of *Eaſter*, and the other Moiety at the Hundred held next after the Feaſt of St. *Michael*, and that the Lords had always been ſeiſed of the ſaid Preſtation, to receive it by the Hands of the chief Deciners; and further ſaid, that they levied the ſaid two Marks of all the Reſiants within the Precinct of the Hundred, according as they had Lands and Goods; and he and all the chief Deciners had ſo levied it Time out of Mind, and to one Mark, that the Plaintiff, *&c.* was aſſeſſed according to his Lands and Goods which he had, in eight Pence; and for the eight Pence behind, he avowed: In which it was obſerved, That the ſaid two Marks being againſt common Right, he preſcribed to levy it, and there Sir *William Herle* ſaid, That in many Places of *England*, thoſe which are in Dozein, ſhall make the Preſtation, and the Freeholders not. In 11 *H.* 4. *fol.* 89. *a. b. & Reſid'* 13 *H.* 4. 9. *a. b.* in a Replevin, the Defendant as Bailiff of the Abbot of *Cerne*, becauſe the Abbot is ſeiſed of the Hundred of *Totecombe* in the County of *Dorſet*, and has there an Hundred (Court) from three Weeks to three Weeks, and has three Leets every Year; one to be held 15 *Mich.* the ſecond the Morrow of *Hillary*, and the third at *Hockday*; to which Leets come three Deciners with their Dozein, and preſent Things preſentable, whereof one is called the firſt Dozein, the ſecond, the ſecond Dozein, and the third, the third Dozein; who with their Deciners yield *de certo Letæ*, a certain Rent at the Leet-Days; and becauſe the Dozeiners came not the Morrow after *Hil-*

1 Rol. Rep. 76. 2 Inſt. 71. Fitz. Avowry 57. Br. Diſtreſs 18. Br. que Eſtate 9.

lary,

lary, *Anno* 10 *Regis nunc*, the ſame Dozein was amerced 6 *d.* and alſo that the Rent *de certo Letæ* was not paid at the Leet held after *Eaſter*, the Deciner was amerced with all the Dozein, and ſo for the two Cauſes he avowed: There *Terwit* took Exception to the Avowry, that the Lord ſhould not amerce the Dozein for Non-payment of the Rent: To which Sir *William Therninge*, Chief Juſtice, who gave the Rule, anſwered, That it ſhould be amerced in that Caſe where the Sum is payable at the Day of the Leet: 2. The Court there held clearly, that where a Man of a Dozein is amerced in the Hundred, or Leet, that his Cattle ſhall be taken, *i.* diſtrained well enough in what Place ſoever they are found within the Hundred, altho' it is in another Dozein. *Vide* 15 *Eliz.* (*a*) *Dyer* 322. *a.* For an Amercement in a Court-Baron, the Lord ſhall not diſtrain without Preſcription. *Vide* (*b*) 44 *E.* 3. 13. *a.* But (*c*) for a Fine, and all Amercements in a Leet, a Diſtreſs is incident of Common Right. *Vide Greſley*'s Caſe aforeſaid, *fo.* 41. *a. b.*

(*a*) 1 Rol. 366, 367, 666. Kel. 66 pl. 8. 3 Leon. 38. 1 Leon. 190. Cr. Eliz. 748. Dyer 322. pl. 23. Dr. & Stud. 74. a. Hughs Abr. 167, 1910. Hob. 206.

As to the fourth Point, admitting that he may diſtrain for the Certainty of the Leet, and that the Impoſition of the Fine is void; and he has avowed the taking of the ſame Beaſts for both Cauſes, and (*d*) it appears of his own ſhewing, that he has no Cauſe for one, if he ſhould have a Retorn, or not, was the Queſtion. And it was objected, That in ſuch Caſe he ſhould not, becauſe the Avowant is an Actor, and the Avowry is in Lieu of an Action: And (*e*) if a Writ is brought for two Things, and it appears by the Plaintiff's own ſhewing, that he has no Cauſe for one, the whole Writ ſhall abate; for they ſaid, That the Writ which is the Foundation of the Action, ought to comprehend Truth; and if it is apparent, that there wants Truth in the Writ, the Writ ſhall abate; and therefore ſome took a Difference, when one brings an Action for two Things, and it appears in the Writ that he miſtakes the Truth of the Matter of one of them, there the whole Writ ſhall abate; as if a Man brings an Action of Debt, or avows for Rent at two Days, and one Day is not come, it was ſaid, the whole Writ or Avowry ſhall abate: But when the Demandant miſtakes the Law for one of them; as if Waſte is aſſign'd in Oaks and Blackthorn, there is a Miſpriſion of the Law. Others took a Difference betwixt General Writs, as Dower, *Unde nihil habet*, Aſſiſe, Waſte, *&c.* and therefore if the Demandant in Dower, makes her Demand to be endowed of Land and of (*f*) Common *ſans* Number; or if he brings an Aſſiſe of Land and of an Annuity; or if he aſſigns Waſte in Timber and Blackthorn, in ſuch Caſes, foraſmuch as the Writs are general,

(*b*) Fitz. Avowry 73. Br. Avowry 25.
(*c*) Cro. Jac. 382. 1 Rol. Rep. 201, 665. Cr. Eliz. 414. Moor 356. Dr. & Stud. 74. a.
(*d*) 1 Rol. Rep. 77. Hob. 133.
(*e*) Antea 5. b. 1 Rol. Rep. 34. 77. 36 H. 6. 28. a. Hob. 164, 178, 199. Yelv. 71, 148. Palm. 524. Cr. Jac. 70, 104. Cr. Car. 575. Cr. El. 325. 1 Brownl. 68. 1 Sand. 285.

(*f*) Cr. Car. 300. 1 Jones 315. 1 Rol. 675. Co. Lit. 30, 32. a. Perk. Sect. 581.

general, it ſhall ſtand for ſo much as may be maintained by Law, for the Writ remains true, but in ſuch Caſe the Count, Plaint, or Aſſignment ſhall abate for the reſt; but it is otherwiſe when the Writ comprehends Certainty, and it appears that the Writ doth not lie for part, there the whole Writ ſhall abate. Know Reader, That the Law doth not warrant theſe Differences in the whole, but the common and true Rule and Difference is; where a Man brings an Action, be the Writ general, or certain and particular; and he demands (*a*) two Things, and it appears of his own ſhewing, that he cannot have an Action, or better Writ for one of them; there the Writ ſhall not abate for the whole, but ſhall ſtand for that which is good: But when a Man brings an Action for two Things, and it appears, that he cannot have this Writ for one Thing, but may have another in another Form, there the Writ ſhall abate for all, and ſhall not ſtand for that which is good. And therefore, if Executors bring a ſpecial Writ upon the Statute of (*b*) 4 *E.* 3. *c.* 7. for breaking the Teſtator's Cloſe, and carrying away a certain Sum of Money *in vita Teſtatoris*; and altho' it is certain, and appears of their own ſhewing, yet foraſmuch as for the Breaking of the Cloſe, they cannot have an Action, the Defendant was ruled to anſwer to the Money in (*c*) 11 *H.* 4. 3. *b.* (*d*) 38 *H.* 6. (8.) 24. 25. In Detinue of a Box ſealed, with Charters and Muniments concerning the Plaintiffs Inheritance, the Plaintiff declar'd of four Charters come to the Defendant's Hands by Trover, and entituled himſelf well to three, and it appeared by his Declaration that the fourth concern'd Land, whereof the Plaintiff and his Wife were jointly ſeiſed, as appeared by his own ſhewing, but becauſe that went to the Action as to the Huſband (for he alone, in ſuch Caſe, cannot have other Action;) for this Cauſe it was adjudged, That the Writ ſhould ſtand good for the Remnant, (*e*) 9 *H.* 6. 54. *a.* (*f*) 16 *H.* 7. (5.) 15. *a.* If a Man brings a Formedon of Land, and of an Advowſon, altho' the Writ is certain, and it appears of his own ſhewing, that a Formedon does not lie for the Advowſon, yet foraſmuch as it goes to the Action of the Writ, as to that the Writ ſhall ſtand good for the Land. 9 *H.* 7. 4. *b.* and 16 *H.* 7. 5. *a.* 37 *H.* 6. 25. *b.* So if a Man makes Avowry of the taking of Diſtreſs for divers Rents arrear, and it appears upon his own ſhewing, that Parcel is not yet due, yet the Avowry is good for the Remnant, and ſhall not abate in the whole. *Vide* 44 *E.* 3. 13. *a.* 48 *E.* 3. 4. *b.* and 5. *a.* 22 *Eliz. Dyer* 369. 370. A Man brought a Writ of *Ejectione cuſtodiæ terræ & hæredis*, and the Parties pleaded to Iſſue, and it was found for the Plaintiff, and the Plaintiff had Judgment of the Land only, for it lies not of the Heir.

Vide

(*a*) 1 Sand. 285. Moor 281. Cr. Jac. 104. pl. 40. 1 Roll. Rep. 11. Hob. 178, 279. Stiles 175. a. Kel. 31. b. Plow. 424. b.

(*b*) Raſt. Ent. 640. Savil. 118. Latch. 167. Poph. 189. Cr. El. 377, 384, 387. Own. 156. Moor 267.

(*c*) Fitz. Brief 229. Br. Brief 118. Br. Executors 120. Br. Joinder in Action 26.

(*d*) 38 H. 6. 24. b. 25. a. Fitz. Detinue 21. Br. Charters de Ter. 47. Br. faits 51. Hard. 166. Br. Reſerv. 18.

(*e*) Fitz. Detinue 6. Hob. 279. Br. Brief 18. Br. Charter de Ter. 6. 9 H. 6. 46. a.

(*f*) 16 H. 7. 15. a. Hob. 280. 1 Rol. Rep. 77. Hob. 133. Dyer 369, 370. pl. 56. 2 Bulſt. 28. 5 Co. 108. a. 1 Rol. 784. 10 Co. 130. b. 132. a. 11 Co. 56. a. F. N. B. 139. Cr. Jac. 104. 2 E. 2. Grant. 4. Hard. 166.

Vide 8 *E.* 2. *Brief.* 847. 41 *E.* 3. *Brief* 543. 26 *E.* 3. 64. 9 *H.* 6. 10. 46. 11 *H.* 6. 5. 22 *H.* 6. 14. 26 *H.* 6. *Attaint* 4. 6 *E.* 4. 7. 8 *E.* 4. 3. 18 *E.* 4. 27. 21 *E.* 4. 24. But if a Man brings a Writ of Entry in the Nature of an Aſſiſe of two Acres, where of his own ſhewing for one Acre he ought to have a Writ of Entry in the *Per*, or in the like Caſes; there the whole Writ ſhall abate, becauſe he may have a better Writ as to one Acre; and that doth not extend to the Action, but to the Writ only, 16 *H.* 7. 5. *acc'*. *Vide* 20 *H.* 7. *p. ultimo*. And Judgment was given for the Plaintiff againſt the Avowant.

Richard

RICHARD LIFORD's *Caſe.*

Mich. 12 Jac. 1.

See Skinner 532, 629. 1 Roll. Rep. 95. Hard. 49. 3 Keble 412. Hughs Abr. 1026, 1569.

IN Treſpaſs by *Thomas Stamp*, Gentleman, Plaintiff, againſt *John Clinton* Defendant, which began *Trin.* 12 *Jac. Regis. Rot.* 343. and declared (*inter alia*) for breaking his Cloſes, called *Wittenham*'s in *Peaſmere*, in the County of *Berks*; the Defendant pleaded, *quod quidam* Johan' Liford *defunct' pater* Richardi Liford, was ſeiſed of a Capital Meſſuage, called *Peaſmere* Farm, and of divers Lands and Tenements thereunto belonging, in *Peaſmere* aforeſaid, whereof the ſaid Cloſes called *Wittenham*'s were Parcel, *&c.* in his Demeſn as of Fee, *& ultimo* Julii, *anno* 4 *Reg. nunc*, by his Deed indented demiſed to the ſaid *Thomas Stamp*, and one *Mary Parker* the Tenements aforeſaid, in which (*Excepto uno cotagio vocat'* the Forge, *ac ommibus arboribus, quercubus, ulmis, & fraxinis adtunc creſcen', ultra creſcentiam* 21 *annorum* (*arboribus decas' non exiſten' maeremium tantummodo reſervat', &c.*) *habend' & tenend' tenementa præd' cum pertin' unde, &c.* (*except' præ-excepti'*) *præfat'* Thomæ Stamp & Mariæ Parker *pro durante vita naturali ipſius* Thomæ & Mariæ *& eorum diutius viven', virtute cujus dimiſſionis iidem* Thomæ & Mariæ *poſtea, & ante præd' tempus quo, &c. in Tenementa præd' cum pertin' in quibus, &c. intraver' & fuer' & adhuc exiſtunt inde Seiſiti in Dominico ſuo ut de libero tenemento pro Termino vitarum ſuarum.* And the ſaid *John Liford* being ſeiſed of the Reverſion, 8 *Jan. anno Reg' nunc Sexto*, by his Deed indented for him and his Heirs, covenanted with *J. Winchecomb* and *Vincent Smith*, as well in Conſideration of a Marriage to be ſolemniſed *inter præd'* Rich' *filium & hæred' apparent' præd'* Johan' Liford & Johan' Shepreve

Cr. Car. 437.

as

as in Conſideration of paternal Love and Affection to the ſaid *Richard*, and his other Sons; that he and his Heirs *Extunc in poſterum ſtarent & eſſent ſeiſiti de Tenem. præd' cum pertin' ſuperius dimiſſis*, to the Uſe of the ſaid *Rich.* and the Heirs Males of his Body; and aftewards to the Uſe of *Thomas* his Son, and the Heirs Males of his Body; and with the like Remainders to *Daniel* and *Nath.* his Sons, leaving the Reverſion of the Fee-ſimple in himſelf: By Force whereof, and of the Statute of *Uſes*, the ſaid *Rich.* was ſeiſed of the Reverſion of the Tenement in Tail, and the ſaid *J. Clinton* by his Command enter'd into the ſaid Cloſes call'd *Wittenhams*, to ſhew to one *Henry Lawrence* and *William Lawrence* certain Oaks then *creſcen' in Clauſ. præd'*, which at the Time of the Demiſe were above the Age of 21 Years *& quæ ad præd' R. Liford de jure pertinebant*, and there then ſold to them ſix Oaks, *&c. prout ei bene licuit, quæ eſt eadem fractio, &c.* and demanded Judgment *ſi Actio, &c.* Upon which Plea the Plaintiff demurr'd in Law: And this Caſe was divided into two general Queſtions, the 1ſt, What Thing was excepted by the Exception of the Trees? 2d, What Thing paſt by the ſaid Conveyance of the Reverſion?

And that the Trees ſhould not paſs to *R. Liford*, four Objections were made: 1ſt, That by the Exception, the Trees remain as Chattels in the Leſſor: The 2d, admitting, that by the Exception the Trees remain in him as an Inheritance; then by the Exception the Soil itſelf is excepted to the Leſſor: The 3d, That a Freehold or Inheritance in Poſſeſſion cannot be by the Rules of the Law, Parcel of the Reverſion expectant upon the Freehold: The 4th, That by the ſaid Covenant, *J. Liford* covenanted to ſtand ſeiſed *de Tenem' præd' cum pertin' ſuperius dimiſſis*, and therefore *R. Liford* could not have more than were demiſed, and the Trees were not demiſed. As to the firſt they conceived, That by the Exception the Trees were Chattels in the Leſſor, divided in Law from the Freehold and Inheritance of the Land; for when a Man demiſes Land for Life, the Property of the Trees is in the Leſſee, and the Leſſor has but a Poſſibility to have them again, *ſc.* If they remain annex'd to his Inheritance when the Leſſee for Life dies, and therefore it is reſolved by the whole Court in the Abbot of *Tores* Caſe, in 21 *H.* 6. 40. *b.* That if a Man makes a Leaſe for Life of his Land, he cannot give the Trees to a Stranger, becauſe he has but a Poſſibility, and by Conſequence when he excepts them to himſelf, they remain in him as Chattels: And it is held in 12 *E.* 4. 8. *a.* That if a Man makes a Leaſe for Years, and the Leſſee fells the Trees, the Leſſor cannot take them. *Vide* 13 *H.* 7. 9. *b.* (12.) 21 *E.* 4. 52 *l.* and if the Leſſor fells the Trees, the Leſſee ſhall have them as it is held in 44 *E.* 3. 44. *b.* Which Books and many others prove, That the Property of the Trees is in the Leſſee for Years, *a fortiori* in the Leſſee for

Br. done & remainder 13. 4 Co. 62. b. Palm. 328. Cr. Car. 274. 2 H. 7. 14. b. 1 Rol. Rep. 97. Moor 9.

Br. Treſp. 430.

11 Co. 82. a.

for Life; and therefore when the Leſſor excepts them, he ſhall have them as Chattels ſevered from the Land. And they rely'd much upon the Book in 2 *El. Dyer* (*a*) 184. in *Daunſey's* Caſe, where Queſtion is made, when Trees are excepted in Caſe of Leſſee for Years, whether they ſhould be Chattels in the Leſſor; of which they would never have made a Doubt, in Caſe of Leſſee for Life; for the Law makes a great (*b*) Difference between an Exception in Caſe of a Leaſe for Years, and in the Caſe of a Leaſe for Life; and therefore if a Man makes a Leaſe for Life of a Manor, excepting one Acre, this Acre, during the Leaſe, is not Parcel of the Manor; for in ſuch Caſe, in a real Action brought of the Manor, Exception ought to be made; otherwiſe it is in Caſe of a Leaſe for Years, as appears (*c*) 38 *H.* 6. 38. *a. Plo. Com.* 103. *b.* in *Fulmerſton's* Caſe (*d*). So if the King makes a Leaſe for Life of a Manor, without ſpeaking of the Advowſon, the Advowſon remains in the King as in Groſs, *quod omnes conceſſerunt*, as appears in (*e*) 38 *H.* 6. 34. *b.* And there it is adjudg'd, That by Grant of the Reverſion, *habendum* the Reverſion with the Advowſon, the Advowſon ſhall not paſs to the Patentee; for the Advowſon in ſuch Caſe was ſevered and become in groſs as to the Fee, which it was ſaid has great Affinity with the Caſe at Bar. 2. Admitting that the Trees are reſerved as an Inheritance in the Leſſor; then the Land itſelf, upon which the Trees grow, is thereby excepted, as it is reſolved in *Ives's* Caſe, *in the fifth Part of my Reports, fol.* 11. *b. Vide* 44 *E.* 3. 22. 46 *E.* 3. 22. *b.* 27 *Aſſ.* 49. (*f*) 3 *H.* 6. 45. *a.* (*g*) 16 *E.* 4. 2. *a.* (*h*) 14 *H.* 8. 1. *a. b.* 33 *H.* 8. *Br. Reſervation* 39. 6 & 7 *E.* 6. (*i*) *Dy.* 79. *a.* and then it cannot paſs by the Conveyance of the Reverſion, for it was not any Part of the Demiſe, and therefore if a Man makes a Leaſe for Life of a Manor, excepting one Acre, and afterwards grants the Reverſion of the Manor to another in Fee, the Acre in Poſſeſſion ſhall not paſs, but is ſevered from the Manor for ever: As if *A.* is diſſeiſed of an Acre, Parcel of his Manor, altho' the Acre in right is Parcel of the Manor, yet if *A.* enfeoffs another of his Manor, the right of that Acre ſhall not paſs, but is ſevered from the Manor for ever, as it is held in (*k*) 38 *H.* 6. 38. *a.* So if a Man is diſſeiſed of a Common Appendant, notwithſtanding the Diſſeiſin, it in Right is appendant to the Manor; and yet if during the Time of the Diſſeiſin, a Feoffment in Fee is made of the Manor, the Common is ſevered and extinct for ever, as it is held in 4 *E.* 3. 46. *a.* and *F.N.B.* 180. *f.* So in the Caſe at Bar, by the Exception of the Trees, the Soil itſelf is excepted, wherefore it cannot paſs by the Grant of the Reverſion. 3. It was objected, That a Reverſion expectant upon a Freehold, may be Parcel or Appendant to a Freehold and Inheritance in Poſſeſſion; but a Freehold or Inheritance in Poſſeſſion, cannot be Parcel or Appendant to a Reverſion expectant upon a Freehold, as it is held in 38 *H.* 6. 38. *a.*

4. The

(*a*) 4 Co. 63. a. 1 Rol. Rep. 96. Palmer 328.

(*b*) Co. Lit. 324. b. 325. a.

(*c*) Br. Compriſe, &c. 28. 5 Co. 11. b. Cr. El. 522.

(*d*) Co. Lit. 307. a.

(*e*) Br. Patents 29. 5 Co. 11. b. Plowd. 152. b. 399. a. b.

(*f*) 1 Rol. Rep. 94, 95. Co. Lit. 4. b. Perk. ſect. 643. Br. Reſerv. 1.

(*g*) Br. General Iſſue 43. Br. Leaſes 44. 5 Co. 11. a.

(*h*) Br. Treſpaſs 167. Br. Property 17. Br. Exception 2. Br. Reſerv. 30. 3 Bulſt. 290.

(*i*) 5 Co. 11. a. 9 Dyer 39.

(*k*) 5 Co. 11. b. Cr. El. 522. Br. Compriſe, &c. 28. Plowd. 103. b.

Palmer 497.

4. The Conveyance of the Reverſion doth not touch the Trees, and the Soil under them; for the ſaid Conveyance recites the ſaid Demiſe of the Land, with the Exception of the Trees, and conveys *Tenementa præd' cum pertin' ſuperius dimiſſ.* and the Exception is not any Parcel of the Demiſe, as it is agreed in 3 *H.* 6. 45. *a.* and therefore the ſaid Conveyance doth not extend to the Trees excepted, and by Conſequence they cannot paſs with the Reverſion; and for theſe Reaſons the Plaintiff ought to recover. Perk. Sect. 643. Br. Reſervat. 1.

On the other Side it was argued by the Defendant's Council, and unanimouſly agreed by the whole Court, that the Plaintiff ſhould be barred.

And as to the firſt, it was anſwered and reſolved, that the Trees, notwithſtanding the Exception, remain Parcel, and grow out of the Inheritance of the Land, and are not Chattels, nor ſhould go to his Executors, but ſhould deſcend to his Heir, if no Conveyance had been made of the Reverſion, and that for divers Reaſons. 1. The Law doth not favour Fractions and Severances of Trees from the Freehold and Inheritance of the Land, becauſe the Trees would be thereby often waſted and deſtroyed: And therefore if a Man by Deed indented, bargains and ſells, gives and grants his Manor of *D.* and all his Trees growing thereon to another, and the Deed is not enrolled according to the Statute, foraſmuch as the Manor will not paſs, the Trees ſhall not paſs to the Bargainee, and ſo to be ſevered from the Manor, altho' they are granted by expreſs Words, and the Grant of every one ſhall be taken moſt ſtrong againſt himſelf, as it was reſolved in 9 *Eliz. Reg.* and ſo was it held in 15 *Eliz.* in *Andrew*'s Caſe in the Common Pleas, which I my ſelf heard. In 23 *Eliz. Dyer* 374. a Man *demiſeth, granteth, and to Farm letteth a Farm*, &c. *together with all Manner of Timber, Wood, Underwood and Hedge Rows, thereunto appertaining (except all great Oaks growing in one certain Cloſe about the Farm-houſe)* to have and to hold the Farm for the Term of 21 Years rendring Rent; and the Doubt was, Whether the Leſſee might fell and ſell the Timber-Trees not excepted, without being impeach'd for the Waſte, and the Lord *Dyer* conceived that he might by this Word Grant, and by the Meaning of the Exception of great Oaks, *&c.* Alſo the *Habendum* which conveys the Limitation for Years, doth not mention Timber, *&c.* But *Periam, Windham* and *Mead*, gave Judgment againſt the Defendant, That he could not fell the Timber, for it was not ſever'd from the Inheritance, nor paſſed by the Grant. The ſecond Reaſon was, That when a Man demiſes his Land for Life or Years, the Leſſee has but a particular Intereſt in the Trees, but the general Intereſt of the Trees remains in the Leſſor; For the Leſſee ſhall have the Maſt and Fruit of the Trees, and Shadow for his Cattle, *&c.* but the Intereſt of the Body of the Trees is in the Leſſor as Parcel of

Vide ante 24. Cr. Car. 243.

Dyer 374. pl. 18. 1 Rol. Rep. 100. 2 Bulſtr. 6. Mo. 831, 881. Palm. 32. Hughs Abr. 1741. Hob. 234.

Hard. 48. 1 Rol. Rep. 100.

Poſtea fol. 81. b.

Dyer 36. pl. 36. 1 Rol. Rep. 181. his Inheritance; and this appears in 29 *H.* 8. *Dyer* 36. where it is held in expreſs Words, That it cannot be denied that the Property of great Trees, *ſcil.* The Timber, is reſerved by the Law to the Leſſor, but he cannot grant it without the Termor's Licence, for the Termor has an Intereſt in it, *ſcil.* To have the Maſt and Fruit growing upon it, and the Loppings thereof for Fewel, but the very Property of the Tree is in the Leſſor as annexed to his Inheritance, and all this Word for Word appears in the ſaid Book: And in 1 *Mar. Dy.* 90. it is alſo held, That the Leſſee ſhall have the Fruit of the Trees, and the Branches for Fewel and Incloſure of Fences. And in 10 *H.* 7. 3. *a.* the Leſſee has no Intereſt in the Trees, but to lop them, or for Shadow for his Cattle; ſo that there it is ſaid, That the Leſſee has Intereſt in the Tree, and the Leſſor alſo. *Vide Herlakenden's Caſe, in the fourth Part of my Reports* 62. And upon Conſideration of theſe and many other Books, it was reſolved, That when no Exception is in the Leaſe of the Trees, the Leſſee has ſuch particular Intereſt in the Tree as is aforeſaid, and the Inheritance of the Tree is in the Leſſor: And by this Difference all our Books are well reconciled; which Difference alſo appears in the Books themſelves, for in Waſt againſt Leſſee for Life or Years in Caſe of felling of Trees, it is ſaid in the Writ to be *Ad exhæredationem* of the Leſſor, and the Leſſor after he has made a Leaſe for Life, may by Deed grant the Trees or reaſonable Eſtovers out of them to another and his Heirs, and it ſhall take Effect after the Death of the Leſſee, and ſuch Grant by the Leſſor is good in Reſpect of the Inheritance which he has in ſuch Caſe in the Trees, and the Leſſor may by Word command (licence) the Leſſee to fell the Trees, as it is held in 18 *E.* 3. 54. & 2 *H.* 7. 14. *b.* But what is ſaid in the ſaid Book of 21 *H.* 6. 46. *b.* is true, That ſuch Gift to a Stranger is void, during the Eſtate for Life, for the particular Prejudice that may accrue to him who has the Eſtate for Life: And in 50 *E.* 3. 10. *a. b* in *Frankley's* Caſe it is ſaid, That at the Common Law it was never ſeen that any Tithes ſhould be paid of great Trees, becauſe, they are Parcel of the Inheritance, and it is provided by the Statute of 45 *E.* 3. 3. that in ſuch Caſe a Prohibition lies, as before has been uſed, which proves that the Common Law was ſo, before the making of the Stat. So it was held, *Paſchæ* 42 *El. Reg. inter Sampſon & Worthington* in *C. B.* That if Timber Trees have been uſually topped and lopped, no Tithes ſhall be paid of them; for as the Law privileges the Body of the Tree, being Parcel of the Inheritance, ſo it privileges the Branches alſo: And therewith agrees *Doct. & Stud.* 175. So if a Man fells his Timber Trees, Tithes ſhall not be paid, for the Germins which are growing *ex radicibus ſeu ſtipitibus*, in Reſpect that the Root is Parcel of the Inheritance

Dyer 90. pl. 8. 10 H. 7. 2. b. 3. a.

Poſtea 81. b. Cr. Jac. 459. Cr. El. 17.

Dyer 91. a. 4 Co. 62. b. Cr. Car. 274. 10 H. 7. 2. b. 3. a. Moor 9. 2 Inſt. 642. 1 Ro. Rep. 100. Plow. 470. b. Cr. El. 1. Moor 907.

1 Rol. 640. Cr. El. 478. Plow. 470. b. Moor 762.

Poſtea 81. a. 1 Rol. 100, 640. Cr. El. 55.

Inheritance, as it was held, *Paſchæ* 29 *Eliz.* in this Court. So if a Timber Tree becomes *arida, ſicca, & non portans folia nec Fructus in æſtate, nec exiſtens Maeremium*, and the Owner fells it, no Tithes ſhall be paid thereof, for the Inheritance which was once in him; which Privilege extends to it when it becomes Dotard, as it was adjudged in *C. B. Hill.* 2 *Jac. Rot.* 229. *inter* (a) *Brook* and *Rogers*. So for the (b) Bark of Oaken Timber, no Tithes ſhall be paid, for the Reaſon aforeſaid, and therewith agrees *Doct.* and *Stud.* 175. But for (c) Acorns Tithes ſhall be paid, becauſe they grow yearly, as appears in the *Regiſt' fol.* 49. And a Man may have an Inheritance in Fee-ſimple in Lands, as long as ſuch a Tree ſhall grow (d) 27 *H.* 8. 29. *b.* becauſe a Man may have an Inheritance in the Tree itſelf. *Vide* 46 *E.* 3. 1. *b.* in *Treſpaſs*, 32 *H.* 6. 2. 20 *H.* 6. 22. *b.* 5 *H.* 4. 2. It is enacted by the Stat. of (e) *W.* 2. *cap.* 22. *Cum duo vel tres teneant boſcum, &c.* That if one (f) Tenant in Common in Fee-ſimple commits Waſte in the Trees, the other ſhall have an Action of Waſte, and the Writ ſhall ſay *ad exhæredationem*, as in 29 *Ed.* 3. *fol.* 19. if one Coparcener before Partition, makes a Feoffment to another, and one of them commits Waſte in the Trees, an Action of Waſte lies, and that was provided for the Preſervation of Trees, and *F. N. B.* 49. (g) If a Parſon of a Church and one *A.* are Tenants in Common of a Wood, and *A.* endeavours to commit Waſte, the Parſon, for the Preſervation of the Timber Trees, ſhall have (h) a Prohibition againſt him, that he ſhall not commit Waſte; and the Reaſon thereof, as the *C. J.* ſaid, was, That if the Parſon of a Church will waſte the Inheritance of his Church to his private Uſe in felling Trees, the Patron may have a Prohibition againſt him; for the Parſon is ſeiſed as in the Right of his Church, and his Glebe is the Dower of his Church, for of it he was endowed; and ſo ſpeaks many ancient Records; and ſo foraſmuch as a Prohibition lies againſt him, Reaſon requires that he ſhould have the like Remedy againſt him who holds in Common with him, and thereupon a notable Reſolution in the Parliament held at *Carliſle* (i) 35 *Ed.* 1. was cited to this Effect; for there, upon Complaint made (in theſe Words) Will our Lord the King underſtand, That Sir *Anthony*, Bp. of *Durham*, waſtes and deſtroys all the Wood appertaining to his Church in the Biſhoprick of *Durham*, by giving, and ſelling, and ill keeping, and by erecting Forges of Iron and Lead, and burning of Coals, *&c.* wherefore if our Lord the King, who is Patron of the Church, puts not Remedy thereto, the Church aforeſaid will be diſinherited and impoveriſhed, in Prejudice of our Lord the King in his Crown, and of the Chapter of *Durham*: *Ita reſponſum eſt*; *Inhibeatur per breve de Cancellar' Epiſcopo & Miniſtr' ſuis ne faciant vaſtum de content' in prit'*, by which it appears, That the Parliament referr'd

(a) Hugh's Abr. 691. Moor 908. cap. 1273. 2 Inſt. 643. 1 Rol. Rep. 100. Cr. El. 477. Cro. Jac. 100. 1 Rol. 640. Poſtea 81. a.
(b) 1 Rol. Rep. 100. 1 Rol. 640. 2 Inſt. 643. Doct. & St. d. 174. b.
(c) 1 Rol 640. 1 Rol. R. 100. 2 Inſt. 643.
(d) Plowd. 557. 1 Rol. Rep. 101.
(e) 2 Inſt. 403.
(f) Co. Lit. 200. b. 247. b. Moor 11. 21 E. 3. 29. a. b. 2 Inſt. 403.
(g) 1 Rol. Rep. 100. F. N. B. 49. J. 59. D.
(h) Hob. 36. 2 Bulſtr. 279. 2 Rol. 813. 1 Rol. Rep. 86. Godb. 259.
(i) Ryley's placit. Parliam. 335. 1 Rol. Rep. 86, 100, 167, 335. 2 Rol. 813. 2 Bulſtr. 279. 11 Co. 72. b.

Poſtea fol. 72. b.

it to the ordinary Remedy of the Common Law by Writ of Prohibition in ſuch Caſe: And *Mich.* 23 *Ed.* 1. *inter adjudicata coram Rege*, Hunt. *fol.* 83. *in Theſaur' Scaccarii ſic adjudicatur, quod Eccleſia eſt infra ætatem & in cuſtodia domini Regis, qui tenetur jura & hæreditates ejuſdem manutenere & defendere: Et Rot' Patent' Anno* 14 H. 3. M. 8. *Archiepiſcopus Dublin fecit finem de* 300 *marcis pro deafforeſtatione foreſtæ Archiepiſcopatus ſui. Vide* 2 Hen. 4. 3. *b.* If a Biſhop or Archdeacon abates, or fells all the Wood that he has, as Biſhop, he ſhall be depoſed as a (*a*) Dilapidator of his Houſe, 29 *E.* 3. 16. *a. acc' Vide* 27 *Aſſ. pl.* 10. 20 *H.* 6. 46. *a.* 10 *E.* 4. 19. And the Treatiſe entituled, *Ne rectores proſternant arbores in cœmiterio*, which is but a Declaration of the Common Law, in theſe Words, *Prohibemus ne Eccleſiarum rectores arbores in cœmiterio creſcent' preſumant proſternere indiſcrete, niſi cum Cancellus Eccleſiæ neceſſaria indiget refectione, &c.* And it is regularly true, (*b*) *Meliorem conditionem Eccleſiæ facere poteſt Prælatus, deteriorem nequaquam.*

See 1 Salk. 135, That a Biſhop may be deprived for Dilapidations.
Poſt. 98. b.
(*a*) Godbolt 259.
Poſtea 98.
1 Rol. Rep. 86. 167. b.
Br. Depoſition 1.
9 E. 4. 34. a.
11 Co. 72. b.
Skin. 236.

(*b*) Co. Lit. 2. b. 102. b.
Hawk. Max. 4.
Wing. Max. 4.

As to the 2d Objection, a Difference was taken betwixt a (*c*) Wood which may be demanded in a *Præcipe* by the Name of ſo many Acres of Wood, and Trees growing out of any Wood which can't be demanded in a *Præcipe* by any Name but by the Name of Land or Paſture, *&c.* where they grow: For if ſuch a Wood, whereof a *Præcipe* lies, is Parcel of my Manor of *G.* and I leaſe my Manor, excepting Woods, thereby the Soil itſelf is excepted, and in a *Præcipe* brought of the Manor, an Exception ought to be made of ſo many Acres of Wood; but in ſuch Caſe (*d*) if I except all my Trees which grow out of any Wood, but upon Land or Paſture, there, by the Exception of the Trees, the Soil itſelf is not excepted, but ſufficient Nutriment out of the Land is reſerved to ſuſtain the Vegetative Life of the Trees, for without that, the Trees which are excepted, can't ſubſiſt; but if the Leſſor fells them, or by the Leſſee's Licence grubs them up, in ſuch Caſe the Leſſee ſhall have the Soil; for (*e*) *ceſſante cauſa ceſſat effectus.* And this Difference may be collected out of *Ive*'s Caſe, *in the* 5*th Part of my Reports, fol.* 11. *Vide* 14 *Hen.* 8. 1. *a. b.* If I (*f*) by Deed, grant all my Trees within my Manor of *G.* to one and his Heirs, the Grantee ſhall have an Inheritance in them, without any Livery and Seiſin. *Vide* Sir (*g*) *Francis Barrington's Caſe, in the* 8*th Part of my Reports, fol.* 137. (*h*) And in a *Præcipe* brought againſt Leſſee for Life, where the Trees are excepted, you need not in ſuch Caſe, except the Trees, becauſe no *Præcipe* lies of them, but they ſhall be recovered by him who has Right Paramount by the Recovery of the Land: *Vide* for the ſaid Rule of Exception, (*i*) 4 *Ed.* 3. 48. 17 *E.* 3. 62. 10. *Hen.* 7. 17. *F. N. B.* 201, *&c.* And by this Difference, apparent in our Books, they all are well reconciled.

(*c*) 1 Leon. 49.
Cro. Jac. 487, 488.
1 Rol. Rep. 97, 99.
Co. Lit. 4. b.
Dyer 19. a.

(*d*) 44 E. 3. 34. b.
Perk. Sect. 642, 643.
1 Rol. Rep. 98.
Cro. Jac. 487, 488.
5 Co. 11. a.

(*e*) 13 Co. 38.
Co. Lit. 76. a. 78. b.
March. 9.
2 Inſt. 103.
Dav. 3.
Moor 181.
Hawks Max. 75.
Wing. Max. 29.
(*f*) 2 Anderſ. 51.
Br. Treſpaſs 167.
Br. Leaſe 44.
Br. Reſerv. 30.
Br. Except. 2.
Br. Property 17, 48.
1 Rol. Rep. 96, 100.
Cr. El. 521, 522.
14 H. 8. 2. b.
(*g*) 1 Rol. Rep. 96, 99.
(*h*) Plowd. 104. a.
5 Co. 11. b.
(*i*) 1 Rol. Rep. 96, 99.
F. N. B. 201. g.

And in the said Exception five Things were observed: 1. That notwithstanding the Exception, they remain as Parcel of the Inheritance: 2. That the Soil itself is not excepted; but sufficient Nutriment for the Growth of the Tree: 3. That the Lessee shall have the Pasture under the Tree, as in 4 *El.* 6. *Tit. Waste*, *Br.* 136. Nothing shall be recovered in Waste, but the Circuit of the Root, and not the Latitude of the Branches: 4. That the Lessee shall have all the Benefits of the Trees: And 5thly, The Young of all Birds that breed in the Trees, and the Fruits. And it was resolved, That altho' *fictione juris quoad* the Lessee, the Tree is divided from the Freehold, yet *in facto* and Truth, as to all others, it is Parcel of the Lessor's Inheritance: For it was said, That Timber Trees can't be fell'd with a Goose-quill, as if Tenant in Tail sells the Trees to another, now they are a Chattel in the Vendee, and his Executors shall have them, and in such Case *fictione juris* they are severed from the Land; but if Tenant in Tail dies before actual Severance, as to the Issue in Tail, they are Parcel of his Inheritance, and shall go with it, and the Vendee can't take them, and yet *quoad* the Tenant in Tail himself, they were severed for a Time, 18 *Ed.* 4. 6. *a.* 11 *H.* 4. 32. *Plow. Com.* 259. *a.* & 438. 27 *Hen.* 8. 5. *b.* So in the Case at Bar *quoad*, the Lessee *fictione juris* they are divided for a Time; but *quoad* the Lessor, and all others, they remain Parcel of the Inheritance. It was also resolved, That there is a Difference betwixt the Cases which have been put, and the Case at Bar: For it is true, if a Man makes a Lease for Life of a Manor, to which an Advowson is appendant, and excepts one Acre with the Advowson, in such Case, if he grants over the Reversion, the Acre with the Advowson shall not pass to the Grantee, but they are severed and disunited from the Manor for ever, as an Arm, or other Member, divided from the Body: But the Trees, notwithstanding the Exception, are growing out of the Land, and have their Nutriment from it, and are not *in rei veritate* divided from it. And therefore if a Man makes a Feoffment in Fee of a Manor, excepting the Trees, and afterwards the Feoffee buys the Trees, they are again made Parcel of the Inheritance, altho' they were absolutely divided for a Time; and that appears in *Herlakenden's Case*, *in the 4th Part of my Reports*, *fol.* 63. *b.* But in the same Case, if an Acre or an House had been excepted, and the Feoffee afterwards purchases the Acre or the House, none of them shall be Parcel of it again: And so the Difference appears *inter partem integralem*, *similarem*, *& dissimilar'*, *& inter partem dissimilarem solo annexam sive adhæren'* (as it is said in 9 *E.* 3. 2. *a. b. Rob. de Vanlore's* Case) *ut domus*, *& partem dissimilar' excrescent'*, *ut arbor.*

Cro. Jac. 459. 2 Rol. 455.

Cro. Jac. 459. Antea 48. b.

1 Rol. Rep. 101. Br. Contract 23, 11, 26. 18 E. 4. 21. b. Perk. Sect. 58. Br. Waste 67. Br. Trespass 2. Br. Tail 1. Br. Done 2.

5 Co. 11. b. Hutt. 88, 89.

Co. Lit. 324, 325.

Owen 49. Cro. Eliz. 522.

1 Rol. Rep. 101. Postea 51. b.

As to the 3d Objection, it is true, That an integral Part, or Thing appendant in Possession, can't be Parcel, &c. of a Re-

verſion expectant on an Eſtate for Life, as has been ſaid; but the Trees (as has been often ſaid) are growing out of the Inheritance, and attendant upon it, as by a Grant of the Reverſion, the Charters and Evidences ſhall paſs as Things attendant upon the Inheritance, and in Truth they are the (a) Sinews of the Inheritance. So if I have a Manor in which there is a Park and Fiſh-Ponds, and I leaſe the Manor, except the Game of Deer, and the Fiſh, and afterwards I grant over the Reverſion, the Grantee ſhall have the Deer and the Fiſh, as Things attendant upon the Inheritance, ſo not only thoſe which have vegetative Life, but alſo thoſe which have ſenſitive Life, ſhall go with the Inheritance. And it is reſolved in (b) 14 *H.* 8. 25. *b. in Wiſtowe's Caſe of Grays-Inn*, That if a Man has an Horſe-mill, and the Miller takes the Milſtone out of the Mill, to the Intent to pick it to grind the better, altho' it is actually ſevered from the Mill, yet it remains Parcel of the Mill, as if it had been always lying upon the other Stone, and by Conſequence by the Leaſe or Conveyance of the Mill it ſhall paſs with it: So of Doors, Windows, Rings, *&c.* the ſame Law of Keys, altho' they are diſtinct Things, yet they ſhall paſs with the Houſe; *a fortiori* in the Caſe at the Bar, the Trees which are growing out of the Inheritance, ſhall paſs with it. And in the Caſe at the Bar, it would be a great Inconvenience if the Trees ſhould not paſs with the Inheritance, for in all the Leaſes for Life or Years, made by the King, either of Land within the Survey of the *Exchequer*, or of the *Dutchy*, the Trees are excepted, and if they ſhould be reputed as Chattels, or if they ſhould not paſs with the Reverſion as Parcel of the Inheritance, great Inconvenience would enſue, altho' the Trees are particularly granted. *Vide Swain's Caſe, in the 8th Part of my Reports, fol. 63. quod nota bene.*

As to the 4th and laſt Objection, it was reſolved, 1. That if the Reverſion had been conveyed over by the Name of Tenements, or of his Reverſion generally, without Queſtion the Trees would paſs; and altho' he covenanted to ſtand ſeiſed *de Tenemen' præd' cum pertin' ſuperius dimiſſ's, &c.* yet thereby the Inheritance of the whole Land paſſed, and by Conſequence the Trees being Parcel of the Inheritance, ſhall paſs with it, and the Trees ſhall not paſs as Things demiſed, but as Things annexed to the Inheritance, notwithſtanding that they are not demiſed. And in the Argument of this Point theſe Caſes were cited, *Paſchæ* 41 *Eliz.* in this Court, *inter* (c) the Lady *Ruſſel*, Plaintiff, and *Gulwell*, Defendant, in an Action of Debt on a Bond, where the Caſe was, That the Plaintiff by Deed indented, leaſed to the Defendant a Farm called *D.* except one Cloſe by Name, and the Leſſee by the ſame Indenture covenanted with the Leſſor to do divers Things concerning the Premiſſes, and was bound in the ſaid Bond to perform all the Covenants and Agreements in the ſaid Indenture; and

(z) 5 Co. 74. b. 9 Co. 17. b. 1 Co. 1. b.

(b) Br. Diſtreſs 23. Co. Lit. 47. a.

2 Rol. 50.

8 Co. 65. a.

1 Rol. Rep. 96.

2 Rol. 59.

(c) Cr. El. 657, 658. 1 Rol. 431. 1 Rol. Rep. 102. Moor 553. Hob. 276.

and if theſe Words, *the Premiſſes*, ſhould extend to the Cloſe excepted, was the Queſtion, (*a*) (and *Mountague* in *Dive* and *Manningham*'s Caſe, held that *the Premiſſes* ſhould extend to the Thing excepted.) But it was (*b*) reſolved, That in the principal Caſe *premiſſa* ſhould not extend to the Thing excepted, but are as much in Effect as *prædimiſſa*. And (*c*) *Paſch.* 10 *Eliz.* one by Deed indented demiſed certain Land between *Pond-Meadow* of the one Part, and *Todes-Yard* of the other Part, and the Leſſee covenanted to repair the Hedges about the Premiſſes, and (*d*) it was adjudged, that it ſhould not extend to the Abuttals, but *præmiſſa* ſhould be taken in Law as *prædimiſſa*; ſo in the Caſe at Bar, *Tenementa prædi', & Tenementa prædict' ſuperius dimiſſa*, and *præmiſſa*, and (*e*) *prædimiſſa*, or *præconceſſa*, are all one in Judgment of Law. But *Paſchæ 36 Eliz. in this Court, inter the* (*f*) Earl of *Pembroke* and *Simons* (Servant of Sir *Henry Barkley*) the Caſe was, That the Father of the Plaintiff had granted to Sir *H. Barkley* the keeping of *Staffordale-Walk*, and of *Brewcomb-Walk*, in the Foreſt of *Fromeſelwood*, for the Term of his Life: The Pl. by his Deed did confirm the Eſtate of the ſaid Sir *H.* in *Brewcombe-Walk*, and granted *Staffordale-Walk* to him and the Heirs-Males of his Body, with a Proviſo, That if he fell'd any Trees in the Premiſſes, that then his Eſtate ſhould ceaſe: And afterwards Sir *H.* fell'd Trees in *Brewcombe-Walk*; and it was reſolved that theſe Words, *the Premiſſes*, ſhould extend to it, for the Deed had Operation in it by Way of Confirmation, and therefore there *præmiſſa* ſhould be taken as well for (*g*) *præconfirmata* as *præconceſſa*, but ſhould not extend to any other Part of the Foreſt, altho' it was not named before, of which the Deed has no Operation. And the *C. J.* ſaid, That as to cutting down of Trees, Graſs, Corn, and other Things annexed to the Soil, there are great Variances of Opinions in our Books, not only againſt whom the Action of Treſpaſs *Vi & Armis* ſhall be brought for Recovery of Damages, but alſo concerning the Property of them. And therefore (*h*) if one diſſeiſes me, and during the Diſſeiſin he cuts down the Trees, or Graſs, or the Corn growing upon the Land, and afterwards I re-enter, I ſhall have an Action of Treſpaſs againſt him *Vi & Armis*, for the Trees, Graſs, Corn, *&c.* for after my Regreſs, the Law, as to the Diſſeiſor and his Servants, ſuppoſes the Freehold always continued in me; but if my (*i*) Diſſeiſor makes a Feoffment in Fee, Gift in Tail, Leaſe for Life or Years, *&c.* and afterwards I re-enter, I ſhall not have Treſpaſs *Vi & Armis* againſt thoſe who came in by Title; for this Fiction of the Law, that the Freehold continued always in me, ſhall not have Relation to make him, who comes in by Title, a wrong Doer *Vi & Armis*, for *in fictione juris ſemper æquitas exiſtit*: But in ſuch Caſe I ſhall recover all the mean Profits againſt my Diſſeiſor, in the ſame Manner as the Diſſeiſee in ſuch Caſes ſhould recover in an Aſſiſe at the Com-

(*a*) Plowd. 67. a.
(*b*) Cr. El. 657.
(*c*) Hob. 276.
(*d*) Hob. 276.
(*e*) Cr. Car. 222.
(*f*) Cr. El. 781, 782. Hob. 276. 1 Rol. Rep. 102. 1 Rol. 422.
(*g*) Cr. Car. 222. Lit. Rep. 145. 1 Anderſ. 236.
(*h*) Hob. 98. Kelw. 1. b. 2 Inſt. 282, &c. 1 Rol. Rep. 100, 101. 2 Rol. 554. Owen 111, 112.
(*i*) 2 Rol. 554. contra. Cr. El. 540. contra. Moor 461. cont. 18 E. 4. 4. a. 1 Anderſ. 352. Godb. 388. 1 Rol. Rep. 101. Co. Lit. 150. a. Palm. 354. Hob. 98.

mon Law before the Statute of *Glouceſter*, *cap.* 1. Damages only againſt the Diſſeiſor. Alſo it is to be preſumed, That the Feoffee has given Conſideration or Recompence to the Diſſeiſor, and that the Leſſee has paid Rent to him, or other Conſideration, and therefore in Reaſon the Diſſeiſor is to be charged with the Whole. (*a*) The ſame Law, if my Diſſeiſor is diſſeiſed, and afterwards I re-enter, I ſhall not have an Action of Treſpaſs againſt the 2d Diſſeiſor, becauſe the ſaid Fiction of Law, as to Action, extends only to my Diſſeiſor; and if I ſhould puniſh the 2d Diſſeiſor, he would be twice charged; and therefore I ſhall recover all the mean Profits againſt my Diſſeiſor, his Servants, and others who have committed the Treſpaſs by his Command, and in his Right; and ſo has the Law been often taken upon Conſideration of all the Books in 9 *E.* 3. 2. *a. b. Peter de Vanlore*'s Caſe, 10 *H.* 6. 14. 19 *H.* 6. 27. 22 *H.* 6. 21. 32 *H.* 6. 32. 33 *H.* 6. 46. 34 *Hen.* 6. 30. 37 *Hen.* 6. 35. 38 *Hen.* 6. 28. 2 *E.* 4. 18. 9 *E.* 4. 39. 11 *E.* 4. 4. 20 *E.* 4. 18. 21 *E.* 4, 5. & 74. 22 *E.* 4. 21. 6 *H.* 7. 9. 10 *H.* 7. 27. 12 *H.* 7. 25. 13 *H.* 7. 15. *b.* And all this is true *quoad actionem, ſed quoad proprietatem* the Regreſs of the Diſſeiſee reveſts the Property in him, as well for the Corn, as for the Graſs and Trees, *&c.* and as well againſt the Feoffee, Leſſee, *&c.* and the ſecond Diſſeiſor, as againſt the Diſſeiſor himſelf; for the Act of my Diſſeiſor may alter my Action, but his Act can't take away my Action, Property or Right. And in this alſo there is great Variety of Opinions in our Books; for ſome, as to the Diſſeiſor himſelf, have taken a Difference between Things which come by the Act and Operation of the Diſſeiſor himſelf (as if he ſows the Land, and afterwards reaps and carries the Corn away, the Diſſeiſee, after his Re-entry, can't take it, for if he had not ſowed the Land, no Corn had been there, and it is for the Advancement of Tillage that the Land ſhould not lie freſh) and Things which come by the Act of God, as Graſs, Trees, *&c.*

(*a*) 2 Rol. 554. Contra. Owen 112. Cr. El. 540. Contra. Hob. 98.

But upon Conſideration of all the Books, it has been reſolved and adjudged, That it is all one, and there is no Diverſity betwixt them; for the Rule and Reaſon of the Law, as has been ſaid, is, That after the Regreſs of the Diſſeiſee, the Law adjudges as to the Diſſeiſor himſelf, that the Freehold has continued in the Diſſeiſee, which Rule and Reaſon doth extend as well to Corn, as to Trees or Graſs, *&c.* The ſame Law, if the Feoffee, or Leſſee, or the 2d Diſſeiſor ſows the Land, or cuts down Trees or Graſs, and ſevers, and carries away, or ſells them to another, yet after the Regreſs of the Diſſeiſee, he may take as well the (*b*) Corn as the Trees and Graſs, to what Place ſoever they are carried; for the Regreſs of the Diſſeiſee has Relation as to the Property, to continue the Freehold againſt them, all in the Diſſeiſee *ab initio*, and the carrying them out of the Land cannot alter the Property, and if the Diſſeiſee takes

(*b*) Dyer 31. pl. 219. Moor 34. Noy 129. Co. Lit. 55. b. Hob. 233. 5 Co. 110. a. b. 85. a. Winch. 51. 1 Rol. 726, 727, 728. Cr. El. 61, 204. 27 H. 6. 1. a. Goldib. 143, 144, 145. 12 H. 7. 25. a. 2 Rol. Rep. 100, 301. Br. Emblements 10, 17, 18, 20. 12 E. 4. 5. a. Perkins f. 100. 5 H. 7. 16. b. Br. Charels 8, 10. 2 H. 7. 1. b. Dyer 173. pl. 15. Hughs Abr. 794. 5 H. 6. 7. b. 3 E. 4. 31. a. b.

takes them, they ſhall be (*a*) recouped in Damages againſt the Diſſeiſor, and ſo has it been often reſolved and put in Experience upon Conſideration of the Books in 27 *H.* 6. 1. *a.* 37 *H.* 6. 7. *b.* 12. *E.* 4. 5. *a.* 14 *E.* 4. 6. *b.* 15 *E.* 4. 31. *a. b.* 2 *H.* 7. 1. *b.* 3 *H.* 7. 1 & 6. 5 *H.* 7. 16. 12 *H.* 7. 25. *a.* 28 *H.* 8. *Dyer* 31 *b.* 1 *Eliz. Dyer* 173. *a.*

(*a*) 5 Co. 30. b.

(*b*) 1 Rol. Rep. 101. Dyer 31. pl. 219. Dyer 173. pl. 15.

Laſtly, It was reſolved by the whole Court in the principal Caſe, That (*c*) when the Leſſor excepted the Trees, and afterwards had an Intention to ſell them, the Law gave him, and them who would buy, Power, as incident to the Exception, to enter and ſhew the Trees to thoſe who would have them; for without Sight none would buy, and without Entry they could not ſee them. As in 9 *H.* 6. 29. *b.* (*d*) A Man ſeiſed of an Houſe in a Borough, &c. deviſeable, deviſed it to a Woman in Tail; and if the Woman died without Iſſue, that his Executor might ſell and diſpoſe of it for his Soul; in that Caſe the Executor might, by the Law, enter into the Houſe, to ſee if it was well repaired or not, to the Intent to know at what Value the Reverſion is to be ſold, *Quod fuit conceſſum per totam Curiam*, 43 *Aſſ. pl.* 7. The Law gives Power to him who ought to repair a Bridge to enter into the Land, and to him who has a Conduit in the Land of another, to enter into the Land to mend it, when Occaſion requires, as it is reſolved in (*e*) 9 *Ed.* 4. 35. *a.* So it is agreed in 2 *R.* 2. *Bar.* (*f*) 237. If I grant you my Trees in my Wood, you may come with Carts over my Land to carry the Wood, *Temp. Ed.* 1. *Grants* 41. *Lex eſt* (*g*) *cuicunque aliquis quid concedit, concedere videtur & id ſine quo res ipſa eſſe non potuit*, and this is a Maxim in Law. *Vide* 5 *E.* 3. *Tranſ.* 13. 20 *E.* 3. *Avowry* 124. 8 *E.* 4. 5. 12 *E.* 4. 10. 18 *E.* 4. 14. *b.* 20 *H.* 6. 37. 21 *H.* 7. 14. *b.* 14 *H.* 8. 2 *Plow. Com. in Manxel's* Caſe. *fol.* 13. *b. Vide in my Reports, lib.* 4. *fol* 62. & *lib.* 5. *Part* 2. *fol.* 11. And as to the Plea in Bar, it was held, That it was without Form, and without Knowledge of good Pleading, and that for four Reaſons: 1. The Defendant pleads a Leaſe for Life of the Tenements in which, to the Plaintiff, and one *Mary Parker*, by Force whereof they entred, and were, and yet are ſeiſed, &c. which is an Averment of the Life of *Mary Parker*, which upon the Matter is, that the Plaintiff has nothing in the Tenements in which, &c. but jointly with *M. Parker* who is alive, not named in the Writ, but concludes and demands Judgment *Si actio*, which is not well pleaded, for every Plea ought to have an apt Concluſion, and therewith agree 40 *Ed.* 3. 9. *b.* 43 *Ed.* 3. 27. 36 *H.* 6. 18. *a. Vide* 22 *Aſſ. pl.* 53. 14 *H.* 4. 7. 4 *H.* 6. 27. 18 *H.* 6. 32. 9 *H.* 7. 2. So if a Man pleads an Eſtopple, he ought to rely upon it, and not demand Judgment *Si actio*.

(*c*) 2 Rol. 74. Plowd. 15. b. 16. a. Hob. 234. 2 Roll. 60. 5 Co. 12. a. Cr. El. 18.

(*d*) Br. Treſp. 16. Plowd. 13. b. Manxel's Caſe.

(*e*) 1 Saund. 323. Br. Nuſans 14. Br. Incident 8. Fitz. Action ſur Caſe 18.

(*f*) Perk. Sect. 110. Hob. 234. Cro. Jac. 170, 190. 2 Rol. 60.

(*g*) 5 Co. 12. a. 47. a. 115. b. 2 Bulſtr. 252. 12 Co. 13, 130. Co. Lit. 56. a. 153. a. 2 Inſt. 306. Moor 218. Cawly 246. Hawks Max. 258. 2 Sid. 39.

Statham Avowry 2. Br. Pleading 53. Br. Brief 243. Doct. pl. 158. 4 Co. 53. a. 2 Jones 8. Br. Waiver de choſe 31.

Doct. pl. 138, 146.

2. The Plea contains double Matter, one to the Writ by Jointenancy, the other in Bar, by the Exception and the Covenant: 3. In pleading of a Leaſe for Life which paſſes by Livery and Seiſin, it is meer Surpluſage to plead an Entry of the Leſſees. 4. He don't aver, That the Trees which were ſold, were not Dotards, which are excluded out of the Exception, but he avers that they, *de jure pertinebant* to *Richard Liford*, which is not formal, for he ought in good Pleading to have averr'd, That they were not Dotards. But upon the whole Matter, ſufficient Matter appears to the Court to give Judgment againſt the Plaintiff; wherefore by the Rule of the Court, the Plaintiff took nothing by his Bill.

The

The Caſe of the Taylors, &c. of Ipſwich.

Mich. 12 Jacobi 1.

TRin. 11 *Jac. Regis* in the *King's Bench, Magiſtri Gardiani, & Communitas Sciſſorum & operatorum pannorum villæ Gipwic' in Com' Suff.* brought an Action of Debt for 13 *l.* 13 *s.* 4 *d.* again *William Sheninge*, and declared, That whereas the King by his Letters Patents had incorporated the Plaintiffs by the ſaid Name, and granted, That they ſhould have *plenam poteſtat' & authoritat' facere & conſtituere rationabiles leges, ordinationes & conſtitutiones, in Script' quæ eis viderentur bon', Salubr', util', honeſt' & neceſſar' ſecundum eorum diſcretiones pro bono regimine & gubernatione, &c. Societatis præd', &c.* and to impoſe Fines and Amercements for Breach of the ſaid Laws, *&c.* and recited the Statute of 19 *H.* 7. 7. by which it is enacted, That no Maſter, Wardens, and Society of Crafts and Myſteries, take upon them to make any Acts or Ordinances, nor to execute any Acts or Ordinances, *in exhæredationem ſeu diminutionem prærogativæ vel aliorum aliquorum, nec contra commune profic' populi, niſi iidem actus & ordinationes examinat' & approbat' forent per Cancellar', Theſaur' Angliæ, Capital' Juſtic' utriuſque Banci, vel tres eorum vel aliter coram Juſtic' Aſſiſe in eorum itineribus, &c. ſub pœna forisfact'* 40 l. *pro quolibet tempore quo ipſi in contr' facerent.* And afterwards the ſaid Corporation in the ſame four Years, made divers Conſtitutions, and (amongſt others) that no Perſon exerciſing any of the ſaid Trades within the Town of *Ipſwich præd'* ſhould keep any Shop or Chamber, or exerciſe the ſaid Faculties, or any of them,

Skin. 133, 171, 376, 380, to 384. Poſt. 88. Lucas 131. 8 Co. 121, 122, *&c.* 1 Rol. 364, 365. 1 Rol. Rep. 4. Godb. 252. 2 Roll. Rep. 97. 3 Keb. 225. Hutt. 5, 6. 1 Brownl. 48. Hob. 210, 211. Moor 869.

Hutt. 5. 1 Brownl. 48. Hob. 210, 211.

Sawers Argument in Quo. War. 44.

or

or take an Apprentice or Journeyman, 'till he had preſented himſelf to the Maſter and Wardens of the ſaid Society, for the Time being, or ſome three of them, and ſhould prove that he had ſerved 7 Years at the leaſt, as an Apprentice, and before he ſhould be admitted by them to be a ſufficient Workman; and if any ſhould offend in any Part thereof, That he ſhould forfeit and pay to the ſaid Maſters, Wardens, and Society aforeſaid, for every ſuch Offence, five Marks, and to levy it by Way of Diſtreſs, or by Action of Debt, *&c.* which (amongſt others) was allowed by the Juſtices of Aſſiſe of the ſame County, according to the ſaid Act of 19 *H.* 7. And that the ſaid *William Sheninge*, Taylor, uſing the Trade of a Taylor, after the ſaid Orders made and ratified as aforeſaid, *ſcil.* 10 *Octob. anno Regni Regis nunc* 10, came to the ſaid Town of *Ipſwich*, and there then uſed the Trade of a Taylor by the Space of 20 Days, before he had preſented himſelf to the ſaid Maſter and Wardens, or any three of them, or had made Proof that he had ſerved as an Apprentice for 7 Years in the ſaid Trade, and before he was admitted by the ſaid Maſter and Wardens, or three of them, to be a ſufficient Workman, *Per quod actio accrevit eiſd' Magiſtr' Gardian' & Com'* to have of the ſaid *H.* the ſaid 3 *l.* 13 *s.* 4 *d.* *&c.*

(*a*) 1 Rol. Rep. 4. Godb. 253.

(*a*) The Def. pleaded that he was an Apprentice by the Space of 7 Years, *viz.* *a* 1 *die Septemb' Anno Reg. nunc* 1 *uſque* 2 *diem Septemb' an.* 8. to one *H. Backet* in the Art of a Taylor, *&c.* and that 9 *Septemb' an.* 10 *Jac. Reg.* *Anthony Penny*, Eſq; Inhabitant in *Ipſwich*, retained him to be his (*b*) domeſtick Servant to ſerve him for a Year, and that he within the ſame Time, by the Command of the ſaid *A.* made divers Cloaths and Garments for him, his Wife and Children, as he well might, which is the ſame Uſe and Exerciſe of the Trade of a Taylor, whereof the Pls. have declared: Upon which the Pls. demurr'd in Law. And in this Caſe, upon Argument at the Bar and Bench, divers Points were reſolved. 1. That (*c*) at the Common Law, no Man could be prohibited from working in any lawful Trade, for the Law abhors Idleneſs, the Mother of all Evil, *Otium omnium vitiorum mater*, and eſpecially in young Men, who ought in their Youth, (which is their Seed Time) to learn lawful Sciences and Trades, which are profitable to the Common Wealth, and whereof they might reap the Fruit in their old Age, for idle in Youth, poor in Age; and therefore the Common Law abhors all Monopolies, which prohibit any from working in any lawful Trade; and that appears in (*d*) 2 *H.* 5. 5. *b.* a Dyer was bound that he ſhould not uſe the Dyer's Craft for two Years, and there *Hull* held, that the Bond was againſt the Common Law, and by G---d if the Plaintiff was here, he ſhould go to Priſon till he paid a Fine to the King; So, and for the ſame Reaſon, If an Husbandman is bound that he ſhall not ſow his Land, the Bond is againſt the Common Law. And *vide* 7 *Ed.* 3. 65. *b.* and if he who takes upon him to work is unſkilful, his Ignorance is

(*b*) Palm. 544. Kelw. 50. b. Cart. 115.

(*c*) Owen 143. Poſtea 86. a. Hob. 211. 1 Sand. 312. Raymond 292. Cr. El. 872. Palm. 396, 397. Cart. 118. 2 Rol. Rep. 392. 2 Keb. 125. 1 Sid. 303.

(*d*) Br. Oblig. 85. Godb. 253. March 193. Mo. 115, 242. 576. Owen 143. Cr. Jac. 596. Co. Lit. 206. b. 1 Jones 13. Cro. El. 872. O. Ben. 46. 2 Rol. Rep. 114, 201, 204. 1 Show. 2. Comb. 121. 2 Show. 345, &c. Rep. Q. A. 93, 94.

is a ſufficient Puniſhment to him; for (*a*) *imperitia eſt maxima mechanicorum pœna, & quilibet quærit in qualibet arte peritos*: And if any one takes upon him to work, and * ſpoils it, an Action on the Caſe lies againſt him. And the Statute of 5 *Eliz.* 4. which prohibits every Perſon from uſing or exerciſing any Craft, Myſtery, or Occupation, unleſs he has been an Apprentice by the Space of ſeven Years, was not enacted only to the Intent that Workmen ſhould be ſkilful, but alſo that Youth ſhould not be nouriſhed in Idleneſs, but brought up and educated in lawful Sciences and Trades: And thereby it appears, that (*b*) without an Act of Parliament, none can be in any Manner reſtrain'd from working in any lawful Trade. Alſo the Common Law doth not prohibit any Perſon from uſing ſeveral Arts or Myſteries at his Pleaſure, *Nemo prohibetur plures negotiationes ſive artes exercere*, until it was prohibited by Act of Parliament of 37 *Ed.* 3. *cap.* 6. *ſcil.* That the Artificers and People of Myſtery, hold themſelves every one to one Myſtery, and that none uſe other Myſtery than that which he has choſen; but this Reſtraint of Trade and Traffick was immediately found prejudicial to the Common-wealth, and therefore (*c*) at the next Parliament it was enacted, That all People ſhould be as free as they were at any Time before the ſaid Ordinance. 2. That the ſaid Reſtraint of the Defendant, for more than the ſaid Act of (*d*) 5 *Eliz.* has made, was againſt Law, and therefore foraſmuch as the Statute has not reſtrained him who has ſerved as an Apprentice for ſeven Years from exerciſing the Trade of a Taylor, the ſaid Ordinance can't prohibit him from exerciſing his Trade, 'till he has preſented himſelf before them, or 'till they allow him to be a Workman; for theſe are againſt the Liberty and Freedom of the Subject, and are a Means of Extortion in drawing Money from them, either by Delay, or ſome other ſubtil Device, or of Oppreſſion of young Tradeſmen, by the old and rich of the ſame Trade, not permitting them to work in their Trade freely; and all this is againſt the Common Law, and the Commonwealth: But Ordinances for the good Order and Government of Men of Trades and Myſteries are good, but not to reſtrain any one in his lawful Myſtery.

3. It was reſolved, That the ſaid Branch of the Act of 5 *Eliz.* is intended of (*e*) a publick Uſe and Exerciſe of a Trade to all who will come, and not of him who is a private Cook, Taylor, Brewer, Baker, *&c.* in the Houſe of any for the Uſe of a Family; and therefore if the ſaid Ordinance had been good and conſonant to Law, ſuch a private Exerciſe and Uſe had not been within it, for every one may work in ſuch a private Manner, altho' he has never been an Apprentice in the Trade.

(*a*) Hawks Max. 332.

* 1 Vent. 268, 269.

(*b*) 8 Co. 125. a. Bridgman 140. Poſtea 87. b. Cart. 115.

(*c*) 4 Inſt. 31.

(*d*) Moor 869. Godb. 253. Hard. 56. Carter 119. Palm. 396. Hob. 183, 211. 2 Rol. Rep. 391. 1 Syd. 303. 2 Keb. 125. 2 Bulſtr. 186. 1 Rol. Rep. 10. Calthorp. 9. 3 Bulſtr. 179. Styl. 223, 383, 479. Cro. Jac. 85. 179. Cro. Eliz. 737. Cro. Car. 316, 347, 499, 516. 2 Rol. 579. 1 Jones 412. Noy. 5. Hutt. 99, 132. 5 Co. fol. 63. b. Lutw. 562, 564.

(*e*) Hob. 183, 211. Moor 886. Cro. Jac. 178. 8 Co. fol. 129. b. Cr. Car. 499. Jenk. Cent. 284. 13 Co. 11. Palm. 542, 544. Lit. Rep. 251. Bridgman 141.

4. It

Hob. 210, 211. 1 Brownl. 48. Hutton 5.

4. It was reſolved, That the Statute of 19 *H.* 7. 7. doth not corroborate any of the Ordinances made by any Corporation, which are ſo allowed and approved as the Statute ſpeaks, but leaves them to be affirmed as good, or diſaffirmed as unlawful by the Law; the ſole Benefit which the Incorporation obtains by ſuch Allowance is, that they ſhall not incur the Penalty of 40 *l.* mentioned in the Act, if they put in Uſe any Ordinances which are againſt the King's Prerogative, or the common Profit of the People, *&c.* And Judgment was given, *Quod querentes nihil caperent per billam.*

[Where a Bond given in Reſtraint of Trade may be good or not. See *Lucas R.* 27 to 30, and 130 to 140. *Q.* If a Cuſtom may be in Reſtraint of Trade? See *Rep. Q. A.* 48. 49. 1 *Salk.* 203.]

EDWARD

EDWARD SAVEL's *Caſe.* See Carth. 204.

Mich. 12 Jacobi 1.

EDward Haymond brought *Ejectione firmæ* againſt *Edward Savel* and *W. Bowes*, *Pro eo, viz. quod cum quidam Jacobus Smith, primo die Aprilis, Anno Regni Regis Jacobi Angliæ* 11. *apud Leeds in Com' Ebor' dimiſit præfat' Edw. Haymond unum Meſſuag' cum pertin' in Leeds præd' & unum Clauſ. vocat' Dovecot-Cloſe cont' 3 Acr' eidem meſſuag' Spectan' ſeu pertin' in Leeds præd'* for Term of three Years, *&c.* and declar'd of an Ejectment, *&c.* The Defendant pleaded *Non culp'*; and the Jury found, as to the Houſe, that the Defendant was not guilty; and as to the ſaid Cloſe called *Dovecot-Cloſe*, the Defendant was found guilty.

1 Roll. Rep. 55. Hugh's Abr. 771. n. 5.

1 Roll. Rep. 135. Cr. El. 458. 1 Roll. Rep. 55. Cr. Car. 555. Contra. Hard. 59, 76, 133. Bridgm. 56. Moor 422, 702. March. 96. 1 Jones 454. Cr. Jac. 124, 125, 435, 436, 574, 621. Contra. Cr. El. 235. contra. 339. Godb. 71. Owen 18. Stile 30. 1 Roll. Rep. 2. 1 Roll. 775. 2 Bulſtr. 214. Allen 74. Yelv. 114, 118, 166. Poph. 197, 203. 1 Brownl. 145. Owen 93, 133. 1 Syd. 229, 295. Cr. El. 116. 1 Leon. 188. Palmer 101. 2 Roll. Rep. 166. Doct. pl. 86. Stiles 194.

In Arreſt of Judgment it was moved, That an *Ejectione firmæ* doth not lie of a Cloſe, altho' it has a certain Name, but it ought to be of ſo many Acres; and altho' he ſaith in this Caſe, containing three Acres, yet he doth not ſhew of what Nature the Acres are, as Land, Meadow, Paſture, Wood, *&c.* and the Certainty ought be compriſed in the Declaration, becauſe he ſhall recover the Poſſeſſion by *Habere fac' poſſeſſionem*, and that ſhall purſue the Form of other Writs of the like Nature, as *Right of Ward*, or *Ejectment of Ward*, or the like, ſhall not be brought of a Cloſe by certain Name, but it ought to be by the Certainty of the Acres containing the Quality of the Land, as of Land, Meadow, Paſture, Wood, *&c.*

And

*F. N. B. f. 2. C. And altho' by * good Order, the moſt Worthy ſhall have the Precedency, and ſhall be preferred before the leſs Worthy; and a Thing entire ſhall be preferred before a Part, *&c.* yet if the ſaid Order be not preciſely followed, the Judges will not abate the Writ, or Count for it. *Vide* 6 *Ed.* 3. 4. *&* 9 *Ed.* 3. 3. And for the aforeſaid || Exception Judgment was arreſted.

|| 1 Show. 338. 4 Mod. 97. Salk. 254. Comb. 198.

[Ejectment for five Cloſes of Land, Arable, Meadow, and Paſture, not good without diſtinguiſhing how much of each. *Carthew* 204.]

BEN-

BENTHAM's *Caſe.*

Mich. 12 Jacobi 1.

MARSH brought a Writ of Annuity againſt *Bentham*, and the Parties came to Iſſue, which was tried for the Plaintiff, and found the Arrearages, *&c.* but the Jury did not aſſeſs any Damages or Coſts; which Verdict was imperfect, and could * not be ſupplied by Writ of Enquiry of Damages; but the Plaintiff releaſed his Damages and Coſts, and thereupon had Judgment: Upon which the Defendant brought a Writ of Error, and aſſigned the Error aforeſaid, *ſcil.* The Inſufficiency of the Verdict; *ſed judicium affirmatur*, becauſe the Plaintiff has releaſed his Damages and Coſts, which is for the Defendant's Benefit. *Vide* 22 *Eliz. Dyer* 369, 370. Where in a Writ of *Ejectione Cuſtodiæ terræ & hæredis*, the Jury aſſeſſed Damages entirely, which was inſufficient; for, for the Heir it doth not lie, yet he releaſed his Damages, and had Judgment for the Land. *Nota*, an inſufficient Aſſeſſment of Damages, and no Aſſeſſment, is all one.

2 Bulſtr. 279. 1 Roll. Rep. 88. Jenk. Cent. 286. 1 Roll. 760. 2 Roll. 722.

* 10 Co. 118. b. Hob. 178. 10 Co. 115. b.

1 Roll. 784.

5 Co. 108. a. 1 Roll. 784. 11 Co. 45. b. Hard. 166. 10 Co. 130. b. Sty. 399. 2 Bulſtr. 28. 10 Co. 130. a. 1 Leon. 92. pl. 118.

Dr.

Dr. FOSTER's *Caſe, concerning Recuſants.*

Mich. 12 Jacobi I.

Lucas 118. 2 Bulſtr. 324. 1 Roll. Rep. 88. 3 Inſt. 198. 23 El. cap. 1. Palm. 542. Cr. Jac. 480. Bridgm. 120. 2 Roll. Rep. 108.

William Shoyle exhibited an Information againſt *Richard Foſter*, Doctor of Phyſick, That the ſaid *Richard Foſter* of the Pariſh of St. *Anthony*, in the Ward of *Cordweyner*, *London*, 20 *Junii*, *Anno Domini Regis nunc* 11. was of the Age of 16 Years and upwards, and from the ſaid 20th Day of *June*, 'till the 10th Day of *May* then next following, *viz.* by the Space of 11 entire Months and more, did not repair to his Pariſh Church aforeſaid, nor to any other Church, Chapel, or uſual Place of Common Prayer or Divine Service, but *per totum tempus prædictum voluntarie & obſtinate abſque aliqua cauſa rationabili abſtinuit ab eiſdem, contra formam ſtatuti in hujuſmodi caſu editi & proviſi, per quod actio accrevit eidem domino Regi ac præfato Willielmo Shoyle qui tam pro Domino Rege quam pro ſeipſo ſequitur ad habendum & exigendum de præfato Richardo Foſter* 220 l. *legalis monetæ Angliæ, viz. pro quolibet menſe, &c.* 20 l. *&c. unde idem Willielmus Shoyle petit inde tertiam partem, juxta formam ſtatuti prædict'.* To which Dr. *Foſter* pleaded, That the ſaid *William Shoyle qui tam, &c. pro prædictis* 220 l. *in eadem informatione content' ſeu aliqua inde parcella proſequi non debet*; for he ſaid, That by an Act of Parliament, *Anno* 23 *Reginæ Eliz.* it was enacted, That every Perſon above the Age of 16 Years, which ſhould not repair to any Church, *&c.* but ſhould abſent himſelf againſt the Statute *de Anno* 1 *Eliz.* for the Uniformity of Common

Cawly 129. 1 Leon. 241. Co. Ent. 569. 1 Ander. 138. 2 Leon. 5.

Cawly 71, 72. 1 Roll. Rep. 88. Cr. Jac. 480. Bridgm. 120.

1 Eliz. cap. 2.

Common Prayer, *& exiſtens inde legitime convict'*, ſhould forfeit to the ſaid late Queen *pro quolibet menſe poſt finem* of the ſaid Seſſion of Parliament, *&c.* 20 *l. &c.* and further, that all the Forfeitures of any Sum of Money limited by the ſaid Act, ſhould be divided into three equal Parts, that is to ſay, One third Part to the ſaid late Queen, to her own Uſe, and another third Part to the ſaid late Queen, for the Relief of the Poor of the Pariſh, *&c.* and the other third Part to ſuch Perſon who would ſue for it in any Court of Record *per Actio' Debiti, Billam, Querelam vel Informationem, &c.* And afterwards by another Act of Parliament, *Anno* 28 of the ſaid late Queen, it was enacted, That every Offender in not repairing to Church to Divine Service, *&c.* againſt the Form of the ſaid Act *de Anno* 23. which ſhould then after happen to be once convicted, in ſuch Terms of *Paſch. & St. Michaeli Archangeli*, which ſhould be next after ſuch Conviction, ſhould pay into the Receipt of the Exchequer, according to the Rate of 20 *l.* for every Month as ſhould be contained in the Indictment upon which ſuch Conviction was, and alſo for every Month after ſuch Conviction, without any other Indictment, ſhould pay into the Receipt of the Exchequer, *&c.* and if any Default ſhould be in any Part of Payment, *&c.* that then and ſo often the ſaid late Queen might by Proceſs out of the Exchequer, take, ſeiſe and enjoy all their Goods, and two Parts of their Lands, Tenements and Hereditaments, Leaſes and Farms, *&c.* And where by the ſaid Act *de Anno* 23 *Eliz.* one third Part of the Forfeitures for not coming to Divine Service, was limited to the Poor, *&c.* by the ſaid Act *de Anno* 28 *Eliz.* it is ordained, That it ſhall be lawful for the Lord Treaſurer, Chancellor, and Chief Baron of the Exchequer, *&c.* to aſſign and diſpoſe of it, *&c.* And further, by the Act of 35 *Eliz.* that *pro magis feſtina (Anglice*, more ſpeedy) *levatione*, and recovery for and by the ſaid Queen *omnium & ſingularum pœnarum, debitorum, forisfactur'*, and Payments that then after ſhould become payable *virtute ejuſdem Actus de Anno* 35 *Eliz. vel dict' Statut' fact' in Anno* 23. *(inter alia) inactitat' fuit authoritate ejuſdem Parliamenti de Anno* 35. *quod omnia & ſingula dicta pœnæ, debit', forisfactur', & ſolutiones forent & potuiſſent eſſe recuperat' & levat' ad uſum dictæ Dominæ Reginæ per actionem debiti, billam, querelam, ſive informationem, vel aliter, in Curia de Banco Regis, Communi Banco, vel Scaccar', in tali modo & in omnibus reſpectibus prout per ordinarium curſum communium legum aliquod aliud debitum ſolubile (Anglice*, due) *per*

29 El. c. 6. Bridgm. 120. Moor 523. Cr. Jac. 480. Lane 60. 1 Rol. Rep. 7, 92, 93. 12 Co. 1, 2.

23 El. c. 1.

29 El. c. 6.

35 El. c. 1. Cr. Jac. 481. 1 Rol. Rep. 90.

aliquam talem perſonam, in aliquo alio caſu, foret vel potuiſſet eſſe recuperat' ſive levat', &c. and further by the ſame Act *de*
35 El. c. 1. *Anno* 35 *El.* it was enacted, That one third Part of the Penalties to be recovered by the ſame Act ſhould be diſpoſed of to the Poor, according to the Act of 28 *Eliz.* aforeſaid: *Et idem Richardus ulterius dicit quod per præd' Statut' de Anno* 35 *ſupradicto, apparet quod omnia & ſingula pœnæ, Debita, Forisfactur', & ſolutiones, quæ poſt præd' Actum de Anno* 35 *ſupradicto accreſcerent vel ſolubil' forent virtute ejuſdem Actus vel præd' Statuti de Anno* 23. concerning Recuſants, *forent & poſſent recuperari & levari ad uſum præd' Regiæ Majeſtatis, &c.*
1 Roll. Rep. 88. *quodq; nulla tertia pars pœnarum, debitorum, forisfactur' & ſoluiionum præd' per præd' Act' de An.* 35 *alicui perſonæ quæ pro ead' ſequi voluerit limitat' vel' proviſ. exiſtit, & hoc idem Richardus paratus eſt verificare, unde petit judicium ſi prædict' W. Shoyle,*
1 Roll. Rep. 88. *qui tam, &c. pro prædict'* 220 *l. &c. proſequi debeat:* Upon which Plea the Attorney General demurr'd in Law, and ſix Objections were made by the Defendant's Counſel againſt this Information. 1. That the Defendant is not ſuch a Perſon as
35 El. c. 1. is within the ſaid Act of 23 *Eliz.* 2. That the Informer is not ſuch a Perſon that may exhibit any ſuch Information upon the ſaid Act of 23 *Eliz.* 3. That the Judgment which ſhall be given in this Caſe, is not within the ſaid Act of 23 *Eliz.*
29 El. c. 6. 4. Admitting all theſe Points againſt the Defendant, it was further objected, that by the ſaid Act of 28 *Eliz.* the Branch which gives a Popular Action is taken away. 5. If the ſaid Act of 28 *Eliz.* doth not take it away, that the Statute of 35 *El. c.* 1. has abrogated it. 6. That if the Defendant ſhould be charged at the Suit of the Informer, he may be charged again at the King's Suit, and ſo twice charged.

To the firſt, The Perſon Delinquent is deſcribed by the Act, by an Attribute which the Defendant wants, for the
23 El. c. 1. Words of the ſaid Act of 23 *Eliz.* are, *Every Perſon above*
Poſtea f. 59. b. *the Age of Sixteen Years, which ſhall not repair to ſome Church, Chappel, or uſual Place of Common Prayer, but forbear the ſame, contrary to the Tenor of a Statute made in the firſt Year of her Majeſty's Reign, for Uniformity of Common Prayer, and being thereof lawfully convicted, ſhall forfeit to the Queen's Majeſty for every Month, &c.* 20 *l. &c.* By which it appears, That
1 Roll. Rep. 89. no Perſon ſhall incur this Forfeiture, unleſs he be before lawfully convicted, ſo that a Recuſant convicted is only within the Purview of this Act, and it doth not appear in the whole Record, that the ſaid *Richard Foſter* has been convicted, and therefore he is not a Perſon within this Act. And Penal Statutes are to be purſu'd (eſpecially in Informations)

mations) ſtrictly, and *in terminis* according to the Purview of the Act, and therefore *Paſchæ* 20 *Eliz.* a Caſe was adjudg'd in the Exchequer, That where an Information was exhibited and ſhewed the Uſurious Contract in certain, upon which it appeared, that above the Sum of 10 *l.* was reſerved and received for the Loan of 100 *l.* againſt the Form of the Statute, *&c.* and altho' it appeared that it was corrupt, and that he concluded *contra formam Statuti*, yet becauſe he did not expreſly ſay, that it was *per corruptam accommodationem* according to the Words of the Penal Statute, the Information was adjudged inſufficient: So in the Caſe at Bar, foraſmuch as the Statute ſaith, That every Perſon, *&c.* being lawfully convicted ſhall forfeit, he ought of Neceſſity to have ſhewed, that the ſaid Dr. *Foſter* was lawfully convicted: *Vide* 3 *Mar. Dyer* 131. 2 *Eliz.* 183. 20 *Eliz.* 367. *pl.* 43.

1 Anderſon 49. pl. 123. Doctrin. placit. 332, 333. Antea 37. a. 18 E. 4. 10. b. 4 Co. 39. b. Br. Indictment 36. Dyer 363. pl. 25. 183. pl. 59. Jenk. Cent. 221. Hales Pl. Cr. 231. Dy. 131, 132. pl. 75. 1 Rol. Rep. 92.

2. That none can inform upon the Statute of 23 *El.* but for the King only, for in the former Part of that Act it is provided, *That every Perſon that ſhall ſay or ſing Maſs, &c. ſhall forfeit the Sum of* 200 *Marks, and that every Perſon that ſhall willingly hear Maſs, ſhall forfeit the Sum of* 100 *Marks*; and afterwards comes in the ſame Act the Clauſe of Forfeiture of 20 *l.* by the Month to the Queen, and afterwards inflicts 10 *l.* by the Month for him who keeps a School-Maſter, and then follows the Clauſe of Diſtribution of the Forfeitures, *And that all Forfeitures of any Sums of Money limited by this Act, ſhall be divided into three equal Parts, &c.* And it was objected, That this Clauſe extends only to the ſaid Forfeitures of 200 Marks, and 100 Marks, *&c.* which Penalties were not given to any Perſon in certain, but indefinitely and generally, that they ſhall be forfeited, and therefore this Clauſe of Diſtribution refers to them; but the Forfeiture of 20 *l.* by the Month for Recuſancy was expreſly given to the Queen, and ſo was not any of the other Forfeitures, and therefore this Clauſe of Diſtribution ſhall not extend to that which was before to the Queen, but to thoſe Penalties which were left indefinitely, and given to Nobody.

1 Rol. Rep. 89. Antea 60. a. 1 Rol. Rep. 89.

3. The Words of the ſaid Act of 23 *Eliz.* are, *being thereof lawfully convicted*, and Conviction ought to be either by Verdict or Confeſſion, *&c.* and can't extend to a Judgment upon a Demurrer as in our Caſe, for there is not any Conviction, for always Conviction ought to precede Judgment; and therefore in our Books, the Difference between a Clerk convicted and a Clerk attainted is, That he who is convicted by Verdict or Confeſſion, *&c.* and takes his Clergy before Judgment, is called a Clerk convicted, and he who

1 Rol. Rep. 89. Poſtea 60. a. 1 Rol. Rep. 89.

takes his Clergy after Judgment, is a Clerk attainted, and therewith agrees *Stamford, fol.* 138. *C.* who holds, That there are two Manner of Clerks, *viz.* Clerk convicted, and Clerk attainted: A Clerk convicted, is he who prays his Clergy before Judgment given againſt him of the Felony, and has his Clergy allowed to him, *&c.* A Clerk attainted, is he who prays his Clergy after Judgment upon him for the Felony: But in the Caſe at Bar, Dr. *Foſter* is a Recuſant (if Judgment ſhall be given againſt him) attainted, and not convicted; and *Stamford, f.* 185. *B.* ſaith, So it is clear in my Judgment that he can't be called Clerk convicted till upon Iſſue join'd a Verdict has paſs'd againſt him; and thereupon it was ſaid, if the Defendant will not anſwer to the Indictment, ſo that he is condemned by *Nihil dicit*, that it is out of this Statute which ſpeaks only of Conviction, and therefore upon the Statute of 1 *E.* 6. *c.* 12. which takes away Clergy in divers Caſes, the Words of which are, *No Perſon or Perſons that ſhall be hereafter in due Form of Law, Attaint, or Convict*, that theſe Words do not extend to him who will not anſwer, *Vide Stamford, fol.* 126. *a.* So that the Caſe at Bar is *caſus omiſſus* out of the ſaid Act, for here, upon the Demurrer upon the Defendant's Plea, no Conviction can be before Judgment, but, if the Law ſhould ſerve for the Informer, Judgment would be given without any Conviction whereof the Statute ſpeaks, and ſuch Penal Act ſhall not be taken by Intendment or Equity.

1 Rol. Rep. 90. Poſtea 60. b. 29 El. c. 6.

4. But admitting it ſhall be a Conviction within the Statute, then by the ſaid Act of 28 *Eliz.* the whole Penalty of 20 *l.* by the Month is given to the Queen, for the Words are, *That every ſuch Offender, in not repairing to Divine Service, &c. as hereafter ſhall fortune to be once convicted, ſhall, in ſuch of the Terms of Eaſter or Michaelmas as ſhall next happen after ſuch Conviction, pay into the Receipt of the Exchequer, after the Rate of* 20 l. *for every Month which ſhall be contained in the Indictment, whereupon ſuch Conviction ſhall be; and ſhall for every Month after ſuch Conviction, without any other Indictment or Conviction, pay into the Receipt of the Exchequer, &c. after the Rate of* 20 l. *the Month, &c. and if Default be made, &c. the Queen's Majeſty ſhall and may, by Proceſs out of the Exchequer, ſeize all the Goods, and two Parts of the Land, &c.* by which it appears, That the whole Penalty for Recuſancy is given to the Queen, and by Conſequence the Informer is excluded.

Poſtea 60. a. 35 El. c. 1.

5. The Stat. of 35 *El.* is ſtronger, for that by expreſs Terms gives

gives the whole Penalty given by the ſaid Act of 23, for Recuſancy to the Queen, the Letter of which Act is, *And for the more ſpeedy levying and recovering for and by the Queen's Majeſty, of all and ſingular the Pains, Duties, Forfeitures and Payments, which at any Time hereafter ſhall accrue, grow, or be payable by Virtue of this Act, or of the Statute of the 23d Year, &c. Be it enacted, That all and every the ſaid Pains, Duties, Forfeitures and Payments, ſhall and may be recovered and levied to her Majeſty's Uſe, by Action of Debt, Bill, Plaint, Information or otherwiſe, in any of the Courts commonly called the King's Bench, Common Pleas, or Exchequer, in ſuch Sort, and in all Reſpects, as by the ordinary Courſe of the Common Laws of this Realm, any other Debt due by any ſuch Perſon in any other Caſe ſhould or may be recovered or levied:* In which, theſe Words in the Preamble are to be obſerved. 1. *For the more ſpeedy recovering and levying for and by the Queen's Majeſty*; here is the Perſon expreſſed who ſhall recover. 2. *Of all and ſingular the Pains*, which Words contain what Things the Queen ſhall recover, *viz. All and ſingular the Pains, &c. & generale dictum generaliter eſt intelligendum.* 3. The Body of the Act, *Be it enacted, that all and every the ſaid Pains, &c. ſhall and may be recovered and levied to her Majeſty's Uſe*; and if all the Pains, and every of them ſhall be recovered to the Queen's Uſe, then it follows, That the Informer ſhall recover nothing; and many Caſes were put, where a latter Act ſhall take away a former, and the Ground was taken, that (*a*) *leges poſteriores priores contrarias abrogant*; but more particularly and more to the Purpoſe, two Reaſons were alledged, why the latter Statutes of (*b*) 28 & 35 *Eliz.* took away and abrogated the Diſtribution of the Act of (*c*) 23 *Eliz.* &c. the firſt, That when an Act of Parliament gives Power or Intereſt to one Perſon certain, by that (*d*) expreſs Deſignation of one, all others are excluded, altho' ſuch Statute be in the Affirmative; and ſo it is held in *Plow. Com.* in *Stradling*'s Caſe (*e*) 106. *b.* that where the Statute of (*f*) 31 *E.* 3. 12. enacts, That Error in the Exchequer ſhall be corrected and amended before the Chancellor and Treaſurer, and therefore it can't be corrected before any other; and there a general Rule is put, That when a Thing is to be done before one Perſon certain by any Stat. it can't be done bef. any other; and yet the Stat. of 31 *E.* 3. is in the Affirmative: So in the Caſe at Bar, the certain Deſignation of the Queen, is an abſolute Excluſion of all others, *Quia (g) incluſio unius eſt excluſio alterius:* And a Caſe was cited out of Juſtice *Dalliſon*'s *Reports, in An.* 3 *El.* that foraſmuch as the Stat. of (*h*) 8 *H.* 6. *c.* 9. of

(*a*) 1 Jones 186. 1 Co. 25. b. 11 Co. 62. b. 64. b. Cr. Jac. 121. 8 Co. 137. b. Stamf. Præ. 69. b. 12 Co. 8. 2 Rol. Rep. 410, 423. Hawk. Max. 452. 2 Inſt. 685. Godb. 169.
(*b*) 29 El. c. 6.
35 El. c. 1.
(*c*) 23 El. c. 1.
(*d*) Carter 36.
(*e*) Plowd. 206. b.
(*f*) 1 Co. 11. 2. Savil. 36.
(*g*) Hawk. Max. 466.
(*h*) 1 Rol. Rep. 92. Dall. 25. pl. 8. Dall. in Kel. 204. pl. 2. Dall. in Aſh. pl. 2. Poſtea 65. 2. 9 Co. 118. b.

of Forcible Entry, deſigneth Juſtices of Peace to make Reſtitution thereby (altho' the Statute was in the Affirmative) others are excluded, and therefore (*a*) neither Juſtices of Oyer and Terminer, or Gaol-delivery, *&c.* ſhall do it: *Vide* 27 *H.* 8. 13. *b.* in *Waſt*, 23 *Aſſ.* 17. in *Rediſſeiſin*, 4 *Eliz.* 211. *Commiſſion* upon (*b*) 28 *Hen.* 8. of the *Admiralty*, &c. The ſecond Reaſon was, in reſpect of the Generality of the Words, *viz. All and ſingular the Pains, &c. and all and every the Pains, &c.* which Words imply a Negative, for if the Queen ſhall recover *all and ſingular, and all and every the Pains, &c.* then no other Perſon ſhall recover any of them, *Et* (*c*) *qui omne dicit nihil excludit, & generale tantum valet in omnibus, quantum ſingulare in ſingulis*; and thereupon they cited the Caſe in (*d*) 33 *H.* 8. 50. that where the Words of 27 *H.* 8. *c.* 27. are, *That all Grants by Letters Patents, to be made for Term of Life, or Years, of any Office concerning the Lands within the Survey of the Court of Augmentation, &c. ſhall be ſealed with the Great Seal of that Court*; and it ſeems there that they imply a Negative, ſo that if the Grant be under the Great Seal of *England*, it ſhall be void; and *Amy Townſend*'s Caſe, *Plow. Com.* 113. and many other Caſes were put to ſuch Effect, which I here have purpoſely omitted.

(*a*) Hardres 116.

(*b*) Dyer 211. pl. 33. Hob. 146. Jenk. Cent. 225. Cr. El. 542, 571. Moor 462, 463, 902.

(*c*) 2 Inſt. 81.

(*d*) Dyer 50. pl. 1. Palm. 495, 542. Hob. 173. Poſtea 64. b.

Poſtea 65. a.

6. It was objected, That if the Defendant ſhould be charged at the Suit of the Informer, he may be by Force of the ſaid two Statutes, and eſpecially of the Statute of 35 *Eliz.* charged again, and ſo twice charged, and (*e*) *Nemo debet bis puniri pro uno delicto*; and the Caſe has the greater Miſchief, becauſe by the Statute of 3 *Jac. Reg. c.* 4. No Traverſe to any Indictment of Recuſancy ſhall be allowed, but to the direct Point of not coming to Church, or that the Party has conformed himſelf, ſo that he can't plead; that another Information is depending; or that he is *auter foits convict*, &c. at the Suit of the Informer.

(*e*) Cr. Jac. 481. 4 Co. 43. a. 8 Co. 118. b. Cawly 78. Noy 82. 1 Roll. Rep. 95. Bridgm. 122.

As to the firſt Objection, it was anſwered and reſolved by the whole Court, That he may be convicted in the ſame Indictment or Information preferred or exhibited againſt him; and ſo was it held by all the Judges of *England* aſſembled at *Ruſſel-houſe*, where Sir *John Puckering*, then Keeper of the Great Seal, then dwelt. *Vide* 10 *E.* 4. 11. *b.* & 7 *R.* 2. *Barr* 241. and that ſtands well with the Words of the Statute, for he ſhall forfeit nothing before Conviction, and ſo has the Law been always taken upon the Statute of 3 *H.* 6. 3. which enacts, That if a Cuſtomer, *&c.* be duly attainted or convicted, *&c.* he ſhall forfeit to the King, *&c.* and all other Statutes which have ſuch Form of Penning, and it is impoſſible that he can be convicted without Suit, and convicted in this Caſe

Antea f. 57. b. 1 Rol. Rep. 90. 203, 234. Cawley 61. 3 Bulſtr. 85.

1 Roll. Rep. 90.

1 Roll. Rep. 89.

Caſe ſhall be taken for attainted, for he ſhall forfeit nothing 'till Judgment, *Vide F. N. B.* 73. *d.* 30 *E.* 3. 1. *b.* in Attaint, and many Books, where convicted is taken for Attainted, *vide* before in the Caſe of *Alex. Powlter* of Clergy, *fol.* 32. *b.*

As to the 2d (*a*) Point, it was anſwered and reſolved, That the ſaid Branch of 23 *Eliz.* of Diſtribution, ſhould extend as well to the Clauſe of the Penalty for Recuſancy, as to the Clauſe of ſaying and hearing Maſs, *&c.* 1. Becauſe it is all one to (*b*) ſay, ſhall (*c*) forfeit generally, and ſhall forfeit to the Queen; for the Queen ſhall have them in both Caſes without ſaying more, *Et expreſſio eorum quæ tacite inſunt nihil operatur.* 2. (*d*) Divers Acts of Parliaments give the Penalty forfeited to the King, and yet afterwards make Diſtribution of the Penalty to another, *viz.* to him who will ſue, as the Statutes of 3 *H.* 6. 3. 3 *H.* 7. 7. *&c.* 3. By two Judgments in Parliament, *viz.* in the ſaid Acts of 28 *&* 35 *Eliz.* For by the ſame Acts, the Diſtribution made by the Act of 23. of the Penalty of 20 *l.* by the Month for Recuſancy, is *quodam modo* altered, which proves, That the ſaid Clauſe of Diſtribution in 23 *El.* extends to Recuſancy, *&c.*

As to the 3d, it was unanimouſly reſolved, That he, againſt whom any Judgment is given, either upon *Nihil dicit*, or an inſufficient Plea pleaded and a Demurrer upon it, is convicted within the Purview of this Act, for it is true that *non ſequitur*, that one is convicted *ergo* he is attainted or adjudged, but it is a good Conſequence that one is attainted or adjudged, *ergo* he is convicted, for he who is attainted or adjudged is convicted and more, *& ex vi termini* (that) extendeth to him who is condemned, as *Cicero* 7 *Verr'*, *Convincere adverſum teſtibus. Idem* 2 *in Catilinam*, *Conſcientia convictus reticuit.* And where by the Statute of 8 *Hen.* 6. 9. it is provided, That if the Party grieved ſhall recover by Aſſiſe, or by Action of Treſpaſs, *&c.* and it be found by Verdict, or in other Manner in due Form of Law, that the Party Def. entred with Force into Lands and Tenements, *&c.* That the Party ſhall recover his Damages treble againſt the Def. And in 6 *H.* 8. the Caſe was, That in ſuch Action brought by the Party grieved, if the Defendant's Attorney pleads *Non ſum informatus*, the Plaintiff ſhall recover his treble Damages, for this Word *(found)* has two Significations, *ſcil.* one by a Jury, and the other by the Judges; and the finding of the Judges, *ſcil.* Their Judgment upon *Non ſum informatus*, or upon *Nihil dicit*, is within the ſaid Act, and ſo was it adjudged in a Writ of Error, *Anno* 4 *&* 5 *Ph. & Ma.* and all this is reported by *Bendloes*, Serjeant at Law. So I myſelf heard the Lord *Dyer*, *Mich.* 14 *&* 15

(*a*) Antea 51 a. 1 Rol. Rep. 89.

(*b*) 2 Vent. 188, 267. Co. Lit. 159. a. Moor 238. 2 Ander. 128. Cawly 61. 1 Anderſ. 139, 140.

(*c*) 4 Co. 74. b. 8 Co. 56. b. 145. a. 10 Co. 39. a. 2 Rol. Rep. 393. Co. Lit. 191, a. 205. a. 2 Inſt. 365. 2 Sand. 351. Latch. 25. 2 Bulſt. 131. 1 Mod. Rep. 190. Hardres 92. 1 Rol. Rep. 310. Palmer 433, 437. 5 Co. 11. a. Lit. Rep. 111.

(*d*) Cawly 71. 1 Anderſ. 139, 140. Antea f. 58. a. 2 Rol. Rep. 89, 90. Cawly 61.

Antea 30. a. Benlow in Kelw. 207. 1 Anderſ. 25. 2 Anderſ. 150. Benlow in Aſh. 1. 1 Rol. Rep. 90. Dyer 214. pl. 45. N. Benl. 11. pl. 6.

Q. if ſo in criminal Caſes?

& 15 *Eliz.* ſay, in the Court of *Common Pleas*, That ſo Judgment was given in ſuch Caſe for the treble Damages upon the Defendant's Default, *Quia fatetur facinus qui judicium fugit*; and the ſame Law he ſaid, If the Defendant pleads an inſufficient Bar, which upon Demurrer is adjudged againſt him.

5 Co. 109. b.

As to the 4th Point it was reſolved, That the Act of 28 *El.* has not taken away the Liberty which the Informer had by the Statute of 23 *Eliz.* for divers Reaſons. 1. The Title is, *For the ſpeedy Execution of certain Branches of the Statute made in the 23d Year, &c.* So that the Makers of the Act of 28 do not intend any Abrogation, but the more ſpeedy Execution of divers Branches of the Act of 23. 2. The Act of 28 gives more ſpeedy Execution only at the Queen's Suit, *ſc.* Upon Indictment, For the Queen for the whole Penalty had not Remedy by the Statute of 23 *Eliz.* but only by Indictment; for the Statute makes it inquirable, *&c.* before divers Juſtices named in the Statute, and ſuch Inquiry is always by Indictment. Alſo in the ſame Act there is a Proviſo, *That every Perſon guilty of any Offence againſt this Statute, which ſhall, before he be thereof indicted, or at his Arraignment or Trial before Judgment, ſubmit and conform himſelf before the Biſhop of the Dioceſe*, &c. *or before the Juſtices, where he ſhall be indicted, arraigned, or tried*, &c. *ſhall be diſcharged*, &c. By which it appears, That in this new Caſe of Forfeiture, the Parliament gave the Queen none other Remedy to recover the whole Penalty, but by Way of Indictm. And the Statute of 28 *El.* extends only to the Queen's Suit by the Way of Indictm. as appears by the Words of the ſame Act, *viz. after the Rate of* 20 l. *for every Month contained in the Indictment*, and by divers other Branches in the Act, and namely, that Proclamation ſhall be made upon the Indictment, *&c.* to appear, *&c.* ſo that this Act gives the Queen none other Remedy than ſhe had before by Way of Indictment, but for the more ſpeedy Proceeding upon the firſt Fundamental Remedy: But does not give the Informer a more ſpeedy Proceeding, but leaves him to his former Proceeding. 3. This Act of 28 *Eliz.* gives not the Penalty to any new Perſon, to whom it was not given before, for the Act of 23. gave the Forfeiture to the Queen, *&c.* 4. The Words of this Act are, *Every Offender that ſhall hereafter fortune to be once convicted, ſhall*, &c. *pay* 20 l. *for every Month contained in the Indictment*, ſo that the Senſe is, *Every Offender that ſhall fortune to be once convicted upon any Indictment*, &c. *ſhall pay* 20 l. *for every Month contained in ſuch Indictment:* And thereby it appears, that it extends only

1 Rol. Rep. 90, 91, 93. Hob. 205. 29 El. c. 6. Antea f. 58. a.

Hob. 205.

1 Jones 193. 1 Rol. Rep. 93, 94.

Hob. 205. Cawly 61.

Cawly 166. Owen 37. 1 Leo. 97. 1 Rol. Rep. 93.

only to the Caſe of Indictment for the Queen, and not to the Action Popular, or Information. 5. Upon the ſame Words, the Defendant ſhall not take the Benefit of this Clauſe to bar the Informer, unleſs he avers that he was convicted at the Queen's Suit, for the Words are, *That ſhall hereafter fortune to be convicted*, ſo that if his Fortune is not to be convicted at the Queen's Suit, he is not within this Act, but is left to the Informer. 6. The Statute is in the Affirmative, and regularly Statutes in the Affirmative do not take away precedent Acts Affirmative, unleſs it is in certain ſpecial Caſes, as ſhall be after ſaid: But the Statute of 28 *Eliz.* (as was well obſerved) has altered the Statute of 23 *Eliz.* in one material Point; *viz.* as to Juriſdiction in theſe Words, *That every Conviction hereafter for any Offence before mentioned, ſhall be in the Court commonly called the King's Bench, or at the Aſſiſes, or general Goal Delivery, and not elſewhere, &c.* Which Clauſe without Queſtion, being general, extends not only to the Queen's Suit, but alſo to the Suit of the Informer: And the ſaid Act of 35. extends not only to the Queen's Suit, but gives her other Remedy than by Indictment, *ſc.* by Action of Debt, Bill, Plaint, Information, and in other Courts, as in the *Common Pleas* and *Exchequer*, and ſo as to the Queen's Suit in other Courts the Statute of 28. is altered, but it doth not touch the Popular Suit of the Informer, nor alter the Statute of 28. concerning the Reſtriction to Courts, as to the Informer, neither does the Act of 3 *Jac. c.* 4. which gives Juriſdiction to the other Juſtices, as Juſtices of Peace alter it as to the Informer, for that Act extends only to the King's Suit by Way of Indictment, *ſc.* by Enquiry only, and doth not mention the Suit of the Informer, but leaves it as it was before: So that this Act of 28 *Eliz.* confines the Informer only to the Court of *King's Bench*, or of Juſtices of Aſſiſe or General Gaol-Delivery, and with Negative Words, *ſc.* and not elſewhere.

29 El. cap. 6.

Hob. 204, 205. Cawly 100, 101, 122. 3 Keb. 535

Cawly 100, 122.

As to the 5th Objection, The Act of 35. doth not abrogate the Stat. of 23. as to the Popular Actions, for four Reaſons. 1. Before that Act (as hath been ſaid before) Remedy was given to the Queen by Way of Indictment, and to the Informer, by Bill, Plaint, or Information; now that Act intended to give more ſpeedy Remedy to the Queen only, and not to the Informer, and ſo are the Words of the Preamble, *For the more ſpeedy recovering for and by the Queen's Majeſty, of all and ſingular, the Pains, &c.* So that the Purpoſe of that Act was not to ouſt the Stat. of 23. but to ouſt Delay, and to give

Antea fol. 58. b.

give to the Queen a more ſpeedy Recovery than ſhe had before. 2. The Words of the Body of the Act are, *That every of the ſaid Pains, &c. ſhall and may be recovered to her Majeſty's Uſe, &c.* This Act has made three Alterations. 1. In the Manner of her Remedy, *viz.* where her Remedy was by Indictment before, now the Queen may have an Action of *Debt, Bill, Plaint, Information, or otherwiſe.* The 2d Alteration is concerning Courts, the Queen is not now confined to the *King's Bench*, or to Juſtices of Aſſiſe, or general Gaol-delivery, but may now ſue in the *Common Pleas*, or in the *Exchequer*, at her Pleaſure. The 3d Alteration was, concerning the charging of one Perſon at the Queen's Suit, who was not charged before, for at the ſaid Aſſembly of Juſtices at *Ruſſel Houſe*, *Hill.* 35 *Eliz.* three Points were reſolved by all the Judges. 1. (*a*) That a Feme-Covert was within the Act of 1 *Eliz. cap.* 2. and ſhou'd forfeit 12 *d.* for not repairing to Church every Sunday and Holiday.

(*a*) 3 Bulſtr. 87. Hob. 97. 1 Rol. Rep. 93, 233, 234. Cawly 26. Sav. 25. Dalt. Juſt. 183.

2. (*b*) That the Act of 23. altho' it is more penal, and inflicts Impriſonment for this Non-feaſance on him who is not able to pay, yet that a Feme-Covert was within this Statute of 23. 1. Becauſe this Act refers to the ſaid Act of 1 *Eliz.* and without Queſtion ſhe was within the Act of 23. 2. (*c*) Femes-Covert were a great Part of the Realm and very dangerous, becauſe they have the Education of their Children, and the governing of their Servants. 3. That foraſmuch as the Remedy of the Queen, was by Indictment, and the Feme-Covert was only indicted, and the Huſband was not Party to it, he was not ſubject to the Wife's Forfeiture of 20 *l.* by the Month, for the Huſband ſhall never be charged for the Act or Default of his Wife, but when he is made a Party to the Action, and Judgment is given againſt him and his Wife, as for the Debt of the Wife, or for Scandal publiſh'd by the Wife, or for Treſpaſs done by her, *&c.* there the Action of Debt, upon the Caſe, Treſpaſs, *&c.* ſhall be brought againſt the Huſband and Wife, and the Huſband ſhall plead, *&c.* and ſhall be Party to the Judgment: But if a Feme-Covert be indicted of Treſpaſs, Riot, or any other Wrong, there the Wife ſhall anſwer, and ſhall be Party to the Judgment only, and therefore the Fine ſet upon the Wife in ſuch Caſes, ſhall not be levied upon the Huſband, and therefore the Informer was as to a Feme-Covert in a better Caſe than the Queen; for inaſmuch as Remedy was given to him for the ſaid Forfeiture, by Action of Debt, Bill, Plaint, or Information, the Informer for the ſaid Forfeiture of the Feme-Covert, might have an Action of Debt, Bill, Plaint, or Information againſt the Huſband and Wife for

(*b*) Cawly 86. Hob. 97.

(*c*) Bridg. 122, 123.

Savil 25. 1 Rol. Rep. 93.

Cawly 123.

Note.

for the Recovery thereof, and ſo make the Huſband Party; but ſo could not the Queen only by Way of Indictment, and therefore the Preamble of the Act was true, *That for the more ſpeedy levying and recovering for and by the Queen's Majeſty, of all and ſingular the Pains, Forfeitures,* &c. *by Virtue of the Stat. of the* 23*d Year,* &c. The Act gave Remedy to the Queen by Action of Debt, Bill, Plaint, or Information, ſo that where the Queen for the ſaid Forfeitures of Femes Coverts ought, before this Act, to have ſtayed till the Death of the Huſband, to levy or recover it againſt the Wife, and if the Wife had died before her Huſband, in many Caſes the Forfeiture was in Danger of being loſt, now this Act in adding Remedy for the Queen by Action of Debt, Bill, *&c.* has given the Queen preſent Remedy to recover it againſt the Huſband and Wife, and to this Purpoſe were the ſubſequent Words added, *viz. In ſuch Sort, and in all Reſpects, as by the ordinary Courſe of the Common Laws any other Debt, due by any ſuch Perſon in any other Cauſe, ſhall or may be recovered,* but for the Debt, or Duty due by a Feme-Covert in an Action, *&c.* brought againſt the Huſband and Wife, the Huſband ſhall be charged for it: And thereupon many Informations upon this Stat. for the Queen, were exhibited againſt Huſbands and Wives, for the Wives Forfeitures upon the Statute of 23 *Eliz.* in the *King's Bench,* &c. and that was the chief Intention of this Branch of 35 *Eliz.* to make the Huſbands of Feme-Coverts Recuſants, to be charged at the Suit of the Queen for the ſaid Forfeitures of their Wives: So that now the Huſbands and Wives may be charged in that Caſe, as well at the Queen's Suit by Action of Debt, Bill, Plaint, *&c.* as at the Informer's Suit. But if the King takes his Remedy by Action of Debt, Bill, Plaint, or Information, then no Proclamation can be made thereupon, for that is only upon Indictment, and only upon Indictment before the Juſtices of Aſſiſe, or General Gaol-Delivery by the Act of 28 *Eliz.* and now before Juſtices of Peace upon Indictment alſo by the Statute of 3 *Jac. Reg. cap.* 4. But the King in Caſe where he proceeds by Action of Debt, Bill, Plaint, or Information, ſhall have Execution according to the Common Law, as he ſhould have upon the ſaid Statute of 23 *Eliz.* The Words of the ſaid Act of 35 *Eliz.* are not penned *ſimpliciter, ſc. That all and ſingular the Pains ſhall be recovered to her Majeſty's Uſe,* For, as hath been ſaid, that was not the Intent of the Makers, but *ſecundum quid & ſub modo, ſc. In ſuch Sort, and in all Reſpects, as by the ordinary Courſe of the Common Laws, any other*

Cawly 123. Cro. Jac. 481.

Cro. Jac. 481. Cawly 123.

Cawly 123.

Cawly 122.

Cawly 120.

Debt due by such Person, should or might be recovered or levied, by which it appears, that this Act alters the Remedy only at the Queen's Suit, that where before she proceeded upon the Indictment according to the Statute, (in which Case the Husband of the Wife Recusant was not charged) now she proceeds by Action, *&c.* as any other Debt may be recovered at the Common Law; in which Case, for the Debt of the Wife at the Common Law the Husband was charged. And in other Statutes which have the like Reference, no Alteration is made of the Law before, but only as to the Point to which the Reference is made, as it is held in 14 *H.* 7. 17, 18. in *Everard Digby*'s Case, where it is enacted by the Statute of 1 *H.* 7. *cap.* 1. *That the Demandant may maintain a Formedon in the Descender or Remainder against the Pernor of the Profits, and the same Pernors to vouch,* &c. *as if they were Tenants indeed:* The Case was, That *Everard Digby* brought a *Scire facias* against the Pernor of the Profits, and it is there held, That the Pernor should not vouch in a *Scire facias*, for it shall be intended in such Action in which he may vouch, and the said Words do not alter the Law of Voucher in any other Point than in that to which the Reference is made, *viz.* that notwithstanding he is not Tenant of the Land, but Pernor of the Profits, that yet he shall vouch; but gives him no new Voucher to other Respects, and therefore he shall not vouch in an Action brought against him, in which no Voucher lay before: So in the Case at Bar, the Act of 35 *Eliz.* shall be intended to extend to that only to which it is referred, and shall not alter or abrogate any Law before. So the Statute of *Westm.* 2. *cap.* 4. which gives the *quod ei deforceat,* &c. to him who has lost by Default, and gives also to the Demandant to vouch in it, but not *simpliciter*, but *secundum quid, viz. Ac si esset tenens in priori brevi si warrantum habuit*, extends only to the Point to which it is referred, *viz.* Notwithstanding he is Demandant, but it doth not alter or abrogate the Law in other Cases; and therefore if the Tenant pleads another Bar, and doth not maintain the first Recovery, he shall not vouch at all; also he shall not vouch other than him in the Reversion; also he shall not vouch in any Action, in which no Voucher lies, *Vide* 9 *E.* 3. 22. 33 *E.* 3. *Counterplea de Voucher* 101. 33 *H.* 6. 16. 14 *H.* 7. 18. 4. This Act of 35 *Eliz.* is all in the Affirmative, and therefore shall not repeal or abrogate a Precedent Affirmative Law before; and the said Rule that *Leges posteriores priores contrias abrogant*, was well agreed, but as to this Purpose, *Contrarium est multiplex.* 1. In Quality, *sc.* If one is an

Cro. Jac. 481. Hob. 113. Br. Pernor de Profits 10. Br. Parliament 21.

Cro. Jac. 481.

Plowd. 113. a. 206. b. Hob. 299. Br. Parliament 21. Br. Pernor de Profits 10. 2 Inst. 349, 350, 351, 352.

Hob. 299. 2 Inst. 352. Cro. Jac. 121, 481. Hob. 173. Moor 412. 1 Co. 25. b. Antea 59. a. Postea 64. b. 8 Co. 137. b. Stamf. Prærog. 69. b. 12 Co. 8. 2 Rol. Rep. 410, 423. Hawk. Max. 452. 1 Jones 186. 2 Inst. 685. Godb. 169.

an expreſs and material Negative, and the laſt is an expreſs and material Affirmative; or if the firſt is Affirmative and the latter Negative. 2. In Matter, altho' both are Affirmative, as by the Statute of (*a*) 33 *H.* 8. *cap.* 23. it is enacted, That if any Perſon being examined before the King's Council, or three of them, ſhall confeſs any Treaſon, Miſpriſion, or Murder, or be by them vehemently ſuſpected, he ſhall be tried in any County where the King pleaſes, by his Commiſſion, *&c.* and afterwards another Law was made, 1 *&* 2 (*b*) *P. & M. cap.* 10. in theſe Words, *That all Trials hereafter to be had for any Treaſon, ſhall be had according to the Courſe of the Common Law, and not otherwiſe:* This latter Act (altho' the latter Words had not been) hath abrogated the former, becauſe they were contrary in Matter: But it doth not abrogate the Statue of 35 *H.* 8. *cap.* 2. of Trial of Treaſons beyond the Seas, notwithſtanding the Negative Words, becauſe it was not contrary in Matter, for that was not triable by the Common Law, *Vide* 3 (*c*) *Mar. Dyer* 132. *acc'. Vide Stamford, fol.* (*d*) 89, 90. So the Statute of (*e*) 1 *E.* 6. of *Chaunteries*, being in the Affirmative, abrogated the Statute of *W.* 2. *cap.* 41. which gave the *Ceſſavit de Cantaria* alſo in the Affirmative, for the one is contrary to the other in Matter. 3. Contrariety in Reſpect of the Form preſcrib'd, as in *Amy Townſend*'s Caſe in *Plow. Com.* and many other Contrarieties there are, which are not neceſſary to be recited: Only it muſt be known, That foraſmuch as Acts of Parliaments are eſtabliſhed with ſuch Gravity, Wiſdom and univerſal Conſent of the whole Realm, for the Advancement of the Commonwealth, they ought not by any conſtrained Conſtruction out of the general and ambiguous Words of a ſubſequent Act, to be abrogated; *Sed hujuſmodi ſtatuta tanta ſolennitate & prudentia edita* (as *Forteſcue* ſpeaks, *cap.* 18. *fol.* 21.) ought to be maintained and ſupported with a benign and favourable Conſtruction; for *Forteſcue* there ſaith, *Quod Angliæ Statuta non Principis voluntate, ſed totius Regni aſſenſu conduntur, quo populi læſuram illa efficere nequeunt, vel non eorum commodum procurare, prudentia enim & ſapientia ipſa eſſe referta putandum eſt, dum non unius, aut centum ſolum conſultorum virorum prudentia, ſed pluſquam trecentorum electorum hominum, quali numero olim Senatus Romanorum regebatur, edita ſunt.* And therewith agrees the Caſe in 4 *E.* 4. 3. *b.* 4. *a. &* 12. *a. b.* and the Caſe of *Cheſter Mills in the Tenth Part of my Reports, fol.* 137. *b.* 138. *a.* 6 *E.* 6. *Dyer* 72. *pl.* 3. And where the Statute of 16 *R.* 2. *cap.* 5. enacts, That all

(*a*) 3 Inſt. 27. Sav. 57. 1 Anderſ. 195. 1 Rol. Rep. 91, 92. Stamf. Cor. 89. a

(*b*) 3 Inſt. 25, 27. 1 Anderſ. 107, 195. 1 Rol. Rep. 91.

(*c*) 3 Inſt. 11. 1 Rol. Rep. 91, 92. Dver 131, 132. Pl. 75.

(*d*) Stamf. Cr. 89. b. 90. a. b.

(*e*) 1 Rol. Rep. 91. 2 Inſt. 457, 458, &c.

2 Rol. Rep. 410.

Bar. 304, 309. Br. Surmiſe 29. Br. Parliam. 52. 8 Co. 72. b Co. Lit. 326. a. 1 Rol. Rep. 91.

all the Lands and Tenements of one attainted in a Premunire ſhall be forfeited to the King, the Caſe in *Paſch.* 21 *El.* was, That one (*a*) *Trudgin* being Tenant in Tail of certain Lands and Tenements was attainted in a Premunire: And the Queſtion before all the Judges of *England* was, If the Eſtate Tail was barred or not, and it was reſolved by all the Judges, That thoſe general Words had not repealed the Statute of *Donis Conditionalibus*, but that he ſhould forfeit only for his Life, and the Iſſue in Tail ſhould inherit. And for the ſame Reaſon it was reſolved in this Caſe. 1. Firſt, that this Statute of 23 *Eliz.* which has inflicted the Penalty of 20 *l.* by the Month, has not taken away the Statute of 1 *El.* which has given the Forfeiture of 12 *d.* for every *Sunday* and Holiday, but that both ſhall be paid; for the one may well ſtand with the other: For the Forfeiture of 12 *d.* is forfeited as ſoon as the *Sunday* or Holiday is paſt, but the 20 *l.* is not forfeited till the End of the Month; ſo that the 12 *d.* is forfeited by Way of Prevention: Alſo the Forfeiture of the 12 *d.* is given only to the Poor, and the 20 *l.* to the Queen, *&c.* And the Neglect of Divine Service on the Sabbath and Holidays deſerves greater Puniſhment. And that the Statute of 23 *Eliz.* has not taken away the Statute of 1. as to the ſaid Forfeiture of 12 *d.* appears by the Statute 3 *Jac. Regis, cap.* 4. for by the ſame Act a more ſpeedy Remedy is given for the ſaid Forfeiture for the Sabbath. 2. The ſaid Branch of the Act of 28 *Eliz. viz.* That every Conviction *hereafter ſhall be in the Court commonly called the* King's Bench, *or before the Juſtices of Aſſiſe*, &c. *and not elſewhere*, doth not abrogate the whole Power of Juſtices of the Peace, and of other Juſtices to whom Authority was given by 23. for yet any of them may take an Indictment, and that by benign Interpretation to abrogate as little as may be, Foraſmuch as the ſaid Act of 28 *Eliz.* reſtrains only the Conviction, ſo that the Power to take the Indictment remains: And ſo it was held by all the Judges and Barons of the *Exchequer* in *Edw. Plowden*'s Caſe: Alſo in the ſame Caſe it was held by them, That whereas the ſaid *Edw.* was indicted before Juſtices of Peace, and proclaimed before the Juſtices of Aſſiſe, it was (as to the Proclamation) againſt the expreſs Letter of the Act: But ſuch Indictment ought to have been removed into the Court of *King's Bench*, and upon that Proceſs to be made, *&c.* 3. That the Statute of 7 *Jac. cap.* 6. provides, That if a Feme-Covert be convicted, that ſhe ſhall be committed to Priſon until, *&c.* that this Affirmative

(*a*) 1 Rol. Rep. 92. Godb. 308. Co. Lit. 130. a. 391. a. 3 Inſt. 126. 2 Rol. Rep. 317, 420, 496, 503. Hob. 340. Cawly 46. Moor 523. 1 Jones 22.

1 Rol. Rep. 94. Dalt. Juſt. 183. Cawly 27.

29 Eliz. cap. 6. Cawley 101.

1 Rol. Rep. 94. Cawly 108.

2 Rol. Rep. 108.

1 Rol. Rep. 94.

firmative Law doth not take away the Remedy which was given to the King for the Forfeiture of a Feme-Covert by the Statute of 35 *El.* or to the Informer by the Statute of 23 *El.* becauſe all the ſaid Acts are affirmative, but ſhe ſhall be puniſhed but upon one of them. Alſo the Negative Clauſe in the Act of 3 *Jac. viz. That no Perſon ſhall be charged for his Wife's Offence, &c.* doth not extend to a Feme-Covert to be charged either upon the Stat. of 35 *Eliz.* at the Queen's Suit, or upon the Act of 23. at the Informer's Suit; for the Words are expreſly penned, *That no Perſon ſhall be charged for his Wife's Offence, by Force of this Act, viz.* of the Act of 3 *Jac.*

35 Eliz. cap. 1.
23 Eliz. cap. 1.

And where it is objected, That the expreſs Deſignation of one Perſon is the Excluſion of all other, that is true in all Acts which are introductive of a new Law, as the ſaid Acts of 31 *E.* 3. & 8 *H.* 6. but here are two Acts of Parliament, and the Act of 35. doth not give it to a new Perſon, but to the ſame Perſon that 23. has given it, *viz.* to the Queen; and it is but an Act of Addition to give a more ſpeedy Remedy than was given by the Act of 23. As in a Writ of Meſn, the Proceſs at Common Law was Diſtreſs infinite; and altho' the Statute of *W.* 2. *cap.* 9. gives more ſpeedy Proceſs, and in the End forejudger; yet the Plaintiff may take which Proceſs he will, either at the Common Law, or upon the ſaid Statute, becauſe both are in the Affirmative, and therewith agree *F. N. B.* 137. *a.* 14 *Hen.* 7. 10. *b.* 36 *Hen.* 6. 3. *a.* 3 *E.* 4. 27. 48 *E.* 3. 14. 15 *Hen.* 7. 16. *Stradling*'s Caſe, *Plo. Com.* 207. *a. b.* 17 *Eliz. Dyer* 243. 46 *E.* 3, 4. 21 *E.* 3. 11. 30 *E.* 3. 11. 20 *Hen.* 6. 11. 29 *Aſſ. pl.* 35. 29 *E.* 3. 24. 8 *E.* 3. 52. 22 *R.* 2. *Damages* 130.

2 Inſt. 371, 372, &c.

Br. Scire fac. 146. 1 Rol. Rep. 91, 243. Dyer 343. pl. 55. Benl. in Kelw. 211. pl. 20. N. Benl. 152. pl. 210. O Benl. 20. pl. 21.

And it was obſerved, That in many Caſes the Deſignation of a new Perſon in a latter Act of Parliament ſhall not exclude another Perſon who was authorized to do the ſame Thing by a precedent Act. It is enacted by the Statute of 8 *Hen.* 6. *cap.* 16. that after Office found, *&c.* he who finds himſelf grieved, may within the Month offer a Traverſe, and to take the Lands and Tenements to Farm, and that then the Chancellor, Treaſurer, and other Officer ſhall let them to him to Farm until, *&c. Vide* 13 *E.* 4. 8. *a.* And now by the Statute of 1 *Hen.* 8. 16. he has Liberty by the Space of three Months; and afterwards the Statute of 32 *H.* 8. *cap.* 40. gave Authority to the Maſter of the Wards, with the Advice of one of the Council, to make a Leaſe of the Lands of a Ward or of an Ideot, during the Time they ſhall remain in the King's Hands; altho' the latter Act deſigns another Perſon, yet it doth not utterly take away the firſt: For if before any Leaſe made by the Maſter of the Wards, the

Moor 245.

the Chancellor and Treaſure make one according to the Statute of 8 *H.* 6. then the ſaid Maſter can't demiſe it; and ſo if the Maſter makes it firſt to another, the Chancellor and Treaſurer can't demiſe it to the Party grieved, as *Stamford* holds, *Prær. Regis, fol.* 69. *a. b.* Where he mentions the ſaid Rule, *Quod* (*a*) *leges poſteriores priores contrarias abrogant*, 43 *Aſſ. pl.* 9. the Statute of 13 *E.* 3. *de Mercatoribus*, which gives the Aſſiſe to Tenant by Statute Merchant, ſhall not take away the Aſſiſe which the Tenant of the Freehold had before, but both well ſtand together. So in 33 *H.* 8. *Dyer* (*b*) 50. If it was enacted, that the younger Son ſhould have an Appeal of the Death of his Father, that ſhould not exclude the elder of his Suit, becauſe there are not any Words of Reſtraint. As to the other Objection, That the Generality of the Words, *All and every, &c.* imply a Negative, becauſe (*c*) *qui omne dicit nihil excludit.* To that it was anſwered and reſolved, 1. That the ſaid Words are not *ſimpliciter* general, but *ſecundum quid*, as has been ſaid, which is a full Anſwer to this Objection. 2. That in the Principal Caſe in (*d*) 33 *H.* 8. *Dyer* 50. that a Demiſe made under the Great Seal, of Land within the Survey of the Court of *Augmentation*, by the Authority of the ſame Book, is not void. (*e*) *Vide Porter's* Caſe *in the firſt Part of my Reports, fol.* 25. and *Gregorie's* Caſe *in the ſixth Part of my Reports, fol.* 19. *b.* and the Statute of (*f*) 23 *Hen.* 8. *cap.* 3. provides generally, *That all Attaints hereafter to be taken, ſhall be taken in the K's B. or Common Pleas* (but the Makers of the Act do not ſtay there, but add theſe Words) *and in* [*none other Court, Vide Dyer* 202. *b.* So it was enacted by the Statute of 6 (*g*) *E.* 6. That the Quarter Seſſions in the Counties of *Angleſey, &c.* ſhould be always held at *Beaumares* only, *Et non alibi infra Comitat' Angleſey, &c.* and Seſſions were held at *Newburgh* in the ſame County, and divers Perſons there indicted, *&c.* and 4 *&* 5 *Ph. & Mar.* it was reſolved by all the Judges of *England*, that all was *Coram non judice* and void, by Reaſon of the ſaid Negative Prohibition: By which it appears, That the General and Affirmative Words were not the Cauſe of the Reſolution.

And the Chief Juſtice ſaid, That altho' there be Negative Words in an Act of Parliament, yet in many Caſes they ſhall not bind the *King's Bench*, becauſe the Pleas there are *Coram ipſo Rege*; and thereupon he put the Caſe in 21 *E.* 3. 55. *b.* *&* 21 *Aſſ. pl.* 12. the Abbot of *Weſtminſter's* Caſe, That where it is enacted by the Statute of *Weſtminſter* 1. *cap.* 3. That from henceforth nothing be demanded,

(*a*) 1 Co. 25. b. 11 Co. 59. a. 62. b. Cro. Jac. 121. 8 Co. 137. b. 12 Co. 8. 2 Rol. Rep. 410, 423. Hawk. Max. 452. 2 Inſt. 685. Godb. 169. 1 Jones 186.

(*b*) Cro. Car. 172. 1 Rol. Rep. 91. Dyer 50. pl. 3.

(*c*) 2 Inſt. 81.

(*d*) Dyer 50. pl. 1. Palm. 495, 542. Antea 59. b. Hob. 173.

(*e*) 1 Rol. Rep. 91, 92, 163. Cro. Jac. 481. Moor 599, 600.

(*f*) Benl. in Kel. 210. pl. 16. Benl. in Aſh. pl. 16. N. Benl. 98. pl. 144. Dyer 202. pl. 70. Co. Lit. 294. b.

(*g*) Dyer 135. pl. 14. 10 Co. 70. a. 2 Rol. Rep. 100.

Raymond 113. Hardres 391. Br. Eſcape 19. 1 Rol. Rep. 92. Br. Sanctuary 12. Br. Reſeiſer pro Rege 17.

manded, not taken, nor levied by the Sheriff, nor by other, for the Eſcape of a Thief or Felon, till the Eſcape be adjudged before Juſtices Errants; the Caſe was, That it was preſented in the King's Bench, that the Abbot of *Weſtminſter* had ſuffered certain Clerks attainted before the King, which were in the Abbot's Priſon, delivered to him out of the *Marſhalſey*, to eſcape, and there *Pole* who was of Council with the Abbot, moved the Court, That by Force of the ſaid Statute, till the Eire, the Abbot ought not to be impeached, by which he ſhould be put to anſwer, *& non allocatur*, wherefore *Pole* pleaded, that they did not eſcape. So when a Statute makes a new Law, and aſſigns certain Juſtices to execute it; although the Juſtices of the King's Bench are not by expreſs Words authorized by the Act, yet they may execute it, as the ſaid Statute of 8 *H.* 6. 9. gave Power to Juſtices of Peace to make Reſtitution, and therefore Juſtices of *Oyer* and *Terminer*, or Gaol-delivery, *&c.* ſhall not make Reſtitution, and ſo it was reſolved as has been ſaid; yet if the Indictment is removed into the King's Bench *Coram Rege*, they ſhall award Reſtitution, and ſo upon Argument it was reſolved in the King's Bench in 4 *H.* 7. 18. *b.* and thereupon a Writ of Reſtitution was awarded, and therewith agree 15 *H.* 7. 5. *b. vide* 7 *E.* 4. 18. And the Chief Juſtice cited a Reſolution of the Judges, *Mich.* 37 *&* 38 *Eliz.* in this Caſe, in the General Pardon *de Anno* 35 *Eliz.* there is an Exception of all Penalties or Forfeitures converted to a Debt by Judgment, Order, Decree, or Agreement; now the Queſtion moved to the Juſtices was, If a Recuſant convicted upon Proclamation made according to the Statute of 28 *El.* ſhould be within this Exception? and it was reſolved, not; for the Words of the Statute are, *Shall be convicted, as if he had ben found guilty by Verdict*, and doth not ſpeak of any Judgment: Alſo, altho' the Parliament upon ſuch Conviction ordains (which is in the Nature of a Judgment) that he ſhall pay the Forfeitures, *&c.* yet that is not ſuch a Judgment as is intended within the ſaid General Pardon: But it was reſolved, that if he had been convicted and Judgment given thereupon according to the Statute of 23, that ſuch Judgment is within the ſaid Exception; and it was well obſerved, that the Statute of 1 *Jac. Regis*, *cap.* 4. enacts, *That all Statutes made againſt Recuſants in the Reign of Queen* Elizabeth, *ſhall be put in due and exact Execution.*

1 Rol. Rep. 92. Dall. 25. pl. 8. Dall. in Kelw. 204. pl. 2. Dall. in Aſh. pl. 2. Antea 59. a. b. 9 Co. 118. b.

9 Co. 118. b. Br. Forcib. Ent. 27. Fitz. Ent. 44. Dyer 187. b. Br. Reſtitut. 11. 1 Rol. Rep. 92, 94. Palm. 41. Cawly 69, 108, 165.

As to the laſt Objection, it was reſolved, That no ſuch double Charge can accrue to him, but that he may plead, That he was *autre foits* convict, *&c.* and ſo by Plea avoid the

Antea 59. b. Bridgman 122. Palm. 40.

double Charge. And where by the Statute of 3 *Jac. c.* 4. it is enacted, That no Indictment, *&c. nor any Proclamation, Outlawry, or other Proceeding thereupon, ſhall be avoided, by Reaſon of any Default of Form, or Lack of Form or other Defect whatſoever, (other than by direct Traverſe to the Point of not coming to Church, or not receiving the Sacrament, whereof ſuch Perſon ſhall be indicted) but that the ſame Indictment ſhall ſtand in Force; any ſuch Default in Form, or other Defect whatſoever notwithſtanding*, the Recuſant may well plead any Collateral Bar, as Pardon, Submiſſion, *auter foits* convict, or other Bar *dehors*, for this Act extends only to Defects within the Indictment, or other Proceedings.

1 Rol. Rep. 95. Cawley 180. Dodr. placit. 377. 1 Salk. 384.

And that the Informer cannot charge any who is convicted before at the Queen's Suit, upon the Statutes of 23 *Eliz.* 35 *Eliz.* or 3 *Jac. Regis.* But thoſe who are concealed, and not charged at the King's Suit, the Informer may exhibit Informations againſt them upon the Statute of 23 *El.* in the King's Bench, or before Juſtices of Aſſiſe, or General Gaol-delivery, and ſo charge them, who peradventure otherwiſe would never be charged, for by the Statute of 23 *Eliz.* he ought to be charged within a Year and a Day: So that for any Forfeiture before the Year and the Day, no Remedy can be taken, either by the King or by the Informer, becauſe the Time is limited in certain by the ſaid Act of 23 *El. &c.* and therefore it was ſaid, that in this Caſe the Informer was *neque falcator, neque meſſor*, but *ſpicilegus, viz.* a Gleaner. And that thoſe Recuſants, Feme-Coverts, or others, who have not been convicted at the King's Suit, that the Informer may find them, and charge them, otherwiſe they might eſcape unpuniſhed: And in the principal Caſe, for a great Part of the Time, If the Informer had not exhibited his Information, the King would have loſt all for ſo much of the Time as was before the Year, whereas in this Caſe he ſhall have two Parts, whereof one ſhall be to the Uſe of the Poor, and afterwards Judgment was given againſt the Defendant.

Cro. Eliz. 261. Cro. Jac. 482. Bridg. 121, 122. Cawly 78. Stat. Limit. Carth. 234.

Cawly 73.

Cawly 78.

Cawly 79, 80. Cr. El. 138, 583. 3 Inſt. 194. 1 Leon. 119. Vaugh. 243. 1 Rol. Rep. 95. Godb. 158. 1 H. 7. 3. 2. Dr. Releaſe 41. Hutt 82. Cawly 76.

Nota Reader, *Trin.* 31 *El.* in this Court *inter Stretton qui tam, &c.* and *Tayler*, it was adjudg'd, That after a popular Action brought, altho' the King's Attorney will enter *ulterius non vult proſequi*, or if the Defendant pleads a ſpecial Plea, altho' the Uſe is that the Attorney-General replies only, yet if he will not reply, or proſecute for the King, the Informer may proſecute for his Part, for by the Suit of the Informer commenc'd, he has made the Popular Action his Private Action, which the King nor any

other can releaſe as to his Intereſt, and the Condemnation or Acquittal of the Party at his Suit is a Bar againſt all others and againſt the King: And yet the King in all theſe Caſes before any Action commenced by an Informer may pardon and releaſe it, and that ſhall be a Bar againſt all People; and this Difference was granted, and denied by none. 1 *H.* 7. 3. *a.* and therewith agree 37 *H.* 6. 4. *a.* 5 *E.* 4. 3. *a.* 2 *R.* 3. 12. Alſo *Mich.* 39 *&* 40 *El.* it was adjudged in this Court, That if pending the Information, the Informer, *qui tam*, *&c.* dies, that yet the King's Attorney may proſecute the Suit for the King, for the Information by the Party, ſhall ſerve for the King after his Death.

3 Inſt. 194. 5 Co. 48. b. 50. b. 51. a. Sav. 23. Cawly 78, 80. Moor 58. Br. Releaſe 41. Br. Action popular 7. 12 Co. 29. 2 Rol. Rep. 33. Cro. Jac. 481. Cr. El. 583. Moor 541. 2 Bulſtr. 261, 262. 3 Inſt. 194.

[Whether a Conviction of Deer-ſtealing is pardoned by an Act of General Pardon. See 1 *Salk.* 384. Rep. Q. *A.* 235.]

The CASE of the Maſter and Fellows of *Magdalen* College in *Cambridge*.

Paſch. 13 Jacobi 1.

1 Rol. Rep. 151, 277. Cr. Jac. 164. Cr. Car. 175. 2 Bulſtr. 146.

John Warren brought an *Ejectione firmæ* againſt *John Smith* Maſter of Arts, which began in the King's Bench, *Paſchæ 9 Jac. Regis, Rot.* 288. and declared on a Leaſe made by *Francis Caſtillion* Knight, 20 *Decemb. anno* 8 *Jac.* of an Houſe in *London in Parochia Sancti Botolphi extra Aldgate in Warda de Aldgate*, from the Feaſt of St. *Michael* the Archangel then laſt paſt for two Years; by Force of which the Pl. entred, and was poſſeſſed till ejected by the Defen. The Def. pleaded Not guilty; and the Jury gave a ſpecial Verdict, *viz.* That long before the Treſpaſs and Ejectment, *Rogerus Kelke Sacræ Theologiæ Profeſſor, Magiſter, & Socii Collegii Sanctæ Mariæ Magdalenæ in alma Academia Cantabrigiæ, Seiſiti fuer' de infraſcripto Meſuagio cum pertinen' in Dominico ſuo ut de feodo in jure Collegii ſui prædi'*, and ſo being thereof ſeiſed, 13 *Decemb' anno nuper Reginæ El.* 17. by their Indenture in *Engliſh*, between the ſaid Queen *El.* of the one Part, and the ſaid Maſter and Fellows of the ſaid College of the other Part, and enrolled in the Chancery of Record, the ſaid Maſter and Fellows *for divers Conſiderations them thereunto eſpecially moving, did give and grant to our Sovereign Lady the Queen, All that their Meſſuage* (which was the Meſſuage mentioned in the Declaration) *with the Appurtenances, lying in the Pariſh of St.* Botolph *without* Aldgate, London, *To have and*

to

to hold the ſaid Meſſuage, with the Appurtenances to our ſaid Sovereign Lady the Queen, her Heirs and Succeſſors for ever; yielding and paying therefore yearly to the ſaid Maſter and Fellows, and their Succeſſors, at the Feaſt of St. Michael *the Archangel,* 15*l.* with Clauſe of Diſtreſs, and under this Condition or Proviſo following, viz. *Provided nevertheleſs, That if our ſaid Sovereign Lady the Queen, her Heirs and Succeſſors, ſhall not ſufficiently convey, and aſſure by Letters Patents under the Great Seal of* England, *the ſaid Meſſuage with the Appurtenances unto one* Benedict Spinola, *Merchant of* Genoa, *and his Heirs, before the Firſt Day of* April *next enſuing, That then this preſent Indenture, and every Gift, Grant, and Article therein contained, ſhall ceaſe and be utterly void, and of none Effect,* as by the ſaid Indenture, whereof one Part was ſealed with the Seal of the ſaid Maſter and Fellows, and the other with the Great Seal of *England* appears: And the Jury further found the Act of 13 *Eliz. c.* 10. by which it is enacted by Authority of Parliament, That from thenceforth, all Leaſes, Gifts, Grants, Feoffments, Conveyances or Eſtates, to be made, had, *or ſuffered* by any Maſter and Fellows of any College, Dean and Chapter of any Cathedral or Collegiate Church, Maſter or Warden of any Hoſpital, Parſon, Vicar, or any other, having any Spiritual or Eccleſiaſtical Living, or any Houſes, Lands, Tithes, Tenements, or other Hereditaments, being Parcel of any ſuch College, Church, Cathedral, Hoſpital, Rectory, Vicarage, or any other Spiritual Living, *&c.* to any Perſon or Perſons, Bodies Politick or Corporate, *other than* for the Term of 21 Years, or three Lives, ſhall be utterly void and of none Effect to all Intents, Conſtructions and Purpoſes, *&c.* and they found likewiſe the Act of Confirmation of Letters Patents made 18 *Eliz. cap.* 2. by which it is recited, That where, after the 18th Day of *Novemb.* in the firſt Year of the Reign of the ſaid Queen *Eliz.* divers and ſeveral Honours, Caſtles, Lands, Tenements, Rents, Reverſions, Services, and other Hereditaments, were conveyed and aſſured to the ſaid late Queen, her Heirs and Succeſſors, by divers and ſundry Perſons, and Bodies Politick, as well for the Diſcharge and Satisfaction of great Debts and Sums of Money, as for other good Conſiderations, for the perfect Aſſurance, Confirmation, and further Surety of which, it was enacted by Authority of Parliament, That all Feoffments, Fines, Surrenders, Aſſurances, Conveyances and Eſtates in any Manner convey'd, had or made, or to be made at any Time within ſeven Years after the End of the Seſſion of the ſame Parliament. *To or for our Sovereign Lady the Queen's Majeſty, by or from any Perſon or Perſons, Bodies Politick or Corporate, of any Honours, Caſtles, Manors, Lands, Tenements,* &c.

Co. Lit. 43. a. 44. a. 301. a. 342. a. 6 Co. 37. a. 1 Rol. Rep. 157. Moor 459, 593. Cr. El. 430. Vaugh. 204. Savil. 129. Goldſ. 171. 1 Brownl. 182. 5 Co. 14. a. b.

1 Rol. Rep. 152, 154, 159, 169, 170. 1 Jones 217. Cr. Car. 172. Cr. Jac. 364. Poſtea 76. a. Moor 338.

for any Debt, Sum or Sums of Money, or other Conſideration whatſoever, ſhall ſtand, remain, and be good and available in Law to all Intents, Conſtructions and Purpoſes, according to the true Meaning, Intent and Purport of the ſame, Saving to all and every Perſon and Perſons, &c. And further it was enacted, That all Letters Patents, Indentures and other Writings, ſealed with the Great Seal of *England*, or the Seal of the Dutchy of *Lancaſter*, or the Seal of the County Palatine of *Lancaſter*, then made and granted by the ſaid Queen for any Sum of Money, or for any other Conſideration, *eſſent bona, perfecta*, and effectual in Law, *&c.* againſt the ſaid Queen, her Heirs and Succeſſors, according to the Tenor and Effect of the ſame Letters Patent, *&c.* And they further found, That the ſaid Queen *Eliz. 29 Jan.* in the ſaid 17th Year of her Reign, by her Letters Patent under the Great Seal, granted unto the ſaid *Benedict Spinola* (who was then a Free Denizen) the ſaid Meſſuage with the Appurtenances, to have and to hold to him, his Heirs and Aſſigns for ever: Which *Benedict Spinola*, 15 *Junii*, *Anno* 22 *Eliz.* by his Deed indented and inrolled within ſix Months in the Court of Chancery, did, for Money, bargain and ſell the ſaid Meſſuage, with the Appurtenances, to *Edward* Earl of *Oxford*, and his Heirs; by Force whereof the ſaid Earl entred, and was thereof ſeiſed in his Demeſn as of Fee, *prout lex poſtulat*, and he being thereof ſo ſeiſed, *Rowland Broughton*, Gent. and *Elizabeth* his Wife, *Craſt. Trin. Anno* 24 *Eliz.* levied a Fine of the ſaid Houſe, with the Appurtenances, to the ſaid Earl of *Oxford* and his Heirs, with Proclamations, which were found at large according to the Stat. and afterwards 9 *Maii*, *Anno* 25 *El.* the ſaid Earl demiſed the ſaid Houſe to *Edw. Hamond* for 51 Years, who 9 *Novemb. Anno* 26 *Eliz.* aſſign'd all his Intereſt and Term for Years in the ſaid Houſe, to one *W. Maſham*, who 4 *Octob. Anno.* 2 *Jac.* died thereof poſſeſſed Inteſtate, after whoſe Death *Alice* his Wife took Adminiſtration of his Goods, *&c.* and 1 *Feb. Anno* 4 *Regis nunc*, took to Huſband the ſaid *Francis Caſtillion*, Knight: And that the ſaid *Roger Kelke*, Maſter of the ſaid College, 8 *Jan. Anno Domini* 1602. (which was *Anno* 44 *Regni Reginæ Eliz.*) died; and after his Death *Barnaby Gooche*, Doctor of the Civil Law, was elected and made Maſter of the ſaid College, and that the ſaid *Edw. Hamond*, in the Name and Stead of the ſaid Earl then Tenant of the ſaid Houſe, paid to the ſaid *Barnaby Gooche*, then Maſter of the ſaid College, 15 *l.* of the Rent aforeſaid, to the ſaid Maſter and Fellows of the ſaid College due at the Feaſt of St. *Michael*, *Anno Domini* 1606; which 15 *l.* the ſaid *Barnaby Gooche*, then Maſter, received, and by Writing under

See the Prince's Caſe, 8 Co.

under his Hand, without a Seal, acknowledged that he had received it; and that the ſaid *Barnaby Gooche*, within five Years after he was choſen Maſter, and after the Receipt of the ſaid Rent, *viz.* 5 *Feb. Anno* 4 *Regis nunc*, into the ſaid Houſe, with the Appurtenances, upon the Poſſeſſion of the ſaid *Francis Caſtillion* and *Alice* his Wife, did enter *in jure Collegii ſui prædi*, and the ſaid Maſter and Fellows of the ſaid College, 5 *Feb. Anno* 4 *Regis nunc*, by their Indenture under their Common Seal, demiſed the ſaid Houſe with the Appurtenances, to the ſaid *J. Smith* the Defendant, for ſix Years; and that the ſaid *Francis Caſtillion*, Knight, upon the Poſſeſſion of the ſaid *John Smith*, re-enter'd and made the Leaſe to the ſaid *John Warren*, *prout* in the Declaration, who was ejected by the ſaid *J. Smith*, *prout* in the Declaration: And the Queſtion which the Jury referred to the Court was, Whether upon the whole Matter, the Entry of the ſaid *J. Smith* was lawful or not, *&c.*

And this Caſe was argued at the Bar by *Hobart*, then Attorney General, *Montague* the King's Serjeant, *George Croke* ——— for the Plaintiff; and *Yelverton* the King's Solicitor, *Thomas Crew* —— for the Defendant.

And in this Caſe four Points were moved and argued at the Bar. Four Points.

1. If the ſaid Conveyance made to Queen *Elizabeth* by the Maſter and Fellows of the ſaid College, of the ſaid Houſe, Parcel of the Poſſeſſions of the ſaid College, after the ſaid Act of 13 *Eliz. Reginæ*, was reſtrained by the ſaid Act? 1.

2. Admitting the ſaid Conveyance was reſtrained by the ſaid Act of 13; if the ſaid Act of 18 *Eliz.* has ſupplied the Defect thereof, and has made it perfect and effectual? 2.

3. Admitting alſo, That the Act of 18 *Eliz.* doth not extend, nor give any Force to it, If the ſaid Fine levied, and five Years paſſed, ſhall bind the Right of the Maſter and and Fellows of the ſaid College for ever? 3.

4. If the ſaid Acceptance of the Rent aforeſaid, by the ſaid Maſter of the ſaid College, ſhould diſable or conclude him from entring into the ſaid Houſe? And if any of the ſaid Points ſhould be adjudged againſt the Defendant, then his Entry was not lawful, and by Conſequence Judgment ſhould be given for the Plaintiff, *Bonum defendentis ex integra cauſa, malum ex quolibet defectu.* 4.

As to the firſt it was objected, That by the Rule of the Law, the King not being named in the Act, is by the Law exempted out of the Act, for the Law gives the King this Prerogative, That for the Dignity of his Royal Perſon, he is not by Conſtruction of the Law included within theſe common Words, *Perſon or Perſons, Bodies Politick or Corporate*; and be the Stat. Affirmative, or be it Negative, which is ſtronger, it

Poſtea 69. b. Kelw. 33. a. 1 Rol. Rep. 151, 155, 156, 164. Plow. 240. a. b. Co. Lit. 43. b. 98. b. 99. a. 120. a. 1 Jones 21. Lit. Sect. 140. Hard. 302.

it ſhall not bind the King unleſs he is ſpecially named, but he ſhall take Benefit of a Statute altho' he be not named, as the Statute of *W.* 1 (*a*) *cap.* 36. which ſettles reaſonable aid (as well to make the eldeſt Son Knight, as to marry the eldeſt Daughter) in certain, enacts, That from henceforth of a whole Knight's Fee be given only 20 *s.* and of 20 *l.* Land held in Socage, 20 *s.* and of more, more, and of leſs, leſs: But it was held, That foraſmuch as the King was not named, he was not bound by that Law, and to ſettle that in certainty was the Act of (*b*) 25 *E.* 3. *cap.* 11. made, in which Act the King was ſpecially named. *Vide F. N. B.* 82. *f. acc.* Alſo the Statutes of Limitations, *ſcil.* of *Merton*, *cap.* 8. *W.* 1. *cap.* 3. and 32 *H.* 8. *cap.* 2. have never bound the King. So the Statute of *W.* 2. *cap.* 5. which gives the Plea of Plenarty by ſix Months, doth not bind the King, becauſe the Act is general, and doth not name the King. The Statute of 27 *E.* 1. which gives Trial in the Country by *Niſi prius*, ſhall not bind the King, *F. N. B.* 241. *b.* 24 *E.* 3. 23, *&c.* So by the Statute of 18 *E.* 1. of *Quia emptores terrarum*, the King is not bound, as it is held in 10 *H.* 7. 23. *a.* &c. The Statute of *Magna Charta*, *cap.* 11. enacts in the Negative, (*c*) *Quod communia placita non ſequuntur curiam noſtram, ſed teneantur in aliquo loco certo*, but that doth not bind the King, as it is adjudged in 23 *H.* 3. Tit. *Brief*, and 31 *E.* 1. Tit. *Prerogative* 28. for he may have a *Quare Impedit* in the King's Bench; and many other Caſes were cited upon this large and common Ground, which you may find in our Books, and eſpecially in *Plow. Com.* (*d*) 240. *b. in the Lord Barkley's Caſe*. *Vide* 11 *H.* 4. *Quare Impedit* 120. 11 *H.* 4. 87. *Br. Prerogative* 57. (*e*) 12 *H.* 7. 21. *a. in Stoner's Caſe*, 4 *E.* 3. 34. 30 *E.* 3. 5. (*f*) 7 *H.* 4. 32. *b.* 4 *Mar. Dyer* 145. So in the Caſe at Bar, foraſmuch as the Queen was not named in the ſaid Act of 13 *Eliz.* ſhe was not bound thereby, but was at Liberty to take the ſaid Grant as ſhe was before the ſaid Act of 13 *Eliz.*

(*a*) 13 Co. 27, 28. Poſtea 74. b. 1 Roll. Rep. 157, 165. 12 Car. 2. c. 24. 2 Inſt. 231, 232. Co. Lit. 162. b. Regiſt. 87. a.

(*b*) 13 Co. 27.

1 Roll. Rep. 151. Plow. 244. a.

Q.

(*c*) 1 Roll. Rep. 164. Pl. Cr. 244. a. Plow. 240. b. 236. b. Poſtea 75. a. 11 Co. 75. a.

(*d*) 1 Roll. Rep. 151. (*e*) 1 Rol. Rep. 151, 164. Poſtea 72. b. (*f*) Br. Treaſon 4.

It was likewiſe urged, That always after the Act of 13 *El.* divers Maſters and Fellows of Colleges, Deans and Chapters, Maſters or Wardens of Hoſpitals, and others having Spiritual or Eccleſiaſtical Livings, have made many Eſtates and Leaſes to Queen *Elizabeth*, and to the King that now is, which are granted over and transferred to many Perſons, and all theſe were made by the Advice of Men well learned in the Law, and of the Counſel learned of the ſaid late Queen, and of the King alſo, and the change of ſuch a common and conſtant Opinion, upon which the Eſtates and Intereſts of ſo many Men depend, will be the Occaſion of great Vexations, Suits in Law, and the Ruin of many, who have not only ſpent their Subſtance,

or

or the greateſt Part of it, upon ſuch Eſtates and Leaſes, but alſo have ſpent much upon new Buildings, and other Charges upon them, all which will be utterly loſt by the Change of the ſaid continual Practice; and in ſuch Changes, (*a*) *Rerum progreſſus oſtendunt multa quæ initio præcaveri aut prævideri non poſſunt*: And another ſaith, *Quod in ædificiis lapis male poſitus non eſt removendus*; and the Law ſaith, (*b*) *Intereſt Reipublicæ ut ſit finis litium.*

(*a*) 6 Co. 40. b. 12 Co. 48. 2 Inſt. 26. Hawks Max. 311, 452.
(*b*) 6 Co. 45. a. 3 Bulſtr. 98, Godb. 242. Hard. 128. 1 Roll. Rep. 152, 154, 161.

As to the 2d Point, it was argued by the Plaintiff's Counſel, That admitting the Queen was bound by the ſaid Act of 13 *Eliz.* yet the ſaid Act of 18 *Eliz.* has made the Grant to the Queen good and effectual; for admitting the ſaid Grant to the Queen was voidable afterwards, or immediately void and of none Effect, yet the Act has made it unavoidable, good and effectual; for the Words are, For the perfect Aſſurance, Confirmation, and further Security of ſuch Aſſurances, Conveyances and Eſtates, *&c.* it is enacted, That they ſhall ſtand, remain, and be good and available in Law to all Intents, Conſtructions and Purpoſes, *according to the true Meaning Intent and Purport of the ſame.* So that it appears by the Words of the Act, that the full Intent of the Makers of it, was to make that perfect which was imperfect, and to make that aſſured which was not ſure, and to add greater Force to that (by Addition of further Security) which was defective before; and to this Purpoſe the Makers of the Act, not only in the ſaid precedent Words, but in thoſe which are ſubſequent, are very Provident, and in a Manner curious to take away all Evaſion which might be made out of it, and therefore firſt it is enacted, That they ſhall ſtand, remain, and be good and available in Law. And to anſwer a ſecret Objection which might be made upon the Words of the Act, *ſc.* All Feoffments, Fines, Aſſurances, Conveyances, Eſtates, *&c.* that they ought to be ſufficient, for an inſufficient Thing is reputed in Law for nothing, to ouſt that, theſe Words are added, To all Intents, Conſtructions and Purpoſes, *according to the true Meaning, Intent and Purport thereof*; ſo that the Act doth not ſay, That they ſhall be good and available, according to the ſtrict Conſtruction and Operation of the Law (for if they were good and available in Law, then there needed not any Act to make them perfect or ſure, or to add further Security) but the Words are, *according to the true Meaning, Intent and Purport of them*; and without Queſtion in the Caſe at Bar, the *true Intent and Meaning* of the Maſter and Fellows, and of Queen *Elizabeth* alſo, and the Purport of the Indenture was to convey the ſaid Houſe to the Queen, her Heirs and Succeſſors, for ſo much the ſaid Indenture purports, altho' it be not of Force to convey it.

And it was ſaid, That if a Biſhop had made an Eſtate or Leaſe to Queen *Eliz.* and afterwards the Act of 18 *Eliz.* was made, that had made good the Eſtate or Leaſe to the Queen, altho' it was never confirmed by the Dean and Chapter. So if an Infant had levied a Fine to the Queen, or to others for the Queen's Behoof, that after the Act of 18 *Eliz.* the Infant ſhould never reverſe the ſaid Fine for Nonage. And many other Caſes out of their own Invention were put, which I purpoſely omit.

1 Roll. Rep. 153, 155, 160, 162. 4 H. 7. c. 24.

As to the 3d Point, they argued, That the ſaid Maſter and Fellows of the ſaid College were a Corporation aggregate of many and had the entire Fee in them, and by the Stat. of 4 *H.* 7. ſhould be bound by Fine and Non-claim by five Years, as it is adjudged in *Croft* and *Howel's Caſe*, *Plow. Com.* 538. and in *Stowel's Caſe*, *Plow. Com.* 376. *Vide* 7 *E.* 6. 83. *Dyer. Vide* 24 *E.* 3. 58. and that the Stat. of 13 *Eliz.* doth not aid them in this Caſe, becauſe it extends only to Leaſes, Gifts, Grants, or other Aſſurances or Conveyances made or ſuffered, and notwithſtanding the Word (ſuffered) yet there ought to be an Aſſurance or Conveyance ſuffered, to which they ſhall be Party, as by a common Recovery of Lands had againſt them, or Recovery of an Annuity by Conſent againſt them, as appears in *Eytrene's Caſe*, 14 *El. in the fifth Part of my Reports*, *fol.* 14. *b.* But this Caſe of a Fine levied between Strangers and Non-claim by five Years, was never queſtioned or doubted; and it would be a great weakning of the general Aſſurance of the Realm, if this Act ſhould be conſtrued againſt the Letter, to exempt all thoſe named in the Act, ſo that they ſhould not be bound by any Fine and Non claim.

1 Roll. Rep. 160. 1 Jones 46. Poſtea 71. a. 2 Rol. Rep. 162. Dyer 83. pl. 77.

1 Roll. Rep. 152, 155, 158, 160, 164, 166, 171. Poſtea 75. b. Hob. 97.

As to the 4th Point, Foraſmuch as the Maſter, who is the Head of the Corporation, has accepted of the Rent, and made an Acquittance thereof under his Hand, he has concluded himſelf from entring during the Time that he is Maſter, and foraſmuch as he is concluded, the Fellows, without their Head cannot enter; and thereupon they concluded, That for all theſe four Points, or for ſome of them, for if any of them ſhould be adjudged for the Plaintiff, Judgment ought to be given againſt the Defendant. Againſt which it was argued by the Defendant's Counſel, and they concluded that Judgment ſhould be given for the Defendant.

1 Roll. Rep. 153, 155, 160, 162.

Antea 68. a. b. 1 Roll. Rep. 153, 161, 163, 164.

And as to the firſt, which was the principal Point of the Caſe, it was argu'd for the Defendant and unanimouſly reſolv'd by the Juſtices, *Coke* Ch. Juſt. Sir *John Croke*, Sir *John Doderidge*, and Sir *Robert Houghton* Juſtices, upon ſolemn Argument in Court, that the ſaid Act of 13 *El.* extends to reſtrain the

the Master and Fellows of the said College from conveying the said House, Parcel of the Possessions of the same College, to the Queen, altho' the Queen was not expresly named in the said Act. And first it was resolved, (*a*) That the general Words of the Act extend to the Queen, for the Words are, *To any Person or Persons, Body Politick or Corporate*, and without Question the Queen was a Person, as it is said in 10 *H.* 7. 18. *a.* (*b*) *Rex est persona mixta*,, and that she was a Body Politick appears in *Plow. Com. in the Case of the Dutchy of Lancaster*, 213. and in *the Lord Barkley's Case*, 234. and in many other Books. Then if the Act be general, and the Queen be clearly included within the Words, if she shall be exempt out of the Act, it ought to be by Construction of Law, and as this Case is, the Law will not make such Construction for Reasons apparent in the Act itself, *scil.* 1. The Queen, Lords Spiritual and Temporal, and the Commons who made the said Act, have adjudged, as in the Preamble appears, long Leases made by Colleges, *&c.* to be unreasonable, and against Reason (*a fortiori*, an Estate in Fee-simple, *&c.*) and the Law which is the Perfection of Reason, will never expound the Words of the Act against Reason. 2. The Parliament has adjudged them Causes of Dilapidations. 3. To be the Decay of all Spiritual Livings. 4. The Decay of Hospitality. And 5. The utter Impoverishment *of Successors Incumbents in the same:* And upon all these follows a Consequent fearful and dangerous, *scil.* decay of the True Religion and Spiritual Worship of God; for it is recorded in History, that there were (amongst others) two grievous Persecutions, the one under *Diocleſian*, the other under *Julian* surnamed the *Apostate*; one of them intending to have extirpated all the Professors and Preachers of the Word of God, and therefore the Record saith, *Occidit omnes Presbyteros*, but notwithstanding that Religion flourished, for, *sanguis Martyrum est semen Ecclesiæ*, and yet that was a dreadful and grievous Persecution; but the Persecution under the other was more grievous and dangerous, *quia* (as the History saith) *occidit Presbyterium*, for he robbed the Church, and spoiled Spiritual Persons of their Revenues, and took from them whatever they might live on, and thence in short Time ensu'd great Ignorance of the True Religion and Service of God, and thereby great Decay of the Christian Profession; for none would apply himself, or his Sons, or any other he had in Charge, to the Study of Divinity, when they should have, after a long and painful Study, nothing to live on. *Vide* all this Word for Word in the *Bishop of Winchester's* Case, in the second Part of my Reports, *fol.* 44. *b.* And therefore it was unanimously resolved, That general Statutes,

(*a*) Hard. 302, 445. 1 Jones 21. 1 Rol. Rep. 236. 5 Co. 14 & 15. Eccl' Case, Hob. 87.

(*b*) 13 Co. 17. 2 Co. 44. a. Cawley 6.

2 Co. 44. b.

1 Roll. Rep. 164.

5 Co. 11. b. Hob. 157. Cawley 54. 2 Bulstr. 155.

tutes, which provide neceſſary and profitable Remedy for the Maintenance of Religion, the Advancement of good Learning, and for the Relief of the Poor, ſhall be extended generally according to their Words; and God forbid that by any Conſtruction, the Queen, who made the Act with the Aſſent of the Lords and Commons, ſhould be exempted out of this Act of 13 *Eliz.* which provides neceſſary and profitable Remedy for the Maintenance of Religion, the Advancement of good Literature, and the Relief of the Poor; and out of theſe Colleges, Deans and Chapters, *&c.* as well the Church is furniſhed with grave and learned Divines, for the Inſtruction of Chriſtians in the True Religion, as the Commonwealth with learned Men for the better Adminiſtration of Juſtice, as well Temporal as Eccleſiaſtical, which (*ſc.* Religion and Juſtice) are the main Pillars which ſupport the King's Crown; and therefore of all others, the King, who as hath been ſaid, is *perſona mixta*, *Medicus Regni*, *Pater Patriæ*, *&* (*a*) *Sponſus Regni*, who *per annulum* is wedded to the Realm at his Coronation, ſhould not be exempted out of this Act by Conſtruction of Law, which would be againſt Reaſon, and the Cauſe of Dilapidations, the Decay of Spiritual Livings, of Hoſpitality, of the utter Impoveriſhment of Succeſſors, and by Conſequence the Decay of Religion and Juſtice would enſue, and therefore it is true, (*b*) *quod ſumma ratio eſt quæ pro Religione facit:* And *W.* 1. (*c*) *cap. ult. ſumma Charitas eſt facere Juſticiam ſingulis, & omni tempore quando neceſſe fuerit.* And it is to be known, That the Law never preſumes that any one will do a Thing either againſt Religion, or any Religious Duty: And therefore it is reſolv'd in *Cholmley's Caſe, in the ſecond Part of my Reports, f.* 51. *a.* where a Reverſion expectant on an Eſtate Tail is granted to one for the Life of Tenant in Tail, and it was ſaid, That by Poſſibility this Grant for Life might take Effect, for the Tenant in Tail having no Iſſue might become a Monk, and enter into Religion, and then the Grantee might have it during his natural Life: But there it is reſolved, That ſuch ſuperſtitious and irreligious Profeſſion ſhould not be preſumed in Law, *Mic.* (*d*) 10 *H.* 6. 8. *a. J. S.* brought an Action of Debt againſt *Johan' Rector' de T. in Com. B.* The Defendant ſaid, That he was, before the Day of the Writ purchaſed, dwelling and converſant at *B.* in the County of *N. & non allocatur*, for a Parſon ſhall be intended by Law to be Reſident upon his Benefice, for the Cure of Souls which he has there; for a Parſon who has Cure of Souls, and is Non-reſident, *non eſt diſpenſator ſed diſſipator, non ſpeculator ſed ſpicalator*, and therefore no ſuch Thing ſhall be preſumed. So in the Caſe at Bar, the Law will never make Conſtruction againſt the Maintenance of Religion, Advancement of Learning, and Suſtenance of the Poor;

Hob. 97.

(*a*) 1 Rol. Rep. 165, 166. Raym. 155.

(*b*) 1 Roll. Rep. 167. 10 Co. 55. a. 5 Co. 14. b. Co. Lit. 341. a. 2 Bulſtr. 53. Hob. 295. Hawks. Max. 2. Wing. Max. 3.

(*c*) 2 Inſt. 264. 1 Roll. Rep. 167. Poſtea 74. b.

(*d*) 1 Roll. Rep. 167. Doctrin. placit 2. Fitz. Brief 268. Jur. Brief 401.

It

It is enacted by the Statute of 1 & 2 *Ph. & Mar. cap.* 8. *That it ſhould be lawful*, &c. *to give Lands, Tenements*, &c. *by Feoffment, Grant, or other Aſſurance, or by laſt Will and Teſtament in Writing, to any Spiritual Body Politick or Corporate*, notwithſtanding the Statute of *Mortmain*. (*a*) One *Allaine Clarke* ſeiſed of certain Lands in *London* in Fee, 4 & 5 *Ph. & Mar.* by his laſt Will in Writing deviſed them to the Maſter, Fellows and Scholars of *Trinity* College in *Cambridge*, and to their Succeſſors for ever, for the finding of certain poor Grammar Scholars, *&c.* And *Mich.* 8 & 9 *Eliz.* a great Queſtion was moved. 1. That the ſaid College conſiſted not only of Divines, but of others alſo. 2. That the Intent was to find Grammar Scholars, *&c.* 3. That in the Statute of 34 & 35 *H.* 8. *Of Explanation of Wills*, Bodies Politick and Corporate are excepted out of it, yet *per opinionem omnium Juſticiariorum utriuſq; Banci & Capitalis Baronis Scaccarii*; the Deviſe was held good, and the Statute of 1 & 2 *Ph. & Ma.* (being made for the Maintenance of Religion, Advancement of Learning, and Exhibition of poor Scholars) ought to be favourably expounded, and altho' the Lands were held of the King, yet in ſuch Caſe the ſaid Act was expounded to bind the King. So the Words of the Statute of 4 *H.* 7. of Fines are general; yet the Succeſſor of a Biſhop, Parſon, Vicar, or any other ſole Corporation, ſhall not be bound by Conſtruction of Law, as a Corporation aggregate of many ſhall be, for then the Biſhop without the Dean and Chapter, the Parſon or Vicar without the Patron and Ordinary, *&c.* might by their Sufferance bind their Succeſſors, which would be the Cauſe of Dilapidation and Diminution of Spiritual Livings, and therefore by Conſtruction of the general Law are excepted, as it is held in *Stowel's* Caſe, in *Plow. Com.* 376. and *Howel's* Caſe, *Plow. Com.* 538. By the Statute of 23 *H.* 8. *cap.* 10. it is enacted, *That all Conveyances*, &c. *to the Uſe of Pariſh Churches, Churchwardens, Guilds, Companies erected of Devotion, or common aſſent*, &c. *and all other like Uſes and Intents, ſhould be void*: And one *Nicholas Gibſon* being ſeiſed of an Houſe and Wharf in *London*, after the ſaid Act deviſed them to *Avice* his Wife, and her Heirs, upon Condition to found a Free-School, and for the Suſtenance of certain poor Men and Women, and it was queſtioned if this Condition was againſt the ſaid Act of 23 *H.* 8. *Mich.* 34 & 35 *Eliz. Reg'*, as it appears in the firſt Part of my Reports, *f.* 22. *b.* and it is there adjudged, that the ſaid general Words of the Act of 23 *H.* 8. do not extend to take away the ſaid good and charitable Uſes, for Inſtruction

(*a*) 1 Co. 25. b. 1 Rol. Rep. 166, 418. Jenk. Cent. 233. 3 Keb. 554. Co. Lit. 99. a. Dyer 255. pl. 7. Hob. 122. 2 Brownl. 246. 1 Rol. 556. Raym. 112. Stiles 391. Godb. 394. 2 Kelw. 66, 168.

1 Co. 25. b.

Antea 69. b.

1 Co. 23. a. 1 Rol. Rep. 166.

1 Co. 25. b. Cr. El. 288. Poph. 6, 7, 8. 2 Bulſt. 34. 1 Rol. Rep. 163.

Inſtruction of Youth in good Literature, and for Suſtenance of the Poor; for there it is ſaid, That no Age was ſo barbarous as to aboliſh Learning and Knowledge, not ſo uncharitable as to prohibit relieving the poor People: So that it appears by theſe Caſes, That by Conſtruction of Law, Lands conveyed for the Advancement of Learning, or Suſtenance of the Poor, have been preſerved and maintained againſt the general Words of the ſaid Acts: But it was never ſeen, That a general Act, made for the Maintenance of Religion, Advancement of Learning, and Relief of the Poor, ſhould be by Conſtruction of Law ſo expounded, that a By-way ſhould be left open, by which the ſaid great and dangerous Miſchiefs ſhould remain, and the neceſſary and profitable Remedy ſuppreſſed; for the Office of the Judge is, to make ſuch Conſtruction as will ſuppreſs the Miſchief, and advance the Remedy, and to ſuppreſs all Evaſions for the Continuance of the Miſchief; and ſuch By-way ſhall never be left open by Conſtruction, altho' it be for the King's Benefit; and that appears by the Act of 1 *El.* by which Archbiſhops and Biſhops are reſtrained from making any Conveyance, *&c.* other than for three Lives, or twenty-one Years, *to any Perſon or Perſons, Bodies Politick or Corporate, other than to the Queen, her Heirs and Succeſſors*; out of which there are three material Things to be obſerved: 1. That the Queen had been included within the ſaid Words of *Perſon and Perſons, Bodies Politick*, &c. if the ſaid Excluſion or Exception had not been made: 2. That if the ſaid By-way had not been contained in the ſame Act, it never had been raiſed by Conſtruction of Law: 3. That foraſmuch as the ſame Words are uſed in the ſaid Act of 13 *El. ſc. to any Perſon or Perſons, Bodies Politick or Corporate*, and no Exception or Excluſion made of the Queen; by Conſequence it appears, that it was the Intention of the Makers of the Act, that the Queen ſhould be bound thereby, and *eo potius* becauſe they had ſo good a Pattern before them, as the Act of 1 *Eliz.* was; and altho' the true Intent of the ſaid Exception in the ſaid Act of 1 *Eliz.* was for the Support of the Crown; yet by Importunity of Suitors, many Eſtates and Leaſes were made to the Queen by *Archbiſhops and Biſhops*, with Intent to grant them over to Subjects to private Uſes; which the King, that is now, perceiving, of his pious and religious Care, That the Poſſeſſions of the Archbiſhops and Biſhops ſhould not be diminiſhed by the ſaid By-way, by an Act of Parliament in the firſt Year of his Reign, and in the firſt Seſſion thereof, *c.* 3. reciting, That where Archbiſhops and Biſhops by the Law could not convey any of their Poſſeſſions to other Subjects, his moſt excellent Majeſty knowing, That divers with great

1 Co. 24. a. b.

1 Ventris 311.

5 Co. 14. b. The Queen bound, though not named.

Note the Craft of the Biſhops to evade the Law.

great Suit had endeavoured to fruſtrate the true Intent of the Law, of his Chriſtian and Princely Piety and Care intending to protect the ſaid Poſſeſſions from Alienation or Diminution, for the better Maintenance of God's true Religion and Hoſpitality, and for avoiding of Dilapidations, and thereby for ever after avoid all Suits and Importunities concerning any of the ſaid Poſſeſſions had of his meer and pious Motion vouchſafed, that it ſhould be enacted, that every Archbiſhop and Biſhop and their Succeſſors ſhould, after the End of the ſame Seſſion of Parliament, be utterly diſabled in Law, to make, levy or ſuffer any Alienation, Aſſurance, Demiſe, Charge or Conveyance of their Poſſeſſions to the King, his Heirs or Succeſſors: And that every ſuch Alienation, *&c.* ſhould be utterly void and of none Effect to all Intents, Conſtructions and Purpoſes.

The 2d Reaſon is, That the King ſhall not be exempted by Conſtruction of Law out of the general Words of Acts made to ſuppreſs Wrong, becauſe he is the Fountain of Juſtice and Common Right, and the King being God's Lieutenant cannot do a Wrong, *Solum Rex hoc non poteſt facere, quod non poteſt injuſte agere*, and therewith agree 13 *E.* 4. 8. *a.* and the Caſe of *Alton Woods*, *in the firſt Part of my Reports*, *fol.* 44. *b.* 48. *a.* *&c.* And altho' a Right was remedileſs, yet the Act which provides a neceſſary and profitable Remedy for the Preſervation of it, and to ſuppreſs Wrong, ſhall bind the King, as appears in the Lord *Berkley*'s Caſe, *Pl. Com.* 246. If Tenant in Tail before the Statute *de Donis Conditionalibus* had aliened, either before Iſſue to bar the Iſſue in Tail, or after Iſſue to bar as well the Donor as the Iſſue in Tail, it was tortious; but no Remedy was given for it till the Statute *de Donis Conditionalibus*, *Anno* 13 *E.* 1. was made, which Act ſaith, *Dominus Rex perpendens, quod neceſſarium & utile eſt in præd' caſibus apponere remedium, &c. ſtatuit, quod non habeant illi, quibus tenementum ſic fuit datum ſub conditione, poteſtatem alienandi, &c.* and the Lord *Berkley*'s Caſe was, That Land was given to King *H.* 7. and to the Heirs Males of his Body; and the Queſtion was, Whether the King, foraſmuch as he was not expreſly reſtrained by the Act *poſt prolem maſculum ſuſcitatum*, might alien or not? And it was adjudged, That he could not alien, but that he is reſtrained by the ſaid Act, for three Reaſons. 1. Becauſe ſuch Alienation before the Statute was wrongful, altho' ſuch Wrong wanted Remedy; for there it is ſaid, it would be a hard Argument to grant, that the Statute which reſtrains Men from doing Wrong and Ill, ſhould permit the King to do it. 2. Foraſmuch as the ſaid Act is *ſtatutum remediale*, and provides a Remedy for

2 Inſt. 358, 681. Antea f. 70. a. Lib. 5. f. 14. b. Cr. Car. 60. 1 Rol. Rep. 166, 167. Plow. 246. b. Noy 182.

That Kings have done wrong, ſee Bacon of Government, lib. 1. p. 199, 200.

1 Co. 44. b. 48. a. 1 Rol. Rep. 153. lib. 7. f. 22. a. Lord Anderſon's Caſe.

this

this remedileſs Wrong, and that it was neceſſary and profitable to provide ſuch Remedy, it was adjudged, That it ſhould bind the King. 3. Becauſe it was an Act of Preſervation of the Poſſeſſions of (*a*) Noblemen, Gentlemen and others, it ſhould alſo bind the King; and the ſaid Act ſhall not bind the King only when he took an Eſtate in his natural Capacity, as to him and the Heirs Males of his Body, but alſo when he claims an Inheritance as King by his Prerogative: And therefore (*b*) if Tenant in Tail, after the ſaid Act be attainted of High Treaſon, altho' the King claims the Forfeiture, as King, by his Prerogative, Yet the King is bound by the ſaid Act, for there ſhall be no Forfeiture to bar the Iſſue in Tail, as it was at the Common Law, as it is held in 7 *H.* 4. 31. 8 *H.* 4. 9. *a. b.* 7 *R.* 2. *Tit. Aide del Roy.* So in the Caſe at Bar, the ſaid Act of 13 *El.* has all the ſaid three Qualities. For, 1ſt, it was to ſuppreſs Wrong: For Dilapidations and Diminution of Spiritual Livings, *&c.* as appears before, are Wrongs, and ſuch Wrongs as are *quodam modo* puniſhed by the Law, for the Maſter, Dean, *&c.* (*c*) for Dilapidations or Waſting, or Diminution of the Revenues of their Houſe, might be deprived, as appears in 29 *E.* 3. 16. *a.* 2 *H.* 4. 3. *b.* 11 *H.* 6. 20 *H.* 6. 46. *a.* 9 *E.* 4. 34. *a.* 35 *E.* 1. (*d*) Reſolved in a Parliament held at *Carliſle*, *quod vide* before in *Richard Liford's* Caſe, *f.* 49. *a.* and a notable Record in 19 *E.* 3. *Rex amovit cuſtodem hoſpitalis de ſuo Patronatu, qui male diſpendit proficua domus, &c.* becauſe it is againſt their Office and Duty to waſte the Poſſeſſions of their Houſes, which are committed to them *pro bono publico.* 2. This Act of 13 *El.* is *actus remedialis*, and was neceſſary and profitable to provide ſuch Remedy for the publick Good of the whole Eccleſiaſtical Eſtate, *&c.* 3. This Act is an Act of Preſervation, *ſc.* to preſerve the Poſſeſſions of Colleges, Deans and Chapters, Hoſpitals, *&c.* and therefore for all theſe three Cauſes ſhall bind the Queen. And where it is enacted by the Statute of *W.* 2. *cap.* 5. *Quod quotieſcunque aliquis jus non habens tempore hujuſmodi cuſtodiar' præſentaverit, &c.* it was reſolved by *Coke* Chief Juſtice, *Croke*, *Dodderidge* and *Houghton* Juſtices, That that Act being made to ſuppreſs Wrong ſhould bind the King, and ſo the Law is well reſolved in a Caſe which was left doubtful in 35 *H.* 6. 60. *a. b.* *Ratcliff's* Caſe. And to conclude this Reaſon, it is notably ſaid in 24 *E.* 3. 41. *a.* That the Law is Reaſon and Equity, to do Right to all, and to keep Men from Wrong and Miſchief, and therefore the Law will never make Conſtruction againſt Law, Equity and Right.

(*a*) 1 Rol. Rep. 167. Co. Lit. 392. b.

(*b*) 1 Rol. Rep. 167.

Co. Lit. f. 392. b. 7 H. 4. 32. b. Br. Treaſon 4. Antea 68. b.

(*c*) Godolph. Abr. 174, 176, 307. Antea 49. Poſtea 98. b. 1 Rol. Rep. 86, 164, 167. Br. depoſitioner 1.

(*d*) 11 Co. 49. a. Ryley's Pla. Par. 335. 2 Rol. 813. 1 Rol. Rep. 86, 100, 335. 2 Bulſtr. 279.

2 Inſt. 353.

The 3d Reaſon is, That the general Words of a Stat. which tend to perform the Will of the Founder or Donor, ſhall bind the

the King, altho' he be not named, and that appears *in Statuto Templariorum, Anno* 17 *Ed.* 2. where it is said, *Ita semper quod pia & celeberrima voluntas Donatoris in omnibus tenetur & expleatur, & perpetuo sanctissime perseveret.* And the said Act *de Donis condic'* is notable to this Purpose, for there it appears, that it was necessary and profitable that the Will of the Donor should be observ'd; the Words of which Act to this Purpose are; *Propter quod Dominus Rex perpendens quod necessarium & utile est, &c. apponere remedium* (and what was such Remedy) *statuit quod voluntas donatoris in cartâ doni sui manifeste expressa de cætero observetur*; which bound the King, as it is adjudg'd in the said Lord *Berkley*'s Case, where, *fol.* 247. it is said, That Men ought to observe the Intent or Will of other Men, and to violate it is ill. And in the Case at Bar, the Intent of the Founder of the said College, was for the Maintenance of Divines, the Advancement of liberal Arts and Sciences, and to educate poor young Persons in Virtue and Learning, which God forbid should not be performed; and therefore it is a stronger Case, and in a more pious and publick Degree than the said Act *De Donis condic'* which was enacted for the Preservation of private Estate-tailes to particular Families. King bound, tho' not named.

The fourth Reason is, That the (*a*) Master and Fellows of the said College, are by the said Act disabled to grant; and then, if they be disabled to grant, the Queen can't take from them who are so disabled; the Words of the Act are, *All Leases, Gifts, Grants, &c. to be made, &c. or suffered by any Master and Fellows of any College, &c. shall be utterly void and of none Effect, to all Intents, Constructions, and Purposes, any Law, Custom or Usage to the contrary notwithstanding*; which is as much as to say, That every Master and Fellows of a College shall be disabled to make any *Lease, Gift, Grant, &c.* but that every such *Lease, Gift, Grant, &c.* shall be utterly void to every Intent and Purpose; for when, by Authority of Parliament, the Grants to be made by any Master and Fellows of a College, are made utterly void to all Intents, *&c.* thereby the Master and Fellows are disabled by Parliament to make any Grant; for in every Grant there ought to be (*b*) Grantor, Grantee, and Thing to be granted; and when the Grant of the Thing is made void, thereby the Grantor is disabled to grant it. But (*c*) this Disability is not *simpliciter, sed secundum quid*, for if the Master and Fellows of a College make such Grant, it shall not be avoided by the Master himself, but by his Successor, as it was resolved in this Case, and oftentimes has been resolved before now.

(*a*) 5 Co. 14. a. Carter 13, 16.

(*b*) Perkins Sect. 1. 27 H. 8. 27. b.

(*c*) Hetley 23. Godb. 302. 3 Co. 60. a. 1 Co. 51. a. Co. Lit. 45. a. Cr. El. 207, 816. Cr. Jac. 173. 1 Mod. Rep. 204, 205. Carter 13, 16. 1 Leon. 307. 10 Co. 59. a. 1 Rol. Rep. 152, 154, 159, 163, 169.

The fifth Reaſon is, in Acts of Parliament which are to be conſtrued according to the Intent and Meaning of the Makers of them, the original Intent and Meaning is to be obſerved; and it appears that the Intent of the Maſter and Fellows was, That they would convey the ſaid Houſe to *Benedict Spinola* and his Heirs; and becauſe they could not do it *de directo*, they attempted to do it *ex obliquo*, to grant it to the Queen and her Succeſſors, but upon Condition contained in the ſame Grant, That the Queen, within three Months, ſhould grant the ſaid Houſe to the ſaid *Benedict Spinola* and his Heirs: So that it was endeavoured, That the Queen, who was the Fountain of Juſtice, ſhould thereby be made the Inſtrument of Injury and Wrong, and of a Violation of a pious and excellent Law, which ſhe herſelf, for the Maintenance of Religion, Advancement of Liberal Arts and Sciences, and for Suſtenance of the Poor, had made. And where the Maſter and Fellows were ſeiſed of the ſaid Houſe to them and their Succeſſors for ever, *in jure Collegii pro bono publico*, and to pious and charitable Uſes, now it ſhould be converted for the private Uſe of *Spinola* and his Heirs for ever, *ſicque* (as the Statute of *Carliſle*, *Anno* (*a*) 35 *Ed.* 1. ſpeaks) *Quod olim in uſus pios ad divini cultus augmentum & cætera opera pietatis charitatiſve fuit erogatum, nunc in ſenſum reprobum eſt converſum:* And the Poet doth well reprehend that.

(*a*) 35 E. 1. c. 1. 1 Rol Rep. 167. Hobert 148. 2 Inſt. 585.

——— *Fuit hæc ſapientia quondam,*
Publica privatis ſecernere, ſacra profanis.

And it was reſolved, That the Law will never make an Interpretation to advance a Private and to deſtroy the Publick, but always to advance the Publick, and to prevent every Private, which is odious in Law in ſuch Caſes. And therefore it is well ſaid in *Heydon's Caſe, in the third Part of my Reports, fol. 7. b.* The Office (*b*) of Judges is always to make ſuch Conſtruction as to ſuppreſs the Miſchief and advance the Remedy; and to ſuppreſs ſubtle Inventions and Evaſions for the Continuance of the Miſchief, *& pro privato Commodo*, and to add Force and Life to the Cure and Remedy, according to the true Intention of the Makers of the Act *pro bono publico*. And if it ſhould be lawful for Maſters and Fellows of Colleges, Deans and Chapters, *&c.* to convey to the Queen with ſuch Condition to grant to a Subject, without Queſtion ſuch Conſtruction would tend to the Continuance of the Miſchief *& pro privato Commodo:* And therefore in 17 *Edw.* 3. 59. *b.* The Friers Carmelites, who then had no Place of Habitation, obtained of one *John Merite*, who was ſeiſed of ten Acres of Meadow,

(*b*) Cr. Car. 537. Cro. Argum. 40. 1 Co. 123. a. 2 Syd. 41. 2 Bulſtr. 187. Hob. 97. 1 Rol. Rep. 162, 166. Co. Lit. 381. b.

Poſtea 74. b.

dow, held of the Biſhop of *Wincheſter*, to have the ſaid Acres of Meadow for a Place of Habitation for them; and becauſe *John Merite* could not grant them the ſaid ten Acres by Reaſon of the Statute of Mortmain, by Covin betwixt the ſaid *John Merite* and the Friers Carmelites to toll the Biſhop of his Seigniory (which was the Impediment.) The ſaid *John Merite* (to make an Evaſion out of the Statute of Mortmain) granted the ſaid ten Acres to the King, his Heirs and Succeſſors, whereby the Biſhop's Seigniory would be extinct, to the Intent that the King ſhould grant over the ſame to the Friers Carmelites, which he did accordingly; and becauſe it was by Covin betwixt them, as aforeſaid, to toll the Biſhop's Seigniory, it was adjudged that the ſaid Charter ſhould be repealed, and that the Friers Carmelites ſhould be diſtrained to deliver the Charter to be cancelled: Out of which Caſe five Things were obſerved. 1. That he who makes the King, who is the Fountain of Juſtice, to be the Inſtrument of Fraud and Covin, and thereupon obtains Letters Patents, that they are void, *quia dolus circuitu non tollitur.* 1 Rol. Rep. 169. 2. If the King is endeavoured to be made an Inſtrument to toll the Right of another, and to that End a Man obtains Letters Patents, that ſuch Letters Patents ſhall be repealed. 3. Although ſuch Covin and Fraud was not contained in the Grant made to the King, but appears only by Averment *dehors*, yet the Patent ſhall be repealed. 4. Altho' the Friers Carmelites were of a Profeſſion of Religion, and had not any Habitation before, ſo that it ſeemed to be a Work of Piety and Charity to provide an Habitation for them, yet *Non facias malum, ut inde fiat bonum.* 5. That ſuch Charter, ſo obtained, was adjudged to be repealed by the Common Law; and the like Caſe, 21 *Ed.* 3. 46. *b.* The Maſter and Scholars of *Merton's* Caſe. *Vide Bracton,* Poſtea 74. b. in the Beginning of his ſecond Book, *Nihil aliud poteſt Rex in terris, cum ſit Dei Miniſter & Vicarius quam quod de jure poteſt; & paulo poſt, Itaque poteſtas juris ſua eſt, non injuriæ, &* (obſerve well) *cum ſit author juris, non debet inde injuriarum naſci occaſio, unde jura naſcuntur.* And the *C. J.* Poſtea 74. b. ſaid, That if one who intends to ſell his Land, had by Fraud conveyed it by Deed inroll'd to the Queen, to the Lit. Rep. 186. Intent to deceive the Purchaſer, and afterwards he ſells the Land to another for a valuable Conſideration, and makes a Conveyance accordingly, in that Caſe the Purchaſor ſhall enjoy the Land againſt the Queen by the Statute of 27 *Eliz. cap.* 4. for altho' the Queen is not excepted, yet the Act being general and made to ſuppreſs Fraud, ſhall bind the Queen. So, he ſaid, if Tenant in Tail be ſeiſed of Land, the Remainder over in Tail or in Fee, and he in Remainder knowing the Tenant in Tail will alien the Land, and by Recovery bar his Remainder, to the Intent to deprive the Tenant in Tail of his

Birth-right, and the Power which the Law gives him to bar the Remainder, and on Purpose and with Intent to deceive the Purchasor, grants his Remainder to the Queen by Deed inrolled, and afterwards Tenant in Tail, for a valuable Consideration, aliens the Land by a Common Recovery, and dies without Issue, the Purchasor shall enjoy the Land against the Queen, by the said Statute of (a) 27 *Eliz.* the Words of which are, *That every Conveyance*, &c. *made*, &c. *to the Intent and of Purpose to defraud and deceive any Purchasors*, &c. *shall be deemed only against such Purchasor*, &c. *to be utterly void:* In which Words it is to be observed, that such *former fraudulent Conveyance* made by the Vendor himself, is not only restrained, but generally, That every Conveyance made of Purpose and Intent to deceive a Purchasor, shall be void; and therefore the Conveyance of the Remainder to the Queen, *of Purpose and Intent* to deceive a Purchasor, is directly within the Words and Purview of the Act; and of such Opinion was *Popham*, Chief Justice, openly in the Exchequer Chamber. And the said Cases of (b) 17 *Ed.* 3. 59. *b.* & (c) 21 *Ed.* 3. 46. *b.* are stronger than this is, Where the Party grieved was relieved by the Common Law, forasmuch as the King can't be an Instrument of Fraud and Deceit, *& cum sit author juris, non debet inde injuriarum nasci occasio, unde jura nascuntur. Vide* (d) *Cholmeley's Case, in the second Part of my Reports, fol.* 51, 52. And it was said, That the Law has given the King a great Prerogative above any of his Subjects, that where by (e) Fraud or false Suggestion he is deceived, that he himself, in such Cases, shall avoid his own Grant, *jure Regio*, and that appears, *Anno* 21 *E.* 3. 47. *b. in the Earl of* Kent's *Case, & Stamford prærog' Regis* 84. *a.*

(a) Co. Lit. 3. b.

(b) Antea 73. b. 74. a.
(c) 1 Rol. Rep. 154. Co. Inst. 44. a. 10 Co. 113. b. 11 Co. 87. a. Antea 74. a.
(d) Antea 70. b. 1 Rol. Rep. 167.
(e) Br. Patent 14. Br. Petition 11. Dyer 87. pl. 100. 1 Co. 44. a. 52. a. 2 Rol. 191.

The sixth Reason, That the Statute has made void all Leases, Grants, *&c.* other than for 21 Years, or three Lives, whereupon the accustomed Rent or more is reserved, which being express and demonstrative of these two particular Cases, excludes all others.

And as to all the Cases which have been put on the other Side, it was resolved, 1. That none of them impugn any of these Reasons or Grounds. 2. That where the King has any Prerogative, Estate, Right, Title, or Interest, that by the general Words of an Act he shall not be barred of them, as in the said Case of reasonable Aid, the King has an Estate and Interest in it, and therefore the general Words of the Act of *W.* 1. (f) *cap.* (36) 46, shall not extend to it. Also the King has a Prerogative (g) *quod nullum tempus occurrit Regi*, and therefore the general Acts of Limitations, or of Plenarty, shall not extend to him; so the King, by his Prerogative,

(f) Antea 68. b. 1 Rol. 157.
(g) Co. Lit. 41. b. 90. b. 118. a. 294. b. Hob. 147, 152. Fitz. Rep. 99, 340. 2 Inst. 273, 360. Godb. 207, 305, 312, 317. Plowd. 321. a. Hard. 24, 25. 1 Rol. Rep. 165. Palm. 354, 357. 2 Rol. Rep. 422. 7 Co. 28. a.

Prerogative may ſue in what Court he pleaſes, and of this Prerogative he is not barred by the general Purview of the Act of *Magna Charta*, *cap.* 11. *& ſic de cæteris*. But in the Caſe at Bar, the King is not excluded of any Eſtate, Right, Title, Intereſt or Prerogative, that he had before the Act in the ſaid Houſe; and therefore for all theſe Reaſons it was concluded, That this Act of 13 *Eliz.* ſhould bind the Queen. *Nota* Reader, That the general Statute of 32 *Hen.* 8. *cap.* 36. of Fines for avoiding of Controverſies ſhall bind the King, as appears in the *7th Part of my Reports*, *fol.* 22.

11 Co. 68. b. 1 Roll. Rep. 164. Plowd. 236. b. 240. b. 244. a.

As to the Number of the Leaſes which have been made ſince the Statutes of 13 *Eliz.* by Maſters and Fellows of Colleges, Deans and Chapters, Maſters of Hoſpitals, *&c.* to that it was anſwered, 1. That it was more *ex conſuetudine Clericorum*, who imitated Precedents of Leaſes made before 13, than of any ſage Advice of Men learned in the Law. 2. *Multitudo errantium non parit errori patrocinium.* 3. The Inconvenience is greater, and concerns more Perſons, and in a more high Degree on this Side than on the other; for in the famous Univerſities of *Cambridge* and *Oxford* there are 42 Colleges, beſides the Colleges of *Weſtminſter*, *Wincheſter*, of *Eaton*, *Sion*, *Greſham*, *&c.* 2. There are 24 Deans and Chapters; Archdeaconries 60; Dignities and Prebends in Cathedral Churches 400; Parſonages and Vicarages 8803, and Hoſpitals an exceeding great Number; ſo that to give all theſe, and their Succeſſors, Power from Time to Time for ever, by a Mean, or By-way, to alien the Poſſeſſions of the Colleges, Deans and Chapters, Archdeaconries, Prebends, Parſonages, Vicarages, Hoſpitals, *&c.* which were given to Religious, Pious, Charitable and Publick Uſes, would be of greater Inconvenience and Conſequence than the Deſtruction of certain Eſtates and Leaſes made ſince the Act of 13 *Eliz.* of the Poſſeſſions, either of Eccleſiaſtical Perſons, or of the Poor, originally given for the Maintenance of Works of Piety and Charity, and now transferred to private Perſons, and converted to private Uſes; and the reſtoring of theſe Poſſeſſions to their original Foundation or Endowment, *ſc.* for the Maintenance of Religion, the Advancement of liberal Arts and Sciences, Suſtenance of the Poor, and other Works of Charity, *pro bono publico*. 4. It would tend to the great Prejudice of Archbiſhopricks and Biſhopricks, for if Deans and Chapters ſhould have Power to alien not only their Poſſeſſions, but their Cathedral Churches, where would then be *Cathedra Epiſcopi?* and where would be his Prebendaries *qui præberent auxilium Epiſcopo*, in Conſultation for the ſuppreſſing of Hereſies and Errors, and in the true Inſtruction of Men in Religion, and the Spiritual Worſhip of God committed to their Charge, and in the Celebration

Cro. Arg. 75. Hardr. 98, 342. 4 Co. 94. a.

1 Roll. Rep. 170.

of Divine Service, *&c.* So of Arch-deacons, *&c.* 5. There never was any judicial Opinion in any Court, That the Queen was not bound by the Act of 13 *Eliz.* but on the other Side, it has been often reſolved in the higheſt Court of Juſtice, That Queen *Elizabeth* was bound by the ſaid Act, and therefore it was reſolved in the Parliament held *Anno* 43 *El.* by *Popham* and *Anderſon*, Chief Juſtices, and divers other Juſtices, Aſſiſtants to the Lords in Parliament, That the Queen was bound by the ſaid Act of 13 *Eliz.* which I have reported in my 5*th Book*, *fol.* 14. *in the Caſe of Eccleſiaſtical Perſons*, which Reſolution of the Judges the Lords and Commons in Parliament well allowed of, and therefore in the Act of Confirmations, at the ſame Parliament of Grants, *&c.* made to the Queen, and of Grants made by the Queen (*ſc.* 43 *Eliz. cap.* 1.) in the Clauſe of Grants, *&c.* made to the Queen, there is an Exception in theſe Words, *other than Conveyances or Eſtates heretofore had or made by any Eccleſiaſtical Perſon or Perſons, Bodies Politick or Corporate, not having Power or Ability by the Laws of the Realm, to make the ſame*; by which Words the whole Parliament well approv'd of the ſaid Reſolution of the Judges as to this Point.

Antea 69. b. 1 Roll. Rep. 152, 155, 158, 160, 164, 166. Hob. 97. Carter 13.

Alſo at the Parliament held 1 *Jac.* when the Biſhops Bill was read, to reſtrain them from conveying to the King, *&c.* it was moved by the Right Reverend Archbiſhop *Whitgift*, That Deans and Chapters, and others, having Eccleſiaſtical Living, *&c.* ſhould be reſtrained and inſerted in the ſaid Bill alſo, as well as Archbiſhops and Biſhops: And it was again reſolved by the Juſtices, Aſſiſtants at the ſame Time, That they were reſtrained by the Statute of 13 *Eliz.* from making any Conveyance to the King of any Part of their Poſſeſſions; and ſo it was ſaid it had been reſolved before that Time, and therefore they were omitted in the ſaid Bill, concerning the Diſability of Archbiſhops and Biſhops at the ſame Parliament, *de Anno* 1 *Jac. Regis.* And of what Authority the Reſolution of the Judges Aſſiſtants in Parliament is, appears in 39 *Ed.* 3. 1. *a. b.* The Duke of *Lancaſter*, and *Blanch* his Wife, brought a *Scire facias* againſt the Lady *Latimer*, and a Queſtion was moved concerning the Abatement of the ſaid judicial Writ; and there *Thorp*, Chief Juſtice, informed the Court, That he was in Parliament when ſuch a Queſtion was debated; and there it was reſolved, That the Writ ſhould not abate: To which *Cavendiſh*, Serjeant, ſaid, My Lords, you are our Judges, and we have none other Judges but you, in this Place; alſo that which was reſolved in Parliament is not of Record, and

and if you will adjudge that we ſhall anſwer, we will readily anſwer: To which *Thorp*, Chief Juſtice (who gave the Rule of the Court) ſaid, We who are Judges, may remember it as well as if it was in Writing, and we will not adjudge the Reverſe of what is adjudg'd there, wherefore anſwer; upon which Book the Chief Juſtice ſtrongly rely'd, as well for the Authority of the Reſolution of the Judges in Parliament, as for the Credit of the Report of the Judges. *Nota* Reader, As it is obſerved in the Caſe *de Anno* 43 *Eliz. fol.* 14. the ſaid Act of 13 *Eliz.* has been always conſtrued beneficially, to prevent all Inventions and Evaſions againſt the true Intention of the ſame Act, as appears there by divers Reſolutions there reported: And alſo that it has been often held, that where the Statute ſays Maſter and Fellows of any College, be the College incorporated by the ſame Name, or by the Name of Warden and Fellows, or Warden and Scholars, or Warden, Fellows and Scholars, or by the Name of Maſter, Fellows and Scholars, or Maſter and Scholars, or Provoſt, Fellows and Scholars, or by any other Name of Corporation, and be the College Temporal for the Advancement of Liberal Arts and Sciences, or to educate Youth in good Literature, or meer Eccleſiaſtical, or mixt, every ſuch College is within the Proviſion of this Act; the ſame Law where the Statute ſays, Maſter or Warden of any Hoſpital, be the Hoſpital incorporated by any other Name, or be it a ſole Corporation, or a Corporation aggregate of many, the Statute extends to all Manner of Hoſpitals, *& ſic de cæteris*, for this Act has always had a benign and favourable Conſtruction.

5 Co. 14. b. Palm. 216.

As to the 2d Point, it was reſolved, That the Statute of 18 *Eliz. cap.* 2. has not given any Force or Effect to the ſaid Grant made to the Queen, but that after this Act the Grant remain'd of the ſame Force as it was before this Act; and that for three Reaſons: 1. This Conveyance to the Queen is out of the Words of the Act of 18 *Eliz.* for two Reaſons: 1. Becauſe the Words of the Statute are, *Where ſince the 18th of November, in the firſt Year of her Majeſty's Reign, divers and ſundry Manors, Lands, Tenements, &c. have been conveyed and aſſured to her Highneſs, her Heirs and Succeſſors, by and from divers and ſundry Perſons and Bodies Politick, as well for Satisfaction of great Debts and Sums of Money, as for other good Conſiderations; for the perfect Aſſurance, Confirmation, and further Surety whereof, Be it enacted, That all Feoffments,*

1 Roll. Rep. 154. Antea 67. a. Hard. 72.

Fines, Surrenders, Assurances, Conveyances and Estates, &c. to or for our Sovereign Lady the Queen, her Heirs and Successors, by or from any Person or Persons, Bodies Politick or Corporate of any Manors, Lands, Tenements, &c. for any Debt, Sum or Sums of Money, or other Consideration whatsoever, shall stand, &c. good, &c. so that it appears, That only such Conveyances are established by this Act, which are made for Satisfaction of Debts and Sums of Money, or other good Consideration, which Words in the Preamble are joined to the Body of the Act, for immediately after the same Words, the Statute says, for the perfect *Assurance, &c. whereof, Be it enacted*, and therefore, altho' the Words are in the Body of the Act, *For any Debt, Sum of Money, or other Consideration whatsoever*, omiting (good) before Consideration, yet it is necessarily implied, not only by the said Connection of the Preamble to the Purview, but also is implied in the Word (Consideration) for *Anno* 16 *Eliz. Dyer* 336. *b.* Consideration is described to be a Cause or Occasion meritorious, requiring a mutual Recompence in Fact or in Law, and inasmuch as the said Grant to Queen *Elizabeth* by the said Master and Fellows of the said College, of the said House, was not for any Debt, Sum of Money, nor other good Consideration; for this Cause the said Grant was out of the Letter of the said Act: And it was observed, that the Queen should never pay the said Rent reserved on the said Grant, for the Rent is payable only at the Feast of St. *Michael* the Archangel, and by Force of the said Condition, which is Compulsory, the Queen ought to grant it over by the first Day of *April*, or forfeit her Estate. 2. There was not only an Omission of a good Consideration, but also an Addition of an ill and fraudulent Practice, to make the Queen, who was the Fountain of Justice, to be an Instrument, and that constructively by Condition (which in Truth was against the Honour and Dignity of the Queen) to convey it to a Subject, the said *Benedict Spinola*, and all this to make an Evasion (if possible) out of the said Act of 13 *Eliz.*

Hard. 72. Carter 139, 143. Dyer 336. b. pl. 24.

3. Admitting the said Grant had been for the Satisfaction of a Debt, Sum of Money, or other good Consideration, yet the said Act of 18 *Eliz.* shall not be extended to this Case; for the better Apprehension of which, and for the true Understanding and Construction of the said Act, it must be known, that as to this Purpose there are five Kinds of Disabilities or Imperfections, whereby Deeds, or other Instruments and Conveyances to the Queen, may be impeached. 1. In Respect of the Disability of the Person of the Grantor. 2. By Reason of the Nature of the Thing granted. 3. Of the Estate of the Grantee. 4. Of the Manner of the Grant which has not legal Foundation. 5. In Respect of the Omission of some Circumstance requir'd by Law, but having a firm Commencement or Foundation. As to the

firſt, Perſons are diſabled either by Common Law, or by Act of Parliament; by Common Law, as by Reaſon of Infancy, Profeſſion, Ideocy, *non ſanæ memoriæ*, Coverture, *&c.* Alſo of theſe Diſabilities by Common Law, ſome are abſolute, as Infants or Monks, who can't do any Act which ſhall bind them, but that by Law it may be in Time avoided; and ſome Diſabilities are *ſecundum quid* and not *ſimpliciter*, and therefore if an Ideot, *non compos mentis*, Feme Covert, makes any Conveyance, unleſs it be by Fine or Recovery, they are avoidable: So a Biſhop without the Dean and Chapter, a Parſon or Vicar without the Patron or Ordinary, a Prebendary without the Biſhop, Dean and Chapter, *&c.* and ſuch like, have Power to diſpoſe of their Poſſeſſions during their Incumbency, but not to prejudice their Succeſſors. Diſability by Parliament, as Maſter and Fellows of Colleges, Deans and Chapters, and others named in the ſaid Act of 13 *Eliz.* and now Archbiſhops and Biſhops by the Statute of 1 *Jac. Regis, cap.* 3. all which are diſabled to do any Thing in Prejudice of their Succeſſors. As to the ſecond, in Reſpect of the Nature of the Thing granted, as if the Donee in Tail holds of his Donor by Fealty, and the Donor by Deed enrolled grants Fealty to the King, this Grant is meerly void, becauſe it is an Incident inſeparable to the Reverſion, as it is held in 26 *Aſſ. p.* 66. So if a Founder of a College, *&c.* will grant his Founderſhip to the King by Deed enrolled, it is void, for it is inſeparable to the Blood, as it is held *temp. Hen.* 8. *Brook, Tit.* —— As to the third, in Reſpect of the Eſtate, as if Tenant in Tail of Land by Deed enrolled, grants the Land to the Queen in Fee, it ſhall not bind his Iſſue in Tail in Reſpect of his Eſtate Tail. 4. As to the Manner of the Grant, which has not a legal Foundation, as if a Man ſeiſed of Land in Fee, grants the Land after his Death to the Queen, her Heirs and Succeſſors, or ſuch like, which are againſt the Rules of the Law. 5. As to the Omiſſion of ſome Circumſtance, as if a Man is ſeiſed of Lands in Fee, and by Deed, in Satisfaction of a Debt or Sum of Money, or other good Conſideration, grants it to the Queen, her Heirs and Succeſſors, and this Deed was never enrolled, here was a good Commencement, but it wanted Enrollment.

Co. Lit. 2, 3.

Br. Reſervation 32. Br. Frank. Marriage 5. Br. Grant 74, 140. Br. Incident 10, 33. Br. Tenure 28, 95.

Poſtea 78. a.

For the firſt it muſt be known, That the general Words of the ſaid Act of 18 *Eliz.* ſhall not enable any Perſon to make any Conveyance, who was diſabled by the Common Law; as if an Infant had conveyed Land to the Queen by Deed enrolled, that is not eſtabliſhed by the ſaid Act, becauſe the Perſon of the Infant, during his Minority, was utterly diſabled: So if an Infant had levied a Fine to the Queen before the ſaid Act of 18 *El.* and afterwards the ſaid Act was made, yet

Cr. Jac. 364.

yet the Infant, notwithſtanding the Statute, might reverſe the Fine by Writ of Error; and ſo it was reſolved *M.* 32 & 33 *Eliz.* in *B. R.* by *Wray*, Chief Juſtice, *& totam Curiam*, in *Vaughan*'s Caſe. And the Reaſon thereof is proved by the Rule of our ancient Books, *ſc.* in 22 *E.* 3. *Corone* 276. And it is enacted by the Statute of *W.* 2. *cap.* 12. *Quod ſi appellatus de felonia, &c. ſe acquietaverit, &c. reſtituant hujuſmodi appellatores damna appellatis.* And the Caſe was, That an Appeal of Death was brought againſt a Monk, who was acquitted, and thereupon he prayed his Damages according to the ſaid Act, but (becauſe a Monk was a Perſon diſabled by the Common Law to recover any Damages, and the general Words of the Act do not enable any Perſon who was diſabled by the Law) for this Cauſe it is there held, That he ſhould not have any Damages: The ſame Law as there *tenetur*, if an Appeal be brought againſt a Feme-Covert, and ſhe be acquitted, ſhe ſhall not have Damages, for ſhe is diſabled by the Law to ſue alone. It is enacted by the Statute of *Marlebridge*, *cap.* 6. That the Lord by Knights Service, ſhall not loſe the Wardſhip by Feoffment made by Colluſion, *Verumtamen non licet eis hujuſmodi feoffatos ſine judicio diſſeiſire, ſed brevia habeant de hujuſmodi Cuſtodia ſibi reddenda*; yet if the Tenant enfeoffs the Villain of the Lord upon Colluſion, the Lord may enter and expel him, and ſhall not be put to an Action, as *tenetur* 33 *H.* 6. 16. for the general Words of the Act ſhall not enable the Villain who is diſabled againſt his Lord by the Common Law, and therefore if the Lord brings an Action againſt him, according to the Letter of the Law, he ſhall be enfranchiſed; *à fortiori* in the Caſe at Bar, when the Maſter and Fellows of the ſaid College are diſabled by the Act of Parliament *de anno* 13 *Eliz.* to make a Grant to bind their Succeſſors, the general Words of the Act of 18 *Eliz.* ſhall not enable them to make any Eſtate againſt the ſaid Act of 13 *Eliz.* So if a Biſhop, without the Aſſent of the Dean and Chapter, by Deed inrolled, had granted Land to the Queen, her Heirs and Succeſſors, and afterwards the Stat. of 18 *Eliz.* is made, this Grant is not made good againſt the Succeſſor, for the Perſon of the Biſhop is diſabled to grant it without the Aſſent of the Dean and Chapter, to bind his Succeſſor; and ſo it was reſolved in 23 *Eliz.* as the Lord *Dyer* reports, which I have under his Hand, but the ſame is left out of the printed Book: The ſame Law of a Prebendary, Parſon, *&c.* But know, Reader, That there is a Difference between a general Act, *ſc. by or from any Perſon or Perſons, Bodies Politick or Corporate*, as the ſaid Act of 18 *Eliz.* and an Act which ſpecifies and mentions particular Kinds of Bodies Politick and Corporate, as the Statute of 1 *E.* 6.

1 Rol. Rep. 363. 2 Inſt. 383, 384, 385.

2 Inſt. 638. 22 E. 3. Coron. 276. 9 Co. 73. a.

2 Inſt. 109, 110.

1 *Ed.* 6. *cap.* 14. of Chantries *verſ. finem, by which it is enacted, That every Gift and Grant heretofore made to the late King, and to his Heirs, or to our Sovereign Lord the King that now is, and to his Heirs, by any Archbiſhop, Dean, Archdeacon, Treaſurer, Prebendary, &c. of any Manors, Lands, Tenements, &c. to any of the ſaid Benefices, Prebends, &c. belonging, ſhall be good and effectual in the Law, to all Intents and Purpoſes.* And in *Paſch.* 7 *Reginæ Eliz. inter Wharton & Morly* in the Exchequer, the Caſe was, That a Prebendary of *York*, by Deed indented, granted Parcel of the Poſſeſſions of his Prebend to King *Hen.* 8. his Heirs and Succeſſors, and altho' the Deed was inrolled, and the Grant was made without Aſſent of the Biſhop, Dean and Chapter, That yet the ſaid Grant was adjudged good, becauſe the Prebendary was expreſly named in the Act. 2. If a Grant had been made to the Queen of an inſeparable Incident, as of a Founderſhip, or of the ſaid Services of the Donee in Tail, the Act of 18 *Eliz.* would never make ſuch Grant good, becauſe ſuch Things are not grantable. 3. If Tenant in Tail by Deed grants his Land to the Queen, ſuch Grant is made good againſt the Iſſue in Tail by the ſaid Act of 18 *Eliz.* for the Perſon of the Tenant in Tail is able, and he has Power over the Land; and ſo was it held in *Vaughan's* Caſe: But if Huſband and Wife, by Deed, Grant the Land of the Wife to the Queen, that is not made good by the ſaid Act to bind the Wife after the Coverture, or her Heirs, for there the Perſon of the Feme-Covert is diſabled to convey her Land, unleſs it be by Fine upon due Examination, and ſo alſo was it held in *Vaughan's* Caſe: 4. When the Manner and Compoſition of the Deed is void in Law, as in the Caſe which has been put, If a Man ſeiſed of Lands in Fee by Deed, for a good Conſideration, grants the Land (*a*) after his Death to the Queen, her Heirs and Succeſſors, ſuch Grant is not made good by the general Words of the Act of 18 *Eliz.* and therewith agree 38 *Hen.* 6. 33. *b.* the Abbeſs of *Syon's* Caſe, and *the Earl of Leiceſter's Caſe, Plow. Com.* 400. *&c.* a ſtronger Caſe than this is, (*b*) *Quæ malo ſunt inchoata principio, vix eſt ut bono paragantur exitu. Vide* 4 *Ed.* 4. 31. 12 *Hen.* 4. *Formedon* 15. 5. When the Perſon is able, and has Power over the Land, and the Deed is good and legal, but wants Circumſtance, as Inrollment, or the like, there ſuch Deed is eſtabliſhed, and ſuch Omiſſion ſupplied by the ſaid Act of 18 *Eliz.* for the Act makes the Conveyance good, *according to the true Intent and Purport thereof*; and in ſuch Caſe the Purport of the Deed is ſufficient enough, altho' it was not of any Effect to paſs the Thing.

Cro. Eliz. 24. 1 Leon. 332. 1 Rol. Rep. 152, 170.

Cro. Jac. 264.

(*a*) Antea 77. a. Br. Grant 60. Br. Patent 29. Co. Lit. 48. b. Cro. Eliz. 254. Hob. 171. 2 Rol. 10. 66. Palm. 30. Moor 394, 423, 881. 2 And. 29. 2 Co. 55. b. 5 Co. 94. b. 1 Rol. Rep. 109, 138, 253, 254, 261. 1 Rol. 828. 2 Bulſt. 274, 303. Cr. Jac. 376, 563. Godb. 264, 265.

(*b*) 4 Co. 2. b. 10 Co. 61. b. 62. a. 2 Bulſt. 45, 192. 4 Co. 90. a. Cawley 214.

3. The

3. The ſaid Act of 18 *Eliz.* might have ſome Operation, as this Caſe is upon the ſaid Grant to the Queen, inſomuch as the ſaid Dr. *Kelke*, the Maſter of the ſaid College, was then alive, and the Act of 13 *Eliz.* has diſabled the ſaid Maſter and Fellows, as to the Succeſſors of the ſaid Maſter. And this Point was ſo concluded, *Quod ubi quid generaliter conceditur, ineſt hæc exceptio, ſinon aliquid ſit contra jus faſque.* And the ſaid Act of 43 *Eliz. cap.* 1. has explained and expounded this Act of 18 *Eliz.* as appears before. And *nota* Reader, If the Act of 18 *Eliz.* ſhould make good Conveyances made by Perſons diſabled, it would not make effectual Eſtates made before the Act, but give Liberty within ſeven Years after to make them, which the Statute never intended, for thereupon great Prejudice and Miſchief would enſue.

Co. Lit. 262. a. As to the third general Point, it was reſolved, That the ſaid Fine and Non-claim by five Years, ſhould not bar the Right of the ſaid College for two Reaſons. 1. The Words of the Act of 13 *Eliz.* are, *That all Leaſes, Gifts,* &c. *Conveyances and Eſtates, had, made, done, or ſuffered by any Maſter and Fellows, &c.* So that in the Caſe at Bar, there is a Conveyance and Eſtate *permitted or ſuffered by the Maſter and Fellows of the ſaid College*; and that theſe Words ſhall not be extended only when the Maſter and Fellows ſuffer a Recovery, *&c.* againſt themſelves, as Party thereunto, but generally according to the Letter, when they ſuffer others to levy a Fine with Proclamation, and ſuffer alſo five Years to paſs without Claim; and altho' the Concluſion of the Purview of the Act is, *ſhall be utterly void, and of none Effect, to all Intents, Conſtructions and Purpoſes*; yet by Conſtruction it ſhall be ſo taken, that the ſaid Fine levied with Proclamation, *&c.* ſhall be void and of none Effect, to bind the Right of the Maſter and Fellows of the ſaid Houſe; and it would have been of none Effect to have prohibited them to bar the Right of their Colleges by Conveyances made by the Maſter and Fellows themſelves, and to have left them Power by their Permiſſion, or Sufferance, and Non-claim to bar it; and to that Purpoſe theſe Words, *permitted or ſuffered*, were added. The ſecond Reaſon was, That foraſmuch as the ſaid Eſtate conveyed to Queen *Elizabeth* was of Force, during the Life of Dr. *Kelke*, then Maſter, and that he was alive at the Time of the Fine levied, and all the Proclamations paſſed in his Time, ſo that none could have made an Entry, or Claim, during his Life; and that Dr. *Gooch*, within five Years after his Death, did enter into the ſaid Houſe, claiming it to be the Right of him, and of the Fellows of the ſaid College; for theſe Cauſes alſo it was reſolved, That this Entry has avoided the Fine. *Vide* 19 *Hen.* 8. 6. *Stowel's Caſe. Plow. Com.* 374, 376 *Croft & Howel's Caſe, Plow. Com.* 538.

Antea 69. b.

As

As to the fourth general Point, that was not thought worthy of any Queſtion, for inaſmuch as the ſaid Body Politick, in this Caſe, is a Body Aggregate of many, the Maſter alone can't, by his (*a*) Acceptance, deveſt any Right or Intereſt which is in him and his Fellows, or conclude him (eſpecially it being without (*b*) Deed) to enter into the ſaid Houſe. *Vide* 7 *H.* 7. 9. *b.* 9 *Ed.* (3) 4. 39. 18 *Ed.* 4. 8. *b.* *Plowd. Com.* 91. *b.* *&c.*

(*a*) Raym. 195. 1 Rol. Rep. 172.
(*b*) Br. Treſp. 288. Br. Corporation 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. Br. Baily 1. 12 H. 7. 26. b.

And according to theſe Reſolutions Judgment was given, *quod querens nihil caperit per billam.*

LEWIS

LEWIS BOWLES's *Caſe.*

Paſch. 13 Jacobi 1.

1 Rol. Rep. 177. Raymond 284.

LEWIS BOWLES, Eſq; brought an Action upon the Caſe upon Trover, againſt *Haſeldine Bury* the younger, (which began in the King's Bench, *Hill.* 10 *Jacobi Regis*, *Rot.* 1319.) and declared, That he was poſſeſſed of 30 Cart-loads of Timber, and loſt them, and that they came into the Hands of the Defendant, and that he, 20 *Feb. Anno 9 Jac. Regis*, at *Norton* in the County of *Hertford*, converted them to his own Uſe; and upon Not Guilty pleaded, the Jury gave a Special Verdict to this Effect. *Thomas Bowles*, Eſq; Grandfather of the ſaid *Lewis*, was ſeiſed of the Manor of *Norton-bury* in the ſaid County in Fee, and, 1 *Sept. Anno* 12. by Indenture, betwixt him on the one Part, and *William Hide* and *Leonard Hide* of the other Part, in Conſideration of a Marriage to be had betwixt the ſaid *Thomas Bowles* and *Anne*, Daughter of the ſaid *William Hide*, *&c.* covenanted, that after the ſaid Marriage had and ſolemnized, That the ſaid *Thomas*, his Heirs and Aſſigns, would ſtand ſeiſed of the ſaid Manor of *Norton-bury*, to the Uſe of the ſaid *Thomas* and *Anne*, for the Term of their Lives, without Impeachment of Waſte, and after their Deceaſes, to the Uſe of their firſt Iſſue Male, and to the Heirs Males of ſuch Iſſue lawfully begotten, and ſo over to the 2d, 3d, and 4th Iſſue Male, *&c.* and for want of ſuch Iſſue, to the Uſe of the Heirs Males of the Body of the ſaid *Thomas* and *Anne* lawfully begotten; and for want of ſuch Iſſue, to the Uſe of *Thomas Bowles*, Son and Heir apparent of *Thomas Bowles* the Grandfather, and the Heirs Males of his Body iſſuing, and for want of ſuch Iſſue, to the Uſe of the Heirs of the Body of the ſaid *Thomas* and *Anne* lawfully iſſuing. Which Marriage was ſolemnized accordingly, and the ſaid *Thomas* the Grandfather, and *Anne*, had Iſſue *John*; and afterwards the

the ſaid *Thomas* the Grandfather died without any Iſſue on the Body of *Anne*, but the ſaid *John*; after whoſe Death the ſaid *Anne* entred into the ſaid Manor, and was thereof ſeiſed, with the ſaid Remainder over, as aforeſaid, and afterwards the ſaid *John Bowles* died, and afterwards *Thomas* the Son conveyed by Fine his Remainder to the Uſe of *Lewis Bowles* the Pl. and *Diana* his Wife, and the Heirs Males of his Body; and the ſaid *Anne* being ſo ſeiſed of the ſaid Manor, with the Remainder over as aforeſaid, *viz.* 20 *Feb. An. Reg' Jac. Reg.* 9. (*a*) a Barn, Parcel of the ſaid Manor *per vim ventorum & Tempeſtat' prænitus ſubverſ. & ad terram deject. fuit*, and that the ſaid 30 Cart-loads of Timber, in the Declaration mentioned, were Parcel of the ſaid Barn, and that the ſaid Timber was found and fit for Building, wherefore the Def. as Servant of the ſaid *Anne*, and by her Command took the ſaid Timber and carried it out of the Limits of the ſaid Manor to *Radial*, in the ſame County; and afterwards the ſaid *Anne*, 24 *Feb. Anno 9 Jac. Reg.* made her Laſt Will, and thereof made *Robert Oſborne* and *Leon. Hide*, Knts. her Executors, and died, after whoſe Death the Pl. ſeized the ſaid Timber, and afterward the Def. by the Command of the ſaid Executors, converted it to his Uſe, and if upon the whole Matter the Def. was guilty or not, the Jury prayed the Opinion of the Court.

And in this Caſe two Queſtions were moved. 1. If upon the whole Matter the Wife ſhould be Tenant in Tail after Poſſibility, or that ſhe ſhould have the Privilege of a Tenant in Tail after Poſſibility, *ſc.* to do Waſte, *&c.* 2. Admitting that ſhe ſhould not have the Privilege, *&c.* If the Clauſe of without Impeachment of Waſte, ſhould give her Property in the Timber ſo blown down by the Wind.

And in this Caſe eight Points were reſolved by the whole Court. 1. That (*b*) till Iſſue, *Thomas* the Grandfather and *Anne*, were ſeiſed of an Eſtate Tail executed *ſub modo*, *ſc.* 'till the Birth of the Iſſue Male, and then by the Operation of Law the Eſtates are divided, *ſc. Thomas* and *Anne* become Tenants for their Lives, the Remainder to the Iſſue Male in Tail, the Reverſion to the Heirs Males of *Thomas* and *Anne*, the Remainder over as aforeſaid; for the Eſtate for their Lives is not abſolutely merg'd, but (exiſts) with this implied Limitation 'till they have Iſſue Male. *Vide Chudleigh's Caſe, in the firſt Part of my Reports, fol.* 120. and *Archer's Caſe, fol.* 66. *b.*

2. That Tenant in Tail, after Poſſibility, has a greater Preheminence and Privilege, in Reſpect of the Quality of his Eſtate, than Tenant for Life, but he has not a greater Quantity of Eſtate than Tenant for Life; in Reſpect of the Quality of his Eſtate, it taſtes much of the Quality of an Eſtate in Tail, out of which it is derived; and therefore, 1. (*c*) She ſhall not be * puniſhed for Waſte. 2. She (*d*) ſhall not be compelled to Attorn. 3. She (*e*) ſhall not have Aid.

(*a*) 1 Rol. Rep. 177.
(*b*) 1 Vent. 306, 307, 345. 1 Rol. Rep. 177, 178. 2 Jones 2. 77. 3 Keble 177, 178, 244, 501. 2 Sand. 383, 387. Co. Lit. 28. a. Raym. 58, 249. 1 Rol. Rep. 178.
(*c*) Doct. & Stud. lib. 2. c. 1. Lit. Sect. 34. 12 H. 4. 3. b. 4. a. 10 H. 6. 1. b. 45 E. 3. 25. a. 18 E. 3. 32. b. 11 H. 4. 14. b. 15. a. 11 H. 6. 1. b. 2 Rol. 826, 828. 1 Rol. Rep. 100, 179, 184. Weſt. Symb. 180. b. 9 Co. 139. a. 6 Co. 41. a. 2 Inſt. 306, 302. * 4 Co. 63. a. Co. Lit. 27. b. 1 Rol. Rep. 179. F. N. B. 59. b. 39 E. 3. 16. a. b.
(*d*) Co. Lit. 27. b. 1 Rol. Rep. 179. 1 Rol. 296. 39 E. 3. 16. a. b. 11 H. 6. 1. b. 43 E. 3. 1. a. Br. Attorn. 10. Br. quid juris clamat 1, 6. 46 E. 3. 13. a. Fitz. quid juris clamat 14, 19. 38 E. 3. 20. a. b. 3 E. 4. 11. a. 12 E. 4. 3. a. 2 H. 5. 1. b. 29 E. 3. 1. b.
(*e*) 31 E. 3. Aid 35. 8 H. 6. 25. a. 10 H. 6. 1. b. Fitz. Aid 67. 7 E. 3. 7. a. b. Fitz. monſtrans de faits 9. 26 H. 6. Aid 77. Co. Lit. 27. b. 1 Rol. 167. 39 E. 3. 16. a. b. 2 H. 4. 17. b. Br. Aid 37. 11 H. 4. 15. a. 1 Rol. Rep. 184.

Aid. 4. On (*a*) her Alienation no *Conſimili caſu* lies. 5. After (*b*) her Death no Writ of Intruſion lies. 6. She (*c*) may join the Miſe in a Writ of Right in a ſpecial Manner, *Temp. E.* 1. *Waſt.* 125. 39 *E.* 3. 16. *a. b.* 31 *E.* 3. *Aid.* 35. 43 *E.* 3. 1. *a.* 45 *E.* 3. 22. 46 *E.* 3. 13. *a.* 27. 11 *H.* 4. 15. *a.* 7 *H.* 4. 10. *b.* 2 *H.* 4. 17. *b.* 42 *E.* 3. 22. 3 *E.* 4. 11. *a.* 21 *H.* 6. 56. 10 *H.* 6. 1. *b.* 13 *E.* 2. *Entre Congeable* 56. 28 *E.* 3. 96. *b.* 26 *H.* 6. *Aid* 77. *F. N. B.* 203. 7. In (*d*) an Action brought by her, ſhe ſhall not name herſelf Tenant for Life, 18 *E.* 3. 27. *a.* a Woman brought a *Cui in via, quod clamat tenere ad vitam*, and maintained it in her Count by a Gift in ſpecial Tail to her and her Huſband, and that her Huſband is dead without Iſſue, and the Writ for Variance of the Title abated. 8. In an Action brought againſt her, ſhe ſhall not be named Tenant for Life. *ſc. Quod tenet ad terminum vitæ. Mich.* 39 & 40 *Eliz. Rott.* 3316. *in Communi Banco*, (*e*) *inter Veal & alios quer' & Read def. in quid juris clamat*, and the Note of the Fine ſuppoſed that the Defendant *tenet ad terminum vitæ*, the Def. demanded Oyer of the Writ, and of the Note of the Fine, and had it, and pleaded that he was ſeiſed in Fee, *abſque hoc quod*, the Day of the Note levied *tenuit pro termino vitæ*, and the Jury found that he held as Tenant in Tail after Poſſibility of Iſſue extinct; and it was adjudged *pro Defendente*, for Tenant in Tail, after Poſſibility, ſhall not be in Judgment of Law included in a Writ or Fine, *&c.* within the general Allegation of a Tenant for Life. *Vide* 19 *E.* 3. 1. *b.*

(*a*) 1 Rol. Rep. 179. Co. Lit. 27. b. (*b*) 1 Rol. Rep. 179. Co. Lit. 27. b. (*c*) 1 Rol. Rep. 179. Co. Lit. 27. b. 39 E. 3. 16. b. (*d*) 1 Rol. Rep. 179. Co. Lit. 27. b. Doct. pl. 241. (*e*) 1 Rol. Rep. 179. 46 E. 3. 27. a. b. Cr. El. 671. Noy 74.

But as to the Quantity, he has but an Eſtate for Life, and therefore, if he makes a Feoffment in Fee, (*f*) it is a Forfeiture of his Eſtate, 13 *E.* 2. *Entre Cong.* 56. 45 *Ed.* 3. 22. 28 *E.* 3. 96. *b.* 27 *Aſſ.* 60. *F. N. B.* 159. (*g*) So if Fee or Tail general deſcends or remains to Tenant in Tail after Poſſibility, *&c.* the Fee or Eſtate Tail is executed, 32 *E.* 3. *age* 55. 50 *E.* 3. 4. 9 *E.* 4. 17. *b.* And by the Stat. of *W.* 2. (*h*) he in Reverſion ſhall be received upon his Default, 2 *E.* 2. *Reſceit* 147. 41 *E.* 3. 12. 20 *E.* 3. *Reſcit* —. 38 *Ed.* 3. 33. *Vide* 28 *E.* 3. 96. *b.* 39 *E.* 3. 16. *a. b.* (*i*) And an Exchange betwixt Tenant for Life, and Tenant in Tail, after Poſſibility, is good, for their Eſtates are equal. See 3 *Salk.* 158.

(*f*) 10 H. 6. 2. b. 11 H. 4. 15. a. 43 Aſſ. 24. Br. Forfeiture 88. Br. Aid 37. 1 Rol. Rep. 179. 1 Rol. 851. 45 E. 3. 25. a. Co. Lit. 28. a. Br. Waſt. 43. Br. entre congeable 12. Lit. Sect. 34. 39 E. 3. 16. a. 3 H. 6. 52. a. (*g*) Co. Lit. 28. a. 1 Rol. Rep. 179. 9 E. 4. 18. a. Br. Eſtate 25. Br. Tenant per Curteſy 4. (*h*) 1 Rol. Rep. 179. Co. Lit. 28. a. (*i*) Co. Lit. 28. a. 1 Rol. Rep. 179. (*k*) 1 Rol. Rep. 185. Co. Lit. 28. a.

3. It was reſolved, That the Eſtate of a Tenant in Tail, after Poſſibility, ought to be a Remnant and Reſidue of an Eſtate Tail, and that by the Act of God, and not by the Limitation of the Party, (*k*) *diſpoſitione legis*, and not *ex proviſione hominis*: And therefore, if a Man makes a Gift in Tail upon Condition, That if he does ſuch an Act, that he ſhall have but for Life, he is not Tenant in Tail after Poſſibility of Iſſue extinct, for that is *ex proviſione hominis*, and not *ex diſpoſitione legis*; but it ought to be the Remnant and Reſidue of an Eſtate Tail, and that by the Act of God and the Law, *ſc.* by the Death of one Donee without Iſſue, *Litt.* 6. *b. Doct. & Stud. lib.* 2. *cap.* 1. *fol.* 61.

2 *H.* 4.

2 *H.* 4. 17. *b.* 26 *H.* 6. *Aid* 77. If Tenants in ſpecial Tail recover in Aſſiſe, and afterwards one dies without Iſſue, and afterwards he who ſurvives (who is Tenant in Tail after Poſſibility) is re-diſſeiſed, he ſhall have a re-diſſeiſin, for it is the ſame Freehold he had before, for it is Parcel of the Eſtate Tail: And becauſe the Wife in the Caſe at Bar had the Eſtate for Life by Limitation of the Party, and the Eſtate which ſhe had in the Remainder, *ſ.* Of the Tenancy in Tail after Poſſibility, was not a larger Eſtate in Quantity, and therefore could not merge the Eſtate for Life, as has been ſaid before, for this Cauſe the Wife was not Tenant in Tail after Poſſibility. Co. Lit. 154. b.

4. It was reſolved, That in this Caſe the Wife ſhould have the (*a*) Privilege of a Tenant in Tail after Poſſibility for the Inheritance which was once in her; for now when *John* the Iſſue Male is dead, the Privilege which ſhe had in Reſpect of the Inheritance which was in her in Remainder ſhall not be loſt. And there is no Queſtion but a Woman may be Tenant in Tail after Poſſibility of a Remainder as well as of a Poſſeſſion; and therefore if a Leaſe for Life is made, the Remainder to Huſband and Wife in ſpecial Tail, the Huſband dies without Iſſue, now is the Wife Tenant in Tail after Poſſibility of this Remainder; and if the Tenant for Life ſurrenders to her, as he may (for the Life of him in the Remainder is higher than the other Life) now is ſhe Tenant in Tail after Poſſibility in Poſſeſſion: And like this Caſe (*b*) if the Father is enfeoffed to him and his Heirs with Warranty, and the Father enfeoffs the Son, *&c.* and dies; in this Caſe the Son, altho' he has the Land by Purchaſe, yet he ſhall take the Benefit of the Warranty as Heir, for he can't vouch as Aſſignee, and the Warranty betwixt the Father and him is loſt, as it is adjudged in 43 *E.* 3. 23. *b.* So here, altho' the Wife can't claim the Eſtate of Tenant in Tail after Poſſibility, yet ſhe may claim the Privilege and Benefit of it. And it was obſerv'd, That Tenant in ſpecial Tail at the Common Law had a limited Fee-ſimple, and when their Eſtate was changed by the Statute *de Donis conditional'*, yet there was not any Change of their Intereſt in doing of Waſte: So when by the Death of one Donee without Iſſue the Eſtate is changed, yet the Power to commit Waſte, and to convert it to his own Uſe, is not alter'd nor chang'd for the Inheritance which was once in him, *Vide Hill.* 2. *Jac. Rot.* 229. *inter* (*c*) *Brooke & Rogers, in Communi Banco*, if a Timber Tree becomes *arida, ſicca, non portans fructus, nec folia in æſtate, nec exiſtens maeremium*, yet becauſe it was once an Inheritance, *&c.* no Tithes ſhall be paid for it, for that the Quality remains, altho' the State of the Tree is altered.

(*a*) Co. Lit. 128. a. 1 Rol. Rep. 178.

(*b*) 2 Rol. 742. 1 Co. 98. 1 Rol. Rep. 180. Co. Lit. 384. b.

(*c*) Moor 908. 2 Inſt. 645. 1 Rol. Rep. 100. 1 Rol. 640. Cr. Jac. 100. Antea 48. b. 49. a. Doct. & Stud. 175. b.

(a) Cr. Car. 242, 274. 2 Rol. 119.

5. That if (*a*) Tenant for Life or for Years fells Timber, or pulls down the Houſes, the Leſſor ſhall have the Timber; and becauſe this Point was reſolved in this Court upon a ſolemn Argument in (*b*) *Liford*'s Caſe laſt *Mich.* Term, which *vide* before in this Book, I will make the ſhorter Report. 1. It is apparent in Reaſon, That the Leſſee had them but as Things annex'd to the Soil, and therefore it would be abſurd in Reaſon, that when by his Act and Wrong he ſevers them from the Land, that he ſhould gain a greater Property in them than he had by the Demiſe. 2. It (*c*) is without Queſtion (as it is reſolved in the ſaid Caſe) That the Leſſor has the general Ownerſhip and Right of Inheritance in the Houſes and Timber-Trees, and the Leſſee has but a particular Intereſt, and therefore be they pull'd down or fell'd by the Leſſee or any other, or by Wind or Tempeſt blown down, or by any other Means disjoined from the Inheritance, the Leſſor ſhall have them in Reſpect of his general Ownerſhip, and becauſe they were his Inheritance; and as to that the Reſolutions in *Herlakenden*'s *Caſe, in the 4th Part of my Reports, fol. 63. a.* were affirmed for good Law, and *Paget*'s *Caſe in the fifth Part of my Reports, fol. 76. b.* for altho' he can't puniſh them in an Action of Waſte at the Common Law becauſe it was his own Act, and in his Leaſe he has not made Proviſion by Covenant or Condition; yet the Inheritance and general Ownerſhip remains in the Leſſor, and the Leſſee (as hath been ſaid) has but a ſpecial Intereſt in the Houſes and Timber-Trees ſo long as they are annex'd to the Land, and this appears by the Statute of (*d*) *Marlebridge, c. 23. Item firmarii vaſtum, &c. non facient, niſi ſpecialem inde habuerint conceſſionem per ſcriptum conventionis, mentionem faciens quod hoc facere poſſint*, whereby it appears, That the Leſſees for Life or Years, which then were, could not rightfully fell the Trees, or pull down the Houſes unleſs the Leſſor had granted by Deed to do it. In which it was alſo obſerved, That at the Time of the making of the ſame Act, the ſaid Clauſe of *without Impeachment of Waſte* was in Uſe, which proves that it was to ſuch Purpoſe that the Leſſee might commit Waſte, and diſpoſe it to his own Uſe, which he could not do without ſuch Clauſe. 3. Every Leſſee for Life and Years ought by the Law to do Fealty upon his Oath, and it would be againſt his Oath to waſte the Houſes and Timber-Trees. And *nota* Reader, upon this Stat. of *Marlebridge* lies a Prohibition of Waſte againſt the Leſſee for Life, and Leſſee for Years, to prohibit them that they ſhall not do Waſte before any Waſte was done, as it was (*e*) againſt Tenant in Dower, and Tenant by the Courteſy at the Common Law.

(*b*) Antea 48. a.

(*c*) Cr. Car. 243. Antea 48. b. Cr. Car. 242. Moor 19. Palmer 327. 5 Co. 76. b. 4 Co. 62, 63. 2 Rol. Rep. 181.

4 Co. 62. b. Dr. & Stud. l. 2. c. 1.

(*d*) 1 Rol. Rep. 382. 2 Inſt. 144, 145, 302.

(*e*) 2 Rol. 813. Co. Lit. 53. b. 2 Inſt. 145. 4 Co. 62. b. 14 H. 8. 6. a. 13 H. 7. 20. b.

Vide

Vide Bract. 316. the Judgment in Waſte at the Common Law. Tenant in Dower or by the Courteſy have as high an Eſtate as Leſſee for Life, and it appears that it was not lawful for Tenant by the Courteſy or in Dower to do Waſte, *Ergo* no more for Tenant for Life: The only Difference was, That a Prohibition of Waſte laying againſt Tenant in Dower, and by the Courteſy, at the Common Law, and not againſt the Leſſees 'till the ſaid Statute of *Marl.* And to prove what Intereſt the Leſſee for Life has in the Trees at the Common Law, it appears by *Bracton*, (who wrote before the Stat. of *Glouc'*) *lib.* 4. *tract. de aſſiſa novæ diſ. c.* 4. *f.* 217. *Si quis vaſtum fecerit, vel deſtructionem in tenemento quod tenet ad vitam ſuam, in eo quod modum excedit, & rationem, cum tantum conceditur ei rationabile eſtoverium, facit tranſgreſſionem, & ſi talis impediatur, ille tenens aſſiſam non habebit, intentio talis liberabit a diſſeiſina, quia in eo quod tenens abutitur male utendo, & debitum uſum & modum debitum excedendo, non poteſt dicere quod diſſeiſitus eſt, quia tantum rationabilis uſus ei conceditur*; which proves directly, That it was a Wrong in the Leſſee for Life to do Waſte, or Deſtruction at the Common Law. And it was reſolved, if an Houſe falls down (*a*) *per vim Venti* in the Time of ſuch Leſſee for Life or for Years, or in the Time of the Tenant in Dower, or Tenant by the Courteſy, *&c.* that ſuch particular Tenants have a ſpecial Property in the Timber to rebuild the like Houſe as the other was for his Habitation: As if they fell a Tree for Reparation, they have a ſpecial Property to that Purpoſe in it, and therewith agree (*b*) 44 *E.* 3. 5. *b.* 44 *E.* 3. 44. *b.* 29 *E.* 3. 3. and 10 *E.* 4. 3. *a.* But the ſaid particular Tenants cannot give or ſell the Tree ſo fell'd, for the general Property is in the Leſſor; and therefore, *Lit. f.* 15. (*c*) holds, That if I bail Goods to another to manure his Land, now he has a ſpecial Property in them to that Purpoſe; and in that Caſe, if he kills them, a general Action of Treſpaſs lies againſt him. See 11 *H.* 4. 17. *a.* & 23. *b.*

(*a*) 1 Co. 63. a. Co. Lit. 53. a.

(*b*) Cr. El. 784. 11 Co. 47. a. 1 Rol. Rep. 181. 2 Rol. 556. 5 Co. 13. b. Cr. Car. 274.

(*c*) Sect. 71. Co. Lit. 57. a.

6. The Preheminence and Privilege * which the Law gives to Houſes which are for Men's Habitation was obſerved. Firſt an Houſe ought to have the Priority and Precedency in a *Præcipe quod reddat* before Land, Meadow, Paſture, Wood, *&c.* F. N. B. 2. *&c.* for his Houſe is his Caſtle, & (*d*) *domus ſua eſt unicuique tutiſſimum refugium.* 2. (*e*) The Houſe of a Man has Privilege to protect him againſt Arreſt by Virtue of Proceſs of Law at the Suit of a Subject, *Vide Semaine's Caſe, in the fifth Part of my Reports, fo.* 91. *b.* 3. It has Privilege againſt the King's Prerogative, for it was reſolv'd by all the Judges, *Mic.* (*f*) 4 *Jac.* That thoſe who dig for Salt-peter, ſhall not dig in the Manſion-houſe of any Subject without

* See 6 Mod. 105. &c. ibid.

(*d*) 5 Co. 31. b. Co. Lit. 4. a. 1 Rol. Rep. 182. 3 Inſt. 162.

(*e*) 5 Co. 92. b. 4 Inſt. 177. Hob. 62, 263, 264. Cr. Jac. 486, 556. 1 Jones 429. Cr. Car. 437, 438. March. 3, 4.

1 Brownl. 50. Yelv. 28, 29. Cr. El. 908. Moor 668. 18 E. 2. Execution 252. contra. 4 Leon 41. 11 E. 4. 9. a. 18 E. 4. 4. a. Br. Execution 100. Br. Treſpaſs 390. 1 Bulſtr. 146. Ben. 122. (*f*) 1 Rol. Rep. 182. 12 Co. 13.

without his Aſſent, for then he, or his Wife or Children, cannot be in Safety in the Night, nor his Goods in his Houſe preſerv'd from Thieves and other Miſ-doers. 4. He who kills a Man *ſe defendendo* (*a*) or a Thief who would rob him in the Highway, by the Common Law ſhall forfeit his Goods, but he who kills one that would rob and ſpoil him in his Houſe, ſhall forfeit nothing. 3 *E.* 3. *Corone* 330. *&* 26 *Aſſ.* 23. *&c.* 5. If there be two Joint Tenants of a Wood, or Arable Land, the one has no Remedy againſt the other to make Incloſure or Reparations for Safeguard of the Wood, or Corn, but if there be two Joint Tenants of an Houſe, the one ſhall have a Writ *de reparatione faciendâ*, againſt the other, and the Words of the Writ are *ad reparationem & (b) ſuſtentationem ejuſdem domus tenetur*, *F. N. B.* 127. *a. b.* (*c*) If a Man is in his Houſe, and hears that others will come to his Houſe to beat him, he may call together his Friends, *&c.* into his Houſe to aid him in Safety of his Perſon; for as it has been ſaid, A Man's Houſe is his Caſtle and his Defence, and where he properly ought to remain: But if a Man be (*d*) threatned if he comes to ſuch a Fair or Market that he ſhall be beaten, in that Caſe he cannot make ſuch Aſſembly, but he ought to have Remedy by Surety of the Peace. 21 *H.* 7. 39. *a.*

(*a*) 5 Co. 91. b. Coron. 192. 3 E. 3. Coron. 205, 330. Br. Cor. 100. 1 Rol. Rep. 182. 5 Co. 91. Stamf. pl. Cr. 14. a. 3 Inſt. 56. Exod. 22. v. 2. 22 H. 8. c. 5. 6 Mod. 312. 1 Salk. 360.

(*b*) Co. Lit. 54. b. 1 Rol. Rep. 182. 5 Co. 91. b.

(*c*) 21 H. 7. 39. a. Br. Riots, &c. 1. Fitz. Treſp. 246. 6 Mod. 210.

(*d*) 1 Rol. Rep. 182. 5 Co. 91. b.

(*c*) 7. The Clauſe of *without Impeachment of Waſte* gives a Power to the Leſſee, which will produce an Intereſt in him, if he executes his Power during the Privity of his Eſtate; and therefore to examine it in Reaſon. 1. Theſe (*f*) Words *abſque impetitione vaſti*, are as much as to ſay, without any Demand for Waſte, for *impetitio* is derived from *in* and *peto*, and *petere* is to demand, and *petitio* is a Demand, and *ſine impetitione* is without any Manner of Demand or Impeachment: Then this Word *Demand* is of a large Extent, (*g*) for if a Man diſſeiſes me of my Land, or takes my Goods, if I releaſe to him all Actions, yet I may enter into the Land, or take my Goods, as *Lit.* holds, *f.* 115. and therewith agree 19 *Aſſ.* 3. 19 *H.* 6. 4. *b.* 21 *H.* 7. 23. *b.* 30 *E.* 3. 19. for by the Releaſe of the Action, the Right or Intereſt is not releaſed, but if in ſuch Caſe I releaſe (*h*) all Demands, that will bar me, not only of my Action, but alſo of my Entry and Seiſure, and of the Right of my Land, and of the Property of my Goods; as it was reſolved in *Chauncy*'s Caſe, 34 *H.* 8. *Br. Releaſe* 90. (*i*) 2 *H.* 7. 6. *b.* the King made one Sheriff *ſine computo*, thereby he ſhall have the Revenues which belong to his Office to collect to his own Uſe. But if the Words had been (*k*) *abſque impetit' vaſti per aliquod breve de vaſto*, then the Action only would be diſcharged, and not the Property in the Trees, but that the Leſſor after the

(*e*) 1 Rol. Rep. 182. Moor 18, 327. 2 Inſt. 146. Hob. 132. lib. 4. 5. 63. a. Poph. 193, 194, 195.

(*f*) Latch. 269, 270. Bridgm. 102. Dyer 27. pl. 11. b. 2 Co. 23. a. 73. a. pl. 135. b. Cr. Jac. 216. 2 Rol. 835. 2 Inſt. 146. 9 Co. 9. a. 2 Rol. Rep. 325. Hetl. 77. Moor 310.

(*g*) Lit. f. 119. S. 496, 497. 3 Co. Lit. 386. a. b. 4 Co. 63. a. 1 Rol. Rep. 184.

(*h*) 1 Rol. Rep. 184. 8 Co. 154. a.

(*i*) 1 Rol. Rep. 183. Br. Patent, 45, 139.

(*k*) Co. Lit. 220. a. 2 Inſt. 146. 1 Rol. Rep. 184. Cr. Car. 274.

Fall

Fall of them might ſeiſe them: And this Difference appears in 3 *E.* 3. 44. *a. b.* in (*a*) *Walter Idle*'s Caſe, where a Leaſe was made without being impeached, or impleaded for Waſte, upon which it was collected that theſe Words *without being impleaded*, without theſe Words *without* (*b*) *being impeached for Waſte*, were not ſufficient to bar the Leſſor of his Property, and that if the Leſſor had granted that the Leſſee might do Waſte, he thereby had Power not only to do Waſte, but alſo to convert it to his own Uſe; and that the Words of the ſaid Act of *Marlebridge*, and the Statute *de* (*c*) *prærogativa Regis*, *c.* 16. do prove, where it is ſaid, That the King ſhall have *annum*, *diem*, *& vaſtum*, *ſc.* which is as much as to ſay, that he ſhall have the Trees, *&c.* at his own Diſpoſition.

(*a*) 8 Co. 76. b. Poph. 194.

(*b*) 1 Rol. Rep. 184. Hob. 132.

(*c*) 1 Rol. Rep. 182.

2. It was ſaid, that the continual and conſtant Opinion of all Ages was, That thoſe Words gave (*d*) Power to the Leſſee to do Waſte to his own Uſe, and it would be dangerous now to recede from it, and as it is ſaid in 38 *E.* 3. 1. *a.* by the Judges (ſo we ſay in this Caſe) we will not change the Law which has been always uſed; and it is well ſaid in 2 *H.* 4. 18. *b.* It is better that there ſhould be a Defect, than that the Law ſhould be changed; (*e*) and the Opinion of *Wray* Ch. Juſt. and *Manwood*, cited in *Herlakenden*'s Caſe, was not Judicial but *prima facie* upon an Arbitrament without any Argument, and perhaps upon the Sight of (*f*) 27 *H.* 6. *Waſte* 8. and therefore, altho' the C. J. argued in this Caſe, againſt their Opinions, yet it was with great Reverence to them, ſaying with *Ariſtotle* in the like Caſe, *Amicus Plato*, *amicus Socrates*, *ſed magis amica veritas*; and *Qui non libere veritatem pronunciat*, *proditor veritatis eſt.* And the Truth of this Caſe appears by *Littleton in his Chapter of Conditions*, *f.* 82. (*g*) where he puts this Caſe, If a Feoffment be made upon ſuch Condition, That the Feoffee ſhall give the Land to the Feoffor, and to the Wife of the Feoffor, To have and to hold to them and to the Heirs of their two Bodies begotten, the Remainder to the right Heirs of the Feoffor; in that Caſe if the Huſband dies, living the Wife, before any Eſtate in Tail made to them, then ought the Feoffee by the Law to make an Eſtate to the Wife as near the Condition and as near the Intent of the Condition as he can make it, *ſc.* to Leaſe the Land to the Wife for Term of her Life without Impeachment of Waſte, the Remainder to the Heirs of the Body of her Huſband on her begotten, the Remainder to the right Heirs of the Huſband; and the Reaſon why the Leaſe ſhall be made in this Caſe to the Wife without Impeachment of Waſte, is (as *Littleton* there ſays) becauſe the Condition is, That the Eſtate ſhall be to the Huſband and his Wife in Tail, and if ſuch Eſtate had been

(*d*) Dyer 184. pl. 63. 1 Rol. Rep. 183. Co. Lit. 220. a. Hob. 132.

(*e*) 1 Rol. Rep. 183. 4 Co. 63. a. Dyer 148. pl. 63.

(*f*) Poph. 194.

(*g*) Sect. 352. Co. Lit. 218. b. 219. a. 1 Rol. Rep. 183.

made in the Life of the Huſband, then after the Death of the Huſband ſhe had had an Eſtate in Tail, which Eſtate is without Impeachment of Waſte, and ſo it is reaſonable that a Man ſhould make an Eſtate as near the Intent of the Condition as he can, which Caſe directly proves, That Tenant for Life without Impeachment of Waſte has as great a Power to do Waſte and to convert it at his own Pleaſure, as Tenant in Tail had. That theſe Words without Impeachment of Waſte, are ſufficient Words to give Tenant for Life ſuch Power, *Vide* (*a*) 2 *H.* 4. 5. *b. and the L.* Cromwel's *Caſe in the* 2*d Part of my Reports*, *f.* 81. *a. b.* 82. *a.* and for this Clauſe of without (*b*) Impeachment of Waſte, 3 *E.* 3. 44. 8 *E.* 3. 34. *a. b.* 35. *a.* 24 *E.* 3. 32. 43 *E.* 3. 5. *a.* 5 *H.* 5. 8. 27 *H.* 6. *Waſt.* 8. 4 *E.* 4. 36. *a.* 20 *H.* 7. 10. 28 *H.* 8. *Dyer* 10. and ſo the *Quære* in the ſaid Book of 27 *H.* 6. well reſolved. And ſee the Opinion of *Statham* in abridging the ſaid Book againſt it. (*c*) But the ſaid Privilege of without Impeachment of Waſte, is annexed to the Privity of Eſtate, 3 *E.* 3. 44. by *Shard* and *Stone:* If one who has a particular Eſtate without Impeachment of Waſte, changes his Eſtate, he loſes his Advantage, 5 *H.* 5. 9. *a.* If a Man makes a Leaſe for Years, without Impeachment of Waſte, and afterwards he confirms the Land to him for his Life, now he ſhall be charged for Waſte, 28 *H.* 8. *Dyer* (*d*) 10. *b.* If a Leaſe is made to one for the Term of another's Life, without Impeachment of Waſte, the Remainder to him for his own Life, now he is puniſhable for Waſte, for the firſt Eſtate is gone and drowned, ſo of a Confirmation. It was adjudged in *Ewen's* (*e*) Caſe, *Mich.* 28 & 29 *Eliz.* That where Tenant in Tail after Poſſibility of Iſſue extinct granted over his Eſtate, that the Grantee was compell'd in a *Quid juris clamat* to attorn, for by the Aſſignment ſuch Privilege is loſt; and that Judgment was affirmed in the King's Bench, in a Writ of Error, and therewith agrees (*f*) 27 *H.* 6. *Aid* in *Statham*. *Vide* 29 *E.* 3. 1. *b.* The Heir at Common Law ſhould have a Prohibition of Waſte againſt Tenant in Dower, but if the Heir granted over his Reverſion, his Grantee ſhould not have a Prohibition of Waſte; for it appears in the *Regiſter* 72, that ſuch Aſſignee in an Action of Waſte againſt Tenant in Dower ſhall recite the Statute of *Glouc'*, *ergo*, he ſhall not have a Prohibition of Waſte at Common Law, for then he ſhould not recite the Stat. *vide F. N. B.* 55. *c.* 14 *H.* 4. 3. 5 *H.* 5. (7.) 17. *b.*

Laſtly it was reſolved, That the ſaid Woman by Force of the ſaid Clauſe of without Impeachment of Waſte, had ſuch Power and Privilege, That tho' in the Caſe at Bar no Waſte be done,

(*a*) Fitz. Condition 5. Br. Condit. 33. (*b*) 2 H. 7. 15. a. Plow. 241. a. 21 H. 6. 47. 2. 28 H. 8. Dyer 20. pl. 37. 20 H. 7. 4. a. 21 H. 7. 24. 2. Perk. Sect. 721. 22 H. 7. 31. a. 2 Co. 23. b. 9 Co. 9. a. Co. Lit. 220. a. 3 Bulſtr. 136. 9 H. 6. 35. 2. Fitz. Waſt. 39. Plow. 135. b. 19 H. 6. 63. b. 10 H. 7. 3. a. 21 H. 7. 24. a. 16 H. 7. 4. b. 2 Rol. Rep. 325. Popham 193, 195. (*c*) 1 Rol. Rep. 183. Co. Lit. 28. 2. Moor 327. 8 Co. 76. b. Br. Waſt. 71. Latch. 269. (*d*) Dyer 10. pl. 37. 5 Co. 23. a. 1 Bulſtr. 136. 8 Co. 76. b. 19 H. 6. 23. 2. Poph. 194. Latch. 269. (*e*) 1 Rol. Rep. 179. Co. Lit. 316. a. 28. a. 2 Inſt. 302. (*f*) Co. Lit. 28. a. Dyer 284. pl. 63. Moor 328. Poph. 194. Latch. 269. 2 Rol. Rep. 183.

done,

done, becauſe the Houſe was blown down *per vim ventî* without her Fault, yet ſhe ſhould have the Timber which was Parcel of the Houſe, and alſo the Timber Trees which are blown down with the Wind, and when they are ſevered from the Inheritance either by the Act of the Party, or of the Law, and become Chattels, the whole Property of them is in the Tenant for Life, by Force of the ſaid Clauſe of, without Impeachment of Waſte. And for this Cauſe Judgment was given *per omnes Juſticiarios una voce, Quod Querens nihil caperet per billam.*

Moor 321, 327. Poph. 193. 1 Rol. Rep. 182, 184. Co. Lit. 220. a.

[*Ante* 82. *b.* where an Officer, *&c.* may break a Houſe to execute Proceſs, *&c.* and where not. See 6 *Mod.* 105. and the Caſes there cited.]

The CASE *of the* MONOPOLIES.

Trin. 44 Eliz.

See Skin. 133, 169, &c. Carthew. 270. Lucas 131. Moor 671. Noy 173. 3 Inſt. 181. 8 Co. 125. 2. 2 Inſt. 47. 3 Keb. 269. Hob. 212.

EDward Darcy, Eſq; a Groom of the Privy Chamber to Queen *El.* brought an Action on the Caſe againſt *T. Allein* Haberdaſher of *London*, and declar'd, That Queen *Elizabeth*, 13 *Junii*, *Anno* 30 *Eliz.* intending that her Subjects being able Men to exerciſe Huſbandry, ſhould apply themſelves thereunto, and that they ſhould not employ themſelves in making playing Cards, which had not been any antient manual Occupation within this Realm, and that by making ſuch a Multitude of Cards, Card-playing was become more frequent, and eſpecially among Servants and Apprentices, and poor Artificers; and to the End her Subjects might apply themſelves to more lawful and neceſſary Trades; by her Letters Patents under the Great Seal of the ſame Date granted to *Ralph Bowes*, Eſquire, full Power, Licence and Authority, by himſelf, his Servants, Factors and Deputies, to provide and buy in any Parts beyond the Sea, all ſuch playing Cards as he thought good, and to import them into this Realm, aud to ſell and utter them within the ſame, and that he, his Servants, Factors and Deputies, ſhould have and enjoy the whole Trade, Traffick and Merchandize of all playing Cards: And by the ſame Letters Patents further granted,

granted, That the ſaid *Ralph Bowes*, his Servants, Factors and Deputies, and none other ſhould have the making of Playing Cards within the Realm, to have and to hold for twelve Years; and by the ſame Letters Patents, the Queen charged and commanded, That no Perſon or Perſons beſides the ſaid *Ralph Bowes*, &c. ſhould bring any Cards within the Realm during thoſe twelve Years; nor ſhould buy, ſell, or offer to be ſold within the ſaid Realm, within the ſaid Term, any Playing Cards, nor ſhould make, or cauſe to be made any Playing Cards within the ſaid Realm, upon Pain of the Queen's higheſt Diſpleaſure, and of ſuch Fine and Puniſhment as Offenders in the Caſe of voluntary Contempt deſerve. And afterwards the ſaid Queen, 11 *Aug. Anno* 40 *Eliz.* by her Letters Patents reciting the former Grants made to *Ralph Bowes*, granted the Plaintiff, his Executors and Adminiſtrators, and their Deputies, *&c.* the ſame Privileges, Authorities, and other the ſaid Premiſſes, for twenty-one Years after the End of the former Term, rendring to the Queen 100 Marks *per Annum*; and further granted to him a Seal to mark the Cards. And further declared, That after the End of the ſaid Term of twelve Years, *ſ.* 30 *Junii*, *An.* 42 *Eliz.* the Plaintiff cauſed to be made 400 Groſſes of Cards for the neceſſary Uſes of the Subjects, to be ſold within this Realm, and had expended in making them 5000 *l.* and that the Defendant knowing of the ſaid Grant and Prohibition in the Plaintiff's Letters Patents, and other the Premiſſes, 15 *Martii*, *Anno* 44 *Eliz.* without the Queen's Licence, or the Plaintiff's, *&c.* at *Weſtminſter* cauſed to be made 80 Groſſes of Playing Cards, and as well thoſe, as 100 other Groſſes of Playing Cards, none of which were made within the Realm, or imported within the Realm by the Plaintiff, or his Servants, Factors or Deputies, *&c.* nor marked with his Seal, he had imported within the Realm, and them had ſold and uttered to ſundry Perſons unknown, and ſhewed ſome in certain, wherefore the Plaintiff could not utter his Playing Cards, *&c. Contra formam prædict' literar' patentium, & in contemptum dictæ Dominæ Reginæ,* (*a*) whereby the Plaintiff was diſabled to pay his Farm, to the Plaintiff's Damages. The (*b*) Defendant, except to one Half Groſs pleaded Not guilly, and as to that pleaded, That the City of *London* is an antient City, and that within the ſame, from Time, whereof, *&c.* there has been a Society of Haberdaſhers, and that within the ſaid City there was a Cuſtom, *Qd' quælibet perſona de Societate illa, uſus fuit & conſuevit emere, vendere,*

(*a*) 1 Roll. 106.

(*b*) Moor 672. Noy 173.

(a) Doctrin. placit. 56.

vendere, & libere (a) *merchandizare omnem rem & omnes res merchandizabiles infra hoc Regnum Angliæ de quocunque, vel quibuscunque personis, &c.* and pleaded, That he was *Civis & liber homo de Civitate & Societate illa*, and sold the said Half Gross of Playing Cards, being made within the Realm, *&c.* as he lawfully might; (b) upon which the Plaintiff demur'd in Law.

(b) Moor 671. Noy 174.

And this Case was argued at the Bar by *Dodderidge*, *Fuller*, *Fleming* Solicitor, and *Coke* Attorney General, for the Plaintiff, and by *Crook*, *G. Altham* and *Tanfield* for the Defendant: And in this Case two general Questions were moved and argued at the Bar, arising upon the two distinct Grants in the said Letters Patents, *viz.* 1. If the said Grant to the Plaintiff of the sole making of Cards within the Realm was good or not? 2. If the Licence or Dispensation to have the sole Importation of Foreign Cards granted to the Plaintiff, was available or not in Law? To the Bar, no Regard was had, (c) because it was no more than the Common Law would have said, and then no such *Particular Custom* ought to have been alledged, for *In his quæ de jure communi omnibus conceduntur, consuetudo alicujus patriæ vel loci non est alleganda*, and therewith agrees (d) 8 *E.* 4. 5. *a.* &c. And altho' (e) the Bar was held superfluous, yet that shall not turn the Defendant to any Prejudice, but that he may well take Advantage of the Insufficiency of the Declaration.

(c) Doctrin. placit. 56. Q. Carth. 270.

(d) Br. Prescription 71.

(e) Doctrin. placit. 69. Hob. 14. Cro. Car. 5. Cro. Jac. 133, 221, 312. 8 Co. 120. b. 133. b. Palm. 287. Lit. Rep. 172, 252. 2 Bulstr. 94.

As to the first Question it was argued on the Plaintiff's Side, That the said Grant of the sole making of Playing Cards within the Realm, was good for three Reasons. 1. Because the said Playing Cards were not any Merchandize, or Thing concerning Trade of any necessary Use, but Things of Vanity, and the Occasion of Loss of Time, and Decrease of the Substance of many, the Loss of the Service and Work of Servants, Causes of Want, which is the Mother of Woe and Destruction, and therefore it belongs to the Queen (who is *Parens patriæ*, *& paterfamilias totius Regni*, and as it is said (f) in 20 *H.* 7. *fol.* 4. *Capitalis Justiciarius Angliæ*) to take away the great Abuse, and to take Order for the moderate and convenient Use of them. 2. In Matters of Recreation and Pleasure, the Queen has a Prerogative given her by the Law to take such Order for such moderate Use of them as seems good to her. 3. The Queen, in Regard of the great Abuse of them, and of the Cheat put upon her Subjects by Reason of them, might utterly suppress them, and by Con-

(f) 20 H. 7. 7. a.

Conſequence without Injury done to any one, might moderate and tollerate them at her Pleaſure. And the Reaſon of the Law which gives the King theſe Prerogatives in Matters of Recreation and Pleaſure was, becauſe the greateſt Part of Mankind are inclinable to exceed in them; and upon theſe Grounds divers Caſes were put, *ſc.* That no Subject can make a (*a*) Park, Chaſe or Warren within his own Land, for his Recreation or Pleaſure, without the King's Grant or Licence; and if he does it of his own Head, in a *Quo Warranto*, they ſhall be ſeiſed into the King's Hands, as it is held in 3 *E.* 2. *Action ſur le Statute Br.* 48. *&* 30 *E.* 3. *Rot. Pat.* The King granted to another all the Wild Swans betwixt *London* Bridge and *Oxford.*

(*a*) Poſtea 87. b. 2 Inſt. 199. 2 Roll. 83, 812. Moor 675. 2 Roll. Rep. 4.

As to the 2d, it was argu'd, and ſtrongly urg'd, That the (*b*) Queen by her Prerogative may diſpenſe with a Penal Law, when the Forfeiture is Popular, or given to the King, and the Forfeiture given by the Statute of 3 *E.* 4. *cap.* 4. in Caſe of Importation of Cards is Popular, 2 *H.* 7. 6. *b.* 11 *H.* 7. 11 *b.* 18 *H.* 7. 8. *b.* 2 *R.* 3. 12. *a. Plow. Com. Greidon's* Caſe, 502. *a. b.* 6 *Eliz. Dyer* 225. 13 *El.* 393. 18 *Eliz.* 352. 33 *H.* 8. *Dyer* 52. 11 *H.* 4. 76. 13 *E.* 3. *Releaſe* 36. 43 *Aſſ. pl.* 19. 5 *E.* 3. 29. 2 *E.* 3. 6. *&* 7. *F. N. B.* 211. *b.*

(*b*) 3 E. 4. c. 4. Br. Patent 109. Br. Prærogative 37, 141. Chart. de Pardon 76. Br. Licenſe 24. Fitz. Grant 33. 12 Co. 18, 19. Jenk. Cent. 292. Hob. 75, 146, 214, 229. 3 Keb. 145, 233, 236.

As to the firſt, it was argued to the contrary by the Defendant's Counſel, and reſolved by *Popham* Chief Juſtice, *& per totam Curiam*, that the ſaid (*c*) Grant to the Plaintiff of the ſole making of Cards within the Realm was utterly void, and that for two Reaſons: 1. That it is a Monopoly, and againſt the Common Law. 2. That it is againſt divers Acts of Parliament. Againſt the Common Law for four Reaſons: 1. All (*d*) Trades, as well Mechanical as others, which prevent Idleneſs (the Bane of the Commonwealth) and exerciſe Men and Youth in Labour, for the Maintenance of themſelves and their Families, and for the Increaſe of their Subſtance, to ſerve the Queen when Occaſion ſhall require, are profitable for the Commonwealth, and therefore the Grant to the Plaintiff to have the ſole making of them is againſt the Common Law, and the Benefit and Liberty of the Subject; and therewith agrees *Forteſcue in laudibus Legum Angliæ, cap.* 26. And a Caſe was adjudged in this Court in an Action of Treſpaſs (*e*) *inter Davenant & Hurdis, Trin.* 41 *Eliz. Rot.* 92. where the Caſe was, That the Company of Merchant Taylors in *London*, having Power by Charter to make Ordinances for the better Rule and Government of the Company, ſo that they are conſonant to Law and Reaſon, made an Ordinance, That every Brother of the ſame Society, who ſhould put any Cloth to be dreſſed by any Clothworker, not being a Brother of

Dyer 52. pl. 1, 2, 352. pl. 25. 3 Bulſtr. 5. Dav. 14. b. 75. b. 1 Sid. 6. 4 Co. 35. b. Co. Lit. 120. a. 8 Co. 29. b. Hardr. 110, 232, 445, 449. 2 Rol. Rep. 115, 117. Cro. Car. 198. 3 Inſt. 237. 2 Keb. 426.

(*c*) Hardr. 55. 2 Rol. 214. Cumberl. 53 to 56. Lucas 131. 2 Inſt. 47. 8 Co. 125. a.

(*d*) Antea 53. b. Raymond 292. Palm. 396, 397. Hob. 211. Carter 118. 2 Keb. 125. 2 Rol. Rep. 392. Cro. El. 872.

(*e*) Moor 576, ad 591, 672. 2 Inſt. 47. 3 Inſt. 182. 1 Roll. 364. Hob. 212. Raym. 292. Carter 116.

of the same Society, should put one Half of his Cloths to some Brother of the same Society, who exercised the Art of a Clothworker, upon Pain of forfeiting ten Shillings, *&c.* and to distrain for it, *&c.* and it was adjudged, That that Ordinance, altho' it had the Countenance of a Charter, was against the Common Law, because it was against the Liberty of the Subject; for every Subject, by the Law, has Freedom and Liberty to put his Cloth to be dressed by what Clothworker he pleases, and cannot be restrained to certain Persons, for that, in Effect would be a Monopoly; and therefore such Ordinance by Colour of a Charter, or any Grant by Charter to such Effect, would be void. 2. The sole Trade of any Mechanical Artifice, or any other Monopoly, is not only a Damage and Prejudice to those who exercise the same Trade, but also to all other Subjects, for the End of all these Monopolies is for the private Gain of the Patentees; and altho' Provisions and Cautions are added to moderate them, yet (*a*) *res profecto stultæ est nequitiæ modus*, It is meer Folly to think that there is any Measure in Mischief or Wickedness: And therefore there are three inseparable Incidents to every Monopoly against the Commonwealth, *sc.* 1. That (*b*) the Price of the same Commodity will be raised, for he who has the sole selling of any Commodity, may and will make the Price as he pleases: And this Word (*c*) *Monopolium, dicitur ἀπὸ τῆς μόνης καὶ πωλέω, quod est, cum unus solus aliquod genus mercaturæ universum emit, pretium ad suum libitum statuens.* And the Poet saith; *Omnia Cæsor emit, sic fit ut omnia vendat.* And it appears by the Writ of *Ad quod damnum. F. N. B.* 222. *a.* (*d*) That every Gift or Grant from the King has this Condition, either expressly or tacitly annexed to it, *Ita quod patria per donationem illam magis solido non oneretur seu gravetur*, and therefore every Grant made in Grievance or Prejudice of the Subjects is void; and 13 *H.* 4. 14. *b.* the King's Grant which tends to the Charge and Prejudice of the Subject is void. The 2d (*e*) Incident to a Monopoly is, That after the Monopoly granted, the Commodity is not so good and merchantable as it was before; for the Patentee having the sole Trade, regards only his private Benefit, and not the Commonwealth. 3. It (*f*) tends to the Impoverishment of divers Artificers and others, who before, by the Labour of their Hands in their Art or Trade had maintained themselves and their Families, who now will of Necessity be constrained to live in Idleness and Beggary; *Vide Forteſcue ubi supra:* And the Common Law, in this Point, agrees with the Equity of the Law of God, as appears in *Deut. Cap.* xxiv. *ver.* 6. *Non accipies loco*

(*a*) 2 Inst. 507.

(*b*) Moor 673. Hard. 55. Noy 179.

(*c*) 3 Inst. 181.

(*d*) Palm. 79. Cro. Arg. 23, 61. 2 Rol. 172.

(*e*) Noy 179.

(*f*) Moor 673. Noy 179.

(*a*) *pig-*

(*a*) *pignoris inferiorem & superiorem molam, quia animam suam apposuit tibi*; you shall not take in Pledge the neather and upper Millstone, for that is his Life; by which it appears, That every Man's Trade maintains his Life, and therefore he ought not to be deprived or dispossed of it, no more than of his Life: And it agrees also with the Civil Law; *Apud Justinianum enim legimus, Monopolia non esse intromittenda, quoniam non ad commodum Reipublicæ sed ad labem detrimentaque pertinent.* Monopolia interdixerunt leges Civiles, cap. de Monopoliis lege unica. *Zeno imperator statuit, ut exercentes Monopolia bonis omnibus spoliarentur.* Adjecit Zeno, *Ipsa rescripta imperialia non esse audienda, si cuiquam Monopolia concedant.* 3. The Queen was (*b*) deceived in her Grant; for the Queen, as by the Preamble appears, intended it to be for the Weal Publick, and it will be imployed for the private Gain of the Patentee, and for the Prejudice of the Weal Publick; moreover the Queen meant that the Abuse should be taken away, which shall never be by this Patent, but *potius* the Abuse will be encreased for the private Benefit of the Patentee, and therefore as it is said in (*c*) 21 *E.* 3. 47. *in the Earl of* Kent's *Case*, this Grant is void *jure Regio.* 4. This Grant is *primæ impressionis*, for no such was ever seen to pass by Letters Patents under the Great Seal before these Days, and therefore it is a dangerous Innovation, as well without any President or Example as without Authority of Law, or Reason. And it was observ'd, that this Grant to the Plaintiff was for twelve Years, so that his Executors, Administrators, Wife or Children, or others inexpert in the Art and Trade, will have this Monopoly. And it cannot be intended, that *Edward Darcy* an Esquire, and a Groom of the Queen's Privy Chamber, has any Skill in this mechanical Trade of making of Cards; and then it was said, that the Patent made to him was void, for to forbid others to make Cards who have the Art and Skill, and to give him the sole making of them who has no (*d*) Skill to make them, will make the Patent utterly void. *Vide* 9 *E.* 4. 5. *b.* And although the Grant extends to his Deputies, and it may be said, he may appoint Deputies who are expert, yet if the Grantee himself is not expert, and the Grant is void as to him, he cannot make any Deputy to supply his Place, *quia* (*e*) *quod per me non possum, nec per alium.* And as to what has been said, that Playing Cards is a Vanity, it is true, if it is abused, but the making of them is neither a Vanity nor a Pleasure, but Labour and Pains.

And

(*a*) Moor 674. Noy 181. 3 Inst. 181.

Note.

(*b*) 10 Co. 113. b.

(*c*) Hob. 115. 10 Co. 113. b. 21 E. 3. 47. a. b. 1 Co. 44. a. Antea 74. a. b.

(*d*) Hob. 148. Br. Office & Officer 16, 48. Br. Patent 108.

(*e*) 4 Co. 24. b. Hawks Max. 55.

(a) Moor 675. Antea 86. a. 2 Inst. 199. 2 Rol. 33, 812. 2 Rol. Rep. 4.

And it is true, that none can make a (a) Park, Chase or Warren, without the King's Licence, for that is *quodam modo* to appropriate those which are *feræ naturæ*, *& nullius in bonis* to himself, and to restrain them of their natural Liberty, which he cannot do without the King's Licence; but for Hawking, Hunting, *&c.* which are Matters of Pastime, Pleasure and Recreation, there needs no Licence, but every one may, in his own Land, use them at his Pleasure, without any Restraint to be made, unless by Parliament, as appears by the Statutes of 11 *H.* 7. *c.* 17. 23 *Eliz. c.* 10. 3 *Jac. Regis c.* 13. And it is evident by the Preamble of the said

(b) 3 E. 4. c. 4.

Act of (b) 3 *E.* 4. *c.* 4. That the Importation of Foreign Cards was prohibited at the grievous Complaint of the poor Artificers Cardmakers, who were not able to live of their Trades, if foreign Cards should be imported; as appears by the Preamble, by which it appears, That the said Act provides Remedy for the Maintenance of the said Trade of making of Cards, forasmuch as it maintained divers Families by their Labour and Industry; and the like Act is made in 1 *R.* 3. *cap.* 12. And therefore it was resolved, that the Queen could not suppress the making of Cards within the Realm, no more than the making of Dice, Bowls, Balls, Hawks Hoods, Bells, Lures, Dog-couples, and other the like, which are Works of Labour and Art, altho' they serve for Pleasure, Recreation and Pastime,

(c) Antea 54. a.

and cannot be suppressed but by Parliament, nor a (c) Man restrained from exercising any Trade, but by Parliament, 37 *E.* 3. *cap.* 16. 5 *Eliz. cap.* 4. And the playing at Dice and Cards is not prohibited by the Common Law, as ap-

(d) Dyer 254. pl. 2. Hob 296. Goldsb. 35.

pears *Mic.* 8. *& 9 El.* (d) *Dyer* 254. (unless a Man is deceiv'd by false (e) Dice or Cards, for then he who is deceiv'd, shall have an Action upon his Case for the Deceit) and

(e) Cr. Car. 234. F. N. B. 95. d. 1 Jones 249. Cro. Eliz. 90. Cro. Jac. 497, 498. 2 Rol. 549.

therefore playing at Cards, Dice, *&c.* is not *malum in se*, for then the (f) Queen could not tolerate nor licence it to be done. And where King *E.* 3. in the 39th Year of his Reign, by his Proclamation, commanded the Exercise of Archery and Artillery, and prohibited the Exercise of casting of Stones and Bars, and the Hand and Foot-Balls, Cock-fighting, *& alios ludos vanos*, as appears *in dors. claus. de An.* 39 *E.* 3. *nu.* 23. yet no Effect thereof followed, 'till divers of them were prohibited upon a Penalty, by divers Acts of Parliament, *viz.* 12 *R.* 2. *cap.* 6. 11 *H.* 4. *cap.* 4. 17 *E.* 4. *cap.* 3. 33 *H.* 8. *cap.* 9.

(f) Hob. 149. Hard. 448.

Also such Charter of a Monopoly, against the Freedom of Trade and Traffick, is against divers Acts of Parliament, *sc.* 9 *E.* 3. *c.* 1 *&* 2. which for the Advancement of the Freedom of

Trade

Trade and Traffick extends to all Things vendible, notwithſtanding any Charter of Franchiſe granted to the contrary, or Uſage, or Cuſtom, or Judgment given upon ſuch Charters, which Charters are adjudged by the ſame Parliament to be of no Force or Effect, and made to the Derogation of the Prelates, Earls, Barons, and Grandees of the Realm, and to the Oppreſſion of the Commons. And by the Statute of 25 *E.* 3. *cap.* 2. it is enacted, That the ſaid Act of 9 *E.* 3. ſhall be obſerved, holden, and maintained in all Points. And it is further by the ſame Act provided, That if any Statute, Charter, Letters Patents, Proclamation, Command, Uſage, Allowance, or Judgment be made to the contrary, that it ſhall be utterly void, *Vide Magna Charta, cap.* 18. 27 *E.* 3. *cap.* 11, *&c.*

As to the 2d Queſtion it was reſolved, that the (*a*) Diſpenſation or Licence to have the ſole Importation and Merchandizing of Cards (without any Limitation or Stint) notwithſtanding the ſaid Act of (*b*) 3 *E.* 4. is utterly againſt Law: For it is true, That foraſmuch as an Act of Parliament which generally prohibits a Thing upon a Penalty, which is popular, or only given to the King, may be inconvenient to divers particular Perſons, in Reſpect of Perſon, Place, Time, *&c.* for this Reaſon the Law has given Power to the King, to diſpenſe with particular Perſons; *Diſpenſatio mali prohibiti eſt de jure Domino Regi conceſſa, propter impoſſibilitat' præviden' de omnibus particular', &* (*c*) *diſpenſatio eſt mali prohib' provida relaxatio, utilitate ſeu neceſſitate penſata.* (*d*) But when the Wiſdom of the Parliament has made an Act to reſtrain *pro bono publico* the Importation of many Foreign Manufactures, to the Intent that the Subjects of the Realm might apply themſelves to the making of the ſaid Manufactures, *&c.* and thereby maintain themſelves and their Family with the Labour of their Hands; now for a private Gain to grant the ſole Importation of them to one, or diverſe (without any Limitation) notwithſtanding the ſaid Act, is a Monopoly againſt the Common Law, and againſt the End and Scope of the Act itſelf; for this is not to maintain and encreaſe the Labours of the poor Card-makers within the Realm, at whoſe Petition the Act was made, but utterly to take away and deſtroy their Trade and Labours, and that without any Reaſon of Neceſſity, or Inconveniency in Reſpect of Perſon, Place or Time, and *eo potius*, becauſe it was granted in Reverſion for Years, as hath been ſaid, but only for the Benefit of a private Man, his Executors and Adminiſtrators, for his particular Commodity, and in Prejudice of the Commonwealth. And King *E.* 3. (*e*) by his Letters Patents, granted to one *John Peche* the ſole Importation of Sweet Wine into *London*, and

Anſwer to the 2d Queſtion.

(*a*) 2 Rol. 179, 214.

(*b*) 3 E. 4. c. 4.

(*c*) Co. Lit. 99. a. Palm. 476. 3 Keb. 236. Godolph. Abridg. 112.

(*d*) 2 Rol. 179, 214. Hardr. 110.

(*e*) Moor 672.

* Cotton's Records. 1 Roll. 106.

and at a Parliament held 50 *E.* 3. * this Grant was adjudged void, as appears in *Rot. Parl. An.* 50 *E.* 3. *M.* 33. Alſo admitting that ſuch Grant or Diſpenſation was good, yet the Plaintiff cannot maintain an Action on the Caſe againſt thoſe who import any Foreign Cards, but the Remedy which the Act of 3 *E.* 4. in ſuch Caſe gives ought to be purſued. And Judgment was given and entred, *quod querens nihil caperet per billam.*

And *Nota* Reader, and well obſerve the glorious Preamble and Pretence of this odious Monopoly. And it is true *quod Privilegia quæ revera ſunt in præjudicium Reipublicæ, magis tamen ſpecioſo habent frontiſpicia, & boni publici prætextum, quam bonæ & legales conceſſiones, ſed prætextu, liciti non debet admitti illicitum.* And our Lord the King that now is, in a Book which he in Zeal to the Law and Juſtice commanded to be printed *Anno* 1610. intituled, *A Declaration of his Majeſty's Pleaſure*, &c. *p.* 13. has publiſhed, That Monopolies are Things againſt the Laws of this Realm; and therefore expreſly Commands, that no Suitor preſume to move him to grant any of them, *&c.*

[See the Caſe of *Sandys* and the *Eaſt India* Company. *Skin.* 132 *to* 137. alſo *ib.* 169, 170, 173.

The Earl of DEVONSHIRE'S *Caſe.*

See Skin. 656.

Hill. 4 Jacobi 1.

CHarles Earl of *Devonſhire*, Maſter of the Ordnance general, obtained of the King a Privy Seal, bearing Date *ultimo Octobris*, *Anno* 2 *Regis Jac.* in theſe Words, *James, by the Grace of God*, &c. *To our right truſty and right well beloved Couſin and Counſellor* Charles *Earl of* Devonſhire, *our Lieutenant of our Realm of* Ireland, *and Maſter of the Ordnance general, greeting*, &c. *Foraſmuch as we are given to underſtand that ſuch Munitions as are utterly decayed and unſerviceable, have been heretofore claimed, taken and enjoyed by the Maſter of the Ordnance for the Time being, as Fees and Avails to them, by Reaſon or in Reſpect of the ſaid Office, belonging; Our Will and Pleaſure therefore is, and we do hereby give unto you full Power and Authority, that you may, at your Pleaſure, receive and take out of the Store within the Tower of* London, *all ſuch broken and other unſerviceable Iron Ordnance, Shot, and other Munitions whatſoever, as are particularly expreſſed, mentioned, or ſet down in a Book*, &c. *and the ſame to receive, retain, employ, and convert to your own Uſe, &c.* By Virtue whereof the ſaid Earl took out of the King's Store, within the Tower, divers Pieces of Iron Ordnance, Shot, and other Munition mention'd in the ſaid Book, and ſold them to divers Perſons for Money, and ſo converted them to his

2 Rol. Rep. 275, 296. 2 Rol. 161. Hardr. 353. 1 Rol. Rep. 469.

own Uſe, and afterwards made his Will, and thereof made an Executor and died: And now the Queſtion was, If the Executor of the ſaid Earl might be charged to the King, for the ſaid Converſion of the ſaid Ordnance and Munition: And the King referred the Examination and Conſideration of this Caſe to the two Chief Juſtices and Chief Baron: And the Counſel of the ſaid Executor objected, That the Executor ſhould not be charged in this Caſe for three Reaſons.

1. Becauſe in Truth, broken, caſt, and unſerviceable Iron Ordnance, Shot, and other Munition, belong to the Maſter of the Ordnance, as Fees and Avails belonging to his Office, and offered to produce divers Witneſſes to prove, That the Maſters of the Ordnance for the Time being, for ſixty Years paſt, have taken the broken, caſt, and unſerviceable Iron Ordnance, Shot, and other Munition, as their Fees and Avails due to their Offices.

2. Admitting, that they were not Fees belonging to their Offices, yet the King, by his Privy Seal, has given thoſe eſpecially expreſſed in the ſaid Book, to the ſaid Earl, by Force of which, he may lawfully take and convert them to his own Uſe, altho' they were not due to him as Fees and Avails, in Reſpect of his Office.

3. It was objected, That in this Caſe the Executor can't be charged in Detinue, for none of the ſaid King's Goods came to his Hands, nor in Accompt, for the Teſtator was never bound to the King to render Accompt, neither as Bailiff, nor as Receiver; for (*a*) no Man ſhall be charged in Accompt but as Guardian in Soccage, Bailiff or Receiver: And there are not other Original Writs in the Regiſter to charge any in Accompt, except in the ſaid three Caſes. *Vide Regiſt.* 135. 19 *Hen.* 6. 5. *a. b.* 29 *Hen.* 6. *Account* 6. And that is the Reaſon that an Apprentice, by the Name of an Apprentice, is not chargeable in Accompt, 8 *E.* 3. 46. *F. N. B.* 119. *d.* 7 *H.* 4. 14. *b.* And although the King has the Prerogative to charge the Executors of an Accomptant, yet he ought to charge the Executor only where the Teſtator was chargeable in Law, in one of the ſaid three Caſes.

(*a*) Co. Lit. 90. b. 172. a. Owen 36. 1 Rol. 118, 119. 2 Inſt. 379.

1 Rol. 119. Co. Lit. 172. a. Owen 36. Fitz. Accom. 19. Winch. 64. Br Action ſur Caſe 34. Br. Accompt 24.

Alſo when any one is charged as Bailiff or Receiver, there ought to be Privity to charge him; but when one claims any Thing to his own Uſe, there he ſhall be never charged in Accompt, becauſe he may plead, never his Bailiff, never his Receiver to render Accompt; and therewith agree 2 *Mariæ Br. Accompt* 89. 2 *Hen.* 4. 12. *a.* 39 *Ed.* 3. 27. So in the Caſe at Bar, the Earl claimed them to

his own Uſe, for which no Accompt lies againſt him, but the perſonal Wrong, if there was any, dies with his Perſon.

As to the firſt, It was anſwered and reſolved, That the Earl could not claim the ſaid Iron Ordnance as Fees or Avails belonging to his Office, for the ſaid Office was erected of late Time; for King *Hen.* 8. *Anno* 35. of his Reign, by his Letters Patents newly erected the ſaid Office of Maſter of the Ordnance, and granted it to *Thomas* Lord *Seymor*, and after his Death in 1 *Ed.* 6. it was granted to Sir *Philip Hobby*, and after his Death, *ſc.* 1 *Mariæ*, it was granted to Sir *Richard Southwell*, and after his Death it was granted to *Ambroſe* Lord *Dudley*, ſo that the ſaid Earl, without Queſtion, can't claim them as ancient Fees by Preſcription to a new Office. Q. Skin. 656.

As to the ſecond, It was reſolved, That the ſaid Privy Seal was made upon a falſe Suggeſtion, and that the King was therein deceived; for in the King's Caſe theſe Words (*heretofore claimed, taken and enjoyed by the Maſters of the Ordnance for the Time being*) ſhall be intended to be lawfully claimed, taken, and enjoyed, and not by Wrong, or Uſurpation: And alſo this Word (*belonging*) implies a Right to take them, and therefore the ſaid Privy Seal being founded upon a falſe Suggeſtion contained in the ſaid Privy Seal, and ſo the King deceived by Matter apparent in the ſame Privy Seal, by Conſequence the Privy Seal is utterly void. Godb. 291, 292. 1 Rol. Rep. 469. 1 Co. 46. a. 2 Rol. 188. Hob. 155. 10 Co. 113. b. 21 E. 3. 47. a. b. Antea 74. a. b.

And as to the third Objection, It was anſwered and reſolved by the Court, That although the ſaid Earl claimed them to his own Uſe, yet he ſhall be bound to the King to accompt, becauſe in the King's Caſe the Law makes a Privity; for if any one takes the King's Goods, or enters into his Lands wrongfully, yet the King may charge him in Accompt, 33 *Hen.* 6. 2. *b.* 4 *Hen.* 7. 6. *b.* 7 *H.* 7. 10. *a.* 15 *Hen.* 7. 17. *a.* 8 *Eliz.* *Dyer* 249. *Brereton's* Caſe, & 40 *Aſſ. pl.* 75. If Goods be deviſed to the King, in whoſe Hands ſoever they ſhall come, the Poſſeſſor ſhall be charged in Accompt to the King, and the King is not driven to his Action of Treſpaſs, for then, by the Death of the Party, the King would be without Remedy; but the King may, by his Prerogative, have an Action of Accompt againſt the Executors of the Party, as appears in *Lit. fol.* 28. And the King is not bound to charge the Defendant as Bailiff or Receiver, as a common Perſon ought; but the King may alledge in his Information generally, That he, *ad compotum Domino Regi reddend' tempore mortis Juæ tenebatur*, in ſo many Sums 2 Rol. 161. 10 Co. 114. b. Cr. El. 224. 508. 2 Rol. 161. Br. Accompt 8, 65. Br. Baily 25. Dyer 249. pl. 83. Moor 476. 2 Rol. 161. Co. Lit. 90. b. Sect. 125. 2 Rol. 161.

of Money due to the King, *&c.* as appears by many Precedents in the Exchequer, and in the King's Bench, and therefore, if upon Evidence, it appears that he is accomptable to the King in any Manner, he ſhall be charged, as if one by Letters Patents, or by Virtue of his Office, has Power to aſſeſs Fines upon Grants or Admittances made to Copyholders within ſuch of the King's Manors, and he aſſeſſes ſmall Fines for the King, and underhand takes great Sums, or other Rewards of the Copyholders, to his own Uſe, in Deceit and Prejudice of the King, in that Caſe he may be charged to the King in Accompt for the Whole, for in Truth the Whole was due to the King: And the King, who is God's Lieutenant, ſhall ſay to ſuch falſe Stewards, *Redde*
2 Rol. 161. *rationem villicationis & vellicationis tuæ:* And if he dies, his Executors, in the King's Caſe, ſhall be charged; for as Sir *William Herle*, Chief Juſtice of the Bench in 3 *Ed.* 3. 10. ſaith, Accompt ought to be brought (rendred) by Equity and good Faith, *Vide* 2 *R.* 2. *Tit. Accompt* 47. *&* 3 *E.* 3. 10. and in 39 *Aſſ. pl.* 18. it is held, That the King's Officers or Miniſters can do nothing to the King's Diſadvantage, but all to his Advantage.

But it was ſaid that is was without Precedent, That the Executors of any ſuch great Officer ſhould be charged after his Death, becauſe he himſelf could have better diſcharged
4 Co. 43. a. himſelf than his Executors, who are Strangers to his Accompts and Buſineſs; and therefore it would be convenient, that as his Office ceaſed by his Death, ſo the Charge, in Reſpect of any Deceit or Wrong concerning his Office, whereof he was not detected in his Life, ſhould ceaſe alſo by his Death as a perſonal Wrong. To which it was ſaid and reſolved, That the Reaſon makes againſt the Prerogative which the Law gives the King, *ſcil.* that he ſhall charge the Executors of his Accomptant, and therefore it is not worthy any other Anſwer. But it is not without many Precedents, one of which was adjudged in the Exchequer, which is enter'd *Mich.* 37 *&* 38 *Reginæ Eliz. Rot.* 312. In an Information preferred by the Attorney-General for the Queen, againſt *Edward Cary* and *William Doddington*, Eſqs. Executors of Sir *Walter Mildmay*, Knt. late Chancellor of
Sir Walter Mildmay's Caſe. 1 Bendl. 74. Godb. 292, 296. Swinb. 729. 2 Rol. Rep. 295. Moor 475. Cro. Eliz. 545. the Exchequer, becauſe the ſaid Sir *Walter* was bound to the Queen the Day of his Death, to render Accompt of divers Sums of Money, amounting together to 1525 *l.* of the Queen's Treaſure, in the Receipt of the Exchequer at *Weſtminſter*, *inter Feſtum Natalis Domini*, *Anno* 1 *Eliz. & idem Feſtum Anno Regni ſui* 20. received, to render thereof Accompt to the Queen, *& quod nemo prædictum compo-*

tum adhuc reddit, nec reddere conatus eſt, and that the ſaid Sir *Walter* conſtituted the Defendants his Executors, *&c.* The Defendants pleaded, *quod prædictus Walterus Mildmay non recepit præd'* 1525 *l. aut aliquam inde parcell', ad inde Dominæ Reginæ computandum, nec die quo obiit tenebatur eidem Dominæ Reginæ in compoto inde, aut alicujus inde parcelle reddend' modo & formâ &c. & de hoc pon' ſe ſuper patriam, &c. Nota* a good Iſſue by the Rule of the Court, and the Jury found for the Defendant, ſaving for 1160 *l.* Parcel, *&c.* for which they gave a Special Verdict, *ſc.* That *Anno* 1 *Eliz.* The Queen by her Letters Patents conſtituted the Marqueſs of *Wincheſter Theſaurar' Scaccarii ſui durante bene placito* (and made him Treaſurer of *England*, by giving to him the Staff) and afterwards, in the ſame firſt Year, ſhe conſtituted the ſaid Sir *Walter Cancellar' Scaccarii ſui pro term' vitæ ſuæ*; and afterwards, in the ſame firſt Year, ſhe conſtituted, by her Letters Patents, *Richard' Sackvil Militem Subtheſaurar' Scaccarii pro termino vitæ ſuæ:* And that the ſaid Treaſurer and Under-Treaſurer of the Exchequer, 10 *Julii*, 1596, made a Warrant in Writing under their Hands, for the Payment to the ſaid Sir *Walter Mildmay*, Chancellor of the Exchequer, of the Queen's Treaſure in the Receipt, being 100 *l.* yearly for his Diet, and 40 *l.* for his Attendance at *London* in the Vacation Time, during the Queen's Pleaſure, becauſe the Chancellor of the Court of Firſt Fruits and Tenths (which Court is now annexed to the Exchequer) had Allowance in the ſame Court for his Trouble and Attendance in the ſame Office; and by Reaſon of the annexing of the ſaid Court of Firſt Fruits, and alſo of the Court of Augmentation, the ſaid Chancellor of the Exchequer was charged with more Buſineſs and Attendance, as well in Term as out of Term, more than any Chancellor of the Exchequer before had been: And theſe were the Reaſons which moved the Treaſurer and Under-Treaſurer to make the ſaid Warrant, and were expreſs'd in it, and directed to four ordinary Tellers of the Receipt of the Exchequer, or to any of them: And afterwards Queen *Eliz.* 19 *Martii, anno Regni ſui ſecundo*, directed her Warrant to the Treaſurer, Chamberlains, and Under-Treaſurer, under her Privy Seal, by which, amongſt other Articles concerning the Privy Council and Payment of Fees to ſome Officers, *&c.* due and accuſtomed, the ſaid Queen willed and commanded them, That they, or any one of them, from Time to Time, ſhould pay of the Queen's Treaſure for Labour, Coſts and Expences of every Perſon who had been, or ſhould be aſſigned or appointed by our Commiſſion or Commandment to enquire for us, or by us or our Council, or by you, or any of you commanded, or that ſhall be

Moor 475. Cro. Eliz. 545.

Moor 475.

put to labour, ride, write, travel, for or about our Causes, Matters and Affairs, Thing or Things whatsoever, according to their Deserts, in as large Manner and Form as in any Time before had been given or rewarded in our said Exchequer, by any Treasurer, Chamberlains, or Under-Treasurer, and more large by their Discretions; (and this was the Clause upon which the Defendant's Counsel relied;) and the Jury further found, That the said 1160 *l.* was paid to the said Sir *Walter Mildmay*, after the said Warrant under the said Privy Seal, for his Diet and Attendance in the Vacation Time at *London*, and that the said Money was paid out of the Queen's Treasure by *Richard Stonely*, one of the Tellers of the said Receipt to the said Sir *Walter*, and by the said Sir *Walter* received to his own Use, by Force or Colour of the said Warrant of the said Treasurer and Under-Treasurer; and that the said Sir *Walter* exercised his Office aforesaid, and discharged the Duty thereof during his Life; and that the said *Stonely* did account yearly before the Treasurer and Under-Treasurer, and other Officers to whom it appertain'd, to hear and determine the said Accompt, and had Allowance for the several Payments aforesaid, and full Discharge from them: And if upon the whole Matter the Court shall adjudge, That the said Sir *Walter* had received the said Money to render Accompt to the Queen, than they found for the Queen, and if not, for the Defendants. And in that Case three Points were moved. 1. If the Lord Treasurer, by himself, or with any other of the King's Officers, could, for the said, or for any other reasonable Cause, *ex officio*, allow any Fee or Reward for the necessary Service of the King. 2. Admitting that he had not Power, *ex officio*, if he had Power in that Case, by Virtue of the said Privy Seal, to make the said Allowance, or not? 3. Forasmuch as Sir *Walter* received them to his own Use, if he should be charged to render Accompt for them upon the said Issue joined, as is aforesaid?

Moor 476. 2 Rol. 180. Cro. Eliz. 545.

As to the first, two Points were resolved. 1. That no Officer that the King has, nor all of them altogether, can, *ex officio*, issue or dispose of the King's Treasure, although it be for the Honour or Profit of the King himself, but it ought to be by Warrant from the King himself; for it is true, that it is for the Honour and Profit of the King, that good Service done to the King should be rewarded; but it ought to be rewarded by the King himself, or by his Warrant, and by no other; for the King's Treasury

Co. Lit. 90. b.

(being the Bond of Peace, the Preserver of the Honour and Safety of the Realm, and the Sinews of War) is of so high Estimation in Law, in Respect of the Necessity of it, that the imbezilling of Treasure Trove, although it was not in the King's Coffers, was Treason;

and

and Treasure, and other valuable Chattels are so necessary and incident to the Crown, that in the King's Case they shall go with the Crown to the (*a*) Successor, and not to the Executors, as in the Case of common Persons, as appears 7 *H.* 4. 43. *a.* & 44 *Ed.* 3. 42. and therefore without the King's Warrant no Treasure shall be issued for any Cause whatsoever, by any (*b*) Officer, *ex Officio.*

(*a*) 2 Rol. 215. Br. Prerogative 81, 85. Br. Gard. 73.

(*b*) Moor 476. Cro. Eliz. 545.

2. It was resolved, That every Warrant of the Queen her self to Issue her Treasure, is not sufficient; for the Queen's (*c*) Warrant by Word of Mouth, or (which is more) the Queen's Warrant in Writing under her Privy Signet, is not sufficient to issue her Treasure: And that appears by a Judgment in the Exchequer in *Petilian*'s Case, *Hill.* 1 *E.* 4. *Rot.* 14. *in dorso*, where such Warrant under the Privy Signet to issue the King's Treasure was disallowed, *Vide* 14 *E.* 4. 2. *a.* And yet in some Case the Law takes Notice of the Privy Signet: And therefore, (*d*) if the King, under his Privy Signet, doth prohibit any to pass out of the Realm, it is sufficient. *F. N. B.* 85. *a.* But the Warrant which is sufficient in Law to issue the King's Treasure, (*e*) ought to be under the Great Seal or Privy Seal.

(*c*) 2 Rol. 183. 2 Inst. 556. Lit. Rep. 91. Cr. El. 545. Moor 476.

(*d*) 2 Rol. 183. Dyer 176. pl. 30. 128. pl. 61. 165. pl. 6. 2 Co. 17. b. Moor 675. 2 Inst. 54. Jenk. Cent. 220.

(*e*) Moor 476. 2 Inst. 555. Lit. Rep. 91. 2 Rol. 183.

As to the second Question, it was resolved, That the said Clause did extend to Commissioners, and other inferior Persons which should travel about the Queen's Business, and (*f*) not to the Chancellor of the Exchequer, for whom (among others) an express Clause was before in the same Privy Seal. Also this Clause is, according to their Deserts, *&c.* So that by the Privy Seal, the Merit ought to precede the Reward; and in this Case the Warrant was made before any Merit or Deserving. Also the Privy Seal is in as large and ample Manner and Form as in any Time before has been given or rewarded, *&c.* and it is not found, that before, any Allowance had been made to the Chancellor of the Exchequer, of any such Fee or Reward. Also it was touched (but not resolved) That where the Privy Seal gives (*g*) Authority to four or to one of them, and two make the Warrant, that they have not pursued their Authority. *Vide* 36 *Hen.* 8. 62. & 27 *Hen.* 6. *b.*

(*f*) Moor 475, 476.

(*g*) 1 Rol. 328, 329. Co. Lit. 181. b. Dyer 38. H. 8. 62. pl. 34. Yelv. 25, 26. Noy 47. Hutt. 127.

As to the third Point, it was resolved, That altho' the said Sir *Walter* received the King's Treasure to his own Use; yet forasmuch as he received it without a lawful Warrant, he knowing that it was the King's Treasure, the Law makes a Privity in the King's Case, and therefore he may charge him as an Accomptant. And so it was adjudged in the Exchequer, *Pasch.* 31 *Eliz. Rot.* 150. *Jurden*'s Case.

1 Rol. Rep. 299. Carter 85. Cro. El. 913, 914. 5 Co. 91. a. Palm. 23, 54. Pop. 202. 5 Co. 94. b. Cro. Jac. 553. 3 Bulstr. 210. 2 Rol. Rep. 101. Perk. Sect. 188. 2 Rol. 161. Cro. Eliz. 545. Mo. 476. 1 Leon. 32, 114. 2 Leon. 34.

And in the King's Case it is not needful that the Money or Goods come to the Hands of the Testator; but if he be a Means or Instrument by which the King is put to Loss or Damage, he shall be charged for so much as the King is damaged, and he shall be compelled at the King's Suit *reddere rationem* thereof, which is in the Nature of an Account. And therefore there is a notable Precedent in the Exchequer, *Mich.* 30 *Ed.* 3. *Rot.* 6. where the Case was, *Quod Willielm'* (*a*) *Porter* being *Magister monetæ, &c.* covenanted with the King by Indenture inrolled, That all the Bullion which should be delivered *ad Cambium Regis pro moneta facienda*, that Money should be delivered for it within eight Days, which Covenant the said *William Porter* broke, for he did not deliver to divers Subjects their Money due to them for the Bullion which they brought *ad Cambium*, according to his Covenant. Upon which, (upon shewing the same in the Exchequer) the King paid to them all the Money due for the Bullion; and because (*b*) *Johannes Walweyn & H. Picard, duxerunt & præsentaverunt dictum* Will' Porter *in Officium illud tanquam sufficientum*; (and that they offered to be Sureties for him, but were not accepted of, which Matter the said *John Walweyn* and *Henry Picard* confessed) *ideo consideratum est quod prædicti Johannes Walweyn & Henr' Picard onerentur versus Dominum Regem, &c.* and were charged to satisfy the King all the Money which the King had paid for the said *William Porter*. And (*c*) although none of the King's Treasure came to their Hands; nor had they any private Benefit by any Matter that appeared in the said Case, yet because they were Means and Causes of the King's Loss and Damage, they were by Judgment charged to the King: And forasmuch as they were chargeable by the Law, in that Case, if they had died before Judgment against them, without Question their Executors, *&c.* should be charged; for where the Testator is by Law chargeable to satisfy the King for Loss or Damage done to him, his Death shall not dispense with it, but his Executors, *&c.* shall be charged to the King. And it was resolved, That in the said Case, the Queen (*d*) either might charge the Executors of Sir *Walter*, or those who made such unlawful Warrant at her Election. And a Judgment was cited in the Argument of this Case *de Termino Trin. anno* 24 *Ed.* 3. *Rot.* 4. in the Exchequer. One (*e*) *Walter de Chirton*, the King's Customer, had purchased certain Lands with the King's Money, and by Covin had caused the Vendor to enfeoff his Friends in Fee to defraud the King, and nevertheless took the Issues and Profits of the Land to his own Use, and those Lands by Inquisition were returned with

(*a*) 2 Rol. 161. Godb. 292, 296. 2 Rol. Rep. 296, 300, 301.

(*b*) 2 Rol. 161.

(*c*) 2 Rol. 161. 3 Keb. 592.

(*d*) 2 Rol. 161. Moor 476.

(*e*) 12 Co. 3. Lane 48, 108. Godb. 293, 299. 1 Vent. 132. 3 Co. 12. b. 2 Rol. Rep. 296, 297, 303, 334. 2 Inst. 19. Dyer 160 pl. 41. 225. pl. 32, 33. 295. pl. 10. 2 Rol. 156.

with the Values into the Exchequer, and there by Judgment were ſeiſed into the King's Hands, *quouſque, &c.* and yet the Eſtate of the Land was never in him. But he who intends to deceive the King of that which belongs to him, will, in the End, deceive himſelf. *Vide* Reader, where and how the King ſhall levy the Sum of which any one is chargeable to him by the Law, not only againſt the Party himſelf, his Lands and Goods in his own Hands, but in the Hands of his Heirs, Aſſigns, Executors or Adminiſtrators; and if he has no Executors or Adminiſtrators, then in the Hands of the Poſſeſſors of the Goods of the Deceaſed, to render an Account to the King, *&c.* And for that *vide* a notable Record *in Scaccario de Term. Mich. Anno* 24 *E.* 3. *Rot.* 11. *ex parte Rememoratoris Regis, Thomas* (*a*) *Favel's Caſe,* which was an Exchequer Chamber Caſe, by all the Juſtices and Barons, and vouched by the Lord *Dyer,* 4 *&* 5 *Phil. & Mar.* 160. *Paſch.* 2 *Eliz. Rot.* 111. (*b*) Sir *William Cavendiſh's* Caſe, and reported by the Lord *Dyer,* 5 *Eliz.* 225. *Plow. Com. in the Caſe of Mines,* 321. *a. & b. Vide* 50 *Aſſ. pl.* 5.

(*a*) God. 292. 2 Rol. Rep. 300.

(*b*) 3 Co. 12. b. Plowd. 321. a. Godb. 292, 297. 2 Rol. Rep. 300, 302. Hard. 25, 26. 8 Co. 171. a.

And afterwards the Executors of the ſaid Earl of *Devonſhire* ſatisfied the King for all the ſaid Iron Ordnance, Shot, or Munition, which he, without Warrant, had converted to his Uſe.

JAMES

11 Co. 93.

JAMES BAGG's *Caſe.*

Trin. 13 Jacobi 1. *Rot.* 23.

In the King's Bench.

See Skin. 454, 468, 471, *&c.* Carthew 176. Lucas 54, 108, 146, 175, 176, 343. 1 Rol. Rep. 173, 224.

JAMES, by the Grace of God, of *England*, *Scotland*, *France* and *Ireland*, King, Defender of the Faith, *&c.* To the Mayor and Commonalty of the Borough of *Plymouth*, in the County of *Devon*, greeting, *&c.* Whereas *James Bagg*, one of the twelve Chief Burgeſſes, or Magiſtrates of the Borough aforeſaid, according to the Cuſtom of the Borough aforeſaid, hitherto uſed, was duly choſen and made. And whereas the ſame *James*, in the Office of one of the twelve Chief Burgeſſes or Magiſtrates of the Borough aforeſaid, a long Time carried and well-governed himſelf; yet you the Mayor and Commonalty of the Borough aforeſaid, little regarding the aforeſaid *James*, unduly, and without reaſonable Cauſe, from the Office of one of the twelve Chief Burgeſſes and Magiſtrates of the Borough aforeſaid, unjuſtly have amoved, in Contempt of us, and to the no little Damage and Grievance of him the ſaid *James*, and the Hurt of his Eſtate, as we, by his Complaint, have underſtood: We therefore to the ſaid *James*, willing, due and ſpeedy Juſtice to be done in this Behalf, as is juſt, command you, and every of you, as before Time we have you commanded, firmly enjoining you, That immediately after the Receipt of this Writ, the aforeſaid *James*, in the aforeſaid Office of one of the twelve Chief Burgeſſes or Magiſtrates of the Borough aforeſaid you reſtore, with all the Liberties, Privileges, Commodities, to the Office aforeſaid, belonging and appertaining; or that you ſignify the Cauſe thereof unto us, leſt in your Default, Complaint thereof again to us come: And

And how this our Writ ſhall be executed to us, from the Day of *Holy Trinity*, in three Weeks, whereſoever we ſhall be in *England*, you make it to appear, under the Penalty of 40 *l.* this our Writ then ſending back, *&c.* Witneſs *E. Coke*, at *Weſtminſter*, the 12th Day of *June*, in the 13th Year of our Reign, of *Eng. France*, and *Ireland*, and of *Scotland* the 48th.

By the Term of *Trinity*, in the thirteenth Year of King *James*, *Rot.* 23. Execution of this Writ doth appear in a certain Schedule to this Writ annexed, *John Clement*, Mayor, The Anſwer of the Mayor and Commonalty of the Borough of *Plymouth* to the Writ, to this Schedule annexed; according to the Command of the Writ aforeſaid, to the Lord the King we moſt humbly certify, That the Lady *Elizabeth*, late Queen of *England*, by her Letters Patents, with the Great Seal of *England* ſealed, bearing Date at *Weſtminſter* the 28th Day of *Feb.* in the 43d Year of her Reign, for herſelf, her Heirs and Succeſſors, granted to the Mayor and Commonalty of the Borough of *Plymouth* aforeſaid, and their Succeſſors, amongſt other Things, That the Mayor and Recorder of the Borough aforeſaid, for the Time being, the Time that they ſhould happen to be in their Offices, and alſo the Predeceſſors of the ſaid Mayor then alive, and for the Time being, and their Succeſſors, ſhould be Juſtices of the ſaid late Queen, her Heirs and Succeſſors, to keep the Peace in the ſaid Borough, and within the Limits, Precincts, and Liberties thereof; and to be kept, and to cauſe to be conſerved and kept, without any Command, Commiſſion, or Warrant for the ſame to be had, or to be obtained: And further to the ſaid Lord the King, we certify, * That within the Borough aforeſaid, there is, and Time whereof the Memory of Man is not to the contrary, there has been a Uſage and Cuſtom, that the Mayor and † twelve Chief Burgeſſes of the ſame Borough, ſtood, and were of the private Council of the Borough aforeſaid, and twenty-four of the other moſt diſcreet Burgeſſes of the Borough aforeſaid, for the Time being, to this choſen and ſworn, ſtood, and were, together with the aforeſaid Mayor and twelve Chief Burgeſſes, of Common Council of the Borough aforeſaid, for the regulating and Government of the ſame Borough. ‡ And that every ſuch Burgeſs who was choſen into the Fellowſhip of the twenty-four Burgeſſes of the Common Council aforeſaid, before he was to be admitted to the ſaid Fellowſhip, || ſhould take corporate Oath before the Mayor of the ſame Borough, for the Time being, that he ſhould carry himſelf well and honeſtly, as well towards the Mayor of the Borough aforeſaid, for the Time being, as towards the aforeſaid twelve Chief Burgeſſes of the ſaid Borough for the Time being, and to them from Time to Time ſhould ſhew Reverence, and that he ſhould maintain and uphold the Liberties and common Profit of the Borough aforeſaid, with his beſt Counſel and Advice: And

Doctr. pl. 105.

* He ought to have firſt preſcribed that there had been an Incorporation of a Mayor, &c. from Time whereof, &c. Vide 22 H. 6. Preſcription 47. 6 E. 6. Dyer 71. &c.

† Twelve Chief Burgeſſes, de privato conſilio Burgi, it would be more aptly ſaid, de privato conſilio Majoris & Burgenſium. Doct. pl. 292. Palm. 452.

‡ They do not preſcribe nor alledge any Charter that they may diſfranchiſe any of the Corporation.

|| The Oath of a Chief Burgeſs.

And further we certify, That every one of the aforeſaid twelve Chief Burgeſſes, from Time to Time choſen, ſhould be preferred by the Mayor of the Borough aforeſaid, or the reſt of the aforeſaid twelve Chief of the Burgeſſes, or by the greater Part of them, for the Time being, only without the Conſent or Aſſent of the * aforeſaid twenty-four, the other Burgeſſes who are (as before is ſaid) of the Common Council of the Borough aforeſaid, to this required. And further we certify, That the aforeſaid *James Bagg*, the firſt Day of *May*, in the 32d Year of the Reign of the Lady *Elizabeth*, late Queen of *England*, was duly choſen and appointed one of the aforeſaid twenty-four of the Burgeſſes of the Common Council of the Borough aforeſaid then being, and the ſaid firſt Day of *May*, in the 32d Year aforeſaid, at *Plymouth* aforeſaid, took corporal Oath before the Mayor of the Borough aforeſaid, according to the ancient Cuſtom aforeſaid, that he the ſaid *James* would carry himſelf well and honeſtly, as well towards the Mayor of the Borough aforeſaid, for the Time being, as towards the other twelve Chief Burgeſſes of the ſaid Borough for the Time being, and to them from Time to Time would ſhew Reverence, and the Liberties and common Profit of the Borough aforeſaid, would maintain and uphold with his beſt Counſel and Advice: And further to the Lord the King we certify, That the aforeſaid Borough of *Plymouth* is ſituate ſo near to the Shore and Sea Coaſts, that by Reaſon thereof, and by Reaſon of the daily Meeting there of Ships and Veſſels there coming, as well from the Parts beyond the Seas, as from elſewhere, many ill-minded Men, as well Aliens as within born, of evil and perverſe Converſation, Contemners of good Government, and Diſturbers of the Peace, in the Ships and Veſſels aforeſaid thither coming, in the Borough aforeſaid, and within the Liberties and Precincts of the ſame ſtaying and remaining, are daily found, who can hardly be there brought to the Obedience of good Rule and Government, unleſs the Authority of the Mayor of the Borough aforeſaid for the Time being, and of the other Chief Burgeſſes aforeſaid, with due Reverence of the other Burgeſſes and Inhabitants of the ſaid Borough, be fortified, and the Perſons of the ſaid Chief Burgeſſes, and of the Mayor, from the Contempt of the Vulgar be preſerved: And further to the ſaid Lord the King we certify, That the aforeſaid *James Bagg*, not ignorant of the Premiſſes, little regarding his Oath aforeſaid, and the Authority, as well of the Mayor of the Borough aforeſaid for the Time being, as his late Predeceſſors aforeſaid, as the other the Chief Burgeſſes of the Borough aforeſaid, ſetting naught by, and labouring and intending to bring the ſame Authority into Contempt: The firſt Day of *May*, in the 6th Year of the Reign of the Lord the now King, the ſaid *James* being then one of the Common Council of the Borough aforeſaid, and one of the Chief Burgeſſes of the ſame Borough, in the Preſence of one *Robert*

* They don't preſcribe in this, and yet it's againſt common Right. 1 die Maii 32 Eliz. James Bagg choſe one of the Twenty-four.

Robert Trelawny, then being Mayor of the Borough aforeſaid, and of many other of the Inhabitants of the Borough aforeſaid, at *Plymouth* aforeſaid, within the Borough aforeſaid, contemptuouſly and malapertly carried himſelf, as well in Geſture as in Words, toward the Mayor aforeſaid; and then and there, to the aforeſaid *Robert Trelawny*, contemptuouſly and ſcoffingly, without any reaſonable Cauſe, theſe Words following, openly and publickly ſaid and ſpeak, that is to ſay, *You*, (the aforeſaid *Robert Trelawny* intending) *are ſome Prince, are you not?* And further to the ſaid Lord the King we certify, That afterwards, that is to ſay, the firſt Day of *February*, in the 7th Year of the Reign of the Lord the now King, the aforeſaid *James Bagg* continuing his evil Diſpoſition and Intention aforeſaid, at *Plymouth* aforeſaid, in the Preſence and Hearing of the aforeſaid *Robert Trelawny*, then being a Juſtice of the Peace of the aforeſaid Lord the King, within the Borough aforeſaid to be kept, by Reaſon of his Mayoralty of the Borough aforeſaid, the Year then laſt paſt, by Virtue of the Letters Patents aforeſaid, and in the Preſence and Hearing of very many other of the Inhabitants of the Borough aforeſaid, openly, publickly, and with a loud Voice, without any reaſonable Cauſe, theſe Words following, contemptuouſly, falſly, and ſcandalouſly ſaid and ſpeak, that is to ſay, *You*, (the aforeſaid *Trelawny* intending) *are a cozening Knave*; whereas in Truth, the ſaid *Robert Trelawny*, all his Life-time, honeſtly, and from all Suſpicion of any Falſity, Fraud, or Deceit, lived altogether unſuſpected, and in the Offices, as well of the Mayoralty as of Chief Burgeſs of the Borough aforeſaid, with Praiſe, carried and governed himſelf: And further to the ſaid Lord the King, we do certify, That the 20th Day of *November*, in the 7th Year of the Reign of the ſaid Lord the now King, the aforeſaid *James Bagg*, continuing his evil Diſpoſition and Intent aforeſaid, at *Plymouth* aforeſaid, ſeditiouſly and maliciouſly ſtirred up, and perſwaded one *Thomas Shervil*, then being of the Chief Burgeſſes of the Borough aforeſaid, that he the ſaid *Thomas* would join himſelf with the aforeſaid *James Bagg* in a Conſpiracy, to amove and depoſe one *John Batterſby*, then being Mayor of the Borough aforeſaid, from his Office of Mayoralty, without any reaſonable or lawful Cauſe, and then and there maliciouſly and contemptuouſly ſpeak to the aforeſaid *Thomas Shervill* of the aforeſaid *John Batterſby*, theſe Words following, that is to ſay, *Maſter Mayor* (the aforeſaid *John Batterſby* intending) *carrieth himſelf fooliſhly in this Place; and if you will join with me, we will turn him out of his Mayoralty and chooſe a wiſer Man in his Place:* Whereas in Truth the aforeſaid *John Batterſby*, during the whole Time of his Mayoralty aforeſaid, in the executing

These Words are to be reprehended, but are no Cauſe to diſfranchiſe him.

These Words are ſcornful, and worthy of Puniſhment, ſc. to bind him to his good Behaviour, if they were publiſhed when the Mayor was ſitting in Execution of his Office, but are no Cauſe to diſfranchiſe the Delinquent. Palm. 127.

These Words are no Cauſe to diſfranchiſe him, 1. Becauſe nothing was done, and it might be, that there was juſt Cauſe to remove him; and the Cauſe certified ought to be ſuch that it may appear to the Court, that it is a juſt Cauſe to diſfranchiſe him; for the Party grieved can't have an Anſwer to it.

executing of his Office aforesaid, carried himself well and discreetly, and with great Integrity and Gravity. And further to the said Lord the King, we certify, That afterwards, that is to say, the first Day of *February*, in the 8th Year of the Reign of the said Lord the now King, the aforesaid *James Bagg* continuing in his evil Disposition and Intent aforesaid, at *Plymouth* aforesaid, in the *Guild-hall* of the Borough aforesaid, in the Presence of one *Thomas Fowens*, then being Mayor of the Borough aforesaid, in the Presence and Hearing, as well of the Chief Burgesses as of the other Inhabitants of the Borough aforesaid, scornfully, and without reasonable Cause, speak to the aforesaid *Thomas Fowens* these false and injurious Words following, that is to say, *Thou* (the aforesaid *Thomas Fowens*, then Mayor intending) *art an insolent Fellow*; Whereas in Truth the said *Thomas*, in the whole Course of his Life, bore himself towards all Men, honestly, civily, and with Praise. And further to the said Lord the King we certify, that he afterwards, that is to say, the first Day of *August*, in the 9th Year of the Reign of the said Lord the now King, at *Plymouth* aforesaid, in the Presence and Hearing of the aforesaid *Thomas Fowens*, and of very many other of the Burgesses of the Borough aforesaid, being gathered together in the *Guild-hall* of the Borough aforesaid, the aforesaid *James Bagg* continuing his evil Disposition and Intent aforesaid, divers contemptible Words of the aforesaid *Thomas Fowens*, then being Mayor of the Borough aforesaid, with a loud Voice speak and uttered; upon which the aforesaid *Thomas Fowens*, with mild Words admonishing the aforesaid *James Bagg* that he would desist from uttering such contemptible Words aforesaid, the aforesaid *James Bagg* thereupon, then and there, that is to say, the 10th Day of *August*, in the 9th Year aforesaid, at *Plymouth* aforesaid, and in the Presence and Hearing of the aforesaid *Thomas Fowens*, then Mayor of the Borough aforesaid, and very many others of the Burgesses and Inhabitants of the Borough aforesaid, and in Contempt and Disdain of the said *Thomas Fowens*, then Mayor, turning the hinder Part of his Body in an inhuman and uncivil Manner towards the aforesaid *Thomas Fowens*, scoffingly, contemptuously, and uncivilly, with a loud Voice, said to the aforesaid *Thomas Fowens*, these Words following, that is to say (*come and kiss.*) And further to the said Lord the King we certify, That afterwards, that is to say, the 20th Day of *August*, in the 9th Year of the Reign of the Lord the now King, at *Plymouth* aforesaid, the aforesaid *James Bagg*, with most insolent Words, threatned the said *Thomas Fowens*, then being Mayor of the Borough aforesaid, without any reasonable Cause; and then and there, to the said *John Fowens*, threatningly and maliciously spake these Words following, that

Ut supra.

This is contra bonos mores, and worthy Punishment as aforesaid, but no Cause of Disfranchisement, or of Indictment. 2 Salk. 697.

that is to ſay, *I will make thy Neck crack.* And further to the ſaid Lord the King we certify, that afterward, that is to ſay, the third Day of *May*, in the 12th Year of the Reign of the Lord the now King, a certain Order and friendly Inſtrument of Admonition was made by *John Scobb*, Mayor of the Borough aforeſaid, and the greater Part of the Chief Burgeſſes of the ſame Borough, in theſe Words, that is to ſay, *The 9th Day of* May, 1614, *the Day and Year above-written, It was agreed by* John Scobb, *Mayor, and ſuch other of the Maſters here under-written, That if Mr.* James Bagg *the Elder, do not before the next Seſſions to be holden within the Borough of* Plymouth, *reconcile himſelf to the ſaid Mayor and his Brethren, for ſuch Wrongs as he hath committed againſt them, and withal, faithfully promiſe to demean himſelf more orderly and temperately for the Time to come, that then he ſhall be clean removed from the Bench, and a new Maſter choſen in his Room:* Which Order or Inſtrument was made and ſubſcribed by the ſaid Mayor and nine other of the Chief Burgeſſes of the Borough aforeſaid. And further to the ſaid Lord the King we certify, That the aforeſaid *James Bagg*, before the aforeſaid next Seſſions, in order aforeſaid mentioned, did not make any ſuch Reconciliation or Promiſe of Conformity, as in the Order aforeſaid is ſpecified, altho' full Notice of the aforeſaid Order, immediately after the making thereof, and before the aforeſaid next Seſſions was given to him at *Plymouth* aforeſaid. And further to the ſaid Lord the King we certify, That afterwards, that is to ſay, the 20th Day of *February*, in the 12th Year of the Reign of the ſaid Lord the now King, the aforeſaid *James Bagg* continuing his evil Diſpoſition, and in his Intent aforeſaid, at *Plymouth* aforeſaid, in the *Guild-hall* of the Borough aforeſaid, in the Preſence and Hearing of *John Scobb*, one of the Chief Burgeſſes of the Borough aforeſaid, and then being a Juſtice for the keeping of the Peace within the Borough aforeſaid, by Virtue of the Letters Patents aforeſaid, by Reaſon of his Mayoralty of the Borough aforeſaid, the Year then next before, and in the Preſence and Hearing of the then Mayor of the Borough aforeſaid, and of divers other of the Burgeſſes and Inhabitants of that Borough, contemptuouſly theſe Words following, ſpeak and uttered of the aforeſaid *John Scobb*, openly and publickly, falſely and ſcandalouſly, that is to ſay, *You* (the aforeſaid *John Scobb* intending) *are a Knave*; whereas the aforeſaid *John Scobb* honeſtly, and

Ut ſupra.

Doct. pl. 326. This is repugnant, ſc. 3 Maii, & 9 Maii.

Here it appears that he ſhould be removed by the Mayor and nine of the Maſters; and in the End of the Return, it is alledged, that he was removed by the Mayor and Commonalty, which is repugnant. Doct. pl. 326.

Ut ſupra.

and with praiſe carried and governed himſelf. And further to the ſaid Lord the King we certify, That afterwards, that is to ſay, the 10th Day of *December* laſt paſt, the then Mayor of the ſaid Borough, and divers of the Chief Burgeſſes of the Borough aforeſaid, at *Plymouth* aforeſaid, being aſſembled together in the Alms-houſe of the ſaid Borough, to require and receive an Account of the Overſeers, Burgeſſes of the Borough aforeſaid, as in Times paſt, and Time whereof the Memory of Man is not to the contrary, it was uſed, the aforeſaid *James Bagg*, then and there, in the Preſence and Hearing of the ſaid Mayor, and other of the Chief Burgeſſes aforeſaid, without any reaſonable Cauſe, openly and publickly ſaid to the ſaid *Thomas Shervill*, there then preſent, and one of the Chief Burgeſſes of the Borough aforeſaid, and for the Space of ten Years then laſt paſt being, theſe falſe and ſcandalous Words following; that is to ſay, *You* (the ſaid *Thomas Shervill* intending) *are a ſeditious Fellow*; whereas in Truth the aforeſaid *Thomas Shervill* always lived not ſuſpected of any ſuch Crime of Sedition, and from Time to Time in the Office of Mayor of the Borough aforeſaid, as in the Place and Office of Chief Burgeſs, honeſtly, diſcreetly, and with great Integrity carried and governed himſelf. And further to the ſaid Lord the King we certify, That whereas the ſaid Lord the King, the Day of *January*, in the 12th Year of his Reign aforeſaid, at *Weſtminſter* in the County of *Middleſex*, with the Advice of the Lords of his Privy Council of this his Realm of *England*, ordained and commanded, by publick Proclamation, and by Letters written under the proper Hands of divers of the Lords of his Privy Council ſealed, that none, nor any Perſon whatſoever, ſhould kill, or put to ſale any Fleſh for Victuals, in the Time of *Lent* then next following, contrary to the Laws and Statutes of this Realm. And that all Mayors, and other Head Officers, in Boroughs and Towns Corporate, within this Kingdom of *England*, in the Beginning of the Time of *Lent* then next coming, or before, ſhould cauſe all Victuallers, Inn-keepers, Keepers of Ordinary Tables, and Alehouſe-keepers, within the Precinct of their Juriſdiction, to be bounden to the Lord the King by Bond, that they ſhould not dreſs any Fleſh for Victuals all the ſaid Time of *Lent* then next following: And whereas afterwards, that is to ſay, the 20th Day of *February*, in the 12th Year aforeſaid, one *John Clement*, then, and yet Mayor of the Borough of *Plymouth* aforeſaid, accord-

Ut ſupra.

according to the Duty of his Place, and in Obedience of the ſaid Ordinance and Command of the ſaid Lord the King, ſent to all the Victuallers, Inn-keepers, Keepers of Ordinary Tables, and Alehouſe-keepers aforeſaid, within the Precinct of the Borough aforeſaid, that they become bound by their Writing Obligatory, to the Uſe of the Lord the King, according to the Tenor and Exigency of the aforeſaid Ordinance and Command of the ſaid Lord the King, the due Execution of the Ordinance aforeſaid, in that Behalf required and endeavoured, within the Borough aforeſaid, the aforeſaid *James Bagg*, well knowing the Premiſſes, and continuing his evil Diſpoſition and Intent aforeſaid, at *Plymouth* aforeſaid, endeavoured and attempted to hinder, and make void the due Execution of the aforeſaid Ordinance and Command of the ſaid Lord the King; and to that Purpoſe, the ſame 20th Day of *February*, at *Plymouth* aforeſaid, to divers Inhabitants of the Borough aforeſaid, and other of the King's Leige People then being, and having then and there ſpeech with the aforeſaid *James Bagg*, of and upon the Buſineſs aforeſaid, the ſaid *James Bagg*, openly and publickly ſpake and uttered theſe Words following, that is to ſay, *Maſter Mayor* (meaning the ſaid *John Clement*) *doth more herein than he need, and more than he can well anſwer*; meaning, that the ſaid *John Clement*, in requiring the aforeſaid Victuallers, Inn-keepers, Keepers of Ordinary Tables, and Alehouſe-keepers, to become bounden to the Uſe of the ſaid Lord the King, according to the aforeſaid Ordinance and Command of the ſaid Lord the King, had done more than was needful, and more than he could well anſwer; by Reaſon of which Speech, divers Victuallers, Inn-keepers, Keepers of Ordinary Tables, and Alehouſe-keepers, dwelling within the aforeſaid Borough, utterly refuſed to be bounden to the ſaid Lord the King, according to the aforeſaid Ordinance and Command of the ſaid Lord the King; and further we certify, that the aforeſaid Mayor and Commonalty of the Borough of *Plymouth*, and their Predeceſſors, Time whereof the Memory of Men is not to the contrary, had and uſed to have within the Borough aforeſaid, a certain Cuſtom of Wine, called Wine-weight, otherwiſe Winewite, payable by every Taverner ſelling Wine within the Borough aforeſaid, of which Cuſtom of Wine aforeſaid, the Mayor and Commonalty from the whole Time aforeſaid, quietly and peaceably were poſſeſſed of, until the aforeſaid *James Bagg*, the 29th Day of *November*, in the 4th Year of the Reign of the ſaid Lord, the now King, at *Plymouth* aforeſaid, perfidiouſly and maliciouſly practiſed with *William Bently* and *Thomas Lyde*, being Taverners and Sellers of Wine within the Borough aforeſaid, to them revealing divers ſecret Counſels concerning the common Profit of the Borough

This is no Cauſe of Diſfranchiſement without Queſtion, alſo the Inuendo is idle and vain.

They have not alledged, That there was a Corporation from Time whereof, &c. 1 Rol. Rep. 224, 225.

Theſe Words are too general.

aforeſaid; and them the ſaid *William* and *Thomas* then and there perſuaded, that they no more ſhould pay the aforeſaid Cuſtom of Wine, called Wine-weight, otherwiſe Wine-wite, nor any Farm or Sum of Money for the ſame, to the aforeſaid Mayor and Commonalty, which very Day, *viz.* the 29th Day of *November*, in the 4th Year aforeſaid, the aforeſaid *James Bagg*, being then one of the twelve Chief Burgeſſes of Common Council of the Borough aforeſaid, at *Plymouth* aforeſaid, perfidiouſly and maliciouſly, ſpake to the ſaid *William Bently* and *Thomas Lyde* theſe Words, that is to ſay; *You need not pay the Money*, (meaning a certain Farm by them the ſaid *William* and *Thomas* for the Cuſtom aforeſaid, before then, to the aforeſaid Mayor and Commonalty payable for the Wine-weight) *any longer, except you liſt, for it is not due unto them:* By Reaſon of which perfidious and malicious Words, the aforeſaid *William Bently* and *Thomas Lyde* utterly refuſed to pay, and yet do refuſe, and by Reaſon thereof divers Striſes and Controverſies are riſen, and hereafter are like to ariſe betwixt the aforeſaid *William Bently* and *Thomas Lyde*, and the aforeſaid Mayor and Commonalty, for the Cuſtom of Wine aforeſaid, and the Farm aforeſaid, to the great Damage and Prejudice of the aforeſaid Mayor and Commonalty: And further to the ſaid Lord the King we certify, that the aforeſaid *James Bagg*, the firſt Day of *May*, in the 12th Year of the Reign of the Lord, the now King, and divers other Days and Times then before, at *Plymouth* aforeſaid, perfidiouſly ſaid to divers Inhabitants of the Borough aforeſaid, and to other the Liege People of the ſaid Lord the King, upon Communication between them and the aforeſaid *James Bagg* then before had, of and concerning the Liberties and Privileges of the Borough aforeſaid, *That he* (the ſaid *James Bagg*) *would overthrow and make void the Charter of the Borough aforeſaid*, meaning the Charter aforeſaid, by the aforeſaid late Queen *Elizabeth* to the aforeſaid Mayor and Commonalty, as before is ſaid, granted; and that he the ſaid *James* the Liberties and Privileges of the Borough aforeſaid, would call in Queſtion, and the ſame Privileges and Liberties would overthrow. And further to the Lord the King we certify, that afterwards, that is to ſay, the 17th Day of *April* now laſt paſt, the aforeſaid *James Bagg* in the ſaid Writ named, for the Cauſes aforeſaid, by the Mayor and Commonalty of the Borough aforeſaid, from the Office of one of the Chief Burgeſſes and Magiſtrates of the Borough aforeſaid, was amoved. *&c.*

This was but his Opinion, which altho' it be falſe, is no Cauſe of Diſfranchiſement, and his Opinion cannot be a Prejudice to their Right; the Inuendo is vain and idle.
1 Rol. Rep. 224, 225, 226.
Yet Remedy lies for this Duty, if they have Right to it by the Law.

Non officiat affectus niſi ſequatur effectus; and it may be the Charter was void in Law, or that it was procured by the leſſer Number of the Burgeſſes and then it might be removed; and ſo he might juſtify theſe Words.
1 Rol. Rep. 226.
1 Rol. Rep. 224, 226.
2 Brownl. 100.

2 *John Clement*, Mayor.

And

AND now in this Term (upon the whole Matter, and for the Cauſes aforeſaid) it was reſolv'd by the Court, That there was not any juſt Cauſe to remove him; and therefore by the Award of the Court, a Writ was directed to the Mayor and Commonalty to reſtore him. See 2 Salk. 697.

And in this Caſe, 1. it was reſolved, That to this Court of King's Bench belongs (*a*) Authority, not only to correct Errors in judicial Proceedings, but other Errors and Miſdemeanors extrajudicial, tending to the Breach of Peace, or Oppreſſion of the Subjects, or to the raiſing of Faction, Controverſy, Debate, or to any Manner of Miſgovernment; ſo that no Wrong or Injury, either Publick or Private, can be done, but that it ſhall be (here) reformed or puniſhed by due Courſe of Law. (*a*) 4 Inſt. 71. 1 Rol. Rep. 225. Raymond 103.

For the general Learning of this and the like Caſes, all that was ſaid in the Argument of this Caſe, was divided into theſe Queſtions. 1. What were ſufficient Cauſes to (*b*) disfranchiſe a Citizen, Freeman or Burgeſs of any City or Borough incorporate, and to diſcharge him of his Freedom and Liberty, and what not? 2. How and by whom, and in what Manner ſuch Citizen or Burgeſs ſhall be diſfranchiſed? 3. If the Return of his Removal, or Disfranchiſement, imports ſufficient Matter, but is falſe; what Remedy ſhall be for the Party grieved in ſuch Caſe? (*b*) Cro. Jac. 506. Cro. Eliz. 33. 1 Roll. Rep. 409. 3 Bulſtr. 189, 190. Styles 478, 479. 2 Rol. 455.

As to the firſt, it was reſolved, That the Cauſe of Disfranchiſement ought to be grounded upon an Act which is (*c*) againſt the Duty of a Citizen or Burgeſs, and to the Prejudice of the publick Good of the City or Borough whereof he is a Citizen or Burgeſs, and againſt his Oath which he took when he was ſworn a Freeman of the City or Borough; for althongh one ſhall not be charged in any Judicial Court for the Breach of a (*d*) general Oath, which he took when he became Officer, Miniſter, Citizen, Burgeſs, *&c.* yet if the Act which he doth be againſt the ſaid (*e*) Duty and Truſt of his Freedom, and to the Prejudice of the City or Borough, and alſo againſt his Oath, it inforces much the Cauſe of his Removal, and there is a Condition in Law *tacite* and annexed to his Freedom or Liberty; which if he breaks, he may be diſfranchiſed; but Words of Contempt, or (*f*) *contra bonos mores*, altho' they be againſt (*c*) Cro. El. 33. 4 Leon. 61. (*d*) 3 Inſt. 166. 1 Roll. Rep. 226. Dyer 333. pl. 28. Palm. 144. (*e*) 1 Roll. Rep. 224, 225, 409. Pollexfen's Arg. in Quo War. 110. Poph. 134. 2 Roll. Rep. 11. Godb. 281. Palm. 455. (*f*) Cro. Jac. 306. Moor 411, 512.

(a) Moor 247, 411, 412. 3 Bulſtr. 189, 190. 1 Roll. Rep. 79. 224, 225. Cro. Eliz. 79, 689. Cro. Jac. 506. Palm. 127.

the Chief Officer, or his Brethren, are (*a*) good Cauſes to puniſh him, as to commit till he has found good Sureties of his Good Behaviour, but not to diſfranchiſe him: So if he intends, or endeavours of himſelf, or conſpires with others, to do a Thing againſt the Duty or Truſt of his Freedom, and to the Prejudice of the publick Good of the City or Borough, but he doth not execute it, it is a good Cauſe to puniſh him, as is aforeſaid, but not to diſfranchiſe him, for (*b*) *Non officit conatus, niſi ſequatur effectus*; and *Non officit affectus, niſi ſequatur affectus*. And the Reaſon and Cauſe thereof is, That (*c*) when a Man is a Freeman of a City or Borough, he has a Freehold in his Freedom for his Life, and with others, in their Politick Capacity, has an Inheritance in the Lands of the ſaid Corporation, and Intereſt in their Goods, and perhaps it concerns his Trade and Means of Living, and his Credit and Eſtimation; and therefore the Matter which ſhall be a Cauſe of his Diſfranchiſement, ought to be an Act or Deed, and not a Conation, or an Endeavour, * which he may repent of before the Execution of it, and from whence no Prejudice enſues; and they who have Offices of Truſt and Confidence ſhall not forfeit them by Endeavours and Intentions to do Acts, although they declare them by expreſs Words, unleſs the Act itſelf ſhall enſue, as if one who has the Keeping of a Park ſhould ſay, that he will kill all the Game within his Cuſtody, or will cut down ſo many Trees within the Park, but doth not kill any of the Game, nor cut down any Trees, it is not any Forfeiture, *& ſic de ſimilibus*, for in all ſuch Caſes, either there ought to be an Act, or ſuch a Negligence as tantamounts, *ſcil.* when Deſtruction of the Game, *&c.* enſues. If a Biſhop, Arch-Deacon, Parſon, *&c.* fells all the Trees, it is a good Cauſe of (*d*) Deprivation, 2 *H.* 4. 3. *b.* So if a Prior aliens the Land which he has *in jure domus ſuæ*, it is a Cauſe of Deprivation, as appears in 9 *E.* 4. 34. *a.* If a Prior makes Dilapidation, it is a good Cauſe to deprive him, as it is held in 29 *E.* 3. 16. *a.* (20) 28 *H.* 6. 46. *a.* But if it be but a Conation, or Endeavour, without any Act done, in none of thoſe Caſes is it any Cauſe of Deprivation, for in thoſe Caſes, *voluntas non reputatur pro facto*. And if a Contempt (be

(b) 1 Rol. Rep. 226.

(c) Cr. Jac. 540.

* 6 Mod. 99.

See before.

(d) Sawyer's Arg. in Quo Warranto 21. Antea 72. b. 49. b. 1 Roll. Rep. 86, 167. Br. Depoſition 31. Godb. 259. Godolph. Abr. 174, 176. 20 H. 6. 46. a. 3 Bulſtr. 167.

(be it of Omiſſion or Commiſſion) ſhould be a good Cauſe to diſfranchiſe, the beſt Citizen or Burgeſs might be, at one Time or other, diſfranchiſed, which would be great Cauſe of Faction and Contention in Cities and Boroughs.

As to the 2d, it was reſolv'd, That no Freeman of any Corporation (*a*) can be diſfranchiſed by the Corporation, unleſs they have Authority to do it either by the expreſs Words of the Charter, or by Preſcription; but if they have not Authority neither by Charter or by Preſcription, then he ought to be convicted by Courſe of Law before he can be removed, and it appears by *Magna Charta*, *cap.* 29. (*b*) *Nullus liber homo capiatur, vel impriſonetur, aut diſſeiſitur de libero tenemento ſuo, vel libertatibus, vel liberis conſuetudinibus ſuis, &c. niſi per legale judicium parium ſuorum, vel per legem terræ*, and if the Corporation have Power by Charter or Preſcription to remove him for a reaſonable Cauſe, that will be *per legem terræ*; but if they have no ſuch Power, he ought to be convicted *per judicium parium ſuorum, &c.* as if a Citizen, or Freeman, be attainted of Forgery or Perjury, or Conſpiracy, at the King's Suit, *&c.* or of any other Crime whereby he is become infamous, upon ſuch Attainder they may remove him: So if he be convicted of any ſuch Offence which is againſt the Duty and Truſt of his Freedom, and to the publick Prejudice of the City or Borough whereof he is free, and againſt his Oath, as if he has burnt or defaced the Charters, or Evidences of the City or Borough, or razed or corrupted them, and is thereof convicted and attainted, theſe and the like are good Cauſes to remove him. And altho' they have lawful Authority either by Charter or Preſcription to remove any one from the Freedom, and that they have juſt Cauſe to remove him; yet if it appears by the Return, that they have proceeded againſt him without (*c*) hearing him anſwer to what was objected, or that he was not reaſonably warned, ſuch Removal is void, and ſhall not bind the Party, (*d*) *quia quicunque aliquid ſtatuerit parte inaudita altera, æquum licet ſtatuerit, haud æquus fuerit*, and ſuch Removal is againſt Juſtice and Right.

As to the 3d Queſtion, If they have Power by Charter or Preſcription to diſfranchiſe one, and afterwards the (*e*) Judges of the King's Bench award a Writ to them to reſtore him, or ſignify the Cauſe, *&c.* and they certify a ſufficient Cauſe to remove him, but it is falſe; then the Court cannot award a Writ to reſtore him, neither can any

(*a*) Styl. 478, 479.

(*b*) 1 Rol. Rep. 225. 4 Leon. 61.

(*c*) 2 Sid. 97. 1 Sid. 14, 15. Palm. 453. 1 Rol. Rep. 225. 1 Mod. Rep. 287. Styl. 447, 453.

(*d*) 6 Co. 52. a.

(*e*) Doct. pla. 189.

any Iſſue be taken thereupon, becauſe the Parties are Strangers, and have no Day in Court; (*a*) but the Party grieved may well have an Action upon the ſpecial Matter againſt thoſe who made the Certificate, and aver it to be falſe, and if it is found for him, and he obtains Judgment againſt them, ſo that it may appear to the Juſtices that the Cauſes of the Return are falſe, then they ſhall award a Writ of Reſtitution, and this is proved by the Reaſon of the Book of 9 *H.* 6. 44. *a.* where it is held, that upon a *Corpus cum cauſa*, if the Cauſe returned be ſufficient, but in Truth is falſe, the Court ought to remand the Priſoner, and he is at no Miſchief, for if they have not Authority, or the Cauſe be falſe, he may have a Writ of Falſe Impriſonment, (*vide Fitz. Tit. Corpus cum cauſa*, 2. the ſaid Cauſe of 9 *H.* 6. 44. well abridged.) So in the other, upon ſuch falſe Return, the Party grieved may have a ſpecial Action upon his Caſe as is aforeſaid. Alſo if the Party grieved, who is ſo disfranchiſed, is for the Cauſes of his Disfranchiſement committed to Priſon, or if his Shop is ſhut up, or if with Force he is removed out of their Aſſembly, *&c.* in theſe and the like Caſes he may have an Action of falſe Impriſonment, or an Action of Treſpaſs *quare domum fregit*, or of Aſſault and Battery, and in thoſe Actions, the Cauſes of his Disfranchiſement ought to be pleaded, and ſhall be decided according to Law, 8 *E.* 3. 437. 8 *Aſſ.* 29. 31. If a Layman is Patron of an Hoſpital, he may viſit it, and depoſe or deprive the Maſter for good Cauſe; but if he is deprived without juſt Cauſe, and by Colour thereof is ouſted, he ſhall have an Aſſiſe becauſe he has no other Remedy; but if the Ordinary deprives a Maſter who is Eccleſiaſtical without a Cauſe, he ſhall not have an Aſſie, for he has other Remedy by Appeal, *vide* 6 *H.* 7. 14. *a. F. N. B.* 4 *B.* 27 *E.* 3. 85. 10 *Eliz. Dyer* 273. *pl.* 35.

Alſo it was reſolved, That ſuch Return of Disfranchiſement ought to be certain, ſo that ſufficient Matter may appear to the Court to disfranchiſe the Party, and *eo potius*, becauſe the Party cannot have anſwer to it, as is aforeſaid.

Laſtly, It was reſolved, That for none of the Cauſes contained in the ſaid Certificate, the ſaid *James Bagg* by Law ought to be removed, and therefore by the whole Court a Writ was awarded to reſtore him to his Franchiſe and Freedom, and ſo he was.

Nota,

(*a*) 1 Mod. Rep. 83. 3 Keb. 401, 430. 10 Co. 139. b.

Dyer 209. a. See Skin. 468, 487, 499.

Cro. Jac. 506.

Nota, Reader, In the Argument of this Case much was said to exhort Citizens and Burgesses to yield Obedience and Reverence to the Chief Magistrates in their Cities and Boroughs, because they derive their Authority from the King, and *Obedientia est Legis essentia*, and therefore it appears before, how they shall be punished who commit any Contempt against them: But the principal Question of this Case was, What Acts were sufficient Causes in Law for the Disfranchisement of any Citizen or Burgess, *&c.*

The Order of the CASES reported in this Eleventh Book.

The Names of the Juſtices of either Bench, and Barons of the Exchequer, alſo of the Serjeants at Law as were in being at the Time of publiſhing this *Eleventh Report.*

De Banco Regis.

Edwardus Coke, C. J.
Johannes Crook,
Johannes Doderidge,
Robertus Houghton, } mil'

De Communi Banco.

Henricus Hobart, C. J.
Petrus Warburton,
Humphridus Winch,
Auguſtinus Nichols, } mil'

De Scaccario.

Laurentius Tanfield,
Georgius Snigge,
Jacobus Altham,
Edwardus Bromley. } mil'

Servientes ad Legem.

Henricus Montague, mil'
Johannes Sherley,
Thomas Harris,
Robertus Barker,
Richardus Hutton,
Johannes Davis, mil'
Randallus Crew, mil'
Robertus Hitcham, mil'
Georgius Wyld,
Willielmus Towſe.
Leonardus Bawtree,
Henricus Finch,
Thomas Chamberlain,
Franciſcus Moore,
Richardus Athow,
Johannes Moore,
Franciſcus Harvey,
Carolus Clyborne,
Thomas Richardſon.

FINIS.